NEW YORK STATE BAR ASSOCIATION

Journal

SEPTEMBER 2016
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Enhance Your "Non-Lawyering" Skills

The Law Practice Management Issue
Edited by Marian C. Rice

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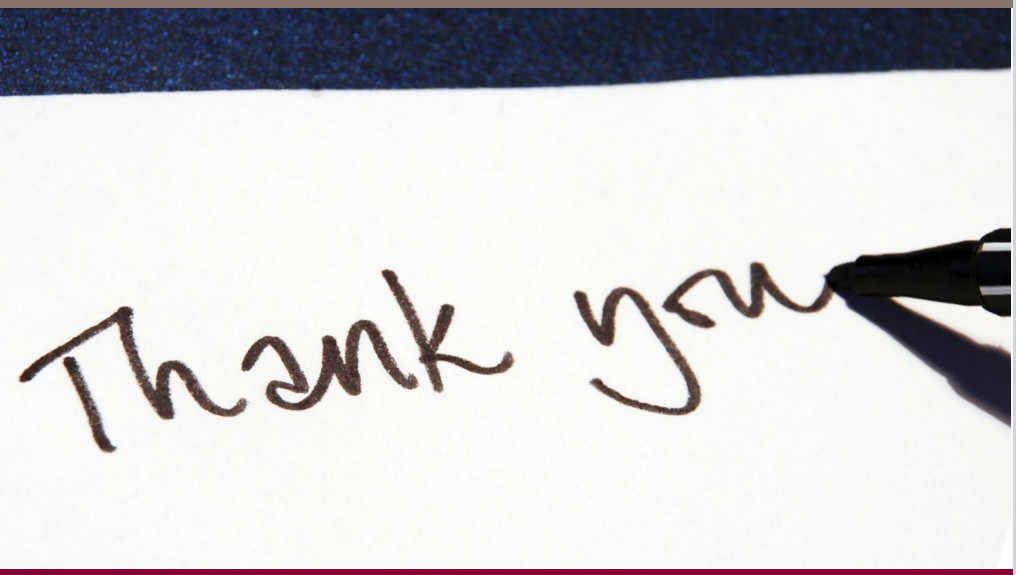

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Your commitment as members has made NYSBA the largest voluntary state bar association in the country. You keep us vibrant and help make us a strong, effective voice for the profession.

Claire P. Gutekunst
President

David R. Watson
Executive Director

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NEW YORK STATE BAR ASSOCIATION
Journal

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DEPARTMENTS

The New York State Bar Association Insurance Program

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CLAIRE P. GUTEKUNST

Joint Initiative with WBASNY Will Assist Victims of Domestic Violence

"Our groundbreaking partnership with the Women's Bar Association of the State of New York will help victims of domestic violence and their children get the legal relief, safety and stability they need."

Domestic violence has reached an epidemic level in New York and across the country. Domestic violence is ongoing, purposeful behavior aimed at exerting power and control over one's intimate partner, and can be psychological, physical, sexual or economic in nature. Nationally, almost 25% of women and over 9% of men have suffered sexual violence by an intimate partner and over 22% of women and 14% of men have been subjected to at least one act of severe physical violence in an intimate relationship, according to a government survey. New Yorkers statewide experience domestic violence without regard to gender identity, race, sexual orientation, religion, ethnicity, age, disability or educational or economic status.

Domestic violence victims often have few resources and desperately need legal help in obtaining orders of protection against their abusers and in addressing collateral issues including housing, child support, custody and visitation, and divorce. High-quality civil legal assistance plays an invaluable role in protecting and empowering victims and their children. But the need dwarfs the available resources. Despite the tremendous efforts by legal services lawyers and the many hours of pro bono service by members of the private bar, there continues to be an urgent need for legal representation of domestic violence victims.

To assist and support legal services providers and increase access to justice for victims, the New York State Bar Association (NYSBA) and the Women's Bar Association of the State of New York (WBASNY) have joined forces to create the NYSBA/WBASNY Domestic Violence Initiative. Building on work done by and working closely with WBASNY and its chapters and NYSBA Sections and committees, our partnership will leverage our combined resources and tap our extensive membership around the state to collaborate with and assist existing legal services providers and bar association and law firm programs, help in recruiting and training volunteer attorneys, and expand pro bono programs serving domestic violence victims.

The Initiative will be chaired by two longtime advocates for victims of domestic violence, Judy Harris Kluger, Executive Director of New York City-based Sanctuary for Families, and Amy Schwartz-Wallace, Senior Staff Attorney at Empire Justice Center in Rochester. The Initiative will include representatives from legal services providers, bar association and law firm pro bono programs, the private bar, the state court system, and law school.

Providing Education and Training – The Initiative will help educate attorneys around the state concerning domestic violence and help ensure that pro bono and civil legal services attorneys have access to the comprehensive training they need to effectively address the broad range of issues faced by individuals and families affected by domestic violence, including those from diverse and traditionally underserved communities.

Expanding Pro Bono Service – To expand the existing pool of volunteer attorneys and opportunities for volunteer service to victims of domestic violence, the Initiative will seek to collaborate with bar associations throughout the state to help address the legal needs of domestic violence victims in their jurisdictions, partner with local service providers to jointly educate the legal community, and help recruit volunteers and provide pro bono legal services to victims. The Initiative also will help develop pro bono models that can be brought to underserved communities.

Legislative Advocacy – The Initiative also will examine and make recommendations concerning pending or proposed legislation that seeks to protect domestic violence victims. Where we find common ground, NYSBA and WBASNY will use our bully pulpit and our lobbying power to advance those recommendations in Albany.

Our groundbreaking partnership with WBASNY will help victims of domestic violence and their children get the legal relief, safety and stability they need. We will be back to you later this year to let you know how *you* can help fight the scourge of domestic violence in our state. ■

CLAIRE P. GUTEKUNST can be reached at cgutekunst@nysba.org.

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

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

Unless otherwise noted, all programs are from 9 a.m. – 5 p.m.

Risk Management 2016
(9:00 a.m. – 1:00 p.m.)
September 16 Syracuse
September 23 Rochester
September 30 Buffalo
October 7 Albany
October 14 Long Island
October 28 New York City
November 18 Westchester

Digital Evidence in Family Law
(9:00 a.m. – 1:00 p.m.)
September 21 Buffalo
September 22 Syracuse
September 23 Albany
November 30 Long Island
December 2 New York City

Legal Ethics in the Digital Age
(9:00 a.m. – 1:00 p.m., live & webcast)
September 29 New York City

Henry Miller – The Trial
October 5 Long Island
October 19 Albany
November 29 New York City

From Panel to Publisher: An In-Depth Look at Transactional Law for Comic Book Creator Clients
(12:15 p.m. – 3:15 p.m.)
October 6 New York City

From the Printed Page to the Silver Screen: An Overview of Licensing Comic Book Properties to the Film and Television Industries
(12:15 p.m. – 1:30 p.m.)
October 9 New York City

Medical Marijuana in New York
(9:00 a.m. – 1:00 p.m., live & webcast)
October 14 New York City

Abstracts and Title Issues
(9:00 a.m. – 1 p.m., live & webcast)
October 20 Albany

Handling and Taking Depositions
(9:00 a.m. – 1:00 p.m.)
October 27 Long Island
October 28 Syracuse
November 2 Albany
November 3 Buffalo, New York City

Bridging the Gap – Winter 2016
November 30 – December 1
Albany, Buffalo (video conf.)
New York City (live)

Labor Law Claims, Coverage and Litigation
December 14 Syracuse
December 15 Long Island, Albany
December 16 Buffalo, New York City

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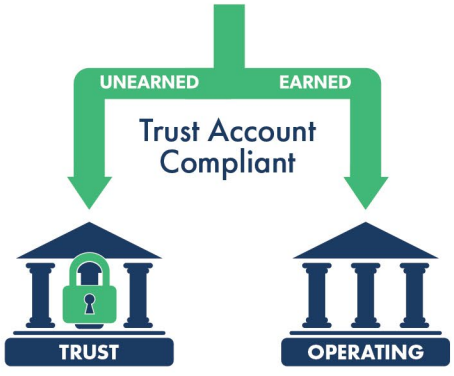

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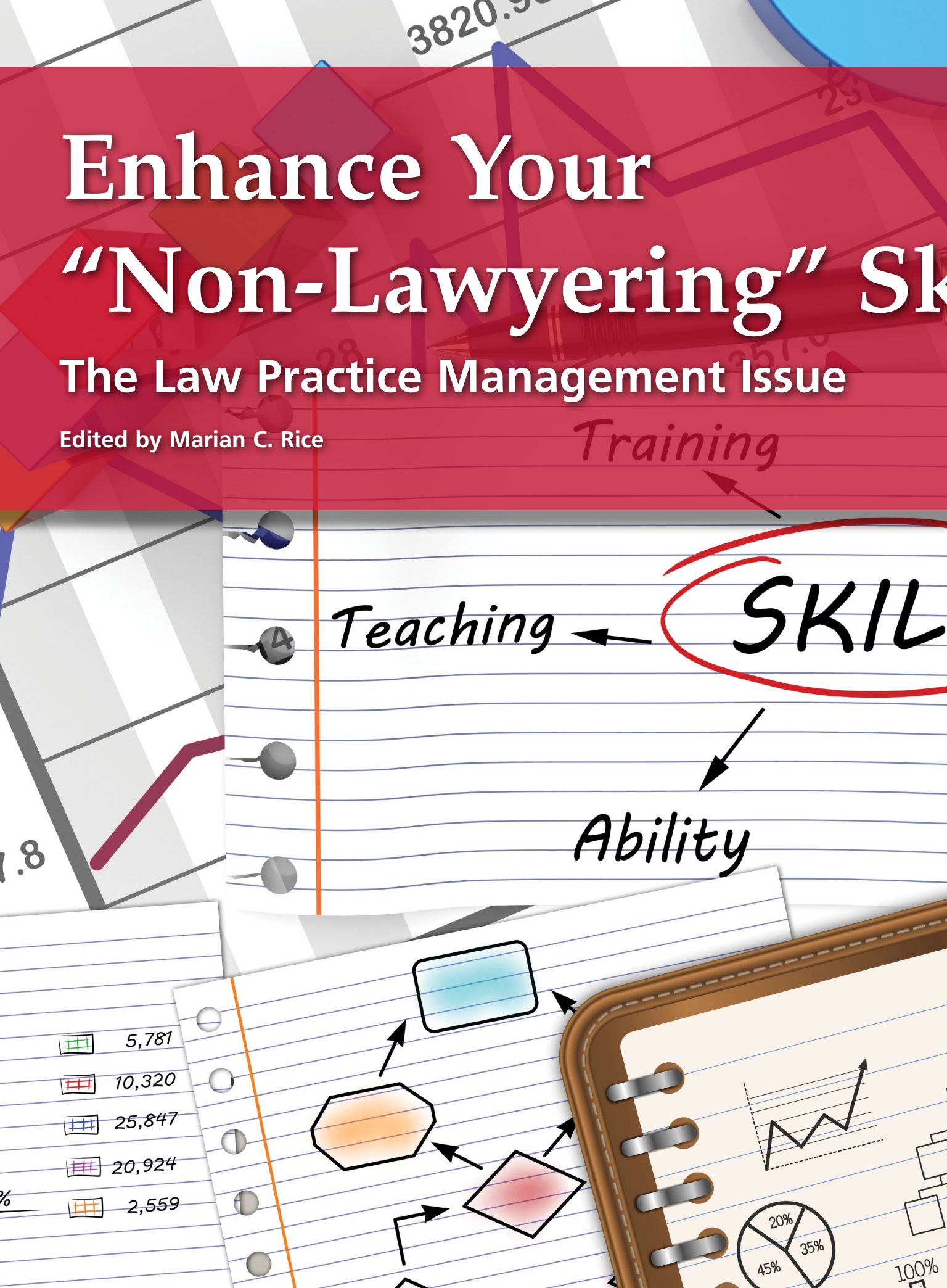
The Law Practice Management Issue

Edited by Marian C. Rice



It's been many (many, ouch!) decades since September brought with it the simultaneous dread and excitement of a new school year. Despite the passage of time, September is still a good month to take stock of the direction your law practice is taking. Has your firm grown? Do you need to update your practices and procedures to adapt with the changes the past year has brought? Is a new hire a good idea? Are your equipment or office leases coming up for renewal? Do you need hardware/software upgrades? The list is endless.

NYSBA's Law Practice Management (LPM) Committee is here to help. Our goal is to direct the attention of the many, many talented NYSBA members to resources that will bump up their skills in managing the practice of law. The Committee is dedicated to providing resources that enable attorneys to obtain the information needed to manage their practices and get back to the primary goal of representing clients. Through materials located on the NYSBA website, the LPM Committee provides lawyers, law firm managers and legal professionals with information on practice management trends, marketing, client development, legal technology and finance. Whether you're a solo practitioner or a managing partner at a national law firm, you'll find law practice management materials designed to meet your day-to-day practice needs. Checklists, best practices, publications and continuing legal education programs provide up-to-date information and practical tips to help you efficiently manage your law practice. Check out our offerings on the NYSBA website and please let us know of any topic you would like to see addressed.

Law practice management has endless facets and we are pleased to showcase some diverse topics designed to enhance your "non-lawyering" skills in this issue of the *Journal*.

Got a problematic client but find that "breaking up is hard to do"? Knowing when it is time to cease representing a client is almost as important to the successful practice of law as obtaining the clients in the first place. Matt Flanagan of the law firm Catalano, Gallardo & Petropoulos, LLP provides us with guidance on how to properly and ethically exit the attorney-client relationship in both litigation and non-litigation contexts.

I was lucky to find my niche area of practice – representing lawyers – very early in my career. Although law schools have had their difficulties in recent years, there are few educations that prepare a person for a wide array of careers better than a law degree. Many attorneys, however, test the waters in different aspects of the profession before landing in a position where they find satisfaction. Donna Drumm's experience spans all aspects of the legal profession, from practicing attorney to bar executive director to entrepreneur. Her thoughtful article provides valuable information on how to reevaluate the options available to attorneys and find the position best suited for an individual's interests and talents.

Many years ago, the *Wall Street Journal* published an article detailing a study that found that as a whole,

human beings are wired as optimists – except those practicing law. It seems that, in general, lawyers are skeptics. The article concluded with the memorable quote "[i]n law, pessimism is prudence." After all, aren't we trained to identify and protect our clients from taking on unknown risk? We take the facts, apply the law and argue the conclusions. There's no room for emotion in this equation – or is there?

In her article examining the role of emotion in leadership, marketing guru Carol Schiro Greenwald details the real-life experiences of six successful and effective managing partners: Jeffrey Citron, managing partner of Davidoff Hutcher & Citron, LLP; Robert Danziger, partner at Danziger & Markhoff, LLP; P. Daniels Hollis III, managing partner, Shamberg Marwell Hollis Andreycak & Laidlaw, P.C.; Mark Mulholland, former managing partner at Ruskin Moscou Faltischek, P.C.; Mark Landis, managing partner at Phillips Nizer, LLP; and Michael Solow, managing partner at Kaye Scholer, LLP. These talented leaders charted the course of their law firms in difficult times by promoting emotional intelligence–based leadership skills based upon the works of Dr. Larry Richard, the principal consultant at LawyerBrain LLC, and the recently released paper "Cognitive Emotion and the Law" by Harold Anthony Lloyd. Not sure what I'm talking about? Good. You are going to love Carol's article, which weaves Richard's findings with the real-life experiences of these modern day leaders.

How to develop, promote and nurture leadership skills is an important topic of LPM. Few law firms fail because their lawyers are not talented. Lack of direction from the top is the most frequent cause of law firm implosions. Management consultant Joel A. Rose of Joel A. Rose & Associates, Inc. tackles the special difficulties confronting management in hard economic times and offers guidance on steering the firm to profitability.

An issue of the *Journal* addressing the multi-facets of law practice management would not be complete without mention of the technology hurdles lawyers are expected to master as part of their duty of competence under Rule 1.1 of the Rules of Professional Conduct. Haven't yet been able to wrap your brain around the concept of the "cloud"? Debra Kaminetzky of Kaminetzky & Associates, P.C. offers a bird's-eye view of the risks and benefits associated with moving your files to the cloud. I promise it won't be over your head.

Law practice management has endless facets.

And finally, stay tuned for the always useful and instructive Attorney Professionalism Forum by Vincent J. Syracuse, Chair of Tannenbaum Helpern Syracuse & Hirschtritt LLP's Litigation & Dispute Resolution Practice. This month, Vince tackles the conundrum of how to handle an adversary who simply makes things up.

Stop by the LPM page on NYSBA's website when you have the chance and let us know if you have suggestions as to how we can help you better manage your practice. ■

Marian C. Rice, current Co-Chair of NYSBA's Law Practice Management Committee and past President of the Nassau County Bar Association, is the chair of the Attorney Liability Practice Group at the Garden City law firm of L'Abbate, Balkan, Colavita & Contini, LLP and has focused her practice on representing attorneys in professional liability matters for more than 35 years.

Bowing Out Ethically

Ending the Attorney-Client Relationship Before the Matter Is Completed

By Matthew K. Flanagan

The N.Y. Rules of Professional Conduct require attorneys to "carry through to conclusion all matters undertaken for a client,"[1] but few attorneys, if any, need to be told that. Attorneys who are retained to perform a task generally want to see the task through to its completion.

There are times, however, where that becomes impossible. The client may stop paying; the attorney may have health problems or other issues that prevent him or her from completing the matter; a conflict of interest may arise; or there may be a breakdown in the relationship with the client that makes it impossible for the attorney to see the matter through to its completion. In such situations, the attorney will need to withdraw from the relationship, even though the client may want the attorney to finish the task he or she was hired to do.

The Rules of Professional Conduct allow an attorney to withdraw, but the attorney should do so with care, since the client who feels abandoned may be more inclined to file a grievance or malpractice action against the attorney. The client who feels abandoned will also be more inclined to refuse to pay the attorney for the work performed before the representation ended.

This article will discuss the proper way for disengaging from a representation in situations where the matter has not been completed and the client has not found a new attorney to take over. It will also discuss the ways in which proper disengagement can assist the attorney in defending malpractice or breach of fiduciary claims that may be brought by the former client, and it will address mechanisms available to attorneys to protect their right to be compensated for the work they have done.

I. Termination of the Attorney-Client Relationship in a Non-Litigation Context

Unless there are some grounds for mandatory withdrawal from representation (such as when the lawyer is discharged or the lawyer's physical and mental condition impairs the lawyer's ability to represent the client), the primary inquiry in determining whether an attorney can withdraw is whether withdrawal can be accomplished "without material adverse effect on the interests of the client."[2] "General inconvenience" to the client is not enough to stand in the way of the attorney's withdrawal.[3] Some adverse effect on the "client's legal interests" is required.[4]

Whether there is an "adverse effect" on the client will often turn on the timing of the withdrawal. If, for example, a statute of limitations is about to expire, or some other deadline is imminent, the client's legal interests may be jeopardized by the attorney's withdrawal.

If there is no material adverse effect on the client, then terminating the attorney-client relationship is a fairly easy task when litigation is not involved. The attorney or firm need not file a formal motion to be relieved. A simple letter or email to the client will do. The client's documents and property should be returned, along with any part of the fee which has not been earned.[5]

The correspondence terminating the relationship should highlight any upcoming deadlines. An attorney who withdraws from representation must "avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client [and] allowing time for employment of other counsel."[6] Specific deadline dates should be referenced, particularly if the dates are approaching quickly. In one case, a firm that was consulted regarding a medical malpractice action was sued for notifying the client a "mere" 33 days before the expiration of the statute of limitations that it would not file an action on her behalf. The court found a question of fact as to whether the firm was negligent in not calling the client's attention to the specific number of days remaining before the statute of limitations expired.[7]

Matthew K. Flanagan is a partner at Catalano Gallardo & Petropoulos, LLP. He is a skilled litigator with extensive trial and appellate experience in the area of legal malpractice defense, professional liability and general litigation. He has successfully argued numerous appeals in the Appellate Divisions for the First, Second and Third Departments, and New York's highest court, the Court of Appeals, and is a frequent lecturer regarding legal malpractice prevention and defense, and ethics and professional liability.

The importance of documenting the termination of the relationship cannot be overemphasized. In addition to confirming the attorney's compliance with the Rules of Professional Conduct, documenting the termination may prove crucial in establishing a statute of limitations defense if a malpractice or breach of fiduciary duty action is brought against the attorney by the former client. The statute of limitations on a malpractice claim against the attorney will in most cases begin to run when the relationship has been concluded,[8] and the easier it is to establish the end date of the relationship, the easier it may be to succeed with a statute of limitations defense. Additionally, by documenting the end of the attorney-client relationship, the attorney-defendant may be able to sever the causal connection between his or her alleged malpractice and the former client's damages. Many a malpractice action has been dismissed where the attorney was able to establish that there was ample time, after the end of the relationship, for the former client or his or her new attorney to do that which the first attorney did not do.[9] As one leading treatise notes, "[a] lawyer's failure to act is not a cause of the loss if there was adequate time for the client or successor lawyer to pursue the client's claim."[10]

If the client does not have sufficient time to retain a new attorney to complete the task that the first attorney was hired to do, then withdrawal may not be deemed permissible under Rule 1.16. One of the challenges in withdrawing in the non-litigation context is selecting the right time to withdraw.

II. Termination of the Attorney-Client Relationship in a Litigated Matter

Where litigation is involved, a lawyer cannot withdraw from employment in the matter without the court's permission (unless, of course, the attorney is replaced by another attorney, a situation which we are not addressing here).[11] In New York's state courts, CPLR 321 governs how attorneys withdraw in a pending litigation. That section provides that "[a]n attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct."[12]

The federal counterpart, in the Southern and Eastern Districts of New York, is Local Rule 1.4, which provides that "an attorney who has appeared as attorney of record for a party may be relieved or displaced only by order of the court and may not withdraw from a case without leave of the court granted by order." In seeking such an order, the attorney must establish (1) "satisfactory reasons for withdrawal"; (2) "the posture of the case, including its position, if any, on the calendar," and (3) "whether or not the attorney is asserting a retaining or charging lien." The local rules of the Northern and Western Districts of New York similarly require a showing of "good cause."[13]

Although the rules in the federal and state courts differ somewhat, the courts apply similar considerations in determining whether to allow an attorney to be relieved from representing a party in a pending litigation. The courts look to (1) the reasons for withdrawal and (2) the impact on the proceeding.[14]

A. Reasons for, and Timing of, Withdrawal

Rule 1.16(b) discusses situations in which an attorney *must* withdraw from representation, such as when the lawyer is discharged or the lawyer's physical and mental condition materially impairs the lawyer's ability to represent the client,[15] and Rule 1.16(c) discusses situations in which the lawyer *may* withdraw from representing a client, such as when the client insists on taking action with which the lawyer has a fundamental disagreement, or when a client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees."[16]

The most common reason for withdrawal is the client's failure to pay the attorney's bills. It may not be enough, however, to say simply that the client has not paid. Some courts have drawn a distinction between "mere nonpayment and deliberate disregard of financial obligation."[17] The latter, but not the former, would justify an attorney's withdrawal, particularly where the withdrawal is sought early in the litigation. The ideal showing on a motion to be relieved from representing a non-paying client is of "[a] solvent client who simply elects not to pay an obligation to an attorney."[18]

A representation may "require more work or significantly larger advances of expenses than the lawyer anticipated when the fee was fixed," but that alone is not grounds for withdrawal.[19] It is expected that the attorney, who is better able to assess the expense of the representation at the outset, will bear some responsibility if his or her assessment turns out to be wrong.[20]

Other circumstances warranting an attorney's withdrawal include "irreconcilable differences,"[21] although not every disagreement establishes good cause for withdrawal. For example, a disagreement as to whether to accept a settlement offer does not, by itself, amount to a "fundamental disagreement."[22]

Likewise, an attorney's belief that the client's claim is frivolous will not necessarily justify permitting the attorney to withdraw, particularly where the judge disagrees that the claim is frivolous, as happened recently in a case in the Northern District.[23] The few courts which have addressed attorneys' claims that they cannot continue to prosecute an action because it lacks merit have expressed concern about addressing the merits of the action in the context of a motion to be relieved.[24] As one state court judge noted: "It seems clear that an application to withdraw is no more appropriate a vehicle for judicial determination of the merits of a claim or defense than it is to resolve an insurance coverage dispute."[25] That particular judge allowed the attorney to withdraw based on a show-

ing of "a change in circumstances since commencement of the representation that has led to a reassessment of the merits of plaintiff's claim," but only after noting that he was satisfied that the attorney was acting in good faith.[26]

A client's filing of a grievance against the attorney will also justify withdrawal from representation in a civil litigation, but not necessarily in a criminal matter.[27] In criminal matters, courts are concerned that the defendants will file grievances against one attorney after the next in order to delay the trial.[28]

herself defending a Judiciary Law § 487 claim based on statements made in the motion to be relieved.

