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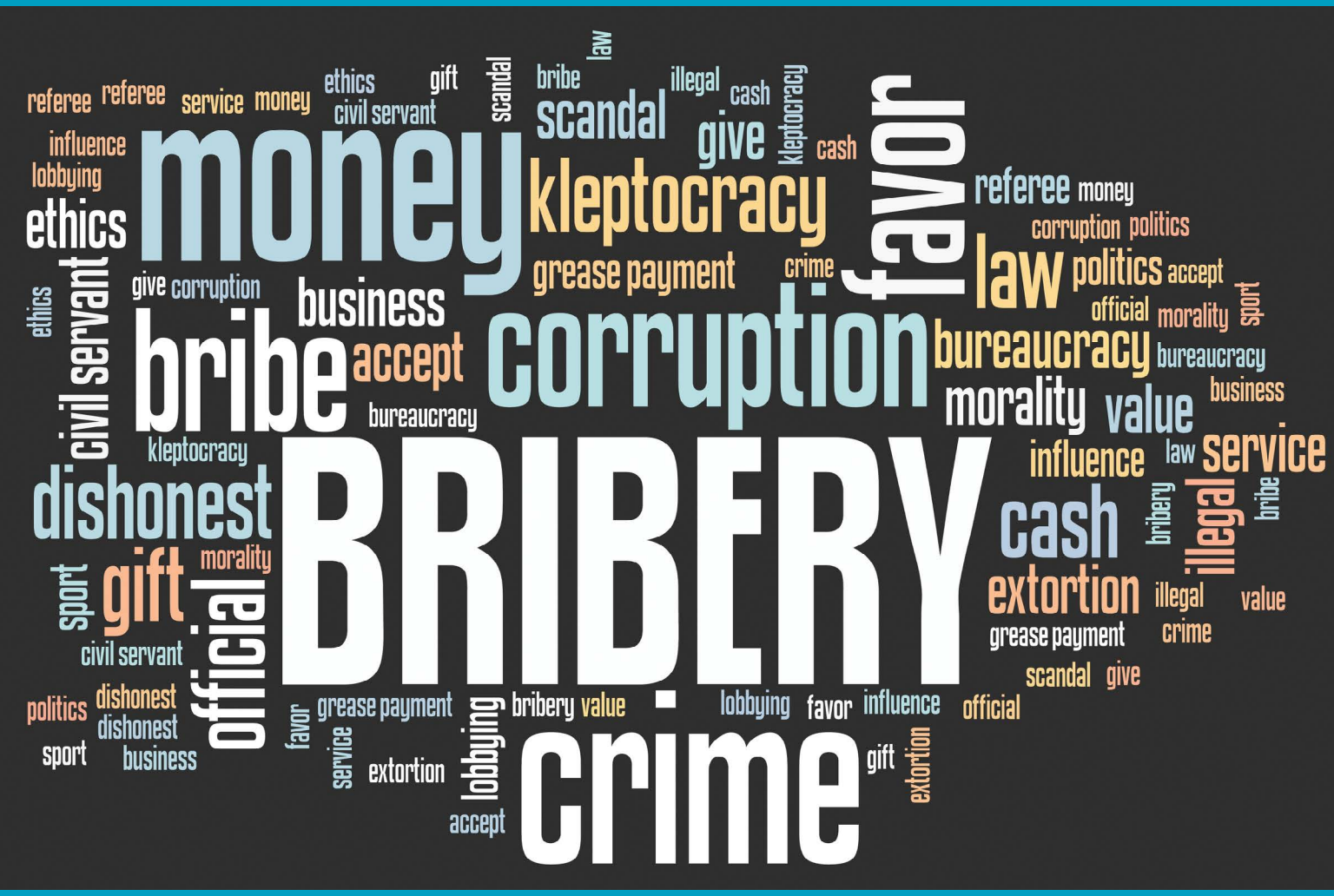
Journal



Civil RICO – The Weapon of Choice

By James A. Johnson

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CLAIRE P. GUTEKUNST

Serving Those Who Have Served Our Country

"Devotion to our nation is devotion to one another first of all."

– Rev. Dr. Gurney O. Gutekunst

My father, Reverend Dr. Gurney O. Gutekunst, a World War II veteran, was the keynote speaker at the Memorial Day Remembrance Ceremony in his upstate town last year. His moving address has a timely message for us as we consider and address the legal needs of veterans. Seventy-plus years after the war ended, my father still feels deeply the camaraderie and devotion soldiers have for one another, and how that is rooted in their shared service, love of country and belief in American ideals. In this message, with his permission, I will quote portions of his address to emphasize the humanity behind the uniform, and to urge that we make that the basis for how we care for and support our veterans.

Some of our veterans come home physically injured and some with invisible wounds of war – post-traumatic stress disorder, traumatic brain injury, depression. Reentry into society can be hard for these veterans, who may have difficulty accessing the services and support they need, or even asking for help. We as a society may not be attuned to their needs, and because most of us do not understand their experience, we may misinterpret a silence or an odd gaze as evidence of hardening, when nothing is further from the truth. As my father noted: "In our day, there is a tendency to believe that war makes men and women impersonal. I do not think that this has ever been so. It is war that is impersonal, not the men and women involved in war."

The problems of veterans who enter the criminal or family justice system often stem from their unique experiences, and attorneys who work with veterans need specialized training to address these issues. The bar has responded. Our Committee on Veterans has taken that as its mission. It has produced a reference/referral guide – which we are currently updating – for use by veterans and service providers and provides educational programming to practitioners to help them address legal issues unique to veterans. ABA President Linda Klein, working closely with the ABA's Standing Committee on Legal Assistance for Military Personnel, has made veterans' issues the focus of her term. The Veterans Defense Program, part of the New York State Defenders Association, was the first program of its kind to address issues of veterans who, because of their experiences and injuries, find themselves enmeshed in the justice system. VDP Legal Director Art Cody, himself a veteran, wants to ensure that these veterans are not seen as separate from "troops we support," and that they get effective advocacy and the help they need. These veterans, too, are worthy of our thanks. We have a lot to learn from their sacrifices, their generosity and their understanding of what it means to love our country.

> Devotion to our nation is devotion to one another first of all. That has always been true on the frontlines of battle and it is just as true for us today. Those who fight side by side in battle and those who work side by side for the common good in peace develop a special kind of devotion for each other. Our love of country is our love of who we are together. Let us stay true to each of those who served in war for us. Let us stay true to their integrity, their loyalty and their selflessness ourselves, against all that is within us and around us that would tear us down. Stay true!

Stay true – by giving back to those who have given so much to help all of us, by ensuring that all veterans are honored and that those who have legal problems get the help they need. Start by going to www.nysba.org/veterans to find links to resources and training opportunities. Then volunteer to help. ■

CLAIRE P. GUTEKUNST can be reached at cgutekunst@nysba.org.

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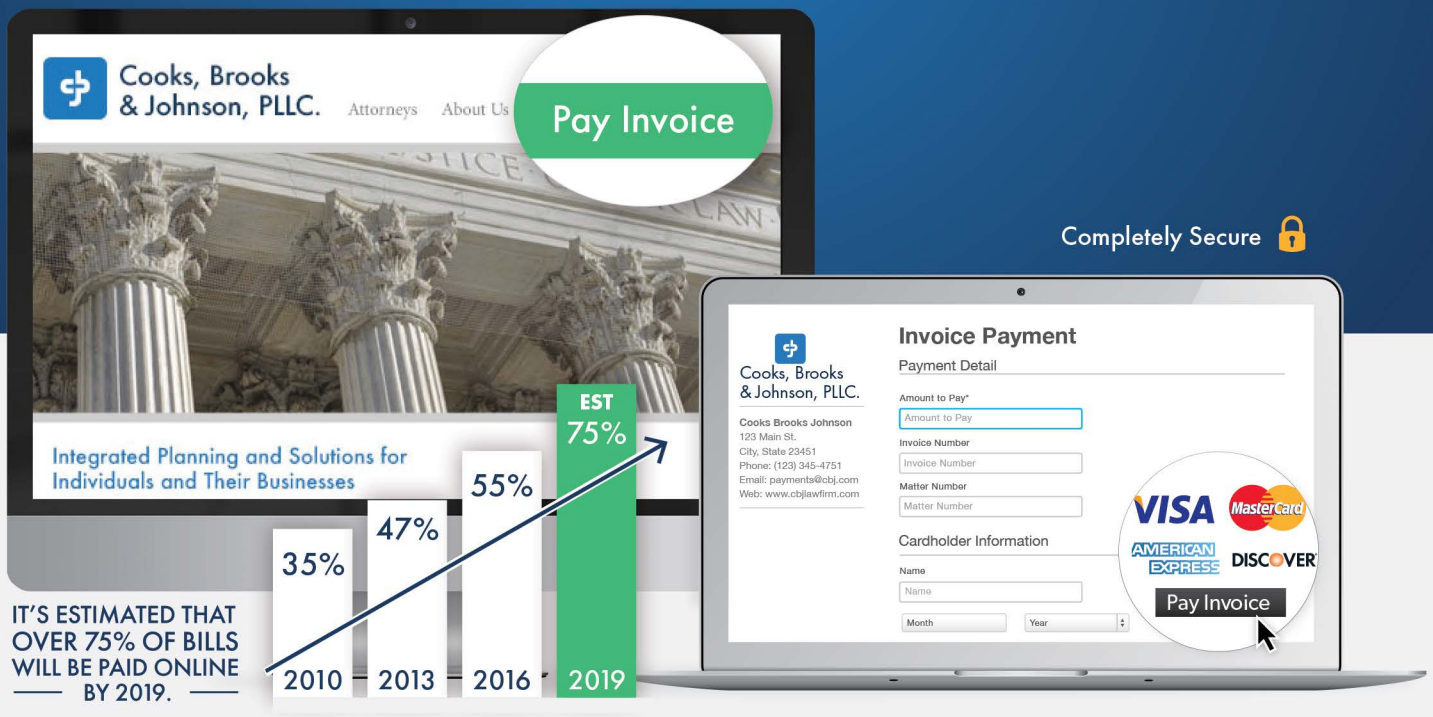

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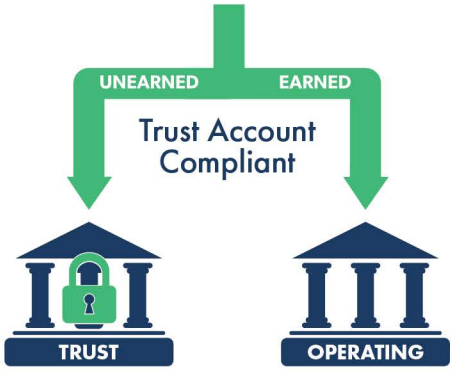

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Digital Evidence in Family Law
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November 30 Long Island
December 2 New York City

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November 29 New York City

14th Annual Sophisticated Trusts & Estates Institute
(live & webcast)
November 18 New York City

Representing the Startup Venture 2016
(live & webcast)
November 18 New York City

Meet the Justices of the Fourth Department
(3:00 p.m. – 5:00 p.m.)
November 29 Rochester

Bridging the Gap – Winter 2016
November 30-December 1 Albany, Boston, Buffalo (video conf.)
New York City (live)

Ethically Creating and Maintaining an Electronic Identity in Your Practice
(9:00 a.m. – 1:00 p.m.)
December 5 Albany
December 14 New York City

Superior Legal Writing Bootcamp for Transactional Attorneys
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December 7 New York City

Superior Legal Writing Bootcamp for Litigators
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December 8 New York City

Gain the Edge: Negotiation Strategies for Lawyers
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Storytelling for Lawyers with William Bernhardt
(9:00 a.m. – 12:30 p.m.; live webcast)
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Advanced Real Estate Topics 2016
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December 12 New York City

Disabilities in the Legal Profession
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December 14 Syracuse
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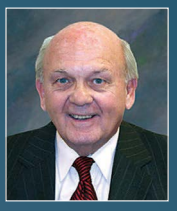

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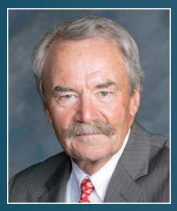

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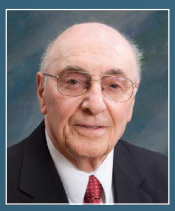

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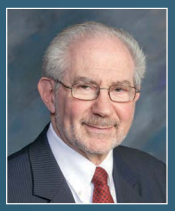

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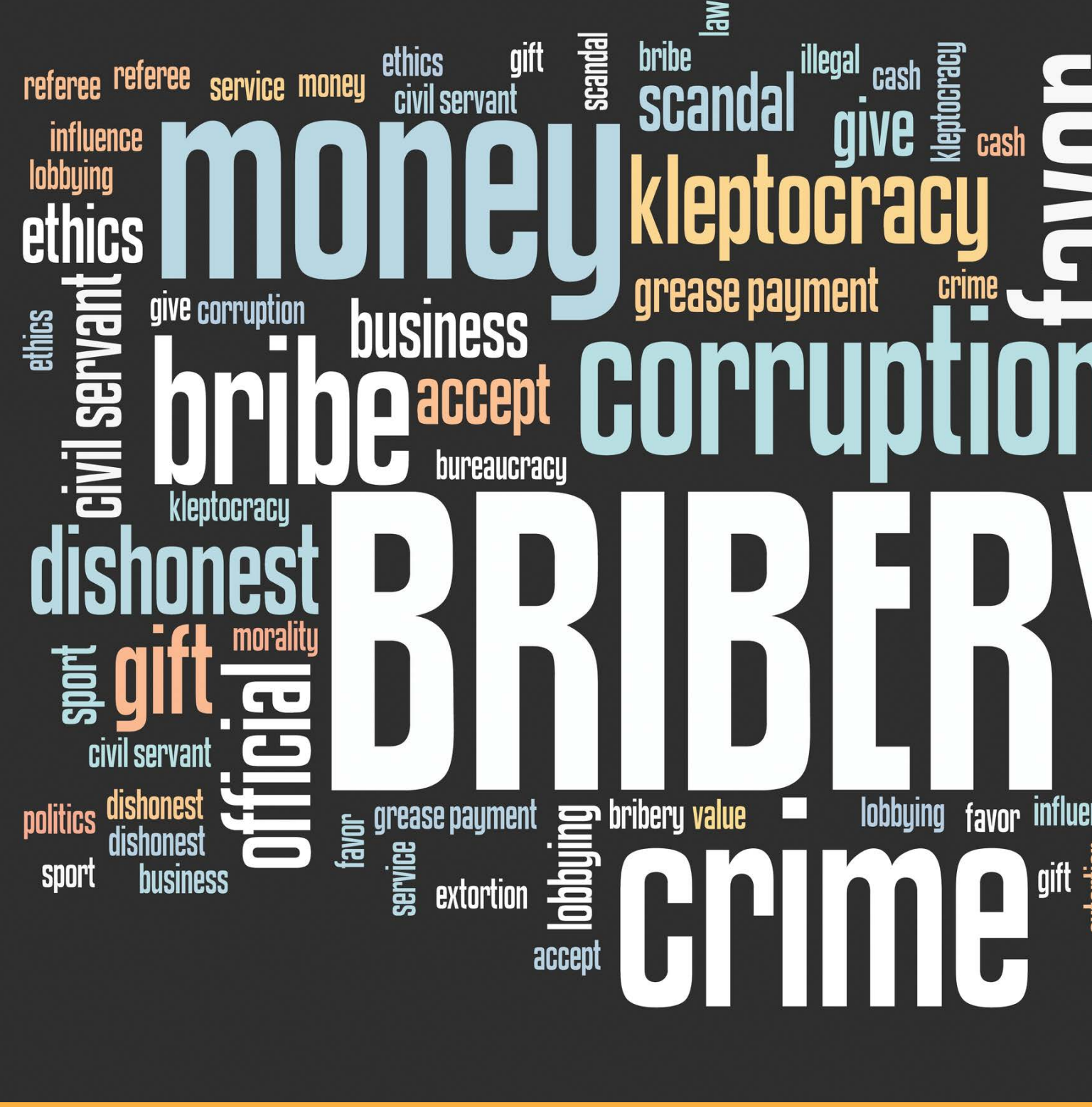

Civil RICO – The Weapon of Choice

By James A. Johnson

Introduction

The Racketeer Influenced and Corrupt Organizations Act (RICO) was enacted as Title IX of the Organized Crime Control Act of 1970.[1] The Act sought to eradicate organized crime in the United States by providing enhanced and novel legal tools. Apart from governmental intervention, civil RICO cases rarely have anything to do with organized crime. Since 1985, RICO has become the weapon of choice for civil plaintiffs because of the broad and liberal construction of the statute and the potential for the litigation equivalent of terror or a thermonuclear device – *the availability of treble damages.*

James A. Johnson (johnsonjajmf@hotmail.com) of James A. Johnson, Esq. in Southfield, Michigan, is an accomplished Trial Lawyer. Mr. Johnson is an active member of the Massachusetts, Michigan, Texas and Federal Court Bars. He concentrates on Insurance Coverage, serious Personal Injury and Federal Crimes. He can be reached at www.JamesAJohnsonEsq.com.

Who May Sue

This weapon of choice has no biases. Civil RICO can be utilized by institutions, corporations, banks, brokerage firms and a bevy of other individuals and associations, as plaintiffs and counterclaims by defendants. The Civil RICO cause of action is created by 18 U.S.C § 1964(c):

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . .[2]

To recover damages requires proof of concrete financial loss and not injury to a valuable intangible property interest.

The purpose of this article is to provide guidance and an advance starting point on Civil RICO claims. An additional purpose is to push the jurisprudential envelope forward and to inspire scholarship. Civil RICO is intended for use by general practitioners, private law firms, in-house corporate law departments and government agencies. This article touches the high points and sets out specific details of prosecuting and defending a RICO claim. Additionally, the information herein is designed to invoke the question by plaintiffs: is there a RICO claim or count in the facts of my case? And, a similar question by defendants: how can I dismiss this RICO count or lawsuit?

The civil racketeering provisions of RICO involve three main sections of the statute: § 1961 provides the definitions, § 1962 describes the prohibited conduct and § 1964 details the remedies. Federal subject-matter jurisdiction is conferred by § 1964(c), which creates the civil RICO cause of action. Personal jurisdiction is conferred by § 1965, which authorizes nationwide service of process. Section 1965(a), the principal venue provision, permits a party to institute a civil RICO action in any district in which a defendant resides, is found, has an agent, or transacts his or her affairs. Civil RICO actions are subject to a four-year statute of limitations. The limitation period accrues no later than the date the plaintiff first knew or should have known of its injury.[3]

The term *person* is broadly defined in § 1961(3) to include "any individual or entity capable of holding a legal or beneficial interest in a property." To determine who may bring suit under RICO has been liberally construed to include not only people, partnerships, corporations and joint ventures but also domestic state governmental units.[4] However, a showing of injury for a civil RICO claim requires proof of a concrete financial loss and not mere injury to a valuable intangible property interest.[5] In addition, the *by reason of* language of § 1964(c) imposes a proximate cause requirement on the plaintiff. The § 1962 violations must proximately cause the plaintiff's injury to business or property.[6] *Money is a form of property.*[7]

Sedima

The U.S. Supreme Court's 1985 decision in *Sedima*[8] is the most frequently cited RICO precedent. It eliminated a bevy of defense arguments and set out the minimal pleading standards a civil racketeering claim must meet. For example, the U.S. Supreme Court overruled earlier lower court decisions that the defendant must have been convicted of criminal offenses constituting the predicate acts and that the plaintiff must have suffered a *"racketeering injury" distinct from the harm inflicted by the predicate acts.* A RICO-based complaint must be drafted with the following instructions from *Sedima* as a guide. A violation of § 1962(c), the section on which *Sedima* relies, requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The plaintiff must allege each of the elements to state a claim. They are all equally essential components and the complaint will fail if any one of them is not adequately pleaded. The practitioner through his pleadings must articulate with great care and attention a viable racketeering claim. In addition, § 1962(a), (b) and (c) are limited in scope to conduct involving enterprises engaged in or the activities of which affect interstate commerce. It is the activities of the enterprise, not each predicate act, that must affect interstate or foreign commerce. RICO requires no more than a slight effect upon interstate commerce.[9] Even a minimal effect on interstate commerce satisfies this jurisdictional requirement.[10]

The most prominently litigated subsection of 1962 is § 1962(c). A plaintiff only has standing to sue if he or she has been injured in his or her business or property by conduct constituting the violation. The violation requires that (1) the *"person" and the "enterprise"* be distinct, (2) what constitutes being *"associated with"* an enterprise and (3) what it means *"to conduct or participate . . .* in the conduct of the enterprise's affairs."

Section 1962(c) requires that the person who violates this section must be distinct from the enterprise whose affairs that person is allegedly conducting or participating. That is because only the person and not the enterprise can be liable under § 1962(c). The person and enterprise must be separate entities. The violator of § 1962(c) who commits the pattern of predicate racketeering acts must be distinct from the enterprise of predicate racketeering acts whose affairs are thereby conducted.[11] Therefore, the unlawful enterprise itself cannot also be the person the plaintiff charges with conducting it.[12] However, in 2001 the U.S. Supreme Court unanimously decided to narrow,

but not eliminate, the concept that the RICO person had to be clearly and completely different from the RICO enterprise. In reversing the Second Circuit's decisions in *Bennett*[13] and *Riverwoods Chappaqua*,[14] the Supreme Court determined that an individual who owns a corporation *"is distinct from the corporation itself."*[15] The Court reached its decision by applying the traditional analysis that a corporation as a legal fiction is an entity different from its owners. Also note, the Eleventh Circuit never enforced the person/enterprise distinction under § 1962(c).[16]

Notwithstanding the distinctness requirement of the person and enterprise, the circuits are split as to the distinctness and *Association-in-Fact Enterprises.* It appears that the District of Columbia Circuit[17] and the Fourth Circuit[18] follow *Cedrick Kusher*.[19] However, the Eighth Circuit, in *Atlas Pile Driving Co. v. DiCon Fin. Co.*,[20] holds an opposite view in espousing that a defendant may be a member of the association-in-fact enterprise without disturbing the required distinction of § 1962(c).

The federal mail fraud statute is one of the most frequently utilized federal criminal statutes and is also one of the predicate offenses for RICO purposes. The statute provides, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations . . . places in any post office or authorized depository for mail matter . . . to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than 20 years, or both.[21]

The mail fraud statute prohibits any person from knowingly causing the use of the mail or private carrier services, like Federal Express, for the purpose of executing any scheme or artifice to defraud. The actual violation is the mailing, which must relate to the underlying fraudulent scheme. Section 1964(c) requires proof that the pattern of mail fraud violations caused the plaintiff's injury to business or property and not some other act.[22]

Because of RICO's broad definition of racketeering activity and the act's reference to mail and wire fraud as predicate offenses, it begs the question: Why not RICO? Or, should the plaintiff consider adding a RICO count to an existing state cause of action? Moreover, since an action under RICO arises under federal law, a plaintiff can elect to have access to federal court. Civil RICO is so broad and liberal that a plaintiff can take almost any given set of facts and fashion his or her pleadings and create a viable civil racketeering claim. The key is to make certain that each of the four critical elements previously set out are in place.

