NYSBA WINTER 2001 | VOL. 19 | NO. 3

Inside

A publication of the Corporate Counsel Section
of the New York State Bar Association

Message from the Chair

To the members of the Corporate Counsel Section:

I am sure you share with me the profound grief that we all feel at the tragic loss of life and property that occurred on September 11th. To our members who may have lost a friend or a loved one, we offer our heartfelt condolences. Many Section members worked for companies with offices in the World Trade Center and nearby buildings, and those who were fortunate enough to escape unharmed will face many difficult months in their attempt to return to their normal activities. To them, we offer our support and encouragement. And to the rest of you, I hope that you join me in striving to maintain the resolve, patience and fortitude needed to overcome the economic and emotional difficulties that have touched us all.

Nearly 100 persons attended our *Ethics For Corporate Counsel* Fall Meeting on October 25th. Cardozo Law Professor Ellen Yaroshefsky and attorneys Michael Ross and Richard Supple presented an enlightening and informative program that is described in more detail on page 9 in this issue. We plan on presenting a four-hour ethics program every fall, where attorneys will be able to obtain all needed MCLE ethics credits in one session from a discussion of issues tailored specifically to the in-house bar. We hope you will consider our Section to be your reliable and valuable MCLE ethics provider through this annual event. Planning is also underway to present an ethics program in one or more upstate areas to better serve our members who are located outside of the New York City metropolitan area. Details will be forthcoming.

Our Section's Annual Meeting will be held on Wednesday, January 23, 2002 during the New York State Bar Association Annual Meeting at the New York Marriott Marquis in New York City. This year's program will feature a one-hour MCLE panel on legal issues in the entrance and exiting of attorneys in corporate law departments and private firms. The speakers will be plaintiff's employment attorney Laura Schnell and Jackson Lewis managing partner Philip Rosen. The remainder of the program will include a discussion of career counseling, outplacement, recruiters and compensation. We hope you will be able to join us for what we expect will offer valuable information to all of us.

In January, we will be mailing a survey to all Section members to assess where you would like us to focus our efforts in the months ahead in order to better serve your needs. Please take the time to complete and return the survey so that your opinion can count toward making our Section one that you find beneficial in your role as corporate counsel.

Gary F. Roth

Inside

Pink Slip or Yellow Ribbon? New York Employers' Obligations to Employees on Military Leave

By Allan S. Bloom

On Monday morning, two of your company's most valuable employees, Ken and Laura, walk into their manager's office with some unsettling news. Ken, a member of the Army Reserves, has been called up for service beginning that Friday at an undisclosed federal installation outside of Washington, D.C. Laura, a part-time member of the National Guard, has volunteered to help patrol the local commercial airport in response to safety concerns expressed by the Governor. Laura believes that she will only miss work for a month. Ken has no idea how many days, months—or even years—he will be away from the office. The manager wants to replace both Ken and Laura. Can the company take this action, or must it hold the employees' positions open during their military leaves? Must the company continue Ken's and Laura's pay and benefits during their absence? What rights do these employees have, if any, when (and if) they are available to return to work?

"In addition, employers' compliance with these laws will ensure that the reservists and other volunteers who comprise an integral part of our national defense will not be dissuaded from answering the call to serve in the present and future campaigns."

In the wake of our country's recent military undertakings, many employers have been faced with employees who have volunteered for, or have been called into, military service. Both federal and New York State law provide a variety of substantive protections to these individuals, including the right to be reemployed upon their return to civilian life. Familiarity with these laws on the part of management will be instrumental in avoiding unnecessary lawsuits during what may be a protracted military campaign, both overseas and in our homeland. In addition, employers' compliance with these laws will ensure that the reservists and other volunteers who comprise an integral part of our national defense will not be dissuaded from answering the call to serve in the present and future campaigns.

