NYSBA SPRING/SUMMER 2017 | VOL. 9 | NO. 1

The Senior Lawyer

A publication of the Senior Lawyers Section
of the New York State Bar Association

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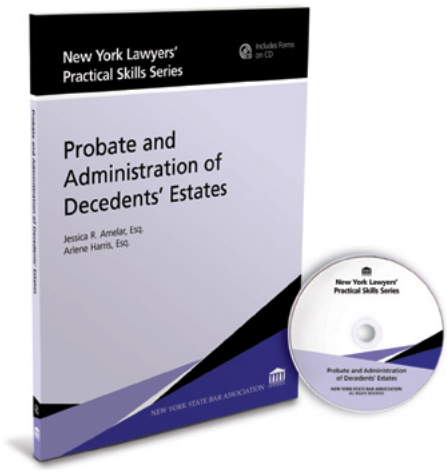
Probate and Administration of Decedents' Estates



PRODUCT INFO AND PRICES*

2016-2017 / 200 pp., softbound
PN: 419607 (Book and CD)
PN: 419607E (Downloadable PDF)

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Probate and Administration of Decedents' Estates is a practical guide for an attorney who represents a petitioner in a probate or administration proceeding. Although other subjects are discussed, this publication focuses on the administration of an estate that is not subject to federal estate taxation.

The authors, experienced trusts and estates practitioners, provide a step-by-step guide for handling a basic probate proceeding and for completing the appropriate tax-related forms. Numerous practice guides are included, making this a useful reference for anyone becoming involved in this area of practice. This latest edition updates case and statutory references, making *Probate and Administration of Decedents' Estates* an excellent resource for any trusts and estates library.

The 2016–2017 release is current through the 2016 New York State legislative session.

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Message from the Section Chair

Dear Section Members:

At our Section's 2017 Annual Meeting CLE program I had the pleasure of participating in the presentation of our first annual Jonathan Lippman Pro Bono award to Glenn Pogust, Esq., Arnold & Porter Kaye Scholer LLP. This award was the idea of Fern Schair, the Chair of our Pro Bono Committee, and is intended to recognize outstanding pro bono work performed by a member of our Section, and to promote the goal of increasing access to justice.

We were honored to have Judge Lippman present the award to Mr. Pogust, and also to have our NYSBA President, Claire P. Gutekunst, participate in the award ceremony. Photos taken during the proceedings are included in this issue. Please keep in mind that this is an annual award and consider nominating a candidate for 2018. Details of the nomination process will be forthcoming.

Congratulations to another of our Section members—indeed, the first Chair of our Section—Justin L. Vigdor, who also was recently honored for his work in promoting access to justice. In declaring Justin its 2017 Celebration of Leadership Honoree, the Empire Justice Center highlighted Justin's role as Chair of the Partnership for Equal Justice Campaign. Empire Justice noted that Justin's leadership ensured that low-income families in Rochester will have improved access to justice by raising funds needed to co-locate four civil legal services providers in one centralized building. The resultant Telesca Center for Justice, and what it has accomplished, has been recognized as a national model for the delivery of civil legal services.

In future issues we would like to include a column reporting significant events, honors, etc., in our Section members' lives. The deadline for this information for our next issue is October 1, 2017. Also, we are looking for a co-editor of *The Senior Lawyer*. If you would like to submit information for inclusion in the next issue, or are interested in the co-editor position, please contact me at cabb1@optonline.net.

The CLE aspect of our 2017 Annual Meeting program was *Planning Ahead for Your Senior Life and Your Practice*. The response to this program was so favorable that plans are under way to present it live in Westchester County and also as a webcast. Suggested topics for future programs, and/or speakers, are always welcome.

In this issue we are continuing to highlight portions of the NYSBA *Planning Ahead Guide: How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death*. This is an invaluable reference for all attorneys, regardless of age or type of practice, and the full *Guide* can be accessed at www.nysba.org/PlanningAhead2016. In addition, recognizing the diverse nature of our Section's membership, topics addressed in this issue include employment pitfalls, cybersecurity, trusts for pets, powers of attorney, mediation, and the effective use of social media in your law firm. The more articles we have from our Section members, the more relevant *The Senior Lawyer* will be for us all, so consider submitting an article for our next issue (October 1st deadline).

This is my last Chair's Message. The new Chair as of June 1, 2017 is C. Bruce Lawrence (cblawrence@boylancode.com). Bruce has been very active in our Section as Co-Chair of our Technology Committee and Secretary, and I know that he will do a great job as our Chair.

In closing, many thanks to the members of our Executive Committee, Section members, and NYSBA staff for guidance and assistance over the past three-and-a-half years.

Carole A. Burns

Willard H. DaSilva

It is with great sadness that we inform you of the passing of the first editor of *The Senior Lawyer*, Willard "Bill" DaSilva, on Friday, May 5, 2017.

Mr. DaSilva (as he was respectfully referred to by almost all who knew him) served in his early years as a Second Lieutenant in the U.S. Army Air Corps, earning wartime medals for his service, including the Victory Medal. He was trained in Meteorology and then Radar at the University of Minnesota and Yale University, respectively. Upon his honorable discharge from the Army, Mr. DaSilva worked as a Chief Executive Officer in the garment industry, or as he often referred to it, the "rag business."

Mr. DaSilva was a successful Chief Executive Officer in the garment industry. However, he is more widely recognized for his second career as an attorney. Mr. DaSilva was admitted to the Bar in 1949, and cut his teeth in the legal arena handling cases that other lawyers simply did not want—matrimonial cases. At that time, adultery was the only ground for divorce in New York State and jury trials were held on the issue. Matrimonial matters were, therefore, deemed too messy to undertake.

Mr. DaSilva, however, saw this as a golden opportunity as matrimonial law was very much in its infancy in New York State and Mr. DaSilva knew that he could grow along with it. The rest is, as they say—history. Mr. DaSilva went on to become one of the foremost authorities on matrimonial law in the State of New York.

Mr. DaSilva was a senior member of DaSilva & Hilowitz LLP, with offices for more than 50 years in Garden City, New York, and more recently in New City, New York. Mr. DaSilva was a past President of the American Academy of Matrimonial Lawyers, New York Chapter, Executive Editor of the ABA *Family Advocate* magazine and Editor Emeritus of the New York State Bar *Journal*, Chairman of the Board of Editors of the nationally published *The Matrimonial Strategist*, and author of *New York Matrimonial Practice*, 2d edition, published by the West Group. He was a former Council Member of the American Bar Association Section of Family Law, a Master and Past President of the New York Family Law American Inn of Court and Past Chair of the New York State Bar Association's General Practice Section.

Mr. DaSilva was inarguably very accomplished. In addition, he was kind, compassionate and patient, would rather settle a case than try it, and had a knack for communicating with clients, opposing counsel and the court. He was not just liked, he was respected—and it was earned.

Mr. DaSilva is survived by his wife, Lynne S. Hilowitz, Esq., his children Jill DaSilva, Deborah DaSilva and Andrew DaSilva, and his stepchildren, Jillian Hilowitz and Matthew Hilowitz.

Is a Trust for My Pet a Viable Option?

By Anthony J. Enea, Esq.

One only needs to observe life's daily interactions to conclude that pets have become an integral part of the lives of many. It is virtually impossible to go to a mall or airport without encountering someone who has a pet or two in tow. In Westchester County, the importance of pets has been readily apparent for over a century. For almost 120 years, Hartsdale has been the home of what is now recognized as the oldest pet cemetery in the nation. Thus, the question most pet owners' face is what steps they can undertake to ensure that their pet or other domestic animal is properly provided for in the event of their demise.

Historically, one could always provide for his or her pet(s) in a Last Will and Testament. One's pet could be left as a bequest to another with the hope that said person would properly provide for the pet, or one's Last Will and Testament could specifically allocate a portion of his or her estate for the care and maintenance of the pet(s). However, the problem with providing for one's pet(s) in one's Last Will is that the Last Will can be contested for a reason unrelated to the pet, and there can also be a significant lapse of time between one's death and the appointment of the executor of said Last Will. These roadblocks can essentially leave the pet in a state of limbo. Because of these impediments, the wishes of pet owners have in many instances been thwarted by the use of a Last Will to provide for their pets.

"Section 7-8.1 of the New York Estates, Powers and Trusts Law (EPTL) permits the creation of a trust for the care and maintenance of a pet(s)."

In 1996, New York was one of the first states to enact a Pet Trust Statute. Section 7-8.1 of the New York Estates, Powers and Trusts Law (EPTL) permits the creation of a trust for the care and maintenance of a pet(s). The pet trust can be created and funded during the life of the grantor/creator as an "inter vivos trust" or it can be a testamentary trust, created in one's Last Will. As with any other trust document, a trustee(s) is appointed to oversee the implementation of the trust terms. Originally, EPTL 7-8.1 provided that the income and principal of the trust was to be used for the benefit of the designated pet(s) until the death of the pet or at the end of a twenty-one (21) year period, whichever occurs earlier. This was done to comply with the well-established "Rule Against Perpetuities," where all interests in property must vest, if at all, no later than 21 years after the measuring life passes. However, in 2010, the statute was amended to recognize the fact that some animals may have a longer life expectancy than 21 years. Thus, the statute now permits the trust to continue for the entire life span of the pet or animal.

At the end of the life of the pet or animal, the trust will terminate and the balance of the income and principal of the trust will be distributed per the wishes of the grantor/creator of the trust. It is important to note that EPTL 7-8.1(b) specifically provides: "(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of all covered animals."

EPTL 7-8.1(d) provides a court with the authority to reduce the amount of property transferred to the pet trust if it determines that it substantially exceeds the amount required for the intended use. The amount of the reduction, if any, will pass to beneficiaries named to receive upon the death of the pet or animal**.** The most well-known pet trust is the one created by Leona Helmsley for her beloved white Maltese, "Trouble." Trouble's Trust was originally funded with $12 million. The Manhattan Surrogate's Court reduced the size of the trust to $2 million, determining that the trust was overfunded for the implementation of the decedent's wishes. (Stephanie Strom, *Helmsley Left Dogs Billions in Her Will,* http://www.nytimes.com/2008/07/02/us/02gift.html [accessed February 4, 2016]; further discussed in *In re Copland*, 44 Misc. 3d 485, 988 N.Y.S.2d 458 (2014), N.Y. Slip Op. 24172.)

In conclusion, if one wishes to ensure that one's pets or animals are adequately protected upon one's demise, a pet trust, even though it too may be contested, especially if it is overfunded, may be the best and most viable option of ensuring that one's wishes are implemented.

Anthony J. Enea, Esq. is the managing member of Enea, Scanlan & Sirignano, LLP with offices in White Plains and Somers, NY. Mr. Enea is a past chair of the New York State Bar Association's Elder Law Section. He was named Best Lawyers' 2016 Elder Law "Lawyer of the Year" in White Plains and Westchester County's Leading Elder Care Attorney at the Above the Bar Awards. Mr. Enea can be reached at 914-948-1500 or A.Enea@esslawfirm.com.

Why Social Media Is Critical to Your Law Firm's Success

By Leslie H. Tayne

We are now living in a digital era and social media has changed the way we communicate and connect with other attorneys and potential clients. Taking control of your online presence is essential and social media is a fundamental way of doing so.

However, for many the world of social media and digital marketing is confusing and intimidating, and therefore often neglected altogether. When utilized properly, social media can give your firm a personality and voice, boost your professional reputation, increase your professional network base, and even land you new clients (yes, even many seniors are using social media these days!).

If you have been reluctant to join the world of social media in a professional capacity, here are some important factors to consider:

You Will Increase Your Brand Visibility

When looking for legal services, a law firm that has a more impressive online presence is going to stand out. Social media is a chance for people to get to know you and your firm, outside of what is contained in your firm's website. Unlike a website, social media profiles tend to be updated more frequently and give you a chance to show off your firm's personality.

There is also an opportunity to increase your referral base by making efforts to network with other businesses and law firms.

It Gets People Talking

The truth is, not only are we living in a digital era, but we are seeing a trend in that people are becoming less and less trustful of brands. More and more, consumers are looking to other fellow consumers for honest opinions and reviews.

In fact, statistics show there is the lowest level of trust in corporations in U.S. history, and many major companies are reallocating money from their traditional advertising budgets to ways of increasing customer satisfaction, all in an effort to ensure they have a great online reputation and positive reviews from their customers.

This not only translates into positive reviews on sites like Yelp (or in the case of the legal world, sites like Avvo), but it gets people talking about your brand on social media as well. Consumers turn to social media to share their opinions—both good and bad—of brands and companies. You, of course, want to ensure your customers are saying good things about you. Social listening is a critical part of a law firm's success and will help you find out what's working and what isn't.

You Can Share Your Expertise

It's not about giving away free counsel, but rather, offering a glimpse into your expertise and showing what you're worth. Participating in online conversation demonstrates you know what you're talking about and makes yourself accessible to a world of untapped potential clients. Never underestimate the power of information to spread via the internet and reach more potential clients.

You Can Stay in Tune With the Industry

Think of social media as a personal newsfeed of information that is relevant to you. As attorneys, our time is valuable, and as much as we might like to, we rarely have the time to read every newsletter, law journal, website, and press release. With social media, you can follow different bar associations and law societies, networking groups, other law firms, law schools, legal publications, and the like. This will help to consolidate all the information you are interested in so you can keep your finger on the pulse.

Paid Advertising Is Relatively Inexpensive

Compared to traditional methods of advertising (i.e., print, television, radio), advertising on social media is relatively inexpensive and can work for any firm's budget. What's even better is ads can be targeted to *very* specific demographics and you'll receive in-depth analytics about how well your ads are performing. A little bit of internet research can tell you how to easily run ads yourself, or if you'd prefer to leave this to someone more seasoned, you can look into hiring a digital marketing agency or freelance digital marketer to create and run your ads for you.

You Can Keep Tabs on Your Competitors

If you're late to the game, it's likely that your competitors are already on social media. Not only is your firm missing out on visibility against their brand, but you're missing out on seeing what your competitors are up to. By keeping an eye on competitors, you'll be able to see what's giving them an edge, such as frequent press releases, industry awards, or unique online content. This will help you keep tabs on what resonates with potential

Leslie H. Tayne, Esq., is an award-winning consumer and business debt-related attorney, advisor and founder of Tayne Law Group, P.C., one of the few in New York State concentrating solely in debt resolution and alternatives to filing bankruptcy for consumers, business owners and professionals. Leslie's mission is to reshape the debt relief industry by giving clients a supportive and reliable environment built on experience, trust and results that will not only relieve clients of the stress from debts but also the burden of the never-ending debt cycle.

clients and what you can do to better improve your online presence.

