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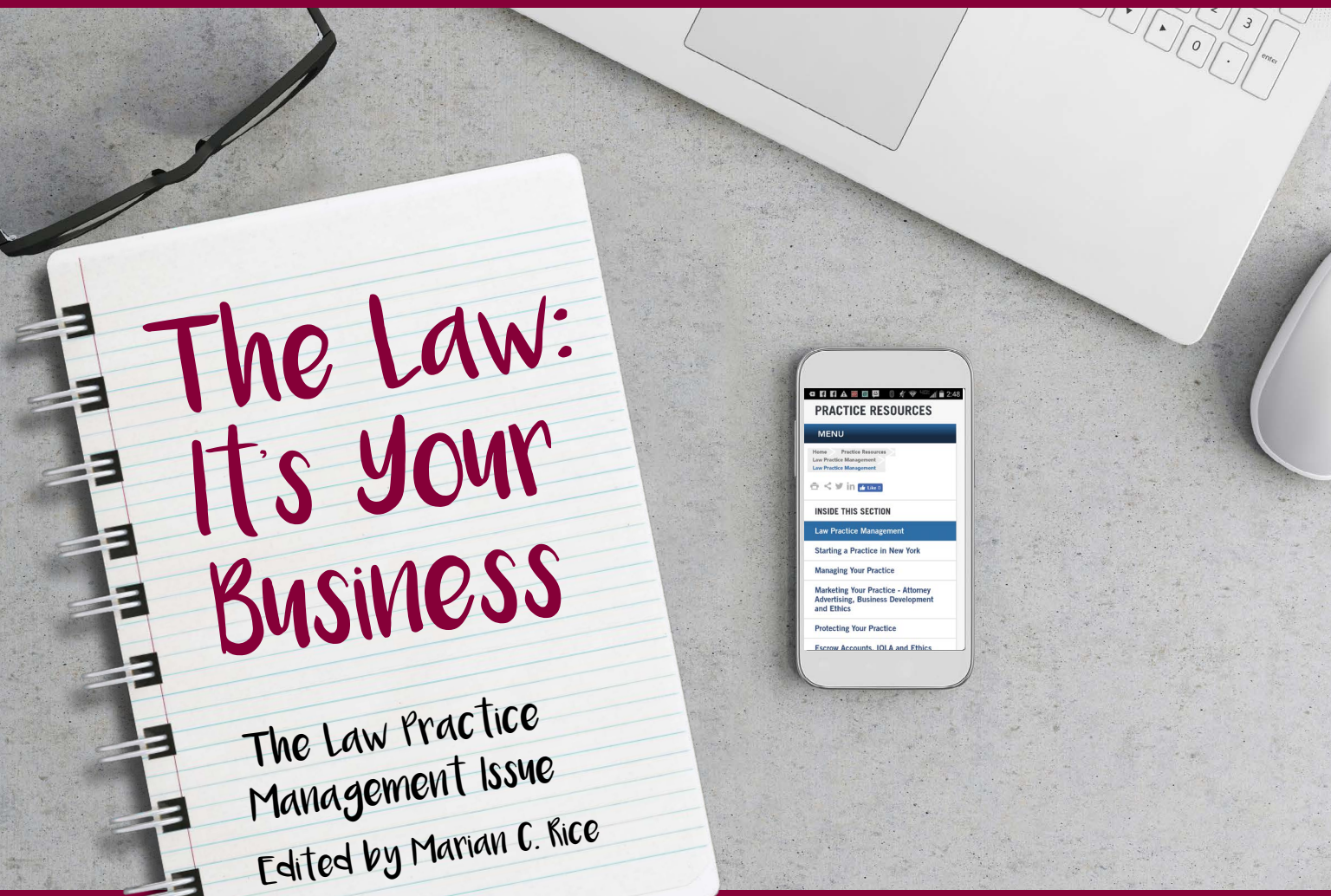

The Law: It's Your Business

The Law Practice Management Issue

Edited by Marian C. Rice

NEW

Starting in October, all issues of the *Journal* will feature a section on practice management and the business of law – topics of relevance to all attorneys in our quickly changing legal landscape.

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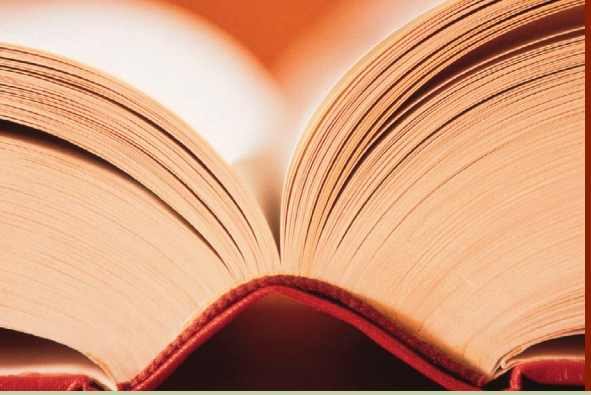

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EUGENE C. GERHART
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Editor-in-Chief, 1961 – 1998

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THE LAW: IT'S YOUR BUSINESS

EDITED BY MARIAN C. RICE

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DEPARTMENTS

The New York State Bar Association
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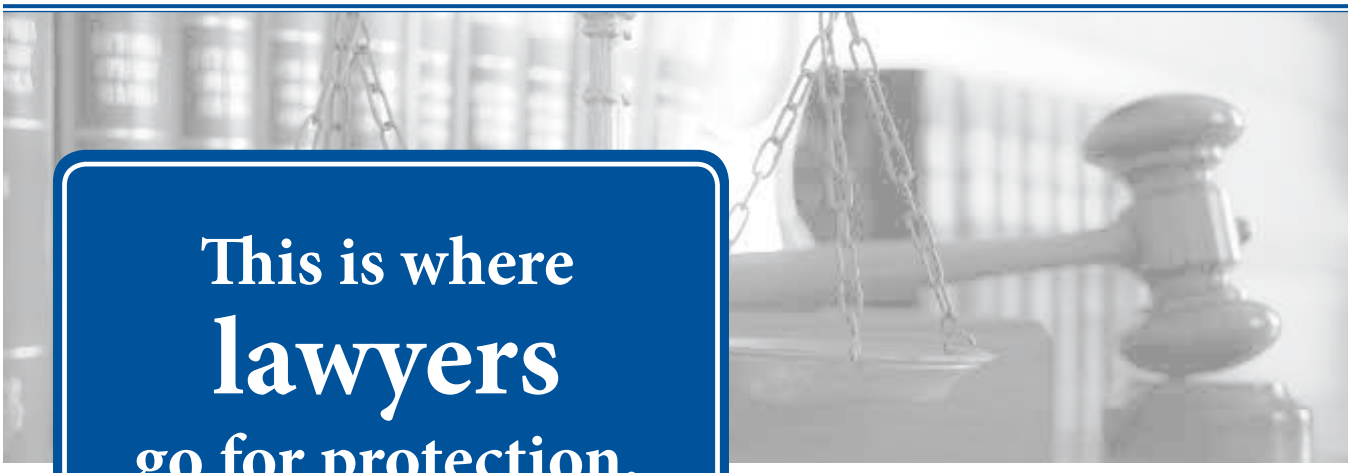

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SHARON STERN GERSTMAN

Law Practice Management Is for Everyone

There was a time when assistance with law practice management was for solos, small firms and the managing agents of larger firms. Today, every lawyer needs assistance with law practice management – even lawyers happily ensconced in Big Law, in government jobs or with public service providers. NY Rules of Professional Conduct 1.1 contains the following comment, adopted by our House of Delegates on March 28, 2015:

> To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of *the benefits and risks associated with technology* the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500 (emphasis added).

Hence, every lawyer has an ethical duty to keep abreast of technological changes that affect his or her practice setting. This includes terms which may seem foreign to so many of us: encryption, cloud technology and cybersecurity – to name a few – as well as subjects like document management and email management, for which existing office policies addressing paper have been adapted. Leaving these matters entirely to our office management is no longer an option.

Recognizing how important it is for our members to keep informed about the rapidly changing legal profession, this issue of the NYSBA *Journal* is devoted to law practice management. The *Journal* will henceforth have a section in each issue devoted to practice management, covering topics such as technology, finance, management and marketing.

It is not only for ethical reasons that we all must possess practice management skills. Technological advances have forever changed the way lawyers deliver legal services to clients and have emboldened non-lawyer providers to offer low cost services via the internet. We have a duty not to let these technological advances change the legal profession's core principles or the quality of service to our clients. We also have a duty to protect the public from services which may harm them. However, it would be a mistake to ignore the non-lawyer providers or to adopt a "Just Say No" attitude. If you don't believe me, just ask Kodak.

To meet these opportunities and challenges, NYSBA leadership is dedicating significant resources to all aspects of the member experience. This includes staff changes, committee realignment, technology investment and a willingness to consider every possible approach.

We already have a solid base. NYSBA's Law Practice Management Committee has been creating resources for lawyers, law firm managers and legal

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

professionals for over a decade. The Committee provides information on practice management trends, technology, marketing, client development and finance. No matter what your practice setting, you can find resources that help you do your job effectively and efficiently. Visit www.nysba.org/LPM for these and other tools.

We formed a new Committee on Technology and the Legal Profession in 2017 to assist the Bar, the public and the bench in all legal technology issues. The approach to changes in the profession is complicated and controversial at times. This Committee, chaired by Mark Berman, which will represent diverse viewpoints on law and technology, is composed of members from all parts of the State and all segments of the Bar. The Committee will form subcommittees/advisory groups that will include both lawyers and non-lawyers, such as specialty bar groups, judges, academics, IT personnel, and others with expertise and insight regarding new technologies and law-related businesses.

The subcommittees will address artificial intelligence in law, cybersecurity, new technologies/electronic communications with clients and online service providers. They will help educate members on potential risks and benefits of all types of legal technology affecting their firms, give guidance on how to protect their data and devices and be a resource to NYSBA as it evolves and expands its offerings in these areas.

Our practice management team is developing programming to deliver this information and guidance. A few examples:

- A solo conference on September 13 featuring updates on LegalZoom, Avvo and ethical compliance in the digital age. Recent ethics opinions on attorney advertising and participating in the providers' legal panels (Ethics Opinions 1131 and 1132) will be explored and discussed.
- A new cybersecurity program on September 19 that will include how to protect yourself and safeguard your firm's data. It will also discuss, in depth, cybersecurity insurance concerns, what to look for when purchasing insurance and what should be covered.
- An advisory panel of 60 managing partners created an exceptional four-part managing partner conference series (*www.nysba.org/ManagingPartnersConference*). The programming included partner compensation, how mid-sized firms survive, leadership and succession planning. These are available online and we are looking forward to this year's series.
- Statewide programming on risk management and insurance considerations will provide in-depth coverage of malpractice insurance. NYSBA members who attend will save 7.5 percent on their professional liability insurance policy premiums with USI (in addition to the 7.5 percent they receive for NYSBA membership).

NYSBA is increasing our online information services to expand the way we reach and deliver content to our members. We will be producing videos, podcasts and exploring myriad other options. A subcommittee of our Executive Committee, chaired by Michael Fox, will be assessing all of our publications and our options going forward.

The overlap of practice management and technology cannot be ignored, and the Law Practice Management Committee and the Committee on Technology and the Legal Profession will be two Committees to watch. The March/April 2018 *Journal* will showcase their efforts in an issue devoted to technology and the future of the profession. If lawyers can identify trends that impact their practice, they may be able to make decisions that will influence those trends.

As a start, this issue of the *Journal* is intended to provoke attorneys to think strategically about their practices. Collectively, these articles and all the ones that will follow raise a host of practice management issues for law firms large and small. How well you and your law firm adapt to our rapidly changing world will likely impact whether you will thrive. NYSBA is committed to doing all that we can to help you. ■

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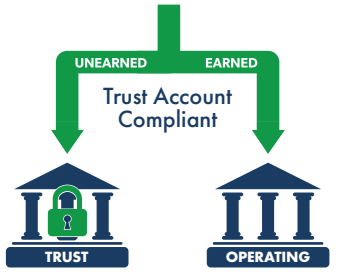

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Tentative Schedule of Upcoming Programs *(Subject to Change)*

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

Defending DWI Cases: The Critical Issues
September 14 New York City
September 28 Albany

2017 Solo Practitioner Conference
(live & webcast)
September 13 New York City

Breach of Fiduciary Duty
(9:00 a.m. – 10:50 a.m.; live & webcast)
September 15 New York City

Ethical Issues in Litigation Finance
(12:00 p.m. – 1: 00 p.m.; live & webcast)
September 15 New York City

Fastcase Session I
(12:00 p.m. – 1 p.m.; live & webcast)
September 18 Albany

Safeguarding Against Cyber Attacks
(1:00 p.m. – 4:00 p.m.; life & webcast)
September 19 New York City

Conducting SCPA 1404 Discovery
September 25 Albany
October 3 Westchester
October 23 New York City
October 25 Buffalo
October 26 Rochester

Henry Miller – The Trial
September 27 Long Island
October 18 New York City
November 8 Albany

Guardianship Practice in New York
(live & webcast)
October 2 New York City

Forensic Accounting
(1:00 p.m. – 3:30 p.m.; live & webcast)
October 10 New York City

Lobbying and the Legislative Process
(9:00 a.m. – 12:50 p.m.; live & webcast)
October 12 Albany

Risk Management 2017
(9:00 a.m. – 1:00 p.m.)
October 13 Buffalo
October 20 Rochester
October 27 Long Island
October 30 Albany
November 3 Syracuse
November 17 New York City

Basics of Matrimonial Practice 2017
October 16 Buffalo, New York City
October 17 Westchester
October 18 Albany, Syracuse
October 19 Long Island

Nuts & Bolts of an Uncontested Probate Proceeding
(11:00 a.m. – 12:15 p.m.; live & webcast)
October 17 Albany

Hope for the Best & Prepare for the Worst: Live & Die by the Prenup
(1:30 p.m. – 5:00 p.m.; live & webcast)
October 17 Albany

Workers' Compensation: Law & Practice Updates
October 20 New York City, Syracuse
November 17 Albany, Buffalo

Fair Trial/Free Press Conference
(12:00 p.m. – 2:15 p.m.)
October 23 New York City

Deposition Boot Camp
(9:00 a.m. – 12:45 p.m.)
October 24 Long Island
November 3 Rochester
November 4 Buffalo
November 17 Westchester
December 1 Albany
December 2 Syracuse
December 8 New York City

To register

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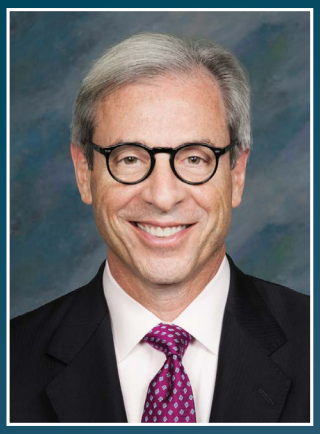

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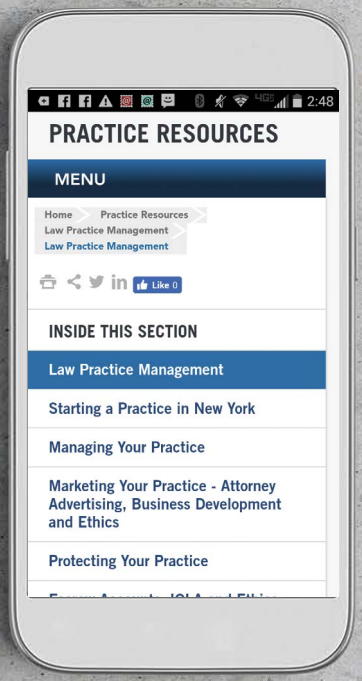
The Law: It's Your Business

By Marian C. Rice

Marian C. Rice, current Chair of NYSBA's Law Practice Management Committee and past President of the Nassau County Bar Association, is the chair of the Attorney Liability Practice Group at the Garden City law firm of L'Abbate, Balkan, Colavita & Contini, LLP and has focused her practice on representing attorneys in professional liability matters for more than 35 years.



I'm not sure everyone is aware yet – but there is a new sheriff in town! In February, Pamela McDevitt joined (or should I say re-joined) the New York State Bar Association – this time in the role of Executive Director. It is a joy to have Pam back with us. She brings with her years of experience as the American Bar Association Law Practice Division Director. This background, combined with her prior stint with NYSBA Law Practice Management (LPM), makes her a serious cheerleader for the role Law Practice Management plays in the life of every attorney and every law firm. Did I say cheerleader? Make that whirling dervish – Pam's enthusiasm and never-ending ideas for articles, projects, webcasts and member benefits have jumpstarted LPM and its role at NYSBA and in the NYSBA *Journal*.

For the past few years, the September issue of the *Journal* has been devoted to articles focusing on the many facets of law practice management: technology, human resources, marketing, finance, ethics, risk management, project management, cyber security (and liability) . . . the list does not end. The *Journal* is committed to helping lawyers keep pace with the demands of the rapidly changing legal landscape. Going forward, each issue of the *Journal* will devote a collection of articles to the various aspects of law practice management.

Lawyers have to master not just the law, but a spectrum of challenges never faced by attorneys in the past.

It's hard to imagine Atticus Finch, Frank Galvin, or Perry Mason ever filing a motion paper via the internet. It's harder still to envision them poring over a potential marketing plan for their practice or deciding which office accounting software to buy. And it's not because they are fictional lawyers who practiced in a Hollywood studio rather than a courtroom. It's because they projected an image of a lawyer who zealously, even obsessively, served his clients, and justice, above all else. There was no time for the more mundane duties of practicing law. If those tasks mattered at all, they were left to minor characters back at the office. What wouldn't you give today for a Della Street in your life, capably handling all of the administrative tasks – and appearing in court delivering the pivotal document exactly when needed?

That image doesn't work today. Today's real life lawyers have to be zealous advocates, of course. But they have to be more than that. They realize that if they are to succeed they have to master not just the law, but a whole spectrum of challenges never faced by attorneys in the past. Today a lawyer not only has to know how to e-file, but also how to send documents to the cloud, and how to protect against security breaches. They have to know how to market themselves in an era of intense competition. They have to know how they can serve their clients while all the time remaining within ethical boundaries. These are not mundane tasks to delegate to support staff. They are tasks for any lawyer to master, young and old, in all settings from solo practice to large firms.

The articles in this issue reflect the scope of changes and challenges for today's lawyer. For those thinking of starting their own practice and wondering how to deal with the everyday business and marketing challenges, we've got you covered. Running a solo practice is one of the most difficult – yet satisfying – roles an attorney can undertake. The nuts and bolts of running a solo business are explained by Deborah E. Kaminetzky in her article *Thinking of Going Solo? Be Prepared to Practice Law* and *Run a Business*. Even an excellent lawyer has little to do without clients. Two of the articles in this month's *Journal* give ideas on how to bump up your marketing skills. Carol Schiro Greenwald outlines how a focus on ethics will enable you to build a practice your clients will love, while Allison C. Shields offers tips on how to get the most out of your LinkedIn profile.

While we spend a great deal of time helping solo and small firms start off their careers on the right path, in this edition of the *Journal*, we also focus on what the future holds for long-practicing attorneys. In their article, *The Changing Face of Succession Planning*, Stephen Gallagher and Leonard E. Sienko Jr. examine issues involving practice succession and "encore careers." Equally as important – and way too often neglected – is developing a plan for the end of your career. Andrew E. Roth explores qualified retirement plan designs for law firms.

The news is inundated with tales of cyber terrorism directed at attorneys and law firms. Learning the vulnerabilities of your law firm's technology is an integral part of practice and part of your ethical responsibilities. In his article, Erik B. Weinick shows how to protect the privilege of a pre-breach cybersecurity assessment. In furthering one's practice skills, Adam Leitman Bailey and Dov Treiman provide a valuable guide to understanding the laws of interest. And please take time to review the nuggets of wisdom addressed monthly in Vince Syracuse's Attorney Professionalism Forum.

It is not easy to keep on top of these constant changes but NYSBA's LPM Committee is here to help. Our goal is to direct the attention of the many, many talented NYSBA members to resources that will develop their skills in managing the practice of law. The Committee is dedicated to providing resources that enable attorneys to obtain the information needed to manage their practices and get back to the primary goal of representing clients. Through materials located on the NYSBA website, the LPM Committee provides lawyers, law firm managers and legal professionals with information on practice management trends, marketing, client development, legal technology and finance. Whether you're a solo practitioner or a managing partner at a national law firm, you'll find law practice management materials designed to meet your day-to-day practice needs. Checklists, best practices, guidelines, publications and continuing legal education programs provide up-to-date information and practical tips to help you efficiently manage your law practice. Check out our offerings on the NYSBA website and please let us know of any topic you would like to see addressed.

As it was in eras past, so it is today that an attorney who fails to keep abreast of changes in the law cannot serve his or her clients well. But today, as these articles show, the same applies to attorneys who fail to keep on top of sound practice management. In short, the lawyer who fails to keep current is the lawyer who faces early obsolescence. LPM is dedicated to not letting that happen. ■

Ratchet Up Your Ethics to Create a Practice Clients Will Love

By Carol Schiro Greenwald

Three of the first four sections in the N.Y. Rules of Professional Conduct (RPC) set the guidelines for the kind of informed, participative, and communicative relationship between attorney and client that today's empowered consumers want. These rules cover the allocation of authority between client and lawyer,[1] the obligation to be diligent[2] and communication guidelines.[3]

Lawyers who build a practice and firm culture around robust implementation of these rules will be addressing, positively, one of the major shifts in the legal market

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today: "the emergence of a buyer's market in which clients demand greater value for the dollars they spend for legal services and in which value is measured by efficiency, predictability and cost-effectiveness in the delivery of services."[4] To this end, clients are becoming more involved in the management and processes of their cases.

This article will discuss clients' perceptions of service value, the shared decision-making relationship established in the RPC, and some practical changes lawyers can implement to make these ethical requirements part of their approach to the practice of law.

Value

Clients determine the value of legal services the same way they arrive at a value for any service. It is a personal assessment rooted in a combination of rational and emotional impressions which, in turn, are based on their experience and expectations.

> A client's sense of well-being and openness to establishing a relationship with you begins the minute they open your office door.

Typically, value reflects benefits rather than features – results rather than legal prowess. Legal skill and experience are taken for granted since that is what you were hired for. Benefits relate to specific case results and how well the lawyer meets the client's needs and expectations. Service quality often becomes the catch-all benchmark for establishing value.

The value determination process is similar whether the client is an experienced general counsel or a clueless consumer.

- Dealing with lawyer clients may be easier because you both speak the same "language," yet more difficult because they may demand a more active role in the management of the case.
- Consumers typically derive their view of law from friends' stories about their brushes with the law, or from legal television shows in which the issue is resolved in less than an hour and usually in favor of the client protagonist. These clients need more education as to the way the "real" legal process functions, but may give their lawyers more latitude regarding the means used to meet their objectives.

At either end of the spectrum, if clients don't understand what is happening and why, they will have difficulty assessing the value of your work.

Lawyer-Client Relationship

In broad strokes, clients are in charge of the beginning and end of a representation; lawyers are in charge of the means to obtain those objectives. "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, . . . ; shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by the client's decision whether to settle a matter."[5] Sometimes clients authorize specific actions without the need for further consultation, but they may revoke this authority at any time.[6]

While ultimate authority rests with clients, usually they will defer to their lawyer's skill and knowledge regarding the appropriate actions. Lawyers may use their professional judgment to "assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client."[7] When disagreements with clients arise, lawyers "should seek a mutually acceptable resolution of the disagreement."[8]

Rule 1.4(b) requires a lawyer to communicate sufficient information so the client can make "informed decisions." The content should be appropriate for a "comprehending and responsible adult."[9] Specifically, lawyers should "promptly inform" clients about:

- Any decision or circumstance that will require informed consent;
- Any information that the court or other laws require be communicated;
- All material developments such as settlement or plea offers.[10]

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonable available alternatives.[11]

Lawyers are also required to keep the lines of communication open by:

- Keeping the client "reasonably informed" as to the matter's status, including decisions regarding routine activities such as scheduling.
- Complying promptly with the client's "reasonable requests" for information.[12]

If clients want their lawyer to do something not permitted by the rules or other laws, the lawyer needs to explain why such action is not permitted.[13] The rules make clear that it is the lawyer's responsibility to educate clients. "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of the representation."[14]

Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client." Comment [2] notes the need to adopt office procedures that effectively manage the process to ensure both timely responses and personal promptness. Comment [3] deals with the impact of procrastination, noting that:

- "The passage of time" may adversely affect the client's interests.
- "[U]nreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."
- In addition, mismatched expectations regarding time are a major source of client complaints.

Sometimes it seems easier for the lawyer to seek forgiveness instead of permission, act first and then address the client's complaints, because to explain all the thinking behind a legal strategy seems overwhelming. Or the lawyer doesn't want to take the time to walk yet another client through the basics. These instincts are human, but it is strategically in the lawyer's interests to make attorney-client interactions smoother by creating a client-focused culture that explains up front how the lawyer and firm work with clients.

Setting expectations at the beginning of a relationship establishes a baseline that you can always return to if the relationship begins to shift into negative territory. Let's look at some easy, practical client-focused communication practices that will help to keep you and your client on the same track.

A Picture Is Worth 1,000 Words

A client's sense of well-being and openness to establishing a relationship with you begins the minute they open your office door. They are expecting to see a professional setting, a waiting area, and, hopefully, something they would like to read while they wait to meet you.

If you have a receptionist, he or she becomes the first important "touchpoint" for the client. If the receptionist is welcoming and gracious and makes the client feel expected and comfortable, the relationship will be off to a good start before you enter the room. However, if he or she acts bored or rude or disinterested, this will set up an immediate negative vibe.

If you meet the client in a conference room, the room should be neat and clean. Papers and whiteboard notes left from previous meetings suggest a cavalier attitude toward confidentiality. If you meet in your office, it too should be neat because, as my mother used to say, "messy desk, messy mind."

First Steps

During the initial conversation you should discuss the firm's rules for communicating with clients. You should find out what their expectations are in terms of:

- Content and timing of discussions;
- Preferred communication methods – in person, phone, email;
- Role and responsibilities of the client, and
- Role and responsibilities of the attorney.

This conversation will provide your first clues as to whether your work styles will mesh successfully. Your discussion of their goals and objectives, and their understanding of the range of results that are legally obtainable, will give you a good sense of the degree to which you will have to modify perceptions and fill in knowledge gaps. Finally, you need to discuss finances: your fees and their ability to pay. If clients seem irrational in their requirements and emotionally driven in terms of the results they want you may not want to take them on as a client.

Assuming the discussion goes well and you end the meeting with a handshake and an agreement to work together, the next step is to send an engagement letter that sets out expectations for both you and the client. Whether the client is an in-house lawyer or a layman, it is important to write as much as possible in clear English rather than legal jargon. Even the in-house lawyer will need to show the document to nonlawyers, so if you use business English rather than legalese they will be pleased by the time saved because they don't need to write an explanatory cover memo.

In addition to the mandated sections on scope of work, fees, and expenses, and the client's right to arbitration, a client-friendly engagement letter will explain the respective responsibilities of the client and lawyer, summarize expectations on both sides, outline the process, and provide an estimated budget to the extent possible, introduce the members of the team, and summarize the agreed-upon methods and schedule for communication. Review the engagement letter with clients and have them sign off on it.

What Clients Want

Objective Results:

- Predictability in terms of process, timing and costs
- Efficiency measured in time and money savings
- Minimization of risk, both financial and strategic
- Protection from future problems
- Resolution of current problems

Personal Issues:

- Impact on personal image and reputation
- Financial concerns
- Lack of control over the outcome
- Insecurity
- Impact on job, career, personal life

Personal Preferences

Everyone has a preferred communication device – cell phone, office phone – and a preferred form of communication – email, texting, face-to-face. As you talk about ground rules for working together, ask them to outline their communication preferences regarding:

- Preferred mode of contact;
- Preferred time of day to take calls;
- Calls preferred on weekends or week days;
- Meetings: in-person or by telephone;
- Their level of involvement in the matter – how often, how detailed; and
- Degree of lawyer autonomy they are comfortable with.

This discussion gives you a chance to lay out your own communication preferences:

- Mode of contact;
- Time of day and days of week preferences;
- Your response time for calls;
- How often you will talk to them in between specific decisions or actions.

You should also identify whom to talk to if you cannot reach the client, and who in your office will answer questions if you are not available. This is the time to say if you do not take weekend calls or calls after 7 p.m. during the week. Also, you should explain how you charge for phone calls, For example, are short calls or scheduling calls complimentary, but calls over five minutes charged at your hourly rate? Or, do you charge for all calls?

All the information should be noted on a chart or in a memo and signed off on by both of you. This information becomes another baseline to refer back to when the need arises to reset expectations.

Memories Morph

A client-focused firm that embodies the intent of the rules will also have policies for memorializing meetings and conversations. At the end of in-person meetings or calls, you should write a file memo summarizing the gist of the conversation, agreed upon direction and activities and next steps. File the memo and send a copy to the client as well with a cover note asking him or her to read it and write back agreeing that it covers the conversation or indicating where it falls short.

These memoranda become building blocks in a construct for managing client expectations. The memoranda become references for discussing how the matter has evolved. These discussions provide a reality check for clients who are upset with the way the case is playing out based on their memories of what happened, when and why.

Emails Need Context

The advantage of emails is the ability to write them when and where you have time. The disadvantage is that emails are a one-way communication vehicle – from you to someone, somewhere. You don't know when they will read it or what they are doing when it arrives to be read.

Although their cases are important to them, clients may not be on top of every legal move, or they may be involved in something else that is important to them. To make sure that they read your email in the context of your case, begin by reminding them:

- What has been happening.
- What is the strategy you are implementing.
- Where you are today.
- Where this email fits into the process.
- The main points you want them to focus on.
- If there is an attachment, summarize the purpose of the document and its main points.
- What you want them to do after they read it.

Context is required whether the email contains matter updates or documents to review. The context acts as a directional signal telling them the reason they received the information, where it fits in the process and what role they will play in next steps.

A client-focused firm that embodies the intent of the rules will also have policies for memorializing meetings and conversations.

It is also important to treat the language in an email as you would language in a professional letter even though emails seem to be a more casual form of communication. There are several reasons to take care:

- Clients view everything from their lawyer as representative of the lawyer's legal expertise and professionalism. Typos and semi-sentences make a writer look sloppy, and sometimes make it harder for the reader to follow the line of thinking.
- These emails also become part of the documentation of what you have done and when it was completed.

To counter the urge to hit send immediately, it is good practice to set the email aside for an hour or more and then reread it to be sure the content is clear. In addition, use spell check on emails and all other written materials that go to clients.

Think of Monthly Invoices as Stories

Your monthly bills are your best communication tools for reinforcing clients' expectations, reminding them of the purpose of their matters and the steps you have taken to get them the results they want. Whether you offer a

flat fee or bill hourly, it is easier for clients to follow the "story" if you can show specific activity items together under each action step.

For example, if you are drafting a contract, list all related activities such as research time, drafting time, conversations with other lawyers related to its content and conversations about it with the client under one heading: Draft Contract. This provides a clearer picture of what you did to achieve a desired result.

Also, if you are billing hourly try to resist showing time in sixths of an hour since it is often difficult for clients to translate these notations into regular minutes and hours.

In addition to the backup detail, add an introductory context paragraph reminding clients of where you were when the month began, where you are now, and what happened in between. At the end of every bill, be sure to thank them for the opportunity to be of assistance.

Concluding Thoughts

When you take the communication admonitions in the Rules of Professional Conduct seriously they provide a platform that merges professionalism and service, showcases your legal expertise and offers clients the relevant participatory role they prefer. Your adaptation to a client focus begins by understanding the emotional and rational needs of the client. It incorporates this perception in both written and verbal communications with the client.

Written communications, especially memoranda memorializing conversations and emails explaining documents, create a paper trail that reinforces the expectations and guidelines you established in the engagement letter. Use invoices to tell stories that reinforce the progress and legal acumen your client expects.

In addition to sharing the Statements of Client's Rights and Responsibilities with the engagement letter, create your own set of communication guidelines and review them with clients throughout the engagement.

Make ethically responsive client service your value proposition, and build your practice around it. The result will be happy clients who put a high value on their relationship with you. These are the clients who will refer you to others and return whenever they need additional legal work. ■

1. N.Y. Rules of Professional Conduct Rule 1.2 (RPC).
2. RPC 1.3.
3. RPC 1.4.
4. Georgetown Law Legal Executive Institute and Peer Monitor, 2017 Report on the State of the Legal Market, p.17.
5. RPC 1.2(a).
6. RPC 1.2, cmt. 2.
7. RPC 2(d).
8. RPC 1.2, cmt. 2.
9. RPC 1.4, cmt. 5.
10. RPC 1.4(a)(1).

Give Clients What They Want

- Make them comfortable in your world: physically, in terms of your office setting, and mentally, by understanding what they want in terms of where they are coming from.
- See the interaction with you and your firm from their point of view.
- Set up communication protocols that respond to their time parameters and yours.
- Be action oriented: Anticipate problems and propose solutions.
- Recognize and validate their need to anticipate and control costs.
- Understand their definition of success and work toward it.

11. RPC 1.0(j).
12. RPC 1.4(a)(3)(4).
13. RPC 1.4(5).
14. RPC 1.4, cmt. 5.

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The Legal Profession in Transition

By Stephen P. Gallagher and Leonard E. Sienko, Jr.

In September 2004, Leonard E. Sienko, Jr. and I teamed up to write our first article for the *NYSBA Journal*. The title of that article was *Yesterday's Strategies Rarely Answer Tomorrow's Problems*. In October 2015, we got together again to write a follow-up article, *For Sole Practitioners, The Future Is Not What It Used to Be*. We thought this might be a good time to once again share our thoughts regarding today's challenges. I generally focus on the trends, while Lenny tempers my theories with practical, real-world tales. He has been in the trenches as a solo practitioner in Hancock, N.Y., for 39 years.

Aging of the Workforce

We are both members of the baby boomer generation born between the years 1946 and 1964, so we are part of the group that is responsible for changing the traditional demographic shape of our society. The legal profession, like all of society, is being challenged to design new approaches that would give lawyers more and better choices for living longer, healthier lives. We are finding that young lawyers as well as mid-career lawyers are just as interested in discovering new ways of knowing and being as more senior lawyers who may be looking to begin winding down their life's work.

Like it or not, traditional forms of retirement are in the process of being replaced by a new stage of life that starts for many in midlife and lasts well into true old age. This new period that essentially amounts to a second half of life is, as yet, ill-defined, but this new stage in life promises to allow boomers to continue contributing to society in new ways, while they pursue deeper meaning and fulfill broader social purposes.

LS: The new reality is that many lawyers and others are in no position financially to retire. A quick perusal of the television ads bombarding prospective retirees about how much money they will need to maintain their standard of living (10x their

annual salary by age 67, says Fidelity) makes one feel less than adequate.[1]

We believe aging of the workforce is a phenomenon that law firms and bar associations can no longer ignore, so we hope to start a dialogue about how the legal profession can better utilize the skills of older attorneys, age 55 and up, currently in the workforce. We are also hoping to convince bar associations to create forums that would enable young lawyers to meet with experienced lawyers for support in finding their place in the profession. The third challenge we see before us will be to convince law firms to allow transition planning to begin much earlier. We believe everyone who holds a license to practice law needs to be involved in figuring out how best to take advantage of this aging workforce.

The New Face of Retirement – Encore Careers

Baby boomers are now entering the traditional retirement years to the tune of 3.5 million people every year, including many individuals who are beginning to challenge traditional views of retirement. We now know that many baby boomers are going to work longer than their parents did, whether they have to, want to, or are compelled to do some combination of the two. Even in the legal market, we are beginning to see more and more boomers looking for a second, and even a third, "encore career," as their health and energy hold out well into their 80s and 90s.

Unfortunately, lawyers who are embarking on these encore careers currently cannot expect smooth transitions because employers – and that includes law firms – generally aren't helping. Up until now, almost all the drivers to change the status quo have come from individuals themselves, as they refuse to walk away from meaningful, productive careers to be permanently put out to pasture.

Managing the New Path to Transition Planning

Transition is the process of letting go of the way things used to be and taking hold of the way they subsequently become. Transition can be triggered simply by recognizing that you are beginning to seek an alternative to your current state. I see this desire to transition in young lawyers who are not advancing in their careers. Transition occurs again with mid-career lawyers who realize they may not want ownership responsibilities.

In my coaching career, I am also beginning to see increasing interest from lawyers in mid-career who are looking to transition away from full-time practice much earlier than in the past. There has never been much of a market for part-time lawyering, but more flexible retirement options are needed in order to create greater opportunities for all lawyers. Boomers are not necessarily seeking retirement, but many are now seeking something new and different.

Mid-career lawyers and younger professionals must balance busy work schedules with added responsibilities to support aging relatives, adult children, grandchildren, and siblings. This multi-generational family dynamic is the new transition "wild card." Far too many law firms follow the mistaken idea that the best way to help people through this transition period is to deny the transition is even taking place. We believe that law firms and bar associations can do much more to help talented lawyers through these periods of transition.

LS: Sandwiched between caring for elderly parents and paying for their own children's college, many allegedly middle-class lawyers keep working because they have to. Faced with the spectacle of rock stars touring well into their 70s, we are also seeing lawyers of the same age doing the same thing for the same reason – they need/want the money. Paul Campos's article The Collapsing Economics of Solo Legal Practice *states that the average compensation for solo practitioners has declined sharply over the last 25 years. He also suggests that the median solo practitioner is earning less than $35,000 per year (and this statistic does not include new attorneys).*[2]

I have found that those firms that prize the interdependence and mutual responsibility among all generations are much better prepared to help their employees through these periods of transition. Senior lawyers in these firms seem to approach retirement as a way of gaining renewed purpose in their lives. Everyone looks to each other to find something different, perhaps

something novel, and certainly something interesting at deeply personal levels. Law firms play an increasingly important role in changing their culture to allow life's transitions to take place.

LS: For solos, the new symbol of retirement is no longer the gold watch or mounted gavel. The solo looks forward to an actual vehicle, i.e., the 18-wheeler truck, which pulls up out front of the office as muscular youngsters scramble down and around hauling out your boxes of files and toss them into the maw of a giant, on-board shredder. Thirty or 40 years of files, hopefully stripped of original documents, previously safely delivered to the clients, are ground up before your very eyes. There is something very final about watching years of your work life ground up and whisked away. There is certainly finality about the bill for the service, which is usually required to be paid in advance.

> Transition is the process of letting go of the way things used to be and taking hold of the way they subsequently become.

A few hours with the shredder truck and you'll understand "transition."

Case Study 1 – Solo to Solo – Then Sold!

Whenever anyone decides to wind down a law practice, selling it to a partner or third party, or bringing in a protégé to transition the practice over time, it is always a challenge. The following comments from a friend may be helpful in understanding why winding down a practice can be so challenging:

> I'm still working full time. All of my associates left me last year, I'm back to a solo. Two left the firm at my request. One left to work closer to home – he had a 45-minute commute each day. I had mixed emotions – he was a nice guy and well qualified – but he married a socialite and didn't want to work very hard. The fourth one hurt! He was the one who was supposed to take over the practice in three or four years or maybe sooner. He left, allegedly, to go to a bigger firm so he could work on "bigger estates." Totally unexpected, one-week notice.
>
> I just no longer have my heir apparent, and at 66, I not only don't have anyone on the horizon for succession, I'm now quite gun-shy to hire anyone for that purpose. My thoughts at this time are to just continue for another couple of years, and then see if I can find someone who wants to buy the practice.

On a positive side, I know this individual has been able to continue building his practice for a possible sale sometime in the future. I see far too many solo practitioners who have completely given up on finding another lawyer to work with in transitioning ownership. This is a mistake!

It is our belief that lawyers hopeful of winding down their law practice need buyers, and there are large numbers of less experienced young lawyers looking to position themselves to buy. At the same time, young lawyers who are coming out of school with far too much school debt need training and patience to accumulate the funds to buy into a practice.

LS: What young lawyers need is a system similar to what has been in place for new doctors in rural areas for many years. I well remember in my first few years in practice, serving on a search committee to attract a doctor to our small, rural community. It wasn't enough that there were state and federal programs in place to offer financial incentives and loan forgiveness for practicing in a "medically underserved area" (this was 35 years ago; but the medical student loans were enormous by 1980s standards). The community had to put together a package for the young physician, which would provide free rent, a guaranteed salary, office staff, and full benefits. Some candidates needed full employment for a spouse.

I often thought about the irony of sitting on that committee, suggesting additional benefits for the new doctor, as I figured out how to pay my own rent and start a practice, unable to afford a secretary. It was clear the community thought they needed to provide financial assistance for the new doctor – not the new lawyer.

These days, anecdotally, I don't see much in the sale of practices from retiring solos to young attorneys. I do see older attorneys being taken on as "Of Counsel" for larger firms in nearby cities, feeding their remaining clients to the big firm. The occasional purchase of a practice, by a younger attorney or anyone else, more often than not consists of a purchase of the real estate and furnishings of the solo's law office. If we want to assist young attorneys in taking over "practices" from retiring solos, we need to figure out a way to come up with low-interest financing for such purchases. It would be nice to trade a law office in wintery upstate for a condo in a warm climate. That's the kind of transition I'd like to see a lender support. Maybe solos need a new type of revolving loan fund, a new type of cooperative financial setup.

Case Study 2 – Firm to Firm – New Beginnings

With the large number of experienced lawyers positioned to leave the profession over the next three to five years, I believe it is critical that law firms look more closely at their own partner age profiles, practice area coverage, and ongoing client relationships. I hope the following story puts a human face to some of the problems and the opportunities.

John admits to being over 65 now. He reports that a year ago, he left a law firm partnership (five attorneys plus himself) to join another local firm as Senior Counsel (two partners, one other Senior Counsel, and four associate attorneys). After notifying the clients he was serving that he was leaving, he was able to take almost 100 percent of those clients to the new firm.

His association with his new firm was enthusiastically supported by the entire firm, its attorneys, and its staff. He was able to bring added value to this firm as he filled a "niche" of sorts and added to one of its practice areas. He has been able to support the clientele of the new firm, and the attorneys in this new firm have provided input and advice for "his" clients. The relationship is based on mutual respect, and it has provided opportunities for added growth. The attorneys are able to consult with each other and share advice and creative thinking for the clients. Needless to say, this transition has been successful. This new firm has been able to take on cases where John's focus can add value.

John had grown tired of the routines of the old firm, and he wanted to continue to learn new areas of practice, so he decided to start anew with a new group. He remains in good health and he again enjoys meeting with old friends to inform them of his new situation.

If firms ignore the interests of aging partners, there is a strong likelihood that many talented senior lawyers will move to other firms or join the ranks of sole practitioners with renewed energy and a greater sense of purpose.

LS: The single greatest challenge to the profession is the number of senior lawyers who actually cannot or will not retire. Over the past 30 to 40 years, the number of solo and small firms has expanded to meet market demands, and today, many of these same practitioners find themselves unable to retire and still maintain anything even close to their current standard of living.

Most of the existing retirement/succession planning books assume practitioners have ample resources for voluntary retirement to take place. Just surviving this transition into retirement is going to be the biggest challenge for many aging lawyers and the legal profession as a whole. I'd caution that we could be seeing large numbers of 70-year-olds who can't support themselves if they retire. It could get ugly, especially with pressure from "kids" graduating with a quarter million dollars in law school loans to pay back, who are willing to work for much less than experienced counsel.

Whether the baby boomers are planning on winding down a law practice, selling to a partner or third party, or bringing in a protégé to transition the practice over time, it is our belief that bar associations can do much more to help bring senior lawyers together with younger, less experienced lawyers to find ways to support these transition efforts.

Case Study 3 – Growing from Within – Hope for the Future

Chuck is a mid-career, solo practitioner who knows he wants out within six to 10 years from the law practice he has built over 27 years. Three years ago he made the decision to hire an associate – one of the scariest decisions of his professional life. This turned out to be one of the best decisions of his professional life as it opened his eyes to light at the end of the tunnel as well as a real possibility that what he built over 27 years actually had a value.

Chuck knows he is the type of person who will never fully retire from the business of running his law practice, but Chuck is now seeing his associate's potential to (1) assist him with building his practice as the associate is a true rainmaker, and (2) a real potential buyer of the practice as his associate sees the true value of the practice.

Chuck enjoys being a mentor, in part, because he never had a mentor when he was building his practice. Chuck hopes that by sharing his knowledge of the law and the "business of law," he can help his new partner be more successful. ■

1. Sharon Epperson, *What's the magic number for your retirement savings?* CNBC, www.cnbc.com/2016/02/11/whats-the-magic-number-for-your-retirement-savings.html (Feb. 11, 2016).

2. Paul Campos, *The collapsing economics of solo legal practice,* Lawyers, Guns & Money, www.lawyersgunsmoneyblog.com/2015/05/the-collapsing-economics-of-solo-legal-practice (May 25, 2015).

Thinking of Going Solo? Be Prepared to Practice Law *and* Run a Business!

By Deborah E. Kaminetzky

A frequent mistake we lawyers make when starting out on our own is that while we may know a lot about the practice of law, we don't necessarily know a lot about how to run a business. We may also fail to recognize that a law practice *is* a business. No matter how good an attorney you are, without that recognition, your fledgling practice is not going to thrive.

This article is written for new solo attorneys, those who are thinking of hanging out a shingle and those who were dismayed when they saw their tax return for the first time after beginning practice on their own. It is solely about your law firm's business accounting – trust accounting is a whole other topic.

Many lawyers know that they should write a business plan prior to opening and, of course, obtain malpractice insurance. Hopefully you took into consideration the costs of rent, telephone, office supplies, etc. when figuring out your business plan. However, there are some expenses you may not be able to predict, like how much your malpractice insurance will go up each year, so you should definitely factor in a bit of a cushion.

Hire a CPA

My first suggestion is that if you do not have a CPA to help you out, get one. Then, once you have one, don't treat them as merely a tax preparer, visiting them in February and handing them what is essentially a done deal – the records of what happened with your firm all year. At that point, all they can do for you is calculate how much tax you owe and make suggestions for next year, and one of those suggestions will very likely be to check in with them toward the end of the following year when you can still do something proactive.

For example, let's say that you received a $10,000 retainer on a divorce in early December, and you deposited the retainer in your operating account. After you've set up the file, the client calls and tells you they are getting cold feet and don't want to file or serve the spouse

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just yet, but that you should feel free to hold on to the retainer until they make up their mind after the holidays.

Let's assume your firm is on a cash basis since you're a solo (larger firms and corporations usually use the accrual basis). You may be thinking, swell, what a great way to end the year with an extra $10,000! If you don't understand what will happen to that $10,000, a call to your CPA may be in order. That $10,000 will result in extra tax to you for the year. If the client calls back in January after reconciling with their spouse and you refund the money in January, you will still owe taxes on that $10,000. Granted, the following year it will be accounted for, but you are still out the money in the meantime. A call to your CPA would have filled you in, and you could have returned the retainer and told the client to call you when they're ready to proceed.

Invest in Bookkeeping

My second suggestion is that you either hire a bookkeeper (if you want your books done the old-fashioned way), or get a software program to keep the books for you (some sort of system for tracking and generating reports). I happen to use QuickBooks, but there are many others, such as XERO and FreshBooks. There are several reasons for this suggestion. First of all, we lawyers tend to prefer doing legal work over administrative tasks, and we might be a bit slow in recording our financials when there is a motion to draft. Hiring a bookkeeper or obtaining a software program that uploads your banking information automatically will give you a much better chance of having accurate records, and more important, will allow you to have your finger on the pulse of your business and to know what your law practice is worth. What does that mean, you ask?

Well, for instance, a profit-and-loss statement tells you whether your practice was profitable during a particular period of time such as a month, quarter, or year. A balance sheet tells you what your practice is worth. Both are useful pieces of information. Considering how often we are bombarded with offers for software, equipment, and books that promise to make our lives easier and our practice more successful, wouldn't you want to base your decision on more than just whether you like the new software? Wouldn't you want to know whether you can afford to lay out the extra money? Imagine being able to push a button and get a year-to-date profit-and-loss statement that tells you whether your practice is profitable. Wouldn't that information be good to have?

Without accurate, up-to-date information, many of your business decisions will be made in a vacuum based on your feelings, and then, at the end of the year, you will find out how you did. That is no way to run a profitable business. What's more, having a bookkeeper or bookkeeping software will ensure that when year-end does come, your books will be ready to send over to your accountant. You have enough stress running a practice – your books should be the least of it.

Know Your Numbers

Suggestion number three is to run a profit-and-loss statement and a balance sheet monthly or to ask your bookkeeper to create one for you. These come in handy for several reasons:

1. Dread making collection calls or going to networking events? One look at your numbers may be just the motivation you need.
2. Didn't realize your phone bill was so high? Call the provider now and see if you can renegotiate.
3. Taking in way more than you realized? Maybe it's time to give yourself a raise! (Call the CPA first).

A profit-and-loss statement can tell you if particular expenses are getting out of control. You will also want two other documents – a balance sheet, and a general ledger. The balance sheet shows what the business is worth. The general ledger contains every transaction in double entry form, which means that for each transaction, there are two entries. For example, should a client pay a bill, the payment goes into the income column, and the amount comes out of the liabilities column. This is how accountants record transactions according to generally accepted accounting principles.

Once you have been up and running for more than a year, you can run a comparative profit-and-loss statement comparing last year to the current year. This is especially helpful when making business decisions. After a while, you may even start to see patterns that will help you plan for the future. Some attorneys realize that their work is seasonal and that they have slow periods that can be filled by offering a new practice area, or if they are satisfied with the overall income, can be filled with a vacation or continuing legal education classes or seminars.

Should you decide you want to get a loan for expansion purposes, a banker may require some or all of the aforementioned documents. For example, some banks will base a loan approval and interest rate on your income as shown on your return; others will use your balance sheet. A potential partner may want to see these documents as well.

Finally, if you get audited by the IRS, having an organized system set up will go a long way toward reducing the stress of the audit. Every single transaction will have been recorded and accounted for. You won't have to go back and create your firm's books; they will already be audit ready.

With your bookkeeping in place, you will be in a much better position to make decisions that will help your firm thrive. Utilizing either a bookkeeper or a bookkeeping program should mean that some of your time formerly spent on administrative tasks should be freed up as well. Use the time wisely; continuing to read and learn about business concepts such as marketing, how to grow a company or manage effectively will help you turn your law practice into a business that suits you. ■

Qualified Retirement Plan Designs for Law Firms

By Andrew E. Roth

I. INTRODUCTION

A discussion on retirement can be a difficult one to start. Qualified Retirement Plans have become an important part of the employee benefit programs offered by professional practices, but partners typically tend to focus on their clients rather than their retirement program. While retirement may indeed be years away, Qualified Retirement Plans can provide practices with substantial tax savings today. Law firms, in particular, can use Qualified Retirement Plans to maximize retirement savings for partners in a tax-efficient manner. Plan contributions are immediately tax-deductible and enjoy tax-deferred growth until they are withdrawn during retirement. Taxation may be further delayed by partners and employees alike by rolling the proceeds of the plan over to an individual retirement account (IRA). Plan assets also have the unique benefit of being unreachable by creditors of the individual plan participants as well as creditors of the firm, with very few exceptions.

This article briefly discusses certain techniques law firms can use to maximize the substantial tax benefits of Qualified Retirement Plans.

II. DEFINED CONTRIBUTION PLANS

A. 401(k) Plans in General

Many law firms offer 401(k) Plans, technically known as Cash or Deferred Arrangements (CODAs). Employees of the firm, including partners, may elect to defer a portion of their salary or draw as a plan contribution. These contributions are generally made pre-tax, where the funds grow and are not taxed until withdrawal at separation from service or retirement. Alternatively, participants may choose to forgo the immediate tax deferral in favor of after-tax contributions that grow, and may be withdrawn, tax free (known as a Roth 401(k)).

Employees may choose to make traditional (pre-tax) 401(k) contributions, Roth (after-tax) 401(k) contributions or a combination of the two – provided that the total does not exceed the annual Internal Revenue Service (IRS) limit ($18,000 for 2017). Employees who have turned age 50 by year-end may make an additional $6,000 "catch-up" 401(k) contribution, increasing their effective 401(k) limit from $18,000 to $24,000. Both the $18,000 401(k) limit and the $6,000 "catch-up" limit are subject to annual cost-of-living increases.

In general, contributions to a 401(k) Plan are subject to an annual nondiscrimination test, called the Actual Deferral Percentage Test (ADP Test). This numerical test separates the eligible employees into two categories – Highly Compensated Employees (HCEs) and Non-Highly Compensated Employees (NHCEs) – and compares the average 401(k) contribution for each group. HCEs include any employee who (a) earned more than the compensation threshold for the *prior* year (earned more than $120,000 in 2016 for the 2017 plan year) or (b) owned directly or by attribution more than 5 percent of the ownership interests in the employer. When the HCEs contribute, on average, significantly more than the NHCEs, the HCEs must receive taxable refunds of those contributions.

B. Safe Harbor 401(k) Plans

Rather than risking potential taxable refunds each year, many professional employers have added a safe harbor component to their 401(k) plans. Safe harbor plans are exempt from the annual ADP Test, allowing the HCEs to maximize their 401(k) contributions without relying on significant participation by NHCEs. The sponsor of a safe

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harbor plan must inform its employees that the firm will be making a contribution on their behalf for the upcoming year. This is done through an annual notice that must be distributed at least 30 days prior to the beginning of the plan year.

There are two types of Safe Harbor plans:

1. **Safe Harbor Non-Elective**: The employer makes a contribution equal to 3 percent of each eligible employee's compensation for the plan year. These contributions are made whether or not the employee actually makes a 401(k) deferral for the year. The Plan may provide that the 3 percent contribution is allocated to all eligible employees or to eligible NHCEs only.
2. **Safe Harbor Match**: The employer makes a matching contribution, generally equal to (a) 100 percent of the employee's first 3 percent of compensation contributed as a 401(k) deferral, plus (b) 50 percent of the employee's next 2 percent of compensation contributed as a 401(k) deferral. This contribution ends up capping out at 4 percent when the employee's 401(k) deferral is at least 5 percent of their compensation for the year. Unlike the Safe Harbor Non-Elective contribution, an employee must make a 401(k) contribution to be eligible to receive a Safe Harbor Matching contribution. Therefore, if NHCE participation is very low, a Safe Harbor Match may be attractive. In our experience, however, NHCEs at law firms tend to see the obvious benefit of participation in such a plan and are more likely than some other types of businesses to make the elective deferrals necessary to receive the Safe Harbor Match.

C. Profit Sharing 401(k) Plans

In addition to 401(k) elective deferrals and employer safe harbor contributions, most professional employer plans include a profit sharing feature. Profit sharing contributions may be made by the employer on behalf of each employee and can increase a partner's total allocation under the plan to as much as $54,000 per year ($60,000 if including the $6,000 401(k) "catch-up" contribution). These additional profit sharing allocations can be skewed toward the partners in the plan through age-weighted nondiscrimination testing (called "new comparability" testing).

New comparability testing separates the employees into the same two categories as the ADP test: HCEs and NHCEs. However, since new comparability is age weighted, higher paid employees who are closer to retirement can receive a much larger portion of the contribution while lower paid employees who are further from retirement receive a much smaller portion of the contribution. This allows the partners of the firm to receive a maximum contribution allocation while limiting the contributions going to the staff to a modest and manageable number.

D. Top-Heavy Plans and Split Plan Design

As noted above, many law firms utilizing these types of Qualified Retirement Plan designs tend to maximize contributions for the partners while limiting the outlay for the staff. This strategy often results in the plan becoming "top-heavy." A top-heavy plan is a plan where at least 60 percent of the total balances belong to the firm's partners. When a law firm partner wants to contribute to a top-heavy plan, the firm must provide all eligible active non-partner employees with a minimum allocation of 3 percent of their salary. This allocation must be provided to non-partner HCEs and NHCEs alike. This can get expensive when the firm employs highly paid professionals who are not partners, like law firm associates. The firm is faced with the difficult decision to either make the top-heavy minimum contribution or exclude these associates from the plan entirely (preventing them from even making their own 401(k) deferrals).

An alternate approach would be to set up a plan solely for the associates and any other highly paid professionals. The firm can then exclude them from the "primary" plan (the plan containing the partners and lower paid staff employees) and avoid the top-heavy minimum contribution for associates and highly paid staff. As long as none of the partners participate in this second "associates-only" plan, no top-heavy minimum contributions would be required in that plan. Participants in the "associates-only" plan are then able to make 401(k) contributions without any need for the firm to make any employer contribution on their behalf. This type of "Split Plan" design is very common with professional practices that have non-owner or non-partner highly paid employees.

Firms with a large number of employees can use a different type of "Split Plan" design. Plans that provide for employer contributions are generally required to provide a minimum contribution level for all eligible staff employees. As the number of staff employees increases, this minimum contribution level can get more and more expensive. While the partners may be receiving the maximum contribution allocation under the plan, they may be on the hook for a considerable cost to the staff. In these situations, firms have split their plan in two. Plan 1 benefits the partners of the firm and half the eligible staff employees. Plan 2 also benefits the partners of the firm but includes the other half of the eligible staff employees. The result is a lower contribution level for the staff employees, while allowing the partners to increase their percentage of the total contribution. This is not a design that necessarily works for all professional practices, since there are a number of nondiscrimination testing requirements, but it can be a cost-effective solution in the right circumstances.

III. DEFINED BENEFIT PLANS

A. Defined Benefit vs. Defined Contribution

Through a combination of 401(k) deferrals, employer safe harbor contributions and employer profit sharing contri-

butions, partners of a law firm can make annual deductible contributions up to the statutory limit of $54,000 ($60,000 if over age 50 for 2017). However, Qualified Retirement Plans are not limited to just defined contribution plans. Defined benefit plans can yield tax-deductible contributions far in excess of the $54,000 or $60,000 annual defined contribution limit. This is because the tax code limitations on defined benefit plans apply to the amount an employee can withdraw at retirement, rather than what an employee can fund today. For example, an individual age 62 who has participated in a defined benefit plan for at least 10 years may withdraw approximately $2.7 million. Funding to that number could allow the firm to contribute and deduct over $200,000 per year for that individual.

While defined contribution plans provide employees with an account balance that fluctuates with the market, defined benefit plans instead provide employees with a guaranteed benefit at retirement. Traditional defined benefit plans express these guaranteed benefits in the form of a life annuity payable at the plan's normal retirement date. The larger the guaranteed benefit is under the benefit formula, the larger the tax-deductible contributions may be to fund those benefits.

B. Cash Balance Plans

Many law firms sponsor a type of defined benefit plan known as a cash balance plan. Cash balance plans often allow partners to supplement their profit sharing 401(k) plan with an additional deductible contribution for themselves at a modest increase in staff costs. A cash balance plan is subject to all of the funding requirements and operational and benefit limitations as a traditional defined benefit plan but looks and feels very similar to a defined contribution plan. Benefits in a cash balance plan are expressed as a guaranteed account balance, increased each year by a "contribution credit" and an "interest credit."

Contribution credits may be a percentage of salary formula or a flat dollar formula (or a combination of both), and may be different for different classes of employees. Law firms may want to give one contribution credit formula to partners of the firm and another (usually much lower amount) to staff employees. Cash balance plans may even be designed to give different contribution credit amounts for each individual partner. Contribution credits are usually fairly close if not equal to the actual plan contributions funded by the firm.

Interest credits are given as a guaranteed rate of return by the employer. These are generally either a flat rate or a rate indexed on a bond yield (like the return on the 30-Year Treasury). If the plan assets consistently underperform the guaranteed rate the employer may need to make additional contributions to compensate. However, if plan assets consistently outperform the guaranteed rate, employers may be able to reduce their contributions in subsequent years.

C. Past Service Plans

Cash balance plans generally rely on level funding, where the contribution amount is consistent from one year to the next. This allows firms to rely on a consistent deductible contribution each year. On the other hand, it would typically not allow a firm to make a significantly higher contribution in a year with a substantial windfall. Rather than setting up "level-funded" (also referred to as "accumulation") plans, firms seeing a one-time influx of cash may be looking for alternative designs to shield that income.

Defined benefit plans and cash balance plans are essentially funding toward a target in the future. There can be a number of different paths to get to that same target. For example, a law firm with a single employee wants to design a plan that will result in a lump sum of $300,000 at retirement, which is three years away. A level-funded plan design may yield an annual contribution of around $100,000 per year over the three-year period, culminating in the $300,000 goal. However, since that employee is close enough to retirement, the plan may be designed to allow the firm to be able to contribute $200,000 in the first year on their behalf with a modest $50,000 per year thereafter. Under the right circumstances, the contribution could potentially amount to as much as $300,000 in the first year, with no further funding requirement over the two succeeding years.

The exact funding requirements and deduction limits on these types of plans are based on the demographics of each firm (and, in part, on plan experience), but this example illustrates how this strategy could allow the firm's partners to shelter non-recurring (or "windfall") income from taxes without the need for a substantial cash commitment in future years. This can be very valuable for law firms whose income stream is unpredictable (e.g., irregular contingent fee revenue at the conclusion of successful litigation) but do not have the cash flow for level funding over a period of years.

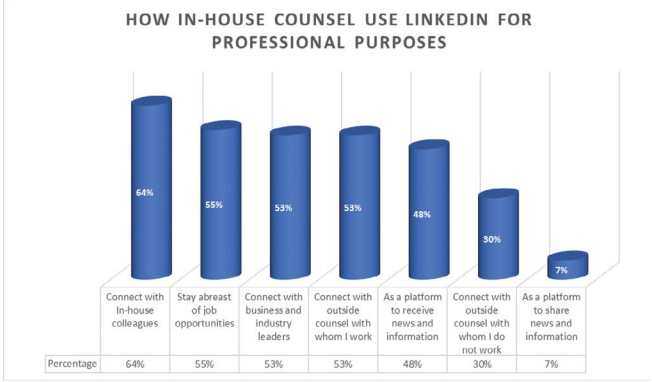
IV. CONCLUSION

Properly designed Qualified Retirement Plans can have substantial benefits for professional practices, and law firms are no exception. Partners can shield substantial income from taxation through their working years and enjoy the results of a tax-deferred "nest egg" upon retirement. These plans can also have the ancillary benefit of functioning as a retention tool for valuable employees by using delayed plan eligibility and vesting provisions. Often, law firms and other professional practices already maintain Qualified Retirement Plans, but do not take advantage of some of the unique design options available to them. Or, plans are set up but not adjusted as the needs of the firm change. As the firm evolves, so should its retirement program. Law firms should look to review their current plan design with a pension expert to ensure they have the best fitting design for the firm as well as its partners. ■

Four Ways to Give Clients What They Want on Your LinkedIn Profile

By Allison C. Shields

This spring, Greentarget and Zeughauser Group released its *2017 State of Digital Content Marketing Survey* report, based on survey responses from in-house counsel as well as law firm CMOs and marketers. The survey revealed that when asked what sources were important when researching lawyers or law firms for potential hire, 71 percent said LinkedIn. Seventy-three percent said they had used LinkedIn for professional reasons within the past week, up from 68 percent in 2015.



The chart below left shows how in-house counsel use LinkedIn generally. When asked how they used LinkedIn specifically with regard to outside counsel, 40 percent of in-house counsel responded that they use LinkedIn to research potential outside counsel, 46 percent use LinkedIn to contact and/or build connections with outside counsel, and 33 percent use it to access content outside counsel pushes out.

According to the survey, when reviewing LinkedIn profiles of outside counsel, 86 percent of in-house coun-

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sel focus primarily on "experience and relevant client matters" more than any other criteria. Only 29 percent pay the most attention to shared articles, updates and comments.

The survey indicates that law firm CMOs and marketers recognize the importance of LinkedIn. When asked whether they provided training for their lawyers on using LinkedIn effectively, only 2 percent responded that they did not offer LinkedIn training and did not plan to do so. Another 7 percent did not currently offer training but did plan to offer it in the future; 41 percent offer informal training, and 50 percent offer formalized training on LinkedIn to their lawyers.

But law firm marketers may be emphasizing the wrong aspects of LinkedIn in their training. According to the survey, those that do offer training emphasize shared updates, articles and comments, and quality of connections. Less than half of the firms offering LinkedIn training focus on what in-house counsel finds most important: experience and relevant client matters.

You want to make sure that your professional headline communicates enough information about you to convince users to click on your name and view your full profile.

Below are four tips you can use to showcase the information about experience and relevant client matters that in-house counsel (and likely other potential clients and referral sources who are professionals or business people) want to see on a lawyer's LinkedIn profile.

Aim for Your Audience

Whether you are targeting in-house counsel, business owners, or divorced moms, your LinkedIn profile should be written in a way that will connect with that audience. Talk about the legal and business issues your clients confront, and use the words they use to describe them.

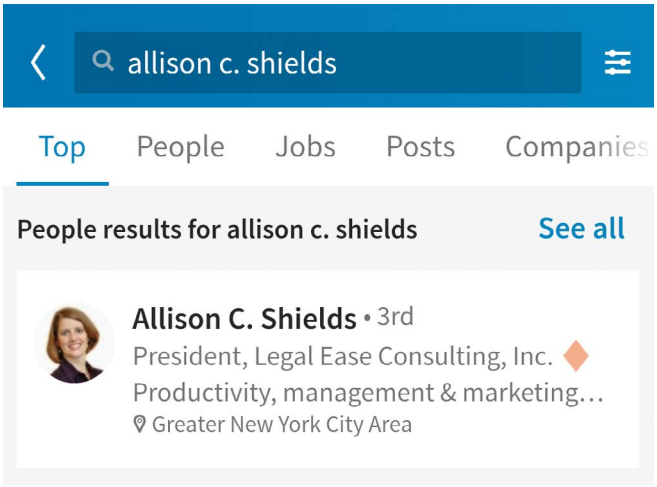
Using keywords that your audience uses will increase your visibility among your target audience and make it more likely that your profile will be returned in search results conducted by your audience.

Stay away from legalese and jargon, unless you are sure that your audience knows, understands, and uses that jargon regularly. Write as if you are speaking directly to your audience. Think more like a journalist and less like a legal brief writer; incorporate who, what, where, why, and when, particularly in your summary and experience sections of your profile. Use bullet points and lists to break up long content.

Show, don't tell. Instead of saying that you have "extensive experience" in your area of practice, that you are "a respected member of the bar," or that you are "skilled at" something, demonstrate those qualities by talking about the work that you do and the clients that you represent.

Pack a Punch with Your Professional Headline

Your professional headline is the line that appears under your name on LinkedIn. When users first encounter you on LinkedIn, they may not be looking at your profile; they may see you as a suggestion in People You May Know on their network page, in search results, in a list of connections, or in a LinkedIn group. In many of those cases, all they will see is your photo, name, and your professional headline:



As a result, you want to make sure that your professional headline communicates enough information about you to convince users to click on your name and view your full profile.

The professional headline is a valuable tool to communicate your area of practice, your knowledge and experience, and to distinguish yourself from other lawyers. Don't limit your headline just to your title or even your title and firm name ("Partner at Flintstone and Rubble, P.C."); if a user is not familiar with your firm, this information may not be enough even to communicate that you are a lawyer (Flintstone and Rubble could be an accounting firm, for example).

Include your firm's name and your title, but add a description of your practice areas or clients keeping your audience in mind. Utilize the 120 characters that LinkedIn makes available.

For example, "Partner at Scooby and Shaggy, LLP, Management-side Labor and Employment Law Trial Attorney," "Elder Law and Estate Planning Associate at Seinfeld & Costanza," or "Partner, Scott, Schrute, Halp-

ert, Beesly & Howard, PC, Risk Management and Legal Malpractice Attorney."

Strengthen Your Summary

The summary appears at the bottom of the main info box at the top of your profile. Although many lawyers either skip over this section or give it short shrift, a good, complete profile should include a strong summary. It is a good opportunity to include keywords in your profile and to highlight your most relevant experience and client matters, whether past or current.

The summary should give a good impression of *what* you do now, *who* you do it for, and *how* you do it, but you should also reference any particularly pertinent prior experience and how it helped you to get where you are. Talk about your approach, the kinds of clients you have worked with, and specific cases or matters that might provide good insight for potential clients or referral sources about what you do.

For example, if Chuck Rhoads entered private practice, his summary might say something like:

> I represent hedge fund managers, business owners, and financial professionals in business, securities, and financial litigation matters, including claims of securities fraud. I practice in all state courts in the New York metropolitan area, as well as the federal courts of the Southern and Eastern Districts of New York. In my 20 years in practice as the United States Attorney for the Southern District of New York, I tried over 1,000 cases, including the landmark case *United States v. Axe Capital*. . . .

Your summary can include up to 2,000 characters, but with the new interface released in early 2017, only the first 200 characters or so will appear when users view your profile unless they click the "See more" link. As a result, those first 200 characters are extremely important; if they don't grab a visitor's attention, that visitor may never see the rest of your summary and may never scroll down to see the rest of your profile. Make sure you include the most important information and keywords in those first 200 characters.

The summary is also a good place to include information that does not fit neatly into other sections of your LinkedIn profile. For example, you may want to include the courts or jurisdictions in which you are admitted to practice, as well as volunteer or charitable work, publications, speaking engagements, or other activities that establish your industry knowledge, commitment to the community or professional excellence.

The summary is often the best place on your profile to include the "Attorney Advertising" disclaimer.

Emphasize Your Experience

The experience section is another area of your LinkedIn profile that should (but often does not) contain more than just cursory information. You have 2,000 characters for each position. Instead of just listing the places you worked and your titles, or copying and pasting your resume or firm bio, use the available space to highlight what clients and referral sources want to know. Include examples or case studies; list important reported decisions and/or representative clients.

You can also add media (images, documents, presentations, or video) to the summary and experience (and education, for law students or recent grads) sections of your profile. Including presentations, checklists, articles, video, etc., in your LinkedIn profile demonstrates your knowledge and experience much better than anything you say about yourself on your profile.

To add media to your profile, on the "Edit Profile" screen, click on the pencil icon in the section where you want to add media. Scroll until you see "Media," and click either the "Upload" or "Link to Media" buttons. Uploading the media to your profile will allow readers to see that content – for example, to view the presentation or video directly within your LinkedIn profile itself.

Focusing on these four tips should provide potential clients and referral sources with the quality information they are looking for on LinkedIn. If you are a more advanced user, you can move on to adding profile sections, such as certifications, publications, projects (which can be used to showcase presentations or important decisions), honors and awards, organizations or volunteer work, incorporating skills and seeking recommendations from clients or colleagues to provide even more value to those who visit your LinkedIn profile. ■

Ensuring Privilege of a Pre-Breach Cybersecurity Assessment

By Erik B. Weinick

While data breaches at Fortune 500 companies and high profile organizations grab the headlines, organizations of all sizes and types must take reasonable steps to safeguard the data they obtain, manage and transfer. After all, cybercriminals are looking to make money as easily as possible and will often target the low hanging fruit offered by ill-prepared smaller companies. As a result, one prudent step organizations of all sizes may wish to consider is performing proactive pre-breach assessments (PBAs) of not only their hardware and software systems, but of their organizational systems and policies. In fact, for some organizations, such as those subject to regulation by New York's Department of Financial Services, conducting a PBA may be a legal requirement.[1] Regardless, conducting a PBA is a prudent business practice that many consultants recommend doing through legal counsel.

Unfortunately, that seemingly reasonable precaution may have an unintended consequence when a subsequent cyberbreach occurs and results in contentious litigation. In that event – and unfortunately, the question of a cyberbreach is one of *when*, not *if* – any conscientious plaintiff's attorney will request production of documents relating to, or concerning, PBAs. In particular, the plain-

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tiff's attorney will seek discovery of any analysis of shortcomings or areas for recommended improvements to the breached organization's cybersecurity systems. Given this likelihood, are there ways for organizations to obtain the benefit of PBAs, while simultaneously reducing the possibility that the PBA itself will become a roadmap for adversaries in later litigation?[2]

While the specific question of whether or not PBAs are privileged has not yet been the subject of published court decisions, analysis of the attorney-client privilege more generally teaches that PBAs may be structured in a manner so as to allow defense counsel for an organization facing a lawsuit over a cyberbreach to argue that the PBA in question is protected by the attorney-client privilege. In the absence of specific judicial guidance, organizations should take two primary steps before proceeding with a PBA in order to best position themselves to argue that the PBA was privileged.

First, the organization should retain outside counsel for the express purpose of conducting the PBA. Counsel's role will be to ensure the organization's compliance with applicable laws, regulations, current policies, and contractual obligations.

Second, outside counsel should, in turn, retain an outside cybersecurity expert or firm (the CE), rather than the organization retaining the CE directly. The CE will assist counsel in determining the organization's compliance with applicable technical standards, as well as identifying areas for improved compliance.

These recommended procedures have their basis in the Supreme Court's seminal case on attorney-client privilege, *Upjohn Co. v. United States*.[3] There, after noting that "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law," the Supreme Court upheld the privilege's applicability to counsel's communications with retained experts whose role is to assist counsel in providing legal advice requested by clients.[4] "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[5] In *United States v. Kovel*, the "giving of information to the lawyer" addressed in *Upjohn* was held to include information obtained from the client by an outside consultant retained by the client's lawyer, which is in turn "translated" for the lawyer so that the lawyer may provide legal advice.[6] Thus, a PBA may arguably be privileged if it is the result of: (i) a request to counsel for legal advice; and (ii) legal counsel's retention of an agent with technical expertise to assist it in the provision of legal advice to the client.

Seen through the prism of *Kovel* and its progeny, it follows that if a client requests outside counsel to conduct a PBA, the communications between the client and counsel, as well as counsel's communications with its retained technical expert, would be considered privileged attorney-client communications. In *Kovel*, Judge Friendly ruled that this privilege can attach to reports prepared by third parties at the request of the attorney or the client, where the purpose of the report is to put information obtained from the client into a usable form.[7] Just as Judge Friendly analogized an accountant to a translator putting the client's information into language that an attorney could effectively utilize, so too would a CE "translate" the technical parameters of the client's hardware and software systems into language that the outside counsel could use to determine the client's compliance with applicable law, regulations and contractual obligations. Of course, basic and traditional procedures for maintaining the attorney-client privilege must still be strictly followed. These well-established conditions may be found in the Second Circuit's decision in *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of Justice*, where the court held that "[t]he attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal assistance."[8]

Also instructive is *United States v. Schwimmer*, where the Second Circuit held that the attorney-client privilege may cover "communications made to certain agents of an attorney . . . hired to assist in the rendition of legal services."[9] Specifically, the court determined that communications from a client to an accountant retained by counsel for a co-defendant with whom he held a joint-defense and common interest privilege could be considered to be privileged as the information was being provided in order to assist both counsel in the provision of legal advice.[10]

Organizations seeking to conduct a privileged PBA should resist the temptation to have it carried out by in-house legal and in-house technical personnel for several reasons. From a non-legal perspective, it is best to retain an outside CE because the in-house team, even if it counts among its members a Chief Information Security Officer (CISO), may not have: (i) as extensive and specific experience and expertise in preventing and correcting cybersecurity breaches (especially if the CISO was appointed merely as a "stop gap" measure in an attempt to comply with regulatory requirements); (ii) the necessary detachment and objectivity to be critical of the systems they may have helped to build, and which they are responsible for maintaining and monitoring on a daily basis; and (iii) the time to stay current on the latest cybersecurity issues and problems confronting organizations with similar cybersecurity concerns.[11]

The same considerations are valid when weighing the use of in-house counsel versus outside counsel. First, especially in smaller organizations, in-house counsel may lack specific expertise and experience in conducting a PBA, and intra-company relationships may impact the level of objectivity and critical thinking, which are crucial to the performance of a worthwhile PBA. Moreover,

courts are apt to deny application of the attorney-client privilege in instances where: (i) an in-house counsel is merely copied on non-legal communications in the hopes that it will transform into a request for, or the provision of, legal advice; and/or (ii) the in-house attorney provides advice that is more business in nature than legal.[12] These obstacles to privilege may fall away when outside counsel is retained for the specific purpose of a PBA.

In the absence of specific published judicial analysis of whether PBAs are privileged, and in an effort to move past the more general analysis provided by courts such as those in *Upjohn*, *Kovel* and *Schwimmer*, it is helpful to analogize to other compliance assessments that routinely employ both outside counsel and outside technical experts equivalent to CEs, serving as an agent of the attorney. Courts have regularly applied the attorney-client privilege when a client is truly seeking legal advice and is not merely employing in-house or even outside counsel as window dressing, and when that counsel, in turn, retains a necessary expert agent. In such instances, the communications and resulting report were privileged and undiscoverable by plaintiff's counsel in later litigation concerning the topic of the report. As these courts have held, the attorney-client privilege "undeniably extends to communications with 'one employed to assist the lawyer in the rendition of professional legal services.'"[13]

For example, in a 2013 Ohio case, communications between in-house counsel and an outside environmental consulting and services firm were found to be privileged because they were "for the specific purpose of explaining or interpreting technical data so as to allow counsel to provide legal advice" to the party and, as such, are protected by the attorney-client privilege.[14]

A further example in the context of environmental actions is found in the oft-cited *U.S. Postal Service v. Phelps Dodge Refining Corp*.[15] That litigation centered on the defendant's alleged failure to fulfill certain contractual obligations concerning the environmental status of the property it had sold to the plaintiff. The court overruled a claim of attorney-client privilege for communications between outside counsel and the engineering firm that had been hired years earlier to oversee remedial environmental work supervised by a state environmental agency, because the engineers were not employed by counsel specifically to assist them in rendering legal advice, but rather were retained directly by the defendants to formulate and implement a remediation plan acceptable to the governmental oversight agency.[16] Critically, the consultant's work was not based upon information obtained directly from the client and put into usable form for counsel, but rather, was based upon information obtained by the consultant from other sources. In contrast, the structure recommended by this article for conducting PBAs has the consultant retained by the attorney obtaining information directly from the ultimate client which bolsters the argument that the consultant is "translating" for the attorney so as to allow the attorney to provide legal advice.

In *Dukes v. Wal-Mart Stores, Inc.*, the court was asked to determine whether defendant Wal-Mart could continue to assert attorney-client privilege protection for an extensive memo prepared by Wal-Mart's outside counsel prior to the inception of the litigation and later leaked to *The New York Times*.[17] That memo contained the results of counsel's investigation of, and opinions regarding, the same labor practices that were at the center of the subsequent litigation. The court recognized the presumption of privilege for the memo and went on to hold that because the disclosure of the memo had not been authorized, Wal-Mart had not waived the attendant privilege.[18]

Albeit in the context of a post-incident investigation, the court in *U.S. v. ISS Marine Services, Inc.*, rejected a claimed privilege where outside counsel had been purposely excluded from the investigation process by the client.[19] There, the defendant was a government contractor providing support services in the Middle East. Two employees attended a workshop and conducted an inspection of corporate facilities in Dubai and Bahrain. While at those locations, the employees noticed practices that they believed exposed the company to liability for fraudulent conduct. They reported this conduct to their superiors. In response, a senior vice president contacted outside counsel. Outside counsel prepared a draft engagement letter to cover the conduct of an internal investigation. The company ultimately rejected the engagement and conducted the investigation on its own, even after being warned that it would not be protected by the attorney-client privilege.[20] During subsequent litigation, the government requested the results of that investigation and report. The company resisted production on the grounds that outside counsel had eventually received and consulted on the report. The court rejected the claimed privilege, finding it to be premised on the gimmick of excluding outside "counsel from conducting the internal investigation but retain[ing] them in a watered-down capacity to 'consult' on the investigation in order to cloak the investigation with privilege."[21] The lesson here is obvious: counsel must truly be directing a process whose primary aim is the provision of legal advice to the client. In the context of a PBA, the strongest argument for the applicability of the attorney-client privilege will be where outside counsel and a CE were retained for the specific purpose of conducting the PBA, actually do conduct the PBA, and are not merely window dressing for the organization conducting the assessment itself.

Consistent analyses and outcomes also appear in the context of tax disputes. For example, in *Cottillion v. United Ref. Co.*, a communication between members of a corporation's retirement committee, outside counsel and the corporation's actuarial consultant regarding IRS and ERISA issues was deemed privileged, because the consultant's involvement was for the purpose of assisting with

the provision of legal advice.[22] By contrast, however, in *United States v. Richey*, the court rejected a claim of privilege where the retained consultant had performed a valuation in order to determine the amount of a charitable tax deduction that could be taken, as opposed to assisting with the provision of legal advice as to the validity of that deduction.[23] Clearly, courts are more inclined to uphold a claim of privilege where the outside counsel is directing a process whose goal is to provide legal advice.

Companies that wish to gird themselves against the ever-present threat of cyberattacks should engage outside counsel to provide them with legal advice on their compliance with the laws, regulations and contractual obligations that apply to them in the context of data protection. Companies which rely solely on in-house legal and technical expertise are vulnerable to having courts reject their claims that their PBAs were privileged. On the other hand, organizations which request that outside counsel direct a PBA with the assistance of CEs and advise the organization on compliance, with applicable legal obligations, will be better positioned to argue that the results of the PBA should remain privileged in the event of litigation following the breach that is likely to be visited upon even the most cyber-savvy and vigilant of organizations. ■

1. See 23 N.Y.C.R.R. 500 (requiring covered entities to "assess [their] specific risk profile[s] and design a program that addresses its risks in a robust fashion.").

2. By contrast, post-breach investigations will almost certainly be conducted in "anticipation of litigation," making the application of privilege that much more critical. As a result, this article does not address post-breach investigations. *See Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 54 (S.D.N.Y. 2000).

3. 449 U.S. 383, 389 (1981).

4. *Id*. at 389.

5. *Id*. at 390.

6. *See United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), discussed *infra*.

7. *Id*. at 922–23.

8. 697 F.3d 184, 207 (2d Cir. 2012) (*citing United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011)).

9. 892 F.2d 237, 243 (2d Cir. 1989), *cert. denied*, 502 U.S. 810 (1991).

10. *Id*. at 244. *See also Scott v. Chipotle Mexican Grill, Inc.*, 103 F. Supp. 3d 542, 547 (S.D.N.Y. 2015) (under *Kovel* and its progeny, "an attorney's agent's communications do not fall under the attorney-client privilege unless she is communicating with the attorney in confidence and in a way that is necessary for the attorney to render legal advice to the client."); 2 Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S EVIDENCE ¶ 503(a)(3)[01] at 503-31–38 (1993) (application of privilege in *Kovel* recognized as extending to representatives of the attorney, such as accountants; administrative practitioners not admitted to the bar; and non-testifying experts).

11. "The biggest and most common mistake when it comes to evaluating cyber security is to ask the internal IT department. It is obvious that the people responsible for maintaining cyber security will not question their work by pointing out possible vulnerabilities. Therefore, the assessment of cyber security should at least be undertaken by bringing in someone from another department of the company or, often even better, by bringing in outside experts." Roundtable: Cyber Security, FINANCIER WORLDWIDE MAGAZINE (January 2017), https://www.financierworldwide.com/roundtable-cyber-security-jan17/#.WJt3fG8rIdU.

12. *See, e.g., U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994) ("the mere fact that a communication is made directly to an attorney, or an attorney is copied on a memorandum, does not mean that the communication is necessarily privileged" and the "multi-faceted duties [of in-house counsel] that go beyond traditional tasks performed by lawyers" necessitates a close examination of whether the in-house attorney is providing legal versus business advice); *OneBeacon Ins. Co. v. Forman Int'l, Ltd.*, No. 04 Civ. 2271(RWS), 2006 WL 3771010, at *5–6 (S.D.N.Y. Dec. 15, 2006) ("[i]nvestigatory reports and materials are not protected by the attorney-client privilege or the work-product doctrine merely because they are provided to, or prepared by, counsel.").

13. *United States v. Singhal*, 842 F. Supp. 2d 1, 5 (D.D.C. 2011) (citing *Linde Thomson v. Resolution Trust Corp.*, 5 F.3d 1508, 1514 (D.C. Cir. 1993) and *Calvin Klein Trademark Trust v. Wachner,* 124 F. Supp. 2d 207, 209 (S.D.N.Y. 2000) ("attorney-client privilege may be preserved even when confidential communications are disclosed to a third party – such as an investment banker – as long as the third party is serving an 'interpretive function' to aid the lawyer in helping the client")).

14. *In re Behr Dayton Thermal Prods., LLC*, 298 F.R.D. 369, 374 (S.D. Ohio 2013) (citing *Graff v. Haverhill N. Coke Co.*, No. 1:09-CV-670, 2012 WL 5495514, at *9 (S.D. Ohio Nov. 13, 2012)).

15. 852 F. Supp. 156 (E.D.N.Y. 1994).

16. *Id.* at 161.

17. No. 01-cv-2252 CRB (JSC), 2013 WL 1282892 (N.D. Cal. Mar. 26, 2013).

18. *Id*. at *5–9.

19. 905 F. Supp. 2d 121 (D.D.C. 2012).

20. *Id*. at 124–25.

21. *Id*. at 129.

22. 279 F.R.D. 290, 304–05 (W.D. Pa. 2011) (citing *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 476–77 (E.D. Pa. 2005) and *In re CV Therapeutics, Inc. Sec. Litig.*, No. C-03-3709 SI (EMC), 2006 WL 1699536, at *6 (N.D. Cal. June 16, 2006), *as clarified on reconsideration*, No. C-03-3709 SI (EMC), 2006 WL 2585038 (N.D. Cal. Aug. 30, 2006)).

23. 632 F.3d 559, 566–67 (9th Cir. 2011).

"Perhaps you'd like to reconsider that last answer."

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) is a member of Geringer, McNamara & Horowitz in New York City. He has represented parties in personal injury, professional negligence, and commercial cases for over 26 years. In addition to his litigation practice, he acts as a private arbitrator, mediator and discovery referee, and is now affiliated with JAMS. He is the author of *Bender's New York Evidence* and *New York Civil Disclosure* (LexisNexis), as well as the most recent supplement to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches New York Practice at Columbia Law School and lectured on that topic, on behalf of the New York State Board of Law Examiners, to candidates for the July 2016 bar exam. He serves as an expert witness and is a frequent lecturer and writer on civil practice, evidence, ethics, and alternative dispute resolution issues. He serves on the Office of Court Administration's Civil Practice Advisory Committee, is active in a number of bar associations, and served as Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee.

Groundhog Day

Introduction

This month's edition of the *Journal* is devoted to law practice management, and it occurred to me that the rules governing civil litigation in New York State, the Civil Practice Law & Rules (CPLR), generally organized chronologically to follow the life of a civil action, provide a useful framework for managing litigation. Unfortunately, its utility as a litigation roadmap is greatly diminished because so many of the rules governing civil practice reside outside the CPLR, and the CPLR plays an ever diminishing role in regulating New York's civil practice.

Complicating matters is a significant roadblock to utilizing those other rules: you have to find them first.[1] Locating and integrating all of the governing rules outside the CPLR has become increasingly difficult in the 54 years since the CPLR was enacted.[2] Sadly, an excellent guide to these rules, Zimmerman's Research Guide, prepared by Andy Zimmerman, Manager of Library Services for the D.C. office of Morgan Lewis & Bockius, is no longer available.[3]

So, for an attorney sallying forth in a New York civil action, using only the CPLR is akin to planning a summer road trip using a map containing half the roads and half the towns in the state. You may get where you want to go. Then again, you may not.

A Modern Day Snipe Hunt: Locating All Applicable Rules

A wonderful American idiom is "snipe hunt," defined this way:

1. An elaborate practical joke in which an unsuspecting person takes part in a bogus hunt for a snipe, typically being left alone in the dark with instructions not to move until the snipe appears.
2. A futile search or endeavor.[4]

To embark on the quest to know all applicable rules of New York civil practice is to embark on a snipe hunt. To successfully navigate a straightforward single-plaintiff/single-defendant Supreme Court action requires utilizing, in addition to the CPLR, the Rules of the Chief Judge,[5] Rules of the Chief Administrative Judge,[6] Uniform Rules of the Trial Courts,[7] Uniform Rules for Jury Selection and Deliberation,[8] Uniform Rules for the Conduct of Depositions,[9] Judicial District Rules,[10] County Rules,[11] and Individual Justices' Rules.[12] If there is an appeal, add in the rules of the relevant Appellate Department,[13] and perhaps even those of the Court of Appeals.[14] Oh, and it might not be a bad idea to be familiar with New York's Rules of Professional Conduct.[15] Notwithstanding that I have taught New York Practice for more than 15 years, I am certain of one thing: I have missed a few of the applicable rules in my summary *above*, and in the course of writing this column I've come across a set of rules I never knew existed (I am too embarrassed to say which one).

Add to the mix pre-printed Preliminary Conference and Compliance Conference forms incorporating directives which may or may not dovetail with the various rules, judges' unwritten rules, and "local practices," and you have a situation where even very experienced litigators can have trouble identifying every possible rule that can impact a case.

If your case is in a specialized court, for example the Commercial Division, you will also have to be aware of the rules of practice in that court. The Commercial Division Rules are quite extensive, affect many aspects of litigation in ways that are often at odds with the CPLR, and are constantly evolving.[16] For cases assigned to the Commercial Division there are statewide rules,[17] county rules applicable to Commercial Division cases[18] and, of course, individual justices' rules.[19]

So it would come as no surprise if a prominent authority on civil practice described New York's civil practice rules this way:

> We have been too long cowed by the [Rules], by a monster of complexity created by us and for us, so that no one dares – except on an ad hoc basis – reexamine this

creature that controls so much of what we do.

It's *Déjà Vu* All Over Again

New York's civil practice rules have been described that way, and while the description is apt for our current state of affairs, the quote is not about today's state of affairs, or even about the CPLR. It is from an article in this publication from 1958 lamenting the state of the Civil Practice Act, the New York Code of Civil Procedure which preceded, and was replaced by, the CPLR in 1963. The article was authored by then-Columbia Law School Professor of Law, now Eastern District of New York United States District Court Judge, Jack B. Weinstein.

Today, Judge Weinstein might feel a bit like Pittsburgh weatherman Phil Connors reporting on Groundhog Day from Punxsutawney, Pennsylvania: It's 6 a.m. and civil practitioners are, once again, cowed by a monster of complexity.

Could Things Get Any Worse?

Learning the rules of civil practice in New York is an inherently difficult task. Compounding this difficulty, and combining with it in what may be a "perfect storm" battering civil practice in New York courts, is the recent change to the New York State Bar Examination.

In July of 2016, those sitting for the bar examination in New York took, for the first time, the Uniform Bar Exam (UBE) in place of the traditional New York Bar Examination. The UBE is described by the New York State Board of Law Examiners this way:

> The Uniform Bar Examination (UBE) is a high quality, uniform battery of tests that are administered contemporaneously in every other jurisdiction that has adopted the UBE. It consists of the Multistate Bar Examination (MBE), the Multistate Performance Test (MPT), and the Multistate Essay Examination (MEE).
>
> The UBE tests knowledge of general principles of law, legal analysis and reasoning, and communication skills – essentially, it tests the fundamental knowledge and lawyering skills that are needed to begin the practice of law. The UBE is uniformly administered, graded and scored, and it results in a score that can then be transferred to other UBE jurisdictions.[20]

So, the UBE is all about general legal principles and while, as Jerry Seinfeld would say, "not that there's anything wrong with that," what is missing, of course, is any testing of any aspect of New York law including, but not limited to, the rules of civil practice.

> To embark on the quest to know all applicable rules of New York civil practice is to embark on a snipe hunt.

Not that New York law was entirely forgotten. As a condition for admission to the New York Bar, UBE exam takers are required to take the online New York Law Course and pass an online, multiple-choice test:

> Upon recommendation of the Advisory Committee on the Uniform Bar Examination (UBE), the New York Court of Appeals adopted the UBE effective with the July 2016 administration of the New York State bar examination. The Advisory Committee also recommended, and the Court of Appeals adopted, a requirement that applicants for admission in New York be required to complete an online course on New York law and take and pass an online examination on New York law, as a requirement for admission.[21]

What is the New York Law Course?

> The NYLC is an online, on demand course on important and unique aspects of New York law in the subjects of Administrative Law, Business Relationships, Civil Practice and Procedure, Conflict of Laws, Contracts, Criminal Law and Procedure, Evidence, Matrimonial and Family Law, Professional Responsibility, Real Property, Torts and Tort Damages, and Trusts, Wills and Estates. The NYLC consists of approximately 15 hours of videotaped lectures with embedded questions which must be answered correctly before an applicant can continue viewing the lecture. Applicants are expected to watch, in good faith, each video in its entirety. The time spent watching each video in the NYLC will be electronically audited by the Board.[22]

Hardly the traditional weekly three, four, or even six-hour doctrinal New York Practice class traditionally offered in New York law schools.

Two consequences of New York's adoption of the UBE, certainly unintended and perhaps unanticipated, almost certainly guarantee that attorneys admitted to practice in New York under the UBE will most likely have no exposure to New York Practice, other than the New York Law Course, before their admission to the New York Bar.

The first consequence is that law students in their final year of law school recognize that New York no longer tests, *inter alia*, New York Practice. Consequently, attendance in New York Practice classes in New York law schools throughout the state has plummeted. Anecdotally, attendance in New York Practice in some law schools has declined by as much as 90 percent. My own New York Practice Seminar & Workshop at Columbia Law School has not run for the last two years due to a lack of enrollment.[23]

The virtual demise of New York Practice as an "unofficial" required course in New York law schools will have an impact beyond simply a lack of familiarity with the rules. One of the deans of New York Practice, Professor Vincent C. Alexander at St. John's University School of Law, summarized numerous benefits inherent in taking New York Practice:

> First and foremost, teaching students in an advanced civil proce-

dure course that concentrates on the CPLR helps them prepare for civil litigation in all of the state courts of New York. As we all know, New York has numerous civil courts of original subject matter jurisdiction – a distressing feature for students and litigants alike. What is sometimes overlooked, however, is that the CPLR governs the procedure in all of those courts unless some specific statute says otherwise. Even for students who intend to practice law in other states, an in-depth study of the CPLR will enhance their ability to cope with complicated procedural issues, regardless of the applicable code.

Furthermore, an analysis of the CPLR indirectly gives students a deeper understanding of the Federal Rules of Civil Procedure, the code that is presented to them in their first-year civil procedure course as the ideal. Students in a CPLR course have an opportunity to compare and evaluate solutions to procedural issues that may be quite different from the Federal Rules. Although many CPLR provisions, by design, are identical in substance to the Federal Rules, the CPLR has a fair number of eccentricities.

* * *

Through a process of comparative analysis, the dedicated student will complete the CPLR course with a deeper understanding of both the CPLR and the Federal Rules. The student who masters the CPLR will be well positioned to maneuver through the procedural thickets that lurk both in New York and other jurisdictions.

A CPLR course also enables students to reflect upon the entire breadth of New York civil substantive law. Most students taking the New York practice course are seniors, and the course offers a useful capstone to their study of the substantive law. Many of the Court of Appeals decisions contained in Professor Oscar G. Chase's authoritative casebook arise in a context that facilitates a quick review of major substantive concepts.[24]

The second consequence of the adoption of the UBE is that bar review courses, a necessary evil for all hoping to regurgitate years of law school study over the course of a two-day examination, no longer cover New York Practice. Why? Because it is no longer tested and, therefore, is of no more utility to a bar examination test-taker than French poetry, calculus, or knitting.

Since nearly every bar exam test-taker enrolls in a bar review course, those sitting for the bar examination before July of 2016 had a thorough, albeit compressed, exposure to New York Practice and, given the prominence of recency in retaining information, that exposure provided a foundation for those practicing in New York on the civil side. To quote Othello, "no more of that."

Conclusion

Judges are understandably unhappy when lawyers appearing before them do not know the applicable rules. Lawyers are unhappy when their adversaries practice unaware of the applicable rules, often creating unnecessary work and causing delay. Lawyers are frustrated when judges appear to countenance sloppy practice through lax enforcement of the rules.

Ignorance may be bliss in certain aspects of life, but lawyers at the bar in New York should not take refuge there when it comes to mastering the rules of civil practice. Procedure can be learned, and sources can be identified, no matter how "new," or "old," an attorney is. As my first legal mentor, Ira Bartfield, Esq., was fond of remarking, "Just because wisdom comes late in life is no reason to reject it." So, while it is certainly true that the creature identified by Judge Weinstein, in its most recent form, bears some responsibility for our current state of affairs, we must all make more of an effort to learn the rules of the road we travel in New York's civil courts. ■

1. Finding the CPLR is not difficult, and it is readily available, online and for free, so that laypersons with unfilled leisure time can peruse the rules. Of course free is not always the bargain it seems. I found a version of the CPLR available online for free at newyorkcplr.com. I clicked on the link for article 31 (Disclosure) and clicked on the first link, for CPLR 3101 (Scope of disclosure), and was taken to . . . CPLR 3201 (Confession of judgment before default on certain installment contracts invalid).

2. A partial listing of where rules may be found can be found at https://cardozo.yu.edu/finding-court-rules.

3. A farewell to Zimmerman's Research Guide can be found at https://www.lexis-nexis.com/infopro/keeping-current/b/weblog/archive/2015/12/10/farewell-to-zimmerman-s-research-guide.aspx.

4. http://www.thefreedictionary.com/snipe+hunt.

5. http://www.nycourts.gov/rules/chiefjudge/index.shtml.

6. http://www.nycourts.gov/rules/chiefadmin/index.shtml.

7. http://www.nycourts.gov/rules/trial-courts/202.shtml.

8. http://www.nycourts.gov/rules/trial-courts/220.shtml.

9. http://www.nycourts.gov/rules/trial-courts/221.shtml.

10. *See, e.g.*, Third Judicial District Rules, http://www.nycourts.gov/courts/3jd/JudgesRules/3JD-Judges%20Rules.shtml.

11. *See, e.g.*, http://www.nycourts.gov/courts/1jd/supctmanh/Uniform_Rules.pdf.

12. *See, e.g.*, Rules of Justice James P. McClusky, http://www.nycourts.gov/courts/5jd/jefferson/supremecounty/rules.shtml.

13. *See, e.g.*, Rules of the Appellate Division Fourth Department, http://www.nycourts.gov/courts/ad4/Clerk/AD4-RuleBook-web.pdf.

14. *See* The New York Court of Appeals Civil Jurisdiction and Practice Outline, http://www.nycourts.gov/ctapps/forms/civiloutline.pdf.

15. http://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf.

16. In fact, if you regularly practice in the Commercial Division, you might want to set your home page to http://www.nycourts.gov/rules/comments/index.shtml.

17. http://www.nycourts.gov/rules/trial-courts/202.shtml#70.

18. *See, e.g.*, Nassau County Commercial Division rules, http://www.nycourts.gov/courts/comdiv/nassau.shtml.

19. *See, e.g.*, Commercial Division Rules of Justice Linda S. Jamieson, http://www.nycourts.gov/courts/comdiv/PDFs/Westchester_Rules_Jamieson.pdf.

20. http://www.nybarexam.org/ube/ube.html.

21. http://www.nybarexam.org/ube/ube.html

22. *Id.*

23. I know, I'm blaming the UBE rather than any pedagogic shortcomings on my part.

24. Alexander, Vincent C., *The CPLR at Fifty: A View from Academia* (2013). *Faculty Publications.* Paper 2. http://scholarship.law.stjohns.edu/faculty_publications/2.

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

Moments in History

Attorney Advertising

Worldwide spending on advertising reached nearly half a trillion dollars in 2012, with the United States as the largest market at $152.3 billion. Lawyer and law-firm advertisements account for only a small fraction of those expenditures, but they would not exist at all if not for the Supreme Court's decision in *Bates v. State Bar of Arizona*.

American lawyers of the 18th and 19th centuries typically were ill-disposed to promoting either themselves or their services through advertising. The Canons of Professional Ethics adopted by the American Bar Association (ABA) in 1908 noted that "the most worthy and effective advertisement possible . . . is the establishment of a well-merited reputation for professional capacity and fidelity to trust." The ABA's 1969 Code of Professional Responsibility prohibited advertising beyond listing specified information on business cards, stationery, office signs, and approved law directories.

In 1976, John Bates and Van O'Steen placed an ad in a Phoenix newspaper for their legal clinic. The ad announced: "LEGAL SERVICES AT VERY REASONABLE FEES" and set out prices for particular services, such as uncontested divorce, adoption, bankruptcy and change of name. The State Bar of Arizona suspended them for violating a disciplinary rule applicable to Arizona lawyers that prohibited advertising.

Reiterating holdings that commercial speech fell under the First Amendment, the U.S. Supreme Court struck down the Arizona ethics code provision barring lawyer advertising. It found that advertising that communicates truthful and valuable information to consumers serves both individual and societal interests and could "not be subjected to blanket suppression." The Court carefully limited its ruling, not commenting on advertising that relates to the quality of legal services and leaving states free to regulate attorney advertising through "reasonable restrictions on the time, place, and manner."

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

A Guide to Understanding the Laws of Interest

By Adam Leitman Bailey and Dov Treiman

While prohibited in many religious traditions,[1] interest is one of the most pervasive concepts in the American economy. Seemingly simple on its surface, it presents a bewildering amount of complexity as soon as one digs into its legal implications. Real estate practitioners, in particular, must know the rules of interest in various scenarios, ranging from when negotiating a mortgage or charging rent, to knowing the full monetary stakes at risk in litigation.

Periods to Which Interest Attaches

In New York litigation, there are three periods to consider regarding interest: the interposition of the claim until verdict or decision, from then until judgment, and from judgment to payoff. CPLR 5004 dictates that all three time periods shall qualify for 9 percent simple annual interest unless the parties contract[2] some other rate below usury.[3] CPLR 5003 allows interest on any money obligation reduced to judgment, including judgments on claims that do not carry interest prior to judgment.[4] Equitable claims can, in the court's discretion, also garner interest.[5] Section

Adam Leitman Bailey, Esq. practices residential and commercial real estate law. He is one of two attorneys at New York real estate law firms with under 30 attorneys to be been ranked in Chambers & Partners, honored with a Martindale-Hubbell "AV" Preeminent rating, a Best Lawyer ranking for himself and his law firm, and selected as one of New York's Top 100 attorneys by Super Lawyers. A New York State Judge wrote that Mr. Bailey "was the best trial lawyer I saw in my nine years as a Judge in New York City" and *The Commercial Observer* named him as one of New York's Most Powerful Real Estate Attorneys. **Dov Treiman** chairs Adam Leitman Bailey, P.C.'s Landlord-Tenant Civil Litigation Practice and is a partner at the firm. Mr. Treiman has participated in many of the most important landlord-tenant cases of this generation and is the Editor and Commentator of the *Housing Court Reporter*, the standard work used by all the New York City courts and all quality practitioners of landlord-tenant law to search through some 50,000 cases for applicable precedents for appellate briefs, legal documents and motions. Mr. Treiman was commissioned by the State of New York to produce special editions of several of these works for their use in chambers by each of the 51 Housing Judges. *The authors would like to thank Hofstra Law student and Adam Leitman Bailey, P.C. spring extern and 2017 summer associate, Carly Clinton, for her research and assistance with the preparation of this article. Starting next September, she will be joining the Firm as an associate.*

1961 of 28 U.S.C. does the same thing for federal claims and sets interest at "a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." In federal litigation, the New York interest rate governs pre-judgment and the federal rate controls post-judgment, both unless the parties in "clear, unambiguous and unequivocal language" stipulate otherwise.[6]

Computing Simple Interest

CPLR 5001 defines the date from which interest is computed as "the earliest ascertainable date the cause of action existed. In cases where damages incurred at various times, interest is computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." In cases where there are damages that accrued at different times, such as torts, interest can be computed separately on each segment measured from its own moment of accrual. In selecting the intermediate date, courts have considerable latitude, but if all the amounts at the various dates are roughly equal in amount, courts frequently choose a date that is simply halfway between the first and last date the liabilities accrued. In an ejectment action, the First Department in *Rose Assoc. v. Lenox Hill Hosp.*[7] specifically endorsed this computational method, holding a "midway point constitutes a 'single reasonable intermediate date' from which to calculate interest under CPLR 5001 (b)."

In terms of foreclosure actions

> in an action on a promissory note, CPLR 5001 permits a creditor to recover prejudgment interest from the date on which each payment of principal or interest became due under the terms of the note until the date which liability is established . . . . [But, i]f a promissory note does not contain an interest provision but is payable on demand, then interest accrues from the date of the demand, at the statutory rate for judgment.[8]

Problems in Calculating Interest

Deciding whether courts should "substitute the so-called 'present value' method of computing interest . . . for the traditional method of computation in determining whether interest is usurious," the Court of Appeals in *Band Realty Co. v. N. Brewster, Inc.*[9] held "interest on the whole amount of principal agreed to be paid at maturity not exceeding the legal rate, may be taken in advance."

Spodek v. Park Property Development Associates,[10] a case involving a note calling for monthly payments, each requiring a separate calculation of interest running from each defendant individually, unraveled the complex calculations the note's scheme required. While the defendants' defaults went beyond the six-year statute of limitations, the court allowed the defaults within the six years to be entitled to a CPLR 5001 interest calculation, holding it simple interest. *Spodek* did not find totaling the separately calculated amounts for judgment to be forbidden compounding of interest, but instead ruled it to be just ordinary permissible addition.

Higher Interest by Contract

Parties can validly contract for interest above the statutory rate, but below the usury rate.[11] "It is well settled that when a contract provides for interest to be paid at a specified rate until the principal is paid, the contract rate of interest, rather than the legal rate set forth in CPLR 5004, governs until payment of the principal or until the contract is merged in a judgment."[12] "Where there is a clear, unambiguous, and unequivocal expression to pay an interest rate higher than the statutory interest rate until the judgment is satisfied, the contractual interest rate is the proper rate to be applied."[13]

Usury Statutes

New York has three usury statutes: General Obligations Law (GOL) § 5-501(2), Banking Law §§ 14a(1) and 108 and Penal Law § 190.40. The GOL and Banking Law set the maximum interest rate at 16%. The Penal Law establishes a rate of 25% as a felony. In all cases, the rate is the effective annual rate.

Courts construe GOL § 5–501(2)'s "interest on the loan or forbearance" literally. It only affects loaned money and not merely money owed for some non-loan like rent, taxes, or fines. Ruling on late fees, for example, the First Department in *Protection Industries Corp. v. Kaskel*[14] specified that a late fee is not a forbearance. The Fourth Department in *F. K. Gailey Co. Inc. v. Wahl,*[15] agreed, writing:

> We reject defendant's contention that the late fee of 2% charged by plaintiff was usurious. The late fee was not a loan or forbearance of money and thus the usury statute does not apply.

While privately imposed interest penalties meant to be so punitive as to discourage any possibility of lateness are unacceptable, usury does not apply to municipal impositions on citizens. Establishing a landmark in this field of interest analysis, in *Waterbury v. City of Oswego,*[16] the Fourth Department held:

> We also reject plaintiff's contention that the late fee is usurious under General Obligations Law § 5-501(2). The late fee is a penalty for failure to pay a water bill when due. It is designed to insure the prompt payment of water bills and is clearly not a loan or forbearance of money. Where there is no loan, there can be no usury.

The Court of Appeals adopted this reasoning in *Seidel v. 18 East 17th Street Owners, Inc.*,[17] holding, "If the transaction is not a loan, there can be no usury, however unconscionable the contract may be."

However, pursuant to GOL § 5–501(6)(a), where the loan or forbearance amounts to $250,000 or more, there is no limitation below criminal usury on the amount of interest that one may charge.[18]

Usury Analysis Applied

In spite of the principle that "usury" is inapplicable for anything but a loan, usury analysis still voids a contract where the penalties for late payment are too severe. Courts look at flat late fees and recompute them as interest percentages and then invoke the usury statutes. For example, in *Sandra's Jewel Box v. 401 Hotel*,[19] the First Department stated:

> Moreover, the late charge provision of the lease, which awarded a 365% per annum penalty, should not be enforced. The charge, while not technically interest, is unreasonable and confiscatory in nature and therefore unenforceable when examined in the light of the public policy expressed in Penal Law §190.40, which makes an interest charge of more than 25% per annum a criminal offense.

With certain exceptions, such as usury, GOL § 5-527 permits compound interest.

Reiterating the same principle, the First Department in *Clean Air Options v. Humanscale*[20] held, "The late fee, which according to the parties' calculations results in an annual interest rate of 78%, is 'unreasonable and confiscatory in nature.'"[21]

In addition, the court has stated:

> A corporation may not interpose a defense of civil usury . . . An individual guarantor of a corporate obligation is also precluded from asserting such a defense . . . However, where a corporate form is used to conceal a usurious loan made for personal, not corporate purposes, the defense of usury may be interposed . . . Further, the prohibition against asserting such a defense does not apply to a defense of criminal usury where interest in excess of 25% per annum is knowingly charged.[22]

Under 12 U.S.C. § 1735f-7a(a)(1), federal law preempts state usury laws for first mortgages on real property made after March 31, 1980 for federally related mortgage loans.[23] The Second Circuit Court of Appeals in *Wolfert v. Transamerica Home First*[24] found New York's usury laws preempted under this statute.

Estoppel

One may naturally question the legal significance of the one who is charged the excessive interest participating in crafting the transaction. This should and can give rise to a theory of estoppel. In *Seidel v. 18 East 17th Street Owners, Inc.*,[25] the Court of Appeals instructed on two variants of the theory of *estoppel in pais*. The first is when the supposed victim of usury executes an estoppel certificate. The certificate serves to prevent a later contest by the certificate's signor on the basis of usury. The second is where the supposed victim of the usury is the one who actually engineered the usurious arrangement, provided there is an intimate relationship between the usurer and the usuree so that the usuree tricked the usurer into committing the usury. In *Pemper v. Reifer*,[26] the First Department held:

> The fact that the borrower sets the rate of interest does not relieve the lender from a defense of usury. . . . In this regard, a borrower, who, because of a fiduciary or other like relationship of trust with the lender, is under a duty to speak and who fails to disclose the illegality of the rate of interest he proposes, is estopped from asserting the defense of usury where the lender rightfully relies upon the borrower in making the loan.

Thus, this latter form of *estoppel in pais* is limited to relationships where the nature of the relationship is such that at least one of the parties has a background with the other giving rise to a heightened sense of trust, rather than arm's length.

Understanding Compound Interest

The Court of Appeals defined "compound interest" in *Spodek v. Park Prop. Dev.*,[27] writing, "Compound interest is commonly defined as 'interest on interest' or interest that is 'paid on both the principal and the previously accumulated interest.' This contrasts with simple interest, which is 'paid on the principal only and not on accumulated interest.'"

For example, consider a $100 January first debt at 2% per month. Assuming the debt remains unpaid, at simple interest, the accumulated interest is 12 x 2% or 24% for a payoff of $124.00.

Now, let us use compound interest at 2% interest per month. At the end of January, the debt has grown to $102 ($100 + 2% of $100). At the end of February, $104.04 ($102 + 2% of $102), then March, $106.12 ($104.04 + 2% of $104.04). Continuing this pattern through the year, the accumulated debt at the end of December is $126.82. The accumulated interest is $26.82, nearly two points above criminal usury.

With certain exceptions, such as usury, GOL § 5-527 permits compound interest. The law assumes simple interest unless the parties contract otherwise. "[M]ere silent acquiescence in [an] account stated [does] not constitute an express promise to pay compound interest."[28]

Technically, the explanation of compound interest given above was for "periodic compound interest" where the compounding takes place at the end of some fixed period like once a month, but it could be *any* fixed period such as weekly, biweekly, or annually. The only limitation is the usury laws that look to how the interest adds up for a one-year period, regardless of how it is achieved. Non-periodic compound interest occurs with certain landmark events that take accumulated interest and effectively add it to the principal of the debt before establishing that prin-

cipal plus interest as the new principal to which to apply fresh interest. Thus, where a contract called for interest, it normally is charged until the judgment and is then fixed at that amount, to which the statutory post-judgment interest is now imposed, effectively "compounding" the interest by the event of the entry of judgment.[29]

While normal judicial awards against a governmental body are, like those against private citizens, simple interest, eminent domain presents a special case. Since the courts are seeking to have the private party put in economically the same situation the private party would have been in but for the taking, in *520 East 81st Street Associates v. State of New York*,[30] the First Department awarded the takings plaintiff compound interest until the entry of judgment, but simple interest thereafter.

Distinguishing Late Fees and Interest

"Late fees" and "interest" are apparently different. But, when basing the fixed fee on lateness of a fixed payment, dividing the former by the latter yields a percentage.

However, a "transaction must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it."[31] In denying summary judgment on a promissory note, the Second Department in *Lugli v. Johnston*[32] held:

> Specifically, the defendant raised triable issues of fact with his contention that the annualized rate of the subject loan was at least 30%, in light of the combined annualized rates for interest and the loan origination fee, and that the loan's interest rate was, thus, in excess of the amount allowed by General Obligations Law § 5-501(1) and Baking Law § 14-a(1). In determining whether a transaction is usurious, the law looks not to its form, but its substance, or real character.

Conclusion

While on its surface, the concept of "interest" appears to be a simple matter of calculating a percentage of what someone owes, the legal development of interest in New York law shows far greater complexity beneath the surface and far greater importance in understanding the amount of money that can be charged and collected. ■

1. As to Judaism, interest is forbidden at Deuteronomy 23:19. Some Christians interpret a similar rule based on Matthew 5:42 combined with the provision from Deuteronomy and other similar provisions. Islam has similar prohibitions in the Quran at 3:130. However, all of these religious provisions have interpreters who say that only usury is prohibited.
2. Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 Harv. L. & Pol'y Rev. 91, 112 (2017).
3. *IRB-Brazil Resseguros, S.A. v. Inepar Investments, S.A.*, 83 A.D.3d 573 (2011).
4. CPLR 5001.
5. *Id.*
6. *FCS Advisors, Inc. v. Fair Fin. Co.*, 605 F.3d 144 (2d Cir. 2010).
7. 262 A.D.2d 68, 69 (1st Dep't 1999).
8. *Gliklad v. Cherney*, 132 A.D.3d 601, 601 (1st Dep't 2015).
9. 37 N.Y.2d 460 (1975).
10. 96 N.Y.2d 577 (2001).
11. *Astoria Fed. Sav. & Loan Ass'n v. Rambalakos*, 49 A.D.2d 715 (2d Dep't 1975).
12. *Citibank, N.A. v. Liebowitz*, 110 A.D.2d 615, 615 (2d Dep't 1985).
13. *Retirement Accounts v. Pacst Realty*, 49 A.D.3d 846, 847 (2d Dep't 2008).
14. 262 A.D.2d 61 (1st Dep't 1999).
15. 262 A.D.2d 985, 985 (4th Dep't 1999).
16. 251 A.D.2d 1060, 1060 (4th Dep't 1998) (internal citations omitted).
17. 79 N.Y.2d 735, 744 (1992).
18. *Bristol Inv. Fund, Inc. v. Carnegie Int'l Corp.*, 310 F. Supp. 2d 556, 562 (S.D.N.Y. 2003).
19. 273 A.D.2d 1, 3 (1st Dep't 2000).
20. 142 A.D.3d 923, 924 (1st Dep't 2016).
21. *See also Hankin v. Armstrong*, 113 Misc. 2d 24, 25 (Sup. Ct., App. Term 9 and 10, 1981).
22. *Tower Funding, Ltd. v. David Berry Realty, Inc.*, 302 A.D.2d 513, 514 (2d Dep't 2003).
23. *See* 12 U.S.C. § 1735f–5(b).
24. 439 F.3d 165 (2d Cir. 2006).
25. 79 N.Y.2d 735 (1992).
26. 264 A.D.2d 625, 626 (1st Dep't 1999).
27. *Spodek v. Park Prop. Dev. Assocs.*, 96 N.Y.2d 577, 580 (2001).
28. *R.F. Schiffmann v. Baker & Daniels*, 147 A.D.3d 482, 483 (1st Dep't 2017).
29. *Spodek*, 96 N.Y.2d at 581–82.
30. 19 A.D.3d 24 (2005).
31. *Feinberg v. Old Vestal Rd. Assocs.*, 157 A.D.2d 1002, 1003 (3d Dep't 1990) (quoting *Lester v. Levick*, 50 A.D.2d 860, 862–63 (2d Dep't 1975)).
32. 78 A.D.3d 1133, 1135 (2d Dep't 2010).

Want to Be an Entertainment Lawyer? Know Your CPLR

By Hon. Martin Schoenfeld

The year was 1971 B.C. (Before Computers). I sat in my New York Practice class at Syracuse University School of Law writing with yellow markers, highlighting what I believed were the most significant points in our Civil Practice Law and Rules (CPLR) textbook. Simultaneously, I dreamed about becoming the next successful executive at a major motion picture, television or recording company, or of representing famous musicians, actors, and other well-known celebrities. At the end of the semester, upon reviewing my notes before finals, I realized that more than 90 percent of my CPLR textbook was now covered with yellow markings. What did I learn from this somewhat tedious course? More important, how was studying the CPLR relevant to my imagined future career as an entertainment lawyer?

Introduction

A comedian who appeared on a television variety show sued its host and producer for defamation;[1] a motion picture company challenged the X rating given to its film by the Motion Picture Association of America;[2] and an entertainment management firm commenced an action claiming to have exclusive rights to represent the 2012 winner of *American Idol*'s television singing competition.[3] The CPLR played a role in each of these cases.

In the entertainment field, court decisions often help shape negotiation strategy and contract drafting. In this regard, New York and California, the world's entertainment capitals on the east and west coasts, are the most prominent states hearing entertainment cases.[4]

Of course, many of these cases are heard in the federal courts, which have exclusive jurisdiction over matters arising under the Copyright Act.[5] On occasion, though, even the federal courts will seek guidance from our state courts.[6]

During my judicial career I have decided a number of entertainment-related cases in such areas as contracts, real estate, and personal injury, many of which involved issues requiring the application of the CPLR. The CPLR is an extremely broad topic. This article is limited to motion practice, primarily as it relates to certain aspects of jurisdiction, injunctive relief, and accelerated judgments. In so doing, I will refer to three of my own early experiences, before becoming a judge, working as a litigation associate at a boutique law firm, and clerking for a New York State Supreme Court justice.

Inconvenient Forum

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just.[7]

While I was an associate attorney in New York, our law firm received a telephone call from California counsel. Our client, Salvatore "Sonny" Bono, a well-known entertainer,[8] came to New York to perform at the Westbury Theater. Mr. Bono, a California resident, was staying at a local hotel when he was served with a summons. The plaintiff, Michigan Star Theatres, Inc., having a theater in Flint, Michigan, was suing Mr. Bono, alleging that he breached an agreement to appear in the play *A Funny*

Martin Schoenfeld, a New York City judge for more than 30 years, is an Associate Justice, Appellate Term, First Judicial District. This article is dedicated to my classmate, James P. McDonald, and to my many former interns who, while assigned to work on motions in chambers, discovered that New York practice under the CPLR, when applied to notable fact patterns, is a dynamic experience.

Thing Happened on the Way to the Forum. The action was commenced in N.Y. Supreme Court, Nassau County.[9]

To my surprise, the firm assigned the case to me. Our goal was to have the action dismissed outright, or at least have it heard in California. I enthusiastically began preparing affidavits and writing a memorandum of law. A motion was made before Justice William J. Sullivan, who found unpersuasive both our argument of improper service and our contention that the plaintiff lacked legal capacity to sue in New York. He did agree with us, however, that under CPLR 327(a) the case should not be heard in New York. After reciting several relevant factors, such as residency and where the contract was to be performed, Justice Sullivan stated: "There is not the slightest nexus of this claim with this state. To require a trial here would not only be burdensome [to Bono], but would institute an unjustifiable imposition upon our courts."[10] The judge dismissed the case, conditioned on Mr. Bono agreeing to accept service of process in California. This was a reasonable result for our client.

There is an interesting inconvenient-forum case involving the Beatles, *ABKO Industries, Inc. v. Lennon*,[11] in which the Appellate Division, First Department, was in a "New York state of mind,"[12] denying dismissal as to three of the four British band members. After the dissolution of the Beatles' partnership and termination of their management contract,[13] the group's former manager, Alan B. Klein, sued in New York for alleged commissions owed and repayment of loans made to the band's companies. The Appellate Division, modifying the decision of Supreme Court Justice Jacob Markowitz, dismissed the complaint against Paul McCartney, who had not signed the management contract. In most other respects, the Appellate Division affirmed the lower court's findings, holding that the other defendants were subject to New York's jurisdiction. This included Richard (Ringo Starr) Starkey, who was served in England where he resided, but who, according to the Supreme Court opinion, "admittedly does do business here and draws substantial revenues from [this] State."[14]

Once jurisdiction was established, the Appellate Division next considered and affirmed the lower court's opinion that New York was not an inconvenient forum. In this regard, the Appellate Division noted that despite the existence of some factors supporting dismissal, a "substantial nexus with New York exists."[15] According to the Appellate Division, this included the following: that plaintiff was to perform in New York most of his managerial and promotional activities on behalf of the Beatles; that the Beatles derive most of their income from New York; that the voluminous records plaintiff requires to prove his claims are in New York; that plaintiff would incur expenses so large in pursuing the action in England that he might be required to abandon the action; and that the judicial effort in the New York actions had already been substantial.[16]

The premise behind any inconvenient-forum application is that although the court has personal jurisdiction, the case would nevertheless be better litigated elsewhere. Thus, New York judges must first decide whether personal jurisdiction exists before they address the issue of inconvenient forum. This is exactly what happened in the *Bono* and *Lennon* cases.

The entertainment field being a global business, counsels' knowledge of CPLR Article 3, which covers jurisdiction,[17] service of process and inconvenient forum, is essential for successful litigation. The best way for entertainment lawyers to minimize jurisdictional pitfalls is to include service of process, choice of law and exclusive jurisdiction clauses in their clients' contracts. That was done in *Phillips v. Audio Active Ltd*.[18] There, Peter (Pete Rock) Phillips, a Bronx rap artist,[19] sued his record company in New York federal court, alleging breach of contract, copyright infringement, and unfair competition. His contract contained a choice of law and forum selection clause requiring that English law apply and that legal proceedings be brought in England. On appeal, in a decision by the U.S. Court of Appeals for the Second Circuit, Judge Richard Cardamone[20] wrote:

> A plaintiff may think that as the initiator of a lawsuit he is the lord and master of where the litigation will be tried and under what law. But if he is a party to a contract that contains forum selection and choice of law clauses his view of himself as ruler of all he surveys may, like an inflated balloon, suffer considerable loss of altitude.[21]

As a result, Mr. Phillips' breach of contract claim was dismissed as having to be litigated in England. His other claims were allowed to remain in New York as not having originated from the contract.

Preliminary Injunction

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing . . . an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff . . . would be entitled to a judgment restraining the defendant from the commission . . . of an act, which if . . . continued during the pendency of the action, would produce injury to the plaintiff.[22]

A few years ago, in a non-litigated matter, Time Warner Cable and CBS were involved in a bitter contract dispute concerning several issues involving broadcasting professional football games, including the ownership of digital rights and the parties' respective percentage of revenue sharing. Not surprisingly, these corporate entertainment giants managed to resolve all their differences just in time for the kickoff of the National Football League season,[23] because sporting events are a major source of income to the broadcasting industry.[24] A football black-

out would have been devastating to Time Warner in the loss of subscribers and to CBS in the loss of ratings and advertisers.

As part of my early legal career, I had the good fortune of clerking for Jerome W. Marks, a New York State Supreme Court justice.[25] My duties with respect to motion practice included research and writing draft opinions. In one case, *CBS Inc. v. French Tennis Federation*,[26] the television network CBS moved preliminarily to enjoin its competitor NBC from televising the prestigious French Open Tennis Tournament. This event is the first of four major yearly tennis tournaments known as the Grand Slam. The other three are the All England Lawn Tennis Championship, known as Wimbledon, the United States Open, and the Australian Open. At the time of this litigation, NBC had the rights to televise Wimbledon. CBS televised the United States Open and had an expiring license agreement with the French Tennis Federation's agent, ProServ, to broadcast the French Open.

The expiring agreement with ProServ gave CBS a time period to negotiate exclusively for the continued television rights to the French Open. Thereafter, ProServ could field other offers, conditioned upon CBS having a right of first refusal to match any offer on equal terms. After the negotiation period ended, ProServ presented CBS with an offer it received from NBC. The offer included not only a specified amount of money but also a requirement that the network promote Wimbledon and the French Open as a coordinated promotional package or alternatively must pay the additional sum of $250,000,[27] which today would equal at least twice that. Not having the rights to televise Wimbledon, CBS claimed that by requiring the Wimbledon promotional tie-in or, alternatively, to pay an arbitrarily fixed sum of money, the offer was intentionally structured to ensure that NBC would obtain the television rights to the French Open.[28]

On a motion for a preliminary injunction, the movant must show three things: (1) a reasonable likelihood of ultimate success on the merits, (2) irreparable injury absent such relief, and (3) a balancing of the equities in its favor.[29] In his opinion, Justice Marks found a likelihood that the offer to CBS was designed to frustrate its right of first refusal and therefore was not a good faith proposal. Regarding irreparable injury, Justice Marks stated that it is difficult to ascertain a value which is represented by a loss of one's viewing audience or to determine the effect such loss has upon a network's prospective advertisers who are influenced by television viewer ratings.[30] Finally, in balancing the equities, the opinion noted that while ProServ should not be prevented from making the best possible deal, and NBC should not be eliminated from competitive bidding, CBS, in accordance with its agreement, is entitled to an assurance that negotiations are conducted fairly.[31] Accordingly, the motion for a preliminary injunction was granted, conditioned upon CBS posting an undertaking required by CPLR 6312(b).

In the entertainment industry, the need for exclusive negotiations and a right of first refusal to televise not only sporting events, but also other special types of shows,[32] are of paramount importance. Without them, a network is placed in the precarious position of promoting an event and enhancing its value without sufficient security to prevent the future benefit from being reaped by another broadcaster. In competing with others for the right to broadcast events, it is only natural to the networks that these programs are considered so unique and extraordinarily valuable as to warrant the remedy of injunctive relief.

Of course, it is not just in matters seeking to preserve television broadcasting rights that injunctive relief requests – sometimes successful, sometimes not – are made in the entertainment field. For example, actress Sophia Loren, as female lead in the motion picture *El Cid*, sought preliminarily to enjoin the distribution of that film unless she received billing credit equal to Charlton Heston, her male counterpart.[33] In another case, Stefani Germanotta, better known as Lady Gaga, sought to enjoin a company from attempting to use the tradename Lady Gaga with Design for a line of cosmetics and jewelry.[34] Recently a Hungarian folk singer commenced an action to enjoin Beyoncé and her husband Jay-Z from allegedly sampling and digitally using that singer's unique voice on their hit song "Drunk in Love."[35] In another recent case, plaintiff Cash Money Records, Inc., claiming exclusive rights to the recordings of Dwayne Michael Carter, Jr., better known as Lil Wayne, asked to preliminarily enjoin Tidal, a digital streaming music service company controlled by Jay-Z, from streaming Lil Wayne's songs.[36]

While music industry technology continues to develop rapidly, as noted by the latter two cases, the one constant is that the business remains based on the public recognition of its artists. In this regard, the right to use a singing group's name is significant. When a band breaks up or a member is replaced, an application for preliminary injunctive relief regarding the use of that group's name is often made by one or more of the artists, their manager or their record producer. Requests for this provisional remedy have been associated with singing groups of all musical genres, including doo-wop, heavy metal and even classical,[37] and have involved popular names like The Drifters and Grand Funk Railroad.[38]

Summary Judgment

> Any party may move for summary judgment in any action, after issue has been joined . . . .
> CPLR 3212(a).
>
> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof . . . . The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.
> CPLR 3212 (b).

Although decided pre-CPLR, the seminal summary judgment case, still cited today, is *Sillman v. Twentieth Century-Fox Film Corp.*[39] In *Sillman*, contracts were executed to make a motion picture version of the Broadway musical play *New Faces of 1952*. The show launched the careers of such performers as Eartha Kitt, Paul Lynde, and a young writer named Mel Brooks, and the film used such new techniques as Cinemascope and Eastmancolor.[40] Shortly after the picture was released, however, the distributor, Twentieth Century-Fox Film Corp., was confronted by the filmmakers and by various investors, each claiming that they were entitled to receive the film's revenue. Litigation commenced to determine whether a binding assignment required that distribution be on a profit-sharing basis. Ultimately, the N.Y. Court of Appeals, faced with two agreements, one containing an assignment provision, the other having an anti-assignment clause, found that the circumstances raised a triable issue of fact. The Court denied a summary judgment motion made on some of the investors' behalf, famously stating that to grant summary judgment it must clearly appear that no material and triable issue of fact is present and that issue-finding, rather than issue-determination, is the key to the procedure.[41]

While some successful musical plays that are later made into movies become blockbuster hits, such as *Grease* and *Chicago*,[42] that is obviously not always the case. For example, the play *Man of La Mancha*, which introduced such classic songs as "The Impossible Dream," was a huge Broadway success, winning five Tony Awards, including Best Musical.[43] It then became a motion picture under the artistic guidance of the well-known director Arthur Hiller and starred the iconic Peter O'Toole.[44] The picture, distributed by United Artists Corporation, was to open in movie theaters during the Christmas season. It was expected to be such a huge hit that exhibitors began bidding for the right to show the film before it was even completed. Unfortunately, the motion picture did poorly at the box office,[45] causing financial losses to the film's exhibitors and others.

Our law firm was asked to commence a lawsuit on behalf of one of the United Artists' subsidiaries that had been unsuccessful in its attempt to collect a balance due from one of the *Man of La Mancha* exhibitors. The exhibitor, which owned several theaters in New York City, had signed a written contract and guarantee for the exclusive right to show *Man of La Mancha* in its newest movie theater located in San Juan, Puerto Rico. To avoid protracted litigation, we moved under CPLR 3213 at my suggestion for summary judgment in lieu of a complaint. This rule provides that when an action is based upon an instrument for the payment of money only, in this case a balance due on the guarantee, plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.

The motion was returnable in New York County before Justice Bernard Nadel. He denied summary judgment in a short opinion, stating that an issue of fact existed, defendant exhibitor having claimed to have been fraudulently induced into entering into the contract.[46] Defendant alleged that when the agreement was made, our client already knew that the picture would not do well. Five years later, after numerous depositions, dismissal of a federal antitrust suit and two appeals to the Appellate Division, First Department,[47] both of which we won, the case was settled. However, it appears that like the movie itself, my creative idea for obtaining a swift, favorable disposition by way of summary judgment in lieu of complaint did not live up to expectations.

As litigation in the entertainment field often involves contract disputes, it is common for practitioners to seek a final determination by way of a summary judgment motion, which is essentially a trial on papers, or by motion to dismiss "founded upon documentary evidence."[48] For example, in *Evans v. Famous Music Corp.*,[49] a music publisher was sued by Ray Evans and by the estates of several other legendary motion picture songwriters, Henry Mancini, Johnny Mercer, and Richard Whiting. The complaint alleged that pursuant to their written agreements, the songwriters were entitled to share in the benefits resulting from their publishers receiving foreign tax credits. The N.Y. Court of Appeals held that tax credits were part of a tax policy and not expressly made part of the contract provision that obligated the publisher to pay its songwriters half of all net sums actually received.[50] In granting summary judgment dismissing the action, the Court wrote that if the parties' intent is "discernable from the plain meaning of the language of the contract, there is no need to look further . . . even if the contract is silent on the disputed issue."[51]

In *NFL Enterprises LLC v. Comcast Cable Communications LLC*,[52] the National Football League's affiliate, NFL Enterprises, and Comcast Cable Communications, the nation's largest cable television company, entered into negotiations for the latter to distribute the television programming of professional football games. According to NFL Enterprises, the final written agreement required Comcast to broadly distribute the games to all major networks. Comcast disagreed, claiming that according to the parties' contract, it had the right to limit distribution of the games to serve its own premium channel package, for which viewers would pay an additional fee. In denying Comcast's motion and NFL Enterprise's cross-motion for summary judgment, Justice Luis Gonzales, writing for a unanimous panel of the Appellate Division, First Department, stated:

> While it is not the Court's preference to find a triable issue of fact concerning the terms of a written agreement between two sophisticated contracting parties, our options are limited where the contractual provisions at issue are drafted in a manner that fails to eliminate significant ambiguities.[53]

A motion to dismiss pursuant to CPLR 3211(a)(1) was granted by Justice Helen Freedman in *Silvester v. Time-Warner, Inc.*[54] In that case, several oldies recording artists, including lead plaintiff Tony Silvester of *The Main Ingredient*, sought monetary damages occasioned by their recording companies having released their records for internet transmission, a medium that did not exist when the parties' contracts were executed. In affirming Judge Freedman's decision, the Appellate Division found that documentary evidence conclusively showed that the plaintiffs had expressly conveyed to defendant companies the right to exploit their recordings by any means including methods unknown at the time of contracting.[55]

A dismissal motion was also made in *Pugach v. HBO Pictures, Inc.*[56] There, defendant production company, having entered into an agreement for the option to produce a documentary film entitled *Crazy Love*, based upon plaintiffs' bizarre life stories,[57] subsequently assigned its rights to HBO Pictures, Inc. Plaintiffs sued, claiming that the production company failed to properly exercise its option and, therefore, could not make that assignment. Justice Orin Kitzes dismissed the complaint pursuant to both CPLR 3211(a)(1), documentary evidence, and CPLR 3211(a)(7), failure to state a cause of action. The judge, noting that a written contract that is complete, clear, and unambiguous on its face must be enforced,[58] found that the assignment was made in accordance with the option terms of the agreement.

The *Greenfield* Decision

The common thread running through these four decisions and a number of other entertainment actions[59] is that they all cite *Greenfield v. Philles Records, Inc.*[60] In that case, three young ladies from Spanish Harlem formed a singing group in the 1960s called the Ronettes.[61] They later signed a recording contract with Philles Records, owned by the then highly successful producer Phil Spector.[62] The Ronettes had several major hit songs, including "Be My Baby," which climbed to number one on the record charts. Despite their popularity, the group disbanded a few years later. Except for an initial advance, the Ronettes received no other royalty payments. Meantime, the lead singer, Ronnie, married Phil Spector, but the marriage was short-lived. The couple divorced in California, executing general releases as part of the divorce decree.

Some 20 years later, there was a resurgence of public interest in 1960s music. Mr. Spector's companies began capitalizing on this trend by licensing the Ronettes' master recordings for use in movie and television productions known in the entertainment industry as synchronization. For example, "Be My Baby" became the background music for the opening credits of the movie *Dirty Dancing*. In addition, the master recordings were licensed for redistribution by third parties and also for compilation albums with other artists. While the Spector companies earned considerable compensation from these various licenses, no money went to the Ronettes. As a result, the Ronettes commenced a lawsuit against Phil Spector and his companies. In response, the defendants argued that because Mr. Spector owned the master recordings, his companies could exploit the masters anyway they wanted, free of all claims by plaintiffs.

Defendants moved to dismiss the case under CPLR 3211(a)(7) for failure to state a cause of action and under CPLR 3211(a)(8) for lack of personal jurisdiction. They did not move under CPLR 3211(a)(1) based on documentary evidence. Their motion was denied.[63] After further motion practice and several interlocutory appeals, the case was tried nonjury before Justice Paula Omansky. Based on the trial testimony, she awarded plaintiffs substantial monetary damages, finding that the parties' contract did not convey to defendants the right to exploit new technologies or marketing developments such as synchronization licensing.[64] The Appellate Division affirmed,[65] but the N.Y. Court of Appeals held differently.

Writing for that Court, Judge Victoria Graffeo, while sympathetic to plaintiffs' plight,[66] applied New York's rule to first search the four corners of the contract,[67] without relying on other resources. She concluded that there was no need for the lower court to consider extrinsic evidence because "the contract unambiguously gives defendants unconditional ownership rights to the master recordings,"[68] including the "right to make phonograph records, tape recordings or other reproductions . . . by any method now or hereafter known."[69] She further stated that in the absence of a reservation clause,[70] a broad grant of ownership rights includes the right to use the work in any manner.[71] Thus, the Court held that defendants did not breach the contract by licensing the master recordings and that the plaintiffs were not entitled to share in the profits received from synchronization licensing.

The Court did, however, offer some relief, holding that according to the terms of their recording contract, the Ronettes, while not entitled to licensing fees, could recover damages for the sale of records, compact discs and other audio reproductions resulting from the third-party distribution of their songs, but limited to the royalty fee schedule incorporated in the recording agreement. In this regard, defendants argued that Phil Spector's ex-wife, now Ronnie Greenfield, having signed a general release as part of the California divorce, should be barred from sharing in any recovery.

Interestingly, California, unlike New York, will at the outset consider extrinsic evidence in addition to the contract's language.[72] Here, the trial testimony before Justice Omansky showed that the release was intended to have Ms. Greenfield surrender her rights as Phil Spector's wife to share in his corporate businesses and had nothing to do with the 1963 recording contract. Ronnie Greenfield was therefore entitled to receive her portion of any royalty payment required to be made to plaintiffs.[73] It is not surprising that both the laws of New York and California,

previously mentioned as the two major states for hearing entertainment cases, were a part of the *Greenfield* decision.

Conclusion

The year is now 2017 A.D. (After Digital). Instead of yellow markers and pens, law students are using laptops and tablets. The scope of disclosure has likewise expanded to include e-discovery. For example, in a case against satellite provider DISH Network by Cablevision, whose affiliate television programs include *Mad Men* and *The Walking Dead*, CPLR 3126 sanctions were imposed for failure to preserve electronically stored information.[74] In a pre-action proceeding under CPLR 3102(c), Atlantic Recording Corporation requested that Reddit, a media website, disclose the identity of the poster of a new song by the band Twenty One Pilots.[75] The song was posted a week before its release date, allegedly causing damage to Atlantic's marketing strategy.[76]

Technological innovations continue to revolutionize the entertainment industry almost daily, while at the same time movies are still made, concerts held and disputes litigated in accordance with the CPLR. So the next time you are standing behind the barricades of 60 Centre Street, gazing at the celebrities as they ascend the steps of Manhattan's Supreme Courthouse to attend the Tribeca Film Festival's annual reception – or you are sitting in the balcony at Brooklyn's Barclays Center cheering on your favorite artists as they take the stage for the Rock & Roll Hall of Fame induction ceremony – remember that you as an attorney can also play an important role in the entertainment field, when you know your CPLR. ■

1. *Mason v. Sullivan*, 26 A.D.2d 115 (1st Dep't 1966) (comedian Jackie Mason sued Ed Sullivan, who said that Mr. Mason made obscene gestures while appearing on his television show; a CPLR 3211 motion to dismiss the complaint was denied); *Costanza v. Seinfeld*, 279 A.D.2d 255 (1st Dep't 2001) (plaintiff's defamation and invasion of privacy claims, alleging use of his name and persona to create a character for the television program *Seinfeld*, were dismissed).

2. *Miramax Films Corp. v. Motion Picture Ass'n of Am., Inc.* (according to CPLR Article 78, Miramax Film Corp. challenged, unsuccessfully, the X rating given to its motion picture *Tie Me Up! Tie Me Down!*); *Morgan v. Worldview Entertainment Holdings, Inc.*, 141 A.D.3d 461 (1st Dep't 2016) (plaintiff may pursue his contractual damage claim for loss of an executive producer credit on the film *Birdman*).

3. *19 Entertainment, Inc. v. McDonald*, 2016 WL 5394206 (Sup. Ct., N.Y. Co. 2016) (New York action concerning who has the right to represent singer Phillip Phillips is stayed under CPLR 2201 pending a hearing before California's Labor Commission).

4. *See Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 462 (6th Cir. 2001) ("Idea-based claims arise most frequently in the entertainment centers of New York and California . . . ."); Kirt T. Schroder, *Entertainment Law: Some Practice Considerations for Beginners*, 13 Entertainment & Sports Lawyer 8 (Winter 1996), http://www.americanbar.org/newsletter/publication/gp-solo-magazine-index/schroder.html ("The great majority of entertainment contracts are entered into and performed in New York and California. Because the industries are so firmly entrenched in those states, extensive regulation of the entertainment industry exists in those jurisdictions.").

5. 28 U.S.C. § 1338(a) ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to . . . copyrights . . . . No State court shall have jurisdiction over any claim for relief arising under any act of Congress relating to . . . copyrights."); *Shamsky v. Garan, Inc.*, 167 Misc. 2d 149, 157-58 (Sup. Ct., N.Y. Co. 1995) (discussing the scope of Federal Copyright preemption in relation to state-created causes of action).

6. *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540 (2005) (in a dispute between music recording companies regarding ownership of early sound recordings by renowned classical artists such as opera singer Maria Callas and cellist Pablo Casals, the U.S. Court of Appeals for the Second Circuit requested the New York State Court of Appeals to determine, *inter alia*, whether expiration of the term of a copyright in England terminates a common law copyright in New York); *King v. Fox*, 7 N.Y.3d 181 (2006) (in a dispute between former member of rock band Lynyrd Skynrd and his attorney, the Second Circuit requested the New York State Court of Appeals to resolve certain questions concerning fee arrangements); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 28 N.Y.3d 583 (2016) (before deciding whether owners of pre-1972 sound recordings by such artists as the Turtles were entitled to receive royalties from broadcasters, the Second Circuit sought guidance from the New York State Court of Appeals about whether such owners have a common law right to control public performance of those recordings).

7. CPLR 327(a).

8. The late Salvatore Phillip "Sonny" Bono, part of the famous singing duo Sonny & Cher, was also formerly a U.S. Congressman from California. Mr. Bono remains the only member of Congress to have previously scored a number one pop single on the U.S. Billboard Hot 100 Chart. Whitburn, Joel, Joel Whitburn's Top Pop Singles. 12th ed. Menomonee Falls, WI: Record Research, 2009. Print; Bono, Sonny. And the Beat Goes On (New York: Pocket, 1991).

9. *Michigan Star Theatres, Inc. v. Bono*, Index No. 13692/1977 (Sup. Ct., Nassau Co.).

10. *Id*.

11. 52 A.D.2d 435 (1st Dep't 1976).

12. Song by Billy Joel from the album *Turnstiles* (1976).

13. *See* Peter McCabe & Robert D. Schonfeld, Apple to the Core: The Unmaking of the Beatles 199 (Pocket Books 1972) ("For several years, the Beatles almost singlehandedly directed the development of the recording industry.").

14. *ABKO Indust., Inc. v. Lennon*, 85 Misc. 2d 465, 470 (Sup. Ct., N.Y. Co. 1975), *aff'd*, 52 A.D.2d 435 (Silverman, J., dissenting in part in an opinion as to defendant Starkey for lack of *in personam* jurisdiction).

15. *ABKO Indus., Inc. v. Lennon*, 52 A.D.2d 435, 440 (1st Dep't 1976).

16. *Id*. at 441.

17. *See Fischbarg v. Doucet*, 9 N.Y.3d 375 (2007) (CPLR 302 personal jurisdiction established over California New Age music company based on continuous telephone calls, facsimiles and emails); *Chase Manhattan Bk. v. AXA Reassurance UK PLC*, N.Y.L.J., Aug. 9, 2001, at p. 18, col. 1 (Sup. Ct., N.Y. Co.) (occasional filming in New York by foreign motion picture producer, without more, does not amount to doing business for purposes of CPLR 301).

18. 494 F.3d 378 (2d Cir. 2007).

19. Peter Phillips, once a member of the critically acclaimed Pete Rock & C L Smooth, is an East Coast hip hop producer, DJ, and rapper. http://en.wikipedia.org/wiki/Pete_Rock.

20. The Honorable Richard J. Cardamone, deceased, was a New York State Supreme Court Justice from 1963 to 1981, until his appointment by President Reagan to the United States Court of Appeals for the Second Circuit, http://www.nycourts.gov/history/legal-history-new-york/luminaries-appellate/cardamone-richard.html; N.Y.L.J., Oct. 23, 2015, at p. 2., col. 1.

21. *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 381 (2d Cir. 2007).

22. CPLR 6301.

23. Bill Carter, *CBS Returns Triumphant to Cable Box*, http://www.nytimes.com/2013/09/03/business/media/cbs-and-time-warner-cable-end-contract-dispute.html (Sept. 2, 2013). Roger Yu, *CBS, Time Warner Cable reach agreement, end blackout*, http://www.usatoday.com/story/money/business/2013/09/02/cbs-time-warner-cable-agreement/2755953/ Sept. 3, 2013.

24. Sapna Maheshwari, *$5 Million for a Super Bowl Ad. Millions More to Market It*, N.Y. Times, Jan. 30, 2017, at B1; Jeffrey Dorfman, Super Bowl Ads Are a Bargain at $5 Million, Feb. 4, 2017, http://www.forbes.com/sites/jeffreydorfman/2017/02/04/super-bowl-ads-are-a-bargain-at-5-million/#198526a67505; Don Kaplan, *NBC and presidential debate squad both fumble TV schedule*, N.Y. Daily News, Aug. 5, 2016 ("The NFL is the most watched, most lucrative programming on TV."). On October 9, 2016, NBC aired Sunday Night Football over the presidential debate. http://www.nydailynews.com/entertainment/tv/nbc-presidential-debate-squad-fumble-debate-sked-article-1.2738999.

25. The Honorable Jerome W. Marks, deceased, is a former assemblyman who served on the bench from 1968 to 1991. Before that he was a partner in the law firm Mintz & Marks, which represented such notable celebrities as actresses Joan Blondell and Eve Arden. *See Legislative Resolution*, http://open.

nysenate.gov/legislation/bill/K332-2011, March 30, 2011; N.Y.L.J., Mar. 8, 2011, at p. 2., col. 1.

26. N.Y.L.J., Jan. 24, 1983, at p. 5., col. 3 (Sup. Ct. N.Y. Co.); *NBC Ordered Not to Broadcast French Tennis Open Until New York Court Determines Whether Tournament's Sponsor Breached Good Faith Negotiation Clause in Prior Contract with CBS*, 4 No. 22 Ent. L. Rep. 1, Apr. 15, 1983.

27. *Id*.

28. *Id*.

29. *Glenn Miller Productions, Inc. v. DeRosa*, 167 A.D.2d 281 (1st Dep't 1990) (criteria met to preliminarily enjoin former ensemble member from using name Glenn Miller Orchestra); *Sports Channel Am. Assoc. v. Nat'l Hockey League*, 186 A.D.2d 417 (1st Dep't 1992) (cable company fails to meet preliminary injunction criteria to broadcast hockey games where right of first refusal clause is ambiguous.); *see* Ben Bedell, *Attorneys Say Judge Made Right Call in Rebuffing Kesha*, N.Y.L.J., Mar. 15, 2016, at p. 1 (judge held in *Gottwald v. Sebert*, Index No. 653118/2014 (Sup. Ct., N.Y. Co.) that in seeking to void exclusive contract with record company and manager p/k/a Dr. Luke, singer p/k/a Kesha failed to meet any of the three requirements for a preliminary injunction).

30. *CBS v. French Tennis Federation*, N.Y.L.J., Jan. 24, 1983, at p. 6., c. 2.

31. *Id*.

32. *See NBC Universal, Inc. v. Weinstein Cnty., LLC*, 2008 WL4619203 (Sup. Ct., N.Y. Co.), *appeal withdrawn*, 61 A.D.3d 460 (1st Dep't 2009) (action to preliminarily enjoin executive producer from moving highly successful reality show "Project Runway" from one cable station to a competing network).

33. *Loren v. Samuel Bronston Productions, Inc.*, 32 Misc. 2d 602 (Sup. Ct, N.Y. Co. 1962).

34. *Germanotta p/k/a Lady Gaga v. Excite Worldwide LLC.*, Index No. 110967/11 (Sup. Ct., N.Y. Co.).

35. *Miczura p/k/a Mitsou v. Knowles p/k/a Beyoncé*, Index No. 162333/14 (Sup. Ct., N.Y. Co.)

36. *Cash Money Records, Inc. v. Aspiro AB, Wimp Music AS & Wimp, Inc.*, Index No. 652501/15 (Sup. Ct., N.Y. Co.) Music streaming delivers sound without the need to download files of different audio formats. Streaming services such as Spotify and Pandora provide songs, generally for a subscription fee, that may be listened to on all types of devices. For further definition, see *Broadcast Music, Inc. v. Pandora Media, Inc.*, 140 F. Supp. 3d 267, 272-73 (S.D.N.Y. 2015).

37. *Gallina v. Giacalone*, 171 Misc. 2d 645 (Sup. Ct., Kings Co. 1997) (The Fireflies); *Poley v. Sony Music Entertainment, Inc.*, 163 Misc. 2d 127 (Sup. Ct., N.Y. Co. 1994) (Danger Danger); *Sontag v. Cook*, 2008 N.Y. Misc. Lexis 10854 (Sup. Ct., N.Y. Co.) (Three Mo' Tenors).

38. *The Drifters v. Circle Artists Corp.*, 13 Misc. 2d 778 (Sup. Ct., N.Y. Co. 1958); *Knight v. GFR Enter., Ltd.*, Index No. 06549/1972 (Sup. Ct., N.Y. Co.).

39. 3 N.Y.2d 395 (1957).

40. *New Faces of 1952*, wikipedia.org, http://en.wikipedia.org/wiki/New_Faces_of_1952 (last modified July 17, 2016).

41. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957).

42. Brett Arnold, *"Jersey Boys" Bombed — Here Are the 5 Highest-Grossing Broadway Film Adaptations of All Time*, Business Insider (June 22, 2014), http://www.businessinsider.com/highest-grossing-broadway-adaptations-2014-6.

43. *Man of La Mancha*, wikipedia.org., http://en.wikipedia.org/wiki/Man_of_La_Mancha (last modified Jan. 26, 2017).

44. *Man of La Mancha (film)*, wikipedia.org., http://en.wikipedia.org/wiki/Man_of_La_Mancha (film) (last modified Jan. 7, 2017).

45. *Man of La Mancha 1972 | Movie*, tvguide.com, http://www.tvguide.com/movies/man-of-la-mancha/review/126452/ (last visited Feb. 2, 2017); *Man of La Mancha* (1972), imdb.com, http://www.imdb.com/title/tt068909/ (last visited Feb. 2, 2017).

46. *United Artists Corp. of Puerto Rico v. Regency Carribean Enter., Inc.*, Index No. 9585/73 (Sup. Ct. N.Y. Co.).

47. *United Artists Corp. of Puerto Rico v. Regency Carribean Enterp., Inc.*, 47 A.D.2d 816 (1st Dep't 1975) (affirming denial of defendant's motion to dismiss the action on *forum non conveniens* grounds); 54 A.D.2d 846 (1st Dep't 1976) (affirming denial of defendant's motion to vacate the note of issue and for additional disclosure).

48. CPLR 3211(a)(1).

49. 1 N.Y.3d 452 (2004). Ray Evans died in 2007.

50. *Id*. at 455.

51. *Id*. at 458.

52. 51 A.D.3d 52 (1st Dep't 2008).

53. *Id*. at 61.

54. 1 Misc. 3d 250 (Sup. Ct., N.Y. Co. 2003), *aff'd*, 14 A.D.3d 430 (1st Dep't 2005).

55. *Silvester v. Timer-Warner, Inc.*, 14 A.D.3d 430 (1st Dep't 2005).

56. 2009 WL 641611 (Sup. Ct. Queens Co.).

57. Peter Travers, *Crazy Love*, Rolling Stone, May 30, 2007 http://www.rollingstone.com/movies/reviews/crazy-love-20070530; https://en.wikipedia.org/wiki/Crazy_Love_(2007_film).

58. *Pugach v. HBO Pictures, Inc.*, 2009 WL 641611, at *3 (Sup. Ct. Queens Co.).

59. Examples of accelerated judgment cases, among others, that cite to *Greenfield* include *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239 (2014) (based upon terms of the contract, case seeking certain foreign royalties by heirs of the great composer and pianist "Duke" Ellington, dismissed pursuant to CPLR 3211), *Helm v. BBDO Worldwide, Inc.*, 93 A.D.3d 428 (1st Dep't 2012) (summary judgment granted to defendant, court finding that according to contract, record company had right to license "The Weight," a song by The Band for advertising use by AT&T), and *Richard Feiner & Co. v. Paramount Pictures, Corp.*, 95 A.D.3d 232 (1st Dep't 2012) (summary judgment granted to defendant where, as per contract plaintiff, who sold the rights to 17 Warner Brothers' Motion Pictures, but with certain reservations, failed to reserve the right to show the films on domestic television).

60. 98 N.Y.2d 562 (2002).

61. The Ronettes, one of the most popular "girl groups" from the 1960s, had more than eight songs on Billboard's Top 100, including "Be My Baby," "Walking in the Rain," and "Baby I Love You." The trio consisted of lead singer Veronica Bennett p/k/a Ronnie Spector, her older sister Estelle, now deceased, and their cousin Nedra Talley. The Ronettes was the only girl group to tour with the Beatles. They were Grammy Award winners and were inducted into the Rock & Roll Hall of Fame2007. https://en.wikipedia.org/wiki/The_Ronettes.

62. Born in the Bronx, Phillip Harvey Spector, a Rock & Roll Hall of Famer, was a record producer, songwriter and originator of the "Wall of Sound" technology. He earned a Grammy Award for co-producing the Concert for Bangladesh album with George Harrison. Mr. Spector co-wrote and produced the single "You've Lost That Lovin' Feeling," the song with the most U.S. airplay in the 20th Century. He is currently incarcerated. https://en.wikipedia.org/wiki/Phil_Spector.

63. *Greenfield v. Philles Records, Inc.*, 160 A.D.2d 458 (1st Dep't 1990) (defendants' motion to dismiss was also initially made under CPLR 3211(a)(5) alleging affirmative defenses. This part was apparently abandoned). *Id*. at 459.

64. *Greenfield v. Philles Records, Inc.*, 2000 N.Y. Misc. Lexis 336 (Sup. Ct. N.Y. Co.).

65. *Greenfield v. Philles Records, Inc.*, 288 A.D.2d 59 (1st Dep't 2001).

66. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 573 (2002).

67. *Id*. at 574.

68. *Id*. at 569.

69. *Id*. at 572.

70. *Id*. at 570.

71. *Id*. at 572.

72. *Id*. at 574.

73. *Id*.

74. *Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93A.D.3d 33 (1st Dep't 2012) (case settled).

75. Twenty One Pilots, an alternative music duo, received the 2017 Grammy Award for Best Pop/ Duo Group Performance and the 2016 Billboard Music Awards for Top Rock Artist and Top Rock Album. https://en.wikipedia.org/wiki/TwentyOnePilots.

76. *In re Atlantic Recording Corp. (Reddit Inc.)*, Index No. 156210/2016 (Sup. Ct., N.Y. Co.) (application withdrawn; petitioner investigated alternative sources to identify poster).

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Hugh B. Lee
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Alexandre Leturgez-Coianiz
Alexander M Levine
Katherine Theresa Lewis
Ashley Christina Lherisson
Alvin Li
Karen Ruo Li
Violeta Luiza Mendes Libergott
Yun Joo Lim
Daniel Lin
Mindy Beth-jane Lin
Stephen David Linley
Laura Rees Logsdon
Cecilia Lopez Santiesteban
Jenna Aviva Lowy
Matthew Nicholas Lu
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Meredith R. Mandell
Hannah Murray Marek
Jacqueline Ashley Marino
Julie Anne Marling
Tanya Liselle Martinez-Gallinucci
Sarah Joanne Mcateer
Kelsey Lynn Mccarthy
Jessica M. McGrath
Duncan Kenneth Ross Mckay
Timothy Martin Mckenzie
Grace Anne McReynolds
Ryan Michael Melvin
Carole Menard
Silvia Menendez Gonzalez
Andrew Mickler
Benjamin David Miller
Jacob Kenneth Millikin
Hunter Brooks Mims
Jie Min
Ruthanne Minoru
Ahmed Mohsen Mohamed
Mariela Jennette Monegro
Linda Moon
Carolina Maria Morales
William Joseph Morici
Michaela Marie Morr
Denise Louise Morris
Teresa Dorothy Morrison
Lawrence C. Moscowitz
Alma Marija Mozetic
Clifford Dankwa Mpare
Ryan Christopher Mullally
Amelia Kathleen Murphy
Christina Murphy
Alok Krishna Nadig
Catherine Degnan Nagle
Sarah Nasser
Malak Nassereddine
Frederick Koerner Neary
Jeffrey C. Nelson
Charlotte Kathleen Newell
Jacob E. Newman
Mandy Thuynghi Nguyen
Timothy Michael O'hara
Nia Kylie Oates
Joshua H. Ontell
Derek Michael Osei-Bonsu
Emi Otsuka
Stephanie G. Paeprer
Edward Panchernikov
Jonathan Walter Panzl
Nirali Sanjay Parikh
Jennifer Park
Bhavika Dilip Patel
Reshama Jitendra Patel
Samir K. Patel
Iricel Elizabeth Payano
Michal Pearl
Stephen Pearson
Daniel Alejandro Pedraza
Lana Leah Pelletier McCrea
Marissa Erin Perlmutter
Moshe G. Peters
Kyle George Petrie
Agbeko Cynthia Petty
Petra Plasilova
Bryan Robert John Podzius
Kacy Louise Popyer
Peter Pottier
Dominic Ryan Price
Casey Ann Prusher
Louis Ferdinand Quagliato
Brenna Ellen Stewart Rabinowitz
Oren Rafii
Tara Lalita Raghavan
Adam Roland Rahman
Marc Ramirez
Sahana Rao
Ariane Raymondo
Margaret Wilson Reis
Sofia Reive
Gregory Charles Richmand
Amy Louise Robertson
Henry Mack Robinson
Alexandra Kelly Roche
Sennett Michael Rockers
Katherine Suzanne Ceisler Rookard
David S. Rosen
Kathryn L. Rosenberg
Corey Rosenholtz
Todd A. Rossman
Samuel E. Roth
Daniel Philip Roy
Joseph Mario Rubbone
Lee J. Rubin
Michael Paul Rubin
Daniel B. Rudofsky
Francesca Rufin
Yuki Sagawa
Vatsala Sahay
David Salter
Allison Faith Saltstein
Sarah M. Salvia
Sybil Nana Ama Efrima Sam
Andres Antonio Sardi Garcia

Matthew Joseph Savoff
Afruz Sayah
Paul Edward Schied
Carly Danielle Schiff
Harrison Schwartzman
Rachel Marie Searle
Matthew Ellis Seitz
Sara Antonia Shackleford
Rachel Austin Shapiro
Liang Shu
Nachum Danny Shulman
Fabio Roman Silva
Stephen Manuel Silva
David T. Silver
David Simins
Michael Eric Singer
Adama Varsey Sirleaf
Courtney Gabrielle Skarupski
Margaret Jene Holm Smilowitz
Monica Smith
Joseph Kyle Snapp
David Joseph Snyder
Nathaniel Eisten Sokol
Delia Anne Solomon
Matthew Sontag
Sehzad Mohammad Sooklall
Jeffrey Mitchell Sorkowitz
Adam Sasan Sowlati
Sara Batya Spanbock
Stephen John Alfred Speirs
Michael Atkerson Stachiw
Mitchell Russell Stern
Nicole Yvonne Stoddard
Amy Su
Terence Sean Sullivan
Matthew B. Sumner
Weixiao Sun
Thomas Quaid Swanson
Brittany K. Sykes
Adam John Szklanny
Christine Marie Taverner
Nicole Taykhman
Ashleigh Victoria Taylor
Robert Taylor
David Teitelbaum
Pengtao Teng
Daniel Aaron Teplin
Brian Edward Thayer
Lynn Alexandria Thomas
Alexander Rowland Tiktin
Feliciano Ernesto Tomarelli Rubio
David G. Ullman
Matthew A. Ulmann
Ellen Grace Van Cleave
Carolina Louise Veltri
Patrick T. Venter
Peter Vizcarrondo
Alexandros Vourlidis
Brittany Morgan Wagonheim
Erica Michelle Walker
Kevin Michael Walsh
Lu Wang
Susan Wang
Ting Wang
Xiao Wang
Jason Andrew Wasser
Alex Evan Waxenberg
Grayson Cooper Weeks
Yakov T. Weis
Jason Michael Weltman
Rebecca Elizabeth Wexler
Paul Anthony White
Christian Witzke
Christian Edward Witzke
James Anthony Wolff
Adela Sarah Woliansky
Jaimie Wolman
Eileen Woo
Chad Woodford
Tania Simone Rose Woods
Lu Xu
Ho Young Yang
Anne Reid Yearwood
Nicole J. Yoon
Yuan Yuan
Luke Zadkovich
Alicia Qimin Zhang
Wen Zhang
Alex Stone Zuckerman

Second District

Ehsan Akbari
Janine Ann Balzofiore
Daniel Thomas Banaszynski
Benjamin Wade Baumgartner
Maureen Belluscio
Elise Constance Bernlohr
Gregory Paul Bitetzakis
Stefania Boscarolli
Alexandra F. Briggs
Lauren Nicole Brown
Umar Abdullah Cash
Andrew Chi
Mariel Cohn
Alejandra Contreras Macias
Jeffrey William Coyle
Kelsey Marie Crowley
Joseph Francis Dell'aquila
Charles Karl Diamond
Thanh Truc Doan
Marjorie Brigetta Dugan
Mallory Winfield Edel
Erica P. Englander
Chris Fennell
Daniel Joseph Fischer
Hannah Perrin Flamm
Ciara Iren Foster
Duncan Alexander Fraser
Jonathan David Frisby
Marlee Chelsea Galvez
Babak Ghafarzade
Erica Regina Gilerman
Mellissa Gobin
Jeremy Maxwell Green
Noah Shalom Greenfield
Benjamin A. Griffith
Morgan Devereaux Guinnip
Zeynep Gulsen
Eric Ross Haren
David Kautsky Hausman
Michelle Michal Herzog
Michael Patrick Hogan
Kenji Horiuchi
Kulani A. Jalata
Patricia Jean-Baptiste
Brian Eneoreuwu Jones
Anthony R. Jordan
Kaitlin Beth Keenan
Jeffrey Francis Kinkle
Jeremy Bell Koegel
Tara Kumar
Meghan Elizabeth Lenahan
Kseniya Lezhnev
Patrick John Looby
Brandi Michelle Lupo
Linden Miller
Julio Enrique Mojica
Lawrence Crane Moscowitz
Atusa Mozaffari
Kwok Kei Ng
Brandon Huy Khoa Nguyen
Thuy-an Thi Nguyen
Robert Magner O'Connor
Nonney Onyekweli
Hillary Ann Packer
Zachary Payne-Meili
Alexander F. Peacocke
Emily Morgan Pearl
Sarah Allison Pfeiffer
Michael Kevin Piacentini
Katie Elizabeth Renzler
Andrew Ritter
Margaret Celeste Rohlfing
Norma Anastacia Roper
Monisola Oyinkansola Salaam
Jaime Sanchez
Kevin Scura
Sylvester Joseph Sichenze
Geoffrey M. Stannard
Jhe-yu Su
Eric Victor Tabache
Summer Elynda Tinnie
Esther Traydman
Max Augustine Wade

Third District

Brenda Baddam
Brandon Batch
Tyler Phillip Broker
Sandra Calhoun
Drew Alexander Chisholm
David W. Crossman
Andrew James Dipasquale
Eric William Dyer
Sara Luz Estela
John T. Judd
Sarah M. Klein
Michael Thomas Koes
Andrew Jordan Matott
Joseph C. Mazza
Calee Oas
Jared J. Pellerin
Vanessa M. Rodriguez
Casandra Stephenson
Patrick Ryan Totaro

Fourth District

Umberto Nicodemo Angilletta
Melissa Benson
Kirsten Dunn
Thomas S. Holmgren
James McPartlon
Philip Takacs
Philip Jules Takacs-Senske

Fifth District

Breanna L. Avery
Benjamin Herbert Bagenski
Megan R. Hartl
Consuelo Valenzuela Lickstein
John Maine
Nathalie Marin
Kevin John Peterman
Alexandra O. Pietropaolo
Laura D. Rolnick
Erica Jacobson Rube
Josiah James Thorogood
Paul Jeffrey Tuck

Sixth District

A Adigwe
Srishti Jain
Joseph Robert Kirby
Maria N. Manning
James H. Mayfield
Sarah Morrisson
Brianna Marie Strope Vaughan

Seventh District

Katherine Theresa Adamides
Ryan Wolfe Allison
Tyler Randy Blake
Richard Catalano
A. Jane Grimes Chambers
Jeffrey John League
Gregory M. Leathersich
Sean McCabe
Lakeshia McCloud
Jennah Marie Michalik
Constance Patterson
Jieting Tang
Benjamin Ryan Williams
Dena Wurman

Eighth District

Kristin Elizabeth Bender
Anthony David Chabala
Cara Alicia Cox
Ashley Ann Czechowski
Melanie Ann Daly
Jacob G. DiMatteo
Jason Richard James Fleischer
Hannah Mary Goldsmith
Donald J. Herbert
Sarah Elizabeth Hicks
Keli Iles-Hernandez
Kaeleigh Clara Jessen
Megan Suchitra Kale
Seokchan Kwak
Jamila Afiya Lee
John Pino Marzocchi
Christine D. McClellan
William Monte
Kaili Marie Mutka
Madison Leeann Ozzella
Danielle Pelfrey Duryea
William Pike
Vilena M. Ramini
Victoria K. Roberts
Gargi Sen
Jenna M. Turco
Sarah Washington
Erin Lynn Whitcomb
Jill Marie Wnek
Margaret Helen Wydysh

Ninth District

Michael Christopher Anderson
Matthew Alexander Bialor
Steven M. Bouknight
Sarah Croak
Deanna Marie Dicaprio
Kevin K. Diffley
Kenneth Eng
Donald R. Gordon
Michael Joseph Griffin
Mitchell Barry Karp
Tara Nicole Lombardia
Caesar Andre Lopez
Elizabeth Anne Lynch
Michael Owen Lynch
Steven J. Manganelli
Michael Marchman
Mariah A. Martinez
Mary Caitlin McDonald
Ashraf A. Mokbel
Neelu Thomas Pathiyil
Dana Pellegrino
Mary Mclean Pena
Silpa Rao
Jacob Schwartz
Robert H. Shadur
Emma Shamo
Katherine Mara Ainlay Steiner
Amanda Danielle Tarallo
Joseph Thomas
Sheuvaun Felicia Vernon
John A. Vitagliano
Patrick J. Welch

Tenth District

Matthew J. Arpino
Harrison H.d. Breakstone
Benjamin L. Broder
Constance Christie
Constance Joanna Christie
Devin Scott Cohen
Andrew Barrie Curran
Eric A. Curtis
Carissa Ann Danesi
Margaret Marion Darocha
Tiffani Marie Diprizito
Christopher Eisenhardt
Jamie S. Eliassaint
Brandon Esquenazi
Christopher Steven Germaine
Jennifer J. Goodwin
Daniel M. Huttle
Sofia Iqbal
Lauren Michelle Jadevero
Sean A. Jefferson
Elana K. King
Jessica M. Klersy
Sarah Nicole Labia
Keely Marie Lang
Joseph Anthony Lupo
Jonathan Paul Manfre
Dennis McGrath
Declan McPherson
Kathleen Miller
Krista C. Miller
Jeffrey A. Mondella
Nicole Rae Morales
Jacqueline Marie Morley
David Mark Muller
Kevin Francis Murphy
Zarah Tehseen Naqvi
Nicholas A. Passaro
Danielle Alesha Robinson
Brooke Salvatore
Eric Robert Sands
Christopher Ross Theobalt
Bernard Tsepelman
Samantha Paige Turetsky
Katherine Michelle Umanzor
Alexandra Rae Wolff
Michael Yazdanpanah
Sean Patrick Young

Eleventh District

Steve J. Ahn
Lawrence G. Campbell
Matthew Carpinello
Jeffrey M. Carr
Raul Armando Carrillo
Jennifer Chan
Rudgee Standley Charles

Jinha Chung
Brandon Robert Coyle
Le Cui
Rachel Dekhterman
Rucha Abhay Desai
Lino Alberto Diaz
Kelsey Michelle Dickman
Brandon Richard Fetzer
Alisa Yakovlevna Gdalina
Michael James Golia
Adriana Lina Greco
Reginald Guerrier
Emily Hartfield Harris
Jesse Daniel Herman
Anthony Jules Holesworth
Shoba Jaglal
Amber Lynn Johnson-Vigouroux
Jana Junuz
Robert A Kansao
Amanjot Kaur
Danielle Crystal King
Keith King
Stephanie Krent
Jamie Keely Kwasniewski
Golda Lai
Bryan T. Lew
Eric Liu
Liam Michael Lowery
Giulia Marino
Nipun Marwaha
Jacqueline Adele Meese-Martinez
Ruth Merisier
Ashley Montana Minett
Teraine Okpoko
Arshi Pal
Sijin Park
Mital Bharat Patel
John Patrick Prager
Nicole Rella
Brianne Noelle Richards
Christian Chayce Sae
Adam Ivan Robert Tzi Guan Seeto
Russell L. Shapiro
Anil Singh
Patrick Martin Steel
Vasilios Stotis
Sakeena Trice
Lauren Josephine Tucker
Juan C. Velez Arteaga
Zixuan Wang
Travis Graham Ward
Eric London West
Gabriela Wong
Si Yang
Jaehee Yoo
Erica Jean Zaragoza
Haizhan Zheng

Twelfth District

John Osei Bonsu
Alana Anne Brady
Drita Brija
Kelsey Maya Edenzon
Atenedoro Gonzalez
Jill Lauren Greco
Michael Z. Jen
Enjole C. Johnson
Danny Woong Lim
Ora Laine Lupear
Joseph Vincent Maniscalco
Oscar Rene Montes
Olivia Orlando
Elysia Rachel Ruvinsky
Benjamin Rory Silver
Whitney Kate Sullivan
Erin M. Teresky
Lourdes Ann Vetrano

Thirteenth District

Olga Aleinik
Joseph W. Antonakos
Eric Aquino
Diego Oswaldo Barros
Jacqueline S. Bruno
Giovanna Marie Colasanto
Michael Frank Cuttitta
Kristen Epifania
Scott Higgins
Alina Kipnis
Matthew David Oginsky
Louis Thomas Pecora
Kathryn Kimball Ramos
Anthony Sears
Artem Skorostensky
Payal G. Thakkar

Out of State

Bria Michelle Adams
Nur N. Adnan
Monica Aguinaldo
Monica Frances Aguinaldo
Aicha Ahardane
Doua Abdulrahman Alattas
Nicolas Arthur Alfonsi
Dean Yousif Ali
Shifa Jamal Alkhatib
Mohammed Almarzouki
Alejandro Jose Alvarez Loscher
David Wayne Anderson
Daniel Andrade Jacintho
Evangelia Andronikou
Zohra Anwari
Ryuta Aoki
Rebecca Hollins Arnall
Ivan Atochin
Aviv Avni
Lijie Bai
Alexander John Baker
Surya Bala
Gillian D. Ballenger
Rupali Bandhopadhya
Rachel Bangser
Rachel Emily Bangser
Fang Bao
Hanyu Bao
Dana Lauren Barile
Pilar Baron Allue
Noah Barr
Alice Noel Barrett
Palash Basu
Yetonde Codjo Beheton
Opeyemi Mensah Felix Bello
Wafa Ben Hassine
Katherine Strike Bentel
Derek Matthew Berry
Gregory A. Berry
Jens Frank Beyrich
Roshni V. Bhalla
Karn Bhardwaj
Francesco Luigi Bianchi
Giuseppe Bianco
Michael John Biles
Michael John Blayney
Alex R. Blum
Lillian M. Boctor
Paul Oluwaseun Bolaji
Theodore Joseph Boutrous
Carl Henrik Braennberg
Jacob Brainard
Michael Brandon
Romiesha J. Briscoe
Jason M. Brisebois
Alexandra Zoe Brodsky
Amanda Louise Brosy
Matthew Francis Bruno
Jonas Bruzas
Samantha Bui
Jonathen Frank Bullwinkel
Joshua Burk
Jo-Yu Burlet Chen
Melissa Leigh Buterbaugh
Kathryn Butler
Catalina Cadavid
Michelle Eve Cafarelli
Brian Patrick Caldera
Thi Minh Cao
Jessica Lynn Caplin
Matteo Capponi
Jonathan Cardenas
John Joseph Carvelli
Nicholas Christopher Cavallo
Jessica Cavanagh
Christophe Cavin
Ivana Chabanova
Pui Hei Chan
Wai Hei Chan
Chialu Chang
Samuel H.S. Chang
Seungmo Chang
Mihir Chattopadhyay
Queping Chen
Ruolan Chen
Sze An Chen
Ying-Chu Chen
Heide Oil-gei Cheuk
Hyungsuk Choi
Won Young Choi
Youngjin Choi
Margaux Andrea Chouchan
Sumeet Chugani
Esther I. Chung
Jacqueline E. Cistaro
Kori Marie Clanton
Walter D. Clapp
Edward T. Colbert
Eduardo Oscar Colon-Baco
Thomas Michael Corsi
Jennifer Elizabeth Cranston
Brian Scott Cunningham
Elizabeth Frances Curran
Alice Da Silva Lima Lovchik
Gregory Damico
Christopher J. Daniel
Roujou De Boubee
James DeBartolo
Jessa Irene Degroote
Anushree Jayant Dehadrai
Aushree Dehadrai
Lorenzo Delzoppo
Andrey Demidov
Decheng Deng
Dexin Deng
Lan Deng
Jacopo Destro
Colin Andrew Devine
Christine Elizabeth Doelling
Dmytro Dolinin
Marie Anne Duarte Cabral
Arbion Duka
Miles Tyler Eckardt
Miles Eckhardt
Ijeoma Uchechi Eke
Vsevolod Elentukh
Rachel Elizabeth Endick
Mendtuvshin Enkhtaivan
Thomas Micheae Enright
Michael Ray Epperly
Murat Erbilen
Samanta Eremciukaite
Ali Can Ergur
Brian Phillip Eschels
Qihui Fan
Xiao Fang
Kelly M. Fay Rodriguez
Teng Feng
Karen L. Fiorelli
Justin G. Fisch
Chelsea Ann Fish
Filka Forkin
Roxanna Camile Francis
Daniel Joseph Freshman
John Phillip Fritz
Shunichi Fujioka
Krista R. Fuller
Dale Robert Funk
Christopher J. Fusco
Rossana Gallego
Luisa Gamboa
Yiming Gao
Wenting Ge
Louis Michael Gerbino
Alexa Leann Gervasi
John Joseph Giampa
Cameron James Gibbs
Devyn Glass
Kristian William Gluck
Sean Evan Goldhammer
Reynaldo Gonzalez
Mara E. Goodman
Michelle L. Goodman
Elena Goor Barron
Meghan K. Gorman Cohen
Colin J. Gorman
Tracy Josephine Grant
Aurelien Pierre Chri Gredy
Robert C. Grimal
Alexander Grimm
Jessica L. Grimm
Carmella Marie Gubbiotti
Nicole R. Gutierrez
Lisette L. Guzman
Anael Hadji
Dillon Joseph Hagius
Darian Gerrod Hands
Erika Lea Hanson
Daniel Fife Hardcastle
Blake Harley
Jeffrey Hampton Harris
Melissa V. Harrup
Devin James Hartley
Seth Patrick Hays
Sean Healy
Amanda Lynn Helms
Ashley Nicole Higginson
Jason Harrison Hilborn
Andrea Michelle Hill
Annemarie L. Hillman
Emily Brooks Hobbs
Holly Jacquelin Hoch
Greta Hogan
Ye Hong
Michael James Horne
Die Hu
Zhenchao Huang
Julie Lynn Hunt
Jessica Lee Hunter
David Hurst
Ajani Barcley Husbands
Emily Louise Hussey
Thomas Huynh
Robert Joseph Ingato
Joseph Louis Ingrao
Lakeysha Greer Isaac
Aki Ito
Sachie Ito
James P. Jaconski
Samuel Aaron James
Javier Rafael Jaramillo
Roosevelt Jean
Jaehoon Jeong
Hansen Ji
Yifan Jiang
Ruoyang Jing
Emily Louise Johnson
Louis J. Johnson
Paula Mary Luciana Joan Jones
Thomas Buckner Jones
Min Jong Joo
Kassandra Genevieve Jordan
Winifred C. Jow
Hat Bit Jung
Lisa Jeanne Jurick
Matthew L. Kahl
Richard Thomas Kaltenbach
Eve Wing-Wai Kan
Spruti Shantesh Kanekar
Seonhwa Kang
Elizabeth Kappakas
Dai Katagiri
Kate Elizabeth Kennedy
Aruna Maya Khan
Omer W. Khwaja
Celina Kilgallen-Asencio
Jieun Kim
Leanne Sung Kim
Woo Joong Kim
Yongtae Kim
Yoo Jin Kim
John M. Kitchura
Holly Klarman
Jonathan Klein
Daniel Patrick Knoth
Youngbok Ko
Anahit Kokobelyan
Scott I. Korf
Devika Kornbacher
Shirah Michal Kovnat
Denise Krall
Elie David Krief
Spencer H. Kuhner
Ruchira S. Kulkarni
Gani Kuseyri
Hyung Kyun Kwon
Sze Hou Lam
Xi Lan
Erika Judith Larsen
Katarzyna Olga Lasinska
Pieter Lavens
Franklyn C. LaVrar
Megan Lebo
Da Eun Lee
Da Sun Lee
HyeMin Lee
Ichia Helen Lee
Jihye Lee
Juyon Lee
Kyehyung Lee
Michael Wookeun Lee

Samantha Lee
Kurt Andrew Leeper
Ana Corina Lefter
Chi Lei
Qianwen Lei
Andrew John Molen Lena
Alexander G. Leone
Jaimie Michelle Lerner
Malisa Yuen-Quan Leung
David Eric Levine
Camille Levy
Jiahong Li
Jingdao Li
Junjie Li
Mengdie Li
Tao Li
Zhiyao Li
Valerie Liang
Daphne Zo Lin
Eric M. Lindenfeld
Dean Lintzeris
Yakun Liu
Yiqiao Liu
Catherine Claire Lobb
Tiziana Londero
Juan David Lopez Guevara
Eric Antwan Love
Brian Lowenberg
John-Paul Lujan
Nathaniel Robert Luken
Xue Cher Luo
John Patrick Lynch
Richard George Lyons
Darcy K. MacDermid
Lucas Coltro Avellar Machado
Trevor Austin Macneill
Ken H. Maeng
Rebecca A. Magenheim
Catherine Margaret Maguire
Matthew B. Mahoney
Johan Maitland
Kanwal Majeed
Avnish K. Mangal
Molly Elizabeth Manson
Matias Ricardo Manzano
Sabina Mariella
Bruna Maronesi
Eileen Catherine Marshall
Justin Gregory Martin
Raymond Vincent Martin
Inti Martínez-Alemán
Lena Rochelle Martinez-Wolfinger
Liliana Mascarenhas Coutinho
Kanwal Maseed
Masafumi Masuda
Maryssa Alexa Mataras
Jacob A. Matlin
Yuki Matsumoto
Hiroaki Matsunaga
Elaine D. McCafferty
Mary Katherine McClelland
Stephen Gary McConville
David Christopher Mcdonald
Emily E. McIntyre
John F. Mckeon
Sascha Meisel
Jenniffer Melendez
Ernesto Mendieta Marquez
Xiangnan Meng
Jing Miao
Roxanne Micca
Alexis C. Minz
Osvaldo Miranda Diaz
Eric Anthony Mitchell
Yuichi Miyashita
Shinji Mochizuki
Martin Louis Monaco
Amanda Cristine Monteagudo
Burke Johnson Montgomery
Rikkilee R. Moser
Xiaozhou Mu
Tess Cassandra Muckensturm
Maureen L. Murat
Patrick Robert Murphy
Pauline Thecla Muto
Mark Myers
Soojin Na
Joyce Lee Nadipuram
Yuta Nakagawa
Mayuko Nakamura
Gabriel Nascimento Rodrigues Freitas
Harry Nettlau
Damon G. Newman
Irene Ng
Joseph W. Njeri
Ciara O'Grady
Brendan Joseph O'Malley
Jennifer Obodo
Norbert Odonwodo
Naoki Ogawa
Lolade N. Ogbuagu
Luca S. Ognibene
Chinwenwa Chioma Ohanele
Rikiya Okuhara
Olamipeju Margaret Olayomi
Tania Joyce Omana Amador
Jerome Orlhac
Anthony James Ortiz
Alexander Ostrovsky
Emi Otsuka
Sarah Ann Padove
Mansi Parikh
Jisoo Park
Sungchoon Park
Wonsuk Brian Park
Scott George Parkin
Keith Andrew Pedrani
Jin Peng
Qianwen Peng
Brian J. Perbix
Katheryn B. Pereyra-Caldwell
Alfonso L. Perez-Diaz
Anh Pham
Meghna Philip
Letitia Z. Pierre
Mariia Piontkovska
Margaret Poissant
Margaret Anne Poissant
Svetlana Portman
Colleen K. Powers
Geoffrey Ryan Pruzinsky
Shi Qiu
Abdulaziz Abdulla Rafeia
Ammad W. Rafiqi
Alexis Antoine Marie Raguet
Anthony H. Raime
Charles T. Raines
Renuka Raman
Elsa Ramo
Nita Rao
Carl R. Rausa
Stephen Ray
Pasha Razi
Justin A. Reinhardt
Na Ren
Wanjie Ren
Jennifer Rochelle Rentrope
Odysseas Repousis
Alexandra Devon Ressa
Mara Redlich Revkin
Karice Davina Rhule
Brandon Wayne Rice
Heather Aley Richardson
Bethany Rishell
Caroline Riley Robb
Paul G. Roche
Patricia J. Rogers
Alexandra Kate Roisman
Cyprianne L. Rookwood
Mark Rosenthal
Joel H. Rothstein
Rodolphe Andre Georges Ruffie
Emily Escher Rush
Jeffrey Jason Saavedra
Vyron Sacharidis
Shahrzad Sadjadi
Dara Sahab
Jaclyn M. Saltzman
John Anthony Salvatore
Evan Sampson
Daniel Sanchez Cordero Canela
Maralee N. Sanders
Anthony Lawrence Sanderson
Livia Santoro
Yaa Serwa Sarpong
Sanal Sasankan
Dominique Renee Scalia
Hans Philipp Scheibenpflug
Benjamin Schiff
Evgeny Scirto Ostrovskiy
Alexander Self
Ryan Henry Sellinger
Roman Semenov
Diana Yeonkyung Seo
Ehsan Ullah Shah
Fanvin Fang-Yun Shen
Jian Shen
Kimberly Shin
Yasuko Shiokawa
Tsuyoshi Shirakawa
Stephanie Ann Short
Brittany Shoul
Lauren Shryne
Paulo Alberto Tejada Sicangco
Joseph William Silva
Lukas Simas
Zachary William Simon
Nehal Singhal
Alexandra E. Skarka
Sofia A. Skarlatos
David Slim
Sarah Hartman Sloan
Bryant Smith
Jason Michael Smith
Nicholas Charles Smith
Timothy Harold Smith
Ellen Karen Snyder
William Snyderwine
Iryna Sokhatska
Dara Solan
Jinmeng Song
Joshua David Sorensen
Alison J. Spark
Brian D. Spector
Stephanie Nicole Spies
Eugenia Chung Srodoski
Darci Stanger
Dana Sterling
M. Wilson Stoker
Michael Wilson Stoker
Marshall L. Stone
Yusuke Sugihara
Daniel Lee Sullivan
Taoran Sun
Tian Sun
Tautvydas Sutkus
Victoria Marie Anne Syreizol
Andrew Simpson Tabashneck
Kyle Michael Tait
Alan W. Tamarelli
Marie Tanaka
Francis Tanczos
Rohan Taneja
Deborah Pei Le Tang
Zheng Tao
Oleksandr Tataryntsev
Shantel N. Tatem
Sapna Thakker
Christie Annie Theodore
Dana Michelle Thompson
Ilene Marie Tognini
Hiraku Totoki
Taylor Elizabeth Trapp
Sakeena Fatima Trice
I-ting Tsao
Ivan Tukhtin
Amanda Tuninetti
Stephen Turner
John Leonhard Urban
Ashley Valdes
Alejandra P. Valenzuela
Bram Lieven Van Cauwenberge
David Allan Van Grouw
Nicole Laurianne Vander Meulen
Yuvaktep Vann
Anna Vikulova
Bridgette Villegas
Carlos Vina Bas
Jessica Wall
Joshua Shu Wan
Danxu Wang
Feicao Wang
Jonas Qing Wang
Pingping Wang
Scarlett Yu Wang
Weiping Wang
Zhou Wang
Julie Goodwin Weber
Wen Wei
Karina Emilie Weichert
Fabio Weinberg Crocco
Stephanie Marie Weinert
Rebecca Ellen Weinstein
I-hsien Weng
Donovan Anthony Westbrook
Anna Gwen Wettstein
Brandon R. White
Kyung Rok Wi
Amber R. Will
Ethan Lee Wilson
Hyeonjeong Woo
Patricia Margaret Wood
James P. Woods
Mengchao Wu
Qiaosong Wu
Wenyuan Wu
Difei Xiao
Qingtao Xie
Ying Xiong
Qiang Xue
Mayu Yamaguchi
Lou Yan
Byunghoon Yang
ByungHoon Yang
Jing Yang
Lei Yang
Zimu Yang
Jin Ye
Zi Ye
Jimmy Kiwon Yi
Kaori Yokota
Sylvia Siew jen Yong
Kazuo Yoshida
Ahmad Fadi Yousef
Kay Kyungsun Yu
Lingling Yu
Mia Yugo
Joseph L. Zales
Shawn Zaman
Themelis Zamparas
Themelis Zamparas
Yihong Zhand
Hong Zhang
Jingwei Zhang
Menglu Zhang
Shaowei Zhang
Yihong Zhang
Junteng Zheng
Xu Zheng
Yunhan Zheng
Chao Zhou
Linxi Zhou
Li Zhu
Ye Zhu

In Memoriam

Jana S. Behe-Kinneston
Albany, NY

Bruce D. Ettman
West Orange, NJ

Gary R. Miller
New York, NY

Thomas J. Mitchell
New York, NY

Samuel A. Schorr
Scarsdale, NY

ATTORNEY PROFESSIONALISM FORUM

To the 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 email communications to me; 3) You may not copy or blind copy your own client to emails 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

Dear Attorney Worrywart:

We can all agree that efficient and effective communication is vital to the practice of law. The Rules of Professional Conduct touch upon nearly every aspect of communication within the legal profession. There are specific rules governing how attorneys communicate with clients (New York Rules of Professional Conduct (RPC) 1.4), unrepresented parties (RPC 4.3), jurors (RPC 3.5), and even how they advertise their services to the public at large (RPC 7.1). Surprisingly, the Rules of Professional Conduct do not expressly govern how lawyers should communicate with one another. *See* Ethics Opinion No. 1124 ("no provision in the Rules of Professional Conduct . . . mandates how lawyers must communicate with each other"). This is likely because the Rules essentially treat our profession as "largely self-governing" trusting that lawyers – as members of a vocation founded principally on honesty and integrity – will hold themselves and their colleagues accountable for following the professional and ethical norms inherent to the profession. *See* Preamble to the Rules of Professional Conduct, ¶ 4. Despite this void in the actual text of the Rules of Professional Conduct, the Standards of Civility set forth in Appendix "A" to the Rules contain several universal principles that lawyers should bear in mind when communicating with an adversary.

The Standards of Civility are guidelines intended to encourage lawyers, judges, and court personnel to abide by principles of civility and decorum and "to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course." However, the Standards of Civility were not intended to replace, or even supplement, the Rules of Professional Conduct. Instead, they are essentially an honor code outlining "best practices" and professional courtesies lawyers routinely observe and extend to their colleagues. Not surprisingly, many of these "best practices" concern lawyer-to-lawyer communication.

For example, the Standards of Civility remind us that "lawyers should allow themselves sufficient time to resolve any dispute or disagreement by *communicating with one another* and

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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imposing reasonable and meaningful deadlines in light of the nature and status of the case." Standards of Civility, ¶ II(B) (emphasis added). The Standards further provide that lawyers should make a good faith effort to *consult with other counsel* regarding scheduling matters in order to avoid scheduling conflicts. *Id*., ¶ III(D) (emphasis added). Finally, Paragraph IV of the Standards of Civility dictates that "a lawyer should promptly return telephone calls and answer correspondence reasonably requiring a response." *Id*., ¶ IV. While the provision does not indicate whose telephone calls and correspondence require a prompt response, one can reasonably infer that calls and correspondence from opposing counsel would fall into that category. Therefore, it is reasonable to conclude that your adversary's self-imposed, week-long grace period for responding to communications may run afoul of the Standards of Civility. But again, the Standards of Civility merely guide – they do not govern.

A recent ethics opinion released in May 2017 offers some more practical guidance on the ways and means of "proper" lawyer-to-lawyer communication. Responding to an inquiry from a lawyer whose adversary would only respond to written communications and preferred not to use the telephone, the New York State Bar Association's (NYSBA) Committee on Professional Ethics advised in Opinion No. 1124 that "[a] lawyer may communicate with opposing counsel in any manner he chooses . . . regardless of the instructions of opposing counsel." NYSBA Comm. on Prof'l Ethics, Op. 1124 (2017). However, the Committee clarified that "opposing counsel is not required to respond to the lawyer's chosen method." *Id*. Therefore, in response to your adversary's instruction to not call or leave him voice messages unless it is an emergency, you may continue to call and leave him voice messages as you see fit; however, bear in mind that he is under no obligation to respond in kind.

Having addressed your adversary's so-called "communication rules," we can now move on to his instructions on client communications. Simply put, the Rules do not contain a provision that require you to communicate with your adversary's client. Just as the Ethics Committee could not pinpoint a specific Rule that governed how attorneys are to communicate with one another in Opinion No. 1124, they could not identify anything in the Rules that requires a lawyer to communicate with his adversary's client. *Id*. "It is not the lawyer's responsibility to keep the opposing counsel's client 'informed about the status of the matter' as required by Rule 1.4(a)(3). That is opposing counsel's obligation under that Rule." *Id*. Thus, you may – as a professional courtesy to your adversary – copy his client on all email communications, but you are under no obligation to do so.

Despite your adversary's direction to the contrary, you may in fact copy or blind copy your own client on emails to your adversary and/or his client. According to NYSBA Committee on Professional Ethics Opinion No. 1076 issued in December of 2015, "[a] lawyer may blind copy a client on email correspondence with opposing counsel, despite the objection of opposing counsel." NYSBA Comm. on Prof'l Ethics, Op. 1076 (2015). Keep in mind, however, that there are certain risks involved with copying and blind copying email communications. The Ethics Committee opined that while it is not unethical to copy or blind copy clients on email correspondence with opposing counsel or adverse parties, there are other practical reasons why attorneys should think twice before doing so. According to the Committee, "cc: risks disclosing the client's email address. It also could be deemed by opposing counsel to be an invitation to send communication to the inquirer's client." *Id*. With respect to the perils of using "bcc:," the Committee stated that while this may "initially avoid the problem of disclosing the client's email address, it raises other problems if the client mistakenly responds to the email by hitting 'reply all.'" *Id*. We previously recommended avoiding the use of "reply all" for this reason. *See* Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., September 2012, Vol. 84, No. 7. Limiting your use of "bcc:" is a way to protect your clients from this frequently committed human error.

Ultimately, if playing by your adversary's communication "rules" becomes too onerous, negatively impacts your ability to effectively represent your client, or impedes the resolution of the case, it is best to relay your concerns to him and attempt to "work out . . . the methods of communication that will best facilitate resolution of the matter at hand." NYSBA Comm. on Prof'l Ethics, Op. 1124 (2017). As we often do as lawyers, you should compromise and devise a communication strategy that is reasonable and feasible for both parties. Above all else, the Ethics Committee recommends that lawyers apply common sense to their dealings with one another. *Id.*

While the contours of attorney communication preferences are a mixed bag of professional courtesies and recent ethics opinions, client solicitation and attorney advertising are far more black and white. According to the "No Contact" rule of the Rules of Professional Conduct, "[i]n representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." RPC 4.2(a). The Ethics Committee has opined, however, that the "No Contact" rule only applies to communications "made by a lawyer in the course of 'representing a client.'" NYSBA Comm. on Prof'l Ethics, Op. 1010 (2014). Therefore, it does not apply to communications from a third-party firm in which the firm seeks to obtain "new clients in matters in which the firm is not already involved." *Id*. In other words, it is not unethical for a lawyer or law firm to "poach" a client who is already represented by counsel in an active matter, as long as the lawyer or law firm is not itself involved in

the case. Therefore, despite your concerns about the firm's business model and their reputation in the legal community, they may lawfully advertise their "second opinion" services to your client.

That being said, the third-party firm's advertising tactics are subject to the Rules governing legal advertisements and client solicitation. Pursuant to Rule 1.0(a) of the Rules of Professional Conduct, an "advertisement" is defined as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." Rule 1.0(a). The Rules restrict and prohibit certain types of legal advertising, including statements or claims that are false, deceptive or misleading (RPC 7.1(a)(1)), and impose limits on paid endorsements and fictionalized portrayals (RPC 7.1(c)). The Rules further require a disclosure that the advertisement is in fact an advertisement (RPC 7.1(f)) and impose pre-approval and retention requirements (RPC 7.1(k)).

The Rules of Professional Conduct also place certain restrictions on client solicitation. Under Rule 7.3, "solicitation" is defined as "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." RPC 7.3(b). While this definition could theoretically encompass the third-party firm's conduct as you described it (i.e., targeting clients who have recently received adverse decisions and offering "second opinions"), the comments to Rule 7.3 narrow the scope of "solicitation" substantially. "[A]n advertisement in public media such as newspapers, television, billboards, web sites or the like is a solicitation if it makes reference to a specific person or group of people whose legal needs arise out of a *specific incident* to which the advertisement explicitly refers." RPC 7.3, Cmt. [3] (emphasis added). If the advertisement does not make reference to a specific incident, it is not considered to be a solicitation, and is not subject to the additional restrictions enumerated in Rule 7.3. *See, e.g.*, RPC 7.3(a)(2)(v) (solicitation not permitted where lawyer intends but fails to disclose that services will be performed primarily by a different, unaffiliated lawyer); RPC 7.3(h) (setting forth requirement that soliciting lawyer include certain information about his or her services); RPC 7.3(e) (applying specific restrictions on solicitations relating to personal injury or wrongful death claims). Advertisements for "second opinion" services arguably approach the line between solicitation and non-solicitation, but according to the Ethics Committee, they are permissible. *See* NYSBA Comm. on Prof'l Ethics, Op. 1010 (2014) ("A firm may advertise that it is available to provide second opinions on pending legal cases on which individuals are already represented."). Therefore, the services offered to your client by this third-party law firm are not subject to tougher scrutiny under Rule 7.3.

If you do have legitimate concerns that this law firm violated one of the above-mentioned Rules on attorney advertising or solicitation when it contacted your client, you may express those concerns to your client if such disclosure would be in his best interest, but be careful to do your research before making any false or unsubstantiated accusations. If you discover that the firm has in fact violated one of the Rules of Professional Conduct, it may be more appropriate to notify the Grievance Committee.

Finally, if you do reach out to the third-party attorney to offer insight and explain aspects of the case, proceed with caution. Remember, you are still bound by the obligation to protect your client's confidential information gained during or relating to the representation. *See* RPC 1.6. The third-party attorney is also bound by these obligations in his or her communications with you. Thus, you should not expect that you will learn much information about what your client discussed with the third-party attorney and what legal advice, if any, was provided.

The communication boundaries addressed here are complex, and as professional norms change and technology advances, the Rules of Professional Conduct – including the Rules governing advertising and solicitation – will have to evolve accordingly. What must remain constant, however, are the core values of courtesy and civility, which attorneys should practice as a matter of course. Add in a touch of common sense and most, if not all, communication hurdles can be cleared.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

On my return home from a summer vacation, I almost had a panic attack standing in line at U.S. Customs. The person in front of me was carrying a laptop with a flash drive, and the customs agent instructed him to turn the laptop on, plug in the flash drive, and open certain documents on it. My laptop was in my bag hanging over my shoulder. I started thinking about what was on my laptop. I had been reviewing documents on a very sensitive deal between two well-known public companies that I am sure my client does not want anyone to know about. I am very careful about cybersecurity, and the laptop requires two-factor authentication to access any documents. But this border agent was directing the person to enter a password and show him information on the computer with a number of people in the immedi-

ate vicinity who could see the screen. Fortunately, I went through the checkpoint without having to even turn on my computer. But I travel frequently and I always bring my laptop with me. I know that a number of the attorneys at my firm regularly travel abroad, and many of them take their laptops and phones with them. I am now very concerned about even carrying my laptop to the airport.

Under what circumstances can a customs agent demand to search through a passenger's electronic devices? Are there any limitations for what the customs agent can and can't search? Can they make copies of materials on my devices? Are there exceptions for attorneys who are carrying devices with sensitive or confidential client information? If an agent directs me to show client information, should I explain to the agent that I am an attorney and carrying sensitive information that I cannot disclose?

If the agent insists on viewing the information despite my protests, is there anything else I can do? Am I violating any ethics rules by following the directions of the agent? Am I breaking any laws by refusing to comply with the agent? If an agent does review my devices and confidential or sensitive client information, what are my ethical responsibilities to my client? Does it matter if I have sensitive or confidential information from a potential client that has not yet retained me? What if the same issue arises with a customs agent from another country? Is there anything I should do to my devices the next time I travel abroad to prevent disclosure of client information? ■

Very truly yours,
Justin Cancun

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.

Shaking Off the Sand!

Two months, 83 falafels, and a sweet farmer's tan later, and I am back in the United States of America. The English language sounds like music to my ears.

What an exceptional summer in exceptional company.

I spent most of the summer working in Israel at an NGO called the Association for Distributive Justice (ADJ). The focus of this organization is the equitable allocation of resources and land to all members of Israeli society.

At the ADJ, I was tasked with identifying and locating law from countries with a similar land distribution system to that of Israel. In Israel, more than 90 percent of the land is owned by the government. To match this structure, I relied on Canada's land system, where, similar to Israel, the government owns roughly 89 percent of land in the country.

While I was interning with the ADJ, I drafted a grant proposal, assisted with English-language communications with entities of the European Union, and performed substantial research on various countries' housing and tenant law.

A significant problem facing the lower socioeconomic members of Israeli society is tenancy protection. To be frank, there isn't much in the law for the protection of tenants living in what we would call subsidized or rent-controlled housing. To combat some of the pitfalls of Israeli tenancy law and its shortcomings, the ADJ has launched multiple projects.

One such project involved the ADJ working to help ensure transparency within the Israeli government so that where, for example, there is a land tender that will impact existing tenants, and to increase the likelihood of tenants knowing of these tenders, the reports are published in both Hebrew and Arabic. With Arabs making up a significant portion of the lower socioeconomic population, it is important they, too, have the ability to review relevant records. The ADJ submitted petitions and proposals to the Israel Land Authority to achieve this.

My time spent working with the ADJ was quite enjoyable. The only snag I encountered was when I was tasked with answering the phones. A little tricky when one's Hebrew vocabulary consists of five or six words!

Back in the States, my thoughts naturally turn to school.

I look forward to my second fall semester in law school. Classes are a bit less menacing as I enter the doors now as a 2L. As the Bar Exam looms in the background, I begin to focus on classes that will aid me in taking (and passing!) the exam, as well as classes in environmental law. I am enrolled in a business organizations class, a land use planning class, which has an emphasis on environmental law, and an evidence class. All three of these, in addition to the other courses I will be taking, are exciting to contemplate. Evidence, on its face, sounds relatively straightforward. Having worked in a law firm before, I understand just how difficult and complex admitting evidence can be, deciding what is privileged, etc. I am excited to delve deeper into this area of law.

I entered law school with an eye on focusing on the environmental law field. Land use planning is the first class I will be taking within that focus area. Similar to my undergraduate years, in which I focused on classes within my major, I am treating this course with a similar level of importance. A bonus of this class: a paper-based final, as opposed to one of those casual, relaxing four-hour final exams.

With the summer coming to a close, and my focus shifting back toward school and another semester at Albany Law School, I look forward to sharing the trials, and triumphs, of my second year with you. ■

Replace "that that" with "that this" or "that the."

Differentiate between *that* (or *which)* and *who*. *That* and *which* refer to things, entities, concepts and animals. *Who* refers to people and to named animals and animals that have special qualities. *Who* and *whoever* are used to refer to subjects and subject complements, whereas *whom* and *whomever* are used to represent objects. To choose the correct pronoun, isolate the subordinate clause and then decide how the pronoun functions within it. *Who* occasionally functions as a subject complement in a subordinate clause. Subject complements occur within the linking verbs *am*, *are*, *be*, *been*, *being*, and *is*.

Exercises: *That* vs. *Which* vs. *Who* vs. *Whom*

Rewrite the following sentences.

1. M&G is the law firm who represents the defendant.
2. The law clerk gave the judge the relevant law, which was meant to help the judge decide the motion.
3. It's uncomfortable to sit on a chair which doesn't have a cushion.
4. The Lower Manhattan office that is located in Tribeca is close to the defendant's home.
5. The court officer that works on Wednesdays never recognizes the judge's interns.
6. The witness saw the man that stole the car.
7. The court held the 500-pound man in contempt.
8. This gun is the weapon which was used in the bank heist.
9. The woman identified the man that had robbed her.
10. The deliberation lasted for seven hours because the jurors couldn't decide the witness that was telling the truth.

Professional Tone

When writing, you get to choose which tone you'll use. This decision is important because your tone is what evokes emotion and reaction from your readers. Because legal writing is formal, avoid casual, impertinent, and joking tones. Keep your sentences short. Short sentences are businesslike and to the point. To avoid seeming biased, use objective language whenever possible. When conveying thoughts on a matter or person, remember that a true statement needn't contain disparaging or otherwise offensive language. Avoid biased modifiers and conclusions. Don't tell; show. Don't just write something. Set out the facts that show why you're right. Cut your adjectives and adverbs. Understate; never exaggerate.

Exercises: Professional Tone

Rewrite the following sentences.

1. An employee who's running late should at least call to let his manager know he'll be late.
2. The prosecutor's motion should be denied. His argument is based on a preposterous claim.
3. The lawyer was very rude to the judge.
4. The egregious crime in question was committed a year ago today.
5. Anyone can see that Mr. Lewis fired her because of his biased views.
6. Pursuant to CPLR 3211 (a), plaintiff has no standing to sue.
7. Come on, Judge. You know as well as I do that that excuse is a lie.
8. Defendant took his hatred for his mother-in-law to a whole new level, and he killed her.
9. She can't be trusted. She's a liar and everyone knows it.
10. The victim bullied the defendant in the past. What makes you think that the defendant wouldn't kill the victim when she had the chance?

Absolutes and Adverbial Excesses

Avoid using absolutes like *always* or *never*. These words are rarely accurate. Avoid adverbial excesses, too. Legal writers often use words like *certainly*, *clearly*, and *undoubtedly* in place of a strong argument. *Why* is a statement clear? *What* makes a statement incontrovertible? If you have answers to these two questions, you should explain them. Although concision is key, don't use an adverbial excess to save words. If you don't explain yourself thoroughly, your readers will begin to doubt the strength of your arguments and the veracity of your claims.

Exercises: Absolutes and Adverbial Excesses

Rewrite the following sentences.

1. When Mr. Robinson was arrested for possession, he said that he was "just holding it for a friend" — which is ridiculous; that's never the truth.
2. Ms. Williams is a drug addict. As you know, Your Honor, drug addicts always lie about their drug habits.
3. The complaint is obviously ridiculous.
4. The witness's testimony does not coincide entirely with the facts. He's clearly lying.
5. The fact that Ms. Daniels has stolen once before from Macy's proves she's a kleptomaniac.
6. The court attorney always reads the calendar in court on Wednesday mornings.
7. Dr. Norman is undoubtedly responsible for the patient's death.
8. The insurance company is clearly not liable for the cost of the surgery.
9. The plaintiff's attorney delivered an extremely underwhelming closing argument.
10. I agree wholeheartedly.

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

Answers: Wordiness

1. The word *of* is unnecessary in this sentence. Eliminate it. *Corrected Version*: The New York State Supreme Court has subject-matter jurisdiction over this case.

2. *As of* creates unnecessary wordiness. Eliminate it. *Corrected Version*: The attorney hasn't filed the motion yet.
3. The words "is the type of witness who" are superfluous. Delete them. *Corrected Version*: He'd lie under oath.
4. Make this sentence more succinct by replacing "have an impact on" with the less-wordy "affect." *Corrected Version*: The jury's decision will affect the plaintiff's future.
5. This sentence contains a nominalization. Remove it. *Corrected Version*: Whether the court will adjourn the case depends on several factors.
6. Using the word *of* in dates and years is superfluous. *Corrected Version*: The crime was committed in October 2012.
7. Make this sentence more concise by replacing "a large percentage of" with the less-wordy "many." *Corrected Version*: Many women attended the judge's seminar at Columbia Law School.
8. Although this sentence doesn't look wordy, it is. The sentence should be written in the active voice. *Corrected Version:* Judge Learned Hand wrote the decision.
9. This sentence contains many redundant words. Eliminate them. *Corrected Version:* After Defendant terminated Plaintiff's employment, Plaintiff sued.
10. Delete "of" after both. *Corrected Version*: Both judges decided the same case.

Answers: *That* vs. *Which* vs. *Who* vs. *Whom*

1. Because the sentence is about which law firm represents the defendant, the name of the law firm representing the defendant is essential information. *Corrected Version*: M&G is the law firm that represents the defendant.
2. Because this sentence implies that the law clerk gave the judge only the relevant law, this sentence is a defining clause. Use *that*. *Corrected Version*: The law clerk gave the judge the relevant law that was meant to help the judge decide the motion. Or, better, delete "that was meant": The law clerk gave the judge the relevant law to help the judge decide the motion
3. Because the subject of this sentence is one type of chair, it's restrictive, which means we should use *that* instead of *which*. *Corrected Version*: It's uncomfortable to sit on a chair that doesn't have a cushion.
4. Removing the part of the sentence that tells us in which neighborhood the Lower Manhattan office is located doesn't change the meaning of the sentence. Use *which. Corrected Version*: The Lower Manhattan office, which is located in TriBeCa, is closest to the defendant's home.
5. Because "[t]he court officer" is the subject of the sentence, use *who*. *Corrected Version*: The court officer who works on Wednesdays never recognizes the judge's interns. *Or*, if there's only one court officer: The court officer, who works on Wednesdays, never recognizes the judge's interns.
6. Because "a man" is a person and the person is the subject of the verb in this sentence, use *who*. *Corrected Version*: The witness saw the man who stole the car.
7. Adding a structural "that" to the sentence will make it clearer. The judge didn't hold a 500-pound man. *Corrected Version*: The court held that the 500-pound man was in contempt.
8. Because this sentence is about which gun was used in the bank heist, it's essential information that *this particular* gun is the one used in the heist. This sentence is a defining clause. Use *that*. *Corrected Version*: This gun is the weapon that was used in the bank heist.
9. *Who* should be used when referring to people. *Corrected Version*: The woman identified the man who robbed her.
10. The important information in this sentence is that the jurors deliberated for seven hours. The latter half of the sentence contains nonessential information. Use *which*. *Corrected Version*: The deliberation lasted for seven hours because the jurors couldn't decide which witness was telling the truth.

Because legal writing is formal, avoid casual, impertinent, and joking tones.

Answers: Professional Tone

1. This sentence lacks tact. Correct it. Make the sentence gender neutral. *Corrected Version*: Employees should notify their manager if they're going to be late.
2. Calling the argument "preposterous" is unnecessarily disparaging and will lead to reader pushback. Think twice before using biased conclusions.
3. This sentence contains disparaging language. Explain *what* made the lawyer come across as rude. *Corrected Version*: The lawyer interrupted the judge several times during the oral argument. And cut "very."
4. There's no need to call the crime "egregious." Use facts to let others decide whether the crime was egregious. Eliminate the words "in question." *Corrected Version*: Defendant committed the crime a year ago today.
5. The unedited sentence contains both an absolute word ("anyone") and accuses Mr. Lewis of

prejudice. Rewrite the sentence to contain neither. *Corrected Version*: Mr. Lewis fired his assistant.

6. This sentence contains legalese. Legalese is unprofessional tone. Rather than "pursuant to," use a common and simple word like "under." *Corrected Version*: Under CPLR 3211 (a), plaintiff has no standing to sue.
7. The tone of this sentence is too casual and dramatic. *Corrected Version*: The excuse is a lie because of X, Y, and Z.
8. The unedited sentence contains an accusatory implication ("he . . . killed her"). We don't know whether the defendant really killed his mother-in-law. *Corrected Version*: Defendant stated that he hated his mother-in-law, and the evidence indicates that he is responsible for her death.
9. The tone of the unedited sentence is disparaging. Revise it. *Corrected Version*: Your Honor, I ask that the witness's testimony be stricken because she has lied under oath.
10. This statement should be rephrased to avoid using condemning and disparaging language. *Corrected Version*: Evidence proves that the defendant wanted revenge on the victim for bullying him in the past.

Answers: Absolutes and Adverbial Excesses

1. The unedited sentence contained both a disparaging word ("ridiculous") and an absolute word ("never"). Remove both. *Corrected Version*: When Mr. Robinson was arrested for possession, he said he was "just holding it for a friend."
2. It's inaccurate to say that drug addicts "always" lie about their drug habits. Rephrase the sentence. *Corrected Version*: Ms. Williams is a drug addict. As you know, Your Honor, she might not be entirely forthcoming about her drug habits.
3. Calling a complaint "obviously ridiculous" is rude. Write that the complaint "lacks merit" or is "unfounded" instead. Then explain why it lacks merit or is unfounded. *Corrected Version*: The complaint is unfounded because of X, Y, and Z
4. The words "he is clearly lying" are both superfluous and disparaging. Remove them. *Corrected Version*: The witness's testimony doesn't coincide with the facts.
5. Just because Ms. Daniels has stolen once before doesn't mean she's a kleptomaniac. Delete the disparaging phrase. *Corrected Version*: Ms. Daniels has stolen from Macy's.
6. In this sentence, using "always" is correct because it's accurate. The court attorney read the calendar only on Wednesday mornings. The sentence is correct.
7. *Undoubtedly* is an adverbial excess. Delete it. *Corrected Version*: Dr. Norman is responsible for the patient's death because of X, Y, and Z.
8. *Clearly* is an adverbial excess. Get rid of it. *Corrected Version*: The insurance company isn't responsible for the cost of the surgery.
9. The word *extremely* adds little to the sentence. Remove it. *Corrected Version*: The plaintiff's attorney delivered an underwhelming closing argument.
10. The word *wholeheartedly* adds little to the sentence. Remove it, unless you want to be dramatic. *Corrected Version*: I agree. ■

GERALD LEBOVITS (GLebovits@aol.com), a New York City Civil Court judge, is an adjunct at Columbia, Fordham, and NYU Law Schools. He thanks judicial interns Alexandra Dardac (Fordham University) and Rosemarie Ferraro (University of Richmond) for their research.

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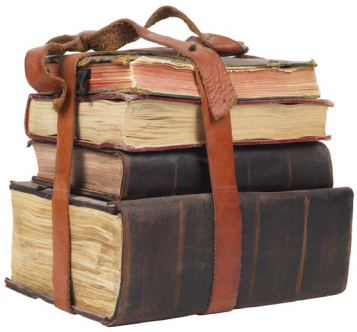

Legal-Writing Exercises: Part III

In the last issue of the *Journal*, the *Legal Writer* discussed cowardly qualifiers, legalese, modifiers, and nominalizations. This issue of the multi-part series covers wordiness; mistakes involving *that*, *which*, *who*, and *whom*; tone; and absolute language and adverbial excesses. At the end of each section are editing exercises. You can add words, change words, delete words, or rearrange words — whatever you think is best. After completing all the exercises, look at the answers at the end of the article to see whether your answers are correct.

Wordiness

Short sentences are read and understood more easily than long ones. And many legal documents are unnecessarily wordy. Writers' use of the word *of* is a main contributor to wordiness. When possible, invert or rearrange a sentence to delete *of*.

Some tips:

- Delete and, if necessary, replace *as of*.
- Delete *of* after "all" and "both," except when followed by a pronoun.
- Delete *of* after "alongside," "inside," "off," and "outside."
- Delete *of* in dates and years.
- Revise sentences to remove *of* abstractions, such as "factor of," "kind of," "matter of," "sort of," "state of," and "type of."
- Use "except for" to replace "outside of."

In addition, remove redundant words and phrases (*example:* "In some instances" *becomes* "Sometimes") and substitute one word for a wordy prepositional phrase (*example:* "the editing of articles" *becomes* "editing articles"). To write more crisply, write in the active voice, and avoid nominalizations and legalese.

Exercises: Wordiness

Rewrite the following sentences.

1. The Supreme Court of the State of New York has subject-matter jurisdiction over this case.
2. The attorney hasn't filed the motion as of yet.
3. He's the type of witness who'd lie under oath.
4. The jury's decision will have an impact on the plaintiff's future.
5. Whether the court will adjourn the case is dependent on several factors.
6. The crime was committed in October of 2012.
7. A large percentage of women attended the judge's seminar at Columbia Law School.
8. The decision was written by Judge Learned Hand.
9. Defendant stated that after he gave Plaintiff advance notice of termination of employment, Plaintiff sued.
10. Both of the judges decided the same case.

That vs. *Which* vs. *Who* vs. *Whom*

Which word you choose between *that* and *which* affects how your readers will understand the sentence. *That* is restrictive (defining); *which* is nonrestrictive (non-defining). Defining clauses provide essential information that is important for the sentence; nondefining clauses introduce nonessential information. If the word or concept following *that* or *which* is one of several, use *that*. If the word or concept expresses a totality, use *which*. *Which* should be surrounded by a comma, whereas *that* shouldn't have commas around it.

Use *that* as a structural device to aid understanding. *Example:* "The People alleged defendant committed murder." *Becomes:* "The People alleged that defendant committed murder." In this sentence, adding *that* aids understanding because "The People" can't allege a defendant.

Writers' use of the word *of* is a main contributor to wordiness.

Eliminate the nonstructural *that*. *Example:* "The advice that he gave to the class is not to be wordy." *Becomes:* "The advice he gave to the class is not to be wordy."

Use *that* to distinguish between direct and indirect discourse. *Direct discourse:* "The senior partner said, 'Bill researched the issues.'" *Indirect discourse:* "The senior partner said *that* Bill researched the issues." *Not:* "The senior partner said Bill researched the issues." Always eliminate the extra *that*. *Example:* The court attorney explained that although she will only draft the decision, *that* no one will read it." *Becomes:* "The court attorney explained that although she will only draft the decision, no one will read it."

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