The Reemployment Statutes

The right of non-career soldiers and service members to return unhindered to their civilian jobs has existed as a part of federal legislation since the outbreak of World War II.[1] Although the reemployment statute has existed in various forms over the years, the substantive protections of the law—and its purpose—have remained essentially unchanged. Supreme Court Justice William O. Douglas wrote over 50 years ago, "He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind."[2] The most recent affirmation of these federal rights is found in the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).[3]

USERRA has three general elements: (1) it protects current, former and future service members from discrimination in employment; (2) it establishes reemployment rights for individuals absent from work as the result of military service or training; and (3) it preserves the benefits of employees on a service-related leave. Unlike other anti-discrimination statutes, USERRA applies to all employers, regardless of size.[4] The statute protects members of the "uniformed services," which include the Armed Forces (Army, Navy, Air Force, Marines and Coast Guard); the reserve components of each of the Armed Forces; the Army National Guard and Air National Guard; the Commissioned Corps of the Public Health Service; and "any other category of persons designated by the President in time of war or national emergency."[5] USERRA applies to uniformed service members on active duty, in training, or on full-time National Guard duty, as well as individuals who are absent from work in order to submit to a fitness-to-serve examination, whether on a voluntary or involuntary basis.[6]

New York's Military Law also provides reemployment rights and protections against discrimination to individuals who have left their civilian jobs in order to perform military service, which are in some cases broader than those granted by USERRA.[7] Notably, neither the Military Law nor USERRA is automatically preempted by the other—employees are entitled to invoke the more

favorable protections and benefits of both statutes at the same time.[8]

Prohibition Against Discrimination and Retaliation

USERRA prohibits an employer from discriminating against a person who is a current, former or prospective member of the uniformed services.[9] The unlawful discrimination includes discharging the employee or denying initial employment, reemployment, promotion or "any benefit of employment" on the basis of one's military status or connection.[10]

An employer will be found to have violated the federal statute when the employee's (or applicant's) membership, service, application or obligation to serve in the uniformed services is a "substantial or motivating factor" in the employer's adverse action. The employer can avoid liability, however, by proving that it would have taken the same action regardless of the employee's military status or connection.[11]

USERRA also contains an anti-retaliation provision, which makes it unlawful for an employer to take any adverse action or otherwise discriminate against any employee or applicant because he or she (1) has taken an action to enforce a protection of the statute; (2) has testified or otherwise made a statement in connection with a proceeding involving the statute; (3) has cooperated with or participated in an investigation under the statute; or (4) has exercised a right granted by the statute.[12]

Similarly, under the New York Military Law, it is unlawful to willfully deny employment to or otherwise discriminate against a member of the organized militia with respect to his or her employment, trade or business, on the basis of such membership.[13]

Right of Reemployment

Employees who meet certain requirements can benefit from generous reemployment rights under both USERRA and the New York Military Law. Under USERRA, reinstatement rights are only granted to employees (1) who give their employers advance notice of their military service or obligation (unless the giving of such notice is made impossible or unreasonable, including by military necessity[14]); (2) whose absence from work does not exceed a cumulative period of five years (except under several special circumstances, including during times of war or national emergency[15]); (3) whose discharge from service is honorable;[16] and (4) who submit an application for reemployment, or return to work, within the prescribed time periods (which can vary from one to 90 days, depending on the duration of military service).[17]

The reemployment protections of the New York Military Law are even broader, extending to any person who receives a certificate of completion of military service, is still qualified to perform the duties of his or her civilian position, and makes an application for reemployment within 90 days after the completion of such service.[18]

Into What Position Must an Employer Reinstate the Service Member?

The position into which a covered individual must be reinstated depends upon the duration of his or her military service, and follows a priority commonly known as the "escalator principle," which contemplates that the returning service member step back onto the seniority "escalator" as if employment had been uninterrupted.[19]

"USERRA imposes on employers the obligation to make 'reasonable efforts' to qualify (or re-qualify) returning service members to the positions they should occupy on the 'escalator.'"

An employee absent from work for military service of less than 91 days is ordinarily entitled to be "promptly" reinstated to the position the employee would have held had he or she not taken a service leave.[20] If this is not possible, the employee is entitled to be reinstated to the position he or she held immediately prior to the service leave.[21] As a last resort, the employer must reinstate the employee to the position that is the nearest approximation to one of these positions, with full seniority.[22]

An employee absent for military service of 91 or more days is entitled to be reinstated to the same positions as above, in the same order of priority, except that the employer may substitute a position of "like seniority, status and pay" at each level, as long as the employee retains full seniority.[23]

What If the Employee Is No Longer Qualified for the Job?