Recruit Top Talent

Plain and simple, law firms that are actively engaged on platforms and in networks that law students and recent graduates frequent have better access to top-tier, up-and-coming talent. You can use social media as a means of not only showcasing your brand to potential clients, but to generate interest from within your industry as well.

Tips to Get Started:

- You don't need to be on every platform. Choose 1 or 2 that make the most sense for your business. Facebook is the most widely used, particularly by an older demographic. LinkedIn is also a powerful tool for attorneys to build a network and establish authority in their practice areas.
- Keep your content varied. Consider including a mix of testimonials, company updates, blogs, photographs, recent awards and media mentions, and infographics. The "golden ratio" for social media marketing is 30/60/10—30% original content, 60% curated content from other sources, and 10% promotional content.
- Consistency is key. You can't expect to build a following and see engagement if you aren't posting regularly. Consider using an online tool like Buffer (www.buffer.com) to preschedule content so you don't need to worry about carving time out of your schedule each day.
- Ensure your profile is complete. Make sure you list your firm's address, contact info, hours of operation, website, and areas of expertise. Make it easy for potential clients to know who you are, what you do, and how to get in touch with you.
- Engage! You can't expect to just sit back and let people come to you. Make efforts to follow other local businesses and firms, join industry and special interest groups, comment on posts, share other users' content when relevant, and "like" other users' posts. This will help get you noticed and encourage people to engage with your content in return.
- Make sure your graphics look professional and compelling. The days of Microsoft WordArt are long behind us. If you don't already have a professional graphic designer, you can still fool people into thinking you do. An online design tool like Canva (www.canva.com) allows you to easily create modern, professional-looking graphics with pre-built templates and drag-and-drop tools.
- The internet is your friend. There is a plethora of great online resources to help you with your social media marketing strategy, even ones specific to the legal industry. When in doubt, turn to the internet and you'll be sure to find the help you need.

Law firms have a lot to gain from social media. As lawyers, we largely depend on social interactions to build trust, create dialogue, and generate referrals and leads. Our success relies on long-term relationships with professionals, current clients, and potential leads, and social media is an easily accessible means of expressing leadership, integrity, and expertise.

One key thing to remember when executing your social media strategy is don't expect to see a sudden surge of clients overnight. Building an online following and social media presence takes time and patience. Despite what it may seem, online content actually rarely goes "viral" when you consider the sheer amount of new content added daily. However, consistency and patience will pay off and get your noticed. The most important part is to have fun with it—don't be afraid to show who you are and what makes you and your firm stand out.

Frequently Asked Questions Re Document Destruction and Preservation

Law Practice Management Committee, Subcommittee on Law Practice Continuity

Question: How long does a lawyer or law firm have to keep closed files?

Answer: Lawyers and law firms have to keep different files and documents for different periods of time. For example, the New York Rules of Professional Conduct require lawyers to keep escrow, trust and operating account bank records for seven years. See Rule 1.15(d)(1).

Rule 1.15(d) also requires lawyers to keep for seven years copies of all retainer and compensation agreements with clients, client bills, all "records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed," as well as copies of all retainer and closing statements filed with the Office of Court Administration.

Court Rules in the First and Second Departments require attorneys for plaintiffs and defendants in personal injury actions to preserve virtually the entire file for seven years after the settlement or discontinuance of the action. *See* 22 N.Y.C.R.R. §§ 603.7(f) and 691.20(f).

Lawyers must maintain original client documents such as wills and trusts or return them to the clients for safekeeping. It is advisable to maintain files in most criminal cases indefinitely, as the need for such files can arise decades later. The same can be said for files in transactional matters and other areas of practice. In contrast, most litigation files need not be maintained for more than three years after the litigation is concluded or the representation of the client terminated, whichever is later (except for personal injury files in the First and Second Departments, which must be kept for seven years). The best practice is to adopt and adhere to a document retention policy and to advise clients of the policy.

Question: What bank records are covered by Rule 1.15(d)?

Answer: A lawyer or law firm should keep all monthly statements, cancelled checks, deposit slips, checkbooks, check stubs, ledgers and reconciliation statements for all special, trust, IOLA and escrow accounts, as well as for all operating accounts. As a precaution, a lawyer or law firm should maintain such records for any other fiduciary account the lawyer or firm maintains. These records may be kept in paper or electronic formats. *See* NYSBA Ethics Opinion 940 (2012) (examining use of electronic tape back-up systems, cloud storage systems and legal obligations of attorneys to preserve certain documents in original form). *See also* NYC Bar Formal Op. 2008-1 (re a lawyer's obligation to retain electronic documents).

Question: What records do I have to keep for conflicts checking purposes?

Answer: The Rules of Professional Conduct require law firms to maintain a "conflicts check system" and "written records of its engagements." See Rule 1.10(e). Rule 1.10(e) identifies four situations in which lawyers must check for conflicts: (1) the firm agrees to represent a new client; (2) the firm agrees to represent an existing client in a new matter; (3) the firm hires or associates with another lawyer; or (4) an additional party is named or appears in a pending matter. Lawyers and law firms should keep enough information about client matters (open and closed) to determine, for example, whether they can represent a new client against a former client or concurrent clients with "differing interests." Lawyers considering a new representation need to be able to determine whether it is "substantially related" to a prior representation. It is advisable to keep the firm's client database (whether that is maintained on index cards or electronically) up to date, with complete information about client identity (including related entities) and the nature of the matter for which the lawyer or law firm was retained. These records must be maintained for as long as the lawyer is in practice or the law firm (or its successors) in business. After all, conflicts may follow lawyers from firm to firm and there is no fixed period for maintaining the information. Thus, a prudent lawyer should maintain it for as long as necessary, namely, as long as the lawyer is in practice. For guidance on former client conflicts, see Rule 1.9.

This originally appeared as Appendix 17 in the NYSBA *Planning Ahead Guide: How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death*. To access the full guide, visit www.nysba.org/PlanningAhead2016.

Question: Can a lawyer simply have a document destruction policy and get rid of all closed files after six months?

Answer: The answer is probably not. Six months sounds like much too short a time frame. The statute of limitations for legal malpractice actions is three years and it can be tolled by continuing representation of a client, even on unrelated matters. There is no statute of limitations for disciplinary complaints, which can be filed many years after a case is over. Except when otherwise required by rule or statute, it is wise to keep most client files for at least six years. There are additional considerations. Lawyers should not destroy documents that may be necessary for the representation of a client in the future or documents that have not been given to the client, but which the client could "reasonably expect that the lawyer will preserve." Attorneys are obliged to preserve electronic documents and email in many situations and certainly should not destroy client files before notifying the client. In *Sage Realty Corp., et al. v. Proskauer Rose Goetz & Mendelsohn, LLP*, 91 N.Y.2d 30, 666 N.Y.S.2d 985 (1997), the Court of Appeals held that the client was entitled to the entire file, except for internal law firm documents. Law firms should give clients an opportunity to pick up their files before destroying them. Helpful guidance can be found in NYSBA Opinion 623 (1991) and NYSBA Opinion 460 (1977). *See also* NYSBA Opinion 766 (2003) ("Former client and/or successor counsel is presumptively entitled to access all attorney files"); NYCBAR 2010-1 (attorneys may put provision in engagement letter specifying handling of client's file at conclusion of matter, but "attorney must take reasonable steps to preserve all documents that she has an obligation to retain or return to the client").

Question: What about old original wills? Can those just be thrown out on the reasonable assumption that they are no longer needed because the clients have died or found new counsel?

Answer: No, if a lawyer or law firm has retained original wills, they must be preserved or returned to the testators for safekeeping. Lawyers who retain original wills should make arrangements for someone else to safeguard them after they retire or cease practicing. Of course, it is impossible to return old wills to persons known or presumed to be deceased. Consider filing the wills in the local Surrogate's court. Note there is a filing fee of $45, though the court may reduce or dispense with the fee. Get informed about common practices in your region. Some County Bar Associations offer will registries which may be useful. Another law office may be willing to retain the wills of a deceased or retired attorney. Like wills, certain contracts, property deeds, trust instruments and other documents that a client might need to establish "substantial personal or property rights," or other original documents like birth and marriage certificates and passports, must be returned to the client or safeguarded by the lawyer. Failure to do so can result in professional discipline for failure to safeguard a client's property or damages for breach of fiduciary duty. (*See* Rule 1.15(c); NYSBA Opinion 940 (2012) (examining use of electronic tape back-up systems, cloud storage systems and legal obligations of attorneys to preserve certain documents in original form); NYCBAR Formal Opinion 2010-1 (examining lawyer's obligation to retain client files).

Question: Is there anything else that a lawyer or law firm should consider in designing a document retention program or policy?

Answer: Yes. First, no documents or files should be discarded if they might be necessary to the firm's defense of its own conduct or its handling of a matter. A firm should be particularly careful not to destroy documents that show that the firm committed malpractice or violated the ethics rules. Second, it is very important that client confidentiality be preserved during any document or file destruction. Shredding is advisable, since anything else may lead to disclosure of client confidences or secrets and liability for the firm. Similar caution should be used when computer equipment is replaced. No computer should be disposed of before the hard drive has been carefully erased, scrubbed or shredded, which can be accomplished simply by using available software programs. Just deleting files and documents won't do, since a person with sufficient computer expertise can retrieve most of those files and documents with a "restore" function. Expert advice is strongly recommended.

Powers of Attorney

By Richard Weinblatt

I. Overview

A. Statutory Short Form Power of Attorney and Statutory Gift Rider

1. The Statutory Short Form Power of Attorney ("power of attorney") is an essential part of the estate plan.

2. Combined with a Statutory Gift Rider ("SGR"), it can help to avoid a costly guardianship proceeding, facilitate the receipt of government benefits such as Medicaid and minimize or eliminate gift and estate taxes.

3. Despite all of its benefits, however, a power of attorney combined with a SGR may also facilitate elder abuse.

B. A Durable Power of Attorney Permits Planning to Be Effectuated Even After Incapacity

1. A power of attorney is an agency relationship.

2. In a typical agency relationship, the power of the agent terminates upon the incapacity of the principal. In elder law and special needs planning; however, the incapacity of the principal is when the need for an agent becomes most important.

3. The statutory default is that the power of attorney is durable. This means that the incapacity of the principal does not revoke or terminate the power of the agent. GOL § 5-1501A.

   a. This statutory default may be modified by expressly providing that the power of attorney is terminated by the incapacity of the principal.

C. Proper Planning Must Be Done Before a Person Becomes Incapacitated

1. Once a person becomes incapacitated, it is too late to execute, amend, revoke or modify a power of attorney. GOL § 5-1501(B) (1)(b).

   a. The statute defines capacity as the ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in the power of attorney, or the authority of any person to act as agent under a power of attorney. GOL § 5-1501(2).

2. To properly advise and assist a client, the elder law and special needs attorney must understand the statutory requirements in order for a power of attorney to be valid, the practical difficulties encountered with acceptance of the power of attorney and anticipate and provide for contingencies.

II. THE CURRENT POWER OF ATTORNEY STATUTE

A. Powers of Attorney Are Governed by the Article 5, Title 15 of the General Obligations Law

1. This statute was significantly changed in September 2009 and amended in September 2010.

2. One of the most significant changes was the addition of the SGR.

   a. Prior to September 1, 2009, the statutory short form power of attorney included a power that could be authorized by the principal granting the agent the ability to make gifts to any person in an amount not to exceed $10,000 per calendar year. The $10,000 limit was the amount of the gift tax annual exclusion at the time the statute was enacted. This amount was routinely increased by elder law and special needs attorneys to facilitate planning for government benefits.

3. The current statute limits an agents gift giving power to a total of $500 per calendar year. GOL § 5-1502I (14).

4. Gifts in excess of $500 per calendar year require the principal to supplement the power of attorney form with a SGR and to initial the power of attorney form indicating that a SGR is attached.

5. Another significant change is the requirement that the agent sign the power of attorney.

6. Although the current statute still uses the term "Short Form" after the changes to the statute that were made in September 2009, the power of attorney form has become a lengthy and complicated document.

This material was prepared by **Richard A. Weinblatt** in connection with the Senior Lawyers Section Fall 2016 CLE program, The Nine Essential Planning Documents Every Senior Lawyer Should Know and Understand. Mr. Weinblatt is a partner in the law firm of Haley, Weinblatt & Calcagni, LLP, located in Islandia, New York, where he practices primarily in the areas of Elder Law and Trusts and Estates. He is a Past Chair of the New York State Bar Association's Elder Law and Special Needs Section, past President of the Estate Planning Council of Long Island, Suffolk Chapter, and a former Co-Chair of the Suffolk County Bar Association's Elder Law, Surrogate's Court, and Tax Committees.

a. The reference to"Short Form" means that the powers that are granted are enumerated on the form by letter with a short description of the power. A full description of the power is found in the construction sections of General Obligations Law § 5-1502.

B. Validity of the Power of Attorney GOL § 5-1501B

1. To be valid, a power of attorney must:

a. Be typed or printed using letters no less than 12 point in size.

b. Be signed and dated by a principal with capacity. The principal's signature must be acknowledged.

c. Be signed and dated by the agent. The agent's signature must be acknowledged.

(1) The validity of the power of attorney is not affected by a lapse of time between the date that the principal signs the power of attorney and the date that the agent signs it or because the principal becomes incapacitated during such lapse of time.

(2) Despite the requirement that the agent date the document, the form does not provide a space for the date.

(3) The date on which the agent's signature is acknowledged is the effective date of the power of attorney for that agent.

(4) The form can be modified to provide that it takes effect upon the occurrence of a date or a contingency. Thus, it can be modified to be a "springing power of attorney."

d. Contain the exact wording of the "Caution to the Principal" and the "Important Information for the Agent"

(1) A mistake in wording, such as in spelling, punctuation or formatting, or the use of bold or italic type, shall not prevent the power of attorney from being deemed a statutory short form power of attorney. GOL § 5-1501(o).

(2) This exact wording requirement is troublesome since an inadvertent mistake that is not covered by the exception above may leave the client without a valid power of attorney and the attorney with a malpractice claim.

C. Modifications of the Power of Attorney and the SGR Are Permitted GOL § 5-1503

1. The power of attorney form and the SGR may both be modified to eliminate powers enumerated in the constructional sections, supplement such powers and specifically list additional powers of the agent.

