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Perspective

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Techniques in Assessing When and Where to File

By Mohammad A. Syed

As the title suggests, this article is devoted to two main themes relating to civil litigation. The first theme is "when" to file. The second theme is "where" to file. The "when" consists primarily of evaluating the merits of a case and determining the applicable statute of limitations. The "where" part is dedicated to examining what courts are available and the factors that impact the decision to file in a particular court.

The article is divided into four parts. The first three parts deal with when to file, whereas the last part deals with where to file. Part one deals with general issues, such as conflicts checks, frivolous litigation, competency, alternate dispute resolution and cost issues. Part two focuses on statutes of limitations, repose and the discovery rule. Part three discusses the method involved in evaluating cases. In order to strike a balance between all the different types of civil litigation the newly admitted attorney is likely to encounter, in this part I have tried to cover medical malpractice, product liability, as well as commercial and contract disputes. Finally, part four compares the state and federal court systems and describes their various procedural requirements.

PART 1. General Issues

1. Conflicts Checks

The attorney should make an initial determination whether an actual or potential conflict is involved with respect to other matters the attorney or the attorney's law firm has. Conflicts can arise in multiple different situations.[1] The attorney-client relationship may attach at different points along a spectrum, for different purposes. The confidentiality relationship may arise prior to the right to earn a fee. As soon as you receive confidential information, you or others practicing with you may be barred from representing a separate interest, even a long-established client, if there is a conflict or potential conflict. One way to avoid this predicament is to tell the prospective client you want to protect that prospective client's interests immediately by being certain you do not have any conflicting interest. Before the prospective client tells you any details about the incident, about injuries, or about personal matters, you want to obtain some preliminary information to check to be certain there are no conflicts. Those would include:

i) The prospective client's full name, any former names, Social Security Number, and address, to check against your conflict records.

ii) The name and address of the person or persons against whom the claim would be asserted.

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Inside

From the Editor's Desk . . .

Welcome to the spring 2008 issue of *Perspective*. Before I get to the authors featured in this edition, I'd like to take a moment to congratulate David A. Kochman, the 2008 recipient of the Outstanding Young Lawyers award. This is an exciting time to be a member of the Young Lawyers Section, and I encourage all of you to attend the Section's 70th Anniversary Celebration and CLE program in New York City on June 6–7, 2008. The Section will also hold its Annual Fall Program in Albany on October 24–25, 2008. Save these dates and visit our website for more information.

This issue is full of substantive and practical legal articles from our membership and well-known attorneys from around the country. Mohammad A. Syed provides a piece on when and where to file civil cases; Bennett Liebman discusses drug testing in horse racing; Joseph M. Hanna gives an overview of the battle between the National Football League and cable television; Amy Lavine provides an article on Community Benefits Agreements; Alan M. Koral discusses the basics of employment law; Elliott Wilcox gives a primer on when to object; and Sherry Levin Wallach, our Chair-Elect, discusses how to navigate the courthouse. I'd like to thank all of the authors for contributing to this issue of *Perspective*, as well as the newsletter department at the New York State Bar Association for assisting me with this issue.

Perspective is published in both the spring and fall. If you would like to submit an article please contact me at mcassidy@nysbar.com. The deadline for submissions for the next issue is August 15, 2008. Submissions should be sent in electronic format to my attention at the above email address. I look forward to hearing from you.

Michael B. Cassidy
Editor-in-Chief

Non-Analytical Positives for Drugs in Horse Racing

By Bennett Liebman

In horse racing, drug positives are the result of a laboratory detecting that a prohibited drug was found in a blood or urine sample collected from a horse either before or immediately after a race.

In very few cases do you find a racing commission pursuing a trainer, a groom or a veterinarian based on circumstantial evidence which does not include a positive finding of a drug. Occasionally, an investigator may come upon a horse receiving a milkshake or a horse receiving an injection, and the racing commission may elect to pursue the matter.[1]

Yet in the rest of the sports drug-testing world, non-analytical positives are increasingly being accepted as valid. The World Anti-Doping Code now provides for a violation for an "attempted use of a prohibited substance or prohibited method."[2] Where there is a non-analytical positive, the doping can be established "through admissions, third-party testimony, or other evidence."[3] Unlike the analytical positives, the burden of persuasion is always on the testing agency to prove intent to use the illegal substance by the athlete. The strict liability standard is not applied to non-analytical positives.[4]

This was clearly used in the BALCO cases. "These investigations were based not on urinalysis or other physical techniques of doping control but on non-analytical positive evidence of e-mail communications, calendars, drug schedules revealing evidence of the use by particular athletes of performance-enhancing substances, personal checks from athletes to BALCO, and other extrinsic paper evidence."[5]

In the BALCO cases, information was provided to the United States Anti-Doping Agency [USADA] from the United States Senate Commerce Committee.[6] USADA conducted its own investigations, relying on "e-mail communications, calendars, drug schedules revealing evidence of the use by particular athletes of performance-enhancing substances, personal checks from athletes to BALCO, and other extrinsic paper evidence."[7]

The top sprinter Kelli White, based on the BALCO circumstantial evidence and not a positive drug test, agreed to a two-year suspension in 2004.[8] Using the BALCO evidence, before the 2004 Olympic Games, five other athletes were suspended from competition by the USADA.[9] For example, the sprinter Tim Montgomery received a two-year suspension from the Court for Arbitration of Sport for using BALCO-provided performance enhancing drugs.[10] The panel upheld the use of the non-analytical positives. While the procedure was not typical of drug positives, the procedure was "not wholly novel."[11] The panel said in this case—as it said in the case of sprinter Michelle Collins[12]—"The straightforward application of legal principles to essentially undisputed facts leads to a clear resolution of this matter."[13]

In finding Montgomery guilty, the panel noted that it had probably not seen the last of the non-analytic positive cases.[14] It concluded by quoting favorably from the Court of Arbitration for Sport's decision in the Comitato Olympico Nazionalize Italiano case:

> In any event, the undeniable circumstance that the conviction for doping offences is more difficult when the evidence is other than positive testing must not prevent the sports authorities from prosecuting such offences, as already remarked, with the outmost earnestness and eagerness, using any available method of investigation.[15]

These non-analytical BALCO positives are likely to be the wave of the future in prosecuting drug cases in athletes:

> These cases were revolutionary because of both the expansion of the role of anti-doping agencies into investigative areas and also for using all evidence available to determine use of a prohibited substance in the absence of a traditional positive test. The significance of the BALCO cases is in their potential precedent. In these cases, all facts and circumstances were considered even in the absence of a positive test. These cases recognized the fact that a positive test does not always tell the whole story. If this is the trend in doping, it should lead to more facts and circumstances considered even when there is a traditional analytical positive test.[16]

In short, non-analytical positives have now become standard practice in human athletic drug prevention efforts and are considered the wave of the future. Yet in horse racing, these non-analytical positives are considered almost as an afterthought.

This situation may come up fairly quickly in New Jersey. The

New Jersey Racing Commission had suspended top harness driver Eric Ledford and his father, trainer Seldon Ledford for 10½ years after they (and two grooms and a veterinarian) had been arrested for race-fixing charges that included allegations of blood-doping of horses and possession of Aranesp.[17] There were no positive drug tests. Recently, the Ledfords pleaded guilty to possession of the anabolic steroid Equipoise. They were sentenced to one year's probation, and they were not convicted of any race fixing charges. Eric Ledford's attorney stated, "Eric was not charged with having it or even touching it, only with knowledge of it being present and not reporting the possession."[18]

Ledford's attorney also stated, "We're very close to finalizing a deal which hopefully will have Eric Ledford back racing in the near future."[19] This means the matter is returning to the New Jersey Racing Commission for its determination. If the Racing Commission applied the non-analytical positive treatment, it could use the possession of the Aranesp and the plea to the Equipoise possession as evidence of non-analytical positives.[20] Yet, it may be that without a formal positive and without a major criminal conviction, the Racing Commission could significantly reduce its penalty on Eric Ledford.

The point is that racing commissions, like New Jersey's, need a specific policy in place for non-analytical positives. They could use the results of raids, records of purchases, admissions, e-mails, investigations, testimony from others, etc., to establish positives even in the absence of a positive test. In all likelihood, non-analytical positives will establish far more significant wrongdoing than the normal drug-testing incident where the trainer or groom administered the wrong medication to the wrong horse on the wrong day. The bad guys are invariably ahead of the drug regulators, and by utilizing non-analytical positives, we might actually catch the evildoers and not just the schmoes.

The process of establishing procedures for non-analytical positives should not involve reinventing the wheel. Just apply the World Anti-Doping Code to horse racing. There would be no presumptions of trainer responsibility. The racing commission would have to prove the positive by a fair preponderance of the evidence.[21] It could bring in all manner of circumstantial evidence to establish the positives, and it could be applied not merely to trainers but to every licensee involved with caring for the horse.

If there is anything that the Association of Racing Commissioners and the Racing Medication and Testing Consortium should be working together on, it is a policy for authorizing racing commissioners to pursue non-analytical positives.

Endnotes

1. See *McGuire v. Hoblock*, 2006 N.Y. Slip Op. 454 (1st Dep't 2006) upholding a 180-day suspension of a veterinarian who was observed giving a milkshake to a horse. *Cf. Galvin v. Hoblock*, 270 A.D.2d 147 (1st Dep't 2000) where an effort by the staff of the Racing and Wagering Board to suspend a veterinarian's license for tubing a horse was unsuccessful in the absence of a positive drug test. The veterinarian was suspended for 60 days for failing to file his medical treatment records. The facts of the *Galvin* matter are discussed in greater detail at *Galvin v. New York Racing Ass'n*, 70 F. Supp. 2d 163 (E.D.N.Y. 1998).
2. WADA Rule § 2.2.
3. *Id*. Comment at § 2.2.1.
4. *Id*. Comment at § 2.3.
5. James A.R. Nafziger "Symposium: Alternative Dispute Resolution in Sports: Circumstantial Evidence of Doping: BALCO and Beyond," 16 *Marq. Sports L. Rev*. 45, 52 (2005).
6. *Id*.
7. *Id*.
8. Jere Longman and Liz Robbins, "Olympics; Sprinter Barred From Olympics As U.S. Doping Scandal Grows," *New York Times,* May 20, 2004.
9. *See* Nafziger, *supra* note 5, at 53.
10. *See* http://www.tas-cas.org/en/pdf/Montgomery.pdf. *See also* Ryan Connolly, "Balancing the Justices in Anti-Doping Law," 5 *Va. Sports & Ent. L.J.* 161, 200 (2006).
11. *Id*.
12. *U.S. Anti-Doping Agency v. Collins*, Am. Arb. Ass'n, Case No. 30 190 00658 04 (2004) (Rivkin, Arb.), cited at Paul C. McCaffrey, "Playing Fair: Why the United States Anti-Doping Agency's Performance-Enhanced Adjudications Should Be Treated as State Action," 22 *Wash. U. J.L. & Pol'y* 645, 654 note 76 (2006); Cathy Harasta. "Former Lakeview Sprinter Accepts Four-Year Doping Ban; Collins Drops Appeal," *Dallas Morning News*, May 20, 2005.
13. *See* note 10, *supra*. See also http://www.tas-cas.org/en/pdf/Gaines.pdf where the same language was employed in the case of sprinter Chryste Gaines.
14. *Id*.
15. *Id*.
16. Jessica Foschi, "Note: A Constant Battle: The Evolving Challenges in the International Fight Against Doping in Sport," 16 *Duke J. Comp. & Int'l L.* 457, 482 (2006).
17. Aranesp is a special synthetic form of EPO that is produced in Chinese hamster ovary cells using recombinant DNA technology. *See* http://www.chemsoc.org/chembytes/ezine/2002/salvage_jul02.htm
18. Bob Jordan, "Guilty Pleas in Racing Scandal," *Asbury Park Press*, January 25, 2007.
19. *Id*.
20. Also to be considered in a non-analytical positive case would be the significant improvement in performance once horses were trained by the Ledfords (*See* Bob Jordan, "Police: Horse trainer cheated," *Asbury Park Press,* April 4, 2006) and the fact that Selden Ledford was not normally present in New Jersey. (Dave Briggs, "Woodbine Entertainment Group Looking at Enhancing Blood Testing," *Guelph Mercury*, April 20, 2006).
21. The World Anti-Doping Code employs a somewhat more stringent burden of persuasion between the fair preponderance standard and the reasonable doubt standard of criminal law.

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The NFL v. Cable Television: Which Heavyweight Will Be Left Standing?

By Joseph M. Hanna

As the whole world now knows, the New York Giants upset the New England Patriots to win Super Bowl XLII, preventing the Patriots from becoming the first team in more than 35 years to go through an entire season, including playoffs, with an unblemished record.

The game, of course, was a rematch of the December 29, 2007 regular season finale, in which the Patriots defeated the Giants to become the first National Football League ("NFL") team since the 1972 Miami Dolphins to finish the season undefeated. Approximately 34.5 million viewers watched this historic game. According to the NFL and Nielsen Media Research, the viewing audience was the largest audience for an NFL non-playoff game in more than 12 years. However, leading up to the game it appeared that most of those 34.5 million fans would miss the Patriots' pursuit of a perfect season because of a standoff between NFL Enterprises LLC ("NFL") and several major cable companies. The story behind the story was the NFL's announcement on Wednesday, December 27, that it was going to simulcast the Patriots game on the NFL Network, CBS and NBC.

The Patriots-Giants game was the first three-network simulcast in NFL history and the first simulcast of any kind of an NFL game since the first Super Bowl in 1967, when CBS and NBC televised the meeting of the champions of the newly merged National Football League and American Football League.

"We have taken this extraordinary step because it is in the best interest of our fans," NFL Commissioner Roger Goodell said. "What we have seen for the past year is a very strong consumer demand for the NFL Network. We appreciate

CBS and NBC delivering the NFL Network telecast on Saturday night to the broad audience that deserves to see this potentially historic game. Our commitment to the NFL Network is stronger than ever."[1]

Why did the NFL make this concession? Because earlier this year, New York State Supreme Court Justice Fried ruled on a matter between the NFL and Comcast Cable Communications, LLC ("Comcast") (*NFL Enterprises LLC v. Comcast Cable Communications, LLC*, 603469/06, Supreme Court of the State of New York, County of New York). The action involved the right of Comcast to broadcast National Football League ("League") games on cable television. The League owns the right to broadcast live, regular season professional football games on television. The League licenses these rights to the NFL, a wholly owned subsidiary of the League. NFL is the owner of the NFL Network, while Comcast is the nation's largest cable television operator.