2. Be Mindful of Client Confidences

Rule 1.6, which governs the confidentiality of information received from the client, does not expressly authorize the disclosure of confidential information in order to allow an attorney to be relieved from representation,[33] yet the attorney may not be able to support the request to withdraw without disclosing confidential communications. For example, if an attorney is seeking to withdraw because the client insists on presenting a claim that the attorney deems frivolous, the attorney cannot establish the grounds for withdrawing without disclosing his communications with the client.

> A representation may "require more work or significantly larger advances of expenses than the lawyer anticipated when the fee was fixed," but that alone is not grounds for withdrawal.

With regard to the timing of the motion to withdraw, the simple rule, well known to most, is: the sooner before trial, the better. Generally, where discovery has not yet been completed and the case is not on the verge of trial, withdrawal will be permitted.[29]

B. Things to Remember in Moving to Be Relieved

In addition to setting forth sufficient grounds to justify withdrawal, and ensuring that the motion is made as long before trial as possible, the attorney moving to be relieved should remember to (1) be accurate and (2) be mindful of client confidences.

1. Be Accurate

Factual statements made in support of the order to show cause to be relieved should be fully documented and completely accurate, as the statements can give rise to claims under Judiciary Law § 487, which prohibits attorneys from engaging in deceit or fraud in connection with a pending court action. Two recent cases illustrate this point. In one case, the plaintiff alleged that the defendant attorneys, although fully paid under the terms of the retainer agreement, claimed otherwise in order to be relieved from the representation.[30] The court held that the allegation was sufficient to state a claim under Judiciary Law § 487. In another case, the former clients claimed that the attorney violated Judiciary Law § 487 by offering "fabricated grounds" in support of an order to show cause to be relieved.[31] The plaintiffs alleged that the attorney asserted a "conflict with plaintiffs regarding strategy and a lack of trust," rather than "the true reason," which, according to the plaintiffs, was "an unfounded belief that plaintiffs could [not] or would not pay future legal bills."[32]

Accurate and substantiated assertions in the order to show cause will assist any attorney who finds himself or

The Comments to Rule 1.16 provide something of a solution. In seeking to withdraw, the attorney who wants to avoid disclosing confidential information should simply state: "Professional considerations require termination of the representation."[34] If that does not work (and it seems that there is a good chance that it will not), then, according to a recent New York State Bar Association ethics opinion, the attorney may go further and, in response to a court order requiring it, disclose confidential information in order to justify withdrawal from the representation.[35] The opinion cautions, however, that the disclosure should be limited to the extent necessary to accomplish the withdrawal, and that the attorney should request an *in camera* examination of the confidential information.[36]

Motions to be relieved should, whenever permitted, be filed under seal or with a request to present the reasons for withdrawal *in camera*. This is routinely done in federal courts,[37] and the local rules for the U.S. District Court for the Western District of New York require that the attorney seeking to withdraw request to submit the reasons for withdrawal *in camera*.[38] This is so even when the dispute relates to the party's unpaid legal fees, a matter which does not necessarily implicate privileged communications.[39] Where unpaid fees are the issue, it should be sufficient to let the other side know that the attorney is withdrawing because of a fee dispute, but in the Western District not even that is required.

Likewise, in state court, where, under CPLR 321, the motions to be relieved are required to be made by order to show cause, documents can be submitted for *in camera*

review. In fact, in some cases, attorneys have been criticized by courts for not doing so.[40]

Needless to say, the attorney should, even in *in camera* submissions or documents submitted under seal, avoid disparaging the client, who will be entitled to review those submissions.

III. Protecting Your Right to Be Paid for the Work Performed

An attorney who seeks to be relieved does not forfeit his or her right to be paid for work performed prior to the withdrawal. In seeking to be relieved, an attorney can request that the court issue an order finding that the attorney is entitled to either a charging lien or a retaining lien. Another mechanism employed by attorneys to be paid for work performed is a judgment by confession.

The lien is important for two reasons. First, it is a step toward getting paid for work performed. Second, it may provide the attorney with a collateral estoppel defense in the event he or she is later sued for malpractice by that client. An order finding that an attorney is entitled to his or her fee necessarily decides that the attorney did not commit malpractice.[41] And this is so even where the order simply establishes the attorney's entitlement to a lien, without specifying the amount.[42]

The two forms of liens, as well as judgments by confession, are discussed below.

A. Retaining Liens

Although Rule 1.16(e) provides that, in terminating the relationship with the client, the attorney must "deliver[ ] to the client all papers and property to which the client is entitled," the comments to the rule acknowledge that a lawyer "may retain papers as security for a fee."[43] The reference is to retaining liens, which "give an attorney the right to keep, with certain exceptions, all of the papers, documents and other personal property of a client which have come into the lawyer's possession in his or her professional capacity as long as those items are related to the subject representation."[44] A client can overcome the retaining lien and secure the release of the file by demonstrating exigent circumstances, which may include indigence.[45]

An attorney who withdraws without good cause will be deemed to have forfeited his lien,[46] and before asserting a retaining lien, the attorney should thoroughly review Rule 1.16 and ensure that good cause exists.

There is risk in asserting a retaining lien. If there is no litigation pending, the attorney will not be able to obtain a court order confirming his or her entitlement to the retaining lien, and a court may later find that the lien, if ever there was one, was waived. Depriving the client of the file may have adverse consequences for the client, and if the lien is wrongfully asserted, the attorney may end up being liable for those consequences.

A cost-benefit evaluation should be performed before the lien is asserted. Even if the lien is rightfully asserted, and ultimately validated, the validation may come in a malpractice or breach of fiduciary action which will cost the attorney in deductible payments under his or her lawyers' professional liability insurance policy or increased insurance premiums in the future.

B. Charging Liens

Charging liens are authorized by Judiciary Law § 475, which provides, in relevant part, that "the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor."[47] These liens can only be asserted by the attorney of record, although the attorney or firm need not be the attorney of record when the settlement is obtained or the verdict or judgment is rendered.[48]

Until recently, charging liens were limited to situations in which an action was commenced, and would not apply if a claim was settled pre-litigation through alternative dispute resolution or negotiations, but recent amendments to Judiciary Law §§ 475 and 475-a change that. Now, it no longer matters that a claim is resolved without ever being placed into litigation. Under the amendments, attorneys can be entitled to charging liens even where the former client's litigation is resolved through alternative dispute resolution or otherwise settled before an action is filed.

Like retaining liens, charging liens can be forfeited if the attorney withdraws without good cause.[49] Some federal courts have suggested that the showing of "good cause" needed to establish the withdrawing attorney's entitlement to a charging lien is greater than the showing of "satisfactory reasons" needed to withdraw from a pending action in the Southern and Eastern Districts under Local Rule 1.4.[50] Thus, in those courts, an attorney can be permitted to withdraw, but might not be found entitled to a charging lien. The more exacting standard invites a greater showing of the reasons to withdraw, and perhaps a greater disclosure of confidential information. The greater disclosure is authorized by Rule 1.6(b)(5)(ii) of the Rules of Professional Conduct, which permits the use of confidential information to "establish or collect a fee," but the disclosure must be limited to the extent reasonably necessary to accomplish that goal.

C. Judgments by Confession

Although they have not been encouraged, there is no rule barring the use of confessions of judgment with respect to legal fees. However, the client must understand "that the amount is to be agreed upon or fixed by the court," and confessions of judgment cannot be used for prospective or unearned fees.[51] Moreover, in matrimonial matters, confessions of judgment cannot be obtained to secure a fee unless the retainer agreement so provides, notice has

been given to the other spouse, and court approval has been obtained.[52]

The client should be given "a complete and full explanation of the character, effect and purpose" of the judgment by confession, including the adverse effect on his or her credit history, and if there is any doubt as to the client's ability to understand its effect, it should not be obtained.[53] The client should also be advised of his right to arbitrate any fee claim under Part 137 of the Rules of the Chief Administrator.

When obtained appropriately and with the client's informed consent, the judgment by confession can have the same *res judicata* effect in a subsequent malpractice action as an order establishing an attorney's retaining lien or charging lien.[54]

IV. Conclusion

Neither the client nor the attorney walks away fully content when the attorney-client relationship ends before the job that the attorney was hired to do is finished, but sometimes the relationship has to end, and the Rules of Professional Conduct account for that. The attorney's withdrawal must be done properly in order to avoid prejudice to the client and to avoid the chances of the attorney later being found to have breached his or her professional obligations to the client. The attorney has additional incentive to withdraw properly where litigation is involved; if a motion to withdraw is denied, the attorney will be forced to persist in a litigation in which he or she wants no part. ■

1. *See* 22 N.Y.C.R.R. 1.3, Comment [4].
2. 22 N.Y.C.R.R. 1.16(c)(1).
3. *See Simon's Rules of Professional Conduct Ann., 2016 Ed.*, at 950 (Thomson Reuters 2016).
4. *See id.*
5. 22 N.Y.C.R.R. 1.16(e).
6. *Id.*
7. *See Burke v. Law Offices of Landau, Miller & Moran*, 289 A.D.2d 16 (1st Dep't 2001).
8. *See, e.g., Farage v. Ehrenberg*, 124 A.D.3d 159, 163–64 (2d Dep't 2014) (although a cause of action for legal malpractice is deemed to have accrued when the malpractice occurred, the statute of limitations may be tolled under the continuous representation doctrine until the attorney's ongoing representation concerning a matter out of which the claim arose is completed).
9. *See, e.g., Perks v. Lauto & Garabedian*, 306 A.D.2d 261 (2d Dep't 2003); *Albin v. Pearson*, 289 A.D.2d 272 (2d Dep't 2001); *Kozmol v. Law Firm of Allen L. Rothenberg*, 241 A.D.2d 484 (2d Dep't 1997); and *C&F Pollution Control, Inc. v. Fidelity & Casualty Co. of New York*, 222 A.D.2d 828 (3d Dep't 1995).
10. *See* Mallen, *Legal Malpractice 2016 Ed.*, § 8.25, at 1047.
11. 22 N.Y.C.R.R. 1.16(d).
12. *See* CPLR 321(b)(2).
13. See Local Rule 83.2(b), Local Rules of Civil Procedure, U.S. District Court, Northern District of New York, and Local Rule 83.2(d)(1), Local Rules of Civil Procedure, U.S. District Court, Western District of New York.
14. *See Winkfield v. Kirschenbaum & Phillips, P.C.*, 2013 WL 371673 (S.D.N.Y., Jan. 29, 2013).
15. *See* 22 N.Y.C.R.R. 1.16(b).
16. *See* 22 N.Y.C.R.R. 1.16(c).
17. *See Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP v. Hirsch*, 2010 WL 2667198 (E.D.N.Y., June 23, 2010).
18. *See id.* (quoting *U.S. v. Stein*, 488 F. Supp. 2d 370, 374 (S.D.N.Y. 2007)).
19. 22 N.Y.C.R.R. 1.16, Comment [8A].
20. *See id.*
21. *See, e.g., Winkfield*, 2013 WL 371673, at *1.
22. 22 N.Y.C.R.R. 1.16, Comment [7A].
23. *Hexemer v. General Electric Co.*, 2014 WL 5465813 (N.D.N.Y., Oct. 28, 2014).
24. *See Hexemer*, 2014 WL 5465813, at *5; *Diaz v. New York Comprehensive Cardiology, PLLC*, 43 Misc. 3d 759, 762 (Kings Co. 2014).
25. *Diaz*, 43 Misc. 3d at 762 (citing *McDonald v. Shore*, 100 A.D.3d 602, 603 (2d Dep't 2012)).]
26. *See id.* at 765.
27. Compare *Davidson v. Scully*, 2000 WL 9512 (S.D.N.Y., Jan. 6, 2000) ("Absent extraordinary circumstances, no law firm should be required to continue to represent a client who has filed a grievance against one of its attorneys.") and *Cahill v. Donahoe*, 2014 WL 3339787 (W.D.N.Y., July 3, 2014) ("[T]he filing of a grievance against an attorney does not create a *per se* conflict between the attorney and client.").
28. *See U.S. v. Polanco*, 2013 WL 5126661, at *5 (E.D.N.Y., Sept. 12, 2013).
29. *See, e.g., Kariminian v. Time Equities, Inc.*, 2011 WL 1900092 (May 11, 2011).
30. *Cohen v. Kachroo*, 115 A.D.3d 512 (1st Dep't 2014).
31. *Brady v. Friedlander*, 121 A.D.3d 431 (1st Dep't 2014).
32. *See id.*
33. *See* 22 N.Y.C.R.R. 1.6.
34. 22 N.Y.C.R.R. 1.16, Comment [3].
35. NYSBA Comm. on Professional Ethics Formal Op. 1057 (June 5, 2015). The opinion quotes Rule 1.6(b), which permits an attorney to "reveal or use confidential information [when] the lawyer reasonably believes necessary . . . (6) when permitted or required . . . to comply with other law or court order."
36. *See id.*
37. *Team Obsolete, Ltd. v. A.H.R.N.A. Ltd.*, 464 F. Supp. 2d 164, 165 (E.D.N.Y. 2006) ("[D]ocuments in support of motions to withdraw as counsel are routinely filed under seal where necessary to preserve the confidentiality of the attorney-client relationship between a party and its counsel.").
38. *See* Local Rule 83.2(d)(1), Local Rules of Civil Procedure, U.S. District Court, Western District of New York.
39. *Harrison Conference Services, Inc. v. Dolce Conference Services, Inc.*, 806 F. Supp. 23 (E.D.N.Y. 1992).
40. *Taveras v. General Trading Co., Inc.*, 2010 WL 10934082 (N.Y. Co. July 6, 2010).
41. *See Molinaro v. Bedke*, 281 A.D.2d 242 (1st Dep't 2001).
42. *See Wallach v. Unger & Stutman, LLP*, 48 A.D.3d 360 (2d Dep't 2008).
43. 22 N.Y.C.R.R. 1.16, Comment [9].
44. *See Universal Acupuncture Pain Services, P.C. v. Quadrino & Schwartz, P.C.*, 370 F.3d 259 (2d Cir. 2004).
45. *Karimian v. Time Equities, Inc.*, 2011 WL 1900092 (S.D.N.Y., May 11, 2011).
46. *Corby v. Citibank, N.A.*, 143 A.D.2d 587, 588–89 (1st Dep't 1988) (citing *Goldman v. Rafel Estates*, 269 App. Div. 647, 649 (1st Dep't 1945)).
47. Judiciary Law § 475 (McKinney 2016).
48. *See Klein v. Eubank*, 87 N.Y.2d 459 (1996).
49. *See Kariminian*, 2011 WL 1900092, at *4.
50. *See id.* (citing cases).
51. *See Katlowitz v. Halberstam*, 284 A.D.2d 306, 307 (2d Dep't 2001).
52. 22 N.Y.C.R.R. 1400.5(a).
53. *See* NYSBA Op. 474 (1977).
54. *See Hoffenberg v. Hoffman & Pollok*, 288 F. Supp. 2d 527, 537 (S.D.N.Y. 2003).

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The "New" Deposition Rules, Ten Years On

Introduction

Next month marks the tenth anniversary of the effective date[1] of the Uniform Rules for the Conduct of Depositions, part of the Uniform Rules for the New York State Trial Courts, and codified at 22 N.Y.C.R.R. §§ 221, *et. seq.* (Part 221).[2] Composed of three subparts, 221.1, 221.2, and 221.3, the rules, in the words of George Carpinello, Esq., chairman of the OCA Civil Practice Advisory Committee:

> [E]mbrace cardinal principles that are abused all the time. Lawyers who know better take liberties at depositions to gain a tactical advantage . . . Judge [Jonathan] Lippman has taken the committee's recommendations and issued a "common sense rule" that sets the parameters for depositions in black and white.[3]

Why were the rules needed? Because there were certain common practices in New York State Court depositions that would lead extraterrestrial visitors to believe they had wandered into a schoolyard brawl, rather than a judicial proceeding. Coaching *via* "if you know," improperly directing witnesses not to answer questions, and abusive behavior, including "barking like a dog at a witness" at a deposition,[4] were rampant. While "New York's Field Code of 1848 provided for pretrial oral examinations of adverse parties as a substitute for testimony at trial,"[5] that statute, and its successors, mainly addressed the mechanics of how a deposition was to be noticed and held, rather than the conduct of the attorneys participating in the deposition.[6]

Part 221 provides detailed, but succinct, rules for questions, objections, and communication with a witness during the deposition. The rules, which have not been amended since their enactment, provide:

> § 221.1 Objections at depositions
>
> (a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.
>
> (b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.
>
> § 221.2 Refusal to answer when objection is made
>
> A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.
>
> § 221.3 Communication with the deponent
>
> An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the

> communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

Three hundred and eighty-four words; written in English, at least for a legal rule; clear and concise. And yet, 10 years on, many attorneys, if subjected to a snap deposition quiz, will get one or more of the provisions wrong.

Some Instructive Decisions

If you thought there would be a torrent of decisions on deposition practice in the 10 years since enactment of the rules, think again. In fact, there are, on average, less than 10 decisions a year, both reported and unreported, and it is rare for a deposition issue to reach an appellate court.

In *Parker v. Ollivierre*,[7] the Second Department described the improper conduct at issue:

> [W]e agree with the appellant that the plaintiff's counsel acted improperly at the plaintiff's deposition, among other things, by making "speaking objections," correcting the plaintiff's testimony, and directing the plaintiff on a number of occasions not to answer certain questions. The questions were designed to elicit information which was material and necessary to the appellant's defense of this action (citations omitted), and the directions not to answer them were not otherwise authorized by 22 NYCRR 221.2.[8]

The appellate court reversed the portion of the trial court's order denying the request for a further deposition to be conducted before a referee:

> While the Supreme Court properly denied that branch of the appellant's motion which was to strike the complaint, as that remedy was too drastic a sanction (citation omitted), under the circumstances, the alternative branch of the cross motion, which was to compel the further deposition of the plaintiff under the supervision of a referee (citation omitted), should have been granted.[9]

In *Mayer v. Hoang*,[10] the Fourth Department addressed the propriety of directions not to answer certain questions, and the trial court's sweeping order that plaintiff appear for a second deposition "'to answer all questions put to him including any questions previously asked at the prior deposition as well as questions regarding any of the issues inquired of by' defendant's attorney."[11]

The appellate court held that some of the directions not to answer were proper:

> On the merits, we agree with plaintiffs that the court abused its discretion in imposing that broad requirement. Defendant took issue with only five of the questions that plaintiff refused to answer, and defendant concedes in his brief on appeal that plaintiff essentially answered two of those questions, which concerned whether plaintiff smokes cigarettes. With respect to the remaining questions, we conclude that plaintiff properly refused to answer questions concerning whether defendant supplied "any defective, unsafe or improper devices or materials which caused [plaintiff's] fall" or whether the work area appeared "to be unreasonably dangerous." It is well settled that a plaintiff at a deposition may not "be compelled to answer questions seeking legal and factual conclusions or questions asking him [or her] to draw inferences from the facts" (citations omitted). Plaintiff also properly refused to answer the question whether he had "a calculation as to any lost wages that [he] would claim as a result of this incident" inasmuch as such question primarily seeks a legal conclusion (citations omitted). Further, a review of plaintiff's deposition transcript reflects that plaintiff properly answered all other fact-based questions concerning his lost wages (citation omitted).[12]

Some, but not all:

> We conclude, however, that the court properly granted that part of defendant's motion seeking to require plaintiff to answer questions concerning his June 2007 motor vehicle accident. At his deposition, plaintiff was directed by his attorney not to answer the question whether he "ever ma[de] a claim for bodily injury following a motor vehicle accident in June of 2007." Contrary to plaintiffs' contention, that question does not implicate the physician-patient privilege inasmuch as it does not request information concerning doctor-patient communications or medical diagnosis or treatment (citations omitted). Further, plaintiff alleges that, as a result of the fall, he injured his back, hip, groin, pelvis, and elbow, areas that are commonly injured in motor vehicle accidents, and thus the question was reasonably calculated to lead to evidence that is "material and necessary" to the defense of the action (citations omitted). We therefore modify the order by denying defendant's motion with respect to a return deposition in part, vacating the third ordering paragraph and substituting therefor a directive that plaintiff submit to a further deposition that is limited to questions concerning the June 2007 motor vehicle accident and relevant questions deriving therefrom, in accordance with 22 NYCRR 221.2.[13]

Finally, a veritable primer on the rules can be found in *Friedman v. Fayenson*,[14] where, *inter alia*, Justice Eileen Bransten analyzed, question by question, the directions by counsel not to answer questions and explained the basis for each ruling. For example:

> Attorney Wertheim asked Evgeny Freidman about the number of instances in which the TB & S Firm had performed legal services for Naum Freidman and Evgeny Freidman. (Respondents' Ex. N at 12:18-24.) Evgeny Freidman asked Attorney Wertheim to clarify his question, stating, "I'm not confused. I want you to ask the cor-

rect question." (Respondents' Ex. N at 13:8-9.) Attorney Wertheim replied, "Tell me what the correct question is." (Respondents' Ex. N at 13:10-11.) As Evgeny Freidman began to answer, Attorney Cohen interrupted by saying, "Stop. Proceed with your next fact question." (Respondents' Ex. N at 13:12-14.) Respondents argue that this statement was made in an effort to stop bickering between Evgeny Freidman and Attorney Wertheim. (Respondents' Mem. Opp. at 17-18.) Notwithstanding Respondents' characterization, bickering is not an enumerated basis for directing a deponent not to answer. Respondents also contend that "[t]he record shows that this was, in fact, *not* an instruction not to answer." (Respondents' Mem. Opp. at 17.) The Court disagrees. Attorney Cohen's instruction to "[s]top" was made during Evgeny Freidman's answer, and was therefore an instruction to Evgeny Freidman not to answer.[15]

Accordingly, the first instruction not to answer was improper.

A total of nine questions which were objected to, and where the witness was instructed not to answer, were analyzed in this manner.

Lest the reader believe that "barking like a dog" behavior is a thing of the past, *Friedman* also addressed the following deposition conduct:

> Movants contend, and the record shows, that Evgeny Freidman interrupted Naum Freidman's deposition with a series of profane remarks after Attorney Wertheim refused to accede to Evgeny Freidman's request that the parties take a lunch break. (Respondents' Ex. D at 64:9-65:5.) Specifically, Evgeny Freidman requested a break because Naum Freidman had been examined for two hours and needed to eat because of his medical condition. (Respondents' Mem. Opp. at 27; Respondents' Ex. D at 61:12-25, 64:9-14.) After being instructed not to speak, Evgeny Freidman interrupted Attorney Wertheim as he prepared to resume his questioning of Naum Freidman, challenging Attorney Wertheim to call the Court, referring to Attorney Wertheim as a "[f]ucking wimp" and a "pussy," and stating that Attorney Wertheim should "[p]ick up the fucking phone and call the Court." (Respondents' Ex. D at 64:16-25.)[16]

In a true exercise of judicial restraint, Justice Bransten drolly ruled:

> Despite Respondents' characterization to the contrary (Respondents' Mem. Opp. at 26-27), Evgeny Freidman's conduct and statements violate Uniform Rule 221.1(b), which provides that "[e]xcept to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning." 22 NYCRR 221.1(b).[17]

Conclusion

Given the number of pretrial examinations before trial conducted in New York State each year, the relative paucity of decisions addressing the deposition rules in the last 10 years might be taken to mean that attorneys in New York have read, understood, and embraced the rules. I'm not so sure, and suspect that an extraterrestrial visitor in 2016 would not mistake a New York State Court deposition for a tea party.

