NEW YORK STATE BAR ASSOCIATION

# Journal

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# Calculating Economic Damages in Wrongful Death and Personal Injury Cases

*By Charles L. Baum, Laura Bonanomi and Patrick A. Gaughan*

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CLAIRE P. GUTEKUNST

# The Imperative To Protect Human Rights and the Rule of Law

"To deny people their human rights is to challenge their very humanity."

– Nelson Mandela

Worldwide, attorneys share a common commitment to the rule of law, justice and fairness. We are part of a vast network of professionals working to preserve and enforce human rights. The phrase "human rights issues" includes refugees seeking asylum, as well as access to justice issues. Our Association is working to protect human rights and to redress wrongs – even to prevent them.

In the face of an immigration crisis, we have entered into a partnership with Governor Cuomo on a new public-private initiative to provide legal representation to immigrants facing removal from the United States, building on the work of our Committee on Immigration Representation to recruit and train pro bono attorneys in this vital area.

Confusion – and some panic – surrounds the President's three recent Executive Orders regarding immigration. Two of these focus on increasing border security and significantly restricting the admission of refugees and non-citizens from seven designated Muslim-majority nations. A third Executive Order directs policy changes that will expand the use of expedited removal and dramatically increase the level of immigration enforcement within the United States. Refugees and asylum seekers, as well as immigrants already in the United States, need lawyers more than ever. Already thousands of lawyers have provided pro bono services to individuals adversely affected by the travel restrictions. We have an important role to play to ensure the rule of law is upheld and that lawyers provide representation to protect individual rights.

The idea that anyone accused of a crime must be afforded competent legal representation has become part of the fabric of our nation. This is a human right, too. It is also a constitutional mandate, under *Gideon v. Wainwright*, and a societal responsibility. Our voice has been loud and clear that New York needs to fully fund and provide independent oversight for indigent criminal legal defense services statewide.

Each state is required to ensure that those charged with a crime will get a fair shake, whether or not they have the money for an attorney. After New York State settled the *Hurrell-Harring* lawsuit by agreeing to provide additional funds to improve indigent criminal defense services in five counties, the Legislature unanimously voted to have the State take over all funding in all counties, and to have an independent entity, the Office of Indigent Legal Services, develop and administer statewide rules and standards for such defense. We urged Governor Cuomo to sign the bill.

Following a disappointing veto of that bill, the Governor's 2017 budget did propose revenue increases to supplement county expenditures for indigent criminal defense services. Unacceptably, however, the Governor's budget proposed to shift some of this societal obligation onto attorneys, by raising the Biennial Attorney Registration Fee by $50 to fund some of that revenue increase. We oppose this and will work long and hard against any fee increase that specifically targets lawyers. The state's constitutional obligation to provide indigent criminal defense should be paid from the General Fund, *not* by a surcharge on lawyers. We have already informed the Legislature of our opposition to this fee and will continue to lobby to defeat it, while supporting full funding of indigent criminal legal defense.

On other human rights issues, we are pleased that the Governor has submitted legislation to implement criminal justice reforms we have been lobbying for – including raising the age of criminal responsibility, and avoiding wrongful convictions by requiring interrogations involving serious crimes to be videotaped and by reforming lineup procedures. We look forward to working with the Governor and the Legislature in the 2017 session to achieve these goals as well as another of our legislative priorities – the sealing of criminal records in certain cases.

Our Association has in recent years researched and spoken out on a number of other human rights issues. Our

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

Committee on Civil Rights, Special Committee on Re-entry and Special Committee on Human Trafficking studied and produced reports on the damage caused by, and the ineffectiveness of, long-term solitary confinement, the need to start planning for prisoner re-entry into society at the time of arrest, and the need for a statewide criminal and civil legal response to human trafficking. These reports brought widespread attention to these issues and made thoughtful recommendations.

The thousands of New Yorkers who need civil legal representation but cannot afford a lawyer to ensure access to essentials of life, such as housing, health care and education, also face a human rights issue. To help address these needs, we lobby in Congress and the state Legislature for government funding for civil legal services. We also provide opportunities for our members to help, and we explore new ways to expand these opportunities. In partnership with the American Bar Association, we recently launched NY.FreeLegalAnswers.org, where low-income New Yorkers can get free answers from pro bono lawyers to simple civil legal questions they post online. We also have partnered with the Women's Bar Association of the State of New York to help victims of domestic violence obtain legal counsel.

Recognizing that many additional New Yorkers face life-altering legal issues but do not qualify for free civil legal assistance, we are looking at innovative ways to assist them. In November, our House of Delegates passed a resolution to encourage limited scope representation – often called "unbundled" legal services – for low- and moderate-income New Yorkers, because "assistance of legal counsel should not be an all or nothing proposition." This will help those New Yorkers obtain the legal assistance they need to protect their human rights.

We have consistently lobbied for adequate funding for our courts, including our hard-pressed Family Courts, where our work was instrumental in obtaining authorization for 25 additional judgeships. If New Yorkers seeking help in the court system cannot get prompt justice because the courts are overcrowded and understaffed, have reduced hours and make no provision for people who must go to court with children in tow, that's a human rights issue, too. Through her Excellence Initiative, Chief Judge DiFiore is working to address these issues, and we support her efforts.

The need to protect human rights runs the gamut from the international to the local, from individuals held at borders to people facing eviction. It ranges from the right to vote to the right to be free from violence. Against the backdrop of global crises, one person's plight may not seem large enough to warrant attention. But as Nelson Mandela said, denying people's human rights – anyone's human rights – challenges "their very humanity." As attorneys, we are sworn to uphold the rule of law and to ensure that justice is served. Please join NYSBA as part of the global network of lawyers who work to preserve and protect human rights and the rule of law. ■

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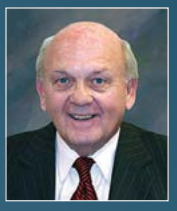

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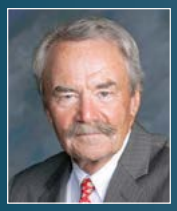

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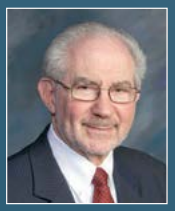

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(9:00 a.m. – 12:40 p.m.)
February 27 New York City
March 3 Rochester
March 4 Buffalo
March 23 Westchester

(5:30 p.m. – 9:10 p.m.)
March 13 Long Island

**Hot Topics in Labor and Employment Law**
(9:00 a.m. – 11:00 a.m., live &webcast)
March 1 New York City

**Marketing for Solo Practitioners 2017**
(live & webcast)
March 3 New York City

**Bridging the Gap – March 2017**
March 7-8 Albany, Buffalo (Video Conf.)
New York City (live)

**Legal Malpractice 2017**
(9:00 a.m. – 1:00 p.m.)
March 10 Westchester
March 17 Rochester
March 24 Albany, New York City
March 31 Long Island

**13th Annual International Estate Planning Institute**
March 23-24 New York City

**Legal Ethics in the Digital Age**
(9:00 a.m. – 1:00 p.m.)
March 30 New York City

**Basic Lessons on Ethics & Civility 2017**
(9:00 a.m. – 1:00 p.m.)
April 5 New York City
April 7 Albany, Rochester
April 28 Buffalo, Long Island

**Securities Arbitration & Mediation 2017**
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April 6 New York City

**Auto & Truck Claims, Accidents and Litigation**
April 7 Long Island, Syracuse
April 21 Buffalo, New York City
April 28 Albany

**Managing Partner Conference Series – Part 3**
(8:30 a.m. – 10:00 a.m., live & webcast)
April 19 New York City

**Anatomy of a Trust**
April 25 Albany
April 26 New York City
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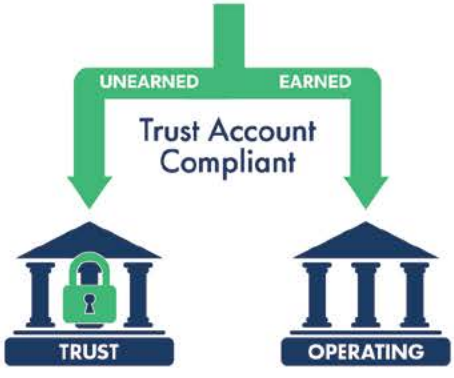


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# Calculating Economic Damages in Wrongful Death and Personal Injury Cases

**By Charles L. Baum, Laura Bonanomi and Patrick A. Gaughan**

## Introduction

In wrongful death (WD) and personal injury (PI) cases, attorneys may hire a forensic economist as an expert to calculate the pecuniary value of economic damages, such as those from lost earnings and lost employment benefits (together called compensation) or the value of lost household services. An economist can play a significant role in establishing a reliable measure of economic losses through the use of appropriate assumptions and data, and through the use of an accepted and reliable methodology. Experienced economists should know that the assumptions, data, and methods they utilize in their analysis can have a significant impact on the total damages amounts they put forward. Using inappropriate assumptions, data, and methodology can result in an overestimate or underestimate of such damages. This article reviews the methods economists frequently use for addressing 10 key

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elements of economic losses in WD and PI cases and evaluates the extent to which these methods are acceptable within New York State's legal framework. Where pertinent, the article outlines whether New York's stipulations – and the decisions economics experts may make within these stipulations – tend to increase or decrease the calculated amount of economic damages.

### I. Earnings Capacity

New York State courts award lost earnings as economic damages in WD and PI cases to provide "fair and just compensation for . . . pecuniary injuries."[1] The appropriate measure may be based on actual lost wages or on the lost or impaired ability to earn wages, sometimes referred to as earnings capacity.[2] Lost earnings would likely be measured as lost earnings capacity for infants, children, students, apprentices, and homemakers.[3] Both past and future lost earnings are recoverable,[4] but these losses must be reasonably certain and cannot be purely due to conjecture.[5] When an injured worker is able to return to work at a lower wage, the relevant measure of lost earnings should be the change in earnings[6] from comparing pre- and post-injury earnings.[7] However, a simplistic comparison may not be satisfactory if factors other than the injury were responsible for some or all of the earnings difference.

Pecuniary damages from lost earnings in New York State can be based on the gross earnings prior to the time of injury or death.[8] New York State does not otherwise stipulate how lost earnings are to be calculated. A mathematical formula for calculating damages is not provided.[9] The calculation must not deviate substantially from what would be deemed reasonable compensation.[10] While the calculation of pecuniary economic losses is ultimately left to the fact-finder, several factors to be considered include "the decedent's earning potential, such as present and future earnings, potential for advancement and probability of means to support heirs, as well as factors pertaining to the decedent's age, character and condition, and the circumstances of the distributees."[11] This list is certainly not exhaustive, as each case can bring its own unique factors, such as changes in the industry in which the plaintiff was employed.

In practice, economics experts often base their testimony on the injured party's actual earnings prior to the cause of action.[12] Forecasting future lost earnings based on an average of earnings in the years prior to the cause of action will increase the calculated amount of economic losses (relative to using earnings from the prior year) when the individual's earnings had been falling over time. Just the opposite, basing future lost earnings on actual earnings just prior to the cause of action (e.g., in the immediately preceding year) will increase the amount calculated when the individual's earnings had been rising. Economists may also consider, where appropriate, national or local average earnings for a particular education level[13] or for a particular industry and occupation.[14]

### II. Employment Benefits

Employers provide workers a portion of their compensation in the form of fringe benefits. As a result, economic damages in WD and PI cases may include, for example, the value of lost health insurance benefits, lost pension and retirement benefits, and lost employer contributions on the employee's behalf to government programs such as Social Security. New York State recognizes that employment benefits are part of a worker's compensation and awards damages for such losses.[15] In practice, economics experts in New York State have valued lost employment benefits with either the replacement cost in the market to the injured party or their survivors, the actual cost to the employer,[16] or the percentage of wages such benefits represent.[17] One New York court indicated a preference for the third approach.[18] Nevertheless, replacement costs to the injured party may be greater than the actual cost to the employer, if the employer benefits from group rates. Thus, the use of replacement costs when valuing employment benefits will tend to increase the calculated amount of economic losses. Defendants may want to introduce the ability of a plaintiff to obtain comparable benefits, such as health insurance, through post-injury employment or the employment of a spouse.

Pecuniary damages from lost earnings in New York State can be based on the gross earnings prior to the time of injury or death.

### III. Household Services

Work may be performed in the home, just as it is in the marketplace. As a result, New York State considers the value of lost household services as economic damages in WD and PI cases.[19] Some New York courts have emphasized that evidence must show it is reasonably certain the services would have been provided, absent the cause of action, to warrant recovery.[20] Others seem to require evidence that the lost services have since been replaced at a cost and may require evidence of such payments.[21] For example, in *Schultz v. Harrison Radiator*, the court rejected losses based upon gratuitous services provided by family members. Regardless, it is common to see eco-

nomics experts in New York WD and PI cases testifying on the value of lost household services, and such losses have subsequently been awarded, without evidence of expenditures on replacement services.[22] One key distinction seems to be that WD cases do not require evidence of replacement expenditures, but PI cases may.[23]

Economists have based the value of the lost services on the replacement cost (calculated as the amount of time the injured individual had devoted or would likely have devoted to providing the services multiplied by the appropriate market wage)[24] or on average measures of time use,[25] typically obtained from federal government surveys.[26] New York courts indicate a preference for the first approach (e.g., "the standard is . . . the cost of replacing the decedent's services").[27] Economists in New York cases have assumed the services would have been provided until retirement[28] or to the end of healthy life expectancy (defined as the period during which an individual is in sufficiently adequate health to engage in basic activities required in daily living),[29] and some economists have even extended such services to the very end of life expectancy in their calculations.[30] Naturally, calculated damages amounts for lost household services are greater the further into the future the household services are assumed to have been provided (e.g., until death versus until retirement). The closer to the end of life expectancy that such losses are projected, the more open to challenge they become: as individuals approach the end of their life expectancy, their ability to provide such services may decline and they may become more recipients than providers of such services.

## IV. Growth Rates

Earnings often grow over time with inflationary forces and possibly greater worker productivity.[31] Economists recognize this and frequently increase projected future earnings in their calculations of economic losses. New York State allows this, although its statutes do not specify the rate or methodology to use when projecting wage growth. In New York State medical malpractice PI cases, juries are asked to identify future economic losses from lost earnings separately by year, reporting base earnings in current-year dollars and the annual rate at which these base earnings are projected to grow.[32] Economics experts may therefore present their calculations using this format. Future losses are presented by juries as an aggregated total in New York non-medical malpractice WD and PI cases and medical malpractice WD cases, so the rate of future earnings growth may not be prominently displayed in verdicts from those cases.[33]

In practice, while each case presents its own unique issues, economists in New York WD and PI cases have successfully relied on general wage trends across the labor force and on rates of wage growth for specific industries, occupations, sectors,[34] and for specific unions.[35] Courts in New York State have also approved of experts relying on rates of price inflation, as measured by the Consumer Price Index, to forecast wage growth,[36] and of experts relying on average wage growth rates for workers with particular levels of educational attainment.[37] Economists have also used measures of industry wage growth and cost-of-living increases to forecast growth in the value of household services[38] and fringe benefits, such as Social Security retirement benefits.[39] New York courts and many economists do seem to agree that the wage growth rate should be smaller than the rate used for present value discounting (discussed in detail below), which results in actual net discounting.[40] If the wage growth rate used by an economist is larger than the interest rate used for present value discounting, then this indicates the economic losses are overestimated.

## V. Worklife and Life Expectancies

In WD and PI cases, earnings and employment benefits are potentially lost over the remaining worklife while household services are potentially lost over a time period that may be close to the remaining life expectancy. New York courts recognize this[41] and provide life tables and worklife tables in their Pattern Jury Instructions to be used in calculating economic losses. Unfortunately, these tables do not necessarily provide the latest available statistics. Courts in New York State allow economics experts to base their calculations on information from the sources cited in the Pattern Jury Instructions and to testify to the validity of expectancy evidence from other sources, such as articles published by economists in peer-reviewed journals.[42]

In practice, economists have used published worklife expectancies[43] or have considered common retirement ages such as age 65.[44] With increased life expectancies over time, using older life tables will tend to reduce economic losses, by shortening the period over which damages from lost retirement benefits or lost household services are calculated. Over the past couple of decades, men and women have been working longer.[45] With increased worklife expectancies over time, using older worklife tables will tend to decrease economic losses, by shortening the period over which damages from lost earnings and lost employment benefits are calculated. However, other factors such as globalization seem to have adversely affected the employment of workers with lower levels of education.

In New York State, remaining worklife and life expectancies should be calculated as of the time of the injury. New York requires the worklife and life expectancies used in the damages calculations to be pre-injury and undiminished by the cause of action.[46] The use of a projected remaining worklife reduced by the cause of action (i.e., reduced by the injury) would understate economic losses.

## VI. Mitigating Factors

In PI cases (but not WD cases), the plaintiff may be able to work in a diminished capacity after the injury or may be able to recover, at least partially, from the injury and return to work. In New York State, earnings from employment after the injury are to be considered by economics experts and subsequently deducted from the economic losses.[47] Furthermore, injured plaintiffs in New York State may be required to demonstrate their efforts to mitigate their damages.[48]

Another potential source of mitigation is income received from other sources due to an injury or death. Traditionally in New York, economics experts were not to adjust their economic loss calculations for collateral income from a source other than the tortfeasor.[49] This is referred to as the collateral source rule. However, over time (beginning in the mid-1970s and continuing through the 1980s), New York State has limited the scope of this rule.[50] Now, collateral sources of income, such as Social Security income, workers' compensation, and insurance benefits, generally should be deducted from both past and future economic losses in both WD and PI cases.[51] New York State identifies some collateral income sources that should not be deducted, such as life insurance benefits in WD cases and voluntary charitable contributions.[52] Otherwise, the primary requirements for deducting collateral income sources are that the injured party is reasonably certain to receive (or to continue receiving) the collateral income source and that the collateral income must directly correspond to a source of economic loss, essentially compensating the plaintiff for that category of damage loss.[53] For example, Social Security survivor's benefits should be deducted from economic damages awards if they replace a decedent's lost earnings.[54] Disability payments would not serve as a replacement for out-of-pocket medical costs.[55] New York's intent is to prevent double-recoveries for plaintiffs, not to provide a windfall for defendants.[56] Procedurally, collateral source deductions are made by the court, after the jury has rendered a verdict; the jury is not to consider collateral source evidence.[57]

Of course, money is fungible. Funds received for one purpose can be used for another. As a result, strict application of the "correspondence category" provision of New York's collateral source rule results in larger economic damages awards. Since such collateral-source compartmentalization is not justified by any economic principle, it unnecessarily overstates economic damages awards for plaintiffs.

Another factor that defendants may want to explore through their economics expert is the disincentive to return to full-time work that post-injury disability payments provide. For example, if a worker is able to receive a portion of prior employment earnings without working (and without incurring monetary and non-monetary work-related costs), then there may be little incentive to return to full-time work. This disincentive will be compounded if some of the post-injury payments are non-taxable.

## VII. Personal Consumption Expenditures

Decedents in WD cases would have spent at least a portion of their earnings on their own consumption. As in many other jurisdictions, economics experts in New York State are required to deduct personal consumption expenditures from the economic losses in those cases.[58] This is also true in New York PI cases when the plaintiff's life expectancy with the injury is less than his or her non-injury worklife expectancy, upon which lost earnings are based.[59] However, New York's statutes do not specify the method to use in making these deductions. New York State courts may consider the decedent's frugality, recent spending habits, and accumulation of assets.[60] It is up to the parties and their experts to present reliable evidence of such factors.

Economics experts in New York State cases have often based personal consumption deductions on earnings, approximating the portion of earnings that would have been consumed during the worklife and then deducting that amount.[61,62] However, decedents would have continued to consume in retirement – after earnings cease. Ignoring this will inflate economic damages. One remedy would be for the economics expert to also deduct the proportion of retirement income that would have been consumed.

In WD lawsuits, another issue that may be relevant is the self-consumption of household services. This is similar to the concept of personal consumption expenditures. Essentially, services for which the decedent is the only beneficiary would not be compensable as they do not reflect a loss to survivors.

## VIII. Discount Rate

Generally, the process of discounting future pecuniary losses to present value identifies the amount of money which, if paid today, will grow, when invested, to an amount equal to that of the future losses. New York State's discounting rules have changed several times. In prior years, the process of discounting was similar to what is currently done in federal court or in other states, such as nearby New Jersey. However, the New York State legislature became concerned that too much testimony was being devoted to what was akin to graduate seminars on discounting and interest rates – issues that they were concerned the average jury could not fully appreciate. Thus, the court rules were changed to attempt to take the discounting process away from the consideration of juries. Instead, mechanistic rules, Rules 50A and 50B, were put in place. Unfortunately, these present their own problems.

Currently, the jury determines economic damages in New York non–medical malpractice WD and PI cases

without discounting economic losses to present value.[63] Juries are to itemize future economic damages separately, indicating the number of years over which each source of future loss is expected to occur, instead of providing an aggregate damage total that includes past losses.[64] Pursuant to Article 50-B, New York State courts (with some exceptions, such as in FTCA cases[65]) then adjust the undiscounted amount of future losses (above a $250,000 threshold) to its present value as of the date of the cause of action (e.g., as of the date of the decedent's death) to fund an annuity providing structured payments.[66] A discount rate prevalent at the time of the verdict is to be used, but this rate is not otherwise specified. New York State courts have relied upon simplistic citation of prevailing interest rates rather than a more accurate consideration of the total return of relevant investments. Nevertheless, financial analysis shows that investments (even default risk-free treasuries) have both an interest payment component and a capital gains (loss) component.

New York medical malpractice PI cases essentially follow non–medical malpractice cases in prohibiting present value discounting by the jury. Pursuant to Article 50-A, economics experts present their economic damages calculations in current-year values, often with a recommended growth rate, without aggregating future yearly losses to a total amount. Discounting is again performed after the verdict by the court, but in medical malpractice PI cases, the discount rate is significantly more defined. In medical malpractice PI cases, the 10-year U.S. Treasury Note rate is to be the basis used for discounting (with a 2 percentage point increase in this rate for losses occurring more than 20 years in the future).[67] However, unlike in non-medical malpractice PI and WD cases, where the first $250,000 of the future pecuniary loss award is undiscounted and paid as a lump sum, in medical malpractice PI cases, the entire future pecuniary loss award is discounted, at which time 35 percent of the computed present value amount is paid as a lump sum. The remainder is used to fund annuities providing structured payments.

Quite differently, economic damages in medical malpractice WD cases commencing after July 26, 2003 are to be discounted by the jury and presented in aggregated lump-sum. New York statutes do not specify the discount rate to use in these cases, leaving that determination to juries.

In New York State, economics experts should include present value discounting in their calculations in medical malpractice WD cases. Economics experts do not testify to juries about discounting in non–medical malpractice WD and PI cases and in medical malpractice PI cases, but courts may ask them to assist with present value discounting in these cases in post-verdict proceedings.[68] In assisting New York juries and courts, economists have used discount rates based on, for example, U.S. treasury securities, using a rate average as of the date of the jury's verdict or the rate on securities maturing at the time of the future loss.[69]

The court's post-verdict procedures for structuring damages payments in New York non–medical malpractice WD and PI cases may overcompensate plaintiffs by essentially adjusting damages awards upward twice for the effects of price inflation. First, juries have the option of adjusting damages upward over time for price inflation in their verdict.[70] This adjustment may be based on an economics expert's trial testimony. After that, the process by which the courts determine the present value of the jury's verdict requires an annually compounded 4 percent increase in damages payments.[71] Specifically, the total undiscounted value of the jury's award for future damages (after several specific deductions) is divided over the years of receipt to produce a first-year damages payment, which then is increased 4 percent per year (in each successive year), before the resulting amount is discounted to present value.[72] Thus, the effect of price growth is included again. Inflation is double-counted. At a minimum, if the jury does not include an inflation adjustment, then the statutory 4 percent yearly adjustment represents the inflation floor.

> In New York State, earnings from employment after the injury are to be considered by economics experts and subsequently deducted from the economic losses.

## IX. Interest

New York State's statutes generally award interest to be paid on damages from the time of the cause of action to the time of the verdict (CPLR 5001), from the time of the verdict until the judgment (CPLR 5002), and from the time of the judgment until the damages have been paid (CPLR 5003).[73] However, interest under CPLR 5001 is not awarded in PI cases, but interest is awarded under CPLR 5002 and CPLR 5003 in PI cases, beginning at the time of the liability verdict.[74] Typically, the period addressed by CPLR 5002 is relatively short and, therefore, the interest accrued is not a substantial amount.[75] The court clerk is designated to calculate this amount. The rate to be used in interest calculations is defined by New York statutes to be 9 percent, without compounding.[76] This mandated rate has been the source of some controversy in recent years, due to the relatively low interest rates that have prevailed in financial markets as a result of the Federal Reserve's expansionary monetary policies.

New York State WD cases are governed by EPTL 5-4.3, which allows pre-judgment interest, beginning at the time of the death, and post-judgment interest, until the judgment is paid. Economics experts may include

pre-judgment interest in their calculations, but it is to begin accruing at the time each loss component occurs, not on the entire damages amount from the time of the death.[77] In *Toledo,* the court provided additional guidance, explaining that losses should be discounted to their value on the date of the decedent's death and then pre-judgment interest from the decedent's death to the date of the verdict should be awarded.[78,79] However, this results in a windfall for the plaintiff when the discount rate used for converting future losses to present value is less than the statutory interest rate. For example, in *Toledo*, the interest rate used was the statutory 9 percent, but the discount rate used was 4.3 percent.[80] Essentially, losses were discounted using the smaller rate and then augmented using the larger interest rate, having the net effect of increasing damages. This occurs because the mandated pre-judgment interest rate is not time-dependent, while the discount rate can vary based upon market conditions.