Damages

To recover damages requires proof of concrete financial loss and not injury to a valuable intangible property interest. The measure of damages is the harm caused by the predicate acts constituting the pattern of racketeering activity. A compensable injury is the harm caused by predicate acts sufficiently related to constitute a pattern. Plaintiffs are required to set out a reasonable basis of recovery by competent proof and not mere speculation.[23] Only damages to *"business or property" occurring by reason of* and proximately caused by the RICO violations are compensable under § 1964(c). Personal and emotional injuries are not compensable under § 1964(c). Under *Sedima,* the plaintiff's compensable injury is the harm caused by the predicate acts.[24] Future damages may be appropriate to the extent that the plaintiff can establish with reasonable certainty that future damages will occur as a result of the defendant's RICO violation.

Section 1964(c) dictates the award of treble damages for civil RICO violations. It provides that the plaintiff *"shall recover threefold the damages he sustains"* in addition to costs and attorney fees. Imposition of treble damages is required by RICO.[25]

Defenses

In order to state a case under RICO the plaintiff must allege the substantive components of an enterprise and *pattern* with specificity.[26] The plaintiff must also allege facts sufficient to support each of the statutory elements for at least two of the pleaded predicate acts and that each defendant knowingly agreed to participate in the conspiracy. However, the court must read the facts alleged in the complaint in the light most favorable to the plaintiff.[27] Where the plaintiff cannot identify the enterprise, or satisfy the pattern requirement or other statutory elements with specificity – enter Federal Rule of Civil Procedure 12(b)(6): motion to dismiss for failure to state a claim upon which relief can be granted. To the extent that any predicate acts sound in fraud, the pleading of those acts must satisfy the particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure. Rule 9(b) provides:

> Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

The complaint must describe the predicate acts with specificity and state the time, place and content of the alleged communications perpetrating the fraud.[28] All elements of the RICO cause of action must be set out factually and with sufficient specificity to permit the court to ascertain whether a viable claim exists and whether the plaintiff has standing to pursue it. Moreover, § 1961 requires that a RICO plaintiff establish that a defendant could be convicted for violating any of its predicate statutes. RICO is fundamentally a criminal statute and civil RICO is dependent upon a defendant committing criminal RICO acts as set out in § 1962.[29] To be criminal, the defendant's conduct must be committed with the mens rea appropriate to the offense. The defendant must possess the specific intent associated with the various

underlying predicate offenses.[30] The plaintiff must prove that the defendant acted *with* the appropriate mens rea.

Aider and Abettor Liability

There remains a question whether one who aids and abets a violation of § 1962 has personally violated the statute and is a defendant in a civil RICO claim under § 1964(c). In order to establish aiding and abetting for civil RICO purposes, the plaintiff must prove that the:

1. defendant was associated with wrongful conduct;
2. participated in it with the intent to bring it about; and
3. demonstrated by conduct to make it succeed.[31]

There must be evidence of an overt act by the defendant designed to aid in the process of the venture.[32] In addition, the defendant must have aided and abetted in at least two acts forming a pattern of racketeering activity.[33]

Conclusion

Where the facts reasonably support a RICO claim there is generally no significant obstacle if you follow the required dictates set out herein. Because of RICO's broad definition of racketeering activity and the act's reference to mail and wire fraud as predicate offenses, the plaintiff is only limited by his or her creativity, articulate and specific pleadings and Federal Rules of Civ. P. Rule 11. This rule imposes an obligation on a lawyer not to assert a claim unless he or she has a good faith belief in the validity of the claim. The application of civil RICO is very broad and liberal. It applies to a plethora of tort and contract claims, so long as the *core facts fit U.S.C. § 1961* and at least two predicate acts are present together with the other requirements set out herein.

The civil RICO claim, if successful, requires the imposition of treble damages and the recovery of attorney fees and costs. Another benefit is the four year statute of limitations. Moreover, the assertion of a civil racketeering claim is the key to the door of a federal court.

The defendant has a bevy of weapons to combat a RICO claim, at the beginning, by Federal Rules of Civ. P. Rule 12(b)(6) motion to dismiss. If that fails, the defense can fashion a RICO-based counterclaim against the plaintiffs out of the same facts that the plaintiffs initially advanced against them. And, after discovery is complete, a Federal Rules of Civ. P. Rule 56 motion for summary judgment may be appropriate.

This weapon of choice is analogous to "A Tale of Two Cities" – it can be the best of times or the worst of times. Therefore, civil RICO is a powerful weapon and should be a tool of advocacy in every trial lawyer's toolbox, both plaintiff and defendant. ■

1. Pub. L. No. 91-452, 84 stat. 922, 941 (1970), codified at 18 U.S.C. §§ 1961 *et seq*.
2. 18 U.S.C. § 1964(c).
3. *Rotella v. Wood*, 528 U.S. 549 (2000).
4. *County of Oakland v. City of Detroit*, 866 F.2d 839 (6th Cir. 1989).
5. *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 492 (5th Cir. 2003).
6. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 641 (2008).
7. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979); *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 976 (9th Cir.), *cert. denied*, 555 U.S. 970 (2008).
8. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985).
9. *United States v. Robinson*, 763 F.2d 778 (6th Cir. 1985).
10. *United States v. Beasley*, 72 F.3d 1518 (11th Cir.), *cert. denied*, 518 U.S. 1027 (1996); *R.A.G.S. Couture, Inc.*, 774 F.2d 1350 (1985).
11. *Bennett v. United States Trust Co. of N.Y.*, 770 F.2d 308 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).
12. *United States v. Turkette*, 452 U.S. 576, 583 (1981); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); *Old Time Enters., Inc. v. Int'l Coffee Corp.*, 862 F.2d 1213 (5th Cir. 1989).
13. *Supra* note 12.
14. *Supra* note 12.
15. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001); *Fleischhauer v. Fletner*, 879 F.2d 1290 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990).
16. *Cox v. Adm'r*, 17 F.3d 1386 (11th Cir. 1994).
17. *Yellow Bus Lines, Inc. v. Drivers Chaffeurs & Helpers Local Union 639*, 913 F.2d 948 (D.C. Cir. 1990) (*en banc*), *cert. denied*, 501 U. S. 1222 (1991).
18. *Entre Computer Centers, Inc. v. FMG of Kansas City, Inc.*, 819 F.2d 1279 (4th Cir. 1987).
19. *Supra* note 15.
20. *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986 (8th Cir. 1989).
21. 18 U.S.C. § 1341 (2012); *Bible v. United Student Aid Funds*, 799 F.3d 633, 638, 656–57 (7th Cir. 2015).
22. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647–48 (2008); *Beard v. Sachnoff & Weaver, Ltd.*, 941 F.2d 142 (2d Cir. 1991).
23. *Doe v. Roe*, 756 F. Supp. 353 (N.D. Ill. 1991); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1299 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990).
24. *Supra* note 8; *Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 671 (5th Cir. 2015); *Jackson v. Sedgwick Claims Mgmt. Serv. Inc.*, 731 F.3d 556, 563, 564, 577, 568 (6th Cir. 2013) (plaintiff must be "injured in his business or property" which bars RICO claims for personal injuries).
25. *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1998).
26. *Home Orthopedics Corp. v. Rodriguez*, 781 F.3d 521, 528–31 (1st Cir. 2015); *D. Penguin Bros., Ltd. v. City Nat'l Bank*, 587 F. App'x 663, 664 (2d Cir. 2014); *Zastrow v. Houston Auto Imports Greenway Ltd.*, 789 F.3d 553, 558 (5th Cir. 2015); *CSX Transp, Inc. v. Meserole St. Recycling*, 570 F. Supp. 2d 966 (E.D. Mich. 2008); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423 (5th Cir. 1987); *Alexander v. Rosen*, 804 F.3d 1203 (6th Cir. 2015).
27. *H. J. Inc. v. NW Bell Tel. Co.*, 492 U.S. 229, 245 (1989); *Kalitta Air LLC v. GSBD & Assocs.*, 591 F. App'x 338, 339, 345, 347 (6th Cir. 2014).
28. *Breard v. Sachnoff & Weaver, Ltd.*, 941 F.2d 142 (2d Cir. 1991); *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 940 F. Supp. 1101 (W. D. Mich. 1996); *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.; Coca Cola Enterprises, Inc.*, U.S. Court of Appeals (6th Cir. Nov. 2, 2012).
29. *Snowden v. Lexmark Int'l*, 237 F.3d 620, 624 (6th Cir. 2001).
30. *Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 908 (3d Cir. 1991); *United States v. Biasucci*, 786 F.2d 504 (2d Cir.), *cert. denied*, 479 U.S. 827 (1986); *Craighead v. E.F. Hutton & Co., Inc.*, 899 F.2d 485 (6th Cir. 1990).
31. *United States v. Diaz*, 176 F.3d 52 (2d Cir. 1999); *Armco Indus. Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475 (5th Cir. 1986).
32. *In re Sahlen & Assocs., Inc. Sec. Litig.*, 773 F. Supp. 342 (S.D. Fla. 1991); *Schultz v. Rhode Isl. Hosp. Trust Nat'l Bank, N.A.*, 94 F.3d 721, 731 (1st Cir. 1996).
33. *Banks v. Wolk*, 918 F.2d 418 (3d Cir. 1990).

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BY DAVID PAUL HOROWITZ

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"I [Gotta] Guy [for That]"

Introduction

By now we are all acquainted with the concept of retrieving deleted material from a computer or other storage device, and understand that very often deleted material can be recovered, in whole or in part. At the same time, electronic disclosure issues continue to bedevil lawyers, and constantly test the limits of our admittedly limited technical knowledge. As a result, both the bench and bar rely more and more on the advice, and guidance, of "experts" (yes, as I am typing this I am making the air quotes[1] gesture).

We are also familiar with the term "forensic," when used in conjunction with examining, cloning, and recovering files and other data from a computer or other electronic storage device. So, for example, where a court directs that one party deliver to another a "clone" (copy) of a hard drive, a forensic computer expert will duplicate that hard drive so that the clone is an exact copy, and so that nothing is altered on the original drive. The same type of expert can examine a hard drive and determine if, and when, alterations were made to the data stored on the device and, in the case of deleted files, make efforts to recover the deleted data.

When the computer being examined belongs, for example, to the attorney draftsman of a will, additional considerations come into play, most significantly the protection of privileged and confidential information on the computer. It also matters that the attorney is a non-party to the proceeding. A recent decision by Surrogate Barbara Howe, Erie County, in *In re Nunz*,[2] (*Nunz* II) addressed the issues that arise in just this scenario, and built upon a prior decision in the same proceeding (*Nunz* I).

Nunz II

In *Nunz* II, a will was offered for probate by the nominated executrix, objections were filed by children of the decedent, and the objectants to the will sought, *inter alia*, forensic analysis of the computer of the attorney who prepared the will offered for probate.

The attorney draftsman (and witness) to the will furnished an affidavit to the court wherein he stated:

> that he had "prepared the will using a Microsoft Word for Mac word processing program on an Apple IMAC computer," that he had "*deleted the digital file* [he] had created in preparing the will *immediately after* printing *a copy of the will*," and that "*any computer files or other materials* relating to the preparation of this will which were *created and/or stored in electronic or digital format have been destroyed or no longer exist*" (emphasis added by court).[3]

In response to the affidavit, the objectants sought

> production of the computer used by [the attorney] in preparing decedent's Will, and [] electronically stored information [ESI] from the computer about the draft of the Will by means of forensic analysis. The estate has opposed production and forensic analysis of the computer, and has requested, *inter alia*, that this Court grant a protective order.[4]

The court ordered that the attorney "shall ensure that the computer on which he drafted decedent's 2012 Will at issue here is preserved and is not removed, replaced or destroyed pending the further Order of this Court."[5]

Thereafter, the attorney draftsman testified at a hearing about his use of the computer used to prepare the will at issue:

> Q. With regard to the computer at issue, has that been the computer you have done your legal work on since the day you did –
>
> A. Yes.
>
> Q. – this will?
>
> A. Yes.
>
> Q. Did you use any other computer?
>
> A. I might have. I mean, I might have used other computers, sure.

Q. All right. Could you characterize – and I understand it would only be a percentage estimate –
A. Well, 95 percent of my stuff is on that computer.
Q. Okay. For the time period –
A. Of the hundreds of clients I have, yes.
Q. Okay. From –
A. And all my personal information and personal photos, yes.

* * *

A. No, no, the computer, I haven't used the computer since the order when they said not to use it and the machine has not been functioning well. It's in the closet and I'm using another computer 'cause it's just very old and it doesn't operate correctly. And then I got nervous I couldn't fix it. If I had gone and fixed it, you know – I didn't fix it, but it's still sitting at my home.
Q. Where is the physical location of the computer, in your home?
A. It's in my office in my home.
Q. Okay. And that's the address you gave –
A. Yep.
Q. – on Quaker Street? Thank you. And is the computer functioning at the present time?
A. I – the last time I operated it, it had a question mark on it and I didn't know what that meant and I made some calls and they said, you have to bring it in, and then the order came down. I said, I'm not touching this computer.
Q. Okay. So the time the computer stopped functioning was in and around the time the order came out?
A. A month – month either way, yeah.

Nunz I

Surrogate Howe's 2015 decision in *Nunz* I[6] detailed the initial proposal by objectants' counsel (Morse) for a forensic examination of the draftsman's (Perla) computer.

On May 19, 2015, Morse served an additional subpoena duces tecum upon Perla, seeking production of the Apple iMac computer he used in preparing the decedent's will. In his cover letter to Perla, Morse wrote:

> All I am looking for in this subpoena is the Apple iMac computer you told me about in connection with preparing Bill Nunz' will. *While you informed me that you deleted the file, I have a guy who thinks he can restore the hard drive and retrieve almost all of it.*
>
> *I imagine that you have concerns over confidentiality for your other clients as their work is likely to be on that computer as well. I proposed that my computer tech guy can operate under a non-disclosure order. When he restores the hard drive, we can simply do a search for all files containing the word Nunz.* You should be able to identify any that deal exclusively with Mary Jane. The remaining files would then be relevant and ultimately, *we may be able to locate the digital file used to create the will.* We can do all of this at the courthouse or any other agreed upon location (emphasis added).[7]

Not surprisingly, the court expressed hesitancy about ordering a forensic analysis of the attorney's computer by the "guy:"

> Given the complexity of e-discovery issues, something more is required from the Morse objectants than their attorney's assertions that a forensic examination of Perla's computer "*should be able* to generate an exact unsigned paper copy of the purported will" (emphasis added), and that such an examination will reveal "metadata describing the document's creation, modification and last access date" (footnote omitted).
>
> More to the point, given the potential for harm in the forensic examination process, I am not prepared to allow any e-discovery request predicated on the assertion that counsel "*ha[s] a guy who thinks* he can restore the hard drive and retrieve almost all of it" (emphasis added). Similarly, I am not prepared to allow indiscriminate access to an attorney's computer where there *may* be attorney-client privilege issues involved, or unrelated confidential information on it, based on the mere assertion by Morse that "*[his] computer tech guy* can operate under a non-disclosure order" (emphasis added). These are sensitive issues, and they need to be carefully explored and resolved *first* before any forensic examination of the computer is permitted.[8]

Electronic disclosure issues continue to bedevil lawyers.

The court directed that Morse furnish the following information about the "guy:"

> (1) the expert's name, address, qualifications and credentials;
>
> (2) the expert's opinion regarding the ability to retrieve the relevant ESI from Perla's computer, including, if being sought, what type of metadata is at issue (using the definitions set out in the *Irwin* decision, *supra*);
>
> (3) how long the process ESI discovery and examination of Perla's computer would take to complete, whether it can be done at Perla's office, or whether some other approach or place is either necessary *or desirable*;
>
> (4) what exactly the expert would need to accomplish the data retrieval; and
>
> (5) how the expert proposes to identify and protect ESI on Perla's computer which may be subject to the attorney-client privilege or to other confidentiality considerations;
>
> (6) what the expert proposes with respect to the considerations set

out in the *Commercial Division, Nassau County Guidelines for Discovery of Electronically Stored Information (ESI)*, section C, items 3, 5, 6, 8, 9, 11, 13, and 15 (available online at www.nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing-Guidelines.pdf).[9]

Finally, the court, while holding in abeyance a determination in the objectants' request for relief pending the exchange of information concerning the proposed forensic expert, directed that Perla "ensure that the computer on which he drafted decedent's 2012 Will at issue here is preserved and is not removed, replaced or destroyed, pending the further Order of this Court."[10]

Conclusion

Following the exchange of the requested information, Surrogate Howe, in her 2016 decision, reviewed the "guy['s]" qualifications, together with the detailed proposal for conducting the forensic examination, all of which will be revealed in the January 2017 column.

Until then, have a Happy Thanksgiving, Holiday Season, and New Year!

1. A gesture with raised pairs of fingers, when making a statement, to simulate quotation marks. It indicates that what is being said is ironic or otherwise not to be taken verbatim, see https://www.italki.com/question/87547.
2. 2016 N.Y. Slip Op. 51185(U), 52 Misc. 3d 1216(A) (Sur. Ct., Erie Co.).
3. *Id.*
4. *Id.*
5. *Id.*
6. 2015 N.Y. Slip Op. 05462, 36 N.Y.S.3d 346 (Sur. Ct., Erie Co.).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

New Criminal Justice Legislation

By Hon. Barry Kamins

This article discusses new criminal justice legislation signed into law by Governor Andrew Cuomo amending the Penal Law, Criminal Procedure Law and other related statutes. The discussion that follows will primarily highlight key provisions of the new laws and as such the reader should review the legislation for specific details. In some instances, where indicated, legislation enacted by both houses is awaiting the Governor's signature and, of course, the reader must check to determine whether a bill is signed or vetoed by the Governor.

Indigent Defense Services

There were two substantive pieces of criminal justice legislation enacted in the last session. The first shifts the costs of indigent defense services from individual counties to the state. In compliance with the mandate of *Gideon v. Wainwright*,[1] New York State originally required each county to fund the costs of providing indigent defendants the right to counsel. The results were uneven and dependent upon a particular county's ability or inability to properly fund the program.

In 2006, the State Commission on the Future of Indigent Defense Services examined the county-based system and concluded that there is "a crisis in the delivery of defense services to the indigent throughout New York State and that the right to effective assistance of counsel . . . is not being provided to a large portion of those who are entitled to it."[2] It was determined that counties have no system for, among other things, supervising caseloads, the quality of representation or ensuring that every person is represented by an attorney at arraignment.

The proposed legislation[3] transfers all costs to the state in phases over the next seven years. It builds on a 2014 settlement in which the state agreed to settle a class-action lawsuit[4] that accused the state of failing to provide adequate representation to indigent defendants in five counties (Suffolk, Washington, Ontario, Onondaga and Schuyler). The settlement committed the state to pay for improved services to indigent defense systems in those counties, but it did not address New York's other 57 counties.

Under the new legislation, effective April 1, 2017, the state would take over 25 percent of indigent defense costs and increase its contribution until it assumed 100 percent of the costs in 2023.

Hon. Barry Kamins is a retired Supreme Court Justice, author of *New York Search and Seizure* (LexisNexis 2016) and a partner in Aidala, Bertuna & Kamins. He is an adjunct professor of law at Brooklyn Law School, where he teaches New York Criminal Procedure.

The bill also gives the Indigent Legal Services Office the authority to promulgate rules and regulations that will ensure the presence of counsel at arraignment, establish caseload and workload standards, and improve the quality of representation. In general, the legislation would eliminate disparities in funding and quality of public defense among counties.

A second and related substantive piece of legislation would support efforts to standardize indigent defense services in New York. The proposed legislation[5] requires the Chief Administrative Judge to establish off-hours arraignment parts in each county outside New York City. This will ensure that defendants are provided counsel at arraignment. The legislation also removes any jurisdictional impediments that would prevent the creation of these courts. Thus, for example, a justice elected in a town or village at one end of a county can now arraign a defendant in a locality at the other end of the county.[6]

Crime Definitions and Penalties

Each year the legislature has amended the definition of certain crimes and increased penalties for others, and this year was no exception. First, the legislature amended the definition of a gravity knife. Over the last 13 years, 60,000 New Yorkers were arrested for possession of a gravity knife, making this one of the most prosecuted crimes.

A gravity knife is defined as "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device."[7] The knife was originally designed for use by paratroopers in World War II who needed to cut themselves free from a parachute that had become tangled in a tree or other obstruction. The knife could be opened by using only one hand; the user pointed the knife downward and the blade became free from the force of gravity and the flick of the wrist.

The law has been criticized as being too broad in that it has been enforced against large groups of individuals who use these knives every day as part of their trade. Law enforcement officials, however, caution that these knives present a threat to safety and that there are many alternative instruments that can be used by tradespeople including the widely used utility knife with a half-inch blade and the standard folding knife.

The legislation amends the definition of a gravity knife and a switch blade knife by clarifying that they do not include knives that have a mechanism "designed to create a bias toward closure" and which require exertion by hand, wrist or arm to overcome the "bias toward closure" in order to open the knife.[8]

The legislature also added the machete to the list of dangerous instruments that are illegal to possess when they are possessed with the intent to use unlawfully against another.[9]

A new law increases the penalty for assaulting three classes of individuals: process servers, employees of a public utility, and transit employees who clean trains and bus terminals. Simple assaults against these individuals will now elevate a misdemeanor charge to a class D felony.[10]

The legislature has enacted a new law which links driving-while-intoxicated crimes to boating-while-intoxicated offenses. The bill seeks to punish those intoxicated boaters who have a record of alcohol-related automobile incidents. The legislation was named after a young woman in upstate New York who was killed in 2006 while traveling as a passenger in a boat operated by an intoxicated person. The boat operator had a record of alcohol-related automobile incidents but under the law could only be charged as if this were his first alcohol-related incident. The legislation requires a sentencing judge in a boating case "to consider" past DWI offenses as follows: when sentencing for a boating offense carrying a 30-day sentence, a court must consider any prior driving convictions within the past five years. When sentencing for a boating offense carrying a 180-day sentence, the court must consider any driving convictions within the past 10 years.[11]

A new law removes ioflupane from the list of controlled substances. Ioflupane is the active ingredient in DaTscan, the agent used by physicians to differentiate between Parkinsonian syndromes and other neurological symptoms. Because of the substance's unique ability and the minuscule amount used, it was determined that it should be removed from the controlled substance list so that it may be more widely available for treatment.[12]

Finally, cities within Orange County were given the ability to increase the penalty for certain fireworks offenses; "sparkling devices" can be included under the definition of "fireworks" and given more aggressive treatment.[13] Orange County is close to Pennsylvania where many more firework devices are legal.

New Crimes

The legislature created a number of new crimes in the last session. Initially, a new law seeks to protect young girls from the harmful practice known as female genital mutilation (FGM). FGM is a 5,000-year-old harmful cultural practice that consists of procedures performed on the female genitalia without a medical purpose. It is prevalent among communities of different religious backgrounds and is, among many groups, performed to preserve a girl's virginity, control her sexuality, or is a prerequisite to marriage.

Although the practice has been unlawful in this state for 19 years, individuals have avoided prosecution by sending female children overseas during school vacations as part of a trip to expose girls to the customs of their ancestral homelands. The new legislation creates a new crime, Facilitating Female Genital Mutilation,[14] making it

a class A misdemeanor to intentionally assist in subjecting a girl to FGM.

The legislature has enacted a comprehensive new law to regulate combative sports in the state.[15] The New York State Athletic Commission will now regulate traditional fighting (professional boxing and wrestling), as well as mixed martial arts, i.e. a combination of kickboxing, wrestling and judo.