USERRA imposes on employers the obligation to make "reasonable efforts" to qualify (or re-qualify) returning service members to the positions they should occupy on the "escalator." For example, if Ken returns to work after a three-year tour of Army duty and is not qualified for the position he would have held had he not taken a military leave (e.g., Vice President), his employer must make reasonable efforts to qualify him to be a Vice President. If he cannot become qualified in spite of

the company's reasonable efforts, he must be reinstated to the job he held prior to his leave (e.g., Assistant Vice President). If Ken is no longer able to perform the Assistant Vice President job, his employer must make reasonable efforts to re-qualify him to do that job. If all else fails, the company must reemploy Ken in the position nearest the Vice President or Assistant Vice President positions that he is qualified to perform.

What are "reasonable efforts"? USERRA defines them as "actions, including training provided by an employer, that do not place an undue hardship on the employer."[24] "Undue hardship" is described as an action which requires "significant difficulty or expense" in light of overall business considerations.[25] Factors to be taken into account in determining undue hardship include the nature and cost of the efforts; the overall financial resources of the employer and the facility involved; the impact on the operations of the facility and the employer as a whole; and the composition, structure and functions of the employer's workforce.[26] The limited case law on the issue indicates that the burden of proving unreasonableness or hardship rests with the employer, and the wording of the statute suggests that the burden could be considerable, especially for larger employers and facilities.[27]

"An employer is not obligated to reemploy a returning service member if the employer can prove that its circumstances have changed so as to make such reemployment impossible or unreasonable."

When Must the Employee Apply Reemployment?

In New York, an employee who receives a certificate of completion of military service has 90 days to present an application for reemployment to his or her civilian employer, regardless of the duration of military service.[28] The timelines for returning to work (or for applying for reemployment) under USERRA can range from one day to 90 days, and depend on the duration of military service.[29]

Under USERRA, an employee's failure to report to work or apply for reinstatement within the prescribed timelines does not automatically forfeit the right to reemployment, but only subjects the employee to the "conduct rules, established policy and general practices of the employer" with respect to unexcused absences from work.[30] Accordingly, if an employer has a three-day "no-show, no-call" rule (after which it terminates an absentee employee), it cannot refuse to hire an otherwise-eligible service member who presents an application for reemployment on the 92nd day after completion of military service.

When Can an Employer Refuse to Reemploy a Returning Service Member?

An employer is not obligated to reemploy a returning service member if the employer can prove that its circumstances have changed so as to make such reemployment impossible or unreasonable.[31] In the legislative history of USERRA, Congress described this exception as "very limited," and several federal courts have determined that it is only applicable where reinstatement would require the creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran.[32] This defense probably requires more than a mere showing that it would be inconvenient or undesirable to reemploy the returning service member, or that there has been a downturn in business.[33]

Protection Against Discharge

Perhaps the most significant benefit conferred by the New York Military Law is that the reemployed service member cannot be discharged without cause from the position into which he or she was reinstated for one year following reemployment.[34] This is a notable exception to New York's at-will employment doctrine, which would otherwise give the employer a nearly unfettered right to discharge the employee, or to modify the terms and conditions of employment.[35]

Continuity of Benefits

Neither USERRA nor the New York Military Law require employers to compensate employees who are on a service-related leave of absence. Under the federal law, employees are entitled to apply any paid leave (including vacation time) accrued prior to the commencement of military service towards their absence from work for such service.[36] Employers may not, however, require their employees to apply their accrued paid time towards a military leave.[37]

An individual who is reemployed in accordance with USERRA is entitled to the seniority and "other rights and benefits determined by seniority" that would have accrued had his or her employment not been interrupted by military service or obligation.[38] Similarly, the returning employee is entitled to the same rights and benefits not determined by seniority that are generally provided to employees at the same level who are on furlough or leave of absence, regardless of whether such

rights and benefits were established during the period of the employee's military service.[39]

Employees on military service leave may elect to continue their health insurance coverage under their employer's plan (including for their dependents and other covered persons) for up to 18 months beginning on the first date of their service-related leave.[40] Employers may generally require these employees to pay up to 102% of the full premium associated with such coverage during the period of continuation.[41] If an employee's health insurance coverage expires or is otherwise terminated by virtue of his or her military service, no exclusion or waiting period may be imposed upon reinstatement of coverage, except as to injuries that were sustained or aggravated during the period of military service.[42]

"Our country's increased reliance on non-career service members, reservists and volunteers as an essential part of national security places a considerable burden on private employers."

