

NEW YORK STATE BAR ASSOCIATION Journal



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Mastering the Business of Law



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Management**
Edited by Marian C. Rice

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PUBLISHER

Pamela McDevitt
Executive Director

MANAGING EDITOR

Dan Weiller
Email: dweiller@nysba.org

PRODUCTION EDITOR

Kate Mostaccio

DESIGN

Lori Herzing
Erin Corcoran
Christine Ekstrom

COPY EDITORS

Alex Dickson
Reyna Eisenstark
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EDITORIAL OFFICES

One Elk Street, Albany, NY 12207
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by Marian C. Rice

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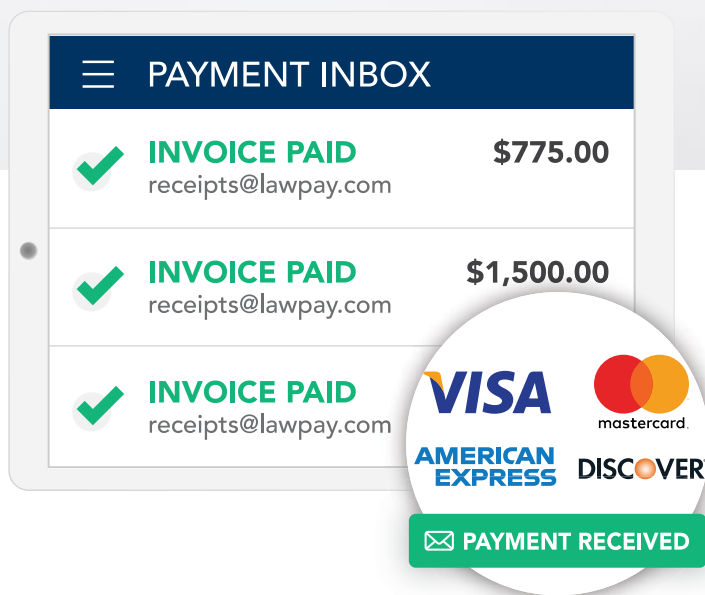
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The Coarsening of American Discourse

Should we lawyers remain silent?

As Americans mourn the death of Senator John McCain, it is well worth remembering how Senator McCain was able to express profound differences with colleagues without demonizing those with whom he differed. His ability to disagree without being disagreeable was an enduring gift to our nation and stands in striking contrast to the current environment, in which the American public discourse has coarsened and deteriorated into shrill and mean-spirited hostility.

Of course, John McCain was not the first to appeal for civility in public discourse. Samuel Johnson, William Penn and George Washington all spoke or wrote about the value and importance of civility. John F. Kennedy in 1961 stated to our nation: "So let us begin anew – remembering on both sides that civility is not a sign of weakness, and sincerity is always subject to proof . . . Let both sides explore what problems unite us instead of belaboring those problems which divide us." And in 2012, while Governor of Indiana, Vice President Mike Pence noted, "We cannot do democracy without a heavy dose of civility."

We tell children that it is important to have good manners and that respect for others and common courtesy are fundamental to good character. We teach law students – and remind attorneys – that as lawyers we are expected to act in a decorous manner, and that civility and courtesy are fundamental to professionalism. Yet today in the legal profession, combativeness and angry confrontation seem to be as commonplace as civility and courtesy.

The New York State Unified Court System adopted non-binding standards of civility in 1997. The preamble to these standards states that they "set forth principles of behavior to which the bar, the bench and court employees should aspire. . . ." The guidelines are "intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course."

Surely the expectation was that these well-intentioned standards would help foster greater civility, courtesy and good manners in both bench and bar. However, it seems clear that the effort has had only limited success.

In a recent President's Message, I wrote about the dangers that certain words and phrases pose, and the special duty we lawyers have to protect and defend our cherished Constitution – a duty to which each of us has sworn an oath. I received many responses, both positive and negative, most of which were thoughtful, courteous, and respectful. However, some expressed deep hostility and anger, and included *ad hominem* personal attacks. It is unworthy of members of our profession – and dangerous – to choose the path of incivility and insults. We lawyers know and must do better.

It's not just attorneys, either. General public discourse has deteriorated and we are all diminished as a result. Before he passed away, Senator McCain wrote a letter to the American people which he intended to be read after his death. "We weaken our greatness when we confuse our patriotism with tribal rivalries that have sown resentment and hatred and violence in all the corners of the globe," McCain wrote. "We weaken it when we hide behind walls, rather than tear them down, when we doubt the power of our ideals, rather than trust them to be the great force for change they have always been."

Provocative and divisive words and thuggish in-your-face political tactics have even given rise to violence. Congressman Steve Scalise was shot and badly wounded on a baseball field by someone who was energized by heated political speech. Participants in a bible study group at a church in South Carolina were murdered by a young man inspired by divisive and ugly rhetoric. An individual emboldened by a movement promoting racial division



PRESIDENT'S MESSAGE

plowed his car into a crowd protesting against a white supremacist rally in Charlottesville, Virginia, killing one young woman and severely injuring several others.

"We are secluding ourselves in ideological ghettos," Senator McCain observed in his final book, *The Restless Wave*. "We have our own news sources. We exchange ideas mostly or exclusively with people who agree with us, and troll those who don't. Increasingly, we have our own facts to reinforce our convictions and any empirical evidence that disputes them is branded as 'fake.'"

Senator McCain observed that: "Paradoxically, voters who detest Washington because all we do is argue and never get anything done frequently vote for candidates who are the most adamant in their assurances that they will never ever compromise with those bastards in the other party."

We live in perilous times. Left unabated, the coarsening of our public discourse will only worsen. We lawyers

have a high and noble calling and we can lead the way, to show by word and conduct that it *is* possible to disagree without being disagreeable. We can – and must – show that it is possible to have fierce and profound differences without anger or hostility and without demonizing our opponents or questioning their integrity or patriotism.

It will be difficult, at times very difficult. We must show that, as President Kennedy noted, "civility is not a sign of weakness." We must serve as a model for how society should debate difficult issues with respect and courtesy.

We can do better, and we *must* do better. Future generations will look back on us and at this moment. Let them say that at a time when discourse had deteriorated in profound and dangerous ways, we lawyers rose to the occasion. Let them say that by our example of respectful advocacy and debate, we helped restore the civility and mutual respect that is an essential element of our democracy. This is our moment. *Carpe diem!*

MICHAEL MILLER can be reached at mmiller@nysba.org

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Mastering the Business of Law

By Marian C. Rice



For the past few years, one of the fall issues of the *Journal* has been devoted to articles focusing on the many facets of law practice management: technology, human resources, marketing, finance, ethics, risk management, project management, talent development, attorney well-being, cyber security (and liability) . . . the list does not end.

Law Practice Management is a topic every attorney must master – whether a solo practitioner or the newest entry in a global mega-firm. Maybe “master” is an overstatement – but to excel as an attorney, it is no longer enough to be a stellar advocate. You must be able to run your office and learn to prioritize the many tasks filling the proverbial inbox. And with the continual leaps forward in technology, the learning process never stops.

The *Journal* is committed to helping lawyers keep pace with the demands of the rapidly changing legal landscape. In addition to the annual issue, each issue of the *Journal* devotes a section to articles addressing the various aspects of law practice management. Tell us what concerns you – we want to know!

But back to this issue. With all the different roles an attorney must play is there any wonder that we at times become paralyzed with the breadth of items needing “immediate” attention and, as a result, get nothing done? As Mark Twain once said “If you eat a frog first thing in the morning, the rest of your day will be wonderful.” In his article, Paul Unger outlines the importance of daily planning and how attorneys can use technological advances – as well as plain old-fashioned paper – to focus on the tasks that need to be accomplished. With the tips provided, we can all learn to “eat the frog” first thing in the morning – and the rest of our day will be wonderful.

If the discussion about toad-feasting is stressing you out, we’ve got you covered. Libby Coreno, shareholder at Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C., and Dr. Kerry Murray O’Hara, Director of Adult Inpatient Services at Four Winds Hospital and Director of Training for Community and Hospital DBT Programs for 16 years, explore the topical issue of *Attorney Wellness: The Science of Stress and the Road to Well-Being*. Every day the news is peppered with the adverse impact of stress on our profession. Solutions seem elusive but in their article the authors outline a four-step process that all law firms should take to assist in facilitating well-being in the law firm workplace and focusing the discussion that will lead toward improvement of the lives of lawyers.

It wouldn’t be Law Practice Management without some attention given to technology. If you think Artificial Intelligence as it applies to the legal field means pretty soon our jobs will be replaced by encyclopedic robots, Christian Nolan’s article *Is Your Law Firm Ready For Artificial Intel-*

ligence? is a must-read. The future isn’t as nightmarish as it may sometimes seem. As the experts Nolan interviews point out – you’re probably already well-versed in some form of AI if you’ve ever used the voice-activated Siri, Alexa or Cortana. Read on for tips on five things to consider when integrating AI into your practice.

The foundation of a good attorney-client relationship starts with a clear engagement letter. It is *not* an annoying administrative detail to be checked off your list. An informative, detailed and tailored engagement letter sets the scope of the work to be performed, the fees that will be charged for the work, the goal of the retention and various other items that enhance communications with the client, not to mention foster compliance with the Rules of Professional Conduct and court rules. It makes it easier for you to get paid and can be your best defense in the event your client expresses dissatisfaction with the work performed. Yet way too many of us relegate this important ethical and risk management tool to administrative staff, or worse, ignore it all together. Every application for professional liability insurance asks whether the law firm uses engagement letters – and we all answer, yes. The professional liability carriers are now looking at the other side of the equation and have learned that although every law firm represented that they used engagement letters in their practice, when a claim was filed, the majority of the law firms involved could not produce an engagement letter for the matter now being criticized by the client. Is there a direct correlation? Very possibly, but it may simply be that the law firm failing to properly document its retention is also failing to address other important aspects of the attorney-client relationship. Allison C. Shields takes us back to the very first step in forging a healthy attorney-client relationship in *What Should Your Engagement Agreement Include?*

Non-intentional (from my point of view, not the grievance committees’) deviations in the maintenance of escrow accounts can have devastating effects on law firms. Have you taken a good hard look at your escrow account lately? Are there some funds that have been sitting around *for years* that have plagued you and caused sleepless nights? Time to “eat the frog” again. A wise amphibian-chomping

Marian C. Rice, current Chair of NYSBA’s Law Practice Management Committee and past President of the Nassau County Bar Association, is the chair of the Attorney Liability Practice Group at the Garden City law firm of L’Abbate, Balkan, Colavita & Contini, LLP and has focused her practice on representing attorneys in professional liability matters for nearly 40 years. Ms. Rice is also a member of the NYSBA Committee on Technology and the Legal Profession and the Committee on Communications and Publications and speaks regularly on issues affecting the representation of lawyers and risk management.



statement also attributed to Mark Twain concludes, “If you have to eat a frog, don’t look too long. If you have to eat two frogs, don’t eat the smaller one first.” Getting your escrow accounts in order is definitely not the “smaller frog.” Enter Matthew K. Flanagan, partner at Catalano, Petropoulos and Gallardo, LLP, with his article outlining the options for *Escrow Cleanup: Taking Care of the Money Left Behind*, which will allow attorneys to transfer abandoned funds from their escrow accounts while at the same time avoiding liability to former clients and third parties.

Of course, no law firm can survive without clients – all of us could use a bump up in our marketing skills. But do you sometimes feel your marketing efforts are more like the tree that falls in the forest with no one listening?

No law firm can survive without clients – all of us could use a bump up in our marketing skills. But do you sometimes feel your marketing efforts are more like the tree that falls in the forest with no one listening?

Strategist and coach Carol Shiro Greenwald lays out some answers designed to cure the epidemic of random marketing in her article *Strategic Networking Begins with a Target*.

Tired of bringing home work every night or staying late at the office? It might be time to think about hiring help. In her article *Lawyer as Employer: The Business Decisions Involved with Getting Help for Your Firm*, Deborah Kaminetzky, founding member of Kaminetzky Law & Mediation, P.C., addresses the very real problem faced by solos and small firms as the marketing tips outlined by Carol Greenwald begin to bear fruit and the work begins to accumulate. Torn between elation at realizing your time is being eaten up by real legal work and the ever mounting pile of unaccomplished administrative work? Deb has some ideas that will help the overworked solo practitioner. Her article will guide you through the process from deciding what kind of assistance you need, to where to look for potential hires, to how to let someone go if they aren’t a good fit for your practice.

It is counter-intuitive – considering I intellectually know that my living depends upon my ability to collect fees for the work I love doing – but I hate preparing invoices and collecting fees. I have always felt there must be a more palatable means recognizing the accomplished work than the ever-present billable hour. Robert D. Lang, Senior Litigation Managing Partner at D’Amato & Lynch, LLP, and Lenore E. Benessere, an associate at the firm, approach the topic from an entirely different perspective in their

article *The Rise of Alternative Fees Against the Billable Hour*, where they explore the history of the billable hour and the increased consumer confidence in subscription based pricing models in the legal landscape.

Have you ever felt the mounting frustration of dealing with a *pro se* litigant whose work product is clearly that of an accomplished lawyer (or lifted from others) but who continues to reap the benefit often afforded individuals who appear to lack the assistance of attorneys? In the incredibly informative column *Attorney Professionalism Forum*, Vincent J. Syracuse, Carl F. Regelmann and Amanda M. Leone of Tannenbaum Helpert Syracuse & Hirschtritt LLP outline the pertinent ethics opinions and legal decisions addressing the topic. And in his column

The Legal Writer, the Hon. Gerald Lebovits outlines the compelling case for use of the Tanbook as the best source for citations in New York.

It is not easy to keep on top of the constant changes in our profession but NYSBA’s LPM Committee is here to help. Our goal is to direct the attention of the many, many talented NYSBA members to resources that will develop their skills in managing the practice of law. The Committee is dedicated to providing resources that enable attorneys to obtain the information needed to manage their practices and get back to the primary goal of representing clients. Through materials located on the NYSBA website, the LPM Committee provides lawyers, law firm managers and legal professionals with information on practice management trends, marketing, client development, legal technology and finance. Whether you’re a solo practitioner or a managing partner at a national law firm, you’ll find law practice management materials and CLE programs designed to meet your day-to-day practice needs. Checklists, best practices, guidelines, publications and continuing legal education programs provide up-to-date information and practical tips to help you efficiently manage your law practice.

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

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Is Your Law Firm Artificially Intelligent?

Here Are Five Things to Consider

By Christian Nolan

Many lawyers consider themselves anything but tech savvy. They may hear the term artificial intelligence and have nightmares of robots replacing their jobs in the not-too-distant future.

But don't be intimidated by the burgeoning legal technology market, experts say. After all, attorneys are already well acclimated to voice-activated AI, such as Apple's Siri, Amazon's Alexa, and Microsoft's Cortana.

"Artificial intelligence is sort of the shiny new label re-applied to many technologies that have been around for some time," said Maura R. Grossman, a New York solo who chairs the artificial intelligence subcommittee for the New York State Bar Association's Committee on Technology and the Legal Profession.

For instance, some lawyers are already adept at using sophisticated search and analytics technologies for electronic discovery (commonly referred to in the industry as technology-assisted review (TAR) or predictive coding) to enhance their litigation practice.

Is your firm ready to automate repetitive tasks but unsure where to start? Legal experts have weighed in on what you should consider.

EVALUATE YOUR PRACTICE

"Just because the firm down the street is using something and it is right for them doesn't mean it will be right for you," said Grossman, who is also a research professor at the University of Waterloo in Ontario, Canada. "Rather than rushing out to buy something simply because it's AI, you should implement a thorough vetting process. Evaluate your own practice and think about what things you can automate and what tools will save you time and money. That will vary for different types of practices."

Once you have decided on the specific needs of your practice, do your due diligence and properly test the products in the market, Grossman advised. She said that not all products are ready for immediate use, off-the-shelf, without proper training and customization.

Grossman said next ask yourself: "What is the use case for this product? How much time will it save? What will it cost to purchase and train?"

"If everyone at the firm is a dinosaur that is resistant to change, you can bring the best technology to the table, but if you can't get anyone to adopt it, it will not be effective," said Grossman. "The cultural and training hurdles can be huge."

PROPERLY VET

Grossman advised speaking to a provider in your practice area and requesting a proof of concept for a few weeks to see how the tool performs in your work environment, rather than simply viewing a display or a demo from the vendor that may not be sufficiently similar to your use case. Try out two or three different products and compare the results, she said.

Like any technology, the licensing agreements may not be cheap. You want to make sure you are making the right decision before you sign on the dotted line, she said. While longer term licensing arrangements will often be cheaper, you may not want to lock yourself in to a long-term contract immediately, only to regret it six months later when the technology has advanced. Longer term licenses can range anywhere from three-to-ten years.

"Make sure you love the tool and are entitled to upgrades before you sign on for that long," said Grossman.

TAR APPLICATIONS

TAR for e-discovery in large, document-intensive litigation was the first AI application to hit the legal industry. This allowed the mundane and time-consuming task of document review to be performed, at least in part, by a machine rather than by scores of lawyers.

Computer programs have developed to the point that lawyers can teach them to adapt when exposed to new data or patterns. This rapidly evolving technology enables computers to perform tasks once thought to be

Ready for ence?



exclusive to people. Proponents say this allows lawyers sufficiently comfortable with AI to reach sound conclusions more cheaply, more accurately and faster than a lawyer could do on his or her own.

Many of the newer research tools, for example, do not require the same syntax and Boolean connectors previously needed to do legal research on Westlaw or Lexis, Grossman explained. Tools now allow users to ask natural language questions the same way you'd ask Siri or Cortana a question. You can ask what a particular law is in a certain state and it will come back with an answer. You could then say "what about Nebraska" or "compare this to Kansas" and get the results.

MONEYBALL

Grossman recently moderated a NYSBA Continuing Legal Education webinar entitled "The Growing Use of Artificial Intelligence Applications 2018." On the panel were Scott Reents, lead attorney for data analytics at Cravath, Swaine & Moore, and Dan Meyers, a former litigator and current president of consulting and information governance with TransPerfect Legal Solutions.

Reents and Meyers likened the attorney use of predictive analytic software in their practice to Moneyball, the analytic-driven era in baseball, as depicted in the 2011 film of the same name that garnered six Academy Award nominations.

The panelists explained that the old school baseball scout would largely go on gut feelings in their assessments of a certain player when predicting future performance. Many lawyers, for example, have those same gut feelings when it comes to the judges they appear before in court, especially after doing so numerous times.

"But your 10-to-15 cases over a couple years are just the tip of the iceberg of that judge's overall experiences," said Meyers.

Now there is software enabling a lawyer to have every decision made by that judge at their fingertips instantaneously. But not only that, you can break the predictive analytics down to such detail as to find out whether the judge is more apt to grant a certain kind of motion or bail before or after lunch. These types of tools are also available for in-house counsel to assess who they may want to retain as a lawyer.

DON'T FORGET CORPORATE LAWYERS

Noah Waisberg, CEO and co-founder of Kira Systems, which utilizes proprietary machine learning technology to simplify review and analysis of complex documents, says corporate lawyers were the forgotten demographic when it came to legal technology. Initial applications benefited litigators.

Waisberg began his career as a corporate lawyer in mergers and acquisitions at Weil, Gotshal & Manges. In that job, he said he spent vast amounts of time reviewing contracts for corporate transactions. He said the task is repetitive and because lawyers typically do not enjoy doing it, they are prone to mistakes.