Several new crimes were enacted that relate to combative sports. It is now a class A misdemeanor to knowingly advance or profit from a combative sport conducted outside the supervision of the Commission; the penalty is increased to a class E felony if one has been convicted within the past five years of this crime. In addition, the law creates unclassified misdemeanors for the following acts: conducting a combative sport without a license; participating in a combative sport as a referee, judge, match-maker, timekeeper, manager, or trainer without a license; or promoting a wrestling match without a license.

Finally, the legislature has come to the aid of New Yorkers who have found it exceedingly difficult to purchase tickets for concerts and shows because events have sold out quickly. It is now a class A misdemeanor for a person or entity to sell or offer to sell a ticket that has been obtained through the use of ticket purchasing software that allows a single buyer to purchase hundreds of tickets at one time. The use of this software, known as "bots," has now been criminalized as it pertains to ticket purchasing.[16]

Procedural Changes

A number of procedural changes were enacted in the last legislative session. Initially, a new law provides a trial court with discretion to grant poor person status for assignment of appellate counsel at the time of sentence. This will streamline the delivery of indigent services and, in the event the trial court denies the application, a defendant would still have the option of making an application to an appellate court.[17]

The legislature has enacted a measure which seeks to curb "organized retail theft crime," which is defined as a larceny of retail merchandise in quantities that would not normally be purchased for personal use or consumption for the purpose of reentering such merchandise in commerce. This crime can be prosecuted in any county where the defendant committed at least one such crime as part of the scheme as long as the county is contiguous to at least one other county in which one or more of the crimes were committed.[18]

Two new laws will impact the judicial diversion program. One prohibits a court from conditioning participation in the program on the use of a specific brand of medication.[19] The other allows courts to permit an eligible defendant to participate in the program near his or her home; previously, participation in diversion programs was limited to treatment programs offered in the court jurisdictions where offenders were charged.[20]

In an effort to ensure that rape kits are processed more efficiently, the legislature has enacted a law that sets specific time limits (10 days) by which a law enforcement agency must submit sexual offense evidence kits to an appropriate forensic laboratory; the laboratory will then have 90 days to submit its report.[21] In addition, every law enforcement agency must submit, within 180 days of the effective date of this law, any sexual offense evidence kit in its custody that was collected prior to the effective date of the law; labs must process those kits within 120 days of receipt.

Finally, under a new law, the four federal district courts in New York will have access to lists of citizens (New York tax filers, unemployment insurance recipients and recipients of public assistance) that were previously unavailable for purposes of selecting potentially qualified jurors.[22] Previously, federal administrators were granted access under state law only to lists of registered voters and licensed drivers.

A number of new laws will affect sex offenders. Volunteer ambulance companies and ambulance services must now screen applicants who wish to be EMTs or paramedics to determine if they are registered sex offenders. In the event they are found to be on the registry, the companies must then determine whether a person is eligible for the position.[23] In addition, a sex offender must now register

all of his or her residences[24] and the Division of Criminal Justice Services must notify local law enforcement no more than 48 hours after a sex offender has registered a change of address.[25]

A number of new laws will affect prisoners. One bill strengthens the prohibition of the use of restraints on pregnant women who are being transported to the place where they will give birth.[26] When an inmate dies in a state correctional facility, the State Commission of Correction will now be required to notify next of kin and provide a death certificate.[27]

With regard to parole boards, a qualified interpreter must now be provided to inmates who appear before the Board and who speak English as a second language, or who do not speak English at all.[28] In addition, appeal decisions by the Board must now be posted on a website within 60 days of the determination.[29] Finally, a victim's statement to the Board shall have no expiration date and will remain on file for future parole hearings.[30]

The New York City Council has enacted the Criminal Justice Reform Act, which will affect the prosecution of low-level, quality-of-life offenses in the city. With respect to these offenses, e.g. open container of alcohol, public urination, littering and public park offenses, the Council determined that, except for limited circumstances, civil rather than criminal enforcement should be utilized. Thus, police officers now have the discretion to issue a "civil summons" instead of a criminal summons. In addition, the new law reduces the amount of criminal fines and creates a series of civil penalties for these offenses.[31]

The ultimate impact of the legislation will depend upon the extent to which police officers, in their discretion, decide to issue civil summonses instead of the traditional criminal summons. By next year, the Police Department must make public new guidelines which provide guidance to uniformed officers on whether civil enforcement or criminal enforcement should be utilized. ■

1. 372 U.S. 335 (1963).
2. Report of the Commission on the Future of Indigent Services (June 18, 2006), at 15.
3. A. 10706, awaiting the Governor's signature.
4. *Hunell-Harring v. New York*, 15 N.Y.3d 8 (2010).
5. A. 10360, awaiting the Governor's signature.
6. *See also*, S. 6849, S. 6088 and S. 7469 authorizing various local facilities to be used for arraignments (all awaiting the Governor's signature).
7. Penal Law §265.00(5).
8. A. 9042, awaiting the Governor's signature.
9. 2016 N.Y. Laws, ch. 269, (amending Penal Law § 265.01), eff. Aug. 19, 2016.
10. 2016 N.Y. Laws, ch. 268, (amending Penal Law § 120.05), eff. Nov. 1, 2016; 2016 N.Y. Laws ch. 267, (amending Penal Law § 120.05), eff. Nov. 1, 2016; 2016 N.Y. Laws ch. 281, (amending Penal Law § 120.05), eff. Nov. 1, 2016.
11. 2016 N.Y. Laws ch. 239, (amending Navigation Law § 49-a), eff. Nov. 1, 2016.
12. 2016 N.Y. Laws ch. 244, (amending PHL § 3306), eff. Aug. 18, 2016.
13. A. 9455, awaiting the Governor's signature.
14. 2016 N.Y. Laws ch. 49, (adding Penal Law § 260.22), eff. Sept. 6, 2016.
15. 2016 N.Y. Laws ch. 32, (adding GBL Art. 41), eff. Sept. 1, 2016.
16. A. 10713, awaiting the Governor's signature. The law relating to the resale of tickets was extended for another year, until June 20, 2017 (2016 N.Y. Laws ch. 34, eff. May 14, 2016).
17. A. 9522, awaiting the Governor's signature.
18. 2016 N.Y. Laws ch. 63, (amending CPL § 20.40), eff. Nov. 1. 2016.
19. 2016 N.Y. Laws ch. 67, (amending CPL § 216.05), eff. June 22, 2016.
20. 2016 N.Y. Laws ch. 315, (amending CPL § 216.05), eff. Sept. 9, 2016.
21. S. 8117, awaiting the Governor's signature.
22. 2016 N.Y. Laws ch. 284, (amending Labor Law § 537, Tax Law § 697, and Social Service Law § 20), eff. Aug. 24, 2016.
23. S. 5542, awaiting the Governor's signature.
24. A. 1819, awaiting the Governor's signature.
25. A. 9239, awaiting the Governor's signature.
26. 2016 N.Y. Laws ch. 17, (amending Corrections Law § 611), eff. May 21, 2016.
27. A. 7500, awaiting the Governor's signature; and 2016 N.Y. Laws ch. 323, (amending PHL § 4174), eff. Dec. 8, 2016.
28. S. 992, awaiting the Governor's signature.
29. S. 6806, awaiting the Governor's signature.
30. 2016 N.Y. Laws ch. 130, (amending Executive Law § 259-i), eff. Oct. 19, 2016.
31. Local Laws 70, 71, 74 and 75; the effective dates of significant provisions are June 13, 2017, June 13, 2017, July 13, 2016 and Aug. 12, 2016, respectively.

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Preparing Your Psychology/Psychiatry Witness: Guidelines for Effective Reports and Testimony

By Gordon J.D. Cochrane

When you retain a psychologist or psychiatrist to conduct an Independent Medical Examination (IME), to critique IMEs conducted by other health professionals or to provide testimony on a key psychology/psychiatry construct, you will want to know that the expert has the necessary knowledge to effectively withstand the rigors of a cross-examination that is hard science-focused and conducted by a well-informed litigator.

As you know, judges are now demanding hard science verification for the assessments, reports and testimony provided by psychologists and psychiatrists, and an increasing number of litigation lawyers are learning how to cross-examine from a hard science perspective.[1] Consequently, when these health professionals make "X means Y" statements in their reports and testimony, judges and lawyers are no longer simply questioning the content of their statements. Instead, they are increasingly asking, "How do you know that X means Y?" and "What hard science evidence validates your declarations?"

You may want to assume that all psychologists and psychiatrists received law-related training in the hard science aspects of psychology and psychiatry and are consequently able to effectively respond to validity challenges during a cross-examination. It is a mistake to make this assumption.

Forensic psychology, which focuses on law-related psychology, is still a relatively new field of study, and a

relatively small number of graduate students choose this field. It is therefore probable that many of the psychologists and psychiatrists that you will retain have limited practical knowledge of common law-related themes, such as

- how the psychometric validity of assessment measures is determined;
- how hard science constructs are differentiated from soft science traits;
- how to identify weaknesses in psychology research designs and how these weaknesses result in replication problems;
- how to identify psychotherapy models that are overly mechanistic;[2] and
- how to identify the common tendency to attribute construct status to psychological metaphors.

Most graduate programs, journals, conferences and continuing education programs in psychology place far greater emphasis on psychological theory and practice than on hard science validation of these theories and practices. It is wise to keep this in mind when you retain a psychologist or psychiatrist. This is especially true if the individuals you retain have little or no direct experience with the justice system. Those with less court experience often underestimate the importance of hard science evidence to support their theories, therapies and constructs. Like many of their counterparts in primary care medicine, they do not actively seek involvement in legal proceedings and are, therefore, less attentive to issues of verification. However, most primary care health professionals are eventually called upon to provide reports and testimony concerning the involvement of one or more of their patients in court matters arising from motor vehicle accidents, family law, employment disputes and other forms of litigation. These clinicians can quickly, and sometimes painfully, discover that well-informed litigators will ask very specific and squirm-inducing questions.

Why Psychology Is a Soft Science and Why This Makes Hard Science Principles Important

The provision of hard science evidence in psychology and psychiatry is difficult for everyone involved because psychology is unlike other sciences in that the subjects studied and assessed are not objective entities. The subjects of psychology research are subjective human beings. As such, we creatively construct our sense of self and we give meaning to the world around us. We imagine; we assume; we generalize; we attribute meaning to ambiguities; we remember creatively; we formulate our values and our beliefs through the screen of our culture; we selectively attend to that which confirms our biases and attitudes; we mind-read with excessive confidence; we project our perceived realities onto other people and situations; we are sometimes honest and sometimes deceptive; we are rational and sometimes irrational; we are consciously motivated and sometimes unconsciously motivated and yet, we function as if our perceptions are reality.

In a nutshell, the subjects of psychology research are creative, perceiving beings for whom reality is unique. Whereas psychologists and psychiatrists consistently work with this subjectivity in the clinical setting, judges have different needs. Judges are increasingly pointing out that because assessments, reports and opinions can significantly impact the lives of the people directly involved, it is incumbent upon psychologists, psychiatrists and other primary care health professionals to provide hard science evidence that will actually assist the court. Hopefully, the following suggestions will be helpful as you prepare your health professionals for their role in the medical-legal realm.

What Your Witness Needs to Know Before Stepping into the Legal Arena

Whereas you cannot tell your retained health professionals how to conduct an IME and you can't tell them what to say when on the stand, you can offer them some problem-prevention suggestions. The meta-suggestion, expressed clearly but respectfully, should be that as witnesses, their role is to serve the needs of the judge or jury by providing verifiable hard science evidence. They are not there to serve your needs and certainly not those of the opposing counsel. They should also be reminded that they are not to offer an opinion beyond their area of expertise and they are certainly not to offer an opinion on the outcome of the case. They need to be clear that it is the trier-of fact to whom their testimony should be directed. This principle is a given for you but it may not be a given for the health professionals that you retain. Now you can turn to more specific suggestions and guidelines for the preparation of the health professionals that you retain.

Diagnoses

As you prepare the health professionals that you retain, you will find it helpful to keep in mind that primary care practitioners, forensic psychologists and forensic psychiatrists differ considerably in their application of the term "diagnosis." When constructing a diagnosis most forensic psychologists utilize standardized assessment tools, while most forensic psychiatrists employ a structured interview because they expect that their diagnoses will undergo a rigorous cross-examination. Most primary care professionals, however, formulate comparatively informal diagnoses that they then use as a prelude to psychotherapy. Consequently, primary care professionals tend to focus more on therapeutic processes and outcomes than on hard science validation of their diagnoses.

When you retain a primary care psychologist, psychiatrist or physician to provide clinical records and on some occasions, a report concerning his or her clinical diagnosis of the psychological well-being of your client, he or she will usually offer a sincere and often sympathetic

diagnostic perspective of your client's well-being. Commonly and understandably, this empathic perspective contains more opinion-based soft science than confirmable hard science. However, the judge may not find this potentially advocating perspective particularly helpful. Also, as you have no doubt seen during an effective cross-examination, primary care witnesses sometimes respond to hard science challenges by becoming personally defensive. It is certainly appropriate for your witness to vigorously defend his or her testimony by citing the applicable research but it is usually a bad idea for the witness to become personally defensive during a cross-examination. Personally defensive reactions by your witness could prompt a by-now frustrated judge to emphatically point out, "Dr. X., it is not about you. It is about your evidence."

When you are preparing a primary care witness it can be helpful to keep in mind that most primary care health professionals are comparatively inexperienced participants in the legal setting. Many are reluctant and even anxious participants while some may be naively overconfident. They do informal therapy-focused diagnoses, often without directly referring to the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5)[3] and they very rarely employ standardized assessment measures. Some primary care professionals also utilize short-form diagnostic measures for various mental health categories, such as anxiety or depression, but these brief measures do not have acceptable content validity. If the primary care health professional that you have retained drew upon short-form mental health measures in the establishment of a diagnosis, he or she may well be asked during cross-examination to outline for the court the meaning of the term "content validity." You will quickly see that this goes to the overall credibility of your witness. The many short-form assessment measures currently available are marketed to primary care health providers as easy-to-use, time-saving clinical tools. However, a well-informed cross-examining lawyer will pressure your witness to provide psychometric evidence to validate the content validity of these measures, knowing that no such evidence exists. Consequently, the entire diagnosis provided by your witness may be called into question and, depending on how the day is going, the cross-examining lawyer or even the judge may cryptically ask your witness why he or she, as a practicing health professional, did not know that these short-form measures do not have content validity.

When preparing primary care health professionals, who may have little or no experience in the use of formal assessment measures such as the *Minnesota Multiphasic Personality Inventory-2 (MMPI-2)* or the *Personality Assessment Inventory (PAI)*, you can assume that their diagnoses will be derived from their clinical interactions and their session notes. These notes, which will probably be placed in evidence, may reflect an initial informal diagnosis and preliminary clinical goals. You may want to encourage the health professional to state his or her diagnoses based on *DSM-5* symptom criteria. You can point out that an original diagnosis may appropriately be altered as more is learned about the individual as the psychotherapy proceeds but the *DSM-5* criteria should still be used at the outset.

> You may want to assume that all psychologists and psychiatrists received law-related training in the hard science aspects of psychology and psychiatry and are consequently able to effectively respond to validity challenges during a cross-examination. It is a mistake to make this assumption.

Your primary care professional may not be aware that a cross-examining lawyer has a very specific job to do on behalf of his or her client and most will therefore be very well prepared. Additionally, most primary care health professionals will struggle if asked during the cross-examination if the *DSM-5* can be considered a hard science document. You may want to remind your witness that it is advisable to acknowledge that the *DSM-5* is, out of necessity, a blend of hard and soft science. If your witness acknowledges this reality, most judges will not allow the cross-examining attorney to go into the *DSM-5* on a fishing expedition designed to challenge the credibility of your witness. If, on the other hand, your witness suggests that the *DSM-5* is a hard science document a fishing expedition could begin with your witness being asked to explain for the court how there can be one version of the Personality Disorders outlined on pages 645 to 684 of the *DSM-5* and an alternate model for Personality Disorders on pages 761 to 781. You can usually avoid this minefield of unpleasantness by simply acknowledging the soft science/hard science realities of psychology, psychiatry and the *DSM-5*.

Overall, when preparing a primary care health professional for legal testimony, respectfully clarify the fundamental differences between his or her role as a psychotherapist and his or her role as a witness.

Independent Medical Examinations (IMEs) in Psychology and Psychiatry

Most psychologists and psychiatrists who conduct IMEs have considerably more experience in the legal realm than do most primary care health professionals. Their

experience, however, does not always equate with a sufficiently sound appreciation of psychometric validity. Whereas psychiatrists generally employ a structured interview based on *DSM-5* criteria, psychologists frequently utilize one or more of the many assessment tools currently available.

In the past, most lawyers focused their cross-examinations on the diagnoses and prognoses derived from these two types of assessment procedures. This approach was clearly advantageous to the testifying psychologist or psychiatrist as it forced the attorney, with his or her comparatively limited knowledge, to venture into the soft science field of psychological theory and practice. In these circumstances psychologists and psychiatrists could respond to the often ineffective challenges to their conclusions and recommendations with psychology-specific terminology and with an authoritative appeal to "my many years of experience." As litigators become increasingly aware of what constitutes hard science in the fields of psychology and psychiatry, they are increasingly turning their attention to the psychometric validity of the prognosis and recommendations. Then and only then, if the expert has successfully defended the methodology employed, will the focus of the cross-examination shift to the specific conclusions and recommendations offered by the testifying psychologist or psychiatrist.

A well-informed litigator will ask your testifying psychologist to demonstrate for the court that the assessment measures that he or she used have construct validity, a standardizing base, content validity and responder validity. Whereas most psychologists who provide assessment services can correctly and effectively respond to psychometric questions in these realms, focused cross-examinations reveal that a surprising number cannot. Psychiatrists are particularly vulnerable to validity questions because they rarely use standardized assessment tools and instead rely heavily upon a structured interview. The format of these interviews can vary considerably from a rigorous adherence to the *DSM-5* symptom criteria to a less-than-rigorous adherence. Primary care professionals are usually woefully under-informed about these validity issues.

Preparing health professionals for a potentially damaging cross-examination of the validity issues that constitute the foundation of a psychology-focused IME often requires a combination of diplomacy and clarity. Whereas you do not want to alienate your witness, you do want your witness to be prepared for strategic cross-examination questions concerning the psychometric and construct validity of his or her testimony. Your personal communication skills will be helpful in this undertaking. In general, people tend to become defensive and non-receptive when instructions begin with the pronoun "you." This is particularly true when the individual has a solid sense of independence. By using an illustration of a validity-focused cross-examination from an actual case or a purposefully created fictional case, you can illustrate the importance of the validity issues described below while reducing the likelihood that your witness will be offended.

It can often be helpful to introduce your illustrations with a one-down statement such as:

> In law school we didn't get much in-depth information on how and what to question when cross-examining psychological assessments. I was, therefore, intrigued to read in a recent journal article about a testifying psychologist who was asked by the cross-examining attorney to define construct validity. After a somewhat floundering response, the psychologist was asked if the personality test that he had used as part of his IME has construct validity. The cross-examining attorney knew two things before asking this two-part question. She knew the definition of construct validity and she knew that personality tests do not have construct validity and therefore have no place in an IME.

There is now less need to directly ask your witness about psychometric validity. Your illustration is an invitation to your witness to discuss his or her familiarity with construct validity or any of the following types of validity that you chose to present in your instructive illustrations.

The following information will give you a basis for preparing your psychology/psychiatry witnesses for credibility challenging cross-examination questions on the validity foundation of his or her testimony. Your witness needs to be well-versed in these validity principles.

Psychometric Validity

Early each year psychologists and psychiatrists receive new catalogues that list assessment instruments available for assessing a wide array of psycho-educational factors. Often the marketing terminology in these catalogues suggests that the word *valid* has the same meaning as does the term *psychometrically valid*. The word valid is commonly used in everyday situations as a malleable synonym for the term "OK." Examples include: That is a valid hypothesis; that is a valid idea; that is a valid concern; you have a valid argument. Valid, as used in these examples, does not mean valid in the psychometric sense. It does not mean that the hypothesis has been validated; it does not mean that the idea has been validated; it does not mean that the concern is more than a concern; and it does not mean that the argument is more than an argument.

A measure is psychometrically valid if that which is being measured has been shown to be real, with identifiable boundaries and is consistent over time. The measure must compare the responder's item responses to the item responses of a large sample of people who actually have the disorder(s) being assessed. The test items must cover all aspects of the disorder(s) being assessed and the measure must have a reliable means of assessing the truthfulness/sincerity of the responder's item responses.

If, for example, the psychologist or psychiatrist that you have retained plans to use measures such as the *NEO-Personality Inventories*, the *California Personality Inventory*, the *Rorschach* or any of the many clinical short-form assessment tools currently available, you will want to call upon your personal communication skills to effectively remind him or her that a cross-examining attorney will aggressively focus on whether these measures have psychometric validity. In fact, they do not and simply pointing out that assessment measures such as the *Rorschach* or the *NEO-Personality Inventories* are backed by a great many published articles in no way establishes their psychometric validity.

In the past judges, juries and litigators often accepted as validating global references to a large body of literature about particular measures. This is no longer the case. Increasingly, cross-examining attorneys will ignore references to extensive literature and pointedly ask whether any of this "extensive literature" actually establishes the psychometric validity of the measure in question. As you know, the cross-examining attorney will already be aware of the answers to this and the other validity-focused questions that will be forthcoming.

Historically, many psychiatrists and some psychologists have used the *Rorschach* when conducting an assessment. If your health professional plans to use this measure, you can again communicate your wishes by using an instructional illustration such as the following:

> In a recent case, the cross-examining lawyer, before asking a specific question, presented the following preamble. I believe, Dr. B., that over the years, hundreds of articles have been published about the *Rorschach* "inkblot" test but Dr. B., it is my understanding that the *Rorschach* is a projective measure and as such, the results are exclusively interpreted by the test administrator. It is also my understanding, Dr. B., that all projective tests require the test-taker to attribute his or her personal meaning to the test items, which in the case of the *Rorschach* are the figures known as the ink blots, and then the *Rorschach* administrator attributes meaning to the meaning attributed to the inkblots by the test-taker. Consequently, Dr. B., I suggest that there is no literature that can possibly demonstrate psychometric validity for this or any other projective test because the psychometric essentials of a standardized base, acceptable construct validity, sufficient content validity and reliable measures of responder authenticity are all determined by the administrator. Do you agree, doctor?

Hopefully, the psychologists and psychiatrists that you retain will see from illustrations such as this one that it is the job of the cross-examining attorney to challenge the testimony of the witness and it is the job of the witness to respond to hard science challenges with hard science answers. Hopefully, too, it will become evident from this illustration that the use of personality, projective or short-form measures in a forensic setting will be exceedingly difficult to defend during a focused cross-examination.

Even in the face of illustrations such as the one just outlined, some psychologists and psychiatrists have been known to claim that the test or tests that he or she used correlate highly with other assessment measures. A well-informed cross-examining lawyer will not accept a claim that one trait-theory personality test correlates highly with another trait-theory test or with any other measure that lacks a standardizing base, construct validity, content validity and responder validity. Correlations are only meaningful if at least one of the measures has verifiable psychometric validity.

Litigators and judges are increasingly aware that the psychometric validity of a psychological assessment instrument is determined by

- the verified authenticity of the characteristics or symptoms being assessed;
- the extent to which the assessment instrument actually measures these characteristics or symptoms;
- whether the responses of the test taker can be compared to a sufficiently large sample of people who actually have these characteristics or symptoms; and
- whether the instrument has scales designed to assess the authenticity/honesty of the test-taker's responses.

