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NEW YORK STATE BAR ASSOCIATION

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by Steven C. Bennett

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Legal Implications of Twitter Social Networking Technology

BY STEVEN C. BENNETT

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DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2009 by the New York State Bar Association. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $20. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

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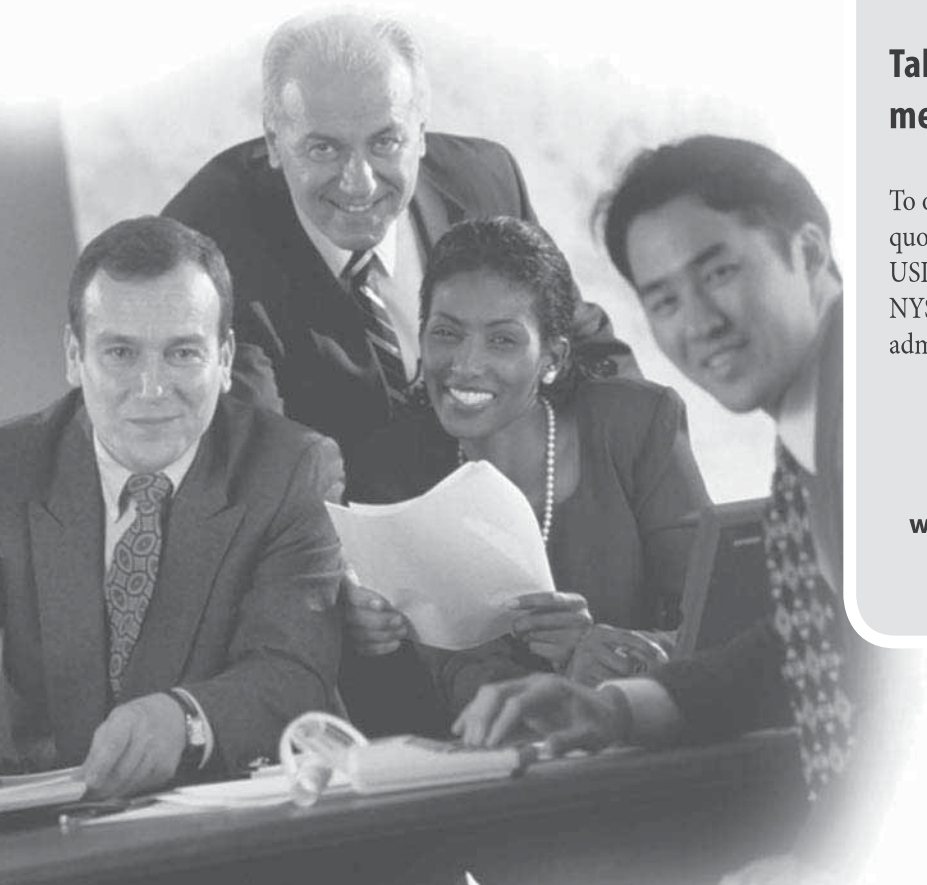

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BERNICE K. LEBER

The Year in Review

It was the best of times. It was the worst of times, . . .
we had everything before us, we had nothing before us.

Charles Dickens, *A Tale of Two Cities*

Well, it's that time. This column draws to a close my year as the 111th President of the New York State Bar Association. I have been privileged and honored to serve this great Association.

Being State Bar President is the greatest job in the world. For one thing, people take my telephone calls. For another, our members and our indefatigable staff continue to impress me with a desire to make a difference in our profession and in clients' lives and with their overall infectious enthusiasm that working together – despite the challenges and enormous economic hurdles we have faced this year – we can do better; we can continue to improve our laws and do more for society and our profession. In countless meetings with you and in my journeys around the state to the local and specialty bar associations, your dedication and sense of commitment to the profession are extraordinary – but even more so in these difficult times.

Key Initiatives Completed

With "Helping Lawyers, Helping Clients" as the theme for my term, last June I asked Barry Kamins to chair (along with my Arent Fox Partner, Scott Peeler as Secretary) the Task Force on Wrongful Convictions. This distinguished group of prosecutors, defense counsel, judges, civil litigators, law school professors and good government groups are the first in this state to study all the causes of wrongful convictions. Since the report issued, district attorneys have commented how impressed they are with the report, with the balanced, even-handed approach and with the testimony elicited in two hearings.[1] These comments underscore how fortunate we are to receive this extraordinary, definitive body of work. As I write this in March, Barry and I have also received over 200 requests from prisoners, their attorneys and their families seeking to expand the study beyond the 53 cases that the task force tackled. Some ranking members of the New York Legislature also have hailed the report, expressing interest in implementing legal reform. We have begun to meet with them in order to discuss ways to put the report into practice. The initiative will surely be a lasting tribute to Barry and his team.

In June 2008, I also invited Michael Gerrard, now director of Columbia Law School's new Center for Climate Change Law, to study and propose a list of priorities for legislative, executive, agency and municipal action in order to reduce the effects of global warming. In a cogent legal study, co-sponsored by the Environmental Law Section, Michael and leading lawyers who concentrate in environmental law (along with a cadre of law students from Columbia Law School) took a fresh look at the key legal steps that must be undertaken in order to reduce greenhouse gas (GHG) emissions 80% by 2050.[2] The legal issues include, for example, amendments to the State Energy Code to cover more building renovations than at present and SEQRA regulations to consider greenhouse gas effects on the environment. They made it possible for the State Bar to take legal positions before our national, state, and local government and their respective agencies in order to ensure a healthier, cleaner environment. The New York State Department of Environmental Conservation has already embraced a recommendation in the report, which requires that whenever energy use or GHGs are significant in a development project, a developer would be required to report on it and mitigate its effects. Mike Getnick, your President-elect, has kindly agreed to continue implementing these projects during his term.

Privacy laws continue to affect lawyers, their clients and government. Whether dealing with identity theft, producing documents with sensitive information covered by privacy laws or advising others on the disclosure of health information, we must be aware not only of our clients' privacy concerns and our own but also our profession's. Here, Alison Arden Besunder and Kelly Slavitt co-chaired a massive interdisciplinary undertaking on Privacy, Lawyers and Clients, and held a Summit on Privacy to share ideas with our Sections and other stakeholders in the report.[3] In this timely report, which for the first time addresses how

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interwoven these laws are, a task force of health lawyers, labor lawyers, intellectual property lawyers, and civil and criminal litigators reviewed statutes and privacy laws from various perspectives and made comparisons. Their work caused our House of Delegates to debate the meaning and implications of privacy and the attorney-client privilege, document retention, identity theft and the like. The members and public will benefit from this study.

In June 2008, the Task Force on the State of our Courthouses, chaired by Sharon Porcellio, Hon. Melanie Cyganowski and Gregg Aronson (three of my colleagues in the Commercial & Federal Litigation Section), began studying our courthouses across the state. Undaunted and driven, they have managed to complete a statewide survey and analyze how to make courthouses more user-friendly for lawyers and clients, judges and court personnel. Their report will be presented at the upcoming House of Delegates meeting in Cooperstown in June.

Fifty-six percent of our members practice law in a small-firm environment, which presents them with unique and formidable challenges. For this reason, this year we focused on another core mission of the State Bar: helping to improve the legal profession. Robert Ostertag, long an advocate for the small- and solo-firm lawyer, spiritedly undertook a renewed study – aided by his capable team of similarly situated, geographically diverse lawyers. They tackled some of the big issues we face practicing in the 21st century and prepared a report and recommendations for consideration by our House of Delegates at our upcoming June meeting.

This year for perhaps the first time, each of the five Task Forces mentioned in my column will have completed its studies in a single year. This is a remarkable achievement for them and for our Association, and furthers the goal of remaining relevant, current and timely to our members. For your energy and dedication, thank you!

Our Association's Response to the Economy

I don't need to remind you as you read and watch the news media that the economy has absorbed us intensely this year – lawyers and clients alike. In September 2008, the Legislature enacted a moratorium, banning the filing of mortgage foreclosures for the fourth quarter and providing for mandatory settlement conferences for so-called "toxic," or subprime, "high-end" mortgages. Last fall, I therefore asked Peter Coffey, Anne Reynolds Copps and our CLE Director, Terry Brooks, to organize free CLE programs for our members on how to handle a mortgage foreclosure proceeding so that lawyers would be in a position to help those who could not afford a lawyer. Thanks to their efforts and the Queens County and Brooklyn Bar Associations, we held a CLE program in Queens County, one of the hardest hit areas. Some 250 lawyers attended, promising to give pro bono help to homeowners threatened with the loss of their most prized possession. Peter, Anne and Terry also produced a wonderful "People's Law School" video for the public. This video, "Saving Your Home from Foreclosure," describes in plain English the rights that homeowners have during foreclosure proceedings.[4] I asked that the video also be made available in bankruptcy and state courthouses across the state. As I write this column in March, over 350 visitors have heard the program at the Web site alone. Many people are unable to pay their mortgages – some 50,000 face foreclosure in 2009 – so your pro bono service is profoundly important for these most vulnerable citizens.

One of a number of challenges this year, unlike perhaps any other year since 1997, has been the state of our economy. With the severe downturn in the financial services market, lawyers and clients have not been spared – directly or indirectly. To remain as responsive to our members as possible, I asked Lauren J. Wachtler, who chairs our Committee on Lawyers in Transition, to create specific programs for our members who suffered the loss of their jobs. Lauren is creating a new job bank at the State Bar Web site where lawyers can post their resumes directly This is in addition to working with lawjobs.com, a Web site company with which the State Bar has built a relationship, which posts broad job prospects and offers support. Lauren also started a special blog for attorneys,[5] found coaches for lawyers on resume building and interviewing, conducted roundtable discussions to address concerns, and single-handedly set up a statewide network of members to assist lawyers. Lauren was aided by our dedicated Membership Chair Claire Gutekunst and Gary Munneke, Chair of the Law Practice Management Committee. On a related note, the tireless Sally Kraus, Chair of the Lawyers Assistance Program, and Pat Spataro, our State Bar LAP director, have continued to work coordinating programs on depression and drug addiction, reinforcing the State Bar as a holistic place where lawyers and their families may call and find professional help.

With over 500 lawyers present for the Presidential Summit during our Annual Meeting in January, we focused on the economic crisis and climate change for our members – with renowned speakers from the financial services industry, government and academia explaining where things stood and should go.[6] Steve Younger, your President-elect-elect, secured the memorable closing address by Dick Parsons who, just the week before, was named chair of Citigroup.

Our Association's Response to Disaster

Besides the economy, sadly this year we were faced with not one but two plane crashes, the second of which, Continental Airlines Flight 3407, claimed the lives of 53 people. A special, special tribute goes to Robert Saltzman, chair of our Mass Disaster Team of lawyers and the members of his team. The telephone calls I received

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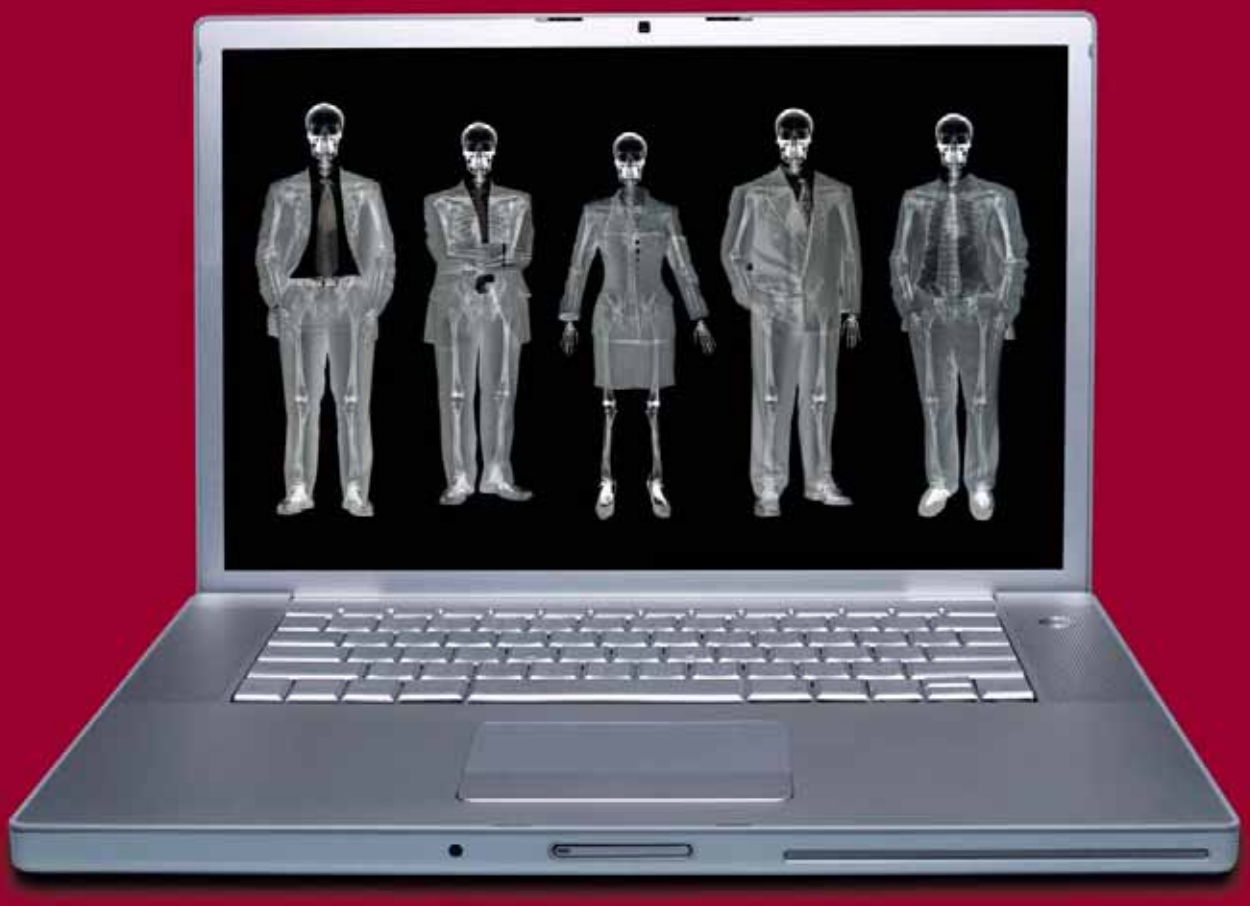
Get to know your outside counsel inside & out.



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Tentative Schedule of Spring Programs *(Subject to Change)*

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

Practical Skills Series: Basic Elder Law Practice
May 5 — Albany; Buffalo; Long Island; Rochester; Syracuse;
May 11 — Westchester
May 15 — New York City

DWI on Trial – The Big Apple IX Seminar
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Fulfills NY MCLE requirement for all attorneys (10.5): 6.0 skills; 3.0 professional practice/practice management; 1.5 ethics
May 7–8 — New York City

Additional Insured Coverage: Hot Topics and Critical Issues for 2009
May 8 — Albany; Buffalo; New York City
May 15 — Long Island; Syracuse

†Advanced Tax Return and Financial Statement Analysis for Matrimonial Lawyers
(9:00 am – 1:00 pm)
Fulfills NY MCLE requirement (4.0): 4.0 professional practice/practice management
May 8 — Long Island
May 29 — Syracuse
June 5 — New York City
June 12 — Albany

General Auto Liability
May 13 — New York City; Syracuse
May 21 — Albany
May 28 — Long Island
May 29 — Buffalo

Estate Planning for the Middle Class Client
May 14 — Syracuse
May 20 — Albany; Long Island
May 27 — Buffalo
June 3 — Rochester
June 9 — New York City
June 12 — Westchester

†International Practice Day/Advanced Level
May 15 — New York City

Health Care Management Essentials – Mini Masters in Public Health
(two-day program)
May 15–16 — Valhalla

Practical Skills Series: How to Commence a Civil Lawsuit
May 19 — Albany; Buffalo; Long Island; New York City; Syracuse; Westchester

Dealing With Residential Foreclosures: Defenses and Remedies From the Borrowers' Standpoint
June 3 — Long Island
June 4 — New York City
June 15 — Albany; Buffalo
June 16 — Westchester
June 17 — Syracuse
June 30 — Rochester

Ethics in the Wake of the New Rules of Professional Conduct
(9:00 am – 1:00 pm)
May 27 — Westchester
June 2 — Rochester
June 4 — Buffalo
June 9 — New York City; Syracuse
June 12 — Albany
June 15 — Ithaca; Long Island

Consumers and Small Businesses in Distress: Using the Bankruptcy Code to Help Weather These Troubled Times
(9:00 am – 1:00 pm)
May 28 — New York City
May 29 — Long Island
June 5 — Rochester
June 10 — Albany; Syracuse

Practical Skills Series: Collections and the Enforcement of Money Judgments
June 2 — Albany; Long Island; New York City; Syracuse; Westchester

The Redevelopment of Contaminated Property: New York State's Brownfield Program and Beyond
June 2 — New York City
June 4 — Albany; Syracuse
June 10 — Long Island

Practical Ways to Handle Employment Issues in Today's Volatile Economy
June 3 — Albany
June 10 — Rochester
June 12 — New York City

Operating the New York Not-for-Profit Organization
June 9 — Albany
June 16 — Rochester
June 18 — New York City

Basic Securities Law for the Business Practitioner
June 10 — New York City

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

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NYSBA

New Model Rules of Professional Conduct Effective April 1, 2009

The new Model Rules of Professional Conduct went into effect in New York on April 1, 2009. The Appellate Division adopted the new rules in December 2008.

The Model Rules for the most part closely parallel New York's former rules, the Lawyer's Code of Professional Responsibility. In fact, at the time of the change, the former Code was "an amalgam of Model Code and Model Rule provisions, interspersed with rules developed specifically by and for New York."[1] Even now, "[a]bout three-quarters of the new rules embody the [former] state code, with the remaining one-quarter lifted directly from the ABA's Model Rules or are ABA rules reworked for the state code."[2] There are, however, some significant changes.

The new rules are based on ones proposed by the NYSBA Committee on Standards of Attorney Conduct (COSAC). In 2003, COSAC, chaired by former NYSBA president Steven Krane, was charged with undertaking a comprehensive evaluation of the ABA's revised Model Rules of Professional Conduct, looking toward their adoption in New York. A major consideration of the committee in its review was the growing need for consistency and accessibility for attorneys seeking ethical guidance. As of 2003, 48 of 50 states had adopted the Model Rules, and multijurisdictional practice was becoming increasingly commonplace. Any lawyer admitted to practice in New York since 1982 has had to pass the Multistate Professional Responsibility Examination, which is based on the ABA Model Rules. This is significant in that more than "two-thirds of all NYSBA members were admitted to practice in 1982 or later."[3] Thus, for years, law students have been taught two sets of sometimes inconsistent and contradictory regulations.

One of the most important changes affecting practice concerns the circumstances under which an attorney may reveal a client confidence or secret. At the Committee on Attorney Professionalism's program during the Association's Annual Meeting this past January, program chair James Altman noted that under the old rules such disclosure was allowed only to prevent commission of a crime. Now, however, disclosure is allowed in a broader range of circumstances as listed under Rules 1.6(b), "Confidentiality of Information." Rule 3.3, "Conduct before a Tribunal," mandates such disclosure to the court under certain circumstances. Another significant change is that conflict waivers must now be in writing.

The Association is working to make available training on and access to the new rules. From May 27 to June 15, the NYSBA will offer at eight different sites a half-day CLE program titled "Ethics in the Wake of the New Rules of Professional Conduct." Additional information on these programs can be found at www.nysba.org/newrules CLEofferings. A copy of the Model Rules of Professional Conduct and a chart showing a side-by-side comparison of the former Code and the new Model Rules can be found at www.nysba.org/professionalstandards. The COSAC Committee report may be accessed through the committee's Web page at www.nysba.org/COSAC. ■

1. Introduction to the Report of NYSBA Committee on Standards of Attorney Conduct ("Committee Report").

2. *New Ethics Standards Take Effect Tomorrow*, N.Y.L.J., Mar. 31, 2009, p. 1.

3. Committee Report at vi.

Look Who's Talking

Legal Implications of Twitter Social Networking Technology

By Steven C. Bennett

At a recent joint session of Congress, where President Obama spoke on plans for responses to the economic crisis, some members of Congress amazed (and perhaps shocked) the public by using some of the latest communication technology available: "Twitter."[1] This new social networking system aims to keep participants connected through the exchange of quick, frequent answers to one simple question: "What are you doing?"[2] Founded in 2006, the service became publicly available and rapidly gained popularity.[3] The service principally operates through cellular telephones, using messages of 140 characters or less (known as "Tweets").[4]

Many lawyers, when first encountering Twitter, "just don't get it." But this latest phenomenon, like e-mail, IM, voicemail, blogging and other social networking technology, is clearly here to stay, in one form or another.[5] What should lawyers make of the new technology? What risks should lawyers recognize? And what advice should lawyers give to their clients? This article briefly addresses some of the legal implications of Twitter.

Implications for Lawyers

The essential purpose of Twitter, for lawyers and other professionals, is to keep connected to friends, acquaintances, clients and prospects. Lawyers, for example, may wish to use Twitter to share information on developments in their practice area or news regarding their activities (the progress of trials, presentations or business travels, for example). The benefits may include "increased visibility" within the lawyer's professional sphere.[6] Twitter is "about the conversation" within a network; users of the technology hope that small talk on Twitter "leads to real conversations and relationships."[7]

Steven C. Bennett (scbennett@JonesDay.com) is a partner at the Jones Day firm in New York City and Chair of the firm's E-Discovery Committee; he co-teaches a course on E-Discovery Law at Rutgers University School of Law. The views expressed are solely those of the author, and should not be attributed to the author's firm or its clients.

Twitter messages from lawyers, for all their informality, must be treated with the same caution as messages in any other form (including correspondence, memoranda or e-mails). Lawyers must pay particular attention to the risks of revealing privileged or confidential information in Twitter messages, which are often programmed to be sent to a group of friends and acquaintances. Further, despite the informality of the medium, messages that contain what may appear to be legal advice, that operate on the (unstated) premise of an attorney-client relationship, or that may be characterized as a solicitation of legal work, may have the unintended consequences of raising professional responsibility issues or ethics concerns.[8] To avoid doubts about the meaning of Twitter communications, lawyers may need to establish some protocols: avoiding anything but general professional news in their Twitter communications, restricting the group of recipients of Twitter communications (or some subset of such communications) and/or providing periodic notice to recipients of the conditions under which the Twitter communications are made.[9]

To the extent that businesses cannot capture and save such messages, they may have particular difficulty regulating Twitter communications.

Implications for Businesses

Business use of social networking tools has grown tremendously in recent years. No longer just a fad, social networking has particularly drawn the attention of advertisers and corporate communications specialists.[10] The Internet has created hundreds of "communities" of interest for marketing, branding and the introduction of new products and services.[11] In a down economy, recruiters and unemployed workers may use such technologies to help change career directions.[12] And some sources suggest that social networking can perform admirably in the event of emergencies.[13]

Twitter enthusiasts suggest that this technology may offer similar business (as well as social) benefits. Because of its novelty, however, Twitter applications typically are not offered by businesses directly for their employees. As a result, text messages generally do not run through an enterprise network but rather through the telecommunication carrier's network. In effect, Twitter messaging, like many forms of mobile computing, may not (at least as yet) fall within the purview of any company IT regulators.[14]

Indeed, to the extent that businesses cannot capture and save such messages, they may have particular difficulty regulating Twitter communications. As a result, some businesses may choose to label Twitter messaging as not part of the company's record-keeping system. Some businesses may go further and forbid the use of such messaging for business purposes.[15]

Yet, corporations clearly have a stake in preparing for the possibility that their employees may use Twitter (and other social networking technologies). Messages sent from corporate employees may convey proprietary information, may reveal other privileged or private information and may expose the company to claims of defamation or harassment. Messages received by employees may contain spam, malware or illegal materials. And, to the extent that employee dedication to social networking becomes a distraction, it may decrease the efficiency of the organization.[16]

As a result of these kinds of concerns, companies may need to survey employee communication practices periodically and may need to conduct training or information campaigns regarding what social networking practices (including Twitter) will be supported and which considered unacceptable.[17] System monitoring may be required to confirm that employees use corporate communication systems in conformity with established policies. In certain circumstances, the company may consider specifying that misuse of corporate communication systems (or private communication systems while on company time or in connection with corporate business) will be considered grounds for termination of employment.[18]

Implications for Litigation

The increasing speed of communication media (from written correspondence to telegraphs, telephones, facsimile transmissions, e-mail, IM and now texting and Twitter) may have decreased the attention span of the average user.[19] Whatever the cause, experience in litigation since the Internet was invented, and e-mail popularized, shows that abbreviated, casual messaging systems tend to breed abbreviated, casual messages.[20] Such messages can get individuals (and companies) in a lot of trouble in the event of litigation.[21]

The limits of the term "electronically stored information" (ESI), as used in the 2006 amendments to the Federal Rules of Civil Procedure, have not been clearly established. One case involving RAM information on a Web site suggests that the term could cover relatively ephemeral information, such as Twitter messages.[22] The case, however, has received some serious criticism.[23] Thus, there may be some question whether Twitter messages are "stored" within the meaning of the Rules.[24]

At very least, the discoverability question may turn on the facts of how Twitter technology has been used in the particular case.[25]

Even if such information is not produced as part of the discovery process, however, Twitter messages may be findable, and usable, in the event of disputes, to the extent that such messages are posted on social networks.[26] Indeed, an ad hoc system for identifying and aggregating Twitter messages on common themes (such as a news event) has developed.[27] And such messages may become potent evidence in the event of litigation, just as e-mail has become.[28]

Formulating Best Practices for Twitter Use

Contrary to the instincts of some, there has been no "end of history" regarding communications technology.[29] The acceleration of new technologies, new computing capabilities, new communications media and new social customs continues.

For lawyers and their clients, the advance of technology may have significant legal implications. The only reliable means to cope with new technologies like Twitter is to embrace an understanding (if not a use) of such technologies, to participate actively in efforts to understand how such technologies may modify legal regimes, and to help clients formulate best practices to control and exploit such technologies.[30]

Lawyers cannot do this job alone. The effort must be interdisciplinary, aimed at understanding both what is legally required and what is practical and economical. Ironically, new technologies like Twitter may drive lawyers to recognize their interdependence with other professional disciplines, even if they never choose to adopt the social networking technologies with which they must become familiar.[31] ■

1. *See* Dana Milbank, *A Tale of 140 Characters, Plus the Ones in Congress*, Wash. Post, Feb. 25, 2009, at A3, *available at* www.washingtonpost.com ("Some members called it a new age of transparency, a bold new frontier in democracy.").

2. *See What Is Twitter? at* http://twitter.com.

3. Twitter.com does not release information on usage rates. One estimate of 2008 usage, however, put the number of Twitter users as high as 4 to 5 million. *See* Jeremiah Owyang, *Social Networks Site Usage: Visitors, Members, Pages Views and Engagements by the Numbers in 2008*, www.web-strategist.com/blog/2008/11/19/social-networks-site-usage-visitors-members-page-views-and-engagement-by-the-numbers-in-2008/ (Nov. 19, 2008); *see also* posting of Andy Kazeniac to Compete, *Social Networks: Facebook Takes Over Top Spot, Twitter Climbs*, http://blog.compete.com/2009/02/09/facebook-myspace-twitter-social-network (Feb. 9, 2009) (ranking Twitter highly among users of social networking sites).

4. Twitter notes that messages may be connected through "phone, IM, or web site, and you are only expected to pay as much or as little attention to them as you see fit." *Isn't Twitter Just Too Much Information?*, www.twitter.com/about#about.

5. One measure of the success of the technology is the fact that many imitators of the Twitter approach already exist. *See* posting of Sean P. Aune to Mashable, http://mashable.com/2008/01/10/7-twitters-of-the-world (Jan. 10, 2008) (Twitter is "easy to love; easy to clone"; listing similar sites).

