NEW YORK STATE BAR ASSOCIATION
Journal
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by Eileen M. Ebel

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The Rule of Law Without Morality: *An Instrument of Tyranny*

Many of us are familiar with the famous line spoken by the Butcher in William Shakespeare's *Henry VI, Part 2*: "The first thing we do, let's kill all the lawyers." It doesn't take a Shakespearean scholar to recognize that the character who utters these words is a "bad guy" who is actually looking to foment upheaval in society. The true message of these famous words is that, without lawyers, there will be no law and order and no rule of law to inhibit egregious behavior.

But is the rule of law itself enough? I submit that it is not, because law without moral underpinnings is tyranny.

Tyrannical governments throughout history such as Hitler's Germany and Mussolini's Italy have relied on the rule of law. But those leaders and their regimes lacked morality.

And the tyranny continues today.

For example, more than 30 attorneys in the Philippines have been targeted and murdered over the past two years. Recently, a leading journalist and her attorney were jailed in the Philippines for re-publishing an allegedly defamatory article that had originally been published seven years earlier. When he was President-elect and was asked about the murders of lawyers and journalists, Philippines leader Rodrigo Duterte stated, "Just because you're a journalist, you're not exempted from assassination."

In Hungary, a new "administrative court system" controlled by the executive branch has been established to handle certain cases, including corruption, election law, and the right to privacy. Europe's highest court recently ordered the Polish government to reinstate two dozen judges who had been ousted from office for decisions unfavorable to the government.

I cite these examples from history and from other nations because they are important for us to understand as we consider what is happening today in American society. The rule of law in the United States is endangered in a way that it has never been before in the history of the republic. I believe that we must demand that there is morality behind the rule of law, and I worry that we as a society are failing to do so.

Given the tumultuous tenor of these political times in our country, it's hard to blame people for wanting to simply tune out. A political disagreement recently led to the longest federal government shutdown in history, which caused upheaval and hardship for millions and impacted many vital services. Undocumented immigrants are separated from their children at the U.S. border, and our government acknowledges that some of these families are unlikely ever to be reunited.

And troublingly, questions swirl around the President relating to obstruction of justice and collusion with foreign governments. A close associate of the President is indicted for actions allegedly taken during the campaign, and while free on bail posted on social media a photo of the judge in his case with the crosshairs of a gun near her head.

In all of these instances and others, I search for a moral component, a belief in some bigger idea and how these actions might support it. I acknowledge that others might find that morality, but I do not. And I wonder, are we inching toward tyranny?

There are many good things happening in our world: The economy is strong. People are living longer lives. Science continually produces breakthroughs that enhance the human condition.

At the same time, our politics are profoundly polarized. Public discourse has become remarkably coarse. And the public is losing confidence in the capacity of our institutions to solve problems.

I've said this on many occasions in recent months, but it bears repeating: It is time for lawyers to step up and speak up. We must use our considerable advocacy skills to remind our communities that the world follows our lead.

We are problem solvers, we are the people others turn to in times of crisis and difficulty. We are trained to consider all sides of a given matter and to help adversaries move toward resolution. We know how to disagree without being disagreeable.

At NYSBA's Annual Meeting in New York City in January, former U.S. Attorney for the Southern District of New York Preet Bharara pointed out that "democracy operates on the honor system."

Lawyers are the guardians of that system and the precious civil liberties it grants to us all. Today it is more important than ever for us to recognize that this important role extends beyond the courtroom or the conference room.

So, it is no longer enough for us simply to talk about the rule of law. We need to demonstrate the moral values that keep the rule of law from being used to impose tyranny.

Without a deep and abiding belief in fairness and human dignity – and without an independent judiciary and the apolitical administration of justice – there will not be equality under the law for all. And without morality, the rule of law becomes an instrument of tyranny.

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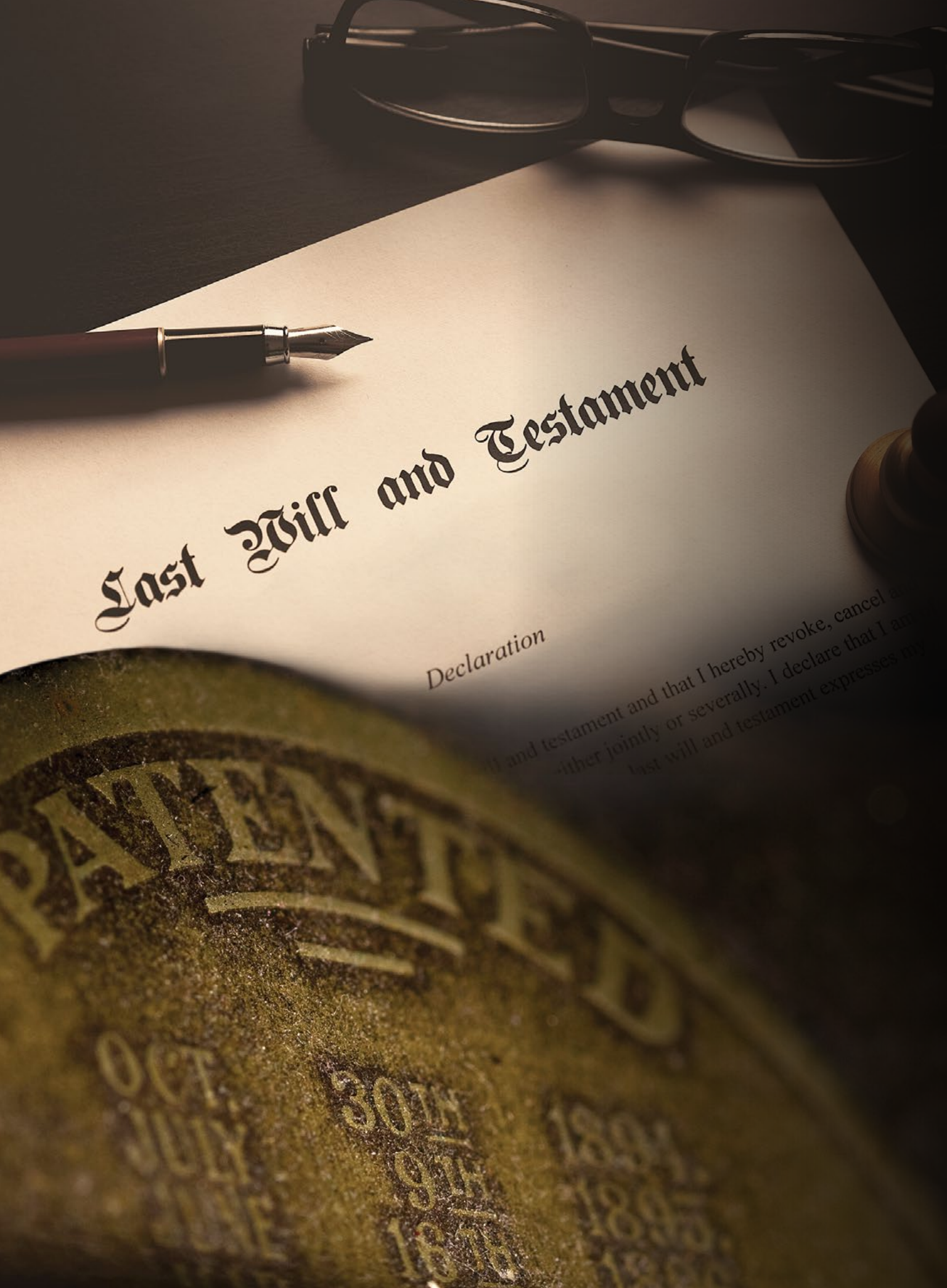
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Estate Planning for Inventors:

It Makes Patent Good Sense

By Eileen M. Ebel

An inventor who is looking for life or estate planning will appreciate a plan that includes a well-reasoned strategy for transfer of his or her patents. A patent can be transferred during the inventor's lifetime by sale, gifting, or placing it in trust. After the death of the inventor, a patent may be transferred by way of a will, trust or, where no effective plan has been established, by intestate succession. In meeting with the client and asking about his or her wishes for the disposition of property, inquiry should also be made regarding the client's inventive endeavors and the status of any patents.

To evaluate how an inventor client can best be served in terms of life and estate planning, it may be helpful to get a sense of how involved the client is in inventing; the composition of patent assets, including issued patents and applications on file; the age of the patents; whether the patents are monetized; and the likelihood of naming a fiduciary or beneficiary who can manage the patents. A will or revocable trust can incorporate language to effectively transfer the patents upon the inventor's death, and a trust can appoint a trustee to manage the portfolio during the inventor's incapacity.

Rights in an invention and any resulting patents inure to the inventor.[1] The rights may be wholly or jointly owned depending on whether the invention was made by the inventor alone or jointly made with a co-inventor. Unless there is an agreement to the contrary, joint inventors of a patent own the patent as tenants in common.[2] Accordingly, when a joint inventor dies, the ownership interest passes to those who inherit from the joint inventor, rather than by survivorship to the co-inventor(s). Another consequence that flows from tenancy in common ownership of a patent is that each co-inventor is permitted to independently exercise all of the rights in the patent.[3] The Court of Appeals for the Federal Circuit held that where there was no waiver or other limit on the right to grant a license under the patent, each co-inventor had the ability to grant a license to a third party without the approval of any other co-inventor.[4]

A patent grants the right to exclude others from making, using, offering for sale, or selling the invention in the United States.[5] The rights granted by a patent are intangible rights, yet they have the attributes of personal property.[6] As such, a patent can be disposed of or transferred like real property, i.e., a patent can be owned, sold, or gifted, and any of the rights in a patent can be licensed. As with other personal property, if the patent had not been placed in trust or otherwise transferred during the patent owner's lifetime, upon the owner's death, the patents then in force are transferred by way of a will or by intestate succession where there is no will.

Transfer of an ownership interest in a patent is effected by an assignment in writing.[7] Transfer of less than the entire ownership interest, e.g., rights limited as to time, geographical area or field of use, is accomplished by a License.[8] Every conveyance of rights in a patent should be recorded in the United States Patent and Trademark Office (USPTO).[9] Ownership of a patent is also transferred by operation of law although it is not by way of a writing, for example, by way of intestate succession.[10] In a case involving patent rights of a sole inventor who died with no will, the Court of Appeals for the Federal Circuit held that the rights in the patent transferred at the time of the inventor's death to his heirs under local (Japanese) intestacy law.[11] The Court reasoned that there is nothing in the federal law that requires assignments to be in

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writing (35 U.S.C. § 261) that limits assignment as the only means for transferring patent ownership.[12] Federal law also acknowledges ownership by inheritance in requiring that a patent grant be awarded to "the patentee, his heirs or assigns."[13] Where patent rights are transferred by intestate succession, the change in ownership should be recorded in the USPTO to update the title.[14] State law governs the particulars of ownership and transfer of rights in a patent, including the law of contracts for sale or license and inheritance law.[15]

Intestate succession in New York dictates who shall receive the balance of a decedent's property not disposed of by will, based upon which family members survive the decedent.[16] If the decedent is survived by a spouse and children, for instance, $50,000 and one-half of the residue is to be distributed to the spouse, and the balance goes to the children.[17] Yet most people prefer to create their own plan rather than leave it to the legislated solution. It is typically the case that a married individual will choose to leave all of his or her property to the spouse, with the remainder upon death of the surviving spouse going to the children.