For purposes of determining vesting, accrual and nonforfeitability of pension or retirement benefits, a person reemployed under USERRA must be treated as not having incurred a break in service with the employer by virtue of his or her military leave.[43] Any employer contributions to the pension or retirement plan made on behalf of the employee must continue uninterrupted during the period of military service, to the extent it would for employees not on leave.[44] In addition, the reemployed individual is entitled to accrued benefits based on employee contributions or elective deferrals only to the extent the employee repays his or her contributions to the plan following reemployment.[45]

Enforcement

Employees alleging violations of USERRA by a private employer have the option of filing an administrative complaint with the U.S. Department of Labor (which may result in a court action prosecuted by the Attorney General's office on the complainant's behalf) or filing a private action in federal district court.[46] A successful plaintiff is entitled to an award of lost wages and benefits, which may be doubled if the court finds that the employer's violation of the statute was "willful."[47] The court is also specifically authorized to use its full equity powers to vindicate the rights or benefits of persons under the statute, including through reinstatement, injunctions, restraining orders and contempt orders.[48] A prevailing plaintiff in a USERRA action may recover his or her attorneys' fees, expert witness fees and other litigation expenses, at the discretion of the court.[49]

An employee bringing a claim under the New York Military Law may do so in the state Supreme Court in any county where the employer maintains a place of business.[50] The court may require that the employer comply with the provisions of the Military Law, and may award lost wages and benefits to the aggrieved employee.[51]

Conclusion

As one military scholar recently noted, "The concept of the citizen-soldier . . . is alive and well in twenty-first century America."[52] Our country's increased reliance on non-career service members, reservists and volunteers as an essential part of national security places a considerable burden on private employers. What can an employer do to avoid or minimize its liability under the military leave laws? First, it should carefully review both USERRA and the New York Military Law to determine its respective obligations under both statutes. Second, it should consider what its reemployment obligations may be under these laws before refilling a position vacated by a departing service member. Third, employers should reexamine their personnel and leave policies, as well as any relevant provisions of their employee benefit plans, to ensure that they are in compliance with the reemployment statutes. Finally, supervisors should be trained to identify and prevent discrimination and retaliation against departing and returning service members. By taking these preventive steps, a company will be prepared to respond promptly, and in accordance with the law, when the citizen-soldiers in its workforce answer the call to arms.

Endnotes

1. Congress first codified reemployment protections for returning service members as part of the Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885 (1940).
2. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946).
3. 38 U.S.C. §§ 4301 *et seq.*
4. 38 U.S.C. § 4303(4)(A). USERRA defines "employer" as "any person, institution, organization, or other entity that pays salary or wages for work performed," including entities which deny initial employment in violation of the statute's anti-discrimination provisions. *Id.*
5. 38 U.S.C. § 4303(16); U.S. Dep't of Labor, Veterans Employment and Training Serv., *A Non-Technical Resource Guide to the USERRA* (2001).
6. 38 U.S.C. § 4303(13).
7. N.Y. Mil. Law §§ 300 *et seq.*
8. Under USERRA, an aggrieved individual is entitled to the benefit of any state or local laws which confer additional rights or

protections not found in the federal statute. Conversely, USERRA supersedes the less favorable provisions of any state or local law. 38 U.S.C. § 4302.

