NYSBA SPRING 2015

Perspective

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

A Message from the Section Chair

It is hard to believe that my tenure as Chair of this Section is nearing its end. It seems like only yesterday we were in Washington, D.C., at the Supreme Court, seeking admission for over 40 members of NYSBA. Months later, I am already nostalgic for this past.

In my last message, I recounted how I came to be a part of the Young Lawyers Section. In this past year as its Chair, I came to truly understand both my role and the importance of the Young Lawyers Section to its members.

The last 18 months have been particularly intense, as the New York State Bar Association's House of Delegates dealt with thorny issues involving pro bono reporting, and, most recently, the Uniform Bar Exam. Where attorneys can practice, how we are licensed, and what is expected of us have all been in play. It is through thoughtful discussions with my fellow delegates that I have endeavored to give our Section a voice. In all of this, I know that—though we may be at the beginning of legal careers—the decisions made today will resonate, altering legal practice in the years to come.

For my own part, I have risen to speak, both expressing the perspectives of the Section and on behalf of attorneys to come. Being Chair of the Young Lawyers Section is a role that I take great pride in, and I will continue to support the efforts of the Section and all officers who follow.

Recently, I heard an award acceptance speech in which the awardee spoke of her reasons for becoming part of NYSBA. I nodded in recognition as she recounted seeking role models on which she could model her practice as an attorney, since she had no such models in her family. Like her, it was through all the great practitioners that I have met at NYSBA that I found my path. If I too can help guide others, even as I mature in my own practice, I intend to do so with the same integrity, honor, professional skill, and courtesy as those who have shown me.

In my time as Chair, not one accomplishment was gotten alone or in a vacuum. Nothing would have been possible without the support of my fellow officers: John Christopher and Terrence Tarver, or our Section's hard-working Executive Committee. I would also like to thank past Chair, Lisa Schoenfeld, as well as incoming Chair, Erica Hines, and Chair-Elect, Erin Flynn. I leave the Section in capable hands and with great hopes for the future. Tiffany Bardwell, our Section Staff Liaison, and tireless advocate, makes all things possible. Her support and friendship have been invaluable.

I would also like to thank NYSBA staff and everyone at the Bar Center, which I have come to think of as a home away from home. It is through everyone's dedication and their unflinching support of the Young Lawyers Section that we remain on the road to success. In the years to come, I look forward to working with you all, and any attorney, new to the profession, who could use a helping hand.

Sarah E. Gold, ***Section Chair***
Gold Law Firm

Inside

NYSBA

From the Editor's Desk

Throughout history, spring and summer have been welcomed and celebrated for their bringing of both climactic and cultural change. Along with the change in seasons is this latest issue of *Perspective.*

In the last few months, our society—and, by extension, the legal landscape—has grappled with an onslaught of issues that have struck at many of our fundamental rights. As several states have passed religious freedom laws that affect the rights of gay citizens, same-sex marriage is back at the Supreme Court (*Obergefell v. Hodges)*, while it also considered the limits of free speech and social media (*Elonis v. United States*), and search and seizure (*Heien v. North Carolina*). Legal personhood for nonhuman persons is again in New York courts (*Nonhuman Rights Project, Inc. v. Stanley*), and matters of personal privacy in this era of expanding technological innovation is both a state (*Foster v. Svenson* and *People v. Barber*) and national issue.

In New York, the long-brewing battle over the Common Core tests has reached the Northern District Court (*Allen v. King*). The Southern District Court has made way for Securities Exchange Commission to pursue insider trading charges (*S.E.C. v. Payton*), despite the evidentiary stricture laid out by the U.S. Court of Appeals for the Second Circuit (*U.S. v. Newman*).

With this issue of *Perspective*, my aim was to highlight those complex legal and policy issues that dominate our headlines, affect our practice of law, and touch our lives. This issue begins as Ruben Magalhaes's follows the SEC in its hunt for fraud in high-frequency trading, and continues with Scott Exner's survey of benefit corporations as they seek to balance companies' public benefit purpose and stakeholder interests. Anthony Fasano then explores the discovery benefits of New York's Freedom of Information Law, and Susan L. Shin discusses Robert L. Haig's treatise, *Business and Commercial Litigation in Federal Courts*.

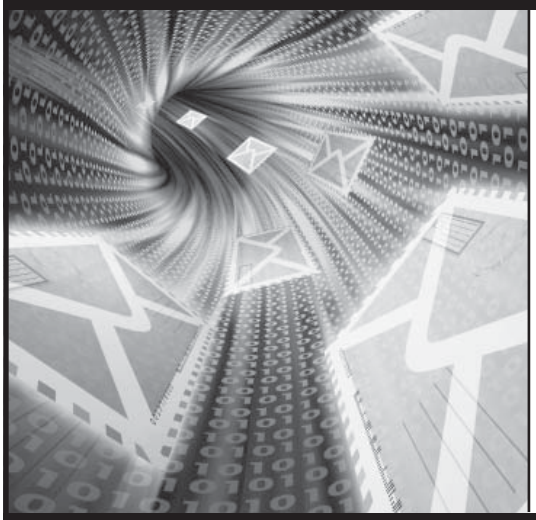
This issue also contains the inaugural appearance of "Meeting of the Minds." Each issue, Meeting of the Minds will ask two area experts to weigh in on a topic that has bearing both on our lives as individuals and as attorneys.

Revenge porn, the sharing or online posting of sexually explicit photos without the consent the person pictured, is a problem unique to our times. In many states, including New York, what constitutes and how to address revenge porn has eluded both legislatures and courts. In this Meeting of the Minds, Alex Urbelis and Amanda Levendowski look at the realities of and challenges surrounding the law and revenge porn.

As always, submissions from the legal community sustain *Perspective.* If you are interested in submitting an article, I welcome articles representing a diversity of opinions, ideas, and practice areas. Send your submissions to f.alex.reid@gmail.com; the deadline for the Fall 2015 issue will be October 9, 2015.

Felicia A. Reid
Editor-in-Chief

Request for Articles



If you have written an article and would like to have it considered for publication in *Perspective*, please e-mail it to:

Felicia A. Reid, Esq.
f.alex.reid@gmail.com

Guidelines
Articles can range from op-eds, current events pieces, short-form law reviews, and articles that highlight certain aspects of law or policy. Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include a brief bio.

