NEW YORK STATE BAR ASSOCIATION

Journal

MARCH/APRIL 2012
VOL. 84 | NO. 3

Mr. Gerhart and Scribes, the American Society of Legal Writers

by Gary D. Spivey

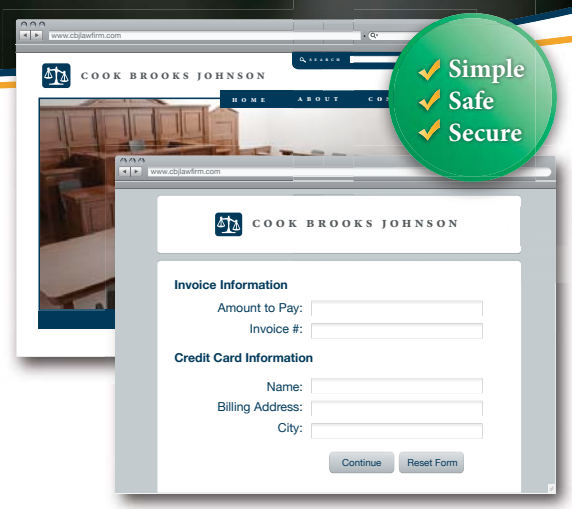
Also in this Issue

Recommended by Over 60
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

AffiniPay ISO is a registered ISO/MSP of BMO Harris Bank, N.A., Chicago, IL

BESTSELLERS

FROM THE NYSBA BOOKSTORE

March/April 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.

Commercial Leasing, 2nd Ed.

Addresses a multitude of issues critical to both the tenant and the landlord. Especially useful are the sample model leases that cover conditions favorable to both the landlord and the tenant. Includes forms, instructions, charts on CD.

PN: 40419 / **Member $165** / List $210 / 2 vols.

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

Contract Doctrine and Marital Agreements in New York

A unique, two-volume reference work covering a complex and challenging area of law.

PN: 4159 / **Member $175** / List $225 / 2 vols.

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

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. Criminal Practice, 3rd Ed.

This valuable text of first reference has been reorganized and rewritten to reflect all changes in the law and practice since the publication of the second edition in 1998.

PN: 41460 / **Member $120** / List $140 / 1,168 pages

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

Real Estate Transactions: Contaminated Property Mitigation

Covers sales and lease agreements, discussing resolving the concerns of all parties to an agreement; due diligence and reporting requirements; liability, tax consequences and cleanup programs; and types of contamination and recommendations for remediation.

PN: 4029 / **Member $40** / List $50 / 96 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!

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 / 2012 / approx. 900 pages / looseleaf

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

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.

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.

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

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

Expand your professional knowledge

1.800.582.2452 www.nysba.org/pubs **Mention Code: PUB1369**

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

NEW YORK STATE BAR ASSOCIATION
Journal

EDITORIAL OFFICES
One Elk Street
Albany, NY 12207
(518) 463-3200
FAX (518) 463-8844
www.nysba.org

ADVERTISING REPRESENTATIVE
Network Media Partners
Meredith Schwartz
Executive Plaza 1, Suite 900
11350 McCormick Road
Hunt Valley, MD 21031
(410) 584-1960
e-mail: mschwartz@networkmediapartners.com

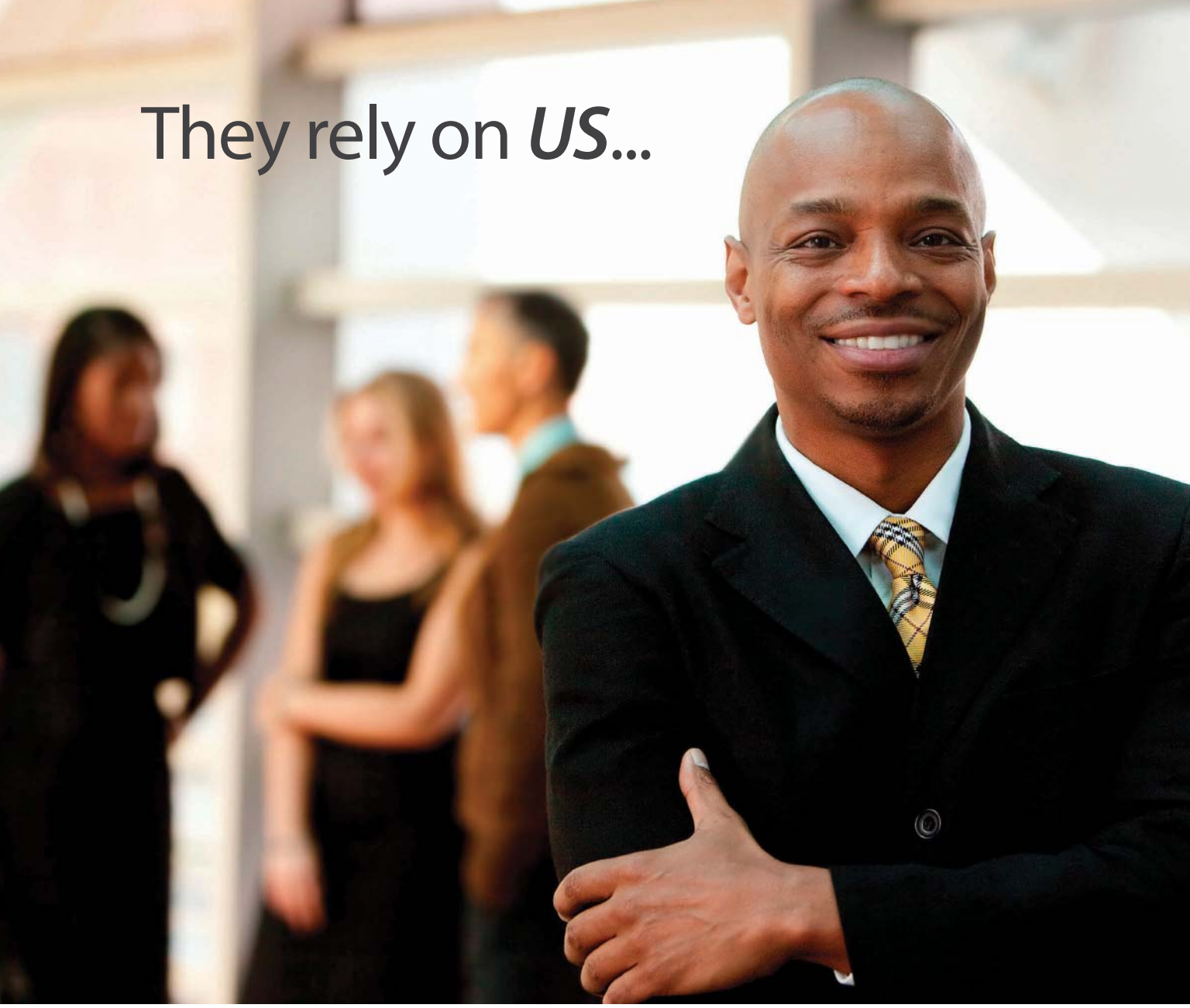
EUGENE C. GERHART
(1912 – 2007)
Editor-in-Chief, 1961–1998

CONTENTS

MARCH/APRIL 2012

DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2012 by the New York State Bar Association. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $30. Library subscription rate is $200 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.



...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

VINCENT E. DOYLE III

Rooted in Core Values; Branching Out to the Future

When our Association was formed 135 years ago, our founders identified several priorities that would be central to the mission of the New York State Bar Association: The Association would aspire "to cultivate the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, [and] to elevate the standard of integrity, honor and courtesy in the legal profession." We continually strive to uphold those fundamental values while also working to account for technological, cultural and economic developments that have dramatically changed the practice of law. As proposals emerge for discussion and debate, it is essential that we consider novel approaches against the backdrop of the fundamental principles underlying our profession, and that we keep pace with changing times without sacrificing our core values.

Today, we are part of a global legal community. Attorneys regularly communicate electronically with clients and colleagues, sometimes halfway across the globe. Attorneys, bar associations and regulatory bodies worldwide have been exploring alternative firm structures, and multi-jurisdictional and multi-disciplinary practice. Last year, our Task Force on the Future of the Legal Profession explored various issues related to the changing legal landscape, ranging from emerging technology to work-life balance. The Task Force recommended that law firms consider alternative firm structures and billing arrangements, and emphasized the importance of compliance with different states' laws in an increasingly multi-jurisdictional practice environment. It also urged further review of the ethical concerns related to virtual law firms, as well as social networking, cloud computing and other new technologies.

The American Bar Association's Commission on Ethics 20/20 has also been looking at these issues, and it has done an outstanding job of examining the challenges and opportunities presented by technology and the increasingly global practice of law. Past ABA President Carolyn Lamm created the Commission to consider the Model Rules of Professional Conduct in order to ensure that the high ethical standards so critical to our profession evolve appropriately, in light of technological advances and burgeoning globalization. The Commission has studied the use of electronic media to provide legal advice, storage of confidential information on mobile devices and "in the cloud," online attorney advertising, multi-jurisdictional practice, alternative law firm structures and outsourcing.

One matter being discussed by the Commission has generated a considerable amount of debate. The Commission has issued a discussion paper proposing amendments to Model Rule 5.4, which could lead to a fundamental change in the provision of legal services. The amendments would allow lawyers and law firms to share legal fees with non-lawyers, who could hold a limited ownership interest in the practice, as long as certain conditions are met. The conditions require that law firms provide only legal services and that the non-lawyer participants be actively involved in supporting the provision of those services. The proposal also includes other ethical safeguards such as ownership and voting caps to prevent the loss of attorney control of the firm. In its discussion paper on the topic, the Commission explained that its approach was guided by the rules of the District of Columbia. It also looked at foreign jurisdictions, such as the United Kingdom and Australia, which permit more expansive non-lawyer ownership.

Vincent E. Doyle III can be reached at vdoyle@nysba.org.

PRESIDENT'S MESSAGE

This is not the first time the ABA has taken up the issue of non-lawyer ownership. More than a decade ago, a prior ABA Commission recommended amending the Model Rules to allow lawyers to share fees and join with non-lawyers in practice entities delivering both legal and non-legal services, as long as the attorneys maintained sufficient control and authority over their legal services. This discussion was prompted by the stated intention of certain accounting firms to "acquire" law firms in the United States, as they had done in Europe. In response, the New York State Bar Association appointed a special committee to study the issue; Robert MacCrate was chair and Steven Krane was vice-chair. The committee's recommendations opposed non-lawyer ownership, albeit recognizing that its position would deny attorneys the ability to enjoy some financial gains. Our governing body, the House of Delegates, adopted a resolution to that effect, and our Association led the effort within the ABA to oppose this and other proposals to allow multi-disciplinary practice. In the end, the proposals were defeated.

The Association has historically maintained its opposition to multi-disciplinary practice. Although our recent Task Force on the Future of the Legal Profession explored alternative law firm structures, it did not recommend changing the prohibition against non-lawyer ownership. I have also had numerous conversations with attorneys throughout New York State about the legal profession, and these formal and informal discussions consistently reaffirm our position against non-lawyer ownership.

However, in light of the thorough, serious and thoughtful treatment of the subject by the Commission on Ethics 20/20, we recently implemented a State Bar Task Force charged with re-examining our Association's position on non-lawyer ownership, to formulate a response to the Commission's discussion paper. The Task Force on Nonlawyer Ownership is chaired by Immediate Past President Stephen Younger, and its members include practitioners, academics, legal ethicists, retired jurists and other attorneys representing a broad cross-section of the legal profession. We have formed the Task Force to evaluate our position, with an eye toward protecting the core values of our profession, including loyalty, independence and confidentiality. Some commentators have minimized the importance of this "core values argument," which they characterize as archaic or as veiled self-interest. And while I am troubled by that cynical approach, I am also confident that neither our Association nor the ABA would turn away from these core values.

In February, I had an opportunity to deliver testimony to the Commission on Ethics 20/20. I outlined our previous opposition to multi-disciplinary practice, and announced the formation of our Task Force. I explained that we recognized that the current proposal is, in some ways, more limited than previous recommendations, and that it was worthy of further consideration. I also reiterated our emphasis on the core values and integrity of the legal profession.

We share a common goal with the Commission – we want attorneys to be able to provide competent legal services that adhere to the highest ethical standards, while also taking advantage of all the benefits technology and global interconnectedness have to offer. The Commission on Ethics 20/20 delivered an informational report to the ABA House of Delegates at its meeting in February, and the ABA House will begin voting on the Commission's proposals at its meeting in August 2012. A recommendation on non-lawyer ownership will not be considered until February 2013.

If our Task Force proposes any change in the Association's position, the question would be presented to our House of Delegates for consideration, debate and possible action. I am certain that our Task Force will approach this issue as objectively as possible and engage in a process as candid and thorough as that which led the Commission on Ethics 20/20 to submit its recommendation. I look forward to receiving the conclusions of the Task Force, and to our Association's participation at the national level in the upcoming debate on these important ethical issues. ■

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

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

NYSBACLE

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

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

CPLR Update
(5:30 p.m. – 9:30 p.m.)
March 21 New York City
March 28 Long Island

†8th Annual International Estate Planning Institute
(two-day program)
March 22–23 New York City

Medical Malpractice - 2012
March 23 Rochester
March 30 Albany

Bridging the Gap
(two-day program)
March 28–29 New York City (live program)
Albany (videoconference from NYC)

Practical Skills: Family Court Practice
April 2 Albany; Buffalo
April 3 Long Island; Rochester
April 4 New York City
April 5 Syracuse; Westchester

What You Need to Know as a Guardian ad Litem
(9:00 a.m. – 1:00 p.m.)
April 4 Syracuse
May 15 Long Island
May 18 Albany
May 23 New York City
May 31 Rochester

Handling Tough Issues in Plaintiff's Personal Injury Action
April 5 Albany; Rochester
April 13 Long Island
April 20 Buffalo
April 27 New York City

Ethics and Civility 2012
April 13 Buffalo
April 20 Albany; New York City
April 27 Long Island; Rochester

†16th Annual New York State and City Tax Institute
April 19 New York City

Practical Skills: Purchases and Sales of Homes
April 23 Albany; New York City
April 24 Syracuse
April 25 Long Island; Rochester
April 26 Buffalo; Westchester

The Examination Before Trial – Honing Your Deposition Skills
April 27 Albany
May 11 Buffalo; New York City
May 18 Long Island

Matrimonial Trial Institute I: Trial Techniques and Strategies
April 27 Westchester
May 11 Long Island
May 18 Rochester
June 1 Albany
June 8 New York City

Advanced Negotiation Strategies for Lawyers
May 1 New York City
May 2 Long Island
May 3 Westchester
May 4 Albany

Immigration Law Update 2012: Basics and Beyond
(two-day program)
May 8–9 New York City

DWI on Trial - 2012
May 10 New York City

Dealing With Your Client's Retirement Assets
(9:00 a.m. – 1:00 p.m.)
May 15 Westchester
May 17 Buffalo
May 23 Syracuse
May 30 Albany
June 5 Long Island
June 8 Rochester
June 13 New York City

Starting a Practice in New York
May 18 New York City

Advanced Insurance Coverage
May 21 Albany; Buffalo; Long Island
June 1 New York City
June 7 Syracuse

Public Sector Labor Relations
May 30 Syracuse
June 8 New York City
June 13 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.

Practical Skills: Basics of Handling an Auto Accident Case

May 31	New York City
June 5	Albany
June 6	Long Island; Syracuse
June 7	Buffalo

Key Issues for Health Care Providers: In-House Counsels' Perspective

(1:00 p.m. – 5:00 p.m.)

June 11	New York City

Practical Skills: Basic Tort and Insurance Law Practice

June 12	Long Island
June 13	Buffalo
June 14	Albany; Westchester
June 15	New York City

Marcellus Shale: New Regulation Challenges

June 13	Binghamton
June 15	Albany
June 22	New York City


SCRIPTORVM PRINCEPS EGO NEC OBITVRA DEINCEPS LAVS MEA NEC FAMA
CAT HVIVS

Gary D. Spivey (gspivey1@gmail.com) is a former New York State Reporter and a past president of Scribes. He is a member of the Board of Editors of the *Journal*.

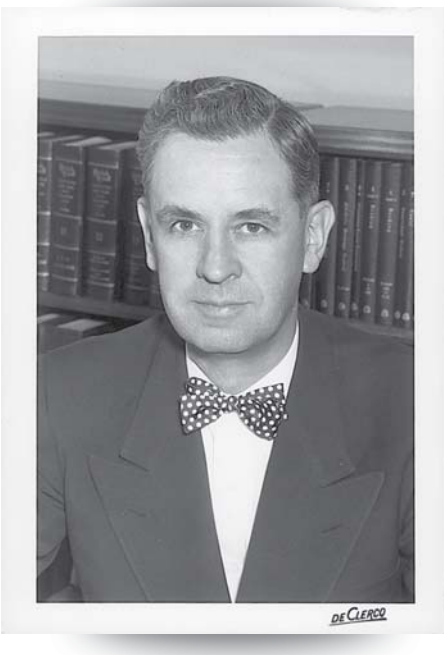
Mr. Gerhart and Scribes, the American Society of Legal Writers

By Gary D. Spivey

More than three decades have passed since the NYSBA *Journal*, then edited by Eugene C. Gerhart, published *The History of Scribes*, then known as the American Society of Writers on Legal Subjects.[1] Mr. Gerhart was a charter member of Scribes, twice served as its president and left an imprint on the organization that other New Yorkers have continued to strengthen.

"Gene" Gerhart (1912–2007) of Binghamton is best known as the biographer of United States Supreme Court Justice Robert H. Jackson, as the compiler of major works on legal quotations and as the editor-in-chief of the *Journal* from 1961 to 1998.[2] But he also was a leading proponent of legal writing reform, a cause that he championed in several publications and through his leadership in the Scribes organization.

As Gerhart's article on the history of Scribes relates, that organization came about as the result of a letter written by New Jersey Chief Justice Arthur T. Vanderbilt, formerly dean of the New York University School of Law (and also the subject of a Gerhart biography),[3] who suggested that a group of lawyers interested in legal history and biography meet at the 1952 annual meeting of the American Bar Association (ABA). Convened with the encouragement of Rochester legal publisher Edgar G. Knight, attendees at that 1952 meeting decided to extend invitations to prominent lawyer-authors to attend a 1953 meeting to consider forming an organization of lawyers and law school professors interested in the promotion of good legal writing. The 1953 meeting gave birth to Scribes.



Eugene C. Gerhart was a charter member of Scribes and twice served as its president. (N.Y.S.B.A. photo.)

Among the objectives of the new organization, as expressed in the constitution adopted at the 1953 meeting, was to foster a "clear, succinct and forcible" style in legal writing. Eligibility for membership was extended to any ABA member who had written at least one published book or three published articles on a legal subject or had served as an editor of an established legal publication (membership criteria that were somewhat relaxed in later

years).[4] The library of the New York Law School was designated as the repository library for Scribes.[5]

Gerhart's Early Influence

At the first regular meeting of Scribes in 1954, Gerhart gave a talk titled "A Formula for Legal Writing – How and What."[6] At the urging of his audience, Gerhart's talk was published in the ABA *Journal*,[7] the editors noting in a preface that "Scribes, dedicated to improving the style of legal writing, may one day become a potent foe of 'legalese.'"

In that article, Gerhart elaborated on the Scribes goal of fostering a "clear, succinct and forcible" writing style:

- *Clarity*. Lawyers' language had long been regarded as the prime example of complex, unreadable and often unintelligible English. Gerhart advocated a clear style that is "sincere, simple, coherent and direct." Observing that legal writers often must deal in abstractions, and that legal writing cannot remain at the abstract level for long and still be clear, he suggested using concrete cases as examples to illustrate abstract statements.[8]
- *Succinctness*. Gerhart noted that "[m]any lawyers suffer from a literary disease called 'sentence inflation.'" The cure for sentence inflation, he suggested, was "to stop being stuffy, legalistic, technical and overly precise in our writing for the general reader."[9]
- *Forcefulness*. Gerhart observed that "the inactive, the intransitive, the impersonal style is preferred by lawyers." Inactive style is not forceful, he asserted; it is weak. "Use active verbs," he urged, and "[w]atch your adjectives." "[S]trike out as many words as you possibly can without altering the sense," he wrote, "and you will increase tremendously the vigor of your style."[10]

Possibly inspired by these views, Scribes created a Committee on Editorial Guidance with Gerhart as its chair.[11]

Gerhart rose rapidly within the leadership of the new organization, becoming vice president in 1956[12] and president at the 1957 annual meeting of the society in New York City.[13] He would again serve as president in 1970–1971, one of only two persons to be twice elected to that position.

Subsequent New York Leadership

Gerhart was the first of nine New Yorkers to lead the society. These subsequent presidents included federal court judges, law school deans, legal publishers and official reporters of judicial decisions.

Between Gerhart's first and second terms, two other New Yorkers served as the society's president: State Reporter and federal District Court (S.D.N.Y.) Judge Edward J. Dimock in 1962–1963; and New York City attorney Herman Finkelstein in 1965–1966.

Following Gerhart's second term, six additional New Yorkers have held the presidency: Rochester and New York City legal publisher Sidney Bernstein (1971–1972), Court of International Trade Chief Judge and St. John's School of Law distinguished professor Edward Re (1978–1979), New York Law School Dean E. Donald Shapiro (1981–1982), Rochester legal publisher Joseph J. Marticelli (1982–1983), New York Law School Associate Dean Margaret S. Bearn (1983–1984) and State Reporter Gary D. Spivey (1999–2001).

State Reporter and federal judge (S.D.N.Y.) Edward Dimock was president of Scribes in 1962-63. (N.Y.S. Law Reporting Bureau photo collection.)

New York Law School Associate Dean Margaret Bearn (left) and Court of International Trade Chief Judge Edward Re (right) at 1981 Scribes Legal Writing Institute at New York Law School. Both served as Scribes presidents. (Scribes photo.)

New York Law School Dean Donald Shapiro was Scribes president in 1981-82. (N.Y. Law School photo.)

New York's Contribution to Programs and Publications

During Gerhart's first term, Scribes presented to Harry D. Nims of New York City the first of its awards for the best article that had appeared in the ABA *Journal* during the past year.[14] Gerhart later edited a collection of the best ABA *Journal* articles from the previous 40 years,[15] which included one of his own,[16] as selected by the *Journal*'s editors from nominations by the ABA leadership.

Although Scribes no longer presents an award for the best ABA *Journal* article, it gives a number of other writing awards, and New Yorkers have been frequent honorees.

Among these is the book award presented annually to the author of the best work of legal scholarship published during the previous year. More than a dozen winners have New York affiliations.[17]

Scribes also presents an annual award for the best student-written article in a law review or journal, and a number of New York law students representing four different New York law schools have been among the winners.[18]

The Scribes brief-writing award, originally a competition among members of the bar, is now presented for the best student-written brief in regional or national moot-court competitions. New Yorkers have claimed prizes in both the former and present programs.[19]

New York Court of Appeals Judge and St. John's School of Law Dean Joseph Bellacosa addressing 2000 Scribes annual meeting in New York City. (Scribes photo.)

Over the years, Scribes has frequently held its annual meeting in New York City in conjunction with the annual meetings of the American Bar Association, most recently in 2008. A number of New Yorkers have been the featured speakers at the meetings in New York City and elsewhere, most recently Joseph W. Bellacosa, former senior associate judge of the Court of Appeals and dean of the St. John's University School of Law, who spoke at the New York City meeting in 2000.

Scribes presents a variety of legal writing programs, often directed at law students and new lawyers. These have included a series of legal writing institutes, usually held in New York City, the first of which was held at the St. John's University School of Law in 1976. More recently, in 2008, Scribes and the New York City Bar Association co-sponsored a symposium on Abraham Lincoln's legal writing.

Rochester and New York City legal publisher Sidney Bernstein, who served as vice president of Scribes under Gerhart and succeeded him as president, first proposed that the society publish a scholarly journal. That proposal led to the *Scribes Journal of Legal Writing*, which, in its 13 volumes, has published articles by or about many of the best-known figures in legal writing; its contributors have included a number of New Yorkers.[20]

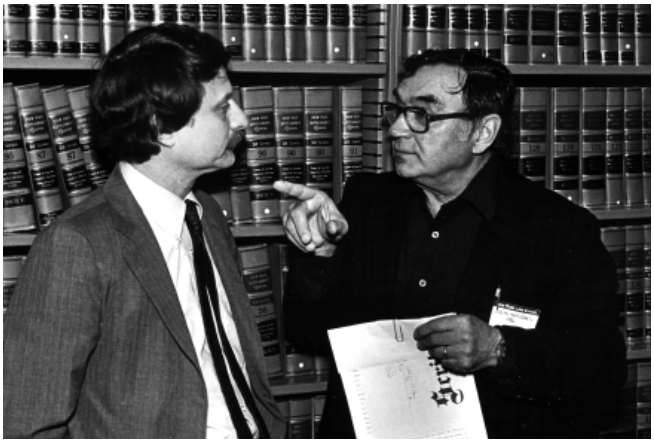
Since 1975, Scribes also has published a quarterly newsletter, the *Scrivener*, which contains organization news and short pieces on legal writing. New York law publisher Joseph Marticelli, later a Scribes president, was its first editor.

Gerhart's Advocacy for Scribes and Its Goals

In all of these activities in pursuit of its goal of improved legal writing, Scribes had an ardent champion in Gene Gerhart. Even his works on legal quotations speak to that goal. "[Many writers are] aware of the improvement they may be able to make on the prior thoughts of earlier writers," he observed; "[t]hus, a book of quotations inspires us all to keep trying to improve our writing."[21]

Echoing the goals of the Scribes organization, he wrote that "[t]he good writer and the good lawyer have the same goal in writing – to express themselves in clear, concise and forcible English[. The] advocate who achieves this high goal will win many battles in the war of words which makes up the lawyer's life."[22]

Scribes past president Gary Spivey (left) with (l-r) Charles Dewey Cole (N.Y.C.), Daniel Dillon (Lido Beach) and Kenneth Gartner (Mineola) at 2008 Scribes annual meeting in New York City. Both Cole and Gartner are Scribes committee chairs. (Scribes photo.)



Scribes president Joseph Marticelli (right) with New York Law School professor (later dean) James Simon, a Scribes book award winner, at 1981 Scribes Legal Writing Institute at New York Law School. (Scribes photo.)

Scribes
The American Society of Legal Writers

Official logo of Scribes, the American Society of Legal Writers. (Scribes photo.)

As he reflected on the achievements of the Scribes organization, Gerhart observed, "Although there are many organizations of writers, Scribes claims the distinction of being the first to call attention to the legal profession itself of the importance of good legal writing, and then establishing a law organization to do something about it."[23]

Conclusion

From its earliest days, Scribes has borne a strong New York imprint, as reflected in its leadership, its award winners, its annual meetings and speakers, its writing programs and its journal contributors. Today, Scribes has more individual members from New York than from any other state,[24] and a number of New York law schools are institutional members of the society.[25] This New York imprint on Scribes is one of the many legacies that Eugene C. Gerhart has bequeathed to the legal profession and his home state. What he wrote in his biography of Chief Justice Vanderbilt seems no less true of Gerhart himself: "[He] would have been pleased with this concentration in the legal profession on clear, precise, forcible legal writing."[26] ■

1. H. Sol Clark, The History of Scribes, N.Y. St. B.J. 332 (June 1980). That history recently has been updated in Thomas M. Steele and Norman Otto Stockmeyer, *Scribes After More Than 50 Years – A History*, 12 Scribes J. Legal Writing 1 (2008–2009). The latter history, used with permission, is the principal source for this article.

2. John Q. Barrett, *Eugene C. Gerhart (1912–2007), Jackson Biographer*, N.Y. St. B.J. 26 (Feb. 2008). The Jackson biography is Eugene C. Gerhart, *America's Advocate: Robert H. Jackson* (1958). His compilations of legal quotations were published in Eugene C. Gerhart, *Quote It! Memorable Legal Quotations: Data, Epigrams, Wit and Wisdom from Legal and Literary Sources* (1969); Eugene C. Gerhart, *Quote It II: A Dictionary of Memorable Legal Quotations* (1988); and Eugene C. Gerhart, *Quote It Completely!: A World Reference Guide to More than 5,500 Memorable Quotations from Law and Literature* (1998).

3. Eugene C. Gerhart, Arthur T. Vanderbilt, The Compleat Counsellor (1980).

4. Minutes of Scribes organizational meeting of Aug. 23, 1953 (on file with author). Today, any member of the legal profession may join Scribes. Those who have published a book, legal articles or judicial opinions or have served as editor of a legal publication may join as regular members; others may join as associate members. Law schools and appellate courts may join as institutional members. See membership information at www.scribes.org.

5. *Id.*

6. Minutes of Scribes meeting of Aug. 15, 1954 (on file with author).

7. Eugene C. Gerhart, *Improving Our Legal Writing: Maxims from the Masters*, 40 A.B.A. J. 1057 (1954).

8. *Id.* at 1057–58.

