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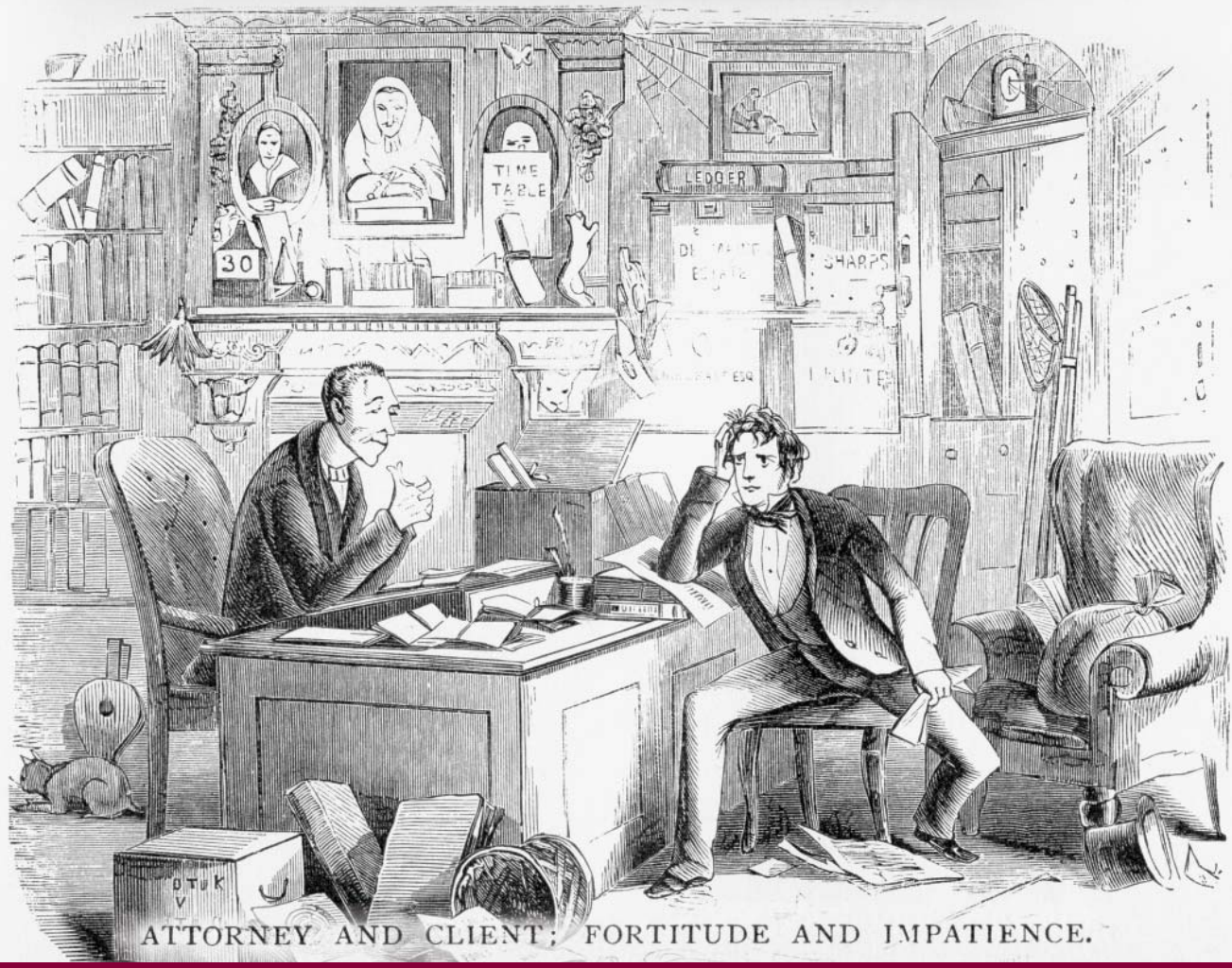

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by Hon. Mark D. Fox and Michael L. Fox

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CONTENTS

FEBRUARY 2009

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Our Profession Requires Greater Civility and Respect

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BERNICE K. LEBER

Win, Win, Win, Win, Win[1]

Lawyers in America, including our House of Delegates, as my prior columns have noted, have historically played a critical role in shaping the debate on and direction of important legal issues affecting our society. This year is no exception. Thus far, we have deliberated on the right of habeas corpus for Guantanamo Bay detainees, laws affecting the privacy of lawyers and their clients, same-sex marriage and soon, climate change. Our sections and committees contribute thoughtful, often provocative reports that enliven our discussions. The State Bar does more, however, than just debate issues. We advocate our views to State and (starting this year on a regular basis) federal legislators, rule-makers, judges and the public. With more than 76,000 State Bar members as of December 2008, we have strength in numbers.[2]

The convergence of three seismic events in our lifetimes forces us to consider where our State and nation are headed environmentally: here global warming, global flattening (the rise of the middle class in India, Brazil, Russia and China, whose consumption patterns mirror those of Americans) and global crowding (compared to 1953, when there were 2.68 billion people living on earth, by 2020, it is estimated that nine billion, or three times the number will inhabit the planet) meet.[3] Global warming thus became one of my six initiatives during my term.[4] The Task Force on Global Warming, headed by Michael Gerrard, Director of the Center for Climate Change Law at Columbia Law School, has deliberated and will be proposing at our April 4 House of Delegates meeting in Albany a far-reaching, comprehensive blueprint for New York and the nation. Salient highlights in the Report include the following:[5]

1. New York should adopt a statewide comprehensive climate change strategy that has a specific, measurable and binding reduction target of reducing greenhouse gas (GHG) emissions (to take into account other energy-saving measures). By utilizing a common metric, the State will be able to assess periodically whether the GHG reduction goal is being achieved and make adjustments as warranted.

2. Nationwide, buildings account for nearly 40% of total energy consumption and contribute nearly that much in total GHG emissions.[6] Improving buildings' energy efficiency decreases the amount of fossil fuel consumed in producing energy used by buildings, which leads to a corresponding decrease in overall GHG emissions. New York should improve energy efficiency in the new construction and renovation of buildings.[7]

3. The State should assist local governments in providing training to building inspectors in order to enforce building energy efficiency standards and to reward municipalities that vigorously enforce the codes.

4. The State should reward "climate friendly" projects by allowing them to "move to the front of the line" when undergoing review by a State agency. Municipalities should also be authorized to provide for such expedited processing for projects undergoing local review, such as subdivision and site plan approval.

5. New York should raise the renewable portfolio standard to 30%. This is currently under consideration by the Public Service Commission, and Governor Paterson has called for such a raise in his "State of the State" address in January 2009.[8]

6. New York should consider allowing the PSC to require time-of-use (or time-differentiated) pricing in circumstances where such rates are found to be in the public interest. Time-of-use pricing is a method by which the price of electricity charged to consumers varies with the time of day, which allows the price to more closely track the actual cost of producing electricity in each hour. Under time-of-use pricing, consumers are able to save on electricity costs by shifting their usage from peak periods when prices are highest to non-peak periods when prices are lower. Customers must have "advanced" or smart meters to take advantage of time-of-use pricing, so the law should be amended to require that all multi-unit buildings be submetered.[9]

7. New York should amend the Town Law, the General City and Municipal Laws and the regulations under the State Environmental Quality Review Act (SEQRA) to incorporate climate change considerations.[10]

8. The State Revenue Maximization Commission should look into the pos-

BERNICE K. LEBER can be reached at bleber@nysba.org.

sibility of leasing state lands (with the exception of parkland), including offshore in Lake Ontario, for wind farms, as well as establishing a wind energy goal.

9. A "feebate" bill should be adopted, implementing an adjustable scale of fees and rebates that apply to the purchase of new motor vehicles. In essence, a fee would be imposed on new vehicles with low fuel economy, while a rebate would be given to purchasers of new vehicles that have high fuel economy. Such a law would foster continuous and significant improvement in vehicle emission characteristics while strongly discouraging the sale of dirty vehicles.

10. New York is a member of the Regional Greenhouse Gas Initiative (RGGI), a regional cap-and-trade system covering all electric-generating units with a generation capacity of 25 megawatts (MW) or greater. Given the modest anticipated reductions in CO_2 since it only applies to large electric-generating units, RGGI should build on its success and expand to include additional GHG emitters.

11. The State should promote methane capture by requiring it in all municipal solid waste (MSW) facilities. In addition, it should consider banning the flaring of methane.

In the 1970s many of you probably read *Greening of America*. In it, Yale Law School Professor Charles Reich described the 1960s student counterculture as a critique of American society. Although derided for its naivete in some circles, it has long been associated with the environmental movement.[11] The Report and our upcoming House debate on climate change remind us of our unique place as lawyers in society and of our fundamental responsibility as a profession to improve life around us, to do the public good and to issue a wake-up call for change. ■

1. "The second biggest decision Barack Obama has to make – the first is deciding the size of the stimulus – is whether to increase the federal gasoline tax or impose an economy-wide carbon tax." *See* Thomas L. Friedman, N.Y. Times, Dec. 28, 2008, *and generally* Friedman's Hot, Flat and Crowded (Farrar Straus & Giroux 2008) ("Hot, Flat & Crowded").

2. Our Membership Committee Chair Claire Gutekunst and her committee as well as Senior Director Patricia Wood and Membership Services Manager Megan O'Toole deserve our special thanks for upping the ante this year.

3. Hot, Flat & Crowded, at 20–26.

4. The other five are: Privacy (co-chaired by Kelly Slavitt and Alison Besunder), the State of Our Courthouses (co-chaired by Sharon Porcellio, Hon. Melanie Cyganowski and Greg Aronson), Wrongful Convictions (chaired by Hon. Barry Kamins), Small and Solo Firms (chaired by Robert Ostertag) and Federal Legislative Priorities (chaired by Stephen Younger).

5. The Report is available at the Task Force Web site, http://www.nysba.org/GlobalWarmingTaskForce.

6. *See* U.S. Envtl. Protection Agency, Buildings and the Environment: A Statistical Summary (2004), *available at* http://www.epa.gov/greenbuilding/pubs/gbstats.pdf. *See also* J. Cullen Howe, Green Financing: Governmental and Private Programs Concerning Financing of Green Buildings (LexisNexis 2008).

7. The State Energy Code Act (Article 11 of the Energy Law) applies to new building construction and to renovations of existing buildings only if the renovation is "substantial" – *i.e.*, only if the renovation involves the replacement of more than 50% of a "building subsystem" such as exterior walls, floors, and ductwork. Thus, many renovations and building system replacements that do not meet this threshold are not required to comply with the Energy Code. Article 11 also prohibits any amendment of the Energy Code imposing new requirements that would cost more than the present value of the expected energy savings over a 10-year period. Article 11 further provides a blanket exemption from the Energy Code for any property that is on the National or State Registry of historical places and for any "property" that is determined to be eligible for listing on the State Registry by the Commissioner of Parks, Recreation and Historic Preservation. New York is the only state that incorporates the 50% rule and the 10-year payback requirement. These are not present in the International Energy Conservation Code (IECC), which is the model code for New York as well as many other states. The State Legislature should enact a similar law that eliminates these exemptions.

8. The text of this speech is available at http://www.ny.gov/governor/keydocs/speech_0107091.html.

9. The installation of submeters in master-metered buildings reduced electricity consumption in the individual units between 18% and 26%.

10. Massachusetts' equivalent statute (MEPA) requires certain agency projects to analyze both direct and indirect greenhouse gas emissions; quantify energy consumption and projected emissions; and commit to mitigation efforts. California is in the midst of developing CEQA guidelines "for mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions." The Governor's Office of Planning and Research is "required to 'prepare, develop, and transmit'" guidelines before July 1, 2009, and such guidelines must be certified and adopted by the Resources Agency by January 1, 2010. In addition, Attorney General Jerry Brown settled several cases involving challenges to projects approved without consideration of climate impacts and has submitted comments to 13 local governments in an effort to include climate change analyses in CEQA reviews. King County in Washington State has taken a different approach and has addressed the issue through an executive order, requiring county agencies to consider climate change in their project assessments.

11. "America is dealing death, not only to people in other lands, but to its own people. . . . We think of America as an incredibly rich country, but we are beginning to realize that we are also a desperately poor country – poor in most things that throughout history of mankind have been cherished as riches," *cited in* R.D. Citron, *Charles Reich's Journey from the Yale Law Journal to the New York Times Best-Seller List: The Personal History of the Greening of America*, 52 N.Y.L.S.L.R. 387 (2008) at 415.

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May 29 — Syracuse
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June 12 — Albany

Civil Trial Practice in the Ninth Judicial District
April 30 — White Plains

International Practice Day/Beginner Level
April 30 — New York City

Practical Skills Series: Basic Elder Law Practice
(9:00 am – 4:20 pm)
May 5 — Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

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Honorable Mark D. Fox is a Retired United States Magistrate Judge, Southern District of New York. He is a former Member of the Committee on Security and Facilities of the Judicial Conference of the United States (former Vice Chair, Subcommittee on Space Management). Judge Fox earned his law degree from Brooklyn Law School and his undergraduate degree from the State University of New York at Buffalo.

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It's No Joking Matter

Our Profession Requires Greater Civility and Respect

By Hon. Mark D. Fox and Michael L. Fox

Rule Number One:
Respect for Colleagues.

Rule Number Two:
The Law Is a Profession, Not a Business.

Rule Two

Let us address Rule Two first, as a lead-in to a discussion of Rule One. There is an unfortunate trend in our profession in which both the public and some attorneys see law as evolving (perhaps we should say regressing) into a business. We have heard attorneys say that law is no longer a profession, it is now a business. Time and money – not creativity, learning and scholarship – are the new marks of a "great" lawyer. This is a dangerous development that is threatening our profession. And we believe it is a profession and refer to it as such in this article and in our personal and professional lives.

We are not alone in noting with dismay the current state of the profession. In a recent decision in the Southern District of New York, District Judge Harold Baer stated:

> The instant case, unfortunately, has been marked by a myriad of . . . "reliable evidence" of attorney misconduct serious enough that this Court felt compelled to act. Sadly, the nub of the problem may not be just the behavior of one or two attorneys or law firms, but a much broader problem that has affected the practice of law generally over the last twenty or thirty years and has in the eyes of many turned what was once a profession into more of a business.[1]

Judge Baer then quoted from a decision by the Honorable Charles D. Breitel, former Chief Judge of the State of New York:

> A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by qualifying licensure, . . . a duty to subordinate financial reward to social responsibility, and, . . . an obligation on its . . . members . . . to conduct themselves as members of a learned, disciplined, and honorable occupation.[2]

The court noted that as the profession has grown, expanded and developed, civility has declined, and "the naked competition and singular economic focus of the marketplace have begun to infiltrate the practice of the

law, subordinating high standards of service, collegiality, and professionalism as a result."[3] Following an extensive discussion of the case and the numerous improper actions by counsel, the court lamented the state to which the sanctioned attorneys had fallen, and imposed penalties.

The President of the Boston Bar Association, Anthony Doniger, has similarly criticized the new trend of practice. He notes that as firms focus more and more on money, the detrimental impact on the profession increases. For example, says Mr. Doniger,

> [a]ssociates are expected to bill more hours than ever before; one rarely hears of firms lowering the hour expectations of associates, and often we hear of firms reminding associates of the price to be paid for their high and ever increasing salaries. The result, of course, is that associates have less time for professional and other non-billable activities. We hear again and again that associates work too hard to participate in bar association or pro bono activities.[4]

Furthermore, other effects of focusing on finance have led to (1) lower ages of forced retirement for partners, reducing the fulfillment of careers; (2) fewer associates making partner; and (3) concomitant with (2), fewer minorities achieving the upper echelons of the profession.[5] None of these things are valuable or helpful to the future of the law as a profession.

Rule One

Along with the stresses of time and money come the pressures that have led to negative practices, a reduction in civility and collegiality, and an environment in which opposing counsel are increasingly seen and treated like enemies in wartime.[6] Attorneys, sometimes at the behest of their clients and sometimes thinking that they are "zealously" representing their clients, will dispute the smallest details of a case – from the granting of an extension of time to the location of a deposition. This, in turn, is leading to a rise in the frustration levels of courts, which are already struggling with overloaded dockets.

One court in Florida decided enough was enough:

> [T]he Court will fashion a new form of alternative dispute resolution, to wit: at 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the . . . U.S. Courthouse. . . . Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. *At that time and location, counsel shall engage in one (1) game of "rock, paper, scissors."* The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition.[7]

This creative order found its genesis in what the court called "the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts."[8] The lesson: courts are less tolerant of attorneys who are unable to navigate the fires of combat to courteously and civilly resolve minor issues on which agreement is a benefit to everyone – client, attorney, adversary and court.

Unacceptable behavior by attorneys further manifests itself in the misleading of opponents and the courts, and occasional outright hostility. Take the recent case of *GMAC Bank v. HTFC Corp.*,[9] in which the court sanctioned both the client *and counsel* for outrageous and unacceptable conduct during deposition. Although the details of the client's behavior and misfeasance are beyond the scope of this article, we do provide a brief synopsis here to illustrate how erroneous and flawed the actions of the attorney were.

In *GMAC Bank*, the court summarized the client-deponent's egregious conduct as follows: "Wider's assault on the deposition proceedings involved three types of inappropriate behavior: (1) engaging in hostile, uncivil, and vulgar conduct; (2) impeding, delaying, and frustrating fair examination; and (3) failing to answer and providing intentionally evasive answers to deposition questions."[10] For example, the court noted at one point that "[i]n fact, Wider used the word 'f--k' and variants thereof no less than 73 times. To put this in perspective – in this commercial case . . . the word 'contract' and variants thereof were used only 14 times."[11] The client also became combative and abusive with the questioning attorney. Part of one exchange went as follows:

> Q. [T]his is your loan file, what do Mr. and Mrs. Fitzgerald do for a living?
> A. I don't know. Open it up and find it.
> Q. Look at your loan file and tell me.
> A. Open it up and find it. I'm not your f--king bitch.
> . . .
> A. I'm taking a break. F--k him. You open up the document. You want me to look at something, you get the document out. Earn your f--king money a--hole.[12]

The numerous other examples cited by the court are no improvement on the poor display just quoted. For instance, later in the deposition this exchange occurred:

> Q. Well, do you know the purpose for these transactions?
> A. Why the f--k would I know that?
> Q. I'm just asking you whether you know.
> A. Why the f--k would I know that?
> Q. I'm asking whether or not you know that.
> A. It's got nothing to do with the transaction. Don't ask stupid questions. Ask smart questions.[13]

Let us address the question of what the attorney representing the deponent should have done. Apparently, the attorney did call for several breaks, but did little to control the client, reprimand the client, or otherwise remedy the hostile and inappropriate conduct. The judge noted that

> [a]s evidenced by the portions of the record quoted . . . throughout the deposition, notwithstanding the severe and repeated nature of Wider's misconduct, Ziccardi [the attorney] persistently failed to intercede and correct Wider's violations of the Federal Rules. . . . Instead, [the attorney] sat idly by as a mere spectator to Wider's abusive, obstructive, and evasive behavior; when he did speak, he either incorrectly directed the witness not to answer, dared opposing counsel to file a motion to compel, or even joined in Wider's offensive conduct.[14]

Counsel's conduct was abhorrent as well. At one point, the attorney taking the deposition had to request that opposing counsel stop snickering at his client's antics – because that just served to encourage him.[15] The court found that counsel for the deponent was on notice of his client's behavior very early on, yet allowed the deposition to continue for two days (a total of about 12 hours).[16]

Indeed, near the end of the opinion, the judge stated that

> [w]hat is remarkable about [the attorney's] conduct is not his actions, but rather his failure to act. Despite the pervasiveness of Wider's evasive and incomplete answers and his repeated failure to answer questions, [the attorney for the deponent] failed to take remedial steps to curb his client's misconduct. . . . The nature of . . . misconduct was so severe and pervasive, and . . . violations of the Federal Rules . . . so frequent and blatant, that any reasonable attorney representing [the deponent] would have intervened.[17]

In addition to sanctions imposed on the client, the court sanctioned the attorney $16,296.61, jointly and severally with the client, for the fees and costs associated with the deposition.[18] The court further warned that, if misconduct continued, it would make a referral to the disciplinary authorities for review.[19]

While this is an extreme case of misconduct, it serves to illustrate the decline in civility and courtesy in the profession. Not only is such behavior impolite and unprofessional, it is a violation of the rules of professional conduct. In New York State, Ethical Consideration (EC) 1-5 explicitly states: "A lawyer should maintain high standards of professional conduct and should encourage other lawyers to do likewise. A lawyer should be temperate and dignified."[20] Furthermore, an attorney "should avoid bias and condescension toward, and treat with dignity and respect, all parties, witnesses, lawyers, court employees, and other persons involved in the legal process."[21] To do otherwise will likely be seen as action serving to prejudice the system and administration of justice.[22]

We all experience stress and pressures – whether they are professional pressures, family pressures, health pressures or financial pressures. However, when we chose to enter the profession of law, we joined an institution that is larger than ourselves. Law is a profession that has existed for thousands of years. We are only its stewards. We safeguard our clients and seek to better society. In doing so, we must remember that with growing discourtesy and incivility will come cracks in the foundation of our great institution – and cracks do not centuries of strength and surety make.

Work Our Hardest, Help People, Do Justice

We would like to quote from remarks given by Lucille A. Fontana, Esq., who practices in Westchester County, New York, as a partner in the firm of Clark Gagliardi & Miller, P.C. Ms. Fontana was honored by her *alma mater*, Pace Law School, in 2000. On that occasion, she spoke of the practice of law:

> It is a noble and honorable practice. . . . The practice of law is noble because we are required to put the client's interests before our own and to avoid anything that would conflict with those interests. But while we are nobly charged with zealous representation, we must always remember that our clients are not above all else. Paramount to them is the law. . . . As lawyers we are in the thick of the human condition and the pressure to win is relentless. I think that there is actually a real peace that descends upon us when we accept that there are certain parameters; that ethically there is only so much we can do. And there is also real motivation that comes from knowing that what we can do, we must do well. How does this translate into practice? We have to work hard. We have to care. . . . And sometimes we are going to lose. We cannot lie to our clients. We cannot lie for our clients. And we cannot facilitate a reinvention of the facts. Integrity is the driving engine, but it is candor, compassion, civility and collegiality that provide the lubrication to keep it all going. Can it be done? Absolutely. The honorable and noble practice of law isn't a fanciful notion. It is the foundation of a just society.

