NEW YORK STATE BAR ASSOCIATION
Journal
JUNE 2015
VOL. 87 | NO. 5

It's Not Just "Lawyering"

The Law Practice Management Issue
Edited by Marian C. Rice

Also in this Issue

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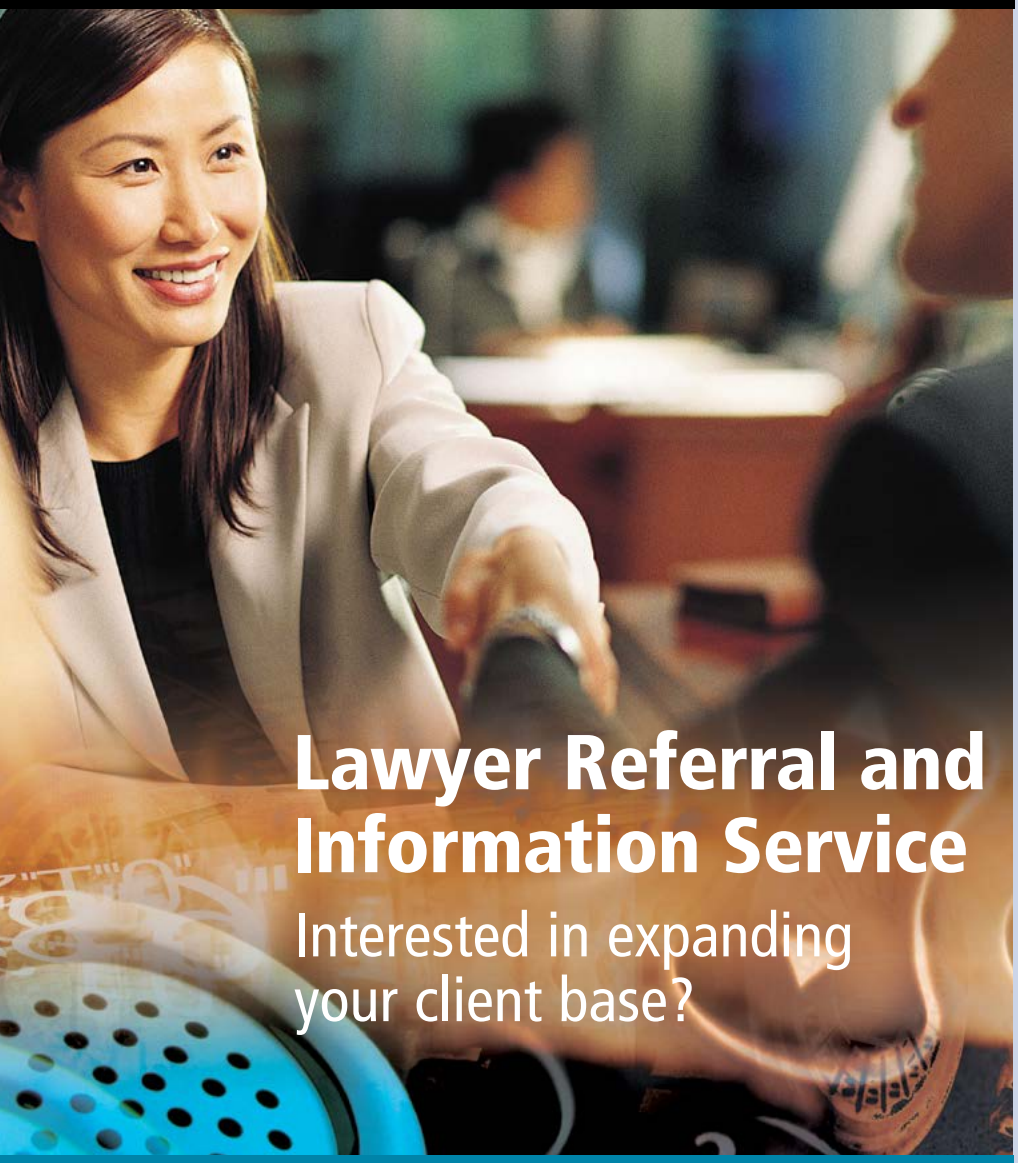

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EUGENE C. GERHART
(1912–2007)
Editor-in-Chief, 1961–1998

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The Law Practice Management Issue

EDITED BY MARIAN C. RICE

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DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media.

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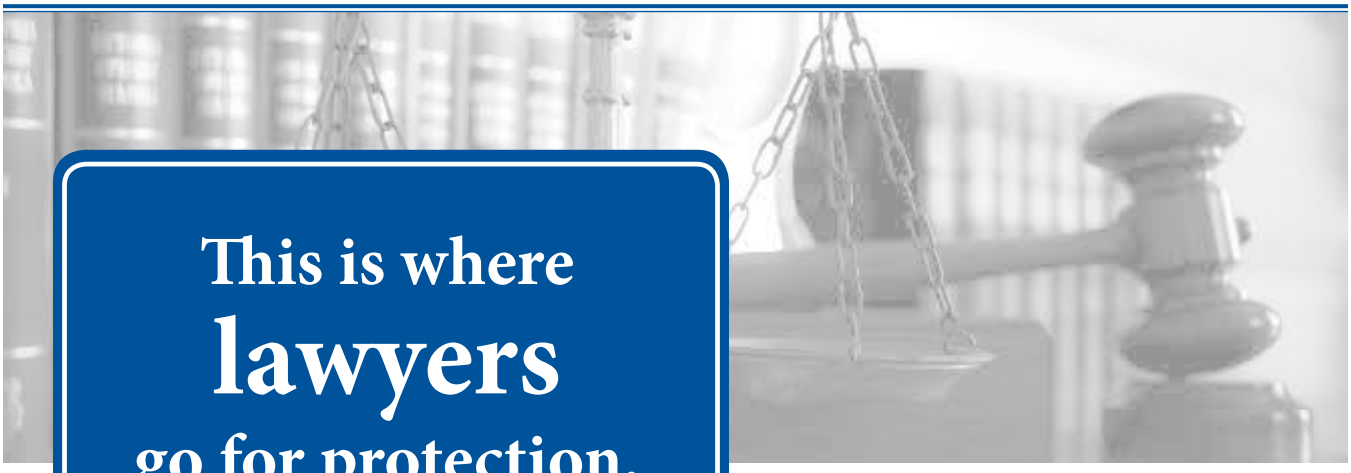

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PRESIDENT'S MESSAGE

DAVID P. MIRANDA

The True Administration of Justice is the Firmest Pillar of Good Government

"To no one will we sell, to no one will we refuse or delay right or justice."

– Magna Carta

These simple words from centuries ago endure and remain relevant today. These words fit perfectly as a caption to a photo of one of our recent political leaders who lost sight of why they were chosen to serve us, or on a sign held by a protester for whom our justice system has failed.

Eight hundred years ago this month, Magna Carta gave birth to our concept of fundamental liberty and justice. That concept journeyed to our American colonies where it was not merely accepted, but cultivated, and ultimately ingrained in our government, constitution and the hearts of the American people. Our Bill of Rights develops the principles in Magna Carta, assuring our citizens a fair trial by jury, due process, and protections from cruel and unusual punishment. Magna Carta marked the beginning of the idea of a higher law, one that is not susceptible to manipulation either by legislative acts or executive mandate, one that no man or woman, no matter how powerful, can rise above. It is this very idea of guaranteed freedom and fairness, recognized and embraced by our founding fathers, that is at the heart of the supremacy clause of the United States Constitution and our contemporary concept of the rule of law.

The heart of the New York State Bar Association's mission is to promote the rule of law and ensure access to justice. In the year ahead, our Association will embark on initiatives to provide greater support to programs that offer opportunities to bring access to justice to the poor and underserved. We will work throughout the state with our sister bars and legal service providers to help narrow the justice gap. By providing equal justice to the poorest among us, we are all served for the better.

The State Constitution

In recent years, our state has faced the harsh realities of fundamental flaws in our justice system. Our criminal justice system is more dependent on incarceration than rehabilitation; our grand jury system has lost our public's confidence and needs reform; our system of separate courts prevents our great state from moving forward efficiently. These issues and many more need our attention, our resources, our resolve. We must use the collective strength of our voices and experience to play a positive role in evaluating and providing recommendations with regard to those issues that impact our legal system and our constitution.

To better understand the challenges we face, we have formed the Committee on the New York State Constitution. The time is right to seriously consider whether the governing structure that has served us for so long remains the best for us now and to accept the challenge to do better. The Committee will be led by Henry Greenberg, a recognized leader on the topic. The Committee will review and make recommendations about our State Constitution, and promote initiatives designed to educate the legal community and the public. We must advance the understanding that reforms to our justice system and reforms to our state constitution are not academic theories, but instead, core necessities.

Court Restructuring

One significant issue is reform of New York's court structure. Archaic provisions in our state constitution have built a patchwork system that has become unnecessarily complex and antiquated. While other states have modernized their outdated court systems, New York's endures. As a result, we suffer the frustration and expense of unnecessary hurdles

David P. Miranda can be reached at dmiranda@nysba.org.

and roadblocks that affect taxpayers and municipalities alike. Businesses and the business of our state are stymied and drained of resources at a time when every dollar is precious.

Our Association has followed this crucial issue with great interest and worked tirelessly to present a compelling case for statutory and constitutional reform as well as other means needed to modernize our court system. We support the consolidation of our state's major trial courts into a two-tier system wherein our current nine distinct courts are represented by a statewide Supreme Court and a statewide District Court. Under such a restructuring, we have proposed that the constitutional cap on Supreme Court Justices be abolished, and that a Fifth Department be added to the Appellate Division.

Restructuring our courts will not alone suffice to cure our justice system, however. The Association has long been a proponent of a constitutional amendment to implement commission-based selection of judges, a system that has served us so well at our Court of Appeals. Reform of the selection of judges will enhance public trust and confidence in the legal system. Implementation of a commission-based plan to appoint judges would eliminate the negative influence of contested elections and provide an environment where the focus remains on the competence, temperament, and integrity of potential judges.

We have also made great strides in implementing the recommendations of our Task Force on the Electronic Filing of Court Documents, which include the State Bar's support of universal mandatory e-filing. E-filing not only helps ensure uniformity in the practice of law for attorneys practicing in different courts across the state, it also allows appellate courts to review documents already on file, and maximizes time and cost saving benefits by reducing the number of documents that would need to be filed and printed.

> Eight hundred years ago this month, Magna Carta gave birth to our concept of fundamental liberty and justice.

Criminal Justice Reform

We must also look to be a productive part of the dialogue on grand jury reform. Compelled by recent grand jury decisions in our own state and around the country, various proposals have emerged to reform our grand jury system. In the midst of present conversations about the current crisis in confidence in our criminal justice system, we must approach potential reforms carefully, in a way that balances the scales of our criminal justice system. Our Association, made up of prosecutors and defenders, public and private attorneys, will work to ensure that our voice embodies balance in reforms that ensure our criminal justice system effectively and fairly addresses those who break the law and lets our law enforcement officials do their jobs with dignity and respect.

NYSBA has introduced comprehensive initiatives intended to make our criminal justice system more fair and efficient in the hope that we can significantly reduce the tragedy of wrongful conviction. Our Association has been at the forefront of the effort to require video recording of interrogations as a way to help improve the criminal justice system. We helped secure funding for recording equipment in our state budget; we collaborated with several district attorneys to implement a pilot project; and we continue to promote the goal of mandatory recording of custodial interrogations. NYSBA also supports reforms in the use of solitary confinement in our prisons and jails by advocating a profound restriction on its use, and the adoption of stringent criteria for its implementation and duration.

Ethics Reform

Events taking place at the highest levels of state government have brought the issue of ethics reform to the forefront of today's political discussion. In 2010, then-President Stephen P. Younger created the bipartisan Task Force on Government Ethics in response to the public's increasing loss of confidence in state government; recent scandals involving state officials have only exacerbated the public sentiment.

Our Task Force proposed recommendations for reforming public sector ethics laws, focusing on four areas: (1) improving the structure of the state's enforcement mechanisms in the area of ethics, consistent with our notions of fairness and due process; (2) enhancing the ability of state prosecutors to bring criminal charges where a public official failed in his or her obligation to provide honest services to the public; (3) enhancing requirements of public disclosure where needed to increase transparency and the public's knowledge of potential conflicts; and (4) modernizing the ethics laws applicable to municipal and local governments. Although the law has changed since the report was issued to reflect some of the concerns we had raised, we believe that these recommendations express a policy that remains crucial and relevant today. We are committed to establishing a climate of ethical conduct that reinforces the public interest and reinvigorates our citizens' confidence in our state's government.

I look forward to the challenges of the year ahead with optimism and vigor, knowing that the driver of our Association's initiatives and positions comes not from political philosophy, but from our core beliefs and values, and the experience and diversity of our members. It is not only our diversity of race, creed, gender and geography, but our diversity of thought which is our greatest strength. ■

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

Traditional and New Trends in Trade Book Publishing
(9:00 a.m. – 12:00 p.m.; live & webcast)

June 12	New York City

Nuts and Bolts of Contract Drafting
(live & webcast)

June 16	New York City

The Evolving Rules of Professional Conduct: Building Your Practice and Staying at the Cutting Edge
(9:00 a.m. – 12:50 p.m.)

June 16	Long Island
June 19	Syracuse
June 22	Rochester
June 23	New York City; Westchester
June 25	Buffalo
June 26	Albany; Ithaca

Employment Law 2015: Current and Cutting-Edge Issues for the Corporate Counselor and General Practitioner
(live & webcast)

June 30	New York City

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It's Not Just

The Law Practice Management Issue

Edited by Marian C. Rice

I became a lawyer because I like to practice law. I was lucky enough to stumble upon my chosen area of practice, representing attorneys, early in my career and never looked back. Contrary to popular belief, attorneys make the best clients. I love to advocate their positions, present written arguments, distinguish my adversary's precedent, prevent and/or fix thorny situations, act as a sounding board and fashion remedies that let everyone get on with their lives.

I did not choose to become a business manager, administrator, marketing guru, public relations maven, accountant, human resource department manager, project manager, crisis management consultant, financial analyst, psychologist or chief bottle washer, but I quickly learned that being a good lawyer involves components of all these jobs. Practicing law may start with delivery of services to clients, but it certainly doesn't end there.

Frank H. Wu, Chancellor and Dean of the University of California Hastings College of the Law, writing for the Huffington Post Blog, nailed it when he observed that "[v]ery few, if any, of the law firms that have 'failed' has foundered because the people employed there were lousy lawyers." Law firms fail from lack of good management:

"Lawyering"

too much space; too much debt; too little revenues; too much disagreement on how to divide the revenues; too much emphasis placed on growth for growth's sake; too much faith (and money) sunk into lateral attorney commitments; too little attention paid to developing talented attorneys within the firm; too much ego; too little leadership; too much emphasis on the bottom line; too little respect afforded the firm's culture. The list goes on and on. Not on the list? Bad lawyers.

At the NYSBA Law Practice Management (LPM) Committee we start with the premise that lawyers will hone their "lawyering" talent elsewhere with NYSBA's rich CLE offerings. Our goal is to direct the attention of the many, many talented lawyers out there to resources that will bump up their skills in managing the practice of law. The Committee is dedicated to providing resources that enable attorneys to obtain the information needed to manage their practices and get back to the primary goal of representing clients. Through CLEs and materials located on the NYSBA website, the LPM Committee provides lawyers, law firm managers and legal professionals with information on practice management trends, marketing, client development, legal technology and finance. Whether you're a solo practitioner or a manag-

ing partner at a national law firm, you'll find law practice management materials designed to meet your day-to-day practice needs. Checklists, best practices, publications and continuing legal education programs provide up-to-date information and practical tips to help you efficiently manage your law practice.

In short, law practice management has endless facets, and we are pleased to showcase some diverse topics designed to enhance your "non-lawyering" skills in this volume of the *Journal*.

Even the best lawyer on earth has little to do without clients. Marketing guru Carol Schiro Greenwald outlines step-by-step, focused strategies for effectively developing and maintaining referral networks as a means of growing a law practice. Her innovative suggestions on how to cultivate dependable referral sources open limitless opportunities for the thoughtful reader.

Take it from me – nothing disrupts the productive practice of law more than having to defend a legal malpractice claim. My colleagues Andrew S. Kowlowitz and Stefanie A. Singer, of the law firm Furman Kornfeld & Brennan LLP, will let you in on a simple practice tip that will support a rock-solid defense to certain claims – and provide you with a great marketing tool if used correctly. No spoiler alert needed here – read the article.

Donna Drumm's experience spans all aspects of the legal profession, from practicing attorney to bar executive director to entrepreneur. Her thoughtful article provides valuable information on firm culture – and how to develop one in the face of a rudderless environment, be it a solo practice or an established firm. The real life case study of one firm's concerted effort to change its culture to comport with the principal attorney's personal beliefs while increasing profitability and – amazingly – having fun, certainly gives one food for thought.

Speaking of lateral hires, my much-missed former partner Matthew K. Flanagan explores one of the areas of law practice management that garners the most unfavorable publicity when things go wrong. Matt echoes my often expressed sentiment – there is little upside for the attorney holding funds in an escrow account and, yet, there is tremendous exposure. His article explores not just the parameters of the ethical rules governing an attorney's escrow obligations but also the lessons learned from the strict application of the rules.

Please: take the "pop quiz" authored by one of my favorite attorneys, Victor Metsch of Smith Gambrell & Russell, LLP. We can be scholarly, innovative attorneys at the top of our fields but if we are not "good" partners, the corrosive effect on a law firm is immeasurable. In a light-hearted style quite unlike the scholarly content of his informative blog, www.legalvictor.net, Victor drives home the qualities we all want, look for and aspire to, as law partners.

Andrew Kowlowitz and Stefanie Singer gave us great ideas on how to document the end of the client-attorney relationship. In my article, we'll do a quick rewind and talk about best practices in documenting the start of the client-attorney relationship – the engagement letter. I know. It is difficult to manage all these administrative tasks. But a well-thought-out engagement letter is not simply an administrative task – it is a substantive blueprint from which the legal services you will be rendering for your client flows. Treat it as such and you will manage your client's expectations and strengthen the client-attorney relationship.

Even the best lawyer on earth has little to do without clients.

Finally, for those of you who really enjoy the finer points of trial practice and have had quite enough of the non-lawyering aspects of our profession, tune in to the Point of View of the incomparable lawyer's lawyer, Henry Miller of Clark Gagliardi & Miller, P.C. One of the lowest moments of my CLE lecturing life was following Henry's extraordinary reenactment of the closing arguments in *Inherit the Wind*. As the silence following his oratory met thundering applause, stunned by his magnificent performance I miserably slunk to the podium to preach to recently admitted attorneys about the comparatively dreary principles of risk management. In his lesson-filled column and with his incomparable style, Henry profiles six excellent reasons why the peremptory jury challenge is a necessity in our "perfect system of justice."

I hope you enjoy this issue of the *Journal* and ask that you check out the LPM resources on the NYSBA website. Let us know if you have a story you'd like to share that will help our members manage their practices, and please let us know if you have a topic you would like to see us address. You can contact us at LPM@nysba.org, or visit us on the website, www.nysba.org/LPM. ■

Marian C. Rice, Editor of this issue of the *Journal*, the current co-Chair of the NYSBA Law Practice Management Committee and past President of the Nassau County Bar Association, is the chair of the Attorney Liability Practice Group at the Garden City law firm of L'Abbate, Balkan, Colavita & Contini, LLP and has focused her practice on representing attorneys in professional liability matters for more than 30 years.

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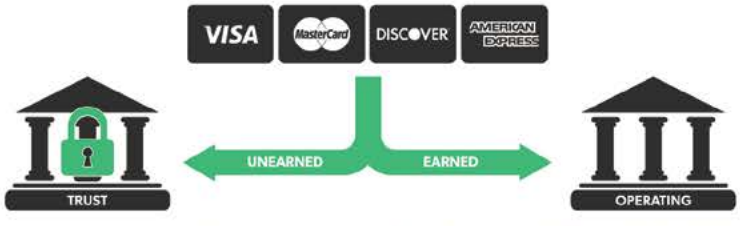

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Carol Schiro Greenwald, Ph.D. (carol@csgmarketingpartners.com) is owner of the New York–based consulting firm MarketingPartners. Ms. Greenwald helps firms create targeted growth strategies built around a lawyer's or firm's best clients and works with firm leaders to use tools such as alternative fees and legal process management techniques. The author of *Build Your Practice the Logical Way: Maximize Your Client Relationships*, Ms. Greenwald held a post-doctorate Eli Lilly fellowship at the Bunting Institute of Radcliffe College. She received her Ph.D. from The Graduate Center, City University of New York (CUNY).

Strategic Referral Relationships Enhance Growth

By Carol Schiro Greenwald

A referral is defined as "the act, action or an instance of referring,"[1] or "a person recommended to someone or for something."[2] The verb "refer" includes an array of meanings:

- "To think of, regard, or classify within a general category or group";
- "To allot to a particular place, stage or period";
- "To send or direct for . . . information or decision";
- "To have relation or connection";
- "To direct attention usually by clear and specific mention."[3]

Lawyers who view referring as a strategic process create a multi-layered approach that incorporates most of the meanings of the verb "refer." Their process focuses on finding referral sources to create connections, to recommend, to send information, or to ask for something. Identifying, developing, monitoring and rewarding referral relationships make sense as a strategy when they are all directed toward your firm or personal business development goals.