9. *Id.* at 1058–59.

10. *Id.* at 1059.

11. Minutes of Scribes meetings of Aug. 15, 1954 and Aug. 21, 1955 (on file with author).

12. Minutes of Scribes meeting of Aug. 26, 1956 (on file with author).

13. Minutes of Scribes meeting of July 14, 1957 (on file with author).

14. Minutes of Scribes meeting of August 24, 1958 (on file with author).

15. Eugene C. Gerhart ed., The Lawyer's Treasury (ABA 1956).

16. Eugene C. Gerhart, *The Fountainhead of the Law – The Facts*, 36 A.B.A. J. 533 (1950).

17. These include: Charles L. Black Jr., The People and the Court: Judicial Review in a Democracy (1961); James B. Donovan, Strangers on a Bridge: The Case of Colonel Abel (1965); Louis Nizer, The Jury Returns (1967); Martin Mayer, The Lawyers (1968); Leon Friedman & Fred L. Israel, The Justices of the United States Supreme Court, 1789–1969 (1970); Robert Shogan, A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court (1973); James F. Simon, Independent Journey: The Life of W.O. Douglas (1981); Cynthia Fuchs Epstein, Women in Law (1982); Franklin Feldman, Stephen Weil & Susan Duke Biederman, Art Law: Rights and Liabilities of Creators and Collectors (1987); Sheldon M. Novick, Honorable Justice: The Life of Oliver Wendell Holmes (1990); Roger Newman, Hugo Black: A Biography (1995); Geoffrey R. Stone, Perilous Times: Free Speech in Wartime (2005); Jonathan Mahler, The Challenge: *Hamdan v. Rumsfeld* and the Fight over Presidential Power (2009).

18. Edith L. Pacillo, *Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography*, 28 Suffolk U. L. Rev. 123 (1994); Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 Colum. L. Rev. 2083 (1995); Mary M. Sheridan, *In re Fauziya Kasinga: The United States Has Opened Its Doors to Victims of Female Genital Mutilation*, 71 St. John's L. Rev. 433 (1997); Katherine A. Ritts, *The Constitutionality of "Let Them Rest in Peace" Bills: Can Governments Say "Not Today, Fred" to Demonstrations at Funeral Ceremonies?*, 58 Syracuse L. Rev. 137 (2007).

19. Howard Pincus & E. Joshua Rosenkranz, N.Y. Office of Public Defender (1993); Christopher Blum, Joy Goldberg & James Moschella, Brooklyn Law School (1996).

20. Roger J. Miner, *Twenty-Five "Do's" for Appellate Brief Writers*, 3 Scribes J. Legal Writing 19 (1992); Charles Rembar, *Dear Sincere*, 4 Scribes J. Legal Writing 101 (1993); Gary D. Spivey, *F. Reed Dickerson: The Persistent Crusader*, 6 Scribes J. Legal Writing 149 (1996–1997); Stephen Halpern, *The Litigation Writer: An Emerging Specialist*, 7 Scribes J. Legal Writing 159 (1998–2000); Irving Younger, *[Collected Essays]*, 8 Scribes J. Legal Writing 121, 125, 129, 133, 137 (2001–2002); Duncan McDonald, *The Story of a Famous Promissory Note*, 10 Scribes J. Legal Writing 79 (2005–2006); Howard Darmstadter *[Collected Essays]*, 10 Scribes J. Legal Writing 129, 137, 145 (2005–2006); Peter Siviglia, *Designs for Courses in Drafting Contracts*, 12 Scribes J. Legal Writing 89 (2008–2009).

21. Eugene C. Gerhart, Quote It!, at vi.

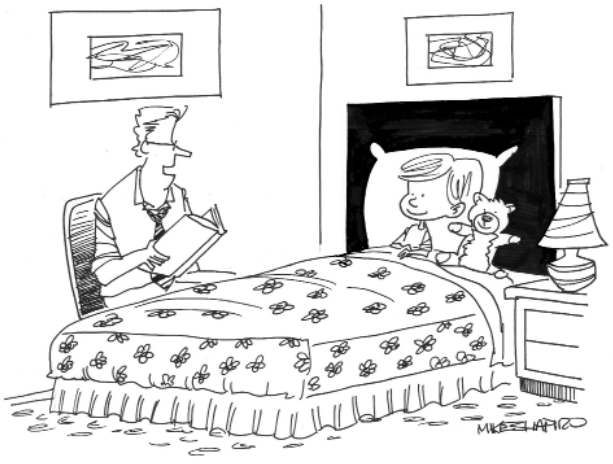
22. Eugene C. Gerhart, *Editorial, Warriors and Words*, 28 Pers. Fin. Q. Rep. 64 (Spring 1974).

23. Eugene C. Gerhart, *The History of Scribes*, Case & Comment 42, 42–43 (July–Aug. 1970).

24. Norman Otto Stockmeyer, The History of Scribes, *at* www.scribes.org/history.

25. Hofstra University School of Law, Pace University School of Law and Syracuse University College of Law.

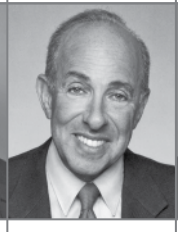
26. Eugene C. Gerhart, Arthur T. Vanderbilt, The Compleat Counsellor, at 201.



" . . . And the cow jumped over the moon. But not before getting the required legal permits."

AT JAMS, YOU FIND EXPERIENCE. KNOWLEDGE. FAIRNESS. SERVICE.

AND AN UNSURPASSED PANEL OF NEUTRALS.

							
Hon. Anthony J. Carpinello (Ret.)	Hon. Stephen G. Crane (Ret.)	Robert B. Davidson, Esq.	Hon. Michael J. Dontzin (Ret.)	Hon. Betty Weinberg Ellerin (Ret.)	Sheldon Elsen, Esq.	Ronnie Bernon Gallina, Esq.	David Geronemus, Esq.
							
Hon. Gloria Goldstein (Ret.)	Katherine Hope Gurun, Esq.	Hon. John J. Hughes (Ret.)	Hon. Allen Hurkin-Torres (Ret.)	Dina R. Jansenson, Esq.	Kenneth M. Kramer, Esq.	Hon. John C. Lifland (Ret.)	Hon. Guy J. Mangano (Ret.)
							
V. James Mann, Esq.	Jed D. Melnick, Esq.	Jeanne C. Miller, Esq.	Hon. Milton Mollen (Ret.)	Shelley Rossoff Olsen, Esq.	Lawrence W. Pollack, Esq.	Hon. Kathleen A. Roberts (Ret.)	David S. Ross, Esq.
							
Mark E. Segall, Esq.	Margaret L. Shaw, Esq.	Vivien B. Shelanski, Esq.	Hon. George Bundy Smith, Sr. (Ret.)	Daniel Weinstein (Ret.)	Carol A. Wittenberg	Peter H. Woodin, Esq.	Michael D. Young, Esq.

JAMS New York Resolution Center
620 Eighth Avenue | 34th Floor | New York, NY 10018
212.751.2700 | www.jamsadr.com

THE RESOLUTION EXPERTS JAMS®

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for more than 23 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 LexisNexis), the 2008 and 2012 Supplements to *Fisch on New York Evidence* (Lond Publications), and the annual "Evidence Survey" for the *Syracuse Law Review*. 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 and the New York State Bar Association's CPLR Committee, and is a frequent lecturer and writer on these subjects.

Neglected No More

Introduction

The last two columns discussed CPLR 3216 and the recent decision of the Court of Appeals in *Cadichon v. Facelle*.[1] Going forward, *Cadichon* may represent a "reset" in the world of court-served CPLR 3216 demands. *Cadichon*, read in conjunction with the statute and existing case law, provides a road map to practitioners facing the threat of dismissal for neglect to prosecute, pursuant to CPLR 3216. This column examines strategies and tactics to deploy when confronted with a CPLR 3216 motion to dismiss; but first, some observations.

Not at Issue in *Cadichon*

One significant component of CPLR 3216 practice that did not play a role in *Cadichon*, and that may play a critical role in cases going forward, is the form of the order dismissing a plaintiff's case.

The Court of Appeals took note that the case before it did not involve the application of the 2008 amendment to CPLR 205(a). Effective July 7, 2008, CPLR 205(a) was amended to add a new final sentence:

> Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.[2]

It is hard to fathom how CPLR 205(a)'s requirement could have been applied in *Cadichon*. How would the order have read? "The plaintiff, having failed to assiduously call and write to persuade the three defaulting defendants to cure their collective violation of the most recent court order by producing their witnesses for deposition as required in that order, has thereby neglected to prosecute its case and the action is, therefore, dismissed"? It is hard to imagine that a dismissal would ever have been ordered on *Cadichon*'s facts.

Left Open by *Cadichon*

A critical factor in the Court's decision was that the order at issue stated a default "will serve as a basis for the court, on its own motion, to dismiss the action for unreasonably neglecting to proceed,"[3] and the trial court dismissed the action without making a motion on notice to the parties.[4] It is unclear to me if the requirement of a notice motion by the trial court must be met in all cases where dismissal is sought based upon a court-served demand, or only where the demand contains explicit motion language. My uncertainty persists despite the Court's concluding sentence:

> But where, as here, the case proceeds to the point where it is subject to dismissal, it should be the trial court, with notice to the parties, that should make the decision concerning the fate of the case, not the clerk's office.[5]

Many of my colleagues disagree with me, but if, in fact, the Court's language requiring that a trial court move on notice to the parties was compelled by the specific language in the order in question, *to wit*, that the failure to timely file the note of issue would "serve as a basis for the court, on its own motion, to dismiss the action,"[6] practitioners in other cases may not receive the benefit of a notice motion.

In a number of counties the CPLR 3216 demands served by the court make no mention of a motion by the court, providing instead that the failure to file the note of issue, for example,

> shall be grounds for dismissal for failure to prosecute pursuant to CPLR 3216, as set forth in the Demand below . . . PLEASE TAKE FURTHER NOTICE that a default in complying with the foregoing demand may result in dismissal of the action for unreasonably neglecting to proceed, without further notice. Prior to the date set forth above, the court may, in its discretion, advise the plaintiff of the impending deadline.[7]

Cadichon's requirement that the trial court provide a motion on notice may not apply to a dismissal emanating from this type of order, and is not compelled by CPLR 3216(a) which, on its face, does not require the court to make a motion:

> Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of

issue, the court, *on its own initiative or upon motion*, may dismiss the party's pleading on terms.[8]

However, there is pre-*Cadichon* case law suggesting that the service of a CPLR 3216 demand by a court must state that failure to comply with the demand will serve as a basis for a motion to dismiss in order for the dismissal to be effective:

> CPLR 3216 permits a court to dismiss an action for want of prosecution only after the court or the defendant has served the plaintiff with a written notice demanding that the plaintiff resume prosecution of the action and serve and file a note of issue within 90 days after receipt of the demand, and also stating that the failure to comply with the demand will serve as the basis for a motion to dismiss the action. Since CPLR 3216 is a legislative creation and not part of a court's inherent power, the failure to serve a written notice that conforms to the provisions of CPLR 3216 is the failure of a condition precedent to dismissal of the action.[9]

Avoiding Dismissal After *Cadichon*

Where a motion is made pursuant to CPLR 3216 to dismiss the plaintiff's case, it is essential that the plaintiff, in opposing the motion, follow the requirements of CPLR 3216(e):

> (e) In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.[10]

Earlier in the year the Court of Appeals held it was an abuse of discretion for a court to deny a motion to dismiss pursuant to CPLR 3216 where the plaintiff failed to establish the statutory elements:

> Supreme Court abused its discretion by declining to grant defendants' motion to dismiss without condition. Plaintiff failed to establish a (1) justifiable excuse for his failure to timely file a note of issue and (2) meritorious cause of action.[11]

The leading Court of Appeals decision outlining the requirements for avoiding a CPLR 3216 dismissal is its 1997 decision in *Baczkowski*:

> We note that under the plain language of CPLR 3216, a court retains some discretion to deny a motion to dismiss, even when plaintiff fails to comply with the 90-day requirement and proffers an inadequate excuse for the delay. Thus, the Appellate Division's statement that in "the absence of any justifiable excuse . . . Supreme Court lacked discretion to excuse plaintiff's default" is unnecessarily rigid. If plaintiff fails to demonstrate a justifiable excuse, the statute says the court "may" dismiss the action – it does not say "must" – but this presupposes that plaintiff has tendered some excuse in response to the motion in an attempt to satisfy the statutory threshold.
>
> Although a court may possess residual discretion to deny a motion to dismiss when plaintiff tenders even an unjustifiable excuse, this discretion should be exercised sparingly to honor the balance struck by the generous statutory protections already built into CPLR 3216. Even such exceptional exercises of discretion, moreover, would be reviewable within the Appellate Division's plenary discretionary authority. If plaintiff unjustifiably fails to comply with the 90-day requirement, knowing full well that the action can be saved simply by filing a note of issue but is subject to dismissal otherwise, the culpability for the resulting dismissal is squarely placed at the door of plaintiff or plaintiff's counsel. Were courts routinely to deny motions to dismiss even after plaintiff has ignored the 90-day period without an adequate excuse, the procedure established by CPLR 3216 would be rendered meaningless.
>
> Thus, when a plaintiff's excuse, though inadequate, is timely interposed, a court in its discretion might dismiss the action or, in an appropriate case, deny the motion and impose a monetary sanction on plaintiff or plaintiff's counsel instead. As discussed above, plaintiff in this case failed to tender any reasonable excuse in timely response to defendant's dismissal motion. Therefore, dismissal was the appropriate result.[12]

Where a case is dismissed pursuant to CPLR 3216 without a motion being made, the plaintiff is required to establish the elements outlined

above. However, the initiatory motion must be made by the plaintiff whose case was dismissed, in the form of a motion to vacate the default.

A Case After *Cadichon*

In the first reported decision discussing *Cadichon*, Justice Randy Sue Marber was confronted with the plaintiff's motion to vacate a dismissal based upon a court-served CPLR 3216 demand:

> Pursuant to the Certification Order of this Court dated January 1, 2010, the Plaintiff was directed "to file a Note of Issue within 90 days." The Order stated that if plaintiff failed to do so "this action is deemed dismissed without further Order of the Court. (CPLR 3216)."[13]

Later on in the opinion, the court described the terms of the Certification Order differently:

> As previously noted, the Certification Order herein dated January 20, 2010, constitutes a valid 90-day demand notice as it advised the Plaintiff that the failure to comply therewith would serve as a motion to dismiss the action.[14]

Thus, it is not clear whether the court-served CPLR 3216 demand in *Pursoo* contained a provision that the court would make a motion.

Thereafter, the parties executed and filed a stipulation extending the plaintiff's time to file the note of issue by 60 days. There is nothing in the decision indicating that the stipulation was "so ordered," and the plaintiff failed to file a note of issue by either the original date or the date set forth in the stipulation. However:

> Unbeknownst to the Plaintiff, on September 15, 2010, the action was dismissed. Upon learning of the dismissal, the Plaintiff moved, *inter alia*, to restore the case to active status and to extend the time to file a Note of Issue.

The court concluded that the stipulation executed by the parties did "not constitute a 90-day demand since it lacks, inter alia, the required language advising the Plaintiff that the failure to comply would serve as a basis for dismissal under CPLR § 3216."

Accordingly:

> Here, because the parties' stipulation, "So-Ordered" by this Court, does not advise the Plaintiff that a failure to comply would serve as a basis to dismiss the action, the Plaintiff's motion to restore the case to active status, to extend the time to file a Note of Issue and to establish a discovery schedule as to the Defendant, Patricia Ngala, is GRANTED.

Justice Marber next discussed *Cadichon*, noting that the parties had been invited by the court to discuss the impact of *Cadichon* on the plaintiff's motion to vacate the dismissal. She explained:

> The factual predicate in that case, however, is different from that herein in that in *Cadichon* there was both a stipulation directing the filing of a Note of Issue by a date certain, as well as a demand for service and filing of a Note of Issue, served upon and signed by the plaintiff's counsel.
>
> Because the case had been ministerially dismissed, however, without notice to the parties, and without entry of a formal order by the court, the Court of Appeals reinstated the case noting that, where the case proceeds to the point where it is subject to dismissal, "it should be the trial court, with notice to the parties, that should make the decision concerning the fate of the case, not the clerk's office."
>
> Although the *Cadichon* decision rests on a different factual predicate than the case before this Court, the general legal principles enunciated therein by the Court of Appeals have guided this Court.[15]

Conclusion

Practitioners should be on the lookout for decisions applying *Cadichon*, particularly those where the court-served demand does not reference the court making a motion to dismiss.

Now that you are equipped to fend off a CPLR 3216 dismissal for neglect to prosecute, just a few minor speed bumps stand between you and winning your case: a motion for summary judgment, trial, and a post-verdict appeal. Along the way, additional neglect to prosecute dismissals lurk, for dismissals arising from disclosure abuses,[16] and for abandonment of the action after the note of issue has been filed, pursuant to CPLR 3404.[17] So be safe out there. ■

1. 18 N.Y.3d 230 (2011).
2. CPLR 205(a).
3. *Cadichon*, 18 N.Y.3d 230.
4. It is evident from the 90-day demand and the dictates of CPLR 3216 that the plaintiffs' failure to comply with the demand would "serve as a basis for the trial court, on its own motion, to dismiss the action. That is not what occurred here; there is no evidence in the record that the trial court made a motion to dismiss the action in this case. . . ." *Id.* at 235–36.
5. *Id* at 236.
6. *Id* at 238.
7. Supreme Court, Queens County Compliance Conference form. Rev'd March 18, 2004.
8. CPLR 3216(a) (emphasis added).
9. *Wasif v. Khan*, 82 A.D.3d 1084, 1085 (2d Dep't 2011) (citations omitted). *Wasif* was decided on March 22, 2011, before *Cadichon*, and is cited by the court in *Pursoo v. Ngala-El*, 937 N.Y.S.2d 844 (Sup. Ct., Nassau Co. 2012), discussed below.
10. CPLR 3216(e).
11. *Umeze v. Fedelis Care N.Y.*, 17 N.Y.3d 751, 751 (2011) (citations omitted).
12. *Baczkowski v. D.A. Collins Constr. Co., Inc.*, 89 N.Y.2d 499 (1997) (citations and parentheticals omitted).
13. *Pursoo*, 937 N.Y.S.2d at 844.
14. *Id.* (citation omitted).
15. *Id.* (language quoted from *Cadichon* and citation omitted)
16. *Andrea v. Arnone*, 5 N.Y.3d 514, 520 (2005).
17. CPLR 3404. Dismissal of abandoned cases:

    > A case in the supreme court or a county court marked "off" or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.

Lawrence T. D'Aloise, Jr. (ldaloise@cgmlaw.com) is an attorney with Clark Gagliardi & Miller, P.C., in White Plains, N.Y., focusing on appellate practice. He received his law degree from Villanova Law School and is listed in Best Lawyers.

An Intrepid Journey Through the Conundrum of Conflicts of Law

By Lawrence T. D'Aloise, Jr.

Prologue

It started out innocently enough in January 2005 when an Ontario, Canada, girls' hockey team and their chaperones embarked on a bus trip from Ontario to Rochester, New York, to play in a hockey tournament. The driver of the Ontario bus was a relatively young man who had worked a second job prior to taking on this trip. The trip to Rochester for the hockey tournament was uneventful. After the game was completed, the bus and its passengers headed for a New York ski resort for a recreational outing.

The Accident

Tragically, the bus was involved in a horrific accident on the way to the ski resort. During the trip, the bus driver appeared to be driving erratically. Some passengers believe the driver was dozing off. While traveling on Interstate 390 near Geneseo, New York, the bus encroached on the right shoulder where a Pennsylvania tractor-trailer hauling produce was illegally parked so the driver could walk his dog. The bus, traveling at 65 miles per hour, hit the rear of the trailer which sliced through the bus almost cutting it in half. The accident resulted in several deaths, many significant personal injuries and immense emotional distress to the bus passengers.

The Lawsuits

Since various plaintiffs were represented by several different law firms, lawsuits were initiated in New York and other venues in the United States. Ultimately the lawsuits were all joined in New York State Supreme Court, Livingston County.

There were also a number of defendants. On the bus side, the defendants (hereinafter referred to as the bus defendants) included the bus driver, the lessor and owner of the bus as well as multiple parent corporations including the overall parent corporation, which was from Scotland.[1]

On the tractor-trailer side (hereinafter the truck defendants) were the driver and owner of the tractor, the owner and lessor of the trailer as well as the company for which the truck was hauling produce, all from Pennsylvania.

After three years of vigorous discovery, the cases were placed on the trial calendar. Rather than signaling that the cases were near completion, placing the cases on the cal-

endar marked the start of a several year trek through the confounding realm of conflicts of law which, ultimately, wound up in the Court of Appeals.

The Ontario Cap on Pain and Suffering

As trial dates were being contemplated, the defendants dropped their bombshell. For the first time in the litigations, the defendants moved the court claiming that Ontario law should apply to the plaintiffs' pain and suffering claims. There were reasons.

The question squarely put to the New York courts was whether the loss allocation law of Ontario, New York or Pennsylvania should apply in these cases.

In a trilogy of cases decided in the 1970s, the Supreme Court of Canada had approved a uniform limit of $100,000 on pain and suffering damages in personal injury cases.[2] The amount of the cap was to be adjusted for inflation, which, in today's dollars, amounts to approximately $350,000. In this case, the plaintiffs' attorneys believed this to be insufficient to compensate any of the plaintiffs, many of whom suffered severe personal injuries as well as those plaintiffs who suffered "zone of danger"[3] emotional distress damages caused by observing the death or serious injury of teammates and family members.

The laws of New York and Pennsylvania do not contain any caps on pain and suffering damages.

The bus defendants claimed on their motion that since the plaintiffs and the bus defendants were from Ontario, Ontario law should apply. The Pennsylvania truck defendants claimed that since the plaintiffs were from Ontario, Ontario law should apply to their claims against the truck defendants as well. The question squarely put to the New York courts was, therefore, whether the loss allocation law of Ontario, New York or Pennsylvania should apply in these cases.

Conflicts of Law in New York

Until the early 1960s, New York applied the traditional conflict of law rule in tort cases that the law of the situs of the accident applied to liability and damages issues. The situs of this accident was, of course, in New York.

In 1963, in its landmark decision in *Babcock v. Jackson*, the Court of Appeals abandoned the place of the accident rule (also known as lex loci delecti) for a more flexible standard described by the Court as the "center of gravity" or "grouping of contacts" approach.[4] According to the Court, the center of gravity concept gave "controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or parties had [the] greatest concern with the specific issue raised in the litigation."[5] In *Babcock* the Court limited the application of this method of analysis to loss allocation issues. Conduct regulating rules were still controlled by the lex loci delecti doctrine because "the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern."[6]

To say the least, later decisions applying the "interest" analysis were varying and, many times, inconsistent.

In 1972, in *Neumeier v, Kuehner*,[7] the Court of Appeals acknowledged that cases decided under the interest analysis approach lacked consistency.[8] The *Neumeier* Court thus formulated three rules of general applicability to loss allocation conflict issues to promote a greater degree of predictability and uniformity. The rules are as follows:

1. When the injured person and tortfeasor are domiciled in the same jurisdiction and the vehicle is registered there, the law of that jurisdiction applies. (*Neumeier* one)
2. Where the injured person or the tortfeasor resides in the jurisdiction where the accident occurs, the law of that jurisdiction applies. (*Neumeier* two)
3. When the injured person and the tortfeasor are domiciled in different jurisdictions and the accident occurs in a jurisdiction where neither is domiciled, the law of the jurisdiction where the accident occurs applies with the exception that the law of a party's domicile is controlling when applying that law "will advance the relevant substantive law purposes [of the party's domicile] without impairing the smooth working of the multistate system or producing great uncertainty for litigants."[9] (*Neumeier* three)

As it turned out, the *Neumeier* rules resulted in additional confusion and uncertainty among the courts. One such issue occurred when multiple plaintiffs and/or tortfeasors from different jurisdictions were involved in the incident: Should there be a single conflict analysis vis-à-vis all plaintiffs and all defendants, or a separate conflict of analysis vis-à-vis each plaintiff and each defendant?[10]

Another issue was whether the interest balancing approach should be used in cases involving the third *Neumeier* rule in determining whether the exception to *Neumeier* three applied.[11]

The Conflicts Issue and These Cases

The Trial Court

These uncertainties manifested themselves in the choice of law motions by the bus and truck defendants. The motion court determined that *Neumeier* three applied to

the claims against the bus and truck defendants because the parties did not share a common domicile and the accident did not occur in the jurisdiction in which any party was domiciled. The court then ruled that Ontario law applied to the pain and suffering claims against both sets of defendants, determining that applying the Ontario cap would not impair the smooth working of the multistate system and would advance the substantive law purposes of Ontario. The court held that Ontario had the predominant interest in applying its loss allocation laws to its citizens, notwithstanding that the truck defendants were from Pennsylvania. Thus, the motion court applied a single conflicts analysis vis-à-vis the bus and truck defendants, applied the exception to *Neumeier* three and held that the Ontario cap applied to the claims against all the defendants.

The plaintiffs' law firms made an immense effort to cooperate in their strategy. They agreed that a single conflicts analysis should be applied to all of the claims against all of the defendants and that the third *Neumeier* rule applied. They disagreed that Ontario law applied. The Ontario cap was intended to keep auto insurance premiums low for Ontario residents. This interest did not apply to the Pennsylvania truck defendants which had no contacts whatsoever with Ontario, and came from a state where there was no cap expectation on plaintiffs' pain and suffering damages. Since the court employed a single conflicts analysis for all the parties and the interests of Ontario and Pennsylvania were irreconcilable, the plaintiffs contended that New York law applied as the "tie breaker" because New York is the only jurisdiction where all the parties have purposely associated themselves in a significant way.[12]

Consequently, the plaintiffs appealed to the Appellate Division, Fourth Department. While the appeals were pending, a trial on liability was held, resulting in agreement between the defendants that the bus defendants were 90% liable and the truck defendants 10% liable for the accident.

The Appellate Division

The Appellate Division came to the same conclusion as the motion court but based its decision upon a different analysis, after it conducted a separate choice of law analysis vis-à-vis the bus and the truck defendants.[13] With respect to the bus defendants, the court applied *Neumeier* one because the plaintiffs and the bus defendants were from Ontario. Consequently, the court held, Ontario law applied to these claims. With respect to the truck defendants, the Appellate Division applied the exception to *Neumeier* three. It determined that applying Ontario law "will advance the relevant substantive law purposes (of Ontario) without impairing the smooth working of the multistate system or producing great uncertainty for litigants." The court also held that applying Ontario law "will not frustrate those interests [of New York] because New York has no significant interest in applying its own law to this dispute."[14]

The Appellate Division, however, implicitly recognized that its decision involved unsettled areas of conflicts of law and granted the plaintiffs permission to appeal to the Court of Appeals.[15]

The Court of Appeals

The Claims of the Parties

The plaintiffs contended the following with respect to the substantive conflicts of law issue:

1. A single analysis of all the conflict of law claims between all the plaintiffs and all the defendants was appropriate since the incident was a single accident involving all of the parties.
2. A separate analysis of the claims against each of the defendants could lead to the application of different laws regarding different defendants. Although only three jurisdictions were involved in these cases, the potential for confusion and uncertainty could abound in future cases where, for example, a similar bus accident occurs where the passengers on the bus are from multiple jurisdictions.
3. Even if the Appellate Division was correct in applying a separate conflicts analysis to each of the defendants, the law of New York applies to the

claims against the truck defendants since they had no relationship whatsoever with Ontario, Ontario's cap was not intended to apply to non-domiciliary defendants and the truck defendants would obtain an unexpected and unfair benefit if Ontario law was applied.

The bus defendants claimed that the Appellate Division was correct in applying a separate conflicts analysis against each set of defendants. They asserted that the Ontario cap applied to the claims against them under *Neumeier* one because the plaintiffs and the bus defendants were from Ontario.

The truck defendants claimed that the Ontario cap applied to the claims against them because Ontario had the greatest interest in applying its law to the plaintiffs because they were Ontario residents.

The Majority Decision[16]

The majority of the Court of Appeals judges rejected the plaintiffs' claim that there should be a joint conflict of law analysis vis-à-vis all the plaintiffs and defendants. They also determined that the choice of law inquiry should be analyzed separately with respect to each plaintiff and defendant.