6. *See* posting of Kevin Hunt to WESTBLOG, http://tnalcorpcomm.wordpress.com/2009/02/03/twitter-and-lawyers (Feb. 3, 2009).

7. Posting of Matt Homann to LawyerKM, http://lawyerkm.wordpress.com/2009/02/03/what-is-twitter-and-how-can-i-use-it (Feb. 4, 2009, 12:38 EST) (summarizing panel discussion at LegalTech New York).

8. *See* Melissa H. Weresh, *A Bold New Frontier – To Blog Where No Lawyer Has Blogged Before*, Iowa Law. (Jan. 2009) (noting ethical concerns regarding unauthorized practice of law, unintended creation of attorney-client relationships, and violation of restrictions on attorney advertising), *available at* http://www.law.drake.edu/academics/docs/weresh_Articles/A%20Bold%20New%20Frontier.pdf; Jason Boulettee & Tanya DeMent, *Ethical Considerations for Blog-Related Discovery*, 5 Shidler J.L. Com. & Tech. 1 (Sept. 2008), *available at* http://lctjournal.washington.edu/vol5/a01BouletteDeMent.html; Adrienne Carter, *Blogger Beware: Ethical Considerations for Legal Blogs*, 14 Richmond J. L. & Tech. 5 (2007), *available at* www.law.richmond.edu/jolt/v14i2/article5.pdf.

9. Given the 140-character limitation, it may be difficult for lawyers to send automated coda for every message, confirming that the message is not intended as legal advice, or to solicit an attorney-client relationship. If that is the intent of the lawyer's Twittering, some alternative form of (at least periodic) notice may be required.

10. *See* posting of Ollie Ross to ZDNet, *CIOs Getting Serious About Social Networking*, http://news.zdnet.com/2100-9595_22-272809.html (Feb. 25, 2009) (noting use of social networking to "generate a buzz").

11. *See* posting of Martha Young to ITWorld, http://itworld.com/virtualization/55572/social-networking-what-business-value (Oct. 2, 2008).

12. *See* Melanie Rodier, *Wall Street Recruiters and Employees Increasingly Use Social Networking for Career Management*, http://wallstreetandtech.com (Dec. 19, 2008).

13. *See* posting of Jason Palmer to New Scientist, http://www.newscientist.com/article/mg19826545.900-emergency20-is-coming-to-a-website-near-you.html (May 2, 2008) (research at University of Colorado at Boulder suggests that "some of the social media were extremely well suited to disaster response, despite not being designed for that purpose").

14. *See* Steven C. Bennett & Cecilia Dickson, *E-Discovery: The Challenges in Mobile Computing*, N.Y.L.J., Sept. 30, 2008, p. 5, col. 1.

15. *See* posting of Robert Mullins to Suite 101, http://office-software.suite101.com/article.cfm/web_20_conflicts_with_ediscovery (Jan. 28, 2009) ("Businesses concerned about the content of IMs first forbade them in the office, but eventually allowed IM once messages could be archived.").

16. *See* posting of Clint Boulton to eWeek, http://www.eweek.com/c/a/Messaging-and-Collaboration/Facebook-Twitter-Use-in-The-Enterprise-Sparks-Hot-Debate (Aug. 20, 2008).

17. Some commentators suggest that "[p]romoting the use of a corporate tool that leverages Twitter's API [application programming interface] . . . is a less risky option than banning it and forcing staff onto a tool that has no auditing capability." Posting of Matthew Hodgson to the {app}gap, www.theappgap.com/ediscovery-enterprise-20-and-the-open-web.html (Nov. 6, 2008).

18. *See* posting of Reed Irvin to ca, www.blog.ca-ig.com/2009/01/enterprise-social-networking-and-the-new-governance-paradigm (Jan. 15, 2009).

19. *See* Steve Rubel, *Twitter, Human Attention and Moore's Law*, www.micropersuasion.com/2007/03/twitter_human_a.html (Mar. 12, 2007) (noting phenomenon of "continuous partial attention" to communications as a result of overwhelming volume of messages).

20. *See* Tresa Baldas, *Beware: Your "Tweet" on Twitter Could Be Trouble*, Nat'l L.J., Dec. 22, 2008 (noting that short "tweets" can be "vulnerable to misinterpretation" and may "open[] the door to poor judgment," especially when sent in anger) (quotations omitted), *available at* www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202426916023; Correy E. Stephenson, *E-Discovery Implications of Twitter*, www.lawyersusaonline.com/index.cfm/archive/view/id/432466 (Dec. 16, 2008) ("Twitter is the haiku of internet communications," so that "this is a medium that has a great potential for de-contextualization – thoughts and words and phrases on Twitter can be more easily construed out of context than in a longer medium where they might be expressed more fully.") (quoting Douglas E. Winter of Bryan Cave law firm).

21. *See generally* Peter Wardle & Barnali Chouhury, *Ediscovery: Weapons of Mass Discovery* (2007), *available at* www.practicepro.ca/information/doc/eDiscovery_slides2.pdf at p. 2 (informal e-mails "can contain ill-considered and potentially damaging statements not found elsewhere" in corporate records).

22. *See Columbia Pictures Indus. v. Bunnell*, 245 F.R.D. 443 (C.D. Cal. 2007).

23. *See, e.g.*, Robert B. Mullen, *Ephemeral Data Meets Hard Law*, The Recorder (Feb. 10, 2009) (decision was "not in keeping with the way lawyers and judges have always done business"), *available at* http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202428129189; Electronic Frontier Foundation, *Columbia Pictures Indus. v. Bunnell* (aka *Movie Studios v. TorrentSpy*) (2007) http://w2.eff.org/legal/cases/torrentspy (decision is "unprecedented" and "threatens to radically increase the burdens that companies face in federal lawsuits").

24. Several cases suggest a contrary view. *See, e.g.*, *Phillips v. Netblue Inc.*, 2007 WL 174459 (N.D. Cal. Jan. 22, 2007) (rejecting as "absurd" argument that hyperlinks should have been preserved); *Healthcare Advocates, Inc. v. Harding, Earley, Follner & Frailey*, 497 F. Supp. 2d 627 (E.D. Pa. 2007) (no sanctions for failure to preserve temporary cache files); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004) (no sanction for failure to preserve "ephemeral" data).

25. *See* posting of Anthony P. Chan to E-Discovery Bytes, *Data Talk: Cache and Transient*, http://ediscovery.quarles.com/2009/02/articles/case-law/data-talk-cache-and-transient (Feb. 12, 2009) (suggesting that discoverability may turn on: whether the data serves a business purpose that warrants retention; whether the requested data is relevant to the case; whether the party is capable of preserving the data; whether data that might have served as evidence has been purposefully destroyed; the timeliness of the request for data, and whether a party has been given notice of the duty to preserve; whether the party acted in good faith to preserve the data; and whether the data is inaccessible because of undue burden or cost, within the meaning of Fed. R. Civ. P. 26(b)(2)(B)).

26. *See* Perry L. Segal, *E-Discovery 101: Twitter MySpace Away on Facebook*, www.ediscoverycalifornia.com/insights/2009/02/ediscovery-101-twitter-myspace-away-on-facebook.html (Feb. 4, 2009) ("You have to be your own filter. Before you post, ask yourself whether you're OK with the concept that anyone on earth might see it – forever. If the answer is yes, go ahead. Post it. Otherwise, keep it to yourself.").

27. *See* Amy Graham, *How to Start a Twitter Hashtag*, www.contentious.com/2008/11/20/how-to-start-a-twitter-event-hashtag (Nov. 20, 2008) (describing informal "convention" by which users label "tweets" to help put together "disparate coverage" of an event).

28. One commentator suggests that Twitter messages, as "present sense impressions," or "excited utterances," may be admissible as exceptions to ordinary hearsay rules. *See* posting of Joshua L. Konkle to DCIG http://www.dciginc.com/2008/02/twitter-and-federal-rules-of-e.html (Feb. 20, 2008). Following such logic, Twitter messages that contain statements of "then existing mental, emotional, or physical conditions" might also be admissible under Rule 803(3) of the Federal Rules of Evidence. *See generally Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) (extensive discussion of evidentiary issues surrounding electronically stored information).

29. The rumor has long circulated that a U.S. Patent Office official once suggested that "everything that can be invented has been invented." The truth of the rumor is highly debatable. *See* Samuel Sass, *A Patently False Patent Myth*, 13 Skeptical Inquirer 310 (1989), *available at* www.myoutbox.net/posass.htm. Whatever the truth of the rumor, the notion that technology will stand still has been repeatedly disproved.

30. *See* Grace L. Mastalli & K. Krasnow Waterman, *Trust, Ethics and the Technology Factor* (June 20, 2008), *available at* www.kkrasnowwaterman.com/Default.aspx?app=LeadgenDownload&shortpath=docs%2FTechnologyandLegalEthics.pdf.pdf at p. 8 ("Today legal competence requires increasing degrees of jurisdiction-specific knowledge, web savvy and technical expertise."); Steven C. Bennett, *Teaching Technology Skills to Lawyers*, 28:19 Nat'l L.J., Jan. 16, 2006.

31. Guidance in this area starts with the essential principle that a team approach (involving input from legal, business, IT, records, risk management and business professional, wherever possible) is essential in developing effective document management and communications policies. *See, e.g.*, Steven C. Bennett, *Implications of a "Keep It All" Data World*, N.Y. St. B.J. (Feb. 2009) p. 42; Steven C. Bennett, *Records Management: The Next Frontier in E-Discovery?*, 7/08 Prac. Litigator 31 (2008); Steven C. Bennett, Sharon Alexander & Cecilia Dickson, *Getting Started: Procedures for Developing a Document Retention System*, 3:1 BNA Accounting Policy & Prac. Spec. Rep. 1 (2007); Steven C. Bennett, *E-Document Management: A Litigator Looks at Retention Policies*, Computerworld, June 1, 2004, www.computerworld.com/action/article.do?command=viewarticleBasic&articleID=93565; Steven C. Bennett, *Building an E-Document Retention Policy*, 3:3 InfoPro 42–45 (2001).

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BY DAVID PAUL HOROWITZ

It's the Note of Issue, Stupid

If you poll litigators, particularly those practicing downstate, asking, "What is the root cause of the most significant procedural problems you routinely face?" most will respond with a variation on the answer that quashed Bush 41's re-election bid: "It's the note of issue, stupid." The note of issue? How can this be?

The Note of Issue Then

The note of issue is, on its face, a simple, straightforward document, easy to complete, and in the "Blumberg Form" version it is an elegant, double-sided, single sheet of paper. Filling one out, even back in the ancient days of typewriters and carbon paper, took minutes, at most. Simply put, it is a document that one party serves and files with the court to signify that disclosure is complete and the case is ready for trial.

The leading treatise on New York civil practice offers this description of the note of issue:

> The serving and filing of the note of issue accompanied by the certificate of readiness is a very important milestone in the course of the New York civil suit, because these events ordinarily mark the end of the pretrial disclosure phase of the litigation and the placement of the case on the trial calendar.[1]

Of course, when the Civil Practice Law and Rules was enacted, courts utilized a master calendar system and, in the pre-commencement by filing days of yore, did not routinely track pretrial activity in civil cases. And, where a party sought to "jump the line" on the master calendar by filing a note of issue prematurely, before the completion of disclosure, a motion to vacate the note of issue was available to provide relief.

To many of the New York State practitioners polled at the top of this column, this is mostly an item of historical interest, not relevant to current practice. Today, filing the note of issue and certificate of readiness in many counties, particularly downstate, often occurs not at the end, but at the midpoint, or even at the beginning, of disclosure.

The Note of Issue Now

If the note of issue no longer automatically signifies "the end of the pretrial disclosure phase"[2] in civil actions, what does it signify? In many counties, it means simply the expiration of the Differentiated Case Management (DCM) mandated timeframes for completion of disclosure, with the concomitant mandate that the note of issue be filed by the end of the disclosure period. If the note of issue is not timely filed, in many counties the case will automatically be dismissed or marked "disposed."

In and of itself, filing the note of issue prior to the actual completion of disclosure need not present a problem. Counties that mandate the filing of the note of issue prior to the completion of all disclosure have a variety of procedures designed to allow for the completion of disclosure while the case is on the trial calendar. Thus, the action continues to move forward toward trial while outstanding disclosure is being completed. In fact, a prior column pointed out many of the advantages that this system has to offer litigants and their clients.[3]

So what's the problem?

I Need More Time

Problem No. 1: A case requires significant time for completion of disclosure, post-note of issue, and the trial date, with its own, generally inflexible "standards and goals" deadline, looms.

Several years ago, I represented the plaintiff passenger in an action that arose from an automobile accident, a rear-end collision. There was the to-be-expected automobile negligence claim. There was also, as a result of a defect in the car's seatback, a product liability claim. Finally, due to what is euphemistically referred to as a "therapeutic misadventure" at the hospital where the plaintiff was taken by ambulance, there was also a medical malpractice

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claim. DCM distinguishes between three discovery tracks:

1. Expedited – discovery to be completed within eight months.
2. Standard – discovery to be completed within 12 months.
3. Complex – discovery to be completed in 15 months.[4]

While the case was assigned to the "complex" track, allowing 15 months for the completion of disclosure, my adversaries and I knew, at the outset, that this was never going to be enough time to complete all necessary disclosure in the three related, but different, cases combined in one action.

Along the way, following numerous depositions, the medical malpractice claim settled, leaving the hotly contested product liability claim and the essentially uncontested automobile claim.[5] It was at about this time that the deadline to file the note of issue came up, and the note was filed with the understanding that the remaining disclosure would be completed while the case was on the calendar awaiting trial.

The post-note disclosure involved product inspections by out-of-state automobile experts, review of voluminous product design documents, and investigation of a possible spoliation claim, all of which are garden-variety disclosure in a case of this type. My adversary in the product liability suit was Francis F. Quinn, Esq., a true "Philadelphia lawyer" (now resident in New York).[6] Tenacious in the defense of his client, he was at all times professional, courteous, and cooperative – in short, a "poster child" for what a civil litigator can, and should, be.

During the pendency of the case, we never once had to resort to motion practice, or even a court conference, to work out any of the questions that arose, involving scheduling, disclosure, and spoliation issues.

The greatest hurdle to overcome? Completing disclosure within the time allotted by the court system for both pre- and post-note phases of litigation.

When Must I Make My Summary Judgment Motion?

Problem No. 2: *Brill*[7] and the making of summary judgment motions.

The March-April column[8] described the potential problems attorneys encounter in making timely summary judgment motions in cases where all disclosure has not been completed prior to the filing of the note of issue. The problems arise, in large part, because the trigger that starts the clock running on a party's time to so move is the filing of the note of issue,[9] whether or not disclosure has been completed.

When disclosure that is necessary for making, or opposing, summary judgment has not been completed pre-note, the attorneys find themselves in a quandary. One course is to await the completion of disclosure and then move, late, seeking leave for "good cause shown" based upon the unavailability, during the time set for making the motion, of the necessary post-note of issue disclosure. Alternatively, a party can decide to timely move for summary judgment and then seek to enlarge the record with the post-note of issue disclosure as it becomes available. Similarly, the party opposing the motion may be unable to adequately oppose a timely motion without the aid of post-note disclosure. The opposing party has to elect between opposing the motion solely on the basis of whether it was timely (generally too dangerous a course to pursue), or oppose on the merits as well, with all the time, energy, and monetary expenditure opposing a summary judgment motion usually entails.

When Must I Exchange My Expert?

Problem No. 3: *Singletree*[10] and the failure to identify experts prior to the filing of the note of issue.

In January this column discussed problems involving the timing of expert disclosure where one party moves for summary judgment, post-note, and the party opposing the motion relies upon the affidavit or affirmation of an expert who was not exchanged prior to the filing of the note of issue.[11]

Once again, the problem arose, in part, because of a linkage of the procedure for exchanging experts with the filing of the note of issue. While the note of issue is supposed to signify the completion of disclosure, until very recently it was never the practice, going back to the time that the exchange of experts was enacted in 1985, that the exchange be completed pre-note. This recent development in the Second Department occurs, ironically, at a time when the note of issue bears increasingly little relation to the completion of disclosure.

Expert exchange tied to the note of issue is particularly problematic since experts must generally review all the relevant disclosure materials gathered in a case and then participate with the attorney in a thorough and careful evaluation of that material as part of the process of drafting the expert exchange. This process, properly done, takes time, time that attorneys have always found and availed themselves of while cases sit on the calendar awaiting trial.

Possible Solutions

The note of issue has, in many counties, lost its original significance. Yet practice rules and procedures continue to develop tied to the filing of the note of issue and based upon the traditional meaning of that filing: disclosure is complete. Some, but by no means all, of the problems this engenders are described above.

Flagging the problem is the easy part. What to do is more complicated.

One possible solution has been suggested already. Rather than have two separate and distinct time periods in the life of a case, pre-note and post-note, combine the two into a single time period calculated from the time an RJI (request for judicial intervention) is filed to the date set for trial. Combining the maximum 15 months available pre-note, with the 15 months set by standards and goals post-note for a case to come to trial, yields 30 months, two and one-half years, in which to prepare a case for trial.

Thirty months would be adequate time for completion of disclosure in all but the most complex of cases, and yet cases would reach trial within the same time as under the current system. Would this encourage some attorneys to delay and procrastinate? Possibly. Yet the active case management system of DCM would continue to be available to oversee disclosure and make certain that cases are moving forward at an appropriate pace, tailored to the complexity of each case and allowing for problems and issues that arise along the way.

Tying the summary judgment trigger to the actual completion of disclosure, rather than the note of issue, would alleviate much confusion and angst and relieve the courts and litigants of the burden of deciding numerous motions seeking leave for "good cause," based upon post-note disclosure. At the same time, fidelity would be maintained with CPLR 3212(a)'s goal in establishing minimum and maximum time periods for summary judgment motions: the elimination of "eve of trial" motions.

One solution could be mandating a true certification conference[12] after the final compliance conference and prior to the first pre-trial conference. The conference could be triggered upon request of a party accompanied by a certification that all pre-trial proceedings have been completed (essentially a revamped certificate of readiness), with an outside date set by rule well in advance of the trial date if no request is made. At this conference, the court could address, *inter alia*, the timing of summary judgment motions.

The court could also address the timing of expert disclosure at a certification conference, or, as is commonly done in the medical malpractice parts in New York City, at a pre-trial conference. Whether such a process would solve the *Singletree* problem is unclear, since that decision appears to assume a note of issue deadline for expert exchange.

Conclusion

It's a scary world out there for litigators as the rules of practice evolve and change in ways that appear to make practice more difficult, not less. At the same time, our court system labors with limited resources and huge dockets, and looming budgetary issues portend greater strain, not less. Together, the bench and bar can find solutions that work for the courts, the lawyers, and, most important, the litigants. ■

1. Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶3042.00, 2d ed. (2009).

2. *Id.*

3. David Horowitz, Burden of Proof, *Help Is Here, Whether You Want It or Not*, 80 N.Y. St. B.J. (Sept. 2008), p. 16 (which, I am delighted to report, was cited by the First Department in *Grant v. Rattoballi*, 57 A.D.3d 272, 869 N.Y.S.2d 53 (1st Dep't 2008)).

4. 22 N.Y.C.R.R. § 202.19.

5. The automobile lawsuit could not be settled with the "rear-ender" due to the potential impact of N.Y. General Obligations Law § 15-108.

6. Frank has told me, and will tell anyone who listens, that the term "Philadelphia lawyer" is high praise, originating with Andrew Hamilton who successfully defended John Peter Zenger in his [in] famous 1735 libel case. Apparently, so the story goes, contemporary wags and bloggers noted that a "Philadelphia lawyer" won the case. I checked in Bryan A. Garner's *A Dictionary of Modern Legal Usage* (2d ed. 1995), and while Garner acknowledges the popularity of the story, he notes the first recorded use of the term was not until 1788. However, one thing Quinn, Garner and Horowitz all agree on: "The phrase a *Philadelphia lawyer* took on the meaning of a 'shrewd and learned lawyer.'" *Id.*

7. *Brill v. City of N.Y.*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2001).

8. David Horowitz, Burden of Proof, "Brill, *Baby*, Brill," N.Y. St. B.J. (Mar./Apr. 2009), p. 24.

9. CPLR 3212(a).

10. *See, e.g.*, *Constr. by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 866 N.Y.S.2d 702 (2d Dep't 2008).

11. David Horowitz, Burden of Proof, *What About the CPLR?*, N.Y. St. B.J. (Jan. 2009), p. 20. (My esteemed colleague, David Hamm, Esq., wrote a detailed and thoughtful counterpoint to my column, which I commend to readers. It may be found on the *Journal* blog *at* http://nysbar.com/blogs/barjournal.)

12. Some counties have a procedure for a certification conference and use them effectively.

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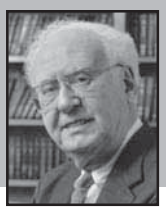
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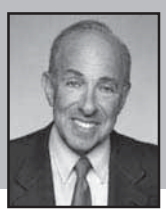
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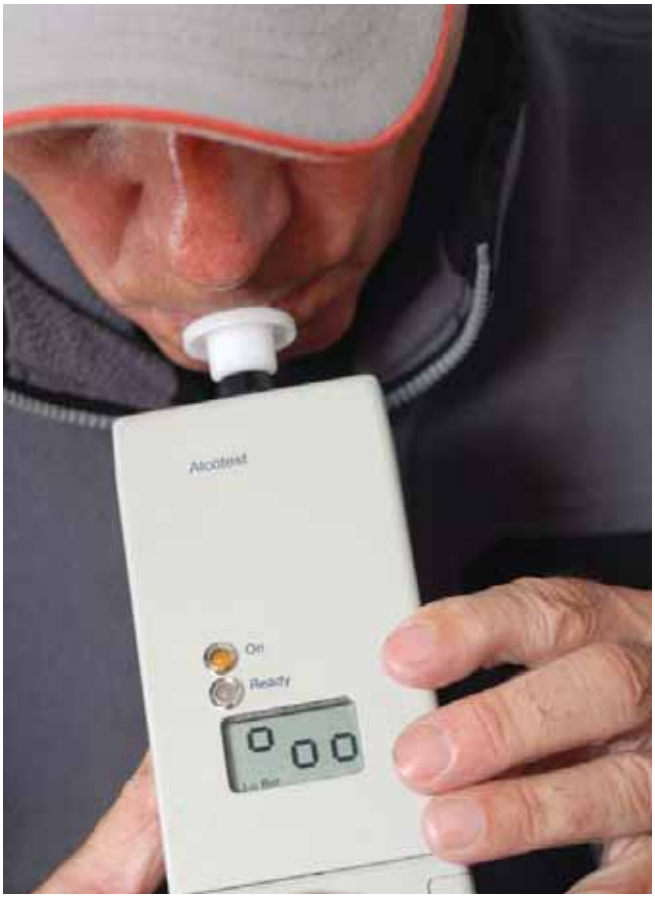

Is the District Attorney a Permissible Guest at a "Pringle Hearing"?

By Joseph F. Castiglione

Vehicle & Traffic Law § 1193(2)(e)(7) (VTL) governs New York State's law for the prompt driver license suspension hearings that are required to determine whether a person's license to operate a motor vehicle in the state of New York should be temporarily suspended pending prosecution of, among other things, charges of driving while intoxicated and/or driving with more than .08% blood alcohol content (BAC) under VTL § 1192(2), (2-a), (3), or (4-a).

These VTL § 1193(2)(e)(7) prompt suspension hearings are known as "Pringle Hearings," based upon the Court of Appeals's decision in *Pringle v. Wolfe*.[1] Since the Court's decision in *Pringle*, however, the issue of whether a district attorney's office can participate in these civil proceedings has been widely discussed, most recently in the Appellate Division, Third Department's July 2008 decision in *Schmitt v. Skovira*.[2] This article discusses *Skovira* and whether a district attorney has the legal jurisdiction to participate in a Pringle Hearing, either before or after a court makes its tentative findings under VTL § 1193(2)(e)(7).

The *Skovira* Decision

The Pringle Hearing statute dictates that "a court shall suspend a driver's license, pending prosecution, of any person charged with a violation of [VTL § 1192(2), (2-a), (3) or (4-a)] who, at the time of arrest, is alleged to have had .08 of one percent or more by weight of alcohol in such driver's blood as shown by chemical analysis of blood, breath, urine or saliva."[3] VTL § 1193(2)(e)(7)(b) continues, stating that "[i]n order for the court to impose such suspension it must find that the accusatory instrument conforms to the requirements of [Criminal Procedure Law (CPL) § 100.40] and there exists reasonable cause to believe [that] the holder" violated the statute. It then adds, in part, that "[a]t the time of such license suspension the holder shall be entitled to an opportunity to make a statement regarding these two issues and to present evidence tending to rebut the court's findings."[4]

The prompt suspension statute contemplates that the parties at a Pringle Hearing include "a court" and the accused "holder" of the driver's license at issue. But what about the district attorney's office? Since the statute was enacted, Pringle Hearings have generally been treated as private events involving only the court and the accused license holder. Recently, however, district attorney offices across the state have begun proactively seeking to participate in these proceedings. Does a district attorney's office have any role to play at a Pringle Hearing? And does a district attorney have the legal capacity to partici-

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pate in what have been identified as civil administrative proceedings? The Appellate Division, Third Department dealt with the latter issue in *Skovira*.

In *Skovira*, the petitioners had been arrested and charged with violating various subsections of VTL § 1192.[5] After a Pringle Hearing was scheduled for each petitioner, but "[b]efore the Pringle hearings could go forward, petitioners commenced [a] CPLR article 78 proceeding claiming that respondent Delaware County District Attorney should not be allowed to participate in the hearings,"[6] as was permitted by the hearing courts. The "petitioners [had] assert[ed on appeal] that by participating in their Pringle hearing, the District Attorney would be acting in excess of his authorized powers. In that regard, petitioners [sought] relief in the nature of prohibition (see CPLR 7803[2])."[7] The Third Department ultimately concluded that, as solely related to the petitioners' request for a writ of prohibition against the district attorney, there was no showing of "any existing provision of statutory or decisional law that prohibits public prosecutors from participating in *Pringle* hearings; accordingly, absent a clear legal right to relief, prohibition does not lie."[8]

The Third Department did not actually determine in *Skovira* that a district attorney could affirmatively participate in a Pringle Hearing; it addressed only whether a writ of prohibition against the district attorney was proper.[9] While the issue was not directly addressed by the court, a district attorney could arguably be allowed to participate in a Pringle Hearing, as limited by the hearing court's determination of whether it is necessary for a district attorney to participate before the court makes its tentative findings under VTL § 1193(2)(e)(7)(b).

VTL § 1193(2)(e)(7) and the court's inherent powers to control the Pringle Hearing and make findings without a district attorney participating in the hearing.

The provisions in VTL § 1193(2)(e)(7) indicate the court is in charge of conducting the proceedings at a Pringle Hearing: "[A] court shall suspend a driver's license," and "the court shall, as soon as practicable . . . suspend such license" and "[i]n order for the court to impose such suspension it must find that."[10] Apart from the direction in the VTL, New York jurisprudence recognizes that courts have the "inherent jurisdiction 'to do all things reasonably necessary to enable [them] to administer justice effectively.'"[11] As further explained by the Appellate Division, First Department:

> The general principle that courts inherently may do that which is necessary to ensure the integrity of the proceedings over which they preside has been long recognized in New York. . . . Inherent power, by its nature, does not derive from express statutory authority, but is governed by the need to reasonably enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. . . . Inherent power is a recognized adjunct to judicial power when a judge must discharge a responsibility, but lacks guidance from explicit legislative or decisional authority. Especially in such "gray area situations," the exercise of inherent authority derives from common-law tradition as a means "to fill the gaps of express law and to respond to problems . . . that come up in carrying out their adjudicative duties . . . to fashion rules and create procedure so that the adjudicative process can function."[12]

A court therefore also appears to have the inherent legal authority to direct the procedures and process at a Pringle Hearing.