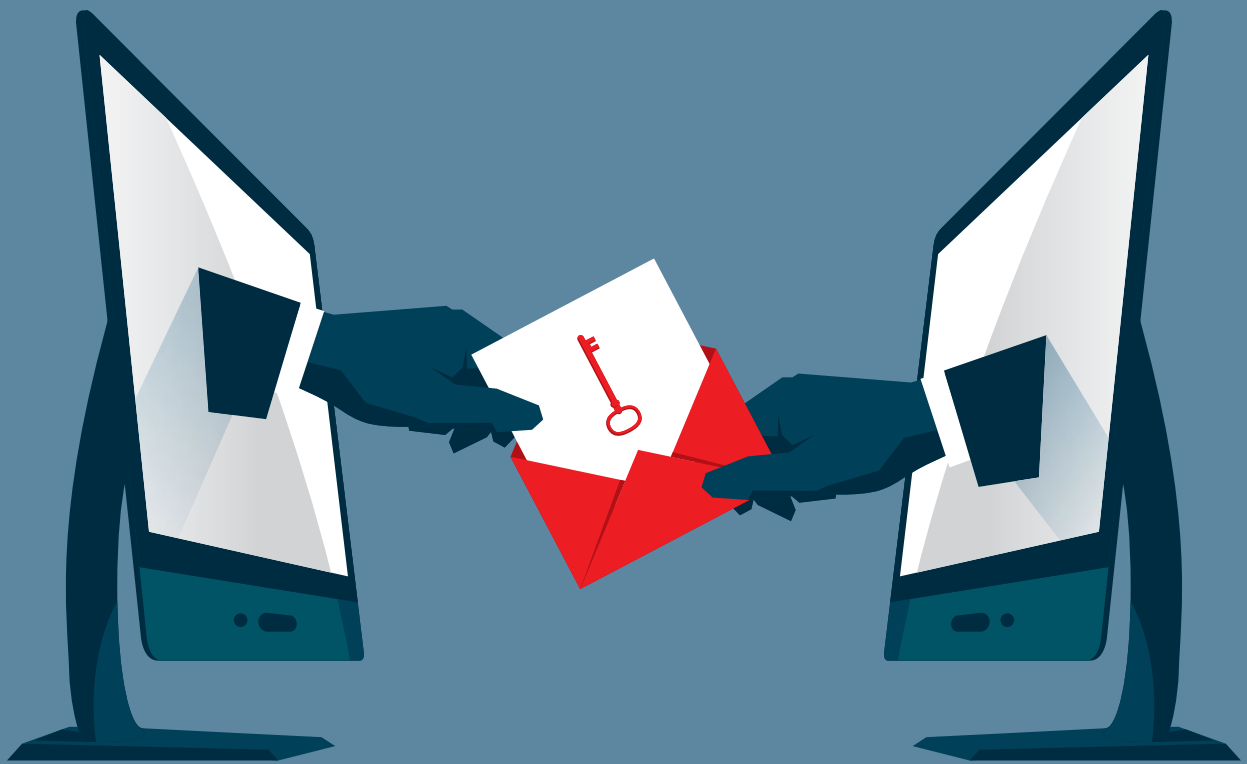
So Waisberg co-founded a company that allows AI to help with monotonous document reviews. He claims this allows lawyers to extract data out of large pools of contracts faster and more accurately in anywhere from 20 to 90 percent less time. This allows firms to take on projects that would otherwise be too big for them to handle due to staff limitations. Now a majority of the 30 largest law firms in the world do business with his company, he said.

"When you look at most big firms, there are more corporate lawyers, transaction lawyers than any other type of lawyers," said Waisberg. "They are a forgotten but huge group of lawyers and a large task for many of them is reviewing contracts."

Nolan is NYSBA's senior media writer.

Lawyers Need Confidential Advice

By Marian C. Rice



The practice of law is complicated. Every day lawyers are confronted with thorny issues on how to proceed when faced with an ethical or practical conundrum. For the benefit of everyone involved – including the client – attorneys should be able to ask for and obtain advice on the topic at issue. But how does an attorney go about securing such advice in light of the ethical strictures on disclosing confidential information?

New York Rule of Professional Conduct 1.6(b)(4) (the “Rules”) specifically allows a lawyer to reveal or use confidential information to the extent that the lawyer reasonably believes necessary to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer’s

firm or the law firm. As Comment [9] to the Rules notes “[i]n many situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer’s compliance with these Rules, court orders and other law.”

But may the lawyer seek legal advice regarding a client and maintain the confidentiality of that communication? In 2005, the NYSBA Committee on Professional Ethics Op. No. 789 acknowledged that “[a] law firm may form an attorney-client relationship with one or more of its own lawyers to receive advice on matters of

professional responsibility concerning ongoing client representation(s), including on matters that implicate the client's interests, without thereby creating an impermissible conflict between the law firm and the affected client." The opinion concluded that the law firm did not have a duty to disclose the fact that advice had been sought from an in-firm General Counsel but that, under certain circumstances, the law firm may have to disclose a conclusion reached as a result of the consultation if the client needed to take action based on that conclusion.

For instance, if an attorney sought advice as to whether a conflict of interest existed because the firm was representing current clients with differing interests and the conclusion was reached that a conflict did exist, the affected clients must be advised of the conclusion so that the appropriate steps may be taken. Similarly, if an attorney seeks advice within the firm as to whether the attorney has made a material error in the representation of a client, if the conclusion is that such an error was committed, the client must be advised. However, since the issue of privilege is a legal question, the opinion did not address whether the communications exchanged in obtaining the advice were protected.

The question remained: may a law firm – like any other business – obtain protected advice from one of its employed attorneys and, if so, whether the analysis changes because the law firm seeking advice is acting in the course of representing the client?

THE STOCK TRIAL COURT DECISION

The New York court's first trial decision addressing the issue, *Stock v. Schnader*,¹ did not bode well for law firms seeking to maintain the confidentiality of the intra-firm privilege. The ruling arose in the context of a contested discovery dispute in which plaintiff claimed defendant law firm failed to advise him that his departure from employment at MasterCard would accelerate the expiration date for his stock options worth \$5 million from 10 years to between 90 and 120 days. During an arbitration filed against MasterCard's fund administrator by plaintiff after the options expired, defendant law firm was notified discovery was being sought from the firm partner as a fact witness concerning whether the law firm's failures in its representation of plaintiff contributed to the monetary losses he was seeking in the arbitration.

The partner and the two attorneys at defendant law firm then representing plaintiff in the arbitration consulted with defendant law firm's General Counsel regarding the firm's ethical obligations under the lawyer-as-witness rule. The General Counsel never worked on plaintiff's representation and plaintiff was not billed for the consultation. At her deposition, the partner testified she had no expectation whether or not her email communications with the firm's General Counsel would be disclosed to plaintiff.

In response to plaintiff's document demands, defendant law firm served a privilege log which included two dozen emails exchanged among the firm attorneys and General Counsel prompted by the request to depose the partner representing plaintiff when he left MasterCard's employ.

In a decision that sent ripples throughout the New York legal community, the *Stock* trial court ordered that the email exchanges between a law firm's attorneys and its in-firm General Counsel must be produced based upon the fiduciary exception to the attorney-client privilege; the deposition testimony regarding the expectation of disclosure; and the argument that defendant law firm placed the communication "at issue" by disclosing some intra-firm attorney communications.²

Defendant law firm appealed. On appeal, the arguments advanced by the law firm were supported by 74 major New York law firms joining in an amicus brief which urged the court to adopt the "intra-firm privilege." Ironically, the Association of Corporate Counsel (ACC), an organization representing the interests of many of the amicus law firm's biggest clients, supported plaintiff and adamantly opposed any effort to establish the existence of an intra-firm privilege.³

THE STOCK APPELLATE DECISION

On June 30, 2016, the First Department recognized that the attorney-client privilege attaches to internal communications between lawyers acting as the law firm's General Counsel and firm attorneys seeking advice on thorny ethical issues or potential malpractice liability – even when the issues involve current clients.⁴

The well-reasoned appellate decision rejected plaintiff's position that while defendant law firm was entitled to assert the attorney-client privilege over the communications with General Counsel as to the rest of the world, they could not be withheld from plaintiff based on the fiduciary exception to the attorney-client privilege. Acknowledging there was no New York precedent on applying the fiduciary exception in a case where the fiduciaries are attorneys who, during their representation of a client, sought legal advice concerning professional ethics or potential malpractice arising from the representation of the client, the First Department reviewed recent decisions in other jurisdictions and the ABA 2013 resolution endorsing the view that the fiduciary exception does not apply when advice is sought by attorneys from the firm's in-house or outside counsel. In doing so, the court concluded that where the attorney or law firm is the "real" client seeking advice about ethical or potential malpractice liability, the attorney-client privilege applies.

The court further concluded the "current client" exception to the attorney-client privilege did not apply and rejected plaintiff's contention that a conflict of interest arises between an attorney and his or her client under

Rule 1.7 simply because the attorney seeks advice from in-firm General Counsel on a purely ethical issue arising from the representation of a current client. The court further held that even if the consultation extended to advice concerning potential malpractice, liability “would not result in the abrogation of an otherwise valid evidentiary privilege attaching to the consultation.”⁵ In addition, the court ruled that the imputation provisions in Rule 1.10 generally prohibit attorneys within the same firm from representing outside clients with differing interests and was not intended to prohibit a firm’s in-house General Counsel – who did not represent the firm’s client – from giving legal advice to his own law firm.

Having rejected application of the current client exception and the imputation arguments advanced by plaintiff, the appellate court then reviewed the stricter rule urged by amicus ACC, i.e., that only client – not the law firm – may assert existence of an attorney-client privilege related to the ongoing representation of a client. The court correctly noted that ACC’s position would encourage attorneys to withdraw “at the first hint of a problem” ultimately resulting in a disservice to the client.⁶

Finally, the appellate court rejected the trial court’s finding that defendant law firm placed its communications “at issue” and held that the testimony of the partner representing plaintiff that she had no understanding of whether her communications were protected from plaintiff’s disclosure was not determinative since intent to disclose does not mitigate the privilege absent actual disclosure.⁷

While the *Stock* decision recognized that the attorney-client privilege attaches to internal communications between lawyers acting as the law firm’s General Counsel and firm attorneys seeking advice on difficult ethical issues or potential malpractice liability – even when the issues involve current clients, it set forth a number of conditions that must be met before the privilege will be preserved.

THE SOURCE OF ADVICE

The natural inclination of an attorney looking to mull over the parameters of a problematic situation is to have a casual discussion with co-workers or colleagues. The likelihood of being able to protect the confidentiality of these types of casual conversations is slim. On the other hand, seeking advice from outside counsel – where the privilege is more easily identifiable – may not always be feasible. The middle ground is to designate an attorney within the firm as the in-firm General Counsel who should be the person of first resort when ethical or legal issues arise involving a client.

It is not enough to have a “go to” person in the firm who naturally fills these shoes. In order to protect the privilege of intra-firm communications, the role (and title) of

“General Counsel” should be specifically designated to an individual. The title for the General Counsel should be publicized throughout the firm and noted on the law firm’s website. All of the law firm’s attorneys should be required to consult with the General Counsel as soon as an issue arises.

What are the characteristics of a good in-firm General Counsel? It is not an easy job. No matter how large or small the firm, the individual serving as in-firm General Counsel must have the support of firm management but often should be separate from management. Attorneys at the firm must feel comfortable seeking advice from the General Counsel. If the perception is that the General Counsel will “snitch” on a firm attorney who has sought advice, the less likely advice will be sought as soon as an issue arises – when it is most easily resolved. The General Counsel needs to be respected by the attorneys, knowledgeable of current legal, ethics and risk management issues faced by attorneys and intimately familiar with the practices, culture and internal workings of the law firm.

The scope of a General Counsel’s role may differ from firm to firm and can include the resolution of ethics issues, risk management, in-house ethics and risk management training, professional liability issues, partnership issues, reviewing litigation guidelines and engagement letters and interaction with professional liability insurers and outside counsel in the event a claim is asserted by a client. The General Counsel should be comfortable balancing the roles of counselor, advisor, mentor and intermediary.

THE NEED TO SEGREGATE THE GENERAL COUNSEL’S ROLE

In order to preserve the intra-firm attorney-client privilege, it is important that the General Counsel not be involved in the representation of the law firm’s client. For that reason, where possible, a deputy General Counsel should be appointed so that if an issue arises involving a client that the General Counsel has actively represented, the deputy General Counsel can assume the role.

INDICIA OF THE ATTORNEY-CLIENT RELATIONSHIP BETWEEN THE LAW FIRM AND IN-FIRM GENERAL COUNSEL

It must be readily apparent that the attorneys are seeking advice from the in-firm General Counsel not to discharge their duties to the client but to “receive appropriate legal counsel about their ethical duties.”⁸ In other words, it must be readily apparent that the General Counsel’s “client” is the law firm – and not the client for whom the legal services are being performed – and the attorneys seeking the advice from the General Counsel should be able to articulate the relationship. The role of General Counsel within the law firm should be specifi-

cally defined and the attorneys need to be educated in understanding the defined role.

The time a lawyer spends consulting with the firm's General Counsel should never be charged to the client or even recorded under the client's file number (with the eventual intention that the time will be written off). The

*The individual serving as
in-firm General Counsel must have
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from management.*

law firm may wish to establish a general file number to record the time expended in discussing an issue on which the in-firm General Counsel consulted but at all times the confidential nature of the entries should be observed.

No documents or emails related to the consultation with the General Counsel should be kept in the law firm's file maintained on the representation of the client. After all, under New York law, the client must be afforded presumptive access to the file maintained in the course of the client's representation.⁹ Placing any communications between the firm attorney and in-house General Counsel in the client's file erodes the assertion that the attorney was seeking the advice for his or her benefit rather than for the client.

WAIVER

Even assuming that all of the above steps have been taken, the privilege may still be waived by the failure to maintain the requisite confidentiality. Law firms should take care to make sure that both the lawyer involved and the General Counsel maintain the confidentiality of the communications and that the lawyer-client does not indiscriminately discuss the issues with others in or out of the law firm.

ENGAGEMENT LETTERS AND OUTSIDE COUNSEL GUIDELINES

The *Stock* decision contains a sound, well-reasoned analysis of how and why the intra-firm attorney-client privilege should be honored. Recognizing that the New York courts are unlikely to address the issue in a different fashion, ACC continues to urge its members to include contractual provisions that waive the right to assert the existence of an intra-firm attorney-client privilege with respect to communications involving the representation of the client. Litigation guidelines must be carefully reviewed to make certain law firms do not unknowingly waive a right that would otherwise be recognized under New York law.

As a proactive risk management strategy, law firms may wish to consider including a provision in their engagement letters which advises the client that the attorney may seek advice that the attorney intends to keep confidential, for instance:

During the course of our representation of you, issues may arise where [LAW FIRM] may wish to seek legal advice either within the firm or from a different law firm in order to determine how best to proceed in resolving a conflict of interest or other issue which may arise relating to the representation we are providing under this agreement. Subject to the New York Rules of Professional Conduct, it is agreed that any communications exchanged between [LAW FIRM] and its counsel under those circumstances will be afforded the same attorney-client privilege which attaches to the communications between you and [LAW FIRM]. Of course, you will not be charged for any of the advice [LAW FIRM] seeks on its behalf under this paragraph.

CONCLUSION

In sum, after selecting the appropriate person to be assigned the role, the practices that enhance the likelihood that an in-firm General Counsel's advice to law firm attorneys will be protected include: (1) the role of General Counsel within the law firm should be defined and attorneys at the firm should be educated in understanding the defined role; (2) the General Counsel should not be involved in the representation of the law firm's client; (3) the client should never be billed for the time spent in seeking the consultation or dispensing the advice; and (4) documents and emails relating to the advice sought should never be kept within the client's file.

Even with the evolving case law recognizing clients ultimately benefit when attorneys are encouraged to seek advice protected by privilege on ethical issues, major corporate clients have made it clear they will continue to seek the right to disclosure of General Counsel advice through contractual means if not by judicial decision. Litigation guidelines must be carefully reviewed to ensure that law firms are not contracting away the right to seek privileged advice from in-house General Counsel at the same time the courts are trending toward recognition of the privilege.

1. 2014 N.Y. Slip Op. 33171(U), 2014 WL 6879923 (Sup. Ct., N.Y. Co. Dec. 8, 2014) (trial order).

2. *Id.* at *2-3.

3. www.acc.com/advocacy/upload/Stock-v-Schnader051215amicus.pdf.

4. 142 A.D.3d 210, 35 N.Y.S.3d 31 (1st Dept 2016).

5. *Id.* at 231-32.

6. *Id.* at 238.

7. *Id.* at 240-41.

8. *Id.* at 222.

9. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 91 N.Y.2d 306, 666 N.Y.S.2d 985 (1997).

Escrow Cleanup: Taking Care of the

By Matthew K. Flanagan

For all the headlines about attorneys stealing client funds, most attorneys faithfully honor their obligation to safeguard client funds and would never contemplate taking client funds or giving the funds to anyone who should not receive them. As a result, many attorneys are left holding funds that no one else seems to want. This article will discuss ways in which attorneys can transfer abandoned funds from their escrow accounts while avoiding liability to former clients and third parties.

GUIDING PRINCIPLES

The Court of Appeals has noted that “[f]ew, if any, of an attorney’s professional obligations are as crystal clear as the duty to safeguard client funds.”¹ There are times, however, when a client seems content to let the attorney safeguard the funds for all eternity. There are other times when an attorney is left holding money while others battle over who is entitled to it.

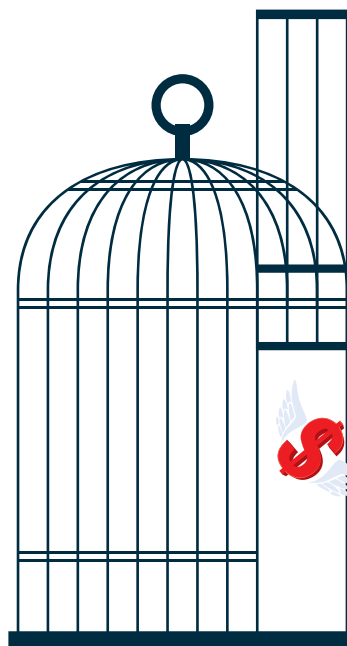
When a client goes missing, leaving his or her funds in the attorney’s escrow account, Rule 1.15(f) of the Rules of Professional Conduct² provides the solution. Where the money is received by the attorney as a result of an action commenced in New York State, the attorney should apply in the county in which the action was brought for “an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers’ Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.”³ Where the money was not received in connection with an action, the lawyer should

apply for such an order to the Supreme Court in the county in which he or she maintains an office.

The interests of third parties in the client funds should not be ignored. Indeed, the reason the client may have walked away from any recovery may be that the net recovery to the client was insignificant. Under Rule 1.15(c)(1),⁴ where a lawyer receives funds in which a client has an interest, he or she must promptly notify the client, but the duty to notify does not stop with the client. The same rule also requires the lawyer to notify any third party who has an interest in the funds. Similarly, Rule 1.15(c)(4) requires the attorney to “promptly pay or deliver” the funds to not only the client, but to any third parties who are entitled to receive them.⁵

An attorney can be held liable for disregarding a third

party’s claim of an interest in client funds. In *Leon v. Martinez*,⁶ a plaintiff in a personal injury matter assigned part of his recovery to one of his caretakers. The attorney representing the plaintiff was aware of the assignment (he drafted it), but when the settlement proceeds arrived, neither the attorney nor his client paid any of the proceeds to the caretaker. The caretaker then sued the attorney and his firm. In finding



Matthew K. Flanagan (mflanagan@cgpllp.com) is a partner in the Jericho, New York law firm of Catalano Gallardo & Petropoulos, LLP, where his practice is concentrated on the defense of legal malpractice actions and attorney liability matters. He is a frequent lecturer regarding legal malpractice defense, ethics and professional liability matters. Website: www.cgpllp.com. LinkedIn: www.linkedin.com/in/matthew-flanagan-1769ba5.



Money Left Behind



that the caretaker had stated a cause of action against the attorney, the Court of Appeals noted that Disciplinary Rule 9-102 (the predecessor to Rule 1.15(c)(4))

“explicitly creates ethical duties running to third parties as to funds in the possession of the attorney to which those third parties are entitled.”⁷

Courts have held that there is no duty to inquire as to possible third-party claims on funds received by an attorney on behalf of his or her client,⁸ but known, non-frivolous claims must be addressed,⁹ and an attorney will be deemed to have knowledge of statutory liens.

Once it is determined that the client funds do, indeed, belong to the missing client and not a third party, then how the attorney proceeds may depend on the amount at issue.

DISPOSING OF MISSING CLIENTS' FUNDS OF LESS THAN \$1,000

When, as is often the case, the money left behind by the missing client is less than the cost of an index number, there is little incentive for the attorney to file an action to obtain an order permitting the attorney to pay the money to the Lawyers' Fund for Client Protection. Several years ago, an Erie County attorney found himself in just such a situation and inquired of the Erie County Ethics Committee as to what he should do. The Ethics Committee responded by quoting Disciplinary Rule 9-102(F) (the predecessor to Rule 1.15(f)), but then suggested a solution which did not comport with the rule. The Committee suggested that the attorney simply remit the amount to the Lawyers' Fund without a court order. The Committee noted that the Lawyers' Fund accepts sums of up to \$1,000 from a lawyer with a missing client without a court order.¹⁰

If there was any doubt that the Lawyers' Fund would accept the funds without a court order, it was laid to rest when the Lawyer's Fund's posted the Erie County Ethics Committee's opinion on its website, where it remains

today. The Lawyers' Fund's policy of accepting missing client funds of less than \$1,000 without a court order is eminently reasonable, but the payment of the money, no matter the amount, without a court order does not comport with the plain terms of Rules 1.15(f). For the sake of consistency, the drafters of the Rules of Professional Conduct may want to consider revising Rule 1.15(f) to comport with the Lawyers' Fund's stated policy. That being said, there has been no reported decision holding that an attorney violated Rule 1.15(f) by remitting an amount less than \$1,000 to the Lawyers' Fund for client protection without a court order, nor should there be. The money is not being disbursed or misappropriated; it is simply being transferred from one safe keeper to another, with the latter being a security fund administered by trustees appointed by the Court of Appeals.¹¹ A missing client who resurfaces years later should be able to make a claim with the Lawyers' Fund, although the manner in which he or she can do so is not entirely clear.¹²

Other options for handling negligible sums left behind include filing the petition or motion contemplated by Rule 1.15(f) or simply allowing the money to remain in the attorney's escrow account. At some point, the aggregate sum of missing clients' funds in an attorney's Interest on Lawyers' Account (IOLA) may reach a level that merits an application for an order directing the attorney to pay the money to the Lawyers' Fund. That is what happened with a Garden City firm that found itself with more than \$67,000 in unclaimed funds. The firm had handled hundreds of real estate closing transactions for various lenders over the course of nine years and had issued checks that were never cashed or deposited by the payees.¹³ An attorney can also wait until he or she retires to clear the missing client funds out of the escrow account, as one Dutchess County attorney did when he retired after 50 years of practicing law.¹⁴

There is no penalty for maintaining missing clients' funds in an attorney's IOLA account, but there is rarely any benefit to doing so. The attorney looking to rid himself of missing client's funds of less than \$1,000 can, after

reasonable efforts to locate the client have failed, remit the funds to the Lawyers' Fund for Client Protection.

