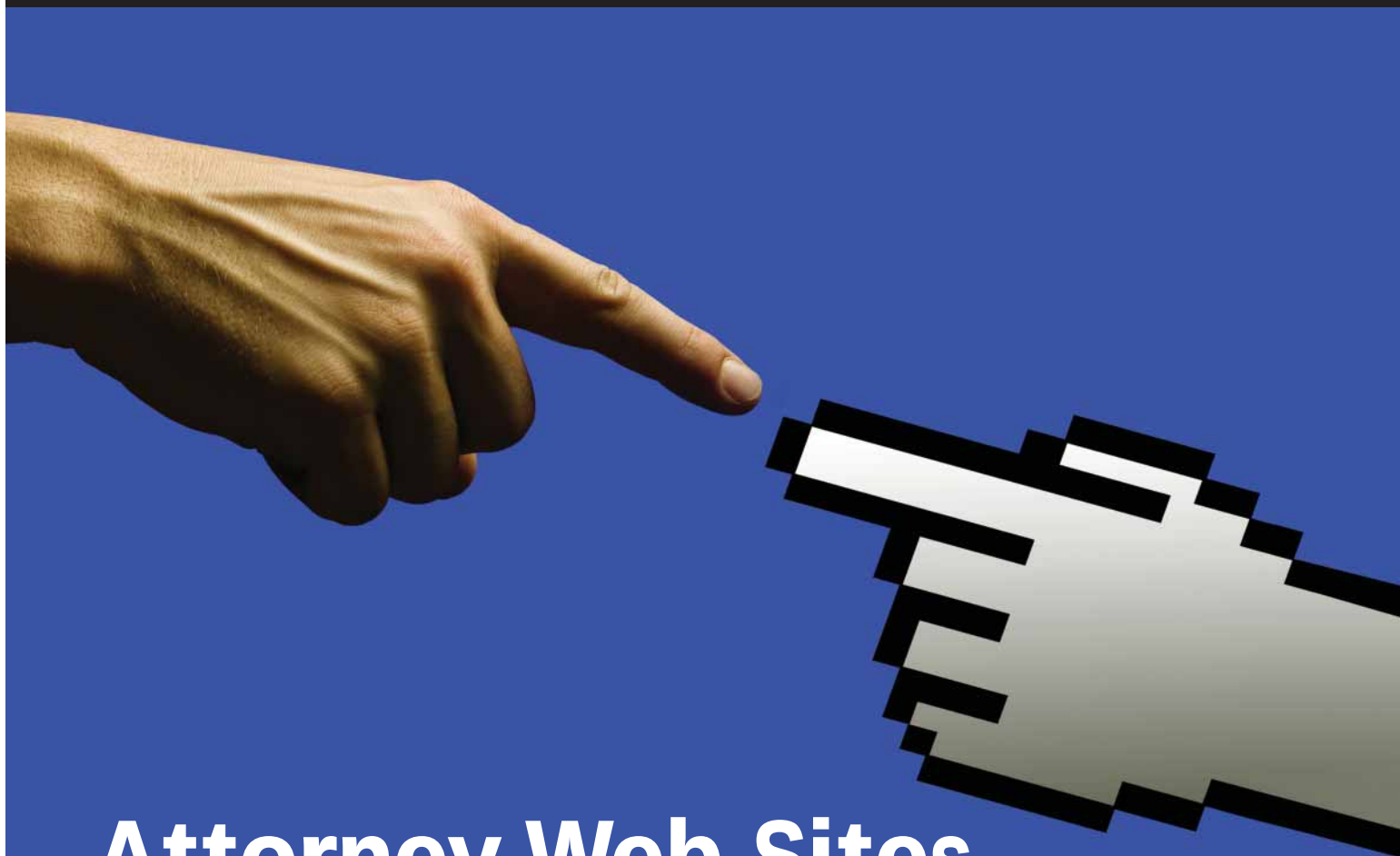


JUNE 2009
VOL. 81 | NO. 5



NEW YORK STATE BAR ASSOCIATION Journal



Attorney Web Sites

Ethical Issues Are Only the Beginning

*by Adam R. Bialek, Paris A. Gunther
and Scott M. Smedresman*

Also in this Issue

From the "Code" to the
"Rules"

"Cohabitation" Clauses
After *Graev*

Avoiding IRS Tax Disputes

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June 2009

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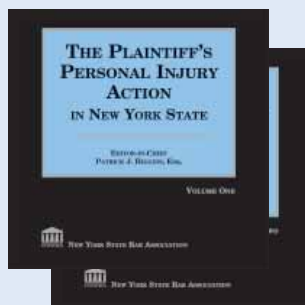
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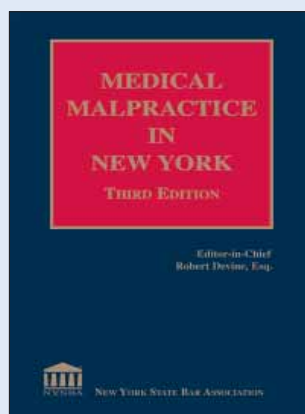
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CONTENTS

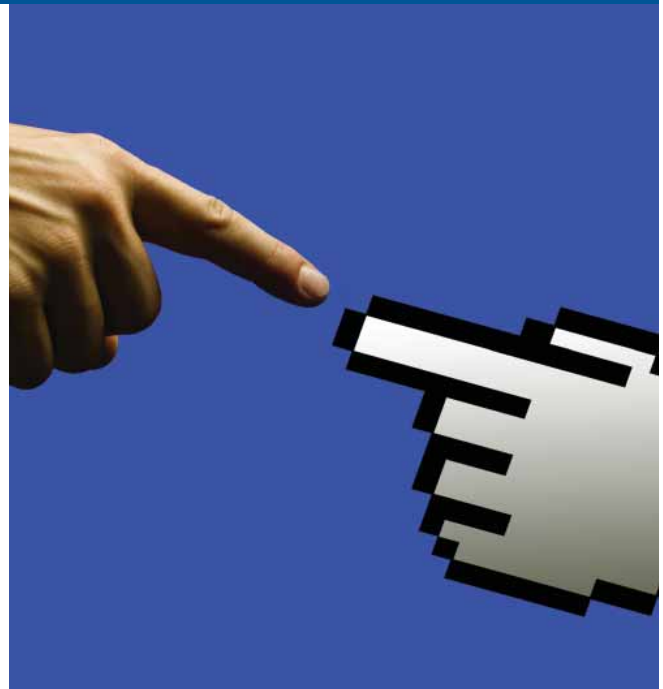
JUNE 2009

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Non-Traditional Attorney
Advertising on the Internet

BY ADAM R. BIALEK, PARIS A. GUNTHER
AND SCOTT M. SMEDRESMAN

10



DEPARTMENTS

- 5 President's Message
- 8 CLE Seminar Schedule
- 20 Burden of Proof
BY DAVID PAUL HOROWITZ
- 44 Meet Your New Officers
- 46 Legal Research
BY WILLIAM H. MANZ
- 50 Computers & the Law
BY DAVID P. MIRANDA
- 56 Attorney Professionalism Forum
- 60 Index to Advertisers
- 60 Classified Notices
- 61 Language Tips
BY GERTRUDE BLOCK
- 63 2009–2010 Officers
- 64 The Legal Writer
BY GERALD LEBOVITS

CARTOONS © CARTOONRESOURCE.COM

24 In With the Rules, Out With the Code

BY STEVEN C. KRANE AND DAVID A. LEWIS

30 Drafting Matrimonial “Cohabitation” Clauses After *Graev*

BY LEE ROSENBERG

33 Ways to Steer Clear of IRS Tax Disputes

BY ROBERT W. WOOD

36 Law Day 2009: “A Legacy of Liberty – Celebrating Lincoln’s Bicentennial”

37 2008 Insurance Law Update *Uninsured, Underinsured And Supplementary Uninsured Motorist Law – Part II*

BY JONATHAN A. DACHS

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PRESIDENT'S MESSAGE

MICHAEL E. GETNICK

Presidential Pledge

With great enthusiasm, I look forward to taking on the presidency of the largest voluntary state bar association in our nation. These are particularly challenging times for the State Bar as the economy is negatively impacting our entire population. This makes our ability to practice law and achieve the goal of access to justice even more difficult. We have great hurdles before us. However, together we will find ways to minimize the economy's devastating effects on both our profession and our communities. I remain confident that by renewing our emphasis on our role as the most powerful and positive voice for (1) attorneys, (2) the clients we serve, (3) an independent judiciary and (4) the poor who need and deserve legal services, we can address the damage that has been done to the public's confidence in our justice system. We must work together to protect and promote the abilities of attorneys to practice law and earn a living.

Throughout my term as the President-Elect, I have been mentored by President Bernice Leber, who has afforded me the opportunity to take part in Bar Association policy development and to meet with and establish relationships with members of the State and Federal governments – as well as members of the judiciary. She has run a remarkable course and done us all proud. Her energy and commitment to our profession and this Association has been an inspiration. Past presidents such as Kate Madigan and others have offered and provided assistance and encouragement, and continue to do so. I look forward to taking on the role of the President not as a personal achievement, but as an opportunity to achieve

the priorities for which our Association advocates and which it embodies.

We have successfully voiced strong opposition to increased court filing fees and bar examination fees; we successfully fought for increased State money to fund legal services; and we activated our Mass Disaster Response Team three times this year. When I was attending ABA activities in Boston, the news came in of the air disaster in Buffalo. During the meeting of the Executive Committee this April in Albany, we were informed of the shootings in Binghamton. In all such instances, the work of the State Bar leadership carried on with the knowledge and assurance that the Mass Disaster Response Team was on the way. We have so much to be proud of.

What I will miss the most from my term as President-Elect is the opportunity to chair the House of Delegates. It has been an honor and privilege. There were times during the meetings when I was correctly questioned under Roberts Rules of Order. (With some humor, I also recall ruling myself out of order at the very first meeting I chaired in Cooperstown.) I sincerely appreciated every speaker who presented resolutions and reports from the podium, as well as each member of the House who asked to be heard on the pending topic. The congeniality we share in practicing our profession and interacting as members of this Bar Association is indicative of far more than our social demeanor.

With more than 76,000 members and a large and diverse House of Delegates, it is no wonder that we approach different subjects of the law from different backgrounds and multiple perspectives. The work of our



committees, sections and task forces is thorough and dedicated. All sides have the opportunity to be heard and present their positions. As lawyers, we are most often advocates. Why then should we be so receptive to having our positions challenged, examined and often altered to be able to come to consensus? It certainly would be far easier to simply rule by majority vote without the opportunity for debate.

I believe Justice Holmes may have said it best when the Supreme Court had the initial opportunity to rule on the Sedition Act of 1918 in *Abrams v. United States*, 250 U.S. 616 (1919). In writing for the dissent, he eloquently defended the philosophy of free speech and free debate:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ulti-

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

PRESIDENT'S MESSAGE

mate good desired is better reached by free trade in ideas – that the best of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

May I be so bold as to suggest that I believe Justice Holmes, if attending a meeting of our House, would say that we got it right.

I am proud to have been a member of the Bar Association for nearly 40 years. I come from a family of lawyers. My father, a member before me, was my mentor. His respect for this Association was unlimited. In these fiscally uncertain times, we must renew our focus on our basic values and mission. We must continue to provide lawyers with authoritative and up-to-date publications and continuing legal education of the highest quality, and to advocate for legislation that supports the right of access to justice and the ability of our profession to practice law. We need to continue and strengthen our relationship with the Courts, as

well as the policy-makers, to achieve key reforms and maintain justice.

We cannot mistake our recent record growth in membership as a sign that we need not do more to continue our success as a voluntary bar association. Many lawyers and their staffs have lost their jobs. Some firms have asked new hires to delay their start dates by a few months or more. Some law firms have rescinded offers to would-be first-year associates. As the newest class of law students graduates, most will carry thousands of dollars in debt and face the pressure of a looming bar exam and, for many, a seemingly hopeless job search. They will be competing in a job market with the many experienced lawyers recently laid off or looking for new employment opportunities.

At the same time, the need for legal services continues to grow. The justice gap has swelled to 85% and more, meaning that people faced with basic legal issues, such as child custody, immigration, disability benefits and foreclosure, are forced to litigate without an advocate. I do not have the answers to these problems. However, I firmly believe that our commitment

of service to our members will carry our Association through this difficult time. At the same time, we must continue to be the voice for the voiceless and support our solo and small firm practitioners. We must continue to advocate for laws that will enhance our justice system, and we must oppose those that are detrimental to the profession.

You have my pledge to do everything within my abilities to lead this Association so that at the end of my term it will be in as good or better position as the day I took office. I hope that when I finish my term, you will be as proud of me as I am to be a member and an officer of this Association.

I look forward to working hand in hand with our President-Elect, Steven Younger. We have already shared many efforts and goals, and both of us look forward to the year ahead. With your input and efforts, we will meet the challenges to come. We will continue the good work already in progress. This is my commitment to you. Thank you for allowing me this opportunity to serve. ■

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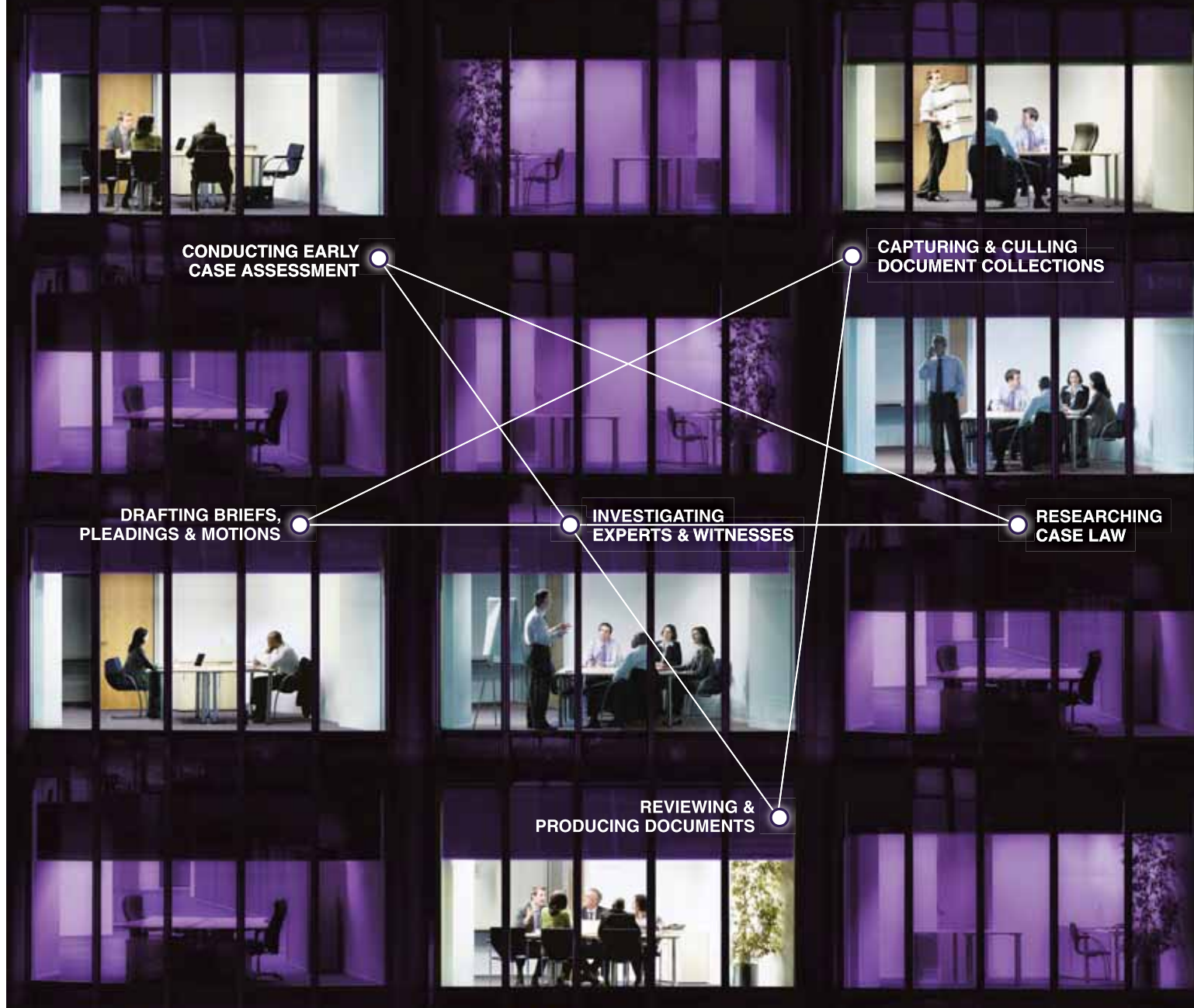
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June 2 New York City
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June 12 Westchester

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June 3 Albany
June 10 Rochester
June 12 New York City

E-Discovery

June 4 New York City

Consumers and Small Businesses in Distress: Using the Bankruptcy Code to Help Weather These Troubled Times

(9:00 am – 1:00 pm)

June 5 Rochester
June 10 Albany; Syracuse

Advanced Tax Return and Financial Statement Analysis for Matrimonial Lawyers

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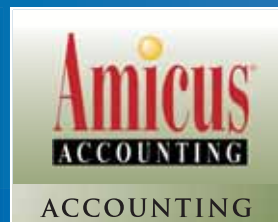
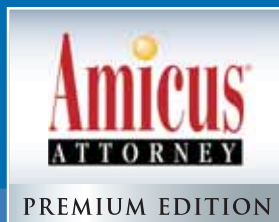


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2009



Attorney Web Sites: Ethical Issues Are Only the Beginning

Non-Traditional Attorney Advertising on the Internet

By Adam R. Bialek, Paris A. Gunther and Scott M. Smedresman

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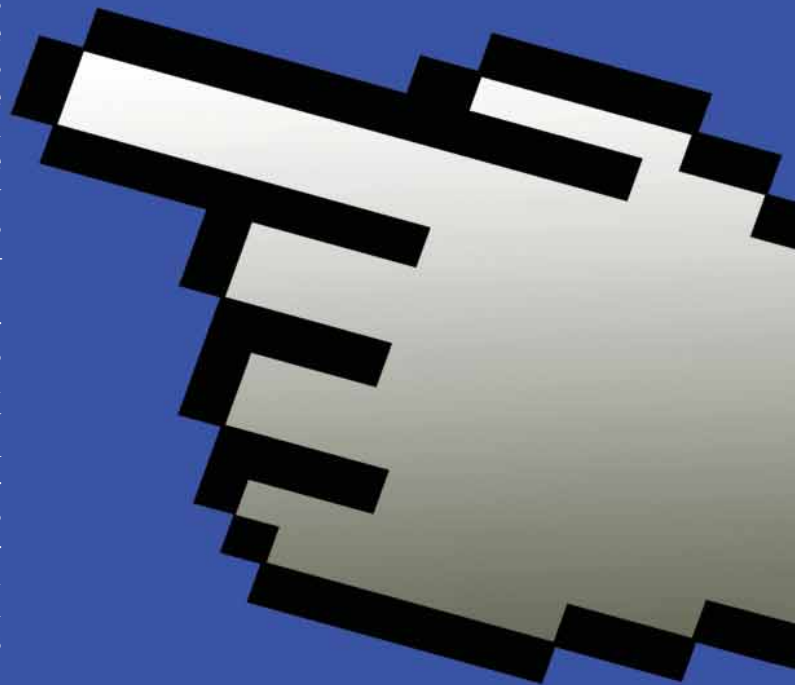
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Web sites have become essential elements of marketing for law firms of all sizes. They can be valuable tools to attract clients, recruit new attorneys and develop a recognizable name. Web sites have progressed significantly from the days when they were static, noninteractive destinations, having more similarities to advertisements in the yellow pages than to the complex mix of promotion and services they now represent. With their increasing interactivity, complexity, and functionality, it is more important than ever to understand and satisfy the myriad conditions imposed on Web sites by state, federal, and even foreign law.

Web sites now interact with their visitors, permitting users to leave materials behind and engage the Web site operators. Many law firms are using their Web sites in once-unconventional ways to advertise, to promote accomplishments or as educational vehicles, such as through videos, blogs and alumni Web sites. While the ethical issues regarding attorney advertising have been publicized and commented on, these newer interactive advertising campaigns raise issues that law firms may not have considered before. And there are laws and rules that all businesses operating Web sites should know – including law firms.

Law firms that operate Web sites must avoid copyright and trademark infringement, insulate themselves from copyright infringement caused by visitors, and comply with state, federal and perhaps foreign privacy laws. There are also the issues raised by the use of official and non-official law firm blogs, the use and implementation of a Web site Terms of Use, and the use of names and images of individuals. Although the benefits of non-traditional attorney Web sites can be great, they should be approached with the same care and consideration an attorney would devote to any other legal issue that arises during practice.



Ethical Issues

Many of the proposed and enacted rules regarding Internet advertising were overturned by the well-publicized case *Alexander v. Cahill*.¹ It is important, however, to remember that some of the regulations survived review, and these should be considered and followed by attorneys utilizing a Web site.

The surviving regulations relate to the selection of a domain name and the retention of electronic advertising. These rules are relatively simple to follow, but they create some questions as to the circumstances and material to which they apply. As a result, it may be advisable to err on the side of caution and comply with the regulations where there is uncertainty.

Section 1200.54 (Rule 7.5(e)) of title 22 of the N.Y. Comp. Codes, R. & Regs.² states that a domain name used by a lawyer must use that lawyer's name, unless a number of qualifications are met – *i.e.*, the domain name cannot be misleading, cannot imply the ability to obtain results and cannot violate any disciplinary rule. So, for example, New York lawyers could use the domain name *bigsettlementlawfirm.com* only if their name happens to be Bigsettlement. Similarly, a firm probably cannot use the domain name *LincolnBrandeisandMarshall.com*, unless that firm coincidentally has members whose names match these famous attorneys' names.³

The other surviving Internet-related regulations are found in 22 N.Y.C.R.R. § 1200.50(f) and (k). They require that electronic "advertisements" include the phrase "Attorney Advertising." This phrase can be placed on a Web site's homepage or in the subject line of an e-mail advertisement. These regulations also contain archiving requirements of at least one year for electronic advertisements and a minimum of 90 days for Web sites.

One point of contention regarding this marking and retention policy is what is an "advertisement"? The first version of the rules defined advertising extremely broadly, potentially applying to almost every e-mail an attorney sends.⁴ After reconsideration, this definition was modified and limited to communications made for the "primary" purpose of obtaining retention.⁵ Yet this too is unclear when it relates to multi-purpose attorney Web sites, particularly those containing nontraditional elements, such as blogs or alumni networking areas. These types of communications can arguably be interpreted as being made for the purposes of raising an attorney's profile or representing to the public the high quality of services the firm offers, which may fall under the definition of "advertisement" as laid out in Rule 1.0(a). Indeed, almost all public attorney activities can be interpreted as motivated, at least in part, by a desire to attract new clients, whether directly or indirectly.

Alternatively, it may be argued that many of these nontraditional elements, such as blogs, have primarily a scholarly purpose. Determining the "primary" purpose

of these statements and communications is critical. As such, although it is unclear if the rules require the marking and archiving of attorney blogs or alumni networking sites, a conservative approach would be to comply with the rules in uncertain situations.

Nontraditional Web Site Design Concerns

Aside from well-publicized ethics rules, there are non-professional responsibility-related issues to be considered in the context of an attorney's or law firm's Web site. These concerns are particularly important where the Web site at issue allows users to interact with the Web site, collects any information regarding users of the Web site, contains a law firm blog or uses images or names of attorneys or clients in promotional testimonials.

Interactivity

Many attorney Web sites now contain a variety of ways that Internet users can interact and leave content on a firm's computer system. If a law firm has a blog with comments enabled, whereby users can post text and, possibly, images and other media, a firm may not be able to tell if the user has the rights to post such material or if the posting of such material would otherwise be unlawful. Similarly, if a firm runs an alumni networking Web site, which may be used in similar ways to the popular Facebook® and LinkedIn® sites, users may upload a variety of materials, whether or not audited by the Web site operator. Additionally, users may have to register with a Web site before participating in such activities, thereby providing the Web site with personal information, such as a name or e-mail address. Web sites may also solicit employment prospects and receive resumes and related submissions that contain personally identifiable information.

Law firms whose Web sites enable user interaction may find themselves in the position of unknowingly violating copyright or trademark laws. Furthermore, attorney Web sites that collect information about visitors, whether solicited or not, may be required to follow strict regulations regarding the privacy and use of that information. Firms can take steps to limit their exposure to these risks.

The Digital Millennium Copyright Act

The issue of copyright liability for Web sites based on the activities of its users was addressed over 10 years ago by the Digital Millennium Copyright Act (DMCA).⁶ This act provides a system that can exempt certain online "Service Providers"⁷ from the copyright infringement committed by its users. With the rise of online media, the DMCA has been well publicized and may be known even by lawyers and firms that do not focus on intellectual property issues. The DMCA, however, has requirements that a

service provider must affirmatively meet in order to take advantage of the act's protections.