Pringle Hearings have generally been treated as private events.

Under VTL § 1193(2)(e)(7) a court is required to find only that the accusatory instrument conforms to the requirements of CPL § 100.40 and that there exists "reasonable cause to believe" that the license holder operated a motor vehicle in violation of the VTL as stated. The "reasonable cause to believe" standard of proof is clearly far from the more onerous beyond all reasonable doubt standard.[13] If the hearing court can do without the aid of a district attorney, either as a factual witness or as legal advocate, the court can simply make its tentative findings and then provide the accused with the opportunity to make a statement and present evidence to rebut the those findings. The statute does not say that a court must allow a district attorney to participate before making its tentative findings. The court appears to have the inherent authority to direct that the evidence it deems necessary to make its tentative findings be submitted by the necessary entities or persons, and then to make its findings without the district attorney's assistance or participation. This seems consistent with the Appellate Division, Third Department's decision in *Broome County District Attorney's Office v. Meagher*, which concerned proceedings at a Pringle Hearing.[14]

In *Meagher*, the Third Department reversed a lower court's "judgment prohibiting [a] Town Court from barring [the district attorney's] participation during [the accused's] rebuttal at the suspension hearing,"[15] saying that the "threshold issue [was] whether prohibition is a proper remedy to challenge [a] Town Court's rulings regarding the manner of proceedings in the prompt suspension hearing."[16] The Third Department specifically noted that the town court had "perceived no further role for the prosecution" when it precluded the district attorney's office from participating in the Pringle Hearing.[17]

The appellate court ultimately held that the town court's ruling did not rise "to the level of acting in excess of its powers in violation of a clear legal right. Accordingly, there was no basis for issuing an order of prohibition."[18]

The *Meagher* decision therefore appears to support the conclusion that the plain language of VTL § 1193(2)(e)(7) does not require that a court allow a district attorney to participate in any capacity at a Pringle Hearing; the court just needs to review the evidence necessary to make its findings. Based upon the court's authority under VTL § 1193(2)(e)(7) and its inherent powers, a court appears also to have the authority to request that the district attorney's office participate in a Pringle Hearing, in a role deemed appropriate by the court; the district attorney could then arguably claim to have the power to legally participate in that hearing.

Section 1193 provides the specific "procedure" for "[s]uspension[s of licenses] pending prosecution."[27] The Pringle Hearings[28] are contained in that provision and identified as "[s]pecial provisions."[29] Section 1193's special procedure for determining whether a temporary license suspension is warranted pending prosecution is necessitated only by the prior existing charges/offenses being levied against individuals under VTL § 1192.

A district attorney's authority extends to prosecuting crimes and offenses and participating in the related procedures under VTL § 1192. However, Article 31 identifies the Pringle Hearings as the "*Procedures Applicable*" to the "Alcohol and Drug-Related *Offenses*" contained in § 1192.[30] While Pringle Hearings are considered civil administrative proceedings[31] that impose a "civil sanction,"[32] a district attorney's powers to prosecute the crimes and offenses levied under § 1192 may plausibly, inherently, extend to participation in the related "license sanctions" procedures provided for in § 1193(2), if requested by a court. That is, if a district attorney has the authority to participate in the proceedings prosecuting the crimes/offenses under § 1192, a district attorney's inherent authority could reasonably extend to participating in the sanction proceedings in § 1193 because they are the "procedures applicable." This rationale regarding the interplay between the crimes/offenses promulgated under § 1192 and the temporary license suspension procedures under § 1193 is consistent with the title of Article 31 itself: "Alcohol and Drug-Related *Offenses and Procedures Applicable Thereto*."[33]

A court appears also to have the authority to request that the district attorney's office participate in a Pringle Hearing, in a role deemed appropriate by the court.

A district attorney arguably has the legal authority to participate in a Pringle Hearing.

The statutory "powers and duties" of district attorneys include "conduct[ing] all prosecutions for crimes and offenses cognizable by the court of [a district attorney's respective] county."[19] These statutory powers also require that a district attorney "perform such additional and related duties as may be prescribed by law."[20] Further, New York jurisprudence recognizes that a district attorney's authority includes the powers and duties that are conferred by the Legislature, "either expressly or by necessary implication."[21] These powers and duties could arguably extend to participation in Pringle Hearings, because these hearings are the means of imposing "sanctions" on individuals who commit crimes and offenses prosecuted under VTL § 1192.[22]

Vehicle and Traffic Law Title VII – "Rules of the Road" – contains VTL Article 31. VTL Article 31 is titled "Alcohol and Drug-Related Offenses and *Procedures Applicable Thereto*."[23] Article 31 promulgates New York State's law governing "[o]perating a motor vehicle while under the influences of alcohol or drugs" in § 1192 and then sets out the related "[s]anctions" in § 1193.[24] Among other offenses, § 1192 addresses the criminal offenses for "[d]riving while ability impaired" (§ 1192(1)); "[d]riving while intoxicated; per se" (§ 1192(2)); "[a]ggravated driving while intoxicated; per se" (§ 1192(2-a)); "[d]riving while intoxicated" (§ 1192(3)); "[d]riving while ability impaired by drugs" (§ 1192(4)); and "[d]riving while ability impaired" by combination of drugs and/or alcohol (§ 1192(4-a)).[25] Then, § 1193(2) promulgates the related "[l]icense sanctions" for alleged charges and violations of VTL § 1192.[26]

A district attorney's interest in preserving evidence and witness testimony.

As stated earlier, a court is statutorily and inherently empowered to administer the proceedings and evidence at a Pringle Hearing. While a district attorney can seemingly participate in a Pringle Hearing if requested by the court, the statute does not require that a court allow a district attorney's office to participate in the hearing before the court is able to make its findings under VTL § 1193(2)(e)(7)(b). It should be noted, however, that, in certain limited circumstances, a court could possibly be considered to have inappropriately abused its inherent authority to control its proceedings if it precludes a district attorney's office from participating at a Pringle Hearing.

A district attorney's authority includes "conduct[ing] all prosecutions for crimes and offenses" recognized under applicable law.[34] That authority includes those powers

conferred upon a district attorney by the Legislature "either expressly or by necessary implication."[35] By implication, that authority could extend to participation in any civil, administrative or criminal proceeding in order to reasonably preserve evidence or testimony that a district attorney would reasonably rely upon to properly prosecute crimes and offenses. If a court allows an accused at a Pringle Hearing to present or contest evidence that could be used at a subsequent time during the underlying criminal proceeding, and that evidence or testimony could reasonably affect the outcome of a trial or other pre-trial proceedings, a district attorney would clearly have an interest in protecting its evidence or witnesses. In those circumstances, a court's decision to preclude a district attorney from participating in the Pringle Hearing could likely constitute an impermissible abuse of its inherent authority over its proceedings.

This seems consistent with the Third Department's decision in *Meagher*. After noting that the town court had "perceived no further role for the prosecution" when it precluded the district attorney's office from participating in the license suspension hearing, the Third Department determined that a writ of prohibition was improper. "There is no indication in the record that Town Court was about to permit [the accused] to turn his right to rebuttal into an opportunity for free-wheeling discovery regarding the criminal matter or to otherwise permit a protracted hearing running amok far beyond the parameters of the narrow issues before it."[36] As such, at a Pringle Hearing, if a court allows an accused to "run amok" in such a manner, and then precludes a district attorney from participating in the Pringle Hearing, grounds for a writ of prohibition and/or to challenge the court's decision, based upon the court abusing its inherent authority, would appear to exist.

Conclusion

No one enjoys the company of any person that shows up to a private event uninvited. In the long and the short, if you see a district attorney or the district attorney's agent at a Pringle Hearing, be cautious: they don't have to be kicked out; however, if the court or issues at the hearing go too far, they may try to stay all night. ■

1. 88 N.Y.2d 426, 646 N.Y.S.2d 426 (1996); *see also Broome County District Attorney's Office v. Meagher*, 8 A.D.3d 732, 732, 77 N.Y.S.2d 567 (3d Dep't 2004); *see also Schmitt v. Skovira*, 53 A.D.3d 918, 919, 862 N.Y.S.2d 167 (3d Dep't 2008).

2. 53 A.D.3d 918.

3. VTL § 1193(2)(e)(7)(a).

4. VTL § 1193(2)(e)(7)(b). Note, the Legislature's express use of the two different words "evidence" and "findings" indicates that the Legislature only intended that an accused be able to present "evidence" to rebut the court's "findings"; the accused does not have the right to rebut the *evidence* the court relied upon in making its findings.

5. *Skovira*, 53 A.D.3d at 918–19.

6. *Id.* at 919.

7. *Id.* at 920.

8. *Id.* at 921 (citation omitted).

9. *See also id.* at 921 n.3 (stating, "[w]e do not comment on the merits of petitioners' contention that a public prosecutor's participation in a *Pringle* hearing would be an act in excess of his or her jurisdiction").

10. *See* VTL §1193(2)(e)(7)(a), (b).

11. *Alvarez v. Snyder*, 264 A.D.2d 27, 35, 702 N.Y.S.2d 5 (1st Dep't 2000).

12. *Id.* at 35 (internal citations omitted); *see also People v. Green*, 170 Misc. 2d 519, 524, 653 N.Y.S.2d 1013 (Sup. Ct., Bronx Co. 1996) (stating that a court's inherent powers include "the power to summon witnesses and compel their attendance"); *see also Trombetta v. Van Amringe*, 156 Misc. 307, 310, 280 N.Y.S. 480 (Sup. Ct., N.Y. Co. 1935) (stating that a court has inherent power "to compel the attendance of witnesses or to require the production of books and papers").

13. The VTL § 1193(2)(e)(7)(b) standard of "reasonable cause to believe" appears to extend to the reliability of the chemical analysis test itself; *i.e.*, the court only need to find "reasonable cause to believe" that the chemical test the court has (and the results) are reliable and proper.

14. 8 A.D.3d 732, 732, 777 N.Y.S.2d 567 (3d Dep't 2004).

15. *Id.* at 733.

16. *Id.* at 734.

17. *Id.*

18. *Id.* Relatedly, to the extent one reads *Skovira* as standing for the proposition that a district attorney *can* participate in a Pringle Hearing because the Third Department found that there was no statute prohibiting a district attorney from participating in the hearings, *Meagher* would then stand for the opposite, *i.e.*, a district attorney cannot participate in a Pringle Hearing because the court in *Meagher* found that there was no "clear legal right" that a district attorney *could* participate in those hearings.

19. N.Y. County Law § 700(1).

20. *Id.*

21. *E.g., Czajka v. Breedlove*, 200 A.D.2d 263, 265, 613 N.Y.S.2d 741 (3d Dep't 1994).

22. An opposing argument would seemingly be that there does not appear to be any statute that affirmatively states that a district attorney can participate in a Pringle Hearing. As a district attorney's "authority is restricted to the powers and duties 'conferred by the Legislature, either expressly or by necessary implication" (*Skovira*, 53 A.D.3d at 919–20), without a statutory basis, there are not any express powers that would reasonably extend by necessary implication to participating in the "preconviction license suspension procedures [that] are civil administrative proceedings." *Id.* However, as stated above and below, a district attorney's powers to prosecute the underlying offenses under VTL § 1192, and the significant potentially negative impacts to their evidentiary interests in prosecuting the underlying offenses, both appear to be more probable and reasonable grounds to confer legal jurisdiction to allow a district attorney to participate in a Pringle Hearing.

23. Emphasis added.

24. The titles of both sections.

25. *See* VTL § 1192 (1), (2), (2-a), (3), (4), (4-a).

26. *See also* VTL § 1193(2)(a)(1) (stating sanctions for "[d]riving while ability impaired" under VTL § 1192(1)), and § 1193(2)(b)(1-a)–(3) (providing for license "revocation" for various violations of § 1192).

27. VTL § 1193(2)(e)(1).

28. *See* notes 31 and 32, *infra*.

29. *See* VTL § 1193(2)(e)(1), (7).

30. Emphasis added.

31. *Pringle*, 88 N.Y.2d at 435 (stating "civil statute"); *Skovira*, 53 A.D.3d at 919–20.

32. *State of N.Y. v. Roach*, 226 A.D.2d 55, 59, 649 N.Y.S.2d 607 (4th Dep't 1996).

33. Emphasis added.

34. *See* County Law § 700(1).

35. *E.g., Czajka v. Breedlove*, 200 A.D.2d 263, 265, 613 N.Y.S.2d 741 (3d Dep't 1994).

36. *Meagher*, 8 A.D.3d at 734.

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Protecting Minority Shareholders in Close Corporation Valuation Proceedings

By Daniel B. Moar

The close corporation can be a useful corporate format for the smaller or family-owned-and-operated business. But unfortunately, that format also offers unique opportunities to oppress minority shareholders. This article will examine why close corporations can be easily misused by the majority to engage in shareholder oppression, typical types of oppression and how an attorney can increase the likelihood that oppressed minority shareholders will receive a higher value for their shares.

The ease with which shareholder oppression can occur in close corporations is largely due to the corporate form, which is generally characterized by the following: (1) a limited number of shareholders; (2) the absence of a public market for the resale of shares; and (3) active shareholder participation in management and day-to-day business operations.[1] Where a minority shareholder is oppressed, the absence of a resale market leaves the shareholder with little ability to withdraw from the close corporation while still receiving a return on his or her investment.[2]

Close corporations are often formed by families or close friends, which also explains why the parties rarely plan in advance for the possibility of the relationship souring. As Professor Charles Murdock noted, "[f]rom a relational standpoint, people enter closely-held businesses in the same manner as they enter marriage: optimistically and ill-prepared. Minority shareholders often fail to obtain counsel and protect themselves through veto provisions or otherwise."[3] Given their lack of anticipation of the business divorce, oppressed minority shareholders generally must turn to the legal system for vindication.

Understanding Oppression

While a minority shareholder can turn to the courts when the majority engages in illegal or fraudulent conduct, that minority shareholder can also seek judicial relief when the majority engages in "oppressive conduct."[4] As noted by the New York Court of Appeals in *In re Kemp & Beatley, Inc.*,[5] oppression is analytically distinct from illegality and is subject to a "reasonable expectations" test.

As the Court explained, "oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture."[6]

Given the broad "reasonable expectations" test, there is no all-encompassing list of acts that can be deemed oppressive, nor will the same acts be considered oppressive in every circumstance. Nonetheless, the most common and recurring forms of oppression include the failure to declare dividends, termination of a minority shareholder's employment, removal of a minority shareholder from management, excessive compensation to the majority shareholders, diversion of opportunities to other corporations and mergers under unfair terms.[7]

To understand why the same acts will not always be deemed oppressive, compare *In re Kemp*[8] with *Burack v. I. Burack, Inc*.[9] In *Kemp*, the corporation historically gave all of its shareholders a distribution of the company's earnings through dividends or extra compensation in proportion to a shareholder's ownership share. When the majority later denied these de facto dividends to some minority shareholders, while continuing to grant them to everyone else, the Court of Appeals found the majority's conduct to be oppressive.[10] In contrast, in *Burack*, the Second Department held that the failure to declare dividends was not oppressive because the corporation had a long-standing policy not to declare dividends.[11] The different outcomes of these cases can be traced directly to the "reasonable expectations" test. Where a corporation has continuously declared dividends in the past, the minority can reasonably expect continued dividends. But where the corporation has not previously declared dividends, the minority cannot reasonably expect them.

Similarly, the removal of a shareholder from management is often – but not always – oppressive. For example, in *In re Farega Realty Corp.*,[12] the majority failed to consult regularly with a minority shareholder. The Third Department held that this was not oppressive under the circumstances because the minority shareholder had not previously sought management responsibilities, and his involvement in the business "was primarily that of a passive investor."[13] In contrast, under the more usual close corporation arrangement, where the minority actively participates in the operation and management of the corporation, termination from management will generally constitute oppression.[14]

Dissolution and Election to Purchase

When the majority engages in fraudulent, illegal, or oppressive conduct, a minority shareholder or shareholders holding at least 20% of outstanding shares[15] can petition for dissolution of the close corporation under BCL § 1104-a. Other shareholders or the corporation have an absolute right to avoid dissolution under BCL § 1118(a), however, by electing to purchase the minority's shares within 90 days after the dissolution filing.[16] Where an election is made to purchase the minority's shares, the purchase price is the "fair value" of the shares as of the day before the filing of the petition for dissolution.[17] Given that dissolution is available where the majority engages in fraudulent, illegal, or oppressive conduct, the minority and majority begin at opposing corners and can rarely agree on fair value. Thus, the primary role for an attorney representing the minority shareholder is to persuade the court to accept the minority shareholder's valuation as the fair value of the shares.

Determining Fair Value

While BCL § 1118 requires that purchase of a minority shareholder's shares be at "fair value," it neither defines fair value nor offers any criteria for determining it. New York case law makes clear that there is no one-size-fits-all formula for determining fair value.[18] Instead, the criteria or valuation methods for determining fair value must be tailored to the specific circumstances of each case.[19]

Given the lack of a uniform standard and the Court of Appeals's broad requirement that courts conduct "a discriminating consideration of all information bearing upon an enlightened prediction of the future,"[20] courts enjoy considerable leeway in determining fair value. One recent trial court described its role in determining fair value as that of a "soothsayer."[21] As a legal fortune teller, the court's role is by necessity and is imprecise, though not entirely without boundaries.

Before addressing what factors courts have considered in finding fair value, it should be noted that not all common valuations lead to fair value. For example, many close corporation shareholder agreements contain a value that a shareholder will receive upon a voluntary sale. The Court of Appeals has made clear, however, that the value in a shareholder agreement for a voluntary sale is not the same as "fair value," because dissolution proceedings resulting from minority oppression are not deemed a voluntary sale but rather the equivalent to a forced buyout.[22]

While there is significant flexibility in determining fair value, there are three generally accepted valuation methods: market value, investment value, and net asset value.

Market Value

Market value is rarely used in determining fair value because close corporation stocks are, by definition, not traded on a public market.[23] Where there is a bona fide offer to purchase all outstanding shares of the corporation, the offer can potentially be used as a basis for determining fair value. Purchase offers are not generally useful for valuation, however, because they are usually made by insiders or family members and are not arm's-length transactions.[24]

Investment Value

Investment value considers what a hypothetical outside investor would pay for the entire business as an ongoing entity, taking into consideration the business's assets, liabilities, tangibles and intangibles.[25] Valuation under this method is usually a function of the expected future earning power of the corporation under either a discounted income approach or a comparative appraisal approach.[26]

The discounted income approach requires that the future cash flow of the close corporation be determined and then discounted to present value.[27] The future cash flow is frequently determined by averaging the corporation's earnings from prior years or applying a weighted average that gives greater weight to corporate earnings in more recent years.[28]

Under a comparative appraisal approach, the price-earnings ratio of comparative publicly traded companies is determined and applied to the close corporation.[29] The usefulness of this approach is limited because many close corporations do not have comparative publicly traded counterparts.[30]

Net Asset Value

Net asset value requires that the value of all assets be combined and reduced by the amount of all liabilities.[31] Given that net asset value focuses on the valuation of tangible assets, it is generally an inappropriate valuation method for corporations having significant goodwill or other intangible assets. The Second Department noted that this valuation method is generally only appropriately applied to "manufacturing corporations or real estate and investment holding companies."[32]

Other Factors

While market value, investment value and net asset value are the three most broadly applied valuation methods, courts will also consider numerous other factors in determining fair value. For instance, the Second Department has repeatedly endorsed consideration of factors used by the Internal Revenue Service in valuing close corporation stock for tax purposes, including:

1. the nature of the business and the history of the enterprise from its inception;
2. the economic outlook in general and the condition of the specific industry in particular;
3. the book value of the stock and the financial condition of the business;
4. the earning capacity of the company;
5. the dividend-paying capacity;
6. whether or not the enterprise has goodwill or other intangible assets;
7. sales of the stock and the size of the block of stock to be valued; and
8. the market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.[33]

The New York Court of Appeals has also suggested that courts "may take into account the shareholders' agreement provisions regarding value, petitioner's own offer to buy, the corporation's alleged efforts to sell the business earlier and any other pertinent evidence."[34] There is no apparent end to the list of factors that courts can consider in determining fair value.

Market value, investment value and net asset value should also not necessarily be viewed as entirely distinct valuation methods. Courts will often fail to state which method they are accepting or will apply a hybrid method mixing the considerations of the three valuation methods.[35] Thus, attorneys representing minority shareholders should be prepared to explain why any factor considered under any of the methods or applied in caselaw weighs in their client's favor.

Discounts

A significant component of valuation consists of determining the propriety of applying discounts to the value of shares. The two types of discounts are the minority discount and the marketability discount.

Potential buyers are generally willing to pay a "control premium" to have a majority interest in a company because the majority can control corporate operations. Conversely, buyers will generally discount the value of a minority interest because of its lack of control. The New York Court of Appeals has held, however, that the minority discount should *not* be applied in determining fair value of the minority's shares.[36] Minority shares should not be valued below majority shares because to do so would enrich the majority by allowing them to force out a minority shareholder at a reduced rate.[37]

The Court of Appeals has, however, endorsed the application of the marketability discount when determining fair value.[38] The marketability or illiquidity discount simply reflects the fact that a potential buyer would pay less for close corporation shares because there is no readily available market to resell them.[39] The marketability discount can be quite substantial, with cases noting or applying marketability discounts of 10% to 50%.[40]

The good news for a minority shareholder is that the marketability discount will likely apply only to the close corporation's "goodwill" and will not apply to that part of its value derived from tangible assets. The Second Department has repeatedly held that the marketability discount applies only to the value of the close corporation attributable to goodwill;[41] the marketability discount does not apply to tangible assets, which are generally easier to resell to a willing buyer. While one trial court in the First Department rejected the Second Department's position and applied the marketability discount to the entire value of the close corporation,[42] a recent First Department

decision suggests that the trial court's decision was erroneous. In *Vick v. Albert*,[43] the First Department rejected the application of any marketability discount to a real estate partnership because its entire value was derived from real estate and thus had no goodwill.[44] *Vick* involved dissolution of a partnership and not a close corporation, but in rejecting application of the marketability discount, the First Department cited to Second Department precedents on close corporations.[45]

Protecting the Minority Shareholder in Valuation Proceedings

"Valuing a closely held corporation is not an exact science."[46] Nonetheless, there are several steps an attorney can take to increase the likelihood that a court will accept the minority shareholder's valuation as fair value.

Obtain Financial Records

A minority shareholder will often want to obtain the financial records of the close corporation prior to filing for dissolution. These records may not be readily available where the minority shareholder has been frozen out of the corporation.

Minority shareholders have several options for obtaining financial records. First, they can assert the right to inspect the books and records of the close corporation.[47] Where a minority shareholder is a director, he or she can also assert the director's right to inspect the books and records.[48] In certain circumstances, a minority shareholder can obtain a court order granting the right to pre-action disclosure under N.Y. Civil Practice Law and Rules 3102(c).

Additionally, the Internal Revenue Code provides an avenue for a minority shareholder to obtain the income tax return of the close corporation, upon written request.[49] Finally, if a minority shareholder cannot obtain the records in advance of petitioning for dissolution, the close corporation is required to make the books and records available to the minority shareholder within 30 days after filing a petition for dissolution.[50]

Time the Filing of the Petition

The timing of filing the petition for dissolution can have significant impact on valuation because fair value is determined "as of the day prior to the date" of filing for dissolution.[51] When an attorney has already reviewed the books and records, he or she may be able to identify events that will significantly affect the value of the close corporation and can time the filing of the petition to ensure the highest valuation. While dissolution proceedings are most commonly filed where the close corporation is in financial decline, this is not always the case.

Where the close corporation has an improving financial outlook, the attorney may want to delay petitioning for dissolution to reach a higher fair value.

For instance, in *Taines v. Gene Barry One Hour Photo Process, Inc.*,[52] the value of the close corporation greatly increased during the two-year period between when the petitioner filed for dissolution and the court issued its decision on fair value. Had the petitioner delayed filing for dissolution, the petitioner would have benefited from a significantly higher fair value.

In some instances the value of close corporation shares will be artificially low where funds have been siphoned away from the corporation.

Where the value of the close corporation increases following the filing of the petition for dissolution, the minority shareholder can, theoretically, withdraw the petition and re-file it later in an attempt to obtain a higher fair value. However, the court remains free to deny the minority shareholder permission to withdraw a petition. The court is likely to decline permission when the corporation or other shareholders have already elected to purchase the minority's shares.[53]

Look for Excessive Compensation and Misappropriation

In some instances the value of close corporation shares will be artificially low where funds have been siphoned away from the corporation. Perhaps the most common form of siphoning is the payment of excessive executive compensation, which is often done in lieu of dividends to lower the corporation's taxable income.[54] Courts have made clear, however, that when excessive executive compensation, misappropriation of funds, or other measures have lowered the corporation's earnings, the share price should be upwardly adjusted to reach fair value.[55]

Avoid the Minority Discount

The Court of Appeals has clearly rejected application of the minority discount in determining fair value.[56] Attorneys must still be wary, however, because in some instances experts have proposed marketability discounts that improperly incorporated elements of the minority discount.[57]

Avoid Prior Stock Sales Comparison

While prior stock sales or offers to sell may be relevant in determining fair value in some circumstances,[58] prior sales will not always provide a valid basis for valuation because they are often made with insiders or family members at severe discounts.[59] And, in some circumstances, apparent arm's-length sales may still be rejected as an improper basis for valuation.

For example, in *In re Bambu Sales*,[60] the court considered a stock sale by a former employee of a close corporation. The former employee had become an entrepreneur on his own and was no longer an insider of the close corporation. When he decided to sell his shares, he did so primarily to avoid the recurring tax problems he had incurred by owning the shares. The court determined that the former employee's sale was at arm's length but was primarily based on personal considerations and was therefore an inappropriate comparison in determining fair value of the close corporation stock.[61]

Avoid an "Added" Marketability Discount

While a marketability discount is properly applied when valuation of the close corporation is based on comparisons to similar publicly traded corporations, under other valuation methods a marketability discount should not be "added" to the value. Some valuation methods already account for lack of marketability, such that a later percentage discount would serve only to double the marketability discount.

For instance, in *In re Seagroatt Floral*,[62] the minority shareholder's expert provided a value based on a capitalization rate that itself accounted for the lack of marketability of the shares. The corporation nonetheless argued that an identifiable percentage discount should still be applied and that the marketability discount could not be "buried" in the expert's capitalization rate. The Second Department rejected this claim, holding that the marketability discount could be included intrinsically in the expert's valuation and did not have to be based on a specified percentage discount.[63]

Avoid the Marketability Discount

In some circumstances the minority shareholder can avoid application of the marketability discount altogether by showing that buyers are willing to purchase the close corporation shares. For instance, in *In re Walt's Submarine Sandwiches, Inc.*,[64] the petitioner argued that no marketability discount should be applied because the close corporation had received 120 responses to a "for sale" advertisement in the *Wall Street Journal*. Both the trial court and Third Department agreed, finding that the evidence of willing buyers amply supported a finding of ready marketability.[65]

Tax-Valuation-Based Estoppel

Individuals and corporations are ordinarily barred from taking positions in court that are contrary to prior positions taken on tax returns.[66] When the majority seeks a low valuation based on contrary positions previously made in a corporation's tax returns, the minority shareholder may rightfully argue that the majority is estopped from arguing the new contrary positions.

Use Different Valuation Methodologies

An attorney may want to offer more than one valuation of the minority shares using either different methods or a blending of two or more methodologies. This was the tactic employed in *Murphy*,[67] where the expert weighed and applied two methods to reflect his view as to proper valuation.[68] An attorney should also consider giving alternative valuations under different valuation methods so that if the court disagrees with the attorney's preferred valuation, it will nonetheless have an alternative to select other than that of opposing counsel.

