NEW YORK STATE BAR ASSOCIATION

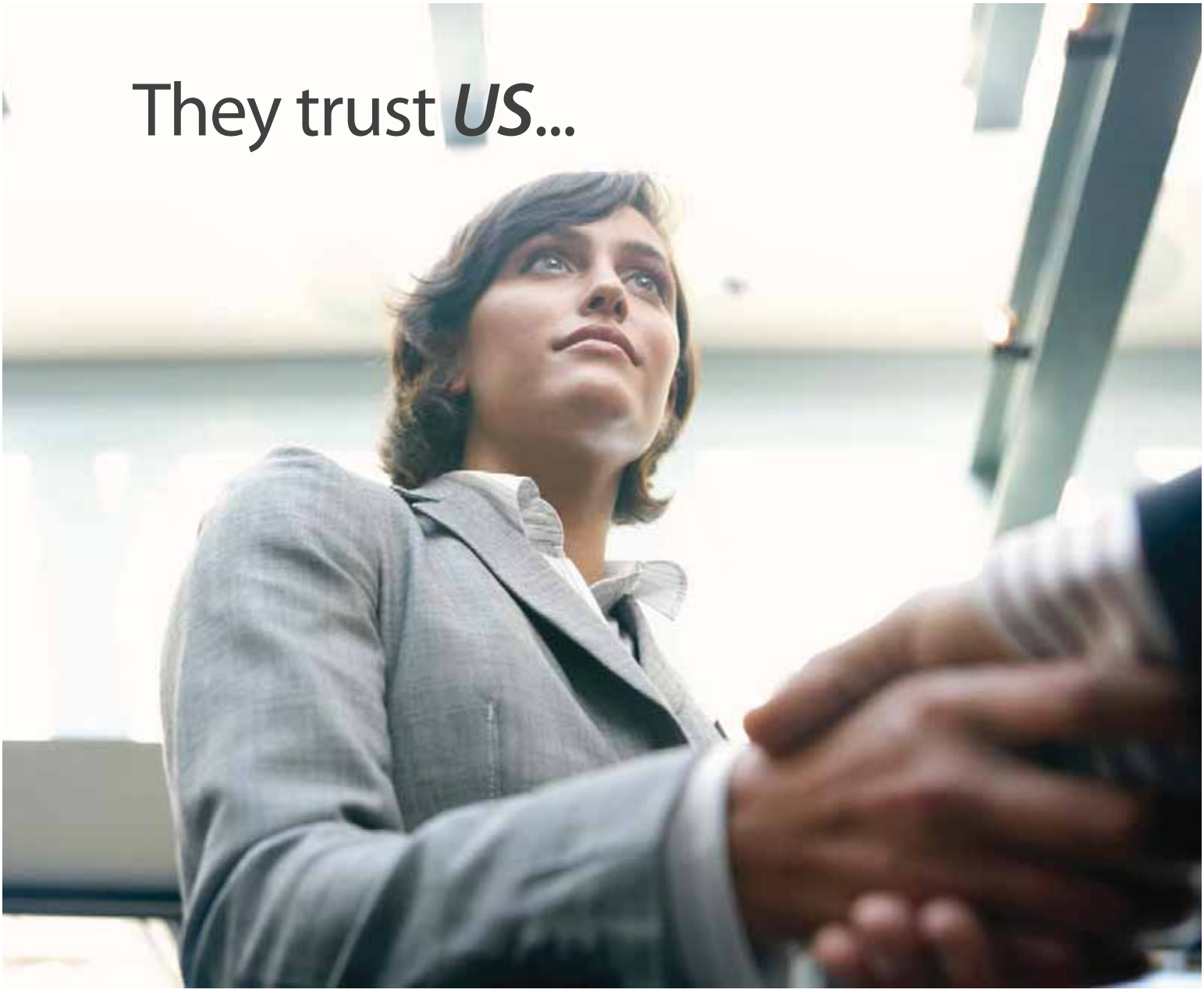
Journal

SEPTEMBER 2012
VOL. 84 | NO. 7

About Legal Ethics and Social Media

Edited by Gary Munneke

Also in this Issue



...because we offer comprehensive insurance programs at competitive prices.

The Lawyer's Professional Liability plan, administered by USI Affinity and underwritten by CNA, was selected by your fellow attorneys because it provides optimal coverage and competitive rates.

Find out why USI Affinity is the right choice for your practice. Call or go online today.

USI AFFINITY

To request your **FREE** quote call

800.727.7770

or visit

www.mybarinsurance.com

LPL : Medical : Life & Disability : Personal & Financial : Other Liability

...because we offer comprehensive insurance programs at competitive prices.

With over 50 years of experience in LPL, we'll design a plan for your firm from an A-rated carrier. We don't just provide coverage in the event of a claim. Our Risk Management services help you limit liability exposure and mitigate losses.

Find out why USI Affinity is the right choice for your practice. Call or go online today.

USI® AFFINITY

To request your **FREE** quote call

800.727.7770

or visit

www.mybarinsurance.com

LPL : Medical : Life & Disability : Personal & Financial : Other Liability

NEW YORK STATE BAR ASSOCIATION
Journal

CONTENTS

SEPTEMBER 2012

A CONVERSATION ABOUT LEGAL ETHICS AND SOCIAL MEDIA

EDITED BY GARY MUNNEKE

10

DEPARTMENTS

CARTOON © CARTOONRESOURCE.COM

since we offer comprehensive, cost-effective coverage from CNA

The NYSBA endorses the Lawyers' Professional Liability plan administered by USI Affinity* and underwritten by CNA. Our LPL plan offers broad and affordable coverage tailored to suit the specific needs of your practice.

Find out why USI Affinity is the right choice for your practice. Call or go online today.

USI® AFFINITY

To request your **FREE** quote call

800.727.7770

or visit

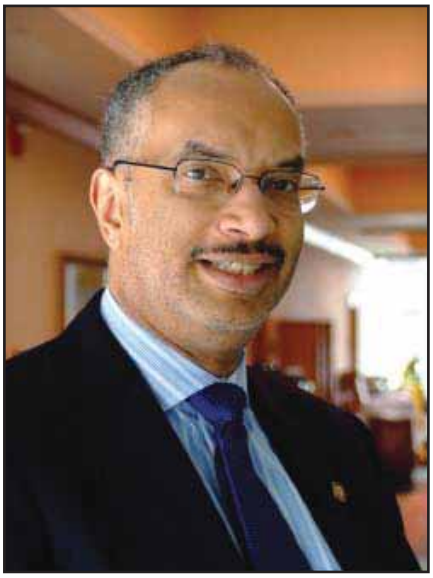
www.mybarinsurance.com

*USI Affinity is the brand and marketing name for the licensed entity USI Insurance Services, LLC

LPL : Medical : Life & Disability : Personal & Financial : Other Liability

SEYMOUR W. JAMES, JR.

A Fair Chance



This year, our theme at the State Bar is "Making a Difference." I consider it a privilege to be able to make a difference in people's lives through my work at The Legal Aid Society, by ensuring that our clients receive the quality legal representation they deserve. But the difference that I and other lawyers are able to make should extend far beyond achieving a favorable outcome in the courtroom.

Every year in New York State, tens of thousands of people are released from our correctional facilities; even more people are arrested and put through the criminal justice system. For individuals who have experienced arrest and incarceration, there are many circumstances and experiences – spanning from the time of their initial arrest until their eventual release from prison – that can have an enormous impact on their ability to reintegrate into their communities. In turn, problems with reentry can lead to recidivism, unemployment, homelessness, untreated substance abuse, mental and physical health issues, family disruptions and various other negative consequences that harm our society.

Individuals who have been released from incarceration often lack the resources they need to find appropriate housing, and they may face discrimination as they seek a place to live. They may experience difficulty accessing public assistance benefits to help them bridge the gap from incarceration to productive participation in society, and they may have substance abuse and physical and mental health issues that require special attention. Newly released prisoners with mental illnesses and physical disabilities are often discharged to their communities with no supportive services. For some, a task as simple as obtaining proper identification can prove to be an insurmountable obstacle. Former prisoners regularly encounter these problems; sadly, it is no surprise that up to two-thirds of the individuals who are released from our prisons and jails each year are rearrested within three years.

Problems with reentry not only affect reentering individuals but their families and communities as well. Despite the fact that maintaining family relationships is critical to positive reentry outcomes and the survival of the family unit throughout incarceration, current policies erect tremendous obstacles for family members to maintain contact with loved ones. Additionally, much of the prison population comes from geographic areas without proper prison facilities, with the result that significant numbers of young people are taken out of their communities and put into prisons some distance away, creating ripples in the economic and social fabric of their communities that are felt for generations to come. New York State has taken some first, tentative steps in implementing smart-on-crime laws and policies. It's time to learn to walk in earnest.

In order to address these concerns from a legal perspective, we have established a Special Committee on Prisoner Reentry. The Special Committee will explore a number of ways that we, as attorneys, can help to address this growing problem. It is often said that quality employment is a primary factor in whether a formerly incarcerated person will successfully reintegrate into society and avoid re-arrest. Education – for people while incarcerated as well as to discourage discrimination by the members of the community to which these people will return – could go a long way to improve results for those individuals who leave our prisons and jails each year. There may also be legal reforms that could further prevent discrimination in housing and employment, and policy changes that could provide additional education and training, as well as assistance with accessing public benefits, to people before they leave a correctional facility. Attorneys from the prosecution and criminal defense bars, as well as those engaged in the provision of civil legal services or pro bono, in collaboration with the law enforcement community and various human service agencies and non-profits, can all play an important role in helping to achieve successful reentry.

It is critical that we address these prisoner reentry issues – not only because it is the ethically appropriate way to treat offenders in our rehabilitative justice system, but also because it could reduce the significant social costs of recidivism and enhance public safety. Former prisoners who become productive members of our society

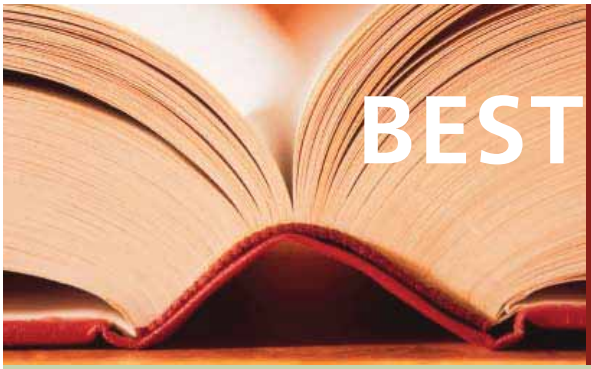
SEYMOUR W. JAMES, JR., can be reached at sjames@nysba.org.

PRESIDENT'S MESSAGE

CONTINUED FROM PAGE 5

are better able to help support their families and avoid the need for public assistance. Successful reentry reduces the likelihood of re-offense, making the community safer and decreasing the extensive costs associated with further incarceration.

After former prisoners have "paid their debt to society," it is essential that we make sure they have a fair chance to rebuild their lives and reenter their communities. To the extent that we are able to reduce recidivism and support successful prisoner reentry, we will enjoy a safer, more just and more productive society. With better laws and support for reentry services we can improve not only the lives of individuals, but their families, communities, and the state. I look forward to the results and recommendations of the Special Committee on Prisoner Reentry, and I am confident that we will provide a valuable legal perspective in this critically important area. ■



BESTSELLERS

FROM THE NYSBA BOOKSTORE

September 2012

Attorney Escrow Accounts – Rules, Regulations and Related Topics, 3rd Ed.

Provides useful guidance on escrow funds and agreements, IOLA accounts and the Lawyers' Fund for Client Protection. *With CD of forms, regulations and statutes.*

PN: 40269 / **Member $45** / List $55 / 330 pages

Best Practices in Legal Management

The most complete and exhaustive treatment of the business aspects of running a law firm available anywhere.

PN: 4131 / **Member $139** / List $179 / 498 pages

Includes CD containing all the forms.

Consumer Bankruptcy, 2nd Ed.

Covers consumer bankruptcy from both debtor and creditor perspectives. It provides official and procedural forms, as well as the local bankruptcy rules for New York's federal districts.

PN: 40456 / **Member $125** / List $170 / 770 pages

Definitive Creative Impasse-Breaking Techniques in Mediation

Written by leading practitioners, trainers, academicians and judges, this volume is a resource for lawyers who represent clients in mediation and negotiation, general practitioners and other professionals interested in honing their ADR skills.

PN: 41229 / **Member $45** / List $60 / 312 pages

Depositions: Practice and Procedure in Federal and New York State Courts, 2nd Ed.

A detailed text designed to assist young attorneys and experienced practitioners with all aspects of depositions.

PN: 40749 / **Member $75** / List $90 / 738 pages

Foundation Evidence, Questions and Courtroom Protocols, 3rd Ed.

This edition, along with its collection of forms and protocols, has two new chapters: Direct Examination and Cross-Examination.

PN: 41070 / **Member $55** / List $65 / 238 pages

Legal Manual for N.Y. Physicians, 3rd Ed.

Completely updated to reflect new rules and laws in health care delivery and management, discusses day-to-day practice, treatment, disease control and ethical obligations as well as professional misconduct and related issues.

PN: 41329 / **Member $120** / List $140 / 1,130 pages

New York Antitrust and Consumer Protection Law

Includes a discussion on the rise of the importance of the Donnelly Act, New York State's Antitrust law, its relation to the Federal Sherman Act and an overview of multistate litigation issues.

PN: 40258 / **Member $50** / List $65 / 260 pages

N.Y. Lawyer's Deskbook and Formbook (2011–2012)

Award-winning and packed with new information and forms for use in over 25 practice areas.

N.Y. Lawyers' Practical Skills Series 2011–2012

An essential reference, guiding the practitioner through a common case or transaction in 16 areas of practice. Fourteen titles include forms on CD.

Post-Trial Practice and Procedures

This comprehensive guide to dealing with complex post-trial issues covers everything from challenging verdicts before and after the jury has been discharged, to post-verdict setoffs, to understanding the interest categories on damage awards and money judgments.

PN: 4175 / **Member $45** / List $60 / 242 pages

Public Sector Labor and Employment Law, 3rd Ed., 2011 Revision

The leading reference on public sector labor and employment law in New York State is completely revised with updated case and statutory law.

PN: 42057 / **Member $150** / List $185 / 1,670 pages

Sales and Use Tax and the New York Construction Industry, 2nd Ed.

Provides practical advice and a comprehensive overview of relevant statutes, regulations and applicable case law.

PN: 42211 / **Member $40** / List $50 / 184 pages

The Practice of Criminal Law Under the CPLR and Related Civil Procedure Statutes, Fifth Edition (2011 Supp.)

A book that pulls together the rules and provisions of law not covered in NY's CPL or Penal Law.

PN: 40698 / **Member $45** / List $55 / 206 pages

NEW!

Admission to the New York State Bar, 2012

Provides all the relevant statutes and rules, and includes an overview of New York's admission procedures, a comprehensive table of statutory and rule cross-references, a subject-matter index and an appendix containing the N.Y. Rules of Professional Conduct.

PN: 40152 / **Member $50** / List $70 / 226 pages

Estate Planning and Will Drafting in New York

A comprehensive text for those who are just entering this growing area, offering practical guidance.

PN: 4095 / **Member $175** / List $210 / 880 pages

Legal Careers in New York State Government, 10th Edition

Everything you need to know about a career in public service in state and municipal government and the state court system. Includes information about graduate internships, graduate and post-graduate fellowship, clerkships, and the New York ethics laws and regulations.

PN: 41292 / **Member $50** / List $70 / 360 pages

NYSBA Practice Forms on CD-ROM 2011–2012

More than 600 of the forms from *Deskbook* and *Formbook* used by experienced practitioners in their daily practice.

Workers' Compensation Law and Practice in New York

Combining academic analysis with practical considerations for the courtroom, this book provides expert guidance on all aspects of workers' compensation law.

PN: 4236 / **Member $125** / List $175 / 720 pages

COMING SOON!

Criminal and Civil Contempt, 2nd Edition

Products Liability in New York

Expand your professional knowledge

1.800.582.2452 www.nysba.org/pubs **Mention Code: PUB1490**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

NYSBA

NYSBACLE

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

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

Health Information Exchanges and Electronic Health Record Systems
Live & Webcast (1:00 – 4:30 p.m.)
September 20 Albany

Risk Management 2012 – Protect Your Practice
(9:00 a.m. – 1:00 p.m.)
September 20 Buffalo
September 21 New York City
September 27 Westchester
September 28 Albany; Long Island

Sports Law (9:00 a.m. – 12:00 p.m.)
September 24 New York City

Henry Miller – The Trial
September 27 Long Island
November 13 Albany
November 30 New York City

Bridging the Gap (two-day program)
October 3–4 New York City (live session)
Albany; Buffalo
(video conference from NYC)

Practical Skills: Basic Matrimonial Practice
October 10 New York City
October 11 Syracuse
October 15 Westchester
October 16 Albany
October 17 Buffalo; Long Island

The Comprehensive Second Circuit: Practice in the 2nd Circuit Court of Appeals
October 10 Syracuse (1:00 – 4:30 p.m.)
October 26 New York City (1:30 – 5:00 p.m.)

Attorney Escrow Accounts 101 – What Every Attorney Needs to Know in New York
(9:00 a.m. – 1:00 p.m.)
October 12 Albany
October 19 Buffalo
October 25 New York City
October 26 Long Island

Commercial Litigation Academy (two-day program)
October 18–19 New York City

Automobile/Trucking Institute
October 22 New York City

Update 2012
October 22 Syracuse
November 5 New York City

Matrimonial Trial Institute II
October 26 Buffalo
November 2 Long Island
November 16 Syracuse
December 7 Albany
December 14 New York City

New York False Claims Act (9:00 a.m. – 1:00 p.m.)
October 29 New York City

Practical Skills: Mortgage Foreclosures and Workouts
October 29 Buffalo
October 30 Albany; Westchester
October 31 New York City; Rochester
November 1 Long Island; Syracuse

Women on the Move (9:00 a.m. – 1:00 p.m.)
October 30 New York City

Representing Purchasers and Sellers of Residential Condominiums, Co-Operatives and Homeowners Associations
November 1 Albany; Long Island
November 6 Buffalo
November 8 Westchester
November 9 New York City

Representing the DWI Defendant in New York: From Arraignment to Disposition
November 1 Buffalo
November 15 Long Island
November 16 New York City
November 29 Albany

To register

or for more information call toll free **1-800-582-2452**

In Albany and surrounding areas dial (518) 463-3724 • Or fax your request to (518) 487-5618
www.nysba.org/CLE (Note: As a NYSBA member, you'll receive a substantial discount)

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

Building a Successful Law Firm
November 2 New York City

Emerging Issues in Environmental Insurance
(9:00 a.m. – 1:00 p.m.)
November 2 New York City

Developing an Elder Law Practice
(9:00 a.m. – 12:45 p.m.)
November 8 Rochester
November 16 Long Island
November 28 Albany
December 7 New York City
December 14 Westchester

†10th Annual Sophisticated Trusts and Estates Institute
(two-day program)
November 8–9 New York City

Securities Arbitration and Mediation
November 14 New York City

The ABC's of Adoption: What Family Law Practitioners Need to Know
November 15 New York City
November 16 Albany

Accounting for Lawyers
November 28 New York City
December 6 Albany

Practical Skills: Basics of Intellectual Property Law Practice
November 29 New York City
November 30 Albany (live & webcast)

Construction Site Accidents: The Law, The Trial 2012
November 30 Long Island
December 7 New York City
December 14 Albany

Persuasive Legal Writing for Lawyers
December 3 Westchester (6:00 – 9:00 p.m.)
December 4 New York City (6:00 – 9:00 p.m.)
December 5 Long Island (6:00 – 9:00 p.m.)
December 6 Albany (1:30 – 4:30 p.m.)

CONVERSATION

About Legal Ethics and Social Media

With Steven Bennett, Marion Fish, Bruce Green, John McCarron, Patricia Salkin, and John Szekeres

Edited by Gary Munneke

Gary Munneke (gmunneke@law.pace.edu) is a Professor of Law at Pace Law School in White Plains, New York, Co-Chair of the NYSBA Law Practice Management Committee and a member of the Task Force on the Future of the Legal Profession. He is guest editor of this issue of the *Journal*.

***Editor's Note**: This issue of the Journal also contains articles on the challenges facing lawyers in transition ("Reflections on Transitions: Things I Have Learned," by Jessica Thaler), the demise of Dewey LeBoeuf ("When Brahmins Bumble: Dewey Really Care?" by Gary Munneke), and the problem of managing the actual cost of delivering legal services ("The Costs of (Inefficient) Legal Services Delivery," by Anastasia Boyko). These thoughtful pieces are intended to give readers some novel and interesting perspectives on contemporary practice management issues that impact all lawyers.*

Panelists

Steven Bennett is a partner in the New York office of Jones Day, and is a frequent contributor to the New York State Bar Association *Journal*.

Marion Fish is a partner in the Syracuse, New York, firm of Hancock Estabrook, and Chair of the NYSBA Attorney Professionalism Committee.

Bruce Green is Louis Stein Professor of Law at Fordham University School of Law, in New York City, and Director of the Stein Center on Legal Ethics.

John McCarron is a partner in the Westchester firm of Montes & McCarron.

Patricia Salkin is Dean of the Touro Law Center, in Central Islip, New York, and an expert on government ethics.

John Szekeres is the Past Chair of the Electronic Communications Committee and a member of the NYSBA Task Force on the Future of the Legal Profession.

Below is the first of two conversations on the interrelationship among legal technology, ethics and practice management with leading thinkers in the field. In an area that is still evolving, many principles remain unsettled. For the past two years, the American Bar Association Ethics 20/20 Commission has struggled to define the parameters of ethical and professional behavior in law practice in situations involving computer and related technology. Although there are often no clear answers to the questions being raised, the pervasive existence of technology reminds us that all lawyers need to think about how they will use technology in practice and the pitfalls they might encounter.

This article is a condensed transcript of a program presented at the 2012 New York State Bar Association Annual Meeting titled "Technology in Your Practice: Trends, Tools and Ethics Rules," sponsored by the Committee on Law Practice Management, and co-sponsored by the Committees on Attorney Professionalism, Electronic Communications and Lawyer Assistance. It is a timely discussion of one of the most prominent areas of practice development today: the use of social media by lawyers. Although much of the attention in the legal press has focused on social media in the context of marketing legal services, this discussion makes it clear that other issues are equally important, and that social media can impact client-lawyer communications in a variety of ways.

Ethics and Social Media

John Szekeres: Social media has given us the potential to greatly expand how we interact with our community, which is not necessarily local anymore. For a lawyer, this represents significant opportunities for networking and knowledge exchange and has created new areas for client representation. But, to take advantage of these opportunities, we must understand how these tools are used and potentially abused. Most importantly, as lawyers, we must be aware of the implications when these tools are used improperly.

Attorneys are governed by complex ethical rules and guidelines that regulate our professional conduct and speech. Internet-based technologies and communication tools have added a whole new dimension of complexity to how we advise our clients, represent them, and conduct ourselves. The issues raised by the use of social networking applications impact advertising, unauthorized practice, conflicts of interest, breaches of confidentiality – inadvertent or otherwise – privileged communications, attorney-client relations, and client expectations. For example, a person who was going through a divorce had an appointment to discuss certain issues with her lawyer, but she was pressed for time, so she requested that she meet with her lawyer via Skype to save her time traveling to her lawyer's office. The lawyer insisted on an in-person meeting with the client, and the client was very annoyed. How is this related to social networking? It's the need to adjust our behavior to the way society is evolving, how it communicates and how networks evolve.

Less obvious and more difficult to assess is the impact on your practice of not having a website or using LinkedIn, writing a blog, or participating in an online chat room or tweeting. Are you missing opportunities to gain new clients? Are you failing to meet client or potential client expectations? While you still have clients coming in the door in sufficient numbers, you may feel that you have not missed any opportunities, but by not using these tools are you failing to gain an understanding of how the tools are used or abused so that when necessary you can effectively represent your clients? How do your existing clients perceive you and your practice?

In the early days of the telephone, it was seen as unprofessional to have a telephone in your office. Having a telephone, it was thought, would take away time from the lawyer's ability to stay intellectually focused on the law. In fact, that observation was probably true, but today you could not function in your practice without a phone. The same scenario played out with computers in law offices in the '90s. Computers were a tool for the secretary. No lawyer would type their own brief. Today, most lawyers have computers on their desks, and they

send and receive dozens if not hundreds of emails a day. Typing your own documents certainly has taken time away from focusing on the higher level work, but it has brought efficiencies as well.

Question 1 – Government Use of Social Media

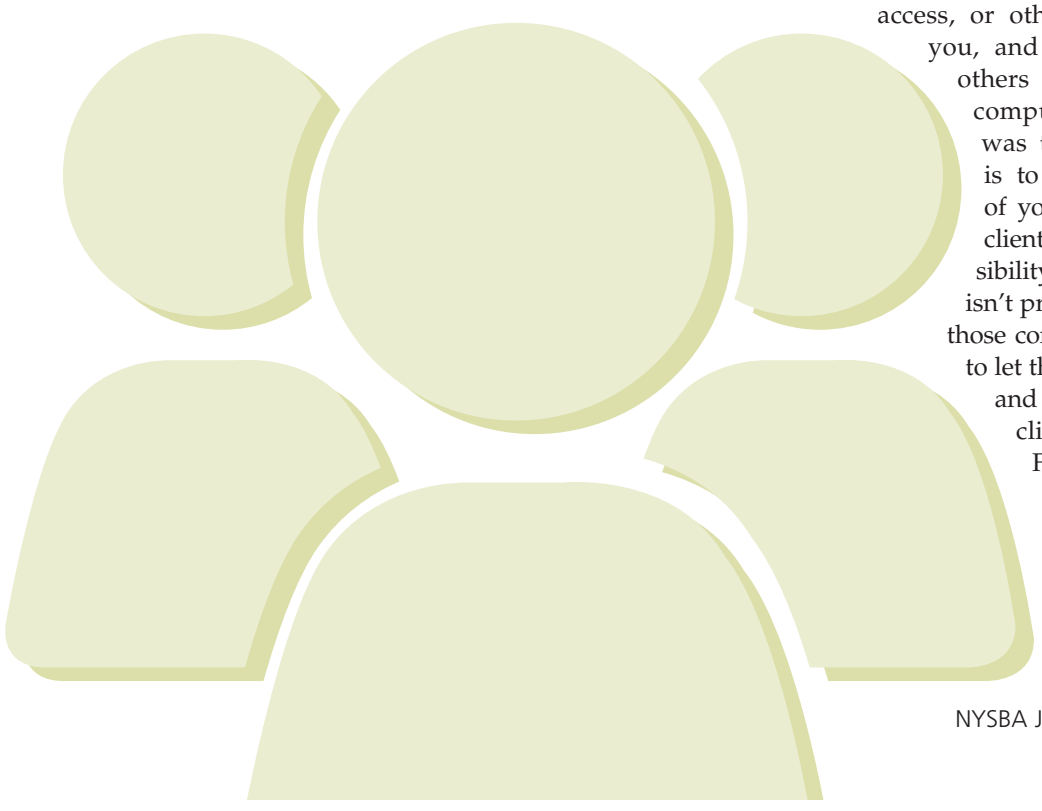
Szekeres: My first question involves government practice. If a governmental entity allows comments on its website, or a Facebook or LinkedIn page, can the governmental entity put in place a moderator to edit screen comments when a person starts making inappropriate comments?

Patricia Salkin: If you represent a municipality, and they want to set up social media sites, the first thing that you have to be concerned about is setting up a policy before they start the site, because people have First Amendment rights, particularly when it pertains to speaking to their government and about their government. So you have to ask whether you want to allow comments to be posted on your site. But once you allow comments can somebody say, "The Mayor is a jerk"? Can somebody use foul language? What kinds of comments might be appropriate or inappropriate? If you don't have a policy, somebody is exercising discretion if they pull down those comments, and then you might be cutting off somebody's free speech. Municipalities often ask their municipal attorneys to be their site moderator. Say no. You don't want to be the person doing that for the municipality. And before somebody can get onto your organization's Facebook page, require people to register. Do you want the members of the public to provide their names, their address, or any other information? Sometimes, depending upon what the conversation is about, if you're using it to engage public participation, you might, because that might demonstrate that members of the public did participate. But the question is what public? The public impacted by the project? Or anybody out there in cyberspace who wants to come on board and make a comment about a proposed development project, or some other public hearing that the municipality is trying to collect information on? However, if you collect that information, does it become a record? And what are your obligations? So any time your client is a governmental entity using the social media sites, there are lots of questions.

Question 2 – Expectations of Confidentiality

Szekeres: Can one have a reasonable expectation that when using any of the social media tools or email that attorney-client communications will remain confidential, and if divulged, whether the confidentiality of the communication is going to be preserved? What about emails – for example, clients using their employer's computer system to communicate with their lawyer? What are the client's expectations? And what about using email outside of the place of business? Do Internet connections receive the same level of regulated protections that telephone and fax communications receive?

Bruce Green: Lawyers have an obligation to preserve the confidentiality of their communications with clients. That's why you don't chat with your clients in the elevator when there are other people there, or at the table in the restaurant when there are other people listening. An ABA ethics opinion in the last year reminded lawyers that although you may have measures to make sure that emails in your office are secure, encrypted or otherwise protected, the same may not be true of the client. The client may be using a workplace computer or smartphone owned by the employer to send emails, or using a computer in a divorce matter to which the spouse has access, or otherwise corresponding with you, and it's not protected because others might have access to those computers. What the ABA said was that part of your obligation is to preserve the confidentiality of your communications with the client if there's a reasonable possibility or likelihood that the client isn't protecting the confidentiality of those communications. You also have to let the client know about the risks and not communicate with the client if those risks are present. For example, an employer may seize the employee's computer at the workplace or access a personal email account through the employer's server, including those that might've



been used in communications with the lawyer, and seek to use them in litigation. Cases around the country have varied about whether that is a waiver of attorney-client privilege, but opinions in New York have found that where the employee had been put on notice of the employer's policy the employee could not claim the attorney-client privilege. So the lesson from those cases is that lawyers have to be cognizant of the risks when they're communicating with clients and take some measures to prevent them.

> In the early days of the telephone, it was seen as unprofessional to have a telephone in your office.

Steven Bennett: The basic obligation of competence requires lawyers to know the capabilities of these systems in order to provide guidance to clients. The client ultimately owns the privilege and can decide whether he or she wants to yell across the room to you, fully understanding there probably isn't much privilege associated with that kind of communication. But what if a client doesn't understand the employer's policy, for example, the Beth Israel case (*Scott v. Beth Israel Medical Center*, 17 Misc. 3d 934, 847 N.Y.S.2d 436 (Sup. Ct., N.Y. Co. 2007)) in New York, where a doctor sent messages from a work computer to a lawyer about workplace conditions in an action against the employer. The court ultimately says that the employer owns the computer and the employer has told the employee that he has no expectation of privacy in the computer system; therefore when you talk to your lawyer via that system, you do not maintain the privilege. If the lawyer understands the situation and doesn't remind the client about it, shame on us.

John Szekeres started by asking whether a lawyer can Skype with a client. Can you send them a tweet? The answer is: Not if you want to assure privacy under those circumstances – or at least tell the client that there could be a problem. Opinions about email go back a while, and they basically say that for email there is a reasonable expectation of privacy. Even though it is very easy to deconstruct email, because it's going over the Internet, the fact it's unlawful to do so without consent gives rise to a reasonable expectation of privacy. But perhaps this is not so in the case of tweeting or going to a Starbucks WiFi hotspot where everybody can access it. It is awareness more than anything else.

Marion Fish: Is there something different about Skype as far as confidentiality compared to other media?

John McCarron: Telecommunications regulations are much stricter than those for phone lines. Although antiquated, it is the same reason why there are a lot of taxes on your phones and not on your Internet service. Skype just has a different level of regulation . . .

Szekeres: But the question is what kind of peril do you put yourself in using Internet communications as opposed to using the telephone?

Bennett: Right. The Electronic Communications Privacy Act was written over 15 years ago, well before any of these technologies existed. So if you're making predictions about whether ECPA will be applied in the case of Skype, that is just a guess.

