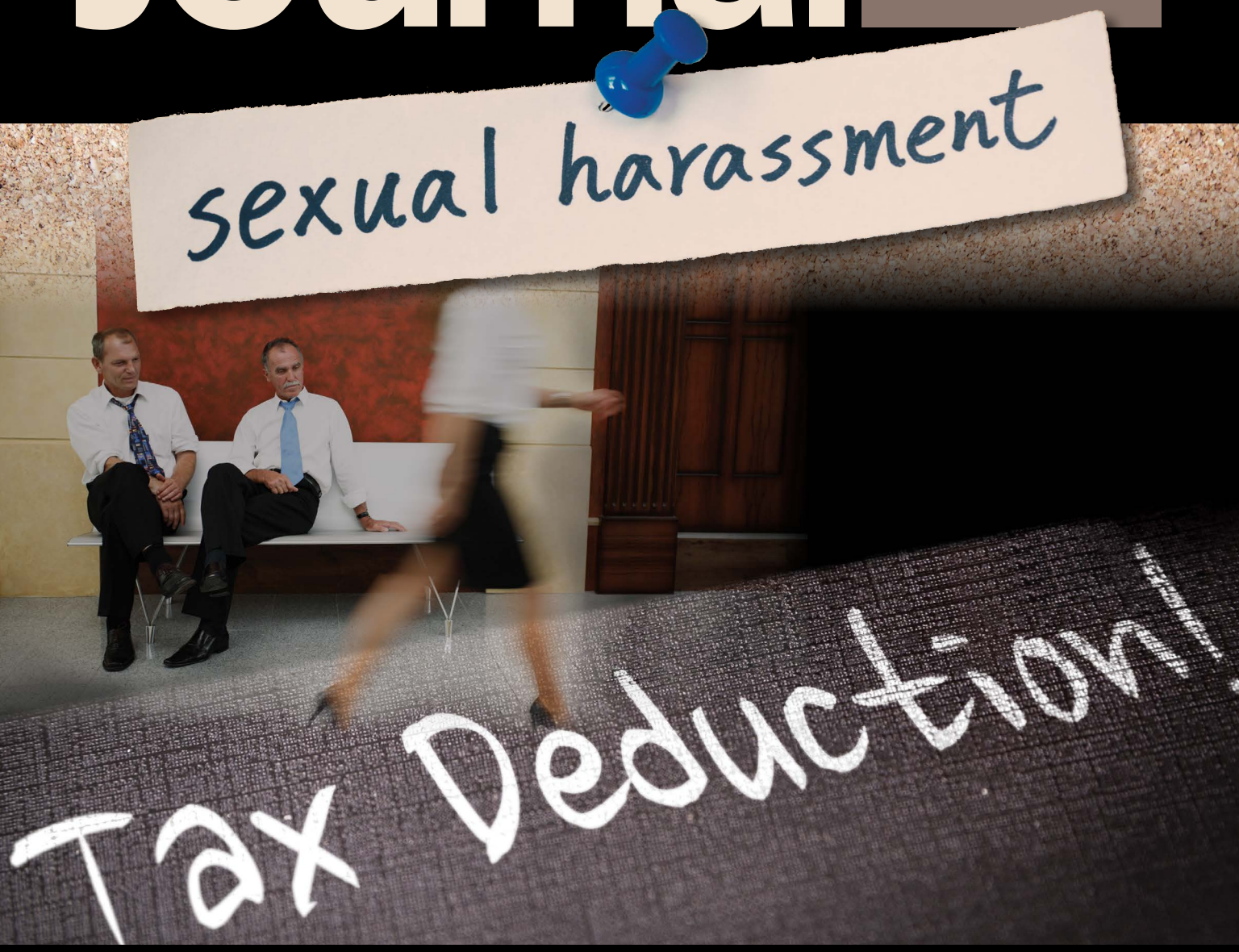
NEW YORK STATE BAR ASSOCIATION

Journal

FEBRUARY 2018
VOL. 90 | NO. 2



Tax Write-Offs in Sexual Harassment Cases After Harvey Weinstein

By Robert W. Wood

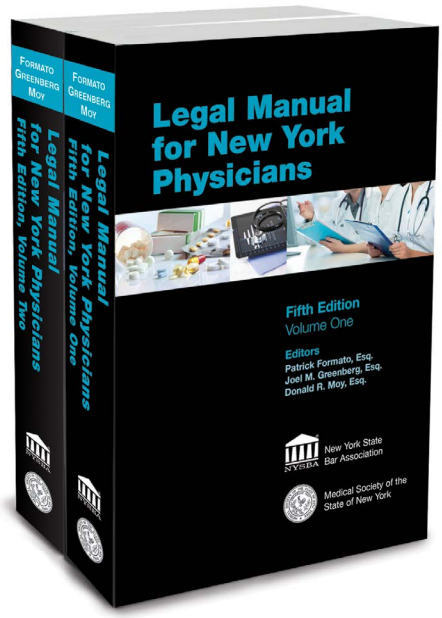
Also in this Issue

Legal Manual for New York Physicians

NEW EDITION

Fifth Edition

Written and edited by more than 70 experienced practitioners, *Legal Manual for New York Physicians, Fifth Edition*, is a must-have for physicians, attorneys representing physicians and anyone involved in the medical field.



Co-published by the New York State Bar Association and the Medical Society of the State of New York, this reference book is designed to provide readers with a fundamental understanding of the legal and regulatory requirements that affect the practice of medicine. This information is provided in an easy-to-use question-and-answer format and comes complete with a detailed table of contents, in-depth index and appendix of forms.

This two-volume title covers 57 topics, including the Formation of a Practice; Life-Sustaining Treatment Decisions; Medical Treatment of Minors; Medical Records; and Billing and Reimbursement Issues, including coverage of Emergency Services, Surprise Bills, Malpractice and Telehealth Considerations.

Also included is a section Controlled Substances which discusses the Prescription Monitoring Program (PMP) and the Medical Use of Marihuana. Also Medicare Audits of Physician Claims and the Medicare Appeals Process.

PRODUCT INFO AND PRICES

Print: 41326 | 2017 | 1,170 pp. | softbound | 2 vols.

E-book: 41326E | 2017 | 1,170 pp. | downloadable PDF

Non-Members	$175
NYSBA Members	**$135**

See what your colleagues are saying about this title:

"Thank you for this excellent resource"

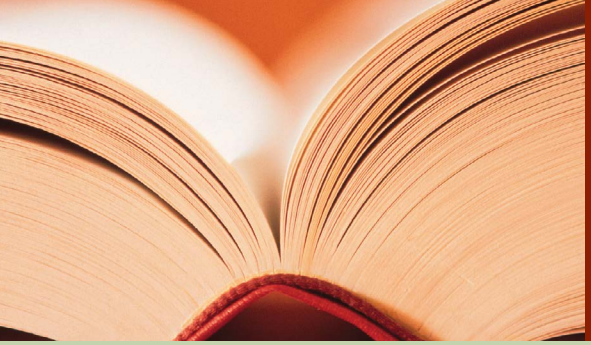
"Great book!"

To order call **1.800.582.2452**
or visit us online at **www.nysba.org/pubs**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

Mention code: PUB8913 when ordering.

NYSBA



BESTSELLERS
FROM THE NYSBA BOOKSTORE
February 2018

Estate Planning & Will Drafting in New York (w/2017 Revision) Updated!
Written and edited by experienced practitioners, this comprehensive book is recognized as one of the leading references available to New York attorneys involved in estate planning. Includes Forms.
PN: 4095C / **Member $185** / List $220/ 930 pages

Legal Manual for New York Physicians, 5th Ed. Updated!
Written and edited by more than 70 experienced practitioners, this title is a must-have for physicians and attorneys representing physicians.
PN: 41326 / **Member $135** / List $175 / 1,170 pages

NY Lawyers' Practical Skills Series Updated!
An essential reference, guiding the practitioner through a common case or transaction in 25 areas of practice. Nineteen titles; 16 include downloadable forms.
Print: 40018PS / **Member $695** / List $895

NYSBA Estate Planning System Updated!
This Estate Planning System is a fully automated, document assembly software that enables the user to draft customized, estate planning documents for a client.
Print: 6270 / **Member $1,104** / List $1,351 (CD)
E-book: 6270E / **Member $1,104** / List $1,351 (Downloadable)

NYSBA's Surrogate's Court Forms Updated!
(Powered by HotDocs)
New York State Bar Association's Surrogate's Forms is a fully automated set of forms that contains all the official probate forms as promulgated by the Office of Court Administration (OCA) as well as the forms used specifically by the local Surrogate's Courts.
PN: 6229 / **Member $666** / List $781 / 1,096 pages

Probate and Administration of New York Estates (w/2017 Revision) Updated!
A comprehensive, practical reference covering all aspects of probate and administration, from the preparation of the estate to settling the account. This offers step-by-step guidance on estate issues, and provides resources, sample forms and checklists.
Print: 40054 / **Member $185** / List $220 / 1,096 pages
E-book: 40054E / **Member $185** / List $220 / downloadable PDF

Must-Have Titles

Attorney Escrow Accounts – Rules, Regulations and Related Topics, 4th Ed.
Fully updated, this is the go-to guide on escrow funds and agreements, IOLA accounts and the Lawyers' Fund for Client Protection. With CD of forms, ethics opinions, regulations and statutes.
Print: 40264 / **Member $60** / List $75 / 436 pages
E-book: 40264E / **Member $60** / List $75 / downloadable PDF

Evidentiary Privileges, 6th Ed.
Covers the evidentiary, constitutional and purported privileges that may be asserted at the grand jury and at trial.
PN: 40996 / **Member $55** / List $75

Foundation Evidence, Questions and Courtroom Protocols, 5th Ed.
This classic text has long been the go-to book to help attorneys prepare the appropriate foundation testimony for the introduction of evidence and examination of witnesses.
Print: 41074 / **Member $65** / List $80 / 344 pages
E-book: 41074E / **Member $65** / List $80 / downloadable PDF

New York Contract Law: A Guide for Non-New York Attorneys
A practical, authoritative reference for questions and answers about New York contract law.
Print: 4172 | **Member $95** | List $130 | 622 pages
E-book: 4172E | **Member $95** | List $130 | downloadable PDF

N.Y. Criminal Practice, 5th ed.
Written by criminal law attorneys and judges with decades of practical experience in the field, this book is intended to guide inexperienced and veteran attorneys alike.
Print: 41466 / **Member $150** / List $190 / 1,160 pages
E-book: 41466E / **Member $150** / List $190 / 1,160 pages

Grow Your Practice: Legal Marketing and Business Development Strategies
Edited by Carol Schiro Greenwald, Ph.D, and written by attorneys and marketing professionals who work with attorneys, this book delivers a client-centric approach to today's legal marketing with tips on communication and how to deliver value. A must-have for attorneys on marketing and management resources that focus on clients and complement today's dynamic legal practice.
Print: 41265 / **Member $50** / List $65 / 302 pages
E-book: 41265E / **Member $50** / list $65 / 302 pages

Preparing For and Trying the Civil Lawsuit, 2nd Ed.
More than 30 of New York State's leading trial practitioners and other experts reveal the techniques and tactics they have found most effective when trying a civil lawsuit.
Print: 41955 / **Member $185** / List $235 / 1,528 pages
E-book: 41955E / **Member $185** / List $235 / 1,528 pages

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

Expand your professional knowledge

1.800.582.2452 www.nysba.org/pubs **Mention Code: PUB8914**

NYSBA

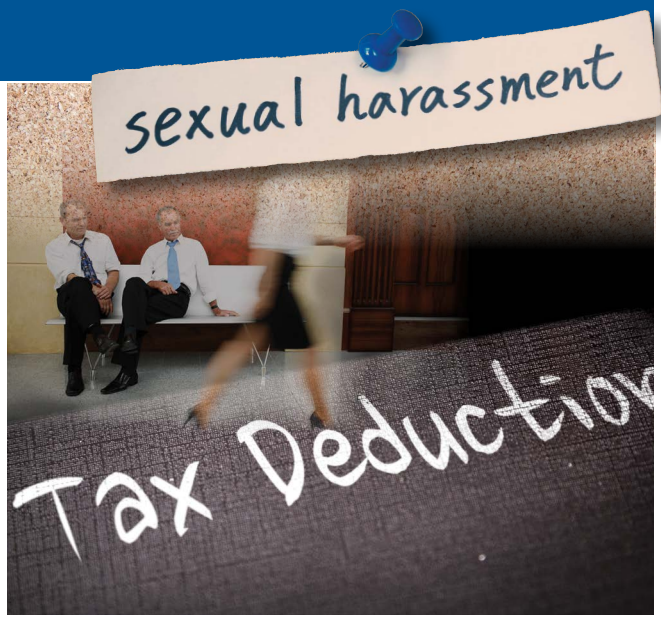
NEW YORK STATE BAR ASSOCIATION
Journal

EDITORIAL OFFICES
One Elk Street, Albany, NY 12207
(518) 463-3200 • FAX (518) 463-8844
www.nysba.org

EUGENE C. GERHART
(1912–2007)
Editor-in-Chief, 1961–1998

CONTENTS

FEBRUARY 2018



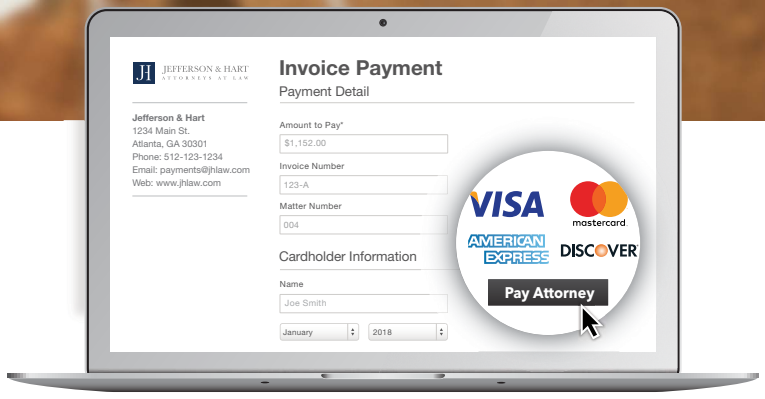
TAX WRITE-OFFS IN SEXUAL HARASSMENT CASES AFTER HARVEY WEINSTEIN

BY **ROBERT W. WOOD**

10

DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $30. Library subscription rate is $210 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.



Have the best of both worlds

LawPay was developed to simplify the way attorneys get paid, allowing you to run a more efficient practice and spend more time doing what you love. Our proven solution adheres to ABA rules for professional conduct and IOLTA guidelines. Because of this, LawPay is recommended by 47 of the 50 state bars and trusted by more than 45,000 lawyers.

LawPay® AN AFFINIPAY SOLUTION + NYSBA®

LawPay.com/NYSBA | 855-759-5284

The experts in legal payments

SHARON STERN GERSTMAN

Teaching Old Law New Tricks

In November, I had the honor of participating in a program organized by Past-President Glenn Lau-Kee. Glenn was hosting a delegation from the People's Republic of China, led by Hon. Zhang Rongshun, Vice Chair of the Legislative Affairs Commission of the Standing Committee of the National People's Congress. He was accompanied by fellow commissioners and staff. They were undertaking a total recodification of all of their civil laws – an undertaking which was unfathomable to the U.S. participants, which included ABA President-Elect Robert Carlson, American Bar Foundation Executive Director Ajay Mehrotra, ALI Director Richard Revesz, Neil Quartaro, the Immediate Past Chair of NYSBA's International Section, as well as other leaders and academics from New York. The delegation had come to New York, and were then traveling to Washington, on an educational expedition. They were trying to learn all they could about how laws are written and how they adapt to social and technological changes.

After a short presentation by each of the participants, the Chinese delegation began asking questions. Thankfully, we were aided by an extremely competent interpreter, Wang Yeuduan, a lawyer licensed both in China and the U.S. The first (and most dominant) question asked by the delegation was how our law was adapting to driverless cars. The Chinese feel the urgency of creating appropriate law, as they predict that driverless cars will be on their roadways within two years.

Luckily for me, I had attended the excellent program of the Tort, Insurance and Compensation Law (TICL) Section in Nashville the prior week. During that program, we had a presentation on driverless cars, including a discussion of the science and the likely impact driverless cars would have on the insurance industry and the legal profession. Few of us in that room had previously really focused on the ripple effect this technology would have on many areas of law and society – not just the tort laws.

While it is doubtful that we would have driverless cars on our roadways as quickly as the Chinese, many experts are predicting that there will be driverless trucks in the next five to 10 years. In October 2016, there was a test run by a beer-delivery truck on I-25, from Fort Collins to Colorado Springs, while the driver slept in a berth in the back. The driver had to negotiate the truck onto the highway (the technology for driving on small roads was not yet available), and the truck was escorted by police, in case anything went wrong. The truck traveled driverless for more than 130 miles without incident.

There is a huge incentive to develop driverless trucks. Approximately 70 percent of goods in the United States are transported by truck. The cost of drivers to the trucking industry is immense – in addition to salaries and benefits, and lodging and food on the road, there is the cost of accidents often caused by driver fatigue, weather conditions and driver error. There is also a shortage of drivers.

For any form of driverless transportation the obvious question is, "What law will apply if there is a collision?" Now, driver fault is the predominant determinative factor of whether an injured party will recover. Will products liability claims (which are more complex and more difficult to prosecute) replace simple negligence actions? Will there continue to be no-fault, and a threshold to recover? Will there be a change in the law of assumption of the risk for passengers in driverless cars? Is there primary or secondary liability on the driver whose function is only to take over in an emergency? The questions are endless.

SHARON STERN GERSTMAN can be reached at ssterngerstman@nysba.org.

The insurance industry is certain to be deeply affected. Currently, liability insurance of at least $25,000/$50,000 is required. Will this be required for a driverless car, if liability is solely (or primarily) on the manufacturer? If driverless technology produces fewer accidents (as is uniformly predicted), there will be fewer claims, and thousands of jobs within the insurance industry will be eliminated. There will likely be fewer lawsuits and fewer medical claims, affecting those professions, as well. Even the need for auto repair and traffic police will change.

There will undoubtedly be government involvement. There will need to be detailed regulations regarding development, deployment and market factors. There may also be governmental strategies to encourage automated driving for safety purposes.

While it is not clear exactly how the law will evolve and how the legal profession will adapt, it is imperative that we begin thinking about it, and try to formulate the best policy. Like the Chinese, we may have to adapt very quickly. In addition to the TICL Section, which will continue to monitor the tort law and the insurance industry, we now have a new Committee on Transportation Law that will be focusing on this and other topics. We are sure to have more CLEs on this topic to help all lawyers become aware of the issues. And we may want to take a look at what the Chinese develop, or at least what happens on their roadways, once driverless cars enter traffic. ■

NYSBA CLE

February, March & April 2018

Live Program & Webcast Schedule

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

Bringing you the best and most relevant continuing education to help you be a better lawyer.

Last year over 2,000 lawyers and judges volunteered for a NYSBA CLE. For decades, CLE volunteers have been developing and presenting seminars, preparing rich collections of written materials and raising the bar for legal practice in New York.

FEBRUARY

Microsoft Word for Legal Professionals
Friday, February 23rd | NYC & Webcast

Symposium on Diversity in Dispute Resolution "The Search for Solution"
Monday, February 26th | NYC

What You Need to Know as a Guardian Ad Litem
Tuesday, February 27th | Albany
Wednesday, February 28th | NYC & Webcast

Intellectual Property for the General Practitioner
Tuesday, February 27th | NYC & Webcast

MARCH

Keeping Current with New York Automobile Litigation
Thursday, March 1st | NYC & Webcast

Mindful Communication: Exploring Implicit Bias and Relating Respectfully with LGBTQ People
Thursday, March 1st | Albany & Webcast

Real Property and Tax Issues for the Elder Law Attorney
Thursday, March 1st | Albany & Webcast

Technology in Your Practice Pt I
Friday, March 2nd | NYC & Webcast

CPLR Update 2018
Friday, March 2nd | Buffalo
Saturday, March 3rd | Rochester
Friday, March 16th | Albany & Webcast
Saturday, March 17th | Syracuse
Tuesday, March 27th | NYC

Aging & Longevity
Tuesday, March 6th | NYC & Webcastt

Intellectual Property for the General Practitioner
Tuesday, March 6th | Albany

Bridging the Gap
Thursday & Friday, March 8th & 9th | NYC
Thursday & Friday, March 15th & 16th | Buffalo
Tuesday & Wednesday, March 20th & 21st | Albany & Webcast

Legal Ethics in the Digital Age
Tuesday, March 13th | NYC & Webcast

The GDPR and How it Might Affect the Practice of Law in New York: An Overview
Tuesday, March 13th | NYC & Webcast

Autonomous & Connected Vehicles: Ethical and Evidentiary Issues Around the Corner
Wednesday, March 14th | NYC & Webcast

Introduction to Discovery and Use of Electronic Information
Wednesday, March 14th | NYC & Webcast

Real Property Tax Assessment Litigation and Appeals
Thursday, March 15th | Albany & Webcast

Debt Collections and the Enforcement of Money Judgments
Thursday, March 15th | Syracuse
Tuesday, March 20th | Westchester
Wednesday, March 21st | Long Island
Thursday, March 22nd | Albany
Tuesday, March 27th | NYC & Webcast

Artificial Intelligence Webinar Series: What is Artificial Intelligence ("A")? How Does it Work?
Wednesday, March 21st | Webcast

14th Annual International Estate Planning Institute
Thursday & Friday, March 22nd & 23rd | NYC & Webcast

Premises Liability 2018: What You Need to Know in New York
Wednesday, March 28th | Buffalo & NYC

Anatomy and Medicine for Lawyers
Thursday, March 29th | NYC & Webcast

APRIL

Emerging Technologies for Solo and Small Firms
Tuesday, April 10th | NYC & Webcast

Diversity in the American Workforce
Tuesday, April 10th | NYC & Webcast

Attorney Fee Dispute Resolution
Tuesday, April 10th | NYC & Webcast

Smooth Moves 2018
Tuesday, April 10th | NYC

www.nysba.org/cle

Register online or call 1.800.582.2452

NYSBA

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

NEW YORK STATE BAR ASSOCIATION

Register as an attorney volunteer or list your organization at **NYSBAProBono.org** today!

Organizations:

- Does your organization provide legal services to our immigrant communities?
- Do you have projects that could benefit from volunteer attorneys?
- Post your training events on the Events page and list your projects today for volunteer attorney referrals!

Attorneys:

- Want to make a difference in your community, but don't know where to turn or lack immigration legal experience?
- Browse a list of exciting volunteer opportunities, review training resources, mentor others, and see what is happening around New York State on the Events page!

The New York State Bar Association's Pro Bono Immigration Portal is a new and exciting initiative created to address the growing needs of our immigrant communities and public service organizations, inspired by an overwhelming response of New York attorneys wishing to contribute and help out in any way they can. Browse available opportunities and volunteer directly, or use the tailored referral service to get connected with organizations that work closely with immigrants.

Questions? Email probonoportal@nysba.org or call 518-487-5642.

This project was made possible in part by a grant from The New York Bar Foundation.

THE NEW YORK BAR FOUNDATION

NYSBA

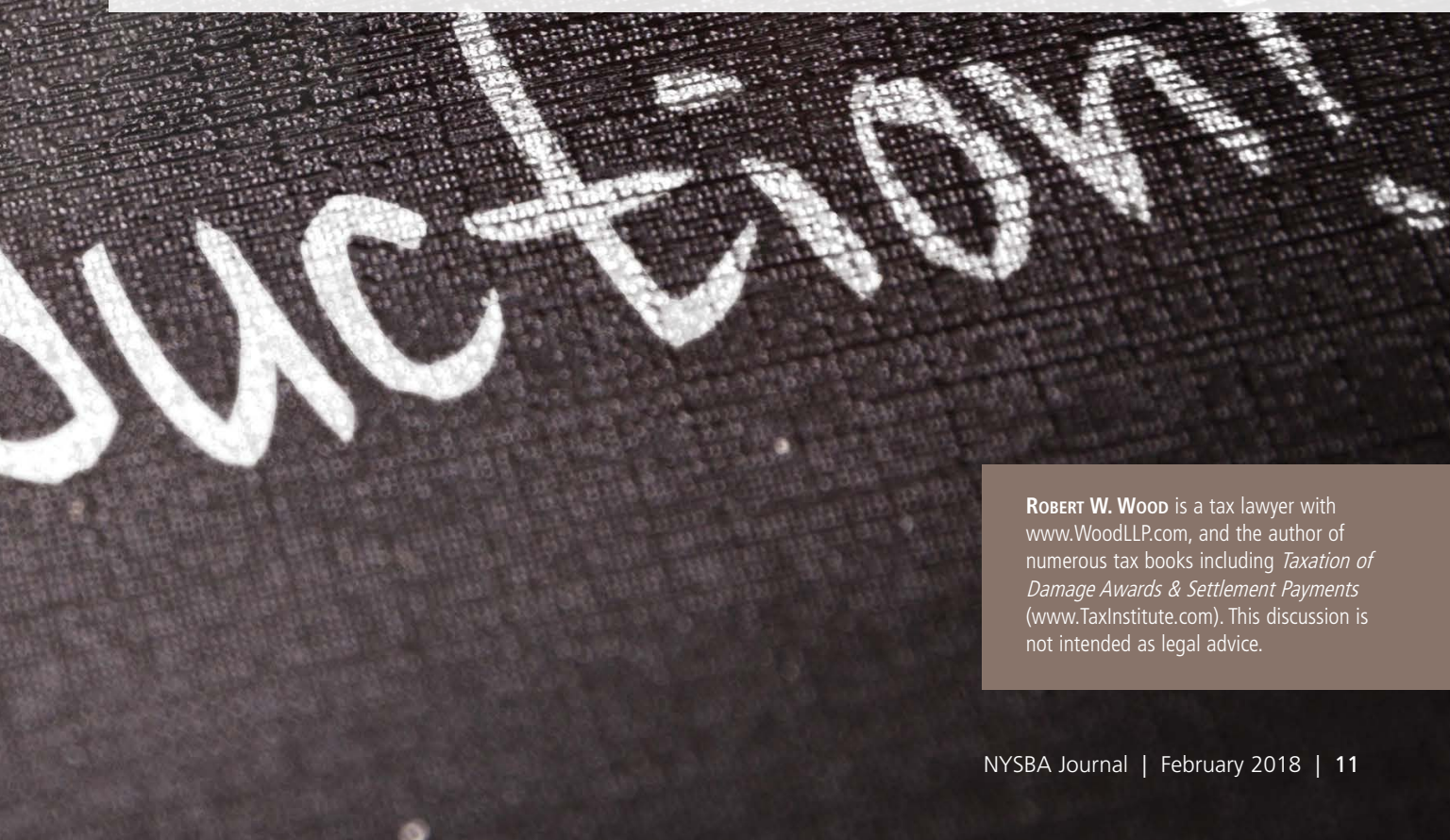

sexual harassment
Tax Ded

Tax Write-Offs in Sexual Harassment Cases After Harvey Weinstein

By Robert W. Wood

Harvey Weinstein, Kevin Spacey, Bill O'Reilly, and many other figures in the business and entertainment world have been accused of serious acts of sexual harassment. In a few cases, criminal investigations have reportedly been opened. In many cases, there have been significant business consequences, with termination of employment, large legal settlements, and no doubt large legal fees.

The movement that was unleashed as many alleged sexual predators suddenly found themselves in the crosshairs came to be known on social media as #MeToo. As 2017 drew to a close, *Time* magazine selected the "Silence Breakers" as its person of the year. They were all the women and men who publicly spoke about being victims of sexual harassment, assault or abuse, as a way to help others.[1]



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

With a major tax bill also unfolding in late 2017, perhaps it was inevitable that these two moments would collide. With tax reform being discussed, perhaps the tax law relating to deductions for sexual harassment settlements and related legal fees should be examined? Many people seemed to be shocked that for businesses legal settlements are nearly always tax deductible, as are legal fees.

In fact, except for legal fees that must be capitalized to an asset, legal fees are nearly universally deductible by businesses. Even legal fees related to clearly nondeductible conduct (such as a company negotiating with the SEC to pay a criminal fine) can still be deducted. The criminal fine might not be deductible.

tion 162 of the tax code generally lists business expenses that are tax deductible.

However, now new § 162(q) provides:

> (q) PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE. — No deduction shall be allowed under this chapter for —
> (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or
> (2) attorney's fees related to such a settlement or payment.

Arguably, denying tax deductions for attorney fees is more significant than denying deductions for settlement

Many people seemed to be shocked that for businesses legal settlements are nearly always tax deductible, as are legal fees.

But the related legal fees have always been fair game. In some cases, this can even be true with legal fees in criminal matters, and payments of restitution. Many people find it surprising that even punitive damages are tax deductible for businesses, no matter how bad the conduct. In general, only fines and penalties paid to the government are not deductible.

And yet, even some fines or penalties can turn out to be tax deductible. This seeming sleight of hand is not illegal or inappropriate in the case of fines or penalties that have a remedial, rather than a punitive, purpose. Fines and penalties can have different purposes. That this kind of analysis goes on should not be surprising.

Yet, there has long been tension over these rules. When big corporate wrongdoers pay punitive damages, or settle regulatory disputes over terrible problems or conduct, there are periodic calls to change the tax rules. Over the last few decades, there have been several proposals in Congress to eliminate the tax deduction for punitive damages, but none have passed.

However, with incredible speed, the recently passed tax bill includes what some have labeled a "Harvey Weinstein tax." It isn't a tax exactly, but it denies tax deductions, which is seen as a kind of tax. Legal fees and legal settlements in sexual harassment cases often end up as deductible business expenses.

New Era

The idea of the new provision is to deny tax deductions for settlement payments in sexual harassment or abuse cases, if there is a nondisclosure agreement. Notably, this "no deduction" rule applies to the attorney fees, as well as the settlement payments. The language is simple.[2] Sec-

payments. Up until now, legal fees are generally seen as classic business expenses, assuming that there is some business connection. Thus, the new law treats sexual harassment settlements and legal fees more harshly than nondeductible government fines (where legal fees could still be deducted).

Of course, most legal settlement agreements have some type of confidentiality or nondisclosure provision. Thus, the fact that the new law applies only to confidential settlements is not much of a qualifier. There has been recent speculation that sexual harassment settlements may now start breaking this normal confidentiality mold.

If the settlement combined with related legal fees represents a large number, the loss of tax deductions might make the lack of a confidentiality provision worthwhile. Defense lawyers almost invariably ask for confidentiality, since they might assume that some plaintiffs might want to go public. But some plaintiffs may not want publicity or scrutiny that might prejudice their employment or other aspects of their lives.

In any event, for some defendants, particularly where the lawsuit has already been the subject of press coverage, the lack of a confidentiality provision might seem to be worth the risk of disclosure. Apart from these obvious points, there have been other observations about the new tax that are worrisome. Some observers have pointed out that it is not crystal clear that the denial of legal fees is only in cases where a nondisclosure agreement is included.

The nondisclosure is clearly the trigger for the denial of the deductibility of the settlement monies. The legal fees are not so clear. It is therefore possible (although I would hope quite unlikely), that the IRS or the courts might read the law as a denial of a tax deduction for legal

fees related to sexual harassment or abuse, even *without* a nondisclosure agreement.

For businesses trying to deduct legal fees for sexual harassment cases that do not include nondisclosure provisions, some support may be derived from the Conference Committee Report. The new language was only present in the Senate version of the tax bill, and not in the earlier House version. Therefore, Congress referred the competing bills to a Conference Committee to determine which provisions of the House and Senate versions would survive.

The Conference Committee report goes provision-by-provision, describing the differences between the House and Senate versions and reporting which version of each provision survived. The Conference Committee Report describes new § 162(q) as disallowing any deduction "for any settlement, payout, or attorney fees related to sexual harassment or sexual abuse if such payments are subject to a nondisclosure agreement."[3]

Congress apparently *intended* for the new provision to only apply to legal fees paid in connection with sexual harassment or sexual abuse settlements that are subject to a nondisclosure agreement. However, there may still be debates over whether the wording of the statute might prohibit legal fee deductions even where there is no express confidentiality clause. Defendants running the gauntlet of confidentiality will surely claim the deductions despite the ambiguity.

Plaintiffs' Legal Fees?

The target of the new law is surely the alleged harasser and the defendant company. But what about legal fees paid by the *plaintiff* in a sexual harassment case in which a confidential settlement is reached? Are they deductible? It is shocking to think that they might not be.

After all, normally, plaintiffs should somehow be able to deduct legal fees if they are receiving a recovery. Yet, the tax treatment of legal fees a plaintiff pays to reach a recovery, often on a contingent fee basis, has been troubled for decades. There has historically been all manner of tax jockeying and a deep rift regarding the tax treatment of legal fees in different Circuit Courts around the country.

Then, in 2005, the U.S. Supreme Court in *Commissioner v. Banks*[4] held that plaintiffs in contingent fee cases must generally recognize gross income equal to 100 percent of their recoveries. This is so even if the contingent fee lawyer subtracts the lawyer's 40 percent (or other) contingent fee before the plaintiff ever sees the money. Being treated as receiving 100 percent means that the plaintiff must figure a way to deduct the 40 percent fee.

The type of deduction has varied and been controversial. Plaintiffs were relieved when a few months before the Supreme Court's *Banks* decision, Congress provided an above-the-line deduction for legal fees in employment cases. In effect, the above-the-line deduction blunted the sting of the gross income in the first place. Since that 2004 statutory change, plaintiffs in employment cases have been taxed on their net recoveries, not their gross.

