

Inside

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

Message from the Chair

I am pleased to welcome you to the newest edition of *Inside*, the newsletter of the New York State Bar Association's Corporate Counsel Section. I am sure that you will find the articles to be of considerable value.

The Corporate Counsel Section's Executive Committee has been busy finalizing our strategic plan for the next few years, to ensure that our members continue to receive the high quality valuable services that they have come to expect from the Section.

Our committees remained hard at work during the summer months. Our Diversity Internship Committee, chaired by former Section Chair Barbara Levi, is overseeing the first season of our diversity internship program, which places exceptional law students in the legal departments of several large corporations.

Of course, our *Inside* Committee, chaired by former Section Chair Bonni Davis, has once again done an outstanding job in creating this edition of *Inside*.

Our CLE/Meetings Committee, chaired by Chair-Elect Steven Nachimson, has several events planned for our members. We are once again presenting our annual Ethics for Corporate Counsel program to be held on Friday morning, October 13, 2006, at the Great Hall of the Association of the Bar of the City of New York, from 9:00 am to 12:30 pm. This program features nationally known speakers addressing ethics topics of particular interest to in-house counsel, and will provide attendees with the necessary four ethics credits. Look for a mailing and email detailing this invaluable program.



For our upstate colleagues, we are co-sponsoring with the NYSBA Antitrust Law Section a program on antitrust issues of interest to in-house counsel in the early Fall in Rochester. Again, look for a "save the date" mailing to go out shortly.

Our members interested in not-for-profit organizations will want to attend a full-day CLE program entitled "Best Practices for Not-for-Profit Organizations," to be held in late October and early November in Albany, Syracuse, Buffalo and New York City. The Corporate Counsel Section previously co-sponsored this series of programs with the Trusts and Estates Section, and we expect this series to be similarly well received. Again, look for registration materials coming your way soon.

A special projects committee of the Executive Committee, chaired by former Chair and current Vice-Chair Gary Roth, is also planning the Second Corporate Counsel Institute, to be held in the Fall of 2007. Keep your eye on these pages and other mailings for more information.

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All of these programs, and much more, are highlighted in greater detail on our revised and expanded home page at www.nysba.org/corporate.

Finally, I invite you to work with us to bring greater value to our members. We have vacancies on the Executive Committee for enthusiastic members who

want to assist us in our continuing endeavors to enhance our Section. If you would like more information on this or any Section activities, please contact me at steven.mosen-son@nyu.edu.

Thank you.

Steven H. Mosenson

Available on the Web *Inside* www.nysba.org/Inside



Back issues of *Inside* (Corporate Counsel Newsletter) (2000-present) are available on the New York State Bar Association Web site

Back issues are available in pdf format at no charge to Section members. You must be logged in as a member to access back issues. Need password assistance? Visit our Web site at www.nysba.org/pwhelp. For questions or log-in help, call (518) 463-3200.

***Inside* Index**

For your convenience there is also a searchable index in pdf format. To search, click "Find" (binoculars icon) on the Adobe tool bar, and type in search word or phrase. Click "Find Again" (binoculars with arrow icon) to continue search.

Don't Let 'em Take You for Granted: Selecting, Retaining and Partnering with Outside Counsel

By Johnnie M. Jackson, Jr.

The Paradox of Partnering

The paradox of “partnering” between outside and in-house counsel goes hand-in-hand with a common misconception. The misconception, especially among outside counsel selected to be on a company’s preferred provider list or counsel that survives an in-house law firm “convergence” exercise, is that “once I’m in, it’s forever”—and, in many cases, that sentiment is followed by “and we can get back what we had to give up to get in the door and to where we financially need to be over time.”

Advice from someone who has been on both sides of the table: **Don't let your outside law firms take you for granted. Don't let anyone get complacent.**

The whole concept that “partnering” is a mutually beneficial, **long-term** relationship is valid, but it does not mean it’s unconditional. It’s a commitment to excellence, give-and-take and continuous improvement on both sides—there’s no going back.