9. 38 U.S.C. § 4311(a).
10. 38 U.S.C. § 4311(a). "Benefit of employment" is defined broadly as "any advantage, profit, privilege, gain, status, account, or interest . . . that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment." 38 U.S.C. § 4303(2).
11. 38 U.S.C. § 4311(c)(1); *Gummo v. Village of Depew*, 75 F.3d 98 (2d. Cir.), 106-107, *cert. denied*, 517 U.S. 1190 (1996).
12. 38 U.S.C. § 4311(b).
13. N.Y. Mil. Law §§ 251, 252, 317, 318.
14. 38 U.S.C. § 4312(b).
15. *See* 38 U.S.C. § 4312(c)(1)-(4).
16. 38 U.S.C. § 4304.
17. 38 U.S.C. § 4312(a)(1).
18. N.Y. Mil. Law § 317(1)(a)-(c).
19. *See Hatton v. Tabard Press Corp.*, 406 F.2d 593, 595 (2d Cir. 1969).
20. 38 U.S.C. § 4313(a)(1)(A).
21. 38 U.S.C. § 4313(a)(1)(B).
22. 38 U.S.C. § 4313(a)(4).
23. 38 U.S.C. § 4313(a)(2)(A), (a)(2)(B), (a)(4).
24. 38 U.S.C. § 4303(10).
25. 38 U.S.C. § 4303(15).
26. *Id.*
27. *See, e.g., Wrigglesworth v. Brumbaugh*, 121 F. Supp. 2d 1126, 1136-37 (W.D. Mich. 2000) (quoting legislative history regarding the "very limited exception" of unreasonableness or impossibility in the context of an employer's USERRA obligations).
28. N.Y. Mil. Law § 317(1)(c).
29. *See* 38 U.S.C. § 4312(e)(1)(A)(i), (e)(1)(A)(ii), (e)(1)(C).
30. 38 U.S.C. § 4312(e)(3).
31. 38 U.S.C. § 4312(d)(1)(A); N.Y. Mil. Law § 317(c). An additional exception to an employer's reemployment obligation under USERRA exists when the employee's pre-service position was for a brief, non-recurrent period and there was no reasonable expectation that such employment would continue indefinitely or for a significant period. 38 U.S.C. § 4312(d)(1)(C).
32. *See, e.g., Kay v. General Cable Corp.*, 144 F.2d 653, 655 (3d Cir. 1944); *Lapine v. Town of Wellesley,* 2001 WL 456434, at *4 (D. Mass. Apr. 26, 2001); *Davis v. Halifax Sch. Sys.*, 508 F. Supp. 966, 968 (E.D.N.C. 1981).
33. *See, e.g., Levine v. Berman*, 161 F. 2d 386, 388-89 (7th Cir.), *cert. denied*, 332 U.S. 792 (1947); *Kay*, 144 F.2d at 655; *Smith v. Lestershire Spool & Mfg. Co.*, 86 F. Supp. 703, 704-705 (N.D.N.Y. 1949).
34. N.Y. Mil. Law § 317(4). Under USERRA, the period of protection from not-for-cause discharge can last up to one year, and depends on the duration of military service. *See* 38 U.S.C. § 4316(c)(1), (2).
35. *See Rooney v. Tyson*, 91 N.Y.2d 685, 689, 674 N.Y.S.2d 616, 618 (1998) (discussing New York's at-will presumption).
36. 38 U.S.C. § 4316(d).
37. *Id.*
38. 38 U.S.C. § 4316(a).
39. 38 U.S.C. § 4316(b)(1)(A), (B).
40. 38 U.S.C. § 4317(a)(1)(A).
41. 38 U.S.C. § 4317(a)(2). Employees absent for military service of less than 31 days cannot be required to pay more than the normal employee share of any premium during their absence. *Id.*
42. 38 U.S.C. § 4317(b)(1).
43. 38 U.S.C. § 4318(a)(1)(A), (a)(2)(A), (a)(1)(B).
44. 38 U.S.C. § 4318(b)(1).
45. 38 U.S.C. § 4318(b)(2). Repayment of employee contributions can be made over a period of time beginning upon reemployment and equal to three times the period of military service, but no longer than five years. *Id.*
46. 38 U.S.C. §§ 4321-4323.
47. 38 U.S.C. § 4323(d). What constitutes "willful" conduct is not specified in USERRA, but one federal court recently defined it as conduct "known to be prohibited" or "with reckless disregard of its prohibition." *Wriggelsworth v. Brumbaugh,* 129 F. Supp. 2d 1106, 1110-11 (W.D. Mich. 2001) (adopting the Supreme Court's definition of "willful" in the context of the Age Discrimination in Employment Act and Fair Labor Standards Act).
48. 38 U.S.C. § 4323(e).
49. 38 U.S.C. § 4323(h)(2).
50. N.Y. Mil. Law § 317(5).
51. *Id.*
52. Lt. Col. H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. Rev. 55, 55 (1999).