For example, if the goal of an attorney in a boutique firm is to cultivate referrals from other attorneys who either do not practice in the same area or who often find themselves with unsuitable opportunities that they pass along, then a strategic referral strategy would focus on identifying and establishing relationships with such attorneys. The attorney's value proposition would explain how sharing client work with the boutique firm enhances the referrer's capabilities and guarantees a continuation of a similar level of client service.

Referrals can also be about recommending "for something" instead of someone. The something could be a client request that is far afield from your expertise but easily handled by a member of your referral circle. For example, a mother needs a baby sitter, child therapist or after-school program. Or someone needs a car mechanic, doctor, broker, real estate agent, banker or accountant. Having access to varied skill sets of vetted members of your referral network adds to your "social capital" – your ability to be a connector, to introduce your contacts to others who can fulfill their needs.

In this article we will look at referrals as a strategy. We will identify different purposes, implementation activities and ways to measure and reward.

Referral Strategies

Typically, attorneys see referrals as an ad hoc byproduct of networking and visibility activities such as blogging, newsletters, speeches, etc. They spend scant time thinking about the reason for wanting a referral in the first

place, the kind of referral they want, or the process for developing a strong, effective referral relationship.

Referrers can come from a variety of sources:

1. Colleagues, past and present, in your practice area or a complementary one
   - Colleagues in various professions who all service a key client
   - Colleagues in your field who can hand off clients too small for them to service
   - Colleagues in complementary fields whose clients will need your expertise
2. Vendors in your work and private life
3. Clients past and present
4. People who know of you through your outreach activities
   - e.g., in-person or online networking, writing, speaking
5. Friends and family
   - College and law school alumni
   - Parents of children who play on the same sports teams as your children
   - Members of your church or synagogue

"If you don't know where you are going, any road will get you there."[4] To decide where to find your best referrers you need to begin by defining your desired results. To know how you want referrers to help you, you must first know what you want. Do you want referrers to:

- Help you build a particular kind of practice?
- Add more of a specific kind of client?
- Complement your own service offerings to your clients?
- Provide service resources such as complementary legal expertise or counsel from other professional areas?

Beginning with the end result, six steps will take you full circle through a referral strategy cycle. We will look at these steps in the rest of the article.

Referral Strategy Cycle

Step I: Personal "Belly-Button" Analysis

Think about what you do now and where you want to be in five or 10 years. Break down your practice into the parts you like and the parts you would prefer to hand off to others. For some, client counseling is their sweet spot, for others it's trial work or crafting the legal strategy. Do you like the hand-holding and drama of a contested divorce, the high stakes of a multimillion dollar merger, or the "feel good" sensation when you work for legal aid clinics that represent those who cannot afford a private lawyer?

Once you've identified your ideal practice situation, you need to think about the areas of your current practice that will enable you to do more of your preferred kind of client interaction. For some attorneys, this just means more of what they are doing today. For others it may mean some retooling to add a new sub-practice area or expand into a totally new arena. For example, a trust and estates attorney might want to segue into special needs law or a corporate attorney might want to focus more on local private business clients.

This leads to the next part of your personal inventory. What kind of client do you prefer? Do you like working with in-house counsel or with businesses that don't have staff attorneys? Do you prefer corporate work or work with individuals? Do you want a national practice or a local practice with more in-person face time with clients?

Next, you want to look at the characteristics of the client base you have selected. One way to begin this analysis is to focus on the 20% of your clients that produce 80% of your business. Go back five years if you can and chart those clients in terms of their industry, legal needs, revenue, and culture.

The "80/20" focus presumably overlaps with your expertise concerning the needs, desires, chemistry and constraints associated with those kinds of clients. Twenty-first century clients don't want to pay for learning-curve time, so by aiming for more clients like those in your "80/20" you should be focused on areas where you have sufficient knowledge and expertise.

The final step is to combine the data into a concise statement of your growth goal: what you want to do and for whom. You may want to augment this goal with a view of the marketplace by creating a SWOT analysis (**S**trengths, **W**eaknesses, **O**pportunities and **T**hreats), which considers the opportunities you are looking for in terms of your own areas of strength and weakness, alongside the marketplace's opportunities and threats. For example, current weaknesses might need to be remedied with CLE courses if you plan to expand into a new area or additional personnel if you plan to grow quickly. Marketplace opportunities include positive trends in the prospect's industry or demographic cohort, developments related to the legal areas you want to focus on and your own reputation. Threats would include competitors or negative trends.

Your referral strategy should be constructed to further the practice growth goals you just put together.

Step II: Define a Niche and the Targets Within It

The niche can be defined in terms of the type of client, a specific need, a geographic location, a specific service and/or your specific area of expertise. Selecting a niche begins by identifying a broad client category: shipping companies or grocery stores or restaurants; baby boomers, entrepreneurs, elderly couples. Then drill down to a sub-group, such as retiring baby boomers, tech entrepreneurs, divorcing elderly couples. Or maybe it's shipping companies that move freight, national chains of grocery stores, fast-food restaurants. You can drill even further down to, say, employment issues in your company niche or health issues among individuals. The more precisely targeted the niche, the easier it is to develop referral strategies.

Once you have a niche, use the data you collected to create a prospecting target – a "Target Persona." A persona is constructed to represent your perfect client. For example, if your target is a business, identify the kind of business, industry, location, who would be your contact person, kind of problem, and legal solution. For a person, include age, gender, location, need, and legal solution. Creating a target persona makes it easier to craft an elevator speech that focuses on exactly what you are looking for.

Step III: Identify Opportunities Within the Niche

The search for referral sources begins by identifying people and places associated with your niche and target population. You want to know:

- groups they belong to – professional associations, networking groups, affinity groups; and
- where they go for information they consider truthful and reliable.

The place to begin to find this information is to ask your "80/20" clients who represent the niche or target, or colleagues who share the same target market. Join LinkedIn groups focused on your target niche or target persona and follow conversations to understand what they care about and value.

Now you are ready to create your strategic referral network.

Step IV: Identify Strategic Referrers

Begin by looking through your contact list for everyone with links to your persona's characteristics, needs or solutions. You can also search LinkedIn for contacts who fit your criteria Then narrow the list of possibilities down to the 10 to 20 people who seem most relevant to your goals. As you move forward, this initial list will change. You will look for specific kinds of referrers and add them to the list, moving others off the list.

Step V: Elevator Speech

Once you have an initial list you want to begin to reach out to the initial 20 to discuss your mutual interests. But before you do that, create your elevator speech. This is a major step because a referral-based growth strategy requires you to educate your sources so that they know what you are looking for.

You want your referral sources to:

- Remember you
- Articulate clearly what you do
- Memorize you – keep you top of mind
- Prefer to refer prospects to you.[5]

Lawyers who view referring as a strategic process create a multi-layered approach.

An elevator speech should be short and focused. Its purpose is to encourage conversation and follow-up questions, not anticipate them. The content should focus on the benefits of your service for the target population or niche you share with the referrer. For example, "We work with families with special needs children [target]. Using my knowledge of special needs opportunities and regulations and my background in trust and estate law [features], I help them plan a very secure future for their child [benefit/value]."

Asking someone for an introduction to anyone usually leads to no one. When the referrer's notion of what you want and why is vague you tend to fall off the radar. Glance back at the initial definitions of "refer" and you will understand why educating referral sources as to the focus and results of your endeavors in very specific terms makes it easier for the referrer to know the kind of introduction that will be most beneficial. If you ask for a precise kind of recommendation that is relevant in a precise kind of situation, the referral is more likely to put two and two together correctly.

Step VI: Referral Strategy Implementation – What Goes Around, Comes Around

Referral relationships are about reciprocity. Often you will have to "go first." Introduce a possible referral source to some of your contacts, suggest mutual marketing activities or befriend them in other ways. Those who only take are soon dropped.

You are looking for people who will take the time to make "engaged introductions." "An engaged introduc-

Referrals

Referral Language: Fool's Gold to Solid Gold

Fools' Gold: "Call my friend Charlie and tell him I said to call."

Gold-plated: "I will make an email introduction to Charlie and cc you." [weak]

"I will make an email introduction to Charlie and tell him why I think the two of you should connect."

Solid Gold: "I will set up a meeting with the three of us."

Referral Courtesy: The Rule of Three

1. Beginning: Thank the referrer when a referral is made and connect quickly with the referred.
2. Middle: Update the referrer if you connect with the referral.
3. End: If you get work, let the referrer know at the beginning and end of the engagement. If you get the introduction but not the work, still thank the referrer.

Referral Strategy Worksheet

Directions: Fill in these areas as a prelude to selection of a referral strategy focus.

Ideal client description: factual and emotional-chemistry

Describe the product or service you want to sell:

What do you do well? What do you most like to do?

Why do people buy what you sell [i.e., the benefits of what you do]?

How do you provide value?

Elevator Speech [20-25 words]

"Core talkable difference": what sets your offer apart from others?

What kinds of referral sources can lead you to your ideal client?

Location, occupation, relationship to you, expertise

What kinds of referral sources can help you sell more of the identified product or service?

How can you add value to your referral sources?

How will you educate them about your focus and capabilities?

How will you make your message relevant to their lives/needs/concerns?

What activities/vehicles will you use to get your message across?

How will you measure the value of each source?

Once you've answered these questions, craft a strategy for the next six months with activities, desired outcomes, responsibilities, due dates, estimate of success upon completion, next steps.

Sample Tracking Form

Name/Title/ Company of Referral	How did you meet the Referral Source?	Activities planned with the person – next 6 months	Number of referrals FROM them	Number of referrals TO them	Names/Revenue of current clients from the Referral Source

tion is a collaborative effort where the referral source works with you to make sure you get connected to the new prospect."[6] When you work in concert with your referrer, it is easier to learn more about the prospect and customize your pitch based on "inside" information. Working in tandem with your referrer also increases the chances of making a solid connection because the prospect's trust in the referrer naturally extends to you.

Begin networking in-person and online in venues frequented by people who are or could become solid referral sources. Finding the best networking locales is an iterative process. If one group doesn't work out, move on. For example, if you want to focus on other lawyers, go to bar association events. If your best referral sources are bankers or accountants, join their associations. Looking for more client referrals would lead to involvement in their schools, clubs, communities, etc.

You will want to limit your key referrer list to a small number of people because the rule of thumb for staying top of mind is some form of meaningful communication every six to eight weeks. The contact need not be in person. You could forward a relevant article, speak at one of their events or write a piece for one of their newsletters or blogs. To do this well requires attention to detail. If you

send someone something that is not relevant to them, the message is worse than sending nothing at all.

Since a referral strategy is a process rather than a series of sporadic events, it is important to create habits that encourage attention to your program. Schedule time in your calendar to make appointments, reconnect. Be sure to allow enough calendared time for meetings so that you can prepare beforehand and summarize afterward.

- Before a meeting: Even if the person you are meeting as part of your strategy is a close friend, take a minute to Google him to see if anything new might be of interest. If the person is a new contact, Google her so that you will be able to ask informed questions and steer the conversation to already identified common interests.

The creation of such groups requires an enormous amount of trust among the participants. You will be sharing confidences and strategies that you don't want turned against you. On the other hand, when done well these groups can give your targeted marketing a trampoline-like boost. The membership will be chosen based on your growth goals.

VIII. Metrics

Typically when asked for a referral, attorneys give three names – usually the last three people they met with or talked to. A more strategic response would be to track referrals in and out, and give one name – the name of someone who has been a good resource for you and who you think will have chemistry with your client. The chart on page 17 is a sample tracking form that you can use in an Excel spreadsheet. Firms with CRM programs can create reports that provide similar data.

Referral relationships are about reciprocity. Often you will have to "go first."

- After the meeting: Take 10 minutes to write down the positive and negative parts of the meeting in your CRM (customer relations management) system, in Outlook, or on an Excel spreadsheet. You need to do this while the meeting is fresh in your mind because as the event recedes your memory of it will change. You also want to note down your next steps – content and timing.

VII. Personal Referral Circles

Personal referral circles are a more sophisticated referral strategy. They are affiliations and alliances through which you work closely with a carefully selected group of referrer contacts to reinforce each other's resources and to make introductions that help each other's practice. Such groups can serve a variety of purposes:

- Mastermind groups that focus on specific member problems, offering advice on ways to resolve issues that reflect their own backgrounds and capabilities.
- Client-centered groups that include key advisors to one client who meet on a regular basis to share notes and discuss ways to produce better results for the client. These groups are often an excellent idea for solos and small firms interested in obtaining the kind of clout large firms get from client teams.
- Prospecting affiliations that share networking and visibility opportunities with each other.
- Knowledge-sharing groups that meet regularly to discuss pre-selected topics with each person contributing to the knowledge pool from the perspective of his or her own specialty and expertise.

Some Final Thoughts

A strategic referral process will maximize your business development time, produce vetted prospects, lead to clients who value what you want to sell, and create friendships. Just remember a few to-dos:

- Be very honest with yourself when you create your growth strategy and ideal client.
- Think both wide and deep when you build your contact list.
- During in-person meetings, talk less and listen more.
- Look for ways to help your referral sources – give to get.
- Plan and document your activities.
- Measure results and retool as needed.
- Enjoy the process and take pleasure in the rewards. ■

1. Webster's Ninth New Collegiate Dictionary (1986).
2. Dictionary.com.
3. Webster's Ninth New Collegiate Dictionary (1986).
4. Attributed by some to Henry Kissinger, a very similar sentiment was put forth in *Alice in Wonderland*.
5. Peter Helmer, "Building a Referral System," Speech Handout (Dec. 2014), www.peterhelmer.com/wordpress/wp-content/uploads/Peter-Helmer-Referral-System-v1.pdf.
6. Bill Cates, "How Selling to Referrals Is Different Than Other Lead Types" (Jan. 7, 2015), http://blog.hubspot.com/sales/how-selling-to-referrals-is-different.

Andrew S. Kowlowitz is partner with Furman Kornfeld & Brennan, and **Stefanie A. Singer** is an associate with the firm. Both Mr. Kowlowitz and Ms. Singer concentrate their practice on the defense of lawyers and other professionals.

Reducing Legal Malpractice Risks

Preserving a Statute of Limitations Defense

By Andrew S. Kowlowitz and Stefanie A. Singer

Legal malpractice claims are highly disruptive to a law practice, draining the financial and emotional resources of the attorneys involved. One of the more streamlined and effective ways of disposing of a legal malpractice action is to pursue a statute of limitations defense. Preserving the ability to pursue such a defense is often a matter of appropriately documenting the scope of representation through the use of engagement letters, and documenting the conclusion of the attorney-client relationship through the use of disengagement letters.

This article provides a summary of the relevant law governing the statute of limitations for legal malpractice claims, the "continuous representation" doctrine (which a client may attempt to invoke to toll the accrual of a statute of limitations claim), and basic – yet highly effective – risk management advice law firms may utilize to maximize the chances of preserving a statute of limitations defense in the unfortunate event a legal malpractice claim is filed.

Statute of Limitations and the Continuous Representation Doctrine

Pursuant to Civil Practice Law and Rules 214(6), a claim for legal malpractice must be commenced within three years of the date of the alleged malpractice. New York courts have consistently held that an action to recover damages for legal malpractice accrues on the date that the alleged malpractice occurs, not on the date on which the malpractice is first discovered.[1]

For example, let's say Attorney Smith is retained by Client, a lender, to represent her in connection with a loan secured by real property. Attorney Smith prepares the mortgage and attends the closing yet fails to record Client's mortgage. Suppose further that Attorney Smith's error is discovered five years after closing. In this instance, pursuant to the CPLR, Client's legal malpractice action accrued on the date of the error (when Attorney Smith failed to file the document), not when Client first discovered Attorney Smith's error.

Like most rules, there is an exception. The statute of limitations for a legal malpractice claim may be tolled pursuant to the continuous representation doctrine when an attorney continues to provide legal services to a client after the error is committed. When properly invoked, the accrual of a claim for legal malpractice is tolled until such time that the attorney ceases to represent the client in connection with the matter from which the malpractice arises.

To invoke the continuous representation doctrine, a plaintiff must establish (1) an ongoing representation connected to the specific matter at issue in the malpractice action; and (2) clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney.[2]

Disengagement letters should be used when a transaction or litigation matter has concluded naturally or when the client retains successor counsel.

As for the first prong cited above, an ongoing *general* relationship between an attorney and a client will not provide a basis for a client to invoke the continuous representation doctrine. The continuing representation after the commission of the error or omission must arise from the *same* matter in which the malpractice occurred.

Next, the continuous representation doctrine does not apply where the attorney-client relationship has been irretrievably broken, or where it is evident that the client no longer continues to repose trust or confidence in his or her attorney.[3] The breakdown of the attorney-client relationship may manifest itself in one of many ways, such as a client refusing to communicate with the attorney for an extended period of time, a client consulting with replacement counsel, or a client unequivocally expressing a distrust of the attorney.

For example, in the case of *Farage v. Ehrenberg*,[4] the Appellate Division, Second Department was asked to consider when a claim for legal malpractice accrued in the context of underlying personal injury matters arising from a 2002 accident and a 2005 accident.

In *Farage*, the defendant attorney argued, *inter alia*, that the claim for legal malpractice arising from the 2002 personal injury action accrued, at the very latest, when he received correspondence in November 2007 from the plaintiff's successor counsel, indicating that plaintiff viewed the defendant attorney as her "discharged attorney." With respect to the underlying representation related to the subsequent 2005 accident, the defendant attorney argued, *inter alia*, that the plaintiff's legal malpractice claim accrued, at the very latest, on March 13, 2008, when he effectively turned over the litigation file to the client, who had already consulted with another attorney to take over the handling of that case.

Conversely, the client argued that both claims for legal malpractice were tolled by virtue of the defendant attorney's "continuous representation" and, therefore, accrued when the Consent to Change Attorney Stipulation was formally filed with the Court on or about April 11, 2008.

In *Farage*, the Second Department affirmed the lower court's finding that the claims for legal malpractice, which were commenced on March 31, 2011, accrued at the earlier point in time – when the defendant attorney returned the plaintiff's file and correspondence between the parties evidenced a lack of "mutual understanding of the need for further representation."[5] The court further held that the defendant attorney's filing of the Consent to Change Attorney subsequently merely constituted a "ministerial act" that did not implicate an "ongoing, continuous, developing, and dependent relationship between the client and the attorney," and was therefore insufficient to toll the accrual of the statute of limitations.[6] As a result, the court found that the claims arising from representation provided by the defendant attorney involving the 2002 and 2005 accidents were time-barred.

There is an important risk management lesson to be learned from the *Farage* case: Appropriate documentation of the return of the client's file and correspondence memorializing the breakdown of the attorney-client relationship served as a basis for the court to adopt the earlier accrual period of the legal malpractice action, thereby supporting dismissal of the legal malpractice action on statute of limitations grounds.

Documenting the Termination and Scope of an Attorney-Client Relationship

If confronted with a claim for legal malpractice, one of the more efficient, streamlined methods of disposing of such a claim is for the defendant attorney to pursue dismissal of the action on statute of limitations grounds. Such an application usually can be brought on a pre-answer, pre-discovery basis pursuant to CPLR 3211(a)(5). Obtaining dismissal of legal malpractice claims prior to discovery is obviously beneficial from a cost savings standpoint, but it also affords dispositive resolution of the claim without a court inquiring into the merits of the allegations of malfeasance.

From a risk management perspective, documenting the scope of the attorney-client relationship and the conclusion of the attorney-client relationship is critical to preserving a potential statute of limitations defense. This is accomplished through the use of engagement letters and disengagement letters.

Engagement Letters

Engagement letters are utilized to set forth the terms and the scope of the attorney-client relationship. The rules governing use of engagement letters – often referred to as retainer agreements – can be found in Part 1215 of the Rules of the New York State Unified Court System.[7] In addition to identifying the fee arrangement, the engagement letter should also state in detail the scope of the representation. This ensures that the attorney and client have a mutual understanding of each party's respective responsibilities. A detailed engagement letter may eliminate confusion and, in the event of a legal malpractice action, provide the court with documentary evidence concerning the scope of the attorney-client relationship.

This is best illustrated through an example: Client retains Attorney Smith to draft various documents in connection with the sale of his business, which Attorney Smith completes. Attorney Smith's engagement letter explicitly states that she was retained to assist with the sale transaction only.

Shortly thereafter, a dispute with the purchaser of the business arises, and Client retains Attorney Johnson to represent him in connection with litigation involving the business dispute. Attorney Johnson contacts Attorney Smith to gather facts and collect information to assist with the litigation. Suppose further that, after the litigation concludes, Client brings claims for malpractice against both Attorney Smith and Attorney Johnson arising from the drafting of the transactional documents and the subsequent litigation. A detailed engagement letter, which clearly identifies the scope of Attorney Smith's responsibilities (i.e., which was limited to preparing documentation related to the sale transaction), would limit Client's ability to argue that Attorney Smith continued to provide representation to Client during the litigation, thereby extending the accrual of the statute of limitations. In other words, an engagement letter may be viewed by the court as documentary evidence supporting Attorney Smith's position that the scope of her representation was limited, and may also support a potential statute of limitations defense to the extent the legal representation she provided concluded more than three years prior to the commencement of the legal malpractice lawsuit.

Disengagement Letters

Another important tool for availing oneself of a statute of limitations defense is the use of disengagement letters – that is, written confirmation of the conclusion of the attorney-client relationship. In the event of a legal malpractice action, effective use of a disengagement letter may provide the court with a clear cutoff point as to when the attorney-client relationship concluded.