2. The power of attorney and the SGR may also be modified to make additional provisions that are not inconsistent with the other provisions of the power of attorney or SGR, including a provision revoking one or more powers of attorney previously executed by the principal.

3. The power of attorney may not be modified to grant any authority provided in a SGR. Thus, the power to make gifts can only be granted in a SGR.

a. This provision creates confusion. It may not always be easy to determine whether or not a power grants the authority to make a gift. If a power is granted in the power of attorney that is later determined to be the power to make a gift, such power will be void. Accordingly, if there is any doubt, the power should be included in the SGR.

D. Acceptance of the Power of Attorney GOL § 5-1504

1. The statute provides that no third-party doing business in this state shall refuse, without reasonable cause, to honor a power of attorney, including a power of attorney which is supplemented by a SGR.

2. The statute lists examples of what constitutes reasonable cause for refusal. The examples include the following:

a. The refusal by the agent to provide an original power of attorney or a copy certified by an attorney.

b. Actual knowledge of a report having been made to the local Adult Protective Services.

c. Actual knowledge or reasonable basis for believing that the principal has died, the power of attorney was executed at a time when the principal was incapacitated or that the power of attorney was procured through fraud, duress or undue influence.

d. Actual knowledge of the termination or revocation of the power of attorney.

3. The statute expressly states that it shall be deemed unreasonable for a third-party to refuse to honor the power of attorney, including a power of attorney which is supplemented by a SGR, for the following reasons:

a. The power of attorney is not on the form prescribed by the third-party. There has been a

lapse of time since the execution of the power of attorney. There is a lapse of time between the date of acknowledgment of the signature of the principal and the date of acknowledgment of the signature of an agent.

b. Despite this provision, it is not unusual for a financial institution to reject the power of attorney on the basis that it is not on their form or that it is too old.

4. If a third party unreasonably refuses to honor the power of attorney or a power of attorney which is supplemented by a SGR, the sole remedy is the commencement of a special proceeding pursuant to GOL § 5-1510.

a. This remedy, however, is not helpful since the only relief that can be granted under GOL § 5-1510 is an order compelling acceptance of the power of attorney. Unlike a lot of states, attorneys fees and costs cannot be awarded by the court.

E. Compensation GOL § 5-1506

1. The statute provides that an agent is not entitled to receive compensation from the assets of the principal but shall be entitled to receive reimbursement for reasonable expenses actually incurred in connection with the performance of the agent's responsibilities.

2. The issue of compensation should be discussed with the client. An independent agent may be reluctant to serve without compensation. On the other hand, permitting a family member to receive compensation may result in family disharmony.

F. Co-agents and Successor Agents GOL § 5-1508

1. The statute permits the principal to designate two or more persons to act as co-agents. Unless provided otherwise in the power of attorney, the co-agents must act jointly.

a. Some financial institutions refuse to open accounts that require two signatures. This can create a problem where agents are required to act jointly.

2. The statute permits the principal to designate one or more successor agents to serve if the initial or predecessor agent resigns, dies, becomes incapacitated, is not qualified to serve for declines to serve.

a. The principal may provide for specific succession rules.

G. Appointment of a Monitor GOL § 5-1509

1. The statute permits the principal to appoint a "Monitor". A Monitor is a person who has the authority to request, receive, and seek to compel the agent to provide a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal.

a. The appointment of a Monitor is rarely used. If the principal does not completely trust the agent, the appointment of that person as agent should not be made.

H. Special Proceedings GOL § 5-1510

1. A special proceeding may be commenced against an agent for failure to provide information to a person entitled to receive such information. The persons entitled to receive information from the agent include the monitor, co-agents, successor agents, court evaluator, guardian ad litem and the personal representative of the principal's estate.

2. A special proceeding may also be commenced for the following purposes:

a. To determine whether the power of attorney is valid;

b. To determine whether the principal had capacity at the time the power of attorney was executed;

c. To determine whether the power of attorney was procured through duress, fraud or undue influence;

d. To determine whether the agent is entitled to receive compensation or whether the compensation received by the agent is reasonable for the responsibilities performed;

e. To approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal;

f. To remove the agent upon the grounds of the agent has violated, or is unfit, unable or unwilling to perform, the fiduciary duties under the power of attorney;

g. To determine how multiple agents must act;

h. To construe any provision of the power of attorney;

i. To compel acceptance of the power of attorney, in which event the relief to be granted is limited to an order compelling acceptance.

I. Powers of Attorney Executed in Other Jurisdictions GOL § 5-1512

1. A power of attorney executed in another state or jurisdiction in compliance with the law of that state or jurisdiction or the law of this state is valid

in this state. This is true even if the principal is a resident of this state.

2. A power of attorney that complies with the law of this state that is executed in another state or jurisdiction by a domiciliary of this state is valid in this state.

3. A power of attorney executed in this state by a domiciliary of another state or jurisdiction in compliance with the law of that state or jurisdiction or the law of this state is valid in this state.

J. Execution of the SGR GOL § 5-1514(9) (b)

1. The SGR must be signed and dated by a principal with capacity, with the signature acknowledged in the manner prescribed for acknowledgment of a conveyance of real property.

2. The SGR must also be witnessed by two persons who are not named as permissible recipients of gifts. The person taking the acknowledgment may also serve as one of the witnesses.

3. The SGR must be executed simultaneously with the power of attorney.

III. MODIFYING THE POWER OF ATTORNEY AND THE SGR FOR CONTINGENCIES

A. Modifications to the Power of Attorney

1. The power of attorney form may be modified to eliminate one or more of the powers enumerated in one or more of the constructional sections and to add powers.

2. In practice, many of the modifications to the power of attorney grant powers that are already enumerated in the constructional sections of the General Obligations Law. This causes no harm, and may facilitate acceptance of the power of attorney since otherwise the third-party being asked to accept the power of attorney may have to research the General Obligations Law to verify that such power is included in the statute.

3. The power of attorney cannot be modified to grant the agent authority to make gifts or changes to interests in the principal's property. That authority can only be granted in a SGR.

4. The statute does not contain examples of powers that may be added.

B. Modifications to the SGR GOL § 5-1514

1. The authority to make gifts and to change interests in the principal's property must be granted in the SGR.

2. The statute gives examples of powers that may be granted. GOL § 5-1514(3).

3. The agent cannot make gifts to himself or herself unless such authority is expressly granted in the SGR.

C. Avoiding the Appointment of a Guardian

1. A properly executed power of attorney may avoid the necessity for the appointment of a property management guardian.

2. Together with a health care proxy, a properly executed power of attorney may avoid the necessity of the appointment of both a property management guardian and a personal needs guardian.

3. Consider modifying the power of attorney to include a provision nominating a person to serve as guardian. In the event of the guardianship proceeding, such nomination should be respected. Mental Hygiene Law§ 81.17 and 81.19.

D. Medicaid Planning

1. Both the power of attorney and the SGR require modifications in order to grant the agent the powers necessary to plan for and obtain Medicaid benefits.

2. Although it is impossible to list all of the possible powers that may be required, the following are some examples of powers that should be considered as modifications to a power of attorney and/or a SGR (if the power relates to a gift or change to interests in property) in order to enable the agent to engage in Medicaid planning:

   a. To make gifts, in any amount.

   b. To transfer the ownership of insurance contracts and annuity contracts and to designate and/or change the beneficiaries of any existing contracts.

   c. To create, fund, revoke and amend trusts.

   d. To join and contribute funds to a pooled community trust.

   e. To exercise any or all powers of appointment reserved by the principal or granted to the principal in any trust or deed.

   f. To make statutory elections and renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent with section 2- 1.11 of the New York Estates, Powers and Trusts Law.

   g. To create, change or terminate other property interests that the principal has.

   h. To modify or terminate any account in the name of the principal and /or other joint tenants.

i. To modify or terminate any bank account in trust form as described in EPTL § 7-5.1, and designate or change the beneficiary or beneficiaries of such accounts.

j. To transfer title to any automobile or other motor vehicle.

k. To act on the principal's behalf with regard to any IRA, retirement plan, insurance policy and/ or trust of which the principal may be a participant or trustee, including the power to make or change beneficiary designations and the power to make distribution elections.

l. To forgive debts owed to the principal.

m. To terminate or assign a life estate interest in property.

n. To purchase a life estate interest in property.

o. To waive any and all benefits, and/or elect out of survivor annuity payments under Section 417 of the Internal Revenue Code and the regulations promulgated thereunder.

p. To make, join, and consent to gifts made by the principal's spouse.

q. To exercise a spousal refusal.

r. To make any of the gifts or other transfers authorized under the power of attorney in cash or in-kind, outright, to an existing trust or a trust established or created by the agent for the benefit of the gift recipient, to a Uniform Transfers to Minors Act account for such beneficiary, or to an Internal Revenue Code § 529 plan.

s. To loan or borrow money on such terms and with such security as the agent may decide in his or her sole discretion and to execute all notes, mortgages and other instruments relating to such loans.

t. To open and remove the contents of any safe deposit box.

u. To represent the principal in all matters before the Social Security Administration, any state Medicaid agency, or any other governmental agency in charge of benefits and entitlement programs, including, but not limited to, the power to make applications for benefits, and appeal the denial, reduction, or discontinuation of benefits.

v. Wave the principal's right of election pursuant to EPTL 5-1.1A and the right to receive exempt property pursuant to EPTL 5-3.1.

IV. ACCEPTANCE OF THE POWER OF ATTORNEY

A. Overview

1. Despite the statute's mandate that is unlawful for a third-party to refuse to accept a properly executed power of attorney, the fact that there are no financial penalties to the third-party who unreasonably refuses to accept the power of attorney allows financial institutions to routinely refuse acceptance.

2. Consider advising clients that they should obtain a power of attorney form from every financial institution that they deal with and use the financial institution's form in addition to the statutory form. Although frustrating, this may be the path of least resistance.

3. In addition, some government agencies may not accept the power of attorney form and others may have their own requirements before a power of attorney form will be accepted.

B. Internal Revenue Service

1. Internal Revenue Service form number 2848 is the official Internal Revenue Service power of attorney form.

2. The Internal Revenue Service will accept a non-IRS power of attorney, but a completed Form 2848 must be attached.

   a. If the non-IRS power of attorney does not contain all of the information required by the Internal Revenue Service but does grant the agent authority to handle federal tax matters, the agent may perfect the non-IRS power of attorney by attaching a statement that the non-IRS power of attorney is valid under the laws of the governing jurisdiction.

   b. Instructions on how to use a non-IRS power of attorney are contained in Internal Revenue Service Publication No. 947.

C. Social Security Benefits

1. Social Security does not recognize a power of attorney.

2. In order to negotiate a manager beneficiary Social Security and/or SSI benefits, your agent must be appointed by Social Security as a representative payee.

D. Veterans Administration

1. The Veterans Administration does not recognize powers of attorney created under state law.

2. In order for a person to become an agent to handle Veterans Affairs, such person must be appointed by the Veterans Administration.

V. POWERS OF ATTORNEY MAY BE A SOURCE OF ELDER ABUSE

A. Matter of Ferrara, 7 N.Y.3d 244

1. Matter of Ferrara, illustrates how a power to make gifts granted in a power of attorney may be misused by an agent. This case involved a power of attorney executed on January 25, 2000. It is the egregious facts of this case that led to the September 1, 2009 amendment to the power of attorney statute requiring that a separate gift rider be attached to the power of attorney form and that such gift rider be acknowledged and witnessed by two persons other than a person who may benefit under the power of attorney.

2. A summary of the facts of this case is worthy of review in this outline.

   a. On June 10, 1999, George Ferrara, a retired stockbroker residing in Florida, executed a will leaving his entire estate to the Salvation Army. On August 16, 1999, George executed a codicil appointing the attorney draftsman of his will as executor.

   b. In December 1999, George was hospitalized.

   c. On January 15, 2000, Dominick Ferrara, George's nephew, accompanied George from Florida to New York.

   d. On January 25, 2000, George signed a power of attorney appointing Dominick and Dominick's father (George's brother) as agents and initialed the form to allow them to act separately. The January 25, 2000 power of attorney authorized the agents to make gifts in unlimited amounts to themselves. The power of attorney was notarized by a friend of Dominick's.

   e. Dominick use the power of attorney to transfer $820,000 of George's assets to himself.

   f. George died on February 12, 2000.

   g. The Salvation Army found out about George's death after a doctor in Florida, learning of George's death, contacted the attorney draftsman of George's will to inquire about an unpaid medical bill.

   h. The Court of Appeals held that Dominick was only authorized to make gifts to himself insofar as these gifts were in George's best interest.

   i. The Court stated that "[T]he term 'best interest' does not include such unqualified generosity to the holder of a power of attorney, especially where the gift virtually impoverishes a donor whose estate plan, shown by a recent will, contradicts any desire to benefit the recipient of the gift."

B. Be Alert for Elder Abuse

1. In planning for eligibility for government benefits, we often prepare powers of attorney supplemented by a SGR.

2. Although we are motivated by our desire to provide services that will assist our clients in meeting their objectives, we cannot overlook the fact that the documents we prepare may be misused and result in harm rather than help to our clients.

3. Before we prepare documents, we should thoroughly discuss with our clients not only their goals and objectives but also the composition of the family and any possible conflicts of interests within the family.

4. It is important that we meet and have these discussions with our clients alone without the influence of other family members. We must pay special attention to situations where our client is not providing equally for children, where there is a radical change from the prior plan, or where it is the children who are expressing the wishes of the parents. In all of these situations, our antennas should be up.

C. Consider Joint Agents for the Purpose of Making Gifts

1. Especially in situations where the client has more than one child, consider requiring all of the children to consent to any gifts made by the agent. If this is not practical, consider having at least one other child consent to any gift made by the agent.

Which Clients Can Benefit from ABLE Accounts?

By Keri Mahoney

What Is the ABLE Act?

The Achieving a Better Life Experience Act of 2014 ("ABLE Act') is a federal bill that was signed into law on December 9, 2014 as part of the Tax Extenders Package.[1] The law is codified as part of the Internal Revenue Code and allows disabled children and young adults to create a special type of tax-exempt savings account that is akin to the 529 savings plans used for educational purposes.[2] Ostensibly, the law provides important tax benefits savings accounts for children and young adults with disabilities.[3]

However, in addition to the tax benefits associated with the new ABLE accounts, such accounts can also be used in order to allow persons with disabilities to preserve assets without losing access to government benefits and entitlements such as SSI and Medicaid.[4] In fact, the stated purpose of the ABLE Act is to "encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence and quality of life," and "[t]o provide secure funding for disability related expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, the Medicaid program…the supplemental security income program…the beneficiary's employment, and other sources."[5] Thus, these accounts bear many similarities to supplemental needs trusts, and will likely become an important part of planning for children and young adults with disabilities.