McCarron: As a practical and technical matter, when it comes to BlackBerrys, iPhones, and devices like that, whether they give you the phone or you bring it yourself, the server doesn't care. For example, BlackBerry offers a corporate environment called the BlackBerry Enterprise Server, which pretty much takes over control of your phone. It runs all the security on your phone, can do lots of nifty things on your phone, limit what you can do on the phone, set your home page, move your icons around. The BES can back up your data and has access to pretty much everything on the phone. So it becomes a big security issue, which is why some people still walk around with two BlackBerrys.

Bennett: If the employer claims that it owns the computers and communication systems, and asserts the right to review communications at any time, giving employees no reasonable expectation of privacy, then, to a degree, the employer owns that information – on both the plus side and the negative side. If somebody is using the system to harass somebody else, or to perpetrate a crime, the company may be responsible, because it owns the information; and in the event of a discovery request for all the data in such and such a category, the question then becomes, Does that include all these g-mail accounts and all the rest of that material? So it's a tough question for an employer to decide what to do.

Question 3 – Breaches of Confidentiality

Szekeres: Let's talk about inadvertent breaches of confidentiality. You accidentally send out an email with some client confidential information to the wrong email address, or you post client intake forms or other confidential material on your firm's website. So what about that? Courts are generally unwilling to recognize a reasonable expectation of privacy. Is that right? When people willingly post?

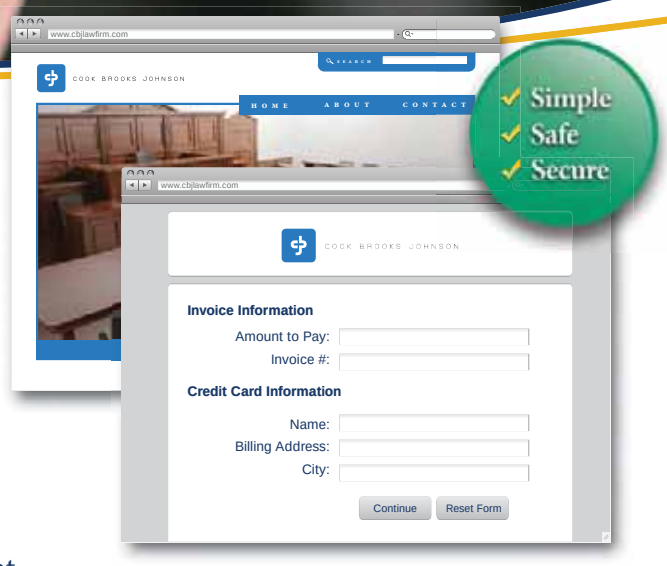
Green: I guess it depends on what the facts are. Are you talking about inadvertent emails? How many people here have never inadvertently sent an email to somebody? I do it all the time. Or do you mean actually posting something on the Internet or a blog or website?

Recommended by Over 70 Bar Associations

The Easiest Way to Get Paid!

- ✓ Accept Visa, MasterCard, Discover & Amex
- ✓ Save up to 25% off processing fees
- ✓ Control cash flow & increase business
- ✓ Accept credit cards for retainers
- ✓ Avoid commingling client funds

LawPay's unique processing program correctly separates earned and unearned transactions keeping your firm compliant. The process is simple. Begin accepting payments today!



Accept payment online through our **Secure Payment Link**

LawPay.com

866.376.0950

CREDIT CARD PROCESSING

Szekeres: I think they're two different issues. I am referring to posting something inadvertently. You think you're putting up one thing, and it's actually something else.

Green: You are asking about whether the information is privileged or not. It is one thing to inadvertently mail or fax something to one person or a small group. It's another thing to disseminate it to the entire world. I don't know how you put the cat back in the bag. Maybe a court is going to say, we will not let someone make evidentiary use out of it. But even if they say that, it's still out there. And so you've hurt your client, and the whole point is to not do that. In the more conventional case of an inadvertent email, what do you do as the recipient? Rule 4.4(b) of the ABA Model Rules of Professional Conduct says that if you receive something you know was sent inadvertently, or reasonably believe or have reason to believe, you have to give notice to the person who sent it so they could then take whatever measures they need to take. Some court decisions say that is not enough.

Bennett: From a supervisory perspective, you may be totally aware about this stuff, but your juniors, paralegals and secretaries might not quite get as much of this as you think, and it can be a problem for the folks who are running the firms. For example, where employees didn't manage to perform the redaction properly, so when you pasted the redacted document into another form, you included information that should not go out. And the folks responsible for electronic filing are often very, very junior, or in some docket department. And they're not really inculcated with these ethics values. When you tell them this thing has to be filed by 5:00, they make it happen, and only later do some of these security issues come up. Concerns about data security apply to businesses in general, but they also apply to lawyers, and so learning this technology and thinking about best practices is just essential in the modern technological era.

Salkin: Some of the responses here are blurring the line between what you're using for business, and the question of whether or not lawyers and people that work with us and for us can have a private life. So, how do you use your firm Facebook and LinkedIn pages versus how you use a personal account? I have seen people comment on their personal Facebook page observations about what they see in the law office, including comments about clients, or witnesses, and fellow employees. They may not attach the person's name but if you knew what was going on, you could figure it out. They might think they can say whatever they want in their private life. I'm not so sure that you can. And I don't think that the younger generations appreciate the difference.

Green: The important point is that you can violate client confidentiality not only by including names and other information, but also by just talking about something in a way

that someone can connect it to a client, and you have to remind these young lawyers about it.

Fish: I also wanted to bring up the point that these are recording devices and video devices, and how that might affect your personal practice. When I meet with a client or I have a private conversation with somebody, I ask them to turn off their phones. And some people are more aggressive when I ask them to leave the phones outside the room, but I know that these recordings have been allowed as discovery, and you don't even know you're being recorded. So as lawyers we also need to think not only about what we're doing on our keyboards and the screen, but also that we're carrying around videos, cameras and voice recordings.

McCarron: Some law firms have a "check your device at the door" policy. They do not want you blogging or Facebooking – especially about work – between the hours of nine to five.

Bennett: It is a Brave New World.

Szekeres: Courthouses routinely require you to leave your electronic devices outside, because even though people are not supposed use recording devices in court, it is possible to record the whole proceeding on a BlackBerry.

Question 4 – Metadata

Szekeres: One of the biggest security dangers today is the metadata imbedded in Word documents. It does not take a great deal of knowledge to go in and ferret out. The safest way to deal with this problem if you do not know how to go in and turn the settings on in Word, is to just print the document, scan it into an image in, and then email the image to the recipient. It makes it difficult if you're trying to search, because the data in the file is no longer searchable. You can also convert your Word documents into text-searchable .pdfs, but creating a pure image protects you.

Green: So if you have an unsophisticated opposing counsel, is it okay to search the metadata in the drafts they send you?

Bennett: There are ethics opinions on that subject – some to the effect that it is devious to do so without indicating to the other side that you've found something. This is in line with the basic ABA rule on inadvertent production of information, to the effect that you should notify the other side. So it would be inappropriate if you found something in the metadata and failed to tell the other side – that would be inappropriate.

Szekeres: And yet there have been some pretty significant situations where the metadata buried in the Word document would become sort of the focal point . . .

Bennett: Oh, there's no question with metadata, you have much more powerful information than you would ever get out of the paper. You know, for example, when things were created, when they were modified, who made comments, exactly what those comments were.

When the government uses Facebook or LinkedIn, are they considered records for purposes of Freedom of Information requests?

Green: But, I mean, in litigation you want to get things in their electronic form. You want . . .

Bennett: You want it searchable.

Green: That's different from when you're corresponding in a transaction or litigation or whatever with counsel. You are not supposed to make evidentiary use of their letters to you. The New York State Bar Association has said it is uncivil, unprofessional, to review metadata. Other bar associations have said it's the problem of the sender.

Szekeres: I have heard recently that certain firms have turned over discovery material with no metadata, and the judge has turned around and said, you can't do that.

Bennett: One of the classic cases on this subject involved somebody taking tens of thousands of sheets of paper, throwing them up in the air, reshuffling them and handing them to the other side as document production. You're not supposed to do that. The rules are pretty clear – you're supposed to keep them as they were originally kept, or organize them according to categories. If you give me a database in paper form, it's utterly useless. Reams and reams of lines that I can read, but I can't analyze. Judge Waxse, in the District of Kansas, said that analyzing this information is key to the case. You have to make it available to the other side in that same analyzable form. Metadata allows that analysis, but a lot of other metadata is just garbage – the font, the margins. Who cares? So it becomes a question of whether you can make some showing that the particular metadata that you're talking about is likely to be useful.

Question 5 – Facebook and FOIL

Szekeres: When the government uses Facebook or LinkedIn, are they considered records for purposes of Freedom of Information requests? How should the government prepare to comply with FOIL requests when they don't host these sites?

Salkin: We don't have an opinion in New York on that, but the Florida Attorney General, responding to a question about Facebook pages, said that they are records. Facebook is not hosted by the municipality or governmental entity. To be on the safe side, many municipal attorneys now advise their clients to regularly make copies and retain copies, because we are not exactly sure

When does posting something on a blog or participating in a chat room or Skyping cross over from advertising into solicitation?

whether or not it is the municipality's responsibility to provide these pages.

McCarron: Interestingly, services have popped up which allow for the archiving of social media pages. Information will be archived on a daily or weekly basis, by taking a snapshot of everything in your Facebook, Twitter, or other social media – whatever the municipality or the company is using – in order to preserve it for e-discovery later on.

Question 6 – Blogging

Salkin: I was hoping that we might be able to talk about lawyers and academics – like myself – who set up blogs to distribute information, and people contact you with questions. We need to be sure not to create the appearance or the belief on the part of the questioner that there is an attorney-client relationship. I find this problematic on my blog, because I allow comments in the hope that people will share information about cases in other states, but I often get legal questions as well. I've tried to be polite and respond, but my pat response now is: Thank you for looking at the blog. Thank you for your question. I'm not engaged in the private practice of law. I can't answer your question. I'm not licensed in Pennsylvania or Kentucky or California. You really need to consult an attorney in that state. When it involves people from New York or New Jersey, where I am licensed, I have to dance around that in another way, but I really avoid answering the questions, even if I think I know the answer, because I don't want the appearance that I'm giving legal advice. I think it's more problematic for law firms that have blogs, because the firms promote themselves through their blogs as a way to attract clients.

Szekeres: It is not just the law firm. What if an associate is at home blogging and on their profile they show where they work? If the associate answers questions or comments on legal matters, do they represent the firm when they speak? And do informal online communications give rise to conflicts of interest that affect the whole firm?

Green: And how does a prospective client become an actual client? Model Rule 1.18 defines prospective attorney-client relationships and establishes a duty of confidentiality to prospective clients. A prospective client is someone who seeks legal assistance. Generally, when someone gives you unsolicited information, it doesn't create an attorney-client relationship, but a lawyer who invites emails or questions on her blog basically invites the creation of a lawyer-client relationship, and the emails create a duty of confidentiality.

Salkin: Some people want to post their comments on the blog, and I moderate my blog. I do not allow every comment to be posted. I'm not a governmental entity, so I don't have to do that, but I have emailed people off-line to the effect that I'm not posting your comment because you've provided personally identifying information about people and situations. I'm not sure that you really intended to post something that everybody could read. I'm not sure if you were trying to message me personally, or if you wanted this posted.

Bennett: Even if you're not practicing law, you may be subject to disciplinary restrictions in another jurisdiction by virtue of these sorts of communications. I think it starts by being as clear as possible as to where you are licensed. I'm only licensed to practice in New York, so you can assume that I have no intention of practicing outside New York without authority. I also think that there's some value in being clear that whatever you put up on a blog is for informational purposes only. It's not a solicitation of an attorney-client relationship.

Green: One of the questions is whether you plan to pick up clients in other jurisdictions. If you're a New York lawyer, but someone in Virginia who reads your blog or website is willing to hire you, and you're willing to do work for them, then Virginia is going to say that you're subject to Virginia advertising rules and unauthorized practice of law, because you're practicing law in Virginia, even though you are physically in New York. Conversely, if you're blasting this stuff to the world from New York, but you're only representing New York clients, I don't think Virginia is going to care too much.

Szekeres: The great thing about blogging, wikis, Facebook, and websites is that suddenly you're projecting yourself far beyond your locality.

Bennett: Not to mention the fact that there are circumstances where you know the access point is someplace else. A client walks into the firm's office in Beijing and says there's a problem in New York. Can you help? The Chinese lawyer on site is the first point of access, but the matter really is a New York matter, and it's perfectly appropriate to forward the problem to the New York office. In fact, that's what large law firms were built to do – to refer internally to get the proper service.

Question 7 – Advertising or Solicitation?

Szekeres: When does posting something on a blog or participating in a chat room or Skyping cross over from advertising (which is allowed) into solicitation (which is prohibited)?

Bennett: The key differentiator according to the Model Rules of Professional Conduct is that real time in interactive communication is treated as solicitation, but sequential communication is treated as advertising. If it is in real time, it's the moral equivalent of calling somebody up on the phone and saying, "Please hire me." It's interactive. You're asking the person to respond. And so that analogy can be applied to things like Facebook, in which somebody interjects themselves into a situation and asks for a response in real time.

Green: New York has a kind of odd definition of solicitation. The standard notion is that advertising involves billboards, ads, television, and other media, and solicitation is reaching out to some individual by telephone or in person. New York defines a lot of what we usually think of as advertising as solicitation if it involves targeting particular individuals. That doesn't mean it's impermissible. It just means it's defined differently, and subject to a stricter set of rules.

Question 8 – Friending

Szekeres: When is it permissible to "friend" somebody during the course of a litigation or any sort of matter where what you're trying to do is friend an adverse witness for purposes of learning information that could be used to impeach that witness?

Salkin: You can't do it. But can you friend a judge? It's another variation on the appearance of campaign contributions. Now it's even more in your face when people can see that the lawyer appearing before the judge is friends with the judge on Facebook. What about people appearing before quasi-judicial bodies like zoning boards of appeals being Facebook "friends" with board members, or connecting with them on LinkedIn? It's a lot different, because there are relationships in the community with lots of different people, but when a relationship is memorialized on the Internet for people to see, it somehow rises to a different kind of appearance.

Green: There are a lot of judicial opinions in the federal district court in New York that allow some use of deceit in evidence gathering, and I'm not sure why those opinions wouldn't apply to the social networking context. I'm not advocating that people should engage in "deceptive friending" – pretending to be someone who you're not – but if you're honest about who you are, then none of the opinions forbid it.

Bennett: City Bar Opinion 2010-2 says it is permissible to use your real name and profile for friending requests. State Bar Opinion 8-43 says you can look at social media information freely even if you're not a friend, and you do not have to friend anybody in order to get it. You can go onto an adversary's website, right, and make copies of information on the site. You can go on a website and buy something in your own name. It may be different, however, to pretend to be somebody you are not.

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for over 24 years and is "of counsel" to Ressler & Ressler in New York City. He is the author of *New York Civil Disclosure* and *Bender's New York Evidence* (both by LexisNexis), as well as the 2008 and 2012 Supplements to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches New York Practice, Professional Responsibility and Electronic Evidence & Disclosure at Brooklyn Law School. He serves on the Office of Court Administration's CPLR Advisory Committee, as Associate Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee, and is a frequent lecturer and writer on these subjects.

"I Thought That Was Confidential"

Introduction

Approximately 33 million people worldwide are infected with HIV, but recent news reports offer the very real possibility, for the first time, that an HIV-infected person may have been cured of infection.[1] Confidentiality issues surrounding HIV infection have existed almost as long as the disease itself has been known. The disclosure of HIV medical information in New York state courts is regulated by N.Y. Public Health Law § 2785, which provides:

> Court authorization for disclosure of confidential HIV related information
>
> 1. Notwithstanding any other provision of law, no court shall issue an order for the disclosure of confidential HIV related information, except a court of record of competent jurisdiction in accordance with the provisions of this section.
>
> 2. A court may grant an order for disclosure of confidential HIV related information upon an application showing: (a) a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding; (b) a clear and imminent danger to an individual whose life or health may unknowingly be at significant risk as a result of contact with the individual to whom the information pertains; (c) upon application of a state, county or local health officer, a clear and imminent danger to the public health; or (d) that the applicant is lawfully entitled to the disclosure and the disclosure is consistent with the provisions of this article.
>
> 3. Upon receiving an application for an order authorizing disclosure pursuant to this section, the court shall enter an order directing that all pleadings, papers, affidavits, judgments, orders of the court, briefs and memoranda of law which are part of the application or the decision thereon, be sealed and not made available to any person, except to the extent necessary to conduct any proceedings in connection with the determination of whether to grant or deny the application, including any appeal. Such an order shall further direct that all subsequent proceedings in connection with the application shall be conducted in camera, and, where appropriate to prevent the unauthorized disclosure of confidential HIV related information, that any pleadings, papers, affidavits, judgments, orders of the court, briefs and memoranda of law which are part of the application or the decision thereon not state the name of the individual concerning whom confidential HIV related information is sought.
>
> 4. (a) The individual concerning whom confidential HIV related information is sought and any person holding records concerning confidential HIV related information from whom disclosure is sought shall be given adequate notice of such application in a manner which will not disclose to any other person the identity of the individual, and shall be afforded an opportunity to file a written response to the application, or to appear in person for the limited purpose of providing evidence on the statutory criteria for the issuance of an order pursuant to this section.
>
> (b) The court may grant an order without such notice and opportunity to be heard, where an ex parte application by a public health officer shows that a clear and imminent danger to an individual whose life or health may unknowingly be at risk requires an immediate order.
>
> (c) Service of a subpoena shall not be subject to this subdivision.
>
> 5. In assessing compelling need and clear and imminent danger, the court shall provide written findings of fact, including scientific or medical findings, citing specific evidence in the record which supports each finding, and shall weigh the need for disclosure against the privacy interest of the protected individual and the public interest which may be disserved by disclosure which deters future testing or treatment or which may lead to discrimination.

6. An order authorizing disclosure of confidential HIV related information shall:

(a) limit disclosure to that information which is necessary to fulfill the purpose for which the order is granted; and

(b) limit disclosure to those persons whose need for the information is the basis for the order, and specifically prohibit redisclosure by such persons to any other persons, whether or not they are parties to the action; and

(c) to the extent possible consistent with this section, conform to the provisions of this article; and

(d) include such other measures as the court deems necessary to limit any disclosures not authorized by its order.[2]

On the civil side, disclosure of HIV records has been ordered (often with redaction of identifying information), *inter alia*, in cases where there is a claim of wrongful transmission of the AIDS virus,[3] in claims arising from allegations of HIV infection caused by a blood transfusion,[4] and fraudulent concealment of the AIDS virus.[5] Of course, in each of these cases, infection with the AIDS virus was the central element of damages.

However, a separate line of cases has addressed the disclosure of medical information relating to HIV infection of plaintiffs in personal injury actions where the injuries claimed have nothing to do with HIV infection. Instead, disclosure is sought by defendants in those cases based upon the claim that HIV infection is relevant to a plaintiff's claim of permanency and future pain and suffering. The most recent, and potentially far-reaching, decision in this area was handed down June 20, 2012, by the Second Department in *Doe v. Sutlinger Realty Corp.*[6]

Doe v. Sutlinger Realty Corp.

In *Doe*,[7] the plaintiff commenced an action for personal injuries resulting from a fall. During the course of disclosure, the defendant received records indicating that the plaintiff was HIV positive. The defendant demanded medical information and sought to question the plaintiff at his deposition concerning his HIV status; the plaintiff refused. The plaintiff thereafter filed a note of issue, and the defendant moved to vacate the note and compel outstanding disclosure, including that relating to the plaintiff's HIV status. The trial court granted the motion to vacate and referred the disclosure of the plaintiff's HIV status to a special referee, at which point the plaintiff appealed.

A unanimous Second Department held:

> Here, the Supreme Court properly applied the requirements set forth in Public Health Law § 2785 for the discovery of confidential HIV-related information. The Supreme Court properly found that the plaintiff put his HIV status in issue by commencing this action and alleging that he suffered permanent injuries and a total disability as a result of the accident. Furthermore, the Supreme Court properly found that the plaintiff's life expectancy would be relevant to an award of damages, and that ignoring the plaintiff's HIV status would violate the defendant's right to a fair trial by seriously hindering the defendant's ability to mount a defense based on a claimed shortened life expectancy.
>
> Contrary to the plaintiff's contention, the Supreme Court did not merely assess the relevance of the requested medical information, but, in effect, considered and concluded that the defendant may have a compelling need for the requested HIV-related information. The Supreme Court appropriately referred the matter to a special referee to "hear and report" on the "statutorily required findings," which we interpret to mean the statutorily required findings under Public Health Law § 2785(2)(a) and (5). In essence, the Supreme Court properly directed a fact-finding hearing on the issue of whether there is a compelling need for each item of HIV-related discovery sought by the defendant.[8]

Disclosure of HIV records has been ordered, *inter alia*, in cases where there is a claim of wrongful transmission of the AIDS virus, in claims arising from allegations of HIV infection caused by a blood transfusion,and fraudulent concealment of the AIDS virus.

To be clear, the holding in *Doe* is that the trial court's referral to a special referee to conduct a fact-finding hearing on the merits of the defendant's request for the plaintiff's HIV records conformed to the requirements of Public Health Law § 2785. The Second Department did not hold that exchange of those records was required.

Prior Cases

The only other appellate authority addressing a demand for HIV-related medical information in a personal injury action where HIV infection was not an injury alleged in the lawsuit, *Catherine D. v. Judy*,[9] involved essentially the same issue as *Doe*.[10] In *Catherine D.*, a dental malpractice action, the defendant sought the release of the plaintiff's HIV and drug/alcohol records, and the plaintiff cross-moved for a protective order. The trial court denied the plaintiff's cross-motion and

directed the exchange of the records. But the First Department reversed, holding that the trial court had failed to evaluate the disclosure requests as required by Public Health Law § 2785:

> Supreme Court did not review defendant's request under the "compelling need" standard. Rather, the court essentially employed the general standard for disclosure, i.e., material and necessary for defense of the action. We therefore remand the matter to Supreme Court to determine whether defendant has demonstrated a compelling need for any HIV-related information. On remand, Supreme Court should also consider whether disclosure of information regarding substance abuse treatment, if any, is warranted.[11]

Again, to be clear, the First Department did not hold that the records were not discoverable, but that the mandates of Public Health Law § 2785 had to be followed. There has not been, to my knowledge, an appellate case in New York reviewing a determination by a trial court, properly made under Public Health Law § 2785, directing the release of HIV records in a personal injury action where the injuries claimed did not include HIV infection.

Application of the Holding Beyond Instances of HIV Infection

The Second Department holding, "that the plaintiff put his HIV status in issue by commencing this action and alleging that he suffered permanent injuries and a total disability," taken in context, means that a plaintiff who is HIV positive and alleges permanency as a result of a claim of injury not based upon HIV infection faces possible disclosure of his or her medical records relating to HIV infection. Such disclosure will be utilized by the defendant to support a defense that the plaintiff's future damages, based upon the permanence of the physical injury alleged in the lawsuit, is limited in duration as a result of the plaintiff's underlying HIV infection.[12]

However, the Second Department holding is not limited to potential disclosure of a personal injury plaintiff's HIV infection. What other medical conditions does "a plaintiff put . . . in issue by commencing [an] action and alleging that he suffered permanent injuries and a total disability"? A history of cancer, heart disease, and diabetes, to name just a few, have the potential to impact a "plaintiff's life expectancy [and] would be relevant to an award of damages."

Underlying the holding and potential impact of *Doe v. Sutlinger Realty Corp.* are issues involving the voluntary or inadvertent disclosure of a plaintiff's HIV infection, case law relating to claims of loss of enjoyment of life,[13] the burden of proof in demonstrating a "compelling need," issues concerning the speculative nature of certain evidence, and the prospect of "turning the fact-finding process into a series of mini-trials."[14] These and other issues will be the subject of the next column.

Conclusion

With the Labor Day weekend come and gone, and summer vacations becoming a distant memory, it is back onto the treadmill for all of us. I hope all readers took and enjoyed some time away from the practice of law and have a renewed vigor for, and interest in, the necessary and important work we all do. See you in court. ■

1. *See* Andrew Pollack, *New Hope of a Cure for H.I.V.*, N.Y. Times, Nov. 29, 2011, p. D1.
2. Pub. Health Law § 2785.
3. *Plaza v. Estate of Wisser*, 211 A.D.2d 111 (1st Dep't 1995) (court held Pub. Health Law § 2785 trumped physician-patient privilege and that policy goal of preserving HIV confidentiality status did not apply to individual who was deceased).
4. *Chambarry v. Mount Sinai Hosp.*, 161 Misc. 2d 1000 (Sup. Ct., N.Y. Co. 1994) (exchange of records of other cases or allegations of transfusion with HIV-infected blood ordered, but with patient identifying information redacted).
5. *Flynn v. Doe*, 146 Misc. 2d 934 (Sup. Ct., N.Y. Co. 1990) (plaintiff alleged defendant fraudulently concealed his HIV status when he had unprotected sex with her).
6. 96 A.D.3d 898 (2d Dep't 2012).
7. *Id.*
8. *Id.* at 899 (citations omitted).
9. 38 A.D.3d 258 (1st Dep't 2007).
10. A 2001 First Department case, *Trevino v. Davis*, 283 A.D.2d 156 (1st Dep't 2001), addressed a plaintiff's voluntary disclosure of his HIV status at a deposition in the context of a motion for a protective order for those records and seeking a contempt sanction against defense counsel.
11. *Catherine D.*, 38 A.D.3d at 259 (citations omitted).
12. It is ironic that this issue comes to the fore just as a possible cure for HIV infection may have been discovered.
13. See the September 2011 Burden of Proof column, "You May Say Something," NYSBA *Journal*, Sept. 2011, p. 16 and the October 2011 column, "All in the Family," NYSBA *Journal*, Oct. 2011, p. 18. These Bill of Particulars columns discussed claims of loss of enjoyment of life, and the impact of such claims, on the scope of disclosure of a plaintiff's medical history.
14. *Andon v. 302–304 Mott St. Assocs.*, 94 N.Y.2d 740 (2000) (Court of Appeals quoting from underlying First Department opinion).

"Exactly how badly do we need to win this acquittal?"

EXCEPTIONAL PANEL **CONVENIENT LOCATIONS** **REASONABLE RATES**

New York Law Journal Reader Rankings — Winner Best ADR Provider NAM 2011

NAM CHOSEN AS THE #1 ADR PROVIDER
IN 2011 NEW YORK LAW JOURNAL RANKINGS SURVEY

NAM®
NATIONAL ARBITRATION AND MEDIATION®

The Better Solution®

122 East 42nd Street, Suite 803, New York, New York 10168

Additional Locations: Garden City, Brooklyn, Westchester and Buffalo (800) 358-2550 www.namadr.com

Reflections on Transitions: Things I Have Learned

By Jessica Thaler

Have you ever felt as though you are having a bad day, bad week, bad month, bad year, bad decade? I found myself having all of the above simultaneously. I was unhappy at my job, going through a bunch of personal struggles and feeling very alone, estranged, disregarded, unsatisfied and lost. I was in my mid-30s, single and living in New York City, one of the most exciting and wonderful and lonely places you could possibly inhabit. I had a constant internal struggle between what I was "supposed" to be doing and how I was "supposed" to be living at that stage of my life, and disliking what I was doing and how I was living. I felt like I was constantly in an uphill battle with The Abominable Snow Monster of the North, who was constantly hurling meteor-sized snowballs at me.

"Work is just a means to live" was the motto my father said my grandfather lived by. As wonderful and enlightened as it sounds, in this day and age, with the advent of the computer, the Internet, the cell phone, Citrix, video conferencing, the Treo, the BlackBerry, the iPhone, email, cloud computing, virtual conference rooms, Skype and more, there is no longer a distinction between work time and family time. My grandfather was a hard worker. He came out of the Depression, working and building a very healthy nest egg for his wife and children despite his lack of formal education. (He got his high school diploma the year before I did, his pride hiding that fact from his children and grandchildren – only my grandmother knew the truth.) But his workday was early morning until early evening, not 48-hour stints in the office. His workweek was generally five days, not back-to-back weekends making

Jessica Thaler is a lawyer in New York City, practicing as a corporate-transactional generalist, counseling clients in connection with various types of corporate transactions including lending and finance, mergers and acquisitions, development and cooperation, services, real property and licensing, in the fields of sports, media, telecommunications, biopharmaceuticals, videogames and virtual worlds, entertainment, environmental, mobile advertising, technology and construction, among others. She is also a member of the New York State Bar Association and serves as the Chair of NYSBA's Committee on Lawyers in Transition, as Co-Chair of Membership of its Entertainment, Art and Sports Law Section and as an active member of the Sports Lawyers Association. Ms. Thaler is a graduate of UCLA, *cum laude*, and Fordham University School of Law.

one week flow undetected into the next. It was not awful if a person did not love what he or she did because work could be compartmentalized, as people knew there was an end to each workday and each workweek. Work as a means to an end was not a daunting statement.

The Plunge

At the time my father shared these words with me, I was struggling to find purpose in what I was doing and to find happiness and satisfaction professionally. I kept hearing my grandfather's words; I understood them intellectually, but they were not bringing me comfort or helping me get through the day. I wanted more out of my job and my career. I wanted to enjoy what I was doing each day because I was spending far too much time working not to. It was 2008. I left the firm I was working for to pursue my dream, but my timing was off. My expertise and client relationships were in banking and finance, an industry that was the heavy stone pulling the economy down, so, like many others, I found myself looking for a new job. And like many others finding themselves in transition, I found myself feeling like I was alone.

Every situation is different. Some people have money saved. Some have a spouse or other life partner who can help alleviate some of the financial pressures or provide the needed emotional support. Some choose to move home. Some pretend the transition is not happening. Some have a great deal of education. Some have little. Some are very senior level. Some are very junior. Some will choose to grab their passport and take off on a trip to restore the soul. Some will not be comfortable taking even one day off until they have found something. Some will become a hermit and speak to no one. Some will go to therapy or turn to religion for guidance. Some will speak to anyone willing to lend an ear. Some will spend their days working out. Some will spend them goofing off. Some will focus on all the home projects they had been meaning to do for years. Some will wake each morning and spend hour upon hour searching through websites for jobs. Some will attend conferences. Some will fill their schedule each day with coffee, lunch and drink dates – all in the name of networking. Some will have supportive family and friends. Some will want to divorce themselves from their family and friends. Some will become sleepless, get stomachaches and have their TMJ act up. Some will breathe deeply for the first time in years. Some will cry. Some will be angry. Some will look at it as a blessing. Some as a curse. For me, I was able to identify with and directly relate to many, if not most, of these people at some point during my transition.

Working Within and Without

Transition is discouraging. It can be very hard to stay positive. I have been in transition for a while now and, during that time, I set up my own firm. I get an unsteady flow of work from clients and other small and solo firms and have obtained a full-time contracting position for which I am grateful, especially when the ebb and flow of my practice starts to weigh on me. I have made it work. I have struggled, failed, fallen down and been scraped off the floor. I have spent hours talking to many people. I discovered that, upon first hearing that a person is in a job search, people are generally very sympathetic, offering drinks, hugs, advice, contacts and more. It is not that sympathy wanes as the months of searching go on but rather that people just do not know what more to say.

Transition is discouraging. It can be very hard to stay positive.

I have read countless books and attended numerous seminars trying to figure it all out. I do not have all the answers but I have made great strides in my outlook, which has significantly improved my access to opportunities, personal and professional relationships, as well as my physical and mental well-being.

When I first started to look for a position, I was in a very negative place, the victim, fighting for control over things I would never have control over, looking for answers and explanations where there were none. I have learned many things about control (or the lack thereof), about how things work (and do not work), about people and about myself. Someone recently commented that I appeared much calmer, happier, at peace and, after we spoke about what had changed in my life and my outlook, he smiled and asked, "So, you have finally accepted your situation?" I thought about it and answered, with a grin, "No, I have surrendered to it."

Whether characterized as surrender or acceptance, I have come to realize that the key is understanding that I can actually control only a small part of my transition. I can control what I do, how I present myself and how I take care of myself. I have little to no control over how I am perceived, even when I put my best foot forward, what assumptions people may make, what is going on with the economy, how many people I am competing against, the decisions a business makes concerning its hiring needs or the candidates it chooses. All I can do is to understand that a large part of the process is luck, collect rejections and know that after an indeterminate number of rejections, I will find something. In the interim, while I keep pushing, applying, interviewing and getting rejections, I need to take care of myself.