A more likely explanation for the small number of deposition decisions, which my anecdotal evidence suggests occur with about the same frequency as before the rules took effect, is that attorneys are just not making motions over improper deposition practices. The work involved in making the motion, when weighed against the fact that the questioner generally ultimately obtains the testimony sought, reduces the incentive to seek judicial relief. And, let's face it, these applications, whether on papers or made orally during the course of the deposition, are a judge's bête noir. When advised of the nature of the application, their initial reaction, often grounded in long experience, is "really?," and their initial gut ruling, again grounded in long experience, is "a pox on both sides."

Still, in the appropriate case, with a particularly obstructive or abusive attorney, and even where all necessary testimony has been obtained by the questioning attorney, deposition motions to enforce the rules have their place, both for the individual litigants and lawyers involved and for the common weal.

So, next time you attend a deposition, bring along a copy of the rules. When your poorly behaving adversary sputters on about "knowing the rules," you can quote them, chapter and verse, on the record, caution the attorney that the conduct in question violates the rules, and advise that an application to the court will be forthcoming if the behavior continues. You will be amazed at how that simple exercise can soothe a savage beast. ■

1. Added Part 221 (eff. October 1, 2006) on August 16, 2006.
2. The rules can be found at https://www.nycourts.gov/rules/trialcourts/221.shtml.
3. Michael R. Wolford, "New OCA rules on the conduct of depositions," *The Daily Record*, September 7, 2006.
4. "A Supreme Court judge has sanctioned an attorney $8,500 for frivolous conduct ranging from attempts to harass his opponents and barking like a dog at a witness during a deposition." Judge Sanctions Attorney, Client Over Behavior, N.Y.L.J., May 14, 2004, p. 1, col. 4.
5. Ezra Siller, The Origins of the Oral Deposition in the Federal Rules: Who's in Charge?, Yale Law School Legal Scholarship Repository, Jan. 1, 2012.
6. *Id*. The examination would be taken "subject to the same rules of examination, as any other witness." 1848 N.Y. Laws, c. 379, § 344 (71st Sess., April 12, 1848).
7. 60 A.D.3d 1023, 876 N.Y.S.2d 134 (2d Dep't 2009).
8. *Id*. at 1023–24.
9. *Id*. at 1024.
10. 83 A.D.3d 1516, 921 N.Y.S.2d 426 (4th Dep't 2011).
11. *Id*. at 1518.
12. *Id*. at 1518–19.
13. *Id*. at 1519.
14. 41 Misc. 3d 1236(A), 983 N.Y.S.2d 203 (Sup. Ct., N.Y. Co. 2013).
15. *Id*.
16. *Id*.
17. *Id*.

What Lawyer-Managers Should Do When Firm Economics Are Less Than Ideal

By Joel A. Rose

What happens when the economics of the practice are less than ideal and there simply isn't enough money to go around? It is not unusual for partners to feel frustrated and thwarted in achieving their personal and professional objectives. Many partners may attribute the firm's financial problems to what they perceive as the absence of sound management of their firm. As a result, lawyer-managers may at this point begin to examine more closely their role on the "business" side of the firm's practice.

While both the partners and the lawyer-managers may be aiming in the right direction in an effort to pinpoint the source of the problem, they may want to keep one critical point in mind: Many of the financial problems experienced by law firms are of the attorneys' own creation.

After many years consulting with partners to improve their firms' management processes and enhance firm revenue and distributable dollars available for partners, it has been my experience that the cause of many firms' financial problems lies in the very nature of the successful partner. He or she may know his or her respective field(s) of expertise and be respected and consulted by clients. He or she perceives his or her prime mission as an attorney to be of service to clients and may have difficulty meeting all of the demands on his or her time. Too often, busy partners are willing to relegate the business affairs of their law firms to the bottom of the pile. When this attitude is coupled with the tendency of some partners to consider

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the firm's administrative systems and procedures, including setting revenue and expense budgets, billing and collecting fees and expenses, etc., necessary evils, a situation results which may lead to neglect of the business affairs of their own firm.

This "benign neglect" may result in serious consequences. Generally, the symptoms of less-than-adequate planning and management are readily traced to the following areas: not setting objectives, under-utilization of lawyers, lack of appropriate budgeting for revenue and expenditures, and the absence of accountability of the lawyers.

Every firm that strives to be profitable must make the effort to formulate, identify and express its objectives in terms of revenue, firm size, management structure, type of practice, staffing, etc. This means answering what may be some difficult questions, such as:

1. Which areas of the practice should be retained or reduced?
2. Which attorneys are able and willing to contribute to the firm's objectives?
3. What should the firm be doing to attract more profitable business and enhance its reputation?
4. What are the sources of difficulties with clients and why?
5. Are the partners actively involved in managing the firm's business and substantive sides of the practice willing and able to manage, or do they perceive their function merely titular?

The answers to these questions are essential in formulating a plan that provides direction and must be compatible with the personal, professional and economic objectives of the partners. The point of defining and establishing objectives is to ensure that maximum effectiveness can be achieved in the day-to-day operations and longer term objectives of the firm.

To Ensure Maximum Effectiveness

A firm's success in providing quality legal services in an effective and profitable manner is directly related to its ability to manage its lawyer personnel. Firm managers must be willing to manage the firm, hold partners accountable for their actions (or inactions) and ensure that partners accept their responsibilities and satisfy their obligations to perform those fee-producing and non–fee-producing activities to progress the firm. This means managers must assume a proactive role for recommending and implementing policy, maintaining adequate control over such activities as recruitment, training and career development of associates; staffing of the firm's practice areas; allocation of work to attorneys; assuring adequate administrative support; developing an associate evaluation program; practice development, the financial well-being of the firm, utilization of paralegals and law clerks; establishing criteria for admission to partnership; developing a compensation plan and benefits program; assuring adequate communications among partners and associates, etc.

A law firm's profits are fundamentally linked to its ability to successfully utilize its partners and associates.

A law firm's profits are fundamentally linked to its ability to successfully utilize its partners and associates. If there is a slackening in leadership and firm management is perceived as lacking direction and the necessary skills to be effective, the result will be lower revenue and fewer distributable dollars for the partners.

It has been my experience that most attorneys are willing to subordinate their independence and autonomy, to some extent, for the benefit of the firm, if they see tangible evidence of management's effort to meet their objectives. The benefits are obviously of mutual advantage.

Financial Planning

Management of the firm's finances begins with careful monitoring of its past and present activities and establishing revenue and expense projections for the future. This involves reviewing the present and potential monetary aspect of each attorney and client matter. In addition, a systematic review of receipts, disbursements and productivity data will enable the firm to make decisions that will assist it in formulating and ultimately achieving practical objectives.

Most firms routinely develop projections for financial goals for the year ahead. To develop the information necessary to establish revenue and expense budgets, the lawyer-managers may be required to take a long and objective look at the firm's financial performance to determine whether its current volume of business will generate sufficient income to meet the partners' expectations and pay their firm's operating expenses. A firm must maintain a volume of business sufficient to fully utilize the time of its attorneys. The most efficient system will not result in a satisfactory net income unless the volume and value of the work is sufficient.

Adequate financial planning includes consideration of the firm's present client base, its billing and collection procedures and specific method for managing the firm's finances. Efficient and effective management involves

overseeing such matters as the day-to-day activities of the accounting staff; advising on the firm's capital requirements and annual budget and fee policies; assessing the results against the budget; developing fee policies for various practice areas; determining controls over billing performance, including profitability, unbilled time and costs, receivables, delinquencies, write-offs, etc.

One other critical aspect of financial planning involves maintaining adequate control over costs. Management must be persistent in tracking overhead costs. Generally, overhead rises more rapidly than revenue. The increase may be warranted, however, and is most often assessed by determining whether the overhead supports their efforts to provide a satisfactory net income. Regardless of the size of the firm, overhead should be controlled by means of a budget for such items as non-lawyer employment costs, occupancy costs, marketing, library, equipment and other direct and indirect costs, etc. This budget should be established as part of the annual financial plan and should represent the total expenses required to support the expected level of revenue-producing activities.

Increase Marketing Efforts

Today, when a firm's most important clients are being targeted by other law firms, marketing efforts assume greater importance. A firm's marketing activities should be coordinated by a marketing committee/partner, rather than implemented in an ad hoc manner.

Partners should be accountable to the committee for their business development efforts. Personal marketing plans should be developed by those attorneys who have demonstrated the potential to generate new clients or to proliferate work from existing clients. Variable hourly budgets of time and out-of-pocket costs devoted to business development activities by these attorneys should be recommended. Their billable and marketing goals must be adjusted accordingly.

Ideally, the marketing committee should develop and implement marketing strategies that call for client development programs that may result in one-third of the firm's clients using at least two of the firm's services. Selected partners should meet with clients having significant potential for additional fees, either through growth of their own operations or their ability to refer business.

Opportunities for cross-selling of legal services to clients should be pursued to further "bond" the client to the firm. To accomplish this, partners must understand a client's business as well as its legal needs. Partners must review with appropriate lawyers what is involved in cross-selling their legal services. Introductions of appropriate client executives to appropriate lawyers should be arranged.

Partners should meet with clients periodically to determine their legal needs. They should survey their clients to measure client perceptions of the firm, determine the client's expansion or contraction in particular areas, specify work in practice areas needed to be performed by the client, and determine other areas of legal work the client might use if the firm had the expertise. Also, the lawyer-managers and the marketing committee must be willing to address the issue of planning the orderly transition of clients from senior partners to other members of the firm.

Partner Accountability

Each partner should be expected to produce working attorney revenue, on a yearly basis, in an amount that would cover his or her compensation plus allocated overhead and an added profit factor.

Lawyer-managers must be prepared to cope in a straightforward manner with those partners who are unwilling or unable to comply with the firm's policies, initiatives and directives designed to increase firm revenue.

With the agreement of the partners, lawyer-managers must administer consequences and not be willing to sit by and allow these recalcitrant partners to take advantage of the firm or others.

The complexities of life when there is not enough money to go around require a firm to have appropriate leadership if it wishes to deal with the professional, financial and personal challenges presented by the partners. ■

Tacking Right (or Left)

Seasoned Litigator Finds New, Fulfilling and Profitable Practice

By Donna Drumm

Like many mid-career attorneys I wanted more from my work. I knew I wanted to continue in and around courthouses but did not want to build a solo practice as a general litigator. I discovered my new practice by using innovative thinking and strategy that I was introduced to at the American Bar Association's Bar Leaders Institute conference.

My previous practice areas were civil litigation – e-Discovery consulting and some motion practice. Getting back into e-Discovery after a few years was not practical. Technical advances in the business had moved beyond my learning curve.

As a member of NYSBA''s Law Practice Management Committee and passionate about legal technology, I knew I could create a mobile or virtual practice where I could work close to my home and leverage technology using affordable tools for billing, time keeping and accessibility to clients.

During my decision-making period, as now, I was an adjunct professor for the paralegal program at Mercy College, which kept me engaged in the practicalities of litigation, pleadings and updates to the CPLR. I loved being in the courtroom and the fellowship of lawyers, court personnel, and judges. I had invested 15 years in the profession. What could I do?

Then, an epiphany. As a staff member of a bar association I had a 2,000-plus foot view of the legal landscape in New York. I knew what concerned clients because we received calls from court users who were overwhelmed with waiting for hearings and decisions. I heard in their voices frantic appeals for resolution in their cases. Men and women shared with me the emotional toll prolonged litigation was taking on their families.

I also heard from citizens seeking legal counsel through calls made to Lawyer Referral Services (LRS). While LRS helped many, a growing number could not afford to pay for legal representation and they did not qualify for free services offered by different legal aid social agencies.

At this time, New York State Retired Chief Judge Jonathan Lippman embarked on his campaign to raise state

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funding for legal services as an increase to the judiciary budget. The "Access to Justice" programs signaled the judiciary's commitment to providing financial backing to expanding legal resources and services to the growing population of under or unrepresented court users.

I saw this as an opportunity to find a way for me to be in the courtroom, use my experience to serve the underserved, and promote change. But I still didn't know how to transform this external opportunity into a new practice area.

Then I heard Kaihan Krippendorff speak at the 2014 ABA Bar Leaders Institute in Chicago. He is the author of *Outthink the Competition: How a New Generation of Strategists Sees Options Others Ignore*. A portion of his speech is available as a TEDx video on the Internet.[1]

His approach is summarized by the concept that there are three paths that help people get "outside the box" and spark new ideas, leading to innovation. The three paths, or stages, are:

- Move early to the next battleground;
- Coordinate the uncoordinated, and
- Create power by creating a good strategy.

He likens this way of thinking to that of a child. I suggest for us adults that we approach thinking about a new practice of law as if we were going to a strategic planning retreat.

Thinking Out of the Box Means Thinking Out of the Office

To think out of the box, we need to, well, get out of the box. Give yourself time away from the office, to allow yourself judgment-free intellectual pursuit. Exercising this creative muscle can be done in many ways – journaling, dictating ideas as they occur to you into your cellphone, brainstorming sessions with a trusted friend or legal colleague. If you are an athletic person, you may set aside time while you are running, when the endorphins are taking effect. Studies show that our most creative thoughts occur when we first wake up; you may want to journal in the morning to capture ideas.[2]

A study on the best conditions for "thinking outside the box," reported on in *Scientific American*, suggests creative thinking or solving "insight problems" at off-peak times. "[Solving] [i]nsight problems involve[s] thinking outside the box. . . . Susceptibility to 'distraction' can be of benefit. At off-peak times we are less focused, and may consider a broader range of information. This wider scope gives us access to more alternatives and diverse interpretations, thus fostering innovation and insight."[3]

Path 1: Move Early to the Next Legal Battleground

I liken Kaihan's first path[4] – to foster innovative thinking is to move early to the next battleground – to investment strategy. It is better to be five minutes early to catch a trend or an investment opportunity than five minutes late. In law, the daily newspaper can show us where the next battleground or legal market space will be.

A trained soldier understands the terrain of the battlefield before stepping onto the next battleground to meet the risks of the unknown. For the experienced attorney, look at your current skill sets and ask yourself:

- How can my skill set be expanded into a new practice arena?
- What are the unknowns I will face in traveling to the next "battleground"?
- What is the projected timing of the trend I want to catch?
- What resources can I research to find out if I will be five minutes ahead or many years behind?

My battlefield, or new practice focus, became "invisible disabilities."[5] In 2009, the Americans with Disabilities Act Amendments Act of 2008 came into effect. While many people are aware of providing accommodations for persons with physical disabilities in the courthouse, such as wheelchair ramps and sign language interpreters for the deaf, it is not widely known that those with invisible disabilities may also seek accommodations in the courthouse.

> Tools to build a new practice area are innovative thought, entrepreneurship and a solid business plan.

Path 2: Coordinate the Uncoordinated

Kaihan's second path suggests that to foster innovative thinking is to observe what processes or groups are uncoordinated and which ones do you have the resources to coordinate?

> Combine and coordinate independent elements within your environment to orchestrate much greater power. Who would we like to coordinate? Customers, experts, employees, real estate, regulators, competitors?[6]

When you think about it many examples come to mind:

- Westlaw brought together state and federal cases and statutes in one database.
- Martindale-Hubbell assembled contact and biographical information on lawyers in a book format.
- LinkedIn coordinated the biographies of businesspeople throughout the world, and each person inputs his or her content.

The New York courts are extremely innovative in bringing resources to the underrepresented by providing dynamic do-it-yourself guides for pro se litigants on court websites. The New York State Bar Association's Task Force on Family Courts in May 2016 presented several programs designed to help unrepresented litigants in family courts write petitions with the help of volunteer lawyers and legal interns. The Westchester County Bar

Association, with the support of the Westchester County Supreme Court, participates with five counties in the CLARO Project where volunteer attorneys provide pro bono services to low-income defendants in consumer debt actions.[7] Erie County Bar Association's Volunteer Lawyers Program, with the assistance of the Erie County Family Court, implemented the Family Court Help Desk.

Many people associate innovation with technology because the power of technology is that it coordinates the uncoordinated. But innovation is not technology. Technology supports innovation, and one can have innovation without technology.

Observing Processes in Your Firm

In my work as a legal consultant for technology companies, I learned that technical processes ultimately are born from frustrated inefficiencies. Routine tasks whose individual steps are disconnected can be improved if they are connected or coordinated. When developing my Americans with Disabilities (ADA) Advocacy practice, what I saw as uncoordinated was the disconnect between accommodations available to persons with disabilities in the courthouse and their lack of knowledge about what could be done and how to go about doing it. My niche became a practice focused on letting people with invisible disabilities who are engaged in litigation know that they can seek accommodations for their disabilities while in the courthouse, and then using the established procedures to make accommodations happen effectively.[8]

Over a period of a few months, I educated myself on the ADA laws and court processes, and soon the puzzle pieces began to come together. I took apart the process and put it back together again in five steps understandable by persons who were represented by counsel or were pro se litigants. I then had a designer illustrate the steps and I published it on my website. By explaining the process as a coordinated series of logical steps, I can educate potential clients and colleagues about what I do in my practice.

- Where in your legal practice is a process that is uncoordinated that you would like to change?

Path 3: Creating a Strategy for Good

Kaihan's third path to foster strategic thinking asks: How can we create strategic power through good strategy? He reconstructs our perceptions of competition from "kill the competition" to an inclusive approach that asks what is best for all stakeholders. This strategy is analogous to lawyers creating a mission statement and culture for their practice.

- Who are the stakeholders in your law firm?
- How can you build a strategy that is a win-win for all your stakeholders?

A good strategy in a law office inherently includes noble aspirations, so the focus should be on a collaborative approach.

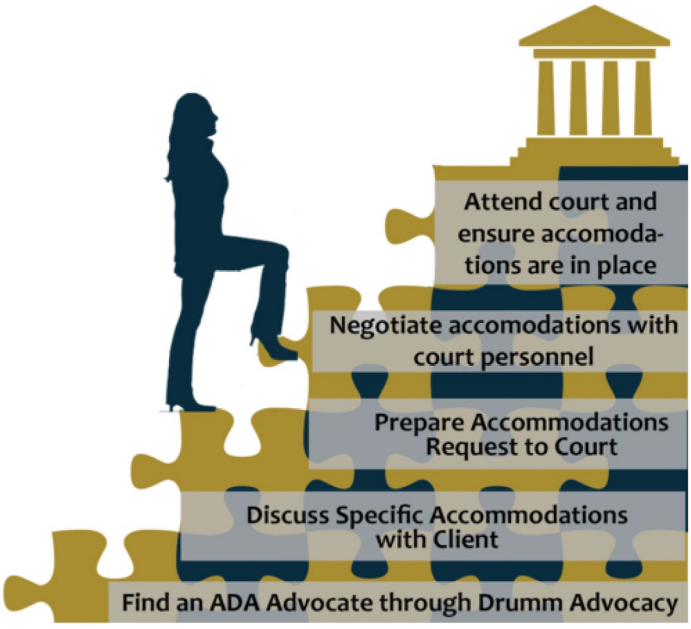
Kaihan points out that seeking alignment with stakeholders in your strategy makes it a win-win.

I identified stakeholders who would be impacted by my ADA advocacy practice: my clients, their attorneys (if represented), psychiatrists, psychologists, court administration, ADA liaisons and judges.

I spoke to representatives of each of these stakeholders about my plan. Since there was already a system in place to accommodate persons with disabilities, the idea of an ADA advocate was not necessarily new, but an attorney taking that on as a practice area was novel. Psychiatrists, in particular, were extremely positive in seeing the possibility of their patients having legal support for their disabilities during the stresses of court appearances. Court personnel were appreciative of a professional advocate partnering with them to create clear accommodation plans for court users, which in turn, assisted their compliance with Title II of the ADA.

Seeking alignment with stakeholders gave power to my strategy to develop a practice area where I could decrease the stress of litigation for unrepresented or underrepresented clients while being in the courtroom with them.

Through research and networking, I met Dr. Karin Huffer, an author and professor, who was trained clinically in mental diseases, and linked the ADA to advocating for persons with disabilities in the courtroom. She developed an ADA advocate training course (currently being held at John Jay College in New York City) for lawyers and non-lawyers. I decided to take the course and committed to practicing ADA advocacy for a specific period to see if I could develop a viable business. I was fortunate other clients came to me with general legal work while I went about building the ADA practice.



Putting Innovative Thought into Solid Action

I wanted a plan to help me develop this business, so I searched the Internet for a business plan targeted toward building law firm practice areas. Many concentrated on the financial aspects of a start-up and how to make presentations to banks. I found LivePlan, www.liveplan.com, which is a business plan program created for entrepreneurs. Advertised as "The world's leading business plan software . . . Liveplan breaks the business planning process down into simple steps with instructions and examples."[9] It is a monthly subscription service and has a free trial period. It appealed to me because I could complete my business plan for under $50 in one month. LivePlan uses a visually appealing platform in a question and answer format, open-ended enough to facilitate innovative thinking and easy enough to instill confidence in me that I would make my idea for a new practice area come to life.

Developing the Basic Practice Focus

The first section of the program helps to develop the practice focus as encapsulated in your elevator speech. How many times a day are we asked:

Q: What do you do?
A: I'm a lawyer.
Q: What area is your practice?
A: Well, I . . . uhh.

The pitch is the hardest part to explain what we do. Creating a well-crafted pitch can also be used in LinkedIn profiles, firm biographies and website content.

The first question to answer is, "What is the problem worth solving?"

For my practice, the problem worth solving is: How can court users with invisible disabilities under the stress of litigation increase their performance interacting with the judge and attorneys in the courthouse?

The program then asks, "What is your solution?"

For my firm, the solution is: DrummAdvocacy is a law firm that works with ADA coordinators in the courthouse to design accommodations under the Americans with Disabilities Act for persons with invisible disabilities to increase their performance in the courthouse.

To meet the needs of starting up a new law practice, I changed some parts of LivePlan.

I converted the "Products and Services" section to 1) what is the work product this new practice will deliver to clients? and 2) what non-legal and legal services will the new firm deliver to clients? Non-legal services could include paralegal support, unbundled services and administration. What I discovered in the LivePlan process was the work product for my potential clients would be their accommodation plan. I built upon my years of experience and decided that my uniqueness would come from my understanding of the administration of the courts, particularly the court personnel responsible for receiving the accommodation plans.

Questions for your practice:

- What is the problem worth solving?
- What is the solution?
- What is the work product this new practice will deliver to clients?
- What non-legal and legal services will the new practice deliver to clients?

Using LivePlan, I moved on to the Sales and Marketing sections. Who was my target audience? How would I let them know what I do and how it can help them? My first investment was hiring legal marketing consultant and fellow NYSBA Law Practice Management Committee member Carol Schiro Greenwald. Together, we created a marketing plan that respects the bounds of ethical lawyer advertising and marshaled social media to spread the word about this new practice to a wide variety of audiences.

The final piece of LivePlan is the Milestones section. Milestones invites accountability by asking the user to input due dates, who is responsible, details of the milestone, and a reminder option which integrates into many calendaring programs.

Conclusion

Tools to build a new practice area are innovative thought, entrepreneurship and a solid business plan. Begin the process now by using the questions at the end of each section above derived from thought leaders. Collaborating with colleagues, stakeholders and consultants can enrich your quest to find a fulfilling and profitable new practice. ■

1. Kaihan Krippendorff, http://tedxnavesink.com/project/kaihan-krippendorff/ (last visited June 1, 2016).

2. Ifran Ahmad, *The Scientifically Proven Best Time to Think and Write Creatively*, Digital Information World, Infographic posted, Nov. 3, 2015, http://www.digitalinformationworld.com/2015/11/infographic-the-scientifically-proven-best-time-to-think-and-write-creatively.html.

3. Cindi May, *The Inspiration Paradox: Your Best Creative Time Is Not When You Think*, Scientific American, March 6, 2012, www.scientificamerican.com/article/your-best-creative-time-not-when-you-think.

4. The paths need not be done all at once or in order but for consistency in this article they are in the order of Mr. Krippendorff's presentation.

5. Examples of invisible disabilities are: ADHD, Alzheimer's Disease, Anxiety Disorders, Autism (ASDs), Bipolar Depression, Major Depressive Disorders, Parkinson's Disease, PTSD and Traumatic Brain Injury.

6. Krippendorff, *supra*.

7. For more information on the CLARO project, see www.claronyc.org/claronyc/default.html.

8. Just as students with learning disabilities are offered accommodations in school settings and law students who are qualified can seek accommodations sitting for the bar exam, court users may also seek accommodations under the ADA. There is a process in place to seek accommodations with ADA liaisons in courthouses throughout the United States.