In 2004, the NFL Network was relatively new, and its programming consisted mostly of sports commentary and features. NFL, in search of a cable system, approached Comcast with an offer in 2004. Both parties agreed to the terms of the agreement, which dealt with both the distribution of the NFL Network by Comcast, and Comcast's potential rights to negotiate to acquire telecast rights to live football games.

According to Comcast, when negotiations between the two parties began, the NFL Network had "limited commercial appeal." However, the opportunity to telecast packages of live NFL games was extremely valuable, as only the networks (ABC, CBS and FOX at that time), ESPN and DirecTV owned such rights. Comcast's belief was that the League would allow Comcast into the "NFL Club" in exchange for Comcast's help in "launching" the NFL Network.

Comcast and the NFL commenced negotiations to permit Comcast's cable channel, Outdoor Life ("OLN"), to telecast nationally a package of live, regular season NFL games. The deal between the two sides never materialized. In fact, in January 2006, NFL licensed the games package to its own NFL Network.

In June 2006, the NFL sent Comcast an offer allowing Comcast the opportunity to distribute the NFL Network. Comcast accepted the NFL's offer in July 2006. In September 2006 Comcast informed the NFL that it had decided it would be moving the NFL Network from its basic digital tier to a premium sports tier which its customers would be required to pay extra to receive. Initially, the NFL did not express any discontent; however, it refused to give Comcast the technical support it needed in order to allow it to place the NFL Network on the sports tier. Eventually, the NFL made it clear that it did not intend to allow Comcast to distribute the NFL Network on a sports tier and brought suit against Comcast.

The NFL argued that when Comcast agreed to carry the NFL Network, Comcast was getting the national games it wanted and was required to put the network on the basic tier. Comcast countered by

arguing that its acceptance of the NFL's June 2006 offer did not affect its rights to offer the NFL Network on a sports tier. The court agreed, holding that there was no ambiguity in the various agreements between the two parties. The court granted Comcast's motion for summary judgment against the NFL and held that Comcast was free to distribute the NFL Network on a sports tier.

So where does this leave us—the average NFL football fan who does not have the Comcast Sports Tier Package (anywhere from $4.95 to $7.95 per month) or DirecTV? Fans of the nation's most popular professional sport have become pawns in a high-stakes dispute between the NFL and cable operators.

Earlier in the 2007 NFL season, the NFL took its first marketing gamble by not moving the Dallas Cowboys-Green Bay Packers marquee match-up to NBC or FOX. Because of the NFL Network's limited reach, the League is taking an even bigger gamble in not moving the Patriots-Giants game to a network. The NFL is hoping that its on-field product is so popular and in such high demand that football fans will see that cable companies are the bad guys and will dump them in favor of the 245 cable, satellite, and telecommunications firms that have agreements with the NFL Network.

According to Nielson Media Research, the NFL Network is available in just 43.5 million (38.6 percent) of the estimated 112.8 million U.S. households with televisions. The NFL's broadcast partners (NBC, CBS and FOX) reach 99 percent of those homes. ESPN, which broadcasts Monday Night Football, reaches 85.5 percent of homes.

NFL Commissioner Roger Goodell has said on several occasions that the League is determined to use games to build its Network. Mr. Goodell has also blamed the current controversy on a double-standard by cable operators. The Commissioner has stated that Comcast has gone to extremes to distribute the Versus and Golf Channel networks, but has forced the NFL Network to a "sports tier" of programming.

Coming off of its initial victory over the NFL to secure its broadcast rights for a sports tier, Comcast filed a breach of contract suit against the NFL in New York State Supreme Court on December 13, 2007 (*Comcast Cable Communications, LLC v. NFL Enterprises LLC*, 604092/07, Supreme Court of the State of New York, County of New York). Comcast alleges that the League has been encouraging its customers to drop their Comcast cable subscriptions, essentially "destroying" the cable operator's right to put the channel on the sports tier. For example, Dallas Cowboys owner Jerry Jones, the outspoken chairman of the league's NFL Network committee, has urged customers of Comcast and other large cable providers who do not carry the NFL Network on a basic tier to switch to a satellite provider or cable service that does offer the network. The NFL Network's IWANTNFL Network.com website asks NFL fans to "MAKE THE SWITCH." On its website, a fan can enter his or her zip code and "Switch to a TV provider that will bring you the NFL Network, not hold you hostage."

On November 19, 2007, Comcast sent the League a "cease and desist" letter asking it to stop any and all public communications encouraging Comcast subscribers to cancel their cable subscriptions. The letter contends that Jerry Jones' actions, along with the website, violate the contract between the NFL and Comcast.

In the suit filed in New York State Supreme Court, Comcast alleges that the NFL breached their agreement "through what has been described as a multimillion dollar marketing campaign to drive Comcast's customers to its competitors and, thereby, to wrongfully coerce Comcast into abandoning its bargained for tiering right."[2]

Both cases are a part of the larger fight between the League and cable companies over telecasting the network. Cable companies say that football fans who want the NFL Network should pay extra for it. The NFL is pushing its NFL Network, for obvious reasons, including, but not limited to, an increase in advertising and fee revenue from the operation.

Comcast has fought the NFL, arguing that the seventy cents ($.70) per month per subscriber the NFL was demanding for the right to broadcast the NFL Network was too much to collect from millions of cable homes that are not diehard football fans. Although the NFL allowed the epic game between the Patriots-Giants to be simulcast on CBS and NBC, the epic battle between the all-powerful NFL and cable giant Comcast wages on.

Endnotes

1. Mark Maske, "NFL Network Will Allow Simulcast of Patriots-Giants," *Washington Post*, Thursday, December 27, 2007, E06.
2. John Eggerton, "Comcast Sues NFL Over Campaign," *Broadcasting and Cable*, December 17, 2007.

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Community Benefits Agreements: An Emerging Development Tool

By Amy Lavine

A community benefits agreement, or CBA, is a private contract between a developer and a community coalition that sets forth the benefits the community will receive from the development. Common benefits include living wages, local hiring and training programs, affordable housing, environmental remediation and funds for community programs. In exchange for these benefits, communities pledge to support projects; this support goes far to ensure that the development approval process will occur expeditiously, and it may be especially useful to developers seeking government subsidies, zoning variances or permits.[1] The CBA model provides enormous flexibility for coalitions to identify and request the benefits most needed for residents and business owners, and developers may value the CBA as a way to improve their public relations to ensure that they maintain strong community support. The CBA negotiating process is also flexible; while CBAs are generally negotiated directly between community coalitions and developers, government officials may sometimes be involved.

CBAs originated in California in the late 1990s, and they have since spread to communities around the country.[2] Proponents of the movement have supported CBAs as a development tool to advance smart growth, social justice and accountable development principles. CBAs, in this regard, aim to ensure that development is equitable and benefits *all* members of the community, eventually contributing to stronger local economies, livable neighborhoods and increased public participation in the planning process. CBAs, however, are not always ideal vehicles to promote social justice issues. Practical problems—from organizing large and diverse coalitions of community groups to negotiating with legally and politically sophisticated developers—will make CBAs unwieldy tools in many cases. Moreover, CBAs have faced stiff criticism in New York, and they have yet to stand the test of judicial review.

This article describes three of the major New York CBAs to have been negotiated to date, and includes a short discussion about the practical and legal problems related to CBAs.

I. New York CBAs

Atlantic Yards

The first New York CBA was completed in 2005 in relation to the multi-billion dollar Atlantic Yards arena project, future home to the New Jersey Nets. In addition to the basketball arena, the project will include an attached residential and office complex to be made up of several high-rise buildings, a development that will radically alter Brooklyn's skyline.[3] Since its inception, the project has faced broad opposition from Brooklyn residents, primarily because the project is to involve the use eminent domain.[4]

The Atlantic Yards CBA was negotiated by eight community groups[5] and includes affordable housing, living wage, local and minority hiring provisions, a commitment to build a day care center and the perk of free basketball tickets for neighborhood residents.[6]

Although there has been some praise for the benefits contained in the agreement, the process by which the Atlantic Yards CBA was negotiated has been heavily criticized. Critics have pointed out that several of the coalition's member groups were created expressly for the purpose of negotiating the agreement.[7] And numerous other community groups in fact expressed opposition to the development and to the CBA, claiming that the developer never had any intention of bargaining in good faith.[8] One of the coalition's member groups also reported receiving $5 million from the developer, creating a conflict of interest that has clearly tarnished the CBA's integrity.[9]

Yankee Stadium

The Yankee Stadium CBA, completed in 2006, has also faced stiff criticism. To begin with, the agreement was made between the Yankees, the Bronx Borough President and the Bronx Delegation of the New York City Council; it was not negotiated or signed by *any* community groups. One of the agreement's most controversial provisions is the trust fund that it created to be administered by "a person of prominence" through distributions to local nonprofit groups.[10] Because the fund's trustee will be appointed by the same elected officials responsible for the CBA, it has been referred to as a "slush fund" by critics who fear that funding will be not be distributed impartially. [11] The Yankee Stadium CBA has also been criticized due to the fact that the development will eliminate more than twenty acres of parks, leaving the city to pay for their replacement in addition to the subsidies already being given to the project.[12]

These concerns have proven to be warranted. As of early 2008, nearly eighteen months after construction began, none of the money set aside by the Yankees has been distrib-

uted. Apparently, the funding has been held up because the advisory panel responsible for administering the fund has yet to choose a chairman (the "person of prominence"), register as a charity or select any grant recipients. The Yankees have indicated that their obligations were fulfilled by depositing the money into escrow and that the club is not responsible for the delay. Moreover, since no community groups signed the agreement, none exist that would have standing to bring an enforcement action. Some local officials are frustrated with the situation and have "complained that they are in the dark" about the CBA.[13] But the Yankee Stadium CBA, despite its weaknesses, should not be totally discounted yet. The Yankees have promised that the community will receive all of the money pledged to it, and it may just boil down for the moment to a waiting game.

Columbia Expansion

Columbia University is planning to put up sixteen to eighteen new buildings in West Harlem, a project that is estimated to cost about $6 billion and is likely to span twenty years. The project is also expected to create about 6,000 jobs, and "transform a shabby enclave of auto-repair shops, warehouses and small manufacturing plants into a pedestrian-friendly environment with more open space, restaurants and shops." Residents and business owners in West Harlem, however, want to ensure that they benefit from the university's expansion and are not pushed out of the neighborhood as gentrification occurs.

The city and Mayor Bloomberg have been especially supportive of Columbia's interest in creating a CBA, providing funds and technical assistance for the negotiating process. [14] The process, in this case, has also been markedly different than the other New York CBAs from the start. Rather than being driven primarily by the developers or elected officials, County Board 9 authorized the creation of a local development corporation (LDC) to be composed of appointed community leaders representing a broad range of constituents.[15]

The negotiations looked promising until November 2007, when three members of the LDC resigned. They cited conflicts of interest among the elected officials on the board and complained that there was a lack of transparency in the negotiations. [16] One of the resigning members complained that the CBA was a "sell-out of the community . . . that represents something that is not what the community wants." [17] Two other members resigned shortly thereafter, claiming that there had been misrepresentations and secrecy. [18]

Despite these troubles, a memorandum of understanding[19] was completed in December 2007, just in time for the City Council to approve of the expansion plan and Columbia's request for rezoning.[20] The agreement commits Columbia to providing $150 million in benefits, including $30 million for a university-run public school, $20 million of in-kind services and $24 million for an affordable housing trust fund. But the bulk of the money, $76 million, was set aside for as-yet undetermined community programs to be implemented over the next 12 years. The agreement has been described as "one-and-a-half non-legally binding pages," and criticism has been directed at the LDC for rushing the CBA process and punting the specifics of the agreement to a later date. [21]

II. Practical Problems with CBAs

CBAs have proven to be effective tools for many communities hoping to obligate developers in providing amenities to the neighborhoods that they affect. However, negotiating a CBA may not be appropriate in all situations,[22] and experience with CBAs has shown that negotiating these agreements can be a difficult task.

Community Organizing

The coalition negotiating on behalf of the community must be representative of the community's residents and property owners to retain and enhance its political capital. As the experiences with Atlantic Yards and Yankee Stadium illustrate, a CBA coalition that leaves out stakeholders may not be accepted by the community. For this reason, community organizers need to take an active role in seeking out community participants.

Formulating community priorities may also present challenges to coalitions. Community groups with different agendas will inevitably have to compromise over the benefits to be sought, and internal politics may arise within the coalition, making cooperation and unity difficult. One method for large and diverse coalitions to build cohesiveness is the development of a "Community Benefits Coalition Operating Agreement" and a list of "Coalition Operating Principles." This type of operating agreement defines membership qualifications, addresses how collective decisions will be made, outlines procedures for dealing with conflicts of interest, and addresses other coalition issues.[23]

Bargaining Power

For a CBA to be fair and effective, it is necessary that the community negotiating the CBA have adequate leverage to obtain meaningful promises from a developer. In some situations, a developer's need to locate the project in a specific place or the possibility of obtaining public subsidies will provide a large amount of leverage to community groups. In other situations, coalitions may have more difficulty convincing developers to negotiate.

When developers do choose to engage in talks with community groups, they may persist in attempts to weaken the coalition's bargaining power. The "divide and conquer" techniques used by developers to

balkanize coalitions require community groups to be united and to have coherent goals. Otherwise, a developer may attempt to appease some community groups without meeting others' needs—to "buy off" the minimum number of stakeholders to be able to spin the project as being community supported.[24] Developers may also characterize CBAs as anti-development tools that push businesses to other cities.

While developers may try to damage coalitions' reputations or seek to win over some of their constituent groups, CBA coalitions have developed some tactics of their own to boost their bargaining power. From the start, coalitions must develop a language to frame the issues in their favor and gain community support. This often involves emphasizing positive visions of the community's future, win-win solutions, inclusiveness, the grassroots character of the campaign and the nature of the CBA as fostering equitable development rather than preventing development or pushing it away.[25] Coalitions may also take advantage of the media to pressure developers to support community benefits.

Money

The costs of negotiating a CBA can be high. Organizing a coalition, holding meetings, conducting community research and preparing reports and drafts will all require funding. Coalitions that have no experience with CBAs, moreover, will likely need technical and legal assistance throughout the negotiation process. The funding required for all of this may inhibit the process.[26]

Resources are available, however. Beyond the grants and funding programs normally used by community groups, a CBA coalition should take advantage of the talents of neighborhood residents. Volunteers are often willing to hand out surveys, post signs and spread the word about public meetings. Local lawyers and other professionals may be willing to offer their services for free or at a reduced cost. Regional and national social justice organizations may also be able to provide information about CBAs and other resources. The faith-based community has also emerged as another source of financial and staff support for these efforts.