When Will ABLE Accounts Be Available in New York?

Although Federal Legislation creates the ABLE accounts, each state must adopt the program (or contract with another state that has adopted the program) in order to allow the state's residents to take advantage of these accounts.[6] In New York, a bill to enact the ABLE Act was introduced on March 23, 2015 and was recently signed into law by Governor Cuomo.[7]

What Are the Differences Between an ABLE Account and a Supplemental Needs Trust?

ABLE accounts and supplemental needs trusts are both viable planning tools for children and young adults with special needs who need a mechanism to save money without jeopardizing means-tested government entitlements. For attorneys practicing in planning for individuals with special needs, it is important to understand the finer distinctions between an ABLE accounts and a supplemental needs trust in order to determine which tool is best suited for any given client. Following is a table outlining some of the distinctions between the two devices.

	ABLE Account	**First-Party Supplemental Needs Trust**	**Third-Party Supplemental Needs Trust**
Main Governing Statute	26 U.S.C. §529A (federal statute, state statute pending).	N.Y. EPTL 7-1.12 and 42 U.S.C. § 1396p.	
Payback Provision	Yes. State named as creditor (rather than beneficiary) of account and entitled to repayment to the extent of total amount paid for medical assistance for the beneficiary and amount of insurance premiums paid by Medicaid.[8]	Yes (to the state if individual trust, to state and/or non-profit agency administering trust if pooled trust).[9]	No.
Beneficiary Eligibility	Individual entitled to Social Security Benefits based on blindness or disability that started before age 26.[10]	**Individual Trust**: Under age 65 and disabled (as defined by Social Security Administration).[11] **Pooled Trust:** Disabled.[12]	Disabled.
Grantor/Settlor	Any person.	**Individual Trust**: Parent, grandparent, or legal guardian of disabled beneficiary, or a court.[13] **Pooled Trust:** Same as individual trust, but in addition, may also be established by the disabled beneficiary.[14]	Any person other than beneficiary, the beneficiary's spouse, or a person with a legal obligation to support the disabled beneficiary.

Countable Resource?	**SSI Eligibility:** $100,000 must be disregarded (but each state may allow for higher disregard).[15] **Medicaid Eligibility**: No suspension of Medicaid for excessive balance.[16]	Disregarded.
Maximum Contribution	Cannot contribute more than the annual gift tax exclusion (currently $14,000) annually.[17]	No limit.
Tax on Trust/ Account Income	Exempt.[18]	Grantor pays tax on trust income.
Treatment of Distributions	**Taxation**: Distributions for items other than qualified disability expenses (education, employment, housing, education, health care, and many other items) are included in gross income and are taxable.[19] **Benefit Eligibility**: Generally, distributions for qualified expenses are disregarded; however, distributions for housing may reduce SSI.[20]	**Taxation**: N/A—no distributions directly to beneficiary. **Benefit Eligibility**: Trustee should not make distributions which would impair government benefits, unless the trustee determines it is in the beneficiary's best interest to do so. In that event, distributions for food, shelter, or health care may have adverse effect on government benefit eligibility.[21]
Limit on Number of Accounts	1 per beneficiary.[22]	None.
Other Restrictions	Funds must be cash.[23] Beneficiary can only direct investment of contributions twice annually.[24] May not use ABLE Account as security for loan.[25]	Controlled by trustee who cannot distribute assets in any manner which will "supplant, impair or diminish government benefits or assistance."[26]

Overall Conclusions

ABLE accounts are another tool for practitioners to consider when helping to plan for the financial security of a disabled child or young adult. The table above highlights some of the important differences between such accounts and supplemental needs trusts. The decision of which tool to use will likely vary depending on the preferences of the disabled person and his or her family.

At the outset, the most important distinction is that ABLE accounts are not available to person(s) who were not deemed disabled before the age of 26. Thus, as part of the initial screening, it is important to determine the age at which the beneficiary became disabled. If the person was certified as disabled after the age of 26, an ABLE account is not an option.

Assuming a client is eligible for an ABLE account, the preferences of the disabled individual and the specific circumstances of that client will guide the decision as to whether to use an ABLE account, a supplemental needs trust, or both. If the client is capable of managing his own funds and prefers to maintain control, then an ABLE account might be preferable because the funds are not managed by a trustee. If the client desires to pay out of pocket for some medical expenses while maintaining eligibility for Medicaid, an ABLE account might be preferable because it may allow this flexibility. If the facts lend themselves to creation of a third-party supplemental needs trust, then the ability to avoid Medicaid payback provision through the use of a third-party supplemental needs trust might weigh against using an ABLE account. For a client of low or modest means, the tax benefits of the ABLE account might prove to be important. Additionally, clients may benefit from having both an ABLE account and a supplemental needs trust, particularly if the client wants an ABLE account, but has income in excess of

the maximum amount which can be contributed to an ABLE account in any given year.

Endnotes

1. National Down Syndrome Society, http://www.ndss.org/Advocacy/Legislative-Agenda/Creating-an-Economic-Future-for-Individuals-with-Down-Syndrome/Achieving-a-Better-of-Life-Experience-ABLE-Act/ (last visited May 13, 2015).
2. *See* 26 U.S.C. § 529 (tax exempt savings for education) *and* 26 U.S.C. § 529A (tax exempt savings for disabled persons).
3. *See* 26 U.S.C. § 529A(a) ("A qualified ABLE program shall be exempt from taxation under this subtitle.").
4. ABLE Act of 2014, H.R. 647, 113th Cong. (2014) (enacted).
5. *Id.* at § 101.
6. Ann Carrns, *Law Creates Special Savings Accounts for Disabled People*, N.Y. Times, Jan. 30, 2015, http://www.nytimes.com/2015/01/28/business/special-savings-accounts-for-disabled-people.html?_&_r=0.
7. *See* S. 04472A, 2015-2016 Reg. Sess. (N.Y. 2015). Kathy Reakes, *Carlucci Hails Signing of ABLE Act into Law*, Clarkstown Daily Voice, Jan. 5, 2016, http://clarkstown.dailyvoice.com/news/carlucci-hails-signing-of-able-act-into-law/614071/.
8. 26 U.S.C. § 529A(f).
9. 42 U.S.C. § 1396p(d)(4)(A)(ii) and (C)(iv).
10. 26 U.S.C. § 529A(e)(1).
11. 42 U.S.C. § 1396p(d)(4)(A).
12. 42 U.S.C. § 1396p(d)(4)(C).
13. 42 U.S.C. § 1396p(d)(4)(A).
14. 42 U.S.C. § 1396p(d)(4)(C).
15. ABLE Act of 2014, H.R. 647 § 103, 113th Cong. (2014) (Enacted); s*ee also House Passes H.R. 647, Achieving a Better Life Experience Act of 2014 (ABLE Act), Social Securit*y (Dec. 5, 2014), http://www.ssa.gov/legislation/legis_bulletin_120514.html [hereinafter *House Passes H.R. 647].*
16. *Id.*
17. 26 U.S.C. § 529A(b)(2).
18. *Id.* at § 529A(a).
19. 26 U.S.C. § 529a (c)(1) and (e)(5).
20. *House Passes H.R. 647*, *sup*ra note 15.
21. N.Y. Est. Powers & Trusts Law 7-1.12(a)(5)(ii).
22. 26 U.S.C. § 529A(b)(1)(B).
23. *Id.* at 529A(b)(2).
24. *Id.* at 529A(b)(4).
25. *Id.* at 529A(b)(5).
26. N.Y. Est. Powers & Trusts Law 7-1.12(a)(5)(ii).

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This article originally appeared in the Winter 2016 issue of the Elder and Special Needs Law Journal*, a publication of the Elder Law and Special Needs Section.*

Cybersecurity: An Advisory Opportunity for the Legal Profession

By Scott Corzine

Summary

As operational risk advisors, we caution our clients to plan, fund, and prepare for information security incidents as if they were inevitable. We recommend that clients develop an internal culture of awareness and preparedness through planning, education, and exercises in order to reduce preventable incidents from occurring.

In our experience, many organizations do not have the cybersecurity skills, investment, infrastructure, or capacity to deter even a modestly sophisticated intrusion, and especially not a significant breach. Consequently, we advise clients to:

- Consider augmenting their normal IT security spending (an average of 3.8% of the typical IT budget) to fund independent security assessments as a digital "second opinion,"
- Develop and exercise cyber incident response plans (CIRP), and
- Retain or arrange stand-by agreements with outside cyber forensic investigators and crisis communications experts, within the parameters established by their cyber insurance carriers.

But perhaps the most important step clients can take is to review their entire information security and privacy policy and upgrade it to be comprehensive, compliant, measurable, and "enforceable." Organizations are limited in what they can do to defend against sophisticated, outside cyber threats. However, good internal policies can dramatically limit the opportunity for breaches that could originate from the carelessness, mistakes, or ignorance of insiders—employees, partners, service providers, and vendors. Insider attacks are on the rise from privileged users, contractors/consultants, temporary workers, and regular employees. Sixty-two percent of organizations polled in the *Insider Threat Spotlight Report* by Crowd Research Partners found that insider attacks are more difficult to detect and prevent than outside attacks, and 53% said they lack or are not sure if they have appropriate controls in place to prevent insider attacks.

Consequently, the return on investment for policy development, awareness, and training of insiders may be as good as or better than the return on constantly escalating investments in prevention and detection software and infrastructure. In its 2014 Cyber Security Intelligence Index, IBM found that human error was involved in 95 percent of all security incidents—from what some have suggested are external attackers who exploit human weakness and lure employees into providing them with sensitive information.

Given the need for the capacity for competent management of response to cyber incidents, we believe that counsel plays an important role in how senior executives and the Risk Management Committee of the Board establish policy and set expectations around cybersecurity.

The "Extra-prise"

The "enterprise" has become considerably transformed by hyper connectivity with the outside world, creating a model far more difficult to digitally defend. Two trends continue to drive this transformation. First, organizations have become porous, by outsourcing operations to partners, affiliates, suppliers and third party service providers in order to control costs and focus on their core strengths by taking advantage of their providers' unique expertise. As organizations connect with these outside parties—and as they install connected devices like "smart building" and HVAC systems, vending machines, and CCTV cameras that are web-enabled or network-enabled—they inadvertently introduce potential cyber-attack vectors that they probably do not control well.

Second, as organizations extend the operational range of employees with mobile devices and laptops, they potentially introduce "1,000 points of risk," quite simply because humans make mistakes. We naturally prefer simplicity and usability to access control complexity, and may not have been adequately trained in the precautions we can take while operating our mobile devices. Because many organizations both permit employees to use their personal mobile devices and to download consumer applications on them, Gartner estimates that greater than 75% of the mobile devices would fail even a basic security test. Veracode reports that the average global enterprise has 2,400 unsafe apps installed in its mobile environment, so the scope of the vulnerability is profound.

This hyper-connectivity with the so-called "Internet of Things" and mobilization of the workforce has turned

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The views expressed herein are those of the author and not necessarily the views of FTI Consulting, Inc., its management, its subsidiaries, its affiliates, or its other professionals. This article was originally published in the Fall/Winter 2015 issue of One on One*, a publication of the General Practice Section.*

the enterprise into what we call the "extra-prise," creating—as an unintentional consequence—many digital access paths into the organization that the IT department simply may be ill-equipped to identify, analyze, or install effective countermeasures. We believe there is now a clear imperative for organizations to better security-align the extraprise with this growing vulnerability created by hyper-connectedness. We think that counsel can play an important role in helping organizations consider any legal implications of these trends as they affect liability, such as becoming involved in how the risk manager negotiates elements of the cyber security insurance policy, or being aware of what kind of representations and warranties are negotiated into contracts with outside vendors and suppliers, so that cybersecurity responsibility between the parties is clear.

Appreciating the Threat

Most of us are treated to a steady litany of cyber incident data. Often these reports are the product of security analysts and research firms, and articulated in a way that may be too technical for the average senior executive or Board member to understand or apply to the circumstances in his or her own companies.

But their message is clear and alarming. It is impossible for the risk manager (or the Chief Information, Information Security, Privacy, Technology, Legal, Compliance, Financial or Executive officers) to guarantee a confident state of cybersecurity in any organization—technically sophisticated or not. The internet, internal systems infrastructure, systems control, and data acquisition (SCADA) systems, as well as the software development process underneath these systems, were almost never optimized for security. Instead, they were optimized for usability, convenience, and cost management. As a result, we ask clients to operate under the assumption that they will be successfully hacked. This is not only because of this embedded security vulnerability, but also because even well-funded IT security budgets may be inadequate to deal with bad actors and nefarious motives, and defenses are always reactions to new types of cyber offenses. Organizations are always playing catch-up, and thus remain vulnerable.

We have come to appreciate that attackers' motives seem creatively endless. Hackers steal and sell personally identifiable information (PII) and personal health information (PHI). Hacktivists punish corporate behavior they do not condone. Competitors engage in industrial espionage to steal trade secrets, and monitor competition. Sovereign states attack their adversaries. Disgruntled employees seek revenge. And common, everyday mistakes that result in cyber risk are made inadvertently by just about everyone.

For organizations that are not the "obvious" targets for theft of PII or PHI (e.g., banks, retailers, credit card companies, government agencies, and health care organizations), we caution that misinterpreting their circumstances should be reconsidered as a justification to underspend in information security. Many breaches have demonstrated motivations as benign-sounding as cyber-intimidation or industrial disruption, where the intent is not economic gain, but to embarrass, create chaos…. or even stop the theatrical release of a film. Perhaps of even greater—and growing—concern is the vulnerability of "closed systems" that monitor and control everything from airport operations and municipal water and sewer systems, to industrial controls, regional power grids, and even FAA or aircraft navigation systems. The potential for catastrophic damage—to a flight, a production line, potable water supply, or electrical power—is obvious. The threat is real and seems to be growing faster than organizations' capacity to counter it.