9. LivePlan, https://www.liveplan.com/how-it-works (last visited June 1, 2016).

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Successful Managing Partners Practice EI-Based Leadership

By Carol Schiro Greenwald

Successful managing partners practice emotional intelligence-based leadership to move their law firms toward their vision. How strange this sounds when we consider that lawyers as a group tend to rank low on the emotional intelligence scales. In this article we quickly review some of Larry Richard's[1] findings from his studies of lawyer personalities, and define the hallmarks of emotional intelligence (EI).

We pair this book learning with the "been there, done that" wisdom of six EI-savvy leaders.

The six former or current managing partners I interviewed lead firms ranging in size from approximately a dozen lawyers to approximately 450 lawyers. They are:

- Jeffrey Citron, managing partner, Davidoff Hutcher & Citron LLP
- Robert Danziger, partner, Danziger & Markhoff LLP
- P. Daniel Hollis III, managing partner, Shamberg Marwell Hollis Andreycak & Laidlaw, P.C.
- Mark Mulholland, former managing partner, Ruskin Moscou & Faltischek P.C.
- Mark Landis, managing partner, Phillips Nizer LLP
- Michael Solow, managing partner, Kaye Scholer

First, Some Definitions

- IQ (intelligence quotient) measures a person's cognitive and intellectual abilities as displayed in logical, rational, conscious reasoning.
- EQ (emotional quotient) measures a person's social-relational intelligence as displayed in his or her capacity to understand himself or herself and his or her ability to empathize with others.
- Leadership is the ability to move people in a common direction by establishing a vision and sharing it with others in a manner that inspires others to willingly follow one's lead.

Lawyer Personality Traits[2]

Ironically, the very traits that facilitate great legal work tend to be emotional intelligence inhibitors. The hallmark trait of the best lawyers is skepticism – the ability to question, argue, and critique statements. The percentage of lawyers registering high on this quality, as measured by the Caliper Profile Scale, is 90 percent compared with a 50 percent level in the general public.

While it is an essential tool for the practice of law, in everyday life it surfaces as negative thinking – "the glass is half empty" or "today's problems will last forever."

The second highest personality trait of successful lawyers is a need for autonomy: they score 89 percent on this trait compared with 50 percent among the general population. Autonomy plays out as a desire to be in control of one's activities and an aversion to direction. That's why people often say that getting lawyers to work together is like "herding cats."

The third-highest lawyer personality trait is urgency – impatience, a need to get things done. Long-range strategies and leadership visions may take years to implement, but the typical lawyer wants to see immediate returns.

On the other end of the personality trait spectrum, lawyers score lower than the general public on three traits that are important prerequisites for EI-based leadership. They tend to have:

- Low resilience: thin-skinned and defensive when criticized; easily hurt by others' comments.
- Low sociability: disinterested in the personal lives of others, reticent to share personal information with others, and fearful of intimate connections with others.
- Low empathy: prefer to pay attention to their own agenda rather than relate to other people's feelings and experiences.

It would seem that organizations that employ a majority of people with these characteristics would not be fertile ground for successful strong leadership efforts. Yet, in today's world when powerful changes are remaking the legal profession, there is a stronger than ever need for effective law firm leadership.

EQ-based leadership

EI lawyer-leaders are more like the rest of us on a good day. They are able to connect on an emotional level with others, making it easier to persuade followers to follow their vision. They listen well, show empathy and build trust. The result is an open communication system that promotes a collegial environment.

People with strong emotional intelligence attributes score high on three planes:

1. They have a strong sense of self, an awareness of their own emotions and an understanding of the impact of emotions on their actions.
2. They are able to self-manage their own emotion-action interplay by consciously choosing their own emotional response to a situation. This ability gives them an "inner space" that allows them to relate to others' responses to their requests.
3. They have a social sense that allows them to predict the probable emotional response of others which, in turn, enables them to anticipate and manage their followers' responses more effectively.

EI at work

- Walk the talk – model the behavior you want.
- Use emotion to create connections that will enable you to lead.
- Be constantly aware of what is going on.
- Create a strong network representative of all the points of view in the firm.
- Create buy-in by articulating clear goals, building open, transparent discussions, and celebrating successes.
- Foster self-development by genuinely working to help everyone become the best that he or she can be.
- Counter the negativity caused by uncertainty by setting clear goals, providing direction and offering emotional reassurance to those who are spooked by change.

Emotionally strong leaders understand that they must arouse emotional responses in order to motivate people to follow them. But at the same time they acknowledge the need to move those reactions along the same path.

All those I interviewed described necessary personal leader attributes with similar words: empathy, ability to listen and strong communication skills balanced by the need to educate and teach followers. Mark Mulholland said, "A leader is willing to stay on a chosen course, even if some dislike him. He must be decisive, but seen as fair by all sides. In return the leader will earn trust and respect."

EI leaders serve as role models for the kind of behavior they want within their firms. As Mike Solow put it, "You always have to be on and up because others make guesses based on your demeanor." For Dan Hollis, you need to live "integrity and accountability" because "you can't fake the hustle."

EI leaders try to be calm and compassionate. For Bob Danziger, forward-thinking leadership requires patience, fairness and the "appearance of calmness." Jeff Citron emphasizes the ability "to get your ideas across," with words and by setting an example of the kind of inclusive, collegial, respectful interactions you want in your workplace.

We all know some strong leaders who prefer to rule by fiat, but if they also are good listeners, patient and empathetic their followers will usually forgive their flaws.[3]

Successful MPs Define Leadership

They all see leadership as a reciprocal connection between leaders and those led in which the leader creates, often with the help of others but sometimes alone, a vision and then makes sure it happens. In part one of the connection, leadership means having foresight: the ability to articu-

late a vison as to where the firm should be in the future, what it should look like and who should be in it.

Each of them saw the second part of leadership connections as the reaction of the led, and the need to build a consensus behind change. Mike Solow explained this as "buy-in through education": "It is the ability to understand your [internal] constituencies and put them in a position to excel in the context of what's going on around them. [The leader] looks at the bigger picture and then helps the others understand its implications."

EI Leaders in an IQ World

How do strong, emotionally intelligent leaders connect with risk-adverse, skeptical, pessimistic followers?

By understanding that personality traits are really preferences that can be modified. Leaders model and teach preferred behaviors. With encouragement and positive feedback others can gain ego strength and begin to appreciate the opportunity to work in a collegial, respectful environment.

"Dictating from the top is not a recipe for success"

These leaders all intuitively understand the "standard lawyer personality." They see that many lawyers are ruled by fear and soothed by the rhythms of habit; falling back on "if it ain't broke, don't fix it" to defend their perspective. They often challenge suggestions for change with the lawyer-like "parade of horribles," trying to derail the idea one detail at a time.

Growth, culture and profitability are the main concerns of these leaders. They deal constantly with change-creating issues as they try to create the most profitable mix of lawyers at different levels, grow their associates by mentoring and teaching them best practices for the 21st century, and grow their client base by focusing on service quality and modernizing relationships between clients and the firm.

Buy-in

To mitigate the impact of this kind of behavior they all prefer to avoid large groups when discussing new ideas. Instead, they work with small groups of influential attorneys, usually key partners, getting individuals behind them one by one. They understand that what moves one person will not move another, so it is important to treat everyone differently.

The first thing Mike Landis did as managing partner was to schedule time with every attorney to learn more about them: "I needed to know what I didn't know." They talked about their view of the future, how they saw their practice growing, the resources they used, the resources they would like to have, etc. After meeting with them, he had a better sense of his own firm's strengths and weaknesses, and an understanding of the best points to build on for the future.

Some change old processes; for example, Jeff Citron has cut the number of regularly scheduled meetings, preferring instead to sit down informally with one or two people for discussions. In an effort to simplify the decision-making process, Mike Landis moved executive committee meetings from weekly to monthly with many decisions pushed down to the practice group level.

Their buy-in processes usually begin with those most impacted by a decision. Mike Solow often has to show the economic and/or social value of specific decisions – such as taking a pro bono case or adding a partner with clients in industries that are offensive to some other partners – by talking one-on-one to individuals with an interest in the decision.

A Modernization Example: Changing the Compensation System

Mark Mulholland recounted the story of how he moved his firm toward a nicer, more collegial, more profitable firm by changing the origination from "eat what you kill" to shared origination. The change allowed everyone to focus on clients as assets of the firm as a whole to be developed through shared efforts and teamwork.

Mark began with the idea that he wanted to create a firm for the next generation of lawyers and clients, and to do this compensation had to be divorced from origination because classic origination leads to silo mentalities, bitterness and an unwillingness to work hard when someone else reaps all the rewards.

To make the change took three years. He began his strategic planning effort by interviewing all of the stakeholders individually. He then did a SWOT analysis that showed the firm's competitive position: its internal strengths and weaknesses vis-à-vis the external opportunities and threats. A key conclusion emerged: the firm didn't function well enough as a team, and this weakness impacted its profitability.

The next step was to create a strategic planning committee. He chose open-minded, forward-thinking equity partners and hired a seasoned consultant to share best practices and lead the group. The group identified areas for adjustment. Number one was how to recognize contributions to client relationships.

They opened this issue up to the whole partnership for discussion. The naysayers said the firm was doing fine so why change. They argued that without old-fashioned origination no one would want to do client work. The debate went on for months until Mark slowly built a majority and the shared origination plan was adopted.

Each practice group decided how to distribute credit within their group. Only if they could not reach a conclusion did the origination committee step in. The result has been buy-in at every stage along the way.

Today anyone in the firm can get origination credit – from associate to senior partner – by bringing in a client or growing a current client. Origination occurs at the

matter level. Because anyone can be rewarded for adding client value, everyone is motivated to seek opportunities and cross-sell services that benefit the client. Everyone is vested as an owner in client relationships. Origination has become just one more aspect of everyone's job.

Mark's vision to be a second generation firm, focused on teamwork, with an evolved compensation system and a flourishing client base became a reality.

Try These EI Leadership Techniques

Effective leaders are seen as strong and fair by their followers, and are able to create a shared willingness to move toward their vision. Leaders can use a variety of techniques to create a culture of fairness and a safe environment for individual development. For example:

- To counter skepticism, celebrate the positive.
- To reduce the need for independence, encourage individual self-management by avoiding micromanagement. This allows people to express their individuality through their habits and approach to work.
- To counter low sociability and resilience, introduce ways of showing that work was useful and relevant. This leads to pride in the work completed, which, in turn, encourages people to feel secure enough to be willing to work together.
- To reduce people's sense of uncertainty and anxiety, leaders can provide specific clear direction as to goals and the means selected to attain them.

Rewards for These Leaders

They all agree that law firm leadership can be a thankless job – long on aggravation and resistance to seemingly obvious changes. But all say that their rewards lie in the results: getting something accomplished that will have a major positive impact on the firm and the lives of those who work there.

- Mark Mulholland characterized the job of managing partner as "worse than thankless – rarely thanked and often criticized. The reward is in knowing you did your best, you won the group's vote of confidence and the changes you made were important and right."
- Mike Solow finds it most rewarding when he is able to help others in the firm to progress and advance in their careers. Also when they are able to come together as a group and make a move that is economically necessary, and do it in a way that adheres to the moral values of the firm.
- Dan Hollis is proud of the changes his firm has made to accommodate the changing needs of members, promote accomplished women lawyers, and create a culture based on a strong work ethic and a collegial atmosphere.
- Mark Landis said he "gets a kick out of helping others reach the next level of success and its payoff for them personally and for the development of the firm."
- Bob Danziger, too, finds rewards in the growth and profitability of the firm and in the challenge of growing the firm while retaining a culture that feels good for members of the firm.
- Jeff Citron finds it most rewarding to "see the process of change pay off – whether it is adding a lateral partner or new practice group or expanding the footprint of the firm and redecorating it to reflect the firm's brand as an entrepreneurial New York law firm."

Results for the firms

Today, all law firms need EI leaders because they understand how to bring people along with them in a positive, emotionally safe way. Firm modernization depends on teamwork. Legal work has become increasingly complex, requiring an integrated approach to matters. Clients find the team approach valuable because it often produces better results. Lawyers are more productive in a positive, collegial work environment. This, in turn, creates a more profitable firm in terms of lawyer satisfaction and firm profitability. ■

1. Larry Richard, "Herding Cats: The Lawyer Personality Revealed," at lawyerbrain.com.
2. *Id*.
3. Larry Richard, "Toward Better Leadership: Self-Development, Focusing on Strengths and Accepting Flaws," from his blog, What Makes Lawyers Tick, at lawyerbrain.com.

Suggestions for increasing your own aptitude for leadership[1]

- Take a test that measures leadership qualities to get a personal baseline.
- Figure out what you do well and work to make those characteristics better.
- Work on only one strength at a time.
- Set concrete, measurable, realistic goals for yourself so you can see progress.
- Encourage feedback as to your progress. Consider implementing a 360° survey.
- Link your progress to something that is personally important to you because then you are more likely to attain your goals.

1. Adapted from Larry Richard's blog, 5/18/16, "Toward Better Leadership: Self-Development, Focusing on Strengths and Accepting Flaws," on Richard's blog, What Makes Lawyers Tick?, at lawyerbrain.com.

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Get Your Head in the Cloud

By Deborah E. Kaminetzky

Many law firm decision makers are talking about "the cloud." Is it safe, should we use it? First, let's discuss what the cloud actually is. The cloud, contrary to popular belief, is not an actual cloud. Rather, it is comprised of remote servers which host information. Most responsible cloud providers have servers in diverse locations such that if there is a disaster in one of their locations, they have replicative storage. The cloud enables one to access the information and/or storage from any location with Internet access. This enables a solo attorney, for instance, to respond quickly to a question from one client while he or she is waiting in a courthouse to represent another client. That means that the attorney does not need to hire someone to be in the office at all times to help clients, and cuts down significantly on the cost of doing business.

New York State published an opinion in 2010 about whether attorneys could use the cloud, although even before the published opinion the New York State Bar Association offered a discount on a cloud practice management software, so I was of the opinion that New York was going to allow us to use the cloud. This is what NYSBA had to say:

> A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality will be maintained in a manner consistent with the lawyer's obligations under Rule 1.6. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information, and should monitor the changing law of privilege to ensure that storing the information online will not cause loss or waiver of any privilege.

Deborah E. Kaminetzky is the founding member of Kaminetzky & Associates, P.C. located in Cedarhurst, New York. Prior to starting the firm, Ms. Kaminetzky was an associate at Weisman Law Group, P.C. where she primarily practiced matrimonial and family law. She is an experienced mediator and has spoken to various groups on topics including matrimonial law, technology and social media use, and disaster preparedness for business.

Also: "Whether a lawyer for a party in a transaction may post and share documents using a 'cloud' data storage tool depends on whether the particular technology employed provides reasonable protection to confidential client information and, if not, whether the lawyer obtains informed consent from the client after advising the client of the relevant risks."

More recently, in 2014, NYSBA Op. 1020 dealt with whether cloud storage could be used for transactional purposes. In that situation the issue was whether an attorney can use an electronic project management tool to help with closings. Sellers, buyer attorneys, real estate brokers and mortgage brokers could post and view documents in one central place. The opinion was that with informed consent, the tool could be used.

So, the standard in New York is "reasonable protection to confidential client information." This does not mean throw caution to the wind and click the box that says "I agree" when using new software without reading it. That kind of recklessness is fine if you want to use an app on a personal device to let you know when your favorite celebrity is nearby, but not for your law practice. It also does not mean that you have to personally interview the people who work for the software you choose to use prior to utilizing it. (Although attending Legaltech is both fun and informative and you will likely meet many of the software and app designers.) Reasonable is somewhere in between.

Knowing where the information is being held and what precautions are being taken and getting that information in writing (print out terms, etc.) are all steps you can take. You also should keep tabs on the ever-changing technology field and the law to see if your technology of choice still complies with the law in New York. Having your clients sign a technology policy is another useful practice tool so that it is clear to them that you are storing their information in the cloud and that you are taking the proper precautions. You need to understand how to protect yourself and your clients prior to even hanging out a shingle and taking your first client, or you will be finished before you start.

Many lawyers I have spoken to say they are worried about the security of the cloud. A recent survey conducted by the Cloud Security Spotlight Report[1] showed that despite the worries about cloud security, very few firms have had actual problems with their cloud security. In my opinion, the benefits outweigh the risks.

We've talked about whether you can use cloud, and what precautions you should take. Let's discuss why it's worth it. Cloud computing has many advantages. First and foremost, as a survivor of New York's most recent natural disaster, where both my home and my office were in the flood zone, I can tell you from a disaster preparedness point of view, the cloud is amazing! While other attorneys in my geographical area had their older files in storage facilities that were flooded (whose owners could barely tell them which firm's files were which in the water), my office had the advantage of having most of our files in the cloud where they were safe and sound. That's not to say that we don't also have copies on a removable hard drive – redundancy goes a long way. From having online backups to having your practice management software in the cloud, the cloud can be utilized for almost everything. My practice management software is known as SaaS, software as service, and it backs up and encrypts all the information on a daily basis. For those of you who don't know what encryption is, it turns the information into an indecipherable mess so that if somehow it is stolen, it is unusable. This helps to comply with confidentiality. It is wise, however, to continue to back up locally to a removable hard drive just in case of a cloud outage. They usually don't last that long, but if it happens right before your deadline you'll be happy you have your data at the ready.

Another great reason to utilize the cloud is that you can access it from anywhere you have an Internet connection, which frees you up to work when and where it's best for you. However, using unsecured (open) Wi-Fi is not advisable. Even hotel Wi-Fi is not that secure as so many people have the password. Your smartphone can act as a secure Wi-Fi or you can utilize a "MiFi" or "hotspot" that comes with a password you create. This goes a long way toward keeping your data secure while on the road.

The cloud has opened up opportunities galore for small and solo law firms. While one used to need to pay rent for a lot of storage for files and books, now one can utilize the cloud at a fraction of the price, which levels the playing field. This means that you don't need to rent as much space or any space at all; I know many who work from home and meet clients on an as-needed basis in rental conference rooms. You do still need to have a physical office in New York as we saw from the recent decision *Schoenefeld v. Schneiderman*.[2]

Another advantage of using cloud providers is that they are usually (but not always) more attentive to prevention of hacking than you can be on your own. It is very difficult to practice full time as well as pay attention to all the IT issues one can have. Cloud providers usually have their own IT department working on that full time so that you don't have to. You should, of course, still have a good IT person on call in case you have issues with your devices or software.

To sum it all up, cloud computing is a wonderful tool for lawyers as long as you take the proper precautions. ■

1. Ricci Dipshan, Concern over Cloud Security Grows, But Reality Is Another Story: Survey, Law.com, http://www.law.com/sites/articles/2016/05/17/concern-over-cloud-security-grows-but-reality-is-another-story-survey/?slreturn=20160501104455 (last visited Jun 1, 2016).

2. 11-4283-cv, N.Y.L.J. 1202755844393, at *1 (2d Cir., April 22, 2016).

Robert Kantowitz has been a tax lawyer, investment banker and consultant for more than 35 years. He is responsible for the creation of a number of widely used capital markets products, including "Yankee preferred stock" and "trust preferred," as well as numerous customized financial solutions and techniques for clients. He is a longtime member of the New York State Bar Association Committee on Attorney Professionalism and, as such, co-authored the Committee's *Report on Attorney Ratings* dated December 7, 2015 and has contributed to the monthly *Attorney Professionalism Forum* feature in this *Journal*.

Practical Pointers on Home Construction Contracts and Projects

By Robert Kantowitz

What does a tax lawyer do for recreation? Many years ago I was a tyro working at a large firm, and when we tax associates needed a break from all the assignments requiring tough analysis of cases, statutes and regulations, and sometimes round-the-clock work, the partners gave us tax shelters to draft. Now that that business is passé, I have decided to pass on some of the things I have learned from observations over the years regarding construction, specifically construction of a single-family home for oneself or a client.

In a previous issue of this *Journal*, Peter Siviglia wrote an article focusing on general contractors and certain contract terms, in particular regarding time delays and payments for subcontractors, also known in the vernacular as "subs" or "trades." (I generally eschew abbreviations and jargon, but I will make an exception for these ubiquitous terms as well as for the abbreviation "GC" for "general contractor.") I am grateful to Peter Siviglia for having reviewed a draft of this article; I am responsible for its content.

The following broad points are not by any means comprehensive, and they are certainly not meant to constitute legal advice. They are meant to be considered from the perspective of both the client who is building a home and his lawyer. I am not going to make any recommendation on whether one should deal only with the GC and let the GC hire the subs, or should select and hire subs oneself, nor am I going to pass on the wisdom of having one's own engineer or construction supervisor, which is a suggestion that Mr. Siviglia has made. But I am going to give some practical pointers.

1. Make sure that the architect whom you select is well-versed in the local building codes and zoning rules and knows the local clerks and officials and the local way of doing things. You don't want your plans rejected or delayed because they do not comply with the rules or have been filed in an incorrect or incomplete way.

Moreover, especially if you have a small parcel of land and big ideas, you would be surprised how many times a well-connected architect who is sensitive to the way local winds blow can take advantage of ambiguities in a zoning code to get you permission to do things that others might not receive. I consider it a major success to avoid the need for a variance if at all possible. Getting there

"firstest with the mostest" (to quote a particularly odious Confederate general) is better than having to endure the vicissitudes of public hearings before a board that could be swayed, lawless as it might seem, by frivolous or selfish objections of other residents.

2. Before beginning construction, be sure that you have the right insurance coverage, especially liability coverage. Consult with your insurance company or broker. There may be coverage in a homeowner's policy for renovations of the current home or of a second home. But what if the owners are living in one home (insured with company A), have bought a second house (insured by company B), but have not yet moved into the second house as their primary residence because they are tearing it down to build a new one into which they plan on moving eventually? They could be covered by both the A and B policies, but if something bad were to happen they could find either or both of A and B refusing coverage for one or another reason – for example, citing the difference between renovation and destruction or complaining about not having been given a requisite notice.

Although the GC's workers' compensation policy is supposed to cover injuries to the GC's crew, that coverage is not always foolproof; state law does not require that a sole proprietor GC, for example, be covered,[1] and if the GC is not fastidious in making sure that subs have coverage, an injured person might sue everyone in sight. In one complicated situation, the resolution of a completely bogus personal injury suit worked out satisfactorily in the end for the simple reason that the claim was shown to be a total fabrication, but the homeowner needed to hire his own attorney at his own expense to "shadow" the insurer's attorney, and until the claimant and the insurer settled, there was the looming risk that the insurer would try to disclaim coverage. More on that in paragraph 14 below.

3. If you are not an expert in construction contracts, you should refer the contract work to someone who is. Even if you have experience and feel that you know what you are doing, it can be helpful periodically to study some recent samples from colleagues. But do not take everything for granted. If a clause or particular language in a contract is puzzling, ask why it is there. There may or may not be a good reason, and even if there is it may not be appropriate to your situation. I have seen prospectuses for securities offerings with irrelevant language that had been mindlessly lifted from precedents, and at least one Revenue Ruling published by the U.S. Treasury containing erroneous facts. And be sensible. You may not need to have a 70-page appendix specifying the numbers and sizes of the nails and the pitch of the screws even if someone else had one for his $5 million mansion or because a summer associate at a Big Law firm needed to be kept busy.

4. It would be useful to give yourself the ability in the contract to reject the GC's choice of subs on the basis that in good faith you have reason to believe that they will not make themselves available to complete their tasks when and as needed, so that the work can be done in the proper order without delay. You don't want to be arguing with the GC about this mid-project. Your architect can probably also be helpful in selecting subs.

5. Having written a sensible contract, follow through on *every* obligation that the contract places on the GC. For example, the contract certainly should require the GC to carry workers' compensation insurance, with the homeowner as a co-insured entitled to notices, but having that in the contract is of no avail if you don't see the certificate and verify the coverage before the work commences or if you ignore some letter or email that you receive a few months later from an insurance company whose name you do not recognize.

6. In selecting a GC, get references – starting with your architect's opinion – not just as to a GC's work quality but also as to his ability to meet deadlines, to balance the completion of waning work on one project with a large workload on a new one and to manage money inflows/outflows and obligations to trades. A gram of prevention here is worth a kilogram of cure. If you like to gamble, go to Atlantic City instead of hoping for a windfall from a construction delay penalty. (The exception that proves the rule: a friend was recently building a house for his son; it bothered him not one whit, and he was positively giddy, that his cost was defrayed by the mounting daily delay penalty while his son continued to stay in his guest room.)