I have had many leads. I have had offers that I turned down and some that were reneged due to a change of

financial circumstances of the company. I have quadrupled my already large network. I have joined every jobsite and every social networking site. I have gotten contract work. I have started my own business. I have spent multiple hours per day making calls; attending meetings; emailing; writing and rewriting my resume, my cover letter and my biography. Not being a coffee drinker, I have never visited as many different Starbucks as I have during this time of transition. I went from never having a cup of coffee to having a few each week. Despite being someone who does not enjoy working out, I have become a regular at the gym, if only to get out of the house for an hour or so each day. I have taken up drawing and painting again after not picking up a brush in more than 14 years despite having started college as an art major. I have learned to enjoy a quiet night at home and stopped filling my evening calendar to the brim. I have come to appreciate the day away from the City with "away" being the suburbs, as opposed to an alternative continent. I have spent the day with the TV on from 7:00 a.m. until midnight without knowing what I watched, as it was on only to provide the companionship and background noise I used to get by being in an office surrounded by others. I have started to learn that asking for help is okay. I have learned how to just say "thank you" when someone offers to pick up the tab, whether for a cup of coffee or for a meal, and not to feel guilty about it. I have gotten further involved with volunteer work – Make a Wish, the Red Cross, my alumni associations and more – figuring if I cannot feel fulfilled while making money, I will seek that fulfillment through doing good for others.

Fullness of Transition

Transition is a word I have used much more frequently since 2008, and I have recognized that it has many meanings. With regard to a career transition, it may mean a person is looking for a position after a layoff, after raising a family or after some other hiatus from working, generally; starting his or her own firm or business, or leaving one or the other; shifting to a different industry focus or type of organization or role; or entering or exiting from a profession. No matter the form transition takes, I have come to realize the experiences and emotions and methods for managing, prevailing or coping in the face of those experiences and emotions have many commonalities. It is scary, exciting, daunting, fun, frustrating, fulfilling and stimulating all at one time. What has gotten me through this process so far?

Accepting, or surrendering to, my circumstances. I have come to understand and embrace the reality that there is an element completely in the hands of the universe, the almighty, faith, karma, luck, or however else the unknown can be characterized, and it plays a large role in reaching the end goal of this transition process. I do need to take control of the things that I do have control over and take comfort in that fact. If I do everything I can actually do that I have control over, the only thing left to do is become comfortable with the fact that there is nothing more I can do other than wait for the stars to come into alignment. (If only I could control the stars.)

Allowing myself to feel down. This is not a call for martyrdom but rather a knowledge that transition is hard, very hard, and there will be good and bad days in the process. Both the good and the bad are to be expected. I try to remember that I am not made of steel, as much as that was a hard reality to grasp, having always prided myself and presented myself as someone who can handle anything thrown at me. However, accepting my vulnerability was liberating. It allowed me to say it is okay not to plan six meetings in a single day, to take a few days off from submitting job applications, to spend a few hours or a full day on the couch watching mindless TV, crying off and on, not answering the phone, to let my friends and family see my fears and then allow them to take care of me.

Forgiving people who do not know what to say to or do. People want to help. They care for me. But, not knowing what to say, they will often try to provide a pep talk or words of wisdom and inspiration. Although these words often feel empty, obvious and annoying, they do come from a good place, normally. I also have come to understand that they can stem from the other person's fear that he or she may end up in the same position as me and that they do not know how to tackle that fear or how they would possibly get through what I am managing my way through. If nothing else, these words often do work great as screensavers. Once I had compiled a list of proverbs so long that I was able to ensure the ability to change them monthly for the next three to four years, how did I avoid an unintended feeling of resentment for and frustration with these well-intended friends, family members and colleagues? I worked up the courage to tell people what I needed, whether it is meeting me at Starbuck's, for a quick lunch, a movie or just a hug. They do want to help. Most will be very grateful to know how they can help and be supportive.

Getting – even more – involved. Once people come to know of you as doer, as someone looking for networking opportunities, for ways to enhance your resume, you will be asked time and again to do one more thing, join one more committee, plan one more event, write one more article or speak on one more panel. With all the positives of this predicament, it did often leave me struggling to balance my sanity with what I thought I "should" do and trying to come through for everyone. I tried to set up rules as to how many things I would take on, meetings I would agree to and activities I would participate in daily, monthly and weekly, but I have found that nothing in my job search has been more beneficial than the volunteer work I have done, whether with

professional organizations, nonprofits or otherwise. As a result, I quickly gave up on those rules. When I feel at my most overwhelmed and find myself struggling to prepare for, or even just get dressed for, yet another meeting, I remind myself that "you never know from where the next great opportunity will come." It has proven true time and again.

Realizing I am not alone. Although misery does love company, although we have all had the nights commiserating with colleagues and friends and although the occasional evening of venting can help me to feel better, I have learned that a "woe is me" mentality not kept in check will throw me quickly, and with added velocity, down Alice's rabbit hole, nothing to grab onto, walls too slippery to brace against, no cushion identifiable below, in the dark, hearing scary noises (sounding very much like insults) emanating from the abyss. I found the best thing to do is talk with people who are transitioning but who are also being proactive and those who have recently successfully transitioned. Those compatriots can provide a knowing nod and sympathetic smile when I am describing the latest sleepless night, my frustration that an opportunity fell through, my exasperation with feeling like my resume is in the void somewhere and my fear of an interviewer's unexplained silence. They will be less likely to walk me so close that I find myself teetering on the edge of the rabbit hole and more likely to ask why, exactly, it is that I am even looking into that hole again. They will help me see that hole ahead, recognize it is there, understand why it is appearing, and help me to steer in another direction. They will also understand the bumps and bruises I may have after a recent fall and may have a trick for alleviating the lingering pain and discomfort.

Knowing I am, and my situation is, not unique. It is not as harsh as it sounds. Despite always being praised for and encouraged to be unique, and in many ways I am very much my own person, and although my specific situation differs in degrees, the commonality I share with others in transition is just that – being in a state of transition. That process brings about uncertainty, vulnerability, stress and fear. As much as acceptance of this lack of distinction was a blow to my ego, when I finally accepted it, I was able to take a deep breath, recognize that there are others similarly situated who have survived this before, will survive it again and, because I also possess many of the same skills, education, resources, resilience, strength, perseverance, power, spirit, desire and drive, I too will survive. And, not only will I survive, I will succeed in my transition.

There Just Will Be Bad Days

Despite all the good, all the hard work and having a great screensaver, there are still those days that are just bad days. The days when I decide I will never work again. I will never be successful. I am a failure. I never deserved to get where I was prior to this transition. For me, those days tend to happen when a job opportunity falls through, whether after one or more interviews or, sometimes, after finding out it has been filled before even having had the opportunity to interview. It is the day when I am told "you're too senior" and "we need someone to hit the ground running" during two separate conversations regarding two similar positions at two different companies. It is when I am heading to a wedding, a baby or bridal shower or a birthday and want to get a gift, knowing I would have gotten a "better" gift if I were in a different financial position. Those days also happen after having a great meeting or interview, when I become so fearful of getting my hopes up, I begin convincing myself that it will not happen before the BlackBerry can even reset itself and start receiving the emails and texts that came through while on the interview.

I have to work hard to get myself through those days. I battle my demons. I know I will not get through every day unscathed. I am learning to have compassion for myself. I am figuring out what I need to feel safe and supported and to seek it out, to take care of myself, to put myself first when I need to, to allow myself to feel and to just be, and to know, at risk of using one of much dreaded proverbs, "this too shall pass."

Moving From Negative to Positive

I truly believe that this will pass and that this period of my life, although challenging in many ways, is part of the cycles that we all must go through in our lives. I believe that, at some point, having had the courage to go out on my own to build a practice, the ability and expertise to acquire and service clients of various sizes and structures in a multitude of industries, the resourcefulness and fortitude to find and maintain a full-time (and now very long-term) contract position that adds to my experience and supplements my income, the altruism and ambition to volunteer for (and often take a leadership role in) professional, philanthropic and other organizations, the initiative and sociability to expand both my personal and professional networks and the great appreciation for and the good fortune to have people in my life who have advised, supported, mentored, listened, assisted, comforted, encouraged and even just hugged me, will all work collectively not only to allow me to find a new job but also to permit me to find professional and personal satisfaction and fulfillment in and through that new job. Like Rudolph who turned his bad experience with The Abominable Snow Monster of the North into friendship, I know that I will look back at this time of transition with the knowledge that I embraced that which scared and challenged me, and transformed my experience into a positive one. ■

Gary Munneke (gmunneke@law.pace.edu) is Professor of Law, Pace University School of Law, White Plains, New York, and Co-Chair of the New York State Bar Association Committee on Law Practice Management. He is the guest editor of this issue of the *Journal*.

When Brahmins Bumble: Dewey Really Care?

By Gary Munneke

The first time I visited Dewey, Ballantine, Bushby, Palmer & Wood was in the 1970s, when I was a young Assistant Dean at the University of Texas School of Law; I could not help but feel awed by the iconic law firm. The firm's offices were elegantly appointed and Dewey's lawyers sat perched high above the fray, perusing their dominion with inscrutable serenity. In the legal caste system, these lawyers were indeed Brahmins. Even the lobby, dominated by an immense oil painting of Governor Dewey himself, proclaimed to the world that this firm was at the summit of the legal profession.

This image of Dewey in its heyday is not meant to suggest there were no other Brahmin firms sharing this rarified atmosphere – Cravath, Milbank and a handful of other top firms could claim comparable pre-eminence. In those days New York was the undisputed hub of world lawyerdom, and these were the undisputed leaders of the New York legal scene. And it seemed to me on that crisp day in March that Dewey was the crème de la crème. So the news that Dewey LeBoeuf, successor to the Brahmin institution I visited over almost four decades ago, had filed for bankruptcy following a highly publicized and extended implosion brought a twinge of sadness that this Brahmin bastion had fallen so far.

Dewey LeBoeuf is not the first law firm to collapse in dramatic fashion (nor will it be the last). Pundits quickly pointed to the Finley Kumble debacle in the 1980s, the dissolution of Silicon Valley firms in the '90s, and the disappearance of other firms in the most recent economic downturn. Some of these have closed shop and shuttered their windows while others have been swallowed bit by bit by scavenger-firms devouring the edible morsels and leaving the bones to dry in the sun. Dewey's collapse is, however, the largest and most dramatic in U.S. history.

The legal press had a field day. Even the *New York Times* and the *Wall Street Journal* got into the act, dissecting Dewey's demise with the same journalistic gusto the tabloids give to unraveling celebrity marriages. There is something about these human train wrecks that will not allow us to look away. There is something disturbingly alluring about watching the mighty fall. For the legal profession, Dewey had celebrity status, and its demise captured the attention of lawyers everywhere.

The remaining question, however, is this: Dewey really care? Is this just a salacious tale for lawyers – "The Case of the Bumbling Brahmins" – or is there something more? Is this just a great summer read, or can we find lessons to be learned from Dewey's demise? Is it as Cole Porter said, "Just one of those things," or can other firms change their ways and avoid Dewey's mistakes?

As a law professor, I might present the Dewey issue as a multiple-choice question on a law practice management exam, as follows:

From what you know about the collapse of the Dewey LeBoeuf law firm, which of the following statements about Dewey's problems is most accurate?

(a) Dewey's problems were caused by a national economic downturn, which reduced the amount of legal work available in the legal marketplace, making the firm's economic position untenable.
(b) Dewey's problems were caused by bad management decisions, which destabilized the firm and took it down.
(c) Dewey's problems were caused by dramatic changes in the law firm business model, which rendered the firm uncompetitive in the evolving marketplace for legal services.
(d) All of the above.

The correct answer is (d) "All of the above." To understand why this is so, let's dissect the situation through the alternative answers.

The Economic Downturn

The economic analysis is fairly straightforward. As the national economy declined in 2008 following the collapse of the real estate market, there was a decline in the amount of money that people and institutions spent on legal services. Companies earned less money from their core businesses and sought to cut costs, including legal services. Other companies and many individuals simply became more cautious about spending money generally or postponed using non-essential services. Some companies did not survive the economic downturn, and the work they generated evaporated.

With less money in the market to pay law firms for services, many firms experienced a decline in gross revenues. This was exacerbated by increased economic pressures as more law firms sought to represent the clients who still had the resources to pay for legal services. Not only was there more competition from traditional firms, but the increase in multijurisdictional practice produced competition from firms headquartered in different states. Law firms outside the United States sought to represent the global clients of U.S. law firms, and non-legal professional service providers poached clients traditionally represented by lawyers.

In this declining marketplace it was inevitable that some providers would be more successful than others. What is intriguing, however, is the question of what separates the winners from the losers. Why do some firms persevere through times of adversity and eventually thrive, while other firms wither, and in some cases – like Dewey LeBoeuf – die? The answers are not easy to discern. The winners by and large stay close to the core business that made them successful in the first place. They grow organically and gradually. They read the tea leaves closely enough to retrench before the economic indicators go south. They use the bad times to retool for the coming good times. The losers expand too far, too fast. They get out in front of the economic bubble and crash when it pops. They create an infrastructure that cannot be sustained when the availability of legal work evaporates.

Dewey LeBoeuf is not the first law firm to collapse in dramatic fashion (nor will it be the last).

It is worth noting that aggressive expansion can pay off during times of economic growth. Firms that anticipate a boom in the need for legal services may be able to reach these new clients first. By taking risks in order to grow, these firms may reap significant rewards. Conversely, firms that successfully negotiate the bad times may find that their hidebound risk-averse cultures are ill-suited to taking advantage of opportunities produced during periods of economic expansion.

Ideally, a firm would know when to grow and when to go slow. In theory, a firm could be on the winning side during both expansion and decline in the economic cycle. Like the controlled breathing of a distance runner, such a firm would inhale and exhale according to the needs of its clients. In reality, this rarely happens. Most firms struggle to keep up with changes in the marketplace; sometimes they guess right and sometimes they do not. Most firms experience both the positive benefits of growth and the pangs of economic downturns without falling apart.

Dewey LeBoeuf was one of those firms that guessed wrong. They expanded as the economy collapsed. They found themselves in a position where they lacked the revenues or reserves to meet their obligations, not only to creditors but also to their own lawyers. As the situation became apparent to lawyers at the firm, those who

were able to jump ship began to do so, further undermining Dewey's stability. In the end, the firm simply imploded, as the weight of its unsustainable commitments and dwindling prospects rendered the enterprise unredeemable.

Bad Management

The second possible answer to the Dewey question is that bad management took the firm down. This answer is particularly appealing to other firms that perceive themselves as not having made the mistakes that Dewey did. They survived the recession; they may have made some tough decisions, like laying off lawyers and staff or withdrawing job offers but, unlike Dewey, they are still here. So, the thinking goes, better management got them through the bad times and economic recovery will lead to renewed prosperity.

With their merger, the two firms sought to create a legal powerhouse that could compete on the world stage.

What makes the story interesting is that Dewey did expand too aggressively to sustain itself when the economy collapsed in 2008 and the recession ensued. What is even more interesting is that Dewey seems to have made expansionist decisions just as the economic pendulum swung from growth to contraction. Whether Dewey would have survived had the economic boom persisted a while longer is anyone's guess, but many believe that the decisions made by Dewey's leadership destined it to fail.

In 2007, Dewey Ballantine merged with LeBoeuf Lamb. With their merger, the two firms sought to create a legal powerhouse that could compete on the world stage. Both Dewey and LeBoeuf had long histories of representing leading clients in their respective areas of strength: bankruptcy and corporate for Dewey; public utilities, energy and insurance for LeBoeuf. Thinking strategically, the new firm's leadership believed that its past success in these legacy practice areas might not be enough to prevail in the future, so they sought to solidify their existing practice areas and at the same time expand into new areas and markets. Eventually, Dewey LeBoeuf would dominate the evolving marketplace for high-end legal services. To accomplish this goal, the merged firm actively recruited top legal talent away from competitors by promising greater compensation – even guaranteed compensation – to join the new firm. In theory, these superstar lawyers would act like magnets drawing the best clients to Dewey.

Unfortunately, Dewey promised too much to too many rainmakers. Perhaps in an expanding economy the strategy would have worked, but the economy is cyclical, and the collapse of this house of cards was inevitable. Dewey's financial commitments to leading partners hung like the sword of Damocles over the entire firm, and as revenues dried up, the prospects for survival evaporated.

The Changing Business Model for Large Law Firms

In the background, however, is the gnawing question: Could recession and bad management alone bring down a Brahmin behemoth legal powerhouse like Dewey LeBoeuf? Shouldn't this paragon of prosperity in the legal world have had the resources and the wherewithal to retrench and retool, to shift courses and emerge to litigate another day? Shouldn't Dewey have been too big to fail?

At the risk of mixing metaphors, we might look at the fate of two ships – the Andrea Gale, portrayed in *The Perfect Storm*, and H.M.S. Titanic, the "star" of the movie *Titanic* – to illuminate what happened to the legal aircraft carrier Dewey. The Andrea Gale disappeared at sea during the chance convolution of three weather patterns, which created the perfect storm. The carrier Dewey's perfect storm also consisted of three forces: the economy, mismanagement, and a changing business model. But perhaps the Titanic story is more apropos. There, nature dropped an iceberg into the liner's path. A series of human errors before and after the ship struck the iceberg led to unspeakable suffering and loss of life. Yet, it took decades to learn that a third factor was involved – the design of the Titanic herself. From the moment Titanic struck the iceberg in the North Atlantic that evening 100 years ago, her fate was sealed. The ship's design guaranteed that her "water-tight" compartments would fill with water, one after the other, until Titanic went down. We know, in retrospect, that the intellectual arrogance involved in creating an "unsinkable" ship was flawed thinking–at best. The passenger Molly Brown may have been unsinkable, but Titanic was not.

If there was indeed a perfect storm of conditions involved in the Dewey sinking, comparing the economy to Titanic's iceberg and Dewey's managers to the ship's crew is easy enough. The third force – the design of the vessel – is more problematic. As a part of the NYSBA Task Force on the Future of the Legal Profession, I moderated discussions about whether the basic model of large law firms in the United States is sustainable. Some participants argued that the model had worked for most of the 20th century, and that although the legal marketplace is changing, this change is incremental and BigLaw firms will adapt as necessary. Others believed that a model that had worked at one time (and for a long time) is totally out of sync with the economic realities of the new marketplace for professional services. The large law firm of the future, they concluded, will be radically different from the large law firm of the past.

CONTINUED ON PAGE 32

Personalized information at www.nysba.org/MyNYSBA

Customize your own MyNYSBA page to instantly see the information you want.

When you go to the MyNYSBA page you will see just the information you have requested.

(Login is required to access your personalized content).

- The customized myNYSBA page provides information tailored to your areas of practice.
- Choose "Personal Interest Profile" to select the practice topic areas in which you wish to receive information. Your selected interests will automatically generate content into the "Articles of Interest" and "Events" area of your MyNYSBA page
- Use the gavel icon to make any page a NYSBA favorite for easy access any time.
- Choose "Personal Contact Profile" to personalize your contact preferences with NYSBA.
- Quickly find resources tailored for your stage, practice setting or firm type.

Scan this code with your phone to go to www.nysba.org/MyNYSBA

NYSBA

Continued from Page 30

Yet, it is not hard to make the case for large law firms staying the course. They have been doing what they do for decades and doing it well. They have a lock on the best clients and, in a sense, only large law firms have the resources to service the legal needs of large organizations. They hire the best talent and winnow that talent to identify the best partners. An up-or-out policy that applies to upwardly mobile partners and partnership-aspiring associates accomplishes this winnowing, so that, in the end, the law firm pyramid is presided over by a meritocracy of experienced lawyer leadership. Armed with an intellectual aristocracy, an army of workers and a network of relationships going back generations, the top firms are well-positioned to stay on top. The hourly billing system, while not perfect, is an excellent and acceptable measure of effort and value – both to clients who pay the bills and to firms as a metric to assess performance and compensation. These firms have the resources to pay for the best talent, invest in the newest technology and guard against the risks of recession, professional liability and the occasional departure of key lawyers to other firms. The fact that some firms may fail is not an indictment of the economic model but rather an indictment of the lack of competitiveness of the failed firms.

However, the countervailing position holds that everything has changed. Technology has provided tools that allow many legal services to be commoditized and permit knowledge-management systems to leverage information the way the pyramid system leveraged people. In the new process/knowledge-based model, it is possible to deliver many services more efficiently, more profitably, and more quickly, using fewer people than the old model. More subtly, whereas in the past all legal work was considered unique, and thus subject to the highest billing rates, routine work tends to be more price sensitive and subject to the market forces of supply and demand. Corporations, reinventing their own business models to become more efficient, are sophisticated consumers. They understand that they do not have to pay top dollar for routine work, although they are willing to pay more for unique or value-added services. For much legal work, however, they want discount rates for basic services, and they are willing to shop around for deals. For many clients, hourly billing represents an impediment to getting the best deal, because it masks value by placing emphasis on time rather than output or outcome. There has been a significant shift away from hourly billing to alternative fee arrangements (AFAs). Prices for commodity work are driven down by competition from other large firms, regional firms, non–U.S.-based firms, small boutique firms, outsourced services and non-legal service providers. Corporations are also less willing to fund the training of new lawyers in traditional law firms, which let new practitioners cut their teeth on basic client work. All these factors lead to one result: less revenue to sustain the old pyramid.

Law firms have responded by reducing the number of associates who become equity partners. Non-equity partners (or a number of other titles) have produced a new tier in the pyramid, and this phenomenon has in turn reduced the need to hire as many new associates to fuel the up-or-out system. Firms have increasingly turned to lateral hiring of experienced associates to allay client concerns about paying for the training of new associates, without considering the fact that if everyone hired experienced associates, where would new lawyers learn to practice law? Firms have outsourced work to both legal and non-legal contractors as far away as India. In short, the shape of the emerging firm is becoming more like a diamond, small at the top and bottom, and fatter in the middle. The total head count appears to be declining as well, as highly paid associates and junior partners increasingly become luxury purchases that do not make economic sense. Many firms are exploring AFAs in order to serve their clients and retain business, but these firms have had to examine both the human costs and the process costs of providing services using a flat-fee model. All these changes point to a very different business model for law firms in the future – at least for the largest legacy practices in the United States.

> If law firm leaders could write off the fall of Dewey LeBoeuf as a combination of a particularly nasty economic downturn and mismanagement at the top, then they could go back to business as usual.

All of the Above

In the end, the correct answer is "All of the above." The recession undermined the legal marketplace as the general slowdown of economic activity produced a decline in the amount of legal work available for law firms to handle. One of the costs that companies often cut was outside counsel fees, which translated directly to less income for law firms. Dewey LeBoeuf made a series of unfortunate decisions, most significantly the commitment of guaranteed compensation to top partners which it ultimately could not meet, triggering an exodus from

the firm. However, bad judgment and the economy alone may not have brought Dewey down. Both Dewey and LeBoeuf were strong organizations, which might have survived the crisis except for the impact of the changing law firm business model.

If law firm leaders could write off the fall of Dewey LeBoeuf as a combination of a particularly nasty economic downturn and mismanagement at the top, then they could go back to business as usual, assured that they will survive the next recession like they did this one, because they will not make the mistakes that Dewey did. What this mindset ignores is that the game has changed. Clients have more power and they will hire new outside counsel at the drop of a hat. They will turn to law firms outside the United States and even non-legal service providers to get the best representation at the best price. They are actively exploring less expensive, less time-consuming and less uncertain dispute resolution systems to replace an expensive, inefficient and unpredictable adversarial litigation system. They want a different billing model based on predictable fees, rather than hourly rates. They do not want the next generation of practitioners to be trained at their expense. They understand that much of the work that lawyers do is routine and therefore, it is commoditized and price sensitive. Law firms will have to re-invent themselves in order to meet the demands of this new marketplace.

The new law firm model will have a much smaller ownership base. Firms will hire fewer lawyers but keep more as permanent employees, although most will not become equity partners. The size of support staff will also diminish as legal process and knowledge management become automated. Many functions, including basic legal tasks, will be outsourced to individuals and organizations that can provide these functions at lower cost than the firm could if it handled them itself. The physical footprint of the law office will be dramatically smaller as fewer people will actually work at a desk in a traditional office building. A handful of global mega-firms will dominate the international legal business, and specialized boutiques will replace regional generalist firms in most metropolitan legal markets. In 10 years, most of the AmLaw 200 will no longer exist in their present form.

If you believe that the Dewey collapse was just a blip on the radar screen, destined to join Finley Kumble as another footnote in the history of American law, then you can go back to your desk, look out the window with self-satisfaction (like the Dewey lawyers of the '70s), and return to billing your hours. But if you think that what happened to Dewey might be a harbinger of what is yet to come, then you know that the answer to the question, "Dewey really care?" is this: "We Dew." ■

Anastasia Boyko
(anastasia.v.boyko@gmail.com) works at Practical Law Company, advising firms and companies on issues of legal service efficiency, attorney development and training, knowledge management and business development. She often presents on topics of legal business and project management, alternative fee arrangements, attorney-client business relationships and legal resources. Ms. Boyko is a graduate of Yale Law School and a member of the New York State Bar Association's Committee on Attorney Professionalism.

The Costs of (Inefficient) Legal Services Delivery

By Anastasia Boyko

It seems as if everywhere you turn there is another story about alternative fee arrangements. Clients now expect them, and law firm leaders have conceded that these "new" fee models are here to stay. But this isn't an article about alternative fees; this article is about the core of the fee discussion: What does it cost to deliver the services for which we lawyers charge?

In essence, profits equal revenue less cost. In an alternative fee arrangement, the revenue is predetermined in one way or another, whether as a flat fee or as an incentive tied to performance. This type of arrangement, more so than a traditional hourly billing arrangement, forces us to look to what it costs to deliver the service, because by controlling the cost of delivering the service, we can maximize the profits from these types of fee arrangements. Conversely, if we fail to manage the costs of delivering our services, it is difficult or impossible to sustain profitability. It is only by identifying the inefficiencies in how we deliver legal services and correcting these inefficiencies that attorneys practicing in the current market will be able to compete and stay profitable.

What Goes Into Delivering Legal Services?

What are the intangibles, the inherent costs of delivering legal services that aren't always quantifiable or tied to a line item in the law firm budget? As a practitioner in large New York law firms and as a consultant to firms of all sizes across the country, I have observed a number of ways to practice more efficiently. After speaking to hundreds of firms and thousands of lawyers, I always come back to the same question – Do legal service providers really know how much it costs to deliver their product? The short answer is "sort of," which is not going to help a firm thrive in today's climate.

An Investment in Human Capital

When we start to unbundle what goes into providing legal services – the lease of the office, the copy machines, the electric bill, the water bill, salaries, benefits, legal technology, etc. – the initial costs are easy to identify. But what about the investment in human capital? I became a lawyer in an era that seemed to consider associates a dime a dozen and fairly interchangeable. Our behavior

was likened to that of well-compensated mercenaries as we skipped from firm to firm for a better bonus or a better boss (or so we thought). In those pre-2008 days, associates were not investments, we were commodities to be traded and treated on whim. If we didn't get the training we needed to do our jobs, a new crop was around the corner to replace us. If we weren't happy, we could just go to another firm, a different name on a different door. These are the dangerous games firms played in the "good ol' days."

When I talk to law firm partners these days about efficiency and client satisfaction, I start with an introduction of the investment in human capital. Now this would seem to be a simple concept. If you are going to hire associates who – per the current legal economic wisdom – do not begin to cover their overhead until their third year of practice, it would behoove you to make an investment in their training and their careers. This is a good idea for a few reasons. First, you don't want them leaving you while they are still a net loss to you – that is, before that third year. (This is not good for any investment.) Second, they are the future stakeholders of your firm, so they are your *personal* investment, an investment that hopefully will provide you with some retirement income. Third, for a law practice the value of continuity is exponential. When these junior attorneys who have begun to understand your clients – their needs, their business, their plans for the future – walk out the door they take that institutional knowledge with them. Fourth, training a new associate to understand a client's business and needs is expensive and inefficient, and it definitely doesn't make the client very happy. Thus, not investing in your junior talent can cost you current and future income.

Doing It Right From the Start – The Importance of Training

So what goes into this investment in human capital? First, firms need to hire people who possess the skills and background to do the work they will be required to do, not just as associates, but also as senior lawyers in the firm. Although practice skills can be developed over time, it helps to equip hires with the tools they need to grow professionally over time. It is not enough just to hire lawyers with sharp minds or perfect pedigrees, because without a strong set of fundamental lawyering skills, the brightest recruits will fail.

The second element is training, training and more training. If we look back on what our first year of legal practice was like, most of us would agree that those never-ending months were full of worry, anxiety, insecurity and all of those other symptoms of not knowing what we were doing. Who is to blame for that disconnect is well beyond the scope of this article, but I'll venture to guess that no one institution can take the full brunt. Some lawyers got lucky; they had mentors who took the time to explain the components of a merger or a brief – the "why" and "how" that are so priceless. The practice-specific know-how that comes from experience is not often well communicated and can be hard to come by in a busy firm with busy lawyers who have long since forgotten what it was like to be green and not know the ins and outs of a transaction.

The third element is to supplement good training with resources – practical resources from experienced professionals. I have seen many savvy firms use their practical resources or leverage third-party resources for their training programs so that their billing attorneys aren't spending inordinate amounts of time training their junior attorneys. There are so many core principles to most practice areas that trying to re-teach them all internally and maintain those training materials for legislative and marketing updates is both unrealistic and not the best use of senior attorney time. Outsourcing training is often a much better solution.

The Costs of (Not) Training

The costs of inadequate training for junior attorneys are deceptively hidden, but they are massive. It is rare that an associate makes a mistake that can be directly linked to a monetary loss for the client or the firm, although we have all heard of such instances. In most cases, here's what happens: Junior attorneys are left to figure things out on their own, through trial and error. This trial and error, however, can drain hours of a senior attorney's

time walking the associate through lengthy documents to explain how and why things should have been drafted. In a less ideal (but probably more common) situation, the senior attorney duplicates the junior's research or drafting, and consequently writes off the junior associate's time, while using his or her more valuable time on junior tasks. The senior attorney would then possibly discount the time it took to duplicate the task. Duplication of work has another nefarious consequence – allocating senior attorney time away from high-value, fully billable tasks to less valuable, discounted tasks. So the cost of providing legal services in this scenario is not only the cost of the junior associate's unbilled, written-off time: factor in the reduced billing of the senior attorney's time, and the lost opportunity of the senior attorney's billing fully on another more valuable matter. Such an environment can handicap a firm in the delivery of legal services, disappoint clients and substantially limit revenue.

Adequate Legal Resources

The second set of resources critical to efficient legal services delivery is an adequate array of legal tools, which includes a combination of legal content and technology. In order for attorneys to be able to address their clients' needs quickly, they need to have the most recent legal resources at their fingertips, and these resources need to be easy to navigate and up-to-date. All of that seems intuitive, but if we realize how recently the Internet entered the realm of legal research – a profession built on precedent and old paper reporters – the idea of on-point legal guidance is a fairly new one. Many attorneys still perform their daily research tasks at the law library, continuing doing business as usual because it may be the cheapest solution available. It should be noted, however, that when the primary good you are selling is your expertise, measured most often by units of time, the time you spend doing legal research in the library that could be done in a fraction of time at your desk can end up being quite expensive. Investing in proper legal research tools, most notably online "efficiency" tools, can help both large- and small-firm lawyers harness more profits through the efficiencies realized.

In a larger sense, legal research should complement and integrate with the organization's internal work product database. For example, if a firm has already conducted research on a particular topic, updating its existing research is less time-consuming than starting the research effort from scratch. To do this, the firm needs to be able to identify and retrieve its prior work in a format that can be effectively re-used and supplemented. Conceptually, the firm owns a substantial knowledge base, or intellectual work product, which it can leverage to the advantage of its clients and ultimately to its own benefit. The more sophisticated this knowledge-management process becomes, the more the firm will be able to reduce delivery costs and at the same time improve the quality of its work.