Now, though, there is real concern that the legal fee deduction rules are going backwards. It may be fine to deny Harvey Weinstein and Miramax any tax deduction for settlements and legal fees, but how about the plaintiffs? The wording of the new law is at least debatable.

On its face, it would seem to prevent *any* deduction for legal fees in this context. The target may have been the harasser and the harasser's company. Yet it appears to deny *any* attorney fees, including fees paid by the plaintiff. Even the language in the Conference Committee Report is not particularly helpful to plaintiffs trying to deduct their fees.

One answer to this surely unintended result might be to revisit the 2004 change that ushered in the above-the-line deduction for employment cases. That language is still in the tax code, promising an above-the-line deduction for legal fees in any employment-related claim. Yet the new Weinstein provision says that it trumps all others.

The new § 162(q) denies any deductions "under this chapter." Section 162 is located in Chapter 1 of Subtitle A, which extends all the way from § 1 through § 1400U-3. As a result, the new § 162(q) would appear to disallow deductions under §§ 62, 162, and 212 (as well as several other sections).

The above-the-line deduction for legal fees in employment cases is located in § 62. Plaintiffs might wonder if their legal fee deduction is also disallowed. One would hope that the IRS would view the *plaintiff's* legal fees as materially different from those of the defendant in this context.

Since 2004, the above-the-line deduction in employment cases has generally been non-controversial. In general, the IRS has interpreted the above-the-line deduction liberally. For example, in cases involving multiple claims, the IRS has generally not attempted to bifurcate the legal fees into constituent parts.

If some of the claims are about employment, one might generally assume that the above-the-line deduction should presumably apply to *all* of the fees. Even very large figures on tax returns appear to generate few disputes between taxpayers and the IRS about the above-the-line deduction for attorney fees. Despite the somewhat worrisome wording of the new statute, perhaps plaintiffs and their tax preparers may assume that this non-deduction provision can *surely* not have been intended to apply to plaintiffs.

Surely Congress would not want a sexual harassment victim to pay tax on 100 percent of his or her recovery when 40 percent goes to his or her lawyer! Besides, a below-the-line deduction appears not to be available either. This is where the picture for plaintiffs arguably darkens even more materially.

Below the Line?

One might think that even if the IRS were to read the Weinstein provision as applying to defendants *and* to plaintiffs, there might be a fallback position. A below-the-line deduction is never as attractive. Yet, if there is a risk of the above-the-line deduction failing, at least an old-fashioned miscellaneous itemized deduction for the legal fees could help.

Remember, before the 2004 change, many employment-claim plaintiffs had to be content with such a deduction. In such a case, some of the fees were non-deductible on account of the 2 percent of gross income threshold. There were also phaseouts of deductions, depending on the size of the plaintiff's income. Worse still, there could be alternative minimum tax (AMT) repercussions.

The possibility that a plaintiff could be taxed on a gross recovery with no deduction for legal fees seems significant.

In a few well publicized cases, plaintiffs with high legal fees actually lost money after taxes by winning their case.[5] But for many, a miscellaneous itemized deduction for the fees at least prevented the worst injustices. Now, that deduction seems to be gone too, at least until 2026.[6]

This is not a feature of the Weinstein tax, but of the other significant changes in the new tax law. With higher standard deductions, the law now eliminates these deductions until 2025. Thus, for the sexual harassment plaintiff, the choice would appear to be either an above-the-line deduction or nothing.

Even if the tax law did not eliminate miscellaneous itemized deductions until 2026, all miscellaneous itemized deductions are found in Chapter 1 of Subtitle A of the Tax Code. The below-the-line deduction that plaintiffs claimed before the above-the-line deduction was introduced in 2004 is found in § 212. That is in the same Chapter as the new § 162(q). As a result, the new § 162(q) would seem to also disallow below-the- line deductions under § 212.

This arguably suggests a broader tax problem. Outside of the employment context, there is a large problem for legal fees. Until 2025, plaintiffs who do not qualify for an above-the-line deduction for their legal fees evidently now must pay tax on 100 percent of their recoveries, not merely on their post-legal fee net. Only employment and certain whistleblower claims are covered by the above-the-line deduction.

One other possible deduction that might suggest itself would be a business expense deduction. Even before the above-the-line deduction for employment claims, some plaintiffs have argued that their lawsuit amounts to a business venture. A plaintiff doing business as a proprietor and filing Schedule C might claim a deduction there for legal fees related to the trade or business.[7]

However, this argument too seems obviated by the new law. Another possibility for legal fee deductions might be capital recoveries, where the legal fees can often be capitalized and offset against the gain. This does not appear to be impacted. Cases discussing the capitalization of legal fees generally mention § 263.[8] Section 263 is part of the same chapter of the tax code as § 162, so § 162 would appear to override § 263 *if* they conflict.

However, it is not clear that they do conflict. New § 162(q) only disallows "deductions." It is not clear whether capitalized expenses are "deductions" for purposes of new § 162(q), but hopefully they are not. After all, capitalized expenses are reported on Schedule D rather than claimed with other tax deductions on Schedule A or Schedule C.

Moreover, § 263 states that "[n]o deduction shall be allowed" for capitalized expenses, which would seem nonsensical if capitalized expenses were a type of deduction. Section 1.212-1(k) of the Treasury Regulations also uses language that implies that capitalized expenses are not "deductions." On the other hand, perhaps the new law will be read broadly enough to cover even this.

In any event, in many circumstances the possibility that a plaintiff (outside the employment-claim context) could be taxed on a gross recovery with no deduction for legal fees seems significant. This hardly seems to be a drafting error. Eliminating miscellaneous itemized deductions means that many plaintiffs (outside employment cases and certain whistleblower cases) may have *no legal fee deduction at all*. If this is correct, vast numbers of plaintiffs in many types of litigation apparently may now feel the full force of paying taxes on their gross recoveries, with no deduction for legal fees.

Express Allocations

Most legal releases understandably cover a wide range of claims, known and unknown. After all, a defendant paying money to resolve a case wants to know that any and all claims will now be barred. In an employment case, even if race, gender, or age discrimination claims were not explicitly made, they will surely be covered by the settlement agreement.

Sexual harassment is likely to be covered, too. But will *any* mention of such claims trigger the Weinstein provision? If it does, will it bar *any* tax deduction, even if the sexual harassment part of the case is minor? Could plaintiff and defendant expressly agree on a particular tax allocation of the settlement to head off the application of the Weinstein tax?

In a $1 million settlement over numerous claims, could one allocate $50,000 to sexual harassment? This figure may or may not be appropriate on the facts. However, legal settlements are routinely divvied up between claims. And there could be good reasons for the parties to talk turkey about such allocations now.

Of course, the IRS is never bound by an allocation in a settlement agreement. But the IRS does often pay attention to such allocations and (in my experience) often respects them. Given the tax risks to both plaintiffs and defendants, such an allocation could help both sides.

I expect that we will start seeing such explicit sexual harassment allocations. We may see aggressive allocations, where the sexual harassment may have been the primary impetus of the case. We may also see such allocations, presumably with nominal dollar amounts, even in cases where the claims are primarily about something else.

An allocation could reduce the tax exposure for both sides. And one might think that the legal fees could (and perhaps should) be allocated pro-rata according to the stated allocation. The IRS normally applies that pro-rata approach to legal fees.[9]

Suppose that the parties allocate $50,000 of a $1 million settlement to sexual harassment. That amounts to 5 percent of the gross settlement. If $400,000 is for legal fees, 5 percent of those fees ($20,000) should presumably be allocated to sexual harassment, too.

One other possible answer might be for the parties to expressly state that there was *no* sexual harassment, and that the parties are not releasing any such claims. Yet it is hard to imagine a defendant agreeing to the latter. Defendants want complete releases, and surely excepting sexual harassment or abuse from a release would be unattractive to the defendant.

Thus, what about including the complete release, but stating that the parties agree that no portion of the settlement amount is allocable to sexual harassment? That may make sense in some cases. Perhaps it will be analogous to cases in which punitive damages were requested in the complaint.

When it comes settlement time, one or both parties may want to expressly state that no punitive damages are being paid. Including a complete release but having both parties agree that this is not (primarily, or perhaps even remotely) a sexual harassment case may make sense.

Technical Corrections?

It is possible that Congress did not intend many of the problems that now seem apparent with this provision. It seems likely that Congress did not intend the scope of the denial of legal fees to be any different from the scope of the denial of legal settlement payments. It seems likely that Congress particularly did not mean to adversely impact plaintiffs who bring sexual harassment cases.

In that sense, surely plaintiffs should be permitted to deduct legal fees above the line. However, it is not 100 percent clear. Moreover, how successful plaintiffs and defendants will be with allocation techniques in this sensitive new area is also not clear.

Finally, there is an elephant in the room posed by a new lack of miscellaneous itemized deductions. This astounding change should presumably not impact plaintiffs in employment cases. It also should not impact whistleblowers in federal False Claims Act and IRS whistleblower cases. Notably, SEC whistleblower plaintiffs are still not expressly covered by an above-the-line deduction. The Senate amendment to extend the above-the-line deduction to SEC claims did not survive the Conference Committee.[10]

Standard deductions have been significantly increased. Yet for many types of cases involving significant recoveries and significant attorney fees, the lack of a miscellaneous itemized deduction could be catastrophic. There may be new efforts, therefore, to explore the exceptions to Supreme Court's 2005 holding in *Banks*.

The Supreme Court in *Banks* laid down the general rule that plaintiffs have gross income on contingent legal fees. But the Court alluded to various contexts in which this general rule might not apply. We should expect taxpayers to more aggressively try to avoid being tagged with gross income on their legal fees. Stay tuned. ■

1. *See* Edward Felsenthal, *The Choice*, Time (Dec. 6, 2017).
2. *See* Tax Cuts and Jobs Act, Pub. L. 115-97, § 13307.
3. H. Rept. 115-466 at 279.
4. 543 U.S. 426 (2005).
5. *See Spina v. Forest Preserve District of Cook County*, 207 F. Supp. 2d 764 (N.D. Ill. 2002).
6. Tax Cuts and Jobs Act, Pub. L. 115-97, § 11045.
7. *See Alexander v. Comm'r*, 72 F. 3d 938 (1st Cir. 1995).
8. *See Woodward v. Comm'r*, 397 U.S. 572, 575 (1970); *Dye v. United States*, 121 F.3d 1399, 1405 (10th Cir. 1997).
9. *See Robinson v. Comm'r*, 102 T.C. 116, 124 (T.C. 1994).
10. H. Rept. 115-466 at 166–67; *see also* Tax Cuts and Jobs Act, H.R. 1, 115th Cong. (2017), § 11078 (as amended by Senate).

"Upset at you for breaching the non-compete? Of course not."

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) is a member of Geringer, McNamara & Horowitz in New York City. He has represented parties in personal injury, professional negligence, and commercial cases for over 26 years. In addition to his litigation practice, he acts as a private arbitrator, mediator and discovery referee, and is now affiliated with JAMS. He is the author of *Bender's New York Evidence* and *New York Civil Disclosure* (LexisNexis), as well as the most recent supplement to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches New York Practice at Columbia Law School and lectured on that topic, on behalf of the New York State Board of Bar Examiners, to candidates for the July 2016 bar exam. He serves as an expert witness and is a frequent lecturer and writer on civil practice, evidence, ethics, and alternative dispute resolution issues. He serves on the Office of Court Administration's Civil Practice Advisory Committee, is active in a number of bar associations, and served as Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee.

"Two Different Worlds"

Introduction

Written by Al Frisch (music) and Bernie Wayne (lyrics) and first performed in 1956,[1] "Two Different Worlds" has been performed by, among others, Robert Goulet, Engelbert Humperdinck, and my favorite, Nat King Cole. It contains the lyrics:

> So far apart
> They say we're so far apart
> And that we haven't the right
> To change our destiny[2]

Written about lovers from different walks of life, these lyrics aptly describe what New York lawyers frequently encounter when practicing in two Appellate Departments. Two different worlds, where substantive and procedural law are often "so far apart," and where judges and attorneys cannot "change [their] destiny" by applying the law from a different Appellate Department.

When the rule in one Appellate Department differs from that in another, there is a "split in the Departments," and a January 2018 Third Department case aptly illustrates a split with both procedural and substantive ramifications over whether a CPLR 3101(d)(1)(i) expert exchange is required for a treating physician.

How Did We Get Here?

In *Mountain View Coach Lines, Inc. v. Storms*,[3] the Second Department explained the structure of New York's Appellate Division and the impact of appellate precedents throughout the four Departments:

> At the outset, we note that if the Third Department cases were, in fact, the only New York authorities on point, the trial court followed the correct procedural course in holding those cases to be binding authority at the nisi prius level.[4] The Appellate Division is a single State-wide court divided into departments for administrative convenience (citations omitted) and, therefore, the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule (citations omitted). This is a general principle of appellate procedure (citations omitted), necessary to maintain uniformity and consistency[5] (citation omitted), and, consequently, any cases holding to the contrary (citation omitted) are disapproved.[6]

In the absence of authority from another Appellate Department or the Court of Appeals,[7] trial level courts statewide are obligated to follow the single, controlling authority of any Department. Where its own Department has not spoken, but two or more of the other Departments have, but with different results, a trial court may elect which of the Department's holdings to apply.[8]

However, that Appellate Department authority is not binding on the appellate courts in the other Departments:

> Such considerations do not pertain to this court. While we should accept the decisions of sister departments as persuasive (citations omitted), we are free to reach a contrary result (citations omitted). Denial of leave to appeal by the Court of Appeals is, of course, without precedential value (citation omitted). We find the Third Department decisions little more than a "conclusory assertion of result," in conflict with settled principles, and decline to follow them (citation omitted).[9]

Or, as one appellate court put it, "to the extent that our holding today may be inconsistent with *Wilson*, we attribute it to a respectful disagreement with our sister court."[10]

In *Mountain View*, where the Second Department declined to follow precedent from the Third Department, that new Second Department precedent became binding on trial courts located within that Department, while trial courts in the Third Department remained bound to follow that Department's holding:

> The doctrine of stare decisis does not compel a judge at Special Term

> to follow a decision of a Special Term in another judicial district; nevertheless, he must follow a decision made by the Appellate Division of another department, unless his own Appellate Division or the Court of Appeals holds otherwise (citation omitted).[11]

These rules do not require counsel to ignore favorable authority from other Departments, and the Court of Appeals, citing *Mountain View*, has held that the failure to cite persuasive authority from another appellate Department (and, indeed, from other jurisdictions) may amount to ineffective assistance of counsel:

> Appellate counsel's apparent conclusion that *Di Pasquale* was not worth citing was not a reasonable one, even by the undemanding standard we apply in ineffective-assistance cases. *Di Pasquale*, though old, was still a valid precedent, binding on all trial-level courts in the state (citation omitted) and entitled to respect by appellate courts. Neither the failure to cite an 1884 Oyer and Terminer case nor the existence of an alternative holding seriously impaired *Di Pasquale*'s precedential force. The *Di Pasquale* court had carefully considered, and squarely rejected, the only argument that would have been available to the People in the present case, if the People had been confronted with a statute of limitations defense to the manslaughter count. The *Di Pasquale* court explained that the status of a charge (attempted murder, in that case) as a lesser included count of murder could not overcome the statute of limitations: "[U]nder the indictment [for murder] the defendant could be convicted only of murder, and . . . the lapse of time prevents a conviction for any other crime in connection with the death" (citation omitted).
>
> More recent authority, though not technically binding, would have strengthened defendant's statute of limitations argument. In *People v Hughes* (citation omitted), the Appellate Division relied on *Di Pasquale* for the proposition that "an uncharged misdemeanor which could not have been timely raised in the accusatory instrument may not be charged as a lesser included offense." While *Hughes* is distinguishable from this case, on the ground that in *Hughes* "the time-barred misdemeanor charge was not a valid lesser inclusory count" (citation omitted), it strongly suggested that *Di Pasquale* was not a dead letter. There was also non-New York authority approving of and following *Di Pasquale* (citations omitted).[12]

Colucci v. Stuyvesant Plaza, Inc.[13]

There's a lot going on in *Colucci*, where the Third Department affirmed a trial court's grant of summary judgment dismissing the plaintiff's complaint, including the sufficiency of a trial court's written decision *vis á vis* appellate review,[14] the adequacy of the moving papers,[15] whether the plaintiff's theories survive a *Frye* challenge,[16] violation of a court order scheduling expert disclosure,[17] and relating to the subject at hand, whether a CPLR 3101(d)(1)(i) expert exchange is required for a treating physician.[18]

In *Colucci*, there was a trial court order setting forth dates for the parties to exchange experts. The defendant complied with the order, the plaintiff did not. When the defendant moved for summary judgment, the plaintiff submitted an affidavit from a doctor who was a treating physician, who had been identified as one of 28 treating physicians in the plaintiff's bill of particulars, but whose affidavit came one year after the deadline to exchange experts.[19] The Third Department affirmed the trial court's preclusion of the medical expert, and explained that Department's rule for expert exchanges and treating physicians:

> Plaintiffs were not entitled to "ignore court orders with impunity" (citation omitted). Under these circumstances, we cannot conclude that Supreme Court abused its discretion in precluding plaintiffs from submitting the expert affidavits and opinions . . . in opposition to defendant's motion and at trial (citations omitted).

With regard to Johanning, Colucci's treating physician, this Court has interpreted *CPLR 3101 (d) (1) (i)* as "requiring disclosure of any medical professional, even a treating physician or nurse, who is expected to give expert testimony" (citation omitted). Thus, while Johanning was listed in Colucci's responses to defendant's bill of particulars as one of 28 treating physicians or medical providers, and medical treatment records for her were disclosed, this at most indicated to defendant that Johanning might have been called as an expert by plaintiffs; it did not obviate the need for plaintiffs to comply with *CPLR 3101 (d) (1) (i)* and Supreme Court's order by disclosing their intent to rely on him as an expert, as well as the substance of the facts and opinions to which he was expected to testify (citation omitted). To that end, the expert disclosure statute requires, in relevant part, "reasonable detail [of] the subject matter on which [the] expert is expected to testify, the substance of the facts and opinions . . . and a summary of the grounds for [the] expert's opinion" (citation omitted), none of which was timely disclosed to defendant (citation omitted). Notably, "the burden of providing expert witness disclosure and setting forth the particular details required by the statute lies with the party seeking to utilize the expert; it is not opposing counsel's responsibility to cull through [copious medical records] to ferret out the qualifications of the subject expert, the facts or opinions that will form the basis for his or her testimony at trial and/or the grounds upon which the resulting opinion will be based" (citation omitted). Moreover, the record supports Supreme Court's conclusions that Johanning's expert affidavit, submitted for the first time in opposition to defendant's motion, offered substantially new medical and scientific theories not reflected in his medical records (citation omitted). Thus, the court

providently precluded Johanning's expert affidavit and testimony.

So, in the Third Department, an expert exchange is required for all experts, including treating physicians.

And in the Other Worlds?

The Court of Appeals has not addressed the issue, but each of the other Appellate Departments has, and the First, Second, and Fourth Departments are in agreement that a CPLR 3101(d)(1)(i) expert exchange is not required for a treating physician.[20]

In *Ryan v. City of New York*,[21] the First Department held that where treating physicians' reports have been exchanged, a defendant has sufficient notice of the proposed testimony and neither surprise nor prejudice would result, and in *Lee v. Riverhead Bay Motors*,[22] it held that a trial court improperly precluded testimony of a treating orthopedic surgeon as to the plaintiff's need for future hip replacement surgery which was raised in the plaintiff's bill of particulars; the surgeon should have been permitted to testify as to permanency of the plaintiff's pain, limp, and future need of a cane.

In *Logan v. Roman*,[23] the Second Department held that the plaintiff's treating physician should have been permitted to testify at trial, notwithstanding any failure or deficiency in providing disclosure pursuant to CPLR 3101(d)(1)(i), because that provision does not apply to treating physicians and the treating physician could testify to the cause of the plaintiff's injuries even if he had expressed no opinion regarding causation in his previously exchanged medical report.

In *Bonner v. Lee*,[24] the Fourth Department agreed that CPLR 3101(d)(1)(i) does not apply to treating physicians.

Of course, the ability of a treating physician to testify at trial in the absence of a CPLR 3101(d)(1)(i) exchange, as well as the scope of the physician's testimony, will be determined by examining whether there has been compliance with other disclosure requirements, including the rule requiring the exchange of medical reports in personal injury actions.[25]

Conclusion

Practitioners must be cautious when navigating among the trial courts of New York, and must know which Appellate Department the trial court they are appearing in is part of. It can be easy to forget you have left one world for another. Downstate, a mere two subway stops separate the courthouses of the First and Second Departments, yet they can be worlds apart. Upstate, it can be even more confusing. While driving west on I-90 from Albany, you start out in the Third Department, cross into the Fourth Department, then back into the Third, before finishing your drive in Buffalo back in the Fourth Department.

So, drive carefully. ■

1. https://en.wikipedia.org/wiki/Two_Different_Worlds_(1956_song).
2. http://lyricsplayground.com/alpha/songs/t/twodifferentworlds.shtml.
3. 102 A.D.2d 663, 476 N.Y.S.2d 918 (2d Dep't 1984).
4. I know, why can't they just write trial court?
5. *See also People v. Shakur*, 215 A.D.2d 184, 627 N.Y.S.2d 341 (1st Dep't 1995).
6. *Id.* at 664-65.
7. Court of Appeals authority is controlling as of the date of the decision. *See People v. Anderson*, 151 A.D.2d 335, 542 N.Y.S.2d 592 (1st Dep't 1989).
8. *See Scott v. City of New Rochelle*, 44 Misc. 3d 366, 986 N.Y.S.2d 918 (Sup. Ct., Westchester Co. 2014).
9. *Id.* at 665.
10. *In re Estate of Johnson*, 93 A.D.2d 1, 460 N.Y.S.2d 932 (2d Dep't 1983), *rev. on other grounds*, 59 N.Y.2d 461, 465 N.Y.S.2d 900 (1983).
11. *D'Alessandro v. Caro*, 123 A.D.3d 1, 992 N.Y.S.2d 520 (1st Dep't 2014).
12. *People v. Turner*, 5 N.Y.3d 476 at 482, 806 N.Y.S.2d 154 (2005).
13. 2018 NY Slip Op. 00211 (3d Dep't 2018).
14. *Id.* at 2.
15. *Id.*
16. *Id.* at 3–4.
17. *Id.* at 3.
18. *Id.* at 4–5.
19. *Id.* at 3–4.
20. 1-21 LexisNexis AnswerGuide New York Civil Disclosure § 21.06.
21. 269 A.D.2d 170, 703 N.Y.S.2d 90 (1st Dep't 2000).
22. 57 A.D.3d 283, 868 N.Y.S.2d 666 (1st Dep't 2008).
23. 58 A.D.3d 810, 810, 872 N.Y.S.2d 491 (2d Dep't 2009); *see also Mantuano v. Mehale*, 258 A.D.2d 566, 685 N.Y.S.2d 467 (2d Dep't 1999) (CPLR 3101(d)(1)(i) does not apply to treating physicians).
24. 255 A.D.2d 1005, 679 N.Y.S.2d 775 (4th Dep't 1998).
25. 22 N.Y.C.R.R. §202.16(g).

Sheila E. Shea is the Director of the Mental Hygiene Legal Service (MHLS) for the Third Judicial Department. **Carol Pressman** was a Principal Attorney with the agency and is now retired. Since 1965, the MHLS has provided legal services and assistance to people with mental disabilities. Its enabling statute is codified at Article 47 of the Mental Hygiene Law (MHL).

Guardianship: A Civil Rights Perspective

By Sheila E. Shea and Carol Pressman

Introduction

A person's right to determine the course of his or her life is a fundamental value in American law and firmly embodied in New York State jurisprudence.[1] Guardianship is the legal means by which a court appoints a third party, most typically an individual, but in other cases a not-for-profit corporation or government official, to make some or all decisions on behalf of a person determined unable to manage his or her own affairs.[2] Guardianship can be an important protective device, forestalling personal harm, financial exploitation, and other affronts to the dignity and welfare of people who are alleged to lack decisional capacity.[3] The civil liberties of the person subjected to guardianship yield in the process, however, exacting a personal and societal cost that warrants further exploration and consideration.[4]

This article weaves historical context and modern disability theory together to highlight the principle that less restrictive alternatives must be considered before a guardianship is imposed upon any person. Stakeholders in New York are urging modernization of our guardianship statutes at the same time the American Bar Association has resolved that legislatures and courts recognize supported decision-making as a less restrictive alternative before guardianship is imposed. The article closes with an admonition that guardianships should be considered dynamic, rather than static, in nature. Restoration of rights is required when the person subject to the regimen no longer benefits from its boundaries. Guardianship from a civil rights perspective shatters conventional beliefs about surrogacy and is offered for the benefit of people with disabilities who wish to define their own futures.

Guardianship and American Law

Guardianship has been employed since Ancient Rome to protect people who are unable to manage their personal and financial affairs because of incapacity by removing their right to make decisions and transferring legal power to another person, the guardian.[5] Guardianship is a matter of state law. Before a guardian may be appointed, an indi-

vidual must be determined to be an incapacitated person, defined in various ways, but codified in uniform acts as:

> an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.[6]

In most states, a single guardianship statute applies to all populations, regardless of the alleged cause of the person's incapacity. New York is one of six states, the others being California, Connecticut, Idaho, Kentucky and Michigan,[7] that have a separate statute that may be invoked for people with developmental disabilities. Guardianships may be plenary in nature, divesting all autonomy from the person subject to the regimen, or tailored to the individual needs of the person found to lack capacity.[8] Although virtually all state statutes have an explicit preference for limited guardianships, the empirical evidence that is available suggests that most guardians appointed by courts are authorized to exercise total or plenary authority over the affairs of the person determined to be incapacitated.[9]

> A goal of an effective guardianship regime should be to restore the rights of individuals who are capable of making their own decisions individually or with the assistance of others.

A lack of clarity persists concerning the actual number of people who may have guardians appointed for them in the United States. Estimates range from less than 1 million to more than 3 million, but the number will likely increase significantly with the aging of the "baby boomers,"[10] as well as the prevalence of dementia in the population.[11]

Guardianship and Civil Rights

Given its ancient origins, guardianship laws predate not only modern civil rights laws, such as the Americans with Disabilities Act,[12] but also precede the U.S. Constitution and the Magna Carta.[13] Often examined through the lens of benevolence, the appointment of a guardian divests autonomy from another person and has severe civil rights implications. As stated in 1987 by the House of Representatives Special Committee on Aging:

> By appointing a guardian, the court entrusts to someone else the power to choose where [he/she] will live, what medical treatment [he/she] will get and, in rare cases, when [he/she] will die. It is in one short sentence, the most punitive civil penalty that can be levied against an American citizen . . .[14]

The "civil death" characterization of guardianship arises because a person subjected to it loses autonomy over matters related to his or her person and property. Indeed, in many jurisdictions a person with a legal guardian will be deprived of fundamental rights, such as the right to vote, marry and freely associate with others.[15]

A powerful counter voice to guardianship as civil death is the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol.[16] Adopted in 2006, the CRPD is the first international human rights treaty drafted specifically to protect the rights of people with disabilities.[17] Legal scholars argue that the CRPD will provide the impetus for reshaping guardianship laws in the United States as "CRPD dictates supported – as opposed to substituted – decision making."[18] Whereas guardianships involve a third party making decisions for the individual subject to the regimen, supported decision-making focuses on supporting the individuals' own decisions. As stated by the American Bar Association:

> Supported decision-making constitutes an important new resource or tool to promote and ensure the constitutional requirement of the least restrictive alternative. As a practical matter, supported decision-making builds on the understanding that no one, however abled, makes decisions in a vacuum or without the input of other persons whether the issue is what kind of car to buy, which medical treatment to select, or who to marry, a person inevitably consults friends, family, coworkers, experts, or others before making a decision. Supported decision making recognizes that older persons, persons with cognitive limitations and persons with intellectual disability will also make decisions with the assistance of others although the kinds of assistance necessary may vary or be greater than those used by persons without disabilities.[19]

One form of assistance is the "Supported Decision-Making Agreement" by which the person with a disability chooses individuals to support him or her in various areas, such as finances, health care, and employment. In turn, "supporters" agree to assist the person in his or her decisions, rather than substituting their own. Supported decision-making agreements are used in pilot projects around the world and in at least one state, Texas, which enacted its own Supported Decision-Making Agreement Act.[20] In New York, it can be expected that recommendations for legislation will emerge as a result of a five-year pilot funded by the Developmental Disabilities Planning Council. The Council has issued a grant to a consortium of faculty members from Hunter College/City University of New York, among others, to study supported decision making as an alternative to guardianship in New York.[21]

Guardianship in New York

The general adult guardianship statute in New York is codified at Article 81 of the Mental Hygiene Law (MHL). The stated purpose of Article 81 is to:

> [S]atisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.[22]

A discrete statute exists, however, that may be invoked for people alleged to be in need of a guardian by reason of an intellectual or other developmental disability. In contrast, that statute, codified at Article 17-A of the Surrogate's Court Procedure Act (SCPA), is a plenary statute the purpose of which at its inception in 1969 was largely to permit parents to exercise continued control over the affairs of their adult children with disabilities.[23] In essence, the statute rested upon a widely embraced assumption that "mentally retarded"[24] people were perpetual children.[25] Under New York law, a person with developmental disabilities can be subject to either guardianship statute, despite the considerable substantive and procedural variations between Article 81 and Article 17-A.[26] A conundrum arises, as a result, because a petitioner for guardianship can choose between two statutes and petitioner's choice will determine the due process protections to be afforded to a respondent with developmental disabilities.

Article 81 of the Mental Hygiene Law

Article 81 of the MHL, proceedings for appointment of a guardian for personal needs or property management, became effective on April 1, 1993.[27] Article 81 replaced the former dual structure conservatorship and committee statutes that operated in New York.[28] By way of history, the appointment of a committee, pursuant to former Article 78 of the MHL, was the only available legal remedy to address the affairs of a person alleged to be incompetent. However, the committee statute required a plenary adjudication of incompetence.[29] Because of the stigma and loss of civil rights accompanying such a finding, the judiciary became reluctant to adjudicate a person in need of a committee.[30] In 1972, the conservatorship statute (former Article 77 of the MHL) was enacted into law as a less restrictive alternative to the committee procedure.[31] Unlike the committee statute, the appointment of a conservator did not require a finding of incompetence. Rather, the former law authorized the appointment of a conservator of the property for a person who had not been:

> [J]udicially declared incompetent and who by reason of advanced age, illness, infirmity, mental weakness, alcohol abuse, addiction to drugs or other cause suffered substantial impairment of his ability to care for his property or has become unable to provide for himself or others dependent upon him for support.[32]

However, by design, the statute limited the power of the conservator to property and financial matters.[33] Chapter amendments to the MHL were enacted in 1974 attempting to expand the role of conservators. The first established a statutory preference for the appointment of a conservator.[34] A second chapter amendment authorized conservators to assume a limited role over the personal needs of the person who was the subject of the proceeding.[35] Cast as reform measures, the amendments actually contributed to the "legal blurring" between Articles 77 and 78.[36] In 1991, the Court of Appeals was confronted with a case requiring a construction of the statutory framework to determine the parameters of the authority of a conservator. The question presented to the tribunal was whether a conservator could authorize the placement of his ward in a nursing home. In *In re Grinker*,[37] the Court of Appeals determined that such power could be granted only pursuant to the committee statute. The *Grinker* decision "settled the debate" surrounding the authority of a conservator to make personal needs decisions.[38] However, the *Grinker* holding also "dramatized the very difficulty the courts were trying to resolve, namely, choosing between a remedy which governs property and finances or a remedy which judges a person completely incompetent."[39]

To resolve the difficulties inherent in the conservator-committee dichotomy, the New York State Law Revision Commission proposed the enactment of Article 81 as a single remedial statute with a standard for appointment dependent upon necessity and the identification of functional limitations.[40] The new statute rejected plenary adjudications of incompetence in favor of a procedure for the appointment of a guardian whose powers are specifically tailored to the needs of the individual. Going forward, the right to counsel would be guaranteed[41] and monitoring of guardianships would be required.[42] The objective of the proceeding as declared by the legislature was to arrive at the "least restrictive form of intervention" to meet the needs of the person while, at the same time, permitting the person to exercise the independence and self-determination of which he or she is capable.[43]

Still, Article 8l may be "more progressive on paper than . . . in practice."[44] As stated by scholar and former jurist Kristin Booth Glen:

> [G]uardianship cases are generally only a small portion of the mix of cases carried by individual Supreme Court Justices but if done right can be extremely time consuming. The combination of an over-burdened judicial system, petitioners who routinely request plenary authority, inadequate resources for independent evaluation, and the likelihood that the [alleged incapacitated person] AIP will be unrepresented, result in far too little of the "tailoring" to specifically proven functional incapacities that is the heart of the statute.[45]

In addition, as noted by Glen, where the person alleged to be incapacitated suffers, or appears to suffer, from a progressive dementia, "petitioners will request – and courts often grant – full plenary powers to avoid the necessity of repeated future hearings as the individual's capacity (inevitably) deteriorates."[46] Protection of individual liberty, however, should not yield to arguments regarding expense of the proceeding or the convenience of parties other than the person alleged to be incapacitated.[47] While Article 81 is deemed a model statute in many respects, the statute in application is not without critics. From a civil rights perspective, potential areas ripe for reform abound and include improvement of guardian monitoring in New York, promoting alternatives to guardianship and establishing diversion programs.[48]

> dents, then respondents can be unjustly deprived of their right to autonomy.[55]

Given the many substantive and procedural variations between Article 17-A and Article 81, the Governor's *Olmstead* Cabinet[56] and commentators have called for reform or "modernization" of Article 17-A.[57] Surrogate's Courts are bringing enhanced scrutiny to Article 17-A adjudications and dismissing petitions where guardianship is not the least restrictive form of intervention.[58] Further, a lawsuit was commenced on September 26, 2016 in the U.S. District Court for the Southern District of New York by Disability Rights New York[59] seeking to enjoin the appointment of guardians pursuant to Article 17-A.[60] While the lawsuit was subsequently dismissed on *Younger* abstention grounds, the complaint alleged that Article 17-A violates

Under Article 17-A, the basis for appointing a guardian is whether the person has a qualifying diagnosis of an intellectual or other developmental disability.

