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NEW YORK STATE BAR ASSOCIATION

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NEW YORK STATE BAR ASSOCIATION
Journal

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MICHAEL E. GETNICK

The Good We Do: It's Time for a Pat on the Back

A recent Gallup poll indicated that only 25% of Americans have a positive image of lawyers.[1] It gets worse. On a recently aired episode of *Family Feud*, the host asked the contestants to name a profession whose members are least likely to get into heaven. Of 100 people surveyed, 43 answered lawyers – other answers included politicians, pimps, strippers and drug-dealers. Ouch! It is no surprise that boosting the image of the profession is among the top priorities of bar associations across the nation, including ours.

It is essential that the public have confidence in members of the bar and our justice system. Improving our image, especially in a culture where lawyer jokes abound, is a challenge, but not because of the lack of good things to talk about. For nearly 20 years, our motto has been "Do the public good. Volunteer for pro bono." And our members have answered the call. Every day, in cities and towns and villages across New York and beyond, thousands of lawyers are providing free legal assistance to the poor. They are helping people save their homes from foreclosure, secure desperately needed governmental benefits and seek refuge from abusers. I know of no other profession that gives so freely of its time and expertise.

In an effort to spread the word about our members' good deeds, while at the same time giving them a much-deserved pat on the back, we launched "The Good We Do Campaign" to promote the good that lawyers do. Our campaign coincided with the first-ever National Pro Bono Week, October 25–31, which recognized attorneys' pro bono work, encouraged pro bono volunteerism and raised community awareness of pro bono service. Toward this end, we issued a statewide radio ad campaign touting pro bono service. We solicited good news stories from lawyers and their clients about the benefits of pro bono service, and shared those stories with media outlets. We reached out to many mayors and state leaders, asking them to issue proclamations declaring October 25–31, 2009, as National Pro Bono Week in their respective cities and jurisdictions. We received proclamations from various locations, including Albany, Buffalo, Binghamton, Utica, and Ithaca, to name a few, and Attorney General Andrew Cuomo issued a citation commending the State Bar for our efforts to promote pro bono service. We participated in a kick-off celebration, graciously hosted by Chief Judge Jonathan Lippman and the Court of Appeals. Local bar associations all across the state joined us in celebrating pro bono by hosting clinics for the public, CLE programs for pro bono volunteers, and awards ceremonies. It was a wonderful celebration of what lawyers do – not just for one week, but all year long.

Get Involved; Share Your Story

I felt proud and honored to be a part of this campaign recognizing our profession for the hundreds of thousands of hours of free services that lawyers provide. So many of you shared your pro bono stories, which indicate that the experience is often just as rewarding for the attorney as it is for the client. Pro bono service – helping our most vulnerable at the darkest time in their lives – is at the very heart of why most of us joined this honorable profession. I urge our pro bono volunteers to keep it up and, if you have not yet gotten involved in pro bono service, please consider volunteering your time. Now, more than ever, the need is great. This campaign is ongoing, so please continue to share your good news stories. Many of the stories we received can be found on our Web site at www.nysba.org/probono and on our new blog, www.thegoodwedony.org.

Recognizing the Good You Do

If you are one of our many members who do pro bono, we want to recognize you for the good that you do. Last year alone, we welcomed more than 1,300 of our members into the ranks of our Empire State Counsel program for providing 50 or more hours of free legal services to the poor. We are now accepting applications for our 2009 class of Empire State Counsel. I strongly encourage you to apply. It is very simple: just affirm for us the 50 or more hours of pro bono service you volunteered during the calendar year of 2009. You can find more information at www.nysba.org/probono. Please help us reach our goal of more than 3,000 Empire State Counsel inductees.

Who We Are

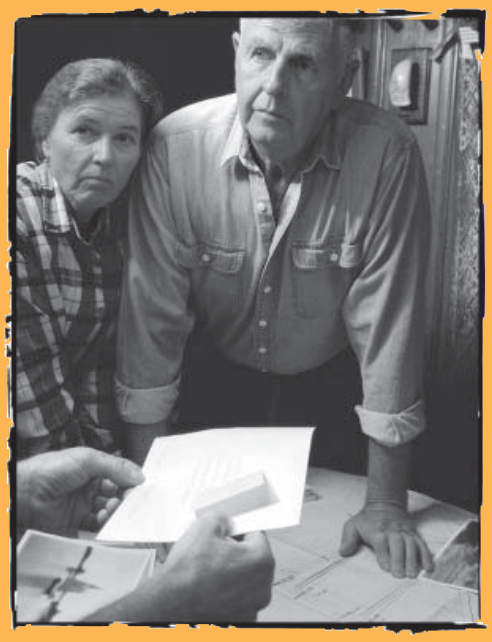
By doing pro bono, you not only provide a tremendous service to the public, but you also take part in a rewarding professional experience that serves to boost the image of our profession. On behalf of the State Bar, thank you for the good that you do. ■

1. Only three industries received lower rankings: real estate, automobile, and oil and gas.

MICHAEL E. GETNICK can be reached at mgetnick@nysba.org.

There are millions of reasons to do Pro Bono.

(Here are some.)



Each year in communities across New York State, indigent people face literally millions of civil legal matters without assistance. Women seek protection from an abusive spouse. Children are denied public benefits. Families lose their homes. All without benefit of legal counsel. They need your help.

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The Contested Accounting Proceeding in Surrogate's Court: The Law and Techniques You Should Know
(9:00 am – 1:00 pm)

November 17	Buffalo (1:00 pm – 5:00 pm)
November 20	Westchester
December 1	Syracuse
December 3	Albany
December 8	Long Island
December 10	New York City
December 11	Rochester

Ethics and Professionalism
(9:00 am – 12:35 pm)

November 17	Long Island
November 20	Westchester
December 1	Buffalo
December 8	Rochester

Practical Skills: Civil Practice – The Trial

November 18	Albany; Buffalo; Long Island; New York City; Syracuse; Westchester

Protecting Your Practice – Risk Management for the Solo and Small Firm
(1:00 pm – 5:00 pm)

November 18	Buffalo; New York City

Medical Malpractice

November 18	Rochester
November 19	Albany; New York City

†Update 2009 (video replay)

November 18	Binghamton
November 19	Ithaca; Long Island; Saratoga
November 20	Canton; Utica; Watertown
December 2	Buffalo; Suffern
December 3	Plattsburgh
December 4	Jamestown; Poughkeepsie
December 10	Corning; Westchester
December 11	Loch Sheldrake

Representing Licensed Professionals
(9:00 am – 1:00 pm)

November 19	Syracuse
December 3	Long Island

†Corporate Counsel Institute
(two-day program)

November 19–20	New York City

†Seventh Annual Sophisticated Trusts and Estates Institute
(two-day program)

November 19–20	New York City

Foreclosure and Other Receiverships
(9:00 am – 11:45 am)

November 20	Rochester

Handling Tough Issues in a Plaintiff's Personal Injury Case

November 20	Albany; Long Island

No Fault – What You Need to Know in New York

November 20	New York City

Construction Site Accidents

November 20	Buffalo
December 4	Albany; Long Island
December 11	New York City; Syracuse

Practicing Matrimonial & Family Law in Chaotic Economic Times
(9:00 am – 12:45 pm)

November 20	Syracuse
December 4	Albany
December 11	New York City

† Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

Limited Liability Companies
(9:00 am – 1:00 pm)

December 1	New York City
December 2	Albany
December 4	Buffalo

Finding the Bottom Line – Rights of People With Disabilities in New York State

December 1	Rochester
December 4	New York City
December 9	Albany

Hot Topics in Elder Law

December 2	Albany; New York City
December 4	Rochester
December 9	Westchester
December 10	Long Island

New York Appellate Practice

December 3	New York City
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Advanced Real Estate Practice

December 14	New York City

†Estate Planning (video replay)

January 22	Jamestown

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William Comiskey (William_Comiskey@tax.state.ny.us) is Deputy Commissioner for Enforcement, New York State Department of Taxation and Finance. In this role, he supervises the full spectrum of the Department's enforcement activities, including audits, collections, investigations and civil and criminal enforcement efforts. Before this, the author served for many years in senior law enforcement positions involving the prosecution of fraud and corruption cases. He is a graduate of Fordham University School of Law.

New Criminal Tax Laws

Taking Aim at Tax Evaders

By William Comiskey

In an effort to narrow New York's annual multi-billion dollar tax gap – the difference between the taxes owed and the taxes collected – and to combat tax fraud, on April 7, 2009, Governor David Paterson signed into law historic legislation to increase civil and criminal penalties for fraud and tax evasion and to improve the Tax Department's ability to identify and pursue non-compliant taxpayers. These changes signal an unmistakable determination to improve tax compliance and curtail cheating. They will be welcome news for the millions of honest taxpayers who are forced to take up the slack for those who cheat.

This article examines the changes to the criminal tax code. The new law replaces a confusing and unfair patchwork of tax crimes that often left serious tax fraud untouched and that sometimes treated minor acts of cheating more severely than major tax evasion. The new law creates a new crime – tax fraud – and adopts a classification system for felony offenses that markedly increases the severity and punishment for acts of serious tax evasion. It also increases the monetary penalties for felony tax fraud, expands county jurisdictional provisions for false filing tax offenses, and amends County Law § 702(7) to make it easier for district attorneys to cross-designate Tax Department attorneys to prosecute tax cases.[1]

Given the Department's increased commitment to fighting tax fraud,[2] these new laws will provide prosecutors with additional tools and resources to punish and deter those who engage in serious evasion of their tax obligations.

Former Statutes

Because the new law applies only to crimes committed after April 7, 2009, the former law will continue to govern many of the cases brought over the next three to five years. Most of New York's former criminal tax provisions, which are contained in Article 37 of New York's Tax Law, §§ 1800–1848, were enacted as part of the Omnibus Enforcement Act of 1985. This act created separate criminal provisions for 13 different types of taxes administered by the state.

In application, the former laws were both unfair and inadequate.

They were inadequate because the penalties imposed were not commensurate with the societal harm caused by the misconduct. Because the vast majority of tax offenses under the former law were only punishable as misdemeanors or low-level felonies, the laws failed to serve as a meaningful deterrent to tax fraud.[3] Worse, the former laws often failed to adequately distinguish between serious tax fraud and minor acts of cheating. Indeed, the former law punished more severely certain types of evasion while treating other types of evasion, which caused the same or greater harm to the state, more leniently.

The crimes under former Tax Law § 1802, which dealt with the failure to file income tax returns, are a good illustration. Because the deliberate failure to file an income tax return under the former law only became a felony when the taxpayer willfully and with intent to evade payment of the tax failed to file for three consecutive years (if there was a tax due in each of those years), an income tax

evader who defrauded the state of millions by not filing in a single year or in two consecutive years faced, at most, a misdemeanor under former Tax Law § 1801.

In contrast, a low-level cheat who intentionally filed a false income tax return misrepresenting earnings or deductions, even by a small amount, faced (and still faces) prosecution for a class E felony false filing prosecution under the Penal Law. Thus, our former law treated the taxpayer who exaggerated charitable contributions by a few hundred dollars as a felon, while the million-dollar non-filing income tax cheater faced only a misdemeanor.

Prior law also failed to distinguish between major league cheats and relatively minor acts of fraud in other ways as well. For example, the prior law treated all three-year repeat income tax non-filers the same, whether they defrauded the state of $100 in each of the years they failed to file or cheated the state of $1 million in each of those years. In each instance, the tax evader faced the lowest class felony in New York – a class E felony – and the same low level of penalty.[4]

In another example, the former law treated false filers who fraudulently obtained refunds more harshly than those who fraudulently underpaid their taxes, even though the financial harm to the state in both instances was identical. Taxpayers who obtain refunds through false filings face larceny charges under the Penal Law which, as described in endnote 3, provides escalating penalties depending upon the amount of money stolen, with a top charge of a B felony for stealing a refund of more than $1 million. In contrast, taxpayers who did not obtain a refund but instead filed false returns and underpaid their taxes faced only an E felony, whether taxes of $1 or $10 million were evaded.

These irrational and unfair distinctions are eliminated by the recently enacted revisions to Article 37. The new criminal provisions streamline Article 37 and eliminate redundant and confusing provisions to create a simpler, fairer and more just criminal tax law.

Revised Article 37

The law now treats all tax fraud the same, regardless of type of tax evaded and regardless of how the fraud was accomplished. The new structure recognizes that every form of tax evasion – whether occasioned by non-filing, false filing or by some other fraudulent scheme – causes the same harm to the state and thus warrants the same punishment. It also recognizes that the severity of these crimes against the public pocketbook should be measured by the amount of harm suffered by the state and local governments. These fundamental concepts are at the core of the new provisions.

The new law creates a new crime, tax fraud, and defines eight ways in which tax fraud can be committed when the defendant has acted willfully.[5] Each of the tax fraud acts are examined below. Tax fraud in the fifth degree, the lowest level of tax fraud, is a class A misdemeanor as provided in the new Tax Law § 1802.

Most significantly, the law creates a new series of tax felonies to punish major tax evaders. If the defendant commits a tax fraud act and evades more than $3,000 in tax liability, the defendant now faces potential felony liability under new §§ 1803–1806, which define the levels of tax felonies based on monetary thresholds. Under the new law, evasion of more than a million dollars in taxes is now a class B felony.

Tax Fraud Acts – The Defendant Must Act Willfully

Section 1801 of the new law defines the eight ways in which a criminal tax fraud act can be committed. These newly defined tax fraud acts are, in the main, already penalized as misdemeanors by statutes within the tax law that apply to one or more – but not all – of the taxes the state administers. Now, however, the willful commission of these tax fraud acts is a misdemeanor regardless of the type of tax involved.

New Tax Law § 1801(c) defines "willfully"

> to mean acting with either intent to defraud, intent to evade the payment of taxes or intent to avoid a requirement of this chapter [the Tax Law], a lawful requirement of the commissioner or a known legal duty.

The new definition standardizes the minimum required culpable mental state for all tax offenses. Under the former law, misdemeanor tax violations for identical or similar conduct were defined in numerous sections scattered throughout Article 37,[6] which defined the required culpable mental state in several ways. Most sections required that the person act willfully, but the statute did not define *how* one acts willfully. One former section, 1815(a)(1)(D), penalized the failure to file a highway use and fuel tax report, without specifying any culpable mental state. The misdemeanor provisions for income, corporate and estate taxes used yet another formulation that required the defendant to act with either an "intent to evade any tax imposed under article twenty-two" or an "intent to evade . . . any requirement" of the applicable tax article.[7]

The new definition of "willful" includes all the prior formulations of culpable mental states under the former provisions of Article 37 and further includes a formulation of acting willfully that has been recognized by the Court of Appeals.[8] This is also a formulation of the term "willful" that is the standard under federal law.[9] Proof establishing any of the formulations will establish that the defendant acted willfully.

Eight Ways to Commit Tax Fraud

New Tax Law § 1801(a) sets out the eight ways in which a tax fraud act can be committed by a person willfully

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CONTINUED FROM PAGE 12

engaging in, or willfully causing another person to engage in, those acts. The Penal Law rules relating to accomplice and corporate liability and anticipatory offenses all apply to crimes committed under the Tax Law.[10]

Tax Fraud Act 1 – Willful Failure to File a Return or Other Required Document.

New Tax Law § 1801(a)(1) replaces in a single provision numerous sections that made the failure to file certain returns and documents due under the Tax Law a misdemeanor. The new law does not significantly change or expand the misdemeanor penalties for failure to file, but it does make major changes to the felony penalties for these acts.

The new law defines a tax fraud act to include willful "fail[ure] to make, render, sign, certify or file any return or report"[11] required under the tax laws and regulations within the time required by or under the tax laws and regulations.

> The new provisions make it unmistakably clear that those who willfully and knowingly deceive the government in a tax matter commit a crime.

The willful failure to file becomes a felony under the new law when the taxpayer acts with the intent to evade a tax and evades more than $3,000 as a result of his or her act. These new felony sections substantially expand the law as it relates to felony failure to file certain returns and diminishes liability in a few situations.

The former Tax Law imposed felony liability on taxpayers for failing to file only in limited circumstances. First, § 1815(b) made the "willful" failure to file a highway use or fuel tax return with the "intent to evade the tax" a class E felony, regardless of the amount of tax evaded. Under the new law, such a failure will result in a felony only if the amount of taxes evaded exceeds $3,000.

Second, failure to file income or corporate tax was, under the former law, a felony when the taxpayer failed to file for three consecutive years and the taxpayer had a tax liability in each year. The new felony provisions eliminate the requirement that the taxpayer fail to file repeatedly and instead impose felony liability if the defendant possesses the intent to evade tax or to defraud the state or a subdivision and as a result in fact underpays an amount that meets the monetary thresholds specified in the felony tax fraud sections.

Many non-filers of all tax types who did not face felony sanctions under the former law will be subject to felony prosecution under the new statute. Any willful non-filer – whether a delinquent sales tax filer, an income tax filer or an excise tax filer – who intends to evade tax and succeeds in evading more than $3,000 in tax liability will face felony penalties. Because the Internal Revenue Service has reported that approximately 11% of the federal tax gap is attributable to taxpayers who evade their tax responsibilities by not filing, the legislative determination to increase the penalties for income tax non-filers who commit serious tax evasion is appropriate.

Tax Fraud Acts 2 and 3 – Willfully and Knowingly Making or Filing a False Return or Report or Supplying False Information.

New Tax Law § 1801(a) subsections (2) and (3) relate to false returns and submissions. They replace numerous Tax Law sections that prohibited the filing or making of a false return or report and the submission of false information to the state or to the Tax Department. The new provisions are stronger and broader and make it unmistakably clear that those who willfully and knowingly deceive the government in a tax matter commit a crime.

The former statutory prohibitions were a mess. The provisions lacked consistent language and were scattered throughout Article 37. The former false submission provisions applied to different documents and submissions,[12] had different elements,[13] required different culpable mental states[14] and imposed different penalties. Identical acts of deception constituted a misdemeanor if done with respect to one type of tax return or document and felonies for others.[15] There was no discernible rhyme or reason to these provisions.

In two sections that are intended to address the universe of acts involving the submission of fraudulent information to the Department, the new statute brings consistency and uniformity to the Tax Law while broadening the reach of the criminal sanctions to cover the full spectrum of acts of deception.

New Tax Law § 1801(a)(2) sets out the rules relating to false documents that are filed with the state. It is a tax fraud act when a person willfully, while

> knowing that a return, report, statement or other document under this chapter contains any materially false or fraudulent information, or omits any material information, files or submits that return, report, statement or document with the state or any political subdivision of the state, or with any public office or public officer of the state or any political subdivision of the state.

New Tax Law § 1801(a)(3) deals with other information that is submitted to the Department. It is a tax fraud act if a person willfully and

> knowingly supplies or submits materially false or fraudulent information in connection with any return, audit, investigation, or proceeding or fails to supply information within the time required by or under the provisions of this chapter or any regulation promulgated under this chapter.

These new laws thus cover every materially false tax filing and submission regardless of the type of taxes involved.

The provisions relating to materially false submissions in § 1801(a)(3) are especially significant in that they apply to every type of submission, including oral submissions, made to the Department in connection with any return, audit, investigation or proceeding. They also apply to taxpayers who willfully fail to timely supply the Department with information required by the Tax Law and its regulations.

The knowing submission of fraudulent documentation to justify a position taken on a tax return would unquestionably fall within this provision as would a materially false representation made by a taxpayer, or his or her representative, to an auditor or investigator during the course of a Department audit or investigation relating to the existence or non-existence of taxpayer records or other facts. A taxpayer who falsely asserts that he or she does not maintain sales tax records, or who fails to supply those records to the Department when required during a sales tax audit, or who claims that he or she has only one business bank account when the taxpayer has several, runs the risk of committing this type of tax fraud act.

The rules also apply to tax professionals who knowingly provide false documents or who make false assertions on behalf of taxpayers during a Department audit. As noted above, new Tax Law § 1832(b) specifically provides that the Penal Law provisions relating to accessorial liability apply to tax crimes. The Department has identified fraudulent conduct by tax professionals as a major area of concern and has, for more than a year, cracked down on such fraud in cases across the state.[16] This provision makes clear that tax professionals who intentionally help taxpayers cheat in their filed returns or during an audit will be held accountable as an accomplice to the taxpayer and will face the same penalties as the corrupt taxpayer.

The new laws reduce three false filing felonies under the former Tax Law to misdemeanors when the tax evaded is less than $3,000.[17] Under the former law, these felonies did not require any level of tax evasion.

The new law also replaces provisions that made knowingly filing a false income or corporate tax return with intent to evade a tax a class E felony when the false filing produced a "substantial understatement" of tax, which was defined as at least $1,500.[18] Under the monetary thresholds adopted by the Legislature, knowingly filing a false income or corporate tax return will be a tax felony only when the amount of evaded tax exceeds $3,000.

Finally, the new law creates new felonies for all other false document and false submission cases in which the materially false submission has been willfully made or filed with the intent to evade a tax or to defraud and where false submission resulted in a tax evasion of more than $3,000.

Of course, these new Tax Law provisions are in addition to the Penal Law false filing statutes, which penalize as a misdemeanor knowingly filing a false document with any public office or public servant[19] and which elevate that conduct to a class E felony when the false filing is performed with an intent to defraud the state or any political subdivision.[20] There is no monetary requirement to establish a felony Penal Law false filing crime. Thus, defendants who file a false income tax return that cheats the government of less than $3,000 will face both a Tax Law misdemeanor under the new law and a Penal Law felony.

Tax Fraud Act 4 – Willfully Engaging in a Scheme to Defraud the State in Connection With Any Matter Under the Tax Law.

Criminal sanctions are now provided for fraudulent conduct that does not neatly fit into the parameters of a false document or non-filing tax evasion case.

New Tax Law § 1801(a)(4) makes it a tax fraud act when a person willfully

> engages in any scheme to defraud the state or a political subdivision of the state or a government instrumentality within the state by false or fraudulent pretenses, representations or promises as to any material matter, in connection with any tax imposed under this chapter or any matter under this chapter.

The language of this provision is similar to language included in the Penal Law statutes defining "Scheme to Defraud"[21] and "Defrauding the Government"[22] but, unlike those statutes, it does not require that the tax scheme involve a "systemic ongoing course of conduct," nor does it require that the defendant obtain property from the state as a result of the false or fraudulent pretenses, representation or promises. The statute is also different in that, unlike the Penal Law offenses, this new section requires that the false or fraudulent pretenses, representations or promises be material.

This new section would reach frauds such as cigarette tax evasion schemes in which bootleggers sell untaxed cigarettes with counterfeit tax stamps in an effort to evade the cigarette taxes. Many of these criminals do not file returns and are not required to file returns, nor are they directly required to pay the taxes they are evading. Nonetheless, their acts create the false pretense that the tax has been paid and they are acting with the intent to defraud the state and evade the cigarette tax. This broad statute thus provides prosecutors with the tools to reach these and other schemes that do not neatly fit the typical tax evasion case. Because the amount of tax evaded by those engaged in cigarette bootleg schemes is often quite significant, the new levels of tax felonies, described below, will be especially important in making cases against bootleggers.

Tax Fraud Act 5 – Willfully Failing to Remit Taxes Collected on Behalf of the State.

New Tax Law § 1801(a)(5) makes it a tax fraud act when a person willfully

> fails to remit any tax collected in the name of the state or on behalf of the state or any political subdivision of the state when such collection is required under this chapter.

Employers who collect withholding taxes from their employees and vendors who collect sales taxes from their customers are fiduciaries who hold these collected taxes in trust on behalf of the government. Fiduciaries who steal these trust funds may be prosecuted for larceny under the Penal Law and under the former and new Tax Laws.[23] Under the former Tax Law, there was no Tax Law crime that penalized the failure of a sales tax vendor to remit collected taxes and the Tax Law penalty for employers who failed to remit withholding taxes was only a misdemeanor, regardless of the amount of payroll taxes withheld and not remitted.[24]

Failing to collect sales tax is a common form of tax evasion.

This new provision makes it a tax fraud act, punishable under the Tax Law, to willfully collect and fail to remit these taxes.

Tax Fraud Act 6 – Willfully Failing to Collect a Sales, Excise or Withholding Tax That Is Required to Be Collected.

Failing to collect sales tax is a common form of tax evasion whereby business operators seek a competitive advantage by offering to sell property to customers without collecting or charging sales tax. Often, to hide the evasion, the transactions are conducted in cash and without receipts, which also facilitates income tax evasion by the business operators.

The prior law failed to adequately address this type of evasion. Former Tax Law §§ 1806(a) (withholding taxes) and 1817(c) (sales taxes) made it a misdemeanor for employers or sales tax vendors to willfully fail to collect taxes. For others who are required to collect taxes, the former catchall provisions making willful acts or omissions of any provisions of particular articles a misdemeanor also provided a mechanism to reach the same result.[25] The only felony for failing to collect any of these taxes was former § 1817(c)(2), which made it a class E felony to fail to collect $10,000 in sales tax or to fail to collect $100 or more on 10 or more occasions.