DISPOSING OF MISSING CLIENTS' FUNDS IN EXCESS OF \$1,000

Where the client is missing, the amount is more than \$1,000, and there are no known third parties with an interest in the funds, the attorney should file the motion or petition, pursuant to Rule 1.15(f), for an order directing payment to the lawyer of any fees and disbursements that are owed by the client, and the balance, if any, to the Lawyers' Fund for Client Protection. As noted above, where the funds are received as a result of an action previously commenced, the motion should be made to the court in which the action was pending. Otherwise, the action and application should be made in Supreme

Court in the county in which the attorney's office is located. The petition and motion should detail the attorney's efforts to locate the missing client. The Lawyers' Fund for Client Protection provides forms on its website for the convenience of attorneys.¹⁵



Where the missing client's entitlement to the funds is questioned by a third party, the attorney should commence an action of interpleader pursuant to CPLR 1006, followed by a motion permitting the attorney to pay the money into court and receive a discharge of liability.¹⁶ The motion pursuant to CPLR 1006 should include a request for fees and expenses incurred by the attorney. When money is held pursuant to an escrow agreement, the agreement may provide for the escrow agent to recover reasonable fees incurred in filing an interpleader action, but even in the absence of such an agreement, courts have discretion to award the stakeholder attorney fees under CPLR 1006.¹⁷

Finally, it will take some time to determine that a former client cannot be located. The attorney, when he or she initially received the client's funds, may have decided to place the funds in an IOLA account, rather than a separate interest-bearing escrow account. The decision may have been reasonable at the time because the attorney did not anticipate holding the funds for very long and there was no agreement requiring the attorney to place the funds into a separate interest-bearing account. Ordinarily, an attorney's good faith decision to place client funds in an IOLA account rather than an interest-bearing account is not actionable,¹⁸ but there have been instances of clients complaining that an attorney should have transferred the funds to an interest-bearing account when it appeared that he would be holding them for

several years.¹⁹ It is rare that an attorney would be held liable for a good faith decision to place funds in an IOLA account, but if the amount is significant and it appears that the money will be held for some time while efforts are made to locate a client or while parties claiming an interest in the funds are litigating, some thought should be given to transferring the funds to an interest-bearing account. It may help head off a complaint in the future.

CONCLUSION

In conducting periodic reviews of the escrow account, attorneys and firms should identify funds that may have been left behind. If the clients or third parties who may be entitled to the funds cannot be located after diligent efforts, then the attorney or firm can remit the funds to the Lawyers' Fund for Client Protection. If the amount is less than \$1,000, the attorney can remit the amount to the Lawyers' Fund without a court order, although a revision to Rule 1.15(f) to reflect this option would be helpful. If the amount is more than \$1,000, then the missing client funds should be remitted to the Lawyers' Fund for Client Protection only after the attorney obtains a court order permitting the attorney to do so. Regardless of the amount at issue, where third parties claim an interest in the funds, an interpleader action should be commenced, or the third parties should be given notice of any applications made pursuant to Rule 1.15(f).

1. *In re Gallasso*, 19 N.Y.3d 688, 694 (2012).
2. 22 N.Y.C.R.R. § 1200.0, Rule 15(f).
3. *Id.*
4. 22 N.Y.C.R.R. 1200.0, Rule 1.15(c)(1).
5. 22 N.Y.C.R.R. 1200.0, Rule 1.15(c)(4).
6. 84 N.Y.2d 83 (1994).
7. *Id.* at 90.
8. *See Ehrlich v. Froelich*, 19 Misc. 3d 1130(A), at *3 (Nassau Co. May 6, 2008), *aff'd*, 72 A.D.3d 1010, (2d Dep't 2010) (rejecting argument that attorney had a "duty to inquire with regard to any conditions . . . on the wired funds merely because it was placed in [the] attorney trust account").
9. 22 N.Y.C.R.R. 1200.0, Rule 1.15(c)(4).
10. Erie County Ethics Opinion 04-01(2004).
11. *See* Judiciary Law § 468-b (McKinney 2018).
12. The "absence of specifically applicable statutory or regulatory provisions" regarding "claims made against missing-client funds" was discussed by the court in *Vega v. Academy Express, LLC*, 38 Misc. 3d 337 (Kings Co., 2012).
13. *See In re Application of Burns, Russo, Tamigi & Reardon, LLP Pursuant to 22 N.Y.C.R.R. Part 1200, Rule 1.15(f) for the Release of Escrow Funds*, No. 14301/2012 (Nassau County 2012).
14. *See In re Application of Thomas A. Reed Pursuant to 22 N.Y.C.R.R. Part 1200, Rule 1.15 for the Release of Escrow Funds From an IOLA Account*, No. 0005095/2012 (Dutchess Co. 2012).
15. *See* www.nylawfund.org.
16. *See* CPLR 1006(f), which provides that a stakeholder "may move for an order discharging him from liability in whole or in part to any party."
17. *See Republic National Bank of N.Y. v. Lupo*, 215 A.D.2d 467 (2d Dep't 1995).
18. *See* Judiciary Law § 497(5) ("No attorney or law firm shall be liable in damages nor held to answer for a charge of professional misconduct because of a deposit of moneys to an IOLA account pursuant to a judgment in good faith that such moneys were qualified funds.").
19. *See Mann v. Skidmore*, 2 Misc. 3d 50 (App. Term, 9th and 10th Jud. Districts, 2003); *Takayma v. Schaefer*, 240 A.D.2d 21, 27 (2d Dep't 1998) (Luciano, J., dissenting).

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¹ Council for Disability Awareness 2018

² “What Do You Know About Disability Insurance” survey, Life Happens, 2018

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What Should Your Engagement Inclusion

The single most important document that defines the attorney-client relationship is the retainer agreement or engagement letter. Regardless of the type of matter, the value of the deal or anticipated award, having a written engagement agreement or retainer letter is a smart move, even if it is not required.

A written engagement agreement can protect both lawyer and client. It makes the relationship clear to the client, helps the client to value and take the lawyer's work seriously, and it memorializes the agreement and the scope of work to be performed in the event that any dispute should arise later.

In New York, 22 N.Y.C.R.R. 1215 governs written engagement agreements. It provides as follows:

1215.1 Requirements.

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter:

- (1) if otherwise impracticable; or
- (2) if the scope of services to be provided cannot be determined at the time of the commencement of representation.

For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent

a third party, the term *client* shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

- (1) explanation of the scope of the legal services to be provided;
- (2) explanation of attorney's fees to be charged, expenses and billing practices; and
- (3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b) of this section.

1215.2 Exceptions.

This section shall not apply to:

- (a) representation of a client where the fee to be charged is expected to be less than \$3,000;
- (b) representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client;
- (c) representation in domestic relations matters subject to Part 1400 of this Title; or
- (d) representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

There are also several rules in the New York Rules of Professional Conduct that apply to attorneys' engagement agreements.

Allison C. Shields, Esq. is the President of Legal Ease Consulting, Inc., which provides productivity, practice management, marketing, business development and social media training, coaching and consulting services for lawyers and law firms nationwide. She is a co-author of several books, most recently, *How to Do More in Less Time: The Complete Guide to Increasing Your Productivity and Improving Your Bottom Line*, published by the American Bar

Association Law Practice Division, and is a frequent lecturer on practice management topics. LinkedIn: www.linkedin.com/in/allisoncshieldslegalease. Facebook: www.facebook.com/LegalEaseConsulting. Twitter: <https://twitter.com/allisonshields>.



r Engagement de?

By Allison C. Shields



WHAT TO INCLUDE IN YOUR ENGAGEMENT LETTER

In addition to what is mandated by the rules, there are additional subjects that may be prudent for lawyers to include in their written engagement letter or agreement with the client. While you may prefer to cover some of these items in an accompanying letter or other document, rather than in the engagement agreement itself, the following areas should be covered with the client both at the initial consultation and in written form.

Who is the client?

The engagement letter should clearly state who is being represented pursuant to the agreement, and in some cases, should also indicate who is *not* being represented. For example, you may represent a specific employee but not the business itself (and vice versa). Or you may represent one member of a family, or an estate but not the individual heirs. In those cases, it may be best to specifi-

cally state whom you *do not* represent. This will highlight the fact that the client's interests may not be aligned with those of other interested parties who may also interact with you, and provide an opportunity to discuss how conflicts will be handled if they do arise.

New York Rule of Professional Conduct 1.13, Organization as Client, provides,

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

In some cases, the client may not be the one paying the bill for the representation. This could occur, for example, where you represent a child but the parent is paying the bill. In that case, the engagement agreement should set

forth the rules of confidentiality, to whom the duty of confidentiality is owed, and explain attorney-client privilege.

Scope of work and exclusions

The retainer agreement should accurately and specifically reflect the work that will be performed for the client. While this sounds simple, without a clear statement of scope, you could create confusion or discord with clients who expect that you will perform work you did not anticipate, or who did not understand that you would be billing the client for specific tasks. For example, a retainer agreement for a real estate closing may seem straightforward, but what happens if the first deal falls through?

If you are billing by the hour or under any method by which the fee will not be known until the work is completed, provide the client with an estimate or budget.

How many contracts are you willing to negotiate for the quoted fee? Be as specific as possible.

If the client does request additional services not covered under the original engagement agreement's scope of work, be sure to document both the additional services and the fee and obtain the client's consent. Be aware that the court may apply greater scrutiny to revised or amended agreements once the confidential relationship has been established.

In addition to covering work included in the representation, it may be advisable to enumerate what is *not* included in the representation. For example, if the agreement covers a litigation matter, does it include working on an appeal, or is that excluded?

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer, section (c), provides, "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel."

Fees and costs

The agreement should include the method of calculating the fee, responsibility for expenses, frequency of bills and timing and method of payment. The clients should be advised about not only when they should expect to receive the bill, but when they are expected to make a payment. Some things to consider for this portion of your engagement agreement include:

- If an up-front retainer is paid, when will your fees be considered earned?

- Does your agreement include nonrefundable fees?
- Will the client be billed in stages?
- Is this a replenishing or evergreen retainer?
- What is the fee structure?
- Will you be seeking additional payments in advance (for example, 30 days before trial)?
- How will you accept payments (credit cards, check only, electronic payments, etc.), and what are the terms and conditions of using these payment methods?
- Are there consequences for the client's late payment or failure to pay? Will work stop until the account is current? Will the client be charged interest?
- What kinds of costs will be incurred (filing fees, expert witness fees, court reporter's bills, etc.) and when will the client be expected to pay these costs?
- Will the client pay costs directly or will the law firm pay them and seek reimbursement from the client?

If you are billing by the hour or under any method by which the fee will not be known until the work is completed, provide the client with an estimate or budget.

If your fee is subject to change, outline the circumstances under which the fee might change, and whether your quoted fee applies to the entire engagement. If you request a modification of your fee and a dispute arises later, you may be required to show that any modification of the existing fee agreement was reasonable under the circumstances at the time of the modification and that it was explained to and accepted by the client.

The requirement to communicate scope of work and fees to clients can be found in Rule 1.5 of the New York Rules of Professional Conduct, which provides in part:

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

The duties and responsibilities of the parties

The agreement should set forth not only the firm's obligations to the client, but also the client's obligations to you, including the client's responsibility to cooper-

ate with you, respond to requests, provide necessary documents and information in a timely manner, preserve data, and more.

You may wish to include information about which attorney or attorneys will be staffing the client's matter and/or to reserve the right to make appropriate changes in staffing the client's matter. Good practice dictates that any such changes be communicated to the client immediately and that the client does not incur additional fees as a result of a staffing change made by the firm.

This may also be the place in the agreement to discuss the client's right to their file and the firm's file retention policies and time limitations.

Arbitration and mediation

Part 137 of the Rules of the Chief Administrative Judge establishes the New York State Fee Dispute Resolution Program. This is an informal program to resolve fee disputes between attorneys and clients through arbitration and mediation.

In matters that qualify for the program as outlined in Part 137, when a client requests arbitration under the program, it is mandatory for the attorney. But in some cases, you may wish to include a clause in your engagement agreement that the client consents to resolution of fee disputes in advance pursuant to Part 137. Or you may be required to include a clause in the engagement agreement that advises the clients of their right to arbitration or mediation of fee disputes.

Grounds for withdrawal or other consequences for breach of the agreement

Rule 1.16, Declining or Terminating Representation, outlines the circumstances under which you may withdraw from representation of a client. Your engagement agreement should advise the client that you have the right to withdraw, subject to court approval where applicable, as well as the grounds and procedure for any such withdrawal.

Similarly, your agreement should inform the clients of their right to discharge you as their lawyer and the method for doing so.

A time limitation/when the agreement takes effect

When clients fail to return an engagement agreement, it can lead to problems and potential confusion about whether you are really their lawyer. To combat this, if you send the clients the engagement agreement to sign, rather than having them sign while they are in your office, you should state specifically that the provisions contained within it (including the fee) are only valid if the agreement is signed within a specific period of time, and make it clear that if the agreement (and retainer fee) are not received within that period of time, you are not obligated to represent the client. It may be prudent to follow up with a non-engagement letter once the time period has expired.

No guarantees

Finally, you may wish to reiterate in your engagement agreement that the firm cannot guarantee clients any specific outcome to their matter.

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Attorney Wellness:

The Science of Stress and the Road to Well-Being

By Libby Coreno and Kerry Murray O'Hara

In the normal clinical setting, a trained psychotherapist would begin treatment with a patient to train them away from anticipatory anxiety, rather than toward it. Such worry is a hallmark of suboptimal psychology in a human being and yet is a cornerstone of lawyer training.

“To be a good lawyer, one has to be a healthy lawyer.

Sadly, our profession is falling short when it comes to wellbeing . . . the current state of lawyers' health cannot support a profession dedicated to client service and dependent on the public trust.” ABA National Task Force on Lawyer Well-Being (August 14, 2017)

“We know what we are, but know not what we may be.” Shakespeare provides us a beautiful reminder in *Hamlet*

that we are masters of our own fate. While we may be facing trying or difficult times today, it does not mean it will remain the same forever. It is a reminder that we must embrace uncertainty and live life with an open mind as to what is possible. And so it is with the status of health and well-being among the legal profession and lawyers generally – we know what we are in the current state of assessment, but know not what we may yet become.



The news concerning the statistics of the impact of the profession on the mental, emotional and physical well-being of lawyers is becoming more and more studied (and grim) – and yet solutions can feel elusive. From addiction to depression to suicide, it can feel hopeless to try to determine exactly what drives the sobering statistics among lawyer mental health and well-being. Fortunately, in the last several years enormous strides have been made in the quantitative study of lawyer well-being and happiness, thus pointing us toward the beginning of who we may yet become if we can approach the uncertainty of change with courage and an open mind.

In 2017, the American Bar Association released its report from the National Task Force on Lawyer Well-Being, which outlined recommendations in eight areas for our profession to assist in transforming the practice of law to one that is more focused on the health and well-being of its practitioners.¹ The Report was released on the heels of two other recent and significant quantitative studies of lawyer well-being: Lawrence Kreiger and Kenneth Sheldon's *What Makes Lawyers Happy: A Data-Driven Prescription to Redefine Professional Success*, *George Washington Law Review*, 2015, and the ABA/Hazelton Betty Ford Foundation's study in the *Journal of Addiction Medicine* on substance abuse and mental health issues among attorneys (2016). Yet, the correlation between attorney well-being and the demands of practice are not new. In fact, Johns Hopkins University released a study in 1990 which found that lawyers were nearly four times as likely as the general population to suffer from depression, anxiety, social isolation, and other forms of psychological distress.²

Sadly, in the decades between the Johns Hopkins University study on depression and the most recent findings, the health and well-being of lawyers has not improved. The Hazelton Betty Ford study found: (1) 20.6 percent of lawyers screened positive for alcohol-dependent drinking (higher among men and younger attorneys); (2) 28 percent of lawyers suffer from depression (higher among men); (3) 19 percent of lawyers struggle with anxiety (higher among women); and (4) 23 percent of lawyers experience significant stress.³ In this article, we will look at some of the causes of higher levels of mental health struggles and substance abuse issues in the legal profession and, more important, some of the recommended changes and techniques that can be implemented in lives of lawyers to help them go from striving to thriving.

THE LAWYER 'PERSONALITY'

In 2006, *Res Gestae* published an article by Stephen Terrell which contained the observation that "what makes for a good lawyer may make for an unhappy human being."⁴ The psychological underpinnings for the potential disruption to healthy emotional functioning can be drawn from aspects of the lawyer "personality"

such as perfectionism, "Type A" attributes, and anticipatory anxiety (or pessimism). When healthy emotional functioning is disrupted, it is not uncommon to suffer from psychological and emotional distress that can often lead to substance use/abuse, burnout, relationship deterioration, and physical health impairment. "Mental health disorders can profoundly affect attorneys' daily functioning. Irritability, feelings of inadequacy, difficulty concentrating, a sense of worry and impending danger, sleep disturbances, heart palpitations, sweating, fatigue and muscle tension are all side effects of depression and anxiety."⁵

Perfectionism is a pattern of belief where nothing is ever good enough.⁶ Law school, law firms, judges and clients reinforce the notion that lawyers must be free from mistakes in order to be effective at their job.⁷ At every turn, there is the need to set and meet exceedingly high standards in one's self and in others. Holding the responsibility for the outcome of someone's life can be overwhelming, so all aspects need to be executed without flaws. In order to look at cases "effectively" and maintain a dispassionate detachment to achieve a "perfect" result, lawyers receive early training to be emotionally withdrawn – a trait that can help with professional effectiveness but have disastrous consequences personally.⁸ Significantly related to perfectionism is the lawyer trait of being detail-oriented – the ability to pay high-level attention to facts and data, consistently over time, to bring about the desired outcome. Paying attention over long periods of time at such a high level can lead to feelings of competitiveness, urgency, impatience, stress, or Type "A" attributes.⁹ Added together, the attributes that are highly

M. Elizabeth "Libby" Coreno, Esq., is a shareholder at Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C., in Saratoga Springs, where she specializes in land development and zoning law. Practicing law since 2004, Libby is routinely asked to bring her solution-oriented approach to a wide range of clients from individuals to regional businesses to Fortune 500 companies in the areas of commercial and real estate development matters, including some of the largest industrial and commercial projects in the region. Libby also brings a personal passion to all her work that changes conversations and she is a frequent lecturer in areas of land use, real estate, management, mindfulness, empowerment and creative problem-solving. In addition to her position as a Director at Carter Conboy, she provides a one-of-a-kind consultancy service that helps legal and business professionals learn ways to live, practice, and make life transitions mindfully, authentically, and creatively.



Kerry Murray O'Hara, Psy.D., is a clinical psychologist and has served as the Director of Adult Inpatient Psychiatric Services at Four Winds Hospital and the Director of Training for Community and Hospital DBT Programs for the past 16 years. Dr. O'Hara has presented on a variety of topics in numerous clinical and academic settings throughout the northeast and has held clinical positions at Boston University School of Medicine, McLean Psychiatric Hospital, Harvard Medical School and has served as an adjunct professor at Sage Graduate School.



prized in lawyers are also known to lead to mental health disturbances.¹⁰

As one lawyer reflected, “We have the perfect storm of both personality traits and career circumstances which are generally known to cause depression. Most lawyers are Type-A people who put way too much pressure on themselves. In our profession we are always being attacked, literally, from opposing counsel and other players in litigation. Other than professional boxing, I can’t think of any other profession where the job requires constant fighting.”¹¹

Lawyers are risk averse. We don’t want to be the first to try anything new because we love stare decisis.