Article 17-A of the Surrogate's Court Procedure Act

Under Article 17-A, the basis for appointing a guardian is whether the person has a qualifying diagnosis of an intellectual or other developmental disability.[49] Current law permits the appointment of a guardian upon proof establishing to the "satisfaction of the court" that a person is intellectually or developmentally disabled and that his or her best interests would be promoted by the appointment.[50] As a jurisdictional prerequisite, a 17-A petition must be accompanied by certifications of two physicians or a physician or a psychologist that the respondent meets the diagnostic criteria of an intellectual or other developmental disability.[51] On its face, Article 17-A provides only for the appointment of a plenary guardian and does not expressly authorize or require the surrogate to dispose of the proceeding in a manner that is least restrictive of the individual's rights. Indeed, Article 17-A does not even require the court to find that the appointment of a guardian is necessary, does not guarantee the right to counsel and permits the proceeding to be disposed without a hearing at the discretion of the court.[52] That said, Article 17-A has been revered by families because of its relative ease in commencing the proceeding, often without the assistance of counsel.[53] In contrast, Article 81 proceedings can be very complex and expensive to prosecute.[54] The convenience of Article 17-A proceedings as compared to Article 81 proceedings causes tension in New York. As aptly stated by Patricia Wright:

> If guardianship is made too expensive, incapacitated people who need the protection and assistance of a guardianship may not have those needs met. However, if guardianship fails to protect the rights of respon-

the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, the ADA and § 504 of the Rehabilitation Act.[61] The federal court's decision to abstain does not prejudice the right of the plaintiffs to challenge the statute in state court.

Restoration

Not enough study has been undertaken regarding the restoration of rights of people subject to guardianship.[62] Nonetheless, a goal of an effective guardianship regime should be to restore the rights of individuals who are capable of making their own decisions individually or with the assistance of others. Article 81 expressly authorizes modification or termination of the guardianship when, among other things, the incapacitated person has become able to exercise some or all of the powers which the guardian is authorized to exercise.[63] Parallel remedies are available to Article 17-A respondents, as Surrogate's Court retains jurisdiction over the proceeding and may consider applications to modify or terminate a guardianship.[64] For example, in *In re Guglielmo*,[65] Surrogate's Court previously appointed a 17-A guardian for a respondent who suffered a traumatic brain injury and was in a coma or semi-comatose state for approximately nine months. At the time the 17-A proceeding was commenced, the respondent was dependent upon others for assistance in many activities of daily living. Fifteen years later, he sought to restore his civil rights. The respondent's condition had substantially improved from the time of the accident resulting in his brain injury and three years, in fact, had elapsed since he had been in contact with his guardian. Termination of the guardianship was also sup-

ported by the certifications of both a neuropsychologist and a neurologist who opined that the injuries suffered by the respondent did not currently render him incapable of handling his own medical or financial affairs. After hearing from the respondent, who testified at a hearing regarding his abilities and persuasive evidence of capacity, the court determined that the guardianship should be terminated.

In an unreported case, the MHLS assisted an Article 17-A respondent in modifying and then terminating a guardianship that had been purportedly imposed upon the respondent's consent when the guardian (a family friend) would not support the respondent's desire to marry after the respondent became pregnant. The respondent had a mild intellectual disability and had been deemed capable of making an array of decisions concerning her treatment and desire to engage in an intimate relationship. Despite the respondent's capabilities, her Article 17-A guardian would not advocate for the respondent's preferences and desires and instead substituted her own judgment for that of respondent. The guardian went so far as to declare her intention to have the respondent's child removed from the respondent's custody upon birth so that the guardian could establish custody and raise the child. Further, because the respondent was subject to a guardianship, her obstetrician would not accept the respondent's own consent for prenatal care and was prepared to accept the guardian's direction that the respondent receive an intrauterine device (IUD) following delivery of her child. The respondent was willing to accept a different form of birth control, but was opposed to an IUD.

The MHLS identified an OPWDD-certified program where the respondent could reside with her child and her child's father, who also had an intellectual disability, but the guardian would not consent or agree to the placement. When multiple attempts to resolve the respondent's differences with her guardian failed, the MHLS assisted the respondent in filing a petition in Surrogate's Court under the authority of SCPA 1755 and 1759 to terminate the guardianship. Relief was granted in stages with the respondent's mother being appointed as temporary guardian up and until the birth of the child and then the guardianship was thereafter terminated.

In another unreported case, the MHLS assisted a then 67-year-old woman with mild intellectual disability in removing her 17-A guardian, preventing the appointment of a successor guardian – the guardian's daughter – and dissolving the guardianship. The woman's guardian of 30 years, a distant cousin, had never visited her, had called once in those 30 years and only spoke to care providers when inquiries were made because the guardian failed to return documents presented for her signature. The proposed successor guardian had never met the person subject to guardianship. The woman was, in fact, very capable of making her own decisions. She read books, provided her own consent for medication treatment, and exercised her right to vote. As a resident of a state-licensed family care home, the woman consistently maintained that she did not want a guardian and did not know the proposed successor guardian. As counsel, the MHLS argued against the guardianship based on the woman's capacity and because both the guardian and the proposed successor guardian displayed a complete lack of involvement or interest in the woman's life. After multiple reports to the court, which included two medical opinions stating that the woman did not require a guardian, several objections to withdrawing the petition by petitioner's counsel, and repeated adjournments, petitioner's counsel finally consented to a conference, the withdrawal of his application for the appointment of the successor guardian and the termination of the guardianship.[66]

Restoration efforts in New York may experience a revival as a result of the Supported Decision-Making pilot program funded by the Developmental Disabilities Planning Council. A component of the pilot is to refer people to Disability Rights New York for restoration of rights. As illustrated by the case examples above, the MHLS will also assist individuals subject to both Article 81 and Article 17-A guardianships to petition for modification or termination of guardianship in appropriate cases consistent with the MHLS's enabling regulations.[67]

Proposals for Legislative Reform

During the 2017 legislative session, several bills were introduced to reform Article 17-A, but none of them passed.[68] There are differences among the various proposals. However, in all of the reform measures advanced, Article 17-A would survive as a discrete statute designed for people with developmental disabilities. Common to the various bills are provisions guaranteeing that a guardian will only be appointed where the respondent exhibits significant impairments in specific enumerated domains of intellectual functioning and/or adaptive behavior. Thus, the proposed chapter amendments promote and require an inquiry by the court into the person's actual abilities before a guardian is appointed.

Additionally, as conceived, the reform measures require that petitioners affirmatively plead that alternatives to guardianship were considered, and identify them. Alternatives may include advance directives, service coordination and other shared or supported decision-making models. The reasons for the declination of alternatives to guardianship must also be pleaded. New formulations of Article 17-A would also include the right of all respondents to a hearing and representation by counsel of the respondent's own choosing, the Mental Hygiene Legal Service, or other court-appointed counsel. Ultimately, the vision behind statutory reform is a reduction in guardianship filings and promotion of alternatives to guardianship.

Conclusion

Guardianship law is evolving internationally, nationally and in New York State. For judges and the practicing bar, the time has come to reexamine and apply the fundamental principle that guardianship should be considered only after lesser restrictive alternatives, such as supported decision-making, have proven ineffective or are unavailable. Further, if guardianship is found to be necessary and is imposed upon any person, an essential goal of that guardianship should be retention and eventual restoration of individual rights if at all possible. The time has come for the plenary guardianship of unlimited duration to be relegated to history in recognition of the right of people with disabilities to participate in society on an equal basis with all others. ■

1. *See Schloendorff v. Society of New York Hospital*, 211 N.Y. 125 (1914).

2. *See, e.g.*, N.Y. Mental Hyg. Law (MHL) § 81.19. Despite its significance, "guardianship is among the least-noticed, least discussed institutions in the legal system" (Lawrence Friedman, Joanna Grossman, Chris Guthrie, *Guardians: A Research Note*, 40 Am. J. Leg. His. 146 (1996)).

3. *See In re Cooper (Joseph G.)*, 46 Misc. 3d 812 (Sup. Ct., Bronx Co. 2014).

4. *See* Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond*, 44 Colum. Hum. Rts. L. Rev. 93 (2012).

5. *Id.* at 102–06.

6. Uniform Guardianship and Protective Proceedings Act (UGPPA) Art. 1, Definitions § 102 (11) (1997).

7. Cal. Prob. Code § 1801(d); Conn. Gen. Stat. Ann. § 45a-669 *et. seq.*; Idaho Code Ann. § 15-5-301 *et. seq.*, Mich. Comp. Laws Ann. Ch. 330 (Mental Health Code) § 330.1600 *et. seq.*; Ky. Rev. Stat. Ann. § 387.500–.800; N.Y. Sur. Ct. Proc. Act (SCPA) 1750–1761.

8. Proposed Resolution and Report, American Bar Association, Commission on Disability Rights, Section of Civil Rights and Social Justice, Section of Real Property, Trust and Estate Law, Commission on Law and Aging, Report to the House of Delegates (2017) (ABA Report) www.americanbar.org/content/dam/aba/directories/policy/2017_am_113.docx.

9. *Id.* at 2.

10. *Id.* at 2, n. 6, *citing,* Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A"But Guess" National Estimate and the Momentum for Reform in Future Trends in State Courts (2011); A Profile of Older Americans* 2015 (Administration on Aging, Administration on Community Living U.S. Department of Health and Human Services).

11. Robert Abrams, *The Dementia Crisis*, 89 Jan. N.Y. St. B. J. 8 (2017).

12. 42 U.S.C.A §§ 12101 *et seq*.

13. Guardianship originally grew out of the 14th century English concept of *parens patriae* – the duty of the King, and later the State, to protect those unable to care for themselves. *See* Jennifer Wright, *Protecting Who from What and Why and How: A Proposal for an Integrative Approach to Adult Proceedings*, 12 Elder L. J. 53 (2004); A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans In the Twenty-First Century – A March of Folly? Or Just a Mask of Virtual Reality?* 27 Stetson L. Rev. 1 (1997).

14. H.R. Doc. No. 100-641, at 4 (1987). Subcomm. on Health and Long-term Care of the House Select Comm. on Aging 100th Cong. Abuses in Guardianship of the Elderly and Infirm: A National Disgrace. Prepared Statement of Chairman Claude Pepper.

15. *See* Michael Perlin, *"Striking for Guardians and Protectors of the Mind:" The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 Penn. St. L. Rev. 1159 (2013).

16. *See* http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf.

17. Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights*, Routledge (2015).

18. Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. Colo. L. Rev. 157, 161 (2010); Nina Kohn, Jeremy Blumenthal, Amy Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 Penn. St. L. Rev. 1111 (2013).

19. ABA report, *supra* note 8 at 5.

20. Tex. Estates Code Ann § 1357 (West 2015).

21. The New York DDPC Funding Announcement solicited proposals for two pilot projects utilizing supported-decision making to divert persons at risk of guardianship and the other to restore the rights of persons subject to guardianship (http://ddpc.ny.gov/supported-decisionmaking-0). Other consortium partners are the Arc of Westchester, NYSARCA and Disability Rights New York. Kristin Booth Glen is the SDM-NY project director.

22. MHL § 81.01.

23. Upon its enactment in 1969, parents and parent organizations primarily voiced the need for an abbreviated guardianship proceeding for individuals with mental retardation when they reached the age of 18. *See* Karen Andreasian, Natalie Chin, Kristin Booth Glen, Beth Haroules, Katherine Hermann, Maria Kuns, Aditi Shah, Naomi Weinstein, *Revisiting S.C.P.A. 17-A: Guardianship for People with Developmental Disabilities*, 18 CUNY L. Rev. 287 (2015).

24. The term "intellectual disability" has replaced the term "mental retardation" and its derivatives in the federal government and most states, including New York (*see* 2010 N.Y. Laws ch. 168; 2011 N.Y. Laws ch. 37). In 2016, the legislature removed the term "mentally retarded" from Article 17-A and substituted "intellectually disabled" (2016 N.Y. Laws, ch.198).

25. *See* Bailly & Nick Torak, *Should We Be Talking? Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 Albany L. Rev. 807, 818 (2012) (The statute's emphasis on the continued role of parents is evidenced from several of its features including that Article 17-A is placed in New York's Consolidated Laws immediately following guardianship of minors, codified at Article 17 of the SCPA.).

26. *See, e.g., Guardianship of Derek*, 12 Misc. 3d 1132 (Sur. Ct., Broome Co. 2006).

27. 1992 N.Y. Laws ch. 698.

28. *Id*.

29. *See generally*, Bailly & Nick Torak, *supra* note 25 at 817; *In re Fisher*, 147 Misc. 2d 329 (Sup. Ct., N.Y. Co. 1989).

30. *In re Fisher*, 147 Misc. 2d at 332.

31. 1972 N. Y. Laws ch. 251.

32. MHL § 77.01 (repealed 1992 N.Y. Laws ch. 698).

33. *Id*.

34. MHL §§ 77.04 & 78.02 (repealed 1992 N.Y. Laws ch. 698). Section 78.02 provided that "prior to the appointment of a committee under this article, it shall be the duty of the court to consider whether the interests sought to be protected could best be served by the appointment of a conservator." *See In re Seronde*, 99 Misc. 2d 485 (Sup. Ct., Westchester Co.1979).

35. 1974 N.Y. Laws ch. 623, § 3.

36. Julie M. Solinski, *Guardianship Proceedings in New York: Proposals for Article 81 to Address Both Lack of Funding and Resource Problems*, 17 Pace L. Rev. 445 (1997), *citing* G. Oliver Koppell & Kenneth J. Munnelly, *The New Guardian Statute: Article 81 of the Mental Hygiene Law*, N.Y. St. B. J., Feb. 1993, at 16.

37. *In re Grinker (Rose)*, 77 N.Y.2d 703 (1991).

38. Solinski, *supra* note 36 at 450.

39. *Id*.

40. Memorandum of the Law Review Commission Relating to Article 81 of the Mental Hygiene Law Appointment of a Guardian for Personal Needs and/or Property Management, Senate No. 4498, Assembly No. 7343, Leg. Doc. No. 65 [C] (1992).

41. MHL § 81.10; *see In re St. Lukes's Roosevelt Hospital (Marie H.-City of New York)*, 89 N.Y.2d (1996).

42. MHL § 81.30.

43. MHL § 81.01.

44. Kristin Booth Glen, *supra* note 4 at 115, n. 102.

45. *Id*.

46. *Id*.

47. Article 81 proceedings can be expensive, but the cost does not dilute the merit of proceeding in a manner that protects the due process rights of the alleged incapacitated person. *See* Rose Mary Bailly, Practice Commentaries McKinney's Cons. Laws of N.Y. Book 34A, MHL § 81.01, p. 9, *citing* Strauss, *Before Guardianship, Abuse of Patient Rights behind Closed Doors*, 41 Emory L. J. 761, 763 (1992).

48. *See Guardianship in New York: Developing an Agenda for Change, Report of the Cardozo School of Law Conference* (2012). The report is available online: https://www.cardozo.yu.edu/sites/default/files/GuardianshipReport.pdf.

49. SCPA 1750, 1750-a. An Article 17-A proceeding may also be commenced for a person alleged to have a traumatic brain injury (SCPA 1750-a[1]).

50. *Id*.

51. *Id.*; *but see Guardianship of Derek*, *supra* note 26, holding that in a contested 17-A proceeding the physician-patient privilege applies and certificates obtained in violation of the privilege would not be considered by the court.

52. *See* Bailly & Nick Torak, *supra* note 25 at 821–25.

53. *See* Andreasian et al., *Revisiting S.C.P.A. 17-A*, *supra* note 23 at 300 (where the authors note that 17-A procedure is relatively simple and can be typically managed by *pro se* petitioners).

54. Bailly, *supra*, note 47.

55. *See* Jennifer Wright, *supra* note 13 at 62.

56. The Olmstead Cabinet was created following the U.S. Supreme Court decision in *Olmstead v. LC*, 527 U.S. 581 (1999). The Cabinet's mandate is to recommend law and policy changes to ensure that people with disabilities receive services and supports in settings that do not segregate them from the community, https://www.ny/gov/programs/olmstead-communityintegration-every-new-yorker-last.

57. *See* Bailly & Nick Torak, *supra* note 25; Andreasian *et al.*, *Revisiting S.C.P.A. 17-A*, *supra* note 23.

58. *See In re D.D.*, 50 Misc. 3d 666 (Sur. Ct., Kings Co. 2015).

59. Disability Rights New York is the Protection and Advocacy Agency in New York State acting pursuant to an enabling statute codified at 42 U.S.C.A. §§ 10802 *et seq*.

60. *Disability Rights New York v. New York State*, 1:16-cv-0733 (AKH) (filed 9/21/16). Complaint is available at http://www.new.drny.rg/docs/art-17a-lawsuit.pdf.

61. *Id*.

62. The Florida Developmental Disabilities Council may be a leader among states in this regard. The Council commissioned a research study to examine guardianship restoration among people with disabilities. The report of the Council's findings, Florida Developmental Disabilities Council, Restoration of Capacity Study and Workgroup Report (2014), is available online.

63. MHL § 81.36 (a)(1-4).

64. SCPA 1755, 1759. While there are specific statutory provisions for modification and termination of an Article 17-A decree, they are lacking due process safeguards. For instance, no hearing is required in a modification proceeding and typically applications are brought only to replace a family member with another as successor guardian. The burden of proof for Article 17-A termination proceedings is not codified and there is no indication of what must be proved for a guardianship to be dissolved (Andreasian *et al.*, *Revisiting S.C.P.A. 17-A*, *supra* note 23 at 316–17).

65. 2006 N.Y. Misc. Lexis 4804; 236 N.Y.L.J. 92 (Sur. Ct., Suffolk Co. 2006).

66. During its investigation, MHLS discovered that there had been a testamentary trust established by the woman's deceased mother. The 17-A guardian was the trustee, and successfully petitioned in 2010, for the appointment of her daughters to replace her as co-trustees. During the 30 years that the trust was in existence, no funds were ever expended for the benefit of the beneficiary. MHLS subsequently successfully petitioned to remove the co-trustees and reform the trust as a supplemental needs trust.

67. N.Y. Comp. Codes R. & Regs. tit. 22, §§ 622.2(b)(5), 694.2(b)(5), 823.2(b)(5), 1023.2(b)(5).

68. *See* N.Y. Assembly Number 8171 (2017), N.Y. Assembly Number 5840 (2017), N.Y. Senate Number 5842 (2017). *See also* N.Y. Senate Number 4983 (2015-2016).

Ten Degrees of Separation

How to Avoid Crossing the Line on Witness Preparation

By John Gaal and Louis P. DiLorenzo

Witness preparation is an accepted practice in the United States. Attorneys are not only expected to prepare witnesses for trials and depositions, but it is their professional responsibility as advocates for their clients to do so.

Attorneys often meet with witnesses before they give testimony to discuss with them what they should expect at an upcoming proceeding. Although there is no explicit affirmative duty to prepare a witness for trial, the failure to do so can constitute a breach of an attorney's professional responsibility, as attorneys are required to "competently" represent their clients.[1]

This representation of clients, however, must be "within the bounds of the law." Attorneys must be careful not to cross the line from permissible witness preparation to impermissible witness coaching by suggesting what testimony a witness should give. A widely quoted rule of thumb has been that "an attorney can instruct a witness how to testify, but should refrain from telling a witness what to say."[2] As noted by the N.Y. Court of Appeals:

> [An attorney's] duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.[3]

The *Restatement (Third) of the Law Governing Lawyers* § 116, Comment b broadly[4] provides that witness preparation may include:

> [D]iscussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observa-

> tions or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear.

However, Comment b also states that a lawyer may not "assist the witness to testify falsely as to a material fact." It also further notes that inducing a witness to testify falsely can be a crime, "either subordination of perjury or obstruction of justice, and is ground for professional discipline and other remedies."

So, how does an attorney discern what is permissible and what constitutes crossing the line? Below are 10 steps to follow as you walk the line.

1. Instructing a Witness About the Law Before Learning the Facts

A common issue for lawyers is whether to advise a client (or other witness) of the applicable law before hearing the client's (or witness') version of the facts.[5] Under New York Rules of Professional Conduct Rule 3.4(b) (RPC), a lawyer must not "participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false." Similarly, under the ABA Model Rules of Professional Conduct, a lawyer must not "counsel or assist a witness to testify falsely."[6] However, lawyers are permitted to interview witnesses prior to their testifying, and in preparing a witness to testify, a lawyer may discuss "the applicability of law to the events in issue."[7] The obvious concern in leading with the legal "lecture" is that doing so may induce a client/witness to alter testimony to fit "legal needs" rather than to only tell the truth. On a less sinister level than outright fabrication, the lecture might simply subconsciously alter a witness' perception and recollection.[8]

The Nassau County Bar Association Committee on Professional Ethics has specifically addressed this issue in Opinion No. 94-6 (1994). It considered the following scenario:

> A client consults with inquiring counsel about an automobile accident the client was involved in. Prior to discussing the case further inquiring counsel explains what is necessary to be successful on a claim as follows:
>
> Before you tell me anything . . . I want to tell you what you have to show in order to have a case. Just because you got hurt it doesn't mean you have a case. I can't tell you what to say happened because I wasn't there. And I am bound by what you tell me happened and it must be the truth. Now, I know the intersection.
>
> Main Street [place where the accident took place] is governed by a Stop Sign. If you went through the Stop Sign without stopping – you will most likely have no case. If you stopped momentarily and then proceeded through the intersection you might have a case. If you stopped at the intersection and before proceeding to enter the intersection looked carefully and saw no cars that you believed would impede your proceeding then you have a much better case.

The Committee noted that whether this interview approach was appropriate presented a difficult question. On the one hand, the Committee recognized that by educating the client before being given a full recitation of the facts, the attorney may be allowing the client to tailor his story to fit the legal standards. On the other hand, to mandate keeping the client ignorant of the law until he has given a recitation of the facts could be viewed as "legislating" a mistrust of the client's honesty. The Committee ultimately determined that as long as the attorney in good faith did not believe that he or she was participating in the creation of false evidence, the conduct did not violate the N.Y. Code of Professional Responsibility.

This scenario presents perhaps the classic illustration of the importance of "intent." Clearly making sure a witness – especially a client who has a direct interest at stake – understands the legal requirements to prevail so that he can better understand the context of his testimony and is better positioned to tell his lawyer, truthfully, about facts which he might not otherwise appreciate as significant, is permissible. Lecturing a witness/client on the law before learning what he has to say, for the purpose of allowing – even inducing – him to conform his testimony, and create helpful "recollections" accordingly, is not. Generally, the most prudent course of action – to avoid even an appearance of impropriety – is to "save the lecture" until after the lawyer has learned the basics of the witness' testimony so that it is better used as a true "memory jogger" rather than a "memory creator."

Professor Wydick,[9] along with several other commentators, reference the "lecture" scene from *Anatomy of a Murder* by Robert Traver, 35–49 (1958), as perhaps the best example of using the "lecture" to cross the line in witness preparation.[10]

Anatomy of a Murder is a story of a criminal defense attorney, Biegler, and his client, Army Lt. Manion. Manion, in front of several witnesses, shoots a man who raped Manion's wife. The lawyer is worried that in preparing his client, "a few wrong answers to a few right questions" will leave the lawyer with a client "whose cause was legally defenseless."[11] As a result, the lawyer lectures his client on the law of murder and possible defenses. He explains the law in a way that makes his client understand his only hope is a type of insanity. The self-interest light bulb goes on and the client then describes his mental

Lou DiLorenzo and **John Gaal** are Members in the Labor and Employment Law Group at Bond, Schoeneck & King, PLLC. Both are former Chairs of the New York State Bar Association's Labor and Employment Law Section.

condition so as to fit within the definition his lawyer just explained in detail. In case the reader missed what just happened in the story, the jurist-author explains:

> The Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical . . . Hence the Lecture, an artful device as old as the law itself, and one used constantly by some of the nicest and most ethical lawyers in the land. "Who, me? I didn't tell him what to say," the lawyer can later comfort himself. "I merely explained the law, see." It is a good practice to scowl and shrug here and add virtuously: "That's my duty, isn't it?"[12]

There appears to be no per se ethical prohibition against the simultaneous preparation of multiple witnesses.

2. Altering the Witness' Words

Lawyers, more than most people, understand the importance of words, especially the "right words." As Mark Twain wrote, "the difference between the almost right word and the right word . . . [is] the difference between the lightning bug and the lightning."[13] In the course of preparing witnesses to testify, lawyers often – sometimes at their own initiation and sometimes at the request of the witness – suggest ways to better communicate the substance of the testimony the witness is to deliver, including the suggestion of specific wording. This issue was addressed in D.C. Bar Ethics Opinion No. 79:

> [T]he fact that the particular words in which testimony . . . is cast originated with a lawyer rather than the witness whose testimony it is has no significance so long as the substance of that testimony is not, so far as the lawyer knows or ought to know, false or misleading. If the particular words suggested by the lawyer, even though not literally false, are calculated to convey a misleading impression, this would be equally impermissible from the ethical point of view. Herein, indeed, lies the principal hazard . . . in a lawyer's suggesting particular forms of language to a witness instead of leaving the witness to articulate his or her thought wholly without prompting: there may be differences in nuance among variant phrasings of the same substantive point, which are so significant as to make one version misleading while another is not. Yet it is obvious that by the same token, choice of words may also improve the clarity and precision of a statement: even subtle changes of shading may as readily improve testimony as impair it. The fact that a lawyer suggests particular language to a witness means only that the lawyer may be affecting the testimony as respects its clarity and accuracy; and not necessarily that the effect is to impair rather than improve the testimony in these respects. It is not, we think, a matter of undue difficulty for a reasonably competent and conscientious lawyer to discern the line of impermissibility, whether truth shades into untruth, and to refrain from crossing it.[14]

We all remember, for example, James Mason preparing the anesthesiologist to testify in the movie *The Verdict*. When asked what caused his patient to lose oxygen, he first says, "She'd aspirated vomitus into her mask." In response, Mason says, "Cut the bullshit, please. Just say it. She threw up in her mask," and the doctor then repeats that phrase verbatim.

But, of course, even this conduct can go "too far." For example, influencing a witness in an automobile accident case to change her unfiltered statement about a "recklessly speeding car" which was involved in a "thunderous crash" to one about a "car traveling down the road and hit a parked vehicle" may go too far. While the "revised" statement may be accurate, the changes have affected the substance of the testimony.[15]

In *Ibarra v. Harris County Texas*,[16] the court considered the impact of a trial consultant's introduction of "new language" into the testimony of witnesses. In this case, which involved a § 1983 action against a Texas county and several law enforcement officers, an expert consultant had prepared a report justifying the conduct of the officers, in part, based upon the fact that the events in question had taken place in what the consultant described as a "high crime area" and that the officers' conduct could be justified because of concern over "retaliation." Both of those terms became linchpins of the defense theme, yet neither were ever mentioned in the officers' pretrial statements. Their trial testimony, which followed meetings with the consultant, referred repeatedly to these specific concepts.

In reviewing claims of improper witness coaching by defense counsel (since the consultant operated generally under the direction of and in conjunction with defense counsel), the Fifth Circuit noted that "[a]n attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way."[17] The plaintiffs in the 1983 case argued that these "terms of art" as additive of prior testimony reflected a conspiracy between the defendants and the consultant. The court, not surprisingly, noted that "the appearance of these terms in the litigation would not be noteworthy if they merely repackaged the witnesses' prior testimony, neither adding nor subtracting anything substantive." But it ultimately accepted the District Court's conclusion that this was an impermissible alteration of testimony in order to substantively conform the witness' testimony to the defense's novel theories of the case. The result was that the Fifth Circuit upheld misconduct findings and sanctions against the defense counsel involved.

In many situations, whether the suggested language change goes too far may depend on context and materiality. Where the language relates to something legally immaterial, but which nonetheless might be prejudicial to the jury, suggested alterations are likely to be more acceptable. On the other hand, where the testimony goes to the core issue, altering the witness's more emotional description may actually impact the substance of the testimony, thereby rendering it false, and goes too far.[18]

3. Changing the Witness's Appearance, Demeanor and/or Confidence

Most commentators seem to agree that influencing the witness's appearance and/or demeanor, to make a more presentable/likeable (credible) witness is permissible.[19] But at the extremes, "influence" in this context can be problematic. There is, of course, a natural disincentive to "tweaking" a witness's appearance/demeanor too much, in that it may become an easy target on cross-examination (or for rebuttal witnesses who "know" what the witness looks and sounds like in the "real world") and actually serve to undermine the witness's credibility. And, of course, going too far can simply amount to perpetrating a fraud on the court. Thus, no one would think that a lay witness could take the witness stand in clergy garb. Similarly, urging a non-Christian to wear a visible cross while testifying before what is believed to be an all-Christian jury may also go too far.[20]

In *Professional Conduct and the Preparation of Witnesses for Trial*,[21] the author writes of the communicative nature of demeanor and places it within one of three categories: (1) behavior not intended to be communicative (for example, involuntary or spontaneous conduct such as a yawn), (2) behavior intended to communicate a general message (for example, the use of polite mannerisms or wearing a suit, intended to convey the notion of an upstanding credible citizen) and (3) behavior intended to convey a specific message (such as expressing surprise at something). The author suggests that conduct in the first category is not intended to be communicative and, by definition, cannot be falsified. He also suggests that demeanor in terms of the second category is too general to be capable of being falsified or misrepresented, although it seems in the extreme (clergy garb or wearing a cross) it could be. The third category is of course the most subject to creating misrepresentation. Thus, for example, a witness' feigned surprise at a known fact or an insincere emotional reaction could be tantamount to an explicitly false statement.

More problematic, because of its easy potential to substantively alter the meaning of testimony, and the difficulty in countering it through cross-examination, is instilling a witness with "confidence" if false or taken to the extreme. While no one would quarrel with preparation and practice (even repeated) to make a witness more comfortable and to overcome the natural jitters of testifying, blindly instructing a witness of the need to be "confident" in her testimony can cross the line where the implicit meaning – or foreseeable outcome – is that the witness should come across as "firmly" recollecting that which in fact she is unsure of. Thus, as one commentator has observed, "[o]ne can easily envision situations . . . where insisting that a witness answer . . . with the tone and appearance of complete confidence will improperly mask the witness' real belief, which is that their recollection of a particular phone call or meeting is hazy at best, or that they were not fully comfortable with a decision they made . . . ."[22]

4. Creating Memory and/or Creating Inducements to False Testimony

A witness preparation Memo and the EEOC/Mitsubishi letter[23] illustrate the problems created by not relying on the witness to provide you with their testimony initially but rather "setting the stage" for the witness first. These issues are akin to the "lecture" problem except instead of leading with the "law," the lawyer is effectively leading with "desired facts" (or at least strong suggestions as to what those facts should be). In both the Memo and Mitsubishi cases, there were no final determinations of wrongdoing. Nonetheless, their substance is troubling. And it is particularly troubling if that information was first provided to the witness before discussions with counsel. Many of the matters raised in those documents might well have been proper for counsel to investigate with a witness after first hearing what they had to say on their own, but when performed in the fashion it appears it was completed, it smacks of an attorney introducing themselves to a witness with: "Here are the five things I need you to say to have a perfect case. How many of them can I get you to say?" Such a method raises serious questions about the reliability of the responses. Indeed, the same outcome is possible through the inappropriate use of leading questions to guide a witness in the development of his or her recollection.[24]

5. Simultaneous Preparation of Multiple Witnesses/ Using Other Sources to Refresh Recollection

There appears to be no per se ethical prohibition against the simultaneous preparation of multiple witnesses.[25] One court, the Sixth Circuit,[26] focused on whether information concerning the joint meeting could be a subject of cross-examination. Interestingly, there was a recording of the group meeting and one witness was persuaded in the joint session that he had heard racial slurs despite denying it earlier. Although there is no per se violation against group preparation, the process can create multiple problems (e.g., creating the appearance of collusion if it comes out at trial; weakening the value of each witness's testimony; creating false recollections and perceptions (even if unintentionally)) that often can outweigh the expediency and efficiency this approach offers.[27]

It is less problematic to use external sources – documents, another witness's recollection/version – to assist a witness in preparing for testifying when it is done after the witness has first exhausted their own, unassisted recollection. In the end, at least the D.C. Bar seems to be of a mind that "the governing consideration for ethical purposes is whether the substance of the testimony is something the witness can truthfully and properly testify to." If so, the fact that the particular point of substance was initially suggested by someone else is without significance.[28]

6. Only Answer the Question Asked/"I Don't Recall"

All lawyers have instructed witnesses, in one manner or another, to answer "only" the question asked and if they do not truly recall something, to say so. But this advice needs to be provided in a more complete context. For example, while the general proscription against volunteering information not asked for is appropriate, witnesses should understand that "half an answer" (even if literally due to having been asked only "half a question") which leaves a false or misleading impression is inappropriate.[29] So too can counseling a witness that "any memory less than a vivid one is no memory at all" (so that questions are untruthfully met with "I don't recall") constitute inappropriately influencing the substance of a witness' testimony.[30]

7. Repeated Rehearsals

It is common to hold multiple "rehearsal" or role playing sessions with a witness, to go over expected direct and cross examination. Like most witness preparation techniques, there is nothing inherently improper in this conduct.[31] Also like most preparation techniques, this practice can go too far, both practically and ethically. Some level of preparation allows a witness to feel comfortable and testify confidently in a focused manner. On the practical side, too much preparation can create the appearance of a witness who is too "slick" for his own good. It can also lead to a witness being very comfortable with the material covered in the preparation but completely at a loss to respond to any "twists" that often come up in the course of testifying, thereby undermining that portion of their testimony that initially appeared to go "well." The ethical concern is that repeated rehearsals can improperly affect both the substance of the witness' testimony and the conviction with which the witness presents it (despite internal doubts about the accuracy of what they have to say), leading to the creation of false evidence.