Apply for Interest and Costs

Finally, the minority shareholder should apply for interest and costs. Interest will be determined "from the date prior to the filing of the petition until the date of payment, unless a determination is made that petitioner has acted in bad faith."[69] The court may award costs as a matter of equity in proportion to the petitioner and majority shareholders' percentages of shares owned.[70]

Conclusion

Determining what constitutes "fair value" of close corporation shares is not an exact science and is often subject to wildly different valuations by dueling experts. For example, in one case the difference between the two experts' valuations of the minority shares was nearly 30,000%.[71] While courts have considerable leeway in determining fair value, an attorney can take steps to increase the likelihood of achieving a higher valuation for the minority shareholder. These steps include obtaining financial records in advance of petitioning for dissolution, strategically timing the filing of the petition to obtain a higher value, avoiding the use of inapplicable or exaggerated discounts and ensuring that any valuation is adjusted to account for the siphoning of corporate funds. ■

1. Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 Duke L.J. 293, 299 (2004); *see In re Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 71, 484 N.Y.S.2d 799 (1984) ("It is widely understood that, in addition to supplying capital to a contemplated or ongoing enterprise and expecting a fair and equal return, parties comprising the ownership of a close corporation may expect to be actively involved in its management and operation.").

2. *Kemp*, 64 N.Y.2d at 72 ("As the stock of closely held corporations generally is not readily salable, a minority shareholder at odds with management policies may be without either a voice in protecting his or her interests or any reasonable means of withdrawing his or her investment.").

3. Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares*, 65 Notre Dame L. Rev. 425, 426 (1990); *see In re Wiedy's Furniture Clearance Ctr. Co.*, 108 A.D.2d 81, 84, 487 N.Y.S.2d 901 (3d Dep't 1985) (noting that the minority shareholder was frozen out "for no legitimate reason other than family animosity").

4. N.Y. Business Corporation Law § 1104-a(a) (BCL) allows minority shareholders holding 20% or more of all outstanding shares to petition for judicial dissolution of the corporation where "(1) [t]he directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders; [or] (2) [t]he property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation."

5. 64 N.Y.2d 63.

6. *Id.* at 73; *Brickman v. Brickman Estate at the Point, Inc.*, 253 A.D.2d 812, 813, 677 N.Y.S.2d 600 (2d Dep't 1998).

7. *In re Parveen*, 259 A.D.2d 389, 391, 687 N.Y.S.2d 90 (1st Dep't 1999); F. Hodge O'Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 Clev. St. L. Rev. 121, 125–29 (1987); *see also* Murdock, *supra* note 3, at 425 n.4 ("[A] 'freeze out' is used to denote the situation in which a minority shareholder retains his or her interest but is deprived either of employment or of dividends such that he or she is unable to realize any return on the investment in the close corporation.").

8. 64 N.Y.2d 63.

9. 137 A.D.2d 523, 524 N.Y.S.2d 457 (2d Dep't 1988).

10. 64 N.Y.2d at 67.

11. 137 A.D.2d at 526.

12. 131 A.D.2d 797, 517 N.Y.S.2d 610 (3d Dep't 1987).

13. *Id.* at 798.

14. *See, e.g., O'Donnel v. Marine Repair Servs., Inc.*, 530 F. Supp. 1199, 1208 (S.D.N.Y. 1982).

15. Where the minority shareholder owns less than 20% of outstanding shares, he or she can still bring a common law action for dissolution. *Leibert v. Clapp*, 13 N.Y.2d 313, 315, 247 N.Y.S.2d 102 (1963) ("Although there is no explicit statutory authority for the relief of dissolution sought in this action, the entire court is agreed that it is available as a matter of judicial sponsorship."). Courts will generally consider the same case law as applied in a dissolution proceeding under BCL § 1104-a. *See, e.g., In re Davis*, 174 A.D.2d 449, 571 N.Y.S.2d 234 (1st Dep't 1991); *Lewis v. Jones*, 107 A.D.2d 931, 483 N.Y.S.2d 868 (3d Dep't 1985).

16. *In re Pace Photographers, Inc.*, 71 N.Y.2d 737, 744–45, 530 N.Y.S.2d 67 (1988) ("[T]he Legislature provided a defensive mechanism for the other shareholders and the corporation, giving them an absolute right to avoid the dissolution proceedings and any possibility of the company's liquidation by electing to

purchase petitioner's shares at their fair value and upon terms and conditions approved by the court.").

17. BCL § 1118(b) ("determine the fair value of the petitioner's shares as of the day prior to the date on which such petition was filed").

18. *In re Seagroatt Floral Co., Inc.*, 78 N.Y.2d 439, 445, 576 N.Y.S.2d 831 (1991) ("[F]air market value, being a question of fact, will depend upon the circumstances of each case; there is no single formula for mechanical application."); *Amodio v. Amodio*, 70 N.Y.2d 5, 516 N.Y.S.2d 923 (1987).

19. *Markman v. Exterior Delite, Inc.*, 14 Misc. 3d 910, 918, 831 N.Y.S.2d 656 (Sup. Ct., Bronx Co. 2006) ("Stocks of closely-held corporations cannot reasonably be valued by application of any inflexible approach; it must be tailored to the particular circumstances.").

20. *Amodio*, 70 N.Y.2d at 7.

21. *Murphy v. U.S. Dredging Corp.*, No. 2640-06, 2008 WL 2401230, *12 (Sup. Ct., Nassau Co. May 19, 2008).

22. *Pace Photographers*, 71 N.Y.2d at 747.

23. *Blake v. Blake Agency*, 107 A.D.2d 139, 146, 486 N.Y.S.2d 341 (2d Dep't 1985).

24. *Id.*

25. *Markman*, 14 Misc. 3d at 921 ("The investment value method estimates what a prudent and informed investor would be willing to pay in order to buy the entire business as an ongoing entity, considering its assets, liabilities, tangibles and intangibles."). Investment value is generally the valuation method of choice for corporations that provide services. *In re Brooklyn Home Dialysis Training Ctr., Inc.*, 293 A.D.2d 747, 741 N.Y.S.2d 280 (2d Dep't 2002).

26. *Blake*, 107 A.D.2d at 147.

27. Stephen J. Leacock, *The Anatomy of Valuing Stock in Closely Held Corporations: Pursuing the Phantom of Objectivity into the Millennium*, 2001 Colum. Bus. L. Rev. 161, 187 (2001).

28. *Blake*, 107 A.D.2d at 147.

29. *In re Fleischer*, 107 A.D.2d 97, 100, 486 N.Y.S.2d 272 (2d Dep't 1985); Leacock, *supra* note 27 at 192.

30. *See, e.g.*, *In re Bambu Sales, Inc.*, 177 Misc. 2d 459, 462, 672 N.Y.S.2d 613 (Sup. Ct., Nassau Co. 1997) (rejecting expert's comparison of value of wholesalers of tobacco and grocery products to close corporation whose only business was the wholesale distribution of cigarette papers manufactured in Spain).

31. Leacock, *supra* note 27 at 185.

32. *Blake*, 107 A.D.2d at 146.

33. *Amodio v. Amodio*, 70 N.Y.2d 5, 7, 516 N.Y.S.2d 923 (1987) (citing Rev. Rul. 59-60, 1959-1 C.B. 237); *Blake*, 107 A.D.2d at 146–47 (same).

34. *In re Pace Photographers, Inc.*, 71 N.Y.2d 737, 748, 530 N.Y.S.2d 67 (1988); *see also Murphy v. U.S. Dredging Corp.*, No. 2640-06, 2008 WL 2401230, *7 (Sup. Ct., Nassau Co. May 19, 2008) (considering defendant corporation president's prior offer to repurchase petitioner's shares).

35. *Murphy*, No. 2640-06, 2008 WL 2401230, at *5 (considering expert valuations based on the weighing of different approaches).

36. *Friedman v. Beway Realty Corp.*, 87 N.Y.2d 161, 169, 638 N.Y.S.2d 399 (1995).

37. *Id.*

38. *In re Seagroatt Floral Co., Inc.*, 78 N.Y.2d 439, 445–46, 576 N.Y.S.2d 831 (1991) ("[W]hatever the method of valuing an interest in such an enterprise, it should include consideration of any risk associated with illiquidity of the shares.").

39. *Friedman*, 87 N.Y.2d at 165.

40. *In re Vetco, Inc.*, 292 A.D.2d 391, 392, 738 N.Y.S.2d 599 (2d Dep't 2002) (25%); *Blake*, 107 A.D.2d at 149 (25%); *Murphy*, No. 2640-06, 2008 WL 2401230, at *18 (15%); *Markman v. Exterior Delite, Inc.*, 14 Misc. 3d 910, 914 n.2, 831 N.Y.S.2d 656 (Sup. Ct., Bronx Co. 2006) (10%); *Hall v. King*, 177 Misc. 2d 126, 132, 675 N.Y.S.2d 810 (Sup. Ct., N.Y. Co. 1998) (applying 25% marketability discount and noting expert testimony that average marketability discount in appraisers' studies is from 25% to 40%); *see also In re Cohen*, 168 Misc. 2d 91, 99, 636 N.Y.S.2d 994 (Sup. Ct., N.Y. Co. 1995) (noting studies suggest marketability discount of 35% to 50%); Moll, *supra* note 1, at 317 (noting that empirical evidence indicates that the marketability discount averages 35% to 50%).

41. *See Cinque v. Largo Enter. of Suffolk County*, 212 A.D.2d 608, 609–10, 622 N.Y.S.2d 735 (2d Dep't 1995); *Whalen v. Whalen's Moving & Storage Co., Inc.*, 204 A.D.2d 468, 469, 612 N.Y.S.2d 165 (2d Dep't 1994).

42. *Hall*, 177 Misc. 2d at 134 ("[T]he line of Second Department cases limiting the unmarketability discount appears to lack any valid theoretical underpinning.").

43. 47 A.D.3d 482, 849 N.Y.S.2d 250 (1st Dep't 2008).

44. *Id.* at 484 ("The unavailability of the discounts is particularly apt here, where the business consists of nothing more than ownership of real estate.").

45. *Id.* (citing *Cinque*, 212 A.D.2d 608).

46. *In re Seagroatt Floral*, 78 N.Y.2d 439, 445, 576 N.Y.S.2d 831 (1991).

47. BCL § 624; *Dwyer v. DiNardo & Metschl, P.C.*, 41 A.D.3d 1177, 1178, 838 N.Y.S.2d 745 (4th Dep't 2007) ("It is well settled that a shareholder has both statutory and common-law rights to inspect the books and records of a corporation if inspection is sought in good faith and for a valid purpose and he set forth a proper purpose for the inspection, i.e., that an inspection of the books and records of respondent was necessary in order to determine the value of the shares.") (internal quotations omitted); O'Neal, *supra* note 7, at 139.

48. *Cohen v. Cocoline Prods.*, 309 N.Y. 119, 122 (1955) ("[T]he courts of this State have accorded to corporate directors an absolute, unqualified right, having its roots in the common law, to inspect their corporate books and records."); O'Neal, *supra* note 7, at 139.

49. I.R.C. § 6103(e) (providing that the income tax return of a corporation "shall, upon written request, be open to inspection by or disclosure to . . . any bona fide shareholder of record owning 1 percent or more of the outstanding stock of such corporation").

50. BCL § 1104-a(c).

51. BCL § 1118(b).

52. 123 Misc. 2d 529, 539, 474 N.Y.S.2d 362 (Sup. Ct., N.Y. Co. 1983).

53. *See, e.g.*, *In re Hung Yuk Ong*, 299 A.D.2d 173, 174, 753 N.Y.S.2d 360 (1st Dep't 2002).

54. *Raskin v. Walter Karl, Inc.*, 129 A.D.2d 642, 643, 514 N.Y.S.2d 120 (2d Dep't 1987).

55. *In re Walt's Submarine Sandwiches, Inc.*, 173 A.D.2d 980, 569 N.Y.S.2d 492 (3d Dep't 1991) ("[The] Supreme Court properly rejected the valuation submitted by respondent's expert as it failed to account for excessive executive compensation."); *Raskin*, 129 A.D.2d at 643 ("In order to truly reflect the companies' earning power, the net income is adjusted by eliminating from the corporate expenses a portion of the officer-shareholders' salaries that is considered excessive compensation."); *Markman*, 14 Misc. 3d at 915 ("[T]he receipt of excessive compensation by a shareholder/director has been held to be a proper ground for adjustment of stock value.").

56. *Friedman v. Beway Realty Corp.*, 87 N.Y.2d 161, 169, 638 N.Y.S.2d 399 (1995).

57. *See, e.g.*, *Raskin*, 129 A.D.2d at 644.

58. *In re Pace Photographers, Inc.*, 71 N.Y.2d 737, 748, 530 N.Y.S.2d 67 (1988).

59. *Blake v. Blake Agency*, 107 A.D.2d 139, 146, 486 N.Y.S.2d 341 (2d Dep't 1985).

60. 177 Misc. 2d 459, 672 N.Y.S.2d 613 (Sup. Ct., Nassau Co. 1997).

61. *Id.* at 467.

62. 78 N.Y.2d 439, 576 N.Y.S.2d 831 (1991).

63. *Id.* at 447.

64. 173 A.D.2d 980, 569 N.Y.S.2d 492 (3d Dep't 1991).

65. *Id.* at 981.

66. *See, e.g.*, *Naghavi v. N.Y. Life Ins. Co.*, 260 A.D.2d 252, 688 N.Y.S.2d 530 (1st Dep't 1999) (deeming plaintiff to be bound by prior positions taken in tax returns); *Ginor v. Landsberg*, 159 F.3d 1346 (2d Cir. 1998).

67. *Murphy v. U.S. Dredging Corp.*, No. 2640-06, 2008 WL 2401230 (Sup. Ct., Nassau Co. May 19, 2008).

68. *Id.* The expert's novel approach was ultimately unsuccessful and was rejected by the court. *Id.* ("With all due respect to my dueling experts who prove you can put the same information in one end of the pipeline and produce different results at the other, I reject their conclusions.").

69. *Blake*, 107 A.D.2d at 150.

70. *Id.* at 151; *In re Gift Pax*, 123 Misc. 2d 830, 838, 475 N.Y.S.2d 324 (Sup. Ct., Nassau Co. 1984), *aff'd*, 107 A.D.2d 97, 101, 486 N.Y.S.2d 272 (2d Dep't 1985).

71. *Taines v. Gene Barry One Hour Photo Process, Inc.*, 123 Misc. 2d 529, 531, 474 N.Y.S.2d 362 (Sup. Ct., N.Y. Co. 1983).

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BY GARY A. MUNNEKE

Everything You Need to Know (About Practicing Law) . . . You Learned in Law School

It happened again. I was attending a cocktail party at the New York State Bar Association Annual Meeting, when I happened to overhear a conversation between two lawyers. The younger one was lamenting the fact that she felt totally unprepared to practice law. "I spent three years in law school, for what?" she complained. "As far as I'm concerned law school was *totally* irrelevant!" The young lawyer's companion nodded sympathetically and then mused, "You know, law school isn't supposed to teach you how to practice law; it teaches you how to think like a lawyer. You learn how to practice law on the job."

I cringed. Being a law professor, I found it disconcerting to hear a lawyer newly in practice say that law school was "totally irrelevant," and that law school did not teach students "how to practice law." In fact, I wanted to lean over to these cocktail companions and say, "Actually, everything you need to know about practicing law, you learned in law school." But I didn't, opting instead to make my case in this column. Before dismissing my position as ridiculous (or totally irrelevant, as the case may be), think about what you *did* learn in law school.

Without a doubt, you learned to think like a lawyer. Whatever else may be said about law school, by the time you received your JD, you learned to approach, analyze and solve problems in a different way than when you started. I would argue that this ability to think like a lawyer transforms not only the way you deal with legal questions, but also the way you address other issues in your personal and professional life. After law school, you inevitably think like a lawyer when you make decisions about practicing law.[1]

You also graduated from law school with a vast amount of blackletter law in your head; but, moreover, you learned in law school that no matter how much you think you know, you still need to conduct research to update your knowledge (because the law is always changing) and to fill in the gaps you might have missed. I suggest that as a practitioner, you will apply the same model for doing research when it comes to such problems as which computer to buy, which secretary to hire, and which marketing brochure to send out.

Arguably, thinking like a lawyer and conducting thorough research are useful tools in the practice of law, but by themselves, they will not help you find the courthouse or interview a client. In this area, law schools have changed since the time when many older lawyers went to school. In 1991, the ABA MacCrate Task Force described a set of 10 fundamental lawyering skills[2] that lawyers acquired in an educational continuum beginning before law school and extending throughout their professional lives.[3] At the time the MacCrate Task Force report was released, law schools were adding clinic and professional skills courses, such as client interviewing, counseling, negotiation, trial advocacy, practice management, and others, but these offerings were typically third-year electives, and only a fraction of students were exposed to these "fundamental" skills. Today, at a majority of law schools, clinic and skills courses have proliferated, and offerings are much more robust.

The ABA has amended its Standards for Approval of Law Schools to provide: "A law school shall require that each law student receives substantial instruction in . . . professional skills generally regarded as necessary for effective and responsible participation in the legal profession."[4]

Let's be clear about one thing: being introduced to a subject in law school does not replace honing a professional

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skill on the job. A student may take an introductory course in trial advocacy, but that educational experience will not replace arguing a case before a jury in becoming a skilled trial lawyer. On the other hand, graduates who have taken a trial advocacy course in law school are better prepared to build upon what they have learned in class when they enter the practice of law. In this sense, law school and practice can work synergistically to train better lawyers, and to shorten the learning curve for attaining competence. From my vantage point as an academic lawyer, law schools have made a quantum leap during the last decade in their efforts to prepare students for the practice of law.[5]

In making the point that law schools have become more relevant in recent years, we can refute the charge that they are irrelevant, but we do not necessarily establish the proposition that students learn during law school *everything* they need to know to practice law. To make this point, we have to look beyond the classroom to the law school experience as a whole, and we have to continue to accept the MacCrate Task Force paradigm of education in professional skills as a continuum. In this sense, we come to law school with some basic skills that helped us to be successful in high school and college, as well as work settings before law school. We learned how to take a competitive examination (the LSAT) under pressure, and to organize our applications and lives to get ready for law school. During law school, we developed these basic success skills, and added a variety of other skills that helped us to succeed in the demanding environment of a legal education. When we graduated from law school, we took with us to the practice of law all of these accumulated skills, which we now employ in our professional work, wherever that might be. It should be the case that we continue to grow as professionals, becoming more proficient at our craft, but I would argue that the building blocks are all there. Law school did, in fact, provide us with everything we need to know about practicing law.

Law students learn how to manage their time. They learn how to meet the (sometimes excessive) demands of law professors who never consult one another in making assignments. This skill is critical for the juggling act of dealing with multiple clients or partners and clients, not to mention keeping up with all the demands of law practice. Learning to recognize the importance of deadlines may be the most important tool in avoiding malpractice, and law students face deadlines throughout their education.

If they could not do it before, law students learn the skill of multi-tasking. Lawyers are pulled from problem to problem, case to case, all the time. Finding extended quality time to work on projects is often an unrealizable goal. Law students, as well, find themselves having to do several things at once. For younger law students who grew up around computers, multi-tasking may be easier than for their older peers and future colleagues in the bar, but regardless of how well-prepared they are, law school takes multi-tasking to a whole new level.

Money is a perpetual problem for law students, many of whom take out student loans to go to school. They must manage their finances, and for some coming out of the parental cocoon, this is a new experience. Others give up good-paying jobs to return to school with the attendant squeeze on their standard of living. What they learn about handling their own financial affairs in law school will serve as a predicate for how they manage their money after graduation (as well as their clients' money!).

Law students develop a sensitivity for and understanding of a variety of concepts that will stay with them throughout their lives, and which filter down to the way they practice law. Here are a few examples:

- ***Due process*** is more than a term in Civ Pro; it is a rules-based way of assuring fairness in transactions, and for good or ill, lawyers inevitably turn to process as a tool for achieving fairness.
- ***Precedent*** is another theme that becomes engrained in our lawyer psyches: recognizing the persuasive value of past decisions is more than a way to read cases. For practitioners, looking to past decisions to make choices in similar, but slightly different, factual settings often provides the calculus for setting policy in law firm management and client representation.
- ***Advocacy*** is one of the cornerstones of law practice, whether or not one is a trial lawyer. Lawyers are called upon to use their professional skills to represent others by advocating a position or point of view for those they represent. Lawyers take the heat on behalf of those they represent, whether it comes from a petulant adversary, a demanding judge or a bored bureaucrat. Throughout law school, students are given the opportunity to stand up for others in a representational capacity, and this training provides a foundation for their work as lawyers serving as advocates for the interests of their clients.
- ***Civility*** represents a standard of respect for those with whom we deal – whether adversaries, judges, peers, clients, or others. Law school teaches us about decorum and respect for institutions of authority. Whether it involves reciting a case in class or discussing a classmate's completely ridiculous analysis of the same case after class, we learn to treat each other with dignity, even when we disagree.
- ***Editing*** is an aspect of legal writing that law school teaches. Whether learned on law review, in moot court or at a law school seminar, law students learn what lawyers know: one draft is not enough, and fine-tuning your prose can make a difference in whether you make your point or not.

- ***Leadership* and *supervision*** are critical to success in the practice of law, because lawyers inevitably work with support staff and, in time, with subordinate lawyers to get the legal work done. The image of Atticus Finch working single-handedly and tirelessly to solve his client's legal problems may have romantic appeal, but in real life the delivery of legal services is more likely handled by a team. Perhaps the better media image is Perry Mason, who never made a move without his secretary Della Street or investigator Paul Drake at his side. Law students gain experience in classroom, extracurricular, and work settings to develop supervisory and other people skills.
- ***Collaboration*** represents another area where law students gain expertise, because they are frequently called upon to work with partners or in groups to solve problems and complete projects. They have to learn to listen to what their collaborators have to say in order to forge a solution to problems. In practice, lawyers who do not master this skill, whether in dealing with clients, fellow lawyers or other groups, cannot achieve their potential in the practice of law.

This list could go on, but the point should be clear: law school develops an entire set of professional skills that students will use on a daily basis in the practice of law. Further, those who do not learn these skills in law school begin the practice of law behind the curve in their own professional development. Further still, practitioners who excel in this not-always-obvious arena will achieve more in the practice of law than their less-proficient peers.

Without law school, the education of lawyers would be a slow and tedious process. In the past, lawyers could gain admission to practice by "reading the law" – that is working in a law office while studying legal texts instead of going to law school. This practice slowly disappeared over the course of the 20th century, because law school proved to be a much more efficient system for delivering legal education.

This column would be remiss without acknowledging that legal education is not perfect. Law schools have come a long way since I graduated in 1973, but they still have a distance to go. The admonition to provide all law students with substantial training in professional skills remains a goal rather than a reality at most schools. Some law school course offerings, while not completely irrelevant, challenge both students and observers to discern their relevance. The cost of clinical and skills education tempts deans and administrators to offer large section survey courses that teach more substantive information than professional skills. Pressure to pass the bar exam and find a job often leads students to choose courses to assure their successful entry into practice over long-term success in the practice of law.

I return to the couple I overheard at the State Bar meeting, and I remain convinced that law school is far from irrelevant and that the responsibility for teaching new lawyers how to practice law should not fall exclusively on the law firms where graduates go to work. In truth, we are in this together; law schools and law firms (as well as other legal employers) share the duty of preparing new members of the legal profession for the work they will perform. To this end, I maintain that law students are introduced during school to everything they will encounter in the practice of law. This introduction is accompanied by an array of learning experiences both inside and outside of the classroom that will undergird the transition from the world of education to the world of practice (often referred to as the "real" world, as if law school were somehow not real). Some students may learn more than others and some students may learn better than others, but they all leave our ivy-covered walls ready to practice law, and ready for their mentors in the bar to take them to the next levels of competence and professionalism.

The admonition to provide all law students with substantial training in professional skills remains a goal rather than a reality at most schools.

If you think of "everything you need to know" as the accumulation of knowledge, skill, values, and habits intrinsic to the practice of law, then law school does provide the key to open the door to the world of law practice. New lawyers may be new to practice, but they are not without preparation. If this were the Marines, the new lawyer would be more like the graduate of Parris Island basic training than the new recruit getting off the bus. So the next time you overhear lawyers demeaning the value of their legal education, just stop them and say, "Whoa! Did you know that *everything* you need to know about practicing law you learned in law school?" ■

1. I often tell my first-year students that they know they are in law school when they have an argument with their spouse, parent or significant other and find themselves saying with exasperation, "You just don't see the issue."

2. These skills include those described in *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (American Bar Association, 1991) ch. 5, *available at* www.abanet.org/legaled/publications/onlinepubs/maccrate.html.

3. *Id.*

4. American Bar Association, Standards for the Approval of Law Schools, 302(a)(4) (2008).

5. The ABA Standards even say, "A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession." *Id.* at 301(a).

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BY JACOB L. TODRES

No Recovery of Tax Overpayment in Tax Malpractice Action in New York

In examining the elements of damages recoverable in tax malpractice situations,[1] I was struck by New York's position that additional taxes and interest incurred on a tax underpayment are not recoverable. In my view, prohibiting[2] the recovery of additional taxes in tax malpractice actions is incorrect and unjustified, and while prohibiting the recovery of interest on a tax underpayment is defensible and arguable, nevertheless it ought to be changed.

This article focuses on the recovery of additional taxes, and leaves an extended discussion of the second issue for another day. However, because New York's positions on both matters were established in the same case, *Alpert v. Shea Gould Climenko & Casey*,[3] and are often treated as a unit, there will also be some discussion on the recovery of interest issue.

Tax Malpractice and the Tort of Negligence

Normally, when an attorney or accountant is negligent in giving tax advice, recovery of the damages suffered by the client may be obtained by means of a malpractice suit. Although many different types of tort and breach of contract claims are encountered in such situations,[4] recovery is most often obtained under the traditional tort of negligence.[5] The elements of this cause of action include (1) a duty owed by the professional (attorney or accountant) to the plaintiff, (2) breach of the duty, (3) injuries suffered by the plaintiff, and (4) a proximate cause relationship between the breach of duty and the injuries.[6]

In a tax malpractice suit based on the tort of negligence, the most common and direct type of damages encountered consists of four elements: (1) additional taxes; (2) interest; (3) penalties; and (4) corrective costs. While New York's position with regard to the recovery of penalties and corrective costs is consistent with the mainstream view that such damages are recoverable,[7] it takes the position that there is no recovery with regard to the first two elements. This is contrary to the position of most, if not all, other states.[8] Such damages should be recoverable as a policy matter, and would be recoverable under New York's traditional approach to the measure of damages recoverable in negligence causes of action. The only possible basis for a contrary position would be the inappropriate extension of the holding of *Alpert*,[9] a fraud case, to the malpractice area.

Before focusing on *Alpert*, a brief review of the two elements of damages addressed in *Alpert* – additional taxes and interest – is helpful for a proper perspective on the issues involved.

Additional Taxes and Interest

Because the focus of the advice is tax minimization, when a tax advisor is negligent, the type of damages one might encounter is for additional taxes. (In fact, many such instances are encountered in the reported cases.[10]) While there are many elements in determining additional taxes,[11] the principle itself, that additional taxes are recoverable, seems very well established – at least outside of New York.[12] The only caveat is the need to distinguish between additional taxes suffered by a plaintiff on account of the negligence and other taxes incurred by a plaintiff. Additional taxes are properly recoverable. But the caselaw is very clear that other taxes incurred by a plaintiff, *i.e.*, those not caused by the tax advisor's negligence, are not recoverable.[13]

Overpayment

For instance, if a taxpayer would owe taxes of $10,000 if his tax return were properly prepared and, as a result of the preparer's negligence in failing to claim allowable deductions, the taxpayer pays $12,000 of taxes, the maximum recoverable damages are the additional $2,000, not the full $12,000.[14] The other $10,000 of taxes is appropriately paid by the plaintiff and has nothing to do with any negligence that might have occurred.