Under new § 1801(a)(6), the willful failure to collect taxes when required is defined as a tax fraud act. If the taxes not collected exceed $3,000 in one year, the act is a felony. These changes eliminate some unsupportable results under the prior law. Previously, a sales tax vendor who failed 200 times to collect $75 in sales tax, resulting in a $15,000 evasion, or one who failed to collect $9,000 in sales tax in a single transaction, faced a lesser penalty (a misdemeanor) than a vendor who committed a felony by failing on 10 occasions to collect $100, resulting in a $1,000 evasion. These unjust results are corrected under the new law and the vendors who commit the $15,000 and $9,000 evasions will face prosecutions for a class D or E felony; the vendor who evades $1,000 will face only a misdemeanor.

Tax Fraud Act 7 – Willfully and With an Intent to Evade Any Tax, Failing to Pay a Tax Due.

New Tax Law § 1801(a)(7) defines a tax fraud act to include one where a party willfully and "with intent to evade [payment of a] tax fails to pay [such] tax." The requirement under the new law that the failure to pay must be both willful and with intent to evade tax requires a greater showing of intent than a series of sections under the former law, which required only that the non-payment be "willful."[26] It also requires a greater showing of intent than former Tax Law § 1810 (income, earnings and corporate taxes), which authorized a failure to pay misdemeanor prosecution when the defendant acted with the intent to evade "any lawful requirement of the commissioner" or to evade tax. The new law may be satisfied only by proof that the taxpayer not only failed to pay but did so willfully and with the specific intent to evade payment.

By requiring that non-payment may be punished only when willful and when the non-payment is occasioned by an intent to evade the tax, the new law attempts to take those who would pay but who cannot out of the criminal realm.

The former Tax Law imposed no felony liability for failing to pay a tax. The new law provides for felony liability if as a result of failure to pay with a specific intent to evade tax, the person in fact underpays an amount that meets the monetary thresholds specified in the felony tax fraud sections. This new section will provide prosecutors with a possible tool to address the thousands of taxpayers who file, often repeatedly, income or sales tax returns without paying their liabilities.

Tax Fraud Act 8 – Issuing False Exemption Certificates.

New Tax Law § 1801(a)(8) defines a tax fraud act to include one where a party willfully

> issues an exemption certificate, interdistributor sales certificate, resale certificate, or any other document

> capable of evidencing a claim that taxes do not apply to a transaction, which he or she does not believe to be true and correct as to any material matter, which omits any material information, or which is false, fraudulent, or counterfeit.

The requirement under the new law that the failure to file be "willful" before misdemeanor liability attaches is identical to the mental state under former Tax Law §§ 1812-f(c)(4) (petroleum taxes), 1812(c)(4) (motor fuel taxes) and 1817(m) (sales taxes). The new definition adds to those statutes by making clear that a willful omission in an exemption certificate or an entirely false certificate constitutes a violation of the law.

The former law imposed no felony liability. The new law provides for felony liability if the defendant possesses the intent to evade tax or to defraud the state or a subdivision and as a result in fact underpays an amount that meets the monetary thresholds specified in the felony tax fraud sections.

Felony Tax Fraud Classifications

To elevate a tax fraud act to a felony, two facts must be established. First, the defendant must act with the intent to evade a tax due or to defraud the state or a political subdivision. With the addition of this *mens rea*, tax law felonies can be committed only when the defendant acts both willfully (as required to commit a tax fraud act) and with the intent to evade or defraud. The additional mental element is designed to ensure that felony liability under the Tax Law applies only to those who deliberately evade their responsibilities and not to those who may have failed to comply with a tax obligation (and who may owe substantial taxes as a result) but who have not acted with criminal intent to evade paying those taxes.

Second, a tax fraud act is a felony only when the tax evaded reaches the monetary thresholds set out in new Tax Law §§ 1803 (tax fraud in the fourth degree) to 1806 (tax fraud in the first degree). Under the new law, the felony grades of tax fraud are defined in monetary terms where the degree of the crime and the severity of punishment turn on the amount of loss to the state.

In fixing the tax fraud thresholds, the Legislature rejected the Governor's proposal to use the familiar monetary thresholds that currently exist in the Penal Law for the crimes of grand larceny, welfare fraud and insurance fraud.[27] The Governor's proposal was based on the view that tax evasion is essentially stealing from the state and that it should be treated with the same seriousness that our law treats any type of larceny. Instead, the Legislature opted for the thresholds that were recently adopted for health care fraud in Penal Law Article 177, which established higher monetary levels for the class E and class D levels of tax fraud. Even so, the new law nonetheless results in a structure that substantially increases the penalties for serious tax evasion.

The following chart compares the monetary thresholds for these various crimes:

Classification	Degree	Tax/ Health Care Fraud	Larceny/Welfare/ Insurance
E felony	4th	>$3,000	>$1,000
D felony	3rd	>$10,000	>$3,000
C felony	2nd	>$50,000	>$50,000
B felony	1st	>$1,000,000	>$1,000,000

The new structure represents a significant step in increasing the sanctions for serious tax evasion in the income, corporate and excise tax areas. For high-end income and corporate tax evaders, the new law means that for the first time they will face class D, C and B felony charges. While sales tax and withholding tax evaders have long faced these levels of felonies when prosecuted under the larceny statutes, the addition of the new tax fraud statutes will provide prosecutors with a second tool with which to pursue such evaders.[28]

The Legislature's determination to set higher monetary thresholds for the class D and E levels of tax fraud will have a practical impact in Tax Law prosecutions for certain types of tax fraud. It will not have any practical impact in cases involving tax evaders who collect but fail to remit sales or withholding taxes because these cheaters will continue to face liability under the Penal Law larceny provisions. Similarly, tax evaders who file a false return but who do not reach the monetary threshold to establish a felony tax fraud will nonetheless continue to be liable for the Penal Law class E felony "Offering a False Instrument for Filing." Under the new Tax Law, these Penal Law charges remain available to prosecutors to the same extent as they were available under the former law.[29]

Aggregation

The new law limits the amount of unpaid tax liability that can be considered in determining the grade of the felony crime. The Legislature rejected the Governor's proposal, based on the long-standing rules applicable to larceny cases, to permit prosecutors to aggregate amounts of unpaid tax liabilities over multiple years to establish the monetary thresholds for felony tax fraud charges.[30]

Instead, the Legislature adopted a rule that permits aggregation but only for liabilities evaded within a single-year period. Each felony provision in the new law specifically provides that the amount of evaded tax liability must be determined by looking at the tax not paid "in a period of not more than one year." In addition, new § 1807 sets out the tax fraud aggregation rule. It provides that

> the payments due and not paid under article one of this chapter pursuant to a common scheme or plan or due and not paid, within one year, may be charged in a single count, and the amount of underpaid tax liability incurred, within one year, may be aggregated in a single count.[31]

These changes will significantly increase the monetary penalties faced by high-end tax cheats.

This new aggregation rule relates only to aggregation under the Tax Law and does not limit the prosecutor's well-established ability to aggregate sales tax or withholding tax liabilities to determine the appropriate level of larceny to be charged. Since these cases involve stolen trust funds, a more expansive rule of aggregation is justified.

Other Provisions: Monetary Penalties

The new law amends Tax Law § 1800(c) to increase the monetary penalties for tax felonies to "the greater of double the amount of the underpaid tax liability resulting from the commission of the crime" or either $50,000 for individuals or $250,000 for corporations. These changes will significantly increase the monetary penalties faced by high-end tax cheats and are consistent with the new civil penalties that were also enacted as part of the enforcement package in this year's budget bill.[32] The maximum fines for tax misdemeanors remain unchanged – $10,000 for individuals or $20,000 for corporations.

Venue

The new law expands the county venue provisions for false filing tax offenses by creating a new subsection (m) to N.Y. Criminal Procedure Law § 20.40(4). The new provision recognizes that taxpayers are often involved in economic activity in one county that gives rise to a tax liability reflected in a tax return that happens to be filed in a different county. The new provision enables the prosecutor in the county where the economic activity took place to prosecute the resultant tax crimes. That new section provides the following:

> (m) An offense under the tax law or the penal law of filing a false or fraudulent return, report, document, declaration, statement, or filing, or of tax evasion, fraud, or larceny resulting from the filing of a false or fraudulent return, report, document, declaration, or filing in connection with the payment of taxes to the state or a political subdivision of the state, may be prosecuted in any county in which an underlying transaction reflected, reported or required to be reflected or reported, in whole or part, on such return, report, document, declaration, statement, or filing occurred.

Conceptually, the new section is similar to CPL § 20.40(4)(k), which defines jurisdiction regarding false filing and larceny charges based on filed false instruments seeking payment or reimbursement for services or goods. That statute allows prosecution in the county where the goods or services were purported to be provided. Similarly, the new venue statute for tax offenses authorizes tax prosecutions based on false filings in any county where the underlying transaction occurred or purportedly occurred.

Subpoenas

The new statute replaces various sections of Tax Law Article 37 that made it a misdemeanor offense for individuals to willfully fail to comply with some, but not all, Department administrative subpoenas.[33] New Tax Law § 1831 makes the willful failure to comply with any Department subpoena a misdemeanor. These changes are significant, especially in light of the Department's decidedly more aggressive use of its investigative subpoena power, as illustrated by the following numbers:

Fiscal Year	Subpoenas Issued in Criminal Fraud Investigations
2006–2007	199
2007–2008	349
2008–2009	1,320

Tax Preparers

The Legislature also took steps this year to begin regulating the tens of thousands of unlicensed tax preparers doing business in the state. These preparers operate without any educational standards and with limited oversight and, as the Department's investigations have demonstrated, too many engage in brazen and open fraud.[34]

New Tax Law § 32 requires tax preparers who are not licensed attorneys or certified public accountants to register with the Department as tax preparers and to sign every return that they prepare. Under new Tax Law § 1833 the failure to register or sign a return is a misdemeanor. Section 32 further directs the Department to convene a task force to examine the issues relating to tax preparers and to make recommendations for standards and educational requirements. That task force began meeting in the fall of 2009.

Conclusion

It is a new day for criminal tax enforcement in New York and the fight against tax fraud is a central component of the Department's strategy to narrow New York's annual multi-billion dollar tax gap. To carry out this strategy, in the past two years the Department has built a credible and effective criminal tax enforcement presence. The goal of this enforcement effort is not, however, simply to make more tax cases or more serious cases. To the contrary, the objective is to create an environment where the threat of serious prosecution serves as an effective deterrent to influence taxpayers to voluntarily comply with the law. We know that deterrence works[35] and we are confident that the adoption of the Governor's historic enforcement package will help the Department and state prosecutors

deter many who previously thought they were above the tax law.

1. With regard to the County Law amendment, the Department has recently hired experienced former white-collar prosecutors and investigative attorneys to lead fraud investigative teams across the state. This new law will make these prosecutors available to county prosecutors struggling with limited resources.

2. In the last two years, the Department has restructured and quintupled its criminal fraud investigative staff and is now investigating and seeking criminal prosecution for more tax fraud cases than ever. In fiscal year 2008–2009, the Department opened 2,078 criminal fraud investigations, the most in its history, and up from 928 cases in '07–'08 and 581 in '06–'07. At the same time it referred more cases to prosecutors. Criminal fraud referrals in '08–'09 grew to 594, up from 271 in '07–'08 and 198 in '06–'07. For more on the Department's increased focus on criminal tax enforcement, see, e.g., Jason Subik, *State Getting Tough on Sales Tax Cheaters*, Daily Gazette, Aug. 12, 2009; Gerald B. Silverman, *New York State Steps Up Enforcement, Cracks Down on Preparers to Close Tax Gap*, BNA Daily Tax Report, Dec. 11, 2008; Tom Herman, *New York Sting Naps Tax Preparers*, Wall St. J., Nov. 26, 2008; Jack Trachtenberg & Michelle Merola-Kane, *New York's Less Kind and Gentle Tax Department – Preparing for Criminal Investigations*, State Tax Notes, Mar. 31, 2008 at 1041.

3. The inadequacy of the former criminal tax law was mitigated, at least in part, by the fact that certain Penal Law provisions were also applicable to some types of tax cases. *See, e.g.*, former Tax Law §§ 1806(b), 1817(k) (the Tax Law criminal provisions relating to withholding and sales tax did not preclude prosecution under the Penal Law with respect to the willful failure to pay over-collected sales or withholding taxes). The Penal Law statutes will remain available to prosecutors under the new law. *See* new Tax Law § 1832.

The most common Penal Law statutes that had, and that will continue to have, relevance to some types of tax prosecutions include:

Offering a False Instrument for Filing in violation of Penal Law § 175.35, which makes knowingly filing a false instrument with the state with the intent to defraud a class E felony. This crime is virtually always charged in cases involving fraudulent tax returns that have been filed;

Falsifying Business Records in the First Degree, in violation of Penal Law § 175.10, which makes the fraudulent creation of false business records to conceal or commit another crime a class E felony.

Grand Larceny in violation of Article 155 is often charged in tax cases involving the theft of more than $1,000 in collected sales taxes or collected employee withholding taxes. The level of felony turns on the amount stolen, with the top larceny offense (for the theft of more than $1 million) being a class B felony. Penal Law § 155.42.

4. *See* former Tax Law § 1802.

5. *See* new Tax Law § 1801(a).

6. *See, e.g.*, former Tax Law §§ 1801(a), (b) (income and corporate taxes); 1811(a) (estate and gift taxes); 1812(b) (motor fuel taxes); 1812-f (b) (petroleum taxes); 1813(b) (alcoholic beverage tax); 1814(b) (cigarette and tobacco products tax); 1815(a)(1)(D) (highway use and fuel use tax); 1817(a) (sales tax); 1817(*l*) (compensating use tax).

7. *See* former Tax Law §§ 1801(a), (b), 1811(a).

8. *See People v. Coe*, 71 N.Y.2d 852, 527 N.Y.S.2d 741 (1988) (to establish a willful violation of the Public Health Law, which is a misdemeanor under Public Health Law § 12-b, the People are required to establish that the defendant is aware that his or her conduct is illegal).

9. *United States v. Bishop*, 412 U.S. 346 (1973).

10. New Tax Law § 1832(b).

11. Tax Law § 1801(a)(1).

12. For example, the criminal provisions relating to income tax and corporate tax made it a misdemeanor to "make, render, sign, certify or file" a false "return, declaration or document" and a felony to file a false return (former Tax §§ 1804(a), (b), 1805(a), (b)). The provisions relating to cigarette and tobacco taxes prohibited as a misdemeanor the "making and subscribing" of any

"return, report, statement or other document which is required to be filed" and "willfully delivering or disclosing . . . any list, return, report, account, statement or other document" known to be false or fraudulent as to any material matter (former Tax Law § 1814(c)(1), (2)).

13. Some provisions required that the filing be false in a material respect while others did not have any requirement of materiality and some covered material omissions and others did not. *See and compare* former Tax Law §§ 1812(c) (motor fuel); 1812-f(c) (petroleum tax); 1813(c) (alcoholic beverage tax); 1814(c) (cigarette and tobacco products tax); 1817(b) (sales and use tax) *with* former Tax Law §§ 1804(b), (c); 1805(b), (c) (income and corporate tax returns).

14. Compare, for example, the former provisions relating to filing a false income tax return, which required an "intent to evade" the income tax (former Tax Law § 1804(b)) with the motor fuel provisions which prohibited willfully making and subscribing a return or document that was required to be filed when the person "does not believe [the document] to be true and correct as to every material matter" (former Tax Law § 1812(c)(1)).

15. Making or filing a false document or return was a misdemeanor under the former law, regardless of the amount of tax evaded, for estate tax filings (former Tax Law § 1811(b)), petroleum tax filings (former Tax Law § 1812-f(c)), and cigarette and tobacco tax filings (former Tax Law § 1814(c)). In contrast, for the following types of taxes, making and subscribing a false return or document that was required to be filed was a felony under the former tax law, again regardless of the amount of tax evaded: motor fuel tax filings (former Tax Law § 1812(c)) and alcohol tax filings (former Tax Law § 1813(c)) and highway or fuel use tax returns (former Tax § 1815(b)). Filing a false income or corporate tax return under the former law was a felony if the false filing "substantially" understated the defendant's tax liability, which was defined as understating liability by at least $1,500 (former Tax Law §§ 1804(b), (c), 1805(b), (c)).

16. Descriptions of numerous recent prosecutions of tax preparers can be found among the press releases on the Department's Web site: www.nystax.org.

17. Former Tax Law §§ 1812(c)(1) (relating to making false motor fuel tax returns); 1813(c)(1) (relating to alcohol beverage tax documents); 1815(a)(1)(E) (relating to highway use and fuel tax).

18. Former Tax Law §§ 1804(b), (c), 1805(b), (c).

19. Penal Law § 175.30.

20. Penal Law § 175.35.

21. Penal Law §§ 190.60, 190.65.

22. Penal Law § 195.20.

"Is it to woo a civil, criminal or grand jury?"

23. *See* former Tax Law §§ 1806(b) (withholding taxes); 1817(b)(k) (sales taxes); new Tax Law § 1832.

24. Former Tax Law § 1806(c).

25. *See, e.g.*, former Tax Law §§ 1813(f) (alcoholic beverage tax), 1814(h) (cigarette and tobacco products tax).

26. *See* former Tax Law §§ 1811(a) (estate, gift, and transfer taxes); 1812(b) (motor fuel taxes); 1812-f(b) (petroleum taxes); 1813(b) (alcoholic beverage tax); 1814(b) (cigarette and tobacco products tax); 1817(*l*) (sales or compensating use tax).

27. *See* Penal Law arts. 155 (larceny); 158 (welfare fraud); 176 (insurance fraud).

28. Because there are different thresholds between the tax fraud statutes and the Penal Law larceny statutes, a sales tax cheater stealing more than $1,000 in collected sales tax dollars will face a felony larceny charge (Grand Larceny in the 4th degree) but only a misdemeanor tax fraud charge (Tax Fraud in the 5th degree).

29. New Tax Law § 1832.

30. The rules for establishing the amount stolen in a larceny case allow prosecutors to aggregate multiple takings when those takings are accomplished pursuant to a single, sustained criminal impulse or a general fraudulent scheme. *See generally People v. Cox*, 286 N.Y. 137, 36 N.E.2d 84 (1941).

31. As adopted, this statute permits aggregation of payments not paid "under article one of this chapter." There are, however, no payments that are required or made under "article one" of the Tax Law which consists of a hodgepodge of definitional and similar provisions. Undoubtedly, the Legislature intended to limit aggregation to payments made under "one article" of the Tax Law (and not to taxes paid under "article one") and it is hoped that this unintentional drafting error will soon be corrected.

In addition, the changes to the aggregation statute diluted an important and often used prosecutorial tool for dealing with multi-year tax evaders. This dilution is inconsistent with the overall intent of the new law to strengthen the criminal tax statutes, and it will hopefully be corrected by restoration of the former non-filing felonies. Former Tax Law §§ 1802 and 1803, which made it a felony to fail to file income or corporate tax returns for three or more consecutive years (where there was a liability in each of those years), were among the many sections of the former law that were repealed as unnecessary or repetitive under the new law. These former sections were mainstays of previous enforcement efforts, forming the basis on which most income tax non-filing cases were referred to prosecutors and accepted by them for investigation and potential prosecution. Under the provisions originally proposed by the Governor, which allowed aggregation over multiple filing years and which set the felony level at $1,000, it was believed that the former sections were unnecessary and redundant. In light of the Legislative changes to both the felony thresholds and the aggregation provisions, however, non-filer cases that were previously (and often) filed as felonies will now only be misdemeanors. Unless the Legislature reinstates former §§ 1802 and 1803, prosecutors will have lost the effective tools that existed under the prior law to deal with repeated failures to file personal and corporate income tax returns, even as the state is plagued by such failures to file, which number in the hundreds of thousands each year.

32. *See* the amendments to Tax Law §§ 289-b(1)(d), 433(1)(d), 512(1)(d), 527(d), 685(cc), 1085(f)(2), 1145(a)(2).

33. Former Tax Law §§ 1809 (subpoenas in income and corporate tax matters); 1812(g) (subpoenas in connection with motor fuel taxes); 1812-f(e) (subpoenas in connection with petroleum business taxes); and 1817(n) (subpoenas in connection with sales taxes).

34. See, e.g., the cases described in the articles noted in note 2, *supra*, and in numerous press releases about preparer cases that appear on the Department's Web site: www.nystax.gov.

35. One of the Department's economists has estimated that the Department's well-publicized crackdown on fraudulent preparers produced an increase in voluntarily paid taxes of over $200 million during the 2008 income tax filing season. Roger Cohen, *It Pays to Increase Enforcement on Income Tax Preparers*, State Tax Notes, vol. 50, p. 709, Dec. 15, 2008. Other Department studies have demonstrated the impact of enforcement on compliance. For example, the levels of compensatory use tax paid by New York taxpayers following the highly publicized prosecution of former Tyco executive Dennis Kozlowski in 2002 for use tax evasion by Manhattan District Attorney Robert M. Morgenthau increased approximately $80 million in the two years following Kozlowski's arrest.

BURDEN OF PROOF

BY DAVID PAUL HOROWITZ

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"To Be Continued . . ."

Introduction

A little known fact: This final column of 2009 completes five years of "Burden of Proof." Anyone who knows me, and my procrastinating ways, will no doubt be astounded to learn that I have cranked out these columns, issue after issue, for five years. How was it possible? In a word: continuances.[1] The editor of the *Journal* has always accommodated my requests for additional time, somehow balancing my needs with the requirement that the *Journal* remain on track for timely publication.[2]

Of course, I am not alone in needing the occasional continuance, so this column reviews the circumstances under which an attorney may get a case continued, or adjourned.

Grounds for a Continuance

Trial courts are afforded broad discretion to grant or deny applications for continuances or adjournments:

> A court is vested with broad discretion to control its calendar. In deciding a request for an adjournment, the court should conduct a balanced review of all relevant factors, including the merit of the action, prejudice or lack thereof to the plaintiff, and whether or not there was an intent to deliberately default or abandon the action.[3]

Witnesses

Applying these factors, the Fourth Department recently held it to be an abuse of discretion to deny a motion to adjourn a trial in order to secure the attendance of a witness where, the appellate court found, the witness's testimony was material, counsel had exercised due diligence in subpoenaing the witness, and counsel learned just one week before trial that the witness was out of the country and unable to return for the trial due to a family emergency.[4] The appellate court pointed out that the requested adjournment would only have resulted in a delay of nine days, and would not have prejudiced the defendant.[5]

However, where the request for an adjournment is necessitated by a "lack of due diligence in preparing for trial and where the witnesses it intended to call were not identified," it is within the trial court's discretion to deny the request.[6] Thus, it was not an abuse of discretion for a trial court to deny "defendant's request for an adjournment in order to subpoena two unnamed witnesses. . . . Defendant had ample opportunity to compel the presence of witnesses on his behalf, but waited until the eleventh hour, and even then failed to provide the court with any information on the identity of the witnesses or the relevance of their testimony."[7]

A request for a six-day continuance, so that a criminal defendant could call a police officer to testify concerning a statement he took containing an alleged inconsistency with the complainant's testimony, was properly denied.[8] Defense counsel had already extensively cross-examined the complainant about the police officer's write-up. The First Department also pointed out that the officer had already testified prior to trial that the complainant never made the allegedly inconsistent statement and defense counsel would have been barred from using the write-up to impeach his own witness, the police officer.[9]

It was found to be an abuse of discretion for Family Court to fail to adjourn a child custody hearing "to provide the attorney for the child with a reasonable opportunity to present additional witnesses."[10]

Documents

Another case concerned a plaintiff who had requested certain documents well before trial.[11] On the first day of trial, defense counsel turned over the police officer's aided report of the accident at issue in the case and was still photocopying other documents to exchange with the plaintiff.[12] The plaintiff requested a continuance to permit review of the documents and deposition of the police officer. The trial court denied the request and, thereafter, granted the defendant's motion to dismiss the action.[13] On appeal, the First Department held that, while a disclosure penalty against the defendant was not warranted based upon defense counsel's representation that the late exchange was not intentional,[14]

> the trial court did improvidently exercise its discretion by refusing to grant a continuance so that plaintiff could depose the officer who wrote the aided report and receive and review the documents that defendant was still photocopying on the day of trial. Plaintiff had requested the documents as long ago as April 2000, so the need for a continuance was not caused by any lack of due diligence on his part, and defendant, who stated

> that it had no objection to producing the officer for deposition, would not have been prejudiced by a continuance.[15]

One justice dissented, writing that the trial court had precluded the defendant from utilizing the aided report and from calling the police officer, at which point plaintiff's counsel protested that additional documents existed that the defendant had not exchanged, so additional disclosure was required.[16] When the trial court refused to permit further disclosure, plaintiff's counsel requested that the trial be adjourned so that the issue could be taken to the appellate division.[17] This request was also refused, at which time plaintiff's counsel advised the court she could not proceed, and the action was dismissed.[18] The dissenting justice would have affirmed, finding the denial of the request for a continuance was an appropriate exercise of discretion, concluding, "If counsel felt that discovery was essential plaintiff would have been better served by a request for leave to withdraw the note of issue as opposed to his attorney's refusal to proceed with the trial."[19]

Experts

Cases detailing problems with experts are legion, and often the wounds caused by expert difficulties are self-inflicted. However, what if an expert is precluded from testifying at the last minute when opposing counsel makes a motion *in limine* after jury selection,[20] and the court properly precludes the expert from testifying for failing "to establish a sufficient evidentiary foundation with respect to causation"?[21]

When plaintiff's counsel requested a continuance, it was denied. The First Department held this to be an abuse of discretion:

> Plaintiffs, however, contend that the court abused its discretion in denying their motion for a continuance pursuant to CPLR 4402 to enable them to retain a medical expert to testify concerning causation.
>
> * * *
>
> Here, plaintiffs' request for a continuance was not the result of their failure to exercise due diligence. To the contrary, they were without an expert witness upon the commencement of the trial because the trial court entertained defendant's motion in limine made after jury selection. As plaintiffs' counsel argued in support of his application, had defendant's motion been made prior to jury selection, plaintiffs would have had the opportunity to obtain another expert witness. Further, any resulting delay or waste of judicial resources would not have been the fault of plaintiffs, because, but for defendant's motion in limine, they were prepared for trial.[22]

The dissenting justice would have reversed as to the preclusion of the expert,[23] and offered a little more detail on the manner in which defendant's motion was made:

> Furthermore, the timing of the motion and decision are shocking; at the end of the court day following the completion of jury selection and pretrial proceedings on March 26, 2007, plaintiffs' counsel was presented with this thoroughly prepared motion in limine including 15 exhibits and a legal analysis that had to be responded to immediately. He was required to counter the legal analysis, without even time to collect and submit any relevant exhibits, such as any deposition testimony, perhaps by the child or his mother, setting forth their firsthand experience or observations of the nature and extent of the changes in Tyrone since the accident. The record on appeal is appallingly one-sided, essentially consisting of the pleadings, defendant's submissions on its motion, and the in-court colloquy, with plaintiffs' opposition limited to a two-page "Brief in Opposition."[24]

What if an expert is precluded from testifying at the last minute when opposing counsel makes a motion *in limine* after jury selection?