Disengagement letters should be used when a transaction or litigation matter has concluded naturally (i.e., when the transaction is completed, or when the litigation has come to a "natural" end) or when the client retains successor counsel to take over the handling of an ongoing matter, such as in the case of *Farage*, discussed above.

In this first instance, when an attorney-client relationship concludes naturally at the end of a transaction or litigation, it may appear intuitive that the attorney-client relationship is over and there is no further need to document the file. On the contrary, documenting a finite end date of the attorney-client relationship is still critically important. Often a statute of limitations defense to a legal malpractice action provides a close call for the courts, and hinges upon a matter of days. Clients who sue at the last moment may try to extend the accrual of a statute of limitations by arguing that, despite the completion of a transaction or the settlement of a litigation, the attorney continued to advise the client (perhaps in subsequent telephone calls). In this case, effective use of a disengagement letter may be considered persuasive documentary evidence by the court, when confronted with determining the precise end date of the attorney-client relationship.

The disengagement letter should explicitly state that the representation in the particular matter has ended and that the law firm plans to close its file. The letter should be sent via certified mail, return receipt requested, to confirm delivery to the client. Disengagement letters need not only be used as a defensive law practice measure, but may also be used as a marketing tool. For example, if a lawyer represents a client in connection with the sale of a home, the lawyer may write the client to confirm that the transaction has closed and the lawyer intends to close the file. The lawyer may also wish to point out that her firm handles trust and estate matters and personal injury matters, and that the firm would welcome the opportunity to work with the client again in the future.

In the latter instance, where a lawyer is substituted by replacement counsel before the litigation or transaction has concluded, use of a disengagement letter is equally important. In practice, determining when the original lawyer ceased providing legal services while a client matter is ongoing is often a difficult task for a court to determine without clear documentation in the file.

In the case of *Farage*, the Appellate Division, Second Department cited the proposition that

> [a]n affirmative discharge of an attorney by the client is immediate. By contrast, from the standpoint of adverse parties, counsel's authority as an attorney of record in a civil action continues unabated until the withdrawal, substitution, or discharge is formalized in a manner provided by CPLR 321.[8]

For this reason, the Second Department found the attorney-client relationship effectively ended prior to the filing of a Consent to Change Attorney with the court, when the client conveyed to her lawyer that he was discharged. The lesson to be drawn is that, in the instance of a litigation matter, a lawyer discharged by a client prior to the conclusion of the case should be mindful to document the conclusion of the attorney-client relationship immediately, even before a Consent to Change Attorney is filed with the court. This ensures that the earliest possible accrual date of legal malpractice action is preserved.

Similarly, when an attorney handling a transactional matter is discharged before the natural conclusion of the representation, the outgoing lawyer should be mindful to write to the client memorializing that the attorney-client relationship has been terminated, and that the outgoing lawyer does not plan to take further action on behalf of the client.

Conclusion

In sum, the key to maintaining an effective risk management program is to incorporate basic techniques, such as these, into everyday practice. Documenting the attorney-client relationship at each stage is a simple yet effective tool for reducing the risk of a legal malpractice claim, and preserving a lawyer's rights and defenses in the unfortunate event a claim is ultimately made. ■

1. *See, e.g., Shumsky v. Eisenstein*, 96 N.Y.2d 164 (2001).
2. *See, e.g., Deep v. Boies*, 53 A.D.3d 948 (3d Dep't 2008).
3. *See Taylor v. Paskoff & Tamber, LLP*, 102 A.D.3d 446 (1st Dep't 2013); *Fontanetta v. John Doe 1*, 73 A.D.3d 78 (2d Dep't 2010).
4. 124 A.D.3d 159 (2d Dep't 2014).
5. *Id.* at 167.
6. *Id.* at 164 (quoting *Anseel v. Jonathan E. Kroll & Assoc., PLLC*, 106 A.D.3d 1037, 1038 (2d Dep't 2013).
7. https://www.nycourts.gov/attorneys/lettersofengagementrules.shtml. 22 N.Y.C.R.R. pt. 1215.
8. *Farage*, 124 A.D.3d at 165.

How to Shift Law Firm Culture

One Firm's Story

By Donna Drumm

So, something about your law firm isn't working – people are unmotivated, and there is a disconnect between client expectations and employee expectations. Or you are a solo practitioner, thinking to yourself, "There has got to be another way!" By observing the core values of the law firm held by those who run the firm, and developing a culture integration plan, you can have the law firm you love. To prove it, we have included a case study of a law partner in a third-generation New York firm who shifted, along with his partners and staff, a business-as-usual law firm to a thriving and profitable law practice, where one of the core values is to have fun.

Motivations for shifting a law firm's culture may be as varied as the lawyer. These include

- The need to manage risk,
- The desire to be more profitable,
- Client pressure,
- Increased or new responsibility in managing the firm,
- The need to enter into a new practice area, or[1]
- Imminent merger or acquisition of another law firm or practice with a different working culture.

What Is a Law Firm's Culture?

Generally, culture is, "Any group of people that engages in some activity together will have a set of values, conventions, and ways of being that are unique to that particular group."[2]

> A culture is a set of beliefs, behaviors, implicit agreements, and practices that are so prevalent in a group that they are essentially assumed. Every company and every law firm has a culture. Unfortunately, the culture of most law firms is some version of – or contains some elements of – the business-as-usual culture described above. It contains beliefs, behaviors, and practices that support people operating on their own, competing, gossiping about, and undermining each other. While not spoken directly, the implicit agreements include some version of: "you don't challenge me about my poor work habits and I won't challenge you about yours."[3]

Jordan Furlong, in his blog post "Vulture Culture," offers an insider's view:

> Culture is what people at the firm actually do every day. In harsher terms, it's what people get away with. Culture is what actually happens. A law firm's culture is the daily manifestation *of its performance expectations and behavioural norms* – what is encouraged and what is tolerated.[4]

To borrow another definition of culture from the business world: "A company's culture is all the shared values, beliefs and behaviors that determine how people do things in an organization."[5]

Law practice management is a fascinating commingling of two disciplines – business and the practice of law. The business of law is similar to running any American business – payroll must be met, human resources rules and regulations must be adhered to. Yet when it comes to the revenue-producing arm of a business, a law firm is restricted by ethics rules. We are restrained from pursuing clients through advertising; we are restricted by marketing rules. We are restrained from dropping unprofitable clients, and in many states can do so only with permission of the court. While some clever legal managers have borrowed practices from corporate America (which, if they are lucky, some of these companies are their clients) and innovated ways to manage their colleagues and clients within noble, ethical structures, law firm management poses a unique challenge.

Unfortunately, studies of law firm culture are surprisingly sparse. As recently as 2002,

> [l]egal scholars have only recently begun taking law firms seriously as an important arena – and agent – of professional conduct. Drawing on management theory, sociology, and cognitive psychology . . . [l]egal ethics scholars, in particular, are turning to organizational theory and research for insights into the dynamics of ethical decision making within firms and strategies for promoting ethical awareness and compliance.[6]

Very few law firms publicize their culture on their websites or in their marketing literature. Interestingly, well-known corporations – Avaya, Estée Lauder, Home Depot, and Moody's, to name a few – communicate their corporate culture on the company's Human Resources page.[7]

Types of Law Firm Cultures

Law firm culture is viewed introspectively by those who are working there and outwardly by everyone else. The descriptions below identify internal cultures that occur in many small and solo firms.[8] For the most part, founders of the firm determine the culture.

Non-management

No set goals, lack of action plans and ability to implement strategic objectives. Culture is derived from those who work in the firm; there is no formal structure.

Family-Run Firm

The leaders are family members, mother/daughter, husband/wife. The "leaders" are lawyers and may be non-lawyer family member administrators. Those who are not family members operate under an unspoken assumption that they are at a disadvantage and will never achieve the influence that the family members have.

Long-Term Management

The firm has been in existence for many years. There is a defined culture most likely listed in the mission of the firm, or historical values of the firm. The firm leadership has adopted an "if it's not broke, let's not fix it" attitude.

Friend-Run Firm

The founding partners are friends from law school or otherwise long-term friends. Perhaps a lateral hire was made who was one of the founding partner's friends. Merit and client base aside, the management must recognize this assumption by the employees that they have an equal chance in rising through the ranks.

The Founder Effect

> Law firm cultures . . . appear to exhibit some major tendencies," including a heavy dependence on founders . . . once the founders depart, most law firms eventually degenerate into competitive factions and "a new culture based solely on economic power": [F]ounder effect is extremely important. In stable and prosperous firms of any size where the founders remain active, their values and the practices that derive from those values tend to remain ascendant, regardless of whether the founders occupy positions of overt authority.
>
> The departure of the founders can be followed by what [the writer] think[s] of as a "mythological" transitional phase, in which the founders are remembered, talked of, and thought of as powerful influences, and the beliefs and practices they inculcated continue to be reinforced.
>
> At some point, however, the powerful myth can degenerate into empty legend, or the founders can become merely names attached to nothing at all. When that happens, the firm's cultural direction is up for grabs, with factions of existing lawyers and even potential merger or acquisition partners all competing for dominance.
>
> The most likely outcome . . . is a new culture.[9]

Donna Drumm is an attorney in New York. She worked in private practice and at the Westchester County Bar Association as CLE & Publications Director and, later, Executive Director until 2014. A member of the New York State Bar Association's Law Practice Management Committee for over 15 years, she received her law degree from Pace University School of Law.

Partner Expectations

In work groups or practice groups, the partner leading the group sets the culture for the work habits and ethics for the associates and staff.

Solo Firms

The culture of a solo firm is intensely personal, based on the character, integrity and work habits of the attorney. As the founder, practice leader, and face of the firm, even if all decisions were not made by the sole attorney they are attributed to the attorney. The benefit of shifting the culture of a solo firm is that the vision can be changed by one person with no need for buy-in or cooperation by others. The downside is the discipline in implementing the process of shifting the culture must be exercised by the same person.

> Law practice management is a commingling of business and the practice of law.

Mergers & Acquisitions

Law firms can expand through lateral hiring, or merging or acquiring another firm or practice group. Bain & Company, one of the largest global business consulting firms, reported on a survey of executives who oversaw mergers of their companies, saying that culture clash "was the No. 1 reason for a deal's failure to achieve the promised value. In a culture clash, the companies' fundamental ways of working are so different and so easily misinterpreted that people feel frustrated and anxious, leading to demoralization and defections. Productivity flags, and no one seems to know how to fix it."[10]

Dangers of Overlooking Culture

Personal Advancement

Selena Rezvani, a reporter for *The Washington Post*, describes

> another critical element of law's culture is how difficult it is to uncover the hidden rules of succeeding on the job. That onus, it seems, is largely the burden of the associate. I talked with Kelly Hoey, a lawyer-turned-venture-capitalist who spent the first 10 years of her career as an associate in large law firm environments. Hoey noted that the single trickiest aspect of navigating firm culture as a woman is "finding a powerful mentor who tells you straight-out how the law firm game is played," and then "having that strong mentor back you up when you play the game."[11]

Understanding the culture of a law firm requires the sophistication to translate the nuances of what is expected and what is acceptable behavior, particularly in an environment where these expectations are not delineated. Associates that do not embrace the culture are in danger of becoming dissatisfied and leaving of their own accord, or being asked to leave by the firm.

Risk Management: Grievances and Sanctions Reflect Law Firm Culture

In speaking informally with members of grievance committees in New York and New Jersey, the number one grievance lodged by clients against their attorneys is not returning phone calls or emails. A 2012 New York City Bar Association pamphlet, titled "How to Complain About Lawyers and Judges in New York City," instructs clients on how to file complaints. Below is one example of the type of conduct that may result in discipline:

> 1. Neglect. Lawyers are generally prohibited from neglecting their clients' cases. Neglect does not occur merely because a lawyer fails to return a telephone call as quickly as the client wishes, or because a case is not proceeding through the court system as fast as the client might want. Rather, *neglect occurs when a lawyer repeatedly and consistently fails to communicate with his or her client*, or where a failure by the lawyer to take action means that the client has lost a valuable right, such as right to bring a claim, assert a defense, appeal a decision or make a motion.[12]

A culture that allows client communications to drift can occur at firms of all sizes. No one can anticipate which client may file a grievance, but the prospect of being admonished by a grievance committee is devastating to the individual attorney, and if made public, can also be devastating to the reputation of the firm.

For example, in e-discovery disputes communication is key, and the courts have become increasingly strict in awarding sanctions. A comprehensive survey published in the *Duke Law Journal* reviewed 401 cases where motions for sanctions were made pertaining to e-discovery issues in federal court prior to January 1, 2010. Of the 401 cases, 230 sanctions were awarded.[13]

Discovery of electronic information requires the coordination of the client, the client's technology team, and supervision by the attorney or legal team responsible for complying with the discovery rules. Of the 401 cases, only counsel was sanctioned in 30 instances.[14] The various courts ruled that counsel failed to produce the requested discovery or communicate accurate information to the court and opposing counsel in a timely manner. E-discovery are a team sport. Members of a firm refusing to play by the rules are representative of a culture that condones holding back court-ordered information or misrepresenting facts to opposing counsel and the court.

Regardless of the type of case, the dangers of overlooking a culture that breeds non-responsiveness to

clients, or misrepresentation to opposing counsel or the courts, is destructive to the firm.

A Law Firm's Story – Assessing, Diagnosing and Shifting Law Firm Culture

Brian Mittman, Markhoff & Mittman, P.C.

I became reacquainted with Brian Mittman, a disability law attorney, during the 2014 holiday season while we were volunteering at a soup kitchen in Westchester County. He was joined by members of his firm – two attorneys, his part-time marketing person and his personal assistant, whose title is Officer of Success. They brought their own aprons, and the men took off their suit jackets and waited on the homeless and working poor, ladling soup in the church basement's kitchen. It was clear to see he was excited to be participating with his co-workers outside the office for a cause they believed in. We chatted about the recent demise of Binder & Binder, another disability law firm. We started to talk about the business model, which led to a discussion about how he runs Markhoff & Mittman. The comments below are excerpted from a telephone interview conducted January 6, 2015.

"I started as an associate in a third-generation family-founded law firm," Brian said, describing the firm as a classic small New York City law firm, with approximately 12 employees – two to four attorneys, mostly partners, and support staff. "You showed up for work, responded to client phone calls and client walk-ins. We all did what we needed to do, there were lots of headaches and frustrations."

After the World Trade Center was attacked on September 11, 2001, in an effort to recover from the real estate losses and tenant reluctance to return to the downtown area around the World Trade Center, landlords and state and local governments offered financial incentives for businesses to move into office spaces. Brian was a partner at the time his firm relocated downtown to Canal Street in Manhattan. He enjoyed the logistics involved – moving and creating a new space with a classic law firm feel with dark wood, big spaces and an impressive conference room. The working culture continued – you came into work, answered the phone, and had unscheduled meetings with walk-in clients. The risk paid off. Economic development continued in the area and by mid-2003, the firm got busier, growing from 12 to 20 employees. Due to the increase in work and staff, he started to put systems in place to respond to the rising demands of clients and firm members.

By 2006, Brian and his wife were raising four young children in Westchester County. The commute from his home was three hours, round trip. He was typically getting home at 9:30 in the evening. He remembers asking himself, "What is going on here?" His values of being with his family and running a successful law firm were at odds. Right around the same time, he started to educate himself about running a successful and profitable law firm. He read Stephen Covey's *7 Habits of Highly Effective People* and, at a friend's urging, attended a business productivity course.[15]

Following its recent growth, the firm now had an office manager, and Brian and the manager talked about inefficiencies in the office. "Why do people do this?" "Why can't we get this done?" Brian also continued to seek ways to harmonize his values of being present for his family and running a successful law firm in New York City. "We were raised and schooled that this is how you do it in New York," he said. After meeting with a like-minded friend for a drink at 9:30 after work, they decided, "Enough is enough, one of our goals is to move the practice out of the city."

Assess Your Culture

Law firms have internal cultures – those values adopted by those who work in the office, and external cultures – judgments made by colleagues, adversaries, clients, court staff and vendors about the comportment of the firm. Part of assessing and diagnosing a firm's culture is to observe the internal and external firm culture.

Internal Culture

Exercise 1:

- Walk through your office as a new client would for the first time, what do you see? Does it match with the culture you wish to convey to your clients?[16]
- Is your office casual or formal? That's the culture speaking.
- Are the office doors closed or open? That's the culture speaking.
- Are clients greeted by a receptionist in a warm and friendly manner? That's the culture speaking.
- Are attorneys referred to as Mr. and Ms. or by first name? That's the culture speaking.
- What is the dress code for partners? Associates? Staff? That's the culture speaking.
- Do you display awards in your reception area? That's the culture speaking.

External Culture

Exercise 2:

To assess your law firm's external culture, think about and answer these questions:

1. What firms would you consider *similar* to your law firm? In what ways?
2. Do you respect or aspire to their values? Which ones?
3. What firms would you consider *dissimilar* to your law firm? In what ways?
4. Do you respect or aspire to their values? Which ones?

Brian and his partners created the internal culture of the law firm based on its location (lower Manhattan), fur-

nishing it in a conservative manner, and viewing it as a "classic New York law firm." The work ethic, "you come to work, do your job and go home" was shared by all in the firm. When he observed something wasn't quite right – family vs. career, "why weren't people doing things differently," – he sought input from others in the firm, and began to educate himself to develop his goals.

Once he made the decision to move the practice out of New York City to Westchester, it took seven months. Although that is a remarkably quick turnaround, timing was not on his side. In 2007, laws in his practice were changing and the economy was "tanking." The environs changed but the working culture was experiencing the "same chaos, clients coming in without appointments, we were doing things seat of the pants and working really hard." He continued to practice law and work on his business. He asked himself what he wanted out of it, assessed monetary goals, hours worked, and the types of cases he wanted to work on. He engaged others in defining the culture of the firm. "We kept saying even though we were doing a lot of work, we wanted a place where it is calm, we need better communication." More specifically, accountability.

Implementing Process Management

Part of the day-to-day chaos was the constant stream of unending phone calls. Brian tackled this over time with three processes. The receptionist for the firm was tip-top, all the clients loved her voice, and she managed her role effectively. She began to experience burnout. When she was asked what was going on, she answered that she was "only answering phones." Realizing she did not have the benefit of context, that is, an understanding of why clients were calling in a panic, or what insurance adjusters did, Brian educated her by taking her to meetings. She then had a fuller appreciation of her role.

When the firm decided that mailing out certain reports from a governmental agency would benefit their clients, the mailing triggered even more phone calls. The firm learned that clients did not understand the report and a huge percentage called to ask an attorney to explain it to them. All the attorneys were trained and competent in answering the questions, yet it took time away from other work. In an attempt to reduce redundant phone calls, Brian and his team created a cover letter that explained the report. Each time the report was sent out, the cover letter was attached. The phone calls decreased. This system was tested when a new lawyer, who was not trained on the process, sent out the report without the cover letter. Predictably, the client called asking him to explain the report. He was quickly trained on the new process.

Firm-Wide Voicemail Practice

Another process used to create a calmer atmosphere in the office and reduce incoming phone calls was to turn on the answering system during lunch. Unless there was an emergency, no incoming phone calls were directed to attorneys and staff from noon to 1 p.m. Calls from new clients were directed to an answering service. Calls received during the lunch hour were returned after lunch.

Shifting the Culture

Brian identified changing personal habits and goals as the hardest thing about shifting the culture of a law firm. "The toughest part is to work on yourself and lead by example, make sure everything you are doing is in harmony with what you are saying. If you want people to not be on their cell phones, and you walk around with your cell phone, there is a message that is communicated there." Shifting culture and promoting change is an evolution. "You go to an event, you take a seminar, you read a book and then go into the office and say, 'here's what we're doing' and then it would disappear."

Brian emphasizes that the process takes time. He has been working for more than eight years integrating and communicating with his partners and staff to engender a culture of "working hard and having fun – you can have fun in this business, just like any other business." ■

1. Carol Schiro Greenwald, Ph.D., et al. *Grow Your Practice: Legal Marketing and Business Development Strategies* 159 (NYSBA 2015).

2. *Id.* at 159, 160. *See also Finding a Law Firm that Works: Lawyers Assistance Program Facilitated by Robert Bircher*. http://lapbc.com/wp-content/uploads/2012/11/Finding-a-Law-Firm-Culture-that-Works.pptx.

3. Rich Goldstein & Ron Bynum, *Creating a High Performance Law Firm Through a Culture of Collaboration*, Law Practice Today (Jan. 2013) (American Bar Association) (emphasis removed.) http://www.americanbar.org/content/newsletter/publications/law_practice_today_home/lpt-archives/january13/creating-a-high-performance-law-firm-through-a-culture-of-collaboration.html.

4. Jordan Furlong blog post Jan. 22, 2013, http://www.law21.ca/2013/01/vulture-culture/ (emphasis added); *see also* Gabriela Isturiz's LinkedIn Blog: *How Law Firm Culture Affects Productivity*, Mar. 21, 2014, https://www.linkedin.com/pulse/20140321222019-35152036-how-law-firm-culture-affects-profitability.

5. Dale Stafford & Laura Miles, *Integrating Cultures After a Merger*, Bain Brief Dec. 11, 2013, Bain & Co., accessed on the Internet Jan. 8, 2015. http://www.bain.com/publications/articles/integrating-cultures-after-a-merger.aspx.