The client will likely be pleased to hear that his or her patent can be transferred to a beneficiary as desired under a will or trust. During the planning stage it is helpful to keep in mind that there is a high degree of ambiguity in assessing the importance that the patent or patent portfolio will have as an asset at the relevant time. A patent has a fixed lifespan, so it can expire prior to the client's death or incapacity.[18] A strategic decision may be made to let the patent lapse by non-payment of maintenance fees prior to its anticipated expiration. Also, a patent's value can vary greatly with changing circumstances.

Typically, a will or trust will be used to establish final disposition of assets. To plan for the transfer of a patent in this way, it is advantageous for the client to name beneficiaries or fiduciaries who have some knowledge of patents or the skills involved in managing them. The degree and type of knowledge required varies, depending on whether the inventor is actively inventing or whether the portfolio is mature at the relevant time. An understanding of the technical field of the invention may be helpful in view of the authority that the representative holds to file patent applications.[19] If the inventor dies or becomes legally incapacitated while involved in inventing or the patenting process, the fiduciary should investigate filing on any completed inventions that are not covered in any filed applications. Under the current law, an application for patent may also be filed by an assignee, obligated assignee, or a person who otherwise shows sufficient proprietary interest in the matter.[20] Yet the fiduciary may still be an important "point person" for information gathering.

The statutory scheme for patenting under the America Invents Act (AIA) requires that an inventor be the first to file on a given invention in order to obtain a patent.[21] The fiduciary should understand his or her role in preserving and promoting the potential for securing a patent. It follows from the statutory scheme that a patent application should be timely filed.[22] The fiduciary should look to find all relevant invention notes and materials. While it is critical to file promptly, there is also a risk that filing without the complete inventive information could result in the application failing to meet a statutory requirement such as the written description of the invention.[23] If additional information of the deceased inventor is found after the original filing is made, the information should be reviewed for its relevance to possibly file a follow on application including the newly found information.[24] If a year has already passed since the original filing, however, inclusion of new material to the earlier application is barred.[25] This may result in final rejection of the application. With regard to any follow on application filed within the year, claims to inventions supported by the new material for purposes of patentability would be effectively accorded the later filing date. If another inventor has filed on the same invention in the meantime, patentability is precluded for the deceased inventor's application under the current first inventor to file system even though it was filed within the year grace period. The fiduciary should also be careful to not permit public disclosure of the invention prior to filing, also to avoid the potential for creating a bar to patentability.[26]

The prospect of a fiduciary potentially having to file a patent application after the death of an inventor also flags the importance of recommending an estate plan that avoids probate for the client's inventions and patent assets, particularly for a client who is continuously inventing. While in probate, the Surrogate's Court has jurisdiction over the affairs of the decedent, yet timeliness of a patent filing can be critical, as indicated.[27]

The inventor's notebooks should be accessible to the fiduciary upon death or incapacity. The power to access the inventor's digital files should be granted to the fiduciary in a will or trust.[28]

The Administration of Digital Assets Law (Digital Assets Law) covers digital assets for personal use rather than digital assets of an employer used by an employee in the ordinary course of business, and provides authority to fiduciaries acting under wills, trusts, Powers of Attorney, and guardianship proceedings.[29] Whether the inventor provides direction to the custodian of electronic records as to disclosure of content to third parties is relevant to whether or not a fiduciary will be able to access the content of records after the inventor's death.[30] If no direction of nondisclosure was made, a copy of the decedent's will, trust, or other document evidencing consent can

be provided to the custodian.[31] It is best to advise the client, however, that the Digital Assets Law states that if an online tool provided by the custodian allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, Power of Attorney, or other record.[32] This can mean the difference in the fiduciary being able to obtain important information in a timely manner, and it is likely that a typical inventor would store at least some information digitally. Perhaps the client would consider storing information with a different custodian or establishing periodic local backup for files. With respect to data access from all possible locations, where the fiduciary or beneficiary is someone other than the spouse, in practicality it is useful to consider how either or both of them, as may be applicable in a given situation, will be granted access to notebooks, other documentation, any physical models, and all digital files, whether with a custodian or on a local or backup drive, related to the invention.

If the portfolio is mature, the fiduciary's or beneficiary's focus will be on management of the patents. The cost of maintenance fees increases over the earlier part of the patent term. As such, analysis of the actual and potential prospects for the patent should be undertaken periodically to determine the cost effectiveness of maintaining it. Patent valuation is as much an art as a science. After the last maintenance fee due at eleven years and six months from the date of issuance is paid, no further maintenance fees are owed.[33] A patent has a limited lifespan, so it is wise for the fiduciary or beneficiary to keep in mind that a patent's monetary potential is time-dependent and limited. Where rights are licensed in whole or in part, the inventor typically maintains ownership and receives royalties. Otherwise, exploration of a licensing deal or sale of the patents may be considered. In some cases, the inventor may have produced and sold the patented goods or services on his or her own.[34] Accordingly, the fiduciary or beneficiary would optimally have various business, management, finance and tech savvy abilities.

In preparing a will, there are various ways to approach the transfer of patents. If no specific mention is made of them, then patents will pass by way of the residuary disposition since they are not tangible property. In order to identify a different fiduciary or beneficiary than is named with respect to the bulk of the property, the bequest can be written as a specific bequest gifting the patents.

Where the client is confident in the designated beneficiary's ability to manage the patents, a suitable approach to the transfer after death would be to write a specific bequest in a revocable trust. Barring any challenge to the trust, this would allow the beneficiary to update the title and assume patent management quickly because probate of the inventor's will can be avoided. As is the case for all revocable trusts in which avoidance of probate is a planning goal, it is important that the client retitle all property to be placed into the trust.[35] A pourover will is recommended in the event any assets are missed.

Patents should be considered and addressed along with an inventor client's other assets when composing an appropriate estate plan for the inventor client.

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1. 35 U.S.C. § 101.
2. 35 U.S.C. § 262.
3. *Schering Corp. v. Roussel-UCLAF SA*, 104 F.3d 341, 344 (Fed. Cir. 1997).
4. *Schering Corp*., 104 F.3d at 346.
5. 35 U.S.C. § 154.
6. 35 U.S.C. § 261.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Akira Akazawa v. Link New Technology Int'l, Inc.*, 520 F.3d 1354, 1356 (Fed. Cir. 2008).
11. *Id*. at 1357-58.
12. *Id*. at 1356.
13. 35 U.S.C. § 154. Transfer by operation of law may also occur in a manner not explicitly recognized by federal patent law, e.g., state foreclosure law. *Sky Technologies LLC v. SAP AG, 576* F.3d 1374, 1379 (Fed. Cir. 2009), *en banc, and cert. denied*, 559 U.S. 1048 (2010).
14. 35 U.S.C. § 261.
15. *Akira Akazawa*, 520 F.3d at 1357. A patent license dispute, however, may involve state contract law (to varying degrees) and federal patent law. Rinehart, Amelia Smith, *The Federal Question in Patent-License Cases*, 90 IN. L.J. (Iss. 2, Article 5) 659, 660 (2015).
16. EPTL 4-1.1.
17. EPTL 4-1.1(a)(1).
18. A patent is in force from its issuance until 20 years from the filing date, subject to payment of maintenance fees. 35 U.S.C. § 154(a)(2).
19. 35 U.S.C. § 117.
20. 37 C.F.R. § 1.46.
21. *See generally* Leahy-Smith America Invents Act. The AIA transitioned U.S. law from a first to invent to a first to file system as of March 16, 2013.
22. Laura A. Pollander, *"First-Inventor-to-File" May Prove Fatal to Patent Rights Upon the Death of an Inventor*, 27 Quinnipiac Prob. L.J. 186, 188-200 (2013-14) (discussing areas in which estate planning attorneys may guide their clients to avoid potential problems posed by the AIA).
23. 35 U.S.C. § 112.
24. Typically, an original application is filed as a provisional application under 35 U.S.C. § 111(b). A nonprovisional application, which will be reviewed by the USPTO for patentability, is then filed no later than a year from the provisional application filing date and may specifically reference the original provisional and any other provisional applications filed during the year to claim the benefit of the earlier filing date(s) under 35 U.S.C. § 119(e).
25. 35 U.S.C. § 119(e); 37 C.F.R § 1.21(f).
26. 35 U.S.C. § 102(a). Although there are limited exceptions provided in 35 U.S.C. § 102(b) stating that certain disclosures within one year of filing an application do not create a bar, it is recommended that a fiduciary avoid any public disclosure of the invention prior to filing.
27. *See also* Polander, *supra* note 22, at 199–200.
28. *See generally*, Administration of Digital Assets Law, EPTL § 13-A.
29. EPTL 13-A.
30. EPTL 13-A-3.1.
31. EPTL 13-A-3.1(d).
32. EPTL 13-A-2.2.
33. 35 U.S.C. § 41(b).
34. For an entrepreneurial inventor, this scenario would usually occur under the auspices of a small business or corporate structure, with the patents owned as business assets.
35. The patent professionals who prosecuted applications to issuance or are prosecuting pending patent applications can submit the Assignment documents to the USPTO.

Administration of Special Needs Trusts

Development of an Improved Approach

By Edward V. Wilcenski and Tara Anne Pleat

The authors wish to express their thanks to NAELA Fellow Ron M. Landsman for his willingness to offer insight and comment on the ideas expressed in this article.

A version of this article originally appeared in the NAELA newsletter.

Your client with special needs has assets – or expects to receive assets – that may disqualify him or her from eligibility for public assistance. Maybe he or she received an inheritance or was awarded a settlement in a lawsuit or through a divorce. Whatever the source of the assets these individuals could benefit from first party trusts. The very nature of first party trust practice defies efforts to create a uniform set of practice standards for drafting and administration.[1] By definition these trusts are funded with the property of individuals with disabilities (as opposed to parents or other benefactors), leading to practice variations based on:

- disability, which can be cognitive, physical, or some combination of them;
- the nature of the property interest, which can be the proceeds of a personal injury settlement, marital property, inherited or gifted assets, accumulated earnings, and federal and state benefits;
- procedural context, which can be governed by the rules of the guardianship court if the trust is being funded in connection with a guardianship proceeding, the civil practice statute if the trust is being funded as part of a court-approved litigation settlement, or the rules of the family court if the trust is being incorporated into a divorce proceeding; and
- program rules for public benefits, including Supplemental Security Income, Medicaid and Section 8 among many others.

