NEW YORK STATE BAR ASSOCIATION

# Journal

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NYSBA

# Race to the Finish Line

## Legal Education, Jobs and the Stuff Dreams Are Made Of

*By Gary Munneke*

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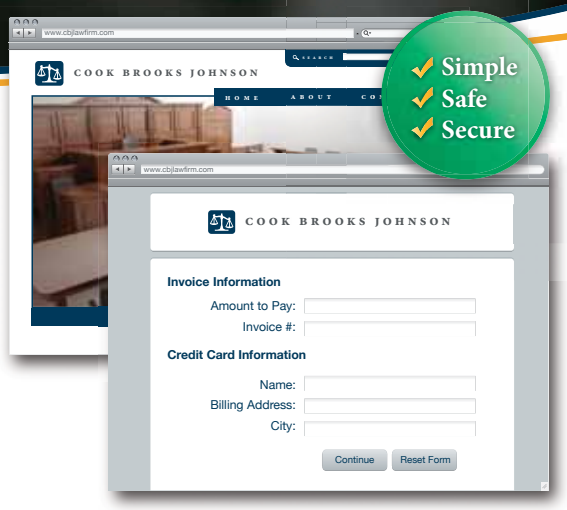


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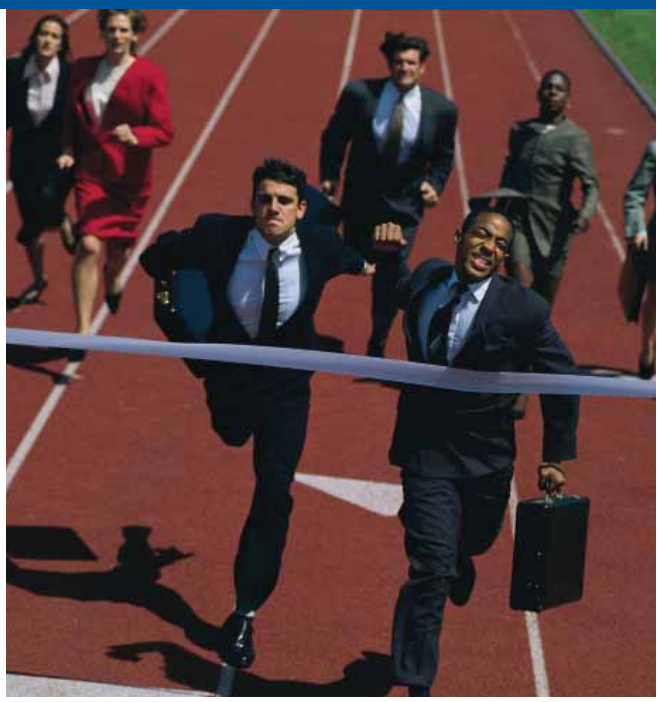



## DEPARTMENTS






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# Looking Ahead: Bar Week in Buffalo

The governing body of the State Bar Association, our House of Delegates, meets four times per year, typically gathering in Cooperstown in June, New York City during our Annual Meeting in January, and Albany in April and November. This spring, the House of Delegates will meet in Buffalo for the first time since 1986. The House has previously met in Buffalo, Syracuse, White Plains and Hauppauge, but it has been more than 20 years since we have held a meeting outside of our usual locations. The State Bar is coordinating a series of other exciting events in the days leading up to the meeting. "Bar Week" will begin on Tuesday, March 27, and conclude with the House of Delegates meeting on Saturday, March 31.

We will kick off Bar Week with a Section Appreciation and Recruitment Reception, which will bring representatives from our Association's sections together with the legal community in Western New York. This will be a terrific opportunity for existing section members to gather with colleagues, and for those who have not yet joined a section to learn more about the additional benefits that accompany section membership. Our sections are organized according to practice area (i.e., the Criminal Justice Section, the Business Law Section, etc.) and other common interests (i.e., the Young Lawyers and Senior Lawyers Sections). They provide members with networking opportunities and access to publications, listserves, forums and substantive educational programs. Joining a section is a great way to become more active and involved in the State Bar. The Section Appreciation and Recruitment Reception will allow you to meet other members and hear about the impact that section membership has had on their professional lives.

On Wednesday and Thursday, the State Bar and the Ontario Bar Association will jointly host a Bi-national Summit. The Summit will convene on Wednesday at the Ontario Bar Association in Toronto and continue Thursday at the Hyatt Regency in Buffalo. The two full-day programs will feature practitioners, judges and officials from Canada and the United States sharing their perspectives on a wide variety of cross-border legal issues, including employment law, estate planning, tax law, alternative dispute resolution and international transactions. We are thrilled that New York State Chief Judge Jonathan Lippman and Ontario Court of Appeals Chief Justice Warren Winkler have agreed to participate in a plenary session in Toronto focusing on cross-border trade in legal services.

The State Bar Task Force on Family Courts will also hold its fourth and final hearing on Thursday, where it will receive testimony from attorneys and other professionals and individuals with firsthand knowledge of the challenges facing our family courts. The Task Force has been working hard to generate recommendations regarding operational improvements and other ways to support overburdened judges and court personnel as they handle more cases with fewer resources. Much of the testimony will be delivered by practitioners in the Fourth Department, and we look forward to their contributions to this important initiative.

On Friday, in cooperation with the Bar Association of Erie County, the State Bar will host a training session for a new program called "Charity Corps," a joint initiative between the State Bar and the New York State Attorney General's office. Launched in January, Charity Corps is designed to prepare attorneys to help charitable organizations with issues such as filing requirements and good corporate governance. It is our hope that this program will make legal assistance available to nonprofits that cannot afford to retain counsel and provide important training to lawyers who would like to help charitable organizations in their communities.

Bar Week will conclude with our House of Delegates meeting on Saturday, where our dedicated volunteer members will conduct the Association's business – considering important legal issues and setting and advancing the agenda of the State Bar. Meetings of the House of Delegates are open to all Association members.

While the primary purpose of these meetings is to consider Bar Association policy, they also provide a wonderful opportunity to spend time with friends and colleagues from across New York State and beyond. Throughout the week, we will host tours and cultural events that will allow participants and their families to socialize and enjoy the city. Additional events and details will be announced in the coming weeks. I look forward to sharing my hometown with colleagues who have not had the opportunity to spend time in Buffalo and to give those who are familiar with the city a great reason to return. ■

VINCENT E. DOYLE III can be reached at vdoyle@nysba.org.


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March 2 — Albany (1:00 p.m. – 5:00 p.m.)
March 3 — Syracuse (9:00 a.m. – 1:00 p.m.)
March 10 — Buffalo (9:00 a.m. – 1:00 p.m.)
March 21 — New York City (5:30 p.m. – 9:30 p.m.)
March 28 — Long Island (5:30 p.m. – 9:30 p.m.)

**Medical Malpractice – 2012**
March 2 — Long Island
March 9 — Buffalo; New York City
March 23 — Rochester
March 30 — Albany

**Law Practice Management – Market U – Marketing on a Shoestring**
(9:00 a.m. – 3:00 p.m.)
March 7 — New York City

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

**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 30 — Buffalo

**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

**Successful Trial of a Matrimonial Case**
April 27 — Westchester
May 11 — Long Island
May 18 — Rochester
June 1 — Albany
June 8 — New York City

**Advanced Negotiation Techniques**
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

**Practical Skills: Basics of Handling an Auto Accident Case**
May 31 — New York City
June 5 — Albany
June 6 — Long Island; Syracuse
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# Race to the Finish Line: Legal Education, Jobs and the Stuff Dreams Are Made Of

**By Gary Munneke**

## The Bad News

For much of 2011, the legal press and b*law*gosphere produced a non-stop litany of negative stories about the dismal job market for lawyers and the failings of legal education in the United States. These critics argued that the law school value proposition no longer worked for students, who assumed significant student loan burdens and then entered a job market where many would not find legal jobs that paid the bills and serviced their debt. Anecdotal evidence suggested that graduates could make ends meet only by going to work for the most prestigious, highest-paying firms, despite declining job opportunities in that sector. Law schools, it was suggested, actively misrepresented their job-placement statistics in order to sustain a bankrupt system of legal education, which did not prepare graduates for the practice of law or the realities of the job market they would encounter. Commentators further noted that, over the past two decades, the cost of legal education had increased faster than the rate of inflation.

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It is true that the recession of 2008–2009 seriously undermined the job market for both new and experienced lawyers. It is also true that legal education is expensive, and many students pay for it through loans that have to be repaid after graduation. And it is well documented that some law schools misstated employment and other statistics in the tight, competitive job market of recent years. But connecting the dots in this case does not lead to a conclusion that our system of legal education is bankrupt or that law school is not an excellent career choice for many students. This article will attempt to re-connect the dots in a way that more accurately reflects contemporary legal education and the job market for lawyers.

I should disclose up front that I am a law professor at Pace Law School in White Plains. Some readers might be inclined to treat these comments as an apology for the status quo, but I have been an observer of the legal job market for almost 40 years and a frequent critic of traditional legal education in America. So when I say the writers and bloggers in the legal press have missed the mark in their criticism of legal education, it is not without recognizing that there is some merit in what they have to say. From where I sit, however, educators have done more to effectuate change than many critics will admit, and some of the fundamental emergent thinking about the future of legal education and the practice of law has come from the academy. What we need today is a cooperative dialogue among stakeholders in the legal market to forge a workable future. What we have is a stalemate, like two galleons firing broadsides in a Nathaniel Philbrick novel. This article is not only a plea for deans, professors, judges, practitioners, corporate counsel and bar leaders to talk, but also a blueprint for how to begin such a dialogue.

## Jobs, Jobs, Jobs

### Pre-2008

First, let's talk about the job market. I graduated in 1973 from a leading law school, yet I remember distinctly that the job market then was not all that great. The U.S. economy was struggling to emerge from a recession. The growth of large law firms that characterized the next quarter century and fueled a bull market for legal jobs was in its infancy. In those days, the top students were hired by the leading law firms (or joined those firms after clerking for a judge for one or two years), whereas students in the middle of the class scattered to a variety of different positions in small firms, government, corporations, and other concerns. A few of my classmates went on to graduate school or the military, and some chose to work outside the legal profession altogether. Although most of us thought that we would get the best jobs when we graduated, everybody knew that not everybody would get those jobs.

It has always been the case that not all law graduates will find employment with the highest-paying firms. Generally, the more elite the law school, the more likely are its graduates to snag those lucrative positions as associates in the largest firms. During the '80s and '90s, as the marketplace for legal services grew dramatically,

more students from more schools were hired by top-tier firms. We should not kid ourselves; even in those heady days, not all graduates got those jobs. And, on some level, law students in that era knew the same thing my classmates knew: not everyone would.

> It has always been the case that not all law graduates will find employment with the highest-paying firms.

Yes, the cost of legal education has risen astronomically since I was in law school. It is also true that the cost has increased in large measure because schools offered more clinics, more skills courses and smaller sections of traditional courses than they did when I was in law school. This does not negate the fact that it did get harder to pay for law school. Increasingly, students who lacked family financial resources have needed financial aid and loans in order to attend law school, and these loans have often been added to the burden of the loans that paid for undergraduate school. Even before 2008, observers lamented the fact that graduates could not afford to accept legal service and public interest jobs, because their student loans made such career choices infeasible – which again reminds us that the cost of legal education has been a growing issue for some time. Yet, many students did make the sacrifices needed to accept jobs in the public sector and in small Main Street firms that paid dramatically less than the salaries enjoyed by their Wall Street cousins. In fact, before the Great Recession, the overwhelming majority of graduates of most law schools did not go to work for BigLaw at big salaries.

### The Great Recession

When the Great Recession arrived in 2008, it affected the legal job market in a number of ways. Large law firms cut back on hiring, rescinded offers, told people to travel the world for a year, laid off "unproductive" associates and partners, and outsourced legal work to less-expensive providers. Evidence suggests that smaller firms did not behave with such draconian abandon and instead elected to hunker down and tighten their belts until things got better. These firms did not bring on new associates or lateral partners, but they did not engage in the same kind of downsizing that characterized large firm hiring. As a result of decreased hiring throughout the legal marketplace, the law school classes of 2008 and 2009 found limited opportunities. Even as things got better in 2010 and 2011, new graduates found themselves in competition with grads from the previous two classes. The outlook for 2012 appears better than it has been for several years, but graduating law students remain nervous about their prospects.

They have reason to be nervous. Even though the job market has improved, it has not returned to its pre-2008 vigor. In the world of corporate practice, general counsel were scrutinizing outside legal costs with an eye toward reducing expenses. They increasingly refused to pay to train start-up lawyers who did not possess the skills to handle legal work on their own. Many general counsel (individually and collectively through the Association of Corporate Counsel) called for an end to the inefficient hourly billing model. They experimented with Alternative Fee Arrangements, outsourcing legal work and requests for proposal before awarding legal bids. Companies explored non-litigation dispute resolution alternatives to reduce costs and increase predictability. On top of all this experimentation, the economy hung like a dark cloud, and the cold, hard reality was that there was just less legal work to go around.

### The Good News

Signs abound that the market for legal services is picking up, in concert with the general economy. Surveys and anecdotal reports tell us that there is once again more work for lawyers. It is not likely, however, that we will return to those halcyon days before 2008. The billable hour is equally inefficient in good times and bad, a fact well known to corporate counsel. New associates are no more practice-ready than they were before the recession. Some of the sheen has evaporated from the veneer of outsourcing – at least overseas – but the principle of contracting out work that can be done more economically seems rather recession-proof. Alternative dispute resolution is just as attractive in recovery as it was in recession. In short, corporate clients want a better deal, and we can expect them to pursue it.

In the world of individual and small-business representation, smaller firms have not experienced the same shakeout that has impacted the large-firm market. The threats to the viability of their firms have come more from online and non-legal service providers encroaching on work traditionally handled by lawyers, and pro se representation. To some extent, small firms and solo practitioners have faced increased competition from lawyers riffed by big firms, and by graduates who did not find employment in the large-firm market. The marketplace on Main Street has been more competitive than before the Great Recession, and the greatest shift has been the pressure to specialize in limited fields of practice in order to improve efficiency and profitability.

One other phenomenon affecting the legal job market (and which has gone largely unreported) is the increasing use of permanent staff by law firms of all sizes. In the past, most firms were divided into two classes of lawyers: partners and associates. Partners could leverage the work of associates to improve profitability. Firms were organized in such a way that, over time, associates were weeded out (or they left of their own volition), and some

who stayed were eventually elevated to partnership. For whatever reason, losses in the associate ranks created new entry-level openings, and new law school graduates stood ready to fill those vacancies.

Now, however, a number of firms have eliminated the up-or-out system, converting experienced associates into "non-equity partners," "of counsel," "staff lawyers" or "permanent associates." By doing so, law firms could continue to leverage the expertise of these lawyers and save on the recruiting and training costs associated with hiring new lawyers. Thus, if the associates who go in do not go out, then there will be fewer new jobs for those eager to come in.

The point is that the economic model for law firms has been changing, and these changes often result in less entry-level hiring. The recent recession masked this evolution, because the faltering economy also produced a decline in job openings. What we will see, however, in the coming years as the economy improves is that law firms, going forward, will not look like law firms of the past. This trend is likely to be most pronounced in larger firms, but it will have an impact on small-firm hiring as well. To the extent that there is less hiring in large firms, more graduates can expect to earn lower salaries.

## The Jobs Forecast

The American Bar Foundation reports that approximately 65% of all lawyers work in the private practice of law, and of these 20% (or 13% of all lawyers) work in large firms. The largest segment of the marketplace belongs to solo practitioners who account for more than 40% of all those in private practice (or 26% of all lawyers). Employment statistics for recent graduates are comparable, except that the number of graduates who go directly into solo practice has traditionally been less than 5% – although many lawyers become solos at some point in their careers. During the recession, fewer graduates found work in law firms and more decided to hang out a shingle. As the economy improves, the number of graduates who open their own practice will probably return to pre-recession levels, although law firm hiring will not reach pre-recession highs. This suggests two important developments in the job market.

First, more entry-level lawyers will earn salaries on the lower end of the spectrum. If the employment pattern projected above comes to pass, slightly more graduates will find themselves in the same situation as more than half of the graduates today, and before the Great Recession. With respect to graduates who go to work for small firms, government agencies, not-for-profits and other organizations, anecdotal evidence suggests that they do pay their bills and repay their loans. Chicken Littles who cry that it cannot be done are simply wrong. Thousands of law school graduates have been following this path for years. It may not be as easy to get by when you are making $60,000 compared to $160,000, but somehow you do it, and you survive.

As a profession, we should be working to create and support programs that permit restructuring of student loans and provide for loan forgiveness for graduates who accept public service / public interest jobs that pay less money. We should remind ourselves that one unchanged statistic over the past four decades (and probably more) is that 80% of the people in the United States do not have a regular lawyer, and many individuals either cannot afford a lawyer or do not have access to legal services. The same thing is true for many small businesses. There is plenty of legal work to go around; we need to find ways to fund these unmet legal needs. Creative ideas and helpful information on this topic are discussed in this *Journal* by Peter Giuliani, "The Long and Winding Road Ahead," and Silvia Hodges, "Winning Legal Business From Small and Mid-Sized Companies." Joel Rose offers guidance for law firms that want to plan proactively to address issues affecting the future of their organizations, in "Strategies for Planning a Retreat: A Case Study."

Second, those who claim that there are not enough legal jobs to go around fail to understand that the job market for lawyers is incredibly elastic, because a law degree is incredibly malleable and flexible. In the early 1970s, the ABA created a Task Force on Professional Utilization to study what it called the "oversupply of lawyers." The thinking was that law schools were spewing out so many graduates that the legal job market could not absorb them. The final report of the Task Force concluded that while not all graduates could find work in law firms (especially the most prestigious ones), they did find work. Graduates also went to work in non-legal and non-law-related jobs in business, industry, government, education, private associations, NGOs, and virtually every other conceivable work environment. Every form of human endeavor encounters legal issues, and lawyers, whether they are practicing law or not, can address those legal issues. And lawyers bring with them a skill set that can be applied in a variety of different settings.

What the Task Force found was that the job market could absorb law school graduates – when there were fewer law firm jobs, more lawyers pursued alternative careers; and vice versa. One might argue that if you are not going to practice law, why should you go to law school? The answer is that a legal education provides training that will give you an advantage in the job market – both in getting the job and performing the job. What the Task Force discovered in the 1970s remains true today.[1]

There is no evidence that people will stop coming to law school, nor is there evidence that they should. Statistics indicate that law school applications tend to increase when the job markets for college graduates decline. Moreover, human nature being what it is, no one applying to law school actually believes that *he* will not find a job – and the best job for that matter. Every 1L *knows* that she will graduate at the top of the class, become editor-in-chief of the law review and get the best-paying job. This is not an argument against giving applicants a true and accurate picture of what their job opportunities really are; it is a suggestion that they will come to law school in any event, because they want to become lawyers.

This takes us back to law schools. What is their role in the evolving business model for law firms? Does a traditional three-to-four-year Socratic curriculum, which teaches graduates to think like lawyers, suffice to prepare law graduates for the realities of the world they will enter? Have law schools become unsustainably expensive?

Law schools must change, just as law firms must change. They must do a better job of preparing students for the practice of law without sacrificing the traditional benefits of legal education. They must find ways to deliver legal education more cost-effectively. They must serve as incubators for improving the practice of law, and they must collaborate with practitioners in finding answers to problems.

Interestingly, and unknown to most practitioners, a great deal of rumination is going on behind the ivy-covered walls of the nation's law schools. The 2012 meeting of the Association of American Law Schools (AALS) was rife with programming that would have been considered heresy only a decade ago. The American Bar Association (ABA) Section of Legal Education and Admissions to the Bar is undergoing a thorough re-examination of the Standards for the Approval of Law School. Curricular experimentation and reform is happening at all law schools – even those most hidebound by tradition. Legal educators are thinking about how legal education needs to change and how to make it more affordable. Deans and professors take seriously the criticisms that have been leveled by critics of legal education. Law schools are responding to the pressures of the marketplace, and re-thinking historical dogma.

Just as it is with law firms, this process is not easy. There is no broad consensus or clear path as to what the law school of the future will actually look like, just as there is no certainty about what the law firm of the future will look like. Like their counterparts in private practice, however, academic lawyers are grappling with the issues. Both practitioners and academics need to realize that we are all in the same boat, and that we need to work together to find workable models for the profession as a whole. If lawyers do not find ways to improve legal education, the quality and cost of legal services, access to justice and public perception of the law, service providers from outside the profession will marginalize the legal profession in the business world, a possibility suggested by Richard Susskind in his book *The End of Lawyers?*

The New York State Bar Association Task Force on the Future of the Legal Profession addressed the questions of legal education, law firm structure, billing practices, technology and life-work balance in a report adopted by the House of Delegates in April 2011. The Report led to a resolution adopted by the ABA House of Delegates, calling on law schools to produce more "practice-ready" lawyers and, more recently, to change bar examination requirements, which would, among other things, permit law students to take more classes in legal skills than before. Albany Law School is sponsoring a conference in March, in Albany, on new teaching models in legal education.[2] These initiatives reflect similar efforts in a number of states and professional organizations around the country.

