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A "Unique Outlier": Liability of Pet Owners in New York State

by Matthew J. Kaiser

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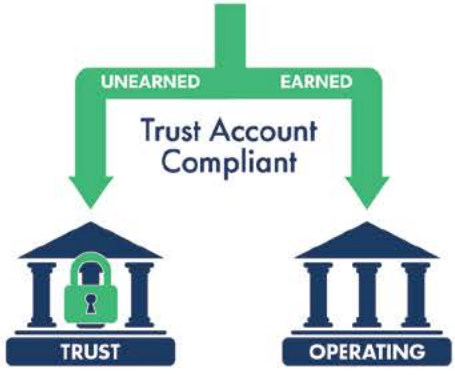

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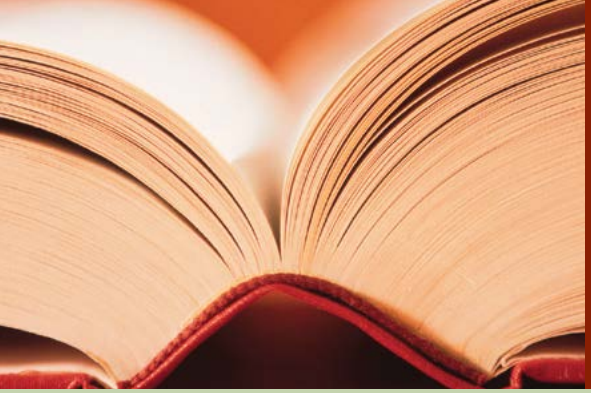

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SHARON STERN GERSTMAN

Magna Carta, the Rule of Law and Russian Hacking

On June 15, we celebrated the 802nd anniversary of the signing of Magna Carta. In 2015, for the 800th anniversary, I was privileged to be in London for a series of programs sponsored by the American Bar Association, and at Runnymede with the Queen – and thousands of other people – for the grand tribute to the Great Charter. Interestingly, at Runnymede the most prominent marker of the place where modern legal theory began is a monument erected by the ABA, originally in 1957, and refurbished and rededicated on that day in 2015. Many acknowledge that Magna Carta is treasured more here than in Great Britain.

The speakers at the programs in London were amazing. All of them related how Magna Carta's most significant principle – that even the King is not above the Rule of Law – is the most important underpinning of a free society. One human rights lawyer from Zimbabwe, whose own life was threatened daily, correctly pointed out that it is respect for the Rule of Law, and not democracy, that protects a nation's citizens. As she said, any country can elect its officers, but it is not how the elected representatives get there, what matters is what they do with the power once they are in office. If they have respect for the Rule of Law, if they acknowledge that the law exists apart from them and respect the process of either following the law or working within the system to change it, the human rights and dignity of the people are protected.

Lack of respect for the Rule of Law is not confined to foreign countries. Russian hacking and the Russian government's attempt to influence our 2016 election have clouded the current administration. The institution of an inquiry by Congress and a concurrent investigation by the Justice Department have brought about the resignation of National Security Advisor Michael Flynn and have required the recusal of Attorney General Jeff Sessions. In April, I brought a panel of experts in the law of Independent Counsel (both federal and state) to speak to our House of Delegates. Panelist Richard Davis, who was a member of Archibald Cox's staff while he was the independent special prosecutor of Watergate, spoke about how Cox's appointment occurred and about the power the White House had over him, evidenced by his firing during the famed Saturday Night Massacre. While President Nixon had the power to force the Attorney General to fire Mr. Cox, or be fired himself, it was the exercise of this power in an attempt to stop the Watergate investigation that led directly to the impeachment process, which then led to President Nixon's resignation. Congress responded to the issues raised in Watergate by passing an Independent Counsel act to remove the Special Prosecutor from the control of the Justice Department and the administration. Kenneth Starr was appointed under this act to investigate Whitewater during the Clinton administration. The legislation authorizing the appointment of Independent Counsel lapsed on June 30, 1999 and was never reauthorized.

Much has already been written about the firing of FBI Director James Comey, and about whether the President had the power to do so. Even if he did, just as President Nixon's firing of Elliot Richardson and William Ruckelshaus for refusing to fire Archibald Cox, that action belied the principle that even the President is not above the Rule of Law. This could not stand, and Acting Attorney General Rod Rosenstein reacted with the swift appointment of Special Counsel Robert Mueller, the former director of the FBI, to lead the Justice Department investigation. Regardless of our politics, as lawyers we have to applaud Mr. Rosenstein's action. The investigation will continue, with the presumption of innocence for all. For that is another Rule of Law we must respect. ■

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Henry Miller – The Trial

September 27 Long Island
October 18 New York City
November 8 Albany

Nuts & Bolts of a Probate Petition

(11:00 a.m. – 12:15 p.m.; live & webcast)
October 17 Albany

Workers' Compensation: Law & Practice Update

October 20 New York City, Syracuse
November 17 Albany, Buffalo

Legal Ethics in the Digital Age Fall 2017

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

Basics of Elder Law 2017

November 13 New York City, Syracuse
November 14 Long Island, Westchester
November 16 Albany

Forming & Operating the New York Not-for-Profit

(live & webcast)
November 30 Albany

Bridging the Gap – Summer 2017

Agenda Topics:

- Nuts and Bolts of a Workers' Compensation Claim
- Cross Examination of a Witness 101
- Will Drafting Basics for New York Practitioners
- Preparing For and Taking Depositions in a Personal Injury Case
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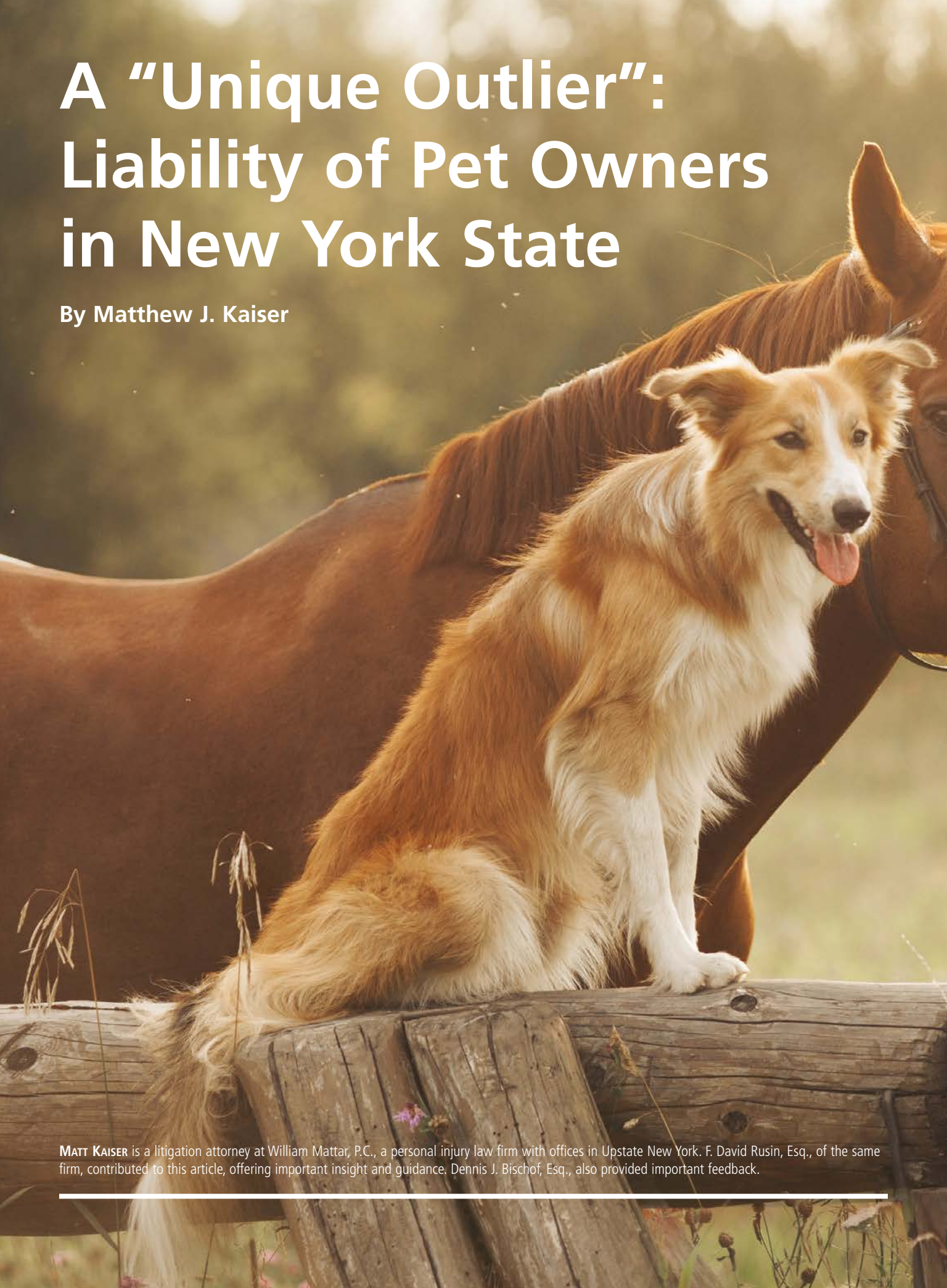
A "Unique Outlier": Liability of Pet Owners in New York State

By Matthew J. Kaiser



Matt Kaiser is a litigation attorney at William Mattar, P.C., a personal injury law firm with offices in Upstate New York. F. David Rusin, Esq., of the same firm, contributed to this article, offering important insight and guidance. Dennis J. Bischof, Esq., also provided important feedback.

Similar Hypotheticals; Divergent Outcomes

You are riding a bicycle down the road. You round the turn, and there is a horse in your lane. You try to evade the equine, but it's just too late. You drop the bike. You're injured.

The horse made its way from pasture to asphalt because its owner failed to mend a gap in a perimeter fence. This particular horse had never previously strayed from the farm, but you are able to show that the owner was negligent in failing to fix the fence, resulting in the escape and your injuries.

A jury will hear your case.

Now change the facts just a bit. You round that turn again. Fortunately, this time, instead of straddling the centerline, the horse is standing vacuously in a field gnawing on grass. This time the owner's loyal mutt is standing squarely in your lane of travel. The evasive maneuver proves futile. You flip over. Again, you're injured.

You investigate. There is a leash law violation, but no showing that the mutt had a habit of interfering with traffic or otherwise showed "vicious propensities"– that is, "the propensity to do any act that might endanger the safety of the persons and property of others in a given situation."[1]

It was, however, reasonably foreseeable that this free-roaming mutt could enter the roadway and harm a passing bicyclist. The animal had previously, on numerous occasions, escaped the property and run toward the road.

A jury will *not* hear your case.[2]

Separate Classes, and a Categorical Distinction

A decade ago, in *Bard v. Jahnke*, the Court of Appeals resolved an Appellate Division split on the question of whether someone injured by a domestic animal could assert a negligence cause of action against its owner.[3] Departing from earlier precedent suggesting it remained a viable cause of action, a bare majority of the Court held that only a strict liability cause of action, hinging on knowledge of the animal's "vicious propensities," would lie.[4]

But there are two classes of domestic animals: the long list of farm animals in Agriculture and Markets Law § 108(7), and domestic pets – "a dog or cat" – referred to in Agriculture and Markets Law § 370.

Would the *Bard* rule apply to both classes of domestic animals?

Short answer: No. The Court of Appeals, in *Hastings v. Sauve*, carved an exception for wandering farm animals – finding that a contrary rule would "immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property" – but two years later, in *Doerr v. Goldsmith*, refused to extend this policy objective to owners of household pets.[5]

The owner of a household pet owes no duty of care to prevent foreseeable injuries. It is only where that owner "knows or has reason to know" that the pet "has dangerous propensities abnormal to its class" that he or she can be held strictly liable.[6] This is a normative question that hinges on whether or not the behavior of the animal is "normal or typical."[7] Alternatively, if the behavior of the animal "would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at harm," liability will obtain – but "only when [that] proclivity results in the injury giving rise to the lawsuit."[8] Where the owner, with or without justification, "lack[s] actual or constructive knowledge" of these tendencies, there is no liability.[9]

Is there truly a "fundamental distinct[ion]" between the failure of a pet owner to prevent his or her animal from behaving dangerously and a farm owner's decision to allow his or her farm animals to wander freely onto a public road?[10]

Yes, pets pose "different risks" than farm animals: They are generally smaller and more susceptible to training.[11] But these "different risks" are nevertheless risks. Pets are very much a part of our lives. It is estimated that more than 36 percent of households own a dog, as opposed to less than 2 percent owning a horse.[12] While dogs and cats enrich our lives, some of their behaviors – often unwitting – carry the potential to inflict grievous bodily harm. According to the Centers for Disease Control and Prevention, approximately 4.5 million dog bites occur each year in the United States, nearly 20 percent causing infection.[13] In 2015, dog bites necessitated more than 28,000 reconstructive surgeries.[14]

Tort law aims to deter conduct that is harmful to society. If pets are omnipresent, and their behavior is a function of "domestication and training," we should set a public policy that encourages responsible domestication and training.[15] Our strict liability regimen alone may not achieve this objective and, on occasion, may even actively undermine it.

Bad Policy?

Proof that a pet was previously confined or restrained can be seen as circumstantial proof of the owner's knowledge of vicious propensities – providing a potential basis for liability. Thus, in *Felgemacher v. Rung*, testimony that the defendant "chained [his] dog at his place of business to prevent the dog from 'jumping on cars'" served as a predicate for liability,[16] while proof in *Gammon v. Curley* that the defendants "did not restrain the dog to keep it away from guests in their home" helped establish judgment as a matter of law.[17]

The posting of a "Beware of Dog" sign, warning passersby of the animal's presence, can, in conjunction with other factors, militate toward a finding of vicious propensities. This sort of signage, together with other circumstances, raised jury questions in cases like *Kidder v. Moore* and *Frantz by Frantz v. McGonagle*.[18]

Is there truly a "fundamental distinct[ion]" between the failure of a pet owner to prevent his or her animal from behaving dangerously and a farm owner's decision to allow his or her farm animals to wander freely onto a public road?

What can be seen as a deviation from reasonable care in a negligence analysis suddenly becomes a basis for summary judgment under a strict liability paradigm. But there can be no negligence analysis where there is no viable negligence cause of action. The responsible confinement and restraint of pets, and warning of their presence, are socially beneficial behaviors. A pet owner who does neither should not receive a windfall.

New York municipalities are empowered to pass leash laws that require dogs and cats to be restrained in public areas.[19] While, as a general rule, the violation of an ordinance may support a finding of negligence,[20] a pet owner can violate the leash law with impunity from civil liability.[21]

In the words of the Court of Appeals:

> Violation of the leash law [is] irrelevant because such a violation constitute[s] only some evidence of negligence, and negligence is not a basis for imposing liability . . .[22]

Apparently, in order for the leash law to have any teeth, we must rely on prosecutorial discretion and the prospect of a trivial fine. This "easy-to-apply bright-line rule" can lead to some pretty anomalous results.[23]

The above examples are not outliers. Under a strict liability regimen, a showing of vicious propensities is, of course, not enough. "[T]he additional requisite issue of fact" is whether the defendant "knew or should have known of [the vicious propensities]."[24] For this reason, it is often the conscientious owner (aware of the pet's behavior) who is held liable, while the absentee owner (ignorant of such behavior) is entitled to judgment as a matter of law.

Consider the decision in *Perry v. Mikolajczk*, where a seven-year-old boy was bitten by a dog that was run-

ning loose in the neighborhood.[25] The boy grabbed the animal's chain to return it to its owner's yard.[26] Once re-chained, "without provocation," the 13-year-old husky-shepherd mix "then suddenly attacked" the young boy, "causing injuries . . . that required his hospitalization."[27] The complaint was summarily dismissed. While there was an "an issue of fact whether the dog had vicious propensities," there was no showing its owner "knew or should have known of them."[28]

Consider also *Dobinski v. Lockhart*, where the plaintiff and her husband were riding bicycles down a country road.[29] The defendant released two German Shepherds from her house, who barked and ran into the road, in the direction of the plaintiff.[30] About 10 seconds later, the plaintiff struck one of them, causing her to flip over the front of her bicycle and suffer severe injuries.[31] While the defendants acknowledged that two of their *other dogs* had run into the road and been struck by a car,[32] this was irrelevant "as those dogs' propensities [could not] demonstrate that the entirely different dogs at issue . . . had a tendency to harm others."[33] More importantly, the defendants "did not have any prior familiarity with the dogs [involved in the collision] or their propensities."[34] The complaint was dismissed.

Again, under a strict-liability-only system, pet owners who "lack[] actual or constructive knowledge" of the tendencies of the animal – dangerous or otherwise – are absolved from liability,[35] while owners familiar with the behavior of the animal can be held strictly liable – regardless of that owner's "exercise[] [of] the utmost care to prevent [the animal] from doing harm."[36] For the pet owner defending an action sounding only in strict liability, ignorance is bliss.

Since "household pets," by nature, tend to spend most of their time in the household, it is often the owner, and witnesses close to or sympathetic with that owner, who have exclusive knowledge of the behavior of the animal. As observed in the pages of the *New York Law Journal*:

> Since a plaintiff may be forced to rely on the defendant's testimony in proving a case, and the court will not consider the defendant's negligence or violation of law as relevant, New York is the "ruff"-est jurisdiction in the nation for a victim of an animal attack to find relief.[37]

One more hypothetical. You rescue a Pitbull from a shelter. You know nothing about the animal's history, and you make no effort to find anything out. Before you take the animal home, you stop off at the park, where you see a sign stating in no uncertain terms that dogs must remain leashed. You unleash your new dog, and it bites someone.

You are entitled to summary judgment. "[A] plaintiff cannot recover for injuries caused by a dog that has not demonstrated vicious propensities, even when the injuries are proximately caused by the owner's negligent conduct in controlling or failing to control [a] dog."[38]

It would seemingly behoove litigation-conscious pet shoppers to avoid inquiry about prior aggression. It would also benefit current owners to turn a blind eye to such signs. Where there is no "actual or constructive knowledge," the risks of pet ownership, including the possibility of unexpected attack, will be borne not by the owner, but instead the innocent victim. This is looking more and more like "an archaic, rigid rule, contrary to fairness and common sense."[39]

Obliviousness as to the behavior of your pet, and its potential to harm others, should not be a shortcut to summary judgment. The availability of a negligence cause of action – which contemplates liability "from failing to do an act which a reasonably prudent person would have done under the same circumstances" – would eliminate any incentive to engage in this sort of willful blindness.[40]

A "Unique Outlier"

Which brings us to the other goal of tort law: making injured parties "whole." Where a domestic animal owner deviates from his or her duty of care, causing foreseeable injury to an innocent person, should it matter whether the instrument of harm is a horse or dog?

Yes, the former is defined by Agriculture and Markets Law § 108(7), and latter implied by Agriculture and Markets Law § 370, but the statutory classification of the offending domestic animal will probably ring hollow for that innocent person.

The American Law Institute has rejected this sort of rigid typology. The Restatement rule is that someone injured by a domestic pet can bring a negligence action against the owner.[41] Thirty-six states follow this rule.[42] New York is the only state whose court of last resort has expressly rejected it.[43]

Given this landscape, there must be a compelling policy reason for the Empire State's place as a "unique outlier."[44] It is true that the strict liability system is, at its essence, a "rule of notice" that allows New Yorkers to manage their affairs based on known risks.[45] The same public policy, however, would be furthered under a system that requires owners to exercise reasonable care – which hinges on the type of risk involved and the likelihood of danger stemming from the activity.[46]

The degree of care owed is, after all, a function of reasonable foresight: An owner with actual knowledge that his or her pet has acted in a way that might endanger others would obviously be held to a higher degree of care than an owner with no such knowledge.[47] For this reason, in most cases, strict liability and negligence causes of action would rise or fall together. In other cases, the availability of a negligence cause of action would fill the interstices of a body of case law that, regardless of the nonfeasance or misfeasance of the pet owner, presupposed non-liability.

In the wise words of Judge Fahey (joined by Judge Pigott):

> We should return to the basic principle that the owner of an animal may be liable for failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.[48]

Consider the recent decision of the First Department in *Scavetta v. Wechsler*, where the defendant tied his 35-pound dog to an unsecured, five-pound bicycle rack.[49] The dog escaped, bicycle rack in tow, running "[v]ery fast."[50] The animal, "still dragging the rack," ran toward the plaintiff, causing his leg to become caught in the rack's crossbar, spinning him around, and ultimately causing him to land on his back.[51] The plaintiff and his wife alleged that the defendant was negligent in tying his dog to the unsecured bicycle rack, but disavowed any cause of action sounding in strict liability.[52]

A unanimous First Department panel, "constrained by Court of Appeals precedent," affirmed an order granting the defendant summary judgment.[53] At the same time, Judge Acosta, joined by his colleagues, observed that the current state of the law "may be neither prudent law nor prudent policy."[54] The First Department proposed – without adopting – another exception, to be placed alongside the *Hastings* exception for wandering farm animals:

> [T]he recognition of the following exception would be appropriate: A dog owner who attaches his or her dog to an unsecured, dangerous object, allowing the dog to drag the object through the streets and cause injury to others, may be held liable in negligence. . . . New Yorkers certainly do not expect to find those dogs running on public roads towing large metal objects behind them. A dog owner who, without observing a reasonable standard of care, attaches his or her dog to an object that could foreseeably become weaponized if the dog is able to drag the object through public areas should not be immune from liability when that conduct causes injury.[55]

It is hard to believe that this scenario – the strapping of an object to a canine, which becomes weaponized – would be framed as a potential exception to the rule that pet owners owe no duty of care. Perhaps acknowledging the impracticability of periodically propping up *ad hoc* exceptions based on notions of "societal expectations," the First Department advocated for a more sweeping change:

> Moreover, as a matter of public policy, we agree with Judge Fahey's dissent in *Doerr* that New York should join the overwhelming majority of states that follow the Restatement (Second) of Torts § 518. Under the current rule articulated by the Court of Appeals, it appears that pet owners would be permitted to act in any number of objectively unreasonable ways when supervising their nonvicious pets, because New York law does not place upon them a duty to observe any standard of care. The potential for unjust outcomes is manifest. Although "the Restatement rule . . . does not treat a domestic pet's untrammeled wanderings as actionable negligence" in all cases, the Restatement does recognize that "[t]here may . . . be circumstances under which it w[ould] be negligent to permit an animal to run at large, even though it is of a kind that customarily is allowed to do so [e.g., a dog] and under other circumstances there would be no negligence." It seems, however, that under the law of New York at present, permitting a domestic pet that has not displayed vicious propensities to run at large under any circumstances – even when doing so would be clearly dangerous – would never give rise to a claim sounding in negligence. We find this to be most unsatisfactory as a matter of public policy and would recognize a cause of action for negligence in appropriate circumstances.[56]

Recognition of a negligence cause of action would encourage responsible pet domestication and training, and ameliorate some of the harsh idiosyncrasies in our strict-liability-only case law.

Recognition of a negligence cause of action would encourage responsible pet domestication and training, and ameliorate some of the harsh idiosyncrasies in our strict-liability-only case law. This expansion would augment – not undermine – the dual interests of managing "societal expectations" and "keep[ing] liability within manageable limits,"[57] departing from a rule that "immunizes careless supervision of domestic animals by their owners and leaves those harmed in the State of New York without recourse."[58] ■

1. *Collier v. Zambito*, 1 N.Y.3d 444, 446 (2004).

2. *See generally Potter v. Zimber*, 309 A.D.2d 1276 (4th Dep't 2003) ("a plaintiff cannot recover for injuries resulting from the presence of a dog in the highway absent evidence that the defendant was aware of the animal's vicious propensities or of its habit of interfering with traffic."); *accord Smith v. Reilly*, 17 N.Y.3d 895, 896 (2011) ("Testimony that the dog . . . escaped defendant's control, barked and ran towards the road is insufficient to establish a triable issue of material fact.").

3. 6 N.Y.3d 592 (2006).

4. *Id.* at 599 ("In sum, when harm is caused by a domestic animal, its owner's liability is determined solely by application of the [strict liability rule]."); *cf. Dickson v. McCoy*, 39 N.Y. 400, 401 (1868) ("It is not necessary that a horse should be vicious to make the owner responsible for injury done by him through the owner's negligence.") *and Hyland v. Cobb*, 252 N.Y. 325, 326–27 (1929) ("negligence by an owner, even without knowledge concerning a domestic animal's evil propensity, may create liability.").

5. *Compare Hasting v. Sauve*, 21 N.Y.3d 122, 125 (2013) (recognizing negligence cause of action with respect to farm animals) *with Doerr v. Goldsmith*, 25 N.Y.3d 1114 (2015) (rejecting negligence cause of action with respect to domestic pets).

6. *Bard*, 6 N.Y.3d at 603, n. 2, *quoting* Restatement (Second) of Torts 509(1).

7. *Bloomer v. Shauger*, 21 N.Y.3d 917 (2013) ("The Appellate Division correctly held that a vicious propensity cannot consist of behavior that is normal or typical for the particular type of animal in question") (internal quotations omitted).

8. *Collier v. Zambito*, 1 N.Y.3d 444, 444.

9. *Hargo v. Ross*, 134 A.D.3d 1461 (4th Dep't 2015).

10. *See Hastings*, 21 N.Y.3d at 125.

11. *Doerr*, 25 N.Y.3d. at 1129.

12. U.S. Pet Ownership Statistics, https://www.avma.org/KB/.

13. Preventing Dog Bites, Centers for Disease Control and Prevention (2015), https://www.cdc.gov/features/dog-bite-prevention.

14. 2015 Plastic Surgery Statistics Report, www.plasticsurgery.org, https://www.plasticsurgery.org/news/plastic-surgery-statistics?sub=2015.

15. *Doerr*, 25 N.Y.3d at 1129.

16. 28 A.D.3d 1088, 1088–89 (4th Dep't 2006) (defendant "testified that he chained the dog at his place of business to prevent the dog from 'jumping on cars'"); *see also Berry v. Whitney*, 288 A.D.2d 857 (4th Dep't 2001) ("Defendant . . . submitted portions of his examination before trial wherein he testified that he did not trust the dog and would not allow his grandson to be 'out near the dog, anywhere near the dog.' He further testified that the dog was always kept chained.").

17. *Gammon v. Curley*, 147 A.D.3d 727 (2d Dep't 2017) (summary judgment warranted where "[t]he defendants did not restrain the dog to keep it away from guests in their home.").

18. *See, e.g., Kidder v. Moore*, 77 A.D.3d 1303, 1303–04 (4th Dep't 2010) ("Beware of Dog" sign on the front of the house); *Frantz by Frantz v. McGonagle*, 242 A.D.2d 888 (4th Dep't 1997) ("[P]laintiff submitted evidence that 'Beware of Dog' signs were posted on the property owned by defendant, of which defendant was aware.").

19. Agriculture and Markets Law § 121.

20. *See* Pattern Jury Instructions 2.29; *Elliott v. New York*, 95 N.Y.2d 730 (2001); *Barnes v. Stone-Quinn*, 195 A.D.2d 12 (4th Dep't 1993).

21. *See Petrone v. Fernandez*, 12 N.Y.3d 546 (2009) (violation of leash law irrelevant inasmuch as such violation was merely evidence of negligence and negligence was not a basis for imposing liability).

22. *Id*. at 549–50; *see also Young v. Wyman*, 76 N.Y.2d 1009, 1011 (1990) (Kaye, J., dissenting) (". . . current statement of public policy on the question [of applicability of leash law as a predicate for civil liability] is surely entitled to some recognition by the courts, yet none is given.").

23. *See Doerr*, 25 N.Y.3d at 1135.

24. *Perry v. Mikolajczyk*, 259 A.D.2d 987 (4th Dep't 1999).

25. *Id*.

26. *Id*.

27. *Id*.

28. *Id*.

29. 25 N.Y.3d at 1120.

30. *Id*.

31. *Id*.

32. *Id*.

33. *Id*. at 1140.

34. *Id*.

35. *Hagro v. Ross*, 134 A.D.3d 1461, 1462 (4th Dep't 2015).

36. *Bard v. Jahnke*, 6 N.Y.3d 592, 603 fn 2 *quoting* Restatement (Second) of Torts 509(1).

37. Marc Miner, *When Animals Attack in New York*, 247 N.Y.L.J. 38, p. 4 (Feb. 28, 2012).

38. *Scavetta v. Wechsler*, 149 A.D.3d 202, 203 (1st Dep't 2017).

39. *Bard*, 6 N.Y.3d at 99 (R.S. Smith, J., dissenting).

40. Pattern Jury Instructions 2:10.

41. Restatement (Second) of Torts § 518.

42. *See generally Doerr*, 25 N.Y.3d at 1149–50 (Fahey, J., dissenting).

43. *Doerr*, 25 N.Y.3d at 1148–49; *see also Bloomer v. Shaugher*, 94 A.D.3d 1273, 1277 (3d Dep't 2012) (Garry, J. dissenting) (New York is "the only state in the nation that rejects the rule set forth in the Restatement [Second] of Torts regarding an owner's negligence as a ground for liability arising from the dangerous acts of animals") (internal quotations omitted), *aff'd*, 21 N.Y.3d 917 (2013).

44. *Id*. at 1149.

45. *Id*. at 1137.

46. *Mikula v. Duliba*, 94 A.D.2d 503, 506 (4th Dep't 1983) ("the care required to be exercised must be commensurate with the known dangers and risks reasonably to be foreseen").

47. *See generally Di Ponzio v. Riordan*, 89 N.Y.2d 578 (1997) ("Foreseeability of risk is an essential element of a fault-based negligence cause of action because the community deems a person at fault only when the injury-producing occurrence is one that could have been anticipated.").

48. *Doerr*, 25 N.Y.3d at 1142–43 (Fahey, J., dissenting).

49. 149 A.D.3d 202.

50. *Id*. at 204.

51. *Id*.

52. *Id*.

53. *Id*. at 210.

54. *Id*. at 202.

55. *Id*. at 211 (internal citations omitted).

56. *Id*. at 211–212 (internal citations omitted).

57. *Doerr v. Goldsmith*, 25 N.Y.3d at 1137.

58. *Scavetta*, 149 A.D.3d at 203.

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"Let's Get Physical"

Introduction

Last month's column on Judiciary Law § 470 promised a follow-up this month discussing what it means for a non-resident attorney admitted to practice in New York to maintain an "office for the transaction of law business" in the state.

The Court of Appeals held in *Schoenefeld v. State*:[1] "By its plain terms, then, the statute requires nonresident attorneys practicing in New York to maintain a physical law office here."

The question remains, "What does it mean 'to maintain a physical office' in 2017?"

Life Imitating Art?

To ease into this subject, let's play a game. Imagine that you are a justice of the Supreme Court and a motion is brought before you to dismiss the plaintiff's complaint, alleging that the plaintiff's attorney, a non-resident of New York State, is in violation of Jud. L. § 470 because she does not maintain a physical office in New York.

It is often said that life imitates art. The threshold question is: which of these fact patterns is recited in motion papers from an actual case, and which is depicted in a television show?

First fact pattern:

> The assertion by plaintiff that his attorney transacted legal business from a small room located in the basement of a restaurant and bar reachable only by passing through a kitchen and down a flight of stairs was most improbable.

Second fact pattern:

> The assertion by plaintiff that his attorney transacted legal business from a small room located in the rear of a nail salon and spa reachable only by passing through a narrow corridor and requiring that the attorney's desk be moved in order to open the office door was most improbable.

The answer? The first fact pattern is from *Lichtenstein v. Emerson*,[2] and the second fact pattern is from the AMC series *Better Call Saul*. You may be interested to learn that *Lichtenstein v. Emerson* was decided in 1998, while *Better Call Saul* premiered on February 8, 2015. So, in fact, this is a case of art imitating life.

A few more facts from the trial decision in *Lichtenstein*:

> [After descending the stairs to the basement you enter] into a room described by Mr. Herlihy as the size of the jury box, and by a bartender as being 10 feet by 12 feet. The room contains three desks, none of which Mr. Herlihy claims to be his. The law literature therein is limited to a copy of the Federal Rules of Civil Procedure. Mr. Herlihy has reported no New York income for the past five years, has no employees, and on his registration with the Office of Court Administration and his membership in the Association of the Bar of the City of New York, he lists a Washington address as his office. The bartender testified that he had never been told that he was authorized to accept service of papers, and the liquor license for the premises indicates that no other business will be conducted at the location. Mr. Herlihy's name is not listed in any New York telephone directory, nor did his name anywhere appear on the premises.[3]

So, in our real, albeit improbable case, does the office in the basement suffice as a physical office for the transaction of business?

> Certainly, a State has an interest in ensuring that a lawyer practicing within its boundaries is amenable to legal service and to contact by his or her client, as well as opposing and other interested parties, and a State may, therefore, reasonably require an attorney, as a condition of practicing within its jurisdiction, to maintain some genuine physical presence therein (citation

> omitted). The New York office requirement of Judiciary Law § 470 is, accordingly, constitutional.[4]

Now that you are warmed up, how do you rule on the following motion to dismiss pursuant to Judiciary Law § 470 where the plaintiff's opposition to the motion consisted of the following:

> Counsel's affirmation avers that the [New Jersey] firm leases a New York office with a telephone, that partners of the firm use the office periodically, and that many of the firm's attorneys are admitted to practice in New York.[5]

If you determined that requirements of Judiciary Law § 470 were satisfied, your decision would have been affirmed by the First Department in its 2014, pre-*Schoenefeld* decision.[6]

How Physical?

A recent case tested some of the boundaries of what constitutes a "physical office." In *Chupack v. Gomez*,[7] at the commencement of the action, the plaintiff's attorney, a California resident admitted to practice in New York in 2000, listed his address as 312 N. Atlantic Street, 2nd Floor, Brooklyn, New York 10201, with a California telephone number. Thereafter, he filed a Notice of Change of Address listing the Brooklyn address as his "old firm information" and his "new firm information" with an address of 43 West 43rd Street, Suite 036, New York, NY 10036-7424," again with California telephone and fax numbers.

The defendants contended that neither address satisfied the requirement to maintain a physical office in the state. As proof, they offered the envelope of a letter sent to the Brooklyn address containing the post office's marking: "Return to Sender, Not Deliverable as Addressed, Unable to Forward."

As to the 43rd Street address, defendants submit an affidavit from Nicole Lisa, an employee of defendants' counsel, stating that on August 21, 2014, she "attempted to serve a Notice" on Wallach at 43 West 43rd Street. She explains that when she arrived at that address, she "saw a plaque posted on the entrance door informing visitors to use the entrance at 42 West 44th Street," and when she went to 42 West 44th Street, "there was a sign indicating that the building was the Association of the Bar of New York." She states she entered the building "and told the concierge that I had papers for Ian Wallach, Esq. in Suite 036," and the "concierge told me that there were no suites in the building and that Ian Wallach, Esq. was not listed as having an office in the building." She states the concierge directed her "to the Bar Building at 36 West 44th Street," and at that building, the concierge told her "there were no suites there and that Ian Wallach, Esq. was not listed as having an office in the building."

Opposing the motion, plaintiff's counsel submitted an affirmation averring, in part, that at commencement of the action:

> [H]e maintained a "physical office" at 312 Atlantic Avenue, 2nd Floor, Brooklyn, New York, where he has the use of an office on the second floor, which "is mine to use, and has a desk, telephone, fax machine, computer and anything else I may need."
>
> * * *
>
> [I]n addition to the office in Brooklyn, during the pendency of this action, on or about June 1, 2014, "I also availed myself of the Virtual Law Firm Program of the New York City Bar Association (with an address of 43 West 43rd Street, Suite 036)," which he asserts, "constitutes a 'physical office' in New York."

In addition to his affirmation, plaintiff's counsel submitted affidavits from the owner of the building at 312 and 314 Atlantic Avenue, Bertrand Delacroix, an affidavit from Bret Parker, Esq., the Executive Director of the City Bar, a letter from the City Bar's General Counsel, Alan Rothstein, and a letter from Alla Roytberg, Director of the City Bar's Small Law Firm Center:

> The owner of the building in Brooklyn, Bertrand Delacroix states that he has known Wallach since "about 2003," as they "are mutual clients for each other's profession," and since 2011, Wallach "has access to one of the offices on the second floor whenever he needs it," where he has "access to a desk, telephone, fax machine, computer." Delacroix states that he and his staff are "able to accept service of process on [Wallach's] behalf at this address (and have)," and "immediately notify Ian Wallach of any calls, service of documents, or mailings (and all such documents are immediately forwarded to him via email and post to his residence or office in Los Angeles, California, unless he is here, in New York, in which case he picks them up)." Delacroix also states that Wallach "can meet clients there if and when he needs to (and has)," and that "business services and facilities" have been available since "around 2011," and Wallach has handled a legal matter from me in the past, and used this address for all purposes related to that matter."
>
> In his affidavit, the Executive Director of the City Bar, Brett Park-

By its plain terms, then, the statute requires nonresident attorneys practicing in New York to maintain a physical law office here.

er, Esq., states that. Wallach has "subscribed" to the VLP since June 1, 2014, and the "postal address" for attorneys using the VLP services is 43 West 43rd Street, New York, NY 10036. Parker explains that the "information desk" at the City Bar has a list of attorneys who use VLP services, City Bar staff collect mail and deliveries addressed to attorneys who use the VLP services, and "attorneys who subscribe to the detailing mailing services, including Mr. Wallach, are then notified that mail or deliveries have arrived, and then can either pick up those items or arrange to have them forwarded by mail or overnight delivery." He further states that on "August 21, 2014, Mr. Wallach was on the list of attorneys who subscribe to the VLO Services and could receive mail and deliveries at the postal address of 43 West 43rd Street, New York, NY 10036" and "has remained on that list and is so today [July 17, 2014]."

When Wallach subscribed to the VLF program, he received a letter from Alla Roytberg, Director of the Small Law Firm Center, welcoming him to the program and providing information that "will help you in connection with your Virtual Law Firm." The letter advised, *inter alia*, that Wallach's "Virtual Law Firm Address" is "43 West 43rd Street, Suite 036, New York, NY 10036-7424," and noted to "please direct all delivers of express mail and parcels as well as messenger services with in-person delivery to our service entrance, located to the left of 43 West 43 Street at '45 West 43rd Street,' and that "[a]ll items requiring signature will be signed for during NYC Bar's regular hours of operation." The letter provided the name, telephone number and email of the person to contact to "inquire whether you have received mail and/or requested mail forwarding," and explained that mail could be retrieved in person by "[t]elling the staff at the Front Desk in the lobby that you are a Virtual Law Firm Member and then proceed to the 4th floor," and "[y]our mail will be located in the Library Staff Office." The letter listed the persons to contact for "general questions about the VLF program," to "reserve a free conference room," and to "reserve a paid meeting room," and gave the hourly rates for a paid meeting room. With respect to service of process, the letter advised that "[b]y becoming a member of the Virtual Law Firm Program, you are agreeing that we will accept service of process and registered/certified mail and sign for it on your law firm's behalf." The letter also noted that when "visitors show-up unexpectedly and ask to see you," they will be told to "contact you directly by telephone or email and that your office hours are by appointment only."

Wallach also submits a letter dated June 23, 2015, from the City Bar's General Counsel Alan Rothstein, responding to Wallach's "inquiry as to whether the Virtual Law Firm (VLF) program" of the City Bar "complies with the current state of the law regarding Section 470 of the Judiciary Law." Rothstein advises that while the City Bar "is not in a position to give you a legal opinion . . . we can provide you with the details of the program that you can evaluate in the context of that statute and the recent Court of Appeals decision in *Schoenefeld v. State*." Rothstein states that the VLF program gives City Bar members the opportunity "to receive mail and service of process at an office address in the New York City Bar building." He explains that "you can have your mail forwarded to you or you can pick it up," and they "provide for a daily description of the mail origin to be emailed to you." He also explains that "you may utilize the office and conference rooms of the Small Law Firm Center located in the New York City Bar Building for the transaction of law business," and "I understand you do indeed make use of those facilities." He states that "you have access to the onsite research facilities of the New York City Bar Library," and that "VLF participants may have phone calls answered in Manhattan at the participant's own area code 212 phone number," including a "live answering service during business hours and a separate voice mail box" or "choose to have calls directly transferred to you at a number you provide."

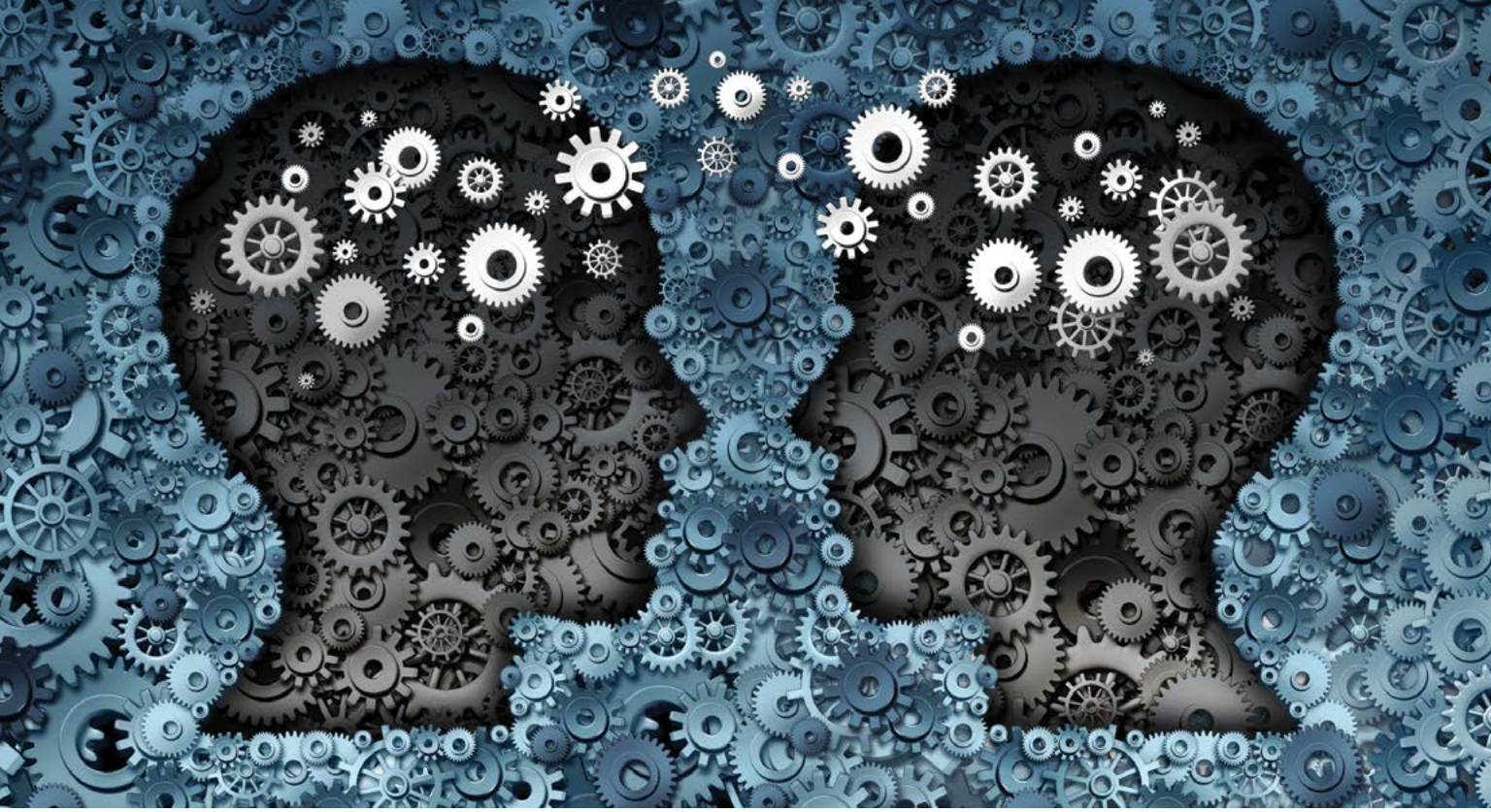
The court concluded "under the circumstances presented, Wallach has made a sufficient showing that his office in Brooklyn and his membership in the VLF program at the City Bar, meet the requirement under Judiciary Law § 470 to maintain a physical office in New York."

Conclusion

One unsolicited suggestion: When operating an office utilized by non-resident attorneys in a jurisdiction with a strict requirement that those attorneys maintain a "physical office," perhaps the name "Virtual Law Firm" is not the best choice.

Now that we know, maybe, what it means to maintain an "office for the transaction of law business" in New York State, we are free to enjoy the long, and hopefully lazy, summer ahead. Have a wonderful Labor Day Weekend! ■

1. 25 N.Y.3d 22, 26–28 (2015).
2. 251 A.D.2d 64 (1st Dep't 1998).
3. *Lichtenstein v. Emerson*, 171 Misc. 2d 933, 938 (Sup. Ct., N.Y. Co. 1997).
4. *Lichtenstein* , 251 A.D.2d at 64–65.
5. *Reem Contr. v. Altschul & Altschul*, 117 A.D.3d 583 (1st Dep't 2014).
6. *Id.*
7. 2016 N.Y. Slip Op. 30051[U], *4–9 (Sup Ct., N.Y. Co. 2016).



The Neuroscience of Start-ups: A Primer for Attorneys (and Other Professionals)

By Scott Friedman, Andrea HusVar, Eliza Friedman, Thomas R. Ulbrich, and Irv Levy

Introduction

Start-up companies are fraught with risk. A recent article in the *Harvard Business Review*, citing a study of venture-backed start-ups, noted that "fewer than 15% of firms are still operating three years after initial funding"[1] and there is nothing to suggest that these discouraging statistics are likely to improve. The ongoing development of innovative technologies, while driving countless business opportunities, also poses new and often unforeseeable risks as they render many historic business models and barriers to competition obsolete or irrelevant. Consider, for example, how AirBnB has successfully competed with traditional hotels without owning a single hotel, or how Uber has successfully competed with traditional taxi companies without owning a single taxi.

Lawyers (and other professionals) who work with start-up companies and entrepreneurs need to evolve their services to keep pace with these changes by developing new insights and strategies to effectively counsel their clients in an increasingly competitive marketplace. This article suggests how we believe they can do so by applying insights from social neuroscience and positive

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psychology to enhance the quality of decisions made in forming and operating a start-up business to (1) more effectively evaluate the vision of a potential new company (and make a "go" or "no go" decision), (2) build a great team, (3) develop, evaluate and refine the company's strategy and plans, (4) assist in securing necessary capital, and (5) establish and nurture a great culture, which has been shown to be critical to organizational success. Our hope is that this introductory primer will encourage not just attorneys but entrepreneurs and their other professional advisors to continue exploring how start-up companies (indeed any organization) could benefit by applying science to their traditional business practices.

I. Clarify and Evaluate the "Entrepreneurial Vision"

Any new startup begins with a "lightbulb moment"– the inspiration that comes from the vision of how an idea can become an opportunity to form a business and make money. The first critical challenge any entrepreneur faces is to thoughtfully evaluate the merits of that vision – how to determine whether to form a new business, a challenge made increasingly difficult by our living in a complex and uncertain world in which the pace of change continues to increase.[2] Beyond these macroeconomic challenges are personal challenges that result from our innately human inability to process information as rationally as we might think we do.

Consider, for example, the following observation by Dan Ariely, the James B. Duke Professor of Psychology and Behavioral Economics at Duke University, who observes in his best-selling book, *Predictably Irrational*, that

> in conventional economics, the assumption that we are all rational implies that, in everyday life, we compute the value of all the options we face and then follow the best possible path of action . . . .[but] we are really far less rational than standard economic theory assumes. Moreover, these irrational behaviors of ours are neither random nor senseless. They are systematic, and since we repeat them again and again, predictably.[3]

Worse yet, beyond our inability to think as rationally as we might assume we do is our related inability to appreciate the extent of our individual limitations. As a result of such dynamics, many entrepreneurs wind up plunging head first into a new venture without having thoroughly vetted the idea and making a thoughtful decision to move forward. Not surprisingly, many such businesses fail.

To help mitigate the risk of pursuing an idea that is unlikely to succeed, we recommend that would-be entrepreneurs first solicit feedback from potential customers – not just family members and friends who might be unwilling or unable to give honest feedback – to help evaluate the merits of a new product or service. Ask potential customers if they would buy the product or service if available. Also consider asking, if the opportunity were available one day, whether they would be interested in the possibility of investing in the contemplated new company? It is easier to get customers to commit to a product if they are engaged in its creation, so solicit ideas as to how to make the product or service even better. If, however, potential customers are unwilling to make some form of commitment to your idea, seriously reconsider moving forward or, perhaps, pivoting to a new direction based on "the market's feedback."

Finally, we are big believers in "focus" – bringing strong and disciplined attention to a business initiative. The United States was founded by risk takers and many, if not most, business successes have been built by those who didn't "play it safe." In the words of former President Jimmy Carter: "Go out on a limb. That's where the fruit is." Nevertheless, and notwithstanding the need to take risks and be "committed" to a venture, continuing research suggests that there can be advantages for entrepreneurs who hedge their bets by starting companies while still working at their day job. As Wharton Professor Adam Grant notes in his best-selling book, *Originals*,

> [i]f you think like most people, you'll predict a clear advantage for the risk takers. Yet [studies show] the exact opposite. Entrepreneurs who kept their day jobs had 33 percent lower odds of failure than those who quit . . . . If you're risk averse and have some doubts about the feasibility of your ideas, it's likely that your business will be built to last. If you're a freewheeling gambler, your startup is far more fragile.[4]

Perhaps entrepreneurs need to strike something of a balance along the lines suggested by business guru Tom Peters, whose recommendation is to "test fast, fail fast, adjust fast." Rather than taking an extreme risk of jumping in full time on "day one," an entrepreneur might be well served by jumping in full time only after the business starts to pick up traction following a slower, more thoughtful and cautious, start.[5]

II. Build a Great Team

Unlike "dreamers," company founders not only have a sense about how they can make money by changing something in the world as it exists, but they also begin to take steps toward achieving that change. While not unusual for a founder to get going by doing a bit of everything (think "chief cook and bottle washer"), growing a business can soon require a wide variety of expertise to operate effectively, including strategic planning, financial planning, sales and marketing skills (including insight as to how to position a product or service), as well as accounting and legal advice – and, depending on the company, a variety of other skills as well, such as engineering skills, clinical care skills, technology skills, etc. Of course, successfully growing a business also requires the judgment and leadership skills to pull these resources together.

Unfortunately, too many founders often resist building the right team for a variety of reasons, including a fear of losing control or a reluctance to incur the expense. As

operations grow in complexity, such resistance can lead to multiple challenges, including constraints on bandwidth to get necessary tasks accomplished and sub-optimal decisions as a result of diminished focus or expertise that, in turn, inevitably lead to poor performance. Ultimately, in today's highly competitive marketplace, such businesses are likely to fail. It is for these reasons that the ability to build a team that can work together toward a common vision is, as Andrew Carnegie observed, "the fuel that allows common people to attain uncommon results."[6] Building a successful team requires, among other traits, humility and having the insight to appreciate the relatively modest ability to succeed without help from others.

Brad Owen, a leading researcher on the correlation between humility and business success, has observed that "humility is an important component of effective leadership in modern organizations . . . humble leaders foster learning-oriented teams and engaged employees as well as job satisfaction and employee retention."[7] While once at risk of being dismissed as a "soft skill," humility is increasingly appreciated by thoughtful leaders and business executives. For example, Tony Hsieh, the founder of Zappos, has recognized humility as one of that company's most important values, noting that "[t]here are a lot of experienced, smart and talented people we interview that we know can make an immediate impact on our top or bottom line. But a lot of them are also really egotistical, so we end up not hiring them . . . Protecting the company culture and sticking to core values is a long-term benefit."[8] Lazslo Bock, the individual in charge of hiring at Google, similarly observes that "it is not just humility in creating space for others to contribute . . . it's intellectual humility. Without humility, you are unable to learn." It's why research shows that many graduates from top ranking business schools plateau. "Successful bright people rarely experience failure, and so they don't learn how to learn from that failure."[9]A commonly shared trait of successful founders is the humility that allows them to "know themselves" – to honestly appreciate what they are good at and what they need help with to accomplish their goals, to know if they have the necessary passion and commitment that will be required to succeed.

Knowing oneself – including one's skills, resources, and interests – allows a founder to more effectively create a team of like-minded individuals with complementary skills and experience who, together, can help grow a business. That team might not only include operating partners, employees, and other support staff but a board of directors (or advisors) that includes thoughtful, experienced, independent thinkers, who can, among other things, contribute wise counsel and credibility.[10]

III. Develop, Execute, and Continuously Refine the Business Plans

Except for those rare instances when luck or serendipity deserves credit, successful businesses are usually driven by thoughtful planning, including a "go to market" strategy, a financing plan, and a "people plan." All these plans must be carefully developed by the key members of the founding team and, among other things, will inform what risks to take – and when. Priorities must be established and choices made about the most effective allocation of resources. Metrics that matter to a business' success should be identified and monitored. While traditional financial statements (income statement, cash flow, balance sheet, profit and loss) may be important, it might be no less important for a business to know its cost to acquire a customer or the rate at which it acquires customers.

With ongoing "advances" in technology that seem to demand our attention, the challenges of remaining focused are increasingly difficult.

Along the way, a founder and his or her team must bring strong focus to the execution of plans and decisions. Success requires moving forward with extreme clarity, answering questions such as (1) what needs to be done? (2) when does it need to be done by? (3) who will do it? and (4) how will we pay for it?

In addition to "organizational focus," success requires "personal focus" from team members. In *The Organized Mind*, Daniel Levitin notes that "[n]euroscientists have discovered that unproductivity and loss of drive can result from decision overload. . . It's as though our brains are configured to make a certain number of decisions per day and once we reach that limit, we can't make any more, regardless of how important they are . . . Our brains do have the ability to process the information we take in, but at a cost: we have trouble separating the trivial from the important, and all this information processing makes us tired."[11] With ongoing "advances" in technology that seem to demand our attention, the challenges of remaining focused are increasingly difficult.

There are many good resources for helping start-ups develop thoughtful business plans. In addition, start-ups are well-served to develop core principles including a vision statement and core values that align and focus the team in its behaviors. With strong focus and a well-rounded team aligned around clear plans, start-ups are ready to move forward including, as might be (typically!) necessary, raising capital.

IV. Secure Necessary (Start-up) Capital

A typical start-up needs to secure capital to finance its plans to operate and grow, sometimes from "family and friends," but oftentimes from unrelated (unbiased) third parties – angel investors, venture capitalists, and lenders. Entrepreneurs seeking funding soon learn how challeng-

ing that process can be. Neuroscience sheds interesting insight into how our brains process information, including with respect to such matters as goal evaluation, preference formation, and choice behavior.[12] Such insights, in turn, suggest some strategies that might be applied to help improve the likelihood that an entrepreneur can secure "backing" from such investors.

As a starting point, most successful investors and venture capitalists are inundated with requests for funding. As a result, we have found it most helpful for start-ups to prepare a short, yet compelling, slide deck to communicate (pitch) the investment opportunity. Consider building your slide deck as you might a story[13] describing the origin of the "problem" (the "dramatic tension") and how the problem gets resolved (the "solution" or the "opportunity"). Also, give consideration to the appearance of every slide, including layout, typography and even the best colors.[14]

Entrepreneurs should also strive to be "fair" in establishing terms and conditions of a potential investment. As Richard Thaler observes in *Misbehaving: The Making of Behavioral Economics*, " '[i]f you gouge them at Christmas they won't come back in March.' . . . . It is incredibly important for any business, no matter how great the demand, not to charge a customer more than the good or service is worth – even if the customer is willing to pay more."[15] Rather than trying to raise money, try to raise friends.[16] Supportive investors who like and trust the entrepreneurs they invest in are more likely to continue to support those entrepreneurs with additional capital and advice that might be needed, from time to time. Entrepreneurs would be well served by appreciating related notions such as "reciprocity" – we tend to support people who treat us fairly and be tough on those who don't.

Experiments have demonstrated that the anticipation of large rewards increases activity in the brain's limbic system – the part of the brain associated with pleasure and wellbeing. As a result, increasing rewards – or the possibility of rewards – enhances brain activity. That is why we tend to feel excited by big rewards – and why our level of impulsivity increases. Sometimes we just can't help ourselves from doing whatever it takes to secure those rewards. While every business opportunity is different, entrepreneurs should keep in mind that investors are generally more excited by investment opportunities with bigger upsides. If a start-up can't rationally demonstrate the possibility that investors will make returns that correlate with the nature of the early-stage risk, developing a business plan that requires less or no venture capital should be considered.[17] On another level, we observe that even top corporate managers, who are typically highly educated, make decisions that are affected by overconfidence and personal history. Many of these behaviors can be explained by well-known principles from cognitive science.[18] More specifically, a team's "track record" can be very important to a start-up's ability to secure funding. This, in turn, suggests yet another reason for building the right team that not only can provide needed expertise but additional confidence in the quality of the investment opportunity to prospective investors. This phenomenon helps explain why legendary investors and entrepreneurs like Steve Jobs, Jeff Bezos and John Doerr became enamored with a technology invented by Dean Kamen, an enormously successful inventor, and were willing to invest tens of millions of dollars into his company. The company's product – the Segway – was, however, listed by *Time* magazine as one of "the ten biggest technology flops of the decade."[19] It also explains why, too often, great opportunities never get funded.

Conforming to the "status quo" and investing in people who, because of their track record, might paradoxically not need investors, is a natural tendency that entrepreneurs should be mindful of when seeking capital from investors who understand the high odds of failure and might prefer not to risk challenging the status quo without strong reasons to do so.[20] In a sense, many start-ups are formed to change something in the world by introducing something new and unusual but, along the way, they might be well served by building a team with a track record of success that can not only provide wise counsel but also credibility to assist in fundraising efforts.

V. Nurture a Culture of Trust

The subject of "culture" continues to receive much deserved attention within great businesses (and business schools) across the United States and beyond. Leaders have come to appreciate that a positive culture at work is a prerequisite to success, not a "soft" skill that is, comparatively, unimportant in the hard-nosed business world. As Tony Hsieh, the founder of Zappos has observed, "businesses often forget about the culture, and ultimately, they suffer for it because you can't deliver good service from unhappy employees." Similarly, Dr. Dan Baker, a prominent psychologist and best-selling author, observes that a "happy company" is one in which all individuals working within the organization work well together toward a common goal, using a diversity of strengths to produce and provide high-quality products and/or services and, through those efforts, find personal satisfaction while making a positive difference in the lives of others.[21]

Beyond what might be one's intuitive sense that such organizations are more likely to flourish than their unhappy competitors are the many scientific studies that have been completed that provide data-rich statistics for the traditional number crunchers in business. Continuously developing fields such as social neuroscience and positive psychology help explain how our biological and cultural heritage that was, for most of human history, critical to survival, can today – when existential threats are far less common – interfere with our ability to work collaboratively with others. Modern day forms of "fight or flight" behavior are manifested in a variety of counter-

productive forms, including fears of new technologies, of the cost of health care, of competition, or of missing projections. Indeed, the list of fears might be limitless.

Positive psychology is the scientific study of how people and organizations flourish. This now fast-growing field developed out of a concerted effort to counterbalance psychology's traditional focus on deficits and problems – i.e., what's wrong with people and how can those problems be fixed? Without disregarding the existence or importance of "real" problems, positive psychology seeks to broaden inquiry and perspective by bringing increased focus to the scientific study of individual and organizational strengths, skills, and talents – as well as considering what can be done to nurture and promote those individuals and organizations to help them grow.

Importantly, while its findings may be consistent with certain insights and guidance offered by religion, philosophy, or otherwise, positive psychology differentiates itself in that it relies upon scientific methods to understand the factors that allow individuals and organizations to flourish. The field has become increasingly relevant to individuals, businesses and organizations that have come to appreciate the scientifically established correlation between "culture" and the "bottom line."[22] The costs of negative culture include decreasing time spent working, reduced interest in collaborating with colleagues, diminishing commitment to an employer, and employee turnover.

In our experience, start-ups benefit from creating a culture which promotes (1) humility, (2) inclusiveness, (3) fair alignment around economic opportunities, (4) robust communication where ideas are openly shared, discussed, constructively criticized and vetted, and (5) a learning environment in which what might otherwise be considered a mistake is instead taken as an opportunity to move forward in a positive direction. This, in turn, helps build an engaged team that is prepared to work hard to execute the plans that have been developed.

Conclusion

We continue to be inspired by entrepreneurs and their creative visions, passions and resourcefulness. The American Dream remains alive and well in the 21st Century! Unfortunately, in spite of what Walt Disney said, all our dreams don't come true, even if we have the courage to pursue them. We believe that entrepreneurs (and their professional advisors) would be well served by following a roadmap that (1) evaluates the potential opportunity by vetting it out with potential customers, (2) evaluating who might be needed to build the company and create the right team, (3) in collaboration with the team, develop a thoughtful "go to market" plan that is continuously evaluated, refined and improved upon, (4) consider new strategies to raising capital, and (5) focus on creating – and nurturing – a great culture. While there are no guarantees in life, our experience suggests that this approach can help make any entrepreneur's dream a more likely reality. ■

1. Clark Gilbert and Matthew Eyring, *Beating the Odds When You Launch a New Venture*, Harvard Bus. Rev. (May 2010), at 78.

2. *See, e.g.*, Thomas Friedman, Thank You for Being Late, 28 (2016) ("[T]here is a mismatch between the change in the pace of change and our ability to develop the learning systems, training systems, management systems, social safety nets, and government regulations . . .").

3. Dan Ariely, Predictably Irrational: The Hidden Forces That Shape Our Decisions (2010).

4. Adam Grant, Originals: How Non-Conformists Move the World, 17 (2016) ("Original").

5. *See* Patrick J. McGinnis, The 10% Entrepreneur: Live Your Startup Dream Without Quitting Your Day Job (2016).

6. Or, more recently, as management guru Ken Blanchard has observed, "None of us is as smart as all of us."

7. Bradley P. Owens et al., *Expressed Humility in Organizations: Implications for Performance, Teams, and Leadership*, 24 Org. Sci. 5, 1517–34 (2013).

8. Tony Hsieh, Delivering Happiness: A Path to Profits, Passion and Purpose, 158 (2013).

9. Thomas Friedman, *How to Get a Job at Google*, N.Y. Times, https://nyti.ms/2jD9RgP.

10. Some startup entrepreneurs are reluctant to secure investments from venture capitalists, sometimes unfairly thinking of these professionals as "vulture capitalists." Many investors, however, not only provide needed capital but can help build companies by providing wise counsel, mentoring, introductions (including to other investors, potential acquirers, customers, and other benefits.

11. Daniel J. Levitin, The Organized Mind: Thinking Straight in the Age of Information Overload, 5–8 (2015).

12. Richard Peterson, *The Neuroscience of Investing: FMRI of the Reward System*, www.richardpeterson.net/Neuroinvesting.htm.

13. *See, e.g.*, Paul J. Zak, Why Inspiring Stories Make Us React: The Neuroscience of Narrative, The Dana Foundation, www.dana.org/Cerebrum/2015/Why_Inspiring_Stories_Make_Us_React__The_Neuroscience_of_Narrative/. *See also* Boyd, B. (2009). *On the origin of stories: Evolution, cognition, and fiction*. Cambridge, MA: Belknap Press. Wallentin, M., Nielsen, A. H., Vuust, P., Dohn, A., Roepstorff, A., & Lund, T. E. (2011). Amygdala and heart rate variability responses from listening to emotionally intense parts of a story. *NeuroImage, 58,* 963–73.

14. *See, e.g.*, Young Entrepreneur Council, *How to Wow Potential Investors With Your Pitch Deck*, Huffington Post, www.huffingtonpost.com/young-entrepreneur-council/how-to-wow-potential-investors_b_7505304.html. *See also* Oren Klaff, Pitch Anything (2011).

15. Richard H. Thaler, Misbehaving: The Making of Behavioral Economics, 138–39 (2016).

16. Evan Baehr and Evan Loomis, Get Backed, Harvard Business Review Press (November 17, 2015) at 5.

17. *See* Peterson, *Neuroscience of Investing*.

18. Cary Frydman & Colin F. Camerer, *The Psychology and Neuroscience of Financial Decision Making*, 20 Trends in Cognitive Sciences 9, www.cell.com/trends/cognitive-sciences/fulltext/S1364-6613(16)30099-7.

19. Grant, Originals, at 29–30.

20. *Id*.

21. Dan Baker, Cathy Greenberg and Collins Hemingway, What Happy Companies Know: How the New Science of Happiness Can Change Your Company for the Better, Pearson/Prentice Hall 2006 at 13.

22. The Gallup organization estimates that U.S. companies lose $360,000,000,000 each year due to lost productivity from employees who don't work well with their supervisors. By contrast, research also demonstrates the upside to a business' bottom line that is associated with positive workplace culture. *See, e.g.*, Shawn Achor, *The Happiness Dividend*, Harvard Bus. Rev. (June 23, 2011) ("A decade of research proves that happiness raises nearly every business and educational outcome: raising sales by 37%, productivity by 31%, and accuracy on tasks by 19%, as well as a myriad of health and quality improvements.").

General Counsels for New York Law Firms: An Idea Whose Time Has Come

By Ira Brad Matetsky

Scenario One

A bank officer is confronted with an unexpected, complex issue involving a customer and the bank. The issue is fraught with legal and ethical implications. The banker wants to be sure the bank acts in a legal and ethical fashion that satisfies its obligations to its customer without unnecessarily jeopardizing its own interests. Therefore, the banker walks down the hall and speaks with the bank's in-house General Counsel. The two of them have a privileged, confidential conversation and the general counsel provides the banker with the legal advice she needs.

Scenario Two

A hospital physician is confronted with an unexpected, complex issue involving a patient and the hospital. The issue is fraught with legal and ethical implications. The doctor wants to be sure the hospital acts in a legal and ethical fashion that satisfies its obligations to the patient without unnecessarily jeopardizing its own interests. Therefore, the doctor walks down the hall and speaks with the hospital's in-house General Counsel. The two of them have a privileged, confidential conversation and the general counsel provides the doctor with the legal advice she needs.

Scenario Three

An attorney at a law firm is confronted with an unexpected, complex issue involving a client and the firm. The issue is fraught with legal and ethical implications. The lawyer wants to be sure the firm acts in a legal and ethical fashion that satisfies its obligations to its client without unnecessarily jeopardizing its own interests. The lawyer wants to walk down the hall and have a privileged, confidential conversation with another lawyer at the firm, to obtain advice and decide how to handle the situation. Can she?

New York's appellate courts had not answered this question until recently. Indeed, the Court of Appeals still has never decided whether a law firm may use the attorney-client privilege to shield intra-firm communications involving a client matter from disclosure in the event of later litigation between the firm and the client. However, in its June 2016 decision in *Stock v. Schnader Harrison Segal & Lewis LLP*,[1] the Appellate Division, First

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Department, upheld a law firm's invocation of the attorney-client privilege to shield intra-firm communications between lawyers within the firm and another lawyer who had been designated as the firm's General Counsel. This decision, which follows a line of decisions from other jurisdictions, suggests that all multi-lawyer firms should consider designating one of their experienced attorneys as the firm's "General Counsel." Doing so will maximize the likelihood that when highly sensitive ethical issues arise, firm lawyers will be able to discuss them with an experienced colleague within their firm on a privileged, confidential basis.

The First Department's decision in *Stock* illustrates the type of situation in which having a General Counsel within a firm can be useful. The case arose in the context of a malpractice suit by a former client. In 2008, the defendant law firm represented the plaintiff in negotiating a separation agreement from his employer. From 2009 to 2011, the law firm also represented the plaintiff in an arbitration against his former employer. Shortly before the arbitration hearings were to commence, the employer gave notice that it intended to call one of the firm's attorneys as a fact witness at the arbitration. At that time, three of the firm's attorneys consulted with a fourth attorney, who was the law firm's designated General Counsel and had never been involved in the underlying client matter. They discussed the attorneys' and the firm's ethical obligations that arose from their colleague being called as a witness in an arbitration the firm was handling. These communications with the General Counsel included a series of emails. The client was not billed for the attorney time spent on these communications.[2]

In 2013, the plaintiff sued the law firm and one of its attorneys for malpractice in Supreme Court, New York County, alleging that they committed legal malpractice when they counseled plaintiff in the employment termination negotiations and thereafter breached their fiduciary duties to the plaintiff by seeking to "cover up" the alleged malpractice. During discovery, the law firm provided a privilege log asserting the attorney-client privilege as to the emails between the General Counsel and other firm employees. The plaintiff moved to compel disclosure, and the court granted the motion. In doing so, the court relied on the "fiduciary exception" to the privilege and held that the lawyers should have had no expectation that the emails would be confidential as against the current client whose matter was being discussed.[3]

The law firm appealed. Recognizing the importance that the issue presented to the Bar, a group of 74 law firms filed an *amicus curiae* brief urging the Appellate Division "to uphold the availability of the attorney-client privilege for law firms and lawyers within them consulting with in-house counsel to the same extent that such privilege is available to other individuals and entities, and even in circumstances where the consultation relates to a current client of the law firm."[4] The Association of Corporate Counsel of America (ACCA) filed an *amicus* brief taking the opposite position and arguing that the privilege should not be applicable under these circumstances.

The Appellate Division reversed the Supreme Court's decision and accepted the arguments in favor of the privilege put forward by the appealing law firm and the 74 *amicus curiae* firms. Justice David Friedman, writing for a unanimous panel, began his opinion by defining the issue and summarizing the holding:

> The primary issue on this appeal is whether attorneys who have sought the advice of their law firm's in-house general counsel on their ethical obligations in representing a firm client may successfully invoke attorney-client privilege to resist the client's demand for the disclosure of communications seeking or giving such advice. We hold that such communications are not subject to disclosure to the client under the fiduciary exception to the attorney-client privilege . . . because, for purposes of the in-firm consultation on the ethical issue, the attorneys seeking the general counsel's advice, as well as the firm itself, were the general counsel's "real clients." Further, we decline to adopt the "current client exception," under which a number of courts of other jurisdictions have held a former client entitled to disclosure by a law firm of any in-firm communications relating to the client that took place while the firm was representing that client.[5]

In its analysis, the court described the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law,"[6] which has long been codified by statute in New York (now CPLR 4503).[7] The court observed that "[n]othing in CPLR 4503 suggests that consultations between a law firm, as client, and its in-house counsel, as attorney, are not covered by the privilege." It observed that several other jurisdictions around the country have "recognized that lawyers associated in a firm have the same right to confide in their firm's in-house counsel."[8] The plaintiff, relying on a "fiduciary exception" to the privilege, asserted that while the law firm could properly shield the emails from disclosure to third parties, it could not properly assert the privilege against its own client whose legal matter was the subject of the emails. The court disagreed, because where an attorney seeks counsel as to his or her own legal and ethical duties, the "real client" is the attorney, not the client in the underlying legal matter. Although no reported New York case had previously considered the issue,

> [i]n recent years, the courts of a number of other states – including the highest courts of Georgia and Massachusetts – have held that the fiduciary exception to the attorney-client privilege, assuming that the jurisdiction recognizes it, does not apply to communications between lawyers and their firm's in-house counsel addressing [ethical] concerns arising from the ongoing representation of a firm client. These courts have concluded that, when lawyers seek the advice of their

> firm's in-house counsel concerning possible conflicts, ethical obligations and potential liabilities arising from the representation of a current firm client, the in-house counsel's "real clients" are the lawyers and the firm itself – not the firm client from whose representation the issues arise – and, therefore, evidence of communications seeking or rendering such advice may be withheld from the firm client as privileged.[9]

A 2013 American Bar Association House of Delegates resolution also took the same position.[10]

The First Department concluded:

> [T]he fiduciary exception does not apply to the January 2011 emails because [the law firm] and its attorneys were the "real clients" for purposes of these attorneys' consultation with . . . the firm's in-house general counsel, whose time spent on the consultation was not billed to plaintiff and who never worked on any matter for plaintiff. The three [firm] attorneys who sought [the general counsel's] legal advice . . . had their own reasons, apart from any duty owed to plaintiff, for seeking the legal guidance. [The adversary's] announced intention to call [one of the attorneys] to testify against plaintiff raised an obvious issue under RPC rule 3.7, the lawyer-as-witness rule. The attorneys, not plaintiff, would be subject to disqualification or professional discipline for any violation of the RPC in their handling of the arbitration. In addition, [the law firm] itself had an obligation "to ensure that all lawyers in the firm conform[ed]" to the RPC (RPC rule 5.1[a]) and thus to have [lawyers at the firm] receive appropriate legal counsel about their ethical duties.[11]

All multi-lawyer firms should consider designating one of their experienced attorneys as the firm's "General Counsel."

The court further rejected the plaintiff's arguments that the fiduciary exception should apply until relations between attorney and client reach "the stage of actual hostility,"[12] and also refused to apply the "current client doctrine" – recognized in some other jurisdictions, but rejected by many others – under which a lawyer may not assert a privilege as to any internal communications relating to a then-client's pending legal matter.[13] Most importantly, the First Department emphasized that "we do not believe that a consultation by attorneys with their firm's in-house counsel on a purely ethical issue arising from the representation of a current client . . . inherently gives rise to a conflict of interest between the firm and the client." To the contrary, the court quoted New York State Bar Association Opinion 789 (2005), which opined:

> The purpose of consultation on a lawyer's ethical and legal obligations is to facilitate the inquirer's adherence to applicable law and rules. Seeking advice from an in-house ethics advisor is intended to facilitate the lawyer's proper exercise of professional judgment and a lawyer's appropriate discharge of the duty of loyalty owed to the client in the same way that an outside client's consultation with a lawyer in the firm is intended to facilitate the client's lawful achievement of legitimate objectives. Considering a lawyer's ethical obligation to represent a client within the bounds of the law, for instance, does not give rise to any rightful claim that such consideration alone adversely affects the lawyer's professional judgment or loyalty, for this is what lawyers are supposed to do.[14]

The First Department's *Stock* decision constitutes binding precedent throughout the state. The case has subsequently been settled,[15] so it will not provide a vehicle for the Court of Appeals to address the privilege issue and provide a final statewide resolution. However, in addition to constituting binding precedent in the First Department, the decision is also a binding precedent governing courts and administrative agencies within the three other judicial departments unless and until the Appellate Divisions in those departments choose to apply a different rule.[16] Given the extensive and scholarly analysis contained in the First Department's opinion, and the fact that its decision is consistent with an emerging consensus of other authorities throughout the country, this seems unlikely. Thus, as a practical matter, law firms throughout the state should feel reasonably assured that they will enjoy the benefits of the decision in all matters decided by state courts or agencies.[17]

Appointing and Using a General Counsel: Guidelines for Law Firms

Any lawyer will understand the value of being able to discuss difficult professional decisions and ethical dilemmas with a knowledgeable colleague, without the fear that the contents of these discussions will be discoverable in later litigation. And where possible, most lawyers would prefer – and client confidentiality may suggest, if not require – that such disclosures be kept within the lawyer's own firm. Now that the courts have given law firms an opportunity to set up a framework for such privileged intra-firm communications, firms should take advantage of the opportunity.

To maximize the likelihood that intra-firm communications will be deemed privileged under the *Stock* court's analysis – and the value of the advice that will be provided in such communications – the following guidelines are suggested.

1. *Appoint a General Counsel.* Any firm whose size extends the level of a solo practitioner or a small handful of lawyers should strongly consider designating one of its members as General Counsel of the firm. Such an appointment has only upside. If it turns out that the law firm is fortunate enough never to be faced with complex, time-sensitive professional decisions raising difficult ethical issues that could benefit from high-level confidential discussion . . . then that firm and its members can consider themselves very lucky. Most firms will not be so fortunate. Sooner or later, and often through no fault of their own, they will find themselves faced with a tough situation. It is far better for the firm's lawyers to know ahead of time whom and how to consult when it happens, rather than have to scramble at the last minute, or worse still, make mistakes that risk forfeiting the protection that the nationwide Bar has fought hard to obtain.
2. *Appoint the right General Counsel*. The General Counsel should be a senior lawyer within the firm, whose advice will be appreciated and likely be heeded by others within the firm. He or she should be an approachable colleague, not someone whom other lawyers hesitate to confide in. The General Counsel should be well-familiar with the law of lawyering, the New York Rules of Professional Conduct, and the practicalities of how the law firm operates. Some very large firms are able to designate a lawyer to serve as General Counsel full-time, perhaps coupling the responsibilities discussed in this article with related tasks such as addressing claims or complaints against the firm, supervising litigation to which the firm is a party, and coordinating the firm's legal malpractice insurance coverage. Smaller firms will typically designate a partner to serve as General Counsel in addition to his or her other responsibilities, in which case this lawyer's commitment of time and expertise to this role should be recognized as an important professional contribution to the firm. Where the chosen General Counsel will often be unavailable, such as for frequent travel or trial work, a Deputy or Alternative General Counsel can also be appointed.
3. *Publicize the General Counsel's appointment and role within the firm*. Designating a General Counsel on paper will do a firm no good if other lawyers do not know whom they should speak to when the need arises. The General Counsel should be accessible to both senior and junior lawyers. Junior lawyers should understand that speaking with the General Counsel is not a substitute for working with their supervising partner or more senior associate on a given client matter. However, having a designated senior lawyer outside the ordinary "chain of command," with whom anyone at the firm can consult if concerned about a potential ethical impropriety, can help ensure the firm's compliance with its professional obligation to "make reasonable efforts to ensure that all lawyers in the firm conform to these Rules [of Professional Conduct]."[18] As stated in a Comment to the Rules, "[i]n a large firm, or in practice situations in which difficult ethical problems frequently arise" a firm may "have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee."[19]
4. *The General Counsel should stay educated*. Of course it is every lawyer's job to know and follow the Rules of Professional Conduct, and to take the required four hours of CLE classes on Ethics and Professionalism in each two-year cycle. But the General Counsel should do more, to the point of becoming the firm's "go-to" resource on ethical issues. He or she may also seek a Bar leadership role in this area, such as serving on a bar association ethics or professional responsibility committee, writing articles, or presenting at CLE programs.
5. *The General Counsel should stay independent*. The General Counsel's role is to provide *independent* professional analysis and advice. A lawyer cannot fulfill that role if he or she is professionally involved in the underlying matter on which the advice is sought. Moreover, the *Stock* decision upholding the privilege for consultations with the General Counsel mentions no fewer than five times that the General Counsel had never worked on any matter for that client.[20] If the General Counsel is one of the lawyers involved in the underlying representation, someone else should act as General Counsel for purposes of that matter.
6. *Don't bill for time spent consulting*. Part of the theory underlying upholding the attorney-client privilege for intra-firm consultations is that the consultations are needed to protect *the firm's own* rights and interests in interpreting and adhering to its ethical responsibilities. Given this rationale, consistency requires that the client should not be expected to pay for the time of either the General Counsel or the other attorneys expended in the course of such consultations. The *Stock* decision mentions four times that the client had not been billed for the time spent on communications to and from the General Counsel.[21] That does not mean that if the time had been billed the result would necessarily have been different . . . but the chance is not worth taking.
7. *File the communications separately.* The Court of Appeals has held that a lawyer's file generated in the course of representing a client belongs to the client, and must be turned over to the client upon request.[22] If written intra-firm communications (such as emails) to and from the General

Counsel are placed in a client file that is destined to be turned over to the client – or to another firm representing the client in a malpractice case – then the whole point of protecting the communications from disclosure will be lost. To be sure, a firm often will not be required to turn over its internal work product as part of the file.[23] But application of this exception in the case law can be unpredictable.[24] By categorizing documents or emails arising from the General Counsel consultation separately from the underlying client file from inception, a lawyer can reduce the chance that they must be included someday if a judge directs, "turn over the client's entire file."[25]

8. *Don't shoot the messenger – at least not yet.* As a lawyer presents an issue to the General Counsel, it may become apparent that mistakes were made in handling the matter – either by that lawyer or by someone else. The mistakes may be readily correctable, or they may not. The General Counsel needs to stay focused on protecting the interests of the firm, which include the firm's complying with its professional obligations to its client. This is not the right time to excoriate the lawyer seeking advice for making the mistake (unless it is a truly venal ethical breach), or to turn the consultation into a performance review session. Whatever the lawyer may have done wrong, at the moment he is doing the right thing by reporting the issue and getting help. If that lawyer ultimately deserves to be criticized for his performance, or disciplined by the firm, or even told to look for employment elsewhere – almost invariably, that can wait until the crisis has passed. But for the moment, the General Counsel needs to be focused on the bigger picture.
9. *Carefully consider the General Counsel's advice*. As with any other legal matter brought to a lawyer, sometimes an issue might be brought to the General Counsel's attention for him or her to decide what to do. Other times, the lawyers working on the matter may have already decided what they want to do, but want to ensure that their intended course of conduct is permissible. At other times, they may want the General Counsel to brainstorm with them and think through various different ways a problem could be addressed. But no matter how the issue is framed, if a problem is worth bringing to the General Counsel, it is worth carefully listening to and considering his or her thoughts. In the rare case in which the decision is made *not* to follow the General Counsel's preferred approach, there should be a clear understanding of exactly why, and there should be confirmation that the approach chosen is at least a permissible one.
10. *Document what was decided*. If the communications over an issue are oral, and if the issue is a significant one that may have later ramifications, it will usually be worthwhile to take the time to prepare a memorandum or email to the file documenting the discussion and the decision that was reached. Ideally, the memorandum or email should be reviewed both by the attorney who consulted with the General Counsel and by the General Counsel himself or herself.
11. *But wait – consider if one might want to disclose the communications after all.* Up until this point, we have assumed that the goal of consulting with the General Counsel is to enjoy the benefits of a confidential communication that will not have to be disclosed to a client, a governmental agency, or anyone else. But on occasion, a lawyer or law firm whose conduct is later challenged may wish to rely on an "advice of counsel" defense – that is, to emphasize to a reviewing court or body that it took the challenged action only after the legal and ethical ramifications of doing so were carefully considered and discussed with counsel, who advised that the action was proper. When advice of counsel is asserted as a defense or mitigating factor in a proceeding, the party asserting it will typically need to fully disclose the advice that was received, as well as the underlying facts provided to the attorney that gave rise to the advice – thereby waiving the otherwise applicable attorney-client privilege as to those communications.[26] If it is anticipated that advice from the General Counsel may have to be used in this way, it should be documented that the General Counsel was provided with all the relevant facts and background, as the failure to do so may vitiate the defense. (In these circumstances, the firm may be well-advised to bring in outside counsel.)
12. *Learn any lessons*. When the issue has been resolved or the crisis has passed, the General Counsel should ask why an issue arose that had to be brought to him or her for consideration in the first place – and what lessons the firm and its lawyers might learn for the future.

The complexities of modern lawyering mean that even the most attentive and ethical of practitioners will be confronted with ethical dilemmas and the need for advice on them.

The complexities of modern lawyering mean that even the most attentive and ethical of practitioners will be confronted with ethical dilemmas and the need for advice on them. Any lawyer who agrees with this statement should welcome the First Department's decision in *Stock* and ensure that his or her firm is in the best position to gain the benefits of that decision if the time comes.

1. 1 42 A.D.3d 210 (1st Dep't 2016).

2. *See id.* at 212–14.

3. *Id.* at 215. The Supreme Court's decision (Schweitzer, J.) is found at *Stock v. Schnader Harrison Segal & Lewis LLP*, 2014 N.Y. Slip Op. 33171(U) (Sup. Ct., N.Y. Co. Dec. 5, 2014).

4. Brief of Amicus Curiae Interested Law Firms, at 38, *Stock v. Schnader Harrison Segal & Lewis LLP* (1st Dep't Apr. 22, 2015). Ganfer & Shore, LLP, of which the author of this article is a member, was one of the law firms that joined in the filing of the *amicus* brief.

5. *Stock*, 142 A.D.3d at 212.

6. *Id.* at 215 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

7. *Id.* (quoting CPLR 4503(a)(1)).

8. *Id.* at 216 (citing *United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996); *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F. Supp. 255 (S.D.N.Y. 1994)).

9. *Id.* at 221 (citing *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 427–29, 746 S.E.2d 98, 107–08 [2013]); *RFF Family P'ship, LP v. Burns & Levinson, LLP,* 465 Mass. 702, 713–16, (2013); *see also Garvy v. Seyfarth Shaw LLP*, 359 Ill. Dec 202, 215, (Ill. App. Ct. 2012)).

10. *Id.* at 221–22 (citing ABA House of Delegates Resolution 103 (2013)) (asserting that "the fiduciary exception' to the attorney-client privilege . . . , if recognized by the jurisdiction, does not apply to confidential communications between law firm personnel, acting on behalf of the law firm in its individual capacity, and the firm's in-house or outside counsel, even if those communications regard the law firm's own duties, obligations, and potential liabilities to a current client").

11. *Id.* at 222.

12. *Id.* at 223.

13. *Id.* at 227–38. The court cited, as cases describing or accepting the proposed "current client" rule, *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 220 F. Supp. 2d 283 (S.D.N.Y. 2002); *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283 (E.D. Pa. 2002); *In re Sunrise Sec. Litig.*, 130 F.R.D. 560 (E.D. Pa. 1989); *In re SonicBlue Inc.*, 2008 WL 170562, (Bankr. N.D. Cal. Jan. 18, 2008). Cases rejecting the doctrine include the previously cited *St. Simons Waterfront* and *RFF Family Partnership*, as well as *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or. 476, (2014); *Palmer v. Superior Court*, 231 Cal. App. 4th 1214, (2014); and *TattleTale Alarm Sys. v. Calfee, Halter & Griswold, LLP*, 2011 WL 382627, (S.D. Ohio Feb. 3, 2011).

14. NYSBA Opinion 789, ¶¶ 15–16 (paragraph numbers and footnotes omitted).

15. The e-courts docket for the case (Supreme Court, New York County, Index No. 651250/2013) indicates that a stipulation of discontinuance with prejudice was filed in October 2016.

16. "The Appellate Division is a single statewide court divided into departments for administrative convenience and, therefore, the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or the [Appellate Division of this Department] pronounces a contrary rule." *Mountain View Coach Lines v. Storms*, 102 A.D.2d 663, 664 (2d Dep't 1984) (citations omitted); *Striver 140 LLC v. Cruz*, 1 Misc. 3d 29, 30–31, (App. Term 1st Dep't 2003) (same).

17. In federal cases, the courts will apply the *Stock* decision as a matter of New York's privilege law in diversity cases, but may develop an independent federal common-law rule on the issue applicable to cases in which a federal question supplies the basis of subject-matter jurisdiction. *See* Fed. R. Evid. 501.

18. Rules of Professional Conduct (RPC), (22 N.Y.C.R.R. 1200), rule 5.1(a).

19. Comment [3] to RPC 5.1. *See also* RPC 5.2(b) ("A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.").

20. *Stock,* 142 A.D.3d at 214, 222, 225, 233, 236.

21. *Id.* at 214, 222, 223, 225.

22. *See Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d 30, 37 (1997).

23. *See id.* at 38.

24. *See, e.g., Gamiel v. Sullivan & Liapakis, P.C.*, 289 A.D.2d 88, (1st Dep't 2001); *Hahn & Hessen, LLP v. Peck,* 2012 N.Y. Misc. LEXIS 6563, at *17–21, 2012 N.Y. Slip Op. 33602(U) (Sup. Ct., N.Y. Co. May 18, 2012).

25. Of course this does not mean that the existence of the documents or emails can be omitted from a privilege log if they are responsive to a properly drafted document request in the course of a litigation.

26. *See generally Deutsche Bank Trust Co. of Ams. v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 64 (1st Dep't 2007); *Village Bd. of Pleasantville v. Rattner*, 130 A.D.3d 654 (2d Dep't 1987).

2016 Review of UM/SUM Law and Practice

By Jonathan A. Dachs

It is my honor and pleasure to present this annual survey of recent developments in the area of uninsured motorist (UM), and supplementary uninsured/underinsured motorist (SUM) law and practice. As always, the period reviewed – here, the calendar year 2016 – was marked by much significant activity in this highly litigated, ever-changing, and complex area of insurance law.

I. GENERAL ISSUES

A. Purpose of SUM Coverage

In *Nafash v. Allstate Ins. Co.*,[1] the court stated that "When a policyholder purchases SUM coverage in New York, he or she is insuring against the risk that a tortfeasor (1) may have no insurance whatsoever; or (2) even if insured, is only insured for third-party bodily injury at relatively low liability limits, in comparison to the policyholder's own liability limits for bodily injury sustained by third parties."

B. Residents

The definition of an "insured" under the UM and SUM endorsements includes a resident relative of the named insured or spouse.

In *Progressive Northern Ins. Co. v. Pedone*,[2] the court observed that "While a person can have more than one residence for purposes of insurance coverage [citations omitted], a person's status as a resident of an insured's household 'requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain' [citations omitted]."

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Generally speaking, the issue of residency is a question of fact to be determined at a hearing.

In *Pedone*, the court found that the evidence at the framed-issue hearing supported the Supreme Court's determination that the claimant, an "itinerant musician," resided in his parents' household in Staten Island at the time of the subject accident. The proof in the record included the presence of the claimant's personal belongings and professional equipment at his parents' house, numerous official documents that listed his parents' address as his residence, and testimony adduced at the framed-issue hearing – all of which sufficed to establish residency in his parents' household within the meaning of the insurance policy.

C. "Motor Vehicle"

In *Guevara v. Ortega*,[3] the court held that a New York City Police Department vehicle being driven by a car wash attendant was a "police vehicle" even though it was not being operated by the police department at the time of the accident. Therefore, it was not required to have UM or SUM coverage.[4]

D. Occupancy

Among the definitions of an "insured" under the UM and SUM endorsements is a person "occupying" a motor vehicle covered by those endorsements. The term "occupying" is defined as "in, upon, entering into, or exiting from a motor vehicle."

In *Government Employees Ins. Co. v. Nakhla*,[5] the claimant was driving a taxicab insured by American Transit when it was struck in the rear by another vehicle. When he exited the taxicab to look for damage, the offending vehicle drove away and struck him while he was standing outside the cab. The claimant filed a claim for uninsured motorist benefits with GEICO, the insurer for his own personal vehicle, as a result of injuries he sustained from the second impact, contending that he was a pedestrian, rather than an occupant of the cab, at that time.

As noted by the court, GEICO's policy defined "occupying" as "in, upon, entering into or exiting from a motor vehicle" – a definition taken from Insurance Law § 3420(f)(3), which similarly defines that term. The essential question was whether "a departure from a vehicle is occasioned by or is incident to some temporary interruption of the journey and the occupant remains in the immediate vicinity of the vehicle and, upon completion of the objective occasioned by the brief interruption, he intends to resume his place in the vehicle (*Rice v. Allstate Ins. Co.*, 32 N.Y.2d 6, 10–11)." The court held that GEICO established that the claimant was an occupant of the taxicab at the time of the second impact (on the authority of several earlier decisions[6]).

In *J. Lawrence Construction Corp. v. Republic Franklin Ins. Co.*,[7] the plaintiff parked the insured vehicle, which was leased by his employer, across the street from his office, exited the vehicle and locked it. He then went into his office, retrieved documents from his desk, and proceeded back to the vehicle. As he crossed the street, he remotely unlocked the vehicle with his key fob when he was "half a step" away from the vehicle, and while reaching for the door handle of the passenger door, he was struck by a vehicle. The policy covering the leased vehicle contained an SUM endorsement, which provided coverage to any person who was "occupying" the insured vehicle, and defined "occupying" as "in, upon, entering into, or exiting from a motor vehicle." The insurer denied the plaintiff's claim on the basis that the plaintiff was a pedestrian and not an occupant of the vehicle at the time of the accident.

The court noted that under the law,

> A person remains an occupant of a vehicle even if that person is not in physical contact with the vehicle, "provided there has been no severance of connection with it, his [or her] departure is brief and he [or she] is still vehicle-oriented with the same vehicle" [citations omitted].[8] A connection to a vehicle will be severed "upon alighting therefrom to perform a chore which was not vehicle oriented" [citation omitted].[9] Moreover, there has to be "[m]ore than a mere intent to occupy a vehicle . . . to alter the status of pedestrian to one of 'occupying' it" [citations omitted].[10] "[O]ne is [not] considered to be occupying a car if he is merely approaching it with intent to enter."[11]

Based upon the evidence in this case, the court concluded that the plaintiff leaving the vehicle "was not a temporary break in his journey such that he remained in the immediate vicinity of the insured vehicle." Moreover, the plaintiff had only "a mere intent to enter the insured vehicle and was not an occupant of the insured vehicle at the time of the accident." Accordingly, the court granted the insurer's motion for summary judgment declaring that it had no duty to provide SUM benefits to the plaintiff.

E. Accidents v. Intentional Collisions

In *Progressive Advanced Ins. Co. v. McAdam*,[12] an action for a judgment declaring that the plaintiff insurer was not obligated to pay certain no-fault claims submitted by the defendants, the insurer sought to deny coverage based on its contention that the "accidents" were "intentionally staged and fraudulent." Although the court observed that "[A]n intentional and staged collision caused in furtherance of an insurance fraud scheme is not a covered accident under a policy of insurance [citations omitted]," it went on to find that the insurer failed to meet its *prima facie* burden on the motion because the uncertified police accident reports it submitted were not admissible, and the affidavit of the insurer's medical representative was based largely upon inadmissible evidence and not upon personal knowledge of the facts surrounding the two collisions.

F. Use or Operation

The court held in *Guevara v. Ortega*[13] that a New York City Police Department traffic van being driven by a car wash attendant was a police vehicle even though it was not being driven by the police department at the time of the accident, interpreting the word "operated" as broader than "to cause to function" or "to drive" and to include the meaning "to exact power or influence."

G. Claimant/Insured's Duty to Provide Timely Notice of Claim

In *Kraemer Building Corp. v. Scottsdale Ins. Co.*,[14] the court noted that the insurer's receipt of prompt notice of an occurrence is "a condition precedent to its liability under the policy," and "a failure to give that notice 'may allow an insurer to disclaim its duty to provide coverage' [citations omitted]."

In *Slocum v. Progressive Northwestern Ins. Co.*,[15] the court observed that where a policy requires that notice be given to the insurer "as soon as practicable," it means, in the SUM context, that "the insured must give notice with reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was underinsured." Here, the plaintiff became aware of the limits of the tortfeasor's policy in September 2012, and learned the extent of her injuries by at least June 2013, when she underwent fusion surgery. Under those circumstances, the court concluded that it was unreasonable for the plaintiff to wait until August 2014 to notify the insurer of her SUM claim.

However, the *Slocum* court went on to hold that plaintiff was nevertheless entitled to coverage based on Insurance Law § 3420(a)(5), pursuant to which an insurer may not deny coverage based on untimely notice "unless the failure to provide timely notice has prejudiced the insurer," and that prejudice is not established "unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim."[16] Because the plaintiff provided notice of the accident within two years of learning the limits of the tortfeasor's coverage, the burden of proving prejudice rested with the insurer, and prejudice to the insurer was not presumed.[17] The insurer failed to meet its burden of demonstrating that its ability to investigate or defend the claim was "materially impaired."

The court refused, in *Castillo v. Prince Plaza, LLC*,[18] to apply an irrebuttable presumption of prejudice resulting from late notice of the occurrence and the lawsuit, pursuant to Ins. L. §3420(c)(2)(B), where such notice was not given until after a default had already been entered against the insured, because the default had been vacated a year before the insurer raised the statute as a ground for its disclaimer of coverage.

In *Freeway Company, LLC v. Technology Ins. Co.*[19] and *Aspen Ins. UK Limited v. Nieto*,[20] the courts reminded that the amendment to the "no prejudice" rule for late notice may not be applied to cases involving policies issued before January 17, 2009; in such cases, the old common law rules apply.

In *Kraemer Building Corp. v. Scottsdale Ins. Co.*, *supra*, a case that arose prior to the statutory amendment pertaining to the "no prejudice" rule, the court rejected the plaintiff's contention that the prejudice rule then applicable to uninsured and underinsured motorist claims, pursuant to *In re Brandon [Nationwide Mut. Ins. Co.]*,[21] and *Rekemeyer v. State Farm Mut. Auto. Ins. Co.*,[22] should be applied in the context of a liability policy as well.

As noted by the court, in the UM/UIM context, the no-prejudice rule had less potency "because an insurer was able to protect its interests due to its receipt of the separate No-Fault claim," while, in contrast, "'[t]he rationale of the no-prejudice rule is clearly applicable to a late notice of lawsuit under a liability insurance policy,' as a liability insurer is unlikely to obtain pertinent information through other means, impairing its ability 'to take an active, early role in the litigation process and in any settlement discussions and to set reserves' [actions omitted]."

In *Pollack v. Scottsdale Ins. Co.*[23] and *Castillo v. Prince Plaza, LLC*,[24] the courts noted that because an injured party is allowed by law to provide notice to an insurance company,[25] he or she is generally held to any prompt notice condition precedent of the policy, but such an injured party can overcome an insurance company's failure to receive timely notice – which would otherwise vitiate coverage – by a demonstration that he or she did not know the insurer's identity despite his or her reasonably diligent efforts to obtain such information.[26]

As further explained by the court in *Mt. Hawley Ins. Co. v. Seville Electronics Trading Corp.*,[27]

> Insurance Law §3420(a)(3) requires the injured party

Under the particular, and compelling, facts of this case, the court applied the doctrine of equitable estoppel to preclude the insurer from denying SUM coverage, rejecting the notion that the doctrine of equitable estoppel may never be employed to create coverage not provided for in an insurance policy.

> to demonstrate that he or she acted diligently in attempting to ascertain the identity of the insurer and thereafter expeditiously notified the insurer [citation omitted]. "In determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that required of the insured[ ]" [citations omitted]. "The injured person's rights must be judged by the prospects for giving notice that were afforded him, not by those available to the insured [citation omitted]." "What is reasonably possible for the insured may not be reasonably possible for the person he has injured. The passage of time does not of itself make delay unreasonable" [citation omitted].

The court stated in *Pollack v. Scottsdale Ins. Co.*[28] that "notice of an occurrence by the injured party constitutes *prima facie* compliance with the notice requirements of the policy, and, if unchallenged, relieves the insured of its contractual duty to provide proper notice."

In *Martin Associates, Inc. v. Illinois National Ins. Co.*,[29] the court held, *inter alia*, that notice to an insurer provided by other insureds under the policy was not sufficient to meet the plaintiff's own notice obligation, since its interests were at all times adverse to those of the other insureds.

The Second Department noted in *Osorio v. Bowne Realty Assoc., LLC*[30] that "circumstances may exist that will excuse or explain the insured's delay in giving notice, such as lack of knowledge that an accident has occurred [citations omitted]. It is the insured's burden to show the reasonableness of such excuse [citations omitted]." In this case, although the insured did not provide notice of the accident until three years after it occurred, it raised a triable issue of fact as to whether that delay was reasonable via the affidavits of its manager and director of operations, both of whom stated that they did not know about the accident until they received the summons and complaint.

In *Karl v. North County Ins. Co.*,[31] a pre-"prejudice rule" case, the insurance policy required notice of the occurrence to be given to the carrier "as soon as practicable," and required legal papers to be forwarded "promptly." Although the plaintiff commenced the underlying action against the defendant's insurer in February 2008, and was aware at that time of the identity of the insurer, it was not until June 27, 2008 that the insurer was notified for the first time of the lawsuit, when it received a copy of the summons and complaint from the plaintiff's counsel. The insurer disclaimed coverage six days later based upon the plaintiff's failure to provide timely notice of the occurrence and of the lawsuit. On the basis of the record before it, the court held that the insurer's disclaimer was timely and proper based upon the plaintiff's failure to promptly forward the underlying pleadings.

In *EAN Holdings, LLC v. Joseph*,[32] the court rejected the respondent's contention that despite the fact that notice of his UM claim based upon an alleged hit-and-run accident was not provided until almost six years after the accident, it should be deemed timely because the claim was asserted within the applicable statute of limitations. The court specifically held "that the six (6) year Statute of Limitations had not yet run is insufficient to explain the failure to have given the Petitioner notice within a reasonable time from the date of the accident," and noted that "it has been held that a delay of more than one year is unreasonable as a matter of law [citation omitted]."[33]

H. Proceedings to Stay Arbitration

CPLR 7503(c) provides, in pertinent part, that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded."

1. Filing and Service of Petition to Stay

In *Allstate Ins. Co. v. Cappadonia*,[34] the court held that the petition to stay arbitration was time-barred because it was not filed within 20 days of receipt of the formal arbitration demand,[35] rejecting the petitioner's contention that the 20-day rule did not apply since the policy did, in fact, contain an arbitration agreement between the parties.

The Second Department held in *Progressive Cas. Ins. Co. v. Garcia*[36] that Progressive's contention that arbitration should be stayed on the ground that the claimants' accident did not involve an adverse "motor vehicle," but, rather, an all-terrain vehicle,[37] does not relate to whether the parties had an agreement to arbitrate. Rather, that issue relates to whether certain conditions of the insurance contract were complied with so as to entitle the claimants to uninsured motorist benefits, and, therefore, had to be asserted within the 20-day time limit set forth in CPLR 7503(c).

The court also observed that Progressive failed to establish that the claimants' notices on intention to arbitrate were deceptive and intended to prevent it from timely commencing the proceeding. The notices of intention to arbitrate complied with the requirements of CPLR 7503(c), and the insurer failed to proffer an affidavit by someone with personal knowledge to support its contention that the claimants' service of the notices upon a certain post office address used by Progressive to process no-fault claims prevented it from timely contesting the issue of arbitrability. Indeed, the record included a letter from Progressive's own claims representative to the insurer's counsel acknowledging receipt of the notices of intention well within the 20-day period.

2. Burden of Proof

In *Allstate Ins. Co. v. Martinez*[38] and *Hertz Vehicles, LLC v. Monroe*,[39] the courts noted that "'[t]he party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary

issue which would justify the stay' [citations omitted]. Thereafter, the burden shifts to the party opposing the stay to rebut the *prima facie* showing [citations omitted]."

The Second Department in *Wynn v. Motor Veh. Acc. Indem. Corp.*[40] held that it was error to admit into evidence a police report without redacting the police officer's diagram of the accident. As stated by the court:

> Information in a police accident report is "admissible as a business record so long as the report is made based upon the officer's personal observations and while carrying out police duties" [citations omitted]. Conversely, information in a police accident report is inadmissible where the information came from witnesses not engaged in the police business in the course of which the memorandum was made, and the information does not qualify under some other hearsay exception [citations omitted].

Thus, insofar as the diagram contained in the police accident report was not derived from the personal observations of the police officer, who did not witness the accident, and there was insufficient evidence as to the source of the information used to prepare the diagram, whether that person was under a duty to supply it, or whether some other hearsay exception would render the diagram admissible, the court held that the diagram should not have been admitted, and its admission into evidence constituted harmful error.

In *Hertz Vehicles, LLC v. Monroe*, *supra*, the host driver testified at a framed issue hearing that, at the scene of the accident, the driver of the alleged offending vehicle gave him the telephone number for his insurance carrier. The host driver wrote that information, as well as other information relating to the identity of the offending vehicle, on a piece of paper. The next day, he called the number he had been given and spoke with an insurance agent, who provided the vehicle's insurance information, which he then also wrote on a separate piece of paper. Ten days after the accident, the host driver used the information he had previously recorded to prepare an MV-104 motor vehicle accident report. That report included the name and address of the driver of the alleged offending vehicle, but did not include any identifying information about the vehicle itself, such as its license plate number, state of registration, make, model, or year. Although the report indicated that the alleged offending vehicle was insured by Esurance, the policy number shown correlated to an Infinity policy. Over Infinity's objection, the court admitted an uncertified and unsworn copy of the MV-104 report into evidence for "limited purposes because some information is hearsay."

On the SUM carrier's appeal from the denial of its petition to stay arbitration, the court held that the carrier

> failed to make an evidentiary showing that the MV-104 accident report was admissible as a memorandum of a past recollection because the host driver did not have personal knowledge of the insurance information in the first instance, and the information on the report relating to the alleged offending vehicle and its insurance was derived from pieces of paper that were not produced at the hearing."
>
> '[A] memorandum not in its nature original evidence of the facts recorded, and not verified by the party who made the report and knew the facts, would open the door to mistake, uncertainty and fraud' [citations omitted].

Thus, the court held that since the MV-104 report did not meet the criteria for admissibility as a memorandum of the accident, the burden never shifted to the purported insurer of that vehicle to establish non-insurance or cancellation prior to the accident.

3. Arbitration Awards

a. Scope of Review

In *GEICO Indemnity Ins. Co. v. Global Liberty Ins. Co. of NY*,[41] a case involving an arbitration award in a UM matter, the court observed that

> [j]udicial review of an arbitrator's award is extremely limited [citation omitted]. Generally, an arbitration award can be vacated by a court only upon the narrow grounds set forth in CPLR 7511(b). While decisional law imposes closer judicial scrutiny of an arbitrator's determination in a compulsory arbitration proceeding [citation omitted], where, as here, the arbitration was consensual, a more deferential standard of review applies.

The court went on to add that "[a]n arbitration award may be vacated pursuant to CPLR 7511 (b)(1)(iii) where an arbitrator 'exceeded his [or her] power, which has been interpreted as including only three narrow grounds: if the award is clearly violative of a strong public policy; if it is totally or completely irrational; or if it clearly exceeds a specifically enumerated limitation on the arbitrator's power' [citations omitted]."

Insofar as the party seeking to vacate the award failed to establish that the arbitrator's award violated public policy, was completely irrational, or exceeded a specifically enumerated limitation of the arbitrator's power, the court upheld the confirmation of the award.[42]

In *Civil Service Employees Assoc., A.F.S.C.M.E. Local 1000, A.F.L.-C.I.O. v. County of Nassau*,[43] the court stated that "[u]pon timely application, an arbitration award should be confirmed, unless the award is vacated or modified upon a ground specified in CPLR 7511 (*see* CPLR 7510). 'An arbitration award may not be vacated unless it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power' [citations omitted]."

> [Moreover,] judicial intervention on public policy grounds constitutes a narrow exception to the otherwise broad power of parties to agree to arbitrate all of the disputes arising out of their juridical relationships, and the correlative, expansive power of arbitrators to

> fashion fair determinations of the parties' rights and remedies [citations omitted]. The public policy exception applies only in "'cases in which public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator'" [citations omitted].

In *GEICO Indemnity Ins. Co. v. Global Liberty Ins. Co. of NY*, *supra*, the court noted that evidence that was not submitted at the arbitration hearing may not be considered upon a motion to vacate (or confirm) the arbitration award.

I. Collateral Estoppel

The Second Department in *Tower Ins. Co. of New York v. Einhorn*[44] held, in pertinent part, that "while a defendant who has defaulted in an action admits all traversable allegations set forth in the complaint, including the basic allegation of liability," in this case, where the insured moved for leave to enter a default judgment only against its insured (Einhorn), "any resulting judgment would bind only her, and may not be given preclusive effect to deprive the nondefaulting defendants of their right to litigate the issues pertaining to coverage as permitted by law in the appropriate forum [citations omitted]."

In *Liberty Mutual Ins. Co. v. Robles*,[45] the petitioner sought a permanent stay of arbitration of a hit-and-run claim. The proposed additional respondents were the insurer and owners of the vehicle that allegedly fled the scene of the accident. In a prior property damage arbitration, the arbitrator determined that the proposed additional respondent's vehicle was the vehicle that fled the scene. Although the petitioner did not raise the issue of collateral estoppel in support of its petition, the Supreme Court granted the petition based upon the doctrine of collateral estoppel. In reversing, the First Department noted, *inter alia*, that although the issue involved was addressed in the claimant/respondent's opposition papers and the petitioner's reply, "those papers were served after the due date of the proposed additional respondent's opposition." Accordingly, the proposed additional respondents had no obligation or opportunity to address the issue.

An arbitration award may not be vacated unless it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power.

J. Equitable Estoppel

In *U.S. Specialty Ins. Co. v. Beale*,[46] the court held that even though the subject policy, which was issued to the town of Poughkeepsie, did not include SUM coverage for the town's police vehicles, the insurer was equitably stopped from denying coverage where:

- it knew, as a result of inspecting and photographing the police car operated by the claimant shortly after the accident, that a police vehicle was involved and that the claimant was making a claim for SUM benefits for damages she sustained while operating a police vehicle;
- its claims adjuster engaged in numerous telephone and written communications regarding the claimant's SUM claim, assigned a claim number for use in the SUM claim process, inquired about the underlying lawsuit and advised that there was $1 million in applicable SUM coverage;
- its attorney sent the claimant's attorneys a letter acknowledging the SUM claim and demanding compliance by the claimant with the discovery provisions of the SUM endorsement and requiring the claimant to obtain its consent to any settlement with the tortfeasor;
- it provided written consent to the claimant's settlement with the tortfeasor for the tortfeasor's minimal ($25,000) bodily injury coverage and the issuance of a general release and stipulation of discontinuance;
- it proceeded with discovery for the SUM claim, including obtaining and processing medical authorizations and participating in an examination under oath and a physical examination of the claimant;
- it participated in a mediation of the SUM claim;
- it made an (unsuccessful) offer to settle the SUM claim; and
- it participated in a pre-arbitration telephone conference call with the SUM arbitrator assigned to the matter, before filing a petition seeking a declaration that there was no SUM coverage under the policy.

As summarized by the court, the insurer in this case "acted in all respects since 2011 through the commencement of this proceeding as if [the claimant] had SUM coverage for her police vehicle as of the date of the 2011 accident." In reliance upon affirmative representations as to SUM coverage, and after having obtained the insurer's consent, she settled her negligence action against the tortfeasor for $25,000 and released the tortfeasor in order to pursue her SUM claim. As a result, she is now foreclosed from pursuing claims against the tortfeasor for damages she believed were available through SUM coverage. Under the particular, and compelling, facts of this case, the court applied the doctrine of equitable estoppel to preclude the insurer from denying SUM coverage, rejecting the notion (asserted by the insurer) that the doctrine of equitable estoppel may

never be employed to create coverage not provided for in an insurance policy.

K. Bad Faith

In *Gutierrez v. Government Employees Ins. Co.*,[47] the plaintiff brought an action against his SUM carrier for breach of the terms of the insurance policy and breach of the implied covenant of good faith and fair dealing, based upon the insurer's refusal to pay his claim after he exhausted the coverage of the tortfeasor. The first cause of action, sounding in breach of contract, demanded payment of the SUM benefits. The second cause of action sought damages in part for GEICO's alleged breach of "its duty to act in good faith" by unreasonably withholding payment of SUM benefits. The third cause of action alleged that GEICO "breached its contract and/or policy, and absolute duties and obligations to the plaintiff and its insureds."

> *v. Hudson Ins. Co.*, 10 N.Y.3d 200, 203; *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d at 195). Such a cause of action is not duplicative of a cause of action sounding in breach of contract to recover the amount of the claim [citations omitted]. Such consequential damages may include loss of earnings not directly caused by the covered loss, but caused, instead, by the breach of the implied covenant of good faith and fair dealing [citations omitted]. The second cause of action states a claim for consequential damages for breach of the implied covenant of good faith and fair dealing.

II. UNINSURED MOTORIST ISSUES

A. Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer

A vehicle is considered "uninsured" where it was, in fact, covered by an insurance policy at the time of the accident, but the insurer subsequently disclaimed or denied coverage.

An insurance company has an affirmative obligation to provide written notice of a disclaimer of coverage as soon as is reasonably possible, even where the policyholder's own notice of claim to the insurer is untimely

GEICO moved pursuant to CPLR 3211(a)(7) to dismiss the second and third causes of action on the basis that if they sounded in breach of the implied covenant of good faith and fair dealing, "that covenant was implicit in every contract, and therefore those causes of action were duplicative of the cause of action sounding in breach of contract."

The court found that the second cause of action alleged a failure to act in good faith, and noted that "[i]mplicit in every contract is an implied covenant of good faith and fair dealing [citation omitted]," – i.e., "a pledge that neither party to the contract shall do anything which will have the effect of destroying or impinging the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct [citations omitted]." Nevertheless, the court held that such a cause of action "is not necessarily duplicative of a cause of action alleging breach of contract." The court did, however, hold that the third cause of action sounded in breach of contract, and, thus, was duplicative of the first.

The court noted that

> An insurance carrier has a duty to "investigate in good faith and pay covered claims" (*Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187, 195). Damages for breach of that duty include both the value of the claim, and consequential damages, which may exceed the limits of the policy, for failure to pay the claim within a reasonable time (*see Panasia Estates*

Insurance Law § 3420(d)(2) provides that if "an insurer shall disclaim liability or deny coverage for death or bodily injury . . . it shall give written notice as soon as reasonably possible of such disclaimer or liability or denial of coverage to the insured and the injured person or any other claimant."

As the Court of Appeals observed in *Keyspan Gas East Corp. v. Munich Reinsurance America, Inc.*,[48]

> [t]he Legislature enacted section 3420(d)(2) to "aid injured parties" by encouraging the expeditious resolution of liability claims [citations omitted]. To effect this goal, the statute "establishe[s] an absolute rule that unduly delayed disclaimer of liability or denial of coverage violates the rights of the insured [or] the injured party" [citation omitted]. Compared to traditional common-law waiver and estoppel defenses, section 3420(d)(2) creates a heightened standard for disclaimer that "depends merely on the passage of time rather than on the insurer's manifested intention to release a right as in waiver, or on prejudice to the insured as in estoppel [citations omitted]."

In *Provencal, LLC v. Tower Ins. Co. of New York*,[49] the court noted that where the underlying insurance claim does not arise out of an accident involving bodily injury or death, Ins. L. § 3420(d)(2) and its heightened requirements do not apply.[50]

The court held, in pertinent part, in *Estee Lauder Inc. v. One Beacon Ins. Group, LLC*[51] that in a matter involving property damage claims, the court rules on the common

law for the proposition that "[a] ground not raised in the letter of disclaimer may not later be asserted as an affirmative defense."

In *Carlson v. American International Group, Inc.*,[52] the court noted that the provisions of Ins. L. § 3420 apply only to policies "issued or delivered in this state," and that the phrase "issued or delivered" is not to be conflated with the phrase "issued for delivery," which formerly appeared in the statute. Thus, where the policy involved was issued in New Jersey and delivered in Seattle, Washington, and then in Florida, it was not issued or delivered in New York, and, therefore, the statute (there, § 3420[a][2], governing direct actions against the insurer to recover on a judgment against its insured) was inapplicable.[53]

In *Pollack v. Scottsdale Ins. Co.*,[54] the court observed that "Where the required notice of [denial or disclaimer] is not provided by the insured, but rather by the injured party, the insurer's notice of disclaimer must address with specificity the grounds for disclaiming coverage applicable to the injured party as well as the insured."

In *Batista v. Global Liberty Ins. Co.*,[55] the court observed that "An insurance company has an affirmative obligation to provide written notice of a disclaimer of coverage as soon as is reasonably possible, even where the policyholder's own notice of claim to the insurer is untimely" and that "Where there is a delay in providing the written notice of disclaimer, the burden rests on the insurance company to explain the delay."

In *Imperium Ins. Co. v. Utica First Ins. Co.*,[56] the court held that the insurer sufficiently demonstrated that its delay in issuing its disclaimer "was reasonably related to a prompt, diligent, and necessary investigation to determine the relationship of the parties in the underlying action and whether an employee exclusion in the relevant insurance policy excluded coverage," and that the insurer's three-day delay in sending its notice of disclaimer after the completion of its investigation was not unreasonable.

In *Martin Associates, Inc. v. Illinois Mutual Ins. Co.*,[57] the court held, *inter alia*, that a disclaimer for late notice issued by the insurer 26 days after it received notice was timely as a matter of law.

In *Black Bull Contracting, LLC v. Indian Harbor Ins. Co.*,[58] the court held that the insurer's disclaimers, "had they been subject to the timeliness requirement of Insurance Law §3420(d)(2)," would have been untimely as a matter of law because they were issued 79 days and 85 days after the insurer received notice of the claim, and the basis for the disclaimer was apparent from the face of the notice of claim and accompanying correspondence.

However, the court went on to note that whether the untimeliness of the disclaimer under Ins. L. § 3420(d)(2) precluded the insurer from denying coverage depended on whether there was "a lack of coverage in the first instance" or "a lack of coverage based on an exclusion." As the Court of Appeals elaborated in *Worcester Ins. Co. v. Bettenhauser*,[59] "Disclaimer pursuant to section 3420[d] [now §3420(d)(2)] is unnecessary when a claim falls outside the scope of the policy's coverage. Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed. By contrast, disclaimer pursuant to section 3420(d) is necessary when denial of coverage is based upon a policy exclusion without which the claim would be covered."[60]

B. Hit-and-Run

UM/SUM coverage is available to victims of accidents involving a "hit-and-run," i.e., an unidentified vehicle that leaves the scene of the accident.

In *Government Employees Ins. Co. v. Huang*,[61] the court reminded that when there is a genuine triable issue of fact with respect to whether a claimant's vehicle had any physical contact with an alleged hit-and-run vehicle, the appropriate procedure is to stay arbitration pending a framed-issue hearing on that issue.

In *American Transit Ins. Co. v. Caba*,[62] the court stated that in reviewing a determination made after a hearing, the power [of the appellate court] is "as broad as that of the hearing court," and it "may render the judgment it finds warranted by the facts, bearing in mind that in a close case, the hearing court had the advantage of seeing the witnesses and hearing the testimony [citations omitted]."

In some instances, a claim is made that the subject vehicle was identified by the claimant/insured, but was not, in fact, involved in the subject accident. Such cases often result in framed issue hearings to determine the issue of involvement, with results dependent upon the specific facts of each case.

For example, in *American Transit Ins. Co. v. Caba*, *supra*, the claimant was able to record the license plate number of the vehicle that hit his vehicle as it drove away from the scene, and he provided it to the police. Upon claimant's presentation of his claim to the purported insurer for the offending vehicle, that insurer denied that its insured vehicle was involved in the accident. Claimant then presented an uninsured motorist claim to his own insurer. After a framed issue hearing, the court granted the SUM carrier's Petition to Stay Arbitration on the ground that the alleged offending vehicle was insured at the time of the accident.

On appeal, the court upheld the Supreme Court's determination that the claimant's vehicle was struck by the identified vehicle, which was insured, on the basis that such determination was supported by the record, which included the Police Accident Report, a New York registration search document, and testimony by the claimant as to the involvement of the subject vehicle in the accident, which was "credible and unrebutted."

In *EAN Holdings, LLC v. Joseph*,[63] the Supreme Court reminded that physical contact from an unidentified

vehicle is a condition precedent to an arbitration based upon a hit-and-run accident, and that in *Allstate Ins. Co. v. Killakey*,[64] the Court of Appeals ruled that "physical contact occurs within the meaning of the statute, when the accident originates in a collision with an unidentified vehicle, or an integral part of an unidentified vehicle."

III. UNDERINSURED/SUPPLEMENTARY UNINSURED MOTORIST ISSUES

A. Trigger of SUM Coverage

In *Nafash v. Allstate Ins. Co*,.[65] the court reaffirmed that the appropriate comparison for determining whether SUM coverage is triggered is between the bodly injury liability limits of the tortfeasor and the bodily injury liability limits of the claimant.

B. Offset/Reduction in Coverage

In *Ameriprise Auto & Home Ins. Co. v. Savio*,[66] where the Claimant's policy provided bodily injury liability coverage of $100,000/$300,000, but only $50,000/$100,000 in SUM coverage, the court held that insofar as the $50,000 recovered by the claimant from the tortfeasor (the applicable limits for death) were the same as the maximum SUM limit provided for by her policy, and, thus, the difference between the SUM policy limit for one person ($50,000) and the amount paid by the tortfeasor's insurer ($50,000) was zero, the Claimant had no possibility of an additional recovery, and, thus, her SUM claim was rendered academic. Accordingly, the order granting a permanent stay of arbitration was affirmed.

In *Redeye v. Progressive Ins. Co*,.[67] the plaintiff, a pedestrian injured when a vehicle operated by a drunk driver collided with a parked car, which was propelled into him, recovered damages in a settlement from the driver of the vehicle, as well as a fire company that allegedly sold the driver alcoholic beverages prior to the accident. He then made a claim for SUM benefits from his own motor vehicle insurer, which the insurer denied on the ground that the SUM coverage was exhausted by the recoveries the plaintiff already received. Although the plaintiff conceded that the amount of his SUM coverage was properly reduced by the amount he received from the driver's insurer, he argued that it was improper to reduce the SUM coverage by the amount he received from the fire company under its general liability insurance policy. The Fourth Department rejected that contention and granted the insurer's Petition to Stay Arbitration, finding that the payment from the fire company's insurer was for bodily injury damages, and, thus, constituted a proper reduction pursuant to the Non-Duplication provision of the SUM Endorsement.

However, in *Government Employees Ins. Co. v. Sherlock*,[68] the Second Department, effectively overruling its earlier decision in *Weiss v. Tri-State Consumer Ins. Co*,[69] held that GEICO's insured, who maintained a policy with $25,000 in SUM coverage, and who settled her action against the automobile tortfeasor for the $50,000 limit of his policy, and then, after an arbitration, settled with the municipal (non-motor vehicle) defendants, i.e., town and town police department, for an additional $425,000, was entitled to proceed to SUM arbitration against GEICO for the total sum of $200,000, representing the $250,000 SUM limits reduced by the motor vehicle tortfeasor's $50,000 coverage, only. Essential to this decision was the court's finding, in agreement with the claimant, that the "Non-Duplication" provision of the SUM Endorsement (Condition 11) does not serve to reduce the SUM limits for recovery for non-motor vehicle defendants except to the extent that such recovery could be deemed duplicative of the SUM benefits claimed. As stated by the court, "The key to a proper understanding of Condition 11 is the recognition that 'shall not duplicate' is not aimed at preventing an insured from seeking full compensation by combining partial recoveries from several tortfeasors, but at preventing double recoveries for their bodily injuries." The claimant in this case alleged in her arbitration request that the bodily injury damages "are in the millions of dollars." The court thus noted that, presumably, if the motor vehicle policy contained the same $250,000 liability limit that the GEICO policy provided, the claimant would have been able to obtain $250,000 from the motor vehicle defendant's insurer, as well as the $425,000 from the municipality defendants' insurer. Insofar as the claimant seeks only, through her claim under the SUM endorsement, for which she paid a premium, to be in the same position she would have been in had the motor vehicle defendants not been underinsured relative to her, "[to] the extent that *Weiss* can be interpreted to require that the amount of SUM coverage be reduced without regard to the actual amount of bodily injury damages suffered, it should no longer be followed."

Thus, there is now a dispute between the Fourth and Second Departments on this issue.[70]

C. Priority of Coverage

In *Government Employees Ins. Co. v. Nakhla*,[71] the court took note of the fact that the SUM policy at issue provided that if the claimant was entitled to uninsured motorist or SUM benefits under more than one policy, "the maximum amount such insured may recover shall not exceed the highest limit of such coverage for any one vehicle under any one policy," and that the policy covering the vehicle "occupied by the insured person" would be applied first. In this case, GEICO, the insurer for the claimant's personal auto, successfully argued that the claimant, who was struck by a vehicle as he was standing outside of the taxicab he had been driving, while he was looking for damage by a hit in the rear to the taxicab, was an occupant of the taxicab at the time he was struck, and, thus, that the policy on the taxicab was primary to its policy. The only issue that remained was whether GEICO's policy limits

exceeded the taxicab's policy limits – an issue as to which the court remanded the matter for determination. ■

1. 137 A.D.3d 1088 (2d Dep't 2016).
2. 139 A.D.3d 958 (2d Dep't 2016).
3. 136 A.D.3d 508 (1st Dep't 2016).
4. *See State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 25 N.Y.3d 799 (2015).
5. 140 A.D.3d 762 (2d Dep't 2016).
6. *See In re Nassau Ins. Co. [Maylou]*, 103 A.D.2d 978 (2d Dep't 1984); *Estate of Cepeda v. USF&G*, 37 A.D.2d 454, 455 (1st Dep't 1971); *and State-Wide Ins. Co. v. Murdock*, 31 A.D.2d 978 (2d Dep't 1969), *aff'd*, 25 N.Y.2d 674 (1969).
7. 145 A.D.3d 761 (2d Dep't 2016).
8. *Rice v. Allstate Ins. Co.*, 32 N.Y.2d 6, 11–12 (1973); *see Coregis Ins. Co. v. McQuade*, 7 A.D.3d 794, 795 (2d Dep't 2004); *Travelers Ins. Co. v. Wright*, 202 A.D.2d 680 (2d Dep't 1984).
9. *Saunderson v. Motor Veh. Acc. Indem. Corp.*, 54 A.D.2d 936 (2d Dep't 1976).
10. *Rice v. Allstate Ins. Co.*, 32 N.Y.2d at 11 (1973); *see State Farm Auto. Ins. Co. v. Antunovich*, 160 A.D.2d 1009, 1010 (2d Dep't 2010); *Saunderson v. Motor Veh. Acc. Indem. Corp.*, 54 A.D.2d at 936 (2d Dep't 1976).
11. *Rice v. Allstate Ins. Co.*, *supra*, 32 N.Y.2d at 11.
12. 139 A.D.3d 691 (2d Dep't 2016).
13. 136 A.D.3d 508 (1st Dep't 2016).
14. 136 A.D.3d 1205 (3d Dep't 2016), *motion for lv. to appeal denied*, 27 N.Y.3d 908 (2016).
15. 137 A.D.3d 1634 (4th Dep't 2016).
16. 16 Ins. L. § 3420(c)(2)(C).
17. 17 Ins. L. § 3420(c)(2)(A).
18. 142 A.D.3d 1127 (2d Dep't 2016).
19. 138 A.D.3d 623 (1st Dep't 2016).
20. 137 A.D.3d 720 (2d Dep't 2016).
21. 97 N.Y.2d 491 (2002).
22. 4 N.Y.3d 468 (2005).
23. 143 A.D.3d 794 (2d Dep't 2016).
24. 142 A.D.3d 1127 (2d Dep't 2016).
25. 25 See Ins. L. § 3420[a][3].
26. See also, *Aspen Ins. UK Ltd. v. Nieto*, 137 A.D.3d 720 (2d Dep't 2016).
27. 139 A.D.3d 921 (2d Dep't 2016).
28. 143 A.D.3d 794 (2d Dep't 2016).
29. 137 A.D.3d 503 (1st Dep't 2016), *motion for lv. to appeal denied*, 27 N.Y.3d 910 (2016).
30. 140 A.D.3d 1136 (2d Dep't 2016).
31. 137 A.D.3d 865 (2d Dep't 2016).
32. 52 Misc. 3d 1220 (A) (Sup. Ct., Nassau Co. 2016).
33. *See Rekemeyer v. State Farm Mut. Auto. Ins. Co.*, 4 N.Y.3d 468 (2005). Although the court did not specifically address the issue of prejudice, it is readily apparent that the respondent did not, and could not, present evidence to rebut or overcome the statutory presumption of prejudice caused by such a delay (Ins. L. § 3420[c][2][A]).
34. 143 A.D.3d 1266 (4th Dep't 2016).
35. 35 CPLR 7503[c].
36. 140 A.D.3d 886 (2d Dep't 2016).
37. *See Progressive Ne. Ins. Co. v. Scalamandre*, 51 A.D.3d 932, 933 (2d Dep't 2008).
38. 140 A.D.3d 743 (2d Dep't 2016).
39. 138 A.D.3d 847 (2d Dep't 2016).
40. 137 A.D.3d 779 (2d Dep't 2016).
41. 51 Misc.3d 138 (A) (App. Term, 2d Dept., 2d, 11th & 13th Jud. Dists. 2016).
42. *See also Hanover Ins. Co. v. Vasquez*, 143 A.D.3d 612 (1st Dep't 2016) (award upheld as rationally supported by the record).
43. 142 A.D.3d 1167 (2d Dep't 2016).
44. 133 A.D.3d 841 (2d Dep't 2016).
45. 139 A.D.3d 496 (1st Dep't 2016).
46. 54 Misc.3d 880 (Sup. Ct., Dutchess Co. 2016).
47. 136 A.D.3d 975 (2d Dep't 2016).
48. 23 N.Y.3d 583 (2014).
49. 138 A.D.3d 732 (2d Dep't 2016).
50. *See* Dachs, Jonathan A., *The Applicability (Inapplicability) of New York's Disclaimer Statute, Continued*, N.Y.L.J., March 15, 2017, p.3, col. 1.
51. 130 A.D.3d 497 (1st Dept. 2015), *rev'd.*, 28 N.Y.3d 960 (2016).
52. 130 A.D.3d 1477 (4th Dep't 2015), *lv. to appeal granted*, 26 N.Y.3d 918 (2016).
53. *See* Dachs, Jonathan A., *The Applicability (Inapplicability) of New York's Disclaimer Statute*, N.Y.L.J., Feb. 1, 2017, p.3, col. 1.
54. 143 A.D.3d 794 (2d Dep't 2016).
55. 135 A.D.3d 797 (2d Dep't 2016).
56. 130 A.D.3d 574 (2d Dep't 2015), *motion for lv. to appeal denied*, 26 N.Y.3d 918 (2016).
57. 137 A.D.3d 503 (1st Dep't 2016), *motion for lv. to appeal denied*, 27 N.Y.3d 910 (2016).
58. 135 A.D.3d 401 (1st Dep't 2016).
59. 95 N.Y.2d 185, 188–89 (2000).
60. See also *State Farm & Cas. Co. v. Guzman*, 138 A.D.3d 503 (1st Dep't 2016) ("Since the policy never provided coverage for those circumstances in the first place, the untimeliness of Plaintiff's disclaimer is irrelevant"); *United Services Auto. Ass'n v. Iannuzzi*, 138 A.D.3d 638 (1st Dep't 2016) ("Since the acts at issue were outside the scope of coverage, timely disclaimer pursuant to Insurance Law §3420(d) was unnecessary").
61. 139 A.D.3d 950 (2d Dep't 2016).
62. 137 A.D.3d 1018 (2d Dep't 2016).
63. 52 Misc.3d 1220(A) (Sup. Ct., Nassau Co. 2016).
64. 78 N.Y.2d 325 (1991).
65. 137 A.D.3d 1088 (2d Dep't 2016).
66. 137 A.D.3d 1272 (2d Dep't 2016).
67. 133 A.D.3d 1261 (4th Dep't 2015), *motion for lv. to appeal denied*, 26 N.Y.3d 918 (2016).
68. 140 A.D.3d 872 (2d Dep't 2016).
69. 98 A.D.3d 1107 (2d Dep't 2012).
70. See Dachs, J., *SUM Offsets: A Rare Reversal of `Settled' Law*, N.Y.L.J., July 20, 2016, p. 3, col. 1.
71. 140 A.D.3d 762 (2d Dep't 2016).

Do You Need a Job Coach?

By Melvin Simensky

You've been practicing law for some years now, but you are growing restless in the profession and you don't know why. You want to keep practicing law but you think you might need to look for a new job; however, you aren't sure what kind of a legal job would be more fulfilling. Or maybe it's not a matter of choice – maybe you want to keep practicing law but are being forced out of your firm and have no idea what to do next. Whatever the circumstances, you are a lawyer in transition. Where do you turn for help? A headhunter? An employment agency? A therapist, mentor or advisor? Perhaps even a sympathetic colleague or friend? You might try a different course. You might turn to a job coach.

Many lawyers who are grappling with one or more of the above dilemmas often do seek the help of a coach and, when moving from one job on the legal spectrum to another, the overwhelming majority of lawyers in transition remain in the legal profession. Accordingly, this article will focus on the relationship between coaching's "role of change" and the jobs lawyers in transition express interest in. Put another way, the question is how does a lawyer's desire for "change" influence the lawyer's selection of new employment, and the path by which this new employment may be attained? When trying to respond to this question, it's possible, if not probable, that lawyers in transition will experience the stress and confusion of change, "sometimes beyond (their) apparent resources."[1] In these circumstances, the lawyer in transition may seek a "helper (namely, a coach) to partner with them in designing the lawyer's desired future."[2]

Melvin Simensky is a lawyer, life coach, teacher and author. While practicing entertainment and intellectual property law, Mel taught as an adjunct in the Graduate Division of New York University School of Law for 17 years. With colleagues, he co-published five legal texts, and singly published more than 20 legal articles. Mel also served as the *Entertainment and Intellectual Property Law* columnist for the *New York Law Journal*. Undertaking his own transition, Mel is now a life coach, focusing on career/transitional coaching for professionals, especially lawyers. He has both published and chaired workshops on the subject of lawyers in transition. Mel can be reached at melvinsimensky@gmail.com.

What Is Coaching?

Coaching is a method of communication between a coach and another person (in this case a "lawyer in transition" or "lawyer") to collect information about the lawyer for the purpose of helping the lawyer realize his or her full potential, including bestowing upon the lawyer a greater sense of fulfillment, purpose and empowerment. Coaching is a "profession that works with individual clients to help them . . . sustain life-changing behavior in their lives and careers . . . and has an emphasis on producing action

and uncovering learning that can lead to more fulfilment and more balance."[3]

A job coach won't tell you what to do. A good coach will enable you to decide what course to take, and why. The single most important function of coaching is its development of concrete actions aimed at creating significant changes in the lawyer, such as alteration of the lawyer's outlook on life, conduct or thinking, in order to actualize the lawyer's potential so that he or she can achieve his or her goals over time. The lawyer can't keep doing the same things over and over and expect different results. It's the job of the coach, working with the lawyer, to alter this dynamic and elicit from the lawyer a new sense of commitment, connection, empowerment and transition. These are indicators of personal growth that serve to encourage the lawyer to trust and believe in his or her coach, and so be motivated to take a leap of faith, if required, to attain the goals sought. Coaching

> aims to draw out a person's potential . . . It develops rather than imposes. It reflects rather than directs . . . It enables people, rather than trains them . . . Empathy is central to the coaching process. Good personal coaching seeks to help the other person's understanding of himself or herself.[4]

Coaching includes several activities, such as offering guidance, support, and supervision, and teaching the lawyer in transition. Coaching does something important that no other job placement service does, and that is to work with the lawyer's potential – not his or her present status of abilities and qualifications. Coaching is about vision and possibilities.

Another way to define coaching is to separate it from what it is not. "Coaching is not mentoring, training, psychotherapy or counseling. While coaching shares the end goals of learning and growth with these professions, the focus and process of coaching differ in significant ways."[5] Therapy focuses on past trauma to relieve present pathological symptoms, such as depression/anxiety. Both therapy and coaching empower the lawyer in transition to alter his or her life, but the expressions of these commonalities differ. Therapy seeks to overcome a client's past psychological difficulties, so as to change and return the client to health. By contrast, the changes coaching contemplates are meant to alter a client's present persona in order to gain future reinvention, in the form of a client reaching his or her goals. Therapy points to a past to relieve the present. Coaching moves from the present to an enhanced future.

Coaching isn't advising, either.

> There's a huge difference between coaching and advising: Coaching is centered around the client, whereas [advising] tends to be based on the beliefs, values, and opinions of the [advisor] . . . The coach's role, and the coaching concept, is to help the other person find their own solutions, not to have them follow an advisor's recommendations and suggestions. This is a fundamental principle.[6]

Consider this hypothetical example: A lawyer in transition enters into a relationship with a coach to confirm what he thinks he wants to do, which is new employment as a psychotherapist. He becomes a lawyer in transition. The lawyer and coach know little about psychotherapy. Nevertheless, the coach still guides and teaches the attorney about the need to study as much about psychotherapy as possible. Then something big happens. The lawyer says he doesn't want to practice psychotherapy. After speaking with several therapists, reading relevant texts and working with the support and supervision of his coach, the lawyer in transition explains that he doesn't want to constantly work with others' pain and suffering. Absent the need to explore the subject of doing therapy, the parties turn elsewhere and exchange questions about the legal profession. All the while, the coach supports and comforts the lawyer. As a result of this interplay, the lawyer decides to remain in the profession, at least for the present. This is after considering, with his coach, what the lawyer is good at, what the lawyer likes to do in the law, and what specialized category of legal practice the lawyer thinks he would most like to do, including writing, analysis, counseling, teaching, research and management.[7]

While the above hypothetical shows how coaching produces results, another hypothetical shows how a coach uses his or her skills to get those results. Consider the plight of Liz. She is a manager at a large HMO, and had been a director there when she took a break to earn a J.D. She thought her law degree would propel her into upper management at the HMO but it hasn't worked out that way. As a result she is unhappy and frustrated. She has gained weight and finds her work a "bore." At the same time, she is applying for high-level management positions that, quite frankly, her resume will not qualify her for. Liz has turned to a job coach for help and provided all the above information during her first session. And now the coach faces some challenges for the second session: What questions will the coach ask? What layers need to be peeled? What straightforward things should the coach say while being unconditionally supportive at the same time? These aren't easy questions to answer, but a skilled coach will know where to start and how to follow through.

Why Not a Headhunter or Placement Agency Instead?

Some observers have considered coaching and headhunting to be contradictory. But not so in all cases; rather, the two are often complementary. The sole function of lawyer headhunters is to place attorneys in law jobs, and sometimes in law-related jobs. The function of coaching is to help lawyers in transition discover what they want to do with their lives and then help them to do it. If as a result of coaching a lawyer in transition decides to work

in a law firm, perhaps a large firm, then a headhunter would be the appropriate person to whom referral should be made.

One of the most significant differences between coaching and headhunting is the speed with which headhunting can find someone a new job. Generally, this means a matter of weeks. By contrast, it could take several months for a coach to help a lawyer in transition determine what he or she wants in a job, and then pursue a way to get that job. Coaching faces challenges headhunting does not. These challenges sometime involve coaching's discovery of a different personality within the lawyer, one more amenable to an assertion of growth, change and realizing one's potential. The management of these assertions takes time. Because of the extra time and care coaching affords – in contrast to headhunting and all other law placement services – it is more likely that the position obtained via coaching will turn out to be more suitable and appropriate for the lawyer in transition.

Headhunting and other legal placement services cannot match the attention coaching can provide because their business model doesn't allow it. Their business model provides for fee payments only upon a satisfactory job placement. This means that for headhunters to make a living and more they must place their lawyer clients quickly. When a prospective employer contacts a headhunter, the headhunter has to respond with speed, or else lose the placement opportunity, and with it the fee.

Who Are the Job Coaches?

Job coaches come from different walks of life with various backgrounds. Lawyers hire coaches for many reasons. One commentator has written that a "life coach helps (a lawyer) maximize his or her accomplishments. A life coach helps (a lawyer) gain clarity on his or her life. A life coach helps (a lawyer) find purpose in his or her life. A life coach pushes a lawyer to follow his or her dreams."[8] Another observer has written that a coach helps a lawyer "set far better goals that motivate (the lawyer in a healthy way) . . . [the coach will help the lawyer move up to the next level of his or her professional and personal life.] . . . A life coach can help a lawyer be happier with his or her life . . . [and finally], the coach can help the lawyer gain a 'better life, not just a better lifestyle.'"[9] Often coaches are called life coaches whose clients may have non-work-related goals, such a losing weight or gaining self-confidence. For the purposes of this article, though, the focus will be on job coaching for lawyers in transition.

Job coaches could be fellow lawyers or persons who are professionals or others. Many come from the mental health field and have done therapy or counseling. It matters not so much the previous work the coaches may have done, but the qualities they exhibit. One observer has said that a

> good coach is self aware . . . a good coach treats individuals as partners . . . a good coach knows the strengths and weaknesses [of the client] . . . a good coach listens to others and tries to understand their points of view [and] a good coach expresses encouragement and optimism when both easy and difficult issues are discussed.[10]

Another commentator has said that to be effective "coaches need to be patient, detached, supportive, interested, perceptive, aware, self-aware and attentive . . . They require various core skills: the ability to create rapport . . . asking powerful questions."[11] Still another commentator states that it is recommended that the prospective coach have four different qualities, including "a regular habit of gathering new information . . . the ability to see patterns and trends . . . a creative ability, and a personal chemistry that engenders trust."[12]

At present, there is no requirement in the United States that a coach must be licensed or otherwise regulated. There are many coaches who are psychologists or social workers who must be licensed. This sets up the syllogism that if psychologists and social workers must be licensed, and they form a significant segment of all coaches, then it is safe to conclude that the time will come – sooner rather than later – that coaches will also have to be licensed. In place of licensure, many coaches seek what is called "certification" by an external organization, such as the International Coach Federation, which declares that the prospective coach is or is not sufficiently competent to undertake normal coaching activities. "Certification" generally requires that a prospective coach attend an accredited coaching school, lasting from several months to a year, and that the prospective coach perform several hours of coaching, followed by taking and passing a written test.

> Coaching may fail for a number of reasons: The coach may have a tendency to prescribe simplistic solutions . . . The coach may share his/her opinions too early . . . The coach may fail to follow through on monitoring and homework . . . The coach may respond to self-imposed pressure from the person being coached . . . to achieve quick results …[13]

What Are the Logistics?

There are certain logistical considerations surrounding coaching that give it further definition. These include, for example, (1) when not coaching attorneys for transitions, what other issues are suitable for attorney coaching; (2) when the client should retain a coach; (3) how to find a good coach; (4) how long should coaching last; and (5) the average cost of a coach.

First, as to what issues are appropriate for attorney coaching, some attorneys use a coach to acquire business development skills, to help reverse "attorney burnout" and to improve their office communications.

Second, when should a client hire a coach? "There is no 'right' time . . . the time to hire a coach is 'ideally before the 'need' for an objective perspective is acutely felt' . . . Attorneys will not usually hire a coach until they

feel a pressing need," or at various distinct stages of an attorney's career.[14]

Third, "Getting a referral is the best way to find a genuinely and consistently successful coach. Referrals can come from many sources, including therapists, friends, colleagues, human resource professionals, and university career center staff . . . Hirsch recommends looking at what coaches have published."[15] There are also directories online listing the names and addresses of recommended coaches. Coach trade associations, such as the International Coach Federation, can also help in the search.

Fourth, "coaching relationships can vary in duration and complexity . . . Short term, feedback coaching generally takes from one to six months and is intended to provide immediate feedback to the individual to help him or her develop a plan to address specific needs . . . . Longer term: This type of coaching will involve more in depth collection and analysis with intensive feedback sessions, lasting from 6 to 12 months."[16]

Fifth, many coaches charge a fixed monthly fee. Others bill on the basis of a set charge per hour. These latter hourly fees average $125 or more to $175 or more. Some coaches establish a set number of sessions, usually twice a month. Many, if not most, coaches have flexible arrangements with their clients, such as using a sliding scale for billing.[17]

Who Are the Lawyer-Clients?

Generally, clients can be any lawyer at any point in his or her career. They may work in large firms or small ones, as in-house counsel or as solo practitioners, but all have one thing in common – they are lawyers seeking to strike out on a new path, usually in the form of finding a new legal job. They also face the risks that are common in making a life-changing decision – anxiety, loss of professional identity, no salary for a time. Job coaches can help clients cope with these risks without being paralyzed by them.

While clients are of all ages and legal specialties, perhaps no group of lawyers can benefit more from coaching than Baby Boomers who have been, or are about to be, squeezed out of their firms. While Congress passed the Age Discrimination in Employment Act of 1967 to protect older workers, there are two exceptions that allow employers to justify terminating older employees, such as a law firm depending on the orderly departure of senior partners to allow for the arrival of younger partners to smooth the transition of the firm's clients to new attorneys. This means that large and small law firms in New York State and elsewhere will disgorge thousands of senior lawyers over time, many if not most of whom are still capable of effectively practicing law. Some may want to continue practicing on their own; others may be interested in mediation or not-for-profit work, or other fields. The number of senior lawyers is large – about one quarter of all attorneys in the United States.

Where do they go for help? Generally, they are too old to go to headhunters or other job placement services. And talking to senior lawyers in big firms with forced retirement policies will also not prove helpful. Speaking to friends may or may not be useful. In contrast to these activities, coaching can be a productive and effective means of helping them decide what they want to do with the rest of their lives, and then guiding them in achieving their goals.

How Do Coaches Work?

In coaching, power is granted to the coaching relationship – not to the coach. The client and coach work together to design an alliance that meets the client's needs. Coaching clients do not buy a packaged program. Instead, they are involved in creating a powerful relationship that fits the coach's and client's working and learning styles. "Coaching approaches the whole of a person's life . . . It's one of the reasons why coaches almost always do a broad assessment (early in coaching] . . . Health affects career; finances and recreation are intertwined; relationships are interwoven throughout. It's hard to pull a thread out without bringing two or three other pieces with it."[18]

While clients are of all ages and legal specialties, perhaps no group of lawyers can benefit more from coaching than Baby Boomers who have been, or are about to be, squeezed out of their firms.

Individual coaching of a lawyer resembles a conversation between two persons using a Q&A format to obtain as much information about the lawyer as possible. This information is important because it constitutes the raw material from which attorneys determine their goals and, with their coaches, develop means by which such objectives can be obtained.

Lawyers are particularly well-suited to a coaching experience. A coach uses a questioning format because it's the best way to obtain information. Similarly, a lawyer's stock in trade is the capacity to ask good questions that might discover significant information. This is whether the matter is a corporate issue, or litigation oriented. A litigator, for example, must know how to use various legal vehicles that have been developed to obtain information from questioning. These include such legal tools as depositions, questions at trial, document productions and interrogatories.

Based on the elicited information, coaches can then begin to chart a path with their clients.

> Coaches often have to train their clients in a new way of thinking, speaking and listening, especially if those clients have been involved in therapy. Psychotherapy . . . [is] a way for clients to grasp their self-identity . . . Coaching, on the other hand . . . [may often involve] leaps of faith . . . Coaching supports clients in redefining themselves in such a way that they are actually enabling themselves and their lives in a wonderfully creative way . . . In addition to the above specification of qualities comprising a good coach, another very respected expert in the field has written that a coach should have the ability to let go of his or her needs for being liked, good and loveable . . . should have the conviction that clients can realize their highest potential . . . Being . . . a cheerleader. Willing to explore with your clients, without an attachment to the outcome, or how you think it ought to be . . . We are in the business of empowering our clients [not egotistically empowering ourselves].[19]

What Tools Do Coaches Use?

Coaches mainly use four methods, or tools, to guide clients – assessments, values, goals, and alignments.

Helping clients discover and clarify their values is a way to create a map that will guide them through the decision paths of their lives.

An assessment is the evaluation or estimation of the nature, quality or ability of someone to engage in some activity. Synonyms are judgment, appraisal, analysis and opinion. Put another way, an assessment is the gathering and discussing of information in order to develop a person's deeper understanding and knowledge of himself or herself and his or her environment. An assessment refers to the methods or tools used to evaluate and analyze collected information.

In coaching, many, if not most, coaches use assessment activities, along with values considerations, as some of the most important functions of the entire coaching cycle. This is because the information used in coaching comes primarily from doing assessments, and the interpretations of this information depend heavily on one's values. This information constitutes the raw material on which the entire coaching regime depends.

There are primarily three categories of assessments used in coaching. The first one consists of the client's answers to self-awareness questionnaires. The second is collecting information revealed by the client in answering questions from the coach. The third is the client's answers to questions propounded by outside independent exams. These tests use indirect and sometimes oblique questions (making it difficult to scam the test) whose purpose is to determine the personality of a client. A well-known and widely used personality exam in coaching is the Myers Briggs Type Indicator (MBTI). It is nationally considered to be a truthful and accurate assessment, and is used by many coaches. Data supporting the accuracy and truthfulness of the test has been collected for at least five or six decades.

Besides MBTI, other outside independent tests are the DiSC, the Hartman Value Profile, the StrengthsFinder and the Conflicts Dynamics Profile. A challenge using these tests is that the data produced may require outside interpreters to read the exam's results. Coaches who interpret these exams are generally certified.

As for values, clients "frequently come into coaching because they are experiencing a radical rift between their current external or internal way of being and their core values. They may not recognize that this issue is central to many of the challenges in their lives . . . For example, imagine clients who value family, but who are working on a job that requires long hours, which precludes much quality time with family members. If those clients' work situation mandates the violation of a deeply held value, they will likely experience serious inner conflict. If clients value respect, yet their opinions and views are not listened to at work, their lives are in conflict with one of their values . . . ."[20]

"Core values are the three to five critically important personal values we hold. When we are not living our values, we are likely to feel dissatisfied, depressed, embarrassed, and even ashamed. It's impossible to lead a fulfilling life that does not honor or is out of alignment with our core values." "The deepest, most powerful, and most centering force for an individual . . . is [his or her] values . . . An individual's personal values are a reflection of the highest principles of mind and thought, and may even be part of the spiritual domain . . . When clients live their life in line with their values, it engenders a sense of well-being, self-respect, and self-esteem."[21]

A client's values are intertwined with his or her goals. In the language of coaching, a goal is "an outcome that the client would like to achieve. Goals are most helpful when they are measurable, specific, are owned by the client, have a date by which they will be accomplished, are made public (in order to achieve support and accountability), and constitute a reasonable stretch for the client."[22]

Subject to the qualification below, the role of a goal in coaching is the "reward or prize" that the client originally sought from coaching, and which the client subsequently obtains, resulting from the required changes the client has

made in his or her life. This is so regardless whether such goals, to the outside world, seem large or small, significant or not, transformative or not.

The qualification is that if the goal the client seeks is to be fully realized, the goal should be in "alignment" with a client's values and subsequent actions aimed at obtaining such a goal. The process of alignment means "the proper positioning or state of adjustment of parts . . . in relation to each other:"[23] What this definition lacks, however, is the "special purpose" for which alignment is established in the first place. I suggest that the purpose of aligning assessments, values, goals and subsequent effectuating actions is to give us meaning in life to be used "as guiding principles to make our lives easier and more fulfilled."[24] So long as a person's values, goals and subsequent actions are in alignment, individually and in combination, and serve a good purpose, such circumstances will generate good things for the client. However, if this alignment is not honored, it's possible, if not likely, that the client will experience just the opposite of what he or she originally wanted, and be left with a life filled with dissatisfaction and dissonance.

To give a coach some ability to predict whether a particular goal that the client seeks will align with the client's values, and so be considered valid and effective, coaches use a tool expressed as the acronym SMART. This is short for goals that are Specific, Measurable, Attainable, Realistic and Timely.

> A specific goal has a much greater chance of being accomplished than a general goal. To set a specific goal, [the client] must answer six "W" questions: Who: Who is involved? What: What do you want to accomplish? Where: Identify a location. When: Establish a time frame. Which: Identify requirements and restraints. Why? Identify the reason(s) for seeking the objective.[25]

The link between values and fulfillment is so obvious it may be invisible. Helping clients discover and clarify their values is a way to create a map that will guide them through the decision paths of their lives. When you clarify values with the client you learn more about what makes the client tick: what's important and what's not. Clients discover what is truly essential to them in their lives. It helps them take a stand and make choices based on what is fulfilling to them.[26]

What Do Coaches Expect from Clients?

The short answer is trust and accountability. A good and meaningful relationship between a coach and client goes a long way in helping the client achieve his or her dreams and goals. In one relevant study, 35 coaches were teamed with 35 clients and interviewed to determine the effectiveness of their relationship in producing positive change. The findings showed that clients attributed the "effectiveness of their coaching in large part to the relationship they had with their coach. Receiving unconditional acceptance and respect from the coach was not only a facilitative condition but also directly responsible for change . . . There is something that is common to every individual relationship . . . [that] if developed and leveraged . . . has the potential to create unparalleled success and prosperity . . . That something is 'trust.' [Trust] is the fundamental element to a successful coaching relationship."[27] "For a relationship to be healthy, trust needs to be reciprocated. Trust is the essential ingredient of any good coaching relationship – without it, the client is not going to tell you, the coach, those confidential things that may be necessary to allow you to be of real help."[28]

Building a trusting relationship takes time, of course, but that is why coaching is so unique and meaningful. Where else can clients work with someone who will help them learn about themselves, develop their potential, and decide to change or not – and then send them out in the world. Yes, this is a process that takes time, but it is really the only way it can be done. Some clients won't have the time to invest X number of months in the effort, so the coach does the best that he or she can.

In any case, in a relationship based on trust coaches can expect that "clients account for what they said they were going to do. It is determined by three questions: (1) What are you going to do? (2) By when will you do this? and (3) How will I know? Accountability does not include blame or judgment. Rather, the coach holds the client accountable to the client's vision or commitment and asks the client to account for the results of the intended action. If need be, holding the client accountable includes defining new actions to be taken."[29]

In professional coaching, accountability does not include scolding or punishment. Accountability is a tool for the client's action and learning. To be accountable means simply to give an account. What worked? What didn't work? What happened? What would you do differently next time?

Clients are moving into new territory, stretching their boundaries, finding a new resourcefulness. They are coming up with new ways of operating and overcoming old resistance. Accountability gives structure to this growth. As coaches, we hold clients accountable – not to see them perform but to empower the change they want to make. Accountability can provide the means for change and creates a great opportunity to acknowledge how they succeeded. This ultimately is what clients are accountable for: their own lives, their own agenda.

What Can Lawyer-Clients Expect from Coaching?

"The coaching process puts the lawyer in a very active role. Nothing much of importance will happen as a result of coaching unless the lawyer in transition wants it to happen . . . It is up to the lawyer how best the [coaching process] can be leveraged. The lawyer's job is to keep the train in continuous motion to reach the lawyer's desired destination; should the lawyer choose to be a stationary

train and expect the destination to reach him or her, the coaching relationship is likely to break. The coach will not bring results to [the lawyer in transition]. It is the lawyer who will bring results with the help of the heightened awareness created by the coach."[30]

Reflections

Coaching can help a lawyer in transition obtain the goal he or she seeks through personal change, especially if the goal is finding a new, more fulfilling job.

The purpose of coaching is to help the lawyer obtain the goal sought not in the present time but to be realized at a future time. This is because coaching first tries to determine what goal the lawyer wants to achieve and, second, works with the lawyer to help him or her achieve it. Coaching seeks to realize a client's potential. This is a process that requires time as the coach needs to elicit information from the client and then apply it to the situation at hand. The process of coaching relies substantially on acts of assessment, value clarification, goal selection and alignment. These activities breathe life into coaching and give the lawyer-client hope that he or she can change enough to secure the "prize" he or she seeks.

Employers can't wait to hire based on a lawyer's potential – they must hire based on the lawyer's present credentials. Thus, a lawyer who seeks change on his or her own might well end up accepting a new job just like the old one he or she wanted to leave. But for the lawyer who seeks the help of a coach, the chances are that much greater that whatever new job the lawyer selects will be the right "fit" for his or her goals.

Consider this: A lawyer-client works with a coach and the end result is finding a job that can be more meaningful, relevant and appropriate than any other placement organization can achieve. In this way, not only is the lawyer in transition extremely "vetted" but the prospective employer knows he or she is getting someone who wants to be employed there. And the same from the client's point of view. Aren't lawyers who feel themselves appreciated and in a job they care about happier people, better employees? ■

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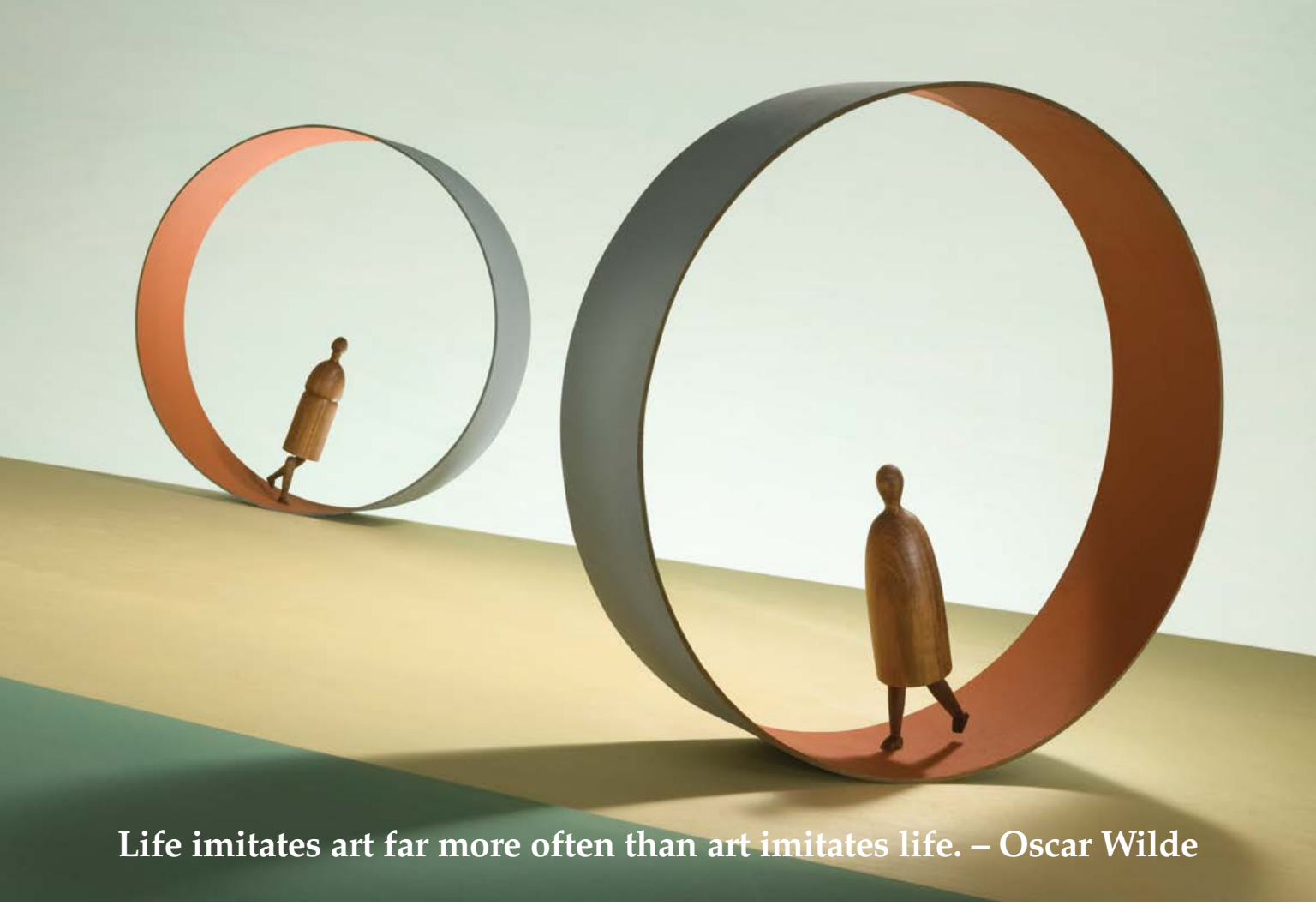
30. Stevenson, *supra* note 16.

He suspected that his case had been thrown out of court.



Law Imitates Art: *Jarndyce v. Jarndyce* and Litigation Without End

By William B. Stock

Gentle reader, imagine a case that was first reported unofficially in 1852 in England. While never officially approved for publication by a judicial body, the case has been cited hundreds of times on both sides of the Atlantic and the Pacific by bench and bar ever since. The case obviously deals with a troublesome issue long inherent to the legal system that will not go away soon because, as will be seen, even Shakespeare mentions the problem.

Now consider this: the case never existed, except in the fertile imagination of Charles Dickens in his masterpiece *Bleak House*. *Bleak House* is an 800-plus page epic of Victorian society with many subplots and scores of characters, but the case of *Jarndyce v. Jarndyce*[1] is the thread that runs through the novel. This article will not give away the ironic ending for those tempted to read

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the book,[2] but here is a hint: it has to do with a case of long duration and attorney fees. This article will discuss both the legal world's obvious fascination with *Jarndyce v. Jarndyce* and how some real-life cases rival it in duration.

The dissent in a recent case from the Second Department, *York v. York*,[3] demonstrates that the case remains a potent legal authority. "Reminiscent of Dickens's infamous Jarndyce litigation in Bleak House," the dissent reads in part, "this matrimonial litigation has festered on the Supreme Court's docket, in one form or another, for more than 19 years."

In dealing with a case that had lasted more than 10 years, the Wyoming Supreme Court[4] was moved to write this:

> We are reminded of the following passage from the novel *Bleak House,* by Charles Dickens:
>
> Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.
>
> Charles Dickens, *Bleak House,* 4 (Oxford University Press 1991) (1853).

Bleak House in Its Time

Bleak House was first serialized in 1852 and published as a novel the following year, although it is set a few decades earlier.[5] In the early 1800s, the English Court of Chancery, where *Jarndyce v. Jarndyce* was venued, was then a place where even a simple legal matter could be tied up for years and costs could exceed any possible recovery. Indeed Dickens himself started a suit in Chancery to enforce the copyright on *A Christmas Carol*. He won, but it cost him more than he could hope to recover. As a result, he declined to sue on a second infringement of his works.[6] *Bleak House* helped provide a foundation for the Judicature Acts of the 1870s,[7] which reformed the Chancery courts.[8]

Jarndyce Meets Reality

But *Jarndyce v. Jarndyce* would not have the enduring resonance it does, and would not be cited so often, if it did not reflect some reality of our legal system. Most cases plod on to their conclusion but some do not, at least not until both sides are exhausted or the money to pay lawyers runs out. Here are some examples.

- According to Google, the longest running civil case in American courts was the claim of Myra Clark Gaines, a Louisiana socialite, to her rights under a will. While Ms. Gaines is largely forgotten today, she was famous in her time and her life was the subject of a novel. The case ran from 1834 to 1891 (Ms. Gaines died in 1885) and it reached the Supreme Court of the United States no less than 17 times.[9]
- Anna Nicole Smith was primarily known as a *Playboy* model until she married Texas billionaire investor J. Howard Marshall in 1994. He was 89 years old and Ms. Smith was 26. The following year Marshall died, leaving Smith no share of his estate. Then began litigation over the Marshall estate that continues on to this day, despite Ms. Smith's death in 2007. The case was heard in Texas state courts, a federal court in California and twice went to the highest court in the United States.[10]

But even the U.S. Supreme Court has limits to its patience. In *Stern v. Marshall,*[11] Chief Justice Roberts wrote:

> This "suit has, in course of time, become so complicated, that . . . no two . . . lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause: innumerable young people have married into it;" and, sadly, the original parties "have died out of it." A "long procession of [judges] has come in and gone out" during that time, and still the suit "drags its weary length before the Court."
>
> *Those words were not written about this case, see C. Dickens, Bleak House, in 1 Works of Charles Dickens 4–5 (1891), but they could have been.* This is the second time we have had occasion to weigh in on this long-running dispute between Vickie Lynn Marshall and E. Pierce Marshall over the fortune of J. Howard Marshall II, a man believed to have been one of the richest people in Texas. The Marshalls' litigation has worked its way through state and federal courts in Louisiana, Texas, and California, and two of those courts – a Texas state probate court and the Bankruptcy Court for the Central District of California – have reached contrary decisions on its merits. The Court of Appeals below held that the Texas state decision controlled, after concluding that the Bankruptcy Court lacked the authority to enter final judgment on a counterclaim that Vickie brought against Pierce in her bankruptcy proceeding. (footnote omitted, emphasis added).

What litigator would want a judge to write this about his or her case?

So *Jarndyce v. Jarndyce* lives on and on. According to WestlawNext, it has been cited in approximately 157 state cases[12] in America. "Jarndyce" appears 164 times in federal cases, the earliest being *In re Curtis*,[13] which held in part, "[w]e may well indulge the fear that at its close this case will have its counterpart in the tragic and untoward ending of the noted case of *Jarndyce v. Jarndyce*. We are not inclined to impose upon the Seventh judicial circuit the baneful influence of *that* authority."

Indeed, *Bleak House* has spread throughout the English-speaking legal world. It has been cited at least 25 times in Canadian cases and several times in Australian ones.[14] Of course, it has been cited many times in England.

However, the surest proof that *Jarndyce v. Jarndyce* is prominent in the legal mind is that it has been cited over a thousand times in "Secondary Sources," according to WestlawNext. The earliest citation was in an article in the *Harvard Law Review* published in 1893.[15] What is most significant about the quotation from the novel is that it does not even mention Dickens by name, it simply says *Bleak House*. The novel did not have to be further identified.

Clearly we have come a long way since the days of the real Bleak House, but there is still more to do.

How can the legal profession eliminate what might be called "the Jarndyce effect?" In a sense, it is almost pointless to make another suggestion how to eliminate it: ideas how to improve the legal system have been around since biblical times.[16] However, this writer cannot resist one observation.

Anyone who has litigated in both state and federal court knows that the former is usually crowded to the point of near paralysis, and it is almost miraculous that so much good justice emerges from it. However, step into federal court and you are in a different world. Being a well-funded court of specific jurisdiction, federal jurists can give cases individual attention and make sure they proceed quickly to resolution. If state legislatures realized that their courts were not agencies of government but instead were vital branches of government entitled to the same respect as the legislature and executive and would fund them adequately, "the law's delay" might cease to be an applicable phrase.

It is common knowledge to the public at large that our country was in a bad recession a few years ago, from which it is only now recovering. States were required to balance their budgets by their constitutions and many were forced to slash the money usually allocated to courts. The National Center for State Courts has collected on its website[17] selected quotations from State of the Judiciary messages that show how the cuts impacted justice.

Kansas palpably attempted to put a good face on a bad situation:

> [In 2012] the Kansas Supreme Court had closed all state courts for lack of money . . . While virtually unavoidable due to the poor state of the economy, this unfortunate restriction on Kansan's access to justice also had a positive effect. It helped convince the Supreme Court to be even more efficient, to make the best use of the hard-earned money of our taxpayers, and to continue to improve the administration of justice. (Kansas 2013).

However, New Mexico was more realistic:

> But the practical reality is this: Furlough closures of backlogged courts don't save a dime for the taxpayer or the government . . . (2011).

And in Iowa in 2013, this was the case:

> Currently, all clerk of court offices in Iowa are closed every Tuesday and Thursday afternoon. Closures deny access to Iowans, including those seeking commitment of loved ones for mental illness and substance abuse and people seeking protection from domestic violence.

Can there be much doubt that cuts like these will only slow justice to a standstill?

So, *Jarndyce v. Jarndyce* remains relevant to our judicial system. Even dismissing the importance of *Bleak House* as a work of literature, *Jarndyce* will only cease to be cited when litigation is always swift[18] and sure and lawyers have no reputation for being the only real winners in lengthy, expensive litigation. Thus, it seems *Bleak House* and its famous case will be with us for some time to come. ■

1. In the novel, the case is referred to as Jarndyce and Jarndyce. It has been Americanized here.
2. The plot is outlined in Wikipedia, or the reader can skip ahead to Chapter 65 in *Bleak House* after reading Chapter 1.
3. 98 A.D.3d 1038, 1039 (2d Dep't 2012), *aff'd*, 22 N.Y.3d 1051 (2014).
4. *Lieberman v. Mossbrook*, 208 P3d 1296, 1310 n. 4 (Wyo. 2009).
5. *See* Wikipedia article on *Bleak House* ("*Bleak House*").
6. *See Law Meets Literature: Bleak House and the British Court of Chancery*, www.mimimatthews.com (April 6, 2015).
7. *See* Wikipedia article on "Judicature Acts."
8. "*Bleak House*."
9. *See* Wikipedia article on "Myra Clark Gaines."
10. *Judge in Decades Old Anna Nicole Smith Case Announces He's Had Enough*, www.Forbes.com (Jan. 30, 2017).
11. 564 U.S. 462, 468–69 (2011).
12. A few involved litigation against an entity called "Bleak House Realty," hence the word "approximately."
13. 100 F. 784, 794 (7th Cir. 1900) (emphasis added).
14. A. Conan Doyle et al., *The Reigate Puzzle: A Lawyerly Annotated Edition*, 6 JL: Periodical Laboratory of Leg. Scholarship 141, 199 (2016).
15. Balch, Land Transfer – A Different Point of View, 6 Harv. L. Rev. 410 (March 1893).
16. When Moses is overburdened with deciding disputes, he is directed by God to appoint subordinate jurists to ease his load. *See* Exodus 18:13-end.
17. www.ncsc.org.
18. Does not even Hamlet speak of "the law's delay" in the "To be or not to be" soliloquy? Act III, Scene 1.

The Attorney Is to Blame! No, It's the Notary Public's Fault!

What to Look for in Your Lawyer's Professional Liability Insurance When You Are the Attorney *and* the Notary Public

By Jeffrey S. Chase

Regardless of the area of practice, every attorney may reasonably expect to need a notary public to administer an oath to an affiant, certify the authenticity of signatures on a document or, as it is more commonly known, to "notarize" a document. Not only might that need be frequent but it may occasionally be immediate. Fortunately, New York permits an attorney admitted to practice law in the state to become a notary public and provides a fast-track appointment process for that purpose.[1] Therefore, motivated by a combination of ease, convenience, and practical necessity, many eligible attorneys apply for and receive a notary public commission and license soon after admission to the bar.[2]

From a client's perspective, the line separating the attorney and notary public roles may be blurred when the person whom the client observes doing the attorney and notary public services is one and the same person.[3]

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Nevertheless, the legal boundaries defining the authority of each role remain important.[4] Consider, for example, an attorney who drafted a legal document that included, at its end, certificates of acknowledgement to be filled in by a notary public when the document was signed by the parties. Several months after the parties personally appeared before a notary to sign the document, the validity of the document was challenged based on a defect in the wording of one of the certificates. The challenge was sustained by the court, and the entire document declared unenforceable as a result.[5] The client who suffered damages due to the document's failure now demands compensation for that loss from the party responsible.

There are two parties the client may look to, namely, the drafting attorney and the notary public who took the signature acknowledgement. So, is the client's loss the direct result of the attorney's error made when drafting the certificate of acknowledgement? Or is the loss the direct result of the notary public's error for having used a facially defective certificate of acknowledgement?[6] The answers to these questions are moot if the attorney and notary public are one and the same person, as is often the case when an attorney holds both licenses. The client need look no further in that case – it's clear who is at fault.

In response to the client's potential or actual claim, the prudent attorney/notary public will promptly notify his or her professional liability carrier to ready a defense and possible indemnification. But does a lawyer's professional liability policy cover an act or omission if it was done by the insured not as a lawyer, but as a notary public? Even more unsettling than having to notify the carrier is not knowing whether the claim will be covered under the policy. This article examines the expanded liability risk when an attorney also serves as a notary public and how that risk may be countered by purchasing appropriate professional liability insurance. The article uses pertinent provisions from a sample policy endorsed by the New York State Bar Association and administered by USI Affinity to illustrate desirable provisions related to those issues.

Professional Liability Coverage

All insurance policies expressly describe the types of events covered by the policy and, equally important, the types excluded from the policy's coverage. Generally, professional liability policies cover the negligent acts or omissions of the insured in the performance of the duties specific to his or her profession. The sample policy provision below illustrates how the type of covered acts or omissions might be collectively described in a lawyer's professional liability policy:[7]

> **I. INSURING AGREEMENT**
>
> A. Coverage
> The **Company** agrees to pay on behalf of the **Insured** all sums . . . that the **Insured** shall become legally obligated to pay as **damages** because of . . . an act or omission in the performance of **legal services** by the **Insured** . . ."
>
> * * * *

By law, when a notary public performs notary services, those services do not constitute legal services; otherwise, every non-attorney notary public would commit the unlawful practice of law each time he or she performed a notarial act.[8] Intuitively, therefore, because a notary public's duties are legally distinct from those of an attorney, it is reasonable to expect that notary public services are not within the definition of covered "legal services" as that term might be used in a lawyer's professional liability policy. The parties to a contract, however, can give the contract's terms whatever definition the parties mutually agree to. Insurance policies are contracts and, in the above sample policy provision, "legal services" is highlighted in bold to show that it is a term having its own policy-specific definition. Consequently, before concluding that notary public services are not covered under this policy, it is necessary to read further to learn how the policy defines "legal services."

In this sample policy, "legal services" is defined as follows:[9]

> **III. DEFINITIONS**
>
> * * * *
>
> **"Legal services"** mean:
>
> A. those services, including pro bono services, performed by an **Insured** for others as a lawyer, arbitrator, mediator, title agent or other neutral fact finder or as a *notary public.* (italics added) . . .
>
> * * * *

Pursuant to the express language of the sample provision above, notary public services performed by the insured attorney/notary public are clearly incorporated within the sample policy's definition of covered "legal services." Therefore, when purchasing professional liability insurance, every attorney/notary public should carefully examine how coverage is defined to confirm that their policy, like this one, unequivocally extends coverage for notary public services performed by the insured.

In addition to provisions defining what is covered, such policies typically contain provisions expressly excluding the insurer's obligation to defend and indemnify the insured for damages caused by the insured's intentional conduct. For example, a policy might contain provisions similar to those below:[10]

> **IV. EXCLUSIONS**
> This Policy does not apply:
>
> A. Intentional Acts
> to any claim based on or arising out of any dishonest, fraudulent, criminal or malicious act or omission or intentional wrongdoing by an **Insured** except that:

> 1. the **Company** shall provide the **Insured** with a defense of such claim unless or until the dishonest, fraudulent, criminal, malicious act or omission or intentional wrongdoing has been determined by any trial verdict, court ruling, regulatory ruling or legal admission, whether appealed or not. Such defense will not waive any of the **Company's** rights under this Policy. Criminal proceedings are not covered under this Policy regardless of the allegations made against the **Insured**;
>
> 2. this exclusion will not apply to any **Insured** who is not found to have personally committed the dishonest, fraudulent, criminal, malicious act or omission or intentional wrongdoing by any trial verdict, court ruling, or regulatory ruling.
>
> * * * *

Not perpetrating willful, malicious, or intentional acts, however, does not prevent an injured party from alleging that the attorney/notary public's wrongdoing was purposeful. For example, an injured party might allege an action against the insured for fraud;[11] however, a mere allegation of fraud does not equate to a formal finding of fraud. Therefore, even though an injured claimant may accuse the insured of intentionally committing a damaging act or omission, the professional liability policy's provisions should obligate the insurer, as do those in the sample policy's passage but for criminal conduct, to defend the insured, while reserving its rights under the policy against such alleged claim until there has been an adverse adjudication against the insured or an admission by the insured.

Expiration of Coverage

Equally important as knowing what kinds of services qualify for coverage under the policy is knowing when the coverage ends. The time frame that a policy's coverage begins and ends is not measured solely by the time between its beginning and ending dates; rather, the existence of coverage also hinges on the classification of the policy as either an "occurrence policy" or a "claims-made policy." Under an occurrence policy, a claim will be covered so long as the act or omission complained of happened within the interval of time between the inception and end dates of the policy, also referred to as the "policy period," even if the claim against the insured is made long after the period ends. However, under a claims-made policy, coverage exists for acts or omissions that happened during the policy period but only if the claim for damages resulting from the alleged act or omission is also made before the policy period ends.

Most lawyers' professional liability policies are claims-made policies. Therefore, if the policy period ends without a claim made against the insured, coverage also ends for any subsequently made claims. Still surviving after the coverage lapses, however, are any unrealized claims whose statute of limitations have not yet expired. For the insured to remain protected from such viable claims, if any, every claims-made policy should offer the insured an opportunity to purchase an "extended reporting period." An extended reporting period allows the insured to maintain seamless liability coverage from the date that coverage would otherwise end without an extension and lasting for either a set number of years or indefinitely. Provisions in the policy should clearly describe and explain the availability of extended reporting periods to the insured. The following provisions show how this coverage option might appear in a policy:[12]

> **VI. EXTENDED REPORTING PERIODS**
>
> As used herein, "extended reporting period" means the period of time after the end of the policy period for reporting claims that are made against the Insured during the applicable extended reporting period by reason of an act or omission that occurred prior to the end of the policy period and is otherwise covered by this Policy.
>
> * * * *
>
> A. Within thirty (30) days after termination, the Company will notify the Named Insured, in writing, of the automatic sixty (60) day extended reporting period. The Company will also notify the Named Insured of the availability of, the premium for, and the importance of purchasing an additional extended reporting period. . . .
>
> * * * *
>
> F. Only one such extended reporting period coverage endorsement shall be issued and the extended reporting period for such coverage shall be one year, three years, six years or unlimited. . . . .
>
> * * * *

Deciding on an appropriate length to elect for the extended reporting period coverage, also referred to as "tail" coverage, requires an understanding of the length and accrual of the statute of limitations for the type of claims covered by the policy. For example, a lawyer's professional liability policy protects the insured attorney from claims of legal malpractice. The statute of limitations for legal malpractice is three years.[13] It is well-settled that except in cases where the doctrine of continuous representation applies and tolls the statute of limitations, it is the attorney's alleged wrongful act or omission that starts the statute's clock even if the facts have yet to be discovered by the would-be plaintiff.[14] In other words, it is the date of the attorney's alleged wrongdoing, and not the date of its discovery, on which the claim accrues and marks the date from which a claim's compliance with the statute of limitations will be measured.[15] Therefore, an attorney would be wise to elect an extended reporting period no shorter than three years starting from the insured's last performed service as an attorney.

An attorney/notary public, however, must additionally be aware of other causes of action that could be assert-

ed against him or her as a notary public and to determine the length and accrual criteria of their corresponding statutes of limitation. If any of those actions against notaries either accrue or have a statute of limitations longer than three years from the date of the alleged wrongdoing, the recommended three-year extended reporting period on the lawyer's professional liability policy is too short to protect an attorney/notary public from all timely claims stemming from the notary public services he or she has performed.

> commerce. However, the statute of limitations does not begin to run with the doing of the wrongful act, but upon injury to a plaintiff whenever that may occur.[21]

Consequently, in cases where there is a gap in time between the notary's error and the plaintiff's subsequent injury proximately caused from it, it may be possible for a plaintiff's action under Executive Law § 135 to still be timely even if brought far more than six years after the notary's wrongful act or omission. It is not enough, therefore, for an attorney/notary public seeking protection from all potential claims that may arise from his or her notary public services to elect even a six-year extended reporting period. Instead, the best practice is for the insured to purchase an extended reporting period that is unlimited in duration. With an unlimited reporting period, the attorney/notary public can expect to have coverage for latent claims, if any, made long after six years from the date he or she last performed services either as an attorney or as a notary public.

A combination of ease, convenience, and practical necessity causes many licensed attorneys in New York State to also become notary publics.

New York has two statutes that create private rights of action for persons alleged to have been injured by a notary public. First, unlike an attorney, a notary public in New York State is a "public officer" and, under Real Property Law § 330, a "public officer" is liable to a party directly injured by the officer's "malfeasance or fraudulent practice."[16] Second, Executive Law § 135 makes a notary public liable to a party directly damaged by the notary's "misconduct."[17] Unfortunately, neither statute defines its respective operative words, namely, "malfeasance" or "misconduct," thereby leaving it to the courts to determine what the legislature intended those words to mean. Though there are few reported cases that offer guidance on the interpretation of either statute, it has been held that a notary's "misconduct" under Executive Law § 135 is not limited only to a notary public's willful, fraudulent, and intentional acts, but it also includes a notary's negligence.[18] Consequently, an attorney/notary public electing an extended reporting period must identify which one of the two statutory actions has the longer statute of limitations and which one has an accrual event that could potentially be the latest to ever occur. In other words, he or she must identify which of the two statutory actions might be alleged against the insured the longest time after the policy period ends but still be timely under its statute of limitations.

Actions under Executive Law § 135 and Real Property Law § 330 are each subject to a six-year statute of limitations.[19] Courts, however, have interpreted Executive Law § 135 to mean that an action under that statute does not accrue merely with the happening of a notary's wrongdoing; rather, it accrues when a party suffers an injury as a direct result of the notary's wrongful act or omission.[20] As one court reasoned, Executive Law § 135 liability

> is not unlike strict products liability where the wrongful act for which a person may sue is that of a manufacturer putting defective products into the stream of

Conclusion

A combination of ease, convenience, and practical necessity causes many licensed attorneys in New York State to also become notary publics. There is an indisputable practice advantage to being a notary public when handling a client's legal affairs; however, there is a tradeoff for serving these dual roles, namely, accepting an additional and separate liability risk that comes with performing duties reserved exclusively for notaries public. Compounding this extra risk exposure is the high number of times that a notary public in a law office, in particular, an attorney/notary public, takes an acknowledgement or administers an oath. Unfortunately, either in spite of or because of the fact that notarial acts are so often performed, a busy notary public may become complacent and fail to strictly adhere to all legally mandated formalities that surround the proper exercise of notary public duties.

Complacency is fertile ground for errors and omissions. It is crucial, therefore, for an attorney/notary public to be appropriately insured against potential liability claims arising not only from the practice of law, but from the performance of notary public services. As discussed in this article, a comprehensive lawyer's professional liability policy can be purchased that protects the insured from claims related to the acts or omissions of the insured either as an attorney or a notary public. Such single-

policy coverage is highly recommended and should be sought by an attorney/notary public when obtaining or renewing lawyer's professional liability insurance. ■

1. Executive Law § 130. Attorneys admitted to practice and reside in or have an office in the state need only submit a completed notary public application along with payment of the application fee to the New York State Secretary of State.

2. Based on data provided by the NYS Department of State Office, from 2005 to 2015 the average number of licensed notary publics in the state remained relatively steady at 283,696. The office does not maintain a record of how many of those licensees are also practicing attorneys. NYS Department of State FOIL Memo (2016).

3. *See* Cohen, Joel and Walsman, Danielle Alfonzo, *"Can You Notarize This?" Taking the Notary Job Seriously*, N.Y.L.J., July 18, 2008.

4. Judiciary Law §§ 484 and 485 and Penal Law § 195.00 prohibit a notary public from giving legal advice unless he or she is an attorney admitted to the practice of law. On the flipside, Executive Law § 135-a prohibits an attorney from performing notarial acts unless he or she is a licensed notary public.

5. *See, e.g.*, *Galetta v. Galetta*, 21 N.Y.3d 186 (2013), where the N.Y. Court of Appeals declared a prenuptial agreement unenforceable due to a faulty certificate of acknowledgement. For case analysis, *see* Horowitz, David Paul, *Sweat the Small Stuff*, N.Y. St. B.J., Vol. 85, No. 6, at p. 18 (July/August 2013) *and also see* Seigel, David D. (ed.), *Acknowledging Prenuptial Agreement: Rigid Construction of Acknowledgment Requirement Results in Summary Judgment Invalidating Prenuptial Agreement*, N.Y. St. Law Dig., Vol. 642 (June 2013).

6. Professor David Siegel raised this question in a postscript to his edited commentary of *Galetta, see supra* note 5.

7. *See* www.mybarinsurance.com/Content/Downloadables/CNA_Sample_Policy.pdf. The words in bold print also are in bold in the policy.

8. *See supra* note 4.

9. *See supra* note 7.

10. *Id*.

11. Under New York law, actual fraud and constructive fraud are recognized as separate and distinct causes of action. Actual fraud requires that the defendant had knowledge of the falsity of his or her representation or, in other words, had scienter. Constructive fraud does not require scienter. *See Brown v. Lockwood*, 76 A.D.2d 721, 432 N.Y.S.2d 186 (2d Dep't 1980).

12. *See supra* note 8.

13. CPLR 214(6).

14. CPLR 203(a); *see McCoy v. Feinman*, 99 N.Y.2d 295 (2002); *see also Balanoff v. Doscher*, 140 A.D.3d 995 (2d Dep't 2016).

15. *Id.*

16. Under Real Property Law § 330, a notary public "who is guilty of malfeasance or fraudulent practice in the execution of any duty prescribed by law in relation thereto, is liable in damages to the person injured."

17. Executive Law § 135 states, in pertinent part, that "[f]or any misconduct by a notary public in the performance of any of his powers such notary public shall be liable to the parties injured for all damages sustained by them. . . .".

18. *Jennings-Purnell v. Donner*, 2016 N.Y. Slip Op. 31517 (Sup. Ct., N.Y. Co. 2016); *Dizazzo v. Capital Gains Plus Inc.*, 2009 N.Y. Slip Op. 32186 (Sup. Ct., N.Y. Co 2009); *Marine Midland Bank, N.A. v. Stanton*, 147 Misc. 2d 426 (Sup. Ct., N.Y. Co. 1990); *Independence Leasing Corporation v. Aquino*, 133 Misc. 2d 564 (1986).

19. CPLR 213(1); *see also Rastelli v. Gassman*, 231 A.D.2d 507 (2d Dep't 1996); *Pericon v. Ruck*, 2008 N.Y. Slip Op. 30500 (Sup. Ct., N.Y. Co. 2008); *Marine Midland v. Stanton*, *supra* note 18.

20. *Amodei v. New York State Chiropractic Ass'n*, 160 A.D.2d 279 (1st Dep't 1990), *aff'd*, 77 N.Y.2d 890 (1991); *Chicago Title Ins. Co. v. LaPierre*, 104 A.D.3d 720 (2d Dep't 2013); *Rastelli v. Gassman*, *supra* note19; *Marine Midland Bank, N.A. v. Stanton*, *supra* note 18.

21. *Quoting Marine Midland Bank, N.A. v. Stanton*, 147 Misc. 2d at 428, *citing Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395 (1975). *Victorson* is the seminal N.Y. Court of Appeals case that set the requirement for there to be injury to a party before the party's strict products liability claim could accrue.

ATTORNEY PROFESSIONALISM FORUM

To the 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 who 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

Dear Attorney Foraday:

The market for per diem attorneys has been booming in recent years as the "on-demand" economy has expanded and as people and businesses have grown accustomed to addressing their most pressing needs with the click of a button. When last-minute court appearances and unavoidable scheduling conflicts arise, hiring a per diem attorney can be a very attractive option – particularly for solo practitioners or smaller law firms that lack the resources to handle these types of unexpected developments. However, despite the temporary and sometimes narrow scope of per diem work, it is important to bear in mind that per diem attorneys are still members of the Bar and owe the same professional and ethical obligations to their clients, adversaries, and courts as their more traditional, full-time legal colleagues. In addition, the hiring firms should be aware of their own supervisory and ethical responsibilities before retaining per diem attorneys to perform even the simplest of legal tasks.

"Today, nearly 3 million people are employed in temporary jobs," notes Kyle Braun, president of the employment website CareerBuilder.com, "and that number will continue to grow at a healthy pace over the next few years as companies strive to keep agile in the midst of changing market needs." (*See* www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?ed=12%2F31%2F2016&id=pr947&sd=5%2F5%2F2016).

The use of per diem attorneys by law firms large and small has become commonplace throughout the legal services industry, and is poised to grow even further as the market for temporary employees of all kinds continues to expand. Law firms may opt to hire per diem attorneys for a variety of logistical and economic reasons. Similarly, per diem work can provide an attractive and flexible professional option for attorneys who are inbetween firms, transitioning to another career, or – like you – embarking on a new journey as a solo practitioner.

And while their assignments are temporary, per diem attorneys can participate in projects that can go on for months, or even years.

Despite the transitory nature of their engagements, per diem attorneys are bound by the same ethical obligations as all other attorneys. In January 2017, the New York State Bar Association (NYSBA) Committee on Professional Ethics issued Opinion No. 1113 (NYSBA Op. 1113), which addresses some of the most pressing ethical issues raised by per diem practice. *See* NYSBA Op. 1113. In essence, the opinion outlined the basic ground rules for per diem attorneys, and made clear that they are required to comply with the same obligations in the New York Rules of Professional Conduct (NYRPC) as the law firm that hired them.

First, while they are not hired directly by clients and typically have limited contact, per diem attorneys owe duties to clients. Under NYRPC 1.4(a)(3), they are responsible for keeping the client (through the hiring firm or lawyer) reasonably apprised of the status of the matter they are covering. Moreover, under NYRPC 1.6, they are bound by the obligation to preserve the confidentiality of any confidential client information to which they are privy.

Second, per diem attorneys are also bound by standard conflict of interest rules concerning current and former clients. *See, e.g.*, NYRPC 1.7, 1.8, 1.9;

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

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see also NYSBA Op. 715 (1999) ("contract lawyers, like other lawyers, must comply with the conflicts rules with respect to current and former clients"). NYRPC 1.10(e)(3) imposes a sweeping mandate that a conflict check be performed by the hiring firm or attorney *anytime* the firm or attorney hires or associates with another attorney, and per diem attorneys are not exempt from this obligation. The rule requires *both* the hiring firm and the per diem lawyer to maintain a formal written record of prior engagements, and to implement a system by which proposed engagements can be checked against this formal written record. If a conflict is discovered, the per diem lawyer and the hiring firm or attorney must obtain client consent, or decline representation. Similarly, if a per diem attorney is hired in a limited capacity to cover a single appearance or to argue a specific motion, the per diem attorney cannot later appear on behalf of the adversary in that case or in one that is substantially related. *See* NYSBA Op. 1113; *see also* Am. Bar Assoc. Comm. on Ethics & Prof'l Responsibility, Formal Op. 88-356 (1988). Third, per diem attorneys owe duties of honesty and integrity to their adversaries and third parties. Under NYRPC 4.1, a per diem attorney must not make a false statement of fact or law to an adversary or any other third party. Under NYRPC 4.2, he or she must not discuss or otherwise communicate about the subject of the representation with a party they know to be represented by counsel unless they have that counsel's prior consent.

Fourth, per diem attorneys owe duties to the courts before which they appear. Pursuant to NYRPC 3.3(f)(1), when appearing before a court or tribunal, the per diem lawyer must comply with local rules of practice of the particular court or tribunal, just as the hiring law firm or attorney would. In NYSBA Op. 1113, the Committee confirmed that per diem attorneys are bound by the Uniform Rules for the Supreme Court and the County Courts, and noted that failure to comply with court rules can result in the imposition of sanctions and professional discipline. Maintaining familiarity with the rules of all the courts in which a per diem attorney may appear can seem daunting, but doing so is essential to the per diem attorney's ability to uphold his or her obligations to the courts.

And finally, like all members of the Bar, per diem attorneys owe their clients general duties of competency and diligence. NYRPC 1.1 provides that any lawyer appearing in a given matter – including per diem attorneys – should be competent and well-versed in whatever knowledge is required for the particular appearance or assignment. Under 22 N.Y.C.R.R. § 202.12(b), attorneys attending preliminary conferences must be "thoroughly familiar with the action and authorized to act on behalf of the party" on behalf of whom they are appearing, and "sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery." Rule 1(a) of the Commercial Division, 22 N.Y.C.R.R. § 202.70(g), takes it one step further, and requires that all counsel who appear before the Commercial Division to be "fully familiar with the case and authorized to enter into substantive and procedural agreements on behalf of their clients." *See* NYSBA Op. 1113. In other words, the ethical bar for competency and diligence will not be lowered for per diem attorneys, regardless of the circumstances of their retention.

Where per diem attorneys fail to comply with their ethical obligations, they may be subject to sanctions. *See, e.g.*, 22 N.Y.C.R.R. § 130-2.1(a) (imposing sanctions and awarding costs and fees upon an attorney who fails to appear at a court-scheduled matter without good cause). In one incident in New York County, a per diem attorney agreed to appear at two conferences, in two separate cases, on the same morning. After he failed to appear on time at one of the two conferences, the preliminary conference was adjourned. However, on the adjournment date, the per diem attorney failed to appear for a second time, claiming that he had not been retained by the hiring firm to appear on the adjournment date. Nevertheless, the court imposed an $800 sanction on the per diem attorney. While the sanction was eventually vacated, the court made clear in its opinion that both the attorney of record and per diem counsel owed the same professional and ethical obligations to the court and their client, noting that "responsibility attaches once any agreement, action or appearance is taken in furtherance of the representation." *George Constant, Inc. v. Berman*,N.Y.L.J., Dec. 3, 2003, at 18, col. 1 (Sup. Ct., N.Y. Co.).

The hiring of per diem attorneys can also give rise to important, and sometimes novel, ethical issues for the law firms that retain them. First and foremost, the hiring attorney or law firm remains counsel of record and retains full responsibility for the per diem's work for the duration of the per diem attorney's involvement – just as they would for any other full-time associate. *See* NYRPC 5.1 (requiring that all New York law firms properly supervise subordinates); *see also In re Berkman*, 55 A.D.3d 114, 116 (2d Dep't 2008) (attorney's failure to adequately supervise lawyers in his firm to whom he delegated responsibilities violated rules of professional conduct). In other words, throughout the course of the per diem attorneys' engagement, the hiring attorney or law firm must monitor and ensure the quality of their work product, and their compliance with applicable ethical rules.

In addition, the hiring law firms are required to obtain client consent before a per diem attorney may exercise his or her professional discretion with respect to substantive and/or strategic aspects of the representation. In 2015, the NYSBA specifically amended the Comments to NYRPC 1.1 to, among other things, make clear that a firm "should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer." NYRPC 1.1, Comment 6A. By contrast, client consent "may not be necessary for discrete and limited tasks supervised closely

by a lawyer in the [hiring] firm" such as "an outside lawyer [hired] on a per diem basis to cover a single court call or a routine calendar call."

For example, the firm employing the per diem attorney may not need to obtain client consent before the per diem attorney can exercise his or her judgment with respect to a ministerial issue of largely logistical significance, such as the scheduling of a conference or the setting of a procedural deadline. Therefore, when the hiring attorney or law firm reasonably anticipates that a court appearance will be simple or non-substantive, there may be no need to obtain client consent before sending a per diem attorney to cover the appearance. On the other hand, if the hiring attorney or law firm has reason to expect that the court appearance will involve substantive arguments, require strategic decision-making, or expose the per diem attorney to highly confidential client information, the hiring attorney or law firm has a professional duty to obtain consent from the client. *See also* NYRPC 1.1, Comment 7A ("if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client . . . whenever the retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a)").

Law firms also have ethical obligations with respect to how their clients are billed for the work performed by per diem attorneys. In 2009, New York adopted NYRPC 1.5(g)(2), which requires New York firms to first obtain written consent from the client before hiring per diem attorneys if the firm intends to divide its fees with the per diem attorney. The rule further requires New York firms to disclose the rate at which their per diem attorneys will be paid. This disclosure can be made to the client in either the initial retainer agreement, in a written notice, or in the client's billing statement. However, when a per diem attorney's rate is merely billed to the client on an hourly or fixed-fee basis, client consent is not required. *See* NYSBA Op. 1113 ("[W]e do not believe that Rule 1.5(g) applies where a hiring lawyer is hiring a per diem lawyer on an hourly or fixed fee basis that is based on the fair value of the work and that is similar to what the hiring lawyer would pay an employee of the firm.").

As you can see, the hiring of per diem attorneys can give rise to a wide range of potentially thorny ethical issues. It is therefore crucial for both per diem attorneys and the law firms that hire them to familiarize themselves with the nuances of per diem practice, and understand their respective obligations under the NYRPC. When used properly, per diem attorneys can provide a useful and cost-efficient alternative for law firms and clients alike. But if per diem attorneys and the firms that hire them fail to contemplate how their ethical obligations apply in the context of a per diem retention, they may be subject to professional sanctions and left with an unhappy client.

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am dealing with an adversary who communicates very differently than I do. We had a discovery dispute and I would spend time drafting specific letters with references to statutes, case law, and bates numbered documents. After I would send out the letters, I would immediately get back a vague one paragraph response that didn't address any of the issues I raised. I tried calling him, but his number always went directly to voicemail and he would only respond, days later, with another vague email. I expressed my frustration with the attorney and finally received an email saying that due to my "excessive" communications with him, he was sending me a list of "rules" that I was supposed to follow going forward. Some of the rules seemed outlandish: "1) Do not call or leave messages on my voicemail unless it is to notify me of an Order to Show Cause or some other emergency relief being sought (in which case, the phone call is MANDATORY); 2) You must copy my client on all e-mail communications to me; 3) You may not copy or blind copy your own client to e-mails to me and my client; 4) Do not follow up on any communications with me until I have had a week to respond." Can an attorney dictate rules for how another attorney communicates with them? Even if I ignore these rules, what can I do to deal with an attorney who is so difficult and non-responsive?

While I am on the subject of attorney communications, I just learned that one of my clients was getting a "second opinion" from another attorney about a case I am handling. I am not sure how this new attorney met my client, but I know that her firm advertises heavily in our area for giving second opinions on pending cases and there was recently an article in the law journal that one of our motions was partly denied. I am concerned because I have no idea what this attorney is telling my client and she might be bad-mouthing me in the hopes of taking over the case. This firm's business model appears to be based upon taking over cases from other attorneys and does not have a very good reputation in the local legal community. Can I ask my client about what the other attorney is saying about the case? Can I warn my client that there are rules about how attorneys solicit clients and that the other attorney may have violated them? Can I contact the other attorney to explain some of the legal aspects of the case that my client may not fully grasp? Even if I can talk to my client or this other attorney, should I?

Very truly yours,
Attorney Worrywart

Addendum to the June 2017 Forum

RPC 1.6(c), which was discussed in our June 2017 *Forum*, was recently amended and now states, "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b)." Comments 16 and 17 to RPC 1.6 were also amended to include several factors which are to be considered in determining the reasonableness of a lawyer's efforts to safeguard confidential information including "(i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients." ■

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be used only when writing a complaint and the exact places or times are unknown. When discussing an exception to a rule rather than the rule, use "generally," "typically," and "usually." *Example:* "Generally, we only allow customers to use the restrooms. But your emergency situation is an exception."

Exercises: Cowardly Qualifiers

Rewrite the following sentences. You might have to add words to make the sentence readable.

1. The defendant probably pleaded guilty solely because his attorney told him to plead guilty.
2. Apparently, the owner of the store threatened to shoot the teenager if the teenager didn't leave the premises.
3. The accident occurred at or near the intersection of Union Turnpike and Springfield Boulevard.
4. It appears that the plaintiff had back injuries before the accident.
5. Seven (7) college students were arrested on hazing charges.
6. The judge seems to question whether the plaintiff is telling the truth about what happened the night of the accident.
7. The defendant is a somewhat admirable character.
8. The witness basically confirmed the facts about the crime without offering any new information.
9. As far as a judge is concerned, a defendant is innocent until proven guilty.
10. Evidently, the defendant was distraught after hearing the jury's verdict.

Modifiers

Modifiers are words, phrases, or clauses that act as adjectives or adverbs. Modifiers should point clearly to the words they modify. Modifiers can be misplaced, squinting, or dangling. Place modifiers next to the words they modify.

Misplaced modifiers are placed too far from the word or words they modify. Misreadings arise when phrases or words are misplaced. *Example:* "I went to a lawyer with legal problems." By writing the sentence this way, the reader will believe that the lawyer, not you, has legal problems.

A squinting modifier can refer to the word before it or the word after it. But a modifier should modify only one word. Place these modifiers right before or right after the words they modify. Placing the modifiers elsewhere will allow for a meaning different from what you intended *Example:* "A modifier should only modify one word." *Becomes* "A modifier should modify only one word" because we want to place emphasize on "one word." Squinting modifiers include "almost," "also," "even," "exactly," "hardly," "just," "merely," "nearly," "scarcely," "simply," "solely."

> Dangling modifiers (dangling participle phrases) fail to refer logically to any word in the sentence.

Dangling modifiers (dangling participle phrases) fail to refer logically to any word in the sentence. *Example:* "Though only 18, the judge found the young defendant guilty on all charges." This sentence suggests that the judge is only 18 years old. You have two ways to fix dangling modifiers: (1) include the subject of the sentence; or (2) turn the modifier into a word group and include the subject. *Corrected version:* "Although the defendant was only 18, the judge found him guilty on all charges." Dangling participles describe something left out of a sentence. *Example:* "Writing carefully, dangling participles must be avoided." This phrase dangles; it doesn't answer who writes carefully or who must avoid dangling participles. *Corrected version:* "To write carefully, one must avoid dangling participles." To fix dangling participles, identify who's doing what to whom to point out clearly the subject and avoid double passives.

Exercises: Modifiers

1. Answering questions can be difficult during cross-examination.
2. The defendant only pleaded guilty to two charges, not them all.
3. Jurors are vigilantly encouraged to read through documents.
4. Knowing that the defendant isn't liable, the case went to trial.
5. The victim described her attacker as having a birthmark on his cheek, which was shaped like a heart.
6. After jaywalking the intersection, the crossing guard yelled at me for not paying attention.
7. The robber was described as a short man with a heavy accent weighing about 130 pounds.
8. Many students have, by the time they completed law school, had internships in the field.
9. The lawyer walked toward the bench wearing a blue suit.
10. The judge told the attorneys when the trial was over that he would send the decision in the mail.

Now that you've completed the exercises (we hope you didn't peek at the answers), study the answers and reread your writing to practice your skills.

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

Answers: Nominalizations

1. The nominalization is "assistance." Choose the strong verb "assist." *Corrected Version:* The intern assisted (or, better, helped) the attorney.
2. The nominalization is "consideration." Choose the strong verb "consider." *Corrected Version:* The committee members said they'd consider my application.
3. The nominalization is "identification." Choose the strong verb "identify." *Corrected Version:* The

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eyewitness identified the defendant.
4. The nominalization is "ruling," even though it isn't one of the more common suffixes. Choose the strong verb "ruled." *Corrected Version:* The judge ruled for the defense.
5. The nominalization is "preference." Choose the strong verb "prefer." *Corrected Version:* The attorney prefers Criminal Court cases.
6. The nominalization is "enforcement." Choose the strong verb "enforce." *Corrected Version:* police officer's role is to enforce the law.
7. The nominalization is "obligation." Choose the strong verb "obligate." *Corrected Version:* Parents are obligated to take care of their children.
8. The nominalization is "violation." Choose the strong verb "violate." *Corrected Version:* The attorney violated the ethical rules.
9. The nominalization is "consideration." Choose the strong verb "consider." *Corrected Version:* The interns considered that the less they talk to each other, the faster they'll finish their work.
10. The nominalization is "requirement." Choose the strong verb "require." *Corrected Version:* The Associate position requires a Juris Doctor degree.

Answers: Legalese

1. "As per the Judge" can be eliminated. *Corrected Version:* Interns may dress casually on Fridays.
2. Two words in this sentence should be eliminated: "aforementioned" and "currently." Both are unnecessary and wordy. *Corrected Version:* The parties are in court.
3. You wouldn't use "henceforth" in a formal speech, so don't write it. *Corrected Version:* No water bottles are allowed in the courtroom.
4. "Herewith" is a useless legalism. *Corrected Version:* Enclosed is my application for the position of Associate Attorney. Or, better, Enclosed is my application for the Associate Attorney position.
5. Rather than "pursuant," use a common and simple word like "under." *Corrected Version:* Under CPLR 3211(a), Mr. Erikson has no standing to sue.
6. The phrase "as stated heretofore" adds nothing to the sentence. Delete it. *Corrected Version:* The police had insufficient evidence to arrest the defendant.
7. The phrase "set forth herein" is legalese. It'll confuse many readers and is unnecessary to understand the sentence. *Corrected Version:* Both parties accept the agreement's terms and conditions.
8. Just as you should replace "prior to" with "before," replace "subsequent to" with "after." *Corrected Version:* After the Supreme Court's decision in *Obergefell v. Hodges*, every state recognized same-sex marriage.
9. Eliminate "hereto." It's unnecessary to the sentence. *Corrected Version:* The court requires written affidavits of each of the parties.
10. Nothing screams, "I'm writing in legalese" like Latin phrases. Eliminate all Latin phrases from your legal writing. *Corrected Version:* More documents are required to prove that the marriage was entered into validly and in good faith.

Answers: Cowardly Qualifiers

1. Eliminate "probably" to avoid uncertainty. *Corrected Version:* The defendant pleaded guilty solely because his attorney told him to plead guilty.
2. Get rid of "apparently." *Corrected Version:* The owner of the store threatened to shoot the teenager if the teenager didn't leave the premises.
3. "At or near" is a cowardly expression. Eliminate it; the exact place of the accident is known. *Corrected Version:* The accident occurred at the intersection of Union Turnpike and Springfield Boulevard.
4. Eliminate "it appears." *Corrected Version:* The plaintiff had back injuries before the accident.
5. Don't combine numbers and letters. Eliminate "(7)." *Corrected Version:* Seven college students were arrested on hazing charges.
6. Remove "seems to" because it's a cowardly qualifier. *Corrected Version:* The judge questioned whether the plaintiff told the truth about what happened the night of the accident.
7. Avoid constructing meaning by employing a not-quite-right word with a qualifier that adds strength or tones down a noun or verb. It's important to employ words that create a precise meaning. *Corrected Version:* The defendant is a sympathetic character.
8. Remove "basically." *Corrected Version:* The witness confirmed the facts about the crime without offering any new information.
9. Eliminate "as far as a judge is concerned." It's an unnecessary and cowardly qualifier. *Corrected Version:* A defendant is innocent until proven guilty.
10. Remove "evidently." *Corrected Version:* The defendant was distraught after hearing the jury's verdict.

Answers: Modifiers

1. Repositioning "during cross-examination" is essential to avoid misplacing modifiers. *Corrected Version:* Answering questions during cross-examination can be difficult.
2. This sentence is ambiguous. "Only" is a squinting modifier. In this case, it limits the word "two" and should be placed right before it. *Corrected Version:* The defendant pleaded guilty only to two charges, not them all.
3. The word "vigilantly" should be placed next to the word "documents." "Vigilantly" describes how the documents should be read. *Corrected Version:* Jurors are

encouraged to read documents vigilantly.

4. The initial phrase "knowing that the defendant was not liable" is a dangling participle. The sentence must be rephrased to give the phrase something or someone to modify. *Corrected Version:* Knowing that the defendant isn't liable, defendant's attorney requested a trial.
5. This sentence suggests that the cheek was shaped like a heart. Correctly replace the modifier to clarify the sentence. *Corrected Version:* The victim described her attacker as having a birthmark shaped like a heart on his cheek.
6. This sentence states that the crossing guard yelled at me after jaywalking. It's unclear whether I jaywalked or whether the crossing guard jaywalked. Add a word group in the opening phrase that introduces the subject. *Corrected Version:* After I jaywalked the intersection, the crossing guard yelled at me for not paying attention.
7. This sentence suggests that the accent weighed 130 pounds. Make this sentence clear by placing the modifier next to the word it modifies. *Corrected Version:* The robber was described as a 130-pound short man with a heavy accent.
8. The helping verb "have" should be closer to the verb "had" to make the sentence clearer. *Corrected Version:* By the time they complete law school, many students have had internships in the field.
9. This sentence states that the bench is wearing a blue suit. Correct the misplaced phrase by placing it near the subject. *Corrected Version:* The lawyer wearing a blue suit walked toward the bench.
10. This sentence is unclear because of a squinting modifier. This sentence can describe two different situations depending on where the modifier is placed. *Corrected Version:* When the trial was over, the judge told the attorneys that he would mail the decision. *OR* The judge told the attorneys that he would mail the decision when the trial was over. ■

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 intern Alexandra Dardac (Fordham University) for her research.

BECOMING A LAWYER

BY LUKAS M. HOROWITZ

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

Shalom!

In a change of events, my internship placement was adjusted before I arrived in Israel, so I find myself working at an NGO called the Association for Distributive Justice. The change was fortuitous, as my experience has been exceptional thus far. The focus of the group is to strive for equitable distribution of land within Israel, as well as just resource allocation, access to seashores, etc.

When I learned of the change in placement, I was unsure of what my duties would be. Well, let me tell you, legal research in Israel is the same as legal research in the States. I have spent a solid chunk of time researching English and Spanish law in order to compare their practices for protecting tenants to the practices in Israel. While English law was not an issue, Spanish law, on the other hand, was a bit more difficult to both track down, and read. Suffice to say, I should have paid a little more attention to my teacher in 10th grade Spanish.

Life in Israel is a big shift from that in the States. The first thing I noticed, instantly, is peoples' spatial awareness here in Israel, or rather, the lack of it. It is similar to riding the subway in New York City at rush hour, except that you never get off.

That aside, the country is beautiful. My group of interns will stay in two locations this summer; the first is on Mount Carmel. Every morning I get to drink a cup of coffee while looking at the Mediterranean Sea. Even while sitting quietly having my coffee, there is a different atmosphere in Israel than any I have experienced before. Saying it is electric, or has a buzz, does not do it justice. It just has to be experienced.

What is most shocking is that, thus far, I have yet to suffer a single sunburn! It generally takes about five to six minutes of exposure to the northeastern sun in New York to do the trick, but I am on my sun block game big time! Every second I am outdoors I hear my mother's voice saying "reapply, reapply, reapply."

My internship at the federal courthouse in White Plains, while brief, was exceptional. I got to work every day with incredibly capable and professional court staffers who always seemed to have the time to explain to me what was going on. While it was bittersweet to leave chambers for Israel after just a few weeks, I am amazed by the wide-ranging and complex matters I was exposed to in that short time. It was the first time I was able to take some of what I had learned (and, surprisingly, retained) in law school, and *apply* it on a daily basis. A part of me had always thought that what you learn in school does not necessarily transfer over into practicing law. Boy, was that thought disproven. Along with that came the realization that I will never be able to escape federal civil procedure.

My actual ability to learn Hebrew has far surpassed my expectations. While I can now count to five, say goodnight, and ask where the bathroom is, I believe I will soon be able to barter in markets, order with confidence in restaurants, and both ask for directions and understand the answer. Still, a huge plus side to Israel: Almost everyone speaks English! ■

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BY GERALD LEBOVITS

Legal-Writing Exercises: Part II

In the last issue of the *Journal*, the *Legal Writer* reviewed important concepts in legal writing, including the passive voice, writing in the positive, metadiscourse, and gender neutrality. This column in our multipart series will review additional important concepts in legal writing: nominalizations, legalese, cowardly qualifiers, and modifiers. At the end of each section, you'll be tested 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 the article to determine whether you've edited them correctly.

Nominalizations

A nominalization occurs when an added suffix turns a verb into a noun. Your writing shouldn't have any nominalizations. They're wordy and abstract. Use a strong verb rather than a noun. You want your sentence to show action. *Example*: "The court *reached the decision* that. . . ." *becomes* "The court *decided* that . . . ." Avoid buried verbs that end with these suffixes: "-tion," "-sion," "-ment," "-ance," and "-ity." A "be"- verb attached to a clause that ends in a preposition should be eliminated. *Example:* "Be in attendance" *becomes* "attend."

Exercises: Nominalizations

Rewrite the following sentences.

1. The intern provided assistance to the attorney.
2. The committee members said they'll take my application into consideration.
3. The eyewitness provided an identification of the defendant.
4. The judge gave a ruling in favor of the defense.
5. The attorney has a preference for Criminal Court cases.
6. A police officer's role is the enforcement of the law.
7. Parents have an obligation to take care of their children.
8. The attorney committed a violation of ethical rules.
9. The interns took into consideration that the less they talk to each other, the faster they'll finish their work.
10. The requirement for the Associate position is a Juris Doctor degree.

Legalese

Writing in legalese is a poor form of writing. Not only are legalisms confusing, but they also have meanings you don't fully grasp. Write in plain English using simple and common Anglo-Saxon words. Writing in plain English is formal and proper; avoid conversational English. Eliminate words like "aforementioned," "henceforth," "hereinabove," "whereby," and "said." If you aren't sure whether a word is legalese, ask yourself whether you'd say it in a formal speech. Because writing is planned, formal speech, you shouldn't write it if you wouldn't say it. Use legal terms only when necessary for terms of art or words that can't be translated into plain English.

Exercises: Legalese

Rewrite the following sentences.

1. Interns may dress casually on Fridays, as per the Judge.
2. The aforementioned parties are currently in court.
3. Henceforth, no water bottles are allowed in the courtroom.
4. Enclosed herewith is my application for the position of Associate Attorney.

Writing in legalese is a poor form of writing.

5. Pursuant to CPLR 3211(a), Mr. Erikson has no standing to sue.
6. As stated heretofore, the police had insufficient evidence to arrest the defendant.
7. Both parties accept the agreement's terms and conditions set forth herein.
8. Subsequent to the Supreme Court's decision in *Obergefell v. Hodges*, every state recognized same-sex marriage.
9. The court requires written affidavits of each of the parties hereto.
10. More documents are required to prove a *bona fide* marriage.

Cowardly Qualifiers

Eliminate doubtful, hedged, timid, and misleading phrases and words: "apparently," "as far as I'm concerned," "basically," "practically," "it might be said," "it seems," "more or less," "nearly," and "somewhat." Don't combine letters and numbers. *Example:* "four (4)." Eliminate cowardly expressions: "at or near," "on or about," and "on or before." These expressions should

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