JULY/AUGUST 2009
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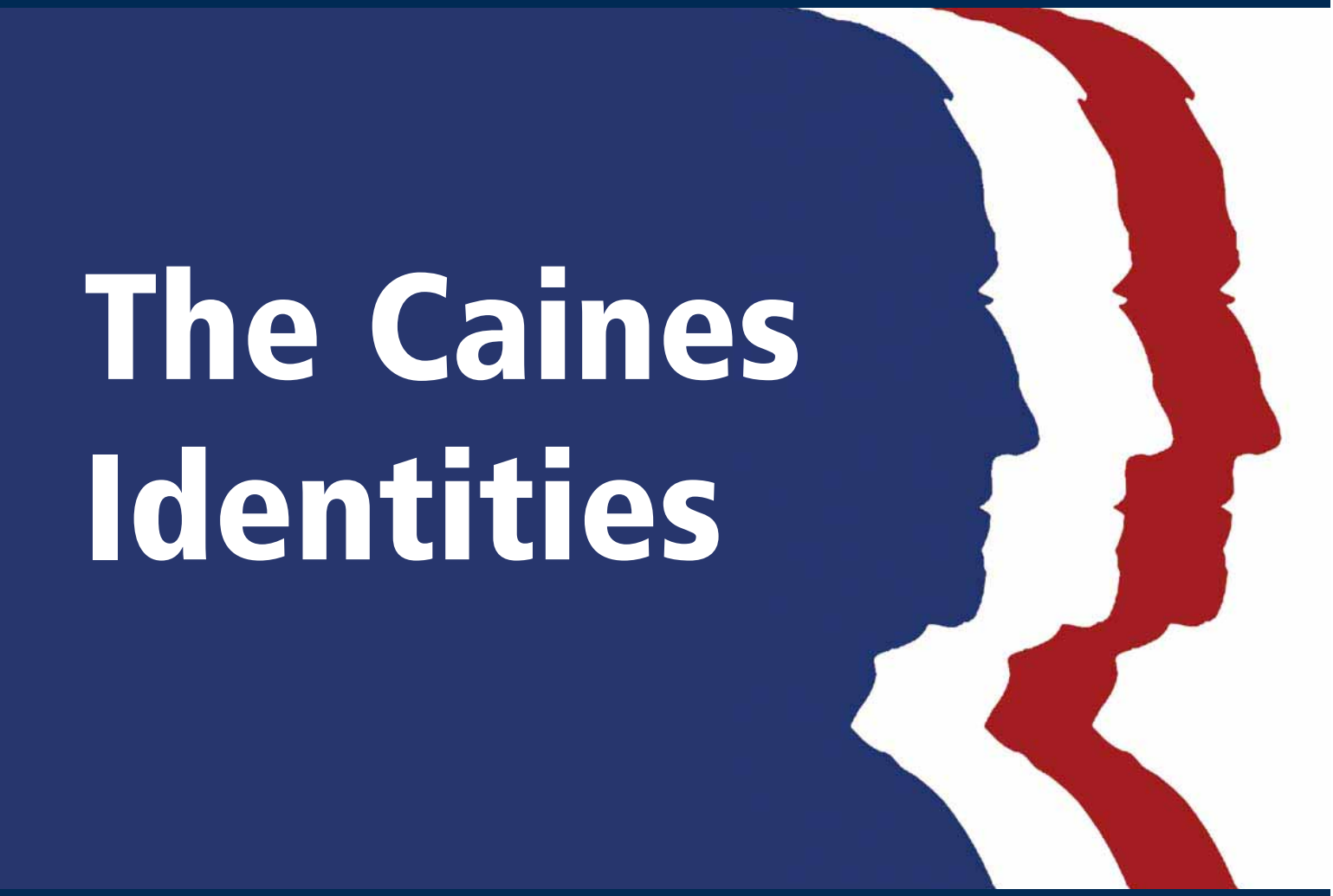
NEW YORK STATE BAR ASSOCIATION

Journal



The Caines Identities

The Faces of America's First Official Reporter

by Gary D. Spivey

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July/August 2009

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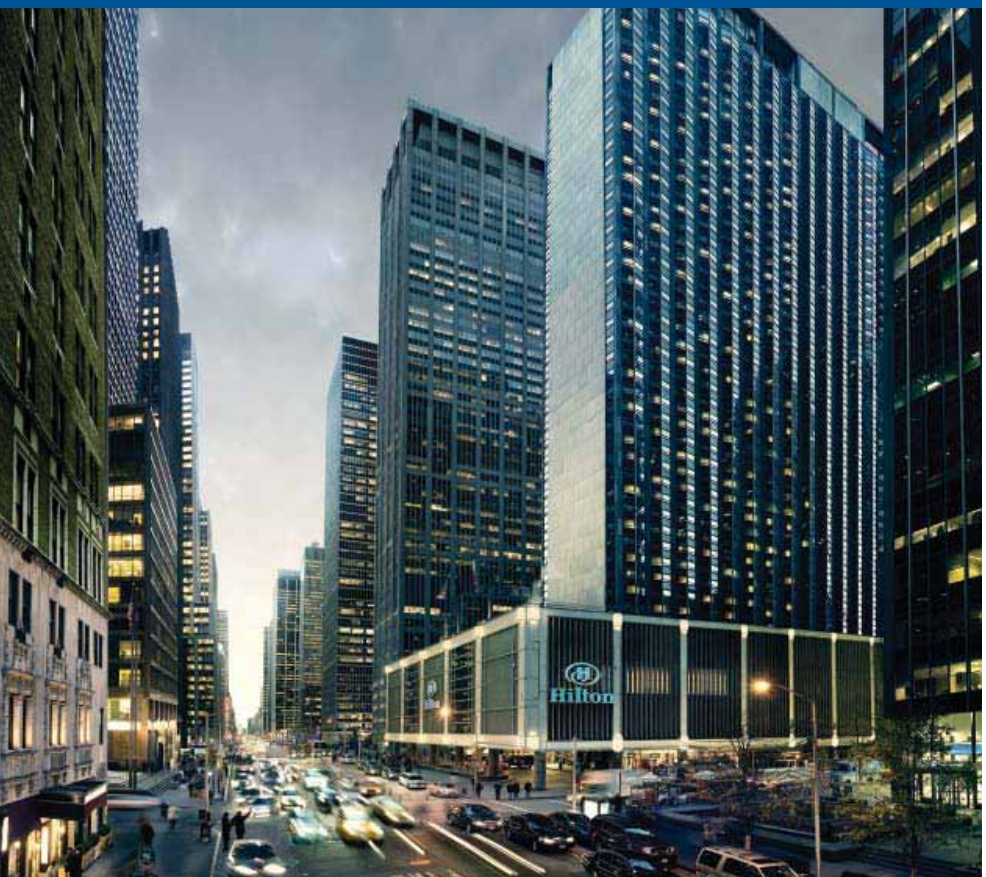

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Editor-in-Chief, 1961–1998

CONTENTS

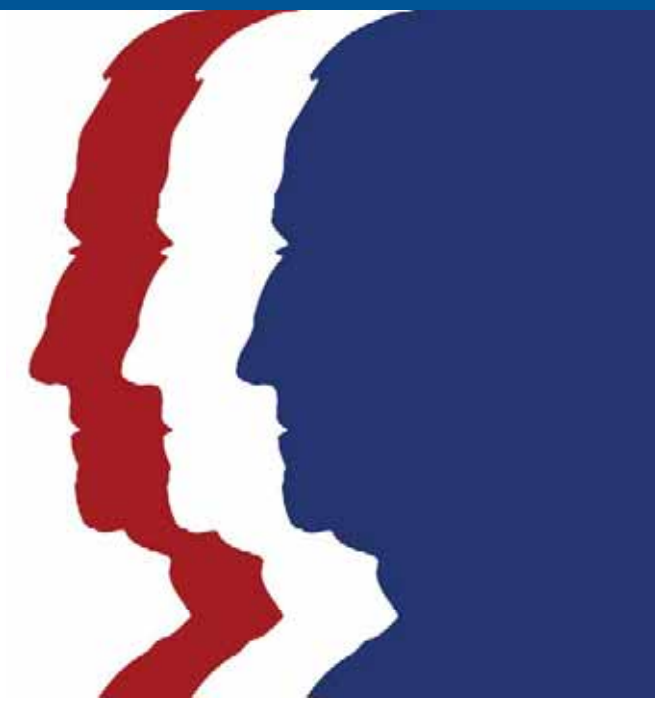
JULY/AUGUST 2009

THE CAINES IDENTITIES

The Faces of America's First Official Reporter

BY GARY D. SPIVEY

10



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The New York State Bar Association health insurance program is administered by USI Affinity.

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MICHAEL E. GETNICK

The Membership Bottom Line: What's in It for *You*

During these tough economic times, when some of our members have lost their jobs and even more are struggling to save their practices, it is imperative that lawyers find ways to maintain a high level of service while cutting costs. This is no easy task. The situation is especially hard for solo and small firm lawyers, some of whom have seen certain parts of their practices completely dry up. As you, our members, try to do more with less, I am well aware that you are scrutinizing the value of every dollar – even those set aside for your bar membership dues. We're working to ensure that the payment of your State Bar dues is one of the best investments that you make this year. While you focus on the bottom line, our focus is on you. Our leaders and staff are asking the same question: What's in it for you, our members?

This year, under my agenda "Lawyers Helping Lawyers," we are going to emphasize and bolster current committees and initiatives that offer programs and services to members in this down economy. Our Law Practice Management Committee (LPM), chaired by Gary Munneke, already is producing valuable resources and programs designed to ease the burden of managing your firm's business. We have a tremendous amount of useful tools and information that will ease your daily practice of law – but we're learning that many members are unaware of what is available to them through their State Bar membership. Our Web site continues to be updated. To ensure you are getting the full value of your membership, I am going to highlight some of the many services the Association provides.

The LPM Committee sponsors luncheon telephone seminars on various topics, including marketing, social networking and practice management. The seminars are geared toward those with busy schedules and can be downloaded from our Web site at any time. More than 400 members participated in the seminar on practice management and the new Rules of Professional Conduct. The committee also presents live seminars, imparting advice on starting your own practice and risk management for solo and small firm lawyers.

But there's more. The LPM Web site and Solo and Small Firm Resource Center (visit these sites at www.nysba.org/lpm and www.nysba.org/solo) feature practice management tips and tools, including a vendor resource guide and a compilation of forms and free publications on topics such as model partnership agreements and business continuity. Members can stay abreast of the latest practice management news by frequenting two new blogs – Smallfirmville.com, a blog for solo and small firm practitioners by Marshall Isaacs, and www.nysba.org/lpmblog, an LPM Finance and Management blog. In June, the LPM Committee launched a new publication, *NYSBA T-News*, which is a monthly e-newsletter that provides information and updates on law practice technology. The first issue features articles on 2009 technology trends for solos, tips on how to get more from your BlackBerry, and e-filing in New York State courts. There also is a link to a free guide titled "The Busy Lawyer Quick Computer Reference Guide for Outlook, Word and Powerpoint." All members should have received the first *NYSBA T-News*. If you did not and would like to subscribe, simply visit the LPM Web site and request that you be added to the distribution list.

This is just a start. As I write this message, we're anticipating the House of Delegates' review on June 20, 2009, of the report and recommendations of our Special Committee on Solo and Small Firm Practice. The report contains valuable insight as to how we can build upon current offerings for solo and small firm lawyers in the areas of educational programs, publications, Internet resources, member benefits and networking opportunities. We are marshalling all available resources to provide lawyers with the assistance they need to succeed, even in these difficult times.

We also are engaging our terrific Committee on Lawyers in Transition, ably chaired by Lauren Wachtler (Mitchell Silberberg & Knupp), which produced three free Webcasts this spring to provide expert guidance to lawyers who have recently lost their jobs. Topics included networking, updating a resume, interviewing, and marketing your talents during a down economy. More than 1,200 lawyers attended these programs, which are all available for free downloading and

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

viewing directly from the committee's Web site, www.nysba.org/lawyersin transition. The site also features a blog and an ambassador/mentoring program for lawyers in transition, a career center, and numerous additional resources to help lawyers move into a new job or practice area.

The State Bar also will continue to monitor policy and proposed legislation that affects your bottom line. This year alone we have opposed measures that would have increased certain court fees, such as the cost for purchasing an index number and the bar exam fee. We also partnered with our Real Property Law Section in opposing legislation that would have prohibited lawyers from providing title insurance to their clients, and with our Trusts and Estates and Elder Law Sections to secure an extension of the effective date for the new power of attorney legislation. We will remain a strong voice for our members, using the vast expertise of our members to shape the public policy debate on both state and federal issues. We will be your best ally.

Finally, if you've been laid off or if managing your practice during these stressful times is difficult for you to bear, please remember that you are not alone. The State Bar's Lawyer Assistance Program provides free, confidential assistance to lawyers, judges, law students and their immediate families. The program brings together legal professionals who provide peer support to colleagues struggling with alcoholism, addiction, depression, mental illness and debilitating stress. If you or someone you know is struggling with any of these issues, contact the LAP director, Pat Spataro, at the LAP Helpline: 1-800-255-0569.

In addition to these resources, the member discounts offered on cutting-edge CLE programs, Association-sponsored group insurance, including health and dental, reference books and publications, legal research and legal software, can result in savings that greatly exceed the cost of annual State Bar dues. We are seeking to provide ever-expanding benefits at lower premiums and fees. If you are not taking advantage of these and other member benefits, you are not getting the full value of your membership. Some of our members save more than $1,200 each year, and you can too. Space does not allow me to list all of the tremendous benefits of State Bar membership – not to mention the numerous benefits of membership in one or more of our 25 sections.

This is just a small sampling of what State Bar membership offers, what's in it for you. We are always looking for ways to increase member benefits and to lower premiums and fees, and I welcome your thoughts and ideas about what you need to make State Bar membership more relevant to your everyday practice. You can send any comments or suggestions to me at mgetnick@nysba.org.

Of course, the State Bar also provides great opportunities to serve, to give back to the profession and the public. We are rich with opportunities for speaking, writing, leading, mentoring, providing pro bono service, just to name a few. Now 76,000 members strong, the State Bar is a diverse body of lawyers with expertise in a wide range of practice areas. When we work together – lawyers helping lawyers – we all reap the benefits. ■

LPM Resources

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Law Practice Management -

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- Monthly e-Tech newsletter
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Tentative Schedule of Fall Programs *(Subject to Change)*

The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

"Search Engine Optimization": How to Help Potential Clients Find You on the Web
(12:00 pm – 2:00 pm Eastern Time)
August 5 — Webinar (all sites)

New Section 457A
September 17 — New York City

Bridging-the-Gap
(two-day program)
September 23–24 — New York City (live session); Albany; Buffalo (video conference from NYC)

Practical Skills: Basic Matrimonial Practice
October 5 — Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

Public Utility Law
October 16 — Albany

Law School for Claims Professionals
October 16 — Buffalo; New York City; Syracuse
October 23 — Long Island

Practical Skills: Introduction to Estate Planning
October 19 — New York City
October 20 — Albany; Buffalo; Long Island; Rochester; Syracuse; Westchester

Update 2009
October 23 — Syracuse
October 30 — New York City

Practicing Matrimonial and Family Law in Chaotic Economic Times
(9:00 am – 12:45 pm)
October 23 — Buffalo
November 6 — Long Island
November 20 — Syracuse
December 4 — Albany
December 11 — New York City

Practical Skills: Purchases and Sales of Homes
November 10 — Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

Securities Arbitration
November 12 — New York City

Handling Tough Issues in a Plaintiff's Personal Injury Case
November 13 — Buffalo; New York City
November 20 — Albany; Long Island

Practical Skills: Basics of Civil Practice – The Trial
November 18 — Albany; Buffalo; Long Island; New York City; Syracuse; Westchester

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

Construction Site Accidents
November 20 — Buffalo
December 4 — Albany; Long Island
December 11 — New York City; Syracuse

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The Caines Identities

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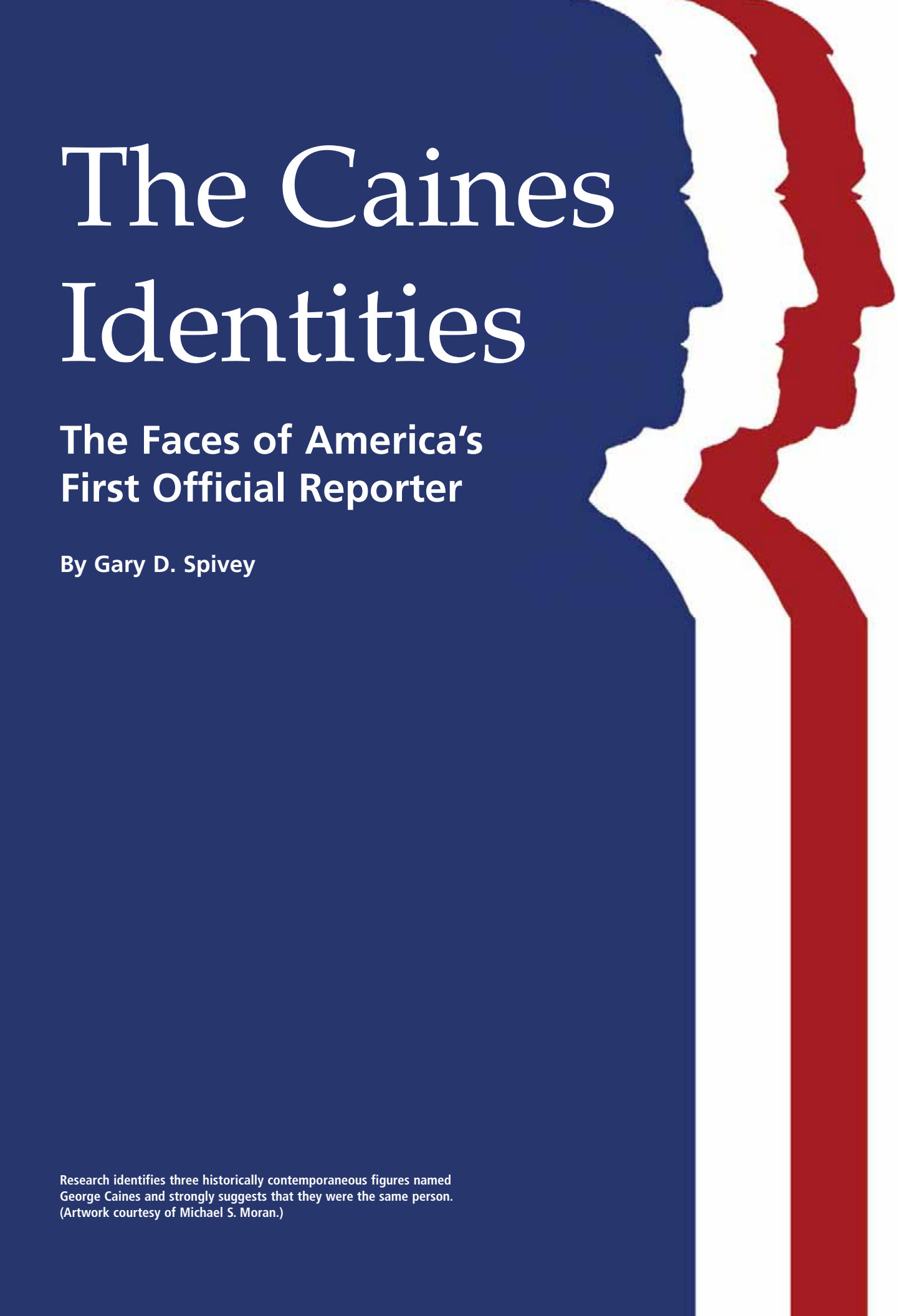


Research identifies three historically contemporaneous figures named George Caines and strongly suggests that they were the same person. (Artwork courtesy of Michael S. Moran.)

Gary D. Spivey
(gspivey1@gmail.com) is a graduate of Indiana University – Bloomington and its School of Law. He served as State Reporter and head of the New York State Law Reporting Bureau from 1999 to 2009. He is a member of the Board of Editors of the *Journal*.

George Caines is acknowledged as the first official reporter of judicial decisions on this continent and the most prolific legal writer of his time.

Yet, his biographies do not record his parentage, exact date and place of birth, or much about his background before he appeared in New York in 1801. And his reputation has been tarnished by the writings of a contemporary, Chancellor James Kent, who was an influential judge. Kent criticized Caines's judgment and morals, but the basis for those criticisms has never been fully examined.

The growing digital availability of previously obscure sources has made possible a more thorough examination of Caines's background and sheds new light on his competence and character. Research in these sources identifies three historically contemporaneous figures by the name of George Caines and strongly suggests that they were the same person. They are, in chronological sequence of their appearance in the record:

- A resident of St. Kitts (St. Christopher) in the British West Indies, educated at the Middle Temple in London but not called to the bar. He was named a defendant in a bank fraud case but was not apprehended.
- A supposed West Indian who suddenly appeared in Bermuda and opened a law practice on the representation that he had been at the Middle Temple and was admitted to the English bar. He aroused the suspicions of the authorities, who thought him to be the unapprehended defendant in the bank fraud case. They revoked his law license and threatened him with decisive measures if the criminal charges were authenticated.
- A reputed English advocate from the West Indies who had practiced law in Bermuda before arriving in New York. He married into society and began a career as a lawyer, author and reporter, interacting at least tangentially with such notables as Thomas Jefferson, Alexander Hamilton, Martin Van Buren, Paul Revere and Washington Irving.

Perhaps tellingly, each George Caines in this chronology disappears from the historical record when the next in the sequence appears.

Caines of St. Kitts

The surname "Caines," an English name of Norman origin, was well known on the island of St. Kitts in the British West Indies in the 18th and 19th centuries. Charles Caines of St. Kitts, possibly a prosperous merchant/trader,[1] had a large family, including a fifth son named George, who was sent to England to study law.

"George Caines, fifth son of Charles C., of the Island of St. Christopher, in America, esq.," was admitted to the study of law at the Middle Temple in London on April 21, 1780.[2] His age at the time is not given but, assuming that he was in his late teens, as seems typical, his year of birth would have been about 1761 or 1762.

The Middle Temple educated not only those preparing for a career in the law but also those who would require some knowledge of the law in their careers.[3] Thus it is possible that the merchant Caines sent his son to the Middle Temple to familiarize him with the law merchant, the legal system regulating the relationship of mariners and merchants. In any event, George Caines apparently was not admitted to the English bar; instead, his life took a rather sinister turn.

Caines studied law at London's Middle Temple. (Drawing by Thomas Shepherd.)

In 1793 Caines was named as a defendant in the prosecution of a group of men charged with defrauding a bank in Worcester, England. The fraud involved establishing a relationship with banks by exchanging valid Bank of England banknotes for local banknotes and later, having established a pattern of legitimate transactions, presenting worthless paper to be discounted.[4] An accomplice supplied a description of Caines, whom he knew as "Caney."

> Aged abt. 34[;] born in St. Kitts West Indies[;] about five feet 8 inches high[;] rather inclined to be corpulent[;] dark complexion – dark eyes and dark hair[;] was a student in the Temple but not called to the Bar – deliberate and easy in his speech – Walks upright.[5]

The other defendants were captured and imprisoned, but Caines was never caught.

Caines of Bermuda

George Caines, described as "[a] plausible young man of good address,"[6] arrived in Bermuda from New Providence, Bahamas, in 1797. If he was the same person implicated in the Worcester bank fraud, as Bermudian authorities later came to suspect, he may have first sought refuge in the Bahamas, where Methodist slavery reformer and future chief justice William Wylly – perhaps a cousin – had a law practice in New Providence.[7]

A "supposed West Indian," Caines arrived in Bermuda aboard the sloop *Experiment*, a privateer – that is, a privately owned vessel authorized to attack enemy merchant shipping.[8] He bought a home, stated that he had been admitted to the bar upon study at the Middle Temple and set up a law practice, which included the representation of privateer owners.[9]

Caines incurred the displeasure of Bermudian authorities when he challenged their seizure of a capsized American ship. He placed a notice in the New York *Gazette* criticizing the seizure and seeking to represent the owners or insurers of the vessel. This incident led to the suspension of Caines's law license and an investigation of his credentials.[10]

The investigation concluded that Caines was "not of any regular standing at the English Bar"[11] and possibly was the unapprehended defendant in the Worcester bank case. The Governor of Bermuda characterized these accusations as those "of a most criminal nature indeed, and [evidence of] the genius and talents of the Man, rendering it unlikely that he would do anything by halves."[12]

While the Governor and his Council did not consider the criminal charges to be sufficiently authenticated at that time, they warned Caines that "it will be encumbent on them to take decisive measures, whenever the Information shall be authenticated."[13] Shortly thereafter, the authorities received the description of "Caney" from a defendant in the case. In January 1800, Caines's license to practice law was revoked, and he soon departed from Bermuda.[14]

Caines of New York

George Caines first applied for admission to the bar of the New York Supreme Court in the January term, 1801.[15] He was reputed to be an "English advocate"[16] from the West Indies,[17] who had practiced in Bermuda before coming to New York.[18]

James Kent's criticisms have tarnished Caines's reputation. (Portrait courtesy of Court of Appeals Collection.)