Lawyers may not be able to change economic cycles, alter global trends or shift societal mores and behavior. Lawyers may not be able to see the future – even the short-term future – with clarity. The fact that we cannot predict or control what lies ahead, however, is no justification for ignoring the future, for sticking our heads in the sand and hoping that it will just go away. Futurists often talk about alternative futures, suggesting that the "future" is not some preordained path that humans are forced to follow. Rather, the future comprises an infinite number of paths, and humans have the power to influence some things, which will determine the alternative future that comes to pass. Evidence exists that global warming is real, but there are things we can do to affect this trend. Lawyers may not be able to control the economic cycle that drives the market for legal jobs, but they can make structural changes in the organizations where they work to survive and thrive in good times and bad. Lawyers, whether they work in law firms or law schools or other settings, can anticipate change in a proactive way, rather than wait for change to occur and then try to react. As a profession, we need to talk more to other parts of the profession, and listen to voices outside the law, in order to effectively manage this change. ■

1. *See* Munneke, Henslee and Wayne, Nonlegal Careers for Lawyers (ABA 2007), *available at* http://www.ababooks.org.

2. Center for Excellence in Law Teaching at Albany Law School, March 29 – 30, 2012.

BY DAVID PAUL HOROWITZ

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# Not Neglected

## Introduction

Last issue's column discussed the pre-Court of Appeals history of its November 2011 decision in *Cadichon v. Facelle*.[1] This column tackles two particular elements of the Court's decision and a number of questions these elements raise.

## Case Resurrected

In this four to three decision,[2] the majority, in an opinion written by Judge Pigott, the Court of Appeals reversed the trial court's dismissal of the plaintiff's case, which had been affirmed by the First Department:

> Here, the action was apparently "dismissed" on December 31, 2007. But there is no order of dismissal to that effect, as evidenced by the parties' conduct in scheduling depositions as if the case were still active. Defendants point to the stipulation, claiming that once the plaintiffs failed to file their note of issue, the trial court was within its right to dismiss the action. 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, and it is apparent that the case was dismissed based upon plaintiffs' failure to comply with the May 3, 2007 stipulation and 90-day demand in doing so. Indeed, there was apparently no "order" of the court dismissing the case and, at best, only a ministerial dismissal of the action without benefit of further judicial review even though the order provided that it only "will serve as a basis for the *court* on its own motion . . ." to take further action.[3]

## Who Dismissed the Case?

The majority concluded that there was "only a ministerial dismissal of the action without benefit of further judicial review." Unlike CPLR 3404 (dismissal of actions marked off the trial calendar and not restored within one year), where the statute makes the dismissal mandatory and specifies that the dismissal is a ministerial act not requiring a court order,[4] CPLR 3216 states:

> 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.[5]
>
> * * *
>
> No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken . . .[6]
>
> * * *
>
> 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.[7]

Accordingly, dismissal of an action is not required where a party fails to comply with a 90-day notice, and some action by the court is required. The majority's description of the dismissal in *Cadichon* as "ministerial" was disputed in the dissent written by Judge Graffeo:[8]

> The majority reinstates plaintiffs' complaint based on their conclusion that the purported "administrative" dismissal of the claim was erroneous because it was not preceded by a motion on notice – an argument that plaintiffs have not asserted at any stage of this proceeding. The majority therefore decides this case on an unpreserved issue that was never raised in the parties' submissions.[9]

Judge Graffeo further criticized the majority decision's focus on the procedural issue:

> The approach is also misguided because the fact that the prior dismissal was not preceded by such a motion could not have had any material effect on the rights of the parties. If Supreme Court had *sua sponte* initiated a motion on notice to dismiss plaintiffs' claim based on failure to comply with the 90-day demand as the majority suggests should have occurred, plaintiffs would still have had to meet the CPLR 3216 standard in order to avoid dismissal – the same standard Supreme Court applied to

> determine the motion to vacate the order of dismissal. Since plaintiffs failed to meet the statutory standard (a conclusion that the majority does not dispute), they are not entitled to reinstatement of their claim.[10]

Accordingly, the impact of *Cadichon* may be limited to situations where the dismissal is a ministerial act performed by a clerk, and the majority's language suggesting that the court was required to make a motion on notice, rather than exercise, *sua sponte*, its power to dismiss the action, should be approached with caution.

## What 90 Days?

Something that neither the majority nor the dissent mentions is the fact that the demand to file the note of issue was served approximately 208 days before the deadline set for the filing of the note of issue. Both the majority and dissent accept that the demand contained in the "so ordered" stipulation was, in fact, a valid CPLR 3216 demand. However, CPLR 3216 does require that

> [t]he court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed.[11]

Where a CPLR 3216 demand contained in a Compliance Conference Order is served less than 90 days before the date set forth in the demand for the filing of the note of issue, the demand has been held to be invalid. "The compliance conference order dated January 7, 2003, could not be deemed a 90-day demand pursuant to CPLR 3216 because it gave the plaintiff only 87 days within which to file the note of issue."[12]

The Court of Appeals has held that courts do not possess an inherent power to dismiss actions for failure to prosecute, and that the service of a CPLR 3216 demand is a condition precedent to a dismissal on this basis:

> [The court] erred in granting the ex parte motions to dismiss on the grounds of "gross laches" or failure to prosecute. The procedural device of dismissing a petition for failure to prosecute is a legislative creation, not a part of a court's inherent power. Thus, the conceded failure of respondent or the court to afford petitioners adequate written notice constitutes a failure of a condition precedent to the dismissal.[13]

However, there is also authority that a 90-day notice served by a party, which does not provide the requisite 90-day notice, may serve as the basis for a motion to dismiss for want of prosecution where the motion is not made until more than 90 days following the service of the demand has passed:

> The history of this action, since its commencement in September of 1983, is one of inactivity upon the part of the plaintiffs in the prosecution of their claims to recover damages for injury to personal property. Sporadic settlement negotiations terminated in May of 1985. On or about August 1, 1985, the plaintiffs were served with a demand, pursuant to CPLR 3216, which required them to serve and file a note of issue within 45 days of receipt of the demand, rather than within

the statutorily mandated 90-day period. On or about October 18, 1985, a motion was made to dismiss the action for failure to prosecute and the plaintiffs cross-moved for leave to serve a late reply to certain counterclaims and for examinations before trial of the defendants.

By order dated December 9, 1985, the Supreme Court correctly denied the motion to dismiss for failure to prosecute. While the erroneously designated 45-day demand is an irregularity that may be disregarded where the defendants wait 90 days after the plaintiffs' receipt of the demand before moving to dismiss the action for failure to prosecute, here, the motion to dismiss was served before expiration of the requisite 90-day period. Consequently, the court lacked jurisdiction to entertain the motion.[14]

Thus, strict compliance with this condition of a CPLR 3216 dismissal has not always been strictly construed.[15]

In *Cadichon*, of course, the issue is not insufficient time under 3216, but time well in excess of the 90 days set forth in the statute. There is no discernible 90-day period in the order, although it may have been roughly calculated from the date in the "so ordered" stipulation on which the last act of discovery, the deposition of representatives of the two hospital defendants, was to be completed, 128 days before the deadline set for filing the note of issue.

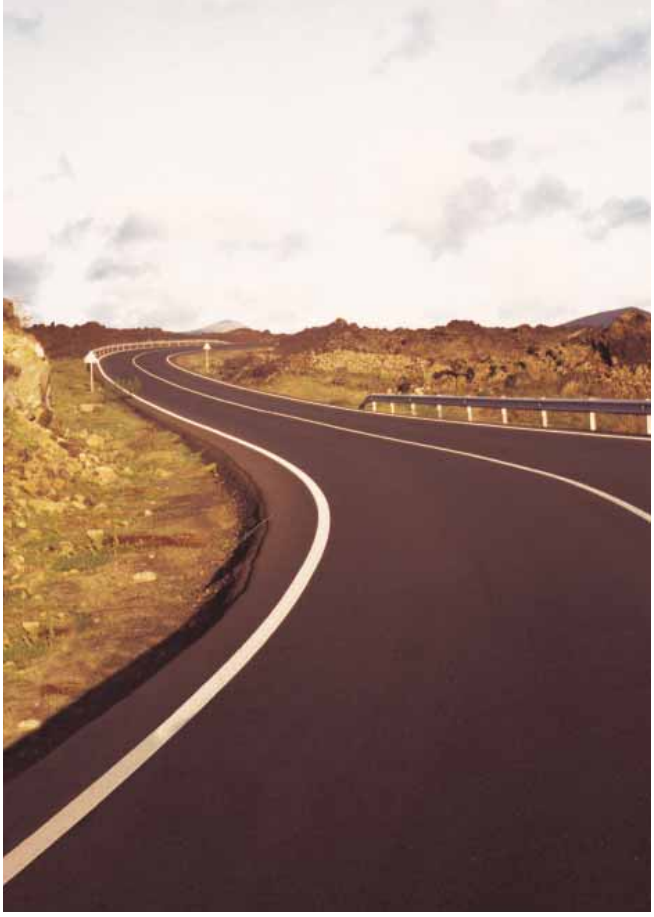
Given that the majority and the dissent in *Cadichon* do not question the validity of the demand as a CPLR 3216 demand, it appears well settled that the 90-day requirement, at least in a demand served by the court, is merely a minimum time period and does not establish the final date by which calendaring must occur.

This raises the question, however, of how far in advance a 90-day notice may be served by a court. Could the court, for example, include a CPLR 3216 demand in a Preliminary Conference Order, setting as the deadline for filing the Note of Issue the date established under the Differentiated Case Management rules for the completion of discovery, even though that deadline can be as long as 15 months? And to the extent that the service of the demand is designed, in part, to focus the attention of a party (almost always the plaintiff), not to neglect the prosecution of the action, how is that goal achieved with service of the demand at the outset of the litigation, before any neglect may have occurred?

## Conclusion

The next column will discuss the steps to be taken to both enforce, and defend against, a dismissal under CPLR 3216. ■

1. 18 N.Y.3d 230 (2011).
2. *Id.* Chief Judge Lippman and Judges Ciparick and Jones joined in the opinion.
3. *Id.*
4. "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." CPLR 3404.
5. CPLR 3216(a).
6. CPLR 3216(b).
7. CPLR 3216(e).
8. *Cadichon*, 18 N.Y.3d 230. The dissenting opinion was joined by Judges Read and Smith.
9. *Id.*
10. *Id.*
11. CPLR 3216(b)(3).
12. *Delgado v. N.Y. City Hous. Auth.*, 21 A.D.3d 522 (2d Dep't 2005).
13. *Airmont Homes, Inc. v. Ramapo*, 69 N.Y.2d 901 (1987) (citations omitted).
14. *Lyons v. Butler*, 134 A.D.2d 576 (2d Dep't 1987) (citations omitted).
15. There is also trial-level authority excusing the failure to comply with the requirement that mailing a CPLR 3216 demand be done by registered or certified mail. *Secreto v. I.B.M.*, 194 Misc. 2d 512 (Sup. Ct., Dutchess Co. 2003) (service by Federal Express permitted).



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# The Long and Winding Road Ahead

**By Peter A. Giuliani**

As the legal marketplace slowly recovers from what economists called the deepest recession since the 1930s, lawyers are taking stock of their prospects and moving forward. Lawyers remain nervous about the road ahead, as they try to forge a path that will lead to better times. Looking back at 2009 and 2010, we can now assess the damage caused by the economic storm that hit the United States generally and the legal profession specifically. Here are some observations on the Great Recession, which may help on the road to recovery:

1. The firms hardest hit were the "money-center" and transactional firms in New York, Boston, San Francisco, London, etc. Long-standing clients like Bear Stearns and Lehman Brothers evaporated. Other banks teetered on the brink. Deal flows dried up. Institutional investors fled to the safety of cash.
2. Normally, in a recession, business in litigation and work-out groups tends to rise sharply, but this didn't happen until just recently. To be sure, there were firms that profited from the Bernie Madoff and Marc Dreier scandals, but that was a drop in the bucket. Businesses and investors were holding onto cash. Litigation is expensive, so they delayed taking action. The old reliable litigation piston failed to fire on schedule.
3. Some commercial real estate projects that already had funding finished up. Cluster residential development shifted to rental strategies rather than take big losses in a depressed housing market. No new development emerged. Real estate departments across the country nose-dived.
4. The only firms that saw little fall-off in business were those whose practices were "Main Street" and not "Wall Street." Texas didn't even know we were in a recession. Cities in the heartland and southeastern United States weathered the storm just fine. Not surprisingly, the biggest gains were among DC-based firms. Also largely unaffected were the mid-sized firms (50 to 100 lawyers), which had diverse client rosters and much more modest overhead than their "Big City" cousins.
5. Like Texas, the plaintiffs' personal-injury bar – not an inconsequential segment of the legal marketplace – did just fine throughout this recession. People still get physically injured during an economic downturn. More important, the opportunities to form and certify classes of investors who suffer economic injury in a market sell-off multiply at warp speed in a downturn. Just check your mailbox.

If one were to sum up what happened, one would have to conclude that BigLaw – and the law schools that feed the behemoths – took it on the chin, while the vast majority of smaller firms did just fine and, in some cases, were able to shop for bargains. Remember, there are a whole lot more lawyers practicing at very high levels outside the AmLaw 200 than those practicing in it. So, the impact of the Great Recession on the *overall* legal profession was not as bad as reported by the press, which typically focuses on BigLaw. (We suspected this was the

case, and we have confirmed it through interviews with our clients and contacts across the country.)

Nevertheless, *all* law firms reacted to the Great Recession. First, they cut support staff. Then they fired and reduced hiring of associates. Finally, they started culling the herd among partners, either through forced retirements, de-equitizations or outright terminations. Many will admit that the Great Recession offered "cover" for them to take actions that they might have deferred had not the fear of falling profits – and the potential loss of key rainmakers – stiffened their spines. It is interesting to note that, while associate lateral hiring dried up during the recession, firms' appetites for lateral-partner hires remained strong.

BigLaw – and the law schools that feed the behemoths – took it on the chin, while the vast majority of smaller firms did just fine.

This last year, 2011, was one of modest recovery in the legal profession, coupled with a re-thinking of the overall law-firm business model. Jobs in law firms are still down across the board, but they seem to be slowly coming back. It is often instructive to read the local job postings to see what kind of people are in demand. In 2009, there were almost no job postings in Connecticut and much of New York State. In 2010, we saw increased interest in hiring litigation associates and paralegals. Finally, in 2011, we started to see ads for real estate, corporate, estates and trusts, and other non-litigation areas of practice. These are all positive signs of a rebound in business.

What about law-school recruiting? A recent gathering of managing partners took up the issue of hiring and the traditional law-firm business model. The preface of the discussion ran something like this: "Every time law firms come through a rough economic patch, they seem to revert to their old habits when it comes to recruiting and hiring – staff up with lots of newly minted grads and weed them out through attrition over a three-year period. We have just come through one of the roughest patches in history. Are we going to do things differently, or are we going to stick with Einstein's definition of insanity, repeating the old patterns and expecting a different result?"

Clients' expectations are changing. First, there is growing discontent with hourly fee arrangements – although not as much as one might expect. We all know that open-ended hourly fee arrangements promote inefficiency and create uncertainty in clients' budgets. But, do we have the will to tackle the issue and come up with innovative ways to manage legal work more efficiently and with greater accountability? We've been talking about alternative fees for more than 25 years. It's time we did something.

Second, there is the shift to a buyers' market for legal services – at least in the business law segment of the market. There is a growing realization that lawyers and law firms should be paid based on the value received from their services, not on the cost of providing the services. The competitive edge among law firms in the future will go to those who develop truly different and distinctive ways of delivering legal services. Those who succeed will have to demonstrate that they know how to manage the work they are hired to do. A host of "non-legal" skills are becoming critical competitive factors: staying within budgets and/or fee caps, keeping matters moving to conclusion and on schedule, managing client communications, offering a blend of legal and business acumen, and facilitating a successful result. In short, if you stay with "business as usual" you're likely to get kicked off the island.

We are thus caught between a rock, i.e., needing to adapt to changing client expectations while still remaining competitive, and a hard place, i.e., needing to attract and retain high-quality talent without going broke. Law firms compete in two markets: the market for clients and the market for talent. The old ways don't work anymore in either market. The road ahead will be longer and harder than we have imagined, but it is still a journey we must make, if the legal profession is to recover from the Great Recession.

In closing, I offer some questions for readers to consider. Some are rhetorical challenges; others point to solutions.

1. **Are firms really going to change their business models, as they emerge from the Great Recession? Will we slip back into old habits or adapt to the changing market?**

Of late, we have been meeting a fairly large number of younger law partners who think the world is ready for innovation. These people are mostly working in smaller firms and are somewhat immune to the BigLaw herd instinct. Imagine a future in which lawyers are paid for being efficient, rather than for racking up hours. Imagine true "value billing," in which the lawyer and client negotiate a fee target or work parameters *before* commencing work. Imagine a world in which lawyers are trained in project management and actually manage their work to achieve predetermined budgets and standards.

2. **What are the pressures that make adaptation difficult? What should we do to overcome those pressures? How do we encourage innovation in a profession that seems bound to precedent and herd behavior?**

Take associate salaries, for example. In the world of BigLaw, the base salary for new grads is set by an oligopoly of New York and West Coast law firms. Once

the pay is set, other firms have to choose between matching the "going rate" or being viewed as a second-rate law firm. Eventually most choose to follow the herd, even if the herd is a bunch of lemmings going for a swim.

While this is all going on, law schools are turning out thousands of new lawyers who would never be courted by the BigLaw elite. One Louisiana firm reported that it can get really good Tulane Law School graduates to work in "apprentice" programs for two years at a rate of about $50,000 per year. Most legal markets have a market glut and the "market-clearing price" is dropping fast.

By all observations, BigLaw starting salaries will probably stay flat for a while. Yet, they were already quite high in 2007/2008. What we need are a few BigLaw innovators who are willing to break with the herd. A few large firms, like Drinker Biddle, are experimenting with their own apprenticeship programs in which new grads are hired at drastically reduced salaries and spend most of their first two years in a kind of lawyer "boot camp," where they learn from experienced partners how to practice law. They are not expected to bill hours. They are expected to master the practical aspects of law practice so that they are "battle hardened" by the time the firm is ready to charge clients for their services.

This is the kind of really innovative thinking and risk taking the profession needs.

**3. What do law schools need to do to turn out a more "user-friendly" product? What is missing from the traditional legal education curriculum?**

OK. Even the *New York Times* and the *Wall Street Journal* have weighed in on this question. What's missing? Anything and everything having to do with the practical aspects of delivering legal service. "Elite" law schools scoff at the idea of offering practical courses. That said, true innovators, like Pace University Law School in New York and Quinnipiac Law School in Connecticut, are offering practice management courses. Law schools need to teach skills like time and stress management, effective delegation and supervision, project and work-flow management, basic business and financial understanding, client communications and management of client expectations – the list goes on and on. By imparting these career skills to law students, law schools will be able to offer more value through their graduates, saving the law firms themselves from having to finance this "donut hole" in the law grads' education.

**4. Is there room for alternative career paths? Does everyone have to aspire to become an equity partner? Can we accommodate different personal goals?**

In many larger firms, the new leverage model seems to be one-third equity partners, one-third non-equity partners and one-third associates. It used to be two or three associates per equity partner. The new model reflects a number of recent trends in the population of the legal profession. First, there are probably now more female lawyers than male lawyers. Second, many new lawyers who are married are married to other professionals – many of them also lawyers. Third, male professionals are showing increasing interest in participating in child rearing. Fourth, with both spouses employed in the professional work force, the household income of many professional families is quite comfortable. The end result is a growing number of lawyers who are content to practice law without aiming for the "brass ring" of equity partnership.

Law firms need to recognize this reality and structure positions in which younger lawyers (male and female) can find their level, do high-quality work, have rewarding and fulfilling lives, and not be burdened by the enormous commitment required to make it to equity partner "on-track." It is reasonable to predict that non-equity status will become more the norm than the exception. The real challenge will be to define what a rewarding career as a non-equity partner looks like. What are the expectations? What role do non-equity partners play? How do we present them to clients? How do we compensate them fairly for their contributions (certainly not by lockstep compensation)?