Counsel

Sometimes the attorney's schedule, personal or professional, is the problem. In an action where defense counsel was granted permission to withdraw and then, after the defendant *pro se* proceeded to trial and selected a jury, sought leave to "take the defendant's case 'back,'" providing the trial court agreed to a three-day continuance (to accommodate the attorney's planned vacation), it was not an abuse of discretion to deny the request.[25]

Tell the Truth

In *Carroll v. Nostra Realty Corp.*,[26] the plaintiff's action was dismissed, the dismissal was affirmed by the First Department, and the Court of Appeals dismissed the appeal, where an affirmation of engagement was submitted on the date jury selection was scheduled to commence. The affirmation averred "[t]hat on this date I am actually on trial in the Supreme Court of the State of New York, County of Westchester, in the matter of *Christine DeLuca v. Catherine Iannuzzi*, bearing the Index # 13222/01."

Unfortunately, the affirmation was not accurate. As the First Department explained:

On October 11, 2006, Mr. Gold appeared on another matter in Westchester County, was issued a jury slip on that matter, and was instructed to return on October 16, 2006 for jury selection.

On October 12, 2006, Mr. Gold's partner, Jesse Sable, appeared in Part 40 before Justice Gammerman with an "affirmation of engagement," in which Mr. Gold affirmed that he was actually on trial in another matter. However, the court learned that Mr. Gold was not on trial on that date, and that the other matter had been scheduled for jury selection on October 16, 2006. The court then rejected the affirmation of engagement as misleading, and dismissed this action. On appeal, plaintiffs contend that they demonstrated a reasonable excuse because their counsel was actually engaged on trial on October 12, 2006.

Section 125.1(b) of the Rules of the Chief Administrator of the Courts states: "[e]ngagement of counsel shall mean actual engagement on trial or in argument before any state or federal trial or appellate court, or in a proceeding conducted pursuant to rule 3405 of the CPLR and the rules promulgated thereunder." On October 12, 2006, Mr. Gold was not actually engaged on trial or in argument before any court, and as the record reveals, was actually preparing witnesses on another matter. Accordingly, we reject plaintiffs' contention that they demonstrated a reasonable excuse for failing to proceed to trial in this action.

While there is no express definition of the term "on trial" in the applicable rules, it is commonly understood that a trial commences with the selection of a jury. In any event, under no reasonable understanding of that term can an attorney who is directed to appear days later to select a jury be considered to be on trial on the day the direction is given. Contrary to plaintiffs' contention, an attorney is not actually engaged on trial when he is issued a jury slip. Accordingly, Mr. Gold was not actually engaged on trial in another matter on October 12, 2006 since he had not commenced selecting a jury in that case.

At a minimum, even if Mr. Gold believed that he was actually engaged on another matter, he was required to appear on October 12, 2006 on this action, and, pursuant to the Rules of the Chief Administrator of the Courts, permit the courts to determine which trial should proceed first.[27]

What about the party whose case is now dismissed? The trial court, observing that "counsel has made his procrustean bed in egregious misstatements to the Court, and must now lie in it,"[28] acknowledged:

> The court is mindful that this harsh result penalizes the clients, the Carroll family. However, contrary to Mr. Gold's contention, it is not the Court that is denying the Carroll family their day in court; Mr. Gold accomplished this result when he decided to refuse to appear in Part 40 before Justice Gammerman as ordered.[29]

Conclusion

Requests for continuances often require the court to balance competing interests between the parties, which often collide with the court's own requirements and goals. For the attorney, successfully requesting or opposing continuances is often more science than art.

As my first boss instructed when I was sent to obtain a critical trial adjournment, at the call of the trial calendar I was to stand up and, in a loud and firm voice, call out "ready." Next,

before anyone else could get a word in, in an equally loud and firm voice, I was instructed to call out "conference." Finally, at the conference, in the relative privacy of the judge's robing room and away from the audience in the TAP Part, I was instructed to beg, plead, and, if necessary, explain I how I would lose my job if my case was not adjourned.

As long as there have been trials, there have been requests for continuances, and as long as there have been columns like "Burden of Proof," there have been requests from authors on deadline for more time. The willingness of courts, under the proper circumstances, to grant continuances, is to be continued. So too this column, in 2010. ■

1. As a trial lawyer, my first preference would be for an adjournment, but with a strict publication deadline, a continuance is the best I can hope for.

2. And I suspect that David Wilkes's generosity in granting continuances was the direct result of the Herculean efforts of the *Journal* staffers (especially Joan Fucillo) who were required to convert my child-like scribbles into fine legal prose.

3. *174 Second Equities Corp. v. Hee Nam Bae*, 57 A.D.3d 319, 321, 869 N.Y.S.2d 433 (1st Dep't 2008).

4. *Chamberlin v. Dundon*, 61 A.D.3d 1378, 877 N.Y.S.2d 579 (4th Dep't 2009).

5. *Id.*

6. *Pinnacle Uptown, LLC v. Asia Banks*, 24 Misc. 3d 139(A), 2009 WL 2178435 (App. Term, 1st Dep't 2009).

7. *174 Second Equities Corp.*, 57 A.D.3d at 321.

8. *People v. Riley*, 57 A.D.3d 379, 869 N.Y.S.2d 490 (1st Dep't 2008), *lv. denied*, 12 N.Y.3d 820, 881 N.Y.S.2d 28 (2009).

9. *Id.*

10. *Krieger v. Krieger*, 65 A.D.3d 1350, 1350, 2009 WL 3135655 (2d Dep't 2009) (citations omitted).

11. *Perez v. City of N.Y.*, 63 A.D.3d 405, 879 N.Y.S.2d 455 (1st Dep't 2009).

12. *Id.* at 405.

13. *Id.*

14. *Id.*

15. *Id.* at 406 (citations omitted).

16. *Id.* at 406–407 (DeGrasse, J., dissenting).

17. *Id.* at 405.

18. *Id.*

19. *Id.* at 407 (DeGrasse, J., dissenting).

20. *Guzman v. 4030 Bronx Blvd. Assocs. LLC*, 54 A.D.3d 42, 861 N.Y.S.2d 298 (1st Dep't 2008).

21. *Id.* at 51.

22. *Id.* at 52.

23. *Id.* at 53 (Saxe, J., dissenting).

24. *Id.* (Saxe, J., dissenting).

25. *Garritano v. Garritano*, 62 A.D.3d 657, 657, 878 N.Y.S.2d 402 (2d Dep't 2009).

26. No. 109293-2002, 2007 WL 5274120 (Sup. Ct., N.Y. Co. Feb. 21, 2007), *aff'd*, 54 A.D.3d 623, 864 N.Y.S.2d 10 (1st Dep't 2008), *appeal dismissed*, 12 N.Y.3d 792, 879 N.Y.S.2d 38 (2009).

27. *Carroll*, 54 A.D.3d at 624 (citations omitted).

28. *Carroll*, 2007 WL 5274120.

29. *Id.*

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Legal Implications of the Assignment of a Construction Contract

By Steven C. Bennett

For lawyers, construction contracting is about the allocation of risk. The key to dealing with adverse developments on a construction project (delay, cost overruns, and malfeasance of various sorts) is to identify risks before the project begins and to deal with foreseeable risks in the contract documents.[1]

One significant risk appears in circumstances where a participant in a project (often a contractor or subcontractor) cannot perform work as originally planned, or wishes to transfer its right to compensation to another party. In those circumstances, a party may attempt to designate a replacement.[2] This article explores the legal implications of assignment of a construction contract for the parties involved.

Assignment, Delegation and Novation

New York law draws distinctions between the "assignment," "delegation" and "novation" of a contract. An "assignment" involves the transfer of rights under a contract.[3] A "delegation" involves the appointment of another to perform one's duties.[4] Lawyers may use the two terms "inartfully," intending to include delegation within the term assignment.[5] The distinction, however, is important. Generally, "when rights are assigned, the assignor's interest in the rights assigned comes to an end. When duties are delegated, however, the delegant's obligation does not end."[6] Thus, although "most obligations can be delegated," the act of delegation "does not relieve

the delegant of the ultimate responsibility to see that the obligation is performed."[7]

A "novation," by contrast, may "discharge the duty of the delegating party," but only where the obligee expressly "release[s] the delegating party, in exchange for the new liability of the delegate."[8] Because a novation actually discharges all duties of the original obligor, leaving the obligee solely to obtain performance from the recipient of the delegated obligation, "there must be a clear and definite intention" expressed, on the part of all parties involved, that such is the purpose of an agreement.[9] Absent a clear novation, a principal obligor "has a continuing liability," even if the assignment of rights and delegation of duties is otherwise valid.[10]

Although an obligor may delegate performance to another, it cannot escape the obligation to ensure that performance is properly completed.

Limits on Delegation

In New York, "most obligations can be delegated as long as performance by the delegate will not vary materially from performance by the delegant."[11] The classic case that stands for this proposition is *Devlin v. Mayor of the City of New York*.[12] In *Devlin*, a contractor agreed to sweep the streets of the city, but later assigned its rights and obligations to another contractor. The city claimed that the contract terminated because the original contractor did not personally perform, even though the replacement contractor performed adequately until termination by the city. The New York Court of Appeals held that, at very least, the substitute contractor was entitled to payment for the work performed.[13] The Court continued, noting that delegation of duties would not generally result in an automatic termination of a contract:

> If the service to be rendered or the condition to be performed is not necessarily personal, and such as can only with due regard to the intent of the parties, and the rights of the adverse party, be rendered or performed by the original contracting party, and the latter has not disqualified himself from the performance of the contract, the mere fact that the individual representing and acting for him is the assignee, and not the mere agent or servant, will not operate as a rescission of, or constitute a cause for terminating the contract.

In short, under the *Devlin* rule, unless the contract performance is "personal," the performance (absent contract limitations) should be freely delegable to another. If, thereafter, the contract is properly performed, then the substituted party may "have the benefit of the contract" (*i.e.*, compensation for goods and services provided).[14]

But what is a "personal" contract, whose duties cannot be delegated? The *Devlin* Court noted that the answer would depend upon "the nature of the contract and the character of the obligations assumed."[15] Thus, under New York law, the characterization of a contract as "personal" is a question of fact.[16] Where a contract requires "personal trust and confidence" in the performance of a party, such duties may not be delegated.[17] A contract for the employment of an attorney, for example, is personal.[18] And a contract that involves skill, judgment, integrity and reputation, such as between an author and a publisher, may be considered personal.[19] By contrast, obligations under a contract that do not involve "any personal relationship or skill" may be delegated.[20]

Contracts related to construction may vary widely in the degree to which they may be characterized as "personal." Thus, in New York, numerous construction-related contracts have been held not to be "personal."[21] Various similar examples appear in other states.[22] Despite this trend in the cases, however, there may be circumstances where, due to the special skill or science called for in a construction contract, performance of the contract may be deemed "personal," and not subject to delegation or assignment.[23]

Liability for Duty to Perform the Obligation

Although an obligor may delegate performance to another, it cannot escape the obligation to ensure that performance is properly completed.[24] In *Devlin*, for example, the Court held that, although the contract obligations could be delegated, the original contractor "was at no time discharged from his obligations" under the contract.[25]

Liability for Negligence

A contractor assigning work may be obligated to see that the project is completed, but the assigning contractor is generally not liable for the negligence of the assignee.[26] Thus, general contractors are most often held not responsible for the negligence of their subcontractors.[27] The New York Court of Appeals has held that

> mere retention of the power of general supervision to see that the over-all work proceeds properly and to coordinate the actions of several subcontractors on the site will not ordinarily cast [a party] in damages for

> the negligence of any of the latter. Nor is the general contractor obliged to protect employees of his subcontractors against the negligence of his employer or that of a fellow servant.[28]

Another New York court has held that, when work is delegated to a third party, the third party becomes a "statutory 'agent' of the owner or general contractor" and has the authority to supervise and control the work. The court noted: "To hold otherwise and impose a nondelegable duty upon each contractor for all injuries occurring on a job site and thereby making each contractor an insurer for all workers regardless of the ability to direct, supervise and control those workers would lead to improbable and unjust results."[29]

Several exceptions apply to the general rule of nonliability. Liability may exist where the employer is under a statutory duty to perform or guard the work, or where the employer has assumed a contractual obligation to perform the work, or where the employer is under a duty to keep the premises safe, or where readily foreseeable danger is inherent in or created by the work assigned to the contractor.[30]

One exception to the general rule appears in New York Labor Law § 240.[31] The law requires that owners secure ladders and scaffolding at construction sites, and an owner may be held liable for injuries to employees of subcontractors from unsecured ladders.[32] In *Broderick v. Cauldwell-Wingate, Co.*,[33] an employee of a carpentry subcontractor suffered severe injuries when a platform collapsed. The court ordered a new trial to determine whether the general contractor could be held liable for telling an employee that the platform was "all right" and to "[g]o ahead," after the employee questioned the platform's safety. As the *Broderick* court noted, a general contractor cannot escape liability from a subcontractor's employee if it "assumes control and gives specific instructions which necessarily involve the safety of the subcontractor's men."[34]

A New York Court of Appeals case from the 1940s, *Schwartz v. Merola*,[35] concerned an owner who entered into a contract with a general contractor to renovate a building. The general contractor entered into a contract with a subcontractor for tiling and terrazzo pebble work. The plaintiff was injured when a bag of terrazzo pebbles that the subcontractor piled on the sidewalk outside the building fell on him. The second assignee was primarily responsible for the accident, but the owner, the general contractor, and the assignor subcontractor were all held liable for the plaintiff's injuries because they had notice that a dangerous condition existed.[36] The Court held: "An independent general contractor, who is present and sees and realizes that a subcontractor is doing his work in an unlawful and dangerous manner, may be liable for an injury resulting directly to a third person from such unlawful and negligent conduct."[37]

Assignment of Payments

Subcontractors, especially smaller or newer companies, may have difficulty financing their work, even before a job is done.[38] Further, subcontractors who have completed projects may prefer not to await payment from the principal contractor, choosing instead to sell (or "factor") their accounts receivable.[39] As a matter of public policy, under the Uniform Commercial Code, arrangements that permit such financing are encouraged, and contract provisions preventing assignment of payments to permit such financing are void.[40]

Further, to the extent that work has been performed on a project, the right to receive compensation for prior work under the contract is assignable, even if the remaining work cannot be delegated.[41] In circumstances where an owner terminates a general contractor but nevertheless permits a subcontractor to continue to provide service on the project, the subcontractor may be held to have a lien on the proceeds of any amounts owed the general contractor (including amounts owed for services by the subcontractor).[42]

Drafting Issues

Parties are generally free to specify, in their contracts, whether some or all of the rights and obligations under the contract may be transferred to others. Specificity in the language of the contract, however, is essential. Thus, for

example, even where an agreement stated that it would bind "successors and assigns" of the parties, the Court of Appeals held that the contract was "personal," and thus could not be assigned.[43] Similarly, reference to assignment of the "benefits and burdens" of a contract would not necessarily authorize a delegation of all "rights and obligations" under the agreement.[44] The inclusion of a contract term permitting "assignment," moreover, would not alone suffice to create a novation.[45]

If parties intend that any assignment be rendered "void," they should so state expressly in their agreement.

Similarly, parties may, by the express terms of a contract, make performance under a contract "personal," such that rights and obligations under the contract cannot be assigned or delegated (or require consent to any such transfer). Yet, such limitations may import ambiguity into the relationship. A general term forbidding "assignment" of an agreement, for example, could prohibit a contractor from delegating performance of duties, or it could aim only at assignment of payments under the contract.[46]

The American Institute of Architects (AIA) offers a standard form provision in its suggested contracts to the effect that "neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the contract."[47] This provision, according to one commentator, makes the "classic mistake" of not precluding assignability but merely stating that neither party "shall assign." The final sentence of the provision, moreover, actually contemplates the possibility of an assignment, and states the consequence in that event.[48] Thus, if parties intend that any assignment be rendered "void," they should so state expressly in their agreement.[49] ■

1. *See generally* Mark H. McCallum, A Quick Primer on Construction Risks and Contracting Practices, at 2 (2000), www.people.umass.edu (risk is an "inherent and expected part" of the construction process).

2. *See generally* Philip L. Bruner & Patrick J. O'Connor, Bruner and O'Connor on Construction Law § 5:245 (2009) ("The assignment of contractual rights is a regular occurrence on construction projects.").

3. *See MSF Holding Ltd. v. Fiduciary Trust Co. Int'l*, 435 F. Supp. 2d 285 (S.D.N.Y. 2006) ("assignment" of letter of credit did not include "transfer or delegation of any duties"); *Nationwide Mech. Contractors Corp. v. Hokkaido Takushoku Bank Ltd.*, 188 A.D.2d 871, 591 N.Y.S.2d 578, 580 (3d Dep't 1992) (assignment of contract rights to lenders as security "could not impose" performance obligations upon lenders).

4. *See Assocs. Capital Servs. Corp. of N.J. v. Fairway Private Cars, Inc.*, 590 F. Supp. 10, 17 (E.D.N.Y. 1982) (assignment was "solely of rights, and not a delegation of duties").

5. *See Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 924 (2d Cir. 1977); *see also Aetna Cas. & Surety Co. v. Aniero Concrete Co.*, 404 F.3d 566, 569 (2d Cir. 2005) (rejecting claim that terms "assignment" and "delegation" were "interchangeable"); *Viacom Int'l, Inc. v. Tandem Prods., Inc.*, 526 F.2d 593, 596 n.6 (2d Cir. 1975) (noting "distinction to be drawn between the assignment of a party's rights under a contract and a delegation of the party's duties," and noting that "attorneys do not always utilize the skills of contract draftsmanship required" to recognize this "subtle distinction").

6. *Contemporary Mission*, 557 F.2d at 924 (quoting 3 Williston on Contracts) (noting that rule is "obvious" as "otherwise obligors would find an easy practical way of escaping their obligations).

7. *Id.* ("[i]f the delegate fails to perform, the delegant remains liable"); *see also Quintel Corp., N.V. v. Citibank, N.A.*, 596 F. Supp. 797, 800 (S.D.N.Y. 1984) (where obligee accepted "assignment" of obligor's "rights and duties," obligor nevertheless "remained liable for the obligations").

8. *Holland v. Fahnestock & Co.*, 210 F.R.D. 487, 490 (S.D.N.Y. 2002) (quotation omitted).

9. *Yahaya v. Hua*, 1989 WL 214481 at *4, No. 87 Civ 7309 (CES) (S.D.N.Y. Nov. 28, 1989); *see also Holland v. Fahnestock & Co.*, 2002 WL 1774230 at *9, No. 01Civ.2462RMBAJP (S.D.N.Y. Aug. 1, 2002) (absent "express discharge" of obligations, "assignment" constituted consent to delegation of duties, but did not discharge original obligor).

10. *See McSpadden v. Dawson*, 117 A.D.2d 453, 458 n.2, 503 N.Y.S.2d 357 (1st Dep't 1986); *Toroy Realty Corp. v. Ronka Realty Corp.*, 113 A.D.2d 882, 883, 493 N.Y.S.2d 800 (2d Dep't 1985) ("assignor cannot relieve himself of all obligations under the contract absent a release or novation").

11. *Contemporary Mission*, 557 F.2d at 924.

12. The complete title is *Devlin v. The Mayor, Aldermen & Commonality of the City of New York*, 63 N.Y. 8 (1875).

13. *Id.* (noting "liberal" rule permitting "assignment" of rights to payment). Thus, "even if the contract had been terminated for every other purpose," the replacement contractor would be entitled to payment. *Id.*

14. *Id.* (noting that "[p]arties may, in terms, prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations").

15. *Devlin*, 63 N.Y. at 17. In *Devlin*, for example, the street sweeping contract involved "servile labor," and the contractor was expected to "employ workmen and appoint agents and overseers of the work." *Id.* The *Devlin* court, moreover, noted that work upon "the canals of this State, either in their repair or construction," was delegable.

16. *See In re Noonan*, 17 B.R. 793, 798 (Bankr. S.D.N.Y. 1982) (determination depends upon "sui generis" attributes of the performance).

17. *Paige v. Faure*, 229 N.Y. 114, 119, 127 N.E. 898 (1920) (exclusive agency obligations could not be delegated).

18. *See Wilkerson v. City of Utica*, 59 Misc. 2d 864, 865, 300 N.Y.S.2d 693 (Sup. Ct., Oneida Co. 1969) ("A contract for the employment of an attorney to provide legal services is personal in nature, and terminates upon the death of the attorney.").

19. *See In re Waterson, Berlin & Snyder Co.*, 36 F.2d 94, 96 (S.D.N.Y. 1929) (contract with composer or author cannot be delegated without consent), *rev'd & remanded on other grounds*, 48 F.2d 704 (2d Cir. 1931).

20. *Seligman & Latz, Inc. v. Noonan*, 201 Misc. 96, 99, 104 N.Y.S.2d 35 (Sup. Ct., Monroe Co. 1951) (contract to train party as an operator in a beauty salon required "special skill and peculiar qualifications," making it personal).

21. *See, e.g., New England Iron Co. v. Gilbert Elevated R. Co.*, 91 N.Y. 153 (1883) (contract to build railway); *Wetter v. Kleinert*, 139 A.D. 220, 123 N.Y.S 755 (2d Dep't 1910) (contract for demolition of buildings); *Janvey v. Loketz*, 122 A.D. 411, 106 N.Y.S. 690 (2d Dep't 1907) (contract to decorate dwelling); *Levy v. Cohen*, 103 A.D. 195, 92 N.Y.S. 1074 (1st Dep't 1905) (contract to build synagogue); *Brewster v. City of Hornellsville*, 35 A.D. 161, 54 N.Y.S. 904 (4th Dep't 1898) (paving of municipal streets).

22. *See, e.g., Decatur N. Assocs., Ltd. v. Builders Glass, Inc.*, 180 Ga. App. 862, 350 S.E.2d 795, 798 (Ga. Ct. App. 1986) (recaulking of windows on a building did not involve "personal confidences" of the parties); *Madison v. Moon*, 148 Cal.