James Kent, then an associate judge of the Supreme Court, wrote that Caines "was not then successful" (perhaps because of citizenship) "and so assumed the Business of reporting."[19]

Caines seems to have been busy with the publication of a treatise titled *An Enquiry into the Law Merchant of the United States; or, Lex Mercatoria America, on Several Heads of Commercial Importance*, which covered the laws of navigation and shipping, subjects familiar to the Caineses of Bermuda.

Caines credited William Coleman – who had published decisions of the Supreme Court for the period 1791 to 1800 in an unofficial work called *Coleman's Cases* – for the manuscript reports of certain cases in his treatise. He lamented Coleman's retirement from the practice of law (to become editor of the New York *Evening Post*) and the resultant "loss of a regular series of reports of cases in the Supreme Court of the State of New-York."[20] Caines may have recognized that Coleman's retirement created a void that he might fill.

Marriage to Cornelia Verplanck

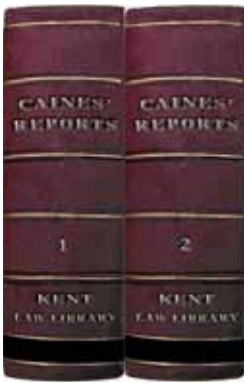
Lex Mercatoria was in the hands of the printer when Caines married Cornelia Johnston Verplanck at Trinity Church in New York City on May 27, 1802. This may have been a second, or even a bigamous, marriage for Caines. The Worcester bank defendant who had described "Caney" also stated that his accomplice had married a lady in the Blackheath section of London. But no record of the existence or fate of the marriage has been found.

Cornelia Verplanck was the widow of Gulian Verplanck, former president of the Bank of New York. Verplanck had died in 1799, leaving seven children, about

seven to 14 years of age.[21] Cornelia was born in 1757[22] and was several years older than Caines.

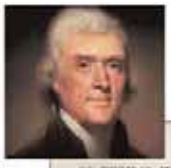
The marriage to Cornelia catapulted Caines into the New York City social elite. A month after the marriage, Theodosia Burr Alston, daughter of Aaron Burr, then vice president of the United States under Thomas Jefferson, wrote to her husband:

> We have this evening been to visit Mrs. Caines (late Mrs. Verplanck) at her country place. The marriage was thus published – Married, G.C., Esq., counsellor of law, from the West Indies, *and now having a work in the press*, to Mrs., &c. That work has been the cause of some curiosity and not a little amusement.[23]

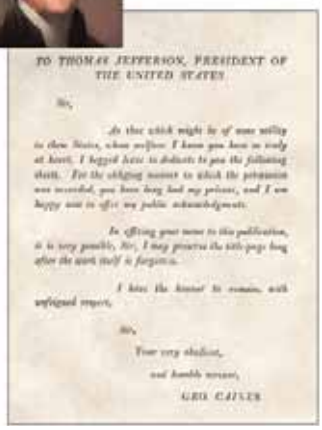


Daniel Webster called Caines' Reports "a valuable acquisition to the Country at large." (Photo of books in James Kent Law Book Collection, New York State Library.)

The source of the amusement is not clear. It may be an allusion to procreation,[24] or it may just illustrate some skepticism about the mysterious newcomer who had so quickly won the hand of the society matron. In any event, *Lex Mercatoria* was published. Caines dedicated it to Thomas Jefferson, who consented to the dedication.[25] It was America's first commercial law treatise and "by far the most ambitious undertaking of the kind ever issued from the New York press."[26]



Caines dedicated his commercial law treatise to Thomas Jefferson. (Jefferson portrait by Rembrandt Peale.)


TO THOMAS JEFFERSON, PRESIDENT OF THE UNITED STATES

Sir,

GEO. CAINES

The book was planned as the first of two volumes, but apparently was not commercially successful, so the second volume was never published.[27] Instead, Caines turned his attention to the practice of law, arguing 10 cases before the Supreme Court in 1803 to 1804, and to the preparation of a volume of the decisions of the court in what would become *Caines' Reports*.

People v. Croswell

The most celebrated of the cases argued by Caines in the Supreme Court was *People v. Croswell*,[28] heard in February 1804. Caines argued for the prosecution in a case against a printer accused of libeling President Thomas Jefferson. Alexander Hamilton – also of West Indian origin – argued for the defense. James Kent wrote a separate opinion favoring the defense, but the decision went to the prosecution on a tie vote. The result was later overturned by legislation.

Caines won a short-lived victory over fellow West Indian Alexander Hamilton in a celebrated libel case. (Portrait by John Trumbull.)

In the same year, Caines published the arguments in the case.[29] Although the transcript purported to be "at full length," a six-hour oration by Hamilton was condensed.[30]

Caines has been described as a "political follower" of Jeffersonian Attorney General Ambrose Spencer, and when Spencer suddenly was named to the Supreme Court, he selected Caines to present the prosecution's case in *Croswell*.[31] Caines's role in this case, together with his dedication of *Lex Mercatoria* to Jefferson, reveals his Jeffersonian leanings and provides a possible explanation for the Federalist Kent's animosity towards him.

Caines as Reporter

On April 7, 1804, the New York State Legislature enacted a statute[32] that provided for the designation of an official reporter to publish the decisions of the Supreme Court of Judicature (Supreme Court) and the Court for the Trial of Impeachments and the Correction of Errors (Court of Errors). Caines – who already had commenced publication of a volume of Supreme Court decisions – was appointed to the position, becoming the first official reporter of judicial decisions on this continent.[33]

Caines eventually published three volumes of the decisions of the Supreme Court, covering 1803–1805 (*Caines' Reports*), and two volumes of the decisions of the Court of Errors, covering 1801–1804 (*Caines' Cases*).

Kent was severely critical of the quality of Caines's work. He wrote in the margins of Caines's first volume of Supreme Court reports:

> Mem.: I have penned this November & corrected some Mistakes. I think the Reporter does not take Notes very correctly & that the work is too full of Mistakes. The decisions of the Court when in writing, as most of them are, appear correct and this source of accuracy stamps the whole value on the book, for without that aid, I should have no reliance on the Reporter. His own annotations in the margin might well be spared. However, as the first essay, the work deserves great indulgence.[34]

Kent was also disdainful of Caines's marginal annotations. In one case commentary Caines opined that a referenced case "seems by no means analogous."[35] In his copy of the reports, Kent retorted: "We considered . . . the Case . . . analogous, the remark of the Reporter to the contrary notwithstanding."[36]

Despite the "great indulgence" that Kent gave the first volume, his criticism of Caines's work extended to subsequent volumes and a note in his copy of the second volume was especially sharp when Caines gave short shrift to Hamilton's last argument in the court.[37]


LAWS OF NEW-YORK.

Reporter.

CHAP. LXVIII.

An 1804 statute created the reporter position that Caines originally filled.

In 1804 Kent became Chief Justice, and in 1805 he arranged for Caines to be replaced by William Johnson, a personal friend and fellow Federalist.[38]

While Kent was critical of Caines's work, others have been more favorable, one noting that his reports "were distinguished by brevity and accuracy, and for long enjoyed a high reputation with both bench and bar[,] . . . contain[ed] much important matter, display[ed] much ability, and [were] esteemed authoritative."[39] Even Kent acknowledged the value of Caines's reports, quoting Daniel Webster's view that the reports were "a valuable acquisition to the Country at large."[40]

Subsequent Career

In the immediate aftermath of his service as reporter, Caines continued publishing at a pace that earned him a reputation as "by far the most prolific law writer of the time."[41] He was a fixture in New York City's literary and legal milieu. As one writer recalls:

> In a pedestrian excursion through our then thinly populated streets, one might see . . . Caines, the deep-read reporter; Cheetham and Coleman, the antagonistic editors; Kent, afterwards the great Chancellor.[42]

In 1808, Caines published *Coleman and Caines' Cases*; a second edition of *Coleman's Cases*, updated through 1805; a practice manual titled *Summary of the Practice in the Supreme Court of the State of New York*; and *Practical Forms of the Supreme Court* taken from *Tidd's Appendix*.

While those works were in process, Caines teamed with other writers on other publishing ventures. With Thomas Lloyd, reporter of the debates of Congress, he transcribed in shorthand the Boston manslaughter trial of attorney Thomas O. Selfridge. (Paul Revere was on the jury that acquitted Selfridge in an important case on the law of self-defense.[43]) He collaborated with Washington Irving on Irving's first book, a translation from the French of F. De Pons's *A Voyage to the Spanish Main* (1806). Caines's knowledge of navigation presumably was useful in the translation of technical terms, but Irving's biographer dismissed the book as a "piece of hackwork."[44] Caines planned to publish a treatise on bills of exchange and promissory notes, but this work apparently was never issued, possibly because of business issues with his bookseller, who later became insolvent.[45]

Caines's publishing activity came to an end, and he turned his attention to the practice of law, "ultimately achieving a prominent position at the New York bar."[46] He argued more than 30 reported cases in the Supreme Court and Court of Chancery between 1807 and 1823. Perhaps indicative of his expertise in maritime law, he also practiced in the New York City Marine Court. In one colorful case he successfully represented a passenger against members of the crew (posing as Father Neptune and his acolytes) in a suit for an assault and battery that took place on a British ship.[47]

Financial Difficulties

Despite his personal income and propitious marriage, Caines seems to have struggled financially. Kent wrote that "since he ceased to be Reporter – in 1805, he had never been prosperous."[48] Kent's use of the epithet "the profligate Caines" seems to reflect his view that Caines was a spendthrift.[49]

Caines's management of his wife's financial affairs brought him into conflict with his stepchildren, who had a remainder interest in their father's estate under a plan drafted by Alexander Hamilton. Cornelia Caines had a life estate in the real and personal property and could sell the real property, but she was entitled only to the interest earned on the proceeds, the principal being reserved for the children.[50]

Caines arranged for the sale of a number of properties with Cornelia's apparently freely given consent. In the attestation to one deed executed on the sale of certain property in Delaware County, the master in chancery recorded that "the said Cornelia [Caines] on being by me [examined] privately and apart from her said husband confessed that she executed said deed freely and without any threats or compulsions from her said husband."[51]

In 1814, the children, who by then had reached adulthood, sued both their mother and stepfather over certain sale proceeds, seeking an accounting and appointment of a receiver, and the case came before Kent in the Court of Chancery. The Caineses objected by demurrer to discovery of interest payments and the appointment of a receiver. Kent agreed that the Caineses were not required to disclose the interest payments, but overruled the demurrer on a pleading point and reserved the issue of appointing a receiver.[52]

CONTINUED ON PAGE 16

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CONTINUED FROM PAGE 14

During this same period, Caines suffered a financial setback when he was sued on a debt owed to his bookseller for law books sold and delivered. In a case heard by Kent in the Supreme Court and ultimately affirmed by the Court of Errors, Caines was unsuccessful in attempting to set off his claim against the insolvent bookseller for a larger sum of money ($1,000) than that sought by the plaintiffs.[53]

Martin Van Buren acquired Caines's law library in satisfaction of a loan. (Engraving by John Sartain, reproduction of 1839 painting by Henry Inman.)

Perhaps illustrative of his financial straits at that time, Caines made a conditional assignment of his extensive law library, numbering 397 titles, to state senator Martin Van Buren, the future president, to secure a loan of $6,000. Caines apparently later defaulted on the loan, and Van Buren gained ownership of the books.[54]

The state Legislature came to Caines's financial succor in 1815, passing "An Act for the relief of George Caines, late reporter of this state."[55] Acknowledging that Caines had prepared his first volume of Supreme Court reports prior to his appointment as reporter, the act awarded him a year's salary ($850) for that work and $18 for each set of the reports supplied to certain counties.

Cornelia died that same year and the estate that she had inherited from Gulian Verplanck passed to the Verplanck heirs. Caines remarried, possibly as early as 1820.[56]

The Final Years

While remaining a communicant of St. George's Church, an offshoot of Trinity Church (Episcopal) where he and Cornelia were married, Caines in 1819 became a founder of the Missionary and Bible Society of the Methodist Episcopal Church.[57] Like William Wylly of the Bahamas, Caines may have been sympathetic to Methodism's social gospel. A hint of this ethos is found in Caines's preface to *Lex Mercatoria*, where he protested English ethnocentrism and urged "more tenderness for others."[58]

His ambitions were not extinguished, however. In 1821, Caines was recommended for appointment to a judgeship in the territory of Florida by a "Jonathan Thompson," presumably the Republican party leader and collector for the port of New York, but that appointment apparently did not materialize.[59]

Instead, Caines made an attempt to regain the reportership, when Kent was facing forced retirement because of age, and Kent's friend William Johnson was ousted as reporter (over Kent's objections). Kent wrote to Johnson that he was "mortified & extremely disgusted" by Caines's "pretensions as an old original & persecuted Reporter."[60] The Van Buren faction on the selection committee chose Esek Cowen instead.[61] Soon thereafter, Caines was appointed as a master in chancery, an office that Kent himself had held early in his career and that had provided an income sufficient to relieve Kent of his own financial distress.[62]

Declining in health, Caines in 1825 decided to retire to Windham in Greene County's Catskill Mountains, an area with which he was long familiar because Cornelia had property there. En route to that destination, he died suddenly in Catskill on July 10 and is buried in the Thompson Street cemetery in that village. It was reported that "[h]is remains were followed to the tomb by a large and respectable concourse of citizens, together with the members of the bar, who in respect of the deceased, wore the usual badge of mourning."[63]

He rests beneath a tombstone reading:

Sacred
to the Memory of
GEORGE CAINES, Esq.
who departed this Life
July 10, 1825,
aged
64 Years[64]

The gravestone inscription resolves a worrisome discrepancy in the Caines biography. It gives his age at death as 64, which translates to a year of birth of 1760 or 1761. Possibly through a typographical error, his obituary in the Catskill newspaper, copied in other obituaries, gave his age at death as 54, translated by his biographers to a year of birth of 1771. The earlier date is more harmonious with an admission to the Middle Temple in 1780, with the age estimate given by the Worcester accomplice in 1793 ("about 34"), and with the year of birth of Cornelia Caines (1757).

Caines is buried at the Thompson Street cemetery in Catskill. (Photo courtesy of Sylvia Hasenkopf, Greene County Historical Society.)

Apparently relying on the published obituaries, Kent used the 1771 date in a necrology. Hostile to the end, Kent's piece concluded that Caines was "not greatly respected either for sound Judgment or pure Morals."[65]

Conclusion

The reader is left to decide, and future researchers to confirm or disprove, whether this narrative describes the

life of a single individual named George Caines rather than separate persons of the same name. Except for the year of birth discrepancy, all of the information presently available supports the same-person theory, and no information contradicts it.

Assuming a single individual, the more difficult question is determining his competence and character. While there is evidence to support Kent's assessment, that assessment suffers from Kent's questionable objectivity. He detested Caines's politics and probably the man himself, and he wanted his friend Johnson in the reporter role. Moreover, Kent held Caines to a standard that neither Kent himself nor his political allies consistently achieved – as evidenced by the "almost unbelievably egregious mistakes" in Kent's citation of foreign authority[66] and by Hamilton's scandalous adultery.[67]

Nevertheless, there is evidence from critics other than Kent that Caines's editorial work was sometimes deficient. That said, his condensing the arguments of the notoriously verbose Hamilton seems to have been an exercise of good editorial judgment rather than a deficiency. In any event, Caines never claimed to be producing great literature. He was satisfied to be a compiler, transcriber, translator and annotator of the writings of others. As he described his work on his first volume of reports, his "exertions ha[d] been reduced to little more than arranging the materials received, and giving, in a summary manner, the arguments adduced."[68]

Despite his limitations, Caines produced reports of unquestioned value. To be sure, they take their value primarily from the importance of the opinions contained therein and the prestige of the bench that rendered them, rather than from the contribution of the reporter, but Caines deserves credit for his great enterprise in producing them, initially at his own expense and risk.

As to Caines's character, there are many troubling elements in his biography, but the evidence of culpability is inconclusive. We simply do not know the circumstances of his alleged involvement in the Worcester bank fraud. For now, as Caines himself wrote in a different context in his preface to *Lex Mercatoria*, "God forbid that ever [we] should, when ignorant of motive, charge the heart of any one with a crime."[69]

Moreover, we do not know what Kent was alluding to in his reference to Caines's supposed lack of a reputation for "pure Morals." It may – like Theodosia Burr Alston's quip – be a reference to his sexual behavior. In any event, it seems probable that Kent disapproved of Caines's management of Cornelia's estate and his disputes with her children, but on this point it must be noted that Caines seems always to have acted with Cornelia's approval even if not with Kent's.

In sum, George Caines, to a greater or lesser degree than his peers and his many successors in office, probably was a man with some faults – even serious ones – and some redeeming qualities. But nothing can take away his distinction as New York's – and the nation's – first official reporter and progenitor of a system of law reporting that has served our state and nation well for more than two centuries. ■

1. A "Charles Caines" is listed as a merchant of St. Kitts during the period 1776 through 1806 in Ingram, Manuscript Sources for the History of the West Indies, Part C, ¶ SJH 878, at 473 (2000).

2. Register of Admissions to the Honorable Society of the Middle Temple from the Fifteenth Century to the Year 1944, at 389 (1949). A "Clement Caines," possibly an older brother, was admitted to the Middle Temple in 1771. *Id.* at 373. Clement Caines of St. Kitts was a prominent planter, author, politician and opponent of the slave trade. His publications are listed at 89 *National Union Catalog Pre-1956 Imprints* 263 (1970).

3. Middle Temple History, *available at* http://www.middletemple.org.uk/the_inn/History/The_Sixteenth_Century.html (last visited Mar. 30, 2009).

4. Brief in *The King v. Freeman* (Lent Assizes, Worcester 1793), as summarized in *Letters from Governor George Beckwith of Bermuda to George Caines* (United Kingdom National Archives catalogue ref. CO 37/48, folios 133–35 (hereinafter "Beckwith to Caines"), at 133–34 (1799)), read in Council, Oct. 1, 1799.

5. Description of George Caines, also known as George Caney, obtained from Joseph Hardwick(e?), one of his associates (United Kingdom National Archives catalogue ref. C0 37/49, folios 248–49 (1800)).

6. Henry C. Wilkinson, Bermuda from Sail to Steam 188 (1973) ("Wilkinson").

7. A "Charles Caines" of St. Kitts was the uncle of William Wylly (Wylie), of the Bahamas (Buchanan, Genealogy of the Roberdeau Family 39 (1876)). On Wylly, see *Judges of New Brunswick and Their Times* 56 n. 4 (Stockton ed. 1907); 1 Craton & Saunders, *Islanders in the Stream: A History of the Bahamian People* 203–204, 221–24 (1992).

8. Jean Kennedy, Bermuda's Sailors of Fortune 87 (1963) ("Kennedy").

9. Wilkinson, *supra* note 6 at 188; Kennedy, *supra* note 8 at 87.

10. Wilkinson, *supra* note 6 at 188.

11. Beckwith to Caines, at folio 134.

12. Letter from Governor George Beckwith of Bermuda to Duke of Portland, Oct. 5, 1799 (United Kingdom National Archives catalogue ref. CO 37/48, folio 139 (1799)).

13. Beckwith to Caines, at folio 135, read in Council, Oct. 2, 1799.

14. Wilkinson, *supra* note 6 at 189.

15. Memorandum by James Kent in his copy of 1 Caines (New York State Library, Albany. N.Y., Manuscripts and Special Collections, James Kent Law Book Collection ("Kent Collection")).

16. 7 J.C. Hamilton, History of the Republic of the United States of America as Traced in the Writings of Alexander Hamilton and of his Contemporaries 722 (1865).

17. Unidentified newspaper article quoted in Letter from Theodosia Burr Alston to Joseph Alston, dated June 26, 1802, *in* 2 Davis, Memoirs of Aaron Burr 203 (1837).

18. New-York *Evening Post*, June 7, 1802.

19. Memorandum by James Kent in his copy of 1 Caines (Kent Collection). Caines was naturalized on Oct. 13, 1802, listing the United Kingdom as his former nationality.

20. Lex Mercatoria Americana, Preface, at vii.

21. Descendants of Gulian Verplanck (1698–1751), *available at* http://worldroots.com/brigitte/royal/crommelin/gulianverplanckdesc1698.htm (last visited Mar. 30, 2009).

22. Original Family Records (of Johnston of New York and New Jersey) *in* 5 New York Genealogical Biographical Record 173 (1874).

23. Letter dated June 26, 1802, *in* 2 Davis, Memoirs of Aaron Burr 203 (1837).

24. Caines (and Cornelia?) had two daughters, one born in 1801, one year prior to Caines's marriage to Cornelia, and the other born in 1803, nine months

after the marriage. Reichler & Bigler, History of the Moravian Seminary for Young Ladies 378 (1901).

25. Letter from Thomas Jefferson to George Caines (Mar. 21, 1801), *in* Thomas Jefferson Papers (Image 338), available at http://memory.loc.gov/ammem/mtjhtml/mtjhome.html (last visited Mar. 30, 2009).

26. Morton J. Horwitz, Transformation of American Law, 1780–1860 150 (1977); *Observations on the Particular Jurisprudence of New York*, 23 Albany L.J. 386, 387 (1881).

27. J.G. Marvin, Legal Bibliography 169 (1847) (describing the work as a "crude compilation").

28. 3 Johns. Cas. 337 (1804).

29. Speeches at Full Length of Mr. Van Ness, Mr. Caines, the Attorney General, Mr. Harrison, and General Hamilton: in the Great Cause of the People against Harry Croswell, on an Indictment for Libel on Thomas Jefferson, President of the United States (Caines ed. 1804).

30. 1 Law Practice of Alexander Hamilton 793–94 (Goebel ed. 1964).

31. Thomas J. Fleming, *A Scandalous, Malicious, and Seditious Libel*, *in* Stories of Great Crimes & Trials, from American Heritage Magazine 152, 162 (1974).

32. 1804 N.Y. Laws ch. 68.

33. H.W. Howard Knott, *George Caines*, *in* 3 Dictionary of American Biography 404 (1921) ("Knott").

34. Memorandum by James Kent in his copy of 1 Caines, at 107 (Kent Collection).

35. *Seaman v. Drake*, 1 Caines 9, 11 (1803).

36. Memorandum by James Kent in his copy of 1 Caines, at 11 (Kent Collection).

37. Memorandum by James Kent referencing *Vandervoort v. Smith*, 2 Caines 155 (1804) in his copy of 2 Caines (Kent Collection).

38. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 Colum. L. Rev. 547, 578–79 (1993).

39. Knott, *supra*, note 33 at 404. *See also* Marvin, *supra* note 27 at 169 ("The Cases are stated with brevity, with method and perspicuity").

40. Memorandum by James Kent in his copy of 1 Caines (Kent Collection).

41. *Observations on the Particular Jurisprudence of New York*, 23 Albany L.J. 386, 387 (1881).

42. John W. Francis, Old New York; or Reminiscences of the Past Sixty Years 351 (1858).

43. Trial of Thomas O. Selfridge, Counsellor at Law, Before the Hon. Isaac Parker, Esquire: for Killing Charles Austin, on the Public Exchange, in Boston, August 4th, 1806 (Lloyd & Caines ed. 1807).

44. 1 Pierre M. Irving, Life and Letters of Washington Irving 219 (1864).

45. Hall, Am. L.J. 391 (1808); *see also* text accompanying note 53, *infra*.

46. Knott, *supra*, note 33 at 404, 405.

47. *Duffie v. Matthewson*, 2 Am. St. Trials 901 (1814).

48. Donald M. Roper, *The Elite of the New York Bar as Seen from the Bench: James Kent's Necrologies*, 56 N.Y. Hist. Socy. Q. 199, 212–13 (1972) ("Roper, *Necrologies*").

49. As quoted in James Kent Horton: A Study in Conservatism 151 n. 85 (1969). However, "profligate" was a term that Kent frequently invoked against political enemies ("This county [Tioga] . . . now rivals Delaware county in Democracy and profligacy") *id*. at 127–28.

50. 26 Papers of Alexander Hamilton 234, 235 n. 4 (Syrett ed. 1979).

51. Sale to John Jones by Cornelia VerPlanck Caines – 29 July 1803 (Delaware County, N.Y. Deedbooks 1813–1824, Vol. F, at 83–85, available at http://www.dcnyhistory.org/pdfs/deeds-jones.pdf (last visited Mar. 30, 2009)).

52. *Verplank v. Caines*, 1 Johns. Ch. 57 (1814).

53. *Alsop v. Caines*, 10 Johns. 396 (1813), *aff'd sub nom. Caines v. Brisban*, 13 Johns. 9 (1815).

54. Calendar of the Papers of Martin Van Buren 23 (E. West ed. 1910); Kohan, Historic Furnishings Report for "Lindenwald": Martin Van Buren National Historic Site 143 & App. E, F (1986).

55. 1815 N.Y. Laws ch. 126.

56. New York County, Letters of Administration granted to Jane Caines (July 30, 1825).

57. Henry Anstice, History of St. George's Church 485 (1911); 1 J.M Reid, Missions and Missionary Society of the Methodist Episcopal Church 18 (1879).