This principle was aptly stated by the Alaska Supreme Court:

> The [plaintiffs] were, and are, under a legal duty to pay taxes. . . . We note that if the malpractice action ripens, the appropriate measure of damages is the difference between what the [plaintiffs] would have owed in any event if the tax returns were properly prepared, and what they owe now

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> because of their accountants' negligence, plus incidental damages. The [plaintiffs] should not recover as damages all taxes owed.[15]

Underpayment

With respect to interest, normally when there is an underpayment of tax an interest charge is imposed on the taxpayer for the late payment of the taxes. The second element of damages is the recovery of such interest from the negligent tax professional.[16] Here, three views have developed. Under the traditional – probably the majority – view,[17] such interest is recoverable because the defendant's negligence caused the plaintiff to incur the interest charge and is properly recoverable under the traditional measure of damages in negligence causes of action. But for the negligence, the plaintiff would not have incurred this expense.[18]

A second view, absolutely denying the recovery of any such interest, developed in the wake of, and often in reliance upon, *Alpert*.[19] The theory is that the award of such interest would result in the plaintiff's getting an unjustified windfall. The plaintiff would have had the use of the money (the underpaid taxes) and would recover the interest paid for the use of the money. In effect, the plaintiff would enjoy an interest-free loan for the time period during which the taxes were unpaid.[20]

Balance

Approximately a decade after *Alpert* a balance was struck between these two extreme views.[21] While the rationale behind the no-interest-recovery view initially seems compelling, the results seem harsh. There are three problems with it.

First, it assumes the plaintiff has available an amount of money equal to the underpayment, can invest the money and can earn enough interest to offset the interest charged for the underpayment. Many plaintiffs, however, do not have funds available to invest.[22] The second problem is that the no-interest-recovery view assumes the plaintiff can earn a rate of return on the funds equal to the amount charged by the government for the underpayment, an assumption that often may not be true. Finally, the no-interest-recovery approach does not take into account the hardship that may be incurred by a plaintiff who has to make an unexpected payment.[23]

For these reasons the intermediate view permits a recovery of the interest differential, *i.e.*, the difference between the interest paid by the plaintiff on the tax underpayment and the earnings realized by the plaintiff on this money.[24]

The *Alpert* Case

In *Alpert*, the plaintiff[25] had invested in a tax shelter whose chief attraction was the immediate deduction of advance minimum royalty payments for the right to mine coal in the future. Originally, the shelter program contained a tax opinion by one of the defendant law firms suggesting the advance minimum royalty payment was deductible when made. On December 16, 1977, the Income Tax Regulations were amended to disallow the deduction for such advance royalty payments. On December 19, 1977, a Revenue Ruling was issued by the IRS advising that such advance royalty payments could be deducted only over the period for which they were paid and not in the year of payment.

In light of these developments, the law firm, on or before December 21, 1977, withdrew its opinion and expressed doubts as to the immediate deductibility of the payments, making its earlier opinion useless to the promoter of the tax shelter. Immediately (on December 20, 1977) the promoters of the tax shelter obtained an opinion from the second defendant law firm in which the validity of the Revenue Ruling was questioned. The plaintiff invested $52,000 in the tax shelter on December 30, 1977, and claimed a deduction of over $216,000 on his 1977 tax return for advance royalty payments. The IRS subsequently disallowed the deduction. In December 1986 the plaintiff paid over $117,400 in back taxes and over $165,800 in interest.[26]

In 1984 this action was brought against the defendants for fraudulent misrepresentation, *i.e.*, fraud.[27] After extensive discovery, the defendants moved for partial summary judgment dismissing the plaintiffs' claims for damages for the recovery of taxes and interest.[28] The lower court granted the defendants' motion to the extent of dismissing damage claims for back taxes, but denied the motion with respect to interest. Both of these rulings were appealed by the losing parties.[29]

With respect to the damage claims for back taxes, the First Department affirmed the lower court's dismissal. The First Department's reasoning, in its entirety, was as follows:

> The recovery of consequential damages naturally flowing from a fraud is limited to that which is necessary to restore a party to the position occupied before commission of the fraud.
>
> * * *
>
> [I]n the instant case, recovery of back taxes would place plaintiffs in a better position than had they never invested in the . . . [tax shelter].[30]

With respect to damages for interest paid to the IRS, the First Department reversed the lower court and held the recovery of such amounts was also precluded.

> In *Freschi v. Grand Coal Venture* . . . , a case involving violations of Federal securities law, the United States Court of Appeals found that a defrauded investor in a coal mine tax shelter, similar to the one herein, was not entitled to recover interest paid to the IRS upon disallowance of tax deductions. The court reasoned that such interest was not damages suffered by plaintiff but rather was a payment to the IRS for his use of the money during the period of time when he was not entitled to it. There is support for such a result in New York case law as well.

> Moreover, the equities militate in favor of barring recovery of such interest rather than allowing plaintiffs the windfall of both having used the tax moneys for seven years and recovering all interest thereon.[31]

The Problem

The damages that may be recovered in a fraud cause of action are very different from those recoverable in a negligence cause of action. In a fraud cause of action the measure of damages is referred to as the "out-of-pocket" rule. Under this rule, damages are recoverable for the actual monetary loss sustained as a result of the wrong. Damages are computed by ascertaining the difference between what the plaintiff received and the amount paid. The goal is to compensate the plaintiff for what he or she lost because of the fraud, not to compensate the plaintiff for what he or she might have gained.[32]

On the other hand, in a negligence cause of action, damages are measured as the difference between what was obtained by the plaintiff and what would have been obtained with non-negligent performance by the defendant.[33] These "expectancy" or "benefit-of-the-bargain" damages are very different from, and more extensive than, the out-of-pocket damages recoverable in a fraud cause of action.

With respect to its holding that there may be no recovery of back taxes in a fraud action, the First Department's holding in *Alpert* is correct. It has been followed by a federal district court[34] and its rationale has been adopted by the New York Court of Appeals.[35] Remember, however, that *Alpert* was addressing the measure of damages in a fraud cause of action. It did not address the proper recovery in a negligence cause of action.

Unfortunately, the very same First Department that promulgated *Alpert* seems to have extended it to negligence causes of action, a field governed by a very different measure of damages. In *Menard M. Gertler, M.D., P.C. v. Sol Masch & Co.*,[36] the plaintiff sought to recover damages from the defendant accountant for deficient advice. The advice apparently pertained to the tax consequences of trading on margin in a pension account.[37] The only ground for recovery asserted by the plaintiff was on a theory of professional malpractice.[38] This suggests the typical negligence cause of action. Nowhere in this very brief opinion is there any mention of fraud. Nevertheless, relying upon *Alpert*, the court stated that "taxes and tax interest are not recoverable under New York law."[39]

> These "expectancy" damages are very different from the out-of-pocket damages recoverable in a fraud action.

This analysis has several problems. First, a distinction must be made between *Alpert*'s holdings on taxes and tax interest. When *Alpert* held that taxes may not be recovered in a fraud cause of action, its analysis pertained only to fraud causes of action and not to recoveries for negligence, which have a completely different measure of damages. However, when *Alpert* held that interest on a tax underpayment may not be recovered, this holding did not seem to be based on any principle unique to the fraud measure of damages. Rather, it seemed based on the argument that there are no damages when a plaintiff who underpaid his or her taxes must later pay interest for the use of the money. Any other result, said the court, would give the plaintiff a windfall in the interest-free use of the money.[40] Extending this logic – that payment of interest on underpaid taxes does not constitute damages – to the negligence situation would seem permissible. There is no misapplication of a rule of one area of law (measure of damages in fraud) to another area (measure of damages in negligence), as there is when *Alpert*'s rule of no recovery of taxes in fraud situations is extended to negligence situations.

Note that a number of cases lump together the analysis of the recovery of taxes and interest, and simply hold that no recovery is available for both – based on *Alpert*.[41] Such a conclusion may be correct with respect to a fraud cause of action but not with respect to a negligence cause of action. *Alpert* never addressed the recoverability of taxes in a non-fraud context.

The other problem with *Gertler* and other such cases is that a proper analysis of the recoverability of taxes under a negligence measure of damages requires the separation of additional taxes from other taxes. Other taxes that would have been incurred regardless of the negligence are not recoverable, even in a negligence cause of action, because they are not damages. Additional taxes caused by the negligence of the defendant should be recoverable, both under the New York traditional measure of damages for negligence[42] and under the virtually universal precedent in other states.[43]

Caveat

This article has presented the New York position as simply being that taxes may not be recovered in a malpractice action against a negligent tax advisor. This is based on *Gertler*, in which the court extended its *Alpert* no-tax-recovery position to a non-fraud, professional malpractice claim. It must be noted, though, that the court's holding was simply a one-sentence conclusory statement with no reasoning, only a citation to *Alpert*.[44] There is language in an earlier First Department case, however, that suggests additional taxes may be recoverable damages in a legal malpractice cause of action.

In *Proskauer Rose Goetz & Mendelsohn L.L.P. v. Munao*,[45] a law firm sued to recover a legal fee and the defendant counterclaimed alleging legal malpractice. The plaintiff law firm's motion to dismiss the counterclaim was denied below and was the subject of this appeal to the First Department. In

affirming the denial of the motion to dismiss the First Department stated:

> The extent to which defendants incurred taxes and related expenses they would not otherwise have incurred but for plaintiff's advice, and the extent to which defendants realized any offsetting profits as a result of that advice . . . goes to the issue of defendants' damages, if any.[46]

Part of the reason why *Alpert* may have been extended inappropriately is that *Alpert* also held that interest on a tax underpayment is not recoverable, and this holding has found a following even with respect to negligence causes of action.[50] Cases discussing damages often lump together additional taxes and interest,[51] and refer to *Alpert* as holding, in the conjunctive, that taxes and interest are non-recoverable.[52] Thus *Alpert*, or more precisely, its other holding, does have relevance in negligence causes of action.

Analytically, however, the two holdings are very different and must be separated. The no-interest-recovery holding is based upon the logical argument that there are no damages when a plaintiff must pay interest for the use of the government's money when the plaintiff was not entitled to such use. While such logic was enunciated by *Alpert* with respect to a fraud cause of action, the logic may be applied also to a negligence cause of action. However, with respect to the recoverability of taxes, *Alpert*'s holding was based on the fraud measure of damages – out-of-pocket damages. It may not be extended to negligence causes of action which are governed by very different criteria, *i.e.*, by benefit-of-the-bargain damages.

A joke I heard many years ago, in my first college Business Law class, helps make the point: An elderly judge had a very good reputation as a jurist, except for the fact that after so many years on the bench he would occasionally "go off the deep end." The judge was trying a paternity suit. Things seemed to be going very well for the defendant. Although he could not locate the actual father, he was able to prove the child in question was conceived at least several months before he had been with the mother. He was therefore anticipating he would be victorious and not be required to support the child. On the day the judge was to announce his decision, some eyebrows were raised when he sent his clerk to locate a copy of the Uniform Commercial Code. Sure enough, the judge found the defendant liable to support the child because the law, pointing to the Uniform Commercial Code,[53] provides that where the maker cannot be located, the endorser may be held liable.

The no-interest-recovery holding is based upon the logical argument that there are no damages when a plaintiff must pay interest for the use of the government's money when the plaintiff was not entitled to such use.

The *Gertler* opinion did not discuss, or even cite, *Proskauer*.

While the New York position may be more nuanced, and less definitive than an absolute "no-tax-recovery in tax malpractice actions" rule, the most recent holding by the First Department certainly seems to have adopted the absolute rule. In addition, research has not revealed any unequivocal holding that taxes, or only additional taxes, are recoverable in New York.

Conclusion

Under New York's traditional measure of damages in attorney malpractice situations, the amount recoverable is "the difference in the pecuniary position of the client from what it should have been had the attorney acted without negligence."[47] If analyzed this way, it would seem clear that any additional taxes caused by the negligence of a tax advisor should be recoverable. Such a view would be consistent with most, if not all, other states,[48] and also with the language in *Proskauer*.[49] In *Gertler*, however, the First Department took the opposite view, based upon *Alpert*. It is respectfully suggested that the extension of *Alpert*'s no-tax-recovery holding is inappropriate in this instance. *Alpert* addressed only a fraud cause of action; the measure of damages is very different from that in a negligence cause of action.

Just as the Uniform Commercial Code may not be taken out of context and applied in a support case, so too, it is not permissible to take *Alpert*'s no-tax-recovery holding in a fraud cause of action and apply it out of context to a negligence cause of action. ■

1. *Tax Malpractice Damages: A Comprehensive Review of the Elements and the Issues*, 61 Tax Law. 705 (Spring, 2008). ("Malpractice Damages").

2. As will be developed subsequently, the New York position is actually somewhat unclear, but very likely amounts to a prohibition. For purposes of the discussion it will be treated herein as a prohibition.

3. 160 A.D.2d 67, 559 N.Y.S.2d 312 (1st Dep't 1990).

4. *Malpractice Damages*, *supra* note 1 at 709–10.

5. *Id.* at 709. *See also* Bernard E. Wolfman et al., Standards of Tax Practice § 601.1 (6th ed. 2004) ("Wolfman et al.").

6. The essence of the cause of action consists of the four elements listed. *Malpractice Damages, supra*, note 1 at 709. Wolfman et al., *supra* note 5, at § 601.2.1. Some courts list only three elements, *see, e.g., Estate of Louise Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 259 A.D.2d 282, 283, 686 N.Y.S.2d 404 (1st Dep't 1999) (negligence, proximate cause and damages), while, in other contexts, a fifth element – causation in fact – is added. *See, e.g.*, Dan B. Dobbs, The Law of Torts § 114 (2000). As evidence that the number of elements into which the cause of action is broken down may be insignificant, see *Frank v. Lockwood*, 275 Neb. 735, 749 N.W.2d 443 (2008), in which the court cites with approval in two adjoining sentences one case that lists four elements in a negligence action and another case that lists only three elements in an accounting negligence action. *Id.* at 741.

7. *See generally*, *Malpractice Damages*, *supra* note 1, Parts III.A.3.& 4. *See, e.g., Blumberg v. Altman*, 15 Misc. 3d 1140(A), 841 N.Y.S.2d 818 (Sup. Ct., N.Y. Co. 2007) (not officially reported) (penalties).

8. *Malpractice Damages*, *supra* note 1 at 712–14.

9. 160 A.D.2d 67, 559 N.Y.S.2d 312 (1st Dep't 1990).

10. *See, e.g.*, *Pytka v. Gadsby Hannah, L.L.P.*, 15 Mass. L. Rptr. 451, 2002 WL 31862712 (Mass. Super. Ct. 2002); *King v. Neal*, 19 P.3d 899, 900–901 (Okla. Civ. App. 2001); *Jerry Clark Equipment, Inc. v. Hibbits*, 245 Ill. App. 3d 230, 612 N.E.2d 858, 861 (Ill. App. Ct. 1993). *See also Malpractice Damages*, *supra* note 1, at 712–14.

11. *Malpractice Damages*, *supra* note 1, at Part III A.1.a.

12. *See supra* note 10.

13. *Malpractice Damages*, *supra* note 1 at 712–14.

14. The text assumes the statute of limitations for the recovery of the additional $2,000 has expired. If not, the damages would be limited to the corrective costs – the costs of preparing and filing an amended return to obtain a refund of the overpaid $2,000.

15. *Thomas v. Cleary*, 768 P.2d 1090, 1092 (Alaska 1989).

16. The discussion does not address any other type of interest that might be encountered as damages in a tax malpractice situation. For instance, in *Billings Clinic v. Peat Marwick Main & Co.*, 797 P.2d 899 (Mont. 1990), the issue involved was the recoverability of additional interest incurred by a plaintiff where the tax advisor's negligence prevented the plaintiff from obtaining low-cost, tax-exempt financing thereby forcing the plaintiff to borrow at the higher conventional interest rate.

17. *See Malpractice Damages*, *supra* note 1 at 723 n. 109.

18. *Id.* at 724.

19. *Id.* at 725.

20. *Id.*

21. *Id.* at 726–31. The two cases that established this view are *Ronson v. Talesnick*, 33 F. Supp. 2d 347, 353–54 (D.N.J. 1999), and *Streber v. Hunter*, 221 F.3d 701, 734–35 (5th Cir. 2000).

22. *Malpractice Damages*, *supra* note 1 at 726. Although the courts articulate this objection to the no-interest-recovery view as stated in the text, it is my view that even if the plaintiff does not have available liquid assets to invest, there is still a benefit realized since the plaintiff had the use of another's funds. Such access to these funds enabled the plaintiff either to make additional expenditures or investments or to forgo borrowing. In either event, the plaintiff gained the benefit of funds belonging to the government. *See id.* at 726.

23. *Id.* at 726–27. Another possible problem with the no-interest-recovery view is that a plaintiff who erroneously believes he or she has more wealth than he or she really does may make more risky or aggressive investments or spend more than he or she can really afford.

24. *Id.* at 726–31. Nebraska recently adopted this intermediate view. *Frank v. Lockwood*, 275 Neb. 735, 799 N.W.2d 443 (2008).

25. There were actually two plaintiffs in *Alpert*, but I will refer to only one plaintiff to simplify the presentation. (Portions of this paragraph are adapted from Jacob L. Todres, "Malpractice and the Tax Practitioner: An Analysis of the Areas on Which Malpractice Occurs," 48 *Emory Law Journal* 547, 636–37 (1999).)

26. *Alpert v. Shea Gould Climenko & Casey*, 160 A.D.2d 67, 70, 559 N.Y.S.2d 312 (1st Dep't 1990). Penalties were not assessed against the plaintiff.

27. Although the opinion notes that the plaintiff was "claiming, inter alia, fraudulent misrepresentation," *id.* at 71, indicating that other claims were also asserted, nevertheless, the First Department's opinion refers only to the fraud cause of action throughout the opinion.

28. *Id.* The defendants also moved to dismiss claims for penalties incurred by the plaintiff, but this is ignored since no penalties were imposed upon the plaintiff. *Id.*

29. *Id.*

30. *Id.* at 71–72.

31. *Id.* at 72 (citation omitted).

32. *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 646 N.Y.S.2d 76 (1996).

33. *See, e.g.*, *Flynn v. Judge*, 149 A.D. 278, 280, 133 N.Y.S. 794 (2d Dep't 1912); *Sanders v. Rosen*, 159 Misc. 2d 563, 572, 605 N.Y.S.2d 805 (Sup. Ct., N.Y. Co. 1993). *See also Lewis v. Alper*, 15 A.D.2d 795, 796, 224 N.Y.S.2d 996 (2d Dep't 1962) (Hopkins J., concur).

34. *See, e.g.*, *Seippel v. Jenkins & Gilchrist*, 341 F. Supp. 2d 363, 384, *amended on reconsideration*, No. 03 CIV. 6942, 2004 WL 2403911 (S.D.N.Y. 2004).

35. *Lama Holding Co.*, 88 N.Y.2d 413.

36. 40 A.D.3d 282, 835 N.Y.S.2d 178 (1st Dep't 2007).

37. *Id.* The facts are not disclosed in the opinion in any more detail.

38. *Id.* at 282–83.

39. *Id.* at 283.

40. *Alpert v. Shea Gould Climenko & Casey*, 160 A.D.2d 67, 70, 559 N.Y.S.2d 312 (1st Dep't 1990).

41. *See, e.g.*, *Gaslow v. KPMG LLP*, 19 A.D.3d 264, 797 N.Y.S.2d 472 (1st Dep't 2005); *Penner v. Hoffberg Oberfest Burger & Berger*, 303 A.D.2d 249, 755 N.Y.S.2d 835 (1st Dep't 2003); *Seippel v. Jenkins & Gilchrist*, 341 F. Supp. 2d 363, 384, *amended on reconsideration*, No. 03 CIV. 6942, 2004 WL 2403911 (S.D.N.Y. 2004).

42. "[T]he difference in the pecuniary position of the client from what it should have been had the attorney acted without negligence." *Flynn v. Judge*, 149 A.D. 278, 280, 133 N.Y.S. 794 (2d Dep't 1912). *See also Sanders v. Rosen*, 159 Misc. 2d 563, 572, 605 N.Y.S.2d 805 (Sup. Ct., N.Y. Co. 1993); *Lewis v. Alper*, 15 A.D.2d 795, 796, 224 N.Y.S.2d 996 (2d Dep't 1962) (Hopkins J., concur).

43. *See supra*, text accompanying notes 8 and 10–15.

44. *Menard M. Gertler, M.D., P.C. v. Sol Masch & Co.*, 40 A.D.3d 282, 283, 835 N.Y.S.2d 178 (1st Dep't 2007).

45. 270 A.D.2d 150, 704 N.Y.S.2d 590 (1st Dep't 2000).

46. *Id.* at 151.

47. *Flynn*, 149 A.D. at 280.

48. *Malpractice Damages*, *supra* note 1 at 712–14.

49. *See supra* text accompanying note 46.

50. *See, e.g.*, *Blumberg v. Altman*, 15 Misc. 3d 1140(A), 841 N.Y.S.2d 818 (Sup. Ct., N.Y. Co. 2007) (unreported).

51. *See, e.g.*, *Gaslow v. KPMG LLP*, 19 A.D.3d 264, 264–65, 797 N.Y.S.2d 472 (1st Dep't. 2005); *Penner v. Hoffberg Oberfest Burger & Berger*, 303 A.D.2d 249, 755 N.Y.S.2d 835 (1st Dep't 2003).

52. *See, e.g.*, *Menard M. Gertler, M.D., P.C. v. Sol Masch & Co.*, 40 A.D.3d 282, 283, 835 N.Y.S.2d 178 (1st Dep't 2007); *Seippel v. Jenkins & Gilchrist*, 341 F. Supp. 2d 363, 384 (S.D.N.Y. 2004).

53. *See* N.Y. U.C.C. § 3-415.

He paused, revelling in the lack of regulatory oversight on his life.

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2008 Insurance Law Update

Uninsured, Underinsured and Supplementary Uninsured Motorist Law – Part I

By Jonathan A. Dachs

It is once again my distinct pleasure to report on developments in the area of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law from the prior calendar year. As usual, 2008 was a busy and significant year in this ever-changing, highly complex area of the law.

This article, which is the first of two parts, will address several general issues pertaining to UM/UIM/SUM coverage and claims. Part II, which will appear in a forthcoming issue of the *Journal*, will address several additional general issues, as well as other issues that are specific to each particular type of coverage.

Insured Persons

The definition of an "insured" under the SUM endorsement (and many liability policies) includes a relative of the named insured, and, while residents of the same household, the spouse and relatives of either the named insured or spouse.

Relatives

In *Government General Employees Ins. Co. (GEICO) v. Constantino*,[1] the claimant, who was struck by a hit-and-run driver while he was riding a bicycle, sought SUM benefits under a policy issued to his fiancée. The insurer sought to stay arbitration on the ground that the claimant was not a "resident relative" under the policy and, therefore, not entitled to benefits thereunder. The claimant argued that he was entitled to SUM benefits because when his fiancée purchased the policy from GEICO, she specifically sought coverage for him that was equal to her own, and because a page of GEICO's Web site listed him as a "driver[ ] covered" and an "individual covered" under the policy. The court affirmed the grant of the Petition to Stay on the basis that the claimant was neither married to nor related to the insured and was, therefore, not a "relative." The court further rejected the claimant's contention based upon the Web site entry because the policy provided that its "terms and provisions . . . cannot be . . . changed, except by an endorsement issued to form a part of this policy," and the Web page did not constitute such an endorsement.[2] Moreover, insofar as the language of the policy was not in any way ambiguous, "resort may not be had to the extrinsic web page which is not a part of the policy."[3]

Residents

In *Korson v. Preferred Mutual Ins. Co.*,[4] the court explained that

> [t]he term "household" as used in insurance policies, has been characterized as ambiguous and devoid of any fixed meaning. Its interpretation requires an inquiry into the intent of the parties. The interpretation must reflect the reasonable expectation of the ordinary business person and the circumstances particular to each case must be considered.[5]

Thus, in this case, where evidence revealed that the subject house was a single family home, with a single mailbox, and one electric meter, one gas bill, unrestricted access between the areas of the home in which the co-owners lived, and the policy indicated that both co-owners were named insureds with respect to a single address, the court held, "There is no indication in that document that their reasonable expectation was to insure anything other than one household."[6] Thus, the action brought against one co-owner by the other co-owner's step-daughter to recover for injuries sustained by her daughter as a result of exposure to lead paint while living with the second co-owner fell within the exclusion in the homeowner's policy for bodily injury to "residents of your household," even though they lived on separate floors in the residence.

Occupants

In *Continental Casualty Co. v. Lecei*,[7] the court observed that where the claimant was not a named insured under the policy issued to his employer, for purposes of SUM coverage he could be deemed an insured entitled to coverage only if at the time of the accident he was "occupying" the employer's truck within the meaning of the policy. Insofar as the parties offered radically different versions of the facts relating to the claimant's actions at the time of the accident, a hearing was required to determine whether he was an "occupant" of the truck and, therefore, entitled to coverage.

In *Faragon v. American Home Assurance Co.*,[8] the claimant, a truck driver, was struck by a hit-and-run vehicle while standing on the street after off-loading a 44,000-pound, 50-to-55-foot-long boom lift from a 70-foot tractor-trailer. This procedure involved many steps, including setting out safety cones, unchaining the boom lift, folding out and inserting pins in the jib, inspecting the basket, lowering the trailer, backing the machine off the trailer, and securing and extending axle lifts. He had completed these steps, and had been training the worker who was going to operate the equipment for 10 to 15 minutes when the accident took place. After observing that the term "occupying" has long received a liberal interpretation in New York and thus, "the status of passenger is not lost even though [an individual] is not in physical contact with [the vehicle], provided there has been no severance of connection with it, his [or her] departure is brief and he [or she] is still vehicle-oriented with the same vehicle,"[9] the court held that the claimant "was no longer vehicle-oriented." As the court explained, "[h]is absence from the vehicle was not intended to be brief and, at the time of the accident, he was engaged in instructing the lessee about the operations of the delivered equipment. Under such circumstances, he was no longer 'occupying' his employer's vehicle."[10]

"Motor Vehicles"

In *Progressive Northeastern Ins. Co. v. Scalamandre*,[11] the court held that a four-wheeled ATV did not constitute a "motor vehicle" for purposes of invoking a UM endorsement. The court further explained that "although UM coverage extends to all 'motor vehicles,' as defined by Vehicle and Traffic Law § 125, ATVs are specifically excluded from the definition of motor vehicles set forth therein."[12] Finally, the court distinguished this case from *Nationwide Mutual Ins. Co. v. Riccadulli*,[13] wherein a three-wheeled ATV was considered a motorcycle, thereby rendering UM benefits available. In *Scalamandre*, however, the ATV at issue was a four-wheeled vehicle, which "[did] not fit the statutory definition of a motorcycle, which is limited to [vehicles] with no more than 'three wheels in contact with the ground.'"[14]

"Accidents"

The UM/SUM endorsements provide for benefits to "insured persons" who sustain injury caused by "accidents" "arising out of the ownership, maintenance or use" of an uninsured or underinsured motor vehicle.

In *Emanvilova v. Pallotta*,[15] the court stated that "[e]ven innocent victims are not entitled to coverage if their injuries were not caused by an 'accident' within the meaning of the applicable insurance policy."