Not So Funny: Pernicious Lawyer Jokes Demean a Great Profession

> What do you call 1,000 lawyers at the bottom of the ocean? – A good start.[23]
>
> What is the difference between a catfish and an attorney? – One is a scum-sucking bottom feeder, the other is a fish.[24]
>
> How can you tell when a lawyer is lying? – His lips are moving.[25]

> Santa Claus, the tooth fairy, an honest lawyer and an old drunk are walking down the street together when they simultaneously spot a hundred dollar bill. Who gets it? – The old drunk, of course, the other three are mythological creatures.[26]

These are four examples of traditional cocktail-party lawyer jokes. Judges are not immune from cutting one-liners either.

> What do you call a lawyer with an IQ of 10? – A lawyer.
>
> What do you call a lawyer with an IQ of 15? – Your Honor.[27]
>
> What do you call a lawyer gone bad? – Your Honor.[28]

As members of the legal profession, we hold lawyer jokes in contempt. While we each believe that we have a good sense of humor, lawyer jokes, as inane generalizations, are an unwarranted insult to our profession as a whole. One of the most offensive "jokes" is also most often taken out of context – the line from William Shakespeare's *Henry VI*, Part II, Act IV, Scene II: "The first thing we do, let's kill all the lawyers."[29] If any of the disparagers took the time to check the full context of Shakespeare's work, they would see that the characters who were speaking were plotting to overthrow the king and the whole order of society. To succeed, the anarchists knew that the first thing they would have to do was "kill all the lawyers." The legal profession – our profession – was recognized as one of the bulwarks of an ordered society of laws. Before the ordered society of laws could be successfully challenged, any potential challenger would first have to kill all the lawyers, the guardians of law and justice.[30]

It Is a Profession

Every lawyer has handled matters involving issues of great import in the life of a fellow human being. Perhaps it was for a person facing a long term of imprisonment, a parent seeking to keep or gain custody of a child, a person seeking to purchase a home, or any other person seeking assistance on some issue of importance. No matter what the circumstances, clients are concerned about their problems and seek the help of attorneys to deal with a complex legal system which, to a greater or lesser degree, they do not understand.

In ancient and medieval times, by comparison, the "legal" landscape was much different. Disputed legal issues were tried by test of arms or actual battle – a contest in which each party fought, or certain members of society had the right to nominate a champion to fight by proxy.[31] In this process – another version of which was called the "ordeal" – guilt or innocence, or victory in a civil dispute, was determined by who was triumphant in battle, or who was spared injury during a torturous physical test (*i.e.*, ordeal by fire, trial by water).[32] The idea was that God would see to it that the right side won, or the innocent escaped serious injury to their person.[33] Today, we have a system that, everyone can agree, is likely to produce a fairer and more accurate result. Indeed, there is a reason that trial by jury replaced trial by ordeal.[34]

As the stewards of the law, lawyers in an orderly society are the ones nominated to do "battle" for the client; we are the campaigners for our clients' causes. Our obligation is to make principled, honest and effective efforts. When our lips move, it is to advance truthful arguments intended to advocate justice.

We practice a *profession*. A profession is a vocation, a calling, requiring knowledge of some department of learning or science, and our profession is, indeed, a *learned* one. The work that the members of our profession have done and still do benefits all of society.

- It is due to the efforts of members of our profession over the past 50 years that children of all races attend school together.
- It is due to the efforts of our profession over the past 50 years that all persons accused of crimes are provided with legal counsel when they face prosecution.
- It is due to the efforts of members of our profession over the past 50 years that abused and neglected children have their interests represented by competent, certified law guardians in family courts.
- It is due to the efforts of members of our profession that the lives of millions of people have improved, because the quality of justice has improved.

Law is a wonderful, satisfying, exciting profession, in spite of the tribulations of everyday practice. Very often our legal profession is brilliant and stimulating. We are able to work our hardest to right wrongs, help people, "do justice" – and earn a living while doing it. Virtue, morality and uprightness are our goals, our strengths, and our professional sustenance. Let us never forget that because of those qualities, we safeguard society. We are the base upon which our democratic government "of the people, by the people, for the people"[35] finds its foundation.

During commencement ceremonies at Columbia University in the City of New York, each of the college deans stands and requests that the University President confer upon their graduating students the degrees earned, with all attendant rights and privileges. In May 2003, when then-School of Law Dean David Leebron stood, he requested that the President confer upon the Doctors of Law their degrees so they could go out into the world to preserve and protect the rights and privileges granted to all of the other graduates, in addition to protecting all members of society. Dean Leebron's sentiments say it all – and it is time for those sentiments to be recognized by a larger audience.

In Sum . . .

Be aggressive – yet civil – in your representations. To quote the Bard once again, remember that as attorneys

we must "do as adversaries do in law – Strive mightily, but eat and drink as friends."[36] While caring about our clients, and making every effort in the best interests of our clients, civility and courtesy amongst members of the bar will ensure that, at the end of the day, we remain colleagues.

Honor the Law as it honors us. Work to put an end to lawyer jokes, and reproach those you hear tell them. Be proud of our Profession. It and we deserve no less. After all, if attorneys wish to be accorded the respect and status enjoyed in decades and centuries past, we must strive to conduct our practice in a manner that is consistent with the high standards demanded of our profession. ■

1. *Wolters Kluwer Fin. Servs., Inc. v. Scivantage*, 525 F. Supp. 2d 448 (S.D.N.Y. 2007) (Baer, D.J.).

2. *Id.* at 450.

3. *Id.* at 450–51.

4. Anthony Doniger, *A Different Measure of Success*, Boston B.J., Mar./Apr. 2008, at 2. Although it should be noted that Stroock is one of the firms at which an exception to this trend is found, with associates and partners often involved in pro bono representations and bar association committees and activities.

5. *See id.*

6. The decline in civility in our profession is very much reflective of the decline in courtesy and respect within our society as a whole.

7. *Avista Mgmt., Inc. v. Wausau Underwriters Ins. Co.*, Case No. 6:05-CV1430ORL31JGG, 2006 WL 1562246 (M.D. Fla. June 6, 2006) (Presnell, D.J.) (emphasis added).

8. *Id.*

9. 248 F.R.D. 182 (E.D. Pa. 2008) (Robreno, D.J.).

10. *Id.* at 8.

11. *Id.* at 11.

12. *Id.* at 9.

13. *Id.* at 12.

14. *Id.* at 30–31.

15. *Id.* at 31 n.17.

16. *Id.* at 33.

17. *Id.* at 38.

18. *Id.* at 41.

19. *Id.* at 41 n.23.

20. New York Lawyer's Code of Prof'l Responsibility, EC 1-5.

21. *Id.* at EC 1-7.

22. *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.3(A)(5) (DR 1-102(A)(5)). *See also* Model Rules of Prof'l Conduct R. 8.4(a), (d); Fed. R. Civ. P. 30(d)(2).

23. Heard at any number of cocktail parties.

24. *Id.*

25. *Id. See also* Lawyer Jokes *at* http://www.lawlaughs.com/short/honesty.html (last visited Apr. 24, 2008).

26. *Id. See also* Michael L. Fox, *To Tell or Not To Tell: Legal Ethics & Disclosure After Enron*, 2002 Colum. Bus. L. Rev. 867, 923 (2002) (for another common iteration, using the Easter Bunny instead of Santa Claus).

27. Judge jokes *at* http://www.lawyer-jokes.us/modules/mylinks/viewcat.php?cid=13 (last visited Apr. 24, 2008).

28. *Id.*

29. William Shakespeare, The Second Part of King Henry the Sixth act 4, sc. 2. Among some modern versions are: "What is the ideal weight for a lawyer? – Ten pounds - but that includes the urn." *See* http://www.lawlaughs.com/short/observations.html (last visited Apr. 24, 2008). "Where can you find a good lawyer? – In the cemetery." *See* http://www.lawlaughs.com/short/simple.html (last visited Apr. 24, 2008).

30. The authors are familiar with the competing line of thinking – that the Butcher and Cade were discussing how lawyers protected the landed and wealthy class, and how the new kingdom would feature an equality of all classes only achievable by ridding England of the lawyers who created contracts of serfdom. (Many across the Internet and other forums advance this argument.) As charitably as we can state it, this argument is unsupportable. Taking *Henry VI* in full context, it is clear that while some lawyers in society may be less than altruistic, by and large attorneys are the ones who perpetuate an ordered civilization of laws, and who must be eliminated in order for traitorous mutineers or other dark souls to find success. Indeed, in other Shakespearean works – see, for example *The Merchant of Venice* act 4, sc.1 – attorneys (doctors of law) are accorded great respect.

31. Members of the clergy, women and children, and persons disabled by age or infirmity could nominate a "champion." *See* Encyclopaedia Britannica 73–74 (15th ed. 1994).

32. The Columbia Encyclopedia 2020 (5th ed. 1993).

33. *Id.*

34. *Id.*

35. Abraham Lincoln, Sixteenth President of the United States, Gettysburg Address (Nov. 19, 1863). President Lincoln was a gifted orator and attorney.

36. William Shakespeare, The Taming of the Shrew act 1, sc. 2.

BY DAVID PAUL HOROWITZ

How About Some Courtesy?

Tales of New York lawyers engaging in sharp practice, hurling insults at one another, even brawling, are legion. To eradicate this bad behavior, members of the bar have been bombarded with directives to be civil, courteous, and professional. These directives take the form of court rules, continuing legal education programs, and frequent (justified) admonitions from the bench.

Along with most of my colleagues, I have welcomed and supported this effort. I have always endeavored to work collaboratively with opposing counsel, without sacrificing the interests of my clients, and have striven to do so in both a professional and pleasant manner. The old adage "you catch more flies with honey than vinegar" has always seemed particularly apt in litigation, nowhere more so than in disclosure.

While few mourn the demise of the "Rambo Litigator," it is doubtful that the last vestiges of discourtesy and lack of professionalism will ever be fully obliterated from practice, so we must all continue our efforts to get along with one another. This involves, as every introductory lecture to good practice tells us, extending "professional courtesies" to one another.

Unfortunately, this beneficent tendency often runs smack into the wall of disclosure deadlines set by the court, often through a mélange of preliminary and compliance conference orders, individual justice's rules, and "local rules." In *Ford v. City of New York*,[1] the First Department reminded litigators that the court is included in the penumbra of "professional courtesy":

> It is commendable that all counsel here showed each other professional courtesy. The court deserves the same consideration. The IAS court demonstrated a remarkable willingness to permit counsel to complete discovery on their own terms. However, orders, including so-ordered stipulations, "are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored." "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity."[2]

"Can I Get An Adjournment?"

It always surprises new lawyers that the most frequently asked question (FAQ, for those readers who are members of GenX and GenY) in each and every phase of litigation is some variant of "can I get an adjournment?"[3] From 30-day extensions of time to answer through an additional week to submit reply briefs on appeal, the one constant in our legal landscape is that lawyers generally want more than the time allotted by the rules for accomplishing any legal task.

Indeed, when I teach New York Practice and we arrive at the point in the syllabus where summary judgment motions are covered, I ask the class "What is the first thing you do when you are served with a motion for summary judgment?" After fielding well-intentioned answers that include "have the client come in and prepare an affidavit," "re-read every scrap of paper in the file," and "consider whether or not a cross-motion for summary judgment is warranted," I tell them the only possible correct answer, one every lawyer who has been practicing for more than 15 minutes knows: "Call your adversary and get an extension of the time to oppose the motion."

So, when the inevitable phone call from opposing counsel comes requesting, *inter alia*, that a scheduled court-ordered deposition be adjourned, suspend your initial, professional, and very courteous inclination to agree to the adjournment. Before granting the request, first consider carefully whether there is an order or rule that requires obtaining permission from the court for the adjournment and, second, whether the adjournment is one that should be considered as requiring judicial permission, even in the absence of an explicit directive.

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Depositions, a particular source of adjournment requests, were at issue in *Ford*. Because so many disclosure orders specify "on or before" dates for conducting depositions, it is often only discovered in the afternoon of the day before the "on or before" date (which is, of course, the last date on which the deposition may be conducted pursuant to the order) that [choose all that apply]:

1. The witnesses scheduled to be deposed prior to this witness have not yet been deposed;
2. Disclosure necessary to adequately question the witness, which was supposed to be exchanged has not been exchanged;
3. The witness is not available;
4. The witness cannot be contacted;
5. One or more of the attorneys is not available; and/or
6. Your three-attorney office has six depositions court-ordered for the same date and time.

Because this realization often occurs late in the day, contacting the court, assuming doing so is even on the attorney's radar, is often not possible. A post-adjournment call or letter is probably not what the court had in mind.

Everyone knows that adjournments are routinely granted between and among the attorneys in a given case without judicial permission and without the court being notified, either before or after the fact. So long as the litigants honor and adhere to their "side" agreement, no party is adversely impacted and the court is "none the wiser." Attorneys who request and acquiesce to adjournments in this manner argue that the practice falls within the "no harm, no foul" exception to the command "a litigant cannot ignore court orders with impunity," set forth by the Court of Appeals in *Kihl v. Pfeffer*.[4]

Problems arise, however, when the agreement is not honored or when the scheduling contained in the "side" agreement bumps up against or otherwise conflicts with summary judgment, trial or other deadlines set by the court, requiring use of the disclosure in question.

This is what happened in *Ford*, where the courtesies the litigants extended to one another included stipulating to adjourn pending summary judgment motions. Unfortunately for some of the lawyers and their clients, Justice Paul A. Victor would not ratify this post hoc evisceration of his order:

> The court rejected the application to adjourn, deemed the motions submitted and entered an order on March 20, 2007, denying all motions on the ground that they were untimely. Citing the so-ordered stipulation requiring all EBTs to be conducted on specific dates, the last being July 25, 2006, with no adjournments without prior court approval, the court noted that no such approval was sought or given. Since all motions were submitted more than 60 days beyond the date set for completion of discovery, the motions were untimely. The court did not consider the merits of the motions.[5]

The First Department, after chronicling the myriad delays and adjournments in the case, described the "final conference" that set the stage for the denial of the motions as untimely:

> This "final conference" resulted in a stipulation signed by counsel for all parties and "so-ordered" by the court, providing that depositions were to be completed on various dates, the latest being July 25, 2006. Any independent medical examinations were to be conducted before July 28, 2006. The stipulation provided that defendants' time to move for summary judgment "is extended to 60 days after completion of EBTs." The court added the following language:

> "Failure to comply with the foregoing may warrant imposition of sanctions, including waiver of discovery. No EBT may be adjourned without Court approval." Another "final conference" was scheduled for October 27, 2006. At that conference, the matter was set down for trial on March 12, 2007, with the court records noting that "all parties request this date." There is no indication in the record that any discussion regarding outstanding discovery took place at this conference.[6]

The First Department was in full agreement with Justice Victor:

> We simply cannot accept defendants' claims concerning alleged ambiguities in the so-ordered stipulation, particularly in light of the fact that, according to the City's papers, the deposition of a defendant still had not taken place as of the time of the motions. To accept this argument would mean that counsel, not the court, can set the schedule and pace of discovery, and that the end of discovery would be a fluid, moving goal, not a fixed point in time. The court system simply cannot be run in this fashion.[7]

The final arrow in the appellants' quiver, that the order from the final conference was "ambiguous," failed to hit its intended target:

> Here, the court specifically inserted language requiring court approval for adjournments of the scheduled dates of the EBTs, something absent from the order in *Vila*. As a result, the order here was neither vague nor ambiguous, and counsel's claims of "good cause" for the untimely submission of the motions are without merit.[8]

What to Do?

Lest my recitation of *Ford* appear one-sided, I practice in the same world as the litigants in that case do, and regularly grant and receive adjournments, on occasion without extending to the court the same "professional courtesy" as I extend to my adversaries. *Ford* serves as a vivid warning of the risks in this practice.

So, what to do?

First, scrutinize orders, including all pre-printed language, for any specific directives concerning disclosure. Second, familiarize yourself with the "local rules" and individual justices' rules. Third, know your adversary. Fourth, be aware of all scheduled disclosure in a case, and all deadlines and future court appearances. Fifth, having done all of the above, err on the side of contacting the court and, having done so, document the contact.

Conclusion

I know. Tons of "c.y.a."[9] correspondence. Offending your colleagues. Not being a "regular" guy or gal. And, worst of all, not being courteous.

The answer, I suppose, is friends don't ask friends to jeopardize their clients' cases. So, work out disclosure conflicts and issues as you always have, with the added step of including the court in the loop. Then, offer to buy your offended adversary lunch. ■

1. 54 A.D.3d 263, 863 N.Y.S.2d 180 (1st Dep't 2008).
2. *Id.* at 266 (citations omitted).
3. Variants include "can we put this over," "can we re-schedule," or, in Kings County, any number of phrases beginning with the salutation "Yo."
4. 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999).
5. *Ford*, 54 A.D.3d at 265.
6. *Id.* at 264–65.
7. *Id.* at 267.
8. *Id.* (discussing *Vila v. Cablevision of N.Y. City*, 28 A.D.3d 248, 813 N.Y.S.2d 401 (1st Dep't 2006)).
9. You didn't really think I would write that in a scholarly legal publication, did you?

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More Than Bargained For?

Topics for Consideration in the Issuance and Acceptance of Delaware LLC Opinions

By Brian M. Gottesman and Scott E. Swenson

A word of caution to preparers of third-party closing opinions on Delaware limited liability companies: there is more behind these opinions than meets the eye. For many non-Delaware lawyers engaged in this practice, especially those who may be accustomed to offering opinions on Delaware corporations, opinions on Delaware LLCs[1] may pose significant and unforeseen risks to both preparer and recipient. These risks come from the deceptively broad scope of LLC opinions, opinion-givers' possible unfamiliarity with requisite Delaware contract law and recent Delaware case law exposing opinion-givers to the jurisdiction of the Delaware courts.

Integrating Delaware Contract Law

In February 2006, the TriBar Opinion Committee ("TriBar") issued a report addressing third-party closing opinions on LLCs.[2] The report placed special emphasis on Delaware LLCs because Delaware is the venue of choice for many practitioners forming LLCs, especially for transactional purposes.[3] The Committee observed that, unlike the Delaware General Corporation Law[4] (DGCL), which as a statute is relatively rigid and comprehensive, the Delaware Limited Liability Company LLC Act[5] (the "LLC Act") provides maximum deference to the parties' freedom of contract. The LLC Act consists largely of a series of default rules for an LLC failing to specify otherwise in its operating agreement.[6] As such, the Delaware LLC is a creature of contract.[7] This fundamental characteristic of Delaware LLCs means, according to the TriBar, that opinions rendered concerning Delaware LLCs must cover not only the substance of the LLC Act and its related case law, but also the broader body of Delaware contract law.[8]

Issuing an opinion on Delaware LLC law is therefore unlike other forms of Delaware-related legal services routinely provided by attorneys across the nation. The opinion-giver has not been admitted by any court body *pro hac vice*, which would require association with a Delaware-licensed attorney and assurances of adherence to Delaware law. It is also distinguishable from issuing opinions on corporations, where accepted practice permits attorneys to limit their opinions to the four corners of the DGCL and related case law.[9] In stark contrast, because Delaware LLC operating agreements are inherently products of contract law, attempts to limit an LLC opinion to

the terms of the LLC Act and its related case law may very well prove unenforceable.[10]

A recent illustration of these principles can be found in a 2008 Chancery Court decision in the case of *Fisk Ventures, LLC v. Segal*.[11] In *Fisk*, a member of a Delaware LLC filed a petition for dissolution. The petitioner raised claims against certain third-party and counterclaim respondents including allegations that they had breached (1) the LLC agreement, (2) the implied covenant of good faith and fair dealing, and (3) fiduciary duties. The respondents filed a motion to dismiss under Delaware Court of Chancery Rule 12(b)(6) for failure to state a claim on which relief could be granted.

In adjudicating the issue of the alleged breaches, the court began its analysis with a discussion of basic contract principles:

> The *sine qua non* of pleading an actionable breach is demonstrating that there was something to be breached in the first place. In other words, before the Court can start worrying about whether or not there was a breach, the Court needs to determine that there was a *duty.* In the context of limited liability companies, which are creatures not of the state but of contract, those duties or obligations must be found in the LLC Agreement or some other contract.[12]

The court further noted that it must "interpret contracts to mean what they objectively say."[13] With respect to the claims that the respondents had violated the LLC agreement, the court carefully analyzed the contractual provisions and ruled that

> [t]here is no basis in the language of the LLC Agreement for Segal's contention that all members were bound by a code of conduct, but, even if there were, this Court could not enforce such a code because there is no limit whatsoever to its applicability. Under Segal's reading, a Genitrix member would be liable to the Company or other members for *any* damage caused by gross negligence, willful misconduct, or a knowing violation of law. There is no guidance as to how or when this "code of conduct" applies, and this Court declines to follow Segal's invitation to turn an expressly exculpatory provision into an all encompassing and seemingly boundless standard of conduct.[14]

Moreover, no breach of fiduciary duties had occurred. Relying upon the language permitting abrogation of fiduciary duties in 6 Delaware Code § 18-1101(c), Chancellor Chandler held that the LLC agreement at issue effectively eliminated the respondents' fiduciary duties "to the maximum extent permitted by law by flatly stating that members have no duties other than those expressly articulated in the Agreement."[15] The ruling establishes that where, as here, the LLC agreement does not expressly articulate fiduciary obligations, such obligations do not exist.[16] This ability to exclude fiduciary duties stands in stark contrast to Delaware corporate law, which imposes duties of care and loyalty on both directors and officers of corporations.[17]

Further evidence of this contrast can be found in the court's treatment of another third-party respondent, H. Fisk Johnson. Dr. Johnson filed for dismissal of claims against him for lack of personal jurisdiction. This was granted due to the petitioner's failure to demonstrate any nexus between the claims against Dr. Johnson and his contacts within the state of Delaware.[18] The petitioner had based his claims in part on the grounds that, as a controlling *member* of the LLC, Dr. Johnson owed duties to the other parties that he had breached.[19] The court found, however, that neither Delaware's long-arm statute[20] nor the provision for service of process on managers found in the LLC Act[21] allowed for service on a member of an LLC who did not enjoy the status of manager under the LLC agreement. The fact that a member could exercise control was immaterial to the court's analysis.[22]

The question to preparers of LLC opinions, then, is one of familiarity with Delaware's body of contract law. As with other states, contract law in Delaware is fluid and ever-changing, consisting of a few statutory fixed points amidst a vast sea of case law. As opinions on Delaware LLCs necessarily have a basis in Delaware contract law, an ongoing understanding of the judicial decisions that make up Delaware contract law is the only way to ensure accuracy in these opinions.