58. Lex Mercatoria Americana, Preface, at vi.

59. 22 Territorial Papers of the United States 43 n. 40 (Carter ed. 1956); Frederick Diodati-Thompson, *Family of Thompson, of the County of Suffolk, New York*, *in* 22 New York Genealogical and Biographical Record 33, 41–43 (Jan. 1891).

60. Roper, *Necrologies* 213 n. 23 (quoting Kent letter to William Johnson, April 22, 1823, Kent Papers, Library of Congress).

61. Roper, "*Cowen, Esek*," *in* 5 American National Biography 610–11 (Garraty & Carnes ed. 1999).

62. James Kent Horton: A Study in Conservatism 110–12 (1969).

63. *Obituary*, The Recorder (Catskill, N.Y.), July 15, 1825.

64. Transcription by Sylvia Hasenkopf, Greene County Historical Society. *See also* Minnie Cohen, Gravestone Inscriptions of the Catskill Village Cemetery, Catskill, Greene County, New York 90 (1931).

65. Roper, *Necrologies* 212–13.

66. "[H]e sometimes cites works that he has either not consulted or, at least, not on that occasion." Alan Watson, *Chancellor Kent's Use of Foreign Law*, *in* The Reception of Continental Ideas in the Common Law World 1820–1920 45, 62 (Reimann ed. 1993).

67. Ron Chernow, Alexander Hamilton 362–70 (2004).

68. 1 Caines, Preface to the First Edition, at viii (1804). In the second volume, however, he "began a little to dress the opinions of the judges in his own language" (1 Caines, Preface to the Second Edition, at v (1813)).

69. Lex Mercatoria Americana, Preface, at vi.

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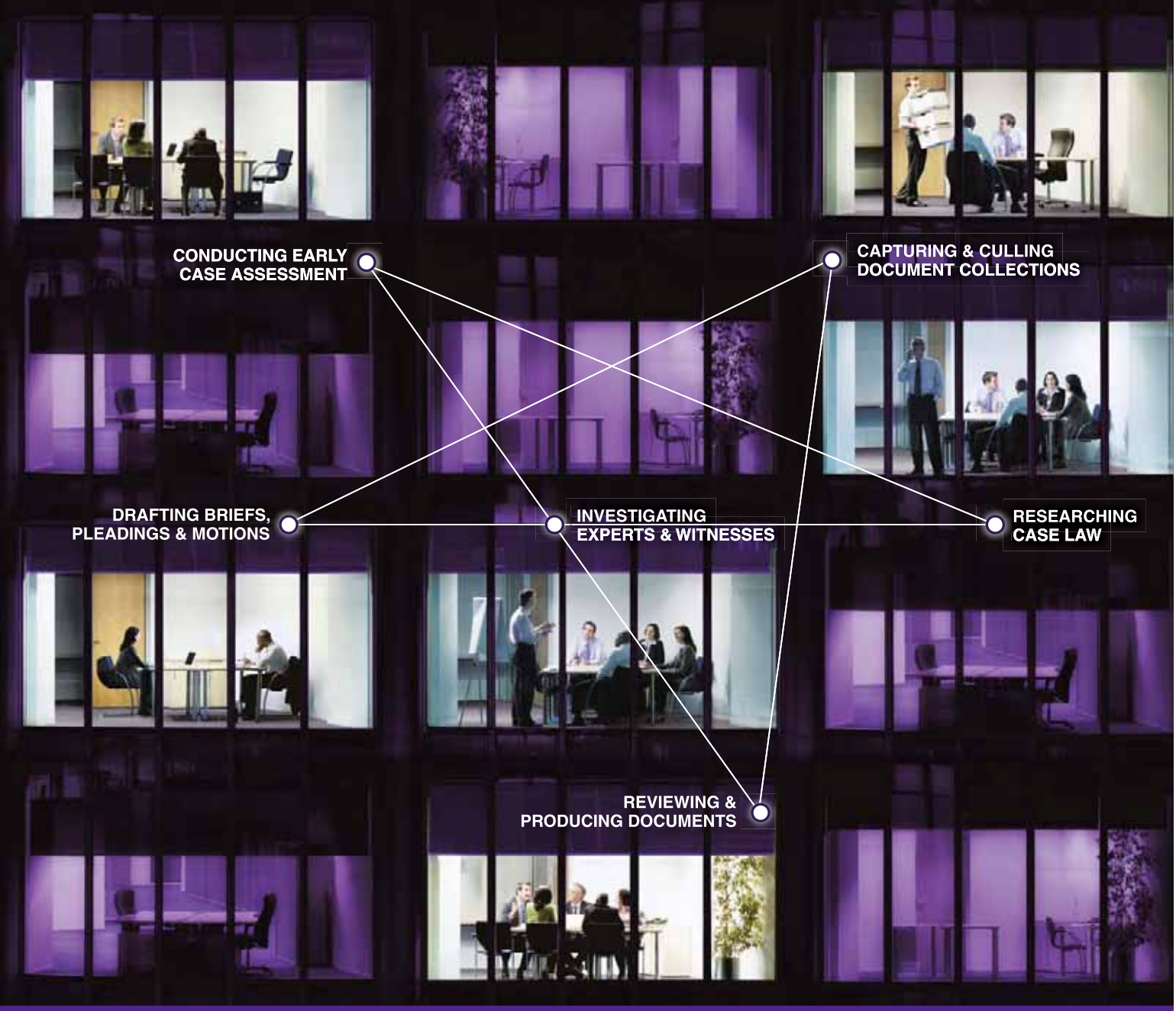

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"Pleeeease Talk to Me"

Introduction

The 2007 decision by the Court of Appeals in *Arons v. Jutkowitz*[1] resolved a split in the appellate divisions and authorized the practice of defense counsel interviewing a plaintiff's treating physicians as a natural component of an attorney's trial preparation. Because of medical privilege and privacy concerns under HIPAA, defense counsel required a HIPAA-compliant authorization from the plaintiff in order for the physician to be permitted to talk to defense counsel.[2] Accordingly, the Court held that a plaintiff may, where appropriate, be compelled to furnish a HIPAA-compliant authorization permitting, but not compelling, a treating physician of the plaintiff to be interviewed by defense counsel.[3]

"Informal Discovery"

After chronicling the facts and history of the three cases before it, the *Arons* Court began its analysis under the heading "Informal Discovery of Nonparty Treating Physicians."[4] In arriving at its holding, the Court framed the issue in terms of a party's right, via "informal discovery," to interview witnesses as part of trial preparation.[5] The Court relied almost exclusively upon its prior opinions: the seminal decision in *Niesig v. Team I*,[6] and the *Niesig*[7] redux, and *Siebert*,[8] decided earlier that year.

Emphasizing the importance of "informal discovery," the Court concluded that non-party treating physicians should not be treated any differently from the former and current employees of a corporate party, whose interviews were at issue in *Niesig* and *Siebert*, subject to the limitations imposed by those two decisions.[9]

The plaintiffs' concern that defense counsel would overreach during interviews and obtain information beyond the scope of the limited waiver of the medical privilege was subservient, in the Court's opinion, to the benefits of "informal discovery."[10] "This is the same 'danger of overreaching' that we rejected explicitly in *Niesig* and implicitly in *Siebert*, finding it to afford no basis for relinquishing the considerable advantages of informal discovery."[11]

The Court relied upon its assumption, set forth in *Niesig*, that interviewing attorneys would "comport themselves ethically":

> Again, we "assume[ ] that attorneys would make their identity and interest known to interviewees and comport themselves ethically." . . . Here, the danger that the questioning might encroach upon privileged matter is surely no greater than was the case in *Siebert* since the subject matter of the interview or discussion – a patient's contested medical condition – will be readily definable and understood by a physician or other health care professional. In sum, an attorney who approaches a nonparty treating physician (or other health care professional) must simply reveal the client's identity and interest, and make clear that any discussion with counsel is entirely voluntary and limited in scope to the particular medical condition at issue in the litigation.[12]

Straub[13]

The danger of overreaching may not be so far-fetched. The requirement that defense counsel present the treating physician with a HIPAA-compliant authorization is absolute, and has been patent both pre- and post-*Arons*. Nonetheless, a recent Third Department decision details how, during trial, a defense attorney conducted *ex parte* interviews with two of the plaintiff's treating physicians without obtaining and furnishing to the physicians the required authorization. A new trial was ordered after a defense verdict was returned:

> During the course of the trial here, defense counsel had ex parte conversations with Anthony Sanito and Lowell Garner, both of whom treated plaintiff, without obtaining plaintiff's authorization under HIPAA. This was in clear violation of the law in effect at the time of trial and plaintiffs' counsel did not discover it until that time.
>
> Through these conversations, defense counsel obtained information that he otherwise did not have, which enabled him to elicit testimony that was not only favorable to his client, but that came as a complete surprise to plaintiffs and which they were unprepared to rebut. . . . Inasmuch as such testimony was clearly prejudicial to plaintiffs' case, we do not find that

> Supreme Court abused its discretion in setting aside the verdict and ordering a new trial in the interest of justice.[14]

Porcelli

One issue not directly addressed in *Arons* was the specific language to be included in the required HIPAA-compliant authorization, and an area of dispute has been what, if any, language plaintiff's counsel may insert into the authorization and/or cover correspondence to alert the treating physician that the authorization was being furnished pursuant to court order, that the interview was solely for the benefit of defendants, and that participation in any interview was voluntary.

In the first appellate pronouncement on the subject, *Porcelli v. Northern Westchester Hospital Center*,[15] the Second Department answered the question of whether such language could be included in the authorization with a resounding "Yes!"[16]

During pretrial proceedings the defendant learned that the infant plaintiff had received treatment from a number of medical providers. The defendant's demands for *Arons* authorizations came "[a]fter jury selection in the matter had been scheduled," and the plaintiff, in opposing the motion that was subsequently brought by the defendant's seeking to compel production of the authorizations, "conceded that [the defendant] was entitled, pursuant to *Arons*, to interview the treating physicians." The *Porcelli* decision is silent as to whether any prior demand, or court order, addressed *Arons* authorizations. The decision does not state whether the plaintiff objected that, while *Arons* authorizations are permitted, a demand made after jury selection had been scheduled, and presumably after the filing of the note of issue, was untimely.

An objection based upon the timing of the demand would have been proper.

The *Arons* Court stated that "the filing of a note of issue denotes the completion of discovery, not the occasion to launch another phase of it. While interviews may still take place post-note of issue, at that juncture in the litigation there is no longer any basis for judicial intervention."[17] Thus, absent "unusual or unanticipated circumstances," HIPAA-compliant authorizations must be demanded by defense counsel, and any necessary motion practice to compel the exchange of authorizations must be made prior to the filing of the note of issue or as part of a motion to vacate the note of issue.[18]

Putting aside the timing of the demand, the Second Department addressed the plaintiff's cross-application that the authorizations state: "The purpose of the requested interview with the physician is solely to assist defense counsel at trial"; and "The physician is not obligated to speak with defense counsel prior to trial. The interview is voluntary."[19] The authorizations the plaintiff proposed to exchange were annexed as exhibits to the plaintiff's papers, and the cautionary language was highlighted in yellow.[20]

The defendant opposed the application:

> Quoting *Arons*, [the defendant's] counsel noted that the onus is on defense counsel to provide the admonitions expressed in the challenged language: "an attorney who approaches a nonparty treating physician (or health care professional) must simply reveal these clients' identity and interest, and make clear that any discussion with counsel is entirely voluntary and limited in scope to the particular medical condition at issue in the litigation." [The defendant's] counsel further averred that inclusion of the challenged language in the authorizations themselves would chill any cooperation and imply that the plaintiff preferred non-cooperation, which he contended was especially true here, since the plaintiff highlighted the disputed language with yellow marker, thereby conveying an "unmistakable message" that the plaintiff preferred non-cooperation.[21]

The trial court directed that the authorizations be exchanged with the challenged language.[22]

The Second Department conducted an extensive review of *Arons* before plunging into the issue of the language contained in the authorizations.

On appeal, the Second Department conducted an extensive review of *Arons* before plunging into the issue of the language contained in the authorizations:

> The Court of Appeals noted that nonparty treating physicians were free to decline to participate in the interview, as the authorizations only ensured compliance with HIPAA and the HIPAA Privacy Rule. The Court of Appeals further noted that the orders in *Aron*s and *Webb* erroneously required defense counsel to turn over to the plaintiffs copies of all written statements and notations from the treating physicians, as well as any recordings, transcripts, interview memoranda, or notes, as such conditions were not required by HIPAA and were inconsistent with *Niesig* and *Siebert*. Accordingly, the Court reversed the orders of the Appellate Division in all three of the cases before it, and granted the defendants' motion to compel the plaintiffs to provide the HIPAA-compliant authorizations "in accordance with this opinion."
>
> Notably, although the Court of Appeals expressed some preference that defense counsel disclose to the treating physician "the cli-

ent's identity and interest, and make clear that any discussion with counsel is entirely voluntary and limited in scope to the particular medical condition at issue in the litigation," it did not explicitly strike down the conditions imposed by the Supreme Court in *Arons*, requiring that the physician

The language was unlikely to have a chilling effect.

be informed by the plaintiff directly on the authorization itself, in boldface type, that "the purpose of the interview is to assist the defendants in defense of a lawsuit and it is not at the request of the plaintiff." Nor did it state an express preference for the condition in *Kish v Graham*, which required the plaintiff's HIPAA-compliant authorization to be accompanied by a cover letter from defense counsel informing the treating physician, inter alia, that "the physician is not obligated to speak with defense counsel prior to trial" and "[t]he purpose of the requested interview with the physician is solely to assist defense counsel at trial." Indeed, in a footnote, the Court of Appeals stated,

> "[w]e take no issue with those portions of the *Arons* and *Kish* orders that required defense counsel to identify themselves and their interest, to limit their inquiries to the condition at issue, and to advise physicians that they need not comply with the request for an interview. We believe that the execution of a valid authorization and the fact that the physician, under HIPAA, is permitted, but not required, to grant the interview will address these concerns in the future."[23]

Emphasizing that the Court of Appeals "neither disturbed nor criticized the Supreme Court's requirement in *Arons* that the admonition, in boldface type, be placed directly on the authorizations themselves,"[24] the Second Department held the language was unlikely to have a chilling effect,[25] and concluded:

> The overall tenor of the decision of the Court of Appeals in *Arons* strongly suggests that it is of primary importance for the treating physician (or other health care professional) to be informed that the purpose of the interview is to assist defense counsel during the litigation and that his or her participation is voluntary. Providing such information best ensures that an individual who agrees to be interviewed will not unwittingly disclose privileged information regarding a medical condition not at issue in the litigation. Which party conveys such message and in what manner is of secondary importance. Accordingly, we hold that the method the plaintiffs employed here – placing the admonition directly on the HIPAA-compliant authorizations and highlighting the language – is consistent with *Arons*, as it clearly serves the primary purpose of conveying the information in a manner that best prevents the accidental disclosure of privileged information. While the information could also have been conveyed to the treating physicians by defense counsel, for example, by orally conveying such information prior to the interview or in a written document appended to the plaintiff's authorization, *Arons* does not require only defense counsel to be the messenger of such information.[26]

Conclusion

Until such time as another appellate division reaches a different conclusion than the Second Department's in *Porcelli*, or until the Court of Appeals weighs in on the issue, plaintiff's counsel may, and undoubtedly should, include the limiting language approved by the Second Department. Defense counsel will, no doubt, face tougher threshold questioning from the plaintiff's treating doctors on the issue of consenting to an interview (hence the plaintive "pleeeease" in the title). Whether *Arons* interviews warrant all of the attention they have sparked (the result in *Straub* notwithstanding) is unclear, and is something only an empirical study can answer.

Having pre-empted the scheduled July/August column, "Not[e] Bene,"[27] in order to address the "ripped from the headlines" issue in *Porcelli*, *Burden of Proof* will return next column to practice issues surrounding the note of issue. Until then, I wish all readers (both of you) a pleasant and relaxing summer. ■

1. 9 N.Y.3d 393, 850 N.Y.S.2d 345 (2007).
2. *Id.*
3. *Id.* at 409.
4. *Id.* at 406.
5. *Id.*
6. 149 A.D.2d 94, 545 N.Y.S.2d 153 (2d Dep't 1989).
7. 76 N.Y.2d 363, 559 N.Y.S.2d 493 (1990).
8. *Muriel Siebert & Co., Inc. v. Intuit Inc.*, 8 N.Y.3d 506, 836 N.Y.S.2d 527 (2007).
9. *Arons*, 9 N.Y.3d at 409 (citing *Dillenbeck v. Hess*, 73 N.Y.2d 278, 287, 539 N.Y.S.2d 707 (1989)).
10. *Id.* at 410.
11. *Id.*
12. *Id.* (quoting *Niesig*, 76 N.Y.2d at 376).
13. *Straub v. Yalamanchili*, 58 A.D.3d 1050, 871 N.Y.S.2d 773 (3d Dep't 2009).
14. *Id.* (citations omitted).
15. 2009 NY Slip Op 04881, 2009 WL 1636078 (2d Dep't June 9, 2009).
16. *Arons*, 9 N.Y.3d at 410.
17. *Id.* at 411.
18. *Id.*
19. *Porcelli*, 2009 WL 1636078 at *2.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at *5–6 (citations omitted).
24. *Id.* at *6.
25. *Id.*
26. *Id.*
27. To be published in September "Burden of Proof."

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Plaintiff Expert Reports: An Insider Revisits *Disney*

By H. Stephen Grace, Jr.

Part I: The Corporate Governance "Case of the Century"

The corporate governance "case of the century," the shareholder derivative litigation in connection with Walt Disney Company's hiring and subsequent termination of Michael Ovitz, has concluded. Both the Chancery Court and Delaware's Supreme Court found in favor of the defendant directors.

The question addressed here is whether an examination of the report of the plaintiffs' compensation expert offers insights that actually support the courts' decisions for the defendants. Do the issues the expert chose to examine and those he chose not to examine speak to the factual issues of interest to the courts? Do the analyses undertaken reflect on the strengths and weaknesses of the plaintiffs' allegations?

The examination of the compensation expert's report undertaken here supports the courts' decision and, in an interesting way, responds to those critics who charge that the Delaware courts failed to see important, highly visible facts, and that their "pro-business" inclinations drove their decision.

This article draws on my involvement with the Disney case – having served as the consultant to the primary directors' and officers' (D&O) carrier and its counsel – which included gaining an understanding of Milberg Weiss's allegations, analyzing certain plaintiffs' expert reports, and examining Walt Disney's business investment decisions to hire and, subsequently, to terminate Michael Ovitz.

The article briefly reviews the Milberg allegations and sets out a summary of the findings of the plaintiffs' compensation expert. Next, Disney's decision to hire and Disney's subsequent decision to terminate Michael Ovitz are examined. These examinations provide a valuable framework for analyzing the plaintiffs' expert's report.

The Milberg Weiss Complaint

Milberg Weiss was counsel to the plaintiffs. The Plaintiffs' Second Amended Consolidated Derivative Complaint allegations included these charges:

- Paragraph 3 – Michael Eisner, the CEO of Disney, recruited Michael Ovitz as a result of their personal friendship.
- Paragraph 3 – The hiring of Ovitz was facilitated by Irwin Russell in his role as chair of the compensation committee.
- Paragraph 4 – The compensation committee "inadequately investigated the proposed terms of the Ovitz

Employment Agreement (OEA)." The compensation committee and the old board paid insufficient attention to the terms of the OEA.
- At the September 1995 meeting, more time was spent on Russell's additional compensation for handling the negotiations than on the terms of the OEA.
- Paragraph 5 – The compensation committee and the old board "indifferently and recklessly, failed to obtain and consider all material information reasonably available to them and evaluate whether the OEA was desirable from a corporate standpoint."

The allegations throughout the complaint are highly critical of the actions of Eisner and the Disney board.

The Plaintiffs' Expert Reports

The compensation expert compared Ovitz's expected compensation to that received by other "non-CEO presidents" and concluded:

- Ovitz's cash and total compensation were far in excess of that received in 1995 by any non-CEO president in the S&P 500;
- Ovitz's contract was unusually generous in virtually all regards;
- Ovitz's severance arrangements were unusually generous in virtually all regards;
- Ovitz's severance arrangements provided strong incentives to leave Disney early in his term, so long as his departure could be treated as a non-fault termination; and
- The total cost of the non-fault termination to Disney was approximately $130 million.

The Hiring and Termination of Michael Ovitz: An Insider's View

This overview of the hiring and the subsequent termination of Michael Ovitz draws on Chancellor William B. Chandler's Opinion, trial-related information, other public documents and my work on this matter. Chandler's Opinion and the other documents address the well-understood risks associated with business investment decisions, including the hiring of senior executives, the factors at work that may have influenced Disney's decision to seek the services of Michael Ovitz, the hiring process, the terms of the hiring, the performance of Ovitz, the termination process, and the terms of the termination.[1]

Business investment decisions involve risk. Mergers or acquisitions, systems development, sports and entertainment undertakings, or the hiring or termination of senior executives all involve some degree of risk. Large front-end, sign-on bonuses, stock, restricted stock and stock options, periodic bonuses, lucrative back-end payments, and other provisions are often components of the contracts entered into with senior executives. Both hiring a new executive and promoting a proven executive are fraught with risk.

For an example, one has only to examine the details of the hiring of Gary Wendt to lead Conseco, Inc., where Wendt was paid a sign-on bonus of $45 million and received various other forms of compensation. Conseco and Wendt separated only a few years after Wendt took over the leadership of Conseco.

Even when a formal contract is not in place, a company may elect to make a significant payment to a departing executive. The payout that Doug Ivester, CEO of Coca-Cola, received upon his severance from the company, is one example. Coca-Cola's board determined that Ivester needed to step aside, and Ivester did not actually have an employment agreement that spoke to such an occurrence. Despite that, the severance he received was estimated to be worth $166 million.[2] (Both Warren Buffet and Herb Allen were on the Coke board at that time, and Allen chaired the compensation committee.)

The Decision to Hire Michael Ovitz

The growth in the Disney share price from the time that Eisner and Frank Wells joined Disney in 1984 until the mid-1990s was outstanding. Ten thousand dollars invested in Disney stock in September 1984 was worth approximately $160,000 by July 1994, while a $10,000 investment in the S&P Index was worth $56,000. In a 1995 article, John Huey said, "Disney has consistently reported annual increases in profits and return on equity of more than 20%, and Wall Street has rewarded it by driving its market value up from less than $2 billion in 1984 to more than $28 billion today – bigger than Ford, for example."[3]

In 1994, Disney was hit with multiple significant personnel issues. Frank Wells's death in April 1994 was followed four months later by Eisner's quadruple bypass surgery. Jeff Katzenberg, who headed Walt Disney Studios, departed. There had been three capable executives; now there was only one, and he was recovering from major surgery.

Disney's agreement to acquire CapCities, which would add 60% to Disney's size, was a further complication. Disney's decision to seek the services of Michael Ovitz, who was widely recognized as the most powerful player in the content area, was sound.

Ovitz was "in play." Edgar Bronfman, chairman of Seagram's – which had acquired 80% of MCA from Matsushita – was estimated by *The Economist* to have placed an employment package of between $250 million and $300 million on the table to persuade Ovitz to become the entertainment group's new chairman.[4] The MCA offer recognized Ovitz's capabilities, as well as his estimated income of $20 to $25 million earned annually as CEO of Creative Artists Agency. When Ovitz declined the MCA offer, *The Economist* speculated that "it is only a matter of time before he (Ovitz) is offered yet another, more tempting media giant to run – without a young

proprietor to second-guess him all the time. One would be Time Warner . . . another could be Viacom."[5]

The Hiring Process

The hiring process was well structured and incorporated Disney's "pay-for-performance" culture. The employment agreements of Eisner, Wells, Katzenberg, and others reflected a careful adherence to this culture. There were no upfront signing bonuses, awards of stock, restricted stock or guaranteed annual bonuses. Base salary compensation was reasonable; one stock option was awarded per multi-year employment contract; and annual bonuses depended upon the achievement of defined performance criteria.

Disney's pay-for-performance culture was recognized as creative, forward-thinking, and beneficial to shareholders. Corporate governance observer Nell Minow, in a January 7, 2002, *Fortune* article on Eisner, said that prior to 1996 she "applauded Eisner not just for reviving Disney, but for taking a modest base salary of $750,000" in what she called a "truly credible pay plan based on escalated options."[6]

Initial discussions with Ovitz involved Irwin Russell, Disney's compensation committee chair; Eisner; and later on, Raymond Watson, former Disney chairman and a member of the compensation committee. Having the chair of the compensation committee and another long-term board member head the negotiations ensured both compensation committee and board awareness of these negotiations.

A highly credible consultant, Graef Crystal, was quickly involved in assisting Russell and Watson. The negotiations were lengthy and contentious. Ovitz's contract terms changed during the course of these negotiations. The evidence indicates that the changes in the compensation terms favored Disney.

The Ovitz deal was arm's length. Ovitz's advisors were capable and independent. The individuals leading the negotiations for Disney were "informed buyers of talent" who understood the parameters within which the Ovitz contract had to be structured.

