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by Hon. Gerald Lebovits

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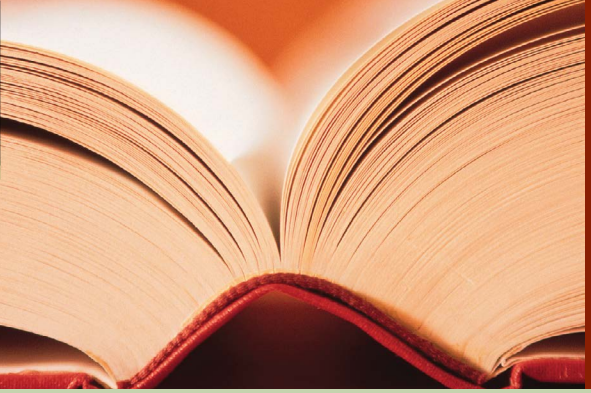

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EUGENE C. GERHART
(1912–2007)
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CONTENTS

JUNE 2017

JUDICIAL WELLNESS:
The Ups and Downs of Sitting New York Judges

BY HON. GERALD LEBOVITS

10

DEPARTMENTS

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

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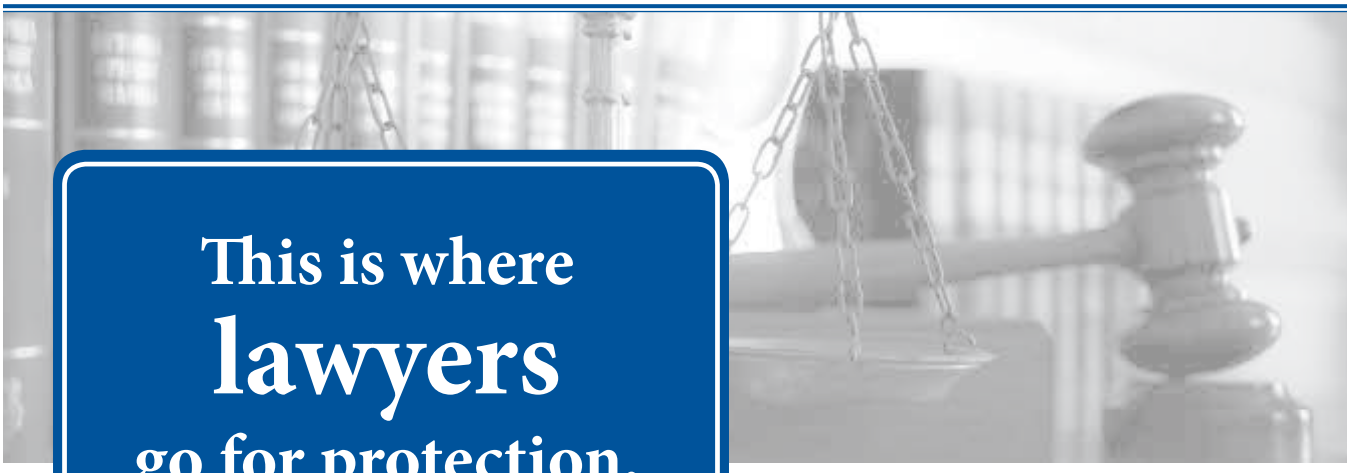

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SHARON STERN GERSTMAN

What Do John Legend, the Koch Brothers and NYSBA Have in Common?

John Legend, the singer/songwriter and winner of an Oscar, a Golden Globe and 10 Grammy awards, has been speaking out on prison reform. His multi-cultural campaign "Free America" means to educate the public on the frightening statistics regarding incarceration. Posted on his website, www.letsfreeamerica.com, are the following facts:

Nearly seven million people are now under correctional control (in prison, on parole or on probation). One in four adults (65 million people) has a criminal record. Over the last 40 years, the incarceration rate has increased 700 percent, even though crime rates have fallen.

In 2015, the Koch brothers announced an alliance with the Obama White House to work on criminal justice reform, with an eye toward reducing the prison population. While many are skeptical about their motivation, the Kochs have brought attention to the problem of mass incarceration and have made it "safe" for conservatives to embrace criminal justice reform. In 2016, there was bipartisan support for a number of criminal justice reform bills, including sentencing reform.

During the next year, NYSBA will host a number of initiatives on ways we can reduce the population in state and federal prisons. As of March 30, 2016, there were 77,227 adults incarcerated in New York correctional facilities.[1] The good news is that since 2007, the number of incarcerated adults has decreased from 95,005. The bad news is that there has been no decrease over the last three years. Furthermore, the demographics of those held by the State Department of Corrections reveal that the population is overwhelmingly African American or Hispanic. In 2013, it was reported that 49.6 percent of inmates were African American and 24.1 percent were Hispanic.[2]

One way to reduce the prison population is to ensure that children do not enter prison. One of NYSBA's legislative priorities of 2016–2017 was to raise the age of criminal responsibility from 16 to 18. We are very pleased that this was accomplished through the state's budget bill, passed in April 2017. However, much more needs to be done to break the cycle of criminality within juvenile populations. Too often, zero tolerance in our schools means that children deemed disruptive are arrested or are disciplined by being expelled or suspended, which keeps them out of school. Without education, the hope of leading a successful life is greatly diminished, and too often a life of crime is inevitable. Solving the "school to prison pipeline" requires concerted efforts by all of the stakeholders. We must find alternatives to traditional discipline while keeping our schools safe. I am so pleased that John Gross and Sheila Gaddis have agreed to co-chair a new task force that will bring together school districts, teachers, police, district attorneys, Family Court judges, student advocates, and others, to study current methods, review the law of school discipline, and formulate policies and best practices for schools to employ in the effort to reduce juvenile crime and criminality.

I have also asked the Criminal Justice Section, under the leadership of Tucker Stanclift, to address a number of issues that affect our prison population: bail, implicit bias in the exercise of DA discretion, recidivism and rehabilitation, and the privatization of federal prisons. I will be reaching out to our partners – the courts, the district attorneys, the Department of Corrections – about working on these issues together.

The cost of incarceration in New York is the highest in the United States. According to the *New York Times*, as of 2013, it was $60,000 per inmate, per year, outside of New York City, and $168,000 within the five boroughs.[3]

There is no shortage of good reasons to address these issues now. ■

1. Website of New York State Department of Corrections, www.scoc.ny.gov/pop.htm.

2. New York Corrections and Community Supervision Under Custody Report, www.doccs.ny.gov/Research/Reports/2013/UnderCustody_Report_2013.pdf.

3. www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html.

SHARON STERN GERSTMAN can be reached at ssterngerstman@nysba.org.

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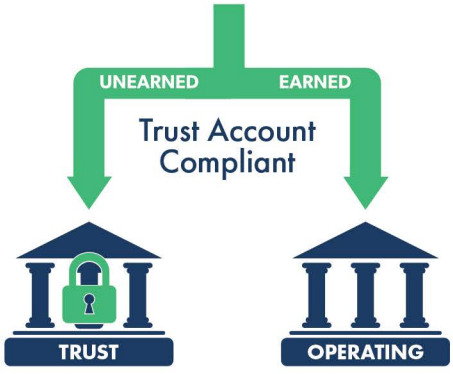

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(9:00 a.m. – 12:35 p.m.)
June 23 Ithaca
June 26 Rochester
June 27 Westchester

Legal Ethics in the Digital Age Fall 2017

(9:00 a.m. – 12:50 p.m.; live & webcast)
October 25 New York City

Bridging the Gap – Summer 2017

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Preparing For and Taking Depositions in a Personal Injury Case

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Judicial Wellness:

The Ups and Downs of Sitting New York Judges

By Hon. Gerald Lebovits

Gerald Lebovits, an acting Supreme Court justice in New York County, is president of the New York State Association of Acting Supreme Court Justices and was president of the New York City Civil Court Board of Judges and the Association of Housing Court Judges. For their research, he thanks Alexandra Standish, his principal court attorney, and Michael Curreri, his judicial fellow. For their thoughts on judging, he thanks David M. Godosky, Pery D. Krinsky, Michael S. Ross, Debra A. Scalise, Gerald Stern, Robert H. Tembeckjian, and Presiding Justice Karen K. Peters.

Judges are held to high standards of ethics and competence in their personal and professional lives, in which they must make hard decisions nearly every day. Litigants, lawyers, law students, the press, and other judges scrutinize their decisions. When judges are wrong, people condemn them. When judges are right, people celebrate them. Some judges are mythical and legendary. All are smart and dynamic. They're responsible, not only for the fate of litigants, but also for upholding the public good, due process, equal justice, and the federal and New York Constitutions. Being a judge is an honor and privilege beyond measure. Judicial service ranks among the highest-status jobs and the most fulfilling ways to serve our country. Judges possess accoutrements of power – court-

rooms, gavels, robes – and honorifics. Judging is indoor work with no heavy lifting.

Perhaps because it's all those things, judging is demanding. In their next lives, some judges might prefer to return as waiters. That way the customer will always be right. In this life, half a judge's customers are wrong, and the judge must look them in the eye and tell them so.

Judges must act like they know what they're doing. They must conform to an image of integrity and wisdom – the late Judge Joseph A. Wapner comes to mind – without breaking a sweat, complaining, seeking anything in return, or expecting (or wanting) a thank you. Nothing is easy about doing that day in and day out. Judging is stressful. Judges must cope with intellectual and emotional ups and downs.

Stress

Judicial responsibility comes with pressures. Struggles take a toll on judges. Judges aren't immune from anxiety, addictions, or mental illness. Stressors, or those things that cause stress, have impaired some of the most qualified, skilled, humane, and intelligent jurists. New York judges are subject to stressors specific to New York, such as budgetary deprivations that have acutely affected New York courts and presiding over enormous caseloads that always grow larger. Working as a judge in New York, a state fueled by stressors, is difficult for judges to sustain over a span of years. Judicial candidates are aware of these pressures before they take the bench. But the weight of judicial stress is impossible to appreciate until judicial service begins.

Lawyers often don't appreciate, or care about, the stresses judges face. Nor should they. Lawyers and the public are entitled to good, honest judges without worrying about how a judge's problems will affect them. The strain lawyers experience, including getting and keeping clients, are foreign to judges. But judges are subject to dynamics different from what lawyers experience. A lawyer's work is often collaborative, with clients and other lawyers. Trial judges are each stranded on their own islands. Judges must deal with heightened oversight: Their decisions are subject to appeal and to motions for leave to renew and reargue. Lawyers can complain to their clients, partners, and the judges who rule against them. To whom can judges talk about their problems? Too often the answer is no one.

Financial hardship has also caused stress. That stress is in the rear-view mirror, finally, thanks to the extraordinary efforts of so many, especially the New York State Office of Court Administration. But until recently, New York State judicial salaries failed to compensate judges adequately to assure that they'd spend their time working on their cases instead of fretting about their rent or mortgages.[8] For 13 years, until 2015, New York City Civil Court, Criminal Court, and Housing Court judges were the lowest-paid judges in America in terms of cost of living.[9] Upstate judge suffered, too. Low judicial salaries led to divorce, crippling loans, early retirement, reduced pensions, and "imped[ed] retaining qualified and experienced judges and attracting the best and brightest attorneys to the bench."[10]

To whom can judges talk about their problems? Too often the answer is no one.

Subordinates, colleagues, and lawyers rarely tell a judge about a problem the judge is having. If they did, most judges would be unwilling to unburden themselves for fear of looking weak and not in control or of being reported to the New York State Commission on Judicial Conduct (CJC), which is responsible for disciplining judges of the State's Unified Court System (but not support magistrates, court attorneys, referees, administrative law judges, or New York City Housing Court judges).[1]

The CJC's staff prosecutes judges for violating the New York Rules Governing Judicial Conduct (RGJC),[2] often called the Rules of Judicial Conduct. The CJC's commissioners adjudicate. The judge is the respondent. In 2016, eight judges were admonished, censured, or removed for violating the rules; four more retired or had expired terms while charges were pending.[3] The majority of disciplined judges are part-time town or village justices, who comprise about 60 percent of the approximately 3,150 New York State Unified Court System judges.[4] In 2015, for example, 12 of the 16 judges disciplined were town or village justices. Ten of those 12 were non-lawyer judges. About 61 percent of town and village justices are non-lawyers.[5] All other state judges are lawyers.

Judges can't confide deep, dark secrets to other judges, even judge-friends. There's competition among judges to get elected and promoted. And the RGJC might require a judge to report possible misconduct to a supervising or administrative judge or to the CJC.[6]

Many judges suffer from isolation.[7] The burden of judicial decision-making is heavy. Judges must make these decisions alone. Loneliness plagues judges who're isolated due to their position in society. After taking the bench, judges often lose contact with friends, family, and peers.

To be a judge is also to gamble with your life. One incentive of judicial service is a pension. Judges begin their judicial careers late and retire late. That makes judges, almost alone in public service, at risk of losing the Death Gamble.[11] Under New York's Retirement and Social Security Law, the beneficiaries of a judge who dies in office aren't entitled to the full pension benefits a retired judge would have received.[12] This often forces judges to retire prematurely and causes trauma for loved ones.

The words judges use to render decisions are another source of stress. Judges must walk a fine line between writing too much and too little. An increasing trend would hold judges accountable for opinion writing that amounts to "intemperate conduct in court."[13] Judges are legitimized by their words, and "their words deserve respect only when those who utter them are ethical."[14] Judges fear that after years of service they'll say or write something that in a microsecond might destroy otherwise stellar careers.

The high-stakes nature of exercising discretion to decide a case is taxing. All judges must decide the fate of litigants.[15] Except when they have some discretion, judges must render decisions, not according to their beliefs, but according to the law. Judges inevitably render decisions that contradict their values.

Because judges are subject to public opinion, they must behave cautiously on and off the bench. A judge's behavior, professionally and socially, is always under the microscope. They must avoid the appearance of impropriety.[16] Under the Code of Conduct for United States Judges and New York's RGJC, judges must always maintain an image of judicial propriety: Judges must make sure they don't "lend the prestige of judicial office to

advance their [personal] interests."[17] Outside the courtroom, judges must conduct their extra-judicial activities so as not to "cast reasonable doubt on the judge's capacity to act impartially as a judge [,] . . . detract from the dignity of judicial office[,] . . . or . . . interfere with the proper performance of judicial duties."[18] A momentary lapse in judgment, even in the form of "[j]okes and offhand remarks,"[19] can have catastrophic effects on a judge's career.

Although stress may lead some judges to say wrong things, judges often believe themselves forced to say nothing at all and just take it on the chin. Although judges are entitled judiciously and temperately to rebuke wayward litigants and lawyers, judges often decline to confront anyone in the courtroom. Whether out of concern of being scolded in the press, disciplined by the CJC, or condemned by bar associations, judges sometimes feel forced to allow others to get away with egregious behavior.

Women judges, especially, are no strangers to dealing with egregious behavior. They face "disrespect in the courtroom and professional settings."[20] Some lawyers and litigants reject women judges: "[E]fforts to remove female judges from a variety of cases [arise] simply because they are women."[21] This lack of acceptance isn't limited to attorneys and litigants. It extends to the judiciary itself – colleagues.[22] Federal and state judges are predominantly male.[23]

Women judges' isolation is greater than that of their male counterparts.[24] In a study of 500 U.S. judges, 73 percent of female judges reported incidents of compassion fatigue and symptoms of depression versus 54 percent of males.[25] Among new judges, women experience higher levels of stress than men; "women continue to have primary family responsibilities [and] they are more often conflicted with role conflicts."[26] Women judges must also consider family planning and maternity leave. They must deal with balancing their careers and families in ways male judges will never experience.[27] They must deal with the same stresses male judges do while facing gender bias and warding off gender-based attacks.

All judges experience feelings that they're under attack. Outside the courtroom, judges are subject to criticism, public assaults on their character, and threats. One popular way to confront judges is anonymously, on the internet. Blog posts, social-media networks, judge-rating websites, and media websites give the public a forum to talk and rant about judges. Information published online is often false. Judges are often portrayed in an unsavory and inaccurate way. Removing this information from the internet is nearly impossible. The right to have content removed, or taken down, is mainly reserved for copyright holders under the Digital Millennium Copyright Act.[28] The First Amendment strongly protects information posted on the internet, and search engines like Google refuse removal requests unless accompanied by a court order.[29] In an age when Googling someone is the first thing people do after meeting someone, having a negative web footprint is embarrassing, especially for judges, who are constantly being Googled.

Thanks largely to the internet, threats against judges are on the rise, as evidenced by many news reports detailing electronic threats sent to members of the judiciary.[30] Threats cause extreme distress for judges. According to U.S. District Judge and Chair of the Judicial Conference Committee on Judicial Security Nancy Atlas, "[t]he Internet and social media are having a profound impact on judges' personal security."[31]

Blog posts and social-media platforms have unified disgruntled litigants. This has led to a new age of "online mob threat."[32] Public figures like judges are subject to and expect threats because of the visibility of their roles. Judges give up anonymity when they take the bench. But with disgruntled litigants and critics joining forces like never before, the stress and effects it can have on members of the judiciary are higher than ever.

Aggrieved parties also use the court system to go after judges. The right to pro se representation is important, as is the courts' obligation to give the unrepresented access to justice. Too often, though, pro se litigants use courtrooms as "battlegrounds to satisfy private, legally unredressable vendettas."[33] Some file false and frivolous claims to harass judges. These claims include Uniform Commercial Code (UCC) liens against judges for alleged financial harm arising from court rulings. In 2014, the New York Legislature made this behavior punishable as a Class E felony under Penal Law § 175.35.

Sometimes pro se litigants won't simply appeal a judge's decision. They'll sue the judge. Pro se litigants don't always know how to handle unfavorable decisions. Some seek revenge. Fortunately, the State Attorney General's Office does a fine job defending judges sued by aggrieved litigants.[34]

Because judges must never respond to threats or disparaging accusations, judges suffer in silence. Not responding to public comments leads to internalized stress in which stress manifests in the form of physical conditions or illnesses that impair a judge's well-being. Bar associations and the Communications Office of the New York State Unified Court System are left to stand up for the judge's skills and character and for the judiciary's dignity when a judge is unfairly assailed in the press or by elected officials.[35]

Aggression against judges isn't reserved to litigants and lawyers. Our highest-ranking officials have called into question the judiciary's aptitude and neutrality. The President of the United States recently referred to a federal judge as a "so-called judge" and labeled one of his rulings ridiculous.[36] Nothing good can come of it when the nation's leader assaults the judiciary's independence, integrity, and competence.

Stress associated with reactions to judges' rulings doesn't end with criticism. Violence plagues judges

across the country. Acts of violence against judges have resulted in the murders of judges and their loved ones. With U.S. court-targeted violence on the rise, the fear for the safety of judges and their families is real.[37] Judges are "more visible, susceptible, and vulnerable than other public figures" because of their decisions.[38] It's simple for judges to collect enemies. Judges are twice as likely to be killed when an act of "courtroom violence" is committed against them.[39] Home security is given to all federal judges but not state judges.[40] Living in fear of confrontation in the courtroom and in one's home affects the judiciary's well-being.

> Justice suffers when a judge suffers physically or mentally.

Judges have an arduous time finding relief from these threats. The law doesn't protect judges from a threat unless it's a true threat. The Second Circuit has defined a true threat as "a statement that . . . a reasonable person hearing or reading the statement and familiar with its context would understand it as a serious expression of intent to inflict an injury."[41] This leaves New York State judges without recourse to avert non-violent threats made against them and which inconvenience their lives. Limiting the scope of threats in this manner provides a loophole for disgruntled litigants and other displeased parties to launch their mayhem. The courtroom is a public forum where New York litigants in distress engage in intimidation tactics like sitting in the front row of a courtroom staring down a judge when their case isn't on the calendar.

The issue of security is as vital for judges in New York's big cities as it is for judges in New York's towns and villages, where judges are likely to encounter disaffected litigants whose cases they decided. We are grateful in New York City to our court officers, whom we call New York's Smartest.

Many threats that would go unaddressed for state judges are addressed for federal judges. The United States Marshals Service, Judicial Security Division (JSD), provides federal judges with protection from threats.[42] Federal judges benefit from offices like the Office of Protective Intelligence and the Office of Protective Operations, which conduct threat assessments and provide protective responses.[43] The Department of Public Safety, headed by the Chief of Public Safety, oversees the management of judicial threats in New York State.[44] New York judges are given a Judicial Threats phone number, but in an emergency they should call 911.

New York State judges face challenges different from those of federal judges. New York judges don't have a fraction of the resources available to the federal judiciary. Many state courthouses are beautiful and well-equipped, but too many are less so. In so many respects, our state court system has been ravaged by years of miserly budgets – and crushing caseloads, slated for reduction under Chief Judge Janet DiFiore's Excellence Initiative[45] – that have affected New York State judges' ability to render timely justice. Also, New York State judges must struggle with the anxiety surrounding reelections and reappointments. Unlike federal judges, New York State judges don't have lifetime tenure.

Further specific to the stress of New York State judges is the open-door policy that allows anyone to complain about judges to supervising and administrative judges.[46] Lawyers and litigants are given a forum to submit letters of protest against judges. Dealing with these complaints puts supervising and administrative judges in an awkward position. These grievances can be one of three types: those made by psychopathic complainers, by parties angling to get a judge to rule for them, or as legitimate concerns about judicial efficiency and temperament. What are these supervisory judges to do when they receive these letters? Do they tell their judges? Do they investigate their colleague's conduct? What do they tell the letter-writers?

Some of the biggest recipients of complaints are Family Court judges and the Supreme Court's Matrimonial Part justices. These judges are subject to bitter accusations from aggrieved husbands, wives, mothers, and fathers.

Aside from worrying about the behavior of disgruntled parties, judges must forgo activities important to them, such as supporting or opposing political candidates.[47]

The visibility of judicial service exposes judges' lives to the public. No matter how judges conduct themselves, they can't hide much or for long. Judges must file a financial disclosure statement with the Ethics Commission for the Unified Court System.[48] The statement, made public, includes judges' income, debts, investments, and assets and that of their families.[49] This disclosure comes as no surprise to those aspiring to the bench, though. Judges must uphold high standards. Turning over information about their lives is also necessary before judges are elected or appointed. The public is entitled to know about candidates and not be surprised about their past. Transparency is expected and required.

The fear of a judge's issues being exposed acts as a roadblock for judges to correct and prevent them. When judges don't address their problems and instead internalize stress, they increase the risk of negative manifestations and ultimately harm the judiciary.[50] Justice suffers when a judge suffers physically or mentally.[51]

Manifestations

Accumulating stress and suppressing emotions have damaging effects on a judge's cognitive and decision-making skills, especially for the "many difficult decisions [that] must be made quickly."[52] Stress ineffectively maintained can manifest in a judge's body, mind, and actions.

Trial judges who report high levels of stress have exhibited effects like frequently arguing, feeling easily annoyed, and having temper outbursts, trouble concentrating, making decisions, recalling simple things, sleeping, and maintaining an appetite.[53]

Judges are human. They laugh, cry, get injured, and are diagnosed with illnesses that require treatment. Yet by virtue of their positions, their work must get done. They have cases to preside over, decisions to make, deadlines to meet. Staying on top of these obligations makes judges put their well-being on the back burner. In extreme situations, judges experience depression, breakdown, and even suicidal thoughts or actions. Sometimes judges use negative coping methods like gambling, drinking, and abusing drugs to deal with these problems.[54] Negative coping is manifested in judges' exhibiting "hostile behavior, frequent absences and inappropriate behavior and moods . . . that lead to violations of the code of judicial conduct."[55] Overworked and depressed judges can be slovenly in dress, unkempt in appearance, and regularly late to court and in their decision-making.

Depression is prevalent among lawyers. A recent study by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs reported significant levels of depression, anxiety, and stress among lawyers, "with 28%, 19%, and 23% experiencing mild or higher levels of depression, anxiety, and stress, respectively."[56] In a study of 104 professions, lawyers were found to have the highest rate of depression, "suffering at a rate four times the general population."[57] The level of depression in judges is doubtlessly high as well, given the judiciary's unique pressures and isolation. Judges might self-medicate with drugs and alcohol to mitigate the effects of depression.[58] These unhealthy habits can lead to dependencies and diseases that cause a decline in cognitive function and contribute to judicial impairment.

The effects of stress – disrupting sleep and appetite – cause weight gain.[59] In a 2012 study conducted by Harris Interactive for Careerbuilder.com, judges were found among the top four occupations most likely to report weight gain.[60] Issues with sleep, exercise, and diet combined with the sedentary lifestyle of working from the bench make judges gain weight.

Judges also suffer from compassion fatigue and burnout, not surprising given the sadness they see and the profound decisions they make. Families torn apart, catastrophic injuries, whether to send people to jail or order people treated over objection – those are a judge's bread and butter. Compassion fatigue is "a disorder that affects those who do their work well, specifically encompassing the burnout, and . . . trauma associated with those in the helping professions who encounter clients who have undergone trauma."[61] Burnout consists of "a pattern of emotional overload and subsequent emotional exhaustion."[62]

Compassion fatigue and burnout lead to "chronic health problems, poor job performance, substance abuse and other forms of self-medication, and impoverished relationships."[63] The symptoms of compassion fatigue "parallel those of posttraumatic stress disorder."[64] These symptoms are far-reaching.[65] In a study examining 105 judges representing a cross-section of U.S. urban and rural centers, 63 percent of judges reported experiencing one or more short- or long-term compassion-fatigue symptoms.[66]

One way stress might manifest itself in judges is bullying from the bench.[67] Good jurists can come across as angry. Stress can cause an occasional temper tantrum or rude behavior.[68] Bullying can be unintentional: A bad day might cause it.[69]

A form of bullying is benchslapping – public shaming in which a judge criticizes lawyers and litigants in a judicial opinion for real or imagined misbehavior. Benchslapping, which can't be appealed, might violate a judge's obligation to be courteous, dignified, patient, and respectful.

Some judges also suffer from "judge-itis," or "robe-itis": An imaginary illness that causes judges to believe they're all knowing, all powerful, and better than everyone else.[70] Often that's an unfair diagnosis: Judge-haters believe that every judge has judge-itis, that everyone who exercises judgment is judgmental, that judges lack empathy watching events in the little workshops they call their courtrooms. But it's true that once judges embark on their

judicial careers, lawyer-colleagues begin acting more formally. Friends, neighbors, even relatives "display heightened respect and deferential behavior."[71]

Judges who experience judge-itis become overly absorbed in their professional role, lose some of their former identity, and become unable to "relate as a peer to most people."[72] The power trip of judge-itis can build up a judicial façade of infallibility that can trickle into the courtroom and the judge's personal life. New judges are especially susceptible to judge-itis. Culture shock accompanies the first months after judges are appointed or elected. Their once-private life is now public. The learning curve's steep. It's intimidating.

Suggestions

Judges should integrate stress-management techniques and activities into their lives. Tackling milder stressors head-on can prevent long-term adversities like depression and substance abuse.[73] According to the lawyers thanked in the credits to this article, here are some strategies for judges to reduce stress, promote wellness, and stay away from the CJC.

Time Outside the Courtroom

Constantly focusing on others' lives makes judges ignore their own. Many judges dedicate insufficient time to their own feelings. A "chronic disregard of one's own feelings negatively affects social, cognitive and physical wellbeing."[74] Judges must address their physical and psychological wellbeing. Judges who suppress their emotions might engage in "a repressive coping style" like substance abuse, bullying, and other undesirable practices.[75]

Time spent outside the courtroom can make for a less stressful and more productive judicial career. When judges become overwhelmed or agitated, they should get up, go for a walk, and drink water. Judges should take short coffee breaks twice a day, eat a healthful lunch every day, and enjoy the generous vacations allotted to them. Judges must decompress and spend time with loved ones, family, and friends.

For new judges, their time is no longer entirely theirs. Much of it now belongs to the public. Family and friends must share their time with the judge, and the judge must find ways to include them.

Engaging in after-work, extracurricular activities can increase the brain's "plasticity and ultimately the quality of work while increasing our resilience to stressful material."[76] Physical activity, rest, relaxation, and social activity are among the most useful strategies to cope with bench-related stress.[77]

Socializing with other judges will reduce compassion fatigue, stress, and other judicial challenges. They should secure a support network of likeminded individuals who deal with similar issues. Judges should attend such events as judicial conferences, judge lunches, judge dinners, and bar association meetings. Especially important to attend are judicial-education programs offered by New York's Judicial Institute and our state's judicial associations. These programs satisfy the state's Mandatory Continuing Judicial Education (MCJE) requirements, the judicial equivalent of a lawyer's Continuing Legal Education (CLE) requirements.[78]

Outsiders can empathize with the weight judges carry, but they'll never fully appreciate it unless they take the bench themselves. Finding a judicial mentor can provide judges with insight into maintaining a healthy career. New judges who participate in a mentoring program show a statistically significant "reduction in the stress domains of role overload, role boundary, and psychological strain."[79] Experienced judges "can act as important confidants and help newer judges recognize and address their stress."[80] Older judges can pass down techniques that minimize stress.[81] Mentorships benefit not just mentored judges but their mentors as well.[82] These relationships give experienced judges an opportunity to give back to the judicial community and find satisfaction helping other judges.[83]

Community Involvement

Whether from judge-itis or because of the job's authoritative nature, judges too often feel isolated from the public. Community events foster a positive relationship between the judiciary and the public. Judges can participate in local school mock trials and law school moot competitions. Judges can teach, write, and volunteer.

Organize

Judges should create daily routines to make their lives easier. To decide cases efficiently, judges should invent shortcuts. Judges can avoid negative thoughts, anxiety, and depression when they deploy "effective control strategies . . . and [minimize] mental load."[84] Judges can lighten their workloads by delegating work to court staff. Court attorneys and law clerks will help judges research and draft opinions. So long as every word in an opinion is the judge's authentic expression, the collaborative effort of opinion writing allows judges to delegate work and still maintain control.[85]

Judges should address communications like email quickly to avoid a cluttered, unanswered inbox. When emailing, they should think twice before sending anything possibly harsh or injudicious.

Judges must learn to say no if they already have a lot on their plate.

Perfection, as we know, is the enemy of the good. Judges shouldn't overstress drafting perfect decisions. Efficiently and quickly deciding cases is a priority and a central metric to being a good judge. Don't use your decisions to teach forensic skills or to lecture on social issues. Just decide the case. And don't live in fear of getting reversed; reversals are healthy in a democracy, and judges can learn from them.[86] As long as an opinion

decides the motion or case, it needn't address every issue. Doing so seems defensive anyway.

But a judge who has made a decision should move on to the next case and not look back, wracked by what-ifs, should've said thats, guilt, and remorse.

Judges should accept their share of work. Judges greatly appreciate those colleagues who don't dump cases on them. Decide the simple things. Clear your workload by timely issuing decisions on less complicated matters. Decide motions from the bench without always issuing written opinions. Sometimes it's practical to forgo a written opinion.[87] Bench decisions often leave an insufficient explanation for the clerk's office, parties, the public, other lawyers and judges, and appellate courts. And forcing a judge to write assures a better decision, because writing is thinking at its hardest. But when appropriate, bench decisions save time and effort, and lawyers will appreciate a speedy resolution without the need to explain delays to their clients.

Judges must control lawyers. Allowing them to carry on more than necessary prevents judges from maximizing their schedules. The more lawyers talk, the less time judges have to address others in the courtroom. But don't prevent lawyers from making a record. Lawyers need to preserve their arguments for clients and for an appeal.

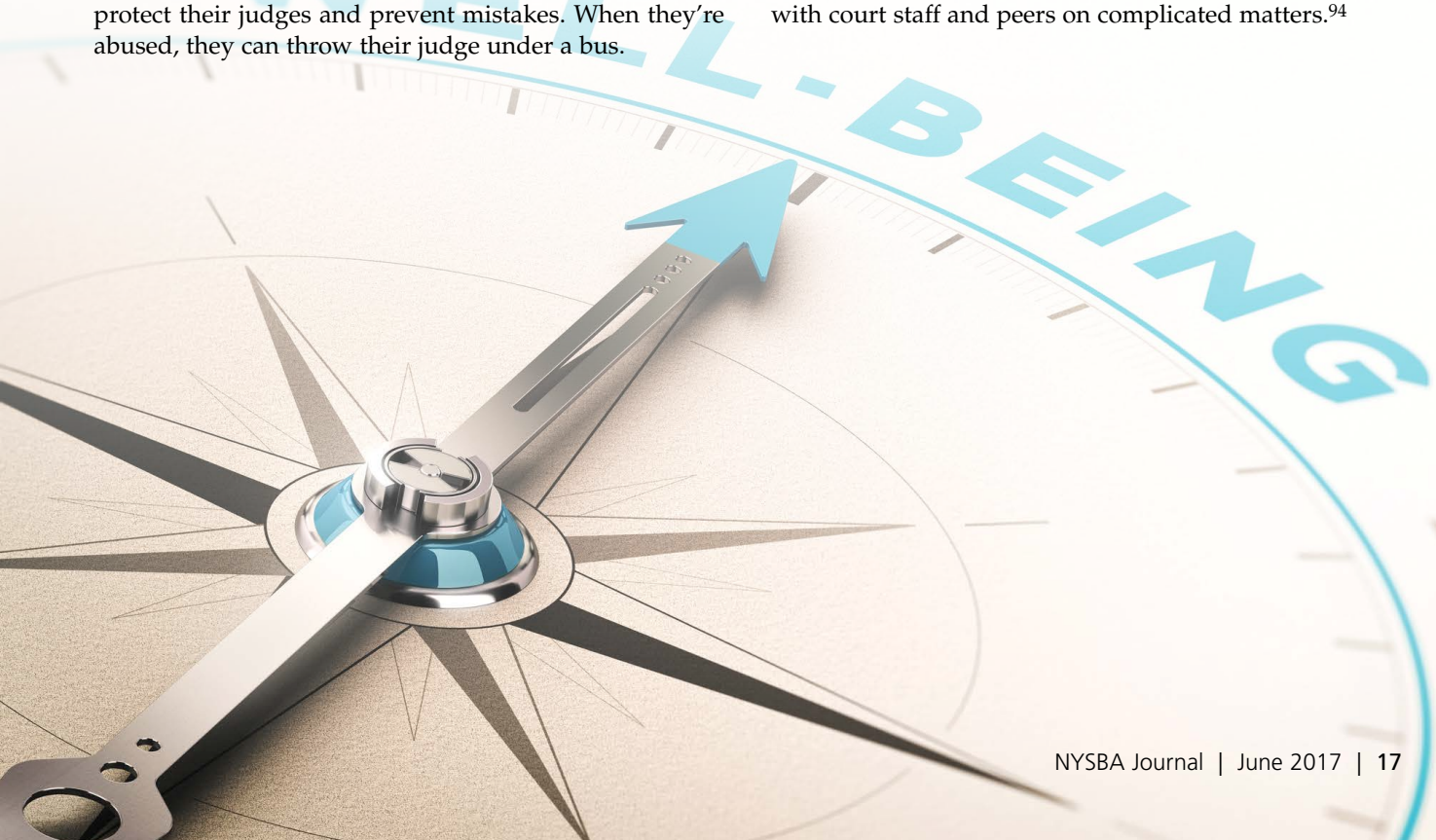
Judges must control their courtrooms. In addition to handling litigants, lawyers, and other parties, judges must manage court staff. The actions of court staff reflect on their judges.[88] Monitoring staff is important to make sure that they engage in respectful behavior and appearance. But treat them well as a team, even as family. Judges must have an open and respectful dialogue with court staff. Court officers, clerks, interpreters, and others can protect their judges and prevent mistakes. When they're abused, they can throw their judge under a bus.

Do Homework

Judges should study and adhere to ethics opinions issued by the Advisory Committee on Judicial Ethics, currently co-chaired by retired Second Department Justice George D. Marlow and Justice Margaret T. Walsh, an Albany County Family Court judge and acting Supreme Court justice.[89] Its opinions are easily accessible through the nycourts.gov website, where judges can search for specific issues. Judiciary Law Article 7-A provides that judges' actions taken in accordance with findings or recommendations from Advisory Committee opinions are presumed proper for the purpose of a CJC staff investigation.[90] Judges should also submit their own ethics questions to the Advisory Committee to clarify concerns.[91]

Adhering to the New York State Standards of Civility (NYSSC) will help judges. The NYSSC set forth "principles of civility and decorum" for judges, court personnel, and lawyers.[92] These guidelines are aspirational reminders for judges about how they should conduct themselves in court and with lawyers, parties, and witnesses. The NYSSC has seven recommendations specific to judges regarding demeanor, consideration of others, punctuality, promptness, and best efforts to ensure courtroom civility.[93]

Judges who know the law are less stressed than those who don't. It's understandable for judges to take extra time to learn new information when deciding a case. It's hard for judges to admit they don't know an area of law. The sooner they accept the need to brush up on or learn new material, the easier it'll be to decide the case and maybe figure out a way to help the litigants settle and thus bring justice to them. New judges, in particular, must do their homework, learn the material, and confer with court staff and peers on complicated matters.[94]



Avoid Controversy

Judges should avoid and rise above controversy. They must maintain courteous behavior at all times toward court staff, colleagues, litigants, and the general public. Judges should stay out of infighting between other judges and never pick fights with colleagues or supervising or administrative judges.

Opinion-writing should be all business. Avoid humor, puns, satire, embellishments, personal asides, and attacks.[95] Neither judging nor judges are funny.

Outside the courtroom, too, judges must conduct themselves as though the whole world is watching. Remember that you're a judge everywhere – from your chambers to an unfamiliar street.[98]

Don't discuss cases or decisions outside work. The repercussions can be catastrophic. You might want to share with people the important, exciting work you're doing, but doing so might violate the RGJC.[99]

The judicial image shouldn't be confused with robe-itis. Maintain a level head and avoid believing that people treat you differently "because you are especially brilliant or you are a special person."[100] Stay humble: Just because people call you Your Honor doesn't mean you shouldn't wash the dishes and discard the trash.

Don't use decisions to teach forensic skills or to lecture on social issues. Just decide the case.

Stay out of political drama. Avoid political activity unless it's for your own campaign for elected office.[96] Avoid debating religion and politics on or off the bench.

Judges may never use their status to secure preferential treatment in personal matters. Don't show your judicial identification to a police officer who has pulled you over or otherwise ever ask for special consideration.

One adjustment new judges undergo is dealing with their family and friends. They'll act differently; they'll expect undeliverable things from you. The RGJC's professional requirements offer guidance on how to behave with family and friends.[97]

Judges must be prepared to recuse themselves in accordance with the RGJC. They must be prepared to lose friends for not using judicial power for their benefit. They must be prepared to lose friends for many reasons. Or, worse, for no reason.

Uphold the Judicial Image

Judges are less on a pedestal than they are on display. People always stare at a judge on the bench. The higher judges ascend in their careers, the more exacting become the standards required of them. The appearance of judges, regardless of their skill, will dictate how the public perceives them. Keep inappropriate behavior off the bench.

Professionalism and civility come from the bench, which is seen as the face of the legal system. Don't scold or lecture people from the bench. To avoid saying the wrong words while on the bench, judges should speak one third slower and filter their thoughts. When things get stressful, take a deep yoga breath, in and out through the nose. Nasal breathing allows you to take a quick moment, catch your breath, and do so without opening your mouth for the whole courtroom to see and hear. Avoid eye contact with those in the courtroom who aren't speaking. Never go *mano a mano* with lawyers or litigants. Keep good posture on the bench. Don't eat or chew gum on the bench. Regardless what kind of day you're having, keep a serious but kind judge-like face about you.

Be Safe

Maintaining a low profile is important for judges concerned about their safety. Judges should refrain from revealing themselves unless there's a reason to do so. If someone cuts you off in traffic or picks a fight with you, don't reveal your status. Judges should forgo judicial privileges such as special judicial license plates, experts say. Though convenient, these symbols allow people to identify you as a judge.

Something I neither encourage nor discourage, but mention for information only, is that under New York Penal Law § 400.00(2)(d), certain New York judges are specially eligible to get a license to carry a concealed pistol.

Maintain a Healthy Regimen

Physical fitness, diet, and strong, supportive social networks outside work will keep mental health on track.[101] Studies have shown that "intervening psychosocial variables, such as hardiness, Type A and Type B personality styles, sense of humor, social support . . . and coping" help moderate stress.[102] Find healthy ways to cope with your stress.

Regular exercise increases a judge's ability to perform at optimal levels, think better, and build immunity to disease and illness.[103] Increasing overall health, exercise has a direct stress-busting benefit.[104] Exercise can be accomplished through competitive sports like basketball or more relaxing practices like yoga. Before beginning an exercise program, judges should take a fitness test, consult a physician, and get medical clearance.[105]

Judges with a history of physical activity are ideal candidates for high-intensity interval training (HIIT).[106] HIIT involves quick bursts of intense work periods that allow

for a full workout in 20 minutes.[107] HIIT isn't suitable for judges with a history of coronary disease, smoking, hypertension, diabetes, abnormal cholesterol levels, and obesity.[108] But all judges will benefit from a well-rounded physical activity program comprised of aerobic exercise and strength-training exercise of moderate intensity for 30 minutes, five days a week.[109] To stay engaged, alter your routine every few weeks. Enjoy your workout, not just for its stress-busting benefits, but also for the time it gives you to focus on yourself.

Exposure to stress can alter the metabolic and behavioral state of humans and have detrimental effects on diet and well-being.[110] A "true causal association [exists] between diet quality and depression."[111] As a result of heavy caseloads and the demanding nature of being a judge, judges tend to skip meals, overeat, or develop other unsavory dietary habits. These habits are an easily maintainable aspect of a judge's daily routine. Maintaining a healthy diet is crucial in controlling stress levels. Healthful eating can be a "preventi[ve] strategy" and provide a "therapeutic strategy for those with existing depression."[112]

Stress is better dealt with when people eat a variety of healthful foods.[113] Comfort food can "diminish the contribution of life stress to . . . stress-related disorders."[114] Eat at intervals during the day by having a snack containing sucrose, which assists stress relief.[115] Bring a stash of fruit, dark chocolate, and other sucrose-laden snacks to chambers.

Confront Issues

It's difficult for judges to hide impairments. Judges are visible in court and through their writing. Their decisions have an impact, and making the wrong decision will hurt people. Instead of avoiding subjects and making excuses, judges should acknowledge their symptoms.[116] Judges must have the strength, courage, and conviction to get help when they need it. Getting help is necessary to protect themselves and the public. To seek help, judges must accept that they're humans before they're judges.

Rely on Assistance Programs

Judges needn't handle bench stress on their own. Judges should seek outside assistance. New York is fortunate to have the Judges' Assistance Program (JAP) under the Lawyer Assistance Program (LAP) of the New York State Bar Association Judicial Wellness Committee. This committee, chaired by the Hon. Karen Peters, Presiding Justice, Appellate Division, Third Judicial Department, is made up of judges who assist judges with stress-related concerns.[117] The Committee formulates and recommends policies and procedures to help judges deal with prob-

Confidential Assistance for NY Judges

Hon. Karen K. Peters, Chair, NYSBA Judicial Wellness Committee

The Judicial Wellness Committee fosters a sense of community and care among the New York State Judiciary and provides confidential assistance to impaired judges. Recognizing that all judges are affected by the day-to-day stress of their responsibilities, the Committee works to foster mutual support among members and to promote the concept of judicial wellness through educational and outreach programs.

In furtherance of its purpose, the Committee, among other things, formulates and recommends policies and procedures to assist judges in dealing with treatable mental illnesses, such as addiction and depression. Through its programs and conferences, it assists judges in the identification of these impairments in themselves and others, and promotes rehabilitation in an environment of care and concern. All services are confidential and protected under § 857 of the Judiciary Law.

Judges who practice wellness are rewarded with a better quality of life, both professional and personal, and are better equipped to serve the public and achieve justice for those who appear in their courtrooms.

For confidential assistance, call **Susan M. Klemme**, Director, New York State Bar Association Lawyer Assistance Program, **1-800-255-0569**; **Paul Curtin**, Office of Court Administration Special Projects Coordinator, **315-278-0028**; or **Eileen Travis**, Director, New York City Bar Association Lawyers' Assistance Program, **212-302-5787**.

Hon. Karen K. Peters is the Presiding Justice of the Appellate Division, Third Department, and Chair of NYSBA's Judicial Wellness Committee. She previously served as counsel to the New York State Division of Alcoholism and Alcohol Abuse.

lems like alcoholism, gambling, drug abuse, stress, and depression.[118] Under Judiciary Law § 857, communications between judges and judicial assistance committees, with carefully tailored exceptions to protect the public interest, are confidential.[119] To access JAP, judges must contact a helpline. For more information, see Justice Peters's sidebar in this issue.

In addition to or instead of the New York-specific Committee helpline, judges may call the American Bar Association's national hotline for judges with mental-health and addiction problems.[120] This hotline is confidential and pairs judges with local resources and peer-support judges who've been through similar issues.

Assistance programs like JAP make it easier for judges and their families, staffs, and the public to come to terms with human imperfections. It's long gone unrecognized that judges "face the same challenges to their physical, mental and emotional health as do other members of society."[121] When not addressed, issues with physical, mental, and emotional health might result in judicial misconduct. Seeking confidential assistance helps judges avoid behavior that may lead to sanctions.

The Judicial Wellness Committee has the resources to help. According to Paul Curtin, an Office of Court Administration Special Projects Coordinator who works with the Judicial Wellness Committee, 13 judges in recovery from chemical dependence are available to travel throughout the state to assist judges with similar dependencies. The Judicial Wellness Committee also organizes 12-Step meetings.

Some want to end the confidentiality of Judicial Wellness Committee communications with judges. But the Committee is one of the few platforms judges have to get help. Take confidentiality away, and a judge needing help might have nowhere to turn.[122]

Complaints Against Judges

The CJC holds hearings in secret to protect judges from embarrassment.[123] The 11-member CJC and its staff would like to change the law regarding confidentiality of disciplinary proceedings and enact a public-proceedings law "to open the Commission's proceedings to the public."[124] Although the CJC might be better perceived if its work were more transparent, keeping proceedings confidential allows innocent judges to keep their reputations intact and prevents unfair allegations from tarnishing the judiciary as a whole.

Because of the nature of the job – in which judges are expected to portray an image of calm and control – judges are slow to seek help. Doing so signifies they're no longer calm or in control. Judges against whom complaints are filed should consult an affordable attorney right away. Judges are uniquely unqualified to address their own complaints against them. Judges should be honest with their attorneys. Just as judges are reluctant to tell others about their stresses, they'll often hide problems from their attorney.

When the CJC addresses a complaint, it might, in less serious cases of possible misconduct, consider judicial stresses as a mitigating factor. Apt stressors include having an ill child, spouse, or parent. The Commission may consider stress when it determines whether to go forward with a complaint or when it decides what type of sanction to impose on a judge. Judges too embarrassed to admit things to their lawyers and the Commission will be unable to avail themselves of all possible defenses.

Stresses may offer more than mitigation. Judges should raise all defenses they have. A judge who engages in introspection, contrition, and meaningful steps like therapy and treatment to prevent complained-of incidents might see a Commission that decides not to go forward with charges. As a former CJC commissioner recently explained, "[j]udges who can project a serious commitment to duty, a capacity not to re-offend and who admit their errors and apologize may be treated leniently and even, in a close case, avoid removal."[125]

That said, the goal of judicial discipline is not to punish judges but to protect the public.[126] The Court of Appeals in *In re Restaino* articulated a standard of behavior higher for judges than for non-judges.[127] The Court also found that stressors offer no defense to judges in serious instances of misconduct and that the gravity of proven wrongdoing is "[o]f ultimate importance" in calculating fitness.[128]

Conclusion

Judicial service isn't for the faint of heart. But for those with the stomach for it, the virtues of judicial service vastly exceed and easily justify the sacrifice necessary to be a good judge these days. Judicial service is like joining hands with our maker to bring justice for victims and peace to our neighbors. Judges have but three masters: the public, the law, and their conscience. If you must have three masters, those seem like pretty good ones.

A judicial career is privileged; it should bring joy to judges. Judges whose stresses threaten to stop them from that enjoyment should get help from the New York State Bar Association. Its wellness program can avert judicial misconduct and sanctions – and also be a life – and career-saver.

And let's hope that our Judicial Branch, our Legislative Branch, and our Executive Branch will always work together to ensure that our judges – those tasked in New York with assuring the independent and true administration of justice – have the tools to administer that justice for the public they serve. ■

1. N.Y. St. Comm'n on Jud. Conduct, *The Commission's Authority and Jurisdiction*, www.scjc.state.ny.us/Publications/Brochure.pdf (last visited May 15, 2017).

2. 22 N.Y.C.R.R. 100.0.

3. N.Y. St. Comm'n on Jud. Conduct, *Annual Report 2017*, at 8, www.scjc.state.ny.us/Publications/AnnualReports/nyscjc.2017annualreport.pdf (last visited May 15, 2017).

4. N.Y. St. Comm'n on Jud. Conduct, *Annual Report 2016*, 8, www.scjc.state.ny.us/Publications/AnnualReports/nyscjc.2016annualreport.pdf (last visited May 15, 2017).

5. *Id.*

6. 22 N.Y.C.R.R. 100.3(D)(1) ("A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action.").

7. Isaiah M. Zimmerman, *Isolation in the Judicial Career*, 36 Ct. Rev. 4, 4 (2000).

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Brick and Mortar Rules!

Introduction

We've heard a lot in the news, for many years, about the demise of brick-and-mortar stores due to the rise of e-commerce, and main streets and malls throughout the country are replete with shuttered stores that were formerly the linchpins of their communities.

However, brick-and-mortar offices are alive and well for lawyers admitted to practice in New York who do not reside in the state. For this group of lawyers, a physical office in New York is required to avoid running afoul of Judiciary Law § 470 (Jud. Law).

Jud. Law § 470 provides:

> § 470. Attorneys having offices in this state may reside in adjoining state
>
> A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state.

On April 17, 2017, an eight-year legal saga came to an end when the U. S. Supreme Court denied *certiorari* in *Schoenefeld v. Schneiderman*.[1] Along the way, the case, which was filed in the Southern District of New York, made its way to the Northern District of New York, to the Second Circuit, to the N.Y. Court of Appeals, and back to the Second Circuit where, on April 22, 2016,[2] that court upheld Jud. Law § 470's requirement that non-resident attorneys maintain a physical office for the practice of law in New York, thereby providing a means "for them to establish a physical presence in the state on a par with that of resident attorneys."

Schoenefeld at the Trial Level

Southern District Judge Buchwald set forth the pertinent facts in her order transferring venue of the action to the Northern District of New York:[3]

> Plaintiff is an attorney admitted to practice law in New York, New Jersey and California. (Citation omitted) She resides in Princeton, New Jersey and has her office in Lawrenceville, New Jersey, where she works as a solo practitioner. (Citation omitted) The thirty-six named defendants in this case include twenty-one members of the Committee on Professional Standards, Third Department, eleven justices of the Appellate Division, Third Department, the clerk of the Appellate Division, Third Department, the Attorney General of the State of New York, the New York Supreme Court Appellate Division, Third Department, and the State of New York. (Citation omitted) The individual defendants, all sued in their official capacities, reside in Albany. (Citation and footnote omitted).
>
> Plaintiff alleges that during a continuing legal education class she attended on June 5, 2007, she "learned for the first time that, according to § 470 of the New York Judiciary Law which is applicable to non-resident New York attorneys only, she may not practice law in the State of New York unless she maintains an office located in the State." (Citation and footnote omitted) This statutory provision has not been enforced against plaintiff nor has any party threatened to enforce the law against her. Plaintiff, however, concerned about potential disciplinary action, has declined one or more cases that would have required her to practice in the state courts of New York, including in New York City. (Citation omitted).[4]

Following the transfer to the Northern District of New York, Judge Kahn denied defendants' motion to dismiss Schoenefeld's Privileges and Immunities Clause claim:

> Section 470 does not serve to facilitate a full-time practice requirement applicable only to attorneys admitted on motion. Nor is it a local rule adopted by a particular court. Rather, it is a state rule that applies to all nonresident attorneys, even those who have shown their commitment to service and New York law through attending CLE courses and passing the state bar exam. Plaintiff has alleged sufficient facts, which, if accepted as true, indicate

> that she has a protected interest in practicing law in New York. The state has offered no substantial reason for § 470's differential treatment of resident and nonresident attorneys nor any substantial relationship between that differential treatment and State objectives. Given this failure, and because case law does not necessitate dismissal of Plaintiff's claims as a matter of law, the Court denies Defendants' Motion to dismiss Plaintiff's claim that § 470 violates the Privileges and Immunities Clause.[5]

Thereafter, Judge Kahn granted Schoenefeld's motion for summary judgment:

> In deciding whether a statute bears a close or substantial relationship to a substantial state interest, a court must consider the availability of less restrictive means to pursue the state interest in order to minimize the burden on the affected party. (Citation omitted). Even assuming that § 470 advances a substantial state interest, Defendants argue that it employs the least restrictive means available to do so because there are a number of different ways for nonresidents to satisfy the office requirement. Defendants primarily rely on Austria, which held that a nonresident attorney paying rent for a desk in, and maintaining an "of counsel" relationship with, an office in New York satisfied the office requirement. (Citation omitted).
>
> This argument is unavailing. The Court of Appeals held in Matter of Gordon that although a state has a legitimate interest in regulating the attorneys who practice law in their courts, there are less restrictive means of furthering that interest than denial of admission to the bar. (Citation omitted). Matter of Gordon suggested, for example, that one such method would be to enact "legislation requiring nonresident attorneys to appoint an agent for the service of process within the State." (Citations and parenthetical omitted). It well-established that New York allows licensed corporations to appoint an agent for service of process in-state if the corporation maintains its principal place of business out-of-state or abroad. (Citation omitted). Mandating that out-of-state attorneys have an appointed agent for service of process in New York is a simple and less restrictive means of ensuring that a nonresident attorney will be subject to personal jurisdiction instate and to contact by the court, clients, and opposing parties.
>
> Similarly, the Supreme Court in Piper suggested that state courts may require a nonresident lawyer who resides at a great distance from a particular state to retain a local attorney for the duration of proceedings and to be available for any meetings on short notice. (Citations omitted). Such a requirement would be less restrictive than the current requirements imposed by § 470 for two reasons: first, it would affect only out-of-state attorneys who reside a great distance from New York; and second, it would only require those attorneys to make arrangements for the limited duration of a proceeding. The Supreme Court also held in Frazier that the problem of attorney unavailability to court proceedings may be significantly alleviated with the use of "modern communication systems, including conference telephone arrangements." (Citations and parentheticals omitted). All of the above present less restrictive means of ensuring attorney availability than does § 470's burdensome requirement that all nonresident attorneys maintain offices or full-time of-counsel relationships in New York. (Citation omitted). Because Defendants have failed to establish either a substantial state interest advanced by § 470, or a substantial relationship between the statute and that interest, the Court concludes as a matter of law that it infringes on nonresident attorneys' right to practice law in violation of the Privileges and Immunities Clause.[6]

Schoenefeld on Appeal

On appeal to the Second Circuit, that court certified the central question in the case to the N.Y. Court of Appeals:

> Because it is "our preference that states determine the meaning of their own laws in the first instance," (citation omitted), we respectfully certify the following question to the New York Court of Appeals:
>
> > Under New York Judiciary Law § 470, which mandates that a nonresident attorney maintain an "office for the transaction of law business" within the state of New York, what are the minimum requirements necessary to satisfy that mandate?
>
> The New York Court of Appeals may, of course, expand, alter, or reformulate this question as it deems appropriate. (Citation omitted).

The N.Y. Court of Appeals explained the origin, evolution, and 21st century rationale for Jud. Law § 470:

> It is well settled that, where the language of a statute is clear, it should be construed according to its plain terms (citation omitted). We have also held that "no rule of construction gives the court discretion to declare the intent of the law when the words are unequivocal" (citation omitted).
>
> Here, the statute appears to presuppose a residency requirement for the practice of law in New York State. It then makes an exception, by allowing nonresident attorneys to practice law if they keep an "office for the transaction of law business" in this State. By its plain terms, then, the statute requires nonresident attorneys practicing in New York to maintain a physical law office here.
>
> However, recognizing that there may be a constitutional flaw if the statute is interpreted as written, defendants urge us to construe the statute narrowly in accordance with the doctrine of constitutional avoidance (citation and parenthetical omitted). In particular, they suggest that the provision can be read merely

to require nonresident attorneys to have some type of physical presence for the receipt of service – either an address or the appointment of an agent within the State. They maintain that interpreting the statute in this way would generally fulfill the legislative purpose and would ultimately withstand constitutional scrutiny.

The statute itself is silent regarding the issue of service. When the statute was initially enacted in 1862, however, it did contain a service provision. At that time, it essentially required that an attorney who maintained an office in New York, but lived in an adjoining state, could practice in this State's courts and that service, which could ordinarily be made upon a New York attorney at his residence, could be made upon the nonresident attorney through mail addressed to his office (citation omitted). Upon the enactment of the Code of Civil Procedure in 1877, the provision was codified at § 60. In 1909, the provision was divided into two parts – a service provision, which remained at § 60 of the Code, and a law office requirement, which became § 470 of the Judiciary Law. Notably, after we invalidated a New York residency requirement for attorneys in *Matter of Gordon* (citation omitted) the legislature amended several provisions of the Judiciary Law and the CPLR to conform to that holding (citation omitted). Section 470, however, was not one of the provisions amended and has remained virtually unchanged since 1909.

Even assuming the service requirement had not been expressly severed from the statute, it would be difficult to interpret the office requirement as defendants suggest. As the Second Circuit pointed out, even if one wanted to interpret the term "office" loosely to mean someplace that an attorney can receive service, the additional phrase "for the transaction of law business" makes this interpretation much less plausible. Indeed, the Appellate Division departments have generally interpreted the statute as requiring a nonresident attorney to maintain a physical office space (citations omitted). Defendants' proffered interpretation, on the other hand, finds no support in the wording of the provision and would require us to take the impermissible step of rewriting the statute (citation omitted).

The State does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here. However, it is clear that service on an out-of-state individual presented many more logistical difficulties in 1862, when the provision was originally enacted. The CPLR currently authorizes several means of service upon a nonresident attorney, including mail, overnight delivery, fax and (where permitted) email (citation omitted). Under our own Court rules, the admission of attorneys who neither reside nor have full-time employment in the State is conditioned upon designating the clerk of the Appellate Division in their department of admission as their agent for the service of process for actions or proceedings brought against them relating to legal services offered or rendered (citation omitted). Therefore, there would appear to be adequate measures in place relating to service upon nonresident attorneys and, of course, the legislature always remains free to take any additional action deemed necessary.

Accordingly, the certified question should be answered in accordance with this opinion.[7]

The last stop for this case was back at the Second Circuit:

> Having now received the New York Court of Appeals' response to our certified question as to the "minimum requirements necessary to satisfy" § 470's office mandate, (citations and parenthetical omitted) we conclude that § 470 does not violate the Privileges and Immunities Clause because it was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law. To the contrary, the statute was enacted to ensure that nonresident members of the New York bar could practice in the state by providing a means, i.e., a New York office, for them to establish a physical presence in the state on a par with that of resident attorneys, thereby eliminating a service-of-process concern. We identify no protectionist intent in that action. Indeed, it is Schoenefeld who, in seeking to practice law in New York without a physical presence in the state, is looking to be treated differently from, not the same as, New York resident attorneys. Such differential treatment is not required by the Privileges and Immunities Clause.
>
> * * *
>
> Indeed, the effect of § 470, as applied, is no different from a neutral statute requiring all licensed New York attorneys, resident and nonresident alike, to maintain a physical presence in the state, which raises no Privileges and Immunities concern.[8]

Conclusion

The Memorial Day weekend will have come and gone when you read this column, and summer will be upon us. As you fire up the grill, go to the beach, or attend a baseball game, you can look forward to summer reading in the form of next month's column, discussing what it means to maintain an "office for the transaction of law business" in New York State. ■

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2. 821 F.3d 273 (2d Cir. 2016).
3. *Schoenefeld v. New York*, 2009 WL 1069159 (S.D.N.Y. Apr. 16, 2009). Venue was transferred pursuant to 28 U.S.C. § 1404(a) based upon the convenience of witnesses.
4. *Id.*
5. *Schoenefeld v. New York*, 2010 WL 502758, at *5 (N.D.N.Y. Feb. 8, 2010, [LEK/RFT]).
6. *Schoenefeld v. New York*, 907 F. Supp. 2d 252, 264–66 (N.D.N.Y. 2011).
7. *Schoenefeld v. State*, 25 N.Y.3d 22, 26–28 (2015).
8. *Schoenfeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016).

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Performing Artists' Entitlement to Compensation Under the N.Y. WCL

By Harvey S. Mars

Workers' compensation statutes exist in this country for two basic reasons. First, they provide a streamlined procedure through which employees who are injured during their employment can receive income replacement if they are unable to work temporarily because of these injuries. Second, by placing financial limitations on the award employees can recover from an employer because of a work-related injury, the law protects and ensures the solvency of employers. Employers are legally required to obtain insurance that will provide the financial means by which workers' compensation awards may be satisfied. Nevertheless, one factor that limits the reach of workers' compensation laws is that only employees are eligible to apply and receive it. For many years, this fact precluded performing artists from successfully applying for workers' compensation as they were characterized as independent contractors. For performing artists to obtain recompense for work related personal injuries, they had to engage in protracted legal proceedings at a substantial cost, both in terms of time and money.

After a herculean effort by advocates for performing artists that extended several years, in 1986, the definitional section of the N.Y. Workers' Compensation Law (WCL), § 2(4), was amended so that professional musicians and other persons engaged in the performing arts rendering services for various entertainment establishments and venues were now statutorily defined as employees. The justification for the amendment cited in the memorandum that supported it was that

> [m]usicians and performers are often required as a condition of employment, to sign a statement that they are independent contractors. Thus, these individuals are denied the basic rights afforded to other working men and women in New York State. This bill would provide basic coverage to musicians and performers who are presently excluded from many benefits and/or protections under the Labor Law.[1]

This legislative reform was the initiative of a diverse array of proponents, including various unions that represented performing artists. For instance, the AFL-CIO

wrote in support of this amendment that "[t]he entertainment industry in New York is unique and deserving of interest, support and, where necessary, legislative protection. For too long these workers were without union representation and the resulting benefits because they were classified as essentially independent contractors."[2] Assemblyman Roger J. Robach, then chairman of the Assembly's Committee on Commerce, Industry and Economic Development, noted in a letter he wrote in support of the amendment that the

> vast majority of musicians and performers who are not in the "star" category are under the direction of an employer, whether directly or as a contractor. Under common law these groups are eligible as employees since they meet the test of being under an employer's direction, supervision and control. Currently these employees must now litigate to be awarded their due benefits.[3]

At the same time, the definitional sections of the N.Y. Unemployment Insurance Law and the N.Y. State Labor Relations Act (NYSLRA) were amended to provide that performing artists were statutorily presumed to be employees. Because of the comprehensive amendment, WCL § 201 now states:

> "Employee" shall also mean, for purposes of this chapter, a Professional musician or a person otherwise engaged in the performing arts who performs services as such for a television or radio station or network, a film production, a theatre, hotel, restaurant, night club or similar establishment unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by this chapter. "Engaged in the performing arts" shall mean performing service in connection with the production of or performance in any artistic endeavor which requires artistic or technical skill or expertise.

Unemployment Insurance Law § 511(1)(b)(1-a) was added to the definition section of that statute, which now states that:

> The term employee is defined as:
> (1-a) as a professional musician or a person otherwise engaged in the performing arts, and performing services as such for a television or radio station or network, a film production, a theatre, hotel, restaurant, night club or similar establishment unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by this chapter. "Engaged in the performing arts" shall mean performing services about the production of or performance in any artistic endeavor which requires artistic or technical skill or expertise.

NYSLRA, the statute that applies when the National Labor Relations Board (NLRB) does not have jurisdiction, such as when an employer does not have significant revenue, has similar language to the other statutes because of the amendment:

> NYSLRA § 701(3)(b):
> (b) The term "employee" shall also include a professional musician or a person otherwise engaged in the performing arts who performs services as such. "Engaged in the performing arts" shall mean performing services about production of or performance in any artistic endeavor which requires artistic or technical skill or expertise.

Without this presumption, musicians cannot avail themselves of the protections of state representational and unfair labor practice proceedings when the NLRB is incapable of exercising jurisdiction.

The import of these sections is that they create a presumption that musicians and other performing artists are employees, rather than independent contractors. This is an important distinction since by operation of these statutes, employees are entitled to unemployment insurance, workers' compensation benefits and the protections and the ability to form a union afforded by the NYSLRA, whereas, independent contractors are not. Benefit entitlement hinges upon the classification of the worker involved in the proceeding. For performing artists such as musicians, these provisions remove a significant obstacle to coverage. As it now stands, performing artists do not have to prove that they are employees. Rather, employers must prove that they are independent contractors.

Under the National Labor Relations Act, a multi-factored "right of control" test is utilized to ascertain whether a worker is an independent contractor or employee.[4] Under this test, an individual is considered an employee if the one for whom services are performed retains the right to control the manner and means by which he or she achieves the result sought. This test is usually satisfied because most musicians' performances are controlled by the music director or conductor of the organization for which they are engaged (even though the way they play their instruments is not).[5]

The fact that the right of control test may be satisfied for musicians when many of the facts indicate independent contractor status was made clear by the NLRB in a case involving the American Federation of Musicians (Royal Palm Theatre) musician's union.[6] There, the board held that freelance musicians who were hired to make recordings used at a dinner theater were employees, even though the musicians were not selected by the employer and were utilized for only a few hours with no real expectation of future employment. The board held that these factors, which would normally indicate independent contractor status, were outweighed by the fact that the employer's musical director exercised complete control over the musicians, telling them when to appear, what to play, and how the music should sound. The board concluded that the musicians were "under the continuous supervision and exercised control of the musical director and subject to his complete discretion and artistic interpretation and taste."[7] Prior to the amendment of New

York's statutes, performing artists were often misclassified as independent contractors, despite precedent under federal law.

Until recently, performing artists' entitlement to workers' compensation benefits and unemployment insurance under New York law remained unquestioned. However, recently performing artists' coverage under the WCL has been called into question. This was the result of a horrific accident that occurred on the stage of the one the world's most celebrated opera houses – The Metropolitan Opera (Met). On December 17, 2011, during a performance of Gounod's "Faust," veteran Metropolitan Opera mezzo-soprano Wendy White fell from a platform eight feet above the stage. Evidently the accident was caused by a faulty hinge connecting the platform to a stairway leading to the stage. While she did not suffer any broken bones from the fall, the fall ended her career as an opera singer. The fall injured her torso and caused nerve damage that prevents her from singing sustained high notes. She also has trouble standing for long periods of time. Because of her inability to sing at a professional level, the Met terminated her contract and refused to pay her the remaining balance.[8] Not surprisingly, Ms. White commenced a breach of contract suit against the Met. However, the primary defense the Met has raised to the suit is that it is barred by operation of the WCL.

Until recently, performing artists' entitlement to workers' compensation benefits and unemployment insurance under New York law remained unquestioned.

Under most circumstances, because of the 1986 legislative amendment, an injury sustained by a performing artist while performing, such as what happened to Ms. White, is covered by the WCL. However, typically, workers' compensation claims are limited to lost wages and medical expenses. If a personal injury lawsuit were filed instead of a workers' compensation claim, potential recovery is much greater because additional forms of damages, such as compensation for "pain and suffering" and front pay, would be available. The financial limitations on recoverable damages in a plenary suit will be much less. However, if a claim is covered by the WCL, it is barred from being pursued as a personal injury claim. Financial recovery under the WCL on a claim such as Ms. White's inhibits Ms. White from receiving the full range of damages she may be entitled to because of her career-ending accident. Thus, to ensure that her suit may proceed to a determination on the merits, she is seeking legislatively an exception to § 2(4). These efforts have been problematic for performing artists.

In an initial attempt to surmount the potential legislative roadblock to the suit, in 2015, legislative lobbyists secured passage of an amendment to § 2(4) by both the Assembly and Senate. This amendment would have permitted musicians and other performers to opt out of coverage.[9] Viewed in its best light, the amendment was a retrograde throwback to the pre-1986 legal landscape where musicians and other performers once again can be considered non-employees. While this consequence might have been unintended and not immediately obvious, it existed and would have had an adverse impact on those musicians who, not understanding the ramifications and ultimate effect of seeking exemption from coverage under the workers' compensation law, would have by doing so lost the protection of employee status.

It was suggested that the amendment would have no impact on the beneficial purposes of the 1986 amendment. A close examination of the proposed amendment, however, did not bear this out. Once a musician or performer exercised their newly conferred statutory right not to be considered an employee eligible for workers' compensation, their choice would have been immutable and they would no longer be entitled to employee status. Once they returned to work after their injury abated, the precedent would have been set and their employer would have legal justification in excluding them from employee status.

This possibility existed even though collective bargaining agents were given the legal right to veto the performer's request, because a significant portion of performing artists are often compelled to work in non-union contexts to make a living. Moreover, once they have been designated as independent contractors, there is no longer any possibility that these performers can unionize, because independent contractors are excluded from coverage under the National Labor Relations Act as well as NYSLRA.

Nor was this exclusion from employment status warranted or necessary. The fact remains that the WCL exempts corporate officers from coverage under § 54, subdivision 6. The fact also remained that the amendment may not have its intended effect since many courts will still make an independent assessment of whether a particular performing artist is truly an independent contractor under traditional common law analysis, although they operate as a corporate entity.

While the amendment passed both the State Assembly and Senate, on December 22, 2016, it was vetoed by Governor Cuomo.[10] In his veto message Governor Cuomo stated that the bill would violate the "fundamental" bargain of the state workers' compensation system, that workers injured on the job are entitled to recover benefits for lost earnings and medical expenses while the employer is shielded from liability. It would "violate that basic compromise by defining certain individuals as non-employees" and "create confusion by treating an individual as a non-employee for workers' compensation benefits but an employee for the purpose of other laws."[11]

As it stands there have already been three bills presented to the legislature meant to permit Ms. White's suit to proceed. Each attempt, however, failed, partially because the definitional revision to the Workers' Compensation Law potentially adversely impacted performing artists.

While the legislature has not yet accorded Ms. White the ability to proceed with her suit, the Appellate Division, First Department was more willing to do so. Its recent decision in the pending personal injury suit litigation, *White v. Metropolitan Opera Association, Inc.*,[12] reveals that the results of this suit and further legislation that is anticipated to be proposed in tandem with it could have a far-reaching impact upon professional musicians and performing artists alike.

On January 5, 2017, the appellate court affirmed the Supreme Court of New York County's decision denying the Met's motion to have Ms. White's suit dismissed on the ground that it was barred by the WCL. As an initial ground for the affirmance, the court determined that since Ms. White worked as an employee of her own company, Wendy White, Inc. (WW, Inc.), she might be exempt from the reach of the § 2(4) statutory definition since she was the employee of another employer. The fact that WW, Inc. did not maintain a separate Workers' Compensation insurance policy was not deemed fatal to this holding because that issue was between WW, Inc. and the Workers' Compensation Board, and not Ms. White.

However, the appellate court went further and indicated a second reason for its denial of the motion to dismiss. During the suit, documentary evidence was presented revealing that the legislature intended to exempt "star" performers from coverage. The court noted that the evidence produced "indicates that the statutory definition of employee was intended to protect the vast majority of performers, who are not 'stars' and that the statutory exception was designed to exclude those performers with the clout to negotiate the terms of their own engagements."[13] The court determined that based upon this legislative history star performers were not intended to be considered employees.[14]

This determination is problematic for performing artists. How can the judiciary determine which musician should be considered a "star" exempt from the WCL? Many star performers may still be considered employees under the common law right of control test. If the only parameter that is relevant to coverage is a performer's leverage to negotiate an individual services contract, a huge number of musicians may be potentially excluded from coverage.

The fact that the motion to dismiss has been denied simply means that the case may proceed and further proceedings may result in a further determination that the WCL bars this suit. Further, the Met may decide to pursue a discretionary appeal before the N.Y. Court of Appeals.

However, subsequent to this decision a new amendment to the definition section of the WCL was introduced that would limit the exception only to Ms. White's accident.[15] Such legislation, known as a "picture bill," would allow Ms. White's suit to proceed but would not otherwise disturb the broad coverage the law extended to performing artists. The enactment of this amendment would modify the Appellate Division's holding and produce an optimal situation by allowing Ms. White to pursue full compensation, without jeopardizing performing artists' ability to seek statutory protection as employees.

On March 15, 2017, Governor Cuomo signed this amendment into law. In the justification section of the bill sponsor's memo, it is noted that "[t]his bill is not intended to impact the beneficial purpose of the 1986 amendments and the right to workers' compensation for other musicians and performing artists, but to remedy an unfair interpretation of the law for a particular performer. Every musician or other performing artist would still be automatically covered by the statute as amended in 1986." Hopefully, this amendment will mitigate the negative impact of the *White* decision. ■

1. *See* NYLS' Governor's Bill Jacket, 1989 Chapter 43, p. 6.

2. *See* NYLS' Governor's Bill Jacket, 1989 Chapter 903, p. 50.

3. *See* NYLS' Governor's Bill Jacket, 1989 Chapter 903, p. 6–7.

4. 29 U.S.C. § 152(2).

5. *See Lancaster Symphony Orchestra v. Nat'l Labor Relations Bd.*, 822 F.3d 563 (D.C. Cir. 2016) (holding that musicians are employees under the "right of control" test).

6. 275 NLRB 677 (1985).

7. *See also In re Faze 4 Orchestra, Ltd.*, 245 A.D. 2d 929, (3d Dep't 1997). In that case, musicians were ruled to be employees of their booking agent, who set their fee and instructed the band where and when to play.

8. *See Singer Files Suit Against Met Opera Over Fall*, NewYork Times, August 2, 2013, https://artsbeat.blogs.nytimes.com/2013/08/02/singer-files-suit-against-met-opera-over-fall/.

9. The pertinent portion of the amendment stated that: "Employee" shall also mean, for the purposes of this chapter *only, and not for the purposes of any other provision or statute dependent upon the definition of employer*, a professional musician or a person otherwise engaged in the performing arts who performs services as such for a television or radio station or network, a film production, a theater, hotel, restaurant, night club, or similar establishment unless by written contract, such musician or person is stipulated to be an employee of another employer covered by this chapter, *or exempt from the requirement of coverage because the musician or person is an executive officer of a corporation who is deemed excluded from coverage under paragraphs C and E of subdivision six of section fifty-four of this chapter.* "Engaged in the performing arts" shall mean performing services in connection with the production of or performance in any artistic endeavor which requires artistic or technical skill or expertise (emphasis supplied). *See* Senate Bill 4402, 2015–2016 Regular Sessions.

10. *See* http://laborpress.org/sectors/municipal-labor/9294-cuomo-vetoes-bill-exempting-performers-from-workers-comp.

11. *Id*.

12. 2017 N.Y. App Div. LEXIS 90, 2017 N.Y. Slip Op. 00093 (1st Dep't Jan. 5, 2017).

13. *See* NYLS' Governor's Bill Jacket, 1989 Chapter 903, p. 6-7.

14. The court did take judicial notice of the fact that legislation had been proposed further refining the law's definition of employee to exclude executive officers of corporations, but held that this fact was not dispositive of the issue.

15. The Bill, Senate 3353, only excludes certain musicians or persons who had a work-related accident on December 17, 2011 who are an executive officer of a corporation who contracts for the musician or person's services from the definition of employee for purposes of the Workers' Compensation Law.

Return to Fundamentals?

Tax Malpractice Damages – Recovery of Additional Taxes

By Jacob L. Todres

If a client overpays taxes due to the negligence of a tax advisor, one of the most fundamental elements of damages that ought to be recoverable from the errant advisor is the additional taxes incurred.[1] Normally the tax advisor will be either an attorney or CPA. In New York, as in most states, the rules governing recoveries for tax malpractice by attorneys are the same as those governing other claims for attorney negligence. The same standards are utilized when the advisor is a CPA. Whether additional taxes incurred are recoverable will be determined by the measure of damages rules governing attorney negligence.

Under New York's traditional measure of damages recoverable in a negligence cause of action for attorney malpractice, the additional taxes seem to be recoverable. However, there are several cases in roughly the last decade that simply hold such additional taxes are not recoverable.[2] While these cases do not articulate a principled rationale for disallowing such a recovery, they all seem to deny the recovery by applying the narrower fraud measure of damages rather than the appropriate, and broader, negligence measure of damages. The reason they do so is a mystery.

The most recent appellate level case to address this issue is *Serino v. Lipper*.[3] On its face and ignoring these few recent fraud-based cases, *Serino* is a rather unremarkable case. In *Serino*, the First Department seems to have correctly applied longstanding fundamental principles of New York law. The court recognized that the fraud and negligence measures of damages are different. The court also held that additional taxes incurred, while not recoverable in fraud, may be recoverable in negligence, thus recognizing that the negligence measure of damages is broader than the fraud measure of damages.

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I believe *Serino* has effectively overruled these few recent fraud-based cases and should be viewed as returning New York law to its traditional and correct approach.

New York's Negligence Measure of Damages

In New York, the measure of damages in an attorney malpractice cause of action goes back more than 100 years to *Flynn v. Judge*.[4] In *Flynn*, the plaintiffs were removed as executors and trustees of their father's estate. They sued their attorney for damages, asserting his negligent advice caused them to lose their positions and the income they would have earned. In reviewing the trial court's dismissal of the plaintiffs' causes of action, the Second Department held: "the measure of damages is the difference in the pecuniary position of the client from what it should have been had the attorney acted without negligence."[5] The court continued, quoting from a contemporary treatise, "[i]n actions against attorneys for negligence or wrongs . . . the plaintiff is entitled to be in the same position as if the attorney had done his duty."[6]

Campagnola v. Mulholland, Minion & Roe[7] involved the issue of whether in a legal malpractice action the defendant attorney could offset the agreed upon contingent fee against any recoverable damages. In addressing the measure of damages, the majority of the Court of Appeals held "[t]he object of compensatory damages is to make the injured client whole. Where the injury suffered is the loss of a cause of action, the measure of damages is generally the value of the claim lost."[8] But the majority opinion is not specific about what it means to make the injured client "whole." However, the concurrence by Judge Judith S. Kaye specifically addresses this issue and, while not citing *Flynn*, adopted the *Flynn* measure of damages:

> In lawyer malpractice cases, as in all negligence cases, the focus in damages inquiries must be on the injured plaintiff . . . the objective being to put the injured plaintiff in as good a position as she would have been in had there been no breach of duty.[9]

Sanders v. Rosen,[10] a subsequent lower court case, left no doubt that in an attorney malpractice cause of action, the measure of damages is the *Flynn* measure. *Sanders* held "damages for malpractice are also limited to pecuniary loss – i.e., the difference between the actual result achieved and that which should have been accomplished, and the financial loss thereby sustained."[11]

Under this negligence measure of damages, which essentially enables the injured plaintiff to recover his or her expectancy, it would seem that any additional taxes caused by the negligence are recoverable.

New York's Fraud Measure of Damages

Lama Holding Co. v. Smith Barney Inc.[12] is a recent reiteration by the Court of Appeals of New York's traditional fraud measure of damages, the "out-of-pocket" rule:

> In an action to recover damages for fraud . . . "[t]he true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong" or what is known as the "out-of-pocket" rule . . . Under this rule, the loss is computed by ascertaining the "difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain" . . . Damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained . . . Under the out-of-pocket rule, there can be no recovery of profits which would have been realized in the absence of fraud.[13]
>
> Nor does the out-of-pocket rule allow for recovery of the payment of taxes, couched as consequential damages or otherwise . . . This case is similar to *Alpert v. Shea Gould Climenko & Casey*.[14]

In denying recovery for the payment of taxes under the fraud out-of-pocket rule, the Court of Appeals approved *Alpert v. Shea Gould Climenko & Casey*.[15] In *Alpert*, the plaintiffs invested in a tax shelter whose chief attraction was the immediate deduction of advance minimum royalty payments for the right to mine coal in the future. The defendant law firms gave opinions that the shelter was valid. The shelter turned out to be invalid and the plaintiffs paid substantial back taxes and interest. The plaintiffs brought this action against the defendants for fraudulent misrepresentation – i.e., fraud. They sought to recover lost profit as well as the tax benefit they would have obtained if they had not relied on the defendants' opinions and, instead, invested in a viable tax shelter.[16] The lower court granted the defendants' motion for partial summary judgment, dismissing the plaintiffs' claim for back taxes. In affirming this portion of the lower court's opinion, *Alpert* held:

> The IAS court was correct in rejecting plaintiffs' damage claims for back taxes. The recovery of consequential damages naturally flowing from a fraud is limited to that which is necessary to restore a party to the position occupied before commission of the fraud . . . in the instant case, recovery of back taxes would place plaintiffs in a better position than had they never invested in the . . . [tax shelter].
>
> It is also well settled that the victim of fraud may not recover the benefit of an alternative agreement overlooked in favor of the fraudulent one. Hence, plaintiffs' argument that but for the fraud they would have invested in some other tax shelter must fail.[17]

The "Other" Cases

Despite the longstanding and well established differences between the negligence and fraud measures of damages, there are approximately a half dozen cases within the last decade that have totally ignored the negligence measure of damages and have simply held, or assumed, that in negligence causes of actions involving tax malpractice no taxes may be recovered as damages.[18] For some

unexplained reason these "other" cases apply the fraud "out-of-pocket" measure of damages to tax malpractice negligence claims.

These cases can be illustrated by focusing on the earliest and most recent of these cases – *Menard M. Gertler, M.D., P.C. v. Sol Masch & Co.*[19] and *Chen v. Huang*,[20] respectively. *Gertler* involved an action against an accountant for professional malpractice, apparently involving taxes incurred in trading securities on margin in a pension account. In affirming the trial court's directed verdict dismissing the complaint, the First Department, without any discussion, simply held "taxes are not recoverable under New York Law,"[21] citing only *Alpert*,[22] a fraud case applying the fraud "out-of-pocket" measure of damages.

Chen involved an allegation by the plaintiff that the defendant attorney failed to properly effectuate a like-kind exchange under § 1031 of the Internal Revenue Code despite representing that she would do so. The causes of action asserted by the plaintiff were for breach of contract, breach of fiduciary duty and legal malpractice. Among the damages asserted by the plaintiff was that he had to pay income taxes currently on the disposition of his real property rather than being able to defer such taxes under a valid § 1031 like-kind exchange.[23] In *Chen*, the defendant moved for summary judgment dismissing the complaint on the grounds that the plaintiff did not allege any compensable damages, even if the alleged malpractice did occur. In addressing the recovery of taxes the court stated:

> Here, defendant correctly asserts that taxes paid are generally not recoverable under New York law (see *Menard M. Gertler, M.D., P.C. v. Sol Masch & Co. . . . Alpert v. Shea Gould Climenko & Casey* . . . see also *Lama Holding Co. v. Smith Barney*[24] (citations omitted).

The only rationale given by the court for this holding was to adapt a statement from *Alpert* that since "tax liability results from a taxable event . . . allowing recovery for the payment of such tax would therefore constitute a windfall for a plaintiff."[25]

Two of the three cases *Chen* relies upon – *Alpert* and *Lama Holding* – are fraud cases, not negligence/malpractice cases. While the other case, *Gertler*, is a negligence case, it contains no reasoning. It simply adopted *Alpert's* holding without focusing on the fact that *Alpert* was a fraud case applying the fraud out-of-pocket measure of damages. *Chen* and all the "other" cases simply did what *Gertler* did and transported *Alpert's* fraud result to the negligence area.

Alpert involved a fraud cause of action. *Alpert's* holding that taxes paid may not be recovered in a fraud cause of action is consistent with New York's fraud measure of damages. As reaffirmed by the Court of Appeals in *Lama Holding*, New York's out-of-pocket fraud measure of damages is designed so that a plaintiff may recover only what was lost because of the fraud, i.e., the difference between what the plaintiff was fraudulently induced to pay and the value of what was received. Under this rule, a plaintiff may never recover any potential profit that might have been gained.[26] Under *Flynn*'s negligence measure of damages, as reaffirmed by the Court of Appeals in *Campagnola*, a plaintiff may recover the difference between what was actually obtained and the position the plaintiff would have been in had there been no breach of duty,[27] i.e., the plaintiff may recover his expectancy. It seems clear that the *Flynn* measure of damages is broader than the fraud "out-of-pocket" measure of damages. While taxes paid may not be recoverable under the fraud out-of-pocket rule, any additional taxes caused by the malpractice negligence seem to be recoverable under *Flynn*'s negligence measure of damages.

It seems almost inexplicable why Gertler and the "other" cases following it applied the fraud measure of damages to malpractice – a species of negligence – causes of action rather than the appropriate negligence measure of damages.

It seems almost inexplicable why *Gertler* and the "other" cases following it applied the fraud measure of damages to malpractice – a species of negligence – causes of action rather than the appropriate negligence measure of damages. Nor did any of these cases even acknowledge that they were applying a measure of damages from a different area of law. It is almost as if these cases simply applied the *Alpert* result to all tax malpractice claims encountered since *Alpert* also involved a tax malfeasance situation, never focusing on the different causes of action involved.

The *Serino* case

In *Serino v. Lipper*,[28] the First Department returned to longstanding and fundamental principles and held that fraud and "negligence/malpractice" causes of action have different measures of damages and that taxes might be recoverable in a negligence, but not fraud, cause of action.

Serino arose from alleged malfeasance by the auditor, PricewaterhouseCoopers (PWC), of an investment company and its hedge funds in not detecting the overvaluation by at least $130 million of securities owned by the hedge funds. *Serino* involved cross claims by the owner of the investment company, Lipper, against PWC arising from the overvaluation.

In addition to performing services for the investment company and the hedge funds involved, PWC also prepared Lipper's personal tax returns and provided him with personal financial advice, for which Lipper personally paid. One of the claims asserted was that in rendering personal advice to Lipper, PWC utilized the inflated value of the hedge funds' securities, thereby overstating Lipper's net worth. Relying on the inflated values, in connection with his divorce, Lipper agreed to make certain gifts to his daughters, and incurred more than $6 million in gift taxes. One of the cross claims asserted by Lipper against PWC was to recover the gift taxes paid. Causes of action for recovery of the gift taxes were asserted in fraud, negligence/malpractice, breach of contract, breach of fiduciary duty and negligent misrepresentation.

In reversing the lower court's dismissal of all asserted causes of action for the recovery of the gift taxes, the First Department held that recoupment of taxes paid under the fraud and negligent misrepresentation claims was barred by New York's out-of-pocket damages rule. However, the court went on to hold that the out-of-pocket damages rule did not bar the recovery of such damages in connection with the cross claims for negligence/malpractice, breach of contract or breach of fiduciary duty.[29] The court thus properly distinguished negligence/malpractice damages from the more limited fraud out-of-pocket measure of damages and held that additional gift taxes paid may be recovered in negligence/malpractice causes of action.

Whether *Serino*'s clear differentiation of the negligence/malpractice measure of damages from the fraud out-of-pocket measure of damages will finally reestablish the *Flynn* measure of damages in tax malpractice situations remains to be seen. In two prior instances, the First Department indicated that additional taxes could be recoverable damages in a negligence cause of action. In both instances the court held that an assertion by a plaintiff that additional taxes were incurred was a sufficient allegation of recoverable damages to withstand the defendant attorney's motion to dismiss.[30] However, in each instance the court was conclusory and did not elaborate at all.[31] Both cases seem to have disappeared. Neither case was even cited by any of the "other" cases that applied the fraud measure of damages.

In *Serino* the First Department specifically focused on the negligence/fraud distinction as to damages recoverable and, while the court did not cite *Flynn*, it appropriately applied *Flynn's* longstanding negligence measure of damages. Hopefully this will settle the area, reestablish the traditional distinction between the negligence and fraud measures of damages, and confine *Alpert's* narrow measure of damages to fraud causes of action, which is all that *Alpert* itself did. ■

1. Other elements of recoverable damages are not focused upon.

2. *See, e.g., Menard M. Gertler, M.D. P.C. v. Sol Masch & Co.*, 40 A.D.3d 282, 283, (1st Dep't 2007); *Shaiman v. Carpet One of the Hamptons, Inc.* 27 Misc. 3d 1232(A), 2010 N.Y. Misc. LEXIS 1551, at *9 (Dist. Ct., Suffolk Co. June 9, 2010); *Apple Bank for Savings v. PricewaterhouseCoopers, LLP*, 23 Misc. 3d 1126(A), 2009 WL 1363026 at *6 (Sup. Ct., N.Y. Co. April 14, 2009), *rev'd*, 70 A.D. 3D 438, (1st Dep't 2010); *Chen v. Huang*, 43 Misc. 3d 1207(A), (Sup. Ct., Kings Co. 2014); *see also Solin v. Domino*, 2009 WL 536052 at *3 (S.D.N.Y. Feb. 25, 2009), *aff'd*, 501 Fed. Appx. 19 (2d Cir. 2012).

3. 123 A.D. 3d 34, (1st Dep't 2014).

4. 149 A.D. 278 (2d Dep't 1912).

5. *Id*. at 280.

6. *Id*. (quoting Edward P. Weeks, Treatise on Attorneys and Counsellors at Law § 319 (2d ed. 1892)).

7. 76 N.Y. 2d 38 (1990).

8. *Id*. at 42.

9. *Id*. at 45-46.

10. 159 Misc. 2d 563 (Sup. Ct., N.Y. Co. 1993).

11. *Id*. at 572.

12. 88 N.Y.2d 413 (1996).

13. *Id*. at 421.

14. *Id*. at 422.

15. 160 A.D.2d 67 (1st Dep't 1990).

16. *Id*. at 71.

17. *Id*. at 71–72. *Alpert* also focused on the recoverability of the interest paid on the tax underpayment. However, that portion of the opinion is not relevant. I addressed *Alpert* much more extensively in Jacob L. Todres, *New York's Law of Tax Malpractice Damages: Balanced or Biased*, 86 St. John's L. Rev. 143 (2012).

18. *See, e.g., Menard M. Gertler, M.D. P.C. v. Sol Masch & Co.*, 40 A.D.3d 282, 283, (1st Dep't 2007); *Shaiman v. Carpet One of the Hamptons, Inc*. 27 Misc. 3d 1232(A), 2010 N.Y. Misc. LEXIS 1551, at *9 (Dist. Ct., Suffolk Co. June 9, 2010); *Apple Bank for Savings v. PricewaterhouseCoopers, LLP*, 23 Misc. 3d 1126(A), 2009 WL 1363026 at *6 (Sup. Ct., N.Y. Co. April 14, 2009), *rev'd*, 70 A.D. 3D 438, (1st Dep't 2010); *Chen v. Huang*, 43 Misc. 3d 1207(A), (Sup. Ct., Kings Co. 2014). *See also Solin v. Domino*, 2009 WL 536052 at *3 (S.D.N.Y. Feb. 25, 2009), *aff'd*, 501 Fed. Appx. 19 (2d Cir. 2012).

19. 40 A.D. 3d 282, (1st Dep't 2007).

20. 43 Misc. 3d 1207 (A) (Sup. Ct., Kings Co. 2014).

21. *Id*. at 283.

22. *Gertler*, 40 A.D.3d 282; *Alpert*, 160 A.D. 2d 67 (1st Dep't 1990).

23. *Chen*, 43 Misc. 3d 1207(A) at *1.

24. *Id*. at *2.

25. *Id*.

26. *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y. 2d 413, 421.

27. *Campagnola v. Mulholland, Minion & Roe*, 76 N.Y. 2d 38, 45–46.

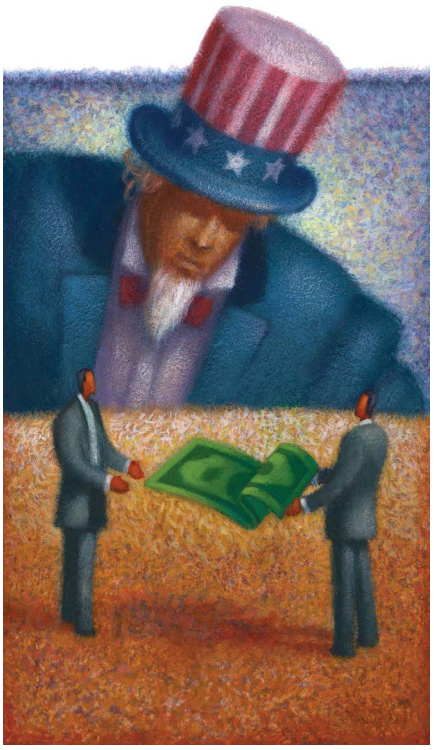
28. *Serino v. Lipper*, 123 A.D. 3d 34 (1st Dep't 2014).

29. *Id*. at 42.

30. *Fielding v. Kupferman*, 65 A.D.3d 437 (1st Dep't 2009); *Proskauer Rose Goetz & Mendelsohn LLP v. Munao*, 270 A.D.2d 150 (1st Dep't 2000).

31. *Fielding*, 65 A.D.3d at 442; *Proskauer*, 270 A.D.2d at 151.

BY ROBERT W. WOOD



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Key Steps to Dispute IRS Tax Bills

Everyone must pay federal income taxes. Yet exactly how much you owe, and on exactly how much, is famously complex. All tax returns must be signed under penalties of perjury. That means you have to do your best to report everything fully and honestly. But the grey areas are legion.

For example, exactly when is something income, even though you physically don't have it? What type of proceeds qualifies for long term capital gain rather than ordinary income rates? What losses are full write-offs, and which ones are limited to offsetting gains? What assets can be written off all at once, and what must be capitalized and written off ratably over many years?

These and many other questions come up at tax return time. You must have some answers to be able to file, even if you are leaving many of the details to tax return preparers. But once you sign your name and file, what about the IRS notices that come? How should you react, and in what order?

You can contest many IRS tax bills, although there are times not to. When you disagree with the IRS, procedure is important. You must pay attention to the order in which notices arrive and the specific ways in which you can respond.

Most Audits Are Via Correspondence

Most audits do not involve sitting across the desk from an IRS agent. Let's say you file your tax return and later receive a notice from the IRS saying it has information that you received $6,000 that you failed to report. It might be due to a Form 1099 you mislaid, one that failed to show up in the mail, or some other bit of information the IRS has that does not match your return.

Usually such a notice will ask you to sign the form and mail it back if you agree. Alternatively, the notice will ask for an explanation of why the information is incorrect. You can contest it – if you do so promptly. You can also agree if the IRS is right.

Don't Fight Every Tax Bill

If you know the IRS is correct, don't fight. Likewise, if the IRS is seeking a small amount of tax, you may be better off not fighting it, even if you are right. Just consider whether it is worth it if the dollars are small. Of course, what is a small tax bill can mean different things to different people.

Sometimes, disputing something small can end up triggering other issues that might have best been left alone. So consider that, too. But in most cases, if you get a bill for additional taxes you'll want to preserve your rights. Timelines and procedure are critical.

Watch Out for Proposed Deficiencies

The notice described above is not a Notice of Proposed Deficiency. Still, you should answer it. An Examination Report may follow the first notice if you fail to respond. Most tax lawyers call the Examination Report and accompanying letter a "30-day letter." It will say you have 30 days to respond in a so-called administrative "protest." A protest is just a letter.

Make Sure You Prepare a Timely Protest

If you receive an IRS Examination Report, make sure you prepare a protest and sign and mail it before the deadline. Keep a copy. Keep proof of mailing too, preferably certified mail to provide verification of mailing and of IRS receipt. Explain yourself thoroughly and attach documents where they will be helpful.

Your protest should analyze the facts and the law. Put your best foot forward. The IRS may review your protest and agree with you. Even if they don't, how you frame your protest can help later. If you have protested in a timely way, you will normally receive a response that the IRS is transferring your case to the IRS Appeals Division.

IRS Appeals Division Is Nationwide

The IRS Appeals Division is a separate part of the IRS. Its mission statement

is to resolve cases. By definition, these are cases in which the auditor has recommended additional taxes, and the taxpayer disagrees. The Appeals Officer assigned to your case works for the IRS, and in that sense, can never be truly unbiased.

Even so, the IRS Appeals Office is separate, and it tries to be impartial and (when it can), to split the baby. This process of working out compromises works surprisingly well. A tax lawyer may be best qualified to handle your case, but an accountant can too. Alternatively, you can do it yourself.

Just be aware that while it is less expensive to do it yourself, it is also generally less effective. The vast majority of tax cases are resolved at Appeals. Usually, you'll be assigned to the Appeals Office closest to you. Offices are throughout the U.S. Sometimes you are assigned to an Appeals Office in some far corner of the country.

This is generally based on the workload of the offices and Appeals Officers. It can also be based on particular tax issues that some offices are handling. If that location doesn't facilitate a face-to-face meeting and you want one, you can ask for the case to be moved to the IRS Appeals Office nearest you, nearest to your tax lawyer, your books and records, etc.

The IRS is not required to grant such requests, but it usually does. Most IRS Appeals Officers are happy to get a case they are assigned off their desk and assigned to someone else!

Beware a Notice of Deficiency

If you fail to protest, or if you do not resolve your case at IRS Appeals, you'll next receive an IRS Notice of Deficiency. An IRS Notice of Deficiency always comes via certified mail. It can't come any other way. A Notice of Deficiency is often called a "90-day letter" by tax practitioners, because you'll have 90 days to respond.

There used to be many flubs about exactly when those 90 days ran out. So today, the IRS is required to prominently display on page one of the Notice of Deficiency the *actual deadline* for your response. Don't write the IRS to protest a Notice of Deficiency. In fact, only one response to a Notice of Deficiency is permitted: filing a Tax Court petition in the U.S. Tax Court clerk's office in Washington, D.C.

Although it is best to hire a tax lawyer, some taxpayers handle their Tax Court case on their own, *pro se*. There are special simplified procedures available to taxpayers who represent themselves in cases where less than $50,000 in tax is in dispute. Whether you are handling the case yourself or you hire a tax lawyer, the U.S. Tax Court cannot hear your case if you miss the 90-day deadline.

A tax lawyer may be best qualified to handle your case, but an accountant can too.

Tax Court Judges Travel to Your Area

The Tax Court building and clerks are all in Washington, D.C. However, the 19 Tax Court judges travel to federal courthouses all around the country to conduct trials. You can pick the city where you want your case to be heard when you file your Tax Court petition.

Tax Court procedure and rules of evidence are streamlined, with no jury, and with relaxed rules of evidence. You can call witnesses, and many cases are presented based on a "stipulated record." In it, you and the government agree on certain facts.

Your Case Can Go Back to IRS Appeals

Remember, the only way you can respond to a Notice of Deficiency is to file a timely petition in U.S. Tax Court. Fortunately, though, that doesn't mean your case will necessarily be decided in court. An IRS lawyer will file an answer to your Tax Court petition. As with most other answers in litigation, the IRS will generally deny whatever your petition says.

But then, you can ask the IRS lawyer to transfer your case to IRS Appeals. Often, a Notice of Deficiency is issued before a case has ever gone to IRS Appeals. In that sense, it can seem as if the IRS is trying to cut off your right to an appeal. Actually, though, it is usually because of workload, or because the IRS is worried that the statute of limitations on the tax year in question is about to run.

The IRS often issues a Notice of Deficiency to make sure you can't later say the IRS is too late to assess taxes. When this happens, the IRS lawyer will almost always be happy to transfer your case to (or back to) IRS Appeals. This also ties into extensions of the IRS statute of limitations, below.

IRS Often Asks *You* to Extend the Statute

Often, the IRS says it is auditing you, but needs more time. Giving the IRS more time to audit you? It may sound counterintuitive – if not downright crazy – to give the IRS more time, but it is not, as we will see. The IRS may *ask you* for an extension because it needs more time to audit you.

Your first reaction may be to relish the thought of telling the IRS absolutely not! Even a routine tax audit can be expensive and nerve-wracking. The IRS normally has three years to audit, measured from the return due date or filing date, whichever is later. But the three years is *doubled* in a number of cases. For example, the IRS gets six years if you omitted 25 percent or more of your income.

Even worse, the IRS has *no* time limit if you *never* file a return, or if you skip certain key forms (for example if you have an offshore company but fail to file IRS Form 5471). You have to assume that if the IRS is asking you to extend the statute, the IRS is already monitoring you closely. And for the most part, people usually do *voluntarily* give the IRS more time to audit.

Why would *anyone* do that? It works like this. The IRS contacts you (usually about two and a half years after you file), asking you to extend the statute. Most tax advisers say you should usually agree. If you say "no" or ignore the request, the IRS will assess extra taxes, usually based on an incomplete and quite unfavorable picture.

You might think that you could fail to say yes or no and that the IRS might forget about you. But this is something the IRS is very careful about. The IRS rarely misses issuing a Notice of Deficiency, and you usually will be worse off (often *much* worse off) than if you agreed to the extension. There are exceptions to this rule, but relatively few. And sometimes you can agree to the extension but limit the extra time you give, or even the tax issues at stake. Get a professional to help you weigh your facts.

You Can Sometimes Get Extensions Too

Everyone knows there are automatic six-month extensions to filing your taxes. April 15 can become October 15, although you still must *pay* any taxes due by April 15. But what about extensions when the *IRS* demands a response to a notice or letter within 30 days?

For many notices, the IRS will grant an extension of time to respond. In some cases, though, it can't. For example, when you receive a Notice of Deficiency (90-day letter), you must file in Tax Court within 90 days, and this date cannot be extended. Most other notices are less strict. If you do ask the IRS for an extension, confirm it in writing, and keep a copy. In fact, confirm *everything* you do with the IRS in writing.

Some IRS Actions Can Be Undone

It is always best to respond to IRS notices within their stated time frames. Still, it is sometimes possible to undo IRS action after the fact. For example, even after the IRS places a lien on property or levies on a bank account, this can be reversed. However, it is usually harder and more expensive to undo something, and it usually requires professional help.

You Can Pay Up, Then Sue

If you do not respond to a Notice of Deficiency within 90 days, and you have an assessment, all is not lost. You will not be able to go to Tax Court, but you can contest the taxes in federal district court or in the U.S. Claims Court. Usually you must pay the taxes first and file a claim for refund. If the refund request is not granted, then you can sue for a refund.

The primary advantage of proceeding in Tax Court is that you need not pay the tax first. In contrast, most taxpayer suits in U.S. District Court or U.S. Claims Court are *after* the tax has been paid. Sometimes, though, you can cleverly shoehorn yourself into one forum even though it might seem that you don't satisfy the rules.

Take the case of *Colosimo v. U.S.*[1] There the IRS pursued the company and its owners for payroll taxes. The owners sued in District Court for a ruling they were not "responsible persons" required to pay the payroll taxes. But the owners paid only a fraction of the taxes the IRS was seeking. This was a clever use of the notion that sometimes you can pay only a portion of the tax due and with your suit resolve both pieces of the asserted tax: the part you paid, and the part you didn't.

Be Careful

Remember, there are many different types of tax notices, even if you are only talking about the IRS. We have covered a few types of IRS notices here, including a Notice of Deficiency. However, there are many other types of important notices, including liens, levies and summonses. Forms of response vary, and procedure is important. You're best advised to get some professional help. In general, don't ignore anything you get from the IRS! ■

1. 630 F.3d 749 (8th Cir. 2011).

BY ROBERT KANTOWITZ

Robert Kantowitz has been a tax lawyer, investment banker and consultant for more than 35 years. He is responsible for the creation of a number of widely used capital markets products, including "Yankee preferred stock" and "trust preferred," as well as numerous customized financial solutions and techniques for clients. He is a longtime member of the New York State Bar Association Committee on Attorney Professionalism and, as such, co-authored the Committee's "Report on Attorney Ratings" dated December 7, 2015 and has contributed to the monthly *Attorney Professionalism Forum* feature in this *Journal*. The author acknowledges helpful comments from Jeffrey Kantowitz and Andrew Oringer. The opinions expressed herein are his own.

The Downsides of a Constitutional Convention

Editor's note: *At the time of publication, the State Bar Association had no position on the question of whether to support or oppose the convening of a constitutional convention in 2019. However, the Association's House of Delegates was scheduled to consider at its upcoming meeting of June 17 the questions of whether to take a position, and if affirmative, what position to take.*

Dr. Henrik Dullea wrote in a previous issue of the NYSBA *Journal* in favor of what might be accomplished in a constitutional convention for New York.[1] Allow me to inject a note of caution and some suggestions.

In short, I agree with Dr. Dullea's suggestions for electoral and judicial reform, but I have objections rooted in both process and substance to calling a constitutional convention.

What Could Possibly Go Wrong With a Constitutional Convention?

As a matter of process, Article XIX, section 2 of the current (1938) New York Constitution,[2] which is the provision that governs a convention, is so short on details that it would be nearly impossible to ensure any predictable process for selecting delegates. That in and of itself is not a defect – democracy at its best is, after all, messy – but chaos and fractiousness have the potential to produce unpredictable results, as happened in the Republican Party Presidential nomination process this past year, so no one should be under any illusion that the delegates will be established political figures or in any way representative of the state's population as a whole.

Second, no matter how delegates actually were to be selected, there could be years of challenges in state and federal courts and perhaps even competing conventions, each claiming to be the sole legitimate convention. The first fusillade of litigation might be launched even before a convention could convene or even before the selection of delegates, alleging that the selection method is unconstitutional.[3]

Third, it is possible that a convention would attempt to constitute itself as a permanent, self-perpetuating font of piecemeal amendments. That is surely not what was intended, but it is arguably within the purview of what is literally permitted under Article XIX, section 2.

As a matter of substance, I believe that there are some things that should be considered for amendment but many others that should not. Thus, for example, if it were possible to limit the subject matter of a constitutional convention to the judiciary and the election of the legislature, I could support a convention called for these specific purposes.

Unfortunately, Article XIX, section 2 appears on its face to operate on an all-or-nothing basis.

In an era where this nation is polarized as we have arguably not seen since the 1850s and 1860s,[4] a plenary convention might rewrite the constitution of this state in a way that does far more damage than good. The disagreements reflect not only the traditional political fault-lines of liberal and conservative but also whether a constitution is to be interpreted under the principles of textualism and originalism. The anger, rancor and recklessness that many on each side display toward those on the other sides of the issues are unparalleled. There is a real danger that whatever is produced by a convention and approved by a majority of this state's voters could do damage to significant minorities who disagree, not to mention spawning litigation of the most vexatious kinds. Conservatives and traditionalists rightly should worry about what kinds of fad-of-the-day material or extreme provisions could make their way into a constitution,

while liberals and progressives would be well advised to consider that they might lose things for which they've fought hard over the years.

One immediately thinks of what happened in 1787 in Philadelphia, when a meeting called to amend the Articles of Confederation produced the U.S. Constitution – a monumental achievement that has withstood the test of time. The two are not comparable. Those deliberations were conducted in comparative secrecy, while with today's technology there would be intense and round-the-clock leaks, scrutiny and political pressure despite any desire or even adopted rule to the contrary unless the convention were to convene on the far side of Mars rather than in Albany as mandated by the constitution.

Alternatives to a Constitutional Convention

There are many important matters that can be handled incrementally, by statute and by discrete and focused constitutional amendments, more appropriately than in a constitutional convention. As far back as the 1970s, Justice William Brennan saw that the Warren Court had become the Burger Court and suggested in a law review article that the individual rights and protections that the U.S. Supreme Court might no longer find in the federal Constitution could still be found in state constitutions, even with identical language, by state judges whose decisions on that score were unreviewable by more parsimonious federal courts.[5] That is still a salutary goal, well within the traditions of federalism. But it is not without controversy and risk; the more novel and ground-breaking the right, the greater the potential for things to go awry. For example, the New Jersey Supreme Court, in the *Mount Laurel* case and its progeny,[6] found a state constitutional right requiring municipalities to allow their fair shares of low- and moderate-income housing. This has led to decades of litigation over what a fair share is and how it should be calculated, as well as dysfunction in the state agency and machinery that was supposed to interpret and enforce the law.[7] Try to imagine a government and court system trying to cope with numerous new constitutional mandates.

Especially if there is some likelihood of a reduction in federal spending on entitlement programs, it may become necessary for states to consider how and the extent to which they can step into the breach. I may be the last person to suggest a tax increase, but if federal taxes are reduced as the current administration has promised, states may have to decide for themselves how to balance the competing priorities of making themselves attractive to business versus raising the level of state revenues and spending to compensate for lost federal aid. If the Affordable Care Act is repealed, it will be open to each state to decide, as Massachusetts did over a decade ago, whether to have its own similar mandatory state health care program. Even many people who have objected ferociously to the imposition of Obamacare on a national level may be inclined to believe that on a more geographically limited scale, for a state that is relatively homogeneous politically, such a program could be acceptable.

In my view, taxation levels and particular uses of funds are important issues that nonetheless generally do not rise to the stature of constitutional principle, and yet I am concerned that a constitutional convention would be unable to avoid the temptation to enshrine in a constitution a right to rent control (even though the current New York City system makes one think that the nickname "Empire State" refers to the Ottoman Empire) or a universal right to affordable health care (whatever "universal" and "affordable" mean) or any number of other "rights" demanded by every interest group. Lest anyone consider this overblown, I recently saw two news stories cheek by jowl on the same page, one reporting discussion in the legislature of a bill to make New York a "sanctuary state" and the other describing a pledge by Mayor De Blasio of more housing for New York City.[8]

I am also quite concerned that a convention would be pressed by partisans on both sides to try to make the impossible decisions between things like free exercise of religion and equal protection. As a final comment regarding a constitution, I certainly would remind readers that it would be counter-productive to try to include provisions that have the effect of attempting to nullify federal law or to violate it, even though in the current environment I have no doubt that support could be found for certain elements of this.[9]

Electoral Reform

Turning to electoral reform,[10] I offer the following observations as suggestions for constitutional amendments.

Dr. Dullea's suggestion for a unicameral legislature has merit but exposes a serious conundrum. New York State is heavily Democratic, as opposed to Republican.[11] Separately, there is a serious divide between the needs and viewpoints of those upstate and those downstate, and even within each of those geographic groupings between those in large cities such as New York, Buffalo and Syracuse, and those in rural districts and suburban counties such as Nassau and Westchester. There is some overlap in the fault lines that demarcate these various distinctions, but they are not identical. It has long been the case, indeed embarrassing almost to the point of astonishment, that through creative gerrymandering the control of the legislature has been split so that one house (the Assembly) is controlled by Democrats and one house (the Senate) by Republicans. Obviously, if we were to go to a unicameral legislature, this kind of power dispersion would not be possible.

I am not suggesting that this artificial balance should be maintained for its own sake, but I do believe that lopsidedness and single-party rule should not necessarily be encouraged. Hence, I have a few suggestions regarding a unicameral legislature that could at least represent an attempt not to end up with a body permanently dominated by whichever party has greater strength in the state in any given era.

As a first cut and relatively simple example, half the seats could be elected

from districts drawn in one way, and half elected from districts drawn in a completely different way, and half of each group would be up for re-election every two years. As a result, at least there is some possibility that the representation would reflect different allocations and combinations of voter orientations and power. Voters themselves might become more politically aware since they would be in one district in one cycle and in a different but partially overlapping district in the alternate cycle two years later.

To take this one step further, I would suggest, for example, 40 percent single-member seats from districts drawn one way, 40 percent single-member seats from districts drawn another way and 20 percent from, say, five to seven much larger districts spanning the state that each elect several representatives at large. This would serve a state like New York even better than having all single-member seats because at least some of the larger districts would likely be more diverse politically than the single-member districts, so that these 20 representatives might be more likely to represent coalition politics and regional thought and bring different orientations and priorities to the legislature. However, certain U.S. Supreme Court precedents look with a dim eye on at-large voting to the extent that it can dilute minority voting strength, so a great deal of care will be required.[12]

I thoroughly disagree with the proposition that the redistricting should be done by an independent commission. Punting the task to an independent commission does not necessarily make redistricting non-partisan; it can leave it as partisan as ever but in the hands of supposed grandees who have utterly no accountability to the voters. No, as long as districts are required to be contiguous and reasonably compact (i.e., to look more like Colorado than like Croatia, more like a circle than like a curlicue) and as long as they are largely as coterminous as is feasible with existing political and physical divisions, there is relatively little mischief that can be done in the way of gerrymandering, and if my suggestion of having different districting plans superimposed upon each other is adopted, that will further minimize the potential for shenanigans. As a further check, in order to test for whether the results have some rational relationship with what would happen absent overt or covert exercise of inappropriate considerations, a computer-modeled statistical test can be employed, as I suggested almost 40 years ago in a law review note.[13]

What about term limits? There are arguments both ways, which I need not rehash here. But I will stress that there are good reasons to avoid having a legislature composed of people for whom that is their only profession. Accordingly, I would encourage the adoption of as limited as possible a schedule of plenary legislative meetings in Albany, at which all the members are expected to be present, and then allow the members to conduct their own regular businesses and professions, obviously subject to conflicts of interest requirements and limitations. With modern communications and the relative accessibility of Albany to the rest of the state, the legislature could legally stay in session as necessary without the members having to be present continuously in Albany.

The Judiciary

What I have to add to Dr. Dullea's analysis concerning the court system is more succinct. New York State does have a bizarre and convoluted court system, as anyone who has ever had to memorize the necessary information for the bar exam can attest, starting with the unusual nomenclature in which "Supreme Court" is a lower level trial court. It will take a great deal of targeted effort and a well-crafted amendment to counter the solidly entrenched and vested interests that certain parties have in the way the court system is set up and in the way that business takes place. For example, anyone familiar with how judges are selected,[14] or how lucrative the business is in the surrogates' corner of the court system (corner is the right word, in the same sense as "cornering the market"), surely understands that there is zero chance of reform unless cozy interest groups are taken on directly.

Conclusion

As I noted above, the question of whether to have a constitutional convention is not necessarily a liberal-versus-conservative issue. There are rights and protections enshrined in the current New York Constitution and in the many amendments that have been added and interpretations of the courts that could be swept away in a plenary convention and unpredictable and undesirable results that could emerge. My suggestion is that we focus not on the excitement of redoing what we first did in Kingston in 1777 but on the several matters most in need of serious reform. ■

1. Dullea, *We the People: A Constitutional Convention Opens the Door to Reform*, 89 NYSBA Journal No. 2, p. 32 (Feb. 2017).

2. This provision states:

> At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question "Shall there be a convention to revise the constitution and amend the same?" shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. . . . The convention shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns and qualifications of its members. In case of a vacancy, by death, resignation or other cause, of any district delegate elected to the convention, such vacancy shall be filled by a vote of the remaining delegates representing the district in which such vacancy occurs. If such vacancy occurs in the office of a delegate-at-large, such vacancy shall be filled by a vote of the remaining delegates-at-large. Any proposed constitution or constitutional amendment which shall have been

adopted by such convention, shall be submitted to a vote of the electors of the state at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention. Upon the approval of such constitution or constitutional amendments, in the manner provided in the last preceding section, such constitution or constitutional amendment, shall go into effect on the first day of January next after such approval.

3. *See, e.g.*, the discussion of multi-member districts in note 12 *infra*.

4. Even during the Civil War, there was widespread philosophical agreement on certain things, including the role of state and local government. The post-Reconstruction period in the former Confederacy is a sordid part of American history, but otherwise it could never have unfolded the way it did. And consider it a small matter if you like, but Lincoln surely attached significance to common bonds and shared understandings in his Second Inaugural Address on March 4, 1865 when he stated regarding the parties to the conflict: "Both read the same Bible and pray to the same God, and each invokes His aid against the other."

5. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

6. *See S. Burlington County NAACP v. Mount Laurel Twp.*, 67 N.J. 151, *appeal dismissed & cert. denied*, 423 U.S. 808, (1975) (generally referred to as "*Mount Laurel I*"); *S. Burlington County NAACP v. Mount Laurel Twp.*, 92 N.J. 158 (1983) (generally referred to as "*Mount Laurel II*").

7. *See, e.g.*, *In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing*, 221 N.J. 1 (2015).

8. *The Wall Street Journal*, Feb. 14, 2017, at A10A.

9. The entire subject of sanctuary cities and states, for example, raises this issue. States cannot be compelled to be arms of federal law enforcement, but states and cities that destroy evidence, refuse to turn over information properly compelled by valid process or create "safe houses" for illegal immigrants to facilitate their evasion of detection will have crossed a line to illegality. One hopes that mayors and other elected officials understand this, but the rhetoric has become heated enough to suggest that at least some do not understand it or do not care. Regardless of what happens on the ground from time to time, it would be madness for a state to include in a constitution any language that could be construed along these lines. State legalization of marijuana, as long as it remains illegal under federal law, raises a similar set of issues.

10. Even in the case of electoral reform I have concerns about what could happen in a plenary constitutional convention. Anything associated with certain outlandish and offensive representation theories that, for example, require that a certain percentage of the representatives come from this or that racial or ethnic group, or to be women, should be explicitly out of bounds. An ounce of prevention is worth a pound of cure, for these approaches are surely unconstitutional as a matter of federal law.

11. Information from the New York State Board of Elections as of November 1, 2016 indicates that party enrollment was approximately as follows:

Democrat . . . . . 6.2 million
Republican . . . . . 2.8 million
Other parties . . . . . 0.8 million
Blank . . . . . 2.7 million
Total . . . . . .12.5 million

See https://www.elections.ny.gov/NYSBOE/enrollment/county/county_nov16.pdf.

The smaller parties often nominate candidates for the major offices who are also nominated by the Democratic or Republican Party. I have to reach back to 1969, when John Lindsay was reelected Mayor of New York City on the Liberal Party line alone after losing his bid for re-nomination by the Republican Party, to recall a major New York officeholder who won without the Democratic or Republican endorsement.

12. As far back 44 years ago, the Supreme Court invalidated multi-member districts in two urban counties in Texas. *White v. Regester*, 412 U.S. 755, 765–70 (1973). For a review of the early cases on this matter (also known as "at-large voting"), see *Group Representation and Race-Conscious Apportionment: The Roles of States and the Federal Courts*, 91 Harv. L. Rev. 1847, 1848–49 & nn. 13–16 (1978). In a touch of irony, perhaps, any convention called under the current New York Constitution would be composed entirely of at-large delegates, three from each of the 63 Senate districts and 15 elected statewide. *See* note 2 *supra*. Back in 1938, of course, when the current State Constitution was adopted, no one would have had any inkling that such a feature would attract any scrutiny. One could expect a challenge to be filed under the U. S. Constitution and section 2 of the Voting Rights Act of 1965 within minutes after any certification of a positive vote on the ballot question. I have not researched precedents to determine whether scrutiny of at-large voting has been extended to state constitutional conventions, but given how the districts have been constructed at least in part with a view to the overall composition of the Senate, and especially as to the statewide districts, the potential for such a challenge cannot be dismissed as fanciful or remote.

13. *See supra* note 12, at 1871–72.

14. *See In re Wilson v. Davis*, 2015 N.Y. Slip Op. 06633 (2d Dep't, Aug. 19, 2015), for a 4-0 opinion of the Appellate Division that matter-of-factly states the law and seems dry and almost inconsequential until one realizes how hard the law makes it for an outsider to get onto the ballot and to challenge a denial of ballot access.

"Moments in History" is an occasional sidebar in the Journal*, which will feature people and events in legal history.*

Moments in History

The Danger Zone in Tort Law

On August 25, 1924, New York City's major newspapers reported an explosion that had taken place the preceding day at a Brooklyn train station. Headlines ranged from "Fireworks Blast Rocks Picnickers" to "Bomb Blast Injures 13 in Station Crowd." Coverage of the incident faded quickly, but one ensuing lawsuit garnered a unique place in legal history.

On the platform of the Long Island Railroad's East New York station in Brooklyn, Helen Palsgraf was waiting with her two daughters for the Sunday train to the beach. A man carrying a package raced to catch a departing train. A conductor extended a man to help the man aboard, and another pushed him from the platform. As the man boarded, his package fell. The train struck the package, causing its contents – fireworks – to explode. The force toppled the large penny scale, which hit Mrs. Palsgraf. She brought suit against the railroad, alleging negligence by the conductors in causing the package to drop and setting the dangerous evetns in motion.

She prevailed at trial but the N.Y. Court of Appeals vacated the award and dismissed the suit. The decision, authored by then Chief Judge Benjamin Cordozo, concluded that the conductors weren't negligent toward Mrs. Palsgraf even if they were negligent to the man with the package. Therefore the railroad didn't' owe her any duty as to an unseen peril caused by a passenger more than 30 feet away.

"The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is the risk to another or to others within the range of apprehension," Cardozo wrote. "Nothing in the situion gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. Proof of negligence in the air, so to speak, will not do."

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 EVAN A. DAVIS

Why I Favor Calling a Constitutional Convention

I am grateful for this chance to share my views as a lawyer who supports taking advantage of the opportunity provided once every 20 years to have a constitutional convention. This constitutional provision for an automatic vote every two decades has been used in the past to great transformational effect. It can be so used again. It must be, because the legislature is unwilling to make badly needed reforms and a convention is the only way the people can correct the situation. Under the "normal" process, the people can't adopt amendments unless they have been twice agreed to in each house of the legislature.

As stewards of the law, it is important for lawyers to worry about the state of our state governance. I go so far as to believe that we are ethically bound to work to secure the integrity of the process by which statutory and regulatory law is made in the same way we are bound to work to secure access to justice and the integrity of the judicial system that develops the common law.

My views are naturally shaped by my experience. I have worked at all three levels of government – local, state and federal – and in all three branches – as counsel for five years to Governor Mario Cuomo, as a task force leader for the House Judiciary Committee's Inquiry into the Impeachment of President Richard Nixon and as a law clerk to Judge Harold Leventhal and Justice Potter Stewart. I have also been active through both the State and New York City Bars in matters of attorney ethics and served as President of the New York City Bar Association.

It is my belief that the health and productiveness of a society is greatly impacted by the integrity of the way in which its people are governed. The basic reason I support a convention call and am actively working to secure a majority "yes" vote this November, is that New York State government has become broken to an unacceptable extent, and a constitutional convention is both a reasonable way and, as already noted, the only way to make the needed changes.

What Are the Problems and How Might Constitutional Change Fix Them?

I describe below the four reasons for a "yes" vote that are most compelling to me. My standard is that the change is important and fit for a Constitution, that it will likely have broad public support and that it is unlikely that both houses of the legislature will concur in proposing it to the people under the usual non-convention constitutional amendment process.

Ethical Behavior and Law-Making Integrity

I start with ethics. We are a profession with strong ethical standards that are actually enforced. The result is widespread voluntary compliance and a generally strong culture of ethical behavior. As lawyers, we also know that ethics is the first line of defense against corruption, because compliance with ethical standards to deter breaches of the public trust requires more than compliance with the criminal law.

According to Siena Research Institute polling, the public overwhelmingly sees corruption as a problem in Albany. Corruption is a bipartisan problem and a problem in both the legislature and the Executive Branch. It is also unending, with no sign of being brought under control.

While the public is calling for strong ethics enforcement mechanisms, the reality in Albany is just the opposite. The latest version of an ethics enforcement agency agreed to by the legislature and the governor is devoid of independence. To the contrary, it is designed to fail.

Two of the governor's appointees to the current ethics agency can veto an investigation of the governor or his top staff members even if the other 12 members want to pursue the matter. Similarly, the three appointees of either the Speaker or the Senate Majority Leader can veto an investigation of any member of their party who is a legislator or a legislative employee that the other 11 members think needs to be undertaken. Also, the ethics enforcement agency has no power to sanction any member of the legislature or legislative employee. That decision is left entirely to the legislature.

I believe it is time to put a strong and independent ethics enforcement mechanism into the Constitution. The members should be appointed by all three branches of government, including the judiciary, and operate by majority vote. The mechanism should have the same sanction powers that the Constitution provides for the Commission on Judicial Conduct with respect to judges. The commission is also appointed by all three branches.

Ethical behavior by public servants is not simply an abstract question of moral behavior. It speaks directly to the fundamental principle that government will be of, by and for the people. It concerns the basic question of whose interests government will serve.

I also believe it is time for a constitutional convention to consider anoth-

Evan A. Davis is a Senior Counsel at Cleary Gottlieb Steen & Hamilton LLP in New York City. He is the manager of the Committee for a Constitutional Convention, a group campaigning for a "yes" vote this November on the convention question.

er constitutional change that reinforces the principle that it is the people's interests that must be served: requiring legislators to work full-time. When government officials have significant outside employment two problems arise. First, there is the question of whether the needs of their business and its clients are taking precedence. Second, doing business with a government official is an easy but hard-to-prosecute way to hide improper payments from those seeking preference and the favorable exercise of official authority.

Currently there is no limit on the outside income of legislators, even though most members of the legislature do not work full time. There will be an even greater need to work full time if we amend the Constitution as we should to require the diligence that ought to be part of the process by which our laws are enacted. There is currently no requirement for hearings or committee reports in the normal course of business, and these assurances of public input and careful consideration are not followed in practice. Even the need to prepare for floor debate is obviated by having the debate that counts held in secret in party conferences. If you add to these basic requirements of legislative diligence the jobs of community outreach, public civic education and constituent service, being a state legislator would definitely be a full-time job.

Finally, I think it is important that we view large campaign contributions as an ethical issue. From my own experience, I can say that the largest sources of conflict of interest in Albany are these large campaign contributions. This is because under current law there are effectively no campaign contribution limits. The majority legislative leaders, who have almost complete power to block legislation, can collect contributions for their members at more than $100,000 a clip. There are no limits on the amount that may be contributed to a political party for all-important and expensive field operations to identify supporters and get out their vote. More and more today these efforts involve sophisticated micro-targeting and social media. Even the limits that nominally exist can be circumvented by forming a one-person limited liability corporation since each such corporation gives the contributor a new alter ego able to make contributions afresh.

There are several ways in which a convention might propose addressing this problem. One is to consider having the new independent ethics enforcement agency set the contribution limits based on the standard that they should not be so large as to create an appearance of "give to get" corruption.

Voting and Electoral Fairness

Number two on my list is electoral reform. Low turnout is a special problem in New York. We consistently rank near the bottom in turnout in every type of election – presidential, statewide office, municipal office, general and primary. And conspicuously New York is way behind in taking the steps other states have taken to improve turnout. We don't have early voting, which exists in 32 states; the ability to vote by mail for convenience, which exists in 27 other states; or same-day registration, which is allowed in 14 states plus the District of Columbia.

Many people are surprised that one reason we don't have these rights is that they are barred by the Constitution. Article II, the Suffrage Article, says that you can only get a mail ballot if you are sick or out of your home county on Election Day. It provides that registration must be at least 10 days before Election Day. A plausible reading is that Article II bars even in-person early voting prior to Election Day. A constitutional convention could propose sweeping away all these obstacles. It could go further and affirmatively require these measures that make it easier to vote.

Then there is the problem of gerrymandering. New York's Assembly and Senate districts are grotesquely gerrymandered. Just take a look at the district maps on the State Board of Elections website. This gerrymandering reflects both incumbent protection and the creation of safe districts to maintain party control.

Safe districts for one party or the other are a polarizing force in legislative politics. This is because the real race is in the primary which, with New York's closed primary system, is a race in a spectrum of ideology that is not representative of the populace as a whole. Also, people who live in safe districts are disadvantaged because it is common knowledge in Albany that marginal (i.e., competitive) districts have a special claim to the majority's best efforts to assist their incumbent members at higher risk of losing.

Some people say that there is no such thing as independent redistricting. When judges have had to draw district lines with the help of a special master, they have done a good job at following instructions about how a legislative district should be constructed. There is every reason to think that a properly constituted independent panel could do an equally good job of applying the principles of fair redistricting specified in law.

Local Government

There is a need to fix the Local Government Article in the State Constitution. While the article purports to protect local governments against the use of special bills directed at a single locality, judicial decisions have undermined these protections. For example, a bill limited to cities with a population of more than one million is considered a general rather than a special bill, even though the population of New York's second largest city, Buffalo, is 261,000; as a result, the bill will never apply anywhere except New York City whose population is more than eight million. This is exactly the mechanism Albany recently used to override the city's local legislation to deter the use of plastic bags with a five-cent fee. Another way to override the autonomy of a local legislature with a special bill is through the nearly unlimited deference the courts currently give to the doctrine of substantial state concern. The Constitution could be amended to limit this doctrine and make it much

harder procedurally to pass these special bills targeted at local initiatives.

The Local Government Article does not address the issue of unfunded mandates which arise when the state imposes costs on local governments for which it is unwilling to pay. A candidate for unfunded mandate relief is the state's practice of imposing a high (by comparison with other states) share of the cost of public assistance, including Medicaid, on local governments. While the voters rejected the proposals of the 1967 Constitutional Convention which were presented on an all-or-nothing basis, one of those proposals was state assumption of the cost of public assistance so that the overburdened communities where public assistance aid was most needed would not have their burden increased by taxation to fund that aid.

Finally, there is the question of local government consolidation. At one time, I lived in the village and town of Cornwall, New York in Orange County. The town and village both had a fire department, and when I had a kitchen fire, both fire departments responded. It was a winter day, and my driveway was icy. The two fire trucks skidded into one another. This became for me a homey illustration of the duplication and waste that the proliferation of units of government has caused in New York.

Equal Rights for All

Choosing my fourth topic is difficult because there are several candidates. For an audience of lawyers, court reform is an obvious topic. We currently elect State Supreme Court Justices in 11 large multi-member districts and provide ballot access only though the judicial nominating conventions which all agree are tightly controlled by the party organizations. Is this the best way to secure a well-qualified and diverse bench? We currently have 11 different trial courts provided for in the Constitution. This can result in the same matter having to be heard in several courts. Does this waste of time and money make any sense? Currently you can't be appointed to the Appellate division unless you are already an elected Supreme Court Justice. Does this unnecessarily restrict the pool of well-qualified candidates who either have not held judicial office or who hold a judicial office by appointment?

However, my choice is the need to add a strong and inclusive equal rights provision to our Bill of Rights that will help to unite and secure equal opportunity for our diverse population. We have strong civil rights laws, but they are crafted for specific contexts such as housing, employment and public accommodations. We need an overarching constitutional commitment to equality.

Such an overarching provision was added to our Constitution as a result of the 1938 Constitutional Convention, but it applies only to discrimination on the basis of race and religion. There was no consideration of including discrimination against women in 1938 when only six out of 178 delegates to the convention were women. This omission was corrected by the 1967 Convention even though only 10 out of 186 delegates were women, but the proposals of that convention were not adopted. From all that appears, no delegate to either convention was openly gay and no consideration was given to covering discrimination based on sexual orientation or identity.

Times have changed; we need to provide equal rights for women, those of diverse sexual orientation or identity and all others targeted by a prejudice of inferiority including discrimination based on ethnicity, national origin, disability or citizenship.

We also need to deal with the fact that the Court of Appeals in 1949 stripped even the limited 1938 provision of any real force. The Court held that because the term "civil rights" was not defined in the provision, it was not self-executing and would, therefore, not support a cause of action against, in one case, the open and official policy of Stuyvesant Town not to rent to African Americans. Judge Stanley Fuld said that his dissent in that case was the most important decision he ever wrote. We can fix this problem simply by changing the phrase "civil rights" to "equal rights."

Why Is a Constitutional Convention a Reasonable Way to Amend the Constitution?

The Convention Is Likely to Be Progressive but Moderate

It is likely that the Convention will be a reasonably moderate body that honors New York's traditional progressive values, what Mario Cuomo called "The New York Idea." Because its delegates are elected largely in Senate Districts, it is reasonable to expect a roughly equal number of Republicans and Democrats just as in the Senate itself. That body recently showed its commitment to progressive values by approving a plan of free tuition at SUNY and CUNY for families earning less than $125,000.

The Convention Is Advisory Only

The advisory structure of the convention process limits the incentive to try to use it to make change that is not broadly popular. Such change won't happen for the simple reason that two separate things would have to occur, both of which are unlikely. The first unlikely thing is that a majority, 103 delegates, will support a break from New York's traditions as reflected in our Constitution. The second unlikely thing, which arises from the fact that the convention is advisory only, is that the people of New York would approve of such a break in the required statewide referendum.

If we consider these two votes as independent variables, an assumption supported by the people's historical willingness to reject convention proposals, then the chance of a measure becoming law is the chance that it will receive the support of 103 delegates multiplied by the chance it will be approved in the statewide referendum. On this basis, the chances are remote of measures that retreat from our traditions becoming law.

Because these chances are very low, it follows that independent expenditure money supporting these more

CONTINUED ON PAGE 47

BY PETER SIVIGLIA

Peter Siviglia (psiviglia@aol.com) has practiced law in New York for more than 50 years, representing clients both domestic and foreign, public and private. He has served as special counsel to other firms on contract matters and negotiations. Peter is the author of *Commercial Agreements - A Lawyer's Guide to Drafting and Negotiating*, Thomson Reuters, supplemented annually; *Writing Contracts, a Distinct Discipline*, Carolina Academic Press; *Exercises in Commercial Transactions*, Carolina Academic Press; and *Contracts and Negotiating for the Business Person*, Carolina Academic Press. He has also written numerous articles on writing contracts and other legal topics, many of which have appeared in this *Journal*.

Boilerplate: Assignment Clauses[1]

Les Préludes

A. Your writing is your mind walking naked across the page.

B. What the wheel is to the world of mechanics, grammar is to the world of writing – especially the writing of contacts.

In the realm of contracts, the term "boilerplate" refers to standard provisions routinely included in contracts. I recoil at the use of that term because it carries with it an anaesthetic that numbs critical and analytical faculties essential to good contract preparation. Boilerplate, though, requires the same diligent scrutiny as any other provision in a contract.

The assignment clause – or, more to the point, clauses restricting the right to assign – provides a worthwhile study.

A. Basic Prohibition on Assignment

A basic prohibition on assignment might read along the following lines:

> Neither party may transfer or assign any of its rights or obligations under this agreement without the written consent of the other. Any transfer or assignment in violation of this Section will be null and void.

But even that basic clause, I submit, requires some refinement along the following lines:

> Neither party may transfer or assign any of its rights or obligations under this agreement without the written consent of the other. A merger or consolidation involving a party, regardless of whether that party is the surviving entity, will constitute a transfer. Any transfer of obligations under this agreement will not release the transferor from its responsibility to perform those obligations regardless of whether they arose before or arise after the transfer or assignment.[2] Any transfer or assignment in violation of this Section will be null and void.

B. Change in Control

A change in the control of a party does not constitute a transfer of the contract; yet, in the context of a particular transaction, such as a license of intellectual property, it may be appropriate to treat a change in control as a transfer – especially when a new owner of the licensee may, itself, be a potential licensee of the intellectual property. In such cases a provision along the following lines would be appropriate:

> A change in control will constitute a transfer. "Control" means the ability, either directly or through one or more entities, to control or determine the management of a corporation, partnership, limited liability company, or other entity, whether by election of those members who can determine the decisions of the board of directors or other governing body or by any other means.

C. Successors in Interest

On the other hand, in many cases it may be of no consequence to allow parties to transfer their interests in a contract to successors to their business and assets. In those situations, a paragraph along the following lines would replace the merger paragraph under item A above but not the succeeding paragraph:

> Notwithstanding the foregoing, a party may transfer and assign its rights and obligations under this agreement to a successor to all or substantially all of its business and assets *provided* the successor assumes all of the transferor's obligations under this agreement regardless of whether they arose before or arise after the transfer.

D. Rights to Payment

Sometimes a party entitled to a payment or a stream of payments under the contract may require the right to assign those payments to a lender providing project financing or working capital. Two examples are manufacturers of capital equipment and construction companies. In these cases a provision along the following lines would be appropriate:

> Notwithstanding the prohibitions on assignment contained in this Section, PARTY A may assign to a lender or provider of other credit facilities to PARTY A, subject always to the terms and conditions of this agreement, PARTY A's rights to payment under this agreement.

E. Leases and Licenses

Sometimes it may be appropriate to restrict one party's right to transfer, such as a lessee of equipment or a licensee of intellectual property, but not the other party's right. For example:

(a) Lessee will not (i) sell, assign, transfer, lease, pledge or otherwise encumber the Equipment or any of Lessee's rights under this Lease or any of Lessee's rights in or to the Equipment, or (ii) permit any of its rights under this Lease or in or to the Equipment to be subject to any lien, charge or encumbrance of any nature. Lessee's merging or consolidating with one or more entities, regardless of whether Lessee is the survivor, will constitute a transfer.

[Consider whether to add a provision regarding changes in control like the one under item B above.]

Any transaction violating any of the provisions of the preceding paragraph will be null and void.

(b) Lessor may, subject to the terms of this Lease, sell, transfer, assign or encumber any of its rights in or to the Equipment or under this Lease.

The assumption by any entity of any of Lessor's obligations under this Lease will not release the Lessor from its responsibility to perform those obligations regardless of whether they arose before or arise after the assumption.

Well, I hope the foregoing is helpful. So . . .

F. Conclusion

Assignment clauses, as well as all other boilerplate, must be assessed critically and crafted carefully in order to "approriatize" them to the particular transaction and the parties involved. ■

1. Portions of this article are based on materials found in *Commercial Agreements, infra*. Heck, I learned to recycle from the Great Ones: Bach, Beethoven, and Vivaldi.

2. Though this clause has no application to a merger or consolidation, it will apply to an asset acquisition.

Point of View
Continued from Page 45

POINT OF VIEW

radical agendas that lack broad support in New York won't be wasted on New York constitutional convention races.

Delegates Will, as a Whole, Be Less Partisan Than Legislators

The convention that was held in 1967 was presided over by the Speaker of the Assembly. Even with that partisanship, Speaker Travia was not able to maintain the partisan party discipline that he had maintained in the legislature. Only 13 of the 186 delegates were legislators. The others were people who had little incentive for compliance. As the League of Women wrote it its 1973 report on the 1967 convention,

> Unlike legislators, many delegates looked upon their roles as a "one time effort." Unworried about reelection, seniority rights and future committee assignments, they were less susceptible to party discipline. Public officials and judges, accustomed to running their own show, did not readily accept dictation from the chair.

The fact that the convention is a unicameral body also reduces partisanship, because people may not stake out partisan positions in the expectation that they have no real chance in the other house. People have to work together.

Why Is the Convention the Only Way to Achieve These Reforms?

The last time that there was an automatic vote to call a convention was in 1997. The New York City Bar Association favored a "no" vote saying that the opportunities for needed reform through the normal process had not be exhausted. Now, 20 years later, despite great effort, those reforms in areas such as ethics, court reform, voting, home rule and equal rights have not been achieved.

The reality is that if we wait for state government to cure itself, it will never happen. The unfortunate fact is that the legislature has become an entrenched interest that much prefers the status quo to curative change. It does not want effective ethics enforcement, fairly drawn election districts, voting by new people who might favor someone other than the incumbent, court reform taking away the effective power of party leaders to pick Supreme Court Justices, or any effective restriction on the state's ability to sit as a court of correction for local legislative initiatives or to spare the state from raising the revenue needed to fund its mandates. With regard to an inclusive Equal Rights Amendment, New York has not seen fit to correct even the conspicuous omission of women let alone the omission of gays and immigrants.

As they say, enough is enough. The 20-year automatic vote provision in our Constitution was designed precisely for the situation we face today. It should be used. ■

MEET YOUR NEW OFFICERS

Sharon Stern Gerstman
President

Sharon Stern Gerstman, of Buffalo, New York, took office June 1 as president of the 72,000-member New York State Bar Association.

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

A 35-year member of the State Bar, Gerstman previously served as Treasurer and on the Executive Committee as an Eighth Judicial District vice-president. She is a member of the House of Delegates, Finance Committee, CPLR Committee, Dispute Resolution Section, and Torts, Insurance and Compensation Law Section.

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

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

Michael Miller
President-elect

Michael Miller of New York City (Law Office of Michael Miller), who became president-elect of the Association on June 1, 2017, is currently vice-president of the First Judicial District. Miller, a solo practitioner for more than 30 years in Manhattan, focuses primarily on estates and trusts.

He is a past president of the New York County Lawyers Association, a past chair of the NYS Conference of Bar Leaders (NYSCBL), and has been a member of the House of Delegates of both NYSBA and the ABA.

Among many NYSBA activities, Miller was a founding member of the Elder Law Section, serving as its first newsletter editor, executive committee member and chair of multiple committees.

Over the years, Miller developed award-winning pro bono programs recognized by NYSBA, NYSCBL and the ABA.

Among his many awards, Miller received the ABA's Pro Bono Publico Award, its highest award for pro bono service, for his leading role in the legal relief efforts in the aftermath of the 9/11 attacks.

Beyond Bar activities, Miller served as an election supervisor in war-torn Bosnia and interviewed Kosovo refugees for evidence of war crimes.

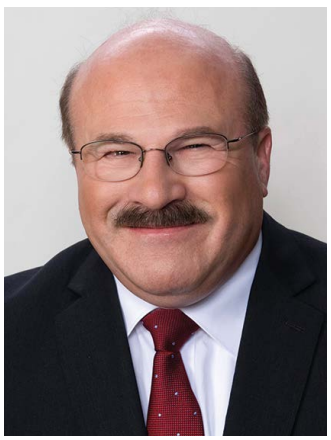
Sherry Levin Wallach
Secretary

Sherry Levin Wallach, who became secretary of the association on June 1, 2017, practiced in Westchester County the past 15 years as a partner in her law firm Wallach & Rendo, LLP. She is the immediate past chair of the State Bar's Criminal Justice Section and just completed a term as vice president from the 9th Judicial District on the NYSBA Executive Committee.

Wallach concentrates her practice on criminal defense and plaintiff personal injury in state and federal courts. She is a past chair of the NYSBA's Membership Committee and is serving her third four-year term in its House of Delegates. Wallach is co-founder of the Young Lawyers Section's Trial Academy where she continues to serve on its faculty as a team leader and lectures on cross examination.

Wallach is the membership chair of the NYSBA Trial Lawyers Section, a member of the NYSBA's Task Force on Gun Violence and the Committee on Mandated Representation. She is a frequent lecturer at CLE programs on topics ranging from trial practice to the handling of DWI cases.

She is a past chair of the NYSBA Young Lawyers Section and sits on the board of directors of the Westchester County Bar. She also serves on the Westchester and Putnam County 18B panels, which provide criminal defense for indigent people.



Scott M. Karson
Treasurer

Scott M. Karson of Melville was re-elected Treasurer of the 72,000-member New York State Bar Association for 2017–18.

Karson is a partner of Lamb & Barnosky of Melville. He concentrates his practice on trial and appellate litigation, including municipal, commercial, real property title, land use and zoning and personal injury litigation. He has argued more than 100 appeals in the state and federal appellate courts.

Karson served a three-year term as vice president of the State Bar for the Tenth Judicial District (Nassau and Suffolk counties), is a member of the State Bar's House of Delegates and is the former chair of the Association's Audit Committee. He is a member and former chair of the Committee on Courts of Appellate Jurisdiction, and serves as a member of the President's Committee on Access to Justice, the Committee on Leadership Development and the Committee to Review Judicial Nominations. He is a past president of the Suffolk County Bar Association and is the delegate of the Suffolk County Bar Association to the American Bar Association House of Delegates.

Karson is vice chair of the Board of Directors of Nassau Suffolk Law Services, the principal provider of civil legal services to Long Island's indigent population.

Karson graduated from the State University of New York at Stony Brook and earned his law degree *cum laude* from Syracuse University College of Law. He is a resident of Stony Brook.

NEW MEMBERS WELCOMED

First District

Stephane Abitbol
Griffin Thomas Almy
Michael Alexander Altman
Kamil Ramzi Ammari
Christopher Clark Antonacci
Alyssa Eve Anzalone-Newman
Michelle Arbour
Gregory Alexander Arutiunov
Ariel G. Atlas
Sabrina Arielle Baum
Martin Bayersdorfer
Alexander Becker
Jonathan Evarts Berger
Benjamin Zoltan Bergmann
Thomas Arthur Bird
Jillian R. Bledsoe
Christina Anne Bogdanski
Claire Elaine Bornstein
Andrew Hussein Bouriat
Heather Nicole Brocksmith
William Michael Brophy
Justin Edward Brown
Samuel Henry Bruce
Geoffrey Raymond Butterworth
Christian Calderon
Golda Genevieve Salazar Calonge
Julian Andres Cardona
Jennifer Turnbull Carl
Jackie Leanne Carleton
Jasmine Chean
Andrew Lyall Chesley
Katherine Bichlan Chew
Gina Marie Chiappetta
Jennifer Collins
Thomas R. Commons
Alexander Myles Connelly
Mark William Connolly
Anthony Bernard Crawford
Matthew Russell-James Crorey
Gary Anthony Crosby
Richard James D'Amato
Alexander Rudy D'Orchimont
Aaron Joseph David
Sophie Davin
Alexa Leigh Davis
Nicholas DeLisa
Zachary Evan Denkensohn
Margaret Patricia Diamond
Jiakun Ding
Cole G. Dumond
Allison B. Eitman
Joseph Michael Elks
Joel V. Ernst
Rogers Jason Bailey Ervin
Joshua Adam Esses
Margo Estrada
Adam Ezrapour
Peter Feher
Anna Naomi Feldberg
Dane Gerard Ferre
Jaryn Samantha Fields
Jeremey Stuart Foster
Kaitlin Eleanor Fox
Daniel A. Funt
Isabela Mazzola Garcez
Lacey G. Garner
Amanda Laurel Gayer
Rod Neema Ghods
Dov Byron Gold
Tesla M. Goodrich
Jesse Altmeyer Gooley
Kimberly R. Greer
Sam Sharon Griffith
Brian L. Grossman
Jacquelynn Justine Guzman
Katherine Hannah
Julia Lee Harvey
Kristi Ann Hayek
Darell D'Angelo Hayes
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Allison M. Heimann
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Heesu Kim
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Fatmata Conteh
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Abraham Dayon
Katrina Michelle Dibbini
Anna Grace Dimon
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Burton Loring Eggertsen
Offer Joseph Egozy
Yvonne Ngozi Elosiebo
Juan Camilo Estremera
Kerry Joseph Ferrell
Nakesha Isabelle Figaro
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Roxanne Jamaila Garcia-Quinonez
Claire Gavin
Christopher Gonnella
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Aurora Heller
Toni Lupo
Elisha Lorelle Rapp
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Erin Patricia Delancey
Kendra Deane Sena

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Naji'a Tameez

Sixth District
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Maria Briana Beltran
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Monchai Chuaychoo
Ian S. Lamont
Walter L. Rudberg
Donghoo Sohn
Kathy Coleman Weinberg
Carolina Kaling Wu

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Eighth District
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Aaron VanNostrand

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George Matthew Beauzile
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Alexandra C. Downey
Sean Michael Egan
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Johnathan Drapan
Jillian Mary Enright
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Maxwell Jake Glass
Joshua George Goldshlager
Michael Steven Grant
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Jeffrey Martin Carr
Katherine B. Chu
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Aryn Ashley Conrad
Samantha Danielle Croffie
Rolando Cubela
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Yi Ba
Monica Babula
Tyler Stephen Badgley
Eliza Staige Bailey
Wonyoung Bang
Nathaniel Kent Bascom
Phyllis Jo Baunach
Escarlata Baza Nunez
Nairuby Lorrene Beckles
Joshua Andrew Berman
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Xinzhu Zhao
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Weiyue Zhu
Yujing Zhu
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BOOK REVIEW

BY STEPHEN P. YOUNGER

Business and Commercial Litigation in Federal Courts, 4th Edition

Editor-in-Chief Robert L. Haig

The breadth and clarity of the fourth edition of Robert L. Haig's *Business and Commercial Litigation in Federal Courts* (4th ed. Thomson Reuters 2016) make it a major contribution to legal scholarship and an essential resource for the active commercial litigator. The fourth edition comprises 14 volumes and contains 25 new chapters. It constitutes 4,400 more pages than the previous edition. The treatise as a whole comes in at 17,142 pages of text, yet it remains remarkably user-friendly. This work will prove extremely valuable both to the new associate in need of an introduction to an area of practice and to the experienced litigation partner desiring to review a complex field (or learn about a new one).

In addition to Mr. Haig, 296 principal authors, including 27 judges, contributed to the treatise. In the foreword, Mr. Haig estimates that the authors and their law firms invested more than $80 million in billable time, at their hourly billable rates, in preparing the four editions of this book. This effort shows. The breadth and scope of the treatise is remarkable, and each chapter benefits from the insights of the distinguished practitioners and judges who authored it. For example, Judge Shira A. Scheindlin, an expert on e-discovery who authored several groundbreaking opinions on that topic during her time on the bench, contributed a chapter, along with Jonathan Redgrave, on the discovery of electronically stored information. This chapter could be used as a reference when practitioners encounter e-discovery issues, but also could be read in full by associates who are new to the world of e-discovery.

The book covers topics that you would expect, such as federal civil procedure, alternative dispute resolution, trial and appellate practice. It also covers a plethora of substantive legal areas related to business and commercial litigation, from agency to warranties and a wealth of other matters in between. There are also chapters on topics that you would not necessarily anticipate to be covered in a treatise, but that are extremely useful to a litigator in the federal courts. For example, David Boies and Stephen Zack authored a chapter on litigation technology, which covers everything from pretrial issues (such as electronic filing) to the use of graphics at trial. For any conceivable topic that one might encounter during federal court practice, there is a chapter that can be consulted.

Each chapter begins with an introduction outlining the framework of the section. Following the introduction is a discussion of applicable legal principles with helpful case analysis, explanations of statutory provisions, and practical legal advice. Each chapter concludes with a section entitled "Practice Aids," which includes procedural checklists and sample forms. The checklists assist attorneys in planning a strategic course of action while the sample declarations, letters, complaints, and jury instructions, to name a few, provide a valuable resource for practitioners.

As one example, Chapter 67 entitled "Social Media," which is new to the Fourth Edition, is typical of the treatise. The chapter is written by two practicing attorneys with years of litigation experience, Paul C. Curnin and Alexis S. Coll-Very. The chapter contains pertinent information about how social media can factor into all facets of litigation. First, the chapter discusses the discovery of social media, including how social media fits into the discovery framework under Federal Rules of Civil Procedure 26 and 34. The chapter also discusses how social media interplays with the rules of evidence at trial, and delves into issues involving jurors and employees. The chapter also provides analysis of ethical issues, including "friending" a judge and communicating with clients through social media. At the end of the chapter, there are model interrogatories, requests for admission, requests for production of documents, and deposition questions. Also, among the 25 new chapters in the Fourth Edition are chapters on civil justice reform, cross-border litigation, mediation, arbitration, securitization and structured finance, and marketing to potential business clients.

Not only is *Business and Commercial Litigation* the most comprehensive treatise of its kind, it reads with the clarity of a travel guidebook. It explains difficult topics like patents and the Foreign Corrupt Practices Act in simple and easy-to-understand language without sacrificing any of the complexity or nuance of the subject. As a result, the most recent edition of Mr. Haig's book is a valuable resource for the busy attorney who needs a quick introduction or a helpful review of an area of federal commercial litigation or to delve more deeply into a topic. *Business and Commercial Litigation* deserves a place on every commercial litigator's bookshelf. ■

Stephen P. Younger is a partner at Patterson Belknap Webb & Tyler LLP. Sam Yospe, an associate at Patterson Belknap, assisted in preparing this book review.

ATTORNEY PROFESSIONALISM FORUM

Dear Forum,

I keep hearing stories of hackers breaking into the computer networks of law firms to steal confidential customer information. I am the managing partner of a 50-attorney firm and I must say this is keeping me up at night. I would appreciate some guidance on what a law firm's ethical obligations are with respect to guarding against the consequences of a cyberattack. Do we have any obligations with respect to the various vendors we hire?

Sincerely,

Sleepless in New York

Dear Sleepless in New York:

Cloud computing and the rise of mobile devices have changed the way companies of all kinds do business, including law firms. Along with these technological leaps have come a variety of cybersecurity issues affecting both lawyers and clients alike. A failure to take reasonable steps to preserve the confidentiality of client data can be more than bad business; it can lead to ethical violations and even potential liability. Attorneys have a professional obligation to maintain the confidentiality of client information (New York Rules of Professional Conduct (NYRPC 1.6(a)), and to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of that information (NYRPC 1.6(c)).

Under NYRPC 1.6, attorneys have two distinct duties to preserve the confidentiality of client information. First, NYRPC 1.6(a) prohibits attorneys from knowingly revealing a client's confidential information, or such other information that may disadvantage the client, unless: (1) the client gives informed consent (as defined in Rule 1.0(J)); (2) the disclosure is impliedly authorized to advance the client's interest and is reasonable under the circumstances; or (3) the revelation fell into one of the specified exceptions of subsection (b) (e.g., necessary to prevent a crime, bodily harm, etc.). Attorneys' second duty under NYRPC 1.6 is more ambiguous – attorneys have an obligation to "exercise reasonable care to prevent . . . others whose services are utilized by the lawyer from disclosing or using confidential information of a client." This standard of reasonableness should be familiar to most practicing attorneys, but may not be especially helpful for ensuring client confidentiality in an era of cutting-edge technological evolution, where there is a limited history of what constitutes "reasonable care." Nevertheless, "the reasonable person . . . is called upon . . . when a problem arises that needs to be solved objectively," and attorneys have no choice but to grapple with their responsibilities to clients on the issue of cybersecurity. (John Gardner, *The Many Faces of the Reasonable Person*, NYU Law Review, http://www.law.nyu.edu/sites/default/files/upload_documents/The%20Many%20Faces%20of%20the%20Reasonable%20Person.pdf).

Complying with these obligations can be an increasingly daunting challenge when "new technologies create new threats to the confidentiality of client data." *See* Drew Simshaw and Stephen Wu, *Ethics and cybersecurity: Obligations to Protect Client Data*, National Symposium on Technology in Labor and Employment Law (March 15, 2015). Indeed, the security of digital data has become an issue of national significance. As FBI Director at the time Robert Mueller recognized in March 2012 "there are only two types of companies: those that have been hacked and those that will be." American Bar Association, *Cybersecurity: Ethically Protecting Your Confidential Data in a Breach-A-Day World* (April 27, 2016).

Law firms are not immune from cyberattacks. Indeed, in March of 2016, a Russian cyber-criminal targeted nearly 50 large law firms in an attempt to obtain the confidential financial information of several of their largest clients. *See* Claire Busher, *Russian Cyber Criminal Targets Elite Chicago Law Firms*, Crain's (March 29, 2016). Hackers managed to breach the computer networks of some of the world's most prestigious law firms, including Cravath Swaine & Moore LLP and Weil Gotshal & Manges LLP. *See* Nicole Hang and Robin Sidel, *Hackers Breach Law Firms, Including Cravath and Weil Gotshal*, Wall Street Journal (March 29, 2016). The FBI has warned that law firms will continue to be targeted for cyberattacks because they have access to their clients' most sensitive and valuable information, and are viewed by hackers as relatively easy targets. *See* Simshaw and Wu, *supra*.

Whatever their size, sector or location, attorneys and law firms have an ethical obligation to institute and maintain sound cybersecurity protocol, and to ensure that third-party vendors do the same. The NYRPC commentary is unambiguous – "to maintain the requisite knowledge and skill, a lawyer should . . . keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients ***or to store or transmit confidential information***." (Comment 8 to NYRPC 1.1 (emphasis

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.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

added).) As commentators have recognized, "the requirement to protect client information is, in essence, an information security obligation," and the New York State Bar Association (NYSBA) and the American Bar Association (ABA) have provided attorneys with some guidance on how attorneys can go about satisfying this obligation. *See* Simshaw and Wu, *supra*.

The NYSBA Committee on Professional Ethics has issued several ethics opinions setting forth the scope of attorneys' obligations to maintain the confidentiality of clients' electronic data under the NYRPC, and what steps attorneys can take to ensure they satisfy their obligations. For instance, in September 2010, the NYSBA Committee on Professional Ethics issued Ethics Opinion No. 842, which dealt primarily with the use of outside online storage providers – commonly referred to as "cloud computing" – to store client data. Opinion No. 842 noted that the storage of client data "in the cloud" implicated NYRPC 1.6 (confidentiality of information), and dealt with an inquiry concerning a solo practitioner's use of cloud storage systems to preserve client data in the event that something was to happen to his own personal computer.

NYSBA Committee on Professional Ethics Opinion No. 842 unequivocally states that in this era of cloud computing, "[a] lawyer must take reasonable affirmative steps to guard against the risk of inadvertent disclosure by others who are working under the attorney's supervision or who have been retained by the attorney to assist in providing services to the client." In today's world, that means taking certain precautions to preserve the confidentiality of a client's digitally stored information. For example, attorneys entrusting confidential information to a third party such as a cloud service provider should ensure that: (1) the service provider has an enforceable obligation to preserve confidentiality and security; (2) the service provider employs available technology to thwart reasonably foreseeable attempts at infiltration; and (3) the lawyer periodically reviews the security protocol in place to ensure that it is still adequate and reasonably up to date. It should be noted that in the scenario presented in Opinion No. 842, the solo practitioner's online data storage system was password-protected, and the data stored on the system was encrypted. These are the types of steps that might satisfy an attorney's obligation under NYRPC 1.6(c) and which, depending upon the circumstances, may represent the bare minimum of what an attorney is required to implement in terms of technical specifications in order to satisfy his or her duty of reasonableness. However, because the nature of cybersecurity is changing rapidly, attorneys "should periodically reconfirm that the provider's security measures remain effective in light of advances in technology." Opinion No. 842.

In August 2014, the NYSBA Committee on Professional Ethics issued Ethics Opinion No. 1019, addressing issues of confidentiality arising from attorneys accessing their firm's electronic files remotely. Working remotely has become an everyday occurrence for most attorneys, who have grown accustomed to the convenience of being able to service a client's needs at a moment's notice, and from anywhere in the world with an Internet connection. However, a 2014 report by the Department of Homeland Security found that "online tools that help millions of Americans work from home may be exposing both workers and businesses to cybersecurity risks." Michael Roppolo, *Work-from-home remote access software vulnerable to hackers: Report*, CBS News (July 31, 2014). In order to access files remotely, attorneys often log on to unsecure Wi-Fi networks or "hotspots," which can expose both the attorney and the firm's files to malware – software designed by hackers that can infiltrate remote desktops and whose capabilities include logging keystrokes, uploading discovered data, updating malware and executing further malware. As the NYSBA Committee on Professional Ethics itself has acknowledged, "lawyers can no longer assume that their document systems are of no interest to cyber-crooks" and that is particularly true where there is outside access to the internal system by third parties, including law firm employees working at other firm offices, at home or when traveling, or clients who have been given access to the firm's document system.

Unfortunately, Opinion No. 1019 provides attorneys little in the way of detail as to how they can work remotely without compromising their own ethical obligations in the process. The Opinion directs attorneys to Comment 17 to NYRPC 1.6, which provides that attorneys are not obligated to "use special security measures if the method of communication affords a reasonable expectation of privacy." "The key to whether a lawyer may use any particular technology is whether the lawyer has determined that the technology affords reasonable protection against disclosure." NYRPC No. 1019, ¶ 5. However, "because of the fact-specific and evolving nature of both technology and cyber risks, [it] cannot recommend particular steps that would constitute reasonable precautions to prevent confidential information coming into the hands of unintended recipients." (*Id.* ¶ 10.) As a result, attorneys would be wise to err on the side of caution when accessing client information remotely, and to look to other resources for technical guidance.

Fortunately, there are a number of cybersecurity resources available to attorneys that may provide further guidance on best practices. Specifically, the ABA has published a handbook to help lawyers and their firms cope with the emerging cybersecurity threat. *See* Jill D. Rhodes & Vincent Polley, *The ABA Cybersecurity Handbook*, ABA Cybersecurity Legal Taskforce (2013). In addition, on May 11, 2017, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion No. 477, which provides a non-exhaustive

list of best cybersecurity practices for attorneys. Among other things, the committee recommends that attorneys: (1) understand the nature of the cybersecurity threat, including a careful consideration of the sensitivity of a client's information and whether a particular client is at a higher risk for attack; (2) understand how the firm's electronic communications are created and stored, so that a lawyer may assess and manage the risk of inadvertent disclosure; (3) understand and use reasonable security measures, such as the use of secure internet access methods; (4) train non-lawyer support staff in the handling of confidential client information; (5) clearly and conspicuously label confidential client information as "privileged and confidential"; and (6) conduct due diligence on third-party vendors providing digital storage and communication technology. While the utility of specific security measures may vary depending upon particular circumstances, compliance with these types of practices will go a long way toward attorneys' ongoing attempts to comply with their ethical obligations while storing and using client's digital information, or when working remotely.

Moreover, the Association of Corporate Counsel, a bar association that promotes the interests of in-house counsel, has also issued a set of guidelines for outside counsel's protection of confidential client information. *See Model Information Protection and Security Controls for Outside Counsel Possessing Company Confidential Information*, Association of Corporate Counsel (the "ACC Model Controls"). The ACC Model Controls provide detailed recommendations for the handling of confidential client data, with a particular emphasis on encryption. Encryption is the process of converting digital information into a code, to prevent unauthorized access by outside parties. One commentator has compared sending unencrypted data over the internet to mailing a postcard without an envelope – it can be accessed and read by just about anyone. The ACC Model Controls therefore suggest the encryption of client data while in transit, as well as encryption of all information stored on outside counsel's systems, servers and mobile devices. The ACC Model Controls also mandate the reporting of any data security breach to the client within 24 hours of discovery of the breach (ACC Model Controls § 3.2).

The failure to employ basic data-security measures can have drastic consequences, including the imposition of civil liability for professional malpractice. In the wake of the data breach at Cravath, Weil Gotshal and other large firms in March 2016, a plaintiffs' law firm planned to initiate a class action lawsuit against them for their failure to preserve the confidentiality of client information. *See* Aebra Coe, *BigLaw in Crosshairs as Firm Plans Data Breach Litigation*, Law 360 (March 31, 2016). In New York, former clients filed a complaint against their attorney following a "spoofing attack" which caused them to wire nearly $2 million to hackers, instead of counsel. *See Millard v. Doran*, Index No. 153262 (Sup. Ct. N.Y. County 2016). The former clients alleged that the attorney's maintenance of her law firm email account on America Online constituted professional negligence and a breach of her fiduciary obligations in light of AOL's track record of vulnerability to hacking attacks. In another case, a client brought suit even prior to the occurrence of an actual data breach, citing the clear gaps in the firm's cybersecurity protocols. *See Jason Shore and Coinabul v. Johnson N& Bell*, Docket No. 1:16-cv-or04363 (N.D. Ill. April 15, 2016).

In addition, on March 1, 2017, the New York Department of Financial Service, which supervises banks, insurance companies and other financial service entities, issued a new set of regulations (23 NYCRR 500 *et seq.*), imposing new information safeguard requirements. *See* Kenneth Rashbaum, *Cybersecurity for Law Firms: Business Imperatives Update 2017*, New York Law Journal (March 6, 2017). The new regulatory requirements will apply to law firms as third party service providers, and will require firms to show that they have assessed their information safeguard protocols. The regulations also require that any agreements with law firms contain representations that the firm has cybersecurity policies and procedures regarding the encryption of nonpublic information in place. Law firms that represent financial services or health care clients will be most affected, but firms of all shapes and sizes would do well to familiarize themselves with these new regulatory requirements.

In addition to the imposition of civil and regulatory liability, a firm's reputation may suffer significant damage as a result of public, and potentially embarrassing, data breaches. Moreover, in light of the ethical guidance provided by the NYSBA and ABA ethics committees, attorneys could very well be the subject of disciplinary proceedings if they fail to adequately secure client data. While we are currently unaware of any disciplinary proceedings initiated in New York as a result of an attorneys being the subject of a cyberattack, such cases may arise as more and more data is stored online, and the number of cyberattacks increase. Attorneys would therefore be wise to familiarize themselves with the applicable ethical guidelines and be proactive with respect to securing their client's confidential information.

Sincerely,

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Continued on Page 60

BECOMING A LAWYER

BY LUKAS M. HOROWITZ

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"It. Is. Finished."

Cue the longest exhale of my life!

I was once told that cupcakes are muffins that believed in miracles. I certainly feel like a cupcake, for my first year of law school is complete. My sanity is still intact (for the most part) and life moves forward.

There should be a disclaimer for law school: Eyesight will deteriorate. I feel like a bat trying to find Waldo, underwater. That may be a little dramatic, but things do look a little fuzzier.

Here are a few things that I have picked up along the way throughout this first year of school: 1) read, re-read, then re-re-read. Generally speaking, reading a rule or statute once is just not enough. 2) Eat a cookie, save a life. You would be surprised at what a cookie can do when you're staring into a contracts book at two in the morning, not knowing if you are still reading a contracts book or a newly created language that has yet to be deciphered. 3) Talk it out. If you can put it into a sentence verbally, you have a solid handle on what it is you are learning. 4) There are only so many hours in a day and days in a week. Do what you can, but get enough sleep. 5) Make sure you pace yourself when celebrating the conclusion of your first year. Unlike studying for law school exams, celebrating does not *require* cramming.

Right before finals, I took part in oral arguments for my lawyering class. I was drilled with questions more difficult than those posed by my mother upon a post-curfew arrival at home when in high school. Nine minutes of my life that seemed, at the same time, to last both 30 seconds and 10 hours. I believe I got to launch into my carefully prepared opening for about 45 seconds before I was asked my first question. And then maybe seven seconds more before being asked a second question. I think you get the picture. You begin to answer one question. In the middle of that question, you are asked a second. As you attempt to answer that question, you are asked a third, all the while remembering that you do, in fact, need to finish answering that initial question. As the nine minutes passed in the blink of an eye, leaving me feeling mentally battered, at the same time I experienced an adrenaline rush. Had I, in some sick way, actually enjoyed the onslaught of questioning I had just endured in front of my classmates? I did! That being said, I cringe when I imagine what it is like to have to do that, for 20 or 30 minutes, or more, in front of a panel of judges, knowing all the while that the outcome of your case could be hanging in the balance.

An interesting aspect of oral argument is its ability to change the outcome of a case. In class, we discussed just that. Our professor asked, generally, how much weight an oral argument has on the decision rendered by a court. Some students suggested 50 percent, others 30. The realistic answer according to the professor? Five, maybe 10 percent. Often times, the judges know their decision prior to hearing arguments, either because this is a case similar to one that has been ruled on in the past, or, having read the record beforehand, they have already come to a decision. I was surprised to learn that there is already a draft decision prepared before the judges hear oral argument. That five or 10 percent, however, is intriguing. It takes a true linguistic ninja to navigate successfully through appellate questioning to be able to actually change the decision of the case. This is a skill I hope to have the opportunity to develop and refine.

It takes a true linguistic ninja to navigate successfully through appellate questioning to be able to actually change the decision of the case.

All and all, friends, the first year of law school, while challenging, was manageable, and, surprisingly, enjoyable. That being said, I am several days into my first summer internship, and am not missing class at all. Wish me luck, and I hope everyone enjoys their summers. Until next time. ■

6. No juror will be placed on a panel if neither the defense nor the prosecution don't object.
7. The most successful lawyers don't spend fewer than seven hours at work a day.
8. How much my client made last year is not insignificant in this case.
9. What my client said is that she shouldn't be misunderstood.
10. No decision will be made unless both sides provide all the necessary information.

Metadiscourse

Metadiscourse is writing about your writing. A phrase like "for all intents and purposes" is metadiscourse; it takes up space without adding anything substantive. Omit these phrases. Other examples of metadiscourse: "the fact of the matter is," "it is submitted that," and "as a matter of fact."

Exercises: Metadiscourse

Rewrite the following sentences.

1. It is well settled that the defendant knew what she was doing before she stabbed the victim.
2. The judge told the jury, "It should not be forgotten that court is ending early today."
3. Please be advised that cellphone use is prohibited.
4. The defense attorney concluded, "The fact of the matter is that at the time of the crime, my client was at home with his grandma."
5. It's come to our attention that only the defendant breached the contract.
6. The point I'm trying to make is that the defendant is entitled to summary judgment.
7. It's clear that the witness is biased.
8. It can be said with certainty that because of plaintiff's injuries, he'll never walk again.
9. It's obvious that the witness is lying under oath.
10. Those sitting in the courtroom should turn their phones off for all intents and purposes.

Gender Neutrality

Gender neutrality in writing is a relatively new, and important, phenomenon. Not only is sexist writing offensive, but it focuses the reader on style rather than content. There're four ways to rephrase gendered language. The first is to use plural forms, which allow you to replace "he" and "she" with "they." *Example:* "If he doesn't appear in court, the trial will still go forward." *Becomes* "If they don't appear in court, the trial will still go forward." The second is to eliminate the pronoun; that might require you to rearrange the sentence. *Example:* "He who isn't a morning person should find a different line of work." *Becomes* "Anyone who isn't a morning person should find a different line of work." The third is to repeat the noun. *Example:* "A court officer will escort you to the jury room. He will do so once all the jurors are assembled." *Becomes* "A court officer will escort you to the jury room. The officer will do so once all the jurors are assembled." The fourth is to use a second-person pronoun like "you," "your," or "yours." *Example:* "She who has patience should work in Family Court." *Becomes* "If you have patience, you should work in Family Court."

> Not only is sexist writing offensive, but it focuses the reader on style rather than content.

Another way to be gender neutral is to use "person" rather than "man" and "woman." Rather than using "policeman," "chairman," "mailman," "stewardess," and "fireman," use "police officer," "chair," "letter carrier," "flight attendant," and "firefighter." If you see the suffixes "-man" or "-ess," delete them. If you see masculine terms using the word "man," delete them. Use "one" to make the sentence gender neutral. *Example:* "To boldly go where no man has gone before." *Becomes* "To boldly go where no one has gone before." Use gender-neutral parallel language: If you use "man," use "woman." If you use "husband," use "wife." Make your subjects agree with their predicates. Avoid the inelegant "he or she," "s/he," or alternating between "he" and "she."

Exercises: Gender Neutrality

Rewrite the following sentences.

1. New Jersey is New York's sister state.
2. A judge can't be biased. She must be impartial.
3. Madam Justice Ruth Bader Ginsburg has been a United States Supreme Court Associate Justice since 1993.
4. He who's comfortable speaking in public should be a litigator.
5. Ben did what any man would have done: he told the truth.
6. The man and wife robbed banks across the country.
7. A good lawyer takes her job seriously.
8. The waitress was hesitant to testify.
9. A convicted con man will be arraigned tomorrow.
10. "I now pronounce you man and wife!"

Now that you've completed the exercises (we hope you didn't peek at the answers), study the *Legal Writer's* answers and compare them with yours.

In the next issue of the *Journal*, the Legal Writer will continue with more exercises.

Answers: Passive Voice

1. This sentence contains a blank passive. We don't know who asked the jurors about their professional history. *Corrected*

version: The attorneys asked the jurors about their professional history.

2. The sentence doesn't state who found the defendant not guilty. *Corrected version:* After the jurors deliberated for 10 days, they found defendant Rosen not guilty.
3. This sentence contains a single passive. It's written in object, verb, subject formation. *Corrected version:* Judge Packer wrote the decision.
4. This sentence is written in the single-passive voice. It follows the object, verb, subject format. *Corrected version:* The jury heard testimony from multiple eyewitnesses.
5. This sentence contains a blank passive. We don't know who instructed the jury. *Corrected version:* The judge instructed the jury not to speak about the case until jury deliberations.
6. This sentence contains a blank passive. We don't know who proposed the short recess. *Corrected version:* Counsel proposed that the court break for a short recess.
7. This sentence contains two blank passives. We don't know who reached the conclusion (concluded) or who'll accept the settlement. *Corrected version:* Plaintiffs concluded that they won't accept any settlement under $200,000.
8. This sentence contains a blank passive. We don't know who killed Max. *Corrected version:* Ryan killed Max with a butcher knife.
9. This sentence is written in the single-passive voice. It's written in object, verb, subject formation. *Corrected version:* The defendant shot the victim.
10. This sentence contains a blank passive. We don't know who asked the lawyers to keep quiet. *Corrected version:* The court officers asked the lawyers in the courtroom to keep quiet.

Answers: Negative

1. This sentence contains a negative word "unless," which frames it as a negative sentence. *Corrected version:* An opening statement will be convincing if it's given with a smile. *Better version:* An opening statement given with a smile is convincing.
2. This sentence contains a negative combination, "rarely ever," that you should stay away from. *Corrected version:* Most cases settle before trial.
3. This sentence contains a negative word: "not." *Corrected version:* John ran away and hid from the police.
4. Rather than "barely," a negative word, phrase the sentence in the positive. *Corrected version:* The only evidence in this case was witness testimony.
5. This sentence contains a negative expression. Rephrase is positively. *Corrected version:* The plaintiff's injuries were minor.
6. This sentence has a negative combination. *Corrected version:* A juror will be placed on a panel if the prosecution and the defense consent.
7. This sentence contains both "don't" and "less than." Rephrase in the positive. *Corrected version:* The most successful lawyers spend seven or more hours at work a day.
8. Rather than write "not insignificant," which is a double negative, phrase it in the positive. *Corrected version*: How much my client made last year is significant in this case.
9. Instead of writing "shouldn't be misunderstood," which is a double negative, phrase it in the positive. *Corrected version:* My client said she should be understood.
10. Rather than starting the sentence with a negative "no," write this sentence in the positive. *Corrected version:* A decision will be made only when both sides provide all the necessary information.

Answers: Metadiscourse

1. The phrase "It is well settled that" adds no meaning to the sentence. *Corrected version:* The defendant knew what she was doing before she stabbed the victim.
2. The phrase "it should not be forgotten" is metadiscourse. It occupies space while not adding anything. *Corrected version*: The judge told the jurors, "Court is ending early today."
3. This sentence contains the phrase "please be advised that," an example of metadiscourse. *Corrected version:* Cellphone use is prohibited.
4. The metadiscourse in this sentence is "the fact of the matter is that." *Corrected version:* The defense attorney concluded, "At the time of the crime, my client was at home with his grandma."
5. The phrase "it's come to our attention that" adds nothing to the sentence and should be deleted. *Corrected version:* Only the defendant breached the contract.
6. The phrase "the point I am trying to make is that" is unnecessary to the sentence and weakens the conclusion. *Corrected version:* Defendant is entitled to summary judgment.
7. The phrase "it's clear that" is unnecessary. *Corrected version:* The witness is biased.
8. The opening phrase can be deleted without changing the meaning of the sentence. *Corrected version:* Because of plaintiff's injuries, he'll never walk again.
9. The phrase "it's obvious" is unnecessary. Omit it. *Corrected version:* The witness is lying under oath.
10. "For all intents and purposes" adds nothing essential to the sentence. Delete it. *Corrected version:* Those sitting in the courtroom should turn their phones off.

CONTINUED ON PAGE 60

Attorney Professionalism Forum
Continued from Page 56

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I recently started a solo practice and my practice is growing slowly. A friend recently asked me to appear for him in court when his per diem attorney had a last minute emergency. I realized that while my practice is still growing, making occasional appearances as a per diem attorney might be a good way to bring in some additional fees. In hindsight, after making the appearance on behalf of my friend, I realized I never did a conflict check and didn't have a written arrangement as to my representation, and I am sure my friend's client didn't know who I was. Although I don't think anyone was concerned about this in the least, did I act improperly? I can't imagine attorneys that appear on a regular basis as per diem attorneys run conflict checks on a daily basis. But if I do this going forward, what rules do I need to consider when appearing as a per diem attorney. For example, do I need to have formal relationships with each of the attorneys or firms that I appear for? Are there certain types of cases I should reject if I am asked to appear? When I worked for my prior firm, I occasionally would show up for a conference expecting to resolve a discovery dispute only to discover that the opposing attorney sent a per diem attorney with no knowledge of the case or authority to act. It would drive me crazy. Am I exposing myself to professional liability even though I was just asked to show up for a routine conference? Any advice would be appreciated.

Yours truly,
Attorney Foraday

The Legal Writer
Continued from Page 59

Answers: Gender Neutrality

1. Use gender-neutral terms. Unless someone is really a sister or brother, replace "sister" or "brother" with "sibling." *Corrected version:* New Jersey is New York's sibling state.
2. This sentence isn't gender neutral. It uses the female pronoun. Making the noun plural is one way to make the sentence gender neutral. *Corrected version*: Judges can't be biased. They must be impartial. *Better version:* A judge can't be biased. A judge must be impartial.
3. This sentence isn't gender neutral. It uses a term reserved for a female. Eliminate "Madam." *Corrected version:* Justice Ruth Bader Ginsburg has been a United States Supreme Court Associate Justice since 1993.
4. This sentence isn't gender neutral. Eliminate the pronoun. *Corrected version:* Anyone comfortable speaking in public should be a litigator.
5. This sentence should substitute "man" for "person" or "human." *Corrected version:* Ben did what any person would have done: he told the truth.
6. The language in this sentence isn't parallel. *Corrected version:* The husband and wife robbed banks across the country.
7. Don't fix gender issues by internal disagreement. *Corrected version*: Good lawyers take their job seriously. *Or:* A good lawyer takes work seriously.
8. To use gender-neutral terms, avoid the suffix "-ess." Replace "waitress" with "waiter" or "server." *Corrected version:* The waiter (or server) was hesitant to testify.
9. Replace "con man" with "con artist" to make the sentence gender neutral. *Corrected version:* A convicted con artist will be arraigned tomorrow.
10. Use gender-neutral parallel language. *Corrected version:* "I now pronounce you husband and wife!" ■

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. He thanks judicial interns Alexandra Dardac (Fordham University) and Tamar Rosen (Benjamin N. Cardozo School of Law) for their research.

"I'm beginning to wonder if both you guys are lying."

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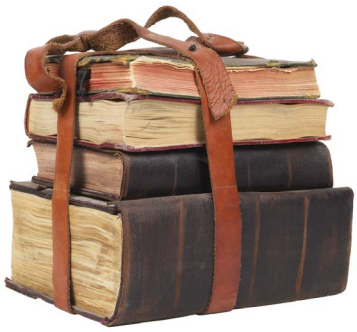

Legal-Writing Exercises: Part I

It's easy to read about how to improve your legal writing. The hard part is putting down your thoughts in written form. Some believe that the most difficult part about legal writing is knowing every rule of style, grammar, and punctuation. They're wrong. The hardest part is clarity, tone, organization, making every syllable count, applying law to fact, and connecting with readers through honest, understated, and readable writing. But to write well, you'll have to learn style, grammar and punctuation —one rule at a time, and the sooner, the better.

This multi-part series is designed to help you exercise your legal-writing skills. In Part I, *the Legal Writer* will review some of the most important concepts in legal writing, including the passive voice, writing in the positive, metadiscourse, and gender neutrality.

Below are exercises to test you on the concepts you've learned, or which you already know. Edit the sentences: Change the words, rearrange them, add or delete them. After you've edited the sentences, look at the answers at the end of this article to determine whether you've edited them correctly.

Passive Voice

The active voice is more effective than the passive voice. The active voice is simpler, clearer, shorter, and more direct. In passive sentences, the format is object, verb, subject. Active sentences follow a different format: subject, verb, object. *Example:* "The attorney faxed the summary-judgment motion." If the structure is object, verb, subject, then it's a "single passive." A sign your sentence has a single passive is if you see the word "by." *Example:* "The summary-judgment motion was faxed by the attorney." Use single passives to connect sentences or end a sentence with emphasis. A double passive, also known as a blank or nonagentive passive, hides the subject. *Example:* "The summary-judgment motion was faxed." In that example, the reader doesn't know who faxed the motion. When you omit the subject, the actor is unknown. The passive voice conceals information, is vague, and places emphasis wrongly. Write in the active voice unless you're using the double passive deliberately to emphasize the object rather than the verb or you don't know or care who the subject is.

Exercises: Passive Voice

Rewrite the following sentences.

1. The jurors were asked about their professional history.
2. After the jury deliberated for 10 days, defendant Rosen was found not guilty.
3. The decision was written by Judge Packer.
4. Testimony was heard by the jury from multiple eyewitnesses.
5. The jury was instructed not to talk about the case until jury deliberations.
6. It's been proposed that the court break for a short recess.
7. The conclusion reached is that any settlement under $200,000 won't be accepted.
8. Max was killed with a butcher knife.
9. The victim was shot by the defendant.
10. The lawyers in the courtroom are requested to keep quiet.

Negatives

Sentences written in the negative might appear acceptable, and there's nothing grammatically incorrect with them. But they aren't preferred. It's always better to write in the positive. It looks and sounds better, and it's easier to understand. Avoid negative prefixes or suffixes like "dis," "ex," "ill," "ir," "-less," "mis," "un," and "non." Eliminate negative combinations: "never unless," "none unless," "not ever," and "rarely ever." Negative words to exclude from your writing include "barely," "except," "hardly," "neither," "not," "never," "nor," "provided that," and "unless."

The active voice is more effective than the passive voice.

Exercises: Negative

Rewrite the following sentences.

1. An opening statement won't be convincing unless it's given with a smile.
2. Most cases rarely ever go to trial.
3. Not only did John run away from the police, but he also hid.
4. There was barely any evidence in this case except for witness testimony.
5. The plaintiff's injuries weren't major.

CONTINUED ON PAGE 58

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