App. 2d 135, 306 P.2d 15, 21 (Cal. Dist. Ct. App. 1957) (contract for construction of road was assignable); *In re Estate of Stormer*, 385 Pa. 382, 386, 123 A.2d 627 (Penn. Sup. Ct. 1956) (where construction documents "specify in detail the type and quality of the material to be used in the work, what the work was to consist of, where it was to be done, and the general methods of construction," leaving only the "mechanical details of excavation and construction," contract was assignable); *Taylor v. Palmer*, 31 Cal. 240, 247 (1866) ("the workmanlike digging down of a sand hill, or the filling up of a depression to a given level" does not require "rare genius and extraordinary skill," such as to make a contract personal).

23. *See, e.g.*, *Devlin v. Mayor of the City of N.Y.*, 63 N.Y. 8 (1875) (noting that there "may be cases" where "personal skill and science" aspects of the contract preclude delegation) (citing example of English case involving construction of a light-house); *Johnson v. Vickers*, 139 Wis. 145, 145, 120 N.W. 837 (Wis. Sup. Ct. 1909) (contract to build canning factory "undoubtedly required skill and experience, and upon its proper execution the success of the enterprise might well depend"); *Swarts v. Narragansett Elec. Lighting Co.*, 26 R.I. 388, 388, 59 A. 77 (R.I. Sup. Ct. 1904) (parties bargained for "a man highly skilled in the work of installing electric apparatus"; the "nature of the work to be done" implied "personal service").

24. *Toroy Realty Corp. v. Ronka Realty Corp.*, 113 A.D.2d 882, 883, 493 N.Y.S.2d 800 (2d Dep't 1985) ("the assignor cannot relieve himself of all obligations under the contract absent a release or novation"); *see County of Sullivan v. State of N.Y.*, 135 Misc. 2d 810, 815, 517 N.Y.S.2d 671 (Ct. Cl. 1987), *aff'd*, 137 A.D.2d 165, 528 N.Y.S.2d 227 (3d Dep't 1988); *see generally* Restatement (Second) of Contracts § 318(3) (1981) ("Unless the obligee agrees otherwise, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor.").

25. *Devlin*, 63 N.Y. at 16; *Tarolli v. Syracuse Inv. Corp.*, 151 Misc. 634, 271 N.Y.S. 871 (1st Dep't) (assumption of obligations under mortgage did not release obligations of original mortgagor), *aff'd*, 241 A.D. 912, 271 N.Y.S. 879 (4th Dep't 1934); *500 Fifth Ave., Inc. v. Nielsen*, 56 Misc. 2d 392, 288 N.Y.S.2d 970 (N.Y. Co. Civ. Ct. 1968) (assignment of lease did not discharge lessee's obligations to landlord).

26. *See generally* 2A N.Y. Jur. 2d Agency § 436 (1998).

27. *Broderick v. Cauldwell-Wingate Co.*, 301 N.Y. 182, 187, 93 N.E.2d 629 (1950).

28. *Id.* (citations omitted).

29. *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 318, 445 N.Y.S.2d 127 (1981); *see also Paone v. Westwood Vill.*, 178 A.D.2d 518, 520, 577 N.Y.S.2d 442 (2d Dep't 1991).

30. *McCleery v. Sears Roebuck & Co.*, 98 N.Y.S.2d 283, 286 (N.Y. Co. City Ct. 1950).

31. N.Y. Labor Law § 240.

32. *See Goodrich v. Watermill*, 169 Misc. 2d 314, 645 N.Y.S.2d 721 (Sup. Ct., Ulster Co. 1996).

33. *Broderick*, 301 N.Y. 182.

34. *Id.* at 187.

35. 290 N.Y. 145, 48 N.E.2d 299 (1943).

36. *Id.* at 151.

37. *Id.* at 152 (citing *Rosenberg v. Schwartz*, 260 N.Y. 162, 166, 183 N.E. 282 (1932)).

38. *See Spellman v. Shawmut Woodworking & Supply, Inc.*, 445 Mass. 675, 682 n.9, 840 N.E.2d 47 (Mass. Sup. Jud. Ct. 2006) (noting "significant financial exposure faced by subcontractors," and holding that assignment of payments is permissible).

39. *See Quantum Corp. Funding, Ltd. v. Westway Indus., Inc.*, 4 N.Y.3d 211, 791 N.Y.S.2d 876 (2005) (describing "typical" subcontractor situation).

40. *See Quantum Corp. Funding, Ltd. v. Fid. & Deposit Co. of Md.*, 285 A.D.2d 376, 378, 685 N.Y.S.2d 688 (1st Dep't 1999) (citing UCC 9-318(4)) ("That statute renders void any term in a contract between an account debtor and an assignor prohibiting assignment of an account or the creation of a security interest or requiring prior consent to assignment or the creation of a security interest."); *Aetna Cas. & Surety Co. v. Bedford-Stuyvesant Restoration Constr. Corp.*, 90 A.D.2d 474, 455 N.Y.S.2d 265 (1st Dep't 1982) (assignment effective, even if assignee took with "full knowledge" that account debtor had sought to prohibit assignment) (quoting Official Comment to UCC 9-318(4)); *see generally* 95 N.Y. Jur.2d, Secured Transactions § 239 (2009) (anti-assignment clause that contradicts UCC "is of no effect whatsoever"; the prohibited assignment "does not constitute a default"). The assignment of payment rights to a lender, however, does not impose obligations on the lender with regard to completion of a project. *See Nationwide Mech. Contr. Corp. v. Hokkaido Takushoku Bank Ltd.*, 188 A.D.2d 811, 591 N.Y.S.2d 578 (3d Dep't 1992).

41. *See Knudsen v. Torrington Co.*, 254 F.2d 283, 285 (2d Cir. 1958) ("Regardless of whether the duties under the contract were delegable, the plaintiff was entitled to receive commissions for orders [previously] obtained.").

42. *See Tibbetts Constr. Corp. v. O & E Contr. Co.*, 15 N.Y.2d 324, 258 N.Y.S.2d 400 (1965) (owner could not "accept performance" by subcontractor "at the same time disclaiming obligation" to subcontractor, on ground that subcontractor was working for general contractor "and could look solely" to general contractor for payment); *but see Data Elec. Co. v. NAB Constr. Co.*, 52 A.D.2d 779, 383 N.Y.S.2d 14 (1st Dep't 1976) (citing *Tibbetts* and noting that, in case at bar, "no privity" existed between owner and general contractor's subcontractor, despite claim that owner "supervised and directed" subcontractor's work).

43. *See Paige v. Faure*, 229 N.Y. 114, 127 N.E. 898 (1920) (contract for exclusive agency contemplated that parties would "personally . . . devote their time to carrying out its terms"). Such language, moreover, would not suffice to permit the delegation of duties under a contract. *See Hugel v. Habel*, 132 A.D. 327, 117 N.Y.S. 78 (1st Dep't 1909). Such language might, however, indicate that rights under a contract were meant to be freely assignable. *See Harris v. Key Bank Nat'l Assoc.*, 193 F. Supp. 2d 707, 710 (W.D.N.Y. 2002) (reference to "successors, legal representatives and assigns" indicated right to assign note and mortgage to a third party), *aff'd*, 51 Fed. Appx. 346 (2d Cir. 2002).

44. *See Kier Constr. v. Raytheon Co.*, No. Civ. A. 19526, 2005 WL 628498 (Del. Ch. Mar. 14, 2005) (applying New York law).

45. *See Viacom Int'l Inc. v. Tandem Prods., Inc.*, 526 F.2d 593, 596 (2d Cir. 1975) (to constitute a novation, "a contract must discharge a previous contractual duty, create a new contractual duty, and add a party who neither owed nor was entitled to its performance"); *see also Mallad Constr. Corp. v. County Fed. Sav. & Loan Assoc.*, 32 N.Y.2d 285, 289, 344 N.Y.S.2d 925 (1973) (where agreement provided for "revocation and cancellation of the prior agreement," novation existed).

46. *See* Richard A. Lord, Williston on Contracts § 74:39 (2009) (such a term is a "matter of interpretation").

47. *See* AIA Form A201, www.aia.org (2007) (Section 13.2.1, regarding assignment). A related provision (Section 5.4) permits the assignment of subcontracts to the owner, if the general contractor is terminated "for cause." *See* Sean R. Calvert, That's Mine: A Contractor's View on Termination, at 6 (2008), www.abanet.org (provision gives the owner "ability to selectively accept assignment of the subcontracts," but to "avoid having to negotiate with existing or replacement subcontractors for completion of the work at prices in excess of the original subcontract costs").

48. *See* Jonathan J. Sweet, Sweet on Construction Industry Contracts: Major AIA Documents § 17.07 at 770 (5th ed. 2009) ("*Sweet*") ("a promise not to assign may be the basis for a breach [claim] but it does not invalidate the assignment"); *see also* Restatement (Second) of Contracts § 317 ("A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested . . . gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective."). As the *Sweet* treatise notes, moreover, the AIA "must have been aware" of the UCC provisions that invalidate clauses that do not permit assignment of monies due, or creation of a security interest in such payments. *See Sweet*; *see also* Charles R. Heuer & Howard G. Goldberg, *Commentary on AIA Document A201-1997*, at 92, *available at* www.aia.org (1999) ("At times, a contractor may want to assign to a major creditor money due or to become due under the contract. This is not prohibited by [AIA § 13.2.1] since it is only an assignment of the right to receive money and not an assignment of the contract as a whole.").

49. *Oliver/Hatcher Constr. & Dev., Inc. v. Shain Park Assocs.*, No. 275500, 2008 WL 2151716 (Mich. Ct. App. May 22, 2008) (interpreting AIA form, and finding assignment not "void"); *TRST Atlanta, Inc. v. 1815 The Exchange, Inc.*, 220 Ga. App. 184, 469 S.E.2d 238, 240–41 (Ga. Ct. App. 1996) (AIA form "anticipates" assignments); *see also Folgers Architects Ltd. v. Kerns*, 262 Neb. 530, 633 N.W.2d 114, 126 (Neb. Sup. Ct. 2001) (despite provision precluding assignment, intent of provision is not affected by permitting assignment of right to collect damages).

Statutory Damages in Copyright Litigation

By Andrew Berger

Statutory damages, although a potent weapon in copyright litigation, are often a trap for the unwary.[1] The Copyright Act of 1976 (the "Act") limits the availability of statutory damages, the number of grants of statutory damages to be awarded and the parties against whom those grants will be individually assessed.[2] The Act also impacts on the availability of actual damages when the copyright owner elects statutory damages before the entry of final judgment.[3] Further, the Act limits the range of statutory damages to be awarded depending on whether the infringement was innocent, non-willful or willful.[4]

Litigants on both sides of the fence sometimes misunderstand these limits. Copyright owners mistakenly seek statutory damages for post-registration infringements of a work that continue the pattern of pre-registration infringement of the same work.[5] Where multiple infringers acting in concert infringe one work multiple times, some copyright owners wrongly believe they are entitled to multiple awards of statutory damages individually assessed against each infringer.[6]

Further, defendants sometimes incorrectly assert that the unauthorized infringing compilations they create from a plaintiff's separate, copyrightable works are subject to only one award of statutory damages.[7] Also, copyright owners who elect to receive an award of statutory damages mistakenly believe they can still raise issues on appeal regarding actual damages.[8] Finally, parties are sometimes uncertain where in the spectrum from innocence to willfulness infringing conduct falls and the statutory damages that will be assessed for that conduct.[9]

This article attempts to clear up these misunderstanding and explains the uncertainties so that all parties may better assess the statutory damages that may be awarded in copyright litigation.

Post-Registration Infringing Conduct That Commenced Pre-Registration

Title 17, § 412(2) of the U.S.C., with one exception not relevant here, prohibits recovery of statutory damages for infringements of a work that commence before the work is registered.[10] But this section is silent about whether a copyright owner may recover statutory damages for infringements of that work that continue after registration. Courts usually say no. The majority hold that the copyright owner is not entitled to statutory damages for the continuation of post-registration infringements that commenced pre-registration.[11] Copyright owners who attempt to avoid this result argue that the post-registration infringements are new, different and separate and thus are wholly divorced from the pattern of pre-registration infringements of the same work.

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This argument usually fails. Courts interpret the words "infringement . . . commenced after the first publication" in § 412(2) to mean "the first act in a series of acts."[12] Further, *Mason v. Montgomery Data, Inc*.[13] adopted a bright-line rule that most circuits have followed. *Mason* prohibited claims for statutory damages for a defendant's post-registration infringements of a work "if the same defendant commenced an infringement of the same work prior to registration."[14]

Mason relied on the legislative history of § 412, which revealed "Congress' intent that statutory damages be denied not only for *the particular infringement* that a defendant commenced before registration, but for all of that defendant's infringements of a work if one of those infringements commenced prior to registration."[15] The purpose of § 412 was to encourage early registration and "'[t]he threat of such a denial [of statutory damages] would hardly provide a significant motivation to register early if the owner of the work could obtain those remedies for acts of infringement taking place after a belated registration.'"[16]

Since *Mason*, courts bar statutory damages for post-registration infringements even if they differ from the infringements pre-registration. In *Shady Records, Inc. v. Source Enterprise, Inc*., the district court noted that "[t]he clear rule announced in *Mason* which is easily applied to preclude statutory damages . . . [is] where any infringement occurs before the effective date of the work's copyright registration is preferable."[17]

Nimmer on Copyright suggests that a plaintiff might be able to recover statutory damages if a "qualitative new infringement occurs after registration" along with "a large lapse of time between the first bout of infringement and its post-registration successor."[18] But no case has been found that has adopted this view.

One Award Against Those Who Act in Concert

Another misconception concerns the number of awards of statutory damages to which a copyright owner may be entitled. Copyright owners often believe they merit multiple awards of statutory damages for multiple infringements by multiple parties acting in concert.[19] But the Act limits a copyright owner to one grant of statutory damages in that circumstance.

The section provides that a copyright owner "may elect . . . to recover . . . *an award* of statutory damages for all infringements involved in the action with respect to any one work . . . for which any one infringer is liable individually or for which any two or more infringers are liable jointly or severally."[20]

The copyright owner is restricted to one award of statutory damages regardless of the number of acts of infringement, whether they are separate, isolated or occurring over many years.[21] As *Goldstein* aptly states, "an infringer will be liable for a single statutory award whether it makes one copy of a copyrighted painting or one thousand and whether it performs the copyrighted work once or nightly over a period of months."[22]

The copyright owner remains restricted to one award of statutory damages against multiple infringers where they act in concert and are therefore jointly and severally liable.[23] Section 504(c)(1) relies on the common law to define joint or several liability. Those principles do not depend on whether the defendants engaged in the same act or exhibited the same level of willfulness.[24] The Act "is unconcerned about gradations of blameworthiness."[25]

Multiple Awards for Unauthorized Compilations of Separately Copyrighted Works

Confusion also surrounds the limitation on the number of statutory damages that may be assessed for infringement of a compilation or a derivative work. The limitation is contained in the last sentence of 17 U.S.C. § 504(c)(1), which provides that "all the parts of a compilation or derivative work constitute one work."[26]

The confusion arises from the "facial" ambiguity in this limitation.[27] It is unclear whether the phrase "compilation or derivative work" refers to the copyrighted work that the plaintiff creates, which is then infringed, or the infringing work the defendant creates from multiple, separately copyrightable works of the plaintiff.

Most courts assume, without extensive discussion, that the one-work limitation refers to a plaintiff-created compilation or derivative work.[28] Thus, where record labels made CDs containing multiple copyrighted songs that the defendant infringed, courts awarded the labels one grant of statutory damages.[29] Where the defendant infringed a plaintiff-crafted compilation of clip-art images, a court reached the same conclusion.[30] Similarly, where the defendant copied 122 photographs from a catalogue that the plaintiff put together, the plaintiff was limited to one grant of statutory damages.[31]

But in *Greenberg v. National Geographic Society*, the district court found that the "compilation" referenced in § 504(c)(1) was the infringing work the defendant created from multiple, separately copyrightable works of the plaintiff. There, the defendant took 64 of the plaintiff's copyrighted photographs and published them in four magazine compilations the defendant created. The court nevertheless limited Greenberg to only four awards of statutory damages.[32]

WB Music Corp. v. RTV Communication Group, Inc. has now resolved the ambiguity, at least in the Second Circuit. The court found that the phrase "compilation or derivative work" in the last sentence of § 504(c)(1) refers to a work created by a plaintiff.[33] Thus, the court held that the one-work limitation is inapplicable if the defendant creates the infringing compilation or unauthorized derivative work from multiple, separately copyrighted works of the plaintiff.[34]

There, the defendant copied 13 of the plaintiff's copyrighted songs onto seven CDs. The district court found that the plaintiff was entitled to seven awards of statutory damages.[35]

> Confusion also exists about the amount of statutory damages to be awarded.

The Second Circuit reversed, holding that the limitation is triggered only by an infringement of a plaintiff-created compilation or derivative work. The court stated, "[T]here is no evidence that any of [the plaintiff's] separately copyrighted works [that were infringed] were included in a compilation authorized by the copyright owners. Rather, the [infringing] compilations were created by the defendants."[36] Accordingly, the court held that the plaintiff was entitled to an award of statutory damages for each of the 13 songs that the defendant infringed.[37]

Election Moots All Issues Regarding Actual Damages

There is another restriction that sometimes confuses copyright owners: the impact on actual damages on appeal arising from an election to receive statutory damages.

Section 504(c) permits a copyright owner at any time before final judgment is entered to choose between two types of damages: actual damages or statutory damages. This means that a copyright owner may ask a jury to award actual damages and, if the copyright owner is dissatisfied with the award, then ask the court to assess statutory damages.[38] But once the election is made to accept statutory damages, copyright owners often do not realize they have forfeited the right to seek actual damages on appeal. As *Jordan v. Time, Inc*. holds, there are no two "bites of the apple."[39]

In *Jordan*, a jury awarded the plaintiff actual damages of $5,000. Before the entry of final judgment, the plaintiff requested that the court, pursuant to § 504(c), assess statutory damages, and the plaintiff was awarded $5,500. The Eleventh Circuit dismissed the appeal of the actual damage award, stating, "[a] plaintiff is precluded from electing statutory damages and then appealing the award of actual damages," adding "once a timely election is made to receive statutory damages all questions regarding actual and other damages are rendered moot."[40]

Areas of Uncertainty

Finally, parties are sometimes uncertain whether infringing conduct was innocent, non-willful or willful and the amount of statutory damages to be assessed.[41]

The uncertainty begins with the absence of a definition of willfulness in the Act. Courts hold that a defendant was willful if it knew its conduct was infringing or acted with reckless disregard for the copyright owner's rights,[42] but it is often difficult to predict whether infringing conducts falls within that definition.[43]

Here are a few guidelines that may assist in determining willfulness: Willfulness will be found where a defendant continues infringement in defiance of a court order.[44] Willfulness may be found where a defendant continues to infringe after being warned to stop that conduct.[45] But a defendant who has been warned may avoid a willfulness finding by demonstrating that it reasonably and in good faith believed its continuing conduct was not infringing.[46] Further, the good-faith belief may be evidenced by an unsuccessful fair use defense if that belief was objectively reasonable.[47]

Absence of Statutory Guidelines

Whether non-willful or willful conduct is found, confusion also exists about the amount of statutory damages to be awarded. There are no guidelines in the Act assisting courts in fixing statutory damages. There is only one statutory requirement: The award must be "just."[48]

Wide Discretion

Courts have wide discretion to weigh the factors they examine in setting statutory damages. These factors include: (1) any revenues the plaintiff may have lost as a result of the infringement; (2) the expenses saved or the profits gained by the defendant in connection with the infringement; (3) the value or nature of the plaintiff's copyrights; (4) the need to deter the defendant and others similarly situated from committing future infringements; (5) the defendant's financial situation; (6) the defendant's state of mind; and (7) in the case of willful infringement, the need to punish the defendant.[49]

Courts may give whatever weight they wish to each factor and may consider all, some or none of them.[50] For example, some courts focus on the actual damages the plaintiff suffered as a result of the infringement. These courts state "statutory damages should bear some relation to actual damages suffered"[51] and set statutory damages at a multiple of actual damages.[52]

Other courts decline to base statutory damages on a multiplier of actual damages. For example, in *UMG Recordings, Inc. v. MP3.com, Inc*., the court stated that "any attempt to reduce this determination [of the amount of statutory damages] to some kind of mathematical formula or equation is spurious."[53] Although *UMG* considered a number of factors in assessing the amount of statutory damages to be awarded, that case calibrated statutory damages primarily to deter future infringing conduct. The court stated that "[s]tatutory damages . . . [of] approximately $118,000,000" would be warranted

because "the potential for huge profits in the rapidly expanding world of the Internet is the lure that tempted . . . MP3.com to break the law and that will also tempt others to do so if too low a level is set for the statutory damages in this case."[54] The court in *Lowry's Reports, Inc. v. Legg Mason, Inc.* affirmed the jury's statutory damage award of $19.7 million, even though the defendant argued "the actual harm" from the infringements was "$59,000."[55]

Because of the discretion courts have in weighing the factors they examine in setting statutory damages, cases involving similar infringing conduct may result in different awards.[56] Ironically, when the same case is later retried, the award may be even greater, as evidenced by *Capital Records, Inc. v. Thomas*.[57] *Capital Records* also highlights the debate that continues whether statutory damages should compensate or deter.

In *Capital Records*, record companies sued the defendant for making 24 songs in her Kazaa shared folder available to others to download. In the first trial, the jury assessed statutory damages of $9,250 per song for a total of $220,000.[58] The trial judge vacated the verdict finding it "wholly disproportionate to the damages suffered by Plaintiffs."[59] The court stated that, although the defendant "infringed . . . 24 songs – the equivalent of approximately 3 CDs, costing less than $54, . . . the total damages awarded is more than five hundred times the cost of buying 24 separate CDs and more than four thousand times the cost of three CDs,"[60] noting,

> [w]hile the Copyright Act was intended to permit statutory damages that are larger than the simple cost of the infringed works in order to make infringing a far less attractive alternative than legitimately purchasing the songs, surely damages that are more than one hundred times the cost of the works would serve as a sufficient deterrent.[61]

On remand, the jury increased the award to $80,000 per song for a total of $1.92 million or more than eight times the damages awarded in the first trial.[62] The award will likely spark a due process challenge because it is so far removed from any possible damage the plaintiff suffered from the infringement. The award also highlights the difficulties parties face when attempting to estimate statutory damages.[63]

With such potentially high stakes, understanding these limitations and uncertainties will assist all parties in prosecuting or defending a copyright case involving statutory damages. ■

1. *See Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455 (D. Md. 2004) (jury award of statutory damages of $19.7 million); *Columbia Pictures Television, Inc. v. Krypton Broadcasting, Inc.*, 259 F.3d 1186, 1189 (9th Cir. 2001) (statutory damages award of more than $31 million).

2. 17 U.S.C. § 412(2) limits the availability of statutory damages. This section requires registration of the work before it is infringed or within three months after its initial publication. 17 U.S.C. § 504(c)(1) provides for one grant of statutory damages where multiple infringers acting in concert infringe one work multiple times. That last sentence of this section also provides for one grant of statutory damages where a plaintiff-created compilation or derivative work is infringed by defendant.

3. Courts construing 17 U.S.C. § 504(c)(1) hold that, once plaintiff elects to receive statutory damages at any time before the entry of final judgment, all appellate issues regarding actual damages are mooted. *See, e.g., Jordan v. Time, Inc.*, 111 F.3d 102, 104 (11th Cir. 1997).

4. 17 U.S.C. § 504(c)(1) provides for a range of statutory damages for ordinary non-willful infringement of between $750 and $30,000. Section 504(c)(2) provides an enhanced range for willful infringement of between $30,000 and $150,000 per work infringed. Finally, this section states that statutory damages may be reduced to not less than $200 for innocent infringement.

5. *See, e.g., Silberman v. Innovative Luggage, Inc.*, 2003 WL 1787123, *8 (S.D.N.Y. 2003) ("[A]s long as infringement commenced *before* the date of registration, statutory damages . . . are barred even if infringement continued *after* the date of registration.") (emphasis in original); *Fournier v. Erickson*, 202 F. Supp. 2d 290, 298 (S.D.N.Y. 2002) ("Each subsequent appearance [of plaintiff's photograph after its registration] was part of the continuous, ongoing advertising campaign. Because the alleged infringement commenced before the effective date of his registration, Fournier is not entitled to statutory damages.").

6. *See Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1980) ("Both the text of the Copyright Act and its legislative history make clear that statutory damages are to be calculated according to the number of works infringed, not the number of infringements.").

7. *See WB Music Corp. v. RTV Commc'n Group, Inc.*, 2004 WL 964247 (S.D.N.Y. 2004), *rev'd*, 445 F.3d 538 (2d Cir. 2006) (awarding statutory damages based on the number of defendant-created compilations).

8. *See supra* note 3.