The Terms of Hiring

Both the investment community and the press responded in a strong, positive manner, pointing out the enormous synergies potentially achievable. While Eisner and Ovitz were friends, they had not come to terms on any business arrangement over the many years during which both stood as powerhouses in the industry.

Ovitz's compensation conformed to Disney's compensation structure. Ovitz received no front-end bonus, no stock awards, and no restricted stock awards. He received a stock-option grant basically equivalent to that held by Frank Wells, his COO predecessor. The non-fault termination provision was necessary to induce Ovitz to join Disney. Without this provision, Ovitz almost certainly would have refused Disney's offer, and Disney might have had to entice him by offering a sizeable, more costly front-end bonus.

Non-monetary considerations appear to have been a part of Disney's negotiations with Ovitz. At trial, Ovitz said he found interesting the opportunity to participate on the "buy side" after having been on the "sell side" for many years.

In comparison with other high-profile, non-Disney executives, Ovitz's compensation could not be considered excessive.

And Ovitz was strongly motivated to succeed. His employment agreement, with no signing bonus or similar guarantees, was mostly option-based, and thus created an incentive for him to succeed. Even though there was the cash-termination benefit and the fact that his options would vest in the case of a non-fault termination, in leaving CAA and declining the MCA offer, Ovitz left cash flows far larger than the Disney cash-termination benefit. Also, there was no assurance the vested options would have any value.

In comparison with other high-profile, non-Disney executives, Ovitz's compensation could not be considered excessive. Proxy data for Michael Armstrong, CEO of AT&T; Carly Fiorina, CEO of Hewlett Packard; Gary Wendt, CEO of Conseco; Robert Nardelli, CEO of Home Depot; and Larry Johnston, CEO of Albertson's; demonstrate that Ovitz's termination payments were not out of line. Assuming Ovitz and each of these executives were terminated within 15 months after hire and their respective share prices increased 25%, Michael Ovitz finished fourth in terms of total compensation received over the 15-month period.

The Performance of Ovitz

In many respects, the story of Ovitz at Disney is the story of a clash of operating styles. Much has been written about Ovitz's operating style; it simply did not fit with Disney's culture. Certainly, Ovitz was highly motivated to succeed. He had the opportunity to exercise potentially significant influence at Disney, and personal failure was

not, in his view, an option. Once the organizational problems at Disney were set out for Ovitz, he only doubled his resolve to be successful in his role, but the culture clash was too great.

The Termination Process

A broad-based awareness developed that Ovitz did not fit well within the Disney operating structure. Ovitz appears to have been largely unaware of these fractures and continued to be committed to succeeding even after Eisner discussed with him the problems that were developing. His termination was apparently based on business considerations and contract driven. Disney made an effort to determine whether to effect a "for cause" termination and concluded that its only business option was to proceed along the non-fault termination lines set out in Ovitz's employment contract.

Eisner headed the separation negotiations. Such an arrangement is not unusual. Given that Ovitz was on the board, it was not possible to hold any discussions regarding his performance or his pending termination at a board meeting.

The Terms of the Termination

The monetary terms of Ovitz's no-fault termination were set out in his employment contract. Ovitz received a cash termination payment of $38.9 million. His three million shares vested, and at the time of the vesting, Disney's price had risen to $71 a share (the strike price was $57 a share). At the $71 share price, Ovitz's three million shares had a value of $42 million (three million shares times $14 per share). This total is consistent with Ovitz's statement to the press regarding his termination compensation, and contrasts with reported allegations that the termination compensation paid was $140 million.[7]

Part II: Compensation Expert Report: An Insider's View

Professor Kevin J. Murphy was the plaintiffs' compensation expert. Chandler states that

> Professor Murphy . . . presented expert testimony for plaintiffs on the issue of damages together with an economic and reasonableness evaluation of Ovitz's compensation package. Professor Murphy concluded that Ovitz's compensation package was unreasonably excessive and orders of magnitude larger than the compensation awarded to executives with arguably equivalent responsibilities. In determining the reasonableness of Ovitz's compensation, Professor Murphy chose not to consider Ovitz's past income at CAA and the effect that income would have on the remuneration he would expect from any future employment. As would be expected, Professor Murphy concluded that the most reasonable and appropriate assumptions

> are those that would maximize the value of the OEA (Ovitz Employment Agreement) and corresponding cost of the NFT (Non-Fault Termination). Perhaps Professor Murphy's most pointed criticism of the OEA is that the Company was unable to reduce its potential financial exposure because the OEA did not contain any provisions for mitigation or non-compete restrictions, but that criticism is not supported by the language of the OEA.[8]

The court's analysis of Murphy's report begins with Section I, "Introduction and Executive Summary."[9] Interestingly, Murphy does not seem to have considered two basic factors to be addressed when attempting to persuade an executive to join a firm: (1) the need to make the executive "whole" relative to what he or she is currently earning; and (2) the need to create additional incentive, thereby providing a basis for the executive to leave his or her existing situation, or forgo other alternatives, and join this particular firm.

Also notable was that Murphy did not examine how Michael Ovitz's compensation fit into the Walt Disney executive compensation structure – that is, how Ovitz's package would compare to those of Michael Eisner and other senior executives. Murphy gave no reason for this decision.

Murphy does, however, state in his report that he reviewed materials that both addressed and made clear the importance of these issues. For example, he reviewed the August 12, 1995, letter from Graef Crystal to Irwin Russell, which set out Crystal's thinking, as a leading expert on compensation, regarding the factors to be addressed in hiring and fairly compensating Michael Ovitz.[10] Among these is the compatibility of Ovitz's compensation with that of Eisner and other senior executives.

Whatever the reason, Murphy chose simply to "compare Mr. Ovitz's expected compensation to that received by other 'non-CEO Presidents'"[11] and did not consider the well-known facts that Ovitz's current position involved compensation estimated at $25 million a year, that he had enormous power, and that he had literally unlimited perks. Further, Murphy overlooked MCA's offer to Ovitz – a $250 million package.

The New York Yankees' acquisition of Alex Rodriguez several years back provides an interesting analogy. Rodriguez played shortstop for the Texas Rangers, was the American League's Most Valuable Player, and was understood to have a salary contract with the Rangers approximating $250 million. The Yankees sought the services of Rodriguez but already had a shortstop and fine team leader, Derek Jeter, in place. They inquired as to whether Rodriguez would be willing to play third base. As such, Rodriguez was being asked to take a new position, where his skills, at least in the field, were unproven.

If the Yankees followed the approach that Murphy appears to advocate in his report, their offer to Rodriguez should have been based on an average of the salaries of Major League third basemen. After all, Rodriguez was moving into a new position where his skills were unproven, both on the field as a third baseman and off in terms of being able to fit into the "Yankee" culture. It would not be difficult to imagine Rodriguez's response to such an offer. Nor is it difficult to imagine Michael Ovitz's response to a proposal under which he would move from his current position and spurn other offers (such as that from MCA) for compensation equivalent to the average of S&P 500 company presidents.

The New York Yankees' acquisition of Alex Rodriguez several years back provides an interesting analogy.

At a roundtable on corporate governance and executive compensation, Leo Strine, Vice Chancellor of the Delaware Chancery Court, had this to say about senior management compensation: "In the CEO marketplace, here is what you ought to ask a CEO that wants a big raise: Did your phone ring? Is there someone that wants you that we have not heard about? Those are the questions that real business people ask their other employees when they set compensation."[12] Strine emphasized the validity of allowing market forces to set the compensation of senior management. Murphy, apparently, chose to overlook them.

The data Murphy presents in his effort to provide a comparison between Ovitz and certain members of Disney senior management is inaccurate. Murphy shows Frank Wells (the former president of Walt Disney) as only receiving a salary of less than $1 million in 1994 and as having received no stock options in 1994.[13] In fact, Frank Wells's stock options (three million shares) received under his 1989 to 1994 contract, vested in 1994, and were worth $64 million. (Disney's policy was to give a single stock option grant at the beginning of the employment contract period.) Murphy does not mention Wells's three million shares nor that this grant was for the five-year period.

Murphy continues this tack in discussing Ovitz's stock option grant, comparing Ovitz's grant for his five-year contract period with the amount received in one year by the other CEOs, many of whom were receiving annual stock option awards.[14] Murphy refers to Ovitz receiving a grant of five million shares, when two million of those shares were defined separately and would not actually be granted until Ovitz completed five years of service at Disney.[15] These two million shares did not vest in the case

of a non-fault termination during the five-year contract period.

Also, Murphy does not consider the absence of front-end incentives from Disney to Ovitz as part of his becoming employed by Disney or the potential costs associated with structuring the separation with Ovitz as, to use Murphy's words, a "resignation" or a "termination for good cause."[16] Ovitz's power and broad-based relationships with producers, directors and actors raise serious questions about the wisdom of Disney terminating its relationship with Ovitz in a confrontational manner. Disney's role as a leading content provider mandated that it evaluate carefully the quality of the relationship to be maintained with Ovitz going forward.

Murphy does not factor in the possibilities of potentially extended and costly litigation should Ovitz's termination have precipitated a confrontation. Indeed, Jeff Katzenberg's separation from Disney in late 1994 provided an important example of what can arise in the case of an unfriendly separation. Disney's litigation with Katzenberg was extensive and expensive, the settlement was large, and an ongoing bitterness continues to exist. Katzenberg's loss represented a loss of his creative talent to Disney. The alienation of Michael Ovitz could potentially have cost Disney its working relationships with numerous directors and actors.

Murphy concludes that "these arrangements provided strong incentives [for Ovitz] to leave Disney early in his term, so long as his departure could be treated as a non-fault termination."[17] Yet Murphy did not take into account the context of Michael Ovitz's decision to leave CAA and join Disney. Ovitz was highly motivated to succeed at Disney for non-monetary reasons, and his subsequent activities focused on succeeding in a different place (than CAA). As Ovitz was separating from Disney, he entered into discussions with Sony. Those discussions did not progress, and a short time later Ovitz bought Livant, a theatrical production group in Toronto, and committed significant resources to that endeavor. Subsequently, Ovitz formed a new company, Artist Management Group, in 1998.

Graef Crystal, in his August 12, 1995, letter to Irwin Russell, discusses at length the unique attributes of both Michael Eisner and Michael Ovitz, and their demonstrated records of success.[18] As Crystal states, they are unique among a small group of business leaders in their ability to command high levels of compensation. Murphy reviewed the Crystal letter; yet, he did not challenge Crystal's assessment.

Ovitz's activities are characteristic of success-oriented business leaders – success for its own sake is important to them, and they want to remain in the game. Ovitz had a very high level of monetary compensation at CAA. What Disney offered was the opportunity to direct an "empire" as opposed to the "kingdom" he headed at CAA. Ovitz could only achieve what Disney had to offer by succeeding at Disney. As an economist, Murphy understands the importance of both monetary and non-monetary compensation.

Conclusion

The examination of the report of the plaintiffs' compensation expert revealed that (1) Murphy elected to omit discussing certain evidence he had reviewed; (2) Murphy elected to omit discussing certain issues of customary practice when hiring senior executives; and (3) Murphy developed questionable comparisons of Ovitz with other executives. The issues overlooked, as well as the analyses undertaken, appear to reflect weaknesses in the plaintiffs' allegations and, interestingly, to confirm the logic of the Delaware courts' findings. ■

1. *See* H. Stephen Grace, Jr., Ph.D., *An Insider Revisits the 'Disney Case,'* Directors Monthly, Vol. 33, No. 8, Aug. 2008.
2. Suzanne Koudsi, *Why CEOs Are Paid So Much to Beat It*, Fortune, May 29, 2000.
3. John Huey, *Eisner Explains Everything*, Fortune, Apr. 17, 1995.
4. *No smoke. (Michael Ovitz will not move to MCA)*, Economist, June 10, 1995.
5. *Id.*
6. Marc Gunther, *Has Eisner Lost the Disney Magic? The company has been walloped by terror and recession. But its problems start at the top,* Fortune, Jan. 7, 2002.
7. David Pauly, *$90 million just to quit Disney?*, Chicago Sun-Times, Dec. 16, 1996.
8. *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 742–43 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. Sup. Ct. 2006).
9. *Id.* at 743 (referencing Prof. Murphy Expert Report).
10. *Id.* at 705 (referencing Letter from Crystal to Russell of 08/12/95).
11. *Id.* at 743 (referencing Prof. Murphy Expert Report).
12. *Roundtable on Corporate Governance and Executive Pay: Problems and Solutions*, J. Applied Corp. Fin., Winter 2004, Vol. 16, No. 1, at 55.
13. *Walt Disney*, 907 A.2d at 743 (referencing Prof. Murphy Expert Report).
14. *Id.* (referencing Prof. Murphy Expert Report).
15. *Id.* (referencing Prof. Murphy Expert Report).
16. *Id.* (referencing Prof. Murphy Expert Report).
17. *Id.* (referencing Prof. Murphy Expert Report).
18. *Id.* at 705 (referencing letter from Crystal to Russell of 08/12/95).

"And this was Mr. Barzinsky after he messed with us."

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Arbitrating Commercial Issues: Do You Really Know the Out-of-Pocket Costs?

By Ronald J. Offenkrantz

The concept that arbitration is a less expensive, more expeditious, substantial equivalent of litigation in a courtroom has been challenged in scholarly writings, in reports of 50- (and more) day arbitration hearings and multimillion-dollar awards, and in commentary by arbitration practitioners.[1] The concept that arbitration also offers the singular benefit of fact finders with greater expertise than that of the judiciary, and thus possibly worth an additional cost, has been uncritically accepted without any basic understanding of how high arbitrator compensation might be. Whereas filing fees to initiate a claim in an arbitration and fees for ongoing administrative services are known, or easily ascertained, the ultimate fees to be paid to the arbitrators are not.[2]

The judicial system and its judges are, of course, paid by the state, local or federal government. Arbitrators, at least in commercial matters, bill on an hourly basis and not just for the hour that each attends an evidentiary arbitration hearing.[3] Long gone is the era of an arbitrator, highly trained in a technical field, who will waive his entitlement to a fee as a matter of "public service."[4]

It is the thesis of the author that the actual cost of arbitrating is an overlooked but critical component in the decision to arbitrate. Arbitration of a commercial case, in the present environment, could well add hundreds of thousands of dollars in arbitrator fees alone, an expenditure that most clients, particularly in this economic climate, would find unacceptable.

Arbitral and administration fees in a commercial arbitration can exceed the amount in dispute – a fact that has gone virtually unnoticed.[5] To illustrate the point: a commercial claimant was recently driven to seek bankruptcy protection in the U.S. Bankruptcy Court for the Central District of California just to avoid an anticipated $50,000 arbitrator advance retainer, requested from the AAA for its share of fees for a three-person arbitral panel (under rules applicable to disputes exceeding $1 million), over the claimant's objection that all it could afford to pay was for the one arbitrator it thought appropriate to its claim.[6] A Bankruptcy Court Order, just reversed on appeal with directions to hold an evidentiary hearing to establish the difference between costs of arbitration and litigation and to determine the ability of the bankrupt to pay, had shifted the burden to the non-bankrupt to pay *five-sixths* of the arbitrators' fees as the condition for the lifting of the automatic stay. Departing from the terms of the arbitration agreement had been justified by the bankrupt on the grounds that

"the Estate lacks the funds on hand to pay the arbitrators' fees."[7]

When a commercial agreement containing an arbitration clause is negotiated, often it is by non-litigators unfamiliar with the arbitration process.[8] Parties who agree to arbitrate before a panel of arbitrators of the AAA, JAMS Resolution Centers (JAMS), The American Health Lawyers Association (AHLA), the International Chamber of Commerce (ICC) or a myriad of others, are unlikely to contemplate that the out-of-pocket outlay can, within a short period of time, easily reach six figures and be subject to reallocation to impose payment of the entire fee on the losing party. The fact is, many of the corporate attorneys drafting an arbitration provision are unaware of the nuances of the rules of the entities chosen by them to administer the arbitration.

While members of preeminent law firms have recently opined that "this is the time to get rid of the billable hour,"[9] that is precisely how an arbitrator today expects to be paid, usually in advance and promptly, with one major caveat: one does not lightly seek to renegotiate the fee with the arbitrators.

The issue of paying one's own arbitration counsel, just as in any litigation, is taken for granted. That fee may be dependent upon a number of matters, including the relationship between litigant and counsel, but it is subject to court oversight.

Currently, arbitrators are unregulated (although licensing has been suggested).[10] Arbitrator fees and how they are set and/or collected will depend on the agreement between the contract parties and the rules of the administering organization. The AAA Commercial Rules, for example, offer more hands-on administration and require that the estimated hourly arbitrator fees be paid to it for remittal to the arbitrators, while the American Health Lawyers Association, which is more similar to an *ad hoc* arbitration, offers virtually no administration after the arbitrators are sworn and permits the arbitrators to bill their hourly charges in non-detailed billings and collect from the litigants directly. Contrast that with the ICC Rules where arbitrator fees are determined as a percentage of the amount of the claim and governed by a minimum/maximum percentage, dependent on complexity, as determined by the ICC.[11]

Would counsel or a client anticipate, before agreeing to arbitrate or filing an arbitration demand, that arbitral fees of three arbitrators for a shareholders' dispute calling for seven days of hearings under the AAA Rules would total $80,000?[12] What of a joint venture/licensing dispute resulting in arbitrators' fees of $468,000,[13] or a trademark license dispute requiring seven days of hearings totaling $124,000 in arbitrator fees, or an employer/employee dispute in which the three arbitrators awarded fees, sanctions and costs of over $300,000?[14] And what of the disputes where arbitrator fees alone can total $500,000 or more?

One does not lightly seek to renegotiate the fee with the arbitrators.

Because the parties in most arbitrations are required to pay an estimated amount in advance under AAA, JAMS, AHLA and other rules and to replenish that amount during the course of the arbitration proceedings when the advance runs low, concern has been voiced as to both the fairness of the sum requested, the need for the services provided, and the avenues available to seek a reduction if a reduction is called for.

In the context of international arbitrations, one preeminent law professor and author observed in 2007:

> The issue of arbitrator fees has become a problematic aspect of the business of transborder arbitration. It is generally known that the going rate for ICC and other international arbitrators is (U.S.) $600/hour or (U.S.) $5,000/day. * * * The enormous fees that can be commanded by the international arbitrators place further pressure on the process. Arbitrators, unregulated except by contract, develop a monetary self-interest that can conflict with both the ethical and practical operation of the process. The exorbitant fees also could eventually deter commercial parties from having recourse to arbitration.[15]

Also in the international context, but relevant to domestic arbitration as well, is the fact that recommendations were made in 2005 by the UNCITRAL Working Group specifically to prevent direct contact between the arbitrator and a party regarding payment of anticipated or outstanding arbitrator fees.[16]

In a domestic arbitration, a slightly different concern has been expressed in connection with parties who may have the funds to pay arbitrators' fees but refuse to do so. In a 2005 article published in the *Dispute Resolution Journal*,[17] the authors observed that

> [a]n important arbitration issue that has not received much attention in ADR or legal publications is that of the party who fails to advance required arbitration fees and arbitrator compensation.
>
> * * *
>
> What happens when a party to arbitration fails to pay its shares of a required deposit covering arbitrator compensation and arbitration fees? Generally, the other party is faced with the choice of:
>
> (i) paying the nonpaying party's share of the deposit and then later seeking to be reimbursed the sums advanced as part of the final award; or
>
> (ii) filing an action in court to obtain an order requiring the nonpaying party to advance the required deposit; or
>
> (iii) discontinuing the arbitration and filing suit in court, claiming that the nonpaying party has waived the right to arbitrate.

The problem there stated, is that

> [t]hese alternatives may not be available in some cases and, in some jurisdictions, courts are reviewing the alternatives. Where they are available, each alternative adds cost and delay to the resolution of the dispute and deprives the party who commenced arbitration of the main benefits of the process – that is, a faster, better, cheaper solution to resolving disputes. The ability of a party to stymie arbitration through nonpayment has the potential to discourage the use of arbitration to resolve commercial disputes, thus undermining the strong policy of encouraging arbitration that the courts have found to exist in the Federal Arbitration Act (FAA) and state arbitration laws. Moreover, the options a party can use to resolve the nonpayment problem are not particularly advantageous,[18]

ignoring the now-evident fact that it may well be the claimant who cannot pay its own fee or fund additional retainers as the arbitration progresses.

Particularly in the complex commercial case – domestic or international – where litigation positions are taken based on "principled" or simply "take no prisoners" strategies by one or more of the parties, arbitral costs for the actual hearing, preliminary matters relating to discovery, study and post-hearing consideration, and the drafting of an award quickly explode. Another factor is that proving or defending against claims in complex commercial matters in arbitration can be harder because of the difficulty of compelling attendance of witnesses across state lines, the severe limitations on prehearing discovery and the lack of judicial review.

In *Estate of Liebeskind*, arbitrator fees and administrative costs approached the high six figures in a shareholder dispute involving mandatory buyback of stock issues on death, rights to insurance proceeds and matters related to corporate governance in an arbitration administered under the Rules of the AHLA. In that arbitration, which included, as respondents, the estates of two deceased shareholders, the Surrogate's Court, Nassau County, New York, was unreceptive to the argument advanced in support of a stay of arbitration: that the costs were prohibitive; that matters involving distribution of estates were subject to the jurisdiction of the Surrogate's Court; and that arbitrator fees charged against the estates were based upon total arbitrator time, even though most of the contentious proceedings did not involve the estates at all.[19]

Parties to an arbitration are reasonably free to chart their own course and contain expenses. They do not have to seek numerous rulings from the arbitrators regarding non-substantive matters; they do not have to seek preliminary relief or demand mini hearings to secure the status quo – which they might seek in court without incurring arbitral fees as part of a court's ancillary jurisdiction in arbitral matters[20] – and they can resist the temptation to seek arbitrator involvement and telephone conferences on collateral matters when to do so is not cost-effective, but certain adversarial conduct cannot be controlled.

The problem faced by a commercial litigant in an arbitration where costs begin to escalate beyond the means of a party to pay is seen in an Appellate Division, First Department decision, affirming an order vacating an arbitration award. In that case, a party to a commercial arbitration administered by the AAA was called upon to advance its 50% share of additional arbitrator fees of $90,000, a precondition of going forward. Over the objections of the party experiencing cash flow issues, the AAA had forwarded the correspondence claiming inability to pay directly to the arbitrators who thereupon *precluded* the party from participating in the last two days of hearings and decided the dispute based on the evidence adduced by the party paying the fees.[21]

In many complex commercial cases, arbitration will decidedly be more expensive than litigation and the results problematic.

The award against the nonpaying party was vacated in the "light of the appearance of impropriety created by the involvement of the arbitrators in the parties' dispute over prepayment of arbitration fees, a matter in which the arbitrators had a direct financial interest." But what of the party who, notwithstanding monetary constraints, pays the amount even if it is believed to be exorbitant because the failure to pay may be thought to prejudice its position?

In many complex commercial cases, arbitration will decidedly be more expensive than litigation and the results problematic.[22] It therefore behooves a party thinking about arbitration to consider the benefits, consider the downside, and, to avoid the shock of arbitrator fees disproportionate to the claim, consider the ultimate price to be paid. Whether at the lower end of the range of fees for three arbitrators (which provoked one claimant to seek bankruptcy protection because it could not pay the $50,000 required of it by the AAA as its share of a

$100,000 advance deposit), or the $600,000 invoiced by the arbitrators in the just-confirmed AHLA-administered shareholder arbitration, or the JAMS advance fee demand of $48,457 for a single arbitrator,[23] arbitrator fees, which the losing party may have to pay in their entirety, will often be substantially higher than counsel or the client ever anticipated. ■

1. *See* Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 Tul. L. Rev. 1945, 1959–60 (1996); Jens Damman & Henry Hansmann, *Globalizing Commercial Litigation*, 94 Cornell L. Rev. 1, 31 (2008) (identifying numerous inadequacies in commercial arbitration and the advantages of the courthouse); Tamara Loomis, *Big Awards Counter Perception of Arbitration*, N.Y.L.J., Aug. 22, 2002, p. 1, col. 3; *Yusuf Ahmed Alghanim & Sons Inc. v. Toys "R" Us, Inc.*, 126 F.3d 15 (2d Cir. 1997) ($46 million award); *Sierra Rutile Ltd. v. Bomar Res., Inc.*, 90 Civ. 0835, 1992 WL 402961 (S.D.N.Y. Aug. 20, 1992) ($56 million RICO award); Ronald J. Offenkrantz, *Negotiating and Drafting the Agreement to Arbitrate in 2003*: *Insuring Against a Failure of Professional Responsibility*, 8 Harv. Negot. L. Rev. 271 (Spring 2003); *Cost of Arbitration: Executive Summary* (May 1, 2002) (Report by Public Citizen), *available at* www.lawmemo.com/arb/res/cost.htm ("[a]rbitration costs will probably always be higher than court costs"); *Arbitration Aggravation*, Business Week, Apr. 30, 2007 at 38 ("While taxpayers pick up judicial salaries, arbitrators draw their big paychecks from the parties who appear before them.").

2. The filing fee in a U.S. District Court in a multimillion-dollar litigation is $120. The filing fee for a $1 million claimant under the AAA rules requires a payment of $8,000 plus an additional $3,250 "Service Fee" before the first hearing. The fees are higher if the claim is greater and apply both to the claimant and counterclaimant.