The Court, therefore, ruled that *Neumeier* one applied to the plaintiffs' claims against the bus defendants because "Ontario has weighed the interests of tortfeasors and their victims in cases of catastrophic personal injury, and has elected to safeguard its domiciliaries from large awards for non-pecuniary damages."[17]

Using the separate analysis approach, the Court of Appeals applied *Neumeier* three to the claims against the truck defendants. Noting that the domicile of the plaintiffs, the domicile of the truck defendants and the situs of the accident were different, the Court held that New York law applied because "there was no cause [for the parties] to contemplate a jurisdiction other than New York, the place where the conduct causing injuries and the injuries themselves occurred."[18]

The Court also determined that the Ontario cap did not apply to the truck defendants because they "had no contacts whatsoever with Ontario other than the happenstance that plaintiffs and the bus defendants were domiciled there."[19]

The Dissent

There was a compelling dissent by Judge Ciparick with whom Chief Judge Lippman concurred. They opined that a single conflicts analysis should be applied "where non-domiciliary defendants are jointly and severally liable to non-domiciliary plaintiffs in a tort action arising out of a single accident within the State of New York. . . ."[20] They also determined that "a separate *Neumeier* analysis for differently domiciled defendants creates additional unpredictability and lack of uniformity in litigation that arises from a single incident."[21] This is antithetical to the purpose of the *Neumeier* rules, which were developed to assure a greater degree of predictability and uniformity.

The dissenters concluded that analyzing the claims against the bus and truck defendants together should result in the application of the law of New York since the plaintiffs and defendants are differently domiciled and New York has a significant interest in properly compensating victims of torts committed by foreign business enterprises that benefit financially from frequent use New York's highways.[22]

Commentary

These cases resolved one of the areas of confusion raised by the *Neumeier* rules. When there is a single accident involving multiple plaintiffs and/or defendants from different jurisdictions, the claim of each plaintiff against each defendant must be considered separately vis-à-vis which law should apply to loss allocation issues.

In this writer's opinion, however, this interpretation of this rule will result in much more confusion for parties, jurists and jurors in cases where many parties from many jurisdictions are involved. Not only will they have to analyze each claim as to which *Neumeier* rule will apply, in each *Neumeier* three claim they will have to grapple with whether the rule or the exception applies. As the dissent in *Edwards* intimated, this hardly promotes the interests of predictability and uniformity, which was the goal when the Court formulated the *Neumeier* rules.

The second area of confusion remains. We know now that in a *Neumeier* three situation the court must apply an interest analysis to determine whether the rule or the exception should apply. However, by applying an interest analysis in every *Neumeier* three situation, the exception would seem almost to swallow the rule. The law of the situs would apply only when that jurisdiction's interests exceed the interests of the domiciliary jurisdictions. Thus, not only has the *Neumeier* three rule been abrogated, the same confusion, unpredictability and lack of uniformity which compelled the *Neumeier* Court to set forth its three rules will continue to plague court decisions applying the *Neumeier* three criteria.

The ancillary question raised is: When the laws of the domiciliary jurisdictions conflict, how can it be that one jurisdiction has a greater interest than the other since the parties are on equal footing regarding the accident?

We believe that this conundrum can be resolved by a simple modification of the *Neumeier* three criteria. When, in a *Neumeier* three situation, the laws of the domiciliary jurisdictions are different and cannot be reconciled, the law of the situs of the accident should apply because that is the only jurisdiction with which all parties have purposely associated themselves.[23] Only if the law of the plaintiff's domicile is consistent

with that of the defendant's domicile should the law of a domicile apply. In other words, abolish the exception in *Neumeier* three.

Such a rule is fair to all and provides uniformity and predictability.

As of now, we can look forward to more inconsistency as the interplay between *Neumeier* three and the exception therein continues to confound the courts and litigants.

As for these cases, they were ultimately settled through intense negotiations. Although the conflicts of law issue relating to loss allocation had been resolved, other vexing questions remained. What law applied to contribution and no-fault threshold issues had to be dealt with during the negotiations. Discussion of these issues is beyond the scope of this article. Suffice it to say that the application of New York loss allocation law to the truck defendants added many millions of dollars to the settlement fund. ■

1. Ultimately, all the bus companies' parent corporations were dismissed from the suit.

2. *Andrews v. Grand & Toy Alberto Ltd.*, 2 S.C.R. 229 (1978); *Thornton v. Prince George School District #57*, 2 S.C.R. 267 (1978); *Arnold v. Teno*, 2 S.C.R. 287 (1978).

3. *See Bovsun v. Sanperi*, 61 N.Y.2d 219 (1984).

4. 12 N.Y.2d 473, 481 (1963).

5. *Id.* at 481.

6. *Id.* at 483.

7. 31 N.Y.2d 121 (1972).

8. *Id.* at 127.

9. *Id.* at 128.

10. *See, e.g.*, *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189 (1985) (the Court of Appeals performed a separate conflict analysis vis-à-vis the two defendants, each of which was from different jurisdictions). *See, e.g., contra*, *Cunningham v. Williams*, 28 A.D.3d 1211 (4th Dep't 2006); *King v. Car Rentals, Inc.*, 29 A.D.3d 205, 213 (2d Dep't 2006) ("Because the liability of all the defendants here is thus interrelated, the application of the laws of different jurisdictions to the several defendants may lead to unanticipated complications as potentially inconsistent law is applied and, therefore, must be rejected").

11. See dissenting opinion of Judge (now Supreme Court Justice) Sonia Sotomayor of the Second Circuit Court of Appeals in *Gilbert v. Seton Hall Univ.*, 332 F.3d 105, 112–13 (2d Cir. 2003).

12. *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 74 (1993).

13. *See Schultz*, 65 N.Y.2d 189.

14. *Butler v. Stagecoach Grp., PLC*, 72 A.D.3d 1581, 1584–85 (2010).

15. *Cowan v. Stagecoach Grp., PLC*, 72 A.D.3d 1586; *Butler v. Stagecoach Grp., PLC*, 75 A.D.3d 1115 (4th Dep't 2010), *aff'd as modified*, *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306 (2011).

16. *Edwards*, 17 N.Y.3d 306.

17. *Id.*

18. *Id.* at 331.

19. *Id.*

20. *Id.*

21. *Id.* at 333.

22. *Id.* at 334.

23. *See Cooney*, 81 N.Y.2d 66; *Edwards*, 17 N.Y.3d at 334.

Diana Bunin Kolev (dkolev@smhattorneys.com) is an attorney with Shamberg Marwell & Hollis, P.C., in Mount Kisco, N.Y., focusing much of her practice on zoning and land use issues. She received her J.D. and Environmental Law Certificate from Pace University School of Law.

Megan K. Collins (mcollins@smhattorneys.com) is an attorney with Shamberg Marwell & Hollis, P.C., in Mount Kisco, N.Y., focusing much of her practice on zoning and land use matters. She received her J.D. and Environmental Law Certificate from Pace University School of Law.

The Importance of Due Diligence

Real Estate Transactions in a Complex Land Use World

By Diana Bunin Kolev and Megan K. Collins

"What do you mean I can't run my business on my property?"

"Why do I have to defend the use of my property in justice court? I haven't done anything wrong."

These statements are often heard when clients face zoning problems they never anticipated when they acquired a piece of property. Whether purchasing a residential single-family home, undeveloped land for commercial or residential development, an existing commercial building, or a multi-use parcel, the buyer is always vulnerable to any zoning and/or land use issues lurking in the background. In this article, we discuss the steps that can be taken by real estate practitioners to identify and address zoning and land use issues during the contract stage, before a substantial investment is made to acquire residential and/or commercial property.

Although some real estate transactions are relatively straightforward – at least on the surface – potential zoning and environmental issues rarely get the attention that they deserve before a transaction is finalized, leaving buyers inadequately protected and vulnerable to unanticipated problems down the road. Those who have had to spend significant time and money defending against zoning violations or have had development plans fall by the wayside after purchasing a property and expending large amounts of money on consultants and plans quickly learn that conducting a proper review of a particular property's zoning history and current zoning status *before* a transaction is complete may save a lot of time, money and headaches.

Why a Review?

A proper and thorough review is necessary due to the fact that in New York the doctrine of *caveat emptor* – "buyer beware" – applies to the purchase and sale of real property. This doctrine leaves buyers with little protection when they discover and/or try to hold sellers accountable for failing to disclose undesirable conditions of a property such as zoning problems. In fact, sellers often are not aware of any such issues.

Meanwhile, the standard form contract for the sale of real estate offers insufficient protection for buyers. Often, the standard contract will provide that the subject property is sold "as is" without warranty as to its condition and further that the buyer accepts the property subject to all covenants, conditions, restrictions, and easements; zoning, environmental, and subdivision laws and regulations; and landmark, historic or wetlands designations, so long as the existing buildings and improvements on

the property are not in violation thereof. This provision does not guarantee, however, that these laws and restrictions will support the intended use or development of the property, or allow the buyer to cancel the contract if it is discovered that such laws and regulations hamper the intended use. And the title insurance policies, which are required by most mortgage lenders in New York State, do not offer protection against the zoning or environmental problems that a parcel of real property may have.

Furthermore, the extent of review that may be satisfactory for a bank or other financial institution to provide financing to the buyer, especially in a residential or small business context, is often grossly insufficient for protecting the buyer's interests. When it comes to more complicated commercial purchases, some lenders may require a zoning counsel's opinion letter to ensure that the current zoning supports the proposed development and/or that the current use is legal and all approvals have been properly issued. Yet, in most cases, further review is necessary.

In sum, very few protections are available to a purchaser of real property in New York State even though said purchaser is ultimately liable for any violations on the property and is subject to restrictions imposed on the use of that property.

Over the past few decades, however, municipalities and state agencies have steadily added more and more regulations to their codes – and further refined and strengthened those already in existence – pertaining to an array of areas affecting property rights. For instance, during the 1960s and 1970s, pursuant to many municipal codes, only a building permit was required to construct a single-family home or small office building. Today, the same improvements may be subject to such requirements as municipal site development plan approval; wetlands, steep slopes, and tree removal regulations and permits; stormwater plan approval; state-imposed wetland and species protection setbacks; and historic preservation laws.

To complicate matters, as a result of ever-expanding local regulation, many properties have gained "legal preexisting nonconforming use" status at the municipal level, which is often thought of as being "grandfathered" under current law. However, any physical expansion or alteration of the subject nonconforming use is often prohibited or triggers additional review. Although legal preexisting nonconforming uses, lots and/or structures do enjoy a certain degree of protection under municipal codes and state common law, they often are saddled with a multitude of limitations that any property owner would prefer to be without, while municipalities have a strong interest in their discontinuance in order to implement and accomplish current planning and environmental goals.[1]

We have heard from clients that, as the economy has slowed and the applications on the agendas of municipal zoning and planning boards have dwindled, municipal code enforcement departments and staff have kept busy cracking down on any use that may be in violation of zoning laws. Municipal code enforcement often involves the issuance of stop-work orders, notices to remedy, and appearance tickets for municipal justice court in an effort to bring properties into compliance with current zoning and other local laws. Once an appearance ticket is issued and violations of local codes are alleged, a property owner can easily face misdemeanor charges in local justice court because state law provides that, for jurisdictional purposes, all violations of zoning codes are deemed misdemeanors that are subject to state criminal procedure laws.[2]

In the past, property owners not utilizing their property in full compliance with zoning regulations may have avoided scrutiny, especially when municipalities had a somewhat ambivalent attitude about uses that may not have been entirely legal in their inception but which had been carried on without incident for a long period of time. Today, however, property owners whose properties have gone unnoticed for 20 years may find themselves standing before a local judge due to alleged violations of zoning codes. Consequently, property owners who have always believed their use of a property to be legal, and which use was perhaps also the use of the predecessors in title, may be in for a rude awakening. In such cases, the owner's ability to continue using the property for the purposes for which it was purchased is now in jeopardy.

In light of this new era of real estate transactions, we will address steps that practitioners can take to protect their clients from buying a property that may be in zoning compliance limbo.[3]

Identifying the Type of Real Property Involved and Your Client's Intended Use of That Property

The first thing that you should do is identify the type of property involved and your client's intended use of it. Is it residential? Is it commercial? Is it already improved or is it to be developed? Both the type of property and the intended use will help you determine, among other things, what types of experts should be consulted, the various laws and regulations that may apply to the property, and the types of protections that would best protect your client.

For example, if the property your client is interested in purchasing is a vacant parcel in a residential district and the client wants to develop a housing complex on it, the input of and evaluation by environmental, engineering, and legal experts may be crucial. There is no substitute for a thorough evaluation of what types of issues may be involved with a property that, in a worst case scenario, could prevent the property from being developed at all. On the other hand, if the property is an existing single-family residence in a residential district, the issues may be limited to the standard items addressed in a home inspection report and a general overview of existing zoning approvals.

For example, recently a local restaurateur in a town outside of Rochester purchased property at the base of Irondequoit Bay on Lake Ontario with plans for building a condominium development.[4] What the purchaser did not know was that the property was home to a family of bald eagles, which are classified as a threatened species in New York State.[5] Once the bald eagle nest was documented, the New York State Department of Environmental Conservation (DEC) established a mandatory 350-foot buffer around the nest from January through September of every year during breeding season and a 750-foot buffer with respect to construction equipment and heavy machinery. According to a lawsuit filed against the state by the property owner, the buffers prevented the owner from harvesting trees and using substantial portions of the property, resulting in damages of $1 million.[6] Had an environmental expert been retained to investigate the property prior to purchase, the bald eagles could have been discovered and the entire situation avoided.

Depending on the location, environmental characteristics and the state of development of a particular parcel of real property, consultations with, among others, a wetlands expert, soil scientist, or a civil engineer may be needed. Their analyses of the development potential of a property could be critical when it comes to your client's time and financial resources.

Unprotected Buyers – *Caveat Emptor*, Standard Form Contract and Basic Title Insurance

Once you have determined your client's intended use of a parcel of real property, and relevant experts have been identified to inspect and analyze whether the property has a degree of development potential that aligns with your client's interests, you need to prepare to negotiate necessary protections for the contract of sale.

As noted above, the standard form contract for the sale of real property usually is insufficient to address the zoning and environmental issues on a property. The current standard form contract identifies the parties to the transaction, the property to be sold, the purchase price, items included in and excluded from the sale, mortgage contingency, varying degrees of protections with respect to the deposit, title and survey, deed, condition of the premises and conditions affecting title, and the right to inspect. It also sets forth obligations with respect to timing, the giving of notice, and responsibility for taxes and recording fees. The only relevant requirements in the standard form contract with respect to zoning and environmental issues are that the seller produce an existing Certificate of Compliance and that there are no municipal violations of record.

The largest source of risk that purchasers face stems directly from the *caveat emptor* doctrine, which places the onus on the purchaser to inspect the property.[7] In the absence of an agreement to the contrary, the seller in an arm's-length transaction has no duty to the buyer to disclose any information concerning the premises, including its defects.[8] Just about the only thing that a seller cannot do under the *caveat emptor* rule is actively conceal property conditions.

> Very few protections are available to a purchaser of real property in New York State even though said purchaser is ultimately liable for any violations on the property and is subject to restrictions imposed on the use of that property.

Property Condition Disclosure Act

New York State moved ever so slightly from the *caveat emptor* doctrine when it enacted the Property Condition Disclosure Act. Enacted by the Legislature in 2002, the act requires sellers to complete, sign and deliver a property condition disclosure statement to a buyer or buyer's agent prior to the buyer signing the contract of sale, but it also allows a seller to choose to pay to the buyer a $500 credit against the purchase price rather than make any actual disclosures.[9] Because it is reasonable to assume that most attorneys representing sellers would advise their clients to pay the credit rather than be exposed to potential liability, the Property Condition Disclosure Act does very little to protect buyers. In any event, the seller is often unaware of any issues with the property and would therefore have nothing to disclose.

Should a seller decide to disclose rather than pay the credit, the information provided in the Property Condition Disclosure Statement is based upon actual knowledge (meaning that there is no duty to inspect); it does not address the existing zoning of a property, let alone any historical zoning issues.[10] However, a disclosure statement may contain some facts helpful in a due diligence search, such as whether there is an existing certificate of occupancy, whether the property is in a wetland, the existence of easements, and the age of the structures on the property, among other things. Nevertheless, the act is irrelevant when it comes to analyzing whether a proposed use on a piece of undeveloped land is feasible.

Title Insurance

Standard title insurance policies, the purpose of which simply is to verify the seller's right to transfer ownership, do not protect buyers of real property in New York State when it comes to zoning and environmental issues. As part of a standard title search, a title insurance company conducts a search of public records available through a county clerk's office, looking for any recorded easements, declarations, liens or judgments, and notices of pendency. The title company will also search the subject municipality's building department and tax assessor records for any real estate tax, water or sewer liens, and any pending municipal code violations. The extent of protection offered by a standard title insurance policy is naturally limited to the findings of those county and municipal record searches, as well as existing conditions shown on any survey of the property. A title search alone is thus insufficient to identify all potential zoning issues; and, generally, title policies contain specific exclusions with respect to zoning and environmental issues.

It is also quite possible that, despite the existence of a Certificate of Occupancy, which is generally prima facie evidence that all code requirements have been met, the municipality may revoke it if it is found to have been issued in error.[11] The long-established rule is that, under most circumstances, a municipality is not estopped from enforcing its laws and correcting any errors "even where there are harsh results."[12] Thus, a title search without more may be misleading.

It all comes down to this: Buyers in New York State are charged with constructive notice of applicable zoning and are bound by all regulatory restrictions that may be discovered through reasonable due diligence.[13]

Negotiating a Zoning Due Diligence Provision Into the Contract of Sale

For all the reasons discussed above, zoning and environmental due diligence should be a component of any real estate transaction, whether residential or commercial. Further, the scope of the due diligence must be tailored to fit the circumstances of each deal.

The standard contract does not include a due diligence provision, so the buyer's attorney should consider negotiating a contract provision that allows a period of time to conduct zoning and environmental due diligence, with appropriate terms to protect the potential buyer in the event that serious issues are discovered, such as contamination on the site, zoning violations, or restrictions preventing planned development on the site. If a separate time frame for zoning due diligence can be negotiated, it would make the most sense for it to follow the inspection time period. This, however, is likely to meet resistance by a seller. Although negotiations for due diligence periods and other representations with respect to the property may prolong the overall negotiation process, any resulting delay is well worth it to adequately protect a buyer. In the slow real estate market that we are currently experiencing, buyers are in a better position than ever to negotiate such protections.

The most significant benefit of a due diligence period is that it gives the buyer the right to terminate the contract of sale if research shows that the existing use, approvals and/or restrictions do not align with the buyer's needs. And this is important because zoning and environmental restrictions may have a similar if not more significant impact on the potential value and use of a property than encroachments, easements and restrictive covenants.

Depending on the complexity of a particular property's history, one other option may be to have the due diligence period coincide with the time period to complete an inspection of the premises. Counsel could build terms regarding the "zoning status" of the property into the "condition of the property" portion of the contract. This is likely to meet less resistance by the seller. However, if a property has a long and complex zoning history, the time period in which to complete an inspection of the property may not be sufficient to conduct a full zoning due diligence and analysis.

The following is a sample of a zoning due diligence provision that could be incorporated into a contract of sale.

> **Section 10. Due Diligence Period; Termination Right.** During the period (the "Due Diligence Period") commencing on the date hereof and ending on the date which is thirty (30) days after the date on which each party shall have received a fully executed counterpart (whether an original or facsimile copy thereof) (the "Due Diligence Expiration Date"), Purchaser shall have the right to conduct the following inspections, studies, examinations and investigations of, or with respect to, the Property: (i) a "Phase I" environmental survey or audit; (ii) review of any and all Planning Board, Zoning Board, and/or Environmental Review Board resolutions of approval or denial; (iii) review of any wetlands and/or steep slopes permits or approvals, department of health approvals, and other permits and approvals issued by any governmental authority; and (iv) review of SEQRA documentation, including any Environmental Assessment Form and Environmental Impact Statement and any statements of findings. If Purchaser, in its sole discretion, determines that it is unsatisfied with the results of any matters disclosed by its due diligence, Purchaser shall have the right to terminate this Agreement by written notice given to Seller prior to 5:00 p.m. on the Due Diligence Expiration Date. Upon any termination of this Agreement pursuant to this Section 10, (I) the Deposit (together with any interest earned thereon) shall be refunded to Purchaser, and (II) neither party shall have any further rights or obligations hereunder other than those which expressly survive the termination of this Agreement. If Purchaser shall fail to terminate this Agreement in the time and manner set forth in this

Section 10, then Purchaser shall be deemed to have irrevocably waived its right to terminate this Agreement pursuant to this Section 10.

This example could be modified to best fit any particular circumstances. The scope of the due diligence often depends on the type of property involved and the overarching environmental and land use issues, and it often includes many sources of information.

The scope of the due diligence often depends on the type of property involved and the overarching environmental and land use issues.

An environmental review usually involves some form of inquiry into potential or existing environmental contamination on the subject real property. It may be as simple as a typical home inspection report of a single-family home performed by a professional engineer in a single-family residence. Such a report involves testing for radon, lead paint, asbestos, underground petroleum storage tanks, water quality, and septic integrity. A more comprehensive review is often required in commercial or industrial transactions, however. This is referred to as a Phase I Environmental Site Assessment, the scope of which is defined by industry standards. This assessment typically involves document review, site visit, and interviews conducted by an environmental consultant. The resulting report assists the purchaser to determine the risks, if any, of the proposed real property transaction.[14]

A zoning review may range from a basic review of existing approvals to a comprehensive analysis of whether the existing improvements and any proposed improvements comply with the existing zoning, or the zoning that was in effect at the time the improvements were constructed so as to entitle the property to legal non-conforming use protection. Some documents that may be reviewed include recorded deeds, easements, declarations, restrictive covenants, surveys, and subdivision maps, as well as municipal approvals and corresponding documents. Collectively, these documents tell the story of a particular property, such as the past and present uses of the property, limitations on future use of the property, and rights of others with respect to the property. In order to fully evaluate the suitability of the property for your client's interests and expectations, these documents must be reviewed in conjunction with applicable local, regional and state laws that may govern the property. Zoning compatibility is in addition to the analysis of environmental constraints with the aid of relevant consultants such as a civil engineer, wetlands expert and soil scientist.

For example, in the purchase of a single-family home, if the client does not intend to build on the property or add any improvements, the land use and zoning due diligence may be straightforward and limited to review of existing approvals. However, even a simple site development plan approval for a residence may contain onerous conditions that the client may not be able to meet. Furthermore, if the client is considering an addition onto the house, a fence, or any other improvement, due diligence will expand beyond existing approvals to the applicable zoning and local regulations for the district, the scope of the review process, and more.

In the purchase of property in an industrial or commercial area, the zoning concerns are usually heightened. In fact, if the property is vacant, the proposed development may not be feasible or may require many approvals. As a result, due diligence may require retaining experts to perform a zoning analysis to identify building coverage and other applicable site limitations. For example, if your client seeks to purchase an existing car repair shop that she would like to expand by adding on to the building, an analysis of various factors would have to be conducted, including sampling to determine whether there is any contamination on the site; review of current zoning restrictions such as building coverage, floor area ratio and setback requirements; review of wetlands maps, etc. You would also have to determine the status of existing approvals and whether there are any explicit restrictions barring future development or new regulations that prevent any changes to the existing use.

Any transaction can encounter unforeseeable circumstances. The fact that a certificate of occupancy is on file does not mean that the use is absolutely protected – it could have been issued in error, or the use may have expanded beyond what was originally permitted. For example, a town in northern Westchester County issued multiple violations against a real estate investor who had purchased real property improved with a multi-family apartment building. The building was constructed in the early 1920s, prior to the enactment of the municipality's first zoning ordinance, and was located in a predominantly single-family residence neighborhood. The prior owner of the property claimed only minor interior modifications to the building, there were no violations on file, and the history showed building permits and certificates of occupancy issued for the premises. Thus, there was reason to believe that the building was a legally protected, preexisting, nonconforming use and structure. Nevertheless, the town claimed that a certificate of occupancy was issued in error and pursued several violations, which ultimately resulted in a settlement that required the investor to pay for costly repairs and changes to the building, in addition to fees for legal representation.

The lesson here is that any use with a claim to preexisting, nonconforming protections should be investigated further to determine whether the property in fact enjoys this protection and what restrictions the municipality places on such uses. For example, a quarry owner may for decades operate and invest in a quarry that was founded by his family in the 1920s only to be shut down by the municipality based on allegations that the use was not continuous, and that the scope of the quarry operation had expanded. The municipality may also provide that a preexisting nonconforming use, such as a retail store in a residential district, may not be rebuilt if a portion of it is destroyed, such as by fire.

In light of such potential pitfalls in developing property or seeking additional approvals, it may be practical for the buyer's attorney to request, in addition to a due diligence clause for existing conditions, a period of time to determine whether a zoning change or a particular additional approval is feasible. One could also make the purchase contract conditional on obtaining the approval by a date certain. It should be noted, however, that the process of obtaining municipal and other governmental approvals is often drawn out over a period of months, if not years. Therefore, in negotiating such a contract, counsel should take into account the length of the approval process involved.

Conclusion

In light of the labyrinthine nature of zoning and land use approvals and regulations, as well as the lack of legal protection for buyers in New York State, a review pursuant to a zoning due diligence clause should be the first line of defense. It is critical to assemble the correct team of attorneys and consultants, and not be tempted by shortcuts in the process. What may have been standard practice in the past is simply not good enough today.

As New York is still a *caveat emptor* jurisdiction, and zoning regulations become more and more complex and onerous, buyers are well advised to negotiate and perform at least some zoning due diligence as a condition of a contract of sale to ensure that their financial investment is sound. Such zoning due diligence review may make the difference between your clients enjoying their property as intended or being at the mercy of a municipality. ■

1. *See generally* Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. Rev. 1222 (2009).

2. *See* N.Y. Town Law §§ 135(1), 268(1). Town Law § 135(1) addresses enforcement of town ordinances generally and provides that violations of a town zoning ordinance "shall be deemed misdemeanors" for jurisdictional purposes.

3. We will not address an attorney's liability in this article but cannot underscore enough the importance of conducting a full zoning review and/or engaging zoning counsel to best represent your clients' interests. We also do not address the potential avenues for relief in the event there is active misrepresentation on the part of the seller as to the zoning status of the property.

4. Steve Orr, *Irondequoit Bay Eagle Case Tests Land Rights*, Democrat & Chronicle, Feb. 13, 2011, *available at* http://www.ongo.com/v/400634/-1/7619B56EAA58D4C6/irondequoit-bay-eagle-case-tests-land-rights.

5. *Id.*

6. *Rochester Waterfront Props., Inc., et al. v. State of N.Y.*, Claim No. 11-122130-0 (N.Y. Ct. Cl. 2010).

7. *See, e.g., Jablonski v. Rapalje*, 14 A.D.3d 484 (2d Dep't 2005); *Commander Terminals, LLC v. Commander Oil Corp.*, 71 A.D.3d 623 (2d Dep't 2010).

8. *Id. See also* Jessica Wilde, *Violations of Zoning Ordinances, The Covenant Against Encumbrances, and Marketability of Title: How Purchasers Can Be Better Protected*, 23 Touro L. Rev. 199, 228 (2007).

9. *See* N.Y. Real Property Law §§ 460–467. Section 465 provides that "[i]n the event a seller fails to perform the duty prescribed in this article to deliver a disclosure statement prior to the signing by the buyer of a binding contract of sale, the buyer shall receive upon the transfer of title a credit of five hundred dollars against the agreed upon purchase price of the residential real property."

10. A copy of the Property Condition Disclosure Statement can be found at http://www.dos.state.ny.us/forms/licensing/1614-a.pdf.

11. Patricia E. Salkin, N.Y. Zoning Law and Prac., § 36:06 (4th Ed. 2011); *see also DeNicola v. Scarpelli*, 154 A.D.2d 462 (2d Dep't 1989).

12. *Parkview Assocs. v. City of N.Y.*, 71 N.Y.2d 274 (1988).

13. *McGlasson Realty, Inc. v. Town of Patterson Bd. of Appeals*, 234 A.D.2d 462, 463 (2d Dep't 1996) ("A prospective purchaser of property is chargeable with knowledge of the applicable restrictions of the zoning law and is bound by them and by the facts and circumstances which can be learned by the exercise of reasonable diligence, even where there are harsh results.").

14. *See, e.g.*, Joseph Philip Forte, *Environmental Due Diligence: A Guide to Liability Risk Management in Commercial Real Estate Transactions*, 5 Fordham Envtl. L.J. 349 (Spring 1994).

Electronic Age Changes in Legal Practice, Which No Attorney Can Ignore

By Joseph Capobianco and Gabrielle R. Schaich-Fardella

We can all remember the time when we asked, "Do you have an email address?" or "Do you have a cell phone?" Now we take it for granted that everyone has an email account – most of us have several; and that everyone has a cell phone – many of us have a smart phone that is comparable to a computer. The rapid advancements in electronic "gizmos" have changed our legal landscape in countless ways. This article discusses three significant changes that every attorney (and client) should know before engaging in civil litigation.