6. Elizabeth Chamgliss, *Measuring Law Firm Culture*, Firms, Legal Culture, and Legal Practice Studies in Law, Politics, & Soc'y (2010), vol. 52, pp. 1–2 (internal citations omitted), http://ssrn.com/abstract=1713999.

7. Greenwald, *supra* note 1 at 163.

8. *Id.* at 161.

9. Chamgliss, *supra* note 6 at pp. 8–9.

10. Stafford & Miles, *supra* note 5.

11. Selena Rezvani, *Large Firms Are Failing Women Lawyers*, The Washington Post (Feb. 18, 2014). Last visited Jan. 17, 2015. http://www.washingtonpost.com/blogs/on-leadership/wp/2014/02/18/large-law-firms-are-failing-women-lawyers/.

12. New York City Bar Committee on Professional Discipline, *How to Complain About Lawyers and Judges in New York City,* New York City Bar Association (June 2012) (emphasis added), http://www.nycbar.org/pdf/brochures/Complaints_Lawyers_Judges/complain.pdf.

13. Dan. H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations*, Duke L.J., vol. 60:789 (2010).

14. *Id.* at 790.

15. Nightingale-Conant, http://www.nightingale.com/.

16. Greenwald, *supra* note 1 at 163.

Follow the Money

Escrow Accounts: The Dangers of Excessive Delegation and Deference

By Matthew K. Flanagan

Tending to a firm's escrow account does not add to a firm's profitability, and attorneys who can avoid dealing with their firm's escrow accounts generally do so. Tasks associated with maintaining an escrow account are menial, often thankless and almost invariably non-billable. Many attorneys delegate such tasks to trusted staff members. Others defer to the firm's managing partner or to partners who use the escrow account more frequently.

Escrow account signatories who defer or delegate to others do so at their own peril. As the Court of Appeals reminded us in *In re Galasso*, "[f]ew, if any, of an attorney's professional obligations are as crystal clear as the duty to safeguard client funds."[1] Although *Galasso* did not establish "a new or heightened degree of liability for attorneys," the Court made it clear that, when client funds are involved, a "high degree of vigilance" is required.

Disciplinary proceedings against attorneys based on their failure to oversee escrow accounts or to review escrow account records are not uncommon. This article will discuss the rules governing escrow accounts and the extent to which tasks related to the maintenance of escrow accounts can be delegated. It will look at situations in which attorneys who are signatories on escrow accounts have been found to have breached their duty to safeguard client money by failing to detect misconduct by others who had access to the accounts. It will also address the oversight lessons to be learned from *In re Galasso*.

A Brief Review of the Rules Governing Escrow Accounts

Thorough and accurate recordkeeping for attorney escrow accounts "is the linchpin upon which [courts], clients and the public must rely to assure the preservation of funds belonging to clients or other persons in a lawyer's possession."[2] That principle is embodied in Rule 1.15 of the Rules of Professional Conduct, which contains precise requirements regarding records that must be maintained for attorney escrow accounts. Pursuant to Rule 1.15(d), attorneys must maintain records of all deposits into, and withdrawals from, any escrow accounts. The records must "specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement." The records must also identify all individuals for whom money is being held, the amount held for each individual, the date or dates on which the money is disbursed, to whom it was disbursed, and a description of each disbursement.[3] The attorney must also maintain "all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips." All entries in the records must, of course, be accurate.

Failure to maintain records in accordance with the requirements of Rule 1.15 is deemed a violation of the Rules of Professional Conduct and will subject the attorney to disciplinary proceedings.[4]

The Delegation of Bookkeeping Tasks for Escrow Accounts

For many firms, the task of maintaining books and records for an escrow account is more than one attorney

Matthew K. Flanagan is a partner in the Jericho, NY law firm of Catalano, Gallardo & Petropoulos, LLP, where his practice is concentrated on the defense of legal malpractice and attorney liability matters. He is a frequent lecturer regarding ethics, legal malpractice defense, and professional liability matters. He is a graduate of St. John's University School of Law.

can handle. Some attorneys and firms, such as those who act as settlement agents for banks, can receive and disburse hundreds of thousands of dollars of client funds on a daily basis and, out of necessity, must delegate some bookkeeping tasks associated with maintaining escrow accounts.

It is permissible to delegate banking and bookkeeping responsibilities for an escrow account to a non-attorney. The Court of Appeals said as much in *In re Galasso*,[5] and Hon. A. Gail Prudenti, former Presiding Justice of the Appellate Division, Second Department, and currently the Chief Administrative Judge for the Courts of the State of New York, called the delegation of banking and bookkeeping responsibilities "perfectly permissible and often inevitable."[6]

The delegation of recordkeeping and other tasks relating to escrow accounts to others, be they lawyers or nonlawyers, must be done with care. Rule 5.3 of the Rules of Professional Conduct provides that "[a] lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate,"[7] and Rule 5.1 requires lawyers with management responsibility in a law firm to "make reasonable efforts" to ensure that other lawyers in the firm comply with the Rules.[8]

Complete deference to a co-signatory can lead to a disciplinary investigation when problems occur with the account. Under Rule 1.15(e), only attorneys can be signatories on escrow accounts, but attorneys are not free to assume that, because a co-signatory is an attorney, he or she will abide by the requirements of Rule 1.15. Thus, an attorney can be subject to discipline even where he or she did not convert or commingle funds, was not aware that a co-signatory converted funds or mishandled the account, and reported the problem as soon as it was discovered. One such instance was seen in *In re Cardoso*.[9] There, the respondent, a criminal attorney, left the handling of his firm's escrow account to his partner, who handled real estate work. Upon discovering improprieties in his partner's handling of the account, the respondent dissolved the partnership and reported the matter to the Grievance Committee. However, because he had admittedly failed to review the firm's financial and bookkeeping records for a year, a disciplinary proceeding was brought against him, and he received a public censure.

The public censure in *Cardoso* was consistent with the discipline in other cases in which the offending attorney had no disciplinary history and the co-signatory's misappropriation or mishandling of the account was reported promptly upon discovery.[10]

More egregious instances of attorneys relinquishing control of escrow accounts have led to more serious discipline. The most extreme example is *In re Duboff*,[11] in which the attorney agreed to act as a mortgage loan settlement agent for Island Mortgage Network, which would later be shut down by federal authorities. Attorney Duboff permitted the comptroller of Island Mortgage to have exclusive control of his signature stamp and to issue all checks from the attorney's escrow account using the stamp, with little or no supervision from Duboff. During the time that Island Mortgage controlled Duboff's account, there were periods when the accounts had an insufficient balance to meet the attorney's escrow obligations, and more than one individual failed to receive loan closing funds disbursed from the account. Duboff received a five-year suspension based on a number of charges, including allowing a non-attorney to issue checks from his attorney escrow account, allowing the comptroller of Island Mortgage to issue checks from the account with little or no supervision and delegating responsibility to review monthly statements to others, without instructing them to advise him of any bounced checks, stop payment orders or negative balances.

In re Galasso caused concern among some members of the Bar because the respondent attorney, who did not knowingly surrender control of his escrow account, was suspended when it was discovered that money had been stolen from the account by one of his employees. The respondent attorney, Galasso, had agreed to hold $4.8 million in an interest-bearing escrow account on behalf of a client who was involved in a matrimonial proceeding.[12] Galasso and his partner completed an application to open an escrow account at a local bank, and Galasso gave the application to his office manager/bookkeeper, who also happened to be his brother.[13] Galasso's brother altered the application to include himself as a signatory and to permit Internet transfers.[14] The brother proceeded to withdraw more than $4 million from the account and concealed his transfers by having the bank send the actual account statements to a post office address, and then sending fabricated statements to the firm.[15] The brother also had access to the firm's primary escrow account and made unauthorized withdrawals of funds from that account as well, resulting in hundreds of thousands of dollars in losses for two of the firm's other clients.[16]

The disciplinary charges against Galasso were based on his failure to deliver the funds held in escrow to the firm's client, and also on his failure to properly supervise his brother, a non-lawyer employee of his firm, in violation of Disciplinary Rule 1-104(d)(2), which was a predecessor to Rule 5.3 of the Rules of Professional Conduct.[17] Galasso maintained that he did not knowingly relinquish control over his firm's escrow account, that he periodically reviewed documents showing the balances in the firm's escrow accounts and that he unwittingly relied on the fabricated bank statements created and sent to him by his brother. He also pointed out that the district attorney who prosecuted his brother had submitted a letter stating that no one else at the firm knew of Galasso's brother's thefts and that nothing in the fabricated documents created by Galasso's brother would have raised any suspicions about the accounts.

Galasso was suspended by the Appellate Division, Second Department, for two years.[18] After the Court of Appeals granted Galasso leave to appeal, several bar associations sought to file *amicus curiae* briefs in support of Galasso's appeal, with some asserting that strict liability had been imposed and others asserting that suspension was too harsh a penalty.[19] The Court of Appeals, in affirming the charges against Galasso, rejected the arguments of Galasso and the bar associations and found that Galasso had "ceded an unacceptable level of control" over the firm's escrow accounts to his brother.[20]

The Lessons of *Galasso*

While some have maintained that the Court of Appeals's decision in *In re Galasso* imposes a strict liability standard,[21] the Court did not establish liability without fault, and a closer look at the facts of *Galasso* confirms that. The decision simply reaffirms that an attorney's fiduciary duty to safeguard client funds is non-delegable, and that attorneys, while delegating tasks associated with the maintenance of escrow accounts, cannot ignore their obligation to oversee the account and supervise those with access to it.

Nor did the Court impose financially onerous requirements on attorneys who safeguard client funds, as others have maintained.[22] To the contrary, the Court suggested specific oversight measures which, for most attorneys and firms, should not result in significant added costs or expenditures of time.

The oversight measures suggested by the Court were those taken by Galasso's firm after the thefts – measures which, the Court said, would have "mitigated, if not avoided, the losses," if they had been implemented earlier.[23] The suggested measures, and the other lessons of Galasso, are outlined below.

Perform Periodic Reviews and Look Beyond Your Firm's Internal Records

Galasso's brother had access to both the special escrow account created for the money held for the firm's matrimonial client and the firm's primary escrow account, and he stole from both. While he fabricated bank statements for the former account to conceal his thefts, he did not have to do so for the primary account because no one ever asked him for the bank statements for that account.[24] He prepared documents purportedly reflecting the balance in the primary escrow account, without providing the corresponding bank statements.[25]

"Personal review of the bank statements" was one of the post-theft measures adopted by the firm that the Court said might have prevented the thefts.[26] The Court did not specify how frequently account records should be reviewed, but it is suggested that escrow accounts should be reviewed monthly or quarterly. Although the periodic reviews should include an examination of internal records reflecting deposits and disbursements and the information required by Rule 1.15(d), the reviews should not be limited to those records. The corresponding bank statements must also be reviewed. Although, as *Galasso* demonstrates, those statements can be manipulated, it is more time-consuming and requires a more sophisticated thief, and there are ways to ensure the accuracy of the statements (by, for example, reviewing the statements online).

Have Direct Contact With Your Bank

The second post-theft measure taken by Galasso's firm, and tacitly endorsed by the Court, was creating direct contact with the firm's bank.[27] Galasso's brother was permitted to open the accounts himself, and thus, unbeknownst to Galasso, was able to have himself placed on one of the escrow accounts as a signatory.[28] He was also able to submit an application that permitted Internet transfers from the fund, even though the original application signed by Galasso did not permit such transfers.[29]

Once the escrow account was opened, Galasso's brother became the "conduit for information from the firm's bank."[30] If deposits were to be made, it was the brother who made them. When a discrepancy regarding the interest rate was raised by the accountant for the matrimonial client for whom the $4.8 million was being held, Galasso assigned his brother to address it with the bank.[31] Counsel for the Grievance Committee argued that, had Galasso made a single call to the bank when the discrepancy was pointed out, the fraud would have been detected and the theft of $3 million would have been prevented.[32]

Direct contact with the bank can consist of nothing more than personally opening the firm's escrow account and then periodically reviewing account statements online. The Court of Appeals did not suggest that the attorney himself must personally deposit each check at the local branch of his bank, but if any questions relating to the account are raised, either by the client, a staff member or an outside auditor, the attorney himself should contact the bank.

Make a Big Deal About Any Discrepancy

"A discrepancy in an escrow account should, at a minimum, be alarming to a reasonably prudent attorney."[33] So said the Court of Appeals in *Galasso*, and it may be the most instructive statement in the decision. The Grievance Committee's counsel argued that, when the discrepancy was noted by the client's accountant, Galasso asked his brother to investigate it and then took no steps to verify his brother's explanation.[34] That failure, according to the Grievance Committee, was part of the reason that the brother's wrongdoing continued to go undetected.[35]

Discrepancies in balances can and do occur frequently, and in most cases, they are the result of innocent errors. But attorneys should never assume that they are. Any discrepancy must be investigated thoroughly by the attorneys who are signatories on the account, not by a subordinate. Although the individual or individuals who are primarily responsible for bookkeeping tasks should

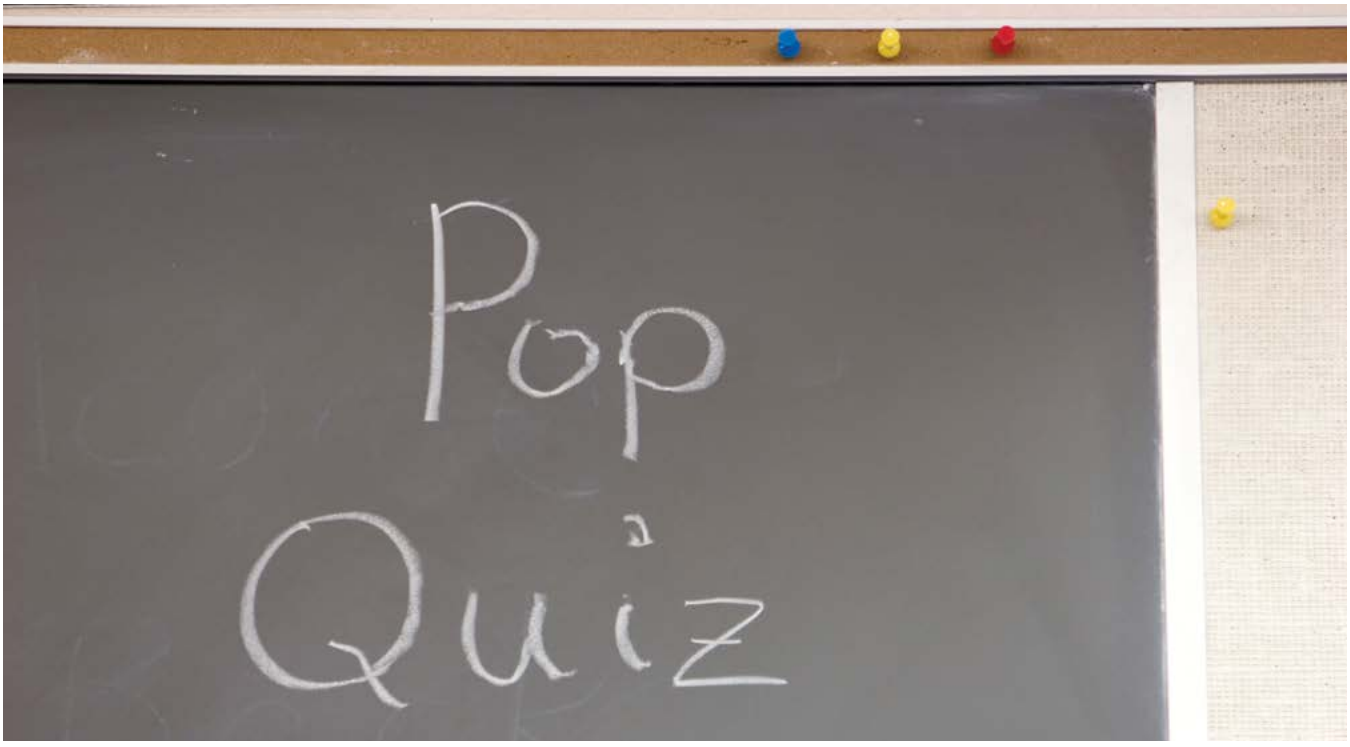
be consulted, they should not be relied on to conduct any investigation themselves. The discrepancy could be an indication of wrongdoing by those individuals, or incompetence. In either case, it is a potential problem for the signatory attorneys who, unlike the subordinate, are the ones charged with the fiduciary duty.[36]

Conclusion

When money goes missing from an attorney's escrow account, the attorney will not find a sympathetic ear at the Appellate Division or the Court of Appeals. Attorneys must exercise vigilance in safeguarding client funds and ensuring that client funds are not lost because of the negligence or misappropriation of co-signatories or employees, or the criminal acts of others. If a client who entrusts money to an attorney loses that money, the Grievance Committee and the courts will focus squarely on the oversight measures the attorney had in place, as well as the training and supervision of staff members involved in the maintenance of the accounts. Reliable oversight measures will leave the attorney in a better position to defend, or even avoid, a disciplinary proceeding in the unfortunate event that money being held for a client is misappropriated or stolen by another but, more important, the measures will help prevent client losses from occurring in the first place. ■

1. *In re Galasso*, 19 N.Y.3d 688, 694 (2012).
2. *In re Sack*, 74 A.D.3d 1697, 1698 (3d Dep't 2010).
3. 22 N.Y.C.R.R. § 1200.15(d)(1)(ii).
4. 22 N.Y.C.R.R. § 1200.15(j).
5. *Galasso*, 19 N.Y.3d at 695.
6. Hon. A. Gail Prudenti, *Be Wary of Delegating Bank and Bookkeeping Responsibilities*, 35 Westchester B.J. 57, 58 (2008).
7. 22 N.Y.C.R.R. § 1200.5.3(a).
8. 22 N.Y.C.R.R. § 1200.5.1(b)(1).
9. 152 A.D.2d 157 (2d Dep't 1989).
10. *See, e.g.*, *In re Marshburn*, 70 A.D.3d 231 (1st Dep't 2009); *In re Linn*, 200 A.D.2d 4 (2d Dep't 1994).
11. 21 A.D.3d 206 (2d Dep't 2005).
12. 19 N.Y.3d at 691.
13. *Id.* at 692.
14. *Id.*
15. *Id.*
16. *Id.* at 692–93.
17. 94 A.D.3d 30, 31–38 (2d Dep't 2012).
18. *Id.* at 37.
19. *See* Andrew Kershner, *Bars Rally Around Suspended Attorney*, N.Y.L.J., Mar. 29, 2012.
20. 19 N.Y.3d at 694.
21. *Id.*
22. *Compare* David S. Hammer & Richard M. Maltz, *Escrow Accounts After "Galasso": You Are Your Brother's Keeper*, N.Y.L.J., July 29, 2014 (arguing that *Galasso* "imposes (or appears to impose) a heavy new burden of financial oversight").
23. *Galasso*, 19 N.Y.3d at 694.
24. *See* Brief for Petitioner-Respondent Grievance Committee for the Ninth Judicial District in *Matter of Galasso*, dated July 31, 2012 (Grievance Committee Brief) at pp. 43–47.
25. *Id.*
26. *Galasso*, 19 N.Y.3d at 694.
27. *Id.*
28. *Id.* at 692.
29. *Id.*
30. Grievance Committee Brief at p. 51.
31. *Id.* at p. 37.
32. *Id.* at p. 36.
33. *Galasso*, 19 N.Y.3d at 695.
34. Grievance Committee Brief at p. 37.
35. *Id.*
36. *Galasso*, 19 N.Y.3d at 695.

BY VICTOR M. METSCH



Are You a "Good" Partner?

You're a partner in a law firm – large or small – and at the end of the day, you satisfy your clients' needs and do enough business to practice comfortably. You're meeting your goals – but are you a *good* partner? And how do we define that term? Is it like being a good roommate? A good parent? Teacher? Student? Partnership requires a synthesis of all of these roles, among countless others.

Evaluating your performance as a partner goes well beyond billings and bringing in new business. Ask yourself the following questions and see how "good" you really are.

Are You an Effective Leader?

1. Do you lead or simply manage?
2. Are you proactive or simply reactive?
3. Do you avoid waste and redundancy?
4. Do you share credit when things go right?

Are You a Team Player?

1. Do you prioritize work for associates?
2. Do you ask associates about work/deadlines for others when giving them assignments?
3. Do you coordinate assignments for associates with your partners?
4. Do you proactively mentor (or just judge and criticize) associates?
5. Do you review all substantive work by associates before it goes out or is filed?
6. Do you give associates time budgets and deadlines on work?
7. Do you give associates prompt feedback on their work product?
8. Do you treat your partners as equals?
9. Do you treat your partners with respect?
10. Do you help a partner who is "swamped"?
11. Do you assist a partner or associate who is having a family or personal problem?
12. Have you introduced your clients to other partners?

Does Your Staff Feel Appreciated?

1. Do you treat your staff with respect?
2. Do you give your staff work throughout the day so as to avoid day-end stress?
3. Do you thank your staff for a special effort or a job well done?
4. Do you coordinate with colleagues with whom you share an assistant?
5. Does your assistant cover tasks for the firm to the same extent as others?

How Do You Handle Billing and New Business?