3. *See* Francis Gurry, *Fees and Costs, Conference on Rules for Institutional Arbitration and Mediation*, World Intellectual Property Organization (January 20, 1995), *available at* www.wipo.int/amc/en/events/conferences/1995/bond.html (comparing various institutional rules, including WIPO, ICC, AAA and others with regard to arbitrator compensation and administrative fees). The AAA, ICC and AHLA rules are available at www.adr.org, www.iccwbo.org, and www.healthlawyers.org/resources/ADR, respectively.

4. *N.V. Maatschappij Voor Industriele Waarden v. A.O. Smith Corp.*, 590 F.2d 415 (2d Cir. 1978) (patent counsel of a Fortune 500 Company acting as neutral arbitrator waived his fee in lengthy patent and knowhow dispute since he and his employer regarded service as an arbitrator as serving the public interest).

5. It has not gone unnoticed in the context of contracts of adhesion, consumer agreements, employer/employee claims and the like in which cost splitting, filing fee and other obstacles to arbitration have been invalidated. *See, e.g.*, *In re American Express Merchants' Litig.*, 554 F.3d 300 (2d Cir. 2009) (invalidating class action waiver in arbitration clause as an impediment to ability to arbitrate); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buff. L. Rev. 185 (Winter 2004).

6. *In re Arundotech LLC*, BK Case SV 08-11458-GM U.S. B. Ct. C.D. Calif. (order dated 9/23/08 lifting stay filed Oct. 14, 2008); *see* Sam Koda, *Arbitration Law, The Effect of a Bankruptcy Filing*, N.Y.L.J., Sept. 4, 1997, p. 3, col. 1.

7. Answering Brief of Appellee, *Arundotech*, at pp. 8–9, U.S. Bankruptcy Appellate Panel for the Ninth Circuit, BAP No. CC-08-1282. See unpublished Decision and Order filed May 4, 2009, in which the Bankruptcy Appellate Panel held in part that "if by proceeding with three arbitrators debtor's costs would significantly exceed those debtor would incur by litigating *** in the bankruptcy court that is a justifiable rationale for the court's decision to impose the [5/6] condition on the arbitration proceeding," giving the Bankruptcy Court discretion to direct that the dispute be litigated "via the adversary proceeding." *Id.* at 13, 14. *Available at* www.ce9.uscourts.gov/bap (click on "Memoranda" and then "Arundotech").

8. *See* Stephen K. Huber, *Arbitration and Contract: What Are the Law Schools Teaching?*, The Berkeley Elec. Press (2003), *available at* www.law.bepress.com/expresso/eps/31; Stephen K. Huber, *Symposium: The Role of Arbitrator: Conflicts of Interest*, 28 Fordham Urb. L.J. 915, 919 (2001).

9. Jonathan D. Glater, *Billable Hours Giving Ground at Law Firms*, N.Y. Times, Jan. 29, 2009 at 1.

10. Cameron L. Sabin, Note *The Adjudicatory Boat Without a Keel; Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 Iowa L. Rev. 1337 (2002).

11. *See* Joyce J. George, *The Advantages of Administered Arbitration When Going It Alone Just Won't Do*, Disp. Resol. J., Aug./Oct. 2002 at 66 (comparing AAA Rules to *ad hoc* arbitrations and reporting on manner of billing and paying for arbitrator fees).

12. *See Bart v. Miller*, 302 A.D.2d 379, 754 N.Y.S.2d 559 (2d Dep't 2003) (confirming the award in AAA No. 13168010799).

13. *Seton Co. v. Lohmann GmbH & Co.*, No. 90 Civ. 1312, 1992 WL 80637 (S.D.N.Y. Apr. 9, 1992).

14. *See G.T. USA Inc. v. American Legend Coop.*, 03 Civ. 6165 (S.D.N.Y. Sept. 30, 2003) (confirming arbitration award in AAA No. 1341330132702); *see also Polin v. Kellwood Co.*, 103 F. Supp. 2d 238 (S.D.N.Y. 2000), *aff'd*, 34 Fed. Appx. 406 (2d Cir. 2002) (sanctions, costs and arbitrator fees awarded by arbitrators in employment dispute); *ReliaStar Life Ins Co. v. EMC Nat'l Life Co.*, 564 F.3d 81 (2d Cir. 2009) (upholding award of arbitrator fees, attorney fees and costs totaling $3 million as sanctions against respondent for bad faith conduct in arbitration).

15. Thomas E. Carbonneau, The Law and Practice of Arbitration 482 (2d ed. 2007).

16. James Costello, *Report on The UNCITRAL Arbitration Working Group*, Disp. Resol. J. May/July 2008 at 8.

17. Richard Dewitt & Rick Dewitt, *No Pay No Play: How to Solve the Nonpaying Party Problem in Arbitration*, Disp. Resol. J. Feb./Apr. 2005 at 27.

18. *Id*. at 28.

19. *Estate of Liebeskind*, Sur. Ct., Nassau Co., File No. 346612 (unpublished decision and order denying stay of arbitration dated September 30, 2008). The subsequent arbitration award was confirmed in the Supreme Court, New York County, and an order entered granting the estate's application to declare that the retention of jurisdiction by the arbitrators to "implement" the award was terminated and that the arbitrators were "*functus officio*." *Liebeskind v. Messina*, Index No. 111075/2007 (Sup. Ct., N.Y. Co. Mar. 27, 2009).

20. *See* Alison C. Wauk, *Preliminary Injunction in Arbitrable Disputes: The Case for Limited Court Jurisdiction*, 44 UCLA L. Rev. 2061 (1997); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972) (enjoining Mr. Erving from playing for other team pending arbitration); *N.V. Maatschappij Voor Industriele Waarden v. A.O. Smith Corp.*, 532 F.2d 874 (2d Cir. 1976) (enjoining disclosure of confidential material pending arbitration). *See also* N.Y. Civil Practice Law & Rules 7502(c) (permitting injunctive relief to maintain status quo).

21. *Coty Inc. v. Anchor Constr. Inc.*, 7 A.D.3d 438, 776 N.Y.S.2d 795 (1st Dep't 2004), *aff'g* No. 601499-022003 WL 139551 (Sup. Ct., N.Y. Co. Jan. 8, 2003); *compare NTSC Commc'ns Inc. v. MCI Worldcom Int'l Inc.*, 17 Misc. 3d 1130, 851 N.Y.S.2d 71 (Sup. Ct., N.Y. Co. 2007) (respondent in a JAMS arbitration, to avoid the *Coty* problem, elected to pay petitioner's share of $48,457, the single arbitrator's fees, when petitioner refused to do so). Contrast the recent determination of the AAA to suspend administration and then terminate the arbitration in AAA No. 18 180 02486 06, when both claimant and respondent refused to pay the $53,000 invoiced by the AAA for arbitrator fees for three arbitrators. *See* AAA letter to counsel dated March 26, 2009 (courtesy of Rosenberg Feldman Smith, LLP, New York City) *and Brady v. Williams Capital Group L.P.*, 2009 WL 1151322 (1st Dep't Apr. 30, 2009) (cost-sharing provision of employment contract requiring employee to pay one-half of $42,300 arbitrator bill – leading to AAA suspension of the arbitration – held to be against public policy and employer directed to pay the entire fee).

22. Problematic notwithstanding Justice Clarence Thomas's just-filed opinion for the majority in *14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456 (2009), attempting to equate arbitration with the courthouse, even for complex claims, an equation that Professor Carbonneau had previously dismissed as both "incredible and preposterous" and without "any understanding of the institution of arbitration" or its "actual operation." Carbonneau, *supra*, note 1 at p. 1959.

23. *See In re Arundotech LLC*, BK Case SV 08-11458-GM U.S. B. Ct. C.D. Calif. (order dated 9/23/08 lifting stay filed October 14, 2008); *Liebeskind v. Messina*, Index No. 111075/2007; *NTSC Commc'ns Inc.*, 17 Misc. 3d 1130.

The New York City Civil Rights Restoration Act Grows Teeth

By Jyotin Hamid and Mary Beth Hogan

The protections afforded employees under the New York City Human Rights Law (NYCHRL) are more expansive than those provided under analogous provisions of Title VII of the Civil Rights Act of 1964. Most employers in New York City ("City") have long understood that. Compared to Title VII, the NYCHRL covers a wider range of employers, prohibits discrimination based on a lengthier list of protected characteristics, imposes no cap on compensatory and punitive damages, and does not require exhaustion of administrative remedies before commencing a lawsuit. But New York City employers must now understand that even with respect to provisions of the City law that are identical to or substantially the same as analogous provisions of federal law, the City law may be interpreted more expansively.

The New York City Council has twice enacted laws intended to ensure that courts construe provisions of the City antidiscrimination law more broadly than analogous provisions of federal law, most recently by passage of the Local Civil Rights Restoration Act of 2005 ("Restoration Act").[1] But until now courts have not given full effect to these legislative efforts. The full – and potentially dramatic – import of the Restoration Act is only now coming into focus with two 2009 court opinions rejecting long-established principles of federal anti-discrimination law in favor of more expansive rights for employees under the NYCHRL and the Restoration Act. In *Williams v. New York City Housing Authority*,[2] the first appellate court decision construing the Restoration Act, the First Department held that the familiar "severe and pervasive" standard for defining sexual harassment

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does not apply to sexual harassment claims under the NYCHRL. In *Zakrzewska v. The New School*,[3] the U.S. District Court for the Southern District of New York held that the well-established *Faragher-Ellerth* affirmative defense to sexual harassment claims is unavailable for such claims brought under the NYCHRL.

The *Williams* and *Zakrzewska* opinions are significant not only for their precise holdings, which render inapplicable to the NYCHRL long-settled concepts of sexual harassment law, but also for the broader trend they may portend. In future, additional concepts of antidiscrimination law with which employers have been familiar, based on federal precedents, may likewise be unsettled.

The Restoration Act

The Restoration Act of 2005 represents the New York City Council's second attempt to distinguish City antidiscrimination law from its state and federal counterparts. The first attempt was in 1991, when the City Council adopted amendments to the NYCHRL in an effort to counteract what were perceived as unduly narrow interpretations of antidiscrimination law being adopted on state and national levels.[4] Commentators have observed that the purposes of the 1991 amendments were never fully realized.[5] After passage of those amendments, courts typically continued to hold that analogous provisions of the City, state and federal antidiscrimination laws could all be construed as parallel.[6]

The Restoration Act seeks to prevent this parallel analysis by mandating that "the provisions of [the NYCHRL] are to be *construed independently* from similar or identical provisions of New York state or federal statutes."[7] While courts may continue to consult interpretations of similarly worded state or federal statutes, the Restoration Act cautions that these interpretations should be viewed "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."[8] In contrast to the 1991 amendments, the Restoration Act also amended the construction provisions of the New York City Administrative Code, instructing courts that every provision must "be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof,"[9] regardless of whether state or federal laws have been so construed. The Restoration Act reminds courts that some provisions of the NYCHRL are textually distinct from their state and federal counterparts and makes clear that City claims are categorically different from state or federal claims.

Since the passage of the Restoration Act, most courts construing the NYCHRL have at least noted the act's requirement of an independent analysis of claims brought under the NYCHRL, though not every court affected thus far has actually conducted such an analysis.[10] Some lower courts, however, have conducted a genuinely non-parallel analysis of NYCHRL claims. For example, in

Every provision must "be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof."

Sorrenti v. City of New York, the New York Supreme Court recognized that the standard for defining retaliatory acts is different under City and federal antidiscrimination laws.[11] Specifically, the court held that "the City Council enacted a less restrictive standard to trigger a HRL violation in that it is now illegal to retaliate *in any manner*," in contrast to the then-prevailing federal standard requiring a materially adverse employment action.[12]

With the 2009 opinions in *Williams* and *Zakrzewska*, non-parallel treatment of NYCHRL claims has come to fruition.

Williams v. New York City Housing Authority

In *Williams*, the Appellate Division, First Department affirmed summary judgment dismissing the plaintiff's claims alleging a hostile work environment, disparate treatment on the basis of her sex, and retaliation. Noting that "a distinct analysis is required to fully appreciate and understand the distinctive and unique contours of the local law in this area,"[13] the First Department undertook a separate analysis of the plaintiff's claims brought under the NYCHRL, using the guidance of the Restoration Act. Reviewing the legislative history and text of the Restoration Act, the First Department found that the NYCHRL was intended to "meld the broadest vision of social justice with the strongest law enforcement deterrent."[14]

In light of this intent, the First Department determined that the federal rule of *Meritor Savings Bank v. Vinson*[15] – that sexual harassment must be "severe or pervasive" in order to be actionable – was inconsistent with the Restoration Act's guidance that discrimination should play no role in the workplace. Finding that the "severe and pervasive" test ultimately "sanctioned a significant spectrum of conduct demeaning to women" and "reduce[d] the incentive for employers to create workplaces that have zero tolerance" for harassment and discrimination, the First Department determined that severity and pervasiveness may be relevant to the consideration of damages, but not to the question of liability.[16] Instead, the court held, the appropriate question is whether the plaintiff "has been treated less well than other employees because of her gender."[17]

The court acknowledged, however, that the NYCHRL was not intended to operate as a "general civility code." Thus, it recognized an affirmative defense if the defendant can show that the conduct complained of consists of nothing more than what a reasonable person would consider "petty slights and trivial inconveniences."[18]

Finding that the defendant satisfied this standard in the *Williams* case, the First Department dismissed the plaintiff's claims.

Zakrzewska v. The New School

In *Zakrzewska*, the Southern District considered the applicability of the so-called *Faragher-Ellerth*[19] affirmative defense to a plaintiff's sexual harassment claim under the NYCHRL. Under Title VII, an employer has a *Faragher-Ellerth* affirmative defense that precludes employer liability for sexual harassment committed by a supervisory employee if the employer can prove that (1) no tangible employment action was taken as part of the alleged harassment, (2) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,"[20] and (3) "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[21]

Although the employer in *Zakrzewska* satisfied the requirements for the *Faragher-Ellerth* affirmative defense, the Southern District determined that the defense was not applicable to claims under the NYCHRL and denied the employer's motion for summary judgment. The court found that the "plain language" of the NYCHRL was inconsistent with the *Faragher-Ellerth* affirmative defense in that the NYCHRL "creates vicarious liability for the acts of managerial and supervisory employees even where the employer has exercised reasonable care to prevent and correct any discriminatory actions and even where the aggrieved employee unreasonably has failed to take advantage of employer-offered corrective opportunities."[22]

Recognizing that this conclusion was "not free from doubt"[23] and would have significant implications for employers, the court certified its decision for interlocutory appeal to the Second Circuit and suggested that the Second Circuit might in turn certify the question to the New York Court of Appeals. As of this writing, there have not been any subsequent developments.

"As Caesar said: I regulate, I litigate ... and I don't remember the other one."

Conclusion

As case law continues to develop following the mandate of the Restoration Act and courts analyze provisions of the NYCHRL independently from analogous provisions of state or federal law, it is likely that additional settled expectations and assumptions about antidiscrimination law will be found inapplicable to claims under the NYCHRL. Employers will need to be mindful of the distinct and broader provisions of City law when they adopt or amend employment policies and when they assess their exposure arising from challenged employment actions. ■

1. 2005 N.Y.C. Local Law No. 85.
2. 61 A.D.3d 62, 872 N.Y.S.2d 27 (1st Dep't 2009).
3. 598 F. Supp. 2d 426 (S.D.N.Y. 2009).
4. N.Y.C. Admin. Code tit. 8 (1991). The 1991 Amendments resulted from passage of 1991 N.Y.C. Local Law No. 39.
5. *See, e.g.*, Craig Gurian, *A Return to Eyes on the Prize: Litigating under the Restored New York City Human Rights Law*, 33 Fordham Urb. L.J. 255 (2006).
6. *See, e.g.*, *Mack v. Otis Elevator Co.*, 326 F.3d 116, 122, n.2 (2d Cir. 2000) ("Our consideration of claims brought under the state and city human rights law parallels the analysis used in Title VII claims.") (quoting *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 565 (2d Cir. 2000), *cert. denied*, 540 U.S. 1016 (2003)); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382 (2004) ("The standards for recovery under the New York State Human Rights Law . . . are the same as the federal standards under Title VII. . . . Further, the human rights provisions of the New York City Administrative Code mirror the provisions of the [State Human Rights Law] and should therefore be analyzed according to the same standards.") (citations omitted).
7. 2005 N.Y.C. Local Law 85, § 1 (emphasis added).
8. *Id.*
9. 2005 N.Y.C. Local Law 85, § 7 (revising N.Y.C. Admin. Code § 8-130).
10. *See, e.g.*, *Moore v. N.Y. State Div. of Parole*, No. 06-CV-1973, 2008 WL 4394677, at *14 (E.D.N.Y. Sept. 23, 2008) (stating that claims under NYCHRL are not controlled by Title VII, but not conducting independent analysis); *Morel v. ABM Co.*, No. 02 Civ. 3564, 2006 WL 3771006, at *7 (S.D.N.Y. Dec. 19, 2006) (noting that NYCHRL claims are to be independently construed, but then applying Title VII standards).
11. 17 Misc. 3d 1102, *4, 851 N.Y.S.2d 61 (Sup. Ct., N.Y. Co. 2007).
12. *Id.* (citing N.Y.C. Admin. Code § 8-107(7)) (emphasis added).
13. *Williams v. N.Y. City Hous. Auth.*, 61 A.D.3d 62, 64, 872 N.Y.S.2d 27 (1st Dep't 2009).
14. *Id.* at 68 (citing Gurian, *supra* note 5 at 262).
15. 477 U.S. 57 (1986).
16. *Williams*, 61 A.D.3d at 76. One lower court reviewing the standards to establish a claim of sexual harassment came to the same conclusion. *See Farrugia v. N. Shore Univ. Hosp.*, 13 Misc. 3d 740, 748–49, 820 N.Y.S.2d 718 (Sup. Ct., N.Y. Co. 2006) (holding that the severe or pervasive test was inconsistent with the NYCHRL and "liability should be determined by the existence of unequal treatment, and questions of severity and frequency reserved for consideration of damages").
17. *Williams*, 61 A.D.3d at 78.
18. *Id.* at 80.
19. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).
20. *Faragher*, 524 U.S. at 807.
21. *Id.*
22. *Zakrzewska v. The New Sch.*, 598 F. Supp. 2d 426, 435 (S.D.N.Y. 2009).
23. *Id.* at 437. In fact, the Court noted that various New York courts had either applied, or assumed the applicability of, *Faragher-Ellerth* in prior NYCHRL cases. *Id.* at 434.

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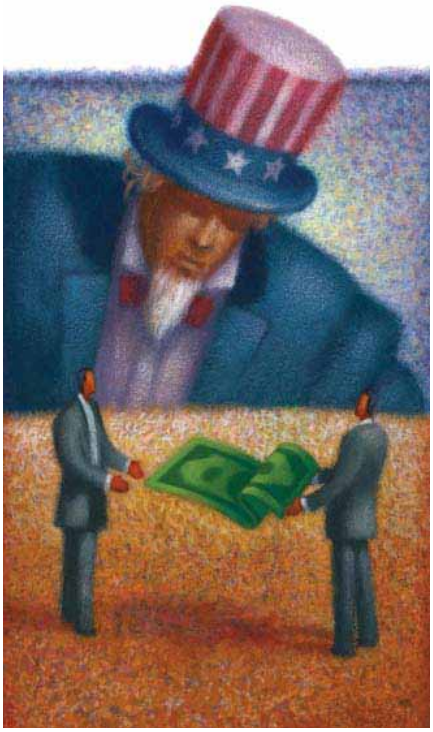
BY ROBERT W. WOOD



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Should False Imprisonment Damages Be Taxable?

Claims for false imprisonment may be brought in various ways under federal or state law. An individual who has been wrongfully incarcerated may sue under 42 U.S.C. § 1983 for a violation of his or her constitutional rights. The individual may also sue under state tort law, making claims for the traditional torts of false imprisonment, malicious prosecution, or abuse of process. Furthermore, many states now expressly provide a statutory scheme for addressing false imprisonment claims.

At the root of all these causes of action is a fairly common fact pattern: a plaintiff is arrested or convicted, spends time behind bars, is later exonerated, and then seeks redress for these injuries. Prosecutorial misconduct may or may not be involved. Although there may well be nuances between the differing legal bases upon which such a claim may be brought, I have argued that the commonality of this fact pattern should mean that such recoveries should be excludable from income under Section 104 of the Code.[1] I will not re-state all of those arguments here, but will endeavor to summarize them briefly.

Section 104 Authorities

The Internal Revenue Code has excluded personal injury damages from income for 80 years. For most of this time, damages for any personal injury (or for sickness) could be excluded from income, whether or not the injury or sickness was physical. In 1996, the statute was narrowed, with the new requirement that the personal injuries or sickness must be "physical" to give rise to an exclusion.

Since 1996, Section 104 has excluded from gross income damages paid on account of physical injuries or physical sickness. The Internal Revenue Service (IRS or the "Service") has interpreted this rule as requiring observable bodily harm in order for an exclusion to be available.[2] In appropriate cases, however, the IRS is willing to presume the existence of observable bodily harm.

Thus, in Chief Counsel Advice Memorandum 200809001,[3] the IRS considered the tax treatment of a settlement for sex abuse. The abuse had occurred while the plaintiff was a minor, and the settlement was paid by the institution many years later, by which time the abuse victim had reached the age of majority. Not surprisingly, by that time there were no physical signs of any abuse, injury or sickness.

Nevertheless, the IRS ruled that the entire settlement was excludable under Section 104. Although the taxpayer had failed to demonstrate any signs of physical injury, the IRS found it reasonable to *presume* there had (at some point) been observable signs of physical injuries in such case.[4] It is unclear how important it was to the reasoning of the ruling that the victim was a minor at the time of the abuse and had reached the age of majority when he received a settlement. Arguably, it should be irrelevant, as the situation could be just as compelling without the age factor. Yet one senses that the Service was trying to eke out a narrow exception from its "we must see it" mantra.

Significantly, the Service failed to back off on the notion that Section 104 requires an outward sign of injuries. Nevertheless, it still gave the taxpayer relief on an unquestionably sympathetic fact pattern. In essence, the IRS ruled that at least under *some* circumstances, while it would not dispense with its view that one must be able to observe the bodily harm, one could occasionally *presume* the injuries. That is clever. It may appear to be a tiny step, but it is also a significant step.

Is False Imprisonment Physical?

It is hard to imagine a more obvious degree of physicality than being physically confined behind bars. Even if no bruises or broken bones befall the plaintiff while behind bars, it seems axiomatically physical to be physically confined. But is it a physical injury or physical sickness?

I argue yes. First, I note that it is almost a certainty that there will be ancillary claims in any long-term false imprisonment case. Whether characterized as assault, battery, medical mal-

practice, etc., most long-term inmates have had altercations that can provide the proverbial physical hook on which one can hang the more general deprivation of liberty claim. Invariably, the presence of such ancillary claims makes the case easier for treating the recovery as excludable under Section 104.

Yet even in the hypothetical case of someone who is wrongfully incarcerated and claims no abuse, battery, or medical malpractice, in my opinion, Section 104 should clearly apply. If a taxpayer is raped, that physical trauma may or may not be visible. Even if tears or bruising do not appear, in my opinion a recovery for that rape should be excludable under Section 104. The act itself manifests injury. False imprisonment, at least serious and long-term cases thereof, should be the same.

Historically, helpful authority can be found concerning the tax treatment of payments made to Japanese-Americans placed in internment camps during World War II. There are also authorities regarding payments made to survivors of Nazi persecution, to U.S. prisoners of war in Korea, and so on. At one time or another, all these types of recoveries were held to be nontaxable as payments for a deprivation of liberty.[5]

In all of these historic cases, these persons were treated as receiving damages for a loss of personal liberty. The payments in each case were therefore held to be nontaxable. There was no wage loss claim or anything else to make the payment in such circumstances appear even arguably to be taxable. The IRS can be forgiven for being skeptical of personal physical injury allocations in many employment cases, where the nature, severity, and consequences of the physical contact and resulting physical injuries are often modest. Long-term false imprisonment is entirely different.

After all, we ended up with the 1996 changes to Section 104 precisely because of abuses in employment cases, where the wage versus non-wage dichotomy was patent. In employment cases preceding the 1996 amendments, the emotional distress moniker was added to virtually every situation. It was no secret that most damages seemed to be labeled as "emotional distress" in view of the obvious tax advantages such nomenclature imported.

The Service's rigidity in its view today may be explained by taxpayer sins of the past. That is unfortunate, for there is nothing whatsoever abusive about a recovery for long-term wrongful incarceration being afforded tax-free treatment. Taxable or not, no amount of money can ever make such victims whole.

Nevertheless, the IRS appears to have concluded that the authorities dealing with recoveries by civilian internees or prisoners of war (which we might collectively call the "internment authorities") should no longer be relied upon. Indeed, in the Service's view, the "physical" requirement interposed into Section 104 in 1996 undercuts these internment authorities. In Revenue Ruling 2007-14, 2007-12 IRB 747, the IRS "obsoleted" all of these revenue rulings, ostensibly due to the 1996 statutory change to Section 104. The IRS does not state publicly exactly why it obsoleted these internment rulings.