In *State Farm Mutual Automobile Ins. Co. v. Langan*,[16] the claimant's decedent was struck and killed by a motor vehicle driven by Ronald Popadich, who pleaded guilty to murder in the second degree, after admitting that he intentionally caused the death by striking the decedent with his automobile. The court upheld the decedent's insurer's disclaimer of uninsured motorist benefits on the ground that the death was the result of an intentional act, and not an accident.[17]

In an interesting concurring and dissenting opinion, Justice Mastro noted that "the overwhelming national trend" has been to permit uninsured motorist coverage in situations like this by interpreting the term "accident" from the perspective of the injured party rather than the tortfeasor. Accordingly, Justice Mastro called for "a reexamination of the governing principles in this area by our state's highest court."[18]

Claimant/Insured's Duty to Provide Timely Notice of Claim

UM, UIM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." A failure to satisfy the notice requirement vitiates the policy.[19]

In *American Transit Ins. Co. v. Rechev of Brooklyn*,[20] the First Department appears to have held that an insurer must demonstrate prejudice from an untimely notice of a lawsuit in order to sustain a notice of disclaimer on that ground. Specifically, the court noted that although the injured party had provided the insurer with information regarding the accident shortly after it occurred, she failed to give the insurer notice of her lawsuit against its insured until 14 months after the suit was commenced and after she had obtained a default judgment against the insured. In upholding the insurer's late notice disclaimer, the court specifically observed that the insurer had lost its right to appear to interpose an answer, *i.e.*, that it had suffered prejudice as a result of the late notice – citing its previous decision (reported on last year) in *American Transit Ins. Co. v. B.O. Astra Management Corp.*[21]

In upholding the insurer's late notice disclaimer, the court specifically observed that the insurer had lost its right to appear to interpose an answer, *i.e.*, that it had suffered prejudice as a result of the late notice.

In a lengthy concurring opinion, Justice McGuire agreed with the majority's "implicit conclusion" that the insurer was required to show that it was prejudiced by the failure of the injured party to provide timely notice of the underlying action, but explained this conclusion by saying

> this appeal is controlled by our decision in *American Transit Ins. Co. v. B.O. Astra Mgmt. Corp.* Consistent with the emphasis of the Court of Appeals placed in *Argo* [*Corp. v. Greater N.Y. Mut. Ins. Co.*, 4 N.Y.3d 332, 340, 794 N.Y.S.2d 704 (2005)] on the fact that the carrier had not received timely notice of claim, this Court held that "[h]aving received timely notice of claim, plaintiff insurer was not entitled to disclaim coverage based on untimely notice of the claimant's commencement of litigation unless it was prejudiced by the late notice" (*id*. at 432). This case is *a fortiori* to *B.O. Astra*, because ATIC received both timely notice of the accident and timely notice of [the injured party's] claim.[22]

Specifically addressing the issue of prejudice, Justice McGuire found that a liability insurer that receives notice of a lawsuit *after* a default judgment has already been taken against its insured demonstrates prejudice, and should not be required to move to vacate the default. Indeed, it would be prejudicial to the insurer's right "to require it to shoulder the burden of moving to vacate the default."

Effective January 17, 2009, the N.Y. Insurance Law ("Ins. Law") has been amended in relation to timing for the giving of notice of claim under insurance contracts – specifically, the effective elimination of the "no-prejudice" rule. Chapter 388 of the 2008 Laws of New York, signed into law on July 21, 2008, effective 180 days thereafter and applicable to policies issued or delivered in New York on or after that date and to any action maintained under such a policy, added a new subdivision, Ins. Law § 3420(a)(5). This subdivision requires every policy or contract insuring against liability for injury to a person issued or delivered by the state to contain a provision that "failure to give any notice required to be given by such policy within the time period prescribed therein shall not invalidate any claim made by the insured, injured person or any other claimant, unless the failure to provide timely notice has prejudiced the insurer" (with exceptions for "claims made" policies). A new § 3420(c)(2)(C) provides that "[t]he insurer's rights shall not be deemed prejudiced unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim." A new § 3420(c)(2)(A) creates a shifting burden of proof on the issue of "prejudice," as follows:

> In any action in which an insurer alleges that it was prejudiced as a result of a failure to provide timely notice, the burden of proof shall be on: (i) the insurer to prove that it has been prejudiced, if the notice was provided within two years of the time required under the policy; or (ii) the insured, injured person or other claimant to prove that the insurer has not been prejudiced, if the notice was provided more than two years after the time required under the policy.

Moreover, pursuant to a new § 3420(c)(2)(B), there will be an irrebuttable presumption of "prejudice" if, "prior to notice, the insured's liability has been determined by a court of competent jurisdiction or by binding arbitration; or if the insured has resolved the claim or suit by settlement or other compromise."[23]

The interpretation of the phrase "as soon as practicable" continued, as always, to be a hot topic.

In *Progressive Northern Ins. Co. v. Sachs*,[24] the court held that the claimant had adequately demonstrated that he was unaware of the seriousness of his injuries until early in 2007 – almost five years after the accident – and, thus, sufficiently established, as a matter of law, the existence of a valid excuse for his delay in providing notice of his SUM claim. Notably, the court did not rely upon the absence of prejudice to the SUM insurer ground relied upon by the lower court but, instead, affirmed the order below on this distinct ground.[25]

On the other hand, in *J.C. Contracting of Woodside Corp. v. Ins. Corp. of New York*,[26] the court held that notice of claim given to the insurer approximately five months

after the plaintiff was served with the summons and complaint in the underlying action, and while a motion for a default judgment was pending, was untimely as a matter of law.

In *Allstate Ins. Co. v. Berger*,[27] the court held that the insureds did not breach their obligation to timely notify their insured of the lawsuit brought against them by the injured party where there was no evidence that either of them was properly served with the summons and complaint in that action. Accordingly, the court held that the insurer's disclaimer based upon late notice was invalid, concluded that coverage was available under the tortfeasor's policy, and granted the UM carrier's Petition to Stay Arbitration.

However, in *Briggs Avenue LLC v. Ins. Corporation of Hannover*,[28] the Court of Appeals held that a liability insurer was entitled to disclaim coverage when the insured, because of its own error in failing to update the address it had listed with the Secretary of State, did not comply with a policy condition requiring timely notice of a lawsuit. As observed by the Court, "[i]t was unquestionably practical for Briggs to keep its address current with the Secretary of State, and thus to assure that it would receive, and be able to give, timely notice of the lawsuit. Brigg's failure to do so was simply an oversight."[29]

In *Young Israel Co-op City v. Guideone Mutual Ins. Co.*,[30] the court held that the plaintiffs' *40-day delay* in notifying the insurer of a motor vehicle accident was unreasonable as a matter of law. Given that the plaintiffs were allegedly negligent in the rear-end collision and that the underlying claimant was taken away from the scene of the accident by ambulance, the insured failed to raise an issue of fact as to whether the delay was reasonably founded upon a good faith belief of nonliability.

Discovery

The UM and SUM endorsements contain provisions requiring, upon request, a statement under oath, an examination under oath (EUO), physical examinations, authorizations and medical reports and records. The provision of each type of discovery, if requested, is a condition precedent to recovery.

In *Interboro Ins. Co. v. Rienzo*,[31] the court held that the branch of the petition that sought to require the claimant to submit to an EUO and a physical examination, and to furnish pertinent medical documentation or authorizations, should have been granted – especially since it was not opposed by the claimant.

In *Progressive Casualty Ins. Co. v. Jackson*,[32] on the other hand, the court held that it was a provident exercise of the lower court's discretion to deny that branch of the petition which sought pre-arbitration discovery.

Pursuant to 2008 New York Laws, chapter 388, effective January 17, 2009, a new § 3420(d)(1) was created. This provides, with respect to liability policies that afford coverage for bodily injury or wrongful death claims where the policy is a personal lines policy other than an excess or umbrella policy, that within 60 days of receipt of a written request by an injured party or other claimant who has filed a claim, an insurer must confirm in writing whether the insured had a liability insurance policy in effect with that insurer on the date of the occurrence, and specify the limits of coverage provided under that policy. If the injured person or other claimant fails to provide sufficient identifying information to allow the insurer, in the exercise of reasonable diligence, to identify a liability policy that may be relevant to the claim, the insurer has 45 days from the initial request to ask for more information, and then another 45 days after such information is provided to furnish the requested insurance information. Pursuant to an amendment to Ins. Law § 2601(a) ("Unfair Claim Settlement Practices"), the failure to comply with these disclaimer requirements may result in departmental sanctions, including financial penalties.

Petitions to Stay Arbitration: Filing and Service

New York Civil Practice Law and Rules 7503(c) provides, in pertinent part, that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded." The 20-day time limit is jurisdictional and, absent special circumstances, courts have no jurisdiction to consider an untimely application.[33]

In *Fiveco, Inc. v. Haber*,[34] the Court of Appeals held "it is well settled that '[a] party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties' "clear, explicit and unequivocal" agreement to arbitrate.'" Because the contract in this case contained an arbitration provision, "it cannot be said that 'the parties never agreed to arbitrate' or that 'no agreement to arbitrate has ever been made,'" regardless of the present viability of the contract containing the agreement to arbitrate.[35] Where, however, the policy does contain an agreement to arbitrate, albeit one that is subject to a condition precedent, and the insurer's contention is that the condition was not satisfied, it must move to stay within 20 days or be precluded from raising the breach of the condition precedent as a defense.[36]

In *Travelers Indemnity Co. v. Fernandez*,[37] after the insured's initial petition to stay arbitration was denied as untimely, the claimant failed to pursue arbitration for several months, and the American Arbitration Association proceeded to close its file. This required the claimant to file and serve a new demand for arbitration, as to which the insurer this time timely moved for a stay. The court affirmed the determination that the untimeliness of the first petition had no bearing on the second petition, and that since the second petition was filed within 20 days

after receipt of the second demand for arbitration, it was timely and properly heard.

In *Interboro Ins. Co. v. Coronel*,[38] the court held that where the SUM carrier was in rehabilitation and, thus, subject to a stay at the time it received the Demand for Arbitration served upon it, the 20-day period for moving to stay arbitration was stayed until the insurer emerged from rehabilitation and the rehabilitation stay was lifted. Thus, the court held that where the insurer petitioned to stay arbitration within 20 days after receipt of a notice from the AAA advising it of a pre-hearing telephone conference, that proceeding was timely commenced in accordance with CPLR 7503(a).

In *State Farm Ins. Co. v. Williams*,[39] although the claimant served Notices of Intention to Arbitration long before the insurer petitioned to stay arbitration, an issue of fact was raised as to whether those Notices were defective because they contained an incorrect policy number, in which case the notices would have been deemed insufficient to trigger the running of the 20-day period. Thus, the matter was remitted for a hearing on the issue of whether the correct policy number was used on the Notices of Intention to Arbitrate.

In *State Farm Ins. Cos. v. DeSarbo*,[40] where the court had previously ruled that the insurer had not timely moved to stay an underinsured motorist arbitration, and, thus, it could not raise certain defenses, the court held that since there was a valid agreement to arbitrate and the 20-day rule applied, the insurer could not circumvent it by commencing a declaratory judgment action seeking the same relief.

In *State Farm Mutual Automobile Ins. Co. v. Scott*,[41] the court held that the timeliness of the proceeding to stay arbitration should not be measured from the service of claimants' attorney's letter notifying the petitioner of their intent to arbitrate their "uninsured motorist claims" because that letter gave no indication whether such claims were being brought based upon a lack of coverage or a hit-and-run. Rather, the court held that timeliness should be measured from the service of the claimants' Demand for Arbitration, which constituted the insurer's first notice that the claims were being brought under the hit-and-run provision, and, thus, when the insurer first learned that it possessed a ground for seeking a stay of arbitration, *i.e.*, one of the claimants' statement that there was no physical contact with the offending vehicle. ■

1. 49 A.D.3d 736, 854 N.Y.S.2d 459 (2d Dep't 2008).
2. *Id.* at 737.
3. *Id.*
4. 55 A.D.3d 879, 866 N.Y.S.2d 338 (2d Dep't 2008).
5. *Id.* at 880–81 (citations omitted).
6. *Id.* at 881.
7. 47 A.D.3d 509, 850 N.Y.S.2d 76 (1st Dep't 2008).
8. 52 A.D.3d 917, 859 N.Y.S.2d 301 (3d Dep't 2008).
9. *Id.* at 918 (citation omitted).
10. *Id.* at 919.
11. 51 A.D.3d 932, 858 N.Y.S.2d 327 (2d Dep't 2008).
12. *Id.* at 933 (citation omitted).
13. 183 A.D.2d 111, 589 N.Y.S.2d 356 (2d Dep't 1992).
14. *Scalamandre*, 51 A.D.3d at 933. *See* N.Y. Vehicle & Traffic Law § 123 (VTL); *see also* VTL § 125-a.
15. 49 A.D.3d 413, 414, 854 N.Y.S.2d 360 (1st Dep't), *lv. to appeal dismissed*, 11 N.Y.3d 826, 868 N.Y.S.2d 594 (2008).
16. 55 A.D.3d 281, 865 N.Y.S.2d 102 (2d Dep't 2008).
17. *See also MetLife Auto & Home v. Kalendarev*, 54 A.D.3d 830, 865 N.Y.S.2d 108 (2d Dep't 2008).
18. *Langan*, 55 A.D.3d at 289 (Mastro, J.P., dissenting).
19. *See N.Y. Cent. Mut. Fire Ins. Co. v. Ljekocevic*, 48 A.D.3d 469, 849 N.Y.S.2d 805 (2d Dep't 2008).
20. 57 A.D.3d 257, 867 N.Y.S.2d 914 (1st Dep't 2008).
21. 39 A.D.3d 432, 835 N.Y.S.2d 106 (1st Dep't), *lv. to appeal denied*, 9 N.Y.3d 802, 840 N.Y.S.2d 762 (2007). *See* Jonathan A. Dachs, *2007 Insurance Law Update: Uninsured, Underinsured and Supplementary Uninsured Motorist Law – Part I*, N.Y. St. B.J. (June 2008), pp. 34, 37.
22. *Am. Transit Ins. Co.*, 57 A.D.3d at 259 (McGuire, J., concurring) (citations omitted).
23. *See* Howard B. Epstein & Theodore A. Keyes, *New Late Notice Law Requires Insurers to Show Prejudice*, N.Y.L.J., Jan. 2, 2009, p. 3, col. 1; Seth B. Schafler & Robyn S. Crosson, *Laws on Late Notice of Insurance Claims Improved*, N.Y.L.J., Aug. 14, 2008, p. 4, col. 4; Norman H. Dachs & Jonathan A. Dachs, *Status of "No Prejudice" and Direct Action Legislation*, N.Y.L.J., July 3, 2008, p. 3, col. 1; Daniel W. Gerber & Nikia A. O'Neal, *Recent Activity in the No-Prejudice Debate*, N.Y.L.J., Mar. 17, 2008, p. 4, col. 4; Norman H. Dachs & Jonathan A. Dachs, *Legislative Initiatives Regarding the 'No-Prejudice Rule,"* N.Y.L.J., Sept. 11, 2007, p. 3, col. 1.
24. 50 A.D.3d 803, 856 N.Y.S.2d 633 (2d Dep't 2008).
25. *See Rekemeyer v. State Farm Mut. Auto Ins. Co.*, 4 N.Y.3d 468, 796 N.Y.S.2d 13 (2005).
26. 48 A.D.3d 422, 850 N.Y.S.2d 643 (2d Dep't 2008).
27. 47 A.D.3d 708, 851 N.Y.S.2d 584 (2d Dep't 2008).
28. 11 N.Y.3d 377 (2008).
29. *Id.* at 381.
30. 52 A.D.3d 245, 859 N.Y.S.2d 171 (1st Dep't 2008).
31. 54 A.D.3d 675, 863 N.Y.S.2d 483 (2d Dep't 2008).
32. 49 A.D.3d 748, 853 N.Y.S.2d 652 (2d Dep't 2008).
33. *See Travelers Indem. Co. v. Fernandez*, 55 A.D.3d 746, 866 N.Y.S.2d 260 (2d Dep't 2008) (the 20-day limitation is treated as a statute of limitations); *State Farm Ins. Cos. v. DeSarbo*, 52 A.D.3d 936, 859 N.Y.S.2d 312 (3d Dep't 2008); *State Farm Ins. Co. v. Williams*, 50 A.D.3d 807, 856 N.Y.S.2d 631 (2d Dep't 2008); *Standard Fire Ins. Co. v. Mouchette*, 47 A.D.3d 636, 849 N.Y.S.2d 592 (2d Dep't 2008).
34. 11 N.Y.3d 140, 144, 863 N.Y.S.2d 391, *reargument denied*, 11 N.Y.3d 801, 868 N.Y.S.2d 580 (2008).
35. *Id.* at 145; *see also Interboro Ins. Co. v. Maragh*, 51 A.D.3d 1024, 858 N.Y.S.2d 391 (2d Dep't 2008) (issue as to whether claimant was a resident of insured's household at time of accident deals with condition precedent to arbitration; if not a resident, not an insured, and, therefore, no agreement to arbitrate and 20-day time limit inapplicable); *Dairyland Ins. Co. v. Figueroa*, 48 A.D.3d 462, 850 N.Y.S.2d 638 (2d Dep't 2008).
36. *See also Nova Cas. Co. v. Martin*, 57 A.D.3d 548, 870 N.Y.S.2d 55 (2d Dep't 2008).
37. 55 A.D.3d 746, 866 N.Y.S.2d 260 (2d Dep't 2008).
38. 54 A.D.3d 342, 863 N.Y.S.2d 448 (2d Dep't 2008).
39. 50 A.D.3d 807, 856 N.Y.S.2d 631 (2d Dep't 2008).
40. 52 A.D.3d 936, 859 N.Y.S.2d 312 (3d Dep't 2008).
41. 49 A.D.3d 465, 854 N.Y.S.2d 132 (1st Dep't 2008).

BY ELLIOTT WILCOX

Presentation Lessons From 35,000 Feet

"Welcome to flight #1007. . . . This is a non-smoking flight. Please listen to these safety instructions as we prepare for takeoff. All carry-ons must be stored in the overhead compartment or completely beneath the seat in front of you. Keep your tray and seatback in their locked and upright positions during takeoff and landing. In the event of a water landing, your seat cushion can be used as a floatation device. If we lose cabin pressure, oxygen masks will fall from the overhead compartments . . ."

How many times have you heard these instructions? Did you pay any attention to them the last time you flew? If not, why not? Was it because of the *substance?* Potentially, these instructions could mean the difference between life and death. That's more important than almost any other presentation you'll hear this year. No, it's not because of the *substance* of the message. It's because of the *style.* These presentations are usually delivered in the same monotone, matter of fact, "I'm forced to do this but I know you don't care and I don't care either" style. As I write this article, we're flying at 35,000 feet. I know the safety instructions were important, but I ignored them anyway. I tried to listen, but after 10 seconds, it sounded like Charlie Brown's teacher was talking to me. ("Wah wah wah, wa-wa-wa-wa-wah.") I tuned out. Instead, I started to ask myself, "Is there anything they could do to grab my attention and force me to listen to a presentation that I've heard dozens of times before?"

I thought of three things they could do to make me listen. These same tips will help you the next time you're speaking to an audience who's thinking, "I've heard this a hundred times before." Start your presentation with one of these tips to grab and hold their attention:

Tip #1. Say What I'm Thinking

"You're probably thinking to yourself, 'Hey, I've heard these safety instructions a hundred times, and there's no reason I need to listen,' right?!?"

"Hey! That's exactly what I was thinking!" Isn't it refreshing when a speaker gives voice to your thoughts and concerns? When you hear your own thoughts delivered from the stage, you say to yourself, "Hey, this guy is just like me. He's smart. I wonder what else he has to say."

Do you want to get the audience on your side? Get on their side. Get inside their heads. Before you speak, take the opportunity to speak with your audience members. Ask them what they think about the topic. Have they heard this subject before? ("You're gonna give another presentation on sexual harassment? Those H.R. guys must think we're perverts.") Say what's on their minds. Be the voice for their concerns. When your audience members think, "Hey, me too, that's what I was thinking!" they'll pay more attention to the other things you say.

Tip #2. Bribe Them

"At the end of our flight instructions, we're going to pick someone at random and ask them a question about the instructions. If they answer correctly, we'll give them a free drink / upgrade to first class / 1,000 frequent flier miles / one day pass to the Admiral's Club / etc."

How much would it actually cost them? A couple of bucks? Nothing? But don't you think I would pay more attention to the instructions?

You can use the same technique in your presentations. The bribe doesn't need to be expensive. You just need to get their attention. You could give them a free report, a discount on your services, a coupon, a one-month trial subscription, move them to the head of the line when food is served, or tell them you'll deliver a secret tip or shortcut during the presentation. Give them an extra incentive to listen to you, and they'll pay more attention to your message.

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

Tip #3. Make Me Laugh

"This is a non-smoking, non-complaining, non-whining flight. Please keep your seat in an upright position during take-off. If you aren't sure that your seat is upright, just adjust it to the most uncomfortable position. In case of a sudden fall in air pressure inside the cabin, oxygen masks will drop from an overhead compartment. Of course we don't expect air pressure to drop – otherwise we would have stayed home. But in case this happens, attach your own mask and breathe normally ('Yeah, right!') If the aircraft should land in water and evacuation becomes necessary, you can use your seat cushion as a flotation device. Please strap it on and 'kick, paddle, kick, paddle' to the nearest shore. If you have more than one child accompanying you, pick up the one with most potential."

These comments were from an actual Southwest flight. And yes, everyone paid attention to their safety instructions. Humor is a great attention getter. Not the recycled jokes that we've heard before ("I just flew in . . . and boy are my arms tired!"), but simple, observational humor. Usually you can find humor in what's most painful about the situation. If your audience members laugh once, they'll listen closely to your material, hoping to laugh again.

"On behalf of the entire crew, I'd like to welcome you to the end of the article. We hope that you've enjoyed your flight and learned some useful tips. We know that you have many choices when it comes to reading articles, so thank you for reading with us." ■

President's Message
Continued from Page 6

late at night from Bob about the tragedy in Buffalo and the near-tragedy in New York City underscore Bob's superb leadership and the committee's immediate response to both horrific events, gave me profound comfort. I cannot thank the members of the team enough for their grace, responsiveness and sensitivity. On a somewhat related note, I also want to send a special word of thanks to Bob, Steve Krane and my colleague here at Arent Fox, Jennifer Bougher, on helping prepare me for my argument on lawyer advertising in January before the Second Circuit, where the State Bar, as amicus curiae, advocated for the affirmance of the order by Northern District of New York Judge Scullin upholding the constitutionality of the moratorium on contacting accident victims or their loved ones within 30 days of an accident.

Federal and State Legislative/Judicial Outreach

There have been so many other high points this year that it is hard to include them all: In October, Mike Getnick, Pat Bucklin and I met with Governor Paterson's counsel to propose that Rockefeller Drug Reform and adequate civil legal services funding become part of the Governor's then-emerging legislative agenda. The Governor subsequently took up both issues, and we are hopeful that he will address them before the end of this legislative term.

Ron Kennedy, Richard Rifkin, Steve Younger (Chair of our new Federal Legislative Priorities Committee) and I visited with leading members of Congress from New York, covering a wide range of issues, including: the destruction of documents in the Executive Branch, loosening the restrictions on funding for the Legal Services Corporation (LSC) and protecting the attorney-client privilege. In February, following President Obama's Executive Order proposing to close Guantanamo Bay prison within a year and study the remaining 300-some prisoner cases, the State Bar successfully advocated for adoption of a resolution before the ABA House of Delegates with respect to ensuring habeas corpus rights, the rule of law, Article III or military courts and jurisdictional concerns affecting Guantanamo Bay detainees. Thanks go to Fernando Bohorquez, who chairs the State Bar Civil Rights Committee, and Sharon Stern Gerstman for negotiating that resolution with the ABA. The resolution went to the President and his administration for consideration.

This year, the Committee on Legislative Policy, led by Chair Hermes Fernandez and the State Bar's Ron Kennedy, of the Office of Governmental Relations, developed a list of key legislation for which we would advocate. Thereafter on a regular basis, Mike Getnick and I had many productive meetings not only with state legislators but also for the first time with the Governor's Office, his Chief of Staff, his counsel and the Division of the Budget, as well as with the majority leaders of the State Senate and Assembly and their counsel, Chief Judge Jonathan Lippman, Chief Administrative Judge Ann Pfau and other officials with the Office of Court Administration. We testified at Senate and Assembly hearings and took the proverbial show on the road by speaking at the Monroe County Bar Association Forum on funding for civil legal services. For the first time, we included in the priorities consideration of how proposed legislation would affect lawyers and the legal profession.

This year Chief Judge Kaye became Chief Emerita of our state's highest court, and we witnessed the investiture of our new Chief Judge, Jonathan Lippman. In that connection, I was asked to testify before the Senate Judiciary Committee in support of the nomination of Judge Jonathan Lippman, and we celebrated at the State Bar Center following his investiture. Chief Administrative Judge Ann Pfau and I spoke weekly, and Mike, Pat Bucklin and I also met with Judge Pfau quarterly to discuss the most important issues affecting lawyers and judges and the practice of law. These productive talks enabled us to communicate with you – timely and effectively – about the latest issues. Thanks go to former Bar President Bob Witmer who, following Governor Paterson's statements to the press in December 2008 concerning diversity on the Court of Appeals, agreed to chair a special subcommittee to study the Commission on Judicial Nomination, and make recommendations on how to increase diversity in the number of applications and in the composition of the commission itself. Bob also agreed next to study the manner in which appointments are made for the Appellate Division bench in order to ensure greater diversity there, too. I am certain that he will find cogent and concrete ways to achieve this important objective. My sincere thanks also go to former Bar President Vince Buzard and his Committee to Review Judicial Nominations, which not only reviewed the nominations of candidates for our Court of Appeals but graciously agreed to undertake for the first time a review of candidates for our federal courts.

You, the Members!

As promised, we continued the Membership Challenge this year, which Mike Getnick has agreed to promote again next year. With tremendous efforts from our Committee on Membership, chaired by Claire Gutekunst, and our State Bar staff Pat Wood and Megan O'Toole, we started the year with a new membership kick-off in what I hope will become an annual event – the July boat ride for some 600 newly admitted lawyers. Over 250 joined as a result – and Mike, together with Sherry Levin Wallach, has agreed to host this annual, wonderful event again this year with the help of our Sections and sponsors. In this past year, despite our economy, our membership jumped from 74,000 members in 2008 to more than 78,000 in 2009. This increase is largely due to a strong, continuous commitment by leadership to raise the level of visibility of the State Bar in New York and across the nation, and our close collaboration

with members to remain relevant to member needs and deliver membership services of real value.

Achieving greater diversity is vital not only within the judiciary but also among our members, our profession and our State Bar leadership, and we have expanded our outreach efforts this past year. In December, Lillian Moy, who chairs our Committee on Minorities in the Profession, Glenn Lau-Kee and I held a lunch for minority bar presidents at Arent Fox. More than 40 bar leaders came to share their ideas on how best to promote their associations, help their communities and promote future leaders in the State Bar. Lillian then followed up in January during Annual Meeting week with a conference especially for minority bar association leaders and the State Bar leadership in order to address their concerns and offer the State Bar's assistance in joint programs. I know that with Lillian at the helm, we will make a lasting impact on increasing the diversity in our profession and in the State Bar. In this regard, special thanks to Claire Gutekunst and former Bar Presidents Kate Madigan, Tom Levin and Ken Standard (the latter three of whom lead the Committee on Diversity & Leadership Development) for making our Annual Meeting Celebration of Diversity so effective and successful (we gained 50 new members of color at that one event alone); and for the wisdom of the House of Delegates in approving the addition of two out-of-state members (whom I have appointed) and, in 2004, the addition of 12 minority lawyers.