9. For instance, *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 855 F. Supp. 905 (E.D. Mich. 1994), *rev'd en banc*, 99 F.3d 1381, 1392 (6th Cir. 1996), found defendant liable for willful infringement of six works and assessed it $5,000 for each work for a total of $30,000. An *en banc* appellate court reversed the award as excessive finding no willfulness.

10. 17 U.S.C. § 412 (2) sets forth the exception, which applies to published works only. The exception permits an award of statutory damages for a post-infringement registration of a published work if the work is registered within three months of its first publication.

11. *See* cases *supra* note 4; *see also Johnson v. Univ. of Va.*, 606 F. Supp. 321, 324–25 (W.D. Va. 1985) ("[T]he alleged post-registration infringements involve only photographs which were first used by defendants prior to registration. Consequently, those alleged post-registration infringements 'commenced' prior to registration, and thus pursuant to § 412 they provide no basis for allowing statutory damages.").

12. *See Dyer v. Napier*, 2006 WL 680551, *3–4 (D. Ariz. Mar. 16, 2006). *See also Troll Co. v. Uneeda Doll Co.*, 483 F.3d 150, 158 (2d Cir. 2007) ("[A] plaintiff may not recover statutory damages and attorney's fees for infringement occurring after registration if that infringement is part of an ongoing series of infringing acts and the first act occurred before registration.").

13. 967 F.2d 135 (5th Cir. 1992). Cases following *Mason*'s bright-line rule include *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 701 (9th Cir. 2008); *Bouchat v. Bon-Ton Dep't Stores, Inc.*, 506 F.3d 315, 330 (4th Cir. 2007); *Qualey v. Caring Ctr. of Slidell*, 942 F. Supp. 1074, 1076-77 (E.D. La. 1996).

14. 967 F.2d at 144.

15. *Id.* at 143 (emphasis in original).

16. *Id.* at 144.

17. 2004 U.S. Dist. LEXIS 26143, *71 (S.D.N.Y. Jan. 3, 2005). *See also Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 609 F. Supp. 1325, 1331 (E.D. Pa. 1985) (holding that post-registration infringing software that was "different" because it contained "improvements" was found to be part of a "series of infringements" that began with the pre-registration software).

18. Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 7.16(C)(1) at 7-181 (2008).

19. Sometimes courts make the same mistake. *See Antenna Tel. v. Aegean Video, Inc.*, 1996 WL 298252, *11 (E.D.N.Y. 1996), ("Since the prevailing plaintiff is entitled to a separate statutory damage award for each infringement committed by the Defendants, the court must determine the total number of infringements and their distribution between the parties.").

20. 17 U.S.C. § 504(c)(1) (emphasis added).

21. H.R. Rep. No. 94-1476 at 162 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5778: "A single infringer of a single work is liable for a single amount . . . no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated, or occurred in a related series."

22. Paul Goldstein, Goldstein on Copyright § 14.2.2.2 at 14:63 (2009). It makes no difference if a defendant infringes two separate rights of the copyright owner such as the right to reproduce and the right to distribute. The copyright owner is still entitled to one grant of statutory damage because only one work has been infringed. *Id.*

23. *See, e.g.*, *Smith v. NBC Universal*, 2008 WL 612696, *2 (S.D.N.Y. Feb. 28, 2008).

24. See *Fitzgerald Pub. Co. v. Baylor Pub. Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986) ("Consideration of these factors in setting the statutory damage award sometimes results – on account of their several and joint liability – in a less culpable defendant being held liable in an amount greater than otherwise would be the case had it appeared in the action alone. This possibility is not a fatal obstacle. . . . [T]he relevant faults of the defendants are irrelevant.").

25. *Id*. On remand in that case, the district court awarded statutory damages jointly and severally against two willful defendants even though one had victimized the other. See 670 F. Supp. 1133 (S.D.N.Y. 1987), *aff'd mem.*, 862 F.2d 304 (2d Cir. 1988).

26. The Act at 17 U.S.C. § 101 defines a compilation as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works." That section also defines a collective work to include one "in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."

27. See *WB Music Corp. v. RTV Commc'n Group, Inc.*, 445 F.3d 538, 540 (2d Cir. 2006).

28. *See, e.g., Eastern Am. Trio Prods., Inc. v. Tang Elec. Corp.*, 97 F. Supp.2d 395, 419 (S.D.N.Y. 2000).

29. *See, e.g., UMG Recordings, Inc. v. MP3.com, Inc.,* 109 F. Supp. 2d 223 (S.D.N.Y. 2000); *Country Roads Music, Inc. v. MP3.com*, 279 F. Supp. 2d 325 (S.D.N.Y. 2003).

30. *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279 (4th Cir. 2003).

31. *Stokes Seeds, Ltd. v. Park Seed Co., Inc.*, 783 F. Supp. 104, 107 (W.D.N.Y. 1991).

32. 2003 WL 25841579 (S.D.Fla. Feb. 18, 2003).

33. *WB Music*, 445 F.3d at 540–41.

34. *Id*. If a defendant were exposed to only one grant of statutory damages, defendant would have the perverse incentive to bundle an unlimited number of plaintiff's separately copyrighted works together into one unauthorized compilation.

35. 2004 WL 964247, *1 (S.D.N.Y. May 5, 2004).

36. 445 F.3d at 541.

37. *Id*.

38. *See, e.g.*, *Branch v. Ogilvy & Mather, Inc.*, 772 F. Supp. 1359, 1364 (S.D.N.Y. 1991) (jury awarded plaintiff nominal damages of $1; plaintiff asked the court to award statutory damages and received an award of $10,000).

39. *Jordan v. Time, Inc.*, 111 F.3d 102, 104 (11th Cir. 1997); *Twin Peaks Prods., Inc. v. Publications Intl.*, 996 F.2d 1366, 1382 (2d Cir. 1993).

40. *Id*.

41. An innocent infringer is one who is not aware and has no reason to believe its acts constitute infringement. *See Los Angeles News Serv. v. Reuters Television Int'l Ltd.*, 149 F.3d 987, 995 (9th Cir. 1998); *Eastern Am. v. Tang*, 97 F. Supp. 2d at 419. A defendant is rarely able to establish innocence; and the presence of a copyright notice on the work prevents a defendant from claiming innocence. See 17 U.S.C. § 401(d); *Matthew Bender & Co. v. West Pub. Co.*, 240 F.3d 116, 123 (2d Cir. 2001).

42. *See Island Software & Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005).

43. *See supra* note 9.

44. *See Kepner-Tregoe, Inc. v. Vroom*, 186 F.3d 283, 288–89 (2d Cir.1999) (maximum statutory damages awarded where defendant "chose to ignore the injunction [prohibiting continuing use of the infringing program]"; *Nat'l Football League v. PrimeTime 24 Joint Venture*, 131 F. Supp. 2d 458, 479 (S.D.N.Y. 2001) (Maximum statutory damages awarded where defendant continued its conduct after district court granted summary judgment finding that conduct infringing).

45. *Microsoft v. Gonzales*, 2007 WL 2066363, *7 (D.N.J. July 13, 2007) ("Willfulness may be inferred if a defendant continued infringing behavior after receiving notice.").

46. *Branch v. Ogilvy & Mather, Inc.*, 772 F. Supp. 1359, 1364 (S.D.N.Y. 1991); *Wenaha Music Co. v. Irish Wheel, Inc.*, 1994 WL 661028, *1 (W.D.N.Y. Nov. 16, 1994) ("[I]t does not follow that the defendants' subsequent failure to cease the alleged infringing acts constitutes willfulness. . . . [D]efendants' actions may been carried out in reliance on advice of counsel.").

47. *See Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996) ("[W]e cannot say that the defendants' belief that their copying constituted fair use was so unreasonable as to bespeak willfulness."); *but see Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1530–33, 1544 (S.D.N.Y. 1991) (unsuccessful fair use defense did not negate willfulness).

48. 17 U.S.C. § 504(c)(1).

49. *See Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 496 (4th Cir. 1996); *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826–27 (Fed. Cir. 1992), *abrogated on other grounds*, *Markham v. Westview Inst., Inc.*, 52 F.3d 967 (Fed. Cir. 1995); *Fitzgerald Publ'g. v. Baylor*, 807 F.2d at 1117; *Getaped.Com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 403 (S.D.N.Y. 2002); *Stevens v. Aeonian Press, Inc.*, 64 U.S.P.Q.2d 1920, 1923, 2002 WL 31387224, *3; *Basic Books v. Kinko's*, 758 F. Supp. at 1545; *see also* cases collected at *Model Jury Instructions in Copyright, Trademark and Trade Dress Litigation* (ABA 2008) at ¶ 1.7.8 at p. 85.

50. See *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007, 1010 (9th Cir. 1994) ("The district court has wide discretion in setting the amount of statutory damages under the Copyright Act.").

51. *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 862 (S.D.N.Y. 1984).

52. *See, e.g., Broadcast Music, Inc. v. It's Amore Corp.*, 2009 WL 1886038, *8 (M.D. Pa. June 30, 2009) ("courts routinely compute statutory damages . . . between two to six times the license fee defendants 'saved' by not obeying the Copyright Act"); *see also EMI April Music, Inc. v. White*, 618 F. Supp. 2d 497, 508 (E.D. Va. 2009) ("[C]ourts have routinely awarded statutory damages in amounts that arc between two and three times license fees"); *Manno v. Tenn. Prod. Ctr., Inc.*, 2009 WL 2059897, *7 (S.D.N.Y. July 16, 2009) ("Case law reflects many instances in which courts have set [statutory damage] awards at several times the amount of lost profits.").

53. 2000 WL 1262568, *5 (S.D.N.Y. Sept. 6, 2000).

54. *Id*. *6.

55. 302 F. Supp. 2d 455, 458, 464 (D. Md. 2004).

56. *See Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332 (9th Cir. 1990) (statutory damage award of $10,000); *Peer Int'l Corp. v. Max Music & Entm't, Inc.*, 2004 WL 1542253 (S.D.N.Y. 2004) (statutory damage award of $30,000); *Peer Int'l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560 (S.D.N.Y. 1995) (statutory damage award of $50,000). *See also* Samuelson & Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375604 at pp. 30-31.

57. 579 F. Supp. 2d 1210 (D. Minn. 2008).

58. *Id*. at 1213.

59. *Id*. at 1227.

60. *Id*.

61. *Id*.

62. *See* http://jolt.law.harvard.edu/digest/copyright/riaacapitol-v-thomas-rasset.

63. To date, two appellate courts have rejected due process challenges to statutory damage awards. *See Zomba Ents. Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 586–88 (6th Cir. 2007); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 459–60 (D. Md. 2004).

Update: Did the Appellate Odds Change in 2008?

Appellate Statistics in State and Federal Courts

By Bentley Kassal

For many years I have been asked, as a former appellate judge, both by attorneys and clients, for my opinion as to their chances on appeal for their respective cases. Being unfamiliar with the specifics of their case, in terms of the legal issues and evidence, my response had to be clearly couched in generalities and carefully conditioned. Finally, eight years ago, I determined to provide as precise and verifiable an answer as possible, by resorting directly to official annual court reports, limited to those courts of particular interest to New York State practitioners.[1] The statistics presented are simple and accurate answers, based on court statistics that are publicly available.

The comments and appellate data herein are for the following appellate courts and include civil and, in some instances, criminal data for the year 2008:

1. New York Court of Appeals.[2]
2. The Four Departments of the Appellate Division of the New York State Supreme Court.[3]
3. The Two Appellate Terms of the New York State Supreme Court for the First and Second Departments.
4. The U.S. Circuit Courts for the Second Circuit and the District of Columbia.
5. The New York Court of Claims (a trial court).

Unless otherwise indicated, all the statistics herein are in percentages and presented in descending consecutive order, with the most recent year, 2008 on the left.

This is the third consecutive year I have intentionally omitted several appellate statistical dispositions that I have deemed to be irrelevant as well as distracting (simplicity and accuracy being the objective of this article). Among those dispositions excluded are those which are basically procedural and not on the merits, usually categorized by the reporting appellate courts as "other" or "dismissed," under "dispositions." As for criminal cases, the statistics included are only for New York State appellate courts, not federal.

New York Court of Appeals[4]

The percentages for appellate statistics for the five-year period, ending 2008, are:

Civil Cases					
	2008	2007	2006	2005	2004
Affirmed	48	56	66	55	58
Reversed	43	27	25	35	37
Modified	9	17	9	10	5

Criminal Cases					
	2008	2007	2006	2005	2004
Affirmed	70	66	71	70	81
Reversed	7	30	17	25	15
Modified	23	4	12	5	4

Bentley Kassal (BKassal@Skadden.com) retired in 1993 as an Associate Justice of the Appellate Division, First Department; also served as a Judge in the Civil Court; a Justice of the Supreme Court, New York County; and an Associate Judge at the New York Court of Appeals in 1985. He was a New York Assemblyman for six years. He received his law degree from Harvard Law School in 1940 and has been counsel to the litigation department at Skadden, Arps, Slate, Meagher & Flom LLP since 1997. On June 6, 2009, in Normandy, Judge Kassal received the French Legion of Honor. This is his seventh consecutive article on the subject of appellate statistics.

Comments

For civil cases, the affirmance rate decreased by 14% from 2007, which year was close to the norm for the years 2005 and 2004. On the other hand, the reversal rate of 43% was significantly higher than the previous two years.

As to criminal cases, the affirmance rate of 70% was about the same as the previous three years, but much lower than the 81% rate for 2004. Note, however, that while the reversal rate also was much lower, the modification rate greatly increased, to 23%.

Avenues to the Court of Appeals – Jurisdictional Predicates

Civil Appeals for 2008 (2007, 2006, 2005 and 2004 in parentheses)	
Dissents in Appellate Division	16 (16) (15) (12) (23)
Permission of Court of Appeals	42 (39) (42) (50) (51)
Permission of Appellate Division	25 (21) (21) (20) (10)
Constitutional Question	5 (6) (9) (6) (4)

Criminal Appeals for 2008 (2007, 2006, 2005 and 2004 in parentheses)	
Permission of Court of Appeals Judges	72 (76) (85) (85) (65)
Permission of Appellate Division Justices	28 (22) (15) (13) (29)

Significant Other Statistics

1. The average time from argument or submission to disposition of an appeal in normal course was 38 days and, for all appeals, 32 days.
2. The average time from filing a notice of appeal or an order granting leave to appeal to oral argument was about seven months, a month more than in 2007.
3. The average time from when all papers were served and filed to calendaring oral argument was approximately three months.
4. The 2008 filings consisted of 328 notices of appeal and orders granting leave, with the previous years being 340, 293, 284 and 296. Of the 328 for 2008, 251 were for civil (compared to 279 in 2007) and 77 for criminal (compared to 61 in 2007).
5. The total number of Appellate Division orders granting leave were 54 (36 civil and 18 criminal) of which the First Department granted 34 (24 civil and 10 criminal), which is 63% of the total of the four Departments.
6. As to the total motions filed, these decreased in 2008 to 1,421 or 4.05% less than the 2007 total of 1,481.
7. Dispositions –

   (a) In 2008, 225 appeals (172 civil and 53 criminal) were decided, compared to 185 (135 civil and 50 criminal) in 2007.

   (b) Of the 225 appeals for 2008, 186 had no dissent.

   (c) Motions: 1,459 were decided in 2008 and 1,440 in 2007.

   (d) The average time from return date of motions to disposition for all motions was 55 days, with 60 days for civil motions for leave to appeal.

   (e) Of the 1,093 motions decided for leave to appeal in civil cases (the same as 2007), 6.8% were granted (7% in 2007).
8. Review of State Commission on Judicial Conduct determinations – three were reviewed in 2008, with all confirming the sanction of removal.
9. Rule 500.27 – Grants discretionary jurisdiction to the Court of Appeals to review certified questions from certain federal courts and other state courts of last resort. At the end of 2007, two such cases were pending and, in 2008, both were answered. In 2008, nine new cases certified by the United States Court of Appeals for the Second Circuit were accepted, with two decided in 2008 and seven pending at the end of 2008.

The Four Departments of the Appellate Division of the Supreme Court of the State of New York[5]

Civil Statistics for 2008 (2007, 2006, 2005 and 2004 in parentheses):[6]	First	Second	Third	Fourth
Affirmed	64 (60) (64) (66) (69)	62 (60) (59) (61) (62)	78 (78) (80) (81) (78)	65 (68) (70) (70) (70)
Reversed	20 (26) (23) (21) (21)	27 (27) (29) (27) (28)	11 (10) (10) (10) (11)	19 (15) (14) (13) (12)
Modified	16 (14) (13) (13) (13)	11 (13) (12) (12) (10)	11 (12) (10) (9) (11)	16 (17) (16) (17) (18)

Criminal Statistics for 2008 (2007, 2006, 2005 and 2004 in parentheses):	First	Second	Third	Fourth
Affirmed	90 (88) (89) (88) (93)	89 (90) (88) (90) (90)	81 (84) (85) (87) (87)	84 (80) (80) (87) (89)
Reversed	5 (6) (3) (3) (2)	6 (4) (5) (5) (6)	10 (6) (6) (7) (6)	6 (9) (9) (5) (3)
Modified	5 (6) (8) (9) (5)	5 (6) (7) (5) (4)	9 (6) (9) (6) (7)	10 (11) (11) (8) (8)

Comments

Affirmance Rates: For 2008, the civil affirmance rate for the First Department increased by 6% over 2007 but was the same as 2006. The other three Departments remained approximately the same.

Total Appellate Disposition: The First Department's was 3,040; the Second's was 17,403; the Third's was 1,838; and the Fourth's was 2,078.

Total Oral Arguments: The First Department's was 1,253; the Second's was 2,314; the Third's was 713; and the Fourth's was 933.

Total Motions Decided: The First's was 4,781; the Second's was 10,427; the Third's was 6,062; and the Fourth's was 4,245.

The Third's Department's much greater affirmance rate of 78% for civil cases, relatively the same as the previous four years, is accounted for by the much greater number of Article 78 Administrative Appeals from State Administrative Agency cases, which are reviewed on the more generous standard of "substantial evidence."

The Appellate Terms of the First and Second Departments

Civil Statistics for 2008 (2007, 2006, 2005 and 2004 in parentheses):		
	First Department	Second Department
Affirmed	62 (61) (65) (62) (73)	52 (61) (61) (52) (57)
Reversed	31 (29) (23) (25) (17)	37 (28) (27) (35) (34)
Modified	7 (10) (12) (13) (10)	11 (11) (12) (13) (9)

Criminal Statistics for 2008 (2007, 2006, 2005 and 2004 in parentheses):		
	First Department	Second Department
Affirmed	79 (86) (69) (72) (80)	62 (38) (64) (70) (57)
Reversed	18 (14) (29) (23) (16)	30 (59) (32) (25) (34)
Modified	3 (0) (2) (5) (4)	8 (3) (4) (5) (9)

Comments

The Second Department's Appellate Term had total dispositions of 1,426, more than three times the First Department's total of 448. In 2007, the Second's total of 1,504 was four times greater than the First Department's total of 370. However, as to 2008 total oral arguments, the First had 308 as contrasted with Second's total of 334.

Regarding the affirmance rate for civil appeals, after argument or disposition, the First's rate was 62%, in contrast to the Second's rate of 52%.

However, as to criminal appeals, the affirmance rate was 79% for the First in contrast to 63% for the Second, which also had a reversal rate of 30%, compared to the First's 18%.

As to the total motions decided, the First had 1,509 as against 3,432 for the Second, more than twice the amount for the First.

U.S. Circuit Courts of Appeal for the Second Circuit and the District of Columbia[6]

This year, for the third time, appellate statistics for civil cases are being presented as they are specifically defined in the official report, namely, as "Other U.S. Civil" and "Other Private Civil." Additionally, administrative appeals are being included for these two circuits. The Court of Appeals for the Federal Circuit is not included because it has nationwide jurisdiction to hear appeals in specific cases, such as those involving international trade, government contracts, patents, trademarks and veterans' benefits. The statistics for 2006 and 2007 are in parentheses.

	Second Circuit		Administrative Appeals
	Other U.S. Civil	Other Private Civil	
Affirmed	65 (63) (67)	64 (61) (71)	Affirmed 18 (70) (70)
Reversed	6 (10) (9)	7 (12) (11)	Reversed 8 (10) (17)
Dismissed	21 (26) (24)	21 (24) (18)	Dismissed 11 (15) (13)
Remanded	8 (1) (0)	8 (3) (0)	Remanded 3 (5) (0)

	District of Columbia		Administrative Appeals
	Other U.S. Civil	Other Private Civil	
Affirmed	77 (83) (67)	79 (85) (71)	Affirmed 65 (63) (70)
Reversed	14 (12) (9)	17 (9) (11)	Reversed 19 (20) (17)
Dismissed	4 (2) (24)	1 (3) (18)	Dismissed 13 (12) (13)
Remanded	5 (3) (0)	3 (3) (0)	Remanded 8 (5) (10)

Comments

In comparing civil appeals, both Circuit Courts have greater affirmance rates than the New York Court of Appeals and all four Appellate Division Departments, with the District of Columbia Court being much higher. The U.S. Circuit Court for the Second Circuit's affirmance rates are also slightly higher, on the average, than both the First and Second Departments of the New York Appellate Division.

New York Court of Claims

This is a trial, not appellate, court solely concerned with claims against the state of New York. Because it is a unique tribunal, these 2008 statistics will have significance for practitioners in this arena.

1. A total of 1,462 claims were disposed of during this period, an increase of 47 over 1,415 in 2007 and a decrease of 349 from 2006. There were 77 awards in 2008, 89 in 2007 and 87 in 2006.
2. The total dollar amount claimed in 2008 was $142,438,223. The actual awards, however, totaled $36,042,246, an increase of $17,317,246, over the $18,725,000 awarded in 2007.
3. In essence, 5.3% of the 1,462 claims disposed of in 2008 resulted in 77 awards; 94.7% of the claims were dismissed. ■

1. For the New York state courts, the information may be obtained at the Web site http://www.nycourts.gov ("Courts," "Court Administration" and "reports"). For the United States Circuit Courts, contact the Administrative Office of the United States Courts, One Columbus Circle N.E., Washington, D.C. 20544 or search its Web site, http://www.ca2.uscourts.gov.

2. See the Annual Report of the Clerk of the Court of Appeals for 2008 *available at* http://www.nycourts.gov/ctapps/crtnews.htm.

3. See Reports of the New York State Office of Court Administration *available at* http://www.courts.state.ny.us/reports/annual/index.shtml.

4. See the Annual Report of the Clerk of the Court of Appeals for 2007 *available at* http://www.nycourts.gov/ctapps/crtnews.htm.

5. See Reports of the New York State Office of Court Administration *available at* http://www.courts.state.ny.us/reports/annual/index.shtml.

6. Applicable to the 12-month periods, ending September 30, 2008 and 2007. This year, for the second time, includes "Remanded."

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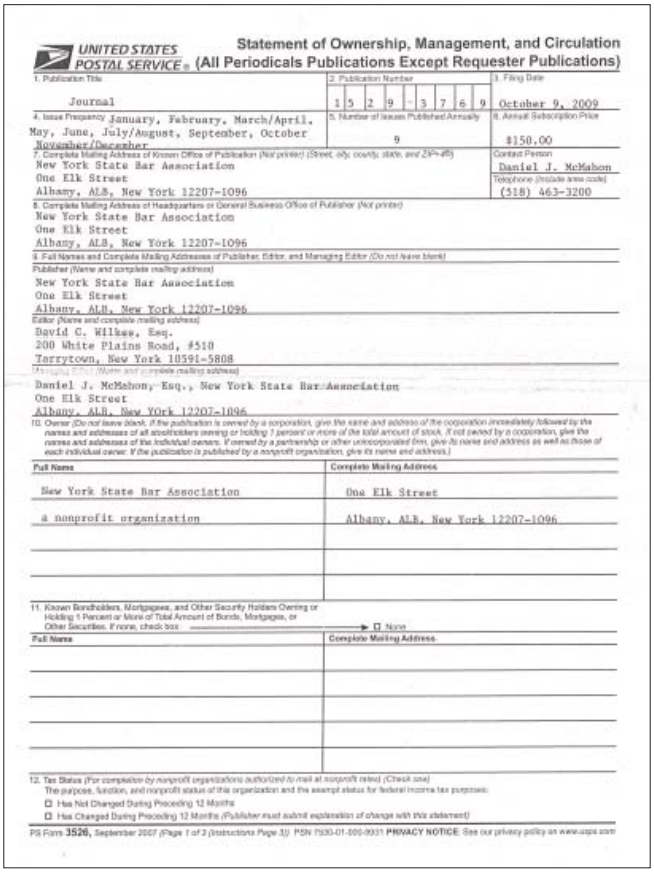

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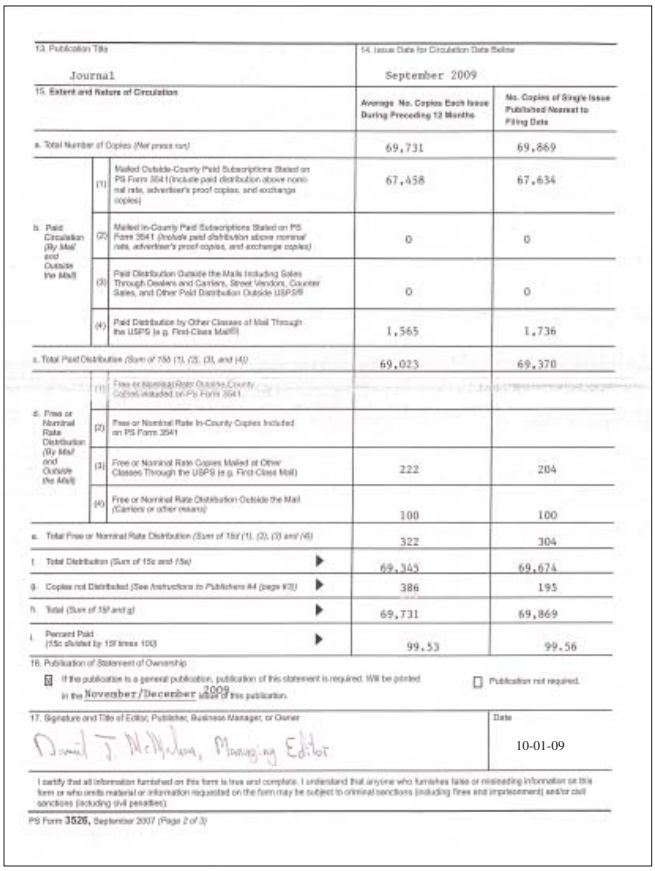

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Which Actions "Affect" Real Property Under CPLR 6501?