FIRST PARTY TRUST ADMINISTRATION: UNCERTAINTY AND INDECISION

New York enacted a third party supplemental (special) needs trust (SNT) statute, Section 7-1.12 of New York's Estates Powers & Trusts Law (EPTL 7-1.12) in 1993. That same year Congress carved out an exception for first party trusts in the federal Medicaid program's transfer of asset penalty provisions,[2] and in 1994 our state legislature amended EPTL 7-1.12 to be used as the drafting template for both types of special needs trusts.[3] The result is something of a hybrid: a trust borne of federal Medicaid law governing asset transfers, framed within a state trust statute that codified the holding of a watershed state court decision on third party trusts.[4]

In New York, some courts – especially in the early years after the enactment of OBRA '93 – attempted to create drafting and administration standards for first party trusts.[5]

These early decisions are inherently fact- and forum-specific. They have led to as much confusion as clarity and offer little precedential value as trial court decisions. At best, they establish little pockets of common law applicable in similar proceedings involving cases with nearly identical facts.

A survey of New York case law[6] involving first party trusts shows that:

- statutory and regulatory guidance is limited;
- in the absence of guidance, courts give excessive deference to public welfare officials and program administrators; and
- the law continues to wrestle with the concept of disability, retaining vestiges of the outdated idea that all disabilities are alike and that every individual with a disability, regardless of the nature of the disability or the existence of informal supports, requires micromanagement and rigid oversight.

Perhaps the most challenging aspect of first party trust practice is the lack of credible guidance in the area of administration, leaving the trustee unsure of the criteria being used to measure its conduct. Some courts are inclined to micromanage expenditures, others are not. Some rely heavily on the public benefit program representatives' opinions, others do not. Some courts have the personnel to review regular accountings of trust activity, others do not.

This uncertainty is compounded by a blurred line of demarcation between what types of activities should be considered part of the trustee's fiduciary responsibility and which activities can and should be delegated to outside counsel, private case managers and others.

For their part, given the inconsistent decisional law in this area, court examiners and judges often substitute their judgment for that of the trustee and default to a generalized and uncircumscribed "best interest" standard to pick and choose which expenditures are deemed appropriate and which should be disapproved and subject to surcharge. This leaves trustees hesitant to make distributions for fear of being second guessed by someone with little or no firsthand knowledge of the beneficiary's day-to-day circumstances and fearful of seeking professional assistance out of a concern that those expenditures will be challenged in the future.

Banks and trust companies bear some responsibility for the current state of affairs. Many entered the special needs trust market without much thought to how SNTs differ from other discretionary trusts, and they applied the same administrative and oversight practices to SNTs they used for other trusts.

As a result, in cases where beneficiaries are incapable of self-advocacy and lack any family or informal supports, SNTs often sit dormant. This was the situation in a well-publicized New York case where a professional fiduciary was chastised for failing to take affirmative steps to remain informed about the needs of its autistic beneficiary. [7] In other cases, the trustees fail to do their due diligence in investigating the availability of government benefits, instead relying exclusively on requests made by

family members and guardians. This occurred in a case which received significant attention here in New York,[8] the result being a substantial surcharge against the fiduciary.

The practical implications of these well-publicized decisions are significant and far-reaching. The disability community needs credible, capable and competent professional trustees to administer special needs trusts, first party and third party alike. Parents and family caregivers are aging, and when they pass on, siblings and other family members may be unwilling or unable to fill their shoes. Disability service providers will continue to face cuts in Medicaid and other sources of government funding. It is a simple matter of demographics and public finance: the safety net is not what it once was, and private dollars will be needed to fill in the gaps.

New York's statute goes one step further. It allows a drafting attorney to provide the trustee with discretion to make a distribution* even if the distribution causes a reduction in benefits, *so long as the beneficiary will be better off as a result.

GENERAL OBLIGATIONS OF THE TRUSTEE OF A SUPPLEMENTAL NEEDS TRUST

SNTs are discretionary trusts, but they require trustees in the exercise of discretion to consider the availability of government benefits before deciding to pay privately for a good or service. In New York, the statute allows for the distribution of "net income and/or principal of [the] trust as the trustee shall deem advisable, in his or her *sole and absolute discretion*."[9]

When it was enacted in 1993, New York's statute was intended to codify the holding of *In re Escher*,[10] the first case in New York to support the right of a discretionary trustee to refuse to pay for something that might be available from a publicly funded source (or, in that case, to repay the state for benefits provided in the past). The trustee's ability to exercise discretion was central to the holding in the case, later upheld by the highest court in the state.

New York's statute goes one step further. It allows a drafting attorney to provide the trustee with discretion to make a distribution *even if the distribution causes a reduction in benefits,* so long as the beneficiary will be better off as a result.[11] In exercising this grant of discretion, a trustee must:

1. Consider *current* financial eligibility rules, understanding that government benefit eligibility is not static and will continually evolve due to changes in family composition, family financial condition, and beneficiary capabilities and preferences;
2. Consider services and supports that are available to the beneficiary as a result of the beneficiary's participation in one or more government-funded programs; and
3. Ascertain whether services and supports available at the time of a proposed distribution are sufficient to meet the beneficiary's needs and preferences, or whether additional or alternative goods and services should be purchased privately with trust assets. If the latter, the trustee must be able to document the basis for the use of private funds.

But once a trustee has done its due diligence and made the distribution, what standard does a court use to review the trustee's decision to determine whether the distribution should be upheld in a proceeding for settlement of the trustee's accounts?

FEDERAL LAW DOES NOT PROVIDE A STANDARD OF REVIEW

The Statute

The federal Medicaid statute, 42 U.S.C. § 1396p(d)(4)(A), provides the underlying foundation for first party trusts. It has four basic requirements: the trust must be established by a parent, grandparent, guardian, a court or by the individual with a disability; the beneficiary must meet the disability criteria under the Social Security Act; the beneficiary must be under the age of 65 at the time the trust is funded with the beneficiary's assets; and the trust must provide that, upon the beneficiary's death, State Medicaid programs be repaid for medical assistance provided during the course of the beneficiary's life.

If a first party trust complies with these four criteria, the trust will receive the associated protections under federal Medicaid and Supplemental Security Income (SSI) law: trust assets will be disregarded in determining resource eligibility while the income-counting rules of these two programs will determine how a distribution will impact benefit eligibility and amount.

With one important exception, the federal statute leaves fiduciary standards to be determined under the law of the state where the trust was established.[12] The federal transfer of asset provisions exempt transfers to first party trusts

under both 42 U.S.C. § 1396 d(4)(A) and d(4)(C) which are established for the "sole benefit" of an individual with a disability. The term has been interpreted to impose a limitation on distributions, often leading to absurd results.[13] We agree with NAELA Fellow Ron M. Landsman, whose thoughtful analysis leads to the better interpretation of that term: a deviation from the traditional fiduciary obligation to treat all beneficiaries equally, both income beneficiaries and remainder beneficiaries.[14]

NEW YORK COURTS HAVE LARGELY IGNORED THE STANDARD SUGGESTED IN OUR STATUTE

A reader might assume that SNT administration in New York is well-settled in light of the fact that our statute says – clearly and unequivocally – that an SNT trustee has "sole and absolute discretion" to make distribution decisions. The reader would assume that trustee conduct is measured in accordance with long-standing New York law governing discretionary trusts.[15] The reader would be mistaken.

New York cases involving first party trusts include personal injury settlements, guardianship proceedings and family court proceedings. Because of the inherently fact-specific nature of the cases, they do not provide a reliable and broadly applicable precedent for the drafting and administration of first party trusts.

While there are cases, including from our highest court, which explicitly acknowledge the discretionary nature of SNTs,[16] we are not aware of any decisions that considered a contested distribution from an SNT, acknowledged the trustee's discretion to make a distribution decision, and upheld the distribution notwithstanding the fact that the court might have made a different decision.[17] This level of deference to the trustee of a discretionary trust – qualified by the trustee's responsibility to ensure that its decision is both supportable on the law and facts and is duly documented – is a familiar concept to the seasoned fiduciary.[18] It underlies the professional fiduciary's willingness to accept an appointment with the understanding that every decision may at some point be called into question.

Many attorneys who represent trustees of SNTs feel as if their clients do not receive the same level of deference, leaving them like fish in a barrel to be speared by the many parties who have standing to second guess: court examiners, judges, public welfare agency attorneys, and disgruntled beneficiaries who may have behavioral and cognitive deficits that make collaborative administration difficult. The fiduciaries' concerns are legitimate.

IDENTIFYING A STANDARD OF REVIEW

Most attorneys who represent fiduciaries know that the traditional standard of review for a discretionary trust is

the "abuse of discretion" standard. Yet once government benefits and disability are added to the mix, conviction wavers and the analysis becomes diluted.

There seem to be two assessment methodologies used by most practitioners, courts and commentators when analyzing distributions from SNTs. One focuses on benefit eligibility, the other uses a broad and uncircumscribed "best interest" analysis. Both assessments are relevant, but neither should be used as a substitute for the "abuse of discretion" standard when reviewing the accounts of the trustee of an SNT.

BENEFIT ELIGIBILITY IS ONLY ONE FACTOR TO CONSIDER IN DISTRIBUTIONS

The language of a "typical" SNT requires consideration of the availability of publicly funded benefits before a distribution is made, with the understanding that the impact of a distribution will vary from program to program.[19] Benefit program rules are applied at the time of the distribution and are based on the beneficiary's *current* eligibility status. So, for example, the payment of rent by a trustee will impact otherwise similarly situated beneficiaries depending on program eligibility: Medicaid, which in New York allows a trustee to make in-kind payments from an SNT, including for food and shelter, without a reduction in benefits;[20] Supplemental Security Income (SSI), the rules of which typically reduce the benefits of an SSI recipient if a trust pays for food and shelter,[21] and Supplemental Nutrition Assistance Program (SNAP), which (in New York) may treat payments to a beneficiary's household that are permissible for Medicaid purposes as countable income for SNAP purposes, thus reducing the monthly SNAP subsidy.[22]

It is not uncommon for a distribution to have an adverse impact on one benefit and no impact or limited impact on another. If a trustee decides to pay a beneficiary's rent, there may be a limited impact on the beneficiary's SSI payment, no impact on Medicaid eligibility, but a

substantial reduction in the SNAP subsidy. If the trustee's decision to pay rent is reviewed (after the fact as part of an accounting proceeding) based on its impact on government benefits, which benefit program should serve as the baseline in determining the permissibility of the distribution by the trustee?

The answer is "none of them." Program rules do not restrict or permit a distribution; rather, the rules inform the trustee and beneficiary alike whether the contemplated distribution will have an impact on benefits. The trustee must decide whether a distribution – and the resulting impact on benefits – puts the beneficiary in a better place.

A best interest assessment is properly undertaken when a trust arrangement is being recommended to a court.

The trustee's failure to consider this distinction results in overreliance on the often ad hoc and arbitrary decisions of government benefit agencies, excessive deference to public welfare agency attorneys in court proceedings involving SNTs, and an obsessive focus on informal and non-binding speculation by agency staff who opine on how an issue might be addressed or decided in the future. From our perspective, the result is that the tail ends up wagging the dog.[23]

Perhaps the best example of "excessive deference" can be found in *In re McMullen*,[24] a trial court case involving the review of a first party trust as part of a proceeding to settle a personal injury lawsuit. Initially, the decision includes a good explanation of the court's responsibility to ensure that a proposed trust document meets the statutory criteria for first party trusts such that the beneficiary's eligibility for Medicaid would be protected.