> If the purpose of role playing is merely to accustom the witness to the rough and tumble of being questioned, then it is ethically unobjectionable. If, however, the lawyer uses the role playing session as an occasion for scripting the witness's answers, then it is unethical.[32]

8. Obstructing Access to a Witness

The flip side of the witness preparation coin is whether an attorney may request a non-client witness to refrain from engaging in ex parte communications with opposing counsel, in an effort to impair that attorney's "preparation." Rule 3.4(f) of the ABA's Model Rules expressly addresses this issue, providing that a lawyer is generally prohibited from requesting a person other than a client to refrain from voluntarily giving relevant information to another party.[33] Exceptions to this prohibition exist in the Model Rules for witnesses who are relatives of a client or who are employees/agents of a client, provided the attorney reasonably believes that the person's interests will not be adversely affected by refraining from giving that information.[34]

Too much preparation can create the appearance of a witness who is too "slick" for his own good.

There is no similar provision in the N.Y. Rules and, in fact, such a provision was proposed but rejected by the courts in adopting the new rules (although without any explanation). Presumably then, an attorney in New York may at least request relatives and employees/agents of clients to refrain from voluntarily speaking with opposing counsel on an ex parte basis and can go further and request the same of other witnesses, so long as the suggestion does not run afoul of the only N.Y. Rules provision which remotely addresses this issue, Rule 3.4(a)(2) (lawyer shall not advise or cause person to hide or leave jurisdiction for purpose of making them unavailable as a witness). N.Y.C. Bar Formal Op. 2009-5 (2009) (lawyer may ethically ask a witness to refrain from speaking voluntarily to other parties or their counsel).

9. Payments to a Witness

N.Y. Rule 3.4(b) provides that a lawyer shall not pay or acquiesce in the payment of compensation to a witness contingent on his testimony or the outcome of a case, nor may a lawyer offer any inducements to testify that are prohibited by law. Payment may be made to compensate a witness for expenses and loss of time reasonably incurred in attending or testifying at a proceeding. This has been interpreted to include compensation for time spent preparing for an appearance as well, so long as the compensation is "reasonable" as determined by the market value of the testifying witness' time.[35]

If You Push the Limits, Expect the Court's Wrath

In the past 20 years there have been widely publicized rulings involving "witness coaching." Here are three of the more recent cases:

Apple, Inc. v. Samsung

In March of 2014, an expert testified on behalf of Samsung in the celebrated smartphone patent litigation, *Apple, Inc. v. Samsung*. The case involved each company accusing the other of multiple patent infringements. One of the Apple patents covers the "swipe-to-unlock" feature of the iPhone, and another the "quick link feature." During the trial of another infringement case, *Apple v. Motorola*, Judge Posner, sitting by designation on the District Court for the District of Northern Illinois, provided a specific claim construction of this quick links patent that was apparently different from that advanced in the *Samsung* litigation. As a result of a ruling by the U.S. Court of Appeals for the Federal Circuit, the "Posner construction" made its way into the *Samsung* litigation. In subsequent testimony by a Samsung expert, rather than offer an alternative view of the case based on the Posner construction, the expert testified, "I have been using this [Judge Posner's] construction since the first day I worked on this case." One individual reportedly described a "visibly angry" Judge Koh as saying:

> [I]n his report, he does not adopt Posner's construction and then he gets up on the stand and says he adopted it from day one. I'm going to strike what he said. *I think he was primed to say that and that's improper* (emphasis added).[1]

The jury returned a verdict against Samsung, in favor of Apple, for $119.6 million. The final chapter on the stricken expert testimony and whether Judge Koh's ruling was warranted has probably not been written.

The Security National Bank of Sioux City, Iowa v. Abbott Laboratories

In this lengthy opinion, the court analyzed at great length deposition conduct consisting of a misuse of "form" objections, witness coaching and excessive interruptions.[2] The court's sanction for inappropriate conduct was to require the offending lawyer to write and produce a video for distribution within her firm on appropriate deposition conduct.

In re Ronald J. Meltzer and the Departmental Disciplinary Committee for the First Judicial Department[3]

In this recent Appellate Division case,a disciplinary investigation involved, among other things, witness preparation of a client's friend, who testified in a criminal trial. During the preparation, some six to eight months before the trial, the attorney's instruction to his client's friend was to "'downplay' the number of times he met with [the attorney] to prepare for the trial in the event that he was asked such a question on cross-examination . . . the friend testified that he and [the attorney] met a total of three times to discuss his testimony. In fact they met a total of five to six times . . . he instructed the friend to 'downplay' the number of times they met so that it did not appear to the jury that they had rehearsed the 'perfect story.'"

The decision highlighted three separate transgressions: suborning perjury, failing to correct false testimony and making a false statement to the court and counsel. This witness preparation, in a DWI case, ended the 25-year career of a New York attorney.

More so than with many ethical issues, trying to delineate the parameters of permissible conduct in the context of witness preparation is extremely difficult, except of course at the outer limits where that conduct amounts to the knowing creation and/or use of perjured testimony. This difficulty arises in part because there is limited authority to guide lawyers (largely due both to the inadequacy of the rules as written and to the "privileged" nature of many client/witness preparations, which often keeps this issue under wraps[4]). But it is also in part due to the tension created by a lawyer's obligation to fully and zealously represent his or her client (a tension that admittedly exists in many ethical contexts).

---

1. *See Walking the Line: Don't Coach Your Experts* (Re: *Apple v. Samsung*), Ryan H. Flax, The Litigation Consulting Report, April 29, 2014; Law 360, B. Winegarner (subscription required) and Law 360, 4 Tips for Prepping a Witness Without Crossing the Line, Erin Coe.

2. *The Security National Bank of Sioux City, Iowa v. Abbott Laboratories* (N.D. Ia. 2014).

3. 2015 N.Y. Slip Op. 08945 (1st A.D. Dec. 3, 2015).

4. Hence the reference to the practice as the profession's "dark" and "dirty" secret and the frequent belief by witnesses that there is something improper about it.

In some jurisdictions, any payments to fact witnesses beyond those expressly authorized by statute may be impermissible.[36]

Attempts to treat a fact witness as a "paid consultant" will be closely scrutinized.[37] However, in NYSBA Formal Op. 668, the Committee drew a distinction between payments to an individual assisting in pre-trial fact finding and payments to that same individual "as a witness." Since DR 7-109(c) (the predecessor to N.Y. Rule 3.4(b)) only applies to witness payments, the Committee concluded that the individual could be paid "any" amount for his pre-trial services and was limited to only "reasonable" compensation for his service as a witness.[38]

Payments contingent on the outcome of the litigation are generally not permitted.[39]

10. When You Fear Testimony Is False

One of the most difficult issues for lawyers to deal with is what if, after all of this witness preparation, the lawyer either "knows" or "reasonably believes" that the testimony the witness will offer is false? Rule 3.3(a)(3) prohibits a lawyer from knowingly offering or using evidence that the lawyer knows to be false. The obligations of Rule 3.3(a)(3) are triggered by the lawyer's "knowledge" that evidence is false. The definition section of the Rules makes it clear that the terms "knowingly," "known" and "know" require "actual knowledge," although it is recognized that knowledge can be inferred from the circumstances.[40]

If a lawyer knows that a client or witness intends to testify falsely, the lawyer may not offer that testimony or evidence. (In a criminal context, different rules apply due to the defendant's constitutional right to testify.[41] If a lawyer does not know that his client's or witness' testimony is false, the attorney *may* nonetheless refuse to offer it if he or she "reasonably believes" it is false.[42] However, "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact."[43] Thus, short of "knowledge" of falsity, the N.Y. Rules give the lawyer – not the client – the ethical choice in the civil context to refuse to offer or use that testimony as he or she sees fit.[44] ■

1. *See* N.Y. Rules of Professional Conduct 1.1(a) (N.Y. Rule), "A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonable necessary for the representation"; *see* ABA Model Rule of Professional Conduct, Rule 1.3 ("[a] lawyer shall act with reasonable diligence and promptness in representing a client" (ABA Model Rule); *In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614 (D. Nev. 1998) (observing that a lawyer has an ethical duty to prepare a witness).

2. Elkan Abramowitz & Barry A. Bohrer, *White Collar Crime: Handling Witnesses: The Boundaries of Proper Witness Preparation*, N.Y.L.J. May 2, 2006, p.2; *see also* Liisa Renee Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 Rev. Litig. 135 (1995); D.C. Bar Ethics Opinion No. 79 (1979) ("[L]awyers commonly, and quite properly, prepare witnesses for testimony …").

3. *In re Eldridge*, 82 N.Y. 161, 171 (1880).

4. One commentator has suggested that the breadth of this delineation is so great that "[i]t would be hard to find any type of preparation short of the lawyer instructing the witness to fabricate a story that would not be defensible" under it. Peter J. Henning, *The Pitfalls of Dealing with Witnesses in Public Corruption Prosecutions*, 23 The Georgetown J. of Legal Ethics, 351, 358 (2010).

5. *See* John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277, 300–04 (1989); Deborah L. Rhode, Professional Responsibility: Ethics by the Pervasive Method 197–99 (2d ed. 1998).

6. ABA Model Rule 3.4(b).

7. *Restatement (Third) of the Law Governing Lawyers*, Section 116 cmt. B (2000); *North Carolina v. McCormick*, 298 N.C. 788 (1979).

8. Salmi, *supra* note 2, at 154.

9. Prof. Richard Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1 (1995).

10. Robert Traver was the pen name of Michigan Supreme Court Justice John D. Voelker. *See* Gerald L. Shargel, *Symposium: Ethics and Evidence: The Application or Manipulation of Evidence Rules in an Adversary System: Federal Evidence Rule 608(b): Gateway to the Minefield of Witness Preparation*, 76 Fordham L. Rev. 1263, 1276 (2007); Erin C. Asborno, *Ethical Preparation of Witnesses for Deposition and Trial*, Trial Practice ABA Section of Litigation, Summer 2011, Verdict 25:3.

11. *Id*. at 32.

12. *Id*. at 35.

13. Letter from Mark Twain to George Bainton (October 15, 1888), www.twainquotes.com.

14. *See also* W. William Hodes, *The Professional Duty to Horseshed Witnesses Zealously, Within the Bounds of the Law*, 30 Tex. Tech. L. Rev. 1343, 1363 (1999) (suggesting that so long as the lawyer's actions do not result in the presentation of false testimony, it is permissible to "enhance the effectiveness of the witness's communication . . . "; similarly counseling witness to avoid slang or derogatory terms is permissible); Harold K. Gordon, *Crossing the Line on Witness Coaching*, N.Y.L.J., July 8, 2005 ("permissible would be a suggestion that a witness eliminate slang or colloquial terms from his responses . . . as long as some independent evidentiary significance will not be lost by doing so."); *Restatement (Third) of the Law Governing Lawyers*, §116, cmt. b ("A lawyer may suggest choice of words that might be employed to make the witness's meaning clear.").

15. *See* Gordon, *supra* note 14 ("a lawyer treads on thin ethical ice when he suggests a choice of words that may alter the substance or intended meaning of the witness' testimony. For instance, encouraging a witness to testify that he had a 'conversation' with the defendant rather than the 'screaming match' that actually took place on the phone or that he simply 'hit' a party instead of 'beating' them would result in false or misleading testimony."; Richard Alcorn, *"Aren't You Really Telling Me . . . ? Ethics and Preparing Witness Testimony*," 44 Arizona Attorney 15 (2008) ("If . . . preparation is intended to modify only the manner in which testimony is presented and not to change its content, the preparation should be viewed as ethical. Attempting to eliminate potentially offensive witness mannerisms, or to eliminate the witness's use of 'powerless' speech phrases such as 'you know,' 'I guess,' 'um,' 'well' or the like, should pass muster. Contrast this with the lawyer who 'reshapes' the witness's testimony by suggesting specific substantive words or answers for responses to anticipated examination."); *but see Haworth v. State*, 840 P. 2d 912 (Wyo. 1992) (prosecutor restricted in his ability to question a criminal defendant about defense counsel's suggestion in preparation for testifying that he use the word "cut" instead of "stab" to describe the incident; court noted the de minimis effect of such word differences on the proceeding where other testimony described the incident).

16. 243 Fed. Appx. 830 (5th Cir. 2007).

17. *Id*.

18. *See* Joseph D. Piorkowski Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of Coaching*, 1 Georgetown J. of Legal Ethics, 389 (1987).

19. *See, e.g.*, Steven Lubet & J.C. Lore, NITA Modern Trial Advocacy: Analysis and Practice 76 (5th ed. 2015); Similarly, preparation – or practice – for the purpose of making the witness more comfortable and credible seems to fall within the scope of permissible preparation. *See* Gordon, *supra* note 15; Liisa Renee Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 Rev. Litig. 135 (1995); D.C. Bar Ethics Opinion No. 79 (1979); *North Carolina v. McCormick*, 298 N.C. 788 (1979).

20. *See* Lubet & Lore, *supra* note 19, at 76.

21. *See supra* note 18.

22. *See* Gordon, *supra* note 15.

23. *See* Joan C. Rogers, *Witness Preparation Memos Raise Questions About Ethical Limits*, ABA/BNA Lawyers' Manual on Professional Conduct (Feb. 18, 1998).

24. *See* Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 Cardozo Law Review, 831, 842–43 (2002) ("For example, asking a witness whether he saw 'a car' is much less suggestive than asking the witness whether he saw 'the' car. Similarly asking the witness whether a person 'smacked' another's face may produce a decidedly different response than asking the witness whether a person 'hit' the other person" (footnotes omitted)).

25. *See generally*, Richard Alcorn, *"Aren't You Really Telling Me . . . ?" Ethics and Preparing Witness Testimony*, 44 Arizona Attorney 15 (2008); Edward Carter, *Horse-shedding, Lecturing and Legal Ethics* (2008), www.kentlaw.edu/faculty/rwarner/classes/carter/2008_lectures/Horseshedding,%20Lecturing%20and%20Legal%20Ethics.pdf; *see also Prasad v. MML Investors Servs., Inc.*, 2004 WL 1151735 (S.D.N.Y. 2004).

26. *United States v. Ebens*, 800 F.2d 1422, 1430–31 (6th Cir. 1986).

27. Wydick, *supra* note 19.

28. *See* D.C. Bar Formal Op. 79; *see also* Campbell, *Ethical Concerns in Grooming the Criminal Defendant for the Witness Stand*, 36 Hofstra L. Rev. 265, 271 (2008).

29. Hudson and Mhairtin, *Preparing Your Client for Deposition or Trial Testimony*, FDCC Quarterly 63 (Fall 2008); Campbell, *supra* note 28, at 271–72 (where witness' intoxication is an issue, inappropriate for lawyer to advise client to testify that he had only "two drinks" if he in fact had "two doubles.").

30. Salmi, *supra* note 2, at 162.

31. D.C. Formal Op. 79; *Restatement (Third) of the Law Governing Lawyers*, § 116 cmt. b.

32. Wydick, *supra* note 9.

33. *See Harlan v. Lewis*, 982 F.2d 1255 (8th Cir. 1993) (imposing $2,500 sanction on attorney for violating rule).

34. ABA Model Rule 3.4(f).

35. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-402 (1996); NYSBA Formal Ops. 962 (2013) and 668 (1994); Calif. State Bar Formal Op. No. 1997-149 (1997); Mass. State Bar Assn. Op 91-3 (1991); Ill. State Bar Assn. Ethics Op. No. 87-5 (1987); *Restatement (Third) of Law Governing Lawyers*, § 117, cmt. b; *see also Prasad v. MML Investors Servs., Inc.*, 2004 WL 1151735 (S.D.N.Y. 2004) (nothing improper in the reimsbursement of a witness' expenses or in the payment of a reasonable hourly fee for time spent; however, payments to a witness to make them "sympathetic" are inappropriate); *State of N.Y. v. Solvent Chemical Co., Inc.*, 166 F.R.D. 284 (W.D.N.Y. 1996); Del. State Bar Assn. Comm. on Prof'l Ethics, Op. 2003-3 (2003); *but see Goldstein v. Exxon Research & Engineering Co.*, 1997 WL 580599 (D.N.J. 2009) ("[w]hen a witness is called because of vast personal knowledge . . . public policy dictates that such a witness may not be compensated for his services by a party to the litigation."); *Golden Door Jewelry v. Lloyds*, 865 F. Supp. 1616 (S.D. Fla. 1996) (payment to fact witness improper where served as inducement to testify, even though testimony truthful); *In re Robinson*, 151 A.D. 589 (1912), *aff'd*, 209 N.Y. 354 (1913) (payments to make witness "sympathetic" impermissible).

36. *See Hamilton v. General Motors Corp.*, 490 F.2d 223 (7th Cir. 1973) (refusing to enforce a claim for services by a witness as contrary to public policy); *Alexander v. Watson*, 128 F.2d 627 (4th Cir. 1942) (any payments to a witness above statutory provision is improper).

37. *See Rocheux Int'l of New Jersey v. U.S. Merchants Fin.l Group, Inc.*, 2009 WL 3246837 (D.N.J. 2009).

38. *But see Florida Bar v. Wohl*, 842 So.2d 811 (Fla. 2003) ("paying an individual who has personal knowledge of the facts [to assist in pre-trial fact finding] is to pay a witness, whether or not that person is expected to testify").

39. *Restatement (Third) of the Law Governing Lawyers*, § 117 cmt. b; *Florida Bar v. Wohl*, *supra* note 38.

40. N.Y. Rule 1.0(k); *see also* New York County Lawyer's Association, Comm. on Prof'l Ethics Formal Op. 741 (March. 1, 2010) (looking to *In re Doe*, 847 F.2d 57 (2d Cir. 1988) for guidance on this issue and indicating that while mere suspicion or belief is not adequate, "proof beyond a moral certainty" is not required).

41. *See* N.Y. Rule 3.3(a)(3).

42. In a criminal proceeding, given the defendant's constitutional right to testify, a lawyer faced with a client who is going to testify falsely may have the option of offering the testimony in narrative form. *See* N.Y. Rule 3.3(a), cmt. 7.

43. N.Y. Rule 3.3, cmt. 8.

44. If a lawyer only comes to learn of the falsity of testimony after it is offered, she will have a remedial obligation to the tribunal. N.Y. Rule 3.3(a)(3) requires that if a lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer must take reasonable remedial measures, including, if necessary, disclosure to the tribunal. In other words, disclosure may be required to remedy false evidence by the lawyer's client or witness, as a last resort, even if the information to be disclosed is otherwise "protected" client confidential information. This marks a significant departure from the N.Y. rules in effect under the former Code of Professional Responsibility.

"Smart Securities" and the Future of Securities Regulation

By Rachel Epstein

"Technology means you can now do amazing things easily; but you couldn't easily do them legally."[1] –Lawrence Lessig

Introduction

New and advancing technology has always been a disruptive force to the law and legal industry. Blockchains, oracles, and decentralized autonomous organizations (DAOs) may sound like Chinese mysticism at first, but these are just some recent technological developments that could, and indeed are starting to, impact and potentially update archaic legal concepts and procedures into the 21st century. This article will focus on one of those old concepts – securities, and how they are regulated in the United States – then proceed to discuss how this novel blockchain and smart contract technology could affect it. By analyzing the historical underpinnings and purpose of key legislation, specifically the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"), in conjunction with the benefits of this cutting edge technology, this article will show how blockchains and smart securities have the potential to be the ultimate investor protection mechanism, thereby fulfilling the fundamental purposes of the legislation in a less costly and more efficient manner.

What's a Security?

A security is a financial instrument that represents an ownership position in a publicly traded corporation (stock), a creditor relationship with a governmental body or a corporation (bond), or rights to ownership as represented by an option.[2] A security is a fungible, negotiable financial instrument that represents some type of financial value. Section 2(a)(1) of the Securities Act and section

Rachel Epstein double majored in Film and Political Science at Johns Hopkins University and earned a M.Phil in Screen Media & Cultures from the University of Cambridge. In 2012, she pursued an accelerated two-year honors law degree and she recently graduated from Cardozo Law School where she participated in both the Indie Film Clinic and Tech Start-up Clinic and graduated first in her class with a law masters degree in intellectual property.

3(a)(10) of the Exchange Act define security to include "any note, stock, treasury stock, security future, security-based swap, bond, debenture, . . . investment contract, . . . or any instrument commonly known as a security." This legal definition of a security is very broad and "sufficient to encompass virtually any instrument that might be sold as an investment."[3] If something falls within the definition of a security under applicable law, it will be governed by extensive rules and regulations that can be quite complex and expensive to comply with.

Over the years, many schemes for raising capital have been devised in attempts to avoid application of the rigorous securities laws. These financial arrangements have been scrutinized by the courts in order to decide whether they are "investment contracts," and therefore "securities" under the federal legislative definition. The U.S. Supreme Court in *SEC v. W.J. Howey Co.*[4] provides precedent to determine what qualifies as an investment contract. Under the *Howey* test, an instrument is only a security if it involves an investment of money or other tangible or definable consideration used in a common enterprise with a reasonable expectation of profits to be derived primarily from the entrepreneurial or managerial efforts of others.

In deciding *Howey*, the Supreme Court created a test that looks at an investment's substance rather than its form as the determining factor for whether it is a security. The form of the security (whether it is a formal certificate or nominal interests in the physical assets employed by the enterprise) is irrelevant. Even if an investment is not labeled a "stock" or "bond," it may very well be a security under the law. Whether a particular investment is considered a security is important because designation as a security means that the investment is subject to certain registration and disclosure requirements. Determining the classification of an investment is still extremely relevant, especially in light of blockchain technology and the rise of decentralized cryptocurrencies (e.g., Bitcoin). While the IRS treats Bitcoin as property, and states like New York are starting to regulate it as virtual currency, recently the SEC has called the mining contracts for Bitcoin securities in a suit against two virtual currency mining companies for fraud and sale of unregistered securities.[5]

Regulating Securities

If the financing of a corporation includes the offering of securities, the corporation will have to comply with federal and state securities laws.[6] Federal regulation of securities began with the Securities Act of 1933.[7] Events of the decade preceding the enactment of the Securities Act moved Congress to take action. As one congressional report noted:

> Fully half or $25,000,000,000 worth of securities floated during this period have been proved to be worthless. . . . The flotation of such a mass of essentially fraudulent securities was made possible by the complete abandonment by many underwriters and dealers of securities of those standards of fair, honest and prudent dealing that should be basic to the encouragement of investment in any enterprise.[8]

The great losses incurred in the securities industry, attributable to the stock market crash of 1929, were most likely not the only reason leading to legislation. Consumers were subject to abuse in other purchases that were not so nearly or fully regulated, but the protection of investors was seen as necessary to ensure that the financial markets were efficiently allocating capital resources to strengthen the overall economy.[9] The regulation of securities also reflects a perception that securities are different from most other commodities in a way that creates a special need for enhanced protection. For example, investors cannot as easily determine the value of a security by looking at it as they might from real property such as a house or a car.

The Securities Act (also referred to as the "truth in securities" law) was therefore designed to achieve two basic objectives – ensure investors are informed and protected.[10] The primary means of accomplishing these goals is by requiring the full, fair, and public disclosure of material facts concerning securities via registration. Section 5 of the Securities Act prohibits the offer or sale of a security unless it has been registered under the act or falls within an exception. Registration requires extensive disclosure to the SEC and to *each* individual purchaser by means of a prospectus and registration statement. The disclosure requirement affirmatively required by the Securities Act expands the more indirect disclosure required by the common law prohibitions against fraud.[11] While the common law aimed at misstatements that had been voluntarily made, the federal legislation was a more exhaustive and proactive protection process. Although the disclosure process established by the Securities Act does not entail a substantive review of the business prospects of the issuer of the securities, it does require that the issuer provide full and clear disclosure of the risks and potential rewards of investing in the securities, and then provide ongoing, regular, and event-based disclosures.[12]

Over time, these initial and ongoing disclosure requirements have become increasingly demanding, thanks to the accumulation of legislative and regulatory obstacles, such as the Sarbanes-Oxley Act of 2002 which imposed heightened periodic disclosure requirements and accounting and auditing reforms, resulting in substantially higher costs – not to mention the cost of distracted executives.[13] Hence today, the process of going public costs millions of dollars in legal, accounting, and other fees and, in a potentially related development, the number of companies electing to do so has shrunk to an all-time low.[14] Besides being a costly process, it is time-consuming and burdensome, especially for new start-up companies, and there are significant consequences for

Blockchain technology refers to the use of a distributed, decentralized, immutable ledger for verifying and recording transactions.

failing to follow the legislative formalities.[15] This fact is known by those starting businesses as well as the SEC, as the current SEC Chairman Jay Clayton noted earlier this year:

> The roughly 50% decline in the total number of U.S.-listed public companies over the last two decades[16] forces us to question whether our analysis should be cumulative as well as incremental. I believe it should be. . .While there are many factors that drive the decision of whether to be a public company, increased disclosure and other burdens may render alternatives for raising capital, such as the private markets, increasingly attractive to companies that only a decade ago would have been all but certain candidates for the public markets. And, fewer small and medium-sized public companies may mean less liquid trading markets for those that remain public. Regardless of the cause, the reduction in the number of U.S.-listed public companies is a serious issue for our markets and the country more generally. To the extent companies are eschewing our public markets, the vast majority of Main Street investors will be unable to participate in their growth. The potential lasting effects of such an outcome to the economy and society are, in two words, not good.[17]

In short, going public has become essentially non-viable for smaller businesses due to the onerous registration requirements and regulatory burdens accompanying a public securities offering.[18]

Beyond the offering of securities, securities trading involves an array of public and private entities which regulate or facilitate trade clearing and settlement, such as: the Depository Trust & Clearing Corporation (DTCC), Securities Exchange Commission (SEC), Financial Industry Regulatory Authority (FINRA), exchanges, clearinghouses, over-the-counter markets, and various third party services like transfer agents. Overall, it is a convoluted process in which parties can commit fraud, manipulate each other, and simply make clerical errors with outsized consequences. This is one reason the apparatus of agencies and rules exists, but they can lead to inefficiencies in the securities trade. Blockchain technology and the use of smart contracts for securities offerings, as well as trading, can disrupt and advance the current regime.

New Technology: Blockchains and Smart Contracts

Blockchain technology refers to the use of a distributed, decentralized, immutable ledger for verifying and recording transactions.[19] The technology enables parties to securely send, receive, and record value or information through a peer-to-peer network of computers. When parties wish to conduct a transaction on the blockchain, the proposed transaction is disseminated to the entire network. The transaction will only be recorded on a block once the network confirms the validity of the transaction based upon transactions recorded in all previous blocks.[20] The resulting chain of blocks prevents third parties from manipulating the ledger and ensures that transactions are only recorded once.

Although the blockchain was originally developed to facilitate cryptocurrency transactions, entrepreneurs are now developing the technology for use in smart contracts – one of the first truly disruptive technological advancements to the practice of law since the invention of the printing press.[21] Smart contracts are self-executing, autonomous computer protocols that facilitate, execute, and enforce agreements between two or more parties.[22] To develop a smart contract, the terms that make up a traditional contract are coded and uploaded to the blockchain, producing a decentralized smart contract that does not rely on a third party for recordkeeping or enforcement.[23] Contractual clauses are automatically executed when pre-programmed conditions are satisfied, which in turn eliminates any ambiguity regarding the terms of the agreement and any disagreement concerning the existence of external dependencies.[24]

One of the most important characteristics of the blockchain as it relates to smart contracts is the ability to enter into "trustless" transactions. Trustless transactions are transactions that can be validated, monitored, and enforced bilaterally over a digital network without the need for a trusted third-party intermediary.[25] Multi-signature (or multi-sig) functionality can be incorporated into smart contracts where the approval of two or more parties is required before some aspect of the contract can be executed.[26] Where a smart contract's conditions depend upon real-world data (e.g., the price of a commodity future at a given time), agreed-upon outside systems, called oracles, can be developed to monitor and verify prices, performance, or other real-world events.[27]

Blockchains act as a shared database to provide a secure, single source of truth, and smart contracts automate approvals, calculation, and other transactions that are prone to lag and error.[28] For these reasons and many more, blockchain-based smart contracts are an attractive technology that can be utilized in numerous industries, such as: financial services, life sciences and health care, music rights management, supply-chain, identity management, energy and resources, and even the public sector.

"Smart Securities"

With blockchains, smart contracts and digital currencies, the entire world of commerce and finance may soon be re-conceptualized by providing a technical framework to

create digital assets and decentralized exchanges.[29] Just as the internet and personal computer placed a digital copy machine in everyone's home, blockchain technology could provide millions of people with the power to easily issue quasi-financial or financial instruments.[30] A smart security is a term to describe a smart contract that is a programmable version of a traditional security that is being issued on a blockchain. If this seems like a futuristic fantasy, well it is not, but rather it has recently become a reality with the SEC approving Overstock's plan to issue stock via the blockchain through its subsidiary tØ platform.[31]

Financial transactions are another way to use blockchain-based smart contracts. Smart securities contracts could be coded so that payment, clearing, and settlement occur automatically in a decentralized manner, without the need for a third-party intermediary, such as an exchange or clearinghouse. For example, a smart security could be pre-programmed with all contractual terms (i.e., quality, quantity, delivery) except for the price, which could be determined algorithmically from market data fed through an oracle.[32] AirSwap is one of several startups aiming to bridge the gap between what investors expect in terms of financial market infrastructure and the nature of cryptocurrency trading.[33]

Utilizing blockchains and smart securities in the financial industry seems to achieve the principal objectives of the Securities Act enacted over 80 years ago, while simultaneously lessening the burdens on issuers of securities and potentially increasing investor activity, which in turn can lead to a stronger economy. For a wide range of potential applications, including the offering and trading of securities, blockchain-based smart securities can offer many benefits. Because smart contracts use software code to automate tasks that are typically accomplished through manual means, they can increase the speed of a wide variety of business processes. Automated transactions are not only faster but also less prone to manual error, thereby improving the overall accuracy of any offer or deal made. However, it is important to note that automation is not a novel concept in the world of finance, with investment management companies like Two Sigma already incorporating a variety of technological methods such as artificial intelligence, machine learning, and distributed computing for its trading strategies.

The decentralized process of execution virtually eliminates the risk of manipulation, non-performance, or errors, since the execution is managed automatically by the network rather than an individual party– thereby nearly removing any counterparty risk. Smart contracts can reduce or eliminate reliance on third-party intermediaries that provide "trust" services such as escrow between counterparties. New processes enabled by blockchain technology require less human intervention, which in turn means reducing the potential for human error, as well as involving fewer intermediaries; therefore increasing efficiency while simultaneously reducing costs. The reliance on a peer-to-peer consensus mechanism that verifies every piece of data uploaded to a blockchain ensures investors are better protected against fraud and misinformation since each security offering, trade, as well as disclosure statement for registration is transparent and accountable.

The path towards implementing and adopting blockchain technology to enhance the financial industry, by making compliance with current securities regulations less burdensome for issuers, is not without some danger. The users maintain the decentralized network, which takes power out of the hands of centralized entities but consequently means there is no oversight or enforcement such as the SEC or FINRA. Smart securities platforms are still considered unproven in terms of scalability and their digital nature could raise concern over cyber hacking and privacy. The immutability of a blockchain-based smart contract makes it nearly impossible to make any changes to information uploaded to the blockchain– making it a very inflexible system. And of course, removing human error does not equate to more consumer protection either. Ultimately, due to the increased transparency of this technology, and its inability to insure against risks of default, any benefits generated may be offset by a riskier financial system.[34]

Conclusion

Despite its potential disadvantages, blockchain technology should still be utilized in the financial industry, especially regarding securities, because it achieves the fundamental purposes of the Securities Act of 1933. Smart securities can assist with companies providing disclosures about material financial information in a faster, cheaper, and more efficient manner. Uploading the smart securities to blockchain-based platforms prevents issuers and traders from deceiving investors, which could lead to more trust in the market and more investing. Blockchain technology can be regarded as a type of regulatory technology in and of itself – enabling laws to be enforced more transparently and efficiently.[35]

Within financial technology ("FinTech"), startups are developing smart contracts for financial transactions, securities, and derivatives, which means regulators in the United States and around the world will ultimately need to formulate an approach for governing their use. In order to regulate effectively to protect consumers, promote innovation, and democratize capital formation, government regulators must work with those in the industry to better understand the nuances of this technology so as to maximize its benefits while also minimizing its risks.[36]

Alternative methods for governance of this technology should also be considered, such as allowing for regulatory sandboxes, creating a best practices rules for technologists, and even supplementing or refining current securities disclosure-based regulation with other

approaches like "suitability rules" as discussed by several academic scholars.[37] While regulation is important, the key is not to fear something new and different or recreate history through over-regulation, thereby producing the same cumbersome effect of the current regime. Instead, implementing this technology for the offering and trading of securities should be embraced, harmonized, and used to update the existing laws. ■

1. Lessig, Lawrence. *Free Culture: The Nature and Nurture of Creativity*. 2d ed. Penguin Books, 2005.

2. *Security*, Investopedia. (Aug. 24, 2015), http://www.investopedia.com/terms/s/security.asp#ixzz4RFZO1Apb.