Good Practices

While escalating technical spending each year on breach prevention and detection solutions is good, we recommend additional actions that organizations should take around breach prevention/mitigation, preparedness, response and recovery. If we agree that information security incidents are essentially inevitable from a technical defense perspective for most organizations facing a determined adversary, and that information security policies are very often incomplete and insufficient, then remixing the cybersecurity budget so that it increasingly includes non-technical elements seems to us appropriate. In addition to technical spending, we recommend that clients and their counsel consider the following additional actions to enhance their cyber-resilience.

Prevention/Mitigation

Engage a third party expert to get an independent opinion of the security of the technical environment and the sufficiency of the organization's information security policies. If the organization responds reasonably to the risk and vulnerability mitigation recommendations that result from the assessment, it begins to build a tangible record of proactive management decision making around cybersecurity that is appropriate to its industry sector, risk factors, and risk appetite. Independent assessments can be a cost effective way to provide some level of credible assurance to top management and the board about vulnerabilities and exposures, as a part of a mature governance, compliance and enterprise risk management framework. Secure IT department leaders should welcome a second opinion. Assessments should map to one or more of the major standards frameworks like COBIT 5, ISO/IEC 27001, NIST, UCF, or CSA, as well as industry-specific regulatory guidance. Counsel can play a role in assuring that the organization understands its statutory or regulatory obligations around information security.

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Top, a group of program attendees look on during the Jonathan Lippman Pro Bono Award ceremony.

Above left, Judge Lippman presents the award to Glenn Pogust.

Above right, Judge Lippman delivers remarks on the importance of pro bono work and introduces the honoree.

At right, NYSBA President Claire P. Gutekunst, Judge Lippman and Section Chair Carole Burns.

At left, Susan B. Lindenauer, past Section chair; Fern Schair, Section Pro Bono Committee Chair; Judge Jonathan Lippman; Charles E. Lapp, III., Section Treasurer, at the Jonathan Lippman Pro Bono Award ceremony.

Below, award recipient Glenn Pogust accepting the award.

Bottom, NYSBA President Claire P. Gutekunst introduces Hon. Jonathan Lippman.

Jonathan Lippman Pro Bono Award

The Senior Lawyers Section presented the first annual Jonathan Lippman Pro Bono Award to Glenn Pogust, Esq., of Arnold & Porter Kaye Scholer LLP during the Section's 2017 Annual Meeting CLE at the Hilton Midtown on Jan. 26, 2017.

Cybersecurity: An Advisory Opportunity for the Legal Profession

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Preparedness

Information privacy and security policies that are determined to be lacking should get a major cross-organizational review. Weak polices should be appropriately upgraded and new policies developed, adopted, implemented, and actively managed. Both assessments and policy reviews should address the domains widely accepted by information security professionals, which include:

- Access Control,
- Telecommunications and Network Security,
- Information Security Governance and Risk Management,
- Software Development Policy,
- Cryptography,
- Security Architecture and Design,
- Operations Security,
- Business Continuity and IT Disaster Recovery Planning,
- Legal, Regulations, Investigation and Compliance, and
- Physical (Environmental) Security.

Policies should establish behavioral thresholds for staff, partners and vendors around items like portable devices, personal use, and strong password management. Information security policies should be made an ongoing part of onboarding, professional development, leadership training, the employee handbook, and enshrined in employment and contractor agreements and in terms of employment.

Compelled exercises that test employees' online awareness of common threats like phishing and social engineering should be regular and unannounced, under the notion that we all get better at what we practice and worse at what we do not. Staff may resist these tests, educational programs and exercises, but these practices raise awareness of the real risks in the use of the shortcuts that many take and in the inadvertently risky cyber behaviors we may engage in. Both the prevention and preparedness elements help establish a defensible record of employee engagement, and the use of professional experts to help the organization align with accepted standards if the organization is legally challenged.

Another recommended preparedness practice is the development of a comprehensive cyber incident response plan (CIRP). While markets, regulators, customers and shareholders may forgive the breach itself, they have become extremely unforgiving of management when an unprepared or bungled incident response to the breach occurs. Poor response points to poor preparation. The best way to prepare for an effective response to a cyber incident is to implement a CIRP that assigns specific roles and responsibilities across the organization; defines and documents response "play books"; describes response protocols based on data classifications in the areas of technical, legal, insurance, crisis communications and forensic response; gains formal Board approval; and is regularly exercised and updated as circumstances and risks evolve. Good CIRPs can be modeled around the widely accepted incident command system (ICS).

Response

While actual responses to cyber incidents often do not perfectly "follow the script" of the CIRP, they demonstrate thoughtful risk management and provide an excellent framework for performing an after-action report (AAR) and building improvements into the plan for the next event. Well-rehearsed and role-played CIRPs increase the likelihood that the organization will execute a more effective response than if the markets view management as "winging it." Plans should be exercised at least annually (more often in the IT shop itself) in a tabletop or functional exercise, differing and complicating the emergency exercise scenario each time. A sober AAR should be performed after each exercise and any actual cyber incidents, as part of a continuous improvement cycle that nudges the organization closer toward maturity in its readiness.

Perhaps most important in cyber response is speed of detection (of behaviors, anomalies or actual breaches), speed and effectiveness of technical response, and well-managed crisis communications. A good response is about doing no additional harm, responding accurately to stakeholders about the facts and impact of the breach (so we "get it right"), and assertively taking control of the narrative. To do that, it is often best to pre-retain an independent forensic response team and crisis communications team with the specific and "battle-tested" skills unlikely to be found in the organization's law firm, PR or IR agency, or in-house IT security team. If a cyber response provider is not named on the organization's cyber insurance policy as a pre-approved vendor of these services,

counsel can help negotiate its inclusion as the policy is written and bound. Once again, using outside third party experts can help create a record of effective management decision making and aid counsel in its work helping the organization respond to legal actions related to the breach.

Recovery

It takes an average of 80 weeks for market value and reputation to recover to their pre-breach level for organizations that are poorly prepared for substantial cyber incidents. We believe that the global pervasiveness of cyber incidents now requires a strong, well-prepared management response and recovery plan (by means of well-constructed and documented BCP and DR plans) as a management imperative. Readiness and vigilance are no longer optional management behaviors.

Sustaining organizational reputation depends on effective response and recovery. Reputation experts tell us that stakeholders and the media blame (or credit) the Chief Executive, Finance, Risk, and Legal officers for either ineffective or effective recovery from a cyber event. We believe that—over time—organizational value is rooted in the level of confidence that the markets and stakeholders have in senior management and the Board. Nowhere is that better illustrated than in management's ability to demonstrate resilience during and after the adversity of a widely reported cyber incident.

Counsel can play a significant advisory role to top management and directors in helping strategically prepare management for effective cyber response, crisis management preparedness, and reputation management. This can include helping clients' compliance with state notification laws and the privacy laws to which their data is subject; opening up an early and constructive dialogue with regulators and law enforcement, including state Attorneys General, the FTC, Secret Service, and FBI; appropriate disclosures to investors and other stakeholders (especially where a public company is concerned); assessing whether third-party data belonging to foreign residents or companies was exposed (implicating foreign privacy claims); working with forensic experts to determine the type and scope of data disclosed, and whether it was encrypted; providing notice to all potentially applicable liability, crime, property and cyber specialty insurance policies; and preparing for potential litigation (whether class actions, individual claims, regulatory proceedings, or card brand/banking litigation).

It should also be noted that cyber security, as a major component of operational risk management, is an important requirement embedded in the regulations of regimes globally that affect critical industry sectors, e.g., insurance, financial services, health care, and critical infrastructure. In its advisory role, counsel is in a position to help clients interpret and comply with these regulations by applying the recommendations discussed in this article.

Watch Your Step: Avoiding Employment Law Pitfalls and Preparing for the Road Ahead

By Gena B. Usenheimer and Samuel Sverdlov

I. INTRODUCTION

There is a common misconception that by virtue of their higher education, skilled professionals are infallible in their own field. However, as experience and common sense dictate, physicians can get sick, financiers can lose money, and attorneys can be sued.

In fact, attorneys are uniquely situated to get a taste of their own medicine, *i.e.*, a lawsuit. Attorneys often employ other attorneys and legal professionals who can readily leverage their professional experience against their current or former employers. Further, attorneys who are either solo practitioners or who work in small law firms often lack the benefit of a robust human resource department to ensure they are in compliance with relevant laws, including the wide-ranging scope and ever present nature of employment laws.

In this article, we discuss some of the most relevant federal and New York State laws governing payment of wages in the employee/employer context, and highlight key changes.

II. INCREASED NEW YORK STATE MINIMUM WAGE REQUIREMENTS

Effective December 31, 2016, New York State increased the hourly minimum wage rates in a tiered structure, based on where the employee works, as follows:[1]

III. OVERTIME OBLIGATIONS - FEDERAL AND STATE LAW

a. Statutory Framework

Two primary laws regulate wage and hour concerns of employers in New York.

The federal Fair Labor Standards Act ("FLSA") applies to any employer that does or makes more than $500,000.00 in sales or business in a calendar year. Even if a business enterprise is small and is not covered by the FLSA by virtue of its annual sales or business volume, individual employees may still be covered by the FLSA if those employees are engaged in "interstate commerce."[2]

The term "interstate commerce," however, is a broad term—one that has been interpreted to encompass such activities as: (i) touching, handling, or guarding materials that have been shipped or received from another state;[3] (ii) communicating via telephone or email with individuals located in another state;[4] (iii) sending or receiving out-of-state letters, bills, contracts, etc.[5]; or (iv) using credit card machines to process payments.[6]

In addition to the FLSA, the New York State Labor Law ("NYLL") applies to business entities doing business in New York with one or more employees.[7]

Minimum Wage Rate Schedule

Location	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	12/31/21
NYC Large Employers (11 or more employees)	$11.00	$13.00	$15.00	$15.00	$15.00	$15.00
NYC Small Employers (10 or fewer employees)	$10.50	$12.00	$13.50	$15.00	$15.00	$15.00
Long Island & Westchester	$10.00	$11.00	$12.00	$13.00	$14.00	$15.00
Remainder of State	$9.70	$10.40	$11.10	$11.80	$12.50	TBD

As both the NYLL and FLSA are independently enforceable and impose varying obligations, employers in New York State must abide by a patchwork of often confusing and overlapping obligations.

b. Overtime Obligations

The basic premise of the FLSA and NYLL is that all employees must receive at least minimum wage for all hours worked up to 40 in a workweek, and overtime pay, at the rate of one and one-half times the regular rate of pay for all hours worked in excess of 40 in a workweek. The most conservative course of action, then, is to pay all employees on an hourly basis at or above the applicable minimum wage and overtime rates.

Because paying employees an hourly basis at or above the applicable minimum wage and overtime rates is not always administratively or fiscally viable, there are certain, limited exemptions from the minimum wage and overtime requirements set out in the FLSA and NYLL. To lawfully rely on these exemptions, however, an employer must strictly comply with their text.

The most common exemptions relied upon in an office environment are the so-called "white collar exemptions," which include the executive, administrative, and professional exemptions.

On the whole, each of these exemptions are comprised of two prongs: (i) the "duty" prong, which prescribes the nature of work that an employee must be engaged in on a day-to-day basis; and (ii) the "salary" prong, which sets a minimum weekly salary threshold. If, and only if, an employee meets both the duty and salary prongs of a particular exemption may he or she be lawfully considered exempt. Side agreements, or an understanding that an employee is "salaried," are insufficient to relieve an employer from its payment obligations under the law.

On May 23, 2016, the U.S. Department of Labor ("USDOL") issued new overtime regulations, which were slated to increase the federal minimum weekly pay requirement for the federal executive, administrative and professional exemptions from $455.00/week (or $23,660.00 annually) to $913.00/week (or $47,476.00 annually). These changes were scheduled to go into effect on December 1, 2016.

On November 22, 2016, however, a district court in the Eastern District of Texas granted a preliminary injunction blocking implementation of the regulations on a nationwide basis. Litigation regarding the regulations and the injunction is ongoing, but as of the date of submission of this article, there has been no determinative outcome.

i. The Executive Exemption

Under federal law, the executive exemption applies to employees whose primary (or principal, main and most important) duty, is managing an enterprise or a customarily recognized department or subdivision of the enterprise, and who regularly and customarily direct the work of two or more full-time employees or their equivalents (such as four part-time employees). The employee must also have the authority to hire or fire other employees, or have his or her recommendations as to the hiring, firing, advancement, promotion or other change in status given particular weight, even if ultimately overruled.[8] The federal weekly pay currently in place is $455.00/week, or $23,660.00 per year.

New York law imposes the additional requirement that executive employees customarily and regularly exercise discretionary powers.[9] Prior to December 31, 2016, New York's salary threshold was set at $675/week or $35,100.00 per year.

On December 28, 2016, however, the New York State Department of Labor ("DOL") passed significant increases to the weekly salary requirements, to be implemented over time in a tiered fashion based on where the employee works, as follows:[10]

New York Weekly Salary Threshold

Location	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	12/31/21
NYC Large Employers (11 or more)	$825.00	$975.00	$1,125.00	$1,125.00	$1,125.00	$1,125.00
NYC Small Employers (10 or fewer)	$787.50	$900.00	$1,012.50	$1,125.00	$1,125.00	$1,125.00
Long Island & Westchester	$750.00	$825.00	$900.00	$975.00	$1,050.00	$1,125.00
Remainder of New York State	$727.50	$780.00	$832.00	$885.00	$937.50	TBD

In many instances, the New York weekly pay requirements exceed the proposed federal changes.

ii. Administrative Exemption

The administrative exemption is one of the most commonly misunderstood exemptions. This exemption does not, as the name suggests, apply to anyone who holds an administrative title or position such as, *e.g.*, an administrative assistant. Indeed, the federal regulations specifically exclude routine secretarial work from the administrative exemption.[11]

Rather, to qualify for the administrative exemption, an employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and the employee must exercise discretion and independent judgment with respect to matters of significance.[12]

The Second Circuit has articulated the high burden imposed by the exemption's "discretion and independent judgment" requirement as follows: to meet this element, the employee must possess "discretion and judgment [] manifested by the authority to formulate, affect, interpret, or implement the employer's management policies or its operating practices, by involvement in planning the employer's long-term or short-term business objectives, or by the carrying out of major assignments or committing major financial resources in the conduct of the employer's business." *Pippins v. KPMG, LLP*, 759 F.3d 235, 240-41 (2d Cir. 2014) (internal citations and quotations omitted) (observing this "standard serves to identify, from among the many workers whose jobs could generally be characterized as 'administrative,' those who perform duties primarily directed towards 'management or general business operations'"); also citing, *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 155-56 (2d Cir. 2010) (identifying as indicative of the "discretion and independent judgment" requirement the "authority to negotiate and bind [a company] on any significant matters, or ... authority to waive or deviate from [the company's] established policies and procedures without its prior approval").