If the psychologist or psychiatrist that you retain still downplays the importance of psychometric validity or still doubts that litigators and judges are becoming more knowledgeable about the hard science aspects of psychology and psychiatry, you can describe for him or her the actual cross-examination of a psychologist who used the *NEO-Personality Inventories* in a recent criminal case. This very effectively focused undertaking is presented later in this article.

The Standardizing Base

The psychologists and psychiatrists that you retain all learned as graduate students that a standardizing base for a psychological assessment measure is a large and current sample of people who definitely have the disorder or disorders being assessed. The characteristics of each disorder, such as depression or anxiety, have been determined from a body of research and professionally agreed-upon evidence. The test taker's responses to the items on the assessment instrument are compared to the responses of the large sample of people who constitute the standardizing base. The test taker either scores similarly to people with one or more of the assessed disorders and is therefore diagnosed accordingly or, does not score like those with a disorder. Standardized measures in other realms also have a base derived from the responses of a large sample of people in the respective fields in question. These include: academic achievement, career interests, aptitude measures or specific forms of cognitive functioning such as learning disabilities. The ques-

tion that will concern you is whether the psychologist or psychiatrist that you have retained remembers enough of this psychometric information to prevent an unpleasant cross-examination experience.

For example, those psychologists who have limited experience with assessments may be unaware of the standardization issue concerning the frequently used *Minnesota Multiphasic Personality Inventory-2-RC* (*MMPI-2-RC*). The norms for the *Minnesota Multiphasic Personality Inventory-2 (MMPI-2)* were updated between 1989 and 2001. New scales, the Restructured Clinical, or RC, scales were created in 2003, and the Fake Bad Scale, or FBS, was devised in 2007. A new instrument called the *MMPI-2 Restructured Form* (*MMPI-2-RC)* was released in 2008.

> Overall, when preparing a primary care health professional for legal testimony, respectfully clarify the fundamental differences between his or her role as a psychotherapist and his or her role as a witness.

The controversy, which will definitely be brought up by a knowledgeable cross-examining litigator, primarily concerns the psychometric validity of these new scales. In his book, *Oxford Handbook of Personality Assessment*,[4] James Butcher points out that the RC scales and the aforementioned FBS scale utilize the *MMPI-2* standardizing sample rather than an independently established standardizing population sample. Since the *DSM-5* came into use in 2013, it can easily be argued that the credibility of the FBS is further undermined by the inclusion in the *DSM-5* of the Adjustment Disorders and Somatic Symptom Disorder. However, as is addressed below, the construct validity of these two disorders is also open to debate.

The standardizing base of the *MMPI-2* validity scales and clinical scales is derived from 1,138 males and 1,462 females between the ages of 18 and 80. As an informed litigator will point out, the RC scales cannot be interpreted on the basis of the *MMPI-2* norms because the *MMPI-2-RC* uses only 60 percent of the *MMPI-2* items. More than 200 items have been eliminated from the 567-item *MMPI-2* and many of these items are clinical and forensic in nature. Additionally, many of the new scales are based on as few as 4-to-6 items and the *MMPI-2-RC* does not differentiate the *MMPI-2* population sample by gender.

If your expert includes the *MMPI-2-RC* as part of an IME in a custody and access case or for damages resulting from a motor vehicle accident, or for any other reason, you can see that the *MMPI-2-RC* profile can be challenged on the grounds of its questionable psychometric validity. Because your expert may have purchased the quite costly *MMPI-2-RC* materials, he or she may defensively point out that it is often used in IMEs. This is true but it is not the relevant issue.

Using your most effective personal communication skills, you will need to say something like this to your expert:

> If during the cross-examination, you are asked if the *MMPI-2-RC* is a psychometrically valid measure of mental health, you must answer truthfully. Therefore, you will be forced to acknowledge that it is not and you will have to acknowledge when asked, and it is highly probable that you will be asked, if the results derived from a measure lacking psychometric validity can possibly be relied upon in a court of law.

Hopefully, your expert will see the value in choosing the *MMPI-2* over the *MMPI-2-RC*.

If your expert plans to use the *Personality Assessment Inventory* (*PAI)*, 1989 in his or her IME, you will want him or her to know that the *PAI* scales for treatment planning and interpersonal factors are not standardized and results from these scales will be challenged if they are included in his or her report. The standardization of the *PAI* clinical scales and the responder validity scales is based on a sample of 1,000 adults from the U.S. census, 1,265 clinical patients from 69 different clinical sites and 1,051 college students. It is not possible to establish a standardizing sample for the scales for treatment planning and interpersonal factors.

When conducting IME assessments, psychiatrists tend to rely heavily on a Structured Clinical Interview rather than the standardized measures commonly used by psychologists. One reason for this is most psychiatrists have not been trained in the use of standardized measures such as the *MMPI-2*. A Structured Clinical Interview is based upon *DSM-5* symptom criteria but the degree of adherence to the *DSM-5* criteria can vary from psychiatrist to psychiatrist. As you know from experience, it is not uncommon for psychiatrists and psychologists to reach differing diagnostic conclusions for the same individual. Psychologists and psychiatrists who conduct IMEs using the Structured Clinical Interview approach cannot, when the validity and reliability of their reports are questioned in the cross-examination, call upon a standardized measure to support their diagnoses. Again, as part of your preparation strategy, you may want to point out to the psychiatrist or psychologist that you have retained that he or she should be prepared to respond to cross-examination questions such as these:

> Dr. D., if you and Dr. Y had both used a standardized assessment measure when conducting your IMEs and did so in approximately the same time period, should we not expect that you and Dr. Y would arrive at fundamentally the same diagnosis? Since you and Dr. Y did not use a standardized measure and did not arrive

at the same diagnosis, is it reasonable to assume that one or both of you has not adequately adhered to the *DSM-5* criteria that supposedly constitutes the foundation of a Structured Clinical Interview?

When using this illustrative approach, you are not telling your expert how to conduct his or her IME but you are saying to your expert that if he or she used a Structured Clinical Interview, he or she should be prepared to demonstrate on the stand consistent adherence to the applicable *DSM-5* diagnostic criteria.

Construct Validity

Until recently, most lawyers and judges had only passing awareness of the term construct validity. That is now changing. A construct is research-based and its meaning is agreed upon by a consensus of professionals qualified in the appropriate field of study. The quantity and credibility of the supporting research is very important in determining the validity of a construct. A valid construct must be a reflection of a real-world phenomenon and it must have clear boundaries that make it distinct, stable and measurable. It is, therefore, important that the assessment instrument or structured interview in question actually assesses real-world phenomena rather than theory-based phenomena.

For example, there is a general consensus among health professionals concerning the constructs of depression and anxiety. There is neither a general consensus among health professionals nor the necessary validating research for traits such as introversion, extroversion, openness and similar traits commonly found in personality tests. The unconscious is theory-based and does not meet the criteria for construct designation, and its spinoff, unconscious motivation, also fails to qualify as a measurable construct. It is not possible to obtain a valid and reliable measure of a poorly defined or undefined trait and efforts to do so in law-related psychology are clearly perilous.

The *Myers Briggs Type Indicator* (*MBTI*) is widely used in employment settings and clearly demonstrates the importance of verifiable construct validity. The *MBTI* does not have construct validity and consequently cannot have a standardizing base, yet it is purported to measure the personality preferences of the respondent on four dichotomies: extroversion vs. introversion; sensing vs. intuition; thinking vs. feeling; judging vs. perceiving. Reviews in the *Buros Mental Measurement Yearbook*[5] by K. Lanning and A. K. Hess indicate that research does not support that the *MBTI* types really exist in nature. If, for example, a person can be sufficiently comfortable in some situations to be labeled extroverted but sufficiently uncomfortable in other situations to be labeled introverted, do the labels have any value? Hess states that test validity for the *MBTI* is totally dependent upon the interpretations drawn by the person giving the test. He goes on to state that "using the *MBTI* in making any clinical, employment or forensic decisions, particularly of the predictive kind, might be perilous." In spite of these concerns the validity problems of the *MBTI* and similar measures are rarely considered in business settings and they are widely used in performance, placement and promotion situations.

Construct validity is an essential aspect of psychometric validity but until recently it has rarely been brought up in IME cross-examinations. That is changing. Therefore, you will be wise to confirm with your retained psychologist or psychiatrist whether he or she is clear about what constitutes a construct and how it differs from the traits found in personality tests. You may be surprised to find that many psychologists and psychiatrists are not as clear about the nature and importance of construct validity as you might expect them to be and not as clear as you want them to be when they are on the stand.

Content Validity

Content validity is the extent to which an assessment instrument is reflective of all of the characteristics of the construct being assessed. For example, a depression measure lacks content validity if it only measures the cognitive aspect of depression but does not measure the emotional or physical aspects of depression. There might be a consensus among the relevant health professionals concerning the validity of the construct being measured, but content validity refers to how fully the measure comprehensively assesses the construct in question.

You may want to again use the illustrative method to help your expert realize that if he or she uses a short-form measure as part of an assessment, the subsequent results, conclusions and recommendations will quite likely be challenged on the basis of content validity. These short-form measures, some of which are produced by pharmaceutical companies for primary care physicians, may or may not have construct validity. The results are not psychometrically determined but are arbitrarily classified as mild, moderate or severe. Because they are created for time-saving, in-office convenience and because they have no capacity to assess the integrity of the patient's responses, they should not be used in forensic situations.

Personality tests do not have construct validity, content validity or a standardizing base because there is no agreement among health professionals concerning the theoretical traits that constitute the malleable pieces of the theoretical personality mosaic. It follows that if psychologists and psychiatrists can't agree on what constitutes personality, it is not possible to create a valid instrument that will assess it. As you will see at the end of this section, if your retained psychologist or psychiatrist includes the results of a personality measure or short-form measure in his or her report, the cross-examination may be very unpleasant. The *Minnesota Multiphasic Personality Inventory-2* (*MMPI-2*) and the *Personality Assessment Inventory* (*PAI*), in spite of the term personality in their respective

titles, are not measures of personality. They are measures of mental health based on *DSM* criteria.

Responder Validity

All self-report assessment measures are vulnerable to purposeful or inadvertent response distortions. A client profile from a psychological assessment measure that does not have a psychometrically acceptable means of assessing responder validity must be viewed with caution. It is quite obvious that there is a higher probability for test-takers to purposefully fake good or fake bad in situations where there is a potential benefit for doing so. For example, insurance cases involving damages, criminal cases, custody and access cases and parole situations are all situations where benefits could result from purposeful deception.

Even though most people, including many psychologists and psychiatrists, believe that they can accurately determine when another person is being untruthful, nobody has consistently demonstrated that they can do better than chance when assessing the truthfulness of another person. Some health professionals claim special skills in this realm but their claims are based upon the "X means Y" principle which is the central feature of projective tests. In the truth assessment realm, X is a voice tone, nonverbal cue or other "signal" that supposedly indicates Y, which is deception. Without an actual standardizing base, an X means Y claim is not reliable and a "benchmark measure" is not a standardizing base. Therefore, responder validity scales such as the L-scale, the K-scale, the F-scale and the S-scale on the *MMPI-2*, which are dependent upon a standardized comparison base, are a necessary feature of any valid psychometric measure. The test-taker's responses to specific items are compared to the responses of the sample group. If the test-taker's responses on these scales are significantly different from those in the sample group, the test-taker's clinical profile cannot be relied upon.

An elevated score on a responder validity scale means that something is not right. It is not possible to tell with acceptable certainty, in spite of claims by the publisher of the Fake Bad Scale on the *MMPI-2-RC*, whether the responder's elevated scale indicates purposeful distortion or inadvertent distortion. It does indicate, however, that the test-taker's clinical scales cannot be relied upon.

It should be helpful if you illustrate for your experts that well-prepared cross-examining lawyers recognize that many psychological assessment measures do not have a psychometrically acceptable means of assessing responder validity and will challenge the validity of the conclusions and opinions derived from such measures.

As outlined earlier, many psychiatrists and some psychologists conduct their assessments without using standardized measures and instead use a structured interview. A structured interview that is conscientiously based on *DSM* symptom criteria should have construct validity but the validity of the responses provided by the patient are open to a rigorous cross-examination challenge because the patient's responses must be deemed valid or invalid by the individual conducting the assessment. Sometimes the justification given for this form of pseudo-validation is "my many years of experience." This appeal to authority can be an inviting target in a cross-examination.

Valid Measures Supplemented by Invalid Measures

As a frequent consultant in court cases involving law-related psychology, the author has often encountered situations where psychologists have used a standardized assessment measure, such as the *MMPI-2* or the *PAI*, and then undermined their professional credibility by supplementing their assessments with psychometrically invalid measures, such as a personality test or other measure that should not be used in a forensic setting. Too often the psychologist or psychiatrist leans heavily on the results of these invalid measures thereby generating unsupported and potentially damaging opinions and cause-effect statements. When this occurs the judge is not impressed, justice is not served and a knowledgeable litigator will conduct a cross-examination that can be exceedingly unpleasant for the psychologist or psychiatrist.

The following instructional illustration is derived from a recent criminal case in which the psychologist used the *NEO-Personality Inventories* to supplement the *MMPI-2* results. Rather than cross-examine from memory, the lawyer brought the relevant literature into the court:

> Dr. K., is it true that the *MMPI-2* is designed to assess psychological disorders such as depression and anxiety as they are described in the American Psychiatric Association's *Diagnostic Manual of Mental Disorders*? (yes).
>
> And would you agree Dr. K. that the APA confirms that depression and anxiety are real and valid constructs? (yes).
>
> Dr. K., is it true that the *NEO-Personality Inventories* that you used in your assessment are based on what is known as trait theory? (a hesitant and uncertain yes).
>
> I believe, Dr. K., that openness, agreeableness and conscientiousness are traits that are assessed by the *NEO-PI*, is that correct? (a hesitant yes).
>
> Are these traits considered to have construct validity by the APA or by most of your colleagues in psychology? (uh, um).
>
> Dr. K., I have two statements here that I would like to read for you and have you comment on them if you would.
>
> "Despite the fact that trait measures have been used for decades and continue to be a central feature in psychological research, there is no doubt that the trait approach is stigmatized by many psychologists and defended by few. Even some of the major contributors to contemporary trait models seem eager to distance themselves from the topic" – Paul Costa Jr. and Robert McCrae, Chapter 16, page 299, the *Oxford Handbook of Personality Assessment*, 2009, Ed. James Butcher.

". . . the NEO Inventories do not include the usual validity scales and do not automatically discard data because there are indications of problems." – Paul Costa Jr. and Robert McCrae, Chapter 16, page 312, the *Oxford Handbook of Personality Assessment*, 2009, Ed. J Butcher.

Are you aware Dr. K., that the authors of these two statements, Paul Costa Jr. and Robert McCrae, are the creators of the *NEO-PI*? (uncomfortable silence).

Are you also aware, Dr. K., that Costa Jr. and McCrae repeatedly state in their chapter in the *Oxford Handbook of Personality Assessment* that they created *NEO-PI* for clinical use, which is in-office therapy, rather than for forensic use? (continued silence).

Dr. K. could you clarify for the court your statement on page 14, the second item, line 11, where you state, ". . . there is a large and adequate standardization sample against which the *NEO-PI* scores are compared." What large and adequate standardized sample are you referring to? (continued silence).

Dr. K. in the second to last sentence of item two, you state that one of the standard forms of the *NEO-PI* is the respondent form. When you say standard form, do you mean psychometrically standardized because, as I'm sure you know, the commonly used term, standard, is not a synonym for psychometrically standardized? (uh hum).

Dr. K., in item two you also state that this respondent form is used to rate the individual being assessed by someone who knows that individual well. You appear to be taking the position that the *NEO-PI* was an appropriate tool to use in this, a judicial setting, and that it was appropriate in this judicial setting, to have a friend of the individual being assessed complete what is called the respondent form. Dr. K., when you use the term, "appropriate," do you mean psychometrically valid and if so, is it "appropriate" because this third party report is part of the *NEO-PI* or, are you simply deeming it appropriate through your use of circular reasoning? (silence).

This real life example of a devastatingly focused cross-examination unambiguously demonstrates that judges, juries and litigators are seeking hard science evidence in real life court cases that can have a life-changing impact on the people directly involved. The court has limited patience with that which is not hard science. The judge in this case expressed his displeasure by asking the psychologist, without waiting for an answer, how psychologists justify the use of personality tests and other pseudo-science assessment measures with real people in the clinical setting let alone in the forensic setting.

If the psychologists or psychiatrists that you retain use psychometrically invalid measures, your client, who is paying for the assessment, may also express some displeasure.

DSM-5 Diagnoses and the Thin Skull Ruling

In an effort to enhance the role of hard science in psychology and psychiatry, the APA's *DSM-5* lays out the most recent diagnostic criteria for the mental disorders contained in its 947 pages. As stated on page 25 of the *DSM-5*, it was developed for clinical rather than forensic use. The *DSM-5* diagnoses do not state a specific degree of disability; they do not address causation and they do not provide recommendations for specific psychotherapies. *DSM* disorders such as Generalized Anxiety Disorder (300.02, pages 222–26) and Posttraumatic Stress Disorder (309.81, pages 271–80) have construct validity and can therefore be diagnosed using a standardized assessment measure for psychological disorders and for responder validity. Disorders such as the Adjustment Disorders (309.0–309.9, pages 286–89) and Somatic Symptom Disorder (300.82, pages 311–15) do not have construct validity. Consequently, the psychometric validity of the diagnosis and the authenticity of the self-reported symptoms, which are judged to be out of proportion to the severity or intensity of the stressor, cannot be verified beyond the clinical judgement of the assessing health professional. With no construct validity and no standardizing assessment measures, different health professionals may diagnose the same patient differently and, as current research shows nobody, including psychologists, psychiatrists and police officers does better than chance when assessing the truthfulness of another person's statements.

In the past judges, juries and litigators often accepted as validating global references to a large body of literature about particular measures. This is no longer the case.

If the thin skull ruling is to be applied in a case involving damages it would seem that there should be verifiable evidence confirming that the individual in question actually has a thin skull. In many medical situations verifiable evidence is often readily available. In psychology and psychiatry this is not always so. The *DSM-5* constitutes a valiant attempt to effectively apply hard science principles to the creative, perceiving human beings who constitute its subjects. This is a necessary and valuable undertaking but, by its very nature, the application of hard science principles to soft science subjects sometimes results in descriptions that are ambiguous and even contradictory. This, it can be argued, is the case

for the Adjustment Disorders and Somatic Symptom Disorder.

Ultimately of course, it is the judge who decides when and if the thin skull ruling applies. The best that you can do when *DSM-5* disorders such as these are involved is present your arguments and prepare your retained psychologists and psychiatrists so they can effectively respond to questionable applications of the thin skull ruling.

Prognoses

When you retain a psychologist or psychiatrist to write a medical-legal report, you will usually expect that a prognosis will be part of the report. Primary care psychologists and psychiatrists sometimes offer prognoses that arise more from an understandable but unacceptable empathy for their client than from cited research and an unbiased statement of probability concerning the degree and time frame of your client's anticipated recovery. Primary care health professionals and even some forensic experts tend to forget that a prognosis is usually about the determination of damages, and damages are primarily about money. When primary care health professionals write reports and give testimony, they often do so from their familiar perspective as an empathic primary care professional. Subsequently, you will need to review with them the nature and purpose of the cross-examination that they will likely encounter. Many, if not most, primary care health professionals are reticent about testifying in court. As you prepare them for court, do your best to be reassuring, but base your reassurance on their confirmed ability to cite hard science support for all aspects of their prognoses.

Additional Suggestions for Preparing Your Witnesses

Most psychologists and psychiatrists do not have your familiarity with the potential pitfalls that await them when they enter the judicial system. The following suggestions, if followed by your retained health professional, can help prepare them for what is to come:

Accept that your prognoses will be challenged from a hard science perspective and prepare accordingly.

Do not let yourself become personally defensive. A defensive response makes it about you and judges view this as an annoying waste of court time.

It is best to avoid using the medical term treatment. Treatment is a medical term and even though it has been incorporated into the psychology lexicon, in a cross-examination its use becomes an invitation to questions such as the following:

> Dr. D., in your prognosis on page 14 paragraph two, you recommend that the plaintiff, Mr. K., receive coverage for a minimum of two years of weekly cognitive behavioral treatment for posttraumatic stress disorder and depression at $200 per hour. (Yes, that is correct).
> Do you agree, Dr., that an antibiotic is a treatment for infection and if taken as directed, it will bring about the desired treatment outcome in a predictable period of time? (Yes).
> Is it true, Dr., that cognitive behavior therapy, commonly known as CBT, is generally considered the gold standard for psychotherapy? (Yes, it is).
> Is it also true Dr., that CBT, like all psychotherapies, is conditionally effective at best because the potential benefits of psychotherapy are dependent upon each client's ability to effectively utilize the tools and information provided by the health professional? (Well yes, I suppose that is true but . . .).
> And I don't suppose then, Dr., that you can be certain that your client will effectively utilize the very expensive psychotherapy that you recommend in your report? (Well no, not really).
> Is it true then, Dr., that your request for significant "treatment" funding implies a cost-benefit outcome that exceeds that which has been reported in the journals of the APA. (Well, I . . .).
> Thank you, Dr., that will be all.

If your expert expresses doubt that an attorney would actually ask these types of questions, you can point out that if a lot is at stake, it is probable that the opposing counsel will have hired a consultant to help frame cross-examination questions on this and other relevant themes, such as the conditional and limited success of psychotherapy and the important but often ignored role of the client's self-efficacy in the outcome of all psychotherapy models.[6]

Earlier in this article, construct validity was discussed as a key component of psychometric validity. Another version of construct validity can also become the focus of a cross-examination when your witness is challenged on his or her use of the many metaphors and difficult-to-define terms that are used in psychology and psychiatry. When you are preparing your experts, it can be helpful to point out that psychologists and psychiatrists often take for granted that their professional vocabulary is readily understood by most people. They also tend to forget that psychology and psychiatry are peppered with metaphors and difficult-to-define terminology such as: cognitive dissonance; emotional distancing; avoidance; the unconscious; unconscious motivation; false memories and self-actualization. Terms such as these can be very difficult to define in everyday terminology.

Your experts may need to be reminded that during cross-examination, they could be asked to explain in everyday language some of the professional terminology that they have included in their report and testimony. They should also know that sometimes this type of questioning is intended to simply create a credibility-eroding problem for the testifying expert and therefore, it is in their best interest to be prepared to effectively respond to definition questions.

In situations where your expert plans to recommend a particular type of psychotherapy for any of the *DSM-5* disorders,[7] he or she will need to cite the specific literature that validates the therapy that is recommended for

that disorder. This is particularly true when you have retained a primary care health professional. The judge wants hard science evidence but primary care health professionals may not realize that when cross-examining lawyers ask hard science questions they do so with a strategic knowledge of the research in question. When your witness is unable to cite the appropriate research to support his or her prognostic recommendations, he or she will be forced to quietly concede this oversight and this walk-back could undermine the credibility of his or her whole report.

In the same vein, if your witness plans to cite one or more studies in support of a fundamental aspect of his or her testimony, you may want to suggest that he or she have a copy of these papers on hand when testifying. If the cross-examining attorney is quoting from these papers, you won't want your witness responding exclusively from memory. Additionally, a cross-examining attorney may hold up an article that is unfamiliar to your witness and ask that he or she respond to what, on the surface, seems to be evidence that undermines the evidence presented by your witness. Your witness should ask for time to read the paper before responding. This will give him or her the opportunity to quickly clarify the research question, check the sample size, assess the acceptability of the research design and determine if the findings are appropriate to the research question. Numerous publications fail in one or more of these categories, thereby generating conclusions that are misleading and even erroneous. A well-prepared psychologist or psychiatrist can do this review quickly and then give a meaningful response to the cross-examining attorney.