Perhaps the most notable of all lawyer traits is that of “anticipatory anxiety,” or being trained to worry. Psychologist Tyger Latham notes that lawyers are “[p]aid worriers . . . [and] expected to predict the future, to anticipate threats and guard against anything that could arise. So they learn to see problems everywhere, even when they don’t exist. And they start to perceive threats as life or death matters.”¹² James A. Fassold, a lawyer in Phoenix, opined that “[Lawyers] constantly ask the question ‘what’s the worst that could happen?’ As a result, lawyers are on a permanent ‘fight or flight’ mode, constantly on guard. They have nothing to sell but their time and advice. They’re not cranking out widgets. They can’t make more time.”¹³

The training toward worry leads to high negative arousal states, a negative perception of the future, and pessimism. In fact, in the Johns Hopkins study from 1990, the legal profession was the only one where pessimism outperformed optimism.¹⁴ In the normal clinical setting, a trained psychotherapist would begin treatment with a patient to train them *away* from anticipatory anxiety; rather than toward it. Such worry is a hallmark of suboptimal psychology in a human being and yet is a cornerstone of lawyer training.

A CULTURE IN RESISTANCE

In its current state, the legal profession finds itself facing myriad issues above and beyond a mental health or substance abuse crisis. Lawyers also contend with a changing landscape that includes increased “social alienation, work addiction, sleep deprivation, job dissatisfaction, a

‘diversity crisis,’ complaints of work-life conflict, incivility, narrowing values in which profit predominates, and negative public perception.”¹⁵ And yet, with all that is confronting the industry, the ABA’s National Task Force on Attorney Well-Being noted in its 2017 Report a culture with deep barriers and resistance to discussing the problems in practicing law, seeking out help and services, and working as a community to establish best practices for the well-being of its membership.¹⁶ Perhaps most notable of all is that lawyers address these demonstrably high levels of unhappiness and dissatisfaction with “a sense of acceptance rather than outrage.”¹⁷

A 2004 study of lawyers recovering from mental illness determined that the two greatest factors in failing to seek treatment was the belief that “they could handle it on their own” and that discovery of treatment would stigmatize their reputation.¹⁸ The National Task Force on Lawyer Well-Being released its research that included an expansive list of reasons why lawyers are so help-averse, including: “(1) failure to recognize symptoms; (2) not knowing how to identify or access appropriate treatment or believing it to be a hassle to do so; (3) a culture’s negative attitude about such conditions; (4) fear of adverse reactions by others whose opinions are important; (5) feeling ashamed; (6) viewing help-seeking as a sign of weakness, having a strong preference for self-reliance, and/or having a tendency toward perfectionism; (7) fear of career repercussions; (8) concerns about confidentiality; (9) uncertainty about the quality of organizationally-provided therapists or otherwise doubting that treatment will be effective; and (10) lack of time in busy schedules.”¹⁹ Moreover, some state applications for the bar admission require disclosure by a lawyer if he or she has received treatment for any type of mental illness.²⁰

Attorney and author Jeena Cho observed that “Lawyers are risk averse. We don’t want to be the first to try anything new because we love *stare decisis*. Not only is there a resistance to trying a different way of practicing law to reduce these issues lawyers struggle with, it appears that there is a deep level of denial. It’s the lawyers at the *other* law firms who are struggling with depression, problematic drinking or substance abuse. When an attorney is exposed as struggling with these serious mental health issues, it’s treated as an isolated incident, that the problem is unique to him or her – not as a systemic issue.”²¹

As a result, a perfect storm can be observed where lawyers are predisposed to certain traits that cause stress and burnout, are then trained into anticipatory anxiety (professional worriers), which is known to be suboptimal psychology, and then are potentially stigmatized and perceived as weak when the burden becomes too much. Rather than seek professional help, many lawyers “withdraw from peers, friends and family, or engage in ‘maladaptive coping behaviors’ such as self-medicating

with alcohol and other substances.”²² In essence, the contributing factors to a lawyer’s unhappiness coupled with the resistance to seek help may lead to the higher than average levels of problem drinking and substance abuse, according to the most recent research.

CHANGE IS IN THE AIR

In 2015, Larry Kreiger and Kennon Sheldon published *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success* in the *George Washington Law Review*, which laid out the results of surveys taken from more than 6,200 lawyers throughout the country in every aspect of the profession.²³ For the first time, Kreiger and Sheldon provide lawyers with the statistical proof that the extrinsic values that drive the definition of “success” (power, prestige, money, highly prized achievements) do not bear “any relationship to the well-being of [lawyers].”²⁴ In fact, the authors found a direct correlation between well-being and intrinsic values such as autonomy, integrity, close relationships, and meaningful and purposeful work – which, when experienced, lead to higher levels of productivity, lower turnover, and overall workplace satisfaction.²⁵ The conclusions drawn from the data should make a change-resistant profession take notice of the importance of well-being, if not solely for the health of their colleagues writ large, but also because the estimated costs of attorney turnover among large firms is \$25 million per year.²⁶

Beyond the data and profitability implications, the ABA’s National Task Force on Attorney Well-Being estimated in its 2017 Report that “40 to 70 percent of disciplinary proceedings and malpractice claims against lawyers involved substance abuse or depression, and often both.”²⁷ The New York State Rules of Professional Conduct (“Rules”) contain multiple references to the responsibility and duty of lawyers charged with the public and client trust. Rule 1.1 requires that a lawyer provide “competent representation” and Rule 1.3 prohibits the neglect of the client matter. In these two examples, it is self-evident that the lawyer must have the capacity to be both competent and attentive – two skills that are substantially affected when the lawyer’s health and well-being is suboptimal. From a clinical perspective, the Report illustrated that suffering from depression directly impacts executive functioning that is necessary for memory, attention, and problem-solving, while nearly 80 percent of alcohol abusers suffer mild to severe cognitive impairment.²⁸

In addition to the workplace satisfaction, profitability, risk management, and ethical implications, lawyers are a cohort whose ecosystem is impacted by the health and well-being of one another from courtrooms to board rooms. In short, focusing on the well-being of the profession as a collective and individually is simply the right thing to do.



FROM STRIVING TO THRIVING: THE ROAD TO WELL-BEING

While the definition of well-being may vary from person to person, clinical practitioners generalize health and wellness across eight distinct areas of life: social, physical, spiritual, emotional, occupational, financial, environmental, and intellectual.²⁹ The “Eight Dimensions of Wellness” have been roundly accepted as the integrative approach to assessing and addressing overall well-being – including by the U.S. Department of Health and Human Services (Substance Abuse and Mental Health Services Administration).³⁰ In the Report, the ABA’s National Task Force described well-being for lawyers as:

A continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational health, creative and intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others. Lawyer well-being is part of a lawyer’s ethical duty of competence. It includes lawyers’ ability to make healthy, positive work/life choices to assure not only a quality of life within their families and communities, but also to help them make responsible decisions for their clients.³¹

The recommendations from the National Task Force are sweeping – from law schools to Lawyer Assistance Programs to law firm and even malpractice careers.³² In summary, the Report encourages our profession to (1) identify stakeholders and the role each one can play in reducing toxicity; (2) work to eliminate the stigma associated with asking for and receiving help; (3) emphasize well-being as an “indispensable” part of a lawyer’s duties; (4) educate the profession on issues affecting well-being; and (5) take steps to change how law is practiced and regulated with well-being in mind.

In light of the Report’s recommendations, and as a direct result of the growing empirical data concerning the state

of lawyer well-being, New York has become the sixth state in the nation to form a committee for Attorney Well-Being, which operates as a subcommittee to the Law Practice Management Committee of the New York State Bar Association. The purpose of the Attorney Well-Being subcommittee is to identify areas of support and to offer assistance to members who seek to implement ways of thriving professionally and personally, and partnering with other NYSBA Committees to bring awareness, programming, and leadership to the issues that both affect well-being and build resiliency.

As part of the NYSBA Annual Meeting in 2018, the authors of this article presented four steps that can be undertaken by firms and legal employers now to assist in facilitating well-being in the workplace. First, we encourage legal employers, law schools, and bar associations to invest in or make available mindfulness or stress reduction programs to law students and lawyers, as well as actively support the time commitment required for the course work. Beyond mindfulness, there are cognitive and dialectical behavioral techniques that can also be utilized to help build resiliency, distress tolerance, and emotional regulation. Programs that build leadership skills, increase competency, listening and empowerment are all part of the Eight Dimensions of Wellness and can have a profound effect on overall well-being. Second, we encourage lawyers, especially lawyers with influence and experience, to engage with leadership within the profession to assist in destigmatizing help-seeking for lawyers. It is the intent of the Attorney Well-Being subcommittee to provide online resources to members to facilitate ways to normalize and encourage wellness as a primary factor in the competency of lawyers. Third, we recommend developing best practices in organizations with lawyers (law schools, law firms, government, and bar associations) for addressing and reducing negative cultural messages that perpetuate the “lawyer personality” of pessimism and perfectionism. Programs are being developed that will specifically address the need for lawyers to develop the skills necessary to “turn on” their training to anticipate problems, but also to be able to turn it off so that life is not simply a series of worst-case scenarios. Finally, we invite all members of the NYSBA to review the self-evaluations and lifestyle management resources that are available at the Attorney Well-Being subcommittee’s webpage. The availability of technology, apps, and education is wide – stretching across multiple areas of life from substance consumption to tech addiction to financial mindfulness.

CONCLUSION

As Shakespeare’s Ophelia pondered philosophically in *Hamlet*, lawyers now know who they are in terms of well-being, but there is so much possibility in who we may yet become. From productivity and profitability to

ethical concerns and the public trust, to the duty we owe to one another, there has never been more evidence or a greater mandate to work toward normalizing well-being in the legal profession. For a slow-to-change profession, the drumbeat continues its rhythm and only grows in volume. It will require courage and open minds to embrace the direction toward the improvement of the lives of lawyers and those who love them.

“The time is now to use your experience, status, and leadership to construct a profession built on greater well-being, increased competence, and greater public trust.” The Report of the National Task Force on Attorney Well-Being, 2017.

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Lawyer as Employer:

The Business Decisions Involved With Getting Help for Your Firm

By Deborah Kaminetzky

Are you bringing work home every day or staying late every night and working weekends? Have administrative tasks like filing, bookkeeping and shredding piled up and become a “one day when I have time” project? Are you missing deadlines? These are all signs that you should consider getting help and delegating some tasks.

The first step in becoming an employer is recognizing that you need help. The next step is deciding which type of help you need, which will be determined by what you feel you can delegate. We solos tend to feel we can do it all. Just because you are capable of performing a task doesn't mean that is the best use of your time.

WHOM TO HIRE

There are several types of employees that might be helpful to the overworked solo.

The first type of employee you could hire is an associate attorney. There are pluses and minuses to hiring an associate. Some of the pros are that they can go to court and execute documents such as wills, and that they can supervise staff. Some of the cons, however, are that they may or may not bring in business, and they may even eventually decide to leave and set up shop right next door to you. A lateral attorney from a larger firm may

be used to having access to more expensive systems and software, relying on support staff, and may not have the “do whatever it takes to get it out the door” attitude that a solo or small firm needs.

Another type of employee you may want to consider is a bookkeeper, especially if you hate math or accounting. They can make sure your business accounts are properly documented, sometimes better than you can. This could be one of the more expensive hires per hour and, if not needed on a daily business, might be better off as an outsourced position. The rewards of having reliable books on which to base your business decisions and the ease of tax preparation come tax time can be well worth it.

Third, hiring a secretary, receptionist or paralegal can be immensely helpful. This type of employee can handle your calls in the first instance, manage your calendar, or screen callers out (such as solicitors) so they don't waste your time. These front desk staff can even handle initial client screening if you give them a script. Then you can call back the potential clients who seem promising. This is a major time saver for the typical solo who may get several inquiry calls per day. Some secretaries or administrative assistants who have been working at other law firms may also have some of the same skills and knowledge as a paralegal. Many paralegals can do mostly everything

Deborah Kaminetzky is the founding member of Kaminetzky Law & Mediation, P.C. in Cedarhurst, New York. Ms. Kaminetzky is a member of the American Bar Association, New York State Bar Association (Business Law, Dispute Resolution, Family Law, General Practice, and Trusts and Estates Sections and serves on the Law Practice Management Committee), Nassau County Bar Association (where she serves as Chair of the General, Solo and Small Law Practice Management Committee), National Association of Divorce Professionals, New York State Council on Divorce Mediation, Family and Divorce Mediation Council of Greater New York, and Nassau County Women's Bar Association. She serves on the Board of Directors of the Yashar Attorney and Judges Chapter of Hadassah as Treasurer. Deborah is a frequent speaker and published writer on topics including matrimonial law, estate planning law, small business law, fee arbitration, commercial leasing, technology and social media use, and legal ethics. Website: www.kaminetzkylaw.com. Blog: www.kaminetzkylaw.com/blog/. Facebook: www.facebook.com/KaminetzkyLawandMediationPC. LinkedIn: www.linkedin.com/in/deborah-kaminetzky-b35b446. Twitter: <https://twitter.com/kaminetzkylaw?lang=en>.





[We are hiring]



an attorney can do in terms of drafting paperwork. Although they can't give legal advice or appear for court, they are a great resource as the "point person" for clients, which will free up your time to do billable work.

Lastly, hiring a marketing assistant can be a useful delegation. They can perform an analysis of your advertising efforts, create ad copy and campaigns and send thank you correspondence. Some can even manage your social media and newsletter campaigns.

DO THE MATH!

Now that you have decided which tasks you want to delegate, the next step is deciding whether you need a full- or part-time person, an actual employee or an outsourced worker. To make that decision you need to calculate how many hours of work you would regularly need the person to do. If you are doing the work yourself, try to estimate how long it would take someone else. It might be more or less time than you are spending. For example, if someone else manages your social media it might take them an hour or two per month for focused marketing whereas you might end up spending extra time on sites beyond what is required for marketing. That might free up an enormous amount of time for you.

When determining how much you can pay the employee you need to understand that their salary is only one part of the picture. You also have to pay the other half of their

withholding and insurances. They will get some vacation time, and you may either need to hire a temp in their absence or do without them while they are away, and you will have to work harder that week. You may have to get a second computer and/or additional licenses for them to work. Some companies that provide cloud services charge for each person using the software. On the other hand, they also provide online training for your employee so you don't have to spend the time training them on that software. Figuring out what to offer in your advertisement can be challenging. There are websites that can give you an idea of what someone who meets the job description would earn in your area. When hiring an associate attorney, you also need to include the cost of malpractice insurance.

The next thing to think about is how long would it take for you to "onboard" the person – in other words, when would they be productive? You can send the new hire benefit enrollment forms, tax forms (W2 and I9) and your employee manual or policies prior to their start date so that they can come in on the first day with those tasks already completed. If the person has never worked in a law firm, or if you have a particular way you want everything done, you will be spending time in the beginning in which you could have done some billable legal work training that person, otherwise known as a "ramp up" period.

Have an idea and preferably a written document of what benchmarks you expect the person to meet within certain time frames. Sometimes if it is a finite project (for instance, you need to go through and cull cases for shredding or you need to scan and store files) you can get a summer intern such as a college student who is interested in law school, but keep in mind that you *do* have to pay them or they have to get college credit.

THE CLASSIFICATION OF HELP IS IMPORTANT!

When deciding on compensation for your hired help, be careful not to misclassify an employee as an independent contractor; the fines could potentially put you out of business. The basic rule of thumb is that if the employee works when you want them to, where you want them to using your tools or equipment, they are an employee. You also should become familiar with the laws and requirements for various insurances that are needed for your employee. These may vary depending on location – think New York City versus upstate. You also need to know that just because you are paying a salary doesn't mean that the employee is exempt from overtime.

Another idea is hiring a temp from an agency. A reputable agency should take care of all the employment taxes and insurance. One of the cons of this arrangement is if you really like the employee you may not be able to hire them away from the agency so easily. Another is that if they work for you long term through the temp agency there is a possibility that they will be considered a hybrid employee.

ONCE YOU HAVE DECIDED TO HIRE AN EMPLOYEE, HOW DO YOU FIND ONE?

Sometimes colleagues know of someone exceptional who wants to leave, so you can try asking around. Posting on a list-serve is also a popular option, however, you should be careful if you are replacing someone. You can try posting on the internet through various job sites; however, there are drawbacks. Posting a job on one of these may get a lot of interest, although not everyone who applies is actually qualified. You may get a lot of resumes and need a lot of time to read them. I once had more than 50 applications for a paralegal position and only found six of them interview-worthy. College or Law School Placement Offices can be useful and usually list the job for free.

THE INTERVIEWING PROCESS

When you have candidates come in for an interview, be careful what you ask on your application; make sure you are steering clear of unlawful questions. While an interview is important, giving applicants a test is a good way to compare them against one another using the same measuring stick. It is also objective. There are tests

for all types of clerical work, such as filing, proofreading and grammar, to name a few. Make sure if you test one applicant, you test them all; this can avoid even the appearance of discrimination.

You need to speak with the references provided and find out if they in fact worked with the candidate. References can also give you an idea of why the person is leaving their job or what their attitude is like. Are they habitually late, did they take pride in their work, or did they leave projects unfinished because it was time to leave at 5 p.m.? If you do hire an employee and you don't want to have to deal with the accompanying human resources issues, there are companies that act as outsourced human resources departments. Some of them will even conduct background checks during the recruitment process. They offer assistance in all areas

Be careful not to misclassify an employee as an independent contractor; the fines could potentially put you out of business.

of human resources administration, including recruitment, payroll, benefit administration, regulatory compliance, and risk management.

WHAT ABOUT OUTSOURCING?

There are many choices of outsourced help for lawyers – from live reception or virtual assistant services to calendaring options to document production. I know that artificial intelligence has been a concern in the legal community regarding our profession. However, we can benefit from it as well by using it to leverage our time without hiring an employee.

LETTING GO

Finally, what if the hire doesn't turn out the way you hoped for and you have to let them go? New York is an "at will" state – you can fire someone for any reason so long as it is non-discriminatory. Having documented policies, benchmark deadlines and frequent reviews all go a long way toward ensuring that you can easily let go of an employee who is not working out.

Strategic Network With a Target



A persona is a fictional composite of the characteristics, good and bad, physical and mental, that are important aspects of your real-life target.

Do you ever wonder if your networking efforts will produce any results?

Do you ask yourself why you attend events crammed with people who turn out to be of no interest to you?

Do you wish clients would just magically appear so you could avoid personal marketing?

Of course you do, everyone does at one point or another. There is a cure for random networking. The cure is strategic networking. Strategic refers to the planning necessary to find the most optimum venues for your personal networking. Strategic means defining your goals and then creating a networking plan directed toward the venues and interests of the people you want to meet. By just identifying the kinds of clients you want and the kind of work you want to do for them you immediately focus your efforts.

In this article we will look at how identifying and defining the best client for you will focus your networking initiatives on the best activities for you. We will discuss how to create a “target persona,” a semi-fictional depiction of your ideal client or the people who might be able to refer such clients to you. This persona becomes your guide to the best venues for interacting with your targets, and the best language to use to be seen as relevant to their needs.

DECIDING WHAT YOU WANT

To begin, analyze your current practice and your current client base in order to identify the kind of work you enjoy most and the characteristics of your favorite clients. Focus on your top clients – the handful that provide most of your revenues, or clients that are valuable because of their name recognition, or clients you want to duplicate because you enjoy the work you do for them.

To examine the characteristics of business entity clients, create a table that identifies the client’s name, their sub-industry and industry, the products they sell and to whom they sell them, the organization of the company,



Carol Schiro Greenwald, Ph.D. is a strategist and coach who works with lawyers and law firms to help them become better networkers, more successful rainmakers and effective leaders. She can be reached at carol@csgmarketingpartners.com or 914-834-9320.



king Begins

By Carol Schiro Greenwald

its geographic reach, and trends that will impact its future success. Look at your relationship with the client: the segments you deal with, the people you know, the services they use and the services they could use. Assess the strength, both depth and breadth, of your relationship with them: do you know all the key players? Do you have competition from other law firms or other service providers? What factors will influence your ability to get additional work from this client?

If you practice in a consumer-focused area, you can still identify the characteristics of the individuals you work with by focusing on the client's key influencers [family and friends], the characteristics of their demographic cohort, the sources of their income and the geographic distribution of their assets. Think about the emotional dynamic that often impacts your work and identify the sources of their problems and opportunities.

Move from clients to yourself and consider where you want to be in your career in five and ten years. Do you want to continue to grow in your current practice niche in your current firm? If not, what do you want to do and when do you plan to do it? How do you define a successful career for you?

Balance your workplace analysis with the demands of your private life: how do you strike a balance between work and pleasure? What responsibilities do you have at home?