**5. Is "equity" a lifetime commitment, like tenure? How do we do a better job of managing "end-of-career" issues?**

Many law firms have reasonably well defined standards for what it takes to become an equity partner, and a few do a good job communicating those standards to their younger people. The real problem is that very few continue to apply those – or stricter – standards when it comes to *sustaining* equity-partner status. Going forward, lifetime tenure for equity partners will become a relic of the past, like seniority-driven lockstep compensation, unfunded defined-benefit pensions for equity partners and mandatory retirement. *Becoming* a partner will be tough. *Staying* a partner will also be tough.

This isn't to suggest that, in the future, law partners won't help each other through rough patches, carry people whose practices are in transition, and otherwise behave like co-owners of a business who share common goals a mutual respect. It is to suggest that performance evaluation and peer review will have an important role to play in determining who gets to be and stay an equity partner.

The road ahead is changing. Market forces are seeing to that. Law firms can choose to adapt and foster innovation, or they can opt for maintaining the status quo and staying with the herd. Innovators will prosper. The weakest in the herd will fall prey, a lucky few will be able to make the status quo work and the rest will merely get by. ■

# Winning Legal Business From Small and Mid-Sized Companies

**By Silvia Hodges**


Three years of cost cutting have created a new dynamic in the lawyer-client relationship. In-house counsel who once had free rein to hire outside counsel are increasingly being made accountable for legal spending and are increasingly expected to budget legal expenses. In addition, a growing number of companies bring in procurement or sourcing professionals to help evaluate providers of legal services and negotiate a good deal for their employers. Law firms fiercely compete with each other, and legal process outsourcing (LPO) firms increasingly take work away from traditional law firms. Truth be told, winning business from Fortune 500 companies, or large companies in general, has never been more difficult than today.

## More Clients Are Out There Than You'd Think

While this may sound rather depressing, large companies make up 0.31% of the market. Most law firm marketing and business development focuses on this sliver of the market, on companies with 500 or more employees.

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Few law firms have dedicated marketing and business development strategies targeting the 99.69% of all corporate clients in the United States (or 5,911,663 small or medium-sized companies compared to 18,469 large companies, according to the latest government census data[1]). Many law firms overlook small and medium-sized companies, even though these organizations have great economic impact. They employ 49.37% of all employees and pay 43.45% of payroll in the United States. They have legal problems and meeting their needs can potentially become the economic "bread and butter" for many law firms.

Small and medium-sized companies are interesting clients for a number of other reasons as well. Through law firm mergers and individual lateral mobility, larger firms are increasingly conflicted out of representing large companies. Larger in-house legal departments mean that less work goes to outside counsel. Large companies were also the first to embrace LPO as an alternative for low-stakes work. In an ever more competitive marketplace, law firms today compete not only with other law firms, but also with other professional service providers as well as associations, banks and insurance companies. In addition, a range of online and offline programs and systems are available to clients at a much lower price, thus reducing the amount of legal services bought from traditional law firms.

Yet, this situation is much less bleak with medium-sized companies. Most medium-sized companies don't employ in-house lawyers, and they don't currently turn to LPO firms.

## Competitive Edge

To develop the competitive edge essential for long-term success, law firms need to thoroughly understand the decision-making process that medium-sized companies use when buying legal services.

### Unbundled Services

For starters, law firms and lawyers often emphasize the aspect of tailored solutions; yet, medium-sized companies place little emphasis on that. They welcome the idea of more efficiency in the provision of legal services, which they see as a consequence of commoditization, with cost savings being passed on to clients. Packaged legal solutions make business sense for decision makers in medium-sized companies, and medium-sized companies are content with the type and depth of information they get, particularly considering the lower price. Law firms should consider which legal problems necessitate tailor-made solutions, and which do not. Law firms should analyze the legal process by separating legal services into segments, including paralegal and research needs, determining which can and should be commoditized – and hence offered less expensively. (Corporate procurement professionals in large companies have "unbundled" legal services in the past few years to rein in legal costs and created sourcing strategies for each individual segment.) Small and medium-sized company clients will appreciate law firms that pro-actively approach them and suggest ways to save money through unbundling and seeking more efficient solutions.

### Predictability

In addition to pure cost savings, medium-sized company clients want realistic cost estimates; they disapprove of billing surprises. The ability to predict and manage cost is therefore one of the most important skills for law firms working with medium-sized companies. Good service and added value for these clients means hiring attorneys who act proactively, keep their clients informed, suggest solutions and invest time in further developing and intensifying the client-provider relationship. The ideal lawyer for a medium-sized company is one who is able to make judgment calls, in the sense of whether a legal action is likely to make commercial sense, and who understands the larger business context in which decision makers in medium-sized companies work. Their ideal lawyer not only solves the clients' legal problems, but also helps them run their business better, such as by helping improve processes. Information is ubiquitous, commercial *judgment* is not.

> Firms should focus their marketing efforts on raising awareness about when legal advice is needed, educating medium-sized company clients about the value consultation with an attorney can add and the potential risks of "self-made solutions."

### Understanding

Lawyers need to understand exactly what clients want, because that can be very different from what lawyers perceive to be important. Generally speaking, small and medium-sized companies want their lawyers to be problem-solvers, not provocateurs; they want creativity in finding business solutions, not narrow legal solutions; they want their lawyers to have knowledge of business generally and their industry specifically, not just legal

knowledge. And they do not want law firms using inexperienced lawyers to handle their work or to pay law firms to train inexperienced lawyers.

Lawyers need to reach agreement with their clients on objectives and strategies before starting work on a project. Lawyers have been criticized that

> [m]any outside counsel believe that every project deserves a Cadillac solution. They will leave no stone unturned, they will dot every "i" cross every "t," and make every argument that can be made up to the Supreme Court. They also will charge you for every stone turned, every "i" dotted, every "t" crossed, and every argument made. Sometimes this approach aligns with your needs. But, if you prefer a more cost-conscious, focused approach, or if you want counsel to pursue alternative dispute resolution rather than litigation, you need to communicate your desires and reach agreement on objectives and strategies at the outset.[2]

## Marketing

Decision makers in small and medium-sized companies are accustomed to making complex organizational purchases and do not consider purchasing legal services significantly more complicated, riskier or more difficult than purchasing materials. Typically, these companies initially look at objective factors (which firms are capable of doing the work), then consider subjective/emotional factors (which firms and lawyers would they prefer to work with). They initially assess the professional issue in a wider business context regarding the value proposition sought, and choose the appropriate "tier" of firm. Rather than individual law firm "brands," these tiers are the brands. This means rather than attempting to brand the firm as a way to differentiate itself in the marketplace, "brand positioning" within one of the tiers is imperative. As the competition is mainly within the tiers, this must be addressed by marketing – more than it is perhaps today.

Since medium-sized companies do not tend to immediately turn to lawyers, firms should focus their marketing efforts on raising awareness about when legal advice is needed, educating medium-sized company clients about the value consultation with an attorney can add and the potential risks of "self-made solutions." What will it cost the medium-sized company if its principals *do not* consult a lawyer?

Decision makers in medium-sized companies also typically differ from managers in large companies in regard to their independence and job security. Managers normally have to report within their hierarchy and justify their decisions; hence, they have less independence in their choice. At the same time, they are more likely to have a personal working relationship with those they report to and can make decisions consistent with expectations and company goals. Decision makers in medium-sized companies in their role of entrepreneur/owner or chief executive officer (CEO), on the other hand, have final decision-making power with less or no need to report to a superior and justify their choices. This may lead to different choices in regard to benefits such as brand and security. Not having to be concerned with "looking good to their superiors," nor having to legitimize their choice of a professional services firm, decision makers in medium-sized companies are less likely to feel the need to choose the "safety brand."

Although this advice applies to all law firms, large and small alike, smaller firms may be particularly interested in this market segment. This is an opportunity that smaller or medium-sized law firms should not miss. It might seem counterintuitive to think that smaller law firms could increase their business in this highly competitive environment, when their competitors are well-financed large law firms and LPO firms. Yet, this may be precisely the time for small and medium-sized law firms to gain a larger share of the market, because corporate clients are looking for cost-effective alternatives to the firms they have traditionally hired. Especially in smaller matters, smaller firms can make a case that they deserve to be retained. ■

1. http://www.census.gov/econ/smallbus.html.

2. Lynn D. Krauss, *I Bought the Law: Purchasing Legal and Other Professional Services*, 84th Annual International Conference Proceedings – 1999, Institute for Supply Management, http://www.ism.ws/pubs/proceedings/confproceedingsdetail.cfm?ItemNumber=11168.

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# Strategies for Planning a Retreat: A Case Study

**By Joel A. Rose**

## Introduction

This article addresses a topic that is relevant to firms of all sizes and practice concentrations. The firm described in the example consists of 42 lawyers, but the same principles apply both to much larger and smaller firms. In large firms, the retreat may include only the partners or a subset of partners, such as a management committee, or practice group leaders. In a small firm or solo practice, support staff might be included in the retreat. This article suggests using a consultant, but the facilitator could also be an individual who is not a law firm consultant. Some firms try to conduct the retreat using an internal facilitator, but this almost never works, because someone who has a stake in the outcome of discussions cannot serve as an impartial voice.

## Why a Retreat?

Law firm retreats are a management tool that can be used in a variety of ways. Some firms use this forum as an opportunity to review trends and developments in the firm's practice areas, and to present objectives and economic projections for the future. Other firms may schedule a retreat in order to address specific issues in an effort to build consensus among their members. Oftentimes the retreat is prompted by a problem. More than likely this takes the form of a less-than-desirable turn of events involving firm economics which, ultimately, may be tied to the management of substantive practice areas and/or methods of firm governance and systems for profit distribution. The results to be achieved are thus determined by the set of circumstances that prompt the retreat in the first place. If the firm is experiencing a downturn in net profits, then the goal for the retreat is to determine why this is happening and what to do about it. The following case study describes the experiences of one such firm.

## The Firm

A firm of 42 lawyers (24 partners and 18 associates) was in serious straits. During the past five years it had expanded its practice by acquiring five lateral partners and four associates, and had also opened a satellite office located in another city within the same state. From a financial perspective, this office was breaking even, which at best, garnered an ambivalent response from the firm's partners. The firm's gross revenue had in fact increased over the past three years, but net profits were sinking while expenses were rising, and the partners' draws had stagnated and, in some cases, declined.

The troops were rumbling. Morale was poor, and the factions were drawing into camps divided more or less along the lines of "us vs. them," such as the branch vs. the office, senior partners vs. younger ones, litigators vs. transactional attorneys, etc. The executive committee

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knew it had to act quickly in order to rally the firm and prevent an escalation of the crisis.

## Planning the Retreat

To mobilize its resources, the firm appointed a retreat planning committee that consisted of five partners and the firm's administrator. It also elected to engage the services of an outside consultant. The partners who had been selected to serve on the committee were drawn from the various age groups of the partners and represented the firm's major practice areas, including a representative from the branch office.

This decision was politically expedient and critical to the success of the retreat. By involving a broader range of partners in the planning process, drawing in the various factions that were threatening to splinter the firm, management hoped to build a basis for consensus. The use of a consultant was deemed necessary to avoid charges that the executive committee had lost its objectivity in managing the firm and was serving its own interests, not the firm's.

## Developing Topics for Discussion

The consultant met with the members of the retreat planning committee to discuss the proposed objectives for the retreat. In addition to formulating a strategic plan for the firm, the committee also wanted to use the retreat as a method of encouraging the partners to relate to one another on a personal level, not only as lawyers. During the course of individual interviews with members of the retreat planning committee, the consultant identified the issues that had to be dealt with at the retreat. The final selection of topics was achieved with the consensus of the committee; it included the following areas:

- Improve overall profitability by developing an economic plan for the firm and its branch offices for the next three to five years.
- Increase the number of billable hours of partners, associates and paralegals.
- Improve the management of practice groups, including work assignment, quality control and training, and smooth the peaks and valleys of attorney workloads.
- Improve the communications between partners and associates in the firm and between the firm and the branch office, including a review of policy concerning organizational assignments.
- Step up lawyer recruitment to improve the quality and number of associates.
- And, improve the plan for marketing and providing legal services.

## Discussion Guide

The next phase involved the development and preparation of a retreat planning discussion guide that served as the agenda during personal and confidential interviews between the partners and the consultant. Because of the issues involved, the firm elected to limit the interviews to its partners. The objective of the interviews was to obtain the attorneys' opinions and assessment of firm culture, economics, governance and growth; practice management, marketing and development; and their personal and economic goals and relationships with each other.

The committee wanted to use the retreat to encourage the partners to relate to one another on a personal level, not only as lawyers.

The interviews were quite extensive and detailed. Yes, it did take time. Yes, there was resistance and grumbling. However, for this particular firm it was a means of drawing all of the partners into the planning process. The following is a sample of the kind of questions that were addressed during the interviews:

### Goals and Culture

1. Identify general goals for the firm, in order of importance to you.
2. Suggest steps the firm should take to ensure its future.
3. Identify and rank personal and professional objectives.
4. Assess the firm's culture and the professional and personal environment.
5. Describe your current satisfaction with, and major complaints about, the firm.

### Firm Governance

1. Evaluate the current methods used for determination and implementation of policy.
2. Describe the present form of governance – and your level of satisfaction and suggested changes.
3. Assess the effectiveness of the firm's management organization and structure – Executive Committee, Managing Partner, Practice Development Committee, Planning Committee, Associate Recruiting and Development Committee, Compensation Committee, Director of Administration, etc.

### Firm Growth (Contraction)

1. Assess your satisfaction with the firm's rate of growth over the past three years. Suggested growth rate for the next five years?
2. Evaluate the current ratio of associates to partners. What do you suggest?

3. Evaluate the utilization of paralegals by specific practice area.
4. Should the firm retain its branch office? Establish new offices? Where? Why? Should they be self-sustaining from the start, or should the firm risk additional seed money?
5. Describe the capability of the firm to meet its future needs within existing practice areas. Which areas need improvement?

**Partner/Associate Relationships**

1. Should the firm create a class of non-equity partners?
2. Should the firm establish a classification of "permanent non-equity" partner?
3. Analyze the criteria for elevating associates to equity partner status. Discuss whether these criteria are satisfactory for the firm's future.
4. Suggest ways the relationship between partners and associates could be improved.

**Marketing and Practice Development**

1. Evaluate the practice development activities of the firm by specific practice areas, in the branch office and by individual attorneys.
2. Analyze the volume and categories of work you have performed for the firm's clients over the past three years. Do you foresee any changes?
3. Identify the trends affecting clients and their industries that may alter the firm's relationship with, and volume of work for, its clients.
4. Identify the opportunities for future growth for the branch office and substantive practice areas.
5. Identify the kind of legal work that should be emphasized or de-emphasized over the next three to five years.
6. Provide recommendations for developing new business from former, current and potential clients.

Interestingly enough, the interviews had revealed that there was more common ground between the dissenting factions than had been apparent previously. One of the questions requested that the partners state a purpose for the retreat. Their answers were in line with the initial proposals submitted by the retreat planning committee and included the following points:

- Establish and reinforce open and honest communications among the members of the management committee, department heads, partners and associates.
- Enable the consultant to provide an objective opinion about the firm's management, financial assets and operations.
- Determine long-range goals and develop plans for future growth.
- Encourage partners to coalesce and integrate their activities in an effort to build "firmness" and improve their morale.
- Establish a structure for the departments and various sections that will provide effective and efficient means for producing the work and alleviating imbalances in the workload.

> The format for the retreat was based upon one of the primary goals stressed by the planning committee, namely the importance of having all of the partners participate in the discussions.

**Firm Economics**

1. Discuss your satisfaction with the firm's gross revenue and net profit.
2. Are you satisfied with your annual cash compensation?
3. Should the firm set requirements for annual billable hours? Suggest the number of hours that should be recorded, both billable and nonbillable, on an annual basis by senior, mid-level, and junior partners and associates and paralegals (by category).
4. Recommend methods for improving the firm's economics.

**Practice Management**

1. Evaluate the current organization of practice groups and interaction between offices. Provide recommendations for improvement.
2. Assess the effectiveness and performance of the practice area heads in terms of work assignments, meetings and other communications, training, review of status of files, quality control, plan for practice development and methods to encourage cross-selling services of other practice areas.
3. Assess the relationships between the administrative partners and the heads of practice areas.
4. Evaluate the practice areas (including the branch office) and the production of legal work in a timely and profitable manner – that is, staffing, quality and balance of expertise, etc.

## The Agenda

Once the salient points raised by the partners in the interviews were reviewed against the proposals submitted by the retreat planning committee, the consultant was able to develop an agenda for the meeting. The topics to be covered were narrowed to the following:

1. a comparative financial report on the firm's economics;

2. long-range financial projections;
3. firm administration and practice management in light of the role, accountability and authority of the partners;
4. setting firm objectives for the next three years; *and*
5. determining and administering the partner compensation plan.

Because of the number of partners involved and the volume of work to be accomplished, the retreat was planned for two days at a facility away from the office. The site selected was a conference center with facilities to provide the partners an opportunity to get to know one another on a different level. The planning committee felt that by socializing, the partners could personalize their relationships and begin to understand and appreciate each other in a more positive light.

## The Retreat

The format for the retreat was based upon one of the primary goals stressed by the planning committee, namely the importance of having all of the partners participate in the discussions. This involved an initial presentation by the consultant that included a summary of the interview results and a discussion about the consultant's experience and knowledge about the management practices followed by other financially and professionally successful firms on each of the major subject areas.

Because economics had ostensibly initiated and tumbled the firm to the door of the retreat, it was strategically important to begin with the current state of affairs. The point was twofold: First, the financial data underscored and reinforced the general feeling that things were not as sound as they might be. Second, it established a concrete starting point from which the partners could begin to see their way clear to plan for the future.

The other discussion topics were spread out over the next day and a half. Although the meeting could have been shortened by about half a day, the planners wanted to permit some time for social activities in between the sessions. Pointedly, the retreat concluded on the same topic that had prompted it at the start. The subject was *economics*, or formulating a compensation plan.

## Did the Retreat Work?

*Most assuredly!* Much of the work was done in the preliminary preparatory stage. The retreat planning committee and the firm's administrator, together with the consultant, proposed the topics and prepared the agenda. The workbook and syllabus were published and distributed to the partners prior to the retreat. It included the overall agenda and workshop discussion outlines on each of the topics; the firm's financial data and analysis; and the survey results and composite of partners' comments (edited to preserve confidentiality). In addition to providing information, the handout material functioned as a tool in preparing all the participants, both leaders and attorneys, for their role at the retreat. The administrator had investigated the retreat facility to review the meeting space, accommodations, food, service, available activities and ease for travel. Since this was to be a working meeting, the committee decided to limit attendance to partners and exclude spouses or guests.

In conducting the retreat, the consultant stressed the main rule: Nobody was to impede another's effort to express their view. No personal attacks of any kind. Any negative comment or criticism was to be balanced by a suggested remedy. If a topic under discussion could not be reasonably resolved within the allotted time, it was to be referred to a specific committee or individual for further study. In the course of proposing alternative actions and solutions, the partners were charged with formulating timetables and assigning partner accountability for the work to be performed. There were a few tense moments when several partners had to be reminded of the rules of conduct. They were quickly rerouted, and the proceedings moved along with due regard for the scheduled agenda.

During the concluding remarks, the emphasis was on follow-up. While the reviews following the retreat were very positive, the post-retreat activities would tell the real story. The retreat planning committee had one final task, and it was a big one. This task involved assuming the role of overseer and making certain that a transcript of the retreat proceedings was prepared for review by the committee; arranging for publication and distribution of the notes to the partners; establishing a procedure to follow up on the committees/individuals designated with specific assignments, as reported in the notes; determining the timetable for reporting on the status of action plans; recommending action plans; implementing programs; appraising the results; and beginning to consider plans for next year's retreat *before* a crisis forced the issue. ■


"The new phone system automatically shuts down if someone says we owe them money."

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# Ethical Walls: Building the Electronic Barrier

## By Devika Kewalramani

When a law firm acquires a lateral hire who has been at a firm representing an adversary, the law firm becomes presumptively disqualified from continuing the representation opposing the adversary represented by the lateral hire's old firm. The presumption can be overcome by, among other things, instituting an "ethical screen" designed to insulate the new hire from the conflicting representation.

### Screening Concerns

The key part of the ethical screen is keeping the new hire from divulging confidences of the old client to the new firm. However, the courts also consider whether the new hire has been adequately insulated from the documents relating to the representation at the new firm. Although there is no reason in the abstract that the new hire should be isolated from the new firm's documents as long as the new hire does not disclose the old client's confidences or participate in the case, the reality is that full isolation makes it easier for the court to conclude that the new hire is indeed not improperly participating in the case. Also, the courts have expressed concern in these cases about the appearance, as well as the reality, of impropriety.

