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Trading Client Trust

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A Glimpse Into Insider Trading Within the Legal Profession

Devika Kewalramani, Jason Canales and Amanda Kane

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Teach Your Parents Well[1]

President's Message

BY SHARON STERN GERSTMAN

On February 14, 2018, a troubled young man walked into Marjory Stoneman Douglas High School in Parkland, Florida, with an AR-15 semi-automatic style weapon and multiple magazines. Within six minutes, 15 students and two staff members were killed and 17 more were wounded. This mass shooting was an all-too-familiar event in recent U.S. history. The Las Vegas Route 91 Harvest Country Music Festival, the Pulse nightclub in Orlando, the San Bernardino Inland Regional Center, Sandy Hook Elementary School, and Columbine High School have become famous as the sites of mass shootings. Each time there was renewed hope that the epidemic of mass shootings would be addressed with an open debate on the appropriate policy for state and federal gun laws and with increased funding and oversight for mental illness. Each time we were disappointed that the debate that should have occurred within Congress and the state legislatures did not occur and that funding for treatment of mental illness was not increased.

There is hope that this time it will be different. Thanks to the surviving students of Marjory Stoneman Douglas High School, who have, in turn, energized students across America, the issue may not retreat into the ether, as it has done many times in the past. Already, there have been national marches and walk-outs, with some real results. The students and their parents put a lot of pressure on the Florida legislature and governor to enact new gun laws. There has been no visible effect yet on Congress to follow suit, but the students have stated that they will continue their protest until change occurs.

As someone who came of age during the era of actions against the Vietnam War and for civil rights for African Americans, this all comes as very welcome news. The protests against the war and many actions for civil rights (e.g., sit-ins, Freedom Rides, marches) were all populated, and often planned, by students. Students also organized voter registration drives and worked on local campaigns. In many cases, the young people led and their elders followed, changing the point of view of the majority of Americans, and real change occurred. Until the Parkland shooting, too many young people had been complacent about political involvement – some because they were too focused on their individual needs and wants, and some because they couldn't see a path to achieving any change through the political process. It is refreshing to see how excited they are about making a difference. I hope that this action translates into a persistent interest in voting and otherwise making their views known to their elected officials.

The debate on constitutional and appropriate limits on gun and ammunition acquisition and ownership is complex and divisive. There is often a real lack of understanding of opposing views and mischaracterization of what the other side hopes to accomplish in the rhetoric which surrounds the issue. There are owners of considerable numbers of guns who not only are very responsible in their use, safety and training, but in some respects more responsible than many of us who have never owned a gun. A young woman told me what it was like growing up in a home full of guns. Her father trained her and her brother on the proper use and storage – the guns were always emptied of ammunition and locked when not in use – and growing up, toy guns were never permitted in their house or anywhere else she and her brother went.

The message was clear: Guns are not toys – they are serious and dangerous tools. In contrast, while neither I nor any member of my family ever owned a gun, my youth included playing Roy Rogers and Dale Evans frequently with my cousins, complete with cap guns. The point is that those of us who cannot imagine owning a gun cannot simply respond, "What's the problem?" when the subject of gun laws comes up. There is another side to the debate.

This is why the NYSBA Task Force on Gun Violence could not reach a consensus on the proper approach to stemming gun violence. The only recommendations in its 2015 report, titled "Understanding the Second Amendment," were the need for education and the repeal of the Dickey Amendment, which limited the ability of the Centers for Disease Control and Prevention (CDC) to accumulate data on injuries caused by gun violence. The Dickey Amendment has been repealed this year, although there is no funding allotted to CDC research on the subject. The Report does includes a superlative scholarly and objective analysis of the constitutionality of various restrictive measures. It is invaluable in informing us about what is or is not constitutional. The Task Force is working on an update to include the cases which have been decided since 2015, but even the 2015 version (http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=54335) is worth rereading.

***

This is my last message to you as NYSBA President. It has been the greatest honor and pleasure of my professional life to represent our members in our advocacy in New York, nationally, and around the world. NYSBA is held in high esteem everywhere. Thank you for being a member.

1. "And you, of tender years, can't know the fears that your elders grew by. And so please help them with your youth, they seek the truth before they can die." Crosby, Stills, Nash & Young, "Teach Your Children."

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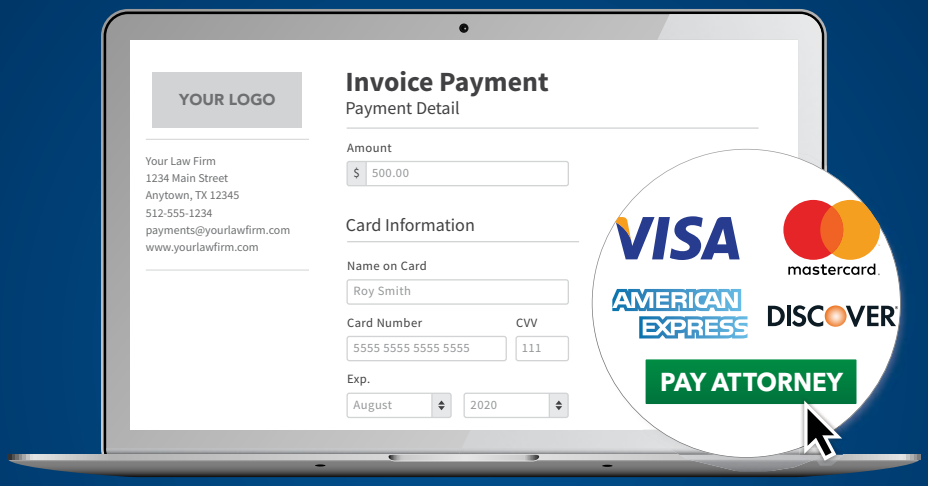

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"Ex-BigLaw Patent Attorney Convicted of Insider Trading for Tipping off Friend About Client Merger"

"Ex-Partner Denies Insider Trading Charges Amounting to $1 Million in Illicit Trading Profits"

"Husband of BigLaw Associate Denies Insider Trading Charges for Trading on Non-Public Merger Information"

"BigLaw Employee Charged in $5.6 Million Insider Trading Scheme"

Have you seen these recent headlines? They highlight a disconcerting increase in the number of insider trading charges against lawyers. The irony is that trust and confidentiality are the pillars on which a client-lawyer relationship stands. Insider trading allegations against a lawyer have the effect of ripping away at the very core of that relationship. The legal profession is regulated by rules of professional conduct that set high ethical and professional standards for lawyers. Moreover, lawyers and law firms are bound by their duty of confidentiality owed to clients. This requirement to protect client information is not a new obligation. So, how can this happen? Could it be because sensitive client information is more readily available at law firms via electronic means such that improper access and use may go undetected or unreported? Whatever the possible causes may be for the proliferation of insider trading activities by lawyers, it seems that there may be a much darker problem facing the legal profession that may need to be looked at and addressed.

Part I of this article will examine recent cases involving insider trading committed by lawyers, their friends and family, non-legal staff and hackers. Part II will highlight the ethical issues that surround the alleged misconduct. Part III aims to lay out some practical tips and guidelines to aid lawyers and law firms on how to keep insider trading issues outside the firm.

PART I: RECENT CASES: EMERGING PATTERNS

A growing number of insider trading cases involving lawyers and law firms generally seem to fall within three sets of categories: the first involves lawyers who are alleged to

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have traded on client information for their own benefit. The second involves lawyers who dole out tips to friends, family and colleagues who then trade on that information. The third involves law firms that may have unwittingly left their client information vulnerable to attack and use by third parties, such as hackers and family members, who then steal the information and trade on it.

Lawyers Directly Making Illicit Trades

The first group of cases involves the most egregious examples of lawyer misconduct – lawyers who themselves unlawfully trade on and profit from confidential client information. Recently, an attorney was convicted and sentenced to 30 months in jail for his role in a large insider trading scheme and was subsequently disbarred by consent by the New Jersey Supreme Court.[1] That attorney, along with a fellow associate, leaked information to a hedge fund about an upcoming client merger through prepaid cell phones in exchange for envelopes of cash.[2] They allegedly made a profit of $32,500.[3] The hedge fund founder and manager who traded on the information was also found guilty of securities fraud and conspiracy, and was fined $92.8 million.[4]

In another instance, a former law firm associate was convicted and subsequently disbarred because of his part in a 17-year, multimillion-dollar insider trading scheme.[5] The associate began the scheme as a young summer associate, feeding non-public client information to traders, and followed it through his early years as a licensed attorney at various large law firms until his arrest.[6] The D.C. Court of Appeals that ultimately disbarred the associate concluded that his insider trading habit was a "crime of moral turpitude."[7]

Another recent case involved an ex-law firm partner accused of using confidential merger information to make trades amounting to $1 million in profits. The partner was alleged to have improperly accessed

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documents related to pending merger announcements belonging to at least 11 firm clients (none of which he personally advised) before tipping off his neighbor and making trades for himself.[8] Likewise, a real estate partner was sentenced to a six-month imprisonment and was fined for purchasing stock in a firm client on the eve of a merger announcement.[9]

Lawyers as Tippers

The second category of cases involves lawyers who breach the fiduciary duties owed to their clients by consciously revealing confidential client information to others, who then use that information to unlawfully trade. For example, a former patent attorney was convicted of insider trading charges by a Brooklyn federal jury for tipping off his friend about a client merger after drinking several glasses of wine and becoming intoxicated during dinner.[10] The friend bought $585,000 worth of stock in the company for himself and clients, netting an illegal $400,000 in profits.[11]

Another insider trading case involved a young transactional lawyer who inadvertently tipped off her father about an upcoming client merger while she was working from home during the holidays.[12] Her father, also an attorney, saw his daughter's transaction documents in the house, including disclosure schedules which identified one of the merging parties to the transaction by name.[13] He then purchased shares in the merging company early on the day the merger was scheduled to be announced.[14] After the announcement, the father sold his shares, earning a small profit.[15] The SEC charged the father with misappropriating his daughter's material, nonpublic information by breaching his family duty of loyalty and confidentiality.[16] The case was ultimately settled.[17] Situations like this exemplify just how vigilant lawyers need to be, even at home where family members are present, with handling paper documents having critically sensitive client information.

Hackers, Husbands and Others

The third category of cases involves hackers, friends and family members of lawyers, and law firm employees who breach law firm security protocols, steal confidential client information and trade on it. Recently, three foreign citizens were criminally charged in the United States for trading on confidential corporate information related to upcoming mergers obtained by hacking into a law firm network and email servers.[18] The hackers were charged with conspiracy, insider trading, wire fraud and computer intrusion. The prosecutors on the case stated that the intruders made more than $4 million in profits through the scheme.[19] Following this case, U.S. officials have continued to warn that law firms are prime targets for hackers given the highly sensitive and valuable client information they hold.[20] Given the potential negative publicity, reputational injury and disciplinary implications that could haunt a firm and its lawyers, a deeper look may be warranted into how information security breaches are occurring at law firms and what law firms and lawyers can do to make sure that they are properly securing confidential client data now and in the future.

Lawyers are obligated to forever protect and preserve the information and documents their clients entrust to them.

Sometimes, people whom lawyers trust (and share a bed with) can also go rogue. Recently, the husband of a now-suspended law firm associate admitted to insider trading charges after using confidential merger information he gleaned from conversations with his wife, information which he then used to trade on in an account set up in his mother's name.[21] The associate's husband is accused of making $120,000 in profits from the information he learned.[22]

Law firm employees have also become entangled in insider trading scandals. In 2015, a systems engineer who scanned his law firm's computer system for merger information was sentenced to two years in prison.[23] In 2016, a managing clerk of a New York law firm tipped his friend off about upcoming mergers his law firm was involved with. He allegedly discovered the information by rummaging through his law firm's computer system using search terms such as "merger agreement," "bid letter" and "due diligence."[24] His sentence was 46 months in prison.[25]

In other instances, non-legal staff in law firms have gone to great lengths to attempt to cover up their indiscretions. For example, the managing clerk of a law firm, together with a trader and a middle man, created a scheme whereby the middle man would transfer material non-public information gleaned by the managing clerk to the trader, who would then use the information to trade for himself and his customers.[26] The managing clerk faced charges by the SEC stemming from an insider trading operation that amounted to $5.6 million in profits.[27] According to the SEC's complaint, the scheme was structured to "avoid detection" by sharing information on post-it notes

and napkins at specified meeting places – usually coffee shops or Grand Central Station.[28] Once the post-it or napkin was transferred, the recipient would rip up or swallow the piece of paper.[29] Not only was information conveyed about what companies were merging, but information about the timing of such mergers was also

conveyed. That, in turn, was used to create fake paper trails of memos and email exchanges that purportedly contained research and analysis on why the trades should be made. In fact, these emails were fabricated in order to create the false appearance that the trades were being made legitimately based on actual research, rather than improperly based on material non-public information.[30]

PART II: ETHICS: A LAWYER'S STOCK-IN-TRADE

A lawyer who may be targeted by the government for insider trading violations could potentially face more than civil and criminal penalties – the lawyer's professional conduct involving potential confidentiality breaches and other ethical transgressions may also be under disciplinary scrutiny. Given that New York's Rules of Professional Conduct (the "Rules")[31] apply equally to lawyers and law firms (including legal departments of organizations),[32] the lawyer's firm may also be potentially impacted by the alleged misconduct of the lawyer for possibly failing to make reasonable efforts to ensure that firm lawyers conform to the ethical rules.[33] Below is a brief discussion of some of the key ethical issues surrounding insider trading by lawyers that may be implicated under the Rules.

Duty of Confidentiality

Lawyers are obligated to forever protect and preserve the information and documents their clients entrust to them. Because a lawyer who engages in insider trading may be liable for misappropriating material-non-public client information, his or her conduct strikes at the very crux of the confidentiality obligation. The duty of confidentiality contained in Rule 1.6(a) provides that "[a] lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person," unless the client gives informed consent or the disclosure is impliedly authorized to advance the best interests of the client or is permitted by the Rules.[34] Moreover, Rule 1.8(b) states that "[a] lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent," except as permitted or required by the Rules.[35] The definition of "confidential information" is contained in Rule 1.6(a) which "consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." The definition excludes a lawyer's legal knowledge, legal research and information that is generally known in the local community, trade, field or profession to which the information relates. Notably, not only is the definition of confidentiality broad, even information not directly received from the client, but from others in the course of the representation, may fall within the protection of the rule.

In addition, Rule 1.6(c) states that:

> A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).[36]

This rule places an additional responsibility on lawyers to take reasonable security measures to prevent confidential client information from being accidentally disclosed to outsiders or improperly accessed by others without the firm's or client's authorization.[37]

If a lawyer breaks his or her oath of silence by sharing any confidential client information – even innocently and without knowledge of the other person's intentions – he or she may still breach his or her duty of confidentiality to clients, regardless of whether he or she is found to be liable under the insider trading laws. It is also important to remember that while lawyers and non-lawyers can get into trouble for violating the insider trading laws, only lawyers are subject to regulation by the ethical rules and can be disciplined by the appropriate grievance committees for unethical conduct.

Duty of Technological Competence

Recent technology amendments to the comments accompanying a lawyer's duty of competence signify how closely the duty of confidentiality is tied to the duty of competence: lawyers need to act competently to protect client confidentiality. While traditionally the elements

of competent representation of a client required "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,"[38] the competency criteria for the modern practitioner has been upgraded to include "technological" competence. Specifically, Comment [8] to Rule 1.1 elaborates on lawyer competence, emphasizing the interplay between the duty of confidentiality and the use of technology in law practice:

> To maintain the requisite knowledge and skill, a lawyer should…keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information . . . [39]

Lawyers and law firms are ethically obligated to take reasonable precautions to protect client data, both electronically and physically. To comply with the techno-competency requirement of Rule 1.1, they need to ensure that adequate cyber security measures are taken to protect against client data breaches from the inside and outside. Also, the broad confidentiality obligation of Rule 1.6, coupled with recent insider trading security breach cases discussed above, demonstrate just how critical it is for lawyers to be equally careful with sharing information with others, guarding physical client documents from being improperly accessed and used by outsiders (and insiders), and holding, transmitting and storing electronic client information.

In addition, lawyers and law firms have an ethical duty to stay on top of technological developments and to reasonably assess the potential security risks posed by the technology they use to make sure confidentiality breaches can be avoided. Failure to do so could be an invitation for disaster. A recent study by a technology consultant reported that approximately two-thirds of U.S. law firms have experienced data breaches. A more detailed study by the same consultant showed that in a survey of over 200 law firms, only 34 percent have adopted comprehensive policies and procedures to protect confidential client documents, only 30 percent have an information security officer (or equivalent position), and 18 percent perform data penetrability and vulnerability tests on their systems. Of the firms surveyed, 66 percent faced security breaches and approximately 40 percent of firms failed to realize that breaches had occurred.[40]

To illustrate this, take one simple example: an M&A lawyer working on a merger could potentially risk committing ethical violations in the following scenario:

- Sending confidential client information to an unsecure personal email account, thereby allowing it to be stored and transmitted in an unsecured manner
- Creating the risk that others will view or have access to confidential client information, which can then be freely and widely disseminated to unintended recipients

Note, lawyers not only have a duty to not disclose confidential client information, but under Rule 1.6(c), to proactively make "reasonable efforts" to prevent the unauthorized disclosure of client information. Comment [17] to Rule 1.6 demonstrates the applicability of Rule 1.6(c) to situations like these, stating that "[w]hen transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."[41] However, Comment [16] to Rule 1.6 clarified that:

> Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by

> Rules 1.6, 1.9, or 1.18, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure.[42]

Currently, there are no established standards for law firms that identify exactly what constitutes "reasonable efforts," and many lawyers and law firms around the country are trying to grapple with the guidance issued by various state bar association ethics committees that shed light on compliance with the ethical duties while using evolving technology in law practice. The lack of clarity surrounding the "reasonable efforts" standard highlights the complex and intertwined relationship between the use of technology in law practice and protecting client confidentiality, while attempting to implement effective law firm data security practices. Lawyers and law firms need to keep up with rapidly changing technology in order to protect client information effectively. These types of efforts could also possibly root out any potential insider trading issues that may be lurking within the firm.

Firm-Wide Duty to Ensure Ethical Compliance

Under Rule 5.1, law firms as well as lawyers in management and supervisory roles are under a duty to: Make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.[43]

This overarching supervisory duty of law firms and senior lawyers incorporates many of the other ethical duties, such as confidentiality and competence that need to be exercised by lawyers to ensure firm-wide ethical compliance.[44] Many firms take steps to comply with Rule 5.1 by, for example, conducting ethics and confidentiality training programs and CLEs and instituting data security policies and practices to ensure protection of client information.

Firms and their senior lawyers also have a duty to make sure that the conduct of junior lawyers and non-lawyers who assist with client matters is compatible with the professional obligations of lawyers.[45] However, junior lawyers under the guidance of senior lawyers are not shielded from responsibility for their own ethical conduct and are independently bound by the Rules, the same way supervisory lawyers are.[46] A chain of command is no excuse for ignorance or noncompliance with the profession's ethical rules and lawyers at every level at a law firm should be aware of these duties to ensure that their conduct and that of non-lawyers (employed or retained by the firm) do not lead to any violations of the ethical rules. Building greater internal firm sensitivity and awareness of the fundamental importance of client confidentiality could probably go a long way to wipe out any possible instances of unprofessional conduct involving use or disclosure of client information, such as tipping, trading or innocent blabbing.

Duty to Report Misconduct

Insider trading violations by a lawyer can raise serious concerns about the lawyer's honesty, trustworthiness or fitness. Rule 8.3 provides that if a lawyer within a firm knows that another lawyer "has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer" he or she has a duty to report such knowledge to the appropriate authorities empowered to investigate or act upon such ethical violations.[47] While there is no duty to self-report ethical misconduct under Rule 8.3,[48] lawyers are members of a self-regulated profession, and therefore have an ethical obligation to report professional misconduct of others (barring disclosure of confidential information protected by Rule 1.6).[49] It is possible that failure to report attorney misbehavior where it meets the standards of Rule 8.3 could potentially put the firm or its lawyers at risk of violating the duty to report professional misconduct, something that lawyers should always keep at the back of their minds.

Duty to Avoid Misconduct

A lawyer is also prohibited under Rule 8.4 from engaging in "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer," "conduct involving dishonesty, fraud, deceit or misrepresentation," or "any other conduct that adversely reflects on the lawyer's fitness as a lawyer."[50] Rule 8.4 reflects the close connection between illegal activity and unethical behavior – a lawyer can be disbarred if convicted of a crime.[51] It is also important to be aware that Rule 8.4 is a stand-alone rule on misconduct, and could apply even if the alleged misconduct by the lawyer or law firm is unrelated to the practice of law or the representation of clients.

Stealing sensitive client data, sharing with a friend, or trading to profit on it are the types of attorney behavior that do not live up to the fundamental tenets that underlie the legal profession. Law firms and lawyers may need to more closely understand not just how insider trading violations may occur within their organizations, but more important, why they are happening more frequently, and what they can do to stop it.