Outsourcing parts of this knowledge management can be far more efficient than trying to do it all yourself. A recent study that Practical Law Company commissioned with OMC Partners in the UK (where knowledge-management systems and efficiencies are well ahead of those in the U.S.) looked at how law firms use actual legal knowledge as a driver of efficiency. Interviewees included partners, associates and heads of knowledge management in leading UK law firms, which many U.S. firms look to as models of efficiency. The study identified common barriers to efficiency as well as successful best practices to achieve a better, faster and more profitable practice. It concluded that by harnessing a firm's internal knowledge correctly, the cost of delivering legal services could be cut by 25%.

> It is not enough just to hire lawyers with sharp minds or perfect pedigrees, because without a strong set of fundamental lawyering skills, the brightest recruits will fail.

Legal Process Management

Richard Susskind, in *End of Lawyers? Rethinking the Nature of Legal Services*, repeatedly reminds us that much of legal work is routine work that can be managed by creating a process that consistently delivers the same quality output with the least amount of work. Such a proposition rubs many attorneys the wrong way (not surprisingly). We tend to think of our profession and the corresponding legal work as "unique" and not routine, but the truth is that much of legal work *is* routine. How often do we use the same agreement as the basis for a new transaction or rely on the same brief to begin a new argument? Relying on precedent is at the core of the legal profession, and much of legal work is consequently repeatable.

Accepting this proposition is the first step toward implementing efficiencies in the costs of legal services delivery. Once attorneys acknowledge that they can streamline routine work, for example by relying on and tailoring up-to-date forms, they can begin to reap the benefits of a legal process management system, one which allows them to recreate the routine work in the same matters in the most efficient way possible. Many law firms are thinking about how to re-engineer legal processes to make

them more streamlined and efficient. However, this is a topic that warrants an article of its own.

Lessons Learned

As many lawyers already know, the legal landscape in which we currently exist is drastically different than the one in which many of us were trained. This new landscape is fiercely competitive and quickly evolving. The firms and lawyers who will succeed in this new legal frontier will accept these changes as the norm and find ways to harness technology and efficiency to best the competition.

When the commodity we sell is our expertise and our time, looking at how we deliver those legal goods is essential. Profitable legal service delivery depends on efficiently training the future generations of lawyers, providing lawyers with the most cutting-edge and innovative legal research tools, and creating processes for maintaining, managing and leveraging internal knowledge. Clients are savvier and more cost-conscious than ever, and firms that adjust to these market demands by reviewing and improving how they deliver legal services will be the ones that survive and thrive in 2012 and beyond. ■

Ethan Bordman (www.ethanbordman.com) is an entertainment attorney and film finance consultant who represents directors, producers, screenwriters, actors and investors. In addition to his law degree and MBA, Mr. Bordman holds an LL.M. in Entertainment Law from the University of Westminster in London, England. He serves as co-chair of the membership committee for the NYSBA Entertainment, Arts and Sports Law Section.

Are You Ready for Your Close-Up?

You May Face Entertainment Law Issues, Regardless of Your Practice Area

By Ethan Bordman

I recently received a phone call from a personal injury attorney whose client found herself on a reality TV show. As the client returned to her parked car, she was surprised – not to mention irritated – to find a parking ticket. Surprise turned to shock when a camera crew from a reality show, which observes parking authority officials and the people they ticket, approached and proceeded to record her explicit statements of frustration and anger upon discovering the ticket. Her attorney wanted to know what, if any, legal action this woman could take against the reality show for recording her without her consent.

A real estate attorney called me to discuss his client, who had been contacted by a production company interested in using the client's home as a movie set. As a result, this attorney – well-versed in terms such as "chain of title" and "amortization" – now found himself confronted with unfamiliar terms such as "back end points" and "below-the-line." He inquired, "Where is this line?"

Hollywood, California, may historically be the epicenter of movie and television production; however, New York is closing in. In March 2012, the *New York Post* declared, "New York is the new Hollywood," explaining that 11 TV pilots – a record number – were filming in the state.[1] According to a November 2011 report by the Bureau of Labor Statistics, the motion picture and television production industry was responsible for more than 141,000 jobs in New York in 2010.[2] The Mayor's Office of Film, Theatre and Broadcasting in New York City, reported that in 2011 approximately $5 billion was spent there on production.[3] This figure included 188 films and 140 television shows; of these, 23 were prime-time shows, the most ever in a single year in the city.[4] In New York City it seems that productions are always being filmed in the streets, right in front of offices and homes. As a result, your clients may start asking how they can be a part of this exciting and potentially lucrative business. So read on – and when the time comes, both you and your client will be "ready for your close-up."

Get It in Writing Anyway

Film producer and studio founder Samuel Goldwyn famously stated, "A verbal contract isn't worth the paper it's written on."[5] In the entertainment business, however, "unsigned" does not necessarily mean "unenforceable." It is always best to have a signed agreement before your client participates in a project. If there is no signed agreement, however, other types of documents may be helpful

to your client in proving the existence of a contract. Deal memos, confirming letters, and short-form agreements have all been found sufficient if they contain material terms of parties, time and place of employment, compensation, and type of employment – all of which help to show the intent of the parties. A "meeting of the minds" can be proven to exist if it can be shown that there was no further negotiation or discussion on any of the essential terms, even if other provisions are open for later negotiation.

In the entertainment industry, tight production timelines often force studios to "lock down" a script, or an actor's services, quickly. As a result, formal written contracts may not be executed before services are rendered. Academy Award winner Charlton Heston once stated, with regard to the more than 60 films in which he appeared, that he never once signed a contract before production began.[6]

One case that illustrates the existence of a contract – despite the fact that no formal writing was executed – was *Main Line Pictures, Inc. v. Basinger.*[7] In this case, a suit was filed by a production company against the actress Kim Basinger for breach of both oral and written contracts after Basinger reversed her decision to star in the film *Boxing Helena*. After she had agreed to perform in the lead role, attorneys for Basinger and Main Line, through "deal memos," agreed upon the terms of employment. Soon thereafter, formal agreements, including an "Acting Service Agreement," were drafted. Following the exchange of numerous drafts between the parties, many ancillary terms were revised and eventually agreed upon. Some time later, after learning of Basinger's decision not to act in the film, Main Line filed suit. The court noted, "Because timing is critical, film industry contracts are frequently oral agreements based on unsigned 'deal memos.'"[8] At the time of this suit, Basinger had executed written agreements for only two of her last 12 films. The jury ruled, based on these actions and writings, that Basinger had entered into both oral and written contracts. The case was later settled.

As illustrated in *Main Line*, concepts such as "course of conduct" or "custom of the business or industry" are often used to show past actions. Just as everything is negotiable in a contract, the court's determination of whether a contract exists, or whether a material term is contained or missing, depends on the facts and circumstances presented. Robert Evans, producer of films including *Chinatown* and *The Godfather*, once stated, "There are three sides to every story: yours . . . mine . . . and the truth. No one is lying. Memories shared serve each differently."[9] Be sure to get all agreements in writing before your client participates in a project, because a contract is less likely to be called into question than someone's memory.

Can Criminal Activity Result in a Financial Windfall?

When the media announces that an alleged or convicted criminal has entered into negotiations for a book or movie deal, people often wonder whether that individual can keep the advance and/or royalties. Between July 1976 and August 1977, David Berkowitz terrorized New York City, killing six people and injuring numerous others.[10] Berkowitz called himself the "Son of Sam," explaining that the black Labrador retriever owned by his neighbor, Sam Carr, told him to commit the killings. Once captured, Berkowitz received numerous offers to publish his story. In an effort to thwart criminals' attempts to profit from their crimes, New York State passed the first "Son of Sam" law, authorizing the state crime board to seize any money earned from entertainment deals to compensate the victims.[11] In 1992, however, the U.S. Supreme Court overturned the 1977 statute in *Simon & Schuster v. Crime Victims Board*, stating it was a violation of free speech.[12] As a result, New York has since amended its law. Interestingly, the law named after him was never applied to David Berkowitz, who was deemed incompetent to stand trial. Berkowitz voluntarily paid his book royalties to the crime board.

Executive Law § 632-a defines "profits from a crime" as "any property obtained through or income generated from the commission of a crime of which the defendant was convicted."[13] The difficulty in applying the law regards the traceability of what is considered "commission of a crime." Many times the individual is not compensated to recount his or her criminal act but rather for the notoriety the accusation or conviction has brought to him or her. In 2010, Rod Blagojevich, the former Illinois governor, was removed from office by the state legislature and later convicted of lying to federal authorities amid corruption charges alleging he plotted to sell the U.S. Senate seat vacated by President Barack Obama.[14] His case was international news. While awaiting trial, Blagojevich served as a paid spokesperson for Wonderful Pistachios in the company's "Get Crackin'" campaign, a move designed to capitalize on his notoriety. A federal law titled "Special Forfeiture of Collateral Profits of Crime"[15] establishes that proceeds "relating to a depiction of such crime" can be forfeited upon a motion by the United States Attorney after the conviction. Although he later was convicted, Blagojevich was permitted to keep the money he earned from the ad campaign, because enjoying pistachios was not considered a "depiction" of the crime of lying to federal authorities.

Son of Sam laws have also been circumvented by following the law to the letter. A prime example is the following New York case, which had an unexpected twist. In January 2011, Brandon Palladino, a 24-year-old New York resident, pleaded guilty to manslaughter for the 2008 killing of his mother-in-law Dianne Edwards.[16] A year after the killing, Palladino's wife Deanna, the victim's only child – and the sole beneficiary of her mother's entire estate – died of a drug overdose. As Palladino and his wife had no children, Palladino stands to inherit the entirety of Edwards's estate, through his wife. Son of Sam laws do not apply here, because Palladino's

inheritance will not come directly from his victim or the "commission of the crime" but rather from his wife, who had inherited it from the victim. Moreover, there were no allegations that Deanna Palladino, the victim's daughter, had anything to do with her mother's death. According to a source, the Suffolk County District Attorney's Office asked Palladino to give up the inheritance as part of a plea bargain, but he refused.[17] The value of the estate was estimated at $241,000 after debts. Furthermore, the victim's daughter had used an additional $190,000, which she had inherited from her mother's savings account, to pay for her husband's defense. The victim, in effect, paid for her accused killer's defense.

Media or Literary Rights as Payment for Legal Services

Discussions of Son of Sam laws often give rise to questions about whether attorneys may receive the client's media or literary rights as payment for legal services. This issue arose in *State of Florida v. Casey Marie Anthony*, the 2011 case of the Florida mother who was ultimately found not guilty of killing her two-year-old daughter, Caylee. The prosecution was concerned that Anthony's attorney, Jose Baez, was being compensated with book or movie deals, which could influence his actions in the representation of Anthony.[18] Baez and Anthony filed affidavits with the court stating that there was no agreement for Baez to sell Anthony's story.

The American Bar Association Rules of Professional Conduct, Rule 1.8(d), states: "Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation."[19] New York Rule 1.8(d)(1), under the Comments section, explains that the lawyer may be tempted to subordinate the client's best interests – for example, by pursuing "a course of conduct that will enhance the value of the literary or media rights to the prejudice of the client."[20] One illustration, not provided in the Comments, is that a client's story is most likely worth more if a verdict occurs, as opposed to a quiet or confidential settlement, even though the latter might be in the client's best interests. The Comments also state that attorneys *themselves* should not enter into arrangements to sell their stories about the representation until all aspects of the representation have concluded.

Reality Entertainment: Release Forms Provide a Reality Check

With the proliferation and vast assortment of reality programs, it is possible that a client could – intentionally or unintentionally – become involved in this genre. The comedian Sacha Baron Cohen, star of the 2006 film *Borat*, was the target of numerous lawsuits filed by individuals whose interactions with his title character – a fictional Kazakh journalist traveling through the United States – were filmed and shown in the movie. Some of these people had signed consent forms; others had not. After the film was released, several of those who had signed consent forms claimed filmmakers misrepresented the project, which was described on the form as a "documentary-style film." They also raised questions about the amount of information the filmmakers provided to them before they signed. The Second Circuit Court of Appeals decided the information provided was sufficient and the consent forms valid because the participants made no attempt to verify the legitimacy of Borat as a news reporter; instead, they relied solely on the representations provided by the filmmakers.[21] The one-page release stated, in part: "Participant agrees not to bring any claim in connection with the Film or its production . . . ."[22] Moreover, the single-paragraph cover letter accompanying the release concluded: "As the agreement makes clear, you will be waiving all claims in relation to the Film."[23]

New York resident Jeffrey Lemerond appears in the trailer and in 13 seconds of the film. He is heard screaming "Go away!" and "What are you doing?" when Cohen, as "Borat," chases him to give him a hug. Lemerond, who did not sign a release, was randomly chosen on a public street (the corner of Fifth Avenue and 57th Street in Manhattan). He later sued for public ridicule, degradation, and humiliation. Judge Loretta Preska, of the Southern District of New York, dismissed the case, finding that limitations on using a person's name and likeness do not apply to "newsworthy events or matters of public interest," stating *Borat* "attempts an ironic commentary of 'modern' American culture . . . ."[24]

The First Amendment has also been used successfully by reality show producers as a defense for broadcasting an individual's appearance without that person's consent. In February 2008, Eran Best was stopped by police in Naperville, Illinois, for driving with expired license plates.[25] The officer smelled alcohol on her breath, and he called for backup in accordance with local procedure, which requires the presence of two officers in administering field sobriety tests. The officer who came to assist was accompanied by a camera crew from the reality show *Female Forces*, which follows female police officers in Naperville. After recording the arrest for driving on a suspended license, the show continued to record the officers' search of Ms. Best's car, including their discovery of marijuana. Representatives from the show asked Ms. Best to sign a consent form; she repeatedly refused to do so. *Female Forces* later aired an episode showing the arrest; in it, Ms. Best's name, date of birth, driver's license number, and other personal information were revealed. Ms. Best filed suit, alleging violation of her constitutional rights to privacy because the show "staged, sensationalized and/or enhanced" her arrest and use of her identity for commercial purposes without her consent, which violated the state's Right of Publicity Act.[26] The production company

and A&E Television Networks asserted their rights under the First Amendment, and in 2011, Judge Matthew Kennelly of the U.S. District Court agreed, stating that the show's "depiction of Best's arrest and its surrounding circumstances . . . conveyed truthful information on matters of public concern protected by the First Amendment."[27] He further stated, "The status of *Female Forces* as an entertainment program, as opposed to a pure news broadcast, does not alter the First Amendment analysis."[28] The court noted that criminal charges and facts concerning arrests and citations are legitimate matters of public concern.

Although some individuals may choose not to participate in reality programming, there are many who want to be known internationally – and compensated – regardless of the release's stipulations or an attorney's legal advice. Since most agreements are non-negotiable, the attorney's role is to explain each clause in detail to the client.

It's Not Child's Play: Minors in Entertainment

In 1919, six-year-old Jackie Coogan was discovered by Charlie Chaplin; Coogan went on to star in films such as *The Kid*,[29] *Oliver Twist*, and *Tom Sawyer*. Coogan earned an estimated $3 million to $4 million[30] in the 1920s (about $40 million to $50 million in 2012 dollars).[31] On his 21st birthday, Coogan discovered that his parents had squandered his earnings on furs, diamonds, and expensive cars. At the time, earnings of minors belonged solely to their parents. Coogan sued his parents but recovered only $126,000.[32] As a result of the incident, several states – including New York – passed the "Coogan Law,"[33] under which entertainment contracts require that 15% of a child actor's earnings be placed in a blocked trust account until the performer reaches age 18.[34]

New York's Child Performer Education and Trust Act of 2003 establishes the rules and regulations for performances by individuals under 18 years of age who render creative or artistic services in the state or are residents of the state. Before a minor can be employed, a Certificate of Eligibility to Employ Child Performers must be filed by the employer; an Employment Permit for a Child Performer must also be filed by the parent or guardian.[35] These forms ensure that proper trust accounts are established, academic obligations are met and appropriate insurance coverage is in place before the child begins working. New York requires that all child performers maintain satisfactory academic performance, which is determined by the school in which the child is enrolled.[36] If the child is unable to attend class on a regular schedule, the parent or guardian must make arrangements to (1) ensure that the child receives the required instruction; (2) provide evidence to the school to demonstrate satisfactory academic performance; and (3) ensure that the child is not without instruction for more than 10 days when school is in session.

Moreover, because child performers have the right to disaffirm a contract under the infancy law doctrine, New York has taken steps to protect them while ensuring that entertainment companies do not suffer – creatively or financially – if a child chooses to not fulfill his or her agreement. New York's Arts and Cultural Affairs Law § 35.03 authorizes courts to approve or disapprove a child's entertainment contract before the performance begins. Under the law, the child appears before a judge who reviews the contract's terms, explains the professional obligations, and determines that the child's decision to perform is made without duress. The judge also explains the personal sacrifices the child will have to make because of his or her work obligations, which may include having less or no free time for personal activities or visits with friends. If the judge is satisfied with the terms of the contract, and the child understands the commitment, the agreement will be confirmed – after which any action by the child that violates the contract is treated the same as a breach by an adult.

Paying for the Production: Film Incentives in New York

According to a report titled "Tax Incentives in New York Are Working," by the Motion Picture Association of America (MPAA), "[t]he New York state production incentives have been a boon to production since adoption."[37] As the state's financial production incentives account for a large portion of the funding for film and television projects, it is important to understand how New York's tax incentives assist filmmakers. More than 40 states offer some kind of incentive designed to attract movie projects and the economies they create. An entertainment project brings business to a variety of business owners such as hotels, restaurants, catering companies, and office spaces, all of which experience a production-related surge in business. Moreover, local professionals are hired to assist with various aspects of the production. If the experience is successful, the producers may choose to return to the same location for another project.

The New York State Film Production Tax Credit and New York City's "Made in NY"® were intended to bring about local expansion of the motion picture industry. In 2009 and 2010, 279 films and 345 television projects were filmed in the state.[38] In 2011, the slate of well-known projects produced in New York continued and included such films as *The Bourne Legacy* and *Men in Black III*, as well as the television series *Blue Bloods, Boardwalk Empire*, and *Glee*.[39]

New York State offers a tax credit of 30% for qualified production expenditures.[40] These include costs for tangible property or services that are directly spent on the production, such as technical and crew production, facilities, props, makeup, wardrobe, and set construction. Productions that qualify for the credit include feature films, TV pilots, TV series, and TV miniseries. Certain productions are excluded from the incentive: documen-

taries, news programs, interview or talk shows, reality programs, and commercials.

New York City's "Made in NY"® Incentive Program offers opportunities to qualified productions that shoot in the five boroughs, in addition to the state's credit.[41] The Mayor's Office of Film, Theatre and Broadcasting provides marketing credits for film and television productions that complete 75% of their work in the city. Moreover, the mayor's office assists productions with locations and permits and the NYPD Movie/TV Unit helps with traffic and crowd control when filming takes place in public locations on streets, as well as on subways and buses.[42]

> Remember: everything is negotiable, but get it in writing.

Making Your Client's Home a Star

One way in which some of your clients may choose to become involved in the growing television and film industry – and be compensated – is to offer their home as a production location. Attorneys need to consider several issues when drawing up the contract with a production company. The first is to check whether the client's building or community allows participation in film projects; some bylaws do not allow production crews because of the potential disruption and inconvenience to fellow residents. Another factor is the amount of time involved; although the scene being filmed may be on the screen only for a few minutes, it may take several hours or even days to create. The type of scene and physical change the production will make to the home must also be considered. Is the movie a drama that will feature a family eating dinner in a dining room, or is it an action movie in which two people will be fighting and smashing into walls? There is a big difference between moving a couch and putting a hole in your wall, though (needless to say) the production company will repair it before they leave (although not necessarily always to your client's satisfaction). This should be explicit in any agreement.

It is recommended that you contact the state or city film office to be sure the production company has the appropriate filming permits and insurance forms on file. To obtain a motion picture or television permit in New York City, the Film Office requires a certificate of insurance for at least $1 million or an equivalent Comprehensive General Liability policy.[43] The agreement should specify which parts of the home are accessible and what changes can be made to the home. It should also provide a few buffer days in case filming is delayed by conflicting production schedules or circumstances beyond human control, like weather.

If the scene involves extensive structural changes to the home, an escrow account can be helpful. The account will hold monies, paid by the production company, which are intended for use in returning the home to its prior condition. The client is thereby assured that he or she will receive the funds necessary to make repairs to the home.

The fee paid by the production company for use of an individual's home is based on various factors, including the number of days the home is utilized and the degree of change required. The decision to use a particular home involves several visits from production company representatives, including location scouts, location supervisors, and even the director. Consultation with a certified public accountant is also advised, because, depending on certain factors, there may be various tax advantages for your client. The state or city film office can often provide real estate agents who specialize in listing homes for use as locations.

What "Options" Does the Client Have?

One entertainment law scenario you might face occurs when a client informs you he has been writing a book or screenplay in his non-work time, and that a production company is interested in "optioning" the story. An "option" is an exclusive agreement that gives the purchaser the right – not the obligation – to produce or begin production on the purchased story. An option is sometimes contingent upon certain conditions being met, which are agreed to by both the producer and the writer.

Consider the following scenario: a film production company expresses interest in making your client's book into a cable TV movie. Your client is, of course, extremely excited. The production company wants to increase the odds that the story will be produced according to its wishes; it also wants to reduce its financial risk. Instead of buying the exclusive right to make the story into a movie, the production company will instead offer an option. The option gives the producer a period of time, usually one to two years, to decide to purchase the story or to meet certain conditions in the agreement. During this time, the production company can find financing, book certain actors or directors, or find a network that is interested in the story. The producer may then choose to purchase the story. The option is advantageous to the writer because of the time it provides. If the producer chooses not to exercise the option within the agreed-upon time frame, it will expire. Your client is then free to shop the story around to other production companies.

There are several key points to keep in mind in a scenario like this. First, consider the price being offered for the option. It is typically 10% of the underlying purchase price – but everything is negotiable. When negotiating an option, simultaneously agree on the price of the underlying purchase agreement in the event the option is exercised. This is essential because if you fail to do this, you have simply sold the right to negotiate at a later date.

Along with the underlying purchase price, there is another important factor to consider. When negotiating the option contract, you must decide whether the price of the option is applicable or non-applicable to the final purchase price. If applicable, the option price is credited

toward the negotiated purchase price. If the price of the option is non-applicable, the purchase price will be separate, in addition to the option price.

Speaking the Language of Entertainment Law

The following definitions explain some of the key industry lingo you may encounter in your negotiations.

Above-the-line: Describes individuals who guide the creative direction of film, such as screenwriters, directors, producers, and lead actors on the project.

Advance: Up-front payment; it is always best to clarify if an advance is recoupable or non-recoupable against expenses, and whether it is refundable or non-refundable in the event that monies from sales are not enough to cover the cost of the advance fee.

Below-the-line: Describes individuals who are involved in the technical aspects of the production, such as costume designers, sound engineers, and film editors.

Completion bond: Insurance policy that guarantees the film is completed; often required to receive state film incentives.

Cross-collateralization: Offsetting expenses in one medium against revenue from another market (e.g., theater ticket sales in the United States offset by DVD sales in Europe).

Final cut: The right to decide which scenes are included in the version of the film that is released.

First monies: First revenue from the distribution of a movie.

Negative cost: The actual cost of production.

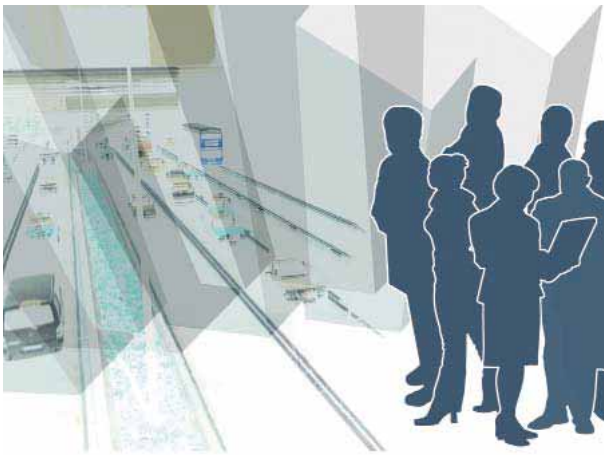
Work-for-hire: Describes an individual commissioned to create work of a certain type (e.g., production company hires a screenwriter to write the story with the company owning the copyright of the work).

That's a Wrap

Entertainment opportunities are everywhere. You never know when or how they may make their way into your practice, no matter your specialty. The key is to recognize that an entertainment law matter may arise in any case or with any client. Remember: Everything is negotiable, but get it in writing. Now you are ready for that close-up. ACTION! ■

1. Hilary Lewis, *New York the Leading State for TV Pilot Production*, N.Y. Post, Mar. 30, 2012.
2. Motion Picture Ass'n of America, *Tax Incentives in New York State Are Working*, Nov. 30, 2011 *at* http://www.mpaa.org/resources/d30bc82d-7256-4c93-9419-629d4d697a90.pdf (MPAA, *Tax Incentives*).
3. The City of New York, Mayor's Office of Film, Theatre and Broadcasting. *Mayor Bloomberg Announces 2011 Was Busiest Year Ever for Television Productions in NYC, Celebrates 100th Episode of Hit TV Series 'Gossip Girl,'* Jan. 26, 2012, *at* http://www.nyc.gov/html/film/html/news/010112_gossip_girl_100.shtml.
4. *Id.*
5. Internet Movie Database (IMDB), biography of Samuel Goldwyn, personal quotes.
6. Charlton Heston, *Of Trust, Manners and How Hollywood Works*, L.A. Times, Apr. 12, 1993, at F5.
7. 1994 WL 814244 (Cal. App. 2d Dist.).
8. *Id.* at 2.
9. Robert Evans, *The Kid Stays in the Picture*, preface (2002).
10. Owen Moritz, *Son of Sam – The Capture*, N.Y. Daily News, 2007.
11. N.Y. Executive Law § 632-a (Exec. Law) (enacted in 1977; repealed and replaced in 1992).
12. *Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105 (1991).
13. Exec. Law § 632-a(1)(b)(i).
14. CBSNews.com. *Blagojevich Gets 14 Years in Prison*, Dec. 7, 2011, *at* http://www.cbsnews.com/8301-250_162-57338646/blagojevich-gets-14-years-in-prison/.
15. 18 U.S.C. § 3681 (enacted in 1984). Title 18, pt. II, ch. 232A.
16. Kieran Crowley, *Att'y Backs 'Heir' Raid: Killer Con 'Deserves' Victim's Estate*, N.Y. Post, Jan. 4, 2011.
17. *Id.*
18. WFTV.com. *Jose Baez Succeeds in Blocking Prosecution From Learning How the Dream Team Is Being Paid*, Mar. 25, 2009.
19. American Bar Association Rules of Professional Conduct, Rule 1.8 – Conflict of Interest: Current Clients: Specific Rules.
20. New York Rules of Professional Conduct, Rule 1.8 – Comments – Literary or Media Rights (9).
21. Eriq Gardner, *Appeals Court Finds No 'Borat' Fraud*, Hollywood Rep, Dec. 14, 2009.
22. TMZ.com. *Borat's Release – Anything But Sexy Time*, Nov. 15, 2006, *at* http://www.tmz.com/2006/11/14/borats-release-anything-but-sexy-time/.
23. *Id.*
24. Sewell Chan, *Judge Dismisses Suit Over 'Borat,'* N.Y. Times, Apr. 2, 2008.
25. *Best v. Berard*, Case No. 09 C 7749, (N.D. Ill. Mar. 3, 2011).
26. *Id*. at 5.
27. *Id*. at 10.
28. *Id.*
29. Screen Actors Guild, *Coogan Law*, *at* http://www.sag.org/content/coogan-law.
30. Katy Coli, *Coogan's Law*, N.Y. Examiner, Sept. 26, 2009.
31. U.S. Inflation Calculator, *at* http://www.usinflationcalculator.com.
32. *Coogan Gets Back $126,000 of Earnings*, Milwaukee Sentinel, Aug. 17, 1939, Vol. CII, No. 357, p. 1.
33. New York Child Performer Education & Trust Act of 2003.
34. Child Performer Trust Accounts New York, N.Y. Estates, Powers & Trusts Law art. 7, pt. 7. *See* http://www.labor.ny.gov/workerprotection/laborstandards/secure/child/cp_trusts.shtm.
35. State of New York Dep't of Labor Child Performer Academics – Certificates and Permits. Available at: http://www.labor.ny.gov/workerprotection/laborstandards/secure/child/cp_certs.shtm.
36. State of New York Dep't of Labor Child Performer Permit – Academic Performance.
37. MPAA, *Tax Incentives*, supra note 2.
38. MPAA, *State-by-State Film & Television Economic Contribution*, *at* http://www.mpaa.org/policy/state-by-state.
39. MPAA, *Tax Incentives*, *supra* note 2.
40. New York State Film Production Credit, *at* http://www.nylovesfilm.com/tax/.
41. Made in New York® Incentive Program, *at* http://www.nyc.gov/html/film/html/incentives/made_ny_incentive.shtml.
42. Message from the Commanding Officer of the NYPD Mobile Movie/TV Unit, *available at* http://www.nyc.gov/html/film/html/locations/nypd_message.shtml.
43. The City of New York, Mayor's Office of Film, Theatre and Broadcasting – Permits and Insurance, *available at* http://www.nyc.gov/html/film/html/permits/insurance.shtml.

BY STEVEN C. BENNETT



Steven C. Bennett (scbennett@jonesday.com) is a partner in the New York City offices of Jones Day, and Chair of the Firm's Ediscovery Committee. The views expressed are solely those of the author, and should not be attributed to the author's firm or its clients.

An Update on Computer Inspection in Civil Litigation

The ever-increasing importance of electronically stored information (ESI) in civil litigation brings with it the question of whether direct inspection of computer systems should become a routine aspect of e-discovery. This article offers an overview of developments in the area, with a particular focus on New York cases.