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Not So Fast!: The SEC Clamps Down on HFT

By Ruben Magalhaes

On Oct 16, 2014, the Securities and Exchange Commission (SEC) settled with Athena Capital Research (Athena) over its high-frequency trading (HFT) system, Gravy, which defrauded the NASDAQ over a six-month period in 2009. Athena had carried out a series of "marking the close'"[1] orders, in an attempt to illegally alter the prices of tens of thousands[2] of publicly traded securities. Athena used Gravy's programming—trading in milliseconds—to move the price of NASDAQ stocks in the last ten minutes of trading, but without any actual intent to invest. Gravy was so effective that, during that six-month period, it constituted 70% of all trading volume of affected stocks within the last ten minutes of the NASDAQ's closing.[3]

The SEC held administrative proceedings and issued a cease-and-desist order to Athena over its HFT system.[4] The SEC outlined Athena's fraudulent strategy as such:

> Immediately after the first Imbalance Message,[5] Athena would issue an Imbalance Only on Close order[6] to fill the imbalance. These orders are only filled if there is an imbalance in a security at the close. Athena would then purchase or sell securities on the continuous book on the opposite side of its on-close order, until 3:59:59.99, with the goal of holding no positions (being "flat")[7] by the close.[8]

In the settlement, Athena neither admitted nor denied the SEC's charges, but paid a penalty of $1 million.[9] The Athena case is the first HFT case the SEC has pursued in administrative proceedings, and marks an important moment for both the SEC and market confidence.[10]

For years, the SEC has attempted to minimize the rampant market abuses that led to the recent stock market crash, subsequent public outcry, and resultant federal and state legislation. Before the 2010 enactment of Dodd-Frank, only those subject to the SEC's direct regulation, such as brokers, could be sued in administrative proceedings. The new forum authorizes the SEC to seek penalties in an administrative case against *any* defendant, such as Athena and other HFT-abusers.

"For years, the SEC has attempted to minimize the rampant market abuses that led to the recent stock market crash, subsequent public outcry, and resultant federal and state legislation."

But why is the SEC suddenly focusing on HFT?

High-frequency trading, which became a common trading tool around 2009, is not illegal in and of itself. In its most basic form, HFT is "a program trading platform that uses powerful computers to transact a large number of orders at very fast speeds."[11] The program uses complex algorithms to examine markets, then executes orders based on market conditions.

What matters is the intent behind the algorithm and how frequently it is used to achieve that intent.[12] HFT is legal—so long as its intent is not to defraud the market. Germane to the Athena decision, the SEC focused on Gravy's intent in determining that "what happened [t]here was fraud."[13]

The ever-increasing public focus on HFT, combined with the prior absence of an SEC prosecution for Athena-type infractions, led to questions about the transparency of the market and the SEC's enforcement capabilities. Yet, because of the complexity of trading strategies, regulators find it difficult to draw the line between acceptable trading and fraudulent manipulation.[14] In the Athena proceeding, the SEC set a starting point for legal precedent on HFT cases.

With an intent to defraud the securities market, HFT cases may violate section 10b of the Exchange Act—a general provision prohibiting fraudulent practices in the purchase or sale of any security. Rule 10b-5 specifically prohibits making any materially[15] false statements or omissions.[16] Action under 10b-5 requires a statement be made with the intent to deceive, manipulate, or defraud.[17] In the Athena order, the SEC pointed to Athena's intent to defraud the market, and thereby, investors.[18]

It is not yet clear exactly how long Athena had been using Gravy. What is certain is that Gravy was in operation for at least six months in 2009 and, during that time, Athena was "acutely aware"[19] of Gravy's machinations. At a time when Gravy was working at 25% accumulation, an e-mail from an Athena manager to the Chief Technology Officer and another manager stated: "[M]ake sure we always do our Gravy with enough size."[20] The next day Gravy operated at 60% accumulation. When NASDAQ issued an automated regulatory alert due to suspicious activity and possible stock price manipulation, the Chief Technology Officer forwarded the alert, noting: "Let's make sure we don't kill the golden goose."[21]

The SEC had a victory with the Athena case. However, its disposition resulted in a "neither admit-nor-deny" settlement. This leaves open the question of whether the Department of Justice (DOJ) will file suit in federal court.

The Athena settlement came five years after the company's fraudulent conduct, highlighting the SEC's challenge in expeditiously targeting illegal strategies. As the SEC tries to accelerate the enforcement of legal regulations through administrative orders, its primary goal must be to mete swift and steep penalties to deter fraudulent trading. Waiting on a DOJ investigation is a luxury the SEC and the markets it regulates cannot afford.

But individuals and companies who consider implementing a Gravy-like system have been put on notice. The Director of the SEC's Division of Enforcement, Andrew Ceresney, declared: "This action should send a clear message that the Commission and its Division of Enforcement have the expertise to investigate and charge even the most sophisticated fraudulent algorithmic trading strategies."[22]

