NYSBA

SPRING 2012 | VOL. 4 | NO.1

The Senior Lawyer

A publication of the Senior Lawyers Section
of the New York State Bar Association

Inside

NYSBA

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A Message from the Section Chair

Greetings: As you receive the Spring edition of our newsletter I am pleased to be writing as the newly elected Chair of the New York State Bar Association's Senior Lawyers Section. Following the splendid examples of Justin Vigdor, the founder of the Section, and of Walter T. Burke, the immediate past chair, is not an easy task. The impressive growth in Section membership and the breadth of issues covered in Section programs and publications sets an example for me and for Section leaders to come. I shall do my best to live up to their excellent examples of leadership.

This issue of *The Senior Lawyer* contains an impressive array of articles. I commend them all to your careful attention. I shall focus on two of the articles. The first is a tribute by the Co-Editor of *The Senior Lawyer*, Willard H. DaSilva, to Carole Burns, Chair-Elect of the Section, for her lifelong commitment to helping the underserved part of our community, largely through pro bono activities, and for her exemplary service to the Section as Co-Chair of the Program and CLE Committee of the Section. Carole is more than worthy of the tribute and a most valuable member of the Section's Executive Committee. I know that for the coming year she has some exciting and worthwhile programs planned for the Section. Please watch for the announcements of these programs. The second article that I comment about is a summary of the Senior Lawyer's Section 2012 Annual Meeting Program, "Considering What's Next." The panels for the program focused on how to transition to the next phase of a legal career; planning issues for senior lawyers and their clients; and pro bono opportunities for senior lawyers. The content of this program summarizes much of what the Senior Lawyers Section is about.

During my tenure as Chair of the Section I hope to continue all of the excellent work the Section has undertaken regarding planning and counseling but place a particular emphasis on two areas. The first is the diversity of the membership of the Section, both with respect to women and to members of minority groups. The second is to strengthen our pro bono activation capacity, including building a strong relationship with the Attorney Emeritus Program that the court system has created. The Section is the natural constituency of that Program. To assist with these efforts I have appointed David Edmunds as Co-chair of the Diversity Committee. I shall serve as the other Co-Chair. I have also added as additional Co-Chairs of the Pro Bono Committee, Fern Schair, who among other important activities, serves as Co-Chair of the Attorney Emeritus Advisory Council, and Stephen Brooks, who recently retired as general counsel of IOLA. I look forward to working with them and with all the other members of our Executive Committee and Section.

Susan B. Lindenauer

A Message from the Co-Editor

Willard H. DaSilva

In a little more than three years that our Section has been in existence, it has seen extraordinary growth. From a handful of members to now more than two thousand active participants, our Section has demonstrated the need to serve the so-called "elder citizens" of our Association and to provide a vehicle so that our members may continue to provide worthwhile services to clients, to the communities that we serve and to the various legal and civic organizations that serve the public.

To me, the designation of our Section as "Senior Lawyers Section" is in a sense a misnomer. We may be senior (to a point) in age; however, our members continue to be an active, vibrant and dedicated group of attorneys who serve not only their clients but also, even after retirement, dedicate their valuable time to serving others in various capacities.

To keep our members apprised of matters of interest in varying fields of law and of life, this magazine is devoted to a panoply of articles covering various subjects. Some are legal in nature, others have human interest aspects, and yet still others are simply entertaining. A full listing is shown on the Table of Contents in this issue of *The Senior Lawyer*.

Marguerite Stenson Wynne

In an effort to improve this publication for your use, we are seeking a few persons to add to our board of editors. If you have an interest in participating in the development and production of this magazine, please communicate with me at your earliest convenience. There are many ideas to improve and expand this magazine, but they require additional editorial assistance.

Rather than review all of the articles that are a part of this issue of *The Senior Lawyer*, I refer you to the contents page. However, of particular note is the message from our Chair of the Section, which you might have already read.

I look forward to hearing from you and to any suggestions, articles, comments and any other thoughts to make this magazine the most valuable publication of our Association.

On behalf of my Co-Editor Marguerite Stenson Wynne and myself, I appreciate the help that you have already given and look forward to further ideas and suggestions and to your increased involvement in our Section.

Willard H. DaSilva, Co-Editor

Request for Articles

If you have written an article you would like considered for publication, or have an idea for one, please contact one of *The Senior Lawyer* co-editors:

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www.nysba.org/TheSeniorLawyer

A Tribute to Carole Burns

By Willard H. DaSilva

For some retirees, life seems to be ending. However, for other retirees, life—a new life—is just beginning. Carole Burns is the epitome of the latter.

Most of us know Carole Burns for her apparently unending work for the Senior Lawyers Section of our Association. We know her, particularly, as Co-Chair of the Program and CLE Committee of our Section.

Carole's commitment, not only to the law, but particularly to needy persons who cannot afford to pay high legal fees, began when she was a law student at Fordham University School of Law. There, she volunteered her services with the Legal Aid Society and Queens Legal Services, both organizations of which provided legal assistance to those who could not afford independent attorneys.

The desire of Carole to help the needy in legal matters prevailed after law school and continued when she joined Nassau / Suffolk Law Services Committee. That Committee was designed to assist persons in the low economic income levels on Long Island and to provide services on a "pay as you are able" basis. Carole retired at the end of 2004. However, her zeal for helping disadvantaged persons who required legal assistance did not diminish. She became an in-house attorney with Nassau Volunteer Lawyers Project, where she remained for several years in a legal capacity as well as performing significant executive functions.

I remember speaking with Carole in early 2009, when she and I were among the initial members of the Senior Lawyers Section. She was then living in Nassau County and told me that she would, this time, really "retire." I did not know her very well at that time. However, in retrospect it occurred to me that Carole's vocabulary did not know the meaning of the word "retire." It is my guess that "retire" means simply to go on to a different *pro bono* project. In 2009, when Carole told me that she had sold her house in Nassau County and was moving to the east end of Long Island, I knew that she was not going to "retire" as in the normal sense, but rather simply "reestablish" herself in another form of rendering legal services to needy persons. Carole's recognition as an outstanding *pro bono* attorney is a model to which all attorneys should aspire. She also has dedicated herself to significant work in the Senior Lawyers Section. Not content with her invaluable services in planning and running the educational aspects of our Section, she has now determined to go on further. She is now Chair-Elect of our Senior Lawyers Section.

Although many attorneys have performed significant *pro bono* work, Carole was singled out recently in a special section of the *New York Law Journal* on September 19, 2011, as one of only a few attorneys highlighted in that prestigious publication for outstanding services, not only as an attorney, but also as an extraordinary human being. We are all, indeed, especially grateful to have Carole as a part of our Section and for her leadership, dedication and expertise—all of which serve as an aspirational level of excellence to which we all can aspire.

The 2012 Annual Meeting: Senior Lawyers Consider What's Next: Defining and Preparing for Retirement

By Rosemary C. Byrne

On January 24, 2012 the Senior Lawyers Section presented "Considering What's Next" as part of NYSBA's Annual Meeting. The genesis of this program was the July-August issue of the NYBA's *Journal* which, in multiple articles, urged attorneys to consider "Are You Prepared for the Elder Years?"

Hon. Judith S. Kaye

In continuing the exploration begun in the *Journal*, our program began with a dialogue led by the Honorable Judith S. Kaye, former Chief Judge of the New York Court of Appeals, among Justin L. Vigdor, Martha E. Gifford, and Steven B. Rosenfeld, all of whom have successfully transitioned to the next phase in their careers. Judge Kaye, who was forced to retire because of mandatory age limits, is now of counsel at Skadden, Arps, Slate, Meagher & Flom. She noted that despite the wide array of opportunities available to her upon retirement, transitioning was nonetheless a challenge. Not being identified by who she was, but rather who she is, was one such challenge. Optimistically she stressed that lawyers are "ultimate problem solvers" and have much to offer when considering what's next. Judge Kaye recommended that an attorney considering a transition find something in his/her past which can be a "transition thread." In her case Judge Kaye continues to focus on children's issues, which for many years have been an important part of her life and work. Currently, Judge Kaye is the Chair of the Permanent Judicial Commission on Justice for Children.

Mr. Vigdor, at age 82, is Senior Counsel at Boylan Code and is in his office every morning. He explained that he has redefined retirement by continuing to do some work for long-standing clients, but also by greatly increasing the time which he spends doing work for the county and State bars and for certain non-profit organizations, and in chairing an exciting new community cultural project, the Rochester Arts Festival. These bar and community activities were begun early in Mr. Vigdor's career and, similar to Judge Kaye's devotion to children's issues, are integral to his redefinition of retirement.

Mr. Rosenfeld and Ms. Gifford illustrate other ways to redefine retirement. In Mr. Rosenfeld's case, he is of counsel at Paul, Weiss, Rifkind, Wharton & Garrison LLP but volunteers two days a week as a Legal Aid lawyer in Manhattan Family Court, representing children in abuse and neglect cases; he described his work as "enormously rewarding." After 40 years as a commercial litigator, Mr. Rosenfeld wanted to continue to represent clients, but doing something entirely different. Among the advice on transitioning which he offered to the attendees was to try to do something completely different, to not wait until you are forced to make a move, and to not get so caught up in what you are doing that you don't enjoy the other aspects of retirement.

After more than 30 years as an antitrust lawyer with the Department of Justice and two major law firms, Ms. Gifford chose to continue to practice antitrust law, but as a sole practitioner. She explained that she is able to provide advice and counseling to corporate clients on major projects and, where necessary, coordinate litigation of significant matters, because she has the correct technology. Her office is her "MacBook Air"; scanning does away with the need for traditional file cabinets; and the computer permits her to carry her "office" with her wherever she chooses to be. Ms. Gifford encouraged the attendees to become, and stay, current with developments in technology, and pointed out that this is what allows her to represent corporate clients, while also spending time with her husband, participating in the work of the Women's Bar Foundation and her college, and performing community service.

After hearing the many versions and definitions of retirement of Judge Kaye, Ms. Gifford and Messrs. Vigdor and Rosenfeld, our focus turned to "Preparing for What's Next," our second panel, addressing the major planning issues we and our clients confront as we approach seniority.

With wit and wisdom, Msgr. Charles Fahey, the immediate past chair of the National Council on Aging and a Professor Emeritus at Fordham University, focused on the realities of aging and its impact on our lives and our health. Stressing that aging is a natural and inevitable phenomenon, Msgr. Fahey described the three "ages" of life. The first age begins at conception and runs through puberty. In the second age we reach our maximum physical capacity for work. In the third age, viewed as the final age, we experience "progressive intermittent frailty," an inevitable biological, physical, social and, perhaps, financial deterioration. Given the advances in science and technology and our own health-conscious behavior, we are, as Msgr. Fahey put it, in "terra incognita," foreign territory, in identifying the starting point and duration of this third age.

He stressed that these uncertainties in our time line underscore the need for estate planning and health care directives. Such planning enables us to maintain our personal autonomy, by making and codifying our own medical, ethical, and, perhaps, religious determinations about end of life or decreased competency care.

Robert Abrams, of counsel to Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, in Lake Success, also emphasized the need for planning. Bob peppered us with questions from his elder preparedness self-assessment Tool (TEPSA) to test our knowledge of elder demographics (Americans who are 65 can expect to reach their 80th birthday, with 25% of them likely to live past 90) and the chronic health conditions of the elderly (the high incidence of Alzheimer's, diabetes and arthritis). Bob used the quiz to urge us not to wait "until it's too late," but rather to be "pragmatic planners." He suggested we prepare our own "To Do" list of estate planning documents and personal information our loved ones would need in the event of our serious illness, incompetence or death. The list would include such items as a will and health care directives, as well as insurance, banking and brokerage account information, pin numbers, passwords, and burial and funeral arrangements.

The panel moved from documents to dollars as Walter T. Burke of Burke & Casserly, PC in Albany, the former chair of our Section, discussed the need for financial planning. A specialist in elder law, Walter used his own "pop quiz" to test our financial knowledge of investment returns, to explain the efficacy and limitations of the so-called "11th commandment" (i.e., "thou shalt not invade principal"), and to highlight the differences between Medicare (available to virtually all at 65) and Medicaid (designed for those in financial need).

Stressing that there is no "magic dollar amount" for retirement, Walter advised considering our individual retirement goals and objectives and establishing a realistic budget to determine the financial feasibility of retirement. Walter also reminded us of the need for and advantages of good tax planning, as well as reliable investment and insurance advice.

Rosemary Byrne of Step-by-Step Coaching, an attorney who has transitioned from full-time lawyering to retirement coaching, explored the life planning aspects of "preparing for what's next." She suggested that once we understand the physical realities of aging and have done the documentary, estate and financial planning urged by Walter and Bob, we still the need to ask ourselves, "Now What?" What will we "do" and how will we define ourselves and find joy in this period commonly called "retirement."

Exploring and rejecting traditional notions of "retirement" and the idea that there is a one-size fits all version of "retirement," Rosemary urged our members to seek their own expansive definition. She defines it broadly as "the span of time after mid-life and before the afterlife" and sees it as a time of personal choice and opportunity in which we are free to engage in work, life and leisure in whatever balance we choose. Above all, however, Rosemary urged us to plan for our retirement life. She cautioned that joyful aging and a desirable work-life-leisure balance do not happen serendipitously; they take planning and preparation.

In 2007 the Special Committee on Senior Lawyers (the predecessor to the Senior Lawyers Section), with the help of survey professionals, surveyed a statistically reliable random sample of 16,000 New York lawyers age 50 and over. Among the questions asked was what the lawyers thought they would be doing when they reach their contemplated retirement age. Approximately 30 percent responded that they would devote some or all of their time to community service or pro bono work. The final segment of our program was composed of panelists associated with four programs which provide those opportunities.

Lynn M. Kelly, Esq., Executive Director of The City Bar Justice Center, described the multiple options for pro bono work offered by the City Bar through its Justice Center and Public Service Network. Maximizing the City Bar's relationship with law firms, corporations, academic institutions, legal services organizations and nonprofits, the Justice Center provides legal services through volunteer attorneys working under the guidance of experts in the fields of economic justice, immigrant justice, and access to justice initiatives. Through the Public Service Network the Justice Center matches attorneys with legal and non-legal volunteer opportunities in the not-for-profit sector.

Fern Schair, Esq., Co-Chair of the Attorney Emeritus Program's Advisory Council, reported that currently there are 51 legal service providers and additional court programs which offer volunteer opportunities through the AEP. Both actively practicing and retired attorneys, who are at least 55 years old and have at least 10 years of experience, are eligible, as long as they commit to 60 hours of pro bono work over a two-year period. AEP attorneys receive malpractice coverage provided by the organizations for which they provide legal services and retired attorneys, but not active attorneys, who register as an Attorney Emeritus are exempt from the $375 registration fee and CLE requirements.

The Center for International Legal Studies, headquartered in Salzburg, Austria, in cooperation with law faculties in Eastern Europe and the former republics of the Soviet Union, offers short-term, unpaid appointments to senior lawyers (at least 20 years of significant practice in the area in which he / she proposes to lecture). Margaret A. Bancroft, Esq., of counsel to Dechert LLP, described her experience as a Visiting Professor teaching courses in principles of American corporate law in Hungary, Estonia, the Czech Republic, and Kaliningrad, Russia, as both professionally and personally rewarding.

For those senior attorneys who are interested in using their talents in new arenas, Mary S. Bleiberg, Executive Director of ReServe Inc., explained that her organization matches professionals who are 55 years or older with nonprofits and public agencies to fill crucial staffing gaps. ReServists work on part-time service projects, in exchange for a modest hourly stipend paid by the employer. The part-time positions can be ongoing or time limited.

Full details of these programs, and the opportunities which they offer for pro bono work, can readily be accessed on their websites, and we encourage all senior attorneys to consider volunteering as part of their plans for "what's next."

This was an informative and enriching program. We look forward to seeing our members at this year's Senior Lawyers Fall Meeting and at our Annual Meeting in January 2013. We welcome suggestions for topics you would like to learn more about at our meetings and invite you to convey your thoughts and suggestions to us.

Carole A. Burns (cabb1@optonline.net) is Chair-Elect of the Senior Lawyers Section and Co-Chair of its Program and CLE Committee.

Rosemary C. Byrne (rcb@sbscoaching.com) is a member of the Senior Lawyers Executive Committee and serves on its Retirement Planning and Investment Committee.

Ensure the Future of Your Firm With a Succession Plan

By Michael J. Garibaldi, CPA/ABV/CFF

Succession planning should be a part of every law firm's practice continuation strategy. The reasons are fairly obvious. Without a succession plan, your firm cannot guarantee it will have qualified lawyers to move up and take over when the current generation of managing partners retires or otherwise becomes unable to perform its jobs.

Not having a succession plan can also affect your relationship with clients. To effectively shift clients from one generation to the next, you need to plan years in advance to avoid interruptions in service and other costly mistakes that may send clients packing.

Finally, without a succession plan, your firm will have trouble implementing long-term goals and strategic plans. Unless you can say with confidence that there will be competent leaders to carry them out, strategic plans can get sidelined.

Replacing the irreplaceable

When most lawyers consider succession plans, they think of their firm's major players—the managing partners who make most of the important decisions.

While replacing founding and managing partners is an important consideration in the firm's long-term survival, you should also plan for the retirement of other partners and nonpartners in the firm. Think, for example, of the impact on the firm if your legal administrator or CFO left or retired tomorrow.

Losing major rainmakers, in particular, can greatly affect your firm's profitability and success. The departure of even a few large clients could have a severe impact on the firm's bottom line, not to mention its morale.

To protect your firm from the loss of these key players, it's important to start early—at least several years before they reach retirement age. Asking senior partners about their retirement plans is a good idea. It will prevent the firm from being caught off-guard and will help you establish a timeline and action plan.

Many partnership agreements include retirement-related stipulations. For example, an agreement might request that the retiring partner notify management three years prior to his or her expected retirement date. At that time, the retiring partner could suggest successors capable of serving particular clients.

Grooming the next generation

Picking successors, however, shouldn't be left entirely to the discretion of retiring partners. Perhaps one of the most important roles of a succession plan is to identify and develop the skills and talents of younger attorneys.

To develop these skills, firms need to understand what each managing partner or other key member of the organization does. For example, what personal characteristics and legal, management, and practice development skills does that person bring to the firm? Are retiring partners valuable because they are client magnets or because they possess a complex understanding of the firm's technology needs?

Knowing the answers to these questions will help you groom more junior partners and even associates to eventually step into retiring partners' roles.

To prepare them for the responsibility, younger attorneys should be assigned to committees and task forces and offered management opportunities. Senior partners should also include these future leaders in client meetings so that they can learn about the client development and marketing aspects of the firm.

Transitions can be troublesome

Even if you begin your succession plan early and are fortunate enough to have many willing and able successors to your retiring partners, you may encounter a few obstacles as the transition gets under way.

Partners used to authority—particularly founding partners—may have a difficult time surrendering it when retirement time arrives. This is especially true in the case of partners who give up their official title but remain with the firm in an "of counsel" role. These individuals often have the urge to second guess new leaders.

While you want to ensure former leaders are available as sounding boards or sources of advice, it is, at the same time, important to prevent them from interfering in the work of the firm's new leaders. To avoid alienating retired partners, you may want to engage them in areas that can benefit from their experience, such as recruiting or mentoring new attorneys.

Determining financial compensation for retiring attorneys can also potentially produce conflict. One way to avoid surprises is to set up a several-year plan that ties the partner's draw to a corresponding reduction in production. Retirement payout should be linked to the firm's retention of business formerly managed by the retiring partner.

Plans benefit everyone

Because there is never one succession plan that fits all firms, plans should be flexible and tailored to the needs of your firm, its size, and the skills of its people.

Whatever plan you choose, it should ensure that future leaders will be well trained and capable of taking the helm. Finally, and perhaps most important of all, a well thought out and executed succession plan should lead to a smooth transition that does not disrupt the firm or lead to hard feelings among retiring or remaining partners.

Michael J. Garibaldi, CPA/ABV/CFF is President and CEO of Israeloff, Trattner & Co., CPAs, one of the region's leading certified public accounting, financial and management consulting firms, and the officer-in-charge of the Firm's Business Valuation, Law Firm Services, Forensic Accounting, and Litigation Support Groups. A noted law firm management consultant and valuation expert, his areas of expertise include accounting for law firms, business and management consulting, and the valuation of closely held businesses, professional licenses, and professional practices in the context of shareholder or partner dissolution/oppression actions, marital dissolution, fraud and embezzlement, estate tax and estate planning, equitable distribution, structuring buy/sell agreements, bankruptcy, personal injury, wrongful death or termination, business loss, breach of contract, acquisition, and sale. An instructor of the AICPA Certificate of Educational Achievement Program in Business Valuation, Michael teaches his expertise to other professionals.

Bankruptcy in the Cloud: Effects of Bankruptcy by a Cloud Services Provider

By David S Caplan

Insolvency lawyers often refer to bankruptcy as a lagging economic indicator. This is surely true when considering bankruptcy's or insolvency's effects on cloud computing. Many of the offerings that fall within the ambit of "cloud computing" are very new. Therefore, few bankruptcy cases or failures of cloud services providers are available to provide lessons on dealing with such a situation. Still, at this early stage, it may be helpful to explain the bankruptcy-related principles that "could" come to bear "if" a company within a particular cloud computing environment should fail or seek bankruptcy protection.

The Danger

Though "the cloud" and the proliferation of remote services is recent, the basic idea of having part of our technological lives in the hands of remote providers is far from new. Accordingly, there are examples of the very real danger of relying too heavily on these remote services.

Consider, for example, a bankruptcy case that shook the San Francisco Bay Area years before the boom of Silicon Valley erupted. In those days, the Bay Area legal community had just begun to become dependent on a new technology called "e-mail." Many providers of email hosting services were aggressively marketing to sign up subscribers. One provider was particularly successful in signing up lawyers and law firms as their subscribers.

The subscribers were so enamored with this new service that they did not consider what would happen if their provider ran into financial trouble. The provider, of course, was not very forthcoming, either, about its financial strength. It didn't tell its subscribers that it was throwing so much money into advertising and promotion that it was unable to ever get profitable. As is inevitable in that situation, it began having trouble paying its vendors. One of those vendors was its network interface provider (the provider of the telephone lines over which all the email traffic flowed between the provider's facilities and its customers).

Ultimately, the phone company wouldn't wait any longer. It cut off service. In a literal instant, tens of thousands of lawyers, doctors and others in the Bay Area lost their email capability and lost access to stored e-mail messages. The provider had gone completely dark with the flip of a switch. Most of those customers never got their stored messages back and had to spend weeks or months to arrange alternate service. The cost and disruption was astronomical.

Cloud Computing Participants

That example shows how 'Cloud' computing is a very apt label when considering the impact of bankruptcy, because any user of cloud services will be dependent on a potentially vast network of relationships that will be opaque to that individual participant. The bankruptcy of any one member of that network could reverberate throughout the environment and impact remote participants in many indirect ways.[1] Therefore, to provide context for discussion of the potential impacts of bankruptcy, this article will highlight some of the different potential participants and their relationships. Of course, as the cloud computing industry develops and becomes more sophisticated over time, the variations in type and number of participants in any particular network will grow and diversify. However, describing a few basic sets of relationships should exemplify the potential effects of bankruptcy. Therefore, following are examples of the sets of relationships that should be kept in mind when considering the impacts from the bankruptcy on each of the three traditional cloud computing environments.

Infrastructure as a Service (IaaS)

From the bankruptcy perspective, this form probably presents the least complexity. In this environment, the IaaS provider is essentially offering its users only a hardware (server) environment, loaded with virtualization software to allocate the hardware resources among customers, and network connections. Accordingly, the participants in an IaaS environment whose bankruptcy could impact the user (who will be referred to as an "at-risk provider") would include:

1. **Direct Provider**. The entity managing the hardware and infrastructure ("Direct Provider") for its users, who then install their own operating systems and applications and may have some access to manipulate the allocation system and network environment.

2. **Software Providers**. Unless the Direct Provider developed its own proprietary software, it is likely to be a licensee from developers of the software necessary to make the environment function. Some of this software might be "shrink wrap" or "off-the-shelf" where a one-time license fee is paid in advance and the developer does not have significant ongoing support duties to the Direct Provider. However, in light of the sophistication needed to operate an IaaS service, it is far more likely that the critical software (such as the virtualization software) will be custom-designed, and the

Direct Provider will owe ongoing license fees and be dependent on the continuing support of the developer for smooth functioning of the system. Examples of this software on which an infrastructure host might rely are Xen® by Citrix or Hyper-V® by Microsoft.

3. **Network Providers**. In today's global computing environment, there will likely be any number of intermediate Internet and other network providers between the Direct Provider with whom the user contracts and the user, and those networks must remain functional for the user to access and utilize the IaaS service.

Platform as a Service (PaaS)

In the PaaS environment, there are probably not any additional classes of participants whose bankruptcy would impact the user of the PaaS service. A PaaS provider only provides operating system software and, occasionally, hardware access. The PaaS provider's customers use their own application software, data, etc. Since the user must rely on the Direct Provider and its software and network providers for the operating system and, perhaps, other application and interface services, the number of software and network providers involved in any given PaaS cloud environment will probably be much larger.

Software as a Service (SaaS)

The situation changes dramatically, however, in the SaaS environment. In this environment, the user's "Direct Provider" is not the infrastructure host, but an application software offeror. The network then expands because the user must rely on the continued operation and security of:

1. The application software developer;
2. Other software developers from whom it licenses key components and tools for functioning of its applications;
3. The infrastructure host on whose servers the software is loaded for use;
4. Any software providers to that host; and
5. The network providers between the software developer and the host and between the host and the user.

Other Constituencies

Listed above are the primary at-risk providers in a cloud environment whose bankruptcy could impact (or devastate) a cloud user. In addition, if any of the above participants experiences financial difficulties, each one may have obligations to several other constituencies whose attitudes, rights and responsibilities will have serious effects on how such financial difficulties are resolved. These other constituencies include:

1. The cloud service provider's landlord or mortgage holder, unless the provider owns its facility outright. Consider the impact if a cloud service provider gets behind on its rent and the landlord exercises a right to lock the provider out of its building or to seize the provider's assets.
2. Software licensors of a cloud service provider. Consider the power of a key software licensor over an at-risk IaaS, PaaS or SaaS provider when the provider misses license payments, thereby triggering a right to terminate the license. Many software programs in recent years even have built in triggers that disable them unless a renewal license code is entered. In addition, if the software is of a type that requires ongoing provider support, that support will surely be disrupted if the licensee (the provider to the user) stops making payments.
3. Utility providers may also discontinue access to power if their service fees are not paid.
4. While other constituents can exist, it should be sufficient for purposes of this article to mention one other group: personal property lessors and secured lenders. Many server hosts do not own the servers they offer for use by their customers or use themselves to provide their services. They lease those servers or use asset-based lending from companies such as G.E. Capital to finance the acquisition of the equipment. Consider the impact, again, if payments are missed on one of those leases or secured loans, giving the lender / lessor the right to repossess and sell the equipment on which the user depends.

Thus, a user considering entering a cloud-computing environment must consider the financial strength and contractual and legal protections offered by the direct provider with whom it engages. The user must also consider the strength of other participants in the network and the protections afforded to the Direct Provider in its relationships with the entities on whom it depends, dependencies that can exist in multiple layers.

Key Bankruptcy Case Considerations

So, with that background in mind, the following section outlines some key principles of bankruptcy law that would govern if a participant in a cloud network were to seek formal protection under the Bankruptcy Code.[2]

Automatic Stay

When a cloud services provider in financial trouble files a petition for bankruptcy protection, rather than simply shutting down its operations, the filing of the petition activates the automatic stay set forth in Section 362(a) of the Bankruptcy Code. In these difficult circumstances, a bankruptcy filing is better for the user and others doing business with the troubled entity because the stay prohibits any party doing business with the debtor company from taking most actions adverse to its viability.[3] Accordingly, for a time at least, landlords cannot lock an IaaS host out of its facility, utility or network providers cannot terminate service, and software licensors cannot terminate necessary licenses. In addition, legal activities must immediately become concentrated in the bankruptcy court, so that all parties involved will have a single forum where their voices can be heard, and heard in the context of the debtor provider's overall circumstances.[4]

> *"Faced with a Chapter 7, don't wait to arrange an alternate provider and orchestrate a smooth migration. Get immediate control of your data, etc., and figure out later how you will start using it again."*

There are exceptions to the automatic stay, and affected parties have rights to have a bankruptcy court terminate it, some of which will be discussed later in this article. However, because the stay is immediate and automatic, it gives the parties breathing room to assess their situations and start developing strategies for dealing with the difficulties facing them.

Type of Case

A company within a cloud network may seek Bankruptcy Code protection in two ways. It can liquidate under Chapter 7 or it can attempt to reorganize under Chapter 11.[5] Besides the automatic stay, the most critical determinate of the level of disruption that users will experience probably is the filing choice made by a troubled company.

Chapter 7 Liquidation

Broadly speaking, when a company files a bankruptcy petition under Chapter 7, the company ceases operations and all management is shifted from the shareholders and board (if a corporation) or members and managers (if a partnership or limited liability company) to an independent Chapter 7 trustee chosen randomly from a panel of standing trustees in the federal court district where the case is commenced. All authority of the previous management to operate the business ceases instantly upon filing of the petition. Literally, if a user phones any (now former) employee two seconds after the petition is filed, even the CEO, the caller will be told (assuming that the CEO answers at all) that "I don't have any power to do anything for you; here is the new trustee's phone number."

Once in place, the trustee's sole job is to sell the "debtor's" assets and gather as much cash as possible for the "estate's" creditors. If a trustee is sufficiently sophisticated and moves quickly enough, he or she could seek authority to continue the company's service to customers for a limited period of time so that the liquidation is orderly.[6] However, unless the trustee (a) is immediately apprised that the debtor operates a cloud service on which many customers rely for continuous access, (b) understands instantly what is required to maintain smooth operations, (c) seeks immediate court authorization, and (d) has been turned over sufficient funds from the debtor to pay the costs of maintaining operations, disruption and even complete termination of service *will occur*. Chapter 7 trustees do not have access to governmental or other funds to operate their trusteeship practices or their debtor's businesses. In any given case, the trustee only will have available the funds the debtor had at the time of filing the petition, and usually the debtor would not have filed under Chapter 7 if it had the funds to pay its bills.

Fortunately, because the automatic stay will require landlords, equipment lessors, network and utility providers and licensors, for the most part, to go to the bankruptcy court and obtain permission before taking action against the debtor company, there may well be a short time, even in a Chapter 7 case, where a cloud system will continue operating. In many respects, the length of that time will depend on the degree to which the system is automated. In other words, as long as the system only needs network access, functioning machines and electric power, the bankruptcy filing would not instantly cut off service.

The difficulty comes when human intervention is required. The stay may temporarily stop a network provider from cutting off access, but it does not force employees to come to work and maintain a server installation if they are not going to be paid. If the party filing bankruptcy is a software provider with support duties to the customers, its employees will not be required to continue providing customer support.

It is rare for companies of any significant size, such as would probably be true of most cloud services providers, to suddenly liquidate and file for Chapter 7 protection. Usually, management of these companies will have sufficient foresight to be able file for reorganization under Chapter 11, where the operations can be maintained (for a longer time at least).

Nevertheless, if a company files for Chapter 7 protection, users of a cloud system can expect to have at most sixty days, on down to just a few days, to take steps to protect themselves. Regardless, the best protection available to an end user may have nothing to do with asserting legal rights – that step may be to log into any remote system and offload every piece of data and / or code that is humanly possible to another location. Don't wait to arrange an alternate provider and orchestrate a smooth migration. Simply put, get immediate control of your data, etc., and figure out later how you will start using it again.

There is serious risk in this drastic situation that it could become irretrievably lost.

Chapter 11 Reorganization

Chapter 11 reorganizations are what most non-bankruptcy practitioners envision when they hear about bankruptcy. In a Chapter 11 reorganization, the filing of a petition does not, in and of itself, alter the company's normal operating pattern.[7] Generally speaking, the limitations mentioned in Section 1107 (quoted on Footnote 7) refer to limitations on actions outside the ordinary course of business, such as secured borrowing or sales of the business or major assets. Thus, until financial circumstances force a different outcome or parties interested in the case convince the bankruptcy court to alter the pattern, the debtor company is permitted to continue operating in the ordinary course of business until it is prepared to present its plan for reorganizing its affairs and restructuring its obligations.

Accordingly, for customers of a participant in a cloud network, the focus of concern shifts in Chapter 11 more toward the effect on the ongoing relationship and the customer's legal rights and solutions and away from the immediate, emergency damage control necessary if a troubled provider files under Chapter 7 or announces an impending non-bankruptcy shut-down of operations.

The basic process in a Chapter 11 case is for the debtor to have a breathing spell from creditor action by virtue of the automatic stay while it decides (or attempts to decide) how to restructure its business and negotiates with its creditors and contract counterparties to restructure its debts and contractual arrangements. These restructurings are then embodied in a Chapter 11 plan that is voted upon by creditors and, if it meets the standards of the Bankruptcy Code, approved (confirmed) by the bankruptcy court.[8]

During the operational period while a debtor is reorganizing, it can take certain actions outside the ordinary course of business if they are approved by the bankruptcy court. The two key actions a debtor might take are (a) the sale of assets (which could even be the entire company or a major business segment) and (b) the assumption or rejection of executory contracts (such as leases, licenses, and other arrangements such as network provider and user agreements). In terms of affecting a customer's relationship with the debtor company, these are the two key areas to monitor between the petition filing and proposal of the Chapter 11 plan. They will be discussed more fully in the remainder of this article.

For now, it suffices to say that, if any participant in a cloud network files for protection under Chapter 11, all other participants who directly <u>or indirectly</u> rely on that debtor participant should monitor the progress toward formulation of the debtor's Chapter 11 plan, because that plan will define what permanent changes will be made to the relationships between that debtor provider and the parties participating in its cloud network.

Asset Sales in Chapter 11

The "reorganization" of a debtor company's affairs can take other forms than formulation of a Chapter 11 plan. The most common form is for the debtor to use the breathing spell provided to it to find a buyer for the business, or a major unit of a multi-function company, and use other provisions besides the plan process to gain court approval for the sale. In bankruptcy parlance, this is called a "363 Sale," named for Section 363 of the Bankruptcy Code which sets forth the primary rules governing the power to sell a company's assets outside of the plan process and outside the ordinary course of business.[9]

> *"The focus for customers shifts in Chapter 11 more toward the effect on the ongoing relationship and away from the emergency damage control necessary if a troubled provider files under Chapter 7."*

The basic rule for a Section 363 sale is rather straightforward. A debtor may sell all or some of its assets if it demonstrates to the bankruptcy court that the sale is in the best interests of the company and its creditors. This would be no different from a company selling its assets outside of a bankruptcy case, except that the Bankruptcy Code gives the debtor two important powers: (a) the power to sell assets free and clear of liens and interests and (b) the power, mentioned above, to reject or assume and assign executory contracts.

These two powers are significant because they alter basic principles of state law which would otherwise protect parties affected by the sale. Traditionally, for example, if a lender holds a security interest in all the servers owned by an IaaS host, the sale of the servers as part of a sale of the business would not eliminate that lien and the lender can demand immediate full payment before the debtor company can pass clear title. Also, under traditional law, a host who leases the facility housing the servers would be prevented from assigning the lease unless the landlord agreed (usually for a large fee, deposit or other conditions).

Sale Free and Clear of Liens

However, if certain standards are met to assure that the secured lender is not materially damaged, a Chapter 11 debtor can transfer clear title to those servers and, with court approval, do so over the objection of the secured lender and without immediately paying the full amount of the related debt.[10] This can benefit the debtor's customers because it permits a sale that would continue the service from being derailed by unreasonable lenders.

Assumption and Assignment of Executory Contracts

Somewhat akin to the ability to sell assets free of liens is the power granted to Chapter 11 debtors to "assume and assign" executory contracts.[11] Even if a real estate lease, network services agreement or any other type of contract contains a prohibition on assignment, a debtor may assume (accept all the terms of) and assign the contract to, for example, a purchaser of its business over the landlord's or other counterparty's objection.[12] [Note: As will be discussed in the next section, this power does not extend to nonexclusive patent and copyright licenses, which means that it does not apply to most software licenses that would be encountered in the cloud computing environment.]

> *"Any customer investigating a potential provider should obtain representations of the provider's plans and procedures to protect its customers in the event it experiences financial difficulties."*

This power to assign contracts means that, if a participant in a cloud network enters Chapter 11 and can find a buyer to take over the operation, no landlord, network services provider or other participant in the network will be able, in most circumstances, to arbitrarily prevent the success of the sale. Again, like the power to sell free and clear of liens, this benefits customers of the debtor company because it enhances the opportunities for a buyer to take over the operation and continue servicing the customers as before the debtor experienced its financial difficulties.

Unique Power of Software Licensors

As just noted, the power to assign contracts does not extend to nonexclusive patent and copyright licenses. Bankruptcy and appellate courts have universally held that a licensee may not assign nonexclusive patent and copyright licenses without the licensor's consent. Therefore, if an IaaS host is a nonexclusive licensee of, for example, virtualization software critical to operation of the cloud network, the Bankruptcy Code cannot be used to permit assignment of that license to a buyer over the objection of the licensor. This author will leave to the intellectual property lawyers the question whether a software package can ever be based only on the licensor's trade secret rights, and not copyright. For bankruptcy law purposes, it is sufficient to understand that software licensors generally will have a great deal of power over a licensee's ability to sell its assets or, in some jurisdictions such as the 9th Circuit, to reorganize and exit from a Chapter 11 case, since the debtor cannot even retain those types of licenses unless the licensors consent. [13]

Therefore, when negotiating such licenses, it is critically important to pay particular attention to the assignment provision and for the potential licensee to negotiate hard for the right to assign the license. In this author's experience, the most favorable term a licensee usually can obtain is a right to assign the license, without the licensor's consent, to a successor in interest to all or substantially all of the licensee's business, unless the potential assignee is a direct competitor of the licensor. Of course, in this situation, it is clearly important to include a definition of competitor that fits the particular industry. Also, if the licensee operates several lines of business, it should negotiate for the "substantially all" definition to apply only to the business unit to which the license relates.

Finally, to the extent possible, a party negotiating a service agreement with, for example, an IaaS host or an SaaS provider should obtain representations from its provider that the provider has the power to transfer its critical inbound licenses in the event that it elects to, or has to, sell its business. In fact, any customer investigating a potential provider should obtain representations of the provider's plans and procedures to protect its customers in the event it experiences financial difficulties.

If the Provider Can't Reorganize or Doesn't Like Its Contracts

The other side of a cloud participant's power to assume and assign its contracts is that participant's power to reject executory contracts. Consider a user of an SaaS application in the cloud whose provider determines that it is losing money in providing the service to the customer. In a Chapter 11 case, that provider has the right to "reject" the contract before its term expires and, generally, the counterparty to the contract cannot do anything about it.[14] The standard for a bankruptcy court to allow a debtor to reject contracts is simply the "business judgment" of the debtor, which is rarely overturned.[15]

Accordingly, such a user should pay close attention to the business decisions being made during any provider's Chapter 11 case, and be on the lookout for signs that the debtor/provider may decide to shed the customer contract. Also, any signs that the reorganization attempt may fail should be red flags telling the user to start immediately setting up alternative arrangements.