Enforcement and Monitoring

Most CBAs include monitoring and enforcement provisions that require coalitions to engage in future activities related to the CBA; and for coalitions that formed for the specific purpose of negotiating a CBA, sustaining this energy for monitoring and enforcement may be difficult. Requiring a developer to set aside seed money for the maintenance of a coalition is one way to ensure that the CBA will be monitored. However, conflicts of interest (perceived or actual) may arise if the developer funds enforcement efforts and inadequate assurances of independence are made. Coalitions that are affiliated with larger, established nonprofits may have an easier time enduring the life of a CBA.

III. Legal Issues Related to CBAs

The validity and enforceability of CBAs has yet to be tested in court, and some lawyers have expressed concerns that the agreements may not pass constitutional or contract law requirements. When CBAs do reach the courts, there will be numerous legal issues to be resolved.

Consideration

Since CBAs may be analogized to a bilateral contract, chief among the questions regarding the validity of CBAs is whether community groups provide any real consideration for these contracts. While supporters argue that a coalition's promise to support a development before land use authorities constitutes sufficient consideration, others have argued that such promises may be considered insufficient when compared to the extensive benefits offered by developers.[27] However, under contract theory, which does not generally inquire into the adequacy of consideration, promises not to oppose developments are likely to be deemed supported by consideration.[28]

Standing to Enforce

Numerous questions have been raised as to who can enforce provisions in a CBA. Because contract law generally permits only contract signatories to enforce a contract, CBA supporters have encouraged coalitions to require each community group to separately sign the agreement. Otherwise, the dissolution of a coalition or the inability to define the coalition's agents may prevent a CBA from being enforceable.[29]

Enforceability questions may also center on which parties are bound by developers' promises. Many CBAs contain language indicating an intent that a CBA's provisions will be binding upon the development's future tenants, contractors or buyers. If a CBA does not require these future parties to sign the original CBA or a similar agreement with the developer, community groups may have difficulties enforcing the CBA's terms against developers' subcontractors, tenants and successors in interest.[30]

Additionally, in states such as New York where development agreements are not specifically authorized by state statute, and where a CBA is negotiated between community groups and a government entity engaged in development activities, the coalition needs to be wary that the agreement may not be enforceable against government officials elected in the future. Constitutional questions remain as to whether a court might view long-term agreements as a bargaining away of the police power. Local governments are prohibited from contracting away their police powers because to do so would em-

power one legislative body to bind future legislative bodies.[31]

Issues Related to the Planning Process

Because the process of negotiating CBAs often involves local governments or elected officials, CBAs may also raise legal issues related to the propriety of the planning process.

When local officials are involved in negotiations, CBAs begin to look somewhat like disguised exactions, a term used to describe the situation in which local officials improperly condition project approvals on the provision of benefits not closely related to the project's impacts.[32] In accordance with this line of reasoning, some CBA opponents have gone so far as to characterize the agreements as "extortion."[33] Even without invoking the concept of illegal exactions, CBAs created through a process involving local officials may, in some cases, raise concerns about conflicts of interests.

IV. Conclusion

While CBAs represent an opportunity to accomplish development projects in a manner that achieves social equity and engages community stakeholders in projects with an eye towards designing processes and results that can be win-win for communities and developers, myriad practical and legal issues are present for all involved participants. Land use and municipal attorneys can expect to hear more about these types of agreements, and may be called upon with more frequency to help negotiate and develop CBAs for interested clients.

Endnotes

1. *See* Julian Gross, Community Benefits Agreements: Making Development Projects Accountable 9-11 (Good Jobs First 2005), *available at* <http://www.goodjobsfirst.org/pdf/cba2005final.pdf>.
2. For a collection of case studies on CBAs, see the Community Benefits Agreement blog at <http://communitybenefits.blogspot.com>.
3. *See Mayor Bloomberg, Forest City Ratner CEO, President Ratner, Civic Leaders Sign Community Benefits Agreement*, US State News, June 27, 2005.
4. Opposition to the project has spawned several lawsuits and attracted the help of hundreds of New Yorkers and a few local celebrities. *See* Develop Don't Destroy Brooklyn, *at* <http://www.dddb.net>.
5. *See* Atlantic Yards Community Benefits Agreement, <http://www.atlanticyards.com/html/community/cba.html>.
6. *See Mayor Bloomberg, Forest City Ratner CEO, President Ratner, Civic Leaders Sign Community Benefits Agreement*, *supra* note 3.
7. One news report indicates that only two of the eight signatory organizations were incorporated before the CBA negotiations began. Matthew Schuerman, *Ratner Sends Gehry to Drawing Board,* The New York Observer, Dec. 4, 2006, *available at* <http://www.observer.com/node/38021>.
8. *See id*.
9. If the conflict of interest wasn't bad enough, the same group, BUILD, was selected to operate the project's job referral program, but has been described as woefully inexperienced for the task. *See* Matthew Schuerman, *A Cool $5 Million*, New York Observer, *available at* <http://www.observer.com/term/29768>. *See also* Matthew Schuerman, *Ratner Sends Gehry to Drawing Board*, *supra* note 7.
10. *See* Bronx County Participation and Labor Force Mitigation and Community Benefits Program Related to the Construction of the New Yankee Stadium, at section VIII, *available at* <http://goodjobsny.org/Yankees_deal.htm>. The Yankee Stadium CBA also contains provisions more common to CBAs, such as a twenty-five percent local hiring goal and funds for job training. *See id*.
11. Matthew Schuerman, *The Yankees' $700,000 Play: 'It Is Not A Shakedown'*, New York Observer, Apr. 10, 2006, at 10, *available at* <http://www.observer.com/node/38670>.
12. *Id*.
13. *See* Timothy Williams, *Stadium Goes Up, but Bronx Still Seeks Benefits*, New York Times, Jan. 7, 2007, *available at* <http://www.nytimes.com/2008/01/07/nyregion/07stadium.html>.
14. *See* Matthew Schuerman, *Mr. Bollinger's Battle: Can Harlem and Columbia Ever Agree on the Benefits of a Bigger Campus?*, New York Observer, Feb. 18, 2007, *available at* <http://www.observer.com/node/36744>. The city appointed an attorney to work pro bono for the Columbia Local Development Corporation, and the city's Economic Development Corporation has contributed $350,000 to pay for a mediator and other expenses. *Id*.
15. *See id*.
16. *See* Daniel Amzallag, *Three Members Resign From LDC*, Columbia Spectator, Nov. 29, 2007, *available at* <http://www.columbiaspectator.com/?q=node/28368>.
17. Matthew Schuerman, *Resignations Over Columbia Harlem Expansion*, Nov. 29, 2007, The New York Observer, *available at* <http://www.observer.com/2007/will-columbia-three-get-any-respect>.
18. *See* Daniel Amzallag, *Community Benefits Agreement Will Include School, Funds for Affordable Housing*, Columbia Spectator, Dec. 20, 2007, *available at* <http://www.columbiaspectator.com/node/28615>.
19. West Harlem Local Development Corporation Memorandum of Understanding, *available at* <http://amy.m.lavine.googlepages.com/MOU-12.19.07.pdf>.
20. *See* Daniel Amzallag, *Community Benefits Specifics Remain Up in the Air*, Columbia Spectator, Jan. 22, 2008, *available at* <http://www.columbiaspectator.com/node/28669>.
21. *Id*. *See also* Timothy Williams and Ray Rivera, *Columbia Expansion Gets Green Light*, New York Times, Dec. 20, 2007, *available at* <http://www.nytimes.com/2007/12/20/nyregion/20columbia.html?ref=us&pagewanted=print>.
22. *See* Madeline Janis-Aparicio and Roxana Tynan, *Power in Numbers: Community Benefits Agreements and the Power of Coalition Building*, Shelterforce Online (Nov.-Dec. 2005), *available at* <http://www.laane.org/pressroom/stories/community_benefits/cbNovDec2005shelterforce.html>.
23. The Public Law Center at Tulane Law School has produced a model Coalition Operating Agreement and Principles, and advocates for community coalitions should recommend adopting such an agreement. Community Benefits Coalition Operating Agreement, *available at* <http://www.law.tulane.edu/WorkArea/showcontent.aspx?id=5750>.
24. *See* Gross, *supra* note 1, at 22.
25. *See* The Partnership for Working Families and Spin, *Words that Work: Communications Messaging for Community Benefits Agreements* 10 (2007), *available at* < http://www.communitybenefits.org/article.php?id=994>.
26. *See* Gross, *supra* note 1, at 23.

27. At a New York panel on CBAs, for example, William Valletta, former general counsel for the New York City planning department asked: "What is the community giving up in order to take part in the agreement? Presumably, they can't sell their vote on their participation in democracy." Matthew Schuerman, *The CBA at Atlantic Yards: But Is it Legal?*, New York Observer, Mar. 14, 2006, *available at* <http://www.observer.com/node/34377>.

28. *See* 17A Am. Jur. 2d, Contracts § 124.

29. Gross, *supra* note 1, at 23–24.

30. *See id*. at 71.

31. *See* Nolon and Salkin, *Land Use in a Nutshell*, at 128 (Thomson West 2006).

32. *See* Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C.L. Rev. 957, 999–1000 (noting that the purposes of many development agreements, to provide infrastructure and other public benefits, may "arguably [be] above and beyond that which a local government could exact under the police power"). Whether CBA provisions constitute exactions, however, is dependent on the local government being significantly involved in developing the CBA, and on the provisions not sharing a sufficient nexus with the project. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nolan v. California Coastal Commission*, 483 U.S. 825 (1987).

33. *See Mr. Bollinger's Battle*, *supra* note 14; *see also* Matthew Schuerman, *CBAs: Coming to a Bar Near You*, New York Observer, Jan. 13, 2006, *available at* <http://www.observer.com/node/34098> (quoting a 1988 report by the Association of the Bar of the City of New York that was critical of developer amenities).

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Employment Law Basics

By Alan M. Koral

The purpose of this article is to provide an overview of some of the basic principles and features of employment law in the United States.

I. Employment at Will

A. The Doctrine of Employment at Will

It is a fundamental principle of American law that all employment that has an indefinite term (including "permanent" or "regular" employment) is presumed to be at the mutual will of the parties, and may be terminated by either at any time, with or without notice, for a good reason, a bad reason or no reason at all, subject to certain limitations discussed below.

B. Exceptions to the Doctrine of Employment at Will

In the U.S. a number of exceptions to the doctrine of employment at will are recognized.

1. Employment for a Fixed Term. In general, where employment is for a fixed term (required to be in writing if in excess of one year because of the Statute of Frauds inherited from Britain), it will be given effect, and the employer may not terminate the employee during the term except for good cause (i.e., the employee's failure to perform as required). A formal employment contract is not required, as any writing signed by the employer providing for a fixed term is enforceable.

2. Collective Bargaining Contracts. Most (but not all) collective bargaining contracts in the U.S. permit termination only for good cause after an initial probationary period, often 60 or 90 days, established in the contract. Enforcement is usually through arbitration, and remedies are generally limited to reinstatement and back pay.

3. Constitutional Restrictions. The federal Constitution in the U.S. operates only as a restraint on governments (including governments in their capacities as employers). Thus "due process" and "equal protection" as well as other constitutional guarantees (e.g., freedom from unreasonable searches and seizures) apply to federal employees and, through the 14th Amendment, to state employees.

Some state constitutions either expressly or through judicial interpretation provide specific guarantees to private sector as well as public sector employees.

4. Legislation. As discussed in more detail below, specific legislation may limit the employer's right to terminate (or refuse to hire) employees at will. In the public sector, civil service laws have the effect of requiring dismissal only for good cause. Antidiscrimination legislation (both at the state and federal levels), union protection laws, wage and hour laws, laws governing leaves of absence and Workers' Compensation laws all have features that abrogate the unfettered application of the doctrine of employment at will.

There is no federal or state law in the U.S., however, that abrogates the employment at will doctrine across the board by requiring only "good cause" discharges in the private sector; rather, there are only legislative exceptions relating to specific issues.

5. Implied Contracts. In the last 20 years, the courts of many states (e.g., New Jersey, California, Illinois, Maryland) have devised a mechanism for avoiding the employment at will doctrine by implying a limitation on employers' ability to terminate employees at will through giving contractual effect

to statements in employee handbooks (e.g., regarding progressive discipline), policy manuals, hiring letters and even oral promises. Most U.S. employers have reacted to this development by prefacing all handbooks and manuals with disclaimers of any intent to create contractual commitments, having employees sign express acknowledgments that they are employees at will, including at-will statements in application forms, and providing that no officer other than the President or the head of Human Resources has the authority to create an employment arrangement other than employment at will. As a result, few implied contract cases are successful today. Moreover, the remedy for breach of an implied contract is limited to possible reinstatement and back pay; tort damages ("pain, suffering and emotional distress," and punitive damages) are generally not available in breach of contract actions, and attorney fees are never available. New York affords limited recognition to this doctrine, and cases brought under it are not favored by New York courts.

6. The Tort of Wrongful Discharge. The courts of many states (including New Jersey) have determined in the last 20 years that a common law remedy exists where an employer's conduct violates an important public policy derived from legislation or constitutional principles; generally (but not always), the tort is available only where the legislature has failed to provide any remedy to vindicate the public poli-

cy. For example, Kentucky's Workers' Compensation law had no provision prohibiting retaliation for claiming benefits, so the Kentucky Supreme Court decided that a common law cause of action existed for an employee who claimed that his discharge was in retaliation for his having obtained Workers' Compensation benefits. Other cases in various states have included termination for refusal to commit perjury (California), for being absent from work to serve on a jury (Oregon), sex discrimination by an employer who was not covered by the state or federal antidiscrimination laws (Virginia) and for reporting safety violations (New Jersey). New York recognizes the tort only with respect to attorneys who claim they were fired in retaliation for reporting misconduct as required by the profession's canons of ethics. In the U.S. torts are tried to a jury and damages can include pain and suffering and punitive damages, but attorney fees are not recoverable.

II. Major Federal Anti-Discrimination Laws

The federal laws generally require that an administrative complaint be filed with the Equal Employment Opportunity Commission ("EEOC") within 30 days of the alleged discriminatory act. The EEOC may investigate and issue a probable or no probable cause determination. EEOC may file complaints (commissions' charges) on its own initiative. If there is a no-cause finding, the individual may nevertheless sue in federal court within 90 days of receiving notice from EEOC. If there is a probable cause finding, EEOC may sue on behalf of an individual or a class (this is unusual, and generally involves very significant cases, such as the Mitsubishi Motors class action for sexual harassment, which settled for about $35 million last year); otherwise, the individual must go to federal court. Many plaintiffs elect to dispense with the EEOC investigation; they have an almost absolute right to demand a right to sue letter from the EEOC. The EEOC has subpoena power, which must be enforced by the federal courts; it cannot order any remedies, and can only attempt to conciliate even after it concludes that the evidence found in its investigation supports a finding of discrimination. Cases are tried to a jury, which can award unlimited back pay and emotional distress and punitive damages (with a collective limit of up to $300,000 for the two latter, depending on the size of the employer). The judge can order reinstatement, but more commonly will make a front-pay award; a prevailing plaintiff always gets attorney fees paid by the employer; an attorney fee award is very rarely made against a losing plaintiff.