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Book Review: A Collaboration About Collaboration

Review by Steven A. Lauer

Successful Partnering Between Inside and Outside Counsel, Robert L. Haig, Editor-in-Chief
(West Group & ACCA 2001, 4 vols., 6,032 pages and 4 diskettes of forms)

"Partnering." The word has gained currency in the legal profession as the preferred type of relationship between the law departments of corporations and their outside counsel.

Unfortunately, however, there is no accepted definition for that term. This makes it difficult for an inside or outside lawyer who wishes to establish such a relationship between his or her organization and its counterpart or counterparts. What does a partnering relationship look like? What elements does it include? What characteristics of a relationship militate against establishing a partnering relationship? What are the benefits of a partnering relationship?

"The 80 chapters represent the thoughts of the most senior legal officers of that many national and multinational corporations, as well as the considerable contributions of senior outside counsel for those same companies."

A resource recently appeared on the scene that might be of significant assistance in developing answers to those and other questions. "Successful Partnering Between Inside and Outside Counsel" is a four-volume treatise on the subject.

The strengths of this publication derive from its parentage. It is a joint effort of the American Corporate Counsel Association and the West Group. Moreover, its 80 chapters represent the writing efforts of dozens of eminent lawyers. Each chapter is the product of multiple authors—in most cases the general counsel of a Fortune 500 company and one of that company's leading outside counsel. The "About the Authors" section alone contains 153 pages.

Another strength of the compendium lies in the fact that its 80 chapters focus on discrete, well-defined topics. For example, one chapter addresses the subject of expenses and disbursements, while another covers billing. There are chapters devoted to substantive areas of practice, such as environmental law and mass torts, and others that focus on practice topics, such as the one entitled "Specialized Approaches to Insourcing Legal Work." Thus, the work contains material for a lawyer who has almost any particular interest within the general subject of representing corporate clients.

Each chapter addresses a variety of issues that are related to the chapter's topical focus. The issues range from the theoretical to the pragmatic. An example of the former is the discussion titled "Know your Ally" in the chapter called "Communication Methods and Skills." That same chapter contains more specific suggestions that might improve communications between inside and outside counsel, such as using videoconferencing in advance of a significant in-person meeting that will require substantial travel by one or more participants; the purpose of a videoconference in such a situation would be to make the in-person meeting more efficient and effective.

The many forms included in the four volumes, which are also collected on four computer disks that are included with the treatise, exemplify the practical elements of the work. Those forms range from a term sheet for a commercial transaction to the corporate governance guidelines of a major corporation.

The authors go so far as to include citations to a multitude of sources. Some are other treatises and articles while others are court opinions. The table of cases cited in the text is 102 pages long. The compilation of such materials is itself a significant contribution to the literature of legal management by the group of authors and editors.

Which brings us to the considerable contribution of the Editor-in-Chief of the set. Robert L. Haig is a senior litigation partner at Kelley Drye & Warren LLP in New York. Mr. Haig not only served as overall editor of the set; he assembled the stellar team of contributors and managed that disparate group of extremely capable and experienced lawyers around the country. Since lawyers are not known for their reticence, particularly in respect of their written work, it would be easy to underestimate the effort and tact that was required of Mr. Haig in putting this set together.

How useful is the treatise? There is certainly an incredible amount of information in its four volumes. In addition to the sheer volume, there is an amazing variety of material included. The 80 chapters represent the thoughts of the most senior legal officers of that many national and multinational corporations, as well as the

considerable contributions of senior outside counsel for those same companies.

The examples of processes, documents, guidelines and techniques from that many well-regarded corporate law departments constitute a valuable store of ideas. Whether the reader is interested in litigation management, law department metrics, environmental law and the management of environmental issues or the ethics associated with partnering between an in-house lawyer and her or his outside counterparts, there is considerable material to review and ideas to apply.

This brings us to the index to the set. That section is 276 pages long. Even so, it provides only a rudimentary map to the contents of the books. Reading a set such as this word by word is not recommended and would probably be an overwhelming exercise for all but the most masochistic among us. Nonetheless, I suspect that there is material contained within the 6,032 pages that is not as easily discovered through the index as one might hope. As an example, the section of the index on litigation does not reference the discussion of privileges, though the existence and scope of those privileges (attorney-client, work product, etc.) are so often critical issues in the progress and success of litigation.