By John R. Higgitt

The notice of pendency, also known as the lis pendens, is a provisional remedy available to a plaintiff[1] in certain actions concerning real property. The notice of pendency provides the world with constructive notice of the plaintiff's potential rights with respect to the real property identified in the notice.[2] The purpose of the notice is to preserve the court's ability to award the plaintiff relief with respect to that property.[3] Thus, following the filing of the notice of pendency, those who "buy the property or lend on the strength of it" are bound by all proceedings in the action and the judgment.[4]

Unlike the other provisional remedies – attachment, injunction and receivership – the notice of pendency is available without judicial intervention; a plaintiff need only file it with the county clerk of the county in which the real property identified in the notice is situated.[5] The absence of pre-filing judicial review is all the more significant as a plaintiff need not make any showing that its action has merit to file the notice. However, post-filing judicial review is not only available but the courts have demanded strict compliance with the requirements for employing the notice of pendency. One of those requirements is that the judgment sought by the plaintiff would "affect" real property.[6] That requirement has been the subject of a lot of judicial attention, most recently in *Homespring, LLC v. Lee*,[7] and is the focus of this article.

5303 Realty Corp. v. O & Y Equity Corp.

CPLR 6501 states, in pertinent part, that "[a] notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property."

The Court of Appeals's principal decision on the issue of which types of actions "affect" real property is *5303 Realty Corp. v. O & Y Equity Corp*. In that case, the plaintiff reached an agreement with a corporation, the defendant O & Y Equity Corp., to purchase a tract of real property and an office building on it. The fee owner of the real property was a limited partnership, the sole assets of which were the property and the building, in which three partners, two limited and one general, held an interest. The general partner, which held a 97% interest in the partnership, was a corporation, defendant 41 Fifth Ave. Realty Corp., that was wholly owned by O & Y Equity. Pursuant to the agreement, the real property itself was not conveyed to the plaintiff. Rather, O & Y Equity would sell to the plaintiff its shares in the general partner (41 Fifth Ave. Realty Corp.) and arrange for the two limited partners to convey to the plaintiff their interests in the realty-owning limited partnership. Thus, "the transaction was constructed in terms of a sale of stock."[8] The closing never occurred and a $500,000 deposit placed by the plaintiff into escrow was paid to the defendants.

The plaintiff commenced an action against the defendants, seeking specific performance of the agreement or, alternatively, damages. The plaintiff filed a notice of pendency against the property, asserting that the action sought to enforce an agreement to sell the ownership in

the property; the defendants moved to cancel the notice. Supreme Court denied the motion, and the Appellate Division affirmed.

The Court of Appeals reversed the order of the Appellate Division and directed that the notice of pendency be cancelled. The Court noted the ease with which a plaintiff can "effectively retard the alienability of real property without any prior judicial review" by filing a notice of pendency, and sought to "counterbalance" the ability of a plaintiff to hinder a defendant's interest in its property. Thus, the Court afforded CPLR 6501 a narrow construction,[9] observing that

> [t]he usual object of filing a notice of *lis pendens* is to protect some right, title or interest claimed by a plaintiff in the lands of a defendant which might be lost under the recording acts in event of a transfer of the subject property by the defendant to a purchaser for value and without notice of the claim.[10]

Rights to shares in a cooperative apartment are personal property, and actions to enforce those rights do not affect real property.

The Court thus concluded that a plaintiff may file a notice of pendency only when the action directly affects the title to or possession of the defendant's land; a "direct relationship" must exist between the action and the defendant's real property.[11] Because the plaintiff sought specific performance of the agreement to sell the shares in a corporation (41 Fifth Ave. Realty Corp.) and those shares represented only a beneficial ownership of realty, *i.e.*, the plaintiff did not seek an interest in the land itself, the Court found that the plaintiff's action did not directly affect real property.[12]

Specific Actions

Certain actions clearly have a "direct relationship" with real property.[13] These actions include: an action to foreclose a mortgage or other lien secured by real property,[14] an action for partition of a tract,[15] an action for specific performance of a contract to convey land,[16] an action to quiet title to real property,[17] and an action to enforce rights to an easement over a defendant's property.[18] Conversely, actions for damages do not affect real property.[19] Thus, where a vendee seeks to recover the down payment it made to the vendor on a contract for the sale of real property, the action does not directly affect real property and a notice of pendency may not be filed in the action.[20] Actions by shareholders, members and partners seeking to vindicate their interests in corporations, limited liability companies and partnerships do not affect real property, regardless of whether the entities have interests in realty. Rather, the interests of shareholders, members and partners in those entities are personal property.[21] Similarly, rights to shares in a cooperative apartment are personal property, and actions to enforce those rights do not affect real property.[22]

Not all actions, however, are easily classified. *Braunston v. Anchorage Woods, Inc.*[23] demonstrates the fine lines that sometimes must be drawn in distinguishing actions that directly affect real property from those "that more or less refer[] to real property."[24] In *Braunston*, the plaintiffs commenced an action against the owners and developers of property adjoining the plaintiffs' lot, claiming that the defendants diverted surface water from their land onto the plaintiffs' land and alleging that the diverted water caused damage to their property. The plaintiffs sought both an injunction compelling the defendants to eliminate conduits that were used to deposit the water on the plaintiffs' property and damages, and they filed a notice of pendency against the defendants' property.

Rejecting the plaintiffs' argument that the notice was available in the action because they sought a judgment that would limit the defendants' use of their land, the Court of Appeals found that the action "concern[ed] simply some encroachment or wrong perpetrated by defendants on plaintiffs' land," *i.e.*, a claim to abate a nuisance.[25] That claim, the Court held, was "actionable, not in order to determine a claim of title to real property[,] but as a tort."[26] Critically, the plaintiffs were not claiming an interest in the defendants' land. Rather, they were "merely seek[ing] to prevent defendants from committing a wrongful act against plaintiffs."[27] In other words, the damage caused to the plaintiffs' property resulted from the defendants' use of their land, but that did not support the conclusion that the action to abate that use directly affected the defendants' real property.

Actions for constructive trusts also can be difficult to classify. An action for a constructive trust is available "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest."[28] When a constructive trust is imposed, the defendant must hold the property in trust for the benefit of the plaintiff and surrender the property to the plaintiff under such terms as the court directs.[29] A notice of pendency may be filed in an action seeking a constructive trust where the plaintiff seeks to impose the trust on the defendant's real property.[30] However, if the *res* of the putative trust is something other than real property, the notice of pendency is not available to aid the action.[31]

Yonaty v. Glauber[32] highlights the need to inspect carefully the nature of the *res* of the putative trust. The plaintiff in *Yonaty* claimed that he and two individuals entered into oral contracts pursuant to which the plaintiff would assist the individuals in obtaining development rights to a building. He also claimed that, in return for his assistance, he would receive, among other things, a

20% interest in the limited liability company that held the title to the land on which the building was sited. Alleging that he performed the services required of him under the contracts and that the two individuals (who were the sole members of the LLC) failed to give him an interest in the LLC, the plaintiff commenced an action against the individuals and the LLC, seeking damages and the imposition of a constructive trust on the property. In conjunction with the action, the plaintiff filed a notice of pendency against the property. Supreme Court granted the defendants' motion to cancel the notice of pendency on the ground that the action did not affect real property.

The Third Department affirmed, finding that the plaintiff sought an interest in the LLC, not an ownership interest in the real property itself. Citing *5303 Realty Corp.*, the court noted the distinction between a corporation's interest in its assets and a shareholder's interest in the corporation – the corporation itself owns its assets, such as realty, and shareholders have an interest in the corporation as a whole but no interest in any particular corporate property.[33] Because the plaintiff sought to enforce his rights to personal property (the interest in the LLC), he could not file a notice of pendency in the action.

What then is the meaning of the directly-affects-real-property requirement? The test for determining whether an action directly affects real property under CPLR 6501 reduces to the following: Does the plaintiff assert some right, title or interest in the real property itself that could be lost during the pendency of the action? And, does the plaintiff seek relief in the action that, if granted, would diminish or extinguish the defendant's interest in the real property?

Scope of Court's Inquiry

To this point we have been concerned with the types of actions that affect real property under CPLR 6501. But what is the scope of a court's inquiry in determining whether a particular action satisfies the directly-affects-real-property test? Is a court limited to examining the allegations in a plaintiff's complaint or can the court consider evidence – affidavits, contracts, etc. – in making that determination?

When a defendant moves to cancel a notice of pendency on the ground that the action does not affect real property under CPLR 6501,[34] "the court essentially is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501," and "a court is not to investigate the underlying transaction in determining whether a complaint comes within the scope of CPLR 6501."[35] Thus, the court cannot consider material beyond the complaint and the plaintiff's likelihood of success on the merits of the action is irrelevant.[36] A court is limited to scrutinizing the allegations of the complaint, and if at least one cause of action is asserted in the complaint that directly affects real property, the motion to cancel the notice of pendency should be denied.[37] The requirement that the court scrutinize the factual allegations of the complaint, however, is a substantial one. Merely asserting that the action will directly affect real property or demanding a judgment that would affect real property does not place the action within the ambit of CPLR 6501. Rather, the court must look past the labels assigned to the causes of action and the content of the "wherefore" clause, and determine whether the facts set out in the complaint demonstrate that the plaintiff has both asserted some interest in the real property itself and sought relief that would directly affect the defendant's interest in that property.[38]

Homespring, LLC v. Lee

The Second Department's recent decision in *Homespring, LLC v. Lee*[39] warrants discussion. In *Homespring*, the plaintiff, a real estate broker, was retained by the managing member of a limited liability company to procure certain real property for the LLC. The agreement between the plaintiff and both the managing member and the LLC stated that the LLC would pay the plaintiff a commission upon the purchase of that real property. Another company, Galaxy, allegedly controlled by the managing member of the LLC, entered into a contract to purchase the property, listing the plaintiff as its broker. After the closing occurred, Galaxy transferred the property to another entity, 38 Parsons. The managing member, the LLC and Galaxy refused to pay the plaintiff his commission, and the plaintiff commenced an action against those parties and 38 Parsons for breach of the brokerage contract, filing a notice of pendency against the parcel. Supreme Court granted that portion of the defendants' motion that sought to cancel the notice of pendency. The plaintiff appealed.

The Second Department affirmed, finding that because the plaintiff was seeking to recover a broker's commission – a claim for damages – the action did not affect real property under CPLR 6501.[40] While the plaintiff asserted a cause of action to set aside the conveyance of the property from Galaxy to 38 Parsons on the ground that it was fraudulent and designed to frustrate the plaintiff's ability to enforce a judgment against the defendants, the court determined that the "gravamen" of the action was the recovery of damages.[41] The dissent would have reversed that portion of Supreme Court's order cancelling the notice of pendency and reinstated the notice.[42] The dissent asserted that because the plaintiff's complaint contained a cause of action for fraudulent conveyance, which would vitiate the transfer of the property between Galaxy and 38 Parsons and place the property back in Galaxy's hands, the action directly affected real property.[43]

The majority's conclusion is consonant with the principle that the action must directly affect real property. Although the plaintiff asserted a cause of action to set aside a fraudulent conveyance, he asserted no right, title

or interest in the real property.[44] Instead, the plaintiff sought to set aside the conveyance to place the property back in the possession of Galaxy, the entity he alleged was liable for the commission. In other words, the plaintiff wanted to use the property as security for a possible money judgment against Galaxy. Therefore, no "direct relationship" existed between the action and the property. The majority's conclusion is also consonant with the purpose of the notice of pendency, which is to preserve the court's ability to award the plaintiff relief with respect to that property[45] not to provide security for a money judgment. When pre-judgment security is sought for a money judgment, the plaintiff should consider whether an order of attachment is available.[46] The plaintiff may have been entitled to an order of attachment on the real property under CPLR 6201(3), which permits a court to grant an order of attachment where the defendants – with the intent to defraud their creditors or frustrate the enforcement of a judgment that might be rendered in the plaintiff's favor – have assigned, disposed of, encumbered or secreted property.

Conclusion

As *Homespring* demonstrates, the question of whether a particular action directly affects real property is not always an easy one. A plaintiff who wishes to use the notice of pendency must therefore take pains to draft a complaint that spells out the factual basis of a claim that would support the filing of a notice of pendency. Absent such a claim, the plaintiff cannot avail itself of that powerful provisional remedy. ■

1. This article will assume that the plaintiff is seeking to use the notice of pendency. However, any party, *e.g.*, a counterclaiming defendant, may employ the notice of pendency. CPLR 6001; *see* Siegel, N.Y. Practice § 306, at 493 (4th ed).

2. *See* Civil Practice Law & Rules 6501; *5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 318, 486 N.Y.S.2d 877 (1984).

3. *See 5303 Realty Corp.*, 64 N.Y.2d at 321, n.5; *Braunston v. Anchorage Woods*, 10 N.Y.2d 302, 305, 222 N.Y.S.2d 315 (1961).

4. *See* Siegel, N.Y. Practice § 334, at 534; *see also Letizia v. Flaherty*, 207 A.D.2d 567, 569, 615 N.Y.S.2d 487 (3d Dep't 1994).

5. CPLR 6511(a).

6. CPLR 6501.

7. 55 A.D.3d 541, 866 N.Y.S.2d 212 (2d Dep't 2008).

8. 64 N.Y.2d at 316.

9. *Id.* at 319–20.

10. *Id.* at 322.

11. *Id.* at 321–23.

12. *Id.*

13. The size or value of the plaintiff's interest in the real property does not appear to be relevant in determining whether an action directly affects real property. *See Jacobs v. Abramoff*, 148 A.D.2d 497, 538 N.Y.S.2d 841 (2d Dep't 1989) (3% interest in real property).

14. *Interboro Operating Corp. v. Commonwealth Sec. & Mortgage Corp.*, 269 N.Y. 56 (1935).

15. Siegel, N.Y. Practice § 334, at 534.

16. *RKO Prop., Ltd. v. Boymel-green*, 37 A.D.3d 580, 829 N.Y.S.2d 657 (2d Dep't 2007).

17. *Al's Atlantic Inc. v. Shatma, LLC*, 61 A.D.3d 787, 876 N.Y.S.2d 890 (2d Dep't 2009).

18. *Shapiro v. Ungar*, 46 A.D.3d 1069, 847 N.Y.S.2d 705 (3d Dep't 2007).

19. *Long Island City Sav. & Loan Ass'n v. Gottlieb*, 90 A.D.2d 766, 455 N.Y.S.2d 300 (2d Dep't 1982).

20. *Rajic v. Sarokin*, 214 A.D.2d 663, 625 N.Y.S.2d 94 (2d Dep't 1995).

21. *See 5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 318, 486 N.Y.S.2d 877 (1984); *McKernan v. Doniger*, 161 A.D.2d 1159, 555 N.Y.S.2d 517 (4th Dep't 1990); *Gen. Prop. Corp. v. Diamond*, 29 A.D.2d 173, 286 N.Y.S.2d 553 (1st Dep't 1968); *see also* N.Y. Limited Liability Company Law § 601.

22. *Savasta v. Duffy*, 257 A.D.2d 435, 683 N.Y.S.2d 511 (1st Dep't 1999).

23. 10 N.Y.2d 302, 222 N.Y.S.2d 316 (1961).

24. *5303 Realty*, 64 N.Y.2d at 321.

25. *Braunston*, 10 N.Y.2d at 305.

26. *Id.*

27. *Id.*

28. *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121, 386 N.Y.S.2d 72 (1976) (citing *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386, 122 N.E. 378 (1919)).

29. *See Beatty*, 225 N.Y. 380.

30. *See Nastasi v. Nastasi*, 26 A.D.3d 32, 36, 805 N.Y.S.2d 585 (2d Dep't 2005); *Peterson v. Kelly*, 173 A.D.2d 688, 570 N.Y.S.2d 592 (2d Dep't 1991); *see also Kasan v. Perlin*, 24 Misc. 3d 1063, 877 N.Y.S.2d 851 (Sup. Ct., Nassau Co. 2009).

31. *See Pizzurro v. Pasquino*, 201 A.D.2d 635, 636, 607 N.Y.S.2d 975 (2d Dep't 1994).

32. 40 A.D.3d 1193, 834 N.Y.S.2d 744 (3d Dep't 2007).

33. *Id.* at 1195.

34. CPLR 6514(a) provides the circumstances under which a court must cancel a notice of pendency. Although it is not listed in that subdivision as a ground for mandatory cancellation of the notice, where the plaintiff does not seek relief that would affect real property under CPLR 6501 the court must cancel the notice of pendency (*see Downs v. Yuen*, 297 A.D.2d 251, 746 N.Y.S.2d 389 (1st Dep't 2002); Siegel, N.Y. Practice § 336, at 537; *see also 5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 320–23, 486 N.Y.S.2d 877 (1984). With respect to the discretionary grounds for canceling a notice of pendency, see CPLR 6514(b); see also *551 W. Chelsea Partners LLC v. 556 Holding Corp.*, 40 A.D.3d 546, 838 N.Y.S.2d 24 (1st Dep't 2007).

35. *5303 Realty*, 64 N.Y.2d at 320–21.

36. *Nastasi*, 26 A.D.3d at 36, 38.

37. *See 83-17 Broadway Corp. v. Debcon Fin. Servs., Inc.*, 39 A.D.3d 583, 586, 855 N.Y.S.2d 602 (2d Dep't 2007); *Moran v. Harting*, 227 A.D.2d 391, 392 (2d Dep't 1996).

38. *See 5303 Realty*, 64 N.Y.2d at 323; *Yonaty v. Glauber*, 40 A.D.3d 1193, 1194 (3d Dep't 2007); *Henrietta Piping, Inc. v. Antetomaso & Micca Group, LLC*, 11 Misc 3d 909, 913, 816 N.Y.S.2d 663 (Sup. Ct., Monroe Co. 2006).

39. 55 A.D.3d 541, 866 N.Y.S.2d 212 (2d Dep't 2008).

40. *Id.* at 542.

41. *Id.* The court also determined that the plaintiff could not file a notice of pendency because the recovery of a broker's commission is "regulated by [N.Y.] Real Property Law § 294-b" and the plaintiff could not "circumvent the restrictions imposed on real estate brokers to secure their compensation embodied in [that statute]." *Id.* However, as Professor Siegel has noted, Real Property Law § 294-b "does not . . . speak to a broker's rights when litigation over the [commission] ensues" (203 Siegel's Practice Rev. at 2 (Nov. 2008)). More fundamentally, Real Property Law § 294-b appears to provide one mechanism pursuant to which a broker can, under certain circumstances, seek to obtain the commission; it is not the sole remedy of a broker who seeks a commission. *See* Real Property Law §§ 294-b(1) (broker "may file an affidavit" implementing the mechanism); 294-b(5)(j) (statute only applicable where contract for broker's commission contains certain language); 294-b(5)(k) (mechanism provided by statute only available with respect to contracts involving certain types of real property).

42. *Homespring*, 55 A.D.3d at 543.

43. *Id.*

44. *See 5303 Realty*, 64 N.Y.2d at 322.

45. *Id.* at 321, n.5.

46. CPLR 6201; *see Zodkevitch v. Feibush*, 49 A.D.3d 424, 854 N.Y.S.2d 373 (1st Dep't 2008).

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Extension of Increased Expensing Provisions

The recently enacted American Recovery and Reinvestment Tax Act of 2009 (the "Act") extends two provisions intended to encourage the purchase of business property with the hope of improving the current economic environment. These provisions enable a business to obtain larger tax deductions in the first year qualified property is placed in service. If the applicable tax rates remain the same over an asset's depreciable life, these provisions accelerate the tax benefits of depreciation deductions for the cost of business property. If tax rates increase, the present value of the benefits of the accelerated deductions may decrease, and vice versa.

Section 179 Expensing

An increased dollar limitation ($250,000, see below) on the amount of tangible personal property and off-the-shelf computer software that can be taken as a current tax deduction under Internal Revenue Code § 179 ("Section 179") was in effect for property placed in service in a tax year beginning in 2008. The Act makes the increased limits available for qualified property placed in service in tax years beginning in 2009. This should encourage many businesses to purchase qualified property this year.

The purchase of tangible personal property and computer software (whether new or used) for use in the active conduct of a trade or business is generally treated as a capital expenditure and the cost thereof is deductible over several years under the applicable depreciation rules. Under Section 179, however, an election is available to treat the cost of such property placed in service during a year as a current expense. The maximum deduction that may be taken under this election for property placed in service during a year beginning in 2009 is $250,000. Unless changed by future legislation, the maximum amount will drop to $125,000 (plus an inflation adjustment) in 2010 and to $25,000 thereafter.

In the case of a sports utility vehicle, the Section 179 deduction is limited to $25,000. A sports utility vehicle is a four-wheeled vehicle with a gross vehicle weight over 6,000 pounds but not over 18,000 pounds.

The above annual dollar limitation is reduced by the amount by which the cost of Section 179 property placed in service during the year exceeds $800,000. Thus, if $1,050,000 worth of such property is placed in service in the year 2009, no Section 179 deduction would be available. As a result, in some cases it would be advantageous to delay putting tangible personal property into service until the beginning of the next taxable year in order to maximize the available Section 179 deductions.

The amount of the allowable deduction cannot exceed the aggregate amount of the taxpayer's taxable income that is derived from the active conduct of any trade or business. However, a carryover is available for the deduction disallowed because of this taxable income limitation.

Partnerships and S corporations can elect to expense the cost of Section 179 property up to the applicable limitation, and the deduction passes through to their partners and shareholders as a separately stated item. The partners and shareholders are also subject to the applicable limitation. For example, a profitable, two-person partnership can elect to expense $250,000 (in the year 2009) of Section 179 property and pass a $125,000 deduction out to each partner. Assuming one of the partners is not subject to other limitations (*e.g.*, basis, at-risk, passive loss rules) and has a $150,000 Section 179 deduction from another source, he or she would be limited to a $250,000 Section 179 deduction for the year 2009. The $25,000 excess amount would be lost as a deduction. If a partnership or an S corporation has a loss for a taxable year, the Section 179 deduction cannot be passed out to its partners or shareholders.

Married persons filing a joint return are limited to a $250,000 aggregate Section 179 deduction. Married persons filing separate returns are treated as one taxpayer, so they must split the $250,000 limitation equally. The component members of a controlled group of corporations must apportion the $250,000 limitation among the members. For this purpose, where a

corporation owns more than 50% of another corporation, the corporations will be considered component members of a controlled group (instead of the usual 80%).

Noncorporate lessors are not eligible to elect to expense the cost of Section 179 property unless the property subject to the lease has been manufactured or produced by the lessor or certain activity tests are satisfied. Estates and trusts are not entitled to a Section 179 deduction.

> The basis of property for which a Section 179 election is made is reduced by the amount of the Section 179 expense deduction.

If a taxpayer's Section 179 property is not used predominantly in a trade or business at any time before the end of the property's applicable depreciation recovery period, the taxpayer must recapture any benefit derived from the current expense deduction. This recapture is accomplished by including in taxable income the excess of the amount expensed over the depreciation deductions that would have been allowable through the year in which the property ceased to be used predominantly in a trade or business.