3. *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

4. *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

5. Demartino, Ian, *Bitcoin Regulation*: *SEC Calls Mining Contracts 'Securities,' COINJOURNAL* (Feb. 19, 2016), http://coinjournal.net/bitcoin-regulation-sec-calls-mining-contracts-securities/; *SEC v. Homero Joshua Garza* (Dec. 2015), https://www.sec.gov/litigation/litreleases/2015/lr23415.htm.

6. This article will focus on the regulation of securities at the federal level, in particular the 1933 Act and 1934 Act requirements for the issuer offering securities.

7. Prior to federal legislation, state laws, often called "blue sky laws," chiefly governed the regulation of securities. When Congress enacted the Securities Act in 1933 it left existing state securities laws in place. Some states expressly regulate the substance of a transaction and exclude those that do not meet the state standards, referred to as 'merit regulation,' and contrasts with the federal SEC disclosure-based approach to securities regulation. *See Report on State Merit Regulation of Securities Offerings*, 41 Bus. Law 785 (1986).

8. H.R. Rep. No. 85, 73d Cong., 1st Sess. 2 (1933).

9. *See* Hazen, Thomas Lee, *The Law of Securities Regulation*. 5th ed., Thompson West, 2006: 110.

10. More about federal securities laws and exemptions can be found on the SEC website, available at https://www.sec.gov/about/laws.shtml#secact1933.

11. Prior to the 1920s, the tort action of deceit was the principal remedy for inadequate disclosure.

12. 15 U.S.C.A. § 77aa.

13. Carney, William J., *The Costs of Being Public After Sarbanes-Oxley: The Irony of 'Going Private'*, 55 Emory L.J. 141, 147 (2006).

14. *See* Chafee, Eric C., *Finishing the Race to the Bottom: An Argument for the Harmonization and Centralization of International Securities Law*, 40 Seton Hall L. Rev. 1581, 1590 (2010); Ibrahim, Darian M., *The New Exit in Venture Capital*, 65 Vand. L. Rev. 1, 11–13 (2012).

15. Schwartz, Andrew A., *Crowdfunding Securities*, 88 Notre Dame Law Rev. 1457 (2013); *see also* Booth, Richard A., *Corporations, Financing the Corporation*. § 7.3 (2011) (citing an SEC estimate of "1176 hours to complete Form S-1") ("It has also been estimated that an IPO consumes 40% of CEO time and 75% of CFO time during the registration process."); Hartman, Thomas E., *The Cost of Being Public in the Era of Sarbanes-Oxley*," Foley & Lardner LLP (2007), https://www.foley.com/files/Publication/6202688d-eebc-42bc-8169-5dfb14ef3ced/Presentation/PublicationAttachment/666c1479-ea9c-4359-bb07-5f71a18166f6/Foley2007SOXstudy.pdf ("[S]ince the enactment of the Sarbanes-Oxley Act, the average cost of compliance for companies with under $1 billion in annual revenue has increased . . . to approximately $2.8 million.").

16. The total number of listed companies in 2016 was approximately 4,300, compared to about 8,100 in 1996. Commission staff produced these estimates using data from the Center for Research in Securities Prices U.S. Stock and U.S. Index Databases (2016), The University of Chicago Booth School of Business.

17. SEC Chairman Jay Clayton, *Remarks at the Economic Club of New York*, New York, N.Y. (July 12, 2017), available at https://www.sec.gov/news/speech/remarks-economic-club-new-york#_ftn7.

18. See Cohn, Stuart R. & Gregory C. Yadley, *Capital Offense: The SEC's Continuing Failure to Address Small Business Financing Concerns*, 4 N.Y.U. J.L. & BUS. 1, 10 (2007).

19. Satoshi Nakamoto conceptualized the blockchain in 2008 when he described how a network of users could engage in secure peer-to-peer financial transactions, eliminating the need for financial intermediaries and reducing the cost of overseas payments. *See* Nakamoto, Satoshi, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN.ORG (2009), https://bitcoin.org/bitcoin.pdf.

20. Consensus within the network is achieved through different voting mechanisms, the most common of which is Proof-of-Work, which depends on the amount of processing power donated to the network. *See* Peters, Gareth William, and Efstathios Panayi, *Understanding Modern Banking Ledgers Through Blockchain Technologies: Future of Transaction Processing and Smart Contracts on the Internet of Money*, available at SSRN 2692487 (2015).

21. Wright, Aaron, and Primavera De Filippi, *Decentralized Blockchain Technology and the Rise of Lex Cryptographia*, available at SSRN 2580664 (2015).

22. *See* Szabo, Nick, *The Idea of Smart Contracts* (1997), http://szabo.best.vwh.net/smart_contracts_idea.html (describing the concept of digital "smart" contracts). However, smart contracts have been conceived of as having applications that are broader than just contractual language. They are generally defined as "cryptographic 'boxes' that contain value and only unlock it if certain conditions are met." Buterin, Vitalik, *A Next Generation Smart Contract & Decentralized Application Platform*, GITHUB (last edited Jan. 5, 2015), https://github.com/ethereum/wiki/wiki/White-Paper.

23. See Szabo, Nick, *Formalizing and Securing Relationships on Public Networks*, FirstMonday (1997), http://firstmonday.org/ojs/index.php/fm/article/view/548/469 (outlining the concept for smart contracts); *see also* Surden, Harry, *Computable Contracts*, 46 U.C. Davis L. Rev. 629 (2012) (continuing to explore how the representation of contractual obligations as data allows for new contracting properties, including "computable" contract terms).

24. *Id.*

25. Chu, Yang & John Ream & David Schatsky, *Upgrading Blockchains: Smart Contract Use Cases in Industry*, Deloitte University Press (June 8, 2016), https://dupress.deloitte.com/dup-us-en/focus/signals-for-strategists/using-blockchain-for-smart-contracts.html#endnote-2.

26. For example, an escrow agreement between two parties and an escrow agent. *See* Wright, *supra* note 21.

27. *See* Swan, Melanie, *Blockchain: Blueprint for a New Economy*, O'Reilly Media, Inc., 2015.

28. Chu, Yang & John Ream & David Schatsky, *Upgrading Blockchains: Smart Contract Use Cases in Industry*, Deloitte University Press (June 8, 2016), https://dupress.deloitte.com/dup-us-en/focus/signals-for-strategists/using-blockchain-for-smart-contracts.html#endnote-2.

29. Wright, *supra* note 21, at 26.

30. *Id.*

31. Perez, Yessi Bello, *SEC Approves Overstock's Plan to Issue Blockchain Securities*, CoinDesk (Dec. 16, 2015), http://www.coindesk.com/sec-approves-overstocks-proposal-to-issue-securities-on-the-blockchain/.

32. Shadab, Houman B., *Regulating Bitcoin and Blockchain Derivatives*, NYLS Legal Studies Research Paper (Oct. 9, 2014), https://ssrn.com/abstract=2508707.

33. Leising, Matthew, *This 31-Year-Old Is Trying to Revolutionize Cryptocurrency Trading*, Bloomberg (Sept. 28, 2017), available at https://www.bloomberg.com/news/articles/2017-09-28/upending-digital-currency-market-is-next-act-for-ex-virtu-trader.

34. Wright, *supra note* 21.

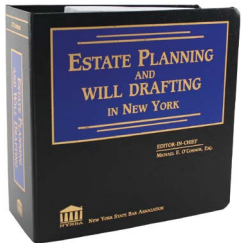
35. De Filippi, Primavera, *We Must Regulate Bitcoin. Problem Is, We Don't Understand It*. Wired (March 1, 2016), https://www.wired.com/2016/03/must-understand-bitcoin-regulate/.

36. France's Autorité des Marchés Financiers (AMF) has recently published a discussion paper regarding blockchain technology and initial coin offerings with an open call to those working in the industry to answer questions regarding the regulation of this technology and help formulate a list of best practices, available at http://www.amf-france.org/en_US/Publications/Consultations-publiques/Archives?docId=workspace%3A%2F%2FSpacesStore%2Fa2b267b3-2d94-4c24-acad-7fe3351dfc8a.

37. Columbo, Ronald J. (2013), *Merit Regulation via the Suitability Rules*, Journal of International Business and Law, Vol. 12, Is. 1, Article 2, available at https://scholarlycommons.law.hofstra.edu/jibl/vol12/iss1/2.

Estate Planning and Will Drafting in New York

Revised 2017



Estate planning is a diverse, challenging and sophisticated area of practice that requires the technical skills of a tax attorney; a strong understanding of business, real property and decedents' estates law; and the sensitivity and caring of a personal adviser. Estate planning is much more than mere will drafting—it is a well-recognized specialty that is a prominent part of the legal profession.

Written and edited by experienced practitioners, this comprehensive book is recognized as one of the leading references available to New York attorneys involved with estate planning. The step-by-step coverage is a great resource for novice as well as experienced practitioners. Especially useful are many "real world" examples, practice tips and sample forms. Includes downloadable forms.

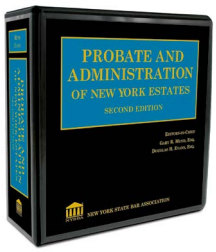
EDITOR-IN-CHIEF & PRODUCT INFORMATION

Michael E. O'Connor, Esq.
Costello Cooney Fearnon PLLC, Syracuse, NY

Book with Downloadable Forms
PN: 4095C | **NYSBA Members $185** | Non-Members $220
E-Book with Downloadable Forms
PN: 4095CE | **NYSBA Members $185** | Non-Members $220
Revision for Past Purchasers
PN: 50957 | 2017 Revision | **NYSBA Members $130** | Non-Members $150

Probate and Administration of New York Estates

Second Edition, Revised 2017



This comprehensive, practical reference covers all aspects of probate and administration, from the preparation of the estate to settling the account.

Probate offers step-by-step guidance on estate issues, detailed appendixes, sample forms and checklists. Of particular note in this edition are chapters on federal and New York estate tax, and fiduciary income-tax planning.

Probate is written and edited by experienced attorneys from across New York State, whose expertise is invaluable to novice and experienced practitioners alike. Periodic updates will make *Probate and Administration of New York Estates* the first reference you turn to when handling an estate.

EDITORS-IN-CHIEF & PRODUCT INFORMATION

Gary R. Mund, Esq., New York, NY
Douglas H. Evans, Esq., Sullivan & Cromwell, New York, NY

PN: 40054 (Print) | 2017 | 1,096 pages | looseleaf
PN: 40054E (E-Book) | 2017 | 1,096 pages | PDF
NYSBA Members $185 | Non-Members $220

Revision for past purchasers
PN: 50058 | 2017 Revision | **NYSBA Members $125** | Non-Members $150

To order call **1.800.582.2452** or visit us online at **www.nysba.org/pubs**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

Mention code: PUB8915 when ordering.

NYSBA

Avoid Creating an Email Contract: The Rules

By Adam Leitman Bailey and John M. Desiderio

In *Stonehill Capital Management LLC v. Bank of the West*,[1] the N.Y. Court of Appeals held that an agreement to sell a distressed loan in the auction loan trading market was enforceable without the execution of a formal written contract. While *Stonehill* may simply reflect the Court's pragmatic acknowledgement of the trading practices that prevail in fast-paced loan trading, there has been concern expressed by some attorneys that *Stonehill* may adversely impact longstanding practices in the negotiation of contracts generally. The authors of this article do not share that concern, but we do believe the decision highlights points that all attorneys should consider when advising their clients. This article discusses when an email exchange will be deemed to constitute an enforceable contract and how to prevent or create such a binding contract.

Stonehill's Holdings

Stonehill held that, in an auction sale of a syndicated distress loan, the parties entered into an enforceable contract when the seller "agreed" to accept a bid in an email that set forth all material terms of the deal (i.e., the sale price, the specific loan to be sold, the timing of the closing, and the manner of payment and wire transfer information), despite the seller stating that its acceptance was "subject

Adam Leitman Bailey, Esq., is the founding partner of Adam Leitman Bailey, P.C., and **John M. Desiderio, Esq.**, is a partner of the firm and Chair of the firm's Real Estate Litigation Group. The authors would like to thank Joshua Filsoof, a spring extern, summer associate with Adam Leitman Bailey, P.C. and current Cardozo student, for his research assistance with this article.

to mutual execution of an acceptable [loan sale agreement]" which was never executed.

The Court acknowledged that "if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed."[2] Nevertheless, in holding the contract "enforceable" despite the seller's "subject to" language, the Court noted that "[t]here is a difference between conditions precedent to performance and those prefatory to the formation of a binding agreement." Noting further that the material terms of the sale were "preset" in the seller's Offering Memorandum, the Court found that the auction bid form "did not unmistakably condition assent on execution of a definitive agreement at some later juncture." The inclusion of "formulaic language" that the parties are "subject to" some future act or event was not a "forthright signal" that the seller intended to be bound only by a formal written agreement.

The Elements of a Binding Contract

The N.Y. Statute of Frauds[3] makes it clear that

> *Every agreement, promise or undertaking* is void, unless it or some note or memorandum thereof be in writing, *and subscribed by the party to be charged therewith, or by his lawful agent*, if such agreement, promise or undertaking * * * * [b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime. (Emphasis added).

In addition, contracts for the sale or lease of real estate are not enforceable unless the essential terms of the sale or lease are set forth in a written agreement signed by the parties to the deal.[4] Nothing the Court said in *Stonehill* alters these prescribed requirements.

General Obligations Law § 5-703(2) expressly provides:

> A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void *unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged*, or by his lawful agent thereunto authorized by writing. (Emphasis added).

Nevertheless, as the law has developed over time, and as the law continues to develop in the age of electronic correspondence, the terms of an enforceable contract may be deemed to consist collectively in more than one written document. Long ago, the Court of Appeals, in *Crabtree v. Elizabeth Arden Sales Corporation*,[5] held:

> The statute of frauds does not require the "memorandum * * * to be in one document. It may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject matter and occasion,"[6] and "the signed and unsigned writings [may] be read together, provided that they clearly refer to the same subject matter or transaction."[7]

Moreover, *Crabtree* further explained that the statute "does not impose the requirement that the signed acknowledgement of the contract must appear from the writings alone, unaided by oral testimony," so long as all the terms of the contract are "set out in the various writings presented to the court, and at least one writing, the one establishing a contractual relationship between the parties, [bears] the signature of the party to be charged, while the unsigned document must on its face refer to the same transaction as that set forth in the one that was signed."[8]

> Whether emails are sufficiently "subscribed" by the party to be charged appears to be the issue that has generated the most number of appellate decisions involving email negotiations.

The Court acknowledged the possibility "that, by fraud or perjury, an agreement never in fact made may occasionally be enforced," but nevertheless explained that "it is better to run that risk, . . . , than to deny enforcement to all agreements, merely because the signed document made no specific mention of the unsigned writing."[9]

Contracts May Be Created by Email Exchanges

All of the above principles that apply to contracts formed through traditional written communications apply with equal force when generated through email exchanges. New York courts have held that "an email will satisfy the statute of frauds so long as its contents and subscription meet all requirements of the governing statute."[10]

Accordingly, whether a court will enforce any agreement negotiated through email exchanges, whether it involve real estate, a commercial purchase or sale, or otherwise, requires finding (a) that the emails constitute undisputed documentary evidence of a meeting of the minds between the parties as to all essential terms of the contemplated contract,[11] (b) that the party to be charged can be said to have "subscribed" one or more of the emails referring to the transaction,[12] and (c) that the emails relied upon by the plaintiff do not "unmistakably" leave for future negotiation essential terms of the contemplated contract.[13]

Contracts That Satisfy the "Essential Terms" Requirement

What are deemed the "essential terms" of a contract will depend upon the nature of the agreement and what must

be included therein in order to accomplish the parties' intentions. For example, as previously noted, the "material" terms in *Stonehill* were the sale price, the specific loan to be sold, the timing of the closing, and the manner of payment and wire transfer information. Similarly, although there is no defined list of "essential terms" that constitute a real estate contract,[14] it is generally agreed that price, identity of the parties, and the parcel of real estate to be sold are "essential." The courts have also held that "those items which must be set forth in a writing are 'those terms customarily encountered' in a particular transaction,'"[15] such as, a specified closing date, the quality of title to be conveyed, adjustments for taxes, and risk of loss.[16]

> Attorneys need to be very attentive to how their email negotiations are conducted.

Accordingly, recent cases have held email exchanges between the parties or their counsel to be insufficient to satisfy the statute of frauds, even where the emails were otherwise found to be adequately "subscribed" to bind the party to be charged, (a) where there was no undisputed documentary evidence in the record to establish, as a matter of law, that the parties had a meeting of the minds on "at least" an agreement "in principle" on price,[17] and (b) where "email messages showed at best that there [had been] negotiations for an agreement" between a mortgage lender and an alleged guarantor of the loan, but "that the material terms of the agreement were not settled."[18]

Subscribing Emails by the Party to Be Charged

Whether emails are sufficiently "subscribed" by the party to be charged appears to be the issue that has generated the most number of appellate decisions involving email negotiations (for both real estate and non-real estate cases).

In *Leist v. Tugendhaft*,[19] the court held that, even assuming that an email was otherwise sufficient to comply with the Statute of Frauds for the conveyance of real property, the email with "a 'Memo of Sale' subscribed by no one, sent as an attachment to an email from the defendant's 'listing agent' to the plaintiff's attorney" was "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."

In *Williamson v. Delsener*,[20] the First Department held that emails exchanged between counsel, which contained their printed names at the end, were "signed writings" within the meaning of the Statute of Frauds, and entitled plaintiff to judgment based on an agreed settlement. The court explained that the defendant "was aware of and consented to the settlement; the record contains no indication to the contrary, or that counsel was without authority to enter into the settlement."

However, the question remains open as to what constitutes a "printed" name sufficient to satisfy the requirement for the purported agreement to be "subscribed by the party to be charged." As noted above, in *Delsener* the First Department held that emails with the "printed names" of the attorneys at the end were "signed writings." However, *Delsener* did not specify how the names were "printed." In *Naldi v. Grunberg*,[21] given another opportunity to address the question, but having already decided that the complaint in that case was dismissible on other grounds, the First Department declined to decide whether an attorney's "signature block" printed at the bottom of an email constituted the requisite subscription.

Where an email is programmed to automatically imprint a sender's signature block at the end of the email text, as is almost uniformly common practice, a court might very well decide that the pre-programmed "signature block" is akin to the automatically imprinted name of the sender at the top of every page transmitted by a fax machine. In *Parma Tile Mosaic Marble Co, Inc. v. Estate of Short*[22] (a case that involved such automatic imprinting by a fax machine), the Court of Appeals held that "[t]he act of identifying and sending a document to a particular destination does not, by itself, constitute a signing authenticating the contents of the document for Statute of Frauds purposes," and plaintiff's argument that such an inference is warranted was rejected.

More recently, the First Department, in *Jimenez v. Yanne*,[23] held that a settlement agreement was enforceable where (a) it was negotiated in a series of emails between the parties' respective counsel, and (b) counsel for the party to be charged "typed his name at the end of the email accepting defendants' offer," which satisfied CPLR 2104's requirement that settlement agreements be in a "writing subscribed by him or his attorney . . . thus creating a binding settlement agreement." The counsel in *Jimenez* signed the crucial email by typing his name "Steven" after typing his clients' acceptance of the defendant's settlement terms.

This suggests very strongly that if parties intend their emails to memorialize a binding agreement that will be an enforceable contract, it indeed would be prudent for them to manifest their "subscription" to the email by expressly adding some form of identifying signature (whether it be by purposely typing the sender's full name or his or her initials or nickname) or even adding an electronic signature and not relying solely upon the automatic imprint of a pre-programmed signature block. This is all the more important when, as has become increasingly routine,

each party's email messages are transmitted without even a signature block and state only that they are "Sent from my iPhone."

Execution of a Formal Contract Must Be "Unmistakably Conditioned"

Stonehill's holding is most relevant where the email exchanges between the parties show that they may have reached an agreement "in principle," but still leave for future negotiation essential terms of the contemplated contract. In *Saul v. Vidokle*,[24] the Second Department found that "emails relied upon by the plaintiff to establish the alleged agreement among the parties for the purchase of the defendant's apartment were insufficient to satisfy the statute of frauds," because the amount of the down payment, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, and adjustments for taxes and utilities, were subject to the execution of a more formal contract of sale. In such cases, unlike in *Stonehill*, where all essential terms were pre-set in the seller's offering memorandum, it cannot be said that the parties have reached a meeting of the minds. Therefore, their "agreement," such as it is, "unmistakably" calls for later "subscription" of either a formal contract or additional emails setting forth all "essential terms" sufficient to bind the party to be charged.

Of course, where the parties' mutual intention for the later execution of a formal written agreement can be clearly perceived in their communications, whether in letter or email form, such express or perceived intention presents the "forthright signal" *Stonehill* requires to preclude a party from being bound to a contemplated contract even though all of the essential terms have been set forth and subscribed "informally" by the party to be charged.[25]

Electronic Signatures

It should be noted that the First Department has held that, pursuant to New York's Electronic Signatures and Records Act (ESRA)[26]

> the terms "writing" and "subscribed" in [General Obligations Law] §5-703 should now be construed to include, respectively, records of electronic communications and electronic signatures, * * * * [and] [a]s much as a communication originally written or typed on paper, an email retrievable from computer storage serves the purpose of the statute of frauds by providing "some objective guaranty, other than word of mouth, that there really has been some deal."[27]

All of the principles set forth above in this article apply with equal force to the use of electronic signatures. Their use is likely to eliminate many potential disputes that would otherwise ensue over whether a particular email agreement is held to be "subscribed" sufficiently to bind the party to be charged.

Conclusion

Attorneys need to be very attentive to how their email negotiations are conducted. Unless attorneys are self-disciplined in the manner in which they communicate contemplated contractual terms through email exchanges, they run the risk of either (a) binding their client to an unfavorable and unwanted deal, or (b) failing to ensure that their client secures a deal that the client wants and that would otherwise be consummated, but for the failure to "subscribe" their emails correctly. At the same time, for those practitioners wishing to create a contract using email exchanges, the guidelines above should assist in navigating this whole new world of doing business. ■

1. 28 N.Y.3d 439 (2016).
2. *Id.* at 451 (citing *Scheck v. Francis*, 26 N.Y.2d 466 [1970]).
3. General Obligations Law §§ 5-701, *et seq.*
4. *Id.*, § 5-703.
5. 305 N.Y. 48 (1953).
6. *Id.* at 54 (internal citations omitted).
7. *Id.* at 55.
8. *Id.* at 55–56.
9. *Id.* at 56.
10. *Naldi v. Grunberg*, 80 A.D.3d 1, 908 N.Y.S.2d 639 (1st Dep't 2010).
11. *Id.*; *see also Saul v. Vidokle*, 151 A.D.3d 780 (2d Dep't 2017).
12. *See Jimenez v. Yanne*, 2017 N.Y. Slip Op. 05677.
13. *See Saul v. Vidokle*, *supra* note 11.
14. *See Argent Acquisitions, LLC v. First Church of Religious Science*, 118 A.D.3d 441, 990 N.Y.S.2d 1 (1st Dep't 2014).
15. *Id.*; *see also O'Brien v. West*, 199 A.D.2d 369, 606 N.Y.S.2d 366 (2d Dep't 1993).
16. *Nesbit v. Penalver*, 40 A.D.3d 596, 598, 835 N.Y.S.2d 426 (2d Dep't 2007).
17. *Naldi v. Grunberg*, *supra* note 10.
18. *Dahan v. Weiss*, 126 A.D.3d 540, 991 N.Y.S.2d 119 (2d Dep't 2014).
19. 64 A.D.3d 687, 882 N.Y.S.2d 521 (2d Dep't 2009).
20. 59 A.D.3d 291, 874 N.Y.S.2d 41 (1st Dep't 2009).
21. *Naldi v. Grunberg*, *supra* note 10.
22. 87 N.Y.2d 524 (1996).
23. *Jimenez v. Yanne*, *supra* note 12.
24. *Supra* note 11.
25. *See, e.g.*, *DCR Mortgage VI SUB I, LLC v. Peoples United Fin., Inc.*, 148 A.D.3d 986, 50 N.Y.S.3d 144 (2d Dep't 2017); *Luxor Capital Grp., L.P. v. The Seaport Grp. LLC*, 148 A.D.3d 590 (1st Dep't 2017).
26. State Technology Law § 304.
27. *Naldi v. Grunberg*, *supra* note 10.

BY PETER SIVIGLIA

Peter Siviglia (psiviglia@aol.com) has practiced law in New York for more than 50 years, representing clients both domestic and foreign, public and private. He has served as special counsel to other firms on contract preparation, negotiations, and other legal matters. Peter is the author of *Commercial Agreements - A Lawyer's Guide to Drafting and Negotiating*, Thomson Reuters, supplemented annually; *Writing Contracts, a Distinct Discipline*, Carolina Academic Press; *Exercises in Commercial Transactions*, Carolina Academic Press; and *Contracts and Negotiating for the Business Person*, Carolina Academic Press. He has also written numerous articles on contract preparation and other legal topics, many of which have appeared in this *Journal*, and a book of poetry and other writings, *The Sidelines of Time*, Archway Publishing.

Non-Compete Clauses: A Reasoned Approach

Les Préludes

A. Your writing is your mind walking naked across the page.
B. What the wheel is to the world of mechanics, grammar is to the world of writing – especially the writing of contracts.
C. The task of transactional attorneys is to place commercial litigators on the endangered species list.

* * *

An article published in the Sunday, May 14, 2017, Business Section of *The New York Times*, "Losing the Right to a New Job," decried, quite properly, the extension of non-compete provisions to middle-level employees.

I say "quite properly" because in my own practice I have noticed an overly aggressive use of these clauses by employers and a lazy (or perhaps desperate) acceptance of them by employees: Too often the protection is not styled to fit the risk.

By way of example, I recently represented a doctor joining a medical practice. The employment agreement prevented the doctor from practicing medicine within a specified geographical area for a period of three years after termination of his employment. That draconian clause would have hamstrung the doctor's ability to earn a living following termination of his employment, which the employer had the right to terminate without cause on 60 days' notice.[1] So we pointed out to the employer that (1) it gained no protection from that clause because it was subject to competition from other practices in the area and that there were myriad other doctors in the field those other practices could hire, and (2) it had the protection it needed by the clause preventing its employees from soliciting its patients.

The prospective employer agreed, and we worked out a solution that allowed my client to work for other practices in the area but precluded him from opening his own practice in that area for a specified period.

On the other hand, a client, a multinational company in the oil and gas and transportation industries, recently hired a new CEO. The contract we prepared contained what I call the usual internal protections:

> (1) prohibition, without restriction as to time, from using and disclosing to others trade secrets and other proprietary information;
> (2) a prohibition, for a limited period, from soliciting employees of the company; and
> (3) a prohibition, for a limited period, from soliciting customers of the company.

Given the industries involved and the nature of the client's business, we saw no reason, following termination of the executive's employment, to restrict his employment with other companies.

* * *

These two anecdotes delineate the two main features of the non-compete clause: (a) internal protections respecting proprietary information, employees, and customers; and (b) what I would call an external protection against working for competitors.

The internal protections are entirely reasonable and proper in all situations and regardless of the rank of the employee. First, trade secrets and other proprietary information belong to the company, so to use or to disclose them elsewhere without the company's consent would amount to theft. Second, the company has a legitimate interest in protecting its employees and its customers from being diverted by one who has gained knowledge of them by virtue of his or her association with the company.

However, the prohibition against working for competitors is another matter. The article in the *Times* focused, in part, on the anti-competitive nature of the restriction. What concerns me more, though, is harm to the individual who is precluded from earning a living. An executive whom the *Times* article quoted argued that, regardless of the level occupied by the employee, the restriction on working for competitors was an essential prophylactic because of the difficulty and

expense involved in detecting violations of and enforcing the provisions designed to protect the company's trade secrets. But there is limited logic to this argument because the restriction on working elsewhere must, by law, be for a limited period only, so ultimately the company must rely on the unlimited protection against the use and disclosure of confidential information. Further, the restriction is just too great a risk to take and too high a price to pay for a job for most people working to support a family. And from a competitive point of view, the restriction is of questionable value when applied to employees who have jobs populated by a host of comparable, competing workers.

The external protection should be limited to those few high level personnel who are crucial to the business; and in some cases, as revealed by the anecdote above, it may not even be necessary or appropriate.

It is essential that the employer and prospective employee consider and examine these clauses in context to determine what is reasonably necessary and appropriate under the circumstances. Initially, it is incumbent upon the attorney for the employer and its client to engage in these considerations before writing, rather than robotically plugging into an agreement a standard form, hoping that the other party will accept it "as is."

There is no shame in writing a fair agreement. It promotes respect and trust, which are qualities that every business should seek to develop in its employees.

* * *

Before concluding this brief but riveting dissertation on the non-compete clause, there are a few refinements to consider.

With regard to the internal protections, depending on the circumstances and the period of the restriction, it might be appropriate to limit solicitation of employees and customers to employees and customers of the company existing at the time employment terminates.

With regard to a prohibition on employment elsewhere, that prohibition should never apply if the employee leaves because of a material breach of the agreement by the employer or if the employee is terminated without "proper cause." But these two exceptions should never apply to the internal protections.

Mercifully, I will not try your patience or bore you with a definition of "proper cause," though you can find a model in the article "Termination, Evergreen, and Severance Clauses, and Some Warnings" that appeared in the October 2017 issue of the *Journal*. ■

There is no shame in writing a fair agreement. It promotes respect and trust, which are qualities that every business should seek to develop in its employees.

1. We made that clause bi-lateral, so my client had the same right to terminate without cause on 60 days' notice.

What's Available for the Mobile Attorney

By Nina Lukina

An increasing number of attorneys are adopting a mobile work style. In and out of the office, they are working from home, traveling to meet clients, and, as always, going to court, devices in hand.

A range of technology is available to support seamless mobile work. The right hardware and software, and some time spent getting used to them, let lawyers take advantage of the ability to work anywhere as they would in the office.

Connectivity

You can bring your own internet with a mobile hotspot. Standalone devices that range in price from $20 to $100 can provide you with internet wherever you go, whether it's the train home from the office or a remote cabin in the wilderness.

You probably already have a mobile hotspot on you. Many smartphones give you the option of creating a network connection for other devices. This will consume data, so be careful of this feature if your plan is not unlimited. Another drawback is that you won't be able to rely on your phone when it doesn't get service, such as in that remote cabin. In such scenarios, it's best to bring along a separate device, such as Verizon's JetPack, or Samsung's Mobile HotSpot. If your firm has an IT department, it might have hotspots available for loan.

Many firms are issuing attorneys laptops that can be docked (more on docking below) in the office and connected to the firm's network via virtual private network (VPN) when they are taken on the road. Together with Wi-Fi connectivity and VPN, you can work on your laptop as if you were at your desk at work. Additionally, if the firm's standard desktop deployment is on the laptop and Outlook is in cached mode, attorneys can work with documents and email even without internet access. When you do get internet access, the emails and documents will sync with the network in the office via the VPN.

Hardware

As mentioned above, a docking station at work, complete with two or more monitors, keyboards, and phone, is a highly mobile-friendly setup that many firms have adopted in the last few years. Attorneys can plug in their laptops when they arrive and enjoy the full benefit of having large monitors to work on (studies show that multiple screens can boost productivity), and take the laptops with them when they leave, continuing their work at their next destination.

Powerful, lightweight laptops and laptop-tablet hybrids have entered the market to meet the needs of this increasingly mobile workforce. The Surface Pro, an example of the latter, weighs two pounds, can be used either as a laptop or tablet, and features powerful processing and storage. Features such as handwriting-to-text translation make it a leading option among attorneys. The Lenovo ThinkPad Carbon is another popular lightweight Windows device.

Blank Rome LLP credits a 2015 firmwide Surface Pro rollout with boosting efficiency, productivity, and associate happiness.

Laurence Liss, the firm's CTO, told *LegalTech News*, "We're trying to cut back on paper and make people more productive by being able to move around, and also more responsive to our clients and their colleagues. For

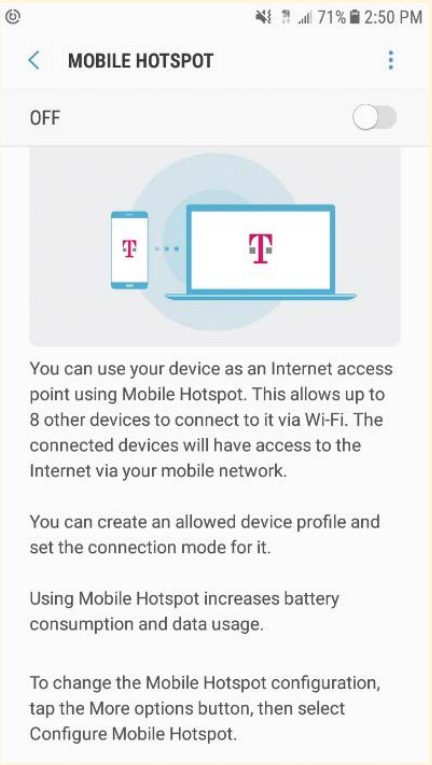


Figure 1 Mobile Hotspot Options on the Samsung Galaxy S7.