However, in trying to reconcile a disagreement between the petitioner and the attorney for the local Medicaid agency on the terms of the proposed trust, the court announced a "prophylactic" remedy that would be applied prospectively in all proceedings brought before that court.[25] The "remedy" was to require a petitioner to secure written approval for the terms of a first party trust from the local Medicaid agency before the court would entertain the petition. In other words, the court would require the petitioning party to concede to the demands of the Medicaid program representative –- in advance and without the right to be heard – just for the matter to be accepted for consideration.

It is unlikely that such a position would be upheld on appeal (none was taken in the case), and one can understand why a court with little statutory guidance and without competent advocacy by special needs trust counsel would try to fashion a remedy to streamline future proceedings. But the case is badly decided.

Another recent New York decision, *In re Tinsmon,*[26] illustrates how public welfare agency attorneys try to use program rules to control and limit fiduciary conduct. In *Tinsmon*, individual co-trustees of a first party trust sought court approval to use trust funds to purchase a one-half interest in the primary residence of the beneficiary, an SSI recipient. The beneficiary already owned the other one-half interest outright. The trust did not require prior court approval, but the co-trustees were also the parents and court-appointed guardians. More important, the one-half interest was owned by one of the co-trustees who had helped the beneficiary finance the purchase prior to the injury.

The co-trustees asked the court to approve the buy out of the co-trustee's interest and, in effect, a distribution of the interest to the beneficiary, outright and free of trust, with the result being that the beneficiary would own the entire residence. The beneficiary was a young mother, and by leaving the home in her name, her interest would pass to her children without estate recovery for expenses incurred prior to age 55.[27]

The local Medicaid agency was served with process because of the Medicaid program's right of recovery at death and – predictably – objected. The agency argued, among other things, that the transaction was prohibited under the POMS.

There is no such prohibition. The POMS clearly contemplate that a trustee may use trust assets to purchase an item which would be exempt in determining SSI eligibility if owned by the beneficiary outright,[28] a point made clear by the *guardian ad litem* who represented the beneficiary in the transaction. The *guardian ad litem* recommended that the transaction proceed as proposed, and the court ultimately approved. [29]

But what if there was an adverse impact on SSI? So long as the trustee determined that the beneficiary would be left in a better position notwithstanding, the terms of the trust and the language of New York's statute give the trustee the discretion to proceed nonetheless. Benefit eligibility is just one factor to consider in the exercise of discretion; it does not independently permit or preclude a discretionary distribution.

THE "BEST INTEREST" FACTOR AND HOW TO APPLY IT

Courts considering the disposition of litigation settlements and guardianship property will render decisions based on what they determine to be in the "best inter-

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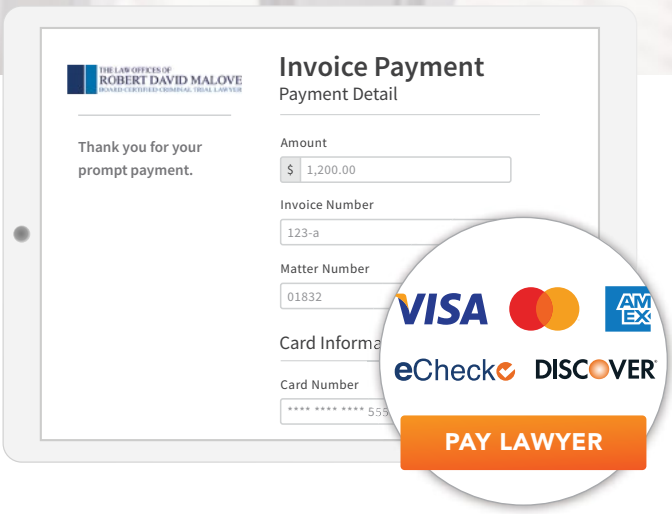

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est" of the unemancipated minor or person with a disability. Predictably, decisional law in this area tends to be very fact-specific and commonly recites the courts' responsibility to protect those who are unable to speak for themselves.[30]

A best interest assessment is properly undertaken when a trust arrangement is being recommended to a court. Whether the use of a trust is appropriate, whether the proposed trustee is acceptable, and whether the terms of the proposed trust are consistent with the objectives and concerns of the court should all be viewed through the "best interest" lens at the time the arrangement is being proposed.

The most frequently cited example of this practice in New York is in *In re Morales*, where a court-appointed guardian sought to transfer litigation proceeds to a first party trust to protect benefit eligibility. Explaining that "the duties and responsibilities of the trustee to the incapacitated person are akin to those of a guardian," the court went on to require modifications to the language of the proposed document which it "deem[ed] necessary to protect the interests of the disabled person."[31] The judge then provided – right in the language of the decision – a sample trust document to be used as a "guide to the bar" for drafting first party trusts.

The "*Morales* trust" document includes provisions not required as a matter of statutory law and which many practitioners believe to be overly restrictive. The decision should be understood to provide guidance only in cases involving the establishment of SNTs in guardianship proceedings. But many New York courts continue to follow it when funding an SNT is proposed.

In the context of the *establishment and funding of an SNT*, the parties understand the rules of the game. The court must decide *whether* the SNT should be established, *who* should serve as trustee, and *how* the trust should be drafted to address the court's specific concerns in that particular case. Counsel have their opportunity to argue against modifications they believe exceed the statutory mandate or which are not necessary given the facts of that case, and ultimately the court will render its decision based on what it believes to be in the best interests of the individual before it.

But the question presented here is a different one: once an SNT has been established and funded in accordance with a court's best interest determination (or even in those cases where the SNT is established independently and without court involvement), what is the standard of review to be applied by a court when reviewing distributions made by the trustee? Little decisional law exists in New York, but one well publicized case[32] illustrates the approach taken by most courts in our experience.

In *In re Liranzo*, the corporate trustee of a first party trust funded with litigation proceeds sought to settle its account and terminate the trust. The trust was initially funded with just over $420,000. Six years later, the trust had approximately $3,200 remaining. The accounting showed that most of the money was used to pay for private caregivers and taxi service for the beneficiary.

The decision begins with the judge's conclusion that the trustee breached a number of commonly understood,

generalized rules of fiduciary conduct (the "duty of undivided loyalty," the obligation to administer the trust in the "sole interests of the beneficiary," and the need to "act reasonably and in good faith"). But the decision goes on to recite concepts that are less precise (criticism of distributions that "could have either been avoided or were unreasonable," the failure to "provide support for the plaintiff for as long as possible," and "authorizing each and every discretionary disbursement requested by the infant plaintiff's mother"[33]).

In addressing the private caregiver payments, the judge criticized the trustee for accepting the mother's claim, supported by a private social worker, that the beneficiary was

better off with private caregivers as opposed to Medicaid-funded aides. This was not sufficient for the judge, who wrote that "the trust agreement requires that a good faith effort be made by the trustee to inquire about providers of home healthcare whose costs are covered under Medicaid."

The court also penalized the trustee for spending more than $50,000 on private taxi services based on the mother's representation that driving in a taxi was a form of therapy for the beneficiary. In the words of the judge, the trustee "should have further investigated before allowing the disbursements. This 'taxi therapy' does not appear to be a responsible use of Trust fund monies consistent with prolonging the life of the Trust."[34]

A trustee might be able to work with the court's analysis of caregiver expenses, as the decision suggests that an investigation of Medicaid-funded alternatives might have saved those distributions from surcharge. But testimony did show that the mother and a social worker were consulted prior to making the discretionary decision to pay privately for that care. Is that not a "good faith effort"? Was the issue the lack of independent inquiry by the trustee or a matter of inadequate documentation?

The court's analysis of the taxi expenses is more troubling. The statement that the expense "does not appear to be a responsible use of trust funds" is vague. Taxi therapy *did* appear to be responsible in the eyes of the mother and the social worker. If the expense was hippotherapy, would that have made a difference? And who better to make that assessment than the primary caregiver and a professional advocate?

Had the court articulated a clear standard of review to be applied to each trust expense, the decision would be more helpful. Instead, the judge substituted her judgment for that of the trustee as to what types of expenditures were in the best interest of the beneficiary, relying primarily on generalized statements of fiduciary responsibility to support her decision.

In the end the court refused to approve the private caregiver and taxi expenses (and a few others as well), resulting in a surcharge of over $170,000. Admittedly, when a trust with well over $400,000 is almost fully depleted in six years it does not bode well for the trustee. But egregious facts should not relieve the court of its responsibility to frame its surcharge and write its decision in a manner that leaves the parties with a clear understanding of the criteria being used to measure conduct.

What trustees need is a workable methodology for analyzing distributions – be they modest or significant, mundane or out-of-the-ordinary – once an SNT is up and running. The first step in developing such a methodology is an agreement on the correct standard of review.

ABUSE OF DISCRETION AND SPECIAL NEEDS TRUSTS

The abuse of discretion standard is the traditional standard applied to the conduct of all discretionary trustees under New York law,[35] and is also consistent with a recent line of New York cases that take the position that SNTs should be treated no differently than other irrevocable trusts established under state law.[36]

The abuse of discretion standard is the only standard that can comfortably incorporate the legitimate objectives of the benefit eligibility assessment and the best interest assessment. Under the abuse of discretion standard, the trustee must consider the impact on eligibility and services (the benefit eligibility assessment) and the resulting benefit to the beneficiary (the best interest assessment) when making a distribution decision. Once these two factors have been reviewed, considered and documented and the distribution has been made, a reviewing court should defer to the trustee and approve the distribution

unless the trustee abused its discretion by acting in bad faith or beyond the bounds of reasonable judgement.[37]

The abuse of discretion standard does not provide a "pass" to the trustee of an SNT any more than it provides a pass to trustees of other types of discretionary trusts. All of the traditional obligations of fiduciary conduct would still apply: the need to invest prudently, the need to account in detail, the prohibition against self-dealing, etc.. But the abuse of discretion standard will protect the trustee who has complied with the traditional obligations of fiduciary conduct, and who can demonstrate that it has done its due diligence in considering a beneficiary's benefit eligibility and best interest when making a distribution decision.

Adoption of the abuse of discretion standard would help address many of the concerns of banks and other professional fiduciaries about assuming trusteeship of first party (and even third party) special needs trusts, and it would encourage more capable and credible institutions to offer their services to individuals with disabilities and their families. If clients prefer to use family members or other individuals as trustees, counsel can advise that their conduct will be measured in a fair and understandable way.

NEXT ISSUE: AN IMPROVED APPROACH

Once we accept the abuse of discretion standard as the correct standard of review for SNTs, the next step is to develop some practice standards and protocols to recommend to our trustee clients. In a future article we will offer some thoughts and suggestions on this topic.

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1. This article is based primarily on law and practice in New York State. While we have tried to focus on general concepts that we believe to be incorporated into the law and practice of other states, we are also aware that many states have substantially modified these concepts by regulation and administrative rule. Thus we offer the standard lawyers' disclaimer: we think our positions are pretty solid here in New York, but you're on your own when you cross state lines.