Since many subjects within the scope of this treatise are somewhat multidisciplinary in nature, an index cannot reference them from all the potential perspectives as the reader might have, at least without becoming a multi-volume treatise of its own! This is not so much a criticism of this work as a statement of the difficulty in creating a complete index to any complex, worthwhile work. The need for an index is greater in such a work. Without a means of accessing it, the most useful information becomes useless because the reader will not be able to discover it. Perhaps having the work searchable in a dynamic fashion electronically would resolve that conundrum.

Overall, the four-volume set would be a very valuable resource on the subject of partnering. It could easily be put to the test early in the representation by a law firm of a client, or at any time during the relationship, for that matter.

Steven A. Lauer was in-house counsel for four real estate organizations over a 13½ year period. He has consulted with a number of corporate law departments on issues associated with the relations between in-house and outside counsel. He is also Deputy Publisher and Deputy Editor of *The Metropolitan Corporate Counsel*.

See Annual Meeting Program Agenda on page 11

Ethics For Corporate Counsel Program

By Janice Handler

At the Corporate Counsel Section's second annual Fall "Ethics for Corporate Counsel" program held on October 25, 2001 in the Great Hall of The Association of the Bar of the City of New York, three distinguished practitioners and professors of attorney ethics focused specifically on the day-to-day ethical issues faced by corporate lawyers.

Gary F. Roth, Esq., of Broadcast Music Inc., Chair of the Section, welcomed over 100 lawyers to the program and promised that a Corporate Counsel Section program devoted exclusively to ethics would remain an annual event of the Section.

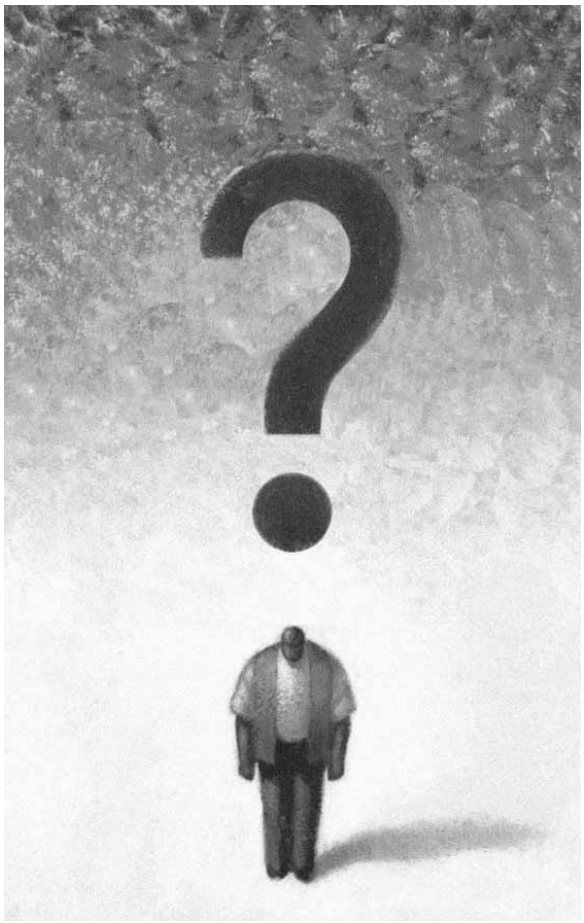
Jay Monitz, Esq., of Federated Department Stores, Inc., the Program Chair, introduced the speakers: Michael S. Ross, a partner in LaRossa & Ross and Adjunct Professor at the Benjamin N. Cardozo School of Law in New York, who concentrates his practice in attorney ethics and criminal law; Richard Supple, Esq., counsel to Edwards and Angell, LLP and Adjunct Professor teaching ethics at Brooklyn Law School; and Ellen Yaroshefsky, Clinical Professor of Law and Executive Director of the Jacob Burns Ethics Center at the Benjamin N. Cardozo School of Law. Mitchell F. Borger, Esq., and Janice Handler, Esq., were also members of the planning committee for this program.