Nina Lukina is a Marketing Associate in the New York office of Kraft Kennedy. She researches and writes about emerging topics in technology. A former consultant at Kraft Kennedy, she's worked on many IT strategy and information security projects for law firms.

example, people now can obviously take their tablets to meetings, to other peoples' offices, and they have all their documents or their emails at their fingertips."

Applications and Documents

With the tools described above, attorneys can empower themselves to work smoothly wherever they go. Some may want to take it further, however, and work not only on their laptops but on other devices. For that, many of the most common legal applications, such as the document management system NetDocuments and the billing programs like Rippe Kingston and 3E Elite, offer cloud implementations that can be used as apps on smartphones or tablets. Programs like Citrix, on the other hand, allow you to log in to your desktop from an iPad. Many attorneys are already relying on Citrix for snow days and other work-from-home occasions.

Staying Secure on the Go

Laptops are sadly prone to being left in taxi cabs and airport lounges. The trove of confidential client data on a typical work device makes security-conscious attorneys rightfully wary of the mobile work style. This is an uncomfortable scenario, but it can be made less stressful with measures such as BitLocker, a full-disk encryption feature that prevents unauthorized access. BitLocker is included with Enterprise editions of Windows. Anyone working with privileged data should strongly consider this option.

As mentioned above, a VPN is highly recommended for working from places like coffee shops and hotels, which typically have insecure connections.

Most modern laptops and some phones also come with fingerprint readers, which simultaneously boost security and convenience. Mobile attorneys take advantage of them to sign in quickly and employ tight security. Mobile device management (MDM) solutions, such as Microsoft Intune, give you and your IT department control over mobile devices and laptops. If they are lost or stolen, for example, they can be remotely wiped. Finally, consider a privacy screen protector, which not only keeps curious and prying eyes from your client's emails but also reduces glare, allowing you to enjoy the sunshine while you work. ■

Many attorneys are already relying on Citrix for snow days and other work-from-home occasions.

How *Not* to Use a "New" Technology to Share Privileged Information

By Ronald J. Hedges

As volumes and varieties of electronically stored information (ESI) increase, so do means to share and communicate ESI. When attorneys share or communicate ESI they must do so by means that maintain client confidences under New York Rule of Professional Conduct Rule 1.6(c) (RPC), which provides that attorneys "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to," confidential ("protected") information. Failure to do so may have ethical consequences for attorneys. That failure may also result in waiver of attorney-client privilege, as demonstrated in *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*[1]

The plaintiff insurer in *Harleysville* filed an action seeking a declaratory judgment that it did not owe the defendants (its insureds) for a fire loss claim. In the course of discovery an investigator for the insurer's parent placed video surveillance footage on an "internet-based electronic file sharing service." A hyperlink to the site was provided to the National Insurance Crime Bureau, which accessed the footage. Thereafter, the investigator placed the entire claims file onto the site to be accessed by the insurer's attorneys. The site was not password protected and the insurer conceded that anyone who used the hyperlink could access the site.

The insureds' attorneys subpoenaed the Bureau, and the Bureau produced, among other things, an email from the insurer with the hyperlink. Defense counsel accessed the site, downloaded the claims file, and reviewed it without any notice to the insurer. The insurer learned of the access when, in response to a discovery request, the insurer produced a thumb drive that included confidential materials. Not surprisingly, the insurer moved to disqualify defense counsel.

Ronald J. Hedges is a member of Dentons' Litigation and Dispute Resolution practice group. He has extensive experience in e-discovery and in the management of complex litigation and has served as a special master, arbitrator and mediator. He also consults on management and discovery of electronically stored information (ESI). He was a U.S. Magistrate Judge from 1986 to 2007 and is the principal author of the third edition of the Federal Judicial Center's *Pocket Guide for Judges on Discovery of Electronic Information*, available under "publications" at the FJC website.

Applying the privilege law of Virginia, the court denied the motion. The court focused on several factors in doing so: (1) There was no evidence that the insurer had taken any precautions to prevent the disclosure in issue, let alone "reasonable" ones; and (2) the claims file remained accessible on the site for six months or more although the insurer "knew – or should have known – that the information was accessible on the internet."

As the court stated, "Harleysville has conceded that its actions were the cyber world equivalent of leaving its claims file on a bench in the public square and telling its counsel where they could find it." The court then applied the federal law of privilege and concluded that the insurer had also waived work product protection.

Several questions remained for the court: "whether defense counsel acted properly under the circumstances and whether any sanction should be imposed." The court found that a confidential notice contained in the email that transmitted the hyperlink was sufficient to trigger an obligation on defense counsel to contact the insurer or secure a ruling from the court before reviewing the claims file and required them to bear the cost of the motion.

What might *Harleysville* teach? First, attorneys and their clients should be expected to use electronic means to share ESI. Those means might be unfamiliar to an attorney. Second, attorneys should familiarize themselves with any means selected to share ESI and determine what reasonable steps should be taken to avoid inadvertent disclosure and possible loss of attorney-client privilege or work product protection. Third, attorneys should counsel their clients to take reasonable steps.

These lessons are also apparent from Formal Opinion 477R of the American Bar Association Standing Committee on Ethics and Professional Responsibility (revised May 22, 2017), *Securing Communication of Protected Client Information*:

> A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

Electronic communication of information is common in the practice of law today. As *Harleysville* teaches, and Formal Opinion 477R points out, attorneys must make reasonable efforts to protect against any inadvertent disclosure that might lead to waiver of the attorney-client privilege and work product protection and also to ethical consequences. ■

1. No. 15cv00057 (W.D. Va. Feb. 9, 2017).

NEW MEMBERS WELCOMED

First District

Tara Elizabeth Adkins Hart
Kenneth Forbes Adler
Caitlin Marie Adorni
Mavara Agha
Isabelle Tara Margaret Ahearne
Umer Meraj Ali
Om Vasudevan Alladi
Daniel Patrick Allman
Tyler Alex Anger
Akeeb Dami Animashaun
Alijah Christopher Arah
Madison Paige Arent
Patrick Kevin Arnett
Kelsey Lynn Avery
Omar Hafez Ayad
Johanna K. Bachmair
Gregg Matthew Badichek
Scott Baird
Robert John Baker
Elise Danielle Balaban
Kristy Jane Balkwill
Danielle Ashton Bates
Erin Rose Bauwens
John Warren Baylet
Alexander Matthew Bein
Sean Robert Belanger
Ivet Annie Bell
Alicia Miriam Berenyi
William Webb Bergesch
Michael Austin Betts
Brynne Cory Bisig
Jessica Marie Blakemore
Tracy Jewel Blauweiss
Anjanette L. Bobrow
Katherine Jenaveve Bogle
Christopher William Bok
Alexa Michelle Bonaros
Blythe Abbey Brauer
Dayne Alexys Brown
Rachael Ashley Browndorf
Melissa Caitlin Buckman
Richard Evans Burke
Sean Alexander Burstyn
Jason M. Bush
Dominic Vincent Capasso
Gregory Ryan Caplan
Sara Kristen Capps
Aimee Jeanne Carlisle
Michael Henry Cassel
Juliana Castano
Kenneth Chambers
Synne Derycke Chapman
Njeri Sarah Chasseau
Ailsa Hiu Yi Chau
Mark Jameson Cherry
Keunjung Cho
Dabin Chung
Mary Margaret Clarke
Jessica Coalter
Michael Patrick Collins
Gilmar Steven Colonia
Declan Thomas Conroy
Renata El Hadi Conte
Catherine M Corbo
Hayley Karen Cowitt
Christian Michael Coyne
Dominique Cullen
Michael Andrew Anthony Curreri
Rebecca Lynn Curwin
Michael Christopher Danna
Stanislas Darrois
Jean Emmanuel Dassie
Marcelo De Antunano Aguirre
Peter De Botti
Thais Helena De Queiroz Garcia
Sarah May Deibler
Maria Li Deknatel
Shaun Patrick Delacy
Patricia Marie Denice
Ralph E. DeSena
Melissa Lucina Desgrottes
Maria Fernanda Diago Romero
Jonah Levinsohn Diamond
Nicholas Alexander Dietz
Trevor Matthew Dodge
Patrick F. Downey
James Connolly Dugan
Jillian Mariel Dume
Jeffrey Ray Dunifon
Taylor Morgan Edwin
Kishore Narasimhan Eechambadi
Alexander John Egervary
Mark Michael Elliott
Ndidi Megan Elue
Stephanie Welch Stroup Estey
Jeremy David Evans
John Henry Falcone
Sean Farrow
Jeremy Michael Feigenbaum
Michael Marc Feldstein
Alan Jason Fenyes
Carissa Nicolette Ferrigno
Sydney Alexis Fetten
Daniel Alexander Field
Katherine Rose Filler
Derek Andrew Fischer
Devan Elizabeth Fogle
Tsz Ying Fok
James Andrew Foley
Ronald Lewis Frey
James Wesley Fribley
Peter Carl Fritz
Rina Fujii
Taihei Turner Fukumoto
Emma Jane Fursland
Laura Gallo
Jesus Raul Garcia
Justin Robert Gaudenzi
James Michael Gaylord
Caroline Rose Geist-Benitez
Brendan Joseph George
Imke Odile Gerdes
Andrew Peter Gesior
Rhea Ghosh
Michael Huw Gilson
Evan Glasner
Steven Emerson Glass
Daniel S. Gobaud
Joseph Gray Julius Golding-Ochsner
Nicole A. Goldman
Joseph A. Goldstein
Ariel Renee Gomberg
Max Samuel Goodman
Arya Goudarzi
Megan Elise Griffith
Alexander N. Gross
Xiaoyin Guan
Gabriel Mayerhofer Guimaraes
Maxence Guinand
Alexander Feliciano Gutierrez
Brendan Patrick Hall
Amanda Leigh Feldman Harris
John Kinneman Hasley
Karen Kiley Haughton
Michelle Marie Healy
Andrew Albert Heitner
Ryan Gipson Hemphill
Alexander Jacob Hendin
Jessica Alexandra Herman
Natalie A. Herron-welch
Sean Patrick Hinton
Joseph Anthony Hof
Jack Sung Oak Hong
Tina Ying Hu
Alexa Ianazzi
Brian Osayimwense Idehen
Farzaan Ijaz
Tyler Kathryn Infinger
Alexandra Courtney Insinga
Sandra Jarva Weiss
Nicole Ann Jeong
John Bingham Johnsen
Antuan M. Johnson Al-Uqdah
Anne-Sophie Juame-Jacot
Peter Clement Kane
Dewey J. Kang
Marc Muneer Kassis
Miriam Sara Kavalerchik
Lauren Rachel Keller
John Patrick Kennedy
Ian Cunningham Kerr
Nathaniel Dunstan Kiechel
Jeoung-woong David Kim
Tackjin Theodore Kim
Samuel Miller Kleiner
Joshua Ari Kors
Antonios George Koulotouros
Mynda Rae Krato
Richard A. Kraus
Rhonda Kravetz Brier
Yoonmo Ku
Stephanie Marie Lagumina
Leslie Lai
Kevin Lam
Jamal V. Lama
Joseph Ephram Landau
Steven Robert Lapkoff
Faisal Rehman Lateef
Bing Le
Eduardo Miro Leal Larralde
Jae Hyung Lee
Jumin Lee
Susanna Lee
Yan-xin Li
Marvin Albert Liang
Stephen Carl Liebscher
Sarah L. Linder
Justin Earl Linn
Jeremy Michael Liss
Kristine Sara Loffredo
Diane Alexandra Lopez
Ileana Emmanouela Loudarou
Mitchell Neal Lowenthal
Justin Michael Lu
Jose Luis Lucena Rebollo
Finnian Dara Maccana
Rebecca Evelyn Mackay
Oriana Farley Madeira
Robert Aaron Maes
Sean Meriwether Mahoney
Farrukh Hussein Malik
Douglas Aaron Mallett
Michela Mancini
Bilal Manji
Katherine Marquart
Kathleen Nicholson Massey
Molly Elena Mauck
Grant Stevens May
Adrian Grant McCrea
Gareth Michael McKibben
Carina Maria Meleca
Esteban Mendoza
Nicolas Molina
Eileen Nan Monahan
Russel Morgan
Alix Josephine Morse
Adam Philip Moskowitz
Jenae Simone Moxie
Rebecca Dawn Moy
Peter John Munro
Christopher James Murray
Julie Beth Myers
Alysha M. Naik
Sara Elizabeth Nassof
Karena Jean Neubauer
Andrew Kevin Nichol
Adam Michael Nicolais
Mitchell David Nobel
Sara Shaw Nommensen
Alexandra Jean Norman
Glory Nwaugbala
Kathleen Lucey O'Brien
Scott Macdonnell O'Brien
Kelly Lynn O'Connell
David Ryon Okada
Rukiye Fusun Oygar
Samuel Frank Page
Pekham Pal
Nicole Alexandra Palermo
Mariana Paoliello C.C. Guimaraes
Eric Constantinos Pappas
Palak Mayani Parikh
Angela Eugene Park
Eddy Park
Madeline Rose Passaro
Priyata Yatin Patel
Beatriz Lomongo Paterno
Jonny Andrey Pena Nunez
Christopher Donald Francis Penhall
Beverly Encarguez Perez
Alexandre Claude Peron
Nadira Amita Persaud
Vincent Michael Pezzulli
David Ryan Placke
Andrew Wayne Plyler
Maria Ponomarenko
Aluizio Porcaro Rausch
Daniel M. Posener
Daliya Poulose
Whitney Claire Price
Rebecca Elizabeth Pugh
Frank Rafael Pumarejo-Martin
Shiloh Asher Rainwater
Michael David Rand
Antoinette Nicoletta Rangel
Alexandra Rappaport
Brittani Raulerson
Veronica M. Reyes
Alexander Adams Rich
Anna Elizabeth Riddle
Alexander George Rienzie
Emma Frances Roberts
Tessa J. Roberts
Caroline Marie Roe
Phillip Rofsky
Scott Jared Rog
Christopher Cordell Rogers
Artyom Rogov
Kari M. Rollins
Ivan R. Rosario
Colin Taylor Ross
David S. Rostowsky
Alexandra Lauren Roth
Hopi Costello Ruplin
Maria Ann Ryden
Blake Elizabeth Sachs
Kimmia Seyed Salehi
Maria Fernanda Sanchez Alvarez
Maho Sato
Kyle Roland Satterfield
Cesar German Savastano
Giulia Scelzo
David Jay Schachter
Hayes St. Clair Schildwachter
Daniel Ryan Schmertz
Phil Schreiber
Philip F. Schreiber
Stephanie Renee Schuman
Jennifer P. Seksaria
Hyo Joo Seo
Surim Seo
Dale Arthur Sevin
Brooke Elizabeth Sgambati
Saiena Shafiezadeh
Nirali Nirmal Shah
Aaron Chaim Shapiro
Jeffrey Shi
Lei Shi
Noah Adam Shier
Katherine Louise Simmonds
Dorian Wayne Simmons
Anne Elizabeth Simons
Vianca Simpson
Rochelle Gnagey Skolnick
Charles Lee Israel Slamowitz
Alec David Smith
Arvind Vikram Sohoni
Melina Somoza Bornstein
Daniel Aaron Soso
Daniel Timothy Spencer
Nidhi Srivastava
Taylor Alexander Steele
Nicolas Ward Steenland
Nina Priya Sudarsan
Alejandro Martin Sueldo
Stanislav Arturovich Sukhorukov
Rachel Anne Sullivan
Patricia Szakats
Toshiyuki Tabata
Theodora Tavridou
Naomi Aisha Tom
Luis Moses Torres
Stephanie E. Toyos
Thomas Patrick Trainor
Agnes Nathalia Trenche Mora
Tyler Andrew Trumbach

Allison Michelle Trzop
Caroline Mclean Turner
Philip Ethan Cole Leder Ulster
Ester Vallat
Paloma Cornelia Cryns Van Groll
Trishna Velamoor
Cynthia Lauren Vella
Karla Alexandra Vergara Perez
Valeriya Vlasenko
Elizabeth Vulaj
Taylor Anne Waites
Bennett Lee Walker
Jonathan Maurice Wall
Peter N. Wang
Geoffrey Lee Weinberg
Mollie Weiss
John Francis Welch
Samuel Wilson Wheeler
Kelly Susan Whelan
Stephen Paul Whitcombe
Daniel Jonathan Widawsky
Andrew James Wilcock
Andrew Taylor Williamson
Samantha Wilson
Jeffrey Wittman
Alexander M. Wolf
Christina Mei Jen Wong
Scott Wong
Valerie Enyidiya Wood
Matthew P. Woodward
Rachel Wrubel
Jeffrey Wu
Jingcong Wu
Yuan Xia
Rose Yan
Jarrett Yanoff
Robert S. Zack
Alexa Fani Zelmanowicz
Benjamin Louis Zepnick
Xiaotong Zhao
Sasha Yishu Zheng
Loveleen K. Zoria
Brian David Zucker
Richard Joseph Zukowsky

Second District
Fatima Victoria Afia
Miguel Alvarez Malvido
Nathan Arthur Magbual Ancheta
Nicholas Caleb Angerame
Israel Tsvi Appel
Chiquita Woolfolk Banks
Iuliia Leonidovna Belyshkina
Nagashree Gajanan Bhat
Nishan Bhaumik
Erin Marie Bishop
Brendan Albert Blase
Cristina Cahn-Speyer
Dalton Lee Carty
Leah Kristina Charlesworth
Daniel Steven Chertok
Brent Childerhose
Andrew Daniel Christoffel
Seng-hwan Chun
Alexandra Colella
Margaret Ann Coulter
Rachel Leya Davidson
Merinda Ivy Davis
Paige Davis
Tom R. K. De Kesel
Dwana Shae Dixon
Sara Armbrust Doody
Evelyn Eva Dormer
Kevin John Downs
Zdenko Durove
Christina Catherine Fasitta
Jennifer Elizabeth Fischell
Yevgeniy Frenkel
Alexander Adam Gerten
Mary Catherine Gibbons
Michael Hayes Glassman
Lindsay Michelle Goldbrum
Daniel Harrison Green
Gregory G. Greene
Malka Gross
Virat Kumar Gupta
Riad Hamai
Ashlyann Lauren Harrison
Brian Matthew Hayes
Beatrice Elizabeth-ann Hinton
Courtney Aileen Hunter
Alex Jacobs
Shawn Kenneth Jarecki
Jacob Jaskiewicz
Alyssa Nicole Kaplun
Zachary Philip Burton Katznelson
Patrick Joseph Keating
Malcolm S. Kim
Fay Elizabeth Krewer
Peter Alec Kurtz
Ralph E. Labaton
Michael Lachman
Daniel Ross Lambright
Eric Shawn Landau
Montae Langston
Kimneeta Kaur Larizadeh
Joseph David Lavelle Wilson
Kathryn Elizabeth Lecusay
Alicia Anna Lee
Susan Lee
Bianca Daryl Lewis
Alex Benjamin Lipton
Samantha Liskow
Natela Lolaev
Michael Rishon Maizel
Souhella Makouri
Natalia Pinheiro Coelho Mariani
Michelle Joanna Martin
William Mattessich
Daniel M. McCarey
Abnet Daniel Mengistu
Jacqueline Alexis Merkher
Thomas Mann Miller
Christine Min
Laura Hibino Misumi
Ashley Elizabeth Mitchell
Sean P. Mix
Amy Michelle Myrick
Zachary Cohen Naidich
Irene O'Brien
Samantha Oakes
Kimberly Nicole Pageau
Wesley M. Paisley
Henry Kohji Parr
Pooja Patel
Dominic Edward Pearson
Amilcar J. Perez
Yssan Yanique Phillips
Ellen Margarita Piris Perez
Sarah Goldsborough Pitts
Matthew Thomas Prewitt
Jacob Michael Rae
Kahini Kishore Ranade
Daron Ramses Ravenborg
Daniel Luke Ravitz
Samantha Danielle Rayborn
Chancey Elliott Raymond
Allison Finn Reddy
Zachary Kedzior Reeder
Wyatt Robinson
Rory Delaney Rohan
Aharon M. Rosenberg
Angela Rozanski
Sandra Rubinchik
Sara Colleen Saenz
John-Patrick Kaupili Sansom
Eric Spencer Schaffer
Emily Rose Scherker
Alisha Lauren Sedor
Shayna T. Sehayik
Marwan F. Sehwail
Rodrigo Seira
Sahana Setty
Eliza Margaret Sheridan
Jane Shim
Eli Shmulik
Jay Russell Shooster
Eric B. Sloan
Dominic Devon Spence
Joshua Nathaniel Stanfield
Eva Marie Sullivan
Joann Sullivan
Avion Alexandria Tai
Ximeng Tang
Nicolo Giuseppe Taormina
Jennifer Elyse Tarr
Tuvia S. Tendler
Danny George Thomas
Jose Andres Torres
Jessica Tsang
Haley Paige Tynes
Alyssa M. Vesco
Lillian Wan
Jade Monique Watkins
Ke Wei
Samantha B. Williams
Tiffany Cheryce Williams
Whitney Lashawnda Williams
Andrea Nixon Wilson
Andrew Lokman Wong
Jake Wong
James Foster Wright
Margaret Xiaoyi Yang
Adrienne Kathrine Yoseph
Kristen Karly Zapalac
Alexandra Maria Zetes
Emily Rong Zhang

Third District
Karen Naana Ansong
Kelly Adele Busch
Matthew Christopher Jones
Angelica Kang
Sarah M. Kempf-Brower
Stephanie Cohen Mazza
Michael Patrick McGeown-Walker
Eugene Daniel Napierski
John M. Nicoletta
Corey Matthew Pronman
Brendan Michael Roche
Zacharias Zacharia

Fourth District
Kristen Marie Casper
Joseph Paul Drescher
Jacquelyn Ann Graff
Erica Lynne Ludwick
Edward William Sanok

Fifth District
Elaine Carnicelli Amory
Nacer Aounallah
Elizabeth Beltran
Kimberly Lynn Morrell
Natasha D. Schuyler
Michael Rody Tierney

Sixth District
Khyle J. Eaton
Benjamin T. Ochs
Marilyn Sanchez-Osorio
Madelyn Frances Wessel

Seventh District
Alfred Young Chu
Andrew Michael Dean
Morgan Marie Nati
Jessica Marie Pollack
Frank Brock Riggs
Safa Nadiyah Robinson-Ferrer
Kate McIver Whiteman

Eighth District
Lauren Adornetto
Sarah Rupp Kocher

Ninth District
Christina Maria Abossedgh
Evan Robert Joseph Baer
Zachary Hays Bendiner
Aisling Marie Brady
Alexandria Lucia Capaccio
Peter Manuel Chema
Leonard Andy Cohen
Danielle D'Abbraccio
Tamina Toos Daruvala
Myra Fatima Din
Sean Michael Douglas
Brian Joseph Dwyer
Lauren Eisler
Ryan Evan Fennell
Linda F. Fenstermaker
Shuang Gao
Elizabeth Ann Gordon
Patience T. Hughes
Mary Louise Kiernan
Nicholas John Lippolis
Sara Marino Collado
Richard Michael Marsico
Megan Martucci
Emily Jane Mcguinness
Kendra Medina
Sarah Morrissey
Margaret Obligin
Eric Paul Odin
Uriel Pinelo
Brian Joseph Pugh
Joshua Z. Rabinovitz
Christian Saint Mark Samuels
Julianne T. Scarpino
Brian G. Shaffer
Zal Kotval Shroff
Cooper Ross Sirwatka
Edward A. Smith
Michael Smyth
Andrea C. Soto
Douglas Robert Strauss
Patrick Lionel Nogbou Taqui
David Ian Tomack
Antonio Giovanni Vozza
Laura Anderson Weiss
Michael John Willey
Benjamin Charles Wood
Samantha Rebecca Wynne

Tenth District
Love Ahuja
Sheharyar Ali
Nataki Njeri Appolon
Sharon Basiratmand

In Memoriam

Michael Bradfield
Mercersburg, PA

Blair C. Fensterstock
New York, NY

John J. Grimes
Chappaqua, NY

Thomas H. Hagoort
Hilton Head Island, SC

Richard M. Hervey
New York, NY

Donald J. Holzman
Buffalo, NY

Philip Paul Houle
Hyattsville, MD

Brian Daniel Howe
Manlius, NY

Kenneth A. Payment
Tenants Harbor, ME

Lester Rosenbaum
Yorktown Heights, NY

Jim J. Shoemake
Chesterfield, MO

Rocco A. Solimando
Schenectady, NY

James E. Sterns
Washingtonville, NY

John Bernard Tieder
McLean, VA

Richard D. Yellen
Buffalo, NY

Emmanuel Bello
Jason M. Biegel
Angelo R. Bisceglie
James Camillo Bologna
Shane Nathaniel Bornstein
Antonia J. Broughton
Jean-Pierre Brutus
Carla Shannon Brydson
Robert Joseph Burney
John Joseph Caffrey
John Calabro
Cameron Marie Catrambone
Caroline Keane Ceriello
Catherine Elizabeth Chillemi
Steve Hong Suk Choe
Tyler Kane Cooper
Jeffrey Evan Culver
Robert Scott Culver
Charis Jane Damiano
Dominic P. Delorantis
Andrew J. Demasters
Lorena Pilar Duarte
Shane Leary Farrell
Nicola R. Felice
Allison Sarah Flor
Matthew Jordan Glazer
Joshua Allen Goldberg
Justin Adam Goldberg
Lisa Andreina Gomez
Daniel Jacob Gottlieb
Emma Jeanne Guido
Mariselle Rose Harrison
Danielle Barri Hoffmann
Justin Grant Hoitsma
Joseph Michael Hyland
Glenn Robert Jersey
Yuan Jiang
Jordan Elizabeth Johnston
Eckor Joseph
Nicholas Edward Justiz
Robert A. Kaftari
Robert Benjamin Kaplan
Ryan John Keenan
James Mcentee Kerins
Salia B. Khwaja
Jonathan Komorov
Brian S. Kotkin
Brian Sherman Kotkin
Joseph L. Laspina
Megan Madeline Long
Luke William Maiman
Jocelyn Mallory
Craig Michael Marinaro
Desiree Martin
Jennifer Lorraine Martin
John Michael Mazzaro
Scott Eric Migden
Caitlin Miller
Anna S. Molina
Matthew Keith Morris
Michael Paul Napolitano
Margaret R. O'Neill
George Skyler Onorato
Katrina M. Ozols
Andrew William Padover
Eddie A. Pantiliat
John Lawrence Patitucci
Steven Paul Pellechi
Samantha Persaud
Ariana Kali Politis
Ashley Nicole Prinz
Julissa M. Proano
Teresa Jean Raniere
Stephanie Marie Reilly
Gabriel Dennis Rivera
Jacqueline Nicole Rizzardi
Deena Robyn Rosenblatt
Thomas Christopher Rossidis
Angela Ruffini
Dennis Patrick Ryan
Christopher Michael Santoro
Alexis Marie Sarnicola
Rachel Hope Schefen
Nicole Scimeca
John Robert Sepulveda
Elaine Siegmund
Tryn Thomas Stimart
Bryan Charles Sutherland
Jennifer B. Terry
Haley L. Trust
Kaitlyn Luisa Inch Vidasolo
Whitney Meredith Viets
Lisa Volpe
Vanessa Lorraine Wachira
Helene Marie Weiss
Annie Yang
Katlin Rose Young

Eleventh District

Owen Michael Alberti
Julie C. Amadeo
Roshell Amezcua
Solomon Aminov
Amanda Marie Baron
Lily Leyla Belhadia
Ron Bello
Christopher Daniel Bennett
Jeannine Brisard
Benjamin C. Brody
Allyson Nicole Brown
Robert Jason Burch
Larry Orlando Carter
Jennifer Chao
Jenny Chen Liao
Jian Chen
Aneshia Chintamani
Lindsay Lee Cowen
Joseph P. Dalli
Sohom Datta
Logan Michael Desouza
Michael Sean Dibattista
Mohamed Essam El Sayed
Daniel Connors Evans
Kathleen Fulton
Hongfei Gao
Olufemi Idris Gbede
Ariel Elizabeth Gould
Yoedys Yomaira Guerrero Valero
Geovanna Nichole Guimbarda
Geetika Gupta-Roongta
Carmen Elizabeth Halford
Christopher Helwig
Cherae Tiffany Hendy
Elana Herzog
Juancarlos Hunt
Cem Islikci
Sonja Marie Jamelo
Jarienn Amaris James
Linghui Jiang
Sarah Joseph
William Euisuk Juhn
Victoria Kharlamenko
Minju Kim
Jessica Kaycee Lam
Carson Minh Le
Seung Min Lee
Wei Li
Seth Litwack
Shirley Luong
Ray Madraymootoo
Olga Majitova
Diana M. Malave
Julio Cesar Manjarrez
Stephen Fitzgerald Marley
Danielle M. McLaughlin
Danielle Mairin Mclaughlin
Melina Maria Meneguin Layerenza
Thomas John Mountfort
Rachael Lee O'Bryan
Maria Lizbeth Orellana
Rima Yogesh Pancholi
Thanisha Candice Pariage
Sindhu Kandachar Pellegrino
Michael V. Policastro
Urmila Devi Prem
Dina M. Quondamatteo
Michael L. Ramsey
Jeanpaul Rivera
Eduardo Segura
Jessica M. Semins
Angela Shamay
Lakshmiwatie Shiwnandan
Shoyeb Ahmed Siddique
Prium Singh
Hansup Song
Jessica Mendoza Stadmeyer
Christina Lynne Tacoronti
Latecia Cassie Thomas
Weicheng Wang
Zara J. A. Watson
Kevin James White
Adeneiki Chole Williams
Karen Wong
Qiang Wu
Minghui Xu
Christopher Tripp Zanetis
Andrew William Sullivan Zarriello
Wei Zhang

Twelfth District

Rosa Aliberti
Noga Moriyah Benmor-Piltch
Michael James Bittoni
Kevin Michael Chambers
Michael M. Danishefsky
Ariel Ezra Douek
Brandon Granados
Charles Lazo
Loretta Patricia Martinez
Cheri C. Neal
Jose Alfredo Pena Ventura
Brikena Radoniqi
Michael Jared Sanders
David Biko Shepherd
Ulrica Denee Sheridan
Simone Stacy-ann Solomon
Melissa Valdez
Sophie Emma White
Afroza Yeasmin
Samuel David Zimmerman

Thirteenth District

Mina Magdi Beshara
Michael Louis Billera
Brittany L. Daniels
Oyinloluwa Funfunlade Fasehun
Dane Mark Fioravante
Charles Anthony Franchini
Sofia Kopelevich
Nellie Krivosheyev
Elen Krut
Danielle Nicole Menendez
Robert Jason Raghunath
Michelle Celeste Ranello
Laila Saima Varcie
Hangyuan Zhang

Out-of-State

Amanda Anna Adamczenko
Morteza Afshari
Haya Aftab
Oluwatosin Bolanle Agbabiaka
Ben Otieno Akech
Sasha Aliakbar-amid
Jacqueline Angela Allen
Manal Ibrahim Almusharaf
Daniel John Ambrozavitch
Lionel Andre
Mayuri Anupindi
Rami A. Aris
Becky Armady
Christine N. Armstrong
Erika Michelle Asgeirsson
Anahita Avestaei
Tala Ghazi Azar
Akiko Bamba
David Mumbere Bamlango
Tamara Fishman Barago
Caitlin Maria Bardill
Yesenia Barrantes-Isibor
Sharon Basiratmand
Ben Batros
Alexandre Pierre Louis Bavoillot
Douglas Ian Bayer
Helen Michelle Begley
Maria Lorenza Bergamasco
Christopher Mark Bergan
Erica R. Berger-Hausthor
Sasha Bharwani
Masanori Bito
Noah Robert Black
Alena Margita Bohacova
Nathan R. Bohlander
Moronke Oluyemisi Bolutayo
Sarmila Bose
Valentin Bourgeois
Amy E. Boyle
Shaun M Bradshaw
Crystal S. Braswell
Erin A. Brennan
Katherine Baldwin Brezinski
Jennifer Alexandra Brun
Marx P. Calderon
Soraya Emely Camayd Torres
Ian William Scott Campbell
Andrea Gabriela Campos Cervera Ruger
Oriane Cannac
Claudio Caravita
Carolina Cardoso Ramalho
Nicholas Michael Carey
Dominador Maphilindo Ocanada Carrillo
Lance Douglas Cassak
Ho Dong Cha
Alexander Won Chang
Grace Kate Chang
Nicole Elizabeth Charpentier
Haifeng Chen
Ke Chen
Yi Ting Chen
Zhiyu Chen
Austin Franklin Cheng
Guangdong Cheng
Wan-ching Cheng
Nicholas Steven Cheolas
Sarah Julie Chevalley
Christophe Pierre-jean Cheyroux
Daria A Chirkov
Joon Cho
Jaimin Choi
Gloria Joo-hee Chong
Jae-eun Chong
Franklin Michael Chou
Tom Yen Ting Chou
Kajal Chowdhury
Pui Yin Chung
Howard Lawrence Cohen
Brett Anders Colbert
Rory Farrell Collins
Kimberly Jean Zborowski Kolst Contini
Jessel Adrian Contreras Diaz
Margaret Forsyth Craib
Hillary Noelle Creed
Marcela Crespo Uribe
Eileen Annmarie Crowley
Celeste Marie Reyes Cruz
Daniel Paul Cullen
Carrie Elizabeth Cummings
Steven Michael Czurlanis
Maia D'Anna
Fernanda Da Cunha Lopez
Jacob P. Davidson
Cristina Isabel Davila-Pernas
Michael Dean Davis
Michael Karel Marc De Boeck
Renata De Goes Mascarenhas
Sofia De La Fuente Gonzalez
Sarah De Mol
Dokor Azura Dejvongsa
Laura Kathleen Soo-yun Delap
Elizabeth Kilroy Dervy
Florian Louis Dessault
Richard David Deutsch
Yu Ding
Cristina Maria Consolata Dionisio
Roberto Ditaranto
Catherine Marie Divita
Annabelle Laure Helene Divoy
Kasey Elizabeth Doeing
Chenmin Dong
Lea Oliveira Dos Santos
James Walter Doyle
James Alan Dudukovich
John Patrick Duke
Evrard Duplan
Steven John Durham
Dennis Aloysius Durkin
Corinne Irene Duym
Michele Anne Friedlander Eagle
Shinsuke Ebato
Emena Efeotor
Holly L. Eicher
Peter Epp
Alexandra Lucille Espinosa
Ana Carolina Estevao
Jocelyn Eve Ezratty
Jadesola Toluwalase Falode
Roshanak Farhadian Esfahani
Louise Toledo Farias
Irene Fatehi
Yingying Fei
Samuel Raphael Feldman
Kimberly Ann Fetsick
Charity J. Fort
Aude Fourgassie
Louise Fournier
Christina Monica Francois
Hannah Lyon Freedman