There was a time when locked file cabinets provided the necessary separation of documents. But with client documents now being created, revised and saved electronically, client information resides primarily on computers, not in file cabinets. For this reason, there is growing concern about how to create an ethical screen that protects electronic client information.

So, for instance, a lawyer moves laterally from Firm A, where he represented a purchaser, to Firm B, which represents a seller in the same transaction. To avoid disqualification, Firm B promptly erects an ethical wall to screen the conflicted lawyer from participating in the deal or communicating with the lawyers working on it. To prevent his accessing seller's files, the firm keeps the files in a locked cabinet. But if no electronic screen is erected, the conflicted lawyer can easily access the firm's document management system and review the deal documents. What should the firm do to create an effective screen that will help defeat a motion to disqualify the firm?

### ABA Proposes Electronic Screening

In May 2011, the American Bar Association Commission on Ethics 20/20 proposed an updated Comment to the definition of "screened." "Screened," under current Rule

1.0(k) of the ABA Model Rules of Professional Conduct (ABA Model Rules), means the isolation of a lawyer from any participation in a matter. This is to be done by using procedures reasonably adequate to protect information that the isolated lawyer is obligated to protect under the ABA Model Rules or other law. Comment 8 to the ABA Model Rules explains that the purpose of the procedure is to screen a personally disqualified lawyer in instances where screening is sufficient to remove imputation of a conflict of interest under the ABA Model Rules. Although the concern is to keep the screened lawyer from disclosing confidences, Comment 9 notes that a significant feature of a screen is to limit the screened lawyer's access to any information that relates to the matter, which would trigger a conflict.

The ABA Commission observed that technological advances have made client information more accessible to the entire law firm, and that screening should require more than making physical documents inaccessible. Screening should require protection of electronic information as well. The Commission proposed that Comment 9 be updated to explicitly note that a screen should protect electronic documents as well as hard copy.

## ABA, New York Screening Rules Compared

Under both the ABA Model Rules and the New York Rules of Professional Conduct (N.Y. Rules), if a lawyer is personally disqualified from a representation, such disqualification is presumptively imputed to the entire firm, so that all firm lawyers are likewise precluded from the representation.[1] The rule is based on a presumption that associated lawyers share client confidences.

The definition of "screened" in Rule 1.0(t)[2] of the N.Y. Rules is similar to ABA Model Rule 1.0(k), except that under the ABA Model Rule, the isolated lawyer is required to protect his information from the firm, whereas under the N.Y. Rule, either the isolated lawyer is required to protect his information from the firm *or* the firm is required to protect its information from the isolated lawyer. Both rules are silent as to the form of information (i.e., hard copy or electronic) to which a screen would apply.

A potentially significant difference is that the N.Y. Rule does not authorize the use of screens for ordinary lateral hires. Both the ABA Model Rule and the N.Y. Rule accept the use of screens to avoid imputed disqualification involving former government lawyers, judges, arbitrators, mediators, and prior interactions with prospects, but only the ABA Model Rule applies to other lateral hires.

## New York Case Law

New York state and federal courts have allowed the use of ethical screens to avoid imputed disqualification of a firm beyond the scope of the N.Y. Rules. New York case law allows the use of screens in some instances to avoid disqualification involving ordinary lateral hires, even under the N.Y. Rule.

The first New York Court of Appeals case to analyze the use of ethical screens for a side-switching lawyer was *Kassis v. Teachers Insurance & Annuity Association* in 1999.[3] There, the firm isolated the conflicted lawyer from the client files and instructed all attorneys and staff not to discuss the matter with the lawyer. However, the Court found an ethical wall insufficient to eliminate the risk of disclosure of client confidences because of the lateral lawyer's extensive involvement in his former client's matter.

> The reality is that full isolation makes it easier for the court to conclude that the new hire is indeed not improperly participating in the case.

New York state courts have since come around and in some cases have allowed the use of screens to avoid disqualification, as in the 2009 case *320 West 111th St. Housing Development Fund Co. v. Taylor.*[4]

In 2005, the Second Circuit, in *Hempstead Video, Inc. v. Valley Stream*,[5] held that preventive measures such as a formal screen or de facto separation can effectively guard against any sharing of client confidential information. The federal courts have refused disqualification in some cases where screens were instituted.

## Factors for Effective Screens

To determine whether a firm has effectively screened a personally conflicted lawyer from the rest of the firm, thus allowing it to represent a client with materially adverse interests in a substantially related matter, courts have evaluated a number of factors.

### Timeliness: A Stitch in Time?

Prompt implementation of the screen is important. To be effective, "the screening measures must have been established from the first moment the conflicted attorney transferred to the firm or, at a minimum, when the firm received actual notice of the conflict," observed the Southern District in *Chinese Automobile Distributors of America LLC v. Bricklin.*[6] There, the firm had notice of the conflict prior to the lawyer's arrival, but it did not erect

an ethical wall until more than three months later. The delay, the court ruled, was much too long for the screen to be effective. However, the use of a screen was deemed timely, despite the fact that the conflict had arisen two months earlier, in *In re Del-Val Financial Corp. Securities Litigation*,[7] where the firm erected a screen "as soon as [it] did discover the conflict."

**Proximity: De Facto Separation**

Another factor is the physical proximity of the personally conflicted lawyer to the lawyers at the firm working on the relevant matter. In *Intelli-Check, Inc. v. Tricom Card Technologies, Inc.*,[8] the Eastern District found the ethical wall to be effective due in part to the de facto separation between the disqualified lawyer and the litigation team at the time the conflict arose – the disqualified lawyer worked in the New York office while the litigation team operated out of the Washington, D.C., office. Also, the computer networks of the two offices were separate – employees of one office had no access to documents created by employees of the other office. Similarly, in *320 West 111th Street*, the New York State Supreme Court found a firm's ethical screen to be "very solid" where the disqualified lawyer's office was physically secluded from the offices of the other attorneys, the disqualified lawyer was denied access to the client files, and the other attorneys' offices were locked when the law firm's staff was out of the office.

**Firm Size: Small Is Worse**

A screen's efficacy may depend on the size of the firm. Courts can be skeptical of a screen's adequacy in small firms, on the theory that lawyers in a small firm simply encounter each other more. In *Filippi v. Elmont Union Free School District Board of Education*,[9] the Eastern District acknowledged that "the presumption that client confidences are shared within a firm . . . is much stronger within a small firm than a large firm." In *Cheng v. GAF Corp.*,[10] the Second Circuit reasoned that in a small firm "it is unclear . . . how disclosures, admittedly inadvertent, can be prevented." Several cases have disapproved of screens in firms of fewer than 50 lawyers,[11] while other cases have found that the large size of a firm makes the risk of inadvertent disclosure of confidences less likely and have assigned significant weight to this factor in favor of non-disqualification.[12]

**Affidavits: "See No Evil, Hear No Evil, Speak No Evil"**

Apart from document screens, courts have accorded weight to affidavits submitted by (1) the conflicted lawyer, stating that the lawyer has not shared client confidences with others at the firm; and (2) the other lawyers at the firm confirming that they have not received those confidences. For example, in *Papyrus Technology Corp. v. N.Y. Stock Exchange, Inc.*,[13] the Southern District ruled that the presumption of shared confidences was rebutted through affidavits stating that the conflicted attorney did not recall any confidential information regarding the case and did not share such information with any co-workers. Similarly, in *Intelli-Check*, affidavits submitted by the conflicted lawyers stated that they had no communication about the case and they did not disclose client confidences. The firm also denied the conflicted lawyer access to records and files relating to the case.

**Electronic Steps: Block and Track Access**

Protecting electronic client information is critical. The Southern District in *Papyrus* concluded that the electronic screening measures adopted by the firm adequately segregated the disqualified lawyer from the case, "thereby immunizing [the firm] from [the disqualified lawyer's] taint." There, the firm sealed its document management system so that only members of the team working on the case – not including the disqualified lawyer – could access relevant electronic documents. In addition, the firm implemented a monitoring system that could track a lawyer's access to certain electronic files.

**Imperfect Screen Still Effective**

Even where screening measures were "substandard," the Southern District in *Arista Records LLC v. Lime Group LLC*[14] held that a firm can avoid disqualification if the side-switching litigator's conflict posed no "substantial risk of trial taint." Despite (1) the firm's repeated failure to promptly enter the conflict into its conflicts database, (2) a seven-week delay to implement an electronic wall, (3) a three-month delay to circulate an internal screening memo, (4) the firm's failure to send the screening memo to the entire firm, and (5) the disqualified attorney's ability to access an electronic folder on the case after adoption of the screen, the court concluded that the firm provided sufficient evidence that the tainted lawyer did not share his former client's confidences with his new firm, citing the following key factors:

- an "electronic audit" – a review of the electronic record of who had accessed documents – showed that the disqualified lawyer had not accessed any electronic documents relating to the firm's current client,
- an affidavit from the disqualified lawyer stating that he had not disclosed confidential client information to anyone,
- affidavits from the attorneys working on the matter stating that they had not received any confidential information,
- a declaration from the firm's conflicts committee attesting that the disqualified lawyer had confirmed with the lawyers on the matter that he had not shared client confidences with them, and
- the large size of the firm which made inadvertent disclosures of client confidences less likely.

## Another Brick in the Wall

The challenge for modern law firms is not physical insulation of documents (although that may remain necessary), but building an electronic barrier to electronic access to sensitive client information (without hampering proper representations either by the conflicted lawyer or the team working on the insulated matters). For example, one practical problem is how to exclude screened lawyers from firmwide or practice groupwide emails but only those emails disclosing information about screened matters.

Therefore, in implementing electronic screening procedures as a means of information risk management, firms should consider the following measures:

### Document Management System, Firm Applications and Databases

These restrict the conflicted lawyer's ability to access, search and review relevant electronic files and documents, applications and/or databases by instituting computer security protocols at the client and/or matter level, such as sign-in codes.

### Unstructured Data

This limits the conflicted lawyer's access to unstructured network file locations (e.g., W-drives) where relevant client files and records are stored and shared among the lawyers and support staff working on the matter.

### Electronic Audit

When confronted by a disqualification motion, conduct an audit of the firm's document management system to confirm that no prohibited documents have been accessed by the conflicted lawyer. This requires a document management system that retains access information.

### Monitoring System

In accordance with the electronic audit measure, track the conflicted lawyer's access to relevant electronic files to verify whether the conflicted lawyer accessed relevant electronic files.

### Email

Exclude the conflicted lawyer's email account from the firm's email distribution list to preclude him or her from the firm's email groups or set up special email distribution groups for conflicted matters restricted to the lawyers working on those matters. Obviously, more sophisticated and narrower filters, if available, could be used.

### Time Entry System

Exclude the conflicted lawyer from personally entering time on all client matter numbers in the firm's time and billing system unless he or she is provided access on an as-needed basis or unless that system does not permit one lawyer to look at the time recorded by other lawyers. ■

1. ABA Model Rule of Professional Conduct 1.10(a); N.Y. Rules of Professional Conduct (22 N.Y.C.R.R. § 1200.0) Rule 1.10(a) (N.Y. Rules).
2. N.Y. Rule 1.0(t).
3. 93 N.Y.2d 611 (1999).
4. 2009 WL 1815079 (Sup. Ct., N.Y. Co. 2009).
5. 409 F.3d 127 (2d Cir. 2005).
6. 2009 WL 47337 (S.D.N.Y. 2009).
7. 158 F.R.D. 270 (S.D.N.Y. 1994).
8. 2008 WL 4682433 (E.D.N.Y. 2008).
9. 722 F. Supp. 2d 295 (E.D.N.Y. 2010).
10. 631 F.2d 1052 (2d Cir. 1980).
11. *See Decora Inc. v. DW Wallcovering, Inc.*, 899 F. Supp. 132 (S.D.N.Y. 1995); *Yaretsky v. Blum*, 525 F. Supp. 24 (S.D.N.Y. 1981); *Crudele v. N.Y. City Police Dep't*, 2001 WL 1033539 (S.D.N.Y. 2001).
12. *See Papyrus Tech. Corp. v. N.Y. Stock Exch., Inc.*, 325 F. Supp. 2d 270 (S.D.N.Y. 2004); *In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. 270; *Arista Records LLC v. Lime Grp. LLC*, 2011 WL 672254 (S.D.N.Y. 2011).
13. 325 F. Supp. 2d 270 (S.D.N.Y. 2004).
14. 2011 WL 672254 (S.D.N.Y. 2011).

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# Dispositive Motions Involving Deeded Covenants and Restrictions

## The Clear and Convincing Standard May Determine Outcome

**By J. Michael Naughton**

Many property disputes involve claims seeking to enforce private covenants and restrictions. For the most part, these private planning tools are intended for the benefit of all lot owners.[1] The beneficial aspects of covenants, however, can be turned on their head if one is unlucky enough to buy the lot next door to someone opposed to change – or, worse, an unbalanced neighbor. A dream home can quickly become a litigation nightmare. Over the years, the common law has developed burdens of proof that provide trial courts with the tools to "do equity" and resolve predominantly factual issues in summary fashion. This article addresses (1) the heightened burden of proof[2] in lawsuits involving private covenants and restrictions, and (2) the added burden a plaintiff faces when a defendant moves for summary judgment. The article notes the benefits of deciding this type of case on a motion for summary judgment, and the related strategy considerations for counsel.

### Background

Private covenants and restrictions are common in subdivisions with a homeowners' association or projects with common development schemes.[3] Covenants have been drafted to regulate all manner of activity, from the concrete (e.g., the height of a dwelling) to the obscure,[4] (e.g., the preservation of "character" or a "view").[5] It is not unusual to encounter covenants that regulate the color of a home, the type of fence that may be installed, or the location of a shed or garage. The general rule is that "restrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy."[6]

In addition to express covenants found in deeds, a plaintiff may allege a violation of an implied covenant.[7] Typically, implied covenant cases involve claims by buyers that the developer's literature[8] or oral representations[9] amounted to a covenant not to develop a "natural area" or build on open space.

A homeowners' association, or an individual lot owner, generally will have standing to sue a neighbor if the neighbor does, or threatens to do, something on his or her property that contravenes the restrictions.[10] These claims arise in commercial developments and among residential neighbors. Unlike claims between commercial litigants, neighbor disputes involving real property become personal the moment a claim is filed. The ensuing personal animosity that develops can make a settlement among otherwise reasonable people impossible. When faced with the "crazy neighbor" scenario, the stakes are particularly high. The issues in these cases are often factually intensive, and a determined plaintiff can get his or her way by prolonging discovery, filing a notice of pendency, driving up litigation costs, and thriving in a stress-charged atmosphere.

As a practical matter, it is easier for a plaintiff to obtain a temporary restraining order (TRO) or preliminary injunction in cases involving restrictive covenants. Real property is unique, and the courts are correct in using injunctions to preserve the status quo while the parties attempt to reach a resolution or engage in discovery. Even if a TRO is not granted, the mere pendency of a claim seeking permanent injunctive relief may stop a property owner from building his or her project. The stakes of proceeding with construction in the face of an unresolved claim are high. A court may order a completed structure removed if it violates a private covenant.[11] If one is faced with the prospect of having to dismantle a structure or home, the pending case acts as a de facto preliminary injunction. This is especially true if third-party financing is needed to build the structure. Consequently, a party who has been sued by a neighbor has a strong incentive to settle or find a way to obtain an expedited judicial determination of the parties' rights.

## Practice Tips

### Burden of Proof

The burden of proof in a claim seeking to enforce a private restriction is the clear and convincing standard.[12] The added burden evolved from the sanctity accorded real property in American jurisprudence, which is expressed in the maxim that the "law has long favored free and unencumbered use of real property."[13] For this reason, a higher standard of proof applies to dispositive motions involving restrictive covenants. A plaintiff seeking enforcement of a covenant must present *clear and convincing* proof to defeat a motion for summary judgment.[14]

### Strategy

Most attorneys do not realize that the heightened burden of proof – the clear and convincing standard – tends to shift the burden on a motion for summary judgment. The strategic implications of this should not be underestimated. Although the plaintiff may have the upper hand when the case is commenced, the defendant has the advantage on a dispositive motion. A defendant's litigation strategy should be designed to set the stage for a dispositive motion. If necessary, the defendant should consider retaining expert witnesses early in the case. Discovery also should be planned to marshal evidence for a motion. A plaintiff also needs to plan for this contingency. Many plaintiff's attorneys are accustomed to trial courts finding an "issue of fact" whenever the record is thick enough. Plaintiff's counsel may be surprised to learn that merely compiling a lengthy client affidavit may not be sufficient. The plaintiff who is counting on his or her day in court may be disappointed.

> A plaintiff may allege a violation of an implied covenant.

### Dispositive Motions

In cases involving restrictive covenants, the decisions reflect a trend to treat a motion for summary judgment as less an exercise in issue identification and more an opportunity for claim resolution. That is a good thing. In other kinds of cases, courts tend to avoid summary disposition whenever a record is voluminous or a motion complicated. The appellate courts, however, have sent a clear signal to the trial courts that disputes involving covenants and restrictions may be decided prior to trial – regardless of how voluminous the record. Appellate courts frequently find, as a matter of law, that a covenant does not apply, or the plaintiff simply failed to meet his or her burden.

Cases involving restrictive covenants should be decided on an expedited basis and in the context of a motion for summary judgment. Having real property tied up in endless litigation is a disservice to the parties, is contrary to the policy favoring free alienation, and may have economic implications that extend beyond the litigants. The special rules and heightened burdens applicable to covenants help level the playing field.

### Rules of Construction

Another important feature of these cases is that a covenant which is arguably ambiguous may not raise an issue of fact for trial.[15] Instead of finding that the ambiguity requires further discovery, or a trial, to determine the drafter's "intent," the court may resolve ambiguities

on a motion for summary judgment.[16] The court will interpret the document in the least restrictive manner.[17] Alternatively, the court may find that an ambiguous covenant is void and unenforceable.[18] Practitioners should keep in mind the rules of interpretation that apply to restrictive covenants:

- Courts strictly construe restrictive covenants against the party seeing to enforce them.[19]
- Courts will not enforce a restriction that is vague and unenforceable.[20]
- When a court construes ambiguous language, it should apply the least restrictive interpretation[21] and "avoid construing [the] agreement in a manner that would produce 'unreasonable or unfair results.'"[22]
- Any ambiguity must be construed to limit, rather than extend, the restriction.[23]

Based on these maxims, a court may find, "as a matter of law," that a covenant which is arguably ambiguous does not apply to the case at hand.[24]

commenced within two years of the completion of the structure. Older structures completed prior to 1965 are also entitled to the conclusive presumption. There is also a safe harbor for the "replacement, enlargement or alteration of a previously existing structure" that existed prior to certain dates. The existing structure provides a baseline that cannot be challenged.[25] The rule is particularly helpful when a client has purchased an older dwelling and plans to demolish it.

Another key defense is standing. The plaintiff may lack standing to enforce a covenant due to chain of title or other reasons.[26]

Additionally, a party who would otherwise have standing may lose his or her rights to enforce a covenant due to changed circumstances.[27] Section 1951 of the RPAPL provides: "[N]o restriction on the use of land . . . shall be enforced by injunction . . . [if] it appears that the restriction is of no actual and substantial benefit to the person seeking its enforcement. . . ."[28] The statute allows a party to obtain a declaratory judgment that the restriction is not enforceable.[29] Counsel should note, however, that the party claiming that the restriction has no actual and substantial benefit bears the burden of proving it.[30] For this reason, there is often an advantage in waiting for a neighbor to sue to stop a project rather than taking the initiative and commencing an action seeking a declaration of the parties' rights.

If the plaintiff has delayed in enforcing his or her rights, the defendant may have a defense of laches, estoppel, or mootness.

### Visual Evidence

Because of the equitable considerations at stake, visual evidence is particularly important in many of these cases. When visual evidence is needed, consultants can be invaluable. Modern software can produce photo-montages – visual simulations – that provide compelling proof. For example, if a plaintiff claims that a neighbor's plans to demolish a residence and build a new home will create an eyesore or obliterate a "view," architects and consultants can collaborate to create a photomontage of the new structure prior to construction. Photographic evidence and computer simulations can be created to show the before-and-after images of what the new structure will look like and how the new structure will affect a neighbor's view. If a plaintiff has not planned for this, it may be too late to assemble the evidence once a motion for summary judgment has been filed.