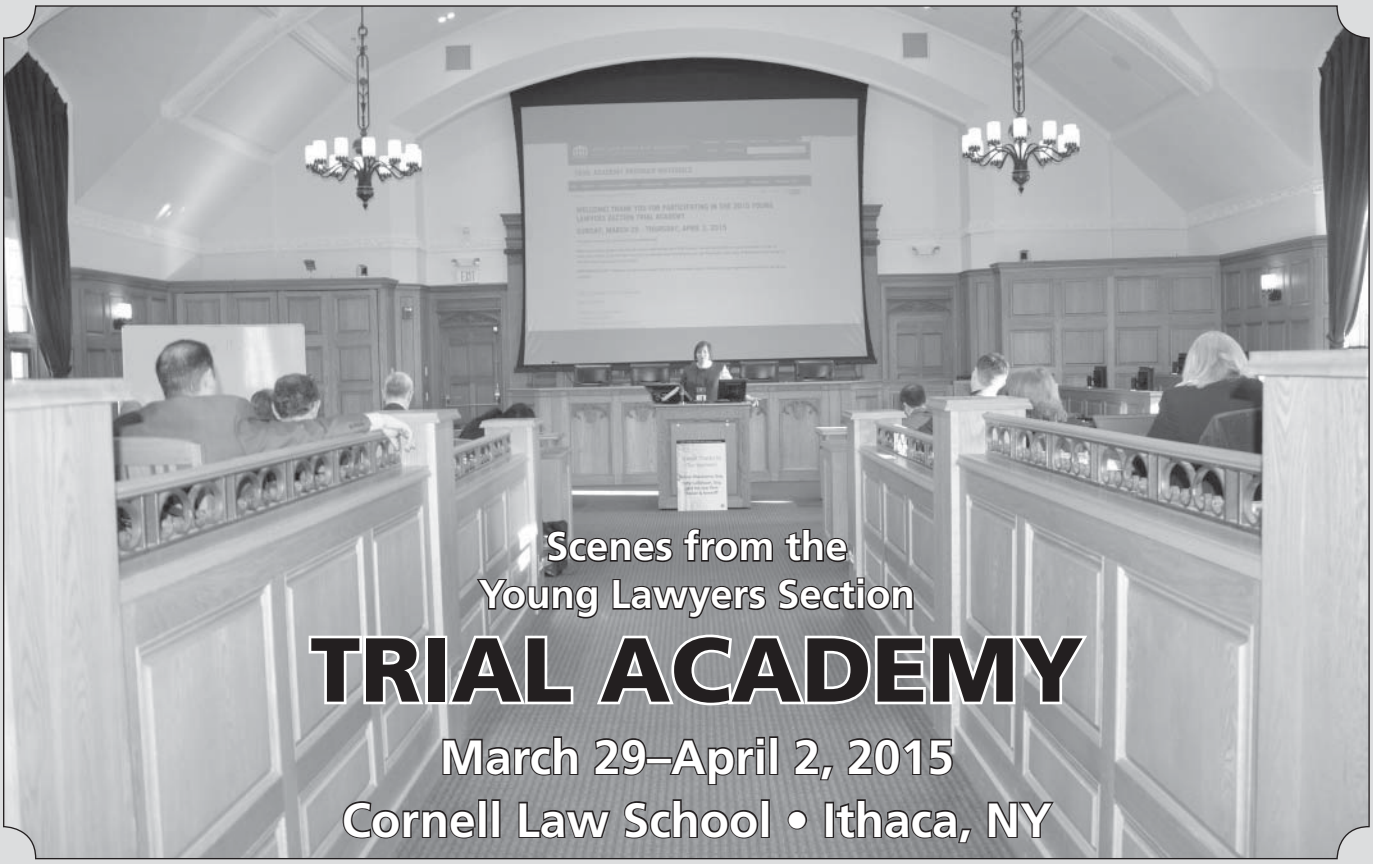
What does this mean for the future of the SEC and high-frequency trading? SEC Chairwoman, Mary Jo White, has said: "When high-frequency traders cross the line and engage in fraud, we will pursue them as we do with anyone who manipulates the markets."[23]

The SEC-New York's Regional Director, Andrew Calamari, speaking at an event at Fordham University School of Law, discussed the Athena case's impact. He underscored the SEC's challenges in overseeing a broad spectrum of laws and regulations, with limited manpower and resources, while having to maintain an expected level of quality and thoroughness. The answer to this challenge, he said, is to: "Win a few major message cases, in different types of cases." Athena, as the first settled HFT case, represents a major piece of that answer. A precedent has now been set.

Endnotes

1. Marking-the-close or "portfolio pumping" is "the illegal act of bidding up the value of a fund's holdings right before the end of a quarter, when the fund's performance is measured. This is done by placing a large number of orders on existing holdings, which drives up the value of the fund." *See*, Investopedia, http://bit.ly/14BVkX6.
2. *In the Matter of Athena Capital Research, LLC*, Exchange Act Release No. 73369/ Investment Advisers Act Release No. 3950 at 1 (Oct. 16, 2014).
3. *Id*. at 2.
4. Securities Exchange Act, 15 U.S.C. § 78a(u)(3) (1934); Investment Advisers Act, 15 U.S.C. §§ 80(b)(1- 21) (1940).
5. *Supra* note 2, at 2 ("Imbalances for the close of trading occur when there are insufficient on-close orders to match buy and sell orders, *i.e.*, when there are more on-close orders to buy shares than to sell shares (or *vice versa*), for any given stock.").
6. *Id*. at 3. ("Imbalance-Only-On-Close Orders (Imbalance-Only Orders) limit orders that would be executed when the market closed, but only if there was an imbalance at the close.").
7. *Id*. at 2. (Athena called this process "accumulation," and the algorithms that accumulated these positions were called "accumulators.").
8. *Id*.
9. The limit for similar cases is $725,000. *See*, 17 C.F.R. § 188.
10. In the Athena case, the SEC imposed liability through Section 21C of the Securities Exchange Act of 1934 (Exchange Act) and Section 203(e) of the Investment Advisers Act of 1940.
11. *See,* Investopedia, http://bit.ly/ 1u81DbN.
12. *Supra* note 2.
13. Press Release, Securities Exchange Commission, SEC Charges New York-Based High Frequency Trading Firm With Fraudulent Trading to Manipulate Closing Prices (Oct. 16, 2014), *available at* http://1.usa.gov/1ARN94P.
14. Peter J. Henning, *Why High-Frequency Trading Is So Hard to Regulate*, N.Y. Times, Oct. 20 2014, *available at* http://nyti.ms/1KLDHFL.
15. 15 U.S.C. § 78a.
16. *Id.*
17. 17 C.F.R. 240.10b-5.
18. *Supra* note 2.
19. *Id*.
20. *Id*.
21. *Id*. at 3.
22. *Supra* note 13.
23. *Id*.

Ruben Magalhaes graduated from Fordham University School of Law in May 2014 and is an attorney pursuing a career in securities regulation. Currently, he focuses on Dodd-Frank, specifically the implementation of the Volcker Rule.



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Beyond the Tipping Point: Benefit Corporations and the New Stakeholder Economy

By Scott Exner

Dating back to *Dodge v. Ford* in 1919, courts have identified the ultimate obligation of for-profit corporation directors: to serve shareholder interests.[1] Academic debate persists regarding the existing legal authority of directors and officers to consider non-shareholder constituencies, such as employees, local or larger communities, or the environment. But in practice, legal custom and corporate incentive structures have created a pervasive culture of short-termism, characterized by adherence to a singular profit-focused paradigm.[2]

Enter the benefit corporation, a term most corporate attorneys—and, in particular, those working with early stage companies—have now heard in their practice. A new and voluntary for-profit business entity, benefit corporations provide legal protection and clarity for entrepreneurs seeking to prioritize long-term value creation, not only for shareholders, but stakeholders as well.[3]

Notably, benefit corporation directors must consider or balance a company's public benefit purpose and stakeholder interests when making decisions. Directors are afforded, alongside shareholders, a right of action to enforce this obligation.[4] More than 2,000 benefit corporations have incorporated nationwide, with exponential growth in the past few years.[5] Legislation authorizing benefit corporations has passed in 26 states and the District of Columbia, and more than 10 states are considering similar legislation in 2015.[6] Delaware, the jurisdiction-of-choice for many U.S. businesses, has accepted registrants since 2013.[7]

Benefit corporations are here to stay, but what are the implications and effects of their presence? Interestingly, the State of Nevada represents the fastest growing proportion of benefit corporation registrants, now totaling over 500 businesses.[8] Over time, benefit corporation passage in states may well alter where social entrepreneurs choose to incorporate.