Consider requiring a bond or at least checking on the GC's financial condition and verifying that the GC could get a bond if one were sought. If a bank report is negative, find another GC. If the GC is a corporation or a limited liability company or partnership, get a personal guarantee of the owner(s) and check everyone's financial condition(s) as well.

7. No matter what you have provided in the contract regarding the stages at which you are obligated to make progress payments, including the final amount to be paid only upon completion, it is very possible that you will find yourself getting ahead of the schedule. Construction phases may be performed out of order for good reasons or by happenstance. The GC may mention that a load of expensive red oak "just fell off a truck" and he can get it for a song as flooring for your project, but only if you advance the money right away. Additional payments will be required if you make changes in midstream or if the contractor points out, sometimes with justification, that there is a problem in the plans drawn up by the architect that requires modification for the GC to do the work in the proper fashion. Regarding such modifications, see paragraph 12 below. In any event, place more faith in tracking and documenting who is getting paid and how much (paragraph 11 below) than in any expectation that

you will have much leverage based on a hold-back at the end.

8. In the preceding point, I mentioned that there may be situations where the GC says that the architect's plans are sub-optimal or just plain faulty. One would hope that all of that would have been resolved before signing the contract with the GC and the costs appropriately considered, but things in the real world are often not as neat as they should be. For a relatively minor dollar amount, you may well decide to eat the cost rather than infuriating the architect and the GC over whose responsibility the flub is and then ending up eating the cost anyway. For example, there could be an error in the elevations requiring a couple of steps from the garage to the house where the plans had had none. In another instance of which I am aware, the plans had a vertical steel post resting on a thick laminated wooden floor beam with no post directly underneath, and the contractor insisted that it would be reckless to do that without having steel all the way down to the concrete basement foundation.

When issues like that arise, get the architect and the GC together and try to get them on the same page if possible, but do not do anything that either one insists will create problems. As a result, in the event of a disagreement between or among the professionals, you are likely to have to take the most conservative and, therefore, most expensive approach. Keep that in mind when estimating the cost of the project.

9. If you do not have a separate construction adviser, you should actively monitor with the GC that payments are being made in a timely fashion to the subs. Don't just assume that everything is going smoothly and wait until a big problem arises. Ask the GC to show you receipts from the subs for their payments as those payments are made; realistically, understand that the GC is not a lawyer or a CPA and so, therefore, do not be surprised if you don't get full compliance. Whatever you get is better than nothing.

But, as important as it is for you to keep on top of this issue for your own safety, it is *not* your responsibility to remind the subs that they have to get paid. And for obvious reasons, never, ever, tell the subs affirmatively that they will get paid or otherwise vouch for the GC.

10. In addition to making sure that monies you pay to cover the trades' work are in fact paid over to the subs, monitor the actual work of the GC and of the subs to the best of your ability. Obviously the subs that the GC has hired are responsible directly to the GC and not to you, and unless you are a civil engineer the GC and the subs will know their work better than you do. However, sometimes problems of timing, workmanship or quality are manifest – for example, half-driven nails or beams that are unevenly spaced or cracked – and you should deal with things like that as quickly as possible. Consider putting something in the contract to allow you to exercise some leverage through the GC with the trades, short of actually requiring you to deal with the subs directly. Many technical matters such as the quality of lumber, the soundness of the work and the like may not be clear-cut. Therefore, if you have not engaged a separate construction adviser or supervisor, you should make sure that your architect, as part of the professional service, will also check in at the jobsite from time to time and make sure that the work is being done to the appropriate standards and full satisfaction; after all, the architect's reputation is on the line as well. To some degree, though, you will have to trust the GC based on the recommendations of other satisfied customers.

Carefully and meticulously document every payment, as well as every change to the contract and the project and the agreed cost.

11. Carefully and meticulously document every payment, as well as every change to the contract and the project and the agreed cost. Resist requests by the GC that you make any payment to any person or account other than the one named in the contract – such as to cash or to the GC directly or to a spouse's account or to a supplier or to someone else to whom the GC owes money. If the GC insists that a check be made out other than as required in the contract, then at least get a receipt or acknowledgment signed by the payee (such as a supplier) and by the GC specifying that such-and-such check was received as directed by the GC *as payment toward your contract obligations*.

The foregoing is important for two related reasons. First, if you get into a dispute with the GC, there will not be any issue regarding counting all of your payments toward the total amount for which you are obligated under the contract. Second, and this is something of which not everybody is aware, there is an important limitation on the ability of subs to place mechanic's liens on your property when they have not been paid: the owner's total liability cannot be more than the total remaining unpaid contract price at the time that a lien is filed.[2] This limitation can be complicated to apply in practice, but if you can document that you have already paid the GC the total contract price, including all amendments, before any liens are placed, you will not have to pay twice if the subs have waited too long to put their mechanic's liens

on the property because the GC has not paid them. In one instance of which I am aware, the GC was so effective at sweet-talking the subs into believing that they would eventually get paid that they ended up with no payment and no liens for an aggregate of tens of thousands of dollars on a residential project.

12. On the subject of changes, exercise a degree of common sense and err on the side of caution. Do not do anything without the architect's participation, approval and assurance that nothing will affect the issuance of the certificate of occupancy, as well as the architect's commitment to make any necessary revised filings. Apart from structural or systems issues that may not be apparent to you, if the outside dimensions are to change, even slightly – certainly as to lot coverage and, in some localities, height or roof pitch – you may need a zoning variance. You may be tempted to create a *fait accompli*, but at least one village with which I am familiar has ordered unauthorized non-complying additions torn down.

13. As President Reagan was fond of saying, and as one teenager quipped when he bounded up the stairs in the *Harvard Law Review* office asking to see if his father really appeared in the formal photographs from 30 years before, "trust, but verify." If something seems to be taking too long – for example, some materials that were supposed to be shipped weeks before from a particular supplier have not arrived, and you are getting implausible or shifting excuses from the GC as to why – get down to the bottom of the problem yourself. If the reason is that the GC's checks to the seller are bouncing, you'll want to know sooner rather than later.

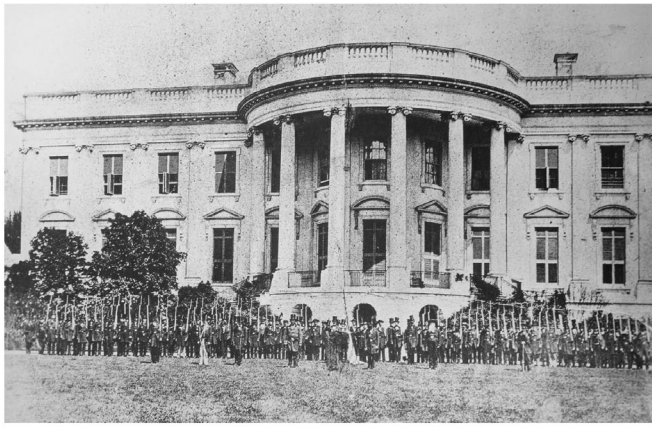
14. Beware of scams, including workers who falsely and brazenly claim to have been injured on the job. This is not the place to expand on this issue, including the extent of workers' compensation coverage and some strict liability laws, but suffice it to say that some pretty outrageous claims have been made by unscrupulous workers and even more unscrupulous lawyers. Read paragraph two again and, even so, be prepared to have to hire lawyers and/or to pay a "nuisance" settlement to make bad actors go away. But be firm when you need to be firm. In one instance, a worker sued a homeowner, claiming to have sustained a crippling back injury. The worker, though, was as stupid as he was mendacious. Long before filing his papers in court, he had given that homeowner's name to another person as a reference for another job. The case evaporated when the second person contacted the first and supplied time-stamped current pictures of the worker on a ladder stretching to install a fixture. In another case, a company had tiled a floor so poorly that it had to do it over. The company subsequently went out of business, and a lawyer who was somehow involved in the ensuing financial tangle sent the homeowner a letter, out of the blue, demanding more money for the redo plus his own fees at an outlandish rate. The outraged homeowner told the scoundrel that if he did not go away, the next communique he'd be receiving would be from the disciplinary committee. The homeowner meant it, the lawyer knew that he meant it, and the lawyer went away.

15. Finally, as I mentioned above, my own field is tax, and I would be remiss were I not to mention a couple of tax points. The documentation of costs referred to in paragraph 11 will be important in establishing your tax basis in the property, if and when you sell it, to determine whether you have a taxable gain and how much. That may not be uppermost in your mind when you are building a residence that you hope to occupy for many years to come, but it is far easier to keep good contemporaneous records than to try to reconstruct (excuse the pun) the expenditures decades later.

On the other hand, you will not be surprised to learn that, having completed a house, you will likely face a reassessment for property tax purposes, which may or may not correspond with how much you have actually spent or the realistic market value. Be prepared for sticker shock. Dealing with that is an entirely separate specialty.

I hope that the foregoing has been informative to readers, whether contemplating building a house or representing a client who is doing so. ■

1. *See* N.Y. Workers' Comp. Law § 2(4).
2. *See* N.Y. Lien Law § 4(1).



Frontier Guard on South Lawn of the White House, April, 1861

Photo courtesy of the Library of Congress

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Protecting the President

The New York Lawyers Who Served in Abraham Lincoln's First "Secret Service"

By James P. Muehlberger

Introduction

On April 27, 1861, a grateful President Abraham Lincoln thanked 116 men – among them 13 New Yorkers – and said, "Nothing is too good for men who stood off a rebel army." Who were these men and what had they done? Some had fought against pro-slavery soldiers in "Bleeding Kansas" in the years leading up to the Civil War. After the fall of Fort Sumter, Lincoln asked these men to bivouac in the White House and serve as his armed bodyguard – the first "Secret Service" – and they likely saved Lincoln's life. As a result of the recent discovery of documents identifying these men, six of whom were New York lawyers, their story can now be told for the first time.[1]

"On to Washington!"

At the outbreak of the Civil War, Confederate leaders realized the South was vastly outnumbered. The Confederates' best chance for success depended on a quick strike. Many believed their best chance for victory would be to eliminate the one person with the courage and determination to "put the foot down firmly" if necessary – Abraham Lincoln. *New York Tribune* editor Horace Greeley said, "There was forty times the reason for shooting [Lincoln] in 1860 than there was in '65, and at least forty times as many intent on killing or having him killed." There were rumors that an army of Confederates, flush with victory after the capture of Fort Sumter, was marching toward the capital to drag Lincoln from bed and hang him from the nearest tree.[2]

Washington was located in the red heart of Confederate country. Located south of the Mason-Dixon Line, the nation's capital was a slave-owning city carved out of Maryland. Most of its residents and government employees either owned slaves or were pro-slavery, and the city was surrounded by the slave states of Virginia and Maryland. Washington was an easy prize for the Confederate States of America – it had no fortifications, only a handful of loyal soldiers, and was infested with Confederate spies and saboteurs. The South rang with cries of "On to Washington!" Jefferson Davis's wife sent out cards inviting her friends to a May 1 reception at the White House. President Lincoln startled his cabinet by stating, "If I were [Confederate General G.T.] Beauregard, I would take Washington."[3]

In April 1861 there was not yet a U.S. Secret Service. No Federal Bureau of Investigation. No Central Intelligence Agency. No well-trained federal agents who could be dispatched to gather intelligence relating to a threatened presidential assassination or overthrow of the government. Most of the 16,000 men in the U.S. Army were out West fighting Indians. The military force that remained in defense of Washington consisted mainly of loyal government clerks and the military band. The clerks had been armed, but they knew little about war. Lincoln desperately needed fighting men who could handle a gun. Fortunately for Lincoln, scores of fighting men from Bleeding Kansas had just arrived in Washington to enroll in the army. Jim Lane, who had just been elected as Kansas's first U.S. Senator, was their leader. Lincoln summoned Lane, whom he had met 16 months earlier during his visit to the Kansas Territory, to the White House to discuss the crisis.[4]

When Lane arrived at the White House, he gripped Lincoln's huge, hard hand. At 52, Lincoln was a strapping 200 pounds of muscle on a 6-foot 4-inch frame, his black suit draped over sinewy shoulders and a narrow waist. His shoulders and forearms were so strong that he could hold a heavy, double-bladed ax horizontally in one outstretched arm and hand without a quiver. His gray eyes peered out beneath bushy eyebrows, set in a leathery face. He was the virile figure of his presidential campaign: the strong, independent, Western rail-splitter, and not yet the haggard, hollow-eyed figure of Civil War photographs.

The men met for several hours in Lincoln's second-floor office, where a fire crackled and blazed in the marble fireplace behind a brass fender. Lincoln's worktable stood between two tall windows that faced the South Lawn, looking out across the marshes to the jumbled blocks that surrounded the unfinished shaft of Washington's monument. Lincoln explained the situation and told Lane: "I don't know who I can depend on." Lane replied, "I'll organize a body of men who will fire when called upon."

The rebels were well known to Lane – he had fought pro-slavery soldiers in successful military campaigns for six years in the Kansas Territory. Lane believed the rumored attack on the White House was a certainty. He knew the mood of his men, some of whom had fought South Carolina men in the Kansas Territory. Knowing them to be rough men ready to do violence on Lincoln's behalf, Lane warned Lincoln: "The only trouble is they may fire whether called upon or not. Their blood is up!"[5]

Lane told Lincoln that there must be a display of force at the White House to discourage the Confederates from attacking, as pro-slavery soldiers had shown a dislike for attacking fortified positions in Kansas. He believed that the large East Room could be used and defended as a base of operations for his men. Lane hoped that the Confederate soldiers would hesitate to attack entrenched, battle-hardened fighters. Lincoln had met many of these rough-hewn men during his visit to the Kansas Territory 16 months earlier, and he quickly agreed to Lane's proposal.

The Kansas/Missouri Border War

The Kansas Territory Lincoln had visited in December 1859 was a rugged, deadly place. The vast territory, a huge swath of open plains stretching west to the Continental Divide and including much of present-day Colorado, had first been opened to white settlers by the May 1854 Kansas-Nebraska Act. The question of whether Kansas would be a free or slave state was to be decided by the voters (i.e., white males). Free State men from New York and elsewhere and pro-slavery men flooded into the territories in an effort to determine the outcome of slavery, and violence quickly ensued. Weapons began flooding into the territory. Partisans on both sides soon became walking arsenals. Newspapers began calling the territory "Bleeding Kansas."

Lawyers, including those from New York, were also attracted to the territory. Land sales and claim disputes led to much legal business. Towns that were county seats (and therefore the sites of courts) were favorites of frontier lawyers. The vast majority of these men were not graduates of law school, but had trained for the bar by apprenticing themselves to another lawyer. They tended to focus on common sense, rather than highly technical legal analysis. Many became leaders of the Free State men.[6]

"The White House Is Turned into Barracks"

As the sun set on April 18, 1861, the men in Lincoln's Guard, bristling with revolvers and rifles, marched down Pennsylvania Avenue to the White House. They brushed by "Old Edward," the wizened Irish doorman who had served seven U.S. presidents, and set up camp in the East Room, to the left of the front entryway. The men forted-up for trouble. They dumped crates of rifles and ammunition in the middle of the floor of the East Room. They expected they might have to withstand a siege, so they wanted plenty of ammunition on hand. If the Confederates attacked, they expected to fight to the death. Lincoln's secretary, John Hay, recognized the desperate and historic nature of what he was witnessing and noted in his diary, which he started that very night: "The White House is turned into barracks. Jim Lane marshaled his Warriors today . . . into the East Room." For the next 10 days the men operated as the country's first "Secret Service."[7]

For 10 days, the city's fate hung by a thread. One question now transfixed the nation: Whose soldiers would reach Washington first? Federal troops to save it? Or the Confederate Army to seize it?

The "Men Who Stood Off an Entire Army"

On Thursday, April 18, 1861, many longtime residents of Washington begin fleeing the city, terrified of being caught in a battle when the Confederates attacked. Trains were filled to overflowing. The roads were clogged with horseback riders, and carriages and wagons heaped with household goods. The poor walked, pulling their personal possessions in handcarts.

Both for Lincoln's protection and the benefit of Confederate spies, Lane conspicuously positioned sharpshooters on the roof of the White House, armed with deadly buffalo rifles, which could blow a hole through a man "big enough to allow a stagecoach to drive through." War stared at them from just 800 feet away. Only the width of the Potomac River separated the United States from the newly formed Confederate States of America. In the wooded Virginia hills overlooking the river, Confederate campfires blinked like red eyes at the city.[8]

It was rumored that the Confederate Army intended to attack Washington that night, kill or imprison Lincoln, and move the Confederate capital north of the Potomac. But the presence of Lane's fighters caused the Confederates to hesitate – as they knew these loyal men could and would shoot. Rather than attack, the Confederates attempted to first learn their opponent's troop strength

and intentions. Based upon the letters the men wrote to their loved ones, they expected they may not live to see the morning light, but they vowed to give the rebels "a good fight." Northern newspapers called them "Lincoln's Guard" or the "Frontier Guard."

Lane and his men began a misinformation campaign, spreading rumors that their numbers the first night were several hundred, and that their force grew quickly over the next few days to several thousand. Lane refused the suggestion that his men wear uniforms – the last thing Lane wanted was for the Confederates to know their identity, location, and number. At night, the men marched noisily back and forth across the wooden Long Bridge spanning the Potomac, making the rebel spies believe they were being reinforced with hundreds of fighters, who it was rumored were hidden at Willard's Hotel, the Treasury Building, and in the unfinished Capitol.[9]

By Saturday morning, April 20, Washington was nearly a ghost town. The city was isolated. Confederates had torn up the railroad tracks leading North, burned railroad bridges, and destroyed telegraph lines. Union spies reported that the Confederates believed Lincoln's Guard were now "400 or 500 strong." In reality, as other loyal men joined the group, the number of men camped in the East Room had grown to only 116.[10]

When Lincoln recalled the events of April 1861 one year later, he described the city's isolation: "The mails in every direction were stopped," while telegraph lines were "cut off by the insurgents" and "all the roads and avenues to this city were obstructed." At the same time, the "military and naval forces, which had been called out by the Government for the defense of Washington, were prevented from reaching the city, by organized and combined treasonable resistance . . . The Capital was put into the condition of a siege." Despite his entreaties, his wife Mary refused to leave his side. She sat up all night fully dressed, waiting to be captured.[11]

Union spies reported that the Confederates in Virginia were in "dread of James Lane and his John Brown horde." To Confederates, Brown was a crazed religious zealot who had been willing to die for his cause of freeing slaves – much like a martyr fighting a holy war. Calling Lincoln's Guard a "John Brown horde" reflected slave-owners' fear that the men in Lincoln's Guard were also martyrs who would fight to the death – and these men had already defeated larger pro-slavery armies in the Kansas Territory. Pro-slavers hesitated to fight them again.[12]

On Monday, April 22, the city was deserted as the sun set. Theaters and stores had closed. Lincoln's Guard marched conspicuously up and down in front of the White House, armed with rifles and revolvers. A glimmer of good news finally appeared on the horizon. It was reported that the Eighth Massachusetts Volunteers and the Seventh New York Regiment had commandeered a ferry boat and had finally sailed into Annapolis Harbor. Their commanders, however, refused to allow them to sail up the Potomac River to Washington because they feared that enemy guns might shell them from the Virginia shore.[13]

On Tuesday, April 23, the city was braced for an attack. General Scott came to dinner at the White House and spoke with Lincoln about the possibility of famine in the city. The impending attack by Confederates seemed more real than the hope of rescue from the North. A haggard-looking, worried Lincoln scanned the Potomac River with field glasses through the window of the Executive Office, looking for ships bringing troops and exclaimed, "Why don't they come! Why don't they come!"

Lane received word from his spies that the Confederates were gathering at the crossroads of Falls Church, Virginia, about nine miles from Washington, for a strike at the White House. Lane's men marched to Falls Church, where they saw a company of Confederates drilling in the town square. They attacked, scattering the Confederates, who did not even have time to take down their flag, which was flapping on top of a flagstaff. They brought the flag back to Washington – the first Confederate flag taken by federal forces on Confederate soil during the Civil War.

On Wednesday, April 24, Lincoln met at the White House with federal troops who had been wounded in Baltimore as they attempted to fight their way into Washington. Lincoln's "impatience, gloom and depression were hourly increasing." He thanked the men for their patriotism and then confided his doubts openly: "I don't believe there is any North. You are the only northern reality." Unknown to Lincoln however, the Confederate general in Alexandria, Virginia wrote Confederate General Robert E. Lee that he believed there was "an army now numbering ten to twelve thousand men" there. The propaganda efforts of Lincoln's Guard had paid off.

On April 25, a train carrying 1,000 soldiers of the Seventh New York regiment finally pulled into Washington. The next day, additional troops from Massachusetts and Rhode Island arrived. The emergency had passed. Lane had succeeded in causing the Confederates to delay their attack, buying Lincoln the time he needed to march federal troops into the city.

On April 27, Lincoln formally thanked the men in the Frontier Guard, and presented each soldier with a signed "Honorable Discharge" (even though they were never officially enrolled in the Union army), and took a photograph with them on the South Lawn of the White House. Lincoln concluded, "Nothing is too good for 110 [sic] men who stood off the entire rebel army." He rewarded the members of his guard with lucrative military or political appointments.[14]

The New York Lawyers in Lincoln's "Secret Service"

The identity and actions of Lincoln's "Secret Service" had been in question until this author discovered the dusty muster roll and after-action report of the men in the Library of Congress, during a sabbatical from his law firm. Finally, we now know the identity of these brave New Yorkers, six of whom were lawyers. But describing these men as

lawyers is like describing Doc Holliday as a dentist. Some of these lawyers were as good with a pistol as with a pen.[15]

Henry Joseph Adams grew up New York. In his early 20s he moved to Cincinnati, Ohio, where he practiced law, became involved in politics, and worked to abolish slavery. In the spring of 1855 he moved to Leavenworth and became active in Free State politics. In 1856, he was elected as a senator in the first Free State Legislature. In the spring of 1857 he was elected as the first Free State mayor of Leavenworth. In January 1858, an unarmed Adams led a group of about 20 Free State men who rode from Leavenworth to Atchison, a pro-slavery stronghold, to confront about 50 heavily armed pro-slavery men who were there to murder Jim Lane when he arrived in town for a campaign speech. Because of his bravery and bravado, he backed down the Missouri Ruffians without a shot being fired. After his service in Lincoln's Guard, Lincoln appointed Adams as a paymaster in the army, a position he held through the war.[16]

Algernon Paddock was born in New York and admitted in 1856 to the New York bar. In 1857, he moved to Omaha, Nebraska Territory. There, he became a writer for the antislavery *Omaha Republican*. Publishing an antislavery newspaper in the Nebraska Territory was a risky occupation. Accordingly, the "Colt pistol was as much the necessary equipment of an editor as his pencil and paper." In 1860, he was a delegate to the Republican Convention, where he was "on hand for Abraham Lincoln's nomination." After serving in the Frontier Guard, Lincoln appointed him Secretary of State for the Nebraska Territory. In 1875, Paddock was elected to the U.S. Senate. In 1887, he was elected to a second Senate term, during which he introduced the Food and Drug Act.[17]

Roswell Hart was born in 1824 in Rochester, New York. He graduated from Yale in 1843, studied law, and was admitted to the New York bar in 1847. In 1856, he was a New York delegate to the Republican National Convention. Prior to Lincoln's election, Hart spoke on Lincoln's behalf at numerous speaking engagements in Rochester. After Hart's service in the Frontier Guard, Lincoln appointed him as Provost Marshall for Monroe and Orleans Districts. In 1865, Hart was elected to the U.S. House of Representatives, where he served two terms. He died in 1883 in Rochester, New York.[18]

Thomas Shanklin was born in 1810 in New York. By 1844 he was practicing law and was appointed as the Commissioner of Deeds in New York. In 1855, Shanklin traveled to the Kansas Territory, before returning to New York, where he began advocating the Free State cause. After Shanklin's service in the Frontier Guard, Lincoln appointed him as American Consul at Port Louis, Isle of France. Shanklin later worked as an assistant U.S. treasurer in New York.[19]

Delano T. Smith was born in 1830 in Litchfield, New York. He received his higher education at Clinton Liberal Institute in Oneida County, New York. In 1851, he was admitted to the bar in Albany. After serving in the Frontier Guard, Lincoln appointed Smith as an auditor in the Treasury Department in New York. After the war, Smith moved to New York City and originated the idea of building an underground railway (subway). In 1886, Smith succeeded in getting a charter from the legislature for the first subway in New York City.[20]

Elisha Wallace graduated from Dartmouth and Yale and practiced law in Massachusetts beginning in 1815. In 1825, he moved to Syracuse, New York, where he continued to practice law. He formed the Unitarian Congregational Society of Syracuse and became an abolitionist. After his service in the Frontier Guard, Lincoln nominated Wallace to be the U.S. Consul at Santiago, Cuba. In 1870, Wallace died in Syracuse.[21]

Conclusion

On April 14, 1865, the day he was shot by John Wilkes Booth, Lincoln signed the law that created the Secret Service. It was a terrible tragedy that one or two of the New Yorkers who had protected Lincoln in April 1861 were not on duty guarding him four years later. Several of the men in Lincoln's Guard said as much, and they wept when they heard of Lincoln's death.[22]

Today, Lincoln is a marble monument, but for these New York lawyers, Abe was a passionate, fallible human being – they shook his huge hand, gazed into his gray eyes, felt his breath, and shared laughs over earthy stories. Those who knew and walked with Lincoln have passed away, but by studying those close to Lincoln, perhaps we can gain insights into the great man. Lincoln never forgot these New York lawyers. Perhaps we should remember them, too. ■

1. James P. Muehlberger, *The 116: The True Story of Abraham Lincoln's Lost Guard* 4–5 (Ankerwycke, 2015) (*The 116*).
2. *The 116*, 1–2.
3. *The 116*, 2.
4. *Id.*, 3.
5. *The 116*, 18–19.
6. Michael H. Hoeflich, Gayle R. Davis, and Jim Hoy, eds., *Tallgrass Essays, The Lawyers of Old Lecompton*, (Topeka: Kansas State Historical Society, 2003), 29–30.
7. *Id.*, 126, 133.
8. *Id.*, 20–21.
9. *Id.*, 131–32, 136–37.
10. *Id.*, 141.
11. *Id.*, 143.
12. *Id.*, 145.
13. *Id.*, 145–46.
14. *Id.*, 149–53.
15. Because the Frontier Guard was a voluntary organization, the men served without pay, they were not mustered into the regular army, and their names were never placed on the official army rolls.
16. *Id.*, 75–77; 259–60.
17. *Id.*, 35.
18. *Id.*, 312–13.
19. *Id.*, 361–62.
20. *Id.*, 364.
21. *Id.*, 379.
22. *Id.*, 153.

