NYSBA FALL 2013

Perspective

A publication of the Young Lawyers Section
of the New York State Bar Association

A Message from the Section Chair

Dear Young Lawyers Section member:

Welcome to the newest edition of *Perspective*—the printed publication of the NYSBA Young Lawyers Section (YLS)! We have only recently begun the 2013-2014 Term of the YLS, which also happens to be our 75th Anniversary Year! We are proud to be "growing old while staying young."

Though the Anniversary Year only began a few months ago, we already had our formal celebration on August 24th. We were able to enjoy an extremely interesting, informative and interactive CLE program with Professor Paul Finkelman, Professor of Law, Albany Law School, and Michael L. Fox, Esq., our Section's Immediate Past Chair and Litigation Managing Attorney at Jacobowitz & Gubits, LLP. The CLE was titled: "Baseball and the Rule of Law: How Our Two National Sports Intersect," and was held in the Caesars Club of Citi Field. We then enjoyed a private lunch, a tour of Citi Field and a baseball game. I want to give a special thank you to Sarah Gold, Esq., our Chair-Elect, and Jason Clark, Esq., our Treasurer, for their efforts in helping to put together this really great anniversary celebration.

Within days of the start of our 2013-2014 Term, the YLS was in Washington, D.C. for our annual Supreme Court Admissions Program.

The program was held on June 9-10, 2013. NYSBA President David Schraver, Esq., was able to join us and move the admission of our admittees before the Court. After the admission ceremony, we were honored to have Justice Ruth Bader Ginsburg spend time speaking with our group in the Courthouse's Conference Room. If you are not yet admitted to the Supreme Court, our annual program is the perfect opportunity to consider doing so.

We held our Fall Executive Committee meeting in New York City on September 30th, followed by a dinner at Virgil's. We were thrilled to co-sponsor the NYSBA Committee on CLE's Bridging the Gap program, which was held in New York City with simultaneous live videoconference in Albany and Buffalo on October 1st and 2nd.

We will have our Annual Meeting as part of NYSBA's Annual Meeting at the New York Hilton Midtown in January 2014. Our Executive Committee meeting and half-day CLE program will be held on January 29th. The CLE program is being chaired by Nathan Kaufman, Esq., a Co-Liaison from YLS to the Intellectual Property Law Section. Our two-day Bridging the Gap program will be held on January 30th and January 31st and is being co-chaired by John Christopher, Esq., YLS' Tenth District Representative and Liaison to the Real Property Law Section, and Courtney Radick, Esq., YLS' Fifth District Representative. Planning has just begun, so keep your eyes open for further information regarding these two programs.

Inside

From March 29th through April 2nd, we will be sponsoring the Fifth Annual Trial Academy (as you can see, it's a year filled with anniversaries for YLS!). Michael L. Fox, Esq., and Sarah Gold, Esq., will be co-chairing this program. The Trial Academy is an intensive five-day trial techniques program, which provides attorneys with the opportunity to improve their trial skills. In the morning, attendees will be able to listen to lectures by attorneys and judges from throughout New York State regarding various areas of trial practice (e.g., jury selection, opening and closing statements, direct and cross examination, etc.). Attendees will then have the opportunity to practice each of these skills in the afternoon using both criminal and civil fact patterns that will be provided. This is an amazing experience that the YLS is excited to offer!

Throughout the year, the YLS' District Representatives from throughout the State will also be holding events near you. Please keep a lookout for further details. We have several Districts that hold annual holiday parties, including the Toys for Tots drive. We also have some Districts working on wine tastings and attendance at a college football game. These are just some examples of what the YLS offers its members.

I am also happy to be continuing the YLS Civics Poster/Essay Contest created by Michael L. Fox, Esq. During his Term as Chair, Michael created this contest to encourage better civics knowledge and education for our students and citizenry. A Special Committee of YLS is in charge of developing, organizing and running the contest. While this is the second year during which we will hold the contest, we hope to make it an annual tradition of the YLS.

Each year, the YLS honors a young lawyer who has rendered outstanding service to both the community and legal profession with the presentation of the Outstanding Young Lawyer Award. The Award is granted to an attorney who has actively practiced less than 10 years, and has a distinguished record of commitment to the finest traditions of the Bar through public service and professional activities. If you know of anyone who is deserving of this award, please consider nominating them.

As with the initiatives of my predecessors, Michael L. Fox, Esq., Immediate Past Chair, and James Barnes, Esq., Chair for the 2011-2012 Term, we are hoping to keep the YLS one of the largest sections of NYSBA and hoping to continue not only increasing our membership, but also providing benefits to our members that far exceed their expectations. If you are not yet a member, please consider joining our Section. As of now, I am happy to report that our Executive Committee is not only very active, but is nearly full, so if you are interested in leadership opportunities within our Section, please contact me for further details.

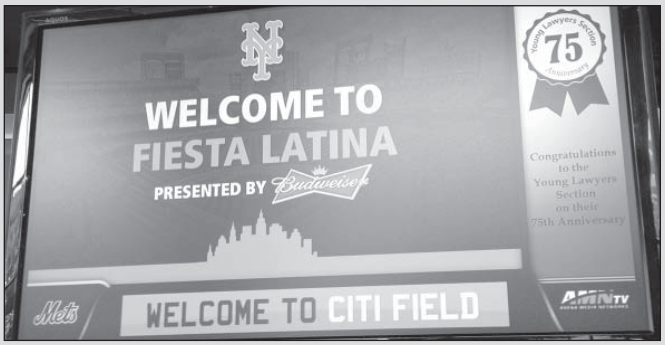
We are excited for the beginning of the new Term and look forward to continuing the great traditions that have been created by YLS' Past Chairs and Executive Committee members!

Sincerely yours,
Lisa R. Schoenfeld, Esq.
Section Chair
Schlissel Ostrow Karabatos, PLLC

Scenes from the Young Lawyers Section

75th Anniversary Celebration

Saturday, August 24, 2013
Caesars Club, Citi Field • Flushing, NY



Seven Strategic Ways to Use LinkedIn

By Ari Kaplan

Whenever I ask lawyers about their use of LinkedIn, many often respond: "I do have a LinkedIn account but have done nothing with it," or "I still have not figured out how to effectively use LinkedIn."

Here are seven simple techniques for reinventing the way you use the social network.

Updates Are Easy

One of the reasons that LinkedIn offers so much potential is that everyone who uses it has generally opted in to receiving notifications about what everyone else in his or her network is doing, who they are meeting, and where they are going, among other details. As such, it is an effective, yet subtle form of broadcasting your schedule and activities.

Each time you have something of note to share (e.g., a new article, a public presentation, or a blog post), provide an update that the site will then distribute to all of your connections. You may not receive an instant response, but you can be certain that others are aware of your activity.

Study Status Updates and Share Resources

Just as your contacts are often quietly reading about you, take note of what they are doing as well. In fact, the current market may offer opportunities for you to help those facing economic challenges.

For instance, you might see a contact's status change from employed to independent. Consider reaching out and giving that person access to your network. Offer potential introductions and share resources. Even if he or she does not secure a job because of your effort, the gesture is one for which social networking is meant—communicating, collaborating, and connecting.

Eventually, that person will be employed and you will have permanently transitioned from simply being a contact to a supportive colleague. More importantly, everyone needs encouragement in those moments when it is in shortest supply.

You Probably Don't Know Who You Know

What you probably have in large supply are direct contacts related to your business development initiatives. The next time you visit a new city, or even have some time at home, conduct a LinkedIn search for relevant connections in your network.

Most of us cannot track the changes in status or new developments for most of the people with whom we are connected. As such, this exercise will help you see how your contacts are doing, but also give you a chance to reestablish communication. Since you are already related on LinkedIn, there is some context and your visit is the catalyst.

Study Those Looking for You

It may surprise you to know that savvy professionals are already doing this, which is one of the reasons that LinkedIn created the "Who's Viewed Your Profile?" feature. It identifies those individuals who are interested in you, what you do, and where you work. Think of these inquiries as leads for your career and business.

You may recognize some of the "viewers" giving you a seamless opportunity to reconnect. Others may simply provide hints that your latest marketing campaign has generated curiosity, or that a new contact received a cold e-mail and is in the process of following up. Over time, you are likely to gain interesting insight from this feature.

Explain Why You Are Connecting

One of the biggest complaints I read about LinkedIn is that users make random requests to connect with each other and provide no explanation in the note other than: "I'd like to add you to my professional network." Avoid this initial interaction.

Aside from being impersonal, it is a wasted chance to set the foundation for a relationship and follow-up conversation. It is also generally unpersuasive.