If a Software Provider Files for Bankruptcy Protection

So far, the most common example this article has used is the Chapter 11 filing by an IaaS host, the provider of the servers housing a cloud network. A different Bankruptcy Code protection comes into play, however, if a provider of software critical to the cloud network gets into financial trouble, especially trouble it can't escape. As just discussed, any debtor has the power to reject its executory contracts, and there are few practical limits on that power. Therefore, consider the predicament of an IaaS host who relies on a license from a third party for its virtualization software (or any other critical component of its software environment) and the licensor files for bankruptcy protection under either Chapter 11 or Chapter 7.

Fortunately, the Bankruptcy Code does contain some protection for a software licensee if a software licensor is truly failing (or decides the contract with the host is a losing proposition) and, therefore, rejects the license to the IaaS host.

Under Section 365(n) of the Bankruptcy Code, a licensee has the power to make an election to "retain its rights" under the license agreement if the licensor rejects the agreement. Generally speaking, this election gives the licensee the right to retain the licensed intellectual property as long as it is willing to continue making the license payments for the remainder of the term (and any renewal option period available under the agreement if the licensee elects to exercise that option). This means that the IaaS host for example, can keep its right to use the virtualization software when the license is rejected. The licensee also may compel the licensor to turn over any "physical embodiments" of the intellectual property that the licensee needs to utilize it.

On the other hand, Section 365(n) is not a complete panacea for the licensee. While it can retain the use of the intellectual property in the condition as it exists at the time of rejection, the licensee cannot specifically enforce other terms of the agreement. Therefore, for example, there would be no duty of the licensor (or anyone who buys the intellectual property itself in a 363 sale) to provide upgrades or bug fixes. Also, any duties to maintain the software or provide technical support or training would cease.

Still, this protection does allow the licensee some very important breathing room. It means that it can still use the existing intellectual property while it searches for a replacement (or negotiates with a buyer of the software for new support services). It is critical, however, to not sleep on one's rights. Any licensee who receives a notice that a debtor intends to reject its contract must formally appear (i.e. through counsel) in the bankruptcy court quickly and voice its election to retain its rights.[16]

What About My Data?

Probably the biggest concern expressed by potential users of cloud computing services is the protection of the privacy of their data stored in the cloud and their ability to recover it if the party with whom they contract (or its host provider) goes out of business. Data privacy and similar laws provide an increasing array of rules covering the treatment of sensitive confidential information. However, two bankruptcy law principles assist the user / data owner and lead to strategies that users should employ.

Property of the Estate

The first protection arises when it is clear that the user (not the cloud provider) is the legal owner of the data. Bankruptcy courts only have jurisdiction over property of the estate, i.e. property of the debtor.[17] Therefore, it is critical that any agreement entered into with a cloud services provider clearly specifies what data and features are owned by the user.

> *"Establish means to protect (e.g. duplicate elsewhere) all information entrusted to a provider in a way that requires the least active participation by the provider for the user to recover it and continue functioning."*

This question must be carefully thought out and covered in the service agreement. It is easy to see that text a user of a cloud-based word processing application enters into the system is the user's property. However, consider a couple of less clear questions:

1. Who owns the user's name or the right to sell that name (or its buying habits, or the buying habits of its customers if the user itself is a seller of goods or services) as part of a customer list?
2. If the user is a software developer whose applications are housed on the servers of an IaaS provider, who owns the software code that makes the application interact with the server's operating system?

These examples should demonstrate that any party about to post information or engage with a service provider must look very closely at all aspects of the relationship and clearly delineate in the service agreement who owns *and who has the right to control dissemination* of the information, code, etc., that will be placed in the provider's hands.

This is also the point in the negotiations where procedures should be specified for return (and deletion from the provider's systems) of all of the user's information. Keep in mind, however, that any procedures which require active assistance from the provider will be at risk of failure because, when the provider runs out of money or a third party on whom it relies fails, serious practical obstacles will quickly appear. Establish means to protect (e.g. duplicate elsewhere) all the information entrusted to a provider in the way that best minimizes the need for active participation by the provider in the user's efforts to recover its data and continue functioning.

"Personally Identifiable Information"

During the time leading up to the massive amendments made to the Bankruptcy Code in 2005, several Chapter 11 cases arose which became notorious because the debtors realized that their databases of sensitive consumer information were valuable assets that others in their industries would pay large sums to acquire. To say consumer protection advocates were highly alarmed by this development would be a major understatement.

One aspect of the alarm was raised when retail debtors were selling customer information contrary to their own privacy policies promising to consumers that "we never sell your data to third parties." The debtors were arguing that they could do this because, at best, the privacy policy was just a contractual arrangement with the consumers that they had the power to reject just like any other executory contract. Since they claimed (successfully) that they, the debtors, owned the data once it was in their hands, they were able to sell it over the objections of the consumers.

Accordingly, some of the very few provisions added to the Bankruptcy Code that was not inserted to aid the banks and credit card companies (sorry, the author's prejudice leaks out sometimes) were a new Sections 332 and an amendment to Section 363(b)(1) (the provision authorizing sale of estate assets). Together, these provisions granted some protection to "personally identifiable information" of consumers if a debtor proposes to sell that information to a third party.

In broad strokes, the new rules add a procedural, if not substantive, safeguard for consumers. If a debtor proposes to sell assets and has a stated policy against selling this consumer information, it must either (a) comply with the policy or (b) convince the court to approve the sale in any event.[18] Before the court can approve the sale, however, it must appoint an independent "consumer privacy ombudsman" to provide the court information about the "facts, circumstances and conditions." The ombudsman is to report on the nature of the policy, the effects on consumer privacy of the proposed sale, the financial effect on consumers, and alternatives to mitigate potential privacy losses.[19]

It is important to note that this ombudsman does not have the power to make any objections to the sale, *per se*, and no standard is provided for the court to make its decision whether to approve a sale. So far, only three reported cases refer to the appointment of such an ombudsman, and each of those cases only states that the ombudsman is to be appointed and present his or her findings.[20] No guidance has been offered yet on how courts will handle the competing goals of honoring privacy expectations and maximizing proceeds from a sale. As these situations arise, consumers (and cloud services users who input the consumer data into a cloud system) can only rely on the good sense of the bankruptcy judges to make wise choices to protect the privacy of this information. In most cases, this reliance will be well placed, because there are many excellent and balanced judges in the key jurisdictions where these types of cases are likely to arise. However, this area is still a serious cause for concern.

Conclusion

So far, most of the providers of cloud computing services are major corporations who are financially strong and should stay that way, except for a plethora of newly-formed SaaS application providers. The strength of the major infrastructure providers lessens the concern that might otherwise exist over the issues raised in this article. Nevertheless, as the economic upheaval of the last few years has demonstrated, size is not necessarily a guarantor of financial strength. Also, cloud server hosts can suddenly become inaccessible for any number of other reasons (e.g. power outages, contract disputes, etc.). Therefore, before signing up for any cloud computing service:

1. Clearly specify in any contract the relative ownership and control rights of all data, software code, processes and everything else that you, the user, consider critical to your own business;

2. To the extent that your agreement with a cloud provider constitutes a license, specify the intellectual property of your licensor that would be transferable to you if the licensor rejects the license in a bankruptcy case, including the means by which you will obtain what you need (e.g. third party source code escrow);

3. Do as much as you can to identify all the parties in the network you enter and assess the financial strength of, not only the provider with whom you contract, but also the parties on whom it relies to bring you the services you seek.

4. Try to gain an understanding of your provider's ability to sell or assign key assets (e.g. critical licensed software) if the provider has to sell its business; and

5. Have a redundancy plan in place to protect against the time when, for any reason, a cloud services provider on whom you rely suddenly ceases to be accessible.

If you have more questions about the bankruptcy issues raised in the cloud-computing environment, feel free to email the author at any time.

Endnotes

1. To avoid continual redundancy, when the term bankruptcy is used in the remainder of this article, it will refer to either a formal bankruptcy filing or a failure (cessation of business), unless the context otherwise requires that a distinction be made.

2. The Bankruptcy Code is contained in Title 11 of the United States Code.

3. In pertinent part, Section 362(a) provides "Except [for a long list of exceptions], a petition…operates as a stay, applicable to all entities, of -…(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;…." 11 U.S.C. §362(a)(3).

4. Section 362(a)(1) prohibits "the commencement for continuation…of a judicial, administrative or other action or proceeding against the debtor…." 11 U.S.C. §362(a)(1).

5. It is technically possible for an individual to be a cloud participant, and protection under a third chapter, Chapter 13, is sometimes available to an individual business person. However, the likelihood of this occurring is so rare that Chapter 13 will not be discussed in this article.

6. 11 U.S.C. §721: "The court may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate."

7. "Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business." 11 U.S.C. §1108. "Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights…and powers…of a trustee serving in a case under this chapter." 11U.S.C. §1107(a).

8. *See,* for example, 11 U.S.C. §§1123, 1125 and 1129.

9. 11 U.S.C. §363.

10. 11 U.S.C. §363(f).

11. A large body of case law analyzes what types of contracts are "executory" or not. However, those distinctions will rarely apply in this context. Most types of contracts to which a cloud participant would be a party are clearly within the definition of an executory contract that can be affected by operation of the Bankruptcy Code. These include real and personal property leases, most software license agreements (at least the nonexclusive ones), network services agreements, and software development or support agreements. For a fairly detailed discussion of the factors in identifying whether a contract is executory, *see* 3-365 Collier on Bankruptcy ¶ 365.02.

12. 11 U.S.C. §365(f).

13. 11 U.S.C. §365(c)(1); *Everex Systems, Inc. v. Cadtrak Corporation (In re CFLC, Inc.)*, 89 F.3d 693 (9th Cir 199); *Perlman v. Catapult Entertainment, Inc. (In re Catapult Entertainment, Inc.),* 163 F.3d 767 (9th Cir. 1999), *cert. denied* 528 U.S. 924 (1999); *RCI Technology Corporation v. Sunterra Corporation (In re Sunterra Corporation)*, 361 F.3d 257 (4th Cir. 2004); *In re Patient Education Media, Inc*., 210 B.R. 237 (Bankr. S.D.N.Y. 1997).

    For readers' information, one aspect of the *Catapult* decision not related to the asset sales discussed in this article has been criticized by some courts, including the Southern District of New York. The *Catapult* court and others who have followed it also held that a reorganizing debtor could not even assume or retain a patent or copyright license since it was not permitted to assign the license. The Southern District, at least, has held that the prohibition under patent and copyright law to assignment of a nonexclusive license does not prevent its retention by a reorganizing debtor. *In re Footstar, Inc.*, 323 B.R. 566 (Bankr. S.D.N.Y 2005).

14. The power derives from 11 U.S.C. §365(b).

15. *See*, for example, *In re Old Carco LLC* (f/k/a Chrysler LLC), 406 B.R. 180 (Bankr. S.D.N.Y. 2009)*; Robertson v. Pierce (In re Chi-Feng Huang)*, 23 B.R. 798 (Bankr. 9th Cir. 1982); *In re Upland/Euclid Ltd*., 56 B.R. 250 (Bankr. 9th Cir. 1985).

16. For a more complete discussion of the rights of licensees under Section 365(n), *see* 3-365 Collier on Bankruptcy ¶ 365.14.

17. *See* 11 U.S.C. §541 for a definition of property of the estate.

18. 11 U.S.C. §363(b)(1)(B) states the court must give "due consideration to the facts, circumstances and conditions of the sale…."

19. For more information on this subject, see 3-332 Collier on Bankruptcy 332 and 3-363 Collier on Bankruptcy P 363.02[7].

20. *In re Old* Carco *LLC* (f/k/a Chrysler LLC), 406 B.R. 180 (Bankr. S.D.N.Y. 2009); *In re Steve & Barry's Manhattan LLC*, 2008 Bankr. LEXIS 4348 (Bankr. S.D.N.Y 2008); *JS Marketing. & Communications, Inc. v. Qwest Corp. (In re JS Marketing. & Communications, Inc),* 48 Bankr. Ct. Dec. 41 (Bankr. D. Mont. 2007).

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Dave received his J.D. with Honors from the University of San Francisco School of Law. He is A.V. rated by the *Martindale-Hubbell Law Directory*, and *Law & Politics* named him as a Northern California Superlawyer for 2005 and 2006.

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NEW YORK LAW FIRM SETTLES EEOC AGE DISCRIMINATION SUIT

Kelley Drye & Warren Agrees To End Mandatory Retirement Policy, Pay $574,000 To Partner Forced to Give Up Ownership Interest in Order to Continue Working

NEW YORK- Kelley Drye & Warren, a law firm with over 300 attorneys, has agreed to end its policy of requiring partners to give up their equity in the firm once they reach 70 years of age and to pay $574,000 to an attorney who continued to practice at the firm after he turned 70, the U.S. Equal Employment Opportunity Commission (EEOC) announced today.

The EEOC's lawsuit, Civil Action No. 10-CV-0655 (LTS)(MHD), filed in the Southern District of New York, charged that under Kelley Drye's former policy, attorneys who wanted to practice after reaching 70 could only do so by giving up all ownership interest in the firm and instead be compensated through discretionary bonuses. This resulted in significant under-compensation of Eugene T. D'Ablemont, who has continued to practice law full-time at the firm since he turned 70 in 2000. Such conduct violates the Age Discrimination in Employment Act (ADEA), which prohibits discrimination based on age, including in compensation.

"There is no reason why attorneys who are capable of continuing to practice at 70 either should be forced to retire or otherwise be dissuaded from continuing to work in their chosen profession just because of their age," said EEOC General Counsel P. David Lopez. "Our strong enforcement of the Age Discrimination in Employment Act is critical to ensuring that workplaces are free from discrimination."

"As Kelley Drye has recognized by its policy change, it simply does not make business sense to arbitrarily force out attorneys with the skill and energy to continue to practice law at a high level even though they are over 70 years old. I urge other law firms to assess their retirement policies," said Jeffrey Burstein, EEOC Trial Attorney in the EEOC's New York District Office.

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the Commission is available at its web site at www.eeoc.gov.

# # #

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	
Plaintiff,	
v.	**Civil Action No. 10-CV-0655 (LTS)(MHD)**
KELLEY DRYE & WARREN, LLP	
Defendant.	

CONSENT DECREE

This action was initiated on January 28, 2010 by Plaintiff, the Equal Employment Opportunity Commission ("EEOC"), an agency of the United States Government, alleging that Defendant Kelley Drye & Warren, LLP ("Kelley Drye" or "the Firm") violated the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq. ("ADEA"), by discriminating against Eugene T. D'Ablemont, Esq. ("D'Ablemont") and similarly situated attorneys who worked at Kelley Drye by implementing and maintaining an age-based system whereby partners age 70 and older who continued to engage in the active practice of law at the Firm were required to (1) relinquish all of their interest in the Firm, (2) relinquish their authority to manage or significantly influence the Firm's operations, and (3) be compensated for their work solely through payment of a discretionary annual "bonus" that resulted in ongoing discriminatorily low compensation paid to D'Ablemont and similarly situated attorneys. EEOC further alleged that Kelley Drye engaged in retaliation against D'Ablemont when it decreased his compensation following his filing of a charge of discrimination with the Commission.

Kelley Drye has denied and continues to deny all of the allegations of discrimination and retaliation asserted by D'Ablemont and/or the EEOC in this action and/or that Kelley Drye engaged in any wrongdoing or illegal activity; and that any of its Partners and/or Life Partners are, or were, "employees" as the term "employee" is used in the ADEA and other federal and state anti-discrimination laws.

EEOC and Kelley Drye ("the parties") have engaged in settlement negotiations and have agreed that this action should be resolved by entry of this Consent Decree, and therefore do hereby stipulate and consent to the entry of this Consent Decree as final and binding between the parties, including Kelley Drye's successors, assigns, subsidiaries, and any other entity into which Kelley Drye may merge or consolidate. The parties have agreed that this Decree may be entered into without findings of fact and conclusions of law having been made and entered by the Court.

In consideration of the mutual promises of each party to this Decree, the sufficiency of which is hereby acknowledged, the parties agree as follows, and the Court finds appropriate, and it is therefore ORDERED, ADJUDGED AND DECREED that:

GENERAL PROVISIONS

1. This Decree resolves all issues in EEOC's Complaint in this case, and all issues raised in EEOC Charge Number 520-2008-02342, on behalf of Eugene D'Ablemont or any other Life Partner of Kelley Drye. EEOC Charge Number 520-2008-02342 served as the jurisdictional prerequisite in this case. This Decree does not resolve any charge of discrimination currently pending before EEOC, or any charge that may be filed in the future, other than the charge listed above. EEOC reserves all rights to proceed regarding matters not covered in this Decree.

2. Kelley Drye agrees that prior to executing an agreement with another law firm, corporation or partnership to merge, consolidate, or otherwise combine Kelley Drye and such law firm, corporation or partnership, Kelley Drye will provide the entity entering into such agreement with notice of this lawsuit and a copy of this Consent Decree.

3. The Court has jurisdiction of the subject matter of this action and over the parties, venue is proper, and all administrative prerequisites have been met.

4. Kelley Drye will not contest the jurisdiction of the United States District Court of the Southern District of New York to enforce this Decree and its terms, or the right of the EEOC to bring an enforcement suit upon the breach of any of the terms of this Decree.

REVISED KELLEY DRYE PARTNERSHIP AGREEMENT

5. EEOC filed its Complaint on January 28, 2010. In February and March 2010, Kelley Drye amended its Partnership Agreement to eliminate the provisions challenged by EEOC that had required that a partner relinquish his/her equity interest in the Firm and enter Life Partner status at the age of 70 ("the Amendments"). The EEOC has reviewed the Amendments and is satisfied that the Amendments are consistent with the purposes of the ADEA.

INJUNCTION AGAINST AGE DISCRIMINATION AND RETALIATION

6. Kelley Drye and its managers, officers, agents, successors, and assigns are permanently enjoined from the following:

A. Involuntary termination, expulsion, retirement, reduction of the compensation of, or other adverse changes to an individual's status with the Firm because of age;

B. Maintaining any formal or informal compensation policy or practice that provides for compensation for attorneys at the Firm being involuntarily reduced based on their age;

C. Maintaining any formal or informal policy or practice requiring involuntary retirement of a partner or requiring relinquishment of an attorney's partnership status as a condition of continued employment once the partner has reached a certain age;

D. Requiring attorneys to involuntarily cease their service on any committee of the Firm or on any practice group of the Firm because of age;

E. Taking any action, or maintaining any policy or practice, with the purpose of retaliating against D'Ablemont or any other person because the person has made any formal or informal complaint about, or has taken any action to oppose, any of the conduct alleged by EEOC in this case to violate the ADEA, or any conduct that is prohibited by this Decree.

DISTRIBUTION OF DECREE AND NOTICE

7. Within 15 days of the entry of this Decree, Kelley Drye will provide a copy of the Decree, with attachments, to each partner. With respect to any individual who becomes a partner during the term of the Decree, Kelley Drye shall provide a copy of the Decree within 15 days of that individual becoming a partner.

8. Kelley Drye will continue to conspicuously display and maintain in its offices, in all places where employee notices are posted, the EEOC poster, as required by federal law, outlining all applicable EEO laws.

TRAINING

9. Kelley Drye will conduct a two (2) hour training session for all partners on the requirements of the ADEA, as well as on Title VII of the Civil Rights Act, the Equal Pay Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act of 2009. For all members of the Firm's Executive Committee, there will be an additional one (1) hour training session on federal laws prohibiting discrimination in employment, with a special emphasis on the ADEA. The

training will also stress that employees will not be retaliated against for opposing discriminatory conduct or engaging in protected activity. The training will be subject to the following requirements:

A. The training will be completed within six (6) months of the entry of the Decree.

B. The training will be conducted by Proskauer Rose LLP or another firm approved by EEOC. At least 30 days prior to the training program, Kelley Drye will submit to EEOC a copy of the agenda and training materials to be used.

C. Kelley Drye will maintain attendance records identifying the name of the attendees at each session. Within ten (10) days of each training session, Kelley Drye will provide to EEOC for its review a copy of the attendance records from the training session.

D. A videotape of this training will also be provided to each attorney who is made a partner with Kelley Drye subsequent to the entry of this Decree within thirty (30) days of his/her being named a partner.

MONETARY RELIEF

10. Kelley Drye will pay D'Ablemont a sum of $124,000.00 as D'Ablemont's 2012 compensation for his services performed at Kelley Drye in the year 2011. This payment is due in full within 30 days from the entry of this Decree.

11. Additionally, Kelley Drye will pay D'Ablemont a sum of $450,000 for back pay for the period January 1, 2001 to December 31, 2010. The first payment of the two payments of this sum, in the amount of $225,000, is due within 30 days from the entry of this Decree. The remaining payment of $225,000, plus 1% interest per annum calculated from the date of entry of this Decree, will be due on January 7, 2013. Should D'Ablemont die before all payments have been made to him, the balance then owing will be payable to D'Ablemont's estate within the time frame set forth in this paragraph.

FUTURE COMPENSATION

12. Beginning with payment in 2013 for his services performed at Kelley Drye in the calendar year 2012, Kelley Drye will pay to D'Ablemont an amount equal to 12% of the fees collected in the immediately preceding year for client matters designated in the separate Settlement Agreement and Mutual General Releases ("Settlement Agreement") entered into between D'Ablemont and Kelley Drye, with the exception of certain matters so designated in the Settlement Agreement for which a different calculation will apply.

13. D'Ablemont may continue to receive direct payments from clients that are so designated in the Settlement Agreement.

14. D'Ablemont will continue to retain his current status quo as a Life Partner who continues to practice at the Firm, including the right to continue to receive office space, secretarial and other support services, and the right to continue to receive his Annual Life Partner Payments, paid monthly as now.

15. Nothing contained herein is intended to, or shall, alter any obligations Kelley Drye may have under any preexisting individual agreement with certain present Life Partners of the Firm.

ADDITIONAL MONITORING PROVISIONS

16. Kelley Drye will maintain records of all written or oral complaints or allegations of age discrimination or retaliation by any of its employees made to Human Resources, a member of the Executive Committee or a Practice Group Head. Within six (6) months of the entry of this Decree, and every six (6) months thereafter, Kelley Drye will provide EEOC with a written report containing a summary of each complaint, and for each such complaint: the name of the complaining party who was allegedly subjected to discrimination or retaliation, the name of the person(s) who allegedly engaged in

such discriminatory or retaliatory conduct, the results of any investigation of the allegation, and any remedial action taken by Kelley Drye. A final report will be sent to EEOC 30 days before the date of the expiration of this Decree.

17. EEOC may monitor Defendant's compliance with the terms of this Decree until its expiration through, inter alia, the inspection of records, and interviews with witnesses, with advance notice to Kelley Drye.

18. All materials required by this Decree to be sent to EEOC shall be addressed to Jeffrey Burstein, Senior Trial Attorney, EEOC, Newark Area Office, 1 Newark Center, 21st Floor, Newark, New Jersey 07102.

EFFECTIVE DATE AND DURATION OF DECREE

19. The Effective Date of this Decree shall be the date the Court enters its Final Approval. This Decree will remain in effect for three (3) years from the date of entry. The Decree will not expire while any enforcement action concerning the Decree is pending. With the exception of Paragraph 6, and except as provided in the preceding sentence, all provisions of this decree will expire three (3) years from the date of entry.

RETENTION OF JURISDICTION

20. The Court retains jurisdiction over this action during the duration of the Decree. The matter may be administratively closed but will not be dismissed during the duration of the Decree. Within 30 days after the date set for the expiration of the Decree, the parties will submit a stipulation of dismissal to the Court or a notice that the Decree has not expired because an enforcement action is pending.

21. In the event that either Party to this Consent Decree believes that the other Party has failed to comply with any provision(s) of the Consent Decree or the Settlement Agreement, the

complaining Party shall notify the other Party, in writing, of the alleged non-compliance within 5 business days of the alleged non-compliance and shall afford the alleged non-complying Party 5 business days to remedy the non-compliance or to satisfy the complaining Party that the alleged non-complying Party has complied. If the alleged non-complying Party has not remedied the alleged non-compliance within 5 business days, the complaining Party may apply to the Court for appropriate relief. This paragraph will not apply to EEOC in the event that it determines that providing such notice concerning the alleged non-compliance will negatively affect the public interest.

SO ORDERED, ADJUDGED AND DECREED this 10th **day of**

April **, 2012.**

Honorable Michael H. Dolinger, U.S.M.J.

APPROVED IN FORM AND CONTENT:

FOR PLAINTIFF:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Dated: 3/28/12

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Dated: 4/3/12

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Divorces, Cyberspace and Discovery: Writing on a Wall May Not Be Private After All

By Amy L. Reiss, Lisa Zeiderman and Danielle Jacobs

The sources for discovery in matrimonial cases are expanding as the online universe evolves. "Social networks are booming,"[1] with "Facebook hosting more than 500 million active users"[2] and "LinkedIn attracting more than 30 million profiles of business professionals."[3] With a surge of shared professional and personal information available on social networking sites, information previously presumed private may now be fodder for discovery. According to an American Academy of Matrimonial Lawyers' study, over 81% percent of responders said they have seen an increase in the use of evidence discovered on social networking sites in family law cases during the past 5 years.[4] According to this survey, Facebook is the "unrivaled leader for online divorce evidence,"[5] divorce_evidence http://www.abajournal.com/news/article/facebook _survey_says/ (February 12, 2010), noting that 66% of those surveyed cited it as a "primary source."[6] The same survey also noted that 15% of lawyers said they have discovered evidence on MySpace and 5% from Twitter.[7]

In September, 2010, the New York Bar Association Committee on Professional Ethics determined that lawyers can ethically utilize the public pages of social networking websites to collect damaging information on opposing parties in lawsuits. The Professional Ethics Committee concluded:

> A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).[8]

As the foregoing Committee Opinion indicates, public information on social networking sites can be collected and utilized in litigation. However, is the information that has been designated "private" by the social network site user also discoverable? As set forth below, "private" information contained on a social networking site may be discoverable provided it: a) is relevant and material to a case, b) is not mere speculation, and c) has not been gained through deception. All matrimonial litigants need to understand the ways in which information posted on social networks can be used in their divorce case.

Social Networking Sites

In the mid-1950s, long before Facebook and MySpace were conceived, sociologist J.A. Barnes used the term "social network" to "describe the physical interactions of people who have similar interests."[9] Social networking sites are now a virtual medium—an entirely new source for discovery of extremely useful information, in family law and matrimonial cases. Once the relevant social networking sites are identified, the matrimonial attorney needs to determine how to gain access to the relevant information for his or her cases, while at the same time protecting clients from becoming the victim of what he/she believes may be a gateway to building and advancing his/her personal and professional life.

Many practitioners know the names of the more popular social networking sites such as Facebook, MySpace and Twitter, but do we know what information exists on each site and how to access the information? The following is a brief synopsis of some of the more popular sites.

Facebook

Facebook is a social networking site that connects its users with friends, colleagues, and family members. Facebookers can post unlimited photos, friend thousands of individuals, update statuses, comment on other users' activities and maintain an inbox. Facebookers can share a broad range of information including their educational background, religious affiliations and preferences, relationship status, thoughts about raising children, interests, favorite movies, and quotes.

Facebook has established its own vocabulary. For example, "friending" someone means searching for a particular individual on Facebook, and clicking friend. Once the "friend" accepts the request, the two users are now "friends," thereby allowing more access to each other's profile. To "inbox" someone means sending a message that supposedly only both parties can see, "confidentially." Pictures, videos, and text can be discovered through these messages. Inboxes can occur between one and several people. Then there is "writing on someone's 'wall'" which allows the user to write a message, enabling "friends" to see it. However, if so called "friends" are viewing the message, the argument can be made that writing on the wall is not so private after all. Certainly, there is a reasonable expectation that even a friend can pass along this once private message to the public.

The privacy policy page for Facebook states that: "Facebook is about sharing information with others…."[10]

The policy page also informs the user that Facebook "may disclose information pursuant to subpoenas, court orders or other requests (including criminal and civil matters) if we have a good faith belief that the response is required by law."[11]

User settings on Facebook control how much information the user chooses to share with "friends" versus outsiders. Facebookers have the option of sharing or limiting statuses, photos, posts, bios, family relationships, email, aim, phone numbers, and addresses. Pursuant to 18 U.S.C. section 2701 et seq., Facebook advises its users that the Electronic Communications Privacy Act ("ECPA") limits Facebook from producing any "content" without notarized user consent or a search warrant.[12] "A subpoena and prior notice are needed to compel an Internet Service Provider (ISP) to turn over content information and noncontent information (such as logs and 'envelope' information from email). In addition it limits the ability of commercial ISPs to reveal content information to non-government entities."[13]

MySpace

MySpace is also a social networking site, which permits its members to create personal profiles online with the goal of finding and communicating with old and new friends. It is a self-described online community that makes it possible to share photos, journals, and interests with a growing network of mutual friends. A portal reaching millions of people around the world, the MySpace Privacy Policy pages inform the user that there may be instances where MySpace provides information about an account without the user's permission, including compliance with the law or legal process.[14]

Twitter

Twitter, an entity based in San Francisco, California, is a "real-time information network"[15] where users "tweet," updating their statuses for the world to read.[16] Users can be followed by their spouses by viewing their daily and sometimes minute-by-minute updates. Used improperly by the Tweeter and properly by the Tweeter's spouse, a person may be tweeting the day away as his or her spouse follows his or her every move. The user's profile may provide their name, location, e-mail address, and biography.[17] To limit viewers of their tweets, users may adjust their privacy settings. However, utilizing the privacy setting may not protect the user from the court ordered subpoenas or even the authorization that he / she may be directed by a court to sign in order to retrieve the information.[18]

Privacy Versus Relevancy

Long before computers, email, texts and social networking sites were contemplated, the Fourth Amendment of the U.S. Constitution was drafted to protect the security of citizens, papers, houses, and effects against unreasonable searches and seizures. With the advent of cyberspace, several acts were passed to protect online security and fill in the gaps of the Fourth Amendment formed by the computer age.

In 1986, Congress passed the ECPA[19] to expand government wiretapping restrictions with respect to telephone calls to include transmissions of electronic data by computer. As part of the ECPA, Congress also enacted the Stored Communications Act ("SCA"), formally known as the Stored Wire and Electronics Communications Act, to protect online third party stored communications.

The SCA pertains to voluntary and compelled disclosure of third party internet service providers. Pursuant to the SCA, 18 U.S.C. section 2701 et seq., an entity such as Facebook or MySpace is prohibited from disclosing information about an individual's current and historical Facebook and MySpace pages and accounts, subject to certain exceptions. [See, 18 U.S.C. section 2702(b)] for exceptions to disclosure of communication. For the matrimonial law attorney, one relevant exception is the attorney's ability to discover so called private information upon securing the authorization of the user or by court ordered subpoena.

Recent case law indicates that discovery of an individual's so called "private" information on social networking sites is possible. In the 2010 case of *Romano v. Steelcase Inc. Educational & Institutional Cooperative Services Inc.*,[20] defendant Steelcase submitted a motion requesting access to plaintiff Romano's "current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information." In arguing their case, Steelcase asserted that Romano had placed certain information on Facebook and MySpace which was inconsistent with her claims about her injuries, and loss of enjoyment of life. Steelcase claimed that Romano's MySpace and Facebook pages would demonstrate Romano's active lifestyle, her ability to travel, contrary to her claimed inability to do so, as a result of such injuries.

The Court held that Steelcase was entitled to receive the private portions of Romano's social networking sites, since the public portions contained material contrary to her claims and deposition testimony. The Court also cited the reasonable likelihood that the private portions of Romano's sites may contain further evidence such as information pertaining to her activities and enjoyment of life, all of which were material and relevant to Steelcase's defense. The Court stated that:

> Preventing Defendant from access to Plaintiff's private postings on Facebook and MySpace would be in direct contravention to the liberal disclosure policy in New York State.

In reaching its decision, the Court noted that although there was no other New York Case law directly addressing the issues raised, there were other instructive cases from other jurisdictions including *Ledbetter v. Wal Mart Stores Inc.*[21] and *Leduc v. Roman*,[22] a Canadian case.

In *Ledbetter*, Wal-Mart Stores sought information from several social networking sites regarding the personal information of the plaintiff. The Court denied the plaintiff's request for a protective order, finding that the subpoena could lead to discovery of relevant evidence that would be admissible in trial. A confidentiality agreement was already in place to protect the privacy of information obtained from the sites.

In *Leduc v. Roman*, plaintiff Leduc was involved in a car accident, which he claimed resulted in a diminished enjoyment of life and his inability to engage in sports activities. During his examination by an expert psychiatrist with respect to the litigation, Leduc mentioned to the psychiatrist that he had several friends on Facebook. As a result, defense counsel attempted to access Leduc's Facebook account and discovered it was restricted to Leduc's Facebook "friends." Defendant's counsel moved for production of all information in Leduc's Facebook profile. Having been denied his request, the defendant appealed. On appeal, the Court held it was reasonable to infer that plaintiff's Facebook site could contain content relevant to the issue of Leduc's post-accident lifestyle, given the social networking nature of Facebook. However, the Court also stated that while defendant's request for production was not a fishing expedition, mere proof of a Facebook profile did not entitle the defendant to access all of the material placed on the site—there must be evidence of relevant content to compel production. The Court determined that the defendant had the right to cross examine Leduc regarding the relevance of content posted by Leduc on his site. The Court also ordered Leduc to preserve his Facebook postings, thus leaving the door open for defendant to gain access upon a showing of relevance.

With respect to the question of production of the access limited contents of a Facebook profile, such issue was addressed by Judge Rady in the Canadian case of *Murphy v. Perger.*[23] In *Murphy*, plaintiff claimed a loss of enjoyment of life as a result of injuries sustained in a car accident. Murphy, however, had posted photographs on her publicly accessible Facebook profile showing her engaged in various social activities. Perger moved for production of all photographs maintained on Murphy's private Facebook profile in which Murphy controlled. Regarding the issue of relevancy versus speculation, Judge Rady stated:

> It seems reasonable to conclude that there are likely to be relevant photographs on the site for two reasons. First, www.facebook.com is a social networking site where I understand a very large number of photographs are deposited by its audience. Second, given that the public site includes photographs, it seems reasonable to conclude the private site would as well.
>
> On the issue of relevancy, in this case, clearly the plaintiff must consider that some photographs are relevant to her claim because she has served photographs to the accident, notwithstanding that they are only "snapshots in time."

With respect to the privacy issue, Judge Rady stated the following:

> Having considered these competing interests, I have concluded that any invasion of privacy is minimal and is outweighed by the defendant's need to have photographs in order to assess the case. The plaintiff could not have a serious expectation of privacy given that 266 people have been granted access to the private site.

In *McCann v. Harleysville Insurance Company of New York,*[24] also a personal injury case, the Appellate Division held that while the Court properly denied the defendant's motion seeking to compel plaintiff to produce photographs and an authorization for plaintiff's Facebook account information, it improperly granted plaintiff's motion for a protective order and abused its discretion in prohibiting defendant from seeking disclosure of plaintiff's Facebook account at a future date. The Appellate Division left the door open for such discovery.

As the foregoing cases indicate, information previously perceived as private information by the user of social networking sites may be discoverable. Taking a cue from the personal injury cases, it is possible to discover information from "private" social networking sites. The attorney seeking such discovery must be prepared to establish relevancy and show that such demands for private material are not equivalent to a fishing expedition. To prove such relevancy, researching the public information available may be beneficial.

If such public information set forth in social networking sites indicates that relevant financial and / or data regarding custody exists on public postings, a Court may be convinced that so-called private postings may also contain relevant data. Information about a spouse's career, business successes and failures, business schedules, lifestyle and emotional state may all be relevant in matrimonial / custody matters. In *Bishop v. Minichiello*,[25] defendant's motion for production of plaintiff's computer's hard drive was granted to perform an analysis of how much time plaintiff spent on Facebook. The foregoing analysis could certainly be relevant to custody / access issues where the amount of time a parent actually spends with a child during access time may be compared to his or her time online during the same time period.

Practical Advice

Social networking sites present a new challenge for the matrimonial / family law attorney. Clients should be advised to: a) think carefully before clicking the send button, b) guard their password, email accounts and computer information from nosy online trespassers via illegal spyware, and c) exercise caution with social networking postings. In addition to advising clients to maintain records of emails, texts and other technological information sent to them from their spouse and other sources that may prove helpful in settlement and / or litigation,[26] clients may be counseled to mine for the public information on social networking sites and to the extent that one is legitimately and legally "friended," the equivalent, private information as well.

Attorneys should also advise clients to diligently supervise their children's online sites. No client embroiled in a custody case, sitting in the witness box, wants to identify evidence revealing his or her child spending countless hours on Facebook instead of completing homework assignments; nor does any parent want to identify pictures of his / her child engaging in inappropriate conduct such as drinking or Facebook posts boasting of drugs, sex and alcohol use while in that parent's care. Teaching good judgement regarding online social networking sites is now included in good parenting skills. Finally, it doesn't behoove any parent to see pictures and postings of herself / himself on Facebook demonstrating poor judgement.

The following is a check-list of practical online advice for divorcing spouses:

1. Instruct your client to refrain from participating in online networking sites during the pendency of a divorce action. While popular, they are a hotbed of information that may prove harmful to your client's case. On the other hand, lawful discovery of such information about your client's spouse on such a social networking site may be fruitful.
2. Advise your client not to be dishonest on a social networking site, e.g., anyone who is unemployed shouldn't claim they are working.
3. Tell your client not to post pictures of girlfriends and boyfriends while married. (Obvious, but prevalent.)
4. Tell your client to "Defriend" his / her spouse from a Facebook page, unless your client can utilize total self-control.
5. Have your client print his / her own Facebook pages and that of his / her spouse for your files (so long as such Facebook pages for the spouse are received by legal and legitimate means).
6. Remind clients that while using all privacy controls available to prevent others from viewing what they want to maintain as private is essential, it is not necessarily a protection during litigation. Overly informative statuses and pictures should simply not be posted.
7. Remind clients to log out of all sites when they are finished using such sites (the same sites they shouldn't be using during the divorce action anyway).
8. Inform clients that certain information can be subpoenaed or obtained through authorization and that it is advisable not to post at all until after a Judgement of Divorce is entered, and to always exercise caution.

Endnotes

1. http: / / www.abanet.org / media / youraba / 200812 / article04.html / .
2. http: / / www.facebook.com / press / info.php?statistics.
3. *Supra*, note 1.
4. http: / / www.aaml.org / about-the-academy / press / press-releases / e-discovery / big-surge-social-networking-evidence-says-survey- (February 10, 2010).
5. http: / / www.abajournal.com / news / article / facebook_is_ unrivaled_leader_for_online_.
6. *Supra*, note 5.
7. *Id*.
8. See New York State Bar Association, Committee on Professional Ethics, Opinion 843 (9 / 10 / 10). See Rules 4.1: 4.2: 4.3; 5.3(b)(1); 8.4(c).
9. http: / / www.nvbar.org / Publications / NevadaLawyer / 2008 / March / socialnetwork.htm (How Lawyers Can Mine Social Network Sites for Personal Information, Carole Levitt & Mark Rosch).
10. http: / / www.facebook.com / policy.php http: / / www.facebook. com / policy.php. at part 6.
11. *Supra*, note 10.
12. http: / / www.facebook.com / pages / Stored-Communications-Act / 129853733722803.
13. *Supra*, note 12.
14. http: / / www.myspace.com / index.cfm?fuseaction=misc.privacy.
15. http: / / twitter.com / about.
16. https: / / twitter.com / privacy.
17. *Supra*, note 16.
18. *Id*.
19. 18 U.S.C. Section 2510.
20. *Romano v. Steelcase Inc. and Educational & Institutional Cooperative Services Inc.*, 2010 NY Slip Op. 20388; 907 N.Y.S.2d 650; 2010 N.Y. Misc. LEXIS 4538 (New York Supreme Court, Suffolk County 2010).
21. *Ledbetter v. Wal-Mart Stores, Inc.*, 2009 U.S. Dist.LEXIS 126859, 3-5 (D.COLO. Apr. 21, 2009).
22. *Leduc v. Roman*, 2009 CarswellOnt 843 (February 20, 2009).
23. *Murphy v. Perger* 2007 O.J. No. 5511 (S.C.J.) (OL).
24. *McCann v. Harleysville Insurance Company of New York*, 2010 NY Slip Op. 8181; 910 N.Y.S.2d 614; 2010 N.Y. App. Div. LEXIS 8396 (4th Dept, 2010).
25. *Bishop v. Minichiello*, 2009 BCSC358 (CanLII, April 7, 2009).
26. *Snooping: What's Legal, What's Illegal* by Amy L. Reiss, Esq. and Lisa Zeiderman, Esq., NYSBA, Family Law Review, Summer / Fall 2009.