Kelton Patrick Frye
Toshishige Fujiwara
Steven Gaechter
Megan Christine Gallagher
Douglas Cooper Galloway
Weina Gao
Yexiang Gao
Clemens Gaugusch
Lawrence J. Gebhardt
Debra Joy Gelson
Tianpeng Geng
Michael Elias Gerakios
Scott M. Gerard
Salvatore Gerbino
Leah Ann Gerstley
Jorge Antonio Ghazal-Akhras
Stephanie Belle Glickman
Lior Golan
Santos Gonzalez Victorica
Kay Alyssa Gonzalez
Andrea Gosfield
Frances Hayley Gourdie
Jerome Emanuel Graham
Daniel John Greco
Diana Eleanor Griffin
Sarah Shereen Griffith
Patrick John Grozinger
Xianjun Guo
Joseph Edwin Hamilton
Dotan Hammer
Ethan Dong Hyun Han
Yumiko Hanaeda
Emery King Harlan
Nicole Lanette Harris
Heba Mohamed Hazzaa
Kai Shan He
Natalie A. Herron-Welch
Rena Lyn Holmes
Steven Alan Holt
Perri Lin Hom
Shoko Honda
Seunghee Hong
Terryann Suzanne Howell
Hsiao-pei Huang
Simei Huang
Yan Huang
Alexandre Pierre Vincent Hublet
John Brian Hudak
Emma M. Hughes
Todd John Hughes
Youhyean Hwang
Sho Imanaka
Noriya Ishikawa
Suejung Jang
Anita Jaweed
Soumaya Nathalie Jean
Mark Erick Jensen
Heejeong Vicky Jeong
Varun Pradeep Jetly
Young June Jhe
Hengka Ji
Ying Jiang
Lei Jing
Jeffrey William Jones
Joel Joseph
Hanying Ju
Yukiko Kaeriyama
Njoki Daria Kamuiru
Sydney Leigh Kane
Jason Scott Kanterman
Danae Athina Kapralos
Alexander Kazam
Cannon Curry Kearney
Caroline Keller-Lynn
Johanna Elizabeth Kelley
Ryan Fallon Kenny
Roy Rene Khoury
Do Woo Kim
Gee Hwan Kim
Sun Mi Kim
Yosuke Kitayama
Zachary Ethan Kleinbart
Aiko Kobayashi
Jieying Kok
Konstantinos Anastas Krimizis
Allison Marie Kroeker
David Christopher Lai
Rebecca Lantner
Valentin Jean-Marie Le Dily
E. Jin Lee
Kyu Min Lee
Olga Leimoni
Michelle Maria Lerner
Laura Shu Ka Leung
Eric Barry Levine
Jordan Joseph Levine
Robert Edmund Lewis
Feiran Li
Huiling Li
Jiachen Li
Pengxuan Li
Xia Li
Xinran Li
Yingying Li
Yipu Li
Yixiao Liang
Kenneth Cong Liao
Sijia Liao
Wenlan Liao
Fabien Raphael Liegeois
Kyle Joseph Litfin
Chang Liu
Jia Yin Liu
Xiaoxi Liu
Yanying Liu
Yawen Liu
Ying Liu
Yingran Liu
Shiyue Lu
Tingting Lu
Ude Lu
Yixi Lu
Zhenting Lu
Daniel Joseph Luccaro
David Ludwig
Jeanette Altagracia Luna
Siyi Luo
Deirdre Kirby Lydon
Xiaolin Ma
Yuelin Ma
Yuhong Ma
Clovis Christopher Maalouf
Moritz Maassen
Devon Whitney MacGillivray
Megan Browne MacGillivray
Peter L. Macisaac
Ignacio Madalena Gonzalez De Linares
Nancy Mahoney
Hannah Justine Makinde
Sanya Malhotra
Martha Azucena Mallory
Amanda Stokes Mann
Dushyant Manocha
Jonathan Christopher George Mark
Mailise Rose Marks
Kimberley Catherine Maruncic
Monika Theresa Mastellone
Brett Tyler Masters
Roberta Dos Reis Matheus
Tatsuya Matsumoto
Read K. McCaffrey
Veronica Nicole Meffe
Katharine Menendez De La Cuesta Lamas
Qingguo Meng
Jennifer Lynne Menjivar
Alexander Vladimir Hubert Mertelsmann
Gerald P. Meyer
Jason Donald Meyers
Perri Diana Michael
Christopher West Michaels
Hanna Merwin Miller
David Preston Milligan
Shuqing Min
Lisa Kristina Minichini
Sindi Lynn Mncina
Zandile Lungelo Mngadi
Christopher Arthur Mooney
Hazen Moore
Tasnim Motala
Robert Edward Moyer
Carolynn Ann Mulder
Cole Robert Munson
Edward J. Murphy
Jordan Francis Murray
Ceara Brehan Murtagh
Neetika Mutreja
Bernardo Nacouzi De Mello Franco
Yukie Nakagawa
Ramsey Saleem Nassar
Ronaldo Ramos Natividad
Simon Navarro Gonzalez
Abeba Negga
James Kwan-lun Ng
Nathaniel Aaron Ng
Valeria Niglia
Kazuyuki Nishihara
Daniela De Lima Nogueira
Michael David Nord
Eryk Piotr Nowakowski
Lidiya Nychyk
Amanda Kathleen O'Keefe
Marta Beatriz Ochoa
Makoto Ohnuma
Kimberly Kopff Ohrn
Carlo Urriza Olivar
Fernando Igor Ortiz Melendez
William M. Osterbrock
Zadok Ozani
Jonghyun Paik
Albert Young Pak
Troy Dewey Palmer
Mekela Panchalie Panditharatne
Fabiana Pardi Otamendi
Bridget Pastorelle
Emily Margaret Peel
Ruben Dario Perez
Joanna Perkowska
Caitlin Masterson Perry
Christopher Neil Petersen
Mary Elizabeth Picarella
Vinicius Pimenta Seixas Pereira
Vito A. Pinto
Benjamin Samuel Piper
Stephen Haines Plum
Natalia Ponce De Leon
Nikita Ponomarev
Andrei Alexander Popovici
Costanza Posarelli
Holly Paxson Pratesi
Mishka Vasanti Puran
Jiarui Qiu
Lee Teck Tanaan Quek
Meagan Maureen Rafferty
Priyanka Raswant
Amlan Ray
Swapna Cherukupalli Reddy
Cindy Redling
Danielle Jamey Reiss
Amaury Amilcar Reyes Torres
Manuel Francisco Reyna
Lorenzo Ricchi
Julie Alissa Rich
Nathan Mark Richardson
Lyle Roberts
Enid Felicia Robinson
Emma Chiampou Robison
Antonio Carlos Rodrigues Do Amaral
Joanne Parcel Rogers
Hyun Tae Roh
Elizabeth Rohan
Caleb Nathaniel Rosenberg
Zachary Max Rosenberg
Lauren Elizabeth Ross
Robert James Rossmeissl
Kristen Roth
Joseph M. Rothberg
Solomon Jesse Rotstein
Anthony Michael Ruffolo
Kihwang Ryu
Konstantinos Salonidis
Wordy Samson
Thomas J. Sateary
Pauline Emilie Sauvadet
Mikael Elie Schinazi
Kirk Theodore Schroder
Marlise Leonie Seckel
Christopher T. Shanahan
Stephen Richard Shaw
Yosuke Shimizu
John Andrew Shope
Kaiken Shu
Bradley Philip Sica
Natalia Sieira Millan
Seokmin Sihn
Hillela Beatrice Simpson
Douglas M. Sinars
Joshua Martin Harry Sinclair
Gizem Sirer
Jamera R. Sirmans
Jason Anthony Sison
Kelly Skinner
Jessica Solis
Junjuan Song
Shuang Song
Peter Sosinski
Lesley Sotolongo
Steven Carnahan Sparling
John Carl Spataro
Ram Spektor
Donald Alastair Spencer
Brandon Glenn Stanislaus
Adrian Stepanian
Claire Elizabeth Stephens
Anastasia Anne Stylianou
Gita Subramaniam
Viviane Cristina Sullivan
Ashley Boland Summer
Quan Sun
Yan Sun
Jun Suzuki
Tatsuya Takazoe
Chenying Tan
Ryohei Tanaka
Tomoyuki Tanaka
Giuseppe Tantulli
Letao Tao
Dorothy Goldstein Tegeler
Bogdan Y. Tereshchenko
DIS1 Test
Leonidas-stasis Theodosiou
Gavin Michael Thole
Nicole Melissa Thomas
Kevin Elton Thorn
Malcolm Xavier Thorpe
Mark Douglas Timmerman
Melissa Merlo Tombs
Peter J. Torcicollo
Kary Torres
Stephen Thomas Tower
Chi Lan Tran
Ming Ting Tsai
Alexandros Tsionis
Keiko Tsuruta
Vivek Upadhya
Abigail Grigsby Urquhart
Jeffrey Paul Valacer
Nicole Danielle Valente
Jantien Ashni Van Renterghem
Manuel Felipe Villalon
Hiromoto Wakabayashi
Samuel Aaron Waldbaum
Chien Chun Wang
Juewei Wang
Qian Wang
Xiao Wang
Xinyue Wang
Yan Wang
Yiying Wang
Scott Samuel Watson
Hawa Wehelie
Jinji Wei
Carlton Edward Wessel
Jill Rose Whitelaw
Magnus Bengt Gunnar Wieslander
R. Mitchell Wilcosky
Yvonne Necchi Woldeab
Randi A. Wolf
Shuang Wu
Yiman Wu
Chenchen Xiao
Zhihui Xiong
Mallik Nelson Yamusah
Yuzheng Yan
Di Yang
Ziyi Yang
Yeon-gyeong Karen Yi
Ayca Yilmaz
Onur Can Yilmaz
Victor Alan Yiu Tsun Yip
Curtis A. Young
Marc David Young
David Michael Zack
Sarah Grace Zambon
Hanwen Zhang
Xiangyu Zhang
Xiaoye Zhao
Yi Zhao
Yingfu Zhao
Hanqing Zhou
Xueqing Zhou
Abdelkhalek Zirar
David Thomas Zummo

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

My firm has decided to host a business development event at which several clients and prospective clients who are small business owners will set up tables and booths to sell and promote their products and services. It's not only a chance to generate some new business for the firm, it's also an opportunity for the firm's attorneys, clients, and other business contacts to network with one another and do some holiday shopping. In the past, the event has been very successful. This is my first year serving as the chair of the committee organizing the event and I have a couple new ideas that I think will maximize our opportunity to promote the firm and generate business.

First, I'd like to organize a raffle for a few door prizes. The firm will purchase products from each of the vendors attending the event and wrap them in gift baskets with the firm's colors and logo. I'm thinking that we could even throw in a few attorney business cards or some pens or other small items with the firm's name. Instead of using traditional raffle tickets, however, attendees at the event will enter the raffle by "adding" the firm on various social media platforms (Facebook, Twitter, and LinkedIn) and using a special hashtag for the event. Are there any specific ethics rules or regulations implicated by conducting the raffle in this way, or by conducting the raffle at all?

In conjunction with the raffle, I'd really like to use the event as an opportunity to build up the firm's ratings and reputation online. Like many firms, we're listed on sites like Avvo and Lawyers.com, but we're a small firm and only have a handful of reviews at the moment. Therefore, I was thinking that we could offer our current and past clients who are present at the event a discount on future legal services if they leave us an online review. If we offer this type of promotion, are we violating any ethics rules?

Sincerely,

I. M. Hopeful

Dear I.M. Hopeful:

Business development is crucial to the success of any business, and law firms of all types and sizes are looking for new and innovative ways to reach potential clients, and to strengthen their relationships with existing clients. Social media platforms and online professional referral services offer smaller law firms like yours an opportunity to reach a larger audience, and to grow their practices in new and exciting ways. But when engaging in a new form of marketing, lawyers must be guided by their ethical obligations and must consider how they might apply to new business development initiatives. As lawyers, we are subject to a strict set of guidelines that govern advertising for our services and the solicitation of new business from existing or potential clients. The starting point for any firm event or online marketing campaign should be the applicable New York Rules of Professional Conduct (RPC). Your question implicates issues of attorney advertising (RPC 7.1), payment for referrals (RPC 7.2) and attorney solicitation (RPC 7.3). So before addressing the specifics of your question, we must first summarize the parameters and requirements of these rules and assess the distinctions between these related but distinct ethical concepts.

Attorney Advertising and Solicitation

RPC 7.1 governs advertisements by lawyers and law firms, and RPC 1.0(a) defines the term "advertisement" as "any public or private communication made by or on behalf of a lawyer . . . , the primary purpose of which is for the retention of the lawyer or law firm." However, as the New York State Bar Association (NYSBA) has noted, "[n]ot all communications made by lawyers about the lawyer or the law firm's services are advertising." (NYSBA Comm. on Prof'l Ethics, Op. 873 (2011).) For example, as Comment 8 to RPC 7.1 makes clear, "communications by a law firm that may constitute marketing or branding are not necessarily advertisements." "[P]encils, legal pads, greeting cards, coffee mugs, T-Shirts or the like with the firm name, logo, and contact information printed on them do not constitute 'advertisements' within the definition of [RPC 7.1] if their primary purpose is general awareness and branding, rather than retention of the law firm for a particular matter." (RPC 7.1 Comment [8].) In other words, the threshold issue of whether a business development campaign constitutes an "advertisement" under RPC 7.1 depends upon the intent of the lawyer or law firm. Communications intended to promote general awareness of the firm or lawyer's existence are not "advertising" under RPC 1.0(a). By contrast, communications intended to promote the retention of a law firm by a particular client, for a particular purpose, will constitute "advertising."

When an offer or marketing effort does constitute an advertisement under RPC 1.0(a), the lawyer and law firm is then subject to all the requirements of RPC 7.1 For example, RPC 7.1 prohibits the dissemination of advertisements containing false statements, the

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

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

portrayal of fictitious law firms, or the use of paid endorsements or testimonials without disclosing that they are being compensated. (*See* RPC 7.1(a), (c).) However, pursuant to RPC 7.1(b), an advertisement may include information pertaining to: legal and non-legal degrees and education; names of clients regularly represented (provided they give prior written consent); and a description of the legal fees charged for initial consultation, or contingency fee rates in civil matters (so long as it is accompanied by the disclosure required by paragraph (p)). So once a particular marketing effort qualifies as an "advertisement" under RPC 1.0(a), it is important to review and abide by the requirements of RPC 7.1, so as to avoid any unintentional ethical violation.

The RPC impose even stricter requirements with respect to attorney solicitations, which should not be confused with mere attorney advertisements. "A 'solicitation' in Rule 7.3(b) is by definition an 'advertisement' that meets additional criteria, so something cannot be a 'solicitation' unless it is first found to be an 'advertisement.'" (NYSBA Comm. on Prof'l Ethics, Op. 873, citing RPC 7.3 Comment [1].) RPC 7.3(b) defines a "solicitation" as "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." Notably, subject to certain narrow exceptions, RPC 7.3(a)(1) expressly prohibits in-person solicitation, as well as solicitation by "telephone contact, or by real-time or interactive computer-accessed communication." Comment 9 to RPC 7.3 makes clear the underlying policy goals of the prohibition against in-person solicitation: "in-person solicitation, [] has historically been disfavored by the bar because it poses serious dangers to potential clients." For example, "a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration" and "[t]hese same risks are present in telephone contact or by real-time or interactive computer-accessed communication." (RPC 7.3, Comment [9].) Ordinarily, however, "email communications and web sites are not considered to be real-time or interactive communication." (*Id.*) As a result, mass emails, or the posting of an offer on a firm-website or social media page is unlikely to constitute a "solicitation" under RPC 7.3(b). By contrast, communicating with a client via a text message or online messaging platform such as Facebook, Messenger or WhatsApp would likely constitute a "real time or interactive communication" and, thus, could potentially qualify as a solicitation. (*Id.*)

Conducting an Event and Raffling Prizes

So what does all of this mean for your event and your raffle? The NYSBA Committee on Professional Ethics has concluded that "[a] law firm may hold a party or a sporting event to promote the firm's name, but its lawyers may not use those occasions to engage in in-person solicitation of its guests unless those guests fall within one of the exclusions in Rule 7.3(a)(1)" such as "a close friend, relative, former client or existing client"). (NYSBA Comm. on Prof'l Ethics, Op. 1136 (2017).) In addition, the invitation to any such event "may not seek the law firm's retention in a matter" unless it complies with the public filing and record-keeping requirements of RPC 7.3(c). (*Id.*) Also, to the extent the invitation qualifies as an "advertisement" (i.e., its primary purpose is pecuniary gain), it must comply with the requirements of RPC 7.1. As for giving away or raffling of a prize, so long as the offer complies with applicable law and does not constitute illegal conduct, the RPC do not prohibit a law firm from giving a client or potential client a prize in exchange for attending an event or for joining the firm's social network. (*See* NYSBA Comm. on Prof'l Ethics, Ops. 873 and 1136.) The lawyer or law firm may even require the winner of the prize to retrieve it from the law firm's office, so long as they do not "use that opportunity to solicit the winner's legal matters (as opposed to, say, using the moment for a photo opportunity with the winner for release to the press to raise public awareness of the firm)." (NYSBA Comm. on Prof'l Ethics, Op. 1136.) Attorneys should therefore be very mindful of the restrictions of RPC 7.3 when meeting with a client or potential client who has come to the firm's event or offices to claim a raffle price.

So to summarize, you can organize a firm event, but you should consider whether the invitation to the event constitutes either an "advertisement" or a "solicitation" under RPC 1.0(a) or 7.3(b) respectively. Putting some firm-branded merchandise into a gift basket would likely be construed as an effort to raise "general awareness and branding" of the sort discussed in Comment 8 to RPC 7.1, and it is therefore unlikely to constitute attorney advertising for the purposes of RPC 7.1. In addition, you may conduct a raffle to give away prizes to current or potential clients for attending the event or using your suggested hashtag, so long as the receipt of the prize is not contingent upon retaining the firm, and the claiming of the prize is not used as an opportunity to solicit the winner's business.

Encouraging Online Reviews

In the modern internet economy, consumers of all kinds begin their search for products and service providers with a simple internet search. It is no surprise then that law firms, like virtually all other businesses, are looking for ways to increase their online presence, and to appeal to a younger generation of client that may be looking for legal services through new or previously under-utilized channels like professional review websites such as Avvo. However, your use of Avvo as a marketing and/or referral platform implicates issues of attorney referrals under RPC 7.2 and attorney advertising under RPC 7.1. So before implementing a marketing initiative built around encouraging online reviews of your law firm, you must first consider how

encouraging online reviews as part of a business development initiative could, potentially, run afoul of your ethical obligations under these rules.

Subject to certain limited exceptions, RPC 7.2 prohibits a lawyer from compensating a person or organization for a recommendation resulting in employment by a client. (RPC 7.2(a)). The key to whether you can offer a discount to a client for writing you a review turns on whether the discount is in any way contingent upon the nature or substance of the review itself. The NYSBA has concluded that "Rule 7.2(a) does not apply [if] the [attorney] is asking for a rating, not a recommendation." (NYSBA Comm. on Prof'l Ethics, Op. 1052 (2015).) In other words, a rating is not necessarily a recommendation, so long as the law firm does not attempt to exert any influence over whether the client writes a positive or negative review. Therefore, merely offering a discount for a client review does not, by itself, implicate the prohibitions of RPC 7.2(a). However, the NYSBA Committee on Professional Ethics also opined that "[i]f the inquirer made the credit contingent on receiving a positive review or high scores, or if the inquirer made the credit contingent on being retained by a new client as a result of the rating, then the credit would violate Rule 7.2(a)." (*Id.*) You should therefore make clear to your clients, and to the other attorneys in your firm, that your suggested discount on future legal services cannot be conditioned in any way on the nature or substance of the client's review.

If a client review is in fact positive, you should nevertheless consider the requirements of RPC 7.1 before utilizing it in any of your law firm's advertising or marketing materials. The NYSBA Committee on Professional Ethics recently concluded that Avvo's website "is an 'advertisement' within the meaning of Rule 1.0(a)" and, as a result, "[t]his means that a participating lawyer must determine that the website does not make false, misleading or deceptive statements or claims, or otherwise violate the Rules." (NYSBA Comm. on Prof'l Ethics, Op. 1132 (2017).) For example, "lawyers may not use Avvo ratings (or any other ratings) in their advertising unless those ratings are 'bona fide professional ratings.'" (*Id.*, citing RPC 7.1(b)(1) and Comment [13].) Attorney ratings "are not 'bona fide' unless (among other things) the ratings 'evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests," and are "not subject to improper influence by lawyers who are being evaluated." (NYSBA Comm. on Prof'l Ethics, Op. 1132 quoting RPC 7.1 Comment [13].) In its recent opinion, the NYSBA Professional Ethics Committee concluded that it "lack[ed] sufficient facts to determine (and [did] not decide) whether Avvo's rating system meets the criteria for a bona fide professional rating." (NYSBA Comm. on Prof'l Ethics, Op. 1132.) Law firms looking to capitalize on favorable ratings may wish to further investigate this issue before referencing it in any advertising or marketing materials.

While you did not raise this particular issue in your inquiry, you should also consider whether your law firm's relationship with Avvo itself could potentially violate RPC 7.2. In its recent ethics opinion, the NYSBA Committee on Professional Ethics considered the propriety of Avvo's so-called "marketing fee" – a monthly fee paid by participating attorneys for each legal service the attorney has completed during the prior month. (See NYSBA Comm. on Prof'l Ethics, Op. 1132.) "As an example, Avvo's website tells lawyers that 'if a client purchases a $149 document review service with you . . . you will be charged a $40 marketing fee.'" (*Id.*) As the NYSBA Committee on Professional Ethics observed, "[t]he marketing fee raises questions about whether lawyers who participate in Avvo Legal Services are improperly sharing legal fees with a nonlawyer." (*Id.*) This turns on whether the law firm is paying Avvo for its marketing services (which is permissible), or whether the firm is paying Avvo to recommend the firm to potential clients (which would violate RPC 7.2(a)). (*See id.*) Comment [1] to RPC 7.2 notes that "lead generators" are improper to the extent the lead generator "states, implies, or creates a reasonable impression that it is recommending the lawyer" and the committee concluded that Avvo – as it was operating – was in fact making a "recommendation" to potential clients for the benefit of the participating lawyers. (NYSBA Comm. on Prof'l Ethics, Op. 1132.) Accordingly, the NYSBA Committee on Professional Ethics opined that "[a] lawyer paying Avvo's current marketing fee for Avvo Legal Services is making an improper payment for a recommendation in violation of Rule 7.2(a)." (*Id.*).

Conclusion

In an increasingly competitive legal marketplace, law firms are always looking for new ways to get ahead, and to market themselves to new and existing clients. The internet, in particular, is constantly offering new avenues for attorney advertising. Lawyers, however, have a special ethical obligation to ensure that any new marketing initiatives do not violate the RPC. You were right to question whether your raffle and your plan to incentivize client reviews of your firm would run afoul of your ethical obligations. But so long as the raffle is not utilized as an opportunity for solicitation, and provided your proposed client discount is not contingent on the substance of the client's review of your firm, your firm should be able to proceed with its initiatives without violating any of its ethical obligations.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com)
Carl F. Regelmann, Esq.
(regelmann@thsh.com)
Richard W. Trotter, Esq.
(trotter@thsh.com) and
Amanda M. Leone, Esq.
(leone@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

Continued on Page 59

* There are exceptions. When the noun that follows *nor* in the phrase "neither . . . nor" is plural, use a plural verb. (E.g.: Neither the doorman nor the residents of this building *were* sure about the identity of the robber.) "The number" is singular, whereas "a number" is plural (E.g.: The number of my clients *is* declining; a number of them *have* decided to shop elsewhere because of the defamation.)

3. Gender-Related Mistakes

If the subject of a sentence has a definitive gender — either masculine or feminine — use that gender consistently. (E.g.: Ms. Smith is the company's CEO. *She* is also a board member, and the board decides *her* salary.) If it's not necessary or possible to articulate the subject's gender, use gender-neutral language to avoid the tedious "he or she" and "his and her" and to avoid giving the impression that you're excluding one of the genders. (*Ex.:* A good *police officer* has a sense of teamwork.)

4. Mistakes Related to Capital Letters

There are only a handful of cases when you should use capital letters: at the beginning of a sentence; for proper nouns, such as April (the name of a month), Jennifer (the name of a person), and New York (the name of a city or state); and titles.

5. Pronoun-Related Mistakes

What's a pronoun? It's a word used to refer to a noun. If it's used, it's one of the most important parts of a sentence. If the pronoun reference is unclear, the entire sentence will wind up being confusing.

Incorrect: Christine and Rose both loved *her* children. *[It's unclear whose children they are.]*

Correct: Christine and Rose both loved *Christine's* children.

Correct: Christine and Rose both loved *their own* children.

Incorrect: James told Michael that no police officer will come to arrest *him*. *[It's unclear who the police would arrest; it could be either James or Michael.]*

Correct: James told Michael that no police officer will come to arrest *Michael*.

Incorrect: *They* considered whether to file an action against the general contractor. *[It's unclear to whom "they" refers. The antecedent to which the pronoun refers is missing.]*

Correct: *The workers who were injured* considered whether to file an action against the general contractor.

Incorrect: When the defendants avoided looking at the victim, it meant they were probably lying. *["It" doesn't refer to any specific word in this sentence.]*

Correct: The defendants avoided looking at the victim. The lack of eye contact implies they were lying.

Incorrect: Each person in the meeting room should keep *their* voice low.

Correct: All people in the meeting room should keep their voices low.

6. Mistakes Involving I vs. Me vs. Myself

The differences between *I* (a subject), *me* (an object), and *myself* (a reflexive pronoun) are similar to the differences between he/him/himself, she/her/herself, it/it/itself, you/you/yourself, we/us/ourselves, and they/them/themselves. When referring to yourself and someone else, put the other person's name first in the sentence. (*E.g.: Mike and I* walked together to the court.) Use *myself* when you've already used *I*, making "I" the subject the sentence. (*E.g.:* I will handle it myself.)*

* Tip: Choose *I* or *me* by removing the other subject's name and seeing which sounds correct.

Incorrect: Send a copy of the brief to my partner and *I* to review. *[By removing "the partner," this sentence reads "Send a copy of the brief to I to review." That doesn't sound right.]*

Correct: Send a copy of the brief to my partner and *me* to review.

7. List-Related Mistakes

All words or phrases in a list should be similar. The items in a list must be in parallel form.

Incorrect: Having a plan, *work hard*, and developing a network are essential for a lawyer's success.

Correct: Having a plan, working hard, and developing a network are essential for a lawyer's success.

Incorrect: Several tools are in his toolkit: his hammer, *a screwdriver*, and his wrench.

Correct: Several tools are in his toolkit: his hammer, *his screwdriver*, and his wrench.

Correct: Several tools are in his toolkit: a hammer, *a screwdriver*, and a wrench.

8. Comparison-Related Mistakes

a. When you write a comparison, make sure that the items being compared are comparable both grammatically and logically.

Incorrect: Unlike the economies in England and France, Spain has a declining economy.

Correct: Unlike the economies in England and France, the economy in Spain is declining.

Correct: Unlike England and France, Spain has a declining economy.

b. When you compare something to something else, always clarify what that something else is. Otherwise, the comparison is incomplete, and the reader won't know what the comparison means.

Incorrect: The weather on the West Coast is dryer and warmer.

Correct: The weather on the West Coast is dryer and warmer *than that on the East Coast*.

Incorrect: My laptop is faster, stronger, and better.

Correct: My laptop is faster, stronger, and better *than Jack's laptop*.

9. Mistakes Involving Hypothetical Situations

When you write about a hypothetical or contrary-to-fact situation, use "was/were" or "would."

Incorrect: I wish I *am not* busy working at the law firm.

Correct: I wish I *wasn't* so busy at the law firm.

Incorrect: If I *am* you, I *will not* do this.

Correct: If I *were* you, I *would not* do this.

Incorrect: I *would rather taking* a different approach.

Correct: I *would rather take* a different approach. *[Use "would rather" and the base form of a verb to talk about preferences in the present or the future.]*

Incorrect: Lucy *would rather* she *chose* a different house.

Correct: Lucy *would rather* she *had chosen* a different house. *[Use "would rather" and the past perfect tense to express hypothetical situations in the past.]*

10. Mistakes Involving Active and Passive Voice

The "voice" of a sentence confuses people. When a sentence is written in the active voice, the subject performs the action that the verb expresses. When a sentence is written in the passive voice, the subject is acted upon. (E.g. for active voice: "A man in a red shirt stole my car." E.g. for passive voice: "My car was stolen by a man in a red shirt." A double, or blank, passive hides the actor: "My car was stolen."

a. The passive voice sounds weak and unclear. The active voice doesn't.

Active voice: The prosecutor bears the burden of proof.

Passive voice: The burden of proof is borne by the prosecutor.

Active voice: The plaintiff will serve on the clerk a copy of the order.

Passive voice: A copy of the order will be served to the clerk by the plaintiff.

b. Use the passive voice only when you have a good reason to use it. These reasons include:

- You don't want to mention the actor's name. (E.g.: I have been told that he's not an honest man.)
- The subject of the action is not important and you want to put the emphasis on the action itself. (*E.g.:* This article has been cited frequently.)
- You don't know who did the acting. (E.g.: My jewelry was stolen.)

* Hint: If your sentence still makes sense when you insert the words "by zombies" at the end of it, then it's written in the passive voice.

11. Mistakes Involving a Dangling Participle

A participle is a verb form that acts as an adjective. There are two kinds of participles: the present participle (this is the -ing form of a verb, e.g.: "a smiling face") and the past participle (the -ed/en form of a verb, e.g.: "a tampered piece of evidence"). Participle phrases are phrases that begin with a verb form. They're used to modify nouns or pronouns. A "dangling" participle refers to a participle that's misplaced and, therefore, modifies the wrong noun or pronoun. You can rearrange a sentence that has a dangling participle by placing the subject of the sentence right after the participle.

Incorrect: Irritated by the plaintiff's testimony, a chair was thrown across the courtroom by the defendant. The participial phrase "irritated by the plaintiff's testimony" is dangling because it makes it seem like the chair was irritated by the plaintiff's testimony.

Correct: Irritated by the plaintiff's testimony, the defendant threw a chair across the courtroom.

Incorrect: Turning the bike toward the sidewalk, the pedestrian was hit by the cyclist. The participial phrase "turning the bike toward the sidewalk" is dangling because it makes it seem as if the pedestrian was turning the bike toward the sidewalk.

Correct: Turning the bike toward the sidewalk, the cyclist hit the pedestrian.

> Use the passive voice only when you have a good reason to use it.

12. Formatting Mistakes

Sometimes we're inconsistent with our font and format. Inconsistencies in font, indentation, margin size, and paragraph spacing will annoy readers and make you look careless and sloppy. But these mistakes are easy to correct. Ensure that your formatting is uniform and adheres to all requirements. Single space your documents (double space between paragraphs) unless court rules dictate otherwise. Use one space between sentences and citations. Use and align your text to be right-ragged (unless you're instructed otherwise). Unless it's grammatically required or otherwise necessary, avoid capital letters and underlining, bolding, or italicizing words.*

* Tip: When you write on Microsoft Word, you can fix formatting errors easily and quickly by clicking the "Home" tab at the top of the page and then the "Replace" tab on the right of the ribbon. In the "Find what" bar, type what error you want to correct (e.g.: two spaces between words). In the "Replace with" bar, type what the correct thing should be (e.g.: a single space). Click "Replace all," and the system will correct this mistake wherever it discovers it in the document.