A looming and pivotal juncture is for a benefit corporation to go public—a transition to which there is no statutory impediment. Benefit corporations are already raising capital from high-profile investors.[9] In 2013, publicly traded Campbell Soup Company acquired Plum Organics, and supported Plum's conversion into a benefit corporation shortly thereafter.[10]

In a crowded marketplace, today's entrepreneurs understand the need to differentiate. Many are now driving benefit corporation adoption as a vehicle for sustaining and enforcing company mission over time or upon exit. This is especially important for attracting and retaining talent from a workforce increasingly populated by millennials,[11] who, research shows, seek out employers that prioritize both profit and purpose.[12]

Investors pursuing more efficient and reliable means of tracking environmental, social, and governance (ESG) performance, and a growing conscious-consumer base, will benefit from the increased transparency that helps to distinguish good businesses from good marketing. Ensuring that a company's stated public benefit goals match its operations is highly dependent upon providing investors and consumers access to easily benchmarked and comparable data. Benefit corporation compliance with statutory reporting requirements, and the use of independent third-party standards, will be critical in this regard.[13]

State policymakers and regulators must also avoid inadvertently hindering purpose-driven entrepreneurial activity. For instance, benefit corporations are for-profit businesses. They should not be regulated as charities to any greater extent than traditional corporations when engaged in a market exchange of value for their products or services. Effective regulatory mechanisms are in place to protect members of the public who engage in donative activities in response to for-profit businesses that advertise a specific charitable purpose. However, broad regulation or registration of benefit corporations, or other mission-driven, for-profit businesses, would be misplaced —particularly if based on a misunderstanding of the benefit corporation form.[14] Alternately, changes to existing federal policy could help jumpstart the growing impact investment market,[15] and in turn, increase the flow of capital to mission-aligned businesses.[16]

The impact and presence of benefit corporations is growing, fueled by the rise of conscious consumerism and a desire amongst corporate leaders and entrepreneurs to shift toward long-term, stakeholder-driven growth strategies. The right blend of policy, prudent judicial response, and the engagement with the public as a powerful force for market-based accountability, will all be critical in shaping the role of benefit corporations in the emergent stakeholder economy.

Endnotes

1. *See, Dodge v. Ford,* 204 Mich. 459 (Mich. 1919). Under *Revlon, Inc. v. MacAndrews & Forbes, Inc.*, 506 A.2d 173, 182 (Del. 1986), the fiduciary duty to maximize shareholder profits, at least in the public markets context, was held to be preeminent in a sale transaction.
2. "[E]ven if it were the case that corporate directors and managers were well suited to act as the guardians of employees, consumers, the environment, and society

generally, the accountability structure within which they operate in the United States is tilted heavily toward one specific constituency: stockholders." Leo E. Strine, Jr., *Making it Easier for Directors to 'Do the Right Thing*,' 4 HARV. BUS. L. REV. 235 (2014).

3. Benefit corporations are often confused with, and should be distinguished from, Certified B Corps. These are businesses privately certified by B Lab, a 501(c)(3) nonprofit, for meeting high standards of social and environmental performance. Any for-profit entity in any country can seek B Corp certification.
4. William H. Clark, Jr., *Model Benefit Corporation Legislation*, §§ 301(a), 305 (June 24, 2014), http://bit.ly/1EB6ATD; *see also*, DEL. CODE. ANN. tit. 8 §§ 365(a), 367.
5. Estimate based on accumulated public data received from various state Secretary of State offices as of March 13, 2015. On file with B Lab.
6. Twenty-four states and the District of Columbia have adopted legislation mirroring model benefit corporation legislation with some slight variation state by state. Delaware and Colorado have adopted similar, but amended, requirements. *See*, B Lab, *State by State Legislative Status*, http://bit.ly/1D7B3Zg.
7. *Id. See also*, DEL. CODE. ANN. tit. 8 § 361-68. Delaware recognizes these entities as "public benefit corporations" (PBCs).
8. *Supra* note 5.
9. Examples include Founders Fund (AltSchool), Andreessen Horowitz (AltSchool), and Benchmark Capital (Farmigo). *See*, Founders Fund, *AltSchool*, http://bit.ly/1E6WQLQ; Andreessen Horowitz, *Portfolio*, http://bit.ly/1iHWvry. *See also*, omio Geron, Forbes, *Farmer's Markets at Massive Scale? One Startup's New Approach*, http://onforb.es/1By8r8b (Dec. 11, 2012) (Identifies Benchmark Capital as a Series A investor in Farmigo).
10. *See*, Campbell Soup Company, *2014 Corporate Social Responsibility Report*, http://bit.ly/18BNwXj ("Plum Organics was acquired in June 2013, and Campbell worked with Plum to incorporate it as a Public Benefit Corporation (Plum, PBC) under Delaware law.").
11. Millennials will represent 75% of the workforce by 2025. Morley Winograd & Dr. Michael Hais, *Governance Studies: How Millennials Could Upend Wall Street and Corporate America*, http://brook.gs/1wqgC47.
12. Three quarters of millennials "report that their company's purpose was part of the reason they chose to work there." Delloite, *Mind the Gaps: The 2015 Delloite Millennial Survey*, http://bit.ly/1IIzCjG.
13. Clark, *supra* note 4 at § 401-402.
14. *See*, Robert T. Esposito, *Charitable Solicitation Acts: Maslow's Hammer for Regulating Social Enterprise*, 11 N.Y.U. J.L. & BUS. (forthcoming 2015).
15. According to the Forum for Sustainable and Responsible Investment (US SIF), U.S.-domiciled assets managed under sustainable, responsible, and impact investing strategies grew to $6.57 trillion by the beginning of 2014, up from $3.74 trillion in 2012. USSIF. *See*, US SIF, *Report on US Sustainable, Responsible, and Impact Investing Trends 2014*, http://bit.ly/1C7dWfP. *See also*, David Brooks, *How to Leave a Mark*, N.Y. TIMES, Jan. 27, 2015, at A21 ("[I]mpact investing is now entering the mainstream.").
16. For example, ERISA regulations in the U.S. have had a chilling effect on ERISA fiduciaries' consideration of environmental, social, and governance factors. *See*, G8 Social Impact Investment Taskforce, Mission Alignment Working Group, *Profit-With-Purpose Businesses*, http://bit.ly/1Hg070A (recommending country laws "should not prohibit investment managers or fiduciaries responsible for investing pension funds or endowments from (i) investing some portion of those funds in social mission businesses, or (ii) applying a positive impact screen to some or all of their investments").