1. Do you enter your time on a regular basis?
2. Do you bill your clients at least once a month?

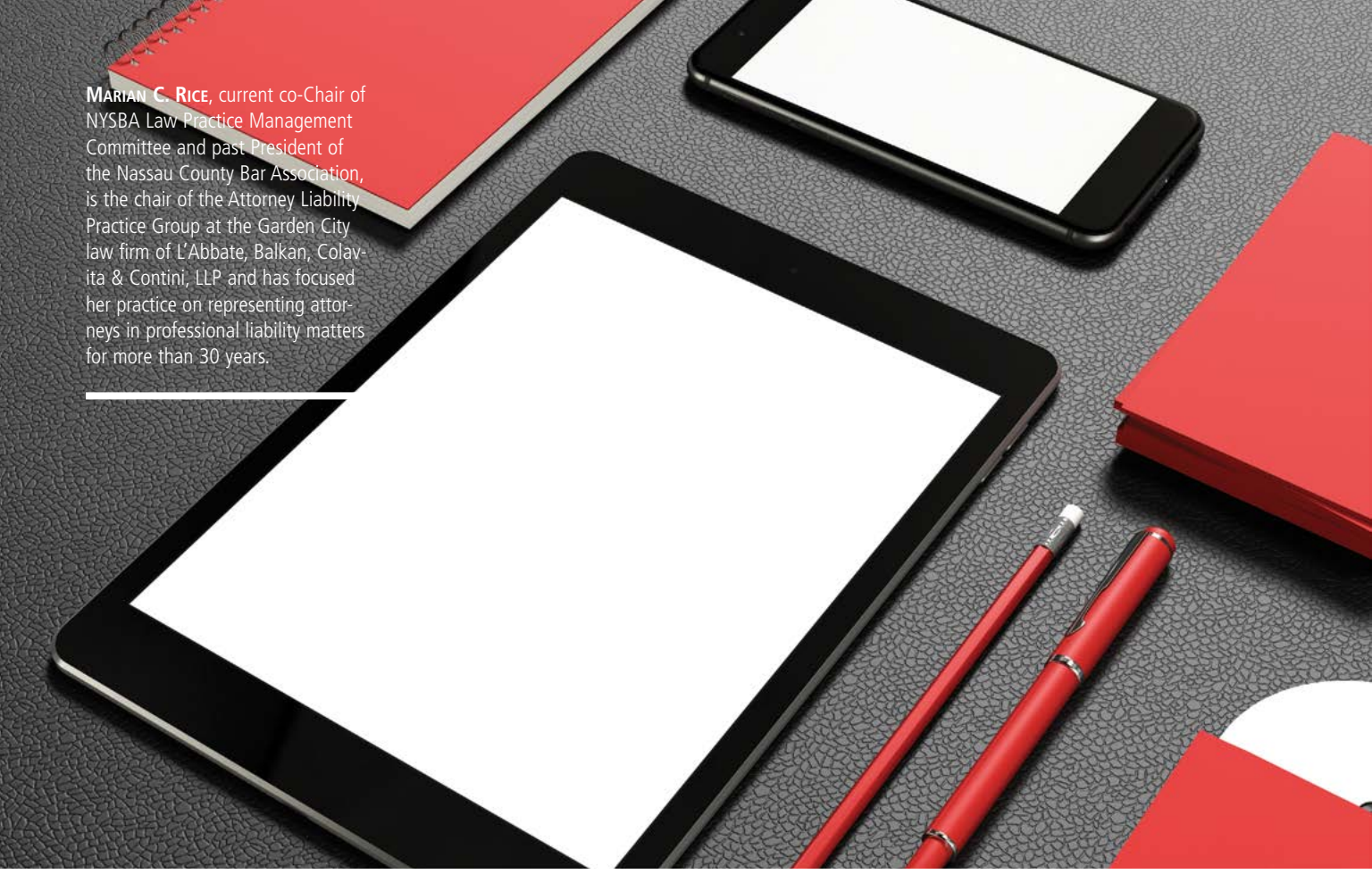
3. Do you follow up your accounts receivable once a week?
4. Do you address issues with clients who have ceased to be responsive to requests for payment?
5. Do you do conflict searches on new clients/matters?
6. Do you get signed retainer agreements from new clients before commencing work?
7. Do you get advance/evergreen retainers on new clients/matters?
8. Do you get prior approval from management committee on all special fee arrangements?
9. Do you get a second opinion on contingent fee matters?
10. Do you get a second partner to review new litigation matters?
11. Do you avoid non-reimbursable expenses?
12. Do you have your clients pay large out-of-pocket expenses directly?
13. Do you routinely reduce time charges before you send out bills?
14. Do you routinely grant clients concessions on billed amounts?

Are You an Island?

1. Do you think running the firm is someone else's job?
2. Do you leave work to the last minute?
3. Do you blame associates for your own failure to supervise?
4. Do you think you are the only partner who is working?
5. Do you think that your work is the most important in the office?
6. Do you think that you are the only partner dealing with difficult clients or complex problems?
7. Do you think that you are the only partner who has to address emergencies?
8. Do you think that you are the only partner with family/health/other issues?

Are you really a "good" partner? ■

Victor M. Metsch is Of Counsel in the Litigation, Alternative Dispute Resolution and Appellate Practices of Smith, Gambrell & Russell, LLP in New York City. Mr. Metsch practices primarily in the area of commercial dispute resolution. He has served on various court and professional responsibility committees of the New York City Bar Association, such as the Committee on State Courts of Superior Jurisdiction; the Committee on Professional and Judicial Ethics; the Committee on Professional Discipline; the Committee on Professional Responsibility; the Committee on the Judiciary; and on various court committees of the New York State Bar Association. He received his B.A. from the New York State School of Industrial and Labor Relations at Cornell University and his J.D. from New York University School of Law.



Marian C. Rice, current co-Chair of NYSBA Law Practice Management Committee and past President of the Nassau County Bar Association, is the chair of the Attorney Liability Practice Group at the Garden City law firm of L'Abbate, Balkan, Colavita & Contini, LLP and has focused her practice on representing attorneys in professional liability matters for more than 30 years.

Start Out Right

Engagement Letters

By Marian C. Rice

Since 2002, New York attorneys have been required to enter into written engagement letters documenting the terms of their relationship with each of their clients.[1] Matrimonial attorneys have had to do so for even longer.[2] Every professional liability insurance application asks whether the attorney or law firm uses written engagement letters on each of its matters. According to Michael Furlong, Vice President – Underwriting at CNA Insurance Co., the NYSBA-endorsed professional liability insurer selected by our sponsored broker, USI Affinity, slightly more than 50% of law firms report regular use of engagement letters containing all the essential recommended elements of such letters. Yet less than 20% of law firms have utilized engagement letters in reported claims. Based upon current information, it seems the majority of claims filed against attorneys involved representations where the attorney and client did not enter into a written engagement letter.

Is there a correlation between the lack of a written engagement letter and legal malpractice claims? Well-drafted engagement letters will often prevent the misunderstandings that lead to claims. In other situations, the connection may not be as obvious. But the absence of a written engagement letter may be emblematic of a larger client communication issue, and poor client communication is a significant source of legal malpractice claims and grievances against attorneys.

The absence of a written agreement does not necessarily determine whether a client-attorney relationship exists. A clear, unambiguous engagement letter assists each of the parties in understanding their respective roles and promotes good client relations. Considering that the law is a service profession and there are so many law firms available, it is odd that poor client-attorney relationships continue to cause legal malpractice actions and grievances. Part of the problem is client perception. No one is ever at their best when hiring an attorney. When clients come to us, they have a problem and look to their attorney to fix it. At a minimum they are looking for responsiveness. Nevertheless, the 2012 study of the American Bar Association Standing Committee on Lawyers' Professional Liability looked at a cross-section of

legal malpractice claims during the period of 2008–2011 and reported that nearly 15% of all claims were caused by poor client-attorney relationships.[3]

One of the most important components of client satisfaction and a healthy client-attorney relationship is full and frank communication between the attorney and client. The first step toward the goal of client satisfaction is an understanding of the purpose of the retention, the terms under which services will be provided, and the respective responsibilities of the attorney and the client. The second step is reducing to writing the agreement reached with the client.

The Court Rules

Under Part 1215 of the court rules, written engagement letters are mandatory for all representations where the fee is expected to be $3,000 or more, unless the "services are of the same general kind as previously rendered to and paid for by the client." Similarly, the N.Y. Rules of Professional Conduct (Rules) require that the written engagement letter explain the scope of the services rendered and the fee and expenses to be charged, and contain a statement of the client's fee arbitration rights under Part 137.[4] A clearly written engagement letter will assist an attorney in complying with the ethical requirements as to the scope of engagement and allocation of authority between the attorney and client.[5] Attorneys handling domestic relations matters must comply with separate procedures detailed at Part 1400 of the court rules.

Whom Do I Represent?

Failure to address the seemingly simple question of the identity of the client leads to a host of problems ranging from confidentiality issues to conflict conundrums. As a result, the engagement letter should explicitly specify the identity of the client whose interests are being represented. Equally as important is a definition of those parties whose interests are not being represented by the attorney (with separate notification to individuals or entities who might believe their interests are being covered by the retention). When representing a business organization, particular care should be taken to explain to the constituents of the organization that the organization is the attorney's client and the interests of the organization may not be aligned with those of the constituents.[6] Engagement letters in the trusts and estates field should also identify the attorney's client to avoid the common misconception by relatives of the client that the attorney is the "family" lawyer.

Scope and Scope "Creep"

Attorneys often labor under the misapprehension that the broader and more general the engagement letter, the greater the likelihood that additional services will be requested. One does not follow the other. It is certain, though, that a broadly worded scope of services provision will generate increased exposure to the attorney for services the original engagement may never have contemplated. It is perfectly acceptable for a lawyer to reasonably limit the terms of the engagement, provided the client knows of the limitations and gives his or her informed consent.[7] A plainly worded provision setting forth the defined scope of the services to be performed is one of the most important risk management tools an attorney can adopt. If the intended engagement does not include appeals, the engagement letter should say so. If the attorney represents the executor but an accounting professional is separately retained by the estate to prepare the estate tax returns, spell it out in the engagement letter.

Do not let the services rendered "creep" beyond the originally defined scope without documenting the expanded services being provided. A simple amendment to the original agreement will suffice. Rendering services beyond those originally requested without documenting the increased responsibility vitiates the benefit of a finely crafted scope of services provision.

Fees and Expenses

The court rules require that the engagement letter set forth the financial terms of payment. Additional issues that should be addressed include the frequency of payment, the definition of the expenses for which the client will be responsible, a general outline of the steps involved in the representation and the time frame within which the client may expect to know the outcome of the retention. Disputes over fees disrupt the client-attorney relationship and are a constant source of non-payment – or worse, malpractice claims and grievances. Estimating the cost of the representation, subject to updates as the matter proceeds and unanticipated events occur, will go a long way toward avoiding misunderstandings. If the client's reaction to the cost of the engagement is of concern at the outset, the problem will not get better with time. Even stellar results pale when attorney fees mount beyond the client's expectations.

An engagement letter is a contract, the terms of which are set once executed. As the Court of Appeals has recognized, however, "attorney-client fee agreements are a matter of special concern to the courts and are enforceable and affected by lofty principles different from those applicable to commonplace commercial contracts."[8] A revised fee agreement entered into after the attorney has already provided legal services is reviewed with heightened scrutiny, because a confidential relationship has been established and the opportunity for exploitation of the client is enhanced.[9] Rule 1.5 states that "[a]ny changes in the basis or rate of the fee or expenses shall also be communicated to the client." If it is anticipated that hourly rates may change throughout the representation, the engagement letter should spell out the circumstance warranting change. Additional factors which may negate the ability to change the terms of compensation include

the sophistication of the client and the timing of the requested change. To condition the continuation of legal work when deadlines loom on the renegotiation of legal fees is impermissible.[10]

An attorney may not charge unreasonable fees or expenses.[11] The factors that weigh in on reasonableness include:

1. the time and labor required;
2. novelty of the issue presented and skill required to perform the requested tasks;
3. the extent to which the engagement would preclude the attorney's ability to service other clients;
4. the usual and customary fee for similar services;
5. the amount involved and the results obtained;
6. the time limitations imposed by the client or the circumstances;
7. the nature and length of the client-attorney relationship;
8. the experience and reputation of the attorney; and
9. whether the fee is fixed or contingent.

No one factor is determinative. Rather, the "reasonableness" of the fees provided for in the engagement letter is the client's understanding of the amounts charged and the reasons for the fee structure. However, even if a client has provided his or her informed consent in advance, a fee disproportionate to the work performed will not be allowed and may form the basis for a grievance and order of restitution. The burden of demonstrating that the engagement letter is "fair, reasonable, and fully known and understood by their clients" rests with attorneys.[12]

The engagement letter should also spell out the consequences of the client's failure to timely pay legal fees owed. The tolerance a law firm has for unpaid invoices may differ from client to client, but keeping track of troublesome accounts receivable and taking appropriate action if requests for payment are ignored is an important function of firm management. Conservative estimates place the likelihood of a legal malpractice counterclaim in response to a suit for fees at 25%,[13] with anecdotal reports at more than double that figure. There is no question that suits for unpaid legal fees provoke retaliatory malpractice claims. While the ability of a law firm to extricate itself from an engagement in New York depends upon compliance with Rule 1.16 and, if the matter is litigated, permission of the tribunal,[14] attorneys must pay close attention to accounts receivable and ensure clients do not fall too far behind in payment without addressing the issue. If a dispute over fees arises, work with the client and take advantage of the Part 137 arbitration program mandated by the court, as well as mediation programs sponsored by bar associations.

Staffing

The adage that clients build relationships with attorneys, not law firms, is true. No client appreciates being passed to another attorney the moment the engagement letter is signed. To foster the trust and confidence of a client, it is important to identify from the outset the attorneys involved in the representation. Introduce the involved attorney(s) at the first meeting. Given the ever-increasing penchant for lateral movement in the legal profession, circumstances and even the subject matter of engagements may shift with time. As a result, the engagement letter should indicate that the law firm reserves the right to appropriately staff the engagement. If there is a change of assigned attorneys, get ahead of the issue by advising the client up front and do not charge the client for the time incurred in getting the new attorney up to speed.

> Well-drafted engagement letters will often prevent the misunderstandings that lead to claims.

Client Communication

The scope of an attorney's ethical obligation to communicate with his or her client is set forth in Rule 1.4. An attorney must keep the client apprised of all material events in the representation and promptly respond to the client's reasonable requests for information. Remember that this ethical rule is not aspirational. It is conduct required in order to avoid attorney discipline. Fostering a strong client-attorney relationship requires more than the minimum mandate.

Misunderstandings can be avoided by an upfront agreement as to the frequency and means by which the client will be kept apprised of the status of the proceedings. Addressing the issue in the engagement letter manages expectations from the start. While email has become a common means of communication, attorneys must caution their clients that no client-attorney privilege will attach to substantive communications made where there is a significant risk that the communications will be read by a third party.[15]

Conflicts

If an actual or potential conflict of interest exists, the manner in which the conflict is being addressed should be spelled out in the engagement letter. The ability to identify, analyze and resolve conflicts of interest is a critical component of being a good lawyer. It is not always easy. Discuss issues that arise with your colleagues (without divulging confidential information) and take advantage

of ethics hotlines. If a conflict exists, the client's informed consent must be obtained for any waiver to be effective. To obtain the client's informed consent under the Rules of Professional Conduct, an attorney must provide the client with sufficient information so the person can make an informed decision after the attorney has explained the material risks of waiving the conflict and the reasonably available alternatives.[16] Remember that not every conflict can be waived and that the consequences of failing to adequately analyze a conflict can be devastating to both the client and the law firm.

The Client's File

Attorneys are obligated to ensure a litigation hold is in place and the preservation of data is maintained from the moment it becomes reasonably evident that a dispute exists. Reference to the client's role in the preservation obligation should be spelled out upon engagement. While the details of the client's obligations should be outlined in a separate document (and reiterated throughout the engagement), a cursory reference to the need for the client to safeguard data and cease routine document destruction policies is warranted.

The disposition of a client's file following the conclusion of the engagement should also be addressed up front and reiterated when the representation ends. While Rule 1.15(d) requires attorneys to maintain specified bookkeeping records for a period of seven years, there is no similar bright line rule articulating the period of time for retaining closed client files. Various appellate rules mandate that virtually every document in a file involving a claim for personal injury, property damage, wrongful death, loss of services resulting from personal injuries, due to negligence or any type of malpractice, and claims in connection with condemnation or change of grade proceedings, be maintained for seven years as well.[17] These court rules, however, do not authorize the law firm to destroy the client's file when the representation is concluded.

Ethics opinions divide the components of a closed file into four general categories: (1) documents belonging to the attorney; (2) documents the attorney is under a legal duty to keep; (3) documents the client must keep; and (4) the remaining majority of documents found in an attorney's file.[18] Documents belonging to the attorney may be disposed of provided the lawyer has no other legal duty to keep the materials and there is no apparent indication the client has a need for the file. The problem with this subjective analysis is evident. All of the opinions sidestep the issue as to what constitutes documents belonging to the client because this issue is a question of law for the courts. The Court of Appeals has held that upon termination of a client-attorney relationship, where there is no claim for unpaid fees, the client is presumptively accorded full access to the entire file, including documents otherwise considered attorney work product.[19] If one employs the analysis utilized by the majority of the ethics opinions on the issue, there is little in a file that may be unqualifiedly categorized as materials belonging to the attorney.

Outlining the attorney's document retention policy in an engagement letter is the first step in advising the client that there is a finite period of time in which copies of the file may be obtained. Reiterating the policy at the time the representation terminates provides the client with the opportunity to obtain the file if desired before destruction. Purely for the purposes of risk management, the retention policy should exceed the longest period of limitation applicable to claims against attorneys and a copy of the file should be maintained before it is returned to the client during that period. Technological advances in scanning documents makes this process less cumbersome than retaining hard copies of the documents.

Conclusion

The practice of law requires implementing administrative obligations that didn't exist in years past. The requirement that written engagement letters be entered into in most representations, however, has given us the opportunity to develop open communications with the client from the start. The time taken to draft a clear and unambiguous engagement letter will repay the attorney many times over by fostering a good relationship with the client, increasing prompt payment for services rendered and reducing the possibility of a malpractice claim or grievance. ■

1. N.Y. Comp. Code, R. & Regs. tit. 22, pt. 1215 (N.Y.C.R.R.).
2. 22 N.Y.C.R.R. pt. 1400.
3. *See Profile of Legal Malpractice Claims 2008–2011* (ABA 2012).
4. 22 N.Y.C.R.R. pt. 137.
5. Rule 1.2.
6. Rule 1.13(a).
7. Rule 1.2(c).
8. *In re Cooper*, 83 N.Y.2d 465, 472 (1994).
9. *In re Lawrence*, 24 N.Y.3d 320 (2014); *see, e.g.*, NYSBA Ethics Op. 910.
10. *Brooks v. Lewin*, 48 A.D.3d 289 (1st Dep't 2008).
11. Rule 1.5(a).
12. *Shaw v. Mfrs. Hanover Trust Co.*, 68 N.Y.2d 172, 176 (1986).
13. 1 Legal Malpractice § 2:113 (Thompson Reuters 2015).
14. CPLR 321.
15. ABA Formal Op. 11-459.
16. Rule 1.0(j).
17. *See, e.g.*, 22 N.Y.C.R.R. § 691.20(f) "Preservation of records of claims and actions."
18. The Association of the Bar of the City of New York Comm. on Professional & Judicial Ethics, Formal Op.1999-05; New York County Lawyers' Ass'n Comm. on Legal Ethics, Formal Op. 725 (1998); NYSBA Comm. on Professional Ethics, Op. 623 (1986); The Association of the Bar of the City of New York Comm. on Professional & Judicial Ethics, Op. 1986-4; Nassau County Op. 81-10.
19. *Sage Realty v. Proskauer Rose Goetz & Mendelsohn, LLP*, 91 N.Y.2d 30 (1997).

BY HENRY G. MILLER

Henry G. Miller is the senior member of Clark, Gagliardi & Miller, P.C., in White Plains, NY, and he has been actively trying cases of all types for more than 40 years. Mr. Miller is Past President of both the New York State Bar Association and the Westchester County Bar Association and is one of very few trial attorneys in the country who has been both a Regent of the American College of Trial Lawyers and a Director of the International Academy of Trial Lawyers. He is a frequent guest on television and radio and a sought-after lecturer on all aspects of trial practice. He is the author of *Settlements* in the Art of Advocacy series, editor of the *New York Practice Guide on Negligence* and, most recently, *On Trial: Lessons from a Lifetime in the Courtroom*.

The Necessary Peremptory Challenge

Over the years, I've heard some reformers argue for the abolition of peremptory challenges because they allow lawyers to excuse jurors without any reason. They claim it gives rise to an opportunity for prejudice.

Here are six jurors who prove why the peremptory challenge is necessary.

Mary Sweet

You like Mary Sweet, but something nags at you. She frowns when you speak. She turns away when you look at her. Yet, her answers are perfect. She is exactly what you're looking for. But you have no peremptories under the new system. You have to keep her. She turns the jury against you. You lose. What happened? It turns out you look and talk just like Uncle Mike – the worst human being she has ever known. What? You don't think this happens? You don't pick juries, do you?