1. Title VII of the Civil Rights Act of 1964. Prohibits discrimination based on race, color, sex, religion and national origin, and requires "reasonable accommodation for the religious needs and observances of employees and applicants. "Sex discrimination" includes sexual harassment, which has been defined to include both "quid pro quo" and "environmental" harassment, as well as harassing conduct based on gender; it also includes discrimination based on pregnancy.

2. Age Discrimination in Employment Act of 1967 ("ADEA"). Prohibits discrimination against employees and applicants based on age, except permits mandatory retirement of certain very highly ranked executives at age 65. It has somewhat different remedies from Title VII.

3. The Rehabilitation Act of 1973, § 703. Applies to federal contractors and subcontractors; prohibits discrimination against qualified individuals with a disability who can perform the essential functions of the job with or without reasonable accommodation, and requires maintenance of affirmation action plans ("AAP"). (Enforced by the U.S. Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP"))

4. Americans with Disabilities Act ("ADA"). Essentially applies the requirements of the Rehabilitation Act to all employers having 15 or more employees, except for the AAP requirement. It's enforced like Title VII. The duty of making reasonable accommodations to disabilities is a very important feature of this statute.

5. The Employee Retirement Income Security Act of 1974 ("ERISA"). Section 510 prohibits discriminating against or retaliating against an employee in order to deprive him or her of benefits under any employee benefit plan. Enforced by courts, remedies include attorney fees.

6. The Civil Rights Act of 1866 ("§ 1981"). Has been interpreted to prohibit discrimination in hiring and employment based on race, national origin (if in the 19th century the group was considered a "race") and alienage. There is no administrative mechanism; remedy includes unlimited compensatory and punitive damages, and attorney fees. There are varying statutes of limitation, often very lengthy, depending on the state in which the action is brought.

7. The Older Workers Benefit Protection Act ("OWBPA"). Restricts employer's ability to obtain releases from older workers and requires that extensive information about affected and non-affected employees be given if two or more employees are terminated at the same time and a release is sought.

8. Executive Order 11246 (1964). Requires that all federal contractors and subcontractors agree to an "EEO clause" in their contracts that commits them not to discriminate based on race, color, sex, religion and national origin, and to take "affirmative action" to eliminate the effects of discrimination in the workforce. Regulations require elaborate affirmative action plans. It is enforced by OFCCP, which may demand back pay and other remedies for "affected classes."

9. The Equal Pay Act of 1963. Requires that men and women doing the same job in the same place be paid the same, unless the employer can show "reasonable factors other than sex" to explain the discrepancy. It is generally subsumed in Title VII, but has somewhat different remedies and may be enforced by the U.S. Department of Labor. The statute does not embody "comparable worth" principles.

III. State and Local Discrimination Laws

States are free to legislate more stringently than the federal government both in areas where federal legislation exists (e.g., New Jersey and New York prohibit age discrimination against individuals age 18 and older) and where it does not (e.g., New York and New Jersey and about 15 other states prohibit discrimination based on sexual orientation). Other characteristics that are often protected by state and local laws include marital status (New York, New Jersey, Illinois and most other states), ex-offender status (New York and a few other states), and height and weight (Michigan). In addition, many states (including New Jersey and New York) define some of the key terms in discrimination legislation more broadly than does the federal government—for example, almost all medical conditions are disabilities under New York law, while under federal law only those conditions that constitute a substantial impairment of a major life activity can qualify for protection.

Even more important than the expansion of protection is the states' ability to provide different or greater remedies from federal law. For example, New Jersey places no cap on emotional damages or punitive damages in discrimination cases, so plaintiffs in that state sue under both the federal and the state law. New York City also has no caps on these damages, and also provide for individual liability for supervisors, which is excluded under federal law and is substantially unavailable under New York State law.

IV. Common Law Torts

Discrimination lawsuits are often accompanied by state common law claims. These claims may be brought by the employee against individuals (supervisors, managers and co-workers) and/or against the company as well. Torts are tried to a jury and may involve an award for emotional damages as well as economic injury and punitive damages, but attorney fees are not available for these claims.

Typical torts include: defamation, intentional infliction of emotional distress (called "outrage" in many western states), negligent infliction of emotional distress (not recognized by many states, and often preempted by Workers' Compensation laws), negligent supervision (the same), assault and battery (mostly in harassment cases), malicious interference with contract, and fraudulent misrepresentation. The courts do not look favorably on these claims, but they can seriously complicate a discrimination case.

In the security context, employers should be especially mindful of tort claims of intrusion on privacy. This tort occurs when "[o]ne intentionally intrudes, physically, or otherwise upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (1977). Employee searches, surveillance, and drug testing are most likely to expose employers to tort liability. Employers may avoid liability by putting employees on notice of the employer's security policies and by limiting the scope of those policies that tend to infringe on the privacy of employees.

V. Social Welfare Laws

While states are free to exceed federal requirements, few have done so to any great extent. The federal laws follow:

1. The Family and Medical Leave Act ("FMLA"). Provides up to 12 weeks unpaid leave for personal or immediate family health needs. Intermittent FMLA leave is possible, and can be very difficult to administer.

2. WARN. Requires 60 days notice for a plant closing or mass layoff. (Note: The U.S. has no federal and almost no state legislation requiring severance pay other than this "notice" law.)

3. ERISA. Is intended to protect the integrity of pensions and other employee benefit plans. (Note: There is no requirement in the U.S. that employers offer pension plans, health or life insurance, or indeed any benefits at all, including paid vacations. ERISA simply assures that if they do offer benefit plans, employers follow the terms of the plans.)

4. Workers' Compensation. Provides medical expenses and some lost wages for job-related injuries.

5. Disability Benefits. Six states, including New York and New Jersey, require that employers maintain insurance to pay some salary substitution (normally less than $400/week) to employees who are absent because of illness for up to 26 weeks. (Note: There is no federal requirement with respect to these short-term disabilities, and no federal or state requirement regarding long-term disabilities. *See* Social Security below.)

6. Social Security. Pays modest amounts (up to about $1,200/month) on retirement; also pays disability benefits for total disability.

7. Unemployment Insurance. Pays varying amounts, usually for 26 weeks, to people who have lost their jobs except for those fired for serious misconduct. Amounts vary by state, but are not large. Some states pay benefits to workers who are on strike, but most do not.

8. Whistleblower Laws. A few industry-specific federal laws prohibit retaliation against employees who report their employers' violations of specific aspects of the legislation. Several states have general whistleblower protection, generally addressed to reports of violations that affect public health or safety. The most recent whistleblower law is under the Sarbanes-Oxley Act, which requires publicly held companies to have an anonymous hotline to report violations of financial regulatory laws to the Board of Directors, and protects those who report financial misconduct on the part of their employers against discrimination and retaliation.

9. Wage-Hour and Wage Payment Laws. The wage-hour laws (federal and state) regulate child labor, the minimum wage and payment of overtime at time and one half the regular hourly rate for hours worked over 40 in the week. There are very detailed recordkeeping requirements. (Some states require daily overtime for hours worked over 8 in a day.) Employees are classified as "exempt" or non-exempt. Exempts are defined as executives, administrators, professionals and outside sales, and there are complex definitions for each. The wage payment laws are state laws that simply require employers pay wages owed to employees; there are often criminal penalties and very short deadlines for paying wages after they are earned.

10. The Occupational Safety and Health Act ("OSHA"). This statute requires that employers adhere to safety standards and recordkeeping and reporting requirements developed by the Occupational Safety and Health Administration. There are penalties for violations, including fines and injunctions.

11. Personnel Files. A few states require that employers permit employees to inspect their personnel files and place comments in them if they disagree with what they find.

12. Smokers' Rights. While no state requires employers to allow smoking on premises, many have passed laws prohibiting discrimination against people for being smokers. A few states (e.g., New York) have passed "lawful activities" laws, protecting smokers among others against discrimination for their non-work-related activities.

13. Anti-retaliation. Most laws prohibit retaliation against employees for asserting rights protected by or obtaining benefits provided by the statute. As noted above, where this kind of provision is omitted, some states repair the omission by recognizing a tort of wrongful discharge in violation of public policy.

VI. Labor Unions

Labor unions in the U.S. are far less powerful than they are in Europe, and worker participation in the management of the enterprise, encouraged to a degree by the laws of Sweden, for example, is essentially prohibited. (In some industries, unions hold one or two seats on boards of directors, but this is extremely rare.) The National Labor Relations Act protects workers' rights to organize, requires good-faith bargaining with certified unions, regulates elections and prohibits discrimination against employees or applicants because of union activity. Employees may sue their unions for breach of the duty of fair representation, and may sue employers for breach of a collective bargaining agreement if the union fails to act, but most disputes are settled through arbitration. Unions may also be sued for discrimination, where appropriate. Supervisors may not belong to the same union as the rank and file, and there are very few supervisor unions.

Many unions have health and welfare plans that provide benefits to members, often with joint employer participation. There are also union-sponsored pension plans, again frequently jointly sponsored with employers and in some industries with employer associations.

VII. Constitutional Issues

Employer search policies should also accommodate employees' Fourth Amendment right to be free from unreasonable search and seizure, primarily in the context of government employment. Items seized from an employee pursuant to an unreasonable search may be excluded from evidence in later proceedings. *Government Printing Office,* 82 LA 78 (Feldesman 1984) (arbitrator refuses to admit stolen equipment into evidence). Therefore, the use of overzealous policies may disadvantage employers attempting to defend employment decisions in the face of a breach of contract, wrongful discharge, discrimination, or other claims.

The Fourth Amendment generally only acts as a restraint on government, but private employers should also be mindful of Fourth Amendment concerns. Evidence seized by an employer in connection with the actions of government agents may be excluded from later proceedings. *Burdeau v. McDowell,* 256 U.S. 465 (1920); *but see United States v. Goldberg,* 330 F.2d 30 (3d Cir. 1964) (records seized by a defendant's business associates and turned over to the police without his knowledge were admissible). In addition, many collective bargaining agreements import language such as "probable cause" or "reasonable cause" from Fourth Amendment case law regarding drug testing and search policies. Violations of such agreements will usually be treated as breach of contract claims, but arbitrators and judges may look to the Fourth Amendment case law to define the terms of the contract.

State constitutions may be an additional source of employee's rights. These protections may be more extensive than those provided by the federal Constitution. For instance, the New York Constitution protects

against the unreasonable interception of telephone communications and the New Jersey Constitution contains a general right to privacy. N.Y. CONST. art. I, § 12; N.J. CONST. art I. However, like the federal Constitution, state constitutional protections are generally inapplicable to private action.

Conclusion

Despite the plethora of laws affecting employment in the U.S., the workplace remains relatively unregulated compared to other countries. However, the economic stakes are extremely high if violations are found under our antidiscrimination and many other laws, especially when compared to the very limited amounts of damages available in other countries, either through legislation (UK, Sweden, Italy) or practice (Japan). There are no labor tribunals, except for the limited authority of the National Labor Relations Board, and most disputes (other than those that are subject to arbitration under collective bargaining agreements or employer-sponsored mandatory arbitration programs or individual contracts) are taken to the courts and tried to a jury if not disposed of on motion or settled. The U.S. is an increasingly litigious society, the growth in the number of lawyers practicing employment law has been exponential, and our courts (especially the federal courts) are clogged with employment cases. As every person is in several protected categories (everyone has a gender, a religion or the lack of one, a "national origin"), it is not difficult to escape the employment at will doctrine by finding some piece of employment legislation that is hospitable to a litigation theory. Thus employee relations here ultimately require the same degree of scrutiny, common sense and documentation that they do elsewhere.

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You Can Object . . . But Should You?

By Elliott Wilcox

One of the major skills you developed during law school was how to spot issues. You remember the FIRAC (Facts—Issue—Rule—Application—Conclusion) method of case briefing from law school, don't you? Back in law school, your issue-spotting skills determined how well you would perform on the final exam. The more issues you spotted, the better your chances of passing the exam.

However, in trial, superlative issue-spotting skills can sometimes become a *detriment* to your case. The reason they can actually harm your case is because many trial lawyers are tempted to act like they're still in law school. You've seen them in trial—as soon as they spot an issue, they announce it to the world. ("Objection! That's a leading question" "Objection! That asks for hearsay!" "Objection! That calls for speculation!")

Technically, they're right, because the issues that they spot in trial ***can*** be objected to. But to become a skilled advocate, you need to move beyond mere issue-spotting skills. To become a top-tier trial lawyer, you must be able to analyze the admissibility of every piece of evidence and every word of testimony, and then answer the following three questions:

"**Can** I object?"
"**Should** I object?"
"**When** should I object?"

And, most importantly, you need to conduct that entire analysis in a split-second. You can't unring a bell and you can't stuff toothpaste back in a tube—if you don't object in time, the jury will hear the objectionable material, and it will be too late to fix the damage. (That's why trials can be so tiring, because you're expected to have your brain redlining at 9,000 rpm throughout the entire trial, spotting every issue and deciding whether or not to object.)

"You can't unring a bell and you can't stuff toothpaste back in a tube—if you don't object in time, the jury will hear the objectionable material, and it will be too late to fix the damage."

QUESTION #1: "Can I Object?"

Every trial lawyer should know the answer to this question. This question draws upon your issue-spotting skills and your knowledge of the evidence code. The stronger your knowledge of the evidence code, the stronger your trial skills will be. Every time your opponent or a witness is about to say or do something objectionable, you must immediately recognize the issue and identify why it's objectionable. You need to develop this skill **before** you get to trial. By the time you get to the courtroom, it's too late to start reading through the evidence code. You won't have time to look up the proper objection or review an evidentiary predicate. That information must be committed to memory and available for instant access.

QUESTION #2: "Should I Object?"

If you know the answer to this question, then you're one of the better trial lawyers in your courthouse. Just because the evidence is objectionable doesn't mean you should object. Not every issue really matters. For example, in a single witness examination, you may spot 23 leading questions. Technically, they're all objectionable. But before you object, ask yourself, "Does that evidence hurt my case?" If not, maybe you shouldn't object.