Take an extra minute and explain why you are connecting. Did you meet at a recent event? Read an article by that individual? Have a mutual friend? Most people are more likely to reply (and do so promptly) when there is a reason to do so. Also, do not indicate that you are a "friend" of the person if you are not. It poses more questions than answers.

Send a Follow-Up Note After Connecting

Just like the invitation, the response to that query is critical. Unfortunately, most people who receive LinkedIn connection requests from individuals with whom they are familiar, whether current contacts or long-lost friends, simply accept the invite and move on. This is a lost chance to create forward momentum.

Each time you receive a request, send a reply (the site actually pro-

vides a convenient link to send a message after you officially connect). Think of the request as someone saying "hello" and your message as the reply. It does not need to be complicated, but it should prompt a dialogue.

Depending on the nature of the contact, thank the person for his or her message and then ask how he or she is doing. This almost always sparks follow-up. It is the essence of creating opportunity.

View Profiles to Get Profile Views

Speaking of opportunity, in preparation for a recent trip I conducted a LinkedIn search for alumni of my law school (this is a proven technique that you should employ to organically expand your network locally, nationally, and internationally). I clicked on a few profiles in the search results prior to making contact directly by e-mail.

I met with a remarkable partner at a large firm, with whom I am certain I will stay in touch. What I noticed, however, was that another lawyer reviewed my profile simply because I reviewed his. We weren't able to meet, but I could have easily called him soon after he reviewed my background and there is a strong likelihood that he would have recognized my name.

Technology has made it much easier to add context to what was otherwise a cold call or e-mail just a few years ago. Take advantage of that new level of familiarity. LinkedIn makes networking universally accessible since it is both practical and strategic without requiring you to be bold or outgoing.

An attorney and inaugural Fastcase 50 honoree, Ari Kaplan is the author of *Reinventing Professional Services: Building Your Business in the Digital Marketplace* (Wiley, 2011). He is a leading legal industry copywriter and analyst, who speaks at conferences, law schools, and professional services firms worldwide about standing out and reinventing your practice. He has served as the keynote speaker at a variety of events and blogs at ReinventingProfessionals.com. E-mail him for links to listen to the audio version of his first book, *The Opportunity Maker: Strategies for Inspiring Your Legal Career Through Creative Networking and Business Development* (Thomson-West, 2008), completely free.

How to Be 3x More Persuasive

By Elliott Wilcox

Veni. Vidi. Vici.
Friends. Romans. Countrymen.
Snap. Crackle. Pop.

For whatever reason, your brain is wired to pay more attention when provided with a list of *three* options. Your brain will be persuaded more easily when provided with a list of *three* arguments, and you are more likely to take action if you are given *three* reasons to do something.

For our brains, three is the magic number. Not two ("Too few!"). Not four ("Too many!"). No, *three* is the perfect number of options, arguments, or reasons to provide to the person you are trying to persuade.

Let's call it the Triad of Persuasion. If you can find a way to provide someone with three options, three arguments, or three reasons to justify their decision, you will have a much better chance of persuading them than ever before.

One of the most effective ways to put the Triad of Persuasion to use is when you need to handle an objection from someone you're trying to persuade. It could be the judge you need to rule in your client's favor, the potential client you want to sign, or the senior partner whose permission you need to work on a career-changing project.

Regardless of whom you're trying to persuade, unless you've got the Force on your side ("These aren't the droids you're looking for"), you are probably going to encounter objections.

For example, let's take the scenario with your potential client. You have just started your new solo practice and have done such a great job of marketing yourself and improving your legal skills that now you are sitting face-to-face with a potential client who could potentially need your legal services for *years* to come. But then, just as you think you have got everything finalized and are ready to ask for the business, she raises an objection: "I'm not sure we should do this.… After all, you are just a one-person´s operation."

"Your brain will be persuaded more easily when provided with a list of three *arguments, and you are more likely to take action if you are given* three *reasons to do something."*

This might stump other attorneys, but not you. After all, since you are a professional, you have already anticipated this objection. As Dr. Alan Weiss, the author of *Million Dollar Consulting* says: "there aren't *any* objections you haven't heard before." So if you are not prepared to respond to an objection, you are negligent.

But you are not negligent, that is why you have not one, not two, but *three* answers ready for this objection.

Begin by disarming the objection with a confident statement, such as "That's *exactly* why you need me."

That statement usually creates a pause or gets the client to ask, "What do you mean?" Either way, take this brief moment to gather your thoughts. Then launch into your Triad of Persuasion, outlining the benefits of hiring your single-person firm rather than a large, multi-national conglomerate: First, you are going to get my complete attention and will be my number one priority. You are going to get a faster response because I can adapt quickly to respond to your needs. Second, you are going to be dealing with the principal attorney at all times, so your case will never be handed off to somebody else who does not know everything about the case. You are never going to walk into court and see some junior attorney whom you have never met before. And finally, since I am a one-person operation, my fees do not have to support a gigantic overhead or a large staff."

Obviously, if you work for a gigantic firm, you would have three responses prepared for when the client objects and says, "I'm not sure we should do this.… You are such a large firm, I am afraid my case will not be a priority."

By preparing *three* responses to each objection, you become—literally—three times more persuasive. But actually, you will become even more persuasive than that, because the Triad of Persuasion has a multiplier effect. By stacking the three reasons, you appear more confident and more prepared, and therefore, you also appear more reliable.

But do not limit your use of the Triad to those situations where you have prepared your responses to expected objections. You can also use the Triad when you are speaking off the cuff and need to demonstrate your conviction or your confidence.

Let's imagine a scenario where you are at a luncheon and the person next to you asks, "You're a law-

yer, right? Do you think lawyers should advertise on TV?"

Again, start with confidence. "I'm glad you asked me that. There are three reasons why lawyers should/shouldn't advertise on TV. First, because.…"

When you make that statement, you may not know exactly what your three reasons are going to be. You will probably know exactly what your first reason will be, you will have *some* idea of what your second reason will be, but you might not have any idea at all what your third reason is going to be.

It does not matter. You should still begin with the same set-up: "I'm glad you asked me that. There are three reasons why.…" In fact, you should practice that set-up phrase a few times so that it rolls off your tongue. That way, while you are delivering the line, you can put your mind into high gear and finalize your thoughts for reasons #2 and #3.

"By justifying your arguments with three *points, you look more polished and better prepared."*

Watch how much more attentive your listeners become when you deliver *three* reasons for each question or each objection, rather than the customary one (or worse, the half-answer) that they usually receive.

By justifying your arguments with *three* points, you look more polished and better prepared. People will assume that you have put more thought into your answer, and will also feel that your answer is more believable, simply because you have done a better job of justifying it.

By giving three reasons, rather than one, you will soon become more persuasive than ever before!

Elliott Wilcox is a DUI defense attorney in central Florida. He has served as the lead trial lawyer in nearly 200 jury trials, and publishes *Trial Tips Newsletter* available at www.trialTheater.com.

Published in *Trial Tips Newsletter*, dated August 9, 2013.

Can an Arbitrator Conduct Independent Legal Research? If Not, Why Not?

By Paul Bennett Marrow

Do arbitrators have authority to undertake independent legal research without authorization by the parties? Or, are they prohibited from doing so, as many arbitrators believe? These are vexing questions. For answers, this article looks for guidance in the Federal Arbitration Act (FAA),[1] state arbitration statutes, case law, and the rules of several arbitration institutions, as well as the Code of Ethics for Arbitrators in Commercial Disputes. The takeaway is that if an arbitrator wants an award that will withstand an attack based on "evident partiality," "misconduct" or the "exceeding of powers," there are good reasons to refrain from *unauthorized* legal research.

Why even consider the question, since the parties' attorneys (are supposed to) provide the arbitrator with briefs. The problem arises when the legal picture presented by the briefs is inadequate or just plain wrong, or where one or both parties fail to provide the arbitrator with a brief. Under these circumstances may the arbitrator research the legal issue or is it best to assume that had the parties intended to give that power to the arbitrator they would have indicated so in the arbitration clause in clear and unambiguous terms? Would it make a difference if the contract designated the governing law and required the arbitrator to apply the law, and/or called for a reasoned award?

Looking at these questions from the perspective of an arbitrator's obligation to be diligent and thorough, and to produce fair and impartial decisions, doesn't the suggestion that independent legal research might be inappropriate seem counterintuitive? After all, if arbitrators are barred from assuring themselves of the correct law in a case, how can they meet expectations that justice will be achieved? Taking it one step further, if there is unauthorized legal research, is that action sufficient for one party to object on the grounds that the arbitrator's impartiality has been compromised?