Seek Cost-Shifting So That the Party Demanding Discovery Bears the Staggering Expenses of Production

The formidable amount of time and expense required to produce electronically stored information (ESI)[1] during civil litigation is a significant consideration for clients and may be a factor in forum selection.[2] Although it is natural for clients to expect that the party requesting production of ESI must pay the costs associated with producing it, this is not necessarily true. The general rule in both federal and New York state litigation is that the party producing the discovery bears the costs of its production. However, federal courts and, although less frequently, New York courts provide some relief to this rule through "cost shifting," requiring the party *demanding* the production of ESI to pay some or all of the costs of collecting, filtering, processing, reviewing, and producing the ESI.

Joseph Capobianco (jcapobianco@reismanpeirez.com) is a partner at Reisman Peirez Reisman & Capobianco LLP, where he focuses on commercial litigation and bankruptcy. He is also a member of the Board of Directors of the Nassau Health Care Corporation, which operates the Nassau County Medical Center.

Gabrielle R. Schaich-Fardella (gschaich@reismanpeirez.com) is a senior associate at Reisman Peirez Reisman & Capobianco LLP. She is also an adjunct instructor at Queens College, where she teaches Bankruptcy Law and Legal Writing.

Federal Rule of Civil Procedure (FRCP) 26(b)(2)(B) provides that a party does not need to produce ESI "from sources that the party identifies as not reasonably accessible because of undue burden or cost." The United States District Court for the Southern District of New York has defined "accessible" information as information stored in a readily usable format – for example, information stored on hard drives and optical disks, as opposed to erased or fragmented data.[3] A court may direct the production of ESI that is *not* reasonably accessible, however, "if the requesting party shows good cause."[4]

Once a court determines that the ESI should be produced, the court may shift the costs to alleviate the burden upon the producing party, depending on factors such as the following:

1. the extent to which the request is specifically tailored to discover relevant information,
2. the availability of such information from other sources,
3. the total cost of production compared to the amount in controversy,
4. the total cost of production compared to the resources available to each party,
5. the relative ability of each party to control costs and its incentive to do so,
6. the importance of the issues at stake in the litigation, and
7. the relative benefits to the parties of obtaining the information.[5]

Federal courts have authority to shift costs not only pursuant to federal case law but also under FRCP 26(b)(2)(C) (enabling courts to limit discovery when the burden or expense of the proposed discovery outweighs its likely benefit), and FRCP 26(c) (allowing courts to enter protective orders imposing terms and conditions on discovery to protect a party from undue burden or expense).[6]

Courts may also shift costs to encourage parties to make narrowly tailored discovery demands or to be more reasonable where the parties have already spent significant resources in producing ESI.[7] Significantly, courts are unlikely to shift costs where the party producing ESI requests cost-shifting after already incurring the costs.[8] It is no surprise that non-parties have a lesser burden in demonstrating that requested discovery is not reasonably accessible, and they are more likely to obtain the benefits of cost-shifting.[9]

Unfortunately, New York state law respecting cost-shifting in ESI discovery is confusing and unsettled.[10] Some recent state cases apply a two-tier rule similar to the federal rule: (1) where the electronic documents sought are readily available, the producing party must bear the costs of production; and (2) where the electronic documents sought are not readily available or are inaccessible and require additional effort, such as retrieving archived or deleted electronic information, cost allocation may be appropriate.[11] Indeed, the Civil Practice Law and Rules provides courts with the discretion to shift costs: CPLR 3103 – comparable to FRCP 26(c) – permits courts to enter protective orders imposing terms and conditions on discovery to protect parties and non-parties from unreasonable expense or other prejudice.

Section 202.12(c)(3) of the Uniform Rules of the New York State Trial Courts now invites courts to address electronic discovery issues at the preliminary conference stage, so that the parties may establish the method and scope of any electronic discovery. However, this section does not set forth specific standards for the production and expense of ESI discovery. Similarly, Rule 8 of the New York Rules of the Commercial Division, codified at 22 N.Y.C.R.R. § 202.70, mandates that, prior to the preliminary conference, counsel discuss – and confer with the court at that conference – anticipated electronic discovery issues, including implementation of a data preservation plan; anticipated cost of data recovery and proposed allocation of such cost; disclosure of the programs and manner in which data is maintained; and identification of the computer systems utilized.

Clearly, New York federal law and, more so, state law are in the early stages of responding to rapidly changing technology in our electronic age, including standardizing civil procedure with respect to the now-common demand for and production of ESI. Knowledge of this evolving area of law is necessary to advise clients fully of their rights and responsibilities regarding ESI discovery, and the potentially significant costs involved in the production. As a rule of thumb, an attorney must not delay in seeking cost-shifting as soon as a request for production of ESI lands on that attorney's desk; conversely, an attorney should not demand ESI without expecting an application for cost-shifting from the producing party.

You Must Specifically Request Metadata – or Another Preferable Form of ESI – at the Inception of Discovery

In general, the procedure for demanding and producing ESI is significantly more convoluted than that of traditional document discovery because ESI comes in various forms. For example, in its "native" format ESI contains "metadata" – also known as "data about data." Metadata is electronically stored data that describes the history, tracking, or management of an electronic document, and includes hidden text, formatting codes, and formulae. Accordingly, first, the requesting party demands, with reasonable particularity, the ESI, and may specify the form of ESI production. Second, if the requesting party specifies a form, the responding party may object to that form and, instead, state the form it intends to use. Third, if the requesting party does *not* specify a form, the responding party must produce the ESI in a form "in which it is ordinarily maintained or in a reasonably usable form."[12] Of course, the responding party may not convert ESI from the form in which it is ordinarily main-

tained to another form that makes it more difficult or burdensome for the requesting party to use in litigation.[13] If the parties cannot agree as to the form of the ESI, a party will have to seek court intervention. Accordingly, it is imperative that attorneys fully understand the various "forms" of ESI – such as native format, metadata, static images, and load files – and specify the form of ESI that will best assist the client's case.

The native format of ESI is the default format of a file to which access is typically provided through the software program on which it was created. Documents can be produced quickly and efficiently in native format; however, they cannot be identified with traditional Bates numbers, cannot be effectively redacted, and can be opened and used by the requesting party only if that party has the software on which the documents were created.

As noted above, ESI in its native format contains metadata. Generally, the more interactive the application (e.g., an Excel spreadsheet, as opposed to a Word document), the more important the metadata is to understanding the application's output. Thus, metadata provides little to no assistance in understanding a word-processed document; it is somewhat useful for comprehending a spreadsheet application; and it is critical to grasping the significance of a database application.[14] Indeed, the U.S. District Court for the Southern District of New York recently stated that "it is well accepted, if not indisputable, that metadata is generally considered to be an integral part of the electronic record."[15]

Types of metadata include (1) embedded metadata, (2) substantive (or application) metadata, and (3) system metadata. Embedded metadata is often crucial to understanding an electronic document, and, as the Southern District of New York noted, "is 'generally discoverable' and 'should be produced as a matter of course.'"[16] It consists of text, numbers, content, data, or other information that is input into a file – but not typically visible to the user viewing the output display – such as spreadsheet formulas, hidden columns, linked files, hyperlinks, references, fields, and database information.

However, most substantive and system metadata generally lack evidentiary value because of irrelevancy. Substantive metadata reflects substantive changes made by the user, such as modifications to a document and data that instructs the computer how to display the fonts and spacing of a document. System metadata reflects information created by the user or by the organization's information management system, for example, author, date of creation, and date of modification.[17]

Significantly, courts have generally required the production of metadata only when it is sought in the initial document request and the responding party has not yet produced the documents in any form. The advisory committee notes to FRCP 26(f) suggest that the demand and production of metadata should be discussed at the Rule 26(f) conference.[18] Thus, if metadata is not sought in the initial document request, and the responding party has already produced documents in another form, courts tend to deny later requests for metadata.[19]

Courts may shift costs to encourage parties to make narrowly tailored discovery demands or to be more reasonable where the parties have already spent significant resources in producing ESI.

Forms of ESI

A "static image" is a representation of ESI produced either by converting a native file into a standard image format capable of being viewed and printed on standard litigation support software or by scanning a paper copy of a document into an electronic form, such as a tagged image file format (TIFF) or a portable document format (PDF). Static images can be redacted and can have Bates numbers placed electronically on each page. The text of static images created from native files is generally searchable; however, the text of static images created by scanning hardcopy documents is not. The text of static images made from scanned hardcopy is made searchable by using optical character recognition (OCR) software, which translates the images of words into searchable text. This can be helpful, but is not completely accurate. Thus, if an attorney is demanding the production of ESI in the form of static images, the attorney should be careful to specify "searchable" static images.

A "load file" is a "file that relates to a set of scanned images or electronically processed files, and indicates where individual pages or files belong together as documents, to include attachments, and where each document begins and ends, and may also include data relevant to the individual documents, such as metadata, coded data, and the like."[20] A requesting party can demand the production of ESI in the form of load files, which are helpful in ensuring the transfer of accurate and searchable images and data – in other words, in ensuring that the produced ESI is reasonably usable. If load files have been created in the process of converting native files to static images, or if load files could be created without undue burden or cost, they are typically easily produced with static images.[21]

In sum, attorneys must have a thorough understanding of the various forms of ESI, both in the event that they receive discovery demands specifying a form of ESI, and to designate in their own demands the form of ESI

most useful to their case at the inception of discovery (or, preferably, prior to the preliminary conference in state court, or the Rule 26(f) conference in federal court). An attorney's failure to have a firm grasp of ESI discovery, including the forms of such discovery, could amount to a fatal waiver of some or all ESI discovery.

Warn Clients Not to Use Monitored Email Accounts, Because Doing So May Constitute a Waiver of the Attorney-Client Privilege

In today's world, most clients communicate with their attorneys via email – it is fast, efficient, and reliable. A client should be aware, however, that he or she may inadvertently waive the attorney-client privilege if the client's email account is monitored or can be accessed by a third party. Attorneys must advise their clients against using any monitored email account, including work email accounts and personal email accounts that can be accessed by others.

We are all familiar that the attorney-client privilege attaches:

> (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.[22]

When an attorney-client privilege is challenged, the proponent of the privilege bears the burden of proving both the applicability of the privilege and that it has not been waived. The protection claimed must be narrowly construed, and its application must be consistent with the purposes underlying the immunity, e.g., to enable a person seeking legal advice to freely communicate with counsel while knowing that the contents of the exchange will not be revealed against the client's wishes.[23] Indeed, "disclosure of an attorney-client communication to a third party or communications with an attorney in the presence of a third party, not an agent or an employee of counsel, vitiates the confidentiality required for asserting the privilege."[24]

Attorneys often assume that emails sent to and from their clients fall squarely within the attorney-client privilege. CPLR 4548 explicitly provides that

> [n]o communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.

Upon enacting CPLR 4548, the Legislature made a "finding that when the parties to a privileged relationship communicate by email, they have a reasonable expectation of privacy."[25] Nevertheless, some New York courts have recently found that attorney-client emails were *not* privileged or, even if they were privileged, the client had waived the privilege by emailing his attorney on a monitored email account.

For a court to determine that the attorney-client privilege applies to emails, the proponent must demonstrate, *inter alia*, that the client sought legal advice from an attorney in confidence, and that the client had a reasonable expectation of privacy. To demonstrate a *non-waiver* of the attorney-client privilege, the proponent must show that (1) he or she intended to maintain confidentiality and took reasonable steps to prevent disclosure, (2) he or she promptly sought to remedy the situation after learning of the disclosure, and (3) the party in possession of the materials will not suffer undue prejudice if a protective order is granted declaring the inadvertently disclosed information to be privileged.[26]

When applying these factors specifically to attorney-client emails, courts have considered (1) whether the email account was monitored and/or accessible by a third party (e.g., the client's employer or children); (2) whether the client was aware or should have been aware of such third-party monitoring/access (e.g., whether the employer notified employees of monitoring policies, whether the client had left his or her email password on a note next to the computer); (3) whether the client was aware or should have been aware of his or her employer's policy forbidding personal use of work email accounts (e.g., whether the employee handbook prohibited employees from using work email for personal use); and (4) whether the client had implemented reasonable procedures to prevent discovery of the emails (e.g., by deleting the emails).[27]

For example, in *Willis v. Willis*, the New York Appellate Division for the Second Department ruled in a divorce action that the plaintiff's emails with her attorneys were not made in confidence, because her children – who were also the children of the plaintiff's adversary – regularly used the plaintiff's email account. The court also noted that there was no evidence "that the plaintiff requested that the children keep the communications confidential." Thus, the plaintiff did not promptly attempt to remedy the situation.[28]

Another illustrative case is *Scott v. Beth Israel Medical Center Inc.*, in which a physician sued his former employer, a hospital, for wrongful termination. The physician sought a protective order requiring the hospital to return all email correspondence exchanged between the physician and his attorney through the hospital's email system. The New York Supreme Court ruled that the physician had waived the attorney-client privilege as to these emails in light of the hospital's policy – of which the physician had been aware – prohibiting the use of work email accounts for personal use and permitting the hospital to monitor email usage without notice. The court explained:

> As with any other confidential communication, the holder of the privilege and his or her attorney must protect the privileged communication; otherwise, it

> will be waived. For example, a spouse who sends her spouse a confidential email from her workplace with a business associate looking over her shoulder as she types, the privilege does not attach.[29]

In sum, clients' communications to their attorneys through email accounts that are monitored by or accessible to third parties may constitute a fatal waiver of the attorney-client privilege. Courts generally do not view such communications as confidential and deem the client to have had no reasonable expectation of privacy. Thus, attorneys should warn their clients not to communicate to legal counsel through such email systems. ■

1. ESI includes, but is not limited to, emails and attachments, voicemail, instant messaging, text messages, word-processing documents, text files, hard drives, spreadsheets, graphics, audio and video files, offline storage or information stored on removable media, information on laptops and other portable devices, and network access information. *Commercial Division, Nassau County, Guidelines for Discovery of Electronically Stored Information ("ESI")*, http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing_Guidelines.pdf.

2. For example, it costs between $100 and $450 to preserve a computer hard drive, and between $350 and $450 to preserve a backup tape. The cost to restore and produce email from five backup tapes can total $19,003.43; the cost to restore and search 72 backup tapes can total $165,694.72, plus $107,694.72 in attorney and paralegal review costs. 3 N.Y. Prac., Com. Litig. in N.Y.S. Courts § 25.42 (3d ed. Sept. 2010).

3. Typically accessible ESI is (1) active online data (e.g., hard drives), (2) near-line data (e.g., disks), and (3) offline storage/archives (i.e., removable optical disks or magnetic tape media, which can be labeled and stored on a shelf or rack). Non-accessible ESI is generally: (1) backup tapes (i.e., devices like tape recorders that read data from and write it onto a tape but are typically not organized for retrieval of individual documents or files) and (2) erased, fragmented, or damaged data. *Zubulake v. UBS Warburg*, 217 F.R.D. 309, 318–19 (S.D.N.Y. 2003) (requiring the production of ESI only where it does not impose an undue burden or expense on the responding party; in other words, where the ESI is in an accessible format).

4. *See* FRCP 26(b)(2)(B), which references FRCP 26(b)(2)(C) (permitting a court to limit discovery if, *inter alia*, the discovery sought is unreasonably cumulative or can be obtained from other more convenient sources, or the burden of the proposed discovery outweighs its likely benefit). Notably, FRCP 34(a)(1)(A) provides that a party may demand "electronically stored information . . . stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form."

5. *Zubulake*, 217 F.R.D. at 322; *see Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978); *Guy Chem. Co. v. Romaco AG*, 243 F.R.D. 310, 312 (N.D. Ind. 2007).

6. Further, the parties are required to submit to the court a proposed discovery plan, which must state the parties' views and proposals on, *inter alia*, issues regarding the discovery of ESI, "including the form or forms in which it should be produced." FRCP 26(a)(1)(C), (f)(3).

7. *See, e.g., Laethem Equipment Co. v. Deere & Co.*, 261 F.R.D. 127, 145–46 (E.D. Mich. 2009); *In re Fosamax Pros. Liab. Litig.*, 2008 WL 2345877, *10–11 (S.D.N.Y. June 5, 2008); *W.E. Aubuchon Co. v. Benefirst, LLC*, 245 F.R.D. 38, 43–44 (D. Mass. 2007). *See also Aguilar v. Immigration & Customs Enforcement Div. of the U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 361–62 (S.D.N.Y. 2008) (ordering the production of metadata on the condition that the requesting party pay all costs associated with it, where the requesting party had failed to demand specifically "metadata" until after the responding party had already produced extensive ESI).

8. *Fendi Adele S.R.L. v. Filene's Basement, Inc.*, 2009 WL 855955, *9–10 (S.D.N.Y. Mar. 24, 2009).

9. *Guy Chem. Co.*, 243 F.R.D. at 313; *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 49 (S.D.N.Y. 1996).

10. *Commercial Division, Nassau County, Guidelines for Discovery of Electronically Stored Information ("ESI")*, http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing_Guidelines.pdf. (stating "[o]n the issue of whether the Requesting or Producing Party bears the cost of producing ESI, and cost-shifting/cost-sharing, the law in New York is still developing"). For instance, the First Department in *Clarendon Nat'l Ins. Co. v. Atlantic Risk Mgmt., Inc.*, 59 A.D.3d 284, 286 (1st Dep't 2009), stated that "the general rule [is] that, during the course of the action, each party should bear the expenses it incurs in responding to discovery requests." Contrarily, in *Waltzer v. Tradescape & Co., L.L.C.*, 31 A.D.3d 302, 304 (1st Dep't 2006), the First Department stated that, "as a general rule, under the CPLR, the party seeking discovery should bear the cost incurred in the production of discovery material."

11. *Silverman v. Shaoul*, 30 Misc. 3d 491, 495 (Sup. Ct., N.Y. Co. 2010); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 27 Misc. 3d 1061, 1074 (Sup. Ct., N.Y. Co. 2010).

12. FRCP 34(b)(2).

13. FRCP 34, Advisory Committee's Note, 2006 Amendment.

14. *Aguilar*, 255 F.R.D. at 353–54; *Irwin v. Onondaga Cnty. Res. Recovery Agency*, 72 A.D.3d 314, 319–20 (4th Dep't 2010).

15. *Nat'l Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement Agency*, 2011 U.S. Dist. Lexis 11655, *11 (S.D.N.Y. Feb. 7, 2011) (Hon. Shira A. Scheindlin). The court in *Lake v. City of Phoenix*, 222 Ariz. 547, 550 (2009) explained that "the metadata in an electronic document is part of the underlying document; it does not stand on its own. When a public officer uses a computer to make a public record, the metadata forms part of the document as much as the words on the page."

16. *Aguilar*, 255 F.R.D. at 355 (quoting United States District Court for the District of Maryland, *Suggested Protocol for Discovery of Electronically Stored Information* at 27–28; http://www.mdd.uscourts.gov/news/news/esiprotocol.pdf (internal quotations omitted)).

17. *Id*. at 354. Notably, system metadata may be relevant if, for instance, the authenticity of a document is at issue, or if knowing the recipients of a document is important.

18. FRCP 26(f), Advisory Committee Notes, 2006 Amendment (stating that whether metadata "should be produced may be among the topics discussed in the Rule 26[f] conference").

19. *Aguilar*, 255 F.R.D. at 357, 360 (explaining that if the requesting party had made a formal demand for metadata before the responding party had begun to gather responsive ESI, the parties would have saved significant expense in discovery litigation and the court would have entertained the requesting party's requests). *See also Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 248 F.R.D. 556, 557–59 (N.D. Ill. 2008) (denying a motion to compel the production of metadata after the responding party had already produced the documents in PDF and paper format – a "reasonably useable form" – where the requesting party had not specified a form for production at the outset).

20. *Aguilar*, 255 F.R.D. at 353, n.3 (quoting *The Sedona Conference Glossary* at 31 (2d ed. 2007), http://www.thesedonaconference.org/content/miscfiles/tscglossary_12_07.pdf (internal quotations omitted)).

21. *Irwin*, 72 A.D.3d at 321; Commercial Division, Nassau County, *Guidelines for Discovery of Electronically Stored Information ("ESI")*, http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing_Guidelines.pdf.

22. *United States v. Bein*, 728 F.2d 107, 112 (2d Cir. 1984). *See also* Fed. R. Evid. 501, 502 (codifying the attorney-client privilege); CPLR 4503 (same).

23. *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377 (1991); *Delta Fin. Corp. v. Morrison*, 12 Misc. 3d 807, 810 (Sup. Ct., Nassau Co. 2006).

24. *Forward v. Foschi*, 27 Misc. 3d 1224(A), *13 (Sup. Ct., Westchester Co. 2010) (citing *Doe v. Poe*, 92 N.Y.2d 864, 867 (1998); *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's London*, 176 Misc. 2d 605, 610 (Sup. Ct., N.Y. Co. 1998), *aff'd*, 263 A.D.2d 367 (1st Dep't 1999)).

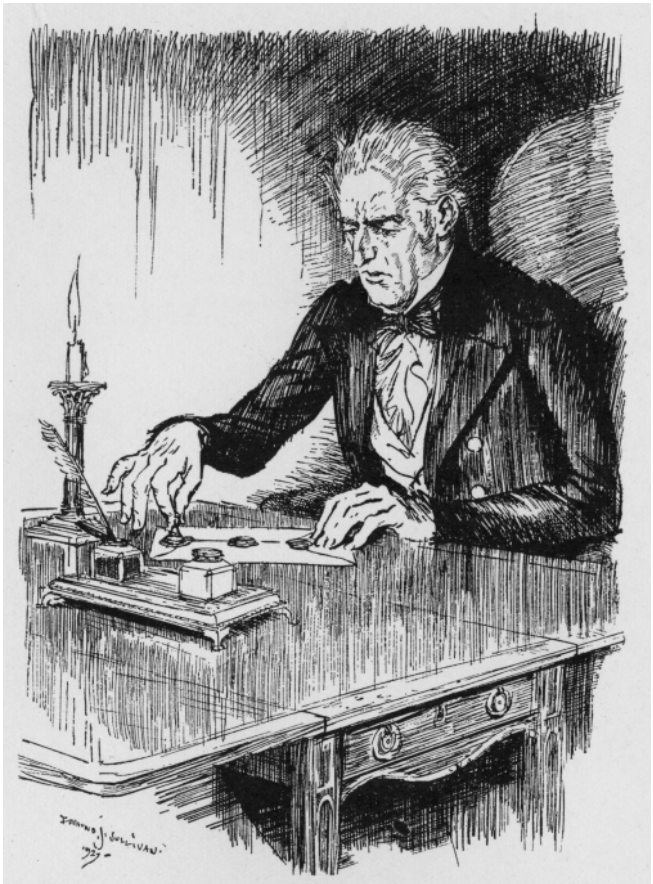
25. *Scott v. Beth Israel Med. Ctr., Inc.*, 17 Misc. 3d 934, 938 (Sup. Ct., N.Y. Co. 2007) (quoting Vincent Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 4548).

26. *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 74 (S.D.N.Y. 2009); *AFA Protective Sys., Inc. v. City of New York*, 13 A.D.3d 564, 565 (2d Dep't 2004).

27. *See Curto v. Med. World Commc'ns, Inc.*, 2006 WL 1318387, *3–7 (E.D.N.Y. May 15, 2006); *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (S.D.N.Y. 2005); *Willis v. Willis*, 79 A.D.3d 1029, 1031 (2d Dep't 2010); *Current Med. Directions, LLC v. Salomone*, 26 Misc. 3d 1229(A), *11 (Sup. Ct., N.Y. Co. 2010) (denying a motion for a protective order and ruling that the attorney-client privilege did not extend to attorney-client emails transmitted through the client's business email server, where the client had made no effort to delete the emails and did not assert the privilege over the emails until another party made an *in limine* motion).

28. *Willis*, 79 A.D.3d at 1030–31. *See also Parnes v. Parnes*, 80 A.D.3d 948, 950–51 (3d Dep't 2011) (ruling that a client had waived the attorney-client privilege with regard to one email, which he had printed out and left on a desk in a room used by multiple people, because that client could not prove that he took reasonable steps to maintain the confidentiality of that email).

29. *Scott*, 17 Misc. 3d at 938 (Hon. Charles E. Ramos presiding). *See also Forward*, 27 Misc. 3d 1224(A), *14 (ruling that the fact that the system administrator had been provided with the client's email password did not, in and of itself, vitiate the attorney-client privilege attached to that client's emails).



I LAY DOWN THE PEN, AND PROCEED TO SEAL UP MY CONFESSION

Stephen G. Rinehart (stephen.rinehart@troutmansanders.com) is a partner at Troutman Sanders in New York City. He earned his J.D. from New York University and his B.A. from Harvard University.

Adam S. Libove (adam.libove@troutmansanders.com) is an associate at Troutman Sanders in New York City. He earned his J.D. from Fordham University and his B.A. from Columbia University.

You've Got a Confession (of Judgment). Now What?

By Stephen G. Rinehart and Adam S. Libove

What Is a Judgment by Confession?

A confession of judgment is an affidavit in which a party admits liability to another party, accepts a quantification of damages and agrees that the affidavit may be filed as a judgment upon the occurrence of a stated condition, usually an affidavit from the creditor attesting to the default. A judgment by confession can be a useful tool for a creditor because it avoids costly and time-consuming litigation. The number of confessions filed in New York County has risen dramatically in the wake of the 2008 economic crisis.[1] This, combined with drastic staffing reductions in the Supreme Court and the Clerk's office and the increased use of sophisticated and complicated confessions, has led to more confessions being rejected. This article reviews the legal requirements for filing a judgment by confession, offers some practical guidance to facilitate filing, and reviews certain aspects of the usury law and common law on interest rates with which counsel should be familiar. Finally, this article reviews available litigation options when initial attempts to file a confession prove unsuccessful.

Requirements of CPLR 3218

CPLR 3218 addresses judgments by confession and sets forth the requirements for filing. Unlike some other states where a judgment by confession may be filed upon an attorney's affirmation (often called a "cognovit judgment"[2]), in New York, the defendant must execute an affidavit that states the sum for which judgment may be entered, authorizes entry of judgment, and states the county where the defendant resides or, if the defendant is a non-resident, the county in which entry is authorized.[3] The affidavit must also state concisely the facts out of which the debt arose and indicate that the sum confessed is justly due or to become due.[4] This requirement has been interpreted to mean that "there must be sufficient genuine detail to enable other creditors to investigate the claim and ascertain its validity."[5] If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, the defendant's affidavit must concisely state the facts constituting the liability and demonstrate that the sum confessed does not exceed the amount of liability.[6]

An affidavit of confession of judgment may be filed with the clerk of the county where the defendant stated in the affidavit that he or she resided when it was executed, or if the defendant was then a non-resident, with the clerk of the county designated in the affidavit, within three years after the affidavit is executed.[7] In addition to calculating the principal and interest owed on the judgment, the Clerk will tax costs, generally adding a $210 filing fee.[8] Under CPLR 3218 the judgment may be docketed and enforced in the same manner and with the same effect as a judgment in an action in the Supreme Court.[9]

The Appellate Division, First Department has held that a judgment by confession has "all of the qualities, incidents and attributes of a judgment on a verdict, including a presumption as to its validity."[10]

A judgment creditor seeking to file a judgment by confession should also file an affidavit of the plaintiff that relates any important events that occurred after the defendant executed the affidavit of confession, including any payments of principal or interest that the defendant made before default. The plaintiff's affidavit can also include a detailed calculation of the applicable pre-judgment interest, including a per diem rate so that the Clerk can account for the precise day of filing. The interest calculations can also be submitted in the form of an attorney's affirmation. When presenting the confession for filing, counsel should also have on hand a copy of the promissory note or other instrument setting forth the interest rate because the Clerk will generally ask to review same before filing the affidavit and entering judgment.

Please! File *Original* Affidavits of Confession of Judgment

Practitioners should be aware that the New York County Clerk's office generally requires original signatures on the documents it accepts for filing. Confessions of judgment and the accompanying defendant's affidavit are no exception to this practice. Notably, CPLR 3218 does not expressly require that the defendant's affidavit of confession be an original. Indeed, two provisions of the CPLR and a New York County Supreme Court decision suggest that the Clerk's practice may be extralegal.

CPLR 2101(e) states in pertinent part: "Except where otherwise specifically prescribed, copies, rather than originals, of all papers, including orders, affidavits and exhibits may be served or *filed*."[11] Similarly, CPLR 2102(c) provides: "A clerk shall not refuse to accept for filing any paper presented for that purpose except where specifically directed to do so by statute or rules promulgated by the chief administrator of the courts, or order of the court."[12]

In *Gehring v. Goodman*,[13] the New York County Supreme Court adjudicated an Article 78 petition seeking an order directing the New York County Clerk to accept for filing copies of affidavits that the petitioner wanted to file, pursuant to CPLR 3218(b).[14] The court noted that "CPLR 3218(b) does not specify that only the original of the affidavit must be accepted for filing and does not proscribe the filing of a copy of the affidavit" and that "CPLR 2101(e) allows the filing of copies of affidavits."[15] The court went on to say that "[t]here is neither a statute nor rule of the Chief Administrator of the Courts that directs respondent to refuse to accept for filing a copy of an affidavit under CPLR 3218(b)."[16] Citing to McKinney's Supplemental Practice Commentaries, the court added that the purpose of CPLR 2102(c) is to strip clerks of any authority to reject papers offered for filing unless the refusal is directed by law, rule, or court order.[17] Based on the foregoing, the court directed the Clerk to accept for filing copies of the affidavits pursuant to CPLR 3218(b).[18]

Notwithstanding the *Gehring* decision, based on the New York County Clerk's current practices counsel is advised to present original affidavits to avoid delay in filing judgments by confession.

Usurers Beware

Usury Defined Under the General Obligations Law, the Banking Law and the Penal Law

The Clerk may refuse to file and enter a judgment by confession if the Clerk believes the interest rate charged therein is usurious.[19] Thus, it is critical to understand the web of New York statutes concerning usury. With certain significant exceptions discussed below, the General Obligations Law caps the maximum interest rate upon a loan or forbearance of any money, goods, or things in action at 6% with the important qualifier "unless a different rate is prescribed in section fourteen-a of the banking law."[20] The Banking Law, in turn, sets the maximum rate of interest at 16% per year.[21]

There are, however, important exceptions to the 16% maximum. For example, loans of $250,000 or more, except a loan or a forbearance secured primarily by an interest in real property improved by a one- or two-family residence, are exempt from the 16% maximum[22] but must still comply with the criminal usury statutes. The criminal laws set the maximum interest rate at 25% per year.[23] Further, a loan of $2.5 million or more is exempt from both the civil cap of 16% and the criminal cap of 25%.[24]

When Calculating the Interest Rate for Usury Purposes, Remember to Use the Net Loan Amount

To determine the interest rate on a loan for usury purposes, prepaid interest or discounts may generally be amortized over the entire loan term.[25] That is, when calculating the interest rate, the original principal amount is not considered the amount of the loan. Instead, only the net principal amount actually received by the borrower – after deducting points and other fees considered interest and paid from the loan proceeds – is considered as the amount of the loan.[26] Failing to heed this rule increases the loan's interest rate for usury purposes and may cause the loan to be usurious even if the face amount of the loan is nominally below the usury rate.[27]

Usury Is a Defense Personal to the Borrower

As noted, the New York County Clerk may refuse to enter a confession of judgment if the underlying interest rate is deemed usurious. This practice notwithstanding, the defense of usury is personal to the borrower,[28] that is, it may be asserted only by the borrower, not by someone else on the borrower's behalf. This raises the question of whether the Clerk has standing to reject an

instrument for filing based on usury or, rather, whether such a defense must be raised by the judgment debtor in a plenary action.[29] In a recent decision, the New York County Supreme Court held that a determination by the Clerk that an instrument presented for filing contains a usurious interest rate is beyond the scope of CPLR 3218.[30]

Default Interest Is Not Usury

Another potentially troublesome issue involves default interest – that is, interest that only accrues upon the borrower's default. As a matter of law, however, a default interest rate is not usurious.[31] That said, counsel should be aware that they may encounter difficulties when attempting to file a judgment with a default interest rate in excess of 16% or 25%, despite the fact that default interest is not considered usury. This is because officials in the Clerk's office may incorrectly deem such default interest usurious.

To Obtain Post-Judgment Interest That Exceeds the Statutory Rate, the Instrument Must Provide for Same "Clearly and Unequivocally"

Another matter to double check before attempting to file a judgment by confession is the post-judgment interest. By statute, after entry in New York state court, interest on a judgment accrues at 9% per year, unless otherwise provided by statute.[32] The common law rule is that where the contract provides interest shall be paid at a specified rate until the principal shall be paid, the contract rate governs until payment of the principal, or until the contract is merged in a judgment.[33] Naturally, parties are free to "contract around" this rule but must do so with clear and unequivocal language. The documents should make clear that the default interest applies "until the judgment is satisfied"[34] and "survives entry of judgment."[35]

When "No" Means Litigate

The Clerk is by law required to accept a judgment by confession that meets the requirements of CPLR 3218.[36] However, instruments that reflect complex commercial transactions and reference various agreements may be rejected. A general rule from the context of default judgments is applicable as it relates to judgments by confession – that is, "[i]f anything more than arithmetic is called for, application must be made to the court."[37]

When the Clerk rejects a judgment by confession, counsel has at least three options: (1) commence a special proceeding against the Clerk under Article 78 of the CPLR; (2) file an action for summary judgment in lieu of complaint under CPLR 3213 against the putative judgment debtor; or (3) seek an order to show cause pursuant to CPLR 3218 against the putative judgment debtor. Each mechanism has unique advantages and disadvantages.

Article 78 Proceeding Against the Clerk

The court in the county where the Clerk has its office has jurisdiction to entertain an Article 78 proceeding against the Clerk because CPLR 7803(1) empowers courts to determine whether a body or officer failed to perform a duty enjoined upon it by law, and CPLR 7803(3) empowers courts to decide whether a determination was made in violation of lawful procedure or affected by an error of law.[38] Recently, in *Pro Player Funding LLC v. Goodman*, the New York County Supreme Court adjudicated an Article 78 petition involving two judgments by confession that the Clerk rejected because they were deemed usurious. After reviewing the requirements of CPLR 3218 discussed above, Justice Kern found that the Clerk "failed to perform a duty enjoined upon it by law when it refused to enter the confessional judgments."[39] The court reasoned that the affidavit properly enumerated the requirements of CPLR 3218, is presumed to be valid, and that "there is nothing in CPLR 3218 giving the clerk discretion to reject the terms of the affidavits for underlying substantive reasons."[40] Under such circumstances, the court held "the Clerk was without authority to question the validity of the terms and required to enter the judgments for the sum confessed."[41]

> The Clerk may refuse to file and enter a judgment by confession if the Clerk believes the interest rate charged therein is usurious.

In the authors' experience, commencing the Article 78 proceeding via order to show cause, with an answer interposed by the Clerk and with one adjournment, the above proceeding will take at least two months. Counsel should be aware that under CPLR 7804, the petitioner must serve the New York State Attorney General[42] in addition to personal service upon the Clerk.[43]

Motion for Summary Judgment in Lieu of Complaint

When the Clerk refuses to enter judgment by confession, a creditor can also proceed pursuant to CPLR 3213, which allows a party to commence an action for summary judgment in lieu of complaint upon an instrument for the payment of money only. A promissory note is generally considered such an instrument under CPLR 3213.[44]

A CPLR 3213 action may require personal service upon the putative judgment debtor,[45] which may be costly and time-consuming, and negates the reason for obtaining the

defendant's affidavit of confession. On the other hand, because it is brought on by motion, plaintiff's counsel can schedule the return date far enough in advance to accomplish personal service, if necessary, and control the time the defendant's answering papers are due.

Order to Show Cause Against the Judgment Debtor Seeking Entry of Judgment

Lastly, a less conventional method of obtaining relief is to seek an order to show cause against the judgment debtor for an order entering judgment against the debtor pursuant to the terms confessed. Surprisingly, such a motion does not require filing an underlying pleading. Rather, counsel need only purchase an index number, submit an affidavit from a representative of the plaintiff attesting to the underlying facts, and annex the operative documents such as the promissory note and the affidavit of confession. At least one New York County justice has signed such an order and allowed notice to the defendant via certified mail.[46] The downside with such a method is that other New York County justices may refuse to sign the order to show cause on the grounds that the procedures of CPLR 3218 or 3213 are appropriate.

Check the Law of the Filing Jurisdiction Before Drafting

When drafting a confession of judgment, counsel should consider where the lender will enforce the judgment upon the borrower's default and then consult the law of that jurisdiction to ensure that it recognizes judgments by confession.[47] This is important because some courts have viewed judgments by confession "with judicial distaste."[48] In some states confession of judgment provisions are invalid[49] or void as against public policy.[50] Other states make void confessions of judgment arising out of consumer loans.[51] Knowing ahead of time whether the filing jurisdiction recognizes judgments by confession is critical to protecting the client's interests before the borrower's default.[52]

Conclusion

A judgment by confession is a powerful vehicle for obtaining relief without litigation, provided that the Clerk accepts it. By closely adhering to the requirements of CPLR 3218, counsel can help ensure that such a judgment is accepted for filing and entry. Careful attention must be paid to the applicable pre- and post-judgment interest rates to prevent rejection. Loan documents should make unambiguously clear that the default interest rate survives entry of judgment and applies until the judgment is satisfied. Counsel should also make their best efforts to file original affidavits of confession whenever possible. When the Clerk's office does reject a confession, counsel has various means of obtaining judicial relief. Each procedural option should be examined to ensure that counsel considers the necessary cost and time expenditure, as well as what, if any, notice should be provided to the defendant. Finally, when drafting affidavits of confession of judgment, counsel should review the law of the jurisdiction where the plaintiff will attempt to enforce it to ensure that judgments by confession are valid in that jurisdiction. ■

1. *See* Kevin R.J. Schroth, *How the Recession Has Complicated Judgments by Confession*, Law Journal Newsletters, LJN's Equipment Leasing Newsletter (Apr. 2010) at 1.

2. *See D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 176 (1972) ("The cognovit is the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder.").

3. CPLR 3218(a)(1).

4. CPLR 3218(a)(2).

5. *Princeton Bank v. Berley*, 57 A.D. 2d 348, 354 (2d Dep't 1977) ("The statute and its gloss do not require a procrustean dovetailing of detail.").

6. CPLR 3218(a)(3).

7. CPLR 3218(b). The three-year "shelf-life" of affidavits of confession of judgment is sometimes overlooked by practitioners and is important to bear in mind.

8. CPLR 3218(b).

9. *Id.*

10. *Giryluk v. Giryluk*, 30 A.D.2d 22, 23 (1st Dep't 1968).

11. CPLR 2101(e) (emphasis added).

12. CPLR 2102(c).

13. 25 Misc. 3d 802 (Sup. Ct., N.Y. Co. 2009).

14. It should be noted that the Clerk's office did not submit any papers in opposition to the Petition. *See id.* at 803.

15. *Id.* at 804.

16. *Id.*

17. *Id.* (citing Alexander, Supp. Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 2102, 2009 Pocket Part, at 283).

18. *See id.*

19. As discussed in Part IV below, a recent Supreme Court decision suggests that even making this determination is beyond the Clerk's power when presented with a judgment by confession pursuant to CPLR 3218.

20. N.Y. General Obligations Law § 5-501(1), (2) (GOL).

21. N.Y. Banking Law § 14-a.

22. *See* GOL § 5-501(6)(a).

23. *See* N.Y. Penal Law §§ 190.40, 190.42.

24. *See* GOL § 5-501(6)(b).

25. *See Hammelburger v. Foursome Inn Corp.*, 54 N.Y.2d 580, 594 n.5 (1981).

26. *See Shifer v. Kelmendi*, 204 A.D.2d 300, 301 (2d Dep't 1994) ("the net advance is to be calculated by deducting the initial discount, but not the prepaid interest, from the loan amount") (citing *Hammelburger*, 54 N.Y.2d at 594 n.5).

27. *See Band Realty Co. v. N. Brewster, Inc.*, 37 N.Y.2d 460, 462 (1975) (holding that "the courts should not substitute the so-called "present value" method of computing interest, although arithmetically more precise, for the traditional method of computation in determining whether interest is usurious").

28. *See Broad & Wall Corp. v. O'Connor*, 13 A.D.2d 462, 462 (1st Dep't 1961).

29. *See Pro Player Funding LLC v. Goodman*, Index No. 111408/11, NYLJ 1202536337212, at *4 (Sup. Ct., N.Y. Co., Dec. 9, 2011) ("In the event that . . . the non-party debtors contest the terms of the judgments, each may file a plenary action to vacate").

30. *See id.* at *5 ("However, to conduct such analysis going beyond CPLR §3218 . . . is outside the scope of the clerk's duties . . . Moreover, if respondent were permitted to conduct the legal analysis required to determine that the interest rate charged may violate the usury laws, there would be nothing prohibiting respondent from making the final legal determination of whether the interest rates did actually violate the usury laws").

31. *See Solomon v Langer*, Index No. 113701/07, 2008 N.Y. Slip Op. 31651U, at *4 (Sup. Ct., N.Y. Co. June 11, 2008), *aff'd*, 66 A.D.3d 508 (1st Dep't 2009) (internal citations omitted); *see also Hicki v. Choice Capital Corp.*, 264 A.D.2d 710, 711 (2d Dep't 1999) ("It is well settled that the defense of usury does not apply where . . . the terms of the mortgage and note impose a rate of interest in excess of the statutory maximum only after default or maturity.") (internal quotations and citations omitted; emphasis added); *Fla. Land Holding Corp. v. Burke*, 135 Misc. 341 (Sup. Ct., N.Y. Co. 1929) ("[W]hen an excessive rate of interest is made payable only in the event of default in payment of the principal on its due date, there is no usury because the debtor may relieve himself of all liability by paying the principal and interest theretofore due.") (citing *Diehl v. Becker*, 227 N.Y. 318, 324 (1919)).

32. CPLR 5004 ("Interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute.").

33. *See Marine Mgmt., Inc. v. Seco Mgmt., Inc.*, 176 A.D.2d 252, 254 (2d Dep't 1991), *aff'd*, 80 N.Y.2d 886 (1992).

34. *Id.* at 254 (" . . . in the absence of a clear, unambiguous, and unequivocal expression that [the borrower] agreed to pay the highest interest rate allowed by law, namely, 25%, until the judgment was satisfied, we decline to depart from precedent establishing the statutory rate of interest of 9% as the proper rate to be applied to the judgment.").

35. *Banque Nationale De Paris v. 1567 Broadway Ownership Assocs.*, 248 A.D.2d 154, 155 (1st Dep't 1998) ("Since the loan documents do not constitute a clear, unambiguous and unequivocal expression that defendant agreed to pay the default rate until the judgment was satisfied, and the judgment of foreclosure provided only that the default rate was to be applied from default and going forward from the date of computation of the amount owed without specifying that such rate was to survive entry of the judgment, no reason exists to depart from the rule that the statutory rate applies once a judgment is entered.").

36. *See Pro Player Funding LLC*, Index No. 111408/11, NYLJ 1202536337212, at *4.

37. *Gen. Elec. Tech. Servs. Co. v. Perez*, 156 A.D.2d 781, 784 (3d Dep't 1989).

38. *See Pro Player Funding LLC*, Index No. 111408/11, NYLJ 1202536337212, at *3.

39. *Id.* at *4.

40. *Id.*

41. *Id.*

42. CPLR 7804(c).

43. CPLR 311(4).

44. *See, e.g., Kornfeld v. NRX Techs., Inc.*, 93 A.D.2d 772, 773 (1st Dep't 1983).

45. *See generally* CPLR 308, 310, 311, 311-A (outlining the methods of personal service upon a natural person, partnership, corporation and limited liability corporation).

46. *See, e.g., Pro Player Funding LLC v. Allen*, Index No. 101348/2011 (Sup. Ct., N.Y. Co. Feb. 28, 2011) (Tingling, J.) (short-form order).

47. This is because another state may refuse to give a sister state judgment full faith and credit. *See Kwatra v. Mehta*, Index No. 107486/09, 2009 NY Slip Op. 31992(U) at *2 (Sup. Ct., N.Y. Co. Aug. 31, 2009) ("No other state can vacate this State's judgments. At most, they can only refuse to give it full faith and credit in their own state."). Notwithstanding the Full Faith and Credit Clause of the United States Constitution, U.S. Const., Art. IV, §1, sister state judgments are subject to collateral attack based on lack of personal or subject matter jurisdiction. *See Nat'l Exch. Bank v. Wiley*, 195 U.S. 257, 269–70 (1904); *Grover & Baker Sewing Mach. Co. v. Radcliffe*, 137 U.S. 287, 294 (1890); *see also Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 78 N.Y.2d 572, 580 (1991) ("Cognovit judgments entered in other jurisdictions cannot automatically be denied full faith and credit; rather, enforceability must depend on the facts of each case. More particularly, it must be determined that the judgment debtor made a voluntary, knowing and intelligent waiver of the right to notice and an opportunity to be heard.").

48. *Tara Enters., Inc. v. Daribar Mgmt. Corp.*, 369 N.J. Super. 45, 56 (App. Div. 2004) ("Entry of judgment by confession has long been viewed with judicial distaste. Such judgments have been described as the loosest way of binding a man's property that was devised in any civilized country.") (internal citations and quotations omitted).

49. *See, e.g., Gene's Gulf v. Walnut Equip. Leasing Co.*, 391 So. 2d 753, 754 (Fla. Dist. Ct. App. 5th Dist. 1980) ("In Florida, confession of judgment provisions are invalid, although contracts are not necessarily invalid in their entirety because of the inclusion of such provision where the clause is severable.") (citing, *inter alia*, Fla. Stat. § 55.05); KRS § 372.140 (2011) ("Any power of attorney to confess judgment or to suffer judgment to pass by default or otherwise, and any release of errors, given before an action is instituted, is void.").

50. *See, e.g., Wright v. Robinson*, 468 So. 2d 94, 97 (Ala. 1985) ("It is well settled that, in Alabama, agreements to confess judgment are void as against public policy.") (citing Section 8-9-11, Alabama Code (1975)).

51. *See, e.g.*, Burns Ind. Code Ann. § 24-4.5-3-407 ("A debtor may not authorize any person to confess judgment on a claim arising out of a consumer loan. An authorization in violation of this section is void.").

52. For example, "[i]n New Jersey, sister state judgments by confession are entitled to full faith and credit." *In Sik Choi v. Hyung Soo Kim*, 50 F.3d 244, 248 (3d Cir. 1995) (citing, *inter alia*, *United Pac. Ins. Co. v. Estate of Lamanna*, 436 A.2d 965, 968–74 (N.J. Super. Ct. Law Div. 1981)).

Groninger v. Village of Mamaroneck: Prior Written Notice Laws Are Applicable to Municipal Parking Lots

By Kenneth E. Pitcoff and Anna J. Ervolina

In a significant win for every municipality in New York State, the Court of Appeals held that municipalities are entitled to prior written notice of defects located within municipally owned parking lots.

New York's Prior Written Notice Laws

Prior written notice laws have been enacted by virtually every municipality in the State of New York and provide that a municipality cannot be held liable for injuries caused by a hazard located on a "street, highway, bridge, culvert, sidewalk or crosswalk" unless the municipality has been notified in writing of the hazardous condition and has had a reasonable time to cure the condition.

The Court of Appeals has long recognized that prior written notice laws are "a valid exercise of legislative authority" and that such laws "comport[] with the reality that municipal officials are not aware of every dangerous condition on its streets and public walkways, yet impose[] responsibility for repair once the municipality has been served with written notice of an obstruction or other defect, or liability for the consequences of its nonfeasance, as the case may be."[1]

Kenneth E. Pitcoff is a partner at Morris Duffy Alonso & Faley. He focuses on high-profile public entity cases. **Anna J. Ervolina** is an associate at Morris Duffy Alonso & Faley and manages the firm's appellate practice.
This article appeared, in a slightly different format, in the *Torts, Insurance, & Compensation Law Section Journal*, Winter 2011, Vol. 40, No. 2, published by the TICL Section of the New York State Bar Association.

Only two exceptions to the prior written notification laws have been recognized by the Court of Appeals; namely, where the municipality created the defect through an affirmative act of negligence, and where a "special use" confers a special benefit upon the municipality.[2]

Background of *Groninger v. Village of Mamaroneck*

In *Groninger v. Village of Mamaroneck*, the Court of Appeals had to decide whether prior written notice laws applied to parking lots owned by municipalities. The plaintiff, Margaret Groninger, sued the Village of Mamaroneck for personal injuries she allegedly sustained after slipping and falling on ice located in a parking lot owned by the Village.

The Village moved to dismiss Groninger's complaint on the ground that it never received written notice of the ice condition prior to Groninger's accident as required by Village Law § 6-628.[3]

Groninger opposed the Village's motion, arguing that prior written notice was not required when the defective condition exists in a parking lot because a parking lot is not one of the six locations enumerated in Village Law § 6-628, namely, a street, highway, bridge, culvert, sidewalk or crosswalk.

The Supreme Court, Westchester County, found that prior written notice was required and granted the Village's motion and dismissed the complaint.[4]

Groninger appealed to the Appellate Division, Second Department which affirmed the dismissal of the complaint but certified to the Court of Appeals the question of whether its decision and order was properly made.[5]

The Parties' Arguments Before the Court of Appeals

In support of her position that Village Law § 6-628 was not applicable to parking lots, Groninger relied on the Court of Appeals case *Walker v. Town of Hempstead*,[6] which involved a plaintiff who was injured on a defect at a paddleball court and held that the Town could not require prior written notice of a defect in a paddleball court because a paddleball court was not a location that was specifically enumerated in the prior written notice statute. Groninger argued that since the Court of Appeals struck down the municipal ordinance at issue in *Walker*, which attempted to require prior written notice not only at paddleball courts but also at parking fields, prior written notice cannot be required for municipal parking lots because there is no difference between a parking field and a parking lot.

Although Groninger acknowledged that every appellate department in New York had consistently concluded that prior written notice laws applied to parking lots, Groninger argued that the lower appellate court decisions were inconsistent with the Court of Appeals's decision in *Walker*.

The Village countered that Groninger's analysis was without merit because it ignored the Court of Appeals's decision in *Woodson v. City of New York*,[7] which was decided five years after *Walker* and rejected the very same arguments advanced by Groninger.

In *Woodson*, the plaintiff fell on a defective concrete stairway leading from a sidewalk up to a municipal park. Like Groninger, the plaintiff in *Woodson* argued that prior written notice was not required because the stairway was not specifically enumerated in the notice statute, which was explicitly limited to "streets, highways, bridges, culverts, sidewalks and crosswalks," and that the stairway was categorically different from a sidewalk. The Court of Appeals, however, rejected Woodson's argument and held that prior written notice was required.

In so ruling, the Court of Appeals explained that its decision was not inconsistent with its decision in *Walker* "because [the] paddleball court [in *Walker*] is functionally different from each of the six locations enumerated in General Municipal Law 50-e(4). The stairway in this case functionally fulfills the same purpose that a standard sidewalk would serve on flat topography, except that it is vertical instead of horizontal."[8] Thus, the Village argued that the Court of Appeals, post-*Walker*, intentionally expanded the scope of prior written notice laws to include the "functional equivalents" of the locations specifically enumerated in the statute.

The Village further argued that a "parking lot" is the functional equivalent of a "highway" because it falls within the definition of a "highway," which Vehicle and Traffic Law § 118 defines as "the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel." Since a highway is specifically listed in the prior notice laws, such law extends to parking lots.

Court of Appeals's Decision

In a 4-3 decision,[9] the Court of Appeals expressly rejected the plaintiff's argument and affirmed the dismissal of the plaintiff's complaint. As argued by the Village, the Court of Appeals held that the plaintiff could not ignore its *Woodson* decision, which was decided after *Walker* and which required prior written notice be given of a defect found at a location that functionally fulfilled the same purpose as a location named in the statute.

The Court of Appeals further adopted the Village's argument that a "parking lot serves the 'functional purpose' of a 'highway,' [and that] [a]s a result, the Village was entitled to notice and an opportunity to correct any defect before being required to respond to any claim of negligence with respect thereto."

Groninger's Considerable Significance

Virtually every municipality in the State of New York has enacted a prior written notice law. Likewise, virtually every municipality in the State of New York owns parking lots. Thus, being entitled to prior written notice

of defects in parking lots before liability can be imposed for injuries resulting from said defects is a tremendous benefit for municipalities.

Municipally owned parking lots serve the public good in a variety of ways. For instance, by providing potential customers with parking spaces, publicly owned parking lots support local businesses and attractions, which in turn provide localities with revenue and help promote local economies by attracting customers and tourists to their locales. Also, publicly owned parking lots are a source of revenue in the case of metered parking lots. Without prior notice, municipalities would be forced to bear a crushing economic and logistical burden of monitoring public parking lots and defending against resultant litigation, which would negatively impact local economies and be ultimately borne by already overburdened taxpayers.

Groninger is also noteworthy in light of the Court of Appeals December 2010 decision *San Marco v. Village/Town of Mount Kisco*,[10] which chipped away at the protections afforded municipalities under the prior written notice law. The Court of Appeals long recognized that prior written notice laws do not shield a municipality from liability if the municipality created the defect through an affirmative act of negligence. Prior to *San Marco*, however, the "affirmative act of negligence" exception applied only if the municipality's affirmative act immediately resulted in the existence of a dangerous condition.[11] In *San Marco*, the Court of Appeals limited the protection afforded to municipalities and held that the "immediacy test" did not extend to hazards which are alleged to have been created by a municipality's negligent snow removal activities.

In contrast to *San Marco*, the Court of Appeals in *Groninger* recognized that a "municipality is not expected to be cognizant of every crack or defect within its borders"[12] and reaffirmed its commitment to upholding the legislative purpose of prior written notice statutes, which is to shield municipalities from liability unless they are given an opportunity to cure known defects. ■

1. *See Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474 (1999).

2. *Id. See also Yarborough v. City of N.Y.*, 10 N.Y.3d 726, 728 (2008) (once municipality establishes lack of prior written notice, plaintiff bears burden of demonstrating that either exception to prior written notice statutes applies).

3. Village Law § 6-628 and CPLR 9804 provide:

> No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed or for damages or injuries to persons or property sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert unless written notice of the defective, unsafe, dangerous or obstructive condition, or of the existence of the snow or ice, relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of or to cause the snow or ice to be removed, or the place otherwise made reasonably safe.

4. *Groninger v. Vill. of Mamaroneck*, 2008 WL 7907374 (N.Y. Sup. Jul. 22, 2008) (Trial Order).

5. *Groninger v. Vill. of Mamaroneck*, 67 A.D.3d 733 (2d Dep't 2009).

6. 84 N.Y.2d 360 (1994).

7. 93 N.Y.2d 936 (1999).

8. *Id.* at 938.

9. *Groninger v. Vill. of Mamaroneck*, 17 N.Y.3d 125 (2011) (Opinion by Judge Pigott. Judges Graffeo, Read and Smith concur. Chief Judge Lippman dissents in an opinion in which Judges Ciparick and Jones concur).

10. 16 N.Y.3d 111 (2010).

11. *See Yarborough v. City of N.Y.*, 10 N.Y.3d 726 (2008); *Oboler v. City of N.Y.*, 8 N.Y.3d 888 (2007).

12. *Gorman v. Town of Huntington*, 12 N.Y.3d 275, 279 (2009).

Forms Products
Electronic and Print

NYSBA's Document Assembly Products.

Automated by industry-leader HotDocs® software. Increase accuracy, save time and money. Access hundreds of forms, including many official forms promulgated by the Office of Court Administration.

New York State Bar Association's Surrogate's Forms—Powered by HotDocs®
NYSBA's Trusts & Estates Law Section, Wallace Leinheardt, Esq.
Product Code: 6229
Non-Member Price: $561.00
Member Price: $479.00

New York State Bar Association's Family Law Forms—Powered by HotDocs®
Willard DaSilva, Esq.
Product Code: 6260
Non-Member Price: $514.00
Member Price: $440.00

New York State Bar Association's Residential Real Estate Forms—Powered by HotDocs®
Karl B. Holtzschue, Esq.
Product Code: 6250
Non-Member Price: $613.00
Member Price: $523.00

New York State Bar Association's Guardianship Forms—Powered by HotDocs®
Howard Angione, Esq. & Wallace Leinheardt, Esq.
Product Code: 6120
Non-Member Price: $618.00
Member Price: $528.00

NYSBA's Forms Products on CD.

Access official forms, as well as forms, sample documents and checklists developed by leading attorneys in their fields of practices. Avoid reinventing the wheel in an unusual situation, and rely instead on the expertise and guidance of NYSBA's authors, as they share their work product with you.

Estate Planning and Will Drafting Forms on CD-ROM—2011
Michael O'Connor, Esq.
Product Code: 60952
Non-Member Price: $115.00
Member Price: $95.00

New York Municipal Law Formbook and Forms on CD-ROM (Revised 2010)
Herbert A. Kline, Esq.
Nancy E. Kline, Esq.
Access more than 1,350 forms (over 230 are new) for matters involving municipalities.
CD-ROM Only • Product Code: 616009
Non-Member Price: $170.00
Member Price: $130.00

New York Practice Forms on CD-ROM—2011-2012
Access more than 600 forms for use in daily practice.
Product Code: 615012
Non-Member Price: $315.00
Member Price: $280.00

Commercial Leasing
Joshua Stein, Esq.
Access over 40 forms, checklists and model leases.
Book with Forms on CD-ROM • Product Code: 40419
Non-Member Price: $210.00
Member Price: $165.00

CD-ROM Only • Product Code: 60410
Non-Member Price: $90.00
Member Price: $70.00

Adoption Law: Practice and Procedure in the 21st Century
Golda Zimmerman, Esq.
Access over 50 forms used in adoption practice.
Book with forms on CD-ROM • Product Code: 40204C
Non-Member Price: $200.00
Member Price: $165.00

CD-ROM Only • Product Code: 60204
Non-Member Price: $55.00
Member Price: $40.00

ALSO: NYSBA Downloadable Forms
Visit **www.nysba.org/pubs** for a list of all forms by practice area that you can download for instant use

$5.95 shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be based on destination and added to your order. Prices do not include applicable sales tax.
***HotDocs pricing includes shipping and handling.**

To Order call **1-800-582-2452** or visit us online at www.nysba.org/pubs Source Code: PUB1372

NYSBA

Clifford S. Weber handles regulatory, corporate, securities and transactional matters for financial institutions. He has served as Chairman of the New York State Bar Association's Banking Law Committee, General Counsel to the Community Bankers Association of New York State, and Counsel to the New York State Assembly Insurance Committee. This article appeared, in a slightly different format, in the *NY Business Law Journal*, Winter 2011, Vol. 15, No. 2, published by the Business Law Section of the New York State Bar Association.