From my perspective, a year is a very short period of time. I was blessed to have a warm, supportive and friendly staff that has a resilient "can do" attitude. I will always cherish my friendship with Pat Bucklin, our esteemed Executive Director, for all the sound advice she renders; the unflagging energies of Sebrina Barrett, who has a Midas touch with words; Keith Soressi and Kathy Baxter for assiduously preparing countless legal memoranda, Executive Committee and House agendas; Pat Wood who is always far ahead on membership ideas and ways to maintain our relevancy to members; Kathy Heider for her perfectionism in meeting plans; Rich Martin for his warm and helpful assistance on our numerous surveys and projects; and Kris O'Brien for her patience in all matters financial. To all the staff liaisons who have made events roll seamlessly and who have had the patience to respond to my many questions, I thank you. Finally, to my very good friends Mike Getnick and Steve Younger, thank you for being there for me and especially for your unwavering support. Despite the state of the economy and the challenges we have faced, we have everything before us. ■

1. The report of the Wrongful Convictions Task Force can be found at http://www.nysba.org/wrongfulconvictions.

2. The report of the Task Force on Global Warming can be found at http://www.nysba.org/globalwarmingTFReport.

3. The report of the Task Force on Privacy can be found at http://www.nysba.org/privacyreport.

4. You can view "Saving Your Home from Foreclosure" at http://www.nysba.org/thepeopleslawschool.

5. Visit the Committee on Lawyers in Transition blog at http://nysbar.com/blogs/lawyersintransition.

6. The 2009 Presidential Summit Webcast can be viewed at http://www.nysba.org/summitwebcast.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I work for a mid-sized upstate law firm which represents various businesses throughout the area. Three of these businesses (we can refer to them as Installer One, Installer Two and the Owner) recently became adversaries in litigation concerning an oil spill. Installer One and Installer Two separately installed two different safety mechanisms to an oil heating system located in the basement of the Owner. Allegedly, both of these safety mechanisms failed and suit was brought by the Owner against both Installers. My firm declined to represent any of the three businesses in that litigation after initial consultations about the matter. However, the Owner's insurance company has now refused to cover the costs associated with the spill, and the Owner wants to challenge that refusal in court. Its principal has requested our representation in the matter. Although we do not represent the Installers with regard to the pending oil spill litigation, would it be proper for the firm to represent the Owner in its insurance coverage case?

Sincerely,

Caught in the Middle

Dear Caught:

It is not surprising that this situation arose for a law firm representing multiple businesses within the same area. It's safe to say that this is not the first time it has happened. Businesses will come into contact with one another, and eventually litigation results. In rural areas this type of conflict may be more common, as there are not a multitude of law firms from which a potential client might choose. In some situations the best alternative may be to try and work with the clients to understand the conflict and perhaps even continue with the proper disclosures. Even so, an attorney's ethical responsibilities must always be primary, whether the setting is rural or urban.

Given the obvious conflict of interest involved here, the law firm was correct in declining to represent any of the businesses in a suit against each other. However, a further question arises as to whether it would be proper for the firm to represent the Owner in its efforts to settle with the insurance company. Officially the firm would be representing only one entity, but as a practical matter the interests of both Installers may be collaterally involved.

In addressing this situation, one must consider how communication with the insurance company will affect the Installers, and what information from the Installers may be revealed in the negotiations or proceedings against the insurance company. As with many situations, the Rules of Professional Conduct do not provide a simple, concrete answer but do offer guidance through the clear underlying principles found throughout. In the situation at hand, the principles of those Rules of Professional Conduct concerning conflict of interests and client confidences and secrets must be considered and offer the best way to understand the firm's position.

The Rules regarding conflict of interest should be analyzed first, as the firm may be dealing with the interests of multiple clients. Rule 1.7: Conflict of Interest: Current Clients says that "[a] lawyer shall not represent a client if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other interests." This Rule delineates the lawyer's own potential conflict of interest in representing a client and may be the most important concerning your situation. Even if the firm does not represent the Installers in connection with the oil spill, the firm is most likely going to have continued employment with these two businesses. The Installers may be aware of the firm's representation of the Owner and obviously will be very interested in the outcome of the negotiations and/or proceedings with the insurance company. If the Owner is successful in obtaining insurance coverage, the insurance company will be subrogated to the rights of the Owner against both Installers. The insurance company may pursue those rights more aggressively than the Owner might on its own. The Installers themselves, or the mere concern about continued employment by these businesses, may lead to additional pressure on the firm in representing the Owner. The exercise of professional judgment on behalf of the Owner therefore could be affected by the firm's interest in continuing to represent one or both of the Installers in other matters.

Rule 1.7 also offers guidance in addressing this potential conflict. In pertinent part, Rule 1.7 states that "[e]xcept as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests." Subsection (b) of Rule 1.7 provides that "[n]otwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected

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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client [and] (4) each affected client gives informed consent, confirmed in writing."

Although Rule 1.7 explicitly regulates the multiple employment of a lawyer, the underlying principle is avoiding any conflict of interest. In representing the Owner in its dealings with the insurance company, the firm may inadvertently take into consideration the differing interests of the Installers. This is obviously an improper practice, as it is the firm's job to "provide competent representation to a client." Rule 1.1: Competence. In addition, Rule 1.16: Declining or Terminating Representation provides that "a lawyer shall withdraw from the representation of a client when: (1) the lawyer knows or should know that the representation will result in a violation of these Rules or of law." While the firm would be representing just the Owner in this matter, the firm would be aware that there may be potential future engagement by either one or both of the Installers, and this may impede its current advocacy on behalf of the Owner. This would be even more of a problem if the firm concurrently represents one or both of the Installers in other matters. This factor will be hard for the firm to ignore.

Furthermore, in the negotiations or proceedings with the insurance company, the alleged fault of the Installers would have to be discussed and explored in order to have the matter resolved. Not only will this put the firm in an awkward position, but the firm may have obtained confidences from the Installers that may affect the outcome of the negotiations or litigation.

As all three businesses looked to the firm for representation, it is possible that different attorneys from the firm talked with each business. Confidences, legal advice and information could have been obtained and given by the firm during these consultations. While the firm declined to represent the businesses, its lawyers may have still obtained additional knowledge that may help or hurt these businesses in dealing with the insurance company, and in the litigation among themselves. Not only does this situation present known differing interests among the businesses, but it clearly involves confidences and secrets of what now have become adverse parties.

These confidences and secrets bring into play Rule 1.6: Confidentiality of Information. This section states that "[a] lawyer shall not knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless: (1) the client gives informed consent." Several aspects of this section may be involved in the situation at hand.

In consulting with each business, attorneys in the firm undoubtedly listened to the explanation each gave as to how the litigation arose, and possibly a business could have divulged its fault or communicated other damaging information in the process. While this confidential information may be advantageous for the Owner to use in its negotiations and litigation with the insurance company, it is confidential information not to be disclosed by the firm. The firm would want to but must avoid using this information in zealously advocating for the Owner.

On the other hand, under Rule 1.8: Current Clients: Specific Conflict of Interest Rules, if the firm obtained a confidence or secret from either of the Installers that would be advantageous to the Owner, and was not to the disadvantage of the Installers, the firm may use the confidence or secret upon the client's informed consent. However, requesting consent from either Installer under the circumstances you outline may be inappropriate. While the firm may not be representing the current interests of the Installers, the firm represented those businesses previously. Those businesses sought representation from the firm, expected to be represented, and believed the information discussed would be held in confidence. As a result, any request for consent to use the confidences or secrets of the businesses would be improper and would not suit the best interests of those clients. The request for consent to use the confidences or secrets may also be considered a personal interest under Rule 1.7: Conflict of Interest: Current Clients. Furthermore, it would not be in the best interests of the Installers to allow the Owner to reveal any confidence or secret in the insurance dealings, as it may affect the outcome of the litigation currently pending among the businesses. As such, any disclosure, even with client consent, would be inappropriate.

As of April 1, 2009, New York State has adopted the Rules of Professional Conduct. While the previous Disciplinary Rules were supplemented by caselaw, only time will tell how the adoption of the new rules will impact caselaw. A 2006 case in the Southern District of New York concerned the continued representation of a plaintiff by an attorney after the withdrawal of representation of a third-party defendant. In this litigation, the attorney represented multiple plaintiffs in an action arising from the contamination of ground water. *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 438 F. Supp. 2d 305 (S.D.N.Y. 2006). The defendants in the action subsequently brought a third-party action against the Town where the contamination occurred. The Town requested representation from the same firm representing the multiple plaintiffs. After the initial consultation, and at the request of the defendants, the firm agreed to withdraw from the representation of the Town. The defendants then moved to disqualify the law firm from representing the plaintiffs because of the firm's brief representation of the Town.

The district court determined that the firm could continue representing the plaintiffs based upon the firm's demonstration that the attorney had not received any confidential information from the Town, had not given any legal advice to the Town, and had met with the Town infrequently, and those meetings had been only to inform the Town of the complaint and to confirm

CONTINUED ON PAGE 55

bold, italicize, underline, or use quotation marks or exclamation points for emphasis or sarcasm.

Boldface separates: It breaks up text and causes a vertical break between sections. Use boldface only in headings, titles, subtitles, or topics at the beginning of a letter, paragraph, or chapter. If you use boldface and italics in the text, you'll confuse readers about what's important.

12. Italics and Underlining. Prefer italicizing to underlining. Italicizing makes the text clean and legible. Underlining makes the text obtrusive; it obliterates the lower parts of the letters "g," "j," "p," "q," and "y." To emphasize, however, you may underline a word or phrase in an italicized paragraph or on a page with abundant italicized type.

Use italics for foreign words and phrases not commonly used in English, such as Latin expressions. Use italics for case names. Italicize citational signals. Italicize internal cross-references. Different rules exists about when to italicize titles of books, treatises, articles, legislative materials, reports, other non-periodic materials, periodicals, and punctuation marks.

13. State Court Rules. Consult the court's rules before filing a court document. Below are the typography rules for New York's state courts.

New York Court of Appeals. Briefs filed in the New York Court of Appeals must comply with Rule 500.1.[7] Briefs prepared on a computer must be printed in either a serifed, proportionally spaced typeface like Century, Garamond, or Times New Roman or in a serifed monospaced typeface like Courier. Don't condense typefaces; don't condense the spacing. Except in headings, don't use bold type or type consisting of all-capital letters. If you use a proportionally spaced typeface, you must use 14-point type. Footnotes must be at least 12 points or greater. If you use a monospaced typeface, you must use 12-point type containing no more than 10½ characters per inch. Footnotes in monospaced type must be 10 points or larger.

Court of Appeals briefs must have one-inch margins on all sides of the page.[8] Double-space the text. You may indent and single-space quotations having more than two lines of text. You may single-space headings and footnotes. You must consecutively number the pages at the center of the bottom margin of each page. Use opaque, unglazed white paper measuring 11 by 8½ inches.[9] To secure the pages, briefs must be bound on the left-hand side. Don't use plastic covers or any metal fasteners or similar hard material that protrudes or presents a bulky surface or sharp edge. The court encourages reproducing text on both sides of a page.

The New York Court of Appeals has no page or word limit.

New York Appellate Division. Briefs filed in the Appellate Division must comply with Civil Practice Law and Rules (CPLR) 5529. Briefs and appendices must be on permanent, legible, black-image-on-white 11 by 8½-inch paper. CPLR 5529 requires compliance with court rules specific to each department on the size of margins, line spacing, and length of briefs.

First Department. Briefs filed in the Appellate Division, First Department, must comply with Rule 600.10.[10] Briefs must be in a serifed, proportionally spaced typeface or in a serifed monospaced typeface. If you use a proportionally spaced typeface, the typeface must be no less than 14 points. The rule is different for footnotes and headings: Footnotes must be no less than 12 points; headings must be in type no greater than 15 points. If you use a monospaced typeface, the typeface must be no less than 12 points. Exception: Footnotes must be no smaller than 10 points, and headings may not be greater than 14 points. Briefs must have at least one-inch margins on each page; the text may not exceed 9 by 6½ inches.[11] You must consecutively number the pages.[12]

Briefs must be double-spaced; indented quotations, footnotes, and point headings may be single-spaced. Briefs must also be securely bound on the left-hand side of the page.[13] Briefs with a metal fastener or other hard material that protrudes or presents sharp edges must be covered with linen, plastic masking tape, or similar material. The court discourages "Acco, spiral, or other bulky binding edge binders."[14] You must use recycled paper.[15] Except with the court's permission, briefs may not exceed 70 pages or 14,000 words.[16] The court provides two ways to calculate these limits: page limit or word limit. If you use the page-limit method, include all pages in the calculation except for the table of contents, tables of citations, and any authorized addendum containing statutes, rules, and regulations. If you use the word-count method, include all printed text on each page of the brief. A certificate of compliance must be submitted with the brief.[17]

Second Department. Briefs filed in the Appellate Division, Second Department, must comply with Rules 670.10.1, 670.10.2, and 670.10.3.[18] Briefs prepared on a computer must be printed in either a serifed, proportionally spaced typeface or in a serifed, monospaced typeface. Briefs may not have narrow or condensed typefaces or condensed spacing. Except in point headings, words may not be in bold type or type consisting of all-capital letters. If you use a proportionally spaced typeface, use 14-point type. You may use a 12-point type or greater for footnotes.

Never use footnotes to circumvent page limits.

If you use a monospaced typeface, use 12-point type containing no more than 10½ characters per inch. You must use type of 10 points or larger for footnotes. Briefs must have one-inch margins on each page.[19] Text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Pages must be consecutively numbered, with the numbers appearing in the center of the bottom margin of each page. Briefs may not exceed 14,000 words.[20] A certificate of compliance with the rules must be appended to the brief.

Third Department. Briefs filed in the Appellate Division, Third Department, must comply with Rule 800.8.[21] Rule 800.8 doesn't require any particular typesize. The Third Department requires "good quality, white, unglazed paper." Briefs must comply with CPLR 5528 and 5529. CPLR 5528 provides that briefs contain a table of contents, question(s) presented, statement of facts, argument, and appendix. CPLR 5529 requires compliance with specific court rules — like the Third Department's, for example — for margins, line spacing, and length of briefs. Briefs for the appellant may not exceed 50 printed or 70 typewritten pages, Briefs for the respondent must not exceed 25 printed or 35 typewritten pages.[22]

Fourth Department. Briefs filed in the Appellate Division, Fourth Department, must comply with Rule 1000.4(f)(2).[23] Write briefs in 11-point size or larger. Briefs may not contain footnotes. Double-space. Briefs must be reproduced by standard typographical printing or other duplicating process that produces a clear black image on white paper, with one-inch margins.[24] Briefs must be reproduced on opaque, unglazed white paper measuring 11 by 8½ inches. Consecutively number each page. Bind papers on the left-hand side of the page in a manner that properly secures all the pages and keeps them firmly together. Don't bind the brief with a metal fastener or similarly hard material that protrudes or presents a bulky surface or sharp edge.[25] Briefs for the appellant and the respondent may not exceed 70 pages (either printed or typewritten).

Appellate Term. Briefs filed in the Appellate Term, First Department, must comply with Rule 640.5.[26] Briefs filed in the Appellate Term, Second Department, Second and Eleventh Judicial Districts, must comply with CPLR 5528 and 5529 and with Rule 731.2.[27] No specific rules exist about typeface and typesize. No specific rules exist about page or word limit. The rules for briefs filed in the Appellate Term, Second Department, Ninth and Tenth Judicial Districts, are identical to those in the Second and Eleventh Judicial Districts.[28]

New York Trial Courts. Documents served and filed in New York trial courts must comply with CPLR 2101. CPLR 2101 provides, with some exceptions, that documents served or filed must be on 11 by 8½-inch paper. Writing must be legible and in black ink. Use at least 12-point type for summonses. For all other documents, except exhibits, use at least 10-point type.

For civil actions and proceedings in Supreme Court and County Court, use the Uniform Rules for New York State Trial Courts (Uniform Rules). For guidance, look at Uniform Rules 202.5 and 200.3. Rule 202.5[29] provides that "every paper, other than an exhibit or printed form, shall contain writing on one side only, and if typewritten, shall have at least double space between each line, except for quotations and the names and addresses of attorneys appearing in the action, and shall have at least one-inch margins." Rule 202.5 further provides that "[p]apers that are stapled or bound securely shall not be rejected for filing simply because they are not bound with a backer of any kind."[30] Rule 200.3 refers to papers filed in Criminal Court. It's almost identical to Rule 202.5. Rule 200.3 provides that "every paper filed in court, other than an exhibit or printed form, shall contain writing on one side only, and if typewritten, shall have at least double space between each line, except for quotations and the names and addresses of attorneys appearing in the action, and shall have at least one-inch margins."[31]

The CPLR governs issues not covered by the Uniform Rules.

> Prefer italicizing to underlining. Italicizing makes the text clean and legible.

14. Federal Court Rules. Below are the rules for the federal courts.

United States Supreme Court. The Supreme Court has specific rules for submitting briefs. You must comply with Supreme Court Rules 24, 33, and 34. You must use typeface from the Century family like Century Expanded, New Century Schoolbook, or Century Schoolbook. Use 12-point type with 2 points or more leading between lines.[32] For briefs filed under Rule 33.1, you must submit a signed certificate indicating the number of words in the document, including the words in the footnotes.[33] See Supreme Court Rules 33(h) for a chart of the documents you submit to the Court and their corresponding word count.[34] Rule 33 requires 10-point type for footnotes.[35]

United States Court of Appeals. Briefs filed in the United States Court of Appeals for the Second Circuit must comply with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6).[36] You may use either a proportionally spaced or a monospaced typeface. If you use a proportionally spaced typeface, it must include serifs, but you may use sans-serif type in headings and captions. The typesize must be 14 points or larger. If you use a monospaced typeface, it may not contain more than 10½ characters per inch. The brief must be set in a plain, roman style, but you may use italics or boldface for emphasis. You must italicize or underline case names. Briefs may be reproduced by

any process that yields a clear black image on light paper.[37] The paper must be opaque and unglazed. Use only one side of the paper. Bind the brief in any manner that's secure, doesn't obscure the text, and permits the brief to lie reasonably flat when open. You must use 11 by 8½-inch paper. Double-space the text. You may indent and single-space quotations longer than two lines. You may single-space headings and footnotes. Margins must be at least one inch on all four sides. You may place page numbers in the margins, but no text may appear in the margins.

The Second Circuit has page and type-volume limitations. Rule 32(a)(7)(A)[38] provides that a brief may not exceed 30 pages unless it complies with Rules 32(a)(7)(B) and (C).[39] Rule 32(a)(7)(B) provides that a brief is acceptable if (1) it contains no more than 14,000 words or (2) it uses a monospaced typeface and contains no more than 1300 lines of text. Rule 32(a)(7)(C) provides that a brief must include a certificate that you've complied with the type-volume rules. The certificate must state either (1) the number of words in the brief or (2) the number of lines of monospaced type in the brief.

United States District Court. The United States District Court for the Southern (SDNY), Eastern (EDNY), Western (WDNY), and Northern Districts (NDNY) of New York requires compliance with the Federal Rules of Practice and the Federal Rules of Procedure. Each district has local civil and criminal rules; some of these courts also have rules relating to specific cases like admiralty and maritime matters. Important to note, though, is that many judges have their own rules about document design. Consult them before filing a document with the court. Many courts have intricate rules about the contents of briefs, reply briefs, surreply briefs, memorandums of law, motions, and cross-motions. The courts will allow you to submit a request to the clerk of the court, the judge, or both to deviate from the rules.

The SDNY and EDNY rely on the same Local Civil Rules and Local Criminal Rules.[40] In civil matters, pleadings, motions, and other papers must comply with Rule 11.1(a). The papers must be plainly written, typed, printed, or copied without erasures or interlineations (corrections or alterations made by writing between the lines) that materially deface them.[41] The SDNY and EDNY have no requirements about margins, indentations, spacing, typeface, or typesize. The SDNY and EDNY have no word or page limit. In criminal matters, the Local Criminal Rules don't provide any restrictions on document design.

In the NDNY, you must comply with Local Rules 10.1(a) and 10.1(b).[42] All text, whether in the body of the document or in footnotes, must be in 12-point type or larger. You may not use "compacted or other compressed printing features."[43] All documents must be on 11 by 8½-inch white paper of good quality.[44] All text must be plainly and legibly written, typewritten, printed, or reproduced without erasures or interlineations materially defacing them. Documents must be in black or blue ink. Pages must be stapled (or otherwise fastened) together. All documents must be single-sided and have one-inch margins on all four sides of the page. All text in the body of the document must be double-spaced except for block quotations and footnotes, which may be single-spaced. Extensive footnotes may not be used to circumvent page limits. Pages must be consecutively numbered. The NDNY's page-limit rules are intricate. Memorandums of law must not exceed 25 pages;[45] motions must not exceed 10 pages;[46] and cross-motions must not exceed 25 pages.[47]

In the WDNY, you must comply with Local Civil Rule 10(a)[48] and Local Criminal Rule 49.2.[49] Local Civil Rule 10(a) and Local Criminal Rule 49.2 are identical: All text and footnotes for all documents must be in at least 12-point type and double-spaced. All text must be plainly and legibly written, typewritten, printed, or reproduced without erasures or interlineations materially defacing them. Text must be printed in ink on durable white 11 by 8½ inch paper of good quality and fastened. All text must be double-spaced. Briefs may not exceed 10 pages.[50]

In the next two columns, the Legal Writer will discuss legal-writing mechanics. ■

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1. For more on this topic, see Gerald Lebovits, The Legal Writer, *The Bottom Line on Footnotes[1] and Endnotes[2]*, 75 N.Y. St. B.J. 64 (Jan. 2003).

2. For more on this topic, see Gerald Lebovits, The Legal Writer, *Do's, Don'ts, and Maybes: Usage Controversies — Part II*, 80 N.Y. St. B.J. 64, 64 (July/Aug. 2008).

3. *See, e.g.*, Bryan A. Garner et al., The Redbook: A Manual on Legal Style, Rule 9.3(b), at 135 (2d ed. 2006).

4. Seventh Circuit, Requirements and Suggestions for Typography in Briefs and Other Papers 5, http://www.ca7.uscourts.gov/rules/type.pdf (last visited Jan. 29, 2009).

5. Matthew Butterick, *Typography for Lawyers*, http://www.typographyforlawyers.com/?p=54 (last visited Jan. 29, 2009). Pasting, or importing, text, whether from an e-mail, Westlaw or LEXIS, the Web, or anywhere else, is a fast, accurate way to copy information into a document. But you don't want to copy the source's formatting: You must maintain your formatting. To do that in Word, go to "home," then "paste," then "paste special," and then "unformatted text." In WordPerfect, go to "edit," then "paste special," and then "unformatted text."

6. Benjamin R. Opipari, Writing Tips, *To Go Boldly Without the Bold (and Italics and Underlining and All Caps)*, 16 Perspectives: Teaching Legal Research and Writing 131 (Winter 2008), *available at* http://west.thomson.com/pdf/perspec/Winter_2008/Winter08_9.pdf (last visited Jan. 29, 2009).

7. 22 N.Y.C.R.R. 500.1, *available at* http://www.nycourts.gov/ctapps/500rules08.htm#500_1 (last visited Jan. 29, 2009).

8. *Id.*

9. *Id.*

10. 22 N.Y.C.R.R. 600.10, *available at* http://www.courts.state.ny.us/courts/ad1/rules.shtml#600.10 (last visited Jan. 29, 2009).

11. *Id.* 600.10(a)(4).

12. *Id.* 600.10(a)(6).

13. *Id.* 600.10(a)(2).

14. *Id.*

15. *Id.* 600.10(e).

16. *Id.* 600.10(d)(1)(i).

17. *Id.* 600.10(b)(1)(viii).

18. Rules 670.10.1, 670.10.2, and 670.10.3 are available on the Appellate Division, Second Department, Web site, *available at* http://www.nycourts.gov/courts/ad2/pdf/rulesofprocedure.pdf (last visited Jan. 29, 2009). Westlaw has renumbered the rules: 22 N.Y.C.R.R. 670.10-a; 22 N.Y.C.R.R. 670.10-b; and 22 N.Y.C.R.R. 670.10-c. The rules are identical except for the numbering scheme.

19. 22 N.Y.C.R.R. 670.10-c; *see also* R. 670.10.3, *available at* http://www.nycourts.gov/courts/ad2/pdf/rulesofprocedure.pdf (last visited Jan. 29, 2009).

20. *Id.*

21. 22 N.Y.C.R.R. 800.8, *available at* http://www.courts.state.ny.us/ad3/Rulesofthecourt.html#800.8 (last visited Jan. 29, 2009).

22. *Id.*

23. 22 N.Y.C.R.R. 1000.4(f)(2), *available at* http://www.courts.state.ny.us/ad4/perfecting_appeals.htm (last visited Jan. 29, 2009).

24. *Id.*

25. *Id.* 1000.4(a)(3)(i).

26. 22 N.Y.C.R.R. 640.5.

27. 22 N.Y.C.R.R. 731.2.

28. 22 N.Y.C.R.R. 732.2.

29. Uniform R. 202.5, *available at* http://www.courts.state.ny.us/rules/trialcourts/202.shtml#05 (last visited Jan. 29, 2009).

30. *Id.*

31. Uniform R. 200.3, *available at* http://www.courts.state.ny.us/rules/trialcourts/200.shtml#03 (last visited Jan. 29, 2009).

32. Sup. Ct. R. 33.1(b), *available at* http://www.supremecourtus.gov/ctrules/2007rulesofthecourt.pdf (last visited Jan. 29, 2009).

33. Sup. Ct. R. 33(g).

34. *Id.* 33(h).

35. *Id.* 33(1)(b).

36. Fed. R. App. P. 32, *available at* http://www.ca2.uscourts.gov/Docs/Rules/Rule32.pdf (last visited Jan. 29, 2009).

37. *Id.* 32(a).

38. *Id.* 32(a)(7)(A).

39. *Id.* 32(a)(7)(B); 32(a)(7)(B).

40. E.D.N.Y. and S.D.N.Y. Local R. 11.1(a), *available at* http://www1.nysd.uscourts.gov/rules/rules.pdf (last visited Jan. 29, 2009).

41. *Id.*

42. N.D.N.Y. Local R. 10.1(a) and 10.1(b), *available at* http://www.nynd.uscourts.gov/documents//FinalVersion2009_001.pdf (last visited Jan. 29, 2009).

43. *Id.* 10.1(a).

44. *Id.* 10.1(b).

45. *Id.* 7.1(a)(1).

46. *Id.* 7.1(b)(1).

47. *Id.* 7.1(c).

48. W.D.N.Y. Local Civ. R. 10(a), *available at* http://www.nywd.uscourts.gov/document/civilamendments2004.pdf (last visited Jan. 29, 2009).

49. W.D.N.Y. Local Crim. R. 49.2, *available at* http://www.nywd.uscourts.gov/document/criminalamendments2003.pdf (last visited Jan. 29, 2009).

50. W.D.N.Y. Local Civ. R. 7.1(f), *available at* http://www.nywd.uscourts.gov/document/civilamendments2004.pdf (last visited Jan. 29, 2009).

the representation. Because the law firm had not obtained any confidential information and was rarely involved with the Town in general, the court found that the former, short-lived representation of the Town would not taint the underlying case between the plaintiffs and defendants.

This analysis was consistent with established law. In considering the disqualification of an attorney for prior representation, the question is whether the former representation would taint the underlying matter. The risk of taint is heightened if there is a benefit for the current client from the potential use of confidential information obtained during a prior representation of an adverse party. *Gluek v. Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir. 1981). Although in your case the insurance company has not been represented by the firm, the argument may be made that the knowledge of confidences and secrets of the Installers may adversely affect the insurance company in the current matter, as the insurance company is closely tied with the Owner.

It is important to note that in the course of representing the Owner the insurance company may move for the disqualification of your firm. In order to obtain disqualification and prove a taint of the proceedings, the insurance company would have to prove the existence of the prior client-attorney relationship and demonstrate that the prior relationship is adverse and substantially related to the current action. *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 610 N.Y.S.2d 128 (1994). The insurance company would have to show that there is a reasonable probability of disclosure of confidential information by the law firm. *Greene v. Greene*, 47 N.Y.2d 447, 418 N.Y.S.2d 379 (1979).