Too often, attorneys object to evidence that doesn't hurt their case, and end up shooting themselves in the foot. For example, a while ago, a friend of mine was in trial, prosecuting a misdemeanor case against a relatively inexperienced defense attorney. Partway through his cross-examination of her only witness, this new attorney tried to introduce a photo into evidence. My friend immediately recognized three reasons why the photo should not be admissible, and said, "Objection!" The judge agreed, and didn't allow the photo into evidence.

It sounds like she did the right thing, doesn't it? Something was objectionable, and she kept it out of evidence. But before you make a final decision, you need to know about a rule of criminal procedure that applied to her trial: If a defendant didn't introduce any evidence, he was entitled to both the first and last closing arguments ("the sandwich.") By objecting, she prevented the defense from introducing the photo. But the photo didn't really hurt her case. If the defendant had entered the photo into evidence, he would have lost the "sandwich" and she could have had the benefit of first and final closing arguments.

QUESTION #3: "When Should I Object?"

If you've decided that you *should* object, you should next determine *when* to object. Usually, you'll object

as soon as you realize you "can" and "should." For example, if your opponent tries to ask the witness, "What did you ***hear*** Mort Anderson ***say*** to Mike Brown about who started the fight?" you'll probably object by the 7th word in his question.

But deciding when to object isn't always as clear-cut as that. If your opponent is asking leading questions, but you've decided they don't hurt your case, maybe you won't object at all. Or maybe you let it go for 7-8 questions, and then tell the judge, "I haven't objected up until this point, but, Objection!—Counsel is asking only leading questions."

Many times, your objection needs to be heard *before* trial. You're afraid that if the jury gets even a whiff of the evidence, it will ruin your case. Examples include confessions from your client, previous bad acts, improperly seized evidence, evidence of remedial repairs, etc. If your objection falls into this category, you need to file a motion to suppress or a motion *in limine* before trial to preclude the admission of the evidence.

"During most trials, you probably shouldn't object as often as you could *object."*

Or maybe you don't "object" until closing argument, when you tell the jury, "I could have objected to his questions, because they were all leading questions. . . . The witness wasn't telling you the story, her attorney was. But the reason I didn't object was because I wanted you to see how her lawyer had to spoon feed the testimony to her. The witness didn't know *anything* about the case, and you should disregard what she said . . . or, pardon me, what she *didn't* say."

During most trials, you probably shouldn't object as often as you *could* object. Intellectually, jurors may understand that you're going to object during trial because your opponent is trying to admit improper evidence. But emotionally, many of them may feel that you're objecting because you're trying to prevent them from hearing the truth or because you know the evidence hurts your case. Consider all the ramifications before you say, "Objection," and then ask yourself, "Can I object? Should I object? And if so, when should I object?"

Elliott Wilcox is the creator of Trial Tips Newsletter, a free weekly ezine for trial lawyers (www.TrialTheater.com).

"Still Haven't Found What I'm Looking For": How to Navigate the Courthouse and Its Many Parts

By Sherry Levin Wallach

Courtrooms and courthouses are very exciting and engaging places. As a litigator, they are your stage or your ship. However, to a new practitioner they can be intimidating and overwhelming. Think of the various courthouses as an ocean and each courtroom as a ship in that ocean. The judges are the captains of these ships, but each time you board a ship or enter a courtroom, you want it to appear as if you are the first mate. You always want to appear as if you are in control from the moment you set foot inside the doors of the courthouse to the moment you leave. Next time you enter a courthouse or courtroom, look around at the other attorneys; they all want to appear as if they are the ones in control. This article will assist you in establishing and maintaining the self confidence needed to be the first mate of all the ships you board.

The Courts

Before you worry about how to manage yourself within the courthouse, an attorney must make sure that the case she is handling was properly filed and that she is in the right courthouse. To do this effectively, an attorney must know the parameters of each court's jurisdiction. Along with reading the applicable rules of procedure, the New York State Unified Court System's website, www.nycourts.gov, is an excellent resource for this purpose. The Unified Court System's website explains the hierarchy of the Courts of the State of New York, lists their jurisdictional parameters and also posts many of their individual court rules. McKinney's Civil Practice Law and Rules includes in it a court directory which lists all of the Appellate, Supreme, County, Family, Surrogate's, and City Courts, and Courts of Claims in the

State of New York. *See McKinney's New York Civil Practice Law and Rules CPLR*, 2007 Edition, Thomson/West. See also www.nycourts.gov, which also provides a list of all of the locations of all of the County Law Libraries.

The Court of Appeals is located in Albany and there are four Appellate Divisions in the state which consist of the First through the Fourth Departments. The First Department Courthouse is located in New York City, the Second Department Courthouse is in Brooklyn, the Third Department Courthouse is in Albany and the Fourth Department Courthouse is in Rochester. There is a Court of Claims located in Albany, New York City, Binghamton, Buffalo, Hauppauge, Mineola, Rochester, Saratoga Springs, Syracuse, Utica, and White Plains.

In each of the five Burroughs of the City of New York, there is a Supreme Court (Criminal and Civil), Surrogate's Court, Family Court, Civil Court of the City of New York, Criminal Court of the City of New York and Housing Court. Each of these courts has its own set of rules and procedures. The criminal court handles all misdemeanor crimes and violations which may include violations of the Penal Law (PL), the Vehicle and Traffic Law (VTL), the Alcohol and Beverage Control Law (ABC), and the Corrections Law. In New York City and its five Burroughs, there are traffic courts that handle non-criminal violations of the VTL including parking tickets, speeding tickets and other moving violations. The criminal branch of the Supreme Court handles all felonies after indictment.[1] The civil branch of the Supreme Court handles all civil matters with claims of recovery that exceed $3,000. If a civil case is filed in Supreme Court and found to be of too little value for that court, it is sent back to the district court, which is otherwise referred to as small claims court. If you are handling a matter in a Small Claims Court, Surrogate's Court, Family Court or Housing Court, be sure to contact the specific court for its rules prior to filing the claim. You should also be aware that many judges have their own set of rules which you may get from the court itself or from the www.nycourts.gov website.

Outside New York City, the county courts handle all felony criminal matters in criminal cases and the Supreme Court handles all civil cases that exceed $3,000 in their recovery value. However, the County Court also holds limited jurisdiction over cases involving amounts up to $25,000. Outside of New York City there are 61 city courts and over 2,000 local village and town courts. The city courts handle all misdemeanor criminal matters and violations, and hold jurisdiction in civil claims up to $10,000. The village and town courts hold jurisdiction over civil matters up to $3,000 and all misdemeanor cases and violations. It is important to note that not every city, village and town criminal court has its own set of court rules. Outside New York City, traffic matters are also handled by these city, town and village courts, although they often designate a special day and time for traffic court. In Nassau and Suffolk counties all criminal matters involving misdemeanors or violations are

handled by the district courts, which are centralized criminal courts for each county. The individual towns do not have their own criminal courts as many do throughout the remainder of the state. While the criminal matters involving misdemeanors and violations are prosecuted by the District Attorney's Office, the traffic matters and town or village code violations are often handled by a Town Attorney/Prosecutor.

In each county there is also a Surrogate's Court which handles matters related to wills, trusts and estates, and Family Court which handles non-criminal domestic matters. As a civil litigator who does not practice trusts and estates work, you are likely to find yourself dealing with Surrogate's Court when managing a wrongful-death claim, or devising a structured settlement for a minor or a client's estate. As an attorney practicing in the area of criminal law, you are likely to find yourself dealing with the Family Court when handling cases involving juveniles or domestic violence. The court rules for Family and Surrogate's courts are very specific and often differ from those of Supreme or County courts. For example, the Family Court imposes very strict rules on the retainer agreements used in these types of cases. Aside from specific guidelines regarding attorney's fees, each retainer agreement involving a Family Court matter must have a copy of the Statement of Clients' Rights attached to it. Be sure to familiarize yourself with them before taking on a case in either jurisdiction.

The Courthouse

As a young and new attorney, it is natural to have anxiety when entering a courthouse and a courtroom for the first time. The parts of each courthouse are the same, but they are set up in different ways. While the federal, appellate and supreme courts are most uniform in their layout and appearance, the local village, and town courts are all quite different in their locations and courtroom appearances. It is very important to note that in federal court the rules of practice are very, very different than they are in state court. If you practice primarily in state court, make sure to update yourself on the Federal Rules of Evidence and the court rules prior to entering federal court or you will be in for a rude awakening. While this article concentrates on state court practice, here are some important practice tips to take with you to federal court. The time given for filing documents is very strictly adhered to in federal court. Make sure you get a copy of the court's rules prior to filing papers. These rules can be found at www.megalaw.com/fed/2rules.php. Each United States District Court posts its own set of rules. As for the courtroom itself, when trying a case, never move out from behind your lectern without the express approval of the judge. Most presentations take place from behind it.

Once you are certain that the court you are in has jurisdiction over your case, the next step is to figure out where to go in the courthouse. Although as an attorney you may spend most of your time in a courthouse courtroom, there are many parts to each courthouse with which you must be familiar. Every courthouse has a clerk's office. In some of the larger and busier courthouses there may be more than one clerk's office and several different clerks such as civil calendar, criminal calendar, civil motions, and criminal motions clerks, and a clerk in each courtroom. In the smaller courts there is usually only one office and only one clerk.[2]

If you work for a firm with more than one attorney, you will usually be told by your office exactly where within a courthouse your case is being heard. However, when you work for a very small firm or for yourself, you may be retained on a new case in a new court and not know where to go. In this instance, call the court clerk or, in the larger jurisdictions, the calendar clerk for information regarding everything from directions to the courthouse to in which courtroom and before which judge you must appear. In the larger jurisdictions, you should also find out where the clerk's office is located. If you do not need to go there on your first visit, there is a very good chance you will need to visit the clerk's office at some point in the future. In many of the smaller local courts located north of the city, you may also want to ask the clerk for a description of the court building. You would be surprised to see some of the buildings that house courts in these smaller jurisdictions.

The courthouses in New York City's five Burroughs, as you may imagine or already know, are very busy buildings. Some of the Burroughs such as Manhattan, Brooklyn and Queens have more than one Supreme Court building and separate buildings for the Surrogate's Court, Housing Court and Family Court. In most of the Burroughs, the criminal court or district court has its own building. In Manhattan in addition to criminal court, which handles all misdemeanor and violation offenses, there is traffic court and a few courtrooms throughout the city that handle "quality of life crimes" and violations. When you are retained or assigned a case, be sure to check in which courthouse your matter is being heard and do not always assume it is the main court building.

There are many people in addition to the court clerks who work within the courthouse with whom you will work and with whom you should become familiar. When you enter almost any courthouse, the first court staff you encounter are the court officers or, in many local courts, police officers. While there are still some local courts in Westchester, Rockland and other counties north of Manhattan that do not have security

at their entrance, they are becoming more and more rare. The court officers can be helpful in giving you directions around the courthouse and in some courts getting your case called early. Not only do they staff the security at the entrance to the courthouse, but they also staff the courtrooms. In some courts, they also control the calendar call by running the check-in process for attorneys or by bringing your client, in a criminal case, into the courtroom.

In Federal Court, Supreme Court, Surrogate's Court, Landlord-Tenant Court and the Appellate courts, most if not all of the judges have law clerks or court attorneys who work for them. Sometimes judges may share a court attorney or law clerk. In many civil supreme courts, the court attorneys run the discovery conferences and handle the motion papers. Therefore, when you are in a civil part conferencing a matter, make sure you know to whom you are speaking. Whatever you do, do not make the mistake of incorrectly addressing the judge; believe me, I have seen this happen on more than one occasion.

Bringing your attention to the individual courtroom or "part" for a moment, it is very important to note that many judges have their own specific procedures for handling the day-to-day matters that come before them. In the city, village and town courts oftentimes these rules are not written but simply policies that you as a practitioner are expected to be aware. For example, in most Westchester County local criminal courts, omnibus motions—which are standard criminal motions filed requesting a bill of particulars, discovery and pre-trial hearings—are rarely filed because the District Attorney's Office has an "open file discovery policy" which allows you to come into their office and read through what they determine are the "discoverable" portion of the file and then the District Attorney consents to hearings. However, in order to preserve your right to file motions, you must be sure to request your motion time be tolled at arraignment and at as many future calendar calls as possible.

In Nassau and Suffolk counties, discovery for criminal cases is handled by the use of voluntary disclosure forms (VDFs). These are forms that are provided and filled out by the district attorneys in which a defense attorney is provided with notices, copies of supporting depositions and a bill of particulars. The police reports are not provided nor are they available for review. If an attorney wishes further information, he or she can try to obtain it through motion practice. Never expressly waive your right to file motions. In any jurisdiction, the best way to learn of these procedural rules/policies is to allow yourself the ability to spend some time in the particular court before your matter is addressed. If you have a case in a court in which you have never practiced, plan to arrive early for your matter or even stop by on another day prior to your court date. By doing this, you allow yourself to observe the goings-on of the court and possibly a chance to speak with the clerk or some of the local practitioners. There is nothing wrong with admitting it is the first time you are appearing in a particular jurisdiction, but never use it as an excuse for failing to properly manage your case.

When handling matters in Supreme or County Court, you often are able to access the "part" rules on the New York State Uniform Court System's website, provided earlier. Even armed with these rules, you should follow the advice given above and arrive early if it is your first time in that courtroom or part. With the exception of the village and town courts, the court's daily calendar is usually posted outside the courtroom. In these smaller jurisdictions, don't be afraid to ask a court officer or the court clerk to see a copy of the calendar. In the large jurisdictions such as the New York City, Westchester County and city courts, you should be aware of your case's calendar number when entering the courtroom because you will need to use that number to reference your case with the person running the calendar. If you check the court calendar and the case you are there to handle is not listed, you must check with the court clerk to confirm where and when your case is being heard. In the larger jurisdictions, this often means physically going to the court clerk's office, which may be located on another floor or even a separate building.

In most county and supreme courtrooms, the court officers assigned to the various courtrooms are excellent sources of information on the particular policies of a specific judge. When handling civil matters, there are often different orders, stipulations and forms that need to be filled out prior to any conference. Each court and often each judge has a slightly different manner for handling these documents. For example, in Westchester County Court when you appear for a preliminary conference on a civil matter, you conference the matter with your adversaries in a conference room or oftentimes in the hallway, fill out the preliminary conference order, self-address an envelope for your firm and hand the documents to the clerk for the judge's signature. These documents are mailed to you at a later time. You do not leave with a copy of the signed order and you almost never see the judge on that date. Therefore, it is imperative in this instance that you make a personal note of all dates and things addressed in the order for your records prior to handing over the order. By contrast, in Bronx Supreme Court, when handling a civil matter you fill out your preliminary conference order with your adversaries in the courtroom. You then notify the court officer you are ready and you are sent in to conference your case with the judge. The judge then signs your order and provides each

party with a carbon copy of it. In all court conferences, the judge expects you to have a basic understanding of your claims, their value and the medical and employment status of your client.