### Other Defenses

A number of defenses are peculiar to cases involving private covenants and restrictions. First, there is a special limitation period set forth in Real Property Actions and Proceedings Law § 2001 (RPAPL). The statute has many of the characteristics of a statute of limitations and a safe harbor. RPAPL § 2001 provides that any claim seeking the removal or alteration of a structure that allegedly infringes on an easement or restriction "shall be conclusively presumed" released unless the action is

Finally, if the plaintiff has delayed in enforcing his or her rights, the defendant may have a defense of laches,[31] estoppel,[32] or mootness.[33] If a structure has been completed prior to the plaintiff's obtaining preliminary injunctive relief, the court may find that construction has rendered the case moot.[34]

## Conclusion

The heightened burden of proof in restrictive covenant cases provides the bench with the tools to counterbalance the plaintiff's advantage in these cases. A plaintiff should not be entitled to achieve a de facto injunction by prolonging litigation when a defendant cannot afford to assume the risk of building in the face of a lawsuit. Motions for summary judgment help maintain the balance of the equities. By recognizing the implications of the plaintiff's higher burden of proof on dispositive motions, defense counsel can improve a client's chances of prevailing on the merits and in a time frame that allows the client to achieve his or her goal. Plaintiff's counsel also will need to be prepared for this contingency, because cases involving private covenants are often decided in the

context of a motion for summary judgment. The cases reflect a trend in which courts find – as "a matter of law" – that a covenant does not apply, or that the plaintiff simply failed to carry the burden of proof.

1. *See Chambers v. Old Stone Hill Rd. Assoc.*, 1 N.Y.3d 424, 431 (2004).

2. *See Greek Peak v. Grodner*, 75 N.Y.2d 981, 982 (1990) ("party seeking enforcement of a restriction on land use must prove, by clear and convincing evidence, the scope, as well as the existence, of the restriction").

3. There are four classes of cases in which restrictive covenants may be enforced: (1) a uniform restriction imposed by a common grantor as part of a general plan or scheme for the benefit of all the grantees in a real estate subdivision or development may be enforced by all such grantees against the other; (2) a covenant imposed for the benefit of the grantor's remaining land may be enforced by the grantor against any grantees of the restricted land; (3) mutual covenants between the owners of adjoining lands producing corresponding benefits to such owners may be enforced by the owners or their assigns against each other; (4) an owner of neighboring land, for whose benefit a restrictive covenant is imposed by a grantor, may enforce the covenant as a third party beneficiary despite the absence of privity of estate between the grantor and the neighbor. *See Nature Conservancy v. Congel*, 253 A.D.2d 248 (4th Dep't 1999), *lv. denied*, 99 N.Y.2d 502 (2002) (citing *Korn v. Campbell*, 192 N.Y. 490, *reargument denied*, 193 N.Y. 626 (1908)).

4. *See Turner v. Caesar*, 291 A.D.2d 650 (3d Dep't 2002) (covenant prohibiting acts which materially interfere with the "health, comfort, and pleasure" of other residences "patently vague" and unenforceable).

5. *See Liebowitz v. Forman*, 22 A.D.3d 530 (2d Dep't 2005).

6. *See Chambers*, 1 N.Y.3d at 431; *Reed, Roberts Assoc. v. Strauman*, 40 N.Y.2d 303, 307, *reargument denied*, 40 N.Y.2d 918 (1976).

7. *See Doin v. Bluff Point Golf & Country Club, Inc.*, 262 A.D.2d 842 (3d Dep't), *lv. denied*, 94 N.Y.2d 753 (1999).

8. *See, e.g., Patten Corp. v. Ass'n of Prop. Owners of Sleepy Hollow Lake*, 172 A.D.2d 996 (3d Dep't 1991).

9. *See, e.g., Doin*, 262 A.D.2d at 842–43.

10. *See Dever v. DeVito*, 84 A.D.3d 1539 (3d Dep't 2011), *lv. dismissed*, 2012 WL 15941 (Jan. 5, 2012).

11. *See, e.g., Chambers*, 1 N.Y.3d at 431 (removal of completed cell tower).

12. *See Witter v. Taggart*, 78 N.Y.2d 234, 237 (1991); *Van Schaick v. Trustees of Union Coll.*, 285 A.D.2d 859 (3d Dep't), *lv. denied*, 97 N.Y.2d 607 (2001) (courts will enforce restrictive covenants only when application has been established by clear and convincing proof).

13. *See Witter*, 78 N.Y.2d 234; *Huggins v. Castle Estates*, 36 N.Y.2d 427 (1975).

14. *See generally Doin*, 262 A.D.2d at 842-43; *Ledda v. Chambers*, 284 A.D.2d 690, 691 (3d Dep't 2001) ("law has long favored free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them"); *Gitlen v. Gallup*, 241 A.D.2d 856 (3d Dep't 1997).

15. *See Dever*, 84 A.D.3d 1539.

16. *See generally Mallad Constr. Corp. v. Cnty. Fed. Sav. & Loan Ass'n*, 32 N.Y.2d 285, 290 (1973); *Gitlen*, 241 A.D.2d 856.

17. *See Huggins v. Castle Estates*, 36 N.Y.2d 427 (1975); *Hartford Acc. & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169 (1973).

18. *See, e.g., Turner v. Caesar*, 291 A.D.2d 650 (3d Dep't 2002).

19. *See Witter v. Taggart*, 78 N.Y.2d 234 (1991).

20. *See Turner*, 291 A.D.2d 650.

21. *See Sunrise Plaza Assoc. v. Int'l Summit Equities Corp.*, 152 A.D.2d 561 (2d Dep't 1989), *appeal denied*, 75 N.Y.2d 703 (1990).

22. *See Firemen's Ass'n of the State of N.Y. v. 99 Washington, LLC*, 73 A.D.3d 1320, 1323 (3d Dep't 2010) (quoting *Barrow v. Lawrence United Corp.*, 146 A.D.2d 15, 20 (3d Dep't 1989), *lv. denied*, 89 N.Y.2d 810 (1997)); *Turner*, 291 A.D.2d 650 (court held that a phrase in a restrictive covenant restricting behavior which would "materially interfere with the health, comfort, or pleasure of the owners or occupants of remaining lands," was vague, and thus unenforceable).

23. *See Turner*, 291 A.D.2d 650.

24. *See Higgins v. Douglas*, 304 A.D.2d 1051 (3d Dep't 2003); *see also Dever v. DeVito*, 84 A.D.3d 1539 (3d Dep't 2011); *Gitlen v. Gallup*, 241 A.D.2d 856 (3d Dep't 1997).

25. *See East Island Ass'n, Inc. v. Carbone*, 150 A.D.2d 422 (2d Dep't 1989) (discussing RPAPL § 2001).

26. *See generally Orange & Rockland Util. v. Philwold Estates, Inc.*, 52 N.Y.2d 253 (1981) (discussing rules relating to restrictions that run with the land and privity issues).

27. *See N.Y. City Econ. Dev. Corp. v. T.C. Foods Import & Export Co., Inc.*, 19 A.D.3d 568 (2d Dep't 2005).

28. *See Chambers v. Old Stone Hill Rd. Assoc.*, 1 N.Y.3d 424, 431 (2004).

29. *See Orange & Rockland Util.*, 52 N.Y.2d 253.

30. *See Chambers*, 1 N.Y.3d at 431.

31. *See Zaccaro v. Congregation Tifereth Israel of Forest Hills, Inc.*, 20 N.Y.2d 77, *reargument denied*, 20 N.Y.2d 758 (1967). *But see Turner v. Caesar*, 291 A.D.2d 650 (3d Dep't 2002) (two-month delay in filing action after construction commenced was not a delay that was "unconscionable as a matter of law").

32. *See Freer v. Poncic*, 172 A.D.2d 959 (3d Dep't 1991).

33. *See Dever v. DeVito*, 84 A.D.3d 1539 (3d Dep't 2011).

34. *See Witter v. Taggart*, 78 N.Y.2d 234 (1991); *Huggins v. Castle Estates*, 36 N.Y.2d 427 (1975).

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# Collective Arbitration in New York

## By Samuel Estreicher and Steven C. Bennett

On October 20, 2011, in *JetBlue Airways Corp. v. Stephenson*,[1] a four-judge panel of New York's Appellate Division, First Department, held that whether collective arbitration is permissible under an arbitration agreement governed by the Federal Arbitration Act (FAA)[2] is a question for an arbitrator – not the courts – to decide, thus refusing to expand the narrow list of gateway arbitrability issues reserved for courts. The *Stephenson* court further held that, when an arbitration agreement is silent on the issue of collective arbitration, an arbitrator may permit the action to proceed on a collective basis, distinguishing collective arbitration from the class arbitration addressed by the U.S. Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (*Stolt-Nielsen*).[3]

### Procedural Background

Respondents in *Stephenson* included 728 unnamed current and 18 named former JetBlue pilots who each entered into an identical employment agreement with JetBlue. Each agreement required adjustment in the contracting pilot's base salary if there were increases in the base salary of newly hired pilots. These agreements also contained an arbitration clause, which provided, in pertinent part:

> [I]n the event of any difference of opinion or dispute between the Pilot and the Airline with respect to the construction or interpretation of this Agreement or the alleged breach thereof which cannot be settled amicably by agreement of the parties . . . , such dispute shall be submitted to and determined by arbitration by a single arbitrator in the city where the Pilot's base of operations is located in accordance with the rules of the American Arbitration Association.[4]

The JetBlue pilots contended that the airline failed to increase their salaries properly and filed a single demand for arbitration with the American Arbitration Association on behalf of all pilots. The demand stated that the claims of individual pilots were asserted collectively to resolve an issue of common law and fact between the parties. In response, JetBlue petitioned the trial court, seeking to stay collective arbitration of the claims for breach of independent employment agreements and to compel individual arbitration of the claims pursuant to the FAA. The trial court considered two issues: (1) whether the FAA applied to employment contracts of passenger airline pilots and (2) whether the court or the arbitrators should decide if the arbitrations could be held jointly. Determining that the FAA governed the dispute, the trial court denied JetBlue's petition and remanded the matter to an arbitrator to determine whether the agreements permitted collective arbitration. The Appellate Division affirmed on both issues and added that an arbitrator could require that the action proceed on a collective basis even though the agreement was silent on that issue.

## Appellate Ruling on FAA Coverage

The Appellate Division first addressed the argument that the arbitration agreement was not covered by the FAA. The JetBlue pilots argued that the exception under Section 1 of the FAA for "any other class of workers engaged in foreign or interstate commerce" removed their agreement from FAA coverage.[5] The JetBlue pilots cited *Lepera v. ITT Corp.*,[6] which held that a pilot whose primary responsibility was to transport corporate executives in a private jet was not subject to the FAA. JetBlue, however, relied on *Kowalewski v. Samandarov*,[7] which concluded that car service drivers were not exempt from the FAA because they only transported passengers, not goods. The Appellate Division found *Kowalewski* more persuasive because the *Lepera* court, unlike the *Kowalewski* court, did not have the benefit of the Supreme Court's analysis in *Circuit City Stores, Inc. v. Adams*.[8] In *Adams*, the Court interpreted the FAA exception to be limited to "transportation workers" and defined as such workers "actually engaged in the movement of goods in interstate commerce."[9] In *Stephenson*, the Appellate Division found that eligibility for the exemption hinged on the primary purpose of the industry, and only employees involved primarily in the transportation of cargo or goods were exempt. Although JetBlue carried both passengers and cargo, the JetBlue pilots "primarily" moved *passengers* and therefore were not exempt from the FAA.[10]

## Appellate Ruling on Collective Arbitration

The Appellate Division next turned to the question of whether a court or an arbitrator should determine whether an arbitration agreement permits collective arbitration. The court noted that "[o]nly three threshold questions may be decided by a court[:] . . . (1) whether the agreement to arbitrate is valid; (2) whether the parties have complied with the agreement; and (3) whether the claim is timely."[11] The court recognized that the Supreme Court in *Green Tree Financial Corp. v. Bazzle* remanded to the arbitrator the question of whether the parties' agreement permitted class arbitration, stating that "[a] rbitrators are well situated to answer [the] question [of what kind of arbitration proceeding the parties agreed to.]"[12] JetBlue, echoing the discussion of *Bazzle* in the Court's opinion in *Stolt-Nielsen*, argued that *Bazzle* did not control because it was decided by a mere plurality[13] and further contended that *Stolt-Nielsen* precluded collective arbitration when not explicitly allowed by contract. Drawing parallels to the facts in *Stolt-Nielsen*, JetBlue claimed that each pilot had entered into an individual employment agreement with the airline, which by its "plain language" limited arbitration to the signatory pilot only. The JetBlue pilots, in turn, argued that silence in employment agreements could not be read to prohibit collective arbitration and that *Stolt-Nielsen* did not control because they sought collective – not class – arbitration. Additionally, they asserted, it would be wasteful to require hundreds of individual arbitration proceedings to resolve a single breach of contract issue that applied to all.

The Appellate Division ultimately rejected the arguments offered by JetBlue. The court acknowledged concerns raised by *Stolt-Nielsen* and echoed by Justice Antonin Scalia in *AT&T Mobility LLC v. Concepcion*[14] but concluded that "because the type of proceeding demanded by the pilots is not, like a class proceeding, so fundamentally different from an ordinary arbitration, we cannot, unlike the Supreme Court in *Stolt-Nielsen*, definitively say that the parties did not agree to it."[15] Unlike class arbitration, in the proposed collective arbitration, all the affected pilots would be actual parties. Further, the dispute with the airline presented only one straightforward question to be answered by the arbitration panel, and that disposition would affect each pilot equally. In contrast, in a class arbitration, "common issues need only 'predominate' over issues that are unique to individual members."

JetBlue pilots asserted it would be wasteful to require hundreds of individual arbitration proceedings to resolve a single breach of contract issue that applied to all.

The court also pointed out that in addition to the lack of "binding precedent from the United States Supreme Court holding that an arbitrator should decide whether collective arbitration is permissible, there is likewise no authority requiring a court to decide the question as a 'gateway' issue" under New York law. The Appellate Division went on to explain that the categories of gateway issues are "narrow" and limited to questions that involve enforceability of an arbitration agreement, application of the agreement to a particular dispute, the parties' compliance with the agreement and the timeliness of a claim. Consequently, since no such threshold questions arose in the case, the manner in which the arbitration should proceed was ultimately for the arbitrator, not a court, to decide.

By remanding the issue of the availability of collective arbitration, the Appellate Division left open the possibility that the arbitrator could conclude that collective arbitration was available, even though the arbitration agreement was silent on that matter. Unlike the *Stolt-Nielsen* Court, the *Stephenson* court refused to declare that the arbitration agreement could not be construed by a reasonable arbitrator to permit collective arbitration, primarily due to the fundamental differences between class and collective, or joint, arbitration.

Finally, the Appellate Division rejected JetBlue's argument that collective arbitration violated the forum selection clause in the employment agreements. The court opined that the forum clause was designed exclusively for the pilots' benefit, and the pilots could therefore unilaterally waive the clause.

## Implications

Attempts to bring multi-claimant arbitration have met varying court reactions. The Supreme Court's *Bazzle* decision suggested that arbitrators could interpret silence in an arbitration agreement as implicit authority to impose classwide arbitral proceedings. In response, parties began including class arbitration waivers in their arbitration agreements, but such waivers were not met with universal acceptance. States such as California[16] and New Jersey[17] applied a doctrine of unconscionability under which such waivers were found unenforceable. More recently, the Supreme Court in *Concepcion* held that California's unconscionability doctrine, applied to class arbitration waivers, was preempted by the FAA. The New York state court's *Stephenson* decision adds yet another layer, carving out collective arbitration from class arbitration jurisprudence. It remains to be seen whether other state courts will follow suit, and whether the issue will make its way to the U.S. Supreme Court. Meanwhile, parties should consider whether collective arbitration would be appropriate for their particular situation and avoid ambiguity by including provisions in their arbitration agreements expressly prohibiting or permitting collective arbitration. ■

1. 88 A.D.3d 567 (1st Dep't 2011).
2. 9 U.S.C. §§ 1–16.
3. 559 U.S. __, 130 S. Ct. 1758 (2010).
4. *Stephenson*, 88 A.D.3d at 568.
5. 9 U.S.C. § 1.
6. 1997 WL 535165 (E.D. Pa. Aug. 12, 1997).
7. 590 F. Supp. 2d 477 (S.D.N.Y. 2008).
8. 532 U.S. 105 (2001).
9. *Id.* at 112 (emphasis added).
10. *Stephenson*, 88 A.D.3d 567 (emphasis added).
11. *Id.*
12. 539 U.S. 444, 452–53 (2003).
13. *See* Samuel Estreicher & Elena J. Voss, *Supreme Court: No Class Arbitration Where Agreement Is Silent*, N.Y.L.J., May 18, 2010.
14. __ U.S.__, 131 S. Ct. 1740 (2011). In *Concepcion*, the Court noted the advantages of bilateral agreements over class arbitration in terms of efficiency and costs, specifically noting the potential unfairness to defendants of class arbitration. *Id.* at 1751–52.
15. *Stephenson*, 88 A.D.3d at 573–74. Curiously, the trial court refused to reach the question whether the pilots' demand was a class-action arbitration or "an alternate form of mass action that [did] not raise the same concerns about the differences from bilateral arbitration that the Stolt-Nielsen court addressed."
16. *See* Samuel Estreicher & Steven C. Bennett, *California High Court Weighs in on Class Action Waivers*, N.Y.L.J., Dec. 20, 2005.
17. *See* Samuel Estreicher & Steven C. Bennett, *New Jersey Weighs in on Class Action Waivers*, N.Y.L.J., Jan. 4, 2007.

# A NOTE FROM THE EDITOR-IN-CHIEF

The New York State Bar Association *Journal* is not known for stirring controversy. However, the Point of View articles that appeared, respectively, in the November / December 2011 issue ("Homeowners and Gas Drilling Leases: Boon or Bust?," by Elisabeth N. Radow) and the January 2012 issue ("The Marcellus Shale: A Game Changer for the New York Economy?," by Scott R. Kurkoski) drew an unprecedented and impassioned response. Comments were substantive and also related to the work we do in vetting and editing articles for the *Journal*.

Whichever side of the issue you may favor, and whether you believe the positions were expressed in the best way, the point and counterpoint format is an opportunity the *Journal* provides every so often to permit a dialogue between authors with differing views on a matter of broad public interest. An inherently high level of subjectivity is involved in competing viewpoints. The great challenge, of course, in presenting a debate in print, is to refrain from over-editing the voice of each author while ensuring that neither becomes strident.

A further challenge, for the *Journal*, is to provide sufficient space for readers to comment on what they have read, presented in a location that will allow those comments to be easily viewed by other readers. The *Journal*'s space limitations do not allow for the publication of Letters to the Editor in our print edition.

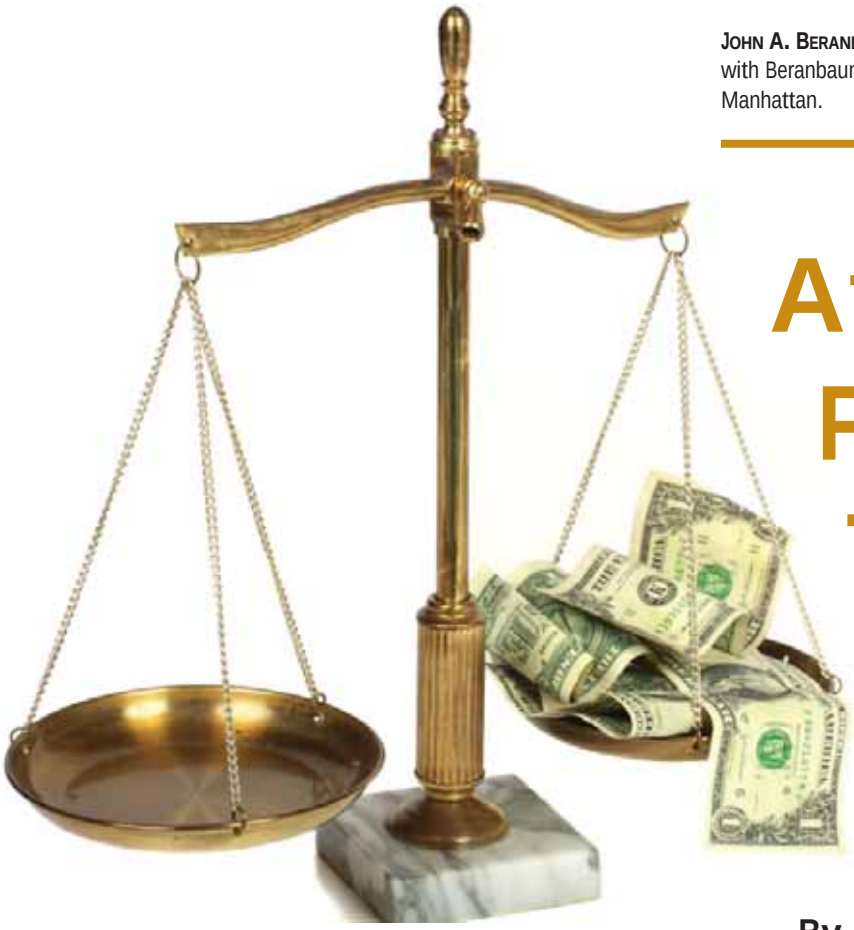
For this reason, we created the *Journal*'s blog (http://nysbar.com/blogs/barjournal/), which permits the online publication of letters as they arrive and with only minimal editing. Particularly in view of the strong opinions several readers expressed after reading the hydrofracking pieces, I hope that you will visit the *Journal*'s blog this month, and consider adding your own comments.