BY ROBERT W. WOOD

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Insurance Bad Faith Recoveries: Are They Taxable?

Are insurance bad faith litigation recoveries taxable? The annoying answer is that it depends. This answer may be a bit less annoying with a brief description of what a bad faith claim may entail. It may be a tort or a contract claim, depending on the facts and the jurisdiction.

It may be brought against one's own insurance carrier, or sometimes, even against someone else's carrier. A common claim is that the insurance company defendant did not proceed appropriately to pay a claim, thus causing the plaintiff additional damages. In that sense, not unlike a legal malpractice claim against a lawyer, one key question will predate the bad faith case.

That is, what was the underlying issue (which may or may not have been litigated) that gave rise to the insurance claim? Most tax professionals will start to imagine a physical injury accident where the insurance company pays too little too late, and later must pay more for the same injuries via a bad faith claim. That is a useful (and common) example to bear in mind.

2009 IRS Ruling

The most important authority is an IRS private letter ruling that technically is not authority, since letter rulings are non-precedential. It was a bombshell ruling when it was issued in 2009, and it suggests that some bad faith recoveries are tax-free. Some case law, on the other hand, suggests that some taxpayers may be reading the ruling too broadly.

In Letter Ruling 200903073,[1] a plaintiff had been employed as a construction worker, and in the course of his employment was struck by a drunk driver. The drunk driver managed a tavern, and had served himself liberally while on duty. The plaintiff was severely injured and sued the driver/manager as well the tavern that had employed him.

The plaintiff received a jury verdict consisting of compensatory damages for his personal physical injuries, medical expenses, pain and suffering, lost earnings, plus punitive damages. After post-trial motions, the jury verdict was reduced to $X in compensatory damages and $Y in punitive damages. The defendants appealed.

Prior to the judgment, the insurer for the tavern (Insurance Company) had rejected an opportunity to settle for policy limits under the tavern's policy. Under state law, the tavern as policy holder had a cause of action against the insurance company if it acted in bad faith in failing to settle the claim. The tavern believed it had a cause of action against Insurance Company.

Thus, as part of an agreement to stay the execution of the plaintiff's judgment, the tavern assigned to the plaintiff its rights to pursue a bad faith claim against Insurance Company. The agreement between the tavern and the plaintiff provided for the assignment of all claims possessed by the tavern and the tavern manager against Insurance Company related to the bad faith claims. Thus, the injured plaintiff ended up with those claims.

The assignment agreement provided that within 30 days of the termination of the litigation against Insurance Company (whether by settlement or judgment), the judgment against the manager and the tavern (relating to plaintiff's personal injury claims) would be marked "satisfied." Eventually, the plaintiff entered into a settlement agreement calling for the insurance company to pay $Z to plaintiff and his attorneys. The settlement agreement provided that upon receipt of payment, plaintiff would cause the bad faith insurance litigation to be dismissed with prejudice, and cause the personal injury judgment against the tavern manager and the tavern to be marked as satisfied.

Underlying Case Tax Free

The IRS starts its analysis in the Letter Ruling with the origin of the claim doctrine. Citing *Raytheon Production*

Corp. v. Comm'r of Internal Revenue,[2] the Service states that the critical inquiry here is in lieu of the damages awarded. The plaintiff may have recovered against the insurance company, but the recovery had its origin in the settlement of the court cases against the tavern manager and the tavern.

Indeed, the plaintiff was merely trying to collect on the plaintiff's judgment against the manager and the tavern for damages awarded on his personal physical injury claim. "But for" the personal physical injury claim and the plaintiff's rights as an assignee, the plaintiff would be receiving nothing from the insurer for the tavern. Quite literally, the plaintiff was only receiving money from Insurance Company *because* the plaintiff was injured.

Thus, the Service concluded that the Section 104 exclusion applied. Interestingly, the Service noted that the exclusion would not apply to any amounts the plaintiff received that resulted from the *punitive* claims. Punitive damages are always taxable.[3] Letter Ruling 200903073 expresses no opinion on allocating between compensatory and punitive damages.

Contract vs. Tort?

In bad faith insurance cases, there is an underlying cause of action for which the taxpayer is seeking redress. It might be a personal physical injury action or something else. It may be viewed as a contract claim relating to the insurance policy, or as a tort claim related to Insurance Company's operations and its treatment of the plaintiff.

The IRS has usually viewed them as contract actions. Regardless, it is relevant to inquire into the treatment of damages that, at least in part, often relate to the original act producing the underlying insurance claim. Not surprisingly, most bad faith insurance cases relate to the mishandling of insurance claims.

Recent Cases

Perhaps as a result of the 2009 letter ruling, some taxpayers may think "tax free" when they hear "bad faith." For example, in *Ktsanes v. Comm'r*,[4] the taxpayer worked for the Coast Community College District (CCCD) in Orange County, California. In connection with his employment, Ktsanes participated in a group long-term disability insurance program managed by Union Security.

The premiums were paid by Ktsanes's employer, CCCD, and were not included in Ktsanes's income. Ktsanes developed Bell's palsy, which caused him to be unable to continue working for CCCD. He filed a claim for long-term disability with Union Security, which the insurance company denied, saying that Ktsanes was not sufficiently disabled to qualify.

In bad faith insurance cases, there is an underlying cause of action for which the taxpayer is seeking redress.

Ktsanes filed a bad faith claim against Union Security. The claim was settled for $65,000. Ktsanes claimed the settlement payment was received on account of a physical sickness (the Bell's palsy), and therefore excluded it from his gross income under I.R.C. § 104(a)(2).

When the IRS disagreed, he also argued that the group long-term disability insurance program was equivalent to a workmen's compensation payment, so it was excludable under I.R.C. § 104(a)(1). The Tax Court rejected both arguments and found the settlement to be taxable. The Tax Court concluded that Ktsanes's damages were received "on account of" the insurance company's refusal to pay the insurance claim and not the Bell's palsy that gave rise to the insurance claim. The court reasoned:

> The relief that petitioner sought in his complaint was causally connected (and strongly so) to the denial by Union Security of his claim for long-term disability benefits. Although petitioner's complaint alleged that he became disabled as a result of physical injuries or sickness, this "but for" connection is insufficient to satisfy the "on account of" relationship discussed in *O'Gilvie*[5] for the purposes of the exclusion under section 104(a)(2). Petitioner would not have filed his complaint if Union Security had not denied his claim but instead paid him the long-term disability payments that he sought. In other words, petitioner sought compensation "on account of" the denial of his long-term disability benefits, not for any physical injuries or physical sickness.[6]

On the surface, this reasoning might make it difficult for bad faith recoveries to qualify under I.R.C. § 104(a)(2). Indeed, when taxpayers claim that bad faith recoveries are excludable from gross income under I.R.C. § 104(a)(2), the personal physical injury or physical sickness almost always concerns the facts that gave rise to the insurance claim, rather than the denial of the claim itself. Put differently, relatively few bad faith claimants can assert that the insurance company actually caused them physical harm.

But some can claim that the insurance company's delays exacerbated their physical injuries and physical sickness. In that kind of case, the argument for excluding all or part of the eventual bad faith recovery can be strong. In *Ktsanes*, though, the Tax Court concludes the opinion by stating that

> [t]he $65,000 that [Ktsanes] received in settlement of his suit essentially represented a substitute for what he would have received had his claim been approved. Under these circumstances, no part of that payment is excludable under any subdivision of IRC § 104(a).[7]

This language, emphasized by its placement at the very end of the opinion, seems to contradict the court's previous language. It looks through the insurance claim to the facts that gave

rise to the insurance claim. Moreover, it implicitly asks how the payment would have been taxed had the insurance claim been paid without dispute.

The taxation of an undisputed payment would surely depend on the facts that gave rise to the insurance claim. In *Ktsanes*, the court seems bothered by I.R.C. § 104(a)(3). Notably, Ktsanes did not raise this sub-section as a basis for excluding the settlement payment from his income.

Under I.R.C. § 104(a)(3), amounts received through accident or health insurance for personal injuries or sickness are excludable from gross income. The key qualifier, of course, is that the premiums for the insurance must not have been paid by the insured's employer as a tax-free benefit to the insured. Ktsanes's long-term disability premiums were paid by his employer, and were not included in his income. Thus, he clearly did not qualify for tax-free treatment under § 104(a)(3). Had his insurance claim been paid without dispute, it would presumably have been taxable.

Read in this light, *Ktsanes* is much more easily reconciled with the other authorities on bad faith litigation. The Tax Court may have been preventing insurance payments that were income from being made tax-exempt merely because the insurance company only agreed to pay the insurance claim after litigation. Another case decided shortly after the 2009 letter ruling is more troubling.

In *Watts v. Comm'r*,[8] the taxpayer sued her automobile insurer claiming breach of contract after she sustained physical injuries in a collision with an uninsured motorist. The parties settled for an amount in excess of Watts's $50,000 policy limit. Watts excluded the settlement under I.R.C. § 104(a)(2).

The IRS disallowed the exclusion, asserting that the breach-of-contract action was not based on tort or tort-type rights. Of course, that requirement (from the *Schleier* case)[9] is now obsolete. Showing a bit of prescience, the taxpayer and the government agreed that the settlement should be analyzed under I.R.C. § 104(a)(2).

But the Tax Court took a dim view:

> The parties apparently believe that the interposing of a lawsuit between the insured and the insurer in this case causes the payment petitioner received from State Farm to constitute "damages" that may be excluded from income only by satisfying the requirements of [IRC § 104(a)(2)]. We disagree.[10]

Instead, the Tax Court analyzed the settlement payment under the authorities of I.R.C. § 104(a)(3), concerning amounts received "through" accident or health insurance "for" personal injuries or sickness. The Tax Court concluded that the settlement payment could be excluded under I.R.C. § 104(a)(3) up to the policy limits, and were taxable interest or other taxable income to the extent the settlement payment exceeded Watts's $50,000 policy limit.

In *Watts*, as *Ktsanes*, the Tax Court seemed focused on making sure that in bad faith and breach-of-contract cases regarding insurers, I.R.C. § 104(a)(2) does not override I.R.C. § 104(a)(3). Where the proceeds of bad faith or breach-of-contract cases would cause payments from insurers to be taxed differently from how the same payments would be taxed if paid by the insurer without dispute, taxpayers might expect the Tax Court to either refuse to apply I.R.C. § 104(a)(2) altogether (as in *Watts*), or to construe its "on account of" language narrowly to render the subsection inapplicable (as in *Ktsanes*).

Notably, though, Letter Ruling 200403046[11] ruled that legal fees allocable to disability benefits were excludable under § 104(a)(3). The ruling involved a taxpayer who purchased disability insurance with after-tax dollars. The taxpayer was disabled on the job, but his claim was denied. The taxpayer thereafter filed suit against the insurance company, alleging bad faith and contract damages.

The taxpayer prevailed, but the insurance company appealed. The matter settled on appeal, and the taxpayer recovered attorney fees and costs. The IRS ruled that because the underlying recovery was excludable under § 104(a)(3), the recovered attorney fees and costs were also excludable.

Hauff v. Petterson[12] is not a tax case. But it is worth reading even if one is focused solely on the taxes. Instead of analyzing a bad faith recovery to ascertain how it should be taxed, the court uses the taxability of a recovery to determine whether the insurance company acted in bad faith. David Hauff filed a claim with his automobile insurer after he was involved in a collision with an uninsured motorist and sustained physical injuries.

Among other things, he requested compensation for lost wages. Hauff's insurance carrier agreed to pay him an amount of lost wages based on Hauff's wages *net* of the income tax that he would normally have to pay on them. Hauff demanded that his lost wages be calculated based on his *gross* lost wages, and filed suit against his insurer alleging bad faith.

The court determined that amounts received by Hauff for lost wages would be excludable from his income under I.R.C. § 104(a)(2) as amounts received on account of a personal physical injury or physical sickness. Because Hauff would not have to pay tax on the amounts received from his insurer, the court found that the insurer was acting in good faith by only paying Hauff his *net* lost wages. As a result, the court found for the insurer on summary judgment.

Braden v. Comm'r[13] predates the 2009 letter ruling, but is interesting nonetheless. Braden received $30,000 from a class action settlement with his automobile insurance company. The action was a breach-of-contract bad faith claim, but was related to underlying physical injury claims Braden had made against the insurance company.

Braden excluded the $30,000 from his gross income under § 104. The IRS disagreed, and the matter went to Tax Court. The IRS moved for summary judgment, arguing that the underlying cause of action was not based on a tort or tort-like rights.

Therefore, the IRS said it could not be excludable under § 104. The Tax Court, however, denied the motion,

stating that the *nature* of the taxpayer's claim controlled. The fact that this lawsuit was for breach of contract did not foreclose the possibility that the taxpayer's claim was for personal physical injuries.

Conclusion

Considering how many claims insurance companies face for putatively bad faith behavior, it is surprising that there are not more tax cases considering the treatment to the plaintiff. Some bad faith plaintiff's lawyers report that they routinely see clients pay tax on the recoveries without complaint. Some plaintiffs may exclude them from income without much thought, and perhaps there are few disputes.

Despite the relative paucity of cases, it seems reasonable to believe that there are an increasing number of bad faith settlements and judgments. Not all involve good arguments for exclusion, but some do. And sometimes the way to get to that position can require some creativity.

Indeed, Letter Ruling 200903073 involved a bad faith claim that was originally owned by the tavern policy holder. The claim was later pursued by an injured plaintiff who recovered "on account of" his injuries.

The assigned bad faith claim enabled the plaintiff to sue the carrier. However, it was the nature of the underlying injury and the plaintiff's claim against the tavern and tavern manager that sparked the assignment. And it was the underlying injury that ultimately led to the recovery. ■

1. January 16, 2009.
2. 144 F.2d 110 (1st Cir. 1944), *cert denied*, 323 U.S. 779 (1944).
3. *See O'Gilvie v. U.S.*, 519 U.S. 79 (1996); *see also* I.R.C. § 104.
4. T.C. Summ. Op 2014-85.
5. 519 U.S. 79 (1996).
6. *Ktsanes v. Comm'r*, T.C. Summ. Op. 2014-85 at *8.
7. *Id.* at *11.
8. T.C. Memo. 2009-103.
9. *C.I.R. v. Schleier*, 515 U.S. 323 (1995).
10. T.C. Memo. 2009-103 at *5.
11. January 16, 2004.
12. 755 F. Supp. 2d 1138 (D. N.M. 2010).
13. T.C. Summ. Op. 2006-78.

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Scott Ta-yuan Luan
Alexander Marcus
Marla Lee Matusic
Eric Mcmahon
Helena Rachael Million-Perez
Anis Min
Edwin Ho Cheung Mok
Christos Chris Philippos Moutousis
Xin Mu
Seth Adam Nadel
Marcin Tomasz Nadgorski
Toochi Lillian Ngwangwa
Corey Marc Offsey
Mina Oh
Suvayu Dev Pant
James Jin Park
Natalie Parker
Poonam Pelia
Jane Shijing Peng
Aneeta Kaur Rai
Chetna T. Ramchandani
Gregg Noel Re
Patrick Lawrence Rieder
Neera I. Roopsingh
Jonathan Phillip Rubin
Yong Hyun Ryu
Joseph Solomon Sadon
Emily Anne Seiderman
Lik Chee Ricky Sim
Wayne Aaron Smart
Silvia Cristina Stanciu
Mingyang Sun
Vladimir Tamayeff
Denny Tang
Jessica Lizeth Thual
Catherine Toner
Christopher Henry Van Buren
Nathalia Alejandra Varela
Alana Beth Weber
Christopher Theodore Wellington
Breahna Shondalese Wright
Xiaodan Wu
Jennifer Yeh
Cindy Kimberly Zapata

Twelfth District
Zila Reyes Acosta-Grimes
Asako Aiba
Indhira Benitez
Melanie Berdecia
Paula Bianca Bondad
Toni Bryanna Boyd
Natalie Anne Corvington
Fuery Thomas Hocking
Derrick Christian Morales
David T. Peterson
Carmin Yassert Sandoval
Marie Kym Smith
Hillel Emanuel Sussman
Belinda Teye
Ruth L. Tisdale
Justice D. Wellington
Hui Yang
Melissa Elizabeth Young

Thirteenth District
Douglass Eric Barron
Catherine Bentivegna
Grace Lee Cheng
Jacob Carmelo Cohen
Amir G. Fadl
Kimberly Ferraro
Michael Louis Henry
Michael Vincent McNichol
Aamen Tarek Nsouli
Birjees Rehman

Out-of-State
Irene Denise Abel
Eliane Michelle Aboganena
Randolph G. Abood
Veronica Abraham
Chioma Achebe
Michael J. Affrunti
Jeremie Yossi Aflalo
Luciano Ernesto Aguilera Burlando
Eduardo Augusto Aguilera
Amani Fahad Hommood Al Rowais
Ehsan Alavi-dehkordi
Andre Albertini
Hannah Elisabeth Wood Alexander
Alexander Joseph Alfano
Alexander Vincent Alfano
Juliann Marie Alicino
Waad Nasser S. Alkurini
Benjamin Lee Allen
Mais Hamad S. Alomar
Courtney Helene Alonzo
Khalid W. Alyafi
Mana Ameri
Ana Amodaj
Daniel Benjamin Amodeo
John Angeloni
Ariela Claudia Anhalt
Salvatore Anzalotti
Masaaki Aono
Doris M. Aragon
Kelly Aran
Alexandra Arango
Olajide a. Araromi
Athena Arbes
Joan O'Connor Archer
Omar Daniel Arnouk
Michael K. Arroyo
Daisuke Asai
Rafay Azim
Charles L. Babcock
Chanyoung Baek
Sang Won Baek
Rui Bai
Yuning Bai
Mahmood Ammar Bakkash
Josefin E. Baldeh
Gary Warren Baldwin
Seema Banda
Young Bin Bang
Larry Ford Banister
Chen Bao
Robert B. Barnett