In all courthouses, the judges have an office known as their chambers, and in the larger courthouses, they may also have robing rooms. Often in the larger buildings, the judge's chambers are on a different floor from their courtroom. Thus, they are given robing rooms which are rooms attached to the courtroom for the judge's use. Many times case conferences take place in either the judge's chambers or his or her robing room. In many Civil Courts, if you are appearing to conference a case, you may not go into the courtroom but go directly to the judge's chambers which are often located in the back halls of the courthouse. If you are in a new jurisdiction and not comfortable going into the back halls of the courthouse, ask a court officer or court clerk for assistance. You cannot be shy or you will never get where you need to go.

When handling civil matters in Supreme or County Court, your first court appearance is usually a preliminary conference. In most jurisdictions, preliminary conferences are held in specific courtrooms by judges designated for preliminary conferences. In the busier jurisdictions, once you've had your preliminary conference, your matter is assigned to a different judge who will handle the remaining conferences on your case. The follow–up conferences are known as compliance conferences. If you file motions on your case during the discovery phase, you will often be assigned to a motion part or judge who will handle your case until the motion is resolved, at which point you will be sent back to your discovery judge. Once discovery is completed, you will then be assigned to a trial readiness part in which your pre-trial conference will be held. Once your matter is ready for trial, you will be sent to a trial judge. In many of the courts, you will pick a jury before being sent to your trial judge. In these courts, your matter will remain with the trial readiness part until you have completed jury selection. Jury selection is overseen by Judicial Hearing Officers (JHOs) who are usually administrative law judges. Each case is assigned to a jury room and the attorneys pick the jury without a judge or JHO present. If an issue arises, then the attorneys go to the JHO for a ruling.

When handling criminal matters in Supreme or County Court, your case gets assigned to a judge following arraignment. That judge manages your case until you are ready for trial. Once you are ready for trial, your case is sent to a trial judge and your jury is picked before that judge.

There are two other rooms in the courthouse with which an attorney must be familiar: They are the records room and the subpoenaed records room. In smaller jurisdictions, such as town or village courts, most if not all court records are kept in the clerk's office. Remember that the court file, with the exception of sealed documents, is all a matter of public record. You can look at and even copy portions of that file simply by going to the clerk's office or the records room and asking to see the file. You will be asked to fill out a written request to do so, and, in the larger jurisdictions, you may have to leave your ID as collateral. Always read the court file prior to going to trial. You may be surprised at the existence of documents which you did not have or are missing from your file for one reason or another.

You may and, in some instances must, have certain records subpoenaed directly to the courthouse when preparing a trial. The rules regarding subpoenas may be found in CPLR 2300. Never forget to visit the subpoenaed records room several times prior to trial to check that all your subpoenaed documents have arrived and to see what your adversary has subpoenaed. By taking the time to follow up on subpoenaed records, you may save yourself the frustration of finding out later that documents essential to your case are missing, or that you have forgotten to subpoena documents for your own file that opposing counsel will be attempting to present at trial. If you have not had an opportunity to review documents being offered into evidence at the trial of a civil matter, to which you have had access, it could be devastating to your case. When trying a civil matter, records which you intend to use at trial must be subpoenaed to the court ahead of time. Failure to do so can lead to preclusion of those documents. Further, when reviewing the subpoenaed records for a case, be sure to confirm that they have the proper certifications attached to them. If you follow up regularly, you will give yourself enough time to have the institution that failed to provide any certification or the proper certification to rectify the error. Finally, do not forget to check for all medical films, such as X-rays and MRIs, in the subpoenaed records room as well and make sure these two have been properly certified.

All attorneys should not only be aware of the law libraries that exist in almost all county and supreme courthouses, but they should also use them.[3] They are a wonderful resource, but be sure to carry plenty of change with you for the copy machines. In today's world, many if not most attorneys rely on electronic resources or legal assistants for research or answers to legal questions. Oftentimes these questions could be answered quickly and efficiently without even leaving the courthouse. While I am not suggesting you abandon your computers, I am suggesting you make a call to your paralegal (if you are lucky enough to have one) and run upstairs to the law library at the same time. You do not need a computer or a fax machine to get a copy of the case you cited in your

argument but forgot to provide to the court, or to look up a case cited by opposing counsel earlier in the day. All you need to do is go to the law library.

When handling criminal matters, you will often have clients who are incarcerated. You can and should speak with your incarcerated clients prior to your court date. Clients who are in custody are held in holding pens which are usually attached to and accessed by attorneys through the courtrooms. You must speak with a court officer or corrections officer to gain entrance. In the busier jurisdictions such as the Bronx and Manhattan, you must leave everything but your file in the courtrooms before entering the pens or "going in the back." By contrast, in some jurisdictions, attorneys are not allowed to go into the cells or cell area where their client is being held, and you must wait for an officer to bring the client into the courtroom.

The final thing I wish to discuss is the court reporter. If you spend any time in the village or town courts throughout the state, you will find that some of them still do not have court reporters. The courts that do not have reporters are required to tape-record the proceedings, but these recordings are often of poor quality and open to misinterpretation. In these instances, the best you can do to preserve your record is keep copious notes and specifically ask the judge to make certain notes on the court's file. Many of the larger courthouses have court reporter offices in them. You may need to learn where the court reporter's offices are if you want to pick up a set of minutes or place an order for a set of minutes, but usually this can be done in court or over the phone.

In closing, an important rule to remember is not to allow yourself to become intimidated by the courthouse or its personnel. Judges often yell or scold attorneys in open court, whether it be during a conference, calendar call or a trial, but that does not necessarily mean you are wrong or at fault. If you are certain of your position, hold strong. You can maintain a position or impress upon a judge to do what you want without becoming enraged or disrespectful. As long as you maintain your professionalism and respect for the judge, you can get your point across, make your record and sometimes even change the judge's mind. Remember that you have an obligation to yourself and your client to do everything ethically within your power to win, but never forget who is captain of the ship.

Endnotes

1. When handling a felony matter, first you appear in criminal or local court for a pre-indictment arraignment. At this arraignment, you cannot enter a plea to the felony charge because they do not have jurisdiction over the case for that purpose. A felony plea is entered at the Supreme or County Court arraignment, which takes place after an indictment has been filed.
2. In the town and village courts, there is also the town or village clerk whose office is usually in the same office as the court clerk.
3. When practicing in a county that has more than one supreme or county court building, there is not a library in each building. The library is usually housed in the main court building.

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Save the Dates!
Young Lawyers Section

70th Anniversary Celebration!

Friday, June 6, 2008
Reception - Katra Lounge, New York City

On Friday, June 6, 2008, the Young Lawyers Section is planning a reception to celebrate the 70th Anniversary of the Section. The reception will take place at the Katra Lounge – a Moroccan restaurant and lounge, located at 217 Bowery @ Rivington (near Manhattan Bridge), New York, New York. The reception is scheduled from 7:00 –10:00 P.M., and will include a DJ, a variety of hot hors d'oeuvres and an open bar. The evening will also include recognition of past Young Lawyer Section chairs, as well as a presentation for the Outstanding "Former" Young Lawyer Award.

Saturday, June 7, 2008
CLE Program - Hughes Hubbard & Reed

On Saturday, June 7, 2008, a three hour CLE ethics program will be offered at Hughes Hubbard & Reed, from 10:00 a.m. – 1:00 P.M. There will also be a group outing (late Saturday afternoon) to Chelsea Pier for a Summer Concert Series.

Overnight accommodations, which are centrally located to both venues, can be made at:

Millenium Hilton
55 Church Street
New York, New York 10007
1-212-693-2001

Embassy Suites New York
102 North End Avenue
New York, New York 10282
1-212-945-0100

For more information, please feel free to contact Megan O'Toole, YLS Staff Liaison, at motoole@nysba.org.

(Continued from page 1)

iii) If it is a Workers' Compensation case, the name of the prospective client's employer and any other companies associated with the project.

iv) If it is a product liability case, the name of any sellers, lessors, and manufacturers. If a pharmaceutical personal injury case, you might want to know whether any of the treating or prescribing doctors are being or have been sued by other lawyers in your firm. In these cases the treating or prescribing doctor can be valuable allies.

2. Frivolous Litigation

New York attorneys are forbidden to file suit or take other action when they have reason to know that the action would serve merely to harass or maliciously injure another.[2] The attorney is also not permitted to advance a claim or defense that is unwarranted under existing law.[3] This proscription on frivolous litigation is embodied in substantive and court rules.[4] The underlying logic in the rules against frivolous litigation is the notion that an attorney must not be compelled to advance a case that he does not believe is legally justified.[5]

The attorney must sign each pleading, written motion or other paper served on an opposing party or submitted to the court.[6] By signing a paper, the attorney certifies that to the best of the attorney's knowledge, information and belief, formed after inquiry reasonable under the circumstances, the paper or contentions in it are not frivolous.[7] Conduct is frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.[8]

3. Competency in Handling Client's Matter

An attorney is not permitted to handle a legal matter that he or she knows is not competent to handle, without associating himself with a lawyer who is competent to handle it.[9] An attorney may not handle a matter without adequate preparation, and may not neglect a matter entrusted to him or her. Thus, careful consideration must be given to existing caseload and the amount and quality of work that will be involved in taking on a new client.

4. When to Recommend Alternative Dispute Resolution

In certain cases, there might be good reason to avoid litigation even though a very strong claim might exist. These cases are usually where a long-term relationship is involved and preservation of that relationship is important. For example, in family disputes, employment disputes, and commercial contracts where the parties are likely to deal with each other repeatedly over a long period of time, in such situations alternate dispute resolution might be a preferred solution. In many instances involving contract disputes, mandatory arbitration or mediation might be required. It is important to check these details before initiating litigation.

5. Cost Issues

Whether your clients are billed by the hour or on a contingency fee basis, it is always critical to advise them that even though they may have a strong claim, you cannot guarantee the amount or the timing of the recovery. For billable-hour clients, you should provide estimates of your legal fees and other costs; however, it is not always possible to predict with accuracy how much work will be involved and what the maximum cost to your client will be. Timing of payment is never guaranteed. Your defendant might become bankrupt or might go into appeal and it might take several years before you see any money come out of the litigation, even after you have won or settled the case.

For contingency-fee clients, keep in mind that you are not allowed to advance funds to your clients. You can pay the costs associated with the litigation, but the client remains ultimately liable to pay these from his or her recovery. The client also remains liable for any liens on the recovery, such as insurance liens.

PART 2. Statutes of Limitations

1. What Is a "Statute of Limitations"?

A statute of limitations establishes a time limit for suing based on the date that the claim accrues. Usually a claim "accrues" when the injury occurs. After the expiration of the statutory period, unless a legal exception applies, the injured person loses the right to file a lawsuit seeking money damages or other relief. Hopefully your clients will not wait to contact you until just before their statute of limitations expires. Ideally, you will have plenty of time to investigate the facts before filing the case. However, I guarantee that every one of you will in your careers come across clients who wait until the very last moment before they contact you. You will then be in a situation where you have to assess the statute of limitations on their claim in a matter of hours, without the opportunity to review very important information. In these situ-

ations you must either accept or reject representation very quickly. You must act very quickly or you might become liable for malpractice.

Although people often speak of the "statute of limitations," in fact there are many statutes which apply limitations periods to civil actions. Sometimes it can be difficult to keep track of the various statutes and their exceptions. It is critical to identify all the potential statutes of limitations implicated by the facts presented by a potential client. You should also consider whether claims might be brought in another state that has a shorter statute of limitations than New York. When considering filing a claim on behalf of an out-of-state client, find out whether New York will "borrow" a shorter statute of limitations from the client's state. In certain cases, New York borrows the shorter limitations period of the home state of the plaintiff.[10]

2. Specific Civil Actions

The following periods represent a small sample of the statutory limitations periods in New York. Please note that it may be possible to bring multiple causes of action from a single incident of wrongful conduct, and thus even if it appears that the relevant statute of limitations has run, it may remain possible to bring a different claim. Also, there may be an exception to the standard limitations period that applies to any given situation. The following list is provided by way of example.

- ***Professional Malpractice:*** Medical malpractice actions must be filed within thirty months of the date of the act or omission that gave rise to the injury occurred. For malpractice actions based upon the presence of a foreign object within the body of a patient, the action must be filed within one year of the date that the foreign object was or should have been discovered. Other professional negligence actions are governed by a three year statute of limitations. *If your client has a pharmaceutical personal injury claim against the manufacturer, where the prescribing or treating physicians might also be liable, remember that you should file the case before the expiration of the shorter medical malpractice statute. Even though you might have three years to file the case against the manufacturer, you will have two-and-a-half years to file against the physicians and/or hospitals.*
- ***Personal Injury:*** 3 years
- ***Fraud:*** 6 years
- ***Libel / Slander / Defamation:*** 1 year
- ***Injury to Personal Property:*** 3 years
- ***Wrongful Death*****:** 2 years (note discovery rule does not apply)[11]
- ***Product Liability:*** 3 years
- ***Contracts:*** 6 years

3. Statute of Limitations or Statute of Repose

A statute of repose is different from a statute of limitations in that after the statutory period has expired it is not possible to file a lawsuit even if an injury occurs after that time. For example, if there is a twenty-year statute of repose on the manufacture of aircraft, a claim cannot be filed against the manufacturer more than twenty years after the date of manufacture, even if a design or manufacturing defect is responsible for a later accident. New York has a ten-year statute of repose for certain claims against engineers and architects.

4. Accrual of Claims

A statute of limitations is said to start running at the time a claim accrues. Ordinarily, that is the time at which an injury is suffered.

5. The Discovery Rule

Sometimes it is not reasonably possible for a person to discover the cause of an injury, or even to know that an injury has occurred, until considerably after the act which causes the injury. For example, an error in the drafting of a will might not be noticed until the will is being executed, decades after it was drafted, or a financial planner's embezzlement might not be noticed for years due to the issuance of false statements of account.

When it applies, the "discovery rule" permits a suit to be filed within a certain period of time after the injury is discovered, or reasonably should have been discovered. The discovery rule does not apply to all civil injuries, and sometimes the period of time for bringing a claim post-discovery can be short, so it is important to act quickly in the event of the late discovery of an injury.