New York law additionally requires administratively exempt employees to regularly and directly assist an employee employed in a bona fide executive or administrative capacity or perform, under only general supervision, work along specialized or technical lines requiring special training, experience or knowledge.[13]

The salary threshold requirements that apply to the executive exemption under federal and state law apply to the administrative exemption, as well.

iii. Professional Exemption

To qualify for the professional exemption of the FLSA, an employee's primary duty must be the performance of work that requires advanced knowledge, meaning work that is predominantly intellectual in nature, and work that requires consistent exercise of discretion and judgment. The employee's advanced knowledge must be in a field of science or learning, and must be customarily acquired by a prolonged course of specialized intellectual instruction.[14]

New York law is similar, but requires an employee to be primarily engaged in the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine, manual, or physical processes.

"The salary threshold for the federal professional exemption is consistent with federal administrative and executive exemptions. Unlike the federal law, however, New York imposes no minimum weekly salary threshold upon its professional employees."

Further, New York law requires the work performed to be predominantly intellectual and varied in character (as opposed to routine, mental, manual, mechanical or physical work), and be of such a character that the output produced or result accomplished cannot be standardized in relation to a given period of time.

A separate exemption, which is not discussed here, applies to creative professionals under both federal and state law, and is applicable to actors, novelists, musicians and composers, etc.

The salary threshold for the federal professional exemption is consistent with federal administrative and executive exemptions. Unlike the federal law, however, New York imposes no minimum weekly salary threshold upon its professional employees.[15]

a. Exempt Status of Attorneys

Attorneys need not meet the foregoing professional exemptions under federal or state law, and need not meet the federal salary threshold requirement. Rather, to be lawfully "exempt," an attorney need only to show that he or she holds "a valid license or certificate permitting the

practice of law...and is actually engaged in the practice thereof."[16]

Whereas in the past, attorneys were generally considered exempt by virtue of their degree, recent authority involving contract attorneys has challenged this universal classification. The decisions discussed below are valuable reminders that it is not an employee's title or position that controls the exemption analysis, but rather the employee's duties, *i.e.*, his or her actual day-to-day work.

In 2015, when analyzing the exempt status of an attorney engaged in document review, the Second Circuit reversed the district court's decision granting a motion to dismiss. *See e.g.*, *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, 620 F. App'x 37, 45 (2d Cir. 2015). The Second Circuit opined that a fair reading of the pleadings established the plaintiff, although he was a lawyer, provided services that a "machine" could have provided. The court held such services did not meet the statutory definition of "engaged in the practice of law" and reversed for development of a factual record below.

In *Henig v. Quinn Emanuel Urquhart & Sullivan*, 151 F. Supp. 3d 460 (S.D.N.Y. 2015), the plaintiff—a licensed contract attorney—claimed that in his job as a first level document reviewer, he was not engaged in the practice of law and was therefore not exempt from federal or state overtime requirements. The district court determined that the critical inquiry in determining whether a plaintiff is "engaged in the practice of law," is whether he or she exercises "legal judgment."

In *Henig*, the plaintiff was required to tag documents as either responsive, non-responsive, privileged, non-privileged, key, interesting, or not confidential. He argued that he was constrained in decision making by the law firm's written and verbal guidance as to what was responsive or privileged, and that those protocols stripped his work "of all legal judgment," requiring only a "modicum of human judgment." He further argued that his work required "merely the ability to read."

The Court rejected these arguments, finding that Henig's "tagging" of documents as "responsive" or "key," as well as his commentary on what communications may have been privileged, revealed that "plaintiff exercised the type of professional judgment necessary to be engaged in the practice of law." The Court ultimately concluded that Henig's decision-making process indicated that he understood the process by which he was meant to review documents and that such process did require him to exercise legal judgment.

b. Non-Exempt Status of Paralegals and Legal Assistants

Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into those fields.

However, federal regulations provide that the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties.[17] For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer might qualify for the exemption.

c. Potential Liability

Because the FLSA and NYLL are remedial in nature, their exemptions are to be narrowly construed, and the burden rests on the employer to prove that a particular employee is exempt. Accordingly, in determining whether an employee meets the requirements of any particular exemption, it is imperative to look through titles and beyond job descriptions to the employee's actual day-to-day job responsibilities.

As an incorrect classification decision could give rise to substantial minimum wage and overtime liability, misclassification decisions could be quite costly to employers. For one, while the federal statute of limitations is two years (three years for willful violations), the NYLL statute of limitations is six years, regardless of intent. Similarly, both the FLSA and NYLL allow an employee who is not paid all minimum wage or overtime owed to recover 100% liquidated damages (for willful violations) plus attorney's fees and costs.

Moreover, liability for wage and hour violations may extend beyond corporate entities. For instance, in *Irizarry v. Catsimatidis*, 722 F.3d 99 (2d Cir. 2013), the Second Circuit held the chief executive officer of a popular grocery chain personally liable for paying over $3 million in back wages under the FLSA and NYLL where he exercised "operational control" such that it "directly affect[ed] the nature of conditions of the employees' employment."

Similarly, under 2014 amendments to the NYLL, the ten members with the largest percentage ownership interest in a limited liability company may be held jointly and severally liable for all wages or salaries due and owing to the LLC's employees.[18]

IV. WAGE THEFT PREVENTION ACT OBLIGATIONS

One common New York State requirement frequently overlooked by employers is the obligation to distribute Wage Theft Prevention Act Notices to employees.

New York's Wage Theft Prevention Act requires employers to provide notification to all employees at the time of hire of: the employee's rate(s) of pay; the basis of the employee's rate(s) of pay (*e.g.* by the hour, shift, day, week, salary, piece, commission, or other); whether the employer intends to claim allowances as part of the minimum wage, including tip, meal, or lodging allowances, and the amount of those allowances; the employee's

regular pay day (in accordance with the frequency of pay requirements in the Labor Law); the name of the employer and any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; the telephone number of the employer and any "such other information as the commissioner deems material and necessary."[19] *See* https://labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm for sample forms.

The pay notice must be in English *and* in the employee's primary language, if the DOL offers the applicable translation. A signed copy of the form must be given to the employee, and one must be retained for a minimum of six years by the employer.

Failure to provide the required wage notice within 10 days of an employee's hire date, gives rise to a $50 per day per employee violation, capped at $5,000 per employee.

If any information on the notice changes, such as a change to the amount, frequency or nature of the employee's wages, in most cases the employer must distribute a revised notice seven days before the changes are implemented.[20]

V. LOOKING AHEAD TO 2018: PAID FAMILY LEAVE

Earlier this year, the New York state legislature passed the Paid Family Leave ("PFL") Benefits Law, the most comprehensive paid family leave law in the country.[21] Subsequent to the law's passage, proposed regulations were issued.[22] While the regulations have not yet been made final, we do not expect significant changes.

PFL will be effective on January 1, 2018. Under PFL, employers with more than one employee in the last 30 days of any calendar year are required to obtain insurance that covers PFL benefits.

PFL provides eligible employees with up to 12 weeks of job protected leave in any 52 consecutive week period. An employee is eligible for PFL if he or she has worked for a covered employer for 26 consecutive weeks (if full-time) or 175 days in a 52-consecutive week period (if part-time).

Closely tracking the Family Medical Leave Act ("FMLA"), leave under PFL is available in order to:

(1) care for a covered family member[23] when the family member has a serious health condition;[24]

(2) bond with his or her child the first year of birth or adoption; or

(3) address any qualifying emergency under the FMLA, where the covered family member is on active duty or has been notified of an order to resume active duty in the military.

The proposed regulations specify that leave for purposes of a child being placed in foster care is also covered. The regulations also clarify that an eligible employee may receive disability benefits or PFL benefits during a postpartum period, but not both at the same time.

PFL time will, in most instances, run concurrently with FMLA leave when the leave is taken for an FMLA qualifying reason. The regulations are silent, however, with respect to PFL's interaction with New York City's Earned Sick Time Act. In addition, disability leave and PFL, when combined, cannot exceed 26 weeks in any year.

Similar to the minimum wage framework, PFL provides an increasing scale for the amount of paid leave available, not to exceed 12 weeks by January 2021:

Effective Date	Length of Leave	Amount of Pay During Leave
January 1, 2018	8 weeks	50% of the employee's average weekly wage, but not more than 50% of the state average weekly wage.
January 1, 2019	10 weeks	55% of the employee's average weekly wage, but not more than 55% of the state average weekly wage.
January 1, 2020	10 weeks	60% of the employee's average weekly wage, but not more than 60% of the state average weekly wage.
January 1, 2021	12 weeks	67% of the employee's average weekly wage, but not more than 67% of the state average weekly wage.

Employers must distribute written policies providing information about PFL, including how to file a claim, as well as conspicuously posting a printed notice concerning PFL in a form prescribed by the Workers' Compensation Board.

With limited exception, employees may not opt-out of PFL coverage. An employer's failure to provide coverage for PFL will lead to a penalty of .05% of the employer's weekly payroll for the period of such failure, and a maximum additional penalty of $500.

Through payroll deductions, employees will fund the costs associated with purchasing the requisite insurance plan. The proposed regulations clarify that an employer is permitted, but not required, to collect the weekly employee contribution on July 1, 2017 for paid family leave coverage beginning on January 1, 2018. The employee contribution amount will be set on or about June 1, 2017 and annually thereafter on September 1, 2017.

Endnotes

1. *See* 12 N.Y.C.R.R. 141-1.3.
2. 29 U.S.C. § 203(b); 29 U.S.C. § 203(s)(1)(A) (i),(ii).
3. Field Operations Handbook, Chapter 11, § 11w00.
4. Field Operations Handbook, Chapter 11, § 11w04.
5. Field Operations Handbook, Chapter 11, § 11c00(a).
6. Field Operations Handbook, Chapter 11, § 11r01(a)(2).
7. N.Y.S. Lab. Law § 2.
8. 29 C.F.R. 541.100(a).
9. 12 N.Y.C.R.R. 142-2.14(c)(4)(i)(d).
10. *See* 12 N.Y.C.R.R. 141-3.2(e)(5)(1). Similar to the changes to New York's minimum wage law, the salary threshold for areas marked "TBD" will continue to remain status quo unless the legislature subsequently adds regulations or amends the law.
11. 29 C.F.R. 541.202(e).
12. 29 C.F.R. 541.200(a).
13. 12 N.Y.C.R.R. 142-2.14(c)(4)(ii) (the New York exemption also differs slightly from its federal counterpart in that it applies only to those individuals whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general operations of the such individual's employer)
14. *See generally* 29 C.F.R. 541.300.
15. 12 N.Y.C.R.R. 142-2.14(c)(4)(iii).
16. 29 C.F.R. 541.304. While the NYLL provides no *per se* exemption for individuals "engaged in the practice of law," in 2015, the Southern District of New York opined that the NYLL adopts this federal standard. *See Henig v. Quinn Emanuel Urquhart & Sullivan*, 151 F.Supp.3d 460 (S.D.N.Y. 2015).
17. 29 C.F.R. 541.301(e)(7).
18. A08106-C, 2013-2014 Regular Sess. (N.Y. 2013), S5885-B, 2013-2014 Reg. Sess. (N.Y. 2013)
19. N.Y.S. Lab. Law § 195(1).
20. N.Y.S. Lab. Law § 195(1)-(2).
21. *See generally* 2016 NY Senate-Assembly Bill S6406, A9006 http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A9006-C&term=2015&Summary=Y&Actions=Y&Votes=Y&Text=Y .
22. *See generally* 12 N.Y.C.R.R. 355.4.
23. A "covered family member" is a biological, adoptive, or foster child, the employees spouse or domestic partner, the employee's parent (including parent-in-law, stepparent or guardian while the employee was a child), or grandchild and grandparent of the employee.
24. A "serious health condition" is a condition that involves in-patient care in a healthcare facility, continuing treatment, or continuing supervision by a healthcare provider.

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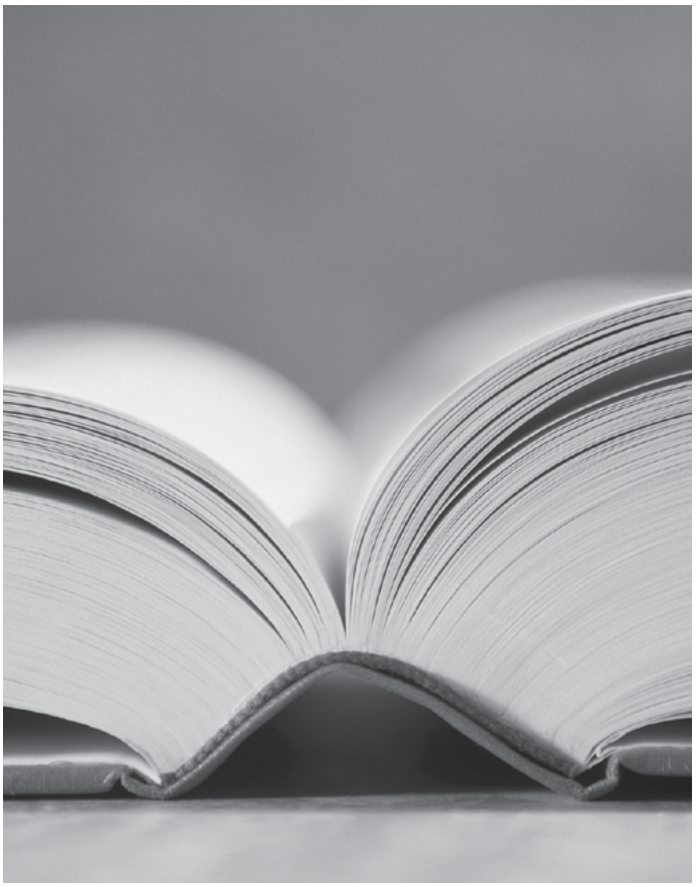
Commercial Litigation in New York State Courts, Fourth Edition

Reviewed by Lynne S. Hilowitz



Corresponding with New York being a longstanding center of commerce, New York has been at the center of commercial litigation. *Commercial Litigation in New York State Courts*, edited by Robert L. Haig, Editor-in-Chief, was first published in 2005, and has recently published its Fourth Edition. The treatise, comprising eight volumes with 127 chapters, explores topics crucial to understanding and applying commercial litigation law in New York.