"Does the emphasis on the freedom to contract open the door for awards that are strange, if not bizarre? Perhaps, but remember that decisions by an arbitrator are confidential and not available as precedent."

The reader might ask if there is something about arbitration and the role that law plays that make arbitration so different from litigation; the answer is "yes." Arbitration is a consensual contractual process intended to be an alternative to (and not a copy of) litigation. In arbitration, parties can contractually agree to give up strict adherence to the law (which *must* be applied in court), in favor of a more informal process customized to their needs. They can decide for themselves what law they want to govern their agreement and any dispute that may arise, and they can even go so far as to mandate that an arbitrator not apply law and instead prescribe principles they deem fair and just. As Judge Richard Posner famously noted "…short of authorizing trial by battle or ordeal, or more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract."[2] And even if parties want the law to apply, there is nothing to stop them from requiring that a version of law mutually agreed to shall govern, even if that version is seen by the arbitrator to be just plain wrong. Decisions about law are for the parties to make, and they may do so without accounting to an arbitrator. Parties may have good reasons for not wanting the arbitrator to research law, reasons they need not share.

Does the emphasis on the freedom to contract open the door for awards that are strange, if not bizarre? Perhaps, but remember that decisions by an arbitrator are confidential and not available as precedent.

Step back and consider the following example: Both sides disagree about whether a widget is blue. Each says the widget is their version of blue. The arbitrator sees what one side calls blue is really red and what the other side sees as blue is really white and concludes that both sides are wrong. But the arbitrator also understands that the parties don't appear to care about what blue really looks like, let alone have any interest in the arbitrator correcting them both. What they have asked is for the arbitrator to decide whose version of blue is really blue—that is, they want the arbitrator to tell them who is right and who is wrong *given their narrow definitions of what is blue*. If the arbitrator says that white is blue for the arbitration, that ruling isn't precedent that can be used in other cases. It's a ruling that reflects the wishes of the parties who, let's face it, from the get-go are blind to what blue really looks like.

Does this analysis encompass both federal and state laws applicable to arbitration and, in particular, the FAA? Assume that the parties have indicated they want an arbitra-

tor to decide whether a certain state's arbitration statute is preempted by the FAA. Both sides file briefs. Side A says state law is preempted but gives a legally incorrect reason. Side B claims state law isn't preempted but gives a legally incorrect reason that's different from that offered by Side A. Are the parties asking the arbitrator to decide what the legally correct reason is or are they asking the arbitrator to decide which party is correct based on the law as the parties see it? It's the latter, even though that seems counterintuitive. In *Steelworkers v. Warrior & Gulf Navigation Co.*, the U.S. Supreme Court instructs that an arbitrator "has no general charter to administer justice for a community which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties."[3] It follows that the arbitrator is bound by the wishes of the parties, even if the arbitrator thinks that the law as stated by both parties is wrong.

In both examples, while the outcome contravenes the reality of the rules dictated by our legal system, neither the parties nor anyone else is harmed. The parties get what they bargained for, and the legal system suffers no adverse impact because the ruling isn't binding on anyone but the parties.

Silence on any issue, independent legal research being no exception, requires the arbitrator to pause before considering an action not otherwise provided for in the parties' written instructions. (This view squares with all the major *domestic* arbitration authorities discussed in this article.)

Remarkably, it seems to make a difference if the analysis involves domestic authorities as opposed to those in the international arena. Many of the legal systems outside the United States favor giving arbitrators broad discretion, especially where the parties have failed to express their wishes. Why this is so is not clear, but for whatever reason, the practitioner must be mindful of this difference.

Domestic Vacatur Statutes and Related Case Law

The FAA and all state arbitration statutes focus on the enforceability of agreements to arbitrate and arbitration awards. These statutes were not designed to mandate the contents of agreements to arbitrate, leaving it to the parties to decide on the terms of their agreement. The only statutory mandate found in 9 U.S.C. § 2 is that the agreement be unequivocal, valid, irrevocable and otherwise enforceable.

What about the conduct of the arbitrator? The main limitations placed on arbitrator conduct are found in the vacatur provisions in the FAA and most state statutes based on the Uniform Arbitration Acts. These provisions allow a court to vacate an award upon a showing of evident partiality, misconduct, or the exceeding of arbitral authority.[4] Significantly, these provisions do not give courts an opportunity to review the arbitrator's decision on the merits.

Supplementing statutory grounds is the common law doctrine manifest disregard of law, which has long been a worry for arbitrators. Many courts consider this doctrine to have survived the recent Supreme Court decision in *Hall Street Associates v. Mattel Inc.*[5]

Let's look at each of these vacatur grounds in turn.

Evident Partiality

Exactly what constitutes "evident partiality" is a troublesome question. Answering it requires an analysis of the standard of proof required to establish intent. Some courts hold that showing an *appearance of bias* is sufficient while others hold this standard is not stringent enough—*actual bias* must be shown. Grappling with the question, the Second Circuit pointed out that "[b]ias is always difficult, and indeed often impossible, to 'prove,'"[6] unless an arbitrator were to publicly announce partiality. As an alternative, this court fashioned a *reasonable person* standard, which is to say that evident partiality is shown "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. In assessing a given relationship, courts must remain cognizant of peculiar commercial practices and factual variances."[7]

Does an arbitrator's unauthorized independent legal research constitute "evident partiality"? If the appearance of bias standard is applied, the answer probably turns on what happens once the independent research has been completed. If the research turns up nothing in opposition to what the parties have presented, it's hard to see any basis for such a claim. But suppose that the research uncovers something entirely new and yet relevant, assuming the case was before a court. For example, research uncovers a valid theory overlooked or ignored by a party. Can the arbitrator make inquiry about the discovery without being accused of being partial? This kind of inquiry is party-specific and goes to the heart of that party's substantive case. So the inquiry could be characterized as an offer to provide assistance or, worse yet, an effort to warn. The inquiry suggests that the arbitrator hasn't thought things through. Perhaps the parties have considered the issues involved and resolved them to their mutual satisfaction. And perhaps one or both of the parties are aware of the omission and, even so, have good reasons not to want the issue raised.

While the courts have yet to speak on the subject, it's hard to see how a court wouldn't find such an offer evidence of a failure to maintain the evenhandedness required by the FAA and the ethical rules and codes of conduct cited in this article.

Arbitrator Misconduct

"Misconduct" requires a showing that the arbitrator's actions resulted in an unfair proceeding.[8] The inquiry is about the conduct of the arbitrator and the impact that his or her conduct has on the proceeding. In this context unauthorized independent legal research is problematic for a number of reasons. By definition such research would be conducted outside of the view of the parties, raising the question of how do the parties control for the possibility that the arbitrator might not conduct an exhaustive examination of applicable law? What assurances do the parties have that the research will consider the concerns of all sides? In addition, how can the parties assure themselves that the sources uncovered are current and germane to the dispute? Given this, in all likelihood courts will disallow independent legal research conducted without expressed consent because there is no way to ensure that the results will not be fundamentally unfair.

Exceeding of Powers

The claim that an arbitrator has exceeded his or her powers means that the arbitrator allegedly went beyond the authority specified in the parties' agreement.[9] Where the terms are definitive, there is no problem; expressed wishes govern.

What happens if an instrument is silent about a given action? Silence alone doesn't necessarily lead to a conclusion that a given power isn't authorized. The Supreme Court has instructed that, at least in cases involving arbitrability, when silence comes into play, a two-step analysis is required before a power can be implied. First it must be determined if the power in question is one reserved by law for the courts. Where such is the case, it cannot be *presumed* that the parties intended to take the matter from the courts and give it to an arbitrator. It is only where there is "clear and convincing evidence" of such intent that a court will imply the power absent.[10]

The power to conduct unauthorized legal research is not one reserved by law for courts, so the way is cleared for implication. But the *appropriateness* of implying such a power involves other considerations. If parties wish law to be applied, they can say so; absent any such mandate, implying a power would appear to be tantamount to permitting courts to rewrite the agreement between the parties.[11] Implication becomes less problematic, however, where the power implied does no more than supplement an existing power.

"The claim that an arbitrator has exceeded his or her powers means that the arbitrator allegedly went beyond the authority specified in the parties' agreement."

Consider an agreement that requires an arbitrator to do no more than issue a reasoned award. Assume that the parties have failed to provide briefs on the applicable law. Under such circumstances is it now appropriate to imply a power to conduct independent research? Reasoned awards that speak solely to facts are commonplace and proper, and there is no reason to assume that a reasoned award *must* also speak about law. But where a reasoned award based solely on a determination of facts is unsupportable without a discussion of law, a court should be comfortable concluding that the implied power complements a power already granted by the parties.