My off-the-record understanding, however, is that the Service felt that the 1996 legislation said "physical" and meant "physical." Being wrongfully locked up – without more anyway – just isn't physical. Yet I believe wrongful imprisonment is *by its very nature* physical. The fact that the internment rulings pre-date the 1996 statutory change should be irrelevant.

General Welfare Exception

Quite apart from Section 104 of the Code, it is independently arguable that the general welfare exception (GWE) shall apply to false imprisonment recoveries. The GWE exempts from taxation payments that are

- made from a governmental general welfare fund;
- made for the promotion of the general welfare (that is, on the basis of need rather than to all residents); and
- not made as a payment for services.[6]

The GWE is intended to exempt from taxation amounts the government pays for the general welfare. The IRS has applied the GWE to various government payments, ranging from housing and education to adoption and crime victim restitution.[7] It is reasonable to believe that payments from the government to make a victim of false imprisonment whole should be within the scope, purpose, and terms of the GWE.

Recent Case

Despite my arguments, there has been no tax case discussing the application of either Section 104 or the general welfare exception to a significant false imprisonment case in which the plaintiff spent years wrongfully behind bars. There is, however, a recent case involving a type of false imprisonment that could well skew the law in an inappropriate direction. The case is *Daniel J. and Brenda J. Stadnyk v. Commissioner*.[8]

In *Stadnyk*, the taxpayer received a settlement of $49,000 in 2002, and the question was whether that settlement was excludable from her income. The settlement resulted from a rather involved set of facts relating to the purchase of a used car. When the taxpayer was unhappy with the car and could not obtain satisfaction from the dealership, she placed a stop payment order on the check she tendered to pay for the car.

Although the stop payment order listed the reason for the stop payment as "dissatisfied purchase," the bank (Bank One, which later would become a defendant) incorrectly stamped the check "NSF" – the customary label for a check with insufficient funds – and returned it to the used car dealer. The dealership filed a criminal complaint against the taxpayer for passing a worthless check. Several weeks later, at 6:00 p.m. one evening, officers of the Fayette County, Kentucky, Sheriff's Department arrested the taxpayer at her home. They did so in the presence of her husband, her daughter and a

family friend. She was taken to the Fayette County detention center, handcuffed, photographed, and confined to a holding area.

Several hours later, she was handcuffed and transferred to the Jessamine County Jail, where she was searched via pat down and with the use of an electric wand. She was required to undress to her undergarments, to remove her brassiere in the presence of police officers, and to don an orange jumpsuit. At approximately 2:00 a.m. the next morning, she was released on bail. Several months later, she was indicted for theft by deception as a result of the check, but the charges were subsequently dropped.

Most of us would be pretty upset by such a course of events. Not surprisingly, the taxpayer eventually filed suit against the dealership and its owners for breach of fiduciary duty. She also sued the bank. She sought compensatory damages and special damages, including damages for lost time and earnings, mortification and humiliation, inconvenience, damage to reputation, emotional distress, mental anguish, and loss of consortium. She also sought punitive damages and alleged counts for malicious prosecution, abuse of process, false imprisonment, defamation and outrageous conduct.

After a mediation, the taxpayer settled her case. At the mediation, everyone seemed to agree that the modest $49,000 settlement would not represent income to the plaintiff and would not be subject to tax. Indeed, the attorney for the taxpayer, the mediator and the attorney for the defendant Bank One all stated rather definitively at the time that the settlement proceeds would not be taxed. Nevertheless, the taxpayer received a Form 1099 for the payment. She did not report the payment on her 2002 tax return, and eventually landed in Tax Court.

Pure Confinement

In considering the appropriate tax treatment of the payment, Judge Goeke of the Tax Court noted that the plaintiff did not suffer any physical injuries as a result of her arrest or detention, save that she was physically restrained against her will and subjected to police arrest procedures. Indeed, the taxpayer stated that she was not grabbed, jerked around, bruised, or physically harmed as a result of her arrest or detention. She did visit a psychologist approximately eight times over two months as a result of the incident. The costs of these visits were covered by her insurance. She did not have any out-of-pocket medical expenses for physical injury or mental distress suffered as a result of her arrest and detention.

In analyzing the applicability of Section 104, the Tax Court recited the usual authorities and the nature of the claims that had to be reviewed. One of the inevitable discussions was over the two-tier requirement of *Commissioner of Internal Revenue v. Schleier*,[9] which imposed two thresholds in order to bring an amount within the exclusion provided by Section 104. First, the payment must be made to satisfy a claim for tort or tort-type rights. Second, the payment must be made on account of personal physical injuries or physical sickness. Despite its Supreme Court provenance, this test has proven to be more tautological than helpful.

The Tax Court in *Stadnyk* lamented the fact that although there had been a mediation, there was no record of the mediation to show precisely what the parties were focusing on during the mediation process. Indeed, the court looked primarily to the complaint and to the fact that, in Tax Court, the taxpayer was relying heavily on the false imprisonment claim as a way to support her claim of excludability under Section 104. Yet this complaint – like so many others in the real world – contained multiple claims.

Indeed, the Tax Court pointed out that the taxpayer had also alleged the torts of negligence and breach of fiduciary duty against Bank One. The IRS argued that those claims were based on contract and were simply not tort claims. The Tax Court seemed to be favoring the taxpayer, noting that it was not as clear as the IRS postulated that a lawsuit relating to a bank and customer relationship was based on contract alone. Admitting of the possibility of tort claims, the Tax Court even noted that it was possible that the bank's actions with respect to the check had proximately caused her arrest.

To the Tax Court, that made it incorrect to view the woman's complaint against Bank One as solely a contract claim. The Tax Court also didn't view it solely as a claim over the wrongful dishonor of a check. In fact, the Tax Court pointed out that the taxpayer was suing Bank One not merely because of the alleged mishandling of her check; rather, she sued Bank One because of the ordeal she suffered as a result of her arrest and detention.

This kind of approach sounds rooted in common sense. It seems to recognize that – cutting through the formalities of multiple causes of action – this was a suit over one incident and one set of damages. Although Bank One did not initiate the criminal proceedings against her, its erroneous marking of her check had actually precipitated her arrest. Moreover, the Tax Court found

Although Bank One did not initiate the criminal proceedings against her, its erroneous marking of her check had actually precipitated her arrest.

that when Bank One settled the case, it entered into a settlement agreement with an intent to resolve her claims for tort or tort-type rights. The Tax Court therefore concluded that the first prong of the *Schleier* test was met.

Physical Injury or Physical Sickness?

Unfortunately, Mrs. Stadnyk was not so lucky with respect to the physical injury or physical sickness requirement enunciated by *Schleier*. The Tax Court commenced its analysis with a discussion of the legislative history of the 1996 statutory change. The terms "physical injuries" and "physical sickness" do not include emotional distress (except for damages not in excess of the cost of medical care attributable to that emotional distress).

In fact, Mrs. Stadnyk had admitted that she did not suffer any physical harm during her arrest or detention. She is to be commended for her honesty. She did not try to spin her story as involving even a technical battery; she was not grabbed, jerked around, or bruised. She did argue that physical restraint and detention by itself constitutes a physical injury, but the Tax Court disagreed. It said baldly that

> [p]hysical restraint and physical detention are not "physical injuries" for purposes of Section 104(a)(2). Being subjected to police arrest procedures may cause physical discomfort. However, being handcuffed or searched is not a physical injury for purposes of Section 104(a)(2). Nor is the deprivation of personal freedom a physical injury for purposes of Section 104(a)(2).[10]

The Tax Court found language from a Kentucky state court case to the effect that the tort of false imprisonment protects one's personal interest in freedom from physical restraint.[11] The same Kentucky court went on to say that the injury from false imprisonment is "in large part a mental one," and that the plaintiff can recover for mental suffering and humiliation. The Tax Court therefore concluded that the alleged false imprisonment against Mrs. Stadnyk did not cause her to suffer any physical injury, which a Section 104 exclusion would require.

The court nevertheless found that Mrs. Stadnyk was not liable for Section 6662 penalties. The Tax Court acknowledged that Mr. and Mrs. Stadnyk had not sought tax advice concerning the recovery. It nevertheless seemed reasonable to rely upon the parties to the mediation and the various lawyers. All of them said with little equivocation that they expected the recovery to be tax free. Thus, although Mrs. Stadnyk had to pay the tax and the interest, there were no penalties.

Bad Case; Bad Law

Stadnyk is an unfortunate case, whether or not one views it as correct. It can certainly be argued that the Tax Court was right to analyze *this particular recovery* as taxable. I do not agree with this argument, but reasonable minds can differ. But are the Tax Court's platitudes about false imprisonment correct?

I believe one must answer that question with a resounding "no." Whatever a Kentucky state court may have said about the nature of a false imprisonment claim, there is nothing mental about being locked behind bars and subjected to the physical confinement it entails. Put another way, although it may well lead to mental damages, the primary thrust of a false imprisonment claim is not mental. Even if you are handled with kid gloves, confinement is physical.

Yet even if we acknowledge that Mrs. Stadnyk's recovery is not physical enough to be tax free, one must be able to draw lines. Clearly, no one would want to spend from 6:00 p.m.

to 2:00 a.m. in jail as Mrs. Stadnyk did. Nevertheless, that period of eight hours (during some part of which she was being processed and transported, and thus apparently was not confined in a cell), hardly compares with spending months or years locked behind bars.

Can anyone seriously compare Mrs. Stadnyk's experience to that of an exonoree who was wrongfully convicted and wrongfully imprisoned in a penitentiary for, say, 10 years? I think not. I recognize that qualitative decisions are not easy.

Arguing that *serious* false imprisonment cases should be treated differently than non-serious ones is analytically difficult and perhaps impracticable. Exactly where one draws the line between trivial and serious false imprisonment is subjective. Indeed, one could reasonably conclude that Mrs. Stadnyk's recovery too should be tax-free.

I do not think it is inconsistent to agree that Mrs. Stadnyk's recovery can be taxable and yet to argue forcefully that a serious and long-term exonoree should receive tax-free treatment. Line-drawing may not be easy, but even if one agrees that Mrs. Stadnyk's recovery should be taxed, it does not follow that *all* false imprisonment recoveries should be taxed. The Tax Court's broad and unnecessary dicta in *Stadnyk*, going on about *all* false imprisonment recoveries is, to my mind, simply wrong.

One way to distinguish the serious false imprisonment case involving long tenure in prison from a case such as Mrs. Stadnyk's relates to ancillary claims. Mrs. Stadnyk herself indicated that she experienced no roughing up and no physical injuries, no medical claims, and so on. She suffered indignities, but she was not bruised, pushed, or manhandled.

A true long-term incarceration case is vastly different. Almost always there are incidents of physical trauma, often leaving permanent scars. There are often battery claims, medical malpractice claims, and more. Yet as a matter of analytical purity, it is worthwhile to ask what *would* happen if the tax consequences of a payment in settlement of a wrongful long-term incarceration case were considered in isolation.

That is, consider the rare (and perhaps even unimaginable) case in which a person is wrongfully incarcerated for 10 years but is fortunate enough to be able to state (as Mrs. Stadnyk did) that she endured no pushing, no shoving, no bruising, no rapes, no assaults, no batteries, no medical malpractice, and so on. In my view – even without the presence of the customary ancillary claims for separate torts, and even without the customary damages usually accompanying those torts – such a false imprisonment recovery should *itself* be tax-free.

Stadnyk is, in my opinion, an unfortunate and probably an incorrect decision, even on its facts. As a technical matter, of course, a Tax Court memo decision is non-precedential.[12] Quite apart from that, neither taxpayers nor the government should put too much stock in the broad statements made by Judge Goeke in *Stadnyk*. ■

1. *See* Robert W. Wood, *Are False Imprisonment Recoveries Taxable?*, Tax Notes, Apr. 21, 2008, p. 279.

2. Perhaps the best illustration of the IRS's view on this point is the so-called "bruise" ruling, Private Letter Ruling 200041022 (PLR), Oct. 13, 2000).

3. Issued Nov. 27, 2007; *available at* 2008 WL 543985 (IRS CCA) (Feb. 29, 2008).

4. See further discussion in Robert W. Wood, "IRS Allows Damages Exclusion Without Proof of Physical Harm," *Tax Notes*, March 31, 2008, p. 1388.

5. *See* Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903. *See also* Rev. Rul. 56-462, 1956-2 C.B. 20 (dealing with Korean War payments); Rev. Rul. 55-132, 1955-1 C.B. 213 (exempting from tax payments made to U.S. citizens who were prisoners of war during World War II); Rev. Rul. 58-370, 1958-2 C.B. 14; Rev. Rul. 56-518, 1956-2 C.B. 25 (providing tax-free treatment for payments by Germany and Austria for persecution by the Nazis).

6. *See* ITA 200021036. *See also* Robert W. Wood & Richard C. Morris, *The General Welfare Exception to Gross Income*, Tax Notes, Oct. 10, 2005, p. 203.

7. *See* Rev. Rul. 76-373, 1976-2 C.B. 16; Rev. Rul. 74-205, 1974-1 C.B. 20; Rev. Rul. 76-395, 1976-2 C.B. 16; Rev. Rul. 75-271, 1975-2 C.B. 23; PLR 200409033 (Nov. 23, 2004); Rev. Rul. 74-153, 1974-1 C.B. 20; Rev. Rul. 74-74, 1974-1 C.B. 18.

8. T.C. Memo 2008-289, 2008 WL 5330828 (U.S. Tax Ct. 2008).

9. 515 U.S. 323 (1995).

10. *Stadnyk*, T.C. Memo 2008-289 at p. 17.

11. *See Banks v. Fritsch*, 39 S.W.3d 474 (Ky. Ct. App. 2001).

12. *See Nico v. C.I.R.*, 67 T.C. 647, 654, *aff'd in part, rev'd in part on other grounds*, 565 F.2d 1234 (2d Cir. 1977) ("we consider neither Revenue Rulings nor Memorandum Opinions of this Court to be controlling precedent").

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NYSBA

BY GARY A. MUNNEKE

Recessionary Road

The popular legal press has devoted countless lines to the impact of the 2008–2009 recession on law firms. A particular fascination with layoffs at large firms has fueled a barrage of articles describing the termination of associates, support staff and even partners. According to some estimates, several thousand layoffs have plagued the AmLaw 500, portending an equally dismal situation for much of the rest of the law firm world. After all, aren't the largest firms the most successful practices? If these firms are laying off lawyers, the logic goes, aren't the less successful medium-sized and smaller firms even more likely to be struggling?

Certainly the legal profession is not immune to the economic cycle. When times are good, the practice of law is good; when the economy turns sour, lawyers, with the exception of those in a few counter-cyclical practice areas like bankruptcy and collections, suffer with their clients and the rest of society. We also recognize that an economic downturn varies in intensity, depending on the geographic area, industry and available resources. With problems in the real estate and financial sector driving the current recession, it should come as no surprise that lawyers and law firms have been hard hit. But not all law firms represent clients in the financial sector and not even all financial clients are in crisis.[1]

Making generalizations about the impact of the recession on the practice of law may be a somewhat risky business; but if we read the stories in the legal press and talk to lawyers on the front lines, it may be possible to glean some useful, if not iconic, insights about what the recession means for the lawyer on the street. Here are some observations.

Mega-Firms and Lawyer Layoffs

The phenomenal transformation of large firms into mega-firms that has taken place over the past few years to meet the demands of an expanding globalized economy may not have served these firms well when the economy collapsed. Such growth depended on a perpetually growing economy. As the economy slowed down and the amount of legal work declined, many firms realized that they had too many lawyers and not enough clients. Large firms traditionally play a numbers game by hiring more legal talent than they need and weeding out the less productive practitioners over time. The recession provided an opportunity to clear out the underbrush of unproductive lawyers at all levels within these firms.

Without analyzing this phenomenon in depth, it should be apparent that many of these newly unemployed lawyers would enter the domain of solo and small-firm practice. They would seek jobs as partners, associates and contract attorneys in smaller organizations, competing with an existing pool of applicants for a declining number of opportunities. And many would take money from their termination payments, partnership shares and retirement plans to open their own solo practices. In some areas already saturated with lawyers, the new competitors would put even greater strain on pre-existing solos. To their disadvantage, many of the large firm émigrés bring no clients with them from their former employers and know little or nothing about running a law firm. But, the interlopers are smart, well-credentialed and used to billing whatever it takes to get the work done. Pundits might debate how much this competition will affect solo and small-firm lawyers, but there is little doubt that it will have an impact and will hurt marginal practices the most.

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Mega-Firms and Staff Layoffs

Large firms have been forced to lay off staff as well as lawyers. Many smaller firms may find it appealing to hire trained paralegals and secretaries who have worked in larger firms. These people are more likely to hit the ground running than new hires that lack experience working with lawyers and clients. A problem that small firms may face in trying to hire support staff with large-firm experience is that these employees may also be used to large-firm salaries. It is axiomatic to say that the pay scale in small firms usually does not match that in larger organizations, and some of these individuals may opt for positions in business and industry outside of the practice of law if they believe that solos and small firms will not pay them what they think they are worth. To the extent that other sectors of the business world are feeling the economic pinch, however, some applicants may be disappointed by the opportunities available outside the law. At least in the legal world, their skills and experience are likely to be transferable.

Small-Firm Culture

Smaller firms are likely to approach the economic downturn differently than larger firms. In smaller organizations where everyone knows everyone else, and the culture is more familial than institutional, the owners of the firm are more likely to avoid dealing with the financial setbacks through employee layoffs. These firms are more likely to seek ways to ride out the storm by tightening their belts and reducing costs if they possibly can. Although staff reductions can cut costs dramatically, small firms are often reluctant to exercise that option.

To Grow, or Not

In a tight economy, small firms may choose not to hire new people or may decline to replace staff who leave through ordinary attrition. Many solo practitioners and small firms have made a strategic decision not to grow, which makes them somewhat growth-averse as a general matter. So when they do add personnel, whether lawyers or support staff, these firms are doing more than hiring employees; they are changing their firm's culture. Moreover, growth in a smaller firm often impacts its ability to serve existing clients. In a firm of two lawyers, both of whom bill 1,500 hours each to client matters, taking on a new client who will require 300 hours of work represents a 10% growth factor. In order to hire a new associate, a firm needs approximately 1,000 hours of "new" work in the first year. Most small firms do not experience this kind of growth in a single year but, rather, over several years, during which the lawyers work harder each year until they decide to add staff to lighten the load. In the two-lawyer firm described above, if the lawyers each work 100 more hours every year for five years, they will be billing 2,000 hours per year, but they will also have generated enough new work to support a new lawyer. Whether they decide to hire another lawyer is a separate question, because it affects the lawyers' vision for the firm, their ability to serve existing clients and their own workload. Rather than adding new people, some firms may decide to refer out new work, upgrade their client list by replacing less attractive clients with more attractive ones, or just continue to put in more hours. This no-growth philosophy is common in a good economy, but in an economy that is stagnant or declining, solos and small firms are even less likely to opt for growth.

Large-Firm Clients Are Hiring Small Firms

Many large-firm clients are looking for lower-cost alternatives to big-firm bills. Although some legal matters may require so many hours that smaller firms cannot handle the work, smaller cases – both litigation and transactional work – can be farmed out to smaller firms, which could include either medium-sized firms or small boutiques. Thus, for some small firms with the right practice mix and a willingness to expand, the recession may generate opportunities that did not exist when times were flush and corporate clients paid their bills without blinking.

Low Overhead

Simply put, solo practitioners and small firms can get by on less. They have less money invested in office space, equipment, furnishings, and employees. They devote fewer resources to marketing, client development, training, and administration. Conventional wisdom suggests that with economies of scale large firms should be more efficient than small firms, because larger organizations can spread costs across a larger number of people; in practice, however, large firms are less efficient, because they pay for a pricier office lifestyle than their smaller firm colleagues. Moreover, smaller organizations are often more adaptable than larger ones, because they can make cuts or change course more nimbly. If clients faced with financial adversity are unable to pay their legal bills, or if payments are simply slow, in a solo or small-firm practice there is much more likely to be a personal relationship between the lawyer and the client, and the lawyer can identify billing issues and respond quickly.

Conclusions . . . to Be Continued

All these observations suggest that the recession has not been as tough on solos and small firms as it has for the large firms we read about in the legal press. Lawyers in small organizations may have experienced some decline in business or sluggish payment of bills. Those who practice in fields hard hit by the economic downturn, such as real estate, may be struggling. Those who work in communities that have been heavily impacted by the recession, for example, lawyers in a town where the only manufacturing plant closed, may be hurting. At the same time, the desire of clients to reduce legal costs has created new opportunities for some lawyers. For those small-firm lawyers who have seen a decline

in income, short-term belt tightening is often possible. In addition, small firms can make a variety of internal management decisions, from recovering receivables to postponing capital improvements, which allow them to react to the economic downturn with agility. And when the recessionary road runs its course, they will be ready to shift gears again to enter the recovery highway.

The issue is that no one knows for sure what is going on outside the world of large firms, because no one is really looking. Consider these numbers: Out of 142,287 lawyers in New York in 2000,[2] 97,181 were engaged in the private practice of law; of these, 67,456 practiced alone or in a firm of 10 lawyers or less, including 54,423 solo practitioners, while the remainder practiced in 3,938 firms of two to 10 members. Whereas large law firms are found in large cities (especially New York City), solos and small firms are located everywhere, from the Big Apple to the smallest hamlet in the state. The point of reciting all these numbers is threefold: First, it is much more difficult to make generalizations about a category as diverse as solo and small-firm practitioners. Second, it is easy to forget that, despite the media coverage, large firms represent a smaller and narrower segment of the legal profession than solos and small firms. Third, it is time to offer some thoughts about a different recessionary road – Main Street, not Wall Street. ■

1. It is easy to forget that during the Great Depression of the 1930s, when unemployment in the United States reached 30% – certainly a shocking number – 70% of the population remained employed. My own grandfather, for example, always had a job during the Depression, but the Dust Bowl forced him to leave one job in Oklahoma for another in Iowa. (John Steinbeck chronicled the travails of less fortunate displaced Okies, who migrated to California to find a better life in *The Grapes of Wrath*, which offers iconic revelations about the plight of millions of Americans who suffered through those difficult times.)

2. *See* Clara Carson, 2004 Lawyers Statistical Report (American Bar Foundation).

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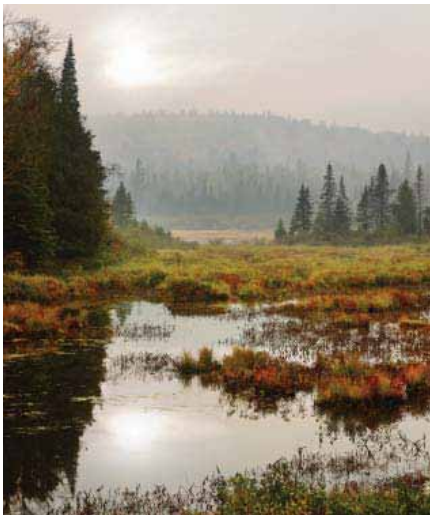
NYSBA

BY PHILIP WEINBERG



Philip Weinberg (weinberp@stjohns.edu), a professor of law at St. John's University School of Law and former chair of the New York State Bar Association's Environmental Law Section, was in charge of the Environmental Protection Bureau at the New York State Attorney General's Office from 1970 to 1978 and contributed to the formulation and enactment of the Tidal Wetlands Act and Freshwater Wetlands Act. He also served on advisory committees named by the State Department of Environmental Conservation to recommend improvements in enforcing those statutes.

Safeguarding "An Invaluable and Irreplaceable Resource"

The Genesis of New York's Wetlands Laws

Once regarded as worthless breeding grounds for mosquitoes and disdained as marshes and swamps – useful only if filled in – tidal and freshwater wetlands are now recognized as vital to our environment and are protected by law. But this awareness, and the resulting safeguards, did not occur overnight. New York State's legislation to protect its wetlands has a complex history, culminating in enactment of the Tidal Wetlands Act[1] in 1973 and the Freshwater Wetlands Act[2] two years later.

Scientific recognition of the vital importance of wetlands for habitat, water quality, and storm and flood control preceded the enactment of these laws. Books like *Life and Death of the Salt Marsh*, by John and Mildred Teal (1969), for example, highlighted this. Fully half of the wetlands that existed in what is now the United States at the time of first European contact are gone – dredged out or filled in. This has led to flooding, storm damage, and severe loss of fish, shellfish and bird habitat, together with reduced water supply.

Task Force

Conservation groups and New York State Attorney General Louis J. Lefkowitz formed a task force in 1971 to engage public support for legislation to protect tidal wetlands. They were joined in this effort by State Environmental Conservation Commissioner Henry Diamond, Suffolk County Executive John Klein, and several other Long Island officials and legislators. Three notable and articulate allies were Assemblyman (later State Supreme Court Justice) Herbert A. Posner, State Senator Bernard C. Smith, and Aurora Gareiss, an impassioned conservationist from Douglaston, Queens.