Gene Talmadge Barton
Taylor Hazelrigg Bates
James Phillips Beatty
Kayla Michele Beauduy
Joshua Becker
Kaytlin Virginia Beckett
Brittany Becklin
Elena Pavlovna Begunova
Emily Behzadi
Seung Joo Beik
Bruce William Bellingham
Christina Irene Bello
Jennifer Morgan Bennett
Richard James Benware
Kyra Berasi
Helene Flora Berion
Jason Christopher Bertoldi
Sarah Linnell Bessell
Patrick James Best
Mitesh Bhakta
Joel A. Biatch
Michael Peter Biggans
David T. Billinger
Mark Robert Bittner
Jason Bloom
Konstantin Bochkarev
Clinton Jacob Bodien
Laurel Bonnyman
Latasha De She Boone
Natascha Helen Born
Jeffrey Francis Borrell
Clarence Dimitri Bourdeau De Fontenay
Amy Kathryn Bowles
J'Naia Boyd
Matthew Daniel John Boyd
Ryan Elizabeth Bratcher
Joshua S. Bratspies
Marion Brauge
Kent David Bressie
Mariana Briceno
Sarah Diane Brigham
Paolo Briolini
Iris Bromberg
Benjamin Dean Brooks
Kaitlin J. Brown
Melanie L. Brown
Melissa Malia Brown
Miatrai Brown
Timothy Wayne Brown
Erin Mary Brummer
Vincent Michael Bruni
Ann Bryant
Benjamin Ari Bryer
Aleece Evelyn Burgio
Christopher M. Burke
John Joseph Doherty Burke
Ananda Venkata Burra
Lisa Maree Butler
Alice Rose Buttrick
Deniz Buyuksahin
Jean-jacques Cabou
Kimberlee Cagle
Giuditta Caldini
Shane Thomas Calendar
Katherine Josephine Calle
Anthony P. Campau
Anthony Philip Campau
Jose C. Campos
Jiajie Cao
Kaifu Cao
Yun Cao
Kaitlan Carey
Patrick C. Carey
Hillary Rachel Caron
Djibril Carr
Emily Mayne McMullin Carroll
Elizabeth Mary Carthy
Daniel Casamassina
David William Casazza
Derek J. Cash
Adam Christopher Caskey
Stephen Robert Catanzaro
Amanda Blaine Easton Cats-baril
Ryan Michael Chabot
John E. Chaffee
Chun Yat Arthur Chan
Evelyn Seewing Chan
Wei-ming Chan
Jung-chih Chang
Kate Chapman
Avni Srinivasan Chari
Shweta Chaubey
Alice Aliette Chavaillard
Alexander L. Chen
Haodong Chen
Kan Chen
Xu Chen
Yun Chen
Sarah Deanna Cheong
Francis Joseph Chesky
Julia Cheung
Robert K. Chewning
Ja Eon Cho
Junyeong Choi
Sanny Choi
Won Sun Choi
Shu-fan Chou
Calvin Tinlop Chui
Alexis Iris Cassandra Chung
Gerard Thomas Cicero
Joseph Anthony Clericuzio
Caitrin Leary Coccoma
George B. Codding
Sean Patrick Collins
Marguerite Boughton Colson
Justin Edward Condit
Christopher Ryan Cooke
Rafael J. Corbalan
Kevin Lawrence Cornel
David Samuel Corrie
Devon Jermaine Cox
Jesse Paul Neil Cox
Rebecca Christine Cronauer
Gregory Alan Cross
Julie Lynn Cross
Reynaldo Ariel Cue
Alexandra Bowman Cumella
Busra Cundioglu
Jennifer Cunningham
Guillaume D'amico
Alexandra Mae Dackin
Christopher Michael Dagley
Christopher R. Dandridge
Matthew Brandon Danzer
Diana Darilus
Haritha Dasari
Tyler Mathew Dato
Shashwat Dave
Chauneice Davis
Dennis De Almeida
Elizabeth Carla De Boyrie
Egbert Joel De Groot
Anne Pierrette Lascombes De Laroussilhe
Joshua Mason Deal
John J. Defelice
Dejon Cheri Delpino
Michael Dominic Demeola
Li Deng
Joel Orlando Denis
Patrick Michael Dennien
Nicholas Louis Depaolo
Walter John Deptuch
William Desmond
Julienne N. DeWalt
Ariel Diamond
Melanie Habwe Dickson
Anelia Dikovytska
Samuel Dillon
Peter Alfredo Dimatteo
Yi Ding
Natalie Nicole Diratsouian
Diana Joy Garcia Dizon
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Lene Boergmann Doherty
Mary Lyle Dohrmann
Matthew Richard Dollan
Fan Dong
Qiuyan Dong
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Suzette Gina Dos Santos
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Sophia Stephanie Eckert
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Troy Allen Edwards
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Chad Daniel Ehrenkranz
Nahi El Hachem
Omar El-khattabi
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Morgan Enriquez
Jon Forrest Erickson
Eleanor Erney
Jeremy Ershow
Sol Ivette Espejo
Alexandra Lucille Espinosa
Isabelle A. Fabian
Twinkle C. Factoran
Hadrien Vincent Fages
James N. Faller
Jingxiao Fang
Maria Jessica Natacha Favori
Joan Feldman
Mathew Daniel Feldman
Ross Feldman
Weihe Feng
Jamara Leigh Cuison Fernandez
Dmitry Filimonov
Edward T. Finch
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Sarah Renee Fink
Danielle N Fiorentino
Jean Hedy Fischman
Jennifer Mary Flagg
John Patrick Flanagan
Peri Fluger
Anne-dominique Massap Yi Fomekong
Marco Fornari
Ian William Forster
Susan E.C. Foster
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Alexander P. Fraser
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Jessica Kye Fredette
Alan Benjamin Freedman
Alexander Friedman
Maksim Andreyevich Frolov
Irina Frolova
Lei Fu
Yukiko Fujioka
Tak-Yin Sandra Fung
Keiko Furukawa
Tyler Henry Gablenz
Marcus Alexander Gadson
Mary Elizabeth Gaiser
Amanda Galbo
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Jue Gao
Yuebai Gao
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Nicole Marie Garibaldi
Rebecca Lauren Gauthier
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Davide Raul Gianni
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Rosa Victoria Gilcrease-Garcia
Nathalie Carroll Giordan
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Margaret Emily Greco
Joshua Greenberg
Stephanie Louise Greene
Gabija Grigalauskaite
Noah Grillo
Gillian Grossman
Xiuhuan Gu
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Manuel Antonio Guevara
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Yue Han
Jared Hanson
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Jennifer Nichole Harrison
Steven Eric Harrison
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Caroline June Hatton
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Yewhoan Hong
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Joseph Edward Hopkins
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Desley Tanith Horton
Reiji Hosokawa
William Howery
Peng Hu
Po-yuan Huang
Weixun Huang
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Julien Bertrnd Jacques Huet
Iram Huq
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Megan Romigh Jackler
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Tamara Claudia Jacobs
Gregory James
Alain Jaquet
Javier Esteban Jaramillo
Michael Jarecki
Blerina Jasari
Lansburg Jean-Pierre
Christina Marie Jeter
Aroon Kumar Jhamb
Yiou Jiao
Linyi Jin
Jordan Scott Joachim
Anthony Edward Johnson
Ashley Noelle Johnson
William Eric Johnson
Ieuan Jolly
Shaheem Ahmed Joya
Yatong Ju
Kevin Roger Beharry Jules
Youmi Jun
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Hojun Joseph Jung
Lanah Kammourieh
Dooyong Kang
Chi-Hsuan Kao
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Adam Todd Karman
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Konstantin Kasyan
Rena Katsuyama
Noah Medvedow Kazis
Husna Kazmir
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Sahal O. Khalawi
Rohom Khonsari
Ngunyi Ebenye Khumbah
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Hyunseo Kim
Joyce H. Kim
Mary Jean Kim
Myeonki Kim
Yi Keun Kim
Yoonki Kim
Youngjoon Kim
Andrea Elizabeth Kimmel
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Siobhan Kinealy
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Viktor Klajn
Kristina Klykova
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Sa-rang Lee
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Vincent Matthias Orson Lehmann
Cathal Michael Leigh-Doyle
Heloisa Maria Pecorali Leite
William Aaron Lesser
Lauren Leung
Talya Miriam Levi
Davinia Levy Molner
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Brandon Michael Lewis
Laura Lewis
Nicholas Raymond Lewis
Hiu Ming Susie Li
Jie Li
Jingshu Li
Morgan Li
Ruxin Li
Yang Li
Ellen H. Liang
Shuangjia Liao
John Anton Libra
Emily Terese Lilburn
Hui-Chun Lin
Liwei Lin
Victor Lin
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Congcong Liu
Fei Liu
Ping Liu
Terrence Liu
Irena Livshits
Joseph Zachary Lloyd
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Kristin Lockhart
Shivani Lohiya
Joseph Patrick Lombardo
Ojeaga A. Longe
Bridget Gallagher Longoria
Javier M. Lopez
Jonathan Errol Lopez
Li Lu
Shang-yun Lu
Xi Lu
Xiaoyang Lu
Yimei Lu
Alisha Shari Lubin
Yijia Luo
Benjamin Wilson Nichols Macdonald
Lauren A. MacDonald
Marianne Madden
Trevor Brett Maddison
Delilah Magao
Kartikey Mahajan
Abdallah Zakaria Ahmed Ali Maher
Waqar Ahmed Malik
Ramasamy Mannar Mannan
Ezra Marcus
Fernando Margarit
Jenel Rose Marraccini
Melissa Wolken Marshall
Benjamin Scott Martin
Isadora Martinez Gomez
Christopher J. Martini
Eva Maryskova
Hady Emmanuel Matar
Eduardo Jose Mathison Fuenmayor
Tanner Works Mathison
Dana J. Maykish
Rachel A. Mazzarella
John Charles McAlister
Paul Matthew McBride
Terence John McCarrick
Rachel Elizabeth McCarthy
Caitlin Honoria Mccartney
Laura Beth McCaskill
Claire Louise McConway
William G. McCormick
Shane McDougall
John Patrick McGaffigan
Patrick McGuigan
Doireann Maria McHugh
Emma McIlveen
Kelly Catherine McKeon
Yasmine-imani P. McMorrin
Olivia Claire McNee
Jeffrey Charles Meehan
Yanqiu Mei
Nataliia Melko
Lawrence Andrew Melsheimer
Sismi Raju Menachery
Nathan Richard Menard
Maria Jose Menendez Arias
Emily Kim Merki
John Bennett Meyer
Jacqueline Rose Meyers
Lauren Marie Migliaccio
Caroline Hope Miller
Erin Lynn Miller
Hamilton Scott Miller
Peyton Randolph Miller
Adam S. Minsky
Roshanak Mirhosseini
Gladys Kemunto Mogaka
Arundhati Mohankumar
Wanadi Jose Molina Cardozo
Aaron Benjamin Mollin
Sally Monkemeier
Anthony Peter Monticciolo
Damon Anthony Moore
Jordan Laird Moran
Ronald J. Morgan
Keita Mori
Norimitsu Mori
Ashley Eleanor Morin
Kirika Morita
Bryan A. Mornaghi
Christopher John Morten
Anca Muir
James Muirhead
Brian Patrick Mulcahy
Matthew Muma
Claire E. Murphy
Finella Ynez Murphy
Adrian Bogdan Musca
Sebastien Jean Philippe Nanteuil
Daniel S. Nanula
Daniel Steven Nanula
Jad Nasr
Joseph T. Nawrocki
Nicholas Harris Nestelbaum
Kathleen Nestor
Bertminhtam Dinh Nguyen
Joseph Duc Nguyen
Mai-khoi Nguyen-Thanh
Yunxuan Ni
Robert Louis Nightingale
Semira Noelani Nikou
Mariam Nisar
Seitaro Nishimura
Heather Elizabeth Nodler
Salvatore Maria Nolasco
Afsha Noran
Matthew James Norton
Irina Nossova
Seth Andrew Notes
Daniel W. O'Grady
Nominchimeg Odsuren
Christian Richard Oehm
Shuya Ogawa
Agape Ogbonda
Song Hee Oh
Naoya Okajima
Jesutofunmi Popoola Olabenjo
Sherifat O. Oluyemi
Fumitaka Omi
Sin Yee Cynthia Or
Demetrios George Orfanoudis
Matthew E. Osman
Michael Ossei-Appau
Michael Edward Otto
Jiangang Ou
Gary R. Owens
Marco Pacheco
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Alessandra A. Pagnotti
Tamara Rose Pallas
Trisha Suzanne Pande
Daniel Park
Emily Park
Min Woo Park
Sang Heui Jacqueline Park
Rebecca A. Parry
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Edwin Clark Pease
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Kathryn Pryor
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Natalie Punchak
Jin Qiu
Bessie Qu
Qing Qu
Wei Quan
Laura Kathryn Raden
Nisha Nilesh Ragha
Charles James Ramsey
Katia Ramundo
William George Raska
Zsofia Rasko
Stephanie Marie Rebolo
Guilherme Recena Costa
Matthew P. Reed
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Jan Christian Reiter
Chad M. Remus
Min Ren
Poseidon Retsinas
Isabelle Payne Richardson
Kevin Michael Riddell
Kristin Hope Riddell
Jay Aaron Riffkin
Daniel Phillip Rifkin
Leo Marc Rishty
Christoph Michael Ritter
Abdul Jamaal Roberts
Natasha Allyn Robertson
Sarah Jane Robertson
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Mark Victor Rohan
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Daniel Harris Rosenblum
Marcel T. Rosner
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Michael Aaron Rothenberg
Michael Hayles Roy
Amanda Haley Russo
Allan C. Ryan
Kathleen M. Ryan
Kevin John Ryan
Thomas William Ryan
Shin Ryoo
Othmane Saadani Hassani
Sara Sabour
Andre Muller Sadeghian
Mahdey Samir Salhab
Rami M. Salim
Wallace J. Salvador
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Christina Sanchez
John Patrick Sanderson
Bindu Sanjeevkumar
Emily Ann Santana
James Sebastian Savalli
Gil Savir
Chandni Saxena

Florence P. Scarborough
Aisha Margaret Schafer
Elyse Suzanne Schindel
Josef Schmidt
Julia Elizabeth Schmidt
Maria Caecilia Schweinberger
Alexander Elias Sculthorpe
Nina M. Sedlacek
Stephanie Jenny L.M.D. Seeuws
Masaya Seki
Takanari Sekiguchi
Viktor Semenyuk
Vincent Jack Sena
David L. Sfara
Travis James Shafer
Amanda Shaffu
Daniel H. Shainker
Emma Smith Shakeshaft
Michael David Shapiro
Aman Syed Shareef
Deepti Satyaki Sharma
Kanika Sharma
Maulik Sharma
Mark William Shaughnessy
Revital Shavit Barsheshet
Chen Shen
Jie Shen
Jiaoting Shi
Tianqi Shi
Yiqun Shi
Serena Shie
Kotaro Shiojiri
Mohammad Shouman
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Brent Samuel Silverman
Cory Alexander Simmons-Edler
Tyler Allan Sims
Raymond Sin
Andrew Robert Singer
Darshana Singh
Ondine Jane Sinsheimer
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Alexander Smith
Owen D. Smith
Raymond Jeffrey Smith
Thomas Anthony Smithurst
Nathalie Alisa Paula Ghislain Smuha
Mark Snyder
Marisa Ruth Soghoian
Jeongsoo Soh
Juliana Maia Soic
Robert Joshua Solomon
Ahree Song
Jason Sorensen
Christina Sorgi
Sophia Souffront
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Jillian N. Spielman
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Divya Harshvardhan Srivastav-Seth
Emer McColgan Stack
Kirk Stadnika
Andrew Jay Stamelman
Carmela D. Starace
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Jennifer Lynn Startzel
Ian Joseph Stearns
Glen Fred Strong
Laurence Eliot Stuart
Kristina Stanislavovna Subbotina
Blake Thomas Sullivan
Alina Sutter
Ryan James Suzano
Mai Takada
Hiroyuki Takahashi
Kana Takahashi
Nobuki Takeuchi
Masa Takriti
Eriko Tamura
Edward Kwan Siu Tang
David Evan Tanner
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Andra Telemacque-Korajkic
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Lizanne Thomas
Ryan Elizabeth Thompson
Lilian M. Timmermann
Michael Tomasino
Sydney L. Tonsfeldt
Marlin Gerald Townes
Richard James Tracy
Marie Catherine Trihy
Abhinav Tripathi
Bryan David Trojan
Meng Chin Tsai
Yenshou Tsai
Shania Tsang
Kylie Mariko Tsudama
Kwok Kei Antonio Tsui
Philipp Tsukanov
Melissa L. Turcios
Madeline Victoria Tzall
Jasmine Anne Mendoza Ual
Olga Ugolev
Ifeoma Maureen Ukwubiwe
Enrique Jose Urdaneta
Fatma Gokce Uzun
Devi Alamelu Vairavan
Thomas Silvio Valente
Brendan Michael Valentine
Ryan Van Olst
James Christopher Vandermark
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Bryan Thomas Vannini
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Xiaobin Wang
Xiaotong Wang
Yu Wang
Navan Ward
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Cameron Alexander Welch
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Zhe Wei Weng
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Spencer Joseph Wolgang
Hiu Hung Wong
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Meredith Wood
Thomas Richard Woolsey
Di Wu
Wenyuan Wu
Yiing-Shin Wu
Zhi Xia
Duo Xu
Hiroyuki Yagihashi
Sofia Maria Yague
Hiroshi Yamada
Jiebei Yan
Yan Yan
Yanyan Yan
Takatoshi Yanagisawa
Pei-chi Yang
Wen-hsuan Yang
Xiaolin Yang
Li Yao
Mohammad Saleh Yassin
Ke Ye
Melissa Sarah Yermes
Jihyun Yoo
Song-Mee Yoon-Smith
Erica Cristina Young
Chenxie Yu
Feifei Yu
Jingjie Yuan
David Howard Yunghans
Rosaline Yusman
Philip Christopher Zager
Agnieszka Anna Zarowna
Ge Zeng
Jia Zeng
Linfan Zha
Chen Zhang
Enbo Zhang
Feifei Zhang
Hao Zhang
Ling Zhang
Moran Zhang
Shiyuan Zhang
Wenyu Zhang
Yilin Zhang
Haibo Zhao
Lynn Olivia Zheng
Xianzhi Zheng
Ni Zhi
Xueting Zhong
Ting Zhou
Yan Zhou
Yuhua Zhou
Zijia Zhou
Jiancheng Zhu
Yana Zubareva

COMING NEXT ISSUE

If you enjoy "Burden of Proof," starting next month you can also enjoy "Son of Burden of Proof," a new column by incoming Albany Law School (Class of 2019) student Lukas M. Horowitz.

Titled "Becoming a Lawyer," the column will follow Lukas and his fellow classmates as they progress from innocent naïfs to sophisticated, newly minted lawyers, and beyond. Whether it's been five months, or 50 years, since you graduated from law school, "Becoming a Lawyer" will remind you how much has changed, and stayed the same, since you were a student. And current students will enjoy sharing the journey with their classmates.

Law students and first-year associates will also be invited to contribute their experiences, some of which will be incorporated into the column. Hopefully, Lukas' and his classmates' triumphs will far outnumber their tribulations, but whatever their ups and downs, this column will be candid, illuminating, and hopefully funny at times.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

While clients understandably are often more emotional when involved in litigation, I have always tried to be civil and, to a certain extent, friendly with opposing counsel. I find that it often works to the clients' benefit since the lawyers are able to remain objective while looking for opportunities to resolve the litigation in a way that is favorable to the client. In recent months, however, I have been involved in very contentious litigations where my adversaries have been keen on bending, or what some might say fabricating, the facts and misstating the law. In briefs submitted to the court and even during oral argument, they have blatantly lied to the court concerning the facts of the case and made misrepresentations about relevant documents. It amazes me that they would risk doing so since your reputation and credibility before the courts is paramount in this business. These lawyers are from large, reputable law firms. Are they counting on their adversaries being poorly prepared to recognize and raise their misrepresentations to the court? How should I handle advocates who might just as well be Pinocchio? Do I run the risk of annoying the court by raising the numerous misrepresentations made by counsel? I'm concerned that some courts might turn on me and find my conduct to be unprofessional or uncivil for essentially calling my adversary out as a liar. My client is outraged and wants to move for sanctions against the lawyer and his client. I'm at a point where I believe something must be done. Your guidance is greatly appreciated.

Sincerely,
Fed Up

Dear Fed Up:

In the heat of oral argument, when you are trying to juggle a judge's questions, client issues, exhibits, the holdings in the voluminous number of cases cited, and the key points you want to make to the judge, there is often a fine line between vigorous advocacy and pure misrepresentations. Other times, the line is not so fine. When New York replaced the existing Code of Professional Responsibility with the Rules of Professional Conduct (NYRPC) in 2009, Canon 7's requirement that "[a] lawyer shall represent a client zealously within the bounds of the law" was removed and neither "zeal" nor "zealously" appear in the Rules of Professional Conduct. (*See* Paul C. Saunders, *Whatever Happened to 'Zealous Advocacy'?*, N. Y. Law Journal, March 11, 2011, 245 no. 47). Many states, perhaps seeing these terms as a relic of the Rambo-era of litigation, similarly have moved away from using them in their rules of professional conduct. Indeed, many detractors have argued that the phrases were being used by those who act outside the bounds of ethical advocacy as a weapon against their adversaries. (*See id.*). But assuming that the principle of zealous advocacy endures in our adversarial system, there is a stark difference between representing a client's case with persuasive force and blatantly mispresenting the law and facts to the court and your adversary for the purpose of gaining a litigation advantage. As Judge Jed S. Rakoff recently put it in *Meyer v. Kalanik*, 15 Civ. 9796, 2016 WL 3981369, at *7 (S.D.N.Y. July 25, 2016), "litigation is a truth-seeking exercise in which counsel acting as zealous advocates for their clients, are required to play by the rules." *Id.*, citing *Nix v. Whiteside*, 475 U.S. 157, 166 (1966).

With these principles in mind, we first address what rules your adversary is potentially violating. It should go without saying that attorneys should never lie to their adversaries or the court. Multiple rules and decisions prohibit attorneys from making false and misleading statements. *See, e.g.*, NYRPC 3.1(b)(3) (A lawyer's conduct is "frivolous" where "the lawyer knowingly asserts material factual statements that are false."); 3.3(a)(1) ("A lawyer shall not knowingly . . . offer or use evidence that the lawyer knows to be false."); 3.4(a)(4) ("A lawyer shall not . . . knowingly use perjured testimony or false evidence"); 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person"); 8.3 (addressing a lawyer's obligation to report another lawyer where there is a substantial question as to that lawyer's honesty); 8.4(c) ("A lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); N.Y. Judiciary Law § 487 (misdemeanor for attorney who is guilty of deceit or collusion with intent to deceive court or party); 22 N.Y.C.R.R. § 130-1.1(c)(3) (sanctions where counsel "asserted material factual statements that are false"). Specifically, Rule 3.3(a)(1), which provides that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, " and Comment 2 to NYPRC 3.3 are applicable to your situation:

> This Rule sets forth the special duties of lawyers as officers of

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> the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the *advocate's duty of candor to the tribunal*. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not vouch for the evidence submitted in a cause, *the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false*.

(NYRPC Rule 3.3, Comment 2) (emphasis added).

The obligation to assure that an attorney's materially inaccurate information is not relied upon by other parties is so strong that it is one of the limited situations in which an attorney may reveal a client's confidential information. (*See* NYRPC Rule 1.6(b)(3) ("A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information . . ..").

The *Forum* has previously addressed Rule 3.3(a)(1) where an attorney has knowledge of a fact that is contrary to the position her firm intends to take in an action. *See* Vincent J. Syracuse, Matthew R. Maron & Maryann C. Stallone, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2014, Vol. 86, No. 9). Your question raises a different issue. How does one deal with an adversary who is making false statements to the court?

Rule 1.3(a) of the NYRPC requires lawyers to "act with reasonable diligence and promptness in representing a client." This rule is instructive on how you should act on behalf of your client and how you should address your less than truthful adversary. In our opinion, the most effective method of handling a dishonest attorney is preparation, attention to detail, and remembering not to sink to their level of practice. If you believe that opposing counsel is lying about facts in court filings, prove it! Do you have an exhibit that unequivocally contradicts the lie? That would be our first exhibit in any responsive motion papers or the first document we would present in rebuttal to your adversary's oral argument to the court. Build the record that your opponents are dishonest. The court will remember it. If you have proof that they are submitting party affidavits to the court that are contradicted by documentary evidence, show the court the contradiction. At oral argument, you may even remind your adversary that NYRPC 3.3(a)(1) *requires* them to *correct* false statements of law or fact. How forcefully you go about this request will depend on the level of dishonesty and your ability to demonstrate that the attorney knew its falsity when presented to the court.

Put another way, don't *tell* the judge your adversary is a liar; *show* the judge that your adversary is being dishonest. If you give your adversary an opportunity to correct the misstatement, the court will see that you are acting professionally without resorting to name calling. In the event that your adversary doubles down on his or her misstatement, insisting that his or her position is valid in the face of contradictory evidence, it is likely that you helped your client by proving to the judge that your adversary and/or his or her client is not trustworthy. As you correctly state in your question, an attorney's reputation and credibility is everything, the most important asset that any of us can ever have. Once an attorney loses his or her credibility before the court, it has a profound effect on how the judge views that attorney, and in our opinion, how the judge views the case. It is surprising that so many members of our profession forget this.

It is generally more difficult to demonstrate that an attorney knowingly made a false statement of law than of fact. An attorney has an obligation to present his or her client's case with persuasive force to the court. (*See* Rule 3.3, Comment 2; NYRPC Rule 1.3(a)). The hallmark of drafting effective papers for a client is to distinguish the legal arguments made by opposing counsel and argue that the cases and statutes should be interpreted in favor of the client's position. Therefore, unless there is a blatant misstatement of the law, and it is not supported by a reasonable argument for an extension, modification or reversal of existing law, your efforts are best spent on your argument to the judge why your adversary's legal position is incorrect. *See* 22 N.Y.C.R.R. § 130-1.1 (attorney conduct is deemed frivolous, and subject to sanctions, if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law"). In our experience, judges loathe being asked to find a member of the bar dishonest merely because you disagree with his or her interpretation of case law or a statute. However, if your adversary has misquoted a case, or misrepresented a case's holding, or omitted key facts that are pertinent to a court's holding or has knowingly failed to cite binding authority that undercuts his or her client's position, you should identify those misrepresentations or omissions in your argument. Again, show the judge why your adversary's arguments cannot be trusted.

Depending on the extent of dishonesty, you may be required to report it to the court or other authority. NYRPC Rule 8.3 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 tribu-

nal or other authority empowered to investigate or act upon such violation." As we put it in a prior *Forum*, "an attorney should use professional judgment and discretion when determining whether and how to report a colleague." *See* Vincent J. Syracuse, Ralph A. Siciliano, Maryann C. Stallone, Hannah Furst, *Attorney Professionalism Forum*, N.Y. St. B.J., May 2016, Vol. 88. No. 4. This advice is similarly applicable to your adversary. Comment 3 to NYRPC Rule 8.3 notes "[t]his Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this Rule. The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."