Recipients of Delaware LLC opinions, along with other parties who may rely upon such opinions,[23] should be aware of two things: first, that any language purporting to limit the opinion to the scope of the LLC Act may ring hollow at law or at equity; and second, that the inclusion of such language calls into question the effectiveness of the opinion as a comprehensive opinion on a Delaware LLC.

Opinion-Giver Qualifications

In light of the TriBar's stance on Delaware contract law and its inseparable connection to the Delaware LLC, it behooves opinion-givers to ensure that they are competent to render opinions on Delaware contract law before opining on matters of LLC law. The American Bar Association's Model Rule of Professional Conduct 1.1 states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Delaware has adopted this rule in full.[24] Both the ABA and Delaware rules hold:

> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer

> is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. *Expertise in a particular field of law may be required in some circumstances*.[25]

While a lawyer is not required to be an expert in a particular area of law before taking on representation in that area, he or she is expected to engage in the "necessary study" in order to attain competence under Rule 1.1.[26] Thus an attorney who seeks to opine on Delaware limited liability company law, without the requisite understanding of Delaware contract law and other areas of relevant Delaware law, may find that he or she has unwittingly run afoul of Rule 1.1. Courts around the country have held that failure to familiarize oneself with the jurisdictional statutes, case law and rules necessary to provide competent representation is a violation of Rule 1.1 and worthy of disciplinary action.[27] It is therefore the responsibility of the opinion-giver to navigate Delaware common law prior to rendering a Delaware LLC opinion, and to keep abreast of its shifting landscape.

Dela-where?

In addition to the problems noted above, lawyers or law firms giving a legal opinion on matters of Delaware law, including opinions on Delaware business entities, may find themselves hauled before a Delaware court notwithstanding their contacts (or lack thereof) within the state. In a case recently before the Delaware Court of Chancery, *Sample v. Morgan*,[28] plaintiffs in a class-action derivative action added as defendants a lawyer and his firm who had acted as outside counsel and rendered advice on Delaware corporate law. The lawyer and firm moved to dismiss on the grounds that, as non-Delaware residents, the court lacked personal jurisdiction over them.

In a November 27, 2007, opinion, the court denied the motion to dismiss, holding that where a lawyer had filed a certificate of amendment with the Secretary of State on behalf of a Delaware business entity and provided legal counsel on matters of Delaware law, the lawyer was subject to the jurisdiction of the Court of Chancery. The court's analysis focused on two primary issues: (1) whether jurisdiction could be based upon Delaware's long-arm statute,[29] which regulates service of process on non-residents; and (2) whether subjecting the defendants to the court's jurisdiction violated the Due Process Clause of the 14th Amendment to the U.S. Constitution.

The Vice Chancellor held that the analysis was quite simple: The long-arm statute is to be broadly read and due process analysis would be employed to "screen out uses of the statute that sweep too broadly."[30] The plaintiffs need not demonstrate any conspiracy between the attorneys and the corporation. Rather, the mere act of filing the certificate of amendment with the Delaware Secretary of State on behalf of a Delaware corporation had subjected the outside counsel to the court's jurisdiction. The court implied that its election to focus on the filing of the corporate certificate in Delaware was intended to simplify its analysis; however, given the broad interpretation of 10 Delaware Code § 3104(c) adopted by the court, it is highly likely that the provision of legal services with respect to issues of Delaware law would suffice to give the court jurisdiction under the long-arm statute.[31]

The court then addressed the due process issues with respect to asserting jurisdiction over the out-of-state counsel. The Vice Chancellor noted:

> The United States Supreme Court has held that it is constitutionally permissible to exercise personal jurisdiction over a non-resident defendant when that defendant should have "reasonably anticipated . . . that his . . . actions might result in the forum state exercising personal jurisdiction over him in order to adjudicate disputes arising from those actions." To satisfy this test, *the defendant need not have ever entered the forum state physically* because the Supreme Court has rightly focused the test on the more relevant question of whether the defendant has engaged in such conduct directed toward the forum state that makes it reasonably foreseeable that that conduct could give rise to claims against the defendant in the forum state's courts.[32]

In *Sample*, the constitutional test was easily satisfied. "As sophisticated practitioners of corporate law, the moving defendants realize that Delaware, as a chartering state, has an important interest in regulating the internal affairs of its corporations, in order to ensure that the directors and officers . . . honor their obligations to operate the corporation lawfully and in the best interest of the corporation's stockholders."[33] Because the moving defendants had provided legal advice to a Delaware business entity, the court found it "difficult to conceive how it would shock the conscience to require the moving defendants to defend a lawsuit in Delaware."[34] Because, in the court's view, "the moving defendants knew that the propriety of the corporate action taken in reliance upon its advice and through its services would be determined under Delaware corporate law, and likely in a Delaware court," they and others similarly situated could expect to find themselves under the personal jurisdiction of the Delaware Court of Chancery.

Conclusions

The pitfalls of third-party opinion practice with respect to Delaware LLCs should give pause to those opinion-givers who may be unfamiliar with the contours of Delaware contract law, and those who may not have contemplated the possibility of finding themselves answerable for these opinions before a Delaware court. Likewise, those who receive Delaware LLC opinions ought to examine the util-

ity of obtaining opinions from counsel who may not have considered these costs.

1. For purposes of this article, the term "opinions" includes opinions on the status, power and action of LLCs and the enforceability of their operating agreements. For more information about the nature and limitations of such LLC opinions, *see* Richard D. Levin & Brian M. Gottesman, *Delaware Entities and Opinion Letters, in* 1 Commercial Real Estate Financing 2006: What Borrowers and Lenders Need to Know Now 419–86 (Practising Law Inst., 2006).

2. TriBar Opinion Committee, *Third-Party Closing Opinions: Limited Liability Companies*, 61 Bus. Law. 679 (2006) (the "*TriBar 2006 Report*"). This report supplemented the Committee's earlier report on third-party closing opinions, generally, which focused more heavily on corporate opinions. *See* TriBar Opinion Committee, *Third-Party Closing Opinions: A Report of the TriBar Opinion Committee*, 53 Bus. Law. 591, 599 (1998).

3. *TriBar 2006 Report* at 681. This includes so-called "special purpose entities," or "SPEs," created as a vehicle to carry out a singular role in a given transaction, and nothing more; oftentimes, this role is that of an obligor.

4. 8 Del. Code § 101.

5. 6 Del. Code § 18-101.

6. *See* 6 Del. Code § 18-1101(b) ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements"); *see also TriBar 2006 Report* at 680, n.8.

7. *See Poore v. Fox Hollow Enters.*, No. C.A. 93A-09-005, 1994 WL 150872 at *2 (Del. Super. Mar. 29, 1994) (citations omitted).

8. *See TriBar 2006 Report* at 682.

9. *Id.*

10. *Id.*

11. *Fisk Ventures, LLC v. Segal*, No. 3017-CC, 2008 WL 1961156, at **1–12 (Del. Ch. May 7, 2008).

12. *Id.* at *9 (citations omitted).

13. *Id.* (citing *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007)); *Seidensticker v. Gasparilla Inn, Inc.*, No. 2555-CC, 2007 WL 4054473 at *1 (Del. Ch. Nov. 8, 2007).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Schoon v. Smith*, No. 554,2006, 2008 WL 375826 at *5 (Del. Feb. 12, 2008) (citing, *inter alia*, *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1988)); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986)); *Ryan v. Gifford*, 935 A.2d 258, 269 (Del. Ch. 2007) (officers owe fiduciary duties to corporation identical to those owed by directors).

18. *See Fisk Ventures, LLC*, 2008 WL 1961156 at **6–8.

19. Under Delaware corporate law, a controlling shareholder who actually exercises control over his company may owe fiduciary duties to minority shareholders. *See, e.g., Kahn v. Lynch Commc'ns Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994); *Orman v. Cullman*, 794 A.2d 5, 20 (Del. Ch. 2002).

20. 10 Del. Code § 3104.

21. 6 Del. Code § 18-109.

22. *See Fisk Ventures, LLC*, 2008 WL 1961156 at **6–8 (citing, *inter alia*, *Palmer v. Moffat*, No. 9C-03-114-JEB, 2001 WL 1221749 (Del. Super. Oct. 10, 2001)). The analysis may well have been different had the LLC in question not had manager(s) and instead vested all power in the hands of its members. *Id.* at *8.

23. These parties may, and typically do, include the Delaware LLC and its members, their counsel, co-counsel preparing other necessary closing opinions, lenders and rating agencies, as the case may be.

24. Del. Prof'l Conduct Rule 1.1.

25. Model Rules of Prof'l Conduct R. 1.1, cmt. 1 (emphasis added); *cf.* Del. Prof'l Conduct Rule 1.1, cmt. 1.

26. *Id.* at cmt. 2.

27. *See, e.g., In re Richmond's Case*, 152 N.H. 155, 872 A.2d 1023, 1028–29 (N.H. 2005) (respondent who "'lacked needed knowledge and skill concerning the operation and interplay with state and federal securities legislation' and 'failed to . . . acquire the needed knowledge from other sources'" suspended for six months); *Attorney Grievance Comm'n of Md. v. Ward*, 904 A.2d 477, 499 (Md. 2006) (failure by attorney, *inter alia*, to familiarize himself with necessary law warranted indefinite suspension); *In re Boykins*, 748 A.2d 413, 413–14 (D.C. 2000).

28. 935 A.2d 1046 (Del. Ch. 2007).

29. 10 Del. Code § 3104. The language relevant in *Sample* provides that a party may be subjected to personal jurisdiction if it "[t]ransacts any business or performs any character of work or service in the State" or "[c]auses tortious injury in the State by an act or omission in this State." 10 Del. Code § 3104(c)(1), (3).

30. *Sample*, 935 A.2d at 1056 (citing *Hercules Inc. v. Leu Trust & Banking (Bahamas) Ltd.*, 611 A.2d 476, 480–81 (Del. 1992); *Chandler v. Ciccoricco*, No. Civ. A. 19842-NC, 2003 WL 21040185 at *10–11 (Del. Ch. May 5, 2003); *Assist Stock Mgmt. L.L.C. v. Rosheim*, 753 A.2d 974, 980 (Del. Ch. 2000)).

31. *See Sample*, 935 A.2d at 1056; *cf.* 10 Del. Code § 3104(c)(4).

32. *Sample*, 935 A.2d at 1062 (emphasis added) (citing, *inter alia*, *In re USACafes, L.P. Litig.*, 600 A.2d 43, 50 (Del. Ch. 1991) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)); *Asahi Metal Indus. Co. Ltd. v. California*, 480 U.S. 102, 110, (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); William M. Richman, *Understanding Personal Jurisdiction*, 25 Ariz. St. L.J. 599, 617–18 (1993)).

33. *Sample*, 935 A.2d at 1064.

34. *Id.*

City Sidewalk Trees and the Law

By Judith S. Kaye, Ralia Polechronis, Anne Reddy and Jonathan Rebold

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On October 29, 2008, New York City Mayor Michael Bloomberg and Bette Midler – in her lesser-known role as founder of the New York Restoration Project (NYRP) – planted tree number 111,111 commemorating the first anniversary of MillionTreesNYC. With the help of fourth-grade students from P.S. 155, they planted a Japanese Zelkova along 117th Street in East Harlem, a "Trees for Public Health" neighborhood.

MillionTreesNYC is a collaborative initiative between the New York City Parks Department and NYRP, dedicated to planting one million trees throughout New York City by the year 2017. Just over one-fifth (or 220,000) will be sidewalk trees. After one year of digging, the initiative is 20% ahead of schedule. Part of Mayor Bloomberg's PlaNYC 2030, the program envisions creating and maintaining a substantial urban forest as a cost-effective method of ameliorating environmental harms associated with the city's growth. Among their many benefits, city trees clean the air, offset climate change and reduce pollutants.

But what is it about city sidewalk trees that merits space in the *Journal*?

First, urban forests are themselves a fascinating subject, reflecting so much about us and our history. Second, virtually every human activity involves the law, lawyers and courts. Sidewalk trees are no exception to that proposition. Third, a case argued during the Court's 2008 session – *Vucetovic v. Epsom Downs, Inc.*[1] – focused particularly on sidewalk trees. Once consciousness is raised as to the infinite variety of these tree arrangements, it becomes impossible to pass without noticing and wondering about them.

In *Vucetovic*, the plaintiff tripped on cobblestones surrounding the dirt area containing a tree stump on the sidewalk in front of the defendant's building, presenting the question: Is maintenance of the "tree well" (also called a "tree pit" or "tree bed") the responsibility of the municipality or the property owner? As tree wells were not mentioned in New York City Administrative Code § 7-210 reassigning sidewalk liability from the city to the property owner, the Court of Appeals concluded that these areas remained the responsibility of the municipality.

As we know, however careful and comprehensive the answer, a court decision rarely is the last word on any subject. In one form or another, sidewalk trees undoubtedly will continue to reappear on the dockets, especially with the prospect of 220,000 more of them on New York

Authors' Note: Our hearts were filled with sadness at the conclusion of the Court of Appeals' December Session, as we left Albany, never to return to Court of Appeals Hall as the Chief Judge and her Law Clerks. Though there was work to be completed in New York City Home Chambers before year-end, for the first time in 25 years Chief Judge Kaye had no January cases to prepare, leaving a huge research-and-writing void. She therefore decided to plunge into a final collaboration, on a subject of her choice for a publication we all enjoy reading.

City sidewalks alone. Although these trees are technically the province of the Parks Department, and sidewalk maintenance is technically the province of the abutting property owners, these separate domains come into contact, and inevitably also into conflict. The collective history of New York "tree" and "sidewalk" laws reflect the competing interests.

Early History of Sidewalk Trees

The public value of sidewalk trees was recognized centuries ago. In 1869, for example, New York State was a frontrunner in encouraging communities to beautify their streets by enacting laws that offered abutting property owners a highway tax abatement for planting trees along the side of the road, leading the Second Department to observe that it was "the policy of the State to encourage the planting of shade trees."[2] In a similar vein, a national "City Beautiful" movement to adorn neighborhoods with trees did not escape the Court of Appeals, which noted:

> Grass plots and shade trees on the sides of streets serve a useful public purpose, consistent with the object for which streets are made, because they add to the beauty of the scene, and the trees furnish shade for pedestrians during the heat of summer. Both tend to increase the value of abutting property and to enlarge the range of taxation.[3]

Sidewalk trees were the pride of the people at the turn of the 20th century, with damages awarded against abutting landowners for harming them. Property owners had a legal interest in their nearby sidewalk trees, either as bona fide owners whose fee extended to the middle of the road or (for those who lacked outright ownership of the street or sidewalk) in the form of equitable easements to grow and maintain the trees. In *Edsall v. Howell*,[4] for example, the court sustained a jury verdict awarding damages to the plaintiff because the defendant, who had sought permission for the construction of a road over his land, depreciated the value of the plaintiff's property when he cut down a tree fronting the plaintiff's premises to make way for the road. (The plaintiff's right derived from a statute authorizing tree plantings.) In another case, a municipality was enjoined from removing trees to make room for electrical poles without first demonstrating that their destruction was "reasonably necessary or expedient for the proper enjoyment by the public of this system of lighting the streets."[5]

Tree pride blossomed into legislation. The 1902 Tree Planting Act vested exclusive authority in the Commissioner of Parks to care for and cultivate the sidewalk trees of New York City, which inundated the Parks Department with requests for removing old trees and planting new ones. The Parks Board, in turn, enacted ordinances both to bar unapproved meddling with sidewalk trees and to prevent work on the streets within three feet of any tree or shrub. Ultimately the law was amended to permit the Parks Board to plant trees with revenues from the street improvement fund and to assess costs against the property as local improvements.

Public support was mixed. Manhattanites complained that the trees obscured light, air and views, and even the Parks Department grumbled that Manhattan soil conditions were less than ideal for tree plantings. Brooklyn, by contrast, having been primarily farmland through the turn of the century, welcomed the trees. When the Parks Department established a trust fund for property owners to plant trees, thousands of Brooklynites responded. The borough's early receptiveness to the plantings is evident in the many verdant blocks we see there today.

Fortunately, government support for urban trees continued throughout the century and in 1978, around the time of the first federal environmental laws, the city and state turned their focus to tree conservation. New legislation granted the Department of Environmental Conservation authority to establish a state Earth Day and spread public awareness of the value of green space in populated areas. Even more significantly, the legislation amended the General Municipal Law to empower local governments to enact and enforce regulations aimed at protecting trees, as an exercise of the state's police power. Highlighting the timeless value of urban trees, the statute echoes the words of the Court of Appeals back in 1899, noting that trees "abate noise, provide welcome shade to people, preserve the balance of oxygen in the air . . . and add color and verdure to human construction."[6]

The public value of sidewalk trees was recognized centuries ago.

Trees and Courts

At the time of the Tree Planting Act of 1902, the common law determined municipal liability for injuries to persons and property resulting from sidewalk defects and provided the foundation for sidewalk tree liability. Under the common law, property owners generally had no obligation to repair streets or sidewalks adjoining their lots. As a rule, the municipality was liable to third parties injured by defective sidewalks (including tree-related injuries), so long as it had notice of the defective condition.[7] This obligated the municipality to conduct reasonable inspections of its trees.

Courts hesitated, however, to extend city liability for all tree-related injuries, specifically those resulting from wandering tree roots. At a time when property owners built and maintained sewer lines from their homes to the main central line, a court in Niagara County concluded that if a private sewer was improperly built, it was not the

city's obligation to repair. "It would be unreasonable," stated the court, "to expect a municipality to go to the almost prohibitive expense of preventing tree roots from growing into improperly constructed sewers."[8]

By the late 1990s the root question was answered (for the time being): an abutting landowner was not liable for sidewalk damage caused by tree roots.[9] Courts applied this rule even where the owner planted the tree in question, as the mere planting of a tree was not an act of affirmative negligence.[10]

Lessons of Experience

The state of the law was less definitive with regard to tree wells. Consistent with New York City's policy of encouraging private parties to take ownership of sidewalk trees, in the mid-1970s the city began issuing illustrated manuals with recommendations for planting and protecting trees.[11] Along with instructions as to how and what to plant, the guide recommended alternative protections for each tree – in particular, surrounding them with low brick walls, topping tree bases with mulch or iron gratings, and covering the wells with bricks or cobblestones to protect roots from being trampled.

Experience soon taught otherwise. As it turned out, the grates, bricks and concrete strangled the roots and raised other adverse consequences. Today, instead, the Parks Department recommends low cast-iron fences or wrought-iron wickets around the perimeter of the tree well.[12]

Enter the Department of Transportation – a new group concerned with these trees. The DOT began issuing citations for illegal tree guards, prompting complaints from ticketed residents about the shift in thinking about proper tree guards. As one resident wrote,

> [i]n the present climate of municipal scandals, the first thought that crosses my mind is that perhaps some local member of the political establishment has gone into the tree guard manufacturing business. Just think how much money could be made by declaring all existing tree guards illegal and requiring owners to buy new ones![13]

The actual experience with sidewalk trees over the years helps to explain the wide variety of tree wells seen on city streets today, as the photographs accompanying this article show.

The Common Law Response

As property owners and city agencies clashed over permissible types of tree guards, courts dealt with liability for injuries involving them. For the most part, courts followed the common law rule that a municipality must maintain its roadways, which included tree wells. In a case where an intoxicated pedestrian tripped and fell in an empty tree well, the court concluded that the tree well

was not a "customary and appropriate urban amenity" but a "sidewalk condition," leaving it for a jury to determine whether the sidewalk was defective.[14]

Other courts dismissed tree well cases against the city – but not always private owners – on the theory that the offending tree guards were "readily observable conditions,"[15] or by applying the common law exception for defects created by the abutting property owner.[16] Still others required that the city, regardless of whether the dangerous condition was open and obvious (a tree stump within a tree well, for example), demonstrate reasonable care under the circumstances.[17]

A Shift in the Law

In an effort to limit the city's liability for personal injury claims, in 2003 New York City Administrative Code § 7-210 removed the city from liability for any injury "proximately caused by the failure to maintain sidewalks," unless such sidewalk abutted a one-, two- or three-family residential property, placing the duty to keep the sidewalk in a reasonably safe condition on the property owner. The legislation made no mention of tree wells. The trees themselves continued under the jurisdiction of the Parks Department, and sidewalk maintenance was delegated to the abutting property owners, but the in-between spaces, some filled with cobblestones, others encircled by iron fences or bordered in brick, others just dirt patches, were technically neither one nor the other.

In the years since the enactment of § 7-210, yet prior to *Vucetovic*, a number of courts grappled with liability in trip-and-fall cases where pedestrians stumbled over sidewalks made uneven by the roots of a tree that had outgrown its well. Faced with the 2003 law, and reaffirming earlier cases holding that the city was not negligent for merely planting trees, courts consistently placed liability with the abutting property owner.[18] Well, almost consistently. In one pre-*Vucetovic* case, the court distinguished injuries occurring *within* the tree well (no property owner liability) from injuries occurring on the sidewalk as a result of tree roots (possible property owner liability), once again blurring liability and ownership issues.

Not surprisingly, *Vucetovic* has already sprouted branches that extend beyond the wells to sidewalk additions such as bus stops, signposts and pedestrian ramps. Courts have since held that Administrative Code § 7-210 does not require abutting landowners to remove snow and ice in bus stops or shelters but – applying traditional common law principles – that a property owner's attempts at snow removal that make the condition more hazardous may create liability.[19] Similarly, liability for injuries occurring due to a signpost may fall on the party who installed it.[20] Most recently, a court relying on *Vucetovic* held that pedestrian ramps are part of the sidewalk because they are located in the area between the curb and adjacent property lines and are "intended for pedestrian use."[21]

Unquestionably, human ingenuity (lawyers and clients) will continue to present new twists that challenge courts.