The Federal Approach

Rule 34(a)(2) of the Federal Rules of Civil Procedure expressly permits a party to request "entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting[,] . . . testing or sampling the property or any designated object or operation thereon." Yet, the Advisory Committee Notes to Rule 34 recognize that inspection or testing of ESI "may raise issues of confidentiality or privacy." The Notes suggest that the Rule is "not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances," and further advise that courts should "guard against undue intrusiveness" resulting from inspection of computer systems. This cautionary language in the Advisory Committee Notes accords with the general practice in discovery that the responding party, rather than the requesting party, conducts any search for relevant, non-privileged information in its possession, custody or control.[1]

In *Piccone v. Town of Webster*,[2] the court, noting the cautionary language in the Advisory Committee Notes to Rule 34, suggested two principal circumstances where computer hard drive inspection may be appropriate. First, inspection may be ordered "where the use of the computer or its files forms the basis of the plaintiff's claims," as in cases involving dissemination of confidential information, sabotage or infringement by use of a computer. Second, a court may order inspection where a party's discovery responses "contain discrepancies or inconsistencies."[3] Mere desire to search a computer to see whether additional documents exist, however, will not suffice to order inspection.[4] Nevertheless, in *Piccone*, the court ordered preservation of the hard drive and permitted a further motion for inspection if further discovery revealed evidence of spoliation.[5] Conversely, another recent case suggested limited inspection of sample computer hard drives as an alternative to a broad order of data preservation.[6]

Even when inspection of a computer appears justified, federal courts hesitate to provide open-ended access to a system. Instead, courts often encourage the parties to negotiate a "protocol" for the discovery by inspection. In *Anthropologie, Inc. v. Forever 21, Inc.*,[7] for example, the court, noting evidence of "deceit" and violation of discovery obligations and a discovery order, held that computer inspection was appropriate, given the "considerable doubt about the completeness" of discovery. Nevertheless, because the party requesting inspection had neither "proffered the specifics of what it proposes to do and how" nor documented its "best estimate of how complicated and extended a process would be involved," the court ordered the requesting party to submit a declaration from a "forensic specialist" (describing a specific proposed protocol), and allowed the responding party to submit comments regarding the protocol.[8] Such a protocol, the court suggested, may include: creation of a "mirror image" of the computer hard drive, inspection (search) of the mirror image by an expert (subject to confidentiality restrictions), limitations on the scope of search, and submission of information to be produced to the responding party's counsel (for privilege and other review) before the information is actually produced.[9] The court indicated that it might also consider allocating the costs of the inspection to the requesting party, or the responding party, depending upon the equities of the case.[10]

The New York State Approach

Section 3120(1) of the Civil Practice Law and Rules generally permits a party to serve a notice or subpoena "to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the posses-

sion, custody or control of the party or person served." Further, CPLR 3101(a) mandates "full disclosure of all matter material and necessary in the prosecution or defense of an action." Yet CPLR 3103 grants courts authority to issue protective orders to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

Combining analysis of these rules, one recent New York appellate decision declared that it was within a trial court's discretion to deny a motion for access to an opposing party's computer, noting that "the principle of full disclosure does not give a party the right to uncontrolled and unfettered disclosure."[11] Thus, in *Schreiber v. Schreiber*,[12] a recent trial court matrimonial decision, the court suggested that inspection of a hard drive is "qualitatively different" from mere copying of documents and noted that courts must "impose limitations" on such inspections "to address potential fishing expeditions, privacy concerns as they relate to irrelevant materials, [and] disclosure of competitive materials."[13] Despite assertions that the defendant might have concealed assets, the court held that the plaintiff was not entitled to "an unrestricted turnover" of the computer hard drive (or a "clone" copy), absent a specific discovery "protocol," which the court suggested should include: a discovery referee and a computer forensic expert (both to be mutually agreed on by the parties), limits on the scope of disclosure, arrangements for review of all data by the defendant's counsel for privilege and other limitations (before production to the plaintiff), and a cost-sharing arrangement.[14]

Further, in *In re Application of Maura*,[15] the surrogate court considered whether to enforce a subpoena to a third-party law firm aimed at reviewing the firm's computer system for records of drafts of a prenuptial agreement. The court, while acknowledging that such a request could be "unduly burdensome" and could be made "every time there is a will contest or a contract dispute," nevertheless enforced the subpoena, because there was no "less invasive and less burdensome method" to obtain the information. As in *Schreiber*, the *Maura* court required a specific protocol for review and production of the information (via "cloning" of the law firm's computer). The court also directed that the requesting party pay the costs of the inspection and production process.[16]

Conclusion

Recent federal and state decisions, although starting from different textual bases in discovery rules, have reached similar conclusions. Normally, the party responding to a discovery request takes on the responsibility to search for and retrieve responsive information. Where, however, evidence of discovery failings appears or the case turns on the specific contents of a computer, a court may order computer inspection.[17] Such an inspection generally requires a specific protocol to avoid undue burden on the responding party and often will involve inspection of a "clone" of the computer hard drive, rather than direct inspection of the computer itself. Finally, under the federal rules a court may, and under the state rules a court presumptively must, shift the cost of such inspection to the requesting party. ■

1. *See Floeter v. City of Orlando*, 2006 WL 1000306 at *3 (M.D. Fla. Apr. 14, 2006) (a Rule 34 request for information "does not give the requesting party the right to conduct the actual search") (quoting *In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003)).

2. 2010 WL 3516581 (W.D.N.Y. Sept. 3, 2010).

3. *See id.* at *8 (quotation omitted) (citing cases).

4. *See id.* at *8–9 (rejecting assertion that party appeared to have "cherry picked" emails, where party represented that it produced all responsive emails).

5. Similarly, in *Calyon v. Mizuho Sec. USA Inc.*, 2007 WL 1468889 (S.D.N.Y. May 18, 2007) (Freeman, M.J.), the court held that mere argument that the responding party did not have the "proper incentives" to conduct an exhaustive search could not justify a computer inspection. The court, however, directed preservation of relevant hard drives, and cooperation between the parties and their experts to develop a protocol for search by the responding party's expert.

6. In *Pippins v. KPMG LLP*, 2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011) (Cott, M.J.), *objections denied*, 2012 WL 370321 (S.D.N.Y. Feb. 3, 2012) (McMahon, J.), the court ordered preservation of information on a large number of employee computers, noting that the burden of preservation was "self-inflicted to a large extent," because the defendant refused to permit review of a "handful of hard drives," as samples to show whether full-scale preservation was required. *See Pippins*, 2011 WL 4701849 at *9.

7. 2009 WL 690239 (S.D.N.Y. Mar. 13, 2009) (Dolinger, M.J.).

8. *See id.* at *5 (noting responding party's contention that inspection could "take weeks and gravely harm its business," an assertion made with "no evidentiary support"); *see also White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning, Inc.*, 2009 WL 722056 (D. Kan. Mar. 18, 2009) (directing parties to confer regarding agreed procedure for retrieval of information).

9. *See Capitol Records, Inc. v. Alaujan*, 2009 WL 1292977 (D. Mass. May 6, 2009) (adapting protocol based on *Ameriwood Indus., Inc. v. Liberman*, 2006 WL 3825291 (E.D. Mo. Dec. 27, 2006)); *Coburn v. PN II, Inc.*, 2008 WL 879746 (D. Nev. Mar. 28, 2009) (outlining protocol for review of "clone copy" of hard drive) (citing protocol form in *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1054–55 (S.D. Cal. 1999)); *see generally* Nolan M. Goldberg & Michael F. McGowan, *Electronic Discovery Behind Enemy Lines: Inspection of an Adversary's Network Pursuant to FRCP 34(a)*, www.metrocorpcounsel.com (Nov. 1, 2007) (outlining factors to be considered in crafting an inspection protocol).

10. *Compare Bank of Mongolia v. M & P Global Fin. Servs., Inc.*, 2009 WL 1117312 (S.D. Fla. Apr. 24, 2009) (declining to order cost shifting, but requiring payment of requesting party's attorney fees) *with Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 2009 WL 546429 (M.D. Fla. Mar. 4, 2009) (ordering cost shifting); *Orrell v. Motorcarparts of Am. Inc.*, 2007 WL 4287750 (W.D.N.C. Dec. 5, 2007) (permitting the defendant, the former employer, to inspect the plaintiff employee's home computer, at the defendant's expense). In theory, the costs of inspection might be considered taxable as "costs," to be recovered by the prevailing party in an action. *See generally* Steven C. Bennett, *Are E-Discovery Costs Recoverable by a Prevailing Party?*, 20 Alb. L. J. of Sci. & Tech. 537 (2010). Further, shifting of costs may be particularly appropriate in the case of a subpoena to a non-party for access to a computer. *See Wood v. Town of Warsaw*, 2011 WL 6748797 (E.D.N.C. Dec. 22, 2011) (ordering inspection where non-party was town manager, employed by the defendant town, and the plaintiff was willing to bear the costs of the search of the non-party computer).

11. *Buxbaum v. Castro*, 82 A.D.3d 925 (2d Dep't 2011) (quotation omitted). By contrast, in *Lamb v. Maloney*, 46 A.D.3d 857 (2d Dep't 2007), the appellate court held that the trial court improvidently exercised its discretion in denying additional discovery, including inspection of computers, where the request was unopposed, and the record failed to demonstrate any prejudice that would result from such discovery.

12. 29 Misc. 3d 171, 904 N.Y.S.2d 886 (Sup. Ct., Kings Co. 2010).

13. *Id.* at 177, 181 (quoting Thomas Gleason & Patrick Connors, *First E-Discovery Demand: Access to Clone of Hard Drive?*, N.Y.L.J., July 18, 2005, p. 3, col. 1; Mark A. Berman & Aaron Zerykier, *Forensic Inspection of Computer Hard Drives Under New York Law*, N.Y.L.J., Sept. 1, 2005, p. 4, col. 4).

CONTINUED ON PAGE 49

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I was retained by a company that was sued in a trademark infringement case. The plaintiff company's Vice President for Marketing and Sales was recently deposed, and I chatted amicably with him during several breaks. Parenthetically, the Vice President is also an attorney (non-practicing) and he is the plaintiff's primary decision maker.

The plaintiff-company's lawyers have been very accusatory and difficult to deal with. I do not believe that it will be possible to settle the case with them, or that they have communicated my settlement offer to their client.

Can I speak with the Vice President directly after the deposition phase and advise him of the settlement offer? Would it make a difference if the Vice President was also the plaintiff-company's general counsel? What if the Vice President calls me after the deposition phase (without informing his company's attorney) to discuss settlement? Should I take the call? What if my client seeks my advice about directly approaching the plaintiff-company to settle the matter (and bypass the attorneys)?

In addition, I have been regularly using email to communicate with my adversary during the course of settlement negotiations. Recently, I received an email from my adversary with a "cc" to the Vice President. The email misstated my settlement offer and I saw this as a golden opportunity to communicate with the Vice President. I pressed "reply all" and sent an email that responded to my adversary's email and stated my settlement position. Opposing counsel went ballistic and accused me of communicating with his client in violation of the Rules of Professional Conduct. Since I was responding to a communication that had "cc'd" the plaintiff, I believe that opposing counsel invited the use of "reply all" and implicitly gave his prior consent.

Who is right?

Sincerely,

What A. Mess

Dear What A. Mess:

Rule 4.2 (the "no-contact rule") of the Rules of Professional Conduct (RPC) governs communications with persons represented by counsel. While the "no-contact rule" seems relatively straightforward on its face, it has been subject to extensive review and discussion and can often be tricky.

The answer to your question whether you may bypass your adversary and communicate settlement offers directly to an adverse party will depend on the actual role played by the opposing party's Vice President for Marketing and Sales (VPMS) in the pending litigation. Rule 4.2(a) states that "[i]n representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." Although the VPMS happens to be an attorney, the circumstances described suggest that he is not acting in that capacity and that you would be precluded from having direct contact with him. It is probable that the acts committed by the person in charge of marketing and sales for a plaintiff in a trademark action are directly related to the subject matter at issue. *See Niesig v. Team I*, 76 N.Y.2d 363, 374 (1990) (contact by opposing counsel is prohibited "with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation"). However, if the VPMS also happened to serve as part of the organization's in-house legal department (with a "counsel" title), there may be certain circumstances that would permit direct contact. Put in simple terms, is the VPMS acting as a "business person" or is he acting as a "lawyer"?

Prior to the RPC, the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics (Committee) issued a formal opinion as to the applicability of the prior "no-contact rule" (the former DR 7-104 under the previous Code of Professional Responsibility (Code)) to contacts with in-house counsel. *See* N.Y. City Bar Op. 2007-1 (2007). In its 2007 opinion, the Committee suggested that contact with an organization's in-house counsel is permissible so long as the in-house counsel was "acting as a lawyer for the entity, though not necessarily with respect to . . . the communication at issue . . ." *Id.* The Committee further suggested that "the contacting lawyer must have a good faith belief based on objective evidence that the in-house counsel is acting as a lawyer representing the organization, and not merely as outside counsel's client." *Id.* To this end, the Committee proposed five objective indicia that may establish that in-house counsel is acting as a "lawyer" for the organization in question (although with the caveat that the indicia "will vary from case to case"). These may include:

> (1) Job title. Certain titles (e.g., "General Counsel," whether alone or conjoined with an officer title

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

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

such as "Senior Vice President and General Counsel") presumptively signify that the person acts as lawyer for the organization, unless there is notice to the contrary. By contrast, other titles, such as "Director of Legal and Corporate Affairs" or "Director of Compliance" are ambiguous as to the role performed by the titleholder in a particular matter, and would not, standing alone, give rise to the same presumption.

(2) Court papers. If the matter in question is a litigation, papers filed in the case may list the in-house counsel as "Of Counsel." Such a reference would reasonably entitle another lawyer in the case to assume that the listed person is acting as a lawyer.

(3) Course of conduct. In both litigation and transactional matters, the course of conduct between the in-house counsel and the lawyer who wishes to contact him or her may give rise to the reasonable presumption that in-house counsel is acting as a lawyer. Course of conduct may also include prior, related, or similar proceedings; if in-house counsel actively represented the organization in such a proceeding, one could fairly presume that he or she is fulfilling the same role in the current proceeding as well.

(4) Membership in an in-house legal department. Corporations often maintain a legal department whose attorneys serve the needs of the business from a centralized location. In those instances, the similarity of the in-house lawyer's role to that of a member of an outside law firm is most pronounced, and ordinarily would indicate that the members of the department are serving the entity as lawyers.

(5) Inquiry. A lawyer who wishes to communicate with in-house counsel of another party can ask the in-house counsel if he or she is acting as attorney for the organization. In-house counsel should exercise candor in clarifying their role to opposing counsel and a lawyer who makes such inquiry can ordinarily rely on the response. *Id.* (internal citations omitted).

More likely than not, the VPMS wore his "business person" hat and would not meet the stated objective indicia which the Committee proposed in N.Y. City 2007-1, allowing you to directly communicate with him. Moreover, since he was previously deposed as a "fact" witness, Rule 3.7(a) may provide some guidance. It states that "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact . . ." except under certain circumstances. Therefore, under Rule 3.7(a), it appears that the VPMS would not be acting as a "lawyer" in this scenario, and you would not be able to directly communicate with him.

With regard to your question concerning communicating settlement offers, it would be inappropriate for you to go around your adversary and communicate a settlement offer to an opposing party "absent the other lawyer's consent or specific legal authority to do so." N.Y. City Bar Op. 2009-1 (2009) (citing ABA Formal Op. 92-362). Even if the VPMS calls you on his own after the deposition to discuss the settlement offer you had previously communicated, the best practice would be to advise him that since his employer is represented by counsel, all communications should go through the organization's outside counsel.

In response to your inquiry whether you may advise your client to directly communicate with the plaintiff-company regarding settlement, Rule 4.2(b) states that "[n]otwithstanding the prohibitions of paragraph (a) [of Rule 4.2], and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place." Comment [11] to Rule 4.2 states that "[p]ersons represented in a matter may communicate directly with each other" and that "[a] lawyer may properly advise a client to communicate directly with a represented person, and may counsel the client with respect to those communications, provided the lawyer complies with paragraph (b) [of Rule 4.2]." Although direct communications between the clients are permitted by the rule, a lawyer cannot counsel a client to have direct communications with the opposing party unless the lawyer first gives reasonable advance notice to opposing counsel. This notice should always be given in writing or confirmed in writing if the notice is given orally. *See* Roy Simon, Simon's New York Rules of Professional Conduct Annotated at 845 (2012 ed.). The advance notice protocol contained in the Rule is not a request for consent or an invitation for an objection so you may proceed once you have given advance notice, even if your adversary should voice an objection.

It is unfortunately a sad reality that from time to time we encounter adversaries who act in a manner which may prevent the resolution of a case that should ultimately be settled. Some have suggested that if an attorney believes his adversary is not communicating offers of settlement to his client, then the attorney may request a settlement conference before the court with the client required to be at the conference, so that a settlement offer may be openly discussed before a judge. *See* Simon at 828.

Turning to your next question regarding email communications, the use of the "reply all" button is a convenient way of communicating with multiple parties but at times can be problematic, especially when attorneys "cc" their clients on an email to opposing counsel. The handful of ethics opinions that specifically discuss "reply all" emails in the context of the "no-contact rule" offer no clear-cut answer. While the opinions suggest that there may be situations where consent may be implied, the best practice is to avoid the minefield by resisting the temptation

to use "reply all" when responding to opposing counsel's email. N.Y. City 2009-1 (which dealt with DR 7-104(A)(1) under the former Code), discusses at length criteria for a finding of "prior consent" when clients are copied on letters and emails sent to opposing counsel. As the Committee observed, "consent to 'reply to all' communications may sometimes be inferred from the facts and circumstances presented." *Id*. The Committee addressed two important considerations: "(1) how the group communication is initiated and (2) whether the communication occurs in an adversarial setting." *Id*. Other jurisdictions have suggested additional factors, including the formality of the communication, since "[t]he more formal the communication, the less likely it is that consent may be implied." *See* State Bar of Calif. Standing Comm. on Prof. Resp. and Conduct Formal Op. No. 2011-181.

It can reasonably be argued that your adversary's email invited a discussion of the settlement offer. When he incorrectly stated the terms in an email and copied the client, a reasonable attorney could believe that he not only "consented" to your use of "reply all," but actually invited the discussion. As a result, your adversary's accusation that your "reply all" email violated the RPC is in our view a non-starter. In the words of the Committee "the absence of express consent does not necessarily establish a violation [of the ethics rules] if the represented person's lawyer otherwise has manifested her consent to the communication." *Id*. The case can be made that by sending the client a "cc" of the email to you, your adversary gave some form of consent permitting you to use "reply all" and copy the opposing party on your response. Your response with a copy to the opposing party certainly gave opposing counsel an opportunity to object and thereby cease future communications or, conversely, consent if the client continues to get a "cc" on further emails. Nonetheless, the contentious nature of the litigation should have put you on the prudent tack of not using "reply all." Why steer a course through uncharted waters and run the risk? Your dealings with opposing counsel should have led you to anticipate your adversary's reaction to your email or, at the very least, should have prompted you to think about whether you should ask for consent from opposing counsel (likely a futile gesture) before pressing "reply all."

In any event, this situation is a good lesson for any lawyer when communicating with an adversary. We suggest that the better practice would be for the attorney to separately forward emails to his client, instead of sending a "cc." In so doing the lawyer will clearly prevent anyone from using "reply all" as a way of directly communicating with a client.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq.,
and Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse
& Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

My firm has long represented Edward Entrepreneur (Eddie).

Eddie calls one day and tells me that he and Paul Partner want to set up a hedge fund. Eddie and Paul tell me that they do not want to incur the expense of hiring multiple lawyers to draw up the agreements, and because I am the preeminent lawyer in the field, they want me to draft them all. Are there any problems with this request? If so, can I fix them and how?

During the representation, Eddie asks my firm to set up Hedge Fund GP, in which Eddie and Paul are equal partners. My firm draws up the papers for Hedge Fund GP to become the general partner of an onshore fund that my firm has organized called Hedge Fund Partners. Because of my firm's long relationship with Eddie, I saw no need to send Eddie an engagement letter for this work, and I chose not to run a conflict check. (1) What are the consequences of the failure to run a conflict check or to send an engagement letter under these circumstances; and (2) what should the engagement letter have said?

Lastly, during the course of our representation of Hedge Fund GP, Hedge Fund Partners, and Eddie, I have participated in hundreds of confidential communications. The hedge fund has now run into some trouble. Investors have sued, naming Hedge Fund GP, Hedge Fund Partners, Eddie and Paul as defendants. The SEC has commenced an investigation, and Eddie and Paul have stopped speaking with each other. Can I represent any of the defendants in the investor suit? If so, are there any limitations on the representation? What would I write in such an engagement letter? Also, can I represent any of the parties in the SEC investigation? If so, do I need a separate engagement letter for that representation and what should it provide? To whom does the attorney-client privilege for those confidential conversations belong?

Help!

Sincerely,

I. Needa Lawyer

14. *See Schreiber*, 29 Misc. 3d at 182–83. The court also ordered pareservation of the defendant's hard drive, pending renewal of the plaintiff's motion for inspection. *See id.*; *see also Etzion v. Etzion*, 7 Misc. 3d 940 (Sup. Ct., Nassau Co. 2005) (directing protocol for review of computer, to exclude privileged information and communications unrelated to business matters, with requesting party to pay the costs of inspection).

15. 17 Misc. 3d 237 (Sur. Ct., Nassau Co. June 28, 2007).

16. *Id.* (noting that CPLR generally requires that "the party seeking discovery should incur the costs incurred in the production of discovery material"); *see generally* Arthur S. Linker, *In the Mirror Image?*, N.Y.L.J., Oct. 10, 2006 (comparing federal decisions on cost-shifting for computer inspections).

17. Significantly, a court order directing inspection of a computer may itself become the basis for sanctions against the responding party, where cooperation with the order does not appear. *See Moreno v. Ostly*, 2011 WL 598931 (Cal. App. Feb. 22, 2011) (affirming award of sanctions where, in response to order to turn over computer and cellular telephone for inspection, the plaintiff produced equipment she did not use during the relevant period, which the court labeled an "astonishing" misuse of the discovery process).

BOOK REVIEW

BY STEPHEN P. YOUNGER

Business and Commercial Litigation in Federal Courts (3rd ed.), Robert L. Haig, Editor-in-Chief

The third edition of Bob Haig's comprehensive multi-volume treatise *Business and Commercial Litigation in Federal Courts* is no small update. It has 34 new chapters covering a wide range of subjects, including coordinate litigation in state and federal courts, international arbitration, derivatives, commodities and futures, medical malpractice, reinsurance, consumer protection, the Foreign Corrupt Practices Act, money laundering, and the interaction between criminal and civil proceedings, to name just a few. Indeed, the new chapters would make a worthy reference work all by themselves.

Although the treatise covers most every topic that a commercial litigator will face, its most impressive feature is not its breadth; rather, the most impressive feature is the depth of expertise of the contributing authors. It is clear that for each chapter, Bob Haig spent careful effort identifying an author who could speak with authority on the subject. For example, the chapter on electronic discovery is written by Judge Shira Scheindlin, the author of the landmark *Zubulake* opinion that has elucidated the complicated world of electronic discovery for so many lawyers. And the chapter on appeals to the U.S. Court of Appeals is written by a distinguished Second Circuit Judge – the Honorable Richard Wesley. The biographical blurbs of the various authors alone take up 125 pages of the first volume, and they read like a Who's Who of the legal profession.

This impressive group of authors is well matched by the authors of the new chapters of this treatise. Set forth below are some of the work's new chapters, along with the distinguished authors who wrote them.

• ***International Arbitration***: This new chapter is co-written by the Honorable Paul Crotty, United States District Judge for the Southern District of New York, and Robert Crotty of Kelley Drye. It provides a thorough overview of the key aspects of the arbitration process. Like most other chapters in the book, it is a self-contained and comprehensive survey of a complicated area of the law. Especially noteworthy are the authors' frequent suggestions of "best practices" to follow when making discretionary decisions.

• ***Pro Bono***: It is unique for a work on commercial litigation to include a chapter on the importance of pro bono work (and the pitfalls that can arise when handling it). This book's coverage of this important issue gives an indication of the treatise's vast scope. Notably, the chapter is written by an author who knows his subject well – James Clark of Gibson Dunn, who also serves on the board of The Alliance for Children's Rights. The chapter explains the risks that an attorney must understand when taking on a pro bono matter, especially for a lawyer who is used to working with corporate legal departments. There are sample engagement and case closing forms, along with a summary of the ethical principles at stake.

• ***Foreign Corrupt Practices Act***: The FCPA continues to be a crucially important statute for our ever-more globalized society. Who better to guide the reader through it than Mary Jo White, the former U.S. Attorney for the Southern District of New York? Along with her co-author, Frederick T. Davis, she explains the FCPA from a prosecutor's point of view and also gives guidance that is important to a client who faces potential prosecution in more than one country.

Each chapter of this work is actually a mini-treatise on the subject at hand, written by an expert in the field. Bob Haig has once again assembled a star-studded group of authors, and any commercial attorney looking for guidance in an unfamiliar area will find this book to be an incredibly useful resource. ■

STEPHEN P. YOUNGER is a partner in Patterson Belknap Webb & Tyler LLP in New York City and is a Past President of the New York State Bar Association. Anthony C. DeCinque of Patterson Belknap assisted in preparing this book review.

NEW MEMBERS WELCOMED

FIRST DISTRICT

Kadog Abdullah
Chandi Abeygunawardana
Samuel Thomas Acker
Jonathan B. Adler
Brandon Scott Adoni
Lance Oguejiofor Aduba
Ella Rachel Aiken
Loura Alaverdi
Nelly Cessiska Almeida
Caetano Penna Franco Altafin Rodrigues Da Cunha
Christopher Donald Amore
Ada Victoria Anon
Luke Appling
Carlos Andres Ardila Pardo
Aaron P. Arnzen
Anjali Arora
Lauren Ruth Ascher
Justin T. Ashenfelter
Edward A. Atkin
Amit Singh Aulakh
Kenneth John Aulet
Jared Marc Averbuch
Joseph Helenus Badtke-Berkow
Anthony Bagnuola
Emma Leigh Baratta
Kimberly Barnashuk
Lindsay Shannon Barry
George N. Bauer
Michael David Bauer
Margaret Ellen Baumer
Jenna Mary Beatrice
Gabriel Esteban Bedoya
Michelle Hicks Behrens
Rachel Erin Beller
Leah F. Belsky
Sandra Nichole Amble Benjamin
Polina Markovna Bensman
Alla Berenshteyn
Sara Graf Berkeley
Alexandra Chase Berkley
Sophia Bernhardt
Andrew M.j. Bernstein
Anjali Bhat
Alexander Stephenson Birkhold
Esther Nechama Birnbaum
Sameer Singh Birring
Keith Philip Black
Rachel Lyons Blackburn
Jamison D. Blair
Joshua David Blechner
Andrew Benjamin Blumberg
Christina Antoinette Blythe
Ana Christa Star Boksay
Silvia Lujan Bolatti
Jacqueline Lee Bonneau
Hozefa Moiz Botee
Pedro Boullosa Gonzalez
Gabriel Bouskila
John A K Bradley
Jonathan Paul Brater
Alexandra Helen R. Briggs
Kristen-elise Frances Brooks
Laura Anne Brooks
Charles Alexander Brown
Spencer Bruck
Avraham Jonathan Brudner
Marley Ann Brumme
Elliot Dov Buckman
Robert Edward Bugg
Renee Elizabeth Cadmus
Joshua Daniel Calabro
Casey Heather Calhoun
Frank Charles Calvosa
Megan Grace Cameron
Jorge Campos
Henrique Bertolo Canarim
Jing Cao
Alessandra Carcaterra
Kathryn Margaret Carmichael
Bess H. Castagnello
Francesca Anna Celestre
Deepal Singh Chadha
Ya Marie Ebrima Cham
Cary Chan
Disha Chandiramani
Ryan Christopher Chapoteau
Alexander Harry Charap
Karen Margaret Chau
Ji Chen
Glen C. Cheng
Melissa Courtney Cheng
Alexis Chernak
Kaley Renee Childs
Kenny Chin
Simon Chiu
Allen Choi
Christian Gabriel Choi
Venice Choi
Allan Chorny
Ming-qi Chu
Jorge A. Cisneros
Meah Corrine Clay
Michael Cohan
Shelby Erin Cohen
Jhovanna Angelie Coira
Mahalia Annah-marie Cole
Candisse Rae Collins
Michelle Ghaznavi Collins
Erin Lynn Connolly
Matthew Lawrence Conrad
Meredith Helen Conrad
Heather Jo Cooksey
Xavier J. Correa
Angela Maria Corridan
Paul Scroppo Cossu
Honor Rose Costello
Noah H. Craven
Nicole Denise Cubides
Amanda Nicole Cully
Brandon David Cunningham
Gia Ann Curatola
Danica Erin Curavic
Thomas Joseph Curtin
Katie Czajkowski
Katie Elizabeth Czajkowski
Peter Francis D'agostino
Reiko Dai
Carolyn Renee Davis
Christopher James Davis
Daniel Waldron Davis
Pieter Sebastian De Ganon
Rita Cecilia De La Guardia Greene
Samuel Benjamin Charles De Villiers
Caleb Martin Deats
Claire Carolan Decampo
Jeremy Aaron Deitch
Bridget Kathleen Deiters
Lucy Demery
Han Deng
Gayle Jennifer Denman
Brendan Jerome Derr
David William Destefano
Lydia Handler Devine
Jeanette Hardy Dexter
Adam Patrick Dickson
Erin Eileen Diers
Parisa Mona Djavaheri
Jeremy James Doane
Heather Noel Doherty
Patrick Donovan
Kwame Leslie Andoh Dougan
Alice Cotta Dourado
Laura Bea Dowgin
Christopher James Driscoll
Katherine Evelyn Driscoll
Joshua Melamed Dubnow
Matthew Joseph Dubroff
Ryne Duchmann
Paul Henry Dumaine
Ayalon Bezalel Eliach
Britt Melissa Ellis
Kimberly Endelson
Malissa Charise Eng
Katherine Elaine Erbeznik
Alexander G. Erdos
Carol Edwine Faden
Aisling Fahy
Matthew Ross Falcone
Jacob Aaron Feldman
Michelle Feldman
Hailey Armstrong Ferber
Melissa Ferraro
Elyse Beth Feuer
Stephanie Nicole Figueroa
Amber Finley
Jacob Francis Fischer
Matthew Hal Fischer
Andrew L. Fish
Elizabeth Ruth Fisher
Melissa Barrie Fishkin
Brandon James Fitch
Richard Thomas Fleming
Jennifer Anne Fleury
Megan Elizabeth Ford
Kemoy Kalelia Foster
Evan Harry Fox
Joelle Bernett Franc
Mishka Camille Francis
Henry Alan Freedman
Daniel Allegretti Freeman
John Benjamin Freese
Daniel Friedman
Jonathan Aaron Friedman
Mark Randall Friedman
Rachel Marie Fritzler
Taryn Gallup
Joaquin Gamboa
Mohammed Ahmed Gangat
Han Gao
Isabel Ann Gardocki
Aarti Garg
Allison Diana Gargano
Brittany Lynne Garmyn
Marisa Beth Geiger
Jenna Lea Gerry
Eric Gerson
Benjamin Anthony Gianforti
Lauren Nicole Giudice
Erin Gabrielle Gladney
Rohini Chintamani Gokhale
Eliza Emerson Golden
Susan Nanci Goldis
Jeffrey Golds
Jason Scott Goldstein
Jennifer Susan Goldstein
Ilona Gont
Leonard L. Gordon
Michael Ryan Gorenstein
Jeremy Gorfinkel
Stephenie Ann Gosnell Handler
Kazumitsu Goto
Natalia Gouz
Katrina Monique Goyco
Kenneth Daniel Grad
Raymond Gradale
Angelica Karen Grasso
Rachel Eleanor Green
Jaime Greenblatt
Christopher Bradford Greene
Robert Emmett Griffin
Meghan Elizabeth Grizzle
Carley Ann Groobman
Robert Gustav Gucwa
Jennifer Mara Gumer
Abhinav Gupta
Anurag Gupta
Stanislav Gutgarts
Shannon Rose Hahn
Anoush Hakimi
Elizabeth Eugenia Hall
Andrea Verena Halpern
Britt Condell Hamilton
Jeffrey Hamilton
Jeffrey Dane Hamilton
Rebecca Lasoski Hamra
Qian Han
Jason Craig Hardy
Emily Anne Hariharan
Jason Robert Harrington
Joseph Lee Harrington
Kyle Anthony Harris
Laura Elizabeth Harris
Kevin Christopher Hartzell
Brandon Hasbrouck
Jun Hasegawa
David Lawrence Hattendorf
Kyle James Hatton
Malik Havalic
Morgan Joseph Hayes
Jennifer Hays
Austen Michael Heim
John Patrick Heim
Ian Roger Henri
Samantha Jane Himelman
Jonathan Lee Himmelstein
William Hines
William Andrew Hines
Guylain Berenger Hippolyte
Eitan Hoenig
Eitan Seth Hoenig
Sasha Nicole Holguin
Jami Elena Holland
John Thomas Holland
Hatty Hong
Joo S. Hong
Valerie Lorraine Hooker
Blake Braden Horn
Shalom Dovber Huber
David Michael Hudson
Benjamin Beach Hughes
Gabrielle Alexa Hughes
Debra J. Humphrey
Kam Ting Hung
Samantha Anne Ingram
Risa Ishikawa
Kyle Hudson Marquis Ishmael
Sohail Itani
Christopher Lesser Jackson
Charles Salim Jacob
Andrew David Jacobs
Daniel Frederick Jacobson
Seon Hae Jhee
Eric Douglas Johnson
Walter Lee Johnston
Frank Jordan
Merritt Alisa Juliano
Ross Michael Kamhi
Anthony Kammer
Matthew Yale Kane
Elisa Spencer Kao
Sophia Karas
Sophia Stephen Karas
Nahale Karimi
Anne O'Hagen Karl
John Karoutsos
Viktoriya Karshenboyem
Melissa A. Katz
Shira Aviva Kaufman
Rohan Kaul
Ryan Mitchell Keats
Michael Thomas Keilty
Nicholas Richman Kelman
Joshua Lenard Kershner
Dejan Kezunovic
Juvaria Saeed Khan
David Kim
Joanne Haesung Kim
Soejung Kim
Sun Kim
Tae Hwan Kim
Young Suk Kim
Meredith Carol Kimmel Hamsher
Erik Thomas Kindschi
Timothy James Kirby
Daniel Jonah Klein
Nadia Klein
Roohia S. Klein
Seth Adam Klein
Jared Davis Kleinman
Michelle Pamela Kliegman
Guyon Hartwell Knight
Benjamin Zev Koblentz
Katie Louise Kohn
Kyle Jameson Kolb
Daniel Martin Komarek
Alexandra Miriam Konigsburg
Shira Konski
Maxwell Arlie Halpern Kosman
Roni C. Kotel
Julie Victoria Kourie
Justin Krane
Susan Ashley Kremer
Scott James Krischke
Alon Kritzman
Alok Anil Kumar
Simon Fanzong Kung
Paul Kuppich
Paul Vincent Kuppich
Jonathan David Kurland
Amy Kusol
David Young Kwak
Tsz Hin Kwok
Ian Matthew Kysel
Sheldon Hunt Laing
Kacie Alina Lally
Spencer Lam
Jennifer Maya Lambert
Maria Marulanda Larsen
Daniel Leslie Law
Nicholas Jordan Lawhead
Jenna F. Leavitt
Albert Young Ju Lee
Bryan Yunho Lee
Kristin Boyle Lee
Minsun Lee
Myung Jin Lee
Samuel K. Lee
Victoria Jean Lee
Patrick Patterson Leibach
Thomas Robert Lemmo
Jonathan Adam Lerner
Justin Evan Lerner
Allen Leung

Lindsay Nicole Leventhal
Laura Elisha Levin
Michael Isaac Levin
Samantha Michelle Levin
Heather M. Levine
Joshua Franklin Levine
Jacob E. Lewin
Samuel Van Dusen Lewis
Di Li
Ling Li
Marc Liberati
Nicole Olivia Lichtman
Lauren Rachel Lifland
Chang Sik Lim
Christine Jeehae Lim
Judy Lim
Ye Na Lim
Jessica Weili Lin
Kevin James Lin
Julia Ann Lisztwan
Ruonan Liu
Sirui Liu
Carolyn Liu-Hartman
Carolyn Jia-lin Liu-hartman
Justin Shing-jo Lo
Lily Lo
Anthony John Logalbo
Karla M. Lopez
Jose Karl Lopez-gallego
Lela Porter Love
Shane Roy Lowenberg
Kimberly Ruth Lucas
Jamie Lynn Lucia
Anthony Louis Lupinacci
Mark Henry Lyon
Irene Claudia Ma
Katherine Courtenay Macilwaine
Heather Katherine Mackintosh Sims
Lindsay Rachel Macleod
Melissa Anne Magner
Richard Henry Maidman
Christopher Davis Maier
Peter Neimat Mandel
Jared Samuel Manes
Rebecca Ariel Marcucci
Erik Hjalmar Marild
Jared Kaden Markowitz
Veronica Marquez
Claire Martirosian
Sandor Derek Marton
Jacquelyn Leah Mascetti
Rigel Spencer Massaro
Seth Jay Mastin
Hania Masud
Sunjay Mathews
Michele Naoko Matsubara
Carolyn Joyce Chua Mattus
Erika Maurice
Frank Joseph Mazzaferro
Alisha Louise McCarthy
John Nowlin McClain
Jennifer Marie McDougall
David Frederick McElhoe
Jason James McInnes
Caitrin Una McKiernan
Stephanie Kyoko McKinnon
Maeghan Joan McLoughlin
Kelly L. McNamee
Jillian Lee McNeil
Paul Edward Means
Jonathan Matthew Medalsy
Daniel P. Meehan
Luca Cristiano Maria Melchionna
John Edward Mellyn
Jesse Melman
Michael Steven Meltzer
Justin Harry Ryann Mercer
Margaret Lewis Merrill
Maren Jessica Messing
Haben Ghebre Michael
Giovanna Micheli
Morten Albert Michelsen
Brooke Terry Mickelson
Sara Miller
Nathaniel Jarrdan Minott
Anna Rae Kathryn Mitchell
Sharanya Mitchell
Melissa Anne Mitgang
Mario Denis Mocombe
Mariya Mogilevich
Zaid Mohammed Mohiuddin
Matthew Moinian
Evan Matthew Moitoso
Daphne Monnoyeur-moore
Juan C. Moran
Juan Carlos Moran
Jeffrey W. Moryan
David Leigh Moses
Jonathan Herbert Moss
Rebekah Jaime Mott
John Paul Mulvaney
Steven Michael Mungovan
Brenda Stephanie Munoz Furnish
Carlee Jo Murphy
Matthew Sean Murtagh
J. Armand Musey
Michael Langsdorf Nadler
Heather Nicole Nale
Soojin Nam
Sripriya Narasimhan
Cenk Narter
Ritu Narula
Bertie Nei
Samuel Duggins Newbold
Jenna Christine Newmark
Abigail Nicandri
Kaj Preston Nielsen
Yuval Nir
Molly Elizabeth Nixon-Graf
Eli Clemans Northrup
Rorie A. Norton
Melissa Colleen Nunziato
Yosef Nussbaum
Jonathan Burns O'Brien
Moreen O'Brien
Ryan Jeffrey O'Hara
Kazuya Ogawa
Rebecca E. Oh
Chimezie Tochukwu Okobi
Frank Walter Olander
Leticia Maria Olivera
Christina Olson
Ian William Oman
Jonas Ezra Oransky
Joseph Martin Ortega
Graham Lewis Oxford
Byron De Angelo Miller Pacheco
Alice Mei Xee Pang
Mary Kathryn Papaioannou
Ji Hyun Park
Caroline Selleck Parker-Beaudrias
David Thomas Parkinson
Nikhil Indravadan Patel
Ruchi Patel
Carina I. Patritti
Jason Brett Pearl
Cristina Ashbey Pejoves
Karen Christina Pelzer
Spencer Pepper
Gloribelle J. Perez
Rafael Andres Perez
Shuyan Phua
Emily Ann Pierce
Zalika Tashia Pierre
Philip Nathan Pilmar
Kaitlyn Lindsay Piper
David Anthony Pisciotta
Amanda Lane Pober
Zachary Samuel Podolsky
William Dane Podurgiel
Amy Lauren Pollak
Lane Polozola
Lane Michael Polozola
Michael Herbert Popper
Christopher Ryan Post
Samantha Corazon Pownall
Giulia Stella Previti
Tahira Aisha Prince
Susan Progoff
Daphne Putka
Matthew Francis Putorti
Daniel Joseph Quon
Stevi Alyse Raab
Melissa Radin
Kristina Raevska
Kristina Stoyanova Raevska
Priya K. Raghavan
Mark Paul Ramsey
Christine Elizabeth Raniga
Daniela Anna Rapisardi
Philip Todd Rappmund
Naveed Rashid
Kenneth Shavar Ratley
Jessica Kathryn Agnes Rauskolb
Thomas Francis Reddy
Rebecca Lynn Reeb
Erin Reid
Laura Leigh Reifinger
Adam Harold Reiser
Veronika Reizin
John Francis Ringwood
Giselle S. Rivers
Christopher William Robbins
Rebecca Nehama Rivka Rodal
Carmen Teresa Rodriguez
Richard P. Roelofs
Dana Roizen
John Joseph Rolecki
Pablo Manuel Ros
Jonathan David Rosen
Jessica F. Rosenbaum
Sara Rosenberg
Christopher John Rosina
Meredith D. Rovelli
Kristin Ella Russell-Paul
Victoria Morton Rutherfurd
Meredythe Medford Ryan
Jia Ryu
Jennifer L. Sabin
Benjamin Isaac Sachs-Michaels
Yaakov Sadan
Sohail Safdar Ramirez
David Matthew Sahargun
Jesseca Elizabeth Salky
Joshua H. Saltzman
Cherie Kathleen Samuels
Michael E. Sanchez
Drue Adam Santora
Nicholas Alexander Savino
James Francis Scaffidi
Michael Gerard Scavelli
Michael Paul Scharpf
Kyler Aiken Scheid
Brendan O'meara Schmitt
Jordan Matthew Schneider
Sara Taylor Schneider
Kendra Wells Schramm
Kristen Michelle Schuck
Jacobus Johannes Schutte
Amanda Rachel Schwartz
Darren Matthew Schweiger
Nicholas Anthony Secara
Kenza Seghrouchni
Peter Scott Seligson
Aram Nubar Sethian
Rushank Raj Shah
Michael Robert Shaheen
Brooke Farrell Shapiro
Anthony Pizzonia Shaskus
Andrew Lee Sherman
Cara Nicole Shewchuk
Joanna Hart Shihadeh
Mik Shin-li
Sam Carroll Shulman
Yan Shurin
Altin Herbert Sila
Jeffrey Sidney Silberman
Sarah K. Simon
Doris Sinoimeri
Jaclyn Coronado Sitjar
Maury B. Slevin
Robert Todd Snetiker
Simon Leighton Snyder
Temilola Oluwatosin Sobowale
Daniel Nissan Soleimani
Angelo Michael Solomita
Joseph Nicholas Soltis
Susan Song
Nicole Soriano
Eudokia Spanos
Elisabeth Marie Sperle
Jared Brett Spiegel
Daniel Jason St. Onge
Mark Allen Stagliano
Madeline Ruth Stavis
Benjamin Joseph Steiner
Donald Joseph Steinert
Alexandra Stemmler
Sharona Hakimi Sternberg
Ryan David Stott
Daniel Eliezer Strassman
Heather Kathleen Suchorsky
Huseina Alma Sulaimanee
Erin Marie Sullivan
Kate Montgomery Swearengen
Nabiha Binte Syed
Emerson James Sykes
Ryan James Sylvester
Michelle Elana Taitz
Tennie Ho Ling Tam
Irene Tan
Roy Tannenbaum
Matthew Ryan Tappin
Shaud Tavakoli
Lisa Mercedes Tech
Jordan A. Thomas
Kendra Nicole Thompson
Tian Tian
Eda Katharine Tinto
Benjamin Tolub
Jacqueline May Tom
Michael David Totaro
Stephanie Lynn Train
Nicholas James Trimboli
Quan Trinh
Stephanie Tsay
Vivian Wei-chieh Tseng
Philip J. Tucker
Laura Catherine Turano
Jessica Lauren Uziel
Bijan Vafegh
Erin Sahlin Vagley
Regina Valdes Montalva
James Thomas Van Strander
Alexander Brian Victor
Sebastian Villaveces
Anna Vinnik
Jason Scott Vinokur
Elizabeth Anne Viole
Anne Volk
Daniel Lee Wagowski
Kenneth Daniel Walsh
Suzanne Michelle Walsh
Evan Jiann Wang
Fei Wang
Haiwei Wang
Victoria Wang
Wan-chun Wang
Ryan Glen Wanttaja
Bryan Nelson Warner
Leticia Maria Watson
Thomas Patrick George Webb
Jonathan Ariel Weinstein
Zachary L. Weintraub
Philip Weiss
Emily Walsh Behl Wells
Sarah Wertheimer
Michael Franklin Westfal
Lori Joan Wheal
Judy Whiting
Helen Sarah Whittington
Leonard Jack Wiener
Thomas Kletus Wiesner
Christopher Patrick Wild
Camden Wesley Williams
Elizabeth Louise Williams
Karla Renee Williams
Amanda Noel Willis
Natalie Filomena Wilson
David Anthony Wolber
Charles Ferdinand Wolf
Eric Sager Wolf
Jessica Amy Wolff
John Wood
Kathryn Anne Wood
Sarah George Woodberry
Melissa Corinne Wotton
Fan Wu
Jia Jane Wu
Rachel Tsai-han Wu
Allison Michele Wuertz
Yohei Yamada
Zhao Yang
Andrew Daekun Yoo
Jae In Yoo
Jung Yoo
Elitsa Valentinova Yotkova
Sarah Haith Young
David Michael Yount
Kara Marie Zandoli
Justin Scott Zaremby
Elvia Zazueta Leon-Quintero
Nina Frances Zelic
Jonathan Seth Zelig
Daniel Zharkovsky
Lina Zhou
Shu Zhou
Weilan Zhu
Yilan Zhu
Laura Rose Zimmerman
Michael Kenneth Zitelli

SECOND DISTRICT
Martha Dalia Adames
Emanuel Aron

Aja Ittasyah Baxter
Jenna Bergamo
Emily Meryl Berttucci
Natraj Saddival Bhushan
Nicole Blumenfeld
Anna Bogunova
Jared Marsal Bretas
Sarah Jane Bruno
Alexander Brent Carlson
Michaela Frances Carpio
Ada Wai Jar Chan
Robert Albert Cornwell
Vincent Joseph Diaz
Camillia Saleh Elahwal
Amira Rashad Elbeshbeshy
William James Fields
Yitzchak M. Fogel
Justin Brett Fox
Jenna Gerry
Leah Marielle Graboski
Laura Heslin
Philip Hung
Oluwafunmilayo Angela Idowu
Shaunya Gloria James
Adam Maxwell Jenkins
Carmen Elena Jule
Amanda Hope Katz
Angelina Khmelnitsky
Alysa Brooke Koloms
Nicholas John La Forge
Michael Colin Landis
Matthew Harold Lawrence
Adrien Lee
Antony Lembersky
Matthew Graver Levien
Kenneth B. Levin-Epstein
Leigh Moran Mangum
Ricardo Juan Martinez
Amee Shah Master
Michael Richard Mastrangelo
Elena T. McDermott
Rebecca Michelle Miller
Steven Jacob Mizrahi
Isaac Jordan Myers
Onitara Namandje Nelson
Ian Oman
Omolola Chiamaka Omoyosi
Luda E. Ostrovsky
Alexiz C. Perez
Alexandra Frances Puleo
Zhen Ruan
Raphael Isaac Ruttenberg
Selaine Melesia Saunders
Randi Michelle Scherman
Allyson Lindsay Stein
Sue-ann Nicola Stevens
Victoria Clara Su
Georgia Tsismenakis
Charlie Anthony Vargas
Pani Vo
Tedmund Yuchung Wan
Darran David Winslow
Alva Louise Wright

THIRD DISTRICT
Victoria Ann Aufiero
Alyssa Bombard
Alyssa Marie Bombard
Amber L. Camio
Tara L. Clothier
Debra Ann Collura
Danielle Angelica Erickson
Brian Evans
Brian Duffy Evans
Peter Flora
Peter Jacob Flora
Michael P. Furdyna
Bradford John Harris
Justin LaPiana
Justin Francis Lapiana
Benjamin Levin
Kevin F. McGarry
Jennifer McGrath
Christina R. Mitcalf
Heidi Nicholson
Sean Daniel Parisi
William Charles Pericak
Alice Peters-baker
Christopher A. Priore
Garrett Martin Smith
Shannon M. Spratt
Michael R. Stabinski
James Andrew Stevens
Shaun Gregory White

FOURTH DISTRICT
Christopher Amash
Kyle Davis
Kyle Loren Davis
Brett Eby
Brett Robert Eby
Robert H. Hassinger
Thomas Reid Knapp
Amanda Lee Lewis
Jennifer Lynn McDonald
Michele Lyn Miller
Robert Drew Palcsik
Adam Powers
Adam Pierce Powers
Sarmili Saha
Vincent Stark
Ashley Ross White

FIFTH DISTRICT
Michael John Bandoblu
William John Barry
Tanisha Theresa Bramwell
Joseph John Centra
Deborah Ruth Gardiner
Elizabeth Hersh
Elizabeth Marika Hersh
Abu B. Kanu
Robinson Wayne Lingo
Ryan L. McCarthy
Jordan Scott McNamara
Kari Anne Moyer-henry
Audra Suzanne Mueller
Frederic Louis Pugliese
Meghan Maureen Reap
Joelle Elizabeth Rotondo
Sarah Ruhlen
Sarah Elizabeth Ruhlen
George Robert Shaffer
Geroge R. Shaffer
Alexander Robert Smart
Lynette Walter

SIXTH DISTRICT
Matthew William Bliss
Max R. Brown
Michelle K. Fassett
Michael Gillis Kohler
Nancy J. Meserow
Cynthia Olin
Cynthia Marie Olin
Dave Petrush
Alexander Smart
Ryan Snyder
Lynn Wassel
Lynn Susan Wassel

SEVENTH DISTRICT
Benjamin Stephen Bergan
Michelle Boyle
Michelle Alana Boyle
Jennifer M. Cintron
Elizabeth Ann Clarke
Jyoti Chandrashekhar Deo
Jason M. Dunn
Jeffrey Neil Evans
Richard Franco
Daniel James Gocek
Jessie Gregorio
Odette Joy Henry
George Edward Heuring
Nathan Joseph Kerstein
Yufeng Ma
Heath Elwood Miller
Armando A. Musa
Bradford Jordan Reid
Andrew Thomas Simkin
Tiffany Marie Spangler
Michael Joseph Witmer

EIGHTH DISTRICT
Joseph Michael Becker
Jeffrey Todd Bochiechio
Jacqueline Florence Chiarot
William Andrew Ciszewski
Jennifer Early
Jennifer Christine Early
Paul Thomas Fusco-Gessick
Gregory Gallo
Gregory Michael Gallo
Erin Elizabeth Hart
Jeffrey David Kasarjian
Meredith Helen Larsen
Patricia H. Lyle
Ashleigh MacMartin
Ashleigh Morley Macmartin
Margaret Ellen Maigret
Eric Michael Majchrzak
Ian Seth Martin
Kevin Mark Martin
David Aaron Martinez
Holly Danielle Mergenhagen
Sally B. Simpkins Oczek
Melissa Lynn Overbeck
Michael Patrick Raleigh
Claire Marie St. Aubin
Marissa John Sweet
Fritzgerald Tondreau
Brigette Renee Whitmore

NINTH DISTRICT
Maria Estela Felipa Manahan Aceron Bisnar
Stavroula N. Anagnostopoulos
James A. Blalock
Emily Cajigas
Emily Anne Cajigas
Carolyn Elizabeth Cottingham
Joseph Andrew Danko
Govinda H. Davis
Alfred John Del Rey
Austin F. DuBois
Paul Fattaruso
Cecile M. Fraser
Christina Gambino
Christina Marie Gambino
Christine Elizabeth Goodrich
Daniel Barnett Grossman
Dean V. Hoffman
Frank Michael Jenkins
Laura E. Jensen
Catherine Rogers Laney
Alexandra Love Levine
Shane Lowenberg
Innessa Sarah Melamed
Christine Moon-counts
Jacquelyn L. Mouquin
Caroline Elizabeth Nelson
Tom Dominic Osadnik
Giulia Palermo
Jillian Petrera
Jessica Orgel Powell
Christopher Louis Rinaldi
Catrina Renee Shivers
Sherri Steiner-Stewart
Jennifer Lee Swearingen
James Rawson Thayer
Jonathan Burke Van Dina

TENTH DISTRICT
Anju Abraham
Frank Michael Ambrosio
Francesca Annunziata
Kathleen Joyce Antenorcruz
Laura Theresa Aviles
Sharon F. Barkume
William Joseph Birmingham
Jason Ian Blanchard
William Eric Blashka
Philip J. Branigan
Jenna A. Burnbaum
Jonathan Cohen
Scott Julian Cohn
Christine Marie Cusumano
Matthieu Daguerre
Eric Dawson
Laura Emma Desilva
Roger Hoang Phuong Dinh
Andrew Gary Donnelly
Natasha Maria Ewart
Robert Alexander Ellis Facey
Michael John Famiglietti
Timothy Francis Flanagan
Jeffrey Michael Fowler
Krystiana Loredana Gembressi
Amanda Rose Gentile
Benjamin David Greenfield
Christine Nicole Guida
Kevin Holden
Bettina L. Hollis
Fay Josovitz
James Patrick Judge
Thea J. Kerman
Andrew Paul Kimble
Tracy Ann Kinneary
Jordi Ian Kushner
Annette Marie Lalic
Michael Christopher Lamendola
Gregory Martin Lanuti
Patricia Miller Latzman
Chul-woo Lee
Douglass Lee
Daniel M. Lehmann
Jessica A. Leis
Eric Matthew Lipenholtz
Elisa Luqman
Scott Bryan Mac Lagan
Laura M. Maletta
Cynthia Lee Malone
Jessica Leigh Maniff
John Joseph Marchiel
Michael David Mattia
Kevin Mason McGowen
Mary C. Merz
Nicole Leigh Milone
Diane E. Moir
Ana Marcela Montoya
Ryan David Moran
Jonathan Omid Mottahedeh
Benjamin Y. Movtady
Gregory Daniel Murphy
Nicole H. Negrin
Michael Albert Nemecek
Isaih Rochell Owens
Christina Lee Pinnola
Adam Morrow Rafsky
Nabiha Rahman
Sonsy Pulikotil Rajan
Aliza Rosin
Allison Lynn Rowley
Mohammad Qasim Rubbani
Amanda Michelle Rubildo
Sam Victor Ruggeri
Melissa Lauren Ruvio
Adam Lawrence Sandler
Marquita Simon
Robert Michael Spataro
Richard Robert Stein
Ted J. Tanenbaum
Jonathan Michael Turnbaugh
Lisa Marie Viscount-tommasino
Robert Andrew Von Hagen
Sean Wilsusen
Adam Zabary

ELEVENTH DISTRICT
Anisa Afshar
Andrea Andrade
Anna Astrakhan
Paula Andrea Avila Guillen
Nikoleta Sarah Barr
Karen Nicole Best
Jacob Ellis Binder
Menachem Brickman
Kenisha C. Calliste
Edward Chen
Liya Chitishvili
Alexander Cohen
Erika Renee Connolly
Marcela Lina Cuadrado
Ruben Davidoff
John Pasquale Esposito
Nikkia Chantel Gause
Michael Harry Gentithes
Daniel Jacob Gross
Bin Hu
Jenny Junyan Huang
Olga Ilyayeva
Amy Tay Jen
Dawa Jung
Eric Buseung Kang
Tingting Kang
Joanna Kata
Despina G. Katsigiannis
Eric Jeffrey Katz
Peter Joseph Kelly
Svetlana Khavasova
Christina Eun Hye Kim
Rostislav Kofman
Anne Ekaterina Cable Kulli
Rick Joseph Lasher
Lori Jackie Nekava
Adam Jared Novzen
Nathaniel L. O'Neal
Jane Silvia Park
Rafael Perez
Brenda Perina
Renato Petocchi
Renato Carlo Petocchi
Joshua C. Polster
Benjamin Randall Pred
Priya Ravishankar
Dinah G. Redula
Bohee Rhee
Anton Moses Robinson
Samone Lakeema Rogers
Matthew John Salimbene
Shawn Schatzle
Scot Scher

Adam Brett Shapiro
Jianye Shi
Neal Patrick Solon
Joseph B. Son
Napatr Thanesnant
Dianne Elizabeth Timmons
Brandon John Tittle
Suzanne Mary Valles
Jonathan Seth Visotzky
Sarah Vulcano
Shao-wen Wang
Jacob Warren
Li Weng
Sung Jin Yoon
Roman Yushuva
Zhuochen Zhang

TWELFTH DISTRICT
Nicole Peta-gay Aldridge-henry
Robert Scott Barrows
Cosette Douglas
Andrew James Fiore
Ian J. Group
Jessica Elise Kingsley
Allison Joan Levie
Zuofei Liu
Robert James Logan
Adam Markovics
Brendan Patrick McArdle
Nathan Landon Mendenhall
Kathleen Ruth Meyers
Terry-ann Rockell Mills-Finnikin
Gabriella Denise Palencia
Allison Sabrina Riesel
Edit Shkreli
Stephanie Monica Taylor
Kelly M. Van Develde
Lianne Wheeler
Jessica Marie Wood

THIRTEENTH DISTRICT
Justin Ralph Dominguez
Tina Duggal

OUT OF STATE
Zaheer Abbas
Petrina Abdallah Boakye
Eva Abdulla
Michael Philip Adams
Adeyemi Adetona
Adeyemi Olubukola Adetona
Marc Leonard Adler
Mai Ahmed
Mai Zikri Ahmed
Taleen Aiazian
Taleen Anita Aiazian
Gregory Keith Albert
Milva Yoselin Alcantara
Nabeel Alexander
Nabeel S. Alexander
Matthew Philip Allen
Thomas Vinu Allen
Andrea Zanini Almeida
Elizabeth Burke Alspector
Zoe N. Amanezis
Christopher Robert Amash
Natalie Rose Amato
Federico Amoroso
Sheila E. Anantharaj
Christopher Bennett Anderson
Ziska Anderson
Ziska Anika Anderson
Tiago Andreotti E Silva
Pavithra Angara
Nitzan Arad
Refai Mirza Arefin
Lorraine M. Armenti
Sarah Jeanne Arpagaus
Rebecca Sara Ashkenazi
Amine Assouad
Brian Patrick Astrup
Lorraine Ater
Lorraine Natasha Ater
Edith Mathilde Aupetit
Antonio Ayala
Claudia Azevedo
Claudia Moreira De Sousa Lim Azevedo
Daniella Melo Azevedo
Hanna Baek
Beverly Jean Baker
Byron Talbot Ball
Michelle Jodi Bamdas
Nicholas Isaac Bamman
Eunyoung Julie Bang
Paul Jonathan Bankes
Marina Merav Barinshtein
Matthew Barison
Matthew Krauss Barison
Robert Barrows
Myrto Barth
Myrto Y. Barth
Dayna Joi Baskette
Lisa Marie Bass
Natalie Matla Bassinski
Emily Ann Battersby
Halli Lucia Bayer
Lyndsey Bechtel
Lyndsey Christine Bechtel
James Joseph Becker
Richard Bruce Beckner
Samantha Ashley Benadiba
Elliott Benjamin
Melissa Christine Bennett
Craig Aaron Benson
Pablo Esteban Bermeo
Sophia Farber Bernhardt
Roberta Berzero
Rita Nanda Bettis
Brian Nicholas Biglin
Shawn Daniel Blackburn
Andrew Joseph Blancato
Samuel Andre Antoine Boccara
Felipe Bohnet-Gomez
Felipe Sebastian Bohnet-gomez
Nicolas Boin
Marina Bongiorno
Pawel Boruch
Pawel Edward Boruch
Charles Boudry
Stefan Garrett Bourn
Donald Jerome Bowman
Jacalyn G. Boyce
Sarah Jane Bradley
Brian a. Bradshaw
Daniel Braun
Daniel William Braun
Roman David Bretschger
Florence Breuvart
Florence Daphne Breuvart
Jamie Michelle Briggs
Eduardo Francisco Bruera
Adam Bryce
Adam John Bryce
Daniel Ryan Bryer
Tana Bucca
Stephen John Buckley
Keith J. Bunkley
Brandon Walter Burke
Carol Burke
Carol Martin Burke
Donald Francis Burke
James Clare Burnett
Samantha Bushey
Samantha Lee Bushey
Suk Hyun Byun
Elizabeth Cabot
Gracielle R. Cabungcal
JohnPaul M. Callan
Jonathan Mask Calmore
John Daniel Cameron
Amy Elizabeth Canning
Jessenia Canot
Shu Cao
Nicolas M. Caraquel
Hugh Carlson
Hugh Alexander Carlson
Kristin Nicole Carlson
Margaret Elizabeth Carlyle
Adam M. Carman
Helen Carrier
Helene Carrier
Sarah Wendy Carroll
Clarissa Raquel Cartagena
Mark Joseph Carter
Travis Harley Carter
Richard Michael Castagna
Michael Chambliss
Michael James Chambliss
Lisa Chan
Lisa Chiying Chan
Douglas Blake Chanco
Elizabeth Chang
Elizabeth Anne Chang
Jeffrey R. Chang
JunHwan Chang
Neha Chaubey
Neha Mithilesh Chaubey
Andrew Ishine Chen
Andy Chen
David Yiding Chen
Wanting Chen
Yingwen Chen
Xin Cheng
Vadim Evgenievich Cherkasov
Osato Francisca Chitou
Naruhito Cho
Woohyoung Cho
Hae Eun Choi
Hae Eun Choi
Yeon Soo Choi
Ping-chuan Chou
Samuel Chow
Catherine Wen Ching Chu
Alexander Clemens
Eimear Jean Coady
Hannah Jeanne Cochrane
Timothy Adrian Cohan
Jordan Todd Cohen
Stephen Sawyer Cohen
Scott Haines Coleman
Marion Zoe Colin
Ann Marie Collins
Melissa Collins
Melissa Bradshaw Collins
Claudia M. Colom Abreu
James D. Comstock
Howard Earl Conday
April F. Condon
Sandrine Christine Constant
Sandrine-christine Constant
Stephanie Conti
Abigail Ruth Cook-mack
Aaron Richmond Cooper
Elizabeth Creighton Corey
Danielle Patrice Counts
Steven N. Cousins
Lysane Cree
Carlos Andres Cristi
Michael Cross
Anne Cunningham
Anne Crawford Cunningham
Maroussia Jeanne Simone Cuny
Christopher August Curley
Douglas Sleater Curran
Ashley Nicole Czajkowski
Manjul Dahiya
Alana Marie Daley
Jeanne Perry Darcey
Camille Beatrice Dautricourt
Daniel David
Daniel Y. David
Sarah Jane Davidson Ladly
Lauren Cozzolino Davies
Ceri Dawn Davis
Frank Tradewell Davis
Govinda Mirabai Davis
Mary Davis
Mary Elizabeth Davis
Paul Hartley Davis
Darvin R. Davitian
Anneen De Jay
Thomas Arthur Deamus
Edwin Samuel Deberdt
Caroline DeCell
Caroline Montague Decell
Kimberly A. Delmonico
Catherine DeLorenzo
Catherine Camilla Delorenzo
Christine Louise Demana
Bojuan Deng
Brent Dimarco
Derek Anthony Disbrow
Julie Ann Dona
Wenjie Dong
Yingying Dong
Polina Mzhen Dostalik
Erin Kathleen Douglas
Lauren Drew
Lauren Kathryn Drew
Evan Druce
Evan Bradley Druce
John David Du Wors
Michael Dundas
Michael Henry Lawrence Dundas
Dauphine Alexandra Dunlap
Kristine Eco
Augusto Egoavil
Amira Elbeshbeshy
Rodolphe Baptiste Elineau
Peter John Elkins-Williams
Bronwyn Laura-anne Elliott
Samuel David Elswick
Sam Engutsamy
Talita Ramos Erickson
Elizabeth C. Ezekwem
Tatiana Sampaio Octaviano Falcao
Stephen Brian Farmer
Jack Alexander Fattal
Katrina Faucett
Katrina Lyn Faucett
Michael Justin Fekete
Jie Feng
Keith Ferguson
Keith Maxwell Ferguson
Carly Fidler
Carly Jessica Fidler
Gabrielle A. Figueroa
Michael David Fisse
Irene Nikoletta Fista
Patrick John Flinn
Stacey a. Fols
Stacy Alison Fols
David Fornal
Jamie Elizabeth France
Cameron Kyle Fraser
Jacob Parker Freeman
Ben Lee Friedman
Danielle Elizabeth Friedman
Pernille Achton Friis
Rebecca Emily Frino
Kojiro Fujii
Orrin Arthur Fullerton
Raymond Joseph Furey
Kathleen Ann Gallagher
Maria Joe Gangemi
Gang Gao
Emily Chelsea Garber
Brian Gatens
Brian Scott Gatens
Hwaja Gee
Joseph Gehrke
Joseph Douglas Gehrke
Yicheng Geng
Michael Gerrity
Michael Peter Gerrity
Keith Michael Gerver
Qais Ghafary
Ryan Glanzer
Ryan William Glanzer
Dorje Tsering Glassman
Jason Christopher Goddard
Tina Ramesh Goel
Michael Sammie Goldberg
Mark Goldenberg
Mallory Sarah Goldsmith
Jane Goldstein
Flavio Goncalves Pontes Sodre
Jennifer Kristyn Goodwin
Ryan Patrick Goodwin
Jay B. Gould
Victoria Gouletas
Siegrid Grassner
David L. Grayck
Murray Ian Alexander Gregorson
Iryna Groshev
Caroline Amy Gross
Theresa Hsin-yi Gue
Carolina Guerra
Carolina Maria Guerra
Jennifer Marie Guida
Jean-Francois Guillot
Sean Talmage Gunn
Qian Guo
Minkyung Ha
Amanda J. Hackett
Alexios Serge Hadji
Robert Turner Haefele
Maija Emilia Hall
James Matthew Hamann
Lalita Michele Hamilton
Jennifer Joy Hammitt
James Hannah
James Russell Hannah
Francine Hanson
Francine Marie Hanson
Kimberly Kate Harding
Adeel Haroon
Seraj Haroun
Angela L. Harper
Adam S. Harris
Laurel Dana Harris
Michael Hartleben
Carmon M. Harvey
Nadia S. Hasan

Yuta Hashimoto
Robert Sherman Hatfield
Keena Mackay Hausmann
Joshua A. Hawks-Ladds
John C. Heath
Pierre Philippe Marie Heidsieck
Kyle Richard Heitman
Jaehoon Heo
Charles Felix Herd
Max Saltzman Heuer
Caitlin Lauren Hickey
Rodrigo Romero Hidalgo
Richard Hiersteiner
Jonathan Himmelstein
Guylain Berenger Hippolyte
Annie-Laurie Hogan
Annie-laurie Marie Hogan
Alexander Helmut Hogertz
Stephanie Hood
Stephanie Ann Hood
Byron Hotchkiss
Byron Eric Hotchkiss
Bonan Hou
Augustus Pritchard Howard
James R. Howard
Weiting Hsu
Collin R. Hu
Mimiao Hu
Hsuan Shirley Huang
Jie Huang
Jing Huang
Agathe Gabrielle Marie Hubert
Mohammad Azfarul Hug
Barbara Perkins Hungerford
Mohammad Azfarul Huq
Umair Hussain
Umair Misdaq Hussain
Fallon Huynh
Fallon Marie Huynh
Uchenna J. Ibekwe
Emiko Imai
Ejoke Rose Imiere
Aluyah Imonitie Imoisili
Ekin Inal
Augustus Sol Invictus
Blair Jackson
Blair Ralph Jackson
Sabina Jacobs
Veronica Manee Jacobs
Anna Elizabeth Jagelewski
Scott Michael James
Aurelie Janeau
Natalie Javed
Patrick Javier
Patrick Serhir Javier
Inchae Jeong
Yan Jiang
Liang Jiaolong
Adrian J. Johnson
Amanda Johnson
Amanda Denise Johnson
Caitlin Johnson
Caitlin Brittany Johnson
Christopher Charles Johnson
Kelly M. Johnson
Kyle Langeness Johnson
Danielle Nicole Johnston
Sumeena Jolly
Sumeena Kaur Jolly
Jessica Danielle Jones
Peachie Lynnette Jones
Jobin Joseph
Jung Won Jun
Linda Lee Jun
Tien Jung-Hsing
Kawino Kabahuma
Cody Kachel
Rania Kajan
Haryle Antonio Kaldis
Styliani Kaltsouni
Etsuko Kameoka
Masahiko Kamiya
Kyounghwa Kang
Anshel Joel Kaplan
Dana Kaplan
Dana Lynn Kaplan
Vahbiz P. Karanjia
Joseph Michael Katz
Bryce Kaufman
Bryce Daniel Kaufman
Laura Beth Kaufman
Pamela Keely
Ayanna Kellar
Ayanna Yejide Kellar
Cathleen Kelly Rebar
John Ryan Kelly
Nima Jacobs Kelly
Emily Kendall
Emily Christine Kendall
Joseph S. Kendy
Kaitlin Kennedy
John Fredrick Kessenich
Adel Khalaf
Selina Khuu
Daeshik Kim
Dowoo Kim
Esier Kim
Joon Soo Kim
Peter Eugene Kim
Suk Min Kim
Taewan Kim
Youngmin Kim
Yung Min Kim
Arthur E. Kimball-stanley
Yamato Kimpara
Martha Ann Kinsella
Kimberley Kirkland
Kimberley Kimmone Kirkland
Lauren Kirkman
Lauren Elizabeth Kirkman
Heather Kirkwood
Heather Jean Kirkwood
Melis Saliha Kiziltay
Justin James Klitsch
Emily Claire Knopf Kuskin
Michael Kohler
Young Seok Koo
Young Seok Koo
Vitaliy Kozachenko
Polina Kropacheva
Amy Lai
Amy Tak Yee Lai
Leif Aarne Laitinen
Lindsey Hirschfeld Lamchick
Katherine Quinn Lampron
Jordan LaVine
Jordan Andrew Lavine
Joshua David Lavine
Wesley Michael Lawrence
William Edward Lawton
Pierre Emmanuel Leandre
Paola Marisol Ledesma
Byoungrae Lee
Emily Young Joo Lee
Heejung Lee
Helen Lee
Helen Kathryn Lee
Hsin Ting Anny Lee
Jennifer Jieun Lee
Jieh-Sheng Lee
Sonia Haejin Lee
Soyoung Lee
Kristina Voorhies Legan
Jared R. Leibowitz
Stephanie Leiter
Stephanie Dana Leiter
Matthew Charles Lenahan
Lauren Ana Erminia Evelyn Lenza
Tracy Leong
Tracy Shawn Leong
Charlotte Leroy
Andrew Lesnever
Andrew Hal Lesnever
Steven David Joern Leunert
Alexander Leventhal
Alexander Grant Leventhal
Jonathan Daniel Lewin
Geng Li
Jing Li
Min Li
Qiang Li
Si Li
Wencong Li
Xin Li
Yakun Li
Chaohui Liang
Guyan Liang
Jiaolong Liang
Laurel Lichty
Laurel Wilson Lichty
Judy Hyunjung Lim
Soo Hyun Lim
Chih-Chien Lin
Melissa Lin
Yanhua Lin
Andre Linhares
Andre Luiz Amado Linhares
Shuang Liu
Xiafei Liu
Ann T. Loftus
Johnny Lombardi
Johnny Medlocke Lombardi
Vincent Charles Lombardozzi
Guadalupe A. Lopez
Michael Coster Loughran Potter
Jin Low
Daniel Gustavo Loza
Yi Lu
Hannah Sophia Lubin
Marguerite Therese Lucila
Lindsey Luebchow
Lindsey Holderness Luebchow
Stephen Matthew Lund
Ling Ling Luo
Brian Keith Lynch
Sheila Monica Lynch
Edward Juan Lynum
Weiyuan Ma
Yan Ma
Nackesha Moneque Maddex
Daniel James Magee
James Patrick Maguire
Robin Mahapatra
Bernhard Michael Maier
Tobias Edmund Maier
Michael Malatino
Julia A. Malkina
Lubna Mohammedi Manasawala
Joseph Vincent Manney
Malou Mararang
Lucas Andrew Markowitz
Christopher Salvatore Martone
Shan Massand
Shan Prakash Massand
Cassi G. Matos
Daniel Matro
Daniel Elliot Matro
Michele Matsubara
Jinnosuke Matsumoto
David Alexander Mawhinney
Igxtelle Anyen Mbah Acha
Conor McLaughlin
Rebecca Paige McBroom
Ryan Leslie McClurg
Jamila Lynn McCoy
Jacob Leon McCray Beier
Sean Martin McDonald
Aine McEleney
Jason Wayne McElroy
Patrick Thomas McEvoy
Clare McGovern
Conor Brian McLaughlin
Michael C. McMinn
Jenna Meath
Jenna Louise Meath
Mitchell M. Medina
William Francis Meehan
Yoav Meer
John J. Megjugorac
Nirav Navin Mehta
Patricia Maria Menendez Cambo
Maria Elena Menendez Ibanez
Angela Mervar
Patrick Michel
Patrick Philippe Michel
Janine Victoria Mickens
Christopher Milla
Christopher Daniel Milla
Susan R. Millenky
Alexis Miriam Miller
Jeremy David Mishkin
Zeynab Ziaie Moayyed
Tatsuya Mochizuki
Stephen Craig Moeller-Sally
Mark Alan Mohr
Christina Molitor-Monreal
Dennis Patrick Monaghan
Rachel Elizabeth Mondl
Brian William Monnich
Erik Morales
Christopher Robert Moran
Michael Robert Morano
Abel G. Moreno
Matthew Moroney
Almira Moronne
Kristen Faith Morris
Marcia C. Mowbray
Aine Moynihan
Kate Lambert Harrison Muchnick
Dominic Johannes Mueller
Amanda Jo Murphy
Jordan Myers
Jordan Elizabeth Myers
Arjun Shankar Narayanan
Helen C.C. Naves
Ratna Nayar
Brigid Ndege
Brigid Kemunto Ndege
Carl Neff
Carl Douglas Neff
Rebecca Neumeier
Meabh Olivia Nichol
Jun Nishida
Emeka Nwani
Michelle Mary O'brien
Ilia Milagros O'hearn
Jun Obara
Trina Obi
Trina Ijeoma Obi
Corinna Ochsmann
Lindsay Dawn Offner
MarkCharles Chukwuemeka Ogunjiofor
Oyinlola Oguntebi
Oyinlola Olamide Oguntebi
Jay Youl Oh
Mina Oh
Niall Ruairi Ohuiginn
Zsolt Peter Okanyi
Charles Okebaram Okeagu
Caroline Arre Oliveira
Jose Ortiz
Jose D. Ortiz
Michael Sherwood Ostrach
Alysson Ford Ouoba
Jennifer Overall
Jennifer Anne Overall
Joseph Packard
Joseph Carl Packard
Elisabeth Linney Page
Eu Ree Paik
Hyo Jin Paik
Hyo Jin Paik
Sylvia Su Wei Paik
Alexandra Panaite
Bibek Raj Pandey
Mayumi Monique Paringaux
Jae Hyun Park
Alana Michelle Parker
Ronald Arthur Parsons
Neil Patel
Ravi D. Patel
Jean Paige Patterson
Ronald H. Pawlikowski
Lucia Veroncia Pazos
Alma Pekmezovic
Jhoana Pen
David M. Petrush
Kieran Sean Piller
Sonia Catalin Pinilla
Renato Luiz Pinto E Silva
Adam Joshua Podoll
Alexander Pogozelski
Alexander Thor Pogozelski
Carlos M. Polanco
Marc Jason Poles
Jonathan Pollard
Jonathan Christopher Pollard
Benjamin Joseph Potter
Michael Coster Loughran Potter
Chansi Renee Powell
Alissa Lightner Poynor
Roberto Prado De Vasconcellos
Kirtan Prasad
Timothy William Preston
Tracy M. Preston
Marissa Joy Pullano
Kati Hannele Punakallio
Dara Elanor Purvis
Alexander Gregory Pyrros
Zheng Qi
Dali Qian
Rebekah Eva Raber
Evan T. Raciti
Ahmad Raia
Ahmad Raja
Piotr Rapciewicz
Julius Maurice Redd
Adam Michael Reich
Catherine Reilly
Catherine Elizabeth Reilly
Alyse Mari Reiser
Eric Remijan

Eric Dominik Remijan
Carla Gabriela Reyes
Rebecca Ann Richardson
Alyson Hannah Drexler Ricker
Kara Ricupero
Kara Anne Ricupero
Brian Gerald Rideout
Paul Allen Ridgeway
Roger Rodriguez Rios
Paul-Alexandre Taylor Rischard
Allan Ritchie
Allan John Ritchie
Peter J. Rivas
Nida Rizvi
John Michael Robert
Jean Rowley Robertson
Kathryn Rockwood
Kathryn Burfitt Rockwood
Roger Rodriguez Rios
Juan Jose Rodriguez
Jose Diego Roman
Vincent Daniel Romano
Vadims Romanovs
Rodrigo Romero Hidalgo
Timothy G. Ronan
Portia Rosemond
Portia Danielle Rosemond
Jeremy Charles Rosenbaum
Christopher W. Rosenbleeth
Andrew Rozynski
Isidro Rueda
Robert S. Ruff
Michael Ryan
Michael James Ryan
Danielle Janette Ryterband
Sha Sa
Ariel Saban
Ariel Moses Saban
Masahito Saeki
Engin Sahin
Amane Sakota
Olakemi Silfat Salau
Ryan E. San George
Rommel V. San Pedro
Harshavardhan Sancheti
Jeffrey Keith Sandman
Beverly Lee Santiago
Marie-claire Jeanine Antonietta Santonastasi
Ingrid Bandeira Santos
Noah R. Schechtman
Harold E. Scherr
Lauren Schivley
Lauren Regina Schivley
Judd Alan Schlossberg
Michael Alexander Schoenecker
Matthew T. Schrieks
Christopher Schuller
Christopher Paul Schuller
Michael E. Schwab
Charles Francis Scott
Kristen E. Scoville
Tanya Sehgal
Itak Seo
Nicolas M. Serlin
Amir Hossein Seyedfarshi
Caterina Sganga
Sara I. Shah
Robert Lawrence Shapiro
Seema Gaur Sharma
Jennifer Ann Shaw
Jennifer Lee Sheldon
Ye Shen
Feng Sheng
Scott Branson Sherill
Scott Sherrill
Kazuyuki Shiiya
Qing Shu
Inna Shulkin
Nabilah Siddiquee
Nabilah Tabassum Siddiquee
Michael Thomas Simon
James Matthew Simpson
Meredith L. Singer
Paris Graham Singer
Smriti Sinha
Damon Skinner
Damon Christopher Skinner
Ian W. Sloss
Heather Dawn Small
K'Shaani Smith
K'shaani Ozoni Smith
Mark Halliwell Smith
Matthew Smith
Rena Kimberly Snow
Elizabeth Susan Soldan
Josefine Liv Sommer
Charles Andrew Sommers
Nahid Sorooshyari
Kari J. Southern
Michael Edward Speight
Thomas R. Spera
Nickolas James Spradlin
Andrew M. Sroka
Sarah Helen St. Vincent
Gwendolyn Amelia Stamper
Stefanie Stannard
Kimia Mousavi Steed
Brian Stehn
Brian Christopher Stehn
Michael S. Stein
Shoshana R. Stein
Carly Jill Steinberg
Drew Everett Stewart
Caitlin Tara Street
Christian Stretz
Jessica Stubbs
Jessica Lynn Stubbs
Stacey Jean Sublett
Eui Suk Suh
Jennifer Suh
Ryan Sullivan
Ryan Edmund Sullivan
Hidetaka Sumomogi
Rich Sun
Robert Michael Swan
Romana Syed
Romana Sirajuddin Syed
Isabel Tam
Tze Kiac Claire Tan
Yasuhiro Tanno
Yelin Tao
Henry Tashjian
Luke Thomas Tashjian
Philip Taylor
Rita Ashley Taylor
Benjamin Lipa Tejblum
Divya Singh Thakur
Rajeeve Thakur
Jordanna Thigpen
Jordanna Gabrielle Thigpen
Thomas Thompson-Flores
Thomas Lynch Thompson-flores
Jung Hsing Tien
Lipin Tien
Keita Tokura
Hiroshi Tomita
Benjamin Potter Townsend
Ai Chau Tran
Aichau Thi Michelle Tran
Jeffrey Tremblay
Jeffrey Charles Tremblay
Patricio Juan Trench
Isabel Triana
Joshua Matthew Trojak
Adam Jared Trott
Irina Tsveklova
Anthony Edsel Conrad Famador Tupaz
Matthew Normand Turko
Christopher Bradley James Turnbull
Carrie Cheryl Turner
Daniel John Tyrrell
Makoto Uda
Naoko Ueda
Masaki Ueno
Martin Ulbrich
Sule Uluc
Aukse Usaite
Carol Gandionco Valenzuela
Joseph F. Verciglio
Victoria L. Vernicek
Gisella Anna Luz Victoria Villeda
Matthew Michale Vince
Christopher Daniel Vitale
Nicole Elizabeth Vitale
Colleen Mary Vitali
Daniele Flavia Chagas Volfe
Sven Michael Volkmer
Iryna Vshynska
Ann Vuong
Iryna Vyshynska
Hiroyuki Wada
Neil T. Wallace
Grayson Todd Walter
Jason Walton
Jason Christopher Walton
Jason Lemuel Walton
Noam Mordechai Waltuch
Josephine Wang
Juan Wang
Xinrui Wang
Yuan Wang
Yufei Wang
Zhiming Wang
Jacob Edwin Warren
Perry Sinclair Warren
Yoshinori Watanabe
Erin Lorraine Webb
Steven J. Weber
Jennifer Webster
Jennifer Ryan Webster
Rita Weeks
Qiuju Wei
Jeremiah Welch
Jeremiah M. Welch
Qian Wen
Nathan Allan Wheatley
Jeffrey S. Widmayer
Karen Williams
Karen Luenda Williams
Robert Davis Williams
Sarah Witt
Sarah Louise Witt
Matthew Wolch
Matthew Lee Wolch
Adam Wollstein
Adam Robert Wollstein
Amanda J. Wong
Sandy Wong
Ricardo Andre Woolery
Jianxiong Wu
Ka Chung Kane Wu
Zhimeng Wu
Jasmine Wynton
Jasmine Selia Wynton
Ke Xu
Liming Xu
Mengbi Xu
Mengxi Xu
Jing Yaivg
Di Yan
Jing Yang
Liu Yang
Ian Wei Ren Yap
Haojia Ye
Hoajia Ye
Taoye Ye
Dillon Cheung Fu Yeung
Heejin Yi
Xiaoli Yin
Jenin Munther Younes
Yunpeng Yu
Yong Yun
Alma Zadic
Pascal Nicholas Zamprelli
Jorge Santos Zemborain
Mei Zeng
Yu Zeng
Jing Zhang
Ran Zhang
Wan Zhang
Xiao Zhang
Xiyan Zhang
Xuehui Cassie Zhang
Yue Jane Zhang
Shan Zhong
Wei Zhong
Xiaofang Zhong
Shan Zhong-Basher
Emily Qianru Zhu
Xinyu Zhu
Yan Zhu
Zeynab Ziaie Moayyed
Allyson Zipp
Allyson Scott Dupuis Zipp
Christopher T. Zirpoli
Alison M. Zitron
Maria Patricia Zucaro
Paula Marie Zwiren
Robert M. Zych

In Memoriam

Nicholas Attanasio
Lake Katrine, NY

Jesse Raymond Baker
New Hyde Park, NY

Anthony M. Barone
Monroe, NY

Renato Beghe
Washington, DC

Steven R. Belasco
Scarsdale, NY

Wallace C. Bernstein
Mill Valley, CA

Frank Anthony Bersani
Syracuse, NY

Edward P. Bracken
Atlantic Beach, FL

Joseph F. Cafiero
Linden, NJ

Eoanna Combothekras
Flushing, NY

Dennis J. Dee
Buffalo, NY

Wayne F. DeHond
Rochester, NY

Howard Lincoln Demott
Garden City, NY

Roger M. Dunwell
Miami, FL

Barbara S. Frees
Wilton, CT

Mandeville A. Frost
Rhinebeck, NY

Frederick Glick
Las Vegas, NV

Ira Mark Goldberg
Williamsville, NY

Henry L. Hulbert
Oneonta, NY

William J. Jeffcoat
Norwich, CT

Dennis A. Kahn
East Amherst, NY

Margaret B. Kelley
Westfield, NJ

Peter E. Klaasesz
Buffalo, NY

Richard S. Kwieciak
Cheektowaga, NY

H. Brian Levinson
Stone Harbor, NJ

Joseph Mangiaracina
Wantagh, NY

Donald F. McKenna
Hamburg, NY

Suzanne Mentzinger
New York, NY

Timothy Gerard Mermann
New York, NY

Russell G. Pelton
Montrose, NY

Stanley L. Shapiro
Jacksonville, FL

Lawrence Smith
Fort Lee, NJ

Herbert Stone
Huntington, NY

Stanley Sturman
Tamarac, FL

Roger A. Tolins
Roslyn, NY

William D. Weisberg
Manlius, NY

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Here is a sentence from an appellate court opinion: "We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us . . . ." (*Sioux City & P.R. Co. v. Stout*, 84 U.S. 657, 664 (1873)). (The remainder of the sentence is unimportant.) My question: According to the rules of grammar, what is "not uniform or harmonious"?

Answer: The grammatical meaning of that statement is that "we" are "not uniform or harmonious"! But that is not what the drafter meant to say. He meant: "We find, accordingly, that *the authorities*, although they are not uniform or harmonious, justify us in holding the case before us . . . ." (My emphasis.) If the drafter had placed the modifier ("although not uniform or harmonious") next to the noun it modifies ("the authorities"), his meaning would have been clear: "the authorities" are "not uniform or harmonious."

Misplaced modifiers are common in legal writing. In my files I have kept numerous writing errors law students have made by misplacing modifiers. Most of these are amusing rather than misleading. Here are two: "The plaintiff was a passenger in a motorbus raped by the chauffeur"; and "The robber entered the café and threatened the cashier standing at the register with a small-caliber handgun."

Squinting modifiers – which are placed inside sentences – can also cause confusion. The following squinting modifier appeared in news reports about a meeting of county commissioners. The journalist wrote, "The Library Committee of the Board of County Commissioners has no doubt reached a conclusion that will be popular with many citizens."

What is there "no doubt" about? As it is placed, mid-sentence, just before the phrase "reached a conclusion" the words *no doubt* apply to "the Commission." But move *no doubt* to its proper place, and the intended meaning becomes clear: "The library committee has reached a conclusion that will no doubt be popular with many citizens." Now we know what there is "no doubt" about.

The following statements show the placement of only one word can cause a 180-degree difference in the meaning of a court opinion: "Since no one was injured by the delay, the doctrine of laches was not *properly* invoked." If you move "properly" you reverse the meaning of the sentence: "Since no one was injured by the delay, the doctrine of laches was *properly* not invoked."

Squinting modifiers are common, but they are easy to avoid. A reader asked about the "squinting modifier" *only* in the following appellate opinion. Notice how the meaning of the entire statement changes when we move the word *only*.

> Because the defendant was liable for the defective wires, the plaintiff could recover *only* damages for his suffering until he died a few seconds later from his fall.
>
> Because the defendant was liable for the defective wires, the plaintiff could recover damages *only* for his suffering until he died a few seconds later from his fall.
>
> Because the defendant was liable for the defective wires, the plaintiff could recover damages for his suffering *only* until he died a few seconds later from his fall.
>
> Because the defendant was liable for the defective wires, the plaintiff could recover damages for his suffering until he died a few seconds later *only* from his fall.

Other adverbs are also risky because they can be ambiguous unless placed as closely as possible to what you intend them to modify. Notice how the adverbs "squint" if they are not placed next to the word they modify in the following sentences:

> The plaintiff was *probably* injured as a result of the defendant's negligence.

The correct meaning:

> The plaintiff was injured *probably* as a result of the defendant's negligence.

And:

> The plan to bring more minorities into state universities was upgraded in 1987, but since that time the number enrolled *steadily* has decreased.

The correct meaning:

> The plan to bring more minorities into state universities was upgraded in 1987, but since that time the number enrolled has *steadily* decreased.

In *Alice in Wonderland*, the March Hare told Alice to "say what you mean." "I do," replied Alice, "at least I mean what I say – that's the same thing, you know."

"Not the same thing a bit!" said the Mad Hatter. "Why, you might just as well say that 'I see what I eat' is the same as 'I eat what I see'!"

Potpourri

In a sidebar in the *New York Times* (January 14, 2011), columnist Clyde Haberman wrote that although suspected-murderer Jared L. Loughner acted weirdly in many ways, perhaps his most bizarre belief was that grammar was part of a government conspiracy to control people's minds. Haberman added: "Some grammarians say they have heard [that belief] more often than you may think."

Linguists understand that insistence on "rules" often seems annoyingly inflexible. But I agree with the English grammarian George Campbell, who wrote in his 1776 *Philosophy of Rhetoric*: "Good usage is reputable, national, and present." That point of view has survived for almost three centuries – and it still sounds reasonable to most of us. ■

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.).

process in summary proceedings, and CPLR Article 3, which covers service of process in plenary actions. Service of process under the RPAPL sometimes conforms to the CPLR's rules, but sometimes it doesn't. When gaps exist in the RPAPL's service rules, the CPLR fills them.

Defective Summons

A summons without a complaint or a summons without notice[12] is jurisdictionally defective.[13] As the defendant, attack the defective summons in a motion to dismiss under CPLR 3211(a)(8). You needn't wait to be served with the complaint.

Before moving to dismiss on the basis of a defective summons, consider your options.[14] Move to dismiss on the basis of a defective summons if the summons is bare and the statute of limitations has run. If the statute of limitations hasn't run, the plaintiff may recommence the action, even if the summons is defective. Even with the defect, a plaintiff's summons might constitute a summons with notice. In that case, you might want to move under CPLR 3012(b) to demand a complaint. Once you receive the complaint, you may move to dismiss the complaint on all possible grounds. If you move to dismiss on the basis of a defective summons and the court rules against you, you won't be able to move to dismiss under CPLR 3211(a) again once you receive the complaint.

CPLR 305(a) explains the information that a summons must contain: "A summons shall specify the basis of the venue designated and if based upon the residence of the plaintiff it shall specify the plaintiff's address, and also shall bear the index number assigned and the date of filing with the clerk of the court." A summons that's missing this information isn't jurisdictionally defective. If you move to dismiss on the basis that the summons is missing this information, a court might deny your motion if the plaintiff cross-moves to amend. The court might allow the plaintiff to amend the summons nunc pro tunc to include the missing information. Consult CPLR 305(a) for information required in a third-party summons and a summons in a consumer-credit case.

> If you're contesting service, you need to set forth sufficient facts, in admissible form, of the allegedly improper service or the lack of service.

Court Has No Jurisdiction Over the Defendant

A plaintiff may serve a defendant outside New York if the defendant is a New York domiciliary or is subject to the jurisdiction of the courts of New York under CPLR 301 or 302.[15]

If you, the defendant, were served outside New York, you may move to dismiss under CPLR 3211(a)(8). You may argue that you're not subject to the court's jurisdiction. The basis for your motion is that you're not a New York domiciliary or you're challenging jurisdiction under CPLR 301 or 302.[16] CPLR 302, New York's long-arm statute, sets out the minimum contacts you may have in New York that might give the court personal jurisdiction over you.

Once you've moved to dismiss, the plaintiff in opposition to your motion must show that your contacts with New York give the court personal jurisdiction over you. The court will hold a hearing to determine the issue of jurisdiction if conflicting facts exist between your affidavits and the plaintiff's affidavits.[17] The court might allow disclosure on the issue if it finds that disclosure is appropriate.[18]

In Rem and Quasi in Rem Jurisdiction Under CPLR 3211(a)(9)

When you, the defendant, are served outside New York because a res (person, property, or status) is in New York, you may move to dismiss under CPLR 3211(a)(9) on the basis that the res doesn't "give the court jurisdiction over the controversy raised in the action."[19]

Invoke in rem jurisdiction "when the plaintiff brings an action that seeks to determine the right to ownership or possession interests in property located in New York."[20]

Invoke quasi in rem jurisdiction when the plaintiff seeks money and attaches your New York property to obtain personal jurisdiction over you.[21]

When the plaintiff serves you under CPLR 314 or 315, move to dismiss under CPLR 3211(a)(9).

CPLR 314(1)

Under CPLR 314(1), a plaintiff may serve you outside the state of New York and obtain jurisdiction in a matrimonial action: an action for a divorce, separation, or annulment or for a declaration about the validity of a marriage.[22] For jurisdiction, "[i]t is sufficient that the plaintiff spouse is a domiciliary of New York."[23] The theory behind this is that the res — the marital status — is located where one of the parties to the marriage is domiciled. The plaintiff must serve the defendant spouse "wherever he or she may be located in order to satisfy the notice requirement of due process."[24] The courts of the state where the marital status is located have "power to confirm or alter the status."[25]

The plaintiff's New York domicile alone won't provide a sufficient basis for a court to award alimony, maintenance, or support. To obtain monetary relief, the plaintiff will have to obtain "in personam jurisdiction over the defendant, or the defendant must have property within the state over which the court may exercise its power."[26] The plaintiff will obtain in personam jurisdiction by serving the defendant in New York or by serving the defendant anywhere if the defen-

dant is a New York domiciliary or by serving the defendant under CPLR 302(b), New York's long-arm jurisdiction statute.[27]

A plaintiff may also obtain quasi in rem jurisdiction over a defendant spouse's property located in New York.[28]

CPLR 314(2)

Under CPLR 314(2), a plaintiff may serve a summons and complaint (or summons with notice) outside New York and obtain jurisdiction when the plaintiff "demand[s] that the person to be served be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state." CPLR 314(2) also provides that the plaintiff may obtain jurisdiction when the plaintiff seeks to enforce, regulate, define or limit "an interest or lien in favor of either party; or otherwise affecting the title to such property, including an action of interpleader or defensive interpleader." In plain English, CPLR 314(2) describes actions in which in rem jurisdiction permits plaintiffs to effectuate service of process on defendants outside New York.

The Appellate Division, First Department, defined in rem jurisdiction well: "'In rem jurisdiction . . . involves an action in which a plaintiff is after a particular thing, rather than seeking a general money judgment, that is, he wants possession of the particular item of property, or to establish his ownership or other interest in it, or to exclude the defendant from an interest in it.'"[29]

The property — "specific real or personal property" — on which the plaintiff is seeking an interest or lien must be in New York.[30] The subject matter of the plaintiff's action is the New York property.[31] The New York property, together with the plaintiff's claim to that property, gives the court "power to alter the defendant's interest in the property."[32] This is all premised on whether the defendant is properly served even though the defendant is located somewhere other than New York.[33]

The last sentence of CPLR 314(2) refers to interpleader actions. Interpleader actions may "be predicated on in rem jurisdiction where conflicting claims are made to specific property held by a third party in New York."[34]

CPLR 314(3)

A plaintiff will obtain quasi in rem jurisdiction over a nondomiciliary defendant when the plaintiff has a claim for money damages and has no basis in which to obtain in personam jurisdiction over the defendant, but attaches the defendant's New York property. Thus, the plaintiff brings the defendant's New York property within the "court's power."[35] Under CPLR 314(3), a plaintiff may serve a defendant outside New York and obtain jurisdiction when the defendant's property has been attached or seized in New York.

Assuming that the plaintiff obtains quasi in rem jurisdiction and that the plaintiff wins the case, the court will apply the defendant's attached property to satisfy the plaintiff's judgment.[36] The plaintiff's judgment "is unenforceable beyond the value of the attached property even if the defendant appears in the action and defends the case on the merits."[37]

The rules for attachment are in CPLR Article 62. As the plaintiff, you'll need to obtain an order of attachment from a court and then arrange for a sheriff or marshal to levy upon the defendant's property.[38] When you're attaching a defendant's property to obtain jurisdiction over the defendant, the levy must precede the service of process.[39]

A plaintiff cannot obtain jurisdiction over an out-of-state defendant who has property in New York unless a nexus exists between the New York property and the plaintiff's cause of action with the defendant.[40] When a plaintiff invokes quasi in rem jurisdiction, a court will inquire about "'the presence or absence of the constitutionally mandated minimum contacts'"[41] — a fact-specific inquiry.

CPLR 315

CPLR 315 explains service by publication. Service by publication is constructive — not actual — notice of an action. You, the plaintiff, must first diligently attempt service on the defendant by one of the CPLR's conventional service methods. You must exhaust all the potential service methods, including seeking an ex parte court order under CPLR 308(5) when effectuating service is "impracticable." According to CPLR 308(5), service will be effectuated "in such manner as the court, upon motion without notice, directs." If all fails, obtain a court order before serving by publication. The court must find that you could not have served the defendant "by another prescribed method with due diligence."[42]

Invoke quasi in rem jurisdiction when the plaintiff seeks money and attaches your New York property to obtain personal jurisdiction over you.

Moving to Dismiss Under Both CPLR 3211(a)(8) and (a)(9)

If you're in doubt about the kind of jurisdiction the plaintiff is asserting, move to dismiss under both CPLR 3211(a)(8) and (a)(9). Invoking both grounds is a precautionary measure.[43] Include in your motion a request that the court specify in its order the jurisdiction — in personam, in rem, or quasi in rem — the court is sustaining.[44] Ensuring that the court's disposition is clear is important because "[d]ifferent consequences, involving the law of

CONTINUED ON PAGE 60

appearances, append to different conduct of a defendant following disposition of a jurisdictional motion."[45]

Absence of Indispensable Party, CPLR 3211(a)(10)

Consult CPLR 1001 and CPLR 1003 before moving to dismiss under CPLR 3211(a)(10).

A court's dismissal of a case under CPLR 3211(a)(10) is "rare."[46]

If you move to dismiss under CPLR 3211(a)(10), a court will have to determine whether the party is a necessary party under CPLR 1001(a). The court will then determine whether that party can be joined under CPLR 1001(b). The court might order the plaintiff to join that party to the action.

If that party cannot be joined, the court will determine whether nonjoinder is excused under CPLR 1001(b).

The court might dismiss the action for absence of an indispensable party if the party is necessary and joinder isn't excused. A party is "indispensable" if a necessary party cannot be made a party to the action and if the action cannot proceed in the party's absence.[47]

Dismissal Under CPLR 3211(a)(11) Because of Immunity Under the Not-for-Profit Corporation Law

Unpaid officers and directors of not-for-profit corporations have immunity for any activity they've performed for the corporation unless the activity amounts to gross negligence or they've carried out the activity with the intent to harm the plaintiff.[48]

Move to dismiss under CPLR 3211(a)(11) if you're a member of the protected class under the Not-for-Profit Corporation Law and if the plaintiff's complaint doesn't allege gross negligence or intent to harm.

If you demonstrate that you're a member of the protected class, the burden shifts to the plaintiff to offer admissible evidence of gross negligence or intent to harm.

The court will dismiss the case if the plaintiff fails to meet its burden. If the plaintiff meets its burden, the court may resolve the issue of immunity at trial.[49]

In the *Journal*'s next issue, the *Legal Writer* will continue with one more column on motions to dismiss and then, in later columns, discuss drafting summary-judgment motions. ■

1. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 36:130, at 36-19 (2006; Dec. 2009 Supp.).
2. CPLR 3211(e).
3. David D. Siegel, New York Practice § 266, at 464 (5th ed. 2011).
4. CPLR 3211(e).
5. *Id.*
6. Siegel, *supra* note 3, at § 266, at 464 (citing *Abitol v. Schiff*, 180 Misc. 2d 949, 951, 691 N.Y.S.2d 753, 755 (Sup. Ct. Queens County 1999)).
7. Barr et al., *supra* note 1, § 36:153, at 36-20 (citing *Wiebusch v. Bethany Memorial Reform Church*, 9 A.D.3d 315, 315, 781 N.Y.S.2d 6, 7 (1st Dep't 2004)).
8. *Id.* § 36:151, at 36-19.
9. *Id.* § 36:152, at 36-20.
10. *Id.*
11. *See generally* Gerald Lebovits & Matthias W. Li, *Service of Process and Traverse Hearings in Landlord-Tenant Actions and Proceedings*, 34 N.Y. Real Prop. L.J. 32, 32 (Spring 2006).
12. See Part I of this series on litigation documents for more information on summons and a complaint and summons with notice: *Drafting New York Civil-Litigation Documents: Part I — An Overview*, 82 N.Y. St. B.J. 64, 54–55 (Sept. 2010).
13. CPLR 305(b).
14. Barr et al., *supra* note 1, § 36:140, at 36-19.
15. CPLR 313.
16. Barr et al., *supra* note 1, § 36:160, at 36-20.
17. *Id.* at § 36:162, at 36-20.
18. *Id.* (citing *Cerchia v. V.A. Mesa, Inc.*, 191 A.D.2d 377, 378, 595 N.Y.S.2d 212, 213 (1st Dep't 1993) (holding that Supreme Court improperly granted defendant's motion to dismiss on jurisdictional grounds before letting plaintiff conduct disclosure on the issue)).
19. *Id.* § 36:130, at 36-19.
20. *Id.* § 36:170, at 36-20.
21. *Id.* § 36:170, at 36-20, 36-21.
22. CPLR 105(p).
23. CPLR 314 cmt. 314:2 at 45 (citing Restatement (Second) of Conflict of Laws § 71 (1971); *Carr v. Carr*, 46 N.Y.2d 270, 273, 413 N.Y.S.2d 305, 307, 385 N.E.2d 1234, 1236 (1978)).
24. CPLR 314 cmt. 314:2 at 45 (citing CPLR 313, 315; N.Y. Dom. Rel. Law § 232; Restatement (Second) of Conflict of Laws § 69 (1971)).
25. CPLR 314 cmt. 314:2 at 45 (citing *Geary v. Geary*, 272 N.Y. 390, 399, 6 N.E.2d 67, 71 (1936); *Rodgers v. Rodgers*, 32 A.D.2d 558, 559, 300 N.Y.S.2d 275, 277 (2d Dep't 1969).
26. CPLR 314 cmt. 314:2 at 45 (citing Restatement (Second) of Conflict of Laws § 77(1)).
27. CPLR 314 cmt. 314:2 at 45–46.
28. CPLR 314 cmt. 314:2 at 46 (citing N.Y. Dom. Rel. Law § 233 (sequestration)). One commentator noted that section 233 "provides quasi in rem jurisdiction and a financial remedy in situations where the defendant could not be personally served with process; it is not available as a means to preserve marital assets." N.Y. Dom. Rel. Law § 233 cmt. at 420.
29. CPLR 314 cmt. 314:3 at 47 (quoting *Majique Fashions, Ltd. v. Warwick & Co.*, 67 A.D.2d 321, 326, 414 N.Y.S.2d 916, 920 (1st Dep't 1979)).
30. CPLR 314 cmt. 314:3 at 47.
31. *Id.*
32. *Id.*
33. CPLR 313.
34. CPLR 314 cmt. 314:3 at 47.
35. CPLR 314 cmt. 314:4 at 50.
36. *Id.*
37. *Id.* (citing CPLR 320(c)(1)).
38. *Id.* 314:4 at 50.
39. *Id.* (citing *Nemetsky v. Banque de Developpement de la Republique du Niger*, 48 N.Y.2d 962, 964, 425 N.Y.S.2d 277, 277, 401 N.E.2d 388, 388 (1979)).
40. Barr et al., *supra* note 1, § 36:173, at 36-21 (citing *Banco Ambrosiano S.P.A. v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 72–74, 476 N.Y.S.2d 64, 67–69, 464 N.E.2d 432, 435–37 (1984); *contra Landoil Resources Corp. v. Alexander & Alexander Services, Inc.*, 77 N.Y.2d 28, 33–37, 563 N.Y.S.2d 739, 741–43, 565 N.E.2d 488 , 490–92 (1990)).
41. CPLR 314 cmt. 314:4 at 52 (quoting *Banco Ambrosiano S.P.A.*, 62 N.Y.2d at 72, 476 N.Y.S.2d at 67, 464 N.E.2d at 435 (holding that sufficient relationship existed among the defendant, the state, and the cause of action to satisfy due process)).
42. CPLR 315 cmt. at 69.
43. Siegel, *supra* note 3, at § 267, at 465.
44. *Id.*
45. *Id.*
46. *Id.*
47. Barr et al., *supra* note 1, § 36:280, at 36-26.
48. *Id.* at § 36:490, at 36-37 (noting Not-for-Profit Corporation Law § 720-a).
49. *Id.* at § 36:491, at 36-37 (citing *Brown v. Albany Citizens Council on Alcoholism, Inc.*, 199 A.D.2d 904, 906, 605 N.Y.S.2d 577, 579 (3d Dep't 1993)).

GERALD LEBOVITS, a New York City Civil Court judge, teaches part time at Columbia, Fordham, and NYU law schools. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's email address is GLebovits@aol.com.

CLASSIFIED NOTICES

RESPOND TO NOTICES AT:
New York State Bar Association
One Elk Street
Albany, NY 12207
Attn: Daniel McMahon

DEADLINE FOR SUBMISSIONS:
Six weeks prior to the first day of the month of publication.

NONMEMBERS:
$175 for 50 words or less; plus $1 for each additional word. Boxholder No. assigned—$75 per insertion.

MEMBERS:
$135 for 50 words and $1 for each additional word. Payment must accompany insertion orders.

SEND ADS WITH PAYMENT TO:
Network Media Partners
Executive Plaza 1, Suite 900
11350 McCormick Road
Hunt Valley, MD 21031
(410) 584-1960
mschwartz@networkmediapartners.com

INDEX TO ADVERTISERS

HOUSE TO RENT OR SWAP

Retired Washington State attorney to rent or house sit luxurious Manhattan home for all or part of 2013. Or, could swap for a large luxurious lake house in Bellevue or a small luxurious beach house on Oahu.

Terence M. McTigue
dorene.mctigue@gmail.com or
425-747-9482

INCORPORATION SERVICES

Add business formation services to your practice without adding demands on your resources.

Help clients incorporate or form limited liability companies with America's leading provider of business formation services. We can also assist in out-of-state qualifications.

Call us today at 800-637-4898 or visit www.incorporate.com to learn more.

LAW OPPORTUNITIES IN EUROPE

VISITING PROFESSORSHIPS – Pro bono teaching assignments East Europe and former Soviet Republics. Requires 20+ years' experience. www.cils.org/sl.

LLM IN TRANSNATIONAL COMMERCIAL PRACTICE – Two-week sessions in Salzburg, Budapest, and Warsaw. www.legaledu.net.

Center for International Legal Studies,
US Fax 1 509 3560077,
Email office@cils.org.

REFER US YOUR DISABILITY INSURANCE CASES

Attorneys Dell & Schaefer - Our disability income division, managed by Gregory Dell, is comprised of eight attorneys that represent claimants throughout all stages (i.e. applications, denials, appeals, litigation & buy-outs) of a claim for individual or group (ERISA) long-term disability benefits. Mr. Dell is the author of a Westlaw Disability Insurance Law Treatise. Representing claimants throughout New York & nationwide. Referral Fees 212-691-6900, 800-828-7583, www.diAttorney.com, gdell@diAttorney.com.

MEMBERSHIP TOTALS

New Regular Members
1/1/12 - 7/25/12 _____ 7,195

New Law Student Members
1/1/12 - 7/25/12 _____ 799

Total Regular Members
as of 7/25/12 _____ 68,999

Total Law Student Members
as of 7/25/12 _____ 2,861

Total Membership as of
7/25/12 _____ 71,860

HEADQUARTERS STAFF EMAIL ADDRESSES

Executive
Patricia K. Bucklin
Executive Director
pbucklin@nysba.org

Teresa Schiller
Associate Executive Director
tschillle r@nysba.org

Richard J. Martin
Assistant Executive Director
rmartin@nysba.org

Executive Services
Andria Bentley, *Executive Services Counsel*
abentley@nysba.org

Kevin Getnick, *Executive Services Counsel*
kgetnick@nysba.org

Mark Wilson, *Manager, Bar Services*
mwilson@nysba.org

Media Services and Public Affairs
Lise Bang-Jensen, *Director*
lbang-jensen@nysba.org

Mark Mahoney, *Associate Director*
mmahoney@nysba.org

Patricia Sears Doherty, *Editor, State Bar News*
psearsdoherty@nysba.org

Brandon Vogel, *Media Writer*
bvogel@nysba.org

Lawyer Assistance Program
Patricia F. Spataro, *Director*
pspataro@nysba.org

Meetings
Kathleen M. Heider, *Director*
kheider@nysba.org

MIS
John M. Nicoletta, *Director*
jnicoletta@nysba.org

Jeffrey Ordon, *Network Support Specialist*
jordon@nysba.org

Lucian Uveges, *Database Administrator*
luveges@nysba.org

Paul Wos, *Data Systems and Telecommunications Manager*
pwos@nysba.org

Web Site
Barbara Beauchamp, *Manager of Internet Services*
bbeauchamp@nysba.org

Governmental Relations
Richard Rifkin, *Senior Director*
rrifkin@nysba.org

Ronald F. Kennedy, *Director*
rkennedy@nysba.org

Kevin M. Kerwin, *Associate Director*
kkerwin@nysba.org

Continuing Legal Education
H. Douglas Guevara, *Senior Director*
dguevara@nysba.org

CLE Programs
Jean E. Nelson II, *Associate Director*
jnelson@nysba.org

Carl Copps, *CLE Program Attorney*
ccopps@nysba.org

Kimberly Francis, *CLE Program Coordinator*
kfrancis@nysba.org

Cindy O'Brien, *Program Manager*
cobrien@nysba.org

CLE Publications
Daniel J. McMahon, *Director*
dmcmahon@nysba.org

Kirsten Downer, *Research Attorney*
kdowner@nysba.org

Patricia B. Stockli, *Research Attorney*
pstockli@nysba.org

Joan Fucillo, *Publication Manager*
jfucillo@nysba.org

Law Practice Management
Katherine Suchocki, *Director*
ksuchocki@nysba.org

Finance
Kristin M. O'Brien, *Senior Director*
kobrien@nysba.org

Cynthia Gaynor, *Controller*
cgaynor@nysba.org

General Counsel Services
Kathleen R. Mulligan-Baxter, *General Counsel*
kbaxter@nysba.org

Law, Youth and Citizenship Program
Eileen Gerrish, *Director*
egerrish@nysba.org

Lawyer Referral and Information Service
Eva Valentin-Espinal, *Coordinator*
evalentin@nysba.org

Pro Bono Affairs
Gloria Herron Arthur, *Director*
garthur@nysba.org

Human Resources and Customer Service
Paula M. Doyle, *Senior Director*
pdoyle@nysba.org

Sonja Tompkins, *Manager*
stompkins@nysba.org

Member Services Division
Richard J. Martin, *Assistant Executive Director*
rmartin@nysba.org

Marketing
Membership Services
Patricia K. Wood, *Senior Director*
pwood@nysba.org

Megan O'Toole, *Membership Services Manager*
motoole@nysba.org

Section Services
Lisa J. Bataille, *Chief Section Liaison*
lbataille@nysba.org

Print and Facilities Operations
Roger E. Buchanan, *Senior Director*
rbuchanan@nysba.org

Building Maintenance
Design Services
Graphics
Print Shop
Gordon H. Ryan, *Director of Design, Printing and Fulfillment Services*
gryan@nysba.org

The New York Bar Foundation

THE NEW YORK BAR FOUNDATION

2012-2013 OFFICERS
Cristine Cioffi, *President*
2310 Nott Street East, Niskayuna, NY 12309

John J. Kenney, *Vice President*
10 East 40th Street, 35th Fl., New York, NY 10016

Patricia K. Bucklin, *Secretary*
One Elk Street, Albany, NY 12207

Richard Raysman, *Treasurer*
31 West 52nd Street, New York, NY 10019

DIRECTORS
James R. Barnes, *Albany*
Earamichia Brown, *New York*
Marion Hancock Fish, *Syracuse*
Emily F. Franchina, *Garden City*
Sheila A. Gaddis, *Rochester*
Sharon Stern Gerstman, *Buffalo*
Michael E. Getnick, *Utica*
Robert L. Haig, *New York*
Frank M. Headley, Jr., *Scarsdale*
Stephen D. Hoffman, *New York*
John R. Horan, *New York*
Glenn Lau-Kee, *New York*
Joseph V. McCarthy, *Buffalo*
Martin Minkowitz, *New York*
Patrick C. O'Reilly, *Buffalo*
Carla M. Palumbo, *Rochester*
Lesley Friedman Rosenthal, *New York*
Sanford J. Schlesinger, *New York*
Lucia B. Whisenand, *Syracuse*

EX OFFICIO
Susan B. Lindenauer, *New York*
Chair of The Fellows

James B. Ayers, *Albany*
Vice Chair of The Fellows

JOURNAL BOARD MEMBERS EMERITI

Howard Angione
Immediate Past Editor-in-Chief

Rose Mary Bailly
Richard J. Bartlett
Coleman Burke
John C. Clark, III
Angelo T. Cometa
Roger C. Cramton
Willard DaSilva
Louis P. DiLorenzo
Philip H. Dixon
Maryann Saccomando Freedman
Emlyn I. Griffith
H. Glen Hall
Paul S. Hoffman
Judith S. Kaye
Charles F. Krause
Philip H. Magner, Jr.
Wallace J. McDonald
J. Edward Meyer, III
John B. Nesbitt
Kenneth P. Nolan
Eugene E. Peckham
Albert M. Rosenblatt
Lesley Friedman Rosenthal
Sanford J. Schlesinger
Robert J. Smith
Lawrence E. Walsh
Richard N. Winfield

2012-2013 OFFICERS

SEYMOUR W. JAMES, JR.
President
New York

DAVID M. SCHRAVER
President-Elect
New York

DAVID P. MIRANDA
Secretary
Albany

CLAIRE P. GUTEKUNST
Treasurer
New York

VINCENT E. DOYLE III
Immediate Past President
Buffalo

VICE-PRESIDENTS

FIRST DISTRICT
Catherine A. Christian, *New York*
Jay G. Safer, *New York*

SECOND DISTRICT
Manuel A. Romero, *Brooklyn*

THIRD DISTRICT
Lillian M. Moy, *Albany*

FOURTH DISTRICT
Rebecca A. Slezak, *Amsterdam*

FIFTH DISTRICT
Thomas E. Myers, *Syracuse*

SIXTH DISTRICT
Mark S. Gorgos, *Binghamton*

SEVENTH DISTRICT
June M. Castellano, *Rochester*

EIGHTH DISTRICT
Sharon Stern Gerstman, *Buffalo*

NINTH DISTRICT
Hon. Arlene Gordon-Oliver, *White Plains*

TENTH DISTRICT
Emily F. Franchina, *Garden City*

ELEVENTH DISTRICT
Richard M. Gutierrez, *Forest Hills*

TWELFTH DISTRICT
Steven E. Millon, *Bronx*

THIRTEENTH DISTRICT
Michael J. Gaffney, *Staten Island*

MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

Samuel F. Abernethy
T. Andrew Brown
Hon. Margaret J. Finerty
Glenn Lau-Kee
Ellen G. Makofsky
Edwina Frances Martin
Sherry Levin Wallach
Oliver C. Young

NYSBA

MEMBERS OF THE HOUSE OF DELEGATES

FIRST DISTRICT
Aaron, Stewart D.
Abdelhamid, Reema Salah
Abella, Zachary J.
Abernethy, Samuel F.
+ * Alcott, Mark H.
Bailey, Lawrence R., Jr.
Baum, Simeon H.
Berman, Scott M.
Blessing, Peter H.
Brown, Earamichia
Brown, Terryl
Chambers, Hon. Cheryl E.
Cheng, Pui Chi
Christian, Catherine A.
Clark, Jason Myles
* Cometa, Angelo T.
Davis, Megan P.
Davis, Tracee E.
Di Pietro, Sylvia E.
Donaldson, Xavier Robert
Dunne, Carey R.
Ellerin, Hon. Betty Weinberg
Eng, Gordon
Eppler, Klaus
Fahey, Stacey O'Haire
Feinberg, Ira M.
Finerty, Hon. Margaret J.
Fontaine, R. Nadine
* Forger, Alexander D.
Freedman, Hon. Helen E.
Friedman, Richard B.
Galligan, Michael W.
Glanstein, Joel C.
Green, Prof. Bruce A.
Gutekunst, Claire P.
Gutheil, Karen Fisher
Haig, Robert L.
Hanks, Kendyl T
Hayes, Vilia B.
Hoffman, Stephen D.
Honig, Jonathan
Hoskins, Sharon T.
Jaglom, Andre R.
+ James, Seymour W., Jr.
Kahn, Michele
Kaplan, Matthew E.
Kiernan, Peter J.
* King, Henry L.
Kobak, James B., Jr.
Kornfeld, John A.
Lau-Kee, Glenn
Lawton-Thames, Lynnore Sharise
+ * Leber, Bernice K.
Lessard, Stephen Charles
Ling-Cohan, Hon. Doris
Lupkin, Jonathan D.
* MacCrate, Robert
Maltz, Richard M.
Marino, Thomas V.
Martin, Deborah L.
McNamara, Michael J.
Minkoff, Ronald
Minkowitz, Martin
Morales, Rosevelie Marquez
Nelson, Lester
Nijenhuis, Erika W.
Parker, Bret I.
* Patterson, Hon. Robert P., Jr.
Prager, Bruce J.
Reed, Thomas A.
Richter, Hon. Rosalyn
Robb, Kathy Ellen Bouton
Robertson, Edwin David
Rosner, Seth
Rothstein, Alan
Safer, Jay G.
Scanlon, Kathleen Marie
Schwartz, Jodi J.
Serbaroli, Francis J.
* Seymour, Whitney North, Jr.
Shamoon, Rona G.
Siegel, Charles J.
Sigmond, Carol Ann
Silkenat, James R.
Silverman, Caryn M.
Smith, Asha Saran
Sonberg, Hon. Michael R.
* Standard, Kenneth G.
Stenson Desamours, Lisa M.
Stern, Mindy H.
Swanson, Richard P.
Syracuse, Dana V.
Tesser, Lewis F.
Ugurlayan, Anahid M.
Valet, Thomas P.
Walsh, Susan J.
Wiig, Daniel K.
Wolk, Lawrence J.
+ * Younger, Stephen P.
Zuchlewski, Pearl

SECOND DISTRICT
Ajaiyeoba, Abayomi O.
Cohn, Steven D.
Doyaga, David J., Sr.
Fallek, Andrew M.
Gerber, Ethan B.
Kamins, Hon. Barry
Lugo, Betty
McKay, Hon. Joseph Kevin
Napoletano, Domenick
Richman, Steven H.
Romero, Manuel A.
Slavin, Barton L.
Sunshine, Hon. Nancy T.
Yeung-Ha, Pauline

THIRD DISTRICT
Ayers, James B.
Barnes, James R.
Baynes, Brendan Francis
Beckford, Marie B.
Burke, Walter T.
Collura, Thomas J.
Crummey, Hon. Peter G.
Davidoff, Michael
Fernandez, Hermes
Gold, Sarah E.
Hanna, John, Jr.
Higgins, John Eric
Hurteau, Daniel Joseph
Hutter, Prof. Michael J., Jr.
Kahler, Annette I.
Kaplan, Edward Ian
Meacham, Norma G.
Meislahn, Harry P.
Miranda, David P.
Moy, Lillian M.
Pettit, Stacy L.
Rivera, Sandra
Rosiny, Frank R.K
Schofield, Robert T., IV
Schopf, Jonathan G.
* Yanas, John J.

FOURTH DISTRICT
Coffey, Peter V.
Hanson, Kristie Halloran
Hoag, Rosemary T.Y
McAuliffe, J. Gerard, Jr.
McMorris, Jeffrey E.
McNamara, Matthew Hawthorne
Nowotny, Maria G.
Onderdonk, Marne L.
Rodriguez, Patricia L. R.
Russell, Andrew J.
Slezak, Rebecca A.
Watkins, Patricia E.

FIFTH DISTRICT
DeMartino, Nicholas
Gall, Hon. Erin P.
Gensini, Gioia A.
Gerace, Donald Richard
+ * Getnick, Michael E.
John, Mary C.
Karalunas, Hon. Deborah H.
Ludington, Hon. Spencer J.
Myers, Thomas E.
Pellow, David M.
Pontius, Nancy L.
* Richardson, M. Catherine
Stanislaus, Karen
Tsan, Clifford Gee-Tong
Woronov, Howard J.

SIXTH DISTRICT
Barreiro, Alyssa M.
Gorgos, Mark S.
Gutenberger, Kristin E.
Lanouette, Ronald Joseph, Jr.
+ * Madigan, Kathryn Grant
Mayer, Rosanne
McKeegan, Bruce J.
Miller, Todd H.
Orband, James W.
Pogson, Christopher A.

SEVENTH DISTRICT
Bleakley, Paul Wendell
Brown, T. Andrew
Buholtz, Eileen E.
+ * Buzard, A. Vincent
Castellano, June M.
Cecero, Diane M.
Giordano, Laurie A.
Hetherington, Bryan D.
Jackson, La Marr J.
Lawrence, C. Bruce
McCafferty, Keith
McDonald, Elizabeth J.
* Moore, James C.
Moretti, Mark J.
Murray, Jessica R.
* Palermo, Anthony R.
Quinlan, Christopher G.
+ Schraver, David M.
Stapleton, T. David, Jr.
Tennant, David H.
Tilton, Samuel O.
* Vigdor, Justin L.
Walker, Connie O.
* Witmer, G. Robert, Jr.

EIGHTH DISTRICT
+ * Doyle, Vincent E., III
Edmunds, David L., Jr.
Effman, Norman P.
Fisher, Cheryl Smith
* Freedman, Maryann Saccomando
Gerber, Daniel W.
Gerstman, Sharon Stern
Habberfield, Kevin M.
Hager, Rita Merino
+ * Hassett, Paul Michael
Russ, Arthur A., Jr.
Ryan, Michael J.
Schwartz, Scott M.
Seitz, Raymond H.
Smith, Sheldon Keith
Sweet, Kathleen Marie
Young, Oliver C.

NINTH DISTRICT
Arnold, Dawn K.
Brown, Craig S.
Cvek, Julie Anna
Dorf, Jon A.
Enea, Anthony J.
Epps, Jerrice Duckette
Fay, Jody
Fedorchak, James Mark
+ Fox, Michael L.
Gordon-Oliver, Hon. Arlene
Hilowitz, Lynne S.
Hollis, P. Daniel, III
Klein, David M.
Marwell, John S.
* Miller, Henry G.
* Ostertag, Robert L.
Pantaleo, Frances M.
Preston, Kevin Francis
Rauer, Brian Daniel
Riley, James K.
Ruderman, Jerold R.
Sachs, Joel H.
Singer, Rhonda K.
Starkman, Mark T.
Strauss, Hon. Forrest
Wallach, Sherry Levin
Weis, Robert A.

TENTH DISTRICT
* Bracken, John P.
Chase, Dennis R.
Collins, Richard D.
DeHaven, George K.
Ferris, William Taber, III
Fishberg, Gerard
Franchina, Emily F.
Genoa, Marilyn
Gross, John H.
Harper, Robert Matthew
Helfer, Cheryl M.
Karabatos, Elena
Karson, Scott M.
Leventhal, Steven G.
+ * Levin, A. Thomas
Levy, Peter H.
Makofsky, Ellen G.
McEntee, John P.
Pachman, Matthew E.
* Pruzansky, Joshua M.
* Rice, Thomas O.
Schoenfeld, Lisa R.
Shulman, Arthur E.
Tollin, Howard M.
Tully, Rosemarie
Warshawsky, Hon. Ira B.
Zuckerman, Richard K.

ELEVENTH DISTRICT
Cohen, David Louis
DeFelice, Joseph F.
Gutierrez, Richard M.
Lee, Chanwoo
Risi, Joseph J.
Taylor, Zenith T.
Terranova, Arthur N.
Wimpfheimer, Steven

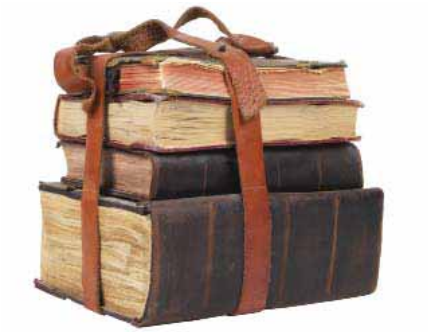
TWELFTH DISTRICT
Calderon, Carlos M.
DiLorenzo, Christopher M.
Friedberg, Alan B.
Marinaccio, Michael A.
Millon, Steven E.
* Pfeifer, Maxwell S.

THIRTEENTH DISTRICT
Behrins, Jonathan B.
Cohen, Orin J.
Dollard, James A.
Gaffney, Michael J.
Hall, Thomas J.
Martin, Edwina Frances
Mulhall, Robert A.

OUT-OF-STATE
Kurs, Michael A.
Perlman, David B.
Ravin, Richard L.
Torrey, Claudia O.
* Walsh, Lawrence E.

† *Delegate to American Bar Association House of Delegates* * *Past President*

BY GERALD LEBOVITS



Drafting New York Civil-Litigation Documents: Part XVIII — Motions to Dismiss Continued

In the last issue, Part XVII of this series, the *Legal Writer* discussed motions to dismiss, specifically CPLR 3211(a)(7) motions to dismiss for failing to state a cause of action.

The *Legal Writer* discussed CPLR 3211(a)(1) through 3211(a)(6) in Parts XV and XVI of this series.

We continue with more CPLR 3211(a) grounds.

Improper Service of Process

If the basis is improper service of process, you must move to dismiss within 60 days after you've raised the objection in your answer or other responsive pleading.[4] If you show "undue hardship," a court might extend your time.[5] The "undue hardship" standard is strict, perhaps an even higher standard than "good cause."[6] The 60-day rule is strictly applied even if your adversary, the plaintiff, doesn't raise an objection in its opposition papers.[7]

Move to dismiss under CPLR 3211(a)(8) if the plaintiff failed to serve the summons and complaint on you, the defendant. Also move to dismiss if the plaintiff improperly served you. Examples of improper service include (1) service by "nail and mail" without due diligence under CPLR 308(4); (2) service by mail under CPLR 308(2) or CPLR 308(4) to an improper address; and (3) service on an unauthorized party under CPLR 311(a).

If you're contesting service, you need to set forth sufficient facts, in admissible form, of the allegedly improper service or the lack of service. Credibly and specifically refute the process server's affidavit with an affidavit from someone with personal knowledge. An affirmation from an attorney is insufficient to establish sufficient facts.[8] Unless the affidavit of service is deficient on its face, it is insufficient to assert conclusory statements that the service of process was defective because it was not served in accordance with the CPLR.

Once you submit admissible proof to the court, the burden will shift to the plaintiff to show that service was proper. The plaintiff may submit the affidavit of service of its process server or any other evidence in admissible form.

If the plaintiff's process server's affidavit of service indicates on its face that service wasn't effectuated correctly, a court will grant your motion.[9] The court will not need to hold a hearing on the issue of service.

If the dueling affidavits raise a factual conflict, the court will hold a Traverse hearing: a hearing to determine whether service of process was proper. It's called a Traverse hearing because the court will "determine whether the defendant has traversed the allegations of the affidavit of service."[10]

Service of process in summary proceedings is even more technical than in plenary actions.[11] In landlord and tenant actions and proceedings, for example, consult New York Real Property Actions and Proceedings Law (RPAPL) 735, which covers service of

CONTINUED ON PAGE 58

> If you move to dismiss and don't raise a CPLR 3211(a)(8) ground in the motion, you waive the jurisdictional ground. If you don't move to dismiss, you may raise your jurisdictional defense in your answer.

Personal Jurisdiction Under CPLR 3211(a)(8)

As the defendant, you may move to dismiss on the basis that the court lacks jurisdiction over your person. You might allege that (1) service of process was improper, (2) the summons was defective, or (3) you're not subject to the court's jurisdiction.[1]

If you move to dismiss and don't raise a CPLR 3211(a)(8) ground in the motion, you waive the jurisdictional ground. If you don't move to dismiss, you may raise your jurisdictional defense in your answer.[2]

As a tactical maneuver, some defendants include the objection to personal jurisdiction as a defense in their answers instead of moving to dismiss under CPLR 3211(a)(8).[3] If a court determines later in the action that personal jurisdiction is absent, the plaintiff might have little to no time to re-start the case. The timing will matter if the statute of limitations has run.

NYSBA**BOOKS**

Enhance Your Practice with

New York Lawyers' Practical Skills Series . . .

Written by Attorneys for Attorneys.

Includes Forms on CD

Complete Set of 16

Members save over $700 by purchasing the complete set of 16.

2011–2012 • PN: 40011GP • Non-Member Price: $800 / **Member Price: $600**

This collection is an invaluable reference for practitioners who work in these areas:

Practical Skills Series Individual Titles with Forms on CD

Business/Corporate Law and Practice
Criminal Law and Practice
Debt Collection and Judgment Enforcement
Elder Law, Special Needs Planning and Will Drafting
Limited Liability Companies
Matrimonial Law
Mechanic's Liens
Mortgages
Mortgage Foreclosures
Probate and Administration of Decedents' Estates
Real Estate Transactions-Commercial Property
Real Estate Transactions-Residential Property
Representing the Personal Injury Plaintiff in New York
Zoning and Land Use

NYSBA Members $90 | Non-Members $105
(If purchased separately)

Stand Alone Titles
(Without Forms on CD)

New York Residential Landlord-Tenant Law and Procedure
NYSBA Members $72 | Non-Members $80

Social Security Law and Practice
NYSBA Members $57 | Non-Members $65

To order call **1.800.582.2452**
or visit us online at **www.nysba.org/pubs**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

Mention code: PUB1492 when ordering.

NYSBA

Periodicals

ADDRESS CHANGE – Send To:
Records Department
NYS Bar Association
One Elk Street
Albany, NY 12207
(800) 582-2452
e-mail: mis@nysba.org