Lee J. Cobb

A young Hispanic man accused of a mugging asks you to defend him. You check him out. His story holds up. He didn't do it. He left before his friends did do it. You can't believe your luck. It finally happened. You have a case where you truly believe your client is innocent. You feel like Clarence Darrow and Gregory Peck all wrapped in one. On the jury comes a guy who looks and talks like Lee J. Cobb in that movie *Twelve Angry Men*. He's angry. You can feel it. He bristles when you talk to him. But he's clever. He wants to sit. He wants to do justice. He gives model answers of propriety. You decide, of course, to use a peremptory challenge. The judge reminds you that under the new reform, there are no peremptory challenges. He stays. The trial goes well for you. You think it's in the bag. But to your amazement, your client is convicted. You learn they were originally for you 11 to 1, but Lee J. Cobb turned them around. "These kids will kill us if we don't stop them." And there was no Henry Fonda to stop Lee J. Cobb this time.

Mr. Cotton

You represent little Hilda Hurt. Her whole body hurts from oozing sores she got from using Sally's Soothing Ointment. The proof was clear. The makers knew that many were allergic to their not-so-soothing ointment but they suppressed any warning. On the jury comes Mr. Cotton. He's a salesman, a seller of cotton. He is a loud mouth. He will be a leader. You know he hates product liability claims. He fears his product will be next. But you can't get him off for cause. He gives the right answers. There are no peremptory challenges. You're stuck. He stays. Your case goes in like a dream. The courthouse regulars and the judge all predict a big verdict for little Hilda Hurt. After three days, the jury announces they're hopelessly deadlocked. The vote is four to two for Little Hilda. But in New York, you need at least five out of six in a civil case to make a verdict.

What happened? Mr. Cotton persuaded one fellow juror, tiny Mr. Meek, to vote no. He argued the world would come to an end if everybody could just sue for a little negligence: "Today it's soothing cream, tomorrow it could be cotton."

Millie Madre

You want mothers on your jury. You represent one. Your client was clearly misdiagnosed. She didn't have cancer but the report said she did. Her breast was removed unnecessarily. An easy case for the plaintiff. On the jury comes sweet Millie Madre. A mother. You like her. But she mentions she has a daughter in medical school. Millie Madre just might identify with the doctor who made the misdiagnosis. Her daughter could do that innocently some day. You go to challenge her. You can't. Millie says she won't identify with the defendant. The judge says no to a challenge for cause. You go to use a peremptory. "No," the judge says. "Did you forget, counselor, we have the new enlightened system. No peremptory challenges. We've eliminated prejudice from our system in order to find a more perfect system of justice."

You know the rest. Sweet Millie Madre with great passion domi-

nates the jury. The defendant-doctor becomes, in effect, her daughter. The doctor wins.

Willie Worker

You're defending Mr. Kindly, a good employer. He gave an employee, Mr. Ingrate, a chance to be his partner. The employee made a lot of money but got greedy and wanted more. He sued Mr. Kindly for breaking promises, a weak case, but enough to get to a jury. Mr. Kindly was a wonderful witness. Mr. Ingrate was a poor witness.

But on the jury, you were stuck with Willie Worker. You couldn't get him off. No challenges available. He was obvious. Willie hated all employers. He still thought we were back in the days when 10-year-old children worked 12 hours a day in the mines. He didn't give Mr. Kindly a chance.

You know the rest. Willie poisoned the jury against Mr. Kindly.

Bubba and Butch

You represent a young black teenager from a wonderful family. He's paraplegic from playing a school-supervised activity of jumping on a trampoline to make baskets. The school had been repeatedly warned this was dangerous. Children got hurt. The school never stopped the activity. Now, your teenage client is paraplegic.

You tell the jury during selection you represent a black family – lovely people – working people. Bubba and Butch, two tough-looking white guys in their 30s, sit in the first and second jury seats. They glare at you. They wear T-shirts. Their hair is so short skin is showing. They have big muscles. They work out. Blue collar guys who work in construction. They look like they haven't smiled in 30 years. You look but can't find any compromising tattoo. "Can you be fair to a young black man engaging in a school-supervised activity?" you ask. "I can be fair," they both answer in a cold voice.

You can't get them off. New system. No challenges. You rush out to see if the settlement offer is still on the table or at least something close to it.

My Conclusion

You want more? I could give you 200 or so more jurors, but you get the idea.

I, too, have a dream, but, as a trial lawyer, I have to live in the real world, the world as it is, not the world as it should be. A world where race, ethnicity, gender and just plain old prejudice, irrespective of race, color or creed, play a great role. The one answerable defense to those who would eliminate peremptory challenges and change the system is simple: Human nature, with its powerful prejudices, will not soon change. ■

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for more than 25 years and is "of counsel" to Ressler & Ressler in New York City. He is the author of *Bender's New York Evidence* and *New York Civil Disclosure* (LexisNexis), as well as the 2008 and forthcoming 2014 Supplements to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches *inter alia*, New York Practice at Columbia Law School and Brooklyn Law School. He serves on the Office of Court Administration's Civil Practice Advisory Committee, as Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee, and is a frequent lecturer and writer on these subjects.

"No Excuses"

Introduction

Last issue's column discussed two divergent lines of cases applying the CPLR 3116(a) requirement that a deponent furnish "a statement of the reasons"[1] why a change in a witness's deposition transcript has been made. The June column discusses a parallel line of cases where witnesses in summary judgment motions submit affidavits that contradict critical elements of their deposition testimony. Labeling these affidavits "feigned"[2] or "tailored"[3] testimony, many courts have rejected them and considered only the deposition testimony, with the result that summary judgment is generally granted to the other side.

"Designed to Avoid . . . Consequences"

In *Kudisch v. Grumpy Jack's, Inc.*,[4] the plaintiff submitted affidavits in opposition to the defendant's motion for summary judgment, which the Second Department declined to consider:

> In opposition, the plaintiffs failed to raise a triable issue of fact. Rather, their affidavits, in which both plaintiffs made statements contradicting their deposition testimony, appear to raise feigned issues of fact to avoid the consequences of their testimony and, thus, were insufficient to defeat summary judgment.[5]

In *Garcia-Rosales v. Bais Rochel Resort*,[6] the plaintiff committed the dual sin of submitting deposition corrections and an affidavit, both of which contradicted critical deposition testimony. Rejecting both, the Second Department held:

> The plaintiff failed to raise a triable issue of fact in opposition to that branch of the defendants' motion. The correction sheet attached to the plaintiff's deposition transcript presented feigned issues of fact tailored to avoid the consequences of his earlier deposition testimony, and was, therefore, insufficient to raise a triable issue of fact. The correction sheet contained no statement of reasons for making the corrections. The plaintiff's affidavit also presented feigned issues of fact designed to avoid the consequences of his earlier deposition testimony, and was likewise insufficient to raise a triable issue of fact. Therefore, the Supreme Court properly granted that branch of the defendants' motion . . . for summary judgment . . . and properly denied that branch of the plaintiff's cross motion which was for summary judgment.[7]

Equally unsuccessful is the use of a non-party affidavit to compensate for a plaintiff's deposition testimony. In *New v. New York State Urban Development Corp.*,[8] the First Department rejected the non-party affidavit:

> We add that the affidavit of Madison's former employee was irrelevant inasmuch as it does not address the issue of how the assailant gained entry into the building. Moreover, the affidavit appears to have been tailored to avoid the consequences of plaintiffs' depositions.[9]

Origin of the "Rule"

So what is the authority for rejecting these affidavits out of hand? Working backward from the cases cited to by recent cases yields interesting results. For example, *New v. New York State Urban Development Corp.*[10] cites *Washington v. New York City Board of Education*:[11]

> Plaintiff failed to submit evidence sufficient to raise a triable issue of fact. The assertions in her bill of particulars and affidavit that she slipped on a wet and slippery condition caused by an "unknown liquid" or "semi-liquid" substance, submitted in opposition to defendant's motion for summary judgment, contradict her prior 50-h hearing testimony that she did not know what caused her to fall. Her claim that she thought the examining attorney was asking if she knew exactly what caused the accident is unpersuasive, especially in view of the fact that the examining attorney had asked her multiple times and in various ways if she knew what she slipped on. Each time, plaintiff responded that she did not know or had "no clue." Because the affidavit and bill of particulars can only be considered to avoid the consequences of her prior testimony, they are insufficient to raise an issue of fact.[12]

The authority cited in *Washington*, *Fernandez v. VLA Realty LLC*, noted:[13]

> Issues of fact and credibility are not ordinarily determined on a motion for summary judgment. But where self-serving statements are submitted by plaintiff in opposition that "clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of h[is] earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment."[14]

Fernandez cites as its authority *Phillips v. Bronx Lebanon Hospital*:[15]

> While issues of fact and credibility may not ordinarily be determined on a motion for summary judgment, where, as here, the self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment.[16]

And the authority cited by the *Phillips* court? There is none.[17]

Finding "Feigned"

In search of the origin of the rule, the earliest mention I found was in a 1925 Court of Appeals decision, *Curry v. Mackenzie*,[18] by no less than Judge Cardozo:

> Civil Practice Rule 113 permits summary judgment at times in favor of a plaintiff though material averments of his complaint have been traversed by the answer. To that end there must be supporting affidavits proving the cause of action, and that clearly and completely, by affiants who speak with knowledge. There must be a failure on the part of the defendant to satisfy the court "by affidavit or other proof" that there is any basis for his denial or any truth in his defense. The case must take the usual course if less than this appears. To justify a departure from that course and the award of summary relief, the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried.[19]

Judge Cardozo cited as his authority a 1923 Court of Appeals decision, *General Investment Co. v. Interborough Rapid Transit Co.*,[20] by Judge Hogan:

> The argument that rule 113 infringes upon the right of trial by jury guaranteed by the Constitution cannot be sustained. The rule in question is simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a *bona fide* issue exists between the parties to the action. A determination by the court that such issue is presented requires the denial of an application for summary judgment and trial of the issue by jury at the election of either party. On the other hand, if the pleadings and affidavits of plaintiff disclose that no defense exists to the cause of action, and a defendant, as in the instant case, fails to controvert such evidence and establish by affidavit or proof that it has a real defense and should be permitted to defend, the court may determine that no issue triable by jury exists between the parties and grant a summary judgment.[21]

While Judge Hogan's decision did not use the word "feigned," the concept is apparent. The authority cited by Judge Hogan? There is none.[22]

Conclusion

Having located, I think, the origin of the rule permitting courts to ignore affidavits submitted in opposition to summary judgment where the "the court [is] be convinced that the issue is not genuine, but feigned," I will attempt to tie together all three columns dealing with "feigned" testimony, whether submitted via deposition errata sheets or affidavit, in the July/August issue.

Until then, enjoy the onset of summer. After last winter, we deserve it. ■

1. CPLR 3116(a).
2. *See, e.g., Kudisch v. Grumpy Jack's, Inc., below.*
3. *See, e.g., New v. N.Y. State Urban Dev. Corp.*, 110 A.D.3d 531 (1st Dep't 2013).
4. 112 A.D.3d 788 (2d Dep't 2013).
5. *Id.* at 791 (citations omitted).
6. 100 A.D.3d 687 (2d Dep't 2012).
7. *Id.* at 687–88 (citations omitted).
8. 110 A.D.3d 531 (1st Dep't 2013).
9. *Id.* at 532 (citations omitted).
10. 110 A.D.3d 531.
11. 95 A.D.3d 739 (1st Dep't 2012).
12. *Id.* at 740 (citations omitted).
13. 45 A.D.3d 391 (1st Dep't 2007).
14. *Id.* at 391 (citation omitted).
15. 268 A.D.2d 318 (1st Dep't 2000).
16. *Id.* at 320.
17. In fairness, I have not attempted to trace each decision back to its original source, but I did randomly select the *New* case, and have obtained the same result in the past.
18. 239 N.Y. 267 (1925).
19. *Id.* at 269–70 (citation omitted).
20. 235 N.Y. 133 (1923).
21. *Id.* at 142–43.
22. While I am no student of early 20th century Court of Appeals practice, if Judge Hogan was good enough for Cardozo, he is good enough for me.

MEET YOUR NEW OFFICERS

President
David P. Miranda

David P. Miranda, of Albany, took office June 1 as the 118th president of the 74,000-member New York State Bar Association.

Miranda is a partner at Heslin Rothenberg Farley and Mesiti in Albany. He is a trial attorney whose intellectual property law practice includes trademark, copyright, trade secret, false advertising, patent infringement and Internet issues.

A 26-year member of the State Bar Association, Miranda has served as president-elect and secretary of the Association and as a member of its Executive Committee and House of Delegates. He is past chair of the Electronic Communications Committee and the Young Lawyers Section, and co-chaired the Special Committee on Strategic Planning. He also served as chair of the Special Committee on CLE and was co-chair of the President's Committee on Access to Justice.

He is a member of NYSBA's Intellectual Property Law Section, Commercial and Federal Litigation Section, Committee on the Annual Award, Committee on Continuing Legal Education and Membership Committee.

Miranda is an arbitrator of intellectual property disputes for the National Arbitration Forum and American Arbitration Association. He is a past president of the Albany County Bar Association. In 2009, he served on the Independent Judicial Election Qualification Commission for the Third Judicial District of the State of New York. In 2002, then-Chief Judge Judith S. Kaye appointed him to the New York State Commission on Public Access to Court Records.

In 2001, he received the *Capital District Business Review*'s 40 Under Forty Award for community involvement and professional achievement.

He was editor-in-chief and contributing author of *The Internet Guide for New York Lawyers* in 1999 and 2005, published by the NYSBA, is the author of "Defamation in Cyberspace: *Stratton Oakmont, Inc. v. Prodigy Services Co.*," published in the *Albany Law Journal of Science & Technology*, and "New York Intellectual Property Law Review" published in the New York Appeals issue of the *Albany Law Review* in 2012.

A resident of Voorheesville, Miranda graduated from the State University of New York at Buffalo and earned his Juris Doctor from Albany Law School.

President-elect
Claire P. Gutekunst

Claire P. Gutekunst took office June 1 as president-elect of the 74,000-member New York State Bar Association.

Gutekunst is an independent arbitrator and mediator. She established her practice in April 2012, and assists companies, organizations and individuals to efficiently resolve disputes in a confidential, cost-effective manner.

In 2012, Gutekunst was appointed as special master for the New York City Asbestos Litigation, where she served a 15-month term. Prior to that, she was a partner in the Litigation Department at Proskauer Rose LLP in New York City. During her nearly 30 years at Proskauer, she handled complex commercial disputes. She also served as an advocate or mediator in mediations and arbitrations.

Active in the State Bar Association for 27 years, Gutekunst served as treasurer from 2011–2013. She previously served on the Executive Committee as vice-president for the First Judicial District and as a member-at-large. Gutekunst chaired the Membership Committee, Committee on Women in the Law and Strategic Planning Advisory Committee and was vice chair of the Dispute Resolution Section. She is a member of the Commercial and Federal Litigation Section's Executive Committee, the Committee on Diversity and Inclusion and the Membership Committee.

Gutekunst is a member of the Advisory Council, the National Task Force on Diversity in ADR and the Arbitration Committee of the International Institute for Conflict Prevention and Resolution. From 2004 to 2015, she chaired the Advisory Council of the YWCA-NYC's Academy of Women Leaders. Between 1997 and 2005, Gutekunst served on the Governor's Temporary Judicial Screening Committee, the New York State Judicial Screening Committee and the First Department Judicial Screening Committee.

Gutekunst, of Yonkers, received her undergraduate and master's degrees from Brown University and her law degree from Yale Law School.

Secretary
Ellen G. Makofsky

Ellen G. Makofsky, of Garden City, New York, has been elected secretary of the New York State Bar Association for a second term.

As the founder of Makofsky & Associates, P.C., Makofsky concentrates her practice in elder law, special needs and trusts and estates.

A 28-year member of the State Bar Association, Makofsky is a member of the House of Delegates. She was a member-at-large on the Executive Committee for four years. She chaired the Elder Law and Special Needs Section and is the immediate past secretary of the Senior Lawyers Section and a member of the Trusts and Estates Law Section. She is the co-chair of the Women in the Law Committee and is a member of the Committee on Continuing Legal Education and the Membership Committee. She serves as the chair of the Task Force on Powers of Attorney. She also is immediate past president of the National Academy of Elder Law Attorneys, New York Chapter.

A resident of Manhasset, Makofsky graduated from Boston University and earned her law degree *cum laude* from Brooklyn Law School.

Treasurer
Sharon Stern Gerstman

Sharon Stern Gerstman, of Buffalo, New York, has been re-elected treasurer of the New York State Bar Association.

Gerstman is of counsel to Magavern Magavern Grimm in Buffalo. She concentrates her practice in the areas of mediation and arbitration, and appellate practice.

A 34-year member of the State Bar Association, Gerstman previously served on the Executive Committee as an Eighth Judicial District vice-president. She is a member of the House of Delegates, Finance Committee, CPLR Committee, Dispute Resolution Section, and Torts, Insurance and Compensation Law Section.

She was chair of the Committee on Civil Practice Law and Rules and the Special Committee on Lawyer Advertising and Lawyer Referral Services. She previously co-chaired the Task Force on E-Filing and the Special Committees on Lawyer Advertising and Strategic Planning. She also served on the American Bar Association's Board of Governors for three years and is a member of the ABA's House of Delegates.

A resident of Amherst, Gerstman graduated from Brown University and earned her law degree from the University of Pittsburgh School of Law. She received a master's degree from Yale Law School.

Disability Determinations, Judicial Authority and CPLR Article 78

Part II

By Chet Lukaszewski

Chet Lukaszewski formed Chet Lukaszewski, P.C. in 2008. The firm's primary areas of practice are New York City and State municipal disability pensions, as well as Social Security Disability claims and personal injury matters. Prior to opening his law firm, Mr. Lukaszewski worked for a foremost disability pension and Social Security disability firm throughout law school. After being admitted to the bar in 2001, he concentrated exclusively on personal injury work for several years, before returning to disability pension law, eventually becoming the lead litigator in one of the top firms practicing in that area at the time. Now, he is recognized as one of the leading disability pension law attorneys in New York.

Part I of this article, published in the May *Journal*, gave an overview of the current interpretation by the courts of the judicial authority possessed by judges under N.Y. Civil Practice Law and Rules Article 78, where municipal retirement systems and pension funds can deny sick and injured civil servants disability retirement pensions by finding an applicant not to be disabled, even if the finding is repeatedly deemed by the courts to be unlawful. This is because the courts have held that New York state judges do not possess the power

in an Article 78 proceeding to find a disability where a pension agency's medical board has not; a judge can only remand for reconsideration an application found to be improperly denied. This second part of the article covers CPLR Article 78 as it relates to municipal disability retirement pensions and reviews the cases that have established this "rule of law."

The Law

Hundreds of thousands of New York citizens work in civil service jobs, and their memberships in municipal pension funds and retirement systems and their entitlement to pension benefits accruing thereunder are not a gratuity. All municipal pension agency members have a pension contribution deducted from every paycheck they receive; it is those monies that primarily fund their retirement pensions. In addition, civil servants enter their occupations believing a retirement pension will be in place when they complete their careers, whether by performing the requisite number of years of service, or if after a certain amount of time on the job, they become disabled and can no longer do their job. The New York State Constitution Article V § 7, establishes that "membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." The Court of Appeals has said that a remedial statute enacted for the benefit of a civil servant, such as the disability pension laws, "should be liberally construed in their favor."[1] Moreover, the courts have maintained that disability pension laws are in place to assure the availability of such benefits to a municipal employee who is permanently incapacitated for duty.[2] The Court of Appeals has also stated that pension agencies are required to act "lawfully, with due regard to the essential evidence and in a nonarbitrary fashion."[3]

Nevertheless, those involved in disability pension law will say there are instances where seemingly disabled workers are denied disability pensions by New York's municipal pension funds and retirement systems – a fact demonstrated by the courts regularly deeming application denials to be improper. In many of these cases, the only recourse for a denied applicant is an Article 78 proceeding challenging the denial. It is in these proceedings that judges lack the authority to award a disability pension.

In many disability pension Article 78 proceedings, the pension agencies are found to have met the applicable standards in denying applications and their determinations are upheld. But in the cases where they are not, it seems contrary to the language of CPLR Article 78, and overly limiting to judicial authority, to not allow a judge to determine that a permanent disability for full duty has been shown. This seems particularly true in light of the fact that a pension agency could keep refusing to find a disability to exist, no matter how many times a court has deemed the determination to be legally improper. A disability pension Article 78 proceeding usually spans 10 to 18 months from the filing of the petition to the receipt of a decision. If an application is remanded to a pension agency by the court, it will be several more months before the often lengthy reconsideration process begins, and that is when the agency does not appeal the court's decision. If the agency appeals, the process becomes longer and costlier, as appellate printing costs, even for the respondent in such a case, are usually over $1,000 (and generally $3,500–$5,000, if the worker loses the Article 78 challenge and brings the appeal), and appeals usually involve additional attorney fees, which are typically several thousand dollars.

Brady v. City of New York

A careful review of the holdings of the courts that are seen as having established the "rule" that judges are prohibited from finding disability in Article 78 proceedings involving pensions for municipal workers calls into question whether said rule actually has definitive legal support. The courts in disability pension matters often indicate that "as is well established, courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board," citing the Court of Appeals decision in *Brady v. City of New York*[4] as support. However, *Brady* involved the question of whether a police officer was off duty at the time of his death, which would determine whether his widow would receive line-of-duty death benefits. There was no question about a medical board making a determination of whether or not a disability for full duty existed.