Scott Exner is a Corporate Associate at Gunderson Dettmer Stough Villeneuve Franklin & Hachigian, LLP. As a former Legal Fellow at the 501(c)(3) nonprofit B Lab, he worked to support entrepreneurs by removing legal obstacles to scaling and investing in social enterprise and innovation. Scott earned his J.D. with honors from UCLA School of Law and is a member of the New York State Bar.

The (Il)legalities and Practicalities of Revenge Porn

By Alex Urbelis

If you watch the *The Newsroom*, you may recall the Season 2 horror, when comely business news anchor, Sloan Sabbith, suddenly realizes that salacious photos of her have been posted on a "revenge porn" site, and were trending on social media.[1] Fiction aside, revenge porn, "or sexually explicit media that is publicly shared online without the consent of the pictured individual,"[2] is a real world problem and becoming increasingly common. The law is reacting, but as is often the case with novel, tech-driven wrongs, most legal redress is cumbersome, ill-fitting, and insufficient.

There are, however, novel legal theories to combat revenge porn at the federal level, and criminal statutes—though of questionable efficacy—at the state level. And, as a practical matter, if a person does share intimate photos, there are technical measures to reduce the likelihood they will remain in another's possession or subject to misuse.

Revenge Porn and the Law

At the Federal Level

A particularly heinous instance of revenge porn involving a current law student has found its way into the U.S. District Court for the Central District of California. Filed by attorneys from K&L Gates, appearing pro bono on behalf of a pseudonymous plaintiff, the complaint alleges that the victim's ex-boyfriend posted sexually explicit material to revenge porn websites, then contacted the victim's friends and colleagues to provide direct links to the obscene material.[3]

This unique federal litigation, seeking injunctive relief and damages, relies on copyright law for jurisdiction. The theory is that since the victim created the images, it is she who owns their copyright. The ex-boyfriend, by posting the images without her consent, is violating the Copyright Act of 1976, entitling the victim to injunctive relief.

There is, however, a major hitch to this approach: relying on copyright law requires that the explicit images be registered with the U.S. Copyright Office. This process is not only cumbersome, but unrealistic and painful for the victim. What is more, assuming the injunction is effective as to the ex-boyfriend, no legal relief can prevent further dissemination of the images. A court can grant relief only regarding a single defendant, and cannot enjoin downstream websites from displaying or transferring the offending images, or prevent search engines, such as Google, from displaying disparaging search results that point to these sites.

Another legal tactic, combating revenge porn with Digital Millennium Copyright Act (DMCA) takedown requests, has sometimes had the opposite of the intended effect. Websites have displayed takedown requests with pride to draw more attention (and clicks) to the offending material. The obvious intent behind this brazen disregard is to discourage future DMCA requests, and it is likely that this audacious tactic is effective.

In sum, copyright law may indeed provide a partial remedy for some patient victims willing to jump through the hoops required of the U.S. Copyright Office, but it is hardly a silver bullet.

Criminalizing Revenge Porn

Defining revenge porn as a criminal act is the clearest signal that this conduct will not be tolerated. Only 13 states criminalize revenge porn, and, technically, New York is not one of them.[4] On the international front, Israel was the first to pass a revenge porn statute and the U.K. the latest to tackle the issue.[5] The mere existence of such laws may be a powerful deterrent. But there are practical considerations for successful prosecutions, and the possibility of foreseeable but unintentional consequences on several fronts.

Chief among practicalities, the law must fit the crime. In New York, the first prosecution of revenge porn failed, largely because existing laws

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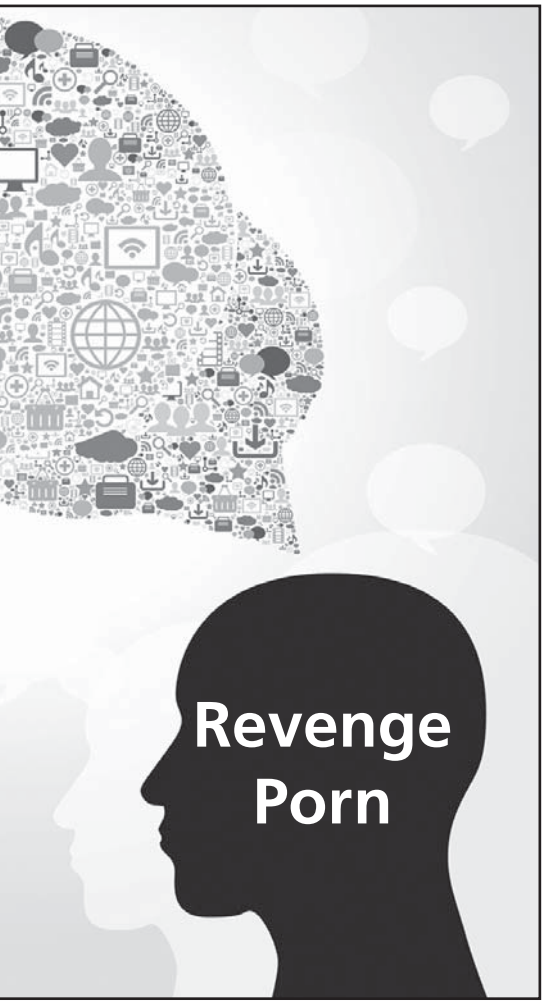

Turning the Tide Against Revenge Porn: How Prosecutions, Enforcements, and Platform Policies Are Making Waves

By Amanda Levendowski

In fall 2014, thousands of nude photographs flooded the internet after a mass hack of celebrities' iCloud accounts. The hacked photos, most of which featured young women, were initially leaked on "wild west" of the internet—sites such as 4chan and Reddit—and surged onto more mainstream platforms.[1] Simply "flagging" the links, a method widely used to report violations of platforms' policies, did little to stem the tide: Even if one image was successfully removed, wave after wave of alternative links rolled in take its place.