We end by returning full circle to the sentiment expressed in our Authors' Note, one of regret that we will no longer be part of the Court of Appeals, as inevitably these and other law issues profoundly affecting daily life are resolved with wisdom, sensitivity and care. Truly it is an extraordinary process that renders justice for the parties while mindful of the need for both stability and growth in the law to meet the needs of a changing world. And no one does it better than the Court of Appeals of the State of New York. ■

1. 10 N.Y.3d 517, 860 N.Y.S.2d 429 (2008).

2. *Lane v. Lamke*, 53 A.D. 395, 398, 65 N.Y.S. 1090 (2d Dep't 1900). *See also* Richard D. Schein, Street Trees: A Manual for Municipalities 24 (Tree Works 1993).

3. *Dougherty v. Trustees of Vill. of Horseheads*, 159 N.Y. 154, 158–59 (1899).

4. 33 N.Y.S. 892 (Gen. Term, 4th Dep't 1895).

5. *Ellison v. Allen*, 30 N.Y.S. 441, 443 (Sup. Ct., Monroe Co. 1894).

6. N.Y. General Municipal Law § 96-b(1).

7. *See, e.g., City of Rochester v. Campbell*, 123 N.Y. 405 (1890).

8. *Colombe v. City of Niagara Falls*, 162 Misc. 594, 596, 295 N.Y.S. 84 (Sup. Ct., Niagara Co. 1937).

9. *Gomez v. City of N.Y.*, 238 A.D.2d 472, 657 N.Y.S.2d 920 (2d Dep't 1997).

10. *See Gitterman v. City of N.Y.*, 300 A.D.2d 157, 751 N.Y.S.2d 478 (1st Dep't 2002).

11. *See* N.Y. Department of City Planning, Trees for New York City (1977).

12. *See* N.Y. City Department of Parks & Recreation, Tree Planting Standards (2008), *available at* http://www.nycparks.org/permits/trees/standards.pdf.

13. Letter from Richard B. Barnett to Ross Sandler, Comm'r, Bureau of Highway Operations, Dep't of Transp. (Mar. 4, 1987) (on file with the N.Y. City Department of Parks & Recreation Library).

14. *Moran v. City of N.Y.*, 153 A.D.2d 607, 608, 544 N.Y.S.2d 641 (2d Dep't 1989).

15. *See Martinez v. City of N.Y.*, 307 A.D.2d 989, 763 N.Y.S.2d 663 (2d Dep't 2003) (refusing to dismiss case against private entity that often parked cars on the sidewalk in the area); *Goldban v. 56th Realty*, 304 A.D.2d 408, 758 N.Y.S.2d 46 (1st Dep't 2003) (dismissing case against property owner and city).

16. *See Lucciola v. City of N.Y.*, 12 Misc.3d 365, 814 N.Y.S.2d 480 (Sup. Ct., Bronx Co. 2005).

17. *See Grgich v. City of N.Y.*, 2 A.D.3d 680, 770 N.Y.S.2d 91 (2d Dep't 2003).

18. *See DiGregorio v. City of N.Y.*, 19 Misc. 3d 1135(A), 862 N.Y.S.2d 814 (Sup. Ct., Kings Co. 2008); *Falco v. Jennings Hall Senior Citizen Hous. Dev. Fund, Inc.*, 19 Misc. 3d 1107(A), 2008 WL 780762 (Sup. Ct., Kings Co. 2008); *Moore v. Newport Assoc. L.P.*, 16 Misc.3d 618, 842 N.Y.S.2d 268 (Sup. Ct., Kings Co. 2007); *Seplow v. Solil Mgmt. Corp.*, 15 Misc. 3d 1138(A), 841 N.Y.S.2d 823 (Sup. Ct., N.Y. Co. 2007).

19. *Garcia-Martinez v. City of N.Y.*, 20 Misc. 3d 1111(A), 867 N.Y.S.2d 16 (Sup. Ct., N.Y. Co. 2008).

20. *See Raleigh v. Broadway 48th–49th Street LLC*, No. 0101733/2006, 2008 WL 2556248 (Sup. Ct., N.Y. Co. 2008); *Asnis v. City of N.Y.*, No. 0111163/2004, 2008 WL 3889212 (Sup. Ct., N.Y. Co. 2008).

21. *Blackburn v. City of N.Y.*, No. 105573/07, 2008 WL 5203281 (Sup. Ct., N.Y. Co. 2008).

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New Criminal Law and Procedure Legislation

By Barry Kamins

The 2008 legislative session produced fewer substantive pieces of criminal justice legislation than in prior years. This article will first discuss three new laws that will have a significant impact on the criminal justice system. The balance of the article will then discuss the remaining legislation signed into law by the Governor.

Post-Release Supervision

As of July 9, 2008, the court system has a new process for returning to court for possible resentencing inmates who are serving determinate sentences, where the sentencing court failed to impose a term of Post-Release Supervision (PRS). In 1998, the Legislature ended indeterminate sentences for defendants convicted of violent felonies and enacted Jenna's Law, named for Jenna Griebshaber. Ms. Griebshaber was a 22-year-old nursing student who was murdered by an individual who had been released from prison after serving two-thirds of his indeterminate sentence for a violent felony. Jenna's Law eliminated indeterminate sentences and required determinate sentences for those convicted of violent felonies. Jenna's Law also created a schedule of *mandatory* terms of PRS as part of a determinate sentence, the purpose of which was to ensure that violent offenders are appropriately monitored upon their reintroduction into society.

Unfortunately, in a number of cases, courts did not inform defendants – either at the time a guilty plea was entered or at the time of sentencing – that they would be subject to a period of PRS following their determinate sentences. In those cases, the Department of Correctional Services (DOCS) administratively added a period of PRS onto those sentences. On April 29, 2008, the New York Court of Appeals held that DOCS had no authority to take this action and that only the sentencing judge is authorized to pronounce the PRS component of a sentence.[1]

In a companion case, *People v. Sparber*,[2] the Court held that when courts fail to pronounce the PRS term, rather than striking the PRS imposed by the DOCS from the sentence, the matter must be remitted to the sentencing court for resentencing. Thus the Court concluded that if a sentencing court errs in this omission, the error can be remedied through resentencing.

These decisions will affect the thousands of inmates still serving determinate sentences without a judicially imposed period of PRS, as well as those who have been released from prison after completing the deter-

minate sentence. The decisions have already led to the review of the sentencing records of hundreds of parolees and inmates; 335 inmates incarcerated for violating the terms of improperly imposed periods of PRS have been released. The Legislature responded to the court decisions by enacting a statutory framework that allows for an orderly judicial resolution in these cases to determine which defendants are to be subject to PRS and which are not.[3]

The resentencing proceedings apply to all inmates in custody of DOCS or "releasees" on parole after serving determinate sentences for crimes committed on or after September 1, 1998, whose original court commitment order does not indicate imposition of any term of PRS. In these cases DOCS or the Division of Parole must notify the sentencing court and the individual that resentencing must take place.

Within 10 days of receiving notification, the sentencing court must appoint counsel and then must calendar the matter within 20 days of the notification. Within 30 days of the notification, the court must commence a proceeding to consider resentencing. At this proceeding, the court is required to utilize the sentencing minutes, plea minutes and any other relevant documents. Forty days after the original notification, the court is required to render a decision. However, all of the above time periods may be waived upon consent of the inmate or releasee.

Note that the new law does not *compel* courts to resentence individuals to a period of PRS. A court may decline to do so, with the consent of the prosecutor.[4] This may occur in situations where a court failed to advise a defendant during a plea colloquy that the court would impose PRS as part of the sentence. The Court of Appeals has held that the failure to so advise a defendant would enable the defendant to vacate the plea.[5] Thus, if a defendant is later brought back for resentencing and the court had failed to mention PRS in the plea allocution, the new law permits the court to resentence the defendant to the original period of incarceration without imposing a period of PRS; this avoids the necessity of a plea vacatur.

Courts will also be faced with resentencing procedures in cases where a defendant has fully served a determinate sentence and has been released from prison. This presents a more difficult issue for courts and one the Legislature may have anticipated. A court is required to notify the Division of Parole when it determines that "it will not resentence the defendant under this section or *otherwise*."[6] Thus, the Legislature has left a window of opportunity for defendants to raise other theories by which a court may decline to impose a period of PRS.

One theory, raised by attorneys in the Legal Aid Society, is that a court has no "inherent power to correct an illegal sentence after the defendant has served the judicially pronounced term."[7] Thus, if a court imposes a period of PRS after the defendant has fully served his or her determinate sentence, this may violate the provisions of the double jeopardy clause.[8] Perhaps in anticipation of such arguments, the statute makes clear that nothing in the resentencing procedure shall prohibit an inmate or parolee from seeking immediate relief through an Article 78 proceeding or a proceeding under N.Y. Criminal Procedure Law § 440 (CPL).

Finally, in an attempt to prevent courts from finding themselves again in an entanglement of resentencing, the Penal Law has been amended to ensure the transparency of PRS. Thus, a court is required specifically, when imposing a determinate sentence, to state the period of PRS.[9]

Identity Theft

Another law enacted in the past legislative session will significantly ease the burden of New York prosecutors in prosecuting identity theft.

Six years ago, the Legislature criminalized identity theft in response to the increasingly pervasive conduct of those who falsely assume the identity of others. Identity theft may be the fastest growing crime in the United States, and it has been estimated that banks lose hundreds of millions of dollars each year to this crime. Five years ago it was estimated that 750,000 cases of identity theft occur each year; unfortunately, that number has continued to grow each year since.

The prosecution of identity theft presents unique problems for a prosecutor.[10] Frequently, identity theft is a multi-jurisdictional crime. The defendant may reside in one jurisdiction, steal a credit card from a victim in a second jurisdiction and ship the proceeds of the credit card fraud to a third jurisdiction. When the Legislature criminalized this conduct, it anticipated the complexity of the prosecution's task, so it permitted a prosecution in (1) any county where the crime was committed, regardless of whether the defendant was actually present in such county; (2) the county in which a victim who suffered financial loss resided; or (3) the county in which the person whose PIN number was used, resided.

However, the Legislature apparently did not anticipate the difficulty prosecutors would have in presenting identity theft cases before a grand jury. It may be necessary for a prosecutor to offer the business records of the credit card company whose credit card was stolen and fraudulently used by the defendant. Frequently, the credit card company is located in another state and the prosecutor must produce a representative of that company before a grand jury in order to introduce those records. The expense involved presents a problem for prosecuting authorities whose budgets have been curtailed in recent years.

Fortunately, the Legislature has remedied this problem by adding a new provision to CPL § 190.30. This section already contains evidentiary rules that apply uniquely to grand jury proceedings and that have been utilized in the past to save the valuable time of individu-

als whose reports should speak for themselves before the grand jury. Certified reports are routinely received by the grand jury in lieu of personal testimony by technicians in the field of medical, fingerprint, ballistic and chemical evidence. In addition, the section permits the introduction of sworn statements by victims of certain crimes. These written statements replace testimony that would merely recite cut-and-dry facts concerning the ownership or possessory interest in property, the value of such property and the defendant's lack of right to possession of such property.

A new evidentiary rule permits the introduction of business records provided by telephone companies and Internet providers as well as records of financial transactions provided by a bank, brokerage or insurance company.[11] The records must be accompanied by a notarized statement that establishes the essential evidentiary requirements for the introduction of any business record: the person providing the statement is a duly authorized custodian of the records; the records were made in the regular course of business; and it was in the regular course of business to keep such records.

Finally, when a business record includes other material that would not be admissible in the grand jury, the prosecutor can choose between two options: redact the extraneous material or instruct the grand jury that it may not consider the material in connection with its deliberation of the evidence.

Inmates With Mental Illness

In a third significant piece of legislation, the Legislature took a major step towards improving the treatment of inmates in the correctional system who suffer from some form of serious mental illness. It is estimated that approximately 8,000 inmates, or 12% of the state prison population, are affected with this disability. Past studies have documented that these inmates, who are routinely subjected to solitary confinement, engage in acts of self-mutilation and commit suicide at an alarmingly high rate. In addition, many of these inmates are continuously shuttled between in-patient care in a psychiatric hospital and the general population of prison or even solitary confinement.

The new legislation is designed to prevent the DOCS from continuing to place these inmates in special housing units (SHU) for confinement.[12] This added protection will benefit inmates who suffer from serious psychiatric disorders (schizophrenia, delusional disorder, bipolar disorder, etc.); inmates who are actively suicidal; inmates diagnosed with organic brain syndrome; and inmates diagnosed with a severe personality disorder. Unless certain "exceptional circumstances" exist, an inmate with mental illness will now be placed in a residential mental health treatment unit.

The new law explicitly criminalizes the act of residential mortgage fraud and increases the penalties depending upon the amount of funds received.

The residential mental health treatment unit will provide housing for inmates suffering from mental illness. It will be operated jointly by the DOCS and the Office of Mental Health. Inmates placed in this unit must receive at least four hours a day (excluding weekends) of structured out-of-cell therapeutic programs or mental health treatment, in addition to exercise. Each unit will be limited to 38 beds.

The decision to transfer an inmate to a treatment unit must be made by a joint case management committee. This committee can deny transfer only in exceptional circumstances. Thus, SHU confinement will be limited to those inmates with mental illness who are deemed a physical threat to themselves or others.

The new law will not apply to local correctional facilities.[13] In addition, the New York State Commission on Quality of Care for the Mentally Disabled will be given the responsibility of monitoring the quality of mental health care provided to inmates. The new treatment units must be in place no later than July 1, 2011.

New Crimes

Aside from the three pieces of criminal justice legislation discussed, the Legislature created a number of new crimes.

Residential Mortgage Fraud

The crime of Residential Mortgage Fraud was a response to the current mortgage foreclosure crisis within the state.[14] Before this enactment, no separate Penal Law provision expressly prohibited this type of fraud and prosecutors had to pursue such cases under a variety of other theories, including a scheme to defraud and larceny. The new law explicitly criminalizes the act of residential mortgage fraud and increases the penalties depending upon the amount of funds received. For example, fifth degree fraud, a class A misdemeanor, can be charged when less than $1,000 is received; first degree fraud, a

Continued on Page 32

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Continued from Page 30

class B felony, can be charged when more than a million dollars is received.

Children

Two new crimes address issues relating to young children. One new law, Luring a Child, creates a new felony of luring a child under the age of 17 into a building, isolated area, car or boat for the purpose of committing certain enumerated offenses, including violent felonies and sex offenses. The luring crime is designated a class E felony, but if the underlying intended offense is a class A or class B felony, then the luring offense is elevated to a class C or D felony, respectively.[15] A second law creates the crime of Facilitating a Sexual Performance by a Child with a Controlled Substance or Alcohol. This crime, a class B felony, is designed to prevent the exploitation of children by those who use drugs or alcohol to engage children under the age of 17 in sexual performances.[16]

Miscellaneous

In an attempt to keep pace with new technology, the Legislature has created a new class B misdemeanor that prohibits the unlawful duplication of computer-related material.[17] This law is designed to prevent individuals from reducing personal records (*e.g.*, medical histories), to computer data and circulating such information for profit. Another new law creates the felony crime of Aggravated Identity Theft when the victim is a member of the armed forces and the perpetrator knows that the victim is deployed outside the continental United States.[18] Finally, a new law prohibits animal owners from leaving their pets in a vehicle without the proper ventilation to prevent extreme temperatures from injuring the animals.[19]

Amendments

Senior Citizens

The Legislature has also amended several current laws to provide increased protection for senior citizens by increasing the penalties for existing crimes when the victims are over the age of 65. Thus, a misdemeanor assault is elevated to a class D felony when the victim is over 65 and the perpetrator is more than 10 years younger than the victim. There is no requirement that the prosecutor prove that the defendant knew or had reason to know the victim's age.[20] In addition, under prior law, in order to prosecute the felony of Scheme to Defraud, the prosecutor had to establish that 10 or more victims existed. Under a new amendment, the crime can also be committed if there is a scheme to defraud more than one person, one of whom is a "vulnerable elderly person," *i.e.*, a person over the age of 60 who is suffering from a disease or infirmity associated with advanced age.[21]

Domestic Violence

As in past sessions, the Legislature enacted several new laws to protect victims of domestic violence. One such law increases the number of individuals who can be protected by an Order of Protection. The amendment expands the definition of "same family or household" to include unrelated persons who are or who have been in an "intimate relationship" with the victim, whether or not the individuals have lived together at any time. Thus, these individuals can now be included in an Order of Protection. However, neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship."[22]

Disabling/Destroying Property

In addition, the Legislature amended the crime of Criminal Mischief in the Fourth Degree to add a new subdivision that punishes an individual who intentionally disables telephone equipment in order to prevent another person from using a telephone to place a call for emergency assistance. Statistics show that in approximately 5% of domestic violence incident reports, it was alleged that a telephone was pulled from a wall by the perpetrator during a victim's attempt to call for help. An ownership interest in the equipment is not a defense to the crime.[23] Finally, the definition of Criminal Mischief was clarified to define the "property of another." In the past, courts have struggled with the interpretation of the statute when jointly owned property has been damaged or destroyed. As a result, one joint owner-spouse was able to intimidate and terrorize the other spouse by damaging or destroying property owned by the two parties without fear of criminal consequences. Under the added definition, it is no defense that a person believes he or she has a right to destroy property merely because that person is a joint owner of the property.[24]

Expanded Definitions and Increased Penalties

As in past sessions, the Legislature has both expanded the definition and increased the penalties of existing crimes. For example, the penalties for an assault on certain municipal employees have been increased. When an individual causes physical injury to a city marshal or traffic enforcement agent in the employee's performance of his or her duties, the penalty has been increased from a class A misdemeanor to a class D felony. The amendment also permits a person to be charged with this offense when the physical injury is caused by an animal under the person's control. This legislation was a response to the increasing number of attacks on traffic agents who issue tickets and on city marshals who evict tenants.[25] In addition, the penalties for operating recording devices in a movie theater or live theater have been increased to reflect the economic impact caused by the crime of motion picture piracy. It

is estimated that this criminal enterprise costs workers billions of dollars in lost earnings and thousands of jobs. The penalties have been increased from a Violation to a class A misdemeanor; when there is a second conviction within 10 years it is elevated to a class E felony.[26]

The definition of Aggravated Harassment in the First Degree has been expanded to include depictions of a noose on any building or real property without the express permission of the property owner. This legislation was a response to a disturbing increase in the number of appearances of nooses around the country, including two incidents in New York – one at a Hempstead police station and another on the office door of a Columbia University professor. Thus, the noose has been added to the Penal Law's list of symbols that universally evoke hatred and racism, *e.g.*, swastikas and burning crosses, and its depiction will now trigger a prosecution.[27] Aggravated Harassment in the Second Degree has also been expanded to include communication by digital transmission including compact disc, cassette, CD-ROM, and so on.[28]

The crime of Criminal Impersonation has been expanded. The misdemeanor crime (Second Degree) has been expanded to include impersonation by means of the Internet "with intent to obtain a benefit or injure or defraud another."[29] It is expected that this charge will deter those who use certain Web sites, *e.g.*, MySpace and Facebook, to steal the identity of others. The felony crime of impersonation (First Degree) now includes impersonation of a *federal* law enforcement officer. In the past only those who impersonated a police officer, as that term is defined in the Criminal Procedure Law, could be prosecuted.[30]

A number of other crimes have been expanded. Plastic knuckles have been added to the list of weapons that are unlawful to possess.[31] This weapon is just as dangerous as a set of brass knuckles and, in addition, many students bring them to school without fear that the item will activate a magnetometer. The crime of Disruption of a Religious Service has been expanded to include the intentional disruption of funerals or memorial services by a person within 100 feet of the service.[32] This was a legislative response to a series of intemperate protests that have taken place at military funerals across the state. The crime of Falsely Reporting an Incident now includes false reports of child abuse to a person required to report such incidents pursuant to N.Y. Social Services Law § 3431(1).[33] It is expected that this change will deter the harassment of parents, guardians and family members, particularly in connection with child custody proceedings. The crime

of Non-Support of a Child in the First Degree has been expanded to raise the age from 16 to 18 for which a parent or guardian with a support order is responsible for his or her child, when there is an order of child support.[34] Coercion in the Second Degree has been expanded to include threats that induce a person to join a street gang or similar criminal enterprise.[35] Finally, the definition of Animal Fighting has been expanded; it is now a Violation for a person merely to attend an animal fight.[36]

Procedural Changes

A number of procedural changes have been enacted by the Legislature. The Youthful Offender statute has been amended to require a lower criminal court to seal an accusatory instrument at arraignment. Under prior law, this sealing was discretionary with the court and rarely done.[37] However, the automatic sealing of the accusatory instrument will help to effectuate the purpose of the statute, which is to minimize the stigma created by an allegation of criminal conduct. Another procedural change permits defendants accused of first degree drug offenses to waive indictment and plead guilty pursuant to a Superior Court Information.[38] This harmonizes the New York State Constitution and the Criminal Procedure Law by permitting a defendant charged with a class A felony *not* punishable with life imprisonment to waive indictment. In addition, the mandatory surcharges pursuant to convictions for felonies, misdemeanors and violations have been increased to $325, $200, and $120 respectively.[39] Finally, a new law adds Herkimer County to the other 23 counties in New York that utilize audio-visual equipment to permit electronic appearances of defendants except at a hearing or trial.[40]

Sex Offenders

During the last session, the Legislature enacted numerous changes related to sex offenders. Following an investigation by the Attorney General's office into the misuse of the Internet by sex offenders, the Legislature enacted the Electronic Security and Targeting of Online Predators Act. The law requires sex offenders to register with the Division of Criminal Justice Services any Internet account that belongs to them; the Internet entity, in turn, will now be authorized to prescreen or remove sex offenders from its services. In addition, under certain circumstances, a court is now authorized, as a condition of Post-Release Supervision, Probation or Conditional Discharge, to restrict the use of the Internet by sex offenders and to prohibit them from using the Internet to communicate with a person under the age of 18 when such offender is over the age of 18. The only exception would be for parents who are not otherwise prohibited from communicating with their children. The same restrictions can be imposed by the State Board of Parole as a condition of Parole or Conditional Release. In imposing probation conditions upon sex offenders, however, a court may not prohibit the offender from using the Internet in connection with his or her education or search for lawful employment.[41]

A new law provides employers with a rebuttable presumption when they are sued for negligent hiring.