2. 42 U.S.C. §1396p(d)(4)(A), enacted as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (1993) ("OBRA '93").

3. EPTL 7-1.12(a)(5(v).

4. *In re Escher*, 94 Misc. 2d 952 (Sur. Ct. Bronx Co. 1978), *aff'd,* 75 AD2d 531 (1st Dep't 1980), *aff'd,* 52 N.Y.2d 1006 (1981).

5. *See*, *e.g., In re Morales*, N.Y.L.J., July 28, 1995, at 25 (Sup. Ct., Kings Co. 1995).

6. Former New York State Bar Association Elder Law Section Chair David Goldfarb's chapter on supplemental needs trust practice in *Warren's Heaton on Surrogate's Court Practice,* 12-211.12 (Lexis 2018) includes a subchapter entitled "Court-Added Criteria for Supplemental Needs Trusts." The subchapter includes a summary of cases from a variety of New York State courts where judges required modifications to the trust document beyond what is required in our state statute, and which imposed administrative responsibilities on trustees beyond what is required in our state regulations. While the summary is interesting and informative, no credible reading of the cases would leave a practitioner with the impression that there is any uniformity of practice and procedure in in New York State.

7. *In re the Accounting of J.P. Morgan Chase Bank, N.A, and H.J.P. as co-Trustees of the Mark C.H. Discretionary Trust of 1995 v. Marie H.*, 956 N.Y.S.2d 856 (Sur. Ct., N.Y. Co. 2012).

8. *Liranzo v. LI Jewish Education/Research*, 28863/1996, *New York Law Journal* 1202609859342 (Sup. Ct. Kings Co. 2013).

9. EPTL 7-1.12(e)(1)(1).

10. *Supra* n. 5.

11. EPTL 7-1.12(e)(2)(i)(5).

12. *Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 933 (2013), involved the interplay between state trust law and federal Medicaid law. In *Lewis*, the State of Pennsylvania by legislation imposed limits on pooled special needs trusts not contained in the federal Medicaid statute, including a limit on the trustees' discretion to make various distributions. In striking down all of the state's restrictions other than oversight by the state attorney general, the court agreed that the state could supervise special needs trusts, but only in the same manner it supervises all trusts under general state trust law.

13. *In re: Estate of Skinner*, N.C. App. Ct. No. COA15-284 (June 21, 2016), *reversed*, 804 S.E.2d 449 (N.C. S. C. 2017). The Court of Appeals found that the lower court's reading of the term "sole benefit" as a rigid distribution standard would lead to the "absurd" result of a beneficiary (for whose benefit a home was purchased by the trustee) living in "bizarre isolation." The Supreme Court reversed the decision of the Court of Appeals because it used the incorrect standard of appellate review.

14. *See* Landsman, Ron M., Esq., *When Worlds Collide: State Trust Law and Federal Welfare Programs*, NAELA Journal Volume 10, No. 1 (Spring 2014) for a comprehensive and persuasive piece on this topic. Interestingly, the North Carolina Court of Appeals in *Skinner, supra* n. 13, similarly interpreted the term "sole benefit" as a deviation from the traditional standard of loyalty owed to all beneficiaries.

15. *See* Restatement [Third] of Trusts § 50(1)(b); *see also In re: Estate of T. Harry Glick*, 2005 N.Y. Misc. LEXIS 7336 (Sur. Ct., Kings Co. 2005) at page 9, *citing In re Gilbert*, 156 Misc. 2d 379 (Sur. Ct., New York Co. 1992); *Trust of Frederick Brockway Gleason, Jr.,* 1999/4582 A, N.Y.L.J. 1202629074611, at 1 (Sur. Ct., New York Co. 2013).

16. *In re Abraham XX*, 11 N.Y.3d 429 (2008) at 434.

17. We are unaware of cases undertaking this analysis, with one important exception: the payment of attorney fees. These payments will always be subject to review (at least in New York), regardless of the grant of discretion and regardless of the consent of all interested parties to the amount paid. *See In re Felice*, 1 Misc. 3d 909(A) (Sup. Ct. Suffolk Co. 2004), which specifically addressed a trustee's argument that the supplemental needs trust document deferred to the trustee on attorney fees, and *Stortecky v. Mazzone*, 85 N.Y.2d 518 (1995), which confirmed the right of a probate court to review fees paid by a fiduciary even if all parties to an accounting have agreed and consented.

18. *See* Restatement [Third] of Trusts § 50(1)(b); *see also In re Estate of T. Harry Glick*, *supra* n. 17 at page 9, *citing In re Gilbert*, *supra* n. 17, and *Leigh v. Estate of Leigh*, 55 Misc. 2d 294 (Sup. Ct. New York Co. 1967).

19. EPTL 7-1.12(a)(5)(ii).

20. 18 N.Y.C.R.R. 360-4.3(e).

21. POMS SI 01120.200E.1.b.

22. *Temporary Assistance (TA) and Food Stamps (FS) Policy: The Treatment of Supplemental Needs Trusts and Reverse Annuity Mortgage (RAM) Loans,* New York State Office of Temporary and Disability Assistance, 01 INF- 8 (March 8, 2001).

23. Consider the April 2018 release of the revisions to the POMS on SNTs. We would all agree that the changes were favorable and provided much needed clarity. But they only involve one agency's interpretation of how a distribution or investment by a trustee might impact the benefits the agency provides. They do not create distribution and administration standards that are applicable across all SNTs, and yet our impression is that many special needs planning attorneys treat them this way. The result is a misplaced and outsized emphasis on that agency's often inconsistent and arbitrary application of its own rules.

24. *In re McMullen*, 166 Misc.2d 117 (Sup. Ct., Suffolk Co. 1995).

25. *Id.* at 121.

26. *In re Tinsmon (Lasher),* 79 N.Y.S. 3d 854 (Sur. Ct., Albany Co. 2018).

27. 42 U.S.C. §1396p(b)(1)(B).

28. POMS SI 01120.201(I)(1)(c).

29. The Department has filed an appeal and oral argument is scheduled for January of 2019.

30. N.Y. Surrogate's Court Procedure Act (SCPA) 1713 ("reasonable, proper and just under the circumstances"); *Dinnigan v. ABC Corp.*, 35 Misc. 3d 1216(A) (Sup. Ct. New York Co. 2012); *In re Teitelbaum*, 11 Misc.3d 1067(A) (Sur. Ct., Rockland Co. 2006).

31. *In re Morales*, 1995 N.Y. Misc. LEXIS 726, 214 N.Y.L.J. 19 (N.Y. Sup. Ct. July 28, 1995).

32. *Liranzo*, *supra* n.8.

33. *Id.* at p. 4.

34. *Id.* at p. 7.

35. *Supra* n.17. In fact, the trustee's discretion as granted under the terms of a will drafted decades ago was a critical part of the court's analysis in the seminal case on special (supplemental) needs trusts in New York, *In re Escher supra* n.4.

36. *In re Kaidirmouglou*, N.Y.L.J. November 5, 2004, at page 28 (Sur. Ct., Suffolk Co. 2004); *In re KeyBank*, 58 Misc. 3d 235 (Sur. Ct., Saratoga Co. 2017); *In re Feuerstein*, 147 A.D.3d 688 (1st Dep't 2017). New York attorneys are well advised to remember that even a wholesale adoption of the "abuse of discretion" standard in evaluating distributions from all supplemental needs trusts will not shield attorney fees from later scrutiny. *In re Felice*, *supra* n.17.

37. *Trust of Frederick Brockway Gleason, Jr.*, 1999/4582 A, N.Y.L.J. 1202629074611, at *1 (Sur. Ct., New York Co. 2013).

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Beneficiaries of S Corp Stock

By Nathan W.G. Berti and Carl A. Merino

More than a year after the Tax Cuts and Jobs Act (TCJA) was signed into law, tax practitioners are still adapting to dramatically altered landscape. As this substantial legislation continues to be analyzed, attention is shifting to subtler effects on the U.S. tax code, such as a change in the permissible current beneficiaries of certain trusts that hold S corporation stock. Liberalized rules for ownership of S corporation stock will allow closely held businesses organized as S corporations to be held in trust for the benefit of both U.S. and non-U.S. family members.

Since 1958, U.S. tax law has allowed certain corporations to elect S status and be taxed on a pass-through basis for income tax purposes. So-called S corporations – named for the location of their governing rules in subchapter S of the code – essentially combine the advantageous legal structure of a U.S. corporation (such as liability protection and corporate governance) with the benefits of U.S. flow-through taxation (only taxed at the shareholder level on most items). In most (but not all) respects, S corporations are taxed like partnerships. However, in some respects they still retain some tax attributes of corporations.

For example, when an S corporation liquidates, the inside gain is still taxable as it would be with a regular "C" corporation, but the inside gain is taxed at the shareholder level and increases outside basis, preventing the shareholders from being subject to double taxation. There is no inside gain recognition when a partnership liquidates. A lot of companies that would have been organized as S corporations in the past are now organized as limited liability companies, which offer ease of corporate governance, limited liability and outright partnership treatment.

However, there are still many businesses structured as S corporations and there are a number of potential uses. For example, electing S status is a way for a "C" corporation to achieve pass-through status (with some limitations, particularly with respect to built-in gains and passive income going forward) without triggering a taxable liquidation.

An S corporation must fit within the definition of a small business corporation under U.S. tax law, including that the corporation (1) is a domestic corporation, (2) has 100 or fewer shareholders, (3) has only individuals as shareholders (exceptions exist for estates, certain trusts, and certain tax-exempt organizations), (4) does not have a nonresident alien as a shareholder, and (5) has only one class of stock.

Nathan W.G. Berti concentrates his practice in all aspects of estates and trusts law and helps a wide range of clients construct complex estate plans, often with multi-generational, multi-jurisdictional (including international), and creditor protection focus. He also counsels fiduciaries and beneficiaries on all aspects of estate and trust administration. Berti authors the estate planning chapter of the *Taxation of Distributions From Qualified Plans*, a leading treatise on the issue of taxation of individual retirement accounts (IRAs) and 401(k)s that is published by Thomson Reuters.

Carl A. Merino represents U.S. and non-U.S. families and companies on a wide range of personal and business tax matters, including cross-border income and estate tax planning, corporate and partnership tax issues, S corporations and income taxation of trusts and estates. He is co-chair of the International Estate Planning Committee of the New York State bar Association's Trusts and Estates Law Section and frequently publishes articles on cross-border tax planning.

Trusts That Own

A trust can hold stock in an S corporation only if it (1) is treated as owned by its grantor for income tax purposes under U.S. grantor trust rules, (2) was a grantor trust immediately before its grantor's death (the trust can only be a shareholder for two years from that date), (3) received stock from the will of a decedent (the trust can only be a shareholder for two years from the date of receipt), (4) was created primarily to exercise voting power over stock transferred to it, (5) is an electing small business trust (ESBT), or (6) qualifies as a qualified subchapter S trust (QSST).