13. Contraction-Related Mistakes

We use contractions in our everyday speech and writing. Using them in more formal writing, too, seems natural. Although the use of contractions, such as *can't*, in legal writing won't damage your credibility or cause your words to be misconstrued or misinterpreted, contractions should be used sparingly in professional writing. They're inherently informal. That's why they're perfect for this column.

Correct (but informal): Upon further consideration, my client has decided that initiating a lawsuit *isn't* in his best interest.

Correct (and professional): Upon further consideration, my client has decided that initiating a lawsuit *is not* in his best interest.

14. Mistakes Involving Articles

There are two types of articles — definite and indefinite. For some reason, they lead to problems for many of us.

Here are some common mistakes when it comes to articles:

a. Using a definite article when you should be using an indefinite article, or vice versa.

A definite article, such as *the*, refers to someone or something specific. An indefinite article, such as *a* or *an*, refers to someone or something general.

Correct: *The* main buildings of the New York Supreme Court in New York County are located in *the* Civic Center neighborhood of Manhattan. *Alternately*: "The New York Supreme Court's main buildings are located in Manhattan's Civic Center."

Correct: You could probably find *a* book about that subject in the library.

b. Using *a* and *an* incorrectly.

While *a* and *an* are both indefinite articles, they can't be used interchangeably. *A* should be used before a letter or word that begins with the sound of a consonant, even if the letter is a vowel or the word begins with a vowel (e.g.: *book* or *eulogy*). *An* should be used before a letter or word that begins with the sound of a vowel, even if the letter is a consonant or the word begins with a consonant (e.g.: "F.B.I. agent" or *apple* or *honorable*).

Correct: *A* person should always be polite to others.

Correct: *An* individual can have a great impact on society even if few people follow their example.

c. Using an article before a noun that can't be counted.

Incorrect: She demonstrated *a* courage when she ran into the burning house to save the child.

Correct: She demonstrated courage when she ran into the burning house to save the child.

The column continues in the *Journal*'s next issue with Part II of the Worst Mistakes in Legal Writing. ■

GERALD LEBOVITS (GLebovits@aol.com), an acting State Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. He thanks judicial interns Rosemarie Ferraro (University of Richmond) and Jie Yang (NYU School of Law) for their research.

Attorney Professionalism Forum
Continued from Page 56

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I'm a personal injury attorney practicing at a boutique law firm that offers legal services across multiple areas of practice including financial services, intellectual property, and trusts and estates (just to name a few). Recently, and very sadly, a friend from law school – who was also a personal injury attorney, but with a solo practice – passed away. Through the years, we kept in touch personally and professionally and would occasionally reach out to one another for advice on particular issues. Unbeknownst to me, before he died, my friend informed his secretary that he wanted to refer two of his cases to me. The secretary in turn gave the clients my name and information, and they contacted me to discuss taking over their cases. I'm still in the process of clearing conflicts and evaluating how far each case has progressed. In one of the matters, my friend had conducted a preliminary investigation and gathered some medical records, but had not yet filed the lawsuit. I'm still not sure how much work was done in the other matter. In any event, my friend and I did not have a referral or fee-sharing arrangement, and nothing was written in his will – it was just his verbal instruction to his secretary. If I accept either of these cases, should I pay a referral fee to my friend's estate for the matters I accept? Or, if I determine that I cannot accept these cases and pass them on to a third attorney, can I accept a referral fee?

While I'm on the topic of wills and estates, there's another question I'd like to ask The Forum. A physician I regularly consult and use as an expert in my practice asked me if my firm's trusts and estates group would draft a will for him and his wife. Assuming that the trusts and estates attorneys at my firm draft the will, and I use this doctor as an expert in a future case, will I be required to disclose my firm's representation of him as a client? Will that disqualify him?

Sincerely,
May B. Fee

MEMBERSHIP TOTALS

New Regular Members 1/1/18 - 1/22/18	**356**
New Law Student Members 1/1/18 - 1/22/18	**19**
Total Regular Members as of 1/22/18	**60,642**
Total Law Student Members as of 1/22/18	**8,347**
Total Membership as of 1/22/18	**68,989**

BECOMING A LAWYER

BY LUKAS M. HOROWITZ

Lukas M. Horowitz, Albany Law School Class of 2019, graduated from Hobart William Smith in 2014 with a B.A. in history and a minor in political science and Russian area studies. Following graduation, he worked for two years as a legal assistant at Gibson, McAskill & Crosby, LLP, in Buffalo, New York, and with the New York Academy of Trial Lawyers hosting CLE programs. Lukas can be reached at Lukas.horowitz@gmail.com.

Didn't I Just Do This?

While miracles can occur year round, it was surely a Christmas miracle that I ended up having my best semester in law school last fall. Don't let this fool you; finals don't get easier the longer you are in school.

My spring semester is in full swing. I have shaken off most of the dust from winter break, and went from zero to 60 overnight as the semester began. My classes this semester include criminal procedure, commercial law survey, and an environmental ethics course.

I am in the second week of my field placement at the Department of Environmental Conservation. I am working in the Office of Hearings and Mediation Services, and have already drafted my first memo, fingers crossed. I have resumed work at the literacy program I worked at the past two semesters, only now with a promotion under my belt to Program Director. So far, so good, though I never would I have thought I would be reading Dr. Seuss's *The Cat in the Hat* while in law school.

This past winter break was the first break since high school where I did absolutely nothing. One might think that three weeks of having nothing to do would be boring, monotonous, etc. Well, take it from me: it isn't! Oh how I cherished those alarm clock free mornings. My Monday morning bed head morphing effortlessly into Tuesday's. Think I could go three days without showering with no regrets? The answer? A resounding yes. All in all, my winter break was a real treat. Family, friends, holidays, and poor hygiene. What more could you ask for? (For the record, I am regularly showering once again).

I am working at my field placement at the DEC three days a week. While I do not receive a grade for these credits (so no impact on my GPA), working outside of the classroom is liberating. Receiving credit and not having to read a textbook? I thought such things existed only in my dreams. Well, by the end of this semester, I will have acquired six credits from this dream.

Criminal procedure has been eye-opening. The cases we have read in the first two weeks have all dealt with searches. I have been distressed by the rationalizations used in the past to justify these searches. Since we are in the early weeks of the class, I find myself hoping that acceptable justifications will evolve toward citizens who will experience greater protection under the law, preventing unwarranted and invasive behavior.

Another month, another column completed. For those of you who actually read last month's piece, you will be relieved to know that I have put my expressive dancing career on the backburner. For now. My personal Battle of Saratoga with the Albany Parking authority draws ever nearer. Morale remains high.

I hope all of you enjoyed the holiday season and are tolerating the roller coaster weather we are experiencing. Stay warm, spring is right around the corner. ■

Moments in History

The Triple Assessment (Income Tax)

Supreme Court Justice Oliver Wendell Holmes Jr. once wrote: "Taxes are what we pay for civilized society." But how society imposes taxes – who pays what in what proportion – has always posed a challenge.

Prior to the development of money, taxes were paid in-kind with labor, grain, cattle, or the like. Thereafter, assessments on land – the forerunner to property taxes – as well as tolls and customs duties on imports and exports became the principal sources of revenue for a state or its ruler. Not until 1798 did taxation of income become the subject of a government's affection.

During most of the 18th century, Great Britain relied on taxation of expenditures for revenue. Akin to a modern-day sales tax, the British system assessed what legal scholars Bernhard Grossfeld and James Bryce call "visible signs of wealth, be it carriages, servants, horses, dogs, clerks, watches, silverware, or windows." As the century's end neared, fighting Napoleon Bonaparte's armies drained Britain's treasury. Prime Minister William Pitt the younger proposed legislation that became the Aid and Contribution Act of 1798. Known as the Triple Assessment, it required payment of thrice the amount a subject had paid in expenditure taxes in the preceding year.

The Triple Assessment gave way almost immediately to Pitt's proposal "that a general tax shall be imposed upon all the leading branches of income." Unsurprisingly, Pitt's tax was poorly received. Among other descriptions, it was called a "monstrous proposition" and "an indiscriminate rapine." Grossfeld and Bryce write that "from the very beginning . . . it had been accepted by the public with disdain and distrust."

Although Pitt's tax was repealed in 1802, the die had been cast. The following year, Parliament enacted a new income tax, which became the foundation for Britain's future tax policy as well as those that would be adopted thereafter in Germany and America.

Excerpted from *The Law Book: From Hammurabi to the International Criminal Court, 250 Milestones in the History of Law* (2015 Sterling Publishing) by Michael H. Roffer.

"Moments in History" is an occasional sidebar in the Journal, *which will feature people and events in legal history.*

MARKETPLACE

TO ADVERTISE WITH NYSBA, CONTACT:
Network Media Partners
Attn: Holly Klarman, Account Executive
307 International Circle, Suite 190
Hunt Valley, Maryland 21030
hklarman@networkmediapartners.com
410.584.1960

MARKETPLACE DISPLAY ADS:
$565
Large: 2.22″ x 4.44″

Please go to nysba.sendmyad.com to submit your PDF file.

Payment must accompany insertion orders.

INDEX TO ADVERTISERS

HEADQUARTERS STAFF EMAIL ADDRESSES

Executive
Pamela McDevitt
Executive Director
pmcdevitt@nysba.org

Executive Services
Kathleen R. Mulligan-Baxter, *General Counsel*
kbaxter@nysba.org

Member Outreach & Development
Mark Wilson, *Manager, Bar Services*
mwilson@nysba.org

Patricia K. Wood, *Senior Director, Membership*
pwood@nysba.org

Marketing and Communications
Daniel Weiller, *Senior Director of Marketing and Communications*
dweiller@nysba.org

Adam Rossi, *Director of Marketing*
arossi@nysba.org

Christina Couto, *Editor, State Bar News*
ccouto@nysba.org

Joan Fucillo, *Senior Messaging & Communications Specialist*
jfucillo@nysba.org

Design Services

Web Site
Brandon Vogel, *Social Media and Web Content Manager*
bvogel@nysba.org

MIS & Content Management
Jason Nagel, *Managing Director of IT Services*
jnagel@nysba.org

Jeffrey Ordon, *IT Operations Manager*
jordon@nysba.org

Lucian Uveges, *Applications Development Manager*
luveges@nysba.org

Member Resource Center
Jeremy Knickerbocker, *Manager*
jknickerbocker@nysba.org

Publications
Daniel J. McMahon, *Director*
dmcmahon@nysba.org

Kathryn Calista, *Senior Publications Attorney*
kcalista@nysba.org

Kirsten Downer, *Research Attorney*
kdowner@nysba.org

Print and Facilities Operations
Gordon H. Ryan, *Senior Director*
gryan@nysba.org

Building Maintenance

Graphics

Print Shop
Donald Gardinier, *Print Production Manager*
dgardinier@nysba.org

Governmental Relations
Ronald F. Kennedy, *Director*
rkennedy@nysba.org

Kevin Kerwin, *Associate Director*
kkerwin@nysba.org

Continuing Legal Education
Katherine Suchocki, *Senior Director of CLE & Law Practice Management*
ksuchocki@nysba.org

CLE Programs
Sally Bratten, *CLE Program Attorney*
sbratten@nysba.org

Thomas Richards, *CLE Program Attorney*
trichards@nysba.org

Cindy O'Brien, *Program Manager*
cobrien@nysba.org

Section and Meeting Services
Patricia B. Stockli, *Director*
pstockli@nysba.org

Lisa J. Bataille, *Chief Section Liaison*
lbataille@nysba.org

Finance
Kristin M. O'Brien, *Senior Director*
kobrien@nysba.org

Amira Rizvanovic, *Controller*
arizvanovic@nysba.org

Legal and Community Services
Stacey Whiteley, *Managing Director of Legal and Community Services*
swhiteley@nysba.org

Minika Udoko, *Diversity and Inclusion Coordinator*
mudoko@nysba.org

Law, Youth and Citizenship Program
Kimberly Francis, *LYC Program Manager*
kfrancis@nysba.org

Lawyer Assistance Program

Lawyer Referral and Information Service
Eva Valentin-Espinal, *LRS Manager*
evalentin@nysba.org

Pro Bono Services
Kristen Wagner, *Director*
kwagner@nysba.org

Human Resources
Paula M. Doyle, *Senior Director*
pdoyle@nysba.org

The New York Bar Foundation
Deborah Auspelmyer, *Foundation Executive*
dauspelmyer@tnybf.org

THE NEW YORK BAR FOUNDATION

THE NEW YORK BAR FOUNDATION

JOURNAL BOARD MEMBERS EMERITI

2017-2018 OFFICERS

Sharon Stern Gerstman
President
Buffalo

Michael Miller
President-Elect
New York

Scott M. Karson
Treasurer
Melville

Sherry Levin Wallach
Secretary
Cross River

Claire P. Gutekunst
Immediate Past President
Yonkers

VICE-PRESIDENTS

First District
Taa R. Grays, *New York*
Carol A. Sigmond, *New York*

Second District
Domenick Napoletano, *Brooklyn*

Third District
Henry M. Greenberg, *Albany*

Fourth District
Matthew R. Coseo, *Gansevoort*

Fifth District
Stuart J. LaRose, *Syracuse*

Sixth District
Alyssa M. Barreiro, *Binghamton*

Seventh District
David H. Tennant, *Rochester*

Eighth District
Norman P. Effman, *Warsaw*

Ninth District
Michael L. Fox, *Huguenot*

Tenth District
Peter H. Levy, *Jericho*

Eleventh District
Karina E. Alomar, *Ridgewood*

Twelfth District
Steven E. Millon, *New York*

Thirteeth District
Jonathan B. Behrins, *Staten Island*

MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

Earamichia Brown
Margaret J. Finerty
Michael W. Galligan
Sarah E. Gold
Richard M. Gutierrez
Bryan D. Hetherington
Drew Jaglom
Elena DeFio Kean
Bruce J. Prager
Sandra Rivera
William T. Russell, Jr.

MEMBERS OF THE HOUSE OF DELEGATES

First District
Aaron, Hon. Stewart D.
Abramson, Joel E.
†* Alcott, Mark H.
Alvarez, Janet
Berman, Mark Arthur
Billings, Hon. Lucy
Bloom, Allan S.
Brown Spitzmueller, Janiece
Brown, Earamichia
Chambers, Hon. Cheryl E.
Chang, Vincent Ted
Cheng, Theodore K.
Christian, Catherine A.
Cohen, Carrie H.
Connery, Nancy A.
Davis, Tracee E.
Ferguson, Gerald J.
Ferrara, Paul A.
Finerty, Margaret J.
First, Marie-Eleana
Foley, Jenifer J.
* Forger, Alexander D.
Freedman, Hon. Helen E.
Gallagher, Pamela Lee
Galligan, Michael W.
Gische, Hon. Judith J.
Goldberg Velazquez, Elena Molly
Goldfarb, David
Grays, Taa R.
†* Gutekunst, Claire P.
Hack, Jay L.
Haig, Robert L.
Hills, Bethany
Himes, Jay L.
Hoffman, Stephen D.
Hollyer, Arthur Rene
Jaglom, Drew
†* James, Seymour W., Jr.
Kiernan, John S.
Kiernan, Peter J.
Kiesel, Michael Thomas
* King, Henry L.
Kobak, James B., Jr.
Koch, Adrienne Beth
Krausz, Diane F.
Land, Stephen B.
†* Lau-Kee, Glenn
* Leber, Bernice K.
Lessard, Stephen Charles
Madden, Hon. Joan Anne
Mandell, Andrew
Maroney, Thomas J.
Martin Owens, Deborah
McNamara, Christopher James
McNamara, Michael J.
† Miller, Michael
Minkoff, Ronald C.
Moskowitz, Hon. Karla
Owens, John, Jr.
Prager, Bruce J.
Quartaro, Neil A.
Rosner, Seth
Russell, William T., Jr.
Safer, Jay G.
Schnabel, David H.
Sen, Diana S.
* Seymour, Whitney North, Jr.
Shampnoi, Elizabeth Jean
Sicular, David R.
Sigmond, Carol Ann
Silkenat, James R.
Singer, David C.
Sonberg, Hon. Michael R.
Spirer, Laren E.
* Standard, Kenneth G.
Stong, Hon. Elizabeth S.
Temkin, Barry R.
Tesser, Lewis F.
Udell, Jeffrey A.
Weiss, Mira B.
Whiting, Judith
Whittingham, Kaylin L.
†* Younger, Stephen P.

Second District
Aidala, Arthur L.
Bonina, Andrea E.
Chandrasekhar, Jai K.
Chidekel, David M.
Cohn, Steven D.
Edgar, Paula Taryn
Fallek, Andrew M.
Grimaldi, Judith D.
Heller, Meredith Stacy
Masucci, Deborah
Napoletano, Domenick
Richman, Steven H.
Richter, Aimee L.
Romero, Manuel A.
† Shautsova, Alena
Slavin, Barton L.
Steinhardt, Hon. Marsha L.
Weston, Hon. Michelle

Third District
Barclay, Kathleen Anne
Burke, Jane Bello
Fernandez, Hermes
Gailliard, Glinnesa D.
Gerbini, Jean F.
Gold, Sarah E.
Greenberg, Henry M.
Grogan, Elizabeth Janas
Hacker, James E.
Heath, Hon. Helena
Hersh, Martin
Hurteau, Daniel Joseph
Kean, Elena DeFio
Kearns, Deborah S.
Mandell, Adam Trent
+* Miranda, David P.
Onderdonk, Marne L.
Rivera, Sandra
Rosiny, Frank R.
Ryba, Hon. Christina L.
Schofield, Robert T., IV
Stabinski, Alexander Leon
* Yanas, John J.

Fourth District
Clouthier, Nicole L.
Coffey, Peter V.
Coseo, Matthew R.
Jones, Barry J.
King, Barbara J.
Rodriguez, Patricia L. R.
Schwenker, Eric C.
Sciocchetti, Nancy
Sharkey, Mrs. Lauren E.
Walsh, Joseph M.
Wildgrube, Michelle H.

Fifth District
Fennell, Timothy J.
Gensini, Gioia A.
†* Getnick, Michael E.
Hage, Joseph K., III
LaRose, Stuart J.
McCann, John T.
Murphy, Hon. James P.
* Richardson, M. Catherine
Williams, James M.

Sixth District
Abbott, Rachel Ann
Barreiro, Alyssa M.
Corbin, Gemma Rossi
Denton, Christopher
Eberle, Aaron Kyle
Flanagan, Patrick J.
Gutenberger Grossman, Kristin E.
Kelly, Kevin Thomas
Lanouette, Dawn Joyce
†* Madigan, Kathryn Grant
May, Michael R.
Shafer, Robert M.

Seventh District
Adams, Holly A.
Brown, T. Andrew
Buholtz, Eileen E.
* Buzard, Allen Vincent
Castellano, June M.
Christensen, Amy L.
Cicero, Jill M.
Gaddis, Sheila A.
Getz, Jon P.
Hetherington, Bryan D.
Jackson, LaMarr J.
Lawrence, C. Bruce
McDonald, Elizabeth J.
* Moore, James C.
Moretti, Mark J.
* Palermo, Anthony Robert
* Schraver, David M.
Shaw, Linda R.
Tennant, David H.
* Vigdor, Justin L.
* Witmer, G. Robert, Jr.

Eighth District
Disare, Melinda G.
Doxey, Deborah Anne
* Doyle, Vincent E., III
Effman, Norman P.
* Freedman, Maryann Saccomando
† Gerstman, Sharon Stern
* Hassett, Paul Michael
Mosher, Matthew Thomas
Nowotarski, Leah Rene
Pajak, David J.
Spitler, Kevin W.
Sullivan, Kevin J.
Sweet, Kathleen Marie
Young, Oliver C.

Ninth District
Bowler, Richard J.
Braunstein, Lawrence Jay
Burke, Michael K.
Burns, Stephanie L.
Clark, Alan John
Cobb, Lisa M.
Fay, Jody
Fox, Prof. Michael L.
Glass, David L.
Goldschmidt, Sylvia
Hyer, James L.
Keiser, Laurence
Kessler, Leonard
Kirby, Dawn
Levin Wallach, Sherry
McNamara, Timothy G.
* Miller, Henry G.
* Ostertag, Robert L.
Pappalardo, John A.
Preston, Kevin F.
Schriever, Andrew P.
Schub, Benjamin E.
Shamoon, Rona G.
Starkman, Mark T.
Stieglitz, Steven
Thaler-Parker, Jessica D.
Weathers, Wendy M.
Weis, Robert A.

Tenth District
Barcham, Deborah Seldes
Block, Justin M.
* Bracken, John P.
Burns, Carole A.
Calcagni, John R.
Christopher, John P.
Clarke, Christopher Justin
DiFalco, Michael Drew
Ferris, William Taber, III
Fishberg, Gerard
Genoa, Marilyn
Glover, Dorian Ronald
Karson, Scott M.
Kase, Hon. John L.
* Levin, A. Thomas
Levy, Peter H.
Mancuso, Peter J.
Margolin, Linda U.
Meisenheimer, Patricia M.
Pessala, Hon. Elizabeth D.
Poster-Zimmerman, Lynn D.
* Pruzansky, Joshua M.
* Rice, Thomas O.
Singer, Hon. Conrad D.
Strenger, Sanford
Tarver, Terrence Lee
Tully, Rosemarie
Wicks, James M.

Eleventh District
Alomar, Karina E.
Bruno, Frank, Jr.
Carola, Joseph, III
Cohen, David Louis
DeFelice, Joseph F.
Gingold, Hilary
Gutierrez, Richard M.
Lee, Chanwoo
Samuels, Violet E.
Vitacco, Guy R., Jr.

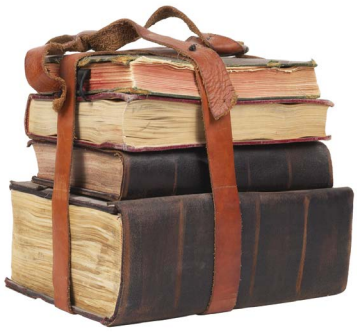
Twelfth District
Braverman, Samuel M.
Calderón, Carlos M.
Cassidy, Daniel D.
Marinaccio, Michael A.
Millon, Steven E.
* Pfeifer, Maxwell S.
Santiago, Mirna M.

Thirteenth District
Behrins, Jonathan B.
Cohen, Orin J.
Lamberti, Anthony J.
Martin, Edwina Frances
Mascolo, Anthony A.
McGinn, Sheila T.
Miller, Mrs. Claire C.

Out of State
Jochmans, Hilary F.
Millett, Eileen D.
Ravin, Richard L.
Sulimani, Natalie

† *Delegate to American Bar Association House of Delegates* * *Past President*

BY GERALD LEBOVITS



The Worst Mistakes in Legal Writing — Part I

When it comes to legal writing, the standards are high — and the ramifications of failing to adhere to these standards are steep. Glaring writing errors confuse, convolute, and mislead. They also hurt your credibility and reputation with clients, lawyers, and judges.

This four-part column focuses on (usually basic) mistakes common in legal writing. Part I covers mistakes involving tenses, subject/verb agreement, gender, capital letters, pronouns, lists, comparisons, hypotheticals, the active voice, dangling participles, formatting, contractions, and articles. Part II covers grammar and punctuation, commas and semicolons, apostrophes, quotations, the serial comma, exclamation points, and hyphens and dashes, commonly confused words, frequently misused words, and spelling mistakes. Part III covers common phrases and popular idioms and typical mistakes in legal writing. What will Part IV cover? Tell me (email below) about your pet peeves. I'll pick a few and discuss them in Part IV (and give you credit).

There are lots of mistakes in legal writing; it's possible to fail in many ways, according to Aristotle. The mistakes addressed in this series are the *Legal Writer's* personal hit parade of horrible horribles.

A. General Mistakes

1. Tense-Related Mistakes

If you use tenses incorrectly, you'll fail to express accurately what you want to say — or, worse, the sentence's flow will be disrupted, and your readers will become frustrated and stop reading.

Here are some common mistakes when it comes to tenses:

a. Using the present/past perfect tense with adverbs of past time. Use the past tense instead.

Incorrect: I *have seen* him last evening.

Incorrect: I *had seen* him last evening.

Correct: I *saw* him last evening.

b. Using the present continuous tense to describe an action that started in the past but has gone on to the present and is continuing still. Use the present perfect continuous instead.

Incorrect: It *is raining* for a week.

Correct: It *has been raining* for a week.

c. Using the future tense in a subordinate clause when the verb in the main clause is in the imperative mood. Use the present tense instead.

Incorrect: Watch that you *will* not slip on the ice.

Correct: Watch that you *do* not slip on the ice.

d. Using the future tense in a subordinate clause when the verb in the main is in the future tense. Use the present tense instead.

Incorrect: The court clerk will let you know when the jury *will reach* a verdict.

Correct: The court clerk will let you know when the jury *reaches* a verdict.

e. Being inconsistent in your use of tenses.

Incorrect: The defendant was aware of the loose pile, but he *doesn't* do anything.

Correct: The defendant was aware of the loose pile, but he *didn't* do anything.

2. Mistakes Involving Subject/Verb Agreement

One of the most basic rules is that a subject and its verb must agree in number. Subjects and verbs can be either singular or plural. If the subject and the verb don't agree in number with each other, the sentence will sound off.

> All words or phrases in a list should be similar.

Here are some common mistakes when it comes to subject/verb agreement:

a. Using a singular verb with a plural subject.

Incorrect: The landowner and the general contractor *was* being sued.

Correct: The landowner and the general contractor *were* being sued.

b. Using a plural verb with a singular subject.

Incorrect: This company *have* several branches.

Correct: This company *has* several branches.

c. Using a plural verb after *either* or *neither*, both of which are usually considered singular.*

Incorrect: Either Dr. White or Dr. Martin *have* looked at the record.

Correct: Either Dr. White or Dr. Martin *has* looked at the record.

Incorrect: Neither of the defendants *were* aware of the risk.

Correct: Neither defendant *was* aware of the risk.

CONTINUED ON PAGE 57

NYSBA**BOOKS**

Enhance Your Practice with the 2017-2018 edition of

New York Lawyers' Practical Skills Series . . .

Written by Attorneys for Attorneys.

Winner of ACLEA's Award for Outstanding Achievement in Publications

Includes **Downloadable Forms**

Complete Set of 19

Members save $200 off the list price by purchasing the complete set of 19

2017–2018 • PN: 40018PS | List: $895 | **NYSBA Members $695**

Practical Skills Series Individual Titles

Arbitration and Mediation *(w/Forms)*

Business/Corporate and Banking Law Practice *(w/Forms)*

Criminal Law and Practice *(w/Forms)*

Debt Collection and Judgment Enforcement *(w/Forms)*

Elder Law and Special Needs Planning/ Will Drafting *(w/Forms)*

Guardianship *(w/Forms)*

Labor, Employment and Workers' Compensation Law*

Limited Liability Companies *(w/Forms)*

Matrimonial Law *(w/Forms)*

Mechanic's Liens *(w/Forms)*

Mortgages *(w/Forms)*

Mortgage Foreclosures *(w/Forms)*

New York Residential Landlord-Tenant Law and Procedure*

Probate and Administration of Decedents' Estates *(w/Forms)*

Real Estate Transactions-Commercial Property *(w/Forms)*

Real Estate Transactions-Residential Property *(w/Forms)*

Representing the Personal Injury Plaintiff in New York *(w/Forms)*

Social Security Law and Practice*

Zoning, Land Use and Environmental Law *(w/Forms)*

*These titles do not include downloadable forms

Order online at **www.nysba.org/PSS2018** or call **1.800.582.2452**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

Mention code: PUB8916 when ordering.

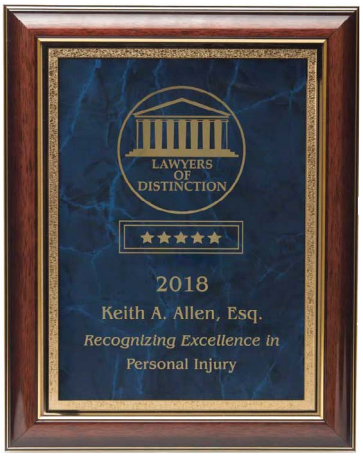
NYSBA

Periodicals

ADDRESS CHANGE – Send To:
Member Resource Center
New York State Bar Association
One Elk Street
Albany, NY 12207
(800) 582-2452
e-mail: mrc@nysba.org

Congratulations to the 2017-2018 New York Lawyers of Distinction

RECOGNIZING EXCELLENCE IN THE PRACTICE OF LAW



**Lawyers of Distinction uses it own independent criteria, including both objective and subjective factors in determining if an attorney can be recognized as a Lawyer of Distinction in the United States in their respective field. This designation is based upon the proprietary analysis of the Lawyers of Distinction organization alone and is not intended to be endorsed by any of the 50 United States Bar Associations or The District of Columbia Bar Association*

Appellate Law
Jillian Rosen, Esq.

Bankruptcy Law
Anthony Giuliano, Esq.
Robert L. Pryor, Esq.
Harold C. Seligman, Esq.

Civil Litigation
John Halloran, Esq.
Robert N. Chan, Esq.
Richard St. Paul, Esq.
Paul Freeman, Esq.
Bradley Schnur, Esq.
Shawn Kelly, Esq.
Robert A. Glick, Esq.
Peter W. Yoars Jr., Esq.
Christopher LoPalo, Esq.
Adam Cahn, Esq.

Corporate & Transactional
Kevin Landau, Esq.
Eric Fidel, Esq.
Ruth Jin, Esq.
Deirdre Pierson, Esq.
Mary Madeline Roberts, Esq.
Monte Albers De Leon, Esq.
Mark Montanaro, Esq.
Jeffrey Davis, Esq.
Samira Arabnia, Esq.
Matthew Browndorf, Esq.
Kevin Landau, Esq.

Criminal Defense
Robert Brown, Esq.
James Hopkins, Esq.
Richard Portale, Esq.
Meir Moza, Esq.

Disability & Workers Comp
Rina Lee, Esq.
Gennaro Battiloro, Esq.

Elder Law
Brian Andrew Tully, Esq.
Joan Lensky Robert, Esq.
Nancy Burner, Esq.
Anthony Marrone, Esq.

Employment & Labor
Jian Hang, Esq.
Zafer Akin, Esq.
Derek Smith, Esq.
Josephine Greco, Esq.
Christopher Davis, Esq.
William Phillips, Esq.
Gennadiy Naydenskiy, Esq.

Estate Planning - Wills & Trusts
Glenn Busch, Esq.
Anthony V. Falcone, Esq.
Christina Panzarella, Esq.
Clifford Meirowitz, Esq.
Richard Luthmann, Esq.

Family & Divorce Law
Carrie Anne Cavallo, Esq.
Esther Schonfeld, Esq.
Lance Meyer, Esq.
John Yacos, Esq.
Jennifer Coden, Esq.
Alissa Van Horn, Esq.
Lynn J. Kampel, Esq.
Ian Mednick, Esq.
Madeleine Nisonoff, Esq.
Virginia G. Alvarez, Esq.
Allison Rockmore, Esq.
Herbert Smith Jr., Esq.
Byron A. Divins Jr., Esq.
Bryan Salamone, Esq.
Stacey A. Balduf, Esq.
Barbara Strauss, Esq.
Cheryl Mallis, Esq.
Steven J. Mandel, Esq.

Family & Divorce Cont'd
Faith Miller Esq.
Michael J. Alber, Esq.
Howard Pobiner, Esq.
Lawrence Schwind, Esq.
Barton R. Resnicoff, Esq.
Clifford Petroske, Esq.
Risa Kass, Esq.
Alla Roytberg, Esq.

Immigration
Susan Henner, Esq.
Dana Davidson, Esq.
Owolabi Salis, Esq.

Intellectual Property
Maurice Ross, Esq.
William Samuels, Esq.

International Arbitration
Rebeca E. Mosquera, Esq.

Medical Malpractice
Sherri L. Plotkin, Esq.

Not-For-Profit Law
Jacki Rogoff, Esq.

Personal Injury
Brian J. O'Connor, Esq.
Michael J. Kuharski, Esq.
Louis Brindisi, Esq.
Thomas Schimmerling, Esq.
Marc Freund, Esq.
David Perecman, Esq.
Charles Gassler, Esq.
Veronica Renta Irwin, Esq.
Ava Zelenetsky, Esq.
Lennon Edwards, Esq.
Stanley Sanders, Esq.
Shawn Carey, Esq.
Adam Thompson, Esq.

Personal Injury Cont'd
Richard Kenny, Esq.
Bruce Schonberg, Esq.
Martin Wolf, Esq.
Adam Shapiro, Esq.
Robert Marino, Esq.

Private Placement Securities Law
Erik P. Weingold, Esq.

Real Estate & Property
Dianne LeVerrier, Esq.
Kenneth Schwartz, Esq.
John R. Merlino Jr , Esq.
Jonathan Houghton, Esq.
Paul Sciocchetti, Esq.
Anthony R. Ianniello, Esq.

Securities Litigation
Emma Gilmore, Esq.
Justin Nematzadeh, Esq.

Special Education
Gina Decrescenzo, Esq.
Michelle Siegel, Esq.
Marshall Bellovin, Esq.

Speeding & Traffic Ticket Defense
Paul Villanueva, Esq.

Sports Law
Mikhaile Savary, Esq.

Trust & Estate Litigation
John Lang, Esq.

Workers Compensation
Patrick Fallon, Esq.
Todd Miller, Esq.

NOW ACCEPTING APPLICATIONS FOR 2018 | LAWYERSOFDISTINCTION.COM