In addition, any teacher in New York State who is convicted of a registerable sex offense will have his or her certificate of qualification automatically revoked, and prosecutors must now notify the Commissioner of Education of such convictions.[42] Also, a similar provision now applies to individuals holding a license as a real estate broker or real estate salesperson.[43] Finally, the Legislature added three federal offenses to the list of sex offenses for which sex offender registration is now required in New York State: coercion and enticement (18 U.S.C. § 2422(b)); transportation of minors (18 U.S.C. § 2423); and use of interstate facilities to transmit information about a minor (18 U.S.C. § 2425).[44]

Ex-Offenders

In the last few sessions, the Legislature has begun to focus on the re-entry of individuals into society following incarceration. In New York State up to 60% of ex-offenders are unemployed one year after release. There is a strong correlation between unemployment and recidivism. Ex-offenders face a number of barriers to re-entry in the work force. For example, the employer will normally ask an applicant if he or she has been convicted of a crime. Employers must ask that question in order to avoid a possible lawsuit for negligent hiring. An employer's liability arises from its failure to take reasonable care in making

hiring decisions. Thus, there is a strong disincentive to hire ex-offenders. A new law provides employers with a rebuttable presumption when they are sued for negligent hiring. Thus, evidence of a prior conviction would be excluded in such litigation if the employer complies with the six factors in Article 23-A of the Correction Law and makes a good faith determination that such factors militate in favor of hiring the employee.[45] Finally, an ex-offender seeking a barber's license is no longer automatically disqualified on the basis of his or her prior conviction.[46]

Prisoners and Parolees

A number of new laws will affect prisoners and parolees. One such law corrected an oversight that was created by the 2004 Drug Law Reform Act. That act provided for mandatory termination of drug sentences after three years of unrevoked parole supervision for class A-I and A-II drug felonies and two years of unrevoked parole supervision for lesser drug felonies. The Division of Parole, however, as well as the Appellate Division, Third Department,[47] interpreted this law as prohibiting termination of supervision when the parolee was presumptively released by the DOCS. The new law makes clear that offenders who are presumptively released are eligible for termination of sentence under the same circumstances as offenders released by the Parole Board.[48] In addition, a new law restores discretion to the Board of Parole to grant discharge to those prisoners sentenced to an indeterminate sentence with a maximum of life.[49]

Miscellaneous

Finally, the Legislature enacted several laws dealing with minor or technical issues. One new law will now offer the parent or guardian of a crime victim under the age of 18 compensation for time spent out of work as a result of the child's hospitalization.[50] Peace officer status has been granted to employees of the New York City Business Integrity Commission.[51] The Legislature has added two crimes to the list of eligible criminal acts which qualify as criminal acts for purposes of the state's enterprise corruption crime: Disseminating Indecent Materials to Minors in the First Degree and Promoting Sexual Performance by a Child.[52] ■

1. *Garner v. N.Y. State Dep't of Corr. Servs.*, 10 N.Y.3d 358, 859 N.Y.S.2d 590 (2008).
2. 10 N.Y.3d 457, 859 N.Y.S.2d 582 (2008).
3. N.Y. Correction Law § 601-d ("Corr. Law"); N.Y. Penal Law § 70.85 (2008 N.Y. Laws ch. 141, eff. 7/9/08).
4. Penal Law § 70.85 (2008 N.Y. Laws ch. 141, eff. 7/9/08).
5. *People v. Catu*, 4 N.Y.3d 242, 792 N.Y.S.2d 887 (2005).
6. Corr. Law § 601-d(5) (emphasis added).
7. Pleadings drafted by Elon Harpaz and Kerry Elgarten of the Legal Aid Society.
8. *Id. See, e.g.*, *United States v. Rico*, 902 F.2d 1065 (2d Cir. 1990); *United States v. Silvers*, 90 F.3d 95 (4th Cir. 1996).
9. Penal Law § 70.45 (2008 N.Y. Laws ch. 141, eff. 7/9/08).
10. *See* Frey, *Prosecuting ID Theft Is Now Easier in New York*, N.Y.L.J., Aug. 12, 2008.
11. CPL § 190.30 (8) (2008 N.Y. Laws ch. 279, eff. 8/6/08).
12. Corr. Law § 137(6)(d), (e) (2008 N.Y. Laws ch. 1, eff. no later than 7/1/11).
13. Corr. Law § 500-K (2008 N.Y. Laws ch. 2).
14. 2008 N.Y. Laws ch. 472, eff. 11/1/08.
15. 2008 N.Y. Laws ch. 405, eff. 10/4/08.
16. 2008 N.Y. Laws ch. 431, eff. 11/1/08.
17. 2008 N.Y. Laws ch. 590, eff. 11/1/08.
18. 2008 N.Y. Laws ch. 226, eff. 11/4/08.
19. 2008 N.Y. Laws ch. 586, eff. 1/23/09.
20. 2008 N.Y. Laws ch. 68, eff. 6/29/08.
21. 2008 N.Y. Laws ch. 291, eff. 9/19/08.
22. 2008 N.Y. Laws ch. 326, eff. 7/21/08.
23. 2008 N.Y. Laws ch. 69, eff. 7/6/08.
24. 2008 N.Y. Laws ch. 601, eff. 11/1/08.
25. 2008 N.Y. Laws ch. 45, eff. 7/22/08.
26. 2008 N.Y. Laws ch. 639, eff. 11/9/08.
27. 2008 N.Y. Laws ch. 74, eff. 11/1/08.
28. 2008 N.Y. Laws ch. 510, eff. 12/3/08.
29. 2008 N.Y. Laws ch. 304, eff. 11/1/08.
30. 2008 N.Y. Laws ch. 434, eff. 11/1/08.
31. 2008 N.Y. Laws ch. 257, eff. 11/1/08.
32. 2008 N.Y. Laws ch. 566, eff. 9/25/08.
33. 2008 N.Y. Laws ch. 400. eff. 12/3/08.
34. 2008 N.Y. Laws ch. 70, eff. 11/1/08.
35. 2008 N.Y. Laws ch. 426, eff. 11/1/08.
36. 2008 N.Y. Laws ch. 308, eff. 7/21/08.
37. 2008 N.Y. Laws ch. 587, eff. 1/1/09.
38. 2008 N.Y. Laws ch. 401, eff. 11/1/08.
39. 2008 N.Y. Laws ch. 56, eff. 7/1/08.
40. 2008 N.Y. Laws ch. 317, eff. 7/21/08.
41. 2008 N.Y. Laws ch. 67, eff. 4/20/08.
42. 2008 N.Y. Laws ch. 296, eff. 7/21/08.
43. 2008 N.Y. Laws ch. 430, eff. 8/5/08.
44. 2008 N.Y. Laws ch. 232, eff. 7/7/08.
45. 2008 N.Y. Laws ch. 534, eff. 9/4/08.
46. 2008 N.Y. Laws ch. 469, eff. 8/5/08.
47. *Sweeney v. Dennison*, 52 A.D.3d 882, 858 N.Y.S.2d 845 (3d Dep't 2008).
48. 2008 N.Y. Laws ch. 486, eff. 8/5/08.
49. 2008 N.Y. Laws ch. 310, eff. 7/21/08.
50. 2008 N.Y. Laws ch. 162, eff. 9/1/08.
51. 2008 N.Y. Laws ch. 564, eff. 9/4/08.
52. 2008 N.Y. Laws ch. 312, eff. 10/19/08.

Legal Requirements That Influence Control of Independent Contractors and Employees

By Robert W. Wood

Is a worker an independent contractor or an employee? The distinction is important under federal, state and local tax laws. It affects contract and tort liability exposure, and raises federal and state labor law compliance issues. Plus, it can impact insurance, employee benefits and myriad other issues.

Worker classification is not determined merely by labels. Various government agencies and the courts can make their own assessment of who is an employee. In appropriate cases, the government can retroactively recharacterize workers, so the stakes can be huge. The courts have long been divided on how to define and interpret these rules. Even today, there is no single test for determining worker status.

The Internal Revenue Service and a variety of state and federal agencies make determinations as to worker status, so a worker may be classified as an employee for one purpose and as an independent contractor for another. Quite apart from tax status, workers classified as employees have rights under federal labor and employment laws. Consequently, issues of statutory coverage and liability may turn on whether a person is found to be an employee.

Gradients of Control

Although tests for assessing worker status have differing formulations, the tighter the company's right to control the worker, the more likely the worker will be considered an employee. Most of the classification methodologies also evaluate the degree to which the worker is integrated into the company's operations, the worker's special skills, the longevity of the relationship, the company's ability to terminate the relationship, and so on. These and other factors are used as earmarks of employment.

A court or agency must determine the worker's true status by evaluating the governing contract and business records. If the worker is micro-managed and subject to the employer's unfettered control, an "independent contractor" label in a contract will probably not save the worker from being recast as an employee.

Legal Requirements

Worker classification is a fact-intensive determination. Because virtually everything is relevant in making the determination, legal and regulatory requirements impacting the working relationship must also be considered.

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For example: a trucking company mandates that its drivers may drive only up to a maximum of eight consecutive hours before taking a required rest. This rule may appear to indicate employer control, which, along with myriad other contract provisions, rules and practices, is relevant in assessing whether the putative employer has exercised (or reserved the *right* to exercise) sufficient control to dictate employee status. If, however, the eight-hour driving maximum emanates from federal or state transportation rules, can this requirement fairly be seen as indicative of company control? In the few cases to consider such a point, the answer appears to be no.

Of course, employers may subject their workers to requirements *exceeding* prescribed regulations. For example, suppose an employer requires workers to check in with the company not less than once every 24 hours because federal or state law imposes such a requirement. Suppose, then, that the applicable law changes to require workers to check in only once every 48 hours. If the employer is ignorant of this change and continues to require 24-hour check in, should this enhanced level of "control" be considered in assessing the worker relationship?

Further, does it matter if the employer exercised due diligence in attempting to keep itself abreast of such legal and regulatory changes? Does it matter if the worker's status is being examined two weeks or five years after the pertinent legal change was made? The answers to these questions are important and, to some degree, subjective. A degree of employer rule-making beyond bare legal requirements should not necessarily constitute sufficient control to characterize the worker as an employee. Nuance is important.

Case Law and Legal Control

Although one may think first of IRS involvement in worker status controversies, it does not appear that the "legal control" issue has been expressly discussed in tax cases. It has, however, come up in federal labor and employment law decisions. For example, in *National Labor Relations Board v. Associated Diamond Cabs, Inc.*,[1] the court was asked to determine whether Miami taxi drivers were independent contractors or employees. The issue hinged on city of Miami regulations that required taxi drivers to fill out "trip sheets" to record all trips, their origins and destinations, fares charged and the time of each trip. At the end of each day, drivers submitted their trip sheets to the company, which were retained for city inspection. The court found that such trip sheets did not evidence control by the company. In fact, the regulations constituted supervision not by the employer, but by the city. The *law* controlled the driver, not the *employer*. As a result, the court found that the regulations failed to evidence control by the company.

Similarly, in *K&D Auto Body, Inc. v. Division of Employment Security*,[2] the court considered federal drug-testing laws and worker classification. K&D required its drivers to sign agreements affirming their independent contractor status, but Missouri found the drivers to be employees, because K&D could require drivers to take random drug tests. Addressing the issue of the drug tests, the appellate court ruled that the company had not required more from its workers than the law required. Thus, the drug tests could not be considered employer control. However, as the *remaining* factors demonstrated an employer/employee relationship, the court held the truck drivers to be employees.

In *Air Transit v. National Labor Relations Board*,[3] a cab company sought reversal of an NLRB decision ruling its cab drivers to be employees. Air Transit was a Virginia corporation; the Federal Aviation Administration (FAA) gave Air Transit the exclusive right to operate taxicab services at Dulles Airport. Air Transit used the services of approximately 100 taxicab drivers who provided their own vehicles and picked up passengers from a designated cab line. It put a uniformed dispatcher at the head of the line to direct passengers and help with their luggage. Air Transit charged drivers $72 a week for participation in the feed line but received no share of the drivers' earnings.

The drivers did not report their earnings to Air Transit; did not keep trip sheets, manifests or other accounts of their earnings; and had control over their own schedules. Drivers received no benefits, vacation time, sick leave, workers' compensation or unemployment insurance from Air Transit. All drivers were personally responsible for their own accounting and self-employment taxes, and received no training.

Air Transit drivers were subject to many rules, however, some of which were mandated by Air Transit's contract with the FAA and some required by Virginia law. Drivers had to use a radio dispatch system, wear name tags, maintain taxicabs in safe operating condition, display the words "Airport Cab" and Air Transit's telephone number on the taxicab, display rate information, possess a valid chauffeur's license and license their vehicles for use in Louden County, Virginia. Air Transit also enforced rules that were not provided by the FAA contract or Virginia law, including requirements that drivers charge a flat rate for certain customers, post a notice in their vehicles about how to file a passenger complaint and purchase greater insurance coverage than required by Virginia law.

While the NLRB claimed that such controls meant that the cab drivers were employees, the appeals court ruled the drivers were independent contractors. The few employee-like factors were grossly outweighed by factors suggesting the drivers were independent contractors. Although Air Transit exercised *some* control over the drivers, beyond the legal regulations, it was insufficient to find the drivers to be employees. Most of the "controls" were mandated by the FAA contract or by Virginia law.

More Case Law on Legal Controls

Taxicab companies seem to feature prominently in the "legal control" cases. For example, *Local 777, Democratic Union Organizing Committee v. NLRB*[4] involved two cab companies providing taxicab service in Chicago. The NLRB ruled the cab drivers were employees.[5] The court reversed, finding the facts insufficient to support employee status.

Each cab driver signed a lease under which the driver paid a fixed fee ($22 for a day lease and $15 for a night lease), in addition to an hourly fee for late returns. The driver leased the cab for two days at a time, or three days on weekends. The driver agreed to be the sole driver, not to sublease the cab, to inspect it at the beginning of the lease and report defects, and to return the cab in good condition with a full tank of gas. The company provided the taxicab, the cab license, liability insurance, antifreeze, oil, towing service, tires, and maintenance. The lease said the drivers were not required to operate taxicabs in a prescribed manner, accept calls or dispatches, report their location, buy gas from the company or keep the cab in a designated location.

The drivers were required to comply with all applicable laws, ordinances, rules and regulations. Chicago municipal regulations and state law governing taxicab drivers required that taxicabs be operated regularly to meet public demand for service, the meter flag be kept down when the cab was carrying passengers and everyone requesting a ride be picked up unless the cab was occupied. The municipal code established fare rates, prohibited passengers in the front seat and prohibited refusing to transport passengers from the airport to the suburbs. Municipal regulations set rules for courtesy to passengers, driver appearance and attire, and driver conduct at cab lines. Drivers could not use drugs, carry weapons, loiter in public outside their cabs, leave their cabs unattended or violate traffic laws.

Driver conduct was never controlled by the cab companies. Drivers were on their own once they left the garage and were free to prospect for fares in any manner. The only requirements the cab company enforced were the daily rate for the cab, care and skill in driving, and compliance with applicable laws and regulations. The court found that compliance with the law could not be deemed control by the employer and ruled the drivers to be independent contractors.

In *SIDA of Hawaii, Inc. v. NLRB*,[6] a company of independent taxicab owner-operators argued that its members were independent contractors. SIDA was a self-governing trade association, providing a collective body of independent drivers to compete with larger taxi companies in bidding for the right to operate at Honolulu airport. SIDA had an exclusive contract to provide taxi service at the airport. An applicant qualified to be a member of SIDA by owning a suitable vehicle, having a valid license, and having an acceptable personal appearance. If the applicant was approved, he or she signed a Standard Independent Drivers Contract with SIDA.

The court found an absence of actual control by SIDA for the following reasons: (1) drivers made substantial personal investments in their taxicab activities, purchasing and maintaining their own vehicles; (2) drivers obtained all necessary city and state permits; (3) drivers paid their own income taxes, health insurance, Social Security, unemployment benefits and auto insurance; (4) drivers paid a monthly stall rental fee to SIDA, along with a $0.50 trip fee for each trip made out of the airport; (5) drivers were substantially independent in their operations and were free to work independent of SIDA; (6) drivers could work for other cab companies, could make their own arrangements with clients and were not limited to operate in a particular area; (7) fares were not determined by SIDA but by local ordinances, and were collected and retained by the drivers; (8) SIDA did not pay compensation to the drivers, did not withhold taxes and kept no income tax records for them; and (9) drivers' contracts specifically provided for an independent contractor relationship.

Driver conduct was never controlled by the cab companies. Drivers were on their own once they left the garage and were free to prospect for fares in any manner.

The NLRB argued that SIDA's rules, regulations and enforcement were strong evidence of the company's control over the drivers. The court disagreed. Many of SIDA's regulations merely incorporated requirements imposed by its commercial contracts and state and local ordinances. Thus, the court found the owner-operators to be independent contractors.

Legal and Community Standards

Meyer Dairy, Inc. v. NLRB,[7] which involved the status of milk distributors as independent contractors or employees, puts a particular spin on the existence of compliance with laws. Meyer Dairy Distributors Association (the "Association") was a group of milk distributors who peti-

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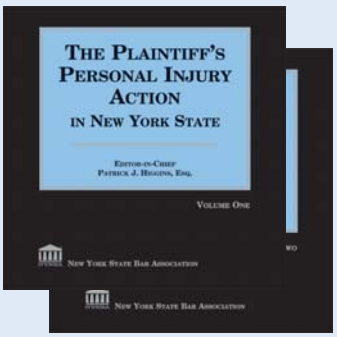

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tioned the NLRB to bargain with its putative employer, Meyer Dairy Company (the "Company").[8] The Company countered that Association members were independent contractors. The NLRB found the Association members (the "Distributors") to be employees, and the Company appealed to the Tenth Circuit.

The Meyer Dairy Company contracted with retail distributors who agreed to purchase the Company's dairy products at fixed prices and sell the products to customers in specified areas. The Distributors, or "milk men," delivered dairy products to customers over fixed routes. They provided their own trucks for delivery, paid all costs and expenses of operation, and could hire helpers if needed. The Company provided Distributors with suggested retail prices, but they were not required to adhere to them. The Distributors' contract required that they comply with regulations and policies of public health authorities, and meet standards established by the Company, consistent with similar dairy businesses in the Greater Kansas City area.

Distributors had no other obligations to the Company except to pay for the products they purchased. They had complete control over their sales and decisions regarding credit, were responsible for losses from retail sales, paid their own income and Social Security taxes, controlled their vacations, and provided their own self-retirement plans or medical and liability insurance. The Distributors were essentially holders of franchises to sell Meyer Dairy products within a specified area. They were not controlled by the Company except to maintain certain standards required by state law; thus the court found they were independent contractors.

Similar issues arose in *Global Home Care, Inc. v. State, Department of Labor & Employment Security*,[9] which concerned the status of live-in health care aides. The Florida Department of Labor and Employment Security ruled that the aides were employees, and Global appealed. The Florida Court of Appeal reversed, saying that Global's lack of control over the aides rendered them independent contractors. Notably, the court held Global's insistence on compliance with state regulations did not constitute supervision of the aides.

The aides were independent contractors because they worked for other agencies and at sites away from company supervision, and the clients provided materials and a work place. The aides were engaged only as needed on a temporary, per-job basis, and both parties intended an independent contractor relationship. Moreover, the majority of the control Global exercised over its aides was to assure compliance with state requirements for home health care. Other aspects of control were deemed too minimal to be significant.

An employer's imposition of rules only slightly stronger than legal requirements presumably will not be fatal to a claim of independent contractor status.

Control in Excess of Regulations

In *Associated Diamond*, *Air Transit, Local 777*, *SIDA of Hawaii*, *Meyer Dairy*, and *Global Home Care*, the employers did not wield control significantly in excess of pertinent regulations. They merely imposed standards following federal or municipal regulations. In contrast, in *K&D Auto Body* the control went well beyond compliance with law. The results suggest that for workers to be reclassified as employees, an employer must wield pervasive control exceeding to a significant degree the scope of the government-imposed control.

The courts in these cases recognized that compliance with laws adds complexity to the worker status mix. They take a reasoned, realistic view of the amount by which a putative employer must exceed legal requirements. An employer's imposition of rules only slightly stronger than legal requirements presumably will not be fatal to a claim of independent contractor status. Conversely, there should be no special latitude, no special allowance for employer controls, just because there is also a legal framework. The legal or regulatory environment should be entirely neutral to the employee vs. independent contractor characterization question, at least if the employer's regimen of rules exactly tracks the legal requirements.

Evaluating Extra Controls

Employers who subject workers to requirements and standards in *excess* of legal requirements should be scrutinized. In *National Labor Relations Board v. Deaton, Inc.*,[10] the court considered the status of interstate courier drivers in the context of Interstate Commerce Commission (ICC) and Department of Transportation (DOT) regulations. Each truck traveling in interstate commerce must be certified. The goal of such registration is to promote safe operation of trucks and to ensure continuous financial responsibility so that truck-related losses receive compensation.[11]

The court found it unnecessary to decide whether ICC-mandated controls would alone be sufficient to establish employee status. The court analyzed the substantial nexus of control required by federal regulations and found that the facts established the existence of "additional control" voluntarily reserved by the employer. For

example, although ICC regulations required Deaton to make certain inquiries, Deaton more thoroughly checked out all drivers, including work references, police records, and driving records.

Moreover, although ICC regulations forbade any disqualified person from driving, Deaton's practice of assessing whether a driver was a "good risk" involved a subjective, employer-like inquiry. This inquiry was qualitatively different from merely ensuring that drivers were not barred from commercial driving. Based on these controls, the court found the drivers to be employees.

Conclusions

The cases discussed illustrate that an overlay of legal controls on work performance can make tougher still the already tough task of determining whether a worker is an employee or an independent contractor. At minimum, the analysis requires reference to applicable law and evaluation of whether the putative employer merely tracks the law or goes beyond it. The problem is exacerbated where legal or regulatory standards are amorphous.