The basis of property for which a Section 179 election is made is reduced by the amount of the Section 179 expense deduction. The remaining basis is depreciable under the normal rules, including eligibility for bonus depreciation.

50% Bonus Depreciation

The Act also extends a provision for an additional first year ("bonus") depreciation of 50% of the adjusted basis of qualifying property (which cannot be used property) purchased and placed in service during 2009. (For certain transportation property, aircraft and property with a longer production period, the date is extended through 2010.) Property eligible for the 50% bonus depreciation ("qualified property") includes:

- Property with a recovery period of 20 years or less, such as machinery and equipment and furniture and fixtures;
- "Qualified leasehold improvement property," which is an improvement to the interior portion of nonresidential real property made by a lessee (or sublessee) or lessor of such portion, where the portion is occupied exclusively by the lessee (or sublessee) and the improvement is placed in service more than three years after the date the building was first placed in service. The term does not include the enlargement of a building, an elevator or escalator, any structural improvement benefiting a common area, or the internal structural framework of a building;
- Computer software, which is not amortizable over 15 years as a "Section 197 intangible"; and
- Water utility property.

Qualified property also includes: (1) property with class life of 20 years or more and either (a) an estimated production period exceeding two years or (b) an estimated production period exceeding one year and a cost exceeding $1 million; (2) transportation property; and (3) certain aircraft. Qualified property does not include any property financed with tax-exempt bonds. The following example illustrates the benefits of the new provisions:

Assume a business owner leasing a portion of a building makes improvements to the interior portion of the building and acquires new machinery and equipment, all of which is placed in service in June 2009. The leasehold improvements cost $400,000 and the machinery and equipment cost $300,000. The first year tax benefit is $168,974 (see sidebar, page 45).

The requirement that the adjusted basis of qualified property be reduced by the amount of the bonus depreciation for purposes of computing regular depreciation reduces the benefit of the bonus depreciation in the first year. Assume property with a cost of $100,000 is placed in service and would be eligible for 20% depreciation the first year, or $20,000. With the bonus depreciation the first year's depreciation is $60,000 ($50,000 plus 20% of $50,000). Thus, the bonus depreciation generated another $40,000 (40%) of depreciation deductions in the first year.

Another benefit for qualified property relates to the alternative minimum tax computation. The bonus depreciation deduction and the Section 179 expensing amount are also deductible for purposes of the alternative minimum tax (they are not considered adjustments or preferences). In addition, the depreciation deductions available for the remaining basis of qualified property over its life are also fully deductible for purposes of the alternative minimum tax.

A word of caution: it is possible to elect out of first year bonus depreciation in order to take more depreciation deductions in later years. If such an election is made, however, the depreciation deductions will become subject to the normal rules for alternative minimum tax adjustments.

Monetization of Costs

The Act also extends a provision allowing a corporation to monetize alternative minimum tax (AMT) credits and research and development (R&D) credits, in lieu of 50% bonus depreciation and accelerated depreciation, if such credits arose in taxable years beginning before January 1, 2006. This provision applies to qualified property placed in service from April 1, 2008 through December 31, 2009 (or during 2010 for certain long-lived property). This alternative could be attractive to corporations with operating losses for which larger depreciation deductions would give no immediate relief.

It allows corporations to elect to receive a refund equal to the lowest of (1) 20% of the amount of the excess of the available write-offs for bonus depreciation and accelerated depre-

ciation over the amount that would otherwise be allowable; (2) 6% of the pre-2006 unused AMT and R&D credits; or (3) $30 million.

For example, assume that during 2009 a taxpayer places in service qualified property with a cost of $10 million with a five-year recovery period. Without regard to bonus depreciation, under the Modified Accelerated Cost Recovery System (MACRS), first year depreciation would be $2 million. With bonus depreciation the first year depreciation would be $6 million (50% of $10,000,000 + 20% of $5,000,000). Thus, the excess referred to in (1) above is $4 million and $800,000 (20%) would be the refundable credit amount, assuming the corporation had $13,333,333 of unused pre-2006 AMT and R&D credits (6% of $13,333,333 is $800,000).

First Year Tax Benefit

Expensing allowance (Section 179 expense):	
Machinery and equipment	$250,000
Bonus depreciation:	
Leasehold improvements: 50% x $400,000	200,000
Machinery & equipment: 50% x $50,000 (net of Section 179 expense)	25,000
Normal depreciation on the balance of expenditures:	
Leasehold improvements: 1.391% times $200,000	2,782
Machinery & equipment: 20% times $25,000	5,000
Total depreciation deduction	$482,782
Federal tax savings (at 35%)	**$168,974**

Additional Points

Other points to remember about these provisions:

- Whether the Act has an impact on state and local taxes depends on whether the state conforms to federal tax law or has decoupled from it. Depending on each state's law, additional state tax benefits may be available.
- A cost segregation study for a real estate project may identify costs eligible for the new benefits.
- It is possible to elect out of bonus depreciation and/or not to elect Section 179 expensing.
- The Section 179 deduction is treated as a depreciation deduction for purposes of the limitation on deductions for luxury automobiles and other listed property (*e.g.*, computers and cellular phones).
- For passenger automobiles placed in service in 2009 and used 100% for business, the maximum otherwise allowable first year depreciation deduction is increased to $10,960 (from $2,960). However, this increase does not apply if an election out of bonus depreciation is made.
- Special rules expand the 50% bonus depreciation to "qualified disaster assistance property" and "qualified cellulosic biofuel plant property."

On June 30, 2009, Senator Chuck Grassley (R-Iowa) introduced the Small Business Tax Relief Act of 2009. One of the provisions in that bill would increase the $250,000 Section 179 expensing amount to $500,000 and provide for a phased reduction when the cost of Section 179 property placed in service during a year exceeds $2 million. The increased limits would be made permanent under this bill. In the present political and financial situations, it is not possible to predict whether this proposal or any other change in the Section 179 expensing amount will be enacted.

It is anticipated that these accelerated tax benefits will help the economy by reducing 2009 taxes imposed on corporations, self-employed persons, and shareholders, partners, and members of entities engaged in a trade or business. Various industries that produce property eligible for these benefits should also see a stronger demand for their products. ■

BY ELLIOTT WILCOX

Elliott Wilcox is a professional speaker and a member of the National Speakers Association. He has served as the lead trial attorney in over 140 jury trials, and teaches trial advocacy skills to hundreds of trial lawyers each year. He also publishes *Trial Tips,* the weekly trial advocacy tips newsletter <www.trialtheater.com>.

Conquer Your Fear of Speaking in Public

Two months ago, when you agreed to speak, you thought it would be a great opportunity to market yourself and meet potential clients. But now, standing offstage as they introduce you, your mouth goes dry, your palms sweat, and your knees are trembling. The feeling of anxiety increases, and you ask yourself, "Why did I agree to do this?"

Afraid to Speak in Public?

You're not alone. *The Book of Lists* ranks "Speaking Before a Group" as the *worst* human fear. It shouldn't be that way. Unless you're saying some final words before your execution, you don't have much to fear about public speaking. I've listened to thousands of speeches, including hundreds of first timers, and I've never seen a speaker pass out, burst into flames, or die of fright. So why do people get nervous, even terrified, when asked to speak?

When you conquer your fear of public speaking, you will enjoy three benefits. First, you will increase your credibility, because people will presume you're an expert. Second, you'll market yourself and increase exposure for yourself, your firm, or your message. Finally, you'll enjoy the adrenaline rush and personal satisfaction that comes from knowing your words made a difference in someone's life. Here are a few tips for controlling your nervousness the next time you speak to a group.

The Audience Is Not Your Enemy

The audience wants you to succeed. Think back to the last time you were an audience member. When the speaker first took the stage, did you want them to fail? Or did you want the speaker to be entertaining, mesmerizing, educational, witty, charming, and at the top of their game?

Your audience feels the same way. You were invited to speak because they want you to share something of value with them. They want to learn something, to be entertained, to grow, to feel better, safer, or smarter. They want you to succeed. Even in enemy territory, they don't want your speech to fail. Imagine a Florida Gator fan listening to a speech by Bobby Bowden or a die-hard Democrat listening to George Bush. Despite the inherent hostility, they probably *still* want to be entertained, inspired, or educated. If you were stuck in the seat for the full hour anyway, wouldn't you rather see a speaker succeed? *Remember, even if they disagree with your message, the audience still wants you to succeed.*

Be a Boy Scout

The Boy Scouts have a simple motto: "Be Prepared." If you'll follow that advice, you can eliminate the most common cause of a speaker's nervousness. Many speakers get nervous because they're not confident about what they're going to say. Investing extra time in your preparation yields a tremendous payoff. Spend extra time to practice your speech, anticipate possible questions or objections, and know who you're speaking to. When you feel confident about your material, you'll stop worrying about what you're going to say and can focus on how you'll help your audience.

Talk to Only One Person in the Audience

Do you feel comfortable speaking to *one* person? Could you present your speech to *one* person? Would you get flustered or forget your speech if there was only *one* person in the audience? No? Then what difference should it make if they're surrounded by hundreds or thousands of people?

Start by picking out someone in the front, making eye contact, and having a one-on-one conversation. If you only talk to one person the entire speech, they'd feel uncomfortable, the rest of the audience would feel neglected, and your speech would be ineffective. To avoid that, talk with them for only a moment, then pick someone in the back left corner, and talk to them for a little while. Then shift to the front left or the back right corner, continuing to work your way around the room, always making eye contact with just one person, having a one-on-one conversation, and then moving on.

This technique has two benefits. First, you won't feel overwhelmed by the size of the audience, because you're only talking to one person at a time. Second, everyone in the room will get the impression you're talking directly to them. They'll feel a connection between themselves and the speaker. When they feel that connection, they listen more attentively, and retain more of your message.

Remember, they want you to succeed. Many members of the audience will even envy your courage. Speak to your new friends in the audience, and you'll conquer your fear of speaking. ■

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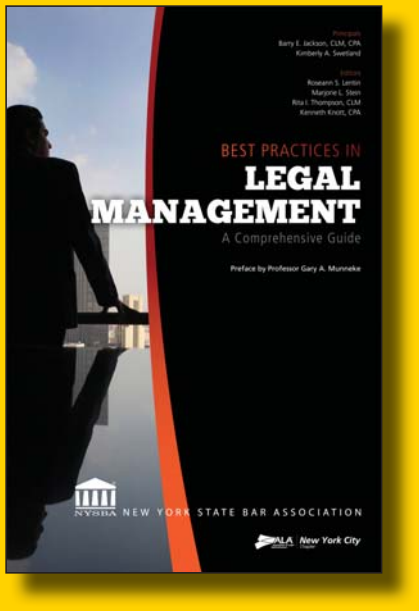

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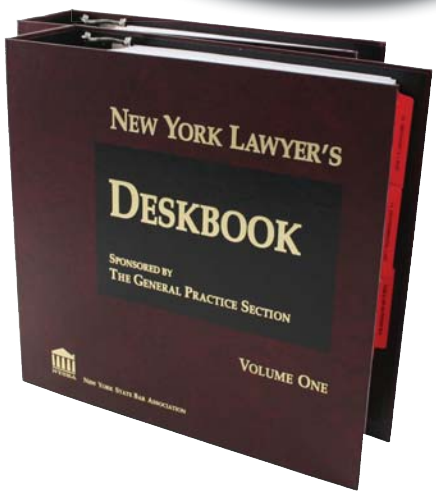

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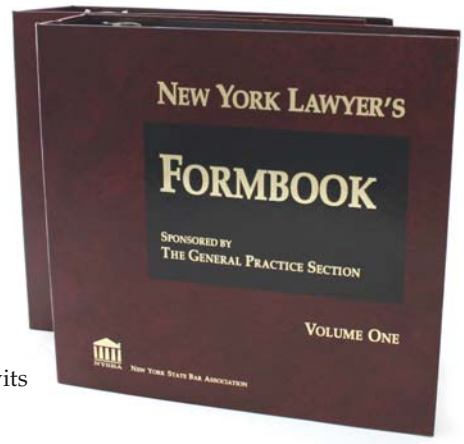

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Are the two words – *incident* and *incidence* – synonyms? Recently I've been seeing them used with the same meaning, and I wonder whether that is just careless writing or the words have become synonyms.

Answer: The two words are not synonyms. An *incident* is a single event or a separate and definite experience. It may describe some routine or unimportant occurrence seen as part of a continuum. An incident can also be an occurrence that temporarily interrupts the normal sequence of events, or even an important occurrence that changes history – for example, "an international incident." As an adjective, *incident* describes a happening that arises from or acts as a concomitant of something else, as in, "Substantial loss of property was incident to the flooding of lowlands."

On the other hand, although dictionaries list an "act" as one meaning of *incidence*, that noun does not usually refer to a single, perhaps unimportant experience or occurrence. The noun *incidence* refers instead to the rate, manner, or frequency of an occurrence as it relates to an untoward result. For example, "The *incidence* of tuberculosis in developing countries has resulted in a soaring death rate."

Writers confuse the two nouns because the plural of *incident* sounds exactly like the singular of *incidence.* So when they write, people think of an *incident*, but they spell it *incidence* – and then incorrectly add a plural. So they speak or write "one incidence" and "several *incidences."* One such response was given by the national vice president of government relations of the NAICU (National Association of Independent Colleges and Universities): "We had not expected to find so many incidences of students . . . dropping out." (She meant to say "incidents.")

Lawyers are familiar enough with a similar pair, *precedent* and *precedence* that they do not misuse them, although non-lawyers often do. The legal meaning of *precedent*, as lawyers know, is "a judicial decision that may be used as a standard in subsequent similar cases." The non-legal meaning is less stringent, but similar: "an act or instance that may be considered as an example in similar circumstances."

The noun *precedence* has the general meaning of "an act, state, or right that carries the authority to precede." It also has a second meaning, "priority." When *precedence* means "priority" it is pronounced with second-syllable stress (*precedence,* the letter *e* pronounced as it is in the alphabet). Pronounced with its usual first-syllable stress, *precedence* also contains a more specific meaning: "a ceremonial order of rank observed on formal occasions."

Question: What is the meaning of that vague phrase *as such*? Here it is, in a quote on the editorial page of a national newspaper:

> The weight of checked-in bags is measured and priced, but the weight of carry-on bags is not. *As such*, many travelers are stuffing their carry-ons to the hilt and posing a greater safety hazard as their numbers multiply and overhead storage areas hold that added weight. (Emphasis added.)

Answer: Actually, the phrase *as such* is not vague but, as seen in the quotation the reader provided, it is often incorrectly used – and unclear. Instead of *as such*, the sentence connector *therefore* would have been correct. (In addition, later in the same sentence, the vague modifier *they* is ambiguous; does "they" refer to the number of "travelers" or of "carry-on bags"? But the reader did not ask about that problem.)

As for the phrase *as such,* it is a sentence-connector with specific meanings, always referring to the closest antecedent noun. It means "in that capacity," or "in or by itself" or "being the person or thing just referred to." For example, in the statement, "The legal profession, as such, does not receive the respect and command it is entitled to," *as such* means, "the profession just referred to." The phrase *as such* is a parenthetical insertion, so it is always enclosed in commas.

In the sentence, "The board of directors, as such, is responsible for decision-making," *as such* means "in that capacity." And in the sentence, "Hourly pay, as such, was the main point of contention," *as such* means "in itself." So the problem with *as such* is not its vagueness, but its improper use by the writer.

Question: I have seen the word *zeugma* and looked up its meaning, but I still do not understand it. Can you provide a better definition than this one: "Zeugma is a construction in which a word is used to modify or govern two words, often so that its use is grammatically or logically correct with only one"?

Answer: That solemn definition is not much help without some examples. Zeugma is a literary device often used for humor because of the incongruity of the examples provided. Poets have always taken advantage of zeugma for that effect. For example, the English poet Alexander Pope used zeugma (in his poem "The Rape of the Lock") to describe the English Queen Anne in these words:

> Here Thou, great Anna!
> whom three Realms obey,
> Dost sometimes Counsel take –
> and sometimes Tea."

(Note: To hear the rhyme, you have to know that in the 18th century "tea" was pronounced "tay.")

The noun *zeugma* is derived from the Greek verb meaning "to yoke." Another way to define zeugma is to call it "semantic incongruity" – the yoking of two unrelated objects by a single verb, thus providing humor. You may not find Pope's description of his Queen to be uproariously funny, but neither does it fit the solemn definition the reader quoted.

Here are some more examples:

> The robber took my advice and my wallet.

CONTINUED ON PAGE 56

NEW MEMBERS WELCOMED

FIRST DISTRICT
Christopher John Alvarado
Vanessa Antoinette
Collin Earle Bailey
Patrick H. Barth
Stacie Lyn Bennett
Richard Alan Beyman
Jonathan P. Brose
Maria C. Caceres-Boneau
Cassandra Marie Celestin
Nigel R. Codrington
Richard D. Cuiffo
Rebecca Davis
Giro DeSimone
Carol Desmond
Jason L. Ederer
Christopher Calvin Elders
Justin E. Ellis
John James Engel
Andrene Vanessa Fairweather
Gregory Charles Farrell
Irina Fayman
Jennifer Danielle Frank
William Eugene Hamilton Fyfe
Patricia L. Gannon
Phoebe Asrat Gebre
Ariel Goldman
Robert M. Hayden
Nicholas Roth Hector
Jean Ballantyne Hegeler
Karla Louise Hughes
Kimberly Kalmanson
Jeeyeop Kim
Kathleen Kim
Cynthia Elaine Kingston
Juanita Lasprilla
Won Hyung Lee
Mindy Lo
Sebastian J. Lovera Riso
Jason F. Lowe
Mandy Jo Lundstrom
David Matthew Mann
Amanda Lauren Marzbani
Matthew D. Matatof
Hilde Marie Matthee
John Patrick McDonough
Rakesh Joseph Michael
Stephanie Claire Miller
Robert Anthony Miranne
Divya Mittal
Samuel Kouamou Ntonme
Carly L. Press
Alphonsa Puthiyamadam
Thomas Jeremiah Reese
Eric Z. Reimer
Erin Hayes Rump
Reza Sarbakhsh
Clara S. Schauman
Robert Hugh Schlosser
Raven Shae Sealy
Mordechai Serle
Eli Robert Shahmoon
Akiva Shapiro
Hong Henry Shi
Harlan Jay Silverstein
Keith James Slattery
John Robert Sobolewski
James H. Stevralia
Niya Tang
Craig Scott Unterberg
Charles Hayden Van Gorder
Desiree Verdejo
Joseph F. Voyticky
Aryeh Weinstein
Lisa Sohayegh Weitz
William Howell Whitney
Andre Damian Williams
Denise S. Wong
Karen Yeh
Valerie Ann Zondorak
Kevin Zuzolo

SECOND DISTRICT
Suzana Carlos
Yvonne Obaigeli Ike
Erica T. Kagan
Spensyr Ann Krebsbach
Igor G. Kuperman
Sean W. McBride
Olga Medyukh
Robert P. Mullagan
Ryan Nathaniel Petersen
Darren Gerard Rooney
Charles Turner
Danielle Nikole Young

THIRD DISTRICT
John Althouse Cohen
Keith Hisao Hirokawa
Lev Samuel Jacoby
Megan Elizabeth O'Brein
John D. Rodgers
Robert Stevenson Rosborough
Deanna Carmen Scesny

FIFTH DISTRICT
Ashley Marie Greiner
Justin Lee Nottingham
Jarrod William Smith

SIXTH DISTRICT
Robert McKertich

SEVENTH DISTRICT
Timothy Joseph Brennan
James Douglas Epp
Natella Feinstein
Megan E. Gullace
John G. Luther
Carrie Marie Mason
Aleksandar Nikolic

EIGHTH DISTRICT
Rachel M. Hess
Willard J. Magavern
Frank Richard Passafiume
Jennifer Marie Smith

NINTH DISTRICT
Rebecca Ivy Blum
Jeannie Gallego
Diane B. Kaplan
Cori Beth Katz
Keturah Rebecca Ladd
Casey Suzanne McCabe
Brooke Jones Oppenheimer
Shalu Rajan
Carmelita A. Riley
David M. Rosoff
Merrill Neil Rubin
Jennifer B. Schramm
Andrew Reid Schwartz
William E. Seeger
Marion M. Walsh

TENTH DISTRICT
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John Anthony Cacchioli
Michael Calcagni
Madge Greenblatt
Fay Rebecca Mattana
Elizabeth B. McCarthy
Janet Puthuparampil
Ellen M. Snow
Jessica D. Sparacino
Elizabeth S. Stein
Jessica Terranova
Jessica S. Winik
Susan Wong

ELEVENTH DISTRICT
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Dimple Kumar
Nakisha McCants
Yana Pechersky
Olga A. Posmyk
Ruth Slomowits
Michael Uvaydov
Keaton Wong
William Sei-Hyun Yoon

TWELFTH DISTRICT
Oluwatosin Adenike Adeniyi
Christine Elizabeth Camacho
Sharon Gail Matthie
Aubrey Ward

THIRTEENTH DISTRICT
Joseph C. Sant
Guy R. Tardanico

OUT OF STATE
Bekhzod Abdusamatovich Abdurazzakov
Charles P. Abraham
Evan Lawrence Abrams
Angela Sheffler Abreu
Stephanie H. Adaniel
Monica Aryitey
Jonathan David Ash
Erica Beth Askin
Michele Lee Backus
Joanne Hashim Badr
Christine Elizabeth Barnwell
Terri Anne Benedetto
Andrew Marshall Bernie
Radhika Bhattacharya
Allison Hagan Binder
Paul Michael Blyschak
Carole Bodin
Bradford Alexander Boyd
Joseph Andrew Boyle
Kevin Scott Brotspies
Adam Buchwalter
Gregory Shaun Burnett
Christopher John Cahill
Justin Royal Carlucci
Noah Davis Carr
Tae-Jin Cha
Weitseng Chen

Mark Englund Christensen
Gary Bart Clark
Jared Cohane
Barry Lee Cohen
Jon David Corey
Eric Randolph Ian Cottle
Nelson Santo DaCunha
David Bishop Debenham
Maria Demoirakou
Shakira Dill
Morgan Daniel Ditch
Deborah Blossom Dong
John Caleb Dougherty
Lindsay Anne Dunn
Adam W. Edelstein
Nieves Julisa Edwards
Christopher George Elko
Obianuju Yvonne Erokwu
Kathleen Dougherty Ewing
Laura Lucille Fairneny
Renee Ann Fatovic
Alice Christine Ferot
Catherine Ann Ferrigno
Leon Fine
Leslie Ann Flora
Keith Harris Forst
Christopher Michael Fox
Jody Frampton
Hidetomo Futami
Christle Raven Garvey
Shahzeb Gaziani
Nicole Ann Gerritsen
Mark Douglas Gerstein
Bruce Cannon Gibney
Lee Ann Gillespie-White
Eric Wayne Golightly
Jonathan Wilfred Greene
Vaidya Gullapalli
Michal Haimov
Daniel Robert Hamad
Adam James Harvey
John James Hays
Lauren Marie Healy
Anneris Virginia Hernandez
Victoria Beatriz Hernandez
Michael James Hickey
Rawan Talat Hmoud
Dana Marie Hrelic
Eileen Hren
James Morrison Humphrey
Elizabeth Louise Hundt
Orla Margaret Hunt
Nnamdi Emmanuel Iheakaram
Keiko Ishizaki
Jonathan Luis Jachym
Eisha Jain
Christine Jean-Louis
Michaelle Jean-Pierre
Paula Denise Johnson
Peter W. Johnston
Thomas E. Jolas
Jaclyn Bari Kass
Jennifer Lauren Buchalter Katz
Sadaf Khadija Kazmi
Kimberly Marie Kempton-Serra
Steven Joseph Keough
Alia Jehan Khan
Peter Kim
Aisha Elizabeth King
Terel Lawrence Klein
Barbara Christine Kluessendorf
Alexander Koganov
Olga Kondrashova
Krassimire Raynov Kostov
Monica Renee Kostrzewa
James Michael Kramer
Ron Kugan
Rebecca Jean Kulik
James Daniel Kuthe
Allicia Wae-jin Lam
Pierre Olivier Lancelin
Lindsey Lee Laughner
Kathryn Faye Lazarev
Kirsten Migee Lee
Seung Key Lee
Irina Licandro
Legrand Gandhi Lindor
Melissa Rene Lombreglia
Carmen Hernandez Lonstein
Hongtao Lu
Gang Luan
Matthew Barry Lunn
Adam J. Lysinski
Jerome Michael Maiatico
Daniel Maloney
Laura Stephanie Manion
Craig Joel Mariam
Thomas More Marrone
Jonathan August Martin
Pamela Ann May
Aisling Margaret McAllister
Jane Margaret McCarthy
Colleen Robin McClafferty
Robert Leonard McKague
Michael John Messinger
Matthew Paul Miller
Vanya Taneva Mincheva-Vichailak
Romel Joseph Mirville
Jack Alan Molenkamp
Wendy Benjamin Morgan
Edmon L. Morton
Nicholas Ulysses Murphy
Anne-Marie Theresa Naccarato
Erika Beatriz Navarro
Ronald Louis Newman
Yung Tri Nguyen
Yaron Gavriel Nili
Chandler Jay Nutik
Sean Philip O'Connor
Forest Jean O'Neill-Greenberg
Adebukola Adedolapo Osuntogun
Priya Palvia
Amit D. Patel
Erik Mahendra Patel
Toral Pankajkumar Patel
Tonia Ann Patterson
Gabriel Adam Pell
Chenyuan Peng
Diego Trindade Pereira
Dawn Marie Phillips
Karen Lee Prena
Xi Qin
Karen Raihofer
Timothy Andrew Razel
Stephanie Crain Reger
Delia Carolina Reyes
Leslie Denise Riley
Chelsey Sophia Rodgers
Gregory Romanovsky
Christopher Anthony Rossi
Matthew Frank Rotman
Molly Moran Ryan
Gabriel Jose Salinas Martinez
Jeffrey Emanuel Salomon
Daniel Thomas Saltus
Nchunu Justice Sama
Ellie Paula Satz
Jesse A. Saul
Jere Stuart Segrest
Simon Jun Seida
Brittain Weaks Sexton
Melissa Marie Sharp
Jonathan Shub
Tara Margaret Smith
Adam Snitkoff
Kristen Courtney Soehngen
Marise Hosomi Spitzeck
Kristin Michele Stoop
Brianne Lee Stuart
Irene Sulaiman
Weiwei Sun
Barbara Ivarine Suri
Adam Michael Swanson
Kai Ling Tan
Migusa Teramura
Yuet Ming Tham
Chad Marshall Troop
Nguyen Anh Tuan
Vanessa Turner
Thankam Ann Varghese
Nguyen Dang Viet
Claudia Meredith Volk
Eido M. Walny
Jamilia Tashima Wang
Akihiko Watanabe
Karin Weiss-Yacobi
Aaron Thomas-durussel Weston
David James Whitecotton
Sean Jeffrey Whittington
David Alexander Wilhite
Catherine Warner Wilkes
Claire Elaine Wilson
Ethan Charles Wood
James Robert Wood
Richard A. Wright
Lauren Margaret Yassine
Iris Laura Yen
Ku Yoo
Christian Adam Young
Min Yu
Michaela Danielle Zabbo
Jordan Ivan Zaluski
Kaiyun Zhang
Shaobin Zhu
Andrew Stephen Zimmerman
Isma Rani Zubair
Liron Zusman

"This is a deposition, Harris, we don't need the special effects."