Manifest Disregard of the Law

The doctrine is one of last resort created by the judiciary—not by statute.[12] The doctrine holds arbitrators to account for manifestly disregarding a law that has been brought to his or her attention by the parties or by their agreement. Significantly, the doctrine does not speak to an error in the application of law. To be invoked, the arbitrator must be shown to have ignored a law

1. that was clear and explicitly applicable to the matter before the arbitrator;
2. that if properly applied, the outcome would have been different;
3. that the arbitrator had actual knowledge of the law not applied.[13]

The doctrine is about knowledge acquired by an arbitrator from a source other than his or her own research. No court has found that an arbitrator has a duty to independently investigate issues of law and apply what was discovered. In *Wallace v. Buttar*,[14] the Second Circuit appears to have found the opposite holding that, until such time as all arbitrators are required to be attorneys, an arbitrator does not have "a duty [under the FAA] to ascertain the legal principles that govern a particular claim through…independent legal research."[15] In arriving at this conclusion, the court expressly rejected the argument by Professor Norman Posner.[16]

> [Posner] argued that "there are powerful reasons why the manifest disregard standard shall be replaced by a broader standard…Because the manifest disregard standard protects an arbitral award from vacatur if the arbitrators did not know the law, it encourages arbitrators not to find out what the law is." We disagree with this contention because it seems to imply that arbitrators will not approach their task in a professional man-

> ner.…As decision-makers, they have an obligation to ascertain what the law is and to apply it correctly. But until the FAA is amended to require that arbitrators be attorneys, or that they possess a certain standard of legal knowledge, we see no basis upon which we can impose a duty upon arbitrators to ascertain the legal principles that govern a particular claim through the conduct of independent legal research. *That is, we expect arbitrators to ascertain the law through the arguments put before them by the parties to an arbitration proceeding*. We recognize the possibility that a case may arise that presents concerns about the relative capacities of the parties to put the law before an arbitral panel; that is, a case where "the dispute is not between roughly equal commercial entities but between parties that are unequal in wealth and sophistication." This is clearly not such a case, however.[17]

In *Metlife Securities, Inc. v. Bedford*,[18] a district court citing *Wallace* reached a similar conclusion in a Financial Industry Regulatory Authority (FINRA) case, finding the doctrine not applicable where the "petitioner failed entirely to educate the Panel as to the legal principles which ought to have been applied to these facts—the law governing liability of corporate affiliates, which would have apprised the Panel of the legal significance of the factual arguments made. It is well established that there is no 'duty upon arbitrators to ascertain the legal principles that govern a particular claim through the conduct of independent legal research.'"

In sum, the doctrine of manifest disregard and the issue of unauthorized research are totally separate, although it can be said that both appear to involve facts suggesting overreaching by an arbitrator.

The International Arena

The UNCITRAL Model Law on Commercial Arbitration, Article 28(2), allows parties to specify applicable law or, absent a directive, requires application of "the law determined by the conflict of laws rules which [the arbitrator] considers applicable." Some countries have their own unique statutory schemes, an example being the English Arbitration Act of 1996, and in recent years several countries have adopted the UNCITRAL Model Law.[19] Unlike the provisions found in the FAA, specific mention is made of the doctrines of *ex aequo et bono* ("what is just and fair") and *amiable compositeur* (unbiased third party). Article 28(3) directs that an arbitrator can apply these principles "only if the parties have expressly authorized" the arbitrator to do so.

But the UNCITRAL Model Law doesn't completely address the questions we are exploring. If the parties select a law but fail to brief the arbitrator on their respective positions or leave it to the arbitrator to designate law and then fail to advise as to their respective positions on that law, the arbitrator would appear to be within bounds to do independent legal research to comply because, without such research, the requirement that the arbitrator "apply" the law selected would be meaningless. But it isn't at all clear whether the arbitrator can conduct independent legal research once the parties make their respective positions known.

Article 34(2)(a) and (b) provides a list of grounds for refusing to recognize or enforce an award. The grounds involving arbitrator misbehavior are limited to making an (1) award that deals with "a dispute not contemplated by or falling within the terms of the submission to arbitration" or (2) an award that contains "decisions on matters beyond the scope of the submission to arbitration…" Both grounds focus on overreaching by an arbitrator, grounds that roughly approximate the FAA injunction against exceeding the powers specified in an arbitration agreement. The first ground speaks to limitations created by parties on disputes within the terms of the submission to arbitration. Independent legal research could conceivably be included here if an arbitrator were to research, identify and decide the merits of a cause of action not advanced by a party. The second ground speaks to a decision on matters beyond the scope of those submitted to arbitration. In the event that parties restrict an arbitrator from doing independent legal research, the argument might be made that violating that restriction would result in a decision beyond the scope of the arbitration clause.

Institutional Rules

The rules of the major institutions administering arbitrations provide an assortment of schemes running along a continuum from total silence to specificity. There are those that

1. are entirely silent on the issue but require the arbitrator to follow the law designated by the parties without indicating what the arbitrator should do if no designation is made;
2. are entirely silent but give the arbitrator great discretion in the conduct of the arbitration process;
3. require the arbitrator to follow the law designated by the parties, give the arbitrator authority to decide what law to apply should there be no designation by the parties and give the arbitrator limited authority to ex-

ercise discretion in the conduct of the hearing;

4. require the arbitrator to follow the law designated by the parties and give the arbitrator authority to decide what law to apply should there be no designation by the parties and also give the arbitrator broad discretion in the conduct of the arbitration process;

5. require the arbitrator to follow the law designated by the parties, give the arbitrator authority to decide what law to apply should there be no designation by the parties, give the arbitrator broad discretion in the conduct of the arbitration process and automatically vest the arbitrator with the power to conduct independent legal research subject only to a written directive from the parties that they wish to "opt out" and preclude the arbitrator from conducting independent legal research.

When considering the role that institutional rules play in answering these issues, the principles governing the implying of a power appear to come directly into play.

Recall that implying a power is acceptable where that power (1) is not reserved in the first instance to the courts, (2) supplements an existing power and (3) is otherwise appropriate. Where an arbitration clause incorporates by reference institutional rules, the question becomes whether the rules so incorporated resolve item (2)—the issue of when a power being implied is supplemental to an existing power. If the rules incorporated state that such is the purpose, there is no challenge. But most, if not all institutional rules don't include such a pronouncement. Instead, institutional rules focus on providing an arbitrator with a set amount of discretion. The more limited the discretion the less likely that the power thought to supplement an existing power does so. The greater the discretion, the more likely it is that the power thought to supplement an existing power does so.

Consider first the institutional rules commonly incorporated into domestic arbitration clauses. Start with the Commercial Rules of the American Arbitration Association (AAA):[20] these rules have nothing to say about the selection and implementation of law. If parties fail to make provision, the power to apply law may not exist leaving the arbitrator to resolve the dispute in whatever manner he or she deems fair and just. By incorporating these rules and saying nothing further, the parties would not create a power supplementing one that already exists because there is no existing power concerning applying law.

International Institute for Conflict Prevention and Resolution (CPR) Rule 10 requires that the arbitrator apply whatever law the parties designate; absent a designation, the arbitrator has the power to select whatever law or rules he or she deems appropriate. Unlike the rules at JAMS, applying law isn't necessarily a given. In theory at least, the arbitrator is not barred from concluding that no law need be applied and instead may opt to do whatever seems fair and just. The CPR rules grant the arbitrator authority to vary from the prescribed procedures as necessary. But that authority is not unlimited. It is confined by the scope of the rules themselves,[21] meaning that which is "reasonable and appropriate."

The rules at JAMS anticipate the existence of such a power concerning law. Rule 24(c) instructs that the arbitrator "*shall* be guided by the rules of law" designated either by the parties in the first instance or by the arbitrator. Incorporating the JAMS rules into an arbitration clause establishes that, no matter what, applying some law is a given. The arbitrator has sufficient discretion to fill in the selection of law if the parties are silent. But the arbitrator may not proceed without applying law.[22]

None of the domestic rules reviewed here directly addresses an arbitrator's ability to conduct independent legal research when the parties present what the arbitrator believes to be an incomplete legal analysis of the issues in a case.

In the international arena things are very different. The International Arbitration Rules of the AAA,[23] UNICITRAL[24] and the International Chamber of Commerce (ICC)[25] require an arbitrator to follow the law designated by the parties and, failing such designation, allow the arbitrator to apply such law and rules as he or she deems appropriate. They all endow the arbitrator with reasonable discretion respecting the conduct of the proceeding and emphasize a need for equality and fairness for all parties.[26] Application of law being a given, the door opens for an arbitrator to conduct independent legal research if the parties fail to brief their positions on the law. If only one party provides a brief, in all likelihood the arbitrator would be barred from doing research without the consent of the other party or parties because of the mandate that all parties must be treated equally. Under such circumstances, the better solution would be for the arbitrator to bring the matter to the attention of all the parties and to follow their wishes.