Use these insights to craft one to three goals that you want to implement in the next 12 to 18 months. These goals will form the foundation for developing your networking strategy. Strategic networking involves a series of strategies and tactics formulated to connect your personal networking, both on- and offline, with the furtherance of your goals.

TARGET PERSONA DEFINED

The first step in creating strategies is to know whom you want to target and why. To this end you will need to create one or two target personas – which help you to connect your goals with your networking efforts. A target

persona is an imaginary construct of a person designed with characteristics, wants, needs, personality and problems to match your preferred clients.

The process of constructing a persona provides insights into your preferred clients' ideas, preferences, idiosyncrasies, opportunities and obstacles. You will be able to identify where your target networks. The persona becomes someone to "talk to" when you are planning what to say and do at a networking event. Understanding your target's main concerns, as typified in your persona, helps you craft questions that will interest them in you and your skillset.

Target personas simplify the process of connecting to your targets. A persona has both tangible and intangible attributes. In addition to the physical attributes you also need to get inside their head to understand how they think, what they like and dislike, how they shop for advisors, and where they go for fun and knowledge. These intangibles will provide insights into what they value and what they care about.

You use the process of creating personas to put yourself in the target's shoes. Understanding what is important to them helps you formulate solutions they will value. If you invest the time and effort in your creation, you will know enough about your networking targets to be accepted in their world.

RESEARCH

Begin with some general research to create a bigger picture of their world. Read about trends that will impact them and other general context public information about the world of these clients.

Complement this with research from your own records and databases: how did the client find you or your firm, how has the relationship grown, what information produced by your firm interests them, etc.? Do they prefer online or in-person meetings? Look at your website analytics to see if they use your website, where do they go on it?

CONSTRUCTING HIM OR HER

Your persona's characteristics should be as detailed as possible. Details are important because they make the persona more believable, and also because in the process of creating a complete human stand-in you will get to know him or her very well.

Begin with physical characteristics:

- Pick a gender.
- Decide on hair and eye color, physique.
- Find a photo to represent your persona.
- Pick a name.

authority? If not, who else is involved and how does that impact your networking with these targets?

Link your marketing with media sources the persona values? What/where are her or his trusted sources of information? Is social media important to him or her, and if so, in what ways? Does your persona read paper books and periodicals or does she or he access everything from a mobile device?

USE THE PERSONA AS YOUR STRATEGIC NETWORKING GUIDE

When you put all your ideas together you will have made a complete persona. As you create a value statement,

It is important to try to understand how your target client looks at the world and feels about his or her success.

Move on to their personal background such as education, religion, level of sophistication, hobbies, living arrangements and geographic location, key influencers in the persona's life.

Now you have an external portrait of your target. But we know that how a person appears is not necessarily a good indication of how they think, how they decide, when they chose to do something. People think with their emotions first. For this reason, it is important to try to understand how your target client looks at the world and feels about his or her success.

Now try to put yourself in her or his mind:

- What motivates the persona?
- What are his or her key values?
- What views about the world around him or her are important or relevant to a decision to use your services?
- What affects her or his mood: happy, sad, worried, excited, impatient, etc.?
- Think about how the persona makes buying decisions – where does he or she go for purchasing information, how important is price, what values are important to her or him when making a purchase.

Then plunge into the details surrounding your target client's job: what they do, how they spend a day, emotional ties to the job, key responsibilities and challenges, personal rewards and frustrations. Does your target persona have buying

elevator speech and conversation starters, return time and again to your persona to test these communication vehicles against the target you have built.

Select networking in-person venues like networking groups and professional or trade or industry associations that are relevant to your target. Pick membership networking groups – on or offline – that include either members of your target group or people who can introduce you to your targets.

The persona becomes your entry point into their world and your guide for creating the kind of authentic, meaningful, trusted advisor relationships that build a business.



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Foundation Seeks Donations to Help Hurricane Florence Victims Obtain Legal Aid



The State Bar Association and The New York Bar Foundation are seeking donations to help victims of Hurricane Florence who need legal assistance.

Impacted residents of the Carolinas will soon face numerous legal issues including dealing with lost documents, insurance questions, consumer protection issues and applying for federal disaster relief funds.

Nonprofit legal services providers in the impacted areas will be inundated with calls for help.

Tax-deductible donations may be sent to
The New York Bar Foundation,
1 Elk Street, Albany, NY, 12207.

Checks should be made with the notation, "Disaster Relief Fund."
Donors also can contribute by visiting www.tnybf.org/donation
click on restricted fund, then Disaster Relief Fund.



The Rise of Alternative Fees Against the Historic Billable Hour

Is There Room for Both in the New Legal Landscape?

By Robert D. Lang and Lenore E. Benessere

Robert D. ("Bob") Lang is a Senior Litigation Managing Partner at the firm of D'Amato & Lynch, LLP in New York City, where he manages platforms for alternative fees, as well as traditional hourly billing. He can be reached at RDLang@damato-lynch.com.

Lenore E. Benessere is an Associate of the firm and can be reached at LBenessere@damato-lynch.com.



In the not-so-distant past, people owned the things they used in their daily lives. They went to stores, purchased products, and brought them home, where they stored them in their closets or inside their garages. Some people reading this may be saying to themselves, “This is not a thing of the past at all; I still own my ‘things.’”

But do you?

For a little over a decade now, the United States has seen a steady increase in the number of people who choose to lease their personal automobiles.¹ People who lease the cars they drive do not own them, the banks do. Most people also do not own the books they read or the shows they watch. Instead, rather than purchase DVDs of our favorite movies or TV shows, CDs from our favorite artists or books from a particular author, we subscribe to services such as Netflix, Spotify and Amazon’s Kindle Unlimited for unlimited movies, music and e-books. In fact, on July 1, 2018, the American multinational consumer electronics retailer Best Buy stopped selling CDs in its stores, citing the main reason behind its decision as the popularity of subscription streaming music services like Spotify and Apple music.² For some people, even owning clothing and accessories is optional. Companies like Rent-the-Runway and Le Tote allow people to subscribe to a service in which you rent, rather than own, the clothing that you wear on a daily basis. These trends in pricing show, at least, a willingness to turn to subscriptions as a way to pay for the services that we use and enjoy in our everyday lives.

EFFECT OF INCREASED CONSUMER CONFIDENCE IN SUBSCRIPTION-BASED PRICING MODELS ON LEGAL BILLING

Staggering proof of the rise of subscription-based pricing models is clearly apparent in Credit Suisse’s finding that consumers spent \$420 billion on subscriptions in the United States in 2015, which is up from \$215 billion in 2000.³ Should we as attorneys be concerned about the clear uptake in interest that the subscription-based pricing model appears to be enjoying? The short answer to this very complex question is, of course, and not because it will eclipse the prominence of the main way that attorneys bill for their time – the infamous billable hour – but because subscription-based pricing may be an alternative fee arrangement that provides real value to some of our clients.

Further, in the current climate, where there is an ever-emerging willingness and interest among consumers to pay subscription fees for services that they want or need, attorneys should, at a minimum, be able to knowledgeably discuss this alternative fee arrangement with their clients. In this way, attorneys will be prepared to address the needs of their clients if we begin to see the same willingness and comfort-level for subscriptions. This is not

to diminish the billable hour, which may always be the preferred method of billing for some clients. The billable hour, however, should be considered one of the tools in our pricing toolbox, rather than the only option.

BRIEF HISTORY OF THE BILLABLE HOUR

Before considering how a subscription-based pricing model provides an effective alternative to the billable hour, we must briefly consider the climate during which the billable hour came to be the accepted form for billing legal services. From the early practice of law in the United States up until 1975, attorneys did not bill their clients by the hour. Instead, lawyers sold their services at fixed fees for various tasks, such as \$100 for drafting a will and \$500 for a simple adoption, which would be more expensive since it might require a court appearance.⁴ Up until the early 1930s and 1940s, states codified reasonable fees for these services and made it illegal to charge more than the minimum fee for a legal service.⁵ Then, with the goal of wanting to increase attorneys’ income, state bar associations began publishing “suggested” minimum fee schedules that created standard pricing for a variety of legal services.⁶ Due to the irrefutable laws of supply and demand, and the state bar associations’ unwillingness to restrict supply (the number of attorneys allowed to practice) or mandate pricing, this change resulted in a race to the bottom, where attorneys undercut each other by offering their services for less than the minimum. As a result, this guidance, originally conceived as a way of setting a price floor, actually created a price ceiling.

In 1969, the American Bar Association addressed this issue and stated that it was unethical for attorneys to charge below the minimum fee. The American Bar Association’s guidance essentially did away with the ability for clients to “shop around” or negotiate fees because all attorneys charged the same thing – the minimum established fee. This created, in effect, a cartel of lawyers all working to keep prices stable. In 1975, the Supreme Court settled this issue in *Goldfarb v. Virginia State*, in which it held that minimum fee schedules violated antitrust law by eliminating competition among law firms.⁷ Out of this climate, the billable hour became the predominant method of compensation for legal services because it provided a clear way for attorneys to charge their clients for the work that they were hired to perform. The billable hour is in stark contrast to the minimum fee model because attorneys were now compensated for the time and effort it took to achieve their client’s goals, rather than a minimum fee that likely was set to drive business to a particular firm. In doing so, attorneys who were able to successfully complete work at a rate faster and as effectively as their competition were able to be rewarded for their efficiency.

BENEFITS OF THE BILLABLE HOUR

While much has changed in the last 40 years, the billable hour's predominance, especially in the realm of billing an attorney's time in litigation, has not. Its obvious benefit is that billing hours provide attorneys with a straightforward way of charging their clients for their service, and clients have a clear understanding of what work the attorney has done for them. In the context of the Supreme Court's 1975 decision in *Goldfarb*, it is clear why the pendulum swung from flat minimum fees for specific services to the billable hour.

Even in the current era, where subscription-based pricing is increasing in popularity, the billable hour pricing model still remains valuable for certain clients, especially those whose legal service needs change from year to year, with little to no predictability when it comes to assessing how much or how little legal assistance they will require during a given time period. Alternatives to the billable hour, however, may be especially helpful for clients who engage the services of attorneys with some regularity.

including bonuses for quick resolution of cases or successes at trial or during settlement negotiations. Since litigation is unpredictable, attorneys must carefully evaluate their practice to quantify the capital needed to fund these types of flat-fee arrangements and should seek to employ safety gauges to ensure fairness. One such safety gauge is a "price collar," which allows law firms to receive partial compensation if their actual fees rise considerably above an agreed-upon amount.⁸

Alternatively, attorneys engaged in transactional work, such as real estate closings, business incorporations or even the drafting of divorce settlements and wills, may wish to charge their clients a flat fee to prepare and file any and all documents necessary to complete the transaction or series of transactions over a period of time. In this context, the law firm may charge a flat fee for each transaction, regardless of the time it takes to complete it, or may charge a flat fee to be "on call" for the client if and when these transactions are needed. Under the latter arrangement, the client may pay the attorney an initial retainer fee and then an additional amount per completed transaction.

Assessing an appropriate fixed-fee amount is not a perfect science. If the law firm has worked with the client for a number of years, data from previous years should help to inform what this "fixed-fee" or subscription fee should be, such that it is mutually beneficial for both the client and the law firm. With new clients, who have no history of billing in a prior year,

applying a subscription-based pricing policy may be more challenging.

Aaron George, who wrote *How to Start A Subscription Based Law Practice (And Why You Should Consider It)*, recommends creating the pricing model for new clients by

add[ing] up the total amount of revenue you generate from a sampling of clients over the course of a year. Try to include some higher value clients, and some lower end ones to get a complete spectrum. Then find the median, and divide it by 12 to determine a monthly subscription rate.⁹

As with preexisting clients, George's pricing model also uses the data law firms already have to assess possible pricing arrangements for clients interested in this fee arrangement. It is clear that this billing approach requires economic analysis, which lawyers must be willing to learn and implement in the context of billing for legal services. A subscription-based pricing model will be most successfully implemented by those law firms that understand that law is a business, where "a product" of sorts is being



SUBSCRIBE

SUBSCRIPTION-BASED PRICING FOR LEGAL SERVICES

In the context of legal services, subscription-based pricing will likely look a lot like a fixed-fee arrangement, where a client pays a flat fee for the law firm's work over a specific period of time. The fee would be agreed upon beforehand and perhaps allow for some flexibility if the work needed by the client exceeds expectations.

Subscription-based pricing models in the legal industry can be structured in a variety of ways to ensure that the clients' needs are met, and the arrangement is financially viable for the attorney or law firm. Some subscription-based pricing models include charging clients a flat fee for unlimited work during a specific time period, such as a quarter of a year, an entire year, over the course of several years or even for a specific "book of business" (i.e., in the case of insurance companies, for cases that originated from occurrences during a specific policy year). Such arrangements may be most useful for litigation attorneys and can include additional incentives for performance,

sold. Lawyers, like manufacturers, must understand the importance of pricing when it comes to driving sales and increasing profitability.

BENEFITS OF SUBSCRIPTION-BASED PRICING MODEL

Clients benefit from subscription-based pricing models because they are able to (1) budget for their legal costs since they will be paying a pre-established rate for the services within a specific time frame, (2) establish a trusting relationship with a particular law firm since they will be working together throughout this period of time, and (3) respond more efficiently when legal services are required

hire the appropriate amount of attorneys to handle the workload.

KEYS TO SUCCESS WHEN USING SUBSCRIPTION-BASED PRICING

As with any deal, careful preparation and negotiation are important when entering into a subscription-based pricing arrangement. This includes research regarding the clients' needs, expectations and objectives to properly assess the amount of work that will be needed to achieve their goals and present a realistic fee structure that ensures both the attorney and client feel they have received the benefit of their bargain. Likewise, to avoid

Even in the current era, where subscription-based pricing is increasing in popularity, the billable hour pricing model still remains valuable for certain clients, especially those whose legal service needs change from year to year.

since the attorneys will come to know and understand the client's concerns, goals and specific needs. While client relations can be fostered under a billable hour arrangement, it is less likely because clients may not have the same scope of interaction with their attorneys. Repeat interactions between the client and the law firm may also ensure continuity in cases or transactions, which may be particularly beneficial for those clients who wish to establish certain precedents during litigation or settlement.

IDENTIFYING THOSE CLIENTS WHO MAY BENEFIT FROM SUBSCRIPTION-BASED PRICING AS AN ALTERNATIVE FEE ARRANGEMENT

To identify those clients who should consider subscription-based pricing attorneys should first address preexisting clients who have expressed interest in alternative fee arrangements. Legal practitioners understand that it has been increasingly important for clients to carefully focus on their bottom lines and reduce risk. In the context of litigation, for example, many attorneys have observed a noticeable increase in settlements to achieve these goals. Sometimes, this phenomenon is the result of courts with limited resources that simply cannot try every case. It is, however, also driven by clients who value minimizing their risks. While trials present unavoidable risks to clients, the unknown amount of their legal fees does not have to compound this uncertainty. Subscription-based pricing allows a client to pay a sum on either a monthly, quarterly, or annual basis. This cost will not change and, therefore, will provide some consistency for the client's profit and loss statement. Likewise, law firms can benefit from this consistency because they will be able to plan for a certain amount of revenue and work and subsequently

the feeling that the deal is one-sided, it is necessary for the client and law firm to "establish a relationship of mutual trust based on a true partnership between the law firms and their clients."¹⁰ Such a relationship is cultivated by frequent and open communication with your clients to encourage a team-oriented approach. Both the law firm and the client should work together to devise and follow the strategy to achieve the desired outcome of the case or legal transaction.

ETHICAL CONCERNS

While law is a business, the Supreme Court made it clear in *Goldfarb* that different rules govern businesses and professions, particularly the legal profession, as lawyers are considered officers of the court. In fact, in *Goldfarb*, the Court specifically stated that in some instances the state may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."¹¹ Therefore, while we should continue to be creative in the billing methods that we offer our clients, we must consider our ethical obligations when doing so.

The ABA Model Rules of Professional Conduct provide us with general guidance when it comes to assessing the appropriate legal fee to charge our clients. Specifically, Rule 1.5(a) states that "a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." ABA Model Rule 1.5 tells attorneys to consider the following eight factors when assessing whether a fee is "reasonable":

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent.

New York has adopted the model rules. Under Rule 1.5(a) of the N.Y. Rules of Professional Conduct, “a lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense.” A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive mirror those of the ABA Model Rule listed above.

Lawyers must be mindful when determining whether to employ an alternative fee arrangement, including a subscription-based pricing model, that specific attention is devoted to ensuring the arrangement complies with all ethical standards and rules. In this regard, we must consider the type of work needed and the likely issues raised by this work. We must also consider the type of attention

and time the work will require, including court appearances and discovery obligations, such as depositions in the case of litigation work. We must also consider when entering into an alternative fee arrangement, the skill of the attorneys who will be assigned to assist the client during the prescribed time period. Finally and most important, attention must also be paid to how much the work would have cost the client under a traditional billable hour arrangement, since ethical rules require attorneys to consider “the fee customarily charged.” If we are seeking to evoke a subscription-based model, which is not customary, then consideration of a customary model is essential. The latter requirement should not provide additional onus on the law firm since, as stated above, costs for hourly rates will likely already have been taken into consideration when assessing the subscription price to ensure that it is mutually beneficial for both parties.

FINAL THOUGHTS

It is clear that in an increasingly competitive legal market, attorneys should consider the various tools in their metaphorical toolboxes because pricing, including flexible billing methods and arrangements, can drive new business and help cultivate preexisting relationships with clients. The billable hour is one such tool and still is likely to be the one most often used by attorneys. However, to ensure that attorneys are adapting to our clients’ needs and the current consumer climate, we must be prepared to consider and, when appropriate, adopt other billing methods. A subscription-based billing approach is one such popular method that we may see infiltrating the legal billing world, as it has in movie, book and music sales and even the sale of everyday items such as clothes. Attorneys who want to succeed in this new frontier should be prepared to consider both alternative and hourly fees or risk missing out on financially rewarding opportunities.

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The Importance of Daily Planning: Using Technology and Paper to Stay Focused

By Paul Unger

Daily planning is critical if you want to change your life and change your habits. If your current routine doesn't include planning, that routine must be broken and reconstructed! The reality is that very few people take the needed 5 to 10 minutes at the beginning of the day or the end of the day that will save them hours, days, weeks, months, and years of waste and inefficiency. Most people just dive in or "show up." We jump right into email and become instantly derailed by fighting little fires instead of creating clear goals or a roadmap for the day. We need to sketch a daily plan, huddle with our team, adjust our daily plan if needed, and then use that daily plan as our roadmap that will keep us focused. When you have no roadmap, it is incredibly easy to allow distractions to control you.

I have observed many people experience success by planning tomorrow's roadmap at the end of the previous day. We tend to know where we left off with tasks and are ambitious. Others have experienced success engaging in daily planning in the morning before the day starts, after we are rested and have a clear mind. If you engage in that morning planning, I recommend coming in early to do so, before all the fires have already started. It is difficult to focus once the chaos begins, especially if you don't have a solid roadmap for the day.

HOW TO CREATE YOUR DAILY PLAN

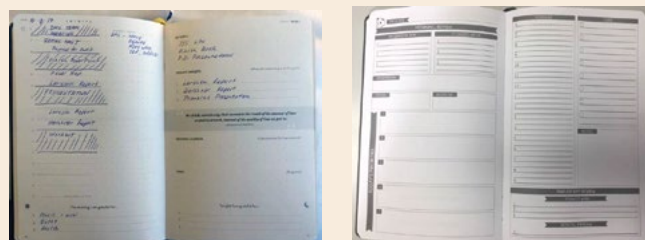
As a 20-plus-year paperless lawyer and consultant, as much as I love technology, I am a huge fan of using some form of paper for planning. Take, as an example, the simple index card. A pack of 100 index cards will cost you less than \$3. Use one card per day, writing three to five tasks that you want to accomplish that day. Another way of articulating this is: "Today is a success if I get these three to five tasks completed." It is okay to rewrite items that are on your calendar, and if you get those three

to five things completed, then get another card out and write down three more tasks!

Another great tool is a planning journal. Two of my favorites are *Best Self-Journal* (<https://bestself.co/>) and *Panda Journal* (<https://pandaplanner.com/>). Many people ask me why you should rewrite this information on paper if it is already on the calendar in Outlook. There are multiple reasons:

1. I want that roadmap for the day prominently in front of me so I can see it at all times. If it is out of sight, it is out of mind. That means for me that this list is near my keyboard. If the list is in Outlook, it is probably minimized most of the day.
2. I don't want to waste a big computer monitor to display my roadmap. I use my monitors for more useful functions like comparing documents, or displaying reference/subject matter relevant to projects that I am working on.
3. It is likely that events on my calendar were created weeks ago, so they are not freshly on my mind. It is helpful to rewrite those events.
4. It is helpful to time-block those events and tasks so you engage in realistic planning about how long it will take you that day.
5. Taking five minutes to write that daily plan serves as a contract with yourself to get those things done that day.