The *Journal*'s staff and board expect to soon provide readers with a far more interactive magazine, which will allow direct online comment and response to articles of interest. These features will be part of a new, highly enhanced, electronic version of the *Journal*. I hope you will take the opportunity for conversation the enhanced version will provide.

As always, I welcome your feedback.

David C. Wilkes

Editor-in-Chief



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# Attorney Fees: The Death of *Arbor Hill*

**By John A. Beranbaum**

The federal civil rights laws are distinct from other statutes in that they authorize the district courts to grant reasonable attorney fees to the prevailing plaintiff, payable by the losing party.[1] Congress included fee-shifting provisions to enable litigants to serve as "private attorneys general," seeking relief for themselves while assuring more generally compliance with the civil rights laws. Without statutory attorney fees, people with modest resources or claims with low damages could not hire a lawyer and would be left powerless to vindicate important rights – to their own and society's detriment.[2]

The Supreme Court has held that a "reasonable attorney's fee" under the fee-shifting statutes is a "fully compensated fee," commensurate with the customary compensation an attorney receives from a fee-paying client.[3] The fee must be "adequate to attract competent counsel, but which do[es] not produce windfalls to attorneys."[4] In 1984, the Court adopted the lodestar method for calculating reasonable attorney fees; this method entails multiplying a reasonable hourly rate consistent with prevailing market rates in the relevant community by the number of hours reasonably expended upon the matter, with a final adjustment for case-specific considerations.[5]

In 2007, a panel of the Second Circuit, including retired U.S. Supreme Court Justice Sandra Day O'Connor sitting by designation, handed down a decision that promised to shake up attorney fees in this circuit. In *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*,[6] the Second Circuit declared that the value of the lodestar method for calculating attorney's fees had "deteriorated to the point of unhelpfulness," causing the court to "abando[n] its use" and replace it with the "presumptively reasonable fee." The substitution of the "presumptively reasonable fee" for the lodestar was significant not just for the change in methodologies but for the implications of that change; from now on, attorney fees were to be calculated to more closely resemble the market between client and attorneys.

So, it was remarkable when in 2011, the Second Circuit, in *Millea v. Metro-North Railroad Co.*,[7] relied upon the recently obsolete lodestar method to reverse a lower court's attorney fees decision and made just passing reference to the "presumptively reasonable fee." The "presumptively reasonable fee" method, it seems, didn't last even four years, and *Arbor Hill* appears to be a thing of the past. This article looks at the reasons for this quick judicial turnaround and what it says about the

importance of statutory attorney fees in enforcing the civil rights laws.

### Arbor Hill Concerned Citizens

In *Arbor Hill*, a neighborhood association brought a successful action under the federal Voting Rights Act of 1965, voiding Albany County's redistricting plan and requiring the county to hold special elections. The plaintiffs then moved for attorney fees under the provision of the Act granting the prevailing party reasonable fees. The sole issue on appeal was whether the plaintiffs' Manhattan law firm should be awarded fees based on the hourly rate customarily charged by Manhattan attorneys or the hourly rate commonly charged in the Northern District of New York, where the action was brought. The Second Circuit affirmed the district court's award based on Northern District rates but, in reaching that decision, found it necessary to address more broadly the computation of fees under the civil rights statutes.

*Arbor Hill* described how two competing methods for calculating attorney fees developed within the circuits. The Third Circuit, in *Lindy Brothers Builder, Inc. v. American Radiator & Standards Sanitary Corp.*,[8] outlined a two-step process in which the court first took the product of the attorney's usual hourly rate and the number of hours worked, the lodestar, and then adjusted that sum by case-specific considerations, such as the lawsuit's likelihood of success. The Fifth Circuit, in *Johnson v. Georgia Highway Express, Inc.*,[9] by contrast, followed a one-step process in which the court set a reasonable fee by considering 12 factors (the "*Johnson* factors"), including the novelty and difficulty of the legal issues; the skill necessary to perform the legal service properly; the results obtained; and the experience, reputation, and ability of the attorneys.[10]

*Arbor Hill* characterized the Supreme Court's attorney fees decisions as adopting the lodestar method "in principle." Whereas the Third Circuit had used the attorney's own billing rate to calculate the lodestar, the Supreme Court introduced a variety of less objective, case-specific factors for determining a "reasonable hourly rate." The Second Circuit criticized the Supreme Court's modified lodestar method as "unhelpful" because it obliged district courts to engage in "an equitable inquiry of varying methodology while making a pretense of mathematical precision." In the words of Circuit Judge Walker, the lodestar method, and fee-setting jurisprudence generally, were afflicted by the "serious illness" of having "come untethered from the free market [they are] meant to approximate."

In place of the lodestar method, the Second Circuit conceived the "presumptively reasonable fee." The presumptively reasonable fee calculation differed from the lodestar methodology principally in two respects. The traditional lodestar method for calculating fees involved two steps – first calculating the lodestar and then adjusting the fee for case-specific considerations – whereas the Second Circuit collapsed the two steps into one. Under *Arbor Hill*, the district courts were to assess case-specific considerations, in particular the *Johnson* factors, at the point when they fixed "a reasonable hourly rate," not as a final adjustment to the lodestar. The other distinctive feature of the "presumptively reasonable fee" also concerned the reasonable hourly rate. While the lodestar method used the prevailing billing rate in the relevant community as the basis for a reasonable hourly rate, *Arbor Hill* instructed the lower courts to use "the rate a paying client would be willing to pay."

*Arbor Hill* gave the district courts little guidance for how to determine "the rate a paying client would be willing to pay." In fact, only at the tail end of the opinion, when the court addresses the specific question on appeal of whether to award the Manhattan law firm fees based on Northern District or out-of-district Southern District rates, is there a discussion of some of the factors that a paying client and his or her attorney would consider in agreeing on a rate. The Second Circuit noted that under its "forum rule," attorney fees ordinarily are calculated using the prevailing hourly rate in the district where the action is litigated, although where circumstances permit, a court may apply higher, out-of-district rates. In a supposed clarification of when a district court may adjust upwards the hourly rate, *Arbor Hill* held that higher, out-of-district hourly rates may be used "if it is clear that a reasonable, paying client would have paid those higher rates."[11]

> Without statutory attorney fees, people with modest resources or claims with low damages could not hire a lawyer and would be left powerless to vindicate important rights.

In the case before it, the court affirmed the lower court's decision to apply in-district rates, giving the following rationale:

> We are confident that a reasonable, paying client would have known that law firms undertaking representation such as that of the plaintiffs often obtain considerable non-monetary returns – in experience, reputation, or achievement of the attorneys' own interests and agendas – that might cause them to accept such representation despite a prevailing hourly rate that is lower than the law firm's customary billing rates, and that the client would have insisted on paying his attorneys at a rate no higher than that charged by Albany attorneys . . . .[12]

Tellingly, in making these suppositions, the appellate court cited to neither the record below nor case law but relied on its own subjective perceptions of lawyers' motivations and clients' negotiating skills.

If the goal of the Second Circuit in *Arbor Hill* was to create a more objective, market-driven standard for setting attorney fees, it failed. If anything, the presumptively reasonable fee was more, not less, subjective than the lodestar. The *Johnson* factors, used by *Arbor Hill* to establish a reasonable hourly rate, were open-ended and generally not empirically based.

> *Arbor Hill*'s presumptively reasonable fee is unworkable with respect to civil rights claims with low damages.

Moreover, despite the Second Circuit's claim to the contrary, pegging a reasonable hourly rate to "the rate a paying client would be willing to pay," required the district courts to engage in greater subjectivity than if they used the lodestar method. With the traditional fee award method, courts could rely on evidence such as the attorney's own billing rate in non-fee-shifting matters and other attorneys' affidavits attesting to their rates in similar matters. *Arbor Hill*, by contrast, required the district courts to answer the hypothetical question of what a client would pay, taking into account such intangibles as the client's success in negotiating a lower fee and the "reputational benefits" of a case. As Magistrate Judge Dolinger stated in analyzing *Arbor Hill*, "[w]hat a reasonable but parsimonious client would be willing to pay for effective advocacy is not self-evident in any case; after all, the inquiry requires an excursion into the subjective state of a hypothetical person or organization."[13]

### *Perdue v. Kenny A.*

In the interim between the Second Circuit's decisions in *Arbor Hill* and *Millea*, the Supreme Court decided *Perdue v. Kenny A. ex rel. Winn*.[14] In *Perdue*, a class action on behalf of foster children in Georgia, the Court considered whether the lower courts erred in granting the plaintiffs' counsel a fee enhancement beyond the lodestar because of superior performance and results. In the course of striking down the enhancement, the Supreme Court reaffirmed that the lodestar approach was the "guiding light of our fee-shifting jurisprudence." It explained that the lodestar calculation, by securing the attorney fee to the "prevailing hourly rate" has the advantage of being "readily administrable" and "objective," whereas the *Johnson* factors give the district courts minimal guidance in setting a fair rate and allow for much subjectivity.

After *Perdue*, it is questionable whether *Arbor Hill*'s presumptively reasonable fee calculation remains good law.[15] The Supreme Court rejected the basic precepts of *Arbor Hill*. Whereas the Second Circuit had found the lodestar method more confusing than helpful, the Supreme Court declared that it remained the foundation of attorney fees jurisprudence. While *Arbor Hill* endorsed the *Johnson* factors for determining a "reasonable hourly rate," the Supreme Court concluded that they were less objective than the considerations used in the lodestar calculation. After *Perdue*, it was left to the Second Circuit to decide what, if anything, remained of *Arbor Hill*.

### *Millea v. Metro-North Railroad Co.*

While *Millea* did not explicitly overrule *Arbor Hill*, its abandonment of the "presumptively reasonable fee" analysis is clear enough. In *Millea*, the plaintiff had prevailed at trial on his claim that the defendant Railroad interfered with his right to take medical leave under the Family and Medical Leave Act (FMLA). Since the plaintiff had missed just two days' work as a result of the Railroad's unlawful interference, the jury awarded him only $612.50 in damages. Although the lodestar was $144,792, the district court awarded just $204 in attorney fees, one-third of the damages, on grounds that the recovery was *de minimis*, the case was not particularly complex or novel, and the interference claim had no public policy significance.

The Second Circuit held that the district court abused its discretion when it awarded fees as a proportion of damages and disregarded the lodestar. Citing *Perdue* a dozen times in the opinion, *Millea* left no doubt of the soundness of the lodestar calculation in this circuit. By contrast, *Millea* mentioned *Arbor Hill*'s "presumptively reasonable fee" once, and then only to suggest, somewhat misleadingly, that it was the equivalent of, and not a departure from, the lodestar.

Arguably as important as restoring the lodestar method in this circuit was *Millea*'s re-focus on the public policy underlying the fee-shifting statutes, which *Arbor Hill*, with its more market-based emphasis, had obscured. *Millea* observed that although FMLA actions are often "small-ticket items," they "serve an important public purpose disproportionate to their cash value," namely "assuring that civil rights claims of modest cash value can attract competent counsel." The Second Circuit added that the district court erred in finding the plaintiff's $612.50 recovery *de minimis*, observing that it was more than 100% of the damages sought on that claim.

*Millea* makes clear that *Arbor Hill*'s presumptively reasonable fee is unworkable with respect to civil rights claims with low damages. When 100% of the damages in a federal lawsuit are, as in *Millea*, $612.50,[16] it is fanciful to ask what rate a paying client would be willing to pay

to bring that lawsuit, much less to "attract competent counsel." And the same is true for a low-income worker's claim for minimum wages or unpaid overtime, or a disabled employee challenging the denial of a reasonable accommodation, or a citizen seeking vindication for being locked up without probable cause. *Arbor Hill*, taken at its word, would preclude a fee award in such small damages cases, despite their importance, since a rational paying client would not bring suit, and therefore would not pay attorney fees.[17]

Even if *Arbor Hill*'s instruction that the fee award be based on what a paying client would pay were not applied literally, the appellate court's entreaty that the district courts "enforce market discipline" in order "to ensure that the attorney does not recoup fees that the market would not bear" was a clear and troubling signal to the lower courts to limit attorney fees in civil rights actions, public policy notwithstanding. After all, if the goal is to make fee awards "best approximat[e] the workings of today's market for legal services," then the attorney who achieves a modest recovery for a client should, consistent with market principles, earn only a marginal fee. Of course, setting fees according to market principles runs up against the well-established public policy of the civil rights laws, which *Millea* has now put back in the circuit's attorney fees jurisprudence.

## Conclusion

It is worth asking how such a respected court as the Second Circuit could have come up with such a wrongheaded decision as *Arbor Hill*, re-writing the calculation of attorney fees with standards that were, in great measure, unworkable, and which were tone deaf to long-settled public policy. The Second Circuit wrote *Arbor Hill* in April 2007, when the American economy was still booming, and leading voices in business, government and academia uncritically accepted the virtues of the "free market." Echoes of that prevailing credo can be heard throughout the opinion. *Millea* was decided four years later, when society was still trying to sort out the damage caused by a largely unregulated economy, and the unfettered market was no longer looked to as the wise arbiter of people's affairs. *Millea*, perhaps, can be seen not only as correcting a flawed decision but as the appellate court's response to the sea change wrought throughout society by the ongoing financial crisis.[18] ■

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (employment discrimination actions). *See, e.g.*, the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (granting attorney fees in actions to enforce rights under the Fifth and Fourteenth Amendments).

2. *See City of Riverside v. Rivera*, 477 U.S. 561, 574–79 (1986).

3. *See Missouri v. Jenkins by Agyei*, 491 U.S. 274, 286 (1989).

4. *Hensley v. Eckerhart*, 461 U.S. 424, 444 (1983) (quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976)) (Brennan, J., *concurring in part, dissenting in part*).

5. *Id.* at 433–36.

6. 493 F.3d 110 (2d Cir. 2007), *amended opinion and superseded on denial of rehearing*, 522 F.3d 182 (2d Cir. 2008).

7. 658 F.3d 154 (2d Cir. 2011).

8. 487 F.2d 161 (3d Cir. 1973).

9. 488 F.2d 714 (5th Cir. 1974).

10. The other *Johnson* factors are: the time and labor expended; the preclusion of employment by the attorney due to the acceptance of the case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the "undesirability" of the case; the nature and length of the professional relationship with the client; and awards in similar cases.

11. Two years later, in *Simmons v. N.Y. City Transit Auth.*, 575 F.3d 170 (2d Cir. 2009), the Second Circuit made more exacting a plaintiff's burden when seeking higher, out-of-district rates. In order to overcome the presumption that the forum's rate apply, a litigant "must persuasively establish that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result." *Id.* at 175.

12. *Arbor Hill*, 493 F.3d at 121.

13. *Tucker v. City of N.Y.*, 704 F. Supp. 2d 347, 359 (S.D.N.Y. 2010) (adopting in part Report & Recommendation of U.S. Magistrate Judge Dolinger, dated Mar. 9, 2010) (internal quotation omitted). Judge Dolinger is one of the few, if not only, lower court judges in the circuit to engage in a searching analysis of *Arbor Hill*, and, not incidentally, he found the decision flawed in ways set out in this article. *See also Lucky Brand Dungarees, Inc. v. Ally Apparel Res., LLC*, 2009 WL 466136 (S.D.N.Y. Feb. 25, 2009).

14. __ U.S. __, 130 S. Ct. 1662 (2010).

15. *See Allende v. Unitech Design, Inc.*, 783 F. Supp. 2d 509, 514 n.4 (S.D.N.Y. 2011) (stating that *Perdue* casts doubt on the viability of *Arbor Hill*).

16. According to the district court, was the maximum potential recovery, including liquidated damages was $11,600. *See Millea v. Metro-North R.R. Co.*, No. 3:06-cv-1929 (VLB), 2010 WL 126186 *5 (D. Conn. Jan. 8, 2010), *aff'd in part, vacated in part, remanded by* 658 F.3d 154 (2d Cir. 2011).

17. *See Tucker*, 704 F. Supp. 2d at 359.

18. The change in tone and substance between *Arbor Hill* and *Millea* cannot be explained by differences in the composition of the panels. Chief Judge Jacobs, who sat on the *Arbor Hill* panel, wrote the opinion in *Millea* – making that decision all the more remarkable given his criticisms of *pro bono* lawyers taking advantage of the attorney's fees statutes to advance their own agenda. *See Amnesty Int'l v. Clapper*, 2011 WL 4381737 (2d Cir. Sept. 21, 2011) (Jacobs, C.J. dissenting from the denial of rehearing *en banc*); "Pro Bono for Fun and Profit," speech by Dennis G. Jacobs, at the Federalist Society, Oct. 8, 2008, *available at* http://www.fed-soc.org/publications/pubido 1178/pub_detail.asp.


"It gives me the time until my career bottoms out."

# "LEEDigation" – The Latest on Leed® and Green Building Legal Issues

**By Earl K. Cantwell**

The LEED® green building rating system – developed and administered by the U.S. Green Building Council (USGBC), a Washington, D.C.-based, nonprofit coalition of building industry leaders – is intended to promote design and construction practices that reduce negative environmental impacts of buildings and improve occupant health and well-being. LEED® "points" are "earned" on a project for decisions pertaining to site selection, energy use, lighting, water and material use, waste management, air quality, reduction of construction waste, and design parameters. The LEED® rating system is keyed to four basic certification levels – Certified, Silver, Gold and Platinum – which correspond to the number of points attained in five core design categories. The latest LEED® rating system v3.0, effective July 1, 2009, is based on the following five primary and two secondary categories:

| | |
|---|---|
| Sustainable Sites | 26 Points |
| Water Efficiency | 10 |
| Energy & Atmosphere | 35 |
| Materials & Resources | 14 |
| Indoor Environmental Quality | 15 |
| | 100 Points |
| | |
| LEED® Innovation Credits | 6 Points |
| Regional Priority Items | 4 |

LEED® v3.0 focuses on energy savings, reduced $CO_2$ emissions, water efficiency, and regional priorities. Reducing carbon footprint and fossil fuel use and emissions received heavier weight in the new LEED® point structure. Energy and atmosphere credits account for 32% of potential points, compared to 24% in the prior scale. Of 100 possible points, 48 are now in general energy and water use categories. Water use reduction of 20% is now a mandatory program requirement (MPR) and additional points are awarded for 30% potable water reduction. Under the prior version, LEED® 2.2, 20% water reduction would have earned a credit point – now it is just an MPR.

The LEED® rating systems have been standardized on 100 point scales, with up to 10 additional credits available for project "innovation credits," and focusing on designated regional environmental priorities:

| | |
|---|---|
| Certified | 40 Points |
| Silver | 50 |
| Gold | 60 |
| Platinum | 80 |

All projects started after June 27, 2009, are required to register under and meet the requirements of LEED® v3.0.

Commonly estimated construction cost premiums and investment return calculations for the various LEED®

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certification levels have been roughly reported in the construction and development industry as follows:

| | | |
|---|---|---|
| Certified | .5%–3% cost increase | 4-year payback |
| Silver | 3%–4% cost increase | 5-year payback |
| Gold | 5%–6% cost increase | 6-year payback |
| Platinum | 7%–12% cost increase | 8-year payback |

Following are some evolving LEED® issues which may give rise to significant legal concerns:

## Insurance Coverage Should Protect Against Potential "LEEDigation"

Design professionals, owners, contractors, architects, and engineers involved with LEED®-certified buildings must consider the potential liabilities of "LEEDigation." As with any new area of potential liability, underwriting lags behind history. Traditional insurance may not call for restoring property to a certified condition. Insurance may disclaim coverage for product failures related to renewable energy or key products, or exclude coverage for the unavailability of green materials, etc.

Insurance companies are marketing coverages to protect buildings that are green-certified, for green re-engineering and re-certification, repairing or rebuilding damaged or vacant property, and for rebuilding to green standards. However, such policies do not necessarily cover other problematic issues of failure to achieve green certification, specified cost or energy savings, or required green standards.