The courts have concluded that "in considering [a] motion for disqualification, . . . 'any doubt is to be resolved in favor of disqualification.'" *Shabbir v. Pakistan Int'l Airlines*, 443 F. Supp. 2d 299, 304 (E.D.N.Y. 2005) (citing *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975)). In this situation it may be better to be safe than sorry. As the firm may be in possession of confidences and secrets of the Installers and has a history of representing those businesses, it may be in the best interest of the Owner and your firm to have the Owner retain separate counsel in the proceedings with the insurance company. Not only will this prevent any conflict of interest between the firm and each of the three businesses, but it may also avoid any hostility between the firm and these businesses. Separate counsel will also guarantee that the firm's financial and business interests will not affect the firm's professional judgment, which the Rules of Professional Conduct seek to avoid.

The Forum, by
Paul E. Pontiff
Glens Falls, NY

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM 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

NEW MEMBERS WELCOMED

FIRST DISTRICT

Grace Marianna Addabbo
Andrew Agati
Nathaniel Emmanuel Akyeampong
Jose Raul Alcantar Villagran
Nicholas Fremont Aldrich
Natasha M. Alexis
Ryan Allen
Prem Amarnani
Francesca Marie Ambrosio
Despina Nicoletta Anagnostou
Jane Elizabeth Andersen
Sarah Christine Anderson
Emiri Ando
Clifford S. Argintar
James C. Austin
Will Charles Autz
Robert Thomas Barisciano
Jeffrey Adam Barlekamp
Linda Bechutsky
Joseph Raphael Becker
Michael David Bell
Elsa Ben Shimon
Nakima Simone Benjamin
Nomi Danielle Berenson
Lesley Ann Berson
Danielle M. Berti
Elizabeth C. Black
Maria Anastasia Boboris
Cristina Maria Bonuso
Catherine Megan Bradley
Diane Bradshaw
David Lionel Breau
Marie-ann Nicole Breaux
Justin Scott Brenner
Jason Harris Bresler
Daniel Seth Brody
Rachel Shira Brody
Jeffery Dennis Brooker
Marques Calvin Brooks
Justin Samuel Brown
Brett David Brumberger
Helene Judith Busby
Marylyn Rita Carabello
Sharon Carmi
Justin Francis Carroll
Shannon Camille Casey
Todd Rochell Chandler
Deborah Anne Chapin
Jacqueline Carolina Chavez
Ivan Chebotariov
Allen C.S. Chein
Sheila Jean Chithran
Jennifer J. Clark
Zachary Lynn Cochran
Adam Philip Cohen
Guy Robert Cohen
Jose Ricardo Coleman Tio
Ilona Beth Coleman
Kieran J. Conlon
David Michael Lance Cooke
Charles Dean Cording
Rebecca Madden Crouse
Danielle Nicole D'Abate
Nicholas Glaeser Daly
Cheryl Linda Davis-Noe
Adam Colum Day
Gaston De Los Reyes
Andrew Wayne Dean
Charlotte W. Decker
John Michael DeSisto
Pietro M. DeVolpi
Erin L. Dittus
Marcia Dobbs
Megan Lin Douglas
Brandon Loren Douglass
Richard James Downey
Pedro Goncalves Drummond
Maria Dubrowski
Monica Teresa Duda
Adrienne Marie Duffy
William H. Ebert
Joshua Todd Edgemon
Benjamin Perry Edwards
Daniel Gerard Egan
Carrie Ann Eicholtz
Joshua Engel
Kimberly Jill Engel
Charles Ethan Enloe
Michael Mehdi Ettannani
Nyssa Michelle Fajardo
Fiona Mary Fallon
Maryam Fattahi
Matthew Thomas Feinman
Megan Elizabeth Ferrier
Amy Lynn Festante
Eric R. Fish
Craig Matthew Flanders
Monica Pilar Folch
Jared Johnson Fontaine
Joshua Franco
Jeffrey Robert Friedman
Matthew Benjamin Friedman
Henry Andreas Gabathuler
Nicole Renee German
Shahab Dean Ghalambor
Sloane Jacqueline Giddon
Sarah Michelle Gilbert
Jillann Ginocchio
Mark Ginsberg
Daniel Gomez-Sanchez
Julia Gorodetsky
Sylvie Celine Goursaud
Seth Michael Graham
Cameron Everett Grant
Bradford Alon Green
Arielle Beth Greenfield
Michelle Katherine Griswold
Richard L. Grossman
Darren Guez
Pallavi Guniganti
Alyssa Lauren Gunther
Brittany Grant Hagans
Meher Nigar Haider
Michael John Harkey
Andrew Scott Harris
Elizabeth Ashley Harris
Robyn Todd Hatcher
Deirdre Mary Heffernan
Kerry Elizabeth Higgins
Ramsey Hinkle
David Milton Hirschberg
Jesse A. Hofrichter
Kieran Patrick Holohan
Jessica Scanlon Hoppe
Jarret Hova
William Adam Hunt
Brooke Lauren Isaacs
Shaina Risa Itkin
Om Madan Jahagirdar
Azmina Noorallah Jasani
Srinivas Murthy Jayashankar
Sonya Denise Johnson
Amit Srinivas Jois
Hrishi Karthikeyan
Tal Kedem
Christopher Patrick Keenoy
Troy Alremi Kennedy
Jessica Lauren Kerner
Jason Thomas Kiley
Daseul Kim
Eileen Young Kim
Hee-jean Kim
Ji Hun Kim
Yongkuk Kim
Michael Klunder
Matan Aryeh Koch
Sarah A. Kogel-smucker
Sara Beth Kolb
Andrew Johannes Koning
Sara Kennedy Kornbluh
Sean G. Kulkarni
Joseph Louis La Perla
Francesca Susan Laguardia
Laura Ashton Laughlin
Brian Christopher Lavin
Sheila Lavu
Christian Leathley
David Y. Lee
Emily Chistobel Lee
Pou I. Lee
Steven Phillip Lendaris
Brian J. Leung
Alycia S. Levy
Mark N. Levy
Yael Levy
Joy Pei-jung Li
Tong Li
Andre Leon Lindsay
Daniel Mark Lipschutz
Ryan P. Loggie
Marco Antonio Lozada
Jocelyn Elizabeth Lupetin
William Thomas MacGregor
Brian Edward Mack
Lynda Madera
Mark William Mancinelli
Sarah Augusta Mandato
Thomas Louis Margiano
Pamela Beth Margolin
Sean Courtney Marlaire
Elizabeth Sian Martini
Marcellin Nkwoley Mbwa-Mboma
Max Oliver McCann
Garth Wells McCardle
Theodore Alfred Bellman McCombs
Elizabeth Fitts McCusker-Concannon
Collin Dylan McDonald
Stacy Frances McDonald
Lauren Mary McEvoy
James Michael McFarlane
Lorraine Gwynneth McKay
Joseph T. McLaughlin
Matthew Joseph Menendez
Cristina L. Meng
Jessica Leigh Miller
Stephen Terrell Milligan
Amber Mills
Maya Aliya Mitchell
Michael Jeffery Moldowan
Eli Mond
Matthew C. Monroe
Matthew Peter Montana
Adrienne D. Moran
David S. Mordkoff
Diana Paola Moreno
Leni P. Morrison
Sean Henderson Murray
Andrew Thomas Myerberg
Dana Leigh Myers
Ali Ufuk Nardali
Daniel Devindra Nauth
Kasra Nejatian
Ariane Nicole Newell
Anne Nicholson
Aveen Nouri
Richard Patrick O'Brien
Michael Francis O'Connell
Jennifer Jon O'Neil
Michael Victor O'Neil
Bolaji Olasokan
Solomon Michael Oliver
Demian Alexander Ordway
R. Stephen Painter
Tiasha Palikovic
Chesley Ruth Parker
Graham M. Pechenik
Kelly Paul Peters
Lindsay Pfeffer
Jamie Pierre-Llouis
Mark Scott Pincus
Marisa Christina Pizarro
Rosa Alina Pizzi
Antonella Maria Pomara
Christian Scott Purcell
Jessica Lynn Purcell
Halina Radchenko
William David Rahm
Stipe Steven Rancic
Matthew Peter Raso
John Barrow Rayburn
Matthew Daniel Robson
Deirdre A. Roney
Jeffrey Todd Rosenberg
Joseph Benjamin Rothenberg
Allan Jack Rotlewicz
Jonathan D. Rubinstein
Joseph M. Ruschell
Philip Ramage Russ
Louis Steven Russi
Eric Joseph Ryan
Julie Elana Salka
Audris Fay Sardjono
Edward Scarvalone
Kathleen E. Schaaf
Irvin Martin Schwartz
Bryan Francis Serino
David Hartley Seymour
Neil P. Shah
Andrew Evan Shapiro
Kristin Irene Sheffield-Whitehead
Sarah Jeanne Shik
Stuart Cyrus Shroff
Lauren Elizabeth Sicard
Jeffrey David Singer
Ramit Singh
Steven Benjamin Sirkis
Suzanne Kenny Skinner
Andrew C. Sloss
David Asher Smith
Debra Rose Smith
Lindsey Sarah Soffes
Joshua Frank Soszynski
Stefanie Sowers
Noah Stein
Clyde Whittaker Steineker
Hershy Stern
Susan A. Stone
Carol Anderson Strone
Matthew Daniel Strugar
Richard Joseph Susalka
Dana Gale Sussman
Dan Tammuz
Jennifer Grant Tancredi
Derek Dov Tarsy
Cybil Easlyn Taylor

Paul Neil Taylor
Erin Elizabeth Thomas
Laura Etoile Tolan
Irina Alexandra Vekselman
Meredith Sussman Victor
Elana T. Viner
Elizabeth J. Wallace
James T. Walsh
Carla Ree Walworth
Marcus Li Wang
Olivia Wang
Qian Wang
Yu Wang
Daniel Alan Wasserman
Daniel Ethan Waxman
Aryeh Weinstein
Alison Michele Weintraub
Matthew Charles Weir
Stephanie Lynn Weitzner
Benjamin Cadle Wells
Steven Adam Werier
Gregory Adam Wetzel
Margaret Dawn Williams
Leanne Marie Wilson
Tim Wirch
Jessica Wisniewski
Joshua Matthew Wolf
Tommy Wu
Thomas Straus Wyler
Forrest Dean Yang
Aliza Shuli Yudkoff
Oded Zaluski
Gregory Joseph Zamfotis
Rachel Sarah Zeehandelaar
Daniel Zweben

SECOND DISTRICT
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Rachel Wainer Apter
Lauren Plant Artese
Lisa Chrishon Averyhart
Vicki Susanne Becker
Samuel A. Blaustein
Rebecca Blumenkopf
Beatrix Bong
Steven Joseph Costigliacci
James Henry Cross
Kenneth James Dale
Farrel R. Donald
Sara Rose Feinberg
Rebecca Beth Fisher
Milena Hanukov
Gwyneth Susannah Horton
Irina Kushel
Chia-Wen Lee
Shalonda Latoya Lewter
Dina Leytes
Dewitt Liu
Theresa Munomi Loken
Christine Love
Guy James Mangano
Terrence J. McElrath
Rose Marie Morgan
Sunny Noh
Miles D. Norton
Charlotte Campbell Owens
Ferve Emine Ozturk
Vanessa Pai-Thompson
Simone R. Procas
Susanna Requets
Joshua Ridiker
Jodi Michelle Savage
Trina Sen
Abigail Esther Shvartsman
Enet Clover Somers-Dehaney
Efrat Sternberg
Boris F. Strogach
Rochelle Roslyn Watson
Jamila Ann Wideman
Shanel Spence Wood
Alexander Daniel Zeltser

THIRD DISTRICT
Aaron Carbone
Charles C. Dunham
Christopher T. Kennedy
Scott D. Lukowski
Jean MacAffer
David Markey
John McFadden
Brian Onofry
Jennifer Principe
Adam W. Silverman
Jonathan M. Valerie

FOURTH DISTRICT
Amy Cara Catherine Brosnan
Carmencita Bruno
Jessica Helen Hugabone
Leah Mary Angelica Kelly
Andrew Joseph Proler
Michael Patchin Ribley

FIFTH DISTRICT
Michael J. Balestra
Jonathan Howard Bard
Joseph Jay Bufano
Liam A. Dwyer
Marcie P. Eaton
Brian Joseph Ehrhard
Ryan P. Keleher
Daniel John Pautz
Joseph P. Plyman
Katherine Ritts
Regan Mary Rondinelli-Haberek
Rachel Alexa Stanley
Brandy Renee Todi
Kathleen Sarah Weber
Natalie Hempson Weiskotten
Rochelle Kathleen Zimpfer

SIXTH DISTRICT
Joseph A. Cirasuolo
Garrett J. O'Day

SEVENTH DISTRICT
Sharon Allen
Alissa Leigh Baader
Jack S. Bailey
Ashley Baker
Jackie Ferrari
Nicholas J. Gallo
Clayton F. Hale
Eliza G. Heaton
Janetha R. Kancharla
Joshua Lenon
Ryan J. Muldoon
Michael E. Nicholson
Mary T. Northrup
Douglas Ross Smith
Megan Thisse

EIGHTH DISTRICT
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Elizabeth Meghan Barnett
Marissa A. Coheley
Tracy Lynn Crawford
Joshua E. Dubs
Kimberly A. Georger
Roland Russell Georger
Amber L. Kerling
Kathleen A. Kugler
Christopher E. Lestak
Kathryn Lisandrelli
Matthew R. Niemiec
Christopher Nicholas Ollinick
BrittanyLee Penberthy
Michael P. Quinn
Larissa Shahmatova
Lindsay M. Swensen
Matthew David Valauri
Ehret Anne Van Horn
John M. Wells
Lauren Marie Yannuzzi

NINTH DISTRICT
Lori Bellows
Matthew J. Bennett
Yaakov Brody
Mark P. Cambareri
Andrea E. Channing Kung
David Joseph Choyne
Paul Francis Colonna
Teresa Monique Czubak
Timothy James Delizza
Elizabeth Anne Douglas
Elizabeth C. Duncan
Nancy Durand
Lilian Obianuju Egbuna
Jonathan Garcia
Lauren Beth Kanfer
Rebecca C. Kilduff
Hillel M. Lazarus
Alice Christina Mascioli
Mary Ellen O'Sullivan
Sang Gyu Ryan Park
Michael Jon Samuels
William Stohner
Jessica Collett Strout
Richard Joseph Wells
Elizabeth M. Wolf
Curtis James Zimmermann

TENTH DISTRICT
John Luke Aloia
Kelly E. Armstrong
Joseph Andrew Aufenanger
Cynthia Ann Augello
Ross Brendan Barbour
Nicholas Bavaro
Jarred W. Blumer
Christine Helen Buchta
Megan Christine Dimiceli-Glaser
Lisa R. Dvoskin
Nancy K. Eisner
Theda Fisher
Oren Jonathan Gerber
Bryan Robert Hiller
Eun Chong Jo
Jonguk Kim
Jeffrey Kirschbaum
Hector D. LaSalle
Kristin Marie Lascala
Linc Leder
James Leonard
Joshua Marc Liebman
Susan Lutinger
Daniel Harris Markowitz
Oriana G. Mazza
Shaun Kevin McCready
Andrew Myers Muchmore
Alex N. Niederman
Jack R. Piana
Rachel Lauren Rosenberg
David Samber
Daniel Ethan Shapiro
Brian Fraser Sharpe
Lance Darryl Simon
Craig Andrew Sirlin
Bradley Timothy Slover
Grace Ann Smith
Joshua Steven Stern
Daniel Vaillant
Alan Jay Waintraub
Margaret Siobhan Ward
Seth Michael Weinberg
Matthew Brian Weinick
Marshall Yuan

ELEVENTH DISTRICT
Sandra Lynn Brown
Amanda Lee Cotrim
Renee C. Fahey
Usman A. Farooqui
Noah Jordan Freed
Maria F. Galante
Lu He
Gwyneth Hesser
Nelson Kong
Nam-kyung Oh
Anupama Devi Ramlackhan
Amanda Reeves
Gregory Adam Ring
Steven J. Seidenfeld
Vasilia Tsismenakis
I June Wang
Chunyang Zhang

TWELFTH DISTRICT
Matthew Gilbert Accardo
Rachel R. Aronov
Michelle M. Benedetto
Nicole Gerber
Erin Michelle Gover
Andrea Alejandra Levato-Chambers
Felicia Hsaio-Yu Lin
Janelle C. L. Matthews
Joseph Elihud Shmulewitz

OUT OF STATE
Ahmed Abdelnabi
Lorraine Amako
Chioma Anopueme
Michael Antoniewicz
Marie-Claire Argac
Henry W. Asbill
Fung Ting Phebean Au
Xavier Marc Bailliard
Stephanie Candace Baker
Adina Balan
Laura Ball
Meredith Lynn Balo
Jeffrey A. Barrack
Edward Mason Barron
Paul Thomas Basmajian
Scott Robert Behman
Alexander Adelman Berengaut
John Bianchi
Philippe Y. Blanchard
Amber S. Bland
Russell Bloch
Doreen G. Boakye-Agyei
Thomas Bourbonneux
Robbie James Bovino
Marvin Cornelius Bowser
Robert William Brady
David Wayne Braswell
Vladislav M. Bulkin
Andrew P. Campbell
Helene Carvallo
Gabriela G. Castillo
Lin Chen
Pei-Shian Chen
Ji Y. Choi
David Taik-Chung Chong
Jennifer Constantinou
Elizabeth C. Conway

Michelle Cronin
Kenneth J. Curley
Ben Davidson
Kevin De Lyon
Ana Elisa De Matos Canelas
Anthony C. DeCinque
Sean R. Delaney
Andrew James Dempster
Tonio DeSorrento
Medha Devanagondi
Mircea Lonut Domaneantu
Fanny Eve Marie-Anne Dusastre Martinez
Aaron Dzamko
Joseph Ashley Ebersole
Kathryn Einspanier
Kimberly Everitt
Laura M. Faustino
Douglas Fischer
Deanna Fisher
Shigenobe Fujii
Corey E. Fulton
Isaac M. Gabriel
Raymond M. Gabriel
Sandrine Gaillot
James Victor Gaven
Phoebe T. Geer
Pamela L. Gellen
Michael Nathan Giacopelli
Scott F. Griffith
Yana Dobkin Guss
Jessica Hafkin
Yong Hai
Jennifer Hainsfurther
Cameron John Hall
Peter Daniel Healey
Franklin P. Hemphill
Jenna Hong
Andrew James Hughes
Kirk Russell Hunt
Salah Husseini
Juno Hwang
Mika Ikeda
Flora Itskovich
Christopher Jerry
Miranda G. Jolicoeur
Maria Roseann Just
Adam B. Kaplan
Christof Karl
Sarah Kelly
Philip J. Kessler
Dana Georges Khalife
Elizabeth Riad Khoury
Jung Min Kim
Maj-Britt Klemp
Courrine Michelle Knight
Myung Ji Ko
Dimitry Kogan
Nancy T. Kong
Avanti Kulkarni
Soojin Kwon
Jennifer A. Laurine
Mosopefoluwa Lawson
Chin Wei Lee
Irene Hua Lee
Jong Sang Lee
Joo Young Lee
Suhhyung Lee
Sung-Min Lee
Youngjin Lee
Tracey Beth Leibowitz
Seth Emerson Libby
Jodi Michelle Luciani
Na Ma
Joao Ferreira Magalhaes
Daniel S. Makoski
Vincent Joseph Mangini
Allen Jason Margulis
Sheetal Markan
Dawn Martello
Abra Mason
Geoffrey Colbourne Mason
Diya Abraham Mathews
Tian Tian Mayimin
Eoghan McArdle
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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Along with other grammatical rules (the proper use of *I/me*, *who/whom*, and *which/that*, for example), I notice that the rule governing the sequence of tenses is being ignored. Educated native speakers used to apply that rule without thinking. Is the loss of that rule part of the "leveling" of language, to which you referred in your March-April "Language Tips"?

Answer: Probably. Some people say that the loss is the result of "sloppy thinking," but whatever the cause, the rule is largely ignored. For readers who don't know the sequence-of-tense rule, here are three illustrations of its proper use in indirect discourse:

> He asked me what my name was.
>
> He told me he was enjoying the weather.
>
> I knew he was a truthful person.

The rule, exemplified above, is that, in indirect discourse, the second verb of the sentence must have the same tense as the first verb. Thus, in the first example, although my name is presumably the same now as it was when I was asked, because the *asked* (the first verb) was in the past tense, the second verb *was* is required. Had the sentences been direct discourse, the sequence-of-tense rule would not apply. The two verbs could be different in tense:

> He asked, "What is your name?"
>
> He said, "I am enjoying the weather."
>
> I said, "He is a truthful person."

The rule is part of the doctrine of "aspect": the relationship between tense and time. If you say, "I played tennis for twenty years," the person you are talking to understands that you no longer play tennis. But if you say, "I have played tennis for twenty years," the person understands that you still play tennis. The addition of the auxiliary verb *have* to the past tense of *play* indicates an ongoing relationship.

Aspect can also apply to other temporal relationships. Compare the following two statements:

> I left when she arrived.
>
> I had left when she arrived.

The second statement indicates that your departure occurred before her arrival. But the first sentence states that you left at the time of her arrival. That construction leaves unanswered the question of whether your departure was due to her arrival and may trigger the *post hoc ergo proper hoc fallacy* ("after this, therefore on account of this").

The New York Times recently quoted Senator Charles Schumer as having said, "This would have been one of the Senate's finest hours if the bill was passed." The sequence-of-tense rule requires that he should have said, "Had the bill been passed, this would have been one of the Senate's finest hours." Or, "If the bill had been passed, this would have been one of the Senate's finest hours." That construction indicates that the passage of the bill preceded – and caused – one of the Senate's "finest hours."

From the Mailbag

The February "Language Tips" column on malapropisms elicited a number of e-mails. New York attorney Reuben Ortenberg set me straight about the Yogi Berra quotation. Berra, not outfielder Jim Wohford, said, "Baseball is ninety percent mental. The other half is physical."

Manhattan attorney Neil Lipton contributed a list of the malapropisms of Eugene Ormandy, who "was possibly the king of malapropisms." Attorney Lipton wrote that Hungarian-born Ormandy, who for many years was the conductor of the Philadelphia Symphony Orchestra, never successfully mastered English. Some members of the Philadelphia Orchestra wrote down many of his malapropisms under the guise of taking notes; most of the malapropisms do not require a knowledge of music to enjoy. Here are a few samples from the supply Mr. Lipton sent:

> Congratulations to each and every one of you for the concert last in New York and vice versa.
>
> I am thinking it right but beating it wrong. I was trying to help you, so I was beating wrong.
>
> It is not as difficult as I thought it was, but it is harder than it is.
>
> Why do you always insist on playing when I am trying to conduct?
>
> (On a friend's death): I told him he'd have a heart attack a year ago, but unfortunately he lived a year longer.
>
> We can't hear the balance yet because the soloist is still on the airplane. Please follow me because I have to follow him and he isn't here. . . . He is a wonderful man, and so is his wife.
>
> I never say what I mean, but I always manage to say something similar.

Finally, thanks to Dr. Judith McLaughlin, Harvard University Senior Lecturer, for sending a list of the winning words in the *Washington Post*'s Mensa Invitational annual competition. Participating readers were to take any dictionary word, then add, subtract, or change one letter to create a new word. Reader McLaughlin thought that the results would also fit the definition of a malapropism. Here are some of the winners:

> Osteopornosis: A degenerate disease.
>
> Inoculatte: To take coffee intravenously when you are running late.
>
> Beelzebug: Satan in the form of a mosquito that gets into your bedroom at three A.M.
>
> Glibido: All talk and no action.
>
> Intaxication: Euphoria at getting a tax refund, which lasts until you realize it was your money to start with.

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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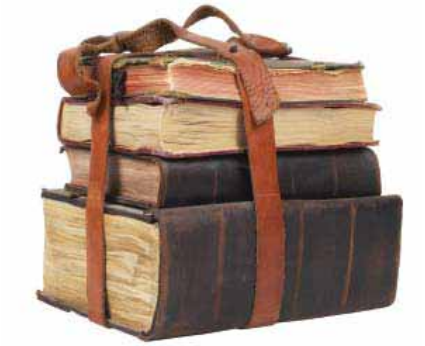
BY GERALD LEBOVITS



Due to an editing error, Judge Lebovits's biography in the March-April issue of the *Journal* was incorrect. We also note that Judge Lebovits did not adapt that column from any previously published material. His bio for Part I of this column, as well as Part II, should read:

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

Document Design: Pretty in Print — Part II

In the last column, the Legal Writer discussed seven issues in document design. We continue with seven more.

8. Footnotes and Endnotes. Footnotes and endnotes are resources and steppingstones.[1] No set ratio of footnotes or endnotes to text exists, but factors include audience, content, purpose, and subject matter. Formatting footnotes and endnotes is nearly as important as the substance they contain.

Judges and attorneys should use footnotes, not endnotes. Readers need to find information. Searching for endnotes at the end of a legal document frustrates readers. Editors and publishers of legal newspapers, newsletters, and magazines mostly use endnotes. Law reviews and law journals mostly use footnotes.

Don't include textually relevant discussion or intensive or substantive analysis in footnotes or endnotes. Too few footnotes or endnotes might emphasize the information in ways the author did not intend. Too many footnotes or endnotes will have the opposite effect: They'll go unread.[2]

Never use footnotes to circumvent page limits.

Consult court rules, journal guidelines, and legal-writing resources for prescriptions on footnotes and endnotes. Rules for footnotes and endnotes may also be different for published materials, depending on the publisher.

Many advise that footnotes and endnotes in a document, as opposed to a published journal, should appear in the same typeface and typesize as the text. Several authorities, however, recommend using a smaller typesize for the endnotes or footnotes than the text,[3] and most court rules allow smaller footnotes.

Single-space footnotes and endnotes even when you've double-spaced the text. Publishers might not adhere to this rule. Most readers prefer double-spacing between footnotes and endnotes in non-published (typed) documents. If you fully justify the text, fully justify the footnotes and endnotes.

Footnote and endnote numbers appear in the text as superscripts (raised above text in smaller type). Sequentially number footnotes or endnotes with Arabic numerals (1, 2, 3, 4, 5). Footnote and endnote numbers immediately follow, without a space, the word, phrase, clause, or quotation to which they refer.

When footnote and endnote numbers follow punctuation, place the numbers immediately (without a space) after quotation marks, periods, commas, question marks, exclamation points, colons, and semicolons. *Incorrect:* "*X v. Y*, 99 F.3d 99 (13th Cir. 2009)[1]." *Correct:* "*X v. Y*, 99 F.3d 99 (13th Cir. 2009).[1]" Place the superscripted number or letter outside a parenthesis if the number or letter refers to what precedes the parenthesis. Otherwise, place it inside the parenthesis.

9. Superscript. Legal citation requires mentioning circuits and departments in parentheticals following a case name and volume. Don't superscript 1st, 4th, 5th, and the like. *Incorrect: A v. B*, 100 F.4th 100 (7th Cir. 2011). *Correct: A v. B*, 100 F.4th 100 (7th Cir. 2011). A similar rule applies to dates. *Incorrect:* "File the papers on April 3rd, 2009." *Correct:* "File the papers on April 3, 2009." The solution is to turn off the automatic superscript-format feature on Word and WordPerfect.

10. Straight Quotes and Curly Quotes. Once again we go to a leading authority on typography: the Seventh Circuit. The Seventh Circuit recommends curly quotation marks: "Use real typographic quotes (" and " [also ' and '] and real apostrophes ('), not foot and inch marks."[4] As one expert notes, "[W]hen you paste . . . text with straight quotes in it . . . those characters are not always converted properly. . . . Use the search and replace function to search for . . . straight single quote (') and replace them with . . . a straight single quote ('). Use the search and replace function to search for . . . straight double quote (") and replace it with . . . a straight double quote (")."[5]

11. Boldface Type. Writers boldface, italicize, or underline words and other parts of a document to emphasize text. The rule is that less is more. Overusing these devices will dilute their impact and irritate readers.[6] Except to emphasize a quoted word or phrase (a technique best used sparingly), don't

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