Don't let your witness offer an opinion on the truthfulness of anyone else's testimony or on the validity of anyone's memory evidence. A primary care professional may wish to offer support for his or her patient but the judge wants hard science. Opinions about truthfulness or the validity of unverified memories again makes it about your witness in that giving his or her opinion implies that this opinion has merit even though the research on uncorroborated truth assessments and on the malleability of memory clearly shows that such opinions are highly unreliable.

Less experienced psychologists and psychologists can sometimes place themselves in unhelpful situations. Don't let your witness offer an opinion, even if asked, about the guilt or innocence of the parties involved or about the general outcome of the case. If he or she does so, the judge will unequivocally clarify for your witness who is and who is not the trier-of-fact.

Don't let your retained health professional be pulled into psychology realms where he or she does not have expertise. If the cross-examining lawyer exposes your expert's willingness to comment on subjects that are outside of his or her area of expertise, the reliability of your expert's entire report and testimony may be challenged.

In general, encourage your experts to consistently provide hard science backing for each aspect of their reports and testimony. In so doing, they will demonstrate their professionalism, they will assist the court and they will protect themselves from unnecessary unpleasantness.

Summary

As an attorney, you are well aware that the trier-of-fact expects that the reports and testimony provided by witnesses from all professions, including the professions of psychology and psychiatry, will be reliable, relevant and science-based. Psychologists, psychiatrists and primary care physicians are not attorneys and they do not have the courtroom knowledge and experience that is comparable to your own. Some are certainly more experienced than others but they are still not attorneys. Therefore, when preparing your retained health professionals, use your most effective interpersonal communication skills to teach them what they need to know and illustrate for them why they need to know it.

Whereas precision and predictability in the professions of psychology and psychiatry can be elusive, judges and litigators are becoming better-informed about the hard and soft science aspects of psychology and psychiatry and therefore, the cross-examinations are becoming more precise. Hopefully, the information and examples outlined in this article will be useful to you as you prepare your health professional witnesses. ■

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Developing a Healthy Appetite for Risk in Your Career

By Deborah Epstein Henry

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Introduction

It was 1993. I was a newlywed and in my third year of law school. One weekend, my husband, Gordon, and I were at our favorite New York City diner and I began seeing opaque spots, like the ones you see when a flash photograph is taken of you. It was a strange sensation and I began feeling increasingly out of sorts. We rushed back to our apartment. The spots intensified as did a feeling that my mind was racing and I could not keep track of my thoughts. Then came a *grand mal* seizure. Next thing I remember is hearing Gordon on the phone as I regained consciousness, asking my parents to meet us at the hospital.

The emergency room diagnosis was a brain tumor. But a couple of days later, we found a specialist and what he discovered was quite heartening. He said that while I had a lesion in the back of my brain, he thought it came from a rare parasite, Cysticercosis, typically found in Latin American countries. The parasite usually multiplies so that when a brain scan is done post-seizure, the brain looks like Swiss cheese. In my case, there was only one lesion. To be sure it was a parasite and not a brain tumor, he would need to operate. Five days after the seizure, I underwent brain surgery. My parents recount the magic moment post-surgery of seeing the brain surgeon jog down the hospital hall yelling, "It was a parasite!" My vision was blurry for about a month after the surgery and I took steroids and anti-seizure medication for a few months more, but I was told I would soon be as good as new.

Brain surgery as a 26-year-old, newly married law student changed my life. The emotional swing from breakfast at my favorite diner, to a seizure, to thinking I was going to die, to a bright prognosis five days later was

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overwhelming. But the seizure, the conflicting diagnoses, the brain surgery, and the experience of having family and friends rally around me not only made me grateful but also, it gave me an unusual perspective. It gave me confidence not to defer important choices and not to be as concerned with keeping all my options open. I felt inspired to start taking smart risks in my life by figuring out what was important to me and what would give me greater satisfaction. Had I not had this experience, I doubt I would have had my first child at age 27. I probably would have waited the two years to see if I could secure the partnership title at the law firm where I worked before electing to leave to start my consulting firm. Or maybe I would not have had the guts to start a consulting firm and leave law practice in the first place. And, then I doubt I would have had the wherewithal to co-found a second company five years ago. But when faced with the prospect that life may end abruptly, time and choices never looked quite the same.

The likelihood of an American getting Cysticercosis is about one in 319,000. Pretty low odds. That is the reason why I tell you this story. I do not want you to wait for an experience like this to begin living your life. So, I ask you: 1. What is standing in your way of taking smart and calculated risks in your career?; 2. What are you risking by not taking these risks?; and 3. How do you gain the confidence to start taking the risks that will propel your career and your life?

Risk Parameters

Risk is often defined as a situation involving exposure to danger. However, risk means different things to different people. One person's risk is often another person's opportunity. People also seem to have different risk thresholds. Some gain more confidence to take risks as they age while others become more risk averse.

Some believe that risk taking is a financial luxury while others see risk as a necessity. When I ran an event focused on risk in New York with Chieh Huang, a corporate lawyer turned successful entrepreneur, he disagreed with the notion that risk-taking is a financial luxury. As the primary breadwinner in his family, he felt he still had the freedom and flexibility to take risks and was confident that if the risk he took did not work out, his skills would enable him to find something else to support his household. He also expressed, with humility, that he was not too proud to "flip burgers" and do whatever was necessary to support his family.

Many believe that gender plays a role in risk aversion. When women appear to be more risk averse, I believe it is for two related reasons. One is how they are raised. As Katty Kay and Claire Shipman report in their book, *The Confidence Code*,[1] girls are often raised to be "good girls" and follow the rules. They are then rewarded for their compliant behavior. I also see women less inclined to take risks because they have not historically been rewarded for going outside of the conventional path. In turn, women are often not expected to take risks and when they do, there is less societal and workplace support for their risk taking.

Whether or not you are supported for taking smart risks, risk-taking is important. *The Confidence Code* research and countless other studies increasingly support the value of risk taking and failure in order to gain greater confidence and success. Indeed, inaction (not taking a risk) can often be a bigger risk than taking the risk a person is contemplating. There are many who have regrets about risks not taken, especially because often there is no subsequent opportunity to recover from failing to take the risk.

Some believe that the risks they are considering will enable them to have more passion in their career and gain greater happiness. And, some question whether happiness and passion are legitimate career motivators. I would argue that happiness and passion in your career are aspirations you should strive for but you need to balance these desires with finding career paths that are practical and viable. Often, it does not have to be one or the other.

Risk Reluctance

Despite the research that supports the idea that risk taking is critical to advancing a person's career forward, many people are still reluctant to take risks. Some of these individuals have taken risks that have not panned out and they are afraid to try again. For those who have gained success and status, they may become even more risk averse for fear of what they might lose. In asking hundreds of people about risk reluctance over the years, I have found that most attribute their reticence to a variety of factors including a fear of failure, rejection and competition as well as a lack of confidence or knowledge. Among these fears, the fear of failure is overwhelmingly the most common. Yet most would acknowledge that it is not healthy to build a life around fear.

Often, a triggering event like my brain surgery is a significant driver to push a person over his or her risk threshold. For others, it may be a natural course of events or transition due to a geographic move, marriage, maternity leave, graduation, retirement, etc. However, when there is no triggering event and no natural transition before you, the question becomes how do you develop the courage to take smart risks?

Courageous Risks

Over the years, I have learned valuable lessons that have helped me and others take strategic risks and, in turn, make a difference in our careers and our lives. What follows are highlights of these learnings:

- **Analyze the pros and cons of your choice**. Anticipating the possible setbacks and potential gains as well as the pros and cons of the risk you are con-

templating is critical. In anticipating the setbacks, it is also helpful to think through contingency plans and potential strategies to effectively bounce back. By preparing in advance a recovery for a risk that may not ultimately be successful, you will gain the confidence to take the risk without allowing the pros and cons to paralyze you.

- **Consult with trusted advisors**. Lack of confidence and fear of exposure or embarrassment often prevent us from sharing the risk we are considering, even with our trusted advisors. But, do not keep the risk you are contemplating a secret. If you keep it to yourself, you are unlikely to benefit from those around you who may help you critically think through the opportunities and challenges as well as identify and connect you with others who may help inform your decision. These trusted advisors you consult with should include people who know you personally and professionally so that they can assess both your professional aptitude as well as your social composition. Your trusted advisors can also help you anticipate the reactions that colleagues, friends and family may have and advise you on how to respond to their reactions.
- **Identify additional information or support needed**. You may ascertain additional information needed to make an informed decision. Or, you may realize that there are others with whom you should consult to reach the right decision. You may also identify others from whom it is important to gain support to maximize the likelihood of success in your risk-taking choice.
- **Consider the impact on others**. While you may think the risk you are contemplating is only about you, more often than not it becomes clear that others will also be impacted. It may be helpful to confer with these people to get their buy-in and support as well as their feedback on whether the choice you are considering is a good one.
- **Contemplate modifying the risk**. People will often pilot the risk they are considering by pursuing it on a volunteer basis, testing it out or doing it on the side before fully committing to it. If you can pursue your risk on a trial basis, it can help give you the confidence in your decision to pursue the risk more fully. It will also inform you whether the risk you are contemplating should be modified based on the information you have gleaned.
- **Anticipate the obstructers**. Anticipate what and who may stand in the way of your risk decision and why they may do so. Assess whether there is any legitimate basis for their discouragement and if such a basis exists, work to resolve those concerns. If you do not believe there is a legitimate basis for their concerns, see if you can convert these potential obstructers into allies. If not, then anticipate how you will best pursue your risk-taking without their support and whether you will need to take any additional steps to contain the damage from any possible attempts to thwart your efforts.
- **Make the ask**. Many are fearful of asking for help or asking for what they need. We are often good at nurturing relationships but we fall short of enlisting others or making that final request that will make the difference. You can often overcome this hurdle by making small and specific asks or seeing if you can make your ask more of a give. If you are generous and helpful, the person receiving the request will likely be more receptive to wanting to help you.
- **Consider ways to build up your risk tolerance**. Determine if there are smaller risks that you can take or less intimidating venues to take these risks to help build up your confidence. More frequent risk taking may also help you develop a greater tolerance for disappointment. Assess whether the risk you are considering can be staged and paced to make the overall risk less intimidating and less damaging if it is not successful. Additionally, contemplate the worst case scenario of taking the risk you are considering and how you would overcome it. If the worst case scenario is something you can tolerate without much hardship, it may help you build up your risk tolerance.
- **Seek out risk-taker inspiration**. Ask others you know who have successfully taken risks about their thought process and how they went about taking the steps that they did to take a risk, as well as the impact of their risk-taking. Seek out books and articles, attend lectures and listen to talks and identify other resources that feature people whose risk-taking approaches and paths are inspirational to you. You may even undertake physical challenges yourself as a means to give you the confidence to take professional risks. For example, some report that after successfully completing a marathon or engaging in challenging ropes courses, white water rafting or other physical adventures, they are more confident in taking risks in their professional lives.
- **Evaluate prior risk-taking successes and experiences**. Look at your prior risk history and assess what factors you previously considered that helped you overcome your fear of taking risks. Consider whether your prior choices made sense and were helpful and what you can do differently or better to achieve a more favorable result. Analyze what has held you back the most in taking risks in the past and what your greatest fears are in taking the current risk you are considering.
- **Be thoughtful about how you frame prior risks**. Rather than see prior unsuccessful attempts as failures, see if you can learn from them and incorporate those lessons into your next effort. When I

ran an event on risk with well-known restaurateur Alison Barshak, Founder of Absolutely Lobster® and former chef of Striped Bass and other esteemed restaurants, she relayed that she did not see the bankruptcies that her companies went through during her career as failures. While she underscored that filing bankruptcy is not a decision to be taken lightly, she also knew that the filings were the best options at the time and they led her to make better choices and achieve greater successes in her future ventures.

- **Assess the best timing**. Your readiness to take a risk and the timing you choose may have a significant impact on your success. If there is no triggering event or natural transition that will motivate you to take a risk you have been contemplating, consider setting goals or targets that will institute a timeline for getting there.
- **Consider the risk of inaction**. Often what propels someone to take a risk is not as much the confidence to do so, but instead, the fear of not doing so. Indeed, the risk of inaction is, at times, greater than the risk of failure. So, it is important to evaluate not only the impact of the choice you are considering but also the impact if you do not make that choice.
- **Recognize it is normal to feel uncomfortable**. Taking risk involves stretching yourself, which is uncomfortable for many of us. By recognizing that pushing yourself out of your comfort zone is often an awkward and scary feeling, it may help you adjust to it more readily. The corollary to this discomfort is a fear that you are being reckless and have gone too far. However, in taking the steps outlined here, you can assure yourself that your decision has not been rash or thoughtless. Without feeling uncomfortable, you will not be able to dream bigger and learn more. Falling short of those efforts and aspirations will prevent you from achieving and pursuing all that is available to you.
- **Focus on resiliency and perseverance, not perfection**. Pursuing a risk that may have some challenges or results in you going in another direction does not mean that you have failed. Focusing on resiliency and perseverance and how to be agile and responsive to challenges and unanticipated scenarios is a healthy framework. Perfection is not a realistic or productive pursuit.
- **Go with your gut**. After all of your thoughtful analysis and consultation, you will need to make a decision. Big decisions are seldom neat and crystal clear. Do not get caught up in the lack of precision in your choice. Ultimately, you will have to go with your gut and a leap of faith that you will be able to confront the unanticipated challenges as you see them and embrace the obstacles as they come.

Conclusion

For nearly 20 years, I have seen that most people who are risk averse are fearful of losing what they have and being unable to get back to where they were if their risk-taking is unsuccessful. However, people often discover that there is not as much finality in the risk they are considering as they initially thought. So the door that you thought you were closing is often still open, at least partially, and the surprise is that once you take the risk you are considering, you realize that the biggest thing preventing you from opening that door again is yourself.

I have found that a significant impetus for successful risk-takers is their appreciation of unanticipated and unintended benefits. That is, that one risk begets another opportunity. Successful risk takers understand that once they take a smart and calculated risk and it delivers a positive result, the outcome is often not one they expected and it subsequently led to more opportunities than they could have dreamed. After thorough analysis, weighing of options, consultation with others and additional contemplation, I hope you will ultimately be buoyed by the unknown rewards in your exciting journey ahead. ■

1. Katty Kay & Claire Shipman, *The Confidence Code: The Science and Art of Self-Assurance—What Women Should Know* (2014).

IN MEMORIAM

Thirty Years of Holding Court on Language

It's safe to say that many lawyers in New York State – and more than a few throughout the country – are better writers today because of Gertrude Block. For some three decades, Gertrude Block wrote a column called Language Tips that appeared regularly in the *Journal* – in more recent years usually on page 61 – before retiring in 2014. In all she answered thousands of queries from attorneys and law students struggling to navigate not the legal arena of statutes and summary judgment motions but the laws of sentences and syntax, and the murky areas of usage and ambiguity. She did it all with a graceful prose style of her own and answers to queries that were marvels of context, clarity and precision.

Gertrude Block, who died over the Columbus Day weekend at the age of 96, was old school in the best sense – meaning she had received her education in an era when students were expected to study grammar and Latin as foundations for mastering the English language. But by the late 1960s the groundbreaking works of linguist Noam Chomsky were taking hold in the academy and the notion of teaching grammar through rote memorization of rules fell into disfavor. As a result students of all disciplines, including the law, could find themselves at sea when it came to naming the parts of speech, or diagramming a sentence, or identifying a dangling modifier. But Gertrude Block knew all this and more, and the popularity of her column, which also ran in four other law journals, was a testament to how valuable her knowledge was to generations of legal minds.

The format of the column was simple. A lawyer or student would send in a query and Ms. Block would begin the process of answering it. Besides her own vast knowledge, she would consult various authorities to learn as much about the topic as possible. Then she would write a first draft of her reply and then . . . nothing. She would put it aside for a while, heeding the advice of the Roman poet Horace, and come back to it later with a fresh eye. Only then, after meticulous review, would she consider it ready for publication.

Sometimes the queries were familiar – questions that bedevil all writers such as the proper use of which and that, or different from versus different than. Sometimes the question was focused on the legal system – for example, if the jury arrives at its (collective) verdict, is it correct to say that the jury changed its (again, collective) mind, or their minds (to reflect what each individual juror was thinking)? Then there were questions of usage, such as the transformation of word loan from a noun to a verb that in today's usage is often used instead of the original verb lend. Ms. Block would trace the origin of the shift and the reasons behind it, and often conclude by reminding readers that the English language is living, meaning it is flexible and subject to change.

Gertrude Block went to Penn State University with no intention of studying law, much less embarking on a career as a legal writing expert. Instead she earned a B.A. in economics and became an assistant buyer after graduation. Then came marriage and years raising her two children. When they left the nest she began looking for ways to keep occupied. At one point she toyed with playing bridge, then thought better of it and enrolled at the nearby Gainesville campus of the University of Florida, where she was drawn to linguistics. Soon she was doing so well that she was teaching English to undergraduates and, along the way, catching the eye of the College of Law faculty, who invited her to teach law students the intricacies of language. It would only be temporary, the faculty warned, just an experiment to see if it would work out. Did it ever.

When word of Gertrude's passing reached our offices, we began to peruse past issues of the *Journal* to get a sense of the body of work she had left behind. We found nothing to quarrel with, save one quibble over a column that appeared in the May 2012 issue. The query went like this:

Question: The phrase "lucked out" used to mean "out of luck," thus in bad luck. Now that phrase seems to have changed 180 degrees, so all my young friends use it to mean "out of bad luck," thus, "in good luck." Which does it mean? Talk about ambiguity!

Answer: Originally the word "out" was thought of as it appeared in phrases like "out of gas," so "lucked out" carried a negative connotation. Gradually, however, young people began to think of "luck" as in phrases like the luck of the draw. So for them, "to luck out" is positive, confusing their elders.

Confusing? How could that be? When Gertrude Block agreed to write a column for the *Journal* all those years ago, we knew we had lucked out – big time – and so had our readers. Not a whit of ambiguity about it. ■

Technology in Court-Annexed Mediation: Policy and Praxis

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By Dean W. M. Leslie

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Recent developments in technology pose special challenges to, and provide unprecedented opportunities for, court-annexed mediation processes. The true administration of justice raises legitimate philosophical questions for unearthing the conjunction of theory and practice (the praxis) in applying the latest, and even the more prosaic, technologies.

The areas of consideration can, and should, include mediation policy, preparation for mediation, the mediation process, the conclusion of mediation that is running in parallel with litigation, and the prognosis for the integration of those considerations in the future. This article will focus primarily on the first of these areas, to wit, the policy questions behind integration of technologies into court-annexed mediation, their relationship to the expectations of the public, the bar, and the judiciary, and recommendations for the development, dissemination, and praxis in connection with cohesive policy.

What Are We Talking About?

It is critical to understand what is meant by court-annexed mediation. There are any number of different, equally plausible answers to this question. Those answers can lead to drastically differing policy positions. In a lay context, mediation means "the act or process of mediating; especially intervention between conflicting parties to promote reconciliation, settlement, or compromise."[1] In popular legal parlance, mediation refers to "nonbinding intervention between parties to promote resolution of a grievance, reconciliation, settlement, or compromise."[2] However, both of these definitions are slightly off the mark. For instance, in a court context, there are separate and distinct meanings and processes related to "mediation," "conciliation," and "settlement."[3] While mediation, with a lower case "m," may include all of those meanings and processes, mediation, with an upper case "M" may mean something quite different, for example, the methods delineated in the Uniform Mediation Act (UMA).[4]

The problem arises that practitioners, judges, and the public not only have differing understandings and expectations around mediation itself, but also around what constitutes court-annexed mediation.[5] As an additional complication, some courts in New York do not even have voluntary court-annexed mediation,[6] while others have recently expanded mandatory programs.[7]

Who is mediating can also have a direct effect on the mediation experience for the parties. For instance, while a judge, versed in settlement conferencing, might balk at the dreaded "ex parte" communication during a mediation, that very form of communication is the cornerstone

of Mediation. Moreover, while it might occur to a judge or judicial referee to create so-ordered interim stipulations as the parties agree to dispense with various aspects of a dispute, most versions of the UMA specifically prohibit a mediator from making a "report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation."[8]

Compounding the practical definitional problem with mediation is the open question of the theoretical expectations of "court-annexed" mediation. For example, one scholar describes court-annexed mediation as one of three things: (i) mediation that has been specifically ordered by a court; (ii) mediation that occurs per general court orders (e.g., standing orders that all family law cases will be mediated before a trial date is set); or (iii) mediation of any and all matters that will of necessity be litigated (e.g., damage awards to minors, divorce actions).[9] This understanding of mediation is not complete, as many courts, for example the United States Court of International Trade (USCIT), have mediators or judges who serve in a mediation capacity within the court. Under USCIT rules, "[a]ny judge may [refer a matter to a Judge Mediator for] Court-Annexed Mediation...in response to a consent motion from all the parties which requests mediation, in response to a motion from one or more parties, or . . . sua sponte . . . ."[10]

Another approach to the definitional problem is offered by the German experience with its Draft Mediation Act (DMA). The DMA sets the categories of mediation, which include mediation independent of any pending judicial proceedings (*außergerichtliche* Mediation), mediation that occurs during pending judicial proceedings but outside the court (court-annexed mediation, or *gerichtsnahe* Mediation), and mediation carried out by judges during a pending court matter, but outside their capacity as judges (court-integrated mediation, or *gerichtsinterne* Mediation).[11]

Given these complexities, the expanded role of mediation within the courts, including by court-affiliated persons, and the potential adoption of the UMA in New York,[12] New York courts must eventually send clear signals to practitioners and laypersons as to what is meant by court-annexed mediation, and what policies are being addressed. In addition, as mediation within the courts develops, special attention must be given to the parallel track of justice, and the conception of justice that is attributable to stakeholders; after all, most courthouses offer promises, in rock, on their facades, about the preservation and protection of justice. Court-annexed mediation policy must, therefore, be responsive to such promises, and development of policy in the area must, by definition, include consideration of these granite-engraved pacts with society.

To Automate or Innovate? That Is the Question.

It has been suggested that many studies of alternative dispute resolution (ADR) are outdated, and founder in the face of the growth of court-affiliated ADR in the 21st century. One commentator notes that "[t]he second generation of ADR research should focus not on whether courts should use ADR, but on how mediation and other ADR processes should be conducted."[13] Although referring to Canada, another commentator cited Ontario Former Chief Justice Winkler in asserting that "we have entered the 'Enlightened Age of Mediation[, and] Mediation is the cornerstone of the justice system . . . . Mediated settlements, not trials and appeals, not even summary judgment motions, have become the most likely way to resolve a dispute."[14] The question of how to integrate technologies into mediation, and, indeed, jurisprudence, presents the age-old policy dilemma of choosing the correct mixture of automation and innovation.

> Who is mediating can also have a direct effect on the mediation experience for the parties.