These celebrities were victims of nonconsensual pornography, or, "revenge porn": their sexually explicit images were publicly shared online without their consent.[2]

Nearly a week passed before Reddit banned the subreddit dedicated to distributing the hacked photos. "We don't ban subreddits for being morally bad," wrote Reddit CEO, Yishan Wong, on the company subreddit, "We *do* ban subreddits for breaking our rules, and one of them is repeatedly and primarily being a place where people post copyrighted material for which valid DMCA requests are being received."[3]

The DMCA, or Digital Millennium Copyright Act, allows owners of copyrighted content to submit requests to remove copyright content from search engines and sites like Reddit. Why would Reddit ever comply with such a request? Under the law, if a website complies with certain conditions, like responding to valid takedown requests, it is immune from liability for the copyrighted content posted by third-parties.[4] If it refuses, it can be held legally accountable.[5] Ultimately, Reddit made the call to prioritize copyright law over gross invasions of privacy.[6]

Previously, I wrote that copyright could be used to combat revenge porn.[7] Because more than 80% of revenge porn images are selfies, the vast majority of revenge porn victims can use copyright law by sending takedown notices to websites and de-indexing requests to search engines.[8] As effective it can be in practice, particularly for celebrities, who have means and better access to legal avenues, copyright is an imperfect solution.[9]

A single successful takedown is insignificant when photos can easily be shared, alternately linked, and distributed widely. Indeed, the tendency of removed content to pop up elsewhere is so common that it is known as the "whac-a-mole" problem. Major revenge porn website operators, who deliberately defy DMCA compliance, may instead draw more attention to the images of victims who request removal.[10] Further, it is difficult to overcome the uneasy feeling that revenge porn is not what copyright law was meant to redress.

Victims do have other remedies. Along with copyright law, there are existing state laws prohibiting voyeurism, stalking, harassment, and invasion of privacy, as well as federal laws criminalizing computer hacking and identity theft. Though underexplored, there is a federal law that demands special recordkeeping for images of individuals engaged in sexually explicit conduct.[11] However, sussing out which laws apply is fact-specific, and lawsuits under these statutes can be expensive and time-consuming.

Targeted Revenge Porn Legislation

Navigating the patchwork of applicable state and federal laws is admittedly tricky, which is why Mary Anne Franks, a professor at the University of Miami School of Law and a member of the Cyber Civil Rights Initiative board, has said that "[S]tate and federal criminal laws are necessary to address the problem of non-consensual pornography."[12] Many states seem to agree: to date, 16 have enacted laws to address revenge porn with more uniformity

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(Continued from page 12)

did not reach this sort of conduct.[6] Harassment was not an option because the material was not sent to the victim herself; unlawful surveillance was inapplicable because the images were created consensually; and the display of offensive materials was similarly inconsonant because nudity is not, per se, offensive.

Responding to this and other failed prosecutions, on 1 November 2014, an amended version of New York's unlawful surveillance statute went into effect, criminalizing the recording or broadcast of images of the sexual or private parts of another which are created without consent.[7] Critics have argued that this amendment does not go far enough to protect victims. As a matter of fit, the law is still not a revenge porn statute—it is a re-engineered version of a peeping tom law. As such, the statute does not extend to sexual material created by mutual consent but distributed without the consent of the victim.

Carrie Goldberg, a board member of the Cyber Civil Rights Initiative, who is active in its 'End Revenge Porn' campaign, notes that: "In New York it's criminal to share credit card numbers[8] and pirated music,[9] yet we have no such protections for the far more personal and devastating distribution of private sexual pictures." Legislation[10] introduced by New York Assemblyman Edward Braunstein would change this, and, according to Goldberg, protect victims regardless of the motive of the distributor, "whether for revenge, entertainment, money, 'lulz,' or no reason at all."[11]

Another practical reason prosecutions fail is for a lack of resources. Revenge porn is a fast-moving, cross-border offense that occurs on several different technological platforms: cameras, smart phones, and web servers. Most local law enforcement and prosecutors do not have the financial, technical, or human resources to track and collect transient forensic evidence across several jurisdictions.

Disappearing Evidence and False Flags

A clear-cut case would look like this: a victim is notified of offending material that can be traced back to an image sent to an ex-boyfriend. The mobile device of that ex-boyfriend contains the image distributed without consent, and distribution can be traced to his IP address and his mobile device. Prosecutions, however, are rarely so straightforward.

The first stumbling block is the image itself. If neither the victim nor the ex-boyfriend have a record or copy of the image (perhaps both upgraded their devices or deleted old messages), then only their mobile carrier(s) will have a record of the initial transmission. Acquiring that data is time-consuming and resource-intensive.

But assuming no problem with the above, the next evidentiary hurdle is proof of distribution. Some exes may be so incensed as to throw caution to the wind, but a thoughtful offender would use a new device and public wi-fi for distribution. Technically astute offenders would use a throwaway device and a virtual private network (VPN), to make it seem as if the distribution originated from China or Russia. Acquiring logs and connection data from a foreign VPN provider (if such records are even kept) is both a crapshoot and a herculean task.[12] But in the prosecutorial context, if you combine this type of anti-forensic behavior with the fact that mobile devices are often lost or stolen, and add to that the prevalence of data breaches and malware, you have something that begins to look very much like reasonable doubt.

With evidence difficult to collect and resources scarce, failed prosecutions may have serious unintentional consequences: discouraging victims from coming forward, deterring further prosecutions, and emboldening potential offenders.

Practical Advice for Cautious Couples

The best way to ensure images never make their way to revenge porn sites is obvious: do not create them. If, however, a person chooses to take and share intimate photos, there are technical measures that can decrease the likelihood of the image being retained and misused.

First: do not send intimate pictures through text message, iMessage, Whatsapp, or any other messaging platform that creates a continuous historical record of activity. Doing so makes it easy for a spurned lover to scroll backwards in time and find revealing photos exchanged during better times.

Second: if you do share private photos, use third-party messaging applications such as Wickr, Silent Circle, or Snapchat that "burn" images after a specified period of time. With these apps, it is possible to specify that the message or image remain with the recipient for as little as ten seconds. While this does not prevent screen captures of images, it does prevent a person from retrieving previously sent images. Further, apps such as Wickr and Snapchat make executing the screen capture function on an iPhone a more cumbersome process, reducing the likelihood that an image will be stored. Snapchat, by the far the most popular app for sharing intimate photos, alerts senders when an image has been screen captured.[13]

Third: if sharing is not the goal, do not use an Internet-enabled device to capture private moments. Recall the standalone digital camera, the long-forgotten device used to take pictures and nothing more. Placing several steps between yourself and transmission of a private photo will make it less likely to occur.

Fourth: do not back up intimate photos to a cloud. Many devices, including iPhones, are configured, by default, to keep photos in a cloud's central repository. Weak passwords and angry exes are an awful combination, and the cloud is an all too easy target.

Fifth and finally: Though unsexy, keep a detailed log of images sent and to whom they are sent. If the relationship devolves into a revenge porn fiasco, those contemporaneous records could be critical to a successful prosecution when evidence from other sources is lacking.