Architects may be susceptible to LEED®-related lawsuits for breach of contract or warranty claims if they wrongfully guarantee that a project will achieve a certain level of LEED® certification or achieve certain energy or water savings. Typical professional liability insurance policies do not provide coverage for warranties or guarantees made by professionals. It is important for design professionals and designer builders to ensure that their errors and omissions policies cover them for "green malpractice," such as failing to achieve a desired green design or level of LEED® certification.

## Contracts Should Clearly Allocate "Green" Responsibilities

Contracts should be drafted to clearly set out the green building responsibilities of the parties. Standard AIA contracts, for example, do not address green building requirements or make specific references to green building certification.

Issues of third-party actions relating to energy efficiency, and challenges to the certification of a building under LEED®, require that contracts be drafted to protect the parties from unforeseen liability well beyond the time frame of any warranties. One potential solution to the issue of long-term liability is to use certification or energy efficiency "goals" and not "specifications" that must be met. Another tactic is to explicitly state that the contractor or design professional has met contract requirements once certification is obtained and the project is "substantially complete."

Green contracts must incorporate sustainable objectives, anticipate warranty or delivery issues, define roles, duties and assumptions of risk, and include practical remedies. Careful drafting should also address the possibility that a certain level of LEED® certification may not be possible – a failure that can affect financing, public entitlements and tax credits, and related issues such as bonding and insurance coverage.

"Green building" project issues to be considered in contract negotiation and drafting include:

1. defining and specifying the "green" standards or requirements;
2. identifying the measurable and achievable criteria for the project;
3. making sure the desired standards and certifications meet any local building;
4. assigning the risks of responsibility for "green" certification;
5. agreeing upon and assigning who is responsible for achieving specific green credits and paperwork submissions;
6. defining whether green certification or compliance, or what level of certification, is a pre-condition to "substantial completion";
7. ascertaining the exact operative design specifications;
8. negotiating any limitations on liability, caps on damages, liquidated damages, and waivers of liability; and
9. being cautious in relying upon or warranting new or untested "green" technology and materials.

Contracts should be drafted to clearly set out the green building responsibilities of the parties.

One of the first reported cases involving "green building" was *Shaw Development v. Southern Builders*, a dispute involving a $7.5-million, 23-unit condominium project in Maryland. The owner, Shaw Development, sought LEED® Silver certification, which would have earned it more than $600,000 in state tax credits if a certificate of occupancy was issued by a certain date. After the contractor filed a $45,000 mechanic's lien action, the owner counterclaimed against the contractor for, among other things, failure to allow the owner to achieve the state tax credits by delivering a LEED® Silver-certified project. The parties had used a standard form contract (AIA A101 – 1997 Standard Form of Agreement), and the contract documents referenced LEED® requirements only via a project manual incorporated by reference. While

*Shaw Development* went into arbitration and settled out of court, this case emphasizes the importance of better contract drafting and risk allocation for failure to obtain LEED® certification.

## False or Overstated Green Marketing Statements ("Greenwashing")

Potential legal liability includes statements about the building. Statements are commonly made in press releases, reports and financing documents that the project "is" or "will" be LEED® certified, "will" result in significant energy savings or "will" create a healthier environment. In fact, no project is certified until after completion; nor will its performance be known for a period of time thereafter. Such statements, however, may be relied upon by investors, lenders, commercial tenants and public officials. Legal claims of misrepresentation and false advertising can be avoided by legal review of information and statements about the green building project, and its anticipated completion and performance.

> Tracking LEED® credits is a document-intensive process that involves drawings, receipts, product spec sheets, testing, photos, plans and more.

Builders and developers also use "greenwashing" comments about projects such as the phrases "built to LEED® standards" or "containing LEED® elements" when a project has not even applied for LEED® certification. Projects are also claiming LEED® "certification" before they are even built and completed.

## Identify Role-Specific "Green Risks"

### Project Owners

- Failure of a project to achieve an anticipated level of certification. This risk is particularly significant when a large new construction project is required to meet certain LEED® levels or sustainability standards. It is particularly important to consider (and expect) that the typical project fails to qualify for 10%–15% of the planned LEED® credits.
- Failure to qualify for tax credits that are contingent upon certification or certification being achieved within a certain time frame.
- Failure to meet loan or incentive program requirements if construction is not as "green" as originally planned.
- Increased "soft costs" due to delays in construction or requirements for additional documentation (in addition to the already greater up-front costs of green building).

### Design Professionals

- Higher standard of care resulting from participation in the building process as LEED® Accredited Professionals (APs).
- Design defects or omissions that result in failure to achieve certification or specific levels of LEED® certification.
- Liability due to the failure of systems or components to perform at expected levels.

### Contractors/Subcontractors

- Failure to deliver features and performance promised by the contract.
- Construction defects, such as improper installation, that may result from a failure to understand the systemwide role of individual building products.
- Failure of structure or systems / components to perform as intended to achieve certification (either short-term or over the lifecycle of the building).

### Tenants

- Failure of a structure to meet expectations for improved worker health and productivity and for reduced utilities costs (where tenants are responsible for utilities expenses). Tenants may seek out commercial or residential space in green buildings specifically because of benefits commonly associated with green buildings, and their expectations may be high and written into the lease.

## Liability for Failure to Document and "Build the Book"

Tracking LEED® credits is a document-intensive process that involves drawings, receipts, product spec sheets, testing, photos, plans and more. The burden of proof falls on the design team to prove to the Green Building Certification Institute (GBCI) that the design and construction meets the templates of all pursued LEED® credits. Be sure to clarify from the start of the project who is responsible for collecting and maintaining the important documents. Failing to do so could result in problems and liability due to the loss of needed points or certification. For example, a contractor could be held liable to an owner of a project for failing to maintain adequate records of waste disposal and recycling if those points were required for desired LEED® certification.

The LEED® reference guide offers advice on what documentation is required (at a minimum). It is at the discretion of the design team member assigned to each credit to provide additional information as necessary to ensure that the reviewer has adequate information to understand the design intent and materials used. Online resources and computer software can assist in listing and maintaining the critical project documents needed to earn and justify LEED® points. It is best to err on the side of organization and inclusion when compiling information

so the USGBC reviewer clearly understands what is being documented, the design, the materials incorporated, and the credit(s) sought.

## Post-Construction Reporting

Many experts have raised serious concern about one requirement in LEED® v.3.0. The requirement, a "precondition" of certification for all buildings under LEED® v.3.0, is that owners must commit to sharing building energy and water-usage data for at least five years after a new building is occupied or an existing building is certified. LEED® certification may be revoked if there is noncompliance with this new minimum program requirement (MPR), or any of the other six so-called MPRs. LEED® v.3.0 imposes ongoing monitoring requirements and calls for possible revocation of certification. LEED® v.3.0 and its related Project Manual entries clearly incorporate the potential "Hammer of Decertification" for failure of the building to perform or the owner to report the data.

Decertification carries major risks and potentially extends periods of notice, statutes of limitations, and the damages presented in claims. For example, if a project depends on achieving a certain certification as part of a lease, failing to reach that level could translate to a breach of the lease and thus implicate risk to the owner and, downstream, to builders, contractors, and designers. Extending that risk past original occupancy through the threat of decertification may dramatically increase the time frame of risk, the chance of a breach, and the potential damages. Decertification may also implicate issues concerning occupancy permits, public bonds and tax credits, compliance with permits and zoning requirements, and other matters.

## Prognosis

A revision to LEED® v.3.0 is in process and expected to be finalized in 2012. Two public comment periods were held in 2011. The proposed changes include new credit categories and several reworked credits and new prerequisites. The new credit categories include a performance credit category, an "integrated process" category and a "location and transportation" category. The performance credit category is aimed at addressing one of the most debated issues of LEED® certification and will try to ensure that LEED® points are not based solely on design, but reflect actual building performance. ■

# ATTORNEY PROFESSIONALISM FORUM

## To the Forum:

I am an associate at a 50-person general practice firm in New York City with a practice in real estate law and litigation. Every day I receive numerous letters, faxes and emails from clients and adversaries, which I always try to answer. My practice is to also use letters or email when it is necessary for me to communicate with an adversary on an important subject. But although I try to be diligent, for reasons that no one has been able to explain, it seems that my adversaries ignore my correspondence, especially emails. Do adversaries have an obligation to respond to my letters and email? How much time do they have to respond to us? Is there anything we can do if our adversaries don't respond? On a related topic, I learned in law school that lawyers have an obligation to communicate with clients and answer their questions. But, my problem is that I get so many telephone calls and emails and that I can't seem to keep up with them. What are my obligations to my clients? How much time do I have to respond? A friend told me that there is a 24-hour rule but I can't seem to find it. Finally, while I am on the topic, I find that many lawyers in our firm use text messaging and email to communicate with us. These communications should be protected by attorney-client privilege but I am concerned that the emails may get to the wrong person and that I could be criticized for not protecting my client's confidences. Is it proper to communicate with clients electronically?

Sincerely,

Communication Challenged

## Dear Communication Challenged:

You raise a few separate but related issues: (1) Do adversaries owe each other a duty to communicate? (2) What are lawyers' communication obligations to their clients? (3) Are emails, text messages, and other digital forms of communication with clients protected by attorney-client privilege? and (4) What happens if a privileged communication in digital form, such as an email, is accidentally disclosed to someone outside the attorney-client relationship?

### Our Duties to Our Adversaries

The New York Rules of Professional Responsibility (the Rules) do not explicitly impose on lawyers an obligation to promptly communicate with adversaries. However, Rule 1.3(b) states that lawyers "shall not neglect a legal matter entrusted" to them, and Rule 3.4(a)(6) states that lawyers shall not knowingly engage in conduct contrary to the Rules; together, these Rules do impose a duty on lawyers to communicate with adversaries in a reasonably prompt fashion.

Some practitioners might quibble with the idea that Rule 1.3(b) imposes a duty to an adversary, arguing that because Rule 1.3's other subsections specifically describe duties lawyers owe to clients, the spirit of Rule 1.3(b), if not its explicit text, likewise describes a duty owed to clients. This idea splits hairs unnecessarily; ignoring communications from (or refusing to communicate with) an adversary constitutes neglect of a legal matter and is a breach of the lawyer's duty of diligence, regardless of whether the duty is owed to the client or the adversary. Moreover, under Rule 3.4, lawyers *do* owe their adversaries the duty of fairness, and engaging in conduct contrary to the Rules – such as neglecting a legal matter – constitutes a breach of Rule 3.4(a)(6). Certainly, there is no doubt that attorneys who fail to communicate with adversaries can face disciplinary action by the Bar,[1] and therefore, whether the obligation stems directly from Rule 1.3(b) or indirectly through Rule 3.4(a)(6), it behooves all lawyers to be diligent in their communications with their adversaries.

Additionally, it is worth noting that Rule 3.2 prohibits lawyers from using means that have no substantial purpose other than to delay or prolong litigation. To the extent an adversary refuses to communicate or takes an excessive amount of time to respond to communications for no apparent purpose other than to delay litigation, that lawyer is breaching his or her ethical obligations under the Rules.

This brings us the related questions you asked: How long does an adversary have to respond, and what can you do if he or she does not respond?

Unfortunately, there is no easy answer to the first of these questions. Lawyers should give their adversaries a reasonable amount of time to respond to a communication, but the amount of time that is reasonable will depend on the nature of the communication and the relationship between the parties. For example, a reasonable time to respond to a request for comments on a draft agreement to settle a complex commercial litigation matter will be much longer than the reasonable time needed to respond to a request to videotape an upcoming deposition. Additionally, if your adversary has previously notified you that he or she is in the midst of a trial on another matter, it is reasonable to expect it will

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.

take the adversary longer to respond to your communications than it would if he or she was in the office.

As for the second related question, there is a series of best-practice steps you should follow to encourage your adversary to communicate with you. First, try a variety of means of communications, and document all of your attempts to reach your adversary. If your voicemail message has fallen on deaf ears, follow up with an email; if your emails are going unanswered, try a phone call instead. If your adversary has communicated with you in a prompt fashion in the past, give him or her the benefit of the doubt; even if your adversary has a history of poor communication, always be civil in your own communications. After all, it is possible your adversary is suffering not from a communication failure, but a technology failure: perhaps the office email server has gone down and the attorney is only available by phone; or maybe he or she is travelling and accidentally activated the out-of-office message only for email and not voicemail.

Second, if voicemails and emails alike do not spur a response, send your adversary a letter detailing the issue(s) about which you need to communicate and describing your attempts to make contact. If your adversary has a history of failing to communicate with you, you may want to take a sterner tone and suggest you will seek intervention from the judge if your adversary continues to be unresponsive.

Third, if your adversary continues to ignore you, it is appropriate to seek help from the court. The form of the intervention you seek will depend on the stage of litigation, your relationship with your adversary, and your client's goals. For example, if you have had a relatively cordial relationship with your adversary and the lack of communication appears to be out of character, a simple letter to the judge (copying your adversary, of course) describing the situation and requesting a conference call to resolve the issue may be all that is necessary to spur your adversary to resume communications with you. Similarly, if your adversary seems to go "radio silent" with respect to only one issue – for example, if he or she suddenly stops answering emails whenever you bring up scheduling depositions but is otherwise responsive to your communications – a letter to the judge is appropriate. In other situations you may want to consider more drastic measures. For example, if your adversary is the plaintiff, and the plaintiff has neither responded to your discovery requests nor initiated any discovery of his or her own, a motion to dismiss for failure to prosecute may be a more suitable action to take.

## Our Communication Obligations to Our Clients

There is no doubt that lawyers have a duty to communicate with their clients with reasonable diligence and promptness. These obligations are set forth in Rules 1.3(a), 1.3(b), and 1.4. The Rules do not impose strict time limits; the 24-hour rule about which you've heard is what one Disney pirate would say is "more what you'd call a guideline than an actual rule." The Rules require you to act with reasonable diligence and promptness in representing your client and communicating with him or her, but they do not specify particular deadlines by which you must respond to your client.

Certain circumstances do require you to act with more swiftness than others. Under Rules 1.4(a)(1) and (4), you must *promptly* communicate with your client about (1) any circumstances requiring your client's consent; (2) any information that a court rule or other law requires you communicate to your client; (3) material developments in the case, including settlement or plea offers; and (4) any reasonable request for information from your client. Other circumstances only require you to *reasonably* consult with your client, such as case strategy (Rule 1.4(a)(2)), the status of the case (Rule 1.4(a)(3)) and limitations on your conduct imposed by the Rules or other law (Rule 1.4(a)(5)).

What constitutes "prompt communication" or "reasonable time" will vary depending on the circumstances of the case and the nature of your relationship with your client. The 24-hour rule is a solid guideline and one we recommend you follow whenever possible. Even if you cannot respond to your client substantively within one day's time (for example, if your client emails you a question that will involve substantial research before you can provide guidance on the issue), you should let your client know that you've received her communication, will look into the matter and will provide a substantive response within a specified period.

If there is ever a time when you will not be able to provide even a cursory response within 24 hours – for example, if you are traveling in an area without reliable mobile communication access, or if you are on trial – you should notify your clients ahead of time and (1) tell them why you will be unavailable, (2) tell them the dates you will be unreachable, and (3) give them contact information for the person or people who will be available to assist your clients in the event of an emergency. Clients are much more likely to understand and forgive a delay in communication if you have informed them ahead of time that you will be unavailable for a short period or that you cannot answer their questions right away because you need to do some research first. They are not as likely to understand if you just fail to respond to them for days or even weeks. Actively managing your clients' expectations and your relationships with your clients through prompt communication will enable you to fulfill your ethical obligations and keep your clients happy with your service.

## Digital Communication and the Attorney-Client Privilege

Under Rule 1.6(a), lawyers have a duty to protect their clients' confidential information, which includes information protected by the attorney-client privilege. Privileged information is also protected from disclosure under CPLR 3101(b) and 4503(a)(1). The Rules and the CPLR use broad terms

such as "confidential information" or "confidential communication" when describing privileged information. This word choice is deliberate: the Rules and the CPLR mean to capture every form privileged information may take, whether that be an oral conversation, a letter, a voicemail recording, a text message, an email, or any other form in which information can be communicated.

There is nothing wrong with using electronic communication with your clients and, as long as the communications otherwise satisfy the privilege standard – a communication between attorney and client, made and kept in confidence, for the purposes of obtaining or providing legal advice – they will be privileged documents and will be shielded from discovery. In fact, CPLR 4548 specifies that an otherwise privileged document will not lose its privilege just because it was communicated electronically. However, you may want to consider stating in your engagement letter that you may use digital communications, including but not limited to email, to communicate with your client and that by countersigning the engagement letter, the client consents to such communication.

There is one important caveat to note when using electronic communication with clients: if someone outside the attorney-client relationship has access to the email account or mobile device, the expectation of confidentiality may be destroyed. For example, if your client is an individual and she emails you from her work email account, and her employer's company policy gives the employer the right to access that work email account, a court may find that your client's emails to you were not privileged because her employer could access them.[2] A wise lawyer will counsel clients to avoid contacting the lawyer through any device that could be monitored or accessed by a third party.

You also have a duty to keep your digital communications with your client confidential, and you should take steps to ensure that your digital information is protected. For example, you should not send or receive confidential text messages if anyone else has access to your phone, nor should you send or receive confidential emails through an email account to which someone else has access. You should protect your digital files with the same diligence you protect your paper files: under lock and key. The difference with digital files, of course, is that the lock and key will also be digital, that is, firewalls and other protections to ensure unauthorized persons cannot access the files.

## Accidental Disclosure

Inadvertent disclosure of confidential or privileged documents is every lawyer's fear, and the risk of such a disclosure is greater as electronic communication becomes easier, because a single mistyped email address or accidental "reply all" can send documents outside the attorney-client sphere.

You can take certain steps to reduce the likelihood of inadvertent disclosure and to minimize the consequences if disclosure occurs. Simply taking the time to double-check email addresses and the numbers to which you are texting or faxing information will help reduce the chances that you will accidentally send confidential information to an adversary or third party. Additionally, ensuring that your electronic files are properly protected behind firewalls and antivirus software will help prevent unauthorized parties from accessing them.

If you do realize that you have accidentally sent confidential materials to an adversary or third party, you should notify that party immediately, inform them of the situation, and request that they destroy, sequester, or return the documents. If the recipient is a lawyer, Rule 4.4(b) requires the attorney to notify you that he or she received your confidential materials, but the Rule does not currently require the recipient to take any further action. Therefore, in case your adversary or the third party resists returning or destroying the materials, you should continue to make every effort to protect your client's confidential information.

First, you should document your position to the recipient in writing (either an email or a letter, whichever you deem appropriate), and set forth your justification for your request that the inadvertently disclosed documents be returned, sequestered, or destroyed. Second, if the recipient refuses to cooperate, request a meet-and-confer to discuss the matter and hear the recipient's justification for the position that he or she need not comply with your request. Finally, if the matter still cannot be resolved, you should then consider court intervention, such as a conference call with the judge to resolve the dispute or a motion for a protective order.

The NYSBA's Committee on Attorney Professionalism has proposed revisions to Rule 4.4(b). If enacted, the proposed rule would, as a matter of professional ethics, protect confidential client information by requiring the recipient to (1) stop reading the document once he or she realizes it is an inadvertently disclosed confidential document; (2) notify the sender of its receipt; (3) return, sequester, or destroy the document; (4) refrain from using the information in the document; and (5) take reasonable steps to retrieve any copies the recipient circulated before realizing its confidential nature. We recommend that attorneys follow these best-practices steps if they receive inadvertently disclosed confidential material even though they are not yet a part of the Rules.

## Conclusion

Good communication skills are a hallmark of the effective professional. Lawyers have an ethical obligation to communicate promptly with their adversaries and clients and to avoid unnecessarily delaying a legal matter. Lawyers should strive to reply to their adversaries and clients within 24 hours whenever possible, and, when we will be unavailable for periods of time, to inform our clients and adversaries of that fact in order to avoid the appearance of being unresponsive.

While electronic communication is permissible, and is often the desired mode of communication, we should take care to protect our clients' confidential information, however communicated, including informing our clients not to use their work computers to contact us and taking all reasonable necessary steps to claw back confidential material that was inadvertently disclosed.

The Forum, by
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New York, New York

1. *See, e.g., In re Berkman*, 55 A.D.3d 114 (2d Dep't 2008) (noting the respondent had "an extensive prior disciplinary record" for, among other things, "failure to adequately communicate with his clients or with adversaries").