The policy dilemma related to automation is encapsulated nicely in a poem written by Sam Walter Foss (1858-1911), originally of New Hampshire, called "The Calf-Path."[15] The poem, perhaps apocryphally, refers to the street plan of Boston, Massachusetts. The story goes that when the city of Boston was new and unpaved, the civil engineers decided against laying out a new street plan, but instead chose to simply pave the paths that had been worn by cattle. As anyone who has had occasion to drive in Boston will attest, the result was a somewhat incomprehensible street plan that generates significant traffic. Thus, the admonition not to "pave the cow path" reminds us not to indolently automate by adapting technologies to traditional methods, but to diligently innovate by adopting new methods.

A straightforward example of how courts may be missing this point is the widespread translation of the same do-it-yourself forms created 50 or 75 years ago, into electronic formats. Such reliance on pure automation is not only unlikely to offer the best outcomes but will ultimately fail to capture the best capabilities of new technologies. It may be more effective to engage fundamental innovations, such as report-generation programs, to evolve forms rather than enshrine them. Given the technologies of today, few persons would design judicial procedures that bear any resemblance to the current ones; yet, as creatures of habit, courts cling to automation.

In order to extract the maximum benefits of new technologies, judges and judicial representatives must partner with technology firms and providers. An example of the power of innovating over automating, and fostering partnerships between the courts and the private sector, is given by the recent projects of the Hague Institute for the Internationalisation of Law (HiiL), a not-for-profit foundation based in The Hague that focuses on creating new procedures to address justice-related problems in areas such as divorce and landlord-tenant disputes.[16] HiiL is now partnering with the Swedish Embassy in Uganda and The Hague Institute for Global Justice to develop the Justice Needs and Satisfaction tool, which provides data about the justice needs of citizens and data on the quality of their justice journeys. In addition, HiiL is bringing its technology to British Columbia in order to provide access to a range of new tools to resolve their legal problems.[17] The Dutch Legal Aid Board is also working on developing an interactive diagnosis and triage website, originally launched in 2007, to innovate online dispute resolution.[18]

Why Not Let the IT Professionals Handle Everything?

While is easy enough to say that we must innovate and not simply automate, innovation is fraught with potential missteps because the persons who are best suited to innovate (the IT professionals) are not necessarily the same ones who are acquainted with the nuance and history of justice (judges and lawyers). As such, courts must set clear parameters for the integration of technologies, which should include, at a minimum, attention to four components of justice: distribution, procedure, retribution, and restoration.

Distributive justice, often cited as a component of egalitarianism and utilitarianism, concerns the allocation of the fruits of society through attention to equity, equality, power, need, and responsibility.[19] Procedural justice addresses fairness in dispute resolution and resource allocation. In *A Theory of Justice*, the philosopher John Rawls distinguished perfect procedural justice (encompassing not only independent criteria for a fair outcome, but the method of achieving that outcome), imperfect procedural justice (which only encompasses the independent criteria for a fair outcome), and pure procedural justice (which only encompasses the method of achieving the outcome).[20] Retributive justice, with underpinnings of deterrence, concerns itself with the punishment of offenders rather than on rehabilitation, and rests on the principles that criminals deserve punishment, from a legitimate punisher, in proportion to the wrong committed.[21] Finally, restorative justice, which attempts to identify and address the root causes of crime, focuses on the rehabilitation of offenders through reconciliation with victims and the community at large.[22] Individuals and groups may have differing aims and orientations with regard to these aspects of justice, and these differences may confound or create support for policy decisions.

Against the backdrop of the aims of justice, the stakeholders in the process of formulating policy for the integration of technology into areas such as court-annexed mediation may have additional concerns. Courts may also want to address issues of the transparency of the mediator's procedures, the independence of the mediator from decision-makers within the same court, and impartiality. At the same time, the mediator within the court must avoid the moral hazard presented by self-imposed, or administratively levied, pressure to be effective in resolving cases, as well as the ethical dilemmas that may arise from working within the courts and maintaining confidentiality. Moreover, the bar and the public will be sensitive to issues of due process, equal protection, accessibility, flexibility, affordability, and general fairness.

At a recent presentation on Technology in Alternative Dispute Resolution, one practitioner expressed concern that rapid development of technology is leaving jurisprudence and traditional mediation behind. However, the confluence of these areas of jurisprudential concern, which can only truly be understood by legal practitioners, should remove all doubt that the bar, the courts, and the public all have critical roles to play in the development of effective and long-lasting policy in the area of court-annexed mediation in particular, and in the area of the integration of technology into jurisprudence in general.

What Is Happening with ADR in New York?

The State Supreme Court for New York County (NYSSC) maintains a roster of neutral mediators to whom commercial cases may be assigned on a mandatory basis. The first four hours of the mediation are at no cost to the parties; however, if the parties so desire, they may continue the mediation at their own expense in pursuit of settlement. In addition, NYSSC maintains a number of court-connected programs in support of ADR including the Community Dispute Resolution Centers Program, the Attorney-Client Fee Dispute Resolution Program, the Collaborative Family Law Center,[23] a Judicial Mediation Part, and a Non-Jury Post-Note-of-Issue Part.[24]

Legislatively, a bill is before the New York Senate (S. 4026) seeking to establish the UMA in New York, with special attention to the issues of privileged communication in mediation, the prohibition on certain reports by mediators, and the disclosure of conflicts of interests. The bill would add an Article 74 to the Civil Practice Laws and Rules creating such a privilege against the disclosure of communications, creating a baseline presumption of confidentiality for such communications, setting forth definitions, scope, exceptions, and waivers, and delineating what a mediator may and may not disclose. In addition, the new CPLR article would set requirements for the disclosure of conflicts of interests before accepting a mediation, and attorney representation in mediation. The

UMA would also have due consideration for uniformity among the States, and provide for severability.

Why Is This Urgent?

It is fair to ask whether there is any particular urgency around the issue of developing a cohesive policy for innovating court-annexed mediation. After all, there are any number of initiatives under way, and the slow integration of technologies may be a good thing: change for the sake of change is likely to be wrong-headed. This argument ignores the need to get change right the first time. A worst-case scenario is making changes that have deeper implications without recognizing them…this is why practitioners, who understand what due process looks like, who innately appreciate when equal protection is at risk, and who know the purposes and thinking behind court procedures, are so critical to innovation.

One example of a technology that is already in widespread use, which will undoubtedly become part of typical court proceedings, is telepresence. Telepresence refers to a set of technologies which allow persons to feel as if they are present, and to give the appearance of being present, sometimes via telerobotics, at a place other than their true location. Not only will telepresence eventually provide the user's senses with such stimuli as to give the feeling of being in that other location, haptics[25] will soon give the user the ability to directly effect the remote location.

Using telepresence, in a military investigation in North Carolina, Afghan witnesses have testified via videoconferencing.[26] In Hall County, Georgia, Southern Business Communications created a customized videoconferencing system for initial court appearances. The system links jails with courtrooms, reducing the expenses and security risks of transporting prisoners.[27] The U.S. Social Security Administration (SSA), which oversees the world's largest administrative judicial system under its Office of Disability Adjudication and Review (ODAR), uses videoconferencing to conduct hearings at remote locations. In 2009, the SSA conducted 86,320 videoconferenced hearings, a 55% increase over 2008. In August 2010, the SSA opened its fifth and largest videoconferencing-only National Hearing Center (NHC), in St. Louis, Missouri. Since 2007, the SSA has also established NHCs in Albuquerque, New Mexico; Baltimore, Maryland; Falls Church, Virginia, and Chicago, Illinois.[28]

Despite this widespread use, which is poised to continue, there are jurisprudential issues that remain unaddressed. Putting aside the obvious Sixth Amendment issue of the right to confront one's accusers, practitioners have already identified technical issues with eye contact, appearance bias, and signal latency.[29] With regard to eye contact, while traditional telephone conversations give no eye contact cues, videoconferencing systems may create the latent, and potentially incorrect, impression that the party being viewed is avoiding eye contact, and being dishonest. Moreover, the party viewed may compound the impression of being untruthful due to the self-consciousness of being on camera. Finally, signal latency may exacerbate the impression, due to the failure of the party to answer questions promptly.

Where Do We Go From Here?

It is often said that the first step to finding a cure is recognizing the illness. New York faces the reality of being the locus, on average, of three to four times as many filings in its courts as in the whole federal system.[30] As noted by Hon. John T. Broderick, former Chief Justice of the Supreme Court of New Hampshire, "[i]nnovation is no longer just a good idea[, i]t is a prerequisite to survival."[31] Along with the high number of filings, disputes continue to increase in complexity. In such a climate, courts will increasingly be forced to rely on special mechanisms, such as court-annexed mediation, to manage the workload.

In order to be successful in creating effective and nuanced court-annexed mediation, courts will have to tackle the issue of defining court-annexed mediation to comport with the expectations of the public, practitioners, various courts, as well as fellow judges and judicial representatives. In making policy based upon those definitions, courts will be challenged to attract the best private and public partnerships to design programming that embraces technology, and, at same time, serves the needs of the public, engages the most suitable technologies, promotes innovation over automation, and protects prevailing notions of justice. In order to vet that policy and programming, evaluation mechanisms must be established in cooperation with practitioners and the public to foster transparency, the access to, and quality of, justice, and confidence in the courts, as well as in any annexed mediation mechanisms. In approaching these tasks we should not be daunted by their magnitude, but heartened by the words of Mother Teresa: "[w]e ourselves feel that what we are doing is just a drop in the ocean. But the ocean would be less because of that missing drop." ■

1. Merriam-Webster.

2. *Id.*, "legal definition."

3. *See, e.g.*, http://legal-dictionary.thefreedictionary.com/Federal+Mediation+and+Conciliation+Service. Definitions offered by the Federal Mediation and Conciliation Service distinguish between mediation (a voluntary, nonbinding form of dispute resolution in which the mediator meets with the parties), and conciliation (a form of dispute resolution in which the conciliator acts as a neutral third party, but typically will not participate in any joint meetings between the parties).

4. The Uniform Mediation Act (UMA) was officially adopted by the full National Conference of Commissioners on Uniform State Laws at its August 2001 meeting in West Virginia. The American Bar Association House of Delegates then voted to endorse the Act at its February 2002 meeting, with only a handful of opposing votes. The UMA has been adopted by the District of Columbia, Illinois, Indiana, Iowa, Nebraska, New Jersey, Ohio, and Washington. In addition, the UMA, a version of it, or similar legislation, is under consideration in Connecticut, Delaware, Florida, Massachusetts Minnesota, Montana, Nevada, New Mexico, New York, Oregon, Vermont, and Wyoming.

5. *See, e.g.*, Committee on Federal Courts Association of the Bar of the City

of New York, Court-Annexed Mediation Programs in the Southern and Eastern Districts of New York: The Judges' Perspective (August 2004) at 6 ("[c]ourt-annexed mediation in the Southern District, pursuant to Local Civil Rule 83.12, is very similar to court-annexed mediation in the Eastern District, but there are four significant differences").

6. *See* New York Law Journal, *Task Force Develops Mediation Program Proposal*, January 25, 2016 ("[a]t its meeting on Nov. 6, 2015, the Executive Committee of NYSBA adopted a proposal mandating that a voluntary court-annexed mediation program be adopted by each New York State court [civil]. The proposal states: "Each civil court in New York State that does not have a court-annexed mediation program shall create and adopt a court-annexed mediation program that enables parties to participate in mediation on a voluntary basis").

7. *See* Administrative Order in the First Judicial District, Supreme Court, Civil Branch, of January 28, 2016 (http://www.nycourts.gov/courts/comdiv/NY/PDFs/AO-ADR22016.pdf), supplanting the scheme under which one-in-five commercial cases were subject to mandatory mediation with one where every commercial case is subject to referral to mandatory mediation.

8. *See, e.g.*, UMA, Section 7, http://www.mediate.com/articles/umafinal-styled.cfm.

9. Stephen R. Marsh, http://adrr.com/adr2/essayq.htm.

10. *See* Guidelines for Court-Annexed Mediation, United States Court of International Trade, http://www.cit.uscourts.gov/Rules/Rules_Forms%20Page/Rules_Forms_Guide_AO%20Page/Rules_Forms_Guide_AO%20PDF's/Guidelines_Mediation.pdf.

11. *See* http://www.disputeresolutiongermany.com/2011/11/mediation-court-annexed-mediation-and-judges-as-mediators/#sthash.0ABnqmP9.dpuf.

12. *See* https://www.nysenate.gov/legislation/bills/2015/s4026.

13. *What We Know and Need to Know About Court-Annexed Dispute Resolution*, Deborah Thompson Eisenberg, South Carolina Law Review, Vol. 67:245 at 247.

14. Igor Ellyn, QC, April 2003, *Persuasive Pleadings Promote Satisfying Settlements Sooner (or Drafting Pleadings with Mediation in Mind)*, discussed in Litigating in the Enlightened Age of Mediation in Ontario, Canada: Drafting Pleadings, https://www.hg.org/article.asp?id=7844.

15. *See* http://www.thepastwhispers.com/Calf_Path.html.

16. *See* http://www.hiil.org/.

17. *See* http://www.hiil.org/projects/?type=current.

18. The Rechtwijzer 2.0 application was initially designed to support people with divorce-related issues in The Netherlands. An English version of this module was scheduled to go live in British Columbia and England, and Dutch landlord-tenant and employment modules were scheduled to go live in The Netherlands, in 2015. For more information, see http://www.hiil.org/project/rechtwijzer; see also http://rechtwijzer.nl/.

19. *See* Forsyth, D. R., Group Dynamics (5th Ed.), pp 388-389, Belmont: CA, Wadsworth, Cengage Learning.

20. *See* Rawls, John, A Theory of Justice, Chapter II, Section 14, Oxford: Oxford University Press 1999.

21. *See* Walen, Alec, Zalta, Edward N., ed., Retributive Justice.

22. For a fuller discussion of restorative justice, see Braithwaite, J., Restorative Justice & Responsive Regulation, at 249, Oxford University Press 2002.

23. *See* http://www.nycourts.gov/ip/adr/Info_for_parties.shtml#courtbasedprograms.

24. *See* http://www.nycourts.gov/courts/1jd/supctmanh/news_&_announcements.shtml.

25. From the Greek haptein meaning "to fasten," haptics is the science of applying touch (tactile) sensation and control to interaction with computer applications. For more information, see http://www.gizmag.com/haptic-tech-vr-wearables-games-sightlence/35616/.

26. *See* http://www.networxsecurity.org/members-area/glossary/v/video-conferencing.html.

27. *See* https://www.lifesize.com/~/media/33E0CAA292494823B530697056BD4894.ashx.

28. *See* https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-11-11147.pdf; see also https://oig.ssa.gov/sites/default/files/audit/summary/pdf/Summary%2011147.pdf.

29. *See* http://ldims2009.blogspot.com/2011/04/video-conferencing.html.

30. *See* https://www.nycourts.gov/reports/annual/pdfs/ar20-1fin.pdf; see also http://litigation.findlaw.com/legal-system/federal-vs-state-courts-key-differences.html.

31. *See* The Changing Face of Justice in a New Century: The Challenges It Poses to State Courts and Court Management, reproduced in the National Center for State Courts, Future Trends in State Courts (2010), http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1631.

"Moments in History" is an occasional Journal *sidebar, that features people and events in legal history.*

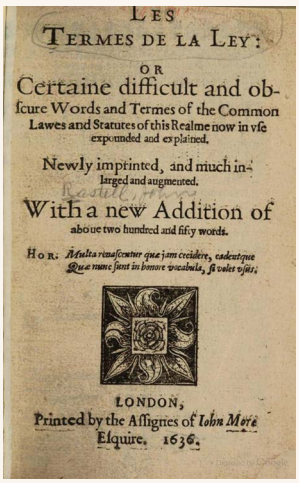
Moments in History

The First Law Dictionary

In 1527, John Rastell, an English lawyer and author, published the first law dictionary in England: *Expositiones Terminorum Legum Anglorum*, later known as *Les Termes de la Ley*. The dictionary included 208 entries laid out alphabetically in parallel columns, one in Latin and the other in Law French, known as Anglo-Norman.

A second edition, issued in 1530, added English translations. Rastell's work wasn't just the first law dictionary; it was the first English-language dictionary of any kind. It preceded the arrival of *The Dictionary of Syr Thomas Eliot Knyght* by more than a decade and Robert Cawdrey's *Table Alphabeticall* by 75 years. Samuel Johnson's *Dictionary of the English Language* didn't appear for another two centuries.

Rastell intended his dictionary to serve an educational function. Beyond lawyers and students, Rastell hoped to inform and educate ordinary citizens. In his view, only an informed citizenry could bring about the ultimate social purposes of the law.


LES
TERMES DE LA LEY:
OR
Certaine difficult and obscure Words and Termes of the Common Lawes and Statutes of this Realme now in vse expounded and explained.
Newly imprinted, and much inlarged and augmented.
With a new Addition of
aboue two hundred and fifty words.
HOR. Multa renascentur quæ jam cecidere, cadentque
Quæ nunc sunt in honore vocabula, si volet vsus;
LONDON,
Printed by the Assignes of Iohn More
Esquire. 1636.

The dictionary appeared in 29 subsequent editions between 1527 and 1819, despite facing competition from the 1729 publication of Giles Jacob's *New Law-Dictionary*, which moved the form of the legal dictionary in the direction of an encyclopedia.

Bibliographer Howard Jay Graham describes *Les Termes de la Ley* as "the ultimate ancestor of every Anglo-American law dictionary and legal encyclopedia" and observes that it "probably has exercised as nearly permanent and decisive an influence as any lawbook in English history."

Excerpted from *The Law Book: From Hammurabi to the International Criminal Court, 250 Milestones in the History of Law* (2015 Sterling Publishing) by Michael H. Roffer.

Bringing About Structural and Jurisdictional Change to New York's Appellate Division

By Hon. David B. Saxe

Chief Judge Janet DiFiore should be lauded for acting so promptly to create a task force to focus on next year's referendum on a constitutional convention, that can engage in a thorough review of the Judiciary Article (Article VI) of the New York State Constitution and propose possible revisions for the improvement of our state court system. She has specifically asked the appointed group to propose possible revisions that would alter the structure, organization and jurisdiction of our state courts to make them more modern, efficient and accessible.[1]

This is the optimal time to articulate specific proposals to amend the state Constitution, because the Constitution mandates that every 20 years a referendum be placed on the ballot asking voters whether to hold a statewide constitutional convention;[2] such a referendum will appear on the 2017 general election ballot. If the voters in November 2017 approve holding such a convention, the process of arranging for a constitutional convention would begin, starting with the election, one year later, of delegates to the convention, which would then be held in April 2019. Prepared proposals to amend the Constitution could then be put forward.

Of course, this effort to improve the structure of our state court system is not a new endeavor. There have been a number of recommendations for substantial alterations to the New York State court system during the past two decades, most prominently the one begun by then-Chief

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Judge Judith Kaye's 1997 and 1998 court restructuring plan to consolidate and simplify the New York trial court system,[3] followed by Judge Kaye's appointed Special Commission on the Future of the New York State Courts, which issued a report in 2007 recommending a range of court reform proposals.[4] Many aspects of the proposals would involve altering the court structure directed by our state Constitution, making those proposed changes dependent on the complicated constitutional amendment process; other proposals would only require legislative enactment. So, while the task force studies what, if any, amendments to our state Constitution to recommend, it may also be useful for those interested in making real improvements to the courts to consider not only what needs fixing, but possible alternative methods of alteration, including some changes that would not require amendments to the Constitution.

The current geographical structure of the four Appellate Division departments is largely the same as that created by the Constitution of 1894.

Restructure the Appellate Division

Now that a broad effort is underway to revise the structure of the court system, I take this opportunity to offer some ideas and thoughts, not as to the entire court system, but in the narrower area of improving the structure, organization and jurisdiction of the Appellate Division.

The current geographical structure of the four Appellate Division departments is largely the same as that created by the Constitution of 1894, which directed that the First Department be made up of just New York County – which, since 1874 had included the portion of the Bronx west of the Bronx River;[5] the 1894 Constitution further directed that the other three departments be formed by the legislature, with approximately equal populations.[6] Legislation creating the boundaries of the other three departments was enacted the following year. Subsequent constitutional amendments did not echo any requirement that the size of the departments be kept balanced, and the geographical lines created in 1895 were largely continued, despite the enormous changes in population in some areas. So, although the populations of New York's counties are vastly from what they were in 1894, the geographic boundaries of the four Appellate Division departments created at that time remain in place.

The wildly uneven population growth that occurred primarily in the New York City suburbs, many decades after the creation of the departments, created a pronounced imbalance in the departments. The 10 counties of the Second Department – Kings, Queens, Nassau, Suffolk, Richmond, Westchester, Putnam, Dutchess, Rockland and Orange – have grown into populous suburbs of the New York City metropolitan area. Now, those 10 counties that make up the Second Department contain over 50 percent of the state's residents,[7] with a population of more than 10 million people, more than three times that of each of the other three departments.

A Fifth Department

Due to this imbalance, in addition to the stopgap measure of bringing the number of justices in the Second Department up to 22 through the appointment of "additional justices,"[8] many, including former Chief Judge Kaye and the Special Commission she created in 2007, have suggested that the imbalance should be remedied by a constitutional amendment creating a Fifth Department of the Appellate Division.[9] Although we may presume that the intention of the plan is that a number of counties would be extracted from the Second Department to make up the new Fifth Department, these plans do not actually specify how the counties should be reallocated to create the new Fifth Department. The logical and simple means of creating a Fifth Department, if population alone were considered, and politics ignored, would probably be to set Kings, Queens and Richmond counties in the Second Department, and include all the other counties in the new Fifth Department. That would effectuate the division of the Second Department into two separate departments of roughly equal size, by population.

But, of course, it cannot be accomplished that simply. As explained in the February 2007 report by Judge Kaye's Special Commission on the Future of the New York State Courts, a large obstacle to changing the structure of the Appellate Division departments is concern about creating a department containing a population with a large majority concentration from one or the other political party, making it likely that most of the judges of that department will be affiliated with that political party.[10] Recognizing how contentious the issue is, and the complicated political pressures the decision would entail, that issue is usually left open for determination by the legislature.[11]

But there are other alternatives that are equally reasonable and perhaps better in some ways. It seems to me that a variety of specific proposals could be valuable to anyone addressing the possibilities, and I therefore offer my own thoughts here in the hope that they may be useful.

Redistribute Counties

The total population of New York State is more than 19 million. The First Department, consisting of New York County and Bronx County, has a population of about three million residents, and the population of the Third

and Fourth Departments, combined, is in the neighborhood of six million. In contrast, the current Second Department has more than 10 million residents. Another means of reducing the size of the Second Department, while to some degree equalizing the size of the remaining departments, would be to redistribute the counties among the existing departments. The Second Department would probably have to contain, at a minimum, Kings, Queens, Nassau and Suffolk, because assigning any of those counties to another department would be unrealistic for practitioners from those counties. That would bring the size of the Second Department down to approximately 5.8 million. Richmond, Westchester, Putnam, Rockland and Orange counties could be reassigned to the First Department, which would bring the population covered by the First Department to almost five million.

Another possibility would be to add only Richmond, Westchester and Rockland to the First Department, and add the more northerly of the current Second Department counties, Orange, Putnam and Dutchess, to the Third Department; if that created an imbalance with the Fourth Department, some of the western counties now in the Third Department, such as Tompkins, Tioga, Chemung and Schuyler counties, could be shifted into the Fourth Department.

Redistributing the counties among the departments would not require a constitutional amendment; the Constitution authorizes the legislature to alter the boundaries of the judicial departments and judicial districts once every 10 years.[12] Of course, the same political concerns about altering the balance between the parties would arise in the legislature in this context as well. But at least these redistribution proposals would allow for each department to contain both an urban center and suburban areas.