Amy L. Reiss is a solo practitioner located in Manhattan who focuses her practice on family and matrimonial law. Lisa Zeiderman, an attorney at Johnson & Cohen, LLP, located in Manhattan, Westchester and Rockland County, focuses her practice on family and matrimonial law. Danielle Jacobs was a summer intern in 2009 at Johnson & Cohen, LLP.

This article originally appeared in the Spring 2011 issue of the Family Law Review, *published by the Family Law Section of the New York State Bar Association.*

Funding a Special Needs Trust: How Much Is Enough?

By Craig Marcott

Your client is trying to plan for the future of their special needs child and wants to make certain that he or she will be financially secure after the parent(s) is gone. You are in the process of creating the necessary legal documents including a special needs trust. The client then asks you how much should the trust be funded with? How much is enough?

Many parents have already addressed this question without considering the impact of their decision. They may have defaulted to an equal division of their estate among their children, without considering whether an equal division is, in fact, equitable. This approach often occurs as a result of wanting to be "fair" to all of their children in combination, with a lack of understanding of the potential future costs of providing their special needs child with the opportunity to live the fullest life possible. In other words, the parents may be inadvertently denying their special needs child the same opportunity that they wish for their other children.

A. Preliminary Considerations

The decision-making process should begin by determining how much is actually required to properly fund the trust. For purposes of our discussion, let's assume that the parents are planning to fund a third-party special needs trust. In order to begin to determine how much should be placed into the trust, they need to:

1. Identify the Short-Term, Intermediate, and Long-Term Costs of Services for Their Special Needs Child

What are the additional support costs that are incurred on an annual basis? What supplemental expenses can be foreseen—both in the near future and down the road as their child matures? Medical and dental expenses? Vacations? Will their child be traveling to visit siblings or other family members? Will they need a traveling companion? What about computers, college, hobbies, etc.?

2. Consider Their Child's Future Living Arrangements

Do they anticipate some type of independent living, or perhaps a group home? Will they need to purchase or rent residential property? Parents who expect their child to live in a group home arrangement often underestimate the costs of providing for the "extras" that contribute to a full life. They believe that the government will provide for all, or nearly all, of the child's needs. Parents often fail to take into account such things as significant events (e.g. 40th and 50th birthday parties), travel (and travel companions), family traditions, and future medical needs.

3. Determine Whether the Special Needs Trust Will Need to Pay a Trustee to Manage Trust Assets

Will an advocate be required? If so, how much will that cost?

4. Perform a Capital Needs Analysis

A dollar will be worth only a fraction of its current value 30 or 40 years from now. Parents—or a professional advisor—will need to do a capital needs analysis to determine the present value of money required for the short-term, intermediate and long-term goals they have identified.

5. Plan for a Longer Life Span

Longevity is increasing at a phenomenal rate, both for the disabled and non-disabled populations. We now plan for people to live into their nineties. Fifty years ago, people with Down Syndrome had a life expectancy of less than 40 years. Now the average life expectancy is 57. With technological and medical advances on a nearly vertical slope, we can expect this trend to continue, which means that parents have to plan for providing for their special needs child for a longer time period.

6. Consider How Life Will Change for Their Disabled Child and His Siblings After the Parents Are Gone

Families are living farther apart geographically, even globally. If parents want their disabled child to visit his or her siblings, they may need to provide for that in their trust. Many changes occur as we get older, and particularly after the death of the last parent.

7. Identify and Maximize Government Benefits Such as Supplemental Security Income (SSI) and Social Security Disability Income (SSDI)

These benefits can help offset some of the costs and expenses outlined above.

Looking ahead, there will be more people competing for fewer resources. The disabled population in general has greater health care needs. If parents want their special needs child to continue to have access to choice in health care, they need to plan to finance access to that care; otherwise choice is going to be restricted.

B. Funding Strategies

It quickly becomes apparent that there is no simple formula for calculating the amount needed to fund a special needs trust. To do so requires a comprehensive approach that incorporates both legal and financial factors, as well as government benefits. Anything less is a piecemeal solution to a complex problem.

There are certain strategies for funding a special needs trust. Numerous articles have been written about the tax consequences of using qualified (tax-deferred) assets such as 401(k)s, 403(b)s, and traditional IRAs to fund the special needs trust. While these usually represent one of the two largest components of a person's estate—the other being their home—they are not the most desirable assets to use to fund the trust.

The home also has its disadvantages, one of them being its lack of liquidity. A poor market climate at the time of death of the last remaining parent could result in a trust funded with a lesser amount than was anticipated. A mortgage on the home may result in other issues that would need to be addressed.

C. Life Insurance Considerations

Cash equivalents such as savings and checking accounts and CDs are reasonable investments, but they usually comprise a relatively small portion of the estate. This leaves us with life insurance, which, not being subject to ordinary income tax, often makes it the preferable method for funding a special needs trust.

Most attorneys are aware that a second-to-die insurance policy is usually the least expensive way to fund a special needs trust. This type of policy also has several additional advantages. First, it is available to divorced parents and parents who have never married. Second, if one of the parents has medical issues, the policy may still be underwritten since the policy only pays out upon the death of the second spouse. The disadvantage of this type of policy is that there is no payment of death benefit upon the death of the first spouse, so the family's situation needs to be evaluated so as to best determine how their needs can be met. It should be noted that a new life insurance policy that addresses this issue has recently been approved in New York.

More confusion seems to arise regarding the use of whole life vs. guaranteed Universal Life (UL) insurance. Each type of insurance has its proponents. Those in favor of whole life will often point out that it builds up a cash value which can be used to eventually pay the premiums, therefore reducing the chance of a lapsed policy.

Let's take a closer look at this argument. Assume that a 40-year-old male is trying to decide between purchasing a whole life policy and a guaranteed UL to fund his child's special needs trust. Let's assume he will receive a preferred rating. Using one of the major insurance carriers, a $1 million death benefit (DB) will require an annual premium of approximately $13,500. It will be 15 years before there is enough cash value in the policy to pay the annual premium under the "current assumptions." These assumptions are not guaranteed.

A UL policy providing the same DB can be purchased for approximately $5,500 per year. Of course, that must be paid over the individual's entire lifetime. However, he can, if he wishes, arrange to pay the entire policy cost over 15 years with an annual premium of slightly less than $10,000. The advantage is that this DB and associated premiums are not based on assumptions, but instead are guaranteed.

Proponents of whole life insurance will point out, and rightly so, that there is no cash value build-up in the guaranteed UL. But what happens if and when the policy owner seeks to access the cash value in the whole life policy? A withdrawal of cash value is a loan, and therefore reduces the DB. This may have advantages for certain individuals with wealth. But if our primary objective is to fund the special needs trust, this defeats our purpose, which is to adequately fund the trust and provide financial security for the future of a child with special needs. In addition, many families with special needs children have less income, more medical expenses, and a greater need for permanent insurance. The additional cost of whole life insurance often translates into a reduced DB to fund the special needs trust.

Developing a cash flow projection which reflects income and expenses over a couple's lifetime is extremely helpful when attempting to determine what is affordable. It also allows a planner to see how different sources of income such as SSI or SSDI, as well as major events such as retirement, will affect future projections.

On a final note, parents should always plan conservatively. In order to provide their child with the opportunity to achieve his or her greatest potential, they must first establish a safety net. This means planning for the worst. They must provide the financial security necessary to allow their child to fail, if he or she is to ultimately succeed. Using a comprehensive approach will help them avoid gaps in their planning and give them a better chance of properly funding the special needs trust for their special needs child.

Craig Marcott has been a Certified Financial Planner™ Professional for 20 years. He is also a Special Needs Consultant and helps parents make certain that their special needs child has the opportunity to achieve his greatest potential. He is guardian of his brother Scott, who has Down syndrome. Mr. Marcott currently serves on the Board of Directors of the Financial Planning Association and is associated with numerous other agencies such as the Suffolk and Nassau chapters of the Association for the Help of Retarded Children, the Long Island Family Support Services Advisory Council, the National Down Syndrome Congress and Gerontology Professionals of Long Island. Mr. Marcott is also a professional speaker and has appeared before groups such as the New York State Office For People With Developmental Disabilities (OPWDD), Parent To Parent of New York State, The Annual Awareness Conference, BOCES (Eastern and Western Suffolk), Family Residences & Essential Enterprises, and numerous other agencies and school districts.

This article originally appeared in the Fall 2011 issue of the Elder and Special Needs Law Journal, *published by the Elder Law Section of the New York State Bar Association.*

The Preclusion of Expert Affidavits in Summary Judgment Motions: A Comparison of the First and Second Departments

By David A. Glazer and Karen Schnur

It has often been argued by lawyers in summary judgment motions that the use of expert affidavits to either support or oppose the motion are improper if the experts were not exchanged prior to the motion as long as a note of issue has been filed. Until recently, that argument had fallen on deaf ears.

The Second Department has begun to accept that argument. Where previously expert disclosure after the note of issue was allowed, the Second Department has started to require that expert information be exchanged prior to the filing of the note of issue if the party wishes to use the expert in a summary judgment motion.[1] However, whether the Second Department is a trendsetter or floating alone in this matter has not yet been fully determined. Thus far, only the First and Second Departments have dealt with this issue at any length recently.

Second Department Cases

As early as 1996, in *Mankowski v. Two Park Co.*, the Second Department held that it was proper for the Supreme Court to preclude the use of an expert or the expert's affidavit to oppose a motion for summary judgment since the plaintiff failed to timely respond to the defendant's discovery demands.[2] Throughout the years, the Second Department made similar rulings.[3]

In 2011 alone, there were at least four decisions where the Second Department has held that the expert affidavit should have been precluded because the expert was not disclosed to the other party prior to the note of issue being filed.

In *Pellechia v. Partner Aviation Enterprises, Inc.*, the plaintiff allegedly sustained injuries when he slipped and fell while disembarking from defendant's charter jet.[4] The Second Department affirmed the Supreme Court's granting of summary judgment for the defendant on the grounds that the defendant made out a prima facie showing for summary judgment and the plaintiff was unable to raise a triable issue of fact.[5] The Second Department upheld the Supreme Court's decision to disallow the plaintiff's expert affidavit "because the plaintiff never complied with any of the disclosure requirement of CPLR 3101 (d) (1) (i), and only first identified his expert witness in opposition to the defendant's summary judgment motion, after the plaintiff filed the note of issue and certificate of readiness."[6] The Court also held that: (1) the expert did not demonstrate that he was qualified to render an opinion and (2) the affidavit was "speculative and conclusory, and was not based on accepted industry standards.…"[7]

In *Ehrenberg v. Starbucks Coffee Company*,[8] the plaintiff sued Starbucks Coffee Company when a cup of hot tea spilled on him, claiming that the accident was the result of a dangerous and defective condition on the premises. Starbucks moved for summary judgment, which was denied by the Supreme Court.[9] On appeal, the Second Department reversed on the grounds that the Supreme Court improperly considered the affidavit of the plaintiff's expert that was submitted in opposition to the motion.[10] The Second Department held that the Supreme Court should not have considered the affidavit "since that expert witness was not identified by the plaintiffs until after the note of issue and certificate of readiness were filed, attesting to the completion of discovery, and the plaintiffs offered no valid excuse for the delay."[11] As a result, the Court granted summary judgment to Starbucks.[12]

In *Stolarski v. DeSimone*,[13] Stolarski attempted to commit suicide when her boyfriend DeSimone, whom she was living with, broke up with her and told her to move out.[14] She was hospitalized after the attempt and upon discharge was referred to the defendant Family Services of Westchester, Inc.[15] After two consultations with a Family Services social worker, Stolarski successfully killed herself using DeSimone's gun.[16] Her parents sued both DeSimone and Family Services for wrongful death and conscious pain and suffering.[17] Both defendants moved for summary judgment and the Supreme Court denied both motions.[18] On appeal, the Second Department reversed and granted summary judgment for DeSimone but affirmed the denial of summary judgment for Family Services because it "failed to establish its prima facie entitlement to such relief."[19] The Second Department held that the Supreme Court "properly declined to consider the expert affidavits proffered by Family Services in support of its motion[]" because "[t]he experts were not identified by Family Services until after the note of issue and certificate of readiness were filed attesting to the completion of discovery, and [it] offered no valid excuse for the delay."[20] The court further explained that because Family Services did not establish its prima facie entitlement to summary judgment, the motion was denied "regardless of the sufficiency of the opposing papers."[21]

Most recently, the Second Department decided *Kopeloff v. Arctic Cat, Inc.*[22] In this case, the plaintiff sued the manufacturer of the snowmobile that he was driving, alleging that an overcentered sway bar caused him to turn over and be thrown off the snowmobile and thus sustain injuries.[23] The defendant moved for summary judgment in August of 2009, over three months after the note of issue and certificate of readiness were filed.[24] In opposition to the summary judgment motion, the plaintiff submitted an affidavit of an expert who was never previously identified to the defendant.[25] The Supreme Court granted the defendant's motion and the plaintiff appealed.[26] The Second Department affirmed the Supreme Court, finding that the court did not abuse its discretion when rejecting the expert affidavit as untimely since the "plaintiff did not provide any excuse for failing to identify the expert in response to the defendant's discovery demands" and also because the plaintiff had retained the expert in question over 18 months prior to the submission of the affidavit yet the defendant was not aware of the expert.[27] Furthermore, the court pointed to a secondary reason to grant defendant's motion for summary judgment: the plaintiff's expert's affidavit was "speculative, conclusory, and partially based on evidence which is not in the record."[28]

First Department Cases

The First Department has also recently addressed this issue, although not with the same frequency, or consistency, as the Second Department. Since April of 2010, the First Department has decided three cases with respect to the preclusion of expert affidavits in summary judgment motions where the expert was not disclosed prior to the note of issue being filed.

In the first case, *Tomaino v. 209 E. 84th Street Corporation*, the plaintiff slipped and fell down a flight of steps and sued the owner of the premises.[29] The defendant moved for summary judgment on the grounds that the plaintiff was unable to state exactly where she fell and the exact cause of her fall, but the Supreme Court denied the motion.[30] On appeal, the First Department affirmed the denial of the defendant's motion for summary judgment and to preclude plaintiffs' expert testimony. It held that the Supreme Court properly did not exclude the plaintiff's expert's affidavit and testimony because "[p]laintiffs established good cause for the untimely disclosure, which does not appear to have surprised or prejudiced defendant."[31]

In *Harrington v. City of New York*, the First Department affirmed the Supreme Court's order which granted defendants' motion for summary judgment and denied plaintiff's cross motion for partial summary judgment.[32] The First Department held that even if the defendants were negligent, "such negligence was not a substantial cause of the events producing the injury" and that the plaintiff "failed to establish prima facie entitlement to summary judgment in her favor on liability."[33] However, the court also stated that "the motion court properly declined to consider the [plaintiff's] expert's affirmation because plaintiff failed to timely disclose his identity."[34] In making this statement, the court cited to a Second Department case, *Wartski v. C.W. Post Campus of Long Is. Univ.*, which held that "[t]he plaintiff's expert affidavit should not have been considered in determining the motion since the expert was not identified by the plaintiff until after the note of issue and certificate of readiness were filed attesting to the completion of discovery, and the plaintiff offered no valid excuse for her delay in identifying the expert."[35] However, the First Department also made clear that even if the expert's affidavit were allowed, that it was insufficient to raise an issue of fact.[36]

The most recent case with respect to this issue was decided in June 2011. In *Baulieu v. Ardsley Associates, L.P.*,[37] the First Department reversed the Supreme Court's granting of summary judgment to the defendant, Powerhouse Maintenance Inc. (Powerhouse) because Powerhouse did not establish prima facie entitlement to summary judgment, and even if it did, evidence offered by the other parties raised triable issues of fact.[38] The Court went further and stated that the plaintiff's expert engineer's affidavit should have been considered on the motion, "notwithstanding that the plaintiffs failed to timely disclose information about the expert before filing their note of issue."[39] It reasoned that the record showed "no evidence that the plaintiffs' belated disclosure…was willful, or that it prejudiced Powerhouse, inasmuch as the specifics of the alleged macadam defect, and the codes and regulations claimed to be violated, were previously set forth in plaintiffs' bill of particulars and deposition testimony."[40]

Comparison of First and Second Departments

The First and Second Departments approach the question of preclusion of expert affidavits, introduced for the first time during a summary judgment motion and after the note of issue has been filed, differently. Looking at the four Second Department cases discussed above, the Second Department will preclude an expert affidavit without a showing of willfulness or prejudice, although it tends to provide at least one secondary reason for either precluding the expert affidavit or its decision to grant or to deny summary judgment. These secondary reasons appear to be a safety net to protect against an appeal. However, as evidenced by *Ehrenberg*, the Second Department will still preclude an expert affidavit solely on the grounds that expert disclosure was not exchanged prior to the note of issue being filed even without a secondary reason for its decision.

The First Department, on the other hand, generally asks whether the late disclosure of the expert was willful or prejudicial to the opposing party and whether the party offering the affidavit had a good cause reason for the delay.[41] *Tomaino* suggests that if the plaintiff presents good cause for the untimely disclosure, that it is not willful, and does not prejudice the other party, preclusion of the expert affidavit is unwarranted. Furthermore, *Baulieu* stands for the proposition that if the information or opinions offered by the expert in the affidavit were disclosed prior to the note of issue being filed, then the opposing party could not have been prejudiced. Therefore, unless the untimely disclosure was willful, the Court should not preclude the expert's affidavit.

Conclusion

The real question is how attorneys should handle expert disclosure moving forward. In any case where a motion for summary judgment is likely, expert disclosure should be made either before the filing of the note of issue, or promptly after its filing. As long as the opposing party has had a viable opportunity to review the disclosure and obtain its own expert for rebuttal purposes, then there should be no issue with the use of an expert affidavit. However, failure to disclose an expert, particularly if that expert was retained well before the filing of the note of issue, will likely result in the preclusion of that expert in a motion for summary judgment.

Endnotes

1. Richard E. Lerner & Judy C. Selmeci, *Timing of Expert Disclosures: A Preemptive Approach*, N.Y. L.J., Aug. 5, 2011, available at http://www.njlj.com.
2. *Mankowski v. Two Park Co.*, 225 A.D.2d 673, 639 N.Y.S.2d 847 (2d Dept. 1996).
3. *See Vailes v. Nassau County Police Activity League, Inc., Roosevelt Unit*, 72 A.D.3d 804 (2d Dept. 2010); *Yax v. Development Team, Inc.*, 67 A.D.3d 1003 (2d Dept. 2009); *Gerardi v. Verizon N.Y., Inc.*, 66 A.D.3d 960 (3d Dept. 2009); *Wartski v. C.W. Post Campus of Long Is. Univ.*, 63 A.D.3d 916 (2d Dept. 2009); *King v. Gregruss Mgt. Corp.*, 57 A.D.3d 851 (2d Dept. 2008); *McArthur v. Muhammad*, 16 A.D.3d 630 (2d Dept. 2005); *Ortega v. New York City Tr. Auth.*, 262 A.D.2d 470 (2d Dept. 1999).
4. 80 A.D.3d 740, 916 N.Y.S.2d 130 (2d Dept. 2011).
5. *Id.*
6. *Id.*
7. *Id.*
8. 82 A.D.3d 829, 918 N.Y.S.2d 556 (2d Dept. 2011).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. 83 A.D.3d 1042, 922 N.Y.S.2d 151 (2d Dept. 2011).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. 84 A.D.3d 890, 923 N.Y.S.2d 168 (2d Dept. 2011).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. 72 A.D.3d 460, 900 N.Y.S.2d 245 (1st Dept. 2010).
30. *Id.*
31. *Id.* (internal citations omitted).
32. 79 A.D.3d 545, 913 N.Y.S.2d 81 (1st Dept. 2010).
33. *Id.*
34. *Id.*
35. 63 A.D.3d 916, 917, 882 N.Y.S.2d 192 (2d Dept. 2009).
36. *Harrington*, 79 A.D.3d 545.
37. 85 A.D.3d 554, 925 N.Y.S.2d 466 (1st Dept. 2011).
38. *Id.*
39. *Id.*
40. *Id.*
41. The one First Department case that did not apply this analysis relied on a Second Department case for its holding.

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This article originally appeared in the Winter 2011 issue of the Torts, Insurance & Compensation Law Section Journal, *published by the Torts, Insurance and Compensation Law Section of the New York State Bar Association.*

Life After Insurance—Giving Back and Getting Back: Have You Visited Your Legal Aid Society Lately?

By Cathy Syhre

After 38 years of managing claims as an adjuster, manager or consultant, I finally retired. Now what do I do to fill my time? Dr. Phil, Oprah and Ellen were telling me every day that I wasn't too old to be a productive member of society, but what skills could I bring to the table? I had been deposed, arbitrated, mediated, tried and won, tried and lost and shepherded my favorite case, *Hooker v. The State of California*, to a victory in the California Supreme Court.

Paging through volunteer opportunities, I found the Hiscock Legal Aid Society in Syracuse, N.Y. My son had spent time early in his legal career as a public defender, so I thought I knew what I would find. I had some legal knowledge, I knew some attorneys, and I had spent years reading contracts, writing looong letters on coverage, and arguing with mediators and judges. I felt I could help somehow. This is the story of my visit to the Hiscock Legal Aid Society (HLAS) and why I stayed.

After an interview with Assistant Director, Joanne Sawmiller, I was asked to report the next Tuesday. They hadn't decided how to utilize me so I came in blind.

My first experience was in the reception area. I could have been in any of the law firms across the United States that I had frequented during my career. Not because of the décor, but the attitude and professionalism of the receptionists, Joan Tauro and Nikia Trice. Joan has been here 27 years and Nikia, a former HLAS client, joined the staff permanently after working here temporarily through the Jobs Plus program. They both speak of what they do with such enthusiasm and passion that I got chills. Nikia told me that when people come in the door, oftentimes their self-worth is broken, but she can see the change in their stature from the moment she calls them "Sir" or "Ma'am."

Their goal is to let clients know from the very beginning that although they are not paying for counsel, they will not get second-rate representation and that they will be treated with concern and respect. Joan and Nikia stress that everyone at HLAS works as a team, and has a dedication to justice that is not constrained by a client's social station, mental health, ethnic background, or financial means.

Their pride in the HLAS team and the services provided is clearly evident from the success stories that they share. Joan and Nikia both wanted to make it clear that no one leaves without some type of assistance. If someone seeking help does not fit within the parameters of the services of HLAS, they are directed to some agency or organization that can assist them.

I urge you to stop in sometime and hear their stories.

"Dr. Phil, Oprah and Ellen were telling me every day that I wasn't too old to be a productive member of society, but what skills could I bring to the table?"

I started my volunteer work in the administrative offices assisting Director of Development, Helen Kelley. HLAS is a 501 (c) 3 and relies on support from government sources, corporations, foundation grants and individual donations. Too many people misunderstand the purpose and scope of a legal aid society just as I did. Helen's job is to raise the profile of HLAS and make sure people understand its value.

We all learn the Pledge of Allegiance as little children and repeat it throughout our lives. HLAS is about the phrase, "…and justice for all.…" Too often we forget that this is one of the basic promises of our democracy and that we, as a nation and individuals, are responsible to uphold that pledge.

As I reviewed the list of names of individual donors I was struck by the low percentage of local firms and lawyers who support HLAS. Who better to understand these advocates of "Justice for ALL"? The lawyers I had worked with in the past had been very charitable and I was sure there was no difference in Syracuse, so I made it one of my goals to work with Helen to increase the participation by local attorneys to help maintain the equilibrium of the scales of Lady Justice. First, though, I needed to learn more about the professionals who make up the legal team of HLAS and the work that they do.

The attorneys at Hiscock Legal Aid Society (HLAS) are known as strong advocates for clients dealing with issues involving domestic abuse and violence, foreclosure, and evictions, and as dedicated legal advocates for cancer patients, immigrants, and refugees.

Linda Gehron, a prominent local attorney, says, "As an assigned counsel attorney who has represented parties and children in the Onondaga County Family Court just short of thirty years, I would like to say that I have noticed over the past few years the remarkable dedication and professionalism of the Legal Aid attorneys assigned to family court. When we are working together towards the outcome of a case, whether as opposing counsel, or not, I am very glad when they are "on my side," and know that I had better prepare my case well when their client's position opposes mine!"

They are the **VOICE** of the under-served who have nowhere else to turn for assistance in escaping abusive situations, finding financial support and resolving custodial issues. **This was not at all what I expected**. Their clients are mostly working poor who are trying to avoid becoming dependent on social services.

I first met with Philip Rothschild, a Senior Attorney in the Appeals Program. He handles criminal and family court appeals for clients who meet HLAS' financial guidelines. Phil has been with HLAS for 21 years. Talking to Phil is fascinating. Beyond all the "lawyer speak" is a man who believes, "If we are successful for our clients, we are successful for society."

I learned so much about criminal and family court appeals that my retired mind was spinning. Most importantly, Phil says that his job and that of the other appellate lawyers, Christine Cook, Kristen McDermott and Piotr Banasiak, is to insure that the system runs honestly, corners aren't cut, and a person's right to a fair trial is preserved. In other words, they strive to ensure that everyone along the path of the justice system does his or her job in order to feel as if they have successfully done theirs.

Appellate lawyers in private practice make a lot of money, so why is Phil here? He admits that as a private attorney, he didn't like the billing process. But more importantly, at HLAS he has an opportunity to work on very interesting cases with colleagues who believe in the mission of the organization and for clients who are, by and large, grateful. To read Fourth Department case summaries see Piotr's blog at: http://hiscockappeals.blogspot.com/.

Greg Dewan and Leah Witmer, two newer attorneys with the Civil Program, filled me in on the intricacies of evictions and foreclosures. These cases sometimes involve volatile situations when landlord and tenant face off in disputes. Clients faced with the prospect of losing their home are not really interested in the intricacies of the law. Greg and Leah and the other civil attorneys have to work within the legal system to search for the best resolution for their desperate clients, and this is often very challenging.

Despite holding open interviews for potential new clients three days a week, Greg and Leah and the other staff attorneys are often called upon at the last minute by those who seek help for the first time after receiving a 72-hour eviction notice.... Preparing all of the paperwork for an eviction hearing takes more than half a day. It is often frustrating for these dedicated lawyers who realize that if they turn their backs on these people, they have nowhere else to go.

Yet how can they service all of these people? The organization's staffing is largely dependent on grants and public funding. Some of their cases can last for years with continuous updated paperwork and appearances.

The Hiscock Legal Aid Society is also the only organization in Onondaga County that provides legal representation for victims of domestic violence. What some of these clients (mostly women) have experienced and endured is for many of us unimaginable. They often have children to support and protect yet face leaving perhaps the only financial security that they have known. The attorneys involved with HLAS' Domestic Violence Project are able to assist with a full range of legal matters such as divorces, orders of protection, and custody agreements.

It is perhaps best to let one of their clients describe her experiences with HLAS. Elaina Leonardo tells her story at this link http://www.everson.org/visit/tickets.php?id=45. Elaina says with the Society's assistance, she is finally able to enjoy a "safe, happy home filled with love and not fear."

Hiscock Legal Aid Society is staffed by 25 full-time attorneys who handle close to 5,000 cases a year. They are the primary provider of mandated representation of adults in Onondaga Family Court and handle more than 2,000 of these cases a year. In a private practice, an increase in clients is an increase in revenue. At the Legal Aid Society, an increase in clients means a scramble for funding.

So I visited Hiscock Legal Aid Society in June and I stayed. I suppose I will be here as long as they will have me. I would encourage you to visit your legal aid society and donate or help in any way.

The halls of justice have many pillars and each supports the other. This pillar needs your support. Please help.

Cathy Syhre can be contacted at CSyhre@aol.com, and Helen Kelley, Director of Development, Hiscock Legal Aid Society, can be contacted at Hkelley@wnylc.com, http://www.hiscocklegalaid.org.

This article originally appeared in the Winter 2011 issue of the Torts, Insurance & Compensation Law Section Journal, *published by the Torts, Insurance and Compensation Law Section of the New York State Bar Association.*

Independent Contractors/Work for Hire Agreements

By Andrew I. Bart

New York City, as the nation's cultural capital, has a dazzling array of cultural institutions, ranging in scope from the Museum of Contemporary African Diasporan Art in Fort Greene to the Metropolitan Museum of Art on Manhattan's Museum Mile, that are visited by millions of tourists and residents alike. These institutions, despite their diverse missions and constituencies, have one unifying administrative issue that they all face: how to engage creative individuals to work on special projects while ensuring that no employment relationships are created with said individuals and how to retain the intellectual property rights to the created work.

It is a difficult area to negotiate because, while on one hand an institution wants to retain artistic workers (such as curators and catalogue contributors) that contribute value and creativity to a project, the institution must also ensure that it protects itself for both tax and intellectual property purposes. In general, if a worker is considered an employee and not an independent contractor, an institution must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages; an institution will have to also have to pay overtime and for benefits, such as health insurance and retirement contributions. However, if a worker is an independent contractor, the institution, besides avoiding overtime and costly benefit payments, does not have to withhold or pay any taxes on payments made to the worker.

In terms of the right to the completed work, a "work for hire" is the intellectual property of the institution. Thus, the artistic contributor is not entitled to any proceeds that may be derived from a reproduction of the work.

As institutions are seeing their government funding dry up and financial contributions wither in these tight financial times, they clearly want to maximize any financial returns that may result from a worker's contribution to a project (such as profits derived from a special exhibition catalogue) while minimizing any unnecessary costs (such as the payment of unemployment tax). In order to fully protect an institution's interests, one must understand how to avoid the creation of an employer / employee relationship and how to ensure that the completed work is a "work for hire" and thus remains the property of the institution.

Preventing the Creation of an Employer/Employee Relationship

An institution clearly wants to prevent the creation of an employment relationship to avoid the extensive costs associated with overtime pay, employee health benefits, retirement contributions, and unemployment insurance. Unfortunately, avoiding having a worker classified as an employee will often prove to be difficult in practice. In terms of unemployment insurance law, "the existence of an employment relationship presents a question of fact for the [New York State Unemployment Insurance Board] to resolve, and while not single factor is determinative, control over the means used to achieve the desired result is particularly significant."[1]

While a contract may state that a worker is an "independent contractor," that language alone does not determine whether an employment relationship exists.[2] Thus, while an institution may have a guest curator, for example, execute an "independent contractor" agreement, that alone will not be sufficient to prevent the finding that he is an employee of the institution.

A. New York State Unemployment Insurance Appeals Board

What factors does the New York State Unemployment Insurance Appeals Board (Board) consider when determining whether a worker is an independent contractor or an employee? The New York State Department of Labor (Labor Department) looks to the common law test of agency in this regard. While the Labor Department cautions that the "real" distinction depends "primarily on the level of supervision, direction and control exercised by the person engaging in the services," it finds that the following are indicators of an employment relationship:

- Control over the worker's activities by such means as requiring full-time services, stipulating hours of work, requiring attendance at meetings, and requiring prior permission for absence from work;
- Requiring the worker to comply with instruction as to when, where, and how to do the job;
- Direct supervision over the performed services;
- Providing facilities, equipment, or supplies for the performance of the services;
- Setting the pay rate;
- Compensating the worker in the form of a salary or hourly rate of pay;
- Reimbursing or providing an allowance for business or travel expenses;
- Evaluating job performance;
- Providing fringe benefits;
- Providing training;
- Requiring oral or written reports;
- Reserving the right to review / approve the work product;

- Furnishing business cards or other means of identification demonstrating that the worker is a representative of the employer; and
- Restricting the worker from performing services for competitive businesses.[3]

On the other hand, the Labor Department finds that "signs of independent contractor status include a person who":

- Has an established business offering services to the public;
- Advertises his services;
- Uses business cards, stationery and billheads;
- Carries his own insurance;
- Has his own place of business, equipment, and supplies;
- Pays his own expenses;
- Negotiates his own pay rate;
- Sets his own schedule;
- Has the freedom to provide services concurrently for other businesses, competitive or non-competitive, during the term of the contract;
- May refuse work offers;
- Is not required to attend meetings or training sessions;
- Is not required to submit oral or written reports;
- Assumes the risk of profit or loss in providing services; and
- May hire his own help.[4]

B. IRS Evaluation of the Worker Relationship

The Internal Revenue Service (IRS), like the Board, also uses common law factors when determining whether a worker is an independent contractor or an employee. In its online guide to assist businesses in determining whether a worker is an independent contractor or an employee, it states that "all information that provides evidence of the degree of control and independence must be considered."[5] The IRS divides the evidence of the degree of control and independence into three categories:

1. **Behavioral**: Does the company control or have the right to control what the worker does and how the worker does his or her job?
2. **Financial**: Are the business aspects of the worker's job controlled by the payer? (including how the worker is paid, whether expenses are reimbursed, and who provides tools/supplies).
3. **Type of Relationship**: Are there written contracts or employee type benefits (i.e., pension plan, insurance, and vacation pay)? Will the relationship continue and is the work performed a key aspect of the business?[6]

While this article will not delve into the IRS' analysis of each category, it is unclear what the IRS means by the phrase "[w]ill the relationship continue and is the work performed a key aspect of the business?" The IRS finds that, if the relationship is to continue "indefinitely," then it is more likely that the intent of the parties was to create an employee-employer relationship. As to a "key aspect of the business," the IRS finds that if a worker provides such services, it is more likely that the business will have the right to direct and control his or her activities. The IRS thereafter gives the example of a law firm hiring an attorney; the law firm will present the work as its own and have the right to direct/control such work. An employer-employee relationship is formed in such a situation.[7]

Institutions should be aware, however, that the IRS (like the Board) cautions that:

> There is no "magic" or set number of factors that "makes" the worker an employee or an independent contractor, and no one factor stands alone in making this determination...The keys are to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination.[8]

How then is an institution to prevent the creation of an employment relationship? One first should examine how the courts weigh the various common law factors in rendering their decisions.

C. How the Courts Weigh the Employment Relationship Factors

The *Scotia-Glenville*[9] case is illustrative in this regard. There, as stated above, the Appellate Division, Third Department upheld the Board's determination that exhibit teachers, who worked for a museum that offered programs at schools and libraries, were employees because the museum "exercised sufficient direction and control over the services of the…teachers."[10] Specifically, the court found that the teachers had to:

- Adhere to museum guidelines;
- Attend four meetings a year; and
- Become museum members so that they could "familiarize themselves with the museum's policies, procedures, and...programs."[11]

Moreover, the museum:

- Made all of the work assignments;
- Prepared an outline for the teachers' presentations at the schools and libraries; and

- Did all of the billing and collection for the programs.[12]

Matter of Ted is Back Corporation [Roberts][13] provides a useful contrast to institutions seeking to avoid the finding of an employment relationship. In this case, the Court of Appeals held that the Board's finding that an employment relationship existed between its salespeople and the corporation was *not* supported by substantial evidence in the record. The Court held, in relevant part, that:

> Although a determination that an employer-employee relationship exists may rest upon evidence that the employer exercises either control over the results produced or over the means used to achieve the results...control over the means is the more important factor to be considered. Thus, incidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship.[14]

The Court found that "the evidence does not support the finding of control over the means of achieving the results," as the salespeople "worked at their own convenience, were free to hold outside employment and were not limited to any particular territory…they were not reimbursed for expenses and received no salary or drawing account, but were paid on a strictly commission basis. No taxes were withheld on their compensation."[15]

The recent case of *Matter of Empire State Towing and Recovery Association, Inc. v. Comm'r of Labor*[16] actually reversed the Board and found that a lawyer who worked as a lobbyist, attorney and administrator for a trade organization was not an employee of the organization. In this case, the attorney performed services from his own office, was free to set his own schedule, and was not working exclusively for the association. The court found that neither the fact that the association's treasurer had to co-sign checks for over $500 nor that the attorney had to submit periodic reports to the board and attend board meetings supported a finding that he was an employee of the organization.[17]

D. Guest Curator Illustration

As an example of how to avoid an employment relationship, let us assume that a museum in New York City is retaining a guest curator for a Picasso exhibit. While this article does not detail specific contractual provisions in such an agreement, it would be prudent for the museum to consider the following:

- Do not provide the guest curator with an exclusive office for the duration of the project;
- Do not set standard working hours for him or her;
- Do not provide him or her with any materials (i.e., a laptop computer) or supplies or instruct the curator where to buy supplies;
- Have a set fee for the services;
- Do not specify what work must be performed by what individual (if the museum is employing a consulting group);
- Do not provide him or her with specific detailed instructions as to how / what / where to perform the work;
- Do not reimburse for expenses;
- Do not sign the curator to an exclusive contract for the project period;
- Do not provide any benefits; and
- Do not require him or her to submit oral and / or written reports.

This list is certainly not exhaustive and an institution should tailor any independent contractor agreement to best satisfy the project at issue. It is a very fact-specific analysis and involves examining the specific needs of the institution verses the desires of the guest worker. An institution, furthermore, wants to ensure that it retains the intellectual property rights to the work performed by the independent contractor. For that, one must examine the work for hire doctrine.

Work for Hire Doctrine

The work for hire doctrine governs the intellectual property rights surrounding the creation of the creative / artistic / literary work at issue. The Copyright Act of 1976 (the Act)[18] provides, in relevant part, that:

> In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and unless the parties have expressly agreed otherwise in a written agreement signed by them, owns all of the rights comprised in the copyright.[19]

The Act explicitly defines a work for hire as either:

> (1) a work prepared by an employee within the scope of his...employment;[20] or
>
> (2) a work specifically ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test...if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.[21]

Several questions that immediately arise are: (1) is the work "specifically ordered or commissioned"?; (2) what are the qualifying categories of "specifically ordered or commissioned work"?; and (3) have the parties expressly agreed that the work "shall be considered a work made for hire"?

A. Specially Ordered/Commissioned Work

First, a work is "specially ordered or commissioned" under the Act "if the hiring party was the 'motivating factor' behind the work and the independent contractor was paid for the work."[22]

As an illustration, in *Logicom Inclusive, Inc. v. W.P. Stewart & Co.*[23] the plaintiffs, developers of computer programs, brought an action against the defendants, users of the programs, alleging, among other things, copyright infringement. The Southern District found that the "specially ordered or commissioned" requirement of the three-prong test was met, as the independent contractor was paid a sum certain for making targeted modifications to the computer programs at issue. Thus, the plaintiffs were "clearly the motivating factor behind the creation of the... work."[24]

This aspect of the three prong test should not be difficult to meet; the institution would clearly seek out, for example, a noted expert to write a piece for an exhibition catalogue and pay him or her a set fee for his or her contribution thereto. Such a piece would be considered to be one that was "specially ordered or commissioned."