Here are examples of the *Best-Self Journal* and *Panda Journal*:



Whatever way you choose – index card or journal or something else – creating your daily plan before you get down to the business of the day will help you accomplish your goals more effectively.



Paul Unger
(punger@affinityconsulting.com) is an attorney, author, speaker, and thought-leader in the legal technology community. He is a frequent lecturer throughout North America. Twitter: [pauljunger](https://twitter.com/pauljunger). Website: www.affinityconsulting.com.

The Transformation of Assigned Counsel Programs

By Cynthia Feathers

On June 16, the NYSBA House of Delegates approved a resolution to seek legislation to increase compensation rates for private attorneys assigned to represent criminal defendants and Family Court litigants who are financially unable to obtain counsel and are eligible for assigned counsel. In addition, the State Bar seeks to have the increases paid for by the state and adjusted annually. Such measures would be vital elements in the reform of mandated representation that has already begun.

Reform is long overdue. In 1965, New York made a fateful mistake in creating a system that requires each county to design, implement, and fund its own program for mandated representation. County Law Article 18-B was our answer to the declaration in *Gideon v. Wainwright*¹ that criminal defendants facing serious charges and the loss of liberty in state court have a constitutional right to counsel. Our county-based, and mostly county-funded, mandated representation system was also our response to the broad right to counsel provided to Family Court litigants by the State Constitution and our statutory scheme.

The lack of state funding and oversight created a dysfunctional system in which the quality of representation is largely dependent on the wealth, or fiscal constraints, of the county. Our fragmented, underfunded system has failed to adequately protect the rights of criminal defendants, as well as Family Court litigants. That was a central conclusion of the 2006 Report by Chief Judge Kaye's Commission on the Future of Indigent Defense Services, which decried inequities among counties and disparities in resources allocated to the prosecution and the defense.

The Kaye Report's recommendations and warning went unheeded. The ultimate catalyst for change was litigation.

In *Hurrell-Harring v. State of New York*,² filed in 2007, the named plaintiffs from five counties blamed the state for systemic failures that deprived them of the right to counsel. During the pendency of the litigation, a new state agency was created: the Office of Indigent Legal Services. That office was charged with monitoring, studying, and making efforts to improve mandated representation. William J. Leahy was appointed the Executive Director of ILS and continues to lead the agency.

In a 2015 settlement agreement reached in *Hurrell-Harring*, the State of New York acknowledged for the first time its responsibility for complying with *Gideon's* promise. ILS was given the responsibility of remedying major deficiencies in the five counties that were added as defendants to the lawsuit. The initial period of implementation of the settlement has provided a vision about the transformative power of state funding to lift mandated representation. Yet state-funded relief pursuant to the agreement only applied to the five named counties.

The next major step occurred in April 2017, when the state budget included statutory amendments extending the *Hurrell-Harring* reforms statewide – at state expense – and broadening the powers and responsibilities of ILS. In 2018, \$50 million was appropriated for reform in year one. That amount is expected to significantly increase each year over a five-year phase-in period, with full statewide reform required by 2023.

Pursuant to its new statutory mandate, ILS has developed statewide plans mirroring the three key components of the *Hurrell-Harring* settlement – counsel at arraignment, caseload relief, and quality improvement. The statewide plans address representation only in the criminal defense realm. Parental representation was not included in the groundbreaking amendments.

An increase in the rates for assigned counsel is the tip of the reform iceberg. So much more is happening below the surface in the assigned counsel arena. The progress now occurring gives reason for optimism and an opportunity to dispel myths about assigned counsel programs (ACPs). It is perhaps well known that ACPs are a vital component of mandated representation in New



Cynthia Feathers is the Director of Quality Enhancement for Appellate and Post-Conviction Representation at the New York State Office of Indigent Legal Services.



York. Indeed, the most common mandated representation model in our counties is having a public defender or other institutional office as the primary provider of representation, in combination with an ACP. But there may not be widespread understanding of other truths regarding ACPs.

Myth one: ACPs are only needed to address conflicts of interest. In fact, other systemic benefits can flow from having both a public defender's office and an ACP. For example, ACPs can absorb excessive caseloads faced by public defenders. Further, a vibrant program empowers the private bar to participate in providing effective public defense. ACPs are the product of the local bar association in each county or New York City borough, and the panel attorneys are members of the local bar. Together, the associations and attorneys can increase their community's awareness of the importance of quality mandated representation and foster a commitment to that goal.

Myth two: Quality in criminal defense or parental representation, at both the trial and appellate levels, can only be provided by staff attorneys at institutional offices. The essential components of competent representation include an administrator or other strong leader; training and supervision; access to, and appropriate use of, non-attorney professional services, such as investigators and expert witnesses; effective communication with clients; reasonable caseloads; and a fit between the expertise of the attorney and the challenge of the case assigned. These elements can be present – or absent – in both institutional offices and ACPs. A major thrust of the transformation unfolding in New York today is the use of state resources to gradually bring to ACPs, as well as institutional programs, all the structural elements needed for quality representation.

Myth three: There has been an exodus of private attorneys from ACPs solely because of low, stagnant hourly rates. To be sure, adequate compensation is needed to attract and keep competent 18-B attorneys, and rates should never again be frozen for a 14-year period. However, attorneys report that they also leave ACPs because the programs offer too little in the way of litigation support and guidance. In *Hurrell-Harring* settlement counties, we have also found that the converse is true. If you build it, they will come. A structured program – one that offers a cohesive community of private attorneys, mentoring services and resource attorneys, and training and supervision – is a magnet for dedicated attorneys, at all levels of experience, who yearn to grow as professionals and to provide meaningful representation to their clients.

Admittedly, after five decades of low expectations by counties, courts, providers, and clients, ACP attorneys cannot be expected to become a statewide *Gideon* army overnight. But the combination of the statewide *Hurrell-Harring* implementation, and an increase in assigned counsel rates, could help create the fierce commitment in our private bar that will be needed to fully realize the promise of *Gideon* and to protect the legal rights of vulnerable persons facing dire legal consequences.

NYSBA should be lauded for so steadfastly advancing the mission of quality mandated representation. The Association's current stance on 18-B rates is only the most recent manifestation of decades of leadership directed toward making the right to counsel a reality in New York. No doubt such leadership will be instrumental to attaining mandated representation goals on the next frontier – state funding and oversight of parental representation.

1. 372 U.S. 335 (1963).
2. 20 Misc.3d 1108(A) (Sup. Ct., Albany Co. 2008).

Scylla and Charybdis

By Peter Siviglia

Editor's note: The following article is based on a real life scenario that is part of a new book by Peter Siviglia, Exercises in Commercial Transactions, to be published by Carolina Academic Press in conjunction with his new textbook for law schools, Transactional Skills – Contract Preparation and Negotiating. It is reprinted here, with permission, because of the multiple dilemmas it presents for a young attorney who finds himself drawn into a web of deception – dilemmas worthy of a Starfleet Academy test of character. Where does the young attorney draw the line between deference to a senior partner and his firm's duty to make a required disclosure? How many times does he have to remind the senior partner to make that disclosure before he himself becomes complicit in the partner's willful deception, which has the clients' acquiescence, even before he orchestrates the final cover-up at the contract's closing? Does it matter that it all works out in the end, as the core elements of the contract hold up, or does the young attorney have a post-closing duty to report his conduct, and that of his senior partner and even the clients, to the proper disciplinary authorities? Or, as the author puts it, what would Captain Kirk do?

John D. Lemma is an associate at a small but respected law firm. The partner with whom John primarily works, I.M. Bishus, handles the work for one of the firm's most important clients, Remarkable Enterprises, Inc. Remarkable has put together a significant tax-leveraged lease transaction in conjunction with a publicly held company in Japan, Kobayashi Maru, K.K. Remarkable has often collaborated with Kobayashi, and through Remarkable, John's firm has often represented Kobayashi.

The transaction involves the sale to a group of investors of contracts for two ships under construction. The investors will charter the vessels to an oil company under net leases. The equity contributions of the investors and loans from a syndicate of lenders will provide the purchase money for the two contracts; the charters will provide security for the loans. The payment to Kobayashi for the contracts will be made at the closing and will be funded by both the equity investors and the lenders. John's firm will represent both Remarkable, its client in the United States, and Kobayashi Maru, its client in Japan.

An important requirement of the transaction is an opinion letter from John's firm with regard to the obligations of the Japanese participant, Kobayashi Maru. For the portions of the opinion involving Japanese law, John's firm, with the knowledge and approval of the equity investors and the lenders, will rely on the opinion of the internationally well-respected law firm in Japan, Tako, Ika & Unagi. This firm is counsel to Kobayashi.

The texts of both opinions are agreed to by the parties, and the text of the Japanese law opinion is sent to Tako, Ika & Unagi. Their opinion will be addressed to John's firm only, and it will be attached as an exhibit to the opinion of John's firm, which will be delivered at the closing. The opinion of John's firm will state:

With regard to matters involving Japanese law, we have relied on the opinion of counsel in Japan, a copy of which is attached hereto.

Because of the size and complexity of the transaction, the negotiations and documentation take a long time to complete. About a month before the closing, Kobayashi advises Remarkable and I.M. Bishus that Tako, Ika & Unagi will not be giving the opinion. Instead, the Japanese law opinion will be issued by a Professor of Law in Japan with outstanding credentials. Kobayashi and Remarkable leave to I.M. handling this change with the other parties. I.M. tells John of the development and asks John for his thoughts.

"Why are they changing lawyers?" John asks.

"According to Kobayashi," I.M. replies, "they didn't look at the opinion until recently. Apparently there are a lot of complex issues that require research, and because of other pressing matters for Kobayashi, they just don't have the time."

"Well," John muses, "I guess there's no problem as long as we disclose the change to the other parties."

"Yes," says I.M., "but not just yet."

continued on page 56

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

State Bar News

There Is No “Justice” at the Court of Appeals – but You’ll Have Better Odds With the “Judges” if You Moot Your Argument

By Joan Fucillo

The New York State Bar Association’s Committee on Courts of Appellate Jurisdiction (CCAJ) offers attorneys scheduled to argue at the state’s highest court a chance to moot their arguments.

Attorneys with cases before the seven-judge Court of Appeals (there are no “justices” on the Court) can apply and request that the committee’s moot court program “moot” their argument. The service is free for NYSBA members. Arguments usually are scheduled 10 to 14 days before the court date. Bar Association members interested in this service should contact Alan Pierce, the moot chair, at apierce@hancock.com, preferably four to six weeks before their scheduled Court of Appeals argument date.

Argument is presented before a panel of three to seven “moot judges,” all experienced appellate practitioners and former judges. Following the simulated argument, the moot judges provide candid feedback covering the strengths and weaknesses of counsel’s argument and offering suggestions for improvement.

Ed Markarian, a partner at Magavern Magavern Grimm LLP and CCAJ member, wrote about mooting an argument in *Leaveworthy*, the Committee’s newsletter:

“Not every case merits a moot. . . . [B]ut how many times will we make it to the Court of Appeals? Maybe



never again. We scrub our briefs. Why not do the same for oral argument?

“Some say that oral argument does not matter but I have heard appellate judges say it matters 10 to 20 percent of the time. I believe it, and for close cases at the Court of Appeals maybe the number is higher. How much effort would you put into your brief to improve your odds by 20 percent? I expect a lot.

“I also know for certain that you can lose a case by making a bad oral argument. Defeat can be snatched from the jaws of victory. If nothing else, consider a moot for defensive purposes. Your moot panelists might alert you to a trap question.”

In general, the CCAJ moot court follows the “unilateral” approach: only one party will ask to moot an argument. “Bilateral” arguments, where both parties appear before the moot panel, will be accepted with the consent of both parties. The judges provide separate evaluations for each attorney.

The Moot Court Program is particularly beneficial for small firm and solo practitioners, who may not have experience at the Court or the opportunity to moot an argument. Attorneys who want to take advantage of this service should schedule their moot appearance as soon as their appeal is calendared.

The committee reserves the right to reject an argument not deemed “moot-worthy,” but that is defined neither by subject matter nor the attorney requesting the moot.

It takes work – time to prepare and most likely a trip to Albany – but the results are worth it. As Markarian noted, “The moot program keeps statistics on whether mooters end up winning. So far mooters win most of the time. Thankfully, I did not spoil that trend.”

Markarian’s article is available in the Summer 2018 *Leaveworthy*: <http://www.nysba.org/CCAJ/Leaveworthy>.

Fucillo is NYSBA’s senior messaging and communications specialist.

Michael Miller Joins NYSBA Council of Judicial Associations September Meeting

The Honorable Cheryl E. Chambers, presiding member of the New York State Bar Association's (NYSBA) Judicial Section, convened a meeting of the Council of Judicial Associations on September 14 at the Appellate Division, First Department courthouse in Manhattan. Guest speakers were NYSBA President Michael Miller and Stroock & Stroock Co-Managing Partner Alan M. Klinger, who counsels the Associations of State and New York City Supreme Court Justices.

The council, which consists of section officers, the presidents of 14 judicial associations from across the state and past presiding members, met to discuss important issues affecting the courts, judges and judicial administration.

Council members used this opportunity to press the point that attacks on the judiciary have increased, while noting that public understanding of the role of the judiciary has decreased and that our constitutional democracy depends on the separation of powers. They also urged NYSBA to work with the council to create opportunities to increase public understanding of the role of the judiciary as a co-equal branch of the government.

Justice Chambers also encouraged bar leadership to work with NYSBA's Judicial Section to develop effective ways to educate the public on the importance of upholding the rule of law.

Miller applauded the work of judges and the courts and stressed that NYSBA continuously works to preserve judicial independence. He noted that the association has established a Rapid Response Advisory Group to respond on matters needing prompt action in today's 24-hour news cycle



Front row, from left to right: Hon. Toko Serita (Asian American Judges), Hon. Michelle Weston (past Presiding Member), Hon. Ellen Spodek (past Presiding Member), Michael Miller (NYSBA President), Hon. Cheryl E. Chambers (Presiding Member), Hon. Marsha Steinhardt (past Presiding Member), Hon. Barbara Kapnick (Section Secretary), Hon. James Quinn (County Judges), Hon. Sylvia Hinds-Radix (Supreme Court, NYC).

Second row, from left to right: Hon. Jeanette Rodriguez-Morick (Court of Claims), Hon. Doris Gonzalez (Latino Judges), Hon. Deborah Karalunas (Supreme Court, NYS; past Presiding Member), Patricia Wood (Section Liaison), Hon. Corey Klein (City Court), Hon. Curtis Farber (LGBT Judges), Hon. Robert Mulroy (Family Court), Hon. David Cohen (Civil Court Judges), Hon. Rachel Kretser (past Presiding Member), Hon. Karen Wilutis (District Court), Hon. Michael Sonberg (Lesbian and Gay Judges), Hon. Jonah Triebwasser (Magistrates), Hon. Eileen Bransten (past Presiding Member), Hon. Ruth Shillingford (Judicial Friends), Hon. Timmie Elsner (Housing Court).

Not pictured: Hon. Denise Hartman (Section Treasurer), Alan Klinger.

— such as when judges are unfairly criticized.

Klinger reviewed pertinent rules and the proposed attendance-monitoring policies for judges. While agreeing that independent does not mean unaccountable, council members commented that attendance policies should remain flexible so as not to impair independence or adversely affect morale.

After listening to attendees' comments pertaining to the implementation of judge attendance policies within several judicial districts, Miller urged the section to submit any issues of concern to NYSBA's Executive Committee. It is an opportunity to begin a dialogue about and to seek action on critical

matters, he noted. In turn, these discussions provide the association with the perspective of the judiciary.

The Judicial Section hosts forums for representatives on the Council of Judicial Associations to address issues relating to legislation and court procedure five times a year. This meeting with NYSBA leaders exemplifies how the Judicial Section provides avenues to present its voice and views on matters affecting the judiciary and justice system, including the practical impact of proposed changes in policies and procedures. Miller and representatives of the council and section indicated that they look forward to ongoing discussions and working together.

6 questions and a closing argument

Member Spotlight with Michael DiFalco

What do you find most rewarding about being an attorney?

By focusing on matrimonial and family law matters, I have the privilege of representing truly incredible, completely ordinary people, who typically are going through one of the worst – if not the worst – periods in their lives. As their counsel from the start of the process through its conclusion, often several years later, I get to actually help people change their lives. Many are faced with arduous challenges, whether it's a dire financial situation or heart-wrenching domestic violence, and I am able to help, and observe, people undergo a radical transformation. I find it very rewarding when I'm able to resolve a matter and have a positive impact on a client's life. Often, my guidance results in a derivative benefit for their children. Knowing that I had a mostly positive impact on a family is deeply satisfying.

What do you find most challenging about being an attorney?

Initially, I allowed the stress of clients' highly personal problems affect my own stress levels. Over the last few years, I've recognized there are usually limits to my ability to help, whether they are legal, logistical, temporal, or emotional. Learning to absorb a client's stress and, if possible, filter it into something productive, has been a critical challenge to practicing law.

Did another lawyer mentor you or advise you on your career path?

I've worked with my aunt for over 15 years. After high school, she invited me to work in her law office since I was interested in becoming an attorney. We're now law partners. Naturally, she

has been instrumental to my selection of a practice area and my development as an attorney. Having someone I can trust absolutely has been incredibly helpful at each point of this journey. I believe that finding a good mentor in your chosen practice area is very important. We advise clients all the time, so we should all recognize how important it is to seek advice, or to provide it, from or to one another.

What advice would you give a young lawyer just starting her or his career?

Most of the time, the important thing is to put your head down and do good work. Yet, it is vital to lift up your head occasionally to make sure you're not missing the big picture. It's important to contextualize what you're working toward and to make sure that you're having the necessary career-development conversations with your colleagues, your mentors, your bosses, and others who make up your legal and broader community.

If you could dine with any lawyer – real or fictional – from any time in history, who would it be and what would you discuss?

Right now, Robert Mueller. Politics aside, I would love to discuss the process of building a case with such significant consequences under such public scrutiny.

If you could practice in a different area of the law other than your current area, what would it be?

I think I would enjoy medical malpractice. Naturally, I am drawn to litigation. I also enjoy representing individuals who need help, so I think working with plaintiffs – or perhaps



DiFalco is a partner at Aiello DiFalco & Gianakos LLP, in Garden City, NY.

even defendants – in a liability-based practice area would be satisfying. Medical seems like an area where I could enjoy the nuances of complex technical issues and expert reports which make each case so fascinating. Maybe it would just be a way of enjoying vicariously the career path I did not choose.

Closing argument: Why should lawyers join the New York State Bar Association?

My experience has convinced me that, on average, better lawyers choose to view this profession as a calling beyond the daily practice of law. As a calling, a sense of obligation seemingly draws them to volunteer their time, as well as their minds and hearts, to the profession at large. What this leads to, particularly in the case of NYSBA, is an extraordinarily high concentration of great lawyers who devote a significant portion of their busy schedules to bar association participation through sections, committees, lectures, and more. Nothing can replace the experience of in-person interactions with fellow lawyers who can educate and inspire us all to be better practitioners. Especially for young lawyers, the practice of law is enriched by the many opportunities to learn, to connect with other members, and to serve or volunteer.

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A Promise to Act

I'm a firm believer in the idea that you can understand a lot about a university by learning about the people for whom its prominent buildings are named. In the days before my first week of classes at the University at Buffalo School of Law, I saw no reason why law school should be an exception, so I decided to do a bit of research.

At UB, the building that houses the law school and library is named after the alumnus and self-professed Victorian John Lord O'Brian who lived from 1874 to 1973. O'Brian navigated the tumult of public office over the course of five U.S. presidential administrations and two World Wars through his unwavering sense of duty to his country and his faith in the ideal of service. He was a lawyer dedicated to the practice of law, but he was also a scholar dedicated to the life of the mind.



A few days after my brief inquiry into O'Brian's life, classes began. Having survived the first day of lectures, I headed to the law library's study carrels to spend the afternoon getting started on assignments for the week ahead. Law school, I've quickly learned, is not solely a test of intellect; it is equally a test of endurance.

While searching for my assigned carrel, I encountered what I recognized to be a portrait of O'Brian hanging in one of the library's corridors. In the midst of the exigencies and uncertainties that accompanied the beginning of classes, he seemed rather distant or museum-like, the relic of a bygone era or an unattainable ideal. If I wanted to manage the stressors of my studies, I concluded as I sat down to work, there was no room for the romanticized visions of lawyering that seemed to be crystallized in O'Brian's portrait.