The act requires a slightly more proactive approach to Web site management than simple reliance on statutory immunity. Procedures must be in place for copyright owners to notify the operator of the posting of infringing material. The immunity provided by the DMCA may be lost if a firm does not ensure that it terminates repeat copyright offenders.⁸ Having a DMCA policy and reacting to notifications is not enough. Pursuant to the DMCA, a firm is required to register a designated agent with the U.S. Copyright Office to receive notifications regarding infringements.⁹ Complying with the designated agent requirement is relatively simple: a firm need only submit a registration to the U.S. Copyright Office designating a name, address, fax number and e-mail address for notifications of infringement, and remit a nominal fee. This information must then be posted on a firm's Web site. The disclosure of the agent information and the repeat offender termination policy are generally noticed through a Terms of Use document that is available via a link from a Web site's homepage or template page.

Once it is established that a provider has complied with DMCA requirements, that provider should be protected from much of the copyright infringement committed by its users. However, a provider is still not permitted to post infringing content itself, and if the provider becomes aware of user-posted content that is infringing, it must remove the content immediately.¹⁰

Many law firms are not comfortable with simply allowing users to post un-screened content to their Web sites – for good reason. Firms do not want to be seen as possibly endorsing unreviewed material. If a provider screens content, it should be vigilant about not knowingly posting material that infringes a copyright. This is simple in cases where the content is obviously infringing. In the context of comments, testimonials and alumni Web sites, a firm is not likely to have sufficient knowledge of the ownership of material in order to determine if it is properly used or licensed. In the event that posted material reasonably appears to be innocuous but turns out to be infringing, the posting generally should not lead to liability, provided that the law firm has complied with the DMCA.

In addition to refraining from posting infringing content, a firm should remove material after it is notified that the material is unlawfully posted. The purpose of designating an agent with the Copyright Office is to facilitate a copyright owner's ability to contact and notify the appropriate party of an infringement. A law firm should designate a specific individual in the firm, either an attorney or an administrator, to monitor notices and ensure that they are properly responded to according to DMCA procedure.¹¹

CONTINUED ON PAGE 14



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Privacy Policies and Terms of Use

Taking the steps to ensure that DMCA protection applies to a nontraditional law firm Web site is not the only measure a firm should take to protect itself from exposure. Firms with Web sites that have large interactive user bases or even occasionally collect information from Web site visitors should post and comply with a Privacy Policy regarding the use and collection of personal information of its users. A Terms of Use may be posted to help ensure that a Web site complies with various regulations and retains control over the more public areas of the site.

It is common for users of interactive Web sites to disclose large amounts of information when interacting online. Users generally disclose information when registering for a Web site service and during the course of use of such service. This may be particularly true for law firm alumni Web sites, which may be similar in structure to social networking Web sites. Additionally, law firm Web sites that accept employment applications collect protected information in the form of material disclosed in a resume. Even a simple “Contact Us” button may result in the collection of protected information in the form of a name and e-mail address.

It is common for users of interactive Web sites to disclose large amounts of information.

Various state and federal laws may apply to this type of data collection, whether or not the collecting law firm commercially uses the data it receives. Some of these laws require businesses to post a Privacy Policy on their Web sites which advise users of what types of information are collected and notify visitors of their rights. Online privacy laws can provide for fines or civil remedies for non-compliance and have been enforced by state attorneys general and by the Federal Trade Commission (FTC). The FTC has not been shy about enforcing some of these statutes; it has in the past levied significant penalties against noncompliant businesses.¹²

One such law is the California Online Privacy Protection Act of 2003 (CAOPPA).¹³ Although it is a California state law, Web site operators who approach or interact with California residents may be subjected to the law’s requirements. The act applies to any Web site which collects personal information from a California resident and requires the Web site to “conspicuously post [a] privacy policy on its Website.”¹⁴ Personal information is broadly defined to include any way that an individual can be contacted, including an e-mail address.¹⁵ The Privacy Policy must include a description of the firm’s treatment and use of personal information, and a link

to the policy must be posted on the firm’s homepage, among other options and requirements.¹⁶

CAOPPA is a very broad statute that likely applies to a firm that allows users to register and make comments on a blog, and almost certainly applies to law firm alumni Web sites. The act applies only when California residents are involved, but it is likely more efficient to apply its requirements to all Web site users. Even if a firm does not practice in California, it may receive inquiries or Web site visits from users who live there. Without an effective way to limit where communications are coming from, compliance may be desirable out of an abundance of caution.

This is but one example of the many laws that address the treatment of Internet users’ personal information. Additional state¹⁷ and federal¹⁸ laws address specific categories of information, such as personal health information¹⁹ and financial information,²⁰ that also must be safeguarded. Furthermore, a number of foreign laws relating to individual privacy and personal information are often far stricter and more comprehensive than those of the United States, and some of them may apply if information is being collected or transferred from those jurisdictions to branch or home offices in the United States.²¹

In addition to a privacy policy, the other common Web site document is the “Terms of Use,” “Terms of Service” or “Terms and Conditions” statement. While not yet mandated by any laws, this document can be an important tool for businesses concerned about limiting the risks associated with operating a Web site. For firm Web sites that include a large amount of user participation, it is desirable to have a document where the rules of Web site participation are established and the DMCA and other notices discussed above are published.

The Terms of Use can be helpful by addressing the user conduct that is acceptable and the conduct that will result in termination of an account. Such guidelines may be broad or detailed, depending on the Web site operator. This document also sets forth the specific areas of the Web site that users are authorized to access and/or those that are not public, thereby creating grounds for a Computer Fraud and Abuse Act²² claim should a user exceed such authorized areas.²³ Furthermore, a Terms of Use document can ensure that a firm’s Web site is granted a license to post the comments or other materials that a user uploads to the Web site. This license may be implied by the act of uploading, but it may be more desirable for a firm to lay out the conditions of its use of users’ materials instead of relying on an implied right. In addition, a Terms of Use can be used to assert: (1) intellectual property rights in proprietary content appearing on a Web site; (2) intellectual property rights in material posted by others; (3) that no legal or financial advice is being provided by the Web site; (4) that prior results are not a guarantee of future performance; and (5) for other similar purposes.

CONTINUED ON PAGE 16



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Web site Terms of Use are not only binding on a Web site's users, they can be similarly binding on the Web site operator. The FTC is charged with enforcing false and deceptive trade practices, and has interpreted this role as applying to Web site Terms of Use and privacy statements. As such, once a Web site Terms of Use or privacy policy is in place, it should be followed by the Web site operator. The FTC has generally focused its enforcement efforts against Web sites that have misrepresented the level of data security they provide; however, jurisdiction likely extends to any statement a Web site makes in its Terms of Use. A law firm should carefully draft its Terms of Use and be vigilant regarding compliance thereto.

The placement of the Terms of Use on the Web site can also affect enforceability. The best way to ensure that a visitor agrees to the Terms of Use is to have a popup box or landing page that requires a visitor to scroll through the terms before checking a box that confirms that the visitor has read the terms, understands the terms, and agrees to the terms. However, most law firm Web sites do not place the Terms of Use on a mandatory click-through page as this type of design would likely discourage many users from visiting a firm's Web site. Instead, a Terms of Use is generally implemented as an implied assent document, meaning that a user's conduct – using the Web site – symbolizes the user's assent to the Web site's Terms of Use.

The validity of implied assent Web site Terms of Use has been an open issue since the rise of Internet contracting and at this point remains largely unanswered.²⁴ The law in this area continues to be outpaced by technological developments. Courts that have addressed this issue have generally found that a user's awareness of the existence of proposed terms is central to their enforceability.²⁵ As such, it is still unclear whether the current practice of placing a Terms of Use notice in small letters at the bottom of a long scrolling homepage is sufficient to effectuate these agreements. As this practice becomes widely known as the norm, knowledge of the existence of a Terms of Use and its common placement at the bottom of a page may be viewed more favorably by courts. For now, a cautious Web site designer or operator may wish to place a Terms of Use notification at the top and bottom of a homepage. Ultimately, it is a firm's choice as to how best to balance Web site aesthetics with legal notices; however, as is clear from the otherwise unclear case law, the more prominent the placement of these policies, the more effective they might be.

Practice of Law and Blogging

Another feature of attorney Web sites that has emerged in the last few years is the attorney or law firm blog. Blogs have been used as a means of publishing commentary or short articles on developments in the law. They are used to heighten awareness of the firm's profile in a field or

perhaps as a general way to attract clients. These blogs raise issues of practicing law and forming an attorney-client relationship that must be clearly addressed.

The subject matter and form of a law firm blog generally focuses on a particular practice area and involves the posting of articles of interest regarding that area. For example, a law firm may have a privacy law blog or an employment law blog. The comments section of the blog is often activated, thereby permitting users to leave questions or comments that may sometimes be responded to by the blog's author.

Attorney-bloggers must be careful in order to avoid dispensing legal advice or otherwise forming an attorney-client relationship. Most legal bloggers avoid the issue by posting a disclaimer noting that the blog is for informational purposes only. The disclaimer must be prominently noticed so that readers are reasonably aware of its existence and thus its disclaiming content. A disclaimer that users do not know about is likely of little value. The previous discussion about notice of Web site Terms of Use may offer some guidance as to how best to implement a disclaimer of this kind. Note also that if a blog enables an RRS feed,²⁶ a firm should be careful that its disclaimer is included with the syndicated text of the blog post.

Blogs are not the only elements of a Web site where this is a concern. Inadvertently offering legal advice and creating an attorney-client relationship is possible through any part of a Web site. This should be considered by a firm in ensuring that the risks of Web site use are minimized. Generally, this is accomplished through the posting of a disclaimer; by being careful as to how statements on the site are phrased; by ensuring it is clear that all materials deal with prior cases or hypothetical facts; and by making clear that no true opinion can be issued without a consideration of the facts of a particular case.

All materials posted to a blog, and indeed any part of a Web site, must comply with all laws. Employees may be considered to speak on behalf of a firm when posting to a blog, and as such, care should be taken that such employees do not post material which the firm does not condone.²⁷ Confidential material, of course, cannot be discussed. Defamation laws must be considered. Consideration must be given to statements made about others. Firms should be careful when touting victories or discussing the facts of cases that are pending. While certain statements made in the context of litigation may be protected, those same statements might not be privileged in the context of a blog or Web site.²⁸

Promotional Testimonials and Third-Party Materials

Many firms post testimonials on their Web sites, whether from clients or current or past employees, or third-party materials touting the accomplishments of a lawyer of

CONTINUED ON PAGE 18

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Firms should be careful not to cause confusion as to sponsorship when using trademarks of third parties.

CONTINUED FROM PAGE 16

the firm. These testimonials often take the form of a laudatory statement about the firm's collegial workplace environment or its superior legal services. Occasionally, a testimonial will be accompanied by an image of the person giving it. The use of a person's image in this commercial environment raises the issue of personal rights of publicity. Additionally, the rights to post third-party materials, such as newspaper articles, must be secured prior to use in order to avoid copyright infringement. Trademark concerns are also raised when identifying the trademark of a client giving a testimonial. A firm should diligently clear these rights, even if a testimonial is being given by an employee of the firm or a client who has actually retained the firm, or the testimonial is from an article that discusses the firm.

Although New York law may lag behind other states' laws in recognizing certain privacy torts, New York law does provide that the unauthorized commercial use of a person's identity is a violation of that person's rights of publicity.²⁹ The use must be commercial, meaning it must be in the context of an advertisement or other trade usage, in order for the violation to occur.³⁰ New York law may allow recovery for the unauthorized use of a person's "name, portrait or picture" under such circumstances.

The use of an individual's photograph on a testimonial likely implicates this law. The purpose of a testimonial is to promote a law firm either to potential clients or prospective employees. As such, the unauthorized use of an individual's image for this purpose likely violates New York law. To avoid this outcome, a firm should obtain the written consent of any individual whose image is used on the Web site to promote the firm's services, even if the individual is a firm employee.

In addition, a firm should be diligent that all third-party materials that appear on a firm's Web site, such as images and articles, are properly licensed. An article from the *Wall Street Journal* that discusses your firm or a case your firm has handled may be excellent publicity, but you might not be permitted to post that entire article without permission from the content owner.

Similarly, a firm should be diligent in requiring that Web site design consultants have proper permission to use images and articles that they place on a firm's Web site. Even if a firm is given assurances that the material has been licensed, a firm can still be held liable under the Copyright Act if such assurances turn out to be false.³¹ To avoid this, a firm may want its agreement with the Web site designer to contain an indemnity clause that includes

coverage for claims of copyright infringement for materials supplied by the designer.

Firms should be careful not to cause confusion as to sponsorship when using the trademarks of third parties, in order to avoid trademark infringement. Context is crucial when referring to the trademark of a client or any other company. If it is clear from the context that there is no sponsorship or other association between the company whose trademark is being used and the firm, there may not be an issue; but there is a fine line between permissible referential use and impermissible confusing use.

Conclusion

Lawyer and law firm Web sites have long been the object of scrutiny from an ethics standpoint; however, Web sites present more than just ethical concerns for lawyers and law firms. Technology and the power of the Internet are having a significant impact on attorney promotion and marketing. Web sites now allow employers to keep in touch with past employees. New techniques allow firms to reach out to clients and attract new lawyers in ways that were not previously considered, or even possible. It is easier than ever to publish statements, often before serious scrutiny is given to them. These advances have been beneficial, but they bring with them a myriad of issues that law firms should be aware of before utilizing this powerful platform. As the law continues to develop in this area it is often unclear, and some of the issues can be highly technical. It may be advisable to retain counsel familiar with these issues to review a Web site and its functionality in order to ensure that the risks discussed herein are minimized, and the benefits to the lawyer or firm are maximized. ■

1. No. 5:07-CV-117 (FJS/GHL), 2007 WL 2120024 (N.D.N.Y. July 20, 2007).
2. 22 N.Y.C.R.R. § 1200.50 (Rule 7.1).
3. See 22 N.Y.C.R.R. § 1200.54(c) (Rule 7.5) (stating that a "lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners").
4. See Section 1200.1(k) of the Proposed Rules available at <http://web.archive.org/web/20060703045818/http://www.nycourts.gov/rules/1200-1.pdf> (defining "advertisement" as "any public communication made by or on behalf of a lawyer or law firm about a lawyer or law firm, or about a lawyer's or law firm's services").
5. See 22 N.Y.C.R.R. § 1200.0(a) (Rule 1.0) (defining advertisement as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.").
6. Digital Millennium Copyright Act, 17 U.S.C. § 101; P.L. 105-304; 112 Stat. 2860 (1998).
7. "Service Providers" is defined extremely broadly by the act as "a provider of online services or network access, or the operator of facilities therefore" (17 U.S.C. § 512(k)(1)(B)(a)). This definition would seem to encompass almost all attorney Web sites.
8. 17 U.S.C. § 512(i)(1)(A).
9. 17 U.S.C. § 512(c)(2).
10. 17 U.S.C. § 512(c)(1)(A).

11. See 7 U.S.C. § 512(g). The procedure requires the removal of the material, providing the user/poster of the allegedly infringing work with prompt notification of its removal and granting that user/poster the opportunity to respond. If the user responds, the copyright owner must file suit or the Provider must re-post the content within a specified period of time.

12. See *U.S. v. Xanga*, Civ. Act. No. 1:2006cv06853 (S.D.N.Y. Sept. 7, 2006) (fining social networking site \$1 million for violation of the Children's Online Privacy Protection Act (COPPA)); see also *U.S. v. Mrs. Fields Famous Brands, Inc.*, Civ. Act. No. 2:2003cv205 JTG (D. Utah, filed Feb. 27, 2003) (\$100,00 in civil fines); and *U.S. v. UMG Recordings, Inc.*, Civ. Act. No. CV-01-1050 (C.D.C.A. filed Feb. 18, 2004) (\$400,000 in civil fines).

13. Cal. Bus. & Prof. Code §§ 22575-22579.

14. Cal. Bus. & Prof. Code § 22577(a). It is important that the Web site conspicuously publicize its privacy policy on the Web site and thus the Web site should have a separate link to the policy.

15. *Id.*

16. *Id.*

17. See "Shine the Light Law," Cal. Civ. Code § 1798.83.

18. See COPPA, 15 U.S.C. §§ 6501-6506; 112 Stat. 2581-728 (1998).

19. See Health Insurance Portability and Accountability Act (HIPAA), Pub. L. 104-191, 110 Stat. 1936 (1996).

20. See Gramm-Leach-Bliley Financial Services Modernization Act, Pub. L. 106-102, 113 Stat. 1338 (1999).

21. For Canada, see Personal Information Protection and Electronic Documents Act (PIPEDA), Statutes of Canada 2000, Chapter 5, Bill C-6 (assented to 13th April, 2000). For the European Union, see Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

22. Computer Fraud and Abuse Act, 18 U.S.C. § 1030; 99 Pub. L. 474; 100 Stat. 1213.

23. For example, if a Terms of Use limits user access to only those publicized areas of the Web site, and a user hacks into a private area of the server, the hacker could be more easily pursued for his or her unauthorized access.

24. For a larger discussion, see Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 Bus. Law. 279 (2003).

25. See *American Airlines, Inc. v. Farechase, Inc.*, Cause No. 067-194022-02 (Texas, 67th Dist., Mar. 8, 2003); see also *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV99-7654-HLH(VBKX), 2003 WL 21397701 (C.D. Cal. Mar. 6, 2003).

26. RSS, or Really Simple Syndication, refers to a method of syndicating a blog to various types of aggregation programs. An RSS document (usually called a "feed") typically includes full or summarized text, plus metadata including publishing dates and origin. Thus, while a Web page on which the original article is posted may include a disclaimer, the RSS feed may not, unless included within the text of a particular blog posting.

27. Firms may wish to be careful that their attorneys do not advocate positions that are contrary to positions that other attorneys in the firm are currently advancing in a proceeding on behalf of a client. For a firm to advocate a position in a blog and take the opposite position in a paper submitted to a court could be embarrassing or damaging to the attorney's or the firm's credibility.

28. A defamatory statement made in the context of litigation is privileged only if "it may be considered pertinent to the litigation." See *Joseph v. Larry Dorman, P.C.*, 177 A.D.2d 618, 576 N.Y.S.2d 588 (2d Dep't 1991). This standard, however, is fairly lax, being characterized as applying "to any statement that may possibly or plausibly be relevant or pertinent, with the barest rationality." *Id.* However, it is unclear whether a marketing statement on an attorney or law firm Web site would qualify for this protection as being "pertinent" to the litigation.

29. See NY CLS Civ. R. §§ 50, 51.

30. See *Hampton v. Guare*, 195 A.D.2d 366, 600 N.Y.S.2d 57 (1st Dep't 1993); *Costanza v. Seinfeld*, 279 A.D.2d 255, 719 N.Y.S.2d 29 (1st Dep't 2001).

31. The Copyright Act does not provide an "intent" requirement with respect to infringement, and as such, the violation of an exclusive right granted by the Copyright Act will not be excused based on a good faith belief that the use was permissible. See *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998 (2d Cir. N.Y. 1983) (finding that subconscious copying is infringement, even if the defendant did not know he was committing infringement).

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BURDEN OF PROOF

BY DAVID PAUL HOROWITZ



“From the *Fryeing* Pan”

Eighty-six years ago the Court of Appeals of the District of Columbia decided *Frye v. United States*.¹ After discussing when expert testimony was appropriate, *Frye* articulated a test to distinguish between the “experimental and demonstrable”:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.²

New York still adheres to *Frye*’s “general acceptance” test to determine whether or not expert testimony is admissible. However, when and how *Frye* applies and is to be applied is often a murky proposition. Consequently, practitioners often find themselves wandering in a *Frye* “twilight zone.” A number of recent cases offer assistance in navigating this *Frye* twilight zone, but by no means guarantee a certain landfall.

What Is the Purpose of a *Frye* Hearing?

On appeal, after a verdict for the plaintiff, the defendant contended that the plaintiff’s expert’s testimony diagnosing certain injuries as thermal burns should have been stricken under *Frye*.

The Second Department disagreed: “The main purpose of a *Frye* inquiry is to determine whether the scientific deduction in a particular case has been sufficiently established to have gained general acceptance in a particular field, not, as the defendants would have it used here, to verify the soundness of a scientific conclusion.”³

When Is a *Frye* Hearing Required?

The First Department affirmed a trial court’s determination that “the theory of causation in this medical malpractice action was a novel one and thus warranted a *Frye* Hearing.”⁴ However, the appellate court went on to hold that the trial court

erred in concluding that plaintiffs failed to establish that there is general acceptance in the medical community of a causal link between [the medication] and the development of [the medical condition]. The medical literature cited by plaintiffs’ expert, which included a Food and Drug Administration mandate that [the medical condition] be added to the manufacturer’s list of adverse reactions to [the medication], supported his theory that [the medication] can cause [the medical condition], thus satisfying the *Frye* standard.⁵

While “[a] *Frye* Hearing is appropriate to ascertain the reliability of novel scientific evidence, specifically, to determine ‘whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally,’”⁶ the Third Department held that a hearing was not required where

“there is nothing to indicate that the disagreement was over a particular scientific methodology or technique employed in reaching these contradictory medical conclusions[, i]nasmuch as plaintiffs are essentially challenging the credibility of the opinions of defendant’s medical experts and not the reliability of novel scientific evidence.”⁷

A *Frye* hearing was also not required in a case involving an allegedly defective forklift where “the plaintiffs’ expert’s conclusions . . . were not based on novel theories.”⁸

What Satisfies *Frye*?

In a case alleging physical injury as a result of exposure to mold, both sides agreed that there is an association between mold exposure and certain physical ailments.⁹ The defendant maintained, however, that the existing scientific literature did not establish

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a causal link between the two.¹⁰ The First Department affirmed the trial court's decision to preclude the plaintiff's expert following the *Frye* hearing and, with the expert precluded, to grant summary judgment to the defendant.

In this regard, even plaintiffs' main expert [] testified that "association" is not the same concept as "causation." Given that plaintiff failed to demonstrate general acceptance of the notion that a causal relationship has been demonstrated between the conditions and ailments in question [plaintiffs' expert's] claim to have established causation in this case by means of "differential diagnosis" is unavailing. Thus, on the record presented to us, plaintiffs have failed to meet their burden of establishing general acceptance of the theory on which the specific claims at issue are based. We note that whether plaintiffs' theory of causation is scrutinized under the *Frye* inquiry applicable to novel scientific evidence or under the general foundational inquiry applicable to all evidence, the conclusion is the same: the proffered expert evidence must be precluded on the ground that the underlying causal theory lacks support in the scientific literature placed before us in the present record. We stress that our holding does not set forth any general rule that dampness and mold can never be considered the cause of a disease, only that such causation has not been demonstrated by the evidence presented by plaintiffs here.¹¹

The First Department went on to hold that the plaintiffs' experts failed to establish both a threshold level of exposure to mold necessary to cause the ailments complained of, and failed to offer a reliable measure of the mold in the subject residence.¹²

In a lengthy dissent, Justice Mazzairelli wrote that the defendant had failed to meet its initial burden of establishing entitlement to a *Frye*

hearing and would have reversed on that basis.¹³

The purpose of a *Frye* hearing is not to prove by any particular evidentiary standard that proposed scientific evidence is sound. Rather, it is to establish that a theory has gained general recognition in the scientific community. To be sure, the proponent of scientific evidence bears the burden of establishing *Frye* admissibility. However, before that burden is ever imposed the party contesting the proffered evidence must first make a prima facie case that the theory has *not* gained general recognition in the scientific community. Here, defendants' submissions failed to make a prima facie case that there is not a consensus in the scientific community that building dampness and mold can cause illness. In fact, their experts conceded this point.¹⁴

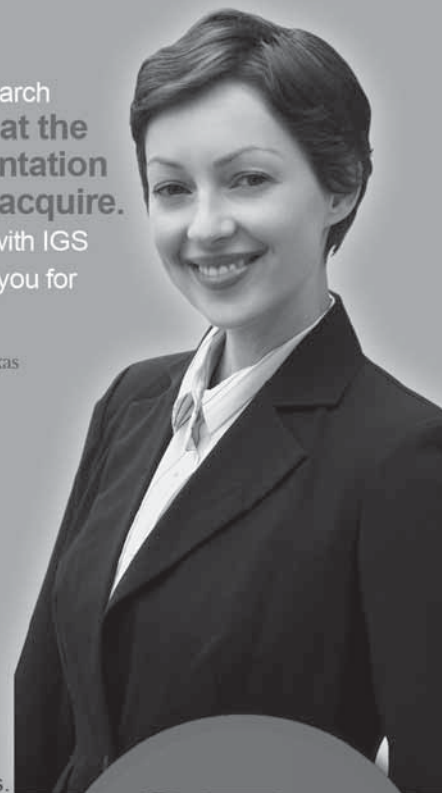
Justice Mazzairelli wrote that the majority imposed far too restrictive an interpretation of *Frye*.