Commercial litigation, like other areas of law, constantly evolves as new technologies and ideas are created and reformed. Consequently, it is paramount for practitioners to ensure that they are well-informed about growing areas of commercial litigation as well as the established practices that frequently arise in commercial litigation. *Commercial Litigation in New York State Courts* provides an exhaustive reference for attorneys at all stages of their careers to draw upon to elucidate complex and murky areas of commercial litigation. In addition to providing a great reference tool to brush up on or learn specific aspects of commercial litigation, each chapter ends with practice aids such as checklists, research references, and sample forms that are monumentally helpful.

Commercial Litigation in New York State Courts, Fourth Edition, incorporates 22 new chapters that address matters of utmost importance to commercial practice today, including: Internal Investigations; Preliminary and Compliance Conferences and Orders; Negotiations; Mediation and Other Nonbinding ADR; Arbitration; International Arbitration; Pro Bono; Reinsurance; Workers' Compensation; Trade Associations; Securitization and Structured Finance; Derivatives; Medical Malpractice; Licensing; Social Media; Tax; Land Use Regulation; Commercial Leasing; Project Finance and Infrastructure; Entertainment; Sports; and Energy. In addition to the new subject matter contained in these chapters, the chapters carried forward from the Third Edition have been thoroughly updated to provide comprehensive and up-to-date guidance to readers.

Since most commercial cases settle before trial, a proper negotiating strategy and a proper mindset are crucial to successfully securing favorable outcomes for our clients. Recognizing this, the Fourth Edition's new chapter on "Negotiations" highlights the applications of negotiations in a commercial litigation setting while providing expert analysis of the ethical rules surrounding negotiating tactics, practical advice for developing negotiation strategies, and checklists detailing steps attorneys should take in advance of preliminary conferences and in advance of negotiations in general.

Commercial Litigation in New York State Courts, Fourth Edition, is a joint venture between Thomson Reuters and the New York County Lawyers' Association.

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A version of this review was originally published in the June 2016 Rockland County Bar Association newsletter, Newsbrief.

Role of Emails in CPLR 3211(a)(1) Motions

By Bruce H. Lederman

At a time in history where substantial aspects of any dispute are evidenced by email exchanges, the question of whether emails are "documentary evidence" for purposes of a CPLR 3211(a)(1) motions takes on ever increasing importance. The Court of Appeals has never directly answered the question of whether emails can be considered documentary evidence under CPLR 3211(a)(1). The Appellate Division in both the First and Second Departments have in a number of cases permitted dismissal of cases pursuant to blanket prohibition on the use of emails. The First Department has recently stated, very clearly, that there is no blanket prohibition on the use of emails in proper cases. On the other hand, the Second Department, while allowing dismissal of complaints based upon emails in a few cases, has repeatedly used language suggesting that emails may not be documentary evidence for purposes of CPLR 3211(a)(1) motions. The Third and Fourth Departments have not issued guidance on the issue of using emails on 3211(a)(1) motions.

This article will explore the history of CPLR 3211(a)(1) motions as well as highlighting recent discussions by the Appellate Division on the use of emails for purposes of CPLR 3211(a)(1) motions. Finally, this article will offer some insights into strategic issues surrounding the decision to make pre-answer motions to dismiss.

The Statutory Text and Its History

CPLR 3211 provides in pertinent part:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> 1. a defense is founded upon documentary evidence; or
>
> 2. the court has not jurisdiction of the subject matter of the cause of action; or
>
> 3. the party asserting the cause of action has not legal capacity to sue; or
>
> 4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or
>
> 5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or
>
> 6. with respect to a counterclaim, it may not properly be interposed in the action; or
>
> 7. the pleading fails to state a cause of action; or
>
> 8. the court has not jurisdiction of the person of the defendant; or
>
> 9. the court has not jurisdiction in an action where service was made under section 314 or 315; or
>
> 10. the court should not proceed in the absence of a person who should be a party.
>
> 11. the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law […]
>
> (b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.
>
> (c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

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The most cited Court of Appeals decision on the standards for determining a motion to dismiss under CPLR 3211(a)(1) is likely *Leon v. Martinez*.[1] Westlaw reports over 14,000 citations to the case. *Leon* does not specifically discuss emails and was decided before emails were so widely used as they are now.

However, the following statement about the standards for CPRL 3211(a)(1) is often invoked by trial judges and remains crucial to understanding the relevant issues:

> Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.[2]

In 2010, in a case which also does not specifically involve emails, the Appellate Division, Second Department, provided an informative discussion of the history of CPLR 3211(a)(1) as follows:

> CPLR 3211, including subdivision (a)(1), appears to have had its genesis in the 1957 First Preliminary Report of the Advisory Committee on Practice and Procedure (1st Rep. Leg. Doc. [1957] No. 6[b] [hereinafter the Report]). According to that Report, the purpose of CPLR 3211(a)(5) was to cover the most common affirmative defenses founded upon documentary evidence, specifically, estoppel, arbitration and award, and discharge in bankruptcy, whereas 3211(a)(1) was enacted to "cover all others that may arise, as for example, a written modification or any defense based on the terms of a written contract". To some extent, "documentary evidence" is a "fuzzy" term, and what is documentary evidence for one purpose, might not be documentary evidence for another.
>
> As Professor Siegel has noted in his Commentary to CPLR 3211, there is "a paucity of case law" as to what is considered "'documentary' under [CPLR 3211(a)(1)]." From the cases that exist, it is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are "essentially undeniable," would qualify as "documentary evidence" in the proper case.[3]

In *Fontanetta*, relying primarily upon Professor Siegel's practice commentaries to the CPLR, the Appellate Division, Second Department, stated that "'documentary,' evidence must be unambiguous and of undisputed authenticity."[4]

Emails should be capable of easy authentication to the extent they are electronically stored, and to the extent the recipient can confirm or deny receipt, and dispute any changes or alterations from the received email. If clients are anticipating litigation, it may be worthwhile advising them to send emails with "requests for delivery receipt" confirmation if there is any thought that emails will be used in litigation.

With this background, the following are recent discussions by the Appellate Departments of the role of emails in 3211(a)(1) motions.

Recent Appellate Division Decisions Confirming That Emails Can Be Considered Documentary Evidence

The First Department has recently specifically held that emails may be considered documentary evidence, although cases often find that emails in particular cases do not meet the standards for establishing entitlement to judgment as a matter of law.

In 2015, in the case *Kolchins v. Evolution Markets, Inc.*,[5] the First Department stated:

> Preliminarily, we reject Supreme Court's conclusion that correspondence such as the emails here do not suffice as documentary evidence for purposes of CPLR 3211(a)(1). This Court has consistently held otherwise. For example, in *Schutty v. Speiser Krause P.C.*, 86 A.D.3d 484, 484–485, 928 N.Y.S.2d 4 (1st Dept. 2011), this Court found drafts of an agreement and correspondence sufficient for purposes of establishing a defense under the statute. Similarly, in *Langer v. Dadabhoy*, 44 A.D.3d 425, 426, 843 N.Y.S.2d 262 (1st Dept. 2007), *lv. denied* 10 N.Y.3d 712, 861 N.Y.S.2d 272, 891 N.E.2d 307 (2008), this Court found "documentary evidence in the form of emails" to be sufficient to carry the day for a defendant on a CPLR 3211(a)(1) motion. Likewise, in *WFB Telecom. v. NYNEX Corp.*, 188 A.D.2d 257, 259, 590 N.Y.S.2d 460 (1st Dept. 1992), *lv. denied* 81 N.Y.2d 709, 599 N.Y.S.2d 804, 616 N.E.2d 159 (1993), this Court granted a CPLR 3211(a)(1) motion on the basis of a letter from the plaintiff's counsel that contradicted the complaint. Therefore, there is no blanket rule by which email is to be excluded from consideration as documentary evidence under the statute.[6]

In 2016, the First Department again stated:

> Emails can suffice as documentary evidence for purposes of CPLR 3211(a)(1); however, the emails, factual affidavits, and contract in this case do not constitute documentary evidence within the meaning of the statute.[7]

The law is less clear in the Second Department where the Court, in *Anderson v. Armentano*,[8] recently stated:

> To qualify as documentary evidence, the evidence must be unambiguous and of undisputed authenticity […] [J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case […] Affidavits and letters were not the types of documents contemplated by the Legislature when it enacted this provision.[9]

The Second Department has made similar statements in a number of other cases listed below, where the Second Department concluded that a defendant's proffering of emails of similar correspondence (i.e., text messages) was insufficient to qualify as documentary evidence for purposes of a 3211(a)(1) motion to dismiss.

- In *Eisner v. Cusumano Const., Inc.*,[10] the court stated that the affidavits and text messages relied upon by the Supreme Court in concluding that the plaintiff failed to comply with the alleged condition precedent were not "essentially undeniable," and did not constitute documentary evidence.
- In *JBGR, LLC v. Chicago Title Ins. Co.*,[11] the court stated that the defendant proffered emails, correspondence, and affidavits in support of its contention that, pursuant to Section 5 of the title insurance policy, the plaintiffs' failure to provide requested information regarding their claim terminated its obligation to cover the defects in the title. Therefore, the Court concluded that defendant failed to present any documentary evidence establishing a defense to the complaint.
- In *Attias v. Costiera*,[12] the Court stated that the affidavits submitted by the defendants, their attorney's affirmation, and the correspondence that was submitted in support of the defendants' motion did not constitute documentary evidence within the meaning of CPLR 3211(a)(1), and should not have been relied upon by the Supreme Court in directing the dismissal of the complaint pursuant to CPLR 3211(a)(1).
- In *Louzoun v. Kroll Moss and Kroll, LLP*,[13] the court stated that the plaintiff's email did not conclusively contradict the allegation in the complaint.
- In *Cives Corp. v. George A. Fuller Co., Inc.*,[14] the court stated that the letters and emails did not constitute "documentary evidence" under CPLR 3211(a)(1) and, thus, should not have been considered by the Supreme Court.

However, there does not appear to be a blanket rule in the Second Department against the use of emails in 3211(a)(1) motions inasmuch as a dismissal of a case based, in part, upon emails was just affirmed in *42nd Avenue Commons, LLC v. Barracuda, LLC*.[15] In that case, the Second Department affirmed a decision dismissing a claim to purchase property based upon emails, as follows:

> The defendant proffered sufficient documentary evidence that the defendant, as seller, never executed the contract of sale [...] The plaintiff's evidence, submitted in opposition, that emails were exchanged between the parties' attorneys, which emails purportedly reflected the parties' agreement to the material terms of the proposed contract for the sale of real property, was insufficient to establish that the statute of frauds was satisfied (*see* General Obligations Law § 5–703[2]). "[A]n agent may only bind a party to a real estate contract if authorized to do so in writing. The unwritten apparent authority of an agent is insufficient to satisfy the statute of frauds" … Here, even if it were found that the defendant's attorney subscribed the subject emails, there was no allegation in the complaint, and there was no evidence, that the defendant's attorney had been authorized in writing to bind the defendant to the contract of sale […] Further, *the emails exchanged by the parties' attorneys established that the parties did not intend to be bound until the signing of a formal contract of sale*.[16]

In *Pinnacle Realty of New York, LLC v. 255 Butler, LLC*,[17] the Second Department reversed the denial of summary judgment in a case for a brokerage commission, stating:

> Here, the parties' submissions, *which included printouts of emails and drafts of contracts*, established that the defendants and the prospective purchaser did not come to a meeting of the minds as to the essential terms.[18]

In *Leist v. Tugendhaft*,[19] the Second Department affirmed dismissal of an action for specific performance based upon consideration of an email which attached an unsigned contract.

> Assuming, arguendo, that an e-mail is sufficient to comply with the statute of

> frauds with respect to contracts for the conveyance of real property …, the document in issue here nevertheless is clearly inadequate, since it was not subscribed, even electronically, by the defendants who are the parties to be charged, or by anyone purporting to act in their behalf ….
>
> The fact *that the listing agent was identified as the sender in the e-mail to which the attachment was made does not satisfy the subscription requirement*. At best, the e-mail was the equivalent of a cover letter to a proposed contract, the signing of which is insufficient to satisfy the subscription requirement […][20]

Thus, while it seems that the Second Department is more reluctant than the First Department to consider emails as sufficient in many situations to justify dismissal under CPLR 3211(a)(1), it does not appear that there is any *per se* rule prohibiting use of emails in a proper case.

> ternet service would have been able to access defendant's "Evaluation Matrix," which described the precise weight to be accorded to the various qualifications used in determining which service providers would be allowed to participate in P3. Notably, this scoring matrix plainly indicated that a potential service provider's willingness to offset the employer's administrative fee accounted for 50% of the provider's overall score. Such proof, coupled with the additional materials tendered by defendant, including a transcript of a webinar conducted in December 2011,[2] more than supports Supreme Court's finding that defendant "extensively and conspicuously" disclosed the payment structure of P3 to its clients, thereby refuting any assertion that defendant engaged in deceptive practices.[22]

While this case may not directly address emails, the court's willingness to consider websites for purposes of CPLR 3211(a)(1) motions may signal a willingness to consider emails in appropriate circumstances.

"An alternative procedural mechanism is to simultaneously answer the complaint and then move for summary judgment under CPLR 3212."

In the Third Department, there appear to be fewer cases addressing the issue. In one case of note,[21] the Third Department affirmed the dismissal of a complaint, relying upon affidavits which provided links to websites establishing the disclosure, which was allegedly not provided:

> We reach a similar conclusion with respect to Supreme Court's alternative ground for dismissal. Dismissal of a complaint under CPLR 3211(a)(1) is appropriate "where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Although plaintiff alleged that defendant failed to conspicuously disclose that any service provider participating in P3 had to pay certain administration fees in order to be designated as a "preferred" provider, such allegation is plainly refuted by the documentary evidence contained in the record, including the very materials tendered by plaintiff. Without belaboring the point, the record reflects that by reviewing the contents of defendant's website and following the hyperlinks contained therein […] anyone with In-

In *Ganje v. Yusuf*,[23] the Third Department held:

> A motion to dismiss pursuant to CPLR 3211(a)(1) is properly granted where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. Materials that clearly qualify as documentary evidence include documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable. To that end, an attorney's affidavit may serve as a vehicle for the submission of documentary evidence.[24]

Research has not revealed any on-point authority in the Fourth Department.