Hours later, after sunset, I remained hunched over my *Principles of Contract Law* (Burton & Drahozal) textbook, the glossy pages of which seemed to produce a slight glow as they caught the glare from the florescent bulb overhead. To allow extra time for a close reading of the assigned cases, I was engaged in a somewhat perfunctory

reading of the book's preface on promises when I was struck by the following sentence: "A promise is an act by which a person imagines a possible world and signals a commitment to bring that world into being by future action." This phrase, almost poetic in its breadth, has remained with me since: as law students, we study the law *to act in the world*.

My thoughts were brought back to O'Brian, this time to words I had read from a speech that he (fittingly) delivered during a New York State Bar Association dinner in 1957. Lawyers, O'Brian wrote,

"Profess faith in the power of ideas; yet we have been taught that abstract ideas have no life of their own. Ideas originate only with individuals, are perpetuated only by individuals, and take on a permanent significance only through the ceaseless efforts of individuals. This is one reason why . . . our lawyers . . . should be ever mindful of the truth 'that for every right and privilege there exists a corresponding obligation.'"

My earlier thoughts were recast in a new light. Read through the lens of O'Brian's exhortation, the beginning of law school prompts the "imagining of a possible world;" it elicits a promise, a promise to act. Perhaps this is what he intuited as a result of nearly five decades of public service: as students and aspiring lawyers, it is our greatest privilege *and* our greatest obligation to act in pursuit of possible, better worlds by "giving life" to the ideas that can bring those worlds into being. The inevitable fatigue and uncertainty that lie ahead, O'Brian seems to imply, can and must be mitigated by the realization that this promise can only be enacted through "the ceaseless efforts of individuals."

For me, law school has only just begun. The stressors and the workload can only grow from here. Now, however, each time I pass O'Brian's portrait on my way to a study carrel, it will be a reminder that becoming a lawyer is a promise worth fulfilling.

Ian Q. Rogers is a 1L at the University at Buffalo School of Law where he is a Merit Scholar and a James Kent Faculty Research Scholar.

Prior to attending law school, Ian was a Gilman

Doctoral Fellow in the Department of German and Romance Languages and Literatures at The Johns Hopkins University where he specialized in intellectual history and cultural theory.

Special thanks to the research librarians at the Charles B. Sears Law Library, especially Brian Detweiler, for making the special collection of John Lord O'Brian's papers available for use.



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

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

TO THE FORUM:

My adversary in a case is representing himself *pro se*, but his briefs are very sophisticated and appear to have been ghostwritten by an attorney. I asked him whether an attorney helped him with it and he just changed the subject. I am frustrated because I feel like the judge is sympathetic to him because he is *pro se*, but I suspect that his legal arguments are actually being crafted by an attorney. I think that this puts me at a big disadvantage. Since he is not a lawyer, I know that he is not bound by the Rules of Professional Conduct. If he is getting help from a lawyer, are there rules that are being violated and is there anything that I can do?

This issue got me thinking about the ease in which anyone can just “cut and paste” briefs, opinions, and articles into their own submissions without attribution. For all I know, maybe my *pro se* adversary isn't really working with an attorney and just found good briefs by other attorneys that were publicly available. In the “old days,” firms had banks of old briefs to work from, but with public e-filing access to literally thousands of briefs from the comfort of home, anyone can access briefs on any subject matter easily. Are there any limitations on where to draw the line on plagiarizing briefs? I admit, I am guilty of occasionally taking good citations and arguments from briefs I find online, but I always check the citations and craft the arguments around my client's specific cases. But should I be concerned I am lifting from briefs too liberally? I recently had an insurance carrier tell me they wouldn't pay for my research time unless I used their legal research firm which includes a bank of briefs. I am fine using the briefs from this service, but should I be concerned that I am signing my name to a brief that was largely written by someone I don't know?

Sincerely,
Jacob Marley

DEAR JACOB:

Your question presents an interesting dilemma: to what extent can we, as lawyers, rely upon and actually republish the work of others? The vast majority of our work product (i.e., legal briefs and pleadings) consists of restatements of the law and recitations of legal analysis adopted and followed by courts and tribunals. But many lawyers may be surprised to learn that there are limits to this practice, and plagiarism in the legal profession is sanctionable. And a *pro se* litigant's use of attorney-created work product without disclosing that he or she had the assistance of counsel is an offense cut from the same cloth.

There is unfortunately no clear consensus for New York lawyers about ghostwriting. Three New York ethics opinions have addressed this topic without a uniform result: two emphasize the need for disclosure of an attorney's contribution, and one indicates that disclosure is only required in certain situations.

In 1987, the New York City Bar Association (NYCBA) Professional Ethics Committee issued a formal opinion that focused upon your specific concern – that because *pro se* litigants are already viewed in a gentler light than seasoned attorneys, a *pro se* litigant's failure to disclose his or her use of a ghostwriter could tip the scales further in his or her favor. *See* NYCBA Professional Ethics Committee Formal Opinion 1987-2 (1987). After all, when initially low expectations are surpassed even the slightest bit, it is basic human nature to view that product favorably, particularly in comparison to the work of a professional who does this routinely. Additionally, nondisclosure could cause the court to waste valuable judicial resources. *Id.* Typically, courts go out of their way to protect the interests of *pro se* litigants whom they perceive (often, correctly) to be at a disadvantage when it comes to understanding civil procedure and preparing legal documents. *Id.* If a court is unaware that the legal documents were actually reviewed and/or prepared by a licensed attorney, clerks and judges may waste valuable

time needlessly combing through documents. *Id.* In its 1987 opinion, the Committee concluded that this non-disclosure could be viewed as “a misrepresentation to the court and to adverse counsel where the assistance is active and substantial or includes the drafting of pleadings.” *Id.* While the Committee did not say what exactly constitutes “active and substantial assistance,” it did expressly state that providing manuals and forms to a *pro se* litigant and offering legal advice did not violate any ethics or professional rules. *Id.*

Three years later, in 1990, the New York State Bar Association (NYSBA) Committee on Professional Ethics published its own opinion on ghostwriting. *See* NYSBA Committee on Professional Ethics Opinion 613 (1990). Adopting a view similar to that of the NYCBA Ethics Committee, this opinion determined that a lawyer’s role *should* be disclosed. *Id.* While the Committee underscored the importance of affordable and accessible legal services in our society, it nevertheless concluded that any

documents for a *pro se* litigant without disclosing his or her involvement or identity. *Id.* As rationale for their position, the Committee cited a recent uptick in the use of ghostwriting and a burgeoning consensus in the legal community that the practice does not raise ethical concerns. *Id.* The Committee also pointed to New York Rules of Professional Conduct (RPC) 1.2 for support, noting that “limited scope representation” is an important service that lawyers provide – one that is beneficial not only to clients, but to the judicial system overall. *Id.* If attorneys were required in all circumstances to disclose their involvement, it could reduce the number of attorneys willing to assume limited scope work and undermine RPC 1.2. *Id.* Therefore, the Committee adopted a nuanced opinion of ghostwriting, and opined that disclosure is only necessary “where mandated by (1) a procedural rule, (2) a court rule, (3) a particular judge’s rule, (4) a judge’s order in a specific case, or any other situation in which an attorney’s ghostwriting would



work prepared by an attorney – even the mere preparation of a pleading – could and should be deemed “active and substantial” assistance and requires disclosure of the attorney’s identity. *Id.* Thus, the NYSBA Committee took the disclosure requirement a step further than the NYCBA Committee – not only must the attorney’s involvement be disclosed, his or her *name* must be on the document. *Id.*

In 2010, the New York County Lawyers Association (NYCLA) Committee on Professional Ethics addressed ghostwriting after a seismic shift in internet technology had occurred and diverged from its sister-committees. *See* NYCLA Committee on Professional Ethics, Op. 742 (2010). In the view of the NYCLA Committee, it is ethically permissible for an attorney to prepare legal

constitute misrepresentation or otherwise violate a law or rule of professional conduct.” *Id.*

While there have been conflicting opinions over the years, unless the work product produced by your *pro se* adversary borders on a “misrepresentation” to the court, or expressly violates the court or the judge’s rules, he is probably in the clear as is the assisting attorney (if there is one).

We now turn to your broader question regarding the use of “brief banks” and other prepared materials. We were all taught from a young age that copying the prose of another without proper attribution is an academic sin and can carry some serious consequences. But there are many aspects of our jobs as attorneys where we are actually *encouraged* to copy from the works of others.

Perhaps it is counterintuitive that a profession that heralds honesty and integrity would condone such conduct, but the fact of the matter is that the impetus of non-academic legal writing is not originality of thought, but the application of precedent. While there are exceptions, a brief anchored by established legal authority is usually more persuasive than one that relies on novel ideas and arguments. And, as we all learned in law school, precedent is important. It provides a degree of stability and predictability in our legal system and gives judges some assurance that the decision they are about to make has sound legal footing. Therefore, as lawyers, we are taught that reciting arguments and excerpts from court decisions, law review articles, and even briefs filed in other cases, is not plagiarism – it is good advocacy. Plus, as a practical matter, when you are billing clients by the hour, it is more economical when you do not have to reinvent the wheel.

But there are boundaries to this practice and, in recent years, those boundaries have become clearer thanks to a handful of judicial and ethics opinions concerning attorney plagiarism. RPC 8.4(c) provides that “[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Legal and ethics opinions on attorney plagiarism treat it as a type of “deceit,” and, accordingly, will often invoke RPC 8.4(c) when disciplining an attorney for such conduct. Other Rules relevant to attorney plagiarism may include RPC 7.1 (prohibiting false statements about the lawyer’s services) and RPC 3.3 (requiring candor toward a tribunal).

The Iowa Supreme Court dealt a significant blow against attorney plagiarism in the litigation context in 2010. In *Iowa Supreme Court Attorney Disciplinary Board v. Cannon*, 789 N.W.2d 756 (Iowa 2010), an attorney was sanctioned for filing a brief that included the “wholesale copying” of a law review article pulled from a law firm’s website. After questioning the “unusually high quality” of the lawyer’s work, the attorney admitted that the brief relied heavily on an article that he had failed to cite. The judge initiated sanction proceedings and discovered that 17 out of the brief’s 19 total pages were copied directly from the law review article without attribution. Relying on Iowa Rule of Professional Conduct 32:8.4 – Iowa’s equivalent of RPC 8.4(c) – the court opined that “[t]his case . . . [did] not involve a mere instance of less-than-perfect citation, but rather wholesale copying of seventeen pages of material. Such massive, nearly verbatim copying of a published writing without attribution in the main brief, in our view, does amount to a misrepresentation that violates our ethical rules.” *Id.* at 759. The Iowa Supreme Court based its determination in part on a 2002 plagiarism decision, *Iowa Supreme Court Board of Professional Ethics & Conduct v. Lane*, 642 N.W.2d

296 (Iowa 2002). There, an attorney submitted a brief that included 18 pages of material copied from a legal treatise, but failed to cite the treatise itself. Reprimanding the attorney, the court stated that “[e]xamination of [the attorney’s] brief does not reveal any independent labor or thought in the legal argument.” *Id.* at 300. Ultimately, the court determined that the attorney’s conduct “constituted, among other things, a misrepresentation to the court” in violation of Iowa Rule of Professional Conduct 32:8.4. *Id.* at 299.

These two Iowa cases – *Cannon* and *Lane* – laid the foundation for judicial and ethics opinions concerning attorney plagiarism nationwide. Indeed, in 2013, a federal judge in the Eastern District of New York imposed a \$1,500 sanction against an attorney for plagiarism and relied in part on the *Cannon* and *Lane* decisions. See *Lohan v. Perez*, 924 F. Supp. 2d 447 (E.D.N.Y. 2013). In that case, the attorney was sanctioned not for republishing another’s writing, but for recycling a brief *she* had previously written in an unrelated case without properly crafting the brief to suit the particular set of facts for the present case or addressing the arguments raised by her adversary. The court noted that “the plagiarism of the type at issue here would likely be found to violate New York State Rule of Professional Conduct 8.4, which prohibits a lawyer from ‘engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation.’” *Id.* at 460, n. 9.

Despite the court’s ruling in *Lohan*, jurisdictions – including New York – vary in the degree to which they deem “recycling” a brief (such as those available in a brief bank) an offense. An ethics opinion authored by the North Carolina State Bar Association in 2008 held that while “it is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract, or pleading excerpts from a legal brief, contract, or pleading written by another lawyer,” if the lawyer knows the identity of the author of the excerpt, “it is the better, more professional practice for the lawyer to include a citation to the source.” NC State Bar Formal Ethics Opinion 2008-14. In a recent opinion issued by the NYCBA Committee on Professional Ethics, however, it distinguished its own view from that of the North Carolina State Bar Association and stated that the reader of a brief “does not expect to see a citation to a prior brief on which the argument is modeled.” NYCBA Prof. Ethics Comm., Op. 2018-3 (2018).

That recent opinion cited to a NYSBA Committee on Professional Ethics Opinion from 1999 which expressly addressed the use of briefs from brief banks. See NYSBA Comm. on Prof’l Ethics, Op. 721 (1999). In that 1999 opinion, the question was whether an attorney could,

at the insistence of an insurance carrier, use materials from a third-party legal research service including a brief bank. *Id.* The Committee found that doing so would *not* violate any professional or ethics rules if the lawyer, “in the exercise of independent professional judgment,” concluded that no additional work was necessary. *Id.* In other words, if the work product and information available in the brief bank/database were adequate for the client’s specific needs without further independent research or writing, there was no ethical issue. To avoid the issues that arose in the *Lohan* case, however, it is vital that you verify the authority you find in the brief banks, apply the facts and arguments in your particular matter, and don’t blindly cut and paste an old brief.

As the contours of attorney plagiarism continue to develop, including whether you may be subject to copyright claims (which is a whole separate issue), best practices dictate that lawyers should cite to their sources and not make the mistake of cutting and pasting without regard to the particular facts and arguments the client needs to address. While the New York Rules of Professional Conduct leave “plagiarism” open to interpretation, the cases and ethics opinions discussed above make it clear that the threat of sanctions is real. While an attorney may be able to stomach the monetary fine, the professional embarrassment and potential damage to his or her reputation is likely to be far worse.

Sincerely,

The Forum by

Vincent J. Syracuse, Esq.

(syracuse@thsh.com) and

Carl F. Regelmann, Esq.

(regelmann@thsh.com)

Amanda M. Leone, Esq.

(leone@thsh.com)

Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I’ve been a litigation attorney for about seven years now, but recently, a former colleague approached me with an opportunity to go in-house at his company. The offer is tempting because recent changes in my personal life have made the litigation grind difficult for me, and I feel like it’s a perfect time in my career to shift gears. I’ve been at my current firm for about five years, and when I came onboard, I signed an employment agreement that contained a non-compete clause. At the time, I was still a relatively young attorney and didn’t think much of it. After pulling out the agreement and looking at it now, even though the restrictions seem reasonable in time and scope, I am starting to question whether the non-

compete is enforceable at all. Are restrictive covenants contained in attorney employment contracts valid and enforceable? What about in my particular situation, where I am potentially going in-house and will not be “competing” against my old firm? If I ultimately decide that in-house life isn’t for me and move to another law firm before the expiration of the non-compete, will I be able to reach out to my former clients and bring them to my new firm? What if I ultimately decide to leave the legal profession altogether?

While we’re on the topic of restrictive covenants, I’m also curious about a confidentiality agreement that my colleague’s company gave me to review before I officially start work as in-house counsel. As a condition of my employment at the company, I am required to sign a confidentiality agreement. The agreement prohibits me from using or disclosing information that the company deems or designates confidential, and these confidentiality obligations survive the termination of my employment with the company. If I eventually decide to return to litigation or go to another law firm, will I still be bound by these obligations? I’m afraid that it could limit my employment opportunities in the future. There is a carve-out in the agreement that says that it is subject to the applicable rules of professional conduct, but is that enough? How do the rules of professional conduct treat these types of agreements?

Sincerely,

Soon B. Inhouse

LITIGATION FINANCING ETHICAL PITFALLS UPDATE

We wanted to update you on a litigation financing issue that was not addressed in our June and July/August 2018 Forums (Vincent J. Syracuse, David D. Holahan, Carl F. Regelmann & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., June and July/August 2018, Vol. 90, Nos. 5-6). Recently, the NYCBA Professional Ethics Committee issued a formal opinion regarding a lawyer’s ability to enter into a direct financing agreement with a litigation funder (NYCBA Professional Ethics Committee, Op. 2018-5 (2018)). The Committee opined that a lawyer is prohibited from entering into an agreement with a litigation finance entity (a non-lawyer) where the lawyer is due some future payment of legal fees because it would violate the prohibition on fee sharing with non-lawyers under RPC 5.4. *See id.* The Committee highlighted that RPC 5.4’s restriction on fee-sharing is designed to “protect the lawyer’s professional independence of judgment.” *See id.*, quoting RPC 5.4 Comment [1].

About a week later John mentions to I.M. that they should advise the other parties of the change of attorneys in Japan. I.M. repeats the refrain: "Let's wait a bit longer."

John continues to remind I.M. of their responsibility, but I.M. persists in the delay. "I want to get closer to the closing to be sure everyone is committed," he says. Kobayashi and Remarkable are aware of I.M.'s tactics and do not object.

About a week before the closing Kobayashi, knowing what's going on, suggests that because of the time difference between Japan and the U.S., the text of the opinion, addressed to John's firm and dated the date of the closing, be telexed [this is before the fax and the internet] from their office to the place of the closing, with the signed opinion to follow by mail. I.M. casually mentions this mechanical detail to the other lawyers, who readily accept it, since arrangements such as these are common in international transactions.

The closing finally arrives without disclosure – despite John's persistent reminders – that counsel in Japan has been changed. John knows, because of the number of people who will attend the closing and because of the numerous details to be attended, that the telex copy of the opinion from Japan will receive superficial attention, if any. No one will question it; at most they will just check to be sure the text is correct. The problem will arise several days later when the signed copy on the Professor's letterhead arrives and is delivered to the other parties.

What does John do and what are the reasons for his actions?

SCYLLA AND CHARYBDIS: DENOUEMENT AND AUTHOR'S COMMENTS

The closing takes place with John and I.M. attending. In fact, I.M.

panics. Amidst the bustle, hands trembling, palms wet, he draws John aside: "They're going to find out," he quakes; "they'll see the telex is not signed and question it."

"No they won't," whispers John, ushering I.M. out of the closing room. "There's too much going on. They won't notice anything. Just stay here a while. I'll handle the rest."

The opinion arrives by telex, and, as John predicted, no one pays much attention to it. The closing concludes without incident, and Kobayashi receives the initial payment for the two ships.

Of course, a few days later, when the original opinion arrives, the banks, the investors, the oil company and their lawyers hit the fan. They hire special counsel on Japanese law to check the opinion, which, as I.M. and John suspected, turns out to be wrong in many respects except one, the only one that matters: the obligations of Kobayashi Maru were legal, binding and enforceable. Following this eruption, the transaction resumes its course; the ships are built and are delivered under the charters to the oil company; and, though a bit scarred, all sail happily into the sunset.

* * *

I.M. feared that the change in lawyers would signal a problem with the opinion that would kill the deal. If he could get by the closing and the initial payment to Kobayashi, there would be a better chance, he reasoned, that the transaction would hold together.

John eventually realized that I.M. had no intention of disclosing the change in lawyers prior to the closing. He had two options: make the disclosure himself or say nothing. A third choice: resigning, never occurred to him.

John decided to say nothing and play out the hand, not because of fear for his job or loyalty to I.M.,

but because he decided that to do otherwise would betray his clients, Remarkable and Kobayashi. Perhaps he anticipated the ethic of the Clint Eastwood character *In the Line of Fire*: The client always comes first.

* * *

I.M.'s and John's conduct violated the Disciplinary Rules of the New York State Bar Association and probably those of every other state. A lawyer must not engage in dishonest, fraudulent or deceitful conduct and must not misrepresent. DR 1-102, A.4. Though one might conjure an argument that disclosure of the change in Japanese counsel was not required because the opinion was to be addressed to and relied upon by I.M.'s firm and the new lawyer had impeccable credentials, this argument must fail because the equity investors and lenders approved the original counsel and so any change mandated disclosure and their approval.

Further, John is not protected because he was an associate acting under the supervision of a partner. A lawyer must comply with the Disciplinary Rules even though that lawyer acts at the discretion of another. A subordinate lawyer is only excused if that lawyer acts according to the supervisory attorney's "reasonable resolution of an arguable question of professional duty." DR 1-104, E and F.

Finally, resigning, the option that John did not consider, would probably not have excused John. DR 7-102 B.1 offers some guidance: A lawyer who knows that a client has perpetrated a fraud must ask the client to rectify the fraud, and if the client refuses or is unable to do so, then the lawyer must reveal the situation to the persons affected unless the information is protected as a confidence or a secret, neither of which applies to this case.