Justice Mazzairelli wrote that the majority imposed far too restrictive an interpretation of *Frye*.¹⁵

Here, the majority has "set an insurmountable standard." It essentially posits that in a case such as this, *Frye* requires that the medical literature conclusively establish that an allegedly offending substance not only has the potential to cause illness but that it *always* causes illness. Indeed, the motion court, in interpreting *Parker* to require at least a "significant association" between an allegedly harmful substance and illness, endorsed Dr. Phillips's position that a "strong

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Is a *Frye* hearing now mandatory simply because the plaintiff requested one?

association occurs all of the time.” This is far too rigorous an application of *Frye*.¹⁶

Justice Mazzairelli would have found the plaintiffs’ expert’s differential diagnosis to satisfy *Frye* as generally accepted for establishing specific causation in mold cases, citing a Fourth Department case decided the year before that reached that conclusion:

The holding in *Parker* put rest to the notion that to establish an appropriate reliability foundation, plaintiffs in a toxic tort case must establish precisely quantified exposure levels or a dose-response relationship, provided, the Court wrote, that “whatever methods an expert uses to establish causation are generally accepted in the scientific community.” Here, Dr. Johanning’s differential diagnosis satisfied that test. Differential diagnosis has been recently accepted by the Fourth Department as a generally accepted method for establishing specific causation in mold cases. That court found in *B.T.N. v. Auburn Enlarged City School Dist.*, a case involving atypical mold in a school building, that a differential diagnosis was an adequate basis for opining that the mold caused the plaintiffs’ symptoms.¹⁷

Is a *Frye* Hearing Required Where an Independent Basis Exists to Preclude the Expert?

This seems to be the holding in a Second Department case where the defendant served two back-to-back expert exchanges for the same biomechanical engineer more than one year after the note of issue was filed, and less than one month prior to the start of the scheduled trial.¹⁸ The plaintiff moved¹⁹ to strike the expert exchanges and preclude the experts from testifying or, alternatively, for a *Frye* hear-

ing.²⁰ The trial court struck the expert disclosure and precluded the expert.

On appeal, the Second Department reversed, holding that “[u]nder the circumstances, preclusion was not warranted based on the defendants’ alleged noncompliance with CPLR 3101(d)(1)(i).”²¹ However, the appellate court went on to hold that it was an improvident exercise of discretion for the trial court to grant the plaintiff’s motion to preclude the defendant’s biomechanical engineer at trial “without first conducting a *Frye* hearing, which the plaintiff had requested as alternative relief.”²²

The rationale for the second holding is unclear. The plaintiff had requested the *Frye* hearing, not the defendant. Since the trial court had already stricken the expert exchange on the procedural ground of noncompliance with CPLR 3101(d)(1)(i), and precluded the expert from testifying on that basis, why would a *Frye* hearing be required to determine whether or not the expert’s anticipated testimony was “generally accepted,” when the expert was already precluded? Following the reasoning of the opinion, upon remand and with the expert exchanges now deemed timely as a result of the appellate reversal, is a *Frye* hearing now mandatory simply because the plaintiff requested one?²³

The fact that the plaintiff had requested a *Frye* hearing as alternative relief should not compel this result. Parties request alternative relief in almost every motion, and there is no requirement that the trial court go through the motion of considering each and every form of relief requested. For now, the meaning of this holding is unclear.

May a New Expert Be Retained After the First Is Precluded Under *Frye*?

Two non-*Frye* cases offer some guidance. In the first, where the plain-

tiff’s noncompliance with CPLR 3101(d)(1)(i) was not willful, the Second Department held the trial court “providently exercised its discretion in permitting the plaintiffs to obtain a new expert and adjourning the trial in this matter.”²⁴

In the second, the defendant moved before trial to preclude the plaintiff’s neuropsychologist, claiming there was no foundation for the expert’s proposed testimony of the cause of the plaintiff’s traumatic brain injury was the ceiling collapse at issue in the lawsuit.²⁵ On appeal, the First Department affirmed the preclusion:

This appeal concerns the trial court’s role as “gatekeeper” in determining the qualifications of an expert, a neuropsychologist, to render a medical opinion and the adequacy of the foundation upon which that opinion is based. While plaintiffs’ expert is qualified to render an opinion on the extent of [plaintiff’s] neurological deficits and may testify that those deficits are consistent with a history of head trauma, plaintiffs have failed to identify any evidentiary basis for the opinion sought to be elicited from the expert as to which of several accidents is the proximate cause of such deficits. Thus, his testimony as to this isolated point was properly precluded.²⁶

The First Department held, however, “that the trial court erred in dismissing this action without affording plaintiffs the opportunity to retain another expert witness to establish the nature of [plaintiff’s] physical injury and its cause, and we remand this matter for further proceedings.”²⁷

Conclusion

While most New York state court practitioners are grateful not to live in a *Daubert* world, *Frye* issues appear to be on the increase, and the time and expense in conducting a *Frye* hearing can rival that of a *Daubert* hearing. In *Fraser*, the *Frye* hearing was conducted over a 10-day period.²⁸ Consequently,

making a *Frye* challenge can feel like jumping from the *Frye*ing pan into the fire. Take care not to get burned. ■

1. 293 F. 1013, 54 App. D.C. 46 (D.C. Ct. of App. 1923).
2. *Id.* at 1014.
3. *Alston v. Sunharbor Manor*, 48 A.D.3d 600, 602, 854 N.Y.S.2d 502 (2d Dep't 2008) (citations omitted).
4. *Leffler v. Feld*, 51 A.D.3d 410, 856 N.Y.S.2d 106 (1st Dep't 2008) (citations omitted).
5. *Id.* (citation omitted).
6. *Page v. Marusich*, 51 A.D.3d 1201, 1202–1203, 856 N.Y.S.2d 734 (3d Dep't 2008) (citations omitted).
7. *Id.* at 1203 (citation omitted).
8. *Hutchinson v. Crown Equipment Corp.*, 48 A.D.3d 421, 422, 852 N.Y.S.2d 187 (2d Dep't 2008).
9. *Fraser v. 301-52 Townhouse Corp.*, 57 A.D.3d 416, 870 N.Y.S.2d 266 (1st Dep't 2008).
10. *Id.*
11. *Id.* at 417–18 (citations and quoted text omitted).
12. *Id.*
13. *Id.*
14. *Id.* at 430–31 (citations omitted).
15. 7 N.Y.3d 434, 824 N.Y.S.2d 584 (2006).

16. *Fraser*, 57 A.D.3d 416 (citation omitted).
17. *Id.* at 435 (citations omitted).
18. *Abramson v. Pick Quick Foods, Inc.*, 56 A.D.3d 702, 703, 868 N.Y.S.2d 137 (2d Dep't 2008).
19. Plaintiff made the motion twice, withdrawing the first motion, on consent, after which the trial court struck the note of issue, and then a second time just prior to the date set by the court for re-filing the note of issue. *Id.* at 702.
20. *Id.* at 702–703.
21. *Id.* at 703 (citations omitted) (citing *Rowan v. Cross County Ski & Skate, Inc.*, 42 A.D.3d 563, 840 N.Y.S.2d 414 (2d Dep't 2007)).
22. *Id.* (citations omitted).
23. There is no mention in the appellate decision of whether or not plaintiff had made a *prima facie* showing of entitlement to a *Frye* hearing, and the four cases cited as authority for the holding are not on point.
24. *Ferro v. Lee*, 48 A.D.3d 412, 412, 849 N.Y.S.2d 795 (2d Dep't 2008) (citations omitted).
25. *Guzman v. 4030 Bronx Blvd. Assocs. LLC*, 54 A.D.3d 42, 861 N.Y.S.2d 298 (1st Dep't 2008).
26. *Id.* at 43–44.
27. *Id.* at 44.
28. *Fraser v. 301-52 Townhouse Corp.*, 57 A.D.3d 416, 870 N.Y.S.2d 266 (1st Dep't 2008).

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In With the Rules, Out With the Code

By Steven C. Krane and David A. Lewis

Change has come to New York legal ethics. On April 1, 2009, after nearly a quarter century, New York finally joined the rest of the country in abandoning the American Bar Association's (ABA) Model Code of Professional Responsibility (the "Model Code") format by adopting the format of the ABA's Model Rules of Professional Conduct (the "Model Rules"). New York's Code of Professional Responsibility (the "Code") has officially been transformed into the fresh and modern New York Rules of Professional Conduct (the "Rules").

This transformation from Code to Rules was by no means simple. While only the courts have the authority to promulgate the state's legal ethics rules in New York,¹ a leading force behind this transformation was the New York State Bar Association's Committee on Standards of Attorney Conduct (COSAC). COSAC collaborated with bar associations across all of New York for more than five

years to produce a comprehensive set of rules that were presented to the New York courts in early 2008.

New York could have been the second state to adopt the Model Rules, instead of among the last, but in 1985, the NYSBA House of Delegates narrowly rejected a proposal to adopt the ABA's Model Rules format. In January

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2003, however, after the ABA's "Ethics 2000" Commission revised the Model Rules, COSAC began work on a New York version of the Model Rules.² COSAC issued an initial draft report in September 2005 after circulation of a number of discussion drafts of the key rules.

"He who leaps high must take a long run." – Danish Proverb

After an extensive comment period for state and local bar associations and other interested parties, the proposed rules were debated by the NYSBA House of Delegates over a period of time spanning much of 2006 and 2007. The proposed rules were approved by the NYSBA in November 2007 and presented to the New York courts for approval in February 2008. After revising that proposal,³ the Rules were officially adopted by the courts in December 2008 and became effective April 1, 2009. At the end of this summer, Maine will adopt a version of the Model Rules, and California will be the only jurisdiction in the country that has not adopted some version of the ABA's Model Rules.

Why Make the Change?

One familiar criticism of the old Code stemmed from its unwieldy and confusing format. For example, the Disciplinary Rules (DRs) were often confused with the Ethical Considerations (ECs). The DRs were the binding ethical rules; the ECs were "aspirational" goals only. This led to some situations where lawyers faced discipline for violating non-binding ECs.

Another common criticism was that the Code was too focused on litigation. Many lawyers felt that a more holistic approach to legal ethics was needed. The new Rules recognize that the client-lawyer relationship manifests itself in many different contexts, not just in litigation. Reflecting this more comprehensive approach, the Rules are categorized according to these different contexts, which include: acting as a counselor, acting as an advocate, transacting with persons other than clients, working in law firms and associations, participating in public service, providing information about legal services, and maintaining the integrity of the profession.

The most obvious benefit of the Rules is their format. Those lawyers who frequently refer to *The Restatements of the Law* published by the American Law Institute will find it very familiar. Blackletter rules have taken the place of the old DRs. The Comments⁴ have replaced the purely "aspirational" ECs and provide ready access to a detailed and more comprehensive discussion of each rule.

The format change also means that New York lawyers can now converse with lawyers from another jurisdiction about, for example, the rules regarding confidentiality by simply referring to "Rule 1.6." This is a common-sense change. No longer will New York lawyers have to translate their rules out of a foreign language, having to refer to a system of regulation rejected by the rest of the nation. The format change will help harmonize national ethics standards and facilitate the growing trend of multijurisdictional practice. New York precedents will become more accessible and more relevant to the rest of the country. New York lawyers can likewise more easily tap into the precedents of other jurisdictions and apply those analyses to the Rules.

Substantive Changes

Many lawyers might be wondering, aside from the new format, do any of the substantive rule changes really matter? Why devote the time and attention required to understand the changes? After all, if a lawyer is a fair-minded, moral person, shouldn't that be enough to assure that the actions he or she takes will automatically be ethical?

Some lawyers might even take the position that all you need do to stay out of ethical "hot water" is to follow the advice of President Abraham Lincoln. In 1850, Lincoln offered this succinct advice as a part of his guidance to a group of would-be lawyers: "[R]esolve to be honest at all events."

Good advice indeed. However, given the ever-increasing complexity of the ethical quandaries facing lawyers, simply being honest, fair-minded and morally upstanding will not always equate to being an ethical lawyer. For a lawyer to act within the ethical boundaries imposed by our self-regulated profession, more is required than simply trying to do the right thing. Legal ethics and morality are neither synonymous nor coextensive; therefore, a thorough understanding of the Rules is indispensable. The reality is that a large number of disciplinary violations come about not because of any intent to flout the ethics rules, but rather from a lack of knowledge about what the rules require.

"The young man knows the rules,
but the old man knows the exceptions."
– Oliver Wendell Holmes

New York's lawyers have numerous opportunities to learn about the Rules through "live" and Web-based courses that help fulfill continuing legal education requirements. Here are just a few highlights of some of the changes brought about by the Rules that are featured in these programs.

Written Engagement Letters

With respect to client-lawyer agreements (note that the “client” now rightfully comes first in the relationship, replacing the old “attorney-client” nomenclature), Rule 1.5 makes written engagement letters mandatory and any violations will be subject to professional discipline. However, lawyers cannot forget their many other obligations with respect to engagement letters.⁵

“Beware of the person who can’t be bothered by details.” – William Feather

Terminology

Rule 1.0 provides detailed definitions that expand on the terms that were previously set forth in the Code and includes a number of significant new definitions.⁶

Client Conflict Waivers and Informed Consent

A lawyer may undertake or continue a representation notwithstanding a conflict of interest only if the lawyer obtains the “informed consent” of the affected clients. “Informed consent” is defined in Rule 1.0(j).⁷ An important change for all New York lawyers is that Rule 1.7 requires that the informed consent of the client be “confirmed in writing” as defined by Rule 1.0(e).⁸ Lawyers that rely heavily on their BlackBerrys and other forms of electronic communication can take comfort in the fact that e-mail is sufficient for the purpose of meeting the “writing” requirement of Rule 1.0(x).⁹

Zealous Advocacy

The word “zeal” has been totally eliminated from the Rules and replaced by the concept of “diligence.” The term “zealous advocacy” from English common law had been incorporated into Canon 7 of the ABA’s Canons of Professional Ethics, promulgated in 1908. The term eventually found a home in the Model Code at DR 7-101. When the ABA adopted its Model Rules, the term “zealous advocate” was deleted. Instead, the ABA put in a comment to Model Rule 1.3 that a “lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” While some of this language has been retained in Comment 1 to Rule 1.3, titled “Diligence,” the word “zeal” has been removed.

Candor Toward the Tribunal

In order to act as an advocate for a client, lawyers rely on their clients to provide basic facts and information on which they will base their advocacy. Being an effective advocate is a critical skill and fundamental to the suc-

cess of any lawyer. Equally important, however, is good judgment. What is a lawyer to do when the lawyer learns that he or she has misrepresented facts or even presented “bad” law to a Tribunal? Does it matter if the event took place many years ago?

Rule 3.3 provides, apparently without any temporal limitation whatsoever, that whenever a lawyer becomes aware of a false statement of material fact or law previously made to a Tribunal by either the lawyer, the client or a witness called by the lawyer, the lawyer must correct that statement and take reasonable remedial measures, up to and including the disclosure of confidential information otherwise protected by Rule 1.6. The old Code provided an exception that prevented the disclosure of information that was protected as a “confidence or secret,” an exception that swallowed the rule. Rule 3.3 has eliminated any such exception in these circumstances. In this respect, Rule 3.3 follows the maxim of Justice Brandeis that “sunshine is the best disinfectant.”

Inadvertent Disclosure

The fundamental ideals of client confidentiality and diligent advocacy are two of the bedrock principles of the profession and help make the legal system work. Many times there is no tension between these two principles because they often work in harmony. When a lawyer inadvertently discloses confidential information to an adversary, however, a serious “dilemma” presents itself.

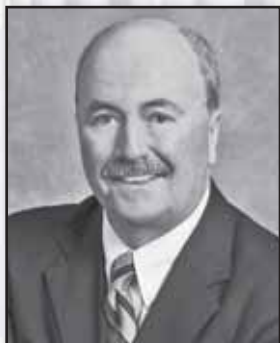
The evolution of technology has allowed lawyers to become more productive and more efficient than was ever previously possible. Many lawyers now rely heavily on some means of electronic communication for corresponding with their clients. It is common for lawyers to send and receive hundreds of e-mails in a single day. However, this new and convenient mode of communication brings with it a few potential nightmares as well.¹⁰ For example, who among us does not know some poor soul who has hit “reply to all,” when a simple “reply” was all that was intended? Today, all it takes to inadvertently disclose confidential information is a single click of a mouse. This type of mistake can occur in a fraction of a second, but the potential consequences can last for a lifetime. Based on how common some of these nightmare scenarios have become, lawyers needed more guidance as to what to do when they occur.

Prior to April 1, 2009, when a lawyer received from an adversary a misdirected communication that revealed confidential information, the lawyer’s obligations were not at all clear. One could take little, if any, specific guidance from the text of the old ethics rules, which were entirely silent on the subject. This lack of guidance led to a number of divergent ethics opinions seeking to create standards to apply in these circumstances. In trying to address inadvertent disclosures, a number of ethics com-

CONTINUED ON PAGE 28

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CONTINUED FROM PAGE 26

mittees found that a lawyer's duty to the client permits the receiving lawyer to use the adversary's inadvertently disclosed confidential information freely in order to benefit the receiving lawyer's client.¹¹ Other ethics committees went to the opposite end of the spectrum and held – without any support in the Code – that a lawyer must notify the adversary immediately when in receipt of an inadvertent disclosure of confidential information and then abide by the adversary's reasonable instructions, such as destruction or “return to sender.”¹²

“When you're finished changing, you're finished.” – Benjamin Franklin

Finally, Rule 4.4(b) brings the long-standing inadvertent disclosure debate in New York to a close as a matter of ethics. It follows the ABA's approach in offering a middle ground and provides a reasonable solution with direct guidance.¹³ Rule 4.4(b) provides that a receiving lawyer can no longer take advantage of an adversary's mistake by keeping an inadvertent disclosure secret by simply remaining silent. However, the only obligation placed on the receiving lawyer is to “notify” the sender. There is no corresponding duty to abide by the sender's instructions as to how to resolve the situation. The burden of taking any remedial measures now falls squarely on the shoulders of the sender.

The Future

The changes in the New York ethics rules are a considerable step in the right direction, but there is still much to be done. As the ethics leaders that were responsible for these important changes begin to look to leadership from the next generation, the focus must be on advancing our regulatory scheme to include rules that recognize the ongoing changes in the practice of law.

The practice of law is no longer contained within strict traditional geographic boundaries. E-mail, faxes and even legal advice routinely crisscross state lines and span the globe. The Internet has all but obliterated the traditional obstacles to multijurisdictional practice. We can no longer afford to ignore the reality that lawyers have become more and more mobile and come into contact, even if only temporarily, with clients outside of their home jurisdiction. New York needs more rules that recognize this reality and provide clear guidance to lawyers that they can rely on in their everyday practice of law.

The NYSBA proposed the adoption of a multijurisdictional practice rule similar to the ABA's Model Rule 5.5 – a rule that three-fourths of the states have embraced – that would recognize that lawyers who come into a

jurisdiction on a temporary basis to represent their clients are not acting unlawfully. This proposal was rejected by the New York courts without any explanation. The New York courts likewise rejected the portion of proposed Rule 5.5 that would have permitted in-house counsel to work for their employers in New York without the need to become admitted to the New York Bar. Most of the rest of the country now permits this, and some jurisdictions have registration requirements that raise considerable revenues for their court systems. As of this date, 37 other jurisdictions have adopted a rule identical or similar to the ABA's Model Rule 5.5, and all but one of the rest have it under consideration. New York is the only jurisdiction to have flatly rejected such a rule. “Give us your tired, your poor, but not your lawyers,” New York says.

Perhaps New York is simply content to be a free rider, with New York lawyers welcome to go into other jurisdictions on a temporary basis while refusing to afford out-of-state lawyers the same benefit. If this position is not changed, however, New York lawyers may have a price to pay. Other states may amend their multijurisdictional practice rules to include reciprocity provisions in retaliation against jurisdictions that have an isolationist view on this issue, such as New York has.¹⁴ Adopting a version of the ABA's Model Rule 5.5 into the New York Rules would recognize the increasing importance of multijurisdictional and cross-border practice in a globalized economy and would help provide ethical guidance for the many lawyers who deal with this growing trend in their everyday practice of law.¹⁵

Despite some shortcomings, however, the changes wrought by the courts in adopting the Rules should be welcomed by all lawyers. While we may have to make some slight adjustments in getting used to our new format and there is still more work to be done, the Rules will undoubtedly serve New York lawyers well for many years to come. ■

1. See N.Y. Judiciary Law § 90(2).

2. COSAC was comprised of 24 lawyers knowledgeable in the field of legal ethics and highly diverse with respect to their practice areas. The committee was also reflective of the diverse geographic makeup of New York, with virtually the entire state represented. The committee also benefited from the efforts of four top-echelon ethics professors serving as reporters.

3. A copy of the proposed rules as presented to the New York Courts by the NYSBA is available at http://www.nysba.org/AM/Template.cfm?Section=Committee_on_Standards_of_Attorney_Conduct_Home.

4. The Comments were drafted by COSAC and approved by the NYSBA House of Delegates.

5. See, e.g., Part 1215 to Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York and Part 137 of the Rules of the Chief Administrator of the Courts.

6. These new definitions include: an expanded definition of “tribunal,” “confirmed in writing,” “informed consent,” “matter,” “reasonable,” “reasonably,” “reasonable lawyer,” “reasonable belief” and “reasonably believes,” “screened” and “screening,” “writing” and “written” (including “signed”).

7. “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

8. “Confirmed in writing” denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person’s oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

9. “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

10. See, e.g., Jeremy Feinberg, Statewide Special Counsel for Ethics for the New York Unified Court System, *Risky Business: E-Mail at Work for Personal Purposes*, The New York Professional Responsibility Report (January 2008).

11. See, e.g., Oregon Opinion 2005-150 (2005), Pennsylvania State Bar Opinion 2005-22 (2005), Philadelphia Opinion 94-3 (1994), Utah State Bar Opinion 99-01, North Dakota Opinion 95-14 (1995), Massachusetts Opinion 99-4 (1999).

12. See, e.g., Tennessee Formal Opinion 2004-F-150 (2004), Virginia Opinion 1702 (1997), Pennsylvania State Bar Opinion 99-150 (1999), Colorado Opinion 102 (1998), New York County Opinion 730 (2002).

13. See, e.g., ABA Standing Committee on Ethics and Professional Responsibility Formal Opinions 05-437 (2006), *Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368 November 10, 1992 (2005)* and *06-440 Unsolicited Receipt of Privileged or Confidential Materials: Withdrawal of Formal Opinions 94-382 (July 5, 1994)*.

14. See, e.g., Connecticut Rule of Professional Conduct 5.5(c) (“A lawyer admitted in another United States jurisdiction *which accords similar privileges to Connecticut lawyers in its jurisdiction*, and provided that the lawyer is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction.”) (emphasis added).

15. For a more detailed discussion and resource on the growing trend of the cross-border practice of law and cross-border legal ethics, go to Proskauer Rose LLP’s International Practice Guide e-book titled *Proskauer on International Litigation and Arbitration* available at www.proskauerguide.com.

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Drafting Matrimonial “Cohabitation” Clauses After *Graev*

By Lee Rosenberg



Without delving into the politics of the matter, most of us remember the discussion over Bill Clinton’s parsing of words in his grand jury testimony regarding the Paula Jones matter. One of his responses brought us the often joked-about statement “it depends on what the meaning of the word ‘is’ is.” As flip-pant, however, as some may find it, we in the practice of law are required not only to parse words, but on a daily basis are expected to use those words in the best and most creative ways. This is particularly true in the drafting of documents. We are also frequently criticized for the use of “legalese” in place of “plain English.” In the perilously titled *Graev v Graev*,¹ the Court of Appeals reminds us all that the words we thought were clear are not.

The Facts

The parties in *Graev* entered into a separation agreement on April 18, 1997, after a 24-year marriage. The agreement provided for the defendant, Mr. Graev, to pay the plaintiff, Mrs. Graev, spousal maintenance of \$120,000 per annum, in equal monthly installments of \$10,000, unless there is a “Termination Event.” One of those events was “[t]he cohabitation of the Wife with an unrelated adult for a period of sixty (60) substantially consecutive days.” So far, this is nothing unusual. While the Domestic Relations Law § 248 (DRL) provides that spousal support may be terminated upon “proof that the wife is habitually living with another man *and* holding herself out as his wife, although not married to such man,”² this can be an insurmountable burden to meet – particularly as to the latter element.³ Contractually though, matrimonial practitioners have usually eliminated the second prong of the DRL § 248 requirement and fashioned other ways of terminating spousal support. This is seen as necessary because interpretation of the statutory language as to ter-

mination upon “habitually living with another” is within the discretion of the court.

Mr. Graev, in moving to terminate his spousal support obligation, did what most such applicants do. He hired investigators to follow Mrs. Graev and her boyfriend. The surveillance began June 13, 2004, and continued through the end of August 2004. Each day the surveillance lasted approximately nine hours.