The foregoing cases illustrate that situations in which emails may be particularly useful in obtaining dismissals pursuant to CPLR 3211(a)(1) may involve cases questioning whether contracts actually exist or not, including brokerage cases and specific performance cases.

Practice Pointers and Conclusions

CPLR 3211(a)(1) motions provide a mechanism to have the Court address the merits of certain defenses at the very outset of a case, before any discovery. For that reason, it is sometimes desirable to test the sufficiency of a complaint at the outset of a case and sometimes emails will be particularly useful in establishing a defense.

An alternative procedural mechanism is to simultaneously answer the complaint and then move for summary judgment under CPLR 3212. On such a motion, there should not be any real problem submitting emails along with an affidavit properly authenticating them. However, some judges apply an unwritten rule only allowing a single summary judgment motion. If a case is before a judge applying such a single summary judgment rule, one risks a situation that the motion is denied because of need for discovery and the judge will later not allow another summary judgment motion after the conclusion of discovery.

A useful practice pointer is to make motions to dismiss, which involve emails under CPLR 3211(a)(1) and alternatively under CPLR 3211(a)(7). The latter is a motion to dismiss for failure to state a cause of action (sometimes historically called a demurrer).

CPLR 3211(c) provides:

> Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

Since emails could unquestionably be considered as evidence on a summary judgment motion, arguably, the emails could be considered as part of a CPLR 3211(a)(7) motion. If any issue is raised by either an adversary or the court as to the propriety of considering emails in such circumstances, a request can and perhaps should be made for the court to treat the motion as one for summary judgment.

For the reasons set forth above, it seems clear that there is no blanket prohibition on use of emails in CPLR 3211(a)(1) motions. However, the Second Department has recently held that emails are not sufficient documentary evidence justifying dismissal of a complaint, in contrast to the First Department. The Third and Fourth Departments have not materially weighed in on this issue. Given somewhat of a split in authority (if not general approach) between the First and Second Departments, it would be useful if, in an appropriate case, the Court of Appeals directly addressed the issue.

Given the large number of controversies today where emails document what was transpiring in "real time," it is worthwhile understanding how and when emails can be used in connection with motions to dismiss.

Endnotes

1. 614 N.Y.S.2d 972, 84 N.Y.2d 83 (1994).
2. *See also Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002) (documents must "utterly refute(s) plaintiff's factual allegations, conclusively establishing a defense as a matter of law"); *Held v. Kaufman*, 91 N.Y.2d 425, 430-431, 671 N.Y.S.2d 429, 430 (1998) (it is settled law that a CPLR 3211 dismissal may be granted where "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law").
3. *Fontanetta v. Doe*, 898 N.Y.S.2d 569, 574, 73 A.D.3d 78, 84-85 (2d Dept. 2010) (internal citations omitted).
4. *Fontanetta*, 73 A.D.3d at 86.
5. 8 N.Y.S.3d 1, 128 A.D.3d 47 (1st Dept. 2015).
6. *Id.* at 8-9 (emphasis added).
7. *Calpo-Rivera v. Siroka*, __ A.D.3d ___ 42 N.Y.S.3d 19, 20 (1st Dept. 2016); *accord Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 992 N.Y.S.2d 7, 11, 120 A.D.3d 436, 439 (1st Dept. 2014) (the emails in question fail to definitely refute plaintiffs' claim that the parties had reached an oral joint venture agreement, dismissal at this stage is not warranted).
8. 33 N.Y.S.3d 294, 139 A.D.3d 769 (2d Dept. 2016).
9. *Anderson*, 33 N.Y.S.3d at 296 (internal citations and quotations omitted).
10. 18 N.Y.S.3d 683, 685, 132 A.D.3d 940, 942 (2d Dept. 2015) (internal quotations omitted).
11. 11 N.Y.S.3d 83, 86-87, 128 A.D.3d 900, 903-04 (2d Dept. 2015).
12. 993 N.Y.S.2d 59, 62, 120 A.D.3d 1281, 1283 (2d Dept. 2014).
13. 979 N.Y.S.2d 94, 96, 113 A.D.3d 600, 601 (2d Dept. 2014).
14. 948 N.Y.S.2d 658, 660, 97 A.D.3d 713, 714 (2d Dept. 2012).
15. 35 N.Y.S.3d 366, 140 A.D.3d 1012 (2d Dept. 2016).
16. *42nd Avenue Commons*, 35 N.Y.S.3d at 367-68 (emphasis added) (internal citations omitted).
17. 5 N.Y.S.3d 173, 125 A.D.3d 952 (2d Dept. 2015).
18. *Pinnacle Realty*, 5 N.Y.S.3d at 175 (emphasis added).
19. 882 N.Y.S.2d 521, 64 A.D.3d 687 (2d Dept. 2009).
20. *Id.* at 522-23 (emphasis added) (internal citations omitted).
21. *Benetech, Inc. v. Omni Financial Group, Inc.*, 984 N.Y.S.2d 186, 116 A.D.3d 1190 (3d Dept. 2014).
22. *Benetech*, 984 N.Y.S.2d at 189 (internal citations omitted).
23. 19 N.Y.S.3d 355, 133 A.D.3d 954 (3d Dept. 2015).
24. *Ganje*, 19 N.Y.S.3d at 357 (internal citations and quotations omitted). The decision does not specify what documentary evidence actually justified dismissal, but the statement that an attorney's affidavit is a proper vehicle for submitting documentary evidence is noteworthy.

Court-Related Mediation—Early and Flexible Leads to Success

By Jennifer Shack

"Mediation would be a waste of time. This case will never settle." "It's too soon to mediate. We need more information." These, or similar statements, are common in courtrooms around the country. On the surface, it may seem that the lawyers making those claims would know best. Sometimes they do. But, it is also clear from research that lawyers may do well to become more flexible in determining whether and when to mediate. Perhaps most of all, lawyers should become proactive in deciding early what is best for each particular case.

Studies of court-connected mediation programs have found that those cases ordered to mediation may be as likely to settle as those in which the parties request mediation, indicating that even when lawyers and their clients are disinclined to mediate, mediation can result in settlement as often as when they agree that mediation would be helpful. Other studies that looked at the effect of timing of mediation have found that early mediation is more likely to result in settlement, and may well reduce litigation costs. The additional benefits of mediating early, according to those who regularly implement early dispute resolution, are reduced exposure, greater control over the dispute and better relationships with their counterpart.

The Effect of Mandating Mediation

Most experienced mediators have stories of successful mediations in which the attorneys told them at the outset that there was no way the case was going to settle, that mediation would be a waste of time. These stories, and related research, indicate that lawyers are not always correct in their assessments of the amenability of a case to mediation. While it might make sense that parties are less motivated to settle if they are being ordered to mediate, research has not borne this out. A review of studies comparing the probability of settlement found that, at least in programs in which some cases were ordered into mediation, there was no difference in settlement rates between those cases ordered to mediation and those programs in which mediation was requested.[1] A study of civil case programs in Ohio likewise found that cases ordered to mediation by the judge were no less likely to settle in mediation than those in which the parties requested it.[2] A study of five pilot programs in California noted that mandatory programs had lower settlement rates than voluntary ones, but that those differences faded when the procedure for mandatory referral was by order of the judge rather than automatic for all cases.[3]

The similar settlement rates between mandated and voluntary mediation may be due to parties being motivated to settle because they believe the judge wants them to. It is also possible that the ordered parties are already motivated to settle. It also may be that the order to mediate reduced or eliminated the lawyers' fears of looking weak if they suggested mediation. Or it may be some combination of these.

In addition, mandating mediation does not appear to have an effect on the parties' perception of the mediation. In Ohio, parties who were randomly assigned to mediation or ordered in by the judge were as likely to view the process as fair as those who requested mediation on their own.[4] This supports the findings of two previous studies, which found that whether the parties requested mediation or not did not have an effect on the parties' perceptions of the mediation as fair.[5]

The lesson from these studies appears to be that judges should not be shy about ordering cases to mediation if they think it appropriate. Ordering mediation can provide attorneys who are open to mediation, but cautious about tipping their hand, the "cover" they need to get the case to mediation and, hopefully, find resolution. An additional lesson from the study is that lawyers should remain open to giving mediation a real try when the judge orders their cases to mediation by preparing thoroughly and being a willing and active participants in the process.

Timing of Mediation

Although mediation is commonly used to resolve civil disputes, the tendency is to use it during the later stages of litigation. Fear of being seen as weak, concern about negotiating without having conducted considerable discovery and, perhaps, just general inertia keep counsel from adopting early mediation. Despite this reluctance to mediate early, research shows that doing so enhances the desired benefits of mediation.

Three empirical studies have all found that mediating early is more likely to result in settlement than waiting to mediate later in the litigation process. Conversely, no study has found settlement to be more likely if mediation occurs late in the case. A study of civil cases in Ohio found that cases that were mediated within six months of filing were more likely to settle, and that those cases that were mediated more than a year after filing were less likely to settle than those mediated between six months and

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a year after filing.[6] Another study of an early mediation pilot program in California found that those cases that went through the pilot program were 30% more likely to settle than those cases that participated in mediation later in the litigation process.[7]

The third study, which looked at cases in Slovenia, found that cases mediated before the first court hearing were 170% more likely to settle before that hearing than similarly situated cases that did not mediate, while those that were mediated more than 500 days after filing were only 70% more likely to settle. The trend toward lesser likelihood of settlement through mediation continued as the case progressed. Those cases that waited to mediate 800 days or more from filing were less likely to settle than those that did not mediate.[8] These results indicate that mediation may have its greatest impact on settlement prior to going to court. Mediation may also save on litigation costs. In the California study, lawyers who mediated early estimated greater savings than those who mediated at the usual time in the case.[9]

The effect of general timing of mediation on the probability of settlement is most likely related to the progress of the case. That is, it is not the elapse of time that correlates with whether the case settles or not, but what occurs in that time period. For example, when attorneys do not have critical information, settlement is less likely, so mediation before any discovery has been done could well be premature and unsuccessful. Additionally, studies suggest that when dispositive motions are pending, attorneys are less likely to settle. In a study of 152 civil cases filed in Georgia, 81% settled if the mediation occurred after the motion was decided, while only 19% settled when the motion was still pending.[10] Data from a second study, of civil cases under $25,000, also suggests that it makes sense to wait for a pending motion to be decided.[11] On the other hand, it is clear that waiting to mediate until all discovery is completed is not helpful to settlement and likely adds to the overall litigation costs.

Planned Early Dispute Resolution

The positive impacts of early mediation can be enhanced through planned early dispute resolution (PEDR). Generally used by in-house counsel, but worth considering more broadly, PEDR treats disputes systematically at the early stages, rather than depending on an ad hoc approach. While PEDR as used in-house is not confined to mediation, it commonly relies on it as an essential component. The corporations that have developed PEDR programs report savings in litigation costs and management time, as well as greater control over the dispute and its outcome, and better relationships with the other disputant.[12]

Whether part of a planned program or decided upon ad hoc, early mediation requires early case assessment. In interviews with researchers John Lande and Peter W. Benner, in-house counsel for corporations that instituted early dispute resolution programs said early case assessment was essential to the success of their programs.[13] It leads to better understanding of parties' needs and options, which, in turn, increases the probability of early settlement. Early case assessment is also used for individual cases even when PEDR is not in place. This allows counsel to approach conflict proactively, rather than reactively, and ensures that disputes are handled according to the company's business goals.[14]

Mediating early has benefits that lawyers should consider at the outset of each case, whether as part of an overall PEDR program or as part of an individualized case assessment. A proactive approach to mediation may not only enhance the possibility of settlement and save in litigation costs, but can also increase the lawyer's control over the case.

Conclusion

Lawyers who consistently object to orders to mediate and wait to mediate until discovery is substantially completed may be doing a disservice to their clients. Settlement in the end appears to be dependent upon the individual parties and their counsel, and not on whether parties are required to mediate. Parties also do not appear to view mediation differently if they have been ordered to participate. Whether mandated or not, they believed the process was fair. Thus, by participating fully in mediation, lawyers provide their clients with a fair process that may well lead to earlier settlement and lower costs. This is particularly true when mediation is conducted early in the case. Settlement is more likely, litigation costs may be saved and litigators maintain more control over the dispute when mediation happens early. Adopting a systematic approach to early dispute resolution can enhance these effects. Though there are reasons not to mediate a case early, waiting to mediate should not be the default option.

Endnotes

1. Roselle Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 Ohio St. J. on Disp. Resol. 641, FN 137 at 677 (2002). Two of the four studies reviewed found no difference in settlement rates between those referred automatically or ordered individually to mediation and those who requested it. Two others found that cases randomly assigned to mediation were less likely to settle than those who voluntarily entered it. It should be noted that differences between comparison groups may have confounded the findings.
2. *Id.* at 676.
3. Heather Anderson & Ron Pi, Judicial Council of California, Administrative Office of the Courts, *Evaluation of the Early Mediation Pilot Programs*, at 38 (2004), available at http://www.courts.ca.gov/documents/empprept.pdf.
4. *Id.* at 682-683.
5. James S. Kakalik et al., An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act, at 53 (1996); Donna Stienstra et al., The Fed. Judicial Ctr., Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs

Established Under the Civil Justice Reform Act of 1990, at 252 (1997).

6. Wissler, *supra* note 1, at 677.
7. Anderson & Pi, *supra* note 3, at 163.
8. Peter Grajzl & Katarina Zajc, Litigation and the Timing of Settlement: Evidence from Commercial Disputes (CESifo, Working Paper Series No. 5520, 2015), available at http://ssrn.com/abstract=2676011.
9. Anderson, *supra* note 3, at 65-68.
10. Naman L.J. Wood, *Can Judges Increase Mediation Settlement Rates? Of "Coase" They Can*, 26 Ohio St. J. on Disp. Resol. 683 (2011).
11. Michelle Hilliker, Michigan State Court Administrative Office, Office of Dispute Resolution, Mediation After Case Evaluation: A Caseflow Study of Mediating Cases Evaluated Under $25,000, at 7 (2011). The data in this study suffered from a small sample rate, making it impossible to draw definitive conclusions.
12. John Lande & Peter W. Brenner, Why and How Businesses Use Planned Early Dispute Resolution (University of Missouri School of Law Legal Studies Research Paper No. 2016-03), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2722664.
13. *Id.* at 31.
14. *Id.*

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The Senior Lawyer is published for members of the Senior Lawyers Section of the New York State Bar Association.

ISSN 1949-8322 (print) ISSN 1949-8330 (online)

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