In the first four cases, either the trust grantor must be alive (or have recently died) or the trust must exist for voting control (that is, non-economic) purposes. Thus, if a grantor wants to leave S corporation stock to a trust for his or her family members after his or her death without terminating the company's S election, the trust must either qualify as an ESBT or a QSST. An ESBT gives the trustee the discretion to accumulate income within the trust for the benefit of one or more individual beneficiaries, and is subject to U.S. income tax at the highest marginal tax rate. A QSST requires all trust accounting income to be distributed annually to one individual beneficiary, and that beneficiary is subject to U.S. income tax on the QSST income at his or her individual tax rate.

A U.S. nonresident alien cannot be a shareholder of an S Corporation, and that is still the case. However, the rules governing who can be a beneficiary of an ESBT have been liberalized. Historically, a nonresident alien could not be a potential current beneficiary of either an ESBT or a QSST. In addition to the more straightforward situation of having a named beneficiary who is a nonresident alien, this issue could manifest in subtler ways.

For example, a U.S. citizen parent owns S corporation stock and establishes a trust that qualifies as an ESBT or a QSST for his or her U.S. citizen child. The trust provides that the child's spouse becomes a trust beneficiary upon the child's death. If the child moves abroad, and is married to a U.S. nonresident alien, then upon the child's death his or her spouse cannot become a trust beneficiary without terminating the corporation's S election. Further, if the child held a power of appointment over the trust, he or she could not exercise that power in favor of the spouse (or a trust for the spouse's benefit) without terminating the S corporation's election.

The TCJA changed the rules applicable to ESBTs effective January 1, 2018 so that a U.S. nonresident alien may be an ESBT's potential current beneficiary: a U.S. nonresident alien may now be entitled to, or at the discretion of any person may receive, a distribution from an ESBT (including cases in which the nonresident alien is the only such person). The TCJA did not change the rules with respect to direct ownership of stock in an S corporation by a U.S. nonresident alien or with respect to ownership by a QSST: a U.S. nonresident alien remains unable to own S corporation stock directly and cannot be a QSST's current beneficiary.

This subtle change to the ESBT rules creates potential planning opportunities in both the estate planning and corporate structuring contexts. In the estate planning context, a U.S. grantor may now establish a trust (that elects to be an ESBT) for a U.S. nonresident alien beneficiary and fund that trust with S corporation stock without terminating its S election. In addition, an existing ESBT's beneficiary may now exercise a power of appointment in favor of a nonresident alien beneficiary. This change in the law may be particularly helpful in the case of closely held family businesses held in trusts where one or more family members are non-U.S. persons, as it will no longer be necessary to exclude non-U.S. family members if the trust is properly structured and the necessary elections are made.

The Juror Who Exchanged 7,000 Text Messages

The conviction of a Syracuse doctor for murdering his wife hangs in the balance over juror misconduct

By Christian Nolan

It was exactly what the judge warned the jurors not to do.

But that didn't stop juror number 12, Johnna Lorraine, from sending and receiving about 7,000 text messages during a three-week-long murder trial, *State v. Neulander,* in Syracuse in 2015.[1]

"Make sure he's guilty," Lorraine's father told her in a text on the first day of trial.

During the trial, a friend asked Lorraine if the defendant was guilty and she replied: "Can't tell."

In a sure sign of the times, some of her responses were with emojis.

"Even though the court told the jurors 45 times not to engage in third-party communications, Lorraine exchanged messages with friends and family about the case throughout the trial," Neulander's appellate lawyer, Alexandra Shapiro, of Shapiro Arato in New York City, wrote in court documents.

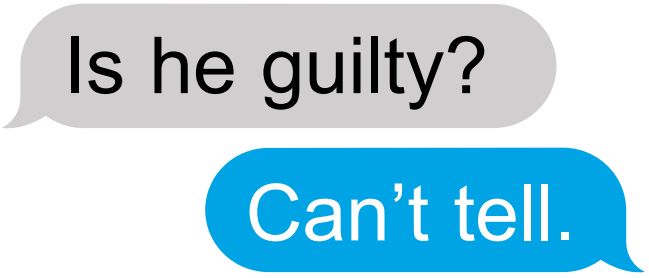
It is common practice for the judge to advise jurors not to speak with anyone about the case while they serve on

the jury, but jurors do still have access to their cell phones in the jury box.

Lorraine not only went on a text messaging spree throughout the trial, but defense lawyers claim she also read articles about the case online. During the trial, jurors are not allowed to read, watch or listen to media stories relating to the trial they are assigned. Not until a trial is over are jurors allowed to read media reports about the case.

To say the *Neulander* case is high profile is an understatement, considering that the website for the local Syracuse newspaper, the *Syracuse Post Standard*, has more than 300 articles about the case online, according to defense lawyers. *Dateline NBC* and *48 Hours* also did segments on the case.

If not for the alternate juror calling a defense lawyer about Lorraine's conduct after the verdict was announced, the doctor's murder conviction and 20-years-to-life sentence likely would have been upheld. On appeal, the Supreme Court, Appellate Division, Fourth Judicial Department, agreed that the evidence was sufficient for the conviction but ordered a new trial due to juror misconduct.



Onondaga County District Attorney William J. Fitzpatrick has appealed the ruling to the state's highest court – a ruling that could go a long way toward determining how future juror misconduct is handled in the digital age of smart phones and instant access to news.

He argues in court documents that even if Lorraine's conduct "constituted a misstep, or even misconduct, that misconduct is significantly outweighed by the substantial proof of guilt presented at trial." As of press time, briefs had been filed but oral arguments had not yet been scheduled.

PROMINENT OB-GYN

At the time of trial, many people in the Syracuse area were still in shock that Dr. Robert Neulander, a prominent OB-GYN, stood trial for killing his wife of 30 years, Leslie, in their home in 2012. The former nurse, local philanthropist and mother of two adult children had died from a head injury.

On the morning of Sept. 17, 2012, Neulander claimed his wife had fallen in the shower of her master suite bathroom in their 8,000-square-foot mansion, that she had a history of vertigo and was prone to falls, according to court documents. Paramedics arrived at 8:31 a.m. but she was pronounced dead 11 minutes later.

The Onondaga County Medical Examiner initially opined that the death was an accident but changed that determination. It was later concluded that Leslie's death was a homicide due to blunt force trauma to the head. In fact, the former chief medical examiner in Onondaga County, Dr. Mary Jumbelic, who was a family friend of the Neulanders, hoped to dispel rumors and suspicions about Neulander and offered to review the case. She didn't like what she discovered.[2]

Jumbelic ultimately concluded it was a homicide, which launched Fitzpatrick's investigation and included additional opinions from national pathologist experts. Jumbelic also testified at trial for the prosecution.

Fitzpatrick also pointed out that the couple's daughter, Jenna Neulander, was home at the time and in her call to 911, exclaimed, "Oh my God, there's blood everywhere!"

Authorities believe Neulander murdered his wife on the bed, covered it up by carrying her into the bathroom to make it look like her injuries were from an accidental fall and then after calling for his daughter, carried her back to the bedroom to appear as though he was trying to resuscitate her.[3]

Neulander was later arrested, indicted and convicted of second-degree murder and tampering with evidence. He was sentenced to 20 years to life in prison.

'MAKE SURE HE'S GUILTY'

According to court documents, at the end of the second day of jury deliberations, defense counsel observed Lorraine speaking with Elisabetta DiTota, a previously discharged alternate juror. He requested that the judge question Lorraine before deliberations resumed.

The next morning, July 30, 2015, Lorraine stated that she had not discussed the trial with DiTota and assured the judge that she had not had any discussions about the case with anyone except the other jurors during deliberations. The jury resumed deliberations and returned a verdict of guilty that same day.

After the verdict was announced that day, DiTota approached defense counsel and said that Lorraine had been inappropriately communicating during the trial. Neulander's trial lawyer, Edward Menkin, soon filed a motion to set aside the verdict. The trial judge, Thomas J. Miller, scheduled an evidentiary hearing on the motion and ordered a forensic examination of Lorraine's phone.

DiTota claimed that at the start of trial, Lorraine attempted to show her a media alert on her phone about jury selection. She also claimed that during a break in Jenna Neulander's testimony, Lorraine announced in the jury room that her friend had sent her a text message about a Twitter report that the court had taken a break because one of the jurors was too upset to continue. Lastly, she claimed that she spoke with Lorraine after the second day of jury deliberations and Lorraine told her that the deliberations were stressful and that the jury was evenly divided.

In an affidavit, Lorraine denied most of DiTota's allegations, claiming she only shared the Twitter report with DiTota, not the other jurors, and denied discussing the deliberations with her.

Defense lawyers obtained a subpoena for a forensic examination of Lorraine's phone, which they say revealed that she had engaged in a series of text messages with family and friends about the case; deleted almost all of the pertinent text messages in question; erased her phone's internet browsing history but left evidence she visited a local news website; and had made false and misleading statements to the court.

In addition to the "Make sure he's guilty" text from her father on the day she was selected to serve on the jury, a friend twice referred to Neulander as "scary" and asked, "Is he scaryyyy" and "Did you see the scary person yet." Lorraine said she had seen Neulander "since day 1" and continued texting with this friend throughout the trial. At one point, Lorraine was asked if Neulander was guilty and she said she couldn't tell yet.

The day Jenna Neulander testified, Lorraine exchanged dozens of messages with another friend who said she had read so much about the case she knew every publicly available detail. The friend said she was anxious for someone to testify against Jenna. In a message that she later deleted, Lorraine responded that "no one will testify against her!" and explained that the only opportunity for the prosecution to question her would come on cross-examination.

Later that day after the prosecution cross-examined Jenna, the same friend wrote that her "mind [was] blown that the daughter [was not] a suspect."

According to defense lawyers, a playful back-and-forth then ensued in which Lorraine sent the friend a "see no evil, hear no evil, speak no evil" emoji and then the friend asked, "[or] is she?" with an accompanying emoji. The friend then continued her suspicions about Jenna's involvement in the alleged murder.

When confronted with the text messages at the evidentiary hearing, Lorraine admitted that she knew these texts violated the judge's rules.

Despite finding that the juror had engaged in serious misconduct, the trial judge upheld the verdict. However, on appeal, the Appellate Division, in a 3-2 split decision on June 29, 2018, did overturn the verdict due to her misconduct.[4]

"[T]he evidence at the hearing established… that juror number 12 received a message from her father that arguably implored her to ensure defendant's conviction, repeatedly disregarded the court's instructions, and actively concealed and was untruthful about her numerous violations of the court's instructions," the majority ruled. "These facts were not controverted at the hearing.

We conclude that every defendant has a right to be tried by jurors who follow the court's instructions, do not lie in sworn affidavits about their misconduct during the trial, and do not make substantial efforts to conceal and erase their misconduct when the court conducts an inquiry with respect thereto. These rights are substantial and fundamental to the fair and impartial administration of a criminal trial."