A Divided New York City

While we are considering redistribution of counties among the four departments, another factor that I have not seen addressed is the problem that is created by having one city, the City of New York, divided into two separate judicial departments. That situation originated inadvertently with the 1894 Constitution, which provided that the First Department would be made up of only New York County, while the other three departments were to be made up of New York State's remaining counties. Of course, in 1894 New York City did not yet consist of the five boroughs. The western part of the Bronx was considered part of New York County and New York City in 1874, while the eastern part of the Bronx was at that time still part of Westchester; the Bronx did not exist as a separate entity until 1898,[13] when Kings, Queens, Richmond and the entire Bronx were consolidated into New York City. Yet, at no time after the five boroughs were consolidated into one city was any alteration made to the judicial departments in response to this division of the city into two separate Appellate departments.

As a result, we are left with an unusual situation in which the residents of one city are subject to two different sets of common law rulings and interpretations of law, depending on which judicial department their borough is in. This is not merely a theoretical problem; it has real consequences. For example, it was recently pointed out that the First and Second Departments have come to different conclusions about which law – the Vehicle and Traffic Law or the New York City Department of Traffic Rules and Regulations – should be applied by a jury in cases where a pedestrian is hit by a motor vehicle. This difference of opinion alters the law applicable to a jury's deliberations, because a violation of the VTL constitutes per se negligence while a violation of a traffic regulation merely "may" support a finding of negligence.[14] New York City residents, to whom all the same traffic rules and law apply, may nevertheless have different outcomes in lawsuits under identical circumstances, depending on the department in which the action is heard.

If considering the adjustment of the boundaries of Judicial Departments is appropriate, and especially if a Fifth Department continues to prove unfeasible, it may be worth considering whether New York City should be covered by one undivided Judicial Department. It would, of course, be quite large, covering more than eight million people, but it would still not be nearly as large as the current Second Department. Consolidating the New York City counties into one department would leave the Second Department without Kings, Queens and Richmond counties, but with the Long Island and northern suburban counties, covering an area with a population of just fewer than five million people.

Other Possible Constitutional Amendments Impacting the Appellate Division

Court Merger

I am in favor of the widely supported court merger plan, under which judges of the County Court, Civil Court, Family Court, Court of Claims and Surrogate's Court would be merged into the Supreme Court, which would be organized to contain Divisions such as the Probate Division, Family Division, etc. One specific aspect of that plan that seems to me particularly beneficial is that it would make all those new Supreme Court justices – including Court of Claims judges, Surrogate's Court judges and lower court judges serving as Acting Supreme Court justices – eligible for consideration to be designated to the Appellate Division. This would, as the 2007 Special Commission report pointed out, significantly expand the pool of available candidates, and make that pool far broader and more diverse.[15] In fact, I would propose expanding the applicant pool for Appellate Division justices in that way even without court merger. I think any Acting Supreme Court Justice, Court of Claims

judge or Surrogate who has served in the trial court for at least five years should be eligible for consideration. Of course, the thorough screening process for appointment to the Appellate Division would ensure that any such candidates possessed the requisite capabilities for consideration.

Civil and Criminal Courts of the City of New York; in the Second Department, Appellate Term also hears appeals from cases originating in District, City, Town and Village Courts, as well as non-felony appeals from the County Court.[22] If, for example, we collapsed the Appellate Term, First Department, into the Appellate Division, and made all the justices currently sitting in Appellate Term part of the Appellate Division, I think that in the long run, such a consolidation of intermediate appellate operations would have a streamlining effect on both courts' operations. ■

The Constitution authorizes the legislature to alter the boundaries of the judicial departments and judicial districts once every 10 years.

Re-designation for "Additional Justices"

Another alteration regarding the Appellate Division that should be considered in the context of these broader Constitutional changes is to make the "additional justices" – those justices who are not among the seven justices authorized by the Constitution – subject to the same five-year designation term as now applies to the Constitutional Justices. It is an odd quirk of our current legal framework for the Appellate Division that the authorization for adding new justices as the workload increases[16] does not require that these justices be re-appointed if their appointment lasts more than five years. Since such a re-designation is required for Constitutional Justices, as the 2007 Report of the Special Commission comments, this oddity "[t]urn[s] the Constitution on its head."[17]

Expanding Jurisdiction

On the issue of the Appellate Division's jurisdiction, this would be a golden opportunity to consider expanding the jurisdiction of the Appellate Division by (1) providing for en banc review by the Court, and (2) expanding the Court's authority on Article 78 review, to allow for reversal in the interest of justice. Providing for en banc review would allow our court, in appropriate circumstances, to deal with conflicting decisions between two or more panels on the same legal issue.[18] Expanding the Appellate Division's authority in Article 78 proceedings would mitigate to some degree the severe construction of CPLR 7804's "abuse of discretion" standard imposed in *Matter of Pell v. Board of Education*,[19] which only permits relief from excessive penalties where the abuse of discretion is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness."[20]

Consolidate Appellate Term

And, while we are considering other types of court consolidation, it may be worth considering folding Appellate Term back into the Appellate Division, which the Appellate Division has full authority to do at any time.[21] Currently, Appellate Terms in the First and Second Departments hear appeals from cases originating in the

1. *See* https://www.nycourts.gov/press/PDFs/PR16_11.pdf; *see also* Joel Stashenko, *Benefits of Changing NY Constitution Are Focus of Task Force*, N.Y.L.J., July 20, 2016 at 1, col 5.
2. N.Y. Const. art. XIX § 2.
3. *See* Jonathan Lippman, *Court Reform – Now*; Perspective, N.Y.L.J., June 16, 1997 at 34, col. 3.
4. *See* www.nycourtreform.org/reports.shtml; http://nycourts.gov/reports/courtsys-4future_2007.pdf.
5. *See* https://www.nypl.org/about/divisions/milstein/vital-records.
6. N.Y. Const. of 1894, art. VI, § 2.
7. *See* https://www.nycourts.gov/courts/ad2/aboutthecourt.shtml.
8. *Id*.
9. *See, e.g.*, www.nycourtreform.org/court_re_bill.pdf.
10. *See* A Court System for the Future, http://nycourts.gov/reports/courtsys-4future_2007.pdf.
11. *See, e.g.*, Quintin Johnstone, *New York State Courts: Their Structure, Administration and Reform Possibilities*, 43 N.Y. L. Sch. L. Rev. 915, 954 (1999/2000).
12. Article VI, §§ 4, 6(b).
13. *See* https://www.nypl.org/about/divisions/milstein/vital-records.
14. *See* Maurice Recchia, *Car Accidents With Pedestrians: Conflict in the Departments*, N.Y.L.J., Sept 12, 2016 at 4, col 4.
15. *See* Report, *supra* note 10, at 72.
16. N.Y. Const. art. VI, § 4(e).
17. *See* Report, *supra* note 10, at 25–26.
18. *See* Saxe, *Perspective: En Banc Review in the Appellate Division*, N.Y.L.J., August 21, 2006 at 29, col 6.
19. 34 N.Y.2d 223 (1974).
20. *See* Saxe, *Article 78: Expand Appellate Divisions Authority*, N.Y.L.J., June 12, 2006 at 34, col 3.
21. N.Y. Const. art. VI, § 8.
22. *See* www.nycourts.gov/courts/lowerappeals.shtml.

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"We need to send the right guy for this negotiation … someone who's adorable, cuddly, cute as a button … who could it be?"

BY LUKAS M. HOROWITZ

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Law School Lesson #2: If You Don't Use It, You Lose It

Two months of law school are behind me, and I can proudly say I still boast a full head of hair. I understand now why the American Bar Association (ABA) highly recommends refraining from working outside of school during the first semester of law school. They weren't kidding. My average week consists of roughly 60 to 65 hours of work, including class time. If only we got paid! I have survived two midterm examinations (results pending, fingers crossed), but am already dreading finals. One would think that after the first few cold calls the process would become easier. Not quite.

The one major assignment I am currently working on is an objective memo[1] for my writing class, which focuses on intentional infliction of emotional distress (IIED), and whether an action, if put in suit, would be successful in establishing IIED. The most difficult part so far is remaining objective. Perhaps because I spent two years working at a litigation firm, always on a "side," I have found that I always lean either one way or the other, for the plaintiff or for the defendant, when reading and discussing cases. Being objective is hard! How do judges do it?

For this assignment, we are writing the memo for the managing partner in our theoretical law firm to evaluate whether an action for IIED brought against our client, the defendant, will be successful. Instinctively, I read all of the supplied case law from the vantage point of defending our client. Having been assigned to represent one party, I find it is very challenging to approach the assigned cases with an unbiased position, and to then write objectively. Natural instinct dictates the formulation of arguments and defenses for future use. On top of that, in our hypothetical we are only to address the first two of the four required elements for establishing IIED: first, extreme and outrageous conduct; and second, intent.[2] I feel like I'm running a race with one leg, knowing all the while that I can only run the race halfway.

A reoccurring theme in law school is just that – reoccurrence. Every new class brings with it new ideas, issues, and rules, yet the new material can only be understood by incorporating and building upon the prior material. As an undergraduate, classes tended to move through material in a straight line, navigating from point A to point B, then on to C, all of which, while related, stood independently. In law school, points A, B, C, and heck even D, E and F, are all intertwined with one another. I need to have an accurate, complete, and at-the-ready understanding of the earlier points, including material from the first week of law school (which seems like many years ago), in order to fully comprehend the new material. Elephants would excel in law school.

While this has been a difficult adjustment, when I take a step back, I am impressed at how fluidly and harmoniously different components of the law come together. Veins and arteries have very different functions, yet the same cells circulate through both. In the same manner, torts and contracts are very different areas of law, yet many of the same legal principles appear in both. Fortunately, the need to be ready to draw on everything previously learned helps keep that old material fresh and at the ready.

Law school students are stigmatized as being ultra-competitive and prone to cutthroat behavior. With two midterm exams under my belt, what I experienced was the complete opposite. My classmates shared ideas and information in preparation for these midterms, working together rather than stepping over one another. There seems to be an unwritten rule that we will suffer together and triumph together.

And, by the way, I finally figured out whether a sound wave could constitute a battery: it depends (my professors' favorite answer). ■

1. An objective memo analyzes the most pertinent facts in the case and their likely impact on the outcome. It is important to consider the arguments for both sides in assessing the outcome.

2. The other two elements for establishing IIED are causation and severe emotional distress.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I work for a governmental agency. We recently held a training workshop for our junior staff attorneys pertaining to trial advocacy. The attorneys were required to cross-examine witnesses, and give opening and closing statements as part of the training. After their closing statements, they received feedback from me as well as other senior staff attorneys. After one of the junior attorneys had concluded his summation, one of my colleagues critiqued him as follows: "You did a great job, but next time try to turn down the gay. A jury is not likely to react positively to it." The junior attorney is openly gay. I watched his reaction and he was visibly upset and taken aback by the comment. As his supervisor, I'm deeply concerned about how to address this situation. On the one hand, my senior colleague was trying to provide constructive feedback because jury bias toward counsel may clearly have an effect on the outcome of a case. On the other hand, my colleague's comments could be construed as being highly offensive and insensitive, if not discriminatory. How should I, as a supervisor, be addressing this issue internally with my colleagues and with the junior attorney? Do I have an obligation to do something? And if so, how do I approach the issue without exposing my team to liability?

Sincerely,
A.M. Awkward

Dear A.M. Awkward:

Social standards surrounding discriminatory conduct have changed dramatically in recent years, and the legal profession is attempting to keep pace by amending ethical rules and redefining the standards of professional conduct that govern the practice of law. Nowhere has the social and legal shift toward greater acceptance and equality been more evident than in the area of gay rights. As the ABA Commission on Sexual Orientation and Gender Identity wrote in its memorandum in support of a proposed amendment to ABA Model Rule 8.4 to prohibit discrimination on the basis of, among other things, sexual orientation, "it is time for the legal profession to support its rhetoric of equal justice with action and consequences. An ethical rule will set a standard for lawyer conduct [and] force lawyers to examine and reform their own behavior." *See* Memorandum to Standing Committee on Ethics and Professional Responsibility, February 7, 2016. As an attorney, you have a professional obligation to keep abreast of these developments, or else risk exposing yourself or your colleagues to ethical violations and, potentially, official sanctions or censure. While there may be no bright line rule for assessing whether your senior colleague's comments about the junior attorney's sexual orientation constitute an ethical violation, familiarizing yourself with the relevant rules and requirements will enable you to take the necessary preventative measures and, if needed, deal with a potentially discriminatory act in a manner consistent with your own ethical obligations.

New York has been a pioneer in enacting rules of professional conduct to prohibit discrimination in the practice of law. In 1990, New York adopted DR 1-102(a)(6), which prohibits discrimination on the basis of sexual orientation, race, gender and other specified bases. *See* Roy D. Simon, *Simon's Rules of Professional Conduct* Annotated at 1968 (2016 ed.) By contrast, the ABA's model rule counterpart was not adopted until August of 2016. *See* Wendy Wen Yun Chang, *A New Model Anti-Discrimination Rule*, Daily Journal, August 19, 2016. In fact, "many states still have no rule making discrimination an ethical violation." Simon *supra*, at 1968. Indeed, as one commentator has noted, "New York's anti-discrimination rule is the paradigm model for targeting and proscribing determination because of its bifocal approach to prohibiting discrimination against clients and other lawyers." Nicole Lancia, *New Rule, New York: A Bifocal Approach to Discipline and Discrimination*, 22 Geo. J. Legal Ethics 949, 949 (Summer 2009).

Rule 8.4(g) of the New York Rules of Professional Conduct (NYRPC), which replaced DR-102(a)(6), governs discriminatory misconduct by attorneys and states that "[a] lawyer or law firm shall not unlawfully discriminate in the practice of law . . . on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation." NYRPC 8.4(g). NYRPC Rule 8.4(g) is, however, somewhat limited in its scope. First, the Rule applies only to an attorney's conduct in the practice of law, and therefore a lawyer cannot be disciplined for discrimination in his or her personal life or in any other business outside the practice of law. Second, Rule 8.4(g) requires that before a complaint for discrimination can be brought before disciplinary authorities, it must first be brought before a tribunal and the petition-

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

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er must obtain a final determination and the right of appeal must be exhausted. As Professor Roy Simon has observed, "[t]he goal of the rule is lofty and laudable, but the scope of the rule is extremely limited." Simon *supra*, at 1966.

With that said, New York courts have been willing to impose penalties upon attorneys that have violated the requirements of NYRPC Rule 8.4. For example, in *Principe v. Assay Partners*, the Supreme Court, New York County, considered a claim of abusive and improper professional conduct by plaintiff's counsel toward an opposing counsel. 154 Misc. 2d 702 (Sup. Ct., N.Y. Co. 1992). During a deposition, plaintiff's counsel made derogatory comments to his opposing counsel which demeaned her on the basis of her gender. He referred to her as "little lady," "little girl" and told her to "pipe down" and "go away." *Id.* at 704. These comments were "accompanied by disparaging gestures [such as] dismissively flicking his fingers and waving a back hand" at opposing counsel. *Id.* The court concluded that the conduct exhibited by plaintiff's counsel was the "paradigm of rudeness" and degraded his colleague on the basis of her gender. *Id.* The court stated that "[a]n attorney who exhibits a lack of civility, good manners and common courtesy tarnishes the image of the legal profession, and an attorney's conduct that projects offensive and invidious discriminatory distinctions . . . is especially offensive." *Id.* The court concluded that plaintiff's counsel had violated the predecessor to NYRPC Rule 8.4(g) and that his behavior fell "within well-established categories of sanctionable conduct." *Id.* at 708. In summarizing the importance of New York's rule against discriminatory conduct, the court in *Principe* found that "[t]he fundamental concern raised is that discriminatory conduct on the part of an attorney is inherently and palpably adverse to the goals of justice and the legal profession," and that "any reasonable attorney must be held to be well aware of the need for civility [and] to avoid abusive and discriminatory conduct." *Id.* at 707–08.

In *In re Monaghan*, the Appellate Division, Second Department considered an appeal of an order of public censure by the U.S. District Court for the Southern District of New York in response to an attorney's race-based abuse of opposing counsel during a deposition. 295 A.D.2d 38 (2d Dep't 2002). The attorney in question harassed opposing counsel for her alleged mispronunciation of certain words, invoking unambiguous racial stereotypes in the process. The District Court warned and then publicly censured the attorney for his race-based abuse and his violation of the predecessor to NYRPC Rule 8.4(g). On appeal, the Second Department granted the petitioner's motion to impose discipline upon the attorney and affirmed the censure for the attorney's professional misconduct. *Id.* at 41.

Courts in other states have issued similar decisions arising from violations of their own professional prohibition of discriminatory conduct by an attorney. For example, in *In re Kelley*, the Supreme Court of Indiana considered a disciplinary petition against an attorney for her derogatory comments to the employee of a company that she contacted on her client's behalf. 925 N.E.2d 1279 (Ind. 2010). The attorney's client had received unlisted phone calls from a company attempting to contact someone with the same name. The attorney called the company and spoke to a male representative. The attorney said that she was calling on behalf of her client and "gratuitously asked the company's representative if he was 'gay' or 'sweet.'" *Id.* The company representative commented on the unprofessional nature of the attorney's comment and ended the phone conversation. The Supreme Court of Indiana subsequently concluded that the attorney had violated Indiana Professional Conduct Rule 8.4(g), which prohibits prejudicial acts by an attorney on the basis of sexual orientation, and imposed a public reprimand and costs against the attorney.

The adoption of ABA Model Rule 8.4(g), and other state rules prohibiting discriminatory conduct by attorneys in the practice of law, has not been without controversy. Some commentators have suggested that such rules restrict an attorney's freedom of speech and thus run contrary to the constitutional values that attorneys are obliged to uphold. (*See* Ronald D. Rotunda, *the ABA Decision to Control What Lawyers Say: Supporting "Diversity" but not Diversity of Thought*, The Heritage Foundation Legal Memorandum No. 191 (Oct. 6, 2016).) They have argued that ABA Model Rule 8.4(g) and its state counterparts attempt to penalize forms of speech protected by the First Amendment and that "[e]ven when a court does not enforce this rule by disbarring or otherwise disciplining the lawyer, the effect will still be to chill lawyers' speech, because good lawyers do not want to face any non-frivolous accusations that they are violating the rules." (*Id.* at 4.) Others have opposed the adoption of ABA Model Rule 8.4(g) on the grounds that it would "change the attorney-client relationship and impair the ability to zealously represent clients." (Elizabeth Olson, *Bar Association Considers Striking 'Honeys' from the Courtroom*, The New York Times (Aug. 4, 2016).) Such objections aside, our profession should expect that the adoption of ABA Model Rule 8.4(g) is likely to cause more states to follow New York's example by adopting ethical rules restricting or prohibiting discrimination by attorneys in the practice of law. As a result, attorneys everywhere have a professional obligation to apprise themselves of current developments in this area.

Your senior colleague's comment that a junior attorney "turn down the gay" raises in our view several issues under NYRPC Rule 8.4(g). First, while the comment appears to have been made in an attempt to provide the junior attorney with constructive criticism, it is also based on certain discriminatory stereotypes concern-

ing the ways in which gay men speak, and attempted to impose an arbitrary and prejudicial standard of how a male attorney would or should sound when giving a closing statement to a jury. In this way, it is very similar to the attorney's comment in *In re Kelley*, which appeared to be based on certain assumptions about the company representative's sexual orientation based purely on his manner of speech. And while your senior colleague's comment does not appear to embody the same degree of vitriol as the statements by the attorney in *In re Monaghan*, it could still be construed as an unnecessary critique of another attorney's speech based purely on a similar set of discriminatory stereotypes. Your senior colleague might claim that it was not his intention to discriminate against the junior attorney. Indeed, he may not have even meant to upset the junior attorney at all. However, NYRPC Rule 8.4(g) does not require that the discrimination be intentional, or even reckless. Instead, the Rule prohibits discriminatory conduct of any kind, whether the conduct was intentional or not. In this way, NYRPC Rule 8.4(g) differs from ABA Model Rule 8.4(g), which requires that the discriminatory conduct be knowing or, at a minimum, negligent. *Compare* NYRPC Rule 8.4(g) with ABA Model Rule 8.4(g).

The other question raised by your senior colleague's comment is whether it was made "in the practice of law," as required by NYRPC Rule 8.4(g). The comments at issue in both *In re Monaghan* and *Principe v. Assay Partners* were made during depositions. The comments by the attorney in *In re Kelley* were not made during a formal proceeding, but were clearly made in the attorney's professional capacity while making a call on behalf of her client. Your senior colleague's comment appears to be somewhat more remote from the actual practice of law than any of the foregoing cases, but could still be construed as having been made within the practice of law because it was made in a professional environment during an official attorney training program. There is not enough case law on this point to definitively say whether the comment was made "in the practice of law," but there is certainly a chance that a court could conclude that it was. *See* Simon *supra*, at 1967 (noting that Rule 8.4(g) does not extend to private business activities).

Regardless of how your senior colleague's comments may be construed by a court in an ethical proceeding, it would be prudent of you to inform him of his ethical obligations under NYRPC Rule 8.4(g). Whether the comments constitute a violation of the Rule or not, they certainly seemed to offend the junior attorney and made him feel as if he was being unfairly targeted based on his sexual orientation. This is likely to have an adverse impact upon not only the junior attorney, but also other attorneys that may have found the comments to be offensive or discriminatory. It could also lead to further problems in your agency and, potentially, employment litigation. While the comments may have been intended as constructive criticism of the junior attorney's performance, there was no reason for your senior colleague to tether his criticism to the junior attorney's sexual orientation. Your senior colleague should not have told the junior attorney to "turn down the gay," just as he should not tell a female attorney to "act more ladylike" or an African-American attorney to "turn down the ghetto." Your senior colleague's critique should have been made without reference to the attorney's sexual orientation, and instead should have been limited to the specifics of the junior attorney's closing argument. For example, did the junior attorney speak too fast, or too slow? Was he too animated, or too droll? Your colleague's choice to bring the junior attorney's sexual orientation into the discussion was a poor one, which has put him and your agency at risk of a potential violation of NYRPC Rule 8.4(g) and civil liability.

Perhaps your senior colleague may be completely unaware of the requirements of NYRPC Rule 8.4(g), and may not have realized that his comment would make the junior attorney so uncomfortable. As discussed above, the fact that he was not aware, however, will not protect him from sanctions under NYRPC Rule 8.4(g). In our opinion, you should discuss the situation with your senior colleague, inform him of his ethical obligations and recommend that he has a follow-up session with the junior attorney in which he provides him with a more constructive, less discriminatory assessment of his performance. You may also want to recommend diversity training for all your staff to avoid similar situations in the future as a failure to address the issue may lead to future improper conduct.

Finally, we should note that this past February, the ABA's House of Delegates enacted Resolution 107 which encourages bar associations and other licensing and regulatory authorities that require mandatory CLE to offer "as a separate required credit, programs on diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias ('D&I CLE')." Resolution 107 has the support of various bar associations who see D&I CLE as an important tool to raise awareness of bias in our profession and develop the means to effectuate change. The adoption of stand-alone D&I CLE in New York is an issue that we expect will be addressed by the NYSBA's House of Delegates in the near future.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I have a new client that is a party to a number of related actions with many parties. My client's prior attorney was a solo practitioner and she recently passed away unexpectedly. My client relied on the prior attorney implicitly, doesn't have any of the voluminous files for the litigation, and believes that the attorney was holding money in her escrow account pending the resolution of the litigation. I have been in communication with the prior attorney's husband who is attempting to wind up the law office. It is clear, however, that in addition to being completely distraught about the loss of his wife, he is not an attorney and doesn't have any idea what to do. He is so concerned that he is going to turn over the wrong files to the wrong person, or turn over files without having collected all of his wife's fees, that he just refuses to turn anything over. He isn't sure if he is going to try to sell the practice or just dissolve it. It doesn't seem like he will be able to resolve this quickly. Meanwhile, I am having a very difficult time moving forward with my client's cases without her file and the client and remaining parties are beginning to lose patience.