## X. Taxes

Income that would have been earned absent the cause of action in WD and PI cases would potentially have been subject to local, state, and federal income taxation, but damages awards in such cases will not be.[81] In New York medical malpractice WD cases, juries should adjust damages awards downward for the income taxes that they are reasonably certain the decedent would have paid.[82] Damages awards in New York medical malpractice PI cases should also be adjusted downward for the taxes that would have been paid, but it is the court, not the jury, that is to perform these calculations.[83] Economics experts have assisted with these tax adjustments in their damages calculations in both WD and PI medical malpractice cases.[84] It is the defendant's responsibility to establish what the relevant tax adjustment should be,[85] and taxes under the Federal Insurance Contributions Act (FICA) are not to be part of this adjustment.[86]

Just the opposite, in New York non–medical malpractice WD and PI cases, taxes are ignored.[87] Economics experts are not to testify to the effect of taxes in non–medical malpractice cases. Economic damages are larger when taxes are not deducted (assuming some income taxes would have been owed after accounting for tax deductions). This potentially results in a windfall for plaintiffs, who would not have otherwise received gross earnings in non–medical malpractice WD and PI cases. Once again, the treatment of taxes, like that of discounting, is different in New York State compared to Federal Court and nearby states like New Jersey or Pennsylvania.

## Conclusions

Although the use of an economics expert is not required for pecuniary economic damages to be awarded in New York State courts, economics experts, when used, may significantly influence the amount awarded. Economists have the ability to increase or decrease the amount of economic damages they calculate with their assumptions, methods, and data. ■

1. EPTL 5-4.3. *Delano v. United States*, 859 F. Supp. 2d 487, 506 (W.D.N.Y. 2012); *Saint v. United States*, 483 F. Supp. 2d 267, 294 (E.D.N.Y. 2007); *Ledogar v. Giordano*, 122 A.D.2d 834, 837 (2d Dep't 1986).
2. *Dershowitz v. United States*, 2015 WL 1573321, at *32 (S.D.N.Y. 2015); *Mono v. Peter Pan Bus Lines, Inc.*, 13 F. Supp. 2d 471, 479 (S.D.N.Y. 1998); *Kirschhoffer v. Van Dyke*, 173 A.D.2d 7, 10 (3d Dep't 1991).
3. *Saint*, 483 F. Supp. 2d at 295; *Kirschhoffer*, 173 A.D.2d at 10; *Kavanaugh v. Nussbaum*, 129 A.D.2d 559, 562 (2d Dep't 1987).
4. *Delano*, 859 F. Supp. 2d at 506; *Ferrarelli v. United States*, 1992 WL 893461, at *8 (E.D.N.Y. 1992).
5. *Carroll v. U.S.*, 295 Fed. Appx. 382, 385 (2d Cir. 2008); *Kirschhoffer*, 173 A.D.2d at 10.
6. *Delano*, 859 F. Supp. 2d at 508; *Saint v. United States*, 483 F. Supp. 2d 267, 295 (E.D.N.Y. 2007).
7. *Beadleston v. American Tissue Corp.*, 41 A.D.3d 1074, 1078 (3d Dep't 2007).
8. *Imbierowicz v. A.O. Fox Memorial Hosp.*, 43 A.D.3d 503, 504 (3d Dep't 2007); *Phelan v. State of New York*, 11 Misc. 3d 151, 169 (N.Y. Ct. Cl. 2005); *Klos v. New York City Tr. Auth.*, 240 A.D.2d 635, 637 (2d Dep't 1997).
9. *Dershowitz v. United States*, 2015 WL 1573321, at *31 (S.D.N.Y. 2015).
10. *Klos*, 240 A.D.2d at 637.
11. *Gonzalez v. N.Y. City Hous. Auth.*, 77 N.Y.2d 663, 668 (1991); *Ferrarelli v. United States*, 1992 WL 893461, at *7 (E.D.N.Y.1992).
12. *Delano v. United States*, 859 F. Supp. 2d 487, 501 (W.D.N.Y. 2012); *Ferrarelli*, 1992 WL 893461, at *3.
13. *DuPont v. State of N.Y.*, 19 Misc. 3d 1144(A) (N.Y. Ct. Cl. 2008); *Kavanaugh v. Nussbaum*, 129 A.D.2d 559, 562 (2d Dep't 1987).
14. *Dershowitz*, 2015 WL 1573321, at *19; *Saint v. United States*, 483 F. Supp. 2d 267, 295 (E.D.N.Y. 2007).
15. *Dershowitz*, 2015 WL 1573321, at *36; *Ferrarelli*, 1992 WL 893461, at *12.
16. *Ferrarelli*, 1992 WL 893461, at *3.
17. *DuPont*, 19 Misc. 3d 1144(A); *Doe v. State of New York*, 189 A.D.2d 199, 205 (4th Dep't 1993); *Ferrarelli*, 1992 WL 893461, at *12.
18. *Ferrarelli*, 1992 WL 893461, at *12.
19. *Id.* at *11; *Gonzalez v. N.Y. City Hous. Auth.*, 77 N.Y.2d 663, 668 (1991).
20. *Berrios v. 735 Ave. of the Ams., LLC*, 103 A.D.3d 472, 473 (1st Dep't 2013); *Presler v. Compson Tennis Club Assoc.*, 27 A.D.3d 1096, 1097 (4th Dep't 2006).
21. *Hyung Kee Lee v. New York Hosp. Queens*, 118 A.D.3d 750, 754 (2d Dep't 2014); *Kastick v. U-Haul Co. of W. Mich.*, 292 A.D.2d 797, 798 (4th Dep't 2002); *Schultz v. Harrison Radiator Div. Gen. Motors Corp.*, 90 N.Y.2d 311, 320 (1997).
22. *Dershowitz v. United States*, 2015 WL 1573321, at *36 (S.D.N.Y. 2015); *Kihl v. Pfeffer*, 47 A.D.3d 154, 161 (2d Dep't 2007); *Doe*, 189 A.D.2d at 207.
23. *Phelan v. State of New York*, 11 Misc. 3d 151, 170 (N.Y. Ct. Cl. 2005); *Mono v. Peter Pan Bus Lines, Inc.*, 13 F. Supp. 2d 471, 481 (S.D.N.Y. 1998).
24. *Ferrarelli v. United States*, 1992 WL 893461, at *6 (E.D.N.Y. 1992).
25. *De Long v. County of Erie*, 60 N.Y.2d 296, 307 (1983).
26. *Dershowitz*, 2015 WL 1573321, at *22; *Ramirez v. Chip Masters, Inc.*, 2014 WL 1248043, at *10 (E.D.N.Y. 2014).
27. *Hyung Kee Lee*, 118 A.D.3d 750, 754 (2d Dep't 2014); *Klos v. New York City Tr. Auth.*, 240 A.D.2d 635, 637 (2d Dep't 1997).
28. *Ferrarelli*, 1992 WL 893461, at *6.
29. *Dershowitz*, 2015 WL 1573321, *21.
30. *Doe v. State of New York*, 189 A.D.2d 199, 205 (4th Dep't 1993).
31. *Ferrarelli*, 1992 WL 893461, at *17; *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 36 (2d Cir.1980).
32. CPLR 5031.
33. CPLR 4111, 5041.
34. *Ramirez v. Chip Masters, Inc.*, 2014 WL 1248043, at *10 (E.D.N.Y. 2014).
35. *Ferrarelli*, 1992 WL 893461, at *5.
36. *Dershowitz v. United States*, 2015 WL 1573321, at*35 (S.D.N.Y. 2015); *Delano v. United States*, 859 F. Supp. 2d 487, 506 (W.D.N.Y. 2012).
37. *DuPont v. State of N.Y.*, 19 Misc. 3d 1144(A) (N.Y. Ct. Cl. 2008).
38. *Ramirez*, 2014 WL 1248043, at *10.
39. *Dershowitz*, 2015 WL 1573321, at *36.
40. *Ferrarelli*, 1992 WL 893461, at *5; *Doca v. Marina Mercante Nicaraguense,*

*S.A.*, 634 F.2d 30, 39 (2d Cir. 1980); Luthy, Michael R., Michael L. Brookshire, David Rosenbaum, David Schap, and Frank L. Slesnick, *A 2015 Survey of Forensic Economists: Their Methods, Estimates, and Perspectives*, Journal of Forensic Economics, 26 (1): 53-83 (2015).

41. *In re Joint E. & S. Dist. Asbestos Litig.*, 726 F. Supp. 426, 431 (E.D.N.Y. 1989).

42. *Dershowitz*, 2015 WL 1573321, at *19, *21.

43. *Doe v. State of New York*, 189 A.D.2d 199, 205 (4th Dep't 1993); *Ferrarelli*, 1992 WL 893461, at *9.

44. *Delano v. United States*, 859 F. Supp. 2d 487, 507 (W.D.N.Y. 2012); *Mono v. Peter Pan Bus Lines, Inc.*, 13 F. Supp. 2d 471, 479 (S.D.N.Y. 1998).

45. Baneree, Sudipto, and David Blau, *Employment Trends by Age in the United States: Why Are Older Workers Different?*, Journal of Human Resources, 51 (1): 163–199 (2015); Blau, David, and Ryan M. Goodstein, *Can Social Security Explain Trends in Labor Force Participation of Older Men in the United States?*, Journal of Human Resources, 45 (2): 328–363 (2010); Schirle, Tammy, *Why Have the Labor Force Participation Rates of Older Men Increased since the Mid-1990s*, Journal of Labor Economics, 26 (4): 549–594 (2008).

46. *McLeod v. Metropolitan Transp. Auth.*, 47 Misc. 3d 1219(A), *7 (Sup. Ct., N.Y. Co. 2015); *DuPont v. State of N.Y.*, 19 Misc. 3d 1144(A) (N.Y. Ct. Cl. 2008); *Doe v. State of N.Y.*, 189 A.D.2d 199, 206 (4th Dep't 1993); *In re Joint E. & S. Dist. Asbestos Litig.*, 726 F. Supp. 426, 433 (E.D.N.Y. 1989).

47. *Berrios v. 735 Ave. of the Ams., LLC*, 103 A.D.3d 472, 472 (1st Dep't 2013); *Miah v. Private One of New York LLC*, 23 Misc. 3d 1133(A), *6 (Sup. Ct., Kings Co. 2009); *Beadleston v. Am. Tissue Corp.*, 41 A.D.3d 1074, 1078 (3d Dep't 2007); *Thompson v. Port Auth. of N.Y. and N.J.*, 284 A.D.2d 232, 233 (1st Dep't 2001); *Bell v. Shopwell, Inc.*, 119 A.D.2d 715, 716 (2d Dep't 1986); *McLaurin v. Ryder Truck Rental*, 123 A.D.2d 671, 673 (2d Dep't 1986).

48. *Berrios*, 103 A.D.3d at 472; *Miah*, 23 Misc. 3d 1133(A), at *6; *Thompson*, 284 A.D.2d at 233; *Bell*, 119 A.D.2d at 716.

49. *Bryant v. N.Y. City Health & Hosps. Corp.*, 93 N.Y.2d 592, 605 (1999).

50. *Id*.

51. *Delano v. United States*, 859 F. Supp. 2d 487, 507 (W.D.N.Y. 2012); *Ferrarelli v. United States*, 1992 WL 893461, at *15 (E.D.N.Y. 1992).

52. CPLR 4545.

53. *Kihl v. Pfeffer*, 47 A.D.3d 154, 164 (2d Dep't 2007); *Bryant*, 93 N.Y.2d at 606; *Oden v. Chemung County Indus. Dev. Agency*, 87 N.Y.2d 81, 87 (1995).

54. *Bryant*, 93 N.Y.2d at 608.

55. *Oden*, 87 N.Y.2d at 87.

56. *Bryant*, 93 N.Y.2d at 607; *Oden*, 87 N.Y.2d at 88.

57. CPLR 4545.

58. *Dershowitz v. United States*, 2015 WL 1573321, *35 (S.D.N.Y. 2015); *Ferrarelli v. United States*, 1992 WL 893461, at *11 (E.D.N.Y. 1992).

59. *DuPont v. State of N.Y.*, 19 Misc. 3d 1144(A) (N.Y. Ct. Cl. 2008).

60. *Gardner v. State*, 134 A.D.3d 1563, 1564 (4th Dep't 2015).

61. *Id.* at 1563; *DuPont*, 19 Misc. 3d 1144(A); *Doe v. State of N. Y.*, 189 A.D.2d 199, 205 (4th Dep't 1993); *Ferrarelli v. United States*, 1992 WL 893461, at *11 (E.D.N.Y. 1992).

62. Some economists instead deduct consumption expenditures as a percentage of earnings during the worklife and as a percentage of retirement income thereafter, through the end of the remaining life expectancy (*Dershowitz*, 2015 WL 1573321 at *22).

63. CPLR 4111, 5041.

64. *Id*.

65. *Ferrarelli*, 1992 WL 893461, at *18.

66. *Toledo v. Iglesia Ni Christo*, 18 N.Y.3d 363, 368 (4th Dep't 2012).

67. CPLR 5031.

68. *Coyne v. Etra*, 183 Misc. 2d 514, 517 (Sup. Ct., Nassau Co. 1999); *Doe v. State of N.Y.*, 189 A.D.2d 199, 205 (4th Dep't 1993).

69. *Coyne*, 183 Misc. 2d at 517; *Ferrarelli*, 1992 WL 893461, at *17.

70. *Schultz v. Harrison Radiator Div. Gen. Motors Corp.*, 90 N.Y.2d 311, 320 (1997).

71. CPLR 5041; *Desiderio v. Ochs*, 100 N.Y.2d 159, 166 (2003).

72. *Desiderio*, 100 N.Y.2d at 166; *Bryant v. N.Y. City Health & Hosps. Corp.*, 93 N.Y.2d 592, 604 (1999).

73. CPLR 5001; 5002; 5003.

74. *Rohring v. City of Niagara Falls*, 84 N.Y.2d 60, 66 (1994).

75. In bifurcated hearings, interest under CPLR 5002 would begin when liability is established, not when damages are determined (*Love v. State of N.Y.*, 78 N.Y.2d 540, 544 (1991)). A stipulation of liability is an exception that does not initiate the accrual of pre-judgment interest (*Mahoney v. Brockbank*, 35 N.Y.S.3d 459, 463 (2d Dep't 2016).

76. CPLR 5004.

77. EPTL 5-4.3; *Milbrandt v. Green Refractories Co.*, 79 N.Y.2d 26, 37 (1992).

78. *Toledo v. Iglesia Ni Christo*, 18 N.Y.3d 363, 368 (4th Dep't 2012).

79. If future losses are instead discounted to their present value as of the date of the verdict (rather than as of the date of the death), then no interest on the award for the time between the death and verdict should be added because that additional interest would be a windfall for the plaintiff (*Milbrandt v. Green Refractories Co.*, 79 N.Y.2d 26, 37 (1992)).

80. *Toledo*, 18 N.Y.3d at 373.

81. *Lazano v. City of N.Y.*, 71 N.Y.2d 208, 211 (1988).

82. EPTL 5-4.3; *Friedman v. Frank*, 16 Misc. 3d 321, 325 (Sup. Ct., Nassau Co. 2007).

83. CPLR 4546; *Boyer v. Kamthan*, 42 Misc. 3d 786, 788 (Sup. Ct., Ulster Co. 2013); *Cabrera v. N.Y. City Health & Hosp. Corp.*, 272 A.D.2d 495, 496 (2d Dep't 2000).

84. *Boyer*, 42 Misc. 3d at 787; *DuPont v. State of N.Y.*, 19 Misc. 3d 1144(A) (N.Y. Ct. Cl. 2008).

85. *Boyer*, 42 Misc. 3d at 788.

86. *Id.* at 790.

87. *Ferrarelli v. United States*, 1992 WL 893461, *9 (E.D.N.Y. 1992); *Lazano v. City of N.Y.*, 71 N.Y.2d 208, 212 (1988); *Johnson v. Manhattan & Bronx Surface Tr. Operating Auth.*, 71 N.Y.2d 198, 206 (1988); *McKee v. Colt Elec. Co., Inc.*, 849 F.2d 46, 49 (2d Cir. 1988).

BY DAVID PAUL HOROWITZ

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# "What's the Guy Gonna Do?"

## Introduction

This month's column returns, as promised, to the subject of forensic computer examinations, with a follow-up column to November/December 2016's "I Gotta Guy For That." That column discussed two decisions in *In re Nunz*, a will contest where the objectants to a will sought a forensic examination of the hard drive of the drafting attorney's computer in response to the drafter's affidavit testimony that he

> "[P]repared 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).

In her first decision,[1] Surrogate Howe held in abeyance a determination on the objectants' request for relief pending the exchange of information concerning the proposed forensic expert's examination of the subject computer.[2] Following the exchange of the relevant information, an evidentiary hearing was conducted, on consent, before the Chief Attorney of the Court, on a "hear and report" basis.[3]

Portions of the transcript of the hearing follow, and provide a useful roadmap for attorneys questioning witnesses on this subject.

## Testimony of the Objectants' Computer Forensic Expert

Following the testimony of the attorney draftsman, John Clingerman, the objectants' forensic computer expert, testified at the evidentiary hearing. Based upon his preliminary testimony, Surrogate Howe determined that Clingerman qualified as an expert on the subject matter at issue. Thereafter, Clingerman described how the computer hard drive would be cloned:

> **Q**. Could you explain step by step what's involved in a computer forensics examination of an Apple iMac computer approximately ten years old?
>
> **A**. Typically what is involved would be, for any forensic analysis, is to *remove the hard drive from the computer. That original hard drive that's in the computer is then write protected so it is connected to a hardware device to prevent the forensic person from making any changes whatsoever to that original hard drive. And then from there the data is* pulled out of that hard drive – or I should say *copied over to another destination piece of media. That destination piece of media is always sterilized ahead of time* so it is full of zeros and it has absolutely no data on it whatever. So *at the end of the process, what we get as the end result on that destination media is an exact replica of the original piece of media.*
>
> **Q**. When you make that copy, what danger is there to the originating computer? Is there any danger of damage?
>
> **A**. No. Everything that we do is forensically sound and it's fully defensible (emphasis added).
>
> * * *
>
> **Q**. The actual storage of a hard drive, the cloned hard drive, where would you put it?
>
> **A**. We have a secure evidence room. While it's under examination, it's in our secure forensic laboratory in Rochester. Very limited access to that room.

Clingerman next testified about the search of the cloned hard drive:

> **Q**. And you have observed the will, the purported will in this case?
>
> **A**. I have.
>
> **Q**. And you understand it's a three-page will and that there's a difference with the first page as opposed to the other two, correct?
>
> **A**. That's what I was told, yes.
>
> **Q**. Okay. But you did see the will, is that correct?
>
> **A**. Yes.
>
> **Q**. All right. *Now, how do you propose to conduct an investigation that would help us to determine what happened to that will and whether it was actually created on the date Mr. Perla said, whether there are other versions of the will or any other useful information* based upon both your experience with D4 and your law enforcement background?
>
> **A**. Quite specifically, *we would make a forensic image of the hard drive of that computer. We would then* take that forensic image, *load it into a software forensic tool and*

*we would conduct examination by doing a couple of very specific things*. So it's my understanding that this will was originally in a Microsoft Word document. *So I would look in the unallocated space of the computer and I would look for Microsoft Word type of documents. I would also run or execute very specific search terms against that area of the hard drive as well to see if we can find fragments of a deleted file* (emphasis added).

Clingerman was questioned about the limitations of utilizing very specific search terms:

**Q**. When Mr. Morse asked you what search terms you would use, *you suggested that perhaps ten search terms might be appropriate for this particular project*. Do you know – and the only specific you gave us was the word Nunz, N-u-n-z. Is it your understanding that the only file with the name Nunz in it on Mr. Perla's computer is the file regarding William R. Nunz, Sr.?

**A**. I have no idea.

**Q**. *Did Mr. Morse ever inform you, either by his own communication or by documents, that Mr. Perla has indicated that on his computer he also has files of many other Nunz family members, including William R. Nunz, Jr., Mary Jane Nunz, Michael Nunz and William R. Nunz, Sr.* – Jr.s' son. Has he ever told you that?

**A**. *I don't recall that being any of our conversations*.

**Q**. I'm so sorry, sir. The affidavit of Keith Perla's that you do recall receiving at one point, is that Exhibit 3 or Exhibit 4?

**MR. SHIFFLETT**: It's the earlier exhibit, Mr. Streb. It's the earlier.

**MR. STREB**: Thank you. *Would you agree then, sir, assuming hypothetically that there are many other files regarding other Nunz family members on Mr. Perla's computer, would you agree that using the search term Nunz will bring up those files as well if they can still be recovered on the hard drive?*

**MR. MORSE**: Objection. Nobody testified to those facts before the Court.

**MR. SHIFFLETT**: It's a hypothetical to an expert. Overruled.

**A**. *Certainly*.

**Q**. Okay. And *would you agree then that that* – we're going to get into the confidentiality issues in a moment, but would you agree then that that is going to pose an issue in terms of confidentiality, that *if you do recover some document fragments, you may be recovering document fragments for, say, a will for another Nunz family member or a DWI case for another family member or other sensitive matter, would you agree?*

**A**. *Yes*.

**Q**. *And would you agree that if you use the word will, w-i-1-1, that could also pose different possibilities*? For example, would you agree that if you find the word will, that we've now seen the ASCII binary code equivalent of, that that could reference a text that says the Last Will and Testament. Would you agree that's one possibility?

**A**. *Yes*.

**Q**. *Would you agree that it could also call up a person's name Will?*

**A**. *Yes*.

**Q**. For example, there's a William R. Nunz, Sr. and a Jr. Would you agree?

**A**. It would certainly find Will.

**Q**. *Would it also potentially call up phrases that say, "I will say" or "They will call you"?*

**A**. *Yes*.

**Q**. *So again, there's a potential here, a very serious potential, that you could be, when you try to do this analysis, looking at completely unrelated confidential files, correct?*

**A**. *Yes* (emphasis added).

Clingerman was questioned about who would be involved in the examination of the cloned drive:

**A**. Initially I would be doing the examination, but when it comes to digital forensics, we pride ourselves, industry standard, to do a peer review of our activities to ensure that we're doing everything correctly, we haven't missed something, in essence leaving no stone unturned.

**Q**. How many other people would be involved?

**A**. I would say probably one other person.

**Q**. So when you use the word team, you're just referring to one other person?

**A**. I have another person that works in the office next to me. My manager is in Chicago and I would discuss my findings with him, as I do all the time and the person who works in my office is a junior member of my team who I will frequently share results or investigative processes with him.

**Q**. So we've got at least three people that would be having access to Mr. Perla's computer, you, a junior member and your manager?

**A**. We could do it that way (emphasis added).

Clingerman next testified about how his findings would be reported:

**MR. SHIFFLETT**: All right. Mr. Morse, before I turn to you for redirect, Mr. Clingerman, what ultimately happens to the cloned hard drive?

**THE WITNESS**: Anything that the client wants to have happen to it. So when a case is resolved, we give the clients a choice and there are actually several choices. We can maintain possession of the cloned hard drives in our evidence vault until whenever they want to have something else occur to it. We can ship that to the client. We can ship it to a third party at their direction. We can have it physically destroyed if they want or we can wipe the hard drive, which means fill it full of zeros and purpose it for another day. So those are the choices.

**MR. SHIFFLETT**: And the client in this case would be Mr. Morse, as you understand where you are at this point in these proceedings?

**THE WITNESS**: Yes, he is my client, but *in a situation like this, we can be directed by the Court*, we can – you know, opposings could have an agreement. *You know, we can do whatever we're instructed to do*.

**MR. SHIFFLETT**: I understand. I just wanted to know what your normal procedure is. *What happens if, in your search of the cloned hard drive, you find no relevant document, as relevancy is defined for you?*

**THE WITNESS**: *Whatever we find or don't find gets reported*. You know, we're an unbiased third party. *We do our search and we provide the findings*.

**MR. SHIFFLETT**: *And you write a report, is that how it's done?*

**THE WITNESS**: It's always done differently. *It all depends on what protocol is agreed to between the parties, such as, you know, protocol would consist of search terms and the processes post examination. I mean, the protocol could address how, where, when we're going to do a forensic image, what we're gonna do with it afterwards and how the examination would be conducted, how we report our findings and who we report our findings to and then, you know, in what format and then ultimately what happens to the clone. So it can all be spelled out* (emphasis added).

Finally, Clingerman elaborated on the concept of, and need for, a well-defined protocol before proceeding:

> **A**. Confidential protocol is the process that we're going to undertake and we have – it's basically rules of engagement and it's determined by the attorneys that are on each side of the matter, so together they devise a plan that we're going to work under and we follow that protocol.
>
> **Q**. The confidential protocols in – so you're expecting a confidential protocol to be developed for this particular case?
>
> **A**. Well, are we talking about protocol or are we talking about, say, the process of nondisclosure? Because which – I'm thinking that's maybe what I'm hearing. So when it comes to the protocol of nondisclosure, again, when we are engaged with clients, sometimes they request of us a very specific nondisclosure agreement, that either they can use our documentation or we can use theirs so – and the protocol may say who we can disclose things to and who we cannot (emphasis added).

## Decision of the Court

Following the hearing, there were a number of issues for the court to decide.

First, the court determined that there was a proper basis to order production of the computer.[4] Second, the court determined that a forensic analysis could be performed properly by Clingerman's "team."

More problematic was selecting the protocol to be followed during the forensic examination:

> Some aspects of the protocol are easier to determine than others, but what is clear is (a) that the parties have never attempted to resolve these issues, and (b) that, left on their own, the parties seem unlikely to come to accord on the protocol. However, without a clear protocol in place, the process will be pointless.

To preserve confidentiality, the court ordered:

> (1) Perla's computer shall be delivered to D4 *either by* Perla himself or by the estate attorney, as they shall determine, at a date, time and place to be agreed upon directly with Clingerman, and neither the Morse objectants nor their attorney shall have any part in that turnover process, except that such objectants' attorney shall be notified by the estate attorney immediately after the turnover has taken place;
>
> (2) Once Perla's hard drive has been cloned, D4 shall ensure the immediate return of the computer itself to whomever D4 had received it from;
>
> (3) After it has received Perla's computer, D4 shall not communicate in any manner whatsoever either with the Morse objectants, or with their attorney, or with Perla or with the attorney for this estate (except to return the computer), or with anyone else except the three D4 employees involved with the project, and D4 shall direct any and all communications, including any reports about its findings, *directly and only* to this Court, by confidential correspondence only;
>
> (4) Any D4 employee who is involved in this project shall give written assurance that he or she shall abide by the directions herein, and by any further protocol established for this project hereafter, and shall not disclose any of D4's analysis, findings or conclusions except as may otherwise be authorized in writing by this Court;
>
> (5) Once D4's report and findings have been transmitted in confidential form to this Court, I will issue whatever further Order is appropriate and necessary regarding disclosure (or not) of all or any part of the contents thereof.