How, for example, should one evaluate a requirement that salespeople receive training that is "thorough and adequate"?[12] Although rules from regulatory bodies ought not to bespeak employment,[13] exactly what is *required* by the government's rules may not be clear. It may be particularly difficult to determine fairly whether the employer is merely trying to duplicate legal requirements or inject its own standards.

In theory, rules imposed by law should be neutral to contractor-employee determinations. At least in the context of labor and employment law decisions, the courts have consistently held that governmental regulations do not evidence control by the employer.[14] Rules imposed by the government constitute supervision not by the employer but, rather, by the state.[15] However, even such a seemingly sensible rule may be very difficult to apply in practice. Suppose a multi-state employer requires independent contractor and employee painters alike to wear protective gear when spraying. Further, what if such protection is not required in two of the 15 states in which the employer operates, but uniformity and ease of administration explain the company's uniform policy?

Technically, this may place the employer's safety rules outside the protective umbrella of legal requirements in the two nonconforming states. But perhaps this kind of discrepancy should not be held against the company in a worker classification dispute. Alternatively, perhaps it should be held against the company only in these two states. The answer is unclear. At the very least, where worker status issues are examined, the presence of laws and regulations affecting that relationship must be considered. The case law (at least in the labor and employment law field) demonstrates that applying a legal regimen should not be treated as employer control, but rather as control by the pertinent legal authority. The applicability in federal and state tax law, tort cases, and so on, however, is also unclear.

Although such legal controls should generally be discounted in making worker status determinations, what is the extent to which variations between an employer's rules and legal requirements should be examined? And, particularly, should any such variations be strictly construed against the employer? Again, the answers are largely unclear. The authorities have thus far examined this issue in the context of federal labor and employment laws; but, the same issues may be expected to arise in federal and state tax cases, state tort law cases, and in legal disputes between the workers themselves and the company over their true status as either independent contractors or employees.

As with so much else in the field of employee-independent contractor classification, the presence of laws regulating worker and/or company conduct in a particular industry or location will require careful thought and attention. One must consider the factual setting, the specifics of the relevant laws and the manner in which the employer incorporates legal compliance into its operations, as well as into its relationship with its workers. ■

1. 702 F.2d 912 (11th Cir. 1983).
2. 171 S.W.3d 100 (Mo. App. W.D. 2005).
3. 679 F.2d 1095 (4th Cir.1982).
4. 603 F.2d 862 (D.C. Cir. 1978).
5. *Yellow Cab Co.*, 229 N.L.R.B. 1329 (1977).
6. 512 F.2d 354 (9th Cir. 1975).
7. 429 F.2d 697 (10th Cir. 1970).
8. *Meyer Dairy, Inc., subsidiary of Milgram Food Stores, Inc.*, 178 N.L.R.B. 454 (1969), *vacated by* 429 F.2d 697 (10th Cir. 1970).
9. 521 So. 2d 220 (Fla. Dist. Ct. App. 2d Dist. 1988).
10. 502 F.2d 1221 (5th Cir. 1974), *cert. denied*, 422 U.S. 1047 (1975).
11. *Id*. at 1224.
12. Cal. Code Regs., tit. 10, § 2695.6 (2003) (applying to insurance salespersons).
13. *See K&D Auto Body, Inc.*, 171 S.W.3d 100.
14. *Nat'l Labor Relations Bd. v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 922 (11th Cir. 1983).
15. *Local 777, Democratic Union Org. Comm.*, 603 F.2d at 875; *Global Home Care, Inc.*, 521 So. 2d 220.

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Implications of a "Keep It All" Data World

Society has moved into a new era of near-universal connectivity, aided by virtual private networks, secure ID cards, smart phones, flash drives, wi-fi hotspots, and other technology. Employers have come to expect their employees to be always "plugged in," regardless of whether they are in the office, at home, or lounging on the beach. It no longer matters where you are, so long as someone can reach you electronically. This marked increase in user connectivity and communication has produced an unprecedented rise in the number and variety of documents generated daily. With storage capacities continuously enlarging to accommodate this surge, companies face the daunting task of organizing this data to aid them in their business operations and meet their regulatory obligations.

This article focuses on the current model by which companies attempt to organize their data, and an emerging trend in some companies – to archive nearly every piece of data in general archive files and sort it out later, referred to here as the "Keep It All" model. This article outlines the implications of a "Keep It All" model and its impact on electronic discovery, and closes with some practical guidance for companies considering a shift to this model.

The Current Model and the "Keep It All" Model

Although electronic communications and word processing have become near-universal in business, archiving such data is often an afterthought. Companies typically employ archiving systems that divide documents into two broad categories – "official" and "other" documents – which determine how documents are stored. Documents deemed "official," such as human resources files, are kept for finite periods and then purged in accordance with document retention schedules. Some of these records (such as corporate charters) are treated as permanent. The "other" documents, including drafts, day-to-day correspondence, e-mail, instant messages, deal and project files, are often kept haphazardly, with few consistent document retention policies in place.

This archiving model, which relies on classification of document type, can seem inefficient, for several reasons:

- Many companies find it difficult to enforce policies regarding proper retention and archiving of documents, especially when such documents can easily be manipulated, deleted, or migrated to local devices by individual employees.[1]
- Today's business and technology systems involve vastly increased numbers of data sources.[2]
- The surge in data sources has outpaced the ability to synchronize and manage data in real time. Thus, data can be overlooked when requested in litigation or regulatory proceedings.
- Although some automated archiving systems exist, their ability to categorize documents accurately may be questionable.[3]

Inadequate attempts to categorize data can have serious consequences for a company in litigation – especially since electronically stored information (ESI) is often a key part of modern litigation.[4] Yet, in a recent survey, more than 69% of companies said they are "not ready to respond" to litigation. Only 6% said they could "immediately and confidently" handle e-discovery requests.[5]

In addition, the costs associated with improperly archiving documents can greatly affect litigation. Courts have shown little sympathy for parties that claim ignorance as a defense for their failure to archive relevant files.[6] From a practical standpoint, managing a mass of archived data can be extremely inefficient and burdensome if the archives are spotty and poorly organized. If the company must resort to restoring backup tapes because of such poor archiving, costs can greatly increase.[7] Further, "[a] restoration of personal mailboxes from a backup tape does not recover any e-mails deleted by the user before the backup tape was made."[8] Thus, dependence on backup tape restoration or selective archiving can lead to problems in litigation.

The Potential "Keep It All" Model

The "Keep It All" archiving model has a rather straightforward design – archive everything (or nearly everything) and sort it later, when (and if) required. Commentators predict that many major companies may move in this direction.[9]

The "Keep it All" model arguably solves the main problems associated with the current model. Retaining all data may quell fears of regulatory violations or litigation charges of spoliating documents.[10] Moreover, with a "Keep It All" approach, employers need not rely on employees to archive their documents correctly. The cost of storing everything, moreover, which was once a concern for some businesses, may shrink with the sharp decrease in storage prices.

With the capability to store everything centrally, and wirelessly in some instances, employees need no longer pull data off a central system and onto local storage devices. The key to making this system work in a mobile computing setting is to ensure that individuals are (1) provided with access to the central system while out of the office, and/or (2) easily able to upload documents created or managed locally when returning to the office. Such a streamlined archiving process should, in theory, capture all business documents.

What Happens to E-Discovery in a "Keep It All" World?

The decision to archive everything may greatly reduce reliance on disaster recovery backup tapes as a source of document collection. Further, rather than gathering all locally saved documents from each employee who may have information relevant to the litigation, the company should, in the event of litigation, simply be able to search its central archives. This centralization should, in turn, lead to a decrease in costs associated with collection of data, since it is generally less expensive to search archives than it is to retrieve and restore backup tapes or individual hard drives. (Many companies have welcomed this move away from the use of backup tapes for litigation purposes.[11])

Moreover, implementing a universal archiving system should lead to a decrease in spoliation claims. A streamlined, central document archive should pass muster under general standards for reasonable search capabilities.

This could also reduce disputes about the accessibility of particular documents. With massive storage systems available to opposing parties, electronic document production may focus less on collection and more on search of the document system. Parties may focus their efforts on negotiating search terms and date restrictions that will tend to locate relevant documents. This negotiation should occur at the start of discovery, as the parties begin to propound document requests, rather than in the middle of production, or in some cases during the trial.[12]

Practical Guidance

For companies contemplating a "Keep It All" approach to archiving, the practical consequences of such a shift should be carefully examined. Courts will generally hold companies to the standards they create for themselves in terms of data archiving, assuming that they otherwise comply with applicable discovery rules and administrative regulations. Thus, a company that claims that it has a complete, centralized archive of all its documents must be able to deliver on that claim.

In addition, although the costs associated with potential spoliation claims and inefficient collection methods should decrease with a "Keep It All" approach, the cost of searching larger archives could offset those gains. Thus, the subject matter of discovery disputes could shift from a focus on collection sources and cost sharing to the adequacy of search terms and date restrictions. If searches are too broad, the expense associated with attorney review of potential "hits" may drive up litigation costs. For these reasons, companies in litigation should actively participate in negotiation of reasonable search terms, in order to limit costs.

The particular approach to archiving will, of course, depend upon the individual company's business and technology needs. The centralized archiving approach, moreover, may change over time as the company's technology systems are upgraded, regulations change, and approaches to the archiving process are revised. The essential issues involved in a "Keep It All" archiving system, however, will remain. Given the emerging trend toward this system, companies would be well-advised to begin to analyze the issues and carefully weigh their options as the trend develops. ■

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1. *See* John Montaña, *Strategies for Minimizing Litigation Risks, Costs*, Information Mgmt. J., Jan. 1, 2008 (employees must be educated to archive adequately).

2. Browning E. Marean, *Evaluating E-Discovery Solutions to Reduce Cost and Risk, and Comply with the FRCP*, LJN's Legal Tech Newsl., May 2008.

3. Mark Fellows, *Retention Still Critical*, Kalamazoo Gazette, Mar. 29, 2007.

4. Brian Fonseca, *E-discovery Rules Still Causing IT Headaches*, Computerworld, Jan. 7, 2008.

5. Nikki Swartz, *Firms Unprepared for E-Discovery*, Information Mgmt. J., Nov. 1, 2007.

6. "Judges have broad discretion to impose spoliation sanctions based upon the degree of fault weighed against the prejudice to the injured party." John Ruhnka & John W. Bagby, *Litigation Support and Risk Management for Pretrial Discovery of Electronically Stored Information*, 77 CPA J. 5, May 1, 2007. *See, e.g.*, *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, No. CA 03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. Mar. 1, 2005).

7. In one recent case, "the cost to produce e-mails from 350 to 400 backup tapes would be anywhere from $3,750 to $4,300 per tape." Michael Osterman, *Not Preserving Data Properly Can Cost You*, Network World (Apr. 8, 2008).

8. Dan Froomkin, *Congress to Bush: You've Lost Mail*, Washingtonpost.com, Feb. 28, 2008.

9. *See, e.g.*, David Farris, *Expect to Archive Everything*, Ferris Research, www.ferris.com (last visited May 17, 2008). *But see* John Harney, *The Drive to Email Archive*, 21 AIIM E-Doc Mag. 6, Nov. 1, 2007 (unnecessary for companies to archive everything).

10. "Every industry has government-mandated retention requirements. On the legal side, general counsel and human resources may worry that critical pieces of information that could support their positions – in [a] case of employment discrimination or harassment claims, for example – may be destroyed." Andrew Conry-Murry, *Comply or Die: Data Disposition Must Be a Priority*, InformationWeek (June 7, 2008).

11. *See* Deni Connor, *FRCP and e-discovery: One Year Later*, Network World, Dec. 6, 2007 ("All the customers on our advisory board agreed that they need to get rid of backup tapes.").

12. Rebecca Sausner, *Email Archiving: Banks' New Quandary: Retain or Destroy?*, 116 US Banker 10, Oct. 1, 2006.

BY GARY A. MUNNEKE AND DEB VOLBERG PAGNOTTA

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Unexpected Career Transitions

Introduction

Among the skills broadly defined as practice management skills, those dealing with career development and advancement are often overlooked. As lawyers, we are forced to address career issues when we are in law school, and on those occasions when, by intent or necessity, we make professional transitions in our professional employment. Yet many lawyers do not recognize that career skills are closely related to long-term success, however they define it, and personal satisfaction. Many lawyers deal with their careers only when circumstances arise that force them out of the status quo. And those who work in one firm or other employment setting for their entire professional lives may never confront these fundamental questions: What do I want to achieve in my career as a lawyer? What path should I follow to attain my goals? What skills will I need to attain my expectations?

This month, the Law Practice Management column turns to someone who has not only made her own career transitions, but who coaches lawyers in the career transition process. Deb Volberg Pagnotta is the president of Interfacet, Inc., a White Plains-based human management consulting practice. Her insights on career transitions are particularly relevant in an economic downturn, during which significant numbers of lawyers have been forced to come to grips with job loss in a market where new opportunities seem limited, and even lawyers who have not lost jobs personally have had to contemplate the possibility of professional dislocation. Ms. Pagnotta's insightful observations should connect with more than a few *Journal* readers.

"The One Less Traveled By"

In 1995, the year I turned 40, I was abruptly fired from my job as acting general counsel at a state agency. A new governor had just been elected, and the winds of change blew most of my law colleagues out of their jobs. I had been in public service for 12 years and had fully anticipated remaining there for at least 12 more.

Change did not sit well with me or my fallen colleagues, despite assurances from well-meaning friends and counselors that "this could be the best thing that ever happened to you." At the time, I remember tucking into my wallet a tiny copy of William Ernest Henley's poem "Invictus":

> Under the bludgeonings of chance,
>
> My head is bloody, but unbowed
>
> . . . .
>
> I am the master of my fate:
>
> I am the captain of my soul.

This was to be my mantra; I was determined to march forward as the sole master of my fate, and forge my new future singlehandedly. Much to my surprise and distress, nothing turned out the way I had envisioned.

First, law jobs were not abundantly available, and, second, competition was fierce for the ones that existed. Reluctantly, I started a solo practice in employment law, focusing on discrimination. Within several years I joined a small firm in White Plains as an employment practice partner. In 1999, as my interests and client base shifted from litigation to counseling and training, I created a consulting practice, which provided corporate training on harassment, cultural diversity, and conflict resolution. These issues meshed well with my college studies in anthropology and linguistics. In 2000, when my law firm merged with another and my husband and I were in the process of adopting our daughter from China, I realized that it was time to reassess my work/life priorities. After much soul searching, I decided to give up the traditional practice of law to pursue my consulting practice exclusively. Now, almost 10 years later, I love my work; I make my own hours; and, amazingly, I am able to weave my various interests together daily.

The New Realities.

Beginning in 2008 and continuing into 2009, lawyer layoffs from firms of all sizes have occurred in record numbers. In contrast to the years before the economic downturn, these lawyers face unique challenges in transitioning to new work. First, we face the harsh economic reality that law jobs themselves are decreasing, whether in firm practice, the government sector, or general counsel.[1] So, less soup is in the pot. Second, lawyers are used to being the advisors, the thinkers, and

the doers, not the ones who are "done-to." Third, it is difficult to maintain optimism in a market where jobs are scarce, competition is great and the end is not in sight. Fourth, many, if not most, lawyers have developed a niche area of expertise. This creates a sense of limited opportunities, in their own and in others' perceptions. Fifth, lawyers often have pursued a legal career since youth, rendering this sudden, unwanted change additionally painful.

However, as my own career counselors told me, these challenges also present great possibilities. If you are a laid-off lawyer, or one who is contemplating an intentional career change, consider the following measures to assist you in following your unique path.

Finding Your Own Path.
Carefully explore what you – not others – want to do. Many will offer advice on various options, but remember nobody else walks in your shoes. Take time to review what you liked and what you didn't like about your past work. Assess your real financial needs, and present assets. Make choices that are best for you.

Dealing With Circumstances.
This may be an unexpected and devastating change for you, but it serves little purpose to assign blame or dwell on your misfortune. Imagine sitting in a boat, rowing as hard as you can across a sea tossed in a storm by angry waves. When you are swept inexorably in directions you did not anticipate and which you cannot control, you may feel overwhelmed. It would be futile to waste your energy rowing frantically to get back to where you started. Instead, your survival may depend on making your way out of the open waters and into a safe port where you can regroup and move on to new opportunities.

Your Choices Are Varied.
You can work towards landing at an organization very similar to the one you recently left, with the goal of doing

the exact type of work you've always done. Or, you can transpose your legal skills – the ones you enjoy – to other types of legal work. Were you doing commercial work? Your writing skills might serve you well in appellate work, legal journalism, or in-house counsel. If you love the advocacy of litigation, explore other types of litigation that are seeing an upswing. Perhaps bankruptcy, foreclosure, or employment law makes sense for you. Alternatively, you can use your diverse interests to create a niche practice of your own. Are you a sports buff? You could focus on sports law. A great reader? What about intellectual property law? Do you have an interest in adoption? Think about establishing a practice relating to the myriad aspects of reproductive processes. What about a scientific background in college? Consider patent law; technology is only increasing and legal issues relating to hardware, software and the Internet are blooming. Last, perhaps this is the time to leave law altogether. Your specific skills are transportable. This option may require additional education, and now might be the time to get that master's or Ph.D. that you've thought about over these years.

Seeking a Job Takes Time.
You need to approach your job search as a job in and of itself. Allocate several hours a day, if not more, to the search. Assume it may take many months. Learn to network in the modern world. While fantasy is wonderful, the chances of simply being offered a perfect job immediately are small.

Reaching Out for Help.
You need to use all the tools you can to enhance your chances and visibility. There is no shame in having been laid-off. Seek out law school classmates. Use your law school alumni and bar association networks. Let family and friends know you are exploring new options. If you belong to social groups, let people know you are looking. Learn new networking skills – specifically, begin to work with online social networks such as LinkedIn. Call on colleagues, or friends of colleagues, and other contacts for advice. It can feel depressing to call and ask strangers to talk with you, but framing the request as one for an "information interview" changes the dynamic. People really do like to help and talk and make contacts. When you call, ask for 20 minutes of that person's time, rather than an hour. This reduces pressure, and you will find most (although not all) contacts receptive. As basic as this sounds, follow up the interviews with a thank you e-mail or note.

Becoming Your Own Best Advocate.
Use the tremendous skills – verbal, collaborative, competitive, written – that you have developed over the years since you graduated from law school. Use real time to craft reasonable, contemporary resumes and cover letters. Do not put off this process, no matter how daunting it might feel. Tailor these documents to the jobs you are seeking and focus on real-life skills and achievements. Review different resume styles and find the one that best suits your search.

Creating and Using Support Networks.
Lawyers are used to being the counselors, but now is the time to seek counsel from others, whether close friends, partners or spouses, career coaches, or therapists. You do not have to do this on your own. Indeed, you cannot. Being laid-off inevitably shakes your sense of security and strength, no matter how much you know the cause is external not internal. As a lawyer, you have been in control, an advocate for others, or at the least, a wise counsel to your clients. You have had rules to follow, and you know how to play the game. Now, you must reinvent yourself, from the inside out. This takes time, patience and humor.

"Chun."
The Chinese Book of Changes, embodying Taoist philosophy, provides an apt hexagram entitled "chun" (difficulty at the beginning). This hexagram "connotes a blade of grass pushing against an obstacle as it sprouts out of the earth."[2] Career transition, particularly involuntary transition, is not easy at all. It feels chaotic, wildly unpleasant, and even, dare I say it, humbling. By recognizing the difficulties that accompany career change, you will be better positioned to move to a different place than you would ever have thought or imagined. While you cannot control outside events, you can learn from them and respond creatively and pro-actively.

As for me, since my own forced transition in 1995, I have replaced "Invictus" with a different poem. Hiking in Switzerland last year, all along the hiking paths, stones, fences, and trees were marked with white and red paint marked the trails, and these markers were peculiarly comforting and resonant to me; even though these markers did not designate precisely where I was hiking, they did tell me that I was indeed upon a path. Yet, I also know that there are times when the markers are uncertain, or altogether missing from the pathways, both in hiking in Switzerland and in our lives generally. On these occasions, "Invictus" offers little guidance on where to go. Instead, these words from "The Road Less Traveled," by Robert Frost, offer more hopeful but more realistic advice:

> Somewhere ages and ages hence:
> Two roads diverged in a wood, and I
>
> I took the one less traveled by,
> And that has made all the difference.[3]

1. The U.S. Department of Labor has reported since June 2008 a steady decrease in legal sector jobs. Across the board, it is reported that, as Wall Street contracts, "the job losses will spread throughout the economy, with private sector job loss reaching 175,000 in [New York City] and 225,000 [New-York-statewide]." http://www.workforce.com/section/00/article/25/99/02.php. The economy clearly will get worse before it gets better.

2. *The I Ching or Book of Changes*, Bollingen Series XIX, The Richard Wilhelm translation, rendered into English by Cary F. Baynes (11th edition 1974, Princeton University Press).

3. "The Road Less Traveled" *in* Mountain Interval by Robert Frost (Henry Holt & Co. 1920).

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New Legislation Requires Property Owners to Disclose Air Contamination Reports

Legislation that became effective late last year requires New York property owners to notify their tenants and other occupants about certain air contamination reports concerning their property. The requirement may arise if a property owner receives a report (referred to here as an "air contamination report") showing that air in the building has, or may have, concentrations of volatile organic compounds (VOCs) that exceed governmental guidelines. Typically such reports are made as part of an environmental investigation or cleanup. VOCs include, for example, chlorinated solvents such as trichloroethylene (TCE) and perchloroethylene ("perc" or PCE, often used in dry cleaning). VOCs can arise wherever solvents were used.

The new law became effective on December 3, 2008, as an amendment to Title 24 of New York's Environmental Conservation Law (ECL).[1] Provisions already in the ECL required that responsible parties remediating a site under certain state remedial programs, including the state Superfund program, give landowners copies of air contamination reports. The ECL did not, however, require property owners to disclose those reports to tenants and occupants. The new ECL section has taken that step.

The legislation sounds relatively innocuous but, as is so often true, the full picture is much more complicated.

Vapor Intrusion and VOC Contamination

The new disclosure statute responds to a phenomenon known as vapor intrusion, which occurs when VOC vapors migrate from the ground upwards or sideways through soil into buildings. In extreme cases, these vapors can accumulate to levels that create immediate safety hazards (such as explosions), illnesses, or aesthetic problems (such as odors). More typically, however, when VOC vapors migrate into buildings, the levels are much lower, creating the more insidious risk of chronic health problems arising from long-term exposure.