Although I am sympathetic to the husband's dilemma, my client is beginning to suffer from the delays. I am worried that I am not doing enough to convince the former attorney's husband to assist me in getting the files and turn over the escrow funds. In our last conversation, he even asked me, "Do you have any thoughts about whether I should dissolve the practice or try to sell it? Would you be interested in purchasing it?" When I asked my client if he had fully paid the prior attorney's fees, the client told me he thought he might owe some fees, but due to the recent delay, he believed that he no longer had to pay them.

Is there anything I can do to encourage the prior attorney's unrepresented husband to turn over the file and escrow funds? Should I be concerned that I am trying to get the file even though the prior attorney may not have been fully paid by my client? I have also been thinking about the offer to buy the practice. Here, it would kill three birds with one stone: I would get the file for my client, help out the prior counsel's husband, and expand my practice. Would I create a conflict of interest with my client by performing due diligence and negotiating to purchase the practice? What if I wasn't buying the practice, but just offering to assist in dissolving the practice?

Sincerely,
Somewhat Conflicted

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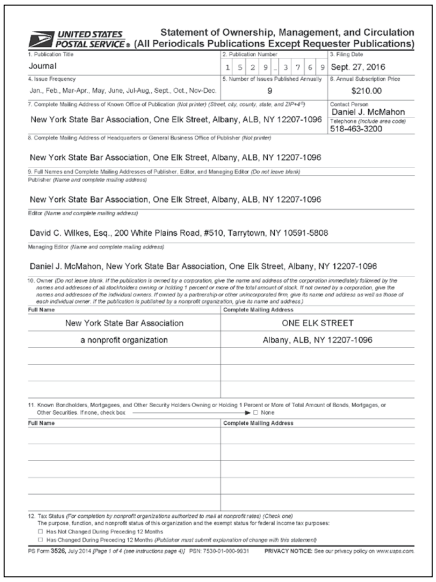

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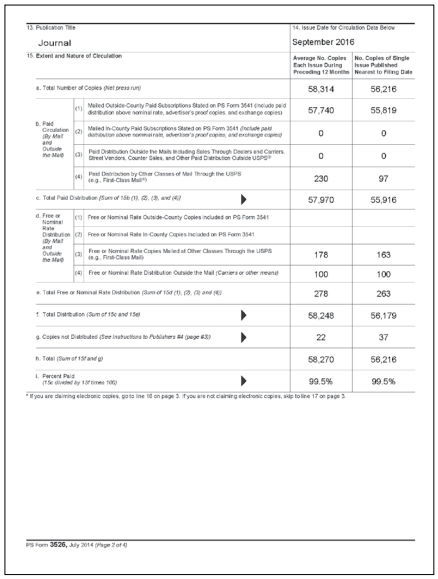

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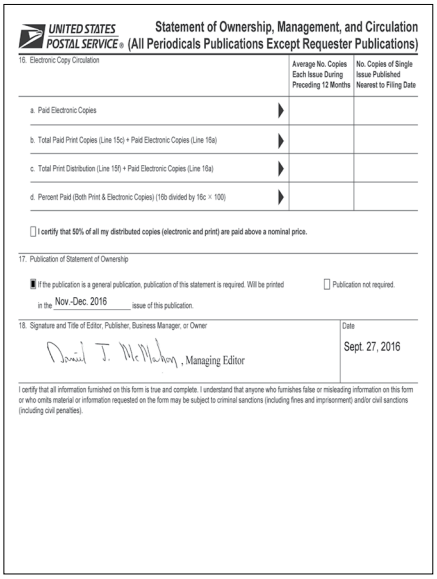

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Questions to Ask Your Clients

Prepare your client's family tree. This is necessary to probate the will after your client dies. Every distributee — that is, anyone who takes through the laws of intestacy — has the right to object to the will. You must notify them that the will is being probated.

Once you have a clear list of the client's family composition, gather an extensive list of assets and how they're owned. Assets controlled by the will are probate assets; these are primarily individually owned assets.[10] Assets that pass outside a will and are not part of the probate estate may be included in the client's estate for federal or New York State tax purposes. In 2016, the federal estate tax had a $5,450,000 exemption. New York State estate tax has a $4,187,000 exemption, which will increase through 2019 when it matches the federal exemption. There are also taxes for gifts to avoid having clients give everything away to avoid paying an estate tax.

Clients may desire to give assets to charitable beneficiaries. Placing assets into a charitable trust creates a deduction for federal estate-tax purposes that may benefit your client's overall estate-planning goals. One caveat is that the property must pass directly from the decedent to the charity. This can be written into the will: "Notwithstanding the foregoing, any exemption or deduction allowed under the will imposing such tax by reason of the charitable purposes of a bequest shall inure to the benefit of the beneficiary receiving such charitable bequests."

Some questions to ask include:

- What do you hope to gain in writing your will and estate plan? You should know your client's objective: whether your client wants to protect a beneficiary from receiving a certain part of the estate or whether your client wants to provide for a beneficiary with special health needs.
- Who are your family members and what are their addresses?
- What are your assets and their value? (The answer to this goes beyond real estate and bank accounts. Ask your client about jewelry, for example.)
- What directions do you want to give the beneficiaries who'll be inheriting a trust? (Consider minors and those with special needs or drug and alcohol problems.)
- Who'll act as the executor and successor executor and trustee and successor trustee of your will?
- Where should your estate go if your entire family dies in a common disaster?
- Are any beneficiaries not yet born?
- Who'll act as guardians of the minor children?
- Do you have children from an earlier relationship?
- Do you have pets? Who'll take care of them?
- What are the usernames and passwords for your digital assets and accounts, and who do you want to have access to them when you die?[11]

Near-Perfect Formula for Will Writing

There's no formula to the perfect will. But these organizational tips will help make your client's will easy to understand and less likely to incur a will contest or construction proceeding.

1. The opening statement contains your client's full legal name and address. It should be short and to the point: "I, Billy Bob, residing and domiciled at 246 West Willow St., Syracuse, New York, declare this to be my Will and Testament."[12] This clear statement might avoid any dispute over where the will must be probated.

2. Following the opening statement should be declarations that your client is of sound age and mind to make the will and isn't under undue influence.

3. Next, have a statement that ensures that the will is the final version of its kind, such as "I revoke any and all wills and codicils I previously made."[13]

4. Usually a statement about directing that all legally enforceable debts and expenses of administration should be paid comes next.[14]

5. Identify immediate family members and persons to whom bequests and devises are made in the will. If someone is disinherited, this is the place to put the disinheritance language.

6. After the introduction, debts, and administration-expenses clause and personal details, start a new article in which the client nominates one or more executors, and any trustees if trusts are created under the will. Name at least one successor, and consider co-trustees if checks and balances or keeping family power balances or harmony is suggested. If the client has minor children, a guardian of the person, for the property, or both may be nominated here as well for those children. Backups are important if the original nominees are unable to perform their duties.

7. Next comes one or more articles covering the disposition of property. These usually start with general bequests of cash money. Then come specific bequests of tangible personal property and intangible property interests: "I give my furniture and furnishings to my girlfriend, Margaret, if she survives me." It's useful to have a tangible personal-property residuary clause that provides a catch-all for any property not specifically bequeathed: "I give all of my tangible personal property and personal affects (other than those specifically bequeathed above) to Kenneth and Natalie, my children, to be divided among them in substantially equal portions as they may agree. If they do not agree on any part of the distribution then my executor shall determine how to dispose of the disputed property and the decision of my executor is final and unreviewable." It's also possible to use a separate personal-property memorandum of instruction: "I request that my tangible personal items be distributed in accordance to a letter of last date I have

made for this purpose. If no such letter is found or if it does not address any property, then I direct that such property be distributed in accordance with. . . .” Then come devises of real property. These are followed by demonstrative bequests: “I direct that my scooter be sold and that the proceeds be given to my friend, Lucas.” Usually last is the exercise of any powers of appointment the client may have.

Discuss with your client whether, if an intended beneficiary predeceases the client, the bequest should go to the predeceased beneficiary’s children, spouse, siblings, or other family members. It’s smart to designate contingent beneficiaries or specify that the gift lapses and passes to the residuary clause of the will. Depending on the client’s assets and selection of beneficiaries, these provisions may be relatively simple and contained in one article, or they may involve a set of interconnected gifts involving several articles to keep the gifts and the beneficiaries and contingent beneficiaries organized.

8. The next article is the residuary clause. If a residuary clause isn’t included, or if the beneficiary of the residuary clause predeceases the decedent, then the remaining assets pass by the laws of intestacy. That might defeat the purpose of doing a will in the first place.

9. Then comes a clause to say who gets the property if everyone named in the residuary predeceases or is not able to accept the gift. This is called the contingent remainder or contingent beneficiary clause.

10. The next article or two of the will covers fiduciary powers, bonding, and tax apportionment. EPTL Article 11 contains comprehensive fiduciary powers. Usually, wills provide that the executor will have all the powers enumerated in the EPTL (or be given additional powers), that the executor/trustee shouldn’t be bonded (why else would you chose this person if not for their trustworthiness?), and that the taxes not be apportioned (the person doesn’t pay tax on the gift).

11. Often an article defining terms and words is important.

12. A will ends with two important clauses. First, the signature clause: This must include the statement below, immediately followed by the signature of the client, under which the client’s name must be typed. “**IN WITNESS WHEREOF,** I sign, seal, publish and declare this instrument as my Last Will and Testament on this ___ day of _____ , 20___, as my free and voluntary act for the purposes herein expressed.” Second, the attestation clause: It can and usually looks something like the following and must recite the witnessing of the declaration of the will by at least two disinterested witnesses:

> The foregoing instrument, consisting of __(_) typewritten pages was signed, published and declared by _, the Testator, to be his/her Last Will and Testament in the presence of each of us and all of us together; and the Testator, upon declaring this document to be his/her Last Will and Testament, requested each of us to sign the same as attesting witnesses; and we thereupon signed our names hereto as such witnesses, in the presence of the Testator, and in the presence of each other, on this _____ day of _ , 20___. We further state that each of us believes that, at the time the Testator executed the foregoing instrument, the Testator was of sound mind and memory, of lawful age, and did so execute it as his/her own free act and deed and not under the unlawful influence of any person.

This is followed immediately by the witnesses’ signatures, which should include their printed names and addresses.

It’s a good practice to have the witnesses swear out a self-proving witness affidavit and attach the original affidavit to the original will.[15]

Be wary of cut-and-paste wills when reviewing documents your client may bring to you for revision. Other attorneys might have used standard wills and clauses from other wills. Ensure that the terms in the will are relevant to your client.

Be wary of cut-and-paste wills when reviewing documents your client may bring to you for revision.

Helping Your Client Pick an Executor

Your client should nominate an executor who’s capable of understanding what the duties require, has the will, discipline, availability and ability to carry them out, and is trustworthy. Clients should choose an executor they trust and who won’t have any conflict of interest. The general role of the executor is to identify and marshal into the estate the decedent’s property covered by the will, to address and reduce any legally enforceable debts of the decedent, to administer and preserve the estate, and to distribute the assets as set forth in the will. The executor is supposed to fulfill responsibilities while exercising a duty of undivided loyalty to the beneficiaries’ best interests, consistent with the terms of the will and the governing law.

The executor selected is commonly a family member or friend who won’t gain anything from the will.[16] The formal limitations of a person appointed to be the executor are that the executor may not be a minor or convicted felon, or a person incapable of understanding the responsibilities of the position. Also, non-resident aliens may serve only with a co-fiduciary who’s a New York State domiciliary. Examples of an executor’s powers include hiring professional help, such as an attorney to help settle the estate;[17] continuing running the decedent’s business

until there is a new owner;[18] mortgaging, leasing, buying, and selling real estate;[19] borrowing money to pay off estate debts;[20] and taking advantage of tax savings in whatever way tax law permits.[21] Other responsibilities of the executor include collecting assets, distributing gifts to beneficiaries, paying state and federal taxes and claims against the estate, selling assets to pay the claims, representing the estate in claims, and preparing documents for probate.[22]

The Execution

Estates, Powers and Trusts Law § 3-2.1 governs the execution and attestation (witnessing of wills). The formalities of will execution must be followed. It's best to have one original will; if more than one original is executed, then all originals must be presented to the court for probate. If any original is missing, it's presumed revoked, unless proven otherwise, and the client will be declared to have died intestate.

It's also good practice to establish a routine and follow it for each will execution. That way the will ceremony can protect the attorney, who can testify that the will was executed the same way as all the other wills for which the attorney supervised the execution.[23]

The attorney can then begin the will ceremony by asking these questions of the client; the client must answer declaratively: (1) Have your read the document in front of you? (2) Do you understand its contents and how it disposes of your property? (3) Are you familiar with the general nature of your property? (4) Do you understand who'd get your property if you didn't have a will? (5) Do you declare this document to be your last will and testament? (6) Do you want these people as your witnesses? The client then signs, and the attorney asks the client whether the client is asking the witnesses to attest to the will.[24] The client asks the witnesses to witness the will. The attorney reads the attestation clause, and the witnesses sign the will and write their addresses if they're not already printed on the will.

Your client should initial, or sign, every page of the will along the margin in the presence of each witness. Some attorneys suggest that the witnesses initial each page as well.[25]

It's another good practice to have in the room where the will is executed only the client and the witnesses. An exception is usually made for a spouse, but if the client has been married more than once, it might be best to have the spouses execute their wills separately to avoid allegations of undue influence on the client.

New York doesn't require the witnesses to sign in each other's presence or in your client's presence. Your client must declare to each witness that the document is signed.[26] Following the time the first witness signs the will, the execution ceremony must be completed within 30 days.[27] If that happens, the attestation clause and the self-proving affidavit must accurately reflect the nature and circumstances of the signing and witnessing.

Witnesses may sign a self-proving affidavit, although that's not required. The self-proving affidavit attests to the will's validity. The affidavit also affirms that your client asked for the witnesses to sign the will, that your client signed in the witnesses' presence, and that the witnesses signed the will in each other's presence. The witnesses must sign the affidavit in the presence of a notary public. Even though a self-proving affidavit isn't necessary, it speeds up the probate proceeding because Surrogate's Court can accept the will without contacting the witnesses who signed it.[28] The absence of a self-proving affidavit doesn't invalidate the will.

Under New York law, there's a rebuttable presumption of due execution for wills signed under the supervision of an attorney admitted to practice law before the courts of the State of New York. A proper attestation clause also creates a presumption of due execution.

Give your client a conformed copy of the will, or make a copy of the original and tell the client to keep the copy in a safe place. A client who loses the original is presumed to have destroyed it, and the drafter might not be able to probate the copy. But if the drafter loses the original, the client's copy may still be probated. Once the will has been stapled — it should be stapled before execution — the staples shouldn't be removed, lest a court and the beneficiaries think that someone has substituted a page.

Part 2 of this column, which will appear in the next edition of the *Journal*, will continue with examples of how to write a clear New York will, including provisions relating to New York's new digital-assets law. ■

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1. *See, e.g.*, Mark Ira Bloom, William P. LaPiana & Harold D. Klipstein, *Drafting New York Wills and Related Documents* (4th ed. 2014); Jerome A. Manning, Anita S. Rosenbloom, Seth D. Slotkin & Kevin Matz, *Manning on Planning* (Prac. L. Inst. 7th ed. 2015); Michael E. O'Connor, *Estate Planning and Will Drafting* (N.Y. St. Bar Ass'n 2015); Robert Sheehan & Michael S. Schwartz, *Stocker on Drawing Wills and Trust*s (Prac. L. Inst. 14th ed. 2016); Lawrence Keller, *New York Wills, 2d* (2016 ed.) (N.Y. Prac. Library); Jonathan J. Rikoon, *Stocker and Rikoon on Drawing Wills and Trusts* (Prac. L. Inst. 13th ed. 2012); Eve Preminger, John M. Thomas, Susan C. Frunzi & Anne K. Hilker, Vol. D, N.Y. Prac., *Trusts and Estates Practice in New York* (2015); Linda B. Hershon, Andrew L. Martin, James D. Pagones, Eugene E. Peckham, C. Raymond Radigan & Joshua S. Rubenstein, *Warren's Heaton on Surrogate's Court Practice* (7th ed. 2016) (multivolume set).

2. Sonja Larsen, *New York Practice with Forms* § 162:45 (Carmody-Wait 2d) (citing *In re Winburn's Will*, 265 N.Y. 366, 193 N.E. 177 (1934); *In re Knickenberg's Will*, 180 Misc. 217, 221, 40 N.Y.S.2d 437, 441 (Sur. Ct., Erie County 1943)).

3. *Knickenberg's Will*, 180 Misc. at 221, 40 N.Y.S.2d at 441.

4. Patricia Shevy, Drafting a Basic Will for a Client (N.Y. St. Bar Ass'n, Cont'g Legal Educ. Lecture Mar. 2016).

5. EPTL §§ 5-1.2(a)(1) & 5-1.4(a)–(b)(1). But a testator may draft around this, as will be explained in Part 2 of this column.

6. EPTL § 5-1.2(a)(5).

7. *Id.* § 4-1.4 (noting that disqualification of a parent to take intestate share); Preminger et al., *supra* note 1, at § 7:63.

8. Preminger et al., *supra* note 1, at § 7:76; Ilene S. Cooper & Jaclene D'Agostino, *Forfeiture and New York's "Slayer Rule,"* 87 N.Y. St. B.J. 30 (Mar./Apr. 2015).

9. N.Y. Domestic Relations Law § 117 (effect of adoption).

10. Bernard A. Krooks & Jessica R. Amelar, *New York Lawyers' Practical Skills Series, Elder Law and Special Needs Planning | Will Drafting*, 242 (N.Y. St. Bar Ass'n 2015-2016). A will covers probate property, defined in EPTL § 3-1.1 as all property the testator was entitled to dispose of at the time of death. Most typically, this includes individually owned property, property owned as tenants in common, and rights under powers of appointment. A testator may not dispose by will assets owned as a joint tenant, assets governed by other documents or agreements (*e.g.*, divorce agreements; ownership of certain securities; corporate documents), and contractually owned assets that have designated beneficiaries or succession provisions (*e.g.*, annuities, life insurance, retirement plans, pensions, deferred comp., restricted stock, and membership in closely held entities).

11. This topic of accessing digital assets is addressed in Part 2.

12. *See* Am. Bar Ass'n, *Making a Will*, www.americanbar.org/content/dam/aba/migrated/publiced/practical/books/wills/chapter_3.authcheckdam.pdf, at 3 (last visited Oct. 3, 2016).

13. *Id.* at 13–14.

14. *Id.* at 14.

15. *New York Forms: Legal and Business*, § 24:116 (offering a 34-point checklist).

16. Am. Bar Ass'n, *Choosing the Executor or Trustee*, www.americanbar.org/content/dam/aba/migrated/publiced/practical/books/wills/chapter_10.authcheckdam.pdf, at 2 (last visited Oct. 3, 2016).

17. *Id.* at 6.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 7.

22. *Id.* at 1–2.

23. *See In re Wilkinson*, 2010 N.Y. Slip Op. 33075(U), at *5–6, 2010 WL 4466752, at *1, 2010 N.Y. Misc. LEXIS 5328, at *7 (Sur. Ct. Nassau County 2010).

24. Shevy, *supra* note 4.

25. *Id.*

26. EPTL § 3-2.1(a)(2) (execution and attestation of wills; formal requirements).

27. *Id.* § 3-2.1(a)(4).

28. *See* SCPA §§ 1404, 1405 & 1406.

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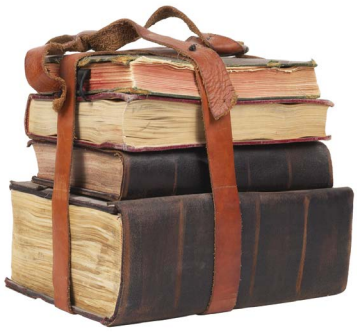

Will of Fortune: New York Will Drafting — Part 1

A will is one of the most sacred legal documents a lawyer can create. For many, it's an uncomfortable subject to think about. But learning how to write a client's will correctly will protect you, as the drafting lawyer, and everyone else involved. A will is called "the last testament" for a reason. It's up to you to preserve your client's final wishes in the most straightforward language your client and beneficiaries can understand — so long as the terms and phrases, even the complicated, legalistic ones, are tried and true and have the virtue of being understood and settled by the courts. That's essential to avoiding, or winning, litigation over wills.

The first of this two-part column outlines how intestacy laws affect an estate, what every will should include, how to avoid some common mistakes, and how to execute a will properly. Part 2 will outline some areas in a will that require special consideration, and therefore, special clarity. Neither part can offer an in-depth examination of will drafting, though. For that, our readers are referred to the many excellent tomes on will drafting authored by experienced New York and national trusts-and-estates professors and practitioners.[1]

New York laws governing wills and estates follow the Estates, Powers and Trusts Law (EPTL). The EPTL also contains rules of descent and distribution of real and personal property in intestacy — dying without a will. Surrogate's Court Procedure Act (SCPA) § 1001 provides the order of priority for who has the right to petition to control the estate and its assets. When a client approaches you to draft a will, you must learn the client's family tree, including the correct spelling of names and addresses, from grandparents through first cousins. Having a clear understanding of the family tree will let you know who has intestate inheritance rights and priority of authority over the estate.

> Without a will, the laws of intestacy take over, and your client loses the advantage of deciding who gets what part of the estate assets.

When your client dies without a will, the laws of intestacy govern who receives the client's assets. Courts favor testacy.[2] The presumption is that a will was written to avoid intestacy.[3] Dying without a will may have negative effects for your client's loved ones. Distribution by EPTL § 4-1.1 intestacy laws might have repercussions. For instance, if a spouse and children survive your client without a will, the spouse will receive the first $50,000 plus half the remainder of your client's assets. The children will divide the remaining half. But clients may want to donate parts of their assets to charity or put money in trust for their children. Creating a will avoids problems that arise from intestacy laws.[4] Your client should write a will before it's too late.

Without a will, your client doesn't have the option of picking an executor, trustee, or beneficiary. Without a will, the laws of intestacy take over, and your client loses the advantage of deciding who gets what part of the estate assets. Without a will, your client's minor children might be under the control of a court-appointed guardian and not the person(s) your client wants. Even a surviving spouse will have to seek Surrogate's Court approval every time your client's spouse wants to access a child's share of the estate money. That takes time and money. Your clients will find comfort in having a will, knowing that when they pass, their loved ones will be taken care of in a manner the client directed.

Ineligible Beneficiaries under Intestacy

Although your will-less clients may want part of their estate to go to family members or close friends, the EPTL provides that some people are ineligible to take under intestacy or under a will in several circumstances. Those exceptions are

1. Divorced spouse.[5]
2. Abandoning spouse.[6]
3. Abandoning parent.[7]
4. Distributee murderer of decedent.[8]
5. Adopted-out children.[9]
6. Stepchildren (not adopted).

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