In a sworn affidavit, one of the investigators detailed the activities of the plaintiff and her boyfriend. The investigator stated that he and his team had been hired by Mr. Graev to conduct surveillance of Mrs. Graev’s Connecticut house for nine hours a day over a 63-day period during July and August of 2004. The team confirmed that Mrs. Graev lived on Keeler Road in Bridgewater and that her boyfriend had a home nearby, on Brown Brook Road in Southbury. The investigator also affirmed that the boyfriend’s car was in Mrs. Graev’s driveway at 5:00 A.M. on virtually all of the 63 days that they conducted surveillance. The investigator related that there was a nine-day period when the “newspapers piled up” at Ms. Graev’s residence. During that same nine-day period, “there were no signs of activity” at the boyfriend’s residence.

In response to her ex-husband’s allegations, Mrs. Graev alleged that she was not having sexual relations with the boyfriend and that he is unable to perform sexually. Mrs. Graev further alleged that she was not “cohabiting” with her boyfriend because they have no

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sexual intercourse and have not lived together 60 consecutive days. She admitted they have shared her home, but claimed this was only to accommodate his move from one residence to another. The trial court scheduled the matter for a hearing on the cohabitation issue.⁴ After a seven-day hearing before a different justice, the court found that there was no “cohabitation” and entered judgment for arrears in Mrs. Graev’s favor.⁵

The Appeal

On appeal, the First Department, with two justices dissenting, affirmed the trial court holding that the term “cohabitation” was not defined in the parties’ agreement.⁶ The court further noted that, given the lack of definition, the term was presumed to fall within a “standard court definition” which included maintaining a single residence and in particular a sharing of expenses – thus requiring an economic component to the definition of “cohabitation.” The majority, in rejecting the dissent’s view stated:

The dissent presumes that these parties intended to use the dictionary definition of “cohabitation.” However, it fails to explain why judicial decisions giving a distinct meaning to the term should be ignored. For example, the Second Department recently discussed the meaning of “cohabitation” when affirming the denial of a husband’s motion to terminate his maintenance obligation. Rejecting a claim that the phrase “cohabitation of the Wife with an unrelated male” was ambiguous, the court stated: “As interpreted by New York courts, the term ‘cohabitation’ entails a relationship between a former wife and an unrelated male who live together in the same residence and share household expenses or ‘function as an economic unit.’”⁷

Of course, the parties were free to condition support as they pleased, or to restrict the dependent spouse’s postdivorce intimate relations. Had the Graevs desired to ascribe a different meaning to “cohabitation,” they were free to do so by using appropriate language in their agreement.⁸

Interestingly, the majority also noted,

Just as it is sensible to presume that when the Legislature amends a statute it is aware of all judicial decisions construing it, *it is also sensible to presume that attorneys using a term such as “cohabitation” in a separation agreement are aware of the judicial decisions construing the term.*⁹

Court of Appeals

Upon Mr. Graev’s appeal to the Court of Appeals, the high Court reversed, but with *three* dissents. The Court found the term “cohabitation” as set forth in the agreement to be ambiguous and remanded the case for a further hearing to determine the parties’ intent with resort to extrinsic evidence. The Court also found that economic entanglement was not a *mandatory* element as

had the First Department. Judge Susan Read, writing for the majority, held:

We do not agree that “the term cohabitation has a plain meaning which contemplates changed economic circumstances, and is not ambiguous” absent an explicit provision to the contrary in a separation agreement or stipulation, or, put slightly differently, is necessarily determined by whether a “couple share[s] household expenses or function[s] as a single economic unit.” Rather, the word “cohabitation” is ambiguous as used in this separation agreement: neither the dictionary nor New York caselaw supplies an authoritative or “plain” meaning. Similarly, courts in other states have not ascribed a uniform meaning to the word “cohabitation” as used in separation agreements.¹⁰

Defining the Term

Black’s Law Dictionary defines “cohabitation” as “[t]he fact or state of living together, esp. as partners in life, usu. with the suggestion of sexual relations.” In addition “cohabit” is variously defined as “[t]o live together as husband and wife: often said distinctively of persons not legally married” (Oxford English Dictionary [2d ed. 1989]); “to live together and have a sexual relationship without being married” (The New Oxford American Dictionary [2d ed. 2005]); “to live together as or as if as husband and wife” (Webster’s Third New International Dictionary [2002]); “to live together as husband and wife, usually without legal or religious sanction,” or “to live together in an intimate relationship” (Random House Webster’s Unabridged Dictionary [2d ed. 2001]); and “to live together as or as if a married couple” (Merriam Webster’s Collegiate Dictionary [10th ed. 1997]). The common element in all these definitions is “to live together,” particularly in a relationship or manner resembling

“Living together” as if husband and wife is no less opaque than “cohabitation.”

or suggestive of marriage, and New York courts have, in fact, used the word “cohabitation” interchangeably with the phrase “living together.”¹¹ Ultimately, however, “living together” as if husband and wife is no less opaque than “cohabitation”: both bring to mind a variety of physical, emotional and material factors, and therefore might mean any number of things in a separation agreement, where otherwise unexplained in the text, depending on the parties’ intent. For example, the parties here might reasonably have meant “cohabitation” to encompass whether Mrs. Graev engaged in sexual relations with an unrelated adult; whether she and the unrelated

adult commingled their finances or – just the opposite – whether she supported the unrelated adult financially; whether she and the unrelated adult shared the same bed; or some combination of these or other factors associated with living together as if husband and wife.

These provisions are subject to adjustment and negotiation depending upon the facts, circumstances and intent of the parties.

The dissent held that the term was not unambiguous and would have terminated Mr. Graev's support obligation. Instructively, Judge Graffeo, writing for the minority and joined by Judges Smith and Pigott, held:

I agree with the majority that economic interdependence can be relevant to the cohabitation analysis. As the plain meaning of the term makes clear, cohabitation is comprised of several distinct elements: (1) living with (2) an unrelated adult (3) for a specified period of time or with an expectation of permanence (4) in an intimate relationship (5) without being married to that person. In my view, the extent to which a couple intermingles its finances is pertinent on the issues of whether the relationship is sufficiently "intimate" or whether the parties intended a long-term commitment. But in this case, the intimate nature of the relationship is not in dispute, and the question of duration or permanence is addressed by the agreement itself – 60 substantially consecutive days. Hence, the cohabitation clause has been triggered.

The Appellate Divisions' "economic unit" theory is also undermined by its failure to take into account that financial independence, as well as economic interdependence, may sometimes support a finding of cohabitation. This is so because there can be more than one purpose for a cohabitation clause. It can represent the parties' understanding that one ex-spouse should not have to pay maintenance if the other has a new partner to help support his or her lifestyle. But, just as importantly, these clauses may also be designed to prevent an ex-spouse from using the money he or she receives from an ex-spouse to support a new paramour.¹²

Beyond the Graevs

So where do we stand? Given the First Department's expectation that "attorneys using a term such as 'cohabitation' in a separation agreement are aware of the judicial decisions construing the term," I would suggest looking to Judge Graffeo's dissent for guidance. These clauses, as previously constituted similarly to the Graevs' agree-

ment, must be re-drafted with the termination by cohabitation provision, possibly as follows:

1. the Wife and an unrelated adult residing, living or maintaining a presence in the same abode with for a substantially continuous period of sixty (60) days consecutively which shall be deemed to be "habitual"; or
2. the Wife and an unrelated adult residing, living or maintaining a presence in the same abode for a substantially continuous period of one hundred twenty (120) days cumulatively within a twelve-month period which shall be deemed to be "habitual";
3. the foregoing termination provisions shall be effective regardless of any shared financial responsibilities, economic or non-economic contributions and without regard to any intent or expectation that the relationship or living arrangement be permanent; further there shall be no requirement that the relationship be sexual in nature or that the unrelated adult be of the opposite gender.

Of course, these provisions are suggested solutions and are subject to adjustment and negotiation depending upon the facts, circumstances and intent of the parties, not to mention whom you represent and the difficulty presented by the other side. As an example, the above provision might not permit the wife to rent space in someone else's house, which the parties may well wish to permit. Such a situation would then have to be excluded from the termination event. As *Graev* makes clear, with all such agreements the four corners of the document will govern, so make your intent as clear as possible; to do otherwise may result in "Graevous" consequences. ■

1. 11 N.Y.3d 262, 869 N.Y.S.2d 866 (2008).

2. DRL § 248 (emphasis added). Although written in gender-specific terms, the statute is read and interpreted in a gender-neutral manner.

3. *Northrup v. Northrup*, 43 N.Y.2d 566, 402 N.Y.S.2d 997 (1978).

4. *Graev v. Graev*, 6 Misc. 3d 1024(A), 800 N.Y.S.2d 346 (Sup. Ct., N.Y. Co. 2005).

5. *Id.* The court denied Mr. Graev's *in limine* motion to permit expert and other extrinsic evidence on the definition of "cohabitation," claiming that the term was ambiguous.

6. *Graev v. Graev*, 46 A.D.3d 445, 848 N.Y.S.2d 627 (1st Dep't 2007).

7. *Id.* at 451 (citations omitted).

8. *Id.* at 425.

9. *Id.* at 451 (emphasis added) (citations omitted).

10. 11 N.Y.3d 262, 271, 869 N.Y.S.2d 866 (2008) (citations omitted).

11. See, e.g., *Scharnweber v. Scharnweber*, 65 N.Y.2d 1016, 1017, 494 N.Y.S.2d 100 (1985); *Olstein v. Olstein*, 309 A.D.2d 697, 698, 766 N.Y.S.2d 189 (1st Dep't 2003); *Markhoff v. Markhoff*, 225 A.D.2d 1000, 1001, 639 N.Y.S.2d 565 (3d Dep't 1996).

12. *Graev*, 11 N.Y.3d at 280–81 (Graffeo, J., dissenting).

3. Stick to the Forms

Tax returns are all about the forms. This may sound silly, but you'd be surprised how many people, professional and amateurs alike, try to submit information on non-tax forms. You can, however, submit footnotes to the forms on separate sheets of white paper. Especially if your tax return is complex, you may find you need to add explanations or disclosures in footnotes. Such disclosures can be made on regular paper or on special IRS forms.

You may find you have a range of available choices, depending on your risk profile and the advice from the tax professional.

The two basic IRS disclosure forms are Form 8275, called a "Disclosure Statement," and Form 8275-R, called a "Regulation Disclosure Statement." The 8275 is used any time you need to disclose something that isn't adequately disclosed on the forms. The 8275-R is a more serious form, used for disclosing positions on your tax return that are contrary to IRS Regulations or other authority. You probably shouldn't be filing a Form 8275-R – or taking a tax return position that would require you to file this form – without professional help.

4. Be Reasonable and Conservative

Of all the rules, this is the toughest to impart and the hardest to summarize. Preparing tax returns often involves judgment and choice. True, many tax issues are mechanical, such as the notion that wages represent income, or that interest is treated as interest.

But if you receive a lawsuit settlement, you may have a range of choices for reporting the recovery. It may be debatable whether your recovery is all ordinary income, all capital gain, or some of each. It may be debatable whether it is fully excludable as a personal physical injury recovery under Internal Revenue Code § 104.

You should rely on professional advice in such a case. Even then, you may find you have a range of available choices, depending on your risk profile and the advice from the tax professional. If that's the case, my advice is to be reasonable. Don't take an extreme position.

If you find yourself rereading Judge Learned Hand's quote for the 10th time, don't assume that means you should cheat the system. You shouldn't. You shouldn't take a position you won't be comfortable defending.

This may be karma again, but if you take tax positions that are reasonable, you'll likely find you won't end up having to defend them. Another way to look at it is this: Always take tax positions that are reasonable, and don't take the last dollar off the table. If you follow this rule and

you DO face a controversy, it is likely to be far easier to resolve. In fact, it can be an effective strategy to point out to the IRS that a range of tax choices was available to you, and you nevertheless took a moderate position.

One final point about being reasonable: Many taxpayers think that if the "right" position on a return is, say, 50% tax-free and 50% taxable on an item, the smart play is to claim a 100% exclusion. After all, the reasoning continues, you can always give up on the other 50% when you're audited! In contrast, such taxpayers reason, if you file with the 50/50 position from the get-go, you've got nothing to give up.

Every situation is different, and the facts and the tax law should be examined carefully. In general, though, this kind of "I can always be reasonable later" reasoning is flawed. It has far more integrity – and is generally far more effective – to take a reasonable filing position, and then be prepared to defend it. I've found that strategy is generally the best one.

5. Make Sure Your Math Is Correct

Here's another rule that sounds silly: Make sure you add and subtract accurately. You'd be surprised at how many times a tax return is audited because 200 and 200 just don't equal 500. Check your numbers throughout, at each step of your return, and do some simple math checks when you finish, just to be sure.

6. Disclose and Explain, But Don't Go Overboard

We've already talked a bit about disclosure. You should fill out tax forms completely, and disclose your positions adequately. Usually that means filling out the forms, and when you need to footnote something to explain it more fully, doing it on 8½ x 11 white paper and including it with the return. That's why you'll hear some tax return preparers and others in the tax field talking about "white paper disclosures," to distinguish them from disclosures made on IRS Forms 8275 and 8275-R, the two forms noted under point 3 above.

When it comes to disclosure and explanations, be concise, truthful and accurate, but don't go crazy. For example, don't provide copies of sales agreements, settlement agreements, bank statements, and so on. Don't provide such items unless you're asked to. Where you have an unusual item on your tax return, such as a lawsuit recovery, even though some tax professionals may advise attaching a copy of your settlement agreement to your tax return, don't do it.

7. Account for Every Form 1099

IRS Forms 1099 come in many varieties. You may receive a Form 1099-INT, which reports interest, 1099-DIV to report dividends, 1099-G that report tax refunds, 1099-R for pensions, and 1099-MISC for miscellaneous income. Chances are you'll receive a number of these forms every

year. Be careful, and be watchful. Most 1099s come in January for the preceding year.

In fact, payors are required to issue them to you by January 31. While the payor is required to mail the form to you by January 31, the deadline for submitting all Forms 1099 to the IRS is the end of February. That built-in one-month delay means that if you receive a Form 1099 that you know is wrong, you may be able to get it corrected *before* the payor sends the incorrect form to the IRS.

But beware of two things. One, many payors send the forms simultaneously to the taxpayer and the IRS, notwithstanding the permitted one-month delay. Two, you may need professional help to deal with incorrect Forms 1099. There are so many Forms 1099 these days that many payors aren't terribly cooperative when it comes to untangling a mistake.

Regardless of how many Forms 1099 you receive, make sure you reflect them all on your tax return. The IRS matching program has been immensely successful, and one way to almost guarantee yourself a tax dispute is to fail to account for something. If a Form 1099 is wrong, you can usually explain it on the return, but you do need to report it on the return.

For example, if you receive a Form 1099-MISC reporting that you received \$30,000 for the pain and suffering settlement from an auto accident, you still need to list this amount on your tax return. Since the \$30,000 settlement should probably be tax free (and you probably shouldn't have received a Form 1099 for it in the first place), you can report the \$30,000, then offset it with a \$30,000 adjustment, explaining (in a footnote) that it was a personal physical injury settlement for an auto accident that was erroneously the subject of a Form 1099. But if you fail to deal with every Form 1099 you receive, you're asking for trouble.

8. Make Sure You Assemble Your Return Correctly

This advice probably sounds ridiculous, but professionals and amateurs alike make this mistake. Comply with the IRS instructions for how to assemble the return. Usually that means the return itself first, followed by schedules in alphabetical order, ancillary forms in numerical order, and plain paper statements and footnotes at the end.

But follow the IRS instructions carefully. That goes for where to attach Forms W-2 also. And don't attach forms that are not required, such as Forms 1099. If you don't follow the rules, you make your return stick out (which isn't good), and you

risk something being overlooked because it is not in its proper place.

9. If You Receive a Small Bill, Pay It

Here's a rule that many find difficult to swallow. If you follow my advice and take reasonable tax positions, check your math, keep good records, and so on, why should you pay a bill if the IRS sends you one? The answer is more practical than principled.

It's fine to want always to be correct and to stick to your guns. However, tax matters are complicated, and despite the best efforts of you and/or your tax return preparer, you may have made a mistake. Alternatively, even if you are quite correct and the IRS sends you a small bill that you know is wrong, my advice is to pay it. The reason is that it usually doesn't pay to fight about something that is small, whether with the IRS or anyone else.

Whether you use a tax professional to write a letter or start a tax controversy or do it yourself, the potential costs can outweigh the benefits. If the tax bill is small, don't get into the system and risk bigger problems for a few dollars. Just pay the bill and move on.

Of course, what is a small bill to one person is a major bill to someone else. There's no absolute standard here. But at least consider the possibility of just paying the tax bill (plus the inevitable interest that comes with it) unless you really and truly think you're better off contesting it.

10. If You Do Have a Tax Controversy, Hire a Professional

This may sound like a tautology, since the subject of this article is how to *avoid* tax controversies, not how to *handle* them. It isn't a tautology, though. After all, it can be hard sometimes to know exactly when a tax controversy starts.

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You might reasonably believe that if you receive a letter from the IRS asking about some aspect of your return, or a letter from a state taxing authority asking why you didn't file a tax return in their state for a particular year, you can safely answer it yourself. That's hardly starting a tax controversy, you might reason.

Actually, while you should clearly find a way to respond to any such query (either yourself or through a representative), you should think carefully about *how* you do it. It's hard to generalize here, and I'm not suggesting that you need a lawyer any time a single piece of paper comes from the IRS. Still, be cautious and reflective, and get some advice about whether or not you need a representative. You should be able to do that for free, such as by contacting accountants or tax lawyers to see if they think you need their services, how much they would charge to represent you, and so on.

The notion that you should hire a professional is painful for some people to accept, but you generally can't represent yourself very effectively. That is true in tax matters and in many other disciplines too. Find someone who does this for a living and who isn't emotionally involved in the case, and you'll usually be better off. There are cases in which representing yourself can make sense up

to a point, but they are pretty rare, and the point at which you need to change horses is usually pretty early.

In fact, I've seen cases where taxpayers end up spending huge amounts of money on a tax case precisely because they tried to handle the early stages of the case themselves. Sometimes you dig a hole that is bigger and wider and deeper than it would have been had you handed it off to a professional from the start.

Conclusion

There's no way to guarantee that you'll never have a tax controversy, no matter how careful you are. While you should be reasonable and you should not be too aggressive in any tax filing, these are often questions of degree. Moreover, no matter how careful and how conservative you are, sometimes your number just comes up. While audit rates for most types of tax returns are now at historic lows, IRS enforcement efforts are on the uptick. That will probably continue.

So do what you can to minimize your exposure. Then, like the refrain from an old Bobby McFerrin song, "don't worry, be happy." ■

1. See *Helvering v. Gregory*, 69 F.2d 809, 810–11 (2d Cir. 1934).

Law Day 2009: "A Legacy of Liberty – Celebrating Lincoln's Bicentennial"

For this year's Law Day, the Committee on Law Youth and Citizenship (LYC) and the Committee on Animals and the Law of the New York State Bar Association teamed up to honor President Lincoln by exploring a less well-known aspect of his character: his deep love of animals and the far-reaching influence that has had on the growing field of animal law.

In preparation for the May 1 event, the State Bar launched a Web site containing information, lesson plans and classroom resources to help educators in New York observe Law Day in their classrooms; and to satisfy N.Y. Education Law, Article 17, § 809, which mandates instruction in the humane treatment of animals.

In his essay, written to accompany the NYSBA's Law Day activities, James F. Gesualdi, chair of the Committee on Animals and the Law, notes that the Lincoln White House was filled with pets – cats, kittens, dogs, and later a turkey and even a couple of goats. As a child Lincoln would intervene if he saw other children treating an animal cruelly. As an adult, Lincoln would halt his travels to rescue a baby bird fallen from its nest. He asked troops under General Grant's command to care for the orphaned kittens that were abandoned at the barracks, and he was known to treat his pets as family members. One of the family dogs, Fido, was the first presidential

pet to sit for an official portrait. Lincoln's son Tad was so distraught by the thought that his pet turkey would be killed for Thanksgiving dinner, Lincoln officially pardoned the bird, starting a presidential tradition still observed today. Gesualdi also recommends a beautifully illustrated children's book, Ellen Jackson's *Abe Lincoln Loved Animals* (illustrated by Doris Ettlinger), which weaves together accounts of Lincoln and animals.

The collaboration between the LYC and the Animals and the Law Committee yielded an unusual and fascinating opportunity to learn about Lincoln the man. Information, lesson plans and classroom resources can be found at www.nysba.org/lawday2009.

Established in 1958 by President Eisenhower, Law Day is the annual commemoration of the importance of the role of law in our society. The Committee on Animals and the Law was established to provide an information resource for the State Bar's members, governments and the public about non-human, animal-related humane issues which arise from and have an effect upon our legal system. The State Bar also houses the Law, Youth and Citizenship Program (www.lycny.org), which has provided civic education resources to teachers and classes throughout New York for three decades. ■



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2008 Insurance Law Update

Uninsured, Underinsured and Supplementary Uninsured Motorist Law – Part II

By Jonathan A. Dachs

This article is the second of two that survey general issues concerning uninsured, underinsured, and supplementary uninsured motorist law (UM/UIM/SUM) coverage and claims. In addition, this article will focus upon certain issues that are specific to each particular type of coverage.

Petitions to Stay Arbitration Statute of Limitations

In *Bloom v. St. Paul Travelers Ins. Co.*,¹ the court held that because the action was based on a dispute arising under a contract of insurance, and sought both the reformation of the policy and the payment of SUM benefits under the reformed policy, the applicable statute of limitations was the six-year period set forth in Civil Practice Law & Rules 213(2).

Burden of Proof

In *Hartford Fire Ins. Co. v. Fell*,² the court affirmed the denial of the petitioner's application to stay arbitration on the basis of the respondent's failure to abide by certain provisions of its policy (other than late notice) because the respondent was not the policyholder and there was no evidence in the record that the respondent was ever provided with a copy of the policy or was aware of its terms. "Under these circumstances, petitioner cannot rely on respondent's failure to satisfy [the] terms of an insurance contract that he did not possess and the terms of which he was not aware to obtain a stay of arbitration."³

Venue of Arbitration

In *Erie Ins. Co. v. Malcolm*,⁴ the court held that the American Arbitration Association (AAA) rules provide that the arbitrator is to select the venue of the arbitration, but that such arbitrations are required to be held not more than 100 miles from an insured's residence.

Arbitration Awards Scope of Review

In *Mangano v. U.S. Fire Ins. Co.*,⁵ the court noted that

[s]ince a claim by an insured against an insurance carrier under the uninsured motorists' endorsement is subject to compulsory arbitration, the arbitrator's award is subject to "closer judicial scrutiny" under CPLR 7511(b) than it would receive had the arbitration been conducted pursuant to a voluntary agreement between the parties. "To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious."

In *Long Island Ins. Co. v. MVAIC*,⁶ the court observed: "Judicial review of an arbitrator's award is extremely limited, and a reviewing court may not second-guess the fact-findings of the arbitrator."

The court, in *Aviles v. Allstate Ins. Co.*,⁷ rejected the petitioner's challenge to an arbitration award on the grounds of alleged "partiality and misconduct" of the arbitrator, noting that the petitioner failed to carry his burden of establishing bias and that the award itself disclosed no

bias, and “the conclusory claim of the petitioner’s counsel to the contrary is unavailing.”⁸

In *Progressive Northeastern Ins. Co. v. Gigi*,⁹ the court held that the arbitrator’s offer to grant the claimant’s request for an adjournment, conditioned upon her counsel’s payment of the appearance fee of her adversary’s expert, was reasonable and did not establish by clear and convincing evidence that the arbitrator committed misconduct within the meaning of CPLR 7511(b)(1)(i).

In *Lowe v. Erie Ins. Co.*,¹⁰ a case involving a challenge to a No-Fault Master Arbitration award, the court addressed the “straightforward but apparent issue of first impression in an appellate court in New York” – in

effective disclaimer, even where the insured’s own notice of the incident is untimely. The timeliness of an insurer’s disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage.¹²

In *Preserver Ins. Co. v. Ryba*,¹³ the Court of Appeals noted that N.Y. Insurance Law § 3420(d) (“Ins. Law”) provides that when a liability policy is “‘delivered or issued for delivery in this state, [if] an insurer shall disclaim liability or deny coverage for death or bodily injury . . . it shall give written notice as soon as is reasonably possible.’” “A policy is ‘issued for delivery’ in New York if it covers both insureds and risks located in this state.”¹⁴ Where,

A vehicle is considered “uninsured” where it is, in fact, covered by an insurance policy but the insurer subsequently disclaimed or denied coverage.

other words, whether the 90-day statute of limitations set forth in CPLR 7511(a), governing applications to vacate arbitration awards, begins to run on the date on which the arbitrator’s decision was mailed or on the date when it was received by the petitioner or his or her agent. After reviewing caselaw involving other types of arbitration proceedings, the court concluded that the operative measuring date is the date of receipt. Thus, where the petition to vacate was filed 91 days after the award was mailed, but only 86 days after it was received by the petitioner’s attorney, the proceeding was timely commenced. (The question was a close one in the No-Fault context because an Insurance Department Regulation, N.Y. Comp. Codes R. & Regs. title 11, § 65-4.10(e)(3), provides that “[t]he parties shall accept as delivery of the award the placing of the award or a true copy thereof in the mail, addressed to the parties or their designated representatives at their last known address, or by any other form of service permitted by law.” The court found that this Regulation governing Master Arbitration proceedings did not apply to CPLR Article 75 proceedings.)