* * *

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CONTRACTS

continued from page 56

This whole incident teaches one practical lesson that few lawyers learn or apply:

The only opinion on which a client should rely with confidence is the opinion of his own counsel . . .

Lawyers who seek and rely on opinions of counsel for the other party often, I believe, do a disservice to their clients. The only time I find need for an opinion of counsel is when my client is doing a transaction in a foreign jurisdiction. In these instances I insist on retaining local counsel; I will not rely on counsel for the other party. Siviglia, *Commercial Agreements – A Lawyer's Guide to Drafting and Negotiating*, §13:1 (Thomson Reuters).

P.S. I wonder what Captain Kirk's solution would have been?

HEADQUARTERS STAFF EMAIL ADDRESSES

EXECUTIVE

Pamela McDevitt
Executive Director
pmcdevitt@nysba.org

EXECUTIVE SERVICES

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

MEMBER OUTREACH & DEVELOPMENT

Victoria Shaw, Director of Attorney Engagement and Retention
vshaw@nysba.org

Patricia K. Wood, Associate Director of Attorney Engagement and Retention
pwood@nysba.org

Mark Wilson, Bar Services Specialist
mwilson@nysba.org

MARKETING AND COMMUNICATIONS

Dan Weiller, Managing Director of Marketing and Communications
dweiller@nysba.org

Adam Rossi, Director of Marketing
arossi@nysba.org

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

Christian Nolan, Senior Writer
cnolan@nysba.org

DESIGN SERVICES

WEB SITE

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

MIS & CONTENT MANAGEMENT

Jason Nagel, Managing Director of IT Services
jnagel@nysba.org

Jeffrey Ordon, IT Operations Manager
jordon@nysba.org

MEMBER RESOURCE CENTER

Jeremy Knickerbocker, Manager
jknickerbocker@nysba.org

PUBLICATIONS

Daniel J. McMahon, Director
dmcmahon@nysba.org

Kathryn Calista, Senior Publications Attorney
kcalista@nysba.org

Kirsten Downer, Research Attorney
kdowner@nysba.org

PRINT AND FACILITIES OPERATIONS

Gordon H. Ryan, Senior Director
gryan@nysba.org

BUILDING MAINTENANCE

GRAPHICS

PRINT SHOP

Donald Gardinier, Print Production Manager
dgardinier@nysba.org

GOVERNMENTAL RELATIONS

Ronald F. Kennedy, Director
rkennedy@nysba.org

Kevin Kerwin, Deputy General Counsel
kkerwin@nysba.org

CONTINUING LEGAL EDUCATION

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

CLE PROGRAMS

Patrick Boland, CLE Program Manager
pboland@nysba.org

Sally Bratten, CLE Program Attorney
sbratten@nysba.org

Jessica Patterson, CLE Program Manager
jpatterson@nysba.org

Thomas Richards, CLE Program Attorney
trichards@nysba.org

Cindy O'Brien, CLE Event Manager
cobrien@nysba.org

SECTION AND MEETING SERVICES

Patricia B. Stockli, Director
pstockli@nysba.org

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

FINANCE

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

Amira Rizvanovic, Controller
arizvanovic@nysba.org

LEGAL AND COMMUNITY SERVICES

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

Minika Udoko, Diversity and Inclusion Specialist
mudoko@nysba.org

LAW, YOUTH AND CITIZENSHIP PROGRAM

Kimberly Francis, LYC Program Specialist
kfrancis@nysba.org

LAWYER ASSISTANCE PROGRAM

LAWYER REFERRAL AND

INFORMATION SERVICE

Eva Valentin-Espinal, LRS Specialist
evalentin@nysba.org

PRO BONO SERVICES

Kristen Wagner, Director
kwagner@nysba.org

HUMAN RESOURCES

Paula M. Doyle, Senior Director
pdoyle@nysba.org

THE NEW YORK BAR FOUNDATION

Deborah Auspelmyer, Foundation Executive
dauspelmyer@tnybf.org

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Cite-Seeing Part I: The Tanbook

A mark of good legal writing is citing correctly; a mark of a good citation system is clarity; a mark of clarity is accuracy and uniformity. Citations aren't arbitrary. They're vital to providing authority and support for legal arguments.

New York practitioners have one accurate resource for citing and formatting: the New York Law Reports Style Manual, known as the Tanbook. Because law schools and legal scholars promote the Bluebook, unaware New York lawyers often find themselves confused about how to cite. Nearly 10 years have passed since we last addressed citation guides and attempted to address this confusion. Check out the *Legal Writer's* earlier articles on this subject: *New Edition of State's "Tanbook" Implements Extensive Revisions in Quest for Greater Clarity (2002)*¹ and *Tanbook, Bluebook, and ALWD Citations: A 2007 Update*.²

In this three-part column, the *Legal Writer* will first address why the Tanbook is the superior source for New York lawyers. In the second part, the *Legal Writer* will address where the Bluebook fails, and in the third, which citation guides also fall short, and which ones might be on the right path.

The Tanbook should be followed for three reasons. First, the Tanbook's authors are experts in New York primary and secondary authority. Second, judges cite according to the Tanbook. Third, lawyers who use the Tanbook make it easier for New York judges to rule in their favor. Forcing judges to spend time checking non-Tanbook citations frustrates the decision-making process.

THE OFFICIAL STYLE MANUAL

The Tanbook is a New York practitioner's best resource for citing. The Tanbook, originally issued in 1956, is currently published by Thomson Reuters. It's prepared by the New York State Law Reporting Bureau (LRB), an agency of the Court of Appeals. It's available for free download at https://www.nycourts.gov/reporter/Styleman_Menu.shtml.³ The Official Reports, first published in 1847, is the largest official reporter of court decisions. According to the LRB, "attorneys are required to cite all New York court decisions from the Official Reports

in briefs, memoranda and papers submitted to the New York courts."⁴ The opinions printed in the Official Reports follow the Tanbook.⁵

The LRB publishes opinions online at <https://www.nycourts.gov/reporter/Decisions.shtml>, in the Official Reports database on Westlaw, and in the print New York Official Reports. The New York (NY) reporter contains Court of Appeals decisions. There are three series of the New York Reports: NY (1847-1955), NY2d (1956-2003), and NY3d (2003-present). The Appellate Division (AD) reporter contains decisions from the four Appellate Division departments (1st, 2d, 3d, and 4th Depts).

The Miscellaneous Reports selectively publishes Appellate Term and trial court opinions, covering 11 courts. The Appellate Term (App Term), located in only the First and Second departments, hears appeals from the lower courts in their departments: Civil Court and Criminal Court of the City of New York, District Courts in Nassau and Suffolk counties, City Courts, and Town and Village Justice Courts.⁶

Other court opinions published in the Miscellaneous Reports are the Supreme Court (Sup Ct), Court of Claims (Ct Cl), Family Court (Fam Ct), Surrogate's Court (Sur Ct), County Courts ([county] Ct), City Courts ([city] Ct), Civil Court of the City of New York (Civ Ct, [county] County), Criminal Court of the City of New York (Crim Ct, [county] County), District Courts of Nassau and Suffolk Counties ([Nassau or Suffolk] Dist Ct), and Justice Courts ([town/village] Just Ct).⁷

The Tanbook is the only citation guide for lawyers practicing in New York state courts. The Tanbook includes rules for citing cases, statutes, rules, regulations, and secondary authority. The Tanbook also has its own rules on style, usage, word choice, quoting, capitalizing, and punctuating. In its preface, the Tanbook notes that "[t]his Edition continues to add and adapt style rules and policies that promote modern practices emphasizing clarity, brevity and use of plain English in judicial decisions; it also facilitates broad access to the law by encouraging citation of reliable, official sources that are publicly available online at no cost."⁸ Changes in the 2017 edition of the Tanbook include an updated version of abbreviations and capitalization, clarification on omitting or altering quoted material;⁹ revised rules on redacting personal

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 intern Tiffany Klinger (Fordham University School of Law) for her research.

identifying information,¹⁰ and more examples of when to use hyphens.¹¹

New York practitioners should be aware of the places where the Tanbook and the Bluebook diverge. They should also know that the Tanbook citations are always more accurate, efficient, and clear than Bluebook. For case citations, the Tanbook removes most periods. For

example, the period after “v” (versus) and the periods in between the reporter abbreviations are removed. It also places citations in text within parenthesis, and alternates parenthesis and brackets. There are three ways of formatting citations depending on where they are placed in the document. This is illustrated below.

Tanbook Rule 1.2 and Rule 3.1 Citing in Running Text	
Case	This issue is addressed in <i>Onassis v Christian Dior-New York</i> (122 Misc 2d 603 [Sup Ct, NY County 1984], <i>aff’d</i> 110 AD2d 1095 [1st Dept 1985]), in which the Supreme Court . . .
Statute	This issue is addressed in Town Law § 199 (1), (3), in which the Legislature . . .
Rule	This issue is addressed in CPLR 5602 (b) (2) (iii), in which . . .
Secondary Source	This issue was discussed in length by Reilly S. Steel, <i>Proxy Access and Optimal Standardization in Corporate Governance: An Empirical Analysis</i> (23 Fordham J Corp & Fin L 173 [2017]), who found that . . .
Citing Inside Parentheses	
Case	This issue was decided. (<i>See Onassis v Christian Dior-New York</i> , 122 Misc 2d 603 [Sup Ct, NY County 1984], <i>aff’d</i> 110 AD2d 1095 [1st Dept 1985].) or This issue was decided (<i>see Onassis v Christian Dior-New York, Inc.</i> , 122 Misc 2d 603 [Sup Ct, NY County 1984], <i>aff’d</i> 110 AD2d 1095 [1st Dept 1985]).
Statute	The statute addresses this issue. (<i>See</i> Town Law § 199 [1], [3].)
Rule	The rule addresses this issue. (<i>See</i> CPLR 5602 [b] [2] [iii].)
Secondary Source	This issue is addressed. (<i>See</i> Reilly S. Steel, <i>Proxy Access and Optimal Standardization in Corporate Governance: An Empirical Analysis</i> , 23 Fordham J Corp & Fin L 173 [2017].)
Citing in Footnotes	
Case	11. <i>Onassis v Christian Dior-New York</i> , 122 Misc 2d 603 (Sup Ct, NY County 1984), <i>aff’d</i> 110 AD2d 1095 (1st Dept 1985).
Statute	12. Town Law § 199 (1), (3).
Rule	13. CPLR 5602 (b) (2) (iii).
Secondary Source	14. Reilly S. Steel, <i>Proxy Access and Optimal Standardization in Corporate Governance: An Empirical Analysis</i> , 23 Fordham J Corp & Fin L 173 (2017).

ACCURACY IN CITING

In reiterating some of the basics of citing, the *Legal Writer* draws from two earlier columns, *Write the Cites Right Part I and Part II*.¹²

Never cite as binding an out-of-jurisdiction opinion that interprets a rule or statute different from your binding authority. If you use an out-of-jurisdiction opinion because no binding case law is on point, be sure to point this out in your brief or oral argument. Otherwise, a judge may think you simply didn't do your research correctly or didn't like what the binding case law says.

If you're citing a concurrence or dissent, always tell your reader. *Example:* Reid, J., concurring; Graffeo, J., concurring in part & dissenting in part.

Always include whether an appellate court granted leave to appeal (N.Y.) or certiorari (U.S.).

If you're quoting a case, statute, or secondary source that quotes another source, always include both citations or state that an internal citation was omitted. *Example:* "It follows that 'a privacy action [cannot] be sustained . . . because of the nonconsensual use of a [representation] without identifying features.'" (*Lohan v Take-Two Interactive Software, Inc.*, 31 NY3d 111, 122 [2018], quoting *Cohen v Herbal Concepts*, 63 NY2d 379, 384 [1994].) OR "It should also be noted that the defendant's motives are immaterial to the question of liability. A valid arrest will not be rendered unlawful by malicious motives nor will good faith rectify an otherwise unlawful arrest."

The Tanbook: A Guide and a Resource

By William J. Hooks, State Reporter

The New York Law Reports Style Manual (Tanbook) was first published by the Law Reporting Bureau (LRB) in 1956 as a citation and word style guide for use of LRB editors in preparing decisions for publication in the Official Reports. It was of limited utility to the legal writing community at large. In 2002, under the guidance of then-State Reporter Gary D. Spivey, and with the enthusiastic support of Chief Judge Judith S. Kaye, the Tanbook began its evolution from an in-house style sheet to "an efficient and effective system of citation and guide to legal writing."¹ That evolution continues with the 2017 edition of the Tanbook, which is published in print and in electronic versions on the LRB's website.²

The Tanbook itself provides guidance in five primary areas — citation, abbreviation, capitalization, quotation, and word style — and is replete with sample citations for specific primary and secondary sources, including electronic versions of those sources.

To incorporate the Tanbook's technical guidance in a holistic approach to legal research and writing, the LRB has packaged it with a variety of online resources on the LRB website. An extensive array of tools is available to assist the spectrum of New York legal writers from law student to judge and includes:

- PDF and HTML versions of the Tanbook. Both are word searchable; the former can be downloaded to your PC or other device, and the latter is hypertext linked for quick and precise navigation.

- Official Reports decisions from 1956 to date with advanced search functionality. New decisions from all courts are posted daily and within hours of hand down.
- Court of Appeals New Filings lists that provide summaries of cases filed with the Court and links to decisions in the cases being appealed.
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- The Legal Research Portal, a comprehensive collection of links to New York State and local government, Federal and other sources. These include NYCRR archives; agency opinions; county, city, town and village codes; legislative bill jackets; and legal writing guides on clarity, use of plain English, grammar, punctuation, and diction, among other topics.

Questions concerning use of the Tanbook and the LRB's website can be sent to Reporter@nycourts.gov.

1. Gerald Lebovits, *New Edition of State's "Tanbook" Implements Extensive Revisions in Quest for Greater Clarity*, 74 NY St BJ 8 (Mar./Apr. 2002), available at https://works.bepress.com/gerald_lebovits/88/.

2. http://www.nycourts.gov/reporter/Styman_Menu.shtml.

(*Broughton v State of New York*, 37 NY2d 451, 458-459 [1975] [citations omitted].)

ORDER OF AUTHORITIES

Always cite the highest court that's ruled on your issue. Limit your string cite to three cases. Separate each case with a semicolon. *Example:* (*Gasperini v Center for Humanities, Inc.*, 518 US 415, 416 [1996]; *Reed v City of New York*, 304 AD2d 1, 5 [1st Dept 2003]; *Weigl v Quin-cy Specialties Co.*, 190 Misc 2d 1, 3 [Sup Ct, NY County 2001].) When ordering authorities in a string citation, a general constitutional provision goes first, then a statute, rule and regulation, case law, and secondary authority. Specifically, federal is first, then state. Within co-equal courts, cite in reverse chronological order.

PINCITING

Use pincites to indicate exactly where in a case the reader can find the proposition cited. Also, use pincites to let your reader know you read the case. Be as precise as possible in your pincite. Don't pincite a span of several pages. *Example:* (*Howell v New York Post Co., Inc.*, 81 NY2d 115, 123 [1993]), NOT (*Howell v New York Post Co., Inc.*, 81 NY2d 115, 120-126 [1993]). Even if your proposition is on the first page of the case, pincite it. *Example:* (*Howell v New York Post Co., Inc.*, 81 NY2d 115, 115 [1993]).

In the next issue of the *Journal*, the *Legal Writer* will discuss the Bluebook's mistakes and how to correct them using the St. John's Law Review's New York Rules of Citation.

1. Gerald Lebovits, *New Edition of State's "Tanbook" Implements Extensive Revisions in Quest for Greater Clarity*, 74 N.Y. St. B.J. 8 (Mar./Apr. 2002), https://works.bepress.com/gerald_lebovits/88/.
2. Gerald Lebovits, *Tanbook, Bluebook, and ALWD Citations: A 2007 Update*, 79 N.Y. St. B.J. 64 (Oct 2007), https://works.bepress.com/gerald_lebovits/102/.
3. For the Law Reporting Bureau's website, go to www.nycourts.gov/reporter. The LRB's editors who prepared the 2017 Tanbook are Kathleen B. Hughes, Cara J. Brouseau, Katherine G. Breitenbach, Kelli J. Flansburg, Maureen L. Clements, Kristen M. Quaresimo, Kayleigh A. Gekakis, Wendy L. Harbour, and Wendy L. Whiteman.
4. New York Official Reports, <https://www.nycourts.gov/reporter/About.shtml>.
5. *Id.*
6. *Id.*
7. Tanbook at 17.
8. Tanbook Preface at v.
9. See Tanbook Preface at vii ("The Style Manual's section on omitting or altering language in quoted material has been expanded to add examples of proper ellipsis use and revised to clarify the rules governing omissions from or alterations of the source text.").
10. See Tanbook Preface at viii; Rule 12.4 ("The rule on redaction of personal identifying information has been revised to provide guidance for consistent redaction of personal identifying and other private information throughout particular writings and in related appellate decisions.").
11. See Tanbook Preface at viii; Appendix 5 ("Examples have been added to the list showing the style of particular words, with a continuing modern style emphasis on reducing excessive use of hyphens and capitalization.").
12. Gerald Lebovits, *Write the Cites Right – Part I*, 76 N.Y. St. B.J. 64 (Oct 2004), https://works.bepress.com/gerald_lebovits/30/; Gerald Lebovits, *Write the Cites Right – Part II*, 76 N.Y. St. B.J. 64 (Nov/Dec 2004), https://works.bepress.com/gerald_lebovits/31/.

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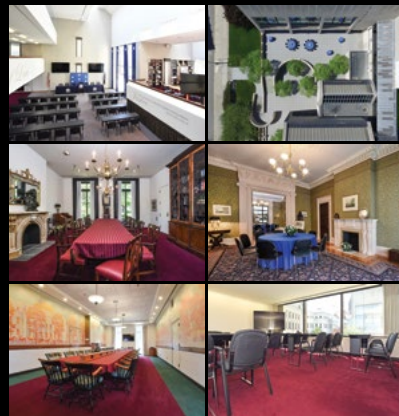
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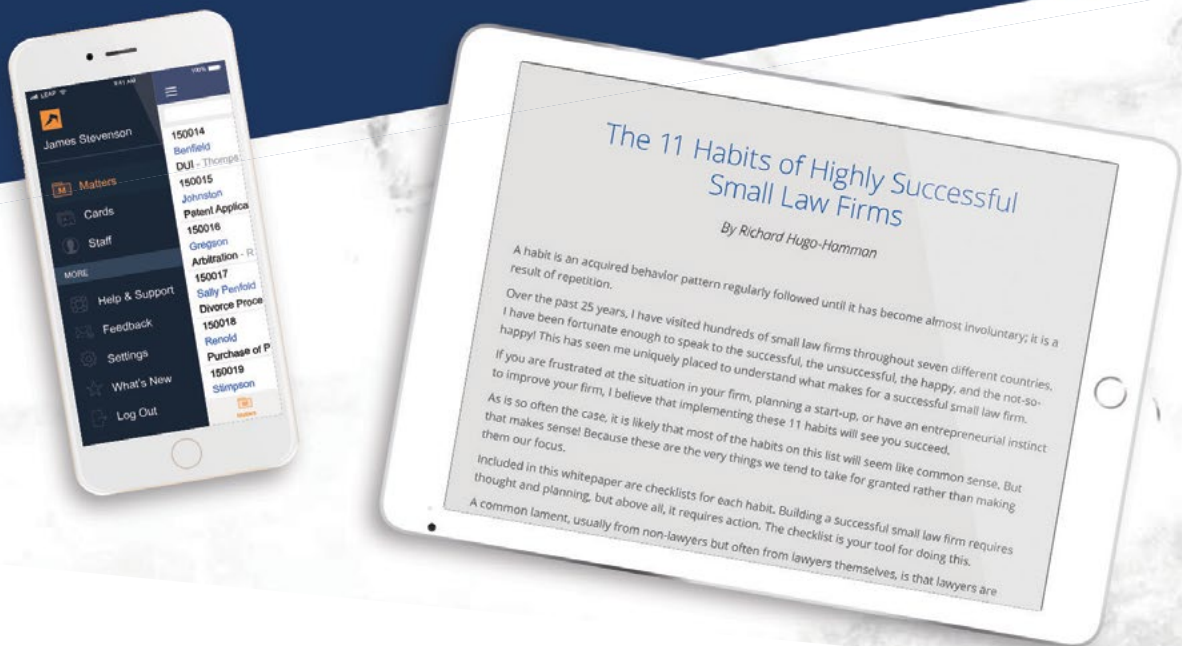
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To improve your business, incorporate 11 habits into your practice across key functions including:

- ▶ Client Communication
- ▶ Customer Service
- ▶ Financial Management
- ▶ Technology
- ▶ Time Recording/Billing
- ▶ AND MORE

Learn more about these 11 habits by visiting leap.us/11-Habits

Firms using LEAP make more money.