Until recently, the state's Department of Environmental Conservation (DEC) focused primarily on soil and groundwater contamination. DEC did not regard vapor intrusion as a significant potential risk unless VOC contamination occurred directly next to an occupied building or directly below its foundation. Therefore, DEC remediation programs usually focused on reducing soil or groundwater contamination, or at least eliminating pathways by which such contamination could reach people.

The regulatory landscape changed a few years ago. After having determined that certain cleaned-up sites would not pose a health risk, DEC was surprised to discover significant levels of VOCs in residences near those sites. By 2005, DEC estimated that VOCs may have caused similar problems for up to 750 sites in the state. DEC therefore announced that for any VOC-contaminated site then being investigated or remediated, DEC would require an evaluation of vapor intrusion risks. In performing or requiring that evaluation and deciding when to require remediation, DEC follows the policies of the state's Department of Health (DOH).

DEC is now systematically reviewing hundreds of VOC-contaminated sites that were pronounced "clean" before 2003. In its review, DEC looks for possible vapor intrusion problems. To the extent it finds them, DEC may not only require additional remediation but may also require responsible parties to give nearby property owners air contamination reports. Under the new statute, those nearby property owners would face disclosure obligations.

Scope of Disclosure Obligations

The new disclosure statute does not distinguish between residential and

commercial property, and hence seems to apply to both. The definition of "test results" applies not only to actual indoor air sampling results but also to sample results from "subslab air, ambient air, subslab groundwater . . . , and subslab soil."[2] DOH uses very conservative thresholds to determine when concentrations of VOCs require further action. Based on these other sample results, DOH and DEC may require disclosure even without requiring or receiving any air contamination reports. Moreover, indoor air test samples may mislead, because they may detect indoor air contamination arising from other chemicals used in the building, such as paint, carpeting, or cleaning supplies, rather than from genuine environmental problems.

The disclosure obligation applies to any "test results" that a property owner receives from (1) an "issuer," defined as a party subject to a consent order under the state Superfund program or an order or agreement under the Navigation Law; (2) a "participant" under the Brownfields Cleanup Project (BCP)"; (3) a municipality operating under an ECL Title 56 Environmental Restoration Program contract; or (4) a party subject to Public Health Law Title 12-A.

The disclosure obligation does not seem to arise, however, if a property owner receives air contamination reports from a party identified as a "volunteer" under the BCP or DEC's previous Voluntary Cleanup Program.

Under the statute, within 15 days after a property owner receives an air contamination report from an issuer, the property owner must give all tenants and occupants the following: (1) fact sheets, to be prepared by DOH, about the contaminants at issue; (2) notices of resources providing more information; and (3) "timely notice of any public meetings required to be held to discuss"[3] the air contamination report. If a tenant or occupant requests a copy of the air contamination report or notice of any closures, the property owner must provide it within 15 days.

If a property has an "engineering control" in place to mitigate indoor air contamination or a monitoring program as part of a continuing remediation program, the property owner must give prospective tenants the same information as existing tenants. The property owner must do this before a prospective tenant signs any "binding lease or rental agreement."

To seek to assure compliance, property owners subject to the new disclosure obligation now must include a disclosure notice in their "rental or lease agreement." This notice must appear in at least 12-point bold face type on the first page. It must read as follows:

> NOTIFICATION OF TEST RESULTS
>
> The property has been tested for contamination of indoor air: test results and additional information are available upon request.[4]

Any property owner that receives an air contamination report from anyone should consult counsel to see whether the new disclosure requirements apply. As a practical matter, the requirements should encourage property owners to resolve any air quality problems quickly, if possible, so they no longer have to disclose the problems to prospective tenants. The Legislature may have had this in mind.

By its terms, the new statute requires disclosure of any air contamination reports – not just reports about vapor intrusion involving VOCs. Some environmental consultants have therefore suggested that the law also applies to air contamination reports arising from asbestos, lead-based paint, radon, and mold. But the new statute resides within ECL Title 24, and the original sponsor's memo for Title 24 suggests the Legislature enacted Title 24 specifically in response to vapor intrusion problems associated with VOCs.

In addition, DEC's regulatory definition of "contaminant" refers only to petroleum and hazardous wastes. If the state has ordered a property owner to remediate asbestos debris or radon waste, then the new disclosure requirement could conceivably extend to these pollutants. But the Superfund program excludes naturally occurring radon, asbestos-containing materials, and lead-based paint that remain part of a building. Thus, as a practical matter, these issues seem unlikely to trigger air contamination reports from issuers that would require disclosure.

It seems reasonable to conclude that the new disclosure obligations apply only to VOC-related air contamination reports. But the words of the statute paint a broader picture, and a conservative property owner, or its counsel, may not want to read the statute as limiting itself to VOC air contamination reports.

The disclosure obligation does not seem to arise, however, if a property owner receives air contamination reports from a party identified as a "volunteer" under the BCP or DEC's previous Voluntary Cleanup Program.

Contamination Reports Previously Received

The statute became effective on December 3, 2008. Without doubt, it applies to any air contamination report that a property owner receives on or after that date. But what if a property owner received air contamination reports in 2007, or 2001, or 1985?

The statute does not say whether property owners must dig through their files to look for old air contamination reports. A fair reading suggests, however, that the statute applies only to information a property owner first receives on or after the effective date. By its terms, the statute applies to any property owner to whom air contamination reports "have been provided." If

the information was "provided" more than 15 days before the effective date, the property owner could not have complied with the notification obligation. Assuming that the Legislature did not intend to impose an unperformable obligation, it is probably fair to conclude that the new disclosure requirements disregard "old" air contamination reports.

Further, the legislative summary of the new law speaks prospectively, stating that "this bill would require individuals, municipalities and the Department of Environmental Conservation that conduct testing" to take certain actions. This language suggests that the law applies only to air contamination reports a property owner receives on or after the effective date.

The new law does not require property owners to conduct their own tests or to perform any retesting. In cases where test results did not use actual indoor air samples but instead were extrapolated using modeling based on soil or groundwater samples, a property owner may (but also may not) want to take samples to determine whether air in the building complies with applicable guidelines.

The new disclosure statute does not seem to apply if a property owner unilaterally discovers air contamination problems – unless it qualifies as an issuer – such as from public records or transactional due diligence. Of course, the property owner might have disclosure obligations under other environmental laws or the common law. Moreover, a violation of the new statute might serve as evidence of breach of duty in a negligence action against the property owner.

Interaction With Other Law; Penalties

When the new statute applies, it probably imposes disclosure obligations that go beyond the common law. Disclosure obligations to tenants may also vary from a property owner's obligations under environmental law to report contamination to government agencies. For example, environmental law typically requires such a report only for hazardous substances that exceed a "reportable quantity." The new statute, in contrast, seems likely to require a property owner to disclose contamination that might not rise to a reportable release (*e.g.*, historical contamination newly discovered, as opposed to an actual discharge), yet which could potentially require disclosure for VOC concentrations that exceed government guidelines.

Vapor intrusion problems often arise because of contamination on other nearby sites. Those problems could be serious enough to trigger air contamination reports, thus forcing a property owner to disclose air quality problems for which the property owner has no responsibility. To avoid liability to its own tenants, the property owner might need to take remedial measures to prevent vapors from migrating into its building. A property owner could try to recover the costs of these measures from a responsible party in a contribution or cost-recovery action.

A property owner may also want to try to treat some or all cleanup costs as operating expenses for purposes of operating expense escalations in its leases. Whether tenants will accept that may represent another issue entirely, one that goes beyond this article.

The ECL does not give property owners any remedy for loss of rent, property damage, or toxic tort claims that might result from nearby contamination. Those issues remain the province of the common law.

A property owner that violates the new disclosure requirement could face the general criminal or civil penalties provided by the ECL.[5] If the indoor air contamination is determined to create an imminent and substantial endangerment, the property owner could face injunctive relief as well as fines of up to $2,500 for each violation and $500 per day for each day it continues. If the property owner becomes a responsible party under the state Superfund law, the violations could cost as much as $37,500 per day.

Conclusion and Overview

The new statute, particularly when placed in its historical context, reminds property owners of just how many environmental problems and surprises can travel with ownership of real property – even property that was believed to be "clean."

Aside from the burden of cleaning up an environmental mess, property owners must now also bear the burden of announcing the problem to their tenants – and possible tenants. This requirement cannot possibly come as good news for landlords already facing a dramatically worsening marketplace and now, perhaps, an unexpected, and possibly substantial, cleanup expense. ■

1. ECL § 27-2405 (2008 N.Y. Laws ch. 521).
2. ECL § 27-2405(1)(a).
3. ECL § 27-2405(2).
4. ECL § 27-2405(3).
5. ECL §§ 71-4001, 71-4003

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Cutting Family Ties: The Inheritance Rights of Adopted-Out Children

An "adopted-out child" is "a child who has been adopted away from his [or her] natural parents" by order of adoption.[1] Until recently, the question of whether an adopted-out child could share in a class gift to a biological parent's issue remained unsettled in the state of New York. *In re Accounting by FleetBank*[2] clarified the inheritance rights of adopted-out children, and this article addresses the development of the law with respect to these rights.

Early Developments

New York law was far more liberal with regard to the inheritance rights of adopted-out children before 1963. Indeed, from 1896 to 1963, the New York Domestic Relations Law permitted adopted-out children to inherit from their biological parents in intestacy.[3] For example, in 1917, in *In re Landers' Estate*, the Surrogate's Court, Oneida County, held that the decedent's biological sister could inherit from his estate, notwithstanding the sister's adoption out of the family.[4] The court premised its decision on the theory that the inheritance rights of the decedent's sister, much like those of all other adopted-out children, remained unaffected by the adoption.[5]

In 1963, however, the New York State Legislature amended N.Y. Domestic Relations Law § 117 (DRL) to reflect the legal theory that an order of adoption changed the status of the adopted-out child's right to inherit from his or her biological family in intestacy.[6] On the one hand, § 117, as amended, ended the legal relationship between the adopted-out child and his or her parents for intestate distribution purposes; on the other, the amended section gave an adopted-out child the right to inherit from his or her adoptive family.[7] In 1966, the Legislature added, among other things, a saving provision to § 117, which authorized a biological parent to provide a bequest to an adopted-out child by last will and testament.[8]

In addition to the saving provision, the 1966 amendments also addressed the inheritance rights of a child who is adopted by a stepparent. Essentially, the amendments extinguished the right of such a child to inherit from his or her non-custodial biological parent in intestacy.[9] A judicially created exception to this statutory principle applies where the child is adopted following the non-custodial parent's death.[10]

In re Best

In *In re Best*, the Surrogate's Court, Westchester County, the Appellate Division, Second Department, and the Court of Appeals addressed whether an adopted-out individual is entitled to receive income as a secondary life beneficiary of a trust.[11] The decedent, Jessie C. Best ("Best"), had died leaving a Last Will and Testament (the "Will") in which she provided for the creation of a residuary trust and designated her daughter, Ardith Reid ("Ardith"), as the income beneficiary.[12] Best's Will directed the trustees of the residuary trust "to divide [the] trust fund into as many shares or parts as there shall be . . . issue . . . and to continue to hold each of such shares or parts in trust during the life of one of said persons" upon Ardith's death.[13]

Although the trustees of the residuary trust initially concluded that Ardith had only one son, Anthony R. Reid ("Anthony"), they later learned that Ardith had given birth to a non-marital child and placed that child for adoption.[14] In an effort to complete jurisdiction in their accounting proceeding, the trustees elected to cite Ardith's then-unknown, non-marital child, and secured Ardith's consent to ascertain that child's identity.[15] After consulting with a caseworker from the agency that oversaw the child's adoption, the child's adoptive parents identified the child as David Lawson McCollum ("David").[16]

Following Ardith's death, the trustees initiated a construction proceeding in order to determine whether to treat David as a secondary income benefi-

ciary.[17] Opining that it had a duty to construe DRL § 117 narrowly, the surrogate's court answered that question in the affirmative, holding that David was entitled to a share of the trust established for the benefit of Ardith and her issue.[18] The court reasoned that § 117 applied to intestate distribution, but not to dispositions made by will or trust, and, therefore, did not preclude David from being included as one of Ardith's issue.[19] As support for that holding, the court noted that the Will did not contain any indication as to an intention on the part of Best to disinherit David or any other adopted-out child of Ardith from the class of beneficiaries of the residuary trust.[20]

Anthony appealed the surrogate's decree to the Appellate Division.[21] Like the surrogate's court, the Appellate Division referenced the fact that § 117 applied to intestacy, but not to inheritance by will.[22] The court also noted that the term "issue" included marital and non-marital children alike, and thus David's status as a non-marital child was not dispositive.[23] Accordingly, the Appellate Division, noting that there was insufficient evidence of Best's intent to exclude David from the class of Ardith's issue, affirmed the decree of the surrogate's court.[24]

The Court of Appeals reversed.[25] In doing so, the Court discussed the public policy considerations that "militate[d] against construing a class gift to include a child adopted out of [a] family."[26] Chief among those considerations were two interrelated rationales: (1) the theory that the Legislature intended to sever the legal relationship between an adopted-out child and his or her biological family when it enacted § 117, and (2) the notion that permitting an adopted-out child to inherit from his or her biological family "would be inconsistent with the child's complete assimilation into the adoptive family."[27]

The Court also referenced other factors, such as the necessity to maintain the confidentiality of adoption records in order to encourage the development of relationships between the adopted-out child and the adoptive family, a goal which would be breached with great haste if the child were to be included as the beneficiary of a class gift from his or her biological family.[28] Another factor was the possibility that surrogate's court decrees would be devalued by the inclusion of the child in the class of permissible beneficiaries.[29] The concern was that decrees would never be final, because there might be an unknown, adopted-out child lurking in the background and waiting to take as a class gift beneficiary.[30]

Post-*Best* Amendments to § 117

In 1986, following the *Best* decision, the Legislature amended § 117 to reflect the Court of Appeals's reasoning that once a child is adopted out of his or her biological family, the child is deemed to be a "stranger" to the biological family for inheritance purposes.[31] Under the 1986 amendments, the general rule applies whether the adopted-out child seeks to inherit as a class gift beneficiary of a will or trust or through intestacy.[32] Of course, an adopted-out child can still inherit from his or her biological family if a biological family member executes an instrument evidencing an intent to include the adopted-out child in the class of beneficiaries provided for in a will or trust.[33]

In 1987, the Legislature once again amended § 117 to create exceptions to the general rule prohibiting an adopted-out child from inheriting from his or her biological family.[34] The 1987 amendments provide that an adopted-out child can inherit from his or her biological family as a class gift beneficiary, if (1) the child's adoptive parent is (a) "married to the child's birth parent," (b) "the child's birth grandparent" or (c) "a descendant of such grandparent"; and (2) "the testator or creator is the child's grandparent or a descendant of such grandparent."[35]

In *In re Seaman*, the Court of Appeals, noting the 1987 amendments, held that § 117 did not preclude the petitioner, the decedent's niece, from securing letters to administer the decedent's estate simply by virtue of the fact that her father, the decedent's half-brother, was adopted by his stepfather after his biological father, the decedent's father, divorced his mother.[36]

In re Accounting by FleetBank

Most recently, in *In re Accounting by FleetBank*, the Surrogate's Court, Monroe County, the Appellate Division, Fourth Department, and the Court of Appeals addressed whether an adopted-out child was entitled to a share of a class gift established in an irrevocable trust for the benefit of the child's biological parent and that parent's issue.[37] In *FleetBank*, Florence Woodward ("Woodward") established irrevocable trusts in 1926 and 1963 for the benefit of her daughter, Barbara W. Piel ("Piel"), and Piel's issue.[38] The 1926 trust instrument directed the trustee to distribute that trust's net income to Piel's descendants, in equal shares, upon Piel's death, while the 1963 trust instrument provided for the distribution of that trust's principal to Piel's living children, in equal shares, at Piel's death.[39]

Although she gave birth to three children, Piel raised only two of her three biological children, having placed her first-born child, Elizabeth McNabb ("McNabb"), for adoption shortly after McNabb's birth in 1955.[40] Piel forfeited

The Court discussed the public policy considerations that "militate[d] against construing a class gift to include a child adopted out of [a] family."

her parental rights with respect to McNabb, and an Oregon court formalized the adoption in an order later that year.[41] From that point forward, McNabb lived with her adoptive family, as a member of the adoptive family, and had no further contact with Piel.[42]

Piel died in 2003. Following her death, FleetBank commenced proceedings to judicially settle its final accounts for the two irrevocable trusts.[43] The bank declined to include McNabb or her children as interested parties in the proceedings.[44] McNabb objected on the ground that she was entitled to one-third shares of the net income from the 1926 trust and principal from the 1963 trust.[45] Relying on the *Best* decision, the surrogate's court held that McNabb did not qualify as Piel's "descendant" or "child" because she was adopted out of Piel's family; therefore, she was not entitled to a share of either the 1926 or 1963 trust.[46] Accordingly, the surrogate's court approved FleetBank's accounts.[47]

McNabb appealed. The Fourth Department reversed the surrogate's decrees[48] premised on the theory that New York law did not exclude an adopted-out child from the pertinent class of beneficiaries at the time Woodward executed the irrevocable trust instruments – 1926 and 1963.[49] As the court explained, McNabb's "status . . . as an adopted-out child [did] not exclude her from the class of [Piel's] descendants or children."[50]

The Court of Appeals reversed the Appellate Division.[51] At the outset, the Court explained that it is unnecessary to consider extrinsic evidence of a grantor's intent to include a person in a class gift where the terms of a trust instrument are clear.[52] However, where, as in *FleetBank*, the terms of the trust instrument are ambiguous and there is no evidence as to the grantor's intent to include or exclude a person in the class of beneficiaries, a court may create general, but rebuttable, principles of construction on the basis of statutory interpretation and public-policy concerns.[53]

Applying those principles to *FleetBank*, the Court opined that the Domestic Relations Law in effect at the time Woodward executed the 1926 and 1963 irrevocable trust instruments did not establish a right on the part of McNabb, or any other adopted-out child, to take a share of a class gift to Piel, her issue, or the issue of another biological family member by implication.[54] In addition, the Court noted the public-policy considerations discussed in *Best* – especially the necessity to fully assimilate an adopted-out child into the adoptive family and the need for finality in surrogate's court proceedings – and concluded that those considerations required the same result in *FleetBank* as in *Best*.[55]

Conclusion

Since 1963, New York's Legislature and the Court of Appeals have consistently limited the overtures of adopted-out children to inherit from their biological family members, except in certain statutorily prescribed circumstances. This is primarily because of the underlying legislative desire to further the assimilation of adopted-out children into their adoptive families. In keeping with § 117 of the Domestic Relations Law and the policy-based justifications for said section, it logically follows that New York courts will continue to consider most adopted-out children to be "strangers" from their biological families for inheritance purposes. ■

1. Eve Preminger *et al.*, N.Y. Practice: Trusts & Estates Practice in N.Y. § 7:42 (2007).
2. *In re Accounting by FleetBank*, 10 N.Y.3d 163, 167, 855 N.Y.S.2d 41 (2008).
3. *Id.*
4. *In re Landers' Estate*, 100 Misc. 635, 640–42, 166 N.Y.S. 1036 (Sur. Ct., Oneida Co. 1917).
5. *Id.*; *see also FleetBank*, 10 N.Y.3d at 167.
6. Alan D. Scheinkman, Commentary, N.Y. Dom. Rel. Law § 117 (2007).
7. *FleetBank*, 10 N.Y.3d at 167; Alan D. Scheinkman, Commentary, N.Y. Dom. Rel. Law. § 117 (1999).
8. *FleetBank*, 10 N.Y.3d at 167.
9. *Id.*
10. *In re Karron's Will*, 52 Misc. 2d 367, 368–70, 275 N.Y.S.2d 933 (Sur. Ct., Kings Co. 1966).
11. *In re Best*, 116 Misc. 2d 365, 365 (Sur. Ct., Westchester Co. 1982), *aff'd*, 102 A.D.2d 660, 477 N.Y.S.2d 431 (2d Dep't 1984), *rev'd*, 66 N.Y.2d 151, 495 N.Y.S.2d 345 (1985).
12. *In re Best*, 66 N.Y.2d 151, 153–54, 495 N.Y.S.2d 345 (1985).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 371–75.
19. *Id.* at 373–75.
20. *Id.*
21. *In re Best*, 102 A.D.2d 660, 660, 477 N.Y.S.2d 431 (2d Dep't 1984), *rev'd*, 66 N.Y.2d 151, 495 N.Y.S.2d 345 (1985).
22. *Id.* at 660–61.
23. *Id.*
24. *Id.*
25. *In re Best*, 66 N.Y.2d 151, 155–56, 495 N.Y.S.2d 345 (1985).
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. N.Y. Dom. Rel. Law § 117(2)(a); Scheinkman, *supra* note 6.
32. Scheinkman, *supra* note 6.
33. *Id.*
34. *Id.*
35. N.Y. Dom. Rel. Law § 117(2)(b).
36. *In re Seaman*, 78 N.Y.2d 451, 453–62, 576 N.Y.S.2d 838 (1991).
37. *In re Accounting by FleetBank*, 38 A.D.3d 1235, 1236–38, 831 N.Y.S.2d 609 (4th Dep't 2007), *rev'd*, 10 N.Y.3d 163, 165, 855 N.Y. S.2d 41 (2008).
38. *Best*, 10 N.Y.3d at 165–66.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *In re Accounting by FleetBank*, 38 A.D.3d 1235, 1236–38, 831 N.Y.S.2d 609 (4th Dep't 2007), *rev'd*, 10 N.Y.3d 163, 165, 855 N.Y.S.2d 41 (2008).
49. *Id.*
50. *Id.* (citation omitted).
51. *In re Accounting by FleetBank*, 10 N.Y.3d 163, 165, 855 N.Y.S.2d 41 (2008).
52. *Id.* at 166–67.
53. *Id.*
54. *Id.* at 168–69.
55. *Id.*

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am an associate in a large Manhattan firm. Most of my clients are large corporations with thousands of employees. I have contact with several employees of one particular company on a daily basis, and attend events sponsored by the company.

Here is my question. I have recently begun dating one of this company's employees, although I still interact with her professionally. I have not been asked to refrain from contact with her as a result of our romantic relationship, nor do I think that my legal judgment has been or will be compromised. However, some of my colleagues have suggested that these circumstances ultimately might cause problems for me and for our firm. Is there any reason to be concerned?

Sincerely,

Involved

Dear Involved:

Whether a romantic relationship between an attorney and an attorney's client runs afoul of the professional disciplinary rules depends on the scope of the representation, and the role of the attorney and the client in that representation.

In your situation, the romantic interest is a client's employee (a "client representative"), and not a direct client, as might be the case in a domestic relations matter (where romantic relationships during the representation are expressly prohibited by the Disciplinary Rules (DR), as noted below). Even in the case of a client representative, however, the scope of the representation and the client representative's own role can vary, and with it the lawyer's responsibilities. The attorney could be defending the client representative's deposition, or the attorney could be doing no more than drafting and reviewing basic documents. The client representative's role could also vary, from a situation where she is an important decision maker who relies on the advice of the attorney, to one where she serves a purely administrative function, such as coordinating the flow of documents between the firm and the client. These varying degrees of participation in the representation will determine how problematic the romantic relationship is from a professional responsibility perspective.

There are few bright line rules with regard to romantic relationships in the context of the attorney-client relationship. Ethical Consideration 5-1 (EC) provides generally that a lawyer should exercise professional judgment solely for the benefit of the client, free from compromising influences or loyalties, and the lawyer's personal interests should not be permitted to dilute the lawyer's loyalty to the client. DR 5-101(A) further emphasizes this point by stating that a lawyer should not accept *or continue* employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own personal interest.

Only one clear rule exists with regard to sexual relations with a client within the context of a current representation. DR 5-111(B) states that a lawyer shall not: (1) "demand sexual relations with a client . . . as a condition of any professional representation"; (2) "[e]mploy coercion, intimidation, or undue influence in entering into sexual relations with a client"; and (3) "[i]n domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client." (DR 5-111(C) permits sexual relationships that predate the attorney-client relationship. It would also seem that relationships entered into after the end of the representation are acceptable as well.) The reason often given for the express prohibition of sexual relations in domestic relations cases is the danger of exploitation of a vulnerable client by the more powerful attorney.

Although DR 5-111(B) may not prohibit most romantic client relationships, it may still be best to avoid engaging in one. In *Sanders v. Rosen* (159 Misc. 2d 563, 605 N.Y.S.2d 805 (Sup. Ct., N.Y. Co. 1993)), Justice Greenfield stated that "[t]he conduct which may be proscribed is entering into a sexual relationship with a *current* client, where emotional involvement may cloud objective professional judgment, and commencing a sexual relationship with a client he represents who is wholly dependent on him and in a very vulnerable state. That could be considered an abuse of his position" (emphasis in original). This argument seems to be reflected in the language of DR 5-111(B), which prohibits sexual conduct resulting from intimidation, or as a condition of representation. However, it is not "the sexual relationship per se which constitute[s] a breach of professional responsibility but rather the attorney's attempt to exploit the professional relationship to gain unsolicited sexual favors." *Edwards v. Edwards*, 165 A.D.2d 362, 367, 567 N.Y.S.2d 645 (1st Dep't 1991).

There are more general reasons to avoid romantic relationships with clients. These include the potential for an abuse of power by lawyers, negative publicity about lawyers, emotional

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harm to clients, potential conflicts of interest, incompetent representation (*i.e.*, a cloud on a lawyer's judgment stemming from the lawyer's romantic interest or emotional entanglement), and loss of attorney-client privilege (pillow talk is not necessarily lawyer-client communication).

It is clear that it is unethical to take advantage of a vulnerable client in domestic relations matters, and perhaps even in other cases of direct representation of an individual, especially where the lawyer is solely responsible for professional judgments on behalf of the client. The situation becomes far less clear, however, when the client is a large institution with many employees, the nature of the work is transactional, and where little to no professional judgment is exercised on behalf of the individual with whom the lawyer is involved. Furthermore, the identity of the actual client can be unclear when the named "client" is an organization, but the attorney interacts with client representatives, as is the case you present here. As discussed above, an analysis of the propriety of the relationship will depend on the scope of the representation and the roles of the parties within the representation.

Although you do not specify the scope of the representation, or the role of you as the attorney and the client representative, it appears that your services are currently not being affected by the romantic relationship. However, given the mercurial nature of these relationships, one should err on the side of caution. You should inquire as to whether the firm has a policy on relationships with clients or client representatives. (It should be noted that a violation of DR 5-111(B) is not imputed to the other lawyers in a firm.) If there is no such policy you are in a gray area. As indicated above, your particular situation is one in which the professional disciplinary rules provide only general guidance. Judgments about what is proper can be very subjective, and determining when it is time for you to notify a supervisor or the firm or to make a decision to resign from the representation will depend on the circumstances in which you find yourself. For example (and there is not enough information to indicate that this fits your situation), if a junior associate engages in a romantic relationship with a high-ranking director or officer of the company, this might be perceived as an opportunity for that associate to use that relationship for personal gain. That would not be good for the associate, or for the client representative.

A romantic relationship between a client representative and an attorney, whether their relative positions in their firms are widely disparate or equal, might pose no difficulty for either. On the other hand, it could jeopardize the attorney's work product, attorney-client privilege and the interest of other clients of the firm. These risks should be strongly considered when deciding to enter into such a relationship, even where it is not expressly prohibited by firm or company policy, or by the professional disciplinary rules.

The Forum, by
Anastasia V. Byrnes
New York City

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a member of a bar association listserve in which members discuss legal issues that affect their practices. Often, a member will post a question that relates to a specific matter he or she is handling, and begins by writing, "I have a client who . . . " The posting attorney then goes on to explain the matter, provide an analysis, including questions and uncertainties, and his or her perception of the strengths and weaknesses of the client's position.

Such a post typically generates numerous responses. I have often considered seeking advice from the members of the listserve concerning matters I am handling, but have hesitated to do so because I am concerned about revealing a client confidence without the client's consent. I am also concerned that a potential or actual adversary might read my post and obtain an advantage by knowing my thoughts about the matter. Does posting a hypothetical about a specific client matter violate the obligation to keep client communications confidential?

Sincerely,
Lawyer Online

conclusions are powerful and effective. The introduction and conclusion should highlight the brief's primary arguments, explain how existing law supports those arguments, and state what the brief is asking the court to do. Articulating positions persuasively means writing in plain, simple English, not in Latin, legalese, or complex conditionals.

Be Credible. Maintain integrity. All advocates hope the judge will agree with them on every issue. The persuasive advocate knows that this isn't always possible. A successful advocate knows the adversary's position, anticipates the adversary's arguments, states the adversary's arguments fairly, and rebuts the adversary's arguments without being defensive. Having a grasp of the other side's position allows the advocate to argue particular points more vehemently than others. Advocates are credible if they refute the opposing argument in their opposing papers. Advocates are credible if they can distinguish which arguments should be conceded — and when — and which are meritorious. Advocates are not credible if they overpromise but under-deliver. Advocates are not credible if they overargue, such as by maintaining that the client is innocent rather than that the prosecution didn't prove guilt beyond a reasonable doubt. Advocates are not credible if they argue emotionally rather than about emotional facts. Advocates are not credible if they use false emphatics like bold, italics, underlining, capitals, and quotations for effect and sarcasm instead of letting the argument speak for itself.

Know Boundaries. A persuasive advocate knows boundaries. An advocate may never exaggerate. The persuasive advocate doesn't overstate with words like "always" and "never." Persuasive advocates cautiously, although confidently, understate all their positions. They avoid biased modifiers and don't offend or misquote adversaries, opposing counsel, or other courts. Boundaries are exceeded when an advocate unfairly attacks and accuses the adversary, the court, or a court below or comments on their motives. Advocates must also portray the record scrupulously and accurately.

Cite Accurately. Persuasive advocates use relevant sources carefully and then cite what they use and use what they cite. An advocate's brief can cite multiple sources, including cases, other briefs, law-review articles, and documents from the record. Regardless of the source cited, the advocate must consult the appropriate citation manual, adhere to proper citation rules, and give the necessary information. The persuasive advocate uses pinpoint (jump) cites to tell the judge the exact page where the citation came from. The more information the advocate gives in citations, the more persuasive the argument.

Be Reasonable. A persuasive advocate is reasonable. This means being logical and fair in arguing positions and asking for relief. The professional doesn't make requests that are farfetched or unsupported by the record or legal authorities. The professional doesn't make frivolous claims or raise frivolous defenses. More than violating ethical rules or risking sanctions, arguing nonmeritorious positions affects meritorious positions: The judge might assume that the advocate is unreasonable and wrong about everything. The professional stresses content, not adjectives, style, and drama. The professional avoids adverbial excesses like "only" and "certainly." Few things can be said with certainty.

Be Specific. Specificity accomplishes two purposes in brief writing. It shows that the advocate has researched thoroughly. It also makes the adversary's position more difficult to prove by creating fewer loopholes in one's own argument. Providing nonconclusory examples using concrete nouns and, better, vigorous verbs is an effective way to stay detail-oriented. In describing a car accident, the stronger argument recalls the color, model, make, time of day, number of passengers, and intersection at which the accident occurred, as opposed merely to stating that "two black cars collided at some point in the afternoon."

Be Original. Persuasive practitioners find ways to argue their positions memorably, even when they follow a generally adhered-to format for court writing. For example, the less boilerplate, the more memorable. The same applies to long, boring quotations, which go unread. Writing memorably means varying sentence length and sentence structure and choosing good words — not fancy ones — to convey positions. It means avoiding metadiscourse — running starts like "the first thing I will argue is that it is well-settled that . . . ." — and clichés. It means referring to parties by names that bolster positions. It means adding visuals and examples that illustrate concepts. It means leaving lots of white space in the brief to make it easy for the judge to read. The goal is to write for the ear but to make the brief pleasing to the eye.

Be Short and Sweet. Make your argument and move on. Write it once, all in one place. Brevity will make the brief clearer and more persuasive. Judges multi-task and consider multiple cases simultaneously. The brief should get to the core of the argument quickly. Otherwise, the advocate's writing will be lengthy and dis-

Advocates are not credible if they argue emotionally rather than about emotional facts.

organized. The judge will be forced to piece together the advocate's arguments. That wastes the court's time, and the judge might choose not to read the brief. Also, the clearer and more concise the brief is, the lower the risk that the judge will overlook an argument. If the advocate's arguments are laid out explicitly throughout the brief, the judge won't need to search through numerous pages of discussion to understand the position being advanced.

Give a Roadmap. The advocate should give the judge a short and simple introduction at the start to set out the argument and format of the brief. This creates a coherent and readable text. It also puts the main points of the argument at the forefront. That allows the judge to know what arguments are being made before the judge begins reading the facts and precedent. It also makes it more difficult for an adversary to misunderstand and misinterpret the argument. This abridged and straightforward roadmap will guide the structure of the brief and guide the judge through the brief in its entirety.

Organize and Limit Issues. Persuasive advocates argue issues, not givens, history, or facts in the narrative. The persuasive advocate then gives the best argument first, supports the best argument by the best law first, and then applies the best facts first. Discussing every conceivable argument is a losing strategy. Advocates should identify the strongest and most important issues affecting their position and argue only those. These will be the issues that have the greatest possibility of success. The judge neither wishes nor has time to hear every conceivable argument. Worse, a judge who hears some frivolous arguments might lose focus and believe that all the arguments are frivolous. A persuasive practitioner will distinguish between strong arguments and weak arguments and present only the winning ones.

Analogize. Use fact and law to articulate positions. A persuasive advocate weaves the facts of the particular case into existing, applicable law. This requires the advocate to be an expert on the facts and the record and to have a comprehensive view on favorable and unfavorable precedent. An advocate who has a good understanding of the law relevant to the case can successfully analogize and distinguish the client's position from earlier cases. An advocate's position can be bolstered by comparing and contrasting the case from other cases. An advocate who succeeds in analogizing and distinguishing the client's position can weaken the adversary's position.

> Advocates are not credible if they overpromise but under-deliver.

Have a Theme. After some preliminary research has been done but before the advocate begins to write, the advocate should see the big picture and outline how to convey it. This allows the advocate to develop a legal theory that can serve as the brief's overarching theme. A theme is a single idea that runs through the entire brief. The theme should be easy to understand. The theme guides the way an advocate portrays the facts and tells a story. Knowing the theme enables the advocate to emphasize law and fact that support the theme and to de-emphasize law and fact irrelevant to the theme. The persuasive advocate will make sure that every argument supports that theme or rebuts the adversary's theme.

Don't Rush. No need to speed through brief writing. Persuasive writing takes time. It requires the advocate to schedule. A persuasive brief will have been thought out in advance — but not too well thought out, because that will delay the writing process — and written in multiple stages. The successful advocate will allocate enough time to research applicable law, outline the argument, write, and edit. A brief written without the advocate's conducting effective research, outlining arguments, and editing is an unpersuasive and careless brief. Persuasive advocates will have uncovered material relevant to their case and their adversary's case. Persuasive advocates start early and edit late.

Proofread. The persuasive advocate must check for errors after finishing writing. Whether the errors are grammatical, stylistic, typographical, they make an advocate's position less persuasive. A brief with errors means that the advocate did not review the brief thoroughly and carefully. This makes a judge see that advocate as careless. Advocates careless about typos might be careless about the record. To eliminate errors, the advocate should edit and revise several times. The advocate should spend some time away from the brief between the writing and editing stages and get an editor to review the brief for errors. This allows the advocate to read and re-work the brief with a fresh thought process and find errors the advocate might otherwise overlook.

Written advocacy is a powerful tool in persuading the judge. A persuasive advocate takes the time to draft a brief to ensure that the final draft is polished. Persuasion requires the skill and effort to move the judge's heart and mind. The time expended aids not only the client but, in our adversary system, the administration of justice as well. Judges are only as good as the advocates who appear before them. ■

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at St. John's University School of Law. This column is adapted from a piece he wrote for the *Advocate*, the Bronx County Bar Journal. For her research, he thanks Brooklyn Law School student Brieana Winn. Judge Lebovits's e-mail address is GLebovits@aol.com.

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INDEX TO ADVERTISERS

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS 1/1/09 - 1/6/09	6
NEW LAW STUDENT MEMBERS 1/1/09 - 1/6/09	10
TOTAL REGULAR MEMBERS AS OF 1/6/09	72,778
TOTAL LAW STUDENT MEMBERS AS OF 1/6/09	3,439
TOTAL MEMBERSHIP AS OF 1/6/09	76,217

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Please explain what malapropisms are and give some examples.

Answer: A malapropism is an unintentional and ludicrous misuse of words, often a word that sounds like the right one. It was given its name by a character called "Mrs. Malaprop" in Richard Sheridan's 1775 play, *The Rivals*. Sheridan coined the name from the French phrase *mal à pros* ("out of place"). Mrs. Malaprop, trying to impress listeners by using long words, usually chose the wrong word. For example, she spoke of her daughter as a "progeny of learning" and called a gynecologist a "groinologist."

Long before the tendency had a name, Shakespeare was a fertile source for malapropisms. In *Much Ado About Nothing*, Constable Dogberry, named for the wild prickly gooseberry plant, must have kept the Elizabethan audiences laughing as he mangled the English language. Among his comments, "Our watch, sir, have indeed comprehended (apprehended) two auspicious (suspicious) characters."

Morton S. Freeman, in *The Story Behind the Word* (1985), dubbed Archie Bunker "today's Mrs. Malaprop." Archie called the Pope "inflammable" (infallible) and commented that patience "is a virgin" (virtue). Jane Ace (of the radio comic show "Easy Aces") contributed "You could have knocked me over with a fender" and many others. And Suzanne Sugarbaker of *Designing Women* contributed "Let's sing it with no music. You know, Acapulco ('a cappella')."

Sports figures do well, too. Jim Wohford, outfielder for the Milwaukee Brewers, commented, "Ninety percent of this game is half mental." Umpire Nestor Chylak explained why he did not eject New York Yankees Manager Billy Martin from the game during an argument: "After all," he said, "I've got only two pairs of eyes." Curt Gowdy truthfully described Dodger Wes Parker as having been "originally born in Chicago." Yogi Berra's malapropisms are famous. For example: "If you can't imitate him, don't copy him," and "The other team could make trouble for us if they win."

Politicians can claim their share of malapropisms. During the riots of the 1960s, Chicago Mayor Richard Daley said, "The police are not here to create disorder. They're here to preserve disorder." Among his other blunders: "I resent your insinuendoes"; "We shall reach greater and greater platitudes of achievement"; and "No man is an Ireland." And then-Governor Edmund G. ("Pat") Brown commented that a recent earthquake was "the worst disaster in California since I was elected."

Vice President Dan Quayle famously misstated the motto of the United Negro College Fund ("A mind is a terrible thing to waste"), which he quoted as "What a waste it is to lose one's mind." Watchful critics have collected George W. Bush's malapropisms. Here are some: "We cannot let terrorists and rogue nations hold this nation hostile" (hostage); "It will take time to restore chaos and order"; and "We are making steadfast (steady) progress."

Senator Christopher Dodd goofed when, speaking on behalf of a Democratic Senate candidate in South Carolina, he praised the gentleman by saying, "We've got a strong candidate," and then spoiled it by adding, "I'm trying to think of his name." There was also the hapless president of a small college who announced at graduation: "It gives me pleasure to present the matchelor and bastard candidates." Finally, a friend told me that a colleague had referred to his own "self-defecating (deprecating) humor."

Laura E. Richards (1850–1943) paid tribute to malaprops in a poem:

> "Eletelephony."
> Once there was an elephant,
> Who tried to use the telephant –
> No! No! I mean an elephone
> Who tried to use the telephone –
> (Dear me! I am not certain quite
> That even now I've got it right.)
> Howe'er it was, he got his trunk
> Entangled in the telephunk;
> The more he tried to get it free,
> The louder buzzed the telephee –
> (I fear I'd better drop the song
> Of elephop and telephong!)

From the Mailbag

Several readers have suggested additions to the oxymorons listed in the October "Language Tips." One reader listed "sweet sorrow" and "thunderous silence." Another described her state's Budget Committee decision as a "brilliant fiasco." Additional offerings: "final tentative copy" and "turned up missing." Finally, this contribution: a pedestrian who had been held up and robbed said the robber had communicated his intentions by "an articulate grunt."

Erratum

Thanks to alert reader Kathryn McCary who correctly wrote that the quotation "I love verbing; verbing weirds words" appeared in the comic strip "Calvin and Hobbes," not *Through the Looking Glass*, as I erred in saying in the November/December column. ■

Gertrude Block (Block@law.ufl.edu) 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

Persuading the Judge Through Writing: How to Win

An advocate's goal in addressing a trial or appellate judge is to win. To win honestly, but to win nonetheless. The advocate wins by persuading the judge that the client's arguments are more compelling than the adversary's client's arguments. Persuasion in the law requires ethos (showing expertise and knowledge with integrity), pathos (appealing to emotion and the judge's sense of justice), and logos (offering logical reasoning and common sense). The advocate seeks to persuade through written and oral advocacy. Persuasion in oral advocacy comes from oral argument in which an advocate, during a conversation with the court, presents the client's position by addressing the judge's concerns. Persuasion in written advocacy comes from a written brief or memorandum to the court in which the advocate writes for the judge without writing like a judge.

Successful persuasion in written advocacy requires the advocate to articulate clearly and concisely what the client wants. Once the court is able to decide the advocate's request — that is, that the court has jurisdiction — the advocate must convince the court that the client's position is the strongest in the current situation and as guiding precedent for the future. An advocate accomplishes this by arguing law, fact, and policy under the appropriate burden of proof and standard of review. A persuasive advocate has the same goals regardless whether the advocate speaks or writes, although oral and written advocacy techniques and styles vary.

Written advocacy is crucial to persuade. A brief consists of numerous parts that give the court the necessary procedural background, the facts of the particular case, and the relevant law. The tone of an advocate's brief is to convince, but the advocate's goal is to state the pivotal issues of the case and to articulate a position in a straightforward, concise, and definite way. A judge is persuaded when an advocate presents an articulate position.

To persuade, an advocate must inform. Judges are unfamiliar with the details of their cases until they hear argument. They rely on the advocate to provide the background. An advocate's brief can shape a judge's opinion even before oral argument. To shape opinion, the advocate has two objectives: To make the judge want to rule for the client and to make it easy for the judge to rule for the client.

The more knowledge an advocate has about the case, the easier it is to persuade. Judges expect the advocate to know the facts and legal principles of the case better than anyone else might. Judges expect advocates to present arguments completely and honestly. Completely means knowing the record as well the adversary's contentions. Honestly means presenting all information accurately, even if that requires the advocate to concede some points.

Each advocate writes in a unique and personal way. Briefs vary in style, tone, and length. Although most advocates follow a similar organizational format, no one approach is uniquely correct. The persuasive advocate brainstorms all possible arguments, outlines before writing, weaves law and policy into the facts of the argument, stresses only important issues, addresses the most important issues first, revises repeatedly, and submits the work on time.

Here are 15 pointers to guide advocates in persuading the judge that their clients should prevail.

Know the Judge. Advocates must familiarize themselves with the judge's judicial philosophy and background before they submit written argument. Knowing how the judge has ruled in previous cases and how the judge conducts the courtroom enables the advocate to structure advocacy to appeal to the judge. One way to do this is to review the judge's judicial opinions before drafting a brief. Some judges emphasize policy; others favor precedent. Persuasive advocates are flexible. They know not only the judge's preferences but also present the client's position to reflect those preferences. Familiarity with the court rules and adherence to them is required. Many judges have procedural rules about page limits, deadlines, font sizes, and footnotes. Persuasive advocates never violate those rules. Persuasive advocates always treat their readers like busy, skeptical professionals.

Articulate Positions. Advocates must be clear and straightforward in asking the court for the relief the client seeks. They may not be cowardly. They must be direct and upfront. Judges seek to resolve cases quickly. Blunt and repetitive language emphasizes the client's position. Well-articulated introductions, transitions, signposts, and

Continued on Page 56

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