Uninsured Motorist Issues

Insurer’s Duty to Provide Prompt Written Notice of Denial or Disclaimer

A vehicle is considered “uninsured” where the offending vehicle was, in fact, covered by an insurance policy at the time of the accident, but the insurer subsequently disclaimed or denied coverage.

In *Tex Development Co., LLC v. Greenwich Ins. Co.*,¹¹ the court observed that

Insurance Law § 3420(d) requires an insurer to provide a written disclaimer of coverage “as soon as is reasonably possible.” An insurer’s failure to provide notice of disclaimer as soon as is reasonably possible precludes

as in that case, the policy is neither actually “delivered” nor “issued for delivery” in New York, an insurer is not required by Ins. Law § 3420(d) to make a timely disclaimer of coverage. The court further noted that the duty to disclaim in a prompt manner imposed by § 3420(d) only applies to denials of coverage “for death or bodily injury.”¹⁵

The Second Department, in *Sirius American Ins. Co. v. Vigo Construction Co.*,¹⁶ held that an unexplained delay of 34 days from the time the insurer knew or should have known of the basis for denying coverage was unreasonable as a matter of law and rendered the purported disclaimer ineffective.

In *Morath v. New York Central Mutual Fire Ins. Co.*,¹⁷ the court held that the insurer’s delay of 36 days in disclaiming, based upon the claimant’s failure to obtain its prior written consent to settle with the tortfeasor, was unreasonable as a matter of law.

In *Wausau Business Ins. Co. v. 3280 Broadway Realty Co. LLC*,¹⁸ the insured misrepresented when he had first learned of the accident, and the insurer relied upon that misrepresentation in initially agreeing to defend and indemnify the insured in an underlying action. When the insurer learned, two years later, that the insured actually knew of the underlying accident several years earlier, it disclaimed coverage 24 days later, after consulting with both in-house and outside counsel. Under these circumstances, the court held that the disclaimer was timely.

Effective January 17, 2009, the Insurance Law was amended to create a new § 3420(a)(6), which allows, with respect to wrongful death and personal injury claims (only), that if the insurer denies or disclaims liability on the ground of late notice, and the insurer or the insured has not commenced a declaratory judgment action naming the injured person or other claimant or parties within

60 days after the denial/disclaimer, the injured person or other claimant may maintain an action directly against the insurer, in which the sole question will be the validity of the insurer's late notice denial or disclaimer.

In *Braun v. One Beacon Ins. Co.*,¹⁹ the plaintiff allegedly struck and injured a pedestrian on May 28, 2004, while driving her vehicle, which was insured by American Home Ins. Co. One Beacon had issued a policy covering a different vehicle owned by the plaintiff's husband. On July 7, 2004, the injured party's attorney notified One Beacon of his representation in connection with a claim for personal injuries on behalf of the injured party, and requested coverage information.

One Beacon responded to this letter on July 12, 2004, by disclaiming coverage on the basis that its insured, the plaintiff's husband, was not involved in the accident. The disclaimer letter also advised that the applicable coverage was with American Home. American Home tendered its policy limits to the injured party, which were rejected. In August 2004, One Beacon was notified that the injured party was seeking excess coverage from it. One Beacon, by letter dated September 16, 2004, again disclaimed coverage, on the ground that the vehicle involved in the accident was not a "covered auto" under its policy. On the basis of these facts, the court concluded that One Beacon's first disclaimer letter (July 12, 2004) was a timely and effective disclaimer of coverage, and the second disclaimer letter (September 16, 2004), based on the same policy provisions, while perhaps late, did not invalidate the first disclaimer. Thus, the court upheld One Beacon's disclaimer and held that it owed no duty to defend or indemnify the plaintiff in the underlying action.

In *Adames v. Nationwide Mutual Fire Ins. Co.*,²⁰ the court reiterated the well-established rule that

[a] notice of disclaimer "must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated" and "[a]n insurer's justification for denying coverage is strictly limited to the ground stated in the notice of disclaimer." Thus, an insurer waives any ground for denying coverage that is not specifically asserted in its notice of disclaimer, even if that ground would otherwise have merit.²¹

In this case, Nationwide relied in its disclaimer upon the homeowners policy's definition of "insured location." This was not a valid basis for denying coverage since the plaintiff's accident triggered the policy's liability coverage, which was not limited to any particular location, not its property coverage. Nationwide further relied upon definitions and exclusions contained in its umbrella policy, which were not relevant since the judgment sought to be enforced by the plaintiff did not exceed the basic policy's limits. The disclaimer failed to mention the homeowners policy's exclusions relating to business

pursuits and rental property, and, thus, those exclusions were held to have been waived.

The Fourth Department, in *Erie Ins. Co. v. Calandra*,²² held that the petitioner did not waive its right to deny coverage based upon the absence of "physical contact" in a hit-and-run case by delaying to do so because "[p]hysical contact goes to coverage, rather than exclusion . . . [and n]o coverage exists in the absence of the required contact. . . . Inasmuch as there is no coverage here, it cannot be said that petitioner waived the right to deny coverage."

Noncooperation

It is well-established that an insurance carrier that seeks to disclaim coverage on the ground of lack of cooperation

must demonstrate that it acted diligently in seeking to bring about the insured's cooperation; that the efforts employed by the insurer were reasonably calculated to obtain the insurer's cooperation; and that the attitude of the insured, after his [or her] cooperation was sought, was one of "willful and avowed obstruction."²³

In *Continental Casualty Co. v. Stradford*,²⁴ the insured ignored a series of written correspondence and telephone calls from its insurer's representatives and from defense counsel, repeatedly refused to provide requested documents, records and evidence, and unreasonably refused to consent to a recommended settlement based upon adverse findings of experts. Notwithstanding his own request for new counsel, he refused to execute stipulations consenting to a change of attorney. He also failed to appear for scheduled depositions and meetings. Two letters sent to him advising him that he risked a disclaimer of coverage if he continued to breach the cooperation clause of his policy were returned "unclaimed." In two other claims, the insurer obtained orders in a declaratory judgment action relieving it of its duty to defend and indemnify as a result of the insured's failure to cooperate in the defense of those claims. Under these circumstances, the court (in a 3-2 decision) held that the insurer met its burden to establish that it acted diligently in seeking to bring about the insured's cooperation, and that its efforts were reasonably calculated to obtain the insured's cooperation, and that the attitude of the insured, after his cooperation was sought was one of "willful and avowed obstruction." (However, the court further held that the insurer's disclaimer for lack of cooperation was untimely insofar as the lapse of in excess of two months from . . . the date it was readily apparent that the insurer's efforts to obtain the insured's cooperation were fruitless, until . . . the date [it] sent its disclaimer, without explanation, was not 'as soon as is reasonably possible' within the contemplation of Ins. Law § 3420(d).²⁵ The court specifically rejected the excuse that the insurer was consulting with claims counsel to determine whether the six-year-long, well-documented pattern of willful non-cooperation warranted a disclaimer of coverage.)

The Court of Appeals, dealing solely with the issue of timeliness of disclaimer for lack of cooperation, noted that “[e]ven if an insurer possesses a valid basis to disclaim for noncooperation, it must still issue its disclaimer within a reasonable time.”²⁶ The Court also noted, “Fixing the time from which an insurer’s obligation to disclaim runs is difficult . . . unlike cases involving late notice of claims or other clearly applicable coverage exclusions, an insured’s noncooperative attitude is often not readily apparent,” as it “can be obscured by repeated pledges to cooperate and actual cooperation.”²⁷

Further, the Court observed that

[t]o further this State’s policy in favor of providing full compensation to injured victims, who are unable to control the actions of an uncooperative insured, insurers must be encouraged to disclaim for noncooperation only after it is clear that further reasonable attempts to elicit their insured’s cooperation will be futile.²⁸

Insofar as the Court found that a question of fact existed as to the amount of time required for the insurer to complete its investigation of the insured’s conduct, it modified the order below by holding that the reasonableness of the two-month delay “to analyze the pattern of obstructive conduct that permeated the insurer’s relationship with its insured for almost six years” presented a question of fact sufficient to defeat summary judgment in the insured’s favor.²⁹

One category of an “uninsured” motor vehicle is where the policy of insurance for the vehicle had been canceled prior to the accident.

In *Allstate Ins. Co. v. Gardaner*,³⁰ the court held that the insurer was justified in disclaiming for the insured’s failure to cooperate in the defense of the action against him where there was no cooperation by the insured, the insured could not be located after a diligent search, and the insured made misrepresentations when he applied for insurance.

On the other hand, in *Country-Wide Ins. Co. v. Henderson*,³¹ the affidavit of the insurer’s investigator, who had no personal knowledge of the efforts made to locate the insured and which merely recited apparent efforts of an unnamed investigator and attached copies of letters to the insured from a claims representative, was held to be based on hearsay and insufficient to establish that the insurer’s efforts were reasonably calculated to bring about the insured’s cooperation or that the insured ever received notice of the disclaimer. “[M]ere efforts by the insurer and mere inaction on the part of the insured, without more, are insufficient to establish non-cooperation as ‘the inference of non-cooperation must be practically compelling.’”³²

In *St. Paul Travelers Ins. Co. v. Kreibich-D’Angelo*,³³ a disclaimer based on failure to cooperate was held to be invalid, without evidence that the insured knew that the insurer was seeking his cooperation and that he willfully refused to cooperate.³⁴

In *Nationwide Mutual Ins. Co. v. Posa*,³⁵ the court noted that “failure to make fair and truthful disclosures in reporting the [accident] constitutes a breach of the cooperation clause [and the fraud and misrepresentation clauses] of the insurance policy as a matter of law.” (Here, the insured falsely claimed that he damaged his pickup truck by driving into it with his garden tractor, when, in fact, as confirmed by his scorned girlfriend, he was involved in an accident with another motor vehicle.)

Cancellation of Coverage

One category of an “uninsured” motor vehicle is where the policy of insurance for the vehicle had been canceled prior to the accident. Generally speaking, in order to effectively cancel an owner’s policy of liability insurance, an insurer must strictly comply with the detailed and complex statutes, rules and regulations governing notices of cancellation and termination of insurance, which differ depending upon whether, for example, the vehicle at issue is a livery or private passenger vehicle, whether the policy was written under the Assigned Risk Plan, and/or whether the policy was paid for under a premium financing contract.³⁶

In *General Assurance Co. v. Rahmanov*,³⁷ the court applied the rule that there is no retroactive cancellation of automobile insurance policies in New York as against third parties on the basis of fraud in the absence of evidence that the claimant was a participant in the fraud.³⁸

In *GEICO Ins. Co. v. Battaglia*,³⁹ on the other hand, the court upheld the insurer’s attempt to void its policy *ab initio* based upon a material misrepresentation with respect to the status of its insured, who was actually deceased. It appears, however, that this decision is incorrect in the absence of any evidence that the claimant, the victim of an accident with a vehicle registered to the deceased insured, was involved in any way in this misrepresentation. The general rule is, and has been for years, that automobile policies cannot be rescinded retroactively for fraud and/or misrepresentation.⁴⁰ It does not appear that this line of cases was ever raised by the parties.

Hit-and-Run

One of the requirements for a valid uninsured motorist claim based upon a hit-and-run is “physical contact” between an unidentified vehicle and the person or motor vehicle of the claimant. “The insured has the burden of establishing that the loss sustained was caused by an uninsured vehicle, namely that physical contact occurred, that the identity of the owner and operator of the offend-

ing vehicle could not be ascertained, and that the insured's efforts to ascertain such identity were reasonable."⁴¹

In *American Transit Ins. Co. v. Wason*,⁴² the evidence at the framed issue hearing established that the taxi in which the claimant was a passenger was involved in an accident with a dark green, four-door vehicle, which fled the scene. Upon exiting the taxi, the claimant and the taxi driver discovered a bumper with a license plate attached to it. They placed the bumper in the trunk of the taxi and transported it to a nearby police precinct, but it was subsequently left in the possession of the taxi driver. Approximately one week later, the taxi driver delivered the license plate, detached from the bumper, to the claimant, who provided it to her attorney. The plate was registered to an individual, Palache, who acknowledged owning a dark green, four-door vehicle, but denied involvement in the accident. On the basis of this evidence, the Special Referee held that Palache's vehicle was involved in the accident, and the Appellate Division upheld that determination. As stated by the court, "[i]t was within the province of the Special Referee to reject the claim of custody arguments proffered by additional respondents and conclude that the license plate discovered at the scene of the accident was the same one produced at the hearing."⁴³

On the other hand, in *Phoenix Ins. Co. v. Golane*,⁴⁴ the police accident report set forth a license plate number for the alleged hit-and-run vehicle, and noted that this number had been observed by an eyewitness. This plate number was found to correspond to a vehicle that matched the description of the offending vehicle, but the owner of that vehicle denied involvement in the accident. At the framed issue hearing on the issue of involvement, the eyewitness testified that after the accident, she and her mother followed the offending vehicle and she wrote down its plate number. On her way back to the scene of the accident, the eyewitness encountered a police officer and gave him the plate number, and watched as he recorded it in his memo book. There was no evidence that the officer to whom the plate number was reported was one of the two officers who responded to the scene of the accident or whether he was involved in preparing the police accident report. Neither the papers on which the eyewitness wrote the plate number nor the police officer's memo book was offered into evidence and neither of the responding officers testified at the hearing. At the conclusion of the hearing, the petitioner sought to introduce the police accident report into evidence. The referee ruled this document to be admissible pursuant to the present sense impression exception to the hearsay rule, and then determined that the identified truck was involved in the accident. Thus, he granted the petition and permanently stayed the arbitration.

On appeal, the Second Department reversed. The court held that the police accident report was inadmissible under the present sense impression exception because the report made by the eyewitness to the officer she encoun-

tered was not based on any present sense she had of the offending vehicle's plate number. As the court explained,

[a]fter she wrote that number on a piece of paper, she was no longer relying upon a present sense of the number, but was relying entirely on the contents of her own writing. Thus, the officer's memo book, and certainly the police accident report generated some-time later, did not "reflect[] a present sense impression rather than a recalled or recast description of events that were observed in the recent past."⁴⁵

Furthermore, "the evidence at the hearing in this case did not establish how much time elapsed between the eyewitness's observation of the license plate and her statement to the police officer, or how much additional time elapsed between that statement and the preparation of the police accident report."⁴⁶

Another requirement for a "hit-and-run" claim is a report of the accident within 24 hours or as soon as reasonably possible.

The court also rejected the petitioner's alternative contention that the police accident report was admissible pursuant to the past recollection recorded exception to the hearsay rule since the eyewitness did not give, and could not have given, testimony to the effect that the police accident report correctly represented her knowledge and recollection when made since she was not present when that report was prepared. Based upon the conclusion that the police accident report was improperly admitted into evidence, and the fact that there was "no other competent evidence" that the identified vehicle was involved in the subject accident, the court concluded that the Petition to Stay Arbitration should have been denied.

In *Erie Ins. Co. v. Calandra*,⁴⁷ the court rejected the claimant's contention that there should be coverage even in the absence of physical contact because she was able to establish through the affidavits of two disinterested eyewitnesses that an unidentified vehicle forced her to take evasive action to avoid the collision, thereby causing her to sustain injuries.

Another requirement for a valid "hit-and-run" claim is a report of the accident within 24 hours or as soon as reasonably possible to a police officer, peace officer or judicial officer, or to the Commissioner of Motor Vehicles.

In *Sitbon v. Unitrin Preferred Ins. Co.*,⁴⁸ the court held that the defendant insurer made a prima facie showing of its entitlement to summary judgment dismissing the complaint for uninsured motorist benefits by demonstrating that timely notice was not provided to either the police or the Commissioner of Motor Vehicles. Moreover, the plaintiff failed to raise a triable issue of fact as to whether

he, or anyone else on his behalf, provided timely notice, or any notice, to the police or the Commissioner. The plaintiff failed to oppose the motion with an affidavit or affirmation from the individual who prepared the original of the unsigned, partially completed, MV-104 form attesting to the filing of the report with the Commissioner and when it was filed. Indeed, the Commissioner's form report of a motor vehicle accident specifically provides that an accident report is not considered complete and filed unless it is signed. Accordingly, the court granted the defendant's motion for summary judgment dismissing the complaint.

Insurer Insolvency

The SUM endorsement under Regulation 35-D includes within the definition of an "uninsured" motor vehicle a vehicle whose insurer "is or becomes insolvent." Under that endorsement, any and all insolvencies, whether or not covered by a Security Fund, give rise to a valid SUM claim.⁴⁹ In cases involving mandatory UM coverage, as opposed to SUM coverage, only insolvencies that are not covered by a Security Fund give rise to a valid UM claim.

The Commissioner's form report of an accident specifically provides that an accident report is not considered complete and filed unless it is signed.

In *Lancer Ins. Co. v. Lackraj*,⁵⁰ the court held that the offending vehicle, a bus, did not meet the definition of an "uninsured motor vehicle" within the meaning of Ins. Law § 3420(f)(1), notwithstanding the fact that the policy insuring the vehicle had a large (\$250,000) deductible and the owner became insolvent.

Underinsured Motorist Issues – Trigger of Coverage

In *Clarendon National Ins. Co. v. Nunez*,⁵¹ where the tortfeasor's insurer paid out the sums of \$5,000 to one claimant and \$15,000 each to three other claimants, totaling the full \$50,000 limits of coverage for the tortfeasor, the court rejected the underinsured motorist claims of each of the claimants under a 25/50 UM/SUM policy, noting, "since the tortfeasor's policy limits for bodily injury liability were identical to the petitioner's policy for bodily injury liability, the tortfeasor's vehicle was not underinsured." The court went on to add that "[c]ontrary to the respondent's contention, 11 N.Y.C.R.R. 60-2.3(f)(c)(3)(ii) [does] not render the tortfeasor's vehicle 'underinsured' for purposes of triggering the SUM endorsement because of the payments the tortfeasor's insurer already made to them."⁵² This conclusion was based upon the court's determination that the section of the Regulation 35-D SUM endorsement that defines an "uninsured motor vehicle" as one for which "(3) there is a bodily injury liability insurance coverage or bond applicable to such

motor vehicle at the time of the accident, but . . . (ii) the amount of such insurance coverage or bond has been reduced by payments to other persons injured in the accident, to an amount less than the third-party bodily injury liability limit of this policy," requires such reduction for payments made "to other persons" and *not* for payments made to the claimants.⁵³

In *Allstate Ins. Co. v. Dawkins*,⁵⁴ the court, relying upon the reduction for payments to other persons injured in the accident provision in the Regulation 35-D SUM endorsement, held that although the bodily injury limits of the tortfeasor's policy and the claimant's policy were the same, i.e., \$25,000/\$50,000, because only \$12,500 in coverage remained under the tortfeasor's policy after paying claims of two other individuals, the offending vehicle qualified as "uninsured," and, thus, the claimant had a valid SUM claim, subject to the offset provisions of the policy.

The Second Department declined Allstate's invitation, made for the first time on appeal, "to reconsider our case law in this area and hold that the Superintendent of Insurance exceeded his authority" in promulgating the

"reduction by payments to other persons injured in the accident" provision of Regulation 35-D.⁵⁵

In *Automobile Ins. Co. of Hartford v. Ray*,⁵⁶ the court compared the tortfeasor's 100/300 policy limits with the claimant's \$300,000 combined single limit (for bodily injury and property damage), and concluded that "the SUM endorsement would not be triggered. Since the petitioner's \$300,000 combined policy limit includes property damage, the bodily injury liability limits of the tortfeasor's policy were not less than the bodily injury liability limits of the petitioner's policy."⁵⁷

Offset Provision

In *Clarendon National Ins. Co. v. Nunez*⁵⁸ and *Allstate Ins. Co. v. Rivera*,⁵⁹ the Second Department held that the SUM carrier was entitled to offset the full \$50,000 received by the respondents from the tortfeasor's insurer against the SUM limits of its policy, effectively allowing for an offset for payments made to the "insureds" (plural) despite the fact that the endorsement provision refers to the "insured" (singular), and precluding any recovery by any of the respondents under the \$50,000 SUM policy.

In *GEICO v. Dunbar*,⁶⁰ the court applied the offset provision to reduce by the \$25,000 received from the tortfeasor the full \$25,000 SUM coverage, and, thus, granted the SUM carrier a permanent stay of arbitration.

Settlement Without Consent

In *Central Mutual Ins. Co. v. Bemiss*,⁶¹ the respondent was injured in a multiple vehicle accident and negotiated a settlement with one of the tortfeasors for the full amount of that party's liability insurance policy. She then gave to her SUM carrier written notice of her intent to enter into this settlement, but the carrier did not respond to her request for permission to settle. Subsequently, she agreed to settle with a second tortfeasor for less than that party's liability limits without first giving any notice to, or obtaining the consent of, the SUM carrier. The respondent ultimately signed releases for both tortfeasors, which made no provision for protecting the SUM carrier's subrogation rights. When the respondent then made a claim for SUM benefits, the SUM carrier denied coverage based upon the failure to protect its subrogation rights. When the respondent demanded arbitration, the carrier moved for a permanent stay, which the Supreme Court granted.

On appeal, the Third Department majority agreed with the respondent that the settlement with the first tortfeasor was proper insofar as "the terms of the policy permitted her to settle with the first tortfeasor without preserving [the SUM carrier's] subrogation rights."⁶² Because a request for consent to settle was made and 30 days passed without a response, under Condition 10 of the SUM endorsement, the insured was permitted to issue a release.

However, the court reached a different conclusion regarding the settlement with the second tortfeasor, concluding that such settlement, even for an amount less than the policy limits, destroyed the insurer's subrogation rights against that tortfeasor. As stated by the court,

[w]hile paragraph 9 of the policy makes clear that respondent was obligated to fully exhaust the policy of only one of the tortfeasors involved in her accident, that same provision does not excuse a failure to comply with paragraph 10 upon settling with another tortfeasor. Unlike the settlement with the first tortfeasor, paragraph 10's first sentence is not applicable to respondent's settlement with the second tortfeasor because the latter was not for the full policy amount. As a result, only the last sentence of paragraph 10 applies here. That sentence provides: "An insured shall not otherwise settle with a negligent party, without our written consent, such that our [subrogation] rights would be impaired." We do not view this sentence to be limited to where a party seeks in the first instance to settle for the full available policy limits of one tortfeasor. Rather, its function is to make clear that the method described in the first sentence of paragraph 10 is the one and only way to enter a settlement with "any negligent party" which impairs petitioner's rights without its consent. There is no dispute that respondent failed to obtain petitioner's consent or reserve petitioner's subrogation rights against the second tortfeasor here.⁶³

Thus, the court affirmed the grant of the petition on the basis of the respondent's failure to comply with the terms of her policy.

A strong dissenting opinion suggested that the majority's requirement of preservation of subrogation rights when less than the policy limits are being paid will make it impossible for a victim even to settle a case where there are multiple tortfeasors.⁶⁴

In *Hertz Claim Management Corp. v. Kulakowich*,⁶⁵ the court held that the SUM carrier's failure to respond to a letter notifying it of an offer to settle for the policy limits of the owner of the offending vehicle, and affording it the opportunity to consent to or reject such offer, "may be deemed an acquiescence to the offer to settle."