PART III: PRACTICAL (NOT IMPROPER) TIPS

So, what more can lawyers and law firms do to avoid breaches of confidentiality stemming from lawyer misconduct or improper use of technology? Some simple starting-off points for consideration in deciding how to best protect against nefarious behavior that may compromise confidential client information are discussed below:

- Create and maintain a restricted securities policy and list of securities that can be sent to the *entire* firm to confirm which securities cannot be traded. It should be regularly updated to add or delete

items, as needed. Consider firm-wide training sessions to explain the purpose and importance of the policy, the need to review the list, how to comply, and consequences of non-compliance.

- Design special secure data storage rooms for merges and acquisitions that have strict security protocols and can only be accessed by the lawyers working on the matters and the clients.
- Avoid directly referencing the companies involved in upcoming (especially, highly sensitive) deals, wherever possible. This is a basic precaution that can help prevent the dissemination of information that could potentially lead to insider trading issues.
- Establish internal controls to monitor computer network activity to identify and prevent unauthorized or unusual access to client-related data.[52] Some law firms may be subject to clients' outside counsel guidelines that may require law firms that receive non-public information to certify compliance with applicable restrictions on insider trading, including taking appropriate steps to limit firm lawyers, non-legal employees and third party consultants, if any, from accessing or using such information.
- Develop and regularly conduct internal ethics and confidentiality training programs to educate and build awareness within the firm regarding the types of activities that could create potential risks to client confidentiality and privilege, and the possible consequences when ethical duties may be violated, even accidentally.

NO TRADE-OFFS

Improper tipping or illegal trading present no trade-offs for lawyers. They risk potential ethical violations and possibly disciplinary charges. Trading client trust tramples over the professional boundaries of the client-lawyer relationship.

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35. *See* Rule 1.8(b).
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42. *See* Cmt. [16] to Rule 1.6.
43. *See* Rule 5.1.
44. *Id.*
45. *See* Rule 5.1; See Rule 5.3, Cmt. [3].
46. *See* Rule 5.2, Cmt. [2].
47. *See* Rule 8.3(a).
48. Note: New York's Judiciary Law § 90(4)(c) requires a lawyer to report his or her criminal conviction by a federal or state court to the Appellate Division of the New York State Supreme Court.
49. *See* Rule 8.3.
50. *See* Rule 8.4.
51. Under New York's Judiciary Law § 90(4)(a), a lawyer convicted of a felony under New York law, or convicted of a crime in another jurisdiction that would constitute a felony in New York, is automatically disbarred.
52. Recently, three hackers broke into several prominent New York law firms and stole M&A information for improper trading purposes. Bob Van Voris, *Chinese Hackers Must Pay $8.9 Million in Law Firm Data Theft*, Bloomberg, May 10, 2017, https://www.bloomberg.com/news/articles/2017-05-10/chinese-hackers-must-pay-8-9-million-for-law-firm-data-theft.

The Law of Guardianship and Involuntary Admissions After Kendra's Law

By Bruce M. DiCicco

Article 9 of the New York Mental Hygiene Law (MHL) is a statute designed to assist the mentally ill while balancing the constitutional right to freedom. But is the legal threshold imposed by statute properly balancing the needs of the mentally ill who would benefit from treatment when the period of restricted liberty is expressed in just hours or a few days? This article will look at an all-too-common scenario and consider the impact of Kendra's Law on the matter.

HYPOTHETICAL

Your client's brother earned straight As in school and went to an Ivy League college, graduating with high honors, while also getting high frequently. The brother had amazing powers of concentration that allowed him to study days on end with little or no sleep. He got a high-paying job and was off on a career in business after graduation. As life progressed you and your family noticed his behavior becoming unusual. He left his job in order to write a book about "the universe and alien influences." It was 800 pages and consumed all his time for a year. He began having outbursts about inconsequential things.

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He developed beliefs about people trying to harm him and spying on him that seemed delusional. He stopped working and was supported by contributions of family members who responded to urgent pleas for financial assistance or else terrible things would happen of one sort or another. He became severely withdrawn and reclusive.

Visits to a psychiatrist reveal a diagnosis of bipolar disorder with paranoid features. He has responded to encouragement from family members and anti-psychotic medicine, which brings him out of his manic and pre-manic states within a day or two if it has not gone too far or gotten too deep. Left untreated, long-term periods of mania take much longer to correct. After treatment and counseling that helps readjust brain chemical levels, he returns to work, as jobs are easy to come by with his educational background and high intelligence. After treatment he realizes he was manic and is grateful to be back in the normal flow of life. But then alcohol and/or drug use (not necessarily in that order) or stress brings on the manic cycle anew. You recognize the symptoms. This time you want to get ahead of the curve so you call Adult Protective Services Program (APS), which provides services for physically and/or mentally impaired adults in New York. The agency works to help at-risk clients live safely in their homes, but your client's brother refuses them access to his apartment and does not respond to any offers from friends or family to assist. His psychiatrist will attest to the fact that he suffers from mental illness and his condition is deteriorating again, but since he has not come to appointments for several months the psychiatrist is reluctant to give an opinion on whether he is in any present danger.

The concern for his well-being and the manic behavior moves you to have an old family friend knock on his door. The brother allows access. The friend views the substantial destruction and disassembly of the apart-

ment. Appliances have been stripped down and taken apart, electrical outlets have been removed from the walls, exposing bare wires, and large sections of the wooden flooring is torn up and placed into a huge pile inside the apartment with the nails exposed. When asked about this, the brother says he is looking for spies and aliens that he knows are there and who are listening to him. You do not know whether bills have gone unpaid or the status of his physical or nutritional health, but you do know that things have reached a critical juncture and are headed downward again. He refuses any medical intervention, saying he has "super powers" that will protect him from all things. What to do?

GUARDIANSHIP

New York State law allows for the appointment of guardians for incapacitated persons. Mental Hygiene Law Article 81 requires a petitioner to meet the highest standard of proof in civil cases, which is the "clear and convincing evidence" standard.[1] The petitioner in a guardianship case must satisfy the court that the evidence makes it highly probable that what the petitioner claims is actually what happened.[2] The evidence required for a personal needs guardian requires a showing of deficiencies in attending to the activities of daily life, including "procurement of food, clothing, arranging for or maintaining shelter, coordinating health care or the inability of the individual to understand and appreciate the risk inherent in their behavior to their personal safety."[3] It is unlikely, given the facts of the hypothetical, that the brother will make statements elucidating his superhuman powers that a court could find would cause him harm. It is also the case that he cannot be made to testify in an Article 81 proceeding.[4] Petitioners will need a better approach under the circumstances of the hypothetical to get care for the subject.

MENTAL HEALTH VOLUNTARY COMMITMENT

Article 9 of the MHL comes to the rescue, or does it? A director of any hospital may receive as a voluntary patient any suitable person in need of care and treatment and who makes a written application.[5] The director of any hospital may also receive as an informal patient any suitable person who requests care and treatment without making a formal or written application.[6] Any patient admitted under this section of the law is, however, free to leave any time after being admitted.[7] The patient must also be made fully aware that the hospital is requesting that he or she be admitted as mentally ill, that he or she is making an application for that admission and the nature of the voluntary or informal status governing his or her release or a conversion to involuntary admission status.[8] Typically, people like the brother in the hypothetical will not even let family members into their apartments, so there is no way of getting them to take a ride down to Bellevue and, even if they did, once they realized it was a hospital, they would very likely just walk out.

MENTAL HEALTH INVOLUNTARY COMMITMENT AFTER PRESENTMENT

The provisions for involuntary admissions are the next consideration. A director of a hospital may petition under MHL § 9.27 to receive a mental patient. This typically arises on an arrest of some sort, even for a minor criminal offense, where the police present the person to the hospital. In fact, state and local officers have a duty to encourage mentally ill persons to apply for admission as a voluntary or informal patient.[9] Two psychiatrists could then certify the need for treatment under the controlling standard, which is the existence of a mental illness for which involuntary care and treatment is required.[10] The standard for required treatment is not spelled out in the statute but it has been held to be evidence that the patient poses a substantial threat of physical harm to himself and/or others.[11] The doctors are also required to consider alternative forms of care and treatment that do not require admission to the hospital.[12] A third physician must also confirm the findings of the first two certifying physicians.[13] An application for the admission of such person attesting to the need for treatment would also be required.[14] The application can come from any one of 11 listed people, such as a roommate who observed the behavior,[15] a family member,[16] the superintendent of a cor-

rectional facility,[17] other directors of facilities treating the mentally ill,[18] or a treating psychiatrist who sees the patient in a mental illness facility.[19] The certificates from the physicians must be executed within 10 days of the admission.[20] Family members are typically more than willing to make the application. Section 9.39 of the MHL also provides for emergency admissions for immediate observation, care and treatment. Ah, but how to get the brother in our hypothetical to be politely arrested or present before hospital personnel?[21] This is unlikely to happen given the facts of the scenario. Next idea.

MENTAL HEALTH WARRANT OF COMMITMENT AND EMERGENCY TREATMENT

The law allows one to bring a petition seeking a Warrant of Commitment supported by a verified statement. The statement must show that a person is apparently mentally ill and is conducting himself or herself in a manner that would only be disorderly conduct of a person who is not mentally ill, or that the person is conducting himself in a way that is likely to result in serious harm to himself.[22] The statute allows the court to direct the person be brought before the court (by the Sheriff's Department in handcuffs is typically how this is accomplished) for a hearing after which the person may be ordered to a hospital or comprehensive psychiatric emergency program for evaluation as to whether the person should be retained. If ordered to a hospital, MHL § 9.39 applies, and if to the program, MHL § 9.40 applies. Both spell out detailed procedures and safeguards for the patient. MHL § 9.40 dictates emergency observation for a period not to exceed *72 hours* upon a referral made by the court. The evaluation must take place "as soon as practicable" but within *six hours* of being received into the emergency room.[23] MHL § 9.39 directs retention for no more than *48 hours* after admission upon finding that the person meets the standard for emergency admission, and that finding must be confirmed by a second physician within that time. This sounds promising to get help to our hypothetical brother.

STANDARD APPLIED BY THE COURTS TO COMMIT

The court must find, however, for the aforesaid involuntary commitments that the illness is ". . . likely to result in serious harm to the person or others."[24] Or the likelihood of serious physical harm as manifested by suicide attempts or threats of suicide or homicidal or other violent behavior.[25] But the brother really does not fit in these categories just yet and herein lies the problem. Well-meaning and loving family members face well-ingrained legal rights of the ill patients, but is the protection of these rights doing more harm than good? It is also a principle of the common law that every adult of sound mind has a right to determine what shall be done with his or her own body and to control the course of his or her own medical treatment.[26] Precedent has declared that such rights may be set aside only in narrow circumstances, including those where the patient "presents a danger to himself or other members of society or engages in dangerous or potentially destructive conduct within the institution."[27]

Courts have looked to a variety of factors in evaluating harm. Where a party's ability to comprehend her illness and need for treatment is impaired, an involuntary admission for psychiatric treatment is appropriate.[28] Courts have ruled that a showing of recent suicidal or homicidal conduct is not necessary for an involuntary admission. *Rueda v. Scharmine*, *supra* [holding that disrobing in public could constitute conduct demonstrating that a person is a dangerous risk to herself under MHL § 9.39, establishing a substantial risk of physical harm]. This is not the only hurdle, though, in involuntary cases because medication is also typically needed, as in the hypothetical case under discussion here.

The law was designed to address situations of mental illness before violence occurred by allowing petitions which may result in court-ordered treatment for mental illness.

Assuming the harm standard is met, it has been held that an order directing involuntary psychiatric treatment is only appropriate where the patient is unable to appreciate his or her illness.[29] Courts have recognized the power of the state to order involuntary treatment under the doctrine of *parens patriae*.[30]

The seminal Supreme Court pronouncement driving the foregoing case law is that the State may not confine a non-dangerous individual who is capable of surviving safely in freedom by himself or herself or with the help of willing and responsible family members or friends. In *O'Connor v. Donaldson*, the patient had been confined for nearly 15 years while continuously demanding his release from a Florida mental institution.[31] The patient posed no danger to others or to himself during the time he had been confined, and he also showed that his requests for release had been supported by responsible persons willing to provide any care he might need on release. *O'Connor* was a terribly egregious set of facts. Is the application

of the same standard wisely applied to limited loss of freedom as provided for in Article 9 and does such an application help the mentally ill individual by preventing evaluation and treatment?

KENDRA'S LAW

New York State has reacted to violent incidents involving mentally ill persons who were not effectively treated by enacting MHL § 9.60, designated as "Kendra's Law." The statute was named after Kendra Webdale, who was pushed to her death into a subway train in New York City by a mentally ill person. The law was designed to address situations of mental illness before violence occurred by allowing petitions which may result in court-ordered treatment for mental illness. In New York State one may, in addition to the previously discussed remedies, petition the court to require compliance with an assisted outpatient treatment program of persons over age 18 who are suffering from mental illness and who are unlikely to survive safely in the community without supervision, based on a clinical determination and other factors. The programs are known as AOTs. In order to petition, one must meet certain other criteria designed to identify persons with a history of mental illness.[32] The law is not permanent but rather scheduled to expire on June 30, 2022. A history of mental illness is defined as either:

> (i) twice within the 36 months prior to the petition mental illness has been a significant factor in necessitating hospitalization in a hospital, or receipt of services in a forensic or other mental health unit of a correctional facility or a local correctional facility, not including any current period, or period ending within the last six months, during which the person was or is hospitalized or incarcerated; or
>
> one or more acts of serious violent behavior toward self or others or threats of or attempts at, serious physical harm to self or others within the last 48 months, not including any current period, or period ending within the last six months, in which the person was or is hospitalized or incarcerated.[33]

Also required is a finding that as a result of the mental illness the person is unlikely to voluntarily participate in outpatient treatment that would enable the person to live safely in the community.[34] It is further required that the person must need assisted outpatient treatment in order to prevent a relapse or deterioration that would be likely to result in serious harm to the person or others, and the person will likely benefit from the assisted outpatient treatment.[35] As can be surmised, extensive medical testimony is likely required to establish these factors. In our hypothetical they are unlikely to be accomplished due to the condition and characteristics of the patient. Petitions under Kendra's Law can only be brought by the following persons:

(i) a person 18 years of age or older with whom the subject of the petition resides; or

(ii) the parent, spouse, sibling 18 years of age or older, or child 18 years of age or older of the subject of the petition; or

(iii) the director of a hospital in which the subject of the petition is hospitalized; or

(iv) the director of any public or charitable organization, agency or home providing mental health services to the subject of the petition or in whose institution the subject of the petition reside; or

(v) a qualified psychiatrist who is either supervising the treatment of or treating the subject of the petition for mental illness; or

(vi) a psychologist, licensed pursuant to Education Law §153, or a social worker, licensed pursuant to Education Law Article 154, who is treating the subject of the petition for a mental illness; or

(vii) the director of the community services, or his or her designee, or the social services official, as defined in the social services law, of the city or county in which the subject of the petition is present or reasonably believed to be present; or

(viii) a parole officer or probation officer assigned to supervise the subject of the petition.[36]

Numerous constitutional safeguards are included in Kendra's Law, such as notice of the petition under this section to all persons listed in MHL § 9.29, the mental hygiene legal service, the health care agent if any such agent is known, the appropriate program coordinator, and the appropriate director of community service. The petition must be accompanied by an affirmation or affidavit of a physician who shall not be the petitioner stating that the physician has personally examined the subject of the

petition and that the subject of the petition is uncooperative.[37] The subject of the petition has a right to be represented by the mental hygiene legal service or privately financed counsel, at all stages of the proceeding.[38] A hearing on the petition shall be no later than three days from the date such petition is received by the court, excluding Saturday Sundays and holidays. Adjournments shall be permitted only for good cause.[39]

Numerous constitutional safeguards are included in Kendra's Law.

CONCLUSION

In our hypothetical, there has been no electrocution from the exposed wires and no puncture wounds from the demolished flooring, *yet*. As pointed out, the courts will balance the loss of liberty versus harm. Under the hypothetical facts, a petitioner will likely lose without more physical harm or threats of harm to self or others. But where is the superpower belief headed? Will a person having such beliefs step into the road believing he can stop an oncoming truck? Where is the hypothetical life of the brother headed if untreated mania continues unabated? Untreated bipolar disorder is a serious health risk because the longer it goes on the worse it becomes.[40]

Kendra's Law will likely not apply in our hypothetical due to the lack of mental illness history. It seems, therefore, that while society should be very cautious in denying one's liberty, treatment for very short periods of time as set forth in Article 9 of the New York statute, not the tragic 15 years reviewed in the seminal case of *O'Connor*, *supra*, might be more liberally construed so as to get help to the mentally ill before violence and harm emerge and before treatment becomes more difficult. The *O'Connor* standard, while appropriate in that case and others like it, is often being applied in the experience of this author in an overly restrictive manner to Article 9 limited evaluation/limited loss of liberty situations. This reluctance by the courts to consider consistent and demonstrated delusional beliefs as harmful in turn may defeat the purpose of Kendra's Law by not allowing documentation of the needed history of mental illness to trigger the AOT assistance that was intended to be given to our mentally ill population that does not involve confinement and the attendant loss of liberty.

1. MHL § 81.02 (b); 81.12 (a). See *In re Rosalie D.T.*, Case No. 32361-1-2017, 2017 N.Y. Misc. LEXIS 5095 (Nassau Co. Ct. Jan. 8, 2018), citing *In re Samuel S. (Helene S.)*, 96 A.D. 3d 954, 957 (2d Dep't 2012); *In re Maher*, 207 A.D.2d 133, 139–40 (2d Dep't 1994)).
2. Prince, Richardson on Evidence, § 3-205 (ed.); 1 *NY Pattern Jury Instructions* 2d. (Supp.), P.J.I. 1:64).
3. Russo & Machlin, *New York Elder Law & Special Needs Practice*, §8.3 (2017 ed.).
4. *In re Eugenia M.*, 20 Misc. 3d 1110(A) (Sup. Ct., Kings Co. 2008); *In re United Health Services Hospitals, Inc.*, 6 Misc. 3d 447 (Sup. Ct., Broome Co. 2004).
5. MHL § 9.13.
6. MHL § 9.15.
7. *Id.*
8. MHL § 9.17.
9. MHL § 9.21 (a).
10. MHL § 9.27(a).
11. *Rueda v. Charmaine D.*, 76 A.D. 3d 443 (1st Dep't 2010).
12. MHL § 9.27(d).
13. MHL § 9.27(e).
14. MHL § 9.27(b).
15. MHL § 9.27(b)(1).
16. MHL § 9.27(b)(2).
17. MHL § 9.27(b)(3).
18. MHL § 9.27(b)(3–11).
19. MHL § 9.27(b)(11).
20. MHL § 9.27(b).
21. This article does not include a discussion of the rights of a defendant who, as a result of mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his or her own defense and therefore cannot be prosecuted for a criminal offense. CPL § 730.20; see, for example, *Ending Disparities and Achieving Justice for Individuals With Mental Disabilities*, 80 Albany Law Review 1037 (2016). Nor does it discuss matters over which the family court has jurisdiction to order the psychiatric examination of a child. Family Court Act § 251 (a).
22. MHL § 9.43(a).
23. MHL § 9.40(b).
24. MHL § 9.40(a).
25. MHL § 9.39(a)(1) & (2).
26. *Rivers v. Katz*, 67 N.Y.2d 485, 492 (1986).
27. *Id.* at 495.
28. *Anonymous v. Carmichael*, 284 A.D.2d 182, 727 N.Y.S. 2d 408 (1st Dep't 2001) (where involuntary admission under MHL § 9.33 was directed because the patient was, "unable to understand the need for such care and treatment," had threatened his family with a weapon and demonstrated aggressive behavior). *Consilvio v. Diana W.*, 269 A.D.2d 310, 703 N.Y.S. 2d 144 (1st Dep't 2000) (where under MHL § 9.33 involuntary admission was ordered because the patient, ". . . does not understand the need for care and treatment," failed to treat her fractured ankle and lacked proper nutrition).
29. *Jay S. v. Barber*, 118 A.D.3d 803, 988 N.Y.S. 2d 68 (2d Dep't 2014) (directing the administration of medication).
30. *In re Sawyer*, 68 A.D. 3d 1734, 891 N.Y.S.2d 813 (4th Dep't 2009) (directing the administration of medication where the patient does not have the ability to make a reasonable decision about her medical condition); *In re McConnell*, 147 A.D.2d 881, 538 N.Y.S. 2d 101 (3d Dep't 1989) (directing involuntary psychiatric treatment where the patient is unable to appreciate her illness and cannot make a reasonable decision concerning appropriate treatment); *N.Y.C. Health & Hosps. Corp. v. Brian H.,* 51 A.D.3d 412, 415, 857 N.Y.S. 2d 530 (1st Dep't 2008) (where AIP failed to seek medical treatment after a fireworks device blew up in his hands, requiring amputation).
31. 422 U.S. 563, 576 (1975).
32. MHL § 9.60(a)(1) & (c).
33. MHL §9.60(c)(4)(i) & (ii).
34. MHL § 9.60(c)(5).
35. MHL § 9.60(c)(6) & (7).
36. MHL § 9.60(e).
37. MHL § 9.60(e)(3).
38. MHL § 9.60(g).
39. MHL § 9.60 (h).
40. See, for example, https://healthguides.healthgrades.com/finding-the-right-bipolar-treatment/the-dangers-of-untreated-bipolar-disorder.