* * *

Technology will always outpace legislation. It is, therefore, no surprise that the legal remedies available to victims of revenge porn are inadequate. Federal remedies are slow, burdensome, expensive, and only partially effective. Criminalizing revenge porn is a strong statement, but also an imperfect solution because of the under-inclusive nature of the proscribed conduct and the ease with which evidence can be destroyed and prosecution frustrated.

What is clear, however, is that victims of revenge porn are seriously and irreparably harmed. The elements and mechanics of criminal statutes and the civil remedies available require further consideration and study. Unless and until such a time, the best defense is a good offense. The more we understand the permanence of our digital footprints and the technical measures at our disposal to reduce them, the better able we, as users, are to avoid the problem of revenge porn altogether.

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10. B. A571, 2015 Assem., Reg. Sess. (N.Y. 2015).
11. New York's proposed revenge porn law establishes as the crime of non-consensual disclosure of sexually explicit images as a class A misdemeanor. The bill is available at http://bit.ly/1GuN3Sy.
12. TorGuard, a prominent VPN provider, advertises that it does not keep logs of activity associated with an IP address. Further, it notes that hundreds of users are using any server at any particular time, making attribution of activity nearly impossible. *See,* Do You Keep Any Log Files, TorGuard, http://bit.ly/1B5UMlv.
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Turning the Tide Against Revenge Porn: How Prosecutions, Enforcements, and Platform Policies Are Making Waves

(Continued from page 13)

than the patchwork of existing laws, frequently relying on Franks' model legislation.[13]

On one hand, criminal laws provide a uniform way for prosecutors to punish revenge porn distributors. On the other, poorly drafted revenge porn laws pose real threats to the First Amendment's free speech protection.

The legislative process has a problem of its own: even the most precisely drafted bill would undergo revision on its way to becoming law. Any revenge porn law runs the risk of inviting a First Amendment challenge for overbreadth or vagueness, but misguided legislative changes can nudge a law from constitutionally questionable to completely indefensible.

Take Arizona's revenge porn law.[14] The law is a marked departure from model legislation proposed by Franks, as well as the legislation proposed by her colleague Danielle Citron, a professor at the University of Maryland's Francis King Carey School of Law.[15] As enacted, the Arizona statute does not operate as a carefully calculated criminalization of revenge porn—it is an omnibus nude photo law. This is why the American Civil Liberties Union joined with a coalition of booksellers, artists, librarians, and free speech organizations to challenge it.[16] In response to the ACLU litigation, the law is undergoing an overhaul. Unfortunately, the proposed revisions lack an exception for images disclosed in relation to a newsworthy event. The law may still criminalize, for example, the conduct of a Phoenix-based journalist who forwarded her editor a photo of former New York Congressman Anthony Weiner's "danger zone" because she would be disclosing a sexually explicit image without the subject's consent.

The Arizona law underscores the tension between laws broad enough to protect all revenge porn victims, yet narrow enough to withstand strict scrutiny under the First Amendment. Given that the Supreme Court has recognized that embarrassing, disgusting, offensive, or false speech retains First Amendment protection, it is far from assured whether any revenge porn law will survive a legal challenge.[17] But the Arizona law, which, on its face, criminalizes showing a photo of your newborn naked baby to a friend, is not even a close constitutional call.

Turning the Tide Using Prosecution, Enforcement and Platform Policies

In the first few months of 2015, there has been a sea change when it comes to penalties for distributing revenge porn. Nearly half of the most notorious revenge porn website operators were met with significant enforcement actions:[18]

- Kevin Bolleart—founder of the revenge porn site, UGotPosted—was found guilty of six counts of extortion and 21 counts of identity theft;[19]
- The Federal Trade Commission filed a complaint against Craig Brittain—founder of the revenge porn site, IsAnybodyDown?—for unfair business practices and false claims;[20]
- Hunter Moore, the "King of Revenge Porn," pleaded guilty to violating the Computer Fraud and Abuse Act, a federal hacking law, and to committing identity theft.[21]

Notably, not one of these actions involved a targeted revenge porn law.

Platforms are also joining regulators and prosecutors in stemming the tides of websites, links, and images featuring revenge porn. Recently, Twitter, Facebook, and Instagram announced new policies regarding revenge porn and retooled reporting mechanisms to make it easier to report nonconsensual pornography.[22] Even Reddit announced that it would be banning revenge porn from its subreddits, not because of copyright law, but because of new privacy policies.[23]

None of this is to say that revenge porn has been successfully drowned out—it hasn't. But these changes demonstrate that new criminal laws are not the only way to punish those who profit from revenge porn.

Endnotes

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Bridging the Gap



FOIL 101: An Inside Route to Better Discovery

By Anthony Fasano

Despite its power and scope, New York's Freedom of Information Law (FOIL)[1] is an often under-utilized attorney tool when seeking access to records from New York State or its local municipalities.[2] Although the disclosure parameters of the Civil Practice Law and Rules (CPLR)[3] provide an attorney with a broad range of discovery options, the law does have its limits. FOIL, however, provides a workaround.

At its core, FOIL "imposes a broad duty of disclosure upon [State or local] agencies" to ensure government transparency.[4] To that end, FOIL allows any individual to submit a request for an agency record unless an exception exists.[5] Under FOIL, a "record" is:

> [A]ny information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations, or codes.[6]

The requirements of the CPLR and FOIL differ on the standard by which documents must be produced. This difference is critical; juxtaposing FOIL and the CPLR, a CPLR discovery demand denied or contested may, nevertheless, be granted if requested through FOIL.[7] Uniquely, there is often a greater right to records through FOIL than under the CPLR,[8] and there is no prohibition from making a FOIL request for the same or similar records as previously requested through discovery.[9] However, attorneys should be mindful of using FOIL requests for "improper purposes, such as harassment and delay," during litigation.[10]

Once a person submits a FOIL request and an agency's record access officer receives it, the agency has five business days to grant that request, deny it in writing, or provide a written response indicating an approximate date when it will respond—generally within 20 business days.[11] The type and number of records requested will usually dictate whether the request is granted or denied in the first five business days.

If the agency denies a request or otherwise fails to respond, an appeal may be brought within 30 days,[12] to which the agency must respond within 10 business days. If the agency's final determination is a denial, that determination may be challenged through an Article 78 proceeding.[13]

In seeking documents through FOIL, attorneys should know that FOIL requires that the request "reasonably describe"[14] the sought records. A common issue that can delay production is when the request does not. Records are reasonably described "when an agency has the ability to locate and identify [the requested] records with reasonable effort. Often pertinent is the means by which an agency maintains, files, indexes or retrieves its records."[15]

When seeking records in a short time frame, attorneys should take care to ensure that the request can be granted within the first five business days of the request—or a reasonable period of time thereafter. When requests are especially voluminous, the agency may simply furnish a written statement indicating that it cannot comply within 20 business days and state a prospective date by which the request will be granted or denied.[16] To prevent receiving a protracted response, requests should focus on specifically needed documents. Save burdensome requests for discovery and use FOIL for records needed immediately, or for those that cannot otherwise be acquired through discovery.