2. *Scott v. Beth Israel Med. Ctr. Inc.*, 17 Misc. 3d 934 (Sup. Ct., N.Y. Co. 2007) (where employee had constructive notice of employer's policy forbidding personal use of company computers and email and providing for employer monitoring of email, employee's communications with his attorney using his work email account were not privileged because the employee had no expectation of privacy). Courts outside New York have held similarly. *Holmes v. Petrovich Dev. Co., LLC*, 191 Cal. App. 4th 1047 (2011) (where company's policy stated that the company would monitor computer and email usage and personal email was strictly forbidden, employee's communications with her attorney using her work computer were not privileged because there was no expectation of confidentiality); *see also City of Ontario v. Quon*, 560 U.S. ___, 130 S. Ct. 2619 (2010) (where city's email policy permitted auditing of employee emails, and where city informed employees that text messages would be treated like emails, search of police officer's personal text messages on his department pager for non-investigatory work-related purposes was reasonable).

## QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM 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 that 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

motion with an affidavit or affirmation stating whether you've moved before for similar relief and the result of that motion. Specify the new facts, if any, on which you base the new motion, if you've asked for similar relief before. When moving ex parte, a court might require you as the moving party to post an undertaking.[7] Under the IAS system, submit your ex parte motion to the assigned judge.

### Stay of Proceedings

Under CPLR 2201, you may move a court in which an action or proceeding is pending to grant a stay of the case. A stay suspends the case. Make your application for a stay in the court in which the matter is pending. You may move for a stay by notice of motion or by order to show cause. Seeking a stay isn't the same as seeking injunctive relief.[8] When a court grants an injunction, it directs a party to do or not do something. The rules about injunctive relief are set forth in CPLR article 63. A court may grant injunctive relief only if it has the jurisdiction to grant an injunction.

### Motions to Correct Pleadings

Before filing a responsive pleading, you may move under CPLR 3024(a), 3024(b), or 3014 to correct pleadings. Under CPLR 3024(b), you may move for a more definite statement if you can't respond to a pleading because the pleading is vague. Under 3024(b), you may move to strike any scandalous or prejudicial material in a pleading. If you can't respond to a pleading because your adversary hasn't separately numbered the allegations or causes of action in the pleading, you may move under 3014 to require your adversary to number its pleading separately.[9]

### Disclosure Motions

They're motions in which you seek relief from the court regarding disclosure, called "discovery" in federal court. The reason you'll move for disclosure might be that the other side has failed to disclose information that you sought and you're asking the court to compel the other side to turn it over to you.[10] You might also be asking the court to penalize the other side because it failed to disclose to you information you sought.

Under CPLR 3124, move to compel your adversary to comply or respond to "any request, notice, interrogatory, demand, question or order." Under CPLR 3126, move for penalties against another party. Under CPLR 3126, a court may strike all or part of your adversary's pleadings, dismiss the case, enter a default judgment against your adversary, preclude your adversary from offering information into evidence at trial, stay the proceedings until your adversary complies, or conditionally order your adversary to comply.

A court, sua sponte or on notice by motion, might also grant a protective order to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice."[11]

### Pre-Trial Motions

A pre-trial motion is a motion in which you seek relief from the court before the trial begins. A pre-trial motion must be on notice to the other parties and in writing.[12] You may move for pre-trial relief (1) by notice of motion with supporting papers[13] or (2) by order to show cause with supporting papers.[14] Motions to dismiss under CPLR 3211 and motions for summary judgment under 3212 are pre-trial motions. Moving to dismiss under 3211 is a quick way to dispose of a case. Under 3212, you may move for summary judgment or partial summary judgment. The *Legal Writer* will discuss more on motions to dismiss and summary-judgment motions in the upcoming issues.

You may file an in limine motion before trial to preclude the other side from offering evidence at trial. You may also file an in limine motion before trial to get an advance ruling to assure that your evidence will be admitted at trial.

> Some attorneys put their legal arguments in their affirmations. But that's the inferior practice: Save your legal points for your memorandum of law, a document separate from your affirmation.

### Trial and Post-Trial Motions

Trial and post-trial motions are motions in which you seek relief from the court during trial (or a hearing) or when the trial has concluded. Depending on the individual judge's rules, trial and post-trial motions may be made orally.

Under CPLR 4401 and 4404, you may move for judgment during and after trial. CPLR 4402 allows you during the trial to move for a continuance or new trial. CPLR 4404(a) allows you to move post-trial for a judgment notwithstanding a verdict. CPLR 4404(a) also allows you to move for a new trial in jury cases.[15]

### After a Judge Has Ruled: Motions to Renew or Reargue

After a judge has decided a motion against you, you must decide whether to move to renew, to reargue, or to renew and reargue. You'll have to make this motion before the judge who decided against you the first time you made the motion.[16] Identify whether you're moving for renewal, reargument, or both. If you're unclear what you're moving for (renewal, reargument, or both), don't expect the court to figure it out for you.

In a motion for renewal, you must show that you have new facts you didn't offer on the earlier motion that would change the court's determination had it known about the facts initially and that

you have a justifiable reason why you didn't offer those facts before.[17] As the moving party, you have the burden to show that the facts didn't exist before or were unknown. You must also show that even with reasonable diligence, you couldn't have discovered the facts to offer them on the original motion.

In a motion for reargument, you're informing the court that it overlooked or misapprehended relevant law or fact.[18] Explain how the court misapplied or misconstrued a statute, rule, or case. Explain the applicable law. But don't repeat your earlier arguments. And don't advance new or additional arguments from your original motion.

## Form and Content of Motions: General Overview

- Motions and orders to show cause must comply with CPLR 2101: All papers must be typed or printed in black on 8 1/2 by 11-inch white paper in at least 10-point type.[19]
- Each motion paper must have a caption containing the court's name and venue, the action's title, and the index number.
- Each motion must state whether the document is a notice of motion or an order to show cause.[20]
- Double-space the text but single-space the caption, title, footnotes, and quotations.[21]
- If counsel represents you, the motion must be endorsed with the attorney's name, address, and telephone number. If you're unrepresented, and thus proceeding pro se, endorse the motion with your name and give your address and telephone number.[22]
- If an attorney represents you, your attorney must sign every written motion. The attorney's signature certifies that its contents aren't frivolous.[23]

## The Essential Components of a Notice of Motion

A notice of motion, usually one or two pages long, specifies the preliminary information that appears before your motion. The notice of motion gives your adversary essential information about the motion. In your notice of motion, include the following:

- The date,[24] time, court location (address of court and part), and department, if applicable.
- The nature of the order you're seeking.
- The evidence on which you're basing your motion. For example, any affidavits, exhibits, or other evidence on which you're basing your motion.
- The caption of the case, including the venue for the motion.
- The assigned judge's name if the case has been assigned to a judge.
- The index number.
- The name and address of the attorney on the motion.
- Whether you're seeking oral argument. Some judges require oral argument on all types of motions; other judges require argument in limited circumstances. In most New York courts, oral argument is the requirement, not the exception.

## Affidavits and Exhibits

Affidavits are the "principal means" to submit evidence to a court in a motion.[25] No evidentiary rules dictate the contents of New York affidavits. But beware attacks from your adversary when you submit affidavits not based on personal knowledge or on documentary evidence: A court will give no probative value to affidavits not premised on personal knowledge or on documentary evidence.[26] If you're relying on pleadings, attach them to your motion in the form of exhibits. How you choose to put together your exhibits (binding them professionally or with clips or staples or hole punches, including a cover and exhibit tabs) is up to you. But make sure you make it easy for the court to find and read your exhibits.

Affidavit(s) accompany a motion. If necessary to your motion, attach documentary exhibits. Affidavits and exhibits help the court rule for you. Affidavits must be sworn before a notary public. An attorney, physician, osteopath, or dentist may swear to information in an affirmation instead of an affidavit.

In an attachment to an affidavit, give the court information or documents obtained during disclosure. Describe in the affidavit the document and why it's important to your motion. In an attachment to an affidavit, you may also give the court testimony from an examination before trial (EBT) — called a deposition in federal court — relevant to your motion. Include the cover page of the transcription and the relevant text.

Your summary-judgment motion must include the pleadings as attachments.[27]

Your motion to dismiss must attach a copy of the complaint.[28]

## Brief or Memorandum of Law in Support of Your Motion

You're not required to submit a brief, sometimes called a memorandum of law, to support a motion. But better attorneys do so in important cases. It's not just the facts of your case that will persuade the court to rule for you. It's also how the facts of your case apply to the law. Some attorneys put their legal arguments in their affirmations. But that's the inferior practice: You should save your legal points for your memorandum of law, a document separate from your affirmation. In affirmations, attorneys affirm to the truth of factual statements. Attorneys may not swear to the truth of legal arguments.[29] And judges sometimes can't recall what you've said during oral argument. Submitting a separate memorandum of law lets the judge hear your arguments again. Sometimes judges ask their law clerks to write their decisions, and the law clerks will not hear your brilliant oral argument. It's thus best to submit a separate memorandum of law with your legal arguments.

For more information on writing briefs, consult the *Legal Writer*'s

CONTINUED ON PAGE 56

column "Writing Bad Briefs: How to Lose a Case in 100 Pages or More."[30] You'll find useful techniques on concision, precision, organization, citation, writing your facts, offering legal argument, and treating the judge and your adversary respectfully. And you'll also learn to avoid legalese, boilerplate, clichés, metadiscourse, negatives, and the passive voice.

In the next issue, the *Legal Writer* will continue with specifics on motions to dismiss. ■

1. David D. Siegel, New York Practice § 245, at 413 (4th ed. 2005).
2. CPLR 2211.
3. Siegel, *supra* note 1, at § 247, at 420.
4. Jane Chuang, *The "How To" of Successful Motion Practice: Program Outline*, N.Y. City Bar Ctr. for CLE 1, 4 (May 18, 2011).
5. CPLR 6301 & 6313.
6. Chuang, *supra* note 4, at 5.
7. CPLR 6313(c).
8. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial at § 16:270, at 16-32 (2006; Dec. 2009 Supp.).
9. In the Second Department, a motion separately to state and number under CPLR 3014 is distinct from a corrective motion under CPLR 3024. *See Consolidated Airborne Sys. v. Silverman*, 23 A.D.2d 695, 257 N.Y.S.2d 827, 828 (2d Dep't 1965). The First and Third Departments authorize corrective motions under CPLR 3024, not CPLR 3014. *See Alexander v. Kiviranna*, 52 A.D.2d 982, 982, 383 N.Y.S.2d 122, 123 (3d Dep't 1976); *Weicker v. Weicker*, 26 A.D.2d 39, 40, 270 N.Y.S.2d 640, 641 (1st Dep't 1996).
10. For more information, review the earlier issues of the *Legal Writer* in this series on drafting civil-litigation documents: Gerald Lebovits, *The Legal Writer, Drafting New York Civil-Litigation Documents: Part XI — Interrogatories*, 83 N.Y. St. B.J. 64 (Nov./Dec. 2011); Gerald Lebovits, *The Legal Writer, Drafting New York Civil-Litigation Documents: Part X — Bill of Particulars*, 83 N.Y. St. B.J. 64 (Oct. 2011).
11. Chuang, *supra* note 4, at 9 (citing CPLR 3103).
12. CPLR 2211.
13. CPLR 2214(a).
14. CPLR 2214(d).
15. Chuang, *supra* note 4, at 29.
16. Exceptions: when the original motion was ex parte; granted on default; or when court "so ordered" a stipulation. CPLR 2221(a).
17. CPLR 2221(e)(2)–(3).
18. CPLR 2221(d).
19. A summons must be printed in at least 12-point type. CPLR 2101(a).
20. CPLR 2101(c).
21. 22 N.Y.C.R.R. § 202.5(a).
22. CPLR 2101(d).
23. 22 N.Y.C.R.R. § 130-1.1(b).
24. CPLR 2214(b) specifies the minimum time period for noticing a motion, except when moving by order to show cause. Some judges will hear certain motions on certain days of the week. Make sure to check with the court and the judge's individual rules.
25. Barr et al., *supra* note 8, at § 16:62, at 16-13.
26. *Id.* at § 16:65, at 16-13.
27. CPLR 3212(b).
28. Barr et al., *supra* note 8, at § 16:60, at 16-65 (citing *Dupuy v. Carrier Corp.*, 204 A.D.2d 977, 977, 614 N.Y.S.2d 950, 960 (4th Dep't 1994)).
29. *Id.* at § 16:670 at 16-14.
30. Gerald Lebovits, *The Legal Writer, Writing Bad Briefs: How to Lose a Case in 100 Pages or More*, 82 N.Y. St. B.J. 64 (May 2010).

**GERALD LEBOVITS**, a Civil Court judge in the Bronx, New York, 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.

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Richard Thiam Tabago
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Lincoln Lim Tan
Tzvi Shmuel Tanenbaum
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Gabriel V. Tese
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# LANGUAGE TIPS

BY GERTRUDE BLOCK

**Question:** The new word "Tebowing" annoys me. Is it just another example of a noun conveniently being changed to a verb instead of the longer phrase "praying on bended knee"? The use of people's names to avoid the longer phrase seems a little too much to me. Do you agree?

**Answer:** No, but there are many people who I am sure will. However, such usage is a very old one. It even has a name: *eponym*. An *eponym* is defined as the name of a person who is or is believed to be the source of the name of a city, county, or an era – or of something significant: for example, "Romulus, the mythical founder of Rome." A related noun that indicates the derivation of a name is *eponymy* (with the stress placed on the second syllable). The adjective *eponymous* is also used. (A lot of forms for a term so seldom used.)

But the term has currently become more popular. The Broncos' quarterback's habitual behavior after making a touchdown has been dubbed *Tebowing*. That term is not surprising in view of Tim Tebow's popularity.

The question now is not whether the term *Tebowing* is appropriate; it is whether "to Tebow" will become a *nonce* word, the name given when a word becomes a fad, then disappears; or whether "to Tebow" will live on and become an American verb.

**Question:** Where did the letter *f* in the British word *leftenant* come from? And why does that spelling exist in British English?

**Answer:** An easy answer used to be that the title, with the British spelling of *leftenant*, derived from a misinterpretation of the Latin words *lieu* ("place") and *tenant* ("holding"), a truncated form of the Latin *locum trenans*. But the *Oxford English Dictionary* (O.E.D.) says that this derivation does not accord with the facts.

The correct derivation is more complicated. The O.E.D. says that the word *leftenant* comes from the labial glide at the end of the first syllable of the compound, which was assumed by 16th century English speakers to have been either a *v* (voiced) sound or an *f* (voiceless) sound. (Readers who find linguistic explanations boring or hard to follow can skip the next paragraph. Others read on.)

The *v* sound and the *f* sound are identical, as you will discover if you whisper the voiceless *f* sound. You will notice that your tongue is in exactly the position in your mouth for both consonants, the *f* and the *v*. When you pronounce the voiceless *f*, because of the characteristic assimilation in language, the next adjacent vowel also becomes voiceless, the (voiceless *t* sound). The result is that the voiceless *t* instead of the voiced *d* sound occurs. Try testing this explanation with other touching sounds: the words *baked* pronounced (bakt) versus the word *begged*, (begd) for example.

Readers who found the foregoing a bore, can begin reading again. The O.E.D. defines as first meaning of both *lieutenant* and *leftenant*: "One who takes the place of another, usually a military or civil officer who acts as his representative or substitute." The second meaning is "an officer just below the rank of captain." But, by the end of the 19th century, *Funk's Standard Dictionary* pointed out that the American pronunciation *leftenant* was confined to retirees of the United States Navy.

At about the same time, another reader asked a somewhat similar question about the strange pronunciation of the title *colonel*. The reader commented that the pronunciation *kernel* reminded him of corn-on-the-cob, not a military officer.

If you are a language buff, you will be interested in the etymology of *colonel*. The meaning of that word has greatly expanded since its inception. Dictionaries still give as its first definition, "an officer in the United States Army, Air Force, or Marine Corps that corresponds to the title of captain in the United States Navy." Thus, a colonel ranks below a brigadier general and above a lieutenant colonel.

But during the early 20th century – in Southern states – the title widened to include certain important members of the bar. So the second definition of *colonel* became "an honorary title bestowed by some Southern states to members of the bar, usually senior members who have brought honor to the state."

That title again expanded in the same states to include distinguished elderly male non-lawyers and honored male visitors to the states, who were often Northerners. For example, "the senior senator from Illinois, who visited recently, was given title of Kentucky Colonel." Then the title again broadened when famous British cartoonist David Low (1881–1961) degraded the honorific by giving the title to a caricature in his comic strip.

The leading character of the comic strip was one "Colonel Blimp," an elderly, fat, and pompous ex-military officer who abhorred new ideas. Some readers may recall that character, for the cartoon became very popular, spawning nonce words like *blimpism* and *blimper*, which are now almost never used. (Fortunately so, for if they were still in use, those pejorative senses would have driven out the dignified sense of "colonel.")

Why pronounce *colonel* like *kernel*? Because of the divergence between the term's orthographic development and its common pronunciation. *Colonel* was derived from Latin *colonus* "a column of soldiers." But in Middle French the French borrowed the Latin word and gave it the French spelling and pronunciation, *coronal*. Then it was borrowed into Middle English with the Latin spelling, *colonel*. But English speakers stubbornly retained the French pronunciation, which was easier for English speakers to pronounce. So we now use the Latin spelling along with the French pronunciation. ■

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**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.).

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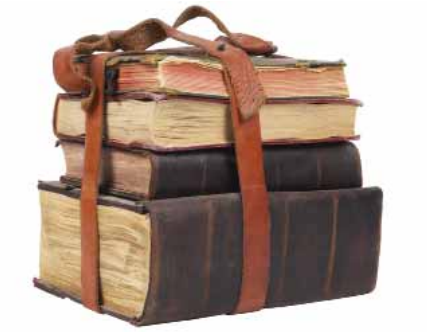

# Drafting New York Civil-Litigation Documents: Part XIII — Motion Practice Overview

The *Legal Writer* continues its series on civil litigation.

In the last issue, the *Legal Writer* discussed responding to interrogatories. In this issue, the *Legal Writer* offers an overview of motions and their essential components. In the following issues, the *Legal Writer* will emphasize motions to dismiss under CPLR 3211 and summary-judgment motions under CPLR 3212, two weapons in a litigator's arsenal. The *Legal Writer* will also discuss cross-motions and replies.

To draft effective motion papers, litigators must be familiar with the Uniform Rules for New York trial courts and the parameters of motion practice found in CPLR 2211 through 2222. Because of New York's Individual Assignment System (IAS), in which a case assigned to a judge might remain with that judge up to and including the trial,[1] litigators must also know what each judge requires in a motion, including motions in the commercial parts. Judges in one county will have rules and preferences different from judges in the same or different counties. The lack of uniformity among judges causes confusion.

## General Information About Motions

A motion is a request for an order from a court.[2] Some motions are made in writing; others, orally. Motions are powerful litigation tools. A successful motion might help you resolve key substantive issues or even dispose of an entire case. A motion might also help you learn critical information for your client. The common practice is for a party to initiate and move the court for some type of relief, although the court might grant an order it has made on its own motion, or sua sponte. Most motions are on notice to the opposing side. Those motions not on notice to the opposing side are called ex parte motions. Courts generally disfavor ex parte motions. Ex parte motions are permissible only when a statute or rule explicitly authorizes them.[3]

## Preliminary Motions

Moving for preliminary relief "protect[s] the movant by maintaining the status quo while the [court determines the] legal and factual issues of the case."[4] Preliminary injunctive relief is an extraordinary remedy a court grants in its discretion. CPLR 6301 and 6313 explain preliminary injunctions and temporary restraining orders.

Request a stay of the proceedings or a temporary restraining order if a risk of imminent harm exists before the court hears the motion on its merits. If you're seeking a temporary restraining order, a court may require you to give notice to the opposing side and give an undertaking.

To obtain a temporary restraining order without notice, you must show that "immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be held."[5] Once a court grants a temporary restraining order, the court sets, or schedules, the hearing for the preliminary injunction.[6] If sought ex parte, a temporary restraining order might be easier to obtain than a preliminary injunction.

## Emergency Motions

A moving party may bring a motion by order to show cause in an emergency. Bringing a motion by order to show cause is an expedited way to move the court for relief when little or no time exists to move on notice. Bringing a motion by order to show cause allows shorter notice than the minimum eight days' notice provided under CPLR 2214(b) for bringing a motion on notice. An order to show cause is obtained ex parte, although a court in its discretion may allow the other side to see it and oppose it before the court signs or declines to sign it. Like a motion on notice, an order to show cause must provide the return date (the date the court will hear the order to show), the time, the place, and the relief you seek. The court sets the day and time when it will hear your order to show cause; leave the day and time blank.

A successful motion might help you resolve key issues or an entire case.

## Ex Parte Motions

Ex parte motions are made to a judge without notice to your adversary. The CPLR authorizes ex parte motions in limited situations: attachment (CPLR 6211); temporary restraining orders (CPLR 6313); and orders specifying the manner of effecting service of process (CPLR 308(5)). CPLR 2217(b) requires you to accompany an ex parte

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