The rules of the London Court of International Arbitration (LCIA) and JAMS International Rules take things to another level.

The LCIA rules not only allow arbitrators to fill a void if one is created by parties, but also empower an arbitrator to (1) adopt procedures suitable to the circumstances of the arbitration and (2) exercise the "widest" discretion with the proviso that (a) the parties can "opt out" and (b) when exercising discretion, ensuring that the results are fair, efficient and expeditious.[27] By allowing discretion that is the "widest…to discharge its duties allowed under such law(s) or rules,"[28] the power to conduct independent legal research is subject only

to the constraint that all parties must be treated "fairly and impartially." In a situation where the parties fail to brief their positions, the arbitrator appears to have sufficient authority to proceed without the consent of the parties, although the arbitrator would still be required to advise the parties of the details of the research and provide adequate assurances that all positions were researched and carefully considered.

JAMS International Arbitration Rules (2011) go even further. Article 20.4 provides:

> Unless the parties at any time agree otherwise in writing, the Tribunal will have the power, on the application of any party or on its own motion, to identify the issues and to ascertain the relevant facts and the law or rules of law applicable to the arbitration, or to inquire into the merits of the parties' dispute.

Article 20.4 doesn't condition the ability of an arbitrator to do independent legal research on the failure of the parties to brief their positions. Theoretically, even if the parties brief their positions, the article appears to allow the arbitrator to independently conduct legal research if the parties' briefs seem inadequate or otherwise problematic.

Ethical Standards

While the canons and/or codes of professional conduct don't have the force of law, they establish standards of conduct that an arbitrator cannot ignore; they form a valuable benchmark for measuring the quality of service provided by an arbitrator.

Most institutions providing arbitration require arbitrators to comply with the canons adopted and approved by the AAA and the American Bar Association (ABA).[29] There are several individual canons that must be read together to appreciate their impact on the issue of independent legal research.

Canon I(D) requires that arbitrators "conduct themselves in a way that is fair to all parties.…" Canon I(F) requires that the arbitrator "conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision." Canon IV(A) speaks to the need for an arbitrator to "conduct proceedings in an even-handed manner." Part IV(E) states that if an arbitrator determines that "more information than has been presented is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses and request documents or other evidence, including expert testimony." Finally, Canon V(A) dictates that the arbitrator "should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues." Still, the Canons stop short of offering a specific mandate about an arbitrator's obligation concerning independent legal research.

In the field of domestic labor and management, arbitrators are expected to comply with the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.[30] Section 2 G(1) of the Code has a provision that appears to touch on the issue at hand.

> An arbitrator must assume full personal responsibility for the decision in each case decided.
>
> a. The extent, if any, to which an arbitrator properly may rely on precedent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties on these matters, as expressed in the contract, or other agreement, or at the hearing.
>
> b. When the mutual desires of the parties are not known or when the parties express differing opinions or policies, the arbitrator may exercise discretion as to these matters, consistent with the acceptance of full personal responsibility for the award.

Without question, this provision goes further than any other in recognizing independent research as an issue and sanctioning arbitral discretion absent a mutually acceptable mandate by the parties.

The International Bar Association (IBA) has developed "Rules of Ethics for International Arbitrators."[31] In the Introduction to its Rules, the IBA explains:

> International arbitrators should be impartial, independent, competent, diligent and discreet. These rules seek to establish the manner in which these abstract qualities may be assessed in practice. Rather than rigid rules, they reflect internationally acceptable guidelines developed by practicing lawyers from all continents. They will attain their objectives only if they are applied in good faith.

Rule 3 of the IBA discusses elements of bias. Rule 3.1 focuses on the definition of partiality. "Partiality arises when an arbitrator favors one of the parties, or where he is prejudiced in relation to the subject matter of the dispute." Rule 3.2 adds that "[f]acts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has…already taken a position in relation to it."

The AAA/ABA Canons and the IBA Rules, when read together, emphasize the need for an arbitrator to maintain an atmosphere of fairness, objectivity and focus on the issues as presented by the parties. Given the relative clarity of the Code of Profes-

sional Responsibility for Arbitrators of Labor-Management Disputes, implying from quoted portions of the Canons and Rules of the AAA/ABA and IBA a sanction for independent legal research seems inappropriate. Had the authors of those Canons and Rules wished to directly address issues involving independent conduct by an arbitrator, they could have followed the example set by the Code applicable to arbitrators for labor-management disputes.

Conclusion

Arbitration is all about what the parties contract for when settling on an alternative to traditional litigation in a courthouse. The law imposes no restrictions on the freedom to contract other than to require that all terms must be "valid, irrevocable and enforceable in law or equity for the revocation of a contract."[32]

In court, judges must apply the law; rulings by some courts can form precedent and bind other courts. So it is consistent that judges are allowed to independently review the law without consent of litigants. In arbitration things are different, not because of disrespect for the law, but because of the priority given to the parties' wishes.

At least in domestic arbitration, arbitrators are well advised to seek consent from the parties before researching the law on their own. While international arbitration rules may seem to give broader authority, the same caution is advisable. The reality of non-enforcement provisions in international arbitration laws and treaties suggests that an award based on the arbitrator's independent legal research may be subject to challenge. Therefore, an arbitrator who feels compelled to research the law to make sure his or her award will be correct should not act on this feeling without first securing written permission to do so from all parties.

For the still skeptical reader: Assume you're an arbitrator in a domestic matter that involves a contract thought by the claimant to be unconscionable. At the hearing, the claimant offered proof of procedural unconscionability but failed to offer proof of substantive unconscionability. The respondent did not object or even mention the lack of proof concerning the substantive issue. You have been provided with briefs from all sides and as you read through them you become convinced that both sides have missed a critical issue. Neither party has addressed whether or not proof of procedural unconscionability alone is sufficient for you to declare the contract unenforceable. Your case manager has sent you an email reminding you that you must submit your award the next day. It is now 9:00 in the evening, and you decide to research the issue on your own. You draft a reasoned award discussing the fruits of your research and state that, based on your research, you find for the respondent.

"[I]t is consistent that judges are allowed to independently review the law without consent of litigants. In arbitration things are different, not because of disrespect for the law, but because of the priority given to the parties' wishes."

Fast forward: six months later you receive a call from the case manager. She wants you to know the award was vacated and that she has received a nasty letter from the claimant's attorney. It seems it cost the claimant $15,000 to undo your award. The claimant's attorney is demanding your removal from the roster of arbitrators because of your conduct.

The case manager reminds you of the policy of the institution concerning independent legal research by an arbitrator. She asks for an explanation. What is your response?

Endnotes

1. 9 U.S.C. §§ 1–16.
2. *Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704, 709 (7th Cir. 1994).
3. 363 U.S. 574, 581 (1960).
4. 9 U.S.C. § 10(a)(2)–(4); Uniform Arbitration Act § 12 (a)(2-3); California and New York have enacted unique statutes not fashioned after the Uniform Arbitration Acts. *See* Cal. Code. Civ. Proc. § 1286.2(a)(3)–(5); CPLR 7511(b)(1)–(5). The statute enacted in Georgia allows for the vacating of an award where an arbitrator manifestly disregards law. See O.C.G.A. § 9-9-13(b)(5).
5. 552 U.S. 576 (2008).
6. *Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984).
7. *Id.*
8. *Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, UAW*, 500 F.2d 921, 23 (2d Cir 1974) (the arbitrator "need only grant the parties a fundamentally fair hearing").
9. *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 824 (2d Cir. 1997).
10. *First Options v. Kaplan*, 514 U.S. 938, 945 (1995).
11. *Collins & Aikman Floor Coverings Corp. v. Froehlich*, 736 F. Supp. 480, 484 (S.D.N.Y. 1990); *accord*, *In re Texans Cuso Ins. Grp., LLC*, 421 B.R. 769 (2009).
12. *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953), *overruled on other grounds, Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).
13. *Duferco Int'l Steel v. T. Klaveness Shipping*, 333 F.3d 383, 389–90 (2d Cir. 2003).
14. 378 F.3d 182 (2d Cir. 2004).
15. *Id.* at 190.
16. *See* Norman S. Posner, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 Brook. L. Rev. 471, 515 (1998).
17. *Wallace*, 378 F.3d at 191, n.3 (emphasis added).
18. 456 F. Supp. 2d 468, 473 (S.D.N.Y. 2006), *aff'd*, 254 F. App'x 77 (2d Cir. 2007).
19. According to the UNCITRAL website, at least 64 nations have adopted the Model Law. In addition four territories of Australia, three within Canada, two within China and two overseas territories of the United Kingdom of Great Britain and Northern Ireland have adopted the Model Law. The Model Law has been adopted by at least seven American states: California, Connecticut, Florida, Georgia, North Carolina, Ohio and Texas. *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

20. The FINRA Code of Arbitration Procedure—Customer Code and Industry Code—follows the same substantive format of the Commercial Rules of the AAA.