The New York Legislature recognized the need to safeguard tidal wetlands in 1972 and passed a bill that year, which Governor Nelson A. Rockefeller vetoed.[3] Like the present statute, it mandated a permit from the State Department of Environmental Conservation (DEC) for alteration of such wetlands. The Governor's veto message expressed concern over the bill's supposed "imbalanced approach, making the preservation of all wetlands an absolute value" and failing to "recognize [ ] that there may be occasions on which that value should not be paramount."[4]

Tidal Wetlands Act

The State Assembly's sponsor, Peter Costigan, reintroduced the bill in 1973, with some modifications to meet the Governor's objections, and the Tidal Wetlands Act became law that year.[5] Costigan's memorandum in support of the measure credited the Attorney General's task force and noted that "[d]estruction of wetlands would be disastrous to New York's fish and shellfish industries" and that this "destruction . . . has rapidly increased in recent years, and more than half of the state's million acres of marshes have been lost."[6]

According to the memorandum, the legislation provided for an inventory of tidal wetlands by DEC (present Environmental Conservation Law § 25-0201), a moratorium on altering wetlands during the inventory (ECL § 25-0202), and the requirement of a DEC permit (ECL § 25-0403), to be issued in accordance with "the public policy of this state to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of this state" (ECL § 25-0102). This last language was added to meet objections that the act lacked sufficient balance between environmental and economic concerns.

Sponsoring senator Bernard C. Smith submitted a similar memorandum to the Governor strongly recommending the legislation to "bring the full power of the State into the essential fight to preserve our dwindling wetlands, while at the same time maintaining the necessary balance between environmental and economic needs and priorities."[7]

Despite opposition from Long Island developers, some local officials

and some state agencies such as the Department of Transportation and Public Service Commission, Governor Rockefeller signed the bill on June 22, 1973, noting that it "will provide the balanced protection of the State's imperiled tidal wetlands that is so urgently needed."[8]

The moratorium on altering tidal wetlands pending completion of DEC's inventory was upheld by the courts.[9] Following the inventory and notice to landowners, the regulation and permit programs took effect, and DEC adopted its Part 661 rules spelling out which activities are to be allowed.[10] Activities in areas adjacent to wetlands also require a permit.[11] The regulations divide tidal wetlands into various classes, depending on their location, vegetation and environmental value. These include coastal fresh marshes, intertidal marshes, coastal shoals, and the like – indistinguishable to the unsophisticated but different enough to scientists to mandate differing permitted activities.[12]

Owners' claims that denial of a permit prevents them from all reasonable economic use of their property are dealt with in ECL § 25-0404. If a taking is proven, the statute requires that the state either grant the permit or buy the parcel, in order to avoid a possible unconstitutional taking of property. For example, in *Lucas v. South Carolina Coastal Council*,[13] the United States Supreme Court found that a shorefront owner was deprived of virtually all value. But such claims are not easy to prove, especially as to property acquired after the law was in effect. As the New York Court of Appeals held in *Gazza v. DEC*,[14] an owner's reasonable expectations of value were reduced once the law existed.

Some years later, a 1987 advisory committee on the act, named by Governor Mario Cuomo, criticized DEC's lack of vigorous enforcement and insufficient staffing. It also recommended greater training for environmental conservation officers, the state's prime witnesses in cases of asserted violation of the act, and urged that the state acquire additional wetlands under its Environmental Quality Bond Act.[15] The bond act, which went into effect in 1972 following a popular vote, made $1.15 billion available for environmental purposes, of which $350 million was allocated to "preserving, enhancing, restoring and improving the quality of land."[16] Most of the committee's salient recommendations have been adopted. At the committee's recommendation, penalties for violations were greatly increased by a 1989 amendment (ECL § 71-2503).

Protection for Freshwater Wetlands

However, the Tidal Wetlands Act failed to protect the state's freshwater wetlands, vital for water supply as well as habitat and flood control, and located, unlike tidal wetlands, throughout the state.[17] This gap was finally filled by legislation passed in 1975, which became the Freshwater Wetlands Act.

Governor Hugh Carey, in approving the act, noted that "vast acreage of freshwater wetlands in this State have been lost, despoiled and impaired by unregulated activities, such as dredging and draining, and our remaining wetlands are in jeopardy for the same reasons." He pointed out that these wetlands "are an invaluable and irreplaceable resource and the protection offered by the provisions of this bill is long overdue."[18] The memo of its sponsors, Senator Fred Eckert and Assemblyman William Hoyt, emphasized that "[w]ith this act, New York State will establish a national landmark in protecting and conserving freshwater wetlands."[19]

Restrictions to the Acts

The Freshwater Wetlands Act follows much of the format of the Tidal Wetlands Act, but with two stark exceptions: freshwater wetlands are protected only if 12.4 acres or larger, or of "unusual local importance" for flood control, habitat, water supply and the like (ECL § 24-0301). Agricultural uses of wetlands are exempt from regulation (ECL § 24-0701(4)). The 12.4-acre threshold – the seemingly odd limit is equal to five hectares in the metric system universally used by scientists – has repeatedly been criticized. Legislation to remove this limit passed the Assembly in 2006 and 2007, though not the Senate.[20]

In addition to these restrictions on DEC's jurisdiction, wetlands in the Adirondack State Park (which includes much privately owned land) are also beyond DEC's authority (ECL § 24-0801) and are instead regulated by the Adirondack Park Agency, which controls land use in that region generally.[21] As the Attorney General's memorandum to Governor Carey noted, more comprehensive legislation, which failed to pass, would have closed some of these loopholes.[22]

Localities may, of course, regulate both tidal and freshwater wetlands within their borders.

The act contains a provision, like that in the Tidal Wetlands Act, designed to avoid landowners' claims that their property is denied all economic use (ECL § 24-0705(7)). In a leading decision, *Spears v. Berle*,[23] the Court of Appeals ruled a landowner entitled to a trial in Supreme Court as to whether the denial of a permit amounted to an unconstitutional taking.

Localities may, of course, regulate both tidal and freshwater wetlands within their borders. Each of the acts contains provisions so specifying.[24]

A unique problem on Staten Island resulted in 1987 legislation allowing private landowners there to challenge freshwater wetland designations by DEC that were otherwise time-barred.[25] This stemmed from the department's failure to originally map some parcels as wetlands. The amendment provided

those owners an opportunity to review those belated designations where they had relied on the state's earlier mapping.

As with the Tidal Wetlands Act, an advisory committee named by Governor Cuomo reported in 1989 its recommendations to make this act more effective. It urged repeal of the arbitrary 12.4-acre threshold, additional permit and enforcement staff, better training, and higher penalties for violations.[26] In recent years, and notably since DEC Commissioner Alexander Grannis has headed the department, staff and training have indeed been augmented.

New York's tidal and freshwater wetlands remain a vital and irreplaceable resource, as was noted over three decades ago when these acts were adopted. The wetlands' continued survival depends on sufficient resources, and penalties, being deployed to protect them. ■

1. N.Y. Environmental Conservation Law art. 25 (ECL).
2. ECL art. 24.
3. N.Y. Assem. 9046 (1972).
4. N.Y. State Leg. Ann. 1972, p. 388.
5. 1973 N.Y. Laws ch. 790.
6. Memorandum of Assemblyman Peter Costigan, *reprinted in* 1973 N.Y. Laws ch. 790.
7. *Id.*
8. Memorandum of Governor Nelson A. Rockefeller, *reprinted in* 1973 N.Y. Laws ch. 790.
9. *N.Y. City Hous. Auth. v. Comm'r of Envtl. Conserv.*, 8 Misc. 2d 89, 372 N.Y.S.2d 146 (Sup. Ct., Queens Co. 1975).
10. 6 N.Y.C.R.R. pt. 661.
11. 6 N.Y.C.R.R. § 661.8.
12. 6 N.Y.C.R.R. §§ 661.4(hh), 661.5.
13. 505 U.S. 1003 (1992).
14. 89 N.Y.2d 603, 657 N.Y.S.2d 555, *cert. denied*, 522 U.S. 813 (1997).
15. An Evaluation of New York State's Tidal Wetlands Program, Final Report of the Tidal Wetlands Advisory Committee of the N.Y. State Dept. of Envtl. Conservation (Feb. 10, 1987).
16. ECL § 51-0103(3); *see generally* ECL art. 51.
17. ECL art. 24.
18. 1975 N.Y. Laws, p. 1763.
19. N.Y. State Leg. Ann. 1975, p. 219.
20. *See* N.Y. Assem. 2048 (2006), 7133 (2007) (N.Y. Leg. Digest 2006, 2007).
21. *See* N.Y. Executive Law §§ 800–820.
22. Memorandum of Attorney General Louis J. Lefkowitz, *reprinted in* 1975 N.Y. Laws ch. 614.
23. 48 N.Y.2d 254, 422 N.Y.S.2d 636 (1979).
24. *See* ECL §§ 24-0501, 25-0401(1).
25. ECL § 24-1104, which expired in 1992.
26. *See* New York State's Freshwater Wetlands Controls: A Resource in Jeopardy, Report of the Freshwater Wetlands Advisory Committee to the N.Y. State Dept. of Envtl. Conservation (July 3, 1989).

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: I am confused about the proper use of *it*, *its*, and *it's* in the drafting of legal documents. May I have your guidance on this subject?

Answer: This e-mail, sent by Pennsylvania attorney Christopher Junker, deals with a subject that confuses many people. The easiest of his questions is how to use *it*, the neutral personal pronoun. The pronoun *it* is used to refer to corporations, firms, businesses, courts, administrations, committees, and similar groups of individuals working together as an entity, often with authority to act as a single individual. When the reference is to one or more individuals in such a group, however, the pronouns *he* and *they* are used.

English speakers are probably more concerned about whether to add an apostrophe to the possessive *its* and whether to punctuate *its* when it means "it is." If you use *its* to indicate possession, do not add an apostrophe. That rule is relatively easy to remember, for no apostrophe is needed for any of the possessive forms of the personal pronouns *I*, *you*, *she*, *he*, *it*, *we*, and *they*. All possessive pronouns are spelled without punctuation – *yours*, *hers*, *his*, *its*, *ours*, and *theirs*.

But *do* add an apostrophe to indicate the contraction of *it is* (*it's*). Contrast the possessive form in, "Its color is purple" (possessive form: no apostrophe) with the contraction of *it is*, "It's a nice day.")

The neutral pronoun *it* has a varied etymology. In Old and Middle English, until about the middle of the 14th century, *it* was spelled *hit*; so the singular neutral pronoun *hit* began with an *h*, just as did the other two singular pronouns, *his* and *her*. The *h* of *hit* began to disappear during the 14th century, but its spelling did not become stabilized for a long time, and both *hit* and *it* were used indiscriminately. The possessive form *its* did not appear until the 16th century after the initial *h* of *hit* finally disappeared.

In fact, the modern possessive form *its* appeared along with the masculine singular *his* for many years. Even in the 17th century, the spelling of *its* was still unsettled, and the *Oxford English Dictionary* cites a 1634 quotation that indicates the earlier *his* instead of *its*: "Boston is two miles north-east from Roxberry: *His* situation is very pleasant." Calling a ship *her* instead of *it* is a remnant of the feminine pronoun still in use today to refer to inanimate objects.

The contraction *it's* (or *it is*) can be used as an anticipatory subject in a statement like "It's hot and humid outdoors," "It's hard to know who is to blame." In that type of statement *it* behaves like the expletive *there*. Compare "There's no time to go" with "It's too late to go."

We need *it* and *there* in those sentences because English grammar requires that a subject appear in the subject-slot of a sentence. Either *it* or *there* can satisfy that syntactic requirement; neither *it* nor *there* adds any meaning to the sentence. The sentences would have the same meaning if they were stated as, "The outdoors is hot and humid." "Who is to blame is hard to know." Either *it* or *there* adds emphasis to the real subject ahead.

It and *there* are called grammatical expletives (not the kind your mother washed out your mouth for using when you were young). They fill the subject-slot, while pointing ahead to the real subject toward the end of the sentence. Properly used, *there* has no number. It becomes either singular or plural depending on the number of the noun it points to.

Thus, it is correct to say and write: "There's only one candidate for the position," and "There are numerous candidates for the position," but, "There's numerous good candidates for the position" is ungrammatical. It is correct to say, "There's a problem with this arrangement," but to say, "There's problems with this arrangement" is incorrect. Substitute "There are problems. . . ." The error is so prevalent, however, that eventually it may become acceptable. A seeming exception occurs with the noun *lot*, a grammatical singular that carries a sense of plurality. So "There are a lot of problems with that solution" is correct.

Question: Which is correct, *de minimis* or *de minimus*? I nearly came to blows with an old supervisor over this; "*de minimus*" causes a "nails-on-blackboard" effect for me.

Answer: The correct spelling is *de minimis* (no *u*). The entire Latin sentence in the limerick below means "The law does not concern itself with trifles."

> There was a young lawyer named Rex
>
> Who was sadly deficient in sex.
>
> Arraigned for exposure,
>
> He said with composure,
>
> "De minimis non curat lex."
>
> Larry Wilde, *The Official Lawyers Joke Book* 20 (1982)

Incidentally, readers have also expressed their irritation about the common misspelling of another Latin phrase, *In Memoriam*, often misspelled *In Memorium*. Neither misspelling bothers most people, however, because Latin is no longer being taught in high schools.

Potpourri

National Public Radio commentator Daniel Schorr once commented on why compound terms are so popular in print journalism. He said that journalists began to substitute compounds for verb-adverb constructions because

CONTINUED ON PAGE 61

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I have been representing a client in negotiating the sale of his business. The business is of a type that requires a state license in order to operate, and in my practice I have assisted many clients in obtaining such a license. After the contract was signed, the purchaser's attorney asked me to represent his client in connection with obtaining its own license.

The contract closing is conditioned on the purchaser obtaining a license within an agreed period of time. Even if I represented the purchaser and it obtained the license, I would not represent the purchaser at the closing of title. However, there is a good chance that I would represent the purchaser after closing, but only with respect to matters unrelated to this particular purchase and sale, and not adverse to the interests of my current client. The partner of my firm who brought in the current client is very anxious for me to undertake the representation of the purchaser in getting its license. Our current client also agrees that I should do it, because he thinks that my representing the purchaser will ensure that the purchaser gets its license and the deal can close. Can I do this? Should I do this?

Sincerely,
Puzzled

Dear Puzzled:

Representing the seller in connection with the sale of its business and the buyer in obtaining the business license, upon which the closing of title is conditioned, clearly involves current client conflicts of interest under Rule 1.7 of the New York Rules of Professional Conduct (NYRPC). While both the seller and the buyer presently have a common interest in the buyer's timely acquisition of the license, business conditions may change and might favor the buyer if it delays processing the application. Also, in preparing the application you may learn information that is adverse to the interests of the seller. You may also have information about the seller, its premises and method of operation which, if disclosed to the buyer or the licensing authority, could have a negative impact on the processing of the application, and even on the ultimate issuance of the license. There is also the possibility that the representation of the buyer may interfere with your exercise of independent professional judgment on behalf of the seller. Finally, the possibility of a continued representation of the buyer is an element of a personal interest conflict that you must seriously consider.

NYRPC Rule 1.7, however, does allow you to undertake the proposed representation if (1) you reasonably believe that you will be able to provide competent and diligent representation of each affected client, (2) the representation is not prohibited by law, (3) the representation does not involve the assertion of a claim by one client against another client represented by you in the same litigation or other proceeding before a tribunal, and (4) each affected client gives informed consent in writing.

It will also be necessary, as required by NYRPC Rule 1.6, to obtain written informed consent from both seller and buyer to the disclosure of confidential information of each as that information relates to the preparation and processing of the license application.

Nevertheless, even if you meet the conditions mentioned above, which ethically would permit you to undertake the representation, the advice here in answer to your second question – Should I do this? – is that you should not. If you do, you very well may be subjected to a constant tug of conflicting loyalties, which will make the exercise of your professional judgment difficult and will require continuous soul-searching to justify your professional decisions. Remember, also, that if you decide to proceed with the representation, and the conflicts issues turn out to be more complex than anticipated, withdrawal may become a necessity, which can have adverse consequences for one or both of the clients. Finally, if a complaint is filed with the disciplinary authorities because one of the clients becomes dissatisfied with how things develop, you will have to defend your actions, and hindsight is always 20/20. Looking back, conflicts may appear much more obvious than when you decided to proceed or when you made decisions during the course of the representation.

So, while it may be ethically possible to undertake the representation, it is submitted that professionalism dictates that you not represent the buyer in connection with its license application as long as you represent the seller in the transaction, even if both parties are fully informed and are willing to provide consent in writing.

The Forum, by
M. David Tell
Wantagh, NY

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I've been a New York litigator for almost 40 years, and in those decades I've seen, heard, and thought a lot about the litigator's role. But just last month, I was shocked by what I heard at a CLE ethics presentation about the new New York Rules of Professional Conduct ("Rules") that became effective on April 1, 2009 – litigators are now supposed to "rat out" their clients if they testify falsely! This is so completely contrary to the New York litigator's traditional role as a zealous advocate that I wondered whether I had just heard an April Fool's Day joke.

Unfortunately, however, this was no joke. Rule 3.3(a)(3) provides that "[i]f a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(b) provides that "[a] lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) then says that the duty to remedy such false testimony or misconduct applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6," the Rule regarding the lawyer's duty not to reveal or use client confidential information (*i.e.*, what the old Code of Professional Responsibility ("Code") used to call "confidences" and "secrets"). In effect, Rule 3.3 requires lawyers to disclose confidential client information to a tribunal – and that includes arbitrators as well as judges – if such disclosure is necessary to remedy any false testimony or intentional misconduct by a client related to the proceedings.

In my view, Rule 3.3 represents a paradigm shift for New York litigators. When I began my practice in 1970, New York had just adopted the Code, and there was some concern about the uneasy relationship between a lawyer's duty to maintain the sanctity of client confidences and secrets and a lawyer's duty of candor to a court. Like the ABA Model Code on which it was based, the New York Code did not expressly resolve that conflict: while Disciplinary Rule (DR) 7-102(B)(1) required a lawyer who knew about a client's fraud upon a tribunal – for example, perjured testimony – to rectify it by, if necessary, revealing the fraud to the tribunal, DR 4-101(B) prohibited a lawyer from revealing or using client confidences or secrets to anyone, including a tribunal.

Those of us who believe wholeheartedly in the adversary system of justice took the position that partisanship shaped the very nature of the litigator's role and that, therefore, a litigator should never be forced to dilute the zeal with which he or she represented a client by pointing out perjured testimony. In our view, the duty of confidentiality trumped the duty of candor and it did so because, as litigators, our most important duty was to our client. Note the now-famous words of Lord Brougham: "[A]n advocate, in the discharge of his duty, knows but one person in the world, and that person is his client." In other words, zealous representation made the adversary system work, and if opposing counsel was not good enough at cross-examination – in Wigmore's words, "the greatest engine ever invented for the discovery of truth" – to demonstrate my client's false testimony, well, then, shame on him.

History shows that the profession agreed with our view. In 1974, the ABA House of Delegates amended DR 7-102(B)(1) to resolve the conflict. It qualified the lawyer's duty to "reveal the fraud to the . . . tribunal" by adding the proviso "except when the information is protected as a privileged communication." This amendment to DR 7-102(A)(1) made it clear that the duty of a lawyer to preserve a client's confidences and secrets prevailed over the duty to reveal to a tribunal client fraud or perjury.

Shortly thereafter, the New York State Bar Association (NYSBA) agreed. In 1976, NYSBA's House of Delegates adopted virtually the same proviso to DR 7-102(B)(1), confirming that the duty of confidentiality was more important to the adversary system of justice than the duty of candor. *See* NYSBA Op. 454 (1976). In fact, it was so important that in 1980, when the NYSBA Committee on Professional Ethics considered whether DR 7-102(B)(2), which required a lawyer to reveal to the court client confidences or secrets in order to rectify the fraud of a nonclient upon a tribunal, but lacked the proviso, the Committee overrode that omission by reading the proviso into DR 7-102(B)(2). NYSBA Op. 523. That Committee reasoned that in New York "the balance is struck by favoring the personal interest of the client in preserving his confidences and secrets against the relatively impersonal obligation of the lawyer to secure the system of justice against fraud."

I realize there were litigators and other lawyers across the country who did not agree with this resolution of the conflict between the duty of confidentiality and the duty of candor to a tribunal, and that they won out in 1983, when the ABA adopted its Model Rules, including Rule 3.3. But New York lawyers – litigators and others – always preferred the New York Code and, among other matters, the priority it gave to the duty of client confidentiality. In 1985, the NYSBA House of Delegates rejected a proposal to adopt the Model Rules. Even when the Code underwent wholesale revisions in 1990 and 1999, incorporating provisions and concepts from the ABA Model Rules, New York lawyers did not alter the priority of client confidentiality preserved in DR 7-102(B)'s proviso.

In short, New York lawyers consistently have chosen that litigators should not betray their clients' trust by identifying them as perjurers or fraud-

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statutes that you've already used in your document. Use a short citation instead. *Bluebook example:* "*Matar*, 500 F. Supp. 2d at 285."

The Bluebook, ALWD, and the Tanbook vary on whether to italicize titles of books, treatises, articles, legislative materials, reports, other non-periodic materials, and periodicals. The Bluebook differentiates between journal citations (used in journal articles) and non-journal citations (used for all other legal documents such as legal memorandums and briefs).[26] For journal publications under the Bluebook, italicize the titles of committee hearings and periodical materials like law-review articles, magazine articles, newspaper articles, proceedings, regular publications by institutes, and newsletters.[27] *Bluebook example:* "César de Castro, Outside Counsel, *Sorting Out the Law on Homicide Prosecutions Against Corporations*, N.Y. L.J., Mar. 19, 2009, at 4."

Capitalizing legal words is a capital offense.

For journal publications using the Bluebook, don't italicize the titles of books, reports, and other non-periodic materials.[28] Use large and small capitals instead of ordinary roman type.[29] *Bluebook example for journal publications:* "Terese Loeb Kreuzer & Carol Bennett, How to Move to Canada: A Primer for Americans 21 (2006)." If you're writing any other legal document, the Bluebook requires italics for book titles, articles, essays, and legislative materials; don't use large and small capitals.[30] *Bluebook example:* "Bryan A. Garner, *The Redbook: A Manual on Legal Style* 69–74 (2006)."

Under ALWD, italicize case names,[31] the title and bill number of congressional hearings,[32] book titles,[33] treatises, other non-periodic materials, journals, law-review articles, newspapers, newsletters, legal and other periodicals,[34] and the title or topic of legal-encyclopedia entries.[35] *ALWD example:* "67 Am. Jur. 2d *Robbery* § 80 (2008)."

Under the Tanbook, italicize the title of periodicals, newspapers, and American Law Reports Annotations, but not book titles.[36] *Tanbook way to cite a book:* "Kerry Colburn & Rob Sorensen, So, You Want to be Canadian: All About the Most Fascinating People in the World and the Magical Place They Call Home, at 4 (Chronicle Books 2004)."

The Bluebook is the only source that has different citation rules for footnotes and endnotes in journal publications.[37] To cite cases in footnotes and endnotes, use ordinary roman type for case names in full citations; however, always italicize procedural phrases. *Example:* "Matar *ex rel.* v. Dichter, 500 F. Supp. 2d 284 (S.D.N.Y. 2007)." For books, use large and small capitals for names of authors and titles. *Example:* "Laurel Currie Oates & Anne Enquist, Just Briefs 73 (2d ed. 2008)." For periodicals, italicize article titles and use large and small capitals for periodical names. Authors' names should appear in ordinary roman type. *Example:* "J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 Pace L. Rev. 559 (2007)."

According to the Bluebook and ALWD (no corresponding Tanbook rule exists), use roman type rather than italics when the words or phrases within italicized material would themselves have been italicized.[38] *Bluebook example:* "Celia Goldwag, *The Constitutionality of Affirmative Defenses After* Patterson v. New York, 78 Colum. L. Rev. 655 (1978)." Italics emphasize. Nothing will stand out if you italicize everything.

All the authorities forbid italicizing the comma after a case name.[39] *Incorrect (Tanbook): United States v. Polouizzi*, 564 F.3d 142 [2d Cir. 2009]). *Correct (Tanbook):* (*United States v. Polouizzi*, 564 F3d 142 [2d Cir 2009]).

Use italics to stress parts of quotations, although it's best to do so sparingly. Both the Bluebook and the Tanbook recommend noting only added emphasis, not when the emphasis appears in the original quotation.[40] *Emphasis in original (Bluebook):* "In *Hamdi*, Justice O'Connor noted that Justice Scalia 'largely ignores the context of this case: a United States citizen captured in a *foreign* combat zone.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 (2004) (quoting 542 U.S. at 523 (Scalia, J., dissenting)). *Emphasis not in the original (Bluebook):* "Mobbs then set forth what remains *the sole evidentiary support* that the Government has provided to the courts for Hamdi's detention." *Hamdi*, 542 U.S. at 512 (emphasis added). ALWD recommends that you note when you've added or deleted emphasis. When quoted material contains several instances of emphasis, both added and included in the original, indicate which alterations were made.[41] *Emphasis added and in original (ALWD):* "Further, Justice Scalia *largely ignores* the context of this case: a United States citizen captured in a *foreign* combat zone." *Id.* at 522 (first emphasis added; second emphasis in original).