Foundation Memorials

A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to The New York Bar Foundation. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

THE NEW YORK BAR FOUNDATION

In Memoriam

Cindy Lou Beale
Pleasantville, NY

Andrew W. Bisset
Greenwich, CT

Paul R. Brenner
Bronxville, NY

Ira L. Freilicher
New York, NY

Thurston Greene
Millbrook, NY

Susan Lehnhardt
Princeton, NJ

Alfred D. Lerner
New York, NY

Frank J. Litz
Schenectady, NY

Lloyd Manning
Marietta, GA

Arthur H. Rosenfeld
New York, NY

Israel G. Seeger
Peekskill, NY

Mario R. Silva
Pittsford, NY

Kenneth D. Stein
Yorktown Heights, NY

Geraldine P. Waldorf
Nanuet, NY

Joseph M. Walsh
Flushing, NY

Language Tips
Continued from Page 52

> Are you getting fit or having a fit? [She] went straight home in a flood of tears and a sedan chair. (Charles Dickens)
>
> The Russian grandees came to Elizabeth's court dropping pearls and vermin. (Thomas Macaulay)
>
> There are three faithful friends – an old wife, an old dog, and ready money. (Benjamin Franklin)
>
> After three days men grow weary, of a wench, a guest, and rainy weather. (Benjamin Franklin)

Potpourri

You may have heard the often-quoted anecdote about Hoyt A. Moore, a partner at Cravath, Swaine & Moore, whose colleague once told him that the firm ought to hire more associates because the staff was overworked. "That's silly," Moore replied, "No one is under pressure. There wasn't a light on in the office when I left at 2 o'clock this morning."

This is from *Time* magazine, January 24, 1964. The story was quoted in Schrader and Frost, *The Quotable Lawyer* (1986). ■

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The Legal Writer
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easier, condense brief, casual e-mails into one paragraph.

This doesn't mean that e-mail writers should abandon all formalities of correspondence for brevity. Maintain a professional tone through proper capitalization and word choice. Many traditional-correspondence rules apply to e-mail.[18]

Front load and summarize questions and answers. If you're asking a question in your e-mail, ask it before you say why you're asking. If you ask the question up front, you're more likely to get an answer; the reader is less likely to stop reading before getting to your question.[19] Another technique when you reply is to summarize the question you were asked — and only then answer the question.[20] That'll let your reader know you're both on the same e-mail page.

Use the subject line to its full potential. Attorneys are inundated by e-mail. They must decide what to read and take care of first. An e-mail's subject line often determines the decision a recipient makes about when, or whether, to deal with it. Use the subject line to inform recipients of the e-mail's subject and purpose.[21]

A recipient will be frustrated by false or insufficient information in the subject line. Include key information to let recipients evaluate quickly whether they've time to deal with your e-mail at that moment. Don't make your subject line too short or too long.[22] Use initial capitals for subject-line messages, but don't capitalize short articles or prepositions. Don't end subject-line messages with a period.

Occasionally you can fit your entire message in the subject line. This works when the message is extremely brief and when asked to reply to a short, simple question. Use the abbreviation "EOM" at the end of the subject line-message.[23] EOM means "end of message." It tells the recipient that the subject line is the complete message and that they needn't waste time opening the message.

Format replies for clarity. Answer at the top of an e-mail so that readers need not search through text.[24] To answer multiple questions or make various points, organize replies with numbers or letters. If you're interlacing your answer between paragraphs of the original e-mail, use a different color, size, or font to set your writing apart from the sender's.[25]

Don't overuse abbreviations. LOL! To be brief and to type quickly, it's tempting to use lots of abbreviations. This isn't as time-saving as it might seem. Abbreviations waste time if your e-mail, filled with ambiguous abbreviations, requires the recipient to reply seeking clarification. The solution is to use them sparingly.[26] Stick with familiar abbreviations that express your meaning.

Use contractions. Although contractions are inappropriate in formal letters, contractions, which enable readers to understand text quickly, are encouraged in e-mails. Not using contractions sounds awkward and fussy and makes readers feel scolded.[27] Using the uncontracted form in the directive "Do not make extra copies of the report," for instance, suggests that dire consequences will follow for doing so.[28] Reserve the uncontracted form for special emphasis.[29]

Be sensitive when e-mailing to and from telephones. Smartphones like Blackberrys and iPhones are increasingly prevalent. Their small screens and cramped keyboards make writing concisely and using the subject line to its full potential even more important. In your quest for concision, never use, in a professional context, SMS (Short Message Service) language, or "textese," like substituting "c u l8r" for "see you later."[30] This extreme form of abbreviation is like writing in another language.

☹ **Emoticons are inappropriate.** Emoticons are small faces made by combining colons, semi-colons, parentheses, and other symbols. The authorities have different opinions about emoticons, but the consensus is that they don't convey meaning in a professional setting.[31]

Correspondence littered with smiley and frowny faces looks juvenile. It reveals the writer's inability to find good words, phrases, and sentences. Readers find emoticons annoying[32] and disruptive.

All capitals are ineffective. All capitals equals SHOUTING. Never use them, regardless of the context.[33]

Exclamation points liven up e-mails! Because e-mail has no affect, "exclama-

tion points can instantly infuse electronic communication with human warmth."[34] They show enthusiasm. Writing "Congratulations!" is more expressive than writing "Congratulations," which sounds apathetic or sarcastic. Don't use multiple exclamation points. Also, don't use exclamation points to convey negative emotion. It means you're throwing a tantrum.[35]

Avoid format embellishments. Many e-mail programs offer options to personalize e-mail. These options include different fonts and background "wall paper" featuring pictures and clip art. Personalize with content, not format embellishments. Stick to a plain font, like Times New Roman or Arial in black type,[36] and 10- to 12-point type size on a plain background.

Project respect. Appropriate salutations and closings express respect. Writers should use salutations and closings in most professional settings. Sometimes official salutations and closings are unwarranted, as in a string of replies between peers or colleagues or among friends.[37]

If you're unsure how to address your recipients, mirror the earlier correspondence.[38] When there's no correspondence, the following are helpful salutations and closings. Use last names and titles until you're told otherwise. For an individual, "Dear Mr./Ms. [*last name*]:" is always appropriate. If you're unsure whether your relationship is familiar enough to allow first names, "Dear [*first name*] (if I may),"[39] allows informality and addresses whether first names are appropriate.

These closings aren't comprehensive, but they're a start to your finding the appropriate ending to correspondence: "All best," "All the best," "Best," "Best regards," "Best wishes," "Cordially," "Regards," "Respectfully," "Sincerely," "Sincerely yours," and "Yours."[40]

Sign your e-mail. An e-mail exchange might be your only correspondence with a recipient. Signatures tell recipients how you like to be addressed and signal that the e-mail is complete. The context of your e-mail determines the appropriate signature. Not every e-mail requires a full signature. Quick responses between co-workers and friends about simple issues dispense with e-mail formalities, including signatures. Alternatively, consider correspondence between opposing counsel at the start of litigation. Signatures with full names and titles are informative. Make the most of this line to tell recipients whether you wish to be addressed by your first name, your last name, or a title.

Start smart. Don't both begin and end an e-mail with your name and who you are. A formal, polite way to write is to introduce yourself up front but to sign your name only at the end. Thus: "I represent Mr. Y, the defendant in X v. Y. Please telephone me tomorrow. Sincerely, John Smith." Not: "My name is John Smith. I represent Mr. Y, the defendant in X v. Y. Please telephone me tomorrow. Sincerely, John Smith."

Tell recipients how they can contact you. Include contact information below your signature. It sets the right business tone and shows your desire to be available to recipients. Include your full name, title, organization name, telephone number, e-mail address, mailing address, Web site, fax number, and other relevant information.[41] Save time with your e-mail program's automatic signature-line feature.

Announce prolonged absences. Tell correspondents when you'll be away from your e-mail for more than a day or two. If you don't, they might e-mail expecting quick action and grow frustrated when you don't reply. Use your e-mail software's "Out of Office" function to send an automatic reply announcing your absence. Or set your program to forward mail to an account you'll monitor while you're away.

Limit urgent e-mail. E-mail programs contain an option to flag or highlight messages as "urgent" or "important." This option helps senders and recipients supplement information in the subject line, but only if the "urgent" or "important" designation is accurate. Using flags to entice recipients to read e-mail that doesn't qualify for a flag harms the flag's purpose and your credibility.[42] Use "urgent" and "important" sparingly.

> Never e-mail anything you wouldn't want to see in tomorrow's newspaper.

Never forward without permission, but always assume that recipients will forward without permission. E-mail makes it easy to reply with the click of a button. Forwarding and carbon copying e-mail is just as simple. The ease with which you can pass along e-mail makes it tempting to do so. But etiquette dictates that you not forward any e-mail unless you have the original sender's permission. Also, when carbon copying (CC) or blind carbon copying (BCC) someone unfamiliar to your reader, state the reason for copying.

Your commitment to following the rules of etiquette doesn't guarantee that others will do the same. Assume that any e-mail you write will be forwarded, copied, and blind copied to others without your permission.[43] Protect your wish that your mail remain with your recipient by placing that request in the subject line and in your e-mail's body. These precautions don't guarantee compliance. E-mail isn't confidential. Don't assume it is.[44]

Don't abuse e-mail. Sending unsolicited advertisements to a mass list of recipients (SPAM) is like clogging up your friends' and colleagues' inboxes with unwanted jokes and chain mail. Don't be a spammer.

Note e-mail policies. Most large employers have e-mail policies. Follow them.

Beware of using business e-mail for personal use. Most large companies can access their employees' e-mail and hard drives. If in doubt, never e-mail anything you wouldn't want to see in tomorrow's newspaper.[45] Never send

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Good protocol makes e-mail fit to print.

inappropriate mail, let alone to or from your office e-mail address.[46]

Your company might require a disclaimer at the end of your e-mail to specify the level of privacy assigned to e-mail communications and a warning that the e-mail shouldn't be used outside its stated context.

The New York State Bar Association provides a sample e-mail policy in its resources for small and solo practice firms.[47] The sample includes a list of risks and liabilities, legal requirements to use company e-mail, and suggested format for company e-mail. The policy is helpful if you're setting up an e-mail system.

E-Mail Tips

Here are some tips to make writing, sending, and receiving e-mail efficient and hassle-free.

Fill in the address box only when you're ready to send. The ease of sending out mass e-mail, purposely or inadvertently, means that you must take care when addressing your message. To avoid sending an e-mail before you're ready, write your entire e-mail, do all your edits, and proofread before you fill in the address box.[48]

Make managing e-mail part of your daily tasks. If the constant inflow of mail becomes overwhelming, set up a schedule to read e-mail just as you would an appointment.[49] Otherwise, read e-mail as received.

Start by answering e-mails that require a response. If you can't give the e-mail full attention, send a quick response to let the sender know that you received the message and that a more complete response awaits.

Set up a filing system. Most e-mail programs allow multiple folders you can add to manually or automatically based on your criteria. Consider a pending folder for e-mail you must deal with later, a monthly or weekly review folder for follow-up exchanges, a permanent folder for mail you must never delete, and folders for clients or personal matters. Don't clog up your inbox. Deal with your mail and then discard it or place it in a folder.

Take the time to respond appropriately. The immediacy of e-mail leads people to send messages before they've fully thought through their ideas. Combined with the constant access to e-mail, instantaneous e-mail correspondence leads to situations in which senders often wish they could take their message back. This is wishful thinking: "No one will remember that you responded instantaneously. Everyone will remember if you respond inappropriately."[50]

Some people are always online. When they press the "send" button, their computer immediately sends the e-mail. Most e-mail programs allow an intermediate step between sending e-mail and its actual delivery: the outbox feature. An outbox works like your home mailbox. You place the letter in the box, but it isn't sent until the letter carrier picks it up.[51] Set your program to send all e-mails in the outbox at a particular time or only when you manually empty the outbox. In the meantime, the e-mail is in the outbox and available to edit or delete.

This feature also helps those who e-mail outside business hours. Setting your outbox to deliver all messages at 9:00 a.m. will hide that you were awake at 4:00 a.m. when you wrote it.

Watch out for Reply All. The "Reply All" feature is convenient to exchange responses with a large group. The feature can turn disastrous if used in error. The horror stories are well known, but the mistakes continue.

Use CC and BCC properly. Several options let senders address messages. The "To" box should include all those to whom the message is directed. The "CC" box is reserved for those who should receive the message for informational purposes but from whom no response or action is required. The "BCC" box works the same way as the "CC" box but preserves recipients' anonymity.[52]

Check and explain attachments. Correspondents can instantly share documents by attaching them to e-mails. This useful feature requires careful attention. First, consider whether to send a document by e-mail. Sending large files (anything over two or three megabytes) causes problems. Many servers block large e-mails. Or an e-mail that goes through might exceed the memory capacity of the recipient's inbox, causing it to crash. Next, remember to attach a document when you state in your e-mail that you're attaching it. Also, explain early in the e-mail message what you've attached, in what form, and why. Finally, attach the correct document, especially when dealing with sensitive materials.

Use your address book wisely. Most e-mail programs offer options to store contacts in an address book. This allows you to maintain a database of e-mail addresses to send e-mails without searching for addresses. Ready access to your contact list might lead to costly mistakes. Confusing your intended recipient is embarrassing. Although it's impractical to maintain separate address books for each contact, maintain separate address books for media,[53] professional, and personal contacts.

Save time: Set up group e-mails. When you're collaborating on a project or regularly exchange e-mail with a set of recipients, set up a group e-mail list. This assures completeness and saves time.

Request an acknowledgment of receipt. If you're concerned that your recipient might not receive an e-mail with time-sensitive or other important information, request an acknowledgment of receipt. Most e-mail programs have an option to do this, but you can also request an acknowledgment in the body of your e-mail. Not all e-mail communications require acknowledgment. Give yourself peace of mind, but don't burden recipients.

Rely on timestamps cautiously. Each e-mail message sent or received is stamped with date and time information. This information is good for documentation, but it's not 100% accurate.[54] Glitches in computer software

and other electronic anomalies result in inaccurate timestamps.

Be careful with interoffice e-mail. Interoffice e-mail systems offer options and features different from personal e-mail programs. Some interoffice systems allow access to the "Properties" of e-mail exchanges to permit senders to check when their recipients read a message, how long the recipient looked at a message, whether the recipient deleted a message, and whether the recipient forwarded a message. Each system is unique. Be aware of these possibilities.

Save your recipient's time with "No reply needed." In an age when so many e-mails are exchanged daily, include a notation in e-mails sent only for informational purposes that no reply is needed.[55]

E-Mail and the Law

E-mail etiquette is important for attorneys because "[e]mail leaves a written, time stamped, and traceable record of your lazy habits, and flip email replies can come back to haunt you."[56]

Not all e-mail between attorneys and clients is privileged: "[E]mail communications in which legal advice is neither sought nor given are not necessarily privileged and could be discoverable."[57] Avoid off-topic banter when corresponding with clients.

You're responsible for your mail. The costs of misdirecting e-mail containing confidential information are incalculable. Check and double check the accuracy of a recipient's address. Attorneys are charged with a standard of care that includes "carefully checking the addresses prior to sending an e-mail and ensuring that privileged information is not inadvertently sent to a third party."[58]

Consider the impact and repercussions each e-mail might have. Arthur Andersen's fall can be attributed to an Anderson in-house attorney's e-mail directing staff to follow its document retention policy — a direction to shred documents.[59] Because electronically stored data, including e-mail, is generally discoverable in lawsuits,[60] consider the legal implications of what you write.

Conclusion

Corresponding with the click of a button instead of dropping an envelope into a mailbox doesn't give you license to become complacent. When attorneys correspond in their professional capacity, it reflects on their capacity as professionals. ■

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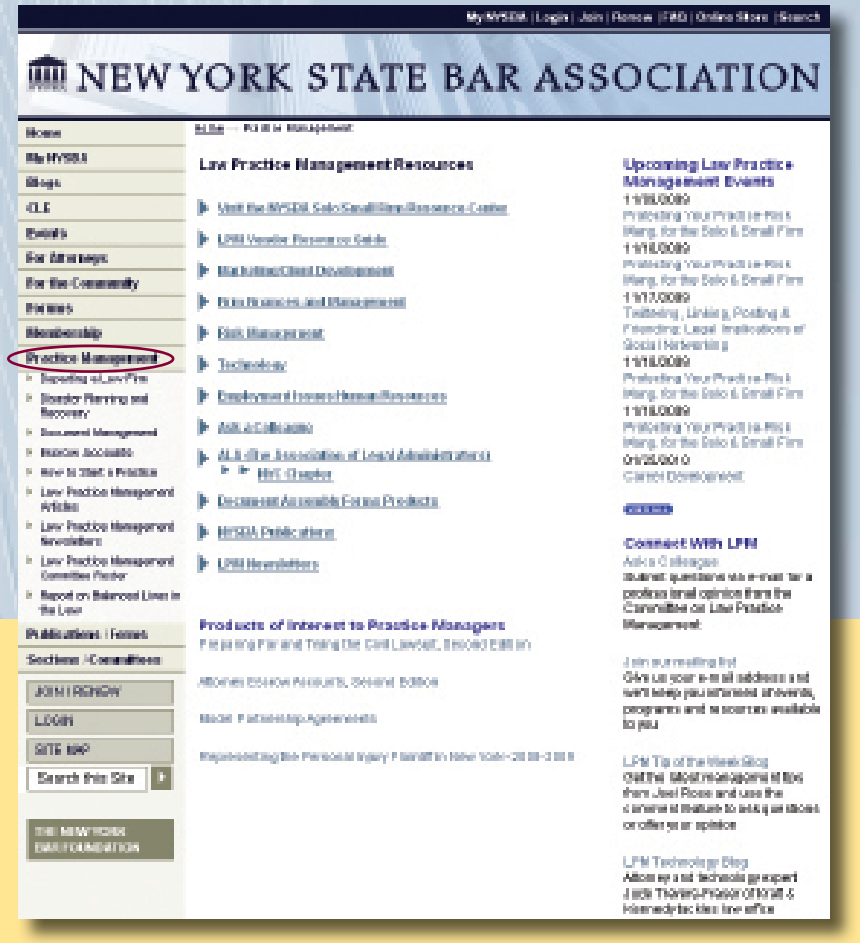

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BY GERALD LEBOVITS

E-Mail Netiquette for Lawyers

Electronic mail, called "e-mail" and often spelled "email," has electrified the practice of law. E-mail is invaluable. It's "cheaper and faster than a letter, less intrusive than a phone call, [and] less hassle than a fax."[1] It eliminates location and time-zone obstacles.[2]

E-mail isn't perfect. Attorneys are besieged by the volume of e-mails. It's hard to sort through the mix of solicitations, SPAM, correspondence, and critical, time-sensitive information. One result: "people are either annoyed by the intrusion [of e-mail] or are overwhelmed by the sheer number of e-mails they receive each day."[3] E-mail also leads to misunderstandings.[4]

Despite its problems, e-mail is an essential tool. Attorneys must make the most of it — so long as the attorney follows this good advice: "Think. Pause. Think again. Then send."[5] This column reviews e-mail etiquette, e-mail tips, and e-mail's implications for the legal profession. Good protocol makes e-mail fit to print.

Etiquette

Lawyers must consider the e-mail's recipient to determine how formal or informal etiquette should be. E-mails among colleagues sent in a series of quick responses are different from e-mails to a potential client. The varied purposes of e-mails and the diversity of recipients lead to conflicting etiquette rules. Many equate e-mail with traditional correspondence. Others see it as a new and different way to write. Some authorities argue that old-fashioned "snail mail" letters are better when interacting with adversaries, clients, and courts.[6] Others criticize the informal and sloppy writing common in e-mails. To them, "the e-mail culture is transforming us into a nation of hurried, careless note makers."[7]

The following etiquette rules outline general concepts and apply to all forms of electronic mail, regardless of the recipient.

Don't hide behind the electronic curtain. Easy access to e-mail leads to the common but poor practice of relying on e-mail's impersonal characteristics to deal with things better done in person. The mantra must be "Never do anything electronically that you would want others to do to you in person."[8] E-mail writers must ask themselves: "Would I say this in person?"[9] Asking this question reduces the potential to use e-mail for an exchange best suited for oral communication.

End confrontations. If communication leads to confrontation, end the dialogue and, if appropriate, agree to speak by telephone or in person.[10] E-mail is an imperfect way to resolve differences. Unlike oral communication, e-mail provides no tone or inflection. The reader must assign character to the communication. Angry, or "flame," mail[11] escalates disputes.[12]

Cut the back-and-forth. Stop e-mailing when an exchange, called a "thread," turns into a long back-and-forth discussion.[13] It's better to discuss on the telephone or in person any matter requiring more than three replies. Long threads lead to confusion when the discussion strays from the original subject. Sending e-mails also gives senders a sense of absolved responsibility when nothing has been accomplished. Just click the "send" button and it's the other guy's responsibility. Clarifying tasks by telephone or in person avoids this trap.

Interpret generously. Just as e-mail writers must consider the tone recipients might assign to the text, so must recipients generously interpret the writer's text.[14] Recipients should assume the best of the writer to avoid overreacting to a text that might be brief, hostile, or unclear. Avoid misunderstandings by giving e-mail writers leeway when deciphering meaning.

Always edit. Avoid confusion through editing. Reading what you've written will let you see how an intended recipient might misinterpret your writing. An example of this is an e-mail that reads "I resent your message" when the writer meant to say, "I re-sent your message."[15]

Editing includes more than reading for meaning. It means checking spelling and grammar. Informality like making typos or using only lowercase letters is fine between friends. It has no place in professional correspondence. To ensure credibility and respect, avoid grammar and spelling errors. Use your e-mail program's spell-check function. Editing is necessary because "[c]lients often can't tell whether your legal advice is sound, but they can certainly tell if you made careless typos."[16]

Be concise. Given the volume of e-mail and the limited time to read and respond, make e-mail readable. Write so that readers can read and comprehend quickly. Compose short sentences, short paragraphs,[17] and short e-mails. To make the reader's job

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