Courts often cite the *Brady* decision when setting forth the aforementioned rule. However, that section involves only the issue of whether the board considered evidence of the deceased officer being on or off duty when he died, and whether the fund's Board of Trustees merely adopted a finding that was clearly deficient. The Board of Trustees oversees the administration of a pension agency and renders final determinations on disability pension applications. It is bound by a medical board's finding of whether or not a disability exists, but it has the ultimate power to determine "causation" when a disability is found. Specifically the decision states:

> In this case, it appears that the board [of Trustees] merely adopted the recommendation (*606) by the medical panel which, in turn, had relied on an incomplete investigation which resulted in a purely conclusory report that the deceased was off duty at the time of his death. The board could not so delegate its independent responsibility for the determination of the issue upon which depended the granting or denial of the petitioner's application. The implications of this failure to make an independent evaluation and determination are acutely apparent in the abundance of documentary evidence in the form of duty charts

> and the testimonial evidence from the deceased's commanding officer and the detectives who worked under his supervision, all of which evidence was clearly available within the police department itself but was never considered by the pension board.[5]

Note that *Daley v. Board of Estimate City of New York*,[6] referenced as support by the *Brady* Court, also involved a pensioner's death and the need to determine whether the death was related to his line-of-duty efforts; it in no way involved the issue of disability. Thus it is perplexing how the courts have derived the proposition, "as is well established, courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board," from the *Brady* case, and that portion of the decision in particular. In a case where the issue is whether a death is line-of-duty related, why has the *Brady* decision come to be the basis for the rule that judges cannot find a disability to exist in an Article 78 proceeding?

Hundreds of thousands of New York citizens work in civil service jobs.

The "Definitive Authority"

The case currently considered the definitive authority on whether a court can find a disability where a medical board has not is *Borenstein v. New York City Employees' Retirement System*.[7] In *Borenstein*, the Court of Appeals overturned the Appellate Division, First Department's ruling that a medical board's no-disability finding was irrational, based upon the medical evidence in the record, and thus the applicant was entitled to the disability pension sought. The *Borenstein* Court noted: "In the end, the Appellate Division here did what it should not do: 'substitute [its] own judgment for that of the Medical Board,'" citing *Brady*.[8] The *Borenstein* Court also cited as support the Appellate Division, Second Department case *Santoro v. Board of Trustees*,[9] which upheld a disability pension denial based upon a no-disability finding. *Santoro* referencing *Brady*, stated, "It is well settled that courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board."[10] The final case cited by *Borenstein* as support for the proposition was *Appleby v. Herkommer*.[11] There, the court also stated that "[a]s is well established, courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board,"[12] citing *Brady*. However *Appleby*, like *Brady*, did not involve the issue of disability vs. no disability; it involved the question of whether a police officer's line-of-duty job stress had resulted in a heart condition, which contributed to his death. Note that in a case where a disability (or death) is found to exist by a medical board, a court does have the power to determine the cause of the disability and award a disability pension.[13] Thus, perhaps *Brady* has been improperly interpreted and relied upon by the courts to establish the supposed rule of law that judges cannot find a disability to exist in an Article 78 proceeding.

It must be noted that in denying NYPD Officer Michael Mazziotti retroactive pension benefits to the date of the original improper denial of his application, as discussed in Part I, despite both court orders finding the pension fund's findings to be unlawful, and despite the fact that when he was finally approved seven years after filing his application, was based upon essentially the same facts and medical evidence proffered throughout, the court in *Mazziotti v. Kelly*[14] wrote, and cited as the basis for its determination:

> Thus, to award petitioner WTC-ADR [the 9/11 line of duty disability retirement pension he was awarded] to the date of any of the Medical Board's prior recommendations to deny his WTC-ADR or ODR applications the court would have to make a finding that at a given point petitioner was disabled for full duty police work as a result of his WTC related psychological issues as a matter of law. This court simply cannot make such a determination as it is well settled that the threshold question of whether an applicant has the injury claimed and whether that injury incapacitates the applicant from the performance of duty is solely for the Medical Board to decide.[15]

If, in the years following the *Brady* case that decision came to be referenced as standing for a proposition that it truly did not, then it would lend further support to the call for revisiting the issue in the Legislature and/or the courts.

The Language of CPLR Article 78

The CPLR states that an Article 78 proceeding can be brought against a "body or officer," can only challenge a decision that is final, and must be commenced in the supreme court of the county. The relief sought can include mandamus (an order from a high court to a lower court, or to an authority, instructing it to perform an action or duty) or prohibition, or certiorari to review. Currently in disability pension challenges , a review and vacatur of the no-disability finding is all that can be sought via the relief of certiorari to review. One cannot seek a pension award under the court's power of mandamus, often referred

to as the "power to compel," which is available to petitioners in countless other Article 78 proceedings. CPLR Article 78 states that the expression "body or officer" includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under the article. It specifically indicates that whenever necessary to accomplish "substantial justice," a proceeding under the article may be maintained against an officer exercising judicial or quasi-judicial functions, or a member of a body whose term of office has expired. Also, any party may join the successor of such an officer or member of a body or other person having custody of the record of proceedings under review. It would seem that based upon the language of the statute, there should be no prohibition on judges possessing the power to find a disability to exist in an Article 78 proceeding brought against a retirement system or pension fund, and to award a disability pension, under the power of mandamus, so as to accomplish "substantial justice."

As per the language of CPLR Article 78, the following questions can be raised in such proceedings:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

The petitioners in most no-disability pension Article 78 proceedings assert that the pension agency's medical board failed to perform a lawful evaluation of their application, and thus the finding and application denial were arbitrary and capricious and an abuse of discretion, based upon facts of the matter, including the medical evidence presented, the realities of their diagnosed conditions, and the realities of the full duty requirements of their job title.

CPLR Article 78 indicates that a court "may grant the petitioner the relief to which he is entitled," or may dismiss the proceeding either on the merits or with leave to renew. It also states that, if the proceeding was brought to review a determination, the judgment may "annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent." Yet, the Court of Appeals has determined that it is not within the purview of New York state judges to find a "disability" in an Article 78 proceeding involving a disability pension, despite their being allowed to determine the cause of a disability in such a case.[16] Article 78 also specifically states: "If a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith."[17] However, currently, a judge cannot hold a trial as to the issue of whether a petitioner is in fact disabled for his or her job title. In a disability pension Article 78 proceeding, when a judge evaluates the propriety of a no-disability denial, the law says that the burden of proving one's incapacity for full duty and its cause is placed upon the applicant; if the applicant is deemed not to have met this burden, then the pension agency's denial is proper and cannot be disturbed.[18] The law is clear that, during the application process, the threshold question of whether an applicant has the injury claimed and whether that injury permanently incapacitates the applicant from the performance of full duty is solely for the agency's medical board to determine. If the medical board certifies that the applicant is not medically disabled for duty, the agency's board of trustees must accept that determination and deny the application.[19] A medical board is legally permitted to differ with an applicant's doctors' findings and conclusions, and the findings and conclusions of all other entities and agencies, no matter how consistent said outside findings may be.[20] The law states that any difference in opinion between the medical board and any of an applicant's physicians is a conflict of medical opinion, which is solely within the province of the medical board, and that conflicting medical opinions alone provide no occasion for judicial interference.[21] With such great deference being afforded to pension agencies and their doctors, when a court nevertheless finds a no-disability denial to be legally improper, why not allow for the judge to deem a disability to have been demonstrated and to award the pension sought? The language of CPLR Article 78 does not seem to preclude such power.

The general standard in disability pension denial Article 78 proceedings is whether the determination is arbitrary and capricious, and without sound basis in reason, and is generally based upon the administrative record that was before the pension agency.[22] The specific standards and elements that are to be applied and

> Their memberships in municipal pension funds and retirement systems and their entitlement to pension benefits accruing thereunder are not a gratuity.

evaluated by judges include whether a medical board's decision was based on "substantial," "credible" evidence, whether "all essential facts" were "investigated," whether the decision was "rational," and whether the reasoning for the decision was fully "articulated."[23]

"Credible evidence" has been defined by the Court of Appeals as "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered . . . must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion."[24] Pension agencies have a duty to applicants to handle cases in a fair and equitable manner, and to consider the totality of the evidence and circumstances surrounding an application.[25] Moreover, a denial cannot be conclusory or based upon a "bald finding" by a medical board.[26] The extent and in-depth nature of these considerations and factors evidences the great familiarity and understanding that a judge unquestionably gains about an application in an Article 78 proceeding.

Conclusion

The Court of Appeals has found that a medical board's determination denying a disability pension where the medical board itself does not perform a physical examination of an applicant can still be deemed to be legally sufficient, as that Court has held that sound medical conclusions can be reached based solely upon the review of medical evidence.[27] Judges presiding over Article 78 proceedings should be perfectly capable of performing such review. Granting judges the power to find disability in Article 78 proceedings would not result in a flood of approvals that would drastically impact pension agencies and, in turn, potentially burden taxpayers, who could be looked to if municipal pension agency fiscal deficits were to ensue; nor would it result in a pension award in every no-disability case. Just as many denials would be upheld, and a remand for clarification and a more appropriate review, as opposed to a pension award, would still likely comprise the majority of judgments in favor of petitioners in such cases. A disability finding and pension award would be a remedy used only in the most extreme and obvious of cases. If necessary, limitations could be placed upon the exercise of said power. For example, it could be established that at the very least, judges would be required to hold a trial under the powers of CPLR 7804(h), where the petitioner would need to appear, before finding a disability to exist, similar to Workers' Compensation and SSD hearings. Action by the Legislature or courts is needed either in the form of an amendment or addendum to CPLR Article 78 or a judicial re-visitation of this issue. A New York state judge can uphold a disability pension denial as being lawful, based upon a finding that it was supported by "substantial" and "credible" evidence, when "all essential facts" are "investigated," and can rationally determine that no permanent disability for full duty has been shown; and a judge can also set aside a pension denial and award the pension sought when concluding as "a matter of law" that a disability was the "natural and proximate result of a service related accident." Then, it stands to reason that New York's judges can also determine that a permanent disability for full duty has been shown to exist as a matter of law.

Closing the legal gap that allows for pension funds and retirement systems to be immune from being compelled to award a disability pension, no matter how many times the courts find a denial to be unlawful, would limit potential abuses of power by pension agencies, and ensure that more disabled civil servants receive the pension benefits they deserve. We must trust in the abilities of New York's judges and empower them, in the appropriate cases, to find injured workers to be disabled and award them the disability retirement pensions to which they are entitled. ■

1. *Mashnouk v. Miles*, 55 N.Y.2d 80, 88 (1982).
2. *O'Marah v. Levitt*, 35 N.Y.2d 593, 596 (1974).
3. *VR Equities v. N.Y. City Conciliation & Appeals Bd.*, 118 A.D.2d 459 (1st Dep't 1986).
4. 22 N.Y.2d 601 (1968).
5. *Id.* at 605–06 (citing *Daley v. Bd. of Estimate City of N.Y.*, 267 A.D. 592 (2d Dep't 1944)).
6. 267 A.D. 592.
7. 88 N.Y.2d 756 (1996).
8. *Id.* at 761 (citing *Brady*, 22 N.Y.2d 601).
9. 217 A.D.2d 660 (2d Dep't 1995).
10. *Id.* at 660.
11. 165 A.D.2d 727 (1st Dep't 1990).
12. *Id.* at 728.
13. *Meyer v. Bd. of Trustees*, 90 N.Y.2d 139 (1997).
14. Index No. 101666/13 (Sup. Ct., N.Y. Co. May 1, 2014).
15. *Id.* (citation omitted).
16. *Borenstein*, 88 N.Y.2d 756; *Canfora v. Bd. of Trustees*, 60 N.Y.2d 347 (1983).
17. CPLR 7804(h).
18. *Evans v. City of N.Y.*, 145 A.D.2d 361 (1st Dep't 1988); *Archul v. Bd. of Trustees*, 93 A.D.2d 716 (1st Dep't), *aff'd*, 60 N.Y.2d 567 (1983).
19. *Zamelsky v. N.Y. City Emps.' Ret. Sys.*, 55 A.D.3d 844, 845 (2d Dep't 2008).
20. *Manza v. Malcolm*, 44 A.D.2d 794 (1st Dep't 1974); *Russo v. Bd. of Trustees*, 143 A.D.2d 674 (2d Dep't 1988).
21. *Manza*, 44 A.D.2d 794; *Muffoletto v. N.Y. City Emps.' Ret. Sys.*, 198 A.D.2d 7 (1st Dep't 1993); *Borenstein*, 88 N.Y.2d 756; *Scotto v. Bd. of Trustees*, 76 A.D.2d 774 (1st Dep't 1980), *aff'd*, 54 N.Y.2d 918 (1981).
22. *Pell v. Bd. of Educ.*, 34 N.Y.2d 222 (1974).
23. *Borenstein*, 88 N.Y.2d 756; *Meyer*, 90 N.Y.2d 139.
24. *Meyer*, 90 N.Y.2d at 147 (internal citations omitted); *Baranowski v. Kelly*, 95 A.D.3d 746 (1st Dep't 2012).
25. *Brady v. City of N.Y.*, 22 N.Y.2d 601 (1968); *Kiess v. Kelly*, 75 A.D.3d 416 (1st Dep't 2010); *see Diaz v. Kelly*, 98 A.D.3d 425 (1st Dep't 2012); *Kelly v. Bd. of Trustees*, 47 A.D.2d 892 (1st Dep't 1975).
26. *Costello v. Bd. of Trustees*, 63 A.D.2d 894 (1st Dep't 1978); *Bennett v. Bd. of Trustees*, 20 A.D.2d 522 (1st Dep't 1963).
27. *Meyer*, 90 N.Y.2d at 145–46.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am currently a mid-level associate at a prominent New York law firm. Two years ago, I served as the foreperson of the jury in a medical malpractice trial in Manhattan Supreme Court. After the conclusion of the trial, we returned a verdict in favor of the defendant. I recall that as everyone was filing out of court, the plaintiff's counsel (Peter Perturbed) approached me and began to speak in a harsh manner as to his and his client's dissatisfaction with the verdict. We then walked in different directions out of court and I just wrote Peter's behavior off as just sour grapes from another obnoxious lawyer.

Last month, the partner in charge of my department came into my office and said he received a long-winded email from Peter that accused me of lying during the voir dire process prior to trial and being unfairly biased toward his client. As much as I know that my superiors honestly believe that I would not act in the manner claimed by Peter, I am deeply disturbed by the scurrilous accusations made against me and I am concerned that it could damage my professional reputation in other avenues of the legal community.

My question to the Forum: Could Peter be subject to discipline if I report him, and if so, what level of punishment could he receive?

Sincerely,

Heather Harassed

Dear Heather Harassed:

The simple answer to your question is "yes." Peter may be subject to discipline. In fact, in *In re Panetta*, 127 A.D.3d 99 (2d Dep't 2015), the Appellate Division, Second Department recently dealt with a situation similar to what you describe. In that case, rather than issue a private sanction, the court unanimously held that a public censure was the appropriate sanction for harassing conduct toward a jury foreperson, who also was an attorney.

The situation you describe is governed by Rule 3.5 of the New York Rules of Professional Conduct (RPC), Maintaining and Preserving the Impartiality of Tribunals and Jurors. While lawyers are strictly prohibited from having any direct or indirect communication with a juror during trial under Rule 3.5(a)(4), post-trial contact with jurors is a different matter. Generally, post-trial communications and contact with jurors are permissible after the jury has been discharged under Rule 3.5(a)(5) unless "(i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service." Rule 3.5(a)(5); *see also* NYSBA Comm. on Prof'l Ethics, Op. 246 (1972) (following discharge of a jury, lawyers may communicate with jurors concerning the verdict and case); Am. Bar Ass'n Ethical Consideration 7-29 ("After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases.").

Here, Peter Perturbed appears to be in violation of Rule 3.5(a)(5)(iii), communicating with a juror after the jury has been discharged, by a communication that involves harassment. Peter also appears to have violated Rule 8.4(h) of the RPC (formerly Disciplinary Rule 1-02(A)(7)), which provides that a lawyer or law firm shall not "engage in any conduct that adversely reflects on the lawyer's fitness as a lawyer."

As stated at the outset, *In re Panetta* illustrates our point. The attorney's client in the underlying case sued the city after she suffered a fractured foot, allegedly due to a defect in the sidewalk. One of the jurors, who at the time was a first-year associate at a law firm, was selected as the foreperson of the jury. After a trial in 2008, the jury returned a unanimous verdict in favor of the city. The trial judge permitted the attorneys to approach the jurors and, if they wanted to, to talk about the outcome of the case. The attorney spoke with the lawyer/foreperson, stating, in sum and substance, that "the verdict doesn't make any sense," and asked how she arrived at the decision to find for the defendant. The lawyer/foreperson did not want to discuss the case, telling the attorney she felt "attacked" by his approach.

Thereafter, the attorney "had a hunch" that the lawyer/foreperson had "lied" during the voir dire of the jury panel and also believed that she had improperly influenced the jury in its deliberations. As a result, he researched her background and discovered that she was a first-year associate at a law firm. He then called her firm and confirmed that the firm defends litigants when they are sued by others. Although the attorney believed that there was a violation of Rule 3.5(d) of the RPC, which prohibits misconduct by lawyers on juries or in voir dire, he put the matter aside in 2008 and did not make a complaint. Unfortunately, he did not let the matter end there. Four years later, the attorney revisited his grievances against the lawyer/foreperson, who was now a partner at another firm. He sent this email:

> SUBJECT: ALL THESE YEARS LATER I WILL NEVER FORGET . . . THE LIAR . . .
>
> After numerous multi-million dollar verdicts and success beyond anything you will ever attain in your lifetime, I will never forget you: the bloated Jury [Foreman] that I couldn't get rid of and that misled and hijacked my jury. You lied, said you had no involvement in defense – no biases. It was all bullshit. You deprived a very nice lady, [Patty] Hartman, from recovering in a smoking gun liability case. You either had no idea of what the concept of probable cause meant or you misled the jurors because you were defense oriented.

The attorney also went on to disparage the city's attorney, writing, "You rooted for the underdog, a totally incompetent corporate counsel, out-

gunned and stupid. I will never forget the high-fives after the trial you tanked[,] between you and a clueless [corporation] counsel." The attorney's message concluded with '"I feel attacked.' Well you should get attacked you A-hole. Good Luck in Hell."

When the Grievance Committee ultimately questioned him about his behavior, the attorney expressed remorse and explained that he was going through an emotional "roller coaster" due to a family illness and financial pressures when he sent the email. In reviewing the totality of the circumstances, the Second Department found the isolated nature of the attorney's conduct, the "stressors" that the attorney was facing in his personal life around the time he sent it, and his expressions of regret and remorse, to be mitigating factors in his punishment. *Panetta*, 127 A.D.3d at 102. The court ultimately concluded, however, that the attorney's "email . . . was designed to harass [the lawyer/foreperson], and his conduct adversely reflects on his fitness as a lawyer," in violation of Rules 3.5(a)(5)(iii) and 8.4(h), and determined that the attorney was to be publicly censured for his professional misconduct.

Other courts have similarly stated that post-verdict communications with jurors that are abusive or harassing in any way would violate their state's ethical rules of conduct and would expose the attorneys to sanctions. *See, e.g.*, *Struski v. Big Y Foods, Inc.*, 2000 WL 1429478, at *5 (Conn. Super. Ct., Sept. 11, 2000); *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425 (Tex. 1998) (holding that the state may regulate an attorney's post-verdict communications with jurors to prevent juror harassment); *Lind v. Medevac, Inc.*, 219 Cal. App. 3d 516 (Cal. Ct. App. 1990) (attorney's letter to members of jury after trial asserting that fellow member of bar may employ "sharp investigative tactics" to "impeach" jury's verdict and have it set aside as "improper" violates the RPC).

Even judges can be sanctioned for improper post-verdict jury communications. *In re Mathesius*, 188 N.J. 496 (2006), is an example. In that disciplinary proceeding, a judge's post-verdict remarks to jurors, which were critical of the jurors for their verdict and were viewed as "insulting and denigrating" to them, were found to violate various provisions of New Jersey's Code of Judicial Conduct. *Id.* at 503–05. Because the judge was cited for numerous other incidents of misconduct and was found to have violated various canons of New Jersey's Code of Judicial Conduct, he was ultimately suspended for 30 days without pay from his judicial duties. *Id*. at 505–15, 528.

Your question raises issues similar to those in *Panetta*. Peter Perturbed here has communicated with your employer and has made accusations about you two years after the trial in what appears to be an attempt to harass or embarrass you. Without the benefit of all the facts, it is unclear whether Peter's conduct rises to the level of public censure or some other form of discipline, such as a monetary fine, suspension or some other private sanction. There are several factors that must be considered, including, *inter alia*:

1. Was this an isolated incident of Peter's misconduct?
2. Has Peter contacted other jurors in this case or in other cases?
3. Has Peter been involved in other incidents of misconduct? Etc.

What is clear, however, is that communications that harass jurors violate Rule 3.5(a)(5)(iii) and may also be a violation of Rule 8.4(h) (conduct that adversely reflects on the lawyer's fitness as a lawyer). It should be obvious to any attorney that this kind of contact with a juror is inappropriate and is likely to get one in trouble. Harassing a juror goes to the very integrity of the judicial system since it serves to intimidate jurors and discourage jury service. If an attorney has a legitimate belief that a juror has somehow acted inappropriately, he or she has a remedy. Under Rule 3.5(d), the attorney must promptly report such impropriety or misconduct by the juror to the court. That is the correct way to address any concern an attorney may have with respect to a juror's purported bias or dishonesty during the process. Attorneys should not take matters into their own hands and send accusatory communications to a juror. *See* N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Formal Op. 743 (May 18, 2011) ("In the event the lawyer learns of juror misconduct . . . the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must promptly comply with Rule 3.5(d) and bring such misconduct to the attention of the court, before engaging in any further significant activity in the case.").