5. Capitalizing.

Don't write a document with all the letters capitalized.[42] The uniform size of capital letters makes them indistinct; the reader will have difficulty processing the document.[43]

Always capitalize the pronoun "I." *Example:* "The judge and I watched Mr. Smith enter the courtroom."

Always capitalize the first letter in the first word of a sentence. *Example:* "Make sure to edit the brief."

Capitalize peoples' names. *Example:* "Chief Judge Jonathan Lippman."

Capitalize areas, buildings, and ships: *Examples*: "Tribeca," "Empire State Building," "the USS Abraham Lincoln."[44]

Capitalize personifications: "He's invisible, a walking personification of the Negative."[45]

Capitalize regions. *Example:* "Sitting in Housing Court is different from

sitting on a beach in the South of France."

Capitalize calendar terms, such as days of the week, months, and holidays. *Examples*: "Wednesday," "March," "Martin Luther King, Jr., Day."

Don't capitalize seasons. *Correct:* "The trial started in the fall of 2008 and ended in the spring of 2009."

Capitalize historical events, important eras, and documents. *Examples:* "the Vietnam War," "the Renaissance," "the United States Constitution."

Capitalize the names of governmental departments, agencies, and officials.[46] *Examples:* "the Federal Bureau of Investigation," "Assistant District Attorney," "the FDA."

Capitalize the names of organizations and institutions: "The Lesbian, Gay, Bisexual & Transgender Law Association of Greater New York (LeGaL)" and "Benjamin N. Cardozo School of Law, Yeshiva University."

Capitalize brand and trademark names. "Apple," "Nike," "Starbucks," and "Tony the Tiger."

Capitalize words derived from proper names. *Example:* "New Yorker."

Capitalize only the adjective in a proper adjective. *Example:* "Judges use certified court interpreters to understand Mandarin- and Cantonese-speaking litigants."

Capitalize titles of statutes, books, and articles.[47] *Bluebook example of a statute:* "N.Y. Penal Law § 98 (McKinney 1998)." To cite books under the Bluebook, either use the first author's name followed by "et al." or list all of the authors' names. *Bluebook example of citing a book:* "Veda R. Charrow, Myra K. Erhardt & Robert P. Charrow, Clear and Effective Legal Writing 281 (4th ed. 2007)." *Also correct:* "Veda R. Charrow et al., Clear and Effective Legal Writing 281 (4th ed. 2007)." In titles, don't capitalize articles ("a," "an," "the"), conjunctions ("and," "but," "or"), or prepositions that have four or fewer letters ("at," "for," "from," "into," "on"). Capitalize the first and last word of a title and the first word after an em dash — also called a long dash — or a colon, even if the word is an article, a conjunction, or a preposition.[48] *Example of capitalizing after a colon:* "Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 Buff. L. Rev. 1155 (2008)." *Example of capitalizing after an em dash:* "Kathleen Reilly, *Making a Killing in Real Estate: Solving the Mystery of Murder's Effect on Tenancy by the Entirety in New York — A Legislative Solution*, 82 St. John's Law Review 1203 (2008)." *Example of capitalizing "the" after a colon:* "Daniel M. Levy, *Defending Demaree: The Ex Post Facto Clause's Lack of Control over the Federal Sentencing Guidelines After Booker*, 77 Fordham L. Rev. 2623 (2009)."

Capitalize nouns, adjectives, participles, and prefixes in hyphenated compounds. *Example:* "The Post-Rehnquist Supreme Court." Don't capitalize articles, prepositions, or coordinating conjunctions after a hyphen.[49] *Example of conjunction "and":* "He's known as Mr. Love 'Em-and-Leave 'Em." Don't capitalize after a hyphen in hyphenated single words.[50] *Example:* "The defendant murdered John Johnson at 92 West Ninety-second Street."

Capitalize the first letter in a quotation if the first letter is capitalized in the original and if the quotation is an independent clause. *Correct:* "The defendant screamed, 'You're a liar. You know I didn't do it!'" Don't capitalize the first letter in a quotation if the quotation is a sentence fragment or is introduced by "that." *Example of sentence quotation fragment:* "According to the witness, the scene was 'gruesome, chaotic, and horrible.'" *Example of "that":* "The officer testified that 'the suspect was armed.'" Enclose the altered letter in brackets when changing a letter from uppercase to lowercase, or vice versa, in a quoted sentence fragment or after "that." *Correct:* "The juror kept saying that '[m]urder is murder!'"[51] Don't capitalize an indirect quotation. *Correct:* "Despite the evidence, the defendant stated he was innocent."

Capitalize the first letter of a direct question even if the direct question doesn't begin a sentence. *Example:* "The stenographer asked the witness, 'What's your name, sir?'" An indirect question in the middle of a sentence shouldn't begin with a capital latter. *Correct:* "The stenographer asked you whether you would restate your name."[52]

When an independent clause follows a colon, capitalize the first word immediately after the colon. *Example:* "You have two options: Go to trial or settle." When a dependent clause follows a colon, don't capitalize the first word immediately after the colon. *Example:* "You have two options: trial or settlement."[53]

Capitalize compass points, but only when identifying a specific area, not when referring to a direction.[54] *Example of specific area:* "More students apply to law schools in the Northeast than in the Southeast." *Example of direction:* "The best judges come from the north, like Canada, for example."

Capitalize all the letters in acronyms — words formed from the initial letters of other words. *Example:* "NATO is the acronym for the North Atlantic Treaty Organization." Don't capitalize all the letters in a false acronym — words in which the letters don't stand for other words. *Correct:* "Fax" or "fax," not "FAX" (facsimile). Don't capitalize acronyms that have become commonly used words. *Correct:* "scuba" (self-contained under-

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Produce a document free of mechanical glitches with all nuts 'n' bolts firmly tight and in place.

water breathing apparatus); "laser" (light amplification by the stimulated emission of radiation).[55]

Capitalize the first letter of the words "act" and "code" when referring to a specific act or code. *Example*: "After September 11, 2001, Congress enacted the PATRIOT Act." *Example:* "The Uniform Commercial Code binds the court." Under the Bluebook, ALWD, and the Tanbook, lowercase "act," "statute," and "code" when standing alone.[56] *Example:* "Nothing in the statute supports the plaintiff's argument."

Lowercase the names of statutes and rules that exist today only as legal doctrines. *Examples:* "rule against perpetuities," "statute of frauds," and "statute of limitations."

Capitalize "court" when referring to a court by its full name.[57] *Examples:* "The New York City Civil Court," "Albany City Court." Under the Bluebook, capitalize the word "court" when naming any court in full or when referring to the U.S. Supreme Court.[58] *Example:* "In the *Flood* case, the Court held that baseball's reserve clause is exempt from the Sherman Antitrust Act." Under ALWD, capitalize the word "court" when (1) naming the court in full; (2) referring to the highest court in any jurisdiction once you've identified it by its full name; (3) referring to the U.S. Supreme Court or the highest court in a state; or (4) referring to the court to which you're submitting the document (*i.e.*, "this Court").[59] ALWD recommends not capitalizing the word "court" when referring to any other court by partial name or to lower courts in general.[60] Under the Tanbook, capitalize the word "court" when standing alone to refer to the U.S. Supreme Court, New York's Appellate Division, or a jurisdiction's highest court.[61]

Under the Bluebook and ALWD, capitalize the word "judge" or "justice" when referring to a judge or justice by name.[62] *Example:* "He appeared before Judge Able."

According to the Tanbook, whose advice on this issue contradicts other authorities, capitalize short-form references to a specific "judge" or "justice."[63] *Tanbook example:* "During oral arguments, the Judge chided the attorney for chewing gum in the courtroom." Otherwise, don't capitalize general references to a "judge" or "justice" unless referring to a "judge" or "justice" of a named court. *Correct:* "More than 10 judges have written on this issue." *Also correct:* "More than 10 Judges of the New York Civil Court, Housing Part, have written on this issue."

All authorities recommend capitalizing "justice" when referring to a Justice of the U.S. Supreme Court.

For capitalization rules on titles of honor or respect, see ALWD and the Redbook.[64] Capitalize titles that precede proper names. No corresponding rules exist for the Bluebook or the Tanbook. *Examples:* "Senior Court Attorney Jane Smith," "Senior Director James Roe," "The Reverend Billy Graham." Titles that go after a name aren't capitalized unless the title is important. *Examples:* "Professor Nadine Strossen was the president of the American Civil Liberties Union for 18 years." "Billy Graham is a reverend." *But:* "Joe Smith is the President of the United States but would rather be a Supreme Court Justice."

Lowercase titular appositives. *Incorrect:* "Convicted Murderer Bobby Joe Lee was sentenced to life imprisonment without parole." *Correct:* "Convicted murderer Bobby Joe Lee was sentenced to life imprisonment without parole."

Capitalize the words "state" and "commonwealth" when part of a state title (New York State), when used as an adjective (the State bird), or when it's a named litigant (*Commonwealth v. Smith*).[65]

Under the Bluebook, capitalize party designations when referring to a case's specific parties.[66] *Bluebook examples:* "Plaintiff," "Defendant," "Appellant," "Appellee," "Petitioner," "Respondent." Under ALWD, capitalize the "p" in "plaintiff" and the "d" in "defendant" when submitting to a court a document that refers to a specific party in the case.[67] *Bluebook and ALWD examples:* "Plaintiff denies Defendant's affirmative defense." *But:* "In that case, the plaintiff alleged that the defendant was not a permanent statutory tenant." Under the Redbook, capitalize party designations when referring to a specific party if the designation isn't preceded by a "the."[68] *Redbook example:* "Defendant argued that Plaintiff had a motive to lie." *But:* "The defendant argued that the plaintiff had a motive to lie." Under the Tanbook, always lowercase "appellant," "defendant," "plaintiff," "respondent," and "petitioner."[69] *Tanbook example:* "Here, plaintiff alleges that defendant acted in bad faith."

According to ALWD and the Redbook, capitalize terms you've defined in a contract.[70] *Example:* "Buyer agreed to purchase 100 Shares from Seller."

Capitalize and spell out the section symbol (§) at the beginning of a sentence. *Incorrect:* "§ 21 of the employee handbook provides that all attorneys at Smith and Smith, P.C., submit to mandatory arbitration if a dispute arises." *Becomes:* "Section 21 of the employee handbook provides that all attorneys at Smith and Smith, P.C., submit to mandatory arbitration if a dispute arises."

Don't capitalize applications, orders, papers, or motions.[71] *Incorrect:* "Defense counsel filed a Motion to Vacate the Default." *Correct:* "Defense counsel filed a motion to vacate the default." *Incorrect:* "The attorney filed an Order to Show Cause to Appoint a Guardian." *Correct:* "The attorney filed an order to show cause to appoint a guardian." *Incorrect:* "The court required her to submit three copies of her Brief." *Correct:* "The court required her to submit three copies of her brief." *Incorrect*: "The respondent moved for Summary Judgment." *Correct*: "The respondent moved for summary judgment."

Capitalizing legal words is a capital offense. *Incorrect:* "Plaintiff did not

prove the claim by a Preponderance of the Evidence." *Correct:* "Plaintiff did not prove the claim by a preponderance of the evidence." Don't capitalize proceedings unless they're named after a case. *Incorrect:* "The court conducted a Suppression Hearing." *Correct:* "The court conducted a suppression hearing." *Correct:* "The court granted defendant's application for a *Ventimiglia* hearing."

Don't capitalize foreign words. *Incorrect:* "He handled the case Pro Bono." *Correct:* "He handled the case pro bono."

Capitalize languages, religions, nationalities, countries, and races but not colors ("black," "white"). *Examples:* "English," "European," "the United States," "African American."

Conclusion

The Bluebook, ALWD, the Tanbook, and the Redbook, among other authorities, have various rules for numbers, numerals, figures, typographic symbols, abbreviations, italicizing, underlining, and capitalizing. Sometimes the authorities agree with one another; sometimes they're at odds. Whichever authority you use, be consistent: Produce a document free of mechanical glitches with all nuts 'n' bolts firmly tight and in place. ■

Gerald Lebovits is a judge at the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at St. John's University School of Law. For their research help on Parts I and II of this column, he thanks Alexandra Standish, his court attorney, and St. John's University law student Jamie Bunyan. Judge Lebovits's e-mail address is GLebovits@aol.com.

1. The Bluebook: A Uniform System of Citation (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).
2. Darby Dickerson & Association of Legal Writing Directors, ALWD Citation Manual: A Professional System of Citation (3d ed. 2006).
3. New York Law Reports Style Manual (Tanbook) (2007), *available at* http://www.nycourts.gov/reporter/New_Styman.htm (html version) *and* http:// www.nycourts.gov/reporter/NYStyleMan2007.pdf (pdf version) (last visited June 6, 2009).
4. Black's Law Dictionary (9th ed. 2009).
5. Bluebook R. 7(b), at 75.
6. ALWD R. 1.8, at 15.
7. Tanbook R. 13.7, at 88, and Appendix 5, at 127–135.
8. Bluebook R. 7(e), at 75.
9. Bluebook R. 2.2(a)(i), at 56; ALWD R. 1.3(3), at 13; Tanbook R. 2.2(a)(1), at 10.
10. Short-form citation may be used after a full citation appears in the document if (a) the short citation tells the reader clearly what's being referenced, (b) the full citation falls in the same general discussion, and (c) the full citation can be located in the document easily. Don't use a short citation if doing so will confuse the reader. In a new section of a brief, repeat the full citation before short-form citing within that section. For short-form citing rules, see Bluebook R. B5.2, at 11; ALWD R. 11.2(b)(2), at 52–53; Tanbook R. 1.3, at 5–6.
11. Bluebook R. B 5.1.5, at 10, and Table 8, at 340.
12. ALWD R. 12.8(a), at 87–89.
13. Tanbook R. 2.2(a)(5), at 11–12, and Appendix 3, at 118–119.
14. Bluebook R. 1.2(a), at 46–47, and R. 2.1(d), at 55; ALWD R. 1.3(1), at 13, and R. 44.6(b), at 326; Tanbook R. 1.4(a), at 6–7.
15. Bluebook R. 1.2, at 46–47; ALWD R. 44.3, at 324–325; Tanbook rule 1.4(a), at 6–7.
16. Bluebook R. 1.2(a), at 46, and R. B4.3, at 5.
17. ALWD R. 44.3, at 325.
18. Tanbook R. 1.4(a), at 6–7.
19. Bluebook, R. 4.1, at 64; ALWD R. 11.3(c), at 55; Tanbook R. 1.3(d), at 6.
20. Bluebook R. 2.1(f), at 56; Redbook R. 3.10, at 74.
21. Bluebook R. 2.1(f), at 56.
22. Bluebook R. 2.1(d), at 55; ALWD R. 44.6(b), at 326; Tanbook rule 1.4(b), at 7.
23. Bluebook R. 1.6, at 52.
24. ALWD R. 46.4, at 337.
25. Bluebook R. 3.5, at 63, and R. 4.1, at 64; and ALWD rule 10.3(c), at 50; Tanbook R. 1.3, at 5–6.
26. Bluebook R. B13, at 23-2 and R. 2, at 54.
27. Bluebook R. 13.3, at 116, and R. 16.2, at 139.
28. Bluebook R. 15.3, at 132.
29. "Small capitals" — a typographic feature — are capital letters that have the same height as surrounding lower-case letters. Using "large capitals" is synonymous to uppercasing, or capitalizing, the letters.
30. Bluebook R. B13, at 24.
31. ALWD R. 1.3, at 13–14.
32. ALWD 15.7(c)(4), at 130.
33. ALWD R. 22.1(b), at 204.
34. ALWD R. 23.1(b), at 218–219
35. ALWD R. 26.1(c), at 235–236.
36. Tanbook R. 7.2, at 49–50; R. 7.5, at 53.
37. Bluebook R. 2.1, at 54–56.
38. Bluebook R. 16.2, at 139; ALWD R. 1.6, at 14.
39. Bluebook R 2.1(f), at 56; ALWD R. 1.4, at 14; Tanbook R. 2.1, at 9–10;
40. Bluebook R. 5.2 (d)(iii), at 70; Tanbook R. 11.1(f), at 78.
41. ALWD R. 48.5(b), at 350.
42. For more on capitalizing, see Gerald Lebovits, The Legal Writer, *Uppercasing Needn't Be a Capital Crime*, 75 N.Y. St. B.J. 64 (May 2003).
43. *See id.*
44. *See* Bluebook R. 8(b)(i), at 76; ALWD R. 3.2(c), at 21–22.
45. Ralph Ellison, *available at* http://www.thepersonification.com/home.html (last viewed June 5, 2009).
46. Bluebook R. 8(b)(i), at 76; ALWD rule 3.2(b), at 21; Tanbook R. 10.1(b)(1), at 65–66.
47. Bluebook rule 8(a), at 76; ALWD rule 3.1(b), at 19; Tanbook rule 10.1(a), at 65; Redbook R. 2.6, at 56.
48. Bluebook R. 8(a), at 76; ALWD R. 3.1(b)(4), at 19; Tanbook R. 10.1(a), at 65.
49. Redbook R. 2.10(c), at 59.
50. ALWD R. 3.1(c), at 19–20; Redbook, R. 1.56, at 38, and R 1.57, at 38–39.
51. Bluebook R. 5.2(a), at 69; ALWD R. 48.1, at 348; Redbook, R. 2.4, at 55.
52. Redbook R. 2.5, at 55–56.
53. For more on this topic, see Gerald Lebovits, The Legal Writer, *Do's, Don'ts, and Maybes: Legal-Writing Punctuation — Part I*, 80 N.Y. St. B.J. 64 (Feb. 2008).
54. *See* Redbook R. 2.13, at 60–61.
55. Redbook R. 2.11, at 59–60.
56. Bluebook R. 8(b)(ii), at 76–78; ALWD R. 3.3, at 23–27; Tanbook R. 10.1(j), at 70.
57. Bluebook R. 8(b)(ii), at 76–78; ALWD R. 3.3, at 23–27; Tanbook R. 10.1(h), at 68.
58. Bluebook R. 8(b)(ii), at 76–78.
59. ALWD R. 3.3, at 25.
60. *Id.*
61. Tanbook R. 10.1(h), at 68.
62. Bluebook R. 8(b)(ii), at 78; ALWD R. 3.3, at 26.
63. Tanbook R. 10.1(i)(1), at 68–69.
64. ALWD R. 3.2(a), at 21; Bryan A. Garner et al., The Redbook: A Manual on Legal Style R. 2.15, at 62–63 (2d ed. 2006).
65. Bluebook R. 8(b)(ii), at 77–78; ALWD R. 3.3, at 23–27.
66. Bluebook R. B.10.6.2, at 21.
67. ALWD R. 3.3, at 23–27
68. Redbook R. 2.15(f), at 62.
69. Tanbook R. 10.1(*l*), at 71.
70. ALWD R. 3.2(h), at 22; Redbook rule 2.9, at 58.
71. Tanbook R. 10.1(m), at 71.

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Language Tips
Continued from Page 49

the cost of a cablegram depended on the number of its words. Hyphenated words were counted as single words, so hyphenation could significantly cut the cost of a cablegram. Therefore, *put off* soon became *off-put*; *play down* became *down-play*; and other new compounds emerged. He recalled one editor chiding a journalist whose story was too long, "For Christ's sake, off-lay!" Schorr ended his piece saying, "This is Daniel Schorr off-signing." ■

Attorney Professionalism
Continued from Page 51

sters if they testify falsely or commit other intentional misconduct in proceedings before a tribunal. The extent of that loyalty to a client, reflected in the lawyer's duty to preserve client confidentiality, has been a constitutive element of a New York litigator's identity since well before I started litigating. *See* ABA Formal Op. 287 (1953). Why are we changing that now?

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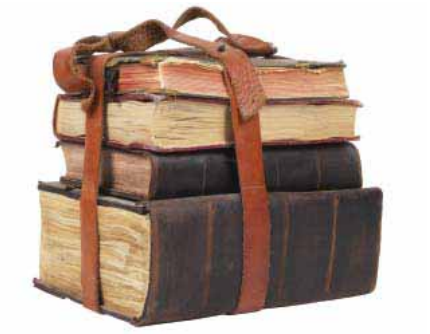

Nuts 'n' Bolts: Legal-Writing Mechanics — Part II

In the last column, the Legal Writer discussed numbers, numerals, and figures; typographic symbols; and abbreviations. We continue with italicizing, underlining, and capitalizing.

4. Italics and Underlining.

Use italics for foreign words and phrases not commonly used in legal English. *Example:* "*Ignorantia legis neminem excusat*." If you're using the Bluebook, consult rule 7(b).[1] For ALWD, consult rule 1.8.[2] If you're using the Tanbook, New York's style manual, read Appendix 5 for the italicization rules for foreign words and phrases.[3] When in doubt about whether to italicize a Latin word or phrase, consult *Black's Law Dictionary*.[4]

Don't italicize Latin words and foreign phrases commonly used in legal writing. *Bluebook examples:* "amicus curiae," "certiorari," "corpus juris," "de jure," "e.g." (if you use "*e.g.*" as a signal, italicize it), "en banc," "habeas corpus," "i.e.," "mens rea," "modus operandi," "prima facie," "quid pro quo," and "res judicata."[5] *ALWD examples:* "ad hoc," "in rem," "quantum meruit," and "de facto."[6] *Tanbook examples:* "ad hoc," "coram nobis," de minimis," inter vivos," "quantum meruit," "scienter," and "sub judice."[7]

Italicize mathematical formulas and variables.[8] *Bluebook examples:* "$E=mc^2$" and "$a>2b$."

Use italics for case names. Italicize the parties' names and "*v.*," "*in re*," or "*ex rel.*"[9] Italicize a case name when the case name appears in a textual sentence. *Example:* "In *Smith*, the jury found the defendant guilty of burglary in the second degree." Italicize case names in short-form citations.[10] *Example: Polouizzi*, 564 F.3d at 143.

Italicize case history. *Bluebook examples:*[11] "*aff'd*," "*appeal denied*," "*appeal dismissed*," "*cert. denied*," "*cert. granted*," "*modified*," "*rev'd*," "*rev'd on other grounds*," "*vacated*." *ALWD examples:*[12] "*appeal filed*," "*mandamus denied*," "*modified*," "*overruled*," "*superseded*," "*vacated*," "*withdrawn*." *Bluebook and ALWD example: Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *aff'd*, 563 F.3d 9 (2d Cir. 2009). *Tanbook examples:*[13] "*affd*," "*affd on other grounds*," "*cert denied*," "*cert granted*," "*lv denied*," "*lv dismissed*," "*lv granted*," "*mod*," "*revd*." *Tanbook citation:* (*Matar v Dichter*, 500 F Supp 2d 284 [SD NY 2007], *affd* 563 F3d 9 [2d Cir 2009]).

Italicize citational signals.[14] *Examples:* "*accord*," "*but cf.*," "*but see*," "*cf.*," "*compare . . . [and] with [and] . . .*," "*contra*," "*e.g.*," "*see*," "*see also*," "*see generally*."[15] Only the Bluebook requires a comma, as in "e.g.," after the period in "e.g."[16] The comma is not required under ALWD[17] and the Tanbook.[18]

Always italicize "*id.*" and the period after the "*id.*"[19]

Don't italicize periods, opening or closing parentheses, or other punctuation marks that aren't part of the italicized matter.[20]

Only the Bluebook requires italicizing the comma after "*see*" in "*see, e.g.*"[21] *Bluebook example:* "*See, e.g., Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007)." No commas are required under ALWD and the Tanbook. *ALWD example:* "*See e.g. Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007)." *Tanbook example:* "(*See e.g. Matar v Dichter*, 500 F Supp 2d 284 [SD NY 2007])."

The Bluebook, ALWD, and the Tanbook recommend not italicizing "see" and "see, e.g.," when the signal serves as the verb of the sentence.[22] *Bluebook example:* "For a discussion of violence against works of art, see M.J. Williams, *Framing Art Vandalism: A Proposal to Address Violence Against Art*, 74 Brook. L. Rev. 581, 582 (2009)." *ALWD example:* "For a discussion of violence against works of art, see M.J. Williams, *Framing Art Vandalism: A Proposal to Address Violence Against Art*, 74 Brook. L . Rev. 581, 582 (2009)." *Tanbook example:* "For a discussion of violence against works of art, see M.J. Williams, *Framing Art Vandalism: A Proposal to Address Violence Against Art* (74 Brook L Rev 581, 582 [2009])."

Different rules determine whether to italicize words and phrases introducing related authority. Under the Bluebook, italicize words and phrases introducing related authority.[23] *Examples:* "*available at*," "*in*," "*reprinted in*." Under ALWD, don't italicize words and phrases introducing related authority.[24] *Examples:* "reprinted in," "cited in," "reviewing," and "cited with approval in." No corresponding Tanbook rule exists.

Italicize internal cross-references — references to other parts of a document — such as text, endnotes, footnotes, appendices, and other internal material.[25] Examples of cross-references include "*infra*" (below) and "*supra*" (above). *Example:* "For a discussion of capitalization rules, consult *infra* Part 5." Don't use internal cross-references to cite outside sources like cases or

CONTINUED ON PAGE 52

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