The Big Step—Creating the “First” New Team

If you have gone through a convergence process to narrow the number of firms you use or if you have gone through an RFP process or a series of “beauty contests,” you and your team had to think about what is important to you and to your company—what separates the kinds of firms you like to deal with from all the others.

You remember all too well that it was not always easy to tell firms with which you had a long-standing relationship that all bets were off going forward. You started with a clean sheet of paper in an effort to create new standards of performance and a new team of inside and outside lawyers that, in your view, could best deliver legal services to your company. That new team may actually have included one or more of your existing firms—but each had to agree to live up to your new standards of performance and new way of thinking. You embraced a businessperson’s approach—with a legal twist—to productivity and results improvement. You also had to formulate a plan to implement the changes you were about to make and you had to explain to senior management why you wanted to make all the changes and predict what benefits the company could expect.

Lawyers who have undertaken such changes in the way legal services are delivered to their corporate clients have already moved on from yesteryear’s purely “who-do-you-know” selection process to a more pro-active, business-like approach. If you are one of them, congratu-

lations. If you haven’t made the move yet, perhaps you should seriously consider it and discuss how to do it with one or more of your colleagues who have.

Whether you have already created your new legal team or are about to do so, your selection parameters likely address at least the following:

- Expectations regarding the in-house–outside counsel working relationship—roles of each—communications back and forth
- Expectations regarding how outside counsel staffs and manages the work
- Expectations regarding interactions with company’s non-legal personnel
- Scope of services—breakdown by subject matter expertise
- Scope of services—breakdown by size and importance of case
- Scope of services—breakdown by geography
- Expectations regarding conflicts of interest
- Expectations regarding fees, disbursements, billing protocols, discounts or alternative billing arrangements
- Expectations regarding using budgets as a management tool
- Expectations regarding a “no surprises” policy
- Expectations regarding results and continuous improvement and lessons learned
- Expectations regarding the use of technology
- Expectations regarding diversity
- Expectations regarding outside counsel’s “investment of time” to learn company’s businesses
- Expectations regarding continuous improvement

Once what you wanted to accomplish was clear in your mind, you started the process. The firms you invited to participate responded. You made your choices and selected the new team. Announcements were made. Kick-off meetings were held and you were on your way. There was an initial period of settling in and making adjustments to make sure everything was working smoothly. You reported to senior management that the deed was done. You took a breather.

The “New Team” Needs Leadership and You’re It

A typical scenario when a new team has been put in place is that during the first year, in-house and outside counsel discover that “expectations” can mean different things to different people—no surprise there!

Questions begin to surface. How much time IS reasonable for a call to be returned? Why do these charges for “plant orientation visits” show up on the bill? How many successive new associates and changes to staffing SHOULD be seen as reasonable? How many outside lawyers and even summer associates really need to be at a meeting—who decides?—who pays? How come the lawyers who were so active in the RFP process no longer seem as available as they used to be? Why does my outside law firm’s formerly favorable position on this case change so dramatically and so quickly—and just before trial? Has outside counsel followed our legal department’s requests regarding information flow and tactical and strategic decision making? Why were the budget variances bigger than I expected and why weren’t they brought to our attention sooner? Why are we being asked the same questions over and over again? When a matter is over, are we satisfied that outside counsel worked with us regarding lessons learned? Obviously there are more questions, but you get the idea.

The point is this: new teams need leadership and you’re it.

When you set your law firm selection parameters, they sound great and generally express what you think is important but they are, by their nature, very broad untested concepts. Chances are, at first, most of the selection parameters do not even have metrics by which they can be measured either by you or by your outside law firm partners—no wonder there are conflicting interpretive views!

So, jump in! Stay on top of what is going on. Talk to and meet frequently with your outside partners. Be sure you know who is accountable. Keep the assignments clear and the dialog fresh and ongoing. Make sure the continuous improvement mindset is alive and well. Be a cheerleader as well as a focused, no-nonsense in-house partner.

Whether you get the benefits you first envision is up to you and how you manage your outside counsel relationships. What motivates you and what motivates your outside counsel will overlap in some, but not all, areas. It’s up to you to set up and then monitor performance parameters and metrics that will motivate your outside counsel to give you what you want.

How do you do that? Answer: make continuous improvement one of your priorities. Keep the dialog with your outside firms ongoing. Never abdicate your responsibility to lead. Listen. Establish performance metrics that

suit your particular situation. Then ask for promises from your outside firms that they will focus on the metrics adopted, meet them and continue to improve.

A good way to keep the process going is to create your own set of “outside counsel guidelines” so your firms and your own people are clear about what is expected. Talk to your colleagues: there are guidelines galore and my experience is that other in-house lawyers will be glad to share what they have. You can pick and choose from among the various versions you collect to come up with something that suits your particular needs. Be aware that one set of guidelines will not fit every situation but they WILL give you a starting point for your discussions and continued dialog. The important point is that you and your outside counsel need to be clear about what you expect.

And don’t forget your own people. Your outside counsel can be as successful as you want them to be only with the help of your organization. Be sure your own in-house lawyers and your business people know what their roles are when dealing with your outside lawyers. You and your people need to keep your commitments to your outside firms as well. You want your lawyers to represent you well—help them. Find out what THEY need to be successful. It’s a team effort. Everyone has a role—an important role.

Keep the performance dialog going with your outside firms and your own people.

The Need for Ongoing Review and Evaluation

There’s an old saying that “if you can’t see it, you can’t manage it”—very true.

Once you have retained your outside lawyers and established your performance metrics, informal quarterly reviews and formal annual reviews are essential to “take stock” and determine how your firms are doing. There should also be frequent but short “touching bases” conversations between reviews. If you get to a review and are “surprised,” then you may not be as close to your firms as you should be. Management hates surprises—so should you.

Incentivize the behavior you want and expect. For example, if billing protocols are important to you, be sure you call your outside partner contact from time to time to ask for clarification and explanations. If your outside firms know that YOU are taking an interest in a particular matter or issue, they will take an interest also—it’s just human nature. If the outside firm is sending four associates to a meeting and you think one is sufficient, say something. Follow up your conversations with emails to confirm action items that come out of your discussions so that completion dates can be monitored in the future.

And remember, performance is a two-way street; so be sure to ask for feedback about how your organization

can help your outside firms do what you expect them to do.

New Firms—Adding to Your Mix

Never let your outside firms take you for granted. You have established your team. The firms first selected are on the team—but team membership is not unconditional. The rules of engagement assume that all parties are committed to continuous improvement. If you find out that's not the case and the relationship just "doesn't work out," you can adjust.

As in-house counsel, keep an open eye for new and emerging firms—both small and large—that may be able to help you. You can find them leading panels at CLE seminars. You can find them by reading their articles in the legal media. You meet them at association meetings. The point is—stay in the loop—keep current with who is doing what. Experiment if you find a firm that fits the progressive profile you are looking for.

Some companies build in a life cycle to their outside counsel relationships and re-bid them every few years. Others are less formal about it. However you choose to manage the tenure of your outside counsel relationships, there should always be an understanding that you can "go elsewhere" for services. And sometimes you should. Pruning and adding is part of keeping the team healthy.

As was said in the beginning of this article, it's a commitment to excellence, give-and-take and continuous improvement on both sides—there's no going back.

Johnnie M. Jackson, Jr. is a partner in the law firm of Barton, Barton & Plotkin, LLP (Admitted only in CT). He brings 23 years of legal and business expertise as the former Vice President, General Counsel and Secretary of Olin Corporation (NYSE: OLN) to BB&P's Corporate Transactions Group.

Today Johnnie represents entrepreneurial and Fortune 1000 clients in corporate transactions, legal strategy and corporate governance, and offers insights on how to address the legal, business and regulatory challenges that define their fast-changing environments. He advises senior management and Boards of Directors on a wide array of timely legal and business issues, including best practices and compliance guidelines.

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Stress Reduction Techniques for Lawyers

By Allison B. Tomlinson

Ever since I started studying for the bar exam, I knew that the stress and strain of that undertaking had the potential to become overwhelming. From the time that I started my first internship at the firm as a 1L, I began getting inundated with “helpful advice” from colleagues about how intense the bar exam would be and to prepare myself mentally because it would be the hardest thing that I ever had to do.

No pressure, right?

Being the generally balanced person that I am, I decided that it might be good to develop an outlet for the stress *before* it started, and am I glad that I did about a year prior to the test. Two years post-bar exam, I’m still practicing the stress-relief technique that I learned then, and now I want to share it with you all.

Yoga.

Sounds clichéd and even a little eccentric, I know. Everyone does yoga nowadays. First, we all heard about feng shui, and we began rearranging our furniture and changing our paint colors. Then, it was yoga and meditation. We ran out to get yoga mats and blocks and DVDs. Next, Pilates took over, with everyone from Jennifer Aniston to your next door neighbor extolling its virtues. And now, there are so many different types of yoga and Pilates, it’s hard to keep it all straight.

Should I do it in a 100 degree room? Maybe.

Do I need fancy clothes and shoes? Do I need shoes at all? No and no.

Can I bring my dog? Yes. There are actually “doga” places in Manhattan.

Can we safely assume that the yoga craze has become big business? Absolutely.

There are magazines, lines of clothing, retreats costing from \$200 a weekend to well over \$2,000. You name it, and you can find it.

But once you get past the cliché and the commercialism, the techniques taught in yoga not only can help the stressed out inside counsel learn to de-stress, but it can also be a life changing experience.

My Journey

I began learning about the yoga techniques by reading a magazine dedicated to its practice. I picked up the magazine by chance one day at the Airport, when I didn’t feel like paying good money to read about Ben-Lo or

whoever the rag mags were discussing that week. I figured it might help me to relax on the plane, and I could leave it in the garbage on my way out. What I found was much more. The magazine taught me about breathing techniques, moves to do at my desk at work, organic foods and healthier ways to prepare my food, environmental responsibility, and reconnecting with nature. By the time that I got off the plane at my destination, I was a total convert.

Next, I wanted to learn the basic moves. I wasn’t comfortable taking a class—what if I was the worst, least flexible person there—plus, as a struggling law student, extracurricular activities weren’t in my budget. So, I started getting the free on-demand yoga classes through my cable company and doing them on Sundays.

For 20 minutes a week, I learned the basic moves: downward dog, cat pose, lotus, mountain. Each move was building off the next, and as I began to get more comfortable with them, I’d move on to more complicated postures. With each move, I learned that it wasn’t important whether I could touch my toes without bending my knees (which by the way, I couldn’t), but I was trying. I learned not to judge myself against the teacher on television. The movements were about me. And they taught me to be patient, to take time, and that it was okay not to be the best, at least not all of the time. I also learned to release tension, by breathing into my movements. For each move, I went slowly, inhaling and exhaling, until I finished. By the end of the 20 minutes, I felt great.

Eventually, I moved onto doing the moves multiple times a week, and practicing deep belly breathing techniques. Yoga taught me that when we’re under stress, sometimes we forget to breathe or we breathe shallowly, which intensifies the stressful feeling. If you practice the deep breathing techniques, everything slows down, including your heart rate and your brain.

Suddenly, I came to realize that I couldn’t focus on the Contracts exam, life after law school or the problems of the world when I was practicing. Instead, I had to focus on what I was doing at that moment.

Ah ha—so that’s what the magazine meant about living in the present and living in the moment.

Three years of practice later, I can definitely see how yoga has changed my life. When my mind is thinking about my next day of work in the evening on the train, I breathe in and out, and enjoy the scenery. When I worry about the future, I remember to live in the present and to fully inhabit the moment that I’m in. And when life throws me a curve ball, I always sit in lotus position

(which is a grown-up pretzel style) or walk by the water, and bring myself back to center.

What Does All of This Mean for a Practicing Lawyer?

We all have stressful jobs; that's a given. We wouldn't have gotten through law school if we weren't competitive, type-A personalities. We are hungry by nature. We don't rest on our laurels. We work hard and play hard. Our cell phones ring at dinner with friends. We work long hours. We shake hands with potential "contacts" at the dog run. We are always "on," even when we're not.

Why do we do this? In my case, it's because I love it. After the first few years of law school and practice, I'm finally getting to the point in my career where the work is interesting and I can apply what I've learned. I can't think of much else that I'd rather be doing at the moment . . . not even resting on a beach seems appealing if there isn't a set time that I'll be back to New York. And I would assume that most of you reading this are like me in that respect.

That's why relaxation and stress reduction techniques are a top priority for lawyers. By learning to manage our stress, not only are we more productive and efficient, but we will be healthier, happier people. With the recent focus on health and fitness, this topic is especially important now.

Maybe yoga isn't for everyone.

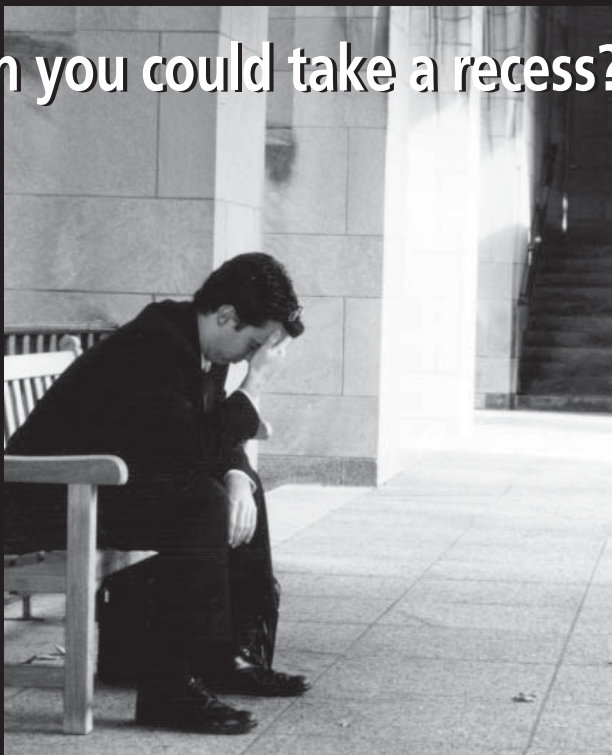
Maybe you prefer to tend to your garden, hit a punching bag, run a marathon or spend time with your loved ones.

But, if you haven't given it a shot, I would recommend trying it. It may just change your life and bring a little clarity to you.

Namaste!

Allison B. Tomlinson, Esq. is the Young Lawyer's Section liaison to the Corporate Counsel Committee, and works in the Legal and Government Contracts Dept. at a global engineering company headquartered in Manhattan. She is also a member of the Go Red for Women movement of the American Heart Association.

Wish you could take a recess?



If you are doubting your decision to join the legal profession, the New York State Bar Association's Lawyer Assistance Program can help. We understand the competition, constant stress, and high expectations you face as a lawyer. Dealing with these demands and other issues can be overwhelming, which can lead to substance abuse and depression. NYSBA's Lawyer Assistance Program offers free and confidential support because sometimes the most difficult trials happen outside the court.

All LAP services are confidential and protected under Section 499 of the Judiciary Law.



NEW YORK STATE BAR ASSOCIATION
Lawyer Assistance Program
1.800.255.0569 lap@nysba.org

Kenneth G. Diversity Internship

August 15



Barry Cozier and Sharon Bowen



**Hon. George Bundy Smith, Hon. Carmen Ciparick,
Pritesh Shah, Ken Standard**



**Pritesh Shah, Ken Standard, Aselle Kurmanova,
Felicia Leo**



**Pritesh Shah, Ken Standard, Aselle Kurmanova,
Mark Alcott, Felicia Leo**



Michael Mosley and Felicia Leo

Over the past year under the leadership of the Internship Committee Chair, Internship Committee members Mitch Borger, Fawn H. H. Chair, Barbara Levi have worked with law school Career Offices and corporate counsel. Aselle Kurmanova and Felicia Leo were selected to work at Goldman Sachs. School's Pritesh Shah interned at the McGraw-Hill Law Department. Both programs, and the superb summer experiences they provided to the interns, Telsey, Kelly Koyama and Pierre Davis, and to Linda Martino, Thomas Ca-

In addition to the interns and their sponsors, the reception was attended by George Bundy Smith and Carmen Ciparick of the New York State Court of Appeals. Other special guests included Barry Cozier, Dean Si- of Flemming Zulack Williamson Zauderer and Chair, NYSBA International, the New York County Lawyers Association; Sharon Bowen of Latham & Watkins; Alternative Dispute Resolution; Tracey Salmon-Smith, UBS; Katherine Friedman, Sachs and Chris Kemp.

Based upon the feedback received from the interns and the host committee, the Internship Program was a rousing success. This fall the Internship Committee will launch a new program. If you have an interest in working on the Committee, or suggesting changes, call (201) 894-2766.



Ken Standard and Mark Alcott



**Aselle Kurmanova
Felicia Leo, M**

from the

. Standard Program Reception

15, 2006

the Counsel Section's Diversity Internship
the Manhattan offices of BMI in honor
and under the auspices of its Kenneth
program is named in honor of the former
ment to initiatives aimed at increasing
internship program focuses on identifying
opportunities for law students from a diverse

hip of Steve Mosenson, Executive
Horvath, Kelly Li, Gary Roth, David Rothenberg, Allison Tomlinson and
porate sponsors to launch the program. Hofstra Law School students
ths' in house Legal and Compliance Departments, and Brooklyn Law
companies are to be commended for their generous support of the
s, with special thanks to McGraw-Hill mentors Susan Winter, Suzanne
Casulli and Michael Mosley of Goldman Sachs.

led by a number of special guests, including Ken Standard, Judges
of Appeals, and Mark Alcott, President of the NYSBA, each of whom
Horvath and Carlos Ramirez, all of Epstein, Becker & Green; John Zulack
al Law and Practice Section; Catherine Christian, President-Elect of
Watkins; Elayne Greenberg, former chair of the NYSBA Committee on
Frink-Hamlett, Frink-Hamlett Legal Solutions; Mariano Agmi, Goldman

panies, the inaugural year of the Kenneth G. Standard Diversity
Committee will begin work on the selection of partners for the Summer 2007
ating a law school or host company partner, please contact Barbara Levi at



Adriano Schiavo and Gary Roth



Thomas Casulli, Aselle Kurmanova, Barbara Levi



David Rothenberg and Hon. George Bundy Smith



Mitchell Borger, Gary Roth, Barbara Levi, Ken Standard, Mark Alcott, Fawn Horvath, Allison Tomlinson, David Rothenberg



**Adriano Schiavo
Entertainer**



**Barbara Levi,
Mitchell Borger**



Barbara Levi, Pritesh Shah, Felicia Leo, Aselle Kurmanova, Mitchell Borger, Ken Standard, David Rothenberg, Mark Alcott, Gary Roth, Fawn Horvath, Allison Tomlinson

Photos by Fernando León

Sexual Harassment Cases in the New York State Courts—2006

By Howard S. Shafer

Recent years have seen more sexual harassment cases filed in New York State Courts, and 2006 seems to continue the trend. The first half of 2006 has seen seven reported decisions involving sexual harassment. The First Department has seen the most action, with three decisions in the Appellate Division and one in the New York County Supreme Court. The Fourth Department ranks second, with two decisions, followed by the Second Department with one. Of the four decisions on the merits, two were in favor of the plaintiffs and two were in favor of the defendants. The remainder of the decisions were based upon procedural motions or statute of limitation defenses.

***Miccio v. Fits System*, January 17, 2006**

In *Miccio v. Fits System*, 25 A.D.3d 439, 810 N.Y.S.2d 13 (1st Dep't, 2006), the employee sought damages for sexual harassment, disparate compensation due to employee's sex and marital status and wrongful discharge. Defendant sought dismissal of the sexual harassment claims based upon plaintiff's failure to file a complaint with the New York State Division of Human Rights within one year. The court ruled that the failure to file within one year did not bar the claim. However, it did find that the failure to file the action within three years after the acts which formed the basis of the complaint did bar the claim. The court did allow the disparate compensation claim to proceed.

***Kowalewski v. New York State Division of Human Rights*, February 3, 2006**

In *Kowalewski v. New York State Division of Human Rights*, 26 A.D.3d 888, 809 N.Y.S.2d (4th Dep't, 2006), the employee sought damages for sexual harassment based upon being touched sexually and being subject to sexual comments daily. She filed a claim with the New York State Division of Human Rights and was awarded \$35,000 for mental anguish and humiliation.

The defendant sought review and annulment of the Commissioner's order and the respondent sought an order of enforcement. The Petitioner argued substantial prejudice based upon the 12 year delay between the complaint and the hearing. The Appellate Division, Fourth Department, denied the petition and ordered the petitioner to pay the prior award plus interest.

***Curto v. Zittel's Dairy Farm*, February 3, 2006**

In *Curto v. Zittel's Dairy Farm*, 26 A.D.3d 808, 808 N.Y.S.2d 886 (4th Dep't, 2006), an employee sought damages for, among other things, sexual harassment, that occurred during her employment with the defendant. The plaintiff sought partial summary judgment. In denying the motion, the lower court found that the plaintiff had not met her initial burden of showing in a dismissible form that: the defendant was aware of the harassment by the co-defendant co-worker; or that it acquiesced in or condoned the conduct. The denial of the motion was affirmed by the Appellate Division.

***Juanita Ghee v. Washington Mutual*, March 20, 2006**

In *Juanita Ghee v. Washington Mutual*, 11 Misc. 3d 1066(A), 2006 WL 7006472 (Sup. Ct., Kings Cty., 2006), the plaintiff filed a complaint alleging personal injuries as a result of sexual harassment, employment discrimination and assault. The defendant filed a motion to dismiss based upon lack of personal jurisdiction. In a lengthy decision the court denied the motion and permitted the suit to proceed in New York.

***Arnovitz v. Price Water House*, March 30, 2006**

In *Arnovitz v. Price Water House*, 27 A.D.3d 393, 812 N.Y.S.2d 504 (1st Dep't 2006), a Canadian resident sued a Canadian company alleging quid pro quo and hostile work environment sexual harassment. The plaintiff claimed that her supervisor began pressuring her for sexual relations as soon as he became her supervisor. The court determined that the plaintiff's statement in her pleadings of when the harassment began constituted a judicial admission.

The court applied New York's borrowing statute in determining whether the action was timely. In an action accruing outside New York brought by a non-resident, New York's borrowing statute requires that the action be timely under the statute of limitations of both jurisdictions. Under a one-year Canadian statute of limitations, the action was time barred. Accordingly, the dismissal was affirmed.

***Mitchell v. Tam Equities*, March 28, 2006**

In *Mitchell v. Tam Equities*, 27 A.D.3d 703, 812 N.Y.S.2d 611 (2d Dep't, 2006), a black female employee brought a suit against her employer and numerous co-workers alleging, among other things, violation of Executive Law § 296(1)(a) by committing racial and sexual harassment, creating a hostile work environment and thus discriminating against her based upon her race and sex. Retaliation based upon the complaints was also alleged. The lower court granted defendants' motion to dismiss based upon failure to state a cause of action.

The Appellate Division found that the plaintiff alleged that two of her co-workers "routinely, repeatedly, and over a significant period of time, directed sexually and racially offensive language at her." She alleged that she repeatedly told them to stop and complained to her supervisors but the behavior continued and her complaints were ignored. The plaintiff also alleged that her employment became intolerable and she felt the need to leave her employment with Homebridge. The Appellate Division determined that the plaintiff sufficiently alleged that the conduct "pervaded the workplace" and that the conduct occurred on "more than a few isolated occasions." In so finding the Appellate Division found that the lower court erred in dismissing the cause of action against her employer pursuant to Executive Law § 296(1)(a) based upon sex and race harassment that created a hostile work environment.

For similar reasons, as well as the alleged response to her complaints and the fact that the plaintiff was engaged in a protected activity, the Appellate Division reversed the dismissal of her claim pursuant to Executive Law § 296(7) based upon unlawful retaliation. The court also determined that although her co-workers were not "employers" within the meaning of Executive Law § 292(5) and cannot be held personally liable for a violation of Executive Law § 296(1)(a), the plaintiff did allege sufficient conduct to subject them to liability based upon aiding and abetting an employer that discriminates in violation of Executive Law § 296(1)(a). The Appellate Division also held that lower court erred in dismissing the constructive discharge cause of action.

The plaintiff also sought to hold the employer's parent and sister companies liable for its actions. The

Appellate Division found that the plaintiff had failed to allege sufficient facts to hold them liable and affirmed the dismissal.

***Anderson v. Shimella "Star" Abodeen*, May 18, 2006**

In *Anderson v. Shimella "Star" Abodeen*, 29 A.D.3d 431, 816 N.Y.S.2d 415 (1st Dep't, 2006), the plaintiff alleged, among other things, sexual harassment based upon hostile work environment and intentional infliction of emotional distress, as a result of the display by his supervisor of nude photographs of the plaintiff to co-workers. The co-worker maintained that the showing of the photographs was necessary in order to determine whether it was the plaintiff that had been using company facilities to contact a woman in whom he was interested. The defendants sought summary judgment dismissing the claims. The lower court granted the motion and dismissed the claims and the plaintiff appealed.

The Appellate Division found that the conduct was not sufficiently outrageous to support a claim for intentional infliction of emotional distress. The court, while finding the conduct alleged to be offensive, determined that there was no evidence that the conduct was motivated by animus against men such as might support a sexual harassment claim.

Conclusion

The Federal District Courts will not be supplanted by the New York State Courts as the venue of choice for sexual harassment claims any time soon. However, plaintiffs have shown in recent years that they are a viable alternative and 2006 appears to be no different.

Howard S. Shafer, Esq. is a Partner in the firm of Shafer Glazer, LLP. The firm concentrates its practice in representing businesses in negligence, employment, insurance coverage and related matters. Howard can be reached through the firm's web site at www.shafer-glazer.com.

Joshua Strobel, a Summer Intern, assisted in the preparation of this article.

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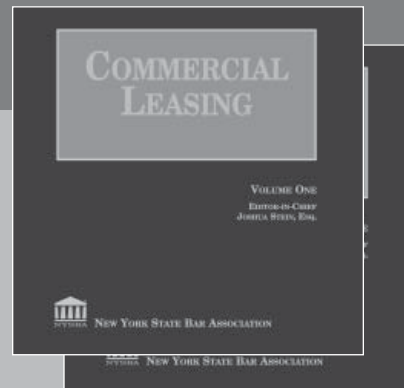
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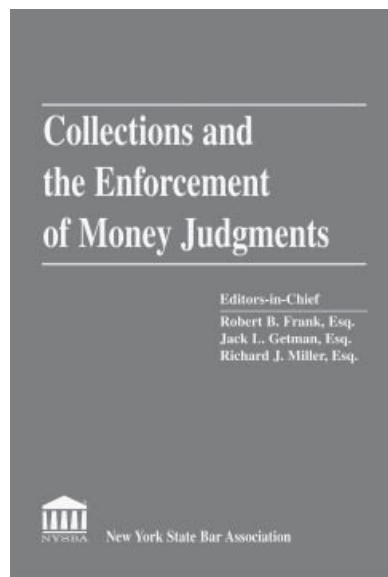
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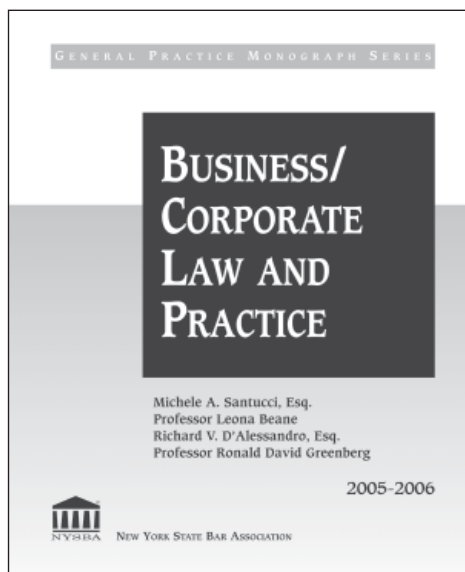
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