Exhaustion of Underlying Limits

In *Hertz Claim Management Corp.*, the court held that where the claimant exhausted, through settlement, the bodily injury limits of the policy of the owner of the offending vehicle, which were less than the liability coverage provided under the claimant's own policy, he was not required to exhaust the liability coverage limits under a separate policy of the operator of the offending vehicle prior to providing an underinsured motorist claim.⁶⁶ ■

1. 57 A.D.3d 819, 870 N.Y.S.2d 400 (2d Dep't 2008).
2. 53 A.D.3d 760, 860 N.Y.S.2d 691 (3d Dep't 2008).
3. *Id.* at 761 (citations omitted).
4. 50 A.D.3d 1459, 857 N.Y.S.2d 393 (4th Dep't 2008).
5. 55 A.D.3d 916, 917, 866 N.Y.S.2d 348 (2d Dep't 2008) (citations omitted).
6. 57 A.D.3d 670, 671, 869 N.Y.S.2d 195 (2d Dep't 2008) (citations omitted).
7. 47 A.D.3d 710, 711, 848 N.Y.S.2d 897 (2d Dep't 2008).
8. *Id.* at 711; see also *Balis v. Chubb Group of Ins. Cos.*, 50 A.D.3d 682, 855 N.Y.S.2d 192 (2d Dep't 2008).
9. 47 A.D.3d 822, 849 N.Y.S.2d 176 (2d Dep't 2008).
10. 56 A.D.3d 130, 131, 865 N.Y.S.2d 465 (4th Dep't 2008).
11. 51 A.D.3d 775, 858 N.Y.S.2d 682 (2d Dep't 2008).
12. *Id.* at 778 (citations omitted); see also *Continental Cas. Co. v. Stradford*, 11 N.Y.3d 443, 871 N.Y.S.2d 607 (2008); *Fireman's Fund Ins. Co. v. Farrell*, 57 A.D.3d 721, 869 N.Y.S.2d 597 (2d Dep't 2008).
13. 10 N.Y.3d 635, 642, 862 N.Y.S.2d 820 (2008).
14. *Id.* (emphasis added; citations omitted).
15. *Id.*; see also *Doyle v. Siddo*, 54 A.D.3d 988, 865 N.Y.S.2d 126 (2d Dep't 2008) (Ins. Law § 3420(d) not applicable to title dispute).
16. 48 A.D.3d 450, 852 N.Y.S.2d 176 (2d Dep't 2008).
17. 49 A.D.3d 1245, 853 N.Y.S.2d 757 (4th Dep't 2008).
18. 47 A.D.3d 549, 850 N.Y.S.2d 84 (1st Dep't 2008).
19. 49 A.D.3d 480, 854 N.Y.S.2d 146 (2d Dep't 2008).
20. 55 A.D.3d 513, 866 N.Y.S.2d 210 (2d Dep't 2008).
21. *Id.* at 515 (citations omitted); see *Gen. Accident Ins. Group v. Cirucci*, 46 N.Y.2d 862, 864, 414 N.Y.S.2d 512 (1979); see also Ins. Law § 3420(d).
22. 49 A.D.3d 1237, 1239, 856 N.Y.S.2d 325 (4th Dep't), *lv. to appeal denied*, 11 N.Y.3d 705, 866 N.Y.S.2d 609 (2008).
23. *Thrasher v. U.S. Liab. Ins. Co.*, 19 N.Y.2d 159, 168, 278 N.Y.S.2d 793 (1967) (citations omitted).
24. 46 A.D.3d 598, 847 N.Y.S.2d 631 (2d Dep't 2007), *modified*, 11 N.Y.3d 443, 871 N.Y.S.2d 607 (2008).
25. *Id.* at 599, 601.
26. *Stradford*, 11 N.Y.3d at 449.

CONTINUED ON PAGE 58

MEET YOUR NEW OFFICERS



President Michael E. Getnick

Michael E. Getnick of Utica, a partner of Getnick Livingston Atkinson & Priore, LLP, and of counsel to Getnick and Getnick of New York City, took office on June 1 as president of the 76,000-member New York State Bar Association. The House of Delegates, the Association's decision- and policy-making

body, elected Getnick at the organization's 132nd annual meeting, held this past January in Manhattan.

Getnick received his undergraduate degree from Pennsylvania State University in 1966 and earned his law degree from Cornell University in 1970.

Active in the Association, he is a member of the House of Delegates and a Fellow of The New York Bar Foundation. He is a former chair of the Committee on Court Operations, and a member of the Diversity and Leadership Development and Membership Committees.

Getnick served as a vice president representing the Fifth Judicial District (Herkimer, Jefferson, Lewis, Oneida, Onondaga and Oswego counties). He is also a past member of the Nominating Committee. In 1988, he received the Association's President's Pro Bono Service Award for the Fifth Judicial District. The award recognizes those lawyers for outstanding contribution of time, resources, and expertise in the provision of legal services to the poor. He is a member of the Fifth Judicial District Pro Bono Committee.

In addition to his NYSBA activities, Getnick is a member and past president of the Oneida County Bar Association (OCBA) and an ex-officio member of the Onondaga County Bar Association.

He is past chair of OCBA's Liaison Committee to the NYSBA, the Domestic Relations Committee and the Private Attorney Involvement Committee. He is also a member of the National Institute for Trial Advocacy and the New York State Academy of Trial Lawyers.

In the community, Getnick is a member of the board of the American Heart Association Northeast Affiliate. He was the initial counsel and attorney who incorporated the Mohawk Valley Committee Against Child Abuse, Inc.

Getnick is past president and member of the board of directors of the Legal Aid Society of Mid-New York and a former member and past president of the New Hartford Central School District Foundation. He was a trainer and

speaker for the Mendez Anti-Drug Program for the New Hartford School District.

He formerly served as vice president of the YMCA of Utica and is past chair of the United Way's Committee for Fund Raising for Lawyers and Doctors. Getnick is a past member of the board of directors of Family Services of Greater Utica.



President-elect Stephen P. Younger

Stephen P. Younger of New York City, a partner at Patterson Belknap Webb & Tyler, LLP, took office on June 1 as president-elect of the 76,000-member New York State Bar Association. The House of Delegates, the Association's decision- and policy-making body, elected Younger at the organization's 132nd

annual meeting, held this past January in Manhattan. As the current president-elect, Younger chairs the House of Delegates and the President's Committee on Access to Justice (formed to help ensure civil legal representation is available to the poor). In accordance with NYSBA bylaws, Younger becomes president of the Association on June 1, 2010.

Younger graduated *cum laude* from Harvard University in 1977 and earned his law degree *magna cum laude* from Albany Law School in 1982, where he was editor-in-chief of the *Albany Law Review*.

A long-standing member of the Association, Younger has served as a member-at-large of the Association's Executive Committee since 2007. He served as chair of the State Bar's Commercial and Federal Litigation Section from 2005–2006; he is also past chair of the section's Securities Litigation Committee and Pro Bono and Public Interest Committee. Younger is a fellow of The New York Bar Foundation and serves on the Association's Committee on Membership.

In addition to his State Bar activities, Younger is counsel to the New York State Commission on Judicial Nominations. He is a member of the First Department Judicial Screening Committee and serves on the advisory committee to the commercial division of the New York State Supreme Court. He served as transition director for New York Attorney General Andrew W. Cuomo and as a member of former Chief Judge Judith S. Kaye's ADR Task Force.

Younger is a member of the New York State Unified Court System ADR Advisory Committee and the New York State Supreme Court Advisory Committee, Commercial Division. A member of the New York City Bar, he has worked on its Committee on Arbitration and was secretary of the Task Force on Civil Courts.

A frequent lecturer and author in the fields of securities litigation, commercial arbitration and international dispute resolution, Younger serves as a mediator for the United States District Court, Southern and Eastern Districts of New York. He is an executive committee member of the CPR Institute for Dispute Resolution and treasurer of the Historical Society of the NYS Courts. He is a member of the Congress of Fellows and the Center for International Legal Studies, a trustee of Albany Law School and past president of the law school's National Alumni Council.



**Secretary
C. Bruce Lawrence**

C. Bruce Lawrence of Rochester, a partner of Boylan, Brown, Code, Vigdor & Wilson, LLP, began serving his second term as secretary of the Bar Association on June 1. Previously, he served as Vice President for the seventh Judicial District.

Lawrence received his undergraduate degree from the University of Rochester and earned his law degree from Dickinson School of Law of Pennsylvania State University.

A frequent lecturer for the Association on bankruptcy and debt collection, Lawrence serves on the Bankruptcy Law Committee and as a member of the House of Delegates. He was a co-chair of the President's Committee on Access to Justice, was appointed a member of the Special Committee on Public Trust and Confidence in the Judicial System, and was a member of the Executive Committee of the Business Law Section. He has served in the House of Delegates for the American Bar Association.

Lawrence is a past president of the Monroe County Bar Association, a past chair of the Monroe County Bar Association's Bankruptcy Committee, and Past Chair of the New York State Council of Bar Leaders.

Lawrence has over 31 years of experience in the fields of debtor/creditor law, bank and commercial collections,

business loan workouts, and commercial bankruptcy. He has frequently been listed in *The Best Lawyers in America* for his bankruptcy expertise.



**Treasurer
Seymour W. James, Jr.**

Seymour W. James, Jr., of New York City, Legal Aid Society of New York City, began serving his second term as treasurer of the Bar Association on June 1.

James received his undergraduate degree from Brown University and earned his law degree from Boston University School of Law.

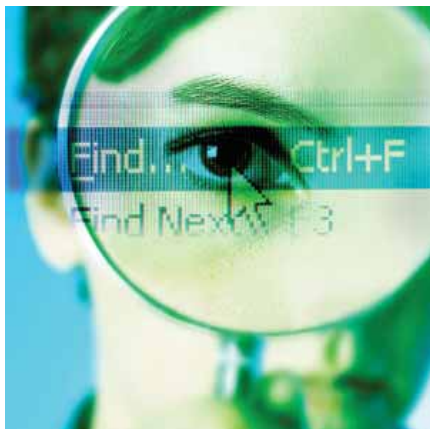
Active in the Association since 1981, James was a vice-president of the Executive Committee representing the 11th Judicial District (Queens County) and is a member of its House of Delegates. He is a member of numerous Association committees, including the Membership Committee and the Committee on Diversity and Leadership Development. He is a past member of a number of committees, including the Nominating Committee and the Special Committee on Association Governance.

James is a past president of the Queens County Bar Association and has served on a number of that association's entities, including its Judiciary Committee. He is also a member of the Macon B Allen Black Bar Association and a former member of the Board of Directors of the Metropolitan Black Bar Association.

James has served as an Adjunct Professor of Law at CUNY Law School and on the faculty of the Benjamin N. Cardozo School of Law Intensive Trial Advocacy Program.

In addition to his Association activities, James is a member of the Committee on Character and Fitness for the Second Judicial Department. He is the Secretary of the Correctional Association and a member of the Board of Directors of the Osborne Association and the Queens Legal Services Corporation.

James formerly served on the board of Community Action for Legal Services (now Legal Services for New York) and the Bedford-Stuyvesant Community Legal Services Corporation.



Researching Superseded New York Statutes

A task that occasionally arises for legal researchers is locating superseded New York laws. Unlike researching legislative intent, the concern here is not determining what the Legislature intended when it enacted a statute, but simply how the law was worded at a given point in time. Depending on the age of the statute, there may be several ways to approach this problem, but in many instances, the simplest method is to obtain an edition of the Consolidated Laws for the period in question. If the statute in question was amended in the recent past and appears in a *McKinney's Consolidated Laws* or a CLS code set pocket-part, the old version will be included in the accompanying hardcover volume. However, if this is not the case, the research will involve consulting an old volume of McKinney's because this set has been continuously published and updated for over 90 years.¹

William Mark McKinney

The McKinney's set, whose title is practically synonymous with New York statutory law, was first published by the Edward Thompson Co. in 1916.² It is named for William Mark McKinney, who served as supervising editor when the set was compiled for publication.³ The man whose name is so closely associated with New York law was not originally from New York. McKinney was from Illinois; he was born in 1865, in Oquawka, a town on the Mississippi River, attended nearby Monmouth

College and then Union College of Law in Chicago (which shortly thereafter became Northwestern University Law School). He graduated from law school in 1886, and a year later moved to New York to work for the recently established Edward Thompson Co., then located in Northport, a Suffolk County town on Long Island Sound. He later became vice-president of the company; by the time the Consolidated Laws set was published, he had become its president.

McKinney's first Thompson publication was a statutory compilation titled *A Treatise on the Law of Fellow-Servants*, published in 1890. By the time the company undertook its Consolidated Laws project, McKinney was a veteran editor, having been involved with preparing *The American and English Annotated Cases*, *Ruling Case Law*, the 32-volume *Encyclopædia of Pleading and Practice* and *The Federal Statutes Annotated*; and he supervised a Thompson department that prepared briefs for attorneys. McKinney was also a director of the Northport Steamboat Co., and served one term in the New York State Senate (1901–02). He was married in Northport in 1891 and later had two children. His daughter, Mira, became

an actress who had minor roles in various Hollywood films, including *Modern Times* and *Captains Courageous*, and later appeared in numerous episodes of such early 1950s television programs as *The Lone Ranger*, *The Gene Autry Show* and *Superman*.⁴

McKinney's employer, the Edward Thompson Co., had its origins in the legal publishing activities of James Cockcroft. Cockcroft began his publishing career by working for his uncle, John Voorhees, a New York publisher and bookseller. He later relocated to Chicago and entered into a law-book publishing partnership with James Callaghan.⁵ After the firm was destroyed by the Great Chicago Fire, Cockcroft returned to New York, where he later became embroiled in bankruptcy proceedings with creditors whose claims totaled approximately \$94,000.⁶ Eventually, Cockcroft moved to Northport, rented a few rooms, and with the help of one assistant resumed his legal publishing efforts.

The Edward Thompson Co.

Cockcroft's new business came to the attention of Edward Thompson, a wealthy Northport entrepreneur, and together they established the Edward

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Thompson Company in the mid-1880s.⁷ Thompson was an Irish immigrant and a former machinist who had become financially successful in the oyster business.⁸ His Northport Oyster Co. controlled thousands of acres of valuable oyster beds, and its extensive operations required the services of one sloop and two steamships. In addition to his business activities, Thompson was active in the Suffolk County Republican Party, served as New York State shellfish commissioner in the late 1890s, and belonged to several exclusive Long Island clubs.

In 1897, Thompson sold his interest in the company to Cockcroft, McKinney, and three others for a reported \$300,000. As reflected by the value of Thompson's interest, by the last years of the 19th century, the company was a thriving enterprise and the economic mainstay of Northport. Its leading title was the 32-volume *American and English Encyclopædia of Law*, a then-novel type of legal reference work developed by Cockcroft. The company, housed in a substantial brick building, had an extensive law library and a workforce of between 300 and 400 persons, including an editorial department consisting of 38 attorneys.⁹ Forty salesmen covered the United States and Canada; the company had representatives in Great Britain, Australia, Manila, and Hawaii.¹⁰

Although financially successful, the Thompson Co. suffered two major legal defeats in the first decade of the 20th century. In 1904, the Southern District rejected the company's claim that the American Law Book Company's use of case lists taken from Thompson books constituted copyright infringement.¹¹ The second and far more serious defeat came in a \$1 million infringement action brought by the West Publishing Co., which charged that Thompson's editors had copied or paraphrased from West's digests while preparing *The American and English Encyclopædia of Law* and the *Encyclopædia of Pleading and Practice*.¹² That case, which produced over 5,000 pages of testimony, was finally decided in favor of

West in 1910 when the Second Circuit held that Thompson's actions constituted infringement. The court denied West's request for an injunction and an accounting and turned the complicated issue of damages over to a special master.¹³ However, the two companies then agreed to a settlement whereby Thompson turned over to West the copyrights, stock, and plates of the first and second editions of *The American and English Encyclopædia of Law*, the first edition of the *Encyclopædia of Pleading and Practice*, and the first five volumes of the second edition.¹⁴

Despite having lost its leading title, the Thompson Co. continued to prosper. Some six years after the suit, the Thompson Co.'s title list included a new encyclopedia, *Ruling Case Law*,¹⁵ other multi-volume sets such as *American and English Annotated Cases* and *The Federal Statutes Annotated*, and assorted treatises like *Moore on Facts* and *Federal Equity Jurisprudence*.

In 1916, the Thompson Co. announced its new Consolidated Laws. In attaching McKinney's name to its new code edition, Thompson was following a common practice. Earlier editions of New York statutes had been popularly identified with their editors, including the then-competing Consolidated Laws set, published in 1909, which was named for New York attorney Clarence F. Birdseye and two former assistants to the Statutory Revision Commission, Robert C. Cumming and Frank B. Gilbert.¹⁶

In marketing its new Consolidated Laws, Thompson emphasized the thoroughness of the research involved in its preparation, claiming its editors had utilized "[a] card index of constitutional and statutory references" obtained by examining page-by-page "all New York Reports and Opinions of the Attorney-Generals from the earliest times."¹⁷ *McKinney's* was advertised as "[a] new style of publication which possesses many advantages that no other legal work does."¹⁸ These features included the "one law one book" format – under which "more than one book will never have to be consulted

on any one law" – and annual cumulative supplements, which "by a novel patented device fit into the cover of the books and become an integral part of them."¹⁹

Despite having lost
its leading title,
the Thompson Co.
continued to prosper.

The new *McKinney's* edition consisted of 67 conveniently sized volumes. Sixty-two covered each of the Consolidated Laws, with additional volumes for the Report of the Consolidators, the State Constitution, the Unconsolidated Laws, a table of repealed laws, and a general index. In contrast, the Birdseye, Cumming, and Gilbert set consisted of nine thick volumes, supplemented with an annual hardcover cumulative update. Physically, it was hardly designed for ease of use. For example, volume one, covering the Banking Law through the Education Law, consisted of 1,372 pages and weighed 6.5 pounds.

In addition to its convenient size and novel features, the success of the new *McKinney's* set may also have been enhanced by negative publicity about Clarence F. Birdseye, the best-known editor of the competing edition. In 1914, he was suspended from practice for one year for commingling his own funds with those of clients.²⁰ Worse, in 1919, he was convicted by a Pennsylvania court of being part of a conspiracy to defraud the stockholders and policyholders of the Pittsburgh Life and Trust Co. and sentenced to a short prison term.²¹

Finding Superseded Statutes

As previously noted, the longevity of the *McKinney's* set makes it an obvious choice in finding superseded statutes, but the features that were so highly touted by Thompson in 1916 compli-

cate the research process. The concept of “one law one book,” each with its own annual pocket-part update, means that an old *McKinney’s* volume cannot simply be marked “superseded” and left on the shelf with the current set of codebooks, as is often done with the official version of the U.S. Code. Instead, in libraries that have them,

the old updates when they received new ones. As a result, the only surviving pocket parts in library storage are usually the last ones issued before the hardcover volume was replaced; their yellowing pages can be found still tucked into the pocket on the inside of the back cover. This means that if a particular volume had a long shelf life

sets should be consulted. They will indicate the statute’s former designation and whether a law derived from the old Revised Statutes, which were published in nine editions between 1829 and 1896.²² For example, the derivation table for § 125.25 of the Penal Law, dealing with second degree murder and enacted in 1965, indicates that it derived from §§ 1044 and 1046 of the 1909 Penal Law, which in turn derived from §§ 183, 183-a, and 184 of the Penal Code of 1881. Like superseded *McKinney’s* volumes, the Revised Statutes sets are generally held by major bar and law school libraries. The first five editions, the eighth edition and the 1896 Birdseye edition are also available as part of the Hein microfiche set.

It should be noted that consulting an old volume of *McKinney’s* will not help anyone seeking to determine the wording of a section of the predecessor of the CPLR, the old Civil Practice Act. Enacted in 1920,²³ the CPA was not included in the Consolidated Laws, and the editors of *McKinney’s* did not include it among the set’s collection of Unconsolidated Laws. The entire text of the CPA was published in various titles, however, including *Gilbert Bliss Civil Practice of the State of New York*, *Cahill Parson’s New York Civil Practice* and *Clevenger’s Annual Practice Manual of New York*, which are still available at some law libraries.

In some instances, those seeking to determine the text of a statute in a given year can find it by using an online database. Westlaw has individual databases for 1987 and each year since 1989. The statutes and accompanying annotations are shown as they appeared in *McKinney’s* in a given year. The databases are designated “NY-STANN” followed by the year in question, meaning that the database for 1995 is “NY-STANN95.” The LexisNexis NYARCH file covers the period since 1992. There are also individual databases for each year (e.g., NY1995). Here, the annotated statutes are shown as they appeared in the CLS set. A more limited, lower cost, alterna-

The pocket parts were never meant to be retained, and libraries have generally discarded the old updates.

old *McKinney’s* volumes are kept in storage, presenting an often-confusing array of books whose dates of publication cannot be ascertained without taking each book off the shelf and checking the copyright date. In some cases, the research process may be further complicated because the old volumes are shelved out of order or are missing.

Compounding the problem is the fact that the publication of *McKinney’s* replacement volumes has not followed a set schedule and their number has varied depending on which part of the Consolidated Laws is involved. For example, in 1963, after the CPLR replaced the old Civil Practice Act (CPA), seven new *McKinney’s* volumes were published. In 1970, a two-volume replacement was published covering §§ 3101–3400. A replacement volume for §§ 3101–3200 appeared in 1991, followed a year later by a new volume for §§ 3201–3400. Overall, the entire CPLR set has grown from its original seven volumes to 23. In sharp contrast, the Canal Law, which was published in one slim volume in 1916, was not replaced until 1939, when a new Canal Law was enacted. This volume lasted even longer than its predecessor; it was not replaced until 1996.

McKinney’s annual pocket-part updates present another potential difficulty. Printed on thin paper, the pocket parts were never meant to be retained, and libraries have generally discarded

between publication and replacement, statutes enacted after its publication, and then repealed before it was superseded, would have appeared only in now long-gone pocket parts.

Modern Research Alternatives

An alternative to the aging and sometimes incomplete and disorganized hard-copy collections of old *McKinney’s* volumes is a microfiche edition published by the William S. Hein Co. This set, consisting of over 7,500 fiche cards, includes every volume of *McKinney’s* ever published. It also solves the missing pocket part problem: it includes every annual pocket part for each volume since publication began. The pocket-part fiche cards are arranged chronologically and are filed separately from the fiche for the hardbound volumes. The Hein set is widely available and is held by the libraries of all New York State law schools; supreme court libraries in New York City, Long Island and upstate; the New York State Library in Albany; the Fourth Department Library in Rochester; and the City Bar and the New York Law Institute in Manhattan.

Another superseded statute research problem, unrelated to the publishing history of the *McKinney’s* set, is whether a statute has been renumbered or moved from one part of the Consolidated Laws to another. In such a case, the derivation tables available in both *McKinney’s* and the CLS code

tive is the National Law Library, which provides the text of the Consolidated Laws since 2001.

A statute's wording in a given year can also be determined by checking the relevant annual volume(s) of *McKinney's Session Laws*, the CLS session laws set, or the Laws of New York. This method works best for relatively brief statutes that have been amended only a few times since their initial enactment. One would first check the historical notes in *McKinney's* or CLS or even consult *Shepard's New York Statute Citations* to discover when the statute was enacted and then amended. For example, § 176.05 of the Penal Law, defining insurance fraud, was enacted by Chapter 730, § 3, of the Laws of 1981. It has been amended only twice: by Chapter 635, § 23, of the Laws of 1996 (changing the wording of current subdivision 1); and by Chapter 2, § 42, of the Laws of 1998 (adding subdivision 2). Here, one could determine the version of the statute that was in effect between 1981 and 1996 by checking either the 1981 or 1996 session laws. The 1996 volume could be used because the former version of a statute can be ascertained from the chapter law amending it; in both the print and online versions, the new and the deleted text are clearly indicated. However, in the case of a lengthy statute with a complicated amendment history, it would be simpler to check an old *McKinney's Consolidated Laws* volume.

Finally, mention should be made of the fate of the Edward Thompson Publishing Co. and the later careers of its leading figures. James Cockcroft never recovered from the shock of being aboard the *RMS Republic* after it was rammed and sunk near Nantucket by an Italian immigrant carrier in 1909; he died two years later. Edward Thompson's business interests eventually expanded to include a bank, a steamboat company offering daily service between Northport and New York, an electric company, and a streetcar line; he died in 1923. After the publication of *McKinney's Consolidated Laws*,

William M. McKinney continued as the chief editor of *Ruling Case Law*; he also later served as an editor for three other legal encyclopedias: *California Jurisprudence*, *Texas Jurisprudence* and *Ohio Jurisprudence*, and in the 1930s assisted in the preparation of *American Jurisprudence*.²⁴ McKinney died in Los Angeles in 1955, several months after being honored as the oldest living member of the American Bar Association.²⁵ As for the Edward Thompson Co., it eventually moved from Northport to Brooklyn. West acquired a controlling interest in the company in 1935, although volumes of McKinney's published through the 1960s retained the Thompson name on the masthead pages and the "ETCo" logo on the book spines. Since the 1990s, the publisher's name on the volume mastheads has reflected the changes in legal publishing, changing from West Publishing Co. to West Group to Thomson-West and, most recently, to simply "West," which is identified as a "Thomson-Reuters business." ■

1. For statutes enacted since the late 1970s, one could also use superseded volumes of the CLS set, now published by LexisNexis. However, libraries are more likely to retain the old McKinney's volumes, and no fiche collection of old CLS pocket-parts is available. The CLS set, formerly published by Lawyers' Cooperative Publishing Co., dates from 1950. It was published in loose-leaf format until the 1970s. Past competitors of McKinney's include the Birdseye, Cumming & Gilbert edition (1909–1925); *Cahill's Consolidated Laws* (1923–1939); and *Baldwin's Consolidated Laws* (1938–1943).

2. The LexisNexis CLS set is widely held, but the relative popularity of the two sets, at least for citation purposes, can be roughly illustrated by the results of a search using Westlaw's New York briefs database. As of this writing, over 7,000 briefs in the database cited to a Consolidated Laws section as published in McKinney's. The total for CLS was slightly over 200.