Notwithstanding the court's observation about the lack of cooperation among the parties, the court ordered that the remaining protocol issues be worked out by counsel for the parties:

> I direct that counsel shall confer with each other and shall thereafter appear for a "protocol conference" with the Chief Attorney of this Court on *Wednesday, September 14, 2016, at 11:00 a.m.* At that conference, counsel should have with them proposed written protocols which can either by incorporated into a further Order to be issued by the undersigned on consent, or which can be tendered to the undersigned for review, consideration and determination. Counsel should reflect on the guidelines referred to in *Tener v. Cremer* (citation omitted), and should refer particularly to the Guidelines for Discovery of Electronically Stored Information [ESI] of the Nassau County Supreme Court Commercial Division. Counsel may also wish to consult with Clingerman prior to the protocol conference about any and all outstanding protocol issues that will be important to include in whatever Order I subsequently issue.

## Conclusion

It is often difficult to locate sample transcripts to serve as a guide when questioning witnesses on an unfamiliar or novel subject, and this decision offers,

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# Getting Indigestion from the Breakfast of Champertors

**By Robert Kantowitz**

Last year in this *Journal* I wrote an article in which I criticized inflexibility in New York judicial doctrine regarding the statute of limitations. Specifically, I advocated eliminating the rule that prohibits contractual agreements allowing a period to sue that is longer than the normal six-year statute of limitations.[1]

This month, I take aim at another element of undue inflexibility: the ancient and largely anachronistic prohibition of champerty.

## What Is Champerty?

Champerty consists of buying a legal claim for the sole purpose (or in some formulations, for the principal purpose) of suing to enforce that claim. The champerty doctrine is so obscure that the spell-checking program on my computer does not recognize the word.[2] When I was in law school 40 years ago, champerty was already so obscure that I do not recall that Professor Clarence Clyde Ferguson, who covered a good deal of English precedent in Civil Procedure, ever even mentioned it.

The original purpose of the champerty prohibition seems to have had elements both of protecting the rightful original claimants from wealthy persons who would buy up claims on the cheap and of tamping down on the number of vexatious and disruptive suits. The New York champerty prohibition applies to attorneys[3] and to corporations and associations.[4]

## Is There Still a Champerty Prohibition?

The champerty prohibition has atrophied or contracted in many jurisdictions, and even in New York it was thought to be dying out in commercial contexts.[5] However, a case decided in late October 2016, *Justinian Capital SPC v. WestLB AG*,[6] shows that the doctrine still exists and packs enough of a wallop to upset investors' reasonable expectations.

The *Justinian* case, as did the statute of limitations case about which I wrote last year, involved asset-backed securities that went bad and allegations that fault lay with the sponsor that had constructed the portfolio. Justinian Capital SPC purchased certain debt securities (the "Notes") from the original holder (Deutsche Pfandbriefbank AG, mercifully abbreviated by the Court as "DPAG"), and within days after purchasing the Notes (and, as it happened, shortly before the expiration of the statute of limitations), Justinian sued the sponsor, WestLB, alleging

fraud and numerous other improprieties in connection with the creation of the Notes.

The New York Court of Appeals held that Justinian could not maintain the action. The Court noted that "the statute prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the primary purpose of bringing a lawsuit."[7] The Court held, over a cogent dissent, that there was no issue of fact regarding the conclusion that "Justinian's sole purpose in acquiring the Notes was to bring this action and hence, its acquisition was champertous."[8] The Court went on to hold, also over the dissent, that the statutory exclusion for situations where the purchase price is more than $500,000 was not available because, in the view of the Court, Justinian had not actually put that amount at risk and would be able to meet its commitment to pay $1 million for the Notes only if it were able to sue successfully to enforce the Notes.[9]

## Why the Champerty Prohibition Should Not Apply to Cases Like This

The champerty prohibition will often present interpretive difficulties with respect to modern financial instruments. If I buy a debt instrument, I am buying it with two intertwined expectations: first, that I will collect the stated payments when due and, second, that if the payments are not made I have the right to hale the obligor into court to compel payment. Both of these complementary expectations must exist. Securities of different issuers, and with different maturities, seniorities and covenants, present different degrees of risk regarding the likelihood of timely payment, the likelihood of having to sue to enforce, where and how one can sue and how much is likely to be collected and when. Consequently, different securities are issued with different interest and discount rates and trade at different prices as a percentage of par. Imposing a separate bar to collectability that depends on a purchaser's motivation requires lines to be drawn on the basis of considerations that have no place in financial analysis.

As to whether the doctrine of champerty was properly invoked on the basis of Justinian's bad motive, and as to whether the purchase price obligation in this case was real or illusory, one can argue over who got the factual answers right or wrong. My point is broader. Although I am inclined to believe that there were issues of fact – so that, as the dissent had said, summary judgment should not have been granted – that conclusion might merely have kicked the can down the courthouse hallway and then along the arrow of time into a trial. Deciding the key question of intent adversely to the plaintiff at that point would have the same effect as deciding it at summary judgment.

Questions of fact likewise cannot necessarily be sidestepped by relying on the $500,000 purchase price exclusion, which was intended to prevent the champerty doctrine from gumming up the workings of the capital markets in what is supposed to be the financial capital of the world. The Court indicated that this exclusion applies when presumably sophisticated parties have sufficient "skin in the game." In theory that makes sense, but my own experience is that the pace of financial engineering is so rapid and unpredictable that even the best intentioned legislature cannot keep up with legitimate innovations. The fact that the wording of the exclusion was modified in the process of drafting the legislation and the fact that the majority and dissent in the *Justinian* case could not agree on the meaning of the term "purchase price" in this particular factual setting[10] illustrate the futility of the exercise.

Therefore, I will leave it to others to debate whether the Court decided the case correctly under the law as it exists. My purpose here is to argue that at least in respect a certain kinds of contract claims – specifically those that are intended to allow for the possibility that they may be traded to other holders, especially but not limited to notes and bonds – the champerty doctrine should be eliminated completely.

I am not claiming that the development of the champerty doctrine as an antidote to distasteful (and in many contexts undesirable) trading in legal claims was not justified, nor am I insisting that there is not presently a place for this doctrine in many contemporary circumstances. But I do believe that the greater the degree of formality to a contract and the greater the degree to which at any point it represents a unilateral claim for money or property, the harder it is to think of the bundle of rights represented by that claim as anything other than a set of expected cash flows, and the less sense it makes to inquire or care about why someone sold the claim or why someone else bought it.

There is clearly an inherent tension between the champerty doctrine and the desire for economic efficiency in allowing persons to vindicate their rights. Modern financial markets are very different from what prevailed in medieval times, and the best way for a claimant to obtain relief may be to sell the claim. We allow attorneys to have contingent fee arrangements in litigation and the financing of litigation that in some instances amounts in all but name to sales of interests in contract and tort claims. We allow the sale of life insurance policies and settlements to persons who did not have the kind of insurable interest to allow them to have taken out the policies in the first place (although personally were I to be a buyer I would feel like a ghoul). To the extent that frivolous litigation is a concern, it is hypocritical to worry about champerty while tolerating class actions in which lawyers get significant fees while, for example, clients get trivial recoveries, worthless coupons or in some securities cases only additional impenetrable disclosure.

In sum, there is little or no reason not to allow, without regard to motivation, the sale of the right to sue on a commercial claim embodied in a security like the Notes.[11]

Just as a court deciding a summary judgment case is supposed to give the non-moving party the benefit of all legitimate factual inferences, in writing this critique I take the same approach for the Court of Appeals and the legislature. In this case, Justinian bought the Notes for a price that might well, as a factual matter, be paid if and only if a suit to enforce the Notes were instituted and won; let's assume that all of the "what ifs" proffered by Justinian were just that and that Justinian in fact believed and intended from the outset that its realistic and anticipated course of action would be to sue on the Notes to collect.

As a legal matter, DPAG itself certainly could have sued on the Notes, but inconveniently, as a German bank receiving assistance from its government, it believed that were it to sue WestLB, also a German bank partially owned by the government, it would put itself in jeopardy from a political perspective. DPAG's apparent expectation was that it could get some money without suffering the same repercussions by having a Cayman hedge fund sue.[12] Certainly that is an unusual fact pattern, but in practical terms it is not all that different from the plight of a holder of any debt claim that does not have the time to wait for a suit to settle or to run its full course or that lacks the funds to prosecute a suit to completion. Sometimes the best way to reduce a claim to a sum of money is simply to sell the claim to someone else who is more prepared and equipped to do the heavy lifting or to take the associated risks of enforcing it.

Under all of these circumstances, it is highly inefficient not to allow the capital markets to do what they do well. When an original purchaser of a security has the confidence that it will be able to realize value not only at maturity but by selling into a liquid market, that original purchaser will be more willing to accept terms and pricing most favorable to the borrower or issuer. Otherwise, the original purchaser will have to demand an illiquidity premium, reduce the size commitment or not provide financing at all.

The New York champerty doctrine is not the only example of ill-considered restrictions that demonstrate that people who do not understand how markets function should not be regulating the activity in markets. For example, under the rubric of "tax sparing," the tax treaty between Canada and Brazil allows a Canadian recipient of interest from a Brazilian source a tax credit for taxes that were not actually paid.[13] Some years ago, I heard a suggestion that the benefit in question had been intended only for the original lender as an inducement to make the loan and therefore maybe should not be available to a subsequent buyer of the debt in question. Apart from the fact that this argument is untenable in light of the plain language of the treaty,[14] it could seriously undermine the incentive to lend in the first place, since the original lender would be concerned that it could never sell even to a similarly situated investor at a price that reflected the tax benefit.

Analogously, in *Midland Funding, LLC v. Madden*,[15] the Second Circuit held that the provision of the federal banking law that limits the application of state usury laws to national banks[16] applies only as long as the claim is held by a national bank; thus a loan that was valid when made by a national bank could be attacked as usurious if later sold to another holder. This interpretation can be defended technically, but it makes no sense as a matter of policy. The court duly noted: "To apply NBA [National Bank Act] preemption to an action taken by a non-national bank entity, application of state law to that action must significantly interfere with a national bank's ability to exercise its power under the NBA,"[17] and yet the court did not focus on the fact that the application of state usury laws to a subsequent purchaser radically narrows the secondary market for the paper and makes it harder for banks to lend in the first place.[18]

> There is clearly an inherent tension between the champerty doctrine and the desire for economic efficiency in allowing persons to vindicate their rights.

In addition, as I noted in my previous article, I used to be a math and physics guy, and in those disciplines, one realizes how inconvenient and troublesome discontinuities can be. In math, one kind of discontinuity is a pesky circumstance where an equation just does not work smoothly or sensibly.[19] In legal affairs, I sometimes use the term discontinuity to mark a place where a slight shift in facts causes a radical change in results. Sometimes discontinuities may be unavoidable, but they are almost never desirable. The champerty rule imposes a discontinuity by making a binary result turn on what was the purchaser's principal or sole motivation in purchasing a claim. In robust economic conditions, it is easy to sell a claim, and the purchaser's motive, as a practical matter, is irrelevant because there will likely never need to be a suit to enforce the claim. But as the obligor's condition deteriorates, and as a default looms closer over the horizon, the need for liquidity becomes more and more critical. At this dangerous point, the purchasers who might ride to the rescue of desperate holders and allow them at least some money for their claims could be deterred by

champerty concerns that seem as outlandish as the exact change toll booth in *Blazing Saddles*.[20]

Note that I am not arguing that as a matter of public policy the right of a future holder to sue or to buy the claim cannot be restricted by the contract itself. For example, had WestLB wanted to restrict the paper only to persons who it was confident would not sue it, WestLB might have adopted restrictions on transfers as is done in many transactions to keep out undesirable holders (such as known corporate raiders or greenmailers). That might have cost the issuer in terms of size or rate. But I do not believe that it is the role of the state to make these decisions or, worse, the role of the law to second-guess these decisions; these should be voluntary choices, as to which parties are free to bargain, not limitations imposed by the common law or a statute on a one-size-fits-none basis.

As I noted above, a carve-out for large purchases appears to be a reasonable way to sidestep the problems and to resolve the tension. But as this case illustrates, in an era of horizontally and vertically sliced portfolios, limited recourse financing, complex derivatives and hedging, one is hard-pressed to determine whether the threshold has been met if one insists that one premise of the provision is that the purchaser must really be at risk for a serious amount of money. And as a more general proposition, I see a broad public good in allowing holders of claims (especially securities) security multiple avenues to realize value, so it troubles me not at all that the purchaser who sues in its own name has little or no value at stake as long as the process reasonably benefits the original holder. ■

1. *"The Bad, the Good and the Beautiful": A Suggested Approach to the Statute of Limitations Problem Raised by Deutsche Bank v. Flagstar Capital Markets*, in Point of View, NYSBA Journal 88:8, at 49 (October 2016).

As an addendum to that article, I direct readers to the recent case of *2138747 Ontario, Inc. v. Samsung C&T Corp.*, 2016 N.Y. Slip Op. 06671 (1st Dep't Oct. 11, 2016). CPLR 202 (the "borrowing statute") provides that where a *non-resident* sues in New York on a claim that arises *outside New York*, the claim has to be timely under *both* the New York statute of limitations and the statute of limitations where the claim arose. The court accepted that the parties had agreed that New York substantive *and* procedural law would apply. The plaintiff had argued that the New York procedural law included the six-year statute of limitations for contract actions. The court, however, treated the borrowing statute itself a part of the statute of limitations, and thus an aspect of New York procedural law; therefore the suit was dismissed because it was untimely under the two-year Ontario rule, as borrowed and implemented pursuant to CPLR 202. The court also refused to consider whether, in the face of the contractual agreement, Ontario had a borrowing statute that would itself adopt the longer, six-year New York period. As I advised in my last article, in drafting a contract one should not blindly rely on shorthand legal terms that may have dangerous baggage; had the contract explicitly specified the New York six-year statute of limitations, the court might or might not have respected that, depending on whether the extreme solicitude for the policy of repose represented by a statute of limitations extends to choices made by foreign jurisdictions. In this case, however, the court was able to pass over that determination. *Id.* at 7. Apart from the drafting point, I see at least four troubling issues in the case: deadlines can be extremely important in certain commercial settings where it may be many years before one discovers the existence of a cause of action. A statute that applies different deadlines to each of the several parties in a contract based solely on their residences, presumably at the time that the cause of action arises, would appear to be (i) certainly unfair, (ii) almost certainly arbitrary and capricious, especially since parties and their residences may change and/or multiply as a contract is assigned, and (iii) arguably unconstitutional. I have not investigated whether any court has addressed the constitutional question. The original goal of the borrowing statute was to deter forum shopping, but it applies regardless of whether in a given case forum shopping is an issue, *i.e.*, even when there is no other forum in which jurisdiction over the defendant may be obtained. Hence the rule is over-broad relative to any necessity that it may serve, though this consideration may or may not have been present in this particular case. New York presently has a policy to encourage parties affirmatively to choose to come into the state to resolve their disputes. As applied to contract disputes, this current policy vitiates the fundamental basis for CPLR 202, namely the concern about forum shopping. Moreover, as a practical matter, the CPLR 202 bias against non-residents acts to defeat the state's current policy because it gives non-residents a powerful reason to refuse to agree in a contract to the typical boilerplate provisions that apply New York law. The court itself recognized the policy question but deferred to the Legislature. The court's stated reason for not inquiring into whether Ontario has a borrowing statute and how it works – "CPLR § 202 only concerns statutes of limitations, it does not require that we consider the foreign jurisdiction's borrowing law" – is logically inconsistent with treating New York's borrowing statute as an element of the statute of limitations, although it may sometimes avoid a potential nasty circularity. One final point: Canadian practitioners are to be commended for the no-nonsense way in which they name special purpose companies, which makes up in part for the inscrutable "Y-something-something" combinations of letters that they use for their airports.

2. One more reason to engage in good, old-fashioned proofreading.

3. N.Y. Jud. Law § 488.

4. N.Y. Jud. Law § 489.

5. *See Trust v. Love Funding Corp.*, 13 N.Y.3d 190 (2009) (answering certified questions from the Second Circuit, on the basis of which the Second Circuit reversed an expansive reading by a district judge).

6. 2016 N.Y. Slip Op. 07047 (Oct. 27, 2016). The statute on its face applies to corporations and associations and to all persons in the business of debt collection and adjustment. A limitation based on the legal form or particular business of the buyer makes little or no sense today (if it ever did), and as in the case of most such provisions might be evaded by careful (read "clever") planning. The court stated in passing that the statute applies to "individuals and companies," *id.* at *4, but the reference to individuals (other than those in the business of debt collection and adjustment) appears to be erroneous; the Court in *Love Funding*, *supra* n. 5, correctly referred to corporations and associations.

7. *Id.* at *2.

8. *Id.* at *6.

9. *Id.* at *8.

10. The majority pointed out, *id.* at *7, that the progression in the legislative process was from a proposed alternative test, under which a claim would not be subject to a champerty defense if *either* the face amount was at least $1 million *or* the plaintiff had actually paid at least $500,000 for it, to the statutory formulation of a "purchase price" of $500,000. On that basis, the opinion stated:

> The "purchase price" language effectively falls between the two earlier proposed safe harbor formulations – strong indication that the Legislature did not intend either that actual payment necessarily had to have been made or that face value alone would suffice to obtain the protection of the safe harbor.
>
> . . .
>
> The phrase "purchase price" in section 489(2) is better understood as requiring a binding and bona fide obligation to pay $500,000 or more.

This faulty argument assumes that the adoption of the "purchase price" test was a *compromise* between two related but very divergent conceptions, one dependent upon a large stated face value *in the note itself* and the other asking what had already *actually been paid* by the purchaser. That's just not correct; the original formulation, at least as laid out by the Court, was that satisfying *either one* of these criteria would take the situation outside the ambit of champerty. There was no need for any compromise, so therefore, I do not find the characterization of "purchase price" as a middle ground to be particularly convincing, and when that goes, the entire argument goes. So, what does "purchase price" mean? As a tax practitioner, I would be inclined to view

"purchase price" as shorthand for the value of the note when acquired by the current holder, just as tax basis is determined, *Philadelphia Park Amusement Co. v. United States*, 126 F. Supp. 184 (Ct. Cl., 1954), and just as the original issue price of a debt instrument is generally defined under IRC § 1273. Among other things, that would rightly eliminate distinctions based on how a person obtained he claim if not for cash paid up front; it would rationalize the analysis of situations with artificially high or low face values and/or interest rates; and it would provide an analytic framework to address whether the investment of the purchaser is or is not significant enough or whether an ostensible unconditional obligation to pay is really illusory. But I remind the reader that the aim of this article is to eliminate the champerty limitation in many circumstances and therefore to make this inquiry irrelevant.

11. It is beyond the scope of this article to address claims trading in Chapter 11 bankruptcy cases and the extent to which this phenomenon is a positive or negative development. *See generally* Frost, *Bankruptcy Voting and the Designation Power*, 87 Amer. Bankr. L.J. 155, 158–59 (2013).

12. 2016 N.Y. Slip Op. 07047 at 2–3. The court expressed no view on the rationality of DPAG's conclusion that it could avoid the ramifications of suing WestLB in its own name by, in effect, outsourcing the deed to a Cayman entity.

13. Canada-Brazil Tax Convention art. XXII(3) (1985). Tax sparing is a fascinating subject at the intersection of tax law and foreign aid policy, whose history and pros and cons are too long to detail here.

14. I refer to the English and French texts of the treaty; my Portuguese is not good enough to allow me to vouch for that version.

15. 786 F.3d 246 (2d Cir. 2015), *cert. denied*, __ U.S. __, 136 S. Ct. 2505 (June 27, 2016).

16. 12 U.S.C. § 85.

17. 786 F.3d at 250 (citations omitted).

18. I am not suggesting that the protection should extend to a "rent a bank" situation where it is never intended that the bank making the loan have a significant principal role. How much of an actual and unhedged investment the originating banks should need to have and for how long are legitimate questions to be addressed.

19. One example I cite is what one elementary school teacher, who had grown up in Philadelphia, told my son's class: the exam score would become the report card grade, except that anyone who got a 76 on the exam would be given a 100 for the course.

20. A similar concern about a small change in facts leading to a dramatically different result can arise in the usury context. In some states, getting it wrong voids the loan entirely and leaves the lender with no right to interest and possibly no recourse to the courts even to recover principal. Other states, by contrast, will honor a contractual savings clause that keeps the loan valid by reducing the rate to whatever rate is necessary to avoid a usury finding. The question whether, in the case of arrangements that involve prohibited usury, it is merely the usury that cannot be collected or the entire contract is void, has been debated at least since the time of the Talmud. *See Babylonian Talmud, Baba Metzia* 72a.

# The *Lochner* Case: New Yorkers in Conflict

## How old rulings on bakers' hours still influence today's High Court votes, including Obamacare

**By Dr. Bruce W. Dearstyne**

### Introduction

On January 12, 1904, Chief Judge Alton B. Parker delivered the N.Y. Court of Appeals' decision in *People v. Lochner.* The court affirmed an 1895 law limiting the hours of work in bakeries to 10 hours per day or 60 per week and imposing sanitary regulations. The U.S. Supreme Court overturned that decision the next year in *Lochner v. New York,* in an opinion written by another New Yorker, Associate Justice Rufus Peckham. Parker and Peckham knew each other; they had served together in New York's Supreme Court. But in this case, the two New Yorkers markedly differed. Parker's *Lochner* opinion that the state's police power may trump liberty of contract and Peckham's *Lochner* opinion, that liberty of contract should usually prevail over the state's regulatory authority, made strong cases for these two opposing positions.

The case has continued to attract attention because of how clearly it presented and defined issues surrounding state regulatory power. Former Chief Justice William Rehnquist, in his history of the Supreme Court, called Peckam's opinion "one of the most ill-starred decisions that [the court] ever rendered."[1] Justice John Roberts, in his confirmation hearing to be Chief Justice of the U.S. Supreme Court in 2005, said that the majority in the

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*Lochner* case was "not interpreting the law, they're making the law . . . . substituting their judgment on a policy matter for what the legislature had said."[2] (As Chief Justice, Roberts himself has often cited the principle that the courts should not substitute their judgment for that of the legislature, for instance, in his opinion upholding Obamacare.) But *Lochner* continues to be the subject of discussion and controversy among legal experts. Cass Sunstein, a law professor at the University of Chicago, has noted that "the *Lochner* court required government neutrality and was skeptical of government 'intervention' that altered distribution of wealth or other resources."[3] David E. Bernstein, a professor at George Mason University School of Law, in his book *Rehabilitating Lochner,* asserted that Peckham's interpretation of the due process clause of the U.S. Constitution was right at the time, based on previous decisions.[4] David Mayer, another law professor, asserted that the federal *Lochner v. New York* decision was based on well-established principles of constitutional law and affirmed constitutionally guaranteed liberties.[5]

## New York's Entry Into Regulating Business

By the end of the 19th century, there were small bakeries in basement locations in every city, thousands in New York City, to meet the needs of the state's growing urban population. Bakers worked long hours and were exposed to flower dust, gas fumes, dampness, and extremes of heat and cold. New York had few industrial regulations at that time; they would mostly come later, in the Progressive Era in the early 20th century. But both political parties came to favor regulating bakeries. A bill to limit working hours and impose sanitary standards passed the legislature unanimously in 1895 and Republican Governor Levi Morton signed it.[6]

The law, inconsistently enforced because the state had only a handful of inspectors, soon met several challenges. It thwarted overtime, essential for a business that responded to daily fluctuations in demand. Critics charged selective enforcement and targeting of non-union shops. It also ran against the tradition that the state should not interfere with employee-employer relations or place unnecessary limits on individual freedom. Opponents rallied behind a concept of what was being called "substantive due process" – the notion that the U.S. Constitution's 14th Amendment's proscription of state laws abridging "life, liberty, or property, without due process of law," adopted in 1868 to help protect the rights of blacks after the Civil War, also applied to the rights of employees to contract to work as they pleased. They contended it trumped the state's "police power" – the power to regulate social and economic affairs for the general welfare, health, and safety of the people. In the closing years of the 19th century and the opening years of the new one, the amendment was pressed into service in campaigns by business to forestall or overturn incipient state regulatory intervention.

Joseph Lochner, a Utica baker, argued that New York State couldn't tell him how to operate his business. He deliberately employed a baker for more than a 60-hour week, was fined, and appealed. In the Appellate Division, his counsel sharpened the argument that Lochner's right to contract and his employees' right to work were guaranteed by the 14th Amendment. Lochner lost again in the appellate court and appealed to the N.Y. Court of Appeals in a dispute that was attracting increasing public attention and coming to be regarded as a test case.

## Albany Judges Decide

The case reached the Court of Appeals in October 1903 and was decided in January 1904. It achieved high visibility for two reasons. One, it would test the validity of an important and possibly precedent-setting regulatory law at a time when the Progressive reform movement was starting to gain traction in New York. Two, Democrat Alton Parker (1852–1926), Chief Judge of the Court since 1897, was a leading contender for his party's presidential nomination in 1904. Parker had won his position as chief judge decisively in the 1897 election after serving for several years on the state Supreme Court. He was known for being an independent moderate on key political issues and as it happened the Democrats had few other strong contenders for the nomination that year.

As chief judge, Parker had been a cautious, judicious progressive. In a 1902 decision, he upheld the right of a union to threaten to strike to compel an employer to discharge non-union workers. "A labor organization is endowed with precisely the same legal right as an individual citizen to do that which it may lawfully do," he wrote.[7] He was wary of cases that threatened to draw the court into competitive business situations. In a 1903 decision, Judge Parker held that an association of wholesale druggists formed to secure lower prices from manufacturers was not a combination in restraint of trade or a violation of antitrust laws. "[T]his is a controversy between opponents in business . . . . When one party finds himself overmatched by the strength of the position of the other . . . quite often he turns to the courts . . . and makes himself for the time being the pretended champion of the public welfare in the hope that the courts may be deceived into an adjudication that will prove helpful to him . . . ," wrote the judge. "[But] the real purpose is to strengthen the strategic position of one competitor in business as against the other." The courts should stay out of such contests and not interfere.[8]

Judge Parker wrote the court's opinion in the *Lochner* case, upholding the bakeshop law's constitutionality.[9] The opinion is longer and in some ways more persuasive than the more famous one that overturned it in Washington the next year. Parker contended that the 14th Amendment to the U.S. Constitution, and a comparable clause in the New York State Constitution, were not intended to infringe the state's police power. He cited several

Supreme Court decisions "sustaining statutes of different states which . . . seem repugnant to the 14th amendment but which that court declares to be within the policy power of the states."[10] He emphasized the 1898 decision in *Holden v. Hardy*, which upheld a Utah law limiting the number of hours of work for miners, as a legitimate exercise of state police power. New York State case law was "all in one direction," too, he said, in support of broad state intervention. Parker cited an 1895 opinion by then-Court of Appeals Judge Rufus Peckham, later a justice of the U.S. Supreme Court: "Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional . . . . They do not appropriate private property for public use but simply regulate its use and enjoyment by the owner."[11] It was ironic, because Peckham usually went in the opposite direction, against state regulation, and would do so the next year, overturning Parker's *Lochner* decision.

Regulating working hours is tied to public health concerns.

**Changing conditions warrant changing regulations.** The Constitution must be read in light of changes in society and the economy. Parker wrote, "By the application of legal principles the law has been, and will continue to be, developed from time to time so as to meet the ever-changing conditions of our widely diversified and rapidly developing business interests."[12]

**Courts should not second guess the legislature.** "The courts are frequently confronted with the temptation to substitute their judgment for that of the legislature," the Chief Judge wrote. But whether the legislation is wise "is not for us to consider. The motives actuating the legislature are not the subject of inquiry by the courts, which are bound to assume that the law-making body acted to promote the public good." Where interpretation is needed, "the court is inclined to so construe the statute as to validate it."[13]

**The public interest is served by sanitary bakeries.** "That the public generally are interested in having bakers and confectioners' establishments cleanly and wholesome in this day of appreciation of, and apprehension on account of microbes, which may cause disease and death, is beyond question," Parker asserted. The statute is designed "to protect the public from the use of the food made dangerous by the germs that thrive in darkness and uncleanness."[14]

**Regulating working hours is tied to public health concerns.** The least strong part of the judge's opinion was the argument in favor of the regulation of working hours. In fact, he handed his critics the kernel of an argument by saying that if the regulation of hours stood alone, "I should incline to the view that the enactment was unconstitutional . . . . That would be to infringe upon the liberty of contract."[15] But, in a tenuous connection, he asserted that "the legislature had in mind that the health and cleanliness of the workers, as well as the cleanliness of the work-rooms, was of the utmost importance and that a man is more likely to be careful and cleanly when well, and not overworked, than when exhausted by fatigue, which makes for careless and slovenly habits, and tends to dirt and disease."[16]

Two of Parkers' colleagues, John C. Gray and Irving G. Vann, wrote concurring opinions: courts should presume legislative competency, the U.S. Supreme Court has validated similar statutes, and the law is based on legitimate concerns about the health of bakery workers and the general public. Judge Albert Haight concurred without an opinion.

But three judges dissented and two of them, Denis O'Brien and Edward Bartlett, wrote decisions that set forth the arguments which Lochner would use to appeal and the majority of the U.S. Supreme Court would use to overturn the bakeshop law the next year.

Judge O'Brien assailed the law for, in effect, permitting bakery workers to work as long as they wished but forbidding employers from "permitting or requiring" such work. Overtime for extra pay was forbidden "no matter what may be the wants or necessities of the business or the judgment or will of the [worker] . . . . It is obviously one of those paternal laws enacted doubtless with the best intentions but which in its operation must inevitably put enmity and strife between master and servant."[17] Moreover, the judge asserted, "what possible relation or connection the number of hours that the workmen are permitted to work in the bakery has, or can have, to the healthful quality of the bread there, is impossible to conceive."[18] It discriminates against one group of workers while leaving others, e.g., farm workers or domestic servants (who, the judge wryly observed, might bake bread and pies for more than 10 hours per day in their employers' homes) unregulated. The whole thing amounted to an "arbitrary and unnecessary restriction" and "mere legislation" cannot deny bakery workers or anyone else of life, liberty, or property, which are protected by the 14th Amendment.

Judge Bartlett issued a short but incisive dissent. The claim that baking is unhealthy "will surprise the bakers and good housewives of this state" who do it every day. There really is no "risk of health and life" in the vocation of baking as there might be, for instance, in making steel and mining coal. New Yorkers had been baking for hundreds of years with no documented health problems. The law thrust the state into an area where it did not belong and where its intervention simply was not needed. It represented another example of "the full panoply of paternalism" and regulatory overreach, Bartlett concluded.

Judge Parker resigned from the Court soon after the *Lochner* decision to run for president. He secured the Democratic nomination but lost the race to another New Yorker, President (and former Governor) Theodore Roosevelt.

## New Yorkers Square Off in Washington

The U.S. Supreme Court agreed to hear Joseph Lochner's appeal of the decision in *People v. Lochner* in 1905. The case by then had high public visibility: originating in the nation's largest, most important state; an opinion from what was arguably the nation's second most prestigious court, after the U.S. Supreme Court itself; written by a judge who had just been a presidential candidate; and presenting well-defined issues of state authority and personal liberty. Lochner's attorney's brief picked up on two points that had surfaced in the N.Y. Court of Appeals O'Brien and Bartlett dissents: bakery work was not inherently unsafe and the provision limiting hours was an unwarranted incursion on liberty of contract. New York Attorney General Joseph Mayer relied mostly on Parker's opinion to argue that the court should defer to the legislature; the law protects the health of workers and the public; and the burden is on Lochner to prove that the law is not warranted.[19]

The Supreme Court had been inconsistent in its view of state regulatory statutes, approving some and invalidating others for authorizing excessive state oversight. But Associate Justice Rufus Wheeler Peckham (1838–1909) had emerged as a shrill and increasingly influential proponent of freedom to contract and an opponent of state regulatory enactments. Peckham had been Albany County District Attorney and a judge on the N.Y. Supreme Court (1883–1885) and then the Court of Appeals (1886–1895). Peckham was elevated to the U.S. Supreme Court in 1895 by another New Yorker, President (and former Governor) Grover Cleveland. A dapper dresser with a long mustache and snow-white hair, he could be sociable and congenial. He was "sturdy, independent, kindly, modest, well poised . . . He loved justice with all his heart," according to Alton B. Parker, praising Peckham at a memorial service after his death in 1909.[20] But he had strong convictions, despised hypocrisy, disliked compromising, and sometimes tried to overawe his judicial colleagues with strongly expressed opinions. "Justice Peckham is regarded as the most outspoken man on the United States Supreme Court," a newspaper observed.[21]

Peckham had occasionally endorsed government regulations. In an 1897 opinion, he applied the federal Sherman Anti-Trust Act of 1890 to invalidate a traffic-pooling and price-fixing agreement among railroads.[22] But for the most part he disdained government intrusion into business affairs and people's lives. If there was no clear-cut, overriding public purpose for a regulation, then it should not exist, Peckham felt. "More than any other judge, Peckham was the exemplar of the conservative jurist early in [the 20th] century. His decisions were prime applications of the dominant legal thought of the day – using the law as the barrier against interferences with the operation of the economic system."[23] In 1889, while still on the N.Y. Court of Appeals bench, he delivered a vigorous dissent in a case involving a state law fixing the rates of grain storage elevators, calling it "paternal government . . . wholly useless for any good effect, and only powerful for evil . . . vicious in its nature, communistic in its tendency."[24]

In 1897, Justice Peckham wrote the majority opinion in *Allgeyer v. Louisiana*, striking down a statute forbidding citizens of that state from doing business with out-of-state insurance companies unless they registered with Louisiana authorities. The law contravened an individual's "liberty of contract," Peckham insisted. He wrote:

> The "liberty" mentioned in [the Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.[25]

When the Supreme Court majority, in *Holden v. Hardy*, upheld a Utah law limiting the number of work hours for miners and smelters as a legitimate exercise of the police power of the state, Peckham wrote a vigorous dissent.[26] As noted above, Judge Parker cited the court's majority opinion in *Holden v. Hardy* in his *People v. Lochner* opinion. The stage was set for a confrontation between Parker's moderate view of the state's regulatory right and his fellow New Yorker Peckham's insistence on the paramount status of liberty of contract.

*Lochner v. New York* was decided on April 16, 1905, by a 5-4 vote, with Peckham writing the majority opinion, which became one of the most influential and famous in American judicial history.[27] Peckham denied that bakers are "wards of the state," ridiculed the assertion that their work was dangerous, asserted that the law did not constitute a legitimate exercise of police power, and contended that it contravened Lochner's and his employees' right of contract. "[N]o state can deprive any person of life, liberty, or property without due process of law," said the judge, conveniently citing his own opinion in *Allgeyer v. Louisiana.* "There is no reasonable ground for interfering with the liberty of person or the right of free contract by determining the hours of labor in the occupation of a baker . . . . Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty per week." Peckham was, in effect, ratifying

the dissenting views of Court of Appeals Judges O'Brien and Bartlett the previous year.

Justice Marshall Harlan, in a dissent endorsed by two other justices, contended that the liberty to contract is subject to reasonable regulation imposed by the state acting under its police power. Judge Oliver Wendell Holmes dissented in a witty opinion where he claimed that the majority followed "an economic theory which a large part of the country does not entertain." Harlan and Holmes' reasoning lined up with Parker, Gray and Vann.

*Lochner v. New York* went permanently into the history books. *People v. Lochner,* its New York predecessor, went into the footnotes and is usually not even included in discussions of the federal version of the case.

## Parker vs. Peckham for More Than a Century

Peckham's *Lochner* opinion, and the judicial philosophy it embodied, had staying power for many years. In the ensuing four decades, the Supreme Court used the 14th Amendment's due process clause to strike down nearly 200 state and federal laws.[28] Many laws designed to regulate social and economic conditions of the industrial and urban eras – minimum wage laws, child labor laws, regulations of insurance, banking, transportation and other companies – fell to Peckham's logic. The courts were more lenient toward laws regulating occupations which government prosecutors could prove to the court were inherently unhealthy or dangerous. In the years after the *Lochner* case, several states passed laws regulating work in mines and smelters and on railroads, which withstood challenges in court.[29] By 1912, New York's union bakers had gained the 10-hour day – not through legislation or court decisions but through union initiative and collective bargaining. New York enacted multiple laws to regulate factory working conditions after the tragic Triangle Shirtwaist factory fire of 1911 where many people died because of inadequate fire escapes. In 1907, the N.Y. Court of Appeals invalidated a statute prohibiting night work in factories by women on the grounds that it was discriminatory and denied them equal rights with men. But eight years later, it effectively reversed that ruling and sustained a similar night-work law, citing "new and additional knowledge," including reports of the State Factory Investigating Commission established after the Triangle fire and "scientific and medical opinion that night work by women in factories is generally injurious."[30]

The struggle over *Lochner* continued for years. A decisive case in the 1930s once again put two New Yorkers on center stage: Chief Justice Charles Evans Hughes, who had been a progressive Republican New York governor (1907–1910) and President Franklin D. Roosevelt, who had served as governor from 1929 to 1933. As governor, Hughes had pushed through the New York State Legislature a number of regulatory measures. Hughes became Chief Justice in 1930 and in that position was ambivalent, sometimes favoring reformist laws and other times voting to invalidate them. In the early 1930s, the court heard constitutional challenges to several of FDR's New Deal reform and regulatory laws. Four of Hughes' ultraconservative colleagues on the high court, who had views of FDR "ranging in charitableness from an image of villainy to one of idiocy," badgered government counsel and found one or two colleagues on the court to rule one New Deal measure after another unconstitutional. For instance, they struck down the business regulatory codes of the National Recovery Act in 1935 and the Agricultural Adjustment Act in 1936.[31]

Several state laws, too, went down in the early 1930s. The court in effect seemed to have reverted to Peckham's *laissez faire* reasoning. In 1933, New York State passed a law to set minimum wages for women. Joseph Tipaldo, manager of the Spotlight Laundry in Brooklyn, had refused to pay his female employees the weekly minimum wages required by state law and falsified his employment and pay records. The state courts had found him guilty and imposed a fine. He appealed his conviction up to the U.S. Supreme Court which struck down the New York law in a 1936 ruling. "The right to make contracts about one's affairs is a part of the liberty protected by the due process clause," wrote Justice Pierce Butler, one of the court's most consistently conservative judges, in the majority opinion.[32] Justice Butler's reasoning was lockstep with Justice Peckham's in *Lochner*: government should not go where the Constitution does not specifically authorize it to go. Hughes and three colleagues dissented in this case, and Hughes sometimes sided with the proponents of regulatory and reform legislation. Many of the negative decisions were 5-4, and Hughes realized that the court's decisions were striking down useful legislation and stirring political criticism.

In 1937, FDR proposed to enlarge the court, allegedly to promote efficiency and speed decisions, but really to give him a chance to name more supportive justices. "During the past half century, the balance of power between the three great branches of the Federal government has been tipped out of balance in direct contradiction of the high purposes of the framers of the Constitution," said the President in a speech that year.[33] Opponents called it "packing the court;" supporters described it as an antidote to obstructionism and "government by judiciary." Many years earlier, in a speech when he was governor, Hughes had said, "We are under a Constitution, but the Constitution is what the judges say it is."[34] Critics of the court often cited Hughes' admission in criticizing the court, but he recognized it still had a kernel of truth. The Constitution had to adapt to the times, for instance the impact of urbanization and industrialization, and it was the responsibility of judges to make that happen. Hughes was alarmed at FDR's scheme but he was sincerely changing his mind about government regulation.

Taking an opportunity to move the court in a new direction, Hughes wrote the majority report in the 1937 case of *West Coast Hotel v. Parrish.*[35] The case concerned a State of Washington minimum wage law, much like the New York law the court had struck down in 1936 in the *Tipaldo* case. But the court approved the Washington state law by a 5-4 vote; Hughes had helped convince a swing voter, Justice Owen Roberts, to side with him in upholding it. "Liberty implies the absence of arbitrary restraint," Hughes wrote, "not immunity from reasonable regulations and prohibitions imposed in the interests of the community." The decision reached back, at least in spirit, to his fellow New Yorker, Alton B. Parker, to justify state regulation on two grounds: the public interest warrants it, and the 14th Amendment tolerates it:

- *The public interest is served by the regulation at issue.* "What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?," Hughes asked. "And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?"
- *The 14th Amendment does not prohibit reasonable regulation.* The law's opponents allege violation of freedom of contract. "What is this freedom? The Constitution does not speak of freedom of contract," Hughes noted, building his case against overly restrictive judicial philosophy dating back to Peckham. "[T]he Constitution does not recognize an absolute and uncontrollable liberty . . . . [T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people . . . . This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable."

## Conclusion

Peckham's *Lochner* opinion seemed to be finished in the *West Coast Hotel* decision. The Court that same year upheld the constitutionality of the Social Security Act and the National Labor Relations Act. Thereafter, it was decidedly supportive of government regulative initiatives. President Roosevelt's court enlargement scheme sputtered out for lack of support. Since that time, in general, the Court has mostly favored Parker's view over Peckham's. But as indicated at the beginning of this article, legal scholars still debate the case and some reach back to Peckham's opinion as part of a case for asserting constitutional limits on government regulatory powers. The issue of how far government may go in restricting individual rights in order to protect an individual's well-being and the welfare of the people will continue to be a matter for judicial attention and public debate. Therefore, *Lochner* seems destined for continued discussion and debate, with the contending views of two New Yorkers, Alton B. Parker and Rufus W. Peckham, reverberating in the background. ■

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2. David E. Bernstein, *Lochner vs. New York: A Centennial Retrospective*, Washington University Law Quarterly 83 (2005), 1649.
3. Cass Sunstein, *Lochner's Legacy*, Columbia Law Review 87 (June 1987), 917.
4. David Bernstein, Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform (University of Chicago Press, 2011).
5. David Mayer, Liberty of Contract: Rediscovering a Lost Constitutional Right (Cato Institute, 2011).
6. Paul Kens, *Lochner v. New York*: Economic Regulation on Trial (University Press of Kansas, 1998), 1–66.
7. *Nat'l Prot. Assoc. of Steam Fitters & Helpers v. Cumming*, 170 N.Y. 315, 331 (1902).
8. *John D. Park & Sons v. Nat'l Wholesale Druggists' Assoc.*, 175 N.Y. 1, 21–22 (1903).
9. *New York v. Joseph Lochner*, 177 N.Y. 145 (1904).
10. *Id.* at 149.
11. *Id.* at 154.
12. *Id.* at 150.
13. *Id.* at 157–58.
14. *Id.* at 161–62.
15. *Id.* at 166.
16. *Id.* at 163.
17. *Id.* at 177–78.
18. *Id.* at 182.
19. Kens, supra note 6, at 121–22.
20. New York Tribune, Dec. 19, 1909.
21. Washington Post, Feb. 16, 1908.
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24. *People v. Budd*, 117 N.Y. 1, 47, 69, 71 (1889).
25. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).
26. *Holden v. Hardy*, 169 U.S. 366 (1898).
27. *Lochner v. New York*, 198 U.S. 45, 53, 57 (1905).
28. Matthew S. Bewig, *Lochner v. The Journeymen Bakers of New York: The Journeymen Bakers, Their Hours of Labor, and The Constitution: A Case Study in the Social History of Legal Thought*, The American Journal of Legal History 38 (October 1994), 417.
29. Sidney G. Tarrow, *Lochner v. New York: A Political Analysis*, Labor History, 5 (1964), 300.
30. *People v. Schweinler Press*, 214 N.Y. 395, 411 (1915).
31. Paul A. Freund, *Charles Evans Hughes as Chief Justice*, Harvard Law Review 81 (November 1967), 13.
32. *Morehead v. New York ex rel Tipaldo*, 298 U.S. 587, 610 (1936).
33. Schwartz, A History of the Supreme Court, 231.
34. Burt Solomon, FDR v. The Constitution: The Court Packing Fight and the Triumph of Democracy (Walker and Company, 2009), 165.
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# We the People: A Constitutional Convention Opens the Door to Reform

**By Henrik N. Dullea, Ph.D.**

This article was adapted by the author from his chapter, *We the People*, in the book, *Making a Modern Constitution: The Prospects for Constitutional Reform in New York*, published in 2016 by the New York State Bar Association.

## Introduction

The mandatory referendum on whether to call a New York State Constitutional Convention will soon be with us. When this question was last presented to the voters in 1977 and 1997, it was rejected.[1] Whether that same decision will be made in 2017 is anybody's guess, but it is essential that the decision be as informed as possible.

Let's face it. Most residents of the Empire State pay scant attention to the U.S. Constitution, let alone the document that sets the stage for governmental activity and individual freedom here in the Empire State. When asked to recall from their high school civics courses provisions of the federal Constitution, many people will tell you something about three branches of government and a bill of rights. Journalists may specifically reference something to do with freedom of the press, gun owners will testify to their rights under the Second Amendment and a few women may mention their right to vote. Beyond that, however, it's a pretty blank page.

When it comes to the New York State Constitution, most people aren't aware of its existence. Even the hundreds of thousands of public employees who, when taking their oaths of office, swear or affirm that they "will support the constitution of the United States, and the constitution of the State of New York" generally have absolutely no idea as to what they are promising to uphold.[2]

We need to shed a bright light on this living document. It is a "living document," because it has been frequently amended and is highly detailed.[3] It has often been referred to as one of the longest state constitutions in the United States.

And in its own way it is a radical document. Its most important words can be found in its Preamble: "We The People . . . Do Establish This Constitution."[4] From the very beginning of our state's history, the state Constitution affirms that its source is not the legislature, not the governor, not the judges, but the people themselves.

## Structural Change

When it comes to constitutional change, both ends of the ideological spectrum become conservative pretty quickly. Traditional conservatives are hesitant about structural change of any type, while liberals and progressives fear that hard-won protections of the past may be swept away by a Tea Party-like majority. My own view is that fundamental reform of the structures of state government, particularly of the legislature and the political process itself, can only come from the work of a constitutional convention.

### A. Executive Branch Reorganization

The Constitution contains a limit on the number of state departments and agencies, setting the limit at 20. It is a theoretical limit only, since the omnibus "Executive Department" has been used to house dozens of agencies, large and small, each created with a separate commis-

sioner or agency head and, of course, each with distinct legislative and public constituencies. Nelson Rockefeller sought broad gubernatorial reorganization authority, but had to settle for specific changes. Governors who are held accountable for the operations of the executive branch should have the authority to manage the executive branch efficiently and effectively, and to that end they should have the ability to reorganize state agencies subject to legislative veto. Governors should be authorized to submit comprehensive reorganization plans to the legislature which will take effect if not rejected by a two-thirds margin in each house of the legislature. Opposition to such broad-based reorganization and consolidation will be fierce, especially from the special interests and public sector employee organizations affected by the changes.

A new convention would in all likelihood take another look at the roles of the state comptroller and the attorney general. Serious consideration might also be given to eliminating the position of lieutenant governor. Bills considered by the legislature under "messages of necessity" from the governor might be required to have a supermajority of some level in order to be exempted from the rule that they be available in some format for at least three days prior to passage. Bills passed by the legislature might be required to be sent to the governor not more than sixty days after their adoption.

### B. Legislative Branch Reorganization

The public's respect for the New York State legislature is at an all-time low. The vast majority of members of the Senate and Assembly are honest, well-intentioned and generally hard-working individuals, but something is wrong in a system where legislative leaders and rank-and-file members alike on both sides of the aisle and in both chambers are indicted and convicted year in and year out for violations of the public's trust. It should be emphasized, of course, that the legislature has no monopoly on the presence of scandal; in recent memory Governor Eliot Spitzer resigned from office in disgrace and State Comptroller Alan Hevesi was sentenced to jail on charges of corruption.

Ever since the reapportionment cases of the 1960s required that legislative bodies be comprised of members elected on the basis of population rather than area, questions have arisen as to why New York and the other 48 states excepting Nebraska have retained a two-house or bicameral model for their legislative structure. While it can be argued that having a two-house structure provides opportunities for greater scrutiny of pending legislation by virtue of the delays typically inherent in their separate debate and consideration, the most frequently heard comment in New York is that the Upstate-Downstate split in perceived political interest is best reflected with Republican control of the Senate and Democrat control of the Assembly. The arrangement has a certain symmetry: "One for Us and One for Them."

No other governmental unit in New York State has a bifurcated, two-chamber legislative body. Counties function with either a single county legislature or board of representatives, towns have town boards, villages have village boards, cities have city councils, school districts have school boards, and special districts have single boards as well. These bodies legislate, make or confirm appointments to office, set policies, approve budgets, and authorize appropriations. To the best of my knowledge, no one in or out of state government is suggesting that bicameral bodies be established locally.

Why do we continue to have this duplication of function at the state level? For the last 50 years in New York, with the exception of the six years from the elections of 1968 until 1974, the objective has been to assure that each major political party has control of at least one house of the legislature no matter who is in control of the executive branch. This practice vastly complicates the budget-making process in Albany, with the majority party in the Assembly championing higher spending while the majority in the Senate presses for greater tax cuts. Governors have been known to find some comfort in the present arrangement. Nelson Rockefeller found it useful to have some of his spending proposals initiated by the Democrats in the Assembly, while Democratic governors have been known to occasionally exhibit relief that fiscal brakes were being applied in the Senate.

To streamline state government, improve transparency and accountability, and ultimately save billions of dollars for the taxpayer, radical surgery is required. It will never happen through the piecemeal constitutional amendment process controlled by the legislature itself. What might a new legislature look like? The Constitution should be amended to create a single, 100-member House of Delegates, elected on an equal population basis from compact, contiguous, and coterminous districts drawn by an independent redistricting commission.

A permanent legislative and Congressional redistricting commission would be established, comprised of members appointed by the governor, the legislature and the Court of Appeals, with the chair named by the Court of Appeals. Gerrymandering in all its forms would be prohibited, and the incumbent protection system would be diminished. The redistricting plans initially proposed by the commission would be made public, submitted to scrutiny by all interested parties, amended as necessary and approved in final and binding form by the commission.

Delegates would serve for four-year terms, with one-half of the seats up for election every two years. The delegates would be paid an initial starting salary of $125,000 per annum and would be expected to conduct their legislative business throughout the course of the entire calendar year. No longer would members of the legislature arrive in Albany at the start of January and essentially do nothing until the negotiations over the budget have concluded. Nor would they adjourn in June to go home

for summer plantings and fall harvests. Rules of the new legislative body would preclude the legislative leader from single-handedly appointing all committee members and removing them at will, and legislation could be brought to the floor of the house by petition. These and other reforms would increase the individual rights and responsibilities of the individual delegates.

Even with a suggested increase in legislative salaries, from a base of $79,500 to a new level of $125,000, the state would immediately see a savings of more than $4.4 million due to the reduced number of members, and a further consolidation of legislative staff would bring major savings as well. The most significant savings, however, would be the result of greater fiscal transparency and accountability. Strict limits need to be placed on the practice of including "member items" in the appropriation bills, since they have risen in size to become mini-foundations, primarily for legislators in the majority party, to dole out taxpayer dollars at will in furtherance of their legislative careers as well as for the good of their respective communities. There is an appropriate role for such appropriations, but only when they are equitably allocated and appropriately monitored to prevent malfeasance. No longer would there be "one-house bills," approved in one chamber with the full knowledge that the measure would never see the light of day in the other.

### C. Judicial Branch Reorganization

When it comes to the judiciary, former Chief Judge of the Court of Appeals, the late Judith Kaye, and her successor, former Chief Judge Jonathan Lippman, joined by a host of professional and civic organizations, have repeatedly called upon the legislature to streamline the state's court system. While some progress has been made over the last decades, fundamental reform is likely to be considered only at a constitutional convention. "New York State has the most archaic and bizarrely convoluted court structure in the country. Antiquated provisions in our state Constitution create a confusing amalgam of trial courts: an inefficient and wasteful system that causes harm and heartache to all manner of litigants, and costs businesses, municipalities, and taxpayers in excess of half a billion dollars per year."[5]

The current system is costly to the taxpayer, with savings in excess of $59 million per year estimated from the Special Commission on Court Reform's consolidation proposal.[6] More dramatically, the savings to litigants and the affected businesses and individuals touched by the legal system may amount to more than $450 million annually.[7] The Judiciary Article is the longest and some would say the most complicated in the constitution. This is not the place to review the judicial system's potential for reorganization in detail, but the repeated failure of the legislature to deal with this inefficiency is both a terrible financial burden for the state and a threat to the provision of fair and impartial justice.

### D. Other Potential Subjects

I have touched on several structural changes, in greater and lesser detail, that could be the subjects of public debate going forward as we approach the mandatory referendum on the call of a constitutional convention in 2017. Many others cry out for consideration: campaign finance reform in the light of the *Citizens United* decision;[8] the balance of public safety and personal privacy in the world of the internet and unparalleled electronic eavesdropping; increasing the deplorable lack of voter participation in both general and special elections; guaranteeing equality of educational opportunity for all residents of the state; permanently prohibiting capital punishment; reducing or eliminating bail as a condition for release of persons charged with nonviolent offenses; facilitating the opportunities for local government and school district consolidation; expanding the provisions for local government home rule; updating the state's commitment to environmental protection; reviewing the pros and cons of term limits for elected officials; and examining the use of initiative and referenda in the consideration of legislation and constitutional amendments.

## Conclusion

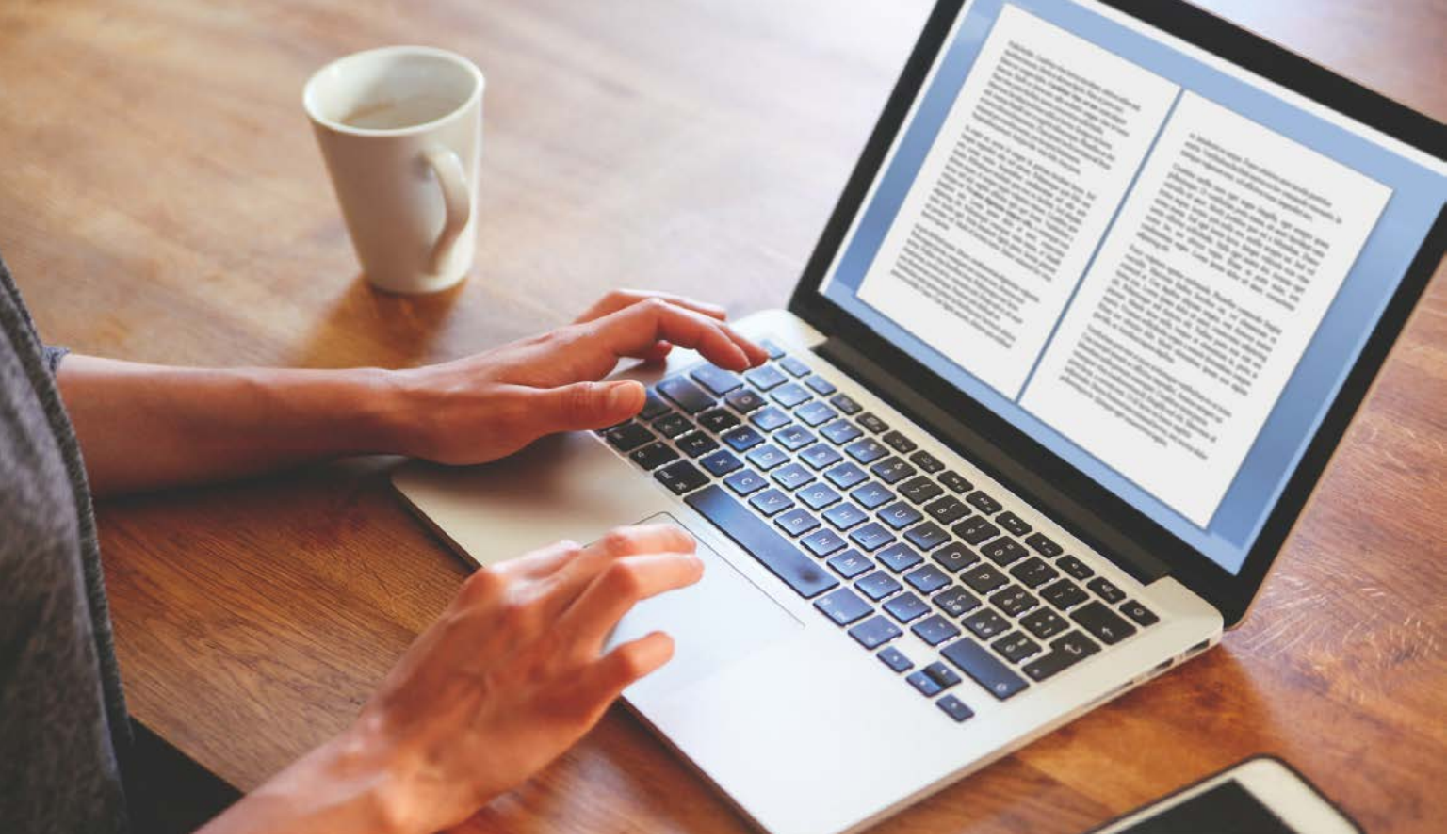
The natural tendency of voters in 2017 will be to be skeptical of the call for a new constitutional convention. Fiscal conservatives will decry the extra expense of paying for the salaries and staff of such a body. Legislators will object that they are fully capable of handling the need for any constitutional revision through the existing legislative amendment process. Public employees will express concern that the contractual protection of their pensions may be repealed. Progressives will fear that conservatives will dominate, and conservatives will be sure that a liberal majority will abandon important fiscal and social protections. The failure of the 1967 convention reflected in the rejection of its single package revised document will be pointed to as evidence that the constitutional convention is an institution that cannot be trusted in our complex, modern society.

Governor Andrew Cuomo has the opportunity to follow in the footsteps of his father and appoint a broad-based, nonpartisan temporary state commission to examine potential constitutional revision issues well in advance of the mandatory referendum. The commission should solicit analyses and recommendations from a wide cross-section of the state's communities with a view toward identifying a range of high-priority issues that could likely be the subjects of debate and public discussion if a new convention were to be called. The time for putting such a commission to work is now.

The upcoming question on the ballot ultimately challenges our faith in the ability of the citizenry to engage in a periodic, fundamental review of the workings of our state and local institutions and of the rights and protections provided to individuals by the constitution. Will

there be a popular movement calling for reform? Will our political, legal, social, business and labor leaders be willing to step out of their normal comfort zones and champion the opportunity for serious and simultaneous dialogue on a wide range of substantial issues? A New York City mayoral election has the potential to increase voter turnout in 2017, and it will come on the heels of a presidential election in the prior year. Will events on the national scene or scandals at the state and local level produce a demand for reform? Will they generate a positive response to the mandatory question: "Shall there be a convention to revise the constitution and amend the same?"[9] The answer will rest with We the People, the true source of the Constitution.

1. *New York State Constitutional Conventions and Constitutional History*, N.Y. State Library, http://www.nysl.nysed.gov/scandocs/nyconstitution.htm (last updated Sept. 21, 2015).
2. N.Y. Const. art. XIII, § 1.
3. Brian M. Kolb, *"New York's Last, Best Hope for Real Reform": The Case for Convening a State Constitutional Convention*, 4 Alb. Gov't L. Rev. 601, 603 (2011).
4. N.Y. Const. pmbl.
5. Special Comm'n on the Future of the New York State Courts, A Court System for the Future: The Promise of Court Restructuring in New York State 9 (2007).
6. *Id.* at 12.
7. *Id.*
8. *See Citizens United v. FEC*, 558 U.S. 310 (2010).
9. N.Y. Const. art. XIX, § 2.



# A Fast Road to Disaster: Mindless Cutting/Copying and Pasting

**By Robert D. Lang**

There is no denying that we attorneys are increasingly time-pressed. And no one disputes that we are all entitled to a vacation. There was a time when taking a vacation meant being truly unavailable, with the "out of office message" having real meaning. Today, thanks to smartphones, improved cell service and demands from similarly armed clients, whether attorneys are in the Gobi Desert, on Easter Island, on the golf course, staring out at the Atlantic Ocean or sitting in their own backyard, they can respond and send emails, and draft or review documents as attachments or links. Actually achieving a successful total "blackout" from work would be the subject of another article examining the need of attorneys to be responsive to clients and their colleagues and, in some instances, an inability to shut off from work because they either lack the self-control to do so or believe that they, and they alone, are indispensable to their firms and clients.

While walking down the hallway, waiting for an elevator (indeed, even while riding in an elevator), walking down in the street, waiting for the traffic signal to turn, waiting in court for a case to be called, downtime at mediations and depositions, and even while on hold on telephone calls, lawyers feel compelled to check and send emails, and review and send sensitive documents. Some attorneys may proudly think that they are being efficient in displaying their masterly talents by multitasking in this manner. However, such "Masters of the Universe" attorneys fail to realize that, although they are undeniably increasing their speed in responding, they are also increasing their risk in making, or not catching, errors,

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which, once sent, will be discovered at some later date. Multitasking can lead to multi-errors.

The focus here is to address one of the potential pitfalls that can result from the entirely reasonable interest by attorneys in drafting quickly and demonstrating their fast turnaround time, by cutting/copying and pasting from earlier works and then presenting the "new" document to clients, colleagues, adversaries and judges.

In today's world of legal practice, it is the exception, rather than the rule, when an attorney takes out a pen and drafts an affirmation or memorandum of law. The singular focus of pen to paper is no longer. Instead, lawyers, especially young ones, do their drafting on a computer. The future is here and the days of using pen and paper for drafting are now in our rear view mirror. We all, therefore, need to be especially careful when copying or cutting and pasting from earlier works.

Any number of errors can result from drafting and sending out work too quickly, without sufficient review, including autofill errors in sending the email to the wrong recipients[1] and overreliance on auto-correct which, if not closely watched, can create, rather than correct, errors.[2]

Put simply, we all recognize that copying/cutting and pasting is designed to save time, allowing attorneys to copy comments and narratives and paste them into a new report. However, if the information being copied is not carefully edited, reviewed and updated, the lawyer will advertently introduce errors into the new report.

Such cutting and pasting errors give new meaning to the phrase "cookie cutter complaints." Consider, for example, the comment by Federal District Judge Paul D. Borman, reviewing nearly identical pleadings filed by plaintiff, granting defendant's motion to dismiss:

> In each of these cases, Mr. Greenwood filed essentially the same "cut and paste," cookie cutter complaint, each alleging the very same counts, and each replete with the same spelling, typographical and party gender and number errors. This slip shod litigation practice does not improve during the course of the lawsuits.[3]

Often, the errors resulting from copying/cutting and pasting from other documents can be minor to the main struggle and do not substantially change the effect of the written work. For example, if the source document refers to one plaintiff and the document being submitted concerns multiple plaintiffs one can argue that no damage has been done as the meaning and sense have not changed. That may well be true, but that approach ignores larger consequences from such seemingly trivial errors. By failing to catch these mistakes in the rush to copy/cut and paste, the attorney who "signs off" from the document is signaling to his or her colleagues, adversaries, clients and any judge, law clerk or law secretary who reads the papers, that the attorney, and his or her law firm, either does not care about the error or does not even know the error was ever made. That is no way to advance within a firm, keep or gain clients or impress judges.

Moreover, adversaries in law are always sizing up their opposite number, checking out the strengths and weaknesses. The lawyer may conclude that opposing counsel is inattentive, and therefore decide to take the case further, go a few more rounds in litigation and perhaps proceed to trial, having been given reason to believe that the opposing counsel will continue to fail to carefully review their work, and therefore may make other errors, one of which may cause a material change in the overall case. Copying/cutting and pasting errors may therefore cause prolonged negotiations in litigations because one side believes the other is so busy and will make other errors. The apt phrase is "the devil is in the details," and

> Judges are less than forgiving of counsel who fail to proofread.

cutting/copying and pasting errors, however innocent they may appear to be, can cause hellish results.

In *Alston & Bird v. Mellon Ventures II, L.P,*[4] several large venture capital firms sued the law firm for $6.3 million over an alleged "cut-and-paste" error made in an investment contract. The venture capital firms alleged that the law firm incorrectly drafted a paragraph that dealt with how the parties were to be compensated during liquidation. The error allegedly resulted from the law firm cutting and pasting the clause from an older contract for prior financing of the company. The provision dealt with how the parties were to be compensated during litigation and resulted from cutting and pasting the wrong words into the contract. Judge Mikell of the Court of Appeals of Georgia noted:

> It is undisputed that, late in the process [of drafting], someone with Alston & Bird "cut and pasted" the tag-along clause from an older contract for prior financing of the company. The transferred paragraph was not appropriate for the economics of the new financing. *No one caught the mistake until after the closing* (emphasis added).[5]

Not only are clients and adversaries unforgiving of cutting and pasting errors; judges are also less than forgiving of counsel who fail to proofread. Note the decision of the three-judge Court of Appellate Military Judges in *United States v. Pena*:[6]

> The appellant's brief asks for relief in part "to send a clear message to the 17th Training Wing." The 17th Training Wing did not process this case. *We have seen similar cut and paste errors in more than one brief from the Appellate Defense Division in recent months. We advise counsel to lend more attention to their briefs* (emphasis added).[7]

We can hardly expect judges to take our work seriously if we don't.

When cutting and pasting is done correctly, which is clearly most of the time, the billing for such may still

cause the attorney to be called onto the carpet. Just note the introductory comments by opposing counsel in their appellate brief to the California Court of Appeals in *Markey, III v. Club*:[8]

> Two hundred and twenty hours! The equivalent of one lawyer working over five weeks on nothing else. It should not take any lawyer over five weeks to prepare what was essentially a routine discovery motion to compel and an equally routine opposition to a discovery motion to compel discovery – especially lawyers as skilled as Respondent's counsel, Morrison & Forster – lawyers who were already intimately familiar with the facts and issues. Also, many of the arguments included in the Respondent's papers were earlier identical or virtually identical, and simply "cut and pasted" from one section to another, further reducing the time needed for completion.

When witnesses sign affidavits which contain cutting and pasting errors, they can reasonably expect their credibility to be questioned, and for there to be consequences for those responsible for creating the error and then not catching it until after the affidavit was submitted and the error is caught by their adversary. Owning up to the mistake may make the attorney understandably uncomfortable, but may be necessary to explain how the error occurred:

> In his Memorandum of Supplemental Points and Authorities in Support of Motion to Suppress, the defendant argues that a drafting mistake by Lub in the affidavit's penultimate paragraph provides additional reason to render the Leon "good faith exception" inapplicable in this case. As Detective Lub explains in his attached declaration, in drafting the affidavit, he used an affidavit he had done in another case as a shell, and made a cut and paste error in borrowing certain language, resulting in a reference to "Robert or Christine Duncan" where he intended to refer to the defendant by name, Declaration of Marnix Lub at 3. One such drafting mistake in a several page, single-spaced affidavit written under investigative time constraints in no way indicates any disregard for the truth on Lub's part. Nor does the fact that the magistrate signed the affidavit on the same page indicate that Lub was not entitled to rely on the magistrate's determination of probable cause. The paragraph immediately preceding this paragraph had the defendant's correct name and the correct address that was the subject of the sought-for search. Under the circumstances, such an error does not detract from the probable cause determination made by the magistrate or call into question whether the magistrate had a substantial basis for issuing the warrant.[9]

See also the affidavit by the detective, explaining why his original affidavit referred to Robert or Christie Duncan, rather than plaintiff Tom Noriega:

> In drafting my affidavit, I used an affidavit I had done in another case as a shell, borrowing some text that I would need for the affidavit I was drafting. In doing so, based on my review of the signed affidavit, it appears that I made a cut and paste error in the second to last paragraph of the affidavit, by referring to "Robert or Christie Duncan" who were not involved in this case, instead of Tom Noriega. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.[10]

The problem is compounded when attorneys hurriedly rely on copy and paste work containing errors from outside their firm, for example, from doctors and hospitals. Patient electronic health records (EHR) are themselves often copy and pasted by physicians. A study of 100 randomly selected hospital admissions found copied text in 78 percent of the medical residents' sign-out notes, written after their shift ended, and in 54 percent of the patient progress notes.[11] The errors in cutting/copying and pasting medical records can produce disastrous or nonsensical findings which, if cited and relied upon by attorneys, can result in disastrous or nonsensical conclusions:

> The EHR copy and paste feature is notorious as a source of errors. It is designed to save time, allowing physicians to copy narrative from a prior visit and paste it into new visit notes. However, if the copied information is not carefully edited and updated, the physician will inadvertently introduce errors into the record. For example, in one reported case, the record of a patient hospitalized for many weeks because of complications from surgery indicated each day that this was "post-op day No. 2" because the note was never edited. In another case, the statement "Patient needs drainage, may need OR" appeared in notes for several consecutive days, even after the patient successfully underwent a procedure to drain his abscess. In yet another instance, a patient's EHR indicated erroneously that he had a below-the-knee amputation (BKA) because of voice recognition dictation system entered "BKA" into the record of the real problem-diabetic ketoacidosis, whose acronym is DKA.[12]

It is therefore no wonder that the American Health Information Management Association issued a statement in 2014 calling for the copy/paste functionality to be permitted only in the presence of strong technical and administrative controls that include organizational policies and procedures, requirements for participation in user training and education, and ongoing monitoring.[13]

No one wants to hire the attorney who blindly relies on such obviously inadvertent, but also obviously wrong, entries copied and pasted by a busy doctor or nurse, without recognizing the errors advising their own experts (to say nothing of their own insurers and clients) of the inadvertent errors. Such errors, undetected, can result in uncomfortable moments for the attorney and their experts at the time of trial or if called upon by clients or insurers to explain why they failed to pick up such obvious cutting/copying and pasting errors in those records on which they chose to rely.

The solution is both evident and obvious. Copying/cutting and pasting are here to stay as it is a true time savings

and have several undeniable advantages, noted above. However, it also requires an important extra step, namely a careful, not cursory, review, before pressing "send." If that is done, copying/cutting and pasting can continue to be an effective tool, especially for those lawyers who begrudge that there are only 24 hours in each day. However, where there is only a fleeting review, a potential disaster can easily be created. Let that not happen to you, or on your watch, or at your firm. ■

1. Lang, *The Double-Edged Sword of Autofill; The Need For Speed While Avoiding Errors*, 88 N.Y.S. Bar. J. 25 (March/April 2016).

2. Lang, *From 'Sua Sponte' to 'Sea Sponge'; The Mixed Blessings of Auto-Correct*, 87 N.Y.S. Bar. J. 28 (July/August 2015).

3. *Pakulski v. Clearvue Opportunity XXII LLC*, 2013 WL 1869102 at *2 (E.D. Mich. 2013).

4. 307 Ga. App. 640, 706 S.E. 2d 652, 10 FCDR 4080 (2010).

5. 307 Ga. App. at 655.

6. No. S 32215, 2015 CCA LEXIS 83 (A.F. Ct. Crim. App. Mar. 4, 2015).

7. *Supra* at 1518670.

8. 2005 WL 1397717 (Cal. ABP 2 Dist. 2005) (Appellate Brief).

9. *United States of America v. Noriga*, 2005 WL 5840047, 5840053 (E.D. Cal. 2005) (Plaintiff's Trial Motion and Memorandum).

10. 2005 WL at #5840057.

11. Wrenn, *Quantifying Clinical Narrative Redundancy in an Electronic Health Record*, 17 J. Am. Med. Informatics Ass'n 49, 52 (2010); Hoffman, *Medical Big Data and Big Data Quality Problems*, 21 Conn. Ins. L.J. 289, 293 (2015).

12. Hoffman, *supra* note 11, 21 Conn. Ins. L.J. at 293.

13. *Am. Health Info Mgmt. Ass'n. Appropriate Use of the Copy and Paste Functionality in Electronic Health Records* (Mar. 17, 2014), http://bok.ahima.org/pdfview?oid=300306; Hoffman, *supra* note 11.

# Modern Variations on an Ancient Theme: Fundamental Changes in Trust Law

**By Alan S. Halperin and Zoey F. Orol**

*This is part one of a two-part article on fundamental changes in trust law. The second part will appear in the March/April issue of the NYSBA* Journal.


## I. Introduction

Relatively recent developments are dramatically reshaping the form and content of the trust. As New York considers whether to adopt the Uniform Trust Code (UTC),[1] it is an opportune time to consider these significant changes. In part one, this article will provide a brief history of the trust and distill the fundamental attributes of the traditional trust. It will then examine several developments that represent seismic shifts in the paradigmatic trust arrangement. The developments will continue in part two. Where applicable, this article will discuss relevant UTC provisions and New York law.

### A. Brief History of the Trust

The modern trust has ancient roots in two particular forms of conveyance, both of which were primarily intended to facilitate the transfer of land.[2] The first is the *fideicommissum*, representing the Romans' "custom of devising property to one capable of taking it, with a request that the devisee deliver the land to a desired devisee who was incompetent to take it directly."[3] The second is the German *salman* or *treuhand*, an arrangement by which a party transferred land to a second party, known

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as a "salman," who would "make a conveyance according to his grantor's directions."[4]

The Middle Ages in England saw the rise of the *use*, uniformly recognized as the direct antecedent of today's trust. Designed to circumvent the lack of a legal mechanism for a landowner to transfer to another person land owned as part of a feudal relationship,[5] a use permitted the owner of a parcel of land to transfer the land to a second party, known as the "feoffee," who "agreed to permit the [intended] beneficiary to take the profits [of the land] and convey [the land] as directed."[6] The Statute of Uses of 1535 eliminated certain types of uses by essentially granting legal title to the intended beneficiary of those arrangements. The types of use that remained following the statute bear close resemblance to the modern trust.[7] American law adopted virtually entirely the English system of trusts left in place after the Statute of Uses. By the end of the 18th century, trusts were fairly common in the United States.[8]

### B. Fundamental Attributes of the Trust

During the modern history of the trust, several fundamental attributes of the trust form have remained relatively constant. These attributes include: the requirement that the trustee adhere to the highest level of fiduciary duties;[9] deference to the settlor's intent in interpreting and administering the trust;[10] and carving out separate interests, rights and roles of the trustee, beneficiary and settlor.[11] Some commentators argue that these fundamental attributes are ripe for overriding, as the trust merely represents a contractual arrangement;[12] the more traditional view, by contrast, holds that these attributes represent required components of any trust arrangement.[13]

Regardless of whether one subscribes to the contractarian or more traditional view, it is undeniable that several developments in trust law that have occurred during the past few decades – a mere blink of the eye in the long history of the trust – are challenging trust attributes that were historically considered fundamental. This article will consider the rise of protectors and the use of directed or divided trusts, which may limit fiduciary duties; trust decanting, reformation and modification, which may diminish a settlor's intention as the guiding star in trust interpretation and administration; and quiet trusts and self-settled asset protection trusts, which may alter the relationships among the beneficiary, the trustee and the settlor. While these developments have distinct attributes and depart from traditional trust doctrine in different ways, they share a common theme. Each development highlights the tension in modern trust doctrine among several fundamental principles: a settlor generally should have broad flexibility to create a trust with terms he or she selects; fiduciary responsibility is the mainstay of a trust relationship; and certain attributes of the trust relationship may be too essential to be overridden.

## II. Changes to the Structure of Fiduciary Duties: Protectors and Directed or Divided Trusts

The rise of trust protectors and the increased use of directed or divided trusts both represent ways in which a party who occupies a trustee-like role may not owe correlative fiduciary duties. These two developments may undercut the traditionally high standard of fiduciary duties required of those parties responsible for administering trusts.

### A. Trust Protectors

Protectors initially were "imported into the United States from offshore jurisdictions seeking to attract asset protection business."[14] Adding a protector to an offshore trust was primarily intended to counterbalance the potential lack of accountability of the trustee, who typically was a foreign individual or entity "beyond the personal jurisdiction of American courts."[15] However, U.S.-situs trusts increasingly have employed protectors. Over time, the role of the protector has expanded to enable the protector to exercise certain rights and hold particular responsibilities that traditionally have been associated with the trustee.

> At first blush, enlisting the services of a protector in trust administration may seem to be a universally sound idea.

The protector's role in trust administration turns on the provisions of the trust agreement. Certain powers commonly granted to protectors clearly derive from the protector's original role as a counterbalance to a potentially unaccountable trustee. For instance, the protector often is called upon to monitor the trustee and is given the authority to remove the trustee in the event of misconduct.[16] However, protectors also may be granted more substantial powers, including those typically assigned to the traditional trustee. These powers include the powers to direct or veto distributions of trust property, arbitrate disputes among beneficiaries or between beneficiaries and the trustee, and modify the provisions of the trust instrument.[17]

At first blush, enlisting the services of a protector in trust administration may seem to be a universally sound idea. When the grantor is no longer able to act or voice his or her views, there remains a trusted party who is given the authority to ensure that the grantor's intent is honored. But to whom is the protector accountable from a fiduciary perspective? Does the protector owe any fiduciary duties at all? There is no consensus in the scholarly literature[18] or in the law[19] – a particularly ironic omission given that protectors initially were intended to ensure fiduciary accountability. As one commentator muses, why would a settlor grant to a protector "exten-

sive power over her trust, perhaps so extensive as to allow material changes to the dispositive and administrative provisions, without providing any recourse" when "damages result[…] from the protector's actions or inactions or behavior inconsistent with the purposes of the trust or the interests of the beneficiaries . . ."?[20] Indeed, until recently, such an arrangement would have been unimaginable.

The nature and content of a protector's fiduciary duties should derive from the similarities between the protector's role and the role traditionally assigned to the trustee.

The UTC takes a middle path by permitting the inclusion of protectors in trusts and establishing that the protector is a fiduciary by default but also suggesting that the settlor could provide otherwise in the trust agreement. Joining the trend toward approval of protectors, the comment to Section 808 notes that the Section, which grants certain powers to non-trustee administrators, is intended to "ratify the use of trust protectors," following "the recent trend to grant third persons such broader powers" as, among other responsibilities, "the power to amend or terminate the trust."[21] Section 808(d) holds that a protector "is presumptively a fiduciary" and therefore "is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries," but does not foreclose the possibility that the language of a trust agreement could surmount that default presumption.[22] Accordingly, while the UTC accepts the premise that a party who acts in a trustee-like capacity should owe duties akin to those of a trustee, these provisions espouse the view that a settlor's intent should be the guiding principle. Apparently, the drafters of the UTC have sought to balance competing fundamental attributes of the trust form – on the one hand, a requirement of the highest level of fiduciary duties, and on the other, the paramount importance of the settlor's intent.

The nature and content of a protector's fiduciary duties should derive from the similarities between the protector's role and the role traditionally assigned to the trustee. As the protector's duties more closely approximate the trustee's traditional role, the protector should be deemed to owe commensurate fiduciary duties.[23] In fact, one commentator highlights the "risk" that "if one starts giving the Protector too many powers," the protector "become[s] seriously at risk of being deemed a *de facto* 'Co-Trustee,' with all the fiduciary duty baggage that carries."[24]

Notably, a few states have already adopted this approach. For example, under Idaho law, as a default rule a trust advisor constitutes a fiduciary when exercising the powers "to direct, consent to, or disapprove a fiduciary's investment decisions, or proposed investment decisions."[25] Under Wisconsin law, as a default rule a protector constitutes a fiduciary when exercising the power to "interpret or enforce the terms of the trust at the request of the trustee," "review and approve the trustee's reports or accounting," "resolve disputes between the trustee or a directing party and a beneficiary," "consent to or veto distributions to a beneficiary," and "consent to or veto investment actions."[26] And under South Dakota law, as a default rule the trust advisor is a fiduciary when given authority "to direct, consent to, or disapprove a fiduciary's investment decisions . . . ."[27] In these states, it is the nature of the powers that the protector is exercising that determine his or her status as a fiduciary.

The possibility that the protector, with powers akin to those held by a trustee, may not owe fiduciary duties represents a shift away from automatically requiring the party traditionally responsible for trust administration to act in accordance with the highest degree of fiduciary duties.[28] If the UTC is adopted in New York, at least as a default rule New York would continue to follow the traditional rule that those who exercise powers traditionally held by trustees owe fiduciary duties commensurate with those responsibilities.

### B. Directed or Divided Trusts

A directed or divided trust is a trust in which the responsibilities of the trustee are bifurcated, with different individuals or entities performing different fiduciary roles and having varying fiduciary responsibilities (and corresponding liability). This bifurcated structure is intended to capitalize on a particular fiduciary's expertise, often by granting responsibility for investments, distributions, and administration to distinct parties.[29] It further enables the settlor to occupy an isolated role in trust administration – such as controlling investments – without running afoul of his or her tax objectives.

Directed trusts and divided trusts are nearly identical in that each trust involves the bifurcation of responsibilities and corresponding fiduciary responsibilities. The arrangements, however, are distinguishable: with divided trusts, responsibilities for different aspects of trust administration and corresponding fiduciary duties are allocated among separate parties; with directed trusts, a trustee – with limited fiduciary duties – carries out the decisions of other parties (who generally owe fiduciary duties). With directed trusts, similar to divided trusts,

there may be different directing parties for different aspects of trust administration.

The issues raised by both types of trust are similar – namely, whether the allocation of fiduciary duties among the various parties involved in trust administration provides sufficient recourse to the beneficiaries in the event of misconduct. As in the case of trust protectors, there is no consensus on these issues, either in state law or in the literature on the topic.

The UTC's relevant provisions focus primarily on directed trusts, while a separate Uniform Law Commission committee has been established to create model provisions regarding divided trusteeship, now known (perhaps oddly) as the Directed Trust Act. Section 808 of the UTC, briefly discussed in the context of protectors, blesses the directed trust arrangement and limits the fiduciary responsibilities (and corresponding liability) of a directed trustee. Section 808(b) provides:

> If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.[30]

As a general rule, under the UTC, the directed trustee must act as directed. Only if the directed trustee is *certain* that the directed action would contravene the trust terms or cause a "serious" breach of fiduciary duty may the directed trustee refuse. (Query whether the directed trustee may decline to act as directed if only a "minor" breach of fiduciary duty would result.)

The comment to Section 808 highlights the reduced fiduciary duties owed by a directed trustee under the UTC, indicating that

> Powers to direct are most effective when the trustee is not deterred from exercising the power by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction.[31]

This powerful language highlights the degree to which the directed trustee's fiduciary duties are starkly limited under the UTC in contrast to the trustee's historical obligations. The directing party, by contrast, is "presumptively a fiduciary" under the UTC and, accordingly, "is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries."[32]

New York does not currently have a statute permitting directed or divided trusts. Nevertheless, it is not uncommon for New York practitioners to allocate certain fiduciary responsibilities – say, investment and distribution decisions – among different trustees. New York case law suggests that, under such an arrangement, the directing party is a fiduciary, while the directed party typically must comply with the directing party's directions or risk liability.[33] However, New York law is not clear on the subject.

Internal documents prepared by the New York Uniform Trust Legislative Advisory Group, which is responsible for studying the UTC and considering its adoption in New York, appear to agree with the view conveyed by the UTC comment. One internal memorandum, for instance, emphasizes that the directed trustee "should not be liable except in cases of the [directed] trustee's willful misconduct," while "[a]n advisor is a fiduciary and the powers and duties of a trustee . . . shall apply to such advisor to the extent of the advisor's powers and duties authorized under the terms of the governing instrument . . . ."[34] If New York were to adopt these provisions, the state would both codify directed trusts for the first time and embrace a substantially lowered fiduciary standard for directed trustees.

How can a trustee who effectively carries out administrative responsibilities with respect to a trust owe virtually no fiduciary duties? Will the interests of beneficiaries be adequately protected if only the directing trustee is liable for most failures in trust administration? Conversely, from a practical perspective, as long as one party owes fiduciary duties with respect to a particular administrative act, why is there concern that beneficiaries would have insufficient recourse? Given the relative novelty of directed and divided trusts in the United States, these questions remain to be answered, but the mere fact that these issues have come to the fore indicates that the traditionally high degree of fiduciary duties owed by the trustee – historically considered to be a fundamental aspect of the trust form – is no longer a given.

While New York has been slow to join the directed or divided trust camp, we encourage New York to act. As long as a particular party owes fiduciary duties with respect to each administrative act, we believe the beneficiaries are adequately protected. Put another way, collective fiduciary obligations and liability, in our view, are not necessary. However, there should be a fiduciary relationship and a corresponding duty with respect to each trust-related activity. ■

1. John Langbein highlights the creation of the UTC as one of the most significant developments in American trust law of the past quarter century. *See* John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 3 (2012).

2. *See, e.g.*, John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 629 (1995). *But see* James Barr Ames, *The Origin of Uses and Trusts*, 21 Harvard L. Rev. 261, 265 (1908) ("[T]he transformation of the honorary obligation of the feoffee into a legal obligation was a purely English development."); Monica M. Gaudiosi, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College*, 136 U. Penn. L. Rev. 1231 (1988) (highlighting antecedents of the trust form in Islamic law).

3. George Gleason Bogert, The Law of Trusts and Trustees § 2 (3d ed. 2000).

4. *Id.* (internal citations omitted).

5. *See, e.g.*, Austin Wakeman Scott and Mark L. Ascher, On Trusts § 1.5 (5th ed. 2006) ("The policy of the feudal system forbade devises.").

6. Bogert, *supra* note 3, at § 2.

7. *Id.* at § 4–5. The 1535 statute was not repealed until 1925. *Id.* at § 4.

8. *Id.* at § 6.

9. As Bogert explains, "a fiduciary relationship is one in which the law demands of one party an unusually high standard of ethical or moral conduct with reference to another. . . . A Trustee . . . owes a duty to act solely in the interest of the beneficiary; fiduciaries must not consider their own personal advantage" and are required to "show more than ordinary candor, consideration, and probity in dealings with the beneficiary." *Id.* at § 1.

10. *See, e.g.*, C. Raymond Radigan and Jennifer F. Hillman, *The Evolution of Trust Reformation and Modification Under New York Law*, N.Y.L.J., July 2012 ("Historically, courts regarded the settlor's intent as the guide to trust administration."); Edward C. Halbach, Jr., *The Uses and Purposes of Trusts in the United States*, *in* Modern International Developments in Trust Law 123, 125 (1999) (noting the "broad freedom of testation enjoyed by property owners under Anglo-American common law"); Scott and Ascher, *supra* note 5, at § 2.2.4 ("For the most part, the settlor, in creating a trust, can make such provisions with respect to the duties and powers of the trustee and the rights of the beneficiaries as the settlor wishes.").

11. The structure of the trust and the rights and roles of each of the relevant parties have remained remarkably consistent since the inception of the trust form.

12. *See, e.g.*, Langbein, *supra* note 2

> In truth, the trust is a deal, a bargain about how the trust assets are to be managed and distributed. . . . The distinguishing feature of the trust is not the background event, not the transfer of property to the trustee, but the trust deal that defines the powers and responsibilities of the trustee in managing the property. . . . [T]he deal between settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract. Trusts are contracts.

13. *See, e.g.*, Restatement (Second) of Trusts, § 197 cmt. b ("The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract."); Austin W. Scott, *The Nature of the Rights of the* Cestui Que Trust, 17 Colum. L. Rev. 269, 269 (1917) (arguing that "[t]he creation of a use or trust . . . as a legal transaction [is] quite different from the creation of a contract.").

14. Stewart Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 Cardozo L. Rev. 2761, 2764 (2006).

15. *Id.*

16. *See, e.g.*, Jay Adkisson, *Trust Protectors – What They Are and Why Probably Every Trust Should Have One*, Forbes, Aug. 2012 ("The idea behind the Protector is to have somebody who can watch over the Trustee, and terminate the Trustee for any misconduct.").

17. Richard C. Ausness, *The Role of Trust Protectors in American Law*, 45 Real Prop. Tr. & Est. L.J. 319, 329 (2010) (listing powers commonly granted to trust protectors).

18. *See, e.g.*, Adkisson, *supra* note 16; Alexander A. Bove, Jr., *The Case Against the Trust Protector*, 37 ACTEC L.J. 77 (2011).

19. *See, e.g.*, Bove, *supra* note 18, at 82–83 (providing examples of state statutes denying that the protector owes fiduciary duties); Ausness, *supra* note 17, at 338–39 (highlighting the UTC's presumption that the protector is a fiduciary but does not restrict the settlor's ability to provide otherwise). There is minimal case law on the topic. The case of *Robert T. McLean Irrevocable Trust v. Ponder*, a Missouri case from 2013, represented an opportunity to expound on the fiduciary duties of the protector but the court ultimately *did not reach the issue because it found that there were no damages for which a protector could be liable. Robert T. McLean Irrevocable Trust v. Ponder*, 418 S.W.3d 482 (Mo. Ct. App. 2013). New York does permit a settlor to relax the duty of undivided loyalty and reduce the trustee's standard of care to, but not below, a standard of good faith. *See, e.g.*, *Renz v. Beeman*, 589 F.2d 735 (2d Cir. 1978). Relatedly, New York does not permit a settlor of a testamentary trust to exonerate a "fiduciary from liability for failure to exercise reasonable care, diligence and prudence." N.Y. Est. Powers & Trusts Law § 11-1.7(a)(1).

20. Bove, *supra* note 18, at 90 (internal citations omitted).

21. Uniform Tr. Code § 808 cmt.

22. *Id.* at § 808(d).

23. *See* Matthew T. McClintock, LISI Estate Planning Newsletter #2439 (July 21, 2016) at www.leimbergservices.com (proposing that when the protector exercises "trustee-like powers" – such as the power to advise a trustee regarding trust distributions, allocations of capital gains to income, and asset sales; to direct the trustee regarding investments; to resolve disputes between or among trustees; and to manage business interests held in trust – the protector should owe commensurate fiduciary duties). By contrast, as Matthew McClintock suggests, those powers that instead represent authority traditionally delegated to a court should not carry with them commensurate fiduciary duties. These powers, McClintock suggests, include the power to resolve disputes among beneficiaries; to modify trust provisions via amendments; to grant, revoke, or modify powers of appointment; to add or remove trust beneficiaries; to alter distribution standards or "the nature of a beneficial interest"; to prevent the assignment of trust interests; to resolve ambiguity in trust terms; to terminate the trust; to remove or replace the trustee; and to consent to trustee compensation and accountings.

24. Adkisson, *supra* note 16.

25. Idaho Code Ann. § 15-7-501(4); McClintock, *supra* note 23.

26. Wis. Stat. § 701.0818(2)(b)(1); McClintock, *supra* note 23.

27. S.D. Codified Laws § 55-1B-4; McClintock, *supra* note 23.

28. The addition of the protector also represents an addition to the cast of characters traditionally involved in trust administration, from the historical settlor-trustee-beneficiary triad to a more complex structure. Accordingly, the rise of trust protectors also bears on consideration of the third issue highlighted in this article: changes in the structure and nature of the relationships among the trustee, beneficiary and settlor.

29. *See, e.g.*, Jerry Cooper, *Are Directed Trusts Too Good to Be True?*, Tr. Advisor, Feb. 2010.

30. Uniform Tr. Code, *supra* note 21, at § 808(b).

31. *Id.* at § 808 cmt.

32. *Id.* at § 808(d).

33. *See, e.g.*, *Will of Rubin*, 143 Misc. 2d 303 (Sur. Ct., Nassau Co. 1989) (permitting advisors to direct the actions of certain fiduciaries, characterizing such advisors as quasi-co-trustees and noting that a testator has broad flexibility to determine the rights and powers exercisable by various fiduciaries). *But see Matter of Rivas*, 30 Misc. 3d 1207(A), *aff'd*, 93 A.D.3d 1233 (4th Dep't 2012) (endorsing a trustee's refusal to act as directed by an investment advisor as "an impermissible division of fiduciary loyalties among the majority of the Advisory Committee" and "violat[ing] the Prudent Investor Act.").

34. Untitled memorandum of New York Uniform Trust Legislative Advisory Group.

"Perhaps you would like to rephrase your last answer."

BY PETER SIVIGLIA


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# Indemnity and Insurance Clauses: Construction Contracts

Essential to any construction contract are the contractor's indemnity and the insurances that the contractor must maintain. The American Institute of Architects (AIA) has published forms of construction contracts that are widely used (for example, A201-2007 (general conditions)), but I find the AIA's indemnity and insurance provisions wanting.

## A. Indemnity

My principal concern with the AIA indemnity provision is that it is limited to negligent acts and negligent omissions. That limitation is unacceptable for two reasons: *First*, the contractor should be responsible for the acts and omissions of itself and its subcontractors regardless of their nature, and surely the owner does not want to litigate the issue of negligence. *Second*, the contractor is protected by its own insurance, which is not qualified by negligence.

Another, lesser concern, is that the AIA indemnity does not provide indemnity for costs incurred to enforce the indemnity.

A sample indemnity addressing these and other concerns appears below. In several respects it is more favorable to the contractor than the AIA clause.

## B. Insurance and Bonding

Also below are sample provisions dealing with insurance and bonding requirements for the contractor. These requirements should include the following, which are either omitted from or ambiguous in the AIA form:

1. The insurances should be exclusive to the project in order to avoid the risk of exhaustion of coverage due to claims under other projects.
2. The owner and those acting for the owner should be "additional named insureds" under the liability policies.
3. The endorsements to the policies must match the insurance requirements under the contract. There must be no difference between the endorsements naming the additional insureds and the coverages required under the contract.
4. Preferably, liability policies should be "occurrence based" as opposed to "claims made" policies. "Claims made" policies cover only claims made during the policy period, while "occurrence based" policies cover claims made during and after the policy period. In the case of "claims made" policies, provision must be made for the policy period to extend beyond completion of the work.
5. Further:
   - It is essential that the owner have an insurance expert (i) examine the insurance requirements of the contract; (ii) verify that the insurances the contractor maintains and their endorsements comply with the requirements of the contract; and (iii) verify that the terms and amounts of the performance bond are adequate.
   - The owner, itself, must maintain its own back-up liability insurance in case, for some reason, the contractor's insurance fails.

## Sample Indemnity Clause

(a) Contractor will indemnify Owner and Owner's Construction Manager and their respective employees, officers, directors, and shareholders (the Owner, the Construction Manager, and any such employee, officer, director or shareholder called an "Indemnitee") against any liability and hold each Indemnitee harmless from and pay any loss, damage, cost and expense (including, without limitation, reasonable legal fees and disbursements, arbitration costs, court costs, the cost of appellate proceedings, and any other reasonable costs of litigation) which an Indemnitee incurs arising out of or in connection with (i) any of the Work [which includes, without limitation, materials, machinery, equipment, tools, plant and facilities used or furnished by Contractor or any of its subcontractors], or the execution of any of the Work, or any act, omission or statement by Contractor or any of its subcontractors, partners, officers, direc-

tors, employees, agents, representatives or by any other person or entity acting for or on behalf of Contractor, or (ii) breach by Contractor of any of the provisions of this Agreement.

(b) In the case of any third-party claim asserted against an Indemnitee, Contractor may, at its expense, by counsel satisfactory to Owner and Construction Manager, defend any claim against an Indemnitee covered by this Section; and if Contractor elects to do so, it will not be liable to any Indemnitee for any expense incurred by the Indemnitee in defense of the claim after Contractor notifies Owner of its election; but Contractor will permit Indemnitees to monitor the defense at their expense.

Owner will promptly notify Contractor of any claim by a third party covered by this Section with full details of the claim. Owner will cooperate in the defense of any such claim and will not settle and will cause every other Indemnitee not to settle the same without Contractor's written consent unless the Indemnitee releases Contractor from all of Contractor's obligations under this Section with respect to the claim. Contractor will not be required to pay any settlement made without Contractor's written consent.

(c) Contractor will indemnify each Indemnitee against any expenses (including, without limitation, reasonable legal fees and disbursements, arbitration costs, court costs, the cost of appellate proceedings, and any other reasonable costs of litigation) that the Indemnitee incurs to establish and enforce its right to the indemnity and hold harmless provisions of this Section.

To be entitled to the benefits of this item (c), Indemnitees must abide and be bound by the provisions of this item (c) and the arbitration provisions of this agreement.

## Sample Insurance Rider

### INSURANCE TO BE PROVIDED BY CONTRACTOR AND ITS SUBCONTRACTORS

Prior to commencement of any work and thereafter the Contractor and each of its subcontractors will, *in respect of the work under this agreement and no other project*, provide, maintain at their own expense, and furnish Owner with certificates confirming the following insurances in amounts not less than those specified below, on terms (including, without limitation, exclusions and deductibles) satisfactory to the Owner, and with companies satisfactory to Owner licensed in the State of [*specify jurisdiction*] and rated not lower than "A" in *Best's Insurance Reports* with a financial category size at least "XII" in Best's.

The limits set forth below may, with the Owner's written consent, be varied for insurances furnished by subcontractors.

If any liability insurance does not cover occurrences happening during the policy period, regardless of when a claim is made, then the Contractor and each of its subcontractors will continue to maintain such liability insurance in accordance with this Rider at least until the first of the following to occur: (i) three years after completion of the Work in accordance with Section ____ of the Agreement to which this Rider is attached, or (ii) three years after termination of the Contractor's services thereunder.

1. Workers' compensation insurance as required by law.
2. Employer's liability insurance in the amount of *[specify amount in words]* dollars ($*[specify amount in figures]*) or higher if so required by applicable law.
3. Disability benefits and other similar employee benefits as required by law covering the employees of the Contractor and each of its subcontractors performing work on the Project.
4. Comprehensive General Liability Insurance for

a. liability for bodily injury and death

b. liability for damage to or loss or destruction of property with the following minimum limits:

A. Each Occurrence Limit – *[specify amount in words]* dollars ($*[specify amount in figures]*)

B. General Aggregate Limit – *[specify amount in words]* dollars ($*[specify amount in figures]*) (other than Products/Completed Operations)

C. Products/Completed Operations (extended for three years after completion of work) Aggregate Limit – *[specify amount in words]* dollars ($*[specify amount in figures]*)

D. Personal and Advertising Injury Limit – *[specify amount in words]* dollars ($*[specify amount in figures]*)

E. Fire Damage Limit - *[specify amount in words]* dollars ($*[specify amount in figures]*)

F. Medical Expense Limit (any one person) – *[specify amount in words]* dollars ($*[specify amount in figures]*)

Comprehensive General Liability Insurance will include, but not be limited to:

Operations, Independent Contractors, Blanket Contractual Liability (oral or written), Completed Operations, Ongoing Operations, and Products Liability, Broad Form Property Damage (including Completed Operations), Explosion, Collapse and

Underground Hazards, Pollution, Personal Injury (all coverage parts including Employees and Contractual Liability), Extended Bodily Injury (assault and battery), and Employers as Additional Insureds. Liability insurance shall not contain any exclusion, restriction or limitation of coverage in respect of bodily injury or property damage sustained by any of Contractor's employees or any employees of any contractor or subcontractor, commonly known as "Labor Law" or "Action Over" claims.

5. Comprehensive Automobile Liability covering Owned, Non-owned and Hired Vehicles, providing Bodily Injury and Property Damage Coverage, all on a per occurrence basis. Limits of liability will be *[specify amount in words]* dollars ($*[specify amount in figures]*) Combined Single Limit per occurrence.

6. "All Risk" Property Insurance on all property and equipment of the Contractor and each of its subcontractors on the construction site and on all materials, machinery, equipment and supplies regardless of their location which are to become part of the construction and are in transit or awaiting incorporation into the construction until completion of such incorporation. The amount of this insurance will not be less than replacement cost and will include the interests of Owner, Owner's Construction Manager, and all contractors performing work on the Project as their interests may appear.

**Contractor's Covenant**: Contractor will not make and it waives, and it will cause its subcontractors not to make and to waive, any claim against Owner for any loss or destruction of or damage to any of, respectively, its or their construction, property, equipment, materials or machinery regardless of the cause or the party responsible for the loss or damage.

This insurance must contain the following endorsement:

"This insurance will not be invalidated should the Insured waive, prior to a loss, any or all right of recovery against any party for the loss occurring to the property described herein."

7. Excess Liability (Umbrella) insurance with a limit of *[specify amount in words]* dollars ($*[specify amount in figures]*) for each occurrence, with an aggregate limit of *[specify amount in words]* dollars ($*[specify amount in figures]*), and with coverages at least as broad as those provided by the underlying Employer's Liability, Comprehensive General Liability and Comprehensive Automobile Liability Insurances.

8. All liability insurances shall not contain any exclusion, restriction or limitation of coverage in respect of negligence or wilful acts or omissions.

The above insurances will be without liability on the part of the Owner, Owner's Construction Manager, and Owner's lender for premiums, and in the cases of Comprehensive General Liability, Comprehensive Automobile Liability, and Excess Liability they (i) will include the following as Additional Named Insureds: Owner, its partners, if any, and its Construction Manager, lenders, architects and engineers, and the officers, directors, employees, agents, advisors and representatives of Owner, its partners, if any, and its Construction Manager, lender, architects and engineers, and (ii) will waive subrogation as to them and will provide that none of them will be a co-insurer.

All insurance policy endorsements must be consistent with the requirements of this Rider.

All of the above insurances must include the following provision:

"It is agreed that these insurances will not be cancelled or materially changed or not renewed without at least thirty (30) days' prior written notice to *[name of Owner and name of Construction Manager]*."

## Sample Bonding Requirement

Concurrently with the execution of this Agreement, and thereafter at the request of the Owner, Contractor will furnish bonds in such form, containing such terms, and with sureties acceptable to the Owner covering the proper and faithful performance of the Contract Documents and the payment of all obligations arising thereunder.

# Helping Your Clients Plan for Retirement

## By Leslie H. Tayne

*This article originally appeared in the fall 2016 issue of* The Senior Lawyer, *a publication of the Senior Lawyers Section. For more information on the Section, or to join, visit www.nysba.org/SLS.*

The United States has roughly 78 million people born between 1946 and 1964 who make up one of the largest demographic cohorts that have entered or are approaching retirement age.[1] Retirement is a lifelong investment that, ideally, your client will have already started planning for. If your client has not thought about a retirement plan yet, or has but has hesitations about the functionality of the plan, should we then, as attorneys and trusted advisors, help guide our clients toward a functional retirement plan?

The reality is that we are attorneys and *not* retirement experts or retirement planners in most cases. However, clients have all kinds of needs and if we function in our role as trusted advisors and get more involved in the long-term needs of the personal lives of our clients, arguably we could fulfill that role as counselor *and* advisor. Let's face it, most of our work as attorneys is short-term and transactional in nature. But what if we took a long-term approach and changed the goal to retain clients as long as possible with the idea that they will generate future business for our practices? We can meet this practice goal by meeting our clients' needs in retirement planning and future comfort through regular discussions and meetings for updates with the client. Simply doing a closing or settling a case for a client is great, but keeping that client's future plans in mind could maximize ultimate benefit from our services and keep that client close as he or she progresses through the journey of life. Case in point, clients in their 20s and clients in their 40s have very different retirement thoughts and plans, and as each client ages, his or her needs evolve. As a result the clients' need for us as attorneys and a trusted advisor evolves as well. As lawyers, we can help to provide guidance and expertise on various aspects and stages of a client's retirement plans.

### How Can You Contribute?

Depending on your practice, there may be several key factors to consider and discuss with your clients as a

**Leslie H. Tayne** is an award-winning consumer and business debt-related attorney, advisor and founder of Tayne Law Group, P.C., one of the few in New York State concentrating solely in debt resolution and alternatives to filing bankruptcy for consumers, business owners and professionals. Leslie's mission is to reshape the debt relief industry by giving clients a supportive and reliable environment built on experience, trust and results that will not only relieve clients of the stress from debts but also the burden of the never-ending debt cycle.

contributor to their retirement planning. First, knowing what you're retained for and how that impacts their retirement planning is key. For example, if you are doing a closing, filing bankruptcy, or helping your client with estate planning, then this will also have an impact on his or her financial future. Regardless of the transaction, the age of your client will dictate his or her short- and long-term goals. Financial support for themselves and their loves ones, including supporting elderly parents, supporting boomerang children or children who are still in college, planning for downsizing, and trying to predict and plan for future health care needs are all discussion points that help the clients see their future financial needs. We want to do a good job with our clients' legal planning and that should include making sure they are thinking about how it impacts their future financial and retirement plans. The factors listed above only touch the surface as to retirement planning through the legal eyes hired by our clients to protect them.

According to a 2013 study by the National Institute on Retirement Security, the average working American household has virtually no retirement savings. The median retirement account balance is $3,000 for all working-age households and $12,000 for near-retirement households.[2] This is far below what is needed to maintain an adequate standard of living in retirement, as evidenced by Fidelity's latest Retirement Health Care Cost Estimate, which estimated that the average 65-year-old couple retiring in 2016 would need to budget for $260,000 in health care costs alone.[3] Furthermore, Americans are retiring with more debt than ever before. For homeowners 65 and older, the percentage carrying mortgage debt increased from 22 percent in 2001 to 30 percent in 2011.[4] Americans are also increasingly entering retirement with outstanding student loan debt, with federal student loan balances for people 65 and older growing from about $2.8 billion in 2005 to $18.2 billion in 2013.[5] This leaves many American families finding themselves constantly wondering how much money they will need to retire and whether they will ever have enough. This also can lead to limitations placed on our ability as attorneys to effectively counsel and provide the best solution for our clients. Once we are aware of our clients' wants and needs and come to understand their financial situations, then we can work to give them the best results with regards to both their legal *and* retirement needs.

## Don't Wait for the "Golden Years"

With increasing costs of living and an aging population, waiting until the "Golden Years" to begin thinking about retirement planning is not an option. It is important to keep clients informed and educated about retirement planning while discussing other issues you may be dealing with. For example, if you are a personal injury attorney, you may be helping your client settle his or her case after a severe car accident; he or she also may be dealing with a decent amount of medical debt or that client may be behind on his or her mortgage if he or she did not have the income to support his or her financial needs during the litigation process. Ethically, one would argue it is prudent to ask clients these questions and see if the award we achieve is best for them and has the best possible positive impact on their financial needs and future retirement planning. Regardless, it can be argued our job should include a concern and discussion about how the result we achieve impacts the client financially in the short- and long-term.

> Americans are retiring with more debt than ever before.

According to an AARP survey, 72% of Boomers expect to delay retirement because they are "financially unprepared"; half of those surveyed believe they may never even be able to retire.[6] This puts a great deal of anxiety on your clients, leaving them with unanswered questions and concerns. This anxiety does not equate to maximization of attorney-client relationships, as many of us have probably found out over the course of vast practice years. Clients with financial stress or strain become clients who do not pay and/or clients who can be combative, and are thus unable to see the work we do for them as beneficial. The solution could be that discussing finances and retirement planning as early as possible may place the wheels in motion for clients to find strategies that best fit their needs now *and* in the future. It may make sense to ask the clients what plans they have made for retirement to date and then discuss how those plans coordinate with the legal services you are providing to those clients. For example, if you are dealing with a matrimonial matter and your client, as the "non-monied" spouse, has no retirement plan and he or she is 50 years old, that discussion will be far different from the one who is the "monied" spouse and potentially facing the requirement to give half of his or her retirement fund to the "non-monied" spouse. Having these discussions is an important part of maximizing the benefit of the work we do as attorneys.

## Bring in the Professionals

We have our limitations as attorneys in the retirement planning arena, and thus, these shortcomings may be met by bringing in additional professionals to assist clients and their needs in planning. As a practitioner, we may further establish relationships to form an interdisciplinary team of experts that can work together to meet the needs of our clients. This will not only ensure that your client has access to the resources of an expert team that you trust and have worked with, but will benefit your

business as well by establishing the relationships necessary to generate future referrals. Draw upon your existing network of referrals and determine which specialties fit into your "*Retirement Advisor Team*" and who the experts are among your network to best prepare your clients and benefit them and your practice. You do not need to make any formal arrangements, but rather, have a discussion about the intent of this new referral network and why it should be of interest to them. Discuss your intent to create a team with your client as the overall plan to work through your client's legal matter.

## Communication Is Key

The next step in helping your clients plan for retirement is opening the lines of communication and determining what exactly their current needs are, as well as anticipating what their future needs/goals may be. This can not only help your clients plan for retirement, but can help you prepare your business ahead of your clients' needs. As our time is expensive and well consumed with many matters, this part does not even have to be done by you, but through an experienced office assistant. When discussing planning for your clients' retirement needs, it is helpful to have a list of questions that make up the retirement questionnaire. Consider some conversation starters like asking first and foremost, do they have any retirement plans? Do they want to achieve complete retirement or remain working in some capacity throughout life? Also consider their sources of income and family needs for income, housing and college expenses, and number of children, as well as their debt, including who they owe and how much. Probing for answers to these questions can help you and your clients determine a starting place and lay the foundation for a more in-depth discussion about their needs and create lasting relationships. As mentioned already, help guide your clients to the professionals who can help them with finances so that the execution of the legal matter you are handling can be maximized. Reassessing these needs and asking the questions may be necessary every few years as goals, circumstances, and laws change and as their case in your office progresses. Consider this as a way to establish a lifelong, trusting relationship with your client which is beneficial to both your practice and the client.

Guiding your clients toward discussions about a retirement plan can, at times, be a little trickier than helping them sort out their legal matter. Trust is key and relationships built on trust are more successful; start slowly and get the client thinking. Consider taking an old-school approach and make that client's matter more than the legalese of the case. If you take steps to understand your clients' financial situation and eventual retirement plan, then they should come to trust you with their financial and legal future. Be the go-to retirement source your clients want and need and give them the gift of retirement-thinking and realization. ■

1. *America's Growing Senior Population: Assessing the Dimensions of the Demographic Change*, Bipartisan Policy Center Health and Housing Task Force, September 2015. Web. 19 Oct. 2016.

2. Rhee, Ph.D., Nari. *The Retirement Savings Crisis: Is It Worse Than We Think?* National Institute on Retirement Security, June 2013. Web. 19 Oct. 2016.

3. Nance-Nash, Sheryl, *Estimate: $260G Needed for Retirement Health Care*, Newsday, 2016. Web. 19 Oct. 2016.

4. *CFPB Spotlights Mortgage Debt Challenges Faced by Older Americans*, Consumer Financial Protection Bureau, 7 May 2014. Web. 19 Oct. 2016.

5. Jeszeck, Charles A., *Older Americans' Inability to Repay Student Loans May Affect Financial Security of a Small Percentage of Retirees*, United States Government Accountability Office, 10 Sep. 2014. Web. 19 Oct. 2016.

6. *America's Growing Senior Population: Assessing the Dimensions of the Demographic Change*, Bipartisan Policy Center Health and Housing Task Force, September 2015. Web. 19 Oct. 2016.

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

# Moments in History

## *The Statute of Anne*

As a general rule, the right of ownership in a creative work – otherwise known as the right to copy it or copyright – belongs legally to its author or creator, although he or she can assign, license, or sell that right.

But authors and other creators haven't always enjoyed formal protections of their works. Prior to Gutenberg's movable type and the printing press, monks, acting as scribes for the Church, typically reproduced texts by hand. Following the advent of commercial printing in England, Mary I issued a royal charter in 1557 to the Stationers' Company, a long-standing trade guild, granting it a publishing monopoly. The law recognized individual printers of the company, not the authors of the books it printed, as the rights-holders in the works.

It wasn't until 1710 that Parliament enacted the first statute to protect the rights of authors. The Statute of Anne – formally An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned – afforded authors significant rights for the first time and importantly granted them the exlusive right to reproduce their works, rather than automatically vesting those rights in printers or booksellers.

These original copyrights weren't unlimited, however. The protections of the statute, limited to books, lasted no more than 28 years (one 14-year term that could be renewed), and authors had to donate nine copies of each work to the Royal Library and a number of universities, including Oxford and Cambridge.

It's no exaggeration to say that the statute laid the cornerstone for all subsequent copyright law in Great Britain, America, and the rest of the world.

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.

BY LUKAS M. HOROWITZ

**Lukas M. Horowitz**, Albany Law School Class of 2019, graduated from Hobart William Smith in 2014 with a B.A. in history and a minor in political science and Russian area studies. Following graduation, he worked for two years as a legal assistant at Gibson, McAskill & Crosby, LLP, in Buffalo, New York, and with the New York Academy of Trial Lawyers hosting CLE programs. Lukas can be reached at Lukas.horowitz@gmail.com.

# Alphabet Soup

Alas, he still has a pulse! My first law school semester is officially in the record books. The three week-long finals period of the semester was interesting, to say the least, in much the same way that having dinner with Hannibal Lecter can be called interesting. Very trying at times but, overall, worthwhile and beneficial.

I didn't realize until I sat down to review the first semester's work just how much information had been covered, and how much knowledge I had acquired. The written material was a critical component, but not the only source of information. As I studied, I began to appreciate and understand how my professors had synthesized the entirety of the material we covered, and I realized I had been afforded the opportunity to acquire a deep and meaningful understanding of that material.

It felt as though at the beginning of the semester I was given various paints and pigments, brushes, and a canvas, and no instructions. As the semester progressed, what began with simple stick figures and finger painting gradually took form on the canvas, so that by the end of the semester I could produce a recognizable landscape. While my final grades made it clear the landscape was not a masterpiece, I know my parents will hang it up on their refrigerator.

I heard a lot about "thinking like a lawyer," and spent the better part of the semester certain I was definitely not thinking like a lawyer. However, by the end of the semester I was shocked to discover that I was able to carry on a legal conversation with my peers, thinking like a lawyer, and without ending every sentence with, "I think."

I left school after the first semester in good spirits, and hopeful. I embarked on a 12-day trip to Israel, an experience that not only met, but vastly exceeded, my expectations. From the Golan Heights in northern Israel to the Old City of Jerusalem, there was never a dull moment, a sentiment no doubt shared by "Big Bertha," the camel I rode while visiting a Bedouin camp.

With the holiday vibes dimming and my jetlag dissipating, I realigned my focus as the second semester of law school began. With torts and federal civil procedure behind me, I am taking on two new subjects: constitutional law and criminal law. Three weeks into the second semester and the wheels in my brain are beginning to spin again. Since I have been back at school, I have noticed a broadening of the areas of law that aroused my interest. Prior to law school, I had always told myself that criminal law was something I would avoid. I had always worked on the civil side of law in the past. To be honest, I had just never considered criminal law as an area I would be intrigued by. However, the cases that we have read thus far, though few in number, have held my attention more than any other type of case covered in my first semester. Proof that you really can't judge a book (or an area of law, for that matter) by its cover. I look forward to plunging further into criminal law as the semester progresses. Constitutional law has also caught my attention. Prior to class, the interpretation of the Constitution appeared to be straightforward. This is what the Constitution says, apply it literally, and you're done. Oh, how wrong I was! Looking at the Constitution through the lens my professor has provided in classroom lectures has changed my understanding of the word "interpretation." I am excited to view this historic document through a new pair of eyes. I know I will be surprised, and challenged, by what I learn this semester.

So, what you really want to know is how I did my first semester. As a child, there was nothing I loved more than alphabet soup. Enough said. ■

## Burden of Proof

Continued from Page 20

at the very least, a jumping off point for crafting a deposition or trial outline.

February provides many distractions, what with Valentine's Day, Washington's Birthday, Lincoln's Birthday, and my personal favorite, Groundhog Day. Nonetheless, for those of you involved in ESI issues, try and carve out a little time on one of these holidays and study *Nunz* and the guidelines referenced in the decision. And if you do so on Groundhog Day, review the material at least two times. ■

1. 53 Misc. 3d 483, 36 N.Y.S.3d 346 (Sur. Ct., Erie Co. 2015).

2. The same Order directed "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."

3. The parties waived the filing of a written referee report and consented that the court could decide the issues on the record before it, pursuant to SCPA 506(6)(c).

4. The court noted "[a]lthough Clingerman was not in a position to state with *certainty* that anything relevant could be recovered due to various unknown factors, he pointedly observed: 'All things considered, I still – I don't know whether or not it's possible. I mean, it's always poss – *we have to look. Until we look, we don't know*'" (emphasis added).

# NEW MEMBERS WELCOMED

**First District**
Charlina Jean Ahn
Peter C. Alkalay
Eric Lee Altman
Hyun Cho Baek
Stephanie Nicole Bell
Brandon Scott Breslow
Nathaniel James Broughty
Neal F. Burstyn
Stephen Butler
Richard Gonzalo Canedo
Luis Maria Clouet
Danielle Louise Coleman
Stephanie R. Cooper
Matthew David Crawford
Enrique Fernando Dancausa
Marishka Trew Detoy
Andrew Marks Felner
Gina Marie Ferrara
Tawn A. Fichter
Deborah Judith Frisch
Dharshan Rajiv Gooneratne
Benjamin Opotow Gould
Michael Charles Griffin
Claudio Andrea Guler
Katherine Marlene Hauck
Joseph Steven Hoff
Megan Marie Ines
Rachel Michelle Jacobson
Phoebe Ruofei Jin
Jeanie Joe
Iris Y. Jun
Steven John Kemps
Daniel J. Kim
Brittany Regan Lamb
Esther Lukman
Alejandra Melgoza Morales
Giselda Metaliaj
Richard Mizrack
Jonathan Ephraim Mond
Benjamin Jacob Morris-Levenson
Monica Sudarshan Narang
Miriam Augusta Nunberg
Bridget Osetinsky
Jesse Palmer Overall
Heather Michelle Palmore
Luciana Parada Villar
Christopher M. Parker
Darsh Patel
Catherine Michelle Pena
Patricia K. Perez
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Galen Ashton Reeves-Darby
Olivia Hale Renensland
Judith R. Reyes
George Edward Rhein
Brandi Ilana Ripp
Taylor Elyse Roberson
Zofia Halina Rubens
Robert B. Ruh
Nachum U. Rybak
Jonathan David Salm
Kyle Aaron Brodkin Schneider
Lewis Seiler
Vincenzo Sessa
Ellen Beth Silverman
Nicholas Anil Singhal
Ashley Rae Sizemore-Smale
Jessica Frances Soricelli
Victoria Liubenova Stephanova
Jonathan Howard Stoler
Brendan Harrington Strang
William James Suozzo
Janice Claire Serrano Tan
Mohammed Ali Tavakoli
Beau V. Taylor
Corey Patrick Teitz
John Thomas Torrenti
Camille Yvette Turner
Sarah Nathalie Vieux
Alan C. Winick
Joshua Benton Wright
Amanda Zink

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Katherine Amy Fallow
Emma Lerner Freeman
Sherief Ahmed Osama Gaber
Joseph P. Garland
Melanie Patricia Grace
Mark J. Kayton
Valerie Ann Madamba
Timothy Allen Markey
Kavita M. Patel
Whitney Bohan Potter
Guy S. Regev
Adam Kanoa Robinson
Marjorie Tamar Scher
Tatyana Segal
Carla A. Taveras
Aileen Chattin Thomson
Jonathan F. Viray

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Michael S. Juarez
Erica Waters
Michael Stephen Wolf

**Fourth District**
Isabelle Paine Thacker

**Fifth District**
Michael Jay Hungerford
Lucero Maria Saldana Mistry

**Sixth District**
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Benjamin F. Nardone
Raymond O. Recchia

**Seventh District**
Marlene Anne Attardo
Joni Brandon
Eric Charette
Tschika Latoya McBean
Mark H. Wattenberg

**Eighth District**
Lynn L. Hartley
Jeffrey Macdonald Reed
Emily Marie Scott

**Ninth District**
Robert H. Hermann
John H. Hersh
Soichiro Ishita
Kevin Ruiz

**Tenth District**
Ancilla Hortencia Dias-pinto
Katherine Elizabeth Flinchum
Catherine Gretschel
Alanna E. McGovern
Rose Nankervis
Darius E. Niknamfard
Ryaan Nizam
Kenza Ashraf Pirzada
Mohammed T. Shaikh

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Jessica Lynn Destefano
Ana-Karine Hallum
Elena Knothe
Stanislav Korotchenko
Mahsa Motlagh
Ted Mulvany
Johanna Christina Ocana
Carmen K. Parra
David Nathan Storm

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**Out of State**
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Akram Salah Alsaidi
Bandar Altunisi
Maria Paula Alves De Souza
Ronald A.C. Anderson
Jason Scott Bailey
Ilaria Bangara
Michael Linus Barrington
Maria Luiza Bejan
Susan Berry
Matthew David Berthinet
Zakiya Theresa Black
Matthew Samuel Blumenthal
Michael Eugene Bonner
Gergely Borsa
Omar Boutaleb
Heidi Laurel Cora Bowerman
Steven Ephraim Brander
David I. Brown
Scott Timothy Buckley
Vasco Antonio Campos Freitas Da Costa
Nazia Manssure Cassamali
Joseph John Cassotta
Julian Humberto Castro
Pratyusha Challa
Sandeep Singh Chandi
Arthur Francois Gaspard and Chaslot
John Thomas Chester
Ketzia Kelly Alicia Chetrite
Maria Antonietta Chhabria
Gustavo A. Chico-Barris
Min Suk Choi
Robert Blake Clark
Michael Alan Clore
Lynna Joy Cobrall
Tyler Pete Cohen
Sarah Victoria Cohenson
Chelsea Delois Coleman
William Joseph Conroy
Sean Lawrence Corgan
Mariele Isabel Coulet Diaz
Kelton Lawrence Crenshaw
Fiamma De Nardo
Mark Christopher De St. Aubin
Emily Kay Declercq
David Stewart Denious
Christopher Thomas Diel
Maria Florentyna Dilorenzo
Hannah Jade Dixie
Caleb Durling
Maud Dusan
Lesa Carol Duvall
Jakob Armin Egle
Vincent El Hayek
Fei Fang
Frank James Fazzio
Cecilia Ferreira
Matthew Ian Ferrie
Robert Michael Fishman
Jeffrey Brian Fohrer
Bridget Anne Freeman
Matthew Edward Frisch
Inta Lesley Gaikis
Diego Gallegos
Kevin Phillip Gibson
Heather Shannon Glass
Shira Elizabeth Gordon
Joseph A. Guay
Suzannah Joan Hacking
Young Jean Hahm
Whitney Louise Harrington
Craig Robert Haughton
Jingru He
Frederick Hearn
Harvey Randolph Herman
Harrison G. Hess
Akira Hiramatsu
Mengyuan Hou
Calum Robert Howe
Miyuki Iyota
Peter H. Jagel
Munizeh Z. Jan
Navneet Kaur Jaswal
Zixuan Jiang
Joonoh Jo
Darcy Lachelle Jones
Gerri Anna Jones
Tomohiko Kamimura
Maris Jamie Kandestin
Brian Adam Kesselman
Joo Hyun Kim
Yoon Jee Kim
George Kimball
David Adam Klaponski
Christie Jeannine Kneteman
Justin Timothy Ko
Ka Lam Karen Kong
Shuai Kong
Philipp Kotlaba
Yoana Ivaylova Kuzmova
Sarah Sofia La Mendola
Pengyao Lai
Barry Tsz-hin Lau
Kwan Hyung Lee
Hoi Chui Leung
Yuanjing Liu
Pei Lyu
Samer Mahjoub
Afije Mahmudi
Kassandra Diana Maldonado
Alison R. Malloy
Laura Jane Marriott
Benjamin Arthur Lee Metzler
Marie-anais Meudic Role
Peggy Joyce Mevs
John Francis Mizerak
Bhavya Gyan Mohan
Ian Anthony Moore
Sean Andrew Moreman
Katrina Ann Morrison
James Moughan
Kalpana Madhuri Muttireddi
Takeshi Nagase
Yujin Nakano
Sarah Elizabeth Nason
Camille Neri Varszegi
Carlton Ka Chun Ng
Nancie Yuuna Nishigai-zhu
Ngozi Nzekwue
Ogoegbunam Nkolika Nwanneka Okafor
Chidinma Peace Okogbue
Abeeb Abidemi Oladipo
Douglas Jon Oosterhouse
Michael D. Oppenheimer
Evan Otero
Byung-kwan Park
Hae-in Park
Faizi Kofi Parkes
Yuval Peled
Jing Wen Peng
Theresa Pfeifle
Todd Evan Phillips
Leah Helen Porter
Sarah Marie Powell
Peng Qian
Tara Rao
Michael D. Recchiuti
Lucie Retif
Kenneth Scott Reynolds
Joshua Paul Riley
Christopher Jarrett Robins
Jackeline Maria Rodriguez Rojas
Alicia Marie Rodriguez
Alison Dorothy Rogers
David Alan Rose
Elham Sadri
Yusuke Sahashi
Jerry Wesner Santer
Adnan Asad Sarwar
Melissa Joan Schwartz
Monera Mohamed Seliem
Anthony Howard Sheh
Francisco Javier Silva

Sheena D. Smith
Samuel Alex Smolkin
William Albert Starshak
Alexander Lav Charles Stevens
Kyle Michael Stewart
Jack Howard Stanley Stringfield
Xi Bing Su
Hiroshi Sugawara
Naoko Sugiura
Mitsuhito Taki
Megha Elizabeth Thampy
Shengxi Tian
Susanne Mary Toes
Ryan Tooley
Philip Liberato Tumbaga
Chitua Ihuoma Uzoh
Christopher Michael Vale
Kamil Valiyev
Hugo Pierre-henri Verdier
Samuel Alexander Villiers
Isabel Rocha Vrabel
Xiaoxuan Wang
Katherine Booth Wellington
Ashley Monique White
Brandes Chaundry Kate Wilson
Vanessa Winkler
Jeffrey Paul Wofford
Sichen Wu
Yifei Xie
Bernard Yi
Vincent Chanhong Yiu
Lesley Aline Yulkowski
Lixuan Zeng
Shujie Zhang
Guannan Zhao
Aiyao Zhou
Zhenzhen Zhou
Yingying Zhu
Andry Olivier Zinsou

## *In Memoriam*

Peter T. Affatato
*Vero Beach, FL*

Andrew J. Cornell
*Wellsville, NY*

Robert M. Donahue
*Staten Island, NY*

Stephen N. Erlitz
*East Rockaway, NY*

Eric Feinberg
*New York, NY*

B. Francis Flaherty
*Garden City, NY*

Arthur S. Hoffman
*Scarsdale, NY*

Bernard Kessler
*Hyde Park, NY*

Ann J. Maglaris
*West Haven, CT*

Richard H. Maidman
*New York, NY*

Robert C. Mitchell
*Central Islip, NY*

H. Richard Schumacher
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Robert Silberglied
*New York, NY*

Donald S. Snider
*Mamaroneck, NY*

Thomas J. Walsh
*Albany, NY*

# ATTORNEY PROFESSIONALISM FORUM

**Dear Forum:**

I am the managing partner in a 50-plus attorney firm. We are in the process of re-evaluating our document retention policies for closed litigation and transactional files. While some attorneys at my firm retain their files indefinitely, others destroy their client files 30 days after the representation has concluded. We would like to develop a firm policy not only for consistency sake, but primarily to reduce the costs associated with the mounting volume of documents being stored in our records department, off-site and on our servers.

What are our ethical obligations to retain and preserve client files after the matter has concluded? After a litigation has been resolved, either through a settlement or judgment, must we continue to maintain the client's files, and if so, for how long? Are the rules the same for transactional matters? How long after a transaction has closed or been completed before we can destroy the client files for that representation?

I am also concerned about electronic files and emails, since I recently learned from one of my partners that he routinely deletes all emails after reading them and does not keep copies of "sent" emails. Do lawyers have an obligation to keep emails?

Does the firm have an obligation to notify our clients before destroying the files? One of our partners destroyed his copies of a client's transactional documents 30 days after the deal closed. The client called a year after that deal closed asking for the files and has threatened to sue the firm because those files were destroyed. The partner never contacted the client to tell them that he was disposing of the files. However, our engagement letter with that client expressly provides that we can dispose of the client's files upon the conclusion of the engagement. We understood that to be permissible but would appreciate your guidance.

Sincerely,

John Q. Manager

**Dear John Q. Manager:**

The sheer volume of documents, correspondence, drafts, and final work product generated by law firms in paper and electronic form can be staggering. While recent technology advances, such as cloud storage, can make it seem that file retention is easier and less expensive than traditional methods – such as warehouse storage – this is not always the case. The transfer of paper documents to electronic formats for digital storage can be time consuming and costly. It is vital that firms regularly update their document retention policies as technologies change, consult with their IT staff on the firm's ethical obligations to store data, and monitor their attorneys and staff to make sure that everyone complies with the firm's policies. Indeed, we recommend that every firm should have a formal document retention policy and that the policy is reevaluated yearly and disclosed to the firm's attorneys and staff. Otherwise, attorneys may believe that their computers, firm's network, and/or email systems are automatically backing up all their work in perpetuity when, in fact, automatic deletion policies are regularly deleting documents without the attorney's knowledge. Without a formal policy, different attorneys will employ different practices, which can result in the problems mentioned in your letter. Therefore, your firm's plan to develop a firm-wide retention policy is a prudent one and is something that your firm should develop and implement as soon as possible.

Despite the fact that all attorneys encounter the same question of what, if any, documents they must retain and for how long after their representation of a client has concluded, the New York Rules of Professional Conduct (RPC) offer little guidance to attorneys on these issues. Indeed, the New York City Bar Association Committee (NYCBA) on Professional and Judicial Ethics noted in Formal Opinion 2010-1 that there are very few provisions in the RPC that address document retention.

One rule that generally touches upon an attorney's document retention obligation is RPC 1.16(e), which provides that:

> [u]pon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid forseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, *delivering to the client all papers and property to which the client is entitled* . . . .

*Id*. (emphasis added). RPC 1.16(e), however, does not define how broadly "papers" or "property" should be construed. For example, do "papers" and "property" include the attorney's emails or work product or drafts that are relevant to the representation or do they simply include any "papers" and "property" provided by the client, deal documents or pleadings?

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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RPC 1.15(d) also gives us a list of bookkeeping records that a lawyer *must* retain for seven years including retainer agreements, bills rendered to clients, records of deposits and withdrawals, and bank statements. It is worth noting that RPC 1.15(d) distinguishes what items may be retained as copies (such as retainer agreements and bills) and what items must be retained in their original form (such as check stubs and bank statements). *See* RPC 1.15(d)(iii), (v), (viii); Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 917 (2016 ed.); NYSBA Comm. on Prof'l Ethics, Op. 1077 (2015). Even upon dissolution of a firm, appropriate arrangements must be made for the maintenance of such original documents by either a successor firm or the attorneys personally. *See* RPC 1.15(h).

Moreover, under RPC 1.1, a lawyer has an obligation to represent a client competently, which implies a general duty to retain files as clients may reasonably expect to ask their attorney for copies of the work product for which they paid. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2008-1 (2008) (noting that former New York Lawyer's Code of Professional Responsibility 6-101, which also included an obligation to represent a client competently, "implicitly impose[s] on lawyers an obligation to retain documents."). In addition, some local court rules require attorneys to keep copies of all files for seven years in personal injury, property damage, and wrongful death cases, such as pleadings, medical reports, repair bills, and correspondence concerning a claim or cause of action. *See*, *e.g.*, 22 N.Y.C.R.R. 603.25(f) (First Judicial Department) and 691.20(f) (Second Judicial Department).

These rules do not address the overwhelming majority of documents and electronic data that law firms create on a regular basis during the course of a representation such as drafts of legal documents and yes, emails. Several ethics opinions and legal decisions addressing lawyers' obligations on document retention offer some help.

In 1986, the NYCBA Committee on Professional and Judicial Ethics issued an opinion on document retention and recommended that before destroying any documents that belong to the client, the lawyer should contact the client and ask whether the client wants delivery of those documents. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 1986-4 (1986). The committee further recommended that, "with respect to papers that belong to the lawyer, or papers as to which no clear ownership decision can be made, the answer to the questions whether and how long to retain such files is primarily *a matter of good judgment*, in the exercise of which the lawyer should bear in mind the possible need for the files in the future." *Id.* (emphasis added). This opinion cites to a number of ABA guidelines which are helpful in making such a determination including whether the lawyer knows or should know that the information "may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired" or is information that the client may need "which the client may reasonably expect will be preserved by the lawyer." *Id.*

In 2008, after 20 years of exponential growth in the creation of electronic files and email use, and new court decisions that addressed attorney file retention, the same committee revisited its 1986 opinion. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2008-1 (2008). The 2008 opinion, with a focus on the need to retain email and other electronic documents, essentially made the same recommendations as the earlier opinion because "many emails and other electronic documents now serve the same function that paper documents have served in the representation of a client." *Id.* Consistent with its earlier opinion, the committee opined that lawyers should use care not to destroy or discard documents such as "legal pleadings, transactional documents and substantive correspondence" while documents such as "draft memoranda or internal e-mails that do not address substantive issues" may be deleted. *Id.* We recommend reviewing both of these opinions when evaluating your document retention policies.

The decision of the N.Y. Court of Appeals in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 91 N.Y.2d 30 (1997) also has provided guidance in addressing the issue of what categories of documents a firm must turn over to the client once its representation of that client has concluded. In that dispute, after a client obtained new counsel for a large and complex transactional matter, the client sought the entire file from its prior firm, including "internal legal memoranda, drafts of instruments, markups, notes on contracts . . . [and] firm correspondence with third parties." *Id.* at 33. The former counsel objected, arguing that those documents were unnecessary for the new counsel to advise the client on their continuing obligations from the transaction. *Id.* The Court held that "upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding," the client is "presumptively afford[ed] . . . full access" to the attorney's file on the matter. *Id.* at 34. The Court, however, specifically excluded two categories of documents from this requirement, including "documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law" and "documents intended for internal law office review and use." *Id.* at 37. The Court noted that, for example, "tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation" would not need to be disclosed to the client by the former law firm. *Id.* at 37–38.

Consistent with this decision, the 2008 NYCBA formal opinion suggested that a client would not have a presumptive right to internal email communications between lawyers of the same firm that are "intended for internal law office review and use" and are "unlikely to be of any significant usefulness to the client or to a successor attorney." *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2008-1 (2008). While *Sage Realty* addressed what retained documents must be turned over to a client, the Court specifically stated that its decision was "not to be construed as altering any existing standard of professional responsibility or generally accepted practice concerning a lawyer's duty to retain and safeguard all or portions of a client's file once a matter is concluded." *Id.* at 38. Rather, the decision just addressed a client's access to documents that had already been retained. *Id.*

Other than the time requirements for retaining certain files identified above, the RPC does not set forth a time-period requirement for file retention. Local bar associations such as the Nassau County Bar Association have recommended that lawyers preserve files for a seven-year period regardless of whether the attorney is required to do so. *See* Bar Ass'n of Nassau County Comm. on Prof Ethics Op. 2006-02 (2006).

Due to the limited number of bright-line rules indicating what documents should be retained, the form in which they should be stored, and the duration of such retention after a representation has concluded, these types of issues are a matter of business judgment that the law firms must make based on the type of legal representation and the client's possible need for the files in the future. Put another way, while your firm may not have an ethical or legal *obligation* to retain documents, such as casual correspondence, internal emails or draft memoranda, your firm may decide as a matter of smart business practice to retain documents (both paper and electronic) concerning a client's representation for a certain extended period after the representation concluded as protection, for example, in the event of a future a malpractice claim (i.e., for three years after the representation ended). *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2008-1 (2008). In fact, prior to making decisions about the time period for your firm's document retention policy, we recommend that you review the retention requirements imposed by your malpractice insurance carrier as its policy requirements may be broader than what is required under the law or the RPC. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2010-1, n. 2 (2010). Alternatively, if a law firm determines in its judgment that files should be destroyed in a shorter time frame than the applicable statute of limitations for any malpractice claim, we recommend that you communicate your document retention policy to the client both at the time of the engagement and at the conclusion of the representation.

We believe that a law firm's document retention policy is a subject that should be addressed in your firm's engagement letter, particularly if your firm chooses to implement a shorter period of retention. According to the NYCBA Committee on Professional and Judicial Ethics, an engagement letter can provide for the destruction of documents at the conclusion of the engagement if they "would furnish no useful purpose in serving the client's present needs for legal advice" or they are "intended for internal law office review and use" as defined in *Sage Realty*. NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2010-1 (2010). "[D]ocuments with intrinsic value or those that directly affect property rights such as wills, deeds, or negotiable instruments" must be preserved unless the client specifically directs otherwise. *Id.* With respect to the remaining documents, which may be deemed useful to the client, if the lawyer obtains the *informed consent* of the client pursuant to RPC 1.0(j), an engagement letter may authorize the attorney to review a closed file and make a determination – at her sole discretion – as to whether the documents should be retained or returned to the client. *Id.* You are advised, however, to consider the client's level of sophistication when obtaining the informed consent. *Id.*

Lawyers are individuals so we should not expect all attorneys in a practice to have the identical methods for handling their email volume. Just like a "clean" desk, some attorneys prefer to keep a "clean" inbox whereby they delete all email once it is read so important email that still requires attention is not buried. Other attorneys prefer to retain all of their email so they can easily search their inbox for a particular subject. There are also attorneys who prefer to create specific matter folders which are essentially desk top file cabinets for each case. Finally, there are those stalwarts who prefer to print important emails for the firm's physical file.

In NYCBA Committee on Professional and Judicial Ethics Opinion 2008-1 (2008), it was noted that while no particular method of electronic organization is required, the organization of emails by files devoted to specific representation was commendable. Even if you are unable to convince all of the attorneys in your firm to commit to such a system, it is advisable to ensure that their email habits do not result in the loss of documents that a client may need later on and reasonably expects the lawyer to preserve. *Id.* It is especially advisable to consult with your IT department to determine if your email system includes an automatic delete function, make sure that your entire firm is aware of that function, and have a protocol for how attorneys should preserve email that should be saved. *See id.* Hopefully, the partner in your firm who routinely deletes *all* emails at least prints out or copies the client on the correspondence that could be deemed useful to the client. If the partner is not making copies, you may suggest that the email retention policy be reconsidered firm-wide or if that attorney is simply not adher-

ing to a policy already in place speak to the offending attorney about how his actions are opening himself and the firm to potential claims of malpractice.

With respect to your question about the wisdom of the destruction of an entire transactional file 30 days after that deal closed, a similar issue was addressed in Bar Association of Erie County Committee on Professional Ethics Opinion 10-06 (2010). In that opinion, the committee addressed an inquiry where, after the settlement of a personal injury claim, an attorney was interested in sending a notice to clients regarding the firm's file. The notice would indicate that if the client did not pick up the materials in connection with the case, or provide instructions regarding the disposition of those materials – within 30 days – the materials would be destroyed. *Id.* The committee opined that this notice would not conform to established ethical responsibilities because:

> (1) it does not take into account the requirements in the Rules of Professional Conduct or other rules governing the particular types of records described therein, (2) it does not require the client's informed consent before the destruction of other types of records, and (3) it contemplates the unilateral destruction of the entire file by the lawyer after a waiting period far shorter than the periods recommended in the ethics opinions that have addressed this subject.

*Id.* Your partner's situation is distinguishable from the Erie inquiry in that there was an engagement letter that provided for the destruction upon the conclusion of the engagement and there was no notice of the destruction after the matter concluded. To the extent that the destroyed file contained any of the documents that your firm was *required* to retain or return to the client under the RPC or local rules, such as the client's property, we are of the opinion that the destruction of the file was improper and you may have some exposure to a malpractice claim. With respect to the remaining documents in the file, destruction without further notice to the client would only have been permissible if you had obtained the *informed consent* of your client – preferably in writing – through the engagement letter. *Id.* As informed consent will depend on the sophistication of the party giving it, we would need more information on the details about the client and the specific directions in the engagement letter. In the future, however, we would recommend implementing a policy whereby you obtain informed consent of your destruction policy at the commencement of your representation and, subsequently before destroying any deal files, you send an email or letter to the client notifying him or her that the firm has a 30-day retention policy as indicated in the engagement letter and unless you hear from the client before a certain date, the firm will proceed to destroy those files in accordance with the firm's policy.

A dearth of clear rules for attorney file retention means that attorneys have an obligation to review files at the conclusion of a matter and use their good judgment to determine what files may be discarded in each case. In addition to potentially violating ethical rules and performing a disservice to your client, hasty file destruction also can lead to an inability to protect your own firm's interests down the road in the event you need to defend yourself against a malpractice claim. We know that keeping files can be expensive but there are many lawyers who believe that they will get repeat business if the clients have to come back for their files. Everything should be kept in balance. We recommend including your retention policies in the engagement letter at the start of your representation with a client, obtaining informed consent from the client as to your firm's file storage policies at the outset, creating policies that require attorneys in your firm to retain emails that may be deemed important to your clients, reviewing the contents of each file before it is destroyed, giving the client notice of the firm's intention to destroy certain files, and providing the client with a reasonable opportunity to obtain those files.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq.
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## QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am a partner in a mid-size firm but have decided to set out on my own. Although I am going solo, I expect to continue working on some cases with my current firm. I intend to handle all aspects of my new practice – at least at the outset – including bookkeeping and accounting. In addition to working with my soon-to-be former firm, I also plan to work with some other firms, including some out-of-state firms, where they plan to refer work to me in return for a fee-splitting arrangement. We both will be providing services to the client on those matters. I want to avoid any ethical improprieties and I am concerned that the fee-splitting issues could be complicated.

Are there any issues with engaging in a fee-splitting arrangement with these firms? What rules should I be aware of? Can I put the split fees into a general practice bank account? Are there any types of law practices or attorneys that I am prohibited from entering into a fee-splitting arrangement with?

Any advice on how to handle split fees would be appreciated.

Sincerely,
Gon Solo

bar-association and community projects.

Here are 15 suggestions to guide lawyers in winning with integrity and professionalism.

### 1. Be Civil

Lawyers who are civil comply with the profession's accepted practices. Civility means being polite. Lawyers don't need to forgo civility to be dogged, persistent advocates for a cause. Good lawyers don't whine or engage in histrionics and hissy fits. On the contrary, lawyers who aggressively defend their clients' best interests while being well-mannered and charming are likely to win points with the judge, not lose them. Lawyers who conduct themselves civilly aren't rude. They don't engage in reprisals. They treat people like busy professionals. They respond only when necessary, and never in kind. Professionals never use vulgar or belittling language. Courtroom antics impress and influence no one; they distract. Ill feelings between clients, particularly during litigation, shouldn't affect lawyers in their conduct toward opposing counsel. Civility requires lawyers not to obstruct. Civility requires lawyers not to attack judges or opposing counsel personally or to make false accusations about honesty, integrity, or industry. Civility requires lawyers not to disparage their own clients — as if doing so will score points with the judge.

### 2. Be Honest

Honesty isn't only the best policy; it's the only way to win. Lawyers who cite reversed or overruled principles will lose the court's respect. Plagiarizing — even lengthy boilerplate — is another way to be discredited. Lawyers should always cite the sources they use and use what they cite. They mustn't pass off a dissent or a concurrence for a holding. The best lawyers don't cheat the system or cut corners. Lawyers shouldn't falsely hold out the possibility of settlement to adjourn discovery or delay trial. They're prohibited from helping a client engage in unlawful or fraudulent conduct. Lawyers should never try to hide. They win by stating the facts accurately and then by having good explanations and evidence to prove their conclusions.

### 3. Be Fair

Know the rules: Respect them, and play by them. A game can be won only if the winner plays by the rules. The practice of law is no different. Lawyers must use tactics consistent with these rules. Professionals know how best to represent their client within these boundaries of conduct. They respect precedent and follow court rules. They don't cheat, exaggerate, fudge, or overstate — with writing style or with fact or law. They serve documents fairly; they don't take advantage of the opposing counsel's absence from their office or serve purposely to inconvenience their adversary. Nor should lawyers submit papers to the court without timely giving copies to opposing counsel. Professionals know that if they act fairly, opposing counsel and judges are likely to respond the same way. Most courts have rules on how legal documents should be drafted and what they must include. Narrowing the margins or changing the font of the brief is a cheap and obvious way to meet the page limit or word count. Professionals comply with technical rules, but they don't complain when opposing counsel violates some hyper-technical rule that a court has the discretion to ignore and will ignore.

> Being clear and concise in writing and orally enhances the odds of getting the message across.

### 4. Be Courteous

Treat others as you would like to be treated. Professionals are considerate when interacting with their client, opposing counsel, and court staff. Courtesy means not cross-talking in court. Good lawyers address only the court, and they let others finish speaking before they start speaking. Courtesy includes returning phone calls promptly, answering correspondence and emails quickly, cooperating with opposing counsel on calendar conflicts, and notifying colleagues of changes. The first request for an extension of time to respond to a pleading should ordinarily be granted as a matter of courtesy. By agreeing to an adjournment, lawyers know it'll benefit them when they themselves ask for an adjournment. Courtesies affect how a lawyer is perceived.

### 5. Be Respectful

Respect and you shall be respected. The best lawyers don't demand respect. They earn it by continuously showing consideration for their colleagues and clients. They're never rude. Engaging in irrelevant or ill-founded conduct exemplifies a lack of respect. Lawyers shouldn't tell judges that their disingenuous adversaries egregiously mischaracterized the evidence. Instead of offering negative opinions, they should offer the grounds for their conclusions. Nor do good lawyers gossip about their colleagues' personal and professional lives.

### 6. Be Credible

Credibility is hard to earn but easy to lose. To be considered credible, a lawyer must be worthy of confidence. The best lawyers never wing it; they're prepared. To avoid under-preparation, the best lawyers do their homework and organize. Poor research wastes the court's time and harms the client. Failing to find controlling or persuasive cases and statutes roughly on point reflects poorly on the lawyer's skill as an advocate and jeopardizes the client's claims. In addition to the ethical requirements that lawyers cite adverse binding caselaw precedent and statutory authority, citing adverse authority demonstrates that the lawyer is reasonable and honest. It also

offers an opportunity to explain why the authority isn't binding or why the judge should overrule it. A thorough review of the record, accompanied by accurate and precise references to the record, adds credibility to the client's claims. It shows that thought went into the lawyer's work. Going outside the record is risky; doubt will fall upon the lawyer who gets caught. Professionals present the other side's argument neutrally and then contradict it. Using this technique suggests that the lawyer is honest, but really it sets up a straw man for the lawyer to contradict the other side's claims. Being candid with the court about facts adverse to the client's position also gives credibility to the lawyer's arguments. Making unverified statements might come easily, and often they go unchallenged, but bluffs when called lead to a loss of credibility.

### 7. Be Consistent

Consistency is key. Being consistent means always acting with integrity, not only when helpful. Consistency demonstrates that lawyers are genuine and not deceitful. Consistent lawyers are interested in improving their skills. As time permits, they take continuing legal education courses. Lawyers' reputations are linked to the consistency of their actions. It takes one negative to taint the positive. Judges are observers; they'll notice whether lawyers act professionally only when it helps them, and judges will be less likely to accommodate them.

### 8. Be Reasonable

The best lawyers use good judgment and common sense. Lawyers don't attach unfair or extraneous conditions to an opponent's request for an otherwise-legitimate and appropriate extension of time. They don't prolong arguments or make motions designed to harass. They avoid unnecessary motions or judicial intervention. They try to negotiate in good faith and reach an agreement with the other party when possible and when it's in their client's interest to do so. They allow time to resolve disputes or disagreements and impose meaningful deadlines in light of the nature and status of the case. Negotiating reasonably can lead to an agreement that satisfies both sides — an outcome that might elude the parties if the judge decides the matter. Professionals aren't pushovers; they stand their ground on large points but they know when to concede small points. Conceding when appropriate allows lawyers to concentrate their efforts on important arguments while appearing reasonable and fair.

### 9. Be Clear and Concise

Being clear and concise in writing and orally enhances the odds of getting the message across. Vague writing affects lawyers' effectiveness and credibility. The best lawyers limit the number of arguments to their strongest: the ones most likely to succeed. But they address their weakest, most vulnerable contentions. Doing so ensures that they're prepared to answer questions from the judge about those weak arguments and demonstrates their honesty. More important, this allows them to contradict the other side's arguments: They know where the opposing counsel's strong points lie. Professionals avoid distractions by keeping it simple. They limit adjectives. They avoid foreign or legalistic language. Written and oral persuasion are linked to clarity and concision. The best lawyers write clear, simple prose in plain English. They avoid confounding their readers with bureaucratic negatives ("this argument is not without support in the cases" rather than "the cases support this argument") and nominalizations ("it is a violation of" rather than "it violates"). They also avoid the double passive, which hides the actor entirely. (Think: "Mistakes were made" rather than "I made mistakes.") Professionals don't obscure the truth; they explain why their argument is the best. They don't write in a conclusory way but in a convincing manner offering details, not opinions. That way they bring their readers to the edge of the cliff without making their readers resist and push back. They don't vouch for their clients' credibility by using statements like "I believe," "I feel," or "I think"; they know that judges want to hear their arguments, not their beliefs. They don't assume that the reader agrees with their point; they make sure that their argument is stated clearly and is easy to understand. Ensuring that arguments are clear and concise diminishes the chances that the court will err.

### 10. Be Accurate and Precise

The best lawyers are specific. Accuracy is crucial to maintaining credibility. Lawyers should avoid biased modifiers. Lawyers must quote and cite accurately and use quotation marks when they quote. Lawyers must use ellipses to note omissions and put alterations in brackets. They should also use pinpoint (jump) citations. Doing so demonstrates not only their honesty but also helps judges find what they're referring to. They don't use snippets out of context. When using citations, they should limit themselves to the ones that add weight to an argument rather that those that add bulk and impress only non-lawyers. Legal writing requires precision in citation to support factual and legal propositions in the form of logical argument.

### 11. Understate; Never Overstate

Less is more. Overstatement is unethical while quiet understatement persuades. Lawyers who are excessive about factual statements make their audience skeptical of everything. To avoid this problem, lawyers should not use "obviously" or "certainly" and shouldn't emphasize by using bold, underlined, or italicized fonts and capitals. Nor should lawyers use qualifiers like "generally" or "usually" to avoid precision. By understating, lawyers naturally come upon the essence of powerful writing: They emphasize content, not style. While arguing to judges, lawyers should speak about passionate subjects without speaking passionately. Passionate performances might convince juries but not judges. This doesn't mean that professionals should be boring. To the contrary, they should vary their tone and body language to make their arguments compelling and interesting. But they should avoid being overly expressive and distract-

ing. Professionals are themselves; they don't act like anyone but themselves.

### 12. Be Punctual

Punctuality communicates more than timeliness and respect. It's an integrity issue. Lack of punctuality demonstrates a lack of focus and clarity. Professionals value time; they don't waste it. The best lawyers appear on time and honor the deadlines the court gives them. If delayed, they notify the court and counsel whenever possible and as soon as possible. Lawyers should also notify opposing counsel and the court or other persons at the earliest time when trials, hearings, depositions, meetings, or conferences must be cancelled or postponed. Lawyers should respect the scheduling commitments of opposing counsel, consistent with protecting their client's interests. Tardiness communicates that the scheduled event is unimportant demonstrates a lack of respect toward others. Being punctual benefits lawyers because judges will accept the non-default party's arguments. Moreover, professionals let court personnel break on time; they don't arrive right before lunch. They show that they're respectful, and court personnel will be more likely to cooperate with them.

### 13. Give Credit Where Credit Is Due

Being magnanimous and giving credit where due is a major part of being a professional. Lawyers must acknowledge colleagues for a job well done. That enhances collegiality among peers. Knowing when to give credit means understanding what needs to be done to win.

### 14. Presentation Is Key: Look the Part

The way you present yourself, whether in person, on the telephone, or in writing, is essential. An unkempt appearance distracts from the arguments and demonstrates that the lawyer doesn't consider the proceeding important. Presentation extends beyond dress. During a trial, lawyers must be prepared; they must have a theme and a plan. They should present their arguments to persuade judges, not their clients. Their clients will want them to throw in the kitchen sink. Presentation in writing is also essential. Judges won't decipher or search for arguments. To effect a professional presentation, good lawyers revise written documents numerous times, verifying their arguments, citations, grammar, quotations, and spelling.

### 15. Accountability

The best lawyers don't blame. Everyone loses cases. Good lawyers accept responsibility for their actions. That establishes honesty and humility. Accountability is an important duty toward clients. Lawyers must explain what happened in their case and why. Lawyers must return telephone calls and correspondence quickly. After a trial, professionals recognize where they erred and what they need to improve. Recognizing the areas needing perfecting demonstrates humility and taking work seriously. Accountability means not overpromising. When promising something to opposing counsel or judges, professionals will always fulfill their commitments.

The legal profession is an honorable profession. Courtesy and civility should be observed as a matter of course. Integrity and professionalism benefit judges, clients, opposing counsel, court personnel, and, most important, the public. Even more, integrity and professionalism accomplish the lawyers' objective: winning. ■

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BY GERALD LEBOVITS

# Winning Through Integrity and Professionalism

Winning isn't about being eloquent. The eloquent talk over the heads of busy and impatient judges and juries. Winning isn't about being logical. Logicians fail to connect with the hearts of decision makers, who seek wisdom, not geometry. Winning isn't about good looks or looking good. Many successful lawyers would come in last in a beauty contest. Winning is, rather, about projecting sincerity without vouching for a client's credibility or the merits of a client's case. Winning is about delivering on promises without overpromising. Winning is about zealous representation without being a zealot.

I learned about advocacy when I no longer wanted or needed to be an advocate. I learned about advocacy when I became a judge. I discovered that winning is about the messenger, not just the message and the media.

On my first day as a judge, a lawyer representing a landlord gave an unrepresented tenant a hard time in a simple nonpayment-of-rent case. The lawyer demeaned the tenant, spoke over the tenant, and ridiculed the tenant's defenses. The lawyer had the good argument on the facts and on the law, and the lawyer eventually won. But I wanted to rule for the tenant. I gave the tenant as much time as he needed to make the best argument he could. I was solicitous to a fault to the tenant and his narrative. The lawyer put me in a position in which ruling for his client meant ganging up on a helpless, hapless pro se. Instead of making it easy for me to rule for his client, the lawyer made it hard. The lawyer made me bend over backward to help his adversary.

Had the lawyer been civil and professional, I would've ruled for his client in a heartbeat — and felt good about it. By being uncivil and unprofessional, the lawyer made me feel rotten ruling for his client. By disrespecting the pro se, the lawyer disrespected the fair administration of justice — and me, personally.

What happened on my first day as judge occurs every day in every American courthouse. It occurs when lawyers are accusatory, emotional, and hostile. It occurs when lawyers pound on the table and not on the evidence. It occurs because some lawyers don't realize that civility and professionalism, not aggression and over-lawyering, win cases.

Being civil and professional doesn't mean being a cuddly lap dog or a rabid pit bull. Being civil and professional means being satisfied with the practice of law; earning money and respect in our chosen, honorable profession; and not dying young of ulcers and heart attacks. Being civil and professional means imparting trustworthiness and qualifications — or, said another way, winning through integrity.

Lawyers must master the art of persuasion. Persuasion requires professionalism and integrity, not merely good arguments. The Greek rhetoricians called it projecting ethos. Winning comes down to persuading the judge that your argument is more compelling than the other side's. "Compelling" signals inevitability: that your argument will prevail, either because it's correct on the law and equities or because an appellate court will reverse the judge who decided against you. Lawyers' presentations and how they conduct themselves are crucial in persuading judges to rule for their clients.

Integrity and professionalism aren't only about winning cases. They're also about winning in the long run. Being seen as professionals and gaining good reputations are essential to successful lawyering.

> Lawyers must master the art of persuasion.

Dealing with unprofessional lawyers is unpleasant. They're bullies who argue not about emotional facts but simply emotionally. Lawyers should know how to disagree without being disagreeable or allowing acrimony. The court and colleagues are more likely to listen and accommodate lawyers perceived as credible and well-mannered professionals. A lawyer who fights over small, irrelevant points will lose those points anyway, and the judge will recall in the next case the aggravation the lawyer caused. To win with integrity and professionalism, lawyers must be transparent. They mustn't mislead or use tricky arguments. They must cooperate with other lawyers, court personnel, and judges. They must require those under their supervision to behave the same way.

The way to win is to be taken seriously by opposing counsel, clients, and judges. Lawyers are taken seriously when, in addition to representing their clients professionally, vigorously, and with undivided loyalty, they also do pro bono work and are involved in

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