21. CPR Rule 9.1.

22. JAMS Rule 22(a):

> The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined reasonable and appropriate to do so.

23. AAA art. 28:

> 1. The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.

24. UNCITRAL art. 35:

> 1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

25. ICC art. 21:

> 1. The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

26. Compare:

AAA Article 16, Conduct of the Arbitration:

> 1. Subject to these Rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

UNCITRAL Article 17:

> 1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

ICC Article 22:

> 4. In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

27. LCIA arts. 14.1, 14.2; art. 22.3.

28. LCIA art. 14.2.

29. Code of Ethics for Arbitrators in Commercial Disputes (2004).

30. As amended and in effect September 2007 and approved by the AAA, the Federal Mediation and Conciliation Service and the National Academy of Arbitrators.

31. Available at: www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#ethics.

32. FAA § 2.

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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.

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.

Endnotes

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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Latest ABA Guidance: Old Wine in a Tech-Ethics Bottle?

By Devika Kewalramani

Information security may no longer be relegated to a lawyer's IT department. Recently adopted amendments to the American Bar Association (ABA) Model Rules of Professional Conduct, recommended by its Commission on Ethics 20/20,[1] require lawyers to be technologically competent. Simply put, lawyers have a duty to stay up-to-date and to upgrade and update when it comes to technology and its security.

Admittedly, for the most part lawyers were not early adopters of new technology, but technology has largely transformed the way lawyers work, communicate and build their business. Productivity and accessibility are the hallmarks of our (not so) newfound tools. But, coupled with these benefits are the potential risks to client confidentiality, attorney-client privilege and attorney competence. How can lawyers, law firms and corporate legal departments manage to keep pace with the many benefits of using technology while remaining attentive to the new threats posed to client confidentiality and the attorney-client relationship? The alarming rise in inadvertent disclosure and unauthorized access to confidential client data through misdirected emails, lost or stolen mobile devices, cloud-based data storage systems or sophisticated hackers has signaled the need for greater and clearer ethical guidance for the legal community on the use of technology.

The ABA Model Rule amendments attempt to close the ever-widening gap between modern law practice and evolving technology. Lawyers perhaps deal with more confidential and privileged information than any other professionals. That is why it is imperative that law firms and legal departments understand how to protect and secure the information clients entrust to them. Today, every law firm and legal department maintains electronic client data in some shape or form. This makes the ABA guidance on a lawyer's use of technology critical to every lawyer's practice.

The ABA Model Rule amendments serve as a useful framework for New York lawyers who should keep an eye out for possibly similar amendments to the New York Rules of Professional Conduct,[2] which have largely incorporated the Model Rules. The notable ABA amendments to particular Model Rules and Comments to Model Rules are discussed below.

"Simply put, lawyers have a duty to stay up-to-date and to upgrade and update when it comes to technology and its security."

Technology, Confidentiality and Competence

Lawyers regularly communicate with clients electronically and confidential client information is routinely transmitted, stored or accessed on law firm or third-party servers, mobile devices or wireless networks. These online interactions have raised new concerns about data security and client confidentiality. Consequently, lawyers need to develop a competent understanding of how electronic client data is created, stored, retrieved and accessed in order to draft documents, do legal research, run investigations and conduct sophisticated electronic discovery.

Protecting Confidences

The lawyer's duty of confidentiality is one of the most fundamental ethical duties owed to a client. The Model Rules define "confidential information" broadly as "information relating to the representation." A significant change to Model Rule 1.6 on "Confidentiality of Information" is to subsection (c) which adds: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Up until the amendments, the duty of confidentiality only required a lawyer "not to reveal" client confidences, unless otherwise permitted. The amended rule obligates the lawyer to act affirmatively "to prevent" such a revelation. The ABA Commission describes three scenarios where unintended revelation of client information could occur: (1) inadvertent disclosure where an email is sent to the wrong person, (2) unauthorized access where a third party hacks into a firm's network or a lawyer's email account, and (3) unauthorized release where employees or other people post client information on the Internet.

Note that Comment [16] to Rule 1.6 clarifies that no ethical violation occurs if "the lawyer has made reasonable efforts to prevent the access or disclosure." Factors to consider in determining the reasonableness of the lawyer's efforts include "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients."

Lawyers are cautioned by Comments [16] and [17] that compliance with the duty of confidentiality in Rule 1.6 does not vitiate their obligations under federal and state law regarding data privacy and breach notice requirements in the event of a breach of privacy. Thus, lawyers need to remember that their obliga-

tions vis-a-vis client information do not end with the ethics rules. There is a burgeoning body of privacy and breach notification laws that appear to apply equally to lawyers as they do to those who store or transmit confidential information electronically. Lawyers need to know these laws, understand their ramifications and comply with their requirements as necessary.

Techno-Competence

Model Rule 1.1 on "competence" requires a lawyer to provide competent representation to clients; this consists of legal knowledge, skill, thoroughness and the preparation reasonably necessary for the representation. In addition, the rule requires the lawyer to stay abreast of changes in the law and its practice. Comment [6] now specifies that, to remain competent, lawyers must also have a firm grasp of "the benefits and risks associated with relevant technology." The ABA Commission noted that a lawyer must understand the basic features of relevant technology—how to create an electronic document and how to use email—in order to ensure clients receive competent and efficient legal services.

Interestingly, the amendments to the Model Rules exemplify how the duty of confidentiality and the duty of competence, especially in the context of a lawyer's use of technology, are closely related: lawyers must act competently to protect confidentiality.

Inadvertent Disclosure

The ABA Commission recognizes the deficiency of certain words used in the Model Rules and makes some practical word changes to modernize the rules so they reflect how lawyers actually utilize technology in their practice. So, for example, Model Rule 4.4 on "Respect for Rights of Third Persons" provides that a lawyer's receipt of inadvertently disclosed "documents" can trigger notification obligations. Since the word "documents" seems inadequate to properly address the ways in which electronic information can be inadvertently transmitted (for example, via emails, flash drives and metadata), the ABA Commission has expanded it to add "electronically stored information." So, the amended rule states that a lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client, and the lawyer knows or reasonably should know that the document or electronically stored information was inadvertently sent, shall promptly notify the sender.

In addition, Comment [2] to Model Rule 4.4 now defines "inadvertently sent" as when a document or electronically stored information is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that is intentionally transmitted.

Metadata

"Embedded data," commonly referred to as "metadata," is the hidden information that may contain confidential and privileged material belonging to the client. Unlike other data, metadata can be harder to see and review without going behind the document. The subject of metadata is addressed in Comment [2] to Model Rule 4.4, which now states that electronically stored information includes "metadata" and clarifies that "metadata in electronic documents creates an obligation under Rule 4.4 only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer."

The issue of "metadata mining" differs from state to state, and lawyers dealing with adverse counsel practicing in various states should be aware that ethics opinions on this issue run the full spectrum from prohibiting data mining entirely (as in New York) to allowing full access and use of metadata (as in some states). Given the rather confusing and conflicting ethics opinions issued by different jurisdictions regarding the propriety of metadata mining, lawyers who produce or receive electronically stored information should be familiar with the applicable ethics rules and ethics opinions where they and their adversaries practice.

Screening

The ABA Commission observed that modern technology has made client information more accessible to the whole firm. Thus, the process of restricting access to this information ought to require more than placing relevant physical documents in an inaccessible location; it should also require appropriate treatment of electronic data. Model Rule 1.0(k) describes the procedures for an effective screen to avoid the imputation of a conflict of interest under Model Rules 1.10, 1.11, 1.12 and 1.18. Comment [9] elaborates on this definition and points out that a key feature of an ethical wall is to limit the screened lawyer's access, to avoid creating a conflict. To provide greater clarity and specificity, the ABA Commission makes explicitly clear in Comment [9] that screening procedures should apply to information in tangible and electronic form.

The expansion of the screening procedures to encompass digital client data highlights the pervasive nature of technology and the recognition by the ABA Commission that the days of storing client papers in locked file cabinets are long gone.