3. For a profile of McKinney, see Edgar L. Murlin, *The New York State Red Book* 79 (1901).

4. For a filmography of Mira McKinney, see The Internet Movie Database (IMDb), Mira McKinney, <http://www.imdb.com/name/nm0571901>.

5. The firm was known as Callaghan & Cockcroft. After the fire, Callaghan remained in Chicago and founded the successful firm of James Callaghan & Co.

6. *Legal News and Notes*, 3 Cent. L.J. 714 (1876).

7. Northport Historical Society, *Edward Thompson: Northport Oysterman, Entrepreneur, and Legal*

Publisher, available at http://town.huntington.ny.us/permit_pics/325.pdf.

8. For profiles of Thompson, see *Who's Who in Finance, Banking and Insurance* 701 (John William Leonard ed., 1911) and *Capt. Edw. Thompson Dies in His 80th Year*, N.Y. Times, Apr. 20, 1923, at 17 (claiming that Thompson arrived in New York as a seven-year-old stowaway).

9. J.H. Long, *How an Encyclopedia of Law Is Made*, 2 Can. L. Rev. 79, 82 (1902).

10. *Id.* at 82–83.

11. See *Edward Thompson Co. v. American Lawbook Co.*, 130 F. 639 (S.D.N.Y. 1904).

12. See *Law Book Publishers at War*, 11 Am. Law. 218 (1903). For a description of how *The American and English Encyclopædia of Law* was produced, see Edgar L. Murlin, *The New York State Red Book* 79, at 81–82. This account makes no mention of the use of West publications.

13. See *West Publ'g Co. v. Edward Thompson Co.*, 176 F. 833 (2d Cir. 1910).

14. See *West Publ'g Co. v. Edward Thompson Co.*, 184 F. 749, 751 (E.D.N.Y. 1911).

15. *Ruling Case Law* was published jointly by Bancroft-Whitney and Lawyers' Co-operative Publishing Co.

16. Examples include the *New York Statutes at Large*, published in 1863, and known as "Edmonds' Statutes," for editor John W. Edmond; *Birdseye's Revised Statutes*, published in 1889–1890, and the *General Laws of New York*, published in 1900 and known as "Heydecker's" after editor Edward L. Heydecker.

17. 1 Consolidated Laws of New York Annotated as Amended pp. vi–vii (1916).

18. Quoted from an advertising blurb bound into the first volume the McKinney's set published in 1916.

19. *Id.*

20. See *Five Lawyers Disciplined*, N.Y. Times, Nov. 7, 1914, p. 9.

21. See *Find Birdseyes Guilty*, N.Y. Times, Nov. 22, 1919, p. 14; *Birdseyes Begin Prison Term*, N.Y. Times, May 1, 1920, p. 17; *In re Birdseye*, 181 N.Y.S. 928 (1st Dep't 1920) (disbarring Birdseye, with leave to apply for reinstatement should his conviction be reversed).

22. For an annotated bibliography of the Revised Statutes editions, see William H. Manz, *Gibson's New York Legal Research Guide*, Third Edition 61–65 (2004).

23. 1920 N.Y. Laws, ch. 925. The entire Act appears as a separate volume of the 1920 Laws of New York.

24. John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 Stan. L. Rev. 613, 641–42 (1954).

25. *William M. McKinney*, N.Y. Times, Nov. 10, 1955, p. 35.



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Protecting Trademarks in the Global Marketplace

As commerce in the global marketplace grows, it becomes increasingly difficult for brand owners to enforce and protect their trademarks throughout the world. The Internet, with its many commercial advantages and multitude of consumer choices, also facilitates rapid counterfeiting and inconsistent enforcement of trademark misconduct. A recent series of counterfeiting cases involving the online auction Web site eBay offers conflicting decisions for the same conduct. In *Tiffany v. eBay*,¹ decided in the Southern District of New York, the U.S. District Court held that trademark infringement and related claims were not proven against eBay for the sale of counterfeit Tiffany jewelry items. Less than two weeks earlier, a French commercial court in Paris issued a decision against eBay in favor of trademark owners, including Louis Vuitton and Christian Dior, for nearly identical conduct.²

The international trademark community has made great strides in facilitating the registration of trademarks, but enforcement still remains difficult. In 2003 the United States joined the Madrid Protocol, along with more than 70 other nations, reducing some of the formalities and costs associated with registering trademarks in multiple jurisdictions.³ The World Intellectual Property Organization (WIPO) also provides alternative remedies for trademark owners subjected to bad-faith registration and use of their marks in domain names.⁴ While these measures have assisted trademark owners in

registering, and to some extent protecting, their marks throughout the world, enforcement against trademark infringement, trademark dilution and counterfeiting remains difficult.

Tiffany v. eBay

Tiffany commenced a lawsuit in U.S. District Court against eBay, alleging that hundreds of thousands of counterfeit jewelry items were offered for sale on eBay's Web site. Tiffany has achieved great renown for its high-quality luxury goods during its 170-year history under the TIFFANY marks for jewelry, watches, china, crystal and clocks. In the case, there was little dispute over Tiffany's right to the mark, or that counterfeit items were being sold on eBay. Rather, the heart of the dispute was over who should bear the burden of policing Tiffany's valuable trademarks in Internet commerce – the trademark owner or the auction site owner. After a bench trial, the district court concluded that Tiffany failed to carry its burden with respect to its claims and held that "Tiffany must ultimately bear the burden of protecting its trademark."⁵

Considering Tiffany's claim of trademark infringement, the court found that eBay's use of Tiffany's trademarks in its advertising, on its home page, and in sponsored links on Yahoo! and Google is a protected nominative fair use of the marks. The court found eBay is not liable for contributory infringement for counterfeit goods sold on its Web site, stating that the standard is not whether eBay could reasonably

anticipate infringement but rather whether eBay continued to supply its services to sellers when it knew or had reason to know of infringement. The court noted that when Tiffany put eBay on notice of specific infringing items, eBay immediately removed those listings. However, eBay refused to monitor its Web site and preemptively remove listings of Tiffany jewelry before being placed on notice of infringement.

Tiffany had sought to have eBay take preemptive measures to prevent the sale of the counterfeit goods. Tiffany argued that because it had a policy of not selling identical items in lots of five or more, all Tiffany items sold on eBay in lots of five or more should be considered presumptively counterfeit. The record established, however, that Tiffany's five or more policy had grown to 25 per customer since 2005. In addition, the record established that groups of five or more authentic Tiffany items had been sold on eBay.⁶ When eBay possessed the requisite knowledge, it took appropriate steps to remove listings and suspend service involving counterfeiting; thus, the court declined to impose liability for trademark infringement.⁷ Tiffany filed an appeal that is pending before the Second Circuit Court of Appeals.

Vuitton v. eBay

The U.S. District Court decision in eBay's favor is in conflict with a decision two weeks earlier by the Paris Commercial Court (PCC), which found against eBay and in favor of Louis

Vuitton and other designers under nearly identical circumstances.⁸ French courts are notorious for their protection of the many high-end designers that are based in France. Like other nations, including the United States, France has statutory protections for Internet services that act merely as a host for wrongful or infringing conduct that occurs on the host system. However, the PCC found that eBay was not acting as a host but rather as a broker. Thus, the French law that limits the liability of a host was not applicable. The PCC, recognizing the problems associated with global commercial markets, stated, “[T]he globalization of trade and the appearance of new means of communication connected with free trade have fostered the marketing of fraudulent products, among them are those that are the result of infringement, that scourge of the legal economy.”⁹

The PCC further noted that eBay, in acting as intermediary between sellers and buyers, acts as a broker for the purpose of receiving corresponding commissions.¹⁰ The court went on to hold that “eBay sites fostered and amplified the marketing on a very large scale of infringing products through electronic selling” and such conduct made it responsible for the infringement that occurred via its system.¹¹ The PCC held “eBay defaulted in its obligation of insuring that its business does not generate any illicit actions, in this case, acts of infringement” and “also defaulted in its obligation of verifying that sellers who habitually carry out numerous transactions on its site do not operate illicitly.”¹² In addition to equitable remedies against eBay, the PCC awarded almost 8 million euros in compensatory royalties for eBay’s conduct, just over 10 million euros for damage to the image of Louis Vuitton and 1 million euros in moral damages, totaling almost 20 million euros or \$27 million. The decision has been appealed by eBay.

L’Oreal v. eBay: A Middle Ground

Courts in Germany have arrived at a middle ground on the issue of respon-

sibility for trademark counterfeiting. In May 2008, Germany’s Hamburg Regional Court decided a counterfeiting case brought by cosmetic and perfume company L’Oreal against eBay.¹³ Plaintiff L’Oreal claimed infringement of “Acqua di Gio” from the “Georgio Armani” line of perfumes; the trademark registrations were licensed to L’Oreal. L’Oreal contended that eBay allowed its users to offer 20-ml perfume bottles carrying the “Acqua di Gio,” and that the bottles were counterfeit because the company does not offer a 20-ml bottle. L’Oreal provided notice to eBay and sought removal of all counterfeit items and an undertaking for future violations, as well as the name of those who offered to sell the counterfeit products. eBay removed the advertised offer in question but provided no further information. A few days later a new allegedly counterfeit advertisement appeared from the same vendor.

L’Oreal commenced the lawsuit seeking injunctive relief, as well as information pertaining to the vendor. The Hamburg Regional Court found that L’Oreal established that it did not manufacture or sell the perfume product in the 20-ml units that were alleged to be counterfeit. Thus, eBay would be liable for the use and infringement of the brand as an indirect infringer. However, the court went on to hold that eBay would not be liable as a principal infringer for the conduct of the vendor also known as “Bubbles 2312.” The activity under the name of

However, the PCC found that eBay was not acting as a host but rather as a broker.

“Bubbles 2312” was a direct infringement of the trademark because it was established that counterfeit imitations were sold. As eBay an indirect violator had a duty to supervise the activities that occur on its online Web site. Given that L’Oreal was able to establish the sale of fraudulent imitations and that all 20-ml packages were always imitations, eBay did not need more information in order to fulfill its legal supervisory duties. The court held that the information contained in the notices provided by L’Oreal to eBay were sufficient for eBay to exercise its responsibility to remove items known to be counterfeit. However, the finding that eBay failed to meet its supervisory duties in this case might not apply to other factual situations if

CONTINUED ON PAGE 57

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phone numbers, highway numbers, street numbers, military time, and years.¹⁴

Use figures if the number includes a decimal point. *Example*: “Pi equals approximately 3.14159.” Don’t use commas after a decimal point. *Incorrect*: “1.23,456.” *Correct*: “1.23456.”

When spelling out numbers, hyphenate two-word numbers below 100. *Example*: “Joe Smith charges five hundred fifty-five dollars an hour.” Use “and” only when expressing cents.¹⁵ *Incorrect*: “To be exact, his hourly fee is

The Bluebook and the Tanbook recommend using figures for calculations. *Example*: “306 + 821 = 1127.”

Under ALWD and the Redbook, use figures in citations unless the number is part of a title; repeat titles as they’re written in the original.¹⁹ *Citation example*: “Johnson sued his employer under 42 U.S.C. § 1983.” *But*: “The parties’ relationship was like the one in the movie *10 Things I Hate About You*.”

Under the Tanbook and the Redbook, use figures for dollar amounts of any size.²⁰ *Tanbook and Redbook examples*:

Spelling out numerals gives a document a formal air, but figures are easier to read than letters.

four hundred and ninety-eight dollars and seventy-five cents.” *Correct*: “To be exact, his hourly fee is four hundred ninety-eight dollars and seventy-five cents.”

The Tanbook and ALWD recommend spelling out fractions less than one.¹⁶ *Examples*: “three-fourths of the estate,” “two-thirds share,” “one-eighth of the farm.” Under the Tanbook, use figures for fractions greater than one.¹⁷ *Example*: “He used 1½ (note: no space between 1 and ½) reams of paper to print his brief.” Under ALWD, fractions greater than one may be written using words or figures.¹⁸ Don’t insert a space between the whole number and the fraction in a figure. *Example*: “Petitioner seeks to evict respondent from her 3½-bedroom apartment.” *Or*: “Petitioner seeks to evict respondent from her three and one-half bedroom apartment.”

To ensure accuracy and prevent forgeries, spell out figures when drafting a bank check, contract, or will. *Example*: “70,000 (seventy thousand) acres.” Otherwise, don’t use both figures and numerals.

Write out constitutional, statutory, and contractual provisions as they appear in the original.

“\$1,” “\$50,” “\$120.” According to the Bluebook and ALWD, you may spell out the phrase or use figures for dollar amounts.²¹ *Example*: “The doctor charged plaintiff \$150 an hour for his court appearance.” *Or*: “The doctor charged plaintiff one hundred fifty dollars an hour for his court appearance.”

When referring to money, put a symbol before the figure or the corresponding word after the amount, but don’t do both. *Correct*: “\$5.” *Correct*: “five dollars.” *Incorrect*: “\$5 dollars.”

According to the Redbook, always use figures for chapters (Chapter 11); dates (November 14, 2005); sections (§ 1983); statutes (title 9 of the U.S. Code); time (9:30 a.m.); volumes (Volume 33); numbers in name of roads (111 Centre Street); military divisions (M1A1 Platoon); measurement units (98° F); and decimals (0.2009).²²

Spell out centuries (“twenty-first century”) and, in text, as opposed to citations, the amendments to the U.S. Constitution (“Twenty-first Amendment”).²³

When precision isn’t required, round off numbers greater than a million and spell out “million,” “billion,” and “trillion.” *Example*: “The Defendant’s \$50

billion Ponzi scheme has been all over the news.”

Don’t use numerical abbreviations like “K” (to represent “thousand”) or “M” (“million”) in legal writing. These colloquial abbreviations create ambiguity.

A plural of a numeral is formed by adding an “s,” not an apostrophe “s.”²⁴ *Example*: “Some attorneys educated in the 1970s still use legalese.” Spell out indefinite expressions unless doing so will confuse. *Example*: “The court reporter is in her twenties.”

When citing a range of pages, according to the Tanbook, give the pages at which the reference begins and ends, separated by an en dash (–) or hyphen (–).²⁵ *Example*: “(People v Wilson, 93 NY2d 222, 224-225 [1999]).” There’s no space between the page number and the en dash or hyphen. Under the Bluebook and the Redbook, retain the last two figures when the numeral has three or more figures, but drop other repetitious digits.²⁶ Separate the page range with an en dash or hyphen. Thus, pages 2308-11 means pages 2308 to 2311. ALWD allows either method.²⁷

Under the Redbook, don’t elide figures in a range of measurements or a span of years.²⁸ According to ALWD and the Redbook, don’t elide a range of sections or paragraphs.²⁹ *Correct*: “15 U.S.C. §§ 2301-2310 (2000).” *Incorrect*: “15 U.S.C. §§ 2301-10 (2000).” The Bluebook permits eliding sections or paragraphs unless doing so might confuse.³⁰ The Tanbook recommends retaining all figures in a range of measurements and sections or paragraphs.

Use figures to write times and dates.³¹ *Examples*: “7:00 p.m.,” “11:00 a.m.” *But*: “four o’clock.” Don’t spell out “th,” “nd,” or “rd” when you write the date in figures, but pronounce them when you speak. *Incorrect*: “Today is August 30th.” *Correct*: “Today is August 30.” Don’t repeat in later references a year that’s already been established. *Correct*: “On April 20, 2004, the child was kidnapped. On April 23, the police found the child and arrested the kidnapper.”

Spell out seasons. *Examples:* “spring,” “summer,” “fall,” “winter.”

A controversy exists about whether to put a comma after a date within a sentence. The comma is optional, but the Legal Writer recommends putting a comma after the year. *Example:* “On October 6, 2008, the attorneys appeared in court for trial.” *Or:* “The attorneys appeared in court on October 6, 2008, for trial.” *Or (to eliminate the controversy):* “The attorneys appeared for trial on October 6, 2008.”

Write “January 30, 1999,” not the international or military “30 January 1999.”

Don’t separate the month from the year with a comma or an “of.” *Incorrect:* “January, 1999” and “January of 1999.” *Correct:* “January 1999.”

Use roman numerals in names to differentiate successors. *Example:* “Judge John Doe III presided over the murder trial.”

In non-legal contexts, spell out ordinal numerals. *Examples:* “first,” “second,” “third,” “fourth”; in legal citations, use 1st, 2d, 3d, 4th, 5th, 43d. *Example:* “The law school is located on 42nd Street.” *Citation example:* *United States v. Doe*, 12 F.3d 456 (2d Cir. 2009).

2. Typographic Symbols

Symbols like \$ (dollars), ¢ (cents), % (percentage), and ° (degrees) are more easily comprehended than the spelled-out terms they represent. Symbols are helpful shortcuts, but don’t use a symbol to begin a sentence.

Use typographic symbols with figures.³² Don’t insert a space between the symbol and the number. *Incorrect:* “The plaintiff seeks \$ 25,000 in compensatory damages.” *Correct:* “The plaintiff seeks \$25,000 in compensatory damages.” Spell out dollar, cent, and percent symbols when the numerals are spelled out.³³ *Example:* “The Defendant stole sixty-two percent of the plaintiff’s fortune.” Repeat the symbol to express a range. *Example:* “The law firm charges between \$300 and \$500 an hour.”

The Tanbook recommends using “feet” and “inches,” not symbols ’ (foot) and " (inch).³⁴ *Incorrect:* “112”

x 112”” *Correct:* “112 feet by 112 feet.” *Incorrect:* “The decedent buried the weapon 9” from the deck.” *Correct:* “The decedent buried the weapon nine inches from the deck.” The Redbook recommends using foot-and-inch symbols.³⁵ To express feet-and-inch symbols, don’t use smart quotes (curly quotation marks). Use the straight typewriter-style, also known as prime or double-prime, quotation marks.

The Redbook suggests using the degree symbol in text. But spell out the word if it’s at the beginning of a sentence (unless you’re referring to the boy band “98°”).³⁶ *Correct:* “Don’t go outside. It’s 98°.” *Or:* “Ninety-eight degrees is the outside temperature.” Under the Tanbook, write out the word “degrees” instead of using the degree symbol.³⁷ *Example:* “98 degrees.”

Under ALWD and the Redbook, use figures with symbols, such as cent, degree, foot, inch, and percent; don’t insert a space between the symbol and the figure.³⁸ *Example:* “It felt like 104° in the courtroom.” ALWD recommends either spelling out the phrase or using figures and symbols.³⁹ Whatever the preference, maintain consistency. *Example:* “The victim crawled twenty-two feet to reach the telephone.” *Or:* “The victim crawled 22’ to reach the telephone.”

Use the symbol “@” (at) only in e-mail addresses. The ampersand symbol “&” (and) is appropriate only in business names that include it in their formal name. Use the ampersand symbol in a party’s abbreviated name. *Example:* “Smith & Smith LLP.”

Here are some symbols’ meanings: ® means that a trademark or service mark is registered, ™ refers to an unregistered trademark, SM refers to an unregistered service mark, and © shows copyright. Don’t use a trademark or copyright symbol in text; doing so is distracting and unnecessary. Capitalize the name of the trademarked word.

Legal writing uses two common symbols: ¶ represents a paragraph; § represents a section. Don’t use these

symbols at the beginning of a sentence: Spell them out. Use the paragraph (¶) and section symbols (§) in legal citations. Always use a non-breaking space, or hardspace, between the symbol and the figure that follows. *Examples:* “Look at ¶ 13 of the brief.” “Plaintiff sued under 42 U.S.C. § 1983.” Under the Bluebook, spell out the words “section” and “paragraph” in the text unless you’re referring to a provision of the U.S. Code or a federal regulation.⁴⁰ *Bluebook example:* “The attorney breached section four of the state’s ethics rules.” *But:* “Plaintiff sued under § 1983 of the U.S. Code.” In Bluebook citations, use the section or paragraph symbol.⁴¹ Under ALWD, you may use the symbols or spell out the words when referring to a specific section or paragraph in the text.⁴² *Example:* “In the brief, ¶ 2 contradicts ¶ 5.” *Or:* “In the brief, paragraph two contradicts paragraph five.” Under the Tanbook, use symbols with figures and spell out words with words.⁴³

Double the section or paragraph symbols when referring to consecutive sections or paragraphs.⁴⁴ *Examples:* “Look at ¶¶ 13, 14, 15 of the affidavit.” “Plaintiff refers to §§ 1961-1965 of the U.S. Code.” *Exception:* When citing multiple subsections within the same section or multiple subparagraphs within the same paragraph, use only one section or paragraph symbol. *Bluebook, ALWD, and Redbook example:* “section 33, subsections 1, 2, and 7.” *Becomes:* “§ 33(1), (2), (7).” There’s no hardspace between the section number and the subsection. *Tanbook example:* “section 33 subdivisions 1, 2, and 7.” *Becomes:* “(§ 33 [1], [2], [7]).” Note the Tanbook hardspace between the section number and the subdivision.

Don’t put a space before or after an em dash (—). *Example:* “The attorney—meticulous and unrelenting—handled the four-week trial.” *Exceptions:* Put a space before and after the em dash when your publisher does so, when the text is fully justified, or when the text appears distorted: “The attorney

CONTINUED ON PAGE 54

— meticulous and unrelenting — handled the four-week trial.”⁴⁵

3. Abbreviations

Abbreviations are shortened forms of a word. Avoid abbreviations in legal writing, except for citations or commonly used abbreviations. Don’t start a sentence with an abbreviation; write out the entire word. If a sentence ends with an abbreviation that has a period, don’t add another period to finish the sentence. *Incorrect*: “The trial will begin at 9:30 a.m..”

Abbreviate time by a.m. and p.m. Abbreviate eras by B.C. for Before Christ, A.D. for Anno Domini (in the year of the Lord), and C.E. for the Common Era. Always use these abbreviations with figures. Write either “11:00 a.m.” or “eleven o’clock” but not both. Don’t abbreviate days or months in the text. *Correct*: “Wednesday.” *Incorrect*: “Wed.” In citations, abbreviate days and months according to the relevant authority.

Abbreviate a person’s title. *Examples*: “Mr.,” “Ms.,” “Dr.,” and “Esq.” These abbreviations are used in conjunction with the person’s name and appear before or after the name. Be formal in legal writing. *Correct*: “Professor Smith.” *Not*: “Prof. Smith.” Abbreviate academic degrees. *Example*: “J.D.,” “M.D.,” “B.A.” Don’t combine abbreviations. *Incorrect*: “Mr. Adam Smith, Esq.” *Correct*: “Adam Smith, Esq.” *Or*: “Mr. Adam Smith.”

When you use the United States as an adjective, you may abbreviate it as “U.S.” *Example*: “The U.S. Court of Appeals for the Second Circuit.”

Write the name of a company as the company writes it. If the company abbreviates corporation (“corp.”), write it as “corp.” If it doesn’t abbreviate, don’t.

Legal writers may create specialized abbreviations in memorandums, briefs, or other documents. Cite the complete term and follow it immediately with the abbreviation, or acro-

nym, set off in parentheses. *Example*: “Manhattan Country Club (MCC) is suing defendant for unpaid membership dues. MCC claims \$10,467 in arrears.”

Consult Tanbook Appendixes 1 (case name), 2 (case law reporters), and 3 (appellate history and other abbreviations in citations) for abbreviations. Consult Bluebook rule 6.1 and Tables T.5–T.16 for lists of abbreviations for arbitral reporters (T.5), case names (T.6), court names (T.7), explanatory phrases (T.8), legislative documents (T.9), geographical terms (T.10), judges and officials (T.11), months (T.12), periodicals (T.13), publishing terms (T.14), services (T.15), and subdivisions (T.16). Consult ALWD Appendixes 3 (general abbreviations), 4 (court abbreviations), and 5 (abbreviations for legal periodicals).

In the next column, the Legal Writer will discuss italicizing, underlining, and capitalizing. ■

1. The Bluebook: A Uniform System of Citation (Columbia Law Review Ass’n et al. eds., 18th ed. 2005).

2. 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 May 7, 2009).

3. Chicago Manual of Style (15th ed. 2003).

4. Bryan A. Garner et al., The Redbook: A Manual on Legal Style (2d ed. 2006).

5. Darby Dickerson & Association of Legal Writing Directors, ALWD Citation Manual: A Professional System of Citation (3d ed. 2006).

6. See Gerald Lebovits, The Legal Writer, *Do’s, Don’ts, and Maybes: Usage Controversies — Part II*, 80 N.Y. St. B.J. 64 (July / Aug. 2008).