Another particular benefit of FOIL is that requests may be made at any time—including prior to the commencement of an action. Absent a court order, to take advantage of discovery through the CPLR there must be a commenced action. However, when a client cannot provide an attorney with sufficient details of a potential claim, this can lead to a deficient complaint or notice of claim. FOIL can help remedy this familiar problem by providing a cost-effective, informational bridge.

For example: A client informs her attorney that her employer, a city authority, has violated a policy pertaining to the investigation of harassment. However, her fear of retaliation prevents her from requesting the policy herself. In this instance, her attorney can FOIL the policy,[17] alleviating his client's fears and without tipping his hand. Once the attorney receives the policy, he can use it to draft a complaint or notice of claim. He can also use it to further evaluate his client's case.[18]

While FOIL provides an additional avenue for attorneys to gain access to records, it is most effective when combined with the CPLR. As many of FOIL's advantages over Article 31 are lost when requests

are burdensome or complex, FOIL should not be used as the primary tool to gain State or local government records. Rather, attorneys will most often find FOIL most beneficial when requests under the law supplement CPLR discovery demands.

Endnotes

1. N.Y. Pub. Off. Law §§ 84-90.
2. The terms "[local] municipality," "government agency," and "agency" are used interchangeably throughout this article and carry the same definition as the term "agency" under N.Y. Pub. Off. Law § 86(3).
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Book Review
An Invaluable Practice Resource for Today's Litigator

By Susan L. Shin

By the time I started practicing in 2001, I did all of my legal research electronically. Yet, I did not hesitate to agree to author a review of Robert L. Haig's treatise, *Business and Commercial Litigation in Federal Courts*,[1] having found its prior digital editions useful in conducting electronic research over the years. When an enormous box arrived one afternoon, I panicked. Inside was a twelve-volume set of hardcover books with gold embossing. It was the familiar anachronistic regality of law school textbooks that we all flipped through with a mixture of dread and weary apathy.

Where would I find the time to read these *and* keep up with my caseload? Yet, to my surprise, I found myself often reaching for the volumes. Haig's treatise has become my time-saving, trusty advisor, and the sections I have found most useful are those I would never have thought to research on Lexis or Westlaw.

To be certain, the Haig compilation is far from a clunky academic tome that dryly lays out the Federal Rules of Civil Procedure or references interpretive cases and authority. Rather, it is a practical collection of the experiences and insights of 251 of the country's most distinguished practitioners and judges. Together, they fill 130 chapters of step-by-step guidance—not only on procedure, substantive law, and trial advocacy, but strategic and tactical considerations for plaintiff and defense counsel. The compilation is stylistically and substantively cohesive and logically organized—an impressive achievement by a gifted editor.

The treatise is practical and user-friendly. Each chapter includes a section on scope, in-depth strategy considerations and analyses, a detailed table of contents for easy reference, and extensive citations to authority and cross-references. Each chapter also includes practice aids and checklists, as well as essential, time-saving litigation forms and pattern jury instructions.

Notably, it is also refreshingly modern. It provides cutting-edge guidance on substantive issues that often plague today's commercial litigator. The treatise includes informative and instructive chapters on internal investigations, regulatory litigation with the SEC, consumer protection, licensing, privacy and security, money laundering, the False Claims Act, and litigation technology, among over 100 others.

Even basic litigation topics come alive with varying views and perspectives from seasoned litigators and judges. In the six months since that box arrived on my doorstep, several issues have arisen in my practice and I referred to the treatise again and again. Strategic considerations in Chapter 10 (Comparison with Commercial Litigation in State Courts) and Chapter 11 (Removal) were particularly helpful in deciding whether to remove a case from a judge in the New York Supreme Court, Queens County—who seemed unsympathetic to my adversary's case. For the same case, Chapter 3 (Enforceability of Forum Selection Clauses) and its strategy considerations gave me a useful and novel perspective.

More recently, I relied on Chapters 13 (Consolidation of Separate Actions) and 15 (Coordination of Litigation in State and Federal Courts) to develop a powerful and efficient strategy to defend a client from seven separate actions, filed in various New York and federal courts, that involved common questions of law and fact. For the same case, Chapter 8's (Responding to Complaints) discussion on the practical and strategic considerations of motions to dismiss, affirmative defenses, and counterclaims gave me insightful advice and perspective.

Haig's treatise provides clear, measured guidance on some of the thorniest issues facing litigators today. For instance, Chapter 23 (Depositions) offers practical instruction on every aspect of deposition procedure and conduct, including the challenges in preparing and defending witnesses under Fed. R. Civ. P. 30(b)(6), and the effective use of deposition testimony down the road during trial. Prominent e-discovery trailblazer, Judge Shira Scheindlin, co-authors Chapter 25 (Discovery of Electronically Stored Information). The chapter includes commentary on current doctrine, duties to preserve, claims of spoliation, and practical guidance and considerations.

I would be remiss if I did not acknowledge Haig's thoughtful and pragmatic attention to law practice issues external to federal procedure, substantive law, and the courtroom. Chapter 47 (Alternative Dispute Resolution), authored by the late Judge Harold Baer, gives a thorough review of mediation and arbitration practice. Likewise, Chapter 33 (Settlements) contains practical discussion on dealing with insurance carriers, conducting litigation risk assessments at the outset of the representation, timing of settlements, and techniques to achieve a favorable outcome before reaching the courtroom.

The treatise further recognizes that a growing number of litigators practice in-house, hired by corporations to manage litigation—an increasingly common aspect of doing business. With this in mind, Chapter 58 is devoted entirely to litigation avoidance strategies, while Chapter 60 covers litigation management techniques. Also excellent are Chapters 62 (Litigation Management by

Law Firms) and 63 (Litigation Management by Corporations), which explore the realities of and approaches to budgeting and managing the ever-increasing costs of litigation.

Litigators at all levels of experience will find this compilation invaluable for its readability, practicality, and usefulness. For those who are still intimidated by the hefty physical volumes, the complete treatise also is available online through Westlaw. But from one practitioner to another, nothing replicates the experience of having the full twelve-volume set of wisdom, experience, and authority at your fingertips. Buy the book; the investment is worth every penny.

Endnote

1. BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS (Robert L. Haig ed., Thompson West 3d ed. 2011-2015).

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