The Business Judgment Rule Is Alive and Well in New York

By Clifford S. Weber

Introduction

Most major American corporations are organized under Delaware law. According to the Delaware Department of State, Division of Corporations, more than half of the Fortune 500 companies are incorporated in Delaware.[1]

The attributes of the Delaware General Corporation Law and the expertise and sophistication of the Delaware courts, specifically the Court of Chancery and the Supreme Court, are often cited as the primary drivers of the choice to incorporate in Delaware. Over the years, those courts have decided the seminal cases in the mergers and acquisitions field, such as *Revlon*[2] and *Unocal*,[3] with which most corporate lawyers are at least passingly familiar. Those decisions, with their nuanced, fact-sensitive distinctions about the nature and scope of directors' duties, constitute the "go to" jurisprudence for lawyers counseling the boards of our mega-corporations regarding business combinations and other significant matters.

While Delaware law may be the predominant legal framework for larger companies, it doesn't entirely occupy the field. Many important companies, both SEC-reporting public ones as well as closely held companies, are incorporated in New York. For these companies, the New York Business Corporation Law (BCL) and the common law developed by our courts comprise the sources of law governing the rights and obligations of shareholders, officers and directors in connection with various activities, including business combinations.

The business judgment rule, of course, is a judge-made rule fashioned by courts sitting in many American jurisdictions, including New York. This decisional rule has engendered scholarly inquiry and debate about its very nature[4] – is it procedural, substantive or evidentiary? This article steers clear of such academic ruminations. Instead, here we examine the application of the business judgment rule by a New York court in a recently decided case involving a bank holding company incorporated under New York law. The court's handling of this real-world dispute furnishes some practical learning and guidance for lawyers who counsel New York business corporations.

Background

Wilber National Bank was an Oneonta-based commercial bank with nearly $1 billion in assets that began serving its central New York market in 1874. In October 2010, The Wilber Corporation, a New York corporation and Wilber National Bank's parent bank holding company, entered into a merger agreement with Community Bank System, Inc., the DeWitt, New York, parent of Community Bank, also a commercial bank. The Wilber Corporation (Wilber) was, and Community Bank System Inc. (Community) is, a public, exchange-listed company. Each company's board of directors approved the transaction unanimously. The deal, valued at $101.8 million, was structured so that Wilber shareholders received, as aggregate consideration for their stock, 20% in cash and 80% in Community common stock, subject to adjustment based upon Community's share price and Wilber's asset quality. The price per share was $9.50, which represented a substantial premium over Wilber's $6.00 market price.

The Class Action

Some law firms earn their living by representing shareholders in class action litigation. Behaving much like the firms that patrol cyberspace checking SEC filings to detect 16-b short swing profit violations, these self-described "shareholder rights" firms post on their websites "investigations" of the fairness of mergers and other deals shortly after they are announced and actively solicit shareholders to act as nominal plaintiffs. The "investigations" are often bereft of facts or evidence, but the threat of an injunction and delay of the deal frequently persuades companies to settle and pay attorney fees (arguably the real purpose of the litigation).

Just days after Wilber and Community announced the signing of their merger agreement, and months before filing documents with the SEC, several law firms proclaimed the launch of investigations into possible breaches of fiduciary duty by the Wilber directors and other unspecified violations of law. Two firms claiming to represent Wilber shareholders contacted Wilber and Community and tried to extract a settlement. The boards of directors of both companies refused to negotiate.

On November 3, 2010, Wilber shareholders filed lawsuits in the New York Supreme Court in Otsego County. Both complaints sought class certification, named Wilber, Wilber's directors, and Community Bank System as defendants and alleged that the director defendants breached their fiduciary duties by failing to maximize shareholder value in connection with the merger and that Community Bank System aided and abetted those alleged breaches of fiduciary duty. Specifically, the complaints alleged that the directors improperly favored Community Bank System and discouraged alternative bids by agreeing to the merger agreement's non-solicitation provision and termination fee provision. Plaintiffs further alleged that, pursuant to the merger agreement, Community Bank agreed to appoint two of Wilber's directors to the boards of Community Bank System and to establish an advisory board of Community Bank, made up of the current directors of Wilber. The complaints also alleged that the directors and officers of Wilber entered into voting agreements to vote their shares of Wilber common stock in favor of the merger. In addition, the complaints alleged that the consideration to be received by Wilber's common shareholders was inadequate and unfair. Plaintiffs sought an injunction stopping the merger and an award of attorney fees.

The Business Judgment Rule

New York law vests a corporation's board of directors with responsibility for direction of the corporate business.[5] Directors may delegate day-to-day management to officers, but they cannot shed accountability for governance or their fiduciary duties of care, good faith and loyalty.[6]

The business judgment rule is a judge-made rule that protects directors' decisions from attack when the directors act consistently with their fiduciary duties. As the Court of Appeals has stated in *Auerbach v. Bennett*, the leading New York case,

> [t]hat doctrine bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. "Questions of policy, of management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to their honest and unselfish decision, for their powers therein are without limitation and free from restraint, and the exercise of them for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient."[7]

The Delaware courts have expressed the business judgment rule in a variety of formulations, mostly in cases involving hostile takeover attempts and competing bids for corporate control.[8] New York courts just don't deal with major corporations battling in these kinds of cases that frequently, and consequently, the rule has not been refined as nicely by the Court of Appeals as it has been in Delaware.[9] *Auerbach* continues to be the definitive articulation of the business judgment rule in New York.[10] For practitioners, that is a blessing. The straightforward *Auerbach* rule relieves us of the formidable task of weeding through the thicket of cases describing the ever-evolving Delaware rule and parsing out the particular iteration of it that may apply to the facts of our case.

The Decision

Community, Wilber and the Wilber directors answered the complaint and promptly moved for summary judg-

ment. On March 28, 2011, the court granted the motion and dismissed both complaints. The merger closed as planned on April 8, 2011. The court based its decision on the following factors, all of which were described in the proxy statement/prospectus delivered to Wilber's shareholders:

- The court gave substantial weight to the process the Wilber board followed once it decided to sell the company. This included many meetings with its financial and legal advisers, solicitation of bids from nine potential acquirers, detailed analysis and comparison of the three bids it received, and comprehensive instruction on directors' fiduciary duties when considering business combinations.
- Wilber received a fairness opinion from a firm that was independent from the financial advisor that marketed the company and whose compensation was contingent on completion of the merger.
- The Wilber directors discharged their fiduciary duty by acting with disinterested independence. Plaintiffs furnished no evidence of directorial conflicts of interest or bad faith.
- Wilber's certificate of incorporation authorized the board to consider the factors enumerated in BCL § 717(b), including the long- and short-term interests of the company and its shareholders and the effects that the transaction may have on the growth, development, productivity and profitability of the company, its employees, customers, creditors and community.
- New York case law upholds deal protection provisions such as voting ("lockup") agreements, break-up fees and other contractual terms the plaintiffs alleged to be wrongful.

Guidance for New York Directors and Counsel

The Internet enables aggressive lawyers to pounce on deal announcements, make flimsy allegations, troll cyberspace for potential plaintiffs and commence litigation to extract a settlement and attorney fees. In this environment, the business judgment rule is a company's and its directors' best defense to any Monday morning attack on the board's decision to enter into a change of control or other transaction with material economic consequences.

The defense boils down to this: If they properly discharge their duties, the business judgment rule protects from liability directors who are sued by shareholders alleging that they sold the company for an inadequate price (the typical claim) or that they benefited personally (another typical claim). To support invocation of the rule, evidence must exist that the directors upheld their duties.

> Directors may delegate day-to-day management to officers, but they cannot shed accountability for governance or their fiduciary duties of care, good faith and loyalty.

The evidence must show that the directors' conduct was consistent with due care and loyalty. Documentation of the board's deliberative process[11] is the evidence that will support a successful business judgment defense in litigation seeking to second-guess the board's transactional decisions.[12]

Practical tips for boards considering business combinations include:

- Consider including provisions in the company's certificate of incorporation that give the board flexibility when considering offers.
- Evaluate the prepared marketing materials and expressions of interest from potential counterparties carefully and thoroughly. Directors should ask questions and make certain that they understand the legal, accounting, financial and regulatory aspects of any proposed transaction. Directors should educate themselves to get the best-informed sense of market value.
- Engage and utilize retained experts, including lawyers, accountants and financial advisors.
- Identify and disclose any conflicts of interest posed by a potential transaction. For example, if a director leases property to a potential acquirer or owns its securities, make certain that he or she discloses same and seeks advice as to whether to abstain from any vote on the deal.
- Careful consideration of competing offers consumes time, which busy directors may not be able to devote. Boards should consider appointing a special committee of the board to handle ongoing tasks, including narrowing the field of bidders to consider, filtering different kinds of offers and getting answers to routine questions from the company's advisors.
- Document the process in the minutes and through the adoption of appropriate resolutions at key junctures. Record all dissenting votes.

Conclusion

Mergers and other major transactions place enormous stress on directors, officers and employees. Aggressors count on that and the fear of delay-by-injunction when they pounce on deals and start hollow litigation. But as the Wilber-Community case shows, companies don't have to cave in to a shakedown. The story can end well

for boards that build a solid evidentiary record for the business judgment rule defense.

1. *See* Lewis S. Black, Jr., *Why Corporations Choose Delaware*, Delaware Department of State: Division of Corporations (2007), *available at* http://corp.delaware.gov/whydelaware/whycorporations_web.pdf.

2. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

3. *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

4. *See* Douglas M. Branson, *The Rule That Isn't a Rule – The Business Judgment Rule*, 36 Val. U. L. Rev. 631 (2002).

5. BCL § 701(a).

6. BCL § 717(a); *Stephens v. Nat'l Distillers & Chem. Corp.*, 1996 WL 384920 (S.D.N.Y. 1996) (The duty of care requires directors to act independently and thoughtfully, with that degree of care that a prudent person in the director's role would exercise. This duty requires that directors act on an informed basis, include the input of financial and legal advisors, and devote sufficient time to their decision making.); *Foley v. D'Agostino*, 21 A.D.2d 60 (1st Dep't 1964); *Bubba Gump Fish & Chips Corp. v. Morris*, 240 N.Y.L.J. 61 (Sup. Ct., Queens Co. 2008) (The duty of good faith/loyalty requires directors to act in the best interest of the corporation, subordinate personal gain to the corporation's interests, and act with undivided loyalty to the corporation.).

7. *Auerbach v. Bennett*, 47 N.Y.2d 619, 629 (1979) (internal citation omitted).

8. The Delaware courts have said that under the business judgment rule, there is a "presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interest of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *cited in Smith v. Van Gorkum*, 488 A.2d 858, 872 (Del. 1985). In other words, courts "will not invalidate a board's decision or question its reasonableness so long as its decision can be attributed to a rational business purpose." *Robotti & Co., LLC v. Liddell*, 2010 WL 157474 (Del. Ch. 2010) (citing *Paramount Commc'ns v. QVC Network*, 637 A.2d 34, 45 n.17 (Del. 1994)) (Under this rule, the directors' decision is protected unless plaintiff can show that the board breached its duty of care or loyalty.). The Delaware Supreme Court has remarked, in connection with the judicial analysis of fiduciary duties, that ". . . there is no single blueprint that a board must follow to fulfill its duties." *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989). Most recently, the Delaware Supreme Court noted that "directors' decisions must be reasonable, not perfect." *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009).

9. *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442 (Del. Ch. 2011) (In this recent decision, the Delaware Chancery court discusses the three levels of review for evaluating director decision making by Delaware courts (business judgment rule, enhanced scrutiny, and entire fairness)); *see also In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813 (Del. Ch. 2011).

10. The Court of Appeals has mentioned the business judgment rule in ten civil cases since *Auerbach* was decided. Four of those involved the conduct of residential cooperative boards. *See 40 W. 67th St. v. Pullman*, 100 N.Y.2d 147 (2003); *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530 (1990); *Fe Bland v. Two Trees Mgmt. Co.*, 66 N.Y.2d 556 (1985); *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557 (1984). None of the 10 cases altered the *Auerbach* formulation in any way.

11. Both the New York and the Delaware decisions focus on the directors' deliberative process to ascertain whether they properly discharged their fiduciary duties and are entitled to business judgment rule protection and, usually, summary judgment. For example, in *Auerbach*, the New York Court of Appeals examined the work of the defendant company's special litigation committee. *See Auerbach*, 47 N.Y.2d 619, 629 (1979). In *Lyondell*, the Delaware Supreme Court focused on the extent of the board's deliberations and its consultations with its financial advisor. *See Lyondell*, 970 A.2d 235, 242 (Del. 2009). One author has noted that "[b]y placing a premium upon the process that directors follow to reach a decision, rather than the resulting decision itself, the business judgment rule serves as a vibrant illustration of process engineering and the attorney's role in it." *See* Branson, *supra* note 4, at 632.

12. While the business judgment rule is frequently invoked in the context of business combinations, it applies to all challenged directorial decisions, including, for example, the issuance of dilutive stock, entry into a new business line or adoption of supermajority voting provisions.

NEW MEMBERS WELCOMED

FIRST DISTRICT
Lisa M. Alexander
Trevor Reginald Allen
Emily Altman
Gabriel Arce-Yee
Shruti Bali Arora
Raffi Baroutjian
Kevin M. Baum
Joanna Rosett Beck
Michael Becker
Kevin Bensley
David Gasper Buffa
Francesca Caroline Butnick
Elizabeth C. Caldwell
Arthur Calzontzi
Toni Camacho
August Albert Carfano
Michael Ceulen
Hye Hyoung Chung
Christina Marie Ciarnella
Micah Joshua Cogen
Ronald Jay Coleman
Christopher James Davis
Francois Deprez
Robert Devine
Matthew Diller
Andrea Dinamarco
Laura E. Dolan
Douglas Allen Donofrio
Jane Ashley Dryer
Daniel R. Einbund
Rebecca Faber
Carine Feipel
Leia Kristin Galasso
Jesse Stuart Gillespie
Flora Min-jeong Go
Ashley Erica Gravley
Christian Guevara
Michael Alan Guttman
Ross Vinson Habif
Jordan Harlow
Elizabeth Ann Hay
Ian Keoki Henderson
Matthew Oliver Hendy
Karl Hepp De Sevelinges
Michelle Theresa Hess
Justin William Hoest
Jennifer Michelle Houti
Omer Hurel
Michael Jahnke
Jason B. Jendrewski
Hye Won Jun
Sophie Louise Kaykov
Jesse Michael Keenan
Sean Gerald Kelly
Howard Klein
Sandra La Sala
Gregory Kurt Lawrence
Barry Scott Le Vine
Renata Leal-Niemela
Marcus Joseph Ledergerber
Jessica Lehrman
Christopher Lopreste
Lloyd S. Lowy
Barry Mallin
Roy A. McKenzie
Nicole Monique Medham
Scott Douglas Miller
Martin Adam Miranda
Brian Alan Moore
Peter Douglas Morris
Elliot Daniel Morrison
Elizabeth Jean Murphy
Dorian Meyer Needham
Jan Neugebauer
Yoogin Catherine Yang Noh
Nicolo Nouratchan
Aaron Oakley
Hector Ivan Oliver
Ehi Ifeyinwa Oviasu
Ryan Patterson
Nicholas Paul Pellicani
Guillermo Perrone
Graciana Chaves Pirfo
Russell L. Porter
Joshua Evan Posner
Frederick Quenzer
Ian Read
Veniamin Rezavker
Lauren Ashley Rieders
Christina Ann Robillard
Manuel Andres Rodeiro
Claudia Teresa Romano
Lourdes Ivette Rosa-Carrasquillo
James Schlessinger Ross
Aaron William Scherzer
Brian Walter Schroeder
Jonathan Gerald Shallow
Clifford Michael Silverman
William Bowen Simmons
Ryan Matthew Sklar
David Francis Standish
John P. Steines
Jie Sun
Anisha Sundarraj
Nina R. Tandon
Aryeh Leib Taub
Marc R. Trevino
Sehj Vather
Nita Sukh Dev Vyas
Adam Robert Walczak
Beiliang Wang
Nicolette Renee Ward
Samuel M. Warfield
Leocadie Elizabeth Welling
Roy White
David Robert Wiles
Anne Elizabeth Winnick
Andrea Woloski
Yanbin Wu
Yuanyuan Xin
Marisa Zuckerman

SECOND DISTRICT
Mireille a. Azzi
Lolita Brayman
Dana M. Carrera
Thomas J. Carroll
Anthony Michael Deliso
Brian Doyle
Farris Mian Fayyaz
Jeanie Fougere
Joseph Lawrence Indusi
Suneela Jain
Uri Kim
Arthur Kiperberg
Tasha LaSpina
Diana Lawless
Roman Lebedinskiy
Natalie Lowe Burge
Alyssa Christine Mack
Gavin Alexander McCandlish
William A. Neri
Aryeh L. Reiser
Saphra Ross
Adam Joseph Sansolo
Sophia Solovyova
Kristin Stranc
Ayanna Watson
Beverly A. Willett

THIRD DISTRICT
Nicholas Antenucci
Benjamin H. Babcock
Caitlin Bedard
Jessica Benton
Melissa M. Beojekian
Kyle R. Christiansen
Amanda S. Connors
Chad M. Cook
Michael Christian Curley
Robin D'Amore
John M. Decker
Jillian C. Diaz
Alicia M. Dodge
Colin Dwyer
Emily L. Evatt
Rebecca Fromer
Joseph M. Gerstenzang
James P. Girvin
Laura Rebecca Hallar
Carl Hasselbarth
Sophia Heller
Alexander J. Hyde
Michael Kaplan
Kelcey J. Kratzer
Jennifer M. Lee
Ross H. Lieblich
Brittany L. Linder
Joel Carlton Lombardi
Jeffery T. Lottermoser
Valerie A. Lubanko
Michael Mainetti
Anne Malak
Elizabeth Ashley Marshall
Bryon C. McKim
Philip S. Meyer
Carl Mills
August Montgomery
Lorraine C1 Netter
Lynn Nolan
Lauren Owens
Phillip Perry
Allison Rich
Katherine Vail Roark
Monique Roberts
Stacey Blair Rowland
Stephanie Scalzo
Cara Palumbo Schrantz
Matthew J. Schrantz
Brandan M. Sheehan
Amanda Shooks
Austin Thomas Shufelt
Monica Skanes
Max Smelyansky
Lesley Rachel Stefan
Christopher J. Stevens
Andrea Tarshus
Michael Telfer
John Robert Theadore
Genevieve Trigg
Jacob A. Vredenburgh
Dean Weld

FOURTH DISTRICT
Meredith L. Birdsall
Sarah Beth D'Alessandro
Gregory T. Dunn
Christopher J. Fleury
Hannah J. Fleury
Denice Goodrich
Angela M. Kelley
Kevin M. Litz
Elizabeth J. Lyons
Rebekah Mairs
Jennifer Lynn McAleese
Lauren E. Palmer
Lisa Ann Robbins Hoover
Ann Flower E. Seyse
Nancy H. Steuhl
Benjamin Terry
Joanne Campbell Thompson
Christina J. Wang
Mark C. Williams
Brian Wood

FIFTH DISTRICT
C. Samuel Beardsley
Andrew L. Boughrum
Christopher T. Brown
Jamie Lynn Caldwell
Derek English
Derrik E. Forshee
Brittany L. Grome
Sarabeth Ann Moore
Don Edmund Snyder
Iris Yao

SIXTH DISTRICT
Gregory P. Bazan
David Carlson
Sarah DeMellier
John A. Fitzgerald
Kristen Grabowski
Rebecca K. Helm
Ryan Larose
Elizabeth Watkins Price
Alexander David Racketa
Joseph B. Rogers

SEVENTH DISTRICT
Thomas J. King
Marc Aaron Stepper

EIGHTH DISTRICT
Katherine Alexander
Lisa Michelle Diaz-Ordaz
Latoya Matthew

NINTH DISTRICT
Ariella Bernstein
Rafael A. Diaz
Christine Catherine Disalvo
Jineen Tara Espinosa
Joseph Reuven Katz
Shay Therese Kershaw
Guy Fitzgerald Lometti
Michael B. Mushlin
Robert J. Permutt
Nicole Leigh Perskie
Michael Quinn
Donna Rabinowitz
Jane Lubowitz Rosenstadt
Kimberly A. Sofia
Suri Sternberg
Pamela Tuzzo
Jonas Urba
Thomas E. Waldron

TENTH DISTRICT
Francis P. Alleva
Anton A. Berezin
Ira David Berger
Lynn Marcy Brown
Christopher J. Chimeri
Wendy Chow
Jason Alan Ciani
Daniel Devine
Kevin P. Fitzpatrick
Robert E. Greenberg
John A. Gresham
Amanda Griner
Robert William Griswold
Michael L. Gurman
Matthew Jokajtys
Michael J. Krakower
Timothy Patrick Manning
Angela M. Mastrantonio
Jacqueline Rose McDermott
Kenneth Ian Misrok
Alexander Hyuk Mun
Lauren Elizabeth Murray
Matthew Palazzola
Brandon Ross Sloane
Eric Taylor
Danielle Erica Tricolla
Amy Van Saun
Lauren Varrone
Esau Venzen
Justin Harris Vilinsky

ELEVENTH DISTRICT
Nataliya Binshteyn
Sankalp Dalal
Owen Dazhuang Gu
Wenzhao Gu
Warren H. Huang
Stephanie Kathleen Jones
Claire Lewis
Andrew Lolli
Jason D. Nussbaum
Jacqueline Orcutt
Benjamin Peters
Michael Jay Santino Pontone
Katherine Keeth Porter
Rajiv Syed
Joseph A. Traver
Joshua Votaw
Xiaocen Zhu

TWELFTH DISTRICT
Gifty Duah-Boakye
Oni K. Taffe

THIRTEENTH DISTRICT
Beata Gadek
Brendan Thomas Lantry

OUT OF STATE

Jean-Paul A. Acut
Adebanke Adeyoola Adeyemo
Monica Ager
Jabeen Ahmad
Natasha-Christina Akda
Danielle Elizabeth Holmes Allen
Robert W. Allen
Emily Ames
Hong Jun An
Susan B. Anamier
Stephanie Anderson
Amanda Lindsay Andrade
Lisa A. Andrzejewski
Philip Edward Angeli
Maya Arianne Angenot
Kevin G. Antonik
Ariel Applebaum-Bauch
Courtney Armour
Roger Lynn Armstrong
Anna Christina Arstein-kerslake
Richelle Lyn Aschenbrenner
Ruby Maria Asturias Castillo
Camard Aurelie
Yeon Ji Bae
Heather Joy Baker
Lisa Paulette Baldwin
Shereefat Oluwaseyi Balogun
Ellen Moira Bandel
Joseph Bargnesi
Shawn Phillip Barnes
Colleen Bridget Barnett
Nigel Anthony Barrella
Jonathan Barrera
Deanne Barrow
Sarah Bartfeld
Byron Basiga
Elma Beganovic
Amanda Benevento
Richard M. Benjamin
Kenneth Hall Benton
Estelle Berenbaum
Laura Berman
Walter A. Bernard
Elizabeth Berretta
Simone Bertollini
Mahlda Bilstein
Anna Noelle Binau
Nicholas J. Birch
Mary Teresa Carmel Blake
Michael Blom
Justine Blondeau
Nayiri Boghossian
Kathleen Elizabeth Bond
Christopher Boone
Maciej Konrad Borowicz
Nicholas Jaison Brannick
Joseph Anthony Brazauskas
Arin Melissa Brenner
Kyle Brittingham
Mark C. Brown
Nathan Lee Brown
Daniel M. Brozovic
Sharon E. Burdicko
Ralph Burgwald
Raquel Freire Burson
Jesse Robert Butler
Jennifer Melillo Buurma
Danielle J. Cardone
Justin Carlson
Thomas Carnes
James G. Carr
Erin Elizabeth Carter
Alexander Paul Catalona
James V. Catano
Genevieve Chabot
Ashley Chan
Kyle Chan
Esther Chang
Sung Chang
Christine Rechner Chapla
Robert Benjamin Chapman
Jiang Chen
Xin Chen
Yu-Ning Chen
Steven Cheng
Rishi Chhatwal
Michael Chipko
Sung Bum Cho
Edward Hyun Choi
Hyun Myung Choi
Robert Roman Josef Christoffel
Jake June Chung
Daniel Mason Churgin
Melanie Claassen
Ian Clark
Alyssa Clemente
Grant Maxwell Cofer
Jennifer B. Cohen
Jeremie Daniel Cohen
Matthew Duffy Cohen
Stephanie Lynn Coleman
Briana Collier
Isabelle Corbett
Matthew J. Correia
Justin Hugh Covey
Steven Carlyle Cronig
Steven Paul Cullen
Caroline Cynn
Gregory Paul D'Alessandro
Marie Ann Juliette D'Harcourt
Lauren Nichole Dabule
Jordan Long Dansby
Chris Datskos
Jeffrey N. Davenport
Peter Johannes Gislenus De Bou
Naomi Mayesha De Silva
Bruna Barros De Sousa Frota
Christopher Anthony DeAngelo
Timothy DeBeer
Camille Delbourgo
Roshni Desai
Thomas Raymond Dettore
Adam Lawrence Deutsch
Aissatou Diallo
Ryan Lawrence Diclemente
Jaclyn DiLauro
Michael Dillon
Jacqueline DiRamio
Aneliya Dobreva
Krista Dolan
Brian R. Donnelly
Za'kiya Dorch
Paul Dorfeld
Peter Dueck
Aileen Dumlao
Kathryn Elizabeth Duran
Ashley Marie Edmonds
Brady Sherrod Edwards
Sarah E. Edwards
Valerie Edwards
Alexander Effendi
Rachel Agnes Egharevba
Debra Eichenbaum
Gregory Eisenstark
Jacob Eisler
Robert Maxwell Ellis
Rapone Eole
Michael Robert Epstein
Austin Ridgely Evers
Wanhong Fan
Rebecca Joy Feinberg
Mary Fernandez Rodriguez
John F. Finnegan
Alexander Gregory Fisher
Rebecca B. Flatow
Aline Flodr
Ashley Flucas
Robert Foote
Sharon Forscher
Amanda Fran
Jordan R. Frankel
Bernard Louis Freedman
Peter M. Friedman
Reannon N. Froehlich
Maria Fruci
Chiho Fujimoto
Marian E. Fundytus
Jacqueline Elizabeth Fusco
Matthew Fusing
Maribeth Gainard
Dorrella Gallaway
Madeline Gallo
Jonathan Gant
Yang Gao
Rebecca Priscilla Gardner
William G. Gardner
Gregory Gasawski
Chloe Gavin
Nicholas A. Gerlach
Anna Gershman
Arianna Ghazi
Sameer A. Ghaznavi
Sean Giambattista
Arina Chandru Gidwani
Andre Paul Giering
Neil Philip Gilbert
Sabrina Gillespie
Matt Gilliam
Charles Andrew Gilman
Zachary Adam Gima
Ziv Glazberg
Christopher Charles Gleason
John Goheen
Claire Goldstein
Sharry Ann Gonzales
Frank Gonzalez
Jeffrey Aaron Gordon
Nikhil Vikas Gore
Ashley Goren
Misako Goto
Kia Grant
Azizza Graziul
Jeffery Louis Greco
Renee Greenberg
Jamison Grella
Gordon N. Griffin
Marisa Grillo
Sanzhuan Guo
Yanni Guo
Brian Guppenberger
Oishika Gupta
Juan-Carlos Guttlein
Daniel Eduardo Guzman
Rebecca Haake
Nathalie C. Hackett
Nicole Candace Hagan
Joshua W.L. Hallock
Andrew Hamad
Valerie Ann Hamilton
Noe S. Hamra Carbajales
Carrol Hand
Hendy Handoko
Jessica Hanley
Brian Francis Hannan
Joergen B. Hansen
Imran Haque
Rhashea Lynn Harmon
Joseph Harms
Jeanna Harnden
D'anna Harper
K. Russell W. Hasan
Daniel Adam Hatley
Elizabeth Rui He
Huiting He
Oierre Heidsieck
Michelle Heisner
Nadja Tilstra Helm
Meghan Davis Hely
James Henson
Michaela Iolanda Herron
Edward Steven Hershfield
Hillary A. Hewitt
Michiko Hirat
Sasha Bayla Rivka Hochman
Benjamin Hoffman
Brian L. Hoffman
Jeanne Marie Hoffman
Michael Scott Holcomb
Winkle H. Hong
Sjivani Honwad
Nobuo Hori
Krista Jacqueline Hosp-Jakubowski
Fong Hsu
Shih-chiang Hsu
Yanfeng Hu
Richard Huang
Yoon Young Huh
William Noble Hulsey
Peter Huthwaite
Takeo Iga
Tess K. Illos

In Memoriam

Keven J. Davis
New York, NY

James S. Eustice
New York, NY

Walter T. Faulkner
New York, NY

Joel J. Karp
Miami, FL

Bevin D. Koeppel
Mamaroneck, NY

Barry E. Lerner
Rye, NY

Fredric S. London
Greenwich, CT

Seymour Manello
Rochester, NY

Joseph T. McLaughlin
New York, NY

Philip C. Pinsky
Syracuse, NY

Peter M. Russo
Rochester, NY

Herbert A. Schectman
Cos Cob, CT

Paul F. Stavis
Castleton-on-Hudson, NY

Joseph C. Vispi
Buffalo, NY

Richard H. Weiner
Albany, NY

John M. Wulfers
Palatine, IL

Kohei Ishida
John W. Jacobson
Kristi Lynn Jahnke
Ashwin Janakiram
Ji Na Jang
Daniel Janow
Li Jiang
Miao Jin
Manali Pradyumna Joglekar
Jonathan Patrick Jones
Lauren Sophia Jones
Sarah Melissa Jones
Jennifer Ju
Benke Julia
Jee Won Jung
Eva Nicole Kalmar
Susan M. Kalp
Margit Kamaras
Joseph T. Karasek
Dayna Katz
Benjamin David Kayden
Jennifer Michelle Keighley
Graham Keithley
Caitlin Kekacs
Michael Kelchen
Robin Kelliher
Linda Kenna
Lauren Shar Key
Salwa Jamal Khatib
Ron Kilgard
Albert Kim
Byung Kil Kim
Elizabeth Kim
Hyo Jin Kim
Hyung Jin Kim
Ki Nam Kim
Yongwoon Kim
Matthew Arthur King
Amber Kirby
Valeriya Kirsey
Jennifer Kirton
Darcy Hideo Kishida
Mayu Kitahara
Muge Ayse Kiy
Gerald Klein
Jeremy Knee
Daisuke Kobayashi
Ryo Kohdate
Asuka Kondo
Renald Konini
William Lawson Konvalinka
Hayley Kornachuk
Bradley Eric Kotler
Estelle Kouakam Kenko
Yevgen Kovalov
Bridget Koza
David Michael Kress
Elizabeth Kreul-Starr
Alex Kuehling
Sarah Kuendig
Paul Kunc-Jasinski
Andrey V. Kuznetsov
James Kwok
Janice S. Kwon
Troy Jahleel Kenaz Lambert
Joshua Landau
Candice Michele Lang
Noel Todd Langerman
Daniel Craig Lapidus
Bryan Daniel Laplant
Brent John LaPointe
Megan Larkin
Holly Larson
Faizal P. Latheef
Eric Latzer
Chung Ba Thanh Le
Andrea Michelle Lee
ChoongJae Lee
Chunsoo Lee
Jared Lee
Jessica Lee
Kai-chen Lee
Kyoung Hoon Lee
Ming Chu Lee
Sora Lee
Thomas Simmons Lee
Vera Zun-woo Lee
Alexander Leff
Michael Leith
Jonathan Leo
Albert J. Leonardo
Justin David Levine
Myrisha S. Lewis
Min Li
Changyu Liao
James Liebscher
Ryan Lighty
Yong Lim
Abby Lin
Joseph Lindell
Wendy Lisman
Juliya Litichevskaya
Lori Kai Littlejohn
Douglas Eugene Litvack
Cynthia Liu
Wei Ming Wilson Lo
Wendy Lo
Geoffrey C. Lorenz
Pietro Lorenzini
Nathalia Lossovska
Sara Lovato
Romola Olinthia Lucas
Kevin Lumpkin
Vicki Lung
Maria Luppino
Marie Lussier
Jessica H. Luzzi
Maylea Ma
Bas Maasen
Daniel Mach
Enrique Alberto Maciel-matos
Christina Ann Maclsaac
Andrew Macurdy
Francesca Maiocchi
Ariel Mairone
Kristin Makar
John Maloney
Aimee J. Manansala
Aichatou Bintou Mane
Alexandra Marghella
Brandon Marley
Lauren Marsh
Christopher Dene Marshall
David Ross Martin
Jessica Ann Martin
Brian J. Massengill
Parul Mathur
Michele Lee Matrachia
Paul Richard Matri
Candia Matthieu
Fonda J. Mazzillo
Roxanne McCarthy
Chantelle D'nae McClamb
Gail Kathleen McDonald
Michael A. McGarry
Elliott Catherine Zekany McGraw
Margaret McInerney
Erin McLaughlin
Grainne McMahon
Katie McManus
Lisa Marie McQuade
Samantha Kirsti McWilliams
Manmeet Singh Mehendiratta
Hardik Pratik Mehta
Anna Melamud
Madison Meng
Stefani Meyer
Justyna Mielczarek
Shirin Mirsaeidi
Ross Miles Mitchell
Katherine Mitroka
Rashi Nidhi Mittal
Caroline Mix
Kara Mobley
Catherine S. Mock
Mohamed Faizal Mohamed Abdul Kadir
Diana Theresa Mohyi
Dan Mokrycki
Alice Monet
Nicholas Monsees
Tara Mooney
Sally Anne Moore
Sarah Moraly
Joseph R. Mucia
Bridget Tina Mullaly
Eric D. Mulligan
Jennifer Mullins
Stephen Eugene Mullkoff
Patrick Mulrooney
David Mussche
Hema Muthiah
Ifiok Mwa
Carolyn Sharenow Nachmias
Randy Ghazi Nahle
Sachi Nakayama
Annapurna Nandyal
Jennifer Nelson
Cindy Nesbit
Rebecca H. Newman
Jennifer Nguyen
Sha Ni
Sebastian Lysholm Nielsen
Michihiro Nishi
Joseph G. Nosse
Alyssa Nugent
Cathrine Maria Nyander
Brett O' Brien
Adebola Esther Odepe
Tonye Tony Oki
Olubusola Onorere Okulaja
Christopher Olive
Ramon Luis Olivencia
Andrew Thomas Oliver
Edwardson Lee Ong
William P. Opel
Allison Orpilla
Raphael Martin Ortega
Adetutu Oshineye
Kristina Osswald
Yoshiaki Otsuki
Lisa Larrimor Ouellette
Rhys John Owens
Mary Lynn Pac-urar
Alexander Pacheo
Thomas Adams Pagliarulo
Jee Won Paik
James M. Parisi
Hyejin Park
Namjoon Park
Sa-Eue Park
Jigar J. Patel
Ravin Patel
Flavia Maffei Pavie
Pearl Chi Pui Pearl
Jolanta M. Pekalska
Andrew Penman
Dawn Amber Pepin
Louis Anthony Peraggine
William Perdue
Sara Alice Perera
Andrew Perlmutter
Erin Lynn Peters
Michael Jon Peters
Laura Petredis
Emily Petrino
George Nader Phillips
Leigh Roger Phillips
Watcharin Henry Photangtham
Anne Pierson
Leah Bridget Pinto
Anne Marie Pippin
Adam Pollet
David Poltorak
Martyna Pospieszalska
Zachee Pouga
Lauren B. Powell
Gregory Field Price
Gary Lee Printy
Ian Privett
Aubrey Proctor
Olga Puigdemont Sola
Zarina Pundole
Lily Qian
Justin Taylor Quinn
Drut Radu Radulescu
Irwin Perry Raij
Lee Edwin Rajsich
Jason J. Ranjo
Michael Ravvin
Jennifer A. Ray
Earl Dubois Raynor
Rimma Razhba
Brendan Craig Recupero
Carla Reeves
Oliver Mark Reimers
Vicente Padilla Reyes
Larkin Lynn Reynolds
Navid Rezanejad
Michelle Lorraine Rice
Justin Matthew Riess
Andris Rimsa
Judith a. Rios
Walker Ristau
Jill Rivera
Daniel Roberts
Jessica Rodek
Jesse D. Rodgers
Matthew D. Rodgers
Rebecca Rodgers
Rachel J. Rodriguez
Matthew Richard Rodwell
Rosalia Roman Urcuyo
Avi Rosenblit
Derek Jay Ross
Neil Ruben
Daniel Ryan
Tarek Saghir
Rowena Fatima Mendoza Salonga
Catherine Sam
Alejandro Alfonso Sanchez-mujica Almada
Gregoire Frederic Sauter
Ashley Schaefer
Jamie S. Schare
Donald Eric Schieffer
Joseph Schlingbaum
Angela Schnell
Nicholas P. Schroter
James Joseph Scott
Zaldwaynaka L. Scott
Patrick John Scudieri
Nathan J. Seifert
Jonathan Serbin
Amy Sfara
Amee Viren Shah
Sumera Shaikh
Mahdi Shams
Miaomiao Shan
Lauren Sheets
Sami Edmund Shehadeh
Michele Shelton
Zhaojun Shen
Haiwen Sheng
Timothy Patrick Shields
Boris Shmaruk
Jonathan Burton Shoebotham
Takao Shojima
Roya Shokrizadeh
Lucas Isaac Silva
Scott Simeon
Gaelle Aloisia Simeon-Lauriston
Adam Thomas Simons
Justin James Skvarce
Robert Brian Sledz
Alexandra Sloan
Joanna Slott
Ileana Mihaela Smeureanu
Jessica Marie Smith
Katrina Smith
Thomas Andrew Smith
Thomas Patrick Smith
John Matthew Snow
Tommaso Soave
Darryl Wen Yan Soh
Ahreum Song
Won Ho Song
George John Souris
Ashley Nicole Southerland
Ian Spear

Eric B. Sposito
Ofir Yoseph Srulovici
Jessica Stein
Kurt Russell Steinkrauss
Jill Noel Stephens-Flores
Shannon Sterritt
Carlos Ignacio Suarez Anzorena
Stephanie Sykes
Maho Takenoshita
Matthew Talley
Julia Tamulis
Kiattikun Tanapad
Wanrong Tang
Yimin Tang
Cosima Taror
Diana Taylor
Jana Lemadry Taylor
David Nathan Tebbi
Amanda Thai
Jean Marie Thomas
Edward Seng Wei Ti
Bartlomiej Stanislaw Tokarz
Michelle G. Tong
Tracy Tong
Anthony Paul Torntore
Brian David Torresi
Kelly Towns
Daphne Trainor
Celine Tran
Jonathan Treves
Stacey Lee Trien
Antonia Jil Uekermann
Robert Joseph Van Maerssen
Maria Helene Van Wagenberg
Carlos Eduardo Vasconsellos
Andrea Vella
Achilles Vergis
Anand Kishore Verma
Eric M. Victorson
John Nicholas Visconi
Christopher Vitale
Kate Voigt
Dorothee Andrea Ilsabe Von Einem Genannt Von Rothm
James Wallace
Corona Wang
Li-Kai Wang
Yiting Wang
Meghan Waters
Jill Grace Webster
Jennifer Wedekind
Sarah Wegman
Richard Leonard Weiss
Patrick Georges Weldon
Jannis Tobias Werner
James Alan West
Chandra Whalen
Jeffrey James Whitehead
Robert Godson Whittel
Kristal Marie Wicks
Seth Wiener
Joanna Wierzbicka
Jessica Wilde
Lee William
Dominique Lee Windberg
Andrew Winerman
Desire Cedric Woi
Jarrett Brice Wolf
Rachel Wolkowitz
Lauren Boyce Woodall
Alexa Woodward
James John Wormington
William Nicholas Wright
Frederick Wu
Jibo Wu
Elizabeth Wysocki
Qin Xu
Randall Yamauchi
Elyse K. Yang
Eui Hyun Yang
Meesun Yang
Xi Yang
Alicia June Yass
Devin Ryu Yasuda
Kathryn Yates
Maheeta Yelamanchi
Damian Guan Yao Yeo
Qi Yi
Yu Yin
Adam Yoffie
Ri Yoo
Soyoung Yoon
Bella Zaslavsky
Lin Zhan
Jing Zhang
Liang Zhang
Michelle L. Zhang
Zhijun Zhang
Ziran Zhang
Qiawjing Zheng
Biqing Zhou
Qian Zhu
Xinying Zhu
Adriana Zimora
Qing Zou

Foundation Memorials

A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to The New York Bar Foundation. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

THE NEW YORK BAR FOUNDATION

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I represent Client Alpha and Client Beta in unrelated matters. Client Beta is a federal agency. Client Alpha's matter requires me to seek discovery from a third party, which is bankrupt and in receivership with Client Beta. Does this discovery request put me in conflict with Client Beta? If so, is this a waivable conflict? Can I avoid the conflict by having another firm seek the discovery on my firm's behalf?

Sincerely,

A.M. I. Conflicted

Dear A.M. I. Conflicted:

Your question poses the problem of the "thrust-upon" conflict, in which an attorney did not deliberately attempt to represent two opposing parties, but because of circumstances outside the attorney's control, the attorney finds him- or herself in that unenviable position. Thrust-upon conflicts often arise due to changes in corporate ownership; the classic example is the law firm who represents Corporation A in a suit against Corporation B, and, while the suit is ongoing, another of the firm's clients, Corporation C, acquires Corporation B, thrusting upon the firm the conflict presented by representing both the plaintiff and the defendant.

In the classic example, the law firm cannot waive the conflict. Pursuant to Rule 1.7(a)(1) of the New York Rules of Professional Responsibility (the Rules), a lawyer cannot represent a client if the representation involves representing differing interests unless the lawyer satisfies the Rule 1.7(b) exceptions: the lawyer reasonably believes he or she can provide competent and diligent representation to each affected client, the representation is not legally prohibited, the clients are not opposing each other in the same litigation, and the affected clients give their informed written consent to the representation. The classic thrust-upon conflict does not meet the Rule 1.7(b) exception and thus is not a waivable conflict.

Your situation differs, however, because you are not directly opposing an existing client. Instead, you represent a client who needs discovery from a third party who is in receivership with an existing client. We must determine, first, if you are adverse or otherwise in conflict with your client, and then, if a conflict does exist, determine whether the conflict is waivable pursuant to Rule 1.7(b).

Underlying the conflicts rules are the primary duties lawyers owe their clients: the duty of loyalty and the duty of confidentiality. If lawyers were permitted to represent a client in one action and be adverse to the client in another action, we could not be true to these duties, because the very secrets learned from the client in the first action could be valuable ammunition against the client in the second. A surface-level analysis of your situation suggests that your duties to Client Beta would not be violated if you represent Client Alpha in its quest for third-party discovery from the bankrupt entity, because the records you seek are not Beta's and you are not seeking to exploit Beta's confidences, given to you under the veil of attorney-client privilege, for the benefit of Alpha. Adhering to the strict letter of your duties, one might conclude that there is no conflict.

A surface-level analysis, however, is not enough. Client Beta, as receiver, has stepped into the shoes of the bankrupt entity with the purpose of preserving the bankruptcy estate. It is Beta who will be maintaining and managing the records of the bankrupt entity, and it is Beta which must respond to any discovery request served on the entity. If any records of the receivership period are sought, the records to be produced are Beta's as well as the bankrupt entity's. For all these reasons, while the third-party discovery Client Alpha needs is ostensibly sought from the bankrupt entity, in actuality the disclosures will come from Beta. If Beta finds it advisable to oppose the discovery demand, you would find yourself in an adversarial position with your client, a crystalline example of the representation of differing interests description of conflicts prohibited by Rule 1.7(a)(1). With a conflict present, you cannot represent Alpha in seeking the third-party discovery from the bankrupt entity in receivership unless the conflict is waivable and you are able to obtain the necessary waivers.

Furthermore, even if this conflict was not readily apparent, as lawyers we have a duty to the perception or appearance of conflicts as well as actual conflicts. Courts have disqualified attorneys on the basis of perception alone, even when no evidence of an actual conflict existed. In *Bank of Tokyo Trust Co. v. Urban Food Malls*, 229 A.D.2d 14, 22 (1st Dep't 1996), for example, the court disqualified a law firm from acting as counsel to a receiver "because of the spectre of a possible conflict" present because an associate at the firm, who was not involved in the current dispute, had worked on matters for the owners of the properties in receivership when he worked at another law firm some 10 years prior. While the third-party discovery you seek may not intrude into the period in which Client Beta began acting as receiver, and Beta may

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.

not oppose the discovery request, the risk of an appearance of a conflict here is simply too high.

The next question is, Is your conflict waivable? If your situation fits within the exceptions described in Rule 1.7(b), the conflict is waivable. However, you may want to consider an alternative to waivers: conflict counsel.

Because only a small and discrete portion of your representation of Client Alpha puts you in a conflict with Client Beta, you may negotiate a revision to your engagement letter to Alpha in order to exclude this particular third-party discovery from your representation. Alpha can engage another lawyer – the conflict counsel – for the limited purpose of seeking and obtaining the necessary third-party discovery from the bankrupt entity. This preserves your duties of confidentiality and loyalty to Alpha and Beta but allows Alpha to seek the discovery it needs while avoiding the potentially high costs of obtaining new counsel Alpha would incur if, due to the conflict with Beta, you were disqualified and forced to discontinue your representation of Alpha mid-stream.

Limiting the scope of your representation of Client Alpha is permitted under Rule 1.2(c), provided the limitation is reasonable, Alpha gives its informed consent and, if necessary, notice is provided to the tribunal and opposing counsel. Here, the limitation is reasonable, because you are only excluding from the representation the limited issue of the third-party discovery sought from the bankrupt entity. Assuming Alpha agrees to the limitation, you may limit your representation to exclude seeking the third-party discovery.

While conflict counsel do not appear to be in widespread use in New York, there is no indication that New York state courts disfavor their use, and courts in other jurisdictions have suggested or encouraged their use. *See, e.g.*, *United States v. Jeffers*, 520 F.2d 1256, 1266 (7th Cir. 1975) (Stevens, J.) (acknowledging that ethical considerations limited a lawyer's ability to thoroughly cross-examine a witness where the witness was a former client and suggesting that the lawyer should have had "some other lawyer retained for this limited purpose"); *Sumitomo Corp. v. J.P. Morgan & Co.*, No. 99 Civ. 8780(JSM), No. 99 Civ. 4004 (JSM), 2000 WL 145747, at *2–5 (S.D.N.Y. Feb. 8, 2000) (defendant Chase's motion to disqualify law firm Paul, Weiss from representing plaintiff Sumitomo in consolidated action, on the grounds that Paul, Weiss represented Chase in other matters, denied because Paul, Weiss had declined to represent Sumitomo in action against Chase and Sumitomo had engaged separate counsel for that action).

Conclusion

Seeking discovery from Client Beta on behalf of Client Alpha, even where Beta is merely acting as a receiver for the party from whom the discovery is actually needed, creates a conflict, but the conflict is waivable if your situation meets the requirements of Rule 1.7(b), i.e., you reasonably believe you can provide competent and diligent representation to Alpha and Beta, the representation is not legally prohibited, the clients are not opposing each other in the same litigation, and Alpha and Beta give their informed written consent to the representation. Additionally, you have the option of obtaining consent from Alpha to exclude from your representation seeking discovery from Beta and advising Alpha to seek conflict counsel for the limited purpose of seeking the necessary discovery.

The Forum, by
Vincent J. Syracuse, Esq. and
Amy S. Beard, Esq.
Tannenbaum Helpern Syracuse & Hirschtritt LLP
New York, New York

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am an attorney at a law firm with a large litigation practice. Obviously, this entails the exchange of numerous discovery demands between parties, including demands for a bill of particulars or interrogatories, and demands for discovery and inspection. In addition, my cases involve the scheduling of numerous depositions.

Because of the demands of a busy practice, opposing attorneys do not always respond timely to discovery requests issued by my firm. In addition, disputes arise between parties regarding what is discoverable and whether certain documents have to be produced. Parties also struggle with scheduling depositions when written discovery requests have not been honored. I have sometimes encountered attorneys who refuse to respond to requests for their client's availability for deposition.

It is my understanding that attorneys are required to engage in good faith efforts prior to filing motions to compel discovery responses. However, I have received motions to compel from adversaries who have made little to no effort to confer with my office prior to filing their discovery motions. I have even received motions which include the obligatory affidavit of good faith efforts when no effort has been made by that party to speak with me about the allegedly outstanding discovery. In addition, I have often been in the position of making several attempts to contact opposing counsel with respect to outstanding discovery demands or a refusal to cooperate in deposition scheduling, without receiving any response. Phone calls and letters have gone unanswered.

Can the Forum please shed some light on what is required in order to fulfill the good faith efforts requirement prior to filing a discovery motion, including a motion to compel? What efforts are required prior to filing the motion by the party demanding compliance? How long must I wait before filing a motion to compel where opposing counsel is non-responsive to my efforts to communicate on this issue? Do lawyers have an ethical obligation to cooperate with each other during discovery?

Sincerely,
Undiscovered

you may serve the papers electronically (email) if the chief administrator of the court has authorized this method of service and if the party has consented to this method of service. Most practitioners who serve by email do so because the case is part of an electronic filing (e-filing) program through the New York state courts and the court rules allow for service by email.[9]

The CPLR explains that if a party to the action is pro se or you can't serve the party's attorney, you must serve the pro se party as outlined in CPLR 2103(b)(1), (2), (4), (5), or (6).[10]

If you serve your motion papers or opposition papers by facsimile, use facsimile only when your adversary designates a facsimile number for service of papers. CPLR 2103(b)(5) provides that

> [t]he designation of a facsimile telephone number in the address block subscribed on a paper served or filed in the course of an action or proceeding shall constitute consent to service by facsimile transmission in accordance with this subdivision. An attorney may change or rescind a facsimile telephone number by serving a notice on the other parties.

Serve the motion and supporting papers at least eight days before the return date—the date the motion is scheduled for the judge to hear it in court. If you're opposing a motion, serve your opposition papers at least two days before the return date.[11] The moving party might not always receive the opposition papers in time for the return date. If you're the moving party, give your opposing party enough time to oppose your motion. For example, file your moving papers at least 16 days before the return date. Your adversary will have to serve its opposition papers at least seven days before the return date. If you need to reply to those papers, do so at least one day before the return date. See below for more information on replies.

In the last issue, the *Legal Writer* discussed bringing motions by order to show cause. You may not bring a notice of motion earlier than the eighth day after you've served the motion papers;[12] therefore, if you want the motion heard faster, you'll have to bring your motion by order to show cause. If you move by order to show cause, it's up to the court to determine the return date, the method of service, and the service date for the order to show cause and any opposition papers.[13] Practitioners usually leave blanks on their orders to show cause for the court to choose the dates.

When you serve your motion papers by mail, add five days to the return date.[14] For example, on an eight-day notice of motion, the return date will be 13 days after mailing (eight days' notice plus five days for mail equal 13). On a 16-day notice of motion, the return date will be 21 days after mailing (16 days plus five days for mailing equal 21 days).[15] A court might deny your motion even if your adversary doesn't appear on the return date if you didn't account for the five days it takes for mailing and for your adversary to respond on time.

If you use a facsimile to serve your papers, no additional time need be added to the CPLR service period. CPLR defines "facsimile transmission" as "any method of transmission of documents to a facsimile machine at a remote location which can automatically produce a tangible copy of such documents."[16] Facsimile is almost instantaneous; your adversary receives your motion almost as soon as you send it. If you use an overnight-delivery service to serve the motion, add one day to the prescribed CPLR time periods.[17] The CPLR defines "overnight delivery service" as "any delivery service which regularly accepts items for overnight delivery to any address in the state.[18] On an eight-day notice of motion, for example, the return date will be nine days after mailing (eight days' notice plus one day for overnight mail equal nine).

You may always ask your adversary for more time to oppose a motion or to reply or to postpone the return date of the motion; if your adversary doesn't consent, you may ask the court for more time on the return date.[19]

Filing Motions

You must give the court all the motion papers you've served. File your papers by the return date, at the latest, with the clerk's office or motion support office.[20]

When you file your papers, attach an affidavit of service to the motion papers. Provide in the affidavit of service (or affirmation of service, if an attorney effectuates service) the date of and the method of service.[21]

If a judge hasn't yet been assigned to the case, accompany your motion with a Request for Judicial Intervention (RJI). File your RJI along with your motion and serve it on all the parties. Otherwise, the court clerk won't accept your motion papers.[22]

Check for specific filing rules with the motion support office or the clerk's office in the county where you're filing your motion papers. You'll have to pay a fee when filing your motion.[23] The clerk of the commercial part or other specialized court parts might have different filing rules and fees. Check CPLR Article 80 for an explanation of court fees.

Local rules and the assigned judge's rules often discuss requirements pertaining to motions. Some judges require practitioners to deliver their motion papers directly to the judge's chambers even after the practitioner filed the motion. Some judges like courtesy copies. Others hate them.

Opposing the Motion

If you've been served with a motion, you must decide whether to oppose it.[24]

If you don't oppose the motion, some courts will determine whether the law supports the motion. But many will grant the motion on

default, without thinking about it too much. You should therefore oppose your adversary's motion even if you think the motion is meritless.

Also, most courts won't allow attorneys who haven't opposed a motion in writing to oppose the motion orally. The failure to submit written opposition results in a default.[25]

A cross-motion is as effective as a motion on notice. It seeks affirmative relief, just like a regular motion.

Sometimes you might not need or want to oppose a motion. Your client might not want to spend the money to oppose the motion. Sometimes filing opposition papers will unnecessarily delay your client's case. Sometimes your adversary's motion is inconsequential: Your adversary may, for example, move to extend your adversary's time to do something in the case or move to correct a technical problem. And sometimes you'll know that the judge will grant the motion despite your opposition. Consider the possibility of consenting to the motion in these circumstances.

If you draft opposition to the motion, label your opposition. Example: "Plaintiff's Opposition to Defendant's Motion to Dismiss." Name the exact motion you're opposing. If you're opposing more than one motion, draft a separate affidavit (or affirmation) for each motion.

You may also serve and file a brief or memorandum of law if you have a legal basis for opposing the motion. If you have only a factual basis to oppose the motion, affirmations, affidavits, and exhibits might suffice to explain to the court why you're opposing the motion.

You must serve your opposition papers on all parties.[26]

Cross-Motions

A party seeking relief against the moving party may do so by moving in a separate motion or by cross-moving. If you cross-move, the same court or judge will hear the motion and the cross-motion at the same time. Under CPLR 2215, a cross-motion is a demand for relief by someone other than the moving party. In your cross-motion, you may demand relief that doesn't respond to the relief the moving party sought. You may demand several different types of relief or relief in the alternative.[27]

A cross-motion is as effective as a motion on notice. It seeks affirmative relief, just like a regular motion.

If you seek affirmative relief from the court but you put in opposition papers instead of cross-moving, it would be error for the court to grant you the relief you seek.[28]

Any party served with a motion may cross-move.

You must serve your cross-motion on the moving party.[29]

If you're seeking relief from a non-moving party, don't cross-move. File a separate motion.

If you're cross-moving, serve and file a notice of cross-motion.[30] You'll have to pay a court fee when you file your notice of cross-motion.[31]

May you cross-move if you've been served with a motion but the motion doesn't directly affect you? CPLR 2215 suggests that you may cross-move if you're seeking affirmative relief. When in doubt about cross-moving, move in a separate motion, and file your notice of motion and supporting affidavits.

You may oppose your adversary's motion and cross-move at the same time. All the papers you'd need to serve and file are in your opposition and a notice of cross-motion. Your notice of cross-motion is all you need to alert the court and your adversary that you're seeking affirmative relief.[32] And your opposition papers might contain all the evidence the court needs to decide your cross-motion. CPLR 2215 provides that "a party may serve upon the moving party a notice of cross-motion demanding relief, with or without supporting papers" provided you comply with CPLR 2215(a) and (b). If you need to give the court additional information —information not in your opposition papers — to support the affirmative relief you're seeking, you may submit in your cross-motion any affidavits, exhibits, and brief or memorandum of law.

The amount of time you have to serve your cross-motion depends on the amount of notice in the original motion. Serve a notice of cross-motion at least three days before the return date.[33] If you serve by mail, add three days; therefore, you'd need six days' notice before the return date (three days' notice plus three days for mailing). If you use overnight delivery you'll need one day's notice. Therefore, you'd need four days' notice before the return date (three days' notice plus one day for overnight mail).

If the original motion gave you at least 16 days' notice and demanded that you respond to the motion at least seven days in advance of the return date, you must serve your cross-motion at least seven days in advance of the return date. If you mail your cross-motion, you must give at least 10 days' notice (seven days' notice plus three days for mailing). If you use overnight mail, you'll need to give one day's notice. Therefore, you'll need eight days' notice before the return date (seven days' notice plus one day for overnight mail).

You may, but you're not required to, accompany your cross-motion with supporting papers to substantiate your cross-motion.[34] A court may decide the cross-motion on the papers in the original motion.

Moving Party's Reply

You may want to reply to your adversary's opposition papers. If you reply, don't repeat the arguments you made in your original motion, and don't

Continued on Page 58

assert new arguments. Only if your adversary raised new legal arguments in the opposition papers should you address those arguments in a reply.[35]

If you raise new arguments in your reply, your adversary won't have the opportunity to respond in a sur-reply. The CPLR doesn't mention a sur-reply. If your adversary submits a sur-reply, a court will not consider it. In its discretion, though, a court may sua sponte ask for a sur-reply.

> Don't risk defaulting for failing to appear on the return date for oral argument in a court that requires a personal appearance.

A lawyer must offer a good reason to explain to the court why a sur-reply is appropriate.

If you gave your adversary eight days' notice on the original motion, you probably won't have any time to reply to the opposition papers. If you gave your adversary 16 days' notice on the original motion, your adversary will have seven days to oppose the motion, and you'll have one day before the return date to reply.

You must file all papers with the court no later than the return date.[36] Because of time constraints, some practitioners bring their reply papers to court on the return date. If you do that, file your reply and bring a courtesy copy for the court and, possibly, your adversary.

Appearance on the Return Date and Oral Argument

In some New York counties, you'll need to request oral argument formally on a motion. To request oral argument formally, writing "oral argument requested" on the notice of motion, order to show cause, opposition paper, or notice of cross-motion will be sufficient.

In other New York counties, and depending on the judge, a court might require oral argument on a motion. Appear on the return date and be prepared for oral argument.

In other counties, and depending on the judge, you might have to request to submit your motion without oral argument.

Judges have the discretion to allow, limit, forbid, or require oral argument on a motion.[37] Some judges require oral argument on some motions but not on others. Some judges require oral argument on the return date; other judges will schedule the argument or a motion conference for a later date.

Follow the court procedures in your county and the individual judge's rules.

Don't risk defaulting for failing to appear on the return date for oral argument in a court that requires a personal appearance.[38] If your adversary fails to oppose your motion or to appear in person (if required), the court will grant your motion on default if you made out a prima facie case for the relief you're seeking in your motion. If your adversary defaults, your adversary may move to vacate the default under CPLR 5015(a)(1) if your adversary demonstrates an excusable default and a meritorious defense or claim.[39]

If you and your adversary agree, you may adjourn the motion. If the court or judge's rules permit, prepare a stipulation of adjournment and submit it to the court clerk or judge. You may not adjourn a motion by stipulation more than three times (no more than 60 total days) unless the judge's rules permit longer or frequent adjournments.[40]

In the next issue, the Legal Writer will discuss motions to dismiss and some nuances to CPLR 3211(a) and (b). ■

Gerald Lebovits, a Bronx County Civil Court judge, teaches part time at Columbia, Fordham, and St. John's law schools. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's email address is GLebovits@aol.com.

1. *See* CPLR 2214(a) ("A notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor.").

2. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial at § 16:101, at 16-16 (2006; Dec. 2009 Supp.)

3. *See, e.g., In re Curcio v. Kelly*, 193 A.D.2d 738, 739, 597 N.Y.S.2d 731, 733 (2d Dep't 1993) ("The court further properly denied the appellants' request for leave to interpose a cross claim nunc pro tunc, since their motion papers failed to annex a copy of the proposed cross claim."); *but see, e.g., Anderson Props., Inc. v. Sawhill Tubular Div., Cyclops Corp.*, 149 A.D.2d 950, 950-51, 540 N.Y.S.2d 82, 83 (4th Dep't 1989) (granting plaintiff leave to serve amended complaint asserting additional causes of action; plaintiff had failed to serve cross-motion requesting this relief and did not give court proposed amended pleading or affidavit showing that proposed amendment had merit.).

4. Barr et al., *supra* note 2, at § 16:101, at 16-16.

5. CPLR 2103(e).

6. Barr et al., *supra* note 2, at § 16:1-4, at 16-16.

7. CPLR 2103(a).

8. CPLR 2103(b).

9. *See generally* Gerald Lebovits, The Legal Writer, *E-Filing: Mastering the Tech-Rhetoric*, 83 N.Y. St. B.J. 64 (May 2011).

10. CPLR 2103(c).

11. CPLR 2214(b).

12. *Id.*

13. Most courts prohibit parties from serving replies on orders to show cause. *See, e.g.*, N.Y. County Justices' R. 13(b); *Forward v. Foschi*, 2010 N.Y. Slip Op. 52397(U), 31 Misc. 3d 1210(A), 929 N.Y.S.2d 199, 2010 WL 6490253, at *9, 2010 N.Y. Misc. LEXIS 6625, at *29 (Sup. Ct., Westchester Co. 2010) (Scheinkman, J.) ("This Court's rules and practice guide specifically advise counsel that replies are not accepted on motions pursued by orders to show cause. The submission of replies delays the disposition of motions and, thus, it would defeat the purpose of the order to show cause procedure to invite replies."). But reply papers are allowed in the New York City Civil Court's plenary part. According to the Unified Court System, "If you have received opposition papers prior to the hearing date of the Order to Show Cause, you may have time to prepare an affidavit in reply . . . . You must serve a copy of the reply affidavit on the other side and bring extra copies and the original, along with proof of service, to the courtroom on the date the Order to Show Cause is to be heard. If you did not have time to prepare reply papers and feel that it is necessary, you can ask the court for an adjournment

for time to prepare papers. The judge may or may not grant your request." http://www.nycourts.gov/courts/nyc/civil/osc.shtml (last visited Feb. 23, 2012). The rule is nearly verbatim for Housing Court. *See* http://www.nycourts.gov/courts/nyc/housing/osc.shtml#reply (last visited Feb. 23, 2012).

14. CPLR 2103(b).
15. Barr et al., *supra* note 2, at § 16:107, at 16-17.
16. CPLR 2103(f)(3).
17. CPLR 2103(b)(6).
18. *Id*.
19. CPLR 2104.
20. CPLR 2214(c).
21. *See* 22 N.Y.C.R.R. 202.8(b) (uniform rules for Supreme and County Courts); *see generally* CPLR 2214(b).
22. 22 N.Y.C.R.R. 202.6.
23. CPLR 8020(a).
24. Barr et al., *supra* note 2, at § 16:130, at 16-19.
25. *See, e.g.*, *Kohn v. Kohn*, 86 A.D.3d 630, 630, 928 N.Y.S.2d 55, 56 (2d Dep't 2011).
26. *See* CPLR 2214(c), 2103(e).
27. CPLR 2215(b).
28. Barr et al., *supra* note 2, at § 16:145, at 16-20.1, 16-21.
29. CPLR 2215.
30. *Id*.
31. CPLR 8020(a).
32. CPLR 2215; *see Palmieri v. Salsimo Realty Co.*, 202 Misc. 251, 252, 115 N.Y.2d 88, 90 (Sup. Ct., Bronx Co. 1952).
33. CPLR 2215.
34. *Id*.
35. For more on reply papers, see Gerald Lebovits, The Legal Writer, *Or Forever Hold Your Peace: Reply Briefs*, 82 N.Y. St. B.J. 64 (June 2010).
36. 22 N.Y.C.R.R 202.8(a); *see* CPLR 2214(c).
37. 22 N.Y.C.R.R. 202.8(d).
38. *McGoldrick v. 2100 Park Assoc.*, 279 A.D.2d 287, 288 (1st Dep't 2001); *Brosnan v. Behette*, 186 A.D.2d 165, 166 (2d Dep't 1992).
39. Barr et al., *supra* note 2, at § 16:172, at 16-22, 16-23.
40. 22 N.Y.C.R.R. 202.8(e)(1).

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Every year the self-designated wordsmiths of Lake Superior State University prepare a list of English words to be banished from the American vocabulary because they are "tired, over-used, and generally useless." Does their list of "banned" words help to get rid of them?

Answer: No. Only public usage decides which words to keep and which to discard from our wordstock; the public ignores edicts by small groups. In the 2010 wordsmiths' list, for example, only two words have not been seen since the group banned them: "bromance" and "chillaxin.'" (But then I had never noticed those words before 2010, so I am not an authority on the subject.) On the other hand, one word the wordsmiths banned was "Obama," as in the compound "Obamacare." That compound is still in robust health and has spawned several additional prefixes since being "banned."

The English language does change, however, to the annoyance of some individuals. Words are added; others disappear. Our vocabulary expands and contracts, words change in meaning. One example appears in the word "robust," used above. Until recently, "robust" referred only to the well-being of animate beings (as in, "the robust athlete"). But *robust* has greatly expanded and is now a fad word, referring to corporations, endeavors, and economies.

To be awarded the title "lady," a woman once had to be of noble birth. Then the meaning of "lady" expanded to include upper-class women. Now every woman is democratically entitled to the honorarium "lady," and to call a female adult a "woman" borders on insult. (Our local newspaper avoids that mistake: in reporting a physical altercation between two jail inmates, both were described as "ladies.")

While some words expand, others narrow. During the Middle English period (approximately 1066 to 1500 A.D.), any young person was called "girl." Now *girl* has narrowed so that it describes only a young female person. When a governor of California expanded it, warning Republicans not to be "girlie-men" during a political campaign, Democrats were furious. When a new meaning takes over, the original meaning of a word may vanish. This has occurred with the word *nice*, which meant "ignorant" when English people borrowed it from France in 1290. Chaucer adopted it almost at once, but with new meanings: "lascivious or wanton." Currently, "nice" has lost that pejorative sense and has expanded to mean "pleasant or agreeable in nature, attractive in appearance, of good character, subtle, executed with skill." (For other favorable meanings, check any dictionary.)

Romantic poet John Keats described the Biblical Ruth as "sick for home, standing in tears amidst the alien grain," which gave most modern readers a mental image of Ruth, surrounded by tall corn-stalks. But that image is false. During the early 19th century Keats wrote that *corn* meant "grain," and since that time the meaning of *corn* has narrowed to identify a specific kind of grain. The word *deer* has also narrowed, having once meant "any wild creature."

Earmark appears to be a compound composed of *ear* and *mark*. But the first syllable actually has nothing to do with an *ear*, the organ of hearing. Instead it refers to a seed-bearing spike from which the word *ear* was derived, as in an "ear of corn." That is the same *ear* as appears in *earmark*, now a political euphemism which originally identified the ownership of a domestic animal.

Folk etymology also results in language change. The Dutch word *booze* referred to glass bottles shaped like log cabins, filled with liquor, and sold by E.C. Booz, a Philadelphia distiller. These were called "Booz bottles," an eponym. People quickly began to associate the name of the distiller with the name of the product; the word *booz* added an "*e*," its spelling changed, and *booze* expanded to mean any alcoholic drink.

The word *hangnail*, originally a compound referring to the damage a painful house nail might inflict, is made up of *hang* (originally *ang*: *pain*), as in the first syllable of "anguish," plus *nail*. As people associated the pain from damage to the cuticle of a person's fingernail, the word *hangnail* took on its new name. We achieved the name *cockroach* from the Spanish term ("cucaracha") because Americans associated it with the Spanish words *cock* ("rooster") and *roach* ("fish").

In Old English (before 1066) one word for "man" was *gome*. Although that word disappeared, it continued to be used in the compound *bridgome*, which then became our modern "bridegroom" because the public associated the noun *gome* with the noun *groom* ("stable boy") despite no link in the two meanings.

We gain wordstock by adopting it from other languages. The word *caucus* was taken from the Algonquin Indians, *sofa* from Arabia and *potato* from Haiti. We also gain language by adding new forms from our own stock: The noun "a lot" (a portion) came into Middle English from the verb "to allot." The verb *to beg* came from the noun "beggar" and *to burgle* from "burglar."

We add words as we need them and discard them when they become useless. In the Old English epic *Beowulf* there were 59 words for "hero." On the way to modern English, 58 were lost. Icelandic has numerous words

CONTINUED ON PAGE 61

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

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
ssmith@networkmediapartners.com

HELP WANTED

General Counsel. Oversee all legal issues of active architectural & interior dsgn firm; draft legal docs; review transactions; provide general legal guidance; review intellectual property issues. Juris Doctorate reqd. Must be licensed to practice Law in the State of NY. 12 mo. exp in pos. offd or as General Manager or any suitable combo of edu, training or exp. Resume by mail to Mr. Scott Ageloff, Ageloff & Associate Architects, PLLC, 1123 Broadway, Ste. 805, NY, NY 10010

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.

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.

VISITING PROFESSORSHIPS

Short-term pro bono teaching appointments for lawyers with 20+ years' experience Eastern Europe and former Soviet Republics. See www.cils3.net. Contact CILS, Matzenkopfgasse 19, Salzburg 5020, Austria, email office@cils.org, US fax 1 (509) 356 -0077.

MEMBERSHIP TOTALS

New Regular Members 1/1/12 - 2/14/12	**1,048**
New Law Student Members 1/1/12 - 2/14/12	**232**
Total Regular Members as of 2/14/12	**75,852**
Total Law Student Members as of 2/14/12	**3,545**
Total Membership as of 2/14/12	**79,397**

INDEX TO ADVERTISERS

ABA/State Street Bank & Trust Company	**9**
AdNet Advertising	**61**
Arthur B. Levine Co., Inc.	**21**
Attorneys Dell & Schaefer Chartered	**61**
Center for International Legal Studies	**61**
International Genealogical Search, Inc.	**39**
Jams/ Endispute	**15**
Jewish Guild for the Blind	**17**
LawPay	**cover 2**
NAM	**7**
The Company Corporation	**61**
USI Affinity	**4**
West, a Thomson Reuters Business	**cover 4, insert**

Language Tips
Continued from Page 60

for "snow." We need only one. But everyone is aware of the burgeoning new vocabulary the Internet has produced.

Efforts to control language usage are not new. Eighteenth century grammarians believed that the language they had inherited was "extremely imperfect," even the best writers committing "gross improprieties, which . . . ought to be discarded" (Grammarian Robert Lowth, 1762). It's safe to say that our current crop of language reformers will have no more success than was achieved by Lowth and his earnest group. ■

HEADQUARTERS STAFF EMAIL ADDRESSES

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

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

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

Teresa B. Schiller, *Executive Services Counsel*
tschiller@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

Debra York, *Assistant Manager*
dyork@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
Rosanne M. Van Heertum
Director of Development
rvanh@tnybf.org

THE NEW YORK BAR FOUNDATION

2011-2012 OFFICERS
M. Catherine Richardson, *President*
One Lincoln Center, Syracuse, NY 13203

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

John H. Gross, *Treasurer*
150 Motor Parkway, Ste. 400, Hauppauge, NY 11788

Cristine Cioffi, *Assistant Secretary*
2310 Nott Street East, Niskayuna, NY 12309

DIRECTORS
Lawrence R. Bailey, Jr., *White Plains*
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*
Kay Crawford Murray, *New York*
Patrick C. O'Reilly, *Buffalo*
Carla M. Palumbo, *Rochester*
Richard Raysman, *New York*
Lesley Friedman Rosenthal, *New York*
Sanford J. Schlesinger, *New York*
Justin L. Vigdor, *Rochester*
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

2011-2012 OFFICERS

VINCENT E. DOYLE III
President
Buffalo

SEYMOUR W. JAMES, JR.
President-Elect
New York

DAVID P. MIRANDA
Secretary
Albany

CLAIRE P. GUTEKUNST
Treasurer
New York

STEPHEN P. YOUNGER
Immediate Past President
New York

VICE-PRESIDENTS

First District
Ann B. Lesk, *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
David L. Edmunds, Jr., *Buffalo*

Ninth District
Hon. Arlene Gordon-Oliver, *White Plains*

Tenth District
Emily F. Franchina, *Garden City*

Eleventh District
David Louis Cohen, *Kew Gardens*

Twelfth District
Steven E. Millon, *Bronx*

Thirteenth District
Grace Virginia Mattei, *Staten Island*

MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

Samuel F. Abernethy
Timothy J. Fennell
Hon. Margaret J. Finerty
Glenn Lau-Kee
Ellen G. Makofsky
Eileen D. Millett
Sherry Levin Wallach
Oliver C. Young

NYSBA

MEMBERS OF THE HOUSE OF DELEGATES

First District
Abella, Zachary J.
Abernethy, Samuel F.
Abramowitz, Alton L.
† * Alcott, Mark H.
Bailey, Lawrence R., Jr.
Baum, Simeon H.
Berke-Weiss, Laurie
Berkowitz, Morrell I.
Berman, Scott M.
Blessing, Peter H.
Bohorquez, Fernando A., Jr.
Brown, Earamichia
Brown, Terryl
Burns, Howard W., Jr.
Chambers, Hon. Cheryl E.
Chang, Vincent Ted
Cheng, Pui Chi
Christian, Catherine A.
* Cometa, Angelo T.
Conley, Sylvia Jeanine
Crespo, Louis
DeGrasse, Hon. Leland G.
Di Pietro, Sylvia E.
Donaldson, Xavier R.
Ellerin, Hon. Betty Weinberg
Eng, Gordon
Eppler, Klaus
Feinberg, Ira M.
Finerty, Hon. Margaret J.
Finguerra-DuCharme, Dyan M.
Fink, Rosalind S.
Fontaine, R. Nadine
* Forger, Alexander D.
Galligan, Michael W.
Glanstein, Joel C.
Goldberg, Evan M.
Grays, Taa R.
Green, Prof. Bruce A.
Gutekunst, Claire P.
Gutheil, Karen Fisher
Haig, Robert L.
Hanks, Kendyl T.
Hawkins, Dennis R.
Hoffman, Stephen D.
Hollyer, A. Rene
Honig, Jonathan
James, Hon. Debra A.
† James, Seymour W., Jr.
Kahn, Michele
Kaplan, Matthew E.
Kennedy, Henry J.
Kera, Martin S.
Kiernan, Peter J.
* King, Henry L.
Kobak, James B., Jr.
Lau-Kee, Glenn
† * Leber, Bernice K.
Lesk, Ann B.
Lieberman, Ellen
Lindenauer, Susan B.
Lupkin, Jonathan D.
* MacCrate, Robert
Maltz, Richard M.
Marino, Thomas V.
McNamara, Michael J.
Miller, David S.
Minkoff, Ronald
Minkowitz, Martin
Moses, Barbara Carol
Moxley, Charles J., Jr.
Nathanson, Malvina
Nelson, Lester
Nijenhuis, Erika W.
Opotowsky, Barbara Berger
Parker, Bret I.
* Patterson, Hon. Robert P., Jr.
Prager, Bruce J.
Prowda, Judith B.
Reed, Thomas A.
Robertson, Edwin David
Rosner, Seth
Safer, Jay G.
Schindel, Ronnie
Sen, Diana Sagorika
Seymour, Samuel W.
* Seymour, Whitney North, Jr.
Silkenat, James R.
Sonberg, Hon. Michael R.
Spiro, Edward M.
* Standard, Kenneth G.
Stern, Mindy H.
Swanson, Richard P.
Syracuse, Dana V.
Syracuse, Vincent J.
Walsh, Susan J.
Wang, Annie Jen
Wolff, Adam John
Wolk, Lawrence J.
† * Younger, Stephen P.
Zuchlewski, Pearl

Second District
Bonina, Andrea E.
Cohn, Steven D.
Doyaga, David J., Sr.
Gerber, Ethan B.
Hernandez, David J.
Lugo, Betty
McKay, Hon. Joseph Kevin
Napoletano, Domenick
Park, Maria Y.
Richman, Steven H.
Romero, Manuel A.
Seddio, Hon. Frank R.
Slavin, Barton L.
Sunshine, Hon. Nancy T.

Third District
Ayers, James B.
Barnes, James R.
Baynes, Brendan F.
Burke, Walter T.
D'Agostino, Carolyn A.
Davidoff, Michael
DeFio Kean, Elena
Fernandez, Hon. Henry A.
Fernandez, Hermes
Hanna, John, Jr.
Hurteau, Daniel Joseph
Hutter, Prof. Michael J., Jr.
Kahler, Annette I.
Kaplan, Edward Ian
Meislahn, Harry P.
Miranda, David P.
Moy, Lillian M.
Pettit, Stacy L.
Privitera, John J.
Roberts-Ryba, Christina L.
Rosiny, Frank R.
Ryan, Rachel
Salkin, Prof. Patricia E.
Schofield, Robert T., IV
* Yanas, John J.

Fourth District
Baker, Carl T.
Coffey, Peter V.
Hoag, Rosemary T.
Lais, Kara I.
McAuliffe, J. Gerard, Jr.
McMorris, Jeffrey E.
McNamara, Matthew Hawthorne
Onderdonk, Marne L.
Rodriguez, Patricia L. R.
Russell, Andrew J.
Slezak, Rebecca A.
Stanclift, Tucker C.
Watkins, Patricia E.

Fifth District
Fennell, Timothy J.
Fish, Marion Hancock
Foley, Timothy D.
Gall, Erin P.
Gensini, Gioia A.
† * Getnick, Michael E.
Gigliotti, Hon. Louis P.
Howe, David S.
John, Mary C.
Ludington, Hon. Spencer J.
Myers, Thomas E.
Pellow, David M.
Radick, Courtney S.
* Richardson, M. Catherine
Tsan, Clifford Gee-Tong

Sixth District
Barreiro, Alyssa M.
Fortino, Philip G.
Gorgos, Mark S.
Grayson, Gary J.
Gutenberger, Kristin E.
Johnson, Timothy R.
Lewis, Richard C.
† * Madigan, Kathryn Grant
Mayer, Rosanne
Orband, James W.
Pogson, Christopher A.
Rich, Richard W., Jr.

Seventh District
Burke, Philip L.
† * Buzard, A. Vincent
Castellano, June M.
Gould, Wendy Lee
Harren, Michael T.
Hetherington, Bryan D.
Jackson, La Marr J.
Laluk, Susan Schultz
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.
* Vigdor, Justin L.
Walker, Connie O.
* Witmer, G. Robert, Jr.

Eighth District
Convissar, Robert N.
† Doyle, Vincent E., III
Edmunds, David L., Jr.
Effman, Norman P.
Fisher, Cheryl Smith
Gerstman, Sharon Stern
Hager, Rita Merino
† * Hassett, Paul Michael
Nelson, John C., III
Russ, Arthur A., Jr.
* Saccomando Freedman, Maryann
Schwartz, Scott M.
Seitz, Raymond H.
Smith, Sheldon Keith
Sweet, Kathleen Marie
Young, Oliver C.

Ninth District
Arnold, Dawn K.
Burns, Stephanie L.
Cohen, Mitchell Y.
Cusano, Gary A.
Cvek, Julie Anna
Enea, Anthony J.
Fay, Jody
Fedorchak, James Mark
† Fox, Michael L.
Goldenberg, Ira S.
Gordon-Oliver, Hon. Arlene
Hollis, P. Daniel, III
Markenson, Ari J.
Miklitsch, Catherine M.
* Miller, Henry G.
* Ostertag, Robert L.
Preston, Kevin Francis
Rauer, Brian Daniel
Ruderman, Jerold R.
Sachs, Joel H.
Sandford, Donald K.
Singer, Rhonda K.
Starkman, Mark T.
Stone, Robert S.
Strauss, Barbara J.
Strauss, Hon. Forrest
Wallach, Sherry Levin
Weis, Robert A.

Tenth District
Asarch, Hon. Joel K.
Block, Justin M.
* Bracken, John P.
Collins, Richard D.
DeHaven, George K.
Ferris, William Taber, III
Franchina, Emily F.
Genoa, Marilyn
Gruer, Sharon Kovacs
Hayden, Hon. Douglas J.
Karabatos, Elena
Karson, Scott M.
Krisel, Martha
Leventhal, Steven G.
† * Levin, A. Thomas
Levy, Peter H.
Makofsky, Ellen G.
McEntee, John P.
Pachman, Matthew E.
* Pruzansky, Joshua M.
Randazzo, Sheryl L.
* Rice, Thomas O.
Schoenfeld, Lisa R.
Shulman, Arthur E.
Tollin, Howard M.
Zuckerman, Richard K.

Eleventh District
Cohen, David Louis
DeFelice, Joseph F.
Gutierrez, Richard M.
Lee, Chanwoo
Nizin, Leslie S.
Risi, Joseph J.
Taylor, Zenith T.
Vitacco, Guy R., Jr.

Twelfth District
DiLorenzo, Christopher M.
Friedberg, Alan B.
Masley, Hon. Andrea
Millon, Steven E.
* Pfeifer, Maxwell S.
Quaranta, Kevin J.
Sands, Jonathan D.
Weinberger, Richard

Thirteenth District
Behrins, Jonathan B.
Cohen, Orin J.
Dollard, James A.
Gaffney, Michael J.
Hall, Thomas J.
Mattei, Grace V.

Out-of-State
Bouveng, Carl-Olof E.
Kurs, Michael A.
Millett, Eileen D.
Perlman, David B.
Ravin, Richard L.
Torrey, Claudia O.
* Walsh, Lawrence E.
Weinstock, David S.

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

BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XIV — Motion Practice Overview Continued

In the last issue, the *Legal Writer* discussed the motions that litigators have in their civil-practice arsenal. The *Legal Writer* briefly discussed the form and content of motions. It also discussed a motion's component parts: the notice of motion;[1] the supporting affirmations, affidavits, and exhibits; and the brief, or memorandum of law, in support of the motion. In this issue, the *Legal Writer* continues with more on motion practice.

Motion Practice Overview

The documents in motion practice are your motion papers, also known as your moving papers. This includes your notice of motion along with supporting affirmations, affidavits, and exhibits and your brief, also called a memorandum of law. Your adversary might want to answer your motion. Your adversary's papers are known as the opposition, or opposition papers. You might then want to respond to your adversary's opposition. Your response is called a reply.

You must prepare, serve, and file the notice of motion along with supporting affirmations, affidavits, and exhibits to have a court clerk calendar your motion before a judge. Also serve and file your brief, or memorandum of law, if you write one. A brief is helpful but not required.

Attach as exhibits to your motion copies of the pleadings if your motion puts the pleadings in issue. Attach them even if they're in the court file. If you're seeking to add or amend pleadings, moving to intervene, cross-claiming, or adding a party, include copies of the older pleadings and your proposed pleadings.[2] If you don't attach a copy of the pleadings, or the old and proposed pleadings, a court might deny your motion.[3]

Many of the rules discussed below apply to actions and special proceedings in New York, although this column is directed toward actions. Special proceedings sometimes have their own rules and unique procedures. So does Federal Court. Determine what kind of case you have and which court will hear it before consulting the rules below.

Serving Motions

Serve all copies of your motion and any supporting papers on all the parties appearing in the action.[4] You must also serve all parties in the action irrespective of the number of motions you make, and even if you're opposing or replying to a motion.[5]

You don't need to serve a party who has failed to appear.

When you're moving to join additional parties, you needn't serve the prospective parties with copies of your motion, but you may do so as a courtesy.[6]

Serve your motion papers the same way you'd serve other papers. The CPLR provides that "papers may be served by any person not a party of the age of eighteen years or over."[7] Follow the CPLR 2103 requirements for serving motion papers.

If an attorney represents a party, you must serve the party's attorney. If the same attorney represents more than one party, serve only one copy of your motion papers on that attorney.[8]

Serve the party's attorney by any of the methods outlined in CPLR 2103(b)(1)–(7). Under CPLR 2103(b)(1), you may deliver the motion personally on the attorney, inhand. Or, under CPLR 2103(b)(2), you may mail the papers to the attorney at the address the attorney designated; use the address on the attorney's notice of appearance. If the attorney has not designated an address, mail the motion to the attorney's last known address. Or, under CPLR 2103(b)(3), you may leave the motion papers at the attorney's office with a person in charge. If no one's in charge, you may leave the papers in a conspicuous place. If the office is closed, you may drop the papers in the letter drop or box at the attorney's office. Or, under CPLR 2103(b)(4), if you can't serve the papers at the attorney's office, leave the papers at the attorney's New York residence with a person of suitable age or discretion. Or, under CPLR 2103(b)(5), you may transmit the papers to the attorney by facsimile. Or, under CPLR 2103(b)(6), you may serve the papers by overnight mail at the address the attorney designated; if no address is designated, serve the attorney's last known address. Or, under CPLR 2103(b)(7),

Attach as exhibits to your motion copies of the pleadings if your motion puts the pleadings in issue.

Continued on Page 56

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

Stand Alone Titles

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: PUB1375 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