Should you report this kind of conduct? We think that reporting this conduct is appropriate. Under Rules 3.5(d) and 8.3 of the RPC, you may be ethically bound to report the misconduct you have described. Rule 3.5(d) states, "A lawyer shall reveal promptly to the court improper conduct by a member of the venire or juror, *or by another toward a member of the venire or a juror* or a member of his or her family of which the lawyer has knowledge" (emphasis added). Moreover, Rule 8.3, "Reporting Professional Misconduct," expressly provides that "(a) A lawyer

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

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who *knows* that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation" (emphasis added). Here, in our view, Peter has crossed the line, and this type of inappropriate behavior should not be tolerated.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com) and
Maryann C. Stallone, Esq.
(stallone@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I'm a commercial litigator in New York. I recently was asked to mediate a commercial contract case, which is pending in the Commercial Division in the Supreme Court of New York, for one of my clients who is the defendant in the action. The morning right before commencement of the mediation, my client informed me that his business has been doing "lousy" and that even if the parties were to reach a settlement, he nevertheless intends to file for bankruptcy before the settlement payment becomes due. During that conversation, he emphasized that this information is confidential and cannot be disclosed to anyone. During the mediation, plaintiff's counsel communicated a final demand to my client, which my client indicated he was willing to accept. I did not disclose the information that my client shared with me, either to the mediator or plaintiff's counsel.

My question to the Forum: Did I have an obligation to disclose my client's confidences under the circumstances? What should I have done? Is there anything I should do at this time?

Sincerely,
Concerned Counsel

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and is unprepared to address the new matter, the court may grant a short adjournment to allow your adversary to secure the witness or proof needed.[22] The court may require the moving party who seeks to amend the pleadings to pay "the objector the costs of securing the belated proof."[23] Even though CPLR 3025(c) is a generous rule, "an amendment at the trial stage that requires an adversary to get new proof to meet it is not always remediable by mere conditions and is therefore not granted for the asking."[24]

Motion to Amend Pleadings to Assert a New Theory

You may amend your pleadings during trial to assert a new theory if the amendment won't prejudice your adversary.[25] A court might commit error if it allows you to amend your pleadings without granting an adjournment to your adversary to permit your adversary to prepare a defense; a new trial might be required.[26] A court will likely grant your motion if "the responsive proof would have been the same whichever conclusory theory or ground had been pleaded."[27]

In opposing your adversary's motion, demonstrate that your adversary's motion should be denied because you "would have prepared different proof with which to respond to the altered ground."[28] Or, in addition to or in the alternative, ask for an adjournment to "gather[] . . . such proof."[29]

Motion to Amend the *Ad Damnum* Clause

The *ad damnum* is "the amount demanded in the wherefore clause of a money complaint."[30] A party asserting a counterclaim may also move to amend its *ad damnum* clause. A court has the discretion to grant your motion to amend your *ad damnum* clause before, during, or after a trial absent prejudice to your adversary.[31]

Formally move to amend the *ad damnum* clause.[32]

A court will likely grant your motion to amend the *ad damnum* clause if the error is a "typographical oversight . . . [and] the amount involved was elsewhere stated in the pleading."[33]

CPLR 3017(c) bans *ad damnum* clauses in complaints alleging personal injury or wrongful death.[34] A party may demand a statement of the amount the pleader believes it's entitled to.

One scholar has noted that the First Department's rule on amending ad damnun clauses has become relaxed, whereas the Third Department's rule has become stricter.[35] Follow your department's rules.

Post-Trial Motions

You may move post-trial if you "disagree[], in whole or in part, with the verdict."[36] Any party may move for post-trial relief.[37]

Consult CPLR 4404(a) if you're moving for relief after a jury trial. Consult CPLR 4404(b) if you're moving for relief after a bench (nonjury) trial.

Under CPLR 4404(a), a court may set aside the verdict and grant judgment to the party entitled to a judgment as a matter of law. This is also called judgment notwithstanding the verdict, or judgment nov.[38] Or a court may set aside the verdict and order a new trial on the basis that the verdict is contrary to the weight of the evidence.

You may move post-trial under CPLR 4404 even if you didn't move under CPLR 4401 (for a judgment as a matter of law, also known as a directed verdict) during the trial: "One is not a condition precedent to the other."[39] For more information on moving for a directed verdict, consult Part XLI of this series on civil-litigation documents in the May 2015 *Journal*. Nonetheless, "a party who loses the verdict and wants judgment n.o.v. is in a more consistent position if [the party] can show that [the party] moved for judgment as a matter of law before the jury retired."[40]

A court may grant relief CPLR 4404 sua sponte.[41]

Practitioners move under CPLR 4404 "promptly upon the delivery of the verdict [or court's decision], and made orally in the courtroom."[42] But each party is entitled to submit a formal, written motion.[43]

If you submit a written motion, comply with CPLR 4405 and 4406.[44] Your motion must be made to the judge who presided over the trial.[45] You have 15 days after the decision, verdict, or discharge of the jury to move post-trial under CPLR 4404.[46] The 15-day period isn't a statute of limitations; a court has the discretion to extend the time period under CPLR 2004.[47] Appealing a final judgment won't "cut off the trial court's power to grant a post-trial motion under CPLR 4404, but argument or submission of the appeal will."[48]

You're allowed "only one formal post-trial motion under CPLR 4404."[49] And "each party shall raise by the motion or by demand under rule 2215 every ground for post-trial relief then available [to the party]."[50]

If you lose your CPLR 4404 motion, you may still obtain relief under CPLR 5015(a), "the statute that authorizes vacatur of judgments on certain grounds."[51] Some of the grounds under 5015(a) include newly discovered evidence, or fraud, misrepresentation, or other misconduct.

The technical rules for moving after a bench trial under CPLR 4404(b) are the same as moving after a jury trial under CPLR 4404(a). The court's powers under CPLR 4404(b) are "more extensive" than under CPLR 4404(a).[52] Under CPLR 4404(b), the court may "make new findings and conclusions, take additional testimony if need be, and render a new and entirely different decision, while in a trial by jury the judge's powers are necessarily more restricted."[53]

An appellate court "stands in the same position as the trial court."[54] After a bench trial, an appellate court "can therefore make whatever findings it determines the trial court should have made and render judgment itself."[55]

Motion for a Judgment Notwithstanding the Verdict (JNOV or Judgment NOV)

The standard is similar whether you move before the verdict under CPLR 4401 or whether you move after the

verdict under CPLR 4404(a) for a judgment nov.[56]

A court will grant your motion for judgment nov if "no valid line of reasoning and permissible inferences [exist that] could possibly lead rational [people]" to the jury's conclusion based on the evidence at trial.[57]

A court may grant judgment nov to defendants or plaintiffs.[58]

If a plaintiff hasn't made out its prima facie case, judgment nov for the defendant is appropriate.[59]

A court may not consider credibility on a motion for judgment nov.[60]

Move for judgment nov if a jury makes findings based on its own theory of the case but the evidence doesn't support the theory.[61]

A jury's inconsistent verdict may result in a new trial and may result in a judgment nov for a party.[62]

If a court grants judgment nov under CPLR 4404 — after the jury has returned its verdict and the court disagrees with the verdict — an appellate court may reinstate the verdict if it disagrees with the trial court's ruling.[63] If a court grants a directed verdict under CPLR 4401 without letting a jury consider the issues, an appellate court that disagrees with the judge has no verdict to reinstate and will therefore order a new trial.

Motion for a New Trial on the Weight of the Evidence

Under CPLR 4404(a), a court may grant a new trial "instead of awarding outright judgment to the other side."[64] A court will grant a new trial if it's "dissatisfied with the verdict, enough to reject it but not quite enough to direct judgment notwithstanding it."[65] A court might order a new trial when it isn't confident that a party is entitled to judgment as a matter of law and thus finds the verdict contrary to the weight of the evidence.[66] Weighing the evidence is in the court's discretion.[67]

Because no precise standard exists to weigh the evidence, "[t]he key is the judge's common sense reaction to the evidence."[68] The verdict might be against the weight of the evidence when "something about the case . . . arouses [the court's] suspicions and makes it uncomfortable, although [the court] cannot say clearly that the result can go in only one direction."[69] The verdict might be against the weight of the evidence if a court believes that the testimony at trial was "incredible, or [that a witness's] story . . . [is] morally improbable."[70] The verdict might be against the weight of the evidence if counsel's misconduct influenced the jury's verdict.[71] A court may grant a new trial even if the "evidence is sufficient to support the verdict."[72]

CPLR 4404(a) allows a court to grant a new trial in the interest of justice.[73] A court will order a new trial in the interest of justice only on evidence that "substantial justice has not been done."[74] Any ground you can raise on appeal, raise in your motion for a new trial in the interest of justice: "[T]he scope of such a motion is limited only by counsel's imagination."[75]

Defining the weight of the evidence is "elusive if not impossible: the 'weight' of the evidence involves the judge's viscera as much as [the judge's] intellect."[76] It is based on a judge's experiences in presiding over cases and writing decisions.[77]

Comply with CPLR 4405 and 4406 when moving for a new trial based on the weight of the evidence, as explained above. You may move orally. You may also move by filing formal, written motion papers with the judge who presided at the trial: "[I]t is only that judge who holds the scale on which the evidence in the case may be 'weighed.'"[78] Move within 15 days after the verdict.[79]

Motion to Reconsider

Ask the court to "order the jury to retire again to reconsider the verdict because the ultimate decision is not established by the findings of fact the jury has indicated."[80]

Motion for a New Trial: Jury Prejudice or Jury Tampering

Although a court rarely grants motions for a new trial, a court might be inclined to grant your motion if you can demonstrate jury prejudice, misconduct, or tampering.[81] You might, for example, discover that one of the jurors is related to the defendant but that the juror never disclosed that information during jury selection.[82]

Additur and Remittitur

Additur and remittitur are mechanisms by which the court may raise or lower, respectively, a jury's verdict on damages in a money action if the court believes that the jury's damage award is inadequate or excessive.[83] A remittitur can reduce a jury's verdict "to a fraction of what the jury has set, and an additur can multiply it several fold."[84]

Generally, a court may not raise or lower the amount "directly, at least not in personal injury and like cases involving unliquidated damages, because the setting of damages is strictly a jury function."[85] A court may grant a new trial "'unless' the defendant stipulates to a higher sum ('additur') or the plaintiff stipulates to a lower one ('remittitur')."[86]

The amount the court sets "and the one to which the party is required to stipulate or face a new trial, represents the minimum (in the case of additur) or the maximum (in the case of remittitur) found by the court to be permissible on the facts."[87]

Additur and remittitur are within a trial court's and an intermediate appellate court's (Appellate Division) discretion.[88] Judges will agree to disagree about the maximum and minimum amounts of a jury's verdict.[89] The amount the trial court chooses is "the product of the [judge's] whole experience brought to bear on the facts that have been tried before [the judge]."[90] An appellate court may disagree with the trial judge and readjust the trial court's amount.[91]

A court may alter a jury's damage award if the award "'deviates materially from what would be reasonable compensation.'"[92]

If the court orders a new trial, the trial is "usually limited to damages only, but it can be for liability as well if . . . liability is intertwined with damages . . . [such as] where . . . difficult

questions of impact or causation [exist] in a personal injury case."[93]

The law used to be that a party's stipulation to a high (additur) or low (remittitur) amount meant that the party was barred from appealing "even the liability finding on the ground that signing the stipulation deprived the party of 'aggrieved' status."[94] A party may now appeal the liability finding despite the stipulation.[95] If you accept a stipulation and "final judgment is entered on the changed figure . . . [your adversary] can still appeal it."

If you're confronted with an additur or remittitur order, you have several options.[96] You may refuse a stipulation and opt for a new trial. Or you may stipulate to the court-set figures. Or you may appeal the court's order. Which option you choose will depend on whether you stand to do better in a new trial.[97]

If you're seeking to challenge the amount of an additur or remittitur, challenge it before a new trial occurs.[98]

In the next issue of the *Journal*, the *Legal Writer* will discuss motions for attorney fees. ■

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct professor of law at Columbia, Fordham, NYU, and New York Law School. He thanks court attorney Alexandra Standish for her research.

1. 2 Edward L. Birnbaum, Carl T. Grasso & Ariel E. Belen, New York Trial Notebook, § 37:60, at 37-18 (2010).
2. *Id.* § 37:61, at 37-18.
3. *Id.* (citing CPLR 3025(b)).
4. CPLR 3025(b).
5. Aaron J. Broder, Trial Handbook for New York Lawyers § 28.4, at 526 (3d ed. 1996).
6. *Id.*
7. David D. Siegel, New York Practice § 237, at 82 (5th ed. 2011) (Jan. 2015 Supp.) (citing *Alrose Oceanside, LLC v Mueller*, 81 A.D.3d 574, 575, 915 N.Y.S.2d 643, 644 (2d Dep't 2011); *Am. Cleaners, Inc. v. Am. Int'l Specialty Lines Ins. Co.*, 68 A.D.3d 792, 794, 891 N.Y.S.2d 127, 129 (2d Dep't 2009)).
8. Birnbaum et al., *supra* note 1, § 37:60, at 37-18 (quoting CPLR 3025(c)).
9. Siegel, *supra* note 7, § 404, at 707.
10. Birnbaum et al., *supra* note 1, § 37:62, at 37-18.
11. Siegel, *supra* note 7, § 404, at 707.
12. *Id.*
13. Broder, *supra* note 5, § 28.4, at 523.
14. Siegel, *supra* note 7, § 404, at 707 (citing *Diemer v. Diemer*, 8 N.Y.2d 206, 212, 203 N.Y.S.2d 829, 834, 168 N.E.2d 654, 658 (1960)).
15. *Id.* § 404, at 708.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* (citing *Harbor Assocs. Inc. v. Asheroff*, 35 A.D.2d 667, 668, 317 N.Y.S.2d 897, 899 (2d Dep't 1970)); *Diemer*, 8 N.Y.2d at 212, 203 N.Y.S.2d at 834, 168 N.E.2d at 658; *but see* Broder, *supra* note 5, § 28.4, at 524 (citing *Andres v. Perry*, 81 A.D.2d 848, 849, 438 N.Y.S.2d 852, 853 (2d Dep't) ("And, even after the testimony had been completed at trial, counsel did not see fit to move to conform the pleadings to the proof. Clearly, plaintiffs consistently and persistently chose to proceed solely on the theory of negligence. Accordingly, the judgment must be reversed and the complaint dismissed."), *aff'd*, 54 N.Y.2d 795, 796, 443 N.Y.S.2d 610, 610–11, 427 N.E.2d 769, 769 (1981)).
21. *Id.* § 404, at 708.
22. *Id.*
23. *Id.*
24. *Id.*
25. Birnbaum et al., *supra* note 1, § 37:64, at 37-20; Broder, *supra* note 5, § 28.4, at 525 (citing *Nixon Gear & Machine Co. v. Nixon Gear, Inc.*, 86 A.D.2d 746, 746 , 447 N.Y.S.2d 779, 781 (4th Dep't 1982)).
26. Birnbaum et al., *supra* note 1, § 37:64, at 37-20.
27. Siegel, *supra* note 7, § 404, at 707; *accord* Birnbaum et al., *supra* note 1, § 37:64, at 37-20.
28. Siegel, *supra* note 7, § 404, at 707.
29. *Id.*
30. *Id.* § 404, at 708.
31. Birnbaum et al., *supra* note 1, § 37:63, at 37-19; Siegel, *supra* note 7, § 404, at 708–709.
32. Birnbaum et al., *supra* note 1, § 37:63, at 37-20 (citing *O'Reilly-Hyland v. Liberty Mgmt. & Constr. Ltd.*, 32 A.D.3d 765, 766, 822 N.Y.S.2d 243, 245 (1st Dep't 2006)).
33. Broder, *supra* note 5, § 28.4, at 524.
34. Birnbaum et al., *supra* note 1, § 37:63, at 37-19.
35. Siegel, *supra* note 7, § 404, at 708–709 (citing *Natale v. Pepsi-Cola Co.*, 7 A.D.2d 282, 284, 182 N.Y.S.2d 404, 407 (1st Dep't 1959)).
36. Jeffrey A. Helewitz, New York Civil Practice 154 (2000).
37. *Id.*
38. Siegel, *supra* note 7, § 405, at 709 (noting that "[t]his stands for non obstante veredicto, Latin for 'notwithstanding the verdict'").
39. Siegel, *supra* note 7, § 405, at 710.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. CPLR 4405.
47. Siegel, *supra* note 7, § 405, at 711.
48. *Id.*
49. *Id.*
50. CPLR 4406.
51. Siegel, *supra* note 7, § 405, at 711.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* § 405, at 709.
57. Birnbaum et al., *supra* note 1, § 38:20 at 38-8.
58. *Id.*
59. *Id.*
60. *Id.* § 38:21 at 38-8.
61. *Id.* § 38:22 at 38-8.
62. *Id.* § 38:27 at 38-11.
63. Siegel, *supra* note 7, § 405, at 710.
64. *Id.* § 406, at 711.
65. *Id.* § 406, at 712.
66. *Id.* § 406, at 711.
67. *Id.* § 406, at 712.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* § 406, at 711.
74. Birnbaum et al., *supra* note 1, § 38:32 at 38-12.
75. *Id.*
76. Siegel, *supra* note 7, § 406, at 711.
77. *Id.* § 406, at 712.
78. *Id.* § 406, at 713.
79. *Id.*
80. Helewitz, *supra note* 36, at 154.
81. *Id.*
82. *Id.*
83. Siegel, *supra* note 7, § 407, at 713.
84. *Id.*
85. *Id.*
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89. *Id.*
90. *Id.*
91. *Id.* § 407, at 714.
92. *Id.*
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94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Oakes v. Patel*, 20 N.Y.3d 633, 643, 965 N.Y.S.2d 752, 756, 988 N.E.2d 488, 492 (2013).

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

BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XLII — In Limine, Trial, and Post-Trial Motions Continued

The *Legal Writer* continues its series on civil-litigation documents. In the last issue of the *Journal*, we discussed trial motions, including motions for a mistrial, for a directed verdict (also called motions for a judgment as a matter of law), for a continuance, to strike, and to reopen the case. In this issue, we'll continue with trial motions. We'll also discuss post-trial motions.

Trial Motions Continued

Motion to Amend Pleadings

Under CPLR 3025(b), a party may amend or supplement its pleading at any time with leave of the court.[1] A trial court has the discretion to amend the parties' pleadings.[2] Courts permit parties to amend pleadings.[3] You must attach to your motion your proposed amended pleading. In your proposed pleading, clearly show the changes you've made or the things you're hoping to add to the pleading.[4] The proposed amendment must be sufficient on its face.[5]

Move to amend as soon as you become aware of the facts that form the basis of your motion.[6]

If you move to amend the pleadings on the eve of trial, a court will consider how long you've been aware of the facts that form the basis of your motion, whether you've offered a reasonable excuse for the delay, and whether your adversary will be prejudiced.[7]

Motion to Conform Pleadings to the Proof

Under CPLR 3025(c), a court may permit the parties to amend their pleadings "before or after judgment to conform [the pleadings] to the evidence, on such terms as may be just including the granting of costs and continuances."[8] The purpose "is to have the final judgment dictated as much as is reasonable by what the evidence actually reveals at the trial rather than by what the pleadings and bill of particulars alleged it would be."[9]

A trial court will allow you to amend pleadings to conform to the proof if your adversary isn't prejudiced.[10] Your adversary's "legitimate claim of surprise is the key" to whether your adversary has been prejudiced.[11] A court will amend the pleadings if you've advised your adversary "sufficiently of the transaction, occurrence, or event out of which the claim or defense arises . . . that a diligent lawyer could be deemed to have been on notice that the matter now sought to be changed or added by amendment could reasonably have been expected to arise at the trial."[12]

You may amend your pleadings to assert a new theory, as explained below. But you may not amend your pleadings by asserting a different cause of action,[13] such as "add[ing] a new substantive claim, otherwise barred by the statute of limitations and clearly beyond what the other side could have expected."[14]

If evidence in an examination before trial (EBT) or in another pretrial disclosure device puts your adversary "on notice of what later emerges at the trial, the claim of prejudice dissolves and the [court will likely grant the] amendment."[15]

Practitioners usually move orally, before or after judgment, to conform pleadings to the proof. But you may also move by filing a motion with the court. Make your motion to conform the pleadings to the proof before the trial judge.[16]

A court that grants your motion to amend may state on the record that the pleadings are deemed amended to conform to the evidence; the court need not issue a written decision and order if it deems the pleadings amended.[17] You may appeal the court's decision to amend the pleadings as part of an appeal from the final judgment.[18] If you seek to appeal the court's decision to amend the pleadings before the court issues a final judgment, "secure the entry of a formal order on the court's ruling [to amend the pleadings] and appeal that."[19]

> A trial court will allow you to amend your pleadings to conform to the proof if your adversary isn't prejudiced.

Trial and appellate courts may conform the pleadings to the proof sua sponte.[20]

A court may place conditions on the amendment. The conditions may include the court's granting of costs and continuances.[21] If your adversary opposes your motion to conform the pleadings on the ground of surprise

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