B. Qualifying Works

The Act defines a collective work as a "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."[25] Two categories are thereafter specifically defined: (1) a supplementary work; and (2) an instructional text. A supplementary work is a "work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictoral illustrations...charts, tables, editorial notes, musical arrangements...bibliographies, appendixes, and indexes"; an "instructional text" is a "literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities."[26]

Based on these definitions, an institution hiring an editor of an exhibition catalogue (or contributor to such a catalogue) or a graphic artist to design exhibition illustrations can safely assume that those contributions will be most likely be "qualifying works" and thus meet the second prong of the work for hire test. Clearly, what constitutes a "qualifying work" is a very fact-specific determination based upon the contribution of the independent contractor. The institution should be aware, however, that not every work prepared by an independent contractor qualifies as a work for hire under the Act.[27] If a work does not fall within one of the qualifying categories, it will not qualify as a "work for hire" "with the special legal consequences which flow from this designation."[28]

In order to meet the third prong of the test, the institution, as set forth below, must ensure that the independent contractor executes a valid written agreement in connection with the work at issue.[29]

C. Valid Work for Hire Agreements

Potential copyright claims will likely be ripe for dismissal if there is a valid work for hire agreement executed by the parties.[30]

In *Morris*, the plaintiffs claimed, among other things, that the production of "The American President" and "The West Wing" infringed on their copyrighted material, namely an original film treatment about a widowed President raising a young daughter. The court, however, found that the plaintiffs were unable to establish their ownership of a valid copyright because the contract at issue clearly stated that the plaintiffs' produced work was to be done in the context of a work for hire relationship with all intellectual property rights assigned by the plaintiffs to the production companies.[31] The court held that the "language in this assignment provision is unambiguous."[32] The "unambiguous" assignment provision in the agreement stated, in relevant part, that Walt Disney Productions obtained:

> [T]he copyright...and all now or hereinafter existing rights of every kind or character whatsoever pertaining to said work, and the title thereof, whether or not such rights are now known, recognized or contemplated; and...the complete, unrestricted, unconditional, and unencumbered title in and to said work, and all results and proceeds of [plaintiffs'] services hereunder, for all uses and purposes whatsoever.[33]

While it is recommended that an institution obtains a strongly worded provision that it retains all the rights and any proceeds that result from a work, such a provision may alienate artistic contributors and must be carefully crafted to balance the institution's needs with the artistic integrity of the contributor. Thus, for example, an institution may hire a writer for a special exhibition catalogue. The writer may want to be able to reproduce the catalogue piece at a later date for his or her own professional development. Perhaps the solution would be that, in the specific work for hire provision of the agreement, the parties agree that the piece remains the property of the institution but that it can be reproduced by the writer only upon written permission of the institution and only after a set time period after the exhibition itself has closed.

It should be noted that the Act "requires that the parties agree *before* the creation of the work that it will be a work for hire."[34] A written work for hire agreement may be executed after the work has been created, however, provided that it is confirming the parties' explicit or implicit intent in this regard.[35]

Conclusion

In these economic times, New York City institutions certainly want to minimize their costs while ensuring that they retain professionals of the highest artistic caliber to contribute to their exhibitions. In order to do so, the artistic contributors clearly should be treated as "independent contractors" and not employees, so that the institutions are not responsible for unnecessary costs. The museums must also make sure that an independent contractor's work is a "work for hire" that remains the intellectual property of the institution; if so, the institution can safely profit from the reproduction rights that will derive from the work itself.

Endnotes

1. *See* Matter of Pepsi Cola Buffalo Bottling Corp. [Harnett], 144 A.D.2d 220, 222(3d Dep't 1988); Matter of Field Delivery Serv. [Roberts], 66 N.Y.2d 516, 521 (1985).
2. Matter of Scotia-Glenville Children's Museum [Harnett], 173 A.D.2d 1046, 1047 (3d Dep't 1991) (teachers working for a traveling museum were held to be employees and not independent contractors); *but see* Matter of Watz (Equitable Life Assur. Socy. of U.S.–Ross), 60 A.D.2D 259, 262 (3d Dep't 1977) (Appellate Division found an insurance agent to be an independent contractor and held that "[w]hile it is not itself determinative, that claimant's contract... provided that he was an independent contractor is another factor to be considered").
3. *See* New York State Department of Labor, Unemployment Insurance Division, *Independent Contractors*, at www.labor.ny.gov/ui/pdfs/ia31814.pdf (last visited Oct. 2, 2011); and New York State Department of Labor, *Independent Contractors*, at http://www.labor.ny.gov/ui/dande/ic.shtm (last visited Oct. 2, 2011).
4. *Id.*
5. Internal Revenue Service, *Independent Contractor (Self Employed) or Employee?*, at http://www.irs.gov/businesses/small/article/0,,id=99921,00.html (last visited Oct. 2, 2011).
6. *Id.*
7. Internal Revenue Service, *Type of Relationship*, at http://www.irs.gov/businesses/small/article/0,,id=179116,00.html (last visited Oct. 2, 2011).
8. Internal Revenue Service, *supra* note 5.
9. Matter of Scotia-Glenville Children's Museum [Harnett], *supra* note 2.
10. *Id.* at 1046.
11. *Id.* at 1047.
12. *Id.*
13. 64 N.Y.2d 725 (1984).
14. *Id.* at 726.
15. *Id.*
16. 15 N.Y.3d 433 (2010).
17. *Id.* at 438; *see also*, Matter of Hertz Corporation v. Comm'r of Labor, 2 N.Y.3d 733, 735 (2004) (Promoter not found to be an employee even though Hertz gave her "instruction on what to wear, what products to promote and how to make a presentation" as "the requirement that the work be done properly is a condition just as readily required of an independent contractor as that of an employee and not conclusive as to either").
18. The Act governs all works created after January 1, 1978.
19. 17 U.S.C. §201(b).
20. For the purposes of this article, we will assume that the worker at issue is an independent contractor and not an employee. Courts will analyze the worker's status using the general common law of agency. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-752 (1989).
21. 17 U.S.C. §101.
22. Archie Comic Publ'ns, Inc. v. DeCarlo, 258 F. Supp.2d 315, 333-334 (S.D.N.Y. 2003), aff'd, 88 Fed. Appx. 468 (2d Cir. N.Y. 2004) (Artistic contributions to a comic book held to be works for hire); Playboy Enterprises, Inc. v. Dumas, 53 F.3d 549, 562-563 (2d Cir. 1995), cert. den., 516 U.S.1010 (1995); 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §5.03 [2][a][ii][d](2008) (A work is produced on commission where one party "is requested by another to prepare a copyrightable work").
23. 04 Civ. 0604, 2004 U.S. Dist. LEXIS 15668 (S.D.N.Y. August 9, 2004).
24. *Id.* at 25.
25. 17 U.S.C. §101.
26. 17 U.S.C. §101(2).
27. Valdez v. Laffrey Associates, 07 Civ. 4566, 2010 U.S. Dist. LEXIS 30160, *12-*13 (S.D.N.Y. March 26, 2010) (Photographs taken by an independent contractor were found not to be "works for hire" as, among other things, they did not fall into one of the nine statutory categories).
28. Nimmer, *supra* note 22, at Copyright §5.03[2][a][i] (2008); *see also* Logicom Inclusive, Inc, *supra* note 23, at *25 ("To be a 'work made for hire' the work in question must also fit under one of nine categories listed in subsection (2) of the definition").
29. *See* Valdez, *supra* note 27, at *12-*13 (No signed written agreement between parties regarding photographs at issue).
30. *See* Morris v. Castle Rock Entm't, 246 F. Supp.2d 290 (S.D.N.Y. 2033); *see also Contractual Obligation Prods., LLC v. AMC Networks, Inc.*, 546 F. Supp.2d 120, 126-127 (Court granted summary judgment on the plaintiff's copyright claim as the agreement rendered the plaintiff's services work made for hire and designated the defendant the author and owner of the work and the proceeds therefrom).
31. In order to prevail on a copyright infringement claim, a plaintiff must demonstrate: (1) its ownership of a valid copyright; and (2) copying of original elements of plaintiff's work. *See* BanxCorp v. Costco Wholesale Corp., 723 F. Supp. 2d 596, 601 (S.D.N.Y. 2010).
32. Morris, *supra* note 30, at 294. The court rejected the plaintiff's other arguments; namely, that it could reclaim its copyright because of a breach of contract by the commissioning parties and because the contract was unenforceable as the treatment was not actually produced.
33. *Id.*
34. *See* Playboy Enterprises, Inc., *supra* note 22, at 559 (emphasis added).
35. *Id.*

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This article originally appeared in the Fall/Winter 2011 issue of the Entertainment, Arts and Sports Law Journal, *published by the Entertainment, Arts and Sports Law Section of the New York State Bar Association.*

A Practical Guide to the New York State Physician Profile

David A. Zarett and Joshua A. Boxer

I. Background

After some highly publicized cases involving "bad outcomes" by physicians with prior disciplinary histories which were otherwise unknown to the public, in particular the Lisa Smart matter of 1997, the New York State Legislature passed, and Governor George Pataki signed into law, the New York Patient Health Information and Quality Improvement Act of 2000 (the "Act"), creating what we now know as the New York State Physician Profile ("the Profile").[1]

The Act can be found at New York Public Health Law § 2995 *et seq.* ("the Profile Statute") and its regulations can be found at Title 10 NYCRR 1000 *et seq.* (hereinafter, the "Profile Regulations"). In general the Profile is a publicly available online database which contains a wealth of information about every physician licensed in New York State, including background on a physician's medical education and training, board certification, medical staff privileging, and legal actions taken against the physician such as medical malpractice awards or settlements.[2] In February 2002, some two years after the Act was signed, the Profile went live.[3] The stated purpose of the Profile is to provide patients with information about health care providers and thereby improve the quality of health care in New York State.[4]

II. Data Collected—Initial Data and Updating Requirements

The data collected in the Profile spans from "required data," such as education and board certification, to "optional data" such as publications and a statement by the physician. Significantly, New York Public Health Law § 2995-a (7) states that a physician who provides materially inaccurate information to the Profile is guilty of professional misconduct. One explanation for this particular provision is that the information maintained by the Profile is based on the information reported by the physicians in their initial profile submission upon licensure (10 NYCRR 1000.4) and pursuant to the physician's self-updating requirements (10 NYCRR 1000.5).

The initial Profile information is collected in accordance with 10 NYCRR 1000.4, which states that the Department of Health will send an initial profile survey to every newly licensed physician in the State of New York. This initial profile survey was also sent to all currently licensed physicians when the Act became law in 2000. For many physicians, this initial Profile survey is the only time that they provide information to the Profile, however, the Profile Regulations provide for more frequent updating. Pursuant to 10 NYCRR1000.5, physicians licensed in the State of New York are required to notify the Profile of any change in their "non-optional" information within 30-days. Any change in "optional information" must be reported to the Profile within 365 days.[5] Finally, as a condition of license renewal, physicians are required to update their Profile information within six months prior to the expiration date of their registration period.[6]

Physicians can update their Profile information by contacting the Profile customer service center and obtaining a Physician Survey Form. The Physician Survey Form is a ten-page form which lists all the information a physician will find in his or her Profile and allows for modifications which are then submitted to the Profile for updating.[7] There is also an online updating option which requires that the physician obtain a username and password from New York State.[8]

III. How Is the Profile Utilized?

The Profile is utilized by patients, insurance payors, hospitals and physician rating / review websites (such as healthygrades.com and vitals.com), amongst others. The Profile has vastly increased the amount of data available to the public regarding physicians licensed in the State of New York. While many utilize the Profile, the information on the Profile is primarily based on self-reported data.[9] Failure of physicians to timely self-report to the Profile has an obvious negative effect on the ability of patients to make informed decisions regarding their choice in practitioner and puts into question the accuracy of the information presented by physician ratings websites. It also puts physicians at risk for not following the Profile updating requirements. Attorneys representing physicians would be wise to remind their physician clients to confirm the accuracy of their profiles and to timely update their profiles. But that is easier said than done due to the lack of regulatory guidance about Profile updating.

IV. Practical Guidance

There is confusion about what information needs to be updated to the Profile and when such updating responsibilities are triggered. One such area of confusion which we have encountered in our practice relates to New York Public Health Law § 2995-a(1)(d), the reporting of hospital privileges restrictions. Any restriction or loss of a physician's hospital privileges constitutes non-optional information which requires updating to the Profile within 30-days.[10] Recognizing physicians' due process rights to challenge a disciplinary action taken against their privileges by a hospital, New York Public Health Law § 2995-a(1)(d) states that a physician must submit to the Profile "a statement of any loss or involuntary restriction of hospital privileges or a failure to renew professional privileges at hospitals within the last ten years, for reasons related to the quality of patient care delivered or to be delivered by the physician **where procedural due process has been afforded, exhausted, or waived**, or the resignation from or removal of medical staff membership or restriction of privileges at a hospital taken in lieu of a pending disciplinary case related to the quality of patient care delivered or to be delivered by the physician…" (bold for emphasis).

In our practice we have faced this issue when representing physicians who have their hospital privileges summarily suspended, sought appeal of the suspension via the hospital due process hearing rights, and were successful in reversing the suspension through the intra-hospital hearing process. Upon review of the Profile Statute and Regulations, along with consultation with representatives at the Profile, we advised our clients that an update was not necessary even though they had been suspended from clinical practice at their respective hospitals for an extended period of time during the pendency of the internal due process hearing process. From a tactical standpoint, the ability to delay the updating or potentially avoid the updating of a hospital privileging adverse action can be very beneficial when representing a physician who is facing such a predicament. As a result of the paucity of regulatory guidance on the specifics of Profile updating in nuanced situations such as these, we have found it necessary to request two opinions from the Profile to determine whether a physician-client's Profile updating obligations had been triggered. Requesting an opinion from the Profile on reporting obligations for your physician clients is a worthwhile avenue for attorneys to evaluate a physician's updating obligations, especially when an update would have the potential to damage a practitioner's reputation. We have also found it helpful at times to call the Profile and speak to one of the knowledgeable staff members on specific client related issues.

Finally, on multiple occasions we have assisted physicians who received notice from the Profile of a posting of a malpractice award, with an appeal pursuant to 10 NYCRR 1000.3, requesting reversal of the decision to publish the award.[11] This written appeals process permits the physician to submit factual clinical information to the Department of Health, which reviews the submission under the standard of whether the settlement / award is "relevant to patient decisionmaking."[12] In our practice, we represented a physician who had a substantial money damages verdict against him. Though it was his first settlement / award the Profile sought to post the award pursuant to 10 NYCRR 1000.3(b)(2)(i) as the plaintiff had suffered a permanent injury. We successfully appealed the decision to post the award to the Profile. While the jury found our client liable, the Profile (through the panel set up to review Profile appeals pursuant to 10 NYCRR 1000.3(b)(2)(ii)(a)) agreed that, "…despite the awarding of payment to a complaining party, appropriate provision of patient care was provided."[13] It is important to note the 30-day time limit by which the appeal must be submitted is based on the date of the Profile notice, **not** the date of receipt of the notice.[14]

V. Conclusion

If you are an attorney who represents physicians it is important for you to consider Profile related issues when representing your client in a wide array of matters. From the benign situation of a physician resigning privileges at one hospital in order to take a new position at another institution, to the more serious and career-threatening situation of a physician facing criminal charges, each may trigger a Profile update obligation.

For those attorneys who represent physicians before the Office of Professional Medical Conduct ("OPMC"), one of the first things mentioned at the physician's Interview by the OPMC investigator is the physician's need to update his or her Profile. Ideally as a result of your counsel, your client will be able to inform OPMC that he or she is in full compliance with their Profile updating obligations. Furthermore, as explained, it is also critical that the physician's Profile information be accurate as misleading information to the Profile constitutes professional misconduct.[15] A relatively simple way to verify your clients' accurate reporting to the Profile is to assist them with the completion of their Physician Survey Form. Finally, if your client is faced with the obligation to update a negative change to his or her Profile (such as a criminal conviction) you may want to consider submitting an optional statement in which the physician can explain the conviction and potentially limit the reputational damage that can understandably result from such an update.

Endnotes

1. See Buettner and Sherman, New York Daily News, March 8, 2000, "Fight For Law To Open Malpractice Records."
2. See Public Health Law § 2995-a, which lists the information collected by the New York State Physician Profile.
3. The New York State Profile is located at www.nydoctorprofile.com.
4. New York Public Health Law § 2995(1).
5. The non-optional information that a physician must update to the Profile within thirty days of any such change includes education and certification, board certification, teaching appointments, hospital privileges, participation in state or federal health insurance programs, translation services offered at his or her office, malpractice award payments, license actions, hospital privileging limitations, and criminal convictions. The optional information that a physician must update within 365-days of any such change includes practice office location, publications, professional community service activities, health plan contracts or other affiliations, and the physician's concise statement which is an optional statement a physician can include on their Profile.
6. New York Public Health Law § 2995-a (4).
7. The Profile Customer Service Center can be reached at (888) 338-6999.
8. To obtain e-access for Profile updating online contact the New York State Health Provider Network at (866) 529-1890 to apply for an HPN account.
9. Along with the self-reporting obligations of 10 NYCRR 1000.3, malpractice judgments and / or settlements are separately reported by professional liability carriers pursuant to N.Y. Ins. Law § 315.
10. NYCRR 1000.5(a).
11. A physician is able to appeal a malpractice settlement / award posting to the Profile if he or she has two or fewer awards / settlements within the most recent 10 years. 10 NYCRR 1000.3(b)(1).
12. 10 NYCRR 1000.3(b)(2)(ii)(a).
13. 10 NYCRR 1000.3(b)(2)(ii)(a).
14. 10 NYCRR 1000.3(b)(2)(ii)(b).
15. See New York Public Health Law § 2995-a (7).

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This article originally appeared in the Summer/Fall 2011 issue of the Health Law Journal*, published by the Health Law Section of the New York State Bar Association.*

Mediator Liability: A Survey of Recent Developments

By Robert A. Badgley

As ADR, and mediation in particular, has become more prevalent, claims and lawsuits against mediators have become more frequent. In most cases, the claims are baseless. However, because one of the parties to the mediation may be dissatisfied with the result or the process, a claim may well follow.

When confronted with the specter of a potential claim, many in the mediation community invoke quasi-judicial immunity—the kind of near-absolute immunity enjoyed by arbitrators—as a basis to avoid liability. However, not all jurisdictions recognize immunity for mediators, and most states that do restrict such immunity to court-annexed mediation. Moreover, the protection is typically not absolute even where immunity is available. The mediator may still be vulnerable to suit predicated upon a wide variety of causes of action that fall outside the scope of the immunity, such as gross negligence, breach of contract, and breach of confidentiality. In addition, other forms of redress that are not barred by immunity, such as state disciplinary or grievance procedures, may be pursued by a disgruntled party. Finally, it is critical to note that, even if mediator defendants ultimately escape liability, they can nevertheless incur significant defense bills.

In addition to potential exposure to civil liability, mediators also face exposure to disciplinary proceedings which address potential misconduct. Although an adverse outcome will not result in payment of money damages, the imposition of disciplinary measures can be costly in other ways, such as the mediator's reputation. And, of course, it costs money to respond to the disciplinary allegations.

The following survey of fairly recent claims makes clear that mediators will continue to face challenges to their conduct, even where the mediator did nothing wrong.

Family Law

One area where the use of mediation continues to proliferate is family law. Couples seeking a divorce can do so more quickly and inexpensively through mediation than via the traditional court process. When mediators do commit errors in the mediation process, they become vulnerable to attack. Moreover, the emotionally-charged context of a divorce produces situations in which, even where a mediator has seemingly done everything right and taken necessary precautions to protect both parties, he or she is still open to claims.

- ***Post-Mediation Advice.*** In April 2011, a mediator was sued in Tennessee state court for allegedly giving legal advice to the divorcing husband a few days after a mediation session. In an e-mail, the husband made comments to the mediator about the wife's allegedly threatening conduct, and the mediator allegedly responded by e-mail that the husband should ask his attorney about pursuing a restraining order or order of protection. The mediator is also alleged to have advised the husband to take measures that could shame the wife into ceasing her conduct and to save e-mails to preserve an evidentiary record. Subsequently, the husband secured an order of protection against the wife.

  The wife is now suing the mediator for $15 million, under theories of malpractice, breach of contract, and intentional infliction of emotional distress. The wife claims that she lost her job as a result of the actions set in motion by the mediator. She also claims to have been arrested in January 2011 as a result of the order of protection set in motion by the mediator.

  Prior to filing the lawsuit, the wife had filed a grievance with the Tennessee Supreme Court Alternative Dispute Resolution Commission. The Commission gave the mediator a private reprimand. The mediator has filed a motion to strike from the civil complaint references to the ADR Commission proceedings. The civil lawsuit is otherwise in its early stages. (2011)

- ***Post-Mediation Murder.*** In California, a family mediator was sued for the death of a wife stabbed by her husband in the building in which the mediation session occurred. The divorcing couple had met a week earlier at the mediator's office for an initial mediation session, which ended without incident. After the second meeting, held a week later and in the evening, the husband left the mediator's office. The wife remained for 20 minutes and spoke with the mediator. The wife then left and, on the first floor of the building, was fatally stabbed by her husband, who had gone to his car and returned to the building with a pair of scissors.

  The court dismissed the complaint in 2008 on the grounds that there was no evidence of prior violence by the murderer or safety concerns at the premises. The same day as the case was dismissed, the parties settled in order to avoid an appeal. The combined settlement amount and defense costs exceeded $100,000. It also bears noting that many professional liability policies do not afford indemnity for bodily injury or death. (2006)

- ***Faulty Settlement Agreement.*** A California mediator participated in the drafting of a Marital Separation Agreement several years ago. The agreement confirms that the mediator was not rendering legal services or giving legal or tax advice. The ex-husband was recently audited by the IRS, and faces possible tax liability in connection with the deductibility of certain support payments made under the agreement. The ex-husband has threatened suit against the mediator. (2010)

Commercial Law and Other Contexts

Lawsuits against mediators arising from commercial law matters and other various types of disputes have proven to be just as dangerous as those which arise out of family law, employment law and personal injury.

- ***Misstated Tax Implications of Settlement.*** In Florida, a plastic surgeon sued a local broadcaster for defamation and false light. The lawsuit was mediated, and a settlement agreement was achieved. In March 2010, the surgeon moved to rescind the settlement agreement, alleging that the mediator had coerced him into settling and had inaccurately represented that the settlement proceeds would be tax exempt. The surgeon gave a deposition in the underlying case in connection with his motion to rescind the settlement agreement. At deposition, he admitted that the mediator never physically or mentally prevented him from leaving the mediation, and did not prevent him from consulting with his lawyers, family, or longstanding accountant regarding the settlement or its tax implications. The proceedings to set aside the settlement agreement in the underlying case are still pending; to date no lawsuit has been filed against the mediator. (2010)
- ***Conspiracy and Bias.*** A commercial law mediation involved a dispute among the plaintiff company, another company that asserted cross-claims against the plaintiff, and the plaintiff's insurer. The court appointed a mediator, who presided over a mediation. The plaintiff left the mediation before it was concluded, after which the insurer and the other company reached a settlement of part of the dispute. The plaintiff then filed suit against the mediator, alleging that he improperly continued with the mediation and conspired with the other parties to prejudice the plaintiff's rights. The trial court granted the mediator's motion for summary judgment, holding that the court-appointed mediator enjoys quasi-judicial (i.e., absolute) immunity. That ruling was affirmed on appeal, but the plaintiff filed a second lawsuit. That suit was also dismissed and has now been appealed. Despite the existence of immunity in California for court-annexed mediators, this claim has gone on for years and has been very costly to defend (more than $400,000). (2005)
- ***Nondisclosure and Bias.*** A commercial law mediation involved a dispute over the creation of a popular television show. The plaintiff claimed the production company owed him compensation for his contribution to the creation of the show. The parties agreed to mediate. Unbeknownst to the plaintiff, the mediator had previously mediated a dispute between the production company and another party which involved the same attorneys. The instant case settled at mediation for $200,000. The plaintiff later discovered the mediator's prior history with the other side and claimed that the mediator was biased against him. He further alleged that if the mediator had properly disclosed this information before the mediation, he would not have agreed to the selection of the mediator. The plaintiff filed a lawsuit, which alleged that the mediator's failure to disclose the prior mediation which involved the production company resulted in a settlement that was significantly lower than it should have been. The complaint alleged causes of action for conspiracy, fraud, breach of fiduciary duty and negligence. Although the lawsuit was eventually dismissed based on quasi-judicial immunity, the mediator incurred significant defense costs. (2002)

Conclusion

As the foregoing relatively recent cases demonstrate, mediators are often exposed to situations with the potential to spark a variety of expensive claims. Although the defendant mediators may avoid liability in many cases, defense costs can be significant. The magnitude of the problem may not be widely known because many of the cases involve confidential settlements entered into prior to trial. Given the current trend of increased use of ADR, these examples demonstrate that mediators cannot afford to be unprotected. In many jurisdictions, mediators cannot rely on strong immunity defenses, and thus must look to other safeguards to protect their business assets. Liability insurance is an obvious first step.

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This article originally appeared in the Fall 2011 issue of the New York Dispute Resolution Lawyer*, published by the Dispute Resolution Section of the New York State Bar Association.*

Email…. Text…. Facebook…. Lawsuit?—Legal Minefield of Cyberbullying

By Joan M. Gilbride and Brian M. Sher

Technological advances in our society, especially the increased sophistication of the internet, are all very positive developments that improve people's lives and move our economy forward. Most of us cannot imagine leading our personal and professional lives without the use of our email and the internet. Face to face interactions are being rapidly replaced by emails, texts, and online social groups. Unfortunately, the individuals that seek to harass, threaten, and intimidate others can also use technology to their advantage.

Although seemingly impersonal and distant, cyberbullying and other forms of online harassment can hurt the recipient's feelings, destroy lives (as is evident in the recent case involving a Rutgers University student), and, in some cases, result in expensive lawsuits. Cyberbullying is possible among all groups, from children and young adults in educational institutions to sophisticated professionals at large companies. In this article, we will discuss several recent cases on cyberbullying and offer our thoughts on this evolving area of law.

What Is Cyberbullying?

Cyberbullying occurs when one person uses technology at his or her disposal to threaten another person. According to the New York State Department of Criminal Justice Services, it can be defined as "the repeated use of information, technology, including e-mail, instant message, blogs, chat rooms, pagers, cell phones and gaming systems to deliberately harass, threaten or intimidate others."[1] Variations of cyberbullying include offensive and sexually charged messages to the recipient, cyberstalking, sharing intimate information about the victim with others, monitoring the victim's online activities, and even infecting the victim's computer with a virus. Although much has been written about cyberbullying, caselaw involving cyberbullying is new and constantly evolving.

Cyberbullying in Educational Settings

We all remember a bully in our schoolyard. Unfortunately, bullying is no longer limited to the kids' lunchrooms and gym locker rooms. Bullying is now online. Just how different is traditional bullying from cyberbullying? Unfortunately, cyberbullying doesn't stop when the school bell rings, and it need not occur on school grounds. Technology and the internet enables harassers to instantaneously communicate with an unlimited number of people; it can be anonymous and hard to trace.

In *S.S. v. Hastings-on-Hudson Unified School District* matter,[2 3] Plaintiff S.S. was a freshman in the Hastings High School during the 2004-2005 school year. S.S. earned excellent grades and was an honor-roll student throughout much of her tenure at Hastings. The District provided students with their own email accounts and maintained a comprehensive computer network on campus. The District also maintained an internet use policy, which strictly prohibited an improper use of the District's network. Between March 17 and March 25, 2005, Plaintiff S.S. received three short emails, all of which were sent from another student's "M.X." email account. (The "Three Emails.") The Three E-mails were extremely sexually explicit, referred to the victim's various body parts, mocked Plaintiff's weight, and were perceived by Plaintiff to be physically threatening.

S.S. brought the Three Emails to the attention of the District's administrators. As a result, the administration commenced an immediate investigation into the origin of the Three Emails. Despite being questioned by the administrators about the Three Emails, M.X. flatly denied sending them, repeatedly claiming that someone must have stolen his password and sent messages to S.S. from his email account without his knowledge or approval. S.S. *did not receive* any further emails from M.X.'s account after *March 25, 2005*, eight days after S.S's receipt of the first email. The District also changed M.X.'s password. Since M.X. denied sending the emails, the District continued its investigation—even after M.X.'s password was changed—in the hopes of tracing the Three Emails definitively to the sender, whether M.X. or someone else. This investigation was ongoing from March until the end of the school year in June of 2005. By June 2005, the District was able to conclusively determine that the Three Emails did in fact originate from M.X.'s school email account and[4] that they were most likely sent remotely, from a location outside of the school. However, due to its technological limitations, the District was not able to conclusively establish the identity of the sender.[5] Nevertheless, S.S and her parents sued the District for deprivation of S.S.'s educational opportunities under Title IX. Title IX of the Education Amendments of 1972 states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." The Supreme Court in *Davis v. Monroe Cty Bd. Of Educ.*,[6] held that educational institutions may, in certain circumstances, be liable to student victims of harassment and bullying.

In the *S.S. v. Hastings-on-Hudson* matter, Plaintiffs asserted that due to these three incidents of harassment, the student became afraid for her physical safety, was forced to stop socializing with other teens, stopped getting good grades, and was eventually forced to leave the school.

Since this was a Title IX case, Plaintiffs had a burden to establish that (1) the perceived incidents of harassment were severe and pervasive; and (2) that the educational institution, the District, in this case, was deliberately indifferent and did not conduct a sufficient investigation.[7] The District's position was that (1) the three offensive emails were not severe and pervasive enough to constitute an actionable claim under Title IX; and (2) the District was not deliberately indifferent to the Plaintiff's complaint and conducted a thorough, albeit unsuccessful investigation. The District also presented evidence that the Plaintiff did not sustain any actionable damages as result of these three short emails. Plaintiff was able to successfully finish the school year and there was no evidence of decreased attendance or decrease in grades.

On the District's motion for summary judgment, the District Court found that the Three Emails, no matter how offensive, were simply not severe and pervasive enough to constitute actionable harassment. The Court held that no reasonable jury can find that three short offensive emails received over a ten-day period constituted harassment that deprived Plaintiff of her educational opportunities. Nevertheless, the District Court refused to rule, as a matter of law, that the District was not deliberately indifferent to Plaintiff's complaints and refused to hold that the District's investigation satisfied its obligations under Title IX.

On appeal, the Second Circuit reiterated the standard that was first set out by the Supreme Court in *Davis*. The *Davis* court held that in order to prevail on a claim against an educational institution under Title IX, plaintiffs must show that (1) the school acted with "deliberate indifference" to sexual harassment (2) and that the harassment was so "severe, pervasive, and objectively offensive that it effectively barred…access to an educational opportunity or benefit."[8] The Circuit Court went to hold that although each case is to be evaluated on its own facts and there are no clear and established boundaries for what constitutes sufficiently severe and pervasive harassment, the Three Emails received over a single ten-day period with no negative effect on Plaintiff's educational life, did not "rise to the level of actionable sexual harassment under federal law."[9]

In other words, the Second Circuit held that the length, content, and effect of cyberbullying on the victim's life will determine the outcome of the case brought by the victim of school online harassment. Not every email or text, no matter how offensive, can be a basis for federal claims.

Another fairly recent cyberbullying case to consider is *Brodsky v. Trumbull Board of Educ.*[10] Plaintiffs Maria Brodsky and her minor child, S.B., brought suit against Defendants for depriving Plaintiff of educational opportunities under Title IX, claiming that the Defendants "tolerated and encouraged a pattern of sexual misconduct and gender discrimination" against S.B. Plaintiff-S.B. was an eighth grade student at Madison Middle School over the course of the 2005–2006 school year. She was the victim of harassment and bullying by her peers in and outside of school. A few incidents occurred through online instant messaging between S.B. and other students. Plaintiff was called names and comments were made with respect to her sexual orientation. Unlike in the *S.S. v. Hastings-on-Hudson* matter discussed above, this case involved numerous instances of online and offline name calling and harassment. The issue on summary judgment was whether Plaintiffs have presented sufficient evidence of each element of Title IX claim to survive summary judgment.[11]

The court found that "the evidence shows that while S.B suffered numerous instances of rude and unkind treatment by various peers, the alleged behavior was not sufficiently pervasive or severe from an objective standpoint so as to give rise under a claim under Title IX."[12] It appears that the Court based its decision on the fact that the victim and the harasser knew each other and had a "history" of insulting each other. The Court noted that federal law is not "intended and does not function to protect students from bullying generally…or to provide them recourse for mistreatment not based on sex."[13] Additionally, the court found no evidence that Plaintiff was deprived of any educational opportunities.

What do these cases teach us? Educational institutions should be mindful of two elements of online harassment and should react with due speed to all legitimate complaints. Of course, there is a difference between a stray email and string of offensive emails intent on personally attacking the recipient. All incidents, however, must be thoroughly investigated. Title IX liability for an educational institution arises only if, in addition to severity and pervasiveness of online harassment, the institution failed to take reasonable steps to investigate harassment. Of course, reasonableness is a very subjective standard and, certainly, some alleged victims would be dissatisfied with the investigation no matter how thorough or prompt. Nonetheless, the institution should follow these basic steps in order to assist the victim and protect itself from costly suits: (1) commence an investigation immediately upon receipt of an oral or written complaint; (2) take all threats to the recipient, no matter how implausible, seriously; (3) preserve all evidence; (4) work with internet technology specialists inside and, if needed, outside of the institution to trace the offensive emails or messages to the sender; (5) take appropriate actions against the alleged harasser. The institution must also develop an effective set of written policies dealing with online harassment and enforce its policies fairly and consistently.

Defamation and Emotional Distress Claims in Cyberbullying Actions

Although cyberbullying is not an independent tort, the victims of cyberbullying can also pursue causes of action for intentional infliction of emotional distress, or defamation. Certainly not an easy burden to meet, an intentional infliction of emotional distress occurs when the harasser's conduct is so "outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[14] There are additional elements that must be met—the victim must prove intent to cause or knowledge of substantial probability of causing severe emotional distress. Additionally, the victim must be able to establish a connection between the harassing conduct and the injury sustained, whether that injury is psychological, financial, or even physical. Of course, Plaintiff must also be able to prove that he or she suffered from severe emotional distress.

If the victim of online harassment chooses to proceed with a cause of action for defamation, plaintiff is required to show that: (1) defendant made an oral or written false and defamatory statement; (2) regarding the plaintiff; (3) that is published to others by the defendant; and (4) that there is resultant injury or *per se* harm. It is for the Court to decide in the first instance whether the writings and/or statements are susceptible to a particular defamatory meaning which plaintiff ascribes to them.[15]

In a recent case of *Finkel v. Dauber*,[16] the Supreme Court in Nassau County found that statements posted on a secret Facebook group created by the Defendants (five of the Plaintiff's fellow school mates) did not amount to defamation. The Facebook group, called "Ninety Cents Short of a Dollar" (the "Group"), was a private Facebook group with membership restricted to invitees only.[17]

Although the Plaintiff's name was never mentioned, the Plaintiff alleges that the references to the "11th cent" throughout the Group's postings was about Plaintiff, because of an edited photograph on the site of Plaintiff, seemingly resembling a "devil," cross referenced with a post commenting that the 11th cent turned into a devil.[18] The postings by the Group's members basically stated that "the Plaintiff contracted AIDS by having sex with a horse or a baboon or that she contracted AIDS from a male prostitute who also gave her crabs and syphilis, or that having contracted sexually transmitted diseases in such manner she morphed into the devil."[19] Finding that "[t]he entire context and tone of the posts constitute evidence of adolescent insecurities and indulgence, and a vulgar attempt at humor," the court dismissed the defamation claim. The court stated that "Determining whether a given statement expresses fact or opinion is a question of law for the court and one which must be answered on the basis of what the average person hearing or reading the communication would take it to mean." It went on to hold that the online statements directed against Plaintiff, "taken together, can only be read as puerile attempts by adolescents to outdo each other" and not as statements of fact.[20]

Additionally, the Plaintiff's second cause of action for negligent supervision against the harasser's parents failed because the parents could not be held liable for "negligent supervision of a child, absent an allegation that the parent entrusted the child with a dangerous instrument which caused harm to a third party."[21] The court declined to declare a computer a dangerous instrument, as it "would create an exception that would engulf the rule against parental liability."[22] Finally, the court rejected the Plaintiff's claim that the posts constitute cyberbullying, and stated that "the Courts of New York do not recognize cyber or internet bullying as a cognizable tort action."[23]

As this case illustrates, trial courts still view cyberbullying cases with a dose of skepticism and Plaintiffs certainly have a high burden to meet in proving defamation or emotional distress as result of cyberbullying.

Conclusion

With the proliferation of social networks and other online communication programs, we are witnessing an increase in federal and state cases alleging cyberbullying. Although some federal laws already deal with online harassment (such as Title IX in schools), it appears that the two recovery theories most often used by plaintiffs are defamation and intentional infliction of emotional distress.

Endnotes

1. http://criminaljustice.state.ny.us/missing/i_safety/cyberbullying.htm.
2. 2010 WL 1407359 (2d Cir.).
3. Our Firm successfully represented the defendants in this matter, both at the trial court level and before the Second Circuit.
4. *Finkel v. Dauber*, 906 N.Y.S.2d 697 (N.Y. Sup., Nassau County 2010).
5. *See id.*
6. 526 U.S. 629 (1999).
7. *K.M. ex. Rel. D.G. v. Hyde Park Cent. School Dist.*, 381 F. Supp. 2d 343, 360 (S.D.N.Y. 2005).
8. *Id.* at 232.
9. *Id.* at 234.
10. 2009 WL 230708 (D. Conn.).
11. *Id.* at *6.
12. *Id.*
13. *Id.* at 7.
14. *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293 (1983).
15. *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235 (1991); *Chalpin v. Amordian Press, Inc.*, 128 A.D.2d 81, 515 N.Y.S.2d 434 (1987).
16. 906 N.Y.S.2d 697 (Sup. Ct., Nassau County 2010).
17. *Id.* at 700.
18. *Id.* at 700–01.
19. *Id.* at 702.
20. *Id.*
21. *Id.* at 702.
22. *Id.*
23. *Id.* at 702–03.

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This article originally appeared in the Fall/Winter 2011 issue of the Labor and Employment Law Journal, *published by the Labor and Employment Law Section of the New York State Bar Association.*

False Claims Acts, City, State, and Federal: Enlisting Citizens to Protect the Fisc

By Gene De Santis and Reannon Froehlich, with editorial assistance by Daniel Levin

Introduction

Governments at all levels (federal, state and local) have historically been plagued by unscrupulous vendors who looted the public purse. During the Civil War, for example, the Union army was victimized by merchants who sold lame horses, defective munitions, and rotten food. An angry President won passage of "Lincoln's Law"[1] on March 2, 1863, to root out the miscreants and stem the financial losses. The law allowed private citizens to sue on the government's behalf ("qui tam") to recoup money from persons that had swindled the government. The citizen who blew the whistle received a bounty of one-half the amount recovered.

The almost century old "False Claims Act" was subsequently crippled by several amendments that dramatically reduced awards for the citizen whistleblower and forbade lawsuits if they were based on any information the government already had, rendering it virtually toothless. The law sat largely fallow until it was rejuvenated under the leadership of Senator Charles Grassley. Senator Grassley and his legislative colleagues bristled after widespread reports of government contractors selling $400 hammers and $600 toilet seats set off a public outcry. Grassley's amendments,[2] signed by President Reagan on October 27, 1986, guaranteed whistleblowers a 15-30% share of the government's recovery, and imposed treble damages against the cheaters. The new law empowered individuals who were in a position to gather evidence and initiate investigations of improper conduct—often before government investigators or auditors were even aware of the corruption.

Qui tam actions brought under the False Claims Act were lauded by fiscal conservatives for safeguarding the public purse and partnering private and government resources to root out fraudulent activity in taxpayer-funded programs. Thus was born the modern day False Claims Act, and a boutique practice known as the "qui tam" bar.

Federal False Claims Act

The federal False Claims Act allows whistleblowers to bring suits under seal in the name of the government—qui tam actions—against parties that have committed fraud against it. The risks incurred by the individual whistleblower are great—by speaking against his or her employer, employees are likely to be terminated and black-listed in their profession—so the law created substantial incentives to speak out.

To encourage an individual who understands the fraud and has access to evidence to support a fraud charge to come forward (the "relator"), the statute provides a financial incentive (generally 15-30% of the award) to those willing to take the time to assist in investigations and endure the emotional and financial stress involved in bringing suit. This also means that whistleblowers will generally only come forward when substantial evidence exists to support the claim. At the same time, the False Claims Act encourages a race to the courthouse; therefore, employees who suspect fraud are more inclined to investigate their suspicions rather than turning a blind eye to questionable conduct.[3] While the compensation awards can be substantial, the statute also provides for triple damages so the state is "made whole" for the costs of investigation, lost interest and whistleblower awards on top of what was taken by fraud.

Protections also exist for the employer, although (or perhaps because of the statutory protections) frivolous suits are rare. An experienced qui tam lawyer will only take the case if he or she thinks it can be won (i.e. there exists a substantial body of evidence), and cases can only be brought if they present new information. For instance, if facts are disclosed in the news, by a court proceeding, or other investigation, the case will be dismissed.

This past year, the Supreme Court narrowed the law even further, by holding that Freedom of Information Act ("FOIA") responses issued by a federal agency were considered "reports," and thus subject to the public disclosure bar in the False Claims Act.[4] This unfortunately will bar countless cases where a federal agency may technically possess records that help substantiate a fraud claim, but, absent the whistleblower's FOIA request, bureaucratic inertia would allow the fraud to continue unchecked.

Furthermore, if a whistleblower brings an action that is later found to be frivolous, vexatious, or harassing, the whistleblower may be forced to pay all of the defendant's attorney fees and expenses.[5] Finally, the government has continued oversight over all qui tam actions. Under the False Claims Act, the government may file a motion to dismiss an action regardless of whether the government declined to intervene in the matter.[6] If fraud is found, but the court determines that the whistleblower "planned or initiated the violation," it can deny the whistleblower a share of the reward.[7]

Need for Qui Tam/False Claims Laws, Constitutional Protections

Government employees are necessarily limited in their First Amendment freedoms.[8] In the context of whistleblowers, specific statutes protect employees who raise the alarm on unlawful or inappropriate conduct. However, when the conduct does not fall under that ambit, the courts do not extend constitutional protections to statements made by government employees in the course of employment.[9]

In *Garcetti v. Ceballos,* the United States Supreme Court considered whether First Amendment protections apply to government employees who speak out against their employers. The court sought to balance the competing interests of citizens commenting on matters of public concern and government employers providing public services.[10] The majority recognized that a government entity has "broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."[11]

Thus, a government employee is protected when speaking on matters of public concern, but can be restricted when doing so is necessary to ensure the effective and efficient operations of government services for which the individual is employed.[12] Rather than silencing employees who become aware of fraudulent activity, especially those who are in the invaluable position of revealing fraud that would otherwise remain secret, legislation was passed to incentivize and protect whistleblowers. Currently lacking, however, is protection for individuals who raise the alarm against private sector fraud that does not impact the public purse.

New York State False Claims Act

In 2005, Congress passed the Deficit Reduction Act, which decreased the federal medical assistance percentage by ten percentage points (thus giving the state a greater share) for recoveries from actions brought under the act.[13] This law encouraged states to adopt statutes similar to the federal False Claims Act, in order to stop an epidemic of fraudulent activity that often involved Medicaid. To receive the increased recovery rate, a state was required to enact a law with provisions at least as effective as 31 U.S.C. §§ 3730-3732 in rewarding and facilitating qui tam actions for fraudulent or false claims.[14]

The federal incentive came at a perfect time. New York State was plagued by soaring real property taxes, and much of the increase was attributable to skyrocketing Medicaid costs. In addition, a *New York Times* investigative series[15] entitled "Program Disorder" published July 18-19, 2005 found that Medicaid fraud likely added $1 billion or more to the cost of the Medicaid program. That triggered legislative hearings as government scrambled to respond. A perfect storm was building, but in Albany the storm took almost two years to hit. Prodded by the *Times* stories, incentivized by Congress, and urged on by a popular new Governor, Eliot Spitzer, the New York State legislature enacted its False Claims Act[16] ("NYFCA") (Chapter 58 of 2007) to receive the increased recovery awards and begin a concerted effort to combat rampant Medicaid fraud.

The NYFCA was not limited to Medicaid fraud, however; it allowed whistleblower suits whenever the government (state or local) was defrauded by any supplier of goods or services. A highway contractor who used inferior asphalt, a builder who padded costs on a school construction project, or a consultant who billed for hours not worked, were all fair game.[17]

The whistleblower was required to first offer the claim to the Attorney General,[18] who had the right to take the case and prosecute the state's claim. Importantly, a whistleblower could proceed with a qui tam suit even if the Attorney General declined to take on the matter.[19]

The NYFCA was significantly broadened and expanded in 2010 by then State Senator, and current Attorney General, Eric Schneiderman. First, Schneiderman's "Fraud Enforcement and Recovery Act"[20] expanded whistleblower laws to protect former employees, contractors, or agents of an employer, in addition to current employees, from being harmed or penalized by an employer or prospective employer in relation to disclosing false claims. Such protection includes employees who violate their contract or duty to their employer by obtaining or transmitting documents, data, correspondence, email or other information pertaining to the state, local government, a qui tam plaintiff, or private counsel.

Second, the act increased the scope of the NYFCA by allowing a qui tam plaintiff to obtain a person's claims, records or statements for suspected tax fraud, if the damages in the action exceed $350,000 and if the net income or sales of the person being sued is greater than or equal to $1 million for any taxable year. However, before the qui tam plaintiff can make a motion to compel the Department of Taxation and Finance to disclose the tax records, the qui tam plaintiff must first obtain approval from the Attorney General.

Third, the act increased the time period for commencing a false claims civil action to ten years. Previously, a false claims civil action needed to be filed within six years of the violation or three years after the date when facts are known about the false claim (but in no event more than ten years after the violation). Fourth, the act allowed a qui tam plaintiff to bring a false claims action without stating the specific circumstances constituting the alleged wrongdoing, if the facts proven true in the complaint would provide a reasonable indication that a false claim violation occurred.[21] Finally, the act narrowed the scope of the public disclosure bar under the NYFCA to prevent public information requests from being barred under a false claims action—thus avoiding the *Schindler Elevator Corp.* problem that limits the federal FCA.[22]

NYC Whistleblower Statute

The New York City whistleblower statute[23] was enacted in 2005 to encourage reporting when any individual, corporation, organization or legal entity commits fraud against the City. It was amended in 2007 because the earlier law did not offer enough protection for whistleblowers. Now, whistleblowers who file suit on behalf of the government can earn up to 30% of any settlement for reporting the fraud. This law focuses on fraud committed by contractors working for the City.

This article has not yet explored a separate body of statutes and case law that addresses whistleblowers who disclose violations of law or regulations which create a substantial and specific danger to public health and safety. State law protects this class of whistleblowers from retaliatory action by their employers,[24] but plaintiffs who assert this claim are barred from asserting any other claims arising out of the events for which the whistleblower protection is asserted.[25] The only exception to the compulsory waiver is for constitutional claims (but see limitations above).[26]

There are regular efforts to expand the types of violations covered, such as legislation recently advanced in Albany. One bill, A.2139 (Benedetto) / S.1517 (Klein) would amend section 740 of the Labor Law to protect whistleblowers against retaliation for disclosing abuse of authority, mismanagement or waste of public assets or monies, threats to the environment, insurance fraud, or financial fraud. If enacted, it would protect a far broader range of whistleblowers, albeit without allowing them to share in any recovery as permitted under a FCA.

Alternatively, A.6971 (Wright) / S.5620 (Savino) would expand whistleblower protections even further by protecting all whistleblowers who disclose any "illegal business activity." The proposed legislation defines "illegal business activity" as "any practice, procedure, action or failure to act by an employer…or agent of such employer, taken in the course of the employer's business, whether or not within the scope of employment or agency, which is in violation of any law, rule or regulation." Presumably such a measure would protect a whistleblower who disclosed that a bank was "robosigning" mortgage foreclosures, a food worker who revealed that scales were rigged, or an employee of a waste hauling firm who discloses that toxins are being illegally dumped in a landfill. The legislation is so broadly drafted that individuals who disclose virtually any illegal acts would be protected.

Bills of this nature represent the next horizon in whistleblower protection. They go far beyond safeguarding the state's public monies, and are aimed more broadly at protecting the public at large. In the era of Bernie Madoff, where one fraudster looted billions of dollars from investors, or when the British Petroleum well disaster on its DeepWater Horizon drilling rig in the Gulf Coast caused billions in environmental damage,[27] it is certainly appropriate for the Legislature to consider even more expansive whistleblower protections.

Endnotes

1. 31 U.S.C. §§ 3729-3733.
2. *Id.*
3. The FCA's "first-to-file bar" encourages employees to bring fraud to the attention of the Government as soon as substantial evidence can be gathered. 31 U.S.C. § 3730(b)(5).
4. *Schindler Elevator Corp. v. U.S.*, 131 S. Ct. 1885, 1896 (2011).
5. 31 U.S.C. § 3730(d)(4).
6. 31 U.S.C. § 3730(c)(2)(A).
7. 31 U.S.C. § 3730(d)(3).
8. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *see Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *see also Waters v. Churchill*, 511 U.S. 661, 668 (1994).
9. *Garcetti*, 547 U.S. at 413.
10. *Id.* at 417.
11. *Id.* at 418.
12. *Id.* at 419.
13. 42 U.S.C. § 1396(h).
14. *Id.*
15. *See* Clifford J. Levy & Michael Luo, *New York Medicaid Fraud May Reach into Billions*, N.Y. Times, July 18, 2005, at A1; Clifford J. Levy & Michael Luo, *As Medicaid Balloons, Watchdog Force Shrinks*, N.Y. Times, July 19, 2005.
16. N.Y. State Finance Law §§ 187-194.
17. N.Y. State Fin. Law § 189.
18. § 190.
19. § 190(2)(f).
20. 2010 N.Y. Laws Ch. 379.
21. CPLR 3016(b) requires that a civil action for fraud shall describe the "circumstances constituting the wrong…in detail." This requirement is waived by the 2010 amendments to the NYFCA.
22. *See Schindler Elevator Corp.*, 131 S. Ct. at 1896.
23. 2005 N.Y.C. Local Law No. 630, N.Y.C. Admin. Code § 12-113.
24. Retaliatory action includes "discharge, suspension or demotion of any employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.Y. Labor Law § 740. *See also Rodgers v. Lenox Hill Hosp.*, 211 A.D.2d 248, 251, 626 N.Y.S.2d 137 (1st Dept't 1995).
25. N.Y. Labor Law § 740(7).
26. *Fischer v. Homes for the Homeless, Inc.*, 1994 WL 319166 *2-3 (S.D.N.Y. 1994).
27. David Barstow, David Rhode & Stephanie Saul, *Deepwater Horizon's Final Hours*, N.Y. Times, Dec. 25, 2010, *available at* <http://www.nytimes.com/2010/12/26/us/26spill.html>.

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This article originally appeared in the Winter 2011 issue of the Government, Law and Policy Journal, *published by the Attorneys in Public Service Committee of the New York State Bar Association.*

E-discovery "Worst Practices": Ten Sure-Fire Ways to Mismanage Document Review and Production

By Jack E. Pace III, John D. Rue, and Jason A. Bartlett

A year ago, the authors published an article in this journal on "Worst Practices" for electronic document preservation through litigation holds.[1] At that time, approximately two years after the incorporation of the "new" e-discovery rules into the Federal Rules of Civil Procedure, we were surprised to feel like pioneers in a field as crowded as e-discovery practice is. That is, even as thousands of "e-discovery experts"[2] came forward, a multitude of "e-discovery luminaries" were identified and interviewed,[3] and accolades were given to at least one "e-discovery scholar,"[4] it seemed that nobody else had stepped forward to lay claim to expertise in the area of e-discovery "Worst Practices."

A year later, and much to our surprise, the e-discovery "Worst Practices" bandwagon seems yet to have left the station. Although, as we noted in 2009, an internet search for the phrase "e-discovery best practices" yielded 27,400,000 hits at that time and 49,500,000 hits today, a recent search for the phrase "e-discovery worst practices" yielded only 8 results, ***each and every one of them referring to our previous article in this journal***. With that revelation, we reluctantly concluded that we have no choice but to soldier on with the next installment in our treatment of the subject. For if not us, then who?[5]

The following are ten Worst Practices in the area of document review and production.

1. Stick It to 'Em!

First and foremost, discovery is the opportunity to stick it to your adversary. For example, why would you produce electronically stored information ("ESI") in the manner by which that information is usually kept?[6] Why would you produce in a format that allows your adversary easily to search through the data, or that provides your adversary with metadata that could just as easily remain hidden? The "Worst Practices" attorney produces in the most burdensome format possible.

For example, in *Goodbys Creek, LLC v. Arch Ins. Co.*, the defendant chose to produce TIFF images rather than files in native format, which made searching through the ESI "much more difficult."[7] The federal district court in Florida rejected the defendant's production choice and ruled that since defendant ordinarily maintained its ESI in a searchable storage format, it could not produce that information in a form that "removes or significantly degrades" that searchability.[8] The court compelled the defendant to "reproduce the data in question in their native format, provide the documents in another comparably searchable format, or supply [plaintiff] with software for searching the TIFF images."[9] While the court declined to sanction the defendant (in part because the plaintiff never specified its desired format for ESI production), the court nevertheless did not seem to appreciate the common "rule" of practice and required the defendant to reproduce what it had already provided to plaintiff—forcing defendant to incur duplicate costs and work.

Another federal judge in Florida also refused to respect this Worst Practice rule in *Bray & Gillespie Management, LLC v. Lexington Insurance Co.* There, the defendant's requests for production specified that ESI was to be produced in native format, without altering any associated metadata, and the plaintiff did not object.[10] Scrupulously observing this Worst Practice, plaintiff "manipulated" 800,000-plus pages of emails and other ESI "to convert the searchable text with metadata to a TIFF image stripped of metadata."[11] Even though the defendant could have conducted searches of the ESI by converting the files into searchable text (in other words, converting over 800,000 pages through optical character recognition ("OCR") technology),[12] the court held that the ESI produced was "not in a reasonably usable form" as required by Rule of Civil Procedure 34.[13] For this and for ignoring the format specified in the defendant's requests for production, the court issued sanctions (1) reopening the discovery period, and (2) requiring plaintiff, at its own expense, to provide defendant with plaintiff's ESI database.[14]

2. Details, Details—Who Cares?

Why go through the trouble of explicitly specifying the format in which you would like to receive an ESI production? Isn't it easier simply to assume that the producing party will supply its ESI in a convenient, ready-to-use format that is easily searchable?

In *MGP Ingredients, Inc. v. Mars, Inc.*, MGP asserted patent infringement and related claims against Mars over a type of dog chew. In response to MGP's requests for production of documents, Mars provided a CD containing documents that Mars indicated were produced "as kept in the ordinary course of business."[15] Since the ESI produced was arranged by custodian, rather than by topic or by any specific request for production, MGP objected to the production and asserted that it was "faced with a 48,000 page haystack and no guidance where to look for a few needles."[16] The court recognized that the production presented MGP with the "formidable task of having to determine which documents are responsive to each particular request,"[17] but nonetheless denied MGP's motion to require Mars to relate the produced documents to each of the document requests.

The court held that Mars had satisfied its production obligations as provided in Rule 34(b). That rule provides that "the producing party must either produce the documents as they are kept in the usual course of business *or* organize and label them to correspond with the categories in the request."[18] Because the rule is phrased in the disjunctive, Mars was justified in producing the ESI arranged by custodian—as it was kept in the usual course of business.[19] MGP may have been able to avoid the task before it by relying on a different part of Rule 34(b), which allows a requesting party either to (1) agree with the producing party on the manner of production, or (2) seek an order from the court mandating the manner of production.[20] As MGP had not availed itself of either option prior to serving its requests, the court refused to spare MGP the burden of "determining which documents relate to each set of its twenty-some requests."[21]

Courts' failure to appreciate this Worst Practice rule is prevalent. In *Ford Motor Company v. Edgewood Properties*, the defendant actually did demand that the plaintiff produce ESI in its native format or in files containing metadata.[22] Plaintiff, however, objected and replied that it would produce ESI in TIFF format.[23] The parties were unable to agree upon a format, and plaintiff produced in TIFF format on three dates spanning eight months. Only after the third and final production did defendant formally object to the format, and after that it waited another two months to first bring its objection to the court.[24] The court found that the defendant acted unreasonably when it waited eight months (after which production was nearly complete) to object to the form of production.[25] Showing no respect for this common Worst Practice rule, the court stated that "it is without question unduly burdensome to a party months after production to require that party to reconstitute their *entire* production to appease a late objection."[26]

3. Deadlines Are for Kids!

Being a Worst Practices attorney can be a hectic job. One sure-fire way to avoid stress is to treat production deadlines as suggestions instead of imperatives. Why rush to meet the court-imposed schedule when you can work at your own schedule?

For example, in *In re Seroquel Products Liability Litigation*, defendant approached production with an admirable pattern of "purposeful sluggishness" that allowed defendant not only to miss discovery deadlines and to produce ESI late, but also to produce incomplete and sometimes unusable ESI.[27] While any Worst Practices attorney can tell you that an attorney's conduct during discovery should aspire to be "stress-free," the court mistakenly referred to it here as "sanctionable."[28]

One must remember that when following this Worst Practice rule, an attorney need not provide explanations for missing deadlines; the attorney need only produce when he or she deems fit. For example, in *Thompson v. U.S. Dept. of Housing and Urban Development*, the defendants produced 80,000 e-mails responsive to plaintiff's document requests long after discovery had closed, without any meaningful explanation for the delay.[29] Once again, the court ignored the Worst Practice rule and sanctioned the defendants. Improbably, defendants were not allowed to introduce any of the 80,000 e-mails into evidence or to use any of the e-mails to refresh a witness's recollection, while the plaintiffs were allowed to use the e-mails in whatever fashion plaintiffs chose.[30]

Further, these Worst Practice rules are not mutually exclusive; for best results, one should employ the tactics suggested by multiple rules. For example, in *Bray & Gillespie Management, LLC*, the plaintiff not only received sanctions for producing ESI in a burdensome format,[31] but also later managed to receive more severe sanctions just months later for failing to timely and diligently search for and produce responsive documents. The court found that the plaintiff had followed the Worst Practice rules even in the face of the defendant's "clear, unambiguous, and frequent" demands for such information and despite "three equally clear and unambiguous orders compelling Plaintiff to produce" the information at issue.[32] The court sanctioned the plaintiff for its inaction by dismissing with prejudice the plaintiff's claim for damages and ordering the plaintiff to pay $75,000 to reimburse the defendant for its discovery expenses and subsequent sanctions motions.[33]

4. Candor (Part I): If You Say It's True, It Must Be!

Sometimes simply ignoring production deadlines is impossible. Courts are notorious for asking questions about whether the parties are complying with case management orders. What is a Worst Practices attorney to do in this situation? This Worst Practice rule contains the answer to this tricky question.

The best answer to this question is simple: tell the court you have satisfied your production obligations, regardless of the actual state of affairs, as that should get you out of the immediately uncomfortable situation of admitting the truth. In *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, plaintiffs alleged fraud in connection with the sale of stock.[34] During discovery, defendant violated the court's production order in a variety of ways, but certified full compliance despite the existence of more than 1,000 backup tapes that had not been processed, searched, or produced at the time of certification.[35] Defendant let this and other data languish for more than six months past the deadline for production.[36] Eventually, defendant produced 8,000 pages of e-mails and asserted that the e-mails were from "newly discovered" tapes, but later admitted the tapes' existence was known even before the initial certification of compliance.[37] Later, as evidentiary hearings were scheduled, the defendant periodically "located" new tapes and claimed others had been "misplaced" by a vendor.[38] The court imposed several sanctions against the defendant: (1) an adverse inference instruction, (2) the shifting of the burden of proof from the plaintiff to the defendant, (3) plaintiff's costs and fees, and (4) a statement to be read to the jury detailing defendant's behavior during discovery.[39]

5. Who Cares About Search Terms?

Developing the proper search terms to sort through backup tapes and other electronic storage media can be a tedious and time-consuming process for a producing party. A Worst Practices secret: much time and effort can be saved by simply leaving the requesting party in charge of formulating the list of search terms.

In re Fannie Mae Securities Litigation is a story of how a federal agency completely avoided the dreadful task of formulating a list of search terms, all for a bargain price equal to about 9% of the agency's annual budget. In this multidistrict litigation against Fannie Mae, the parties subpoenaed records collected by the Office of Federal Housing Enterprise Oversight ("OFHEO"). OFHEO, not a party to the litigation, had conducted a then-closed special review of Fannie Mae's accounting and financial practices.[40] As a part of its response to the subpoenas, OFHEO agreed to a stipulation that the "Defendants will specify the search terms to be used" in searching OFHEO's disaster-recovery backup tapes for responsive ESI.[41] The defendants "submitted over 400 search terms, which covered approximately 660,000 documents."[42] The D.C. Circuit found the unambiguous terms of the stipulation to be controlling and upheld the district court's finding that the stipulated order gave the defendants "sole discretion to specify search terms and imposed no limits on permissible terms."[43] The $6 million OFHEO would need to spend to comply with the stipulated order[44] must have been a pittance compared to the blood, sweat, and tears the agency saved by relinquishing discretion to select search terms to the defendants.

6. Backup Data Is Irrelevant by Definition!

A major problem with producing ESI is the large amount of irrelevant information through which one must search to find relevant information. To avoid this arduous task, the savvy Worst Practices attorney knows that it is best to make every effort to minimize the importance of additional discovery in the court's eyes. First and foremost: Ignore all backup data.

In *Kipperman v. Onex*, the trustee for a debtor's litigation trust sued a private equity firm that had acquired the debtor's subsidiaries for constructive transfer and fraud. During discovery, the defendants' counsel appears to have misrepresented the value of information that would be gleaned from defendants' backup tapes.[45] Indeed, in opposing plaintiff's motion to compel, the defendants successfully induced the court to rely on these statements in ordering a compromise solution to plaintiff's motion.[46] Unfortunately, the court found that "defense counsel's statements were either purposefully misleading or made with a reckless disregard for the truth"[47] and that defense counsel's conduct (including several other unrelated discovery missteps) constituted "a textbook case of discovery abuse."[48] The court ordered defendants to pay over $1 million for plaintiff's attorney's fees and other costs associated with the discovery difficulties created by defendants' behavior.[49]

An excellent way to minimize the value of further production is to certify to the court that production is complete when it may not be; we have already seen the success attorneys have had with this tactic.[50] Thus, the key to this Worst Practice rule is to remember that you can effectively eliminate the need to search for the few relevant needles in the haystack of irrelevant ESI by simply misrepresenting the value of discovery to the court.

7. Electronic Data (and Responsibility for It) Rolls Downhill!

E-discovery vendors can be an extraordinarily useful tool in the production of ESI. Worst Practices adherents know well that delivery of ESI to vendors for preparation and production ends the producing party's role in the discovery process. After all, how can it be your fault if you didn't make the mistake?

PSEG Power New York, Inc. v. Alberici Constructors, Inc. arose from a construction contract between PSEG and Alberici under which Alberici was the principal contractor for a project at a PSEG energy center. PSEG originally produced over 3,000 e-mails, which consisted of over 200,000 individual pages. Alberici soon realized that much of the data provided through a vendor was incomplete—many emails were "divorced" from their corresponding attachments.[51] The cause of this problem? PSEG's vendor used software that couldn't handle the plaintiff's document format and, as a result, the metadata linking attachments to e-mails was destroyed.[52] While the court found that PSEG had not acted maliciously and even lauded its efforts to resolve the problem through cooperation with Alberici,[53] the court refused to require Alberici to accept a "flawed discovery process."[54] The court ordered PSEG to reproduce the data damaged by its vendor's errors at PSEG's own expense.[55] PSEG estimated the cost of reproduction at approximately $206,000.[56]

Courts ignore this Worst Practice rule at an alarming rate. The *In re Seroquel* court cited the Sedona Principles in rejecting defense counsel's splendid attempt to pass on responsibility for shortcomings with ESI produced to plaintiffs, holding that "[u]ltimate responsibility for ensuring the preservation, collection, processing, and production of electronically stored information rests with the party and its counsel, not with the nonparty consultant or vendor."[57]

8. Candor (Part II): If You Can't Dazzle Them with Brilliance…

Production of electronic documents can be complicated. Fortunately, this Worst Practice rule absolves an attorney from ever having to understand fully the technical nuances of the production process.

In *Bank of Mongolia v. M & P Global Financial Services*, the plaintiff alleged that the defendants had conspired to defraud plaintiff of $23 million. At the hearing on the plaintiff's motion to compel following the defendants' failure to respond to document requests, defense counsel had no answers for the court's inquiry into the defendants' search and production methodology.[58] Defense counsel conceded that there was no substantial justification for the defendants' failure to comply with the plaintiff's document requests.[59] The court ordered the defendants to cover the plaintiff's costs associated with the motion to compel.[60]

Worst Practices adherents also may employ creative explanations of the production process. In the *Coleman (Parent) Holdings* and *Bray & Gillespie Management* cases, counsel for the producing party adopted this approach. The stories offered by counsel in these cases differed: one attributed the source of a production to "newly discovered" documents,[61] while the other "concocted" a tale about the process it used to collect ESI for production.[62] In each case, counsel's explanation sadly came undone when the court recognized conflicts between the explanation and other facts before the court.[63]

9. Don't Worry, Be Happy (Part I—Privilege Review): Clawback Agreements and Other Bedtime Stories

Worst Practices adherents know that privileged material will stay privileged no matter what, i.e., even if inadvertently produced, so long as the parties have entered into a clawback agreement. If you already have addressed waiver and inadvertent production issues prior to entering discovery, you're covered, right? Alas, many courts disagree.

In *United States v. Sensient Colors, Inc.*, the plaintiff produced approximately 135,000 pages to defendants over six different dates spanning nine months. Having been notified that its initial document production inadvertently had included privileged material, plaintiff did nothing to change its production methods to prevent further disclosure of privileged material, and each of the plaintiff's following productions also contained privileged materials.[64] The plaintiff relied upon the Discovery Plan it had negotiated with the defendant, which explicitly stated that "the inadvertent production of privileged documents or information (including ESI) shall not, in and of itself, waive any privilege that would otherwise attach to the document or information produced."[65]

The court, oblivious to the prevailing Worst Practice rule, read the Plan to mean only that a mere inadvertent production would not result in a waiver and that the parties intended to incorporate a "flexible" standard to determine if a waiver had occurred.[66] This standard, drawn from Federal Rule of Evidence 502(b), requires that the privilege holder take reasonable steps to prevent inadvertent disclosure and, if necessary, promptly take reasonable steps to rectify any errors in production.[67] The court found that the plaintiff acted unreasonably in refusing to alter its production methods after having been notified that it had produced privileged material; accordingly, the court found that plaintiff had waived privilege as to those documents it produced after being notified of the inadvertent production.[68]

Other courts weighing in on the strength of clawback agreements and similar arrangements also have disregarded the Worst Practice rule. For example, a poor choice of search terms for a privilege review of ESI has been found to waive privilege.[69] Even where a clawback agreement is reached, "reasonable precautions" to protect against inadvertent disclosure remain a necessity for a party wishing to maintain privilege.[70]

10. Don't Worry, Be Happy (Part II—Redaction): If You Cover Your Eyes, They Can't See You!

Electronic documents can be redacted easily by using word processing software to add dark rectangles over text or to shade the background to match the font color. Once you do that, those electronically redacted words are forever protected from the public eye, right? Well, perhaps not perfectly—and some authorities (and technical realities) have proven insufferable nitpickers in this regard.

During the Federal Trade Commission's investigation into Whole Foods Market's purchase of Wild Oats Markets, FTC lawyers electronically filed documents that contained dozens of redacted Whole Foods trade secrets.[71] As the news media discovered, the electronically shaded text could be "searched, copied, pasted and read."[72] Before the FTC realized its mistake and replaced the originally filed documents with scanned images of the redacted documents, the world learned that Whole Foods planned to close at least 30 Wild Oats stores and that Whole Foods negotiated with its suppliers to drive up costs for Wal-Mart.[73]

Electronic redaction problems are not exclusive to attorneys: the United States military revealed classified materials regarding the death of an Italian citizen at a traffic checkpoint in Iraq after it was discovered the black rectangles used to redact information in a PDF document did not prevent a reader from copying and pasting the text beneath the rectangles into a separate document.[74] However, given the rising prevalence of electronic filings, all but the most devoted Worst Practices adherents must remain wary of electronic redaction methods.

Best Practices

As in our earlier Worst Practices article, we close with a few affirmative recommendations for the readers inclined to avoid adventure, and sanctions. We again strongly recommend those interested in the "Best Practices" to become familiar with the Sedona Principles, bane of the Worst Practices adherent.[75] Our list below highlights three recurring issues: formatting, scope, and ownership:

1. **Formatting:** As requesting party, specify your desired format. As producing party, produce in "reasonably usable" form, no matter the format requested. Be wary of electronic redaction tools.

2. **Scope:** Consider all available data for production, including, in certain cases, back-up data, and locate documents for review using carefully selected (and appropriately negotiated) search terms.

3. **Ownership:** "Own" the production by choosing proper search terms, working with vendors, fully understanding your production process, and taking all reasonable precautions to protect privileges. Meet deadlines, but manage your time well to avoid incomplete productions. Candidly admit your errors and technical problems, both to your adversary and the court, as soon as practical.

Endnotes

1. Jack E. Pace III & John D. Rue, *E-discovery "Worst Practices": Ten Sure-Fire Ways to Mismanage a Litigation Hold*, 13 N.Y. Bus. L.J. 2, 48 (Fall 2009).
2. An internet search for the phrase "e-discovery expert" in quotes yields about 226,000 hits.
3. *See, e.g.*, *e-discovery 2.0, available at* http://www.clearwellsystems.com/e-discovery-blog/2008/08/12/five-e-discovery-questions-with-craig-ball/ (announcing the commencement of "a long-running series of interviews with e-discovery luminaries").
4. *See, e.g.*, Hon. Judge John Carol, *Digital Discovery and Electronic Discovery Law*, *available at* http://www.lawcourse.net/ediscovery6/ (describing Judge Shira Sheindlin, author of the *Zubulake* opinions, as "[t]he foremost judicial E-discovery scholar").
5. *See* David Doepp, *Spiderman* (Sony Films 2002) ("With great power comes great responsibility."); *cf.* Nothing to Fear 464, Ben D. Zevin, ed. (World Publishing Company 1946) ("Today we have learned in the agony of war that great power involves great responsibility," quoting an undelivered speech by Franklin D. Roosevelt).
6. *See* Fed. R. Civ. P 34(b)(2)(E)(ii) ("If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.").
7. *Goodbys Creek, LLC v. Arch Ins. Co.*, No. 3 07-cv-947-J-34HTS, 2008 WL 4279693, at *3 (M.D. Fla. Sept. 15, 2008).
8. *Id.* ("[T]he option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, *the information should not be produced in a form that removes or significantly degrades this feature*.") (emphasis in original) (citing to Rule 34 advisory committee's note (2006 Amends.)); *see also Covad Commc'ns Co. v. Revonet, Inc.*, 260 F.R.D. 5, 9 (D.D.C. 2009) ("Understandably, taking an electronic document such as a spreadsheet, printing it, cutting it up, and telling one's opponent to paste it back together again, when the electronic document can be produced with a keystroke is madness in the world in which we live.") (discussing defendant's failure to produce ESI in the form in which it was ordinarily maintained).
9. *Goodbys Creek, LLC*, at *3.
10. *Bray & Gillespie Mgmt., LLC v. Lexington Ins. Co.* (*B & G I*), 259 F.R.D. 568, 572-73 (M.D. Fla. 2009).
11. *Id.* at 585.
12. *Id.* at 575.
13. *Id.* at 575-76.
14. *Id.* at 588. The court noted that the costs related to this production might include "purchasing software or paying license fees for [defendant's] use of the database software, and hiring professionals to copy the database, if necessary." *Id.* Plaintiff also was required to provide a computer expert to inspect the ESI database to ensure plaintiff's compliance with the court's sanctions. *Id.*
15. *MGP Ingredients, Inc. v. Mars, Inc.*, Civil Action No. 06-2318-JWL-DJW, 2007 WL 3010343, at *1 (D. Kan. Oct. 15, 2007).
16. *Id.* at *3.
17. *Id.* at *4.
18. Fed. R. Civ. P. 34(b)(i).
19. *MGP Ingredients*, at *3-4 ("Plaintiff is bound by Rule 34(b)(i). Consequently, Defendants had the right to choose the option of producing their documents and ESI as kept in the usual course of business. Defendants made that choice, and, thus, have satisfied their duty under Rule 34(b).").
20. *See id.* at *4 (citing Fed. R. Civ. P. 34(b)).
21. *Id.*
22. *Ford Motor Co. v. Edgewood Props.*, 257 F.R.D. 418, 424 (D.N.J. 2009).
23. *Id.*
24. *Id.* at 425-26.
25. *Id.* at 426. The court did not specify any precise time limit in which an objection would be timely and explicitly eschewed any "rigid formulation as to when a party must object to a document production." *Id.* The court instead noted that "[r]easonableness is the touchstone principle, as it is with most discovery obligations." *Id.*
26. *Id.* (emphasis in original); *see also In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, No. MD 05-1720(JG)(JO), 2007 WL 121426, at *4 (E.D.N.Y. 2007) (denying defendants' motion to require plaintiffs to reproduce documents plaintiffs had previously produced and to which defendants had waited nearly 12 months to object, thus finding that as between defendants and plaintiffs, "it would be less fair to impose the costs of a second form of production on the latter").
27. *In re Seroquel Prod. Liab. Litig.*, 244 F.R.D. 650, 661 (M.D. Fla. 2007) ("Plaintiffs contend [defendant] waited until mid-May 2007 to begin production of the overwhelming majority of the documents from these 'custodians' and the documents produced have significant errors of omission and are not readable or searchable. Plaintiffs contend that the custodial production has a great deal of missing data, *e.g.*, although [defendant] has a system to deliver voicemail, faxes, and video into Outlook inboxes, none has been produced; there are few emails from some custodians, and email boxes are missing from alternate email boxes.… [Defendant] missed deadlines and produced the electronic documents late; a significant portion of the production had blank pages; new load files were not searchable, in part because the date formats in the metadata were inconsistently loaded and email attachments not consistently associated or identified; authors were not identified as custodians for files; transposed metadata recipients/authors; and no page breaks were inserted in 3.75 million pages.").
28. *Id.* at 652 ("However, [defendant's]…failure to timely and systematically produce electronic discovery associated with eighty [defendant] 'custodians' in any manageable, searchable form [is] sanctionable conduct.").
29. *Thompson v. U.S. Dept. of Hous. and Urban Dev.*, 219 F.R.D. 93, 96 (D. Md. 2003).
30. *Id.* at 104-05.
31. *See supra* notes 10-14 (re: *B & G I*) and accompanying text.
32. *Bray & Gillespie Mgmt., LLC v. Lexington Ins. Co.* (*B & G II*), No. 6:07-cv-222-Orl-35KRS, 2010 WL 55595, at *5 (M.D. Fla. Jan. 5, 2010).

33. *Id.* at *5-7.

34. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, No. 502003CA005045XXOCAL, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005).

35. *Id.* at *1-2.

36. *Id.* at *2-5.

37. *Id.* at *3-4.

38. *Id.* at *4.

39. *Id.* at *7-8.

40. *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 816 (D.C. Cir. Jan. 6, 2009).

41. *Id.* at 817.

42. *Id.*

43. *Id.* at 817-21.

44. *Id.* at 817 ("OFHEO undertook extensive efforts to comply with the stipulated order, hiring 50 contract attorneys solely for that purpose. The total amount OFHEO spent on the individual defendants' discovery requests eventually reached over $6 million, more than 9 percent of the agency's entire annual budget.").

45. *Kipperman v. Onex*, 260 F.R.D. 682, 692 (N.D. Ga. 2009) ("The court does condemn Defendants, however, for making blatant misrepresentations about the value of e-mail discovery in this case in an effort to influence the court's ruling, for refusing to follow the court's ruling once made, and for behaving as if they, and not the court, got to decide what electronic material was relevant and discoverable under Rule 26 and what material was not.").

46. *Id.* at *690-93.

47. *Id.* at *692.

48. *Id.* at *700.

49. *Id.*

50. *See supra* notes 34-39 and accompanying text (discussing *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*).

51. *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, No. 1:05-CV-657 (DNH / RFT), 2007 WL 2687670, at *2, 6 (N.D.N.Y. Sept. 7, 2007).

52. *Id.* at *2, 5.

53. *Id.* at *9.

54. *Id.* at *12.

55. *Id.* ("But for PSEG's vendor creating this email attachment fiasco, we would not be having this discussion. Without question, attachments should have been produced with their corresponding emails as such are kept in the usual course of business.… Whether created by a software incompatibility or malfunction, such deficiency does not provide a sufficient excuse from presenting an important aspect of discovery in a convoluted fashion.").

56. *Id.* at *3.

57. *In re Seroquel*, 244 F.R.D. at 664 (citing Sedona Principle 6.d). The *In re Seroquel* court based its finding that sanctions were warranted not only on the "purposeful sluggishness" of the defendant described above, but also on defendant's "continued failure to produce single-page TIFF documents that would be 'usable' or 'reasonably accessible.'" *In re Seroquel*, 244 F.R.D. at 664. Defense counsel attributed these problems to vendor errors concerning load files and metadata. *Id.*

58. *Bank of Mongolia v. M & P Global Fin. Servs.*, 258 F.R.D. 514, 517 (S.D. Fla. 2009). For example, defense counsel could not explain why it had not searched deleted and unsaved ESI for responsive documents. *Id.*

59. *Id.* at 522.

60. *Id.*

61. *Coleman*, at *3.

62. *B & G I*, at *7-8 ("The false explanation [counsel] gave regarding how ESI had been collected…unreasonably prolonged and multiplied the proceedings regarding the ESI discovery dispute.").

63. *See Coleman*, at *3 ("[Defendant] has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production…and the testimony of its own witness[.]"); *B & G I*, at *8 ("In creating this false tale, [counsel] ignored numerous facts known or readily available to him about the actual process that was used to collect ESI and produce it to [opposing counsel].").

64. *United States v. Sensient Colors, Inc.*, Civil No. 07-1275 (JHR-JS), 2009 WL 2905474, at *4 (D.N.J. Sept. 9, 2009).

65. *Sensient Colors*, at *2 n.4.

66. *Id.* at *3.

67. *Id.* at *3; *see* Fed. R Evid. 502(b).

68. *Sensient Colors*, at *4-7.

69. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008). The defendants were found to have waived privilege over ESI inadvertently produced following a privilege review consisting of searching electronic documents for certain terms. The court held that the defendants had not taken reasonable precautions to safeguard the privileged material, and thus were "not insulated from waiver." *Id.* at 263. The court described the defendants' privilege review shortcomings as follows:

> Defendants have failed to demonstrate that the keyword search they performed on the text-searchable ESI was reasonable. Defendants neither identified the keywords selected nor the qualifications of the persons who selected them to design a proper search; they failed to demonstrate that there was quality-assurance testing; and when their production was challenged by Plaintiff, they failed to carry their burden of explaining what they had done and why it was sufficient.

Id. at 262.

70. *Spieker v. Quest Cherokee, LLC*, No. 07-1225-EFM, 2009 WL 2168892 (D. Kan. July 21, 2009). The court rejected the requesting party's suggestion that the producing party could avoid the costs of a privilege review by turning over all its ESI with a clawback agreement. *Id.* at *3. "Simply turning over all ESI materials does not show that a party has taken 'the reasonable steps' to prevent disclosure of its privileged materials." *Id.*; *see also id.* at *3 n.4 ("[S]imply turning over ***all*** ESI information without some effort to protect privileged material does not rise to the level of 'reasonable steps' set forth in Rule 502(b)." (emphasis in original)).

71. Christopher S. Rugaber, *Error by FTC Reveals Whole Foods' Trade Secrets*, Wash. Post, August 15, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/08/14/AR2007081401784.html.

72. *Id.*

73. *See id.*; *see also Documents Describe Whole Foods' Strategy*, N.Y. Times, August 15, 2007, *available at* http://www.nytimes.com/2007/08/15/business/15food.html?_r=2&scp=19&sq=whole+foods&st=nyt.

74. Munir Kotadia, *Military secrets escape through PDF file*, ZDNet UK, May 5, 2007, *available at* http://www.zdnet.co.uk/misc/print/0,1000000169,39197313-39001093c,00.htm.

75. *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information and Records in the Electronic Age* (The Sedona Conference Working Group Series, Sept. 2005 Version), *available at* http://www.thesedonaconference.org.

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This article originally appeared in the Winter 2010 issue of the NY Business Law Journal, *published by the Business Law Section of the New York State Bar Association.*

Fixing Estate Planning Documents: Part II

By Carlyn S. McCaffrey

This is the second in a two-part article about the various tools available under state law to fix wills and irrevocable trusts. The first part, published in our Fall 2011 issue, explored construction and reformation proceedings. This part discusses amendment, decanting and statutory protections against drafting errors.

I. Amendment

In General

The power to amend a trust instrument can derive either from the terms of the instrument or from state law, generally a statute.[1] When drafting a trust instrument, particularly one that is intended to last for many years or even generations, it is a good idea to provide the trustees and the beneficiaries with the flexibility to deal with changes in circumstances by giving some combination of trustees and beneficiaries the power to amend. In drafting an amendment power, it is important to provide sufficient restrictions so that the holders of the power are not treated as holding general powers of appointment over trust property.

Likely Tax Consequences

An amendment to a trust, if valid under local law, can affect the future tax status of the trust and its beneficiaries. A beneficiary whose consent to the amendment was necessary may be treated as having made a gift, however, if the amendment deprives her of some degree of interest in the trust.

There is no explicit generation-skipping transfer tax effective date protection in the Treasury Regulations for amendments made to GST protected trusts, even when those amendments are authorized under the original trust instrument. This is a curious omission since there are private letter rulings issued before the effective date regulations that protected such amendments.[2] The regulations do, however, protect the exercise of a trustee's discretionary power in favor of a new trust if authorized under the trust instrument.[3] Trustees who are interested in amending an exempt trust ought to consider whether their goals could be accomplished by means of a distribution to a new trust.

II. Decanting (and Exercise of Powers of Appointment)

In General

Powers of appointment, particularly those exercisable in favor of other trusts, provide the same sort of flexibility that amendment powers provide. Generally, to be effective, powers of appointment have to be part of the original instrument. If an appropriate person holds a power of appointment over a trust that is not amendable, she can exercise the power to create a new trust with the desired terms.[4]

Decanting is a technique similar to exercising a power of appointment. The term "decanting" generally refers to the appointment by the trustee of an irrevocable trust of trust property to a new trust which contains terms different from the original trust. The authority of a trustee to make such an appointment generally comes from a state statute, but some find a basis for it in common law. In some cases, a provision in the trust agreement or will creating the trust can provide such authority.

Decanting can be a useful tool in a variety of situations. Suppose, for example, a trustee has an unlimited invasion power exercisable in favor of the primary beneficiary of a trust and that the beneficiary is entitled to receive all of the trust property outright on her thirty-fifth birthday. Suppose the trustee has concluded that an outright distribution to her at that time would be inappropriate because of problems she is having with creditors, with her husband or with life in general. Without the authority to decant, the trustees would have no choice but to make the required distribution. With the authority to decant, prior to the beneficiary's thirty-fifth birthday, the trustee might be able to appoint all of the trust property to a new trust which will extend beyond the beneficiary's thirty-fifth birthday—perhaps until her death.

The rationale behind statutory provisions and case law permitting decanting is based on a belief that if the trustee has the authority to distribute property outright to a beneficiary or for his or her benefit, the trustee should be able to distribute such property to another trust for the benefit of such beneficiary. In effect, the trustee has a special power of appointment exercisable in favor of a beneficiary, and she should be allowed to exercise the power in further trust. This was the rationale of New York Assemblyman Stephen B. Kaufman as expressed in his memorandum written in connection with the passage of New York's decanting statute, the first decanting statute.[5]

Currently, ten states have enacted a decanting statute. Some of these state statutes, as well as the common law origins of decanting, are discussed briefly below.

Decanting Under Common Law

Case law of at least three states arguably recognizes a trustee's authority to invade principal in favor of another trust. The three states are Florida, Iowa and New Jersey, and of these, only Florida has enacted a decanting statute. The Florida and New Jersey case law are discussed below.

Florida: *Phipps v. Palm Beach Trust Co*. In *Phipps v. Palm Beach Trust Co.* a settlor created a trust for the benefit of her children naming her husband as the individual trustee and a trust company as the corporate trustee.[6] The trust agreement authorized the corporate trustee, upon written direction by the individual trustee, to pay over and transfer any portion of the trust fund as the individual trustee determined. The individual trustee determined it was appropriate to pay the trust fund to a new trust for the benefit of the settlor's children with the added provision that income could be payable to the wife of one of the children, if such child so provided in his will. The corporate trustee was unsure whether complying with the individual trustee's direction was consistent with the terms of the trust agreement.[7] The Supreme Court of Florida was thus presented with the issue as to whether a trustee, authorized to direct distributions of any portion or all of a trust fund, could direct distributions be paid over to a new trust. The court, finding that the exercise of the power of appointment by creation of a second trust had been upheld many times, approved the individual trustee's exercise of discretion and ordered the corporate trustee to comply with the individual trustee's direction.[8]

Although the court approved a decanting by the trustees, this case is distinguishable from most fact patterns where a decanting is attempted. The individual trustee's authority to direct the corporate trustee to pay any portion of the trust fund was exercisable by him during his life or upon his death, thereby granting the individual trustee a lifetime and testamentary special power of appointment. Such a power is broader than the typical power of a trustee to distribute trust property. Therefore, while this case is helpful to the proposition that a trustee with authority to invade principal can do so by distributing it to another trust, it is not decisive.

New Jersey: *Wiedenmayer v. Johnson.* The trustees of the original trust in *Wiedenmayer v. Johnson* had authority to pay to the beneficiary outright so much of the trust property as they deemed to be in the beneficiary's best interest.[9] The trustees exercised their discretion by paying the trust property to the beneficiary who in turn contributed the property to another trust for the benefit of the beneficiary. The court approved this distribution, finding that since the trust indenture expressly stated that distributions could be made outright for the beneficiary's best interests, "it seem[ed] logical to conclude that the trustees could, to safeguard the son's best interests, condition the distribution upon [the son's] setting up a substituted trust."[10]

This case deals with trustees with more typical authority to invade, at least as compared to the *Phipps* case. For this reason it is stronger authority for the proposition that a trustee with authority to invade principal can decant to a new trust. However, if the transaction is dissected, it is not the trustees who are the persons adding the property to a new trust. Instead, the trustees first made a distribution to the beneficiary (albeit on the condition that such property is added to a new trust) and then it was the beneficiary who added the assets to a new trust. When viewed in this light, this case is weaker support for a trustee's authority to decant than the *Phipps* case.

State Decanting Statutes

Given the rocky ground on which the common law authority to decant lies, it is generally better for a trustee to decant pursuant to a state statute. There are ten states that currently have a decanting statute: New York, Alaska, Delaware, Tennessee, Florida, South Dakota, New Hampshire, Arizona, North Carolina and Nevada.[11] In each of these states, the trustees may act without court approval, and in some states, the trustees may act without notifying the beneficiaries. Trustees are authorized to obtain court approval, which they may wish to do to protect themselves from future suits by beneficiaries who may object. Some of the statutes are discussed below.

New York. Prior to the amendment of New York's decanting statute in 2011, Section 10-6.6(b)(1) of the New York Estates, Powers & Trusts Law (EPTL) permitted a trustee who had the absolute discretion under the terms of a will or irrevocable inter vivos trust agreement to invade principal for the benefit of the beneficiaries of a trust to exercise that discretion by appointing any part of the principal of the trust in favor of a trustee of another trust. This power could be exercised without the consent of the beneficiaries, but the beneficiaries had to be notified.[12] The only restrictions were that the exercise be in favor of only one or more of the beneficiaries of the trust, that it not reduce the fixed income interest of any beneficiary, that it not violate the rule against perpetuities and that it not violate EPTL 11-1.7, which prohibits granting certain powers and immunities to testamentary (but not inter vivos) trustees.

The requirement that the trustee have absolute discretion to invade principal made New York's decanting statute one of the more restrictive ones. In *In re Estate of Mayer*, the New York County Surrogate's Court held that a trustee whose authority to distribute principal was limited by an ascertainable standard did not have absolute discretion and could not decant.[13]

In August of 2011, legislation was enacted to liberalize New York's decanting rules. Under the amended statute, a trustee may decant trust principal to another trust even if the trustee's power to invade is subject to an ascertainable standard. In that event, the decanting power is subject to certain restrictions—e.g., the current remainder beneficiaries of the new trust must be the same as the old trust. Broader decanting powers remain where the trustee has absolute discretion to invade, and the law expressly provides that the power to invade for the beneficiary's best interests, comfort, welfare or happiness constitutes absolute discretion.[14]

Alaska. In 1998, Alaska followed New York's lead and enacted its own decanting statute.[15] Alaska's statute authorizes a trustee under a will or an irrevocable inter vivos trust agreement governed by Alaska law[16] who has authority to invade the principal of a trust for the benefit of a beneficiary to appoint any part or all of the principal in favor of another trust so long as the exercise does not reduce any fixed income interest of a beneficiary, is in favor of the beneficiaries of the original trust, does not violate the rule against perpetuities and "results, in the appointed trust, in a standard for invading principal that is the same as the standard for invading principal in the invaded trust."[17]

Like the recent New York legislation, Alaska law permits a trustee whose authority to invade is limited by an ascertainable standard to invade in favor of another trust, even if the reason for the invasion is not consistent with the limitations on the trustee's authority to invade. The only restriction is that the new trust must contain the same limitation (i.e., the ascertainable standard) as the original trust.[18] Unlike in New York, the trustees need not provide notice to the beneficiaries of the original trust to effectuate a decanting.

Delaware. In Delaware, a trustee can decant if she possesses any discretionary authority to invade principal and, unlike Alaska, the standard for invasion need not be maintained in the new trust, but the reason for the invasion must comply with such standard.[19] The only other restrictions are that (i) the exercise must be in favor of only one or more of the beneficiaries of the trust, (ii) may not reduce any income interest for which a marital deduction was claimed,[20] (iii) may not extend the vesting date for any property the transfer of which was treated as a gift qualifying for the gift tax annual exclusion and (iv) may not be exercised over any portion of the trust that is currently withdrawable by a beneficiary.[21] Again, the statute does not require notice to, or consent of, the beneficiaries of the original trust.

Florida. Florida enacted its decanting statute in 2007. The statute replaces the *Phipps* case as the authority for decanting. Florida permits decanting where a trustee possesses absolute discretion and explicitly provides that a power to invade for the beneficiary's best interests, welfare, comfort or happiness constitutes absolute discretion for purposes of the statute.[22] Decanting is not permitted where discretion is limited by an ascertainable standard.

The other limitations of Florida's statute are that the beneficiaries of the recipient trust include only beneficiaries of the first trust and that the recipient trust not reduce any fixed income, annuity or unitrust interest of the first trust.[23] This latter requirement is broader than New York's, Alaska's and Delaware's. Florida also includes a tax savings provision which provides that if any contribution to the first trust qualified for a marital or charitable deduction, the recipient trust must not contain any provision that, if included in the first trust, would have prevented the first trust from qualifying for such deduction.[24] Florida's statute requires the trustees to give all qualified beneficiaries sixty days' notice but gives the beneficiaries the right to waive the notice requirement.[25]

Likely Tax Consequences

Generation-Skipping Transfer Tax Risks. The impetus behind New York's decanting statute was to save generation-skipping transfer tax exempt trusts from terminating before the expiration of their perpetuities dates.[26] A trust that was irrevocable on September 25, 1985[27] (and thus protected from the generation-skipping transfer tax) may have provided for outright distributions to a beneficiary at a certain age. Paying such assets outright would result in a loss of such protection. EPTL 10-6.6(b)(1) permitted those trustees with absolute discretion to invade principal to transfer the assets of the protected trust to one that lasted for the lifetime of the beneficiary and then passed to his or her descendants in further trust, thereby maintaining its protection from the generation-skipping transfer tax for longer.

However, as discussed in Part I of this article, a GST-protected trust should only be modified in a manner consistent with one of the safe harbors outlined in Treasury Regulation § 26.2601-1(b)(4), of which only one may protect a modification by way of a decanting that is authorized under a law that was not in effect on September 25, 1985.[28] The available safe harbor is found in Treasury Regulation § 26.2601-1(b)(4)(i)(D). It protects decantings to recipient trusts that do not shift a beneficial interest to a beneficiary who occupies a lower generation than the persons who held the beneficial interest in the original trust. In addition, the terms of the recipient trust may not extend vesting beyond the perpetuities period that applied to the original trust. This latter requirement is straightforward and a requirement of most of the decanting statutes. The former is less clear.

Treasury Regulation § 26.2601-1(b)(4)(i)(D)(2) attempts to clarify when a shift to a lower generation occurs by providing that a shift occurs "if the modification can result in either an increase in the amount of a GST transfer or the creation of a new GST transfer." This would happen when, for example, grandchildren are added as current beneficiaries because distributions to them would permit generation-skipping transfers that were not permitted before the decanting. The same would be true when grandchildren are added as discretionary current beneficiaries, because Treasury Regulation § 26.2601-1(b)(4)(i)(D)(2) provides a default rule for modifications that cannot be immediately determined. The rule is that the modification is deemed to shift a beneficial interest to a lower generation.[29] Therefore, when it cannot readily be determined if there is a shift, the IRS takes the position that there is, in fact, a shift.

Unless a trustee is completely confident that there is no shift, the trustee risks the IRS deeming the distribution as a shift to a lower generation, thus jeopardizing the generation-skipping transfer tax protection of the original trust and the recipient trust. If such protection is lost, the trustee may have caused a future generation-skipping transfer tax liability upon a distribution to a grandchild. Prior to 2011, a trustee could protect herself from both of these results by obtaining a court order and a Private Letter Ruling. For example, in Private Letter Ruling 200520023, a trustee of three separate trusts, one for each child of the settlor, petitioned a state court to modify such trusts so that the trustee could decant to three separate new trusts.[30] The court approved the modification, subject to the receipt of a favorable ruling from the IRS that the decanting would not affect the generation-skipping transfer tax exempt status of the assets transferred. The IRS so ruled in the Private Letter Ruling. As a result, the trustee was protected against suits from all current and future beneficiaries and from the imposition of a tax liability by the IRS.

Unfortunately, trustees can no longer obtain such comfort prior to decanting. The IRS recently announced that, while it is studying the issue, it will no longer rule on whether the distribution of property by a trustee from an irrevocable generation-skipping transfer tax exempt trust through a decanting to another irrevocable trust will be deemed to shift a beneficial interest to a lower generation.[31] Decanting now leaves trustees who exercise their power to decant vulnerable to risks of liability. Unless there is no possibility of a prohibited shift, a trustee of a protected trust should not decant pursuant to a state statute.

To protect against inadvertent loss of effective date protection, a trustee who decants from a protected trust into a new trust should consider using language in the new trust similar to the following:

> Notwithstanding anything in this trust agreement to the contrary, the trustees may not exercise their distribution powers in such manner as to shift a beneficial interest in the property held in the Trust from the beneficiaries who held such interests under the [name of original trust] to a beneficiary who occupies a lower generation than the such beneficiaries within the meaning of Treasury Regulation § 26.2601-1(b)(4)(i)(D).

Gift Tax Risks. A gift tax may be imposed when a beneficiary participates in a decanting, either by acting as the trustee accomplishing the decanting or by consenting to the decanting, and the beneficiary's interest passes to another beneficiary.

Generally, a trustee-beneficiary should avoid being involved in a decanting because when any portion of her interest shifts to another beneficiary, she may be subject to gift tax.[32] North Carolina prohibits a trustee / beneficiary from decanting pursuant to its statute under all circumstances. The statute further provides that the remaining trustees may act or "the court may appoint a special fiduciary with authority" to decant.[33]

Nevada is the only state that requires consent and only when property specifically allocated to a beneficiary is no longer so allocated. Some state statutes permit actions which may be tantamount to giving consent. New York, Florida and North Carolina require a trustee to give notice to beneficiaries of her proposed decanting, and Florida and North Carolina further provide that such notice is waivable by the beneficiaries.[34] Nevada also permits a trustee to give 30 days' notice to beneficiaries which, if given, will be waived by the beneficiaries if they consent to the proposed action.[35] If a beneficiary consents to a decanting or is deemed to have consented to a decanting and the beneficiary's interest passes to another beneficiary, then the beneficiary may be deemed to have made a taxable gift.[36] The IRS might take the position that a beneficiary who waives a notice period or fails to object has made a gift.[37] The argument that the failure to object constitutes making a gift becomes more tenuous when the decanting is initiated by the trustee and the beneficiary remains unaware, which is likely to occur in those states where notice is not required. Again the IRS made it more uncomfortable for trustees who wish to decant but are worried about gift tax consequences when it announced that it will no longer rule on whether a decanting resulting in a change in beneficial interests is a gift under I.R.C. § 2501.[38]

III. Statutory Protections Against Drafting Errors

Some state legislatures have eliminated the need for certain fix-up types of reformations by creating statutory fix-ups that apply generally to trusts unless there is specific language to the contrary.

Problematic Powers of Appointment

If, for example, a trustee has the power to make distributions to herself, she could be treated as having a general power of appointment for federal estate and gift tax purposes unless the power is limited by an ascertainable standard relating to her health, education, support or maintenance or unless exercisable only with the consent of another person who has a substantial interest in the trust adverse to the exercise of the power (an "adverse party"). Most settlors do not intend that their trustees have general powers of appointment by reason of their trustee powers. In order to prevent this result, several states have statutes that limit the power of trustees to exercise discretionary distribution powers in favor of themselves. New York law[39] and Florida law,[40] for example, have prohibitions against a trustee exercising a discretionary distribution power in favor of herself other than powers that are limited by an ascertainable standard relating to the health, education, maintenance or support of the power holder. The laws of several other states permit trustees to exercise discretionary distribution powers in favor of themselves, but cut the power back to one that may be exercised only to make distributions for the power holders' health, education, support or maintenance.[41]

Power to Remove and Replace Trustees

The IRS took the position in Rev. Rul. 79-353[42] that the reservation by the settlor of the power to remove a trustee and appoint another trustee is equivalent to a reservation of the trustee's powers even if the settlor did not have the power to appoint herself as trustee. As a result, if a settlor created a trust the terms of which gave the trustee the power to make discretionary distributions to beneficiaries unrestricted by a standard, and the settlor had the power to remove and replace the trustee, the trust would be included in the settlor's gross estate under I.R.C. §§ 2036(a) and 2038. This principle was extended in private letter rulings to apply to beneficiaries who had the power to remove and replace those trustees who could exercise discretionary distribution powers in their favor or in such a way as to discharge their support obligations to other persons.[43] After a number of courts had refused to follow Rev. Rul. 79-353,[44] the IRS issued Rev. Rul. 95-58.[45] This ruling revoked Rev. Rul. 79-353 and announced a new rule dealing with the replacement of trustees. The new rule provides that a person who has the power to remove and replace a trustee will be treated as having the powers of the trustee only if she has the power to replace the removed trustee with a person who is related or subordinate to her (within the meaning of I.R.C. § 672(c)). After the publication of this ruling, several states passed laws designed to confer on beneficiaries the protection offered by this ruling. The District of Columbia, New Jersey and Pennsylvania all passed laws that prohibit beneficiaries from removing and replacing their trustees with persons related to them if those trustees have the power to make discretionary distributions to them unless that discretion is limited by an ascertainable standard.[46] Alaska took another route. It prohibits a related trustee from exercising a discretionary distribution power in favor of a beneficiary who has the power to remove her unless the discretion is limited by an ascertainable standard.[47]

Endnotes

1. See Fla. Stat. § 737.0412, which permits the trustees and beneficiaries of a trust to amend it without judicial approval, and Cal. Prob. Code § 15404 and N.Y. Estates Powers & Trusts Law (EPTL) 7-1.9, both of which permit the settlor and all the beneficiaries of a trust to amend it without judicial approval.
2. *See, e.g.*, PLR 8926028 (March 31, 1989).
3. Treas. Reg. § 26.2601-1(b)(4)(A).
4. As is the case with amendment powers, it is important to provide sufficient restrictions so that the holders of the power are not treated as holding general powers of appointment over trust property. An error that often occurs in connection with drafting powers of appointment is the failure to prohibit the holder of the power from appointing trust property in a manner that would discharge her obligation to support another person. Such a power would be a general rather than a limited power of appointment.
5. Memorandum of Assemblyman Kaufman in support of L 1992, ch 591, 1992 NY Legis Ann, at 364-367.
6. *Phipps v. Palm Beach Trust Co*, 196 So. 299 (Fla. 1940).
7. *Id.* at 300.
8. *Id.* at 301.
9. *Wiedenmayer v. Johnson*, 254 A.2d 534 (N.J. Super. Ct. App. Div. 1969).
10. *Id.* at 536.
11. EPTL 10-6.6; Alaska Stat. § 13.36.157; Del. Code. Ann. tit. 12, § 3528; Tenn. Code Ann. § 35-15-816(27); Fla. Stat. § 736.04117; S.D. Codified Laws § 55-2-15; N.H. Rev. Stat. Ann. § 564-B:4-418; Ariz. Rev. Stat. Ann. § 14-10819; N.C. Gen. Stat. § 36C-8-816.1; Nev. Rev. Stat. § 163.556.
12. Former EPTL 10-6.6(d).
13. *In re Estate of Mayer*, 672 N.Y.S.2d 998 (N.Y. Co. Surr. Ct. 1998).
14. The amendments to the decanting statute are discussed in more detail by Joseph T. La Ferlita in his article beginning on p. 10 of this issue.
15. Alaska Stat. § 13.36.157.
16. Alaska's statute also applies to trusts whose governing law is changed to Alaska law. Alaska Stat. § 13.36.157(b)(1).
17. Alaska Stat. § 13.36.157(a).
18. *Id.*
19. Del. Code. Ann. tit. 12, § 3528(a) and (a)(5).
20. This restriction is narrower than New York's and Alaska's restriction that the exercise not reduce any fixed income interest.
21. Del. Code. Ann. tit. 12, § 3528(a)(1) through (4).
22. Fla. Stat. § 736.04117(1).
23. Fla. Stat. § 736.04117(1)(a)(1) and (2).
24. Fla. Stat. § 736.04117(1)(a)(3).
25. Fla. Stat. § 736.04117(4).
26. Memorandum of Assemblyman Kaufman in support of L 1992, ch 591, 1992 NY Legis Ann, at 364-367.
27. A testamentary trust that was created under a will executed before October 22, 1986 of a decedent who died before January 1, 1987 would also be protected from the generation-skipping transfer tax.
28. Treas. Reg. § 26.2601-1(b)(4)(i)(A) provides a safe harbor for distributions of trust principal from an exempt trust to a new trust where the distribution is pursuant to the terms of the trust agreement governing the exempt trust or pursuant to a state law in effect "at the time the exempt trust became irrevocable," or September 25, 1985. Because none of the statutes discussed above were in effect on September 25, 1985, this safe harbor will not apply to an exempt trust decanted pursuant to one of the above statutes. When a state statute is a codification of common law that existed prior to September 25, 1985, one can argue that state law permitting decanting was in effect at the required time and thus rely on this safe harbor. This may be the case in Florida, but for the reasons discussed above, this position relies on shaky grounds.
29. Treas. Reg. § 26.2601-1(b)(4)(i)(D)(2).
30. PLR 200520023 (January 28, 2005).
31. Rev. Proc. 2011-3.
32. Treas. Reg. § 25.2511-1(c)(1).
33. N.C. Gen. Stat. § 36C-8-816.1(d).
34. EPTL 10-6.6(j)(2); Fla. Stat. § 736.04117(4); N.C. Gen. Stat. § 36C-8-816.1(f)(2) and (3).
35. Nev. Rev. Stat. § 164.725.
36. Treas. Reg. § 25.2511-1(c)(1).

37. *Snyder v. Comm'r*, 93 T.C. 529 (1989) (holding that a preferred shareholder's failure to convert preferred shares entitled only to noncumulative dividends into cumulative preferred shares was a series of taxable gifts to the corporation's common shareholders).

38. Rev. Proc. 2011-3.

39. EPTL 10-10.1.

40. Fla. Stat. § 736.0814(2). The laws of Alaska, Connecticut, Minnesota and West Virginia contain similar provisions. Alaska Stat. § 13.36.153; Conn. Gen. Stat. § 45a-487; Minn. Stat. § 501B.14; and W. Va. Code § 44-5-13. Florida enacted its statute in 1991. Because of concern that the passage of the statute would cause a lapse of a general power of appointment by trustee-beneficiaries who formerly had unlimited discretion to make distributions to themselves, the statute gave the trustees and beneficiaries of existing trusts the right to opt out of its application. In Rev. Proc. 94-44, 1994-2 C.B. 683, the IRS took the position that the new statute would not be treated as causing the lapse of a power of appointment.

41. *See, e.g.*, D.C. Code § 21-1722; Md. Code Ann., Est. & Trusts § 14-109; N.J. Stat. Ann. § 3B:11-4.1; and 20 Pa. Cons. Stat. § 7504.

42. Rev. Rul. 79-3531979-2 C.B. 325.

43. PLR 8916032 (January 19, 1989).

44. *See, e.g., Estate of Vak v. Comm'r*, 973 F.2d 1409 (8th Cir. 1992), and *Wall v. Comm'r*, 101 T.C. 300 (1993).

45. Rev. Rul. 95-58, 1995-2 C.B. 191.

46. D.C. Code § 21-1722(c); 20 Pa. C.S. § 7506; N.J. Stat. Ann. § 3B:11-4.1.d.

47. Alaska Stat. § 13.36.153.

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The author is grateful to her colleague Vanessa L. Maczko for her assistance in the preparation of this article.

This article originally appeared in the Winter 2011 issue of the Trusts and Estates Law Section Newsletter, *published by the Trusts and Estates Law Section of the New York State Bar Association.*

Bedtime for Doctor *O'Brien*

By Walter F. Bottger

The old saw, "hard cases make bad law," perhaps has no better illustration than the aging but still troublesome case of *O'Brien v. O'Brien*.[1] It may be time to put *O'Brien* to bed.

As everyone by now knows, Dr. Michael O'Brien obtained his medical degree and license during his marriage. During that time, his wife contributed significantly to her husband's support and educational efforts and endured her own career sacrifices for his benefit. Once he had his license, but before he had begun to earn significantly or accumulate assets, the new Doctor O'Brien commenced a divorce action against his wife.

Faced with a set of facts brimming with inequity and unable to offer compensation to the wife with existing assets or income, the Court of Appeals took a metaphysical leap of faith and "discovered" distributable property in the intangible essence of Dr. O'Brien's medical license. With that, the Court of Appeals started New York law down a confusing, often problematic and inequitable path.

Still in the developmental stages after the 1980 enactment of equitable distribution, New York apparently thought itself in the vanguard by creating property out of a license to practice. But, as Judge Robert Smith pointed out in his dissent in the more recent case of *Holterman v. Holterman*,[2] "[i]n 19 years, not one other state has adopted the *O'Brien*[3] rule...." Instead, New York is now more like the old duffer driving the wrong way on the Interstate whose wife calls him on his cell phone to warn him about a driver going the wrong way on the Interstate. "Hell," the oldster responded, "they're all going the wrong way."

Attorneys and courts can point to a few applications of the *O'Brien* rule where, as in the original, justice has been served by valuing an intangible as property in order to compensate a spouse who would otherwise be shortchanged. But more often, it seems, courts have wandered in several directions as they struggled with the mandate that they create something out of nothing.

The gist of the *O'Brien* rule is that:

> [a] professional license is a valuable property right, reflected in the money, effort and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity it affords its holder....[4]

Once the Court of Appeals "discovered" property in a medical license, courts began scrambling to find property lurking in every form of intangible.

In *McGowan v. McGowan*,[5] a master's degree earned during the marriage but not connected to a license was found to be a marital asset to be distributed. A Fellowship in a Society of Actuaries was found to be marital property in *McAlpine v. McAlpine*.[6] In *Haspel v. Haspel*,[7] some securities licenses and a real estate broker's license (not the products of any significant schooling or efforts) which were obtained during the marriage were held to be distributable marital assets.[8] And one court found that a maritime apprenticeship during a marriage but not yet resulting in a license was a marital asset to be distributed.[9]

Courts have also searched outside the bounds of the marriage to find intangible property to pull into the marital pot. In *Madori v. Madori*,[10] a court said that emergency room experience which utilized a pre-marital medical degree comprised marital property. It treated the experience as though it were appreciation of separate property in the manner of *Price v. Price*.[11] And recently the Second Department approved applying an *O'Brien* valuation to a degree awarded after the marriage, where some of the course work for it was completed during the marriage.[12] To do this, the court adopted for intangibles the same method used in valuing bonuses or other tangible property earned during the marriage but received afterward.

The search for "property" has led courts down many exploratory paths, but none more problematic than that of *Golub v. Golub* in 1988.[13] In *Golub*, the New York County Supreme Court reified the celebrity status of a well-known model and actress.

"There seems to be no rational basis upon which to distinguish between a degree, a license, or any other special skill that generates substantial income," said the court.[14] But in its effort to expand the definition of intangible property, the *Golub* court overlooked the connection in *O'Brien* between the license and its resulting enhancement of the holder's earnings. As one court put it clearly: "The value of such assets is reflected in the *enhanced earning capacity* that they afford the holder...."[15] There was in *Golub* no clear connection between the fact of the wife's celebrity and how it had enhanced any earnings that were not there before.

Nevertheless, the *Golub* decision inspired courts with a new burst of property hunting. The Appellate Division, First Department, found *O'Brien* property in an opera singer's career, also ignoring the connection between the "property" and any enhanced earnings.[16] Later, the First Department discovered property in a successful investment banker's career, unconnected to any degree or license.[17] In a model of circuitous logic, the court said, in essence, that the husband's successful career had enhanced his successful career.

Flush with these exercises in mental gymnastics, one court found distributable value in a salesman's efforts and ability as reflected in his "book of business," although the "book of business" belonged to his employer and not to him.[18] That court approvingly noted the earlier cases and the expanding nature of property they represented and thus had no trouble finding that the husband's hard work and salesmanship constituted a distributable marital asset.[19]

One court used imputed income, usually reserved for determining of child or spousal support, to expand the intangible marital property.[20] Confronted with an under-used registered nurse's license, the court increased its value by assuming higher statistical earnings, although the license had not, in fact, enhanced the holder's earnings to that level.

The search for property in intangible places is fraught with danger and potential injustice. For example, the *Hougie* court recognized a Series 7 license to be a marital asset under *O'Brien*.[21] A Series 7 certificate of registration is a permit required to sell stocks. It is obtained after a brief exam for which a few hours of study may be needed. Yet this briefly obtained certificate could, under *O'Brien*, be valued in the millions of dollars, if the receiver of the Series 7 then commits years of effort and skill and becomes a successful financier. Then, because of the Series 7 registration, the titled spouse could be stuck with a multi-million-dollar unmodifiable liability, virtually enslaving him or her for the rest of his or her life.

Following the logic that led to *O'Brien* valuations of a Series 7, it would not be a long reach to find the certificate from a Continuing Legal Education presentation to be a marital asset subject to full *O'Brien* valuation. Or what about such required licenses as an electrician's or barber's license or even a driver's license used to get to work? Or why couldn't a court use the statistical earnings of a professional chef to value a spouse's certificate of attendance at a cooking class? There are few "personal enhancement" courses, such as photography, home decorating, pottery making or even investment advice, which do not offer certificates upon completion. All these could inspire an *O'Brien* evaluation. The possibilities are limited only by the imaginations and penchant for mischief of the lawyers and the courts involved.

A classic case threatening injustice is that of a young person who earns a valuable degree or license, such as an MBA or law license, during a short marriage. Given the long work life ahead, the degree or license would have a very high value, thus forcing the holder to spend much of his or her remaining work life paying off the distributive award. Such an award forces the degree holder to continue his or her present career, while the recipient spouse is free and financially enabled to do whatever he or she wishes.

Another lurking unfairness is the valuation of an unused degree. In one unreported case of which the writer is aware, a practicing physician obtained an MBA degree but never used it. Nevertheless, upon divorce, his MBA was valued statistically, looking to MBAs in the finance world in New York, even though to the holder, the degree had no value at all.

Another anomaly is the likelihood of disparate values assigned to the same degree or license, depending on the personal energy and effort of the more successful holder. This problem is especially evident when the evaluation uses a baseline of statistical earnings and a "top line" of historical earnings. Placing a higher value on the more successful person's degree or license is, in reality, the transmutation of individual effort and ability into a thing, not a personal quality.

Of course, lurking down the path after an *O'Brien* valuation is the possibility of a career or health disaster. An automobile accident could cut short a promising career. A financial crash such as the recent one could suddenly put a high earner on the street. Indeed, an increase in tax rates or even a failure by the titled spouse to achieve his or her hoped-for potential would defeat the assumptions underlying the distribution. With no chance that an award could be modified, regardless of the circumstances, the distribution would likely wreck the holder's entire life. Such problematic outcomes were anticipated by Judge Meyer in his concurring opinion in *O'Brien* itself,[22] but they seem not to have bothered courts until Judge Smith's dissent in *Holterman*.

Courts of other states have more readily recognized the dangers inherent in *O'Brien*. For example, a Massachusetts court said that:

> [t]o adopt a rule that would subject such an item [a license, degree, etc.] to distribution upon divorce would foreclose consideration of the effect of future events on the individual's earning capacity.[23]

Even before *O'Brien* it was recognized by the New Jersey Supreme Court in *Mahoney v. Mahoney* that:

> [e]quitable distribution of a professional degree would...require distribution of "earning capacity"—income that the degree holder might never acquire. The amount of future earnings would be entirely speculative.[24]

Quoting *Mahoney*, a Colorado court said:

> Valuing a professional degree in the hands of a particular individual at the start of his or her career would involve a gamut of calculations that reduces to little more than guesswork.[25]

Built into the *O'Brien* process are also certain mechanical problems with which courts have to struggle. How to pick a proper baseline for earnings can cause disparities. For example, why should a highly compensated attorney whose significant efforts resulted in a large income have, as a baseline, the average earnings of the holder of a bachelor's degree? If that person had not gone to law school, it is more likely than not that he or she would have earned much more than the statistical average.

Top lines can also be problematic. If a person obtained a certain degree or license twenty years before his divorce, why should a few years of his recent highest earnings establish the value of the degree or license? Or why should any imputed (and thus unenhanced) earnings, even if statistically based, be included in the top line? And shouldn't fairness require consideration of the fact that, several years after a degree or license was earned and exploited, both the non-titled and titled spouse have enjoyed its benefits, and that a subsequent award based on its full statistical value would amount to a windfall to the non-titled spouse? Or looked at like tangible property, hasn't the value of the asset depreciated?

As to discount rates, they are hard enough to establish with regard to physical assets such as retirement funds or investments. Why should courts have to struggle applying future value, mortality or other discount rates to assets which are themselves the product of mental holography?

There is, to some extent, a recognition by courts of the difficulties imposed on our jurisprudence by *O'Brien*, and attempts by those courts to limit the damage. Courts, for example, have reduced valuations by applying coverture fractions to the process of obtaining the degree or license, thus reducing the value.[26] Some courts have declined to value as marital any efforts or achievements during the marriage where the degree or license was received either before or after it.[27] The Fourth Department refused to value a banking career as a marital asset in the absence of proof that an undergraduate degree and attendance at business school classes actually enhanced the career.[28] And in a thoughtful and challenging opinion, Justice Laura Drager of the New York County Supreme Court declined to treat a successful financial career, including the acquisition of one of the required securities licenses, as a marital asset."[29] [A]lthough the husband's earnings increased substantially during the marriage," the court said, "his career progression does not constitute marital property."[30]

The most common limitation of *O'Brien* arises from scrutiny of the respective contributions of the spouses to the item in question. Several courts have found that the non-titled spouse had not shown sufficient contributions or sacrifices relating to the "asset" to merit an equal or, in some cases, any distribution of the value.[31]

All of these attempts to mitigate the effect of *O'Brien*, however, constitute little more than taking aspirin for cancer. Why should courts have to seek palliatives to avoid the injustice inherent in a flawed doctrine? The fundamental problem is not how to avoid the potential injustice of *O'Brien*. The fundamental problem is the continued existence of *O'Brien*.

The *O'Brien* rule frequently forces courts to struggle with conceptually illusive and challenging concepts.

Its implementation necessitates expensive experts, hours or even days of court time, and a concomitant significant increase in litigation costs. The results often punish the effort and ability of the titled spouse and infringe on his or her future freedom. In too many cases, the *O'Brien* rule results in an unfair outcome, overvaluing marital property and the ability of the titled spouse to pay. And, it should not be overlooked, the rule renders our own state's jurisprudence an anomaly in the federal system.

At its core, the *O'Brien* problem is a metaphysical one. The rule is ontologically unsound. It transmutes the abstruse into the tangible, making clumsy neo-Kantians out of matrimonial courts. It is like a dedicated idealist, insisting that air is solid, stepping off a cliff.

The ability to compensate the non-titled spouse for his or her part in the attainment of a license or degree would not be lost with the demise of *O'Brien*. The present law on maintenance and equitable distribution provides courts with sufficient means of effecting equity in the marital dissolution. The factors in both the maintenance and equitable distribution parts of Domestic Relations Law Section 236 give courts all the necessary latitude to address contributions or sacrifices by the non-titled spouse. If there is already a significant income stream and/or assets, they can form the basis of an appropriate maintenance award or unequal compensatory distribution of assets. If not, a simple change in the maintenance statute (see below) would suffice. And then, should there be a misjudgment by the awarding court, or a substantial change of circumstances later on, the potential resulting injustice could be corrected.

The courts of the other states have not had trouble taking a more direct approach. For example, in *Downs v. Downs*,[32] the Supreme Court of Vermont noted that "maintenance can be a tool to balance equities whenever the financial contributions of one spouse enable the other spouse to enhance his or her future earning capacity."[33] And the Colorado Supreme Court said that:

> [t]he contribution of one spouse to the education of the other spouse may be taken into consideration when marital property is divided...[and] [t]he trial court could make an award of maintenance based on all relevant factors including the contribution of one spouse to the education of the other spouse....[34]

Two objections to the maintenance approach have been raised. First is the fact that maintenance presently terminates upon the recipient spouse's remarriage. As pointed out below, that problem can be dealt with legislatively.

The other problem is the concern that awarding maintenance rather than "property" fails to reflect the partnership aspect of marriage and, hence, may demean the recipient spouse. But this problem is one inherent, not in maintenance itself, but in the original choice of calling the post-divorce income flow "maintenance." Indeed, the word "maintenance" does imply a disparity of roles in the marriage. But the answer is not to wallow in the metaphysical swamp of *O'Brien*, but to change the word back to "alimony" or to something like "equitable income distribution."

How to effect the demise of *O'Brien* points to the legislature. Waiting for the Court of Appeals to do it seems fruitless. One only has to glance at the majority opinion in *Holterman v. Holterman, supra*, where the court rigidly stuck with *O'Brien* while reading the CSSA in such a way as to validate "double dipping."[35] It is clear that the Court of Appeals is firmly wedded to the *O'Brien* rule. The only hope is remedial legislation.

In a season when New York has finally emerged from the lonely cocoon of marital fault and joined the rest of the United States, it seems felicitous for the State to do the same with its other unique and problematic law. For example, our legislature might address the problem by adding at the end of DRL § 236-B(1)(c):

> Marital property shall also not include such personally held intangible assets as degrees, licenses, certificates, reputation, earning enhancements, or good will (unless attached to a tangible asset with market value).

To give courts more latitude in awarding maintenance in a situation such as *O'Brien*, DRL § 236-B(6)(c) could be amended to read:

> c. The court may award permanent maintenance, but an award of maintenance shall terminate upon the death of either party or, *unless the court orders otherwise upon stated reasons therefor*, upon the recipient's valid or invalid marriage....

Such a change would allow courts more latitude and security in awarding compensatory alimony.

In any case, the *O'Brien* rule has caused too many problems, too much injustice and wasted too much money. It is well past *O'Brien's* bedtime.

Endnotes

1. 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).
2. 3 N.Y.3d 1, 814 N.E.2d 765, 781 N.Y.S.2d 458 (2004).
3. 3 N.Y.3d at 24, 814 N.E.2d at 780, 781 N.Y.S.2d at 473.
4. *O'Brien v. O'Brien*, 66 N.Y.2d at 586, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.
5. 142 A.D.2d 355, 535 N.Y.S.2d 990 (2d Dept. 1988).
6. 176 A.D.2d 285, 574 N.Y.S.2d 385 (2d Dept. 1991).
7. 78 A.D.3d 887, 911 N.Y.S.2d 408 (2d Dept. 2010).
8. See also, *Schwartz v. Schwartz*, 67 A.D.3d 989, 890 N.Y.S.2d 71 (2d Dept. 2009) for a similar finding.
9. *Pino v. Pino*, 189 Misc.2d 331, 731 N.Y.S.2d 599 (Sup. Ct. Nassau Co. 2001).
10. 151 Misc.2d 737, 573 N.Y.S.2d 553 (Sup. Ct. Westchester Co. 1991).
11. 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986).
12. *Kuznetsov v. Kuznetsova*, 79 A.D.3d 974, 913 N.Y.S.2d 325 (2d Dept. 2010).
13. 139 Misc.2d 440, 527 N.Y.S.2d 946 (Sup. Ct. N.Y. Co. 1988).
14. 139 Misc.2d at 446, 527 N.Y.S.2d at 950.
15. *Finocchio v. Finocchio*, 162 A.D.2d 1044, 1045, 556 N.Y.S.2d 1007, 1009 (4th Dept. 1990) (emphasis supplied).
16. *Elkus v. Elkus*, 169 A.D.2d 134, 572 N.Y.S.2d 901 (1st Dept. 1991).
17. *Hougie v. Hougie*, 261 A.D.2d 161, 689 N.Y.S.2d 490 (1st Dept. 1999).
18. *Moll v. Moll*, 187 Misc.2d 770, 722 N.Y.S.2d 732 (Sup. Ct. Monroe Co. 2001).
19. 187 Misc.2d at 774-5, 722 N.Y.S.2d at 735.
20. *Spreitzer v. Spreitzer*, 40 A.D. 3d 840, 837 N.Y.S. 2d 658 (2d Dept. 2007).
21. *Hougie v. Hougie, supra*. Similarly such licenses were said to be subject to equitable distribution in *Haspel v. Haspel*, *supra* and *Schwartz v. Schwartz, supra*.
22. 66 N.Y.2d at 591, 489 N.E.2d at 720, 498 N.Y.S.2d at 751.
23. *Drapek v. Drapek*, 399 Mass. 240, 244, 503 N.E.2d 946, 949 (1987).
24. 91 N.J. 488, 497, 453 A.2d 527, 532 (Sup. Ct. N.J. 1982).
25. *Olar v. Olar*, 747 P.2d 676, 680 (Sup. Ct. Colorado 1987).
26. *See*, for example, *Gandhi v. Gandhi*, 283 A.D.2d 782, 724 N.Y.S.2d 541 (3d Dept. 2001); *Vora v. Vora*, 268 A.D.2d 470, 702 N.Y.S.2d 343 (2d Dept. 2000).
27. *See, Fruchter v. Fruchter*, 29 A.D.3d 942, 816 N.Y.S.2d 525 (2d Dept. 2006); *Spence v. Spence*, 287 A.D.2d 447, 731 N.Y.S.2d 66 (2d Dept. 2001); *Kyle v. Kyle*, 156 A.D.2d 508, 548 N.Y.S.2d 781 (2d Dept. 1989).
28. *West v. West*, 213 A.D.2d 1025, 625 N.Y.S.2d 116 (4th Dept. 1995).
29. *J.C. v. S.C.*, NYLJ, 10/31/2003, 20 (col. 1).
30. *Id*.
31. *See*, for example, *McAuliffe v. McAuliffe*, 70 A.D.3d 1129, 895 N.Y.S.2d 228 (3d Dept. 2010); *Kriftcher v. Kriftcher*, 59 A.D.3d 392, 874 N.Y.S.2d 153 (2d Dept. 2009); *Higgins v. Higgins*, 50 A.D.3d 852, 857 N.Y.S.2d 171 (2d Dept. 2008); *Martinson v. Martinson*, 32 A.D.3d 1276, 821 N.Y.S.2d 537 (4th Dept. 2006); *Cabeche v. Cebeche*, 10 A.D.3d 441, 780 N.Y.S.2d 909 (2d Dept. 2004); *Miklos v. Miklos*, 9 A.D.3d 397, 780 N.Y.S.2d 622 (2d Dept. 2004); *Farrell v. Cleary-Farrell*, 306 A.D.2d 597, 761 N.Y.S.2d 357 (3d Dept. 2003); *Brough v. Brough*, 285 A.D.2d 913, 727 N.Y.S.2d 555 (3d Dept. 2001).
32. 154 Vt. 161, 574 A.2d 156 (Sup. Ct. Vermont 1990).
33. 154 Vt. at 166, 574 A.2d at 159.
34. *Olar v. Olar*, 747 P.2d at 680.
35. *See also, Keane v. Keane*, 8 N.Y.3d 115, 861 N.E.2d 98, 828 N.Y.S.2d 283 (2006), where the court made an untenable distinction while adamantly adhering to *O'Brien*.

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This article originally appeared in the Fall 2011 issue of the Family Law Review, *published by the Family Law Section of the New York State Bar Association.*

Medicaid Expands Definition of "Estate" for Recovery Purposes

By Anthony J. Enea

The following is the first of a two-part article. Pursuant to 42 U.S.C. 1396p (b)(4)(A) the definition of "estate" for the recovery of Medicaid properly paid includes all real and personal property and other assets of the decedent as defined for purposes of State probate law.[1] Additionally, at the option of the States, the definition of "estate" can include any other real and personal property (and other assets) in which the decedent had any legal title or interest in at the time of death (to the extent of said interest). The States, at their option, can include such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy-in-common, life estate, living trust or other arrangement.[2]

As part of the recommendations made by the Medicaid Redesign Team appointed by Governor Andrew Cuomo, the legislature amended 360-7.11(d) of the N.Y.C.R.R. by adding new paragraphs (7) (8) and (9) on April 1, 2011, *subject to* the promulgation of regulations by the N.Y.S. Dept. of Health.[3] Pursuant to this new legislation, the definition of "estate" was expanded to include any property in which the individual has any legal title or beneficial interest at the time of death, including jointly held property, retained life estate, beneficial interest in a trust to the extent of such interest. However, the claim against the recipient of property received by descent, distribution, or survival shall be limited to the value of the property received by the recipient and in no events greater than the Medicaid benefits otherwise recoverable.

Since April 1, 2011, the elder law bar has been waiting for the Department of Health to promulgate the implementing regulations. On June 21, 2011 the Department of Health issued State Plan Amendment transmittal # 11-42 to Title XIX attachment 4.17 A: Page 1.[4] The Governor's office reported no comment to transmittal # 11-42. While as of the date of this writing, the Regulation has not yet been officially promulgated, the aforesaid transmittal # 11-42 provides the best view of the regulation we have been awaiting. If it is not, or is modified in any way, I will report same in the second part of this article.

Pursuant to transmittal # 11-42, the term "estate" for Medicaid recovery purposes is defined to include all real and personal property and other assets included within the Medicaid recipient's estate and passing pursuant to the terms of a valid Last Will or by intestacy.[5] It also includes any other property in which the individual has any legal title or beneficial interest at the time of death including jointly held property, retained life estates and beneficial interests in trusts, to the extent of such beneficial interest. However, the claim against the recipient of such property by descent distribution or survival shall be limited to the value of the property received by the recipient and in no event greater than the amount of medical assistance benefits otherwise receivable, whichever is less.[6]

Interestingly, Transmittal # 11-42 also defines what is not part of the Medicaid recipient's "estate" for recovery purposes. For example: (a) interests in real or personal property, irrevocable trust, life estate or joint interest where the transfer or conveyance was made prior to the adoption of the regulation or within 60 days thereafter or where the interest was held prior to adoption of the regulation, except those assets included within the individuals probate estate and passing under the terms of a valid Will or by intestacy; (b) an irrevocable trust where the recipient has no interest in the principal of the trust, but only a right to income or the right to the use of trust property. However, if such individual has the right to trust income, the individual's estate shall include any trust income that has not yet been distributed on the date of death of such individual; (c) any beneficial interest in any trust or life estate created by someone other than the individual, a life estate purchased for consideration by the individual, or a retained life estate owned by the individual as of his or her death; (d) any beneficial interest created in a Special Needs Trust (except first party trusts with payback provisions); (e) any beneficial interest in a pension plan, IRA's, 401(k), 403(b), 457 plans or any work-related pension plan for self-employed such as Keogh plans, except to the extent that an individual's estate is the beneficiary of such account or plan; (f) any beneficial interest in a life insurance policy and/or annuity payable to anyone other than the individual or his or her estate, (g) any remainder interest in real property owned by a person other than the individual Medicaid recipient; (h) any power that is not a beneficial interest, including, but not limited to, a limited power of appointment, power to substitute property of equivalent value or other grantor trust powers under Sections 671 through 679 of the IRC which are not beneficial interests; (i) any jointly owned bank account to the extent of the surviving joint owner's verifiable deposits thereto; and (j) any jointly owned securities account to the extent of the surviving joint owner per capita share thereof.[7]

Additionally, within 30 days of receipt of a written notice of death from the representative of the estate of a Medicaid recipient or any party with an interest in the estate, the Department of Health shall file a Notice of Claim or Waiver of Claim upon the estate. If the Department of Health fails to file a Notice of Claim within 30 days, this failure to do so shall constitute a waiver.[8]

From the above stated it is clear that the use of retained life estate, revocable living trusts and retaining title to real property jointly will not be able to shield a Medicaid recipient from the claims for Medicaid paid. It's also clear that the use of an Irrevocable Income Only Trust continues to remain a viable long-term care planning tool. Whether or not any further changes to the proposed Regulations will be made remains to be seen. It is also anticipated that litigation challenging the legislation and regulations may be forthcoming.

In the second part of the article I will address the planning options available in light of the new legislation and its implementing regulations as well as bringing you up to date on any changes in the regulation.

Editor's Note: since the article's submission date, the New York State Department of Health has issued new regulations. The author will address these new regulations in a second article.

Endnotes

1. 42 U.S.C. § 1396p (b)(4)(A) (2006).
2. *See id.* § 1396p (b)(4)(B).
3. *See* N.Y.S. 2809, 234th Sess, (2011) (amending N.Y. Soc. Serv. § 369, N.Y. Comp. Codes, Rules & Regs. § 360-7.11 (2011)) (emphasis added) (harmonizing the definition of "estate" in each statute).
4. Amendment #11-42 to the Title XIX Medicaid State Plan, N.Y.S. Dept't of Health (June 21, 2011), http://www.health.state.ny.us/regulations/state_plans/status/coverage/original/docs/os_2011-06-21_spa_11-42.pdf.
5. *Id.*
6. *Id.*
7. *Id.*
8. *See supra* note 3.

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This article originally appeared in the Winter 2012 issue of the N.Y. Real Property Law Journal, *published by the Real Property Law Section of the New York State Bar Association.*

Urban Chickens—Neighbors Cry "FOWL!"

By Lisa M. Cobb

In September 2009, the *New Yorker* magazine published an article by Susan Orlean about raising backyard chickens entitled "The It Bird."[1] The article describes Ms. Orlean's personal journey to owning chickens but also provides interesting background information on the backyard chicken movement.

Among other things, the article describes the founding of the McMurray Hatchery which Ms. Orlean described in 2009 as "the largest rare-breed poultry hatchery in the world." The McMurray Hatchery caters to people with backyard flocks, evidencing the growing importance of this trend. In 1917, Murray McMurray (no [*sic*] required) was a banker who sold chickens out of the back of the bank as a hobby. When the Depression hit, the banking business was in trouble but the chicken business soared. Ms. Orlean quotes the president of the company, Bud Wood, as saying: "When times are tough, people want chickens."

Which brings us to today. Times are tough and people want chickens.

The Grassroots Movement: "Give Peeps a Chance"

One of the more interesting aspects of many of the websites devoted to backyard chicken-keeping was the advice on how to have local laws changed to allow the keeping of fowl in a municipality. For example, an article on "So Po Chickens" (for South Portland, Maine) offers a link to the materials they used in their 2007 campaign to legalize urban chicken-keeping:[2] The pro-chicken FAQs page of their website asserts that hens are typically more quiet than dogs and that, unlike dogs and cats which can carry ticks, chickens eat ticks and mosquitoes.

The challenge for municipal attorneys and planners is to parse the vast amounts of available information and misinformation to make reasoned decisions about the optimal regulation of chickens,[3] should the governing body choose to permit them. This article reviews existing laws and offers guidance toward that end.

Municipal Budget Concerns

In the current economic climate, particularly in light of the recently enacted municipal budget cap in New York, added levels of complexity exist, including the cost of evaluating a proposed law prior to its enactment and the cost of monitoring the chicken-keepers if a law is enacted.

At least one municipality has banned the keeping of chickens in part because the city council concluded that it would be too expensive to enforce the ordinance. In January 2011, the officials of Springville, Utah, voted against a proposal that would have allowed the keeping of chickens in the city.[4] Two neighboring communities already allowed the residential coops, and "several" citizens of Springville wanted the same opportunity.[5] Springville had a planning commission review the proposal and its members expressed two concerns: cost and pests.[6] The city council agreed, and voted 3-1 not to enact the ordinance that would permit the keeping of chickens.[7]

In Riverdale, Utah, the city council also had a planning commission review the proposed chicken ordinance. Like the other, this commission also was not in favor of the idea, citing the "threat" of having farm animals in a residential neighborhood.[8] I am not aware of many municipalities in New York that have the available resources to form and fund a commission to parse through the often anecdotal evidence concerning, for example, the noise or smell associated with the keeping of chickens. If such a commission already exists in the municipality, it probably has bigger chickens to fry, and will choose to spend its resources on more pressing concerns.

The suggestions below offer examples for streamlining the process of adopting local ordinances to regulate the potential problems of backyard chicken-keeping.

Proponents and Opponents

Those in favor of keeping chickens cite the fresh eggs (reputed to be higher in nutrients and better tasting than store-bought), the free, eco-friendly fertilizer, the "green" weed and bug control, and the entertainment value. The 2007 book *The 100-Mile Diet: A Year of Eating Loca*l by Canadian writers Alisa Smith and J.B. MacKinnon describes the growing preference for eating food grown locally.[9] Owning laying hens allows someone to add a local source of protein to his or her diet without having to kill it first.

Those opposed to the trend of allowing "farm" animals such as chickens in non-farm zoning districts cite noise and smell, the concerns that unwanted predators such as coyotes and foxes will be attracted to the neighborhood, and the fear pests such as mice will be attracted to the coops. Opponents of permitting chickens to be kept in residential zones also fear that having chicken coops in their neighborhoods will decrease their property values. They also cite the "slippery slope" of allowing farm animals into residential neighborhoods: chickens today, pot belly pigs and goats on the front lawn tomorrow. The phrase "Beverly Hillbillies" was used more than once by opponents of the enactment of various chicken ordinances.

The mandate for municipal legislators is to balance the desires and rights of all property owners to achieve the optimal use of the land for all concerned. When it comes to keeping chickens, there are as many viewpoints as there are breeds.

Chicken Ordinances—Does Your Municipality Need One?

As Patty Salkin correctly noted in her article entitled "Feeding the Locavores, One Chicken at a Time: Regulating Backyard Chickens,"[10] there exists little state or federal regulation of the keeping of chickens by individuals on their property for their personal use. The regulation of whether, where and how many chickens may be kept by property owners for their own use has been left largely to the local municipalities.

One doctoral student who did her dissertation on people's attitudes about urban livestock surveyed the zoning codes of American cities and concluded that cities are much more tolerant of domestic livestock than suburbs.[11] That trend is not evident in New York. Interestingly, New York City permits the keeping of any number of chickens while the cities of Albany, Amsterdam, Middletown, Plattsburgh and Syracuse currently ban the practice entirely.[12] In fact, the Albany ordinance proclaims that the purpose of the regulations relating to "farm animals and fowl" is to "protect the residents of the City of Albany from nuisance by animals usually known as farm animals or fowl.[13] The keeping or harboring of farm animals within the City of Albany is incompatible with urban life."[14] Any person violating this provision is subject to a maximum fine of $315.00.[15]

In New York City, a permit is required to keep "poultry" or rabbits for sale, and they must not be allowed to roam at large.[16] The coop must be whitewashed or "treated in a manner approved by the Department" (of Health) at least once per year, and "shall be kept clean."[17] However, no regulations whatsoever were found for poultry that is not kept for sale other than a ban on the keeping of roosters more than four months old. This means that backyard chicken-keepers in New York City may keep as many hens as they choose, wherever they choose, in whatever they choose, provided that the chickens do not become a nuisance.

Regulating Chickens Under Nuisance Laws

Many municipalities such as New York City do not regulate the details of keeping of poultry in urban areas; rather, they seek only to ensure that the practice does not constitute a nuisance. Interestingly, only one of the ordinances that I found addressing the keeping of chickens was located in the municipality's property maintenance code. The majority of the others were under the generic heading "Animals" in the code book, often lumped together with the laws on keeping dogs.

In the Town of Islip, the ordinance generally provides that "[a]ny person may keep, maintain, or house poultry, provided that such poultry does not constitute a nuisance or create a hazard to public health."[18] In one of the broader definitions, "poultry" is defined in the code as including "chickens, turkey, geese, ducks, pheasant or other domestically-maintained fowl."[19] However, the ordinance then specifies precisely what constitutes a nuisance, including how many fowl may be kept, where, how their food will be stored, etc. The specifics of these provisions are discussed in more detail below. The Town of Huntington similarly mandates that the birds not be a nuisance, but then specifies additional requirements for their care and maintenance.[20]

During a city council meeting in Riverdale, Utah in February 2011, the city attorney pointed out that, under the current law, chickens were neither expressly permitted nor prohibited. After a heated debate with several viewpoints represented both by residents of the city and members of the City Council, the Council decided not to enact the proposed chicken ordinance, concluding that their existing nuisance laws adequately addressed the chicken situation, at least for the time being.[21] This result appears to be as much a function of not wanting to alienate any portion of the constituency as a belief that the current ordinance was sufficient. Regardless of the reason, the examination of a municipality's existing nuisance provisions is a good first step in determining what additional regulation might be required, if any.

The City of Rochester prohibits as a nuisance only the accumulation of feces on the property, mandating that the feces of all animals not create a nuisance, attract insects or animals, or facilitate the spread of disease.[22] It does not address any other possible nuisance issues, such as the noise created by the hens. A more encompassing nuisance ordinance would be preferable.

The City of Beacon Code expressly grants to the Dog Control Officer the power to abate nuisances arising from the keeping of chickens and provides that the Dutchess County Department of Health shall be the sole judge as to whether coops shall require cleaning or disinfecting.[23] If your governing body chooses to enact an ordinance, review your municipality's code to ensure that someone actually has the authority to enforce the new provisions. If the power is not presently there, grant it.

It also would be beneficial for the consultants to the municipal governing body to review the penalties associated with a determination that a particular group of chickens constitutes a nuisance. Penalties in the existing chicken laws ranged from $25.00 to $1,000.00 per offense. Unless the punishment is sufficient to deter the unwanted practice, the cost of enforcing the law may outweigh any benefit therefrom. Attention also should be paid to the continuing nature of the offense, such that penalties accrue for each day that the violation continues unabated after notice. The Saratoga Springs Code at § 101-22 provides an example of a continuing offense.

If Your Municipality Decided to Enact Such an Ordinance, What Should It Include?

A Bird of a Different Color

An initial determination should be made concerning what types of birds will be regulated by the ordinance, and how they will be referenced. If the ordinance is to apply only to chickens, no more need be said. But many municipalities regulate turkey, geese, guinea hens and other birds as well. The definitions of "fowl" and "poultry" in the various ordinances differ widely. In addition, some municipalities regulate "livestock" or "farm animals" and expressly include or exclude various birds.

The majority of the ordinances reviewed for this article differentiate between roosters and hens, prohibiting the former and permitting the latter, for obvious reasons. The sound of a 4 a.m. wakeup call from a rooster travels farther and is more likely to be found to be a nuisance than that of a laying hen. In New York City, for example, roosters (and ducks, geese and turkeys) are banned from the "built-up portion of the City."[24] While this phrasing leaves room for debate concerning whether a particular section of the City is "built-up," most areas likely would fall within this definition, thus effectively banning roosters from the five boroughs, with the noteworthy exception of Decker Farms on Staten Island. In Saratoga Springs, no person shall harbor a crowing cock, the crowing of which disturbs neighbors between the hours from 12:00 midnight to 7:00 a.m. In my limited experience with roosters, they do not keep to such a tight schedule. An outright ban is probably easier and less costly to enforce, and the absence of a rooster does not impact upon a hen's ability to lay eggs.

Distance from Buildings or Lot Lines

Several ordinances regulate the distance that coops must be kept from property boundaries or buildings, or mandate that the location of the coop be in a rear yard.[25] In addition, in Huntington, the coop must be screened from the view of surrounding streets and residences.[26] In addition to aesthetics, these requirements help to insure that any unwanted noise or odor is not observed on adjacent properties.

In New York City, no permit for the keeping of chickens (for sale) will be issued unless the coops and runways are more than 25 feet from an inhabited building, unless the building is a single-family residence occupied by the applicant seeking the permit or the applicant submits the written consent of the owner of the lot on which the poultry are to be kept.[27] Similarly, in Buffalo, chickens shall not be kept less than 20 feet from any door or window of a dwelling other than the applicant's dwelling.[28]

Proponents of keeping chickens complain that a substantial setback requirement will significantly decrease the number of properties that contain sufficient room to put a coop. As chickens are not native to urban environments, this restriction does not seem unreasonable. In addition, as with other setback requirements, variances may be sought. That process allows neighbors to express their concerns and zoning boards to impose any necessary conditions.

In my opinion, setting the minimum distance from a neighbor's property, and / or requiring screening is justified both aesthetically and for quiet enjoyment purposes. I submit, however, that an applicant should not be barred from keeping fowl because, due to the size or configuration of the lot, the coop would be located too close to the *applicant's* dwelling. That should be a choice left up to the applicant.

As a final note on this point, some municipalities in other states have "permitted" no chickens, by requiring that any chickens be kept at least 150 feet, or in one case, at least 300 feet, from any residence, a mandate that excludes most, if not all lots in these urban areas.[29] In these times of fiscal conservatism, the time and money spent enacting a permissive prohibition could be put to better use.

Noise

If noise is the concern, then limiting the number of hens and barring roosters entirely should alleviate that concern. In addition, the setback requirements discussed will help to alleviate unwanted noise from traveling beyond property boundaries. In Islip, no noise is permitted to be heard beyond the property line between the hours of 11 p.m. and 7 a.m.[30] The Binghamton Code provides that no "disturbing" noise is permitted beyond the property line at any time.[31] Both of these approaches should appease neighbors with concerns about the noise of the flock, and prevent the housing of birds where the property is too small to insure that the neighbors are not disturbed.

Regulating the Number of Chickens That May Be Kept

In Saratoga Springs, as in New York City, there is no limit on the number of fowl that may be kept, only the requirement that they not be permitted to "run at large."[32] In Huntington, owners may keep up to eight "chickens or ducks or any combination thereof."[33] In Buffalo, it is five chickens[34] and in Binghamton it is four chickens or rabbits.[35]

The determination of whether to establish a maximum number of birds or a maximum amount of space to be devoted to these animals must be analyzed on a municipality-by-municipality basis. The determination is a function of the type, size and nature of the properties in the municipality.

Regulating for the Good of the Chickens

Other ordinances take a more "pro-chicken" approach by mandating minimum square footage per chicken. In the City of Rochester, for example, not more than 30 fowl may be kept in an open area of 240 square feet.[36] In Islip, no more than 15 birds may be maintained for every 500 square feet of rear yard space being used for the keeping of poultry.[37] In Huntington, the requirement is for not less than 2 square feet and not more than 5 square feet of floor space per bird.[38] Again, this analysis should be undertaken in light of the type, size and nature of the properties in the municipality and is not subject to a hard and fast rule.

Keeping Chickens "Cooped Up"

Several ordinances mandate that the chickens be kept either in enclosed yards, with clipped wings so that they cannot escape the enclosure, or in enclosed coops and runways. The City of White Plains mandates that fowl be "securely enclosed in such a manner as to prevent them from straying from the premises of the person owning them."[39] The penalty for violating this ordinance is $25 per occurrence.[40] In Islip, poultry is required to be confined to the premises on which its owner resides.[41] In addition, each structure housing poultry is classified as an accessory building requiring a building permit.[42]

These provisions are easily enforceable and help to insure that the birds do not become a nuisance to neighbors. Another advantage of this requirement is less readily apparent. In one municipality, a complaint against the purported owners of the chickens was dismissed for failure to assert and prove the required element of ownership. It could not conclusively be determined by the evidence before the Court that the chickens belonged to the individuals charged. Requiring that the chickens be maintained in an enclosure potentially eliminates this issue.

If predators such as coyotes and foxes are the concern, then keeping the chickens in an enclosed structure is an obvious response. However, drafters should note that the imposition of this requirement would eliminate two of the benefits sought by many chicken owners, namely weed control and garden pest control. Requiring that the chickens be kept in an enclosed area such as a fenced-in yard offers a compromise position. Again, this determination should be made on a municipality-by-municipality basis, with the optimal outcome being a solution that adequately addresses the concerns of those on both sides of the fence.

Smell/Sanitation

The City of Rochester requires that "[a]ll coops, runways and premises where fowl are kept shall be at all times clean and sanitary."[43] The Code also requires that "[a]ll premises where fowl are kept shall at all times be subject to inspection.…"[44] However, the code does not specify the frequency of cleaning required.

Similarly, the Beacon City Code mandates that flocks shall be kept in "suitable" coops "properly cleaned."[45] This approach makes the enactment of the ordinance easier but its enforcement more subjective and therefore more difficult.

In contrast, in Islip, "[t]he area in which poultry are kept shall be cleaned regularly (at least once each day) and shall always be maintained in a sanitary condition."[46] Similarly, in Huntington, the coops are required to "be cleaned once each day and maintained in a sanitary condition."

The "fowl" odor associated with chicken coops is the most frequent objection I have heard to permitting this use in residential neighborhoods. Backyard chicken supporters claim that their coops are cleaned on a sufficiently regular basis so that this is not a problem.

Municipal budgets being what they are, requiring regular inspections of chicken coops, whether annual or at other intervals, may not be feasible. But neighbors being what *they* are, a truly odiferous coop is likely to be reported. It is difficult to conceive of a cost-effective policing mechanism for determining whether a coop is being cleaned on a daily or frequent basis, but any accumulation of dirt and feces would be a good indication that it is not. The requirement that inspections be permitted is a good enforcement tool as well as a possible deterrent to lax cleaning habits.

The Saratoga Springs Code has an interesting provision relating to the keeping of swine that could be of benefit to the drafters of chicken ordinances. In that municipality, odors from a swine enclosure offensive to passers-by or neighbors "shall be presumptive evidence of the unsanitary condition" of the enclosure.[47]

Some municipalities require that the coops be "whitewashed" on a periodic basis. This assumes that the coops are made of wood or other material that may be whitewashed. With the advent of dyed plastic coops,[48] and the increasing use of other materials for the pens, a better practice would be to simply mandate that the coop be cleaned, disinfected and maintained on a regular basis.

Neighbor Consent

Some ordinances require the consent of the neighbors to the keeping of fowl.[49] I generally am not in favor of this approach, as it may have more to do with the popularity (or lack thereof) of the individual seeking to keep the birds than it does with responsible planning practices. However, Buffalo also requires the consent of all residents of multi-family buildings and duplexes, and all tenants in the building other than the applicant. This requirement is critical as it gives a voice to those who would be living on the same lot with the birds.

Exceptions

In discussions on the topic, in municipalities that did not permit the keeping of any chickens, exceptions were sought for the keeping of fowl for certain purposes, such as 4-H competitions. No ordinances were found that contained this exception, unless such competitions are encompassed within an educational use. For example, in the City of Albany, an exception is made from the outright ban on fowl for not-for-profit organizations, upon proof that the farm animals are being kept for educational purposes "in such a manner so as to not disturb the health and safety of the surrounding neighborhood."[50]

Food Storage

Finally, the requirement that feed be stored in metal or rodent-proof containers should be included in every ordinance.[51] The benefit of this action to the community significantly outweighs the minimal cost to the owner of the fowl. The requirements contained in the Buffalo ordinance are unusual in their specificity. They mandate that the food be kept in fastened containers, opened only during feeding time and immediately closed thereafter, and ban the practice of scattering feed on the ground, requiring the chickens to eat out of a trough.[52] Again, each municipality should determine whether this level of detail is required within its boundaries.

Accessory Use, Special Use Permit, or Other Permit or License?

Depending upon the scope of the regulation that is enacted, some level of review by the municipality is probably called for prior to permitting the use to commence.

If a municipality has chosen to enact an all-encompassing chicken law, such that every concern is regulated, then making the use an as-of-right accessory use may be warranted. In that situation, the municipality has undertaken a comprehensive review of all potential situations, making further review of each specific situation unnecessary.

In the absence of such a global ordinance, then review of applications by either the code enforcement officer or a municipal board is warranted. The determination of what individual or entity that will undertake the review is impacted by the municipality's budget and past practices.

Some municipalities require that a Special Use Permit be obtained before the use can commence. This avenue allows review by the municipal board, usually either the Planning Board or the Zoning Board of Appeals, that is tasked with the review of such applications, and has the added advantage that neighbors are often required to be notified of the application, thereby giving them a forum in which to express their concerns.

But not every municipality will want board involvement prior to allowing the keeping of a chicken. If review by a code enforcement officer is preferred to board review, then requiring a building permit for the installation of a coop, or requiring a permit for the keeping of any chickens, becomes an attractive alternative. Both Special Use Permits as well as building or other permits have the added benefits of advising the municipality, in advance, of the proposed chicken use as well as generating additional fees for the municipality. In addition, requiring the periodic renewal of permits offers a built-in opportunity for the municipality to review the condition of the coop and the complaints of neighbors, if any.

Buffalo requires a license before one can keep chickens. As part of the licensing process, all property owners within 50 feet of the applicant's property are notified of the pending application.[53] If written comments are received in opposition to the application, it must be forwarded to the Common Council for review and approval.[54] Buffalo also requires inspection by the Office of Animal Control following the issuance of license.[55] The licenses are renewed annually.[56]

As with any other application, perhaps more so in this case, if the applicant is not the owner of the property, the written consent of the owner for keeping the fowl should be required to be submitted with the application.[57]

Endnotes

1. Susan Orlean, *The It Bird*, The New Yorker, Sept. 28, 2009, *available at* http://www.newyorker.com/reporting/2009/09/28/090928fa_fact_orlean (last visited December 8, 2011).
2. So Po Chickens, *available at* http://www.sailzora.com/SoPoChickens.htm (last visited December 8, 2011).
3. For the most part, this article is limited to the keeping of chickens, which are included in the definition of "poultry" in some municipalities and in others simply as "fowl."
4. *See No Backyard Chickens for Springville Residents*, The Associated Press (2011) *available at* http://www1.whdh.com/news /articles/bizarre/12003379711615/no-backyard-chickens-for-springville-residents/ (last visited December 8, 2011).
5. *Id.*
6. *Id.*
7. *Id.*
8. *See* Katie M. Ellis, *Riverdale Can't Decide if Home is Where the Hen Is* (Jan. 20, 2011) *available at* http://www.standard.net/topics/city-government/2011/01/20/riverdale-cant-decide-if-home-where-hen (last visited December 8, 2011).
9. *See,* Alisa Smith, J.B. MacKinnon, *The 100-Mile Diet* (2007).
10. *See,* Patricia E. Salkin, *Feeding the Locavores, One Chicken at a Time: Regulating Backyard Chickens*, 34 Zoning & Plan. L. Rep. 1 (2011).
11. Peter Applebome, *Envisioning the End of 'Don't Cluck, Don't Tell'*, The N.Y. Times (April 29, 2009), at A21, *available at* http://www.nytimes.com/2009/04/30/ nyregion/ 30towns.html?ref=nyregion (last visited December 8, 2011).
12. *See* Backyardchickens.com, *available at* www.backyardchickens.com/laws (last visited December 8, 2011).
13. City of Albany, N.Y., Code § 115-30.
14. *Id.*
15. *Id.* at § 115-33.
16. New York City, Health Code § 161.19.
17. *Id.*
18. Town of Islip, N.Y., Code § 12-31.
19. *Id.* at § 12-32.
20. Town of Huntington, N.Y., Code § 78-25.
21. *See* City of Riverdale, UT, *Minutes of Regular Meeting of the Riverdale City Council* (February 1, 2011) *available at* http://

www.riverdalecity.com/meetings_events/meetings/council/minutes/2011/020111cc_min.pdf (last visited December 8, 2011).

22. City of Rochester, N.Y., Code § 30-34.

23. City of Beacon, N.Y., Code § 99-7.

24. City of New York, Health Code § 161.19.

25. Town of Islip, N.Y., Code § 12-33 (must be kept in rear yard); Town of Huntington, N.Y., Code § 78-25 (must comply with setback and side-yard requirements); City of Beacon, N.Y., Code § 99-6 (not less than 15 feet from the nearest dwelling); City of Buffalo, N.Y., Code §§ 341-11.1, 341-11.2 (rear or backyard, and at least 20 feet from any door or window, but only 18 inches from the rear property line.).

26. Town of Huntington, N.Y., Code § 78-25.

27. New York City, Health Code § 161.09.

28. City of Buffalo, N.Y., Code § 341-11.2.

29. *See*, William C. Singleton III, *Homewood Hens Fly the Coop, Move to Shelby County*,The Birmingham News (July 7, 2010) *available at* http://blog.al.com/spotnews/2010/07/homewood_hens_fly_the_coop_mov.html (last visited December 7, 2011).

30. Town of Islip, N.Y., Code § 12-33.

31. City of Binghamton, N.Y., Code § 410-19.

32. City of Saratoga Springs, N.Y., Code § 101-19.

33. Town of Huntington, N.Y., Code § 78-25.

34. City of Buffalo, N.Y., Code § 341-11-1(A).

35. City of Binghamton, N.Y., Code § 410-19(C).

36. City of Rochester, N.Y., Code § 30-19(C).

37. Town of Islip, N.Y., Code § 12-33.

38. Town of Huntington, N.Y., Code § 78-25.

39. City of White Plains, N.Y., Code § 5-2-1.

40. *Id.*

41. Town of Islip, N.Y., Code § 12-33.

42. *Id.*; *Accord* Town of Huntington, N.Y., Code § 78-25; City of Binghamton, N.Y., Code § 178-2.

43. City of Rochester, N.Y., Code § 30-19(E).

44. *Id.* Please note that the author offers no opinion on the constitutionality of such provisions.

45. City of Beacon, N.Y., Code § 99-6.

46. Town of Islip, N.Y., Code § 12-33.

47. City of Saratoga Springs, N.Y., Code § 101-21.

48. S*ee, e.g.,* Chicken Houses and Beehives (2010) *available at* http://www.omlet.us/homepage (last visited December 8, 2011).

49. *See, e.g.,* City of Buffalo, N.Y., Code § 341-11-1 (requiring "the express written consent of all residents residing on property adjacent to that of the applicant.").

50. City of Albany, N.Y., Code § 115-32.

51. *See, e.g.,* Town of Islip, N.Y., Code § 12-33.

52. City of Buffalo, N.Y., Code § 341-11.3.

53. City of Buffalo, N.Y., Code § 341-11.4.

54. *Id.*

55. *Id.*

56. *Id.*

57. (The author sheepishly apologizes for the flock of animal references and puns in the preceding pages, pleading "herd mentality" as a defense, citing such erudite sources as Catherine Price, *"A Chicken on Every Plot, a Coop in Every Backyard,"* September 19, 2007, *available at* http://www.nytimes.com/2007/09/19/dining/19yard.html?pagewanted=all (last viewed on September 26, 2011), *and* Peter Applebome, *Envisioning the End of 'Don't Cluck, Don't Tell,* The N.Y. Times, April 29, 2009, at A21 *available at* http://www.nytimes.com/2009/04/30/nyregion/30towns.html?ref=nyregion (last viewed on September 26, 2011).

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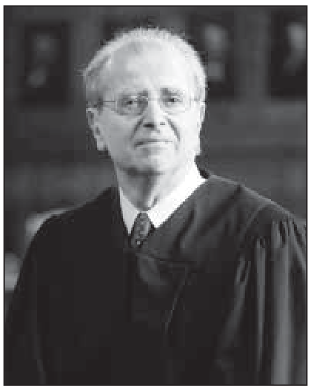
This article originally appeared in the Fall 2011 issue of the Municipal Lawyer, *published by the Municipal Law Section of the New York State Bar Association.*

A Personal Look at the New York Court of Appeals

By Spiros A. Tsimbinos

Although the New York Court of Appeals acts as one body when it issues its decisions, it is comprised of seven distinct individuals with their own personal backgrounds, characteristics and judicial philosophies. We present, for the benefit of our readers, a brief biographical sketch of each of the Judges currently on the Court. We begin with the Chief Judge and continue with the six Associate Judges listed in the order of their seniority on the Court.

Chief Judge Jonathan Lippman



Chief Judge Lippman was appointed to the New York Court of Appeals in 2009. He moved directly from being the Presiding Justice of the Appellate Division, First Department, into the New York Court of Appeals. He was appointed by then-Governor Paterson. Judge Lippman has served for many years within the New York State court system, having held various posts including Chief Administrative Judge. While on the Court, he has attempted to achieve a greater consensus among the Judges, but in many instances he has found himself among the minority, and for the 2010-2011 term he led the Court in the number of dissents, which amounted to 28. He is basically placed within the more liberal bloc of the Court, and usually votes together with Judges Ciparick and Jones. Judge Lippman is currently 66 years of age, with his term expiring in the year 2015. He is a graduate of New York University School of Law.

Judge Carmen Beauchamp Ciparick

Judge Ciparick is the Senior Associate Judge of the Court, serving since 1994 when she was first appointed by former Governor Cuomo. She is currently 69 years of age, and her current term will end in 2012. She is a graduate of St. John's University School of Law. Judge Ciparick grew up in Washington Heights and graduated from Hunter College in 1963. Prior to her elevation to the New York Court of Appeals she served on the New York City Criminal Court and then was elected to the New York Supreme Court in 1982. Judge Ciparick is also generally considered to be a member of the liberal bloc within the Court and to be somewhat more favorable to defense concerns in criminal law cases. During the past term, she issued 19 dissenting opinions and often voted together with Chief Judge Lippman and Judge Jones.

Judge Victoria A. Graffeo

Judge Graffeo was appointed by Governor Pataki and joined the Court in 2000. Her current term ends in 2014. She is currently 59 years of age and is the youngest member of the Court. Prior to her elevation to the New York Court of Appeals, Judge Graffeo held several governmental positions, including Solicitor General and as legislative counsel. She also served in the Supreme Court in the Third Judicial District and was an Associate Justice of the Appellate Division, Third Department. Judge Graffeo was born in Rockville Centre, New York and was educated in Schenectady. She is a graduate of Albany Law School. Judge Graffeo is basically included in the more conservative bloc of the New York Court of Appeals. She often votes together with Judge Read. During the last term, Judge Graffeo dissented in 12 cases.

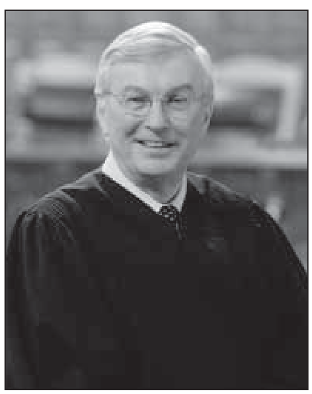
Judge Susan Phillips Read

Judge Read was appointed by former Governor Pataki and joined the Court in 2003. Her current term ends in 2017. She is currently 64 years of age. Prior to her appointment to the Court of Appeals, she served as the Presiding Judge of the New York State Court of Claims, and also served as Deputy Counsel to Governor Pataki from 1995 to 1997. She was born in Ohio and attended the University of Chicago Law School. She also engaged in the private practice of law from 1988 to 1994. Judge Read currently resides with her husband in West Sand Lake and Saratoga Springs, New York. Judge Read is also listed within the more conservative bloc of the Court and she often votes together with Judge Graffeo. During the past term, she issued 13 dissenting opinions.

Judge Robert S. Smith

Judge Smith joined the Court in 2003. He was appointed by Governor Pataki, and his term expires in 2014. He was born in New York City and grew up in Massachusetts and Connecticut. He is a graduate of Columbia Law School where he served as Editor in Chief of the *Law Review*. From 1968 to 2003, he practiced law in New York City with the firm of Paul, Weiss, Rifkind, Wharton & Garrison. He is currently 67 years of age and resides with his wife in New York City. He has three children and two grandchildren. Judge Smith moved directly from the private practice of law to the New York Court of Appeals, and had no prior judicial experience before his elevation to the Court. During his eight years of service on the Court, it has been difficult to place Judge Smith in either the liberal or conservative grouping, and he often takes an independent and contrary position from many of his colleagues. During the last term, he issued 23 dissenting opinions. He also must be considered one of the critical swing votes on the Court.

Judge Eugene F. Pigott, Jr.



Judge Pigott was appointed to the Court by former Governor Pataki, and has served on the Court since 2006. His current term expires in 2016. Judge Pigott is currently 65 years of age. He was born in Rochester, New York and practiced law in Buffalo for several years. He also previously served as Erie County Attorney. His prior judicial experience includes service on the New York State Supreme Court and as presiding Justice of the Appellate Division, Fourth Department. Judge Pigott is married, with two children, and he currently resides in Grand Island, New York. He is a graduate of Buffalo School of Law. Although Judge Pigott is also generally included within the more conservative grouping of the Court, he often pursues a more liberal and pro-defense position in criminal law matters, and is hard to pigeonhole in any one particular camp. He must be listed as one of the swing votes on the Court.

Judge Theodore T. Jones, Jr.

Judge Jones was appointed by former Governor Spitzer in 2007. His current term expires in 2015. Judge Jones was born in Brooklyn, New York and attended public schools in New York City. He is a graduate of St. John's University School of Law. After conducting a private practice for several years in Brooklyn, he was elected to the New York State Supreme Court in 1990. He eventually became the Administrative Judge for the civil term in Brooklyn, and in 2007, he began his current tenure on the New York Court of Appeals. Judge Jones is married and has two children. Judge Jones also has a distinguished military background, having served in Vietnam and having reached the rank of Captain in the United States Army. Judge Jones is placed by most observers within the liberal camp of the Court and currently appears to be one of the most pro-defense Judges with respect to criminal law decisions. During the last term, he issued 24 dissents, the second highest within the Court, many of which involve criminal law decisions. He brings to the Court a criminal law background, since he served for many years as a criminal defense attorney with the Legal Aid Society.

Conclusion

In a recent article in the *New York Law Journal* of August 18, 2011 summarizing the workings of the Court during the 2010-2011 term, Chief Judge Lippman is quoted as commenting, "It is a Court that is not predictable in any particular case. I think we often disagree but are never disagreeable with one another. It is a Court that I don't think is easy to label." Professor Vincent Bonventre, of Albany Law School, who often writes on the New York Court of Appeals, also is quoted as saying, "You have some really interesting personalities writing some very strong opinions." I hope that these brief snapshots of the seven interesting personalities who make up the New York Court of Appeals will lead to a better understanding of the Court by our readers.

This article originally appeared in the Winter 2012 issue of the New York Criminal Law Newsletter, *published by the Criminal Justice Section of the New York State Bar Association*.

The New York City Department of Investigation: A Century of Oversight

By Rose Gill Hearn

This article contains a description of the interesting work of the New York City Department of Investigation, my own experiences as Commissioner these past ten years having been appointed in 2002, and a broad range of reflections and experiences from several former commissioners and a former Mayor.

The purpose and role of the New York City Department of Investigation (DOI) is best understood from knowledge of its history. DOI was born from the corruption scandals that took place in the 1870s. The notorious New York City politician, William "Boss" Tweed, joined forces with other co-conspirators to manipulate the checks and balances in City government and skim millions of City taxpayer dollars. They engaged in bribery, inflated and skimmed from municipal projects, including the building of the Brooklyn Bridge.[1] The outrage over the Tweed ring's blatant fraud, which over a three-year period was estimated to have stolen more than $200 million, led officials to recognize they needed to establish an independent and robust oversight agency to investigate corruption—one that had the statutory powers to take on the City establishment without fear or favor.[2]

In 1873, the State legislature responded by establishing the Office of the Commissioner of Public Accounts, DOI's precursor, as the City's first watchdog created to protect the public's interest. The agency was given the investigative tools it needed to be effective, including subpoena power, the power to examine and remove any books and records of City's agencies, and the power to take testimony under oath.[3] The agency has expanded in size over the years and the name became the *Department of Investigation* in 1938.[4] Over its nearly 140-year history, the agency has evolved as the City has too, although DOI's core mandate remained to investigate fraud, waste and gross mismanagement within and affecting New York City government.[5]

DOI was established to serve the City and its taxpayers as a law enforcement agency that exposes and stops corruption-related crimes, and recovers stolen public funds. Indeed, today the Department recoups millions of taxpayer's dollars each year from its investigations. DOI also uses its role and knowledge of City government for deterrence. That is, DOI works with City agencies, sometimes in the wake of corruption arrests, to close corruption vulnerabilities exposed by DOI investigations. Additionally, in recent years, DOI established a comprehensive outreach and education program, conducting over 500 lectures each year at City agencies and with City contractors about their obligation to report corruption, and their ability to do so confidentially. As Commissioner, I have sought to raise the profile of the Department and conduct it in its tradition as an apolitical anti-corruption office. For the past several years people have contacted DOI in record-high numbers, suggesting the Department's presence has been elevated with the confidence that there will be no reprisal, i.e., last year over 13,000 people contacted DOI on a wide variety of matters. I have a professional, arm's-length relationship with Mayor Bloomberg who is very responsive and supportive of the mission of DOI.

DOI's jurisdictional scope covers all City agencies with the ability to initiate investigations wherever the facts may lead in City government. Given that City agencies are interconnected in many ways themselves, e.g., via budget funding, contracts, personnel and disciplinary rules, databases and substantive missions, DOI's ability to cut across agency lines and collect information, documents, and testimony greatly facilitates its investigations and effectiveness. DOI receives dozens of visiting officials from governments in other cities in the United States and abroad each year, and interestingly, this is because relatively few of them have a citywide anti-corruption agency. DOI hosted a best practices conference in 2008 with inspectors general, government representatives and academics from cities around the United States, to undertake a study of comparative statutory authority and procedures for combating municipal corruption. DOI found that it uniquely provides oversight to a large municipality, i.e., over 45 city agencies, hundreds of thousands of City employees and thousands of contractors.[6]

Former DOI Commissioner Susan E. Shepard, who led the agency from 1990 to 1994 with renowned independence and results, observed about DOI that "[t]he agency pays for itself—literally. With that scorecard, the mystery is why every major city doesn't have [a DOI]."[7]

DOI's multi-faceted approach to combating corruption, its wide-ranging docket of cases, and its staff of approximately 400, is made up of investigators, lawyers, forensic auditors, and computer experts. It refers its criminal findings to New York City's fine cadre of prosecutors—five District Attorneys, the State Attorney General, and the offices of United States Attorney in the Eastern and Southern Districts of New York. DOI's criminal investigations have led to nearly 7,900 arrests since Fiscal Year 1990, with nearly 5,000 of them occurring during my tenure. Those arrests include exposing large-scale corruption cases, such as the recent ongoing *CityTime* probe which found that the multimillion-dollar project to automate the City's timekeeping system was commandeered by fraudsters and consultants, as alleged in the indictment.[8] DOI's investigation of *CityTime* has so far led to charges against 11 defendants and one corporation, the seizing and / or freezing of approximately $50 million, and the return of $2.5 million to the City's coffers. Interestingly, it was the subpoena power imbued on DOI by its forefathers more than a century ago that helped the agency's forensic auditors follow a labyrinthine money trail in today's *CityTime* case and expose the kickback and money laundering schemes that the defendants are charged with concealing through layers of shell companies and sham transactions that reached as far away as India and Latvia.

Last year, DOI also exposed a complex day care fraud ring that reached into three City agencies and resulted in the shuttering of more than 20 day care centers due to safety violations, and nine convictions. The defendants were prosecuted for fraudulently obtaining more than $18 million in benefits intended to help needy families. Separately, investigators found an $8 million food stamp fraud that led to the arrest of four individuals, including two City employees. These notable results produced by the City's own anti-corruption agency would not have been possible in an agency lacking powerful legal authority, independence and support from the City administration.

How DOI has been able to accomplish so much success over the years was explained by former Commissioner Shepard. DOI is the "little agency that could," addressing two of law enforcement's most persistent challenges: how to detect misconduct and how to prevent it from happening again, according to Ms. Shepard. She correctly identifies DOI's great strength as rooted in the expertise of its Inspectors General (IGs) who are fluent in the operations, nomenclature, and inner workings of the City agencies they oversee, and have working relationships with agency employees, giving IGs the in-depth knowledge to identify and understand potential corruption issues in context. Ms. Shepard stated, "DOI embeds Inspectors General in City agencies where they learn the programs and how the agency works and develop relationships with agency employees." Explaining the multi-faceted nature of DOI's role in City government, former Commissioner Shepard added:

> Not surprisingly, Inspectors General are often the first ones to spot problems—and the best qualified to investigate them. At the same time, DOI has developed impressive corruption prevention tools and, with a supportive mayor, the clout to persuade agency commissioners to implement them. If you want to prevent crime, putting the bad guy in jail isn't enough. You have to change agency operational and administrative procedures that invite misconduct. DOI makes criminal cases, but it also has the expertise to develop internal controls which, had they been in place, might have prevented the misconduct in the first place.

That DOI can be effective and resonate within City government only if it is free from political capriciousness was not lost in the aftermath of the Tweed scandals when the agency was created, and subsequently on those who developed DOI's role over the years. The agency's early creators and those who followed ensured that DOI and its Commissioner were imbued with important checks and balances; thus, while the Mayor appoints the DOI Commissioner, the City Council must confirm that appointment, a distinctive feature that creates a safeguard against a Mayoral appointment meant to undermine agency independence.[9] With regard to dismissal of the DOI Commissioner, the Mayor would have to publicly file reasons for the termination, another statutory feature that reinforces DOI's mission to investigate anyone or anything City-related, all the way to the highest levels.[10]

Former DOI Commissioner Nicholas Scoppetta offered vivid recollections and his thought process on the running of DOI, having first been appointed by Mayor John V. Lindsay, and then subsequently reappointed by his successor, Mayor Abraham D. Beame. That was the first time in the City's history that an incoming Mayor reappointed his predecessor's Commissioner of Investigation. I consider that to be a testament to Mr. Scoppetta's caliber and integrity, because obviously Mayor Beame viewed him as the best person for the job, rather than someone else's appointee who should be replaced. Mr. Scoppetta stated that:

> Neither Mayor Lindsay, nor Mayor Beame, ever exerted any political pressure on my office to affect the progress or outcome of any investigation. Nor did either of them ever send me the resume of anyone with a direction that I hire that person. In other words, during my tenure I never felt the slightest suggestion that any of my official duties should be influenced by political considerations.[11]

Drawing on his prior experiences as a state and federal prosecutor and associate counsel for the *Knapp Commission* that famously investigated corruption in the New York City Police Department in the 1970s, Mr. Scoppetta stated that he tried to model DOI on those prior experiences he had gained from "thoroughly professional, independent offices."

Mr. Scoppetta further stated:

> My relationship with both Mayors I served under was excellent, though perhaps a little professionally distant. My way of meeting the statutory requirement that I report investigations and actions by DOI to the Mayor was to send over to the Mayor's office a draft copy of the press release announcing an arrest of a city official or a referral to a prosecutor's office. I did this the day before the arrest or referral. I cannot recall an instance in which City Hall made any substantive changes in any of those press releases.

Commissioners Shepard, Scoppetta and I were all prosecutors prior to our respective appointments as DOI Commissioner. As is still very much the case at DOI today, Mr. Scoppetta had close working relationships with area federal and state prosecutors who advance investigations to the next level by, for example, use of grand jury process, wiretaps and filing charges. Specifically, Mr. Scoppetta stated:

> The work of my office was greatly enhanced by partnerships forged with some of the District Attorneys and the two United States Attorneys in New York City. We made frequent and fruitful use of the prosecutor's authority to utilize electronic surveillance in connection with our undercover investigations. In one of those undercover investigations, we created a sham demolition company and had an undercover police officer take the exam for building inspector resulting in [the undercover's] appointment to [the position of building inspector]. That investigation, which stretched over more than 18 months, resulted in more than 100 indictments.[12]

DOI's role has been expanded and shaped by corruption experiences over the years. In the mid-1980s, after a number of corruption cases took place in the City, Mayor Edward I. Koch gave DOI additional legal authorities that strengthened the agency's investigative tools. By Executive Order in 1986, Mayor Koch dramatically changed DOI's composition and power. Up until that point, City agencies had their own internal IGs that reported to and discussed their dockets with the respective commissioners. Recognizing that this arrangement, in part, led to the proliferation of the municipal corruption scandals at several City agencies during his administration, Mayor Koch acted, removing the internal IGs from the City agencies and consolidating them under DOI's supervision. The Executive Order established DOI as the City's single agency to include all the IGs and their staffs, and mandated that all IGs report to the DOI Commissioner. In addition, the Executive Order reiterated that the newly expanded DOI had the discretion to conduct investigations in a confidential matter.

Mayor Koch's insights relating to DOI are grounded in his experiences:

> The role of DOI in New York City has been to constantly be looking to uncover fraud and incompetence, so as to make the government function better. The Mayor cannot depend on district attorneys and U.S. attorneys to constantly be examining city agencies for fraud and other dishonest practices. The DOI Commissioner has the essential assistance of Inspector Generals placed in each agency by DOI and is not dependent solely on whistleblowers. The latter, I believe are a major source of information for outside law enforcement authorities.
>
> I believe having a DOI is extremely important for the purpose of alerting the Mayor to problems early on. Success, of course, depends on the abilities of the Inspector Generals and the Commissioner of DOI. Mayor Bloomberg is being well served by DOI Commissioner Rose Gill Hearn.

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Former Commissioner Kevin Frawley served as DOI Commissioner from 1988 through 1990,[13] which was shortly after the *Parking Violations Bureau* corruption scandal that resulted in the federal conviction of Bronx Borough President Stanley Friedman, the suicide while under investigation of Queens Borough President Donald Manes and the convictions of several high-ranking appointed City officials. Mr. Frawley said:

> It was a tumultuous time in New York City government in the third term of Mayor Edward I. Koch's administration. The Mayor was devastated by the dishonesty that was uncovered in City government and was completely supportive of my work and that of my immediate predecessor, Kenneth Conboy. We worked even more closely and intensively than ever before with the FBI, US Attorneys, District Attorneys and New York State Attorney General.

During Mr. Frawley's tenure, numerous successful investigations were jointly and publicly announced "to ensure that citizens through the media could be assured that DOI and the City's government were committed to fighting corruption wherever it was uncovered." Moreover, Mr. Frawley echoed some of the thoughts provided by Mayor Koch about developments during the latter half of the 1980s, and the steps taken at DOI by Mayor Koch as a result. Mr. Frawley indicated:

> Major changes were recommended and implemented beginning in 1986, including substantial increases in funding for new

> staff and equipment, the restructuring and greater independence of the Inspector General system and the strengthening of the Corruption Prevention Unit. Simultaneously, the Mayor appointed a City Charter Revision Commission that studied the role of DOI among other legal and administrative issues. The Mayor and I supported the recommendation of Chairman Richard Ravitch that future DOI commissioners would be subject to the advice and consent of the New York City Council. I believed then and now that this change was needed to provide even stronger independence of DOI within City government as there existed a perception, despite Mayor Koch's unwavering support, that DOI as a Mayoral agency was simply another department of the Administration. It wasn't treated that way by Mayor Koch and [DOI] enjoyed the trust and confidence of all [law] enforcement agencies mentioned above. Nevertheless, the perception was as important as reality and needed to be addressed.

Lastly, former Commissioner Frawley made reference to the creation of the Office of the Special Commissioner of Investigation ("SCI"), which was newly created during his tenure, to conduct investigations of matters at the Board of Education ("BOE").[14] Mayor Koch had convened a proactive Commission to study the corruption problems in the New York City school system, which in its final public report recommended the creation of an external watchdog office under DOI to provide needed independent oversight of the BOE.[15] The Special Commissioner reports to the DOI Commissioner; Richard J. Condon currently occupies the position.[16] SCI has a staff of approximately 60 people, subpoena power through DOI, and conducts investigations into corruption, misconduct and conflicts of interest involving employees of the DOE, e.g., teachers, principals, administrative personnel, custodians, and vendors who do business with the DOE.

In discussing SCI, Mr. Frawley explained that he "was the DOI commissioner who voluntarily transferred one portion of [DOI's] subpoena power to the newly established [SCI] on the recommendation of the esteemed *Gill Commission*. That subpoena power endures today and of course is ably employed by Commissioner Condon under the aegis of your DOI and leadership."

In New York City, employees have an *affirmative* obligation to report corruption taking place in City government pursuant to Executive Order 16, which established that employees of the City must cooperate with a DOI investigation upon penalty of termination for failure to do so.[17] That "must report" obligation evolved from corruption scandals where it was determined that various employees knew that wrongdoing was taking place, but did nothing. The executive order eliminates any question as to whether employees should step forward—by law they must—if they know about corruption. Doing nothing is not an option. These employee tips have become important channels of information about matters that should be investigated.

Complementing the "must report" obligation is the City's whistleblower statute that protects employees who report corruption from retaliation. DOI is charged with investigating any whistleblower allegation made by a City employee and if DOI substantiates a claim, it can request an agency it finds has retaliated against an employee to undo the action. If the agency refuses, DOI can go to the Mayor to direct the agency to do so.[18]

While DOI's criminal cases make headlines, they are but one part of a comprehensive approach that the agency employs to expose, stop, and prevent corruption. So, it is not just about making arrests but also about improving City operations and spurring change where needed so corruption vulnerabilities are remedied rather than repeated. This role was so important that DOI appointed an individual several years ago to track all recommendations that IGs make to City agencies, including how and when they are implemented. Since 2002, DOI has issued more than 2,440 policy and procedure recommendations to City agencies, with 77% of those recommendations implemented to date, representing improvements in City operations across agency lines.

In addition, DOI issues public reports—nearly 20 during my tenure—on its investigations, and posts them on its website, giving the public a factual and accessible window into the agency's work. These reports are a powerful and effective tool for exposing problems in any given sector of City government and for mandating reform. The range of topics covered by these reports has included: DOI's investigation into allegations about a possible slowdown by Department of Sanitation workers during the December 2010 blizzard; exposing the manner by which 14 members of the Fire Department submitted bogus on-line educational degrees in an attempt to earn promotions or appointments; the examination of the deaths of 11 children who were in the care of the City's child welfare system; the squalid conditions maintained at buildings belonging to a Section 8-funded landlord; and two separate reports about schemes involving the theft of public funds from City-funded nonprofits that were contractually obligated to provide services to senior citizens and vulnerable populations of children.

These reports and the variety of press releases we issue on developments in DOI investigations create transparency and give the public confidence that the system isn't afraid to bare all and make improvements where necessary.

DOI is also nimble enough to spot trends and target areas of concern that arise during its investigations. In that vein, DOI has created several IG offices over the years for several non-City agencies that have a direct connection to City activities. For example, DOI oversees the large IG offices for New York City's school system, Economic Development Corporation, and the NYC Housing Authority. Additionally, when DOI conducted an investigation involving corruption at the Housing Development Corporation—its then president was convicted and sentenced to prison for defrauding the agency of hundreds of thousands of dollars and child pornography possession—DOI saw the need to establish oversight of the agency, and an IG office was created under DOI's jurisdiction.

Likewise, several years ago, when DOI investigators began uncovering fraud involving publicly funded nonprofits, making numerous criminal cases, we recognized the need for more scrutiny of nonprofits that receive millions of scarce City taxpayer dollars. As a result, DOI formed a nonprofit/vendor fraud unit to focus on the problem and to address the lack of internal controls we discovered in this area. Since its inception in late 2006, the unit has made 37 arrests uncovering fraud and mismanagement at City-funded nonprofits, board members, executives and fiscal employees siphoning hundreds of thousands of taxpayer dollars, and the bogus records about alleged services provided to people in need. In one case, DOI investigated a State Senator and his co-conspirators for financial improprieties at a City-funded Bronx nonprofit. Investigators found hundreds of thousands of dollars paying for personal luxuries for the Senator, who was convicted and sentenced to a prison term.

One powerful example of DOI's impact at an agency can be seen in the Department of Buildings ("DOB"). One of the first problems I faced when I arrived as Commissioner in 2002 was the arrest of 19 DOB inspectors in a large-scale bribery case that wiped out the entire plumbing inspection unit (which inspects gas pipes). Sadly, I learned that event was just one in a series of double-digit arrests of DOB inspectors that had been happening approximately every two years. Indeed, one of the inspectors arrested in 2002 had been previously arrested for bribery and fired from the DOB, then subsequently rehired only to be arrested once again on bribery charges in 2002. The arrest of the 19 inspectors in 2002 caused the City to have to hire a company to conduct scores of re-inspections for safety reasons, at a huge cost.

I chose to have DOI effect change in a number of ways. I asked the Mayor to take the rare step of writing a victim-impact letter to the judge about the real and costly effect of the DOB inspectors' corruption. The judge commented on the letter and sent defendants to jail. Additionally, in every subsequent case DOI sought to arrest not just the City employees who took the bribes, but also the members of the public who offered the payoffs to get around building code regulations. DOI also saturated DOB with anti-corruption lectures informing employees about their obligation to report corruption, and sought termination of an employee who failed to do so.

The emphasis has been working. Since the 19 arrests in 2002, from 2003 through 2010, DOI has arrested another 19 DOB employees on a variety of charges, and more than 270 members of the construction trades on charges relating to DOB matters—and much to our satisfaction, more than 80 of those arrests were the result of DOB employees who turned bribes down and instead *informed* DOI about bribe offers and other illegal conduct. Thus, we had begun to see a change in the culture of corruption, for which we also credit the full cooperation from the DOB and its commissioners. Now, there seems to be a recognition that DOB employees are the first line of defense guarding against corruption and the potential safety hazards that can happen as a consequence.

We also formed the Buildings Special Investigations Unit with the DOB, which is supervised by DOI and staffed with DOB employees. Uniquely formed to identify, investigate, and suspend or revoke buildings licenses of individuals and companies that deliberately violate the City's construction codes causing safety issues, the unit has been successful, investigating and administratively prosecuting more than 390 cases since inception, resulting in $1.3 million in fines and more than 210 revocations or suspensions of licenses of architects, engineers, and others in the construction field.

More than 4,000 corruption prevention lectures have been conducted throughout the City during my tenure, reaching thousands about their obligations and protections in corruption reporting. These lectures are opportunities not just to educate but also to connect with employees on a one-to-one basis and they have also resulted in significant corruption tips. One such tip after a lecture led to a DOI undercover operation that exposed a State Assemblywoman using her official position to obtain a half-million dollar property in Queens. The legislator was charged as a result of DOI's investigation, convicted and sentenced to a prison term. As former Commissioner Scoppetta noted:

> The special knowledge DOI develops about the work and applicable processes within City agencies makes DOI uniquely qualified to investigate activity within those agencies and the people who do business with the City. There is another obligation that DOI has which is to insure the effective delivery of City services. DOI is the Mayoral Agency best equipped to do that.

DOI efforts to make the City whole again from corrupt activity restores services lost to corruption, and addresses illegal activity that have safety implications, including:

- This past year, DOI helped negotiate a $5 million agreement with a large contractor that does business with the City to compensate the City for overcharges on construction projects.
- The agency has been instrumental in exposing and stopping housing tenant fraud, which deprives those in need of public housing and siphons valuable public housing funds. Since 2002, DOI's housing fraud initiative has resulted in more than 600 tenant fraud

arrests and uncovered the theft of more than $13 million in housing benefits. These cases free up scarce public housing units and benefits that eligible people need.

- DOI began an initiative several years ago to track down property owners who had languishing fire code violations, bring those offenders to justice and remedy the violations. This year, DOI expanded that effort to buildings code violations. Together, those initiatives have led to more than 850 arrests resulting in the remediation of the safety violations all around the City, and hundreds of thousands of dollars in fines ordered.

DOI has not only rooted out corruption but has taken on a more expansive role through its corruption prevention lectures, policy and procedure recommendations, and the financial recoveries that are the by-products of its criminal cases. I agree with the collective views of Mayor Koch and former Commissioners Scoppetta, Frawley and Shepard, that DOI should have good working partnerships with area prosecutors; should foster an environment within the City that generates a flow of whistleblower tips; and that our IGs be very vigilant drawing on their knowledge of City agencies to detect and stop corruption in the City.[19] Strengthened by its autonomy, empowered by its authority to look within City agencies, and by virtue of the Administration's support for the mission of integrity in government, DOI has a long history as an anti-corruption agency protecting taxpayers and the public coffers.

Endnotes

1. Kenneth D. Ackerman, Boss Tweed 66-67 (2005).
2. Richard S. Winslow & David W. Burke, Rogues, Rascals, & Heroes: A History of the New York City Department of Investigation 1 (1992).
3. *Id.* at 5-18.
4. *Id.* at 32.
5. *See, e.g.*, Mayoral Executive Order 16 (July 1978, as amended).
6. Department of Investigation, First New York City National Watchdog Conference (Oct. 2008); *see* New York State Commission on Public Integrity, Symposium, *Watching Local Government: A Comparative Analysis of Inspection and Oversight in American Cities* (2010).
7. Commissioner Shepard was the first woman DOI Commissioner, appointed by Mayor David N. Dinkins. Prior to her appointment, she was an Assistant United States Attorney in the Eastern District of New York, and Chief Counsel to the New York State Commission of Investigation.
8. *U.S. v. Mark Mazer, et al.*, S2 11 Cr. 121 (S.D.N.Y. 2011) (Superseding Indictment).
9. N.Y.C. Charter § 31.
10. N.Y.C. Charter § 801.
11. Commissioner Scoppetta was appointed DOI Commissioner after serving 6 years as an Assistant District Attorney in New York County, under District Attorney Frank S. Hogan, and after serving as Associate Counsel to the Knapp Commission, where he directed an undercover investigation into corruption in the New York City Police Department with a focus on the Narcotics Division. He then joined the United States Attorney's Office for the Southern District of New York to complete that corruption investigation (that investigation was subsequently dramatized in the film, *Prince of the City*).
12. Commissioner Scoppetta also recollected that his tenure

    > was not without its lighter moments. Shortly after Mayor Beame was elected, and pursuant to a Mayoral Directive, I began conducting a series of background investigations on prospective Deputy Mayors, Commissioners and other senior managers. One potential appointee had been dragging his feet responding to my request that he supply me with the documentation he claimed he had that would show he had complied with all applicable laws while he was a state official. Although he was warned that he would not be appointed until he produced the documentation he waited until the night before his swearing in to call me, at about 2a.m., to admit he had no such documentation. I called the newly elected Mayor Beame to tell him that the appointment, scheduled for the next morning, could not go forward. The Mayor's wife, Mary, answered the phone. I told her it was important that I speak with the Mayor. She protested that there was no point in waking him up, that it was 2a.m., and that whatever the problem was he could do nothing about it at that time of the night. She suggested I call him in the morning. While I was insisting that I had to speak to him, I heard Mayor Beame, in the background, asking who was calling. Mary told him it was I and he curtly demanded she give him the phone. As I was apologizing for calling at that hour, I heard Mary Beame, in the background saying, "Oh Abe, Abe, this is going to be a terrible job."

13. Commissioner Frawley was appointed by Mayor Edward I. Koch. Prior to that, he served as the New York City Criminal Justice Coordinator. He noted for this article that his years as DOI Commissioner "were among the best years of my career. I'm very proud of those years, the dedicated men and women who served with me and the contributions we made to fighting corruption in New York City."
14. The Board of Education has been referred to as the Department of Education ("DOE") since 2002 following a change in governance giving the Mayor control of the DOE.
15. N.Y.C. Mayoral Exec. No. Order 11 (1990); N.Y.C. Mayoral Exec. Order No. 34 (1992).
16. Prior to his appointment in 2002 to the position of Special Commissioner, Mr. Condon previously served as New York City Police Commissioner appointed by Mayor Koch, Deputy Coordinator of Criminal Justice for NYC, Commissioner of the Division of Criminal Justice Services for New York State under Governor Mario Cuomo, and Director of Worldwide Security for Paine Webber.
17. N.Y.C. Mayoral Exec. Order No. 16 (1978).
18. N.Y.C. Admin. Code § 12-113.
19. I would like to thank Mayor Koch and Commissioners Scoppetta, Frawley and Shepard for their contributions to this article. While each of us has commented separately over the years about our experiences, this is the first time our views about serving at DOI and / or the importance of role of DOI in City government, were gathered in a single overview.

Rose Gill Hearn was appointed Commissioner of DOI by Mayor Michael R. Bloomberg and confirmed by the City Council in 2002. She is the longest serving DOI Commissioner in the history of the Department.

This article originally appeared in the Winter 2011 issue of the Government, Law and Policy Journal, *published by the Attorneys in Public Service Committee of the New York State Bar Association.*

Not the Wild West: Regulation of Social Media

By Mark Grossman

It is time for companies to take their blinders off. Social networking is not going away. You can choose to embrace it now or wait until your company is the last one in. Either way, your company will use social networking at some point. Why wait?

If your answer is that there is legal risk, I would submit that this is a poor answer. Most activities carry legal risk and our job as lawyers is to help our clients manage those risks. Moreover, the risks that come from social networking are manageable. This article will help you accomplish this.

The "risk" issue reminds me of when Internet email was hitting corporate desktops in the 1990s. Companies engaged in what today seems like nonsensical debates about whether employees needed email. Of course, they did. Similarly, they worried about legal risk in the face of unknown law. Sound familiar?

I remember writing a column in the 1990s where I said that virtually every employee with a telephone on his or her desk would have email access within five years. That is one prediction I got right.

Now I have a new prediction. Within two years, virtually every company will be using social media like LinkedIn, Facebook, Google+, and Twitter to promote itself. Does your company really want to be last in?

Reining in Risk for the Enterprise

Most commentators would acknowledge that social networking for the enterprise is not without risks. In fact, it is like any other public forum and carries most of the same risks. Some of the issues that your company needs to consider include copyright infringement, trademark violations, litigation-related issues, advertising and employment law, and privacy.

The starting point of any legal analysis of any issue involving the Internet is that the Internet is *not* the Wild West. Rather, it is a forum that is at least as regulated as any newspaper.

The problem is that like any new technology, new law trails the development of the technology. After all, nobody regulates technology that is yet to arrive.

And "new" is where we are with social media in that the law is still developing. Thus, as we had to do with the Internet generally in the 1990s when "Internet Law" was still in its infancy, we must look to current law and use common sense to apply it by analogy to social networking. (The problem is the concept of "common sense" since "law" has been described as "common sense as modified by the legislature and courts.")

> *"Some of the issues that your company needs to consider include copyright infringement, trademark violations, litigation-related issues, advertising and employment law, and privacy."*

Some of the analogies are easier than others. For example, it is certainly clear that your company cannot use material created by others in violation of general copyright law. The Digital Millennium Copyright Act ("DMCA") is yet another Federal statute that is relevant to social networking. The DMCA could require that your company promptly take down material from a social networking site it controls whether or not an employee or third party posted the infringing content.[1]

Likewise, your company's social networking posts must be sensitive to trademark law. If your trademark analysis says that your company could not use "Coke's®" logo in a company brochure, you could not use it on your company's blog. This is the common sense part.

Another easy one is in the area of litigation. There can be no doubt that if your company has a litigation hold in place for whatever reason, this hold would also apply to all social media. Thus, your company may not erase a blog post that is relevant to litigation although common sense says that it would be wise to remove public access to a problematic post.

Another area of concern is advertising law. It is certainly "common sense" to assume that the Federal Trade Commission act, which bans unfair and deceptive trade practices[2] and the CAN-SPAM Act,[3] which regulates "spam," are relevant to the world of social media.

Using copyright and trademark concerns, litigation holds, and advertising and employment law as mere examples, you can begin to see the importance of training your employees. It goes without saying that they are the actors for your company and that their lack of training and sensitivity to these issues is your nightmare waiting to happen.

You must dispel the myths about the "Wild West." In an online environment where the entire world might see a social networking post, you certainly do not want employees posting things like, "Our only competitor is a thief" because, lo and behold, defamation law applies to social networking activities. (That is unless you really want to go down the "truth is an absolute defense to libel" path. I will go out on a limb here and guess that you do not.)

> *"If your company has not yet jumped headfirst into using social networking to its advantage, it is time to do it."*

Employees' Personal Social Networking

A whole other area of concern for your company is how your employees use social networking outside the office. After all, they have personal accounts on Facebook, LinkedIn, Twitter, Google+ and others. They may not understand that what they say on their personal Facebook account could haunt their employer and them.

If your company does not already have a social media policy in place, you are late at getting there. However, you can begin rectifying that today and you should. A great example of a personal blog policy is one Yahoo developed.[4]

Among the most important concepts in the Yahoo policy is that any employees who identify themselves as Yahoo employees "should notify their manager of the existence of their blog just to avoid any surprises."[5] Knowledge is power and your company can mitigate the risk employees create online by merely knowing the post is there. You should encourage this notice.

While many companies may want their employees promoting their business in their personal LinkedIn and Facebook accounts, it is important to sensitize employees to the fact that when they speak on behalf of their employers on a personal social networking page, they are putting their employer at legal risk just as if they were posting on the employer's "official" LinkedIn page. This may not be obvious to the average employee who may think that different rules apply on a personal social networking page. It is the same theme yet again. It is all about training.

Monitoring Employees' Online Activities

Many companies have started to monitor their potential and current employees' online activities. The fact is that people will post "remarkable" stuff online for all to see. Many companies will look at that "remarkable" stuff and choose to pass on a potential hire or consider terminating an employee over online posts.

It can be hard to feel sorry for someone who "friends" his boss on Facebook and posts, "My boss is an incompetent fool." ("Oops. I forgot he was among my friends.") Still, it is important for your company to have a written policy in place that clearly states that the company does and will continue to monitor social networking activities for posts the company reasonably deems inappropriate. Further, this policy should make it clear that termination is among the possible consequences for inappropriate activities.

A bit of caution is in order when monitoring personal activities online because some states, including New York, have laws that prohibit an employer from punishing an employee due to legal leisure time conduct.[6] Nonetheless, many think that it is a best practice to monitor employees' online activities while being aware of the parameters for action set by statutes or otherwise.

Embrace but Understand

If your company has not yet jumped headfirst into using social networking to its advantage, it is time to do it. This should be about as obvious as the need for a corporate website should have been in 1996.

While it is true that the law can be murky with social networks, with some education, training and supervision, you could and should minimize those risks. Do not permit yourself to be a nay-saying lawyer fearful of new technologies. If that is you, hire an outsider to assist. Do whatever it takes. Just do it.

Endnotes

1. 17 U.S.C. § 512.
2. 15 U.S.C. § 45.
3. 15 U.S.C. Chapter 103.
4. Yahoo! Personal Blog Guidelines: 1.0, *available at* http://jeremy.zawodny.com/yahoo/yahoo-blog-guidelines.pdf (last visited October 4, 2011).
5. *Id.*
6. N.Y Labor art. 7 § 201(d) (LAB).

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This article originally appeared in the Winter 2011 issue of the Corporate Counsel Section Newsletter ("Inside"*), published by the Corporate Counsel Section of the New York State Bar Association.*

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The Senior Lawyer is published for members of the Senior Lawyers Section of the New York State Bar Association.

ISSN 1949-8322 (print) ISSN 1949-8330 (online)

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