Employing a novel interactive format, the speakers presented a legal problem wherein a lawyer for the hypothetical Softeeware, Inc. must navigate a minefield of ethical issues in advising his management with respect to the acquisition of a mainframe manufacturer. Using subtle elaborations and variations of the hypothetical, the speakers covered the special role of corporate lawyers; the in-house lawyer's role in addressing corporate misconduct; lawyer-client and work product privilege issues unique to a corporate setting; corporate lawyers' responsibility for zealous advocacy; the "no-deceit" ethical mandate; and the effects of business entanglements between a corporate lawyer and his or her company.

The interactive format, liveliness and expertise of the speakers encouraged a high degree of audience participation and made for a highly entertaining as well as informative program for which the participants were eligible to receive four New York State MCLE credit hours in ethics.

Survey Alert

Please watch for a Survey coming your way from the Corporate Counsel Section in January 2002. Your information and input are vital to the Section's ability to serve you. When you receive the form, please complete and return it as soon as possible.



Struggling with an ETHICS ISSUE?

NYSBA

NYSBA CAN HELP!

E-mail: ethics@nysba.org
or fax your question to:
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Corporate Counsel Section Executive Committee

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Executive Committee Member Profile: Mitchell F. Borger

Education

B.A., State University of New York at Oneonta, 1979
J.D., Albany Law School of Union University, 1982

Bar Admissions: State of New York; United States District Courts for the Southern, Eastern, Northern and Western Districts of New York; United States Court of Appeals for the Second Circuit; and the United States Supreme Court

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Legal Experience

Mitchell began his legal career in 1982 as an Assistant District Attorney in Bronx County, specializing in child abuse and domestic violence prosecutions. In 1987, he joined the legal department of the Power Authority of the State of New York, specializing in civil litigation. Mitchell moved his practice to the private sector in 1992 when he joined United Merchants and Manufacturers, Inc., a textile manufacturer located in Teaneck, New Jersey. In that role, he specialized in litigation, employment and environmental issues. In 1995, Mitchell joined Federated Department Stores, Inc.'s New York City law office. Federated is the parent company of Macy's and Bloomingdale's Department Stores. Mitchell is responsible for legal issues relating to employment, loss prevention and operational matters, along with supervising commercial and employment litigation for Federated's eastern operations. Mitchell has served on the Corporate Counsel's Executive Committee since January 2000.

Corporate Counsel Section

Annual Meeting Program Agenda

New York Marriott Marquis
1535 Broadway, New York, NY

Wednesday, January 23, 2002

Section Chair
Gary Roth, Esq.
Broadcast Music Inc.
New York City

Program Chair
Mitchell F. Borger, Esq.
Federated Department Stores, Inc.
New York City

"Career Planning for Corporate Counsel"

9:00 to 9:05 a.m.	Introductory remarks **Mitchell F. Borger, Esq.**
9:05 to 10:00 a.m.	Employment issues affecting the entrance and exit of attorneys from private firms and corporate environments **Laura S. Schnell, Esq.** Eisenberg & Schnell LLP New York, NY **Philip B. Rosen, Esq.** Jackson Lewis New York, NY
10:00 to 10:25 a.m.	Outplacement: the forgotten tool **David Miles** The Miles/LeHane Group, Inc. Leesburg, Virginia
10:25 to 10:40 a.m.	Coffee break
10:40 to 11:05 a.m.	Managing your career **Sheryl S. Spanier** Right Management Consultants New York, NY
11:05 to 11:30 a.m.	Finding the right recruiter **Jonathan A. Lindsey, Esq.** Major Hagen & Africa New York, NY
11:30 to 11:55 a.m.	In-house compensation update **Kathryn Parker** Price Waterhouse Coopers New York, NY
11:55 a.m. to 12:05 p.m.	Break
12:05 to 1:00 p.m.	Q&A and panel discussion—"Bringing it all together—effective career management for the corporate counselor"

Submission of Articles

Inside welcomes the submission of articles of timely interest to members of the Section. Articles should be sumitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original. Please submit articles to Thomas A. Reed, BT North America Inc., 350 Madison Avenue, 6th Floor, New York, NY 10017.

Inside

Inside is a publication of the Corporate Counsel Section of the New York State Bar Association. Members of the Section receive a subscription to the publication without charge. Each article in this publication represents the author's viewpoint and not that of the Editors, Section Officers or Section. The accuracy of the sources used and the cases, statutes, rules, legislation and other references cited is the responsibility of the respective authors.

ISSN 0736-0150

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