NEW YORK STATE BAR ASSOCIATION
Journal
NYSBA
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MASS SHOOTINGS AND DOMESTIC VIOLENCE

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Is Domestic Abuse a Red Flag for Mass Shooters?
By Scott M. Karson

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Editor-in-Chief, 1961–1998

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By Scott M. Karson

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An Exciting and Busy Year Ahead

President's Message

BY MICHAEL MILLER

I am deeply honored to serve as the 121st president of the New York State Bar Association. It is humbling to note that so many pillars of our great profession have come before me. I will do my best to live up to the lofty standards set by my predecessors and look forward to working with my colleagues as we embark upon an ambitious agenda over the next 12 months.

Our emphasis in the coming year will be on a broad range of topics relevant to the effective administration of justice in the 21st century. We will focus on important criminal justice issues; explore the criteria and best practices for screening candidates for election to judicial office; discuss key law practice management matters; delve into legal issues impacting transnational families; and address America's scourge of mass shootings, assault weapons and related legal issues. Finally, we will have greater emphasis on out-of-state members, a large segment of our membership that has grown significantly over the past decade.

To help achieve these goals, I have established the following task forces and working groups:

RAPID RESPONSE

All too often these days, judges are subject to harsh personal criticism for their decisions. But while decisions are fair game, the integrity or motives of judges are not. Judges are not permitted to respond, even to personal, *ad hominem,* attacks. A great challenge of the digital age is to effectively respond to events and developments within the relevant news cycle. I have established a rapid response advisory group, including leaders from NYSBA and other bar associations around the state, to help us respond quickly to unfair attacks on members of our judiciary.

EVALUATION OF CANDIDATES FOR ELECTION TO JUDICIAL OFFICE

There is no more important pillar to the foundation of our justice system than the quality of our judiciary. It has long been the policy of NYSBA to advocate for the selection of judges by appointment, rather than by election. However, as long as there are judicial elections, it is vitally important that the process of evaluation is fair and fosters the best judiciary possible. So, I have established a task force to survey the state and report on the various vetting structures that exist throughout New York. Based upon its investigation, the group will propose best practices, guidelines and minimum standards for review of judicial candidates. It will also make recommendations to assist local bar associations, good government groups and others in developing new effective non-partisan judicial evaluation efforts and improving existing ones.

WRONGFUL CONVICTIONS

NYSBA issued a groundbreaking report in 2009 that made valuable recommendations to improve the administration of justice and shed light on what is a profoundly serious and festering problem. A newly empaneled task force will update the 2009 report with recommendations based upon new developments, technology, science, experience, and judicial decisions and make affirmative recommendations to reduce the likelihood of wrongful convictions.

INCARCERATION RELEASE PLANNING AND PROGRAMS

This task force will build upon the work of NYSBA's Task Force on Re-Entry and will recommend state and national policy changes and best practices. The group will examine existing programs and consider a range of

issues, including options for those released into urban and rural settings, inconsistent rules and limited availability of substance abuse and mental health treatment, housing options, and the impact on recidivism of the general lack of release planning and employment opportunities in the state system.

MASS SHOOTINGS AND ASSAULT WEAPONS

The epidemic of mass shootings in America that began with the massacre at Columbine High School in 1999 continues unabated. The genesis of many of these mass shootings has been the ability for a person with a history of serious mental health issues or domestic violence to obtain assault weapons. Between 2009 and 2016, 54 percent of all mass shootings in America involved a perpetrator who had been violent toward a partner or relative, despite federal laws designed to prevent domestic violence perpetrators from gun ownership.

The task force will consider the connection between mental health and mass shootings; the relationship between domestic violence and mass shootings; the potential effectiveness of enhanced waiting periods and enhanced background checks; uniformity of rules regarding purchases in stores and gun shows; whether private sellers should be required to conduct background checks on the domestic violence registry; and federal and state model regulation of assault weapons and related accessories, such as large ammunition magazines, "bump stocks" and other devices.

THE ROLE OF PARALEGALS

In 1997, NYSBA issued guidelines for the use of paralegals. It is time for another look at the role of the paralegal in the context of the 21st century law office and in the virtual law office. This task force will explore relevant ethics considerations, confidentiality and privilege, supervision, make recommendations for best practices in light of relevant ethics opinions and other developments, and look at the possibility of some form of NYSBA membership for paralegals.

MEMBERSHIP DEVELOPMENT

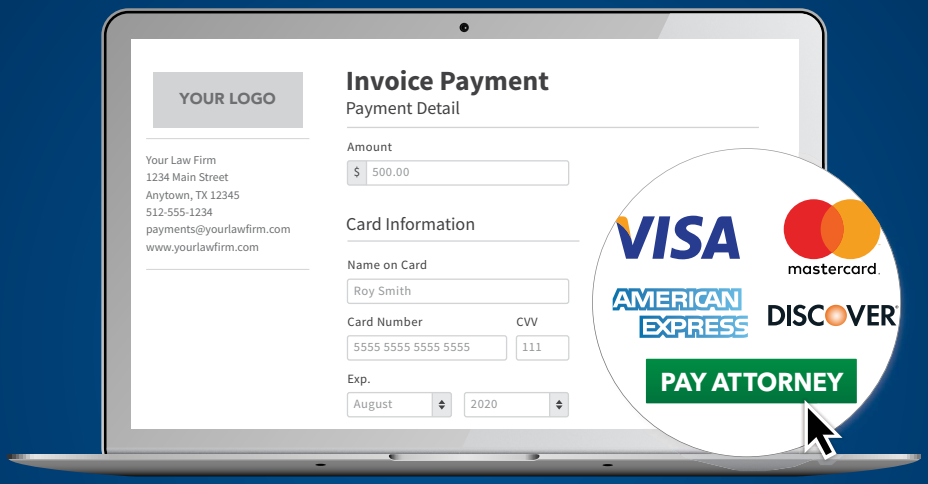
NYSBA continues to face a challenge that is shared by most voluntary bar associations – and indeed most professional associations – across the country: attracting new members and retaining existing ones. I believe that all roads lead to membership and that everything we do should support our membership development efforts.

In the coming year, as we continue our work to improve membership efforts in all areas, we will embark on a vigorous campaign focusing on out-of-state NYSBA members. We have experienced solid and consistent growth in out-of-state membership over the past decade, both domestic and international, and 24 percent of our current membership is out-of-state members.

It is time to provide a more meaningful membership experience for those members outside the United States, and for members in American cities outside New York State where we have significant membership, and to further grow this valuable segment of our association. We will be looking at how we can most effectively meet the needs of these members and what kinds of events and programs we can offer to support them.

I am looking forward to an exciting and busy year working with our exceptional executive committee and dedicated staff – and with all of you, our members.

Michael Miller can be reached at mmiller@nysba.org



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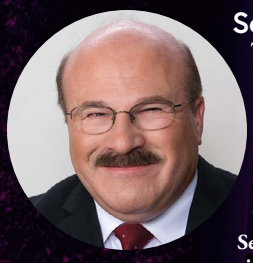
Mass Shootings and

It's Time to Look at the Connections



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Domestic Violence

By Scott M. Karson

The term "mass shootings" brings to mind infamous episodes of mass murder in schools – Columbine, Sandy Hook, Marjory Stoneman Douglas, Santa Fe – at military bases – Fort Hood, Washington Yard and at entertainment and leisure venues – the Pulse nightclub, a music festival in Las Vegas, a movie theater in Colorado, a Waffle House restaurant in Tennessee.

Such shootings garner wall-to-wall coverage and extensive speculation about the often-unknowable "why." These incidents occur in the public eye, and the 24-hour news cycle magnifies the horror and keeps each incident squarely in the public discourse, at least for a few days.

But a mass shooting is not defined by its location. According to the FBI, a mass shooting is, quite simply, the murder, by gun, of four or more people. Note that if the shooter kills himself, that is not considered part of the body count. After the Newtown, Connecticut, school shooting, Congress passed P.L. 112-265, defining a mass killing as one where three or more people died.

The Department of Homeland Security found that in 2017, there were 28 incidents of "mass attacks," which it defined as an occurrence in a public space where three or more people were harmed. It is a sad and sobering reflection on our society that we are having this conversation at all, let alone searching for the most precise definition.

With the FBI criterion in mind, the organization Everytown for Gun Safety pored over seven years of FBI data on mass shootings. It found that a staggering 54 percent of mass shootings that occur in the United States are related to domestic or family violence, and most occur in a private setting, like the home.

The organization also found that in 42 percent of these killings, the perpetrator had exhibited warning signs, including known violent behavior toward an intimate partner, children and other relatives. In some cases, the perpetrator's actions had been reported to the police.

These mass shootings are covered in the local media but rarely make the national news. They are not spectacular enough; they are merely grim statistics. Yet the perpetrators of public and private mass shootings have more in common than just the guns they use – often, they have links to domestic violence.

Some of the most notorious incidents were perpetrated by people with a history of domestic violence, whose rage eventually spilled out onto the public. Devin Kelley, who killed 26 people in a Sutherland, Texas, church, in November 2017, had a history of domestic abuse and harassment, including choking his first wife and fracturing the skull of his young stepson. He remarried, and started texting threats to his mother-in-law. Kelley targeted the church because he expected her to be at the service.

Nikolas Cruz killed 17 people at Marjory Stoneman Douglas High School in Parkland, Florida, in February 2018. Cruz was the subject of dozens of calls to law enforcement, including one incident where he slammed his mother into a wall for taking away his Xbox.

In May 2018, 17-year-old Dimitrios Pagourtzis entered Santa Fe High School in Santa Fe, Texas, and shot 23 people, 10 of whom died. One of the victims was a girl who had refused his advances, and he became increasingly aggressive over the months he pursued her.

Stephen Paddock, who murdered 56 and injured more than 550 concertgoers in Las Vegas in October 2017, was known at the casinos he frequented for his high-stakes gambling – and for verbally abusing his girlfriend.

Omar Mateen regularly beat his first wife and she divorced him after four months of marriage, saying that her family literally had to pull her from his arms. On June 12, 2016, Mateen murdered 49 people at the Pulse nightclub in Orlando.

On the same day as Mateen's shooting spree, Juan David Villegas-Hernandez murdered his wife and four children in Roswell, New Mexico. She had asked for a divorce, citing domestic abuse.

Mateen is still a household name, but most of us are unaware of Villegas-Hernandez's crime, his flight to Mexico, his capture and eventual extradition back to the United States. Villegas-Hernandez was local news, yet he and others like him are responsible for the bulk of mass shootings. Perhaps they should be our focus.

The victims may be targeted, and the shootings rarely occur in public venues, but when they do, bystanders are at risk.

In June 2016, Jason Dej-Odoum followed his wife to a Walgreens, shot her in the parking lot, then drove to their home in Las Vegas and killed their three children before turning the gun on himself. His wife had applied for an order of protection but her application was denied.

On April 10, 2017, Cedric Anderson entered an elementary school in San Bernardino, California, walked into his estranged wife's special education classroom and shot her. Anderson also killed one of her students and injured another before killing himself.

The Parkland shooting led to groundswell of political activity to tighten the gun laws in this country. Proponents often point to Australia as a model of sensible gun laws, which were put into place after a mass shooting in 1996. Australia has a 28-day waiting period, requires a justifiable reason to own a gun, and conducts rigorous background checks. The government also bought back and destroyed one million semi-automatic weapons – about a third of Australia's firearms. There has not been another mass shooting since the 1996 incident, and murder and suicide rates have dropped dramatically.

Twenty-seven states prohibit a person subject to a domestic violence restraining order or convicted of a domestic violence offense from possessing firearms.

Children who observe incidents of domestic violence can be profoundly affected. Fear and anxiety for themselves, siblings or a parent are major stressors. Exposure to domestic violence can make children feel isolated and vulnerable. Many withdraw and experience difficulties in school and social situations, problems which will cause more withdrawal. And children exposed to violent behavior may learn to engage in it themselves.

On January 23, 2018,15-year-old Gabriel Parker brought his stepfather's gun to his high school in Benton, KY. He killed two classmates and injured 14 others. Parker had apparently been planning the attack for more than six months, posting hints on Snapchat. Parker's parents divorced when he was five. His father served 90 days in jail on a disorderly conduct charge related to a domestic violence incident. In her petition for a domestic abuse order, Austin Parker's then-wife called him controlling and a bully.

In the fall of 2016, 14-year-old Jesse Osborne took his father's gun and murdered him. After kissing his pet rabbit and dogs good-by, Jesse drove his father's pickup truck to a Townville, South Carolina, elementary school, where he killed a 6-year-old boy and injured four others, including a teacher. In an interview with the FBI and a sheriff's county investigator, Osborne claimed his father was often drunk and "fussing at" him and his mother and "in my face." Osborne had been in trouble and had been suspended after bringing a machete and a hatchet to school. At the time of the shooting, he was being home schooled and was part of an online group that discussed and planned school shootings.

While numerous factors intertwine to lead an individual from hitting a spouse to shooting up a public venue, or from acting out at home to shooting up a school, the often lethal combination of domestic violence and easy access to guns should not be ignored.

But the Australian approach is unlikely to work in the United States, if for no other reasons than the reverence many feel for the Second Amendment and the sheer numbers of weapons in our country. As of 2009, the last year for which Department of Justice data is available, the United States had 101 guns per 100 people.

Beefed-up federal laws are a worthy goal, including stronger background checks, and closing gun show and private sale loopholes. But in the absence of federal action, states are leading the way. Seven governors, New York's among them, recently announced the formation of "States for Gun Safety," a multistate consortium to study gun violence and public health.

Twenty-seven states prohibit a person subject to a domestic violence restraining order or convicted of a domestic violence offense from possessing firearms. This has only a limited effect on intimate partner homicide rates, because those subject to a restraining order are not required to relinquish the guns they already own. States that require relinquishment – either after conviction (11 states) or for the period a person is under a restraining order (15 states) – have seen significant reduction in domestically related gun homicides. Even so, relinquishment laws are difficult to enforce so are not as effective as they could be.

Six states have what are called "red flag" laws. In California, for example, a concerned acquaintance or family member can ask a court to allow police to temporarily seize the guns of someone at imminent risk of harming him or herself or others. In some other states, the police must petition the court. It is difficult to measure the effectiveness of a law that keeps something from happening – i.e., a homicide – but about a dozen states are looking into the ramifications of implementing such a

law. Other states are looking at secure storage laws and requiring background checks for some private sales.

On May 1, 2018, New York joined the states requiring relinquishment when the Governor signed legislation expanding the list of "serious" crimes which, upon conviction, require the loss of a gun license and the surrender of all firearms. The intent of this legislation is "to ensure no domestic abuser in New York retains the ability to possess a firearm once convicted of a disturbing crime."

One thing we know from the U.S. Supreme Court decision in *District of Columbia v. Heller*: "[T]he right secured by the Second Amendment is not unlimited" and does not invalidate "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

Even modest limitations have good public health and safety outcomes. A number of New Yorkers are still calling for repeal of New York's Safe Act, which in 2013 implemented certain firearm restrictions. But since its passage, the number of violent crimes committed with a firearm decreased from 12,235 to 10,007 in 2016. And New York has one of the lowest suicide rates in the country.

Student survivors of the mass shooting earlier this year at Marjory Stoneman Douglas High School launched the #NeverAgain movement, which has inspired hundreds of thousands of Americans to participate in protests and call for stricter gun laws. Will political activism in the streets lead to stricter, smarter guns laws and a reduction in mass shootings and all gun-related violence? Will Americans take a closer look at the risk factors that can lead individuals to engage in gun violence? That remains to be seen.

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The "Exception to the Exception" on Gun Rights

By Paul Shechtman and Grace Condro

Can a person convicted of a felony in New York own a hunting rifle? The answer to that question isn't so simple.

RESTORATION OF "CIVIL RIGHTS"

Under federal law, it is illegal for any person convicted of a felony to possess any firearm that has been shipped or transported in interstate or foreign commerce.[1] The term "firearm" includes a hunting rifle.[2] There is, however, an exception to the federal prohibition. Under 18 U.S.C. § 921(a)(20), if the offender's "civil rights" have been "restored," then he or she can possess a firearm without subjecting himself or herself to federal prosecution "unless such . . . restoration . . . expressly provides that the person may not . . . possess . . . firearms." The last clause of the provision is referred to as the "unless clause"; it is an "exception to the exception."

Although the statute does not define what "civil rights" must be restored, courts have identified three core rights: the right to vote, the right to serve on a jury and the right to hold public office.[3] To determine whether an offender's civil rights have been restored, a court looks to the law of the state of conviction if the conviction is for a state law crime.[4]

What is New York law on the restoration of civil rights? Under Civil Rights Law § 79(1), a convicted felon who is sentenced to state prison (call him Mr. X) loses all his civil rights during the term of his sentence. His right to vote and to hold public office are restored on his discharge. His right to jury service is not restored.[5] But Mr. X can obtain a Certificate of Relief from Disabilities (CRD) that relieves him from that automatic bar.[6]

In *People v. Adams*, Judge Leventhal held that a CRD does not restore the right to jury service because the Commissioner of Jurors may still "analyze and review all the underlying facts . . . of the crime(s) for which the potential juror was convicted, weigh these factors against all the rehabilitative efforts . . . and then decide . . . whether the individual is qualified to serve as a juror."[7]

But *Adams* seems questionable. As one federal court has held, the fact that a felon may be excused from jury service on an individualized finding of unfitness does not mean that his jury service right is unrestored.[8] He has the right to be considered for service, and that is enough.

If *Adams* is wrongly decided, then all three of Mr. X's civil rights have been restored on his release from prison if he obtains a CRD.

What if a felon (call him Mr. Y) was sentenced to probation (or to local jail time) and therefore has not been incarcerated in state prison? The short answer is that Mr. Y's rights to vote and to hold public office are never lost, except in special circumstances.[9] And if *Adams* is wrongly decided, then his right to jury service can be restored if he obtains a CRD. Which brings us to the Supreme Court's decision in *Logan v. United States*.[10] There, the Court held that "the words 'civil rights restored' do not cover the case of an offender who lost no civil rights." That is to say, the Court read the statute literally: "restored" means restored. The Court recognized that its holding could create anomalous results, but concluded that anomalies were inherent in Congress' decision to have state law determine federal firearm rights.

In *Logan*, the defendant's Wisconsin conviction caused him to lose none of his civil rights. Is the answer different in Mr. Y's case, in which one of the core rights (jury service) may be restored by a CRD but two (the rights to vote and hold public office) were never lost?

The Sixth Circuit addressed that question in *Walker v. United States*, writing this:

> Thus Walker appears to have had at most one of the [three] civil rights restored, a second was not restored because it was never lost, and a third was not restored . . . . This is not sufficient. First, the language of the statute refers to having multiple "civil

rights" restored, not just one civil right . . . . Second, . . . the statute, as interpreted in Logan, defers to acts of forgiveness or rehabilitation by the convicting jurisdiction. The restoration of a single civil right . . . is insufficiently significant to suggest that Congress intended to defer to that also.[11]

In short, Mr. Y's civil rights had not been "restored."

THE "UNLESS CLAUSE"

Even assuming that Mr. X and Mr. Y could claim that their civil rights were restored (and Mr. X has a good claim), the question remains: does § 921(a)(20)'s "unless clause" prevent them from owning a firearm? That raises yet another statutory interpretation issue. The "unless clause" states that a felon whose civil rights have been restored may possess a firearm "unless such . . . restoration expressly provides that the person may not . . . possess . . . firearms."

Does that mean a court should look only to the restoration document (the CRD) or to the whole of the state law? What if the restoration document is silent as to firearms ownership (it does not expressly prohibit ownership), but state statutory law prevents a felon, even one whose civil rights have been restored, from possessing all or certain firearms? The Circuits are divided on this issue, and the Second Circuit has not yet addressed it.[12]

For present purposes, we assume that one looks to the whole of New York law and not just the restoration document. (As will be seen, it does appear to make a difference.) The key case here is *Caron v. United States.*[13] There, the Supreme Court held that if an offender is prohibited from possessing any firearm following the restoration of his civil rights, then he is subject to prosecution under § 922(g)(l).[14] (At issue in *Caron* was Massachusetts law that allowed Caron to possess a rifle or shotgun but prohibited him from possessing a handgun outside his home.) Put simply, to qualify for the § 921(a)(20) exemption, an offender must have all three of his civil rights

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restored and must be authorized to possess all types of firearms.

What then is New York law on firearms disqualification? Under Penal Law § 265.01(4), a convicted felon may not possess a rifle or shotgun. In *People v. Flook*, however, the county court held that a person convicted of a non-violent felony who obtains an unrestricted CRD is exempt from state prosecution.[15] The court noted that under Penal Law § 265.20(a)(5), a non-violent felon who obtains a certificate of good conduct is exempt. It reasoned that it would be "unfair to base prosecution . . . upon the insignificant difference between" a certificate of good conduct and a CRD. (Unlike a CRD, a certificate of good conduct is available to a person convicted of more than one crime, but he must wait a minimum period–three years from release from prison for most felonies–before obtaining relief.)[16]

Under New York law, a convicted felon may not obtain a pistol license, but an unrestricted CRD removes that bar as well.

Flook is hardly a model of statutory interpretation, but other courts have followed it.[17]

One more point: Under New York law, a convicted felon may not obtain a pistol license, but an unrestricted CRD removes that bar as well.[18] The licensing authority, however, maintains the discretion to deny a felon a license. On that basis, in Adams, Judge Leventhal held that a CRD does not relieve an offender of the licensing restriction imposed by New York law.

Once again, however, *Adams* seems questionable. The fact that a licensing authority may deny a license to an offender does not mean that New York law "expressly provides that [he] may not . . . possess . . . a firearm." Thus, the "unless clause" should not prevent Mr. X or Mr. Y from coming within the § 921(a)(20) exception if their three core civil rights are restored.

IMPRISONMENT PRIVILEGE

If the above analysis is correct, then the conclusion is truly anomalous. Mr. X – a felon sentenced to state prison – has his civil rights restored when his sentence is discharged if he obtains a CRD. He may therefore possess a hunting rifle without violating New York or federal law, if his CRD is unrestricted. (If the CRD limits his firearm rights, then § 922 (g)(l), as interpreted in *Caron*, prohibits him from owning a hunting rifle.) But Mr. Y – a felon not sentenced to prison – does not have his civil rights restored, even if he obtains a CRD, because he never lost two of them. That means he cannot own a hunting rifle without violating federal law. Imprisonment, it seems, has its privileges.

TWO AVENUES FOR RELIEF

There are two other potential avenues for relief for Mr. Y. The first is 18 U.S.C. § 925(c), which permits the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to remove § 922(g)(l)'s prohibition "if it is established to [ATF's] satisfaction" that a barred individual "will not be likely to act in a manner dangerous to public safety and that granting the relief would not be contrary to the public interest." But, for years, Congress has included a proviso in the ATF appropriation bill that prohibits ATF from using funds to consider applications for relief.[19] Thus, this avenue is a dead end.

The second avenue is to bring a lawsuit alleging that § 922(g)(l) is an unconstitutional restriction on an offender's Second Amendment right to possess a firearm. The Third Circuit has recently upheld an unconstitutional-as-applied challenge to § 922(g)(l) in a case in which the defendant had an "isolated, decades-old [conviction that did] not permit an inference that disarming [him would] promote the responsible use of firearms."[20] Second Circuit law, however, is less encouraging. The Circuit has rejected a Second Amendment challenge to § 922(g)(l) in a summary opinion.[21]

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1 18 U.S.C. § 922(g)(l).

2 *Scarborough v. United States*, 431 U.S. 563, 574–75 (1977).

3 *McGrath v. United States*, 60 F.3d 1005, 1007 (2d Cir. 1995).

4 *See Beecham v. United States*, 511 U.S. 368, 371 (1994) ("this determination is governed by the law of the convicting jurisdiction").

5 N.Y. Judiciary Law § 510(3).

6 A person is ineligible for a CRD if he has been convicted of more than one felony. A CRD can be obtained from the sentencing court if the offender is not sentenced to state prison or from the Board of Parole if he is. It may be unrestricted or restricted (i.e., "limited to one or more enumerated forfeitures, disabilities or bars"). *See* N.Y. Correction Law § 701(1); *see generally* N.Y. Division of Criminal Justice, Certificates of Relief from Disabilities and Certificates of Good Conduct (2007).

7 *People v. Adams*, 193 Misc. 2d 78, 84 (Sup. Ct., Kings Co. 2002); New York Attorney General No. F91-10.

8 *See United States v. Caron*, 941 F. Supp. 238, 241–45 (D. Mass 1996).

9 *See* N.Y. Public Officers Law § 30 (providing for loss of public office by a person who while in office commits a crime directly related to the office); N.Y. Election Law § 5-106(2) & (5) (a person convicted of a felony but not sentenced to jail does not lose his right to vote).

10 *Logan v. United States*, 552 U.S. 23 (2007).

11 *Walker v. United States*, 800 F.3d 720, 727 (6th Cir. 2015).

12 *See Buchmeier v. United States*, 581 F.3d 561, 564–65 (7th Cir. 2009) (collecting cases).

13 *Caron v. United States*, 524 U.S. 308 (1998).

14 *See* N.Y. Correction Law § 701(3).

15 *People v. Flook*, 164 Misc. 2d 284 (Cty. Ct., Ontario Co. 1995).

16 N.Y. Correction Law § 703(a) & (b).

17 *People v. Adams*, 193 Misc. 2d at 85 (collecting cases).

18 N.Y. Penal Law § 400.00(l)(c); *Hecht v. Bivona*, 306 A.D.2d 410, 411 (2d Dep't 2003).

19 *See* Congressional Research Service, Gun Control: FY2017 Appropriations for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) at 23–24 (2017).

20 *People v. Binderup*, 836 F.3d 336, 356 (3d Cir. 2016).

21 *United States v. Bogle*, 717 F.3d 281 (2d Cir. 2013).

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Mass Shootings Trigger Litigation

Lawyers, Gun Industry Eye "Watershed" Sandy Hook Case

By Christian Nolan

Josh Koskoff, lead attorney for the victims of the Sandy Hook Elementary School massacre in Newtown, Conn., describes his lawsuit against AR-15 assault rifle-maker Remington Arms as the "watershed" case for future mass shooting litigation.

How the Connecticut high court ultimately rules could go a long way toward determining whether gun manufacturers face potential civil liability in the wake of mass shootings. An unfavorable ruling for the gun industry could lead to additional lawsuits in places like Florida and Las Vegas, where other mass shootings have occurred in the years since the December 2012 Sandy Hook massacre.

A trial judge dismissed the high profile Sandy Hook lawsuit in 2016, but the plaintiffs appealed. That appeal is still pending before the Connecticut Supreme Court, as oral arguments took place in November. A decision has been delayed by Remington's bankruptcy proceedings.

"Every detail of [the AR-15] serves the same end: to ensure that whoever wields it will achieve more wounds, of greater severity, in more victims, in less time, every time," Koskoff, of Koskoff Koskoff & Bieder in Bridgeport, writes in court documents. "Over the last several decades, scores of Americans – not soldiers, but civilians – have witnessed firsthand the effects of that mechanical prowess – not on battlefields, but in malls, movie theaters, places of worship, and schools."

In addition to arguing that AR-15s were intended for military, not civilian, uses like hunting and self-defense, Koskoff alleges that Remington targeted a younger demographic. Sandy Hook shooter Adam Lanza, 20, was known to play first-person shooter video games.

"Remington leveraged its advertising with astute product placement in highly realistic first-person shooter games – played overwhelmingly by young men – that 'arm' players with AR-15s, teach assaultive weapon techniques like taped reloads, and reward them for 'head shots' and 'kill streaks,'" Koskoff argued in his appeal to the Connecticut Supreme Court.

Remington's team of lawyers, led by James Vogts of Chicago's Swanson, Martin & Bell, has long argued that a 2005 law called the

federal Protection of Lawful Commerce in Arms Act (PLCAA) prevents Koskoff's suit from proceeding. The statute grants immunity to gun sellers for civil actions arising out of criminal misuse of a weapon. Barbara Bellis, a Connecticut trial judge, agreed when dismissing the suit.

Koskoff brought the wrongful death lawsuit on behalf of 10 of the victims' families using two legal theories that qualify as exceptions to PLCAA: negligent entrustment, a longstanding theory of tort liability that plaintiffs typically alleged against retail sellers, and violation of a statute applicable to the sale of a firearm.

These two theories proved successful recently against a Milwaukee gun dealer accused of a straw purchase after one of its clerks sold a gun to an adult who illegally purchased it for a minor. That case led to a nearly $6 million verdict as the gun was used by the minor, Julius Burton, to shoot two Milwaukee police officers. The parties later settled rather than go through appeals.

NOVEL LEGAL THEORY

Timothy D. Lytton, a law professor at Georgia State University College of Law who edited the book *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts*, explains that extending the theory of negligent entrustment to a gun manufacturer to avoid the immunity granted by PLCAA is a novel application of the theory that has not yet been tried to a jury.

Lytton explained that, prior to the passage of PLCAA, many plaintiffs sued gun manufacturers following mass shootings for negligent sales, distribution and marketing practices under a theory known as negligent marketing, but courts around the country rejected these claims. Once Congress enacted PLCAA, the act ended such claims. However, Congress still left open the possibility of suing a gun seller for negligent entrustment.

"So plaintiffs have come to use negligent entrustment theories only previously used against retailers against manufacturers in order to get around PLCAA," said Lytton, who previously spent 15 years as a professor at Albany Law School. "The problem with that is negligent entrustment in the Sandy Hook case looks very similar to the negligent marketing theories."

Lytton said one judge – Jack B. Weinstein, in the Eastern District of New York – did rule that negligent entrustment was a viable claim in a shooting case, although the case was eventually dismissed on unrelated grounds.

"Every detail of [the AR-15] serves the same end: to ensure that whoever wields it will achieve more wounds, of greater severity, in more victims, in less time, every time."

Lytton said if the Connecticut Supreme Court upholds the trial court's decision to dismiss the Sandy Hook case these types of cases against the gun industry will likely not go much further.

However, if the state Supreme Court reverses and remands the case back for trial, Lytton expects an appeal that could make its way to the U.S. Supreme Court and similar lawsuits being filed in other jurisdictions, such as in Florida or Las Vegas.

"I would expect an uptick in litigation but not open season on the gun manufacturers until the U.S. Supreme Court were to rule," said Lytton.

SEEKING JUSTICE

While all eyes remain on Sandy Hook for potential claims against the gun industry after mass shootings, victims and their families continue to look for other ways to seek justice in the courts.

In recent months, hundreds of lawsuits have been filed in Las Vegas alone following the October 1 shooting that claimed the lives of 58 concert attendees. Standard negligence lawsuits against the hotel company, MGM Resorts International, and concert promoter, Live Nation, allege inadequate security and training.

Some families of the victims in the Marjory Stoneman Douglas High School shooting in Parkland, Fla. on February 14 that left 17 students and faculty dead and 17 more injured have also given notice of their intent to sue. At least one case will be filed against an officer at the school who failed to intervene, and numerous others are expected against the school district, where controversy has already ensued as to whether the shooting can be

considered one incident with many victims, which could severely cap damages.

Other mass shooting-related litigation news in recent months includes:

- Sixteen survivors of the Pulse nightclub shooting in Florida filed suit in April against Google, Twitter and Facebook for "aiding and abetting" ISIS, by allowing them to use those social media platforms to recruit members and doing nothing to stop it. The lawsuit comes the same month that a federal court in Michigan dismissed similar claims there made by Pulse nightclub victims and families.
- In March, the National Rifle Association filed a lawsuit against the state of Florida claiming new gun control legislation that raises the age to buy guns from 18 to 21 violates the Second Amendment. Gun groups in Vermont have also filed a lawsuit in response to reforms made there. Specifically, they say new legislation limiting high capacity magazines violates the state constitution.
- A federal judge in April upheld Massachusetts' assault weapons ban when dismissing a lawsuit brought by the Gun Owners Action League and others who alleged the state ban violated their right to bear arms under the Second Amendment. A lawsuit was also recently filed in Chicago by gun groups opposing an assault weapons ban in the Village of Deerfield, Ill.
- Lawsuits are pending in Michigan and Oregon by young customers challenging new age restrictions for buying guns. Walmart, Dick's Sporting Goods and Kroger recently decided not to sell guns to anyone under the age of 21. Walmart and Dick's are defendants in Oregon. Dick's is the defendant in Michigan.
- The parents of two children killed in the Sandy Hook shooting are suing Alex Jones, a controversial radio host known for conspiracy theories, for defamation. Jones claimed the shooting didn't happen and that the parents are actors who faked their children's deaths.

Nolan is NYSBA's Senior Writer.

A VIEW FROM THE BENCH

In Defense of the Judiciary

By Chief Judge Janet DiFiore

We are grateful to the New York State Bar Association for inviting leaders of the judiciary to write a quarterly column in this *Journal* addressing matters of broad interest to our legal profession. In this inaugural column, I would like to focus on the role of lawyers as guardians of judicial independence and the rule of law. The Preamble to the ABA's Model Rules of Professional Conduct states that a lawyer is three things: a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

Judges are ethically prohibited from engaging in the rough and tumble of public debate about our rulings.

My fellow colleagues, as public citizens and officers of our legal system, we have reason to be concerned about recent trends, including the increasingly vitriolic personal attacks being leveled against judges by executive and legislative officials displeased with judicial rulings, and by proposed legislation in at least 16 states that would, among other things, empower legislatures to override court rulings on the constitutionality of statutes and implement retaliatory judicial budget cuts.

In New York, we have been fortunate to enjoy the steadfast support of the organized bar and many public officials who understand the absolute imperative of defending judges from unfair and irresponsible attacks. That continuing support is critical to the judiciary's ability to decide cases and uphold the rule of law free of outside pressures and fear of retaliation.

While judges are ethically prohibited from engaging in the rough and tumble of public debate about our rulings, that doesn't mean that we are powerless to keep our judicial branch strong and resilient. Despite all the issues dividing Americans today, there is universal agreement on the need for fair, accessible and well-functioning courts that provide timely and affordable justice. Indeed, that is the stimulus for our Excellence Initiative and all our efforts to deliver high-quality justice services that meet the needs and expectations of the people we serve, including the attorneys who practice in our courts.

As Chief Judge, the issue of public confidence in the courts is always paramount in my mind. For when the people we serve value and respect the work of our courts, our institution is in a far better position to withstand the criticism that inevitably comes with our pivotal role as the arbiter of society's most contentious disputes. That is why our administrative judges, trial and appellate judges and court staff are working hard on the front lines to implement operational changes and systemic reforms to speed the justice process, strengthen the quality of judicial decision-making and improve the overall administration of justice. As I reported last February in the State of Our Judiciary Address,[1] we are making real progress in many areas to improve promptness, productivity and the quality of our justice services.

Failure is not an option, for if we fail to meet our core obligations of delivering fair, timely and affordable justice we lose credibility in the public eye and leave our institution vulnerable to the demagogues who seek to subvert our cherished model of judicial independence to further their own agendas. We know we cannot succeed without the input, cooperation and support of our partners in the Bar. We are counting on you, as public citizens, to help us defend the judiciary from unfair attacks and maintain a well-functioning court system that is truly worthy of the public's trust and confidence.

1 www.nycourts.gov/Admin/stateofjudiciary/.

Janet DiFiore
is Chief Judge of the State of New York.

Murder, Inc. and (Troubles) of "Lepke"

On Sunday morning, September 13, 1936, a black two-door Chevrolet Coach pulled up in front of a small candy store on Sutter Avenue in Brooklyn. Moments later, the car's four occupants entered the store and fatally shot the store's owner, Joseph Rosen, riddling his body with 10 separate bullet wounds. A nearby tailor heard the gunshots and, peering through his store window, jotted down the speeding car's license plate. A newsstand owner saw the car as it turned the corner of Livonia and Van Sinderen avenues and came to a stop some 40 feet from the intersection, where the men exited and crossed a Long Island Railroad trestle, then proceeded toward Junius Street before disappearing into the murky Brownsville morning.

It would take seven years, and three courts, to finally hold accountable the man who ordered the Rosen murder. He was Louis "Lepke" Buchalter, who during the 1930s and '40s was one of the most powerful and feared gangsters conducting systemic crimes in the New York City area. He was the "czar" of what the press denominated "Murder, Inc.," a syndicate of murderous thugs who left a trail of tabloid headlines and a large swatch of carnage in New York City's Brownsville and East New York neighborhoods, and beyond. When Buchalter finally agreed to surrender to FBI Director J. Edgar Hoover – at the behest of famed columnist Walter Winchell – it was front-page news across the country. It began a bruising legal odyssey leading to the only execution in U.S. history of a major organized crime figure.

Many of the names associated with New York's gangster era – Lucky Luciano, Frank Costello, Bugsy Siegel, Dutch Schultz (whom Lepke ordered murdered), and Albert Anastasia among them – are recognizable today because their crimes live on in books and films and television. For example, the 1975 Hollywood film *Lepke* starred Tony Curtis in the lead role. What has never attracted much attention are the efforts of defense attorneys who had the unpopular task of providing their clients with the best representation possible. The "Lepke" trial is an example of one of those defense efforts. For several months a team of smart (and savvy) lawyers did their best to save their client from the electric chair. Those efforts were professionally significant and shouldn't be forgotten.

This article examines the obstacles faced by the "Lepke" defense team, and how they attempted to overcome them. It will also show that while they were unable to spare their client in the end they nevertheless raised several questions about the trial that remain unanswered even to this day – questions that attest to how ably they defended their client.

Roger Bennet Adler is a Manhattan-based solo practitioner with a focus on appeals. He appealed before the late Justice Barshay on numerous occasions as a young assistant district attorney under District Attorney Eugene Gold – Bill Kleinman's later law partner

THE EARLY YEARS

Louis Buchalter was born on Manhattan's then-hardscrabble Lower East Side. His mother called him *Lepkeleh* (Yiddish for "Little Louis"). Growing up, he was in and out of jail for crimes ranging from burglary to assault to grand larceny, but he would later become known for providing protection to local labor unions victimized by corporate management, which used their own coercive and violent tactics to compel their workers to toil under debilitating conditions for low wages. Apparently, Buchlater had something of a social conscience – at least initially.

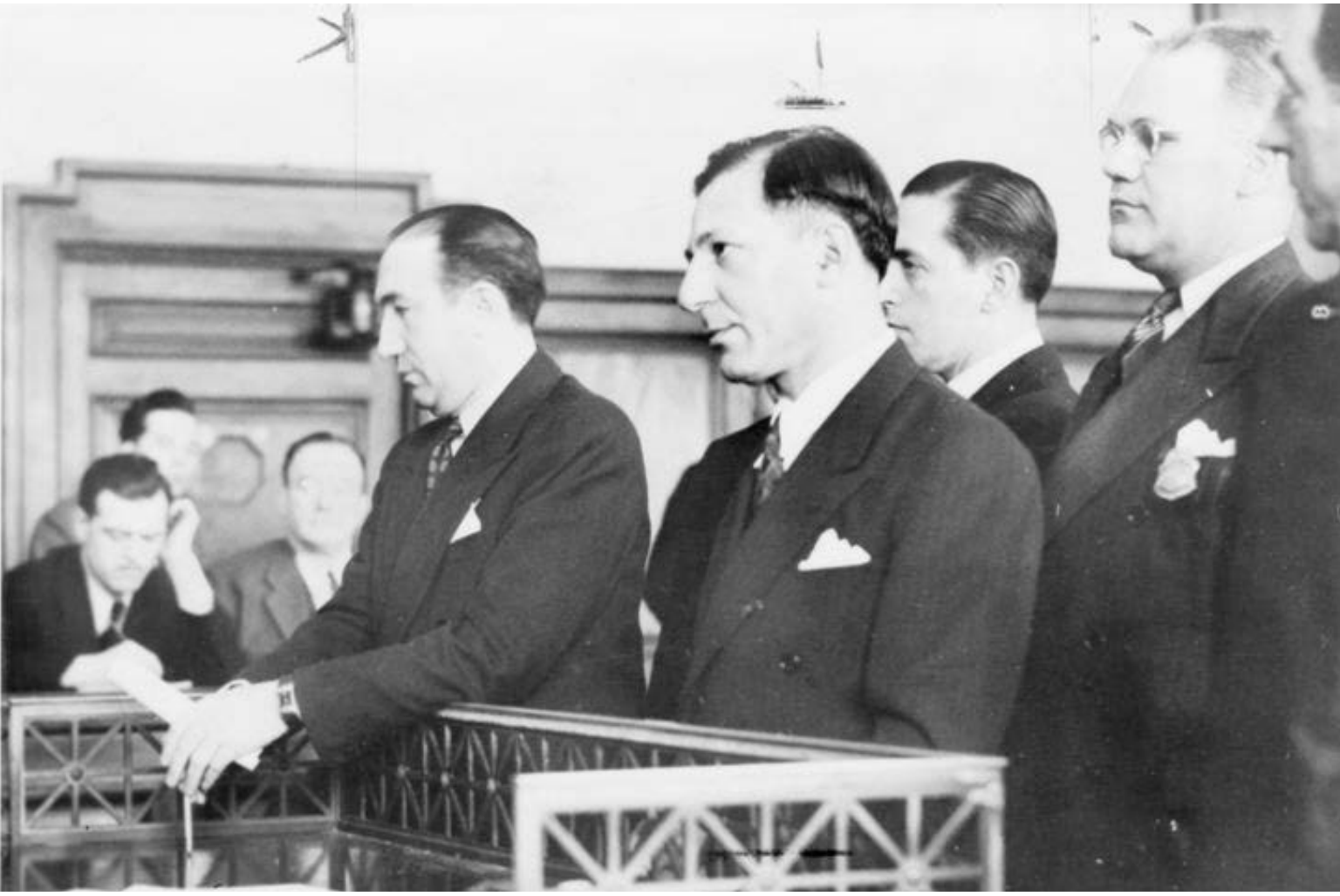
As time passed, though, Buchalter and Anastasia would become the most feared gangsters in New York, reportedly ordering hundreds of contract killings. In addition to murder and attempted murder, Buchalter was accused of extorting factory owners and stealing union bank accounts, as well as trafficking in heroin. In 1936, he and his friend and co-conspirator, Jacob "Gurrah" Shapiro, were convicted of violating the Sherman Antitrust Act for restraining interstate commerce in, of all things, rabbit skins. Yet it appeared that Buchalter would escape justice when the Second Circuit Court of Appeals overturned his conviction (raising the question whether one

the Tsouras Buchalter

By Roger Bennet Adler

of the judges on the Circuit, Martin T. Manton, who would later be convicted of taking bribes to influence court decisions, had been bought off by Buchalter. The question remains unanswered to this day.).

While awaiting his successful appeal – one member of his appellate team was I. Maurice Wormser, a distinguished appellate attorney in his day and a legendary law professor – Buchalter jumped bail, along with Shapiro, and disappeared. While still a fugitive, Buchalter was indicted on federal charges of narcotics trafficking. Although Shapiro would later surrender to authorities, Buchalter remained a fugitive until August 14, 1939, when he surrendered to the FBI's J. Edgar Hoover to face prosecution on the narcotics indictment. Reportedly he had been persuaded by friends that serving time in a federal prison would position him beyond the reach of Thomas E. Dewey, the special prosecutor who was making a name for himself as a crime buster in New York, and who would later go on to become New York governor and a GOP presidential candidate. Buchalter, however, miscalculated – he soon found himself and two co-defendants, "Mendy" Weiss and Louis Capone, on trial for the Rosen murder in Kings County Court on Schemerhorn Street in downtown Brooklyn.



THE ROSEN TRIAL

The Prosecutor

Buchalter's capital murder indictment was returned by a blue ribbon grand jury following a laborious investigation headed by Assistant District Attorney Burton Turkus – an investigation that was significantly assisted when Abe "Twist" Reles and Albert "Tick Tock" Tannenbaum, both members of Murder Inc., agreed to testify against their former cohorts. Turkus was the chief trial prosecutor in the office of then-Brooklyn District Attorney William O'Dwyer, and head of the office's Homicide Bureau. Born and raised in Brooklyn, Turkus worked his way through New York University Law School by serving as a Western Union operator before his 1925 admission to the New York Bar.

Theory of the People's Case

The People, relying significantly upon "cooperator" testimony, subsequently concluded that Emanuel "Mendy" Weiss was one of the shooters under a plan scoped out by co-defendant Louis Capone. The motive ascribed for the shooting was reportedly Buchalter's fear that Rosen would testify against him in the so-called "Dewey Investigation."Buchalter's reported order directing Rosen's murder was allegedly overheard by both Reles and Tannenbaum.

Testimony was elicited demonstrating that one Max Rubin, an executive board member of the finance committee of Local 4 of the Amalgamated Clothing Workers of America, was present with Buchalter on a daily basis when a labor dispute arose between two factions. Buchalter allegedly confided in Rubin that he learned that Rosen was observed going around the Brownsville neighborhood "shooting off his mouth that he is going down to Dewey's office." Such utterances were clearly viewed as an alarming indication of a future intent which, if permitted to proceed, would not merely bode poorly for Buchalter, but had the potential of encouraging others to follow suit.

Tannenbaum claimed that two days before Rosen's murder, Buchalter was heard informing Rubin that "Rosen will never go down to talk to Dewey about me." Tannenbaum claimed he was present in Buchalter's office when Mendy Weiss reported to Buchalter on Rosen's murder. Everything had apparently "proceeded properly," except that "Pittsburgh Phil" Strauss (who had been given strict orders not to do any shooting) reportedly began firing at Rosen as he lay on the candy store floor after having been initially shot by Weiss. Buchalter responded that things had worked out well "as long as everyone is clean." Weiss later explained over coffee that Rosen was "some fellow who used to be in the trucking business and that he was threatening to 'go to Dewey' to talk about Lep."

The Defense

Buchwalter retained Hyman Barshay, a seasoned, exceedingly able (and shrewd) trial counsel. Following graduation from Brooklyn Law School, Barshay was appointed an assistant district attorney in Kings County on Jan. 5, 1929, during a time when such appointments were political in nature. Prior to his appointment, Barshay had been in private practice. Barshay resigned his prosecutor position in 1939 and in June 1940 the Brooklyn *Eagle* reported that he had been hired by the mobster Joe Adonis, who was free on bail in a kidnapping case involving the alleged abduction of Isidore ("I Paid Plenty") Jaffe and Issac Wapinski. Another *Eagle* article reported that Barshay had represented a Jacob Ducker, who was charged with the ice pick murder of Walter Sage. He later represented a pharmacist in a notorious murder-by-poisoning case.[1]

For all his experience in representing unsavory characters, though, Barshay faced nearly insurmountable odds in his defense of Buchalter. For one thing, his client was publicly reviled. Additionally, Reles and Tannenbaum were prepared to testify that Buchalter had ordered Rosen's murder. And, finally, the laws of that era were decidedly in favor of the prosecution.

Barshay's defense was, essentially, that Rosen was "too insignificant" a person to warrant Buchalter's attention (and firepower), and that the cooperating accomplices-witnesses were too unworthy to credit in a case of capital murder.

Following summations, Judge Franklyn Taylor charged the jury. Media reports indicate that the jury sat well past dinnertime, and, after four hours of deliberations, returned a guilty verdict at 2 a.m. The *New York Times* report of the verdict recounted that Buchalter family members were directed to leave the courtroom prior to the announcement of the verdict. Today, we would perceive this to be a violation of the right to a "public trial." It was not until *People v. Jelke*[2] that a sharply divided Court of Appeals reversed a criminal conviction based upon courtroom closure.[3]

THE COURT OF APPEALS

The majority opinion affirming Buchalter's conviction (and mandatory death sentence) was authored by then-Associate Judge Albert Conway. He was the only judge on the Court who was from Brooklyn, and there were few judges more knowledgeable about criminal justice matters generally, and in Brooklyn specifically, than he. Even so, with only three years on the Court he was certainly less seasoned than Chief Judge Irving Lehman, who concurred in the order affirming Buchalter's conviction in a separate opinion. Judges Loughran, Desmond, and Rippey dissented. Accordingly, in a real sense, the

conviction and resulting mandatory death sentence was upheld by the absolute slimmest of possible margins.

The syllabus to the Court's opinion revealed that his appellate counsel raised one point on appeal: "The trial court committed reversible error in its instructions to the jury." The co-defendant Weiss also challenged the jury charge given by County Judge Taylor, and challenged the sufficiency of evidence. Counsel for defendant Capone claimed the evidence was legally insufficient, contending the case should not have been submitted to the jury.

Acting Brooklyn District Attorney Thomas Craddock Hughes (who succeeded District Attorney William O'Dwyer) was well represented by trial counsel Turkus, and Appeals Bureau counsel Solomon A. Klein, Henry Walsh, and Edward H. Levine. The appeal was orally argued before the Court of Appeals in Albany on June 11, 1942, shortly before the Court's summer recess.

On October 30, 1942, the Court issued its opinion. Chief Judge Lehman's concurring opinion began with a recognition that Joseph Rosen's murder was the product of a criminal gang ruthlessly promoting its criminal objectives. He described the People's proof as based upon a testimonial foundation of "degraded criminals," whose trial testimony had been impeached by cross-examination that revealed their callous disregard for law and human life. The Chief Judge's opinion then acknowledged that "The errors and defects in this case are, it seems, to be many." He recognized Judge Loughran's scalding attack on the fairness of the trial. For Judge Lehman, the test was whether he found "room for doubt" that the jury would have reached the same conclusion if all error had been avoided. Essentially, Judge Lehman was applying the "harmless error" rule. This rule was formally codified in Code of Criminal Procedure § 542.[4]

The Dissent

Judge Loughran's dissenting opinion for himself and Judge (later Chief Judge) Desmond acknowledged that two prosecution witnesses swore that Buchalter ordered Emanuel "Mendy" Weiss to kill Rosen. A third witness, however, never mentioned Buchalter. The dissent found unfairness in the trial judge's marshalling of the facts, and the trial assistant's summation "vouching" for the credibility of his witnesses.

Judge Loughran was a "mirror image" of Judge Conway. A native of Kingston, New York, Loughran graduated from Fordham Law, in coincidentally the same class as Judge Conway. His scholarship was so highly regarded that Loughran was asked to stay on and serve as a member of the faculty. Loughran later left academia and returned home to Kingston, where, following a successful law practice, he was elected to serve in the State Supreme Court in the Third Judicial District. He was subsequently appointed to fill a vacancy on the Court of Appeals by Governor Lehman. The Fordham Law School Dean said of Loughran: "He was not a man who had one set of principles for Sundays, and another entirely different set for the other six days of the week." Thus, he may have compartmentalized Lepke's character and concluded that even this scoundrel was entitled to due process of law.

Judge Rippey concurred in Judge Loughran's dissent, finding the trial to have been unfair and the evidence legally insufficient,[5] mindful of the People's use of accomplice testimony, and the requisite statutory need for corroboration.

A motion for re-argument was submitted on November 23, 1942 and quickly determined two days later in a brief *per curiam* opinion.[6] The application was addressed to the trial judge's refusal to afford the defense access to New York City Police Department records, which were provided (and reviewed) *in camera* by the Court, involving surveillance of the lobby of the building where Buchalter had an office. It also found that the motion for a change of venue was properly denied.[7]

It should be noted that, once again, Buchlater's appeal was argued by "Professor" Wormser who, along with Jesse Climenko, presented oral arguments on June 11, 1942.

THE U.S. SUPREME COURT

Following the affirmance and denial of rehearing,[8] albeit of a sharply divided Court of Appeals, the U.S. Supreme Court quite astonishingly granted Buchalter and his co-defendants writs of certiorari.[9] This occurred only after the Court originally denied the petitioner's original application.[10] Buchalter was represented by J. Bertram Wegman and, once again, by I. Maurice Wormser. Weiss was represented by Arthur Garfield Hays and John Schulman, whereas Capone was represented by Sidney Rosenthal and Benjamin J. Jacobson. The appeal was, however, heard by only seven justices (Justices Murphy and Jackson had recused themselves). The oral argument took place late in the Court's term (May 7, 1943), and was decided shortly after Memorial Day (June 1, 1943), in an opinion by Justice Owen Roberts. His opinion noted that the petitioners claimed their 14th Amendment rights were violated.

More specifically, the claim was that unfair and allegedly lurid newspaper publicity denied defendants the ability to obtain a fair and impartial jury, and that the denial of a motion for a change of venue and challenges to prospective jurors resulted in the impaneling of a jury "affected with bias."

Justice Roberts noted that the claim was raised that the District Attorney had suppressed favorable evidence and made unfair arguments to the jury. Roberts wrote:

> The point as to the alleged suppression of evidence . . . is without merit. Certain documentary evidence was

> in court. The judge ruled that the prosecuting officer need not submit it to defense counsel for examination. If there was error of the Court, upon motion for rehearing the Court of Appeals examined the papers and found they were not in significance in respect of any issue in the case. (*Buchalter*, p. 431)

The Court's opinion did not, however, address the nature of the allegedly suppressed evidence. A shroud of legal mystery looms over the case in considering both the nature of the evidence and the timing of the claim coming via a motion for re-argument in the N.Y. Court of Appeals. As to summation error, the opinion viewed the comments by defense provoked fair prosecutorial response, but in any event did not raise a due process question. Nor was it error by the trial judge to deny defense access to the subpoenaed materials. On June 7, 1943 the stays of execution issued attendant to the grants of certiorari were vacated. The prospect of death by electrocution loomed significantly closer.

LEGAL COMMENTARY

Buchalter was tried before a so-called "blue ribbon" jury. The distinct New York "blue ribbon" jury (Judiciary Law § 799-aa) was later reviewed in *Fay v. New York*.[11] In an opinion by Justice Robert Jackson, writing for a sharply divided (5-4) court, the majority found no 14th Amendment due process violation in a jury selection process which:

(a) only applied to part of the state (counties with a population exceeding one million),

(b) encompassed a limited age group (21-70),

(c) required ownership of property valued at $250 (or more),

(d) no prior convictions,

(e) "intelligent,"

(f) sound mind and "good character,"

(g) able to both read and write intelligently.

Justice Frank Murphy wrote a dissenting opinion for himself and three justices. He noted that the qualifications excluded certain classes of people who were admittedly qualified to serve on the general jury panel. Jurors who earned their livelihoods as:

(a) farmers,

(b) laborers,

(c) service workers,

(d) craftsmen,

(e) operatives and kindred workers who did not make the statutory "cut."

The Court's decision was consistent with then-existing perceptions of constitutional law, which did not yet incorporate the panoply of federal guaranteed constitutional rights applicable to the states. Thus, as in *Brown v. New Jersey,*[12] the Supreme Court upheld a Hudson County, New Jersey murder conviction following a trial using the New Jersey "struck jury" system. Rather than providing the defense with 20 peremptory challenges and the state with 12, under the "struck system" each side was afforded only five peremptory challenges.

THE PROCEDURAL PLAYING FIELD

Jury Selection

A "blue ribbon" jury empaneled "back in the day" excluded vast swatches of the population. Women were automatically excused. Blacks suffered from discrimination, and the jury commissioner prepared all-male lists of those found to be of "superior intelligence."

In *People v. Dunn*,[13] the Court of Appeals, in a unanimous opinion by Judge Grau, upheld a practice then in place which, "under the Special Jury Act," overruled a challenge that the act was unconstitutional, as it created two separate and distinct classes of jurors and discriminated unequally. Judge Grau's opinion referred to the higher jury as those whose "general qualifications have been by the machinery of law more particularly ascertained . . .".[14]

Discovery and Inspection

Any true and realistic understanding of the challenge that defense counsel encountered in preparing their case for trial starts with discovery and inspection. Today, we take for granted that discovery and inspection, which are authorized in Criminal Procedure Law (CPL) § 240.20, will compel certain rudimentary probes into the People's case.

As to any obligation to produce exculpatory evidence, remember that *Brady v. Maryland*[15] was adjudicated decades after Buchalter's electrocution.

The general approach to defense discovery in criminal cases traces its roots back to Chief Judge Cardozo's opinion in *People ex rel Lemon v. Supreme Court.*[16] This case involved an application by defense counsel in an Orange County murder case involving the charge that one Lucy Earley had poisoned her husband with arsenic. Not content to receive only the medical examiner's report, defense counsel sought discovery of all statements provided by the accomplice, one William Wegley, and chemical analysis reports of Daniel Earley's body. Lemon, the Orange County District Attorney, prevailed, with Chief Judge Cardozo noting that there was no constitutional right to pre-trial discovery.[17]

For instance, it took until *People v. Matera*[18] to obtain the autopsy report, and *People v. Quarles*[19] to obtain defendant's own statement, and *People v. D'Andrea,*[20] which

dealt with the discovery and obtaining of a defendant's own statement to police.

Access to Witness Statements ("Rosario" Rule)

At the time of the Buchalter trial, the disclosure of a witness's prior statements to law enforcement relevant to the case on trial was far different from what today's practitioners are familiar with.[21]

Rather, the procedure outlined in *People v. Walsh*[22] was for the statement to be inspected *in camera* by the trial judge, to ascertain if the statement contained "contradictory matter" pertinent to cross-examination on the issue of witness credibility. Judge Crouch's opinion for the majority averred that the denial of disclosure would be appropriate if "publication . . . would be prejudicial to the public interest."

This practice was followed in *People v. Schainuck*[23] and *People v. Dales*.[24] The *in camera* practice was upheld in an opinion by Judge Fuld. Mindful of the multiple debriefings and case preparation, we simply don't know how much of a variation (if any) exists between Reles' original statement when he was first interviewed and the version the Buchalter jury subsequently heard at trial.

UNANSWERED QUESTIONS

1. Did the Brooklyn District Attorney's Office suppress prior inconsistent statements by accomplice witnesses, which, if disclosed under the "Rosario Rule," might have, in the hands of defense counsel Hyman Barshay and Bill Kleinman, resulted in a hung jury (or acquittal)?

2. Did Albert Anastasia, against whom Abe Reles was scheduled to testify, mindful of Lepke's fate, have Reles murdered before his scheduled trial date?

3. Was Buchalter denied a fair and public trial when the trial judge refused to change the trial's venue, failed to turn over prior inconsistent statements, and excluded family members from hearing the verdict at a public trial?

4. How did Judge Conway persuade Judge Lehman (the swing vote) to cast his opinion as concurring, and not join Judge Loughran's dissent, which would have reversed the conviction?

5. Did Buchalter possess damaging information concerning labor leaders and politicians loyal to Franklin D. Roosevelt, and try to barter it to Governor Thomas Dewey in a bid to avoid the electric chair?

FINAL THOUGHTS

When defense counsel Hyman Barshay, Bill Kleinman, and the rest of the defense team filed their notices of appearance in 1941 in the Kings County Court, they were entering a pre-Warren Court environment that was solidly (and unabashedly) stacked against the defense. Devoid of any pre-trial access to discovery, prior witness statements, or exculpatory evidence, they were flying directly into the eye of a "legal hurricane," with precious little in rudimentary due process.

It may well be that Lepke Buchalter had a strong motive to order Rosen's murder. The defense was obliged to satisfy an unrepresentative "blue ribbon" jury panel that there was a reasonable doubt. That it failed was, with the benefit of legal hindsight, not surprising. Whether the appeals were rightly decided is questionable.

Today, we no longer really have capital punishment as the ultimate sanction. But for several months, a team of smart (and savvy) lawyers labored mightily to save their clients. Those efforts were made in keeping with the honored principle of American jurisprudence that every person accused of a crime, even one with a despicable reputation, is entitled to a competent and zealous defense. For the Buchalter defense team, steeled by the Great Depression, the march of Nazi oppression, and the cusp of the start of America's entry into World War II, a legal "dream team" did battle for unsavory clients with immense skill and style. Their dedication should not be overlooked, or forgotten.

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1 *People v. Feldman*, 296 N.Y. 127 (1947).

2 308 N.Y. 56 (1954).

3 *See also In re Oliver*, 333 U.S. 257, 270 (1948).

4 *People v. Hines*, 284 N.Y. 93, 100 (1940).

5 *People v. Buchalter*, 289 N.Y. 181, 242–43 (1942).

6 *People v. Buchalter*, 289 N.Y. 244 (1942).

7 Motions for change of venue are today governed by CPL § 230.20(2), which addresses circumstances where defense counsel believe the accused cannot obtain a fair and impartial trial in the county where the indictment is to be tried (*People v. McLaughlin*, 150 N.Y. 365, 375 (1896)). A defendant is required to exhaust all his peremptory challenges, or is deemed to lack standing to complain of a denial of his motion for a change of venue (*People v. Di Piazza*, 24 N.Y. 2d 342, 346–48 (1969)) (22 days spent selecting a jury in small upstate Herkimer County did not warrant a venue change). The motion is not limited to the defendant. The People may also so move (*People v. Goldswer*, 39 N.Y. 2d 656 (1976)), and it overrules the accused's rights to be tried where charged. It is unclear to what county trial counsel hoped to have the case transferred.

8 *People v. Buchalter*, 289 N.Y. 244.

9 *Buchalter v. New York*, 318 U.S. 797 (1943).

10 318 U.S. 766 (1943).

11 332 U.S. 261 (1947), *aff'g* 296 N.Y. 510.

12 175 U.S. 172 (1899).

13 157 N.Y. 528 (1899).

14 *Id.* at 538 (according *People v. Meyer*, 162 N.Y. 357, 362 (1900)).

15 373 U.S. 83 (1963).

16 245 N.Y. 24 (1927).

17 *See also Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

18 52 Misc. 2d 674 (Sup. Ct., Queens Co. 1967).

19 44 Misc. 2d 955 (Sup. Ct., Bronx Co. 1964).

20 20 Misc. 2d 1071 (Sup. Ct., Kings Co. 1960).

21 *See* CPL § 240.45 I; *People v. Rosario*, 9 N.Y. 2d 286 (1961).

22 262 N.Y. 140, 149 (1933). The *Walsh* case was preceded by *People v. Miller*, 257 N.Y. 54, 57 (1931). In an opinion by Chief Judge Cardozo, the Court created a procedure in which a formal demand for the pertinent Grand Jury minutes was required, following which the trial judge would conduct an *in camera* inspection of them to determine legal sufficiency.

23 286 N.Y. 161, 165–66 (1941).

24 309 N.Y. 97, 102, 103 (1955).

Ruff! Ruff! ROFR!

By Robert Kantowitz

Robert Kantowitz has been a tax lawyer, investment banker and consultant for more than 35 years. He is responsible for the creation of a number of widely used capital markets products, including "Yankee preferred stock" and "trust preferred," as well as numerous customized financial solutions and techniques for clients. He is a longtime member of the New York State Bar Association Committee on Attorney Professionalism and, as such, co-authored the Committee's "Report on Attorney Ratings" dated December 7, 2015 and has contributed to the monthly Attorney Professionalism Forum feature in this *Journal*. He thanks Jeffrey Kantowitz and Andrew Oringer for their comments, especially those that challenged and helped him sharpen the views expressed below regarding the duty to deal in good faith.

A "right of first refusal" (ROFR) seems a dull and dreary subject. But every so often, I notice a case that can serve as a springboard for an important point that I often make – that lawyers should always think things afresh rather than using ossified language and unchanging approaches.[1] *Clifton Land Co. v. Magic Car Wash*,[2] which dealt with a ROFR, is that kind of case.

ROFRs can serve a useful role in certain settings, especially ownership of private businesses, so it is important to understand what they can do and how they work. This article highlights the tension between the natural but perilous inclination to rely on what seem to be obvious assumptions and standard documentation versus the practical imperative to anticipate events and contingencies and to customize agreements accordingly.

THE CASE

The facts are a bit hard to follow with the actual names, so I will use more descriptive terms.

Three entrepreneurs are separately in the business of operating car washes around the county. I am one, and the other two are "Seller" and "Interloper."

I am buying one car wash from Seller. I also happen to identify another one of Seller's car washes, along with adjacent vacant land, that I would like to buy.

Seller, however, is not yet disposed to sell that second car wash or the adjacent land.

THE ROFR

That could have been the end of it, but I want to do something to get a leg up. So I get Seller to enter into a ROFR covering the car wash and the vacant land.

What rights and burdens does the ROFR create? In one sense, the ROFR gives me nothing and creates no obligations for Seller. The ROFR does not allow me to compel Seller to sell me the second car wash. However, *if* Seller agrees, during the life of my ROFR,[3] to sell to another buyer on specific terms, then at that time I will be entitled to step in front of that other buyer and to buy from Seller *on those same terms*, and that other buyer can proceed only if I decline to exercise my ROFR. Either way, Seller will get the price that it will have negotiated.

What I pay for the ROFR may or may not be separately specified or might not even have been explicitly negotiated; the ROFR may be a separate agreement or it may simply be one of the terms that I insisted be included in the contract for my purchase of the first car wash.[4]

A ROFR is *not* a call option, although the distinction can be confusing. A call option generally gives the holder an unconditional right to buy identified property at a particular "strike price," and it may be exercised either for some specified period of time ("American call") or on a particular date ("European call"), regardless of whether the seller was otherwise interested in selling at

such point. As has been well developed in finance theory, such a call option has (i) intrinsic value that at any time is represented by the excess (if any) of the property's value over the option's strike price and (ii) time value, which is often far in excess of any intrinsic value, representing the fact that the holder still has time to decide whether to exercise it and during that time the value of the underlying property may increase over the strike price.

By contrast, my ROFR has no intrinsic value or quantifiable time value because I can't purchase the property unless the property is about to be sold to another willing buyer, and in that case I will have to pay whatever that buyer would have paid for it, presumably the fair market value at that time.[5] Still, the value of the ROFR to me could be greater than any objective value, insofar as it may help me expand a burgeoning car wash empire. It also could have blocking value in that if a buyer strikes a particularly favorable deal with the seller at a time when I do not particularly care to exercise the ROFR, I may be in a position to require the buyer to pay me something so as not to stand in his or her way.

WHAT HAPPENS NEXT?

Eventually, Seller decides to get out of the car cleaning business. Seller approaches me, but I do not respond.[6] Seller then approaches Interloper, and Interloper agrees to buy the property for a particular price.

It so happens that Interloper owns a car wash across the street from this property, so Interloper has no interest in using the property as a car wash. Rather, Interloper plans on developing the land as an office building. So Interloper agrees to buy the property (presumably the land on which the car wash was located, the car wash structure and the vacant land) but not the car wash business.

There is, however, a large gorilla in the room – my ROFR. If I exercise it, Interloper will lose the opportunity to protect the market position of its own car wash business and will not be able to develop the office building. So, Seller and Interloper agree to include, as one of the terms of their agreement, a covenant that says the property cannot be used to operate a car wash.

Now I am in a bind. I would like to exercise my ROFR, but I have to buy the property on the *same terms* as had already been negotiated, and one of those terms is the covenant not to use the property as a car wash. That defeats my purpose, since the very reason why I wanted the property and purchased the ROFR at all was so that I could get that car wash if it ever came up for sale.

Seller sued everyone in sight to get a declaratory judgment confirming that it could sell the property and to whom. The court decided in favor of Seller and Interloper. Even though the restrictive covenant was a clever device designed to frustrate my ROFR, the court treated it as having the facially sensible goal of allowing Interloper to protect its across-the-street car wash against competition. The court said that since the "no car wash" condition appeared to be a legitimate condition of sale, I would have to agree to it if I wanted to exercise my ROFR.

ANALYSIS

It's a close case, and I am not going to try to weigh precedents and apply them, but I believe that the court was wrong. Even assuming that the condition was a legitimate way for Interloper to protect its own across-the-street car wash, the device of *including the condition in the agreement so as to subject the ROFR to the condition* was undertaken in bad faith because it was completely unnecessary from Seller's perspective[7] and

completely unnecessary from Interloper's perspective *except to defeat the ROFR*.

The court came close to acknowledging as much:

> Although plaintiff is correct in its argument that a purchase offer is not bona fide where the sole purpose is to wrest a right of first refusal from the holder of the right, [plaintiff] has not provided evidence that the 2016 Purchase and Sale agreement was the result of any collusion between the defendants. [Plaintiff] is merely speculating that it was done in bad faith or the result of wrongful conduct.[8]

No, it was not idle speculation. The court failed to follow the facts to their logical conclusions of bad faith and wrongful conduct. Here is the proof. Assuming that Interloper had instead successfully purchased the property free and clear, and still wanted to insulate its facility across the road from competition, it would have had available to it any number of ways of preventing the operation of a competing car wash without having included a covenant as a condition of sale. For instance, Interloper could hold onto the property, not lease out the car wash and not sell the property to anyone who intended to use it as a car wash, or could have inserted that restrictive condition in the deed *after* gaining possession of the property, or even as a condition for a future sale.[9] The imposition of that provision specifically in the purchase agreement was designed for one reason and one reason only: to make my ROFR untenable and thereby to destroy its value and allow Interloper to get the property. One might argue that Interloper was free to choose any of the available ways to protect his car wash across the street. Maybe so,[10] but Seller's duty of good faith dealing required Seller to refuse to acquiesce to the one that created no additional benefit for either party other than defeating the ROFR.

Suppose that the agreement between Seller and Interloper had included a restriction in the deed stating that the property could be owned and used by anybody except me, whether naming me by name or otherwise using ostensibly objective criteria that narrowed it down to me.[11] Or suppose that the restriction against operation as a car wash had been included ostensibly to ensure peace and quiet in the neighborhood, and the buyer, after taking possession, had immediately amended the deed with the acquiescence of the neighboring landowners to remove the restriction. Those maneuvers would not have been tolerated. Neither should this have been. The issue is not how specific or generic the limitation might be; the question is whether its insertion violated Seller's duty of good faith dealing, and in my view that turns on whether there was any reason to insert the condition at that time other than to defeat the ROFR.

The resolution of a situation like this often is unclear. Courts usually do not go beyond good faith to require the parties to behave in a "reasonable" way. For instance, had Seller still had another nearby car wash and not been exiting the business altogether, a plausible argument might have been made that *Seller* was benefited by having only one, and not two, car washes in this location and might have been acting in good faith in inserting the restriction.

The idea of doing something clever to affect the value of other people's contracts and their provisions such as ROFRs and options is not new. Some time ago, I read, a particular sports league was looking for a new television contract. The incumbent network had a renewal right, but some of the team owners preferred to deal with another network. So they provided in the specifications for the new contract that some games would need to be televised in a particular weekly time slot, thereby making it impossible for the incumbent to compete because of its known other commitments for that time slot. One of the critical elements in the ensuing lawsuit, which the incumbent was said to have lost, was that, even though everyone knew why the specification had been inserted, the court found that this condition did produce independent additional value for the league and was therefore justified on that basis.[12] However, nothing like that could be said about the inclusion of the car wash restriction, since the Seller was getting no benefit for that provision[13] and Interloper did not need it before closing.

PLANNING CONSIDERATIONS: A GRAM OF PREVENTION IS WORTH A KILOGRAM OF CURE

Regardless of who should have won this case, not all situations can be anticipated.[14] The clear lesson is not to treat a ROFR as one-size-fits-all boilerplate. The following is meant not as a compendium but rather as a suggestion of some highlights.

Since I wanted to acquire and use the property as a car wash, I should have protected that by providing in the ROFR agreement that Seller would not limit the use of the property and would fight any applicable zoning restriction that might be proposed, and that the terms and conditions that I would need to meet to exercise the ROFR would not include any limit on use of the property.

I should also have considered and specified what might happen were Seller to decide to sell only the car wash or only the vacant land, or, as happened here, only the structure but not the business.

More generally, though, consider whether a ROFR is necessary or might be a hindrance. A seller may have reason to resist a ROFR because it could deter other potential buyers, since the effort and time that they put into analysis, due diligence and negotiating a contract could come to naught if the holder of the ROFR exercises it. No one really wants to be an uncompensated stalking

horse. Accordingly, if a property owner has granted a ROFR, he might have to give any other potential buyer a break-up fee to induce the latter to enter into an agreement that can be interdicted by the ROFR. To mitigate that, perhaps the ROFR itself should require the holder to provide some early indication of interest, or even a down-payment, if notified by the seller that the seller is negotiating with another party.

A ROFR is most useful in connection with a minority stake in a property or business, covering any portion of the entity that comes up for sale. It allows a current part-owner the prospect of consolidating his position. In connection with bringing in a new owner, a retained ROFR can prevent the later transfer of a significant stake to someone with whom one would prefer not to be associated. A common arrangement between partners, a reciprocal buy-sell arrangement, in which each of the parties has the first right to purchase if the other decides to sell, is, of course, two ROFRs.[15]

ROFRs can be nested. For example, the company might have a ROFR to buy back shares that holders wish to sell, and to the extent that it is not exercised, the other owners might have a secondary ROFR, and to the extent that only some exercise they might be allowed a further opportunity to pick up the declined shares.

One should carefully consider which terms need to be matched, such as timing and consideration. How much time will a ROFR holder have to examine another offer and to come up with the wherewithal to make the purchase? It should be long enough to be reasonable and to provide for a meaningful opportunity to raise funds if necessary, but not so long as to leave the seller with nothing if the ROFR holder takes so long to decline that the other buyer pulls out.

If the other buyer is offering cash, does the ROFR holder have to pay cash? Probably yes if the ROFR contract does not otherwise specify. It is tempting to say that if the new buyer is offering notes, the ROFR buyer can do the same, but that does not address differences in creditworthiness. If the other buyer is a highly rated corporation, the seller might still be justified in expecting the ROFR holder to pay cash or to back any debt with a letter of credit or a guarantee or to limit the debt to a shorter period or include additional covenants, and if the ROFR agreement does not address these matters, there are likely to be disputes. It is even more tempting to say that if the new buyer offers notes then, regardless of what the ROFR does or does not say, the ROFR holder can pay cash, but the "cash is king" sentiment could be parried with an argument that notes have an attractive interest rate or with the retort, "Not so fast; I want an installment sale for tax purposes." If the other buyer is offering a tax-deferred equity deal, does that have to be matched, and if so how is equity to be valued if it is not publicly traded? Indeed, an equity deal might be inherently impossible to match if the holder of the ROFR is an individual or if the other buyer is a company offering an attractive stake in its own business. The ROFR should provide that the holder can pay the cash equivalent and indicate how that is calculated.

Everything is open for negotiation, but better to resolve it up front than leaving it to chance.

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1 *See, e.g., The Bad, the Good and the Beautiful,* NYSBA Journal, Vol. 88, at 49, 53 (Oct. 2016), in which I argued that the New York prohibition against a term in a contract that purports to extend the statute of limitations is indefensible as a matter of policy or logic and in which I provided several workarounds.

2 2017 N.Y. Slip Op. 31303(U) (June 19, 2017, Sup. Ct., Broome Co.).

3 A ROFR will typically have a finite term. If one wishes to utilize a ROFR with an unlimited duration, it will be important to ascertain whether the rule against perpetuities in the relevant jurisdiction applies or whether that particular ROFR is considered too insignificant a restraint to offend the ancient rule.

4 Putting on my tax hat, but quickly doffing it, I will remind readers of a consideration beyond the scope of this article: both parties need to determine whether a ROFR is an asset to which part of the purchase price must be allocated.

5 The line between a ROFR and a call can be blurred. The right to exercise a call could be made contingent on one or more events not in the control of the holder, and a call's strike price could be defined by a formula relative to value rather than as a particular amount. Conversely, one could draft a ROFR with an independent price amount or with a floor or cap. I might describe such arrangements as either ROFRs or contingent options depending on the purpose and the likelihood of a divergence between the contract price and likely fair market value at the time, but the label used should not determine enforceability or effect.

6 This non-action was not found to be in bad faith, nor did it figure in the decision other than as context explaining why Seller looked for another buyer. Nothing in a ROFR typically requires the holder to act if approached before there is another sale in the offing, although, as I point out later, a provision along those lines might be included.

7 Seller was getting out of the business, and therefore it had absolutely no interest of its own in such a provision. The provision could only benefit Interloper.

8 Slip Op. at 5–6.

9 As a general proposition, it rarely makes any sense to make a binding legal or economic choice that one has no present need to make.

10 Could I sue Interloper for tortious interference with contract or for tortious interference with economic advantage? The answer – including the elements of those torts and whether the former requires an actual breach of a contract – may vary state to state and is beyond the scope of this article.

11 Lest one be shocked at the hubris that something like that might take, consider the practice of legislating with respect to particular taxpayers without actually naming them. For example, Congress has given relief from tax provisions to certain categories of taxpayers defined, for example, as "a corporation incorporated on June 13, 1917, which has its principal place of business in Bartlesville, Oklahoma."

12 *See* M. McCormack, *What They Didn't Teach Me at Yale Law School,* 143–44 (Fontana/Collins 1987). I have not independently verified this tale. Nor do I express any view on whether Yale Law School teaches anyone anything.

13 If Interloper were willing to increase the purchase price in exchange for including that provision, one might be tempted to say that it provided a benefit to Seller. But the fact that Interloper would pay more for a *restricted* property than for an unrestricted property is so counterintuitive that it rings the alarm bell. A benefit to Seller, in order to be valid, would have had to flow from the provision itself, not from a payoff for impairing my rights under another contract.

14 Courts can find it very hard to discern whether a particular provision was omitted intentionally or even inadvertently, in which case they will not reform a bad bargain, or was not spelled out explicitly because the parties considered it too obvious and fundamental to have been misunderstood. It may depend on the parties and the context. If two large businesses with armies of lawyers and principals negotiate a 300-page contract covering dozens of remote and incidental contingencies, one might conclude that whatever was left out was left out because they decided that they did not want it in, while one might not reach the same conclusion regarding a short agreement between unsophisticated parties.

15 That is not the same as a so-called "tie-breaker" in which either of two co-owners can force a sale by proposing a price, and the other then decides whether to buy or to sell at that price.

Receipts and End of the Road or Just

The discharge of an executor or trustee is the ultimate end-game of most, if not all, estate and trust administrations. Affording that kind of comfort level to the fiduciary can be accomplished in one of two ways, distinguished by whether the process is judicial or non-judicial. Although the judicial discharge has been the generally accepted route, given the time and expense incurred through this course many fiduciaries opt for an informal discharge by means of a receipt and release.[1]

Nevertheless, the fiduciary who thinks a receipt and release is the answer to all future claims for an accounting and liability may have a surprise in store. Though instinctively a release is thought to provide an absolute bar to litigation, the factual circumstances surrounding the procurement of the release, as well as its terms, often drive the result.

Recent opinions rendered by the Surrogate's Court and the Appellate Division have explored the issue of receipts and releases and have provided insight into just how far the instruments will go to "save the day." The lessons to be learned by the fiduciary and the beneficiary from these opinions are worthy of note.

IN RE BRONNER

The starting point for any discussion of recent opinions on receipts and releases is *In re Bronner.*[2] The decision is instructive to fiduciaries, who are of the mindset that a receipt and release is a complete defense to a compulsory accounting.

Before the Surrogate's Court were, *inter alia,* three contested compulsory accounting proceedings in which the respondent/trustee opposed the relief on the grounds that the petitioner/beneficiary had previously executed receipts and releases discharging him from liability. The petitioner moved for summary judgment, alleging, in part, that the releases were not fairly obtained due to allegedly inadequate disclosure and an explanation of the transaction by the trustee.

In denying the motion, and directing that a hearing be held, the court cautioned fiduciaries who seek to avail themselves of the protections afforded by a release, observing that because a transaction between a trustee

seeking a release from a beneficiary is, essentially, self-dealing, the law requires that there be proof of full disclosure by the trustee of the facts of the situation and the legal rights of the beneficiary, as well as adequate consideration paid.[3]

Moreover, the court noted:

> The mere absence of misrepresentation, fraud, or undue influence in the obtaining of a release is *not sufficient* to insulate the release from a subsequent attack by the beneficiaries; the fiduciaries must affirmatively demonstrate that the beneficiaries were made aware of the nature and legal effect of the transaction in all of its particulars.[4]

By Ilene Sherwyn Cooper

Releases: a New Beginning?

Within this context, based on the allegations of the petitioner, and the lack of documentary evidence to the contrary, the court found that the petitioner had made a prima facie case that the releases in issue were not obtained fairly, and thus did not necessarily foreclose her right to the requested accountings.

In an attempt to resist summary judgment, the trustee alleged that although an informal account was not provided to the petitioner at the time the releases were executed, adequate and full disclosure was made to her by her husband and a trusted friend, who was the asset manager for the real property interests held by the trusts.[5] Additionally, documentary evidence submitted by the trustee suggested that the petitioner was intimately aware of the trust assets, and the transactions underlying the releases.

In view thereof, the court concluded that the trustee's evidence was sufficient to raise genuine questions of fact as to what was known or disclosed to the petitioner. The court opined that while a fiduciary acts at his or her peril in seeking a general release without an accounting, there is nothing in the law that mandates it as a necessary pre-condition to its validity.

> Of course, an accounting fiduciary may prepare an account when seeking a beneficiary's release, but nothing forbids a trustee from pursuing a time-and cost-effective route of forgoing an accounting, formal or informal, as requested or agreed-to by informed beneficiaries.[6]

Moreover, the court rejected the notion that only the trustee could make the requisite disclosure surrounding the procurement of a release to the beneficiary. Rather, the court held that the appropriateness of a disclosure must be determined in light of the circumstances, with the touchstone being fairness.

BIRNBAUM AND ITS PROGENY

In reaching its result, the court, in *Bronner*, took advice from the opinion in *Birnbaum v. Birnbaum,*[7] in which the Appellate Division, Fourth Department, concluded that the rules applicable to self-dealing transactions by a fiduciary were "equally applicable to the obtaining of a release by a fiduciary,"[8] and, thus, cast the burden on the fiduciary to prove the validity of the transaction:

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> When a fiduciary engages in self-dealing, there is inevitably a conflict of interest: as fiduciary he is bound to secure the greatest advantage for the beneficiaries; yet to do so might work to his personal advantage. Because of the conflict inherent in such transaction, it is voidable by the beneficiaries unless they have consented. Even then, it is voidable if the fiduciary fails to disclose material facts which he knew or should have known, if he used the influence of his position to induce the consent or if the transaction was not in all respects fair and reasonable . . . These rules are equally applicable to the obtaining of a release by the fiduciary.[9]

Subsequent to the Appellate Division's opinion in *Birnbaum*, Surrogate and Appellate courts followed its lead as evidenced by decisions reminding fiduciaries of the strictures by which they were to be guided when procuring a receipt and release from a beneficiary. At the same time, they forewarned beneficiaries that a receipt and release would not be lightly disregarded.

The decision in *In re Goldstick* is instructive.[10] Before the Appellate Division, First Department, were cross-appeals from an order issued in contested trust accounting proceedings in which the Surrogate's Court imposed surcharges against the trustees and removed them from office. The Appellate Division reversed many of the surcharges imposed, and remanded other issues for a further hearing. In pertinent part, the court relied, *inter alia,* on releases that had been executed by the objecting trust beneficiaries at the conclusion of the preceding estate administration.[11] Although the Surrogate's Court found these releases to be a nullity, the Appellate Division disagreed, concluding that they effectively barred the beneficiaries from challenging the executors' stewardship. In reaching this result, the court observed that the instruments were derived after the beneficiaries had been provided with full disclosure, an opportunity to obtain counsel, and diligent inquiry by counsel on the beneficiaries' behalf.

Notably, the Court found that these circumstances were "entirely distinguishable"[12] from those in *Birnbaum*, which had been relied on by the Surrogate's Court in disaffirming the releases. As the Court observed, "[h]ere there was complete disclosure coupled with expert advice and guidance." [13] The Court opined that to demand more would "go a long way toward rendering the device unavailing except in the most trivial situations, and would set at naught the long-standing policy of the law approving this expense-saving device in lieu of recourse to judicial intervention for finality in the settlement of fiduciary accounts (*In re Blodgett,* 171 Misc. 596)."[14]

As compared to *Birnbaum*, which established the parameters of fiduciary conduct in procuring a release, *Goldstick* made it clear that an informed beneficiary, acting with the assistance of counsel, would have little hope of later undermining its effectiveness. Since *Goldstick*, other decisions have followed, all with the same perspective.[15]

RECENT VIEWS OF THE SURROGATE'S AND APPELLATE COURTS

The year 2017 saw a surge of opinions addressed to receipts and releases, perhaps resulting from the vitality of the instruments as a means of achieving closure of an estate or trust without resort to the courts. These opinions continue to crystallize judicial thinking on the subject and, as such, provide valuable insight to the practitioner who is advising a client – be it a fiduciary or a beneficiary – of the wisdom of this approach.

The decision in *In re Ingraham* [16] provides instruction as to the nature and extent of the release that will absolve a fiduciary of the duty to account, but forewarning of the court's inherent authority to compel an accounting under appropriate circumstances.

Before the court was a petition by the successor trustee of two separate inter vivos trusts to compel two former trustees of the trusts to account. One of the trustees, who had been removed by the grantor, filed his accountings; the other trustee, who had resigned, objected to the petitions relying on language in the trust instruments, as well as releases executed by the grantor and the other trustee.

At the time the objectant/trustee resigned, the grantor executed instruments releasing her from any and all claims related to her role as trustee, with the exception of claims arising from fraud or willful misconduct. The release further acknowledged that the grantor desired to forgo a formal account, and that the grantor "ha[d] examined the acts and transactions of [the trustee] and . . . assent[ed] to such actions and transactions."[17] The accounting trustee signed a similar release in favor of the resigning trustee, and assented to any account (formal or informal) rendered by her.

The court held that the objectant's reliance on the releases to insulate her from her duty to account was misplaced, inasmuch as the instruments were not "full," having reserved the releasors' rights to seek relief for any fraud or willful misconduct. Further, the court rejected any claim by the objectant that the releases relieved her of her duty to account, a responsibility that was fundamental to any fiduciary relationship. Indeed, the court found that while the release executed by the grantor may have arguably consisted of a waiver of her right to an accounting, it did not constitute a clear and unambiguous waiver of an accounting by the other trustee and trust beneficiaries.

Additionally, the court held that the provisions of the trust instruments did not relate to the final accounting sought by the proceedings. Finally, the court observed that where a former trustee has failed to account within a reasonable time and full releases do not relieve her of

the duty to account, the court may *sua sponte* direct an accounting pursuant to SCPA 2205. Accordingly, the objectant was directed to account with respect to each of the subject trusts.

Utilizing the same principles as expressed by the court in Ingraham, the Surrogate's Court in In re Cozza18 took a different turn, and held that the subject release had been freely and fairly executed, and moreover, that an accounting would not be in the best interests of the estate.

The issue of the release was raised by the executor within the context of a motion for summary judgment dismissing a compulsory accounting proceeding instituted by an estate beneficiary.

Notably, the documentary evidence submitted in support of the motion indicated that the petitioner had executed a receipt, release, waiver and refunding agreement after receiving an informal account prepared by the estate accountant. The informal account was supported by annotated schedules and an acknowledgment by the petitioner that prior to signing the receipt and release she had been given the opportunity to consult an attorney, seek the advice of her own accountant, and to review and ask questions about the informal account.

In opposition to the motion, the petitioner claimed that she was caused to sign the release because she was in need of her inheritance. Nevertheless, she acknowledged that she contacted the attorney and accountant for the estate prior to signing the document, and had been represented by her own counsel.

The court concluded the petitioner was provided with detailed information regarding the informal account, and had freely signed the document after being given the opportunity to consult professionals of her own choosing. The court held that it would not be in the best interest of the estate, given its small size, to require the executor to undertake the expense of a formal accounting proceeding.

In In re Salz,[19] the Surrogate's Court concluded that the broad terms of a Receipt, Release and Indemnification Agreement barred the petitioner's claim in companion proceedings for an inquiry and turnover, pursuant to SCPA 2103.

The proceedings had been instituted against the decedent's surviving spouse by one of the decedent's sons from a prior marriage, who was a beneficiary under his will. Prior to the decedent's death, his spouse, who was his conservator, was the subject of a contested accounting proceeding, in which the propriety of her stewardship, as conservator, was questioned by the petitioner and his brother. They alleged that the decedent's spouse had failed to account for all of the artwork owned by their father. This litigation was resolved after the decedent's death, pursuant to the terms of a "Stipulation of Settlement and Discontinuance," providing, *inter alia,* for the decedent's spouse to be released "individually and in her capacity as Conservator, and in any other capacity . . . from any and all claims which they now or ever had"[20] upon her payment of a sum certain.

A year later, the co-executors of the decedent's estate, of which the decedent's spouse was one, accounted to the estate beneficiaries and the trustee of the trust created under the decedent's will. In connection therewith, the petitioner and his brother executed a receipt and release agreement that stated they had examined the executors' account, found it to be complete, and "released and forever discharged the Executors, individually and as executors, from any and all claims and causes of action, liabilities and obligations whatsoever . . . which each ever had, now has, or hereafter can, shall, or may have . . . by reason of any act or omission . . ."[21]

Thirty years later, the petitioner instituted the subject proceedings asserting, *inter alia,* that artwork was missing from the decedent's estate as a result of fraud and misconduct committed by the decedent's spouse.[22] The respondents moved to dismiss alleging, in pertinent part, that petitioner's claims had been released. In granting the motion, the court found, *inter alia*, that during the course of the co-executors' accounting, the petitioner, after having received and examined the account, and while represented by counsel, had released any claims and causes of action he had against the fiduciaries, in their representative capacity and individually. Citing *Serbin v. Rodman Principal Invs. LLC,*[23] the court held that the broad language of the release was sufficient to encompass any fraud claims.24 Further, the court concluded that petitioner's pleadings failed to identify a separate fraud from the subject matter of the release that could serve as a basis for a claim that the execution of the release was induced by fraud.25

The decision in *Salz* is one of the more egregious instances of a beneficiary having afterthoughts following the execution of a release. It serves as a cautionary tale to those beneficiaries who pay it short shrift, and forebodes dismissal of post-execution claims against the fiduciary when full disclosure to the beneficiary and an opportunity to retain counsel is apparent.

The opinion in *Centro Empresarial Cempresa, S.A. v. America Movil, S.A.B. de C.V.*,[26] upon which the court in *Salz* also relied, provides an even stronger warning to a beneficiary, particularly, the "more sophisticated and well-counseled beneficiary."[27] In the face of arguments that the defendant's fiduciary status barred dismissal of plaintiff's claim for fraudulent inducement based on an earlier procured release, the First Department directed that the complaint be dismissed:

> [A] release that, by its terms, extinguishes liability on any and all claims arising in connection with spe-

> cific matters is deemed to encompass claims of fraud relating to those matters, even if the release does not specifically refer to fraud and was not granted in settlement of an actually asserted fraud claim . . . While [the defendant], as the holder of the majority interest . . . owed plaintiffs certain fiduciary duties, the foregoing principles apply (at least among sophisticated parties advised by counsel) even where the releasee is a fiduciary . . . If [the defendant's] fiduciary status alone sufficed to prevent it from obtaining the dismissal of this action based on the 2003 release, the implication would be that a fiduciary can never obtain a valid release without first making a full confession of its sins to the releasor, *regardless of the releasor's sophistication and the arm's length nature of the negotiations from which the release emerged.* This is not the law . . .[28]

In affirming the opinion of the First Department, the Court of Appeals amplified the Appellate Division's holding, opining:

> A sophisticated principal is able to release its fiduciary from claims – at least where, as here, the fiduciary relationship is no longer one of unquestioning trust – so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into . . .[29]

In *Pappas v. Tzolis,*[30] the Court of Appeals clarified the opinion in *Centro*, and observed:

> Where a principal and fiduciary are sophisticated entities and their relationship is not one of trust, the principal cannot reasonably rely on the fiduciary without making additional inquiry . . . *The test, in essence, is whether, given the nature of the parties' relationship at the time of the release, the principal is aware of information about the fiduciary that should make reliance on the fiduciary unreasonable.*[31]

In *In re Boatwright,*[32] the Second Department added to the foregoing dictates by concluding that the respondent's "failure to consult with an attorney does not preclude enforcement of the release."[33]

The foregoing results are to be compared with the decision in *Birnbaum,*[34] where the court, due to the self-dealing nature of the transaction, placed the onus on the fiduciary to prove that the beneficiary was provided with full disclosure and an understanding of his or her legal rights. The distinction between the two lines of authority seems to be as pinpointed by the Court of Appeals in Pappas v. Tzolis,[35] i.e., whether the release was procured in the context of litigation and/or other adverse setting as between the parties that would alert the beneficiary that the fiduciary relationship "[was] no longer one of unquestioning trust,"[36] rather than in the normal course of settling an estate, in which a stricter standard of scrutiny is applied.

A release, however, may be invalidated for any of the traditional bases for setting aside written agreements, such as duress, fraud, undue influence or mutual mistake.

The latter approach is evidenced by two decisions rendered by the Second Department in In re Lee,[37] and *In re Spacek.*[38] In *In re Lee,* the court affirmed three decrees of the Surrogate's Court that granted the motions of the Bank of New York Mellon (BNY) and Merrill Lynch Trust Company ("Merrill Lynch") to dismiss the petitions for judicial accountings of two testamentary trusts and two inter vivos trusts that had been created by the decedent and his post-deceased spouse. The petitioners were beneficiaries of each of the trusts. Initially, BNY served as co-trustee of the trusts until it resigned and was succeeded by Merrill Lynch. Upon its resignation, the petitioners each executed a release in favor of BNY regarding its management of the trusts. Following the death of the decedents' son, and the succession by Merrill Lynch as trustee, all four trusts terminated, whereupon

the petitioners each executed releases in favor of Merrill Lynch releasing it from any claims based upon its stewardship.

Approximately four years later, the petitioners instituted proceedings to compel respondents, BNY and Merrill Lynch, to account. Motions to dismiss by the respondents were granted, and the petitioners appealed. Significantly, the Appellate Division held that the Surrogate's Court should not have dismissed the petitions against BNY on the basis of the releases, inasmuch as BNY failed to affirmatively demonstrate that all of the petitioners, who were not represented by counsel when the instruments were signed, were fully aware of the nature and legal effect of the releases at that time.[39]

With respect to Merrill Lynch, the court held that the Surrogate's Court had properly determined that the releases executed by the petitioners were valid, inasmuch as upon executing the instruments the petitioners confirmed receipt of an informal accounting, and discharged Merrill Lynch from all liability and any claim for a formal accounting upon the advice of counsel and after negotiations.

Several months after the decision in *In re Lee*, the Second Department followed suit in *In re Spacek*, when it sustained the validity of a release executed by a beneficiary within the context of an informal agreement discharging the fiduciary. Specifically, the court found that the fiduciary had satisfied her burden of demonstrating that the beneficiary was made fully aware of the transaction and particulars of the estate in advance of her signing the instrument. The court held: "[I]f a fiduciary gives full disclosure in [its] accounting, to which the beneficiaries are parties . . . they should have to object at that time or be barred from doing so after the settlement of the account . . ."[40]

CONCLUSION

Generally, a valid release constitutes a complete bar to an action or a claim that is the subject of the release. A release, however, may be invalidated for any of the traditional bases for setting aside written agreements, such as duress, fraud, undue influence or mutual mistake, with the burden on the party seeking to invalidate the release.

In a fiduciary setting, the foregoing principles often yield to the superseding duties of trust, loyalty, and good faith imposed on the relationship, when the circumstances so require. Indeed, as evidenced by the foregoing decisions rendered by both the Surrogate's Courts and the Appellate Division during the past year, and the precedent upon which these opinions relied, much depends on the context in which the release was executed, the sophistication of the parties, and the opportunity to retain counsel. Suffice it to say that the decisions make it clear that a release will not always serve to put litigation to rest, and may just be a new beginning.

1 Although a receipt and release may be utilized when a fiduciary requests a judicial discharge, as in the case where a beneficiary has received a partial or full satisfaction of his or her distributive share, it is more often found when a fiduciary seeks to be discharged informally.

2 2016 N.Y. Misc. LEXIS 151 (Sur. Ct. N.Y. Co. 2016).

3 *Id.* at *23, *Birnbaum v. Birnbaum,* 117 A.D.2d 409 (4th Dep't 1986).

4 *Id.* at *24.

5 Notably, the beneficiary was not represented by counsel at the time she signed the releases.

6 2016 N.Y. Misc. LEXIS 151, at *31(Sur. Ct., N.Y. Co. 2016).

7 117 A.D.2d 409 (4th Dep't 1986).

8 *Id.* at 415.

9 *Id.* (citations omitted).

10 177 A.D.2d 225 (1st Dep't 1992).

11 That administration, in which the trustees had served as co-executors, was apparently reopened by the Surrogate early in the trial of the trust accounting proceedings, albeit the matter had been closed by releases executed by the objectants 13 years earlier.

12 *Goldstick,* 177 A.D.2d at 233.

13 *Id.* Notably, while the disclosure in *Goldstick* took the form of a formal accounting, neither a formal nor informal accounting had been provided to the beneficiary in *Bronner*, yet, as stated *supra*, the court found the trustee's allegations and the record sufficient to create a question of fact as to whether full and adequate disclosure had been made.

14 *Id.*

15 *See, e.g.*, *In re Lifgren,* 36 A.D.3d 1042 (3d Dep't 2007); *In re Leo Grande,* 13 Misc. 3d 1070 (2006).

16 2017 N.Y.L.J. LEXIS 1516 (Sur. Ct., N.Y. Co. 2017).

17 *Id.* at *2.

18 2017 N.Y.L.J. LEXIS 2020 (Sur. Ct., Bronx Co. 2017).

19 2017 NY.L.J. LEXIS 2089 (Sur. Ct., N.Y. Co. 2017).

20 *Id.* at *2.

21 *Id.*

22 In the interim, the decedent's spouse died, resulting in the trustee of the inter vivos trust into which her estate passed on death being made a party to the proceedings.

23 87 A.D.3d 870, 871 (1st Dep't 2011).

24 *Salz, citing Serbin v. Rodman Principal Ins., LLC, supra.*, in which the Court, quoting *Centro Empresarial Cempresa, S.A. v. America Movil, S.A.B. de C.V.,* 76 A.D.3d 310, 318–19, *aff'd* 17 N.Y.3d 269 (2011), opined that the broad release language encompassed any fraud claim, even if it did not specifically refer to fraud, and was not granted in settlement of an actually asserted fraud claim.

25 *See Centro, id.*

26 76 A.D.3d 310, *aff'd,* 17 N.Y.3d 269 (2011).

27 *Id.* at 319.

28 *Id.* at 318–19 (emphasis supplied).

29 17 N.Y.3d at 278.

30 20 N.Y.3d 228 (2012).

31 *Id.* at 232–33 (emphasis supplied).

32 114 A.D.3d 856 (2d Dep't 2014).

33 *Id.* at 858; *see also Skluth v. United Merchants & Mfrs., Inc.*, 163 A.D.2d 104, 107 (1st Dep't 1990):

> The other factor deemed crucial by the Supreme Court, plaintiff's failure to consult with an attorney, also does not preclude enforcement of the release. The court properly found that plaintiff is an educated, experienced businessman with knowledge of release letters such as the one that he was asked to execute . . . There is, certainly, no requirement in the law that consultation with a lawyer must occur in order to render a contractual obligation enforceable . . . Although a party's representation by an attorney is some evidence of the knowledge and volition with which a particular contract was made . . . the absence of counsel is far less critical than the opportunity to consult counsel . . ..

34 117 A.D.2d 409 (4th Dep't 1986).

35 20 N.Y.3d 228 (2012).

36 *Id.* at 232.

37 153 A.D.3d 831 (2d Dep't 2017).

38 155 A.D.3d 747 (2d Dep't 2017).

39 Nevertheless, the court found that the Surrogate's Court had properly determined that the claims were time-barred.

40 *Spacek,* 155 A.D.3d at 748, quoting *In re Lifgren,* 36 A.D.3d at 1044.

Dual Jurisdictions and Governing Laws

Sometimes a situation arises in which parties about to enter into an agreement are at odds about the governing law and the location to determine disputes. A consideration possibly more important than the governing law and one which might well contribute to the disagreement – especially in the case of small companies – is the cost and inconvenience of being sued in a foreign jurisdiction.

The samples below,[1] specifying alternate jurisdictions depending on the party that commences the action, offer a compromise, one for a contract without arbitration and the other for a contract with arbitration. The compromise itself may even provide – to the dismay of trial attorneys – a stimulant to settle disputes.[2]

CONTRACT WITHOUT ARBITRATION

(a) PARTY A must commence and prosecute any claim against PARTY B under or in respect of this agreement (an "Initial Claim") in the courts of the state of *[specify state where PARTY B conducts business]* or in a federal court having jurisdiction in that state *unless* both the state and federal courts determine that they do not have jurisdiction.

PARTY B must assert in that proceeding any counterclaim that, at the time the Initial Claim is commenced, it has against PARTY A under or in respect of this agreement. Failure by PARTY B to do so will constitute a forfeiture of that counterclaim.

(b) PARTY B must commence and prosecute any claim against PARTY A under or in respect of this agreement (an "Initial Claim") in the courts of the state of *[specify state where PARTY A conducts business]* or in a federal court having jurisdiction in that state *unless* both the state and federal courts determine that they do not have jurisdiction.

PARTY A must assert in that proceeding any counterclaim that, at the time the Initial Claim is commenced, it has against PARTY B under or in respect of this agreement. Failure by PARTY A to do so will constitute a forfeiture of that counterclaim.

(c) An Initial Claim will be deemed to commence when a complaint is filed regardless of whether the complaint is amended in respect of that Claim.

(d) This agreement will be governed by and construed in accordance with – and all claims, counterclaims and other matters under or in respect of this agreement will be determined by – the law of the state where the Initial Claim is commenced.[3]

CONTRACT WITH ARBITRATION

(a) Any dispute or claim under or in respect of this agreement will be determined by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA), before a panel of three arbitrators, one appointed by PARTY A, one appointed by PARTY B, and a third appointed by the AAA. The decision or award of a majority of the arbitrators will be final and binding on both parties, and the award may be entered as a judgment or order of any court of competent jurisdiction.

(b) PARTY A must commence and prosecute any arbitration proceeding under or in respect of this agreement (an "Initial Claim") in *[specify a city in the state where PARTY B conducts business]*.

PARTY B must assert in that proceeding any counterclaim that, at the time the Initial Claim is commenced, it has against PARTY A under or in respect of this agreement. Failure by PARTY B to do so will constitute a forfeiture of that counterclaim.

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(c) PARTY B must commence and prosecute any arbitration proceeding under or in respect of this agreement (an "Initial Claim") in *[specify a city in the state where PARTY A conducts business]*.

PARTY A must assert in that proceeding any counterclaim that, at the time the Initial Claim is commenced, it has against PARTY B under or in respect of this agreement. Failure by PARTY A to do so will constitute a forfeiture of that counterclaim.

(d) An Initial Claim will be deemed to commence when a demand for arbitration is filed with the AAA regardless of whether the demand is amended in respect of that Claim.

(e) Notwithstanding the provisions for arbitration contained in this Agreement, each party will be entitled to seek injunctive and other equitable relief in the courts, and it will not be a defense to any request for such relief that the party has an adequate remedy at law. In any such proceeding for injunctive or other equitable relief, neither party will be required to post bond or other security.

Any action for injunctive or other equitable relief by either party must be brought (i) if PARTY A is seeking the relief, in a court of the state of *[specify state where PARTY B conducts business]* or in a federal court having jurisdiction in that state, or (ii) if PARTY B is seeking the relief, in a court of the state of *[specify state where PARTY A conducts business]* or in a federal court having jurisdiction in that state – *unless*, in each case, the state and federal courts in the applicable state determine that they do not have jurisdiction.

(f) Each party will pay the legal fees and other expenses that it incurs in connection with the arbitration proceeding, and both parties will share equally the fees and other charges of the arbitrators and the AAA.

(g) This agreement will be governed by and construed in accordance with – and all claims, counterclaims and other matters under or in respect of this agreement will be determined by – the law of the state where the Initial Claim is commenced.[4]

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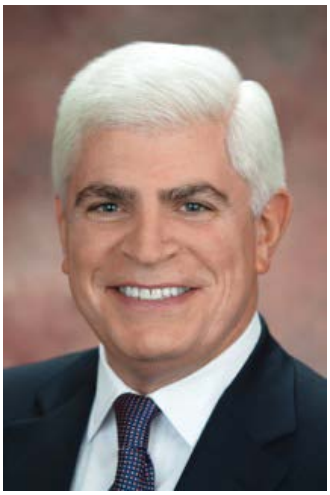
1 The models in this article will comprise part of the 2020 supplement to Commercial Agreements, supra, Copyright 2017, Thomson Reuters. They are pre-printed here with the permission of Thomson Reuters/West.

2 *See Bamberger Rosenheim, Ltd., (Israel) v. OA Development, Inc., (United States),* 862 F.3d 1284 (11th Cir. 2017). The models in this article, written before the author knew of the case, anticipate and treat the issue in that case which spawned the litigation: where to bring counterclaims.

3 Attorneys should retain local counsel in jurisdictions in which they do not practice.

4 See, *supra*, n. 2.



Michael Miller,
PRESIDENT

Michael Miller of New York City (Law Office of Michael Miller) became President of the New York State Bar Association (NYSBA) on June 1, 2018. He spent the previous year as president-elect and chair of the House of Del-egates. He has also served on the Executive Committee as vice-president of the Firstst Judicial District.

Miller has been a solo practitioner for more than 30 years in Manhattan, focusing primarily on estate and trust work, including planning, administration and litigation.

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

Last year, Miller served as co-chair of the President's Committee on Access to Justice. Among many other NYSBA activities, Miller was a founding member of the Elder Law Section, serving as its first newsletter editor, executive committee member and chair of several committees.

Over the years, Miller developed award-winning pro bono programs recognized by NYSBA, NYSCBL and the ABA. Among his many awards, Miller received the ABA's Pro Bono Publico Award, its highest award for pro bono service, for his leading role in the legal relief efforts in the aftermath of the 9/11 attacks.

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

Miller earned his degrees from New York University and New York Law School.

Henry M. "Hank" Greenberg,
PRESIDENT-ELECT

Henry M. "Hank" Greenberg of Albany, a shareholder at Greenberg Traurig, LLP, is President-elect of the New York State Bar Association.

Greenberg concentrates his practice on civil litigation, criminal and civil investigations, and regulatory and ad-ministrative law. He is a former counsel to the New York State Attorney General, general counsel for the New York State Department of Health, and federal prosecutor. Among other government posts, he also served as a law clerk to then-Associate Judge (later Chief Judge) Judith S. Kaye of the N.Y. Court of Appeals.

Previously, he served in the State Bar's House of Delegates as vice-president of the Third Judicial District, and was a chair of the Committee on the New York State Constitution; co-chair of the Committee on Court Structure and Operations; and chair of the Legislative Policy Committee, Steven C. Krane Special Committee on Law School Loan Assistance for Public Interest (SLAP), and Committee on Attorneys in Public Service. He is the current chair of the New York State Third Department Judicial Screening Committee, a member of the Statewide Judicial Screening Committee, and counsel to the New York State Commission on Judicial Nomination, which nominates New York's Court of Appeals judges.

He is a vice chair of The Historical Society of the New York's Courts, a life fellow of the New York Bar Foundation, a fellow of the American Bar Foundation, and a member of the New York State Judicial Institute on Profes-sionalism in the Law and the Advisory Group of the New York State and Federal Judicial Council.

He is a frequent lecturer and has written articles and book chapters on a range of legal subjects.

Greenberg obtained degrees from the University of Chicago, with honors, and Syracuse University College of Law, *cum laude.*

Sherry Levin Wallach,
SECRETARY

Sherry Levin Wallach is serving her second one-year term as secretary of the New York State Bar Association. She is of counsel to Bashian & Farber in White Plains and Brown Hutchinson in their New York City office.

Levin Wallach is the immediate past chair of the Criminal Justice Section, immediate past vice president from the Ninth Judicial District to the Executive Committee, immediate past chair of the Membership Committee, and is serving her third four-year term in the House of Delegates.

Levin Wallach is co-founder of the NYSBA Young Lawyers Section Trial Academy, where she serves on its faculty as a team leader and lecturer on cross examination. She is a frequent lecturer and organizer for continuing legal education programs for the New York State and Westchester County Bar Associations on criminal and civil trial practice, ethics and DWI. She has authored articles on criminal justice issues and trial practice. She also serves on the board of directors of the Westchester County Bar Association.

She concentrates her practice on criminal defense, personal injury, real estate and general civil litigation in state and federal courts. Levin Wallach is admitted to practice in New York, the U.S. District Courts for New York's Southern and Eastern Districts and the U.S. Supreme Court. She serves on the Westchester and Putnam County 18B panels, which provide criminal defense for indigent people.

Levin Wallach leads the Women's Law Group of Bashian & Farber, which focuses on legal representation and advisory services for women in the areas of wealth preservation, estate planning, business law, real estate, pre-nuptial agreements, special needs planning, probate and estate administration, and sexual harassment and discrimination.

Scott M. Karson,
TREASURER

Scott M. Karson of Stony Brook was re-elected treasurer of the New York State Bar Association for his third one-year term.

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

Karson previously served a three-year term as vice president of the State Bar for the Tenth Judicial District (Nassau and Suffolk counties), is a member of the State Bar's House of Delegates and is a member and former chair of the Association's Audit Committee.

He is also a member and former chair of the Committee on Courts of Appellate Jurisdiction, and serves as a member of the Finance Committee, the President's Committee on Access to Justice and the Committee to Review Judicial Nominations.

In addition, Karson is a past president of the Suffolk County Bar Association and is the delegate of the Suffolk County Bar Association to the American Bar Association House of Delegates. He is also a member of the American Bar Association Council of Appellate Lawyers. He is vice chair of the Board of Directors of Nassau Suffolk Law Services, the principal provider of civil legal services to Long Island's indigent population. He is a recipient of the Suffolk County Bar Association President's Award (1996 and 2011) and Lifetime Achievement Award (2018).

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

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'Journey to Full Inclusion'

State Bar Honors Former U.S. Attorney General Eric Holder

By Christian Nolan

Eric Holder, who served as attorney general for six years during the Obama Administration, says substantial progress has been made when it comes to diversity.

"I stand here today having served as the first African-American attorney general in the history of the United States, in the administration of the first black president of the United States and having been succeeded by the first African-American woman to serve as attorney general," said Holder. "Contained in that one sentence is progress the likes of which the generation before mine would have deemed almost unthinkable."

But Holder, a partner at Covington in Washington D.C., acknowledged there is still significant progress that needs to be made on the "journey to full inclusion." Holder pointed to recent statistics showing that roughly 80 percent of all lawyers in the U.S. are white, only a fifth of law firm equity partners are women, and lawyers of color make up about 10 percent of general counsels at large corporations and only two percent of partners at major law firms.

Further, Holder said that white men comprise 58 percent of state court judges in this country though they only make up about a third of the nation's population. Less than one-third of state judges are women and only about 20 percent are people of color.

"When our court systems do not reflect, in a general way, the communities they serve, that serves as one basis for the development of mistrust in the justice system," said Holder.

Eric Holder delivers a speech upon receiving the 2018 Honorable George Bundy Smith Pioneer Award, given by the Commercial and Federal Litigation Section of the New York State Bar Association. The award presentation was part of a "Career Strategies for Attorneys of Color" event this spring at the Lincoln Center for the Performing Arts in Manhattan.

"The legitimate concern we place on having diverse juries 'of our peers' should flow into a determination to make the bench diverse as well."

To complete the "journey to full inclusion," Holder said entities must be committed to equal opportunity, stress the importance of diversity, hold individuals and selection systems accountable for quantifiable results and create meaningful mentorship structures.

"Only then will we get to the place where we must be. Never forget that positive change, though possible, is not promised," said Holder. "It is the result of hard work, sacrifice and endurance in the face of failure. We must commit ourselves as a nation, and you must do so as stewards of our legal system, to making real the opportunities – not the results – that are the birthright of every American. We must strive for a diverse legal community."

Holder delivered his remarks upon receiving the 2018 Honorable George Bundy Smith Pioneer Award, given by the Commercial and Federal Litigation Section of the New York State Bar Association. The award is named after the late former Court of Appeals associate judge who, in 2007, was the first recipient of the award.

To read the full version of this article, including Holder's thoughts on "unconscious bias," please visit www.nysba.org/holder.

Nolan is NYSBA's senior writer.

President's Pro Bono Service Awards

The New York State Bar Association celebrated Law Day by honoring attorneys and law firms from around the state with its 2018 President's Pro Bono Service Awards. State Bar President Sharon Stern Gerstman presented the 17 awards on May 1 at the Bar Center in Albany. To read the full news article and see a list of the awardees, visit www.nysba.org/probonoawards18.

Law Day Reception at the Bar Center

On Law Day, May 1, the judges of the Court of Appeals and NYSBA leadership gathered on the patio at the Bar Center in Albany. From left to right: Hon. Michael Garcia, NYSBA President-elect Michael Miller, Hon. Rowan D. Wilson, Hon. Jenny Rivera, NYSBA President Sharon Stern Gerstman, Chief Judge Janet DiFiore, Hon. Leslie Stein, Hon. Eugene M. Fahey, Hon. Paul G. Feinman, NYSBA President-elect designee Henry M. Greenberg.

5 questions and a closing argument

Member Spotlight with T. Andrew Brown

Brown, managing partner at Brown Hutchinson LLP, lives in Rochester, NY.

What do you find most rewarding about being an attorney?

I have enjoyed the ability to work in so many different capacities. Lawyers are equipped with a wide range of skills. While remaining a full-time attorney, I've found much of my greatest satisfaction using my legal skills in capacities outside of practicing law, especially when serving those less fortunate. My service as the Vice Chancellor of the New York State Board of Regents, setting educational policy and advancing learning for the citizens of New York, is one of those rewarding opportunities. I have a passion for education, and if I hadn't become a lawyer, I probably would have been a teacher.

Who are your heroes in the legal world?

The late Hon. Thurgood Marshall, Charles Hamilton Houston and the other great African-American lawyers of the civil rights era are my legal heroes. They dared to take on cases others thought they could not win, went willingly into unwelcoming communities and appeared in unwelcoming courthouses, often before unwelcoming judges. They challenged unjust systems thought too entrenched to be changed and won significant cases that have had a lasting impact on the foundations of our justice system. If it were not for them, and so many others like them, I wouldn't have had the opportunities that I've had in my lifetime and you wouldn't be reading these words right now.

What advice would you give a young lawyer just starting a career?

Follow the path that most truly suits you. Realize that the biggest opportunities always come with the biggest risks. Have a mission and a sense of value to be sure you stay on course. Without question, the best lawyers are those who like what they do. A long career as an attorney not doing what you want will only make you good at being miserable.

What is one of your passions outside of work and the law?

If I'm not working or traveling, I'm probably spending time with my daughter around horses. For many years I rode horses and used to compete. Now I enjoy watching my daughter train and compete. I'm usually at the stable several times a week. Cleaning up after horses is a great reminder to remain humble!

What is one of your favorite books?

The Warmth of Other Suns by Isabel Wilkerson is the story of the Great Migration, 1915–1970, when African-Americans moved north to leave behind the ravages of slavery and Jim Crow, and how this shaped the American landscape as it is today. It's narrative nonfiction that is better than any history book I've read.

Closing argument: Why should lawyers join the New York State Bar Association?

Anyone who belongs to a profession that he or she truly values should be willing to work not only to protect the integrity of that profession, but also to make it better. For lawyers, I can think of no better way to do that than through bar associations. The New York State Bar Association has long been recognized as a leader and as a model for bar associations to follow. There is great personal and professional value that comes from fellowship and association with so many outstanding lawyers and judges from around the state. I have been fortunate to develop many great friendships and professional relationships throughout my membership with NYSBA and cannot imagine having found the same level of satisfaction with my career had I not been a NYSBA member.

MIRANDA *Warnings*

This June, the New York State Bar Association is launching its first podcast. Miranda Warnings features NYSBA Past President David Miranda in conversation with lawyers, judges and other interesting people on a wide range of topics, including all things legal – and some that are not. T. Andrew Brown talked to David about his work as Vice Chancellor of the New York State Board of Regents and what education means to him. Look for this and other episodes on iTunes, Google Play or connect through the NYSBA's blog: www.nysba.org/blog.

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For more information please contact Philip Karasyk at 212-233-3800.

Medical Expert in Thoracic And Vascular Surgery, Non-Invasive Testing and Wound Care

I have practiced thoracic and vascular surgery since 1991. I maintain an active practice and am Medical Director of Champlain Valley Physicians Hospital Wound Center. I am certified by the American Board of Thoracic Surgery and am a Registered Physician in Vascular Interpretation.

I review for the New York State Office of Professional Medical Conduct and have had over ten years of experience in record review, determinations of standard of care, deposition and testimony in medical malpractice cases.

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Burden Back Where It Belongs, but Barely (Part II)

Last month's column reported on the April 3, 2018 decision of the Court of Appeals in *Rodriguez v. City of New York*[1] where the Court, by the narrowest of margins, held:

> This appeal requires us to answer a question that has perplexed courts for some time: Whether a plaintiff is entitled to partial summary judgment on the issue of a defendant's liability, when, as here, defendant has arguably raised an issue of fact regarding plaintiff's comparative negligence. Stated differently, to obtain partial summary judgment in a comparative negligence case, must plaintiffs establish the absence of their own comparative negligence. We hold that a plaintiff does not bear that burden.[2]

Last month's column promised to discuss the majority and dissenting opinions, and what practitioners may do going forward. This month's column, as promised, contains an analysis of the majority in support of its holding and the reasoning of the dissenters.[3]

RODRIGUEZ: THE MAJORITY OPINION

The majority decision by Judge Feinman, joined by Judges Rivera, Fahey, and Wilson, discussed the interplay of, and statutory rules for interpreting, three CPLR provisions: CPLR 3212(b) and (c), CPLR 1411, and CPLR 1412. Acknowledging the mandate that "[i]n matters of statutory interpretation, our primary consideration is to discern and give effect to the Legislature's intention,"[4] Judge Feinman focused on the "plain language of CPLR 1412:"[5]

> CPLR 1411 provides that: "In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk *shall not bar recovery*, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages." (Emphasis in original).
>
> CPLR 1412 further states that "[c]ulpable conduct claimed in diminution of damages, in accordance with [CPLR 1411], shall be an affirmative defense to be pleaded and proved by the party asserting the defense."
>
> Placing the burden on the plaintiff to show an absence of comparative fault is inconsistent with the plain language of CPLR 1412. In 1975, New York adopted a system of pure comparative negligence, and, in so doing, directed courts to consider a plaintiff's comparative fault only when considering the amount of damages a defendant owes to plaintiff. The approach urged by defendant is therefore at odds with the plain language of CPLR 1412, because it flips the burden, requiring the plaintiff, instead of the defendant, to prove an absence of comparative fault in order to make out a prima facie case on the issue of defendant's liability. (Footnote omitted).
>
> Defendant's approach also defies the plain language of CPLR 1411, and, if adopted, would permit a possible windfall to defendants.[6]

In footnote 3, the majority discussed analyses of *Thoma v. Ronai* by leading CPLR commentators, nicely synthesized by John R. Higgitt:

> John R. Higgitt writes in the Practice Commentaries to CPLR 3212 that the approach favored by Siegel and Connors, which he refers to as the "Siegel approach," has appeal for at least two reasons. First, he notes:
>
> "CPLR 1411's language suggests that a plaintiff seeking partial summary judgment on the issue of the defendant's liability should not have the burden of showing her freedom of comparative fault . . . If a plaintiff's comparative fault shall not bar recovery, but merely diminishes her damages award, then it would seem that the plaintiff should not be required to prove her freedom from comparative fault as a

David Paul Horowitz (david@newyorkpractice.org) is a member of McNamara & Horowitz in New York City. He has represented parties in personal injury, professional negligence, and commercial cases for over 29 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), the most recent supplement to Fisch on New York Evidence (Lond Publications), and since 2004 has authored the monthly column Burden of Proof in the NYSBA *Journal*. Mr. Horowitz teaches New York Practice and Electronic Evidence & Discovery at Columbia Law School and, on behalf of the New York State Board of Bar Examiners, lectures on New York Practice to candidates for the Uniform Bar Exam, serves as an expert witness and is a frequent lecturer and writer on civil practice, evidence, ethics, and alternative dispute resolution issues. He has previously taught New York Practice, evidence, professional responsibility, and electronic evidence and disclosure at Brooklyn, St. John's, and New York Law Schools. 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.

precondition to obtaining partial summary judgment on the issue of the defendant's liability."

(John R. Higgitt, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3212:15).

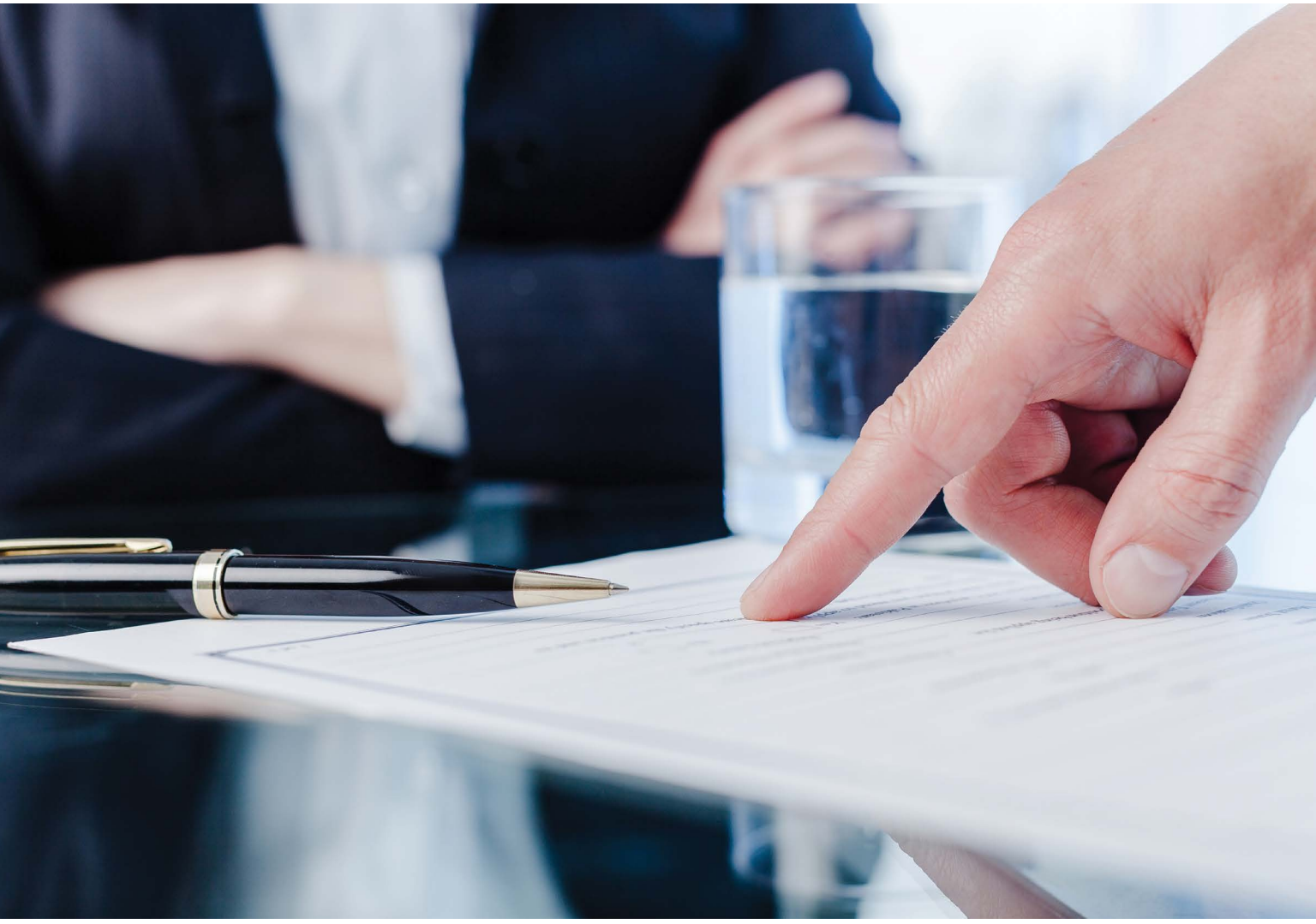
Secondly, he contends that "the Siegel approach provides for harmony between the substantive law of torts and the rules of decision on a plaintiff's motion for partial summary judgment" (*id.*). Higgitt writes:

"A plaintiff is entitled to recover damages in a negligence action if she demonstrates that a defendant's negligence was "a" proximate cause of the plaintiff's injuries, i.e., that the defendant's negligence was one, not necessarily the only, substantial factor in causing the injuries. Thus, a plaintiff's right of recovery arises on her showing that the defendant was negligent and that the defendant's negligence was a proximate cause of the plaintiff's injuries, and any comparative fault on the plaintiff's part will merely diminish the damages award. Under the present rule reflected in the decisions of the First and Second Departments, a plaintiff seeking partial summary judgment on the issue of the defendant's liability is required to prove her freedom from comparative fault. That doesn't seem to jibe with the rule of substantive law providing that a plaintiff is entitled to recover once she establishes that the defendant was negligent and that the defendant's negligence was a proximate cause of the plaintiff's injuries" (*id.* [citation omitted]).[7]

The majority explained that "*Thoma* never addressed the precise question we now confront . . . the import of article 14-A . . . Plaintiff contends, even assuming there is an issue of fact regarding his comparative fault, that he is entitled to partial summary judgment on the issue of defendant's liability."[8]

Agreeing with plaintiff's contention, the majority rejected "defendant's contention that granting the plaintiff partial summary judgment on defendant's liability serves no practical purpose":[9]

> A principal rationale of partial summary judgment is to narrow the number of issues presented to the jury (citations omitted). In a typical comparative negligence trial, the jury is asked to answer five questions:
>
> 1. Was the defendant negligent?



> 2. Was defendant's negligence a substantial factor in causing [the injury or the accident]?
>
> 3. Was plaintiff negligent?
>
> 4. Was plaintiff's negligence a substantial factor in causing (his or her) own injuries?
>
> 5. What was the percentage of fault of the defendant and what was the percentage of fault of the plaintiff?
>
> (PJI 2:36). Where plaintiff has already established defendant's liability as a matter of law, granting plaintiff partial judgment eliminates the first two questions submitted to the jury, thereby serving the beneficial purpose of focusing the jury on questions and issues that are in dispute.[10]

Finally, the majority foresaw no problem in crafting an appropriate charge:

> Nor do we agree with defendant that what it characterizes as bifurcation of the issues of defendant's liability from plaintiff's liability runs counter to the Pattern Jury Instructions.
>
> When a defendant's liability is established as a matter of law before trial, the jury must still determine whether the plaintiff was negligent and whether such negligence was a substantial factor in causing plaintiff's injuries. If so, the comparative fault of each party is then apportioned by the jury. Therefore, the jury is still tasked with considering the plaintiff's and defendant's culpability together. As a practical matter, a trial court will instruct the jury in a modified version of Pattern Jury Instruction 1:2B that the issue of defendant's negligence, and in some cases, the related proximate cause question, have been previously determined as a matter of law. Trial courts are experienced in crafting such instructions, for example when liability has already been determined in a bifurcated trial, or when an Appellate Division upholds a liability determination and remands solely for a recalculation of damages, or a trial on damages has been ordered pursuant to CPLR 3212(c).[11]

RODRIGUEZ: THE DISSENT

The dissent by Judge Garcia, joined by Chief Judge DiFiore and Judge Stein, cited *Thoma* for their conclusion that "[t]he rule has been, and should remain, that a plaintiff must demonstrate the absence of issues of fact concerning both defendant's negligence and its own comparative fault in order to obtain summary judgment (citation omitted)."[12] Arguing that "the issue of whether a plaintiff is entitled to summary judgment without showing freedom from comparative fault is settled, and the Appellate Division Departments have, for the most part, been applying that precedent,"[13] the dissent posited:

> [D]enying summary judgment where there are triable issues concerning comparative fault, is not only the established rule, it is the fairer outcome. We have previously held that comparative fault must be analyzed from a holistic perspective (citation and parenthetical omitted). Determinations of degrees of fault should be made as a whole, and assessing one party's fault with a preconceived idea of the other party's liability is inherently unfair; or, as the Appellate Division characterized it, a defendant would "enter[] the batter's box with two strikes already called" (citation omitted). Indeed, as the Appellate Division also noted, the Pattern Jury Instructions advise that a jury consider both parties' liability together (citation omitted). This is because the issues of defendant's liability and plaintiff's comparative fault are intertwined. A jury cannot fairly and properly assess plaintiff's comparative fault without considering defendant's actions (citation omitted).[14]

Arguing that "[s]imultaneous consideration by the jury of both parties' level of culpability is also the more practical approach," the dissent rejected the majority's statutory synthesis:

> Article 14-A enables a plaintiff to *recover* despite comparative fault (citation and parenthetical omitted). It does not mandate that courts grant partial summary judgment on liability to plaintiffs who are comparatively at fault, as the majority's approach would require. The comparative fault statute simply provides that a plaintiff is entitled to recover a certain amount of damages, to be determined by a jury, even in cases where plaintiff has engaged in some degree of culpable conduct. This requires that each party's culpability be assessed and liability determined before judgment is granted (citation omitted).[15]

CONCLUSION

Having run out of space, next month's column will discuss the impact of *Rodriguez* on existing and future cases.

As you peruse this in the lovely period between Memorial Day and the summer solstice, get outside, enjoy the beautiful weather, and don't work so hard.

---

1 2018 N.Y. Slip Op. 02287 (2018).

2 *Id.*

3 Violating the rule of "under promise, over deliver," space does not permit the inclusion this month of the third promised topic, what to do going forward. Stay tuned.

4 *Id.* at *3.

5 *Id.*

6 *Id.* at *3–4.

7 *Id.* at note 3.

8 *Id.* at *5.

9 *Id.*

10 *Id.*

11 *Id.* at *5–6.

12 *Id.*

13 *Id.* at *7.

14 *Id.* at *8–9.

15 *Id.* at *10.

Blockchain and the Future of Smart Contracts

By Nina Lukina

WHAT IS BLOCKCHAIN?

You may have heard that blockchain technology is about to "disrupt" industries as diverse as music, banking, automotive engineering, and law. For those who have not dabbled in Bitcoin trading, how exactly it will do this is obscure. What is blockchain, aside from a buzzword, and how does it intersect with the legal profession?

Blockchain's origins are in virtual currency. It is the technology that underlies the trading of recently invented money like Bitcoin, giving it value. Often described as a "ledger" that logs transactions and ownership, blockchain fills the role traditionally held by a centralized bank. Unlike a bank, however, blockchain is decentralized. Rather than residing with one trusted third party, this database is spread among nodes in a network. Each device running a virtual currency app is a node in that currency's blockchain. There is no single copy of the database; it is distributed globally and verified at each point (or block of the chain) with cryptography, a system that enthusiasts say is not only tamper-proof, but can also replace traditional intermediaries like centralized banks.

"SMART CONTRACTS"

Though blockchain's history is tied with Bitcoin, a highly voluble currency and possible fad, as well as with shady activities like purchasing drugs anonymously online, its potential extends far beyond its early uses.

In a recent *New Yorker* profile of Bitcoin investor Michael Novogratz, Gary Shteyngart writes:

> What can you do with blockchain besides buying drugs on the dark Web? Potentially, quite a lot. A ledger kept among a vast number of computers can transfer money more securely than traditional banks, and, possibly, faster, all the while denying Wells Fargo, say, a cut of the transaction. But that is only the start. Ethereum's platform, for example, can work as a lawyer-free contract database dealing with everything from property sales to estate transfers.

Ethereum is a blockchain organization that also mints its own cryptocurrency, called Ether. But Ethereum aims to apply blockchain to much more. Its website describes it as a "decentralized platform that runs smart contracts" and encourages developers to "store registries of debts or promises, move funds in accordance with instructions given long in the past (like a will or a futures contract) and many other things that have not been invented yet, all without a middleman or counterparty risk."

Blockchain-based contracts could be created and even carried out without human involvement, with the cryptography algorithm minimizing the possibility for fraud and errors. Ujo, a music startup built on Ethereum's blockchain, aims to make recording contracts as we know them obsolete, thereby giving more control to artists over the distribution and pricing of their music, control they have largely lost since the invention of Napster and the advent of streaming. Musicians would no longer have to register copyrights or go through a record label to release and collect payment for their work.

In an illustration of how blockchain can facilitate lawyerless contract creation and registration of intellectual property, singer-songwriter Imogen Heap was among the first to release a song on Ujo, entrusting all credits and licensing to the blockchain. Listeners and other musicians who may want to remix the track can purchase the song directly from the artist with Ether. Imogen Heap is paid immediately, and her song is embedded with a unique code, or "hashed," to prevent its illegal distribution.

Similarly, programs can be built on the blockchain ledger's hashing to replace legal records and services that provide authentication and transactional history, such as proof of title, chain of custody, property ownership, notarization, and escrow enforcement.

Platforms like Ujo and Ethereum promise to cut out the middleman, giving the parties involved more control and saving them money on fees. In my research, this part puzzled me. Aren't these companies themselves just a new sort of intermediary? In a January 16, 2018 *New York Times* article called, "Beyond the Bitcoin Bubble," Steven Johnson wrote of Ethereum, "[n]o one owns it." Ethereum, originally developed by a Swiss nonprofit called The Ethereum Foundation, is open-source and democratically run by enthusiasts worldwide. It seems that, so far, there has been no evidence of one corpora-

tion or individual gaining too much influence over the blockchain.

CONFRONTING CHALLENGES: THE FUTURE OF BLOCKCHAIN

Will blockchain end up like, say, Google Glass, a technology we hear about until we don't, or will its potential actually come to fruition? The latter did occur with Big Data, after all, which went from buzzword to the unprecedentedly powerful technology behind the Facebook campaign-influence scandal. The answer depends, in part, on whether blockchain can evolve and overcome certain concerns and flaws.

One question is how "smart contracts" will interact with local and cross-border jurisdiction. Such contracts are, at least currently, outside the law. Which data privacy laws will apply? And what about taxes? A 2016 report by the International Monetary Fund titled "Virtual Currencies and Beyond: Initial Considerations," states that virtual currencies have "a high potential as a means for tax evasion" due to the anonymity that blockchain provides.

This anonymity (which some early users of blockchain have capitalized on to conduct illicit transactions) extends to your name. In another way, blockchain is highly transparent. In the case of Bitcoins, for example, you can see how many are in anyone's account and trace transaction histories. Theoretically, if you sign a smart contract with someone, that person will be able to see more information about you and your activities than you might want. Would you want someone who sends you some money for a shared cab, for instance, to see your bank account and purchase history? It is still early yet in the blockchain game, and such problems are still being worked out.

Scalability, or sustainable growth, is another issue that will have to be confronted if blockchain and smart contracts take off. For your cell phone or laptop to serve as a node in the blockchain, it would have to hold the records of all transactions ever, a large, rapidly growing database that demands a great deal of computing resources. Bitcoin traders say it currently takes days to download the Bitcoin database. Alternatively, you can skip this part and just get the client application. As more people opt out of downloading the whole database, as many Bitcoin traders do, the blockchain becomes more concentrated in fewer places and could therefore be more vulnerable to tampering.

Still, the Bitcoin blockchain has never been hacked, despite the high incentive for infiltrating this billion-dollar business. The Bitcoin example suggests that blockchain can promise tight security in a time when data breaches have spiraled out of control.

More challenges will undoubtedly arise as the technology evolves. Other uses will reveal themselves too, as more industries investigate blockchain. Keen on not being left behind in a blockchain revolution, many banks are actively exploring ways to use blockchain to their benefit. Santander was the first bank to launch a payment app based on blockchain. In May 2018, J.P Morgan applied for a blockchain-payment patent. Also in May, the automakers BMW, Ford, GM, and Renault announced the formation of the Mobility Open Blockchain Initiative to investigate its uses in driving.

Meanwhile, in law, big firms like Perkins Coie and Goodwin Procter have started blockchain practice groups. The document management system NetDocuments has completed a proof-of-concept integrating its cloud platform with blockchain. There does not seem to be widespread use of smart contracts or hashing of intellectual property, yet. The next few years will reveal more about how blockchain will affect licensing and contract work. If everything its proponents say proves to be true, its impact on the industry will be significant.

NINA LUKINA is a Marketing Associate in the New York office of Kraft Kennedy. She researches and writes about emerging technology. A former consultant at Kraft Kennedy, she's worked on many IT strategy and information security projects for law firms.

CYBER BYTES

Good Security Plans Combat More Than the "Hack du Jour"

By Joseph "Dan" Waggoner

A recent article from *The Law Society Gazette* described how Duncan Lewis Solicitors' computer systems were hacked, with sensitive client and employee data being spread via social media. The article also mentioned two other law firms that had cybersecurity incidents in the past year.

So what should you and your firm be doing to protect yourself from a potentially crippling computer security breach?

What you should not do is rush out and protect yourself from the hack du jour. That is a recipe for failure for several reasons. With respect to any attack reported in the news, hackers have been using that technique for weeks, if not months. It takes time to implement a proper solution to counter any attack. And, by the time you invest in a solution, a new attack will be in the works.

The fact is you never can get ahead of the attackers. But there are many things that you can and should do.

Most important, you should focus on strengthening your network and all processes that relate to it in order to be more resistant to any kind of cyber attack. In 20-plus years of doing security, I have yet to see a truly strong and robust network be easy prey for cyber attackers. However, I have found that those networks that seem to be crashing all the time or those with poor procedures relating to maintaining up-to-date patches are the easiest to compromise.

Improving your information technology systems security is not just about improving just your IT processes! You should be looking at all of your policies and procedures, even the mundane ones. For instance, I worked with a client who had evidently been hacked, because the invoices the company received from the thief were identical to invoices that were still outstanding, with only the remittance bank changed. This one incident cost this client in excess of $250,000, all because the company had no procedure in place to validate the vendor changes to the remittance address. Validation and integrity processes would have prevented this problem.

Making your computer systems more resistant to cyber attacks is like running a marathon. You cannot do it well without a lot of preparation and training.

Improving your security is similar. You need to start out slowly. It will take time. You will need to look at your entire system and learn about the many different aspects of security, standards, processes, and cyber tools.

The New York State Bar Association is committed to helping you compete in this marathon and protect your clients, your business and your reputation. Watch this space in future issues for more valuable information on how to do that.

Joseph "Dan" Waggoner, CISA, CISSP-ISSAP, PMP

Dan has been involved with IT security since 1990. He has done security consulting for some of the largest financial, government, and private sector entities located in North America. Currently he is freelance consultant that focuses on cloud security, managing security projects, and helping clients create/implement their security strategy.

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: journal@nysba.org, or NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum.**

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TO THE FORUM:

I am a partner at a law firm with experience representing clients who pay for my legal fees through litigation financing companies. In the past few years, more and more of my clients have used these services and, for the most part, our clients have been very pleased. Our firm has also been thrilled to get financed cases because many of our clients would not have commenced these cases if they had to pay the costs themselves even though they had legitimate claims.

A friend from college recently approached me about becoming an investor in a litigation financing company that he is starting. He knows that I have a lot of experience working in this area and that this industry has been taking off. He suggested that if I was able to refer clients to this company, we could all stand to make a lot of money and help out a lot of people.

Before I even consider my friend's proposal, I want to make sure I would not be violating any ethics rules. Can attorneys refer their clients (or potential clients) to litigation financing companies for assistance financing litigation? If so, can I refer a client to a litigation financing company where I am an investor? Would it matter if another one of my partners was handling the case and I had no involvement in it? Even if I don't become an investor, if I negotiate with litigation financing companies on my clients' behalf to finance one of my cases, am I able to charge the client for that work? When working with a litigation financing company are there any particular attorney-client privilege concerns I should be aware of? Does the litigation financing company have any ability to control the decisions or legal strategy of the case?

Sincerely,
Richie Referral

DEAR RICHIE REFERRAL:

Litigation financing is not something new. Various forms of litigation financing have been used in the United States since the 1980s. *See* Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, *Report on the Ethical Implications of Third-Party Litigation Funding*, April 16, 2013 (citing Shepherd, Joanna M., *Ideal versus Reality in Third-Party Litigation Financing,* 8 J.L. Econ. & Pol'y 593 (Spring 2012)). "Third-party litigation financing (TPLF) describes the practice of providing money to a party to pursue a potential or filed lawsuit in return

for a share of any damages award or settlement." *Id.* In recent years, the number of private-practice lawyers using litigation financing has increased dramatically. *See* Joshua Hunt, *What Litigation Finance Is Really About*, The New Yorker, September 1, 2016. There are numerous ethical considerations surrounding an attorney's interaction with litigation financing firms and there are relatively few cases and ethics opinions in New York that address this rapidly developing area of professional responsibility.

As an initial matter, we caution that the legality of TPLF arrangements is an issue separate and apart from attorneys' ethical obligations and, of course, if a proposed action is illegal, then it would be unethical. *See* NYSBA Comm. on Prof'l Ethics, Op. 666 (1994) (citing NYSBA Comm. on Prof'l Ethics, Op. 498 (1978)).

REFERRING CLIENTS TO LITIGATION FINANCING FIRMS TO WHICH THE LAWYER OR ANOTHER ASSOCIATED LAWYER OWNS A FINANCIAL INTEREST

Referring your client to a litigation financing entity in which you or an associated lawyer have a financial interest implicates at least four of the conflict of interest rules within the New York Rules of Professional Conduct (RPC). *See* NYSBA Comm. on Prof'l Ethics, Op.1145 (2018).

RPC 1.8(a) "governs business transactions with clients. It is one of the most stringently enforced rules, and a violation of the rule often results in suspension or disbarment." Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 484 (2016 ed.). This rule sets forth the requirements that must be met in order for a lawyer to enter into a business transaction with a client where they have different interests in the transaction and the client would expect the lawyer to exercise professional judgment for the benefit of the client. *See* RPC 1.8(a). Notably, RPC 1.8(a) does not apply to traditional fee arrangements between a lawyer and client, such as a contingency fee arrangement, but the rule remains applicable when the lawyer accepts an interest in the client's business or other non-monetary property as payment for the lawyer's fee. *See* RPC 1.8 Comment [4C]. RPC 1.8(a) is triggered when a lawyer has a financial stake in the litigation financing firm because the client and the lawyer have differing interests with regard to the financing terms and it would be reasonable for the client to expect that the lawyer is exercising professional judgment on the client's behalf. *See* NYSBA Comm. on Prof'l Ethics, Op. 1145 (2018). When RPC 1.8(a) applies, the transaction must be "fair and reasonable to the client." *See id.*; RPC 1.8. If the transaction is fair and reasonable to the client, the lawyer must then comply with the other requirements of RPC 1.8(a) by: (1) making a full disclosure of the terms of the transaction in writing while utilizing language the client can understand, (2) advise the client in writing of the desirability of seeking independent legal counsel and providing the client with an opportunity to obtain it; and (3) obtaining informed consent from the client in a signed writing. *See* RPC 1.8(a)(1)–(3).

In accordance with RPC 1.10(a), even if you do not personally have an interest in the financing firm to which you refer your client, if any lawyer in your firm has an interest in the financing firm, the conflict is imputed to all of the lawyers in the firm. *See* RPC 1.10(a); NYSBA Comm. on Prof'l Ethics, Op. 1145 (2018). Rule 1.10(a) states, "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein." Therefore, it appears that compliance with RPC 1.8(a) will likely be possible in a litigation financing arrangement assuming the above criteria are met. *See* NYSBA Comm. on Prof'l Ethics, Op. 1145 (2018).

Even if you comply with all of the requirements in Rule 1.8(a), however, you must still comply with RPC 1.7(a)(2) which prohibits the representation of a client where a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." *See* RPC 1.7(a)(2). For example, this issue could arise when the financing firm has an interest in prolonging the litigation with the hope of enhancing the value of their investment, but it is in fact in the client's best interest to reach an early settlement. *See* NYSBA Comm. on Prof'l Ethics, Op. 1145 (2018). Conflicts associated with RPC 1.7(a) can also be waived, as long as the requirements of RPC 1.7(b) are met. RPC 1.7(b) permits representation when: "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing." Therefore, it also appears that compliance with RPC 1.7(a) will likely be possible in a litigation financing arrangement assuming the above criteria are met. *See* NYSBA Comm. on Prof'l Ethics, Op. 1145 (2018).

The next rule that is implicated is RPC 1.8(e), which prohibits a lawyer from advancing or guaranteeing financial assistance to a client. This rule is not something that

can be waived. This rule prevents clients from pursuing lawsuits that might not otherwise be brought and also prevents lawyers from having too great a financial stake in a litigation. *See* RPC 1.8 Comment [10]. RPC 1.8(e), however, does not prohibit a lawyer from advancing money for court costs and litigation expenses to a client. *See id*. These permitted advanced costs are often thought of as indistinguishable from contingent fee agreements and help ensure access to the courts. *See id.*

The fourth rule to consider is RPC 1.8(i) which prohibits a lawyer from acquiring "a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client" with the exceptions of a contingency fee contract or a lien to secure fees and expenses. *See* RPC 1.8(i). This RPC is also designed to ensure the lawyer does not have too great an interest in the representation. *See* RPC 1.8(i) Comment [16]. In addition, if the lawyer acquires an interest in the litigation, it may make it more difficult for the client to discharge the lawyer. *See id.*

The NYSBA Committee on Professional Ethics opined that pursuant to RPC 1.8(e) and (i), it is not permissible for an attorney to refer a client to a litigation financing firm in which any attorney associated with that firm maintains a financial interest – and we agree. *See* NYSBA Comm. on Prof'l Ethics, Op. 1145 (2018). This conduct would likely be a violation of RPC 1.8(e) because the payments from the financing firm would amount to providing improper financial assistance to a client. *See id.*; NYSBA Comm. on Prof'l Ethics, Op. 666 (1994). In addition, the referral would also be in violation of Rule 1.8(i) because it would result in you or an associated attorney (albeit indirectly) having an improper financial stake in the client's litigation. *See id.* It is of little consequence that the attorney would not be providing the client with funds directly, or that the financing firm may have other investors, because RPC 8.4(a) specifically notes that a lawyer cannot violate the RPCs "through the act of another." *See* NYSBA Comm. on Prof'l Ethics, Op. 1145 (2018). Accordingly, we would strongly advise against referring a client to a litigation financing company where you or any attorneys in your firm are investors.

NEGOTIATING A CLIENT'S RELATIONSHIP WITH A LITIGATION FINANCING ENTITY

If your client requests assistance in negotiating an arrangement with a litigation financing firm, you are ethically allowed to assist in those negotiations and charge the client an additional fee for doing so. *See id.*; NYSBA Comm. on Prof'l Ethics, Op. 769 (2003). That said, you should consider whether you have any new obligations to the client as a result of the expanded representation. For example, consider having a separate engagement letter associated with the negotiation of the ligation financing relationship. *See* NYSBA Comm. on Prof'l Ethics, Op. 769 (2003). The NYSBA Committee on Professional Ethics has also suggested that the lawyer should consider that by negotiating the transaction, the client may reasonably assume that the lawyer is also endorsing the transaction and its terms. *See id.* Therefore, the lawyer should either disclaim responsibility or advise the client of all the costs and benefits of the transaction including alternative options. *See id.*

WHO IS PERMITTED TO CONTROL THE LITIGATION STRATEGY?

Your question concerning who may control the litigation strategy once a litigation financing firm becomes involved is a concern that has been raised by many. Some specific common concerns include: Who "owns" the claims? Who can control the lawsuit? How are conflicts resolved between the client's directions and the financing company's goals? *See* Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, *supra*, at 9.

The RPC explicitly prohibits a litigation financing firm from directing or regulating the lawyer's professional judgment. RPC 5.4(c) states, "Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6." RPC 5.4(c). As Professor Simon notes, "[e]ven if a client consents to allow a third party to pay his legal fees, the lawyer is still forbidden to let the third party 'direct or regulate' her professional judgment on behalf of the client unless authorized by law (as in the case of an insurance company)" and the burden is on the lawyer to prevent such interference. Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1436 (2016 ed.). RPC 1.8(f) also provides that while a lawyer is permitted to accept compensation from a third party, the lawyer must obtain the client's informed consent, protect the client's confidential information (in accordance with RPC 1.6), and not allow that third party to interfere with the lawyer's professional judgment. *See* RPC 1.8(f). Therefore, in accordance with the RPC, the lawyer is not permitted to allow any third party to interfere with the lawyer's professional judgment despite payment of the lawyer's fees by a third party.

CONFIDENTIALITY CONSIDERATIONS WHEN REFERRING CLIENTS TO LITIGATION FINANCING ENTITIES

We have run out of space so you will have to wait until next month for the answer to your question about preserving attorney-client privilege with litigation financing companies. We will address the privilege issue and also answer a new question in the next Forum.

Sincerely,

The Forum by

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

A commercial client recently approached me about New York's adoption of the Compassionate Care Act (CCA), which permits the possession, use and distribution of medical marijuana in New York in certain circumstances. I have worked extensively on Department of Health legal issues and other aspects of the medical industry in the past, but I have no experience with the legalization of marijuana. After I started looking into the New York law for my client, I thought about a recent news article discussing how the federal marijuana laws conflicted with various state laws. It suddenly dawned on me: Am I assisting an illegal drug operation?

I certainly don't want to break any laws or risk losing my license to practice law. Even an *allegation* of being complicit in an illegal drug operation would be disastrous for my career. I also don't want to assist my client in breaking any laws. I feel very strongly, however, that an inconsistency between state and federal laws is a minefield for my client to navigate even with legal representation. This is a relatively new law with little precedent and guidance for its enforcement. At the same time, due to its politically charged and divisive subject matter, I imagine that there will be strict enforcement of the statute. I can't imagine telling any client that as a New York lawyer I am prohibited from giving him any advice about complying with a New York law!

Am I violating any rules of professional conduct by providing legal advice to my client on the CCA? Are there any limitations on what aspects of a marijuana business I can advise my client? If the policies for federal enforcement of marijuana laws change, will my ability to advise clients on the CCA also change? If my client starts to pay my legal fees from income derived from a marijuana business, am I permitted to accept those fees? Are there any other pitfalls I should be considering when advising a client on a marijuana business?

Sincerely,
Cheech N. Chong

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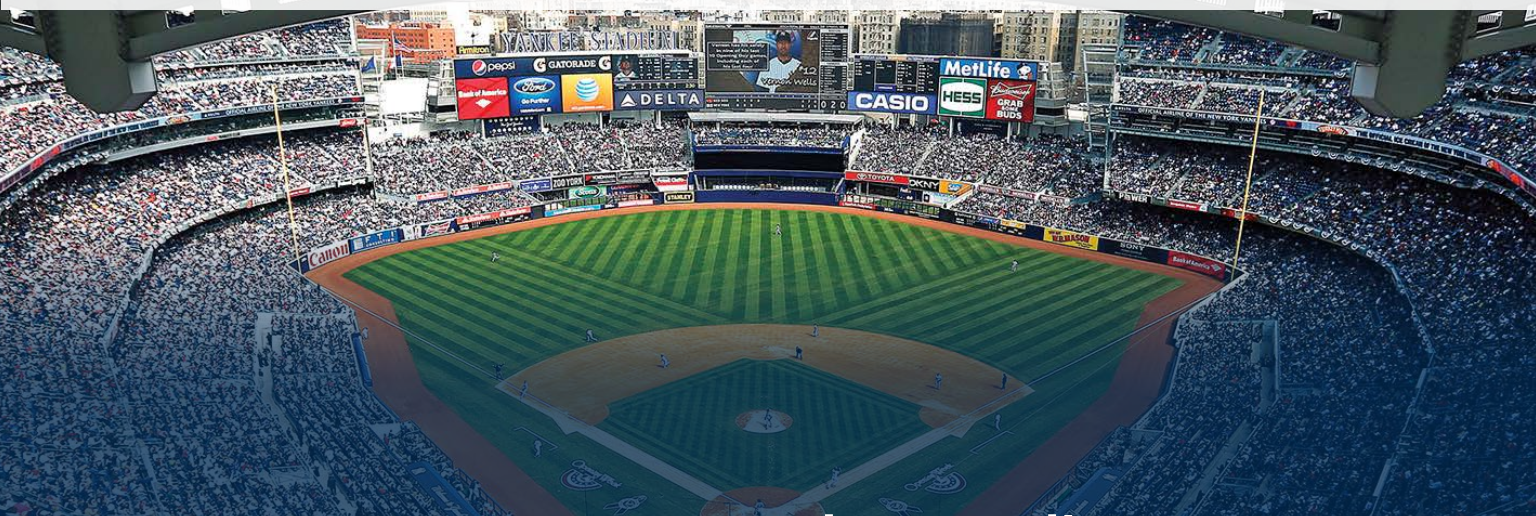

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Season Two Finale

Another semester of school under the belt, and another year of law school completed. Leonardo da Vinci once said, "Learning never exhausts the mind." I don't think he ever went through a finals period at law school. I have eaten an irrational number of cookies, consumed enough coffee to keep the labor force of a small factory running for months, and read enough provisions of the Uniform Commercial Code to make me a filing and perfection guru. Now I am getting ready to enjoy a brief hibernation before the summer begins.

This was the first finals period where I did not have four exams, which was awesome. I had five days in between each exam to study. Well, two days to procrastinate and three days to actually study. But still. A much needed improvement to last semester's back-to-back finals.

It still surprises me how much content a law school class covers, and how much of it you actually do retain throughout the course of a semester. There were many moments throughout studying in which I would say, "Oh right, I remember discussing that in class!" Don't get me wrong. There were definitely quite a few, "When the heck did we read about this?" But all in all, the process went smoothly.

Secured transactions is a beast of a subject. While the class I took was a survey class, operating with more of a broad strokes approach to the content, the particular areas we did dive into were both vast and intricate. One area we focused on was perfecting interests. The purpose of perfection is to establish and maintain priority among other secured creditors. Depending on the parties involved, whether it be lien creditors, secured creditors, or judgment creditors, perfecting one's interest is specific and can be the deciding factor in whether you recover money owed or become an unsecured creditor, which, as we all know, is the worst position to be in as a creditor.

I have landed a summer position at a small Albany law firm with an interesting and diverse practice. I sense I will get considerable exposure to varied areas of the law. I certainly welcome an opportunity to work at a firm with my final year of school approaching and the crushing reality that I will, in fact, have to be an adult one day. I hope the experience will help me decide the type of law I want to pursue. While my answer to everyone's question ("What are you going to do after law school?") remains consistent ("I have no idea"), my summer position should provide some much needed focus for the ultimate decision on the horizon.

Along with having my summer plans established, I have been offered (and accepted) a position for the coming fall semester at the Land Acquisition Section of the Department of Justice's Environment and Natural Resources Division in Washington, D.C. I will work full-time, receive credits toward my degree, and continue my exposure to environmental law, all the while avoiding my nemesis, the law school classroom, for an entire semester.

As I sit typing these final sentences, I feel a great sense of accomplishment knowing that two-thirds of law school has been completed, and I still have a pulse and a personality. My textbooks and notes are stored away. The sun is shining; life is good. I hope everyone is soaking up these first warm rays of sunshine, and, if you're as fair skinned as I am, soaking up copious amounts of sunblock, too.

Lukas M. Horowitz (Lukas.horowitz@gmail.com), 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.

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LaBarbera, Anne Louise
Land, Stephen B.
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* Leber, Bernice K.
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MacLean, Ian William
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Martin Owens, Deborah
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Gold, Sarah E.
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† Delegate to American Bar Association House of Delegates * Past President

The Worst Mistakes in Legal Writing — Part IV

In the last issue of the *Journal*, the *Legal Writer* discussed mistakes involving commonly confused words and mistakes involving frequently misused words. This column covers common phrases and popular idioms and a variety of stylistic mistakes common in legal writing.

A. MISTAKES INVOLVING COMMON PHRASES AND POPULAR IDIOMS

The English language is full of phrases and idioms that, unfortunately, are often said and written incorrectly.

1. Couldn't Care Less

"I couldn't care less" is a popular expression that's spoken and written incorrectly — usually as "I could care less" — far more often than it should be. If you're apathetic toward the outcome of some decision, then you could *not* care less about what happens. When you say you "could care less," you're telling others that you care at least minimally. That's the *opposite* of what you want to say. When writing legal documents, it's crucial you say exactly what you mean and leave no room for misinterpretations.

Incorrect: I *could care less* what Jacqueline thinks of me. *Correct*: I *couldn't care less* what Jacqueline thinks of me.

2. Could've/Should've/Would've

These are all common and legitimate verb contractions, but too often people misspell them as "could of"/"should of"/"would of." *Of* is not the same as *have*, which is the contraction's second word. These misspellings don't make sense.

Incorrect: I *could of* gotten a better grade on the final, but I didn't study for it. *Correct*: I *could've* [could have] gotten a better grade on the final, but I didn't study for it.

Incorrect: I *should of* gone to the carnival with my sister. *Correct*: I *should've* [should have] gone to the carnival with my sister.

Incorrect: I *would of* gone to the mall with you, but my mom wouldn't let me go. *Correct*: I *would've* [would have] gone to the mall with you, but my mom wouldn't let me go.

Gerald Lebovits (GLebovits@aol.com), an acting State Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. He thanks judicial interns Rosemarie Ferraro (University of Richmond) and Jie Yang (NYU School of Law) for their research.

3. Due Diligence

Due diligence, a common phrase in the business and legal worlds, means that someone will investigate a business or individual before signing a contract with them. Take care that you don't misspell this phrase as "do diligence."

Correct: You should do your *due diligence* and investigate companies before committing to business deals.

4. For All Intents and Purposes

The phrase "for all intents and purposes" comes from a 1500s-era English law. It means "effectively." This phrase is commonly written incorrectly as "for all intensive purposes," which is what it sounds like when you say the correct phrase quickly.

5. Hit or Miss

While it's popular to say "hit and miss," the correct expression is "hit or miss." After all, something cannot both hit *and* miss a target; it has to do one *or* the other.

Correct: Correcting a professor's mistake is always a *hit or miss* decision. They'll either be grateful you spoke up, or they'll be angry at you for upstaging them.

6. Make Do

When something is due, it's owed. The common misspelling of the phrase "make do" as "make due" doesn't make much sense — at least not outside an academic setting. The phrase "to make do" means "to make something sufficient."

Correct: I'm just going to have to *make do* this week with the $10 I have for food.

7. Peace of Mind vs. Piece of [My] Mind

When you say that someone has "peace of mind," you're suggesting that the person is calm and tranquil. When you say you're going to give someone a "piece of your mind," you're warning someone that you're going to tell that person what you really think.

Correct: My client just wants to have some *peace of mind*. *Correct*: The defendant gave the judge a *piece of his mind*. He told the judge what he really thought about her ruling.

8. Pique [My] Interest

This phrase is commonly misspelled as "peak [my] interest." But the word *pique* means "to arouse." The correct phrase is "pique [my] interest" — *not* "peak [my] interest," which is a weird way of saying that your interest reached its maximum height at a certain point in time.

Correct: Hearing my name among the words being whispered in the next room *piqued my interest*.

B. GENERAL MISTAKES IN LEGAL WRITING

The other mistakes discussed in this article are mistakes that can be found in any piece of writing and which are especially egregious and embarrassing for legal writers to make. These mistakes have less to do with grammar and punctuation and more to do with appearance and style. The style and tone of your writing will affect your credibility and reputation.

1. Wordiness

When it comes to legal writing, the aspect that's arguably the most appreciated is concision. Anyone who has even minimal experience with the law and the legal world is aware of just how much paperwork is involved with every motion, as well as how unnecessarily long legal documents can be. Get to your point quickly and then say what you have to in as few words as possible (while still being clear enough that there's no room for ambiguity and misinterpretation). Concise language reduces confusion and encourages readers to look over your work. You have everything to gain by streamlining your writing.

Here are some tips to be more concise:

- Avoid lengthy, wordy idioms.
- Cut out flowery language, filler words, repeated sentences/thoughts, and the phrases "there is" and "there are."
- Cut out metadiscourse ("This brief will illustrate all the ways in which. . . .") Get to the point. Cut out your running starts. Forget about the wind-up, and just deliver the punch.
- Cut out nominalizations (definition: verbs converted into nouns).
- Delete the words *of* and *that* wherever possible. These words are often superfluous.
- Include the word "to." It'll save words later. ("I'm going to the store to buy milk" is better than "I'm going to the store and I will buy milk.").
- Use a comma to substitute for *and* or *but*.
- Vary the length of your sentences and paragraphs. But shorter is better than longer.
- Write in the active voice instead of the passive.

2. Organizing Your Writing Poorly

One of the most appreciated and valued qualities in any piece of legal writing, aside from conciseness, is succinctness. Concision implies a brevity of sentences and paragraphs. Succinctness involves the general organization of the entire article or document. Few things are worse than poor organization. If your writing is poorly organized, it'll be difficult to follow and understand. Your readers will be less likely to side with you.

Here are some tips to be more succinct:

- Keep track of the big picture. What's the general topic of your document?
- Once you figure out your general topic, break it down into sections and, if necessary, subsections. Label each section and subsection with an appropriate heading.
- Include everything about a subject in the main section in which that subject is discussed. Avoid saying the same things in multiple places.
- When you're done writing, read through your work out loud and see how it flows/sounds.

3. Using Too Much Legalese

Legal writers often use language dubbed "legalese" simply to sound more intelligent than the average person, whose vernacular doesn't include words like *heretofore* or phrases like "mens rea." In doing this, these writers are hurting themselves. The law was created to protect and serve everyday people. Our writing should do the same. Use plain English, unless the word you want to use has no English equivalent.

4. Adding Extraneous Information

Each case comes with its own set of facts. These facts are important. They're what distinguish one case from another, and you can't win in court if the facts go against you. It's neither necessary nor judicious to reiterate every fact when drafting your argument. Don't sacrifice conciseness for extraneous information, such as dates, places, and people. Some details are crucial to a case; most aren't. If a specific fact isn't helpful to understanding or reaching a decision about a case, leave it out. The more you include, the less significance each one will have and the more likely your readers will forget what happened when.

5. Writing from the Bottom

Consider using a writing strategy known as "writing from the top." This involves stating your conclusion and, if applicable, your requested relief, and then supporting it in later sections. At heart, people are lazy. The less work they have to do, the happier they are. When you put your conclusion first and begin your argument with your

strongest piece of evidence, you ensure that others read the most important parts of your writing with a fresh mind. Start every section of your legal writing with a roadmap, or thesis, paragraph. (Definition: a paragraph that clearly states what you'll be discussing in the section and what conclusion you'll draw.) Your readers should be able to tell what's being discussed and how important a section is to your overall argument by reading the first paragraph or two in your section. Roadmaps also enable readers to know where in your argument of discussion they can find the information they want or need.

6. Failing to Include Topic Sentences

At the start of each of your paragraphs should be a topic sentence. (Definition: a sentence that clearly states what you'll be discussing in the paragraph and what conclusion you'll draw.) Your readers should be able to tell how important a paragraph is to your overall argument just by reading the first sentence.

7. Sounding Opinionated

When writing, avoid stating your opinion — unless your opinion is supported by law. Your opinion is irrelevant if you can't come up with a legally valid argument to support your beliefs. To avoid sounding too opinionated, avoid personal pronouns like *I* or *we*.

8. Using the Wrong Tone

One of the most important aspects of legal writing is tone. It's your job to present facts clearly and to persuade others that the narrative you've spun for your client, or the prediction and recommendation you're suggesting, is correct. You must decide when to be objective and when to be persuasive.

When it comes to legal writing, the aspect that's arguably the most appreciated is concision.

Incorrect: The police report states that on July 23, 2015, *the reckless* Mr. Roberts *neglected the rules of the road* and crashed his car into *the victim's*, Mr. Kowalski's, car.

Correct: The police report states that on July 23, 2015, Mr. Roberts crashed his car into Mr. Kowalski's car.

9. Using Superlatives and Sweeping Statements

Superlatives have their place in the world: in a high-school yearbook. Avoid superlatives in your legal writing. The same goes for broad and sweeping statements. If an act is so bad or immoral it warrants being called "egregious," then the judge and jurors will discern its iniquity and decide that it's egregious. You shouldn't state so outright; doing so unnecessarily lengthens your argument, and grandiose statements irritate readers.

10. Using Adverbial Excesses

Avoid adverbial excesses whenever possible. Legal writers often use words like *certainly*, *clearly*, and *undoubtedly* in place of other, better words or — and this is even worse — in place of a strong argument. *Why* is a statement clear? *What* makes a statement incontrovertible? If you have answers to these two questions, include them in your writing. Conciseness is key, but you should never use an adverbial excess to save words. If you don't explain yourself thoroughly, your readers will begin to doubt the veracity of your claims and the strength of your argument.

Incorrect: The complaint is obviously ridiculous!

Correct: The complaint is unfounded because of X, Y, and Z reasons.

Incorrect: Dr. Goodman is undoubtedly responsible for the patient's death.

Correct: Dr. Goodman is responsible for the patient's death for X, Y, and Z reasons.

Incorrect: Samantha's insurance company alleges that under the terms of her insurance policy, they're obviously not responsible for the cost of her breast reduction surgery.

Correct: Samantha's insurance company alleges that under the terms of her insurance policy, they're not responsible for the cost of her breast reduction surgery.

11. Using Cowardly Qualifiers

Avoid using "cowardly qualifiers" like *typically* and *usually*. Your goal is to be exact and precise — and qualifiers like *typically* and *usually* are neither exact nor precise. How often is "usually?" Six times out of ten? Nine out of ten? We've no way of knowing. Report the exact figure, number, or statistic. If you don't have an exact figure, rethink your decision to use the qualifier in the first place. Ambiguous or vague data is not useful in a court of law. When in doubt, understate. Never exaggerate.

Incorrect: Angina attacks are what *usually* bring Ms. Branson to the emergency room.

Correct: Of the eleven times Ms. Branson has visited the emergency room in the last year, eight of them were due to angina attacks.

12. Irreverence and Insincerity

Cut sarcasm or and other forms of insulting and insincere language. It's not professional, and the people who read your arguments won't appreciate your snide comments and passive-aggressiveness. Avoid attacking judges and opposing counsel. It's a surefire way to lose credibility and make enemies. Better to convey your disbelief or displeasure with someone or something in a more professional and straightforward way.

13. Acting Like the Boss

Avoid aggressive language in your legal writing. When addressing a judge, refrain from using words like *must*. Using words like that causes you to come across as bossy, and I have yet to meet a judge who enjoys being told what to do.

Incorrect: You *must* grant summary judgment.

Correct: I request that the court grant summary judgment.

Incorrect: You *should* dismiss the plaintiff's case because the plaintiff fails to state a cause of action.

Correct: I'm moving to dismiss the complaint because the plaintiff has failed to state a cause of action.

14. Covering Up Weaknesses in Your Argument

When you discover a hole or other weakness in your argument, it's natural to hide it by twisting case law and the facts in your favor. But one of the worst things you can do as a legal writer is to misrepresent the facts by ignoring the ones that can potentially harm your case. Ambiguity and misrepresentation will fool no one. It will, rather, damage your credibility with the court and possibly cost you the entire case. When you discover a weakness in your argument, address it honestly and come up with a response to what opposing counsel might say

about it. You'll gain credibility with the court by being honest, and you'll be ready to rebut the arguments posited by opposing counsel.

15. Inelegant Variation

If you abbreviate a name or tag an actor with an identifier at the beginning of your document, use that abbreviation or tag throughout the remainder of the document. (E.g.: "Federal Bureau of Investigation (F.B.I.)" should be referred to thereafter as "the F.B.I.," and "Mr. Robert S. Parker (Plaintiff)" should be referred to thereafter as "the plaintiff" or simply as "Plaintiff"). If you refer to something with one word, continue using that word to reference that item. (*I.e.*: If you refer to an agreement as "the agreement," don't refer to it later on as "the contract.")

16. Spacing Your Subjects and Verbs Too Far Apart

All good sentences have their subjects and verbs near — or, better, next to — each other. This is because a small or short distance, or no distance at all, between the subject of a sentence and the verb in the sentence helps with cohesion as well as with understanding. Occasionally this involves splitting one sentence into two, but it's worth it. When your subjects and verbs are together, readers can identify the subject-verb unit quicker and understand the sentence more easily.

Incorrect: The trial, which involved testimony from dozens of witnesses, some of whom flew here from places as far as California, lasted for almost two months.

Correct: The trial lasted for almost two months because it involved lengthy testimony from dozens of witnesses, including some who had to fly to New York from places as far as California.

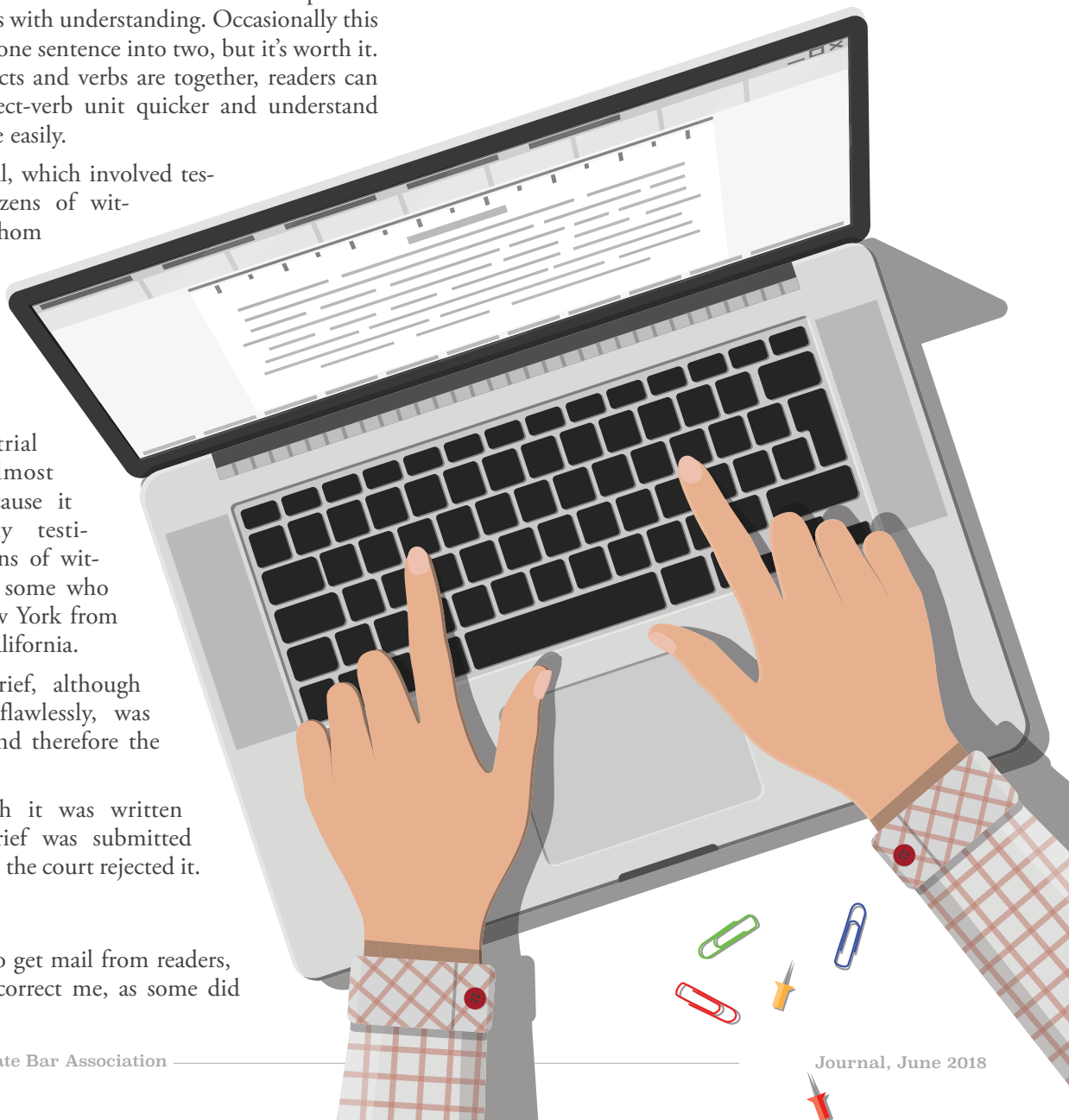
Incorrect: The brief, although it was written flawlessly, was submitted late, and therefore the court rejected it.

Correct: Although it was written flawlessly, the brief was submitted late, and therefore the court rejected it.

ERRATUM

It's always great to get mail from readers, even when they correct me, as some did after reading the Legal Writer column in the May issue of the *Journal*, "The Worst Mistakes in Legal Writing — Part III."

Readers Paul Roman and Robert Fryd pointed out that I got it backward on "less vs. fewer" and "amount vs. number." They note, correctly, that "less" and "amount" are used when referring to something not quantifiable, while "fewer" and "number" are used when referring to something quantifiable. Mr. Fryd also points out that although I correctly noted that the word "effect" is a noun, it can also be used as a verb, as in "effecting change," while Frank Helman adds that "except" can be a verb as well as a preposition. He also points out that the abbreviation "*i.e.*" isn't for "in essence" but is Latin for "that is."



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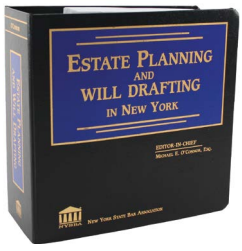

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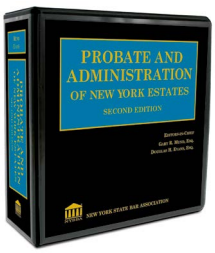

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