Neulander, 66 at the time of the ruling, posted bail and was released from prison after three years while he awaits the fate of his case on appeal.[5] Either the verdict will be reinstated or if the appellate decision is upheld, the prosecution must decide whether to retry the case.

DIGITAL AGE

The Hon. Barry Kamins, retired New York Supreme Court judge, who now practices at Aidala, Bertuna & Kamins, said this case brings the digital age directly into the courtroom.

Kamins noted that judges have long been instructing jurors in criminal cases not to discuss it with anyone else. "But for the last ten years, judges have also been instructing jurors not to have any electronic communications, such as texts, internet chats, about the case," said Kamins. "Courts have realized that we're living in a digital age and it's so easy to communicate and be contacted without anyone knowing about it."

Kamins said the Neulander case is one of the first cases in New York that's reached the court of appeals pertaining to digital communications.

"If the court affirms the lower court decision, it's going to send a very strong message to trial courts that you've got to be extra vigilant about this," said Kamins. "People are communicating instantaneously. How can trial judges take more precautions about this? It's a good question.

"I don't think they'll get to the point where they'll require jurors to turn in their cell phones at the beginning of the day and get them back at the end of the day," continued Kamins. "In the end, you have to rely on the good will of the jurors to follow the judge's instruction."

Nolan is NYSBA's senior writer.

1. www.syracuse.com/crime/index.ssf/2015/07/7000_texts_a_biased_dad_gossipy_friends_enough_to_toss_dr_neulander_verdict.html.

2. www.syracuse.com/crime/index.ssf/2015/04/dr_neulander_family_friend_turns_key_accuser_in_wifes_murder.html.

3. www.syracuse.com/crime/index.ssf/2018/06/robert_neulander_doctor_appeal_murder_leslie_wife.html.

4. *People v. Neulander,* 162 A.D.3d 1771 (4th Dep't 2018).

5. www.syracuse.com/crime/index.ssf/2018/07/robert_neulander_out_of_jail_after_spending_3_years_in_state_prison_for_wifes_de.html.

Cross-Examination in the Modern Era

By W. Russell Corker

In 1903, *The Art of Cross-Examination* by Francis Wellman gave trial lawyers what was to become the leading text on the subject of cross-examination. In 1975, "The Art of Cross-Examination" was the same title for a lecture given by Irving Younger, where he set forth the "Ten Commandments of Cross-Examination." While there is much to commend in the advice given by these two giants in the field, a trial lawyer following these edicts comes away with the sense that much more can be lost from cross-examination than can be gained.

W. Russell Corker is a 1974 graduate of Boston University School of Law who began his carrier as an Assistant District Attorney in Nassau County. In 1977, he became a medical malpractice defense attorney, and in 1980 switched sides and began representing plaintiffs in medical cases. He is a member of the New York State Bar Assoc. Continuing Legal Education Executive Committee. He has written numerous articles concerning medical malpractice litigation as well as a chapter in the book *Medical Malpractice in New York*. He has lectured to the legal and medical professions on numerous occasions since 1980.

For instance, rule one commands that the examiner should "be brief," reasoning that the shorter the time spent cross-examining, the less opportunity for screwing it up. The examiner should limit cross-examination to making no more than three points. Continuing with this same theme, the ninth commands that the examiner limit questioning and never ask one question too many, leaving the argument for the jury. The tenth and last commandment directs that the ultimate points should be made at summation and not during cross-examination. The overriding message is that cross-examination is more of an art than a scientific method, and only the few who are endowed with special abilities can truly perform a good cross-examination. The rest of us should simply try to get it over with as soon as possible before we destroy our case. It is very difficult to square the cautious advice given to generations of trial attorneys with the most famous maxim of all – that cross examination is the best means to establish the truth.

Most seasoned trial attorneys would agree that a successful cross-examination is the single most important decid-

ing factor in the outcome of a trial. The behavioral scientists who study how and why juries make decisions agree that information obtained through cross-examination has greater weight than most other evidence. If these two points are true, and I sincerely believe that they are, then trial lawyers of today must balance the caution advocated by the past with the challenge of using cross-examination to prove their case. This article is a short introduction to a methodology of constructive cross-examination that limits the opportunity for cross-examination to go bad while maximizing the dramatic impact of an effective cross-examination to teach and prove your theory of the case to the jury.

THE AUDIENCE

Cross-examination is a tool of persuasion. Persuasion begins and ends with how the fact finder understands, retains and uses the information you are providing to prove your theory of the case. The human mind is capable of understanding points when they are presented in a particular sequence and in a certain way. First, however, the mind of the juror has to be engaged. It is well known that most people – think of when you were in your high school physics class – will stop listening once the material seems too complicated or disorganized. Even a reluctant listener is easier to engage if the message is well organized and presented in small segments, with each segment proving one particular point. To best accomplish this, the information should be organized going from a general statement and proceeding, step-wise, to a final conclusion. Additionally, this must be done with a limited amount of questions and not over a protracted period of time, because even attentive jurors' minds tend to wander off. The method must engage the minds of the jurors. If the information is not presented this way, as is frequently the case, without tight organization or in a particular sequence, then each individual juror must reorganize all of these facts into a coherent story their own way. It does not require further comment that getting a group of people to reorganize the facts in the same manner is near impossible.

Knowing how jurors process information and make decisions is important to constructing meaningful cross-

examination. In 1956, Professor George A. Miller of Harvard University discovered that the magic number seven, plus or minus two, is the limit of most people's capacity for processing information. When constructing a method of cross-examination, we should limit the amount of information conveyed to the jury at any one time in light of most people's limited ability to process large amounts of information. This principle requires that information be broken up into digestible groups, each designed to establish just one point, by limiting the number of fact questions presented to seven, plus or minus two.

FACT-BASED CROSS-EXAMINATION

Litigation involves cases that routinely have thousands of facts. Many of these facts are clearly related and easily understood by a jury, but many are desparate and need organization to make them comprehensible and relevant to resolving the dispute. All too often, cases are presented in a chronological manner, where each fact is presented as a discrete point, is poorly organized, and is not presented in such a way so as to lead to a strong conclusion. Simply presenting data in one long chronological succession gives up control of the message being presented, and relies too much on the jury reassembling the facts to reach the desired conclusion. It is almost like asking jurors to do a complicated mathematical problem in their head. That same difficult, perhaps impossible, problem becomes easier once you can write it out and visualize it.

It is well established that most people are better visual learners than when they use other senses. Because trials historically have primarily relied upon oratory, perhaps the poorest of the vehicles for learning, an attempt must be made to create visual images using language. To do this, the trial lawyer must first begin to see the case more as a series of visual images and then construct questions that will reconstruct that image in the minds of the listener, the same way that great writers are able to do. Applying this to our method, each series of questions should lead logically, one fact at a time, to the visual goal in hopes of creating an image in the minds of the jurors.

Facts, not conclusions, are the essential building blocks of an effective cross-examination. As Daniel Patrick Moynihan said: "Everyone is entitled to his own opinion, but not to his own facts." The failure to grasp this important rule – and it is significant enough to be called a "rule" – has frustrated many attorneys trying to cross-examine a witness. Effective cross-examiners must develop the skills and ability to discern the difference between facts, conclusions and opinions. Effective cross-examination, one that controls the witness, deals with facts. It is always easier to get a witness to agree to a fact than to get him or her to agree with your conclusion or your opinion. Effective cross-examination is about controlling the information presented to the jury and controlling the witness in order to accomplish that goal. The focus on facts is the key to doing this. Facts often have immunity from adversarial bias, whereas conclusions do not. To use this to our advantage, we must create coherent fact-based cross-examination that will lead to a specific conclusion without specifically requiring the witness to roll over on the stand and admit defeat. If the questions are presented in such a way, there can be only one conclusion, which the jury will understand without additional help.

After the facts are gathered, they are analyzed and broken down into various categories. Every case has large groups of facts that are not contested – facts that do not depend on the credibility of a witness or some other factor to establish. These are "facts beyond change." The best example of this are the facts contained in a document, such as a contract or perhaps a hospital record. Whenever possible, it is good to work with these facts when structuring your cross-examination. The next group of facts relies upon the credibility of a witness or upon an inference based upon some other fact. This group breaks down into facts that are likely provable and those that are either contested or beyond what you can actually prove.

DETAILS

This method requires a greater focus on facts and paying closer attention to details. Most people, myself included, often speak using conclusions, for many reasons. A questioner will rarely get a witness to agree with his conclusion that he was negligent, but that same witness, through controlled questions, will readily concede facts, such as that the road was straight, there were no obstructions to his view, the intersection had good lighting, that there were skid marks left on the road, that the pedestrian was wearing white, that he, the driver, was looking straight ahead, that there were no distractions, that the location of the impact was in the middle of the intersection, etc. Too many lawyers would try to get the witness to admit that he was driving too fast for the conditions, which is a conclusion, instead of taking the time to step by step build the image in the minds of the jurors.

This fact-based method requires closer attention to details. Instead of presenting an important point in a few steps, or questions and answers, that same point is developed in greater detail. While this might seem to some to be contradictory to the points made above about attention spans, the opposite is actually true. First, when information is presented to the witness, and thus to the jury, one fact at a time, devoid of color (and by color I mean adverbs, adjectives and argument), there are fewer objections from your adversary. This serves the dual purpose of keeping your message moving along without interruption and actually speeds up the overall presentation. Often it is these long arguments about the question that take up so much time, permitting jurors to mentally wander off. Moreover, when the question is a short lead-

ing one, the answer is likewise short, usually "yes" or "no." At the end of the session, much more information is presented in a shorter period of time. Learning to think in greater detail is an acquired skill. It often requires that an event, or a point, like "he failed his fiduciary duty," be analyzed with more intense focus, bracketed, and subjective bias removed.

ORGANIZATION: THE LOST ART

The next step is to organize all the data in the file in order to create material for cross-examination. Lawyers are trained to work with complex cases, organizing and distilling them down to the essential data. What is typically lacking, however, is further organization into units that can then be turned into an effective cross-examination.

Because trials historically have primarily relied upon oratory, perhaps the poorest of the vehicles for learning, an attempt must be made to create visual images using language.

This organizational structure can, and should, be started at the beginning of the case, continued throughout the course of the discovery phase, improved after the depositions and finalized for use as cross-examination at trial.

Over the course of many years of being in courtrooms, I have often witnessed even experienced trial attorneys cross-examining without an obvious coherent method. The examinations take place as if it is an argument between two people who are oblivious to the jury. There is rarely a consistent method of questioning that is designed so that the fact finders can easily follow the line of reasoning leading to a conclusion. What follows is a short introduction to such a method that factors in the average human capacity to process and remember information, while improving question organization so that jury can actually remember the information and make the necessary connections to establish your case.

Every case, even simple ones, often involves a series of scenarios. Scenarios are outlines or synopses of the entire case and are composed of a sequence of related events that can often be imagined or visualized. For instance, in a complicated medical malpractice case, there are a number of scenarios that can be identified. Imagine the case as if you were producing a documentary. All movies, indeed all books, have numerous scenarios that are sequenced together to present a story (I do not need to spend time convincing anyone reading this article of the value of the "story.") Once the case has been broken down into important scenarios, keeping in mind that over the course of litigation many more scenarios can be added or deleted, then the larger scenes are broken down into smaller events for more intense analysis. This is where the real work takes place.