7. Bluebook R. 6.2(a), at 73–74; ALWD R. 4.2(a), at 29.

8. Tanbook R. 10.2(a)(1), at 72, and Redbook R. 5.2, at 89–90.

9. Bluebook R. 6.2(a)(ii), at 73; Redbook R. 5.2, at 89; see Redbook R. 5.8, at 92.

10. Bluebook R. 6.2(a)(iii), at 73; ALWD R. 4.2(c), at 30; Tanbook R. 10.2(a)(1), at 72; Redbook R. 5.3(a), at 90.

11. Bluebook R. 6.2(a)(i), at 73; ALWD R. 4.2(b), at 29–30; Tanbook R. 10.2(a)(1), at 72; Redbook R. 5.5, at 90–91.

12. ALWD R. 4.2(h), at 31; Redbook R. 5.11(a), at 93.

13. Bluebook R. 6.2(a)(vii), at 73.

14. Bluebook R. 6.2(a)(vii), at 74; ALWD R. 4.2(h)(3), at 31; Redbook R. 5.11(b), at 93.

15. Redbook R. 5.16, at 96.

16. Tanbook R. 10.2(a)(3), at 72; ALWD R. 4.2(g), at 31.

17. Tanbook R. 10.2(a)(3), at 72.

18. ALWD R. 4.2(g), at 31.

19. ALWD R. 4.1, at 29; Redbook R. 5.2(c)–(d), at 89–90.

20. Tanbook R. 10.2(a)(2), at 72; Redbook R. 5.6, at 91.

21. Bluebook R. 6.2(d), at 74; ALWD R. 4.2(f), at 30.

22. Redbook R. 5.6, at 91.

23. Tanbook R. 10.3(f), at 74; Redbook R. 5.6(c), at 91.

24. Tanbook R. 10.3(e), at 74; Redbook R. 5.13, at 94.

25. Tanbook R. 2.2(a)(4), at 11.

26. This method is known as elision. Bluebook R. 3.2(a), at 59; Redbook R. 5.12, at 94, and R. 5.14, at 95.

27. ALWD R. 5.3(b), at 35.

28. Redbook R. 5.14(b), (c), at 95.

29. ALWD R. 6.6(c), at 40; Redbook R. 5.14(c), at 95.

30. Bluebook R. 3.3(b), at 62.

31. ALWD R. 4.2(e), at 30; Tanbook R. 10.3, at 74–75; Redbook R. 5.15, at 95–96.

32. Bluebook R. 6.2(d), at 74; Redbook R. 5.6, at 91.

33. Bluebook R. 6.2(d), at 74; Redbook R. 6.4, at 100.

34. Tanbook R. 10.2(b)(2), at 74.

35. Redbook R. 6.4(d), at 101.

36. Redbook R. 6.4(a)–(b), at 100.

37. Tanbook R. 10.2(b)(2), at 74.

38. ALWD R. 4.2(f), at 30; Redbook R. 5.6, at 91.

39. ALWD R. 4.2(f), at 30.

40. Bluebook R. 6.6(c), at 74.

41. *Id.*

42. ALWD R. 6.11, at 42.

43. Tanbook R. 10.2(b)(1), at 74.

44. Bluebook R. 3.3(b)–(c), at 62; ALWD R. 6.6(b) and 6.7(b), at 40; Tanbook R. 3.1(b)(2)(c), at 24–25; Redbook R. 6.3, at 100.

45. See Gerald Lebovits, The Legal Writer, *Do’s, Don’ts, and Maybes: Legal Writing Punctuation — Part III*, 80 N.Y. St. B.J. 64 (May 2008).

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

Three years ago, a cousin of mine had a car accident. I was hoping he would retain me to handle the case but he said he would feel more comfortable being represented by someone outside the family.

I referred my cousin (we'll call him Vinnie) to another lawyer, Jack, a friend of mine. Jack and I agreed, "on a handshake" that I would receive one-third of his one-third contingency fee. After that I covered a few conferences, but that was the extent of my involvement with the case.

By the time the case settled, there had been a falling out between Vinnie and me and when he heard I was going to get part of the fee he balked, even though it didn't affect his share of the proceeds.

The dispute just resolved with my receiving a fee only for my actual work. There were hard feelings all around.

I realize, of course, that there should have been something in writing. Nevertheless, I am annoyed at Jack for not doing more to protect my fee.

I'd like to get it right in the future. I'd appreciate your guidance.

Yours,

Vinnie's Cousin

Dear Vinnie's Cousin:

Your question about what constitutes good practice when there is fee sharing in a contingency fee case is quite timely, because there have been recent changes in the law. Before addressing that topic, however, an issue exists about whether you were entitled to be the "referring attorney" in your cousin's case, given what he conveyed to you at the outset.

The assumption here is that your cousin came to you for help in finding an attorney to represent him in his personal injury action. When he told you that "he would feel more comfortable being represented by someone outside the family," did you clarify what he meant?

If he meant that he didn't want you involved in his case because,

for instance, he didn't want family members knowing about his personal affairs, then you could not participate in the fee division even if he retained your friend Jack at your suggestion.

On the other hand, if he indicated that he wanted you to be involved at some level, then it would be appropriate to refer him to another lawyer with whom you would work on his case, and with whom you would share a fee.

As you now understand, the fee agreement you had with Jack should have been in writing. The best guide for drafting the agreement can be found in what we used to call the Code.

Effective April 1, 2009, the Lawyer's Code of Professional Responsibility was replaced by the Rules of Professional Conduct. These Rules have a new format and numbering system based on the ABA Model Rules. There also were substantive changes, including two that are applicable here.

What had been DR 2-107, Division of Fees Among Lawyers, is now part of Rule 1.5: Fees and Division of Fees. In pertinent part, Rule 1.5 reads:

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation; (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, *including the share each lawyer will receive, and the client's agreement is confirmed in writing*; and (3) the total fee is not excessive.

22 N.Y.C.R.R. Part 1200 Rules of Professional Conduct Rule 1.5(g) (emphasis added).

The italicized clauses are substantive additions to the former requirements of DR 2-107.

To be in compliance with Rule 1.5(g) one set of steps would be:

1. Put the name of both the law firm of record and the referring law firm or individual attorney in the retainer. It should be sufficient for each lawyer to assume joint responsibility for the representation. (There have been instances where the referring attorney signs a separate writing, agreeing that she assumes joint responsibility for the case. It is not clear that this is necessary to meet the requirements of paragraph (g)(1), provided both names are on the retainer.)
2. Put a paragraph in the retainer setting forth the percentage each firm/attorney will receive, and that the client understands and agrees to the shared fee.
3. The entire retainer agreement should be explained before it is signed by the client. A copy of the retainer should be given to the client.
4. The attorney of record should send a letter to the referring attorney.

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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ney (with a copy to the client) transmitting a copy of the retainer and reiterating the specifics of the fee division.

5. OCA Retainer Statements must be filed on behalf of both firms.

The above suggestions are for the typical circumstance where an attorney refers the case and thereafter is not actively involved. Rule 1.5(g) also allows fee sharing based on the proportion of work performed by each attorney, but even then you have to meet the requirements of paragraph (g)(2).

We wish you well in your goal of getting it right in the future.

The Forum, by
Lucille A. Fontana
White Plains, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM 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

COMPUTERS & THE LAW CONTINUED FROM PAGE 51

circumstances surrounding the counterfeiting are less clear. Thus, a notice to eBay warning generally that counterfeit items must be removed will not suffice. "Defendant can only be accused of breaches for which it bears the blame, which means that a part of the analysis of reasonableness may have to be carried out in the context of the proceedings," said the court.¹⁴

The court further denied L'Oreal's claim for disclosure of the vendor, stating that as an indirect violator eBay is not subject to pre-action disclosure prior to initiation of proceedings, because an indirect violator will not be liable in damages. Thus, the German court found eBay responsible for removing counterfeit items and those items presumed to be counterfeit when placed on reasonable notice of such violations; however, an indirect violator will not be liable for damages. So in Germany, unlike France, a trademark owner will be entitled only to injunctive relief – not damages for the conduct of online auction sites such as eBay.

Regardless of the outcome of the appeals, companies involved in online commerce, such as eBay, will have difficulty reconciling their conduct

where the laws of nations are so disparate philosophically with respect to the protection of trademarks. In the United States the burden is upon the trademark owner to protect the reputation and use of its mark. In France, and other parts of Europe, the burden of protection has been made to fall upon others in the marketplace. ■

1. *Tiffany, Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463 (S.D.N.Y. 2008).

2. *SA Louis Vuitton Malletier v. eBay, Inc.*, No. 2006077799, Paris Commercial Court (June 30, 2008).

3. Madrid Protocol, 2003.

4. World Intellectual Property Organization, Uniform Dispute Resolution Policy; <http://www.wipo.org>.

5. *Tiffany*, 576 F. Supp. 2d at 470.

6. *Id.* at 463.

7. *Id.*

8. *SA Louis Vuitton Malletier v. eBay, Inc.*, No. 2006077799, Paris Commercial Court (June 30, 2008).

9. *Id.* at p. 9.

10. *Id.* at p. 11.

11. *Id.* at pp. 11–12.

12. *Id.* at p. 12.

13. *L'Oreal S.A. v. eBay Int'l AG*, Hamburg Regional Court, File No. 4160194/07 (May 13, 2008).

14. *Id.* at p. 13.



"Try to live your life with integrity, son. It will save you thousands of dollars in legal fees if you're ever forced to testify about it in front of congress."

2008 INSURANCE LAW UPDATE
CONTINUED FROM PAGE 43

27. *Id.*
28. *Id.* at 450.
29. *Id.*
30. 52 A.D.3d 599, 859 N.Y.S.2d 741 (2d Dep't 2008).
31. 50 A.D.3d 789, 856 N.Y.S.2d 184 (2d Dep't 2008).
32. *Id.* at 791.
33. 48 A.D.3d 1009, 851 N.Y.S.2d 736 (3d Dep't 2008).
34. See also *State Farm Mut. Auto. Ins. Co. v. Mazyck*, 48 A.D.3d 580, 849 N.Y.S.2d 906 (2d Dep't 2008).
35. 56 A.D.3d 1143, 1144, 867 N.Y.S.2d 591 (4th Dep't 2008).
36. See *Mercury Ins. Group v. Ortiz*, 49 A.D.3d 881, 855 N.Y.S.2d 577 (2d Dep't 2008); *AutoOne Ins. Co. v. Zanders*, 50 A.D.3d 682, 854 N.Y.S.2d 315 (2d Dep't 2008).
37. 56 A.D.3d 332, 869 N.Y.S.2d 392 (1st Dep't 2008).
38. See *MetLife Auto & Home v. Agudelo*, 8 A.D.3d 571, 780 N.Y.S.2d 21 (2d Dep't 2004); *Taradena v. Nationwide Mut. Ins. Co.*, 239 A.D.2d 876, 659 N.Y.S.2d 646 (2d Dep't 1997).
39. 55 A.D.3d 1445, 865 N.Y.S.2d 471 (4th Dep't 2008).
40. See *Teeter v. Allstate Ins. Co.*, 9 A.D.2d 176, 182, 192 N.Y.S.2d 610 (4th Dep't 1959), *aff'd*, 9 N.Y.2d 655, 212 N.Y.S.2d 71 (1961); see also *Ins. Co. of N. Am. v. Kaplun*, 274 A.D.2d 293, 298, 713 N.Y.S.2d 214 (2d Dep't 2000).
41. *Nova Cas. Co. v. Musco*, 48 A.D.3d 572, 573, 852 N.Y.S.2d 229 (2d Dep't 2008); see also *Hanover Ins. Co. v. Lewis*, 57 A.D.3d 221, 868 N.Y.S.2d 640 (1st Dep't 2008); *Interboro Ins. Co. v. Coronel*, 54 A.D.3d 342, 863 N.Y.S.2d 448 (2d Dep't 2008).
42. 50 A.D.3d 609, 856 N.Y.S.2d 606 (1st Dep't 2008).
43. *Id.* at 609.
44. 50 A.D.3d 1148, 857 N.Y.S.2d 216 (2d Dep't 2008).
45. *Id.* at 1150 (emphasis in original; citations omitted).
46. *Id.*
47. 49 A.D.3d 1237, 856 N.Y.S.2d 325 (4th Dep't), *lv. to appeal denied*, 11 N.Y.3d 705, 866 N.Y.S.2d 609 (2008).
48. 52 A.D.3d 498, 860 N.Y.S.2d 147 (2d Dep't 2008).
49. See *Am. Mfrs. Mut. Ins. Co. v. Morgan*, 296 A.D.2d 491, 745 N.Y.S.2d 726 (2d Dep't 2002).
50. 51 A.D.3d 486, 856 N.Y.S.2d 624 (1st Dep't), *lv. to appeal denied*, 11 N.Y.3d 712, 872 N.Y.S.2d 717 (2008).
51. 48 A.D.3d 460, 461, 850 N.Y.S.2d 639 (2d Dep't), *lv. to appeal granted*, 11 N.Y.3d 708, 868 N.Y.S.2d 601 (2008) (citations omitted).
52. *Id.* at 462 (citing *GEICO v. Young*, 39 A.D.3d 751, 835 N.Y.S.2d 283 (2d Dep't 2007)).
53. *Id.*; see also, to same effect, *Allstate Ins. Co. v. Rivera*, 50 A.D.3d 680, 855 N.Y.S.2d 217 (2d Dep't), *lv. to appeal granted*, 11 N.Y.3d 708, 868 N.Y.S.2d 600 (2008).
54. 17 Misc. 3d 1117(A), 851 N.Y.S.2d 62 (Sup. Ct., Queens Co. 2007), *aff'd*, 52 A.D.3d 826, 861 N.Y.S.2d 391 (2d Dep't 2008).
55. *Dawkins*, 52 A.D.3d at 826; see also *Allstate Ins. Co. v. Sung Sun Ju*, 56 A.D.3d 551, 866 N.Y.S.2d 882 (2d Dep't 2008).
56. 51 A.D.3d 788, 858 N.Y.S.2d 288 (2d Dep't 2008).
57. *Id.* at 789; cf. *Prudential Prop. & Cas. Co. v. Szeli*, 83 N.Y.2d 681, 686–87, 613 N.Y.S.2d 113 (1994).
58. 48 A.D.3d 460, 850 N.Y.S.2d 639 (2d Dep't), *lv. to appeal granted*, 11 N.Y.3d 708, 868 N.Y.S.2d 601 (2008).
59. 50 A.D.3d 680, 855 N.Y.S.2d 217 (2d Dep't), *lv. to appeal granted*, 11 N.Y.3d 708, 868 N.Y.S.2d 600 (2008).
60. 52 A.D.3d 278, 859 N.Y.S.2d 185 (1st Dep't 2008).
61. 54 A.D.3d 499, 862 N.Y.S.2d 654 (3d Dep't), *lv. to appeal granted*, 11 N.Y.3d 711, 872 N.Y.S.2d 73 (2008).
62. *Id.* at 500.
63. *Id.* at 501; see *S'Dao v. Nat'l Grange Mut. Ins. Co.*, 87 N.Y.2d 853, 854–55, 638 N.Y.S.2d 597 (1995).
64. See Joel Stashenko, *Panel Clarifies Supplemental Insurance Issues*, N.Y.L.J. Aug. 15, 2008, p. 1, col. 4.
65. 53 A.D.3d 578, 579, 862 N.Y.S.2d 93 (2d Dep't 2008).
66. See *Liberty Mut. Ins. Co. v. Doherty*, 13 A.D.3d 629, 789 N.Y.S.2d 55 (2d Dep't 2004).

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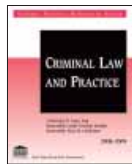
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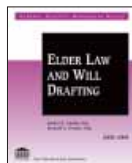
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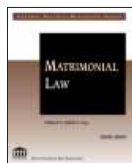
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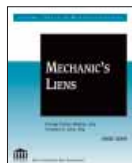
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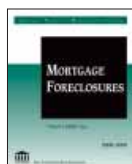
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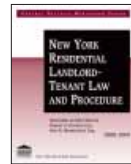
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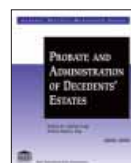
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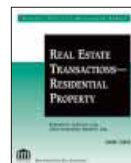
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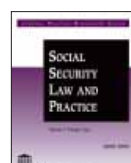
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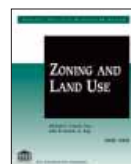
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Amicus Attorney	9
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Bertholon-Rowland Corp.	4
Heslin Rothenberg Farley & Mesiti P.C.	51
International Genealogical Search	21
Jams /Endispute	27
Jewish Guild for the Blind	35
Kristen Shaheen ESQ Attorney at Law & Associates	60
Law Book Exchange, Ltd	60
LAWSUITES.net	60
LexisNexis	7, 17
PS Finance	cover 2
SpeakWrite	23
The Company Corporation	60
Want Publishing Co.	60
West, a Thomson Reuters Business	cover 4
Wolters Kluwer Law & Business	19
Xerox	15

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: In a recent newspaper column, journalist David Brooks, whose language is usually impeccable, wrote: “The current situation is ambivalent.” Is his usage correct?

Answer: Almost, but not quite. The problem is that Mr. Brooks has used a subject (“situation”) with an adjective that can refer only to persons, for only persons can have mixed feelings. *Ambiguous* situations can lead to *ambivalence* in a person who must deal with them. The adjective *ambiguous* indicates that some *thing* (not a person) has more than one meaning.

Readers have complained that the trouble with dictionaries is that you cannot find the word you want to look up unless you know how to spell it. The problem revealed here is that sometimes even after you have located the word in the dictionary, the dictionary may define the word without explaining its limitations.

For example, the adjective *suspect* can have a human or non-human object, but it cannot have a non-human subject. So when a local official recently said, “I am suspect of any group that permits placing sexual predators in someone’s proximity,” he chose the wrong word, for he should have said, “I am suspicious of” or “I suspect” (something).

Another impossible subject-object combination occurred in the presidential campaign when a McCain supporter said, “President Bush has snubbed the firm stand against torture taken by the man he favors as his successor.” Here, the problem is that the verb *snub* must have a cognitive object. One can snub persons, but not things.

Is there a difference between an *amiable* gathering and an *amicable* gathering? Not a great deal, and you might select either of these adjectives as a synonym if your reference is to persons. But if you are referring to a person’s disposition, *amiable* would be a better choice. Besides being a friend, an “amiable” person describes one with a pleasant and affable personality. Both

amiable and *amicable* apply only to persons, not things; but *amicable* is narrower in scope, meaning only “friendly.”

The local newspaper recently announced that traveling to Mexico during the swine flu pandemic makes a person “more risky.” Not so. Only an act or a situation can be more or less “risky.” The traveler may be more *at risk* because conditions are “*more risky*.” Things are considered “risky”; persons are “at risk.” (Unless, of course, you mean “risky to other persons.”) Another journalist was in error when he wrote, “Teens are less risky today than they were in the past.” (Not “less risky,” but “less likely to take risks.”)

Two adjectives that are often misused are *credible* and *credulous*, both seen more often in the negative. Only persons can be *incredulous*. “Incredible occurrences may make a person incredulous.” Situations may be described as *incredible*, though that adjective is also used metaphorically to describe persons who are “incredible.” The adjectives also differ in their noun-forms: “People suffer from *incredulity*, perhaps caused by the *incredibility* of certain occurrences.”

A newspaper headline announced, “Rising Costs Soar Prices” accurately conveying the correct information, but inaccurately using an intransitive verb instead of a transitive verb. The verb *soar* is intransitive, so it cannot take an object. (Prices can soar, but they cannot “soar” anything.) The verb *rise* is also an intransitive verb, the transitive form being *raise*. Another intransitive verb, *lie*, is being ousted by its transitive form *lay*. In today’s (still incorrect) usage, you can *lay down* as well as *lay something down*.

Unlike these errors, some language errors belong in “the wrong word department,” the mistakes people make extemporaneously during discussion or debate. During the long presidential campaign, one participant acknowledged that “It will take time to restore order and chaos . . . in Iraq.” (Instead of the word *and* he meant to say *from*). President George W. Bush

promised, “I am mindful not only of preserving executive powers for myself, but also for my predecessors” (*successors*). And: “We cannot let terrorists and rogue nations hold this nation hostile” (*hostage*).

When a news reporter commented: “Since Dick Gephardt lost his bid for the White House, his singular mission has been to elect Democrats to the House,” he probably meant to say *single*. That adjective means “one,” but *singular* means “rare or deviating from the usual.” And, no doubt intending to compliment President Obama, another news reporter chose the wrong word when he said, “President Obama willfully kept the tone calm.” A better adjective would have been *deliberately*, for *willfully* implies obstinacy.

Errors in language like that can occur even in court decisions. Here is one.

Plaintiff requested that a physician employed by the Navy perform a vasectomy on him. Such request was refused on the ground that it was “unofficial Navy policy” not to perform vasectomies on Naval personnel. However, it was strongly encouraged that Plaintiff’s spouse undergo a tubal litigation. *Smith v. United States*, 599 F. Supp. 606, 607 (S.D. Fla. 1984). ■

GERTRUDE BLOCK is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

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

Writing mechanics refers to writing details: numbers, numerals, and figures; typographic symbols; abbreviations; italics and underlining; and capitalizations.

No one right way best tightens legal-writing nuts 'n' bolts, but different authorities try. Most practitioners, federal judges, law-journal editors, and Moot Court boards use *The Bluebook: A Uniform System of Citation*.¹ New York state judges and court staff use the *New York Law Reports Style Manual*, commonly called the Tanbook.² Writers in the humanities and social sciences often use the *Chicago Manual of Style*.³ Many lawyers rely on an authoritative style manual called *The Redbook*, by Bryan A. Garner, *Black's Law Dictionary's* Editor in Chief.⁴ Some law-school legal-writing professors teach their students the *ALWD Citation Manual: A Professional System of Citation*.⁵

Sometimes the rules in these sources are consistent with one another. Often they're not. The Bluebook, for example, has different rules for different documents: Memorandum and brief writing has one set of rules; journal writing, another. The Bluebook's rules also differ between how sources should appear in the text and how they should appear in footnotes or endnotes. ALWD and the Tanbook make no such distinctions.

Determining the source on which you should rely depends on your audience and document. If you have a choice, choose a source that'll create a document that's accessible, comprehensible, and consistent. No matter what you assemble — a bike, a bookcase, a brief — nothing will endure

unless all the pieces fit. Making your nuts 'n' bolts fit just right will assure an accessible, comprehensible, and consistent document.

1. Numbers, Numerals, and Figures

A number is an abstract mathematical concept. A numeral is a symbol that expresses the abstract mathematical concept. Words denote numerals in ABCs. *Example*: "Three." Figures denote numerals in 1, 2, 3s. *Example*: "123." Cardinal numbers express quantity or magnitude. *Examples*: "one," "two," "three." Ordinal numbers express relative positions. *Examples*: "first," "second," "third."

Conventions vary on whether to spell out numerals.⁶ Under the Bluebook and ALWD, spell out zero to ninety-nine and use figures for 100 and above in textual material, footnotes, and endnotes.⁷ *Examples*: "hundred," "thousand," "million." Under the Tanbook and the Redbook, spell out numerals up to and including nine; use figures for numerals 10 and above.⁸ According to the Bluebook and the Redbook, you may spell out round numbers larger than ninety-nine if you do so consistently.⁹

The Legal Writer recommends following the Tanbook and the Redbook. Spelling out numerals gives a document a formal air, but figures are easier to read than letters. Follow the guidelines in your jurisdiction or citation guide. Whichever numbering method you select, always be consistent.

The style of the larger numbers in a series controls the style of the smaller numbers.¹⁰ *Bluebook and ALWD example*: "The bullets ricocheted 12, 65, and 135

feet from the car." *Tanbook and Redbook example*: "The top law students earned 2, 4, and 11 awards, respectively."

Don't start a sentence with a figure.¹¹ *Incorrect*: "2009 marks the one-year anniversary of his admission to the New York bar." *Correct*: "Two thousand and nine marks the one-year anniversary of his admission to the New York bar." If you must use a number to start a sentence, spell it out or rewrite the sentence. *Example*: "1920 is an important date in the battle for women's rights." *Becomes*: "Nineteen-twenty is an important date in the battle for women's rights." *Or*: "In 1920, after the Nineteenth Amendment was ratified, women were allowed to vote."

Whatever the preference, maintain consistency.

According to ALWD and the Redbook, insert commas between the third and fourth digits, the sixth and seventh digits, and so on.¹² *Examples*: "2,000," "430,000." Under the Bluebook, which differs in this regard from other style guides, insert commas in figures that contain only five or more digits.¹³ *Correct*: "32,457," "3425." *Incorrect*: "3,425."

Don't insert commas in figures when the classification system doesn't use commas. *Examples*: docket numbers, citations, Internet databases, serial numbers, road numbers, room numbers, social security numbers, tele-

CONTINUED ON PAGE 52

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The screenshot displays the New York State Bar Association website. The top navigation bar includes links for MyNYSBA, Login, Join, Renew, FAQ, Online Store, and Search. The main header features the NYSBA logo and the text "NEW YORK STATE BAR ASSOCIATION". The left sidebar contains a menu with links to Home, My NYSBA, Blogs, CLE, Events, For Attorneys, For the Community, Forums, Membership, Publications / Forms, and Sections / Committees. The main content area is titled "All Recorded Programs" and contains text about the Committee on Continuing Legal Education and a Subject Index. A "CLE Credit Tracker" overlay is visible, showing a table of credits earned and needed.

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