Misconduct involving dishonesty, fraud, deceit and/or misrepresentations may result in severe sanctions from short suspensions to disbarment "depending on the repetitiveness of the misconduct and the desire for personal profit." *In re Becker*, 24 A.D.3d 32, 34–35 (1st Dep't 2005)). The rationale behind these sanctions is that "[a]n attorney is to be held strictly accountable for his statements or conduct which reasonably could have the effect of deceiving or misleading the court in the action to be taken in a matter pending before it. The court is entitled to rely upon the accuracy of any statement of a relevant fact unequivocally made by an attorney in the course of judicial proceedings. So, a deliberate misrepresentation by an attorney of material facts in open court constitutes serious professional misconduct." *In re Schildhaus*, 23 A.D.2d 152, 155–56 (1st Dep't), *aff'd,* 16 N.Y.2d 748 (1965); *see also In re Donofrio*, 231 A.D.2d 365 (1st Dep't 1997). Indeed, courts have held that where the misconduct alleged involves the misrepresentation of facts to a court, tribunal, or government agency, suspension is warranted even in the face of substantial mitigating circumstances. *See, e.g.*, *In re Rios*, 109 A.D.3d 64 (1st Dep't 2013) (nine-month suspension warranted where attorneys intentionally influenced their client to misrepresent the situs of her accident in order to pursue an action which they knew was fraudulent from its inception and commenced an action against an innocent third party, filing papers, such as pleadings, containing misrepresentations with the court); *In re Radman,*135 A.D.3d 31, 32–33 (1st Dep't 2015) (suspending attorney for three months; finding that attorney who had submitted purported expert affirmations from two unnamed doctors to a trial court when, in fact, they were drafted by the attorney himself and were never agreed to or signed by any medical experts, had violated NYRPC Rules 3.3(a)(1), 3.3(a)(3) ["offer or use evidence that the lawyer knows to be false"] and 8.4(c) ["engage in conduct involving dishonesty, fraud, deceit or misrepresentation"]); *In re Rosenberg*, 97 A.D.3d 189 (1st Dep't 2012) (one-year suspension for attorney who knowingly used perjured testimony, knowingly made false statements of law or fact, and who thereby engaged in conduct that was prejudicial to administration of justice and adversely reflected on his fitness as a lawyer).

From your question, we do not have enough information to determine whether you have an obligation to report the offending counsel. You will need to use your judgment to determine whether the fabricated facts and misstatements of law you witnessed raised a substantial question as to the lawyer's honesty or whether it was merely an attorney exaggerating his arguments in an attempt to diligently represent his client.

Under 22 N.Y.C.R.R. § 130-1.1(b), you could move for sanctions against opposing counsel, the opposing party, or both. To obtain sanctions for counsel's misstatements of law, you would need to demonstrate that counsel's legal arguments are "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 N.Y.C.R.R. § 130-1.1(c)(1)). To obtain sanctions for counsel's misstatements of facts, you would need to demonstrate that counsel for the opposing party "asserted material factual statements that are false" (22 N.Y.C.R.R. § 130-1.1(c)(3)).

In extreme circumstances, under N.Y. Judiciary Law § 487(1) an attorney can be guilty of a misdemeanor if he or she uses "deceit or collusion, or consent[] to any deceit or collusion, with intent to deceive the court or any party." In addition to the penal law punishment, the attorney forfeits treble damages to the party injured. (*Id.*) Judiciary Law § 487, however, "provides recourse only where there is a chronic and extreme pattern of legal delinquency." *Solow Mgt. Corp. v. Seltzer*, 18 A.D.3d 399, 400 (1st Dep't 2005), *lv. denied*, 5 N.Y.3d 712 (2005). As one federal decision noted, "neither the language of the statute nor the holdings of several decisions applying Section 487 impose any such requirement" (*Trepel v. Dippold*, 04 CIV. 8310 (DLC), 2005 WL 1107010, at *4 (S.D.N.Y. May 9, 2005)). Five months after the *Trepel* decision, however, the Court of Appeals denied leave to appeal in *Solow* which does impose the requirement (*Solow Mgt. Corp. v. Seltzer*, 5 N.Y.3d 712 (October 20, 2005)). Alas, a detailed history and analysis of the "chronic and extreme pattern of legal delinquency" requirement of Judiciary Law § 487 is perhaps a subject for a future *Forum* which will have to wait for another day.

By submitting briefs to the court that are well researched and thoroughly demonstrate where your opposing counsel took liberties with the facts and law, and being prepared at oral argument with a solid grasp of the facts of the case, the record and the nuances of the case law at issue, you accomplish a number of objectives. First, you are complying with NYPRC Rule 1.3(a) which requires your diligence on behalf of the client. You also will be demonstrating the dishonesty of your adversary while protecting the reputation of you and your client in the eyes of the judge that may ulti-

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7. Straw Man

The straw-man argument is a common fallacy that "involves refuting an opponent's position by mischaracterizing."[9]

Example: Ms. Jones argues that the United States shouldn't fund a space program. Mr. Smith counters that science classes are an important part of a student's education.

The fallacy: Mr. Smith is mischaracterizing Ms. Jones's argument to include cutting funding for science classes in schools. Smith can't imply that Jones also wants to stop funding science in school.

8. Genetic Fallacy

A genetic fallacy occurs when one "attempt[s] to prove a conclusion false by condemning its source — its genesis."[10]

Example: Ms. White is a member of Congress. She drafted a bill that will help fund law schools. People opposing White's bill argue that because White lacks a law degree, the bill shouldn't be passed.

The fallacy: The fallacy is that people opposing the bill unfairly challenge it because White wrote it. The opposition isn't challenging the bill's language or content.

9. Ad Hominem, or Appeal to the Person

"Ad hominem" means "to the person." An ad hominem fallacy attacks a person's character, not the person's ideas.

Example: Ms. Robinson argues that mandatory sentences for criminals should be lowered. Mr. Johnson challenges Ms. Robinson because she's a convicted felon. Therefore, Robinson can't be trusted.

The fallacy: Mr. Johnson's argument is fallacious. He attacks Ms. Robinson's character. Johnson doesn't challenge Robinson's idea on its merits.

10. Tu Quoque

"Tu quoque" means "you do it yourself." Writers use tu quoque arguments when they contend that because an individual or group is allowed to do something, everyone should be allowed to do it.

Example: Mr. Mozzarella is a member of the Departmental Disciplinary Committee for New York's First Judicial Department. But he violated the New York Rules of Professional Conduct last year. Therefore, it's acceptable to act unethically in Manhattan and the Bronx.[11]

The fallacy: A tu quoque argument makes it "impermissible to justify one wrong by another."[12] That Mr. Mozzarella acted unethically doesn't entitle other lawyers to act unethically.

11. Nirvana Fallacy

The nirvana fallacy occurs when the writer rejects a solution to a problem. The solution is rejected because it isn't perfect.[13]

Example: Mr. Brown doesn't support a new bill to reduce greenhouse gas emissions. He argues that this bill won't completely eliminate greenhouse gases and thus it shouldn't be passed.

The fallacy: Mr. Brown rejects the bill because it isn't a perfect solution. It's fallacious to argue against a bill on the sole ground that the bill isn't perfect. Brown is entitled to hold out for a better bill, but he can't logically argue that the bill should be rejected because it doesn't advance all his goals.

12. Poisoning the Well

Poisoning the well presumes your adversary's guilt by forcing your adversary to answer a question.

Example: The lawyer asked the witness, "When did you stop beating your wife?"

The fallacy: The question assumes that the witness used to beat his wife, that he stopped beating his wife, that he's married, and that he's married to a woman.

13. Appeal to Authority

The "appeal to authority" fallacy assumes that a person who excels in one area is credible and authoritative in unrelated areas.

Example: Ms. Peterson told Mr. Stevens, a partner at her law firm, that she had a headache. Mr. Stevens told Ms. Peterson to take antibiotics. Peterson took the antibiotics because Stevens, a partner, must be smart.

The fallacy: Mr. Stevens is an excellent attorney. Therefore, he must know how to treat a headache. The conclusion to take the antibiotics is unwarranted. His credibility doesn't extend to medicine.

14. Etymological Fallacy

The etymological fallacy dictates that the present-day meaning of a word or phrase should be similar to historical meaning.

Example: In *Muscarello v. United States*, 524 U.S. 125 (1998), the issue was how to interpret the phrase "carries a firearm" and whether Congress intended by that term to include the notion of conveyance in a vehicle.[14] To define "carries," Justice Breyer cited several dictionaries showing that the origin of the word "carries" includes "conveyance in a vehicle."

The fallacy: Sometimes courts look to a term's language of origin, "[b]ut these historical antecedents are not necessarily related to contemporary usage."[15] Historical meaning doesn't always coincide with present-day meaning.

15. Appeal to Popularity

Appeal to popularity uses popular prejudices as evidence that a proposition is truthful.

Example: The current trend is that defendants are representing themselves at trial. Therefore, all defendants should represent themselves.[16]

The fallacy: Representing yourself at trial is the right thing to do. But a decision to represent yourself is unwarranted based on the premise.

16. Appeal to Consequences

This fallacy suggests that if the consequences are desirable, the proposition is true; if undesirable, the proposition is false.

Example: If there's objective morality, then good moral behavior will be rewarded after death. I want to be rewarded; therefore, morality must be objective.

The fallacy: The argument doesn't address the merits of the conclusion. The conclusion is reached by appealing to the consequences of the result.[17]

17. Appeal to Emotion

Appeals to emotion are frequently used tactics in arguments and fall into "the general category of many fallacies that use emotion in place of reason in order to attempt to win the argument. It is a type of manipulation used in place of valid logic."[18]

Example: Judges may react to the pain and anguish a given law or doctrine causes, and they may point to the painful or existential consequences of that law as reason to change it.[19]

The fallacy: Emotions shouldn't be the basis on which to make decisions. Appealing to emotion is a powerful tool. But it's logically fallacious.

18. Guilt by Association

Writers use guilt-by-association arguments when they support or attack a belief or person by an unrelated association.

Example: Ms. Smith was convicted of armed robbery. Ms. James was friends with Smith. James was charged with conspiracy because of her friendship with Smith.

The fallacy: Ms. James is guilty because of her association with Ms. Smith. Their relationship is not evidence of guilt.

19. Composition

The fallacy of composition assumes that a feature of the individuals in a group is also a feature of the group itself.

Example: The plaintiff's case relies solely on circumstantial evidence. No witness for the prosecution showed that the defendant committed the crime. Therefore, the prosecution didn't prove its case beyond a reasonable doubt.[20]

The fallacy: Although no single witness offered sufficient evidence to convict the defendant, the totality of the circumstantial evidence might be enough for a conviction.

20. Division

Division is the converse of the composition fallacy. If a group has a feature, the individuals in the group have that feature.

Example: The defendant was part of a cult. The cult is known for committing violent acts. Therefore, the defendant is a violent person.

The fallacy: The defendant must be a violent person because he's part of the cult. The fallacy of division suggests that the defendant is violent because the cult he's a part of is violent.

The best way to avoid and detect fallacies is to become familiar with them.

21. Appeal to Ignorance

The logical fallacy of appealing to ignorance occurs by "forgetting that absence of evidence is not evidence of absence."[21] One can't assume that a proposition is true or false just because some information is absent.

Example: Scientists can't prove that aliens haven't visited earth. Therefore, aliens must have visited earth.

The fallacy: The lack of evidence in this case is not evidence of the conclusion. The conclusion is based on a lack of evidence.

22. Begging the Question

Begging the question draws a conclusion based on an unproven assumption. To beg the question isn't to evade the issue or to invite an obvious question.[22]

Example: Murder is wrong because killing another human is wrong.

The fallacy: The fallacy here is that the premise is used to support itself. Murder is wrong, but the conclusion is invalid based on the premise.

23. Circular Reasoning

Circular reasoning is used when the writer "assumes the truth of what one seeks to prove in the very effort to prove it."[23]

Example: The defense attorney argues this in summation: "My client couldn't have committed this crime. He isn't a criminal."

The fallacy: The fallacy in the argument — even though reputation evidence is admissible — is that the defendant is innocent just because he's not a criminal. The logic is circular. Circularity is an invalid method of reasoning.

24. Scapegoating

Scapegoating passes to another target the blame for an unfortunate event.

Example: The Widget Company manufactures cars. Widget didn't properly inspect its brakes in the cars. As a result, the brakes in Widget's cars were faulty. The faulty brakes caused many injuries. Widget blamed the Application Company for the faulty brakes. Application manufactured the brakes for Widget's cars.[24]

The fallacy: The Widget Company's argument relies on the scapegoating fallacy. Widget should have inspected the cars it sold. Widget passed the blame on to the Application Company because Application manufactured the faulty brakes.

25. *Non Causa Pro Causa*

This fallacy occurs when the writer "incorrectly assumes an effect from a cause."[25]

Example: I forgot my umbrella today. Therefore, it'll rain today.

The fallacy: The speaker invalidly concludes it'll rain. It's impossible to conclude from the initial premise that it'll rain.

26. Fake Precision

The fake-precision fallacy occurs "when an argument treats information as more precise than it really is. This happens when conclusions are based on imprecise information that must be taken as precise in order to adequately support the conclusion."[26]

Example: "We can be 90 percent certain that Bloggs is the guilty man."[27]

The fallacy: You can't prove by a percentage how certain you are of a person's guilt. This information is misleading. It gives others an impression that the writer is confident that Bloggs is guilty.

27. False Dilemma

The false-dilemma fallacy occurs when the writer "make[s] choices based on a perceived set of variables that do not effectively identify the real choices available to the decision-maker."[28]

Example: A lawyer asks a witness, "Would you say that the defendant gets drunk about once a week, twice a week, or more often?"

The fallacy: The defendant is drunk at least once a week. The possibility exists that the defendant never drinks. The question posed allows only for a limited number of options.

28. Slippery Slope

The speaker argues that once the first step toward a particular event is taken, the first step will inevitably lead to the worst possible outcome.

Example: Tuition for school is too expensive. If the tuition increases, students won't be able to afford it. If students can't afford to go to school, they'll inevitably turn to a life of crime to make money.

The fallacy: The conclusion relies on the slippery-slope fallacy. The premises don't support the conclusion that students will become criminals if they can't afford tuition.

29. Faulty Analogy

The fallacy of faulty analogy occurs when items in an analogy are dissimilar. When analogies are dissimilar, the conclusion becomes inaccurate.

Example: To illustrate an idea about security interests, Ms. Daniel relates them to the principles under which bankruptcy contracts operate.

The fallacy: Bankruptcy contracts don't function the same way security interests do.[29] The items in the analogy are dissimilar. The method of reasoning is inaccurate.

30. Hasty Generalization

The fallacy of a hasty generalization occurs when the writer takes a limited sampling to justify a broad conclusion.

Example: Chief Court Attorney Samson never edits draft opinions from his law department. All chief court attorneys are lazy.

The fallacy: Because one chief court attorney doesn't edit draft opinions, all chief court attorneys must be lazy. Just because Mr. Samson doesn't edit drafts doesn't mean that he or any other chief court attorney is lazy. Countless reasons can explain why only Samson doesn't edit drafts.

31. Fallacy of Accident

The fallacy of accident occurs when there's an "improper application of a general rule to a particular case."[30]

Example: Murder is illegal. Anyone who kills an ant should be charged with murder.

The fallacy: The general law that murder is illegal is improperly applied to the specific case of killing ants. This is opposite of the fallacy of the hasty generalization.

32. False Cause

False cause is also known as *post hoc ergo propter hoc*. This means "after this; therefore, because of this." This fallacy assumes that because one event occurs after another, the first event caused the second. These types of "arguments fail because they imply a causal relationship without a basis in fact or logic."[31]

Example: Every time I brag about how well I write, I submit a document with lots of typos.

The fallacy: If you don't brag about your writing, you'll submit typo-free documents. No causal link connects bragging and submitting typo-free documents.

33. Appeal to Tradition

An appeal to tradition suggests that a practice is justified because of its continued past tradition.

Example: Law X has been in effect for generations. Therefore, Law X shouldn't be repealed.

The fallacy: An argument is fallacious when it relies on an appeal to tradition. Merely because Law X has been followed for generations doesn't mean it should continue.

34. Special Pleading

A special pleading is a fallacy people use to claim that something is an exception, even without proper evidence to support that claim.

Example: Drunk drivers should be punished. But Mr. A is an exception. Today's his birthday.

The fallacy: That today is Mr. A's birthday isn't an adequate reason for an exception.

35. The Prosecutor's Fallacy

The Prosecutor's Fallacy results from confusion between the probability that (a) any individual will match the description of the guilty person and (b) an individual who does match the description is actually guilty.

Example: The perpetrator was described as seven feet tall, with blond hair, walking with a limp, the exact characteristics of the defendant in the courtroom. An expert testifies that the odds of any given person matching that description is 0.00000072 (72 out of 100 million). The prosecutor argues that the odds that the defendant is the guilty party are approximately 1.4 million to 1.

The fallacy: The prosecutor has ignored the size of the population in question. The New York metropolitan area has a population of more than 20 million people. If the case were in New York, the odds that the defendant is the guilty party (without any other information) are only 1 in 14.4, or less than 7 percent (i.e., 0.00000072 times 20 million).

After reading through this list of fallacies, readers might find it difficult to believe that any argument can be wholly free of them. The best way to avoid fallacies in arguments is to become familiar with them. The following six guidelines, from University of Memphis Professor Andrew Jay McClurg, are a good start for any

lawyer crafting fallacious-free arguments:[32]

1. "The premises must be at least probably true."
2. "The essential premises must be stated."
3. "The conclusion must at least probably follow from the premises."
4. "The conclusion cannot be used to prove itself."
5. "Competing arguments must be fairly met."
6. "Rhetoric must not supplant reason." ■

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1. Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 Am. U. L. Rev. 53, 96 (1992).
2. Bradley Dowden, *Internet Encyclopedia of Philosophy*, http://www.iep.utm.edu/fallacy/#H6 (last visited June 6, 2016).
3. Adapted from *id.*
4. Neal Ramee, *Logic and Legal Reasoning: A Guide for Law Students*, http://www.unc.edu/~ramckinn/Documents/NealRameeGuide.pdf (last visited June 6, 2016).
5. *Id.*
6. *Regester v. Longwood Ambulance Co., Inc.*, 751 A.2d 694, 700 (Pa. Commw. Ct. 2000).
7. Bo Bennet, *Logically Fallacious*, https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/150/Red_Herring (last visited June 6, 2016) (emphasis deleted).
8. McClurg, *supra* note 1, at 90.
9. *Id.* at 89.
10. Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & Pol. 663, 676 (2012) (internal quotation marks omitted).
11. Inspired by Michael P. Scharf & Ahran Kang, *Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 Cornell Int'l L.J. 911, 935–36 (2005).
12. L. Scott Smith, *Religious Toleration and the First Amendment*, 22 Kan. J.L. & Pub. Pol'y 109, 135 (2012).
13. Bo Bennet, *Logically Fallacious*, https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/134/Nirvana_Fallacy (last visited June 6, 2016).
14. Adapted from Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and A Corpus-Based Approach to Plain Meaning*, 2010 B.Y.U. L. Rev. 1915, 1939 (2010).
15. *Id.*
16. Inspired by John McAdams, *It's Good, and We're Going to Keep It: A Response to Ronald Tabak*, 33 Conn. L. Rev. 819, 821 (2001).
17. Adapted from G. Fred Metos, *Appellate Advocacy*, 23 Champion 33, 34 (Mar. 1999).
18. Bo Bennett, *Logically Fallacious*, https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/29/Appeal_to_Emotion (last visited June 6, 2016).
19. Adapted from Ediberto Roman, *Love and Civil Rights*, 58 How. L.J. 113, 123 (2014).
20. Inspired by Harold Anthony Lloyd, *A Right but Wrong Place: Righting and Rewriting Citizens United*, 56 S.D. L. Rev. 219, 233 (2011).
21. Julie Lurman Joly et al., *Recognizing When the "Best Scientific Data Available" Isn't*, 29 Stan. Envtl. L.J. 247, 270 (2010).
22. Inspired by and adapted from Gertrude Block, *Language Tips*, 85 N.Y. St. B.J. 61, 61 (May 2013).
23. Ramee, *supra* note 4, at 6.
24. Inspired by Sean Kane, *Honda Finds Convenient Scapegoat in Takata*, 35 Westlaw J. Automotive 1, *1 (2016).
25. Bo Bennett, *Logically Fallacious*, https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/95/False_Effect (last visited June 6, 2016).
26. W. Jerry Chisum & Brent E. Turvey, *Crime Reconstruction* 115 (1st ed. 2007).
27. Madsen Pirie, *How to Win Every Argument: The Use and Abuse of Logic* 79 (2006).
28. A. Benjamin Archibald, *The False Dilemma*, 47 Boston B.J. 16, 16 (Sept./Oct. 2003).
29. Adapted from Laura B. Bartell, *Revisiting Rejection: Secured Party Interests in Leases and Executory Contracts*, 103 Dick. L. Rev. 497, 535 (1999).
30. William J. Blanton, *Reducing the Value of Plaintiff's Litigation Option in Federal Court: Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 2 Geo. Mason U. L. Rev. 159, 199 (1995).
31. Maureen B. Collins, *Losing Arguments*, 90 Ill. B.J. 669, 669 (Dec. 2002).
32. Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. Colo. L. Rev. 741, 841–42 (1988).

mately decide the case. If, on the other hand, you decide to resort to name calling before the judge, especially where there may be issues of fact or multiple interpretations of the cases cited by opposing counsel, you may annoy the judge and undermine your case in the long run. Judges do not want to spend their time overseeing attorneys that bicker about whether each and every statement is an outright lie or whether it is a matter of interpretation. You may be correct when you say that your opponent is lying. But you need to show the court that you are right. Telling the court that you are right will not help if you cannot demonstrate it. If you judiciously pick your battles over which material misstatements deserve your strongest assertion of impropriety, and you have the evidence to support your contention, you are unlikely to irritate the judge, you will protect the reputation of you and your client, and you will have diligently represented your client's interests.

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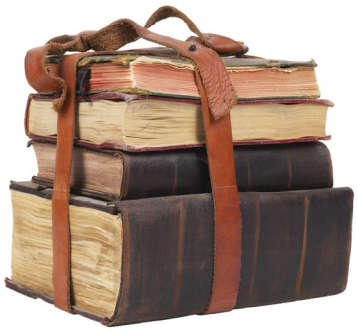

Say It Ain't So: Leading Logical Fallacies in Legal Argument – Part 2

Part 1 of this column, which appeared in the July/August 2016 issue of the *Journal*, covered formal fallacies in legal argument.

Informal Fallacies

Informal fallacies are fallacious because of their content. The following is a list of informal fallacies and what makes them fallacious.

1. One-Sided Argument

When crafting arguments, "[i]t is fallacious to ignore countervailing evidence or arguments in attempting to persuade."[1]

Example: The reputation evidence shows that the defendant is the kind of person who'd never killed a bug. The evidence also shows that he's easygoing and has lots of friends. Therefore, the defendant didn't kill his wife.

The fallacy: The reputation evidence might be true and relevant, but countervailing evidence might refute the conclusion.

2. Amphiboly

It's fallacious to argue based on an ambiguity in the grammatical structure in a sentence.

Example: Ms. Smith hit and injured a person while riding his motorcycle. She should be held accountable.

The fallacy: It's impossible to conclude from the premise that Ms. Smith should be held accountable for the injury. Based on the grammatical structure of the premise, we don't know whether she was driving the motorcycle. The ambiguity in the structure of the sentence makes the conclusion invalid.

3. Accent

An accent fallacy creates an ambiguity in the way a word or words are accented.

Example: A reporter asks a member of Congress whether she favors the President's new missile-defense system. She responds, "I'm in favor of a missile defense system that effectively defends America."[2]

The fallacy: Her answer could mean that she favors the President's missile-defense system or that she opposes it because the system is not effectively defending America. She creates an ambiguity in which word is accented. If the word "favor" is accented, her answer is likely in favor of the missile-defense system. If the words "effectively defends" are accented, she likely opposes the defense system.[3]

4. Complex Question

The complex-question fallacy "occurs when the question itself is phrased in such a way as to presuppose the truth of a conclusion buried in that question."[4]

Example: "Why is the free market so much more efficient than government regulation?"[5]

The fallacy: The question assumes that a free market is more efficient than government regulation. A free market might or might not be more efficient, but one may not assume a fact not yet in evidence.

5. Equivocation

Equivocation uses ambiguous language to hide the truth. If "the same word or form of the same word is used in two different contexts, it must mean the same thing in both contexts."[6]

Example: Mr. Parker told his friends that he passed the bar. His friends congratulated him on his accomplishment.

Equivocation uses ambiguous language to hide the truth.

The fallacy: Mr. Parker equivocated the meaning of passing the bar. Passing the bar has two meanings. Mr. Parker might have lied in suggesting that he passed the bar exam. He could simply have walked past the bar in a courtroom separating the public from the well where the lawyers argue and the judge sits.

6. Red Herring

The fallacy of "the red herring is a deliberate diversion of attention with the intention of trying to abandon the original argument."[7] It "divert[s] attention by sending the audience chasing down the wrong trail after a non-issue."[8]

Example: The prosecution argued at trial that the defendant acted immorally. The defense attorney asserted that morality is subjective and that there's no single definition of morality.

The fallacy: The defense attorney diverted the conversation from the defendant's actions to a discussion of morality.

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