The events, topics and issues that make up the larger scenarios are then analyzed to determine which are the most critical for advancing your theory of the case. Obviously, those that are the most important to establish your theory of the case deserve the most attention to detail. This requires more focused attention to developing the facts that best support the theory of the case. I have found it amazing that once I began using this method of greater attention to detail on the important events, issues and topics, I was able to see facts that were there all the time but I had glossed over without appreciating the richness that they could bring to establishing my goals. Once the events are identified, closer analysis of the various issues and topics within those events becomes easier to identify and organize. The facts of the case are analyzed, and often re-analyzed, to identify all the facts that are associated with the particular issues and topics within the numerous events making up the various scenarios. Another point worth mentioning is that most humans, trial lawyers included, tend to think in more conclusory ways. Learning to think in greater detail is often a skill that requires practice, but pays dividends when attempting to create an image in the minds of the listener. This exhaustive analysis of the facts will frequently permit larger groupings of facts to be broken into even smaller groups, which is always the aim. The smaller the topic of discussion, and by that I mean the fewer questions it takes to make the point, the easier it is for the jury to comprehend.

CONSTRUCTING THE CROSS

To develop this point further, it is necessary to step back and discuss several fundamental concepts necessary for a successful cross-examination. The first of these is that by the time the case gets to trial, most of the cross-examination has already taken place at the deposition. Trials are not the place to be conducting discovery. Most of what I am discussing actually takes place during the deposition, long before the information is presented to the jury. If you lose the battle of cross-examination at the deposition, you will likely meet the same fate at trial. The cross-examiner at trial begins with a tight script that he or she rarely need vary from if he or she has done an effective job of cross-examination at the deposition

The essence of this method is to break down the case into a series of separate question groups, or pages. Each group of questions is given its own page. Each page should generally have no more than 10 questions. Each page should be set up as if there is a discrete discussion on a specific topic. The format is always the same. First, there is the visual goal that is being established. Such as, if your goal is to prove that the witness was in a position to have seen the accident, or the witness has a bias, that is the focus of the page. The facts that support that conclusion are arranged going from general questions on the topic to increasingly more specific questions, all with the design to establish a factual goal. There is always a well-thought-out beginning and an end. The cross-examiner is attempting, through words, to create an image in the minds of the jurors. Remember, each of these pages is to be considered as establishing a separate point. If the facts are carefully selected, the conclusion will be self-evident and will not require the witness to actually agree with your conclusion, which is a logical inference that the jurors will be quite capable of drawing for themselves. Again, think about the facts as if you are shooting just one scene in a documentary. If you pay closer attention to movies, you will notice just how quickly the camera angle changes, creating different effects and inviting the viewers' eyes to capture small images in their minds.

Once these pages are created, using as many facts beyond change as possible, they must be sequenced properly. Remember, as an advocate you are not required to give the jury every single fact in the case to consider. You are a director, and it is your job to select what they will see and hear, always being conscious of what your adversary will be able to present. The proper sequencing of the discrete topics will ultimately be linked together to support your theory of the case.

Another factor to consider when constructing the questions is attention to the vocabulary. By asking only leading questions, the questioner has the advantage of controlling the vocabulary. If open-ended questions are asked, as they frequently are at depositions to explore areas where additional information is needed, it is the witness who gains control of the vocabulary. Once you get an affirmation of a fact or phrase contained in your leading question, that new fact can then be reinforced by the rhetorical device of looping. The new fact is used in the next question, without re-asking the fact, by attaching the looped fact to a safe fact in the next question. While the who, what, when, where and how questions are still important at the deposition, these words should seldom be used during the cross-examination at trial.

When preparing the separate topic pages, the goal of the line of questions is placed at the top of the page. The facts that support this goal are placed into short simple questions, one fact per question, and proceed from general facts to more specific. With practice, writing out the question becomes unnecessary. Simply writing the desired fact will give you enough information to craft a short question. There is a secondary gain as well by simply writing the facts, which is the elimination of visual clutter on the page. All trial attorneys have experienced that unpleasant feeling of looking at a page of questions and not being able to instantly focus on the fact needed. Next to the question should be the source of the fact, which is often the page and line reference of the deposition. Where a fact comes directly from a document, such as an office note entry, that page is copied and stapled to the back of the questions. When facts are presented one at a time, the ability of the jury to comprehend the significance of the fact improves dramatically. Because the jury is hearing these facts for the first time, restricting the questions to one fact gives them more time to absorb the message. Remember, each goal-oriented page must be developed independently, which means that there is a beginning and an end to the sequence of questions. By bringing order to the questioning, keeping the questions short and containing only one fact, without conclusions, even a reluctant juror can maintain focus.

THREE RULES OF CROSS

At trial, there are three simple rules to be followed. First, ask only leading questions. There is an enormous advantage to the questioner being the teacher. Leading questions permit control of the vocabulary, topics discussed, sequence of presenting information, and most of all, control of the witness. Every time an open-ended question is asked, the witness becomes the teacher. To be a good leading question, it must make a short declarative statement, not just suggest an answer, in the form of a question. You are really presenting facts, not asking questions. Second, each question must only present one new fact. This point has been made above, but not only does this improve comprehension by the jurors it also improves the likelihood of getting an affirmative response from the witness. There are advanced cross-examination techniques, such as looping, that permit linking multiple facts in one question, but one fact has already been established by the preceding question. Third, these questions must be organized in such a way that they progress logically to a specific goal. Goal in this context means what particular point the examiner is trying to make.

CONCLUSION

Fact-centric cross-examination has many advantages. Learning to see cases in more detail helps the questioner present facts that create better images for the jurors. Most important, asking questions containing one fact at a time gives the examiner more control over the information, the witness and the juror's comprehension of the goal of the line of questions.

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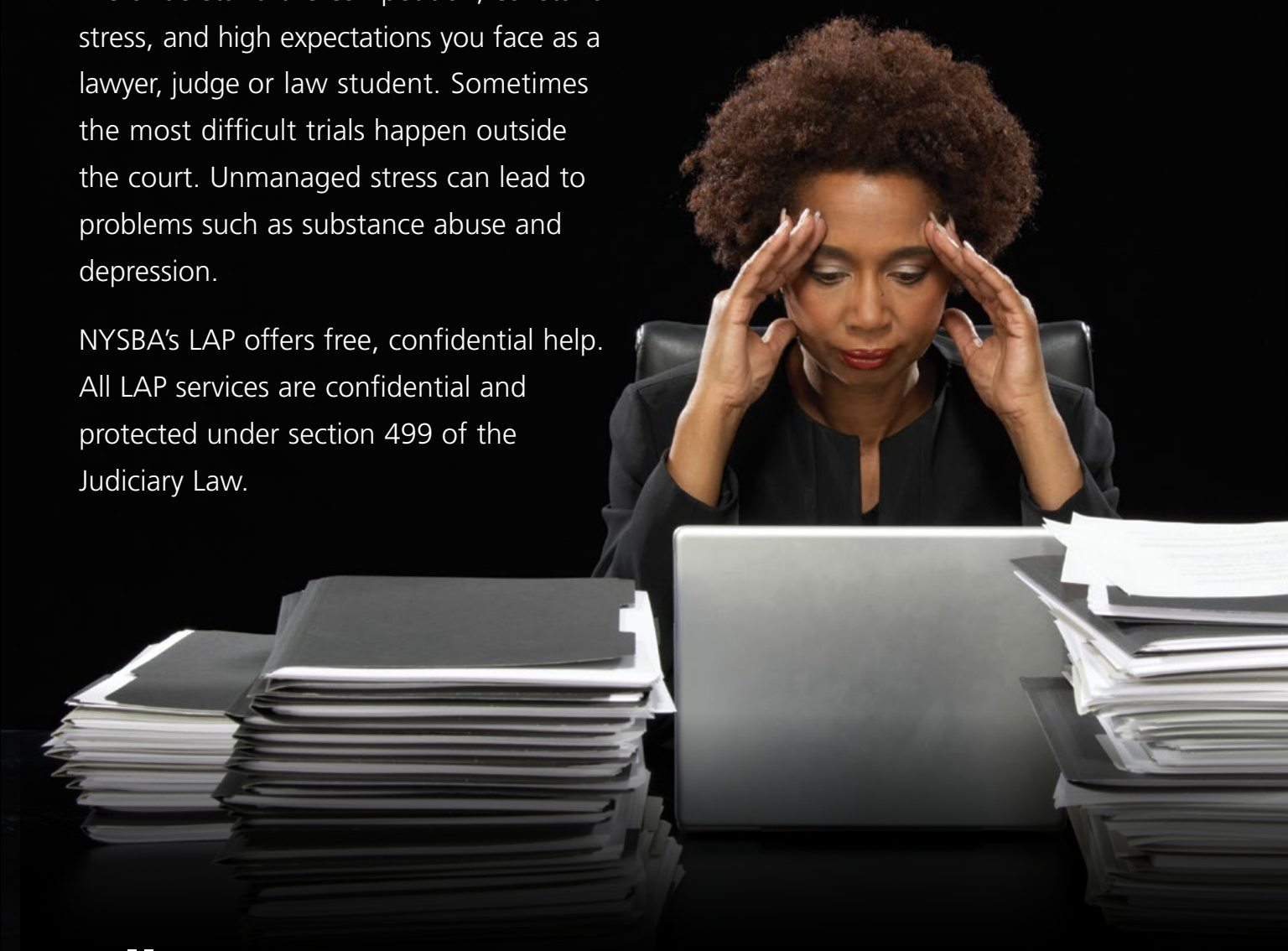

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Immigration: Crime and Punishment

By Cynthia Feathers

These days, the relationship between crime and immigration is widely discussed, but perhaps often misunderstood. Fears for public safety are sometimes invoked as a rationale to keep immigrants out – as well as a basis to deport noncitizens living in the country.

However, recent studies do not support the concept that immigration causes higher crime rates. For example, a 2018 Cato Institute study found that in 2015 in Texas – one of three states with the largest immigrant populations (California and New York being the others) – there were 50 percent fewer criminal convictions for illegal immigrants than for native-born Americans.[1] Further, the criminal conviction rate for legal immigrants was about 66 percent below the native-born rate.

A national study published last year in the journal *Criminology*[2] found that, nationwide, locations with higher percentages of undocumented immigrants did not have higher rates of crime. Indeed, states with larger shares of undocumented immigrants tended to have lower rates of violent crime than states with smaller shares, in the years 1990 through 2014. After controlling for various economic and demographic factors, the relationship between high levels of illegal immigrants and low levels of crime persisted.

DEPORTATION OF NONCITIZENS

The connection between crime and immigration is relevant not only to whether immigrants can enter the country, but also to whether they can remain or are forcibly removed. In recent times, the threat of deportation has significantly increased, as federal authorities have aggressively enforced existing laws to remove noncitