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ONEONONE

A publication of the General Practice, Solo & Small Firm Section
of the New York State Bar Association

A Message from the Chair

Much has been written about the atrocities committed by terrorists on September 11th of last year. Through massive media coverage each of us probably relived recently the senseless and criminal acts of that second "day in infamy" in our history. We experienced once again the torture of being helpless in the hands of murderous terrorists with a completely abhorrent agenda.

As lawyers we strive to achieve justice, and that tragic episode is anathema, which many say should invite retaliation. Retaliation, in and of itself, frequently serves no useful purpose—unless it furthers a worthwhile and humane agenda in the overall plan for ultimate peace. That is the dilemma that now confronts our nation and for which there is no clear-cut or easy answer.

Trying to make sense out of tragedy and seeking to take measures to preserve a lasting peace are monumental tasks that challenge the greatest minds of our leaders and their advisors. We, as practicing attorneys in general practice, have the advantage of looking at the law and its application, not in a specialized vacuum, but in a perspective of the overall landscape. Our thinking and experience in many fields of law have given us the breadth of knowledge and the ability to see varying aspects of problems and to utilize our ingenuity and knowledge to seek answers. Hopefully, the world leaders who will shape our future will have the same breadth of vision and foresight to take the proper and visionary means to attain the goal that all decent, considerate and fair-minded persons want—a lasting peace and the comfort of security and safety in our homes, businesses and everywhere that we may travel or wherever we may be.

The events of one year ago have galvanized our country into a unity of purpose. The legal profession responded admirably, assisting those in need of legal services and providing the legal and financial resources to help rebuild from chaos a new beginning. It is this spirit and drive that sets lawyers apart from the rest of the community. We should use this feeling of cohesiveness and cooperation to further the spirit of cooperation among us, to help overcome the denigrating of other lawyers (even though it may seem warranted) and to

Inside

enter into a relationship with each other to elevate the profession by elevating our esteem for each other. When we denigrate each other, we condemn ourselves. When we seek out the good in others, we elevate each of us and the whole of us.

I hope that you all take a look at our Section's Web site at www.nysba.org and our Section's link to the www.LPMForum.com page for the 911 Tribute. Our own Leona Beane, Esq. did a great job for us all.

NOW, to Section business: Our Section offers two awards, which are: (1) the Hon. Lewis R. Friedman Award to the "Innovative Lawyer of the Year" and (2) The Charlie Shorter, Esq. Award for "Excellence in Law Practice Technology." Both will be awarded at our Section's conference at the NYSBA Annual Meeting on January 21, 2003. Nominations can be sent in letter format to:

Ms. Sue Fitzpatrick
New York State Bar Association
General Practice Section
One Elk Street
Albany, NY 12207

Or in electronic mail format to:

sfitzpatrick@nysba.org

The awards are in the names of: (1) the late Supreme Court Judge Lewis R. Friedman, an innovative and inspirational jurist; and (2) the late Charlie Shorter, a technology-driven lawyer who still managed to make "house calls" to his farmer clients. They were both active and beloved members of our Section who are deeply missed.

I am pleased to report that our membership is growing very nicely and we have regained our second seat in the House of Delegates. Our Web site is really advancing and our membership should receive a very brief e-mail alert twice a month. Our wEbrief and its links are chock full of important practice ideas and recent cases/legislation of interest. We invite your participation in all of our endeavors, including lecturing, wEbrief, *One on One* articles, etc.

Delving deeper into the good parts of our practice and upholding and honoring the law while maintaining a healthy work, family and "play" balance is our collective salvation.

Lynne S. Hilowitz

Did You Know?

Back issues of *One on One* (2000-2002) are available on the New York State Bar Association Web site.

(www.nysba.org)

Click on "Sections/Committees/ General Practice Section/ Member Materials/ General Practice Section Newsletter (One on One)."

For your convenience there is also a searchable index.
To search, click on "Edit/ Find on this page."

Note: Back issues are available at no charge to Section members only. You must be logged in as a member to access back issues. For questions, log in help or to obtain your user name and password, e-mail webmaster@nysba.org or call (518) 463-3200.

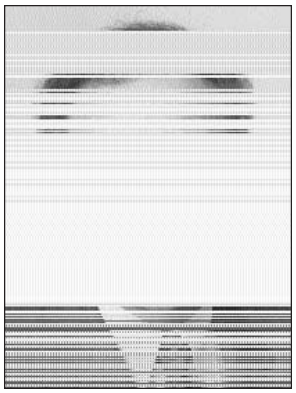
From the Editors

Frank G. D'Angelo

This edition is a joint effort, combining what would have been the last two issues of the year in an effort to make one super edition. We have again included a varied mixture of topics, which we hope the readers will find useful in their practice, if not at least interesting and educational.

We have included an article prepared for this edition by the Chairman of the Workers' Compensation Board of the State of New York entitled, "Meeting the Challenge: The Workers' Compensation Board's Response to the World Trade Center Tragedy." It explains how the Workers' Compensation Board is addressing the unexpected 2,200 World Trade Center death claims and the 4,300 injury claims without diminishing service to the hundreds of thousands of other claimants.

Other articles included in this issue are: "Property Condition Disclosure Act," by Thomas J. Mitchell, which includes a copy of the Act in the Appendix; "Advising the Drunk Driver from Out-of-State? Remember the Compact!" by Daniel Barrett; "Seemingly Innocuous but Fatal Errors in Eviction Proceedings," by Gary A. Hughes; and "Capital Improvement Projects for Private Tenants in Buildings Owned by Governmental Organizations," by Brian G. Cunningham. Our regular features include "Who Is Independent Enough?" written by Martin Minkowitz on workers' compensation law and "The Managing Partner's Role in Leading Change," by Stephen P. Gallagher, Director of NYSBA's Law Office Economics and Management Department.



Martin Minkowitz

Leona Beane, whose office is located just two blocks north of where the World Trade Center stood, has written a poignant, first-hand account of the events of September 11. She has included practical tips that every small-firm attorney and single practitioner should know about computer and e-mail back-up systems and document retention.

Also included is the most recent New York County Lawyers' Association Ethics Opinion on a topic of the ethical obligations of a lawyer who receives inadvertently disclosed privileged information. It is something that has occurred to most of us and the Committee felt that the obligations of the lawyer under those circumstances should be discussed.

We encourage your comments and hope that our readers will consider sharing articles with us for consideration for inclusion in our upcoming editions.

Martin Minkowitz
Frank G. D'Angelo

REQUEST FOR ARTICLES

If you have written an article and would like to have it published in *One on One* please submit to either of the Co-Editors:

Frank G. D'Angelo
Law Offices of D'Angelo & Begley
999 Franklin Avenue, Suite 100
Garden City, NY 11530

Martin Minkowitz
Stroock & Stroock & Lavan
180 Maiden Lane
New York, NY 10038

Articles should be submitted on a 3 1/2" floppy disk, in WordPerfect or Microsoft Word, together with a printed original and biographical information.

Meeting the Challenge: The Workers' Compensation Board's Response to the World Trade Center Tragedy

Robert R. Snashall and Brenda A. Rigas

By now, many attempts have been made to describe the horrific events that shocked and saddened our nation and the world on September 11, 2001. Mere words, however, cannot adequately convey the magnitude of this tragedy. As we all know, on that fateful morning, two aircraft carrying a total of 157 individuals were hijacked by terrorists and were intentionally flown into the two World Trade Center towers, buildings at which over 50,000 people worked on a daily basis. By 10:29 a.m. that day, both Towers had totally collapsed after thousands had exited, but before thousands more could be evacuated. The impacts and resulting collapse of this massive complex created a scene of tremendous destruction and fire, with thousands losing their lives and many others sustaining serious injury.

"Strictly from a workers' compensation vantage, the deadly terrorist attack and the resulting collapse of the World Trade Center may therefore be regarded as the largest 'workplace accident' in U.S. history."

To the extent that the vast majority of those who were killed or injured were in the course of their employment at the time of the attack, they and/or their survivors are entitled to workers' compensation benefits. Strictly from a workers' compensation vantage, the deadly terrorist attack and the resulting collapse of the World Trade Center (WTC) may therefore be regarded as the largest "workplace accident" in U.S. history.

The New York State Workers' Compensation Board ("Board") is responsible for adjudicating claims for workers' compensation benefits. The Chair of the Board is the Chief Administrative Officer of the Board. As of September 11th, the Board employed approximately 1,685 employees statewide, with eleven District offices and thirty service centers throughout the state. Three hundred ninety of the Board's employees worked at the Board's offices in New York City, with the employees in the Brooklyn office actually witnessing the tragic events unfold across the East River in lower Manhattan.

Since September 11th, the Board has received approximately 6,500 claims related to the attacks on the World Trade Center. According to the latest estimates, approximately 2,900 individuals died in those attacks. This includes the 156 passengers and crew aboard the two aircraft, 343 New York City firefighters, and 23 New York City police officers. To date, the Board has received an estimated 2,200 death claims and 4,300 injury claims.

It is notable that not all of those who were injured or killed during the attacks on the WTC have had or will have claims for benefits filed with the Board. For instance, the New York City uniformed employees (which includes both firefighters and police officers) are authorized by law to maintain their own compensation system outside the jurisdiction of the Workers' Compensation Board. Thus, the 366 death claims associated with these individuals are not included in the Board's figures. In addition, many of those who died on the aircraft were either not engaged in work-related activity at the time of the attacks or their survivors have opted to file claims in their home states. These accounted for another 156 death claims. Further, employees of the Port Authority of New York have the option of filing claims in New York or New Jersey. Of course, out-of-state employees who may have been on temporary assignment at the WTC at the time of their injury or death are likewise entitled to file for benefits in another jurisdiction. Finally, many of those killed or injured at the WTC were there for some purpose unrelated to their employment.

In order to appreciate the magnitude of the WTC workers' compensation claims, one must realize that the Board typically establishes a total of about 500 death claims per year. Further, in the year 2000, the New York City district office indexed a total of approximately 61,000 claims for workers' compensation benefits. Thus, the WTC claims alone represented a 400 percent increase in the average annual volume of death claims statewide and about a 10 percent increase in new claim openings in the New York City district.

While it is unlikely that there will be any significant increase in the number of WTC death claims filed with the Board, it is very likely that there will be additional injury filings, some undoubtedly related to exposure and post-traumatic stress disorder.

This article will focus upon the Board's immediate and ongoing response to the unprecedented workers' compensation death and injury claims resulting from the terrorist attacks upon the WTC.

Leadership and Assistance from the Governor's Office

Soon after the collapse of the Towers, Governor George E. Pataki created an inter-agency workgroup to coordinate the state's response to those devastated by the attacks. In those earliest and darkest hours, the Governor stressed that service and support to the many victims of the attack and their families was the new top priority of each and every state agency.

The Governor also issued in excess of 50 Executive Orders in furtherance of this new priority. Of particular relevance to the Workers' Compensation Board was Executive Order No. 113 declaring a state of emergency as to the events of September 11, 2001, and providing for the temporary suspension, alteration or modification of specific provisions of any statute, local law, ordinance, orders, rules or regulations, or parts thereof, if compliance with such provision would prevent, hinder, or delay action necessary to cope with the disaster. Also, Executive Order No. 113.35 temporarily suspended the Workers' Compensation Law section 18 requirement that notice of an accident shall be in writing, signed by the claimant, and given to the employer within 30 days of the accident.

Actions by the Workers' Compensation Board

On the morning of September 12th, the Workers' Compensation Board Chairman called an emergency meeting of executive staff and key managers in order to develop a plan for the Board's handling of this horrific tragedy with its unprecedented number of claims and associated challenges.

Due to the extensive legislative and administrative reforms implemented since 1995 as well as the agency's recent and significant technological enhancements, the Board was fortunate to have the infrastructure in terms of resources and ability to meet the challenges presented by this devastating terrorist attack in an efficient and compassionate manner. Nonetheless, an enormous amount of coordination and attention was required in order to ensure that this particular class of claims would be handled appropriately, without diminishing the Board's service to its constituents elsewhere across the state.

The plan that was soon developed involved a multi-faceted approach addressing the influx of WTC-related inquiries, outreach to constituents, coordination with other agencies, the issuance of orders to suspend or modify Board rules and practices, the processing of WTC-related claims for benefits, the development of a WTC-specific adjudication plan, the review and resolution of particular legal issues, and the ongoing monitoring of WTC claims.

Responding to Inquiries

Immediately recognizing that there would be thousands of victims and their families who would be making inquiries of the Workers' Compensation Board with respect to entitlements to benefits, procedures for filing claims, etc., and that the Board's call center in New York City might possibly be out of service for several weeks following the attack, the Board created three toll-free numbers to address inquiries. The Board had these calls routed to district offices across the state so that staff in the metropolitan area would not be overwhelmed with incoming calls. Further, the Board provided guidance to the staff charged with fielding these calls to ensure that accurate and consistent information was being disseminated.

"In those earliest and darkest hours, the Governor stressed that service and support to the many victims of the attack and their families was the new top priority of each and every state agency."

The Board also established information booths at the Family Assistance Center at Pier 94 in Manhattan. There, questions were addressed, information packets regarding the Board and its processes were distributed, and claims were initiated. The Board maintained representatives at the Family Assistance Center through its closing in early 2002.

For purposes of providing broad access to information relating to the workers' compensation system and the process for pursuing a claim for injury or death resulting from the WTC attacks, the Board developed a special WTC-related page on its Web site where relevant information was posted and a specific e-mail address was published for receiving WTC-related inquiries.

Outreach to Constituents

The Chairman and other key Board executives conducted a thorough outreach campaign to ensure that all constituents and parties of interest were kept informed of the Board's efforts to meet the needs of the victims of the WTC attack and their families. Immediately following the terrorist attacks, and regularly thereafter, the Chair conducted outreach meetings with workers' compensation constituent groups including the AFL-CIO, The New York State Business Council, the International Brotherhood of Electrical Workers, the Communications Workers of America, the American Insurance Associa-

tion, the New York State Association of Self-Insureds, the New York State Workers' Compensation Bar Association, the New York City Workers' Compensation Bar Association, the International Association of Industrial Boards and Commissions, the Healthcare Association of New York State, various preferred provider organizations, hospitals, and other medical providers, and the New York State Medical Society. The Chairman advised these organizations as to the activities of the Board and encouraged ongoing communications and cooperation.

". . . suspending the requirement for a death certificate in claims for death benefits arising from the events of September 11th and permitting the submission of affidavits in lieu of testimony in such cases . . . was an historic and essential measure for the Board considering that part of the dreadful aftermath of the terrorist attacks was the large number of missing victims presumed to be dead."

Further, the Office of the Chairman issued a letter to every workers' compensation insurance carrier doing business in New York urging them to consider applying their statutory right to begin making payments to WTC victims "without prejudice." In 1996, New York's Workers' Compensation Law was amended to include this payment without prejudice provision, whereby insurers were authorized to pay benefits to claimants immediately, without prejudicing their ability to challenge the claim at subsequent Board hearings. The response by insurance carriers was positive and thousands of families promptly began receiving benefits as a result of this voluntary payment option.

Coordination with Other Agencies/Entities

The Board also devoted resources toward coordinating its efforts with those of other agencies.

Regular communications took place between Board officials and representatives of the Governor's Office in order to ensure that all appropriate measures (i.e., Executive Orders, Board Resolutions, other administrative actions) were being taken to accommodate the needs of those injured and the families of those killed in the attacks.

The Board's Office of General Counsel was vested with the responsibility of communicating and cooperating with the New York State Emergency Management Office (SEMO) and the New York State Crime Victims Board. As part of this effort, Board counsels prepared a confidentiality agreement to enable the sharing of claims information between the Workers' Compensation Board and the Crime Victims Board. With this agreement, the Crime Victims Board was able to access the Board's electronic files, thereby alleviating the need for additional filings by WTC victims and their families. Further, the Office of General Counsel ensured that cumulative claims information was shared with SEMO as appropriate.

The Office of Special Counsel to the Chairman was charged with contacting and coordinating with the New York State Department of Health and New York City officials to identify the individuals lost. Due to the unique circumstances of the disaster, there was no complete list available. The Office of Special Counsel therefore contacted numerous sources to obtain the identity information which allowed the Board to initiate claim filings and reach out to victims' families.

Issuance of Orders

In an effort to create the least intrusive, most compassionate and most expedient means of establishing claims and providing for the payment of benefits to those suffering losses in the World Trade Center attacks, the Office of the Chairman took prompt action to alleviate burdens associated with pursuing death claims. On September 25, 2001, at an emergency session of the Board, the Chair introduced a resolution, which was unanimously adopted, suspending the requirement for a death certificate in claims for death benefits arising from the events of September 11th and permitting the submission of affidavits in lieu of testimony in such cases.

This was an historic and essential measure for the Board considering that part of the dreadful aftermath of the terrorist attacks was the large number of missing victims presumed to be dead. In the usual circumstances, the Workers' Compensation Board would require the production of a death certificate in order to establish a claim for death benefits and, oftentimes, families of missing persons must wait three years in order to obtain such certificate from the courts.

Also, in the Board's normal course of business, the dependents of a deceased worker would be required to appear before the Board at a hearing to testify and swear under oath as to their status as a dependent. By virtue of the Board's resolution, the signed and notarized affidavit served as a substitute for such testimony, thereby sparing family members of those killed at the WTC any unnecessary anguish or inconvenience.

Further, the Office of the Chairman undertook action to suspend or amend a number of Board policies and regulatory provisions. Specifically, these steps promoted informal means of resolving issues and stipulating as to facts in WTC cases, permitted higher reimbursement for funeral expenses in a number of downstate counties, authorized the Board to address novel or important questions of law or public policy on its own motion, and, where necessary, permitted health care providers who were not specifically authorized by the Workers' Compensation Law, but who specialized in respiratory conditions and stress disorders, to render acute care to those many workers who required prompt access to such care.

These measures undoubtedly helped to speed benefits to WTC victims and families without unnecessarily adding to their burdens during this most difficult of times.

Processing of WTC Claims for Benefits

During the late 1990s, the Governor and the Legislature provided the Workers' Compensation Board with the resources to substantially automate the agency and its processes. In conjunction with this technology initiative, the Board reorganized its claims operation to promote efficiency and customer service. These improvements were essential to the Board's ability to timely and competently address the many challenges associated with the volume and complexity of the WTC claims.

By far, the improvement which most benefited the Board in its management of this crisis was the Electronic Case Folder. In recent years, the Board had undertaken an imaging project to convert its millions of pages of paper claims files into electronic case folders which could be accessed statewide by Board staff and parties of interest instantaneously, simultaneously, and remotely. This permitted the Board to distribute the enormous WTC workload from the New York City district offices to over 30 senior claims examiners from around the state, thereby ensuring that no one office would be overwhelmed by such matters. This "virtual work group" concept also allowed the Board to concentrate its training of the special processing rules regarding WTC cases to this select group of employees.

Further, all WTC-related claims were assigned a special designation in the Board's claims database so that the filings and progress of these matters could be easily segregated and monitored. Daily reports were generated to reflect the number, distribution and resolution of WTC claims as well as insurance carriers' payment of benefits and contested claims.

Development of Adjudication Plan

Unlike the WTC claims processing work, which the Board could distribute to its staff statewide, any hearings pertaining to WTC claims would need to be held at the Board's New York City sites, for the convenience of the claimants. At the same time, the Board was ever-mindful that it did not wish to overburden its New York City staff or to allow services to suffer anywhere in the state with respect to those pending claims which were unrelated to the events of September 11th.

To resolve the workload challenges associated with the adjudication of WTC claims, the Board established six WTC Hearing Teams comprised of 12 administrative law judges and senior attorneys from around the state who would serve as judges with respect to WTC matters. These teams were assigned to hearing sites in the New York City area on a six-week rotation. Special expedited hearing calendars were established to ensure that proceedings were scheduled promptly. Any subsequent hearing on cases that needed to be continued was scheduled six weeks into the future in order to ensure that the same judge was available to resolve any outstanding issues.

The establishment of the rotating WTC Hearing Teams allowed the Board to promote prompt resolution of issues related to WTC-related claims while at the same time continuing to hear "routine" cases without delay.

Once the "pool" of judges was established and trained on WTC-specific policies and issues of law, the Board needed to address the fact that, by regulation, all determinations on death claims required a hearing before a law judge. Insofar as the majority of the over 2,000 WTC-related death claims were not contested, the Board waived this hearing requirement and authorized its claims examiners to issue Administrative Determinations on these uncontested death claims, thereby speeding payments of benefits to the victims' families and reserving precious hearing resources (judges and hearing rooms) for those cases that truly warranted the intervention of a judge.

Reviewing and Resolving Legal Issues

Not surprisingly, the attacks upon the World Trade Center presented a host of novel legal issues which required review and resolution by the Workers' Compensation Board.

Despite the fact that there had been only two previous and limited instances in New York State history where terrorist attacks resulted in claims for workers' compensation (the 1920 Wall Street bombing by anar-

chists, and the 1993 bombing of the World Trade Center by terrorists), there was essentially no debate that those who were in the course of their employment and were injured or killed as a result of the attacks were entitled to workers' compensation benefits.

A number of other legal inquiries, however, were generated by the unique circumstances of the September 11th attacks. Some of these issues related to the coverage of losses incurred by employees who were on their way to or from their place of employment. Additional coverage queries were reviewed with respect to the many volunteers who suffered losses during the course of the relief efforts. Other questions pertained to the standards of proof necessary to support the anticipated claims for inhalation of and exposure to foreign substances as well as post-traumatic stress. The Board further considered its ability to award expenses for memorial services for the many individuals who were missing/presumed dead and determined that reimbursable expenses on death claims are not limited to those specifically associated with a funeral.

"The Board is . . . appreciative for the dedicated efforts of the entire workers' compensation constituent community during this difficult time."

While these particular items have been reviewed and resolved by the Board in its processing of World Trade Center claims, there remains an entire universe of legal issues which the Board has yet to consider, not to mention those which require more in-depth case-by-case analysis. Further still are the many outstanding legal issues being raised at the federal level with respect to the eligibility, reimbursement and offsets associated with relief from the September 11th Victim Compensation Fund of 2001, as established by Congress and signed into law by the President as part of the Air Transportation Safety and System Stabilization Act.

Ongoing Monitoring of WTC Claims

As noted earlier, by virtue of the Board's technology and the special designation assigned to claims arising out of the World Trade Center attacks, the Board has been able to individually and cumulatively track the progress of the WTC claims.

To date, payment of workers' compensation benefits has begun on 940 undisputed claims. Temporary payment has begun, without prejudice and without admitting liability, on 661 claims.

Of the 2,192 death claims, the Board has fully resolved 1,798 (82 percent) of these death claims with 1,561 (88 percent) being resolved without a hearing.

The Board has conducted nearly 4,000 formal hearings (2,998 hearings and 973 pre-hearing conferences) to help resolve WTC-related cases. These hearings have involved 1,356 hours of the Hearing Calendar or 169 full days of calendar time—nearly three-fourths of a year of calendar time.

Of the 2,998 hearings conducted thus far, 1,048 have fully resolved the claim and findings were developed at 1,587 hearings. This indicates an effective hearing rate of nearly 88 percent.

Conclusion

The ability of the Workers' Compensation Board to receive and process the unexpected 2,200 WTC death claims and 4,300 WTC injury claims, without diminished services to all other cases pending with Board, simply would not have been possible without the vision, leadership, and guidance of Governor Pataki in the transformation and modernization of the New York workers' compensation system, through legislative reforms and the allocation of resources. Further, the cooperation, dedication, teamwork and professionalism of the 1,700 Board employees were essential to the Board's ability to quickly and compassionately provide assistance and benefits to those in need. The Board is also appreciative for the dedicated efforts of the entire workers' compensation constituent community during this difficult time. The contributions and support of all of these parties enabled the Board to meet the many and varied challenges presented as a result of the events of September 11th and to develop creative ideas and procedures that may benefit all workers' compensation claimants in the future.

Robert R. Snashall is Chairman, New York State Workers' Compensation Board, and Brenda A. Rigas is Confidential Aide to the Chairman, New York State Workers' Compensation Board.

Property Condition Disclosure Act

By Thomas J. Mitchell

Act

Effective March 1, 2002, the New York State Property Condition Disclosure Act, Real Property Law Article 14, (see Appendix A, which starts on p. 10) requires the Sellers of one- to four-family residential property to provide a completed "property condition disclosure" statement to a Buyer or Buyer's agent prior to the Seller's acceptance of a purchase offer. The statement includes 48 questions related to the property's condition, patent and latent defects, structure and status with respect to occupancy and location in a flood plain. Questions must be answered by the Seller based on the Seller's knowledge. Knowledge here means actual knowledge of the Seller and not constructive knowledge.

Statement

Let's look at the questions:

General Information	1-9
Environmental	10-19
Structural	20-25
Mechanical Systems	26-47
School District	48

The statement must be signed and certified by the Seller and have the Buyer's acknowledgment.

Note—The Acknowledgment Disclosure Form is not a warranty and not a substitute for any home, pest, rodent and other inspections or testing of the property and inspection of public records.

Savo Fries, President of the New York State Association of Realtors, has stated: "We (brokers) caution, however, that the disclosure is a supplement to professional inspections, not a replacement. Buying a home is the largest financial commitment most people ever make and it simply makes sense to have as much information as possible prior to being bound by a contract."

Penalties

Failure to provide the forms to the Buyer before the Buyer signs the contract will result in a $500 credit to the Buyer from the Seller at closing. Section 467 of the New York Consolidated Laws provides: "Nothing contained in this Article shall be construed as limiting any existing legal cause of action or remedy at law, in statute or in equity."

This means that a Seller's failure to provide the form automatically gives the Purchaser a credit of $500 *plus*, if appropriate, an action for fraudulent misrepresentation by the Seller.

Important—The $500 credit is not an either/or situation. The Seller may remain liable for possible other actions by the Purchaser even after the credit is given.

Attorney Responsibilities

Encourage clients to make a disclosure statement that is complete and accurate to the best of the Seller's ability and knowledge and provide to the Buyer before signing a contract.

Failure to disclose and make delivery of said statement: A Seller who intentionally fails to provide the disclosure statement is in a far worse position coming into court on a post-closing litigation having also violated the statute whose very stated purpose is pro-consumer and pro-disclosure. (See Abraham Krieger's article in the *New York Law Journal*, June 27, 2002.) Mr. Krieger also raises the issue that an attorney who advises a Seller to "opt out" of the PCDA may result in not only a possible breach or violation of the statute by the Seller but professional liability to the attorney who so counseled the client.

Non-Applicability of the Statute

Section 463 of the New York Consolidated Laws lists 14 exemptions from the requirements to deliver a PCDS. In addition, the statute does not apply to:

A) Unimproved real property

B) Condominium units

C) Cooperative apartments

D) Property in a homeowners association that is not owned in fee simple by the Seller.

APPENDIX A

This act will significantly improve the transfer process and better serve the interests of all parties to a home purchase. It will increase clarity regarding the nature of the property and will provide greater certainty to contracts entered into by better informed buyers and sellers.

§ 2. The real property law is amended by adding a new article 14 to read as follows:

ARTICLE 14

PROPERTY CONDITION DISCLOSURE IN THE SALE OF RESIDENTIAL REAL PROPERTY

Section 460. Short title.

461. Definitions.

462. Property condition disclosure statement.

463. Exemptions.

464. Revision.

465. Remedy.

466. Duty of an agent.

467. Liability.

§ 460. Short title. This article shall be known and may be cited as the "property condition disclosure act".

§ 461. Definitions. As used in this article, the following terms shall have the following meanings:

1. "Agent" means a person who is licensed as a real estate broker or a real estate salesperson pursuant to section four hundred forty-a of this chapter and is acting in a fiduciary capacity.

2. "Binding contract of sale" means a real estate purchase contract or offer that would, upon signing by the seller and subject to satisfaction of any contingencies, require the buyer to accept a transfer of title.

3. "Knowledge" means only actual knowledge of a defect or condition on the part of the seller of residential real property.

4. "Real estate purchase contract" means any of the following:

(a) a contract which provides for the purchase and sale or exchange of residential real property;

(b) a lease with an option to purchase residential real property;

(c) a lease-with-obligation-to-purchase agreement for residential real property; or

(d) an installment land sale contract for residential real property.

5. "Residential real property" means real property improved by a one to four family dwelling used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons, but shall not refer to (a) unimproved real property upon which such dwellings are to be constructed, or (b) condominium units or cooperative apartments, or (c) property in a homeowners' association that is not owned in fee simple by the seller.

6. "Transfer of title" means delivery of a property executed instrument conveying title to residential real property and shall include delivery of a real estate purchase contract that is a lease or installment land sale contract.

§ 462. Property condition disclosure statement. 1. Except as is provided in section four hundred sixty-three of this article, every seller of residential real property pursuant to a real estate purchase contract shall complete and sign a property condition disclosure statement as prescribed by subdivision two of this section and cause it, or a copy thereof, to be delivered to a buyer or buyer's agent prior to the signing by the buyer of a binding contract of sale. A copy of the property condition disclosure statement containing the signatures of both

seller and buyer shall be attached to the real estate purchase contract. Nothing contained in this article or this disclosure statement is intended to prevent the parties to a contract of sale from entering into agreements of any kind or nature with respect to the physical condition of the property to be sold, including, but not limited to, agreements for the sale of real property "as is".

2. The following shall be the disclosure form:

PROPERTY CONDITION DISCLOSURE STATEMENT

NAME OF SELLER OR SELLERS:

PROPERTY ADDRESS:

THE PROPERTY CONDITION DISCLOSURE ACT REQUIRES THE SELLER OF RESIDENTIAL REAL PROPERTY TO CAUSE THIS DISCLOSURE STATEMENT OR A COPY THEREOF TO BE DELIVERED TO A BUYER OR BUYER'S AGENT PRIOR TO THE SIGNING BY THE BUYER OF A BINDING CONTRACT OF SALE.

PURPOSE OF STATEMENT: THIS IS A STATEMENT OF CERTAIN CONDITIONS AND INFORMATION CONCERNING THE PROPERTY KNOWN TO THE SELLER. THIS DISCLOSURE STATEMENT IS NOT A WARRANTY OF ANY KIND BY THE SELLER OR BY ANY AGENT REPRESENTING THE SELLER IN THIS TRANSACTION. IT IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR TESTS AND THE BUYER IS ENCOURAGED TO OBTAIN HIS OR HER OWN INDEPENDENT PROFESSIONAL INSPECTIONS AND ENVIRONMENTAL TESTS AND ALSO IS ENCOURAGED TO CHECK PUBLIC RECORDS PERTAINING TO THE PROPERTY.

A KNOWINGLY FALSE OR INCOMPLETE STATEMENT BY THE SELLER ON THIS FORM MAY SUBJECT THE SELLER TO CLAIMS BY THE BUYER PRIOR TO OR AFTER THE TRANSFER OF TITLE. IN THE EVENT A SELLER FAILS TO PERFORM THE DUTY PRESCRIBED IN THIS ARTICLE TO DELIVER A DISCLOSURE STATEMENT PRIOR TO THE SIGNING BY THE BUYER OF A BINDING CONTRACT OF SALE, THE BUYER SHALL RECEIVE UPON THE TRANSFER OF TITLE A CREDIT OF FIVE HUNDRED DOLLARS AGAINST THE AGREED UPON PURCHASE PRICE OF THE RESIDENTIAL REAL PROPERTY.

"RESIDENTIAL REAL PROPERTY" MEANS REAL PROPERTY IMPROVED BY A ONE TO FOUR FAMILY DWELLING USED OR OCCUPIED, OR INTENDED TO BE USED OR OCCUPIED, WHOLLY OR PARTLY, AS THE HOME OR RESIDENCE OF ONE OR MORE PERSONS, BUT SHALL NOT REFER TO (A) UNIMPROVED REAL PROPERTY UPON WHICH SUCH DWELLINGS ARE TO BE CONSTRUCTED OR (B) CONDOMINIUM UNITS OR COOPERATIVE APARTMENTS OR (C) PROPERTY ON A HOMEOWNERS' ASSOCIATION THAT IS NOT OWNED IN FEE SIMPLE BY THE SELLER.

INSTRUCTIONS TO THE SELLER:

(a) ANSWER ALL QUESTIONS BASED UPON YOUR ACTUAL KNOWLEDGE.

(b) ATTACH ADDITIONAL PAGES WITH YOUR SIGNATURE IF ADDITIONAL SPACE IS REQUIRED.

(c) COMPLETE THIS FORM YOURSELF.

(d) IF SOME ITEMS DO NOT APPLY TO YOUR PROPERTY, CHECK "NA" (NON-APPLICABLE). IF YOU DO NOT KNOW THE ANSWER CHECK "UNKN" (UNKNOWN).

SELLER'S STATEMENT. THE SELLER MAKES THE FOLLOWING REPRESENTATIONS TO THE BUYER BASED UPON THE SELLER'S ACTUAL KNOWLEDGE AT THE TIME OF SIGNING THIS DOCUMENT. THE SELLER AUTHORIZES HIS OR HER AGENT, IF ANY, TO PROVIDE A COPY OF THIS STATEMENT TO A PROSPECTIVE BUYER OF THE RESIDENTIAL REAL PROPERTY. THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER AND ARE NOT THE REPRESENTATIONS OF THE SELLER'S AGENT.

GENERAL INFORMATION

1. HOW LONG HAVE YOU OWNED THE PROPERTY?

2. HOW LONG HAVE YOU OCCUPIED THE PROPERTY?

3. WHAT IS THE AGE OF THE STRUCTURE OR STRUCTURES? NOTE TO BUYER--IF THE STRUCTURE WAS BUILT BEFORE 1978 YOU ARE ENCOURAGED TO INVESTIGATE FOR THE PRESENCE OF LEAD BASED PAINT.

4. DOES ANYBODY OTHER THAN YOURSELF HAVE A LEASE, EASEMENT OR ANY OTHER RIGHT TO USE OR OCCUPY ANY PART OF YOUR PROPERTY OTHER THAN THOSE STATED IN DOCUMENTS AVAILABLE IN THE PUBLIC RECORD, SUCH AS RIGHTS TO USE A ROAD OR PATH OR CUT TREES OR CROPS. YES NO UNKN NA

5. DOES ANYBODY ELSE CLAIM TO OWN ANY PART OF YOUR PROPERTY? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

6. HAS ANYONE DENIED YOU ACCESS TO THE PROPERTY OR MADE A FORMAL LEGAL CLAIM CHALLENGING YOUR TITLE TO THE PROPERTY? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

7. ARE THERE ANY FEATURES OF THE PROPERTY SHARED IN COMMON WITH ADJOINING LAND OWNERS OR A HOMEOWNERS ASSOCIATION, SUCH AS WALLS, FENCES OR DRIVEWAYS? YES NO UNKN NA (IF YES DESCRIBE BELOW)

8. ARE THERE ANY ELECTRIC OR GAS UTILITY SURCHARGES FOR LINE EXTENSIONS, SPECIAL ASSESSMENTS OR HOMEOWNER OR OTHER ASSOCIATION FEES THAT APPLY TO THE PROPERTY? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

9. ARE THERE CERTIFICATES OF OCCUPANCY RELATED TO THE PROPERTY? YES NO UNKN NA (IF NO, EXPLAIN BELOW)

ENVIRONMENTAL

NOTE TO SELLER - IN THIS SECTION YOU WILL BE ASKED QUESTIONS REGARDING PETROLEUM PRODUCTS AND HAZARDOUS OR TOXIC SUBSTANCES THAT YOU KNOW TO HAVE BEEN SPILLED, LEAKED OR OTHERWISE BEEN RELEASED ON THE PROPERTY OR FROM THE PROPERTY ONTO ANY OTHER PROPERTY. PETROLEUM PRODUCTS MAY INCLUDE, BUT ARE NOT LIMITED TO, GASOLINE, DIESEL FUEL, HOME HEATING FUEL, AND LUBRICANTS. HAZARDOUS OR TOXIC SUBSTANCES ARE PRODUCTS THAT COULD POSE SHORT- OR LONG-TERM DANGER TO PERSONAL HEALTH OR THE ENVIRONMENT IF THEY ARE NOT PROPERLY DISPOSED OF, APPLIED OR STORED. THESE INCLUDE, BUT ARE NOT LIMITED TO, FERTILIZERS, PESTICIDES AND INSECTICIDES, PAINT INCLUDING PAINT THINNER, VARNISH REMOVER AND WOOD PRESERVATIVES, TREATED WOOD, CONSTRUCTION MATERIALS SUCH AS ASPHALT AND ROOFING MATERIALS, ANTIFREEZE AND OTHER AUTOMOTIVE PRODUCTS, BATTERIES, CLEANING SOLVENTS INCLUDING SEPTIC TANK CLEANERS, HOUSEHOLD CLEANERS AND POOL CHEMICALS AND PRODUCTS CONTAINING MERCURY AND LEAD.

NOTE TO BUYER - IF CONTAMINATION OF THIS PROPERTY FROM PETROLEUM PRODUCTS AND/OR HAZARDOUS OR TOXIC SUBSTANCES IS A CONCERN TO YOU, YOU ARE URGED TO CONSIDER SOIL AND GROUNDWATER TESTING OF THIS PROPERTY.

10. IS ANY OR ALL OF THE PROPERTY LOCATED IN A DESIGNATED FLOODPLAIN? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

11. IS ANY OR ALL OF THE PROPERTY LOCATED IN A DESIGNATED WETLAND? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

12. IS THE PROPERTY LOCATED IN AN AGRICULTURAL DISTRICT? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

13. WAS THE PROPERTY EVER THE SITE OF A LANDFILL? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

14. ARE THERE OR HAVE THERE EVER BEEN FUEL STORAGE TANKS ABOVE OR BELOW THE GROUND ON THE PROPERTY? YES NO UNKN NA IF YES ARE THEY CURRENTLY IN USE? YES NO UNKN NA LOCATION(S) ARE THEY LEAKING OR HAVE THEY EVER LEAKED? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

15. IS THERE ASBESTOS IN THE STRUCTURE? YES NO UNKN NA (IF YES, STATE LOCATION OR LOCATIONS BELOW)

16. IS LEAD PLUMBING PRESENT? YES NO UNKN NA (IF YES, STATE LOCATION OR LOCATIONS BELOW)

17. HAS A RADON TEST BEEN DONE? YES NO UNKN NA (IF YES, ATTACH A COPY OF THE REPORT)

18. HAS MOTOR FUEL, MOTOR OIL, HOME HEATING FUEL, LUBRICATING OIL OR ANY OTHER PETROLEUM PRODUCT, METHANE GAS, OR ANY HAZARDOUS OR TOXIC SUBSTANCE SPILLED, LEAKED OR OTHERWISE BEEN RELEASED ON THE PROPERTY OR FROM THE PROPERTY ONTO ANY OTHER PROPERTY? YES NO UNKN NA (IF YES, DESCRIBE BELOW)

19. HAS THE PROPERTY BEEN TESTED FOR THE PRESENCE OF MOTOR FUEL, MOTOR OIL, HOME HEATING FUEL, LUBRICATING OIL, OR ANY OTHER PETROLEUM PRODUCT, METHANE GAS, OR ANY HAZARDOUS OR TOXIC SUBSTANCE? YES NO UNKN NA (IF YES, ATTACH REPORT(S))

STRUCTURAL

20. IS THERE ANY ROT OR WATER DAMAGE TO THE STRUCTURE OR STRUCTURES? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

21. IS THERE ANY FIRE OR SMOKE DAMAGE TO THE STRUCTURE OR STRUCTURES? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

22. IS THERE ANY TERMITE, INSECT, RODENT OR PEST INFESTATION OR DAMAGE? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

23. HAS THE PROPERTY BEEN TESTED FOR TERMITE, INSECT, RODENT OR PEST INFESTATION OR DAMAGE? YES NO UNKN NA (IF YES, PLEASE ATTACH REPORT(S))

24. WHAT IS THE TYPE OF ROOF/ROOF COVERING (SLATE, ASPHALT, OTHER)? ANY KNOWN MATERIAL DEFECTS? HOW OLD IS THE ROOF? IS THERE A TRANSFERABLE WARRANTEE ON THE ROOF IN EFFECT NOW? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

25. ARE THERE ANY KNOWN MATERIAL DEFECTS IN ANY OF THE FOLLOWING STRUCTURAL SYSTEMS: FOOTINGS, BEAMS, GIRDERS, LINTELS, COLUMNS OR PARTITIONS. YES NO UNKN NA (IF YES, EXPLAIN BELOW)

MECHANICAL SYSTEMS & SERVICES

26. WHAT IS THE WATER SOURCE (CIRCLE ALL THAT APPLY - WELL, PRIVATE, MUNICIPAL, OTHER)? IF MUNICIPAL, IS IT METERED? YES NO UNKN NA

27. HAS THE WATER QUALITY AND/OR FLOW RATE BEEN TESTED? YES NO UNKN NA (IF YES, DESCRIBE BELOW)

28. WHAT IS THE TYPE OF SEWAGE SYSTEM (CIRCLE ALL THAT APPLY - PUBLIC SEWER, PRIVATE SEWER, SEPTIC OR CESSPOOL)? IF SEPTIC OR CESSPOOL, AGE? DATE LAST PUMPED? FREQUENCY OF PUMPING? ANY KNOWN MATERIAL DEFECTS? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

29. WHO IS YOUR ELECTRIC SERVICE PROVIDER? WHAT IS THE AMPERAGE? DOES IT HAVE CIRCUIT BREAKERS OR FUSES? PRIVATE OR PUBLIC POLES? ANY KNOWN MATERIAL DEFECTS? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

30. ARE THERE ANY FLOODING, DRAINAGE OR GRADING PROBLEMS THAT RESULTED IN STANDING WATER ON ANY PORTION OF THE PROPERTY? YES NO UNKN NA (IF YES, STATE LOCATIONS AND EXPLAIN BELOW)

31. DOES THE BASEMENT HAVE SEEPAGE THAT RESULTS IN STANDING WATER? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

ARE THERE ANY KNOWN MATERIAL DEFECTS IN ANY OF THE FOLLOWING (IF YES, EXPLAIN BELOW. USE ADDITIONAL SHEETS IF NECESSARY):

32. PLUMBING SYSTEM? YES NO UNKN NA

33. SECURITY SYSTEM? YES NO UNKN NA

34. CARBON MONOXIDE DETECTOR? YES NO UNKN NA

35. SMOKE DETECTOR? YES NO UNKN NA

36. FIRE SPRINKLER SYSTEM? YES NO UNKN NA

37. SUMP PUMP? YES NO UNKN NA

38. FOUNDATION/SLAB? YES NO UNKN NA

39. INTERIOR WALLS/CEILINGS? YES NO UNKN NA
40. EXTERIOR WALLS OR SIDING? YES NO UNKN NA
41. FLOORS? YES NO UNKN NA
42. CHIMNEY/FIREPLACE OR STOVE? YES NO UNKN NA
43. PATIO/DECK? YES NO UNKN NA
44. DRIVEWAY? YES NO UNKN NA
45. AIR CONDITIONER? YES NO UNKN NA
46. HEATING SYSTEM? YES NO UNKN NA
47. HOT WATER HEATER? YES NO UNKN NA
48. THE PROPERTY IS LOCATED IN THE FOLLOWING SCHOOL DISTRICT UNKN
NOTE: BUYER IS ENCOURAGED TO CHECK PUBLIC RECORDS CONCERNING THE PROPERTY (E.G. TAX RECORDS AND WETLAND AND FLOOD PLAIN MAPS)
THE SELLER SHOULD USE THIS AREA TO FURTHER EXPLAIN ANY ITEM ABOVE. IF NECESSARY, ATTACH ADDITIONAL PAGES AND INDICATE HERE THE NUMBER OF ADDITIONAL PAGES ATTACHED.

_____

_____

_____

_____

SELLER'S CERTIFICATION: SELLER CERTIFIES THAT THE INFORMATION IN THIS PROPERTY CONDITION DISCLOSURE STATEMENT IS TRUE AND COMPLETE TO THE SELLER'S ACTUAL KNOWLEDGE AS OF THE DATE SIGNED BY THE SELLER. IF A SELLER OF RESIDENTIAL REAL PROPERTY ACQUIRES KNOWLEDGE WHICH RENDERS MATERIALLY INACCURATE A PROPERTY CONDITION DISCLOSURE STATEMENT PROVIDED PREVIOUSLY, THE SELLER SHALL DELIVER A REVISED PROPERTY CONDITION DISCLOSURE STATEMENT TO THE BUYER AS SOON AS PRACTICABLE. IN NO EVENT, HOWEVER, SHALL A SELLER BE REQUIRED TO PROVIDE A REVISED PROPERTY CONDITION DISCLOSURE STATEMENT AFTER THE TRANSFER OF TITLE FROM THE SELLER TO THE BUYER OR OCCUPANCY BY THE BUYER, WHICHEVER IS EARLIER.

SELLER _____ DATE _____

SELLER _____ DATE _____

BUYER'S ACKNOWLEDGMENT: BUYER ACKNOWLEDGES RECEIPT OF A COPY OF THIS STATEMENT AND BUYER UNDERSTANDS THAT THIS INFORMATION IS A STATEMENT OF CERTAIN CONDITIONS AND INFORMATION CONCERNING THE PROPERTY KNOWN TO THE SELLER. IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER OR SELLER'S AGENT AND IS NOT A SUBSTITUTE FOR ANY HOME, PEST, RADON OR OTHER INSPECTIONS OR TESTING OF THE PROPERTY OR INSPECTION OF THE PUBLIC RECORDS.

BUYER _____ DATE _____

BUYER _____ DATE _____

3. Nothing in this article shall require a seller to undertake or provide for any investigation or inspection of his or her residential real property or to check any public records.

§ 463. Exemptions. A property condition disclosure statement shall not be required in connection with any of the following transfers of residential real property:

1. A transfer pursuant to a court order, including, but not limited to, a transfer order by a probate court during the administration of a decedent's estate, a transfer pursuant to a writ of execution, a transfer by a trustee in bankruptcy or debtor-in-possession, a transfer as a result of the exercise of the power of eminent domain, and a transfer that results from a decree for specific performance of a contract or other agreement between two or more persons;

2. A transfer to mortgagee or an affiliate or agent thereof by a mortgagor by deed in lieu of foreclosure or in satisfaction of the mortgage debt;

3. A transfer to a beneficiary of a deed of trust;

4. A transfer pursuant to a foreclosure sale that follows a default in the satisfaction of an obligation that is secured by a mortgage;

5. A transfer by a sale under a power of sale that follows a default in the satisfaction of an obligation that is secured by a mortgage;

6. A transfer by a mortgagee, or a beneficiary under a mortgage, or an affiliate or agent thereof, who has acquired the residential real property at a sale under a mortgage or who has acquired the residential real property by a deed in lieu of foreclosure;

7. A transfer by a fiduciary in the course of the administration of a decedent's estate, a guardianship, a conservatorship, or a trust;

8. A transfer from one co-owner to one or more other co-owners;

9. A transfer made to the transferor's spouse or to one or more persons in the lineal consanguinity of one or more of the transferors;

10. A transfer between spouses or former spouses as a result of a decree of divorce, dissolution of marriage, annulment, or legal separation or as a result of property settlement agreement incidental to a decree of divorce, dissolution of marriage, annulment or legal separation;

11. A transfer to or from the state, a political subdivision of the state, or another governmental entity;

12. A transfer that involves newly constructed residential real property that previously had not been inhabited;

13. A transfer by a sheriff; or

14. A transfer pursuant to a partition action.

§ 464. Revision. If a seller of residential real property acquires knowledge which renders materially inaccurate a property condition disclosure statement provided previously, the seller shall deliver a revised property condition disclosure statement to the buyer as soon as practicable. In no event, however, shall a seller be required to provide a revised property condition disclosure statement after the transfer of title from the seller to the buyer or occupancy by the buyer, whichever is earlier.

§ 465. Remedy. 1. In the event a seller fails to perform the duty prescribed in this article to deliver a disclosure statement prior to the signing by the buyer of a binding contract of sale, the buyer shall receive upon the transfer of title a credit of five hundred dollars against the agreed upon purchase price of the residential real property.

2. Any seller who provides a property condition disclosure statement or provides or fails to provide a revised property condition disclosure statement shall be liable only for a willful failure to perform the requirements of this article. For such a willful failure, the seller shall be liable for the actual damages suffered by the buyer in addition to any other existing equitable or statutory remedy.

§ 466. Duty of an agent. An agent representing a seller of residential real property as a listing broker shall have the duty to timely inform each seller represented by that agent of the seller's obligations under this article. An agent representing a buyer of residential real property, or, if the buyer is not represented by an agent, the agent representing a seller of residential real property and dealing with a prospective buyer, shall have the duty to timely (in any event, before the buyer signs a binding contract of sale) inform such buyer of the buyer's rights and obligations under this article. If an agent performs the duties and obligations imposed upon him or her pursuant to this section, the agent shall have no further duties under this article and shall not be liable to any party for a violation of this article.

§ 467. Liability. Nothing contained in this article shall be construed as limiting any existing legal cause of action or remedy at law, in statute or in equity.

§ 3. This act shall take effect on the first day of March in the year next succeeding the year in which it shall have become a law and shall apply to any real estate purchase contract entered into on or after such date.

Advising the Drunk Driver from Out-of-State? Remember the Compact!

By Daniel Barrett

No lawyer should represent a drunk-driving defendant from another state without considering the Driver's License Compact. Representation should include planning to minimize the home-state consequences, planning that requires knowledge of the Compact. One approach is to consider having the driver move to New York or a state that has not joined the Compact.

The Compact provides that the home state must impose a drunk-driving suspension if there has been an out-of-state drunk-driving conviction. New York is party to the Compact,[1] as are 37 other states. Pennsylvania adopted the Compact in 1996.[2] Federal highway funding has encouraged states to join the Compact.

"The most significant injustice under the Compact situation is that first-time offenders usually do not suffer a twelve-month suspension if the offense is committed in Pennsylvania."

The Compact leads to strange results. The Pennsylvanian who pleads guilty to the New York offense of D.W.A.I., "driving while ability impaired," might leave the New York courtroom expecting to be back driving in a month, since he could attend safety classes and obtain a conditional license. His plans will soon be shattered. Pennsylvania will impose a twelve-month suspension as soon as it is notified of the New York conviction.

Different State Approaches

To enforce the Compact, states must compare statutes. The conviction must be for driving "under the influence to a degree which renders the driver incapable of safely driving a vehicle."

New York has divided the drunk-driving offenses into two categories, driving-while-ability-impaired (D.W.A.I.) and driving-while-intoxicated (D.W.I.).[3] D.W.A.I. requires any degree of impairment. D.W.I. requires intoxication.

Pennsylvania has no equivalent offense to D.W.A.I. The Pennsylvania Vehicle Code includes an offense called driving-under-the-influence (D.U.I.).[4] Conviction requires proof that the driver is under the influence to a degree which makes them incapable of safe driving.

Both states also use the blood alcohol level of 0.10% as the standard for D.U.I./D.W.I. (Both would receive more federal highway funding if the limit were reduced to 0.08%.)

New York D.W.A.I. does not involve impairment to the Compact standard. Any degree of impairment is sufficient to convict.[5]

Pennsylvanians were quick to challenge PennDot's inclusion of the New York D.W.A.I. offense under the Compact, and were successful.[6]

In response, the Pennsylvania legislature amended the Vehicle Code, adding section 1586. When the out-of-state offense requires a different degree of impairment, that difference "shall not be a basis for determining that the party state's offense is not substantially similar . . . for the purpose of Article IV of the Compact."[7] The vague standard drew much derision, but the courts upheld it.

The appeals courts of Pennsylvania now hold a New York D.W.A.I. as grounds for suspension under the Compact. Pennsylvania's highest court, the Supreme Court, has not ruled on the issue.[8]

The Compact does not specifically cover the "per se" statutes where the blood alcohol level is itself illegal, without proof of impairment. The Pennsylvania Supreme Court rejected that challenge.[9] It would not review a Commonwealth Court ruling that 0.10%, as a matter of law, rendered the driver incapable of safe driving.

Unequal Justice

The most significant injustice under the Compact situation is that first-time offenders usually do not suffer a twelve-month suspension if the offense is committed in Pennsylvania. The Vehicle Code mandates each county to maintain a diversionary program for eligible offenders, called Accelerated Rehabilitative Disposition (ARD). The programs involve a license suspension of at least 30 days and eventual dismissal of charges. A typical ARD program might impose 90- or 180-day suspensions. Any conviction after an ARD dismissal will be

treated as a second offense, and a mandatory jail term of at least 30 days will be imposed for the second offense.

Cramming the Compact onto state programs leads to widely differing results.

The New Yorker in Pennsylvania will be placed in ARD. Because there is no conviction, he will not lose his New York driver's license. He will not be able to drive in Pennsylvania during the suspension imposed by the Pennsylvania court, but he can drive in any other state.

"Drivers subject to the Compact might need the advice, 'If you don't like it, you can stay.' More specifically, stay in New York. Become a New York driver by the date of conviction."

The Pennsylvanian in New York who pleads to the D.W.A.I. will be unable to drive in New York for 30 to 90 days but will lose his license from his home state for twelve months. Without a driver's license, he will not be licensed to drive in any state.

What should we advise the defendant in New York?

Drivers subject to the Compact might need the advice, "If you don't like it, you can stay." More specifically, stay in New York. Become a New York driver by the date of conviction.

Under the Compact, article II, "home state" means that state which has issued and has the power to suspend or revoke the use of the license or permit to operate a motor vehicle. Article III requires the party state to report each conviction "to the licensing authority of the home state of the license."

When the driver has changed "home state" or no longer has a home state by the date of conviction, the party state should have no state to report to. If it is reported, the Compact-based action can be challenged.

The key date for imposition of Compact sanctions is the guilty plea or conviction. Between arrest and conviction, the driver could move to New York and have it as a "home state."[10] In the alternative, the driver might surrender the home state license and be "stateless," but there have been no decisions on that defense to a suspension under the Compact.

For D.W.A.I. offenders, the unpleasant decision is to accept a three-month suspension to avoid a 12-month suspension. While under suspension from New York, the driver cannot apply for a license in Pennsylvania. After the three months' suspension, privileges can be reinstated in New York. The driver should be able to relocate to Pennsylvania and obtain a driver's license.

Endnotes

1. N.Y. Vehicle & Traffic Law § 615 (VTL).
2. 75 Pa. Cons. Stat. § 1581.
3. VTL § 1192.
4. 75 Pa. Cons. Stat. § 3731
5. *People v. Cruz*, 48 N.Y.2d 419, 423 N.Y.S.2d 625, 399 N.E.2d 513 (1979).
6. *Olmstead v. Dep't of Transp., Bur. of Driver Licensing*, 677 A.2d 1285 (Pa. 1996), *aff'd on other grounds*, 707 A.2d 144 (Pa. 1998), *Petrovick v. Dep't of Transp., Bur. of Driver Licensing*, 741 A.2d 1264, 559 Pa. 614 (1999).
7. 75 Pa. Cons. Stat. § 1586.
8. *Squire v. Dep't of Transp., Bur. of Driver Licensing*, 769 A.2d 1224 (Pa. Commw. 2001).
9. *Barrett v. Dep't of Transp., Bur. of Driver Licensing*, 746 A.2d. 658, (Pa. Commw. 2000), *appeal denied*, 760 A.2d 856, 563 Pa. 691 (2000).
10. *Berner v. Dep't of Transp., Bur. of Driver Licensing*, 746 A.2d 1207, (Pa. Commw. 2000).

Daniel Barrett has practiced law in Athens, Pennsylvania, since 1977. He has been a member of the New York bar since 1983. He is a graduate of the University of Pennsylvania and the Georgetown University Law Center. He represented the driver in *Olmstead*, the first appellate case in Pennsylvania dealing with convictions for D.W.A.I. in New York. An earlier article on the Driver's License Compact appeared in 21 Pennsylvania Law Weekly 645, June 1, 1998.

Practicing Law After the WTC Disaster, Including Tips for the Single Practitioner

By Leona Beane

My office is about two blocks north of the World Trade Center. On September 11, 2001, I started out a little later than usual, and decided to use the subway ("E" train) that goes right into the Trade Center. There were many delays. Finally, when the train stopped at West 4th Street (Greenwich Village), I decided to take a taxi, which was impossible, so I started to walk downtown. While walking downtown, I saw the fires and the extreme smoke. At Canal Street (about 10 blocks north of my office), the crowds were starting to get larger. I walked across Canal Street to go south at Broadway—the crowds kept getting larger, with a mass hysteria of people running toward me, and there was loads of smoke—that was real scary. I think that must have been when the towers collapsed, but I didn't know. I kept walking downtown, trying to get away from the mass crowds by going into doorways for safety. Then I met someone who had an office in the same office building who told me the building had been evacuated, and people were being told to keep walking north (away from the are). Thus, I turned, and started walking north.

I think in the end I walked well over eight miles—it's a good thing I'm a good walker. While walking uptown I met up with four people who work in the Surrogate's Court. The Court had also been evacuated. Two of them were planning to walk across the 59th Street Bridge to get to Queens and Long Island.

As the day went on, the crowds thinned; later in the afternoon, many of the buses started running, and some of the subways. During the day, there were constant sounds of emergency vehicles. People couldn't use cars, and for several hours most of the bridges and tunnels were closed. Police were at all the major street crossings.

My secretary (paralegal assistant) had been in my office in the early morning. There were about three or four other employees also in the office suite. She told me there were emergency announcements for everyone to evacuate the building. She walked downstairs with the others, and was waiting in the lobby. Shortly thereafter, two FBI agents arrived and insisted everyone had to leave the building, and that everyone should just keep walking north (uptown). By the end of the day, she was able to use a subway to Brooklyn as several of the Brooklyn trains were working by that time.

During this whole time the phones downtown were not working—my cell phone didn't work. The few public phones that were working had long lines of people waiting.

The Next Few Days and Weeks Ahead

Thank goodness for e-mail which I used from my home, along with cable modem, as that had become my major form of communication with friends, relatives, and the legal world over the next several weeks.

All areas below Canal Street were closed, with no access, no phones, no mail, no electricity, and loads of smoke and debris and damage.

All courts in New York County (other than the Appellate Division) were closed for the rest of the week. The courts in New York County opened on Monday, but there was no phone service. For the courts' use, the court administration subsequently obtained a few hundred cell phones, which I understand did not always work. The court computers in New York County were not working for several days after they re-opened.

Over the next few days and weeks, several lawyers with offices in midtown offered me the use of their office to do work. The problem was I didn't have any papers or files to work on. All my papers and files were at my office downtown on hard copy and notes, and on the computers in my office. This was a situation where a Palm Pilot would have been a big help. Also, a good backup system is crucial. This has taught me we should plan differently—there are so many things kept in an office such as tax records, financial records, checkbooks, etc. Each night when we leave our offices, we should have a checklist of what we should take with us in case we can't get to the office tomorrow, and for several days thereafter. I didn't even have the phone numbers of clients and others.

Finally, Thursday and Friday (September 20 and 21), I was able to have limited access to my office premises, for 20 to 30 minutes with a police escort, who remained with me (for security purposes) until I left. There was no electricity, no phones and no water in the building, but no real damage that I could see. Looking for papers in files with little flashlights was not easy. But at least I was able to retrieve a few important papers that I was able to locate, and thus possibly arrange to do some limited work at home on my laptop.

On Wednesday, September 26, electricity was restored, but still no telephone service. This time I obtained entry with a police escort, who then was able to leave after the super of the building gave an O.K. The building where my office is located had a wire fence around it, with police guards at the corner, and there was still *no* phone service.

Once the electricity was restored, I was able to check my computers, which appeared to be intact. Thus, I would be able to get some work done. However, it was extremely difficult working without phones, and no fax and no e-mail, and attempting to call other attorneys (most of whom also had no phone service).

Some lawyers and law firms had taken out ads in the *Law Journal* to announce their new temporary addresses and temporary telephone numbers. The New York State Bar Association (on its Web site) had a section listing attorneys' temporary telephone and address changes. The list kept getting longer. Many clients couldn't find their lawyers.

On September 24 and 25, I attended the LegalTech Show in New York—I had signed up for it a few weeks in advance because I realized I had to learn more technology. I'm happy I attended and learned a great deal—they also had several programs on disaster recovery—at that time I was not sure if my computers still worked. Ross Kodner did a phenomenal job in putting together a group of "techies" who agreed to assist those lawyers with offices affected by the WTC disaster—he and his group put together the WTC Disaster Relief LegalTech Assistance Program.[1]

October 2001

As of October 1, 2001, I finally had phone service restored, and at this time the office building was officially opened. There were still intermittent disruptions with the phone service at times. Thus, I continued using my cell phones. Practically everyone in lower Manhattan has been using cell phones, required for basic communication. Virtually all of lower Manhattan still had no regular phone service, and some lawyers still did not have regular access to their offices. The phone service problem was real bad, because the phones appeared to be ringing, but they were not ringing through to the person; it's frustrating to the person calling because they believe the other person is not answering the phone.

Mail service was restored as of October 5, 2001; the large post office at 90 Church St. (across from the WTC) sustained extensive water and other damage, and was not in service. During the several weeks prior to October 5, 2001, I and my assistant had been going to the main post office on 33rd Street to attempt to retrieve the office mail—that's a whole story by itself, since I'm in an office suite with six other attorneys.

No vehicles were permitted below Canal Street. Thus, no deliveries. I wanted to purchase a new office refrigerator because the current one had to be discarded (being without electricity that long). We didn't receive the *New York Law Journal* until October 11 because they claimed they couldn't get access to the building. By that time, there were occasional deliveries in the area from Federal Express and UPS and other delivery services. But, for many weeks, there were still no taxis permitted below Canal Street.

During this whole time (until October 29, 2001) there had been police guards at the corner of Park Place and Broadway, and a wire fence around the office building. There was no admittance to the block without proof of identity and proof that the person had an office there. The block had been listed as "no access" on the disaster area maps. I kept checking the maps at www.nyc.gov to check on the boundary line for "access." Stores on the block, including branches of two large banks, had not been able to open for seven weeks. It's hard to describe the situation to someone who had not personally attempted to gain access.

Situation in December 2001

At times you can still smell smoke, fumes, chemicals and other toxins in the air—the air is just not good. People were sometimes still using small masks—some days it was worse than others.

Some lawyers still didn't have full telephone service restored. Some of the court phone numbers in Manhattan still don't work.

There were several buildings in the area where lawyers still had not yet been permitted to return to their offices. Quite a few attorneys who had offices in the WTC area also lived in the vicinity, and thus may not even have had phone service at home. Virtually everyone downtown was still using cell phones to get by even if phone service was restored, because at times there were disruptions.

Getting through the ordeal of being displaced (even temporarily) has not been easy—it is a very depressing and very stressful situation.

Many lawyers have had the extra burdens and stress of figuring out different travel arrangements—some subway and train stops were not in service, and some subway routes were modified; there have been many restrictions on vehicle travel into and within Manhattan. To go for any appointments, I have to plan on extra time in case of delays in transportation, and delays due to extra security. Many buildings in midtown have extra security measures implemented to enter the building.

Many lawyers have on an ad hoc basis developed some form of temporary arrangement. Some were still working out of their house or the residence or office of a relative or friend. Many were not sure where they will move to or when, and figure they will make decisions later, as long as they are able to somewhat minimally get by in the short term. Many lawyers were not receiving the *Law Journal*, or are under such stressful times, they don't have time to read it even if they do receive it.

Current Situation—June 2002

Even today (June 2002), practically everyone has phone service restored, but there are intermittent telephone disruptions; some businesses and some offices have still not re-opened. There are ongoing construction and repair crews of all types in the area. The large major post office at 90 Church Street is still closed and it is expected to be closed until sometime next year. We are all modifying (on a regular basis) how we each continue practicing law.

I'm providing several tips to be better prepared for emergencies (based on my experiences) which should provide assistance to the single practitioner and small firm.

Some Tips for Lawyers, Primarily for the Single Practitioner

Unfortunately, many tips relate to maintaining (and paying for) duplicate systems and services—both for the office and the home.

1. Back up your computers with a good tape backup system.
2. Back up important files—even if you're not sure which tape backup system to implement; in the interim, copy files to CDs and/or Zip disks and do this regularly (every week or perhaps every day), and then take the CDs and disks home—keep them off-site.
3. Maintain a copy of your office Rolodex for home use (or Palm Pilot or other device) that has all phone numbers, etc.
4. Maintain at home the home phone numbers, e-mail, and other contact information (in addition to office numbers) for lawyers and others that you have regular contact with (such as accountants, insurance agents, surety bonds, etc.) for home use.
5. Must have computer or laptop at home (with all regular software).
6. Set-up e-mail for home use.
7. Join list serves in area of specialty—wonderful source of communication and information.
8. Computerized legal research for home use—such as Lexis or WestLaw or other computerized legal research.
9. Cable modem or DSL for home use.
10. Use different Internet service providers—in case one provider has disruptions in service.
11. Cell phones—if you have more than one cell phone, use two different providers in case of disruptions in service.
12. Have calendar system (on disk or at least a paper calendar) with you for home use, so you know all your court dates and appointments (another advantage of using Palm Pilot or other similar device).
13. Set up file—and also maintain hard copy and copy to disk—of office bank account numbers to maintain at home, plus have on hand at least one blank check for each account—maintain in safe place at home, or off-site.
14. Set up file—and maintain hard copy and copy to disk—of all insurance policies, policy numbers, and short summaries of coverage and endorsements, etc., to maintain in office, and to maintain at home and off-site.
15. If you're in an office suite with other lawyers, set up a file (and maintain hard copy) of the home numbers, home addresses, e-mail, and other contact info for all attorneys and staff.
16. Use software for checkbooks and other financial records, e.g., Quicken or other software program; update on regular basis, and take copy of disk home, and keep off-site
17. Don't keep original wills or original executed deeds and contracts in the office. Have compete photocopies of full execution for office and for off-site, and maintain the originals in a bank safe deposit vault.
18. Have details of laptop serial number and software and phone numbers for warranty, etc., in a file and on separate disk (plus hard copy) when traveling with laptop.
19. In the middle of each day, make a checklist of what you should copy and/or take home in case you can't return to the office tomorrow or for several days thereafter. Then, before you leave your office at the end of the day, follow through on your list.

Endnote

1. Steve Gallagher of the N.Y.S. Bar Association was instrumental in this endeavor.

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NOTE: A version of this article was presented by the author at the New York State Bar Association Annual Meeting, Law Office Economics and Management Committee, on January 23, 2002.

Seemingly Innocuous but Fatal Errors in Eviction Proceedings

By Gary A. Hughes

"Summary proceedings" is New York's fancy name for evictions. They are governed generally by Article 7 of the Real Property Actions and Proceedings Law (RPAPL), but when dealing with manufactured home parks (the politically correct name for mobile home or trailer parks), section 233 of the Real Property Law must be consulted for some specific provisions applicable to them. As anyone familiar with summary proceedings knows, this area of law is not just strewn with pitfalls for the unwary: it teems with punji pits.

Let's first consider some seemingly innocuous things about three-day notices. To bring a summary proceeding for non-payment of rent, the statute provides that the landlord must either have made a demand on the tenant for rent, or served him or her with a three-day notice.[1] The landlord has a choice, but he or she must utilize one or the other method, because it is a prerequisite for bringing a non-payment summary proceeding.[2] An unsigned three-day demand is jurisdictionally defective.[3] A three-day notice with a typewritten signature is also jurisdictionally defective.[4] But since the statute does not require the landlord to personally sign the notice, the attorney for the landlord can sign it,[5] although, as we shall see, that's not an especially good idea. If the three-day notice includes a signature line for the landlord with his or her name under it, and below that the name of a law firm identified as the attorneys for the petitioner, but it is not signed by anyone, it is defective, because it does not clearly demonstrate that it emanates from the landlord.[6]

If the three-day notice is addressed to both the husband and wife, but is only served on one of the spouses, that is sufficient service on the other spouse, at least if the other spouse appears in the subsequent eviction action.[7]

If the three-day notice identifies the rent demanded as a lump sum, rather than detailing it by the amount due for each month or other period, it is jurisdictionally defective.[8]

If you are in the habit of signing three-day notices on behalf of your landlord client, or of sending letters which contain the required three-day notice language to delinquent tenants, you may wish to reconsider these practices. Such letters do not qualify as the prerequisite to an eviction, because three-day notices must be served on the tenant by one of the methods authorized by statute for the service of a Notice and Petition;[9] mailing the notice is not a valid method of service.[10] More importantly, if you send a three-day notice or demand letter on your letterhead, and sign it, it becomes a communication concerning a debt[11] and must comply with the federal Fair Debt Collection Practices Act.[12] A three-day notice signed by an attorney, rather than a landlord, is also a communication concerning a debt, and hence must also comply with the Act.[13] So?, you may ask. To comply with the Act, the letter or signed notice must include other things besides the usual three-day notice language, such as a disclosure that it is an attempt to collect a debt and that any information provided by the tenant in response to it will be used for that purpose,[14] and must provide the tenant with thirty, not three, days to challenge the validity of the amount of the rent claimed to be due.[15] If the letter or notice does not comply with these requirements, you are subject to severe monetary penalties,[16] depending on whether the irate tenant elects to sue you on his or her own,[17] or as the representative of a class.[18]

"As anyone familiar with summary proceedings knows, this area of law is not just strewn with pitfalls for the unwary: it teems with punji pits."

If the summary proceeding is brought on the grounds that the tenant was served with a termination-of-lease notice and holds over after the date the lease was terminated, and the termination notice was signed by the agent of the landlord, but the landlord died before the proceeding was commenced, the proceeding is defective, and will be dismissed. The court is without jurisdiction to entertain the proceeding, as it is brought by a person who no longer has authority to act on behalf of the owner of the property.[19]

Some errors regarding petitions can be more dangerous than you would expect. The failure to state the court in which the petition will be heard is a jurisdictional defect,[20] so it's important to fill in all the spaces at the top of a pre-printed form. A failure to state in a non-payment proceeding petition what method was used to serve the three-day notice is a jurisdictional

defect,[21] although the omission can be remedied by attaching a copy of the three-day notice and the original affidavit of service to the petition.[22] Signature on the Notice of Petition by the landlord alone is similarly a jurisdictional defect; the statute provides that only attorneys and court clerks can issue a Notice of Petition.[23] However, it has been held that the landlord can sign the Notice if it is also endorsed by an attorney.[24]

In a non-payment proceeding, the petition must specify whether the rent was demanded from the tenant orally or in writing, or it is defective.[25] The court has discretion to allow an amendment to the petition to comply with this requirement, but it is dangerous to depend on the court's discretion in eviction proceedings. Allegations of compliance with the oral demand requirement are liberally construed, however, and an oral demand need not meet the requirements set forth in RPAPL § 711(2) for written demands.[26]

"Judges, especially local judges, are not always eager to evict people, and it is often fatal to give them a ground not to do so."

When the proceeding is brought in a court of limited jurisdiction, such as a justice, city, or county court, the petition must request the recovery of the possession of the property in addition to an award of the rent claimed to be due. The Uniform Justice Court Act provides that justice courts may award rent amounts greater than the limitation on their monetary jurisdiction.[27] The Uniform City Court Act contains a similar provision.[28] In the case of county courts, no such provision exists, however; their jurisdiction over summary proceedings derives from the statute granting various courts jurisdiction to hear such cases.[29] If the petition filed in justice, city, or county court only makes a demand for rent, without additionally requesting possession of the property, neither court has jurisdiction to entertain the petition unless the amount of rent requested is within that court's monetary jurisdiction; if the rent demand exceeds the court's monetary jurisdiction the court must dismiss the proceeding.[30]

When proceeding in justice or city courts, the practitioner should remember that one of the grounds specified in Article 7 must be alleged as the basis of the eviction proceeding. If the eviction is sought based on the tenant's violation of some provision of the lease not mentioned in the statute, the court must treat the petition as one for ejectment, and will dismiss the proceeding, since justice and city courts do not have jurisdiction of ejectment proceedings.[31]

If the property sought to be recovered is subject to a federal subsidized rent program, the petition must disclose this fact, and allege the petitioner's compliance with the requirements of the applicable federal regulations. If it does not, the petition will be dismissed.[32]

Service errors can get you into serious trouble. Do not approach summary proceedings as a normal civil action: The RPAPL requires that the Notice and Petition be served not more than 12, or less than 5 days before the return date.[33] Serving the Notice and Petition more than 12 days before the return date is a jurisdictional defect.[34] Thus, the unwary practitioner should not prepare a form Supreme or County Court summons to commence a summary proceeding, and when requesting a return date in Justice Court, should be aware of this limited time period.

Another decision suggests the value of reviewing carefully the affidavit of service you receive from the process server who served the Notice and Petition on the tenant. If the ZIP code of the place of service is not on the affidavit of service, it is defective, at least when the territorial jurisdiction of the court encompasses more than one ZIP code.[35]

The statute requires that the affidavit of service of the Notice and Petition on the tenant be filed with the court within three days of service on the tenant.[36] Bringing it with you to court will not do.[37]

While it can be argued that these are issues which the tenant must raise if he or she appears in court, Professor Siegel's admonition that it is better to have these questions decided in someone else's case applies with equal force in lower courts. Judges, especially local judges, are not always eager to evict people, and it is often fatal to give them a ground not to do so. It is also embarrassing to tell your client, who probably thinks, correctly, that the whole matter is unnecessarily complicated in the first place, that the case has been dismissed, and he or she must start over.

Endnotes

1. RPAPL § 711(2).
2. *Pepe v. Miller & Miller Consulting Actuaries*, 221 A.D.2d 545, 634 N.Y.S.2d 490 (2d Dep't 1995).
3. *Anastasia Realty Co. v. Lai*, 173 Misc. 2d 1012, 662 N.Y.S.2d 714 (N.Y.C. Civ. Ct., Kings Co. 1997).
4. *Fazal Realty Corp. v. Paz*, 151 Misc. 2d 396, 573 N.Y.S.2d 399 (N.Y.C. Civ. Ct., New York Co. 1991).
5. *Yui Woon Kwong v. Sun Po Eng*, 589 N.Y.S.2d 138 (Sup. Ct., App. Term, 1st Dep't 1991).
6. *Anastasia Realty*, 173 Misc. 2d 1012.

7. *Municipal Housing Auth. v. Altieri*, 24 Misc. 2d 989, 205 N.Y.S.2d 438 (Schenectady City Ct. 1960).
8. *St. James Court, L.L.C. v. Booker*, 176 Misc. 2d 693, 673 N.Y.S.2d 821 (N.Y. City Civ. Ct., Kings Co. 1998).
9. RPAPL § 711(2), citing RPAPL § 735.
10. *Zinsser v. Herrman*, 23 Misc. 645, 52 N.Y.S. 107 (Sup. Ct., App. Term 1898).
11. 15 U.S.C. § 1692a(2).
12. 15 U.S.C. § 1692-1692o.
13. *Romea v. Heiberger & Associates*, 163 F.3d 111 (2d Cir. 1998). For more information, see Hughes, "Surprise! Delinquent tenants are 'Debtors' under the Federal Fair Debt Collection Practices Act," One on One, Summer/Fall 1999.
14. 15 U.S.C. § 1692e(11).
15. 15 U.S.C. § 1692g.
16. 15 U.S.C. § 1692k.
17. 15 U.S.C. § 1692k(a)(2)(A).
18. 15 U.S.C. § 1692k(a)(2)(B).
19. *Vartarian v. Brady*, 184 Misc. 2d 333, 707 N.Y.S.2d 285 (N.Y.C. Civ. Ct., New York Co. 1999).
20. *Remanco, Inc. v. Wexler*, 98 Misc. 2d 955, 415 N.Y.S.2d 179 (Yonkers City Ct. 1979).
21. *Stuyvesant Real Estate Co. v. Sherman*, 40 Misc. 205, 81 N.Y.S. 642 (Sup. Ct., App. Term, 1903).
22. *Margolies v. Lawrence*, 67 Misc. 2d 468, 324 N.Y.S.2d 418 (N.Y.C. Civ. Ct., 1971).
23. RPAPL § 731(1); *Grove Street Realty, Inc. v. Testa*, 100 Misc. 2d 278, 418 N.Y.S.2d 858 (Peekskill City Ct. 1979).
24. *Parker v. Paton Assocs., Inc., of Amsterdam*, 128 Misc. 2d 871, 491 N.Y.S.2d 550 (Jamestown City Ct. 1979).
25. *Kulok v. Riddim Company, L.L.C.*, 185 Misc. 2d 195, 712 N.Y.S.2d 728 (N.Y.C. Civ. Ct., New York Co. 2000).
26. *Kulok*, 185 Misc. 2d 195.
27. UJCA § 204.
28. UCCA § 204.
29. RPAPL § 701.
30. *DiBello v. Penflex, Inc.*, 165 Misc. 2d 994, 630 N.Y.S.2d 848 (Rensselaer Co. Ct. 1995).
31. *Watervliet Housing Auth. v. Bell*, 262 A.D.2d 810, 694 N.Y.S.2d 484 (3d Dep't 1999).
32. *Homestead Equities, Inc. v. Washington*, 176 Misc. 2d 459, 672 N.Y.S.2d 980 (N.Y.C. Civ. Ct., Kings Co. 1998), involving Section 8 housing, requiring compliance with 24 C.F.R. § 982.310(e)(2)(ii).
33. RPAPL § 733(1).
34. *Frank v. Ange*, 82 Misc. 2d 465, 370 N.Y.S.2d 365 (Rochester City Ct. 1975).
35. *N.Y. Housing Auth. v. Fountain*, 177 Misc. 2d 784, 660 N.Y.S.2d 247 (N.Y.C. Civ. Ct., Bronx Co. 1997).
36. RPAPL § 735(2).
37. *Shields v. Benderson Development Co., Inc.*, 76 Misc. 2d 322, 350 N.Y.S.2d 549 (Monroe Co. Ct. 1973). *But see Eiler v. North*, 121 Misc. 2d 539, 467 N.Y.S.2d 960 (Delaware Co. Ct. 1983), in which the court said it had discretion to allow a late filing because the filing of the affidavit of service is not a prerequisite to the court's jurisdiction.

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Capital Improvement Projects for Private Tenants in Buildings Owned by Governmental Organizations

By Brian G. Cunningham

The Tax Law of the state of New York specifically identifies those entities and organizations that are exempt from sales tax. All governmental entities, such as public authorities, are exempt. Other non-governmental organizations, such as educational or religious institutions, must apply for tax-exempt status. In many instances, public authorities are created to benefit both public and private purposes. Many construct commercial buildings specifically intending to lease office space to private tenants. The Port Authority's former World Trade Center provides a perfect example.

Private tenants who occupy a leased premises in a building owned by a tax-exempt organization do not step into the shoes of the tax-exempt owner. They do not become tax-exempt merely by leasing space in a tax-exempt building. Tenants making improvements to their leased premises must pay sales tax on the construction services performed unless the project qualifies as a tax-exempt capital improvement. Whether or not the project qualifies is a matter of determination for the tenant based upon the facts and circumstances involved, including the terms of the lease agreement.

The Tax Law presumes that tenant improvements to real property are temporary installations. This presumption effectively disqualifies tenant projects from qualifying as a tax-exempt capital improvement. This presumption can be overcome if the tenant's lease agreement includes language indicating that the improvements are intended to be permanent. Such language should state that title to improvements performed upon the premises vest with the landlord immediately upon installation and remain with the premises upon completion of the lease term. This presumption applies whether or not the tenant's landlord is a taxable or tax-exempt organization.

If the tenant wishes to treat the project as a capital improvement and is assured that its lease contains the necessary language to overcome the temporary presumption, it must provide its prime contractor with a properly completed ST-124 Certificate of Capital Improvement. The ST-124 relieves contractors and subcontractors from the obligation to charge and collect sales tax on the construction services rendered. If the project constitutes maintenance or repair, the tenant must pay sales tax on the construction services.

There does, however, exist one major difference between tenant improvements performed in buildings owned by tax-exempt organizations and those performed in private buildings. It is possible that the tax-exempt organization's exemption from paying sales tax on materials purchased can be passed through to its tenants and, ultimately, to their contractors and subcontractors. Once again, it would be necessary for the tenant to provide sufficient proofs in order for this exemption to apply. And, once again, those proofs are evidenced in the lease language stating a passing of title upon installation. This exemption may apply to both capital improvement and maintenance and repair projects. The only caveat is that the exemption applies only to those materials that will become an integral component part of the structure.

"Private tenants who occupy a leased premises in a building owned by a tax-exempt organization do not step into the shoes of the tax-exempt owner. They do not become tax-exempt merely by leasing space in a tax-exempt building."

In summary, the following principles and procedures apply:

1. If a tenant determines that its project constitutes a capital improvement based upon the surrounding facts and circumstances, it must provide its prime contractor with a properly completed ST-124 Certificate of Capital Improvement in order for the project to be treated as tax-exempt;
2. The prime contractor must distribute copies of the ST-124 Certificate of Capital Improvement to its subcontractors so that they will also be relieved of their obligation to charge and collect sales tax;
3. If the tenant also determines that its lease agreement provides that title to the improvements vest immediately with the tax-exempt owner, the tenant should provide its prime contractor with copies of those relevant lease provisions as well as a document indicating the project loca-

tion, the address and tax-exempt owner of the building;

4. If the prime contractor is provided with the documents described in paragraph 3, it may issue a properly completed ST-120.1 Contractor Exempt Purchase Certificate to its building materials suppliers so long as the materials purchased are to become an integral component part of the structure;

5. The prime contractor should provide copies of the same documents to its subcontractors so that they can also issue an ST-120.1 to their suppliers.

The issue of private tenant improvements in buildings owned by tax-exempt organizations has been reviewed by the Department of Taxation and Finance ("Department"). For example, the Department was asked to provide guidance regarding the tax status of purchases made by contractors for use in constructing improvements for a private tenant in the former 7 World Trade Center. The tenant had entered into a lease agreement with the private entity managing the building on behalf of the Port Authority. The building manager and the Port Authority had previously entered into a master lease agreement. The tenant wished to perform improvements to its leased premises.

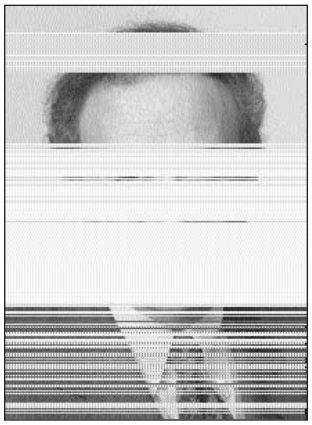
The Department's review of the tenant's case began with the two controlling lease agreements. According to the master lease agreement between the Port Authority and the building manager, legal title to all improvements to the property vested with the Port Authority immediately upon installation. Title to all business and trade fixtures that could be removed from the premises without damage remained with the tenant. The lease agreement between the building manager and the tenant mirrored the master lease provisions. As such, title to the improvements made by the tenant to its leased premises vested with the Port Authority immediately upon their installation.

The Department determined that the sales tax exemption for material purchases that become an integral component part of the property of an exempt organization applied to improvements performed by the tenant. The tenant was advised to provide its contractors with copies of the relevant lease provisions from both lease agreements. The tenant's contractor was authorized to issue an ST-120.1, Contractor Exempt Purchase Certificate, to its material suppliers.

All exemptions from sales tax are strictly construed. It is the taxpayer's burden to prove that an exemption applies to its purchases. Failure to carry that burden can result in serious tax consequences including personal liability for certain corporate personnel.

Who Is Independent Enough?

By Martin Minkowitz



One of the most frequently asked workers' compensation questions to attorneys representing employers is, "What is an independent contractor?" The safest answer is: whatever the Workers' Compensation law judge or Board say it is in any given working relationship.

Whether there is an employee-employer relationship or that of the retention of an independent contractor, becomes a factual issue for the Board to resolve after a claim for benefits has been presented. After the facts of the relationship have been presented by the parties the Board will decide if there is or is not an employee-employer relationship. If their finding is supported by substantial evidence, on the record before them, it will be upheld by the Appellate Division Third Department if it is taken up on appeal.[1]

The case law supports certain guidance which can be given to a client. There are factors to be considered in the Board's making the finding of the status of an employee and not that of an independent contractor. The traditional factors are: Who controlled the work and how it was to be performed? What was the method of payment (was it a lump sum or paid weekly, daily, monthly, and were deductions made)? Who furnished the tools and materials? Who had the right to hire or discharge? Then there is the relative nature of the work test.[2]

It is sometimes suggested that if the work is being contracted for and performed by employees of a corporation, that factor is evidence of an independent contractor relationship. Even if there is only one employee of that corporation, payments are made to the corporation which would generally have its own workers' compensation insurance policy to cover the injured employee.

However, support for the contention that there is no certain and absolute way to counsel that an independent contractor relationship exists is demonstrated in a decision in the case of *Topper v. Al Cohen's Bakery, et al.*, which was decided by the Appellate Division on June 27, 2002.[3]

The claimant testified that he purchased a delivery route from someone who was retiring from the business, and initially delivered products as an independent contractor and did work for Cohen Bakeries ("Cohen"). Cohen was later sold and the new owner cancelled all existing contracts. It was then when the claimant contends that he executed a new agreement which gave Cohen exclusive use of the claimant and could terminate him on three days notice. He also had to sell their products at a fixed price and within an allocated geographic territory. That required him to order and carry at least one of each item Cohen produced. He had to pay for these items whether he sold them or not. They required him to deliver to a certain customer at a specified time. After the injury Cohen covered the delivery route and then replaced the claimant with someone else.

". . .'What is an independent contractor?' The safest answer is: whatever the Workers' Compensation law judge or Board say it is in any given working relationship."

The claimant owned and maintained his delivery vehicle and had his own corporation. The claimant's corporation received the payments for the services rendered from Cohen, and apparently paid the claimant as well as his replacement. Based upon these facts as given by both the claimant and Cohen, the Board found the claimant to be Cohen's employee.

The court affirmed, noting that despite evidence in the record which could have supported a finding of independent contractor, the Board's finding was supported by substantial evidence and should therefore not be disturbed. The Board has the right to resolve conflicting evidence based upon its assessment of the witnesses' credibility and the reasonable inferences drawn therefrom.[4]

The ability to evaluate or assess the relationship is necessary to award benefits. Without a finding of an employee-employer relationship in the employment in which the accident and injury arose, there is no right to benefits.

The relationship is also very significant in the calculation by an insurance company of the employer's premium. If there is a possibility that the Board will find the relationship not to be the engaging of an independent contractor, the carrier has that exposure or risk which it will assume when it issues the policy. Unless it is clear that the worker is an independent contractor the carrier may want to include the payments made to that person in the employer's payroll calculation for premium audit purposes.

The status of who is an independent contractor now seems more unclear. In a time when efforts are being made to more clearly define the relationship, decisions which find that when you contract with a corporation, even under circumstances that look like an exclusive franchise, you may be hiring employees, seem to make the issue more confusing and uncertain. Who is independent enough? The only safe answer is whoever the Board determines is an independent contractor.

Endnotes

1 *Stamoulis v. Anorad Corp.*, 292 A.D.2d 657, 738 N.Y.S.2d 754; *Jhod A. v. Mauser,* 279 A.D.2d 853.

2 *Gallagher v. Houlihan Lawrence Real Estate*, 259 A.D.2d 853; *Winglovitz v. Agway*, 246 A.D.2d 684; *Stamoulis v. Anorad Corp.*, 292 A.D.2d 657.

3 *Topper v. Al Cohen Bakeries, et al.*, ____ A.D.2d ____ (2002).

4 *See Phillips v. Cornell Univ.*, 290 A.D.2d 860; *Myers v. Edor Contr. Co.*, 270 A.D.2d 671, 692.

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NYCLA Ethics Opinion No. 730 (07/19/02)

TOPIC: ETHICAL OBLIGATIONS UPON RECEIPT OF INADVERTENTLY DISCLOSED PRIVILEGED INFORMATION

DIGEST: IF A LAWYER RECEIVES INFORMATION WHICH THE LAWYER KNOWS OR BELIEVES WAS NOT INTENDED FOR THE LAWYER AND CONTAINS SECRETS, CONFIDENCES OR OTHER PRIVILEGED MATTER, THE LAWYER, UPON RECOGNITION OF SAME, SHALL, WITHOUT FURTHER REVIEW OR OTHER USE THEREOF, NOTIFY THE SENDER AND (INSOFAR AS IT SHALL HAVE BEEN IN WRITTEN OR OTHER TANGIBLE FORM) ABIDE BY SENDER'S INSTRUCTIONS REGARDING RETURN OR DESTRUCTION OF THE INFORMATION

CODE: DR 1-102(A)(4); DR 4-l01(A)–(D); DR 7-101(A)(1); DR 7-106(C)(5); EC 4-1; EC 7-1; EC 7-38; EC 9-2

QUESTION:

Does a lawyer have any ethical obligations upon receipt of inadvertently disclosed privileged information? If so, what are those obligations?

OPINION

Because these questions raise novel and important ethics issues upon which the Code of Professional Responsibility and existing New York ethics opinions and case law provide little guidance, the Committee offers its views to assist lawyers who are with growing frequency faced with the need to address the problems created by inadvertent disclosures of privileged information.

The Problem of Inadvertent Disclosure of Privileged Information

The practice of law has been transformed by technological advances which permit lawyers all but instantly to transmit documents and otherwise communicate with clients and others wherever in the world they may be. Communication by fax machine and e-mail now occurs with ever increasing frequency, less premeditation, and greater risk of going astray than ever before.

Although the risks associated with communicating by fax machine or e-mail do not differ in kind from those that arise while having a privileged communication with a client on the telephone or sending a privileged document through the mails, resort to fax machines and e-mail creates a risk of inadvertent disclosure of privileged information, and non-discovery of one's own inadvertence, that differs in degree from that which attends more traditional modes of communication. It is far easier for a lawyer, or one acting at his or her direction, to misaddress a fax or e-mail, thereby placing in the hands of someone other than the client, and often an adversary, the client's privileged information.

Because the possibility is greater than ever before that a lawyer may face the problem of inadvertent disclosure of privileged information—either as the sender or the recipient—at some point in the lawyer's career, it is incumbent upon the organized bar to provide clear guidance to lawyers concerning their ethical obligations upon receipt of such information. Unfortunately, for New York lawyers, the Code of Professional Responsibility offers scant guidance in this regard.

The Code Offers Little Guidance to Lawyers Confronting This Problem

There is no Disciplinary Rule or Ethical Consideration governing a lawyer's ethical obligations upon receipt of inadvertently disclosed privileged information.[1] Nor are any formal ethics opinions interpreting the Code directly in point,[2] and the case law, which is concerned primarily with the separate question whether the disclosure should be deemed to have affected a waiver of the attorney-client privilege or attorney work product doctrines,[3] offers little guidance for New York lawyers with respect to the legal ethics issues these disclosures often raise.[4]

The Code's failure to provide explicit guidance to lawyers who are forced to confront the problems inadvertent disclosures create is particularly unfortunate because lawyers may decide to resolve these problems by choosing between two fundamental—and in such cases conflicting—principles upon which the Code is based: preservation of client confidences and zealous representation.

The ethical obligation to preserve the confidences and secrets of a client is the *sine qua non* of the attorney-client relationship. Canon Four of the Code states: "[b]oth the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer." EC 4-1. Specifically, the Code requires lawyers to preserve the confidences and secrets of their clients, and subjects them to discipline for failure

to do so, except in a few specifically-enumerated circumstances where disclosure is permitted. *See* DR 4-101(A)–(D).

In seeming contradiction, the ethical duty to represent a client zealously is also central to the attorney-client relationship, and to the proper functioning of the adversary system of justice more broadly. The Code provides that "[t]he duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law… " EC 7-1. The Code requires lawyers to represent their clients zealously, and subjects them to discipline for failure to seek the lawful objectives of their clients through reasonably available means permitted by law or the Disciplinary Rules. *See* DR 7-101(A)(l).

Where a lawyer receives information that has been inadvertently disclosed, these two principles are drawn into conflict. On the one hand, respect for the principle that client confidences and secrets should be preserved, whether the information belongs to the receiving lawyer's client or that of another,[5] would appear to require that the lawyer refrain from reviewing or making other use of the information. On the other hand, adherence to the principle of zealous advocacy would seem to require just the opposite: that the lawyer use this and any other information lawfully obtained to the full advantage of his or her client. *See generally* Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 Emory L.J. 1255, 1307 (Fall 1999) (observing that "inadvertent disclosure cases involve the collision of two fundamental concepts underlying the rules of professional conduct and the law of lawyering: partisan advocacy and confidentiality").

Of course, that two or more principles of legal ethics underlying the Code may come into conflict is hardly unprecedented. Nor is it uncommon for lawyers to confront and resolve difficult ethical issues without a Disciplinary Rule or Ethical Consideration squarely in point to guide their decision-making. Nevertheless, inadvertent disclosures of privileged information increasingly create difficult ethical issues for lawyers which may have significant consequences not only for themselves and the clients involved, but for the legal system as whole. For these lawyers, the Code's silence on these issues is truly deafening.

Guidance from National, State and Other Local Bar Associations Is Not Uniform

The dearth of guidance available to New York lawyers is more troubling given the lack of uniformity among those national, state and local bar associations that have sought to define a lawyer's ethical obligations upon receipt of inadvertently disclosed privileged information. That national, state and local bar associations disagree on the subject strongly suggests a need for bar associations to provide guidance to New York lawyers in confronting these issues.[6]

The leading authority seeking to define a lawyer's ethical obligations upon receipt of inadvertently disclosed privileged information is the ABA Committee's Formal Opinion No. 92-368, entitled "Inadvertent Disclosure of Confidential Materials," issued on November 10, 1992.[7] In Formal Opinion 92-368, the ABA Committee opined that:

> A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.

The ABA Committee offers the following bases for the result it reached in Formal Opinion 92-368: 1) "the importance the Model Rules give to maintaining client confidentiality"; 2) "the law governing waiver of the attorney-client privilege"; 3) "the law governing missent property"; 4) "the similarity between circumstances here addressed and other conduct the profession universally condemns"; and 5) "the receiving lawyer's obligations to his client." *Id.*

In brief, the ABA Committee begins by observing that because "the concept of confidentiality is a fundamental aspect of the right to the effective assistance of counsel," this principle strongly supports a rule requiring lawyers to refrain from reviewing inadvertently disclosed privileged information. *Id.* Next, the ABA Committee considers several competing principles and interests that suggest a contrary result, including, among others, the principle requiring zealous advocacy within the bounds of the law. *Id.* The ABA Committee ultimately concludes that these competing principles, although important, "pale in comparison to the importance of maintaining confidentiality." *Id.* The ABA Committee also finds support for the result it reaches by analogizing to the law of waiver and missent property, and based upon considerations of "good sense and reciprocity." *Id.*

Although it remains the leading authority on the question of a lawyer's ethical obligations upon receipt of inadvertently disclosed privileged information, Formal Opinion 92-368, of course, does not interpret the New York Code of Professional Responsibility. In addition, Formal Opinion 92-368 has not been uniformly followed by the state and local bar associations that have considered the issue. According to a 1999 survey of state bar

associations conducted by Professor Trina Jones of Duke University School of Law, although several states have followed Formal Opinion 92-368 in interpreting their own codes or rules of attorney conduct,[8] a roughly equal number either have declined to do so, or issued opinions that are at odds with Formal Opinion 92-368,[9] while nearly a majority of the states, including New York, have no ethics opinions concerning inadvertent disclosure of privileged information.[10] Jones, *Inadvertent Disclosure*, 48 Emory L.J. at 1337 nn.46–47. The local bar associations that have examined the issue, including the ABCNY Committee in a 1995 report, similarly have given Formal Opinion 92-368 mixed reviews.[11] Formal Opinion 92-368 also has been criticized by some commentators, most notably Professor Monroe Freedman of the Hofstra University Law School.[12]

Guidance for New York Lawyers

The Committee believes that a lawyer has an ethical obligation to refrain from reviewing inadvertently disclosed privileged information. The Committee also believes that, for all the reasons articulated in Formal Opinion 92-368 which the Committee hereby adopts and incorporates by reference, there is now ample and compelling justification for requiring lawyers to respect this prohibition.

Recognizing that lawyers have an ethical obligation upon receipt of inadvertently disclosed privileged information supplements and enhances the Code's existing requirement that lawyers preserve the confidences and secrets of their own clients. See DR 4-101(A)–(D), DR 4-102(E). In the Committee's view, it is appropriate that all lawyers share responsibility for ensuring that the fundamental principle that client confidences be preserved—the most basic tenet of the attorney-client relationship—is respected when privileged information belonging to a client is inadvertently disclosed.

In light of the foregoing, the Committee hereby offers the following guidance to lawyers concerning their ethical obligations upon receipt of inadvertently disclosed privileged information:

> If a lawyer receives information which the lawyer knows or believes was not intended for the lawyer and contains secrets, confidences or other privileged matter, the lawyer, upon recognition of same, shall, without further review or other use thereof, notify the sender and (insofar as it shall have been in written or other tangible form) abide by sender's instructions regarding return or destruction of the information.

The Committee's guidance is modeled on the rule announced by the ABA Committee in Formal Opinion 92-368, as well as the ABA's recently adopted Rule 4.4(b) of the Model Rules of Professional Responsibility,[13] and therefore is supported by the views expressed by these bodies.[14] For this reason, the Committee's guidance also draws support from the ethics opinions issued by the state bar associations that have endorsed the ABA Committee's views as expressed in Formal Opinion 92-368.[15]

The Committee's guidance is also supported by the views the ABCNY Committee expressed in a 1995 report on the subject. In that report, the ABCNY Committee concurred with the result reached in Formal Opinion 92-368 and the reasoning that lead the ABA Committee to that result which is described above.[16] *See* ABCNY Committee, "Report: Ethical Obligations Arising Out of an Attorney's Receipt of Inadvertently Disclosed Information," The Record, vol. 50, no. 6 at 664–67. The Committee hereby adopts the ABCNY Committee's report, with one exception detailed below.[17]

Finally, while the Committee acknowledges that Formal Opinion 92-368 has been criticized for failing to provide support from the text of the Model Rules for the result announced there, the Committee does not agree that with the view implicit in such attacks that a lawyer has no ethical obligations except as expressly set forth in the applicable code or rules of attorney conduct. In fact, the New York Code of Professional Responsibility is expressly to the contrary. The Code states that "[w]hen explicit ethical guidance does not exist a lawyer should determine prospective conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." EC 9-2. The Code also states that, in the litigation context, a lawyer shall not "[f]ail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply." DR 7-106(C)(5); *see* EC 7-38. Thus, the Code expressly contemplates that a lawyer's ethical obligations may flow from sources other than the black-letter of the Code, including "local customs of courtesy and practice" of the organized bar.

Indeed, it is precisely in cases such as this where no Disciplinary Rule or Ethical Consideration expressly governs a lawyer's ethical obligations that it is incumbent upon the organized bar to provide guidance to lawyers in an effort to ensure that their conduct "promotes public confidence in the integrity and efficiency of the legal system and the legal profession." EC 9-2. This is the purpose for which the Committee offers the guidance set forth in this opinion.

Inadvertent Disclosure: Three Scenarios

To make more concrete the Committee's guidance offered in this opinion, the Committee applies this guidance to the following scenarios which illustrate examples of inadvertent disclosures of privileged information.[18]

Scenario One: The Errant Fax

Lawyer A represents Mr. Adams in a lawsuit against Mr. Black. Mr. Black is represented by Lawyer B. While representing Mr. Adams, Lawyer A receives a fax addressed to Mr. Black from Lawyer B. The fax appears on its face to contain information that is subject to the attorney-client privilege.

Guidance

Because Lawyer A knows both that the fax was not intended for Lawyer A, and contains secrets, confidences or other privileged matter, Lawyer A shall, without further review or other use thereof, notify Lawyer B and abide by Lawyer B's instructions regarding return or destruction of the fax.

Scenario Two: The Mysterious Memorandum

Upon receipt of a request for production of documents, Lawyer C and Lawyer C's associates review the files of their client, Ms. Clark. Lawyer C subsequently produces forty boxes of materials to opposing counsel, Lawyer D. Unbeknownst to Lawyer C, one of the documents is a memorandum from Lawyer C to Ms. Clark discussing the lawsuit. The first page of the memorandum, which identifies Ms. Clark and Lawyer C, is not attached to the copy that has been produced. The memorandum contains information that is subject to the attorney-client privilege.

Guidance

Because Lawyer D received the memorandum in the context of a document production, and because the copy that was produced neither identifies Ms. Clark or Lawyer C nor otherwise indicates that the information it contains may be privileged, Lawyer D does not know or have reason to believe that the memorandum was not intended for Lawyer D or that it contains secrets, confidences or other privileged matter. Lawyer D has no obligation to notify Lawyer C that the memorandum was produced and Lawyer D may review or make other use of the information it contains. In the event Lawyer D later comes to know or believe that the information the memorandum was not intended for Lawyer D and contains secrets, confidences or other privileged matter, Lawyer D shall, without further review or other use thereof, notify Lawyer C and abide by Lawyer C's instructions regarding return or destruction of the memorandum.

Scenario Three: The Forgotten File

Following a deposition held in a conference room at Lawyer E's law firm, Lawyer E 's adversary, Lawyer F, inadvertently leaves two files containing confidential information on the table. Lawyer E has just noticed the files.

Guidance

Because Lawyer E knows both that the files were not intended for Lawyer E and contain secrets, confidences or other privileged matter, Lawyer E shall without review or other use thereof, notify Lawyer F and abide by Lawyer F's instructions regarding return or destruction of the files. It should be noted that Lawyer E is also prohibited from opening the files or taking other steps to learn their contents by DR 1-102(A)(4) which prohibits a lawyer from "[e]ngag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation." In the Committee's view, such conduct would be dishonest within the meaning of DR 1-102(A)(4). *Cf. Lipin v. Bender*, 193 A.D.2d 424, 597 N.Y.S.2d 340 (1st Dep't), *aff'd*, 84 N.Y.2d 562, 644 N.E.2d 1300, 620 N.Y.S.2d 744 (1994).

CONCLUSION:

A lawyer has ethical obligations upon receipt of inadvertently disclosed privileged information. If a lawyer receives information which the lawyer knows or believes was not intended for the lawyer and contains secrets, confidences or other privileged matter, the lawyer, upon recognition of same, shall, without further review or other use thereof, notify the sender and (insofar as it shall have been in written or other tangible form) abide by sender's instructions regarding return or destruction of the information.

Endnotes

1. This assumes, of course, that the lawyer received the information without fault or misconduct on his or her part. *See* DR 1-102(A)(4) (prohibiting a lawyer from "[e]ngag{ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation."). It should be noted that the Committee takes exception to the reliance placed by the Association of the Bar of the City of New York Committee on Professional Responsibility ("ABCNY Committee") on DR 1-102(A)(4) in support of its view expressed in a 1995 report that lawyers who receive inadvertently disclosed privileged information without fault or misconduct on their part are required to notify the sender and abide by his or her instructions with respect to return of the information. We do not accept that, at a time when no clear ethical or legal restraint was in place, a lawyer's failure to notify the sender of the information, however inappropriate it might have been, could in and of itself have constituted conduct involving "dishonesty, fraud, deceit or misrepresentation," see discussion, infra at 8 n.17.
2. In Formal Opinion No. 700 dated May 7, 1998, the New York State Bar Association ("NYSBA") Committee on Professional Ethics considered whether a lawyer who receives an unsolicited and unauthorized communication from a former employee of an adversary's law firm informing the lawyer that documents produced by the adversary had been altered may seek further information from the employee. The NYSBA Committee opined that the lawyer may not do so if "the communication would exploit the adversary's confidences or secrets," and encouraged the

lawyer to seek judicial guidance on how to proceed. *Id*. Although Formal Opinion No. 700 does not speak to a lawyer's obligations upon receipt of inadvertently disclosed privileged information, the result the NYSBA Committee reached—requiring the lawyer to refrain from exploiting the unauthorized disclosure of confidences and secrets belonging to a client not his own—lends support for the Committee's position articulated herein.

3. In New York, inadvertent disclosure of privileged information does not automatically waive the attorney-client privilege or the attorney work product doctrine. Rather, courts consider several factors to determine whether waiver has occurred. *See Manufacturer's Trust Trading Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 398–401, 522 N.Y.S.2d 999, 1003–1005 (4th Dep't 1987); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985).

4. The Committee's research fails to disclose any New York state court decisions, and only two federal court decisions, discussing a lawyer's ethical obligations upon receipt of inadvertently disclosed privileged information. In *American Express v. Accu-Weather, Inc.*, No. 91 Civ. 6485, 1996 LEXIS 8840, at **3..7 (S.D.N.Y. 1996), Judge Robert W. Sweet sternly rebuked a lawyer for refusing to abide by opposing counsel's instruction to return unopened a package that had been inadvertently sent. Judge Lewis A. Kaplan reached much the same result on similar—albeit not as compelling—facts in *SEC v. Cassano*, 189 F.R.D. 83, 86 n.10 (S.D.N.Y. 1999). Both courts cite the American Bar Association Committee on Ethics and Professional Responsibility's ("ABA Committee's") Formal Opinion 92-368 to support their conclusions that the receiving lawyers' conduct was unethical and therefore sanctionable. However, ABA ethics opinions, do not interpret the New York Code of Professional Responsibility, and as discussed *infra* at 5-6, Formal Opinion 92-368 has not been universally followed by the state and local bar associations that have considered the issue.

5. By its express terms, the Code prohibits lawyers from knowingly revealing the confidences and secrets of their clients, subject to a few specifically-enumerated, discretionary exceptions not relevant here. DR 4-101(B)(1). Yet, the principle that client confidences and secrets be preserved must sweep more broadly, requiring lawyers to refrain from exploiting confidences and secrets of clients not their own, which, as the Code already provides, should not have been disclosed to them in the first place. Put another way, the Disciplinary Rule prohibiting lawyers from knowingly revealing the confidences and clients of their own clients does incomplete justice to the fundamental principle that client confidences and secrets be preserved.

6. *See* discussion *infra* at 5-6 & nn. 8,9 & 11.

7. The ABA Committee reaffirmed its adherence to Formal Opinion No. 92-368 in Formal Opinion No. 94-382. More recently, in 2002, the ABA amended Rule 4.4 of the Model Rules of Professional Conduct, entitled "Respect for Rights of Third Persons," to include Rule 4.4(b) which seeks to define a lawyer's ethical obligations upon receipt of inadvertently disclosed privileged information; see discussion *infra* at 7 n.14.

8. *See*, *e.g.*, Connecticut Bar Informal Ops. 95-4, 96-4 (1996); District of Columbia Bar Op. No. 256 (1995); Florida Bar Op. 93-3 (1994); Kentucky Bar Ass'n Op. E-374 (revised) (1995); Board of Responsibility of the Supreme Court of Tenn. Advisory Ethics Op. 92-A-478 (1992).

9. *See*, *e.g.*, Alabama State Bar, Office of General Counsel, Informal Op. of April 12, 1996; Maine Professional Ethics Comm. Op. No. 146 (Dec. 9, 1994); Maryland Bar Ass'n Op. No. 89-53 (June 23, 1989); Ohio Board of Commissioners on Grievances and Discipline Op. 93-11 (Dec. 3, 1993); Virginia Legal Ethics Op. 1076 (May 17, 1988).

10. In response to written requests for information from Professor Jones, twenty states confirmed that they had no opinions concerning inadvertent disclosure of privileged materials as of 1999: Arkansas, California, Georgia, Hawaii, Idaho, Iowa, Indiana, Kansas, Minnesota, Nevada, New York, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Vermont, Virginia, West Virginia and Wisconsin. *See* Jones, *Inadvertent Disclosure*, 48 Emory L.J. at 1337 n.46.

11. *Compare* ABCNY Report entitled "Ethical Obligations Arising Out of Inadvertently Disclosed Information" (1995) (concurring with the result reached in Formal Opinion 92-368 but opining that this result is required by DR 1-l02(A)(4)) *with* Philadelphia Bar Ass'n Professional Guidance Committee, Guidance Op. 94-3 (June 1994) (distinguishing Formal Opinion 92-368).

12. *See*, *e.g.*, Freedman, *The Errant Fax*, Legal Times, Jan. 23, 1995, at 26.

13. In February 2002, the ABA adopted Rule 4.4(b) to the Model Rules of Professional Responsibility which provides as follows: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." ABA Ethics 2000 Commission Report, issued Feb. 5, 2002.

14. The Committee notes that in adopting Rule 4.4(b), the ABA deemed it proper to add a disciplinary rule governing an attorney's ethical obligations upon receipt of inadvertently disclosed privileged information, and that the ABCNY Committee likewise recommended that such a rule be added to the New York Code of Professional Responsibility in its 1995 report on the subject, *see* discussion *infra* at 8 & n.17. Although the Committee declines at this time to recommend that a disciplinary rule be added to the Code, the Committee notes that, in its view, the disciplinary rules adopted by the ABA and proposed by the ABCNY are flawed to the extent that they omit oral communications and are limited in scope to tangible "document[s]" and "materials." The Committee's guidance offered herein speaks in terms of information which may be conveyed orally or in writing.

15. *See*, *e.g.*, Connecticut Bar Informal Ops. 95-4, 96-4 (1996); District of Columbia Bar Op. No. 256 (1995); Florida Bar Op. 93-3 (1994); Kentucky Bar Ass'n Op. E-374 (revised) (1995); Board of Responsibility of the Supreme Court of Tenn. Advisory Ethics Op. 92-A-478 (1992).

16. As noted, the ABCNY also proposed adoption of a disciplinary rule requiring lawyers to refrain from reviewing inadvertently disclosed privileged information. The proposed rule, entitled "DR 7-111. Inadvertent Production of Documents," provided as follows:

> A. A lawyer who receives a document and knows, before reading the document, that it has been inadvertently sent, shall: (1) not examine the document; (2) notify the sending party; and (3) abide by the instructions of the sending party regarding the return or destruction of the document.
>
> B. A lawyer who receives a document and does not know, before reading the document, that it has been inadvertently sent, but later has reason to believe the document was inadvertently sent, shall: (1) notify the sending party; and (2) return the original documents, if requested to do so by the sending party.

17. The Committee disagrees with the ABCNY Committee's view that a rule requiring lawyers who receive inadvertently disclosed privileged information without fault or misconduct on their part to refrain from reviewing inadvertently disclosed privileged information is required by DR 1-102(A)(4). In the Committee's view, a lawyer does not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation" under such circumstances.

18. The Committee is grateful to Professor Trina Jones of Duke University School of Law for formulation of these scenarios. *See* Jones, *Inadvertent Disclosure*, 48 Emory L.J. at 1265.

The Managing Partner's Role in Leading Change

By Stephen P. Gallagher

Before you accept this new position as managing partner, I invite you to consider the following thoughts.

Managing professionals has always been a difficult job in the best of times, and as we approach what appears to be an even more challenging business environment, law firm leadership—and particularly the role of managing partner—will become increasingly complex. I'd like to examine the role of today's managing partners in light of how connections within a firm and between the firm and the outside world are evolving. Let me start by stating that I believe law firm leadership can no longer operate under some of the old assumptions:

- Expecting blind loyalty from employees in exchange for job security.
- Delaying decisions for days, weeks, months, or years.
- Accepting mediocre job performance.
- Embracing consensus and avoiding conflict.

Several years ago I wrote an article, "How Law Firms Should Respond to New Forms of Competition" (*New York State Bar Journal*, June 2000). In this article, I suggested that we were in the early, turbulent days of a revolution as significant as any other in human history. Over the past two years, the Internet has tightened its grip on the lives and livelihood of more people. This competition among and between all professional service providers has given the consumer the opportunity to shop among the various professions for many of the services that have been traditionally provided by attorneys. Today, managing partners face many new challenging questions: Who are our competitors? Where do our core skills lie? Should we abandon our most successful, long-standing business?

Those individuals who manage professionals must begin dealing directly with the forces that are reshaping the way people live and work. According to former university professor and psychotherapist Morris Shechtman, the rapid rate of social, cultural, political, and economic change in the world today has created a *high-risk* culture.

> In this *high risk* culture our businesses and our lives are in a constant state of flux, and there is no room for safety nets. To succeed in such a culture, we must learn to work with change, not deny it. And with our safety nets gone and our external props kicked away, we must learn to work together in new ways while we find sources of stability within ourselves.[1]

As a managing partner working within this *high-risk* culture, you will need to create an environment that is: more tolerant of dissent; more supportive of experimentation; and at the same time, more committed to shared discussion and learning. Increasingly, managing partners are finding out that while money plays a part in the discussion to leave or stay with the firm, other factors seem to matter more. Law firms are beginning to look more seriously at career development, responsibility, professional satisfaction and overall law firm atmosphere to supplement compensation packages. I'd like to examine some of the ways leaders in this *high-risk* culture handle themselves and their relationships. My emphasis will be on both the personal *and* the professional.

"Today, managing partners face many new challenging questions: Who are our competitors? Where do our core skills lie? Should we abandon our most successful, long-standing business?"

Emotional Leadership and Direction

In a new book, *Primal Leadership: Realizing the Power of Emotional Intelligence*,[2] we learn that an organization's climate can be traced to the actions of one person: the leader. More than anyone else, the boss creates the conditions that directly determine people's ability to work well.[3] More than anything else, the managing partner needs to create the conditions that will bring people together. Research indicates that a leader's emotions are contagious, so my first suggestion is, "If you cannot take the heat, get out of the kitchen."

Research also shows that leaders have more trouble than anyone else when it comes to receiving candid feedback, particularly about how he/she is doing as a *leader*.[4] If you as a leader cannot get your co-workers on the same wavelength emotionally—feeling in synch with the firm's goals—people may think they are doing a "good enough" job, but the firm will not be able to reach its full potential. If this is the case, Daniel Gole-

man and colleagues suggest that a supposed "leader may manage—but he does not lead."[5]

According to Morris Shechtman,

> In this *high risk culture*, employees need to understand why it's important to change from good soldiers to challenging employees. In the past, employees were paid to get work done in a prescribed manner and not irritate the boss. In our new high risk culture, if employees fail to challenge bosses when things aren't right, they'll be fired.[6]

Managing partners, like leaders of any organization, have more trouble than anyone else when it comes to getting candid feedback, particularly about how they're doing as a *leader*. Research indicates that the higher a leader's position in an organization, the more critically the leader needs that very kind of feedback. Managing partner *disease* refers to this information vacuum around a leader created when people withhold important (and usually unpleasant) information.[7]

According to John Kotter and James Heskett, two of the world's foremost experts on business leadership, "Culture can have powerful consequences, especially when they are strong. They can enable a group to take rapid and coordinated action against a competitor or for a customer. They can also lead intelligent people to walk, in concert, off a cliff."[8]

Leadership and Team-Building—Try New Things

There is a great deal of research from the behavioral sciences supporting the notion that people prefer to spend time with people who are similar to themselves. However, if your firm hires only new people whom insiders like and feel comfortable being around, you should expect to continue to rely on ONLY past history, well-developed procedures, and proven technologies to grow your business. In these times when most companies are experimenting with new procedures, and inventing and testing new technologies to satisfy customer demands, enter new markets, and gain an advantage over competition, hiring new kinds of people will be key for your firm's survival.[9]

The Threat of "Highly Marketed Mediocrity"

In order for firms to survive and thrive during difficult economic times, there is strong evidence that firms will need to innovate on broad fronts. To the clients, your firm exists only to create value for them, to provide them with results. This is not the time to continue business as usual.

Law firms, like many companies, have been trimming their workforces for months now, to control costs and stay competitive in a weak economy. In a recent study of senior executives of Fortune 1000 companies, Wirthlin Worldwide, a market research firm for Accenture, found that nearly half of the executives surveyed identified leadership and management as the most sought-after skill. According to Ed Jensen, a partner at Accenture, "The continuing competition for top talent indicates that companies and employees are under increasing pressure to do more with less."[10]

"The key to success lies much less in technical know-how than in excellent leadership to push through and build upon organizational change. The people at the top will set the tone in a firm."

Setting the Tone

According to research by Daniel Goleman, the leader's way of seeing things has special weight, so group members generally see the leader's emotional reaction as the most valid response, and so model their own on it.[11] A managing partner who, for whatever reason, cannot or will not make timely decisions should not be leading a firm. At every level, managers must identify where most value lies. The key to success lies much less in technical know-how than in excellent leadership to push through and build upon organizational change. The people at the top will set the tone in a firm.

Law firms need to pay particular attention to what Jeffrey Pfeffer and Robert Sutton refer to as the "smart talk trap." This is a syndrome where inefficient companies hire, reward, and promote people for sounding smart rather than making sure that smart things are done. In such organizations, talking somehow becomes an acceptable—even a preferred—substitute for actually doing anything.[12] This particular syndrome can wreak havoc with billing hours and client services if left unchecked.

Become a Learning Organization

A company's success depends greatly on the collective skills of its employees—its human capital. Companies that spend more on training and development outperform those that spend the least. According to the Knowledge Asset Management survey, companies that ranked in the top 20 percent or so in spending on training and development would have earned an average of 16.2 percent, annualized, in the five years through 2001, or 6.5 percentage points a year more than the Wilshire

5000 index.[13] There can be intense pressure on firms to increase current earnings by cutting expenses like those of employee training. Such expenses also carry indirect short-term costs, like reduced productivity while employees are being retrained.

Wasting Time in Meetings

Another leadership challenge in many law firms today is the amount of productive time lost by groups that hold meeting after meeting to discuss and write detailed plans about the new products and services they hope to develop, but never quite get around to realizing. Additionally, when everyone in these groups always agree, it may mean they don't have many ideas to share. Or it may mean that avoiding conflict is more important to them than generating and evaluating new ideas. Regardless of the reason, lack of conflict and dissent means the group is unlikely to express and develop many valuable new ideas.[14] These groups should also be disbanded and their leaders removed and retrained.[15]

I do hope we have given you some things to think about when accepting this new position as managing partner.

Endnotes

1. M.R. Shechtman, Working Without A Net: How to Survive & Thrive in Today's High Risk Business World (Simon & Schuster 1994), 5 (hereinafter "Shechtman").
2. *See* D. Goleman, Richard Boyatzis & Annie McKee, Primal Leadership: Realizing the Power of Emotional Intelligence (Harvard Business School Publishing 2002) (hereinafter "Goleman").
3. Stephen P. Kelner, Jr., Christene A. Rivers & Kathleen H. O'Connell, Managerial Style as a Behavioral Predictor of Organizational Climate (McBer & Company 1996).
4. Goleman, 92.
5. Goleman, 21.
6. Shechtman, 23.
7. The CEO disease was first described with this title by John Byrne in "CEO Disease," Business Week, Apr. 1, 1991, 52-59.
8. J.P. Kotter & J. L. Heskett, Corporate Culture and Performance (Free Press 1992), 1.
9. J.G. March, "Exploration and Exploitation in Organizational Learning," Organizational Science 2 (1991), 71-87.
10. *See* V. Marino, "Diary: Cutting too Close to the Bone," N.Y. Times, Mar. 31, 2002.
11. Goleman, 9.
12. J. Pfeffer & R. I. Sutton, "The Smart Talk Trap," Harv. Bus. Rev., May-June 1999, 135-42.
13. Mark Hulbert, "Strategies: Within Companies, Too, Education Proves Its Value," N.Y. Times, Mar. 31, 2002., Sec. 3, 6.
14. R.I. Sutton, Weird Ideas That Work: 11 1/2 Practices for Promoting, Managing, and Sustaining Innovation (The Free Press, 2002), 85 (hereinafter "Sutton").
15. Sutton, 99.

General Practice, Solo & Small Firm Section Awards

The Charles W. Shorter Award

The Shorter Award will be given by the General Practice, Solo & Small Firm Section to honor the memory of Charles W. Shorter, who epitomized the general practitioner with his management skills and strong sense of ethics. This award will be given to a New York attorney who has made an extraordinary contribution of time and expertise to improve the image of the general practitioner and the development of law office management and technology.

The award will be given in January 2003 at the Annual Meeting of the General Practice, Solo & Small Firm Section. The deadline for nominations is January 15, 2003.

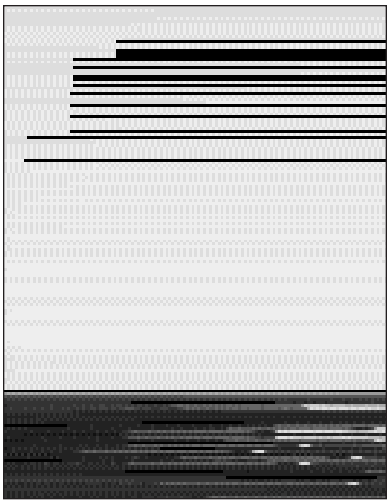
Please fax the name of your nominee, and a brief paragraph stating why you think your nominee is a good candidate for the award, to the NYSBA, Att: Susan Fitzpatrick at 518-487-5694.

Honorable Lewis A. Friedman Award

The Friedman Award will be given by the General Practice, Solo & Small Firm Section to honor the memory of the Honorable Lewis A. Friedman, who exemplified the general practitioner as a litigator and judge. This award will be given to a New York attorney who is outstanding and innovative, has made significant contributions to improve the daily practice of law and who voluntarily participates in NYSBA activities.

The award will be given in January 2003 at the Annual Meeting of the General Practice, Solo & Small Firm Section. The deadline for nominations is January 15, 2003.

Please fax the name of your nominee, and a brief paragraph stating why you think your nominee is a good candidate for the award, to the NYSBA, Att: Susan Fitzpatrick at 518-487-5694.



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