Technology and Client-Lawyer Relationships

How clients locate lawyers and how lawyers market and deliver legal services is also affected by technology. Clients increasingly access information regarding legal services via search engines, websites, blogs and rating or ranking services. Today's client may seek to hire counsel

by visiting attorneys' websites or blogs, which may ask the prospect to supply details about his or her inquiry. Similarly, lawyers frequently use Internet-based tools for client development (such as pay-per-click services and social and professional networking sites), exchange information with prospects on a blog, or use their social networking page to offer advice to "friends." These types of interactions raise ethics issues regarding the actual nature of the client-lawyer relationship.

Prospective Clients

"Discussions" imply two-way verbal exchanges, such as an in-person meeting or a telephone conversation, and can give rise to prospective client relationships. However, this does not capture non-verbal Internet-based communications that can often trigger duties to prospects. To bridge the gap in Model Rule 1.18 on "Duties to a Prospective Client," the ABA Commission decided to replace "discusses" with "consults" and to revise Comment [2] to identify the circumstances where a "consultation" prompts Rule 1.18's duties. The Comment notes that a consultation giving rise to a prospective client relationship can occur when a person responds to "written, oral or electronic communications" by the lawyer that specifically invites information regarding a potential representation without clear warnings that limit the lawyer's duty. The Comment clarifies that no prospective client relationship is created where the person communicates unilaterally and offers matter-specific information in response to an advertisement that lists "legal information of general interest."

Recommendations

Model Rule 7.2 on "Advertising" prohibits a lawyer from paying others (such as "runners" or "cappers") for generating client leads. New marketing tools such as "pay-per-click" and "pay-per-lead" services enable lawyers to pay to have their names listed in response to Internet-based queries by people who use certain search terms and other methodologies. To avoid confusion arising from how the rule applies to these e-marketing tools, the ABA Commission, in Comment [5], clarifies that a lawyer may pay others for generating "Internet-based client leads" as long as the lead generator does not recommend the lawyer, and the lawyer observes other ethics rules that prohibit misleading the public as well as the restrictions on fee sharing with nonlawyers.

Solicitations

Model Rule 7.3, retitled "Solicitation of Clients," prohibits soliciting professional employment by "in-person, live telephone or real-time electronic contact," where a significant motive is the "lawyer's pecuniary gain," unless excepted by the rules. To clarify when a lawyer's online communications constitute the type of direct "solicitations" that are governed by the rule, Comment [1] defines "solicitation" as a "targeted communication" that is directed to specific people and offers legal services but excludes communications from a lawyer that are "directed to the general public," such as through a "billboard, an Internet banner advertisement, a website," or "automatically generated in response to Internet searches."

Techno(law)gy Ethics

The ABA Model Rule amendments signify a recognition that technology is vital to a lawyer's practice today and that the ethics rules needed to be sharpened to provide helpful and practical guidance on continuing professional duties. Lawyers owe their clients an ethical obligation to competently and reasonably safeguard confidential client data. This involves understanding the limitations in lawyer competence when it comes to technology, obtaining appropriate assistance, and continuing to monitor technology and its security as they evolve over time. Many of the amended Model Rules previously resembled the corresponding New York ethics rule. It remains to be seen whether the New York Rules of Professional Conduct will make the "technology leap."

Endnotes

1. *See* ABA House of Delegates Resolutions 105A and 105B adopted at the Annual Meeting in August 2012.
2. N.Y. Comp. Codes, R. & Regs. tit. 22, pt. 1200.

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The Arbitration of New York's Construction Disputes

By Mark Kane

Abstract

The purpose of this article is to make the case that arbitration is a suitable means of resolving disputes and differences arising during the course of New York construction projects while looking beyond the long enduring rhetoric of arbitration being quicker, cheaper, more flexible, and less resource intensive as a method of resolving controversies when compared with litigation.[1]

I. Introduction

The foundation for any construction dispute to be resolved, either by arbitration or litigation, is both the technical nature of construction projects and the hefty sums of money involved. The nature of construction in New York State (N.Y.S.) and the United States (U.S.) is exemplified by the recent data relating to the city of New York provided by the New York Building Congress (NYBC). In that regard, the NYBC states the following: "New York City's public and private institutions initiated $14.8 billion in construction projects over a five-year period."[2]

Of that sum, approximately 53 percent of the projects were related to the ground-up construction of new facilities.[3] The remaining 47 percent of those projects were related to renovations and alterations to existing structures.[4] In addition, the author would highlight the considerable sum of $525 million in institutional projects, to begin during the first five months of 2013 alone.[5] Such data show that even in an unsteady economic climate, construction output is still a considerable driver of economic activity and expenditure.

II. General Considerations

Where considerable sums of money are being spent, as those mentioned above, the likelihood and incentive for commercial disputes and aggressive claimsmanship can increase. The types of disputes occurring on construction projects can generally be broken into two categories: (1) those involving the interpretation of law and contracts, and (2) the resolution of technical and scientific matters.

In either case, one party is likely to financially benefit and the other financially lose out from a decision resolving the dispute, since as commercial parties are engaged in construction projects, they do not tend to argue or concern themselves over non-salient matters.

The legal disputes on a construction project tend to revolve around the application of an established legal rule to a particular fact pattern and the construction contract. This is complicated as construction contract terms are often couched in the language and tradition of the construction industry. Thus, the parties' arguments often revolve around convincing the decision maker (judge, jury, or arbitrator) as to the commercial efficacy of their interpretation, such that it best fits the intention of the parties when they contracted.

By way of illustrative example, it is common that construction contracts now include a degree of "contingency," which consists of the possibility that the owner purchased at the outset a redundancy in relation to time and changes ordered by the owner without undue cost. The owner's need for such a provision being that as the works progress, changes will be ordered in order that the completed work meets the owner's requirements and as many of the apparitional aspects of the project brief.

The nature of these contingency clauses can give rise to dispute and differences of opinion as to the operation of the contingency, its effect upon the contract sum, and the time for completion of the project works. For example, what happens if the contingency is not called upon by the owner during the course of the project works? There the question would be whether the owner is entitled to a credit from the contractor for the priced contingency, or if the contractor is entitled to the benefit of the owner's non-use. Such disputes are often resolved by interpretation of the relevant contract clauses.

Furthermore, technical disputes tend to be concerned with a definitive understanding of a point of science and the application of that point of science to a set of circumstance particular to a construction project. The party whose understanding is persuasive and preferred by the arbitrator being the prevailing party.

In this regard, we may consider a dispute where the owner is alleging that the building's concrete mix design was negligently designed by the engineer, and as a result the building, upon being occupied and fully loaded, began to show signs of structural weakness and potential failure. In such a dispute it is clear, all things being equal, that expert witness reports and testimony will determine the matter. For those unfamiliar with engineering, and more particularly construction defects, there may be various causes for such problems in a completed building, including a concrete mix design which was not fit for its purpose.

Thus, if the expert witnesses are of the opinion that the mix design was the cause of the structural weakness and potential failure, the owner will most likely prevail. In this case, it is highly likely that the engineer will have expert witnesses to offer the opinion that the mix design was adequate and that the failure was caused by another aspect outside the control of the engineer, e.g., where the engineer was not responsible for supervision and the contractor did not follow the engineer's design.[6]

When it comes to resolving these two categories of dispute or, as is frequently the case, a dispute which contains aspects from both categories, an attorney advising his client may have a choice between referral of the dispute to arbitration or to traditionally pursue the dispute to final resolution before the courts. Without prejudice to the general acceptability of resolving commercial disputes through litigation, the accepted use of arbitration as a means of final binding resolution to construction disputes is widely acknowledged both by construction lawyers and industry practitioners, such as engineers[7] and architects.[8] A helpful example of this wide acceptance is the inclusion of mandatory and elective arbitration clauses in standard form construction industry contracts, such as those published by the American Institute of Architects (AIA), which since 1888 included an arbitration clause which was mandatory until recently.[9]

Returning to the default resolution method of litigation, the judiciary as a collective are not experts in construction project delivery or its underpinning sciences, and so it is in their interest that they allow subject matter experts and construction lawyers to sit as arbitrators of construction disputes. It may be helpful on this point to examine two common law jurisdictions.

The United Kingdom (U.K.) jurisdiction of England and Wales has introduced a Technology and Construction Court, staffed by members of the judiciary educated and experienced in matters of construction law and construction industry dynamics.[10] The same court has specialised procedures for the disposal of construction disputes.[11] Such a court negates the weighty need for construction contracts to have heavy reliance on arbitration as a means of finally resolving complex construction disputes.