An Overlooked Weapon

in Product Liability Lawsuits

By Paul D. Rheingold

Picture this: You're having breakfast one quiet Sunday morning and suddenly your toaster catches fire, igniting a blaze that burns down your house. What grounds do you have to sue the manufacturer? What if you can't prove a product design defect – will you prevail in court?

The Court of Appeals had an answer to this question in 1995 when it handed down a decision that virtually created a new cause of action in New York product liability litigation. But in review of decisions over the more than two decades since then, it seems that its usefulness in maintaining product suits has been overlooked.

What *Denny v. Ford Motor Company*[1] did was take the statutory implied warranty cause of action and create an action for a breach based on "whether the product meets the expectation for the performance of the product when used in the customary, usual and reasonably foreseeable manners."

Thus if a toaster catches fire and burns a house down, it should be straightforward to claim and to prove to a jury that the toaster did not perform in a reasonably foreseeable way or in its customary and usual manner. Or as in the facts of *Denny*, if an SUV rolls over, and a reasonable consumer would not expect a vehicle to do so, one can maintain a cause of action for breach of implied warranty – even if there is insufficient proof for a claim based on strict liability.

While strict liability claims have become the mainstay of product litigation in New York, especially in a design defect claim, meeting the proof requirements can be difficult. Most troublesome is the demonstration of a reasonable alternative design, that is, that there was a safer way to design the product that was still cost effective. The trier of the facts is to perform a risk/benefit analysis.[2] The cases are clear, as reviewed in this article, that under

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the *Denny* warranty cause of action one need not demonstrate the existence of a reasonable alternative design.

In *Denny*, the Court of Appeals held that the warranty cause of action existed separately from one based on common law strict liability, and hence a jury verdict in that case, based on a finding of breach of warranty but rejecting the claim based on strict liability design defect, was not inconsistent.

THE HISTORY OF THE *DENNY* DECISION

The *Denny* decision arose as an answer to a certified question about New York law from the Second Circuit.[3] This format provided the opportunity to Judge Titone, who wrote the majority opinion, to review New York jurisprudence, in a somewhat academic way. As the opinion points out, the breach of implied warranty cause of action is statutory in New York, under the Uniform Commercial Code, UCC 2-314[2][c], and 2-318. Since the cause of action is statutory, it cannot be merged with common law causes of action, the majority held. It is a contract-based cause of action, not a tort one.[4]

Uniform Commercial Code 2-314[2][c] creates the following warranty: that the product in question be "fit for the ordinary purposes for which such goods are sold." Judge Titone explains that this law places focus "on the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable manners."[5] One might note that there is no citation for this definition – but the main point is as of 1995 that became the law in New York.

This was a 6-1 decision, with Judge Simons dissenting. His dissent is as long and academic as is the main opinion. He cites law review articles that criticized the utility of the consumer expectation test, in that it was vague and unworkable, especially when the claim was not based upon a manufacturing defect but one based on the product's design. Judge Simons believed that all such product cases should be analyzed through the strict liability cause of action.[6]

DECISIONAL LAW TODAY

Notwithstanding this rather strange launch of the consumer expectation test, it has been recognized by the courts as the law of New York in many decisions since then.

A Court of Appeals decision subsequent to *Denny, Bradley v. Earl B. Feiden, Inc.*[7] illustrates the situation where a plaintiff may prevail on the simpler proof required for a breach of warranty cause of action and yet lose where the burden was to prove a defect in the product. This was an action for property damage due to a kitchen fire. The proof was that the fire began in a new refrigerator, with additional proof that within the refrigerator a defroster timer in the freezer may have failed and started the fire. The jury returned a defense verdict as to a strict liability claim which was based upon the need to prove a defect in the timer, but it found that there was a breach of implied warranty by virtue of the refrigerator being the source of the fire. The refrigerator was found to be not fit for its intended purpose. Thus the Court of Appeals reversed the Appellate Department decision dismissing the case, and reinstated the jury's verdict.

A particularly helpful decision on the application of the *Denny* decision to a case where plaintiff failed to convince the jury that strict liability should be applied is *Wojcik v. Empire Forklift Inc.*[8] The product in question was a fall arrest blocker which a worker would wear while standing on a forklift platform. Should he fall, the device would supposedly arrest his fall. However it turned out that it only worked if the fall was more than six feet, and the fall in which he was injured when he hit the floor was under six feet. The jury rejected a strict liability product defect claim but found a breach of implied warranty, as they were charged pursuant to the Denny phraseology.

The *Wojcik* appellate court affirmed the judgment for plaintiff. The jury could reasonably have found no defect, in that when the utility of the device was considered (stopping a fall over six feet) it worked, but that there was a breach of implied warranty in that the device was not safe for the ordinary purpose for which it was sold (arresting falls).

FEDERAL COURT DECISIONS

Even in federal court decisions, where the judges scrutinize complaints much more strictly at the commencement of litigation, they have had trouble striking the implied warranty cause of action based on *Denny*.

For example, *Duval v. Delta Intern. Machinery Corp.*[9] involved a tilting arbor saw on which a guard had been removed. The worker lost several fingers as he was cutting a large piece of plastic. The focus of *Denny*, the court held, was the expectations for performance of the saw when used in a reasonably foreseeable manner. Hence, the court refused to grant summary judgment for the manufacturer since the saw without the guard was not minimally safe for its expected purpose.

DEFENSES

Since one part of the implied warranty test is that the use being made of the product was a "usual" and "customary" one, room is left for defendants to assert that the facts show that the use being made in a particular situation was not usual or ordinary. Put differently, the defendant may assert that the product was "fit for the ordinary purposes intended," but not the one factually involved in litigation. Such was the case in *Brazier v. Hasbro*,[10] where a boy put a ball, intended for throwing, etc., in his mouth and swallowed it.

However, plaintiffs may counter that even if they were making abnormal use, such use was foreseeable, especially because that concept is in the definition made by Judge Titone.[11]

One should not overlook the consumer expectation test.

Regarding a defense in a product case based upon federal preemption, the *Denny* decision came to a plaintiff's rescue where a defendant had set up a defense of preemption relating to a FDA PMA (pre-market approval) defibrillator lead wire which failed in use. In *Teixeria v. St. Jude Med., Inc.*,[12] a claim that the device did not meet consumer expectations was allowed by the judge to stand as one which was parallel to federal law requirements in that the product deviated from standards set in the original FDA approval. The court also premised its decision in part on the fact that the warranty cause of action is based on contract and not tort.

PRIVITY ISSUES

There is no requirement that the plaintiff (purchaser, user, exposed person) be in privity with the defendant. UCC 3:318 explicitly states that the warranty extends to "any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods."

STATUTE OF LIMITATIONS ISSUES

Counsel should be aware of the separate statute of limitations for an implied breach of warranty, as compared to the three-year tort statute in New York. UCC 2-725(1) creates a four-year statute of limitations, which runs from "tender of delivery." In practical terms, "tender" has been interpreted to mean sale, delivery, or, in the case of a medical advice, installation. There is no extension based upon time of actual injury.

There are few if any decisions on the issue of whether it matters who the defendant is. For example, a defect might cause injury in a car which had been sold used. Let's say this happened two years after that sale, but six years after the manufacturer had first sold the car. Does the manufactured have a statute of limitations defense?

PATTERN JURY INSTRUCTION

The New York pattern jury instruction for a cause of action based on breach of an implied warranty is section 2:14. The comment to PJI 2:142 makes the distinction with strict liability in somewhat high-sounding language: "the implied warranty claims focuses on the disappointed expectations of the purchaser or user of the product, while a cause of action based on strict products liability is concerned with social policy and risk allocation."[13] The comment continues that, in the warranty based cause of action, "recovery may be obtained upon a showing that the product was not minimally safe for its expected purposes."[14]

CONCLUSION

This article, of course, is not advocating relying alone on a breach of implied warranty cause of action in pleading and proving a product liability case in New York. Plaintiff's counsel should plead all of the traditional causes of action, including strict liability, negligence, breach of express warranty, and even violation of the consumer protection laws. However, one should not overlook the consumer expectation test. It is easy to prove and probably the test that an ordinary juror would think of if asked what the obligation of the seller was when a product caused an injury.

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1. 87 N.Y.2d 248, 639 N.Y.S.2d 250 (1995).
2. *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102 (1983).
3. 45 F.3d 106 (2d Cir. 1994).
4. After the Court of Appeals decision answered the federal court's question, the case was then settled. However, years later the plaintiffs again sued Ford relating to the same accident (which occurred in 1986), on the ground that defendant had concealed information at the time of discovery in the earlier case, which information, it was contended, would have led to a larger verdict. *Denny v. Ford Motor Co.*, 959 F. Supp. 2d 262 (N.D.N.Y. 2013). The district court dismissed the various causes of action asserted on the bases of the statute of limitations, res judicata and collateral estoppel.
5. *See Denny* at 258–59.
6. The case coming to the Court of Appeals was of enough notoriety that it brought in national counsel appearing for the defendant plus an amicus brief from counsel representing the Product Liability Advisory Council, Inc. Even plaintiff's counsel was reinforced by national counsel admitted pro hac vice.
7. 8 N.Y.3d 265 (2007).
8. 14 A.D.3d 63 (2004).
9. 2015 WL 4522911 (S.D.N.Y. 2015).
10. 2004 WL 515536 (S.D.N.Y. 2004).
11. *Derienzo v. Trek Bicycle Corp.*, 370 F. Supp. 2d 537 (S.D.N.Y. 2005) (bike broke when used in jumping, which was a foreseeable use); *Malul v. Capital Cabinets, Inc.*, 191 Misc. 2d 399 (Civ. Ct., Kings Co. 2002).
12. 2015 WL 902616 (W.D.N.Y. 2015).
13. New York Pattern Jury Instructions, p. 837 of Vol 1A.
14. The use of the term "minimally" in the last sentence (which is also used in some decisions) is somewhat ambiguous, in that it may suggest either that there can be a breach if the product is only minimally safe, or that all the product has to be, to avoid liability, is minimally safe.

Preparing Witnesses for Know Your Boundaries

While it is common practice for attorneys to prepare witnesses prior to depositions taken by their opponent, there are limitations on how much "coaching" attorneys can do during the deposition itself. There have been longstanding debates over whether counsel should be permitted to make objections during the deposition, instruct the witness not to answer, or interrupt the deposition to confer with the witness. While some courts permit some or all of these tactics under certain circumstances, others do not.

The Federal Rules of Civil Procedure 30(d) provide that:

> (1) Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).
>
> * * *
>
> (3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.
>
> (4) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

According to the Advisory Committee Notes from the 1997 Amendments to the Federal Rules, paragraph (3) authorizes sanctions "not only when a deposition is unreasonably prolonged, but also when an attorney engages in other practices that improperly frustrate the fair examination of the deponent, such as making improper objections or giving directions not to answer prohibited by paragraph (1)." The comments stress that making excessive unnecessary objections, as well as refusal to agree on a fair apportionment of time for the deposition or a reasonable request for additional time to complete the deposition, may constitute sanctionable conduct. And, not surprisingly, at least some courts have recognized their inherent authority to sanction misconduct.[1]

In 2006, the New York State Uniform Court System adopted rules similar to the Federal Rules.[2] These rules provide:

> § 221.1 Objections at Depositions
>
> (a) No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.
>
> (b) Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest

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Depositions:

By John Gaal and Louis P. DiLorenzo

an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

§ 221.2 Refusal to Answer When Objection Is Made

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefore. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

§ 221.3 Communication with the Deponent

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

These standards set the parameters for depositions in New York state courts. They aim to limit the situations in which attorneys stop depositions to instruct witnesses not to answer questions.[3] Furthermore, these rules seek to bar attorneys from coaching witnesses by making lengthy objections in which they suggest an answer to the opponent's question.[4] Specifically, attorneys are

barred from making objections solely on the grounds of competence, relevance, or hearsay.[5] However, they are permitted to instruct witnesses not to answer on the grounds of privilege, when the question delves into an area barred by a prior court order, or if the question is improper *and* answering it would cause "significant prejudice," provided that the attorney "clearly and succinctly" states the reasons for the intervention.[6]

In addition to their legal obligation, attorneys have an ethical obligation to follow these court rules. New York Rule 3.3(e) provides that "intentionally or habitually violat[ing] any established rule of procedure or of evidence . . . " is misconduct.

Attorneys are "strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question."

Federal courts have also taken various regulatory approaches to control communications between witnesses and attorneys during depositions.[7] For example, Rule 30.6 of the Local Civil Rule of the Southern and Eastern Districts of New York provides that "[a]n attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted."[8] This rule, however, is only effective in the Eastern District.[9] Similarly, other districts make only private conferences initiated by an attorney impermissible.[10] Lastly, courts that take the most liberal approach only prohibit attorney consultations with witnesses when a question is pending.[11]

Courts have taken a number of approaches through decisional law to address the problem of witness coaching during a deposition.[12] Perhaps the lead, and most restrictive, case on this subject is *Hall v. Clifton Precision*.[13] In *Hall*, the court held that once a deposition begins, a private conference between a witness and his attorney is not permissible, during the deposition itself or during a recess, unless the purpose of the conference is to decide whether to assert a privilege.[14] This rule applies whether or not the private conference is initiated by the attorney or the witness.[15] Furthermore, if a conference occurs to determine whether to assert a privilege, the conferring attorney must place on the record the fact that the conference occurred, the subject of the conference, and the decision reached regarding assertion of a privilege.[16] The court reasoned that "[a] lawyer, of course, has the right, if not the duty, to prepare a client for a deposition. But once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth."[17] The court further explained:

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did – what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness – not the lawyer – who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts. Rather, a lawyer must accept the facts as they develop.[18]

The court in *Hall* also held that a witness may not confer with counsel about a document shown to him during a deposition while questions are pending regarding that document.[19] Furthermore, attorneys are "strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question."[20] If a witness does not understand a question or needs further explanation, the witness should ask the deposing counsel for clarification.[21]

The U.S. District Court for the Western District of New York's Guidelines for Depositions, premised upon *Hall*, provide that "counsel and their witness/client shall not initiate or engage in private off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege."[22]

Other courts have refused to strictly adhere to *Hall*. For example, the court in *In re Stratosphere Corp. Securities Litigation*[23] *concluded that while it agrees with the Hall* court's identification of the problem, it goes too far in its solution, and strict adherence to *Hall* could violate the witness's right to counsel.[24] The court explained:

> It is this Court's experience, at the bar and on the bench, that attorneys and clients regularly confer during trial and even during the client's testimony, while the court is in recess, be it mid morning or mid afternoon, the lunch recess, [or] the evening recess. The right to prepare a witness is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during

> trial). What this Court, and the Federal Rules of Procedure seek to prevent is coaching the witness by telling the witness what to say or how to answer a specific question. We all want the witness's answers, but not at the sacrifice of his or her right to the assistance of counsel.
>
> Furthermore, "consultation between lawyers and clients cannot be neatly divided into discussions about 'testimony' and those about 'other' matters." Mudd v. United States, 255 U.S. App. D.C. 78, 798 F.2d 1509, 1512 (D.C. Cir. 1986). To deny a client any right to confer with his or her counsel about anything, once the client has been sworn to testify, and further to subject such a person to unfettered inquiry into anything which may have been discussed with the client's attorney, all in the name of compliance to the rules, is a position this Court declines to take.[25]

In light of this analysis, the court held that it would not preclude an attorney, during a recess that he did not request, from conferring with his client.[26] As long as attorneys do not demand a break in the questioning or demand a break between a question and answer, the court was confident that "the search for truth [would] adequately prevail."[27]

Other courts have agreed with *In re Stratosphere Corp. Securities Litigation* and adopted a modified, less stringent form of *Hall*.[28]

Furthermore, courts have found impermissible witness coaching in situations where attorneys instructed witnesses not to answer questions, suggested answers to a witness, repeatedly objected to the form of questions, made lengthy coaching objections which interrupted the flow of the deposition, made vexatious requests for clarification, and left the deposition room while questions were pending.[29] One court even went so far as to justify restrictions on attorney-witness communications during depositions by stating that civil litigants or witnesses, as opposed to criminal defendants, have no constitutional right to advice from counsel during a short recess.[30]

Setting Your Ethical Compass

Because witness preparation takes place in private, typically under the cloak of attorney-client privilege, it rarely sees the light of day (and is rarely subject to discipline). As a result, in this context perhaps more than others, lawyers must determine the direction of their own ethical compass. To do so, each lawyer needs to come to grips with this basic dilemma: Is your view of the line between ethical and unethical conduct one you need to define and then "stay far, far to the good side of that line," or is it a line you need to "get as close to. . . as you can without crossing over to the bad side?"[1]

Most lawyers want to do the "right" thing. This is a context, however, in which defining the right thing can be a complex endeavor. The spectrum of witness preparation styles ranges from a hands-off approach (general guidance and preparation but an unrehearsed, spontaneous presentation) to an extensive shaping of the presentation (believing great witnesses are made, not born). While most witness preparation occurs somewhere between these two extremes, there is always a line that defines permissible conduct. The reported cases indicate, generally, that attorneys may permissibly:

- determine a witness's recollection;
- discuss ways to present that recollection in an effective and accurate manner;
- discuss legitimate means to protect that testimony from adversarial attack including possible cross-examination;
- rehearse the testimony;
- discuss prior testimony to refresh recollection;
- discuss and reveal the testimony of others to have the witness reconsider his recollection (except if sequestration rules or a sequestration order prohibit such conduct);
  - suggest a choice of words to clarify testimony (not to change substantive testimony or cause false testimony);
  - inform the witness of applicable law and its relation to the events at issue (but not to induce false testimony);
  - discuss the inclusion of testimony not initially mentioned (if the witness has an actual recollection);
  - review the factual context into which the witness's testimony will fit;
  - discuss courtroom or deposition appearance, demeanor, procedure or process; and
  - review documents or other evidence.[2]

1. W. William Hodes, *The Professional Duty to Horseshed Witnesses Zealously, Within the Bounds of the Law*, 30 Tex. Tech. L. Rev. 1343 (1999).

2. *See* Richard Alcorn, *Do we implant memories? Yeah, probably we do. Is that something that is wrong? I don't believe it is*, Arizona Attorney, March 2008; *see also* John W. Allen, *Emerging from the Horse-Shed and Still Passing the Smell Test: Ethics of Witness Preparation and Testimony*, Lawyer Trial Forms.

Abbott Laboratories[31] illustrates at least one court's response to inappropriate deposition techniques. The court first analyzed defense counsel's deposition objections to the "form" of the questions asked by plaintiff's counsel. After noting the prolific reliance on this objection (the court calculated that it appeared "on roughly 50% of the pages"

When a lawyer tells a witness to answer "if you know," it not-so-subtly suggests that the witness may not know the answer, inviting the witness to dodge or qualify an otherwise clear question.

of the depositions in issue), the court dissected the range of use of this objection, which went from quibbles with counsel's word choice (for no apparent purpose other than to coach the witness to a desired answer), to "voice absurdly hyper-technical truths," to assert innovative objection grounds ("a non sequitur"). But the bulk of the court's criticism of counsel's use of the "form" objection was her failure to provide any explanation for that form objection. As the court noted, "[r]equiring lawyer to state the basis for their objections is not the same thing as requiring 'speaking objections' in which lawyers amplify or argue the basis for their objections." ____ at _____.[32]

The *Abbott Laboratories* court next criticized counsel's repeated interjections ,which prompted specific witness answers. For example, objections were regularly made to appropriate questions claiming they were "vague," "speculative" or "ambiguous," with those objections often followed by the witness' request for clarification or refusal to answer. As the court noted, "I find it inconceivable that the witness. . . would so regularly request clarification were they not tipped-off by counsel's objections."

The court went on to observe:

> These clarification-inducing objections are improper. Unless a question is truly so vague or ambiguous that the defending lawyer cannot possibly discern its subject matter, the defending lawyer may not suggest to the witness that the lawyer deems the question to be unclear. Lawyers may not object simply because *they* find a question to be vague, nor may they assume that the witness will not understand the question. The *witness*–not the lawyer–gets to decide whether he or she understands a particular question:
>
> > Only the witness knows whether she understands a question, and the witness has a duty to request clarification if needed. This duty is traditionally explained to the witness by the questioner before the deposition. If defending counsel feels that an answer evidences a failure to understand a question, this may be remedied on cross-examination.
>
> *Serrano*, 2012 WL 28071, at *5; *see also Hall*, 150 F.R.D. at 528-29 ("If the witness does not understand the question, or needs some language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question. After all, the lawyer who asked the question is in a better position to explain the question than is the witness's own lawyer." (footnote omitted)); Peter M. Panken & Mirande Valbrune, *Enforcing the Prohibitions Against Coaching Deposition Witnesses*, Prac. Litig., Sept. 2006, at 15, 16 ("It is improper for an attorney to interpret that the witness does not understand a question because the lawyer doesn't understand a question. And the lawyer certainly shouldn't suggest a response. If the witness needs clarification, the witness may ask the deposing lawyer for clarification. A lawyer's purported lack of understanding is not a proper reason to interrupt a deposition.").

Another tactic roundly criticized by the court was counsel's frequent refrain of "you can answer if you know." The court noted:

> When a lawyer tells a witness to answer "if you know," it not-so-subtly suggests that the witness may not know the answer, inviting the witness to dodge or qualify an otherwise clear question. For this reason, "[i]nstructions to a witness that they may answer a question 'if they know' or 'if they understand the question' are raw, unmitigated coaching, and are never appropriate." *Serrano*, 2012 WL 28071, at *5; *see also Specht*, 268 F.R.D. at 599 ("Mr. Fleming egregiously violated Rule 30(c)(2) by instructing Mr. Murphy not to answer a question because his answer would be a 'guess.'"); *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 567 (D. Kan. 1997) (noting that an attorney violated Rule 30 when he "interrupted [a] deposition in mid-question, objected to the assumption of facts by the witness, and advised the witness that he was not obligated to assume facts").

Finally, the court addressed counsel's efforts at reinterpreting or rephrasing posed questions, and in some instances providing the witness with additional information to consider in answering the questions, sometimes even providing the answer for the witness to then repeat. Needless to say, the court found all of these tactics inappropriate and allowing the lawyer to effectively commandeer the depositions.

In this particular case, the court imposed a unique sanction. The court ordered the offending practitioner to:

> write and produce a training video in which Counsel or another in Counsel's firm, appears and explains the holding and rationale of this opinion and provides

> specific steps lawyers must take to comply with its rationale in future depositions in any federal and state court. . . The lawyer in the video must state the video is being produced and distributed pursuant to a federal court's sanction order regarding a partner in the firm, but the lawyer need not state the name of the partner, the case the sanctions arose under, or the court issuing this order.

The court required that access to the video be made available to each lawyer at the firm worldwide – more than 2,000 – who engages in state or federal litigation or who works in any practice group in which at least two of the lawyers have filed an appearance in any state or federal case in the United States.

If nothing else, *Abbott's Laboratories* reflects the courts growing frustration with improper witness coaching and deposition conduct.

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1. *See, e.g., The Security National Bank of Sioux City, Iowa v. Abbott Laboratories*, 229 (N.D. Ia. 595 2014).
2. McKinney's 2007 New York Rules of Court § 221.1-221.3 (22 N.Y.C.R.R. Part 21).
3. *See* Daniel Wise, *N.Y. Rules Target Lawyer Abuses During Depositions*, NYLJ (July 28, 2006).
4. *Id.*
5. *Id.*
6. *Id. Ozkan Terzi & Seyhan Terzi v. Fortune Home Builders, LLC*, 2009 N.Y. Misc. LEXIS 4682 (N.Y. County 2009) (question must be both improper *and* prejudicial); *see also Layne v. Metropolitan Transportation Authority*, 2010 N.Y. Misc. LEXIS 1334 (N.Y. County 2010) (questions to be answered violative of constitutional rights, privileges or palpably irrelevant); *IRB-Brasil Resseguros S.A. v. Portabello International Limited*, 2009 N.Y. Misc. LEXIS 3797 (N. Y. County 2009) (same).
7. Peter M. Panken & Mirande Valbrune, *Enforcing Prohibitions Against Coaching Deposition Witnesses*, Current Developments in Employment Law (July 29, 2004).
8. McKinney's 2007 New York Rules of Court § 30.6.
9. *Id.*
10. *See, e.g.*, U.S. Dist. Ct., S.D. Ind. Local R. 30.1(b). Additionally, some courts distinguish between party and non-party deponents and only prohibit conferences during a deposition between an attorney and a non-party. *See, e.g.*, U.S. Dist. Ct.., Wy. Local R. 30.1(f).
11. *See, e.g.,* U.S. Dist. Ct., S.D. Ind. Local R. 301.
12. *See* Panken & Valbrune, *supra* note 7.
13. 150 F.R.D. 525 (E.D. Pa 1993).
14. *Id.*at 528-29.
15. *Id.* at 529.
16. *Id.* at 530.
17. *Id.* at 528.
18. *Id.* at 528-29.
19. *Id.* at 529.
20. *Id.* at 531.
21. *Id.* at 528-29.
22. *See also Chassen v. Fidelity National Title Insurance Co.*, No. 09-291 (D.N.J. 2010), applying *Hall.*
23. 182 F.R.D. 614 (D. Nev. 1998).
24. *Id.* at 620-21.
25. *Id.* at 621.
26. *Id.*
27. *Id.*
28. *See Musto v. Transport Workers Union of America, AFL-CIO*, 2009 U.S. Dist. LEXIS 3174 (E.D.N.Y. 2009) (consultation between counsel and witness at a deposition only raises questions when the consultation is initiated by counsel); *Okoumou v. Safe Horizon*, 2004 U.S. Dist. LEXIS 19120, at *5 (S.D.N.Y. 2004) (same); *McKinley Infuser, Inc. v. Brian D. Zdeb*, 200 F.R.D. 648, 650 (D. Colo. 2001) (deponents should be prohibited from conferring with their counsel while a question is pending, but consultations during periodic breaks, such as lunch and overnight recess, and longer recesses are appropriate); *Odone v. Croda Int'l PLC*, 170 F.R.D. 66, 69 (D.D.C. 1997) (court will not "penalize an attorney for utilizing a five-minute recess that he did not request to learn whether his client misunderstood or misinterpreted the questions and then for attempting to rehabilitate his client on the record").
29. *See Plaisted v. Geisinger Med. Ctr.*, 210 F.R.D. 527 (M.D. Pa. 2002); *Armstrong v. Hussman Corp.*, 163 F.R.D. 299 (E.D. Mo. 1995); *Van Pilsum v. Iowa State Univ. of Science and Tech.*, 152 F.R.D. 179 (S.D. Iowa 1993); *American Directory Serv. Agency, Inc. v. Beam*, 131 F.R.D. 15 (D.D.C. 1990).
30. *McDermott v. Miami-Dade County*, 753 So. 2d 729, 731-32 (Fla. Dist., Ct. App. 2000).
31. *Supra* note 1.
32. The court acknowledged that some courts favor a different approach, allowing mere "form" objections, citing to *In re St. Jude Med., Inc.*, No. 1396, 2002 WL 1050311 (D. Minn. 2002) or at least allowing references solely to "form" unless the questioner asks for the specific reason, citing to *Druck Corp. v. Macro Fund (U.S.) Ltd.*, 2005 WL 1949519 (S.D.N.Y. 2005).

A New York State of Mind

The Cases and Career of John Jay, the First Chief Justice of the United States

By Hon. Mark C. Dillon

The first Chief Justice of the United States, John Jay, was a New Yorker. A lifetime resident of Westchester County, he was born and grew up in Rye, and maintained a 400-acre homestead in Bedford during his adulthood. He graduated from Kings College, which we now know as Columbia University, and was admitted to the bar of the State of New York in 1768.

Jay is among the Founding Fathers. He is not regarded in history as a member of the exclusive first tier of founders such as Washington, Adams, Jefferson, Franklin, Hamilton, Madison, and Monroe. He is, however, among those at the very top of the second tier. Jay was a wealthy patrician who favored independence from Great Britain by the 1770s, and was a close friend and confidante of George Washington. Politically, Jay was a Federalist who believed in a strong central government. He helped negotiate the Treaty of Paris, in which Great Britain formally recognized the independence of the United States; was President of the Second Continental Congress; was an author of the *Federalist Papers* along with Alexander Hamilton and James Madison; and served as U.S. Minister to Spain from 1779 to 1782 while the nation was governed by the Articles of Confederation.

I. JAY'S APPOINTMENT AS CHIEF JUSTICE

When George Washington was sworn in as the first President of the United States on April 30, 1789, at Federal Hall in New York City, John Jay was on hand for

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the event.[1] One of Washington's first responsibilities was to form a Cabinet, and he needed to arrange the political chess pieces so that Alexander Hamilton, Thomas Jefferson, and John Jay would each fill the most prominent positions. Jay was strongly considered for appointment to head either the Treasury Department or the State Department.[2] He was not an obvious choice for the Supreme Court, as he had not previously presided over trials and had not actually practiced law for at least a decade. But Jay sought the judiciary over other options in the expectation that the Supreme Court would receive a good number of cases involving foreign parties and international law, subjects in which he had a keen interest.[3] Washington ultimately arranged for Hamilton to be Secretary of the Treasury, Jefferson to be Secretary of State, and Jay to be Chief Justice.[4] Jay accepted the nomination, and, without any legislative debate, he was unanimously confirmed by the U.S. Senate. With that, a Westchester lawyer ascended to that first and historic judicial position.

The newly constituted Supreme Court met for the first time on February 1, 1790 in the Exchange Building in New York City.[5] During Jay's tenure as Chief Justice, court facilities were located on a temporary basis in New York and, later, in Philadelphia. The Supreme Court consisted of a total of six justices. Jay's original associate justices were John Rutledge, William Cushing, James Wilson, John Blair, Jr., and James Iredell.

When the current constitutional system went into effect in 1789, cases were filed in the various District Courts but, by definition, there were not yet any matters within the appellate pipeline to feed the Supreme Court. As a result, no cases reached the Supreme Court in 1789 or 1790, and there was only one case in 1791. Indeed, during John Jay's term as Chief Justice from 1789 to 1795, he reviewed a total of only seven Supreme Court cases. Jay's appointment as the nation's first Chief Justice was a plum assignment. He received a full $4,000 annual salary,[6] but had little or no appellate responsibilities at the Supreme Court during significant portions of his tenure on the bench. He nevertheless kept very busy. A portion of Jay's professional time was spent writing rules of procedure to guide the federal courts in the future, setting standards for attorney admissions to the federal bar, and filling judicial staff positions. Jay and his associate justices presided over cases at the Circuit Courts by riding the circuits, and since judges were not at that time prohibited from engaging in politics, he also busied himself in the backroom particulars of the Washington Administration.

II. THE CASES OF THE JAY COURT

Of the seven cases docketed and decided at the Jay Court, some were significant to the development of early American jurisprudence and others not so. Three of the seven Jay appeals, each titled *Georgia v. Brailsford*, were actually the same case, with one appellate issue decided in 1792, a second in 1793, and a final disposition in 1794.[7] The Supreme Court's first case, *Vanstophorst v. Maryland*, which was likely docketed with great fanfare in 1791, was, ironically, the least significant of them all. The *Vanstophorst* matter was dismissed before any oral argument could be held on it because the papers had not been filed in the manner required under then-existing procedural rules.[8]

West v. Barnes (1791)

The first case that was actually argued and decided by the U.S. Supreme Court was *West v. Barnes*.[9] Oral argument was conducted on August 2, 1791, and a decision was rendered the following day, representing a dispositional speed generally incapable of replication by appellate courts today. The plaintiff, William West, was a Rhode Island farmer who had been paying a private mortgage on his property for 20. West had the ingenuity to obtain from his state permission to conduct a lottery that would enable him to satisfy the remainder of the debt, which was owed to the Jenckes family and their ultimate heir, defendant David Leonard Barnes. The substantive issue of the case was whether the post-lottery debt could be paid in paper currency, which Barnes refused to accept, rather than in gold or silver coin, which Barnes demanded. Jurisdiction was based on the diversity of citizenship between the parties.

West lost his case on the merits at the Circuit Court and sought to appeal the matter to the Supreme Court, which was then located in Philadelphia. A procedural rule in effect at the time required appellants to file a writ of error within 10 days of the decision being appealed from, loosely akin to today's practice of filing a notice of appeal. West, acting *pro se*, filed his writ in Rhode Island. On appeal, the Supreme Court ruled against West on a purely procedural ground without reaching the merits of the case. It held that the writ of error for removing the case to the Supreme Court needed to be filed at the Supreme Court itself, not elsewhere.[10]

The writ rule was understandably criticized. In effect, it required lawyers or litigants to travel from far-off states to Philadelphia to file the writ within 10 days of a lower court decision, during an era of horseback transportation and poor roads. As a result of the case and the valid criticisms of it, the rules for filing writs of error were changed in 1792 to allow future filings to occur at the Circuit Courts.[11] The rule change was likely of little consolation to William West, whose family eventually lost their farm as a result of both the case and the ejectment proceedings that followed.[12]

In re Hayburn (1792)

Hayburn presented the Supreme Court with its first case involving questions of legislative constitutionality and the separation of powers. Congress had enacted the Invalid Pensions Act in 1792, which authorized disabled veterans from the Revolutionary War to file pension applications with the Circuit Courts.[13] The Circuit Courts in New York, Pennsylvania, and North Carolina refused to honor the procedure on the ground that they were constitutionally prohibited from performing non-juridical tasks. The matter appeared on the Supreme Court's docket during three dates in August of 1792, but the only decision that was rendered, on August 11th of that year, was to adjourn the matter into the next year's term.[14] In the interim, Congress changed the law on February 23, 1793 to relieve the courts of pension responsibilities. The Supreme Court would have to wait until *Marbury v. Madison,*[15] 11 years later, to consider the unconstitutionality of federal legislation.

Chisholm v. Georgia (1793)

The first truly noteworthy case decided by the Jay Court was *Chisholm v. Georgia*.[16] The case arose from the failure of the state of Georgia to pay for certain supplies of cloth that it had purchased from Robert Farquhar for its use during the Revolutionary War. Farquhar died after the transaction, but a collection suit was commenced in federal court by plaintiff Alexander Chisholm, the executor of Farquhar's estate. Chisholm was a South Carolinian, and the litigation was based upon diversity jurisdiction. The State of Georgia refused to appear in the case by relying upon its sovereign immunity. In a 4-1 disposition, the majority of the Supreme Court, including Chief Justice Jay, held that Article 3, Section 2 of the federal Constitution abrogated the sovereign immunity of states and conferred upon the federal courts the subject matter jurisdiction to hear disputes between a state and a citizen of another state.[17] The sole dissenter, Justice James Iredell, believed that under common law, the states were immune from suits just as the Britain Crown had been when the American colonies were first settled and that suits could only be maintained if the state waived its immunity, which Georgia had not done here.[18]

The historical significance of *Chisholm* did not end there. The various states, distraught by *Chisholm's* holding, pushed for the enactment of an 11th Amendment, which was passed by Congress and ratified by a sufficient number of states within only two years. The 11th Amendment provided that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State."[19] By that amendment, the Supreme Court's holding in *Chisholm* was circumvented, and Justice Iredell's dissent prevailed as a matter of new constitutional policy. To this day, states are immune from foreign citizen suits in the federal courts absent either an express waiver of sovereign immunity or by the exercise of certain remedial powers permitted under the 14th Amendment.[20]

Georgia v. Brailsford (1794)

Another noteworthy case during Jay's tenure as Chief Justice was the 1794 incarnation of *Georgia v. Brailsford*.[21] At that time, the Supreme Court was authorized to preside over jury trials. *Brailsford* is the only reported jury trial conducted at the U.S. Supreme Court.[22] But the significance of the case goes a step further. In the early 1790s, American law was not developed on the question of the precise roles to be played by judges and juries in resolving cases. John Jay believed that there should be a dividing line, with juries empowered to decide questions of fact and for judges to decide the questions of law, though in his view juries could also be permitted to overrule judges on questions of law.

Brailsford was a dispute over private debts owed to British creditors during the Revolutionary War. The State of Georgia had passed a law sequestering such debts so that they not be paid to British nationals, but the 1784 Treaty of Paris recognized the validity of debts owed by each nation's creditors to the other. The plaintiff, Samuel Brailsford, was a British citizen who was owed 7,000 British pounds from a Georgia resident named James Spalding. When Brailsford sued Spalding in federal court to recover the debt, the State of Georgia intervened in the suit, claiming that any money to be paid by Spalding was actually owed to the State under its earlier enacted sequestration law. The case reached the Supreme Court in 1792 and 1793 in connection with certain other issues, and rather than remit the matter to District Court for trial, as would occur today, a jury was instead empaneled in 1794 for a common law trial at the Supreme Court.

The facts of the case, including the existence of Spalding's debt to Brailsford, were undisputed, with the only remaining issue being whether payment was to be made to Brailsford or, alternatively, the State of Georgia. The trial lasted for four days.[23] Brailsford argued, *inter alia*, that the Treaty of Paris guaranteed his right to the pay-

ment under the supremacy clause of the federal constitution. The State of Georgia argued, *inter alia*, that it was a sovereign state free to enforce its own laws, and that the Treaty of Paris only spoke to debts exiting at the time of its ratification without including later debts such as that owed by Spalding. Chief Justice Jay, viewing the payment issue as a question of law, and steeped in his background as an international diplomat, gave instructions to the jury during its deliberations, in response to a jury note, that the Treaty of Paris had the legal effect of validating Brailsford's right to the debt.[24] However, he also instructed the jury that while judges are presumed to be the best at deciding questions of law, as here, the ultimate determination of both facts and law rested with the jury.[25] Upon deliberation, the jury apparently deferred to Jay's instruction on the law and returned a unanimous verdict in favor of Brailsford.

***The first truly noteworthy case decided by the Jay Court was* Chisholm v. Georgia.**

The jurors in *Brailsford* were not a jury of randomlyselected peers such as those we empanel today, but was instead a "special jury" composed only of merchants generally familiar with matters and dealings relevant to the case.[26] Thus, Jay's handling of *Brailsford* assured a proper application of *lex mercatoria,* incorporating mercantile custom into newlydeveloping American law.

Glass v. Sloop Betsey (1794)

A final noteworthy case of the Jay Court was *Glass v. Sloop Betsey*.[27] The *Betsey* was an 18-ton 73-foot long double-masted sloop constructed primarily of white oak in 1772.[28] The *Betsey* was captured in June of 1793 by Captain Peter Arcade Johannene of the French vessel *Citizen Genet*. The *Betsey* and its cargo were seized in the belief that the sloop was British, but it was actually owned by subjects of Sweden and its cargo was both Swedish and American.[29] The capture occurred within two miles of the American coastline near Charleston, and the *Citizen Genet* brought the *Betsey* to the Port of Baltimore for mooring. Plaintiff Alexander Glass commenced an action in federal court claiming that he was the true owner of the *Betsey* and its cargo, and sought custody of the ship, its contents, and an award of monetary damages. The action was commenced because when Glass initially sought political assistance from the Washington Administration, he was unceremoniously referred by Secretary of State Jefferson to the courts.[30]

Sloop Betsey raised a threshold issue of subject matter jurisdiction – whether France, as the captor nation during a time of international belligerencies, possessed sole authority to determine the fate of the *Betsey* and its cargo, or whether the U.S. District Court possessed jurisdiction by virtue of the sloop's location at the Port of Baltimore. The District and Circuit courts both resolved the question in favor of the French-sponsored captor. The Jay Court reversed, unanimously deciding that no foreign power could maintain "any court of judicature of any kind within the jurisdiction of the United States," absent being authorized to do so by treaty.[31] No such treaty provision existed between the United States and France. Therefore, the Supreme Court held that the federal courts possessed admiralty jurisdiction over the matter, and the District Court was directed to render a decision on the merits of the case consistent with the law of nations and the laws and treaties of the United States.[32] The Supreme Court opinion was surprisingly brief. No authority was cited by the court in support of its reasoning. Notwithstanding that, the decision was legally sound, as Article III, Section 2 of the federal Constitution broadly and expressly extends the judicial power of the United States to all cases in law and equity involving admiralty and maritime jurisdiction, and the *Betsey* had been seized and held in American territorial waters.

The Supreme Court's holding, besides representing an early assertion of American admiralty jurisdiction in matters involving foreign interests, had other political and military ramifications that were not lost upon the governments of Europe. France had formally declared war on both Great Britain and the Netherlands on February 1, 1793, and on Spain six days after that.[33] When news of that war reached the American government weeks later, President Washington, upon emergency consultations with his Cabinet, issued a Proclamation of Neutrality on April 22, 1793.[34] Washington had little choice but to declare neutrality as the United States was in no economic or military position to take sides in the escalating European conflict. As a matter of strategy and tactics, the French government allowed privateers acting on its behalf to harass and seize British, Dutch and Spanish ships operating in American waters, in furtherance of the ongoing hostilities between the European nations.[35] The seizure of the *Betsey* appears to be one such example. If the Supreme Court had held that the captor nation (France) was solely possessed of jurisdiction to determine claims involving the "prize" ship, as was the legal practice in Europe at the time, further commercial ships would predictably be commandeered by the proxies of one country or another, using American territorial waters as a battle ground for hostilities between those other nations.[36] The *Sloop Betsey* opinion was rendered in February of 1794, almost exactly one year after France's declaration of war on other European nations. The U.S. Congress passed a Neutrality Act effective June 2, 1794[37] which was consistent with President Washington's earlier

neutrality proclamation. The Supreme Court's opinion in *Sloop Betsey* respected the delicate neutrality that the Washington Administration was attempting to maintain between France and other European powers during the perilous times of 1793 and 1794, both before and after the case was decided.[38]

Sloop Betsey is notable in one final respect. During the summer of 1793, the United States was plagued by foreign privateering in its territorial waters. The number of seized ships caused great alarm, concern, and

overseas, Jay was elected *in absentia* to become the second Governor of the State of New York, prompting his resignation from the U.S. Supreme Court for that reason. The 1795 Jay Treaty averted a new war between the United States and Britain over trade restrictions, tariffs, debt collection, and the impressment of American sailors. The treaty was very controversial within the United States for not going far enough to protect American interests, and on one occasion Jay quipped that because of it, he could travel at night from Boston to Philadelphia solely by the

The Jay Homestead in Bedford, New York.

debate about how to deal with it. President Washington requested that the Supreme Court render an advisory opinion about whether federal courts had jurisdiction to hear claims that could potentially be brought against privateers. The Supreme Court declined to issue an advisory opinion on the ground that it was not appropriate to do so under the separation of powers doctrine.[39] The *Sloop Betsey* decision was rendered a few months later providing all interested parties, including the Washington Administration, with an answer to the jurisdictional issue that bore the imprimatur of a formal, binding, litigated opinion of the court.[40] To this day, the U.S. Supreme Court does not render advisory opinions.

III. THE RETURN TO POLITICS

At the request of President Washington, John Jay left the United States for Britain in 1794, while still serving as Chief Justice, to negotiate what came to be known as the Jay Treaty.[41] Vice President Adams wrote his wife that if Jay's peace mission to Britain proved successful, it would "recommend him to the choice of the people for President as soon as a vacancy shall happen."[42] While

light of his burning effigies.[43] Despite achieving peace, the treaty likely ruined any notion that then-Governor Jay might have harbored for being a serious contender for the Presidency.

In very late 1800, when it became clear that President John Adams would be defeated by Thomas Jefferson in the electoral college for the next presidential term, Adams and the Federalists sought to fill as many federal positions as possible in order to extend their party's influence on the government into the future. Chief Justice Oliver Ellsworth had just resigned from the Supreme Court. Adams, pressed for time, sought to fill the vacancy by unilaterally nominating John Jay for reappointment to his former position at the court, without consulting Jay first. In a responsive letter to Adams, Jay declined the appointment, claiming a dislike for riding the circuits,[44] and his political career ended in 1801 upon the conclusion of his second gubernatorial term in New York.

IV. DENOUEMENT IN BEDFORD

John Jay lived out the remainder of his years on his farm in Bedford.

During retirement, he publicly broke his political silence only once, in the fall of 1819, when he wrote a letter widely published in newspapers regarding the possible admission of Missouri as a state of the union. In the letter, Jay wrote that slavery "not be introduced nor permitted in any of the new states [and that it be] abolished in all of them."[45]

Jay died at his farmhouse on May 17, 1829 at the age of 83. He is buried at the Jay Family cemetery in Rye, New York.[46]

John Jay's personal "Lawyer Bookcase." Lawyers Bookcases are made of compartments stacked upon each other and are still used in law offices today. The reason the design is stackable is that when judges and lawyers had to travel the circuits in the late 1700s, law books had to be transported with them. The compartments therefore had handles on the sides so that they could be transported with the judge or attorney from court to court, state to state.

Jay's boyhood home in Rye, New York is today managed by the not-for-profit Jay Heritage Center and is available for public tours and other activities. Likewise, the John Jay Homestead State Historic Site in Bedford, New York is open to tours most days of the week, which vary depending on the time of year.

1. Walter Stahr, *John Jay: Founding Father*, 269 (New York: Diversion Press 2005).
2. Douglas Southall Freeman, *Washington*, 576 (New York: Charles Scribner's Sons 1985); Stahr, *John Jay: Founding Father*, at 271.
3. Stahr, *John Jay: Founding Father*, at 272.
4. *Id.*, at 271–72.
5. *Id.*, at 273.
6. The Compensation Act, ch. 18, 1 Stat. 72 (1789).
7. 2 U.S. 402 (1792), 2 U.S. 415 (1793), 3 U.S. 1 (1794). The 1792 and 1793 decisions involved the issuance of an injunction and its later continuance.
8. 2 U.S. 401 (1791); Stahr, *John Jay: Founding Father*, 282. *Vanstophorst* is not included here within the seven cases "decided" by the Jay Court, since the matter never reached oral arguments on the merits. Similarly not included are the Supreme Court opinions rendered in *Oswald v New York* (2 U.S. 401 (1792), 2 U.S. 402 (1792), and 2 U.S. 415 (1793)), which regarded ministerial issues and never resolved an appeal.
9. 2 U.S. at 401.
10. *Id.*
11. Ira Cohen, *Rhode Island Federal Courts: A History*, 61 Fed. Law. 54, 59 (Sept. 2014).
12. *Id.* at 59.
13. Act of March 23, 1792, ch. 11, sec. 3, 1 Stat. 243 (1792).
14. 2 U.S. 409.
15. 5 U.S. 137 (1803).
16. 2 U.S. 419 (1793).
17. 2 U.S. at 479. At that time, the practice was for each Justice of the Supreme Court to render separate opinions, rather than joining majority or dissenting opinions written by others, so that the 4-1 holding of the court is merely an arithmetic description of five separate opinions. The practice followed that of the appellate courts in England. Chief Judge Oliver Ellsworth (1796–1800) instituted the practice familiar today of the Supreme Court rendering either a single opinion or majority and dissenting opinions.
18. 2 U.S. at 445–46.
19. US Constitution, 11th Amendment.
20. *See Fitzpatrick v Bitzer*, 427 U.S. 445 (1976).
21. 3 U.S. 1 (1794).
22. There were apparently two "unreported" jury trials at the U.S. Supreme Court. *See* Shelfer, Lochlan F., *Special Juries in the Supreme Court*, 123 Yale L.J. 208, 211 (2013). Such trials were conducted by the Supreme Court pursuant to the requirement in the Seventh Amendment that for suits in common law meeting a certain monetary threshold, "the right of trial by jury shall be preserved." At least, that was the interpretation of the Seventh Amendment in the 1790s embodied by Chief Judge Jay.
23. Stahr, *John Jay: Founding Father*, 308.
24. 3 U.S. at 4.
25. *Id.*, at 4.
26. Lochlan F. Schelfer, *Special Juries in the Supreme Court*, 123 Yale L.J. at 208.
27. 3 U.S. 6 (1794).
28. Kellie Michelle VanHorn, "Eighteenth-Century Colonial American Merchant Ship Construction." Master's Thesis, Texas A&M Univ., Dec. 2004, http://nautarch.tamu.edu/pdf-files/VanHorn-MA2004.pdf/.
29. *Id.*
30. Kevin Alryck, *The Courts and Foreign Affairs at the Founding*, 2017 B.Y.U. L. Rev. 1, 31–32 (2017).
31. 3 U.S., at 6.
32. *Id.* at 6.
33. UNC, "Timeline: The Revolutionary and Napoleonic Wars (1792–1815)," http://www.unc.edu/nbi/texte/NBITimeline.pdf.
34. John M. Blum, Edmund S. Morgan, Willie Lee Rose, Arthur M. Schlesinger, Jr., Kenneth M. Stampp, and C. Vann Woodward, *The National Experience: A History of the United States 4th ed.*, 139 (New York: Harcourt Brace Jovanovich, Inc. 1977); Freeman, *Washington*, at 622.
35. Freeman, *Washington*, at 633.
36. Stahr, *John Jay: Founding Father*, at 310–11.
37. 1 Stat. 381 (1794). In essence, the Neutrality Act made it unlawful for any citizen to serve a foreign country in time of war against the United States or to enlist others to do so, arm privateers, or participate in any military expedition from the United States.
38. Arlyck, 2017 B.Y.U. L. Rev., at 35. *See generally* Todd Estes, *The Jay Treaty Debate, Public Opinion, and the Evolution of Early American Culture* (Amherst: Univ. of Mass. Press 2006).
39. Maeva Marcus, "Is the Supreme Court a Political Institution?" 72 *Geo. Wash. L.R.* 95, 105–06 (Dec. 2003).
40. *Id.*, at 106.
41. Freeman, *Washington*, at 647–48.
42. Stahr, *John Jay: Founding Father*, at 316.
43. David L Faigman, *Laboratory of Justice, The Supreme Court's 200 Year Struggle to Integrate Science and the Law*, 1st ed., 34 (New York: Henry Holt & Co. 2008).
44. Stahr, *John Jay: Founding Father*, 363.
45. *Id.*
46. Find a Grave, *John Jay*, https://www.findagrave.com/cemetery/641195/john-jay-cemetery/.

Life After Death

Assisted Reproductive Technology (ART) is continually changing the landscape of families and potential heirs. This is both miraculous and, at times, confounding.

As modern technology has made posthumously conceived children possible, estate planning practitioners are left looking for guidance on how to best serve their clients. Attorneys need to know how to legally prepare their clients for unknown future children, draft comprehensive estate planning documents to include such children, administer estates or trusts where posthumously conceived children may be beneficiaries or distributees, and potentially represent individual posthumously conceived children.

Some states have addressed posthumously conceived children and, presumably in the coming years, more states will legislate these matters. To ensure estate planning statutes remain relevant, they should be reviewed and revised to make sure future heirs are not unintentionally left out of the equation. One step in this direction came when New York enacted EPTL 4-1.3 in 2015.

Let's take a hypothetical situation: B dies as a New York domiciliary in 2015 and is survived by two minor children. Under B's 2010 will, B provided for separate share beneficiary's trusts "for any children living at my death." The will does not mention posthumously conceived children, and at the time of the execution of the will B had no stored genetic material. The trusts are discretionary and include a complete right of withdrawal when each child attains age 25. The two testamentary beneficiary's trusts are funded in 2015.

In 2016, B's surviving spouse conceives a child using B's genetic material, and the child is born in 2017. Is the posthumously conceived child considered a distributee? Do the monies in the two testamentary beneficiary's trusts need to be reallocated?

The answer to both questions is *yes*, *as long as B followed the conditions of New York EPTL 4-1.3*. If B did not follow the conditions of EPTL 4-1.3, the posthumously conceived child will not be considered a distributee.

EPTL 4-1.3 provides that a child conceived and born after the death of a genetic parent can still inherit from the genetic parent's estate if certain conditions are met. Those conditions are summarized below.

EXPRESS WRITING

In order for a posthumously conceived child to be considered a distributee of their deceased parent (or other relative), a genetic parent must give written permission (an "express writing"), within seven years prior to the parent's death, expressly consenting to the use of their genetic material to conceive a child after their death, and authorizing an individual ("authorized individual"), in writing, to make decisions about the use of the genetic material.

The express writing:

1) must be signed by the genetic parent in the presence of two witnesses. The witnesses must have attained age 18 and cannot include the authorized individual;
2) may be revoked in writing by the genetic parent. The revocation must be executed in the same manner as the original writing;
3) may not be altered or revoked by the genetic parent's last will and testament;
4) may designate a successor authorized individual.

EPTL 4-1.3 includes a sample of an express writing, which could be used by a genetic parent.

NOTICE

After the death of the genetic parent, the authorized individual must give written notice indicating that the genetic material is available for posthumous conception. The notice must be sent by certified mail, return receipt requested, or by personal delivery within seven months from the date of issuance of letters testamentary or administration to the executor or administrator.

If no executor or administrator has been appointed within four months of the death of the genetic parent,

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Preparing for Posthumously Conceived Heirs

By Emilee K. Lawson Hatch

the authorized individual must give written notice within seven months to a distributee of the genetic parent.

RECORDING REQUIREMENT

The authorized individual must also record the express writing which expressly gave them permission to make decisions regarding the genetic material. The express writing would be recorded in the office of the surrogate having jurisdiction to issue letters to the executor or administration of the deceased genetic parent's estate.

TIME LIMIT

In any event, the posthumously conceived child must have been in utero within 24 months after the genetic parent's death or born within 33 months after the genetic parent's death.

EFFECT OF DIVORCE

If the genetic parent was married to the authorized individual at the time the express writing was executed, and they subsequently divorce or receive an annulment or legally separate, then the authority granted to the named authorized individual is revoked.

APPLICABILITY

EPTL 4-1.3 applies to wills of individuals dying on or after September 1, 2014, and to existing lifetime instruments that are subject to the grantor's power to revoke or amend, and to all lifetime instruments executed on or after September 1, 2014. Lifetime instruments may include beneficiary designations, trust documents, and powers of appointment in trusts.

RULE AGAINST PERPETUITIES

The statute clarifies that it only applies for the purpose of determining whether a posthumously conceived child is regarded as an intended heir. The rule against perpetuities focuses on the ability of a person to have a child at some future time, and will still apply to posthumously conceived children who are considered disregarded heirs by the statute.

BOTTOM LINE

Given the potential challenges fiduciaries may face when distributing property, it is important for estate planners to assist testators and settlors to clarify their intent.

As states differ in their statutes addressing posthumously conceived children (or lack thereof), the state in which the deceased genetic parent was domiciled at the time of their death is crucial to determining heirship of the genetic child.

Discussions about abstract situations involving future children require a sensitive discussion with the client and precise language in their documents.

If a posthumously conceived child is properly considered a distributee of their deceased genetic parent, in accordance with EPTL 4-1.3, then the child will be treated, for estate inheritance purposes, the same as any other child of the deceased genetic parent. This means that the child may also be considered an heir of the deceased genetic parent's relatives (grandparents, aunts and uncles, etc.).

NEXT STEPS AND BEST PRACTICES

If individuals work with an estate planning attorney, they can prepare an estate plan that thoughtfully administers their estate so that their assets pass to their chosen beneficiaries. Discussions about abstract situations involving future children require a sensitive discussion with the client and precise language in their documents. Best practices will be developed over time, but may include some of the following:

- Attorneys should ask each client if the client has any genetic material being stored for purposes of conception. EPTL 4-1.3 specifically references "sperm or ova," although presumably the statute would also cover embryos that were created using the deceased genetic parent's egg or sperm.
- Attorneys should be provided with copies of any agreements their client entered into with ART agencies or any facility providing storage of the genetic material.
- Clients may want to have their attorney review the ART and storage contracts before they are executed.
- Forms should be developed in accordance with the requirements of the statute. The attorney should provide an explanation of EPTL 4-1.3 (preferably in writing). The explanation would be given to the client as well as the authorized individual(s), so that they are notified of the strict requirements of the statute.
- When drafting estate planning documents, the attorney should consider referring to the express writing, and further indicate that a plan is in place for an authorized individual to make decisions as to the client's genetic material.
- Attorneys may want to update the definition of issue and descendent in their wills and trusts to specifically reference EPTL 4-1.3.
- If an attorney is hired to represent an executor/administrator and they are aware of an express writing, whether it has been recorded or not, the attorney should proceed prudently. The executor/administrator should be instructed not to distribute the estate funds until it is determined whether a posthumously conceived child may come into existence.
- The existence of a legal parent-child relationship may give rise to other important rights such as inheritance from relatives of the deceased genetic parent, Social Security survivors' benefits, and other retirement and pension survivor benefits.
- Since states' inheritance laws differ, it will be important to talk with clients about their intended domicile in order to determine which laws will decide whether a posthumously conceived child will be included as a distributee.
- Young adults often delay in having a will prepared, but given the strict requirements of this statute, prospective parents and new parents should be strongly encouraged to focus on working with an attorney to complete their estate planning documents.
- Parents who have used ART are often sensitive to privacy. If those parents want to retain a sense of privacy for themselves and their family after their death, trust planning may be appropriate. The parent could specifically create a trust for a posthumously conceived child.
- If a grandparent knows that their child would like to provide for posthumously conceived heirs, the grandparent may want to revise their estate planning documents to specifically include those children.

Second Amendment Meets #NeverAgain

States Consider Gun Law Reforms in Wake of Mass Shootings

By Christian Nolan

One of the most polarizing political issues in our country today is the intent and interpretation of the Second Amendment of the U.S. Constitution. In a modern society haunted by a high rate of gun violence and frequent mass shootings, do we need to reconsider the right to keep and bear arms?

The mass shooting on Feb. 14 that left 17 students and faculty dead at Marjory Stoneman Douglas High School in Parkland, Florida, appears to have been a turning point. Student survivors of the shooting sprang into action and formed the #NeverAgain movement. Hundreds of thousands of people have since taken part in protests and marches around the country, focusing attention on the Parkland shooting, and also reminding Americans about other mass shootings including at an outdoor concert in Las Vegas, at an Orlando nightclub and at Sandy Hook Elementary School in Connecticut.

The student-led crusade even caught the attention of retired U.S. Supreme Court Justice John Paul Stevens. At age 97, Stevens sent an unsolicited essay to *The New York Times* that called for repeal of the Second Amendment. In the piece, published on March 27, Stevens dissented in the contentious 2008 *District of Columbia v. Heller* opinion, which held that the Second Amendment allows individuals a right to own a gun for self-defense.

Momentum for reform is also increasing. According to a Gallup Poll, two-thirds of Americans support tougher gun laws, the strongest such support since 1993. That support is playing out in state legislatures across the country, if not in the U.S. Congress.

Some common gun reforms proposed in various states include the expansion of background checks; a ban on bump stock devices, which essentially enable a semiautomatic rifle to fire more like a machine gun; age restrictions for gun purchases; and "red flag" laws that would remove guns from the homes of those deemed dangerous or mentally ill by law enforcement officials.

Meanwhile, gun rights advocates are focusing on bills that would provide funding for school safety upgrades such as armed security guards and cameras and allowing school staff, including teachers, to carry guns.

The governors of New York, Rhode Island, Connecticut, New Jersey, Massachusetts, Delaware and Puerto Rico have formed their own alliance called the "States for Gun Safety" coalition to combat gun violence by sharing information to help intercept illegal guns.

According to the *Associated Press*, Democrats have introduced more than 90 percent of gun control bills around the country while Republicans account for 80 percent of proposals that would expand gun rights.

Any significant gun law reforms in the immediate future will likely come at the state level. To date, the only related federal action has been an effort to improve the National Instant Criminal Background Check System used to screen U.S. gun buyers, which was included in Congress' recent $1.3 trillion spending bill.

Rather than wait on lawmakers, some major U.S. retailers have decided to take matters into their own hands. Walmart, Dick's Sporting Goods and Kroger have all decided not to sell guns to anyone under the age of 21.

The following highlights reforms that some states have already enacted in the wake of the Parkland shooting, as of press time in April.

NEW YORK

Legislation was approved to increase the number of crimes that would prevent a domestic abuser from getting or retaining a gun. It also closes a loophole that ensures the surrender of all firearms, not just handguns. The law further prevents those wanted for a felony or other serious offense from obtaining or renewing a firearm license.

Democratic Gov. Andrew Cuomo has said that in nine of the 10 deadliest mass shootings in U.S. history, including Las Vegas and the Sutherland Springs, Texas church shooting, the shooter had an existing record of either committing violence against women, threatening violence against women, or harassing or disparaging women.

FLORIDA

A new law here allows a court to prohibit a violent or mentally ill individual from purchasing or possessing a firearm or any other weapon and lets law enforcement remove a firearm from the home of someone deemed an immediate danger.

Signed into law by Republican Gov. Rick Scott, the law also raises the age to buy guns from 18 to 21, creates a three-day waiting period to buy guns, and bans bump stocks. The law provides $400 million in funding to bolster school security and enhance mental health treatment. It allows some school personnel to be armed, but not classroom teachers.

VERMONT

Republican Gov. Phil Scott has signed into law measures that raise the legal age to buy guns from 18 to 21, bans bump stocks and limits high capacity magazines, expands background checks, allows police to confiscate guns from the scene of suspected domestic violence, and makes it simpler for police to remove guns from those deemed an "extreme risk" of danger to themselves or others.

RHODE ISLAND

Democratic Gov. Gina Raimondo signed a red flag executive order creating a statewide policy to keep guns out of the hands of individuals who pose a danger to themselves and others. Connecticut, California, Washington, Oregon and Indiana have also passed red flag laws in recent years. Raimondo's order also convenes a new Gun Safety Working Group to develop recommendations addressing gun violence.

WASHINGTON

The state has banned bump stock devices, as used in the Las Vegas mass shooting. California, Massachusetts and New Jersey had already banned bump stocks prior to the Parkland shooting. Legislative proposals for similar bans have been made in dozens of states since the Las Vegas shooting.

OREGON

The first state to pass a law relating to gun violence immediately after the Parkland shooting (though it was introduced before it happened) prevents convicted stalkers and domestic violence offenders from buying guns and keeping guns. The measure, which received bipartisan support, closes a loophole in a previous law whereby the ban did not apply to abusers who weren't married to, have children or live with the victim.

Christian Nolan is NYSBA's Senior Writer

An Old Standard for New Technology

By Nathan Bu, Paul Stretton and Brandon Wallace

Social media is ubiquitous in 21st century life. Almost 70% of American adults use Facebook, with nearly three-quarters of those users accessing Facebook on a daily basis.[1] But as recent Congressional hearings have shown, Facebook privacy is far from secure. Days of grilling Facebook's CEO, Mark Zuckerberg, have underscored the need to re-examine the most common way to prevent unknown users from seeing one's Facebook activity by restricting visibility to designated users – i.e., "friends."

As it happens, the Washington hearings come on the heels of recent court rulings that have also addressed Facebook activity – and what is, or is not, discoverable.

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Facebook is just one social media site, of course, as data show that over 70% of American teenagers regularly use more than one social media website, and 92% of teenagers go online daily.[2] But Facebook is a huge social media presence and its privacy safeguards, or lack of them, have become a national issue.

While limiting online content to a friends list may help prevent unknown Facebook users from viewing your profile,[3] does marking social media content as "private," in and of itself, shield all, or any, of that content from discovery requests? Not anymore. On February 13, 2018, the Court of Appeals held in *Forman v. Henkin* that even "private" Facebook content, such as photos and posts, may be discoverable if relevant.[4] The Court clarified that, in the social media context, traditional discovery standards apply.

DISCOVERY AND SOCIAL MEDIA

New York has a liberal discovery standard. CPLR 3101 mandates that there shall be full disclosure of all "material and necessary" information. The Court of Appeals has adopted a "broad interpretation" of those words.[5] In practice, courts ask whether the demanding party requests relevant information.[6] Even private material like a personal diary is discoverable.[7]

Distinct Standard for Social Media Prior to Forman

In a series of cases prior to *Forman*, the First, Second, and Fourth Departments developed a more restrictive standard for the discovery of social media.[8] For example, in *Tapp v. New York State Urban Development Corp.*, the First Department held that "[t]o warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account."[9] One way that the demanding party could overcome this factual predicate was by identifying relevant content publicly posted to the responding party's social media page.[10] By requiring that the party demanding social media content satisfy this heightened factual showing, the Appellate Departments departed from the traditional liberal discovery standard of New York and set a hurdle to discovery of social media content unique to that type of information.

Where the demanding party was able to satisfy this burden, the appellate courts often required trial courts, before ordering disclosure, to conduct an *in camera* review of the social media to limit disclosure to relevant posts, messages, or pictures. For example, having found that the social media contained relevant information, the Second Department in *Richards v. Hertz Corp*. instructed that the "Supreme Court should conduct an *in camera* inspection of [all social media posts since the plaintiff's accident] to determine which of those materials, if any, are relevant to her alleged injuries."[11] While one trial court has rejected this approach, the First, Second, and Fourth Departments had approved of it.[12]

COURT OF APPEALS ADDRESSES THE SOCIAL MEDIA STANDARD: *FORMAN V. HENKIN*

Facts and Procedural History

In *Forman*, Plaintiff Kelly Forman alleged that she was injured falling off of a horse owned by Defendant Mark Henkin.[13] Forman alleged physical and cognitive injuries that limited her ability to participate in recreational activities, such as participating in sports, going to the movies, or attending the theater.[14] In deposition testimony, Forman claimed that before her accident, she would frequently post photographs on Facebook, but that about six months after the accident she deactivated her account. While she admitted to posting "a lot" of pre-accident photographs, Forman could not recall whether she had posted any post-accident photographs.

Forman also claimed that her cognitive injuries made it difficult for her to compose messages on a computer. Forman claimed that writing a simple email could take hours because she would need to check several times for spelling and grammar errors.

Henkin moved to compel discovery of Forman's entire Facebook account, including both content publicly shared and content privately shared with friends. Henkin argued that, based on her pre-accident Facebook use, Forman's Facebook photos would contain evidence of her level of activity. Also, Forman's Facebook messages would contain evidence of Forman's ability to compose messages on the computer. Forman opposed the motion, arguing that Henkin had failed to establish a proper basis for the discovery request, because Forman's public profile contained only a single photograph that did not contradict her deposition testimony.

Supreme Court, in an opinion by Justice Billings, granted the motion to compel in part, limiting discovery of Forman's private Facebook content to (1) all pre-accident photographs that would be used at trial; (2) all post-accident photographs that did not depict nudity or romantic encounters; and (3) Facebook records showing the time and word/character-count of post-accident messages written by Forman, including archived or deleted records.[15] Supreme Court denied access to the actual content of Forman's pre- or post-accident written Facebook messages and denied access to her "entire" account.

The First Department Splits 3-2

Forman appealed to the Appellate Division, First Department.[16] The First Department, in a 3-2 decision, modified Supreme Court's order by limiting discovery to photographs that Forman intended to introduce at trial, denying Henkin access to other post-accident photographs and the message data. The majority, which included Justices Moskowitz, Richter, and Kapnick, emphasized stare decisis, focusing on prior social media cases requiring the party seeking social media discovery to establish a factual predicate. In dissent, Justices Acosta and Saxe emphasized New York's open discovery policies and argued that stare decisis should not apply to recent decisions regarding developing technology.

The majority found Forman's previous use of Facebook, whether to post pictures or send messages, did not justify discovery of her private Facebook information.[17] In order to access Forman's private content, Henkin needed, but did not provide, a factual predicate beyond merely the fact that Forman used and posted to Facebook.[18] According to the majority, the factual predicate in the social media context is a check against "fishing expeditions"

and is consistent with the discovery standards in other contexts.[19]

Justices Acosta and Saxe dissented, arguing that requiring a factual predicate contradicts New York's liberal pre-trial discovery policies and is inconsistent with the discovery standards used in civil litigation generally. The dissenters would have applied the "traditional approach to discovery requests" to prevent fishing expeditions. This approach required that a demand be appropriately tailored, prohibiting unlimited access to a party's entire Facebook account. This "traditional" approach would have allowed Henkin access to the content of Forman's Facebook messages, as opposed to just timestamps and word-counts.[20] Finally, although not an issue in the case under review, the dissenters expressed concern at the burden prior social media discovery cases imposed on the courts by requiring *in camera* review of the contents of social media accounts to determine relevancy prior to any exchange.[21]

Post*-Forman, *the responding attorney must treat all incoming requests for discovery of social media content the same as any other discovery request.

The Court of Appeals Unanimously Reverses

The First Department granted leave to the Court of Appeals.[22] The Court of Appeals agreed with the First Department dissenters and reinstated Supreme Court's order, holding that "disputes over the scope of social media discovery should employ our well-established rules – there is no need for a specialized or heightened factual predicate to avoid improper 'fishing expeditions.'"[23] A requesting party must still meet a "threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary' – i.e., relevant."[24] However, this requirement cannot turn on whether content is public or private. At the same time, a party's entire social media account does not automatically become discoverable simply because a personal injury suit has been commenced.[25]

The Court of Appeals announced a two-part test for reviewing social media discovery requests.[26] First, courts are to determine whether relevant information is likely to be discovered, given the nature of the litigation.[27] Second, courts should balance the potential utility of this information against the specific privacy concerns of the producing party.[28] Furthermore, a court may properly limit a discovery order temporally or, at the request of a party or on its own initiative, by issuing a protective order under CPLR 3103(a).[29]

Applying this test, the Court of Appeals held Henkin "more than met" his threshold burden.[30] Forman's deposition testimony created a basis to infer that her post-accident Facebook photos would be relevant to her post-accident level of activity.[31] Furthermore, the message data would likely be relevant to Forman's ability to write and send messages using the computer, and thus her claims of cognitive impairment.[32] The Court of Appeals expressed no view on whether Henkin would be entitled to the content of Forman's Facebook messages or how to appropriately tailor a request for the content of the messages.[33]

Finally, the Court of Appeals, echoing the First Department dissent, expressed concern regarding the use of *in camera* review of social media evidence.[34] The Court of Appeals, in a footnote, emphasized the attorneys' responsibilities as officers of the court in managing discovery.[35] Accordingly, *in camera* review should be the exception rather than the rule.[36]

A PRACTITIONER'S GUIDE TO SOCIAL MEDIA DISCOVERY

The Old Way

Prior to the Court of Appeals' decision in *Forman*, the "specialized or heightened factual predicate"[37] that disclosure of social media enjoyed meant that an attorney responding to a discovery request was unlikely to need to produce social media content – such as the text of posts, photos, or location information – without a court order. Even when a court ordered production of social media, the prevailing party might only obtain what the motion judge deemed relevant after an *in camera* review.

Under the "old" rules, upon receiving a broad request such as "all documents relating to . . . ," without more, the responding attorney did not have to search through the client's private social media accounts to identify relevant information.[38] Established case law "ha[d] conditioned discovery of material on the 'private' portion of a Facebook account on whether the party seeking disclosure demonstrated there was material in the 'public' portion that tended to contradict the injured party's allegations in some respect."[39] Even where the demand for social media was narrowly tailored, the heightened factual predicate applied, and only information that the court approved of in its *in camera* review would ultimately be turned over.

Obligations after Forman

Post-*Forman*, the responding attorney must treat all incoming requests for discovery of social media content the same as any other discovery request – by responding

with "all matter material and necessary"[40] or by making a proper objection. Thus, when working with a client to gather documents from the obvious sources to review for privilege and relevance – emails, files (both physical and digital), calendars, and the like – the responding attorney must marshal all potentially relevant documents contained in a client's social media accounts to decide which documents must be exchanged. This responsibility applies to private messages, posts shared with a limited audience, and even files uploaded but not shared with any online audience. These materials are discoverable: "even private materials may be subject to discovery if they are relevant."[41] While *Forman* may seem to create a new discovery obligation for responding attorneys, it is more accurate to say that *Forman* shifts the burden of reviewing social media content for relevance from the court to the responding attorney. Therefore, the responding attorney's obligation is to ensure that a diligent search for relevant social media content is made. This obligation applies whether or not the discovery request mentions social media by name.

Objections

As the *Forman* Court recognized, genuinely sensitive materials – even those potentially relevant to the litigation – can be protected from disclosure based on a balancing of privacy interests.[42] While a court may give moderately more weight to the sensitive nature of content posted privately on social media than to content posted publicly or semi-publicly, social media enjoys no special protection. Still, while conducting a search for relevant content, the attorney should note the specific privacy settings that the client has applied to a given piece of content. *Forman* suggests that when information is private (and is marked as such online), a party may have a stronger basis for objecting to the discovery request.

The court remains responsible for "balancing the potential utility of the information sought against any specific 'privacy' or other concerns raised by the account holder."[43] This 'balancing' is the same whether the requested material is electronic social media content or any other type of private – but not privileged – material, such as a physical diary or personal, printed photographs.

While a "private" label cannot act as an absolute shield to discoverability, it may bolster the case for protecting sensitive information under CPLR 3103, or possibly during *in camera* review. Presumably, in defending a motion to compel the production of social media content, a "private" label might be a factor to be considered. At the end of the day, however, relevance is key. No matter how sensitive the content posted on social media, it is presumed discoverable if it is relevant to the case at hand.

The responding attorney must be careful to object to overbroad requests – even if they do not mention social media by name. While all discovery requests are required to be "appropriately tailored and reasonably calculated to yield relevant information,"[44] the responding attorney should be particularly careful to object (1) when a request needlessly includes categories of social media content that are sensitive, and (2) when a request specifies no temporal limitation on the social media content sought. The *Forman* Court alludes to both limitations, and these objections would do well to protect a client against an unnecessary invasion of online privacy. To ensure that sensitive content stays private, care must be taken to object to the request in order to protect social media content that is highly embarrassing or personal.

In *Forman*, the mere fact of posting on social media was a relevant issue. As such, any and all social media posts within a specified timeframe were relevant to the issue at hand. Nevertheless, Supreme Court issued its order with the limitation that the plaintiff exclude photographs that "depict nudity or romantic encounters." If a responding attorney is presented with a similar situation in which any type of social media posting might be relevant, an objection is likely appropriate until the request excludes any unnecessarily sensitive, personal, or embarrassing content. Indeed, to prevent needless embarrassment, the responding attorney should object to any request not tailored to avoid sensitive content as overly broad or unduly burdensome, in that it may entail disclosure of unnecessarily personal and private content. If necessary, the responding party can always seek protection under CPLR 3103 to protect a client's privacy rights.[45]

The Requesting Attorney

Carefully tailored discovery requests are more likely to be met without objection and are also more likely to produce a manageable amount of relevant discovery for both sides. When drafting discovery requests that involve production of content from a party's social media accounts, there are at least four factors to consider: availability, specificity, temporality, and privacy.

First, a request for production of social media content is only necessary when the relevant information is not publically available to the requesting attorney.[46] On many social media sites – including Facebook and Twitter – some or all of an account holder's content is often completely accessible to the public, sometimes without even requiring that the viewer be logged into an account of his or her own. In these cases, unless seeking discovery of private postings – or potential postings – that the attorney reasonably believes to be relevant, there may be no need to make a demand for social media content production. Still, there may be advantages – particularly when it comes to laying a foundation for admission – to receiving the public content through the discovery process. Thanks to New York's liberal discovery rules, even

publicly accessible information that a party has already obtained is proper to request in the discovery process.[47]

Second, requests should be as specific as possible. Because of the perception that social media postings are in some way "private," requests will likely be met with resistance. Being as targeted and narrow as possible with respect to the type of post – Photos? Text? Post metadata, such as time and length of post only? – will be more likely to lead to production and less likely to be met with an objection.

Third, including temporal limitations, as with any discovery request, will help avoid an "unduly burdensome" objection. This objection might be particularly justified when accounts might have thousands of posts spanning decades – the vast majority of which are highly likely to be irrelevant to any matter being litigated.

Finally, the requesting attorney should demonstrate an understanding of the sensitive nature of many social media posts that are shared with limited audiences. In *Forman*, Supreme Court "exercised its discretion to exclude photographs showing nudity or romantic encounters, if any, presumably to avoid undue embarrassment or invasion of privacy."[48] Attorneys requesting social media discovery should – but do not have to – include similar limitations in their request to avoid a discovery dispute that is likely unnecessary.

CONCLUSION

In *Forman*, the Court of Appeals stripped social media of special protections from discovery. Rejecting the application of a heightened factual predicate to discovery requests involving social media, *Forman* marks a return to New York's standard, liberal discovery practice. If social media content is relevant and responsive to a proper discovery request, it must now be disclosed – even if it had only been shared "privately" with a limited online audience – absent an independent basis for withholding it. Ultimately, this shifts the burden of reviewing social media postings for relevance from the court – which previously had to conduct an *in camera* review – onto the responding attorney.

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3. Recently, Facebook has become embroiled in a scandal concerning private data that was leaked to the data firm Cambridge Analytica. *See, e.g.*, Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. Times, April 4, 2018, https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html.

4. 2018 N.Y. Slip Op. 01015 at 1.

5. *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 407 (1968).

6. *See, e.g.*, *Andon v. 302-304 Mott St. Assocs.*, 94 N.Y.2d 740, 746–47 (2000).

7. *See, e.g.*, *Faragiano ex rel. Faragiano v. Town of Concord*, 294 A.D.2d 893 (4th Dep't 2002).

8. *See, e.g.*, *Tapp v. New York State Urban Dev. Corp.*, 102 A.D.3d 620 (1st Dep't 2013); *Richards v. Hertz Corp.*, 100 A.D.3d 728, 729 (2d Dep't 2012); *McCann v. Harleysville Ins. Co. of New York*, 78 A.D.3d 1524 (4th Dep't 2010).

9. *Tapp*, 102 A.D.3d at 620.

10. *Spearin v. Linmar, L.P.*, 129 A.D.3d 528 (1st Dep't 2015).

11. *Richards v. Hertz Corp.*, 100 A.D.3d 728, 730 (2d Dep't 2012).

12. *Spearin,* 129 A.D.3d at 528; *Richards,* 100 A.D.3d at 728; *Imanverdi v. Popovici*, 109 A.D.3d 1179 (4th Dep't 2013). *But* see *Melissa "G" v. N. Babylon Union Free Sch. Dist.*, 48 Misc. 3d 389 (Sup. Ct., Suffolk Co. 2015).

13. *Forman v. Henkin*, 30 N.Y.3d 656 (2018).

14. *Id.; Forman v. Henkin,* 134 A.D.3d 529, 529 (1st Dep't 2015).

15. *Forman v. Henkin*, 2014 N.Y. Misc. Lexis 1218 (Sup. Ct., N.Y. Co. 2014).

16. Henkin did not appeal the Supreme Court's decision, which limited the scope of review before the Court of Appeals. *See infra* at n. 33.

17. 134 A.D.3d at 531.

18. *Id.*

19. *Id.* at 532 ("The discovery standard we have applied in the social media context is the same as in all other situations – a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims." (citations omitted)).

20. The dissent found the Supreme Court's motion "awkward and questionable" in this regard.

21. The majority did not address this issue at length, as it was not raised on appeal. However, the majority held that in camera review was discretionary—not mandatory.

22. Because the First Department's decision was not "final," despite there being two dissenters, Henkin lacked an appeal as of right. However, the First Department's grant of leave allowed for review of a non-final order. The grant from the Appellate Division, as opposed to the Court of Appeals, may indicate the First Department's recognition of the need for clarity on this type of discovery issue.

23. *Forman*, 30 N.Y.3d at 665.

24. *Id.* at 661.

25. *Id.* at 664.

26. *Id.* at 665.

27. *Id.*

28. *Id.*

29. *Id.* at 662.

30. *Id.* at 666.

31. *Id.*

32. *Id.* at 667.

33. *Id.* The Court of Appeals could not reach this issue because Henkin did not appeal the Supreme Court's decision, which denied access to the content of the messages.

34. *Id.* at 662, n. 2.

35. *Id.*

36. *Id.* ("When the [discovery] process is functioning as it should, there is little need for a court in the first instance to winnow the demand or exercise its in camera review power to cull through the universe of potentially responsive materials to determine which are subject to discovery.").

37. *Id.* at 665.

38. Of course, this was not a license for the attorney to shirk data preservation responsibilities.

39. *Forman,* 30 N.Y.3d at 663.

40. CPLR 3101.

41. *Forman,* 30 N.Y.3d at 666.

42. *Id.* at 665.

43. *Id.*

44. *Id.* at 664.

45. CPLR 3103 (McKinney).

46. *See* New York State Bar Association, *Social Media Ethics Guidelines* (May 11, 2017), https://www.nysba.org/socialmediaguidelines17/.

47. *In re Steam Pipe Explosion at 41st St.*, 127 A.D.3d 554, 556 (1st Dep't 2015), *aff'd sub nom. In re Steam Pipe Explosion at 41st St. & Lexington Ave.*, 27 N.Y.3d 985 (2016).

48. *Forman*, 30 N.Y.3d at 667.

Burden Back Where It Belongs, But Barely – Part I

In 1993, the N.Y. Court of Appeals decided *Thoma v. Ronai*,[1] a memorandum decision set forth here in its entirety:

> Plaintiff commenced this negligence action to recover damages for personal injuries suffered by her as a pedestrian when she was struck by defendant's automobile in an intersection. Defendant interposes comparative negligence.
>
> The submissions to the nisi prius court on plaintiff's motion for summary judgment, consisting of her affidavit and the police accident report, demonstrate that she may have been negligent in failing to look to her left while crossing the intersection. Plaintiff's concession that she did not observe the vehicle that struck her raises a factual question of her reasonable care. Accordingly, plaintiff did not satisfy her burden of demonstrating the absence of any material issue of fact and the lower courts correctly denied summary judgment.

This short decision sowed confusion for the next 25 years. The object of confusion? Whether the plaintiff in a personal injury action, where defendant alleged plaintiff was comparatively negligent, was required to submit *prima facie* proof when moving for summary judgment that he or she was not comparatively negligent.

The resolution of that confusion? The April 3, 2018 decision of the Court of Appeals in *Rodriguez v. City of New York*,[2] *where the Court, by the narrowest of margins, held:*

> This appeal requires us to answer a question that has perplexed courts for some time: Whether a plaintiff is entitled to partial summary judgment on the issue of a defendant's liability, when, as here, defendant has arguably raised an issue of fact regarding plaintiff's comparative negligence. Stated differently, to obtain partial summary judgment in a comparative negligence case, must plaintiffs establish the absence of their own comparative negligence. We hold that a plaintiff does not bear that burden.[3]

Unlike the short, unanimous, *Thoma* decision, *Rodriguez*, a 4-3 split in the Court, contains a lengthy majority decision by Judge Feinman, joined by Judges Rivera, Fahey, and Wilson, as well as a lengthy dissent by Judge Garcia, joined by Chief Judge DiFiore and Judge Stein.

RODRIGUEZ: THE FACTS

While cases citing *Thoma* typically involved pedestrians struck by vehicles while crossing a street, the facts in *Rodriguez* were a little different:

> Plaintiff Carlos Rodriguez was employed by the New York City Department of Sanitation (DOS) as a garage utility worker. He was injured while "outfitting" sanitation trucks with tire chains and plows to enable them to clear the streets of snow and ice. The following facts are uncontradicted: On a snowy winter day, plaintiff and his two coworkers were tasked with outfitting sanitation trucks with tire chains and plows at the Manhattan 5 facility. Typically, the driver backs the truck into one of the garage bays, and the driver and other members of the team "dress" the truck. One person acts as a guide, assisting the driver by providing directions through appropriate hand signals while standing on the passenger's side of the truck. Once the truck is safely parked in the garage, the driver, the guide, and the third member of the team (here, plaintiff) place chains on the truck's tires.
>
> At the time of his accident, plaintiff was standing between the front of a parked Toyota Prius and a rack of tires outside of the garage bay while the driver began backing the sanitation truck into the garage. The guide, at some point, stood on the *driver's* side of the sanitation truck while directing the driver in violation of established DOS safety practices. The sanitation truck began skidding and eventually crashed into the front of the parked Toyota Prius, propelling the car into plaintiff and pinning him up against the rack of tires.[4]

After discovery was completed, plaintiff moved for partial summary judgment on liability while defendant opposed the motion and cross-moved for summary judgment dismissing plaintiff's complaint. Supreme Court

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denied both motions, holding "there were triable issues of fact regarding foreseeability, causation, and plaintiff's comparative negligence."[5]

FIRST DEPARTMENT AFFIRMS DENIAL OF SUMMARY JUDGMENT

Plaintiff appealed the denial of his motion[6] and the First Department, by a 3-2 margin, affirmed the trial court's denial of plaintiff's summary judgment.[7]

The majority, consisting of Justices Tom, Sweeny, and Andrias, acknowledging the turmoil created by conflicting interpretations of *Thoma*,[8] affirmed the denial of summary judgment:

> In this case, we are revisiting a vexing issue regarding comparative fault: whether a plaintiff seeking summary judgment on the issue of liability must establish, as a matter of law, that he or she is free from comparative fault. This issue has spawned conflicting decisions between the judicial departments, as well as inconsistent decisions by different panels within this Department. The precedents cited by the dissent have, in fact, acknowledged as much. After a review of the relevant precedents, we believe that the original approach adopted by this Department, as well as that followed in the Second Department, which requires a plaintiff to make a prima facie showing of freedom from comparative fault in order to obtain summary judgment on the issue of liability, is the correct one.[9]

The majority explained the basis for its conclusion:

> We agree that the concepts of comparative negligence and sole proximate cause are two distinct defenses which must be pleaded and proved. However, where, as here, an issue of fact as to the plaintiff's comparative negligence has been raised, and the plaintiff has not negated the presence of comparative liability on his or her part, the plaintiff's motion for summary judgment must be denied. This does not prevent a plaintiff from establishing the degree of defendant's liability at a trial; nor does it prevent the plaintiff from minimizing his or her own liability. Rather, it gives both parties a fair opportunity to present their evidence in a unified manner in order to give the jury a complete picture of the incident, the facts of which it must determine.

In his dissenting opinion, Justice Acosta, joined in by Justice Moskowitz, cited his 2012 concurring decision[10] in *Capuano v. Tishman Constr. Corp.*,[11] a Labor Law § 241(6) case wherein he wrote:

> The issue, as raised by defendants on appeal, is whether a plaintiff has the burden to disprove an affirmative defense in order to make a prima facie

> showing of entitlement to summary judgment. I would hold that a plaintiff does not have that burden. Once a prima facie showing is made, the burden shifts to the defendant to raise issues of fact, such as by submitting evidence in support of an affirmative defense.[12]

In *Rodriguez*, Justice Acosta expanded on his position in *Capuano*:

> The affirmative defense of comparative negligence is a partial defense that does not bar a plaintiff's recovery, but merely reduces the amount of damages in proportion to the plaintiff's culpable conduct, if any, that contributed to causing the injury (citations omitted). That is, the comparative negligence doctrine does not bear upon *whether* a defendant is liable; rather, it bears upon the extent of the defendant's liability, where both the defendant and the plaintiff engaged in culpable conduct resulting in the injury. This is distinct from other complete defenses, such as the sole proximate cause defense, through which a defendant may be entirely absolved of liability.[13]

The First Department granted plaintiff leave to appeal to the Court of Appeals.

COURT OF APPEALS REVERSES

The majority explained that an interpretation of *Thoma* as requiring a plaintiff to show an absence of comparative fault in order to obtain partial summary judgment was mistaken:

> Resolution of the issue before us necessarily turns on the interpretation and interplay of these various CPLR provisions. In *Thoma v Ronai* (citation omitted), this Court held that the plaintiff there did not meet her burden of demonstrating the absence of any material fact; "a factual question of her reasonable care" existed, and thus [plaintiff] was properly denied summary judgment (citation omitted). However, *Thoma* never addressed the precise question we now confront. The decision itself never considered the import of [CPLR] article 14-A, and a review of the briefs publicly filed in that case reveal that the plaintiff proceeded on the assumption that if a question of fact existed as to her negligence, summary judgment on the issue of liability would be denied. The plaintiff in *Thoma,* in her limited submissions to this Court, maintained that "[t]he crux of the case is the existence, as a matter of law, of any question of culpable conduct (contributory negligence) by the Plaintiff that would warrant the Trial Court's denial of summary judgment pursuant to C.P.L.R. 3212 on the issue of the Defendant's liability" (citation omitted). Thus, to the extent that the Departments of the Appellate Division have interpreted *Thoma* as explicitly holding that a plaintiff must show an absence of comparative fault in order to obtain partial summary judgment on liability, such a reading of *Thoma* is mistaken (citation, parenthetical, and footnote omitted).[14]

The majority synthesized its holdings in *Thoma* and *Rodriguez* by distinguishing the issues in the two cases:

> On this appeal, plaintiff raises the issue not addressed in *Thoma*. Plaintiff contends, even assuming there is an issue of fact regarding his comparative fault, that he is entitled to partial summary judgment on the issue of defendant's liability.

Rejecting the arguments raised by the defendant, the majority remitted the case to the First Department and concluded:

> To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault. Accordingly, the order of the Appellate Division, insofar as appealed from, should be reversed, with costs, and the case remitted to the Appellate Division for consideration of issues raised but not determined on the appeal to that court and the certified question answered in the negative.

CONCLUSION

Having given away the end of the story, next month's column will delve into the analysis of the majority in support of its holding, the reasoning of the dissenters, and what to do going forward.

Memorial Day is just around the corner. A bit of unsolicited advice: after the winter we have just survived, put away your smartphones, tablets, laptops, and other gizmos for the three-day holiday and give yourself a well-deserved break.

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1. 82 N.Y.2d 736 (1993).
2. 2018 N.Y. Slip Op. 02287 (2018).
3. *Id.*
4. *Id.*
5. *Id.*
6. Defendant did not cross-appeal, so the contention that plaintiff's case should be dismissed "on the ground that an employee cannot recover for injuries sustained while doing an assigned job, the purpose of which is to eliminate the cause of the injury" was not addressed by the court *Id.* at n. 1.
7. *Rodriguez v. City of New York*, 142 A.D.3d 778 (1st Dep't 2016).
8. The majority pointed out in footnote 1 that the Fourth Department had reached a contrary conclusion in *Simoneit v. Mark Cerrone, Inc.*, 122 A.D.3d 1246 (4th Dep't 2014).
9. *Id.*
10. Joined by Justice Saxe.
11. 98 A.D.3d 848 (1st Dep't 2012).
12. *Id.*
13. *Rodriguez v. City of New York*, 142 A.D.3d 778 (1st Dep't 2016).
14. 2018 N.Y. Slip Op. 02287 (2018).

NEW YORK LAW
A Model for the World, and World Peace

The following are excerpts from a speech by the Hon. Charles E. Ramos, senior justice of the Commercial Division in New York, after he received the 2018 Stanley H. Fuld Award given by the Commercial and Federal Litigation Section of the New York State Bar Association at the Annual Meeting last January. The award, named for the late New York State chief judge, recognizes outstanding contributions to the development of commercial law and jurisprudence in New York. We are including his remarks here because we find them relevant not only to the Commercial Division but also to the legal profession itself.

My undergraduate studies were science and economics. I see the world through that filter. As an economist, I am going to make an observation about you. . . The people in this room do more to maintain peace in the world than a room full of diplomats from the UN! You do it without intending or being aware of it.

* * *

Unlike after World War I, when the defeated were isolated and their economies destroyed, after World War II Europe formed the [European Economic Community] and the [European Union]. Europe has become economically interdependent. France, England and Germany have never before enjoyed 70 years of continuous peace.

It may sound profane to say this, but this is an example of the power of money. I sound like Tony Soprano. Actually, money is not profane, greed is. But the people of the world are not greedy, by and large. They need enough. They want reasonable prosperity. They know that money feeds us, houses us, clothes us, cares for our health, educates our children. . .

So, if commerce creates wealth and the by-product peace, who needs us, the commercial lawyers and judges?

The reason we are needed is that the key to economic interdependence is in the magnitude of the commercial activity. The benefits of commerce must overcome humanity's predilection to engage in tribalism and conflict.

That is where you come in. New York State possesses such a wealth of legal and judicial talent that it attracts and concentrates commercial activity to such an extent that all the world wants of us is our business. We have achieved a legal critical mass of law and procedure, and a worldwide reputation for skill and fairness that causes success to lead to further successes.

* * *

New York State contributed more to the wealth and success of America than any other state in the nation. We call New York the Empire State. That is not conceit, it is reality. We built it.

I came to realize how much the world's judiciary respects you when I attended a judicial conference last year in London. This conference was the First Standing Forum of International Commercial Courts. . . . The British organized what was a great party but the best thing I took away was what the other judges from, 27 countries, thought of us. They knew who we were, what you do, how efficient we all are and even read and copy our rules. . . . [T]he second Standing Forum w[ill] take place here in New York. The other attendees were delighted. They want to come to New York because we do commercial law so well.

* * *

[T]hank you for providing the environment, the matrix that allows commerce to thrive here in New York. Without knowing it, you are the enablers of peace. Remember Mao's Little Red Book? To misquote Mao, peace does not come out of the barrel of a gun.

Five Project Red Flags: Lessons from a Project Manager

By Nina Lukina

Lawyers know their work. Non-legal projects at law firms, however, often present challenges for the teams tasked with them. Without the project format and deadlines that attorneys know so well, these endeavors can stymy. They drag, stumble, and often fail entirely.

As a project manager who has worked with many law firms of varying sizes and approaches to projects, I have seen patterns emerge.

Those involved with a project, be they team members or stakeholders, usually focus on the tasks assigned to them. In project manager-speak, "stakeholders" are the people who are most invested in the outcome of the project. These individuals usually commissioned the project and will judge its success at its conclusion. Project managers have the added responsibility of avoiding overall failure in the many ways it can manifest. This can be easy or difficult, but rest assured that there are clear red flags that both project managers and team members can identify and fight.

While I have found these problems to be especially endemic to IT initiatives such as upgrades and rollouts, they can afflict any undertaking that entails a high level of complexity, a long timeline, and multiple parties.

1. DEAD MEETINGS

The first and most easily identified red flag is the dreaded "dead" meeting. This is when, on a status call or meeting, nothing of value is discussed, no updates or next steps are brought up, and everyone leaves the meeting unsure of what the purpose was.

This often happens due to lack of an agenda that calls for a review of the next steps of the project.

It can feel like the goal of meetings is simply to drive discussion toward a certain topic or to clarify questions or concerns. While these tasks are important, they represent a reactive approach that is only half of the equation; there should always be an attempt to address next steps *proactively*.

The remedy here is fortunately simple: awareness of completed, ongoing, and outstanding work. Use meetings to go over the project's status, come up with clear to-do items, and keep everyone on the same page.

2. COMMUNICATION DISENGAGEMENT

Sometimes project managers come prepared with a clear agenda that has been shared ahead of time with their team and the meeting still dies.

Another red flag that should be apparent to any project manager is diminished communication, which can be a sign of a project team disengaging from the work effort.

Sometimes issues come up that leave them with less time or bandwidth to perform project tasks. These instances are difficult to plan for and require a delicate balance of pushing the stakeholders for progress and pulling the work effort's timelines back.

In true examples of disengagement, stakeholders may entirely miss status calls or meetings, or report no progress without justification. Disengagement is also clear when effort has been made to have a higher level conversation about the project as a whole to no effect.

3. RESOURCES BEING PULLED

One of the most obvious project red flags is when your own project resources are pulled from your project, whether they are people, funds, or blocks of time. This can occur for any number of reasons, though the most common is that they are needed for other, possibly more pressing projects.

It is extremely important to take action when this happens.

This can be difficult to prevent, especially if it happens early in the project work when other team members can easily pick up the slack. It will, however, cause issues down the line and will undoubtedly be felt once any resource-intensive tasks arise.

When resources are pulled, make sure to bring attention to this project risk. While it may be more suitable to keep this question to internal parties, making certain stakeholders are aware of this diminished resource pool will allow you to set expectations appropriately and proactively. That said, not all stakeholders may be champions for the project's cause as the next example will detail.

4. UNRELIABLE STAKEHOLDERS

Another common red flag is the unreliable stakeholder. "Unreliable" in this sense can mean any number of qualities, though in its most literal sense, unreliable stakeholders make themselves known by missing meetings, forgetting their tasks, or not championing the project's cause.

A more hands-on approach can often yield the most benefit. Keeping on top of the project's stakeholders by way of more frequent check-ins, like providing courtesy emails a few times a week when you only have a weekly status meeting or call, can do wonders to show that stakeholder that you are trying to maintain their engagement. You can also proactively address project delays by offering your own or your team's assistance for stakeholder-specific tasks. Doing so provides them with an avenue of communication that they may not have known was available to them.

Ultimately, engaging with your stakeholders more directly can only help the project's progress through all of its phases.

5. PROJECT BUDGET VS. WORK COMPLETE RATIOS

One of the most telling yet often missed red flags is an uneven ratio of budget spend compared to work completed. This red flag becomes more and more apparent the longer a project progresses. Fortunately, the early signs of this red flag are identifiable.

For example, you may find that a recently started project requires prolonged deliberation of its scope or other early issues. Consequently, the project team will have expended a large amount of time and budgeted work hours. In this case, the time spent on calls or during meetings can add up, and, before you know it, you find yourself with nearly half the budget expended while having only completed 20 percent of the project's scope. This cascades into attempts to course correct, only for the team to realize that even time spent remediating eats up the remaining budget.

The simplest fix to this red flag is to be aware of how events or issues that pop up throughout the course of a project affect the project's pace. Project managers should be defensive of a project's timeline and any deviation to that timeline should be regarded as a clear risk. Addressing those deviations in their entirety, as well as their effects on the overall schedule, can help stem this problem.

Whether you are an ad hoc leader of your project or a professional project manager, it is vitally important to be aware of these warning signings as they appear throughout the course of a project's lifecycle. Staying aware of these common problems and their solutions will boost your confidence and help to drive your project to a successful completion.

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BY NINA LUKINA

TECH TIPS
Is the Cloud Safe for Law Firms?

Addressing Common Concerns About Privacy, Compliance, and Connectivity

Cloud computing has been gaining momentum for about a decade. Today many law firms are moving their documents, applications, and infrastructure to the cloud, but concerns still abound about its safety, compliance, and connectivity.

What is the cloud, anyway? The concept can seem nebulous, foggy, and unstructured. The government agency NIST defines it as a "Paradigm for enabling network access to a scalable and elastic pool of shareable physical or virtual resources (examples of resources include servers, operating systems, networks, software, applications, and storage equipment) with self-service provisioning and administration on-demand."

Basically, when you transfer your data or application to the cloud, you are moving it from a resource that you possess and manage to that of another company. You already rely on the cloud for some aspect of your work or personal life if you use programs like Office 365, Gmail, Dropbox, or Google Drive.

The benefits of offloading data storage and application management, such as increased flexibility and reduced complexity, are swaying an increasing number of law firms. Still, because sensitive data is leaving the premises, the cloud computing model is far from universally trusted.

The first concern lawyers have about the cloud is, understandably, security. In the age of hacking, this is a foremost concern for an industry that traffics in highly sensitive information. The data is leaving your firm, and that seems worrisome. In fact, however, large cloud vendors like Microsoft, Amazon, and Google provide a level of security that is out of reach for your firm unless you were willing to invest a large amount of capital into it. These companies base their protections on their work for a huge number of companies and thus have a wider, more comprehensive view of cybersecurity.

Security is actually becoming a reason *to* move to the cloud for many companies. The same goes for compliance, which is another common concern, especially among law firms that work in health care, financial services, or with international clients. Many of the established legal IT vendors with cloud products make sure that they are thoroughly compliant with regulatory and international standards. For a complex regulation like HIPAA, it is often a headache to achieve the level of compliance on your own that a cloud vendor can offer.

When considering a cloud vendor, make sure to ask about the particular regulations that matter to your firm. Moving to the cloud can often be a way of outsourcing risk.

For an industry that must be always on and available for its clients, outages are not an option, and the cloud is commonly perceived as providing spotty service. Those of you who have Office 365 will know that this view is inaccurate. Of course, it depends on the quality of your office's internet connection, but running on the cloud does not leave you more vulnerable to being hard to reach. According to Microsoft, Exchange Online–the cloud version of Exchange – has an uptime of more than 99.9 percent. This might even be an improvement compared to your existing email environment.

A switch to cloud systems can make privacy and compliance less of a burden. Depending on your IT setup, it will likely also mean more room for growth, less complexity, and lower costs.

If you are considering the cloud, opt for established vendors who answer to strict security standards and who can provide satisfactory answers to your concerns.

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TO THE FORUM:

My firm recently began providing *pro bono* services for a not-for-profit organization that assists individuals with mental health issues. In most of the cases we have handled, we had an immediate impact, the work was extremely gratifying for the attorneys, and the clients were thrilled to receive assistance. Recently, however, we began representing one individual in a criminal matter where we have faced significant communication issues. Although the client receives treatment for his mental health issues, this client has become aggressive on occasion, is often non-responsive, and has occasionally been verbally abusive to the attorneys on the case. The attorneys in my firm are becoming frustrated because they are trying to act professionally, but are concerned that they are not getting through to the client and, on occasion, are fearful of the client.

I thought that if I placed some limitations on the client's communications with our attorneys, it might resolve some of these issues. For example, we could inform the client that his communications with us are limited to pre-arranged meetings or calls. If that doesn't work, I might possibly limit communications outside the courtroom to only writing. Although I think this might help the situation, and still allow us to provide competent legal advice, I don't want to run afoul of my ethical obligations to the client. Is it acceptable to place limitations on communications with our own client? I think that if I had some assistance from a staff member at the organization we are working with in future client meetings, it might also help. But I am concerned about waiving attorney-client privilege. In the event that I can't resolve the communication issues, is there any reason we can't withdraw as counsel? Are there any other ethical issues our firm should consider when providing legal services to individuals with mental health problems going forward?

Sincerely,
Mo Bono

DEAR MO BONO:

Problems frequently arise in the attorney-client relationship, like other interpersonal relationships, when there is a fundamental issue with communication. After all, if attorneys can't communicate with clients, they cannot have an understanding of client goals and objectives. Although we have previously addressed attorney/adversary communications in a prior *Forum* (Vincent J. Syracuse, Carl F. Regelmann, Richard W. Trotter, & Amanda Leone, *Attorney Professionalism Forum,* N.Y. St. B.J., September 2017, Vol. 89, No. 7), attorney/client communications are a new subject for us.

Your question requires a discussion of several provisions of the New York Rules of Professional Conduct (RPC), including RPC 1.4 ("Communication"), RPC 1.16 ("Declining or Terminating Representation"), and RPC 1.14 ("Client with Diminished Capacity").

We begin with RPC 1.4 which sets forth a lawyer's communication obligations to clients. The Rule generally requires that an attorney keep their client apprised of all material developments in their matter, comply with their client's reasonable requests for information and consult with their client about the means of accomplishing their goals and decisions regarding the representation. (RPC 1.4.) A recent opinion of the New York State Bar Association (NYSBA) Committee on Professional Ethics offers some guidance. The opinion concluded that attorneys are permitted to reasonably limit the timing and manner of their client communications. (NYSBA Comm. on Prof'l Ethics, Op. 1144 (2018).). In the question presented to the committee, the client had ongoing mental health issues, was physically intimidating, verbally abusive and frequently non-responsive. In analyzing whether a lawyer may limit the method of communications with a client, the committee expressed the view that RPC 1.4 does not mandate a specific manner of communication between lawyers and clients; lawyers should use their discretion in controlling the timing and method of the communications. (*Id.*, citing RPC 1.4(a)(4).) This rule

recognizes that it is a fact of life that we often have clients that may make unreasonable demands upon counsel for immaterial information and that attorneys are not obliged to meet every one of those demands in order to comply with their ethical obligations.

Although lawyers must obviously be responsive to the needs of their clients, Rule 1.4 permits them to control the timing of attorney/client communications. The RPC requires that the lawyer comply with the general requirement to "promptly" communicate with his or her client. Comment [4] to RPC 1.4 advises that when a prompt response to a client's request is not feasible, the lawyer or a member of the lawyer's staff should "acknowledge receipt of the request and advise the client when a response may be expected." (*Id.*, quoting RPC 1.4 Comment [4].) The committee also opined that this "Comment is consistent with the notion that a lawyer – often balancing competing obligations – needs to have reasonable latitude to schedule the timing of client communications." (*Id.*) We believe that your plan to prescribe client limitations on communication is a good idea in this circumstance as long as you are able to comply with your obligations under RPC 1.4, including updates to the client of significant information in the case and responding to reasonable requests for information. We hope that this improves the attorney-client relationship and reduces unnecessary stress on the attorneys in your firm.

If you are not able to solve the communication difficulties with your client by placing reasonable boundaries on those communications, it may be appropriate to consider withdrawing from the representation. RPC 1.16(b) addresses compulsory withdrawal while RPC 1.16(c) discusses permissive withdrawal. RPC 1.16(b) requires a lawyer to withdraw from representation, subject to paragraph (d) of the Rule, when: "(1) the lawyer knows or reasonably should know that the representation will result in violation of the [RPC] or of law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; (3) the lawyer is discharged; or (4) the lawyer knows or reasonably should know that the client is bringing legal action . . . merely for the purpose of harassing or maliciously injuring any person." (RPC 1.16(b).) The *Forum* has previously addressed the issue of compulsory withdrawal when a lawyer knew that their client's conduct reached a point where continued representation could result in a violation of the lawyer's ethical responsibilities. (*See* Vincent J. Syracuse, Esq. & Maryann Stallone, Esq., *Attorney Professionalism Forum*, N.Y. St. B.J., July/August 2015, Vol. 87, No. 6, *and* Vincent J. Syracuse, Amanda M. Leone, & Carl Regelmann, Esq., *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2017, Vol. 89, No. 9.)

From the circumstances you describe, it does not appear that you are *required* to withdraw as counsel, but this may be a situation where you may want to consider permissive withdrawal. Rule 1.16(c)(1) permits withdrawal when it "can be accomplished without material adverse effect on the interests of the client"; Rule 1.16(c)(7) permits a lawyer to withdraw when "the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out the employment effectively"; and RPC 1.16(c)(12) permits a lawyer to withdraw as counsel when "the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal." We believe that RPC 1.16(c)(7) is most applicable to your situation. RPC 1.16(c)(7) gives us two

circumstances where an attorney may withdraw: when the client fails to cooperate or when the client makes the representation unreasonably difficult. Examples of a client's failure to communicate include a client's refusal to address certain critical strategy issues, refusal to follow counsel's advice, and a client's attempt to dictate a matter's legal strategy. (Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 956 (2016 ed.), citing *Terry v. Incorporated Village of Patchogue*, 2007 WL 2071557 (E.D.N.Y. 2009).). Professor Simon identifies some circumstances that may render the representation unreasonably difficult under RPC 1.16(c)(7) including a client's deliberate misrepresentations to the attorney, "a client's constant calls to talk about the case or request information beyond what is fruitful or reasonable," failure to keep scheduled appointments or return calls, and "a client's abusive or threatening communications to the lawyer." (*Id*. at 957.) If your client does not cease his aggressive behavior, or improve his responsiveness, withdrawal under RPC 1.16(c)(7) may be appropriate.

The foregoing, however, is subject to the caveat set forth in RPC 1.16(d). RPC 1.16(d) states: "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." (RPC 1.16(d).) In New York state court, if you are unable to file a signed consent to change attorney under CPLR 321(b)(1), you must obtain a court order under CPLR 321(b)(2) in order to withdraw. Federal Local Civil Rule 1.4 of the Southern District of New York also requires permission from the Court before withdrawing as counsel where the attorney has appeared as attorney of record. (Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 963.) If you are considering withdrawing from your matter, be sure to consult with the individual rules of that tribunal before proceeding. Also, as Comment 7A to RPC 1.14 notes, "[p]rior to withdrawing from the representation of a client whose capacity is in question, the lawyer should consider taking reasonable protective action" pursuant to RPC 1.16(e) to avoid forseeable prejudice to the client. (RPC 1.14 Comment [7A].) This would include giving the client reasonable notice of the intent to move for withdrawal, delivering the client litigation materials, and allowing time for new counsel to be hired. (RPC 1.16(e).)

You indicated in your question that your client suffers from mental health issues and therefore discussion of RPC 1.14, entitled "Client with Diminished Capacity," is necessary. RPC 1.14(a) requires that the attorney, "as far as reasonably possible, maintain a conventional relationship with the client" when a client's capacity to make decisions is diminished, because of minority, mental impairment or for some other reason. (RPC 1.14(a).) Comment 6 to RPC 1.14 notes that in determining the extent of a client's diminished capacity, the lawyer should consider the following factors: the client's ability to explain their reasoning leading to a decision, ability to appreciate the consequences of decisions, and the consistency of those decisions with the known long-term commitments and values of the client. (RPC 1.14 Comment [6].) If an attorney believes a client has diminished capacity, and the client is at risk of substantial harm without the ability to act in their own interest, a lawyer is permitted to take reasonably necessary protective action. (RPC 1.14(b).) This includes, "consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." (*Id*.) The NYSBA Committee on Professional Ethics also addressed this issue, noting that a "lawyer may consult with family members, friends, other individuals, agencies or programs that have the ability to take action to protect the client." (NYSBA Comm. on Prof'l Ethics, Op. 1144 (2018), citing NYSBA Comm. on Prof'l Ethics, Op. 986 (2013).)

In the event the appointment of a guardian is necessary under RPC 1.14(b), Rule 1.14(c) specifically notes that information relating to the representation of a client with diminished capacity is still protected by the attorney confidentiality Rule 1.6. (RPC 1.14(c).) Further, the Rule states, "[w]hen taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests." (RPC 1.14(c).) In determining how to proceed with your client, you must first analyze the extent of your client's diminished capacity. Merely suffering from "mental health issues" is not sufficient to warrant invoking RPC 1.14(b). Indeed, the client must be at risk of "substantial physical, financial or other harm" for RPC 1.14(b) to apply and it is not clear from your inquiry to what extent your client may be impaired. (RPC 1.14(b).)

We share your concern about waiving the attorney-client privilege by utilizing the assistance of employees of the non-profit organization to facilitate communications with your client. RPC 1.14 Comment [3] states that "The client may wish to have family members or other persons participate in discussions with the lawyer. *The lawyer should consider whether the presence of such persons will affect the attorney-client privilege*. Nevertheless, the lawyer must keep the client's interests foremost, and except for protective action authorized under paragraph (b), must look to the client, and not family members, to

make decisions on the client's behalf." (RPC 1.14 Comment [3], emphasis added.) Although attorney-client privilege is a legal issue outside the Rules of Professional Conduct, this comment is a clear warning that communications involving non-attorneys may not be privileged even where their presence is for the purpose of assisting clients with a diminished capacity.

The NYSBA Committee on Professional Ethics previously noted that "courts have repeatedly held that the attorney-client privilege is not waived by a lawyer's use of an agent to facilitate communication with a client" including the presence of a daughter of an elderly client. (NYSBA Comm. on Prof'l Ethics, Op. 1053 (2015); *see generally* Michael J. Hutter, *Protecting Privileged Communications Disclosed to Retained Professionals*, N.Y.L.J., April 5, 2017 at 3, col. 1.) The committee opined that if the utilization of a sign language interpreter with a deaf client would not violate the attorney-client privilege, then such use is not only permitted, but required under Rule 1.4 if that is the only means of communicating with the client. (NYSBA Comm. on Prof'1 Ethics, Op. 1053 (2015).) The New York City Bar Association (NYCBA) Committee on Professional and Judicial Ethics also addressed this question in Formal Opinion 1995-12, opining that, "A lawyer who represents a client with whom direct communications cannot be maintained in a mutually understood language, must evaluate the need for qualified interpreter service and take steps to secure the services of an interpreter, when needed for effective lawyer-client communications, to provide competent and zealous representation, preserve client confidences and avoid unlawful discrimination or prejudice in the practice of law." (NYCBA Comm. on Prof'l and Jud. Ethics, Op. 1995-12 (1995); *see also* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 134 (2016 ed.).) While we are unaware of any cases on this point directly, and there are cases suggesting that attorney-client privilege is not waived by an attorney's use of an agent to assist with communications with a client, in light of RPC 1.14 Comment [3], we would suggest using caution or seek a ruling from the court in advance of working with a staff member if you are concerned about waiving attorney-client privilege.

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a partner at a law firm with experience representing clients who pay for my legal fees through litigation financing companies. In the past few years, more and more of my clients have used these services and, for the most part, our clients have been very pleased. Our firm has also been thrilled to get financed cases because many of our clients would not have commenced these cases if they had to pay the costs themselves even though they had legitimate claims.

A friend from college recently approached me about becoming an investor in a litigation financing company that he is starting. He knows that I have a lot of experience working in this area and that this industry has been taking off. He suggested that if I was able to refer clients to this company, we could all stand to make a lot of money and help out a lot of people.

Before I even consider my friend's proposal, I want to make sure I would not be violating any ethics rules. Can attorneys refer their clients (or potential clients) to litigation financing companies for assistance financing litigation? If so, can I refer a client to a litigation financing company where I am an investor? Would it matter if another one of my partners was handling the case and I had no involvement in it? Even if I don't become an investor, if I negotiate with litigation financing companies on my clients' behalf to finance one of my cases, am I able to charge the client for that work? When working with a litigation financing company are there any particular attorney-client privilege concerns I should be aware of? Does the litigation financing company have any ability to control the decisions or legal strategy of the case?

Sincerely,
Richie Referral

Awkward!

It feels like just yesterday that I was writing about the fall semester winding down in anticipation of finals. While the speed at which time is passing is frightening, the thought that two years of law school are behind me is gratifying. For those of you keeping tabs on my extracurricular activities, the Barrister's Ball went well! My ability to navigate an open bar is something I will no doubt put to good use professionally, but I am conflicted about putting that particular skill-set on my resume. My titanic legal battle with the Albany Parking Authority rages on. Disbelief at my plane ticket receipt, indicating I was out of the country when issued the parking ticket, was apparently unconvincing, as I am now required to submit an affirmation from my father confirming I was in fact out of the country on the day the ticket was issued, and that my car was parked roughly 140 miles away in Westchester County. I relish in the back and forth but long for the taste of victory.

Commercial Law Survey has been a great course so far this year. We are currently in the process of discussing the bankruptcy process, including the rights and limitations that bankruptcy places on both secured and unsecured creditors. My takeaway? Avoid being an unsecured creditor at all costs. A secured creditor will always be given priority over unsecured creditors in having their debts repaid first, whether it be with money or collateral. Whatever is left over, if *anything*, is then distributed to the unsecured debtors on a pro rata basis. I think we all know which position we would rather find ourselves in.

I have always thought self-deprecation is an underappreciated tool. Lawyers are famous for telling war stories, but my limited career offers few victories to share (*but see* Albany Parking Authority, *supra*). So, in that spirit, I will share a recent classroom experience that will leave you thinking, "He can't possibly be a rising 3L." So here we go.

I was sitting in my criminal procedure class at the crack of 8:30 a.m., so you can imagine that at this pre-caffeinated hour of the morning, I am relatively delusional. As I am looking over my notes for a case we are going to be covering later in class, I am aware, in the background, that my professor is asking the class about the concept of incorporation. Drifting in and out of the conversation, while still reviewing the assigned case, I noticed nobody was offering a response to the Professor's question. Professor continued, asking, "Really? None of you covered incorporation in Constitutional Law?" In the void of silence that followed, I figured, hey, what the heck, I'll give this a go. So, with my sage-like wisdom consisting of two years (almost) of law school, I confidently raised my hand, whereupon the following exchange took place:

Professor: "You know what incorporation is?"

Me: "Yes, I do. I took business organizations last semester. We learned all about the process of incorporation. Filing your certificate of incorporation, etc."

Professor: Laughing (along with the class).

Well, I came to realize, and rather quickly, that we were talking about the incorporation doctrine, which makes some of the amendments of the Constitution applicable to the states through the Due Process clause of the Fourteenth Amendment. A bit of blush on these fair cheeks of mine was accompanied by an internal voice: "Ah, Lukas, you've done it again, buddy!" Having always been guided by the great Wayne Gretzky, "You miss one hundred percent of the shots you don't take" it is safe to say I missed on this one, but I gave it a shot, at the very least. Note to self: Know what game is being played before taking a shot.

My summer plans are still up in the air, and I am in the process of applying to several local firms for a summer position. Having spent last summer interning in Israel, I feel it is time to embrace some home-body-ness and stay put for a bit. Not to mention it would be nice to actually live in the place I am shelling out rent for!

I don't know about you, but I am tired of this so-called "spring." It is time to move on! Let the sun shine and the birds sing! I hope that when I write my next column, I am bemoaning a heat wave.

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.

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The Worst Mistakes in Legal Writing — Part III

In the last issue of the *Journal*, the *Legal Writer* discussed general mistakes that appear frequently in legal writing. Part III in this multi-part series covers confusing words and frequently misused words.

A. MISTAKES INVOLVING COMMONLY CONFUSED WORDS

Some words are confusing. That's why some writers use words with dissimilar meanings interchangeably. Some of these easily confused words have subtle differences in meanings; others have drastic differences.

1. That vs. Which

Use *that* to introduce a defining clause. Use *which* to introduce a non-defining clause.

Correct: An attorney drafted the documents *that* were filed in court. *(This sentence says that a subset of the documents was filed in court and that the attorney drafted that subset of documents.)* The documents, *which* were filed in court, were drafted by an attorney. *(This sentence says that all documents were filed in court and that the attorney drafted those documents.)*

You should also avoid making *which* work too hard. If whatever follows "which" in your sentence can refer to more than one individual or thing, then delete "which" and start a new sentence.

2. Who vs. Whom

Use *who* if the pronoun is the subject of the verb. Use *whom* if the pronoun is the object of a verb, infinitive, or preposition.

Correct: The witness saw the man *who* stole the car. The witness was the one to *whom* the suspect owed money.

3. Who vs. That

Use *who* when referring to a person. Use *that* when referring to an object.

Correct: This person is the one *who* robbed the bank. (Or, better, "This person robbed the bank.") This gun is the one *that* was used in the bank robbery. (Or, better, "This gun was used in the bank robbery.")

4. I.e. vs. E.g.

These two abbreviations are different, although they are often used interchangeably. *I.e.* stands for "in essence." *E.g.* stands for "example given." The former is used to clarify something. The latter elaborates on a point by giving examples.

Correct: All these solutions are feasible, *i.e.*, they can be done. There are many colors, *e.g.*, red, yellow, and blue.

5. Assure vs. Ensure vs. Insure

To *assure* means to state with confidence. To *ensure* means to make certain. To *insure* means to guard against risk by buying insurance.

Correct: I *assure* you that this machine works well. Please *ensure* that everything is set. I *insured* my car as required by law.

6. Less vs. Fewer

Use *less* when referring to something quantifiable. Use *fewer* when referring to something not quantifiable.

Correct: There are 10 bottles of water or *less* in the fridge. In the world of *The Legend of Korra*, there are *fewer* air-benders than there are any other kinds of bender.

7. Father vs. Farther vs. Further

When you want to refer to someone's dad, use *father*. When you want to refer to physical distance, use *farther*. When you want to refer to non-physical distance, use *further*.

Correct: I bought my *father* an expensive watch for his birthday. This hotel is *farther* away from downtown than the other hotel. I'm *further* away from achieving my goals than I'd like to be.

8. Amount vs. Number

Use *amount* when referring to quantifiable things. Use *number* when referring to things not quantifiable.

Correct: The attorney has done a significant *amount* of work preparing for trial. A great *number* of people are realizing their rights.

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.

9. Between vs. Among

Use *between* to refer to two clearly separated things. Use *among* to refer to things not clearly separated within a group of objects.

Correct: He intervened in the dispute *between* Jason and me. They quarreled *among* themselves.

10. If vs. Whether

Use *if* to express a condition without alternatives. *If* is short for "if and only if." Use *whether* to express a condition in which there are two alternatives or three or more options. *Whether* is short for "whether or not."

Correct: My client will bring an action against the company *if* he doesn't get the compensation he was guaranteed. My client is not sure *whether* she'll be sued.

When writers misuse words, it's often because the words are homonyms — words spelled the same or which sound alike.

11. Like vs. Such As

Use *like* when you're comparing two alike things. Use *such as* when you're giving an example of something.

Correct: *Like* any other reasonable person, he did what he was supposed to do. You can find crime-related datasets, *such as* crime-related polls and surveys, on this website.

12. Specially vs. Especially

Use *specially* to indicate a specific purpose. Use *especially* to indicate an exceptional quality.

Correct: He made this arrangement *specially* for this occasion. He did *especially* well on the bar exam.

13. Historic vs. Historical

Use *historic* to refer to an important event. Use *historical* to refer to something that happened in the past.

Correct: This is a *historic* occasion. The *historical* records show that the plaintiff has a history of non-compliance.

14. Advice vs. Advise

Advice is a noun. *Advise* is a verb. To *advise* people is to give them *advice*.

15. Complement vs. Compliment

Use *complement* to say that something supplements or adds to something else. Use *compliment* when you want to refer to an expression of praise.

Correct: These pieces of evidence *complement* each other. Always *compliment* the one you love.

16. Complementary vs. Complimentary

Complementary means something goes well with something else. *Complimentary* means "free" or "flattering."

Correct: Your skirt and handbag are very *complementary*. The bottle of spring water in our hotel room was *complimentary*.

17. Elicit vs. Illicit

Elicit is a verb meaning "to bring about something." *Illicit* is an adjective indicating that something is illegal.

Correct: The police couldn't *elicit* a word from the suspect. The company's CFO knew the business transaction was *illicit*, but he went through with it anyway.

18. Principal vs. Principle

The word *principal* refers to the main participant or the highest-ranked person. The word *principle* refers to a fundamental truth.

Correct: When it comes to criminal law, a *principal* is the person primarily responsible for the criminal offense. One basic *principle* of criminal law is the presumption of innocence.

19. Accept vs. Except

Accept is a verb meaning "to take or to receive." *Except* is a preposition meaning "to exclude."

Correct: The company *accepted* the offer. We agreed on all the terms *except* the last one.

20. Emigrate vs. Immigrate

These words are often used interchangeably, but they are opposites. The word *emigrate* means "to permanently leave a country" and precedes the preposition *from*. The word *immigrate* means "to move permanently to a country" and precedes the preposition *to*.

Correct: Hiroto *emigrated* from Japan to the United States. Hiroto *immigrated* to the United States from Japan.

B. MISTAKES INVOLVING FREQUENTLY MISUSED WORDS

When writers misuse words, it's often because the words are homonyms — words spelled the same or which sound alike.

1. Affect vs. Effect

Affect is a verb that should be used when you want to indicate an action or influence. *Effect* is a noun and

should be used when you want to refer to a result or consequence.

Correct: The accident *affected* my normal life. The accident had a consequential *effect* on me.

2. There vs. They're vs. Their

Although these words look similar and sound the same, they're used differently. *There* is an adverb specifying a place. *They're* is a contraction of "they are." *Their* is a possessive pronoun referring to something owned by a group or an unidentified or unspecified individual.

Correct: They went *there* to argue the case. *They're* in the courtroom right now. They brought *their* files to the courtroom.

3. You're vs. Your

You're is a contraction of "you are." *Your* is a possessive pronoun that indicates that something belongs to the person to whom you are talking.

Correct: *You're* writing a convincing argument. *Your* argument is convincing.

4. It's vs. Its

It's is a contraction of "it is." *Its* is a possessive pronoun indicating that something belongs to an object (not to a person).

Correct: *It's* raining outside. *Its* color is red.

5. Into vs. In To

The word *into* indicates movement. The phrase "in to" can be used in lots of scenarios that have no relationship to movement.

Correct: I fell *into* a deep hole in the ground. I log *in to* my email to check for messages.

6. Then vs. Than

The word *then* is an adverb that indicates actions in time. *Than* is a conjunction used to make comparisons.

Correct: The suspect hit the victim and *then* ran away. Today is colder *than* yesterday.

7. Weather vs. Whether

Weather is a noun referring to atmospheric conditions. *Whether* is a conjunction that introduces alternatives.

Correct: The *weather* on the date of the accident was bad. It is unclear *whether* there'll be testimony from an expert witness at trial.

8. Loose vs. Lose

The word *loose* is an adjective that means "not tightly fastened or held." The word *lose* is a verb that means "to be unable to find someone or something" or "to fail to win something."

Correct: The *loose* tile fell and hit the victim. The plaintiff might *lose* the trial without this specific piece of evidence.

9. To vs. Too

The word *to* should be used before a noun or verb to describe an action, a destination, or a recipient. The word *too* should be used as an option to *also*, *as well*, or similar phrases.

Correct: The defendant's wife went *to* the court, *too*.

10. Set up vs. Setup

The difference between these two words is that *set up* functions as a verb, whereas *setup* is a one-word adjective or noun.

Correct: I'm going to *set up* the computer. You should follow the computer *setup* instructions. The criminal walked right into the *setup*.

11. A Lot vs. Allot vs. Alot

A lot means "a large quantity." *Allot* means "to give or apportion." *Alot* isn't a word.

Correct: *A lot* of people stood on the stage. How much time should we *allot* to drafting the brief?

12. We're vs. Were vs. Where

We're is a contraction of "we are." *Were* is the past tense of *are*. *Where* is an adverb that reveals the location of someone or something.

Correct: *We're* not going to agree on the settlement. We *were* having dinner when the robbery occurred. *Where* is your evidence?

13. Who's vs. Whose

Who's is a contraction of "who is" and is used to ask questions. *Whose* is a possessive pronoun that indicates that an unknown or unspecified individual owns an object.

Correct: *Who's* the player at first base right now? *Whose* scarf is this?

14. Peak vs. Peek

A *peak* is the top of something, such as a mountain. A *peek* is a quick look at something.

Correct: It'll take several days of intense climbing to reach the *peak* of Mt. Everest. We were able to get a *peek* at the opposing counsel's evidence.

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

Estate Planning and Will Drafting in New York

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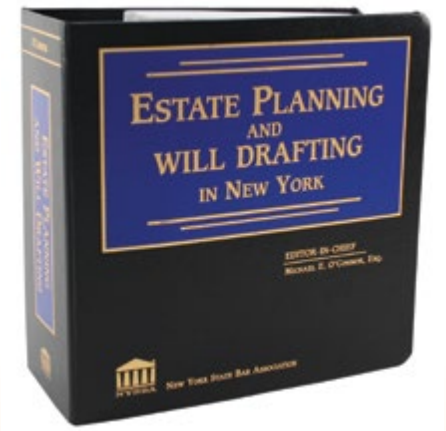

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