New York has enacted a discovery rule in actions to recover for personal injury or property damage "caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within the property. . . ."[12] The three-year statute of limitations period for these latent injuries begins to run from the earlier of:

(1) the date of discovery of the injury by the plaintiff or,

(2) the date when, through the exercise of "reasonable diligence," the plaintiff should have discovered the injury.[13]

6. Tolling of the Statute of Limitations

In addition to late discovery, it may be possible to avoid the harsh result of a statute of limitation by arguing that the statute has been "tolled," meaning that something has stopped the statute from running for a period of time. Typical reasons for tolling a statute of limitations

include minority (the victim of the injury was a minor at the time the injury occurred), mental incompetence (the victim of the injury was not mentally competent at the time the injury occurred), and the defendant's bankruptcy (the "automatic stay" in bankruptcy ordinarily tolls the statute of limitations until such time as the bankruptcy is resolved or the stay is lifted).

Under New York law, a minor ordinarily has three years from the date of his or her eighteenth birthday to commence litigation. However, for medical malpractice actions, the statute of limitations cannot be extended for more than ten years from the date of the act or omission giving rise to the injury.

7. Contractual Limitations

It is often possible to shorten a statutory limitations period by contract. For example, an employment contract might require that any claim relating to the employment relationship, including wrongful termination, be filed within one year of the claimed wrongful conduct. Courts often uphold these clauses, particularly in the context of business transactions, even though they provide for a shorter limitations period than the statute of limitations would otherwise apply.

PART 3. Evaluation of Cases

1. Particular Cases

Each different case requires its own unique approach of investigation. Below are some common techniques in three types of cases.

a. Product Liability

In a product liability case you must first obtain a basic knowledge of the product and its uses. Without an understanding of the proper handling and use of the product, you will not be able to assess the case. Therefore, you must gather the relevant product documents. These may include advertising materials, labels, warnings, manuals, warranties, bills of sale and invoices regarding repairs or maintenance. The defense will try to blame your client for not using the product properly. In order for you to show that your client used the product properly, you will need to evaluate whether your client followed the guidelines he or she may have received. In the prescription drug context you should read all drug labels and information provided by the prescribing physician to your client. Did your client take the medication as prescribed?

It is very helpful to locate the actual product used. You need to know the product's brand name, model number, serial number and batch and lot numbers if any. You will need to know any dates of manufacture, as well as expiration dates.

It is also useful to compare the warning labels and other product information with a competitor's product. This will often give clues as to whether your defendant's product conformed to prevailing safety standards. You will also need to understand the chain of distribution to determine whether a party other than the manufacturer needs to be added to the complaint.

b. Medical Malpractice

You will need to obtain all your client's medical records, including complete physician, hospital, pharmacy and laboratory records and if applicable, death certificates. You can ask the client to provide you with the records for you to investigate, but always make sure to get records directly from the providers. This is essential towards making sure you have accurate and complete information. Spend time speaking with family members and relatives, especially those who accompanied the client on doctor's visits or otherwise communicated with the doctors. If the incident occurred in a hospital, then try to speak to neighboring patients.

You must obtain information on the proper licensure and qualifications of the doctor who treated the patient. You can find out about prior malpractice actions or other disciplinary actions through the Office of Professional Medical Conduct of the New York State Department of Health. You must also fully understand the prevailing standard of care in the particular area of medicine in question.

c. Breach of Contract

At the heart of any contract dispute is a written or oral agreement. You must become intimately familiar with the entire agreement. In cases arising out of a written contract, obtain all drafts of the contract. Also obtain related sales proposals, order forms, invoices, checks or bills of lading. Notes of telephone conversations, meetings, correspondence and internal memoranda that relate to the contract are also important. Your interview with the client must include the general history of the relationship between him or her and the adverse party. Others who witnessed the transaction or are parties to the transaction are also useful to speak with. In situations where the client is a large company, you will have to examine the files of relevant employees. These may give you very valuable clues. You will also need to inquire about the corporate structure to determine the actual authority of persons to bind the corporation.

You should determine the commercial setting of the transaction and make an objective assessment. If the case involves defective goods, try to find out about similar goods sold to other customers. You need to be familiar with industry standards and whether a particular level of performance is considered generally acceptable. Trade associations and other independent industry groups can often provide a wide range of useful information about industry standards. You should also consider any counter-claims that the defendant may file before commencing suit.

2. Information from the Client

You want to learn everything you can from the client. Some attorneys use checklists and forms to be filled out by the client. Some have investigators or paralegals do basic information-gathering interviews. So talk to the client, making notes or filling out checklists or forms as they go.

During the client interview you want to cover several points. It is important to know how the client came to you, whether a referring firm was involved. Often, referring firms have had prior dealings with this client and may also be able to provide you valuable documentary or background information. How did the claim/injury arise? These are the who, what, when, where, why and how questions.

(1) Who: persons directly involved in the incident

(a) Witnesses

(b) Persons who came to the scene

(c) Persons who transported client from the scene

(d) Each healthcare provider

(e) Each lay witness with pre- and post-injury state of health, appearance, and activities

(f) Employer

(g) An entity making an investigation to whom reports may have been sent (i.e., insurance company)

(2) What:

(a) The present location of any vehicles, pieces of machinery, or other physical items involved in the claim, and of any photographs which may have been made of them.

(b) The specific identity of any product(s) which may have been involved, any information known to the client regarding the age, maintenance record, safety record, present whereabouts, and repairs or alterations of the product.

(c) In a Workers' Compensation claim, this inquiry will include nailing down whether it has been reported to the employer that the accident occurred on the job, and if so, the specific details of that report in a form which can be verified by pleadings, written discovery, and/or depositions.

(3) Information about the client:

(a) You can reasonably assume that the other side will want to do all it can to discredit the client, as a means of minimizing the amount to be paid on the claim. This may involve checking with employers and former employers, ex-wives, ex-friends and acquaintances, criminal and traffic records, medical histories, indexes of prior accidents, etc. Therefore, it is important that you know everything possible about the client's background, particularly anything which might be negative, in order that you and the client may discuss it and discuss how to deal with it.

(b) This inquiry will include at least: prior injuries and medical conditions, particularly as relates to parts of the body injured in the incident, and as relates to psychiatric, psychological, or other prior medical treatment which might be exploited by the defense; prior accidents, particularly if it is a vehicular accident case; prior suits in which the client has been a plaintiff or a defendant; convictions; arrests; any difficulties with current employers; past employment history, particularly as relates to difficulties, terminations, etc.; drug or alcohol use, and any treatment for these addictions.

(4) Information to client:

(a) Items you will want to be certain to communicate to the client:

(i) The client should not talk to others about the incident. This is not limited to adverse investigators. Friends, fellow employees, and acquaintances could turn out to be adverse witnesses, if what they heard and related to an investigator was something different from what the client actually said.

(ii) If pain, suffering or inability to engage in activities as before are continuing at the time you talk to the client, the client should keep some sort of diary. That will be discoverable, assuming it is used by the client in preparation for a deposition or trial testimony, and/or if it is used as a discovery or trial exhibit. Nevertheless, it should be done because it will help the client and jury to understand the continuity and progression of recovery, many months later when a trial may occur.

(iii) Explain to the client the anatomy of a lawsuit, time to recovery, etc.

(iv) Costs of prosecuting a case, including court costs, deposition transcripts, doctor's charges for giving depositions, expert witnesses. The client is responsible for these costs.

(v) Strategy. Your client will need to understand the downside of a "when will I get my money?" approach. Convince them of the strength of moving toward trial from day one.

(5) Documents you will need to accumulate:

(a) Police report (if an auto case), medical bills

(b) Bills for medications, automobile insurance policy

(c) Photographs and/or videos

(d) Health insurance policy

(e) Tax returns for last five years

(f) Employer's first report (if it's a Workers' Compensation case)

(g) Authorizations—Medical, tax, employment

(h) Death certificate, if applicable

(6) Fee contract

3. What to Look for When Assessing the Case

a. Liability

Depending upon the legal theory you are proceeding on, you should research very carefully what you will have to prove in order to prove liability. For example, in a product liability case, New York recognizes four separate causes of action for injuries resulting from an allegedly defective product. They are: strict product liability, negligence, breach of express warranty, and breach of implied warranty.[14] The standards under each theory vary as does the degree of the complexity of the evidence required. In cases involving mass torts, for example prescription drug cases, you need to thoroughly review the evidence suggesting corporate wrongdoing before you even begin to interview individual clients. You may have an individual plaintiff who has severe impairments, yet you may not be able to prove that the manufacturer of the drug is liable for the injuries.

Detailing the specifics of what you need to prove in various areas of law is beyond the scope of this article. However, you should consult with experts in each area before you embark on litigation. For instance, in commercial cases you can have a variety of different causes of action: breach of contract, common law fraud, securities fraud, conspiracy, antitrust cases, business torts, etc. Each different case will require you to become thoroughly familiar with the elements of each cause of action you wish to pursue. Study the law and the cases carefully to find out what you will need to prove.

An important element in considering where to file is whether your client's negligence will bar or reduce his or her recovery. New York is a pure comparative negligence state. A claimant's negligence, no matter how great, will not bar recovery, but the damages recoverable will be reduced in proportion to his or her negligence.[15]

b. Damages

What are the present, and anticipated: (1) medical bills and related expenses; (2) lost wages, and/or lost of earning capacity; (3) indices of objectivity and intensity regarding pain and suffering; (4) limitations of usual activities; (5) loss of enjoyment of life; and (6) likely jury range as to recovery. Are there other parties that can claim damages, such as a spouse or children? The client and you should be on the same page about the continuing, and changing, view of the value of the case. You need to consider whether punitive damages are available and what the burden of proof is in order to get punitive damages.

c. Collection Issues

Not all judgments are collectible. You need to research potential hurdles to collection. Even after a win at trial your efforts to collect might be frustrated.

d. Cost to Prosecute

Your client needs to be advised of likelihood of recovering vs. cost of litigation.

e. Credibility and Likeability of Client

Sometimes your own intuition will tell you up front that there is some problem with the chemistry between you and the client, or in the likely chemistry between you and the client, or in the likely chemistry between the jury and the client.

(1) Is the lawsuit an ego trip for the client?

(2) Is the lawsuit a vehicle by which the client primarily wants to ventilate anger and impose the pain of defending litigation on the defendant?

(3) Is the client consumed by greed or simply by unreasonable expectations, to the point of not being able to be receptive to a reasonable evaluation of the case?

(4) Is greed perhaps masked in an "all I want is what I am entitled to" observation by the client? If you get that kind of comment, be sure and pursue a quantifying of what the client thinks a reasonable recovery, to which the client feels "entitled," is.

(5) Is the client a control freak, wanting to tell you how to conduct a case?

(6) Is the client flexible regarding the facts?

(7) Has the client had other attorneys in other cases, or even prior attorneys in this case?

(8) Does the client seem to complain about employers, family members, doctors, lawyers, the world?

f. The Difficult Job of Proving Pain

i) Time of onset—This particular aspect of proving pain is no problem if the client complains of excruciating neck pain at the scene of a vehicu-

lar accident and where the EMTs utilize a cervical collar and a board to transport the client from the scene. It is a little more difficult if the police officer's report shows "no complaint of injury," and the client first complains of soft tissue pain later in the day. In most cases, that is not a serious problem. Most of us have engaged in vigorous exercise, or painted or wallpapered a room, gone to bed feeling pleasantly tired, and woken up stiff as a board the next day. That phenomenon can be explained to a jury by the treating physician and by you as counsel. The problem becomes more serious where the client complains of injury to one part of the body for several days after the incident, and then begins to complain of soft tissue injury in another part of the body. Maybe the intense pain in another part masked the less severe pain in the other part.

ii) Objective evidence of pain—Pain by definition is subjective. The task is to determine whether there is reliable "objective" evidence of the pain, and if so to bring that forward. Rely upon treating physicians.

iii) Intensity of pain—consider video evidence, e.g., burn victims.

iv) Continuity—regularity, or intermittency of pain

v) Effects of pain—"so what"?

4. How to Conduct a Thorough Case Investigation

i) Write to everyone concerned:

(1) Doctors

(2) Hospitals

(3) Therapists

(4) Ambulance records

(5) Employer's first reports (in a Workers' Compensation case)

(6) Insurance companies (client)

(7) Insurance companies (defendants)

(8) Medicare/Medicaid, if applicable

(9) Witnesses/get photos/videos

(10) Product packaging—when identification is an issue

(11) Autopsy/Coroner's report, if applicable

5. Use of Experts

In complicated cases involving medical issues, you will almost always benefit from obtaining an expert review of a case. Assuming you have enough time, send the pertinent medical records to an expert for his or her analysis of causation and damages issues. A specialist may be able to stop you from filing a case or at least identify areas that you need to develop as you move along with the litigation. It is often very useful if the treating physicians give you favorable opinions. Make it a point to talk to the treating physicians. In some cases the treating physicians may also qualify as experts; this will greatly enhance your prospects since their opinions are formed pre-litigation and the jury may view them as more credible than an expert hired to testify.

6. Special Issues in Commercial Litigation

There are further considerations when evaluating a commercial case. You need to thoroughly review your client's files as soon as possible. This should be done before filing a complaint. The review of a client's file will enable you to accomplish several useful things. First, you will be able to locate and assemble documents which should be attached to the complaint as exhibits. Second, you will verify the recollection of your client. Third, you may find documents that suggest additional causes of action. Last, you will locate documents, if any, that are inconsistent with your client's story. This will enable you to refresh recollections.

The volume of documents and electronic data involved in investigating commercial disputes can be overwhelming. The quantity, nature, and use of your client's documents will dictate whether they can or should be left with the client or removed to your office. Keep in mind that commercial disputes often involve sensitive materials such as trade secrets, confidential business plans, or proprietary information relating to customers of suppliers. You should discuss the need to keep such materials confidential. You need to weigh the benefit of proceeding to litigation and having to disclose information during discovery against your client's need for keeping certain documents confidential. Recent developments relating to e-discovery, the production of electronically stored information, must be thoroughly understood and explained to your client. By filing litigation your client might be exposed to burdensome task of producing internal documents and electronically stored information.

During the course of your review of your client's files, it is likely that you will come across documents damaging to your case. Your client may even ask you whether he should destroy damaging documents. The disciplinary rules forbid any such notion. Even if it were not ethically impermissible to suppress or create evidence, the revelation at trial of an attempt to withhold evidence is likely to be far more damaging than the evidence itself. And certainly in today's world of e-mail communications, you can never be sure that a document has truly been destroyed.

You will need to conduct interviews of corporate employees with knowledge of the pertinent facts. While you can expect that your cli-

ent's employees will cooperate with you at any stage in litigation, you cannot be sure that they will still be employed with your client by the time of trial. Therefore, it is prudent to interview all witnesses, including your client's employees, before trial.

Be sure to review the bylaws of the corporation to determine whether the officer with whom you are dealing has the power to institute suits of the type you are contemplating. If not, you should request the proper corporate resolution.

In some cases, there may be value to the potential defendant of keeping the allegations from becoming part of the public record. Since that value is lost upon the filing of the suit, such situations might call for pre-filing settlement proposals.

PART 4. Where to File—Venue Selection, State and Federal Requirements

1. General Considerations

Where to commence an action must be decided at an early stage of the litigation. The first issue to resolve is whether the suit should be filed in state court or federal court. Frequently this depends on individual preference and varies by the nature of the case, the attorney's own prior experiences in similar cases, and the urgency of the relief sought by the client. If you are considering filing in a jurisdiction with which you are not familiar, you must get in touch with lawyers who regularly practice there. These could be old law school buddies, bar association contacts or attorneys within your firm who may have experience in a particular venue. Reach out to whoever may be able to offer insights.

Some attorneys bring certain types of cases in federal court because they believe the federal bench is more experienced and thus better qualified in handling a particular type of dispute. Case assignment procedures in federal court frequently result in the same judge having the case from beginning to end. To some attorneys this is an opportunity to "educate the judge" with respect to their perspective as the case progresses.

A great deal of commercial or business litigation involves federal statutes, and in these cases the preference for federal court makes sense. However, state court judges often can deal with very complex business transactions very effectively and fairly.

The quality of jurors is often very important in determining whether to file in state or federal court. Some attorneys believe that jurors selected from a federal venue are better qualified to deal with the complex factual issues typically involved in commercial or business litigation. This point may not amount for much, since many commercial or business cases in both state and federal court are tried by judges.

Beyond the state vs. federal court issue, greater relevance might attach to the locale. Certain advantages accompany filing in the lawyer's hometown or the hometown of his client. The convenience of being in close proximity to the court, especially where the local reputation of the client and his or her lawyer is good, weighs significantly in favor of filing in the client's or lawyer's hometown. Additionally, if the defendant is not well regarded in the forum community, and is also inconvenienced by "away from home" litigation, this may bring benefits for the client.

A great many attorneys feel that filing a lawsuit in the defendant's hometown is the least desirable option. In many instances this option is unavoidable. This will be affected by the reputation of the defendant in his or her community and relative position in the local economy.

Others favor filing neither in the plaintiff's home nor the defendant's home but rather in a neutral locale. Factors such as location of witnesses, or a facility or object of controversy, as well as the reach of the court's subpoena power may require the choice of such a forum.

The condition of the court's docket and the associated waiting periods from the filing date to trial is an important factor to consider. Similarly, you should find out how easy or difficult it is to schedule hearings on motions, what are the procedures available for emergency relief and whether similar or related actions are pending in the court. It is common for attorneys to want a quick trial date in order to provide much needed financial relief to their clients. However, in some situations a longer evidence-gathering period might be required where highly complex information needs to be analyzed fully in order to prepare the best case for your client. In complex product liability cases involving millions of pages of document review, more time might favor the plaintiff who has a very high evidentiary burden to meet.

In mass tort actions, it might be beneficial to file cases where other similar cases are pending. Primarily this enables plaintiffs' attorneys to pool resources in order to overcome the huge resource differential between their clients, who are mostly contingency fee-based clients, and the large corporate law firms that defend these cases.

2. State Court Procedure

a) State System

i) Supreme Court (check your County)

ii) Lower Courts

(1) City Court

(a) Regular Actions

(b) Small Claims Actions

(2) Village Courts

iii) Court of Claims—actions against the State

iv) Surrogates Courts and Family Courts are courts of special jurisdiction that will not be covered by this article.

b) Proceedings in the State Court System are governed by the Civil Practice Law and Rules (CPLR) and various Court Acts:

i) Court of Claims Act (CCA)

ii) Uniform Justice Court Act (UJCA)

iii) Uniform District Court Act (UDCA)

iv) Uniform City Court Act (UCCA)

c) An action in the New York State Court system is initiated by either filing a pleading or by serving a pleading, depending on the court in which the case is brought.

i) Litigation in Supreme Court, District Court or City Court is initiated by the filing of a pleading with the appropriate clerk's office (County Clerk's Office for Supreme and District Court, the court clerk's office for City Court).

(1) Actions in lower courts used to be initiated by service of pleading.

(a) CPLR was amended in August 2005 to adopt a filing system for District and City Courts.

(b) Village and Town Courts still follow the old procedure.

(2) Pleadings must then be served on the opposing parties within certain time limits.

(a) Summons and complaint must be served within one hundred and twenty (120) days of being filed (CPLR 306-b).

(i) Time can be extended by court order.

(ii) Application must show good cause why service was not accomplished within the 120 days.

(iii) In a proceeding under the Election Law, where statute of limitations is four months or less, service must be accomplished within fifteen days.

(b) Service deadlines can be varied by court order or statute.

(c) For certain types of service, service is not deemed complete until the affidavit of service is filed with the court.

(i) Service on a person of suitable age and discretion (CPLR 308, subd. 2).

(ii) Nail and Mail Service (CPLR 308, subd.4).

(3) Statute of limitations is tolled when action is filed.

(4) An application for an index number has to be filed along with payment of the required filing fee.

(a) Currently it is $175 for Supreme Court Action.

(b) City court filing is less.

(5) A Request for Judicial Intervention and filing fee ($75) is required when filing:

(a) A Notice of Petition and Petition

(b) Order to Show Cause

(c) Summary Judgment in Lieu of Complaint.

ii) Litigation in lower courts is initiated by the service of a pleading on the defendant[s].

(1) Town and Village Courts

(2) Pleadings are not filed until complaint is served

(a) It should be filed within six days.

(b) The Uniform Justice Court Act allows the court to direct the filing *nunc pro tunc* if the plaintiff has not complied with the filing requirements.

(3) Use of the courts with lower monetary jurisdiction can avoid the filing fees required to bring an action in Supreme Court.

(4) The statute of limitations is not tolled until pleading is actually served on the opposing party.

iii) A claim against the State is instituted by filing a Notice of Claim with the Clerk of the Court of Claims with a copy sent certified mail, return receipt requested to the New York Attorney General.

(1) Service is complete when the claim is received by the Attorney General.

(2) Notice of Intention to file claim:

(a) Different than actual claim

(b) If Notice of Intention to file claim is filed within ninety days of accrual of claim, then actual claim may be filed within two years for a negligence claim, one year for an intentional tort (CCA § 10).

(3) A court, in the appropriate circumstances, can grant permission to file a late Notice of Claim.

(a) Excusable delay

(b) Whether the State had notice of the essential facts constituting the claim

(c) Whether the State had the opportunity to investigate the facts underlying the claim

(d) Whether the claim was meritorious

(e) Possible prejudice to the State

(f) Other available remedies

d) Civil Litigation in New York County is brought in Supreme

Court if the amount in controversy is sufficient.

i) Technically, any civil litigation can be brought in Supreme Court.

(1) Cases involving small amounts are subject to remand to lower courts.

(2) Personal jurisdiction issues may prevent use of the lower courts.

ii) An action in Supreme Court is initiated by the filing of a pleading with the County Clerk.

(1) Summons with notice (CPLR 305(b))

(2) Summons and complaint (CPLR 305(a))

(3) Notice of Petition and Petition (CPLR 402 and 403)

(4) Order to Show Cause (CPLR 403(d))

(5) Motion for summary judgment in lieu of complaint (CPLR 3213)

(iii) Actions in lower court are limited to actions for monetary relief.

(iv) Small claims actions are very informal, normally instituted by filling out a form with the court, which will then mail the summons and complaint to the defendant.

e) Pleadings

i) Summons (CPLR 305(a))

(1) A pleading is used to obtain jurisdiction over a party.

(2) A properly prepared summons will contain:

(a) The name of the court in which the action is brought, including the specific court in which the case is filed

(i) Supreme Court—include county.

(ii) Village court—include village and county.

(iii) City Court—include city and county.

(b) The name of all the parties in the action

(c) The basis of the venue claimed for the action

(i) Residence of the one of the parties (CPLR 503)

1. Individual party (CPLR 503(a))

2. Corporate party (CPLR 503(c))

3. Partnership (CPLR 503(d))

(ii) Consumer Credit Transaction—residence of defendant (CPLR 507(f))

(iii) Location of the property involved in the action (CPLR 507, foreclosure/lien)

(3) A summons can be served without or with a complaint.

(a) A summons served without a complaint must be served with a "notice."

(b) The notice must give the nature of the dispute, the relief sought and, except in a medical malpractice action, the amount in controversy (CPLR 503(b)).

(c) The defendant should respond with a Notice of Appearance and Demand for a Complaint (CPLR 3012(b)).

(d) In almost every case, it is preferable to serve a complaint, even a bare-bones complaint, rather than a summons with notice.

(4) If the action involves a consumer credit transaction, the summons must contain that annotation to be effective.

(5) There is no requirement in the CPLR that the summons contain a statement setting forth the time in which a response must be received or that a default judgment can be taken if a response is not timely received, but most summons contain that information as a matter of good practice.

3. Federal Court Procedure

a) Proceedings in federal court are governed by the Federal Rules of Civil Procedure (FRCP).

b) Pleadings:

i) A case is brought in federal court by the filing of a Complaint with the Court Clerk.

(1) A federal court complaint must contain the basis of federal subject matter jurisdiction (FRCP 8(a)(1)).

(a) If jurisdiction is based on a federal question, the statute relied upon should be alleged

(b) If jurisdiction is based on diversity, the complaint should allege:

(i) The citizenship (not residency) of the parties

(ii) The amount in controversy (in excess of $75,000)

(2) The complaint should also state the basis of venue (28 U.S.C. §§ 1391–1412).

(i) Different than state court

(ii) In an action based on diversity of citizenship (28 U.S.C. § 1391 (a)):

1. The district in which any defendant resides if all the defendants reside within the same state

2. The district in which the cause of action arose

3. A district in which the defendants are subject to the personal jurisdiction of the court when the action is commenced if there is no other district

in which the action could be brought.

(iii) In any other action (28 U.S.C. § 1391(b)):

1. The district in which any defendant resides if all the defendants reside within the same state
2. The district in which the cause of action arose
3. A district where any defendant may be found if there is no other district in which the action could be brought.

(iv) Venue must be in the district covered by the specific federal court.

(v) A statutory venue provision, such as ERISA, should be alleged.

(3) A complaint should be signed by an attorney admitted to practice before the court in which the action was brought (FRCP 11).

(4) A filing of the Complaint tolls the statute of limitations.

(5) You also have to file a Civil Action Cover Sheet and pay the filing fee ($250) with the Court Clerk.

(6) Under the new Electronic Filing System, this is the only hard copy paper actually filed with the Court Clerk.

(7) If you represent a corporation, a statement of affiliation must be filed with the first pleading filed with the Court (FRCP 7.1).

ii) Summons for each defendant are submitted to the Court Clerk when the complaint is filed with the Court Clerk.

(1) The form of summons is set by the Federal Rules of Civil Procedure (FRCP 4).

(2) The summons for each defendant is signed by the Court Clerk, not the plaintiff's attorney.

(3) The summons and Complaint must be served within one hundred and twenty days (120) days of filing (FRCP 4(m)).

(4) An affidavit of service, part of the Summons, has to be filed with the Federal Court Clerk (FRCP 4(1)).

c) Other types of proceedings:

(i) There are no provisions in the Federal Rules of Civil Procedure that allow the filing of a Notice of Petition and Petition or an Order to Show Cause.

(ii) The Northern District of New York, perhaps adopting the parallel state court proceedings, does allow the use of those procedural devices.

(a) Notice of Petition and Petition are normally used in arbitration disputed under the American Arbitration Act or Section 301 of the Labor Management Relations Act of 1947.

(b) Orders to Show Cause are used where preliminary relief is requested.

(iii) Other Districts, however, including the Western District of New York, do not recognize the concept of an order to show cause.

(iv) In the Western District a party seeking preliminary relief has to make an application for an expedited motion.

Endnotes

1. NYSBA, The Lawyer's Code of Professional Responsibility, DR 5-105(E). (hereinafter "Code").
2. Code, at DR 7-102(A)(1).
3. Code, at DR 7-102(A)(2).
4. 22 N.Y.C.R.R. pt. 130.
5. *Rindner v. Cannon Mills, Inc.*, 127 Misc. 2d 604, 486 N.Y.S.2d 858 (Sup. Ct., Rockland Co. 1985).
6. 22 N.Y.C.R.R. § 130-1.2a. *See also* 22 N.Y.C.R.R. § 670.2(i) (requiring that every paper in the Second Department be signed in accordance with part 130 signature requirements).
7. 22 N.Y.C.R.R. § 130-1.1-a(b).
8. 22 N.Y.C.R.R. § 130-1.1(c).
9. Code, at DR 6-101(A)(1).
10. Actions Arising Outside of State are barred in this state after expiration of time limited by laws either of this state or of state or country where action accrued, except that where cause of action originally accrued in favor of a resident of New York the time limited by its laws applies. (CPLR 202). Where such cause of action, whether originally accrued in favor of a resident or nonresident, accrued in foreign country with which the U.S. or any of its allies was then or subsequently at war, or in territory then or subsequently occupied by such foreign country, period between commencement and termination of hostilities or occupation is not a part of time limited. This section does not apply to certain actions against a banking organization or superintendent of banks (CPLR 209(a)).
11. *Annunziato v. City of New York*, 224 A.D.2d 31, 37, 647 N.Y.S.2d 850, 854 (2d Dep't 1996).
12. CPLR 214-c(2) (McKinney 1990).
13. *Id.*
14. *Heller v. U.S. Suzuki Motor Corp.*, 64 N.Y.2d 407, 412, 477 N.E.2d 434, 437 (1985); *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d. 395, 400, 355 N.E.2d 275, 277 (1975).
15. CPLR 1411 (McKinney 1997).

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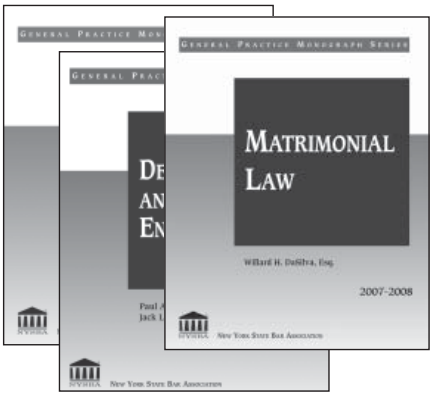

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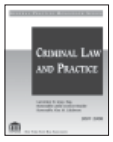

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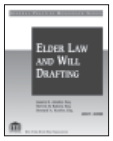

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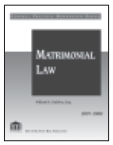

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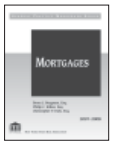

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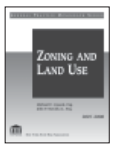

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