It is useful to compare this U.K. construction law court regime with its common law neighbour in Ireland, where the Irish judiciary, who are without such a specialist court, have openly expressed favour at the inclusion of arbitration clauses in order that disputes on construction projects may be dealt with by specialist arbitrators. The Irish Supreme Court speech of Fennelly J. is worth being quoted here to understand the underlying common law jurisprudence: "One of the essential components of the standard-form building contracts is the provision for arbitration to settle disputes or disagreements. The absence of an arbitration procedure in the case of large building contracts will inevitably work great inconvenience for all parties, not to mentions the courts."[12]

It is clear that N.Y.S. and the U.S. resemble the Irish example above mentioned, where their structure does not have a specialist construction court. Thus, N.Y.S. favours the use of arbitration as a means of resolving construction disputes, and thus promotes consideration of arbitration when attorneys are drafting, negotiating, or reviewing construction contracts. That is not to say that the judiciary of N.Y.S. lack construction law experience, and a notable public example of the specific expertise in particular issues can be seen in a recent article entitled *New York's Scaffold Law and the Evolution of Elevation*[13] by Hon. George M. Heymannin,[14] which shows that specific construction law subject matter expertise can be gained through experience and research.

An advantage of both N.Y.S. and U.S. construction arbitration over ordinary commercial litigation is that the decision maker's baseline education and understanding of the issues in dispute can be chosen. It can be the case that the mix of subject matter experts, e.g., architects and engineers, versus construction lawyers is dependent on the nature of the dispute and the relative strengths and weaknesses of each party's case.

For example, if a dispute over the nature of a defective concrete mix design leading to structural collapse is the primary issue, the panel is likely to be made-up of engineers; whereas, if the dispute centres on the interpretation of a clause in a bespoke construction contract, the panel is likely to be made-up of construction lawyers.

The result of using a construction industry professional, be he of a legal or scientific hue, as arbitrator is that the costly requirement of expert evidence to bring the decision maker to the key points of difference or dispute is reduced significantly, and potentially eliminated altogether as the parties may seek to allow the arbitrator to use his own expert knowledge to decide the matter. This is not to suggest that the parties are at the mercy of the unguided experiences and private research of the arbitrator or arbitrators without the parties' consent. This was considered recently by Paul Bennett Marrow, Esq. in the *New York State Bar Association Journal,* where he stated: "At least in domestic arbitration, arbitrators are well advised to seek consent from the parties before researching the law on their own."[15] This author would agree and suggest such an advisory prohibition on unguided legal research for arbitrators extends to scientific research also.

Notwithstanding the foregoing, the use of expert industry practitioners as arbitrators is an ongoing quintessential feature of construction arbitration.

Regardless of what we have mentioned above, the arbitral chair or sole arbitrator, as a baseline level of knowledge and skill, needs to be able to comprehend and critically analyse the arguments of counsel and expert witnesses, and the reasoning of the two party-appointed arbitrators, all the time keeping a close eye on the arbitral procedure as it moves forward to ensure the final arbitral award is safeguarded against potential action, seeking that the award be vacated,[16] from a party who has lost the arbitration.

It is worth consideration that this baseline knowledge with regard

to science and engineering may not be readily present in every lawyer; likewise, the legal and procedural knowledge required of an arbitrator may not be readily available in every engineer or architect and so this gives rise to presence and use of specialist construction arbitrators who have both construction and legal qualifications and experience.

Returning to the arbitral regime in N.Y.S.[17] and the U.S.,[18] it is of considerable commercial efficacy that the law allows for a sole arbitrator to sit as the arbitral tribunal in smaller construction disputes and a panel of three arbitrators in larger, more complex disputes. This allows the parties to tailor expenditure on arbitrator fees and costs to reflect the quantum and complexity of the dispute. In this regard, the U.S. Code employing further commercial efficacy through the default position of a sole arbitrator being appointed[19] when compared with the costly UNCITRAL Model Law[20] default of three arbitrators.[21]

In the case of a sole arbitrator being mandated, the arbitration agreement will usually provide a means of determining the profession and identity of the arbitrator. In the case of a panel of three arbitrators, it is common that each party will appoint one arbitrator and that these two party-appointed arbitrators will in turn agree on another arbitrator to sit as arbitral tribunal chair or umpire. Wherever there is a failure to obtain an arbitrator through the contracted procedure or by agreement ,the parties may have recourse to and support from the courts under N.Y. C.P.L.R. §7504[22] or, where the Federal Arbitration Act (FAA) preempts, under 9 U.S.C. §5[23] for the appointing of the required number of arbitrators.

III. Conclusion

The above-considered evidence supports this author's opinion that the N.Y.S. and U.S. arbitral regime is a method fit for the purpose of resolving construction disputes whether the dispute is a single issue low quantum matter or a large complex dispute, which hinges on matters of expert evidence and interpretation of bespoke construction contract clauses.

On balance, the nature of construction disputes, the relevant law, and the absence of a construction court to hear complex disputes provides encouragement and a reason for the resolution of disputes arising during the course of construction projects to be resolved by arbitration, in lieu of traditional litigation.

Endnotes

1. This common rhetoric being seen in the introduction of the NYSBA *New York Dispute Resolution Lawyer*: "Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations And Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations," p. 5-6:

   > For years, domestic commercial arbitration was in large part viewed in New York as a vehicle for the rapid resolution of relatively minor disputes. Its primary attraction was that it dispensed with many of the expensive and time-consuming characteristics of litigation while at the same time permitting an expeditious but fair result...the fact remains that domestic commercial arbitration has privacy and party control aspects that are not present in court and, in addition, it is still the general experience that such arbitration is less costly, speedier and more efficient than litigation.

2. *See* New York Building Congress, "New York City Institutions Responsible for $14.8 Billion in Construction Starts Over Five Year Period" (August 2013) available at http://www.buildingcongress.com/outlook.
3. *Id.*
4. *Id.*
5. *Id.*
6. *See* Jewish Bd. of Guardians v. Grumman Allied Indus. Inc., 96 AD 2d 465, 464 NYS 2d 778 (1983); Spielvogel v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 127 AD 2d 532, 512 NYS 2d 75 (1987); Cabrini Medical Center v. Desina, 64 N.Y.2d 1059, 1061 (1985); In Matter of R.M. Kliment & Frances Halsband Architects (McKinsey & Co. Inc.), 3 N.Y.3d 538, 788 N.Y.S.2d 648 (2004); Caceci v. Di Canio Constr. Corp., 72 N.Y.2d 52 (1988); Derenzo v. State Farm Mut. Ins., 141 Misc.2d 456 (1988).
7. *See* "In Focus Alternative Dispute Resolution: Bring Me A Dream: Arbitration Awards That Work For You," *PE Magazine* (National Society of Professional Engineers, October 2010); *see also* National Society of Professional Engineers (NSPE): Report on a Case by the Board of Ethical Review (Case No. 86-3), making reference to the "Standard Form of Agreement Between the Owner and the Engineer for Professional Services," published by the Engineers Joint Contract Documents Committee, of which NSPE is a member, which states in Paragraph 7.6.1.: "All claims, counterclaims, disputes, and other matters in question between the parties hereto arising out of or relating to this agreement or the breach thereof will be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association."
8. The majority of AIA contract documents contain arbitration clauses at both architect-owner and owner-contractor level disputes.
9. *See* B101-2007 Commentary—Standard Form of Agreement Between Owner and Architect. AIA 2007, Washington, D.C.
10. *See* Ministry of Justice, "Technology and construction court" (UK June 2012) available at: http://www.justice.gov.uk/courts/rcj-rolls-building/technology-and-construction-court.
11. *Id.*
12. *See McCabe Builders (Dublin) Ltd v. Sagamu Developments Ltd* [2009] IESC 31; Unreported, Supreme Court, April 1, 2009; 42; available at http://www.bailii.org/ie/cases/IESC/2009/S31.html.
13. *See NYSBA Journal* (January 2013) at 11-21.
14. A former Judge of the New York City Housing Court.
15. *See* Paul Bennett Marrow, "Can an Arbitrator Conduct Independent Legal Research? If Not, Why Not?," *NYSBA Journal* (May 2013) at 24-31, 30.
16. *See* N.Y. C.P.L.R. §7511; or where preempted by the FAA: 9 U.S.C. §11.
17. N.Y. C.P.L.R. §75.
18. 9 U.S.C.
19. 9 U.S.C. §5. "…and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator."
20. United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.
21. UNCITRAL Model Law, Article 10.2, "Failing such determination, the number of arbitrators shall be three."
22. N.Y. C.P.L.R. §7504. "Court appointment of arbitrator. If the arbitration agreement

does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator."

23. 9 U.S.C. §5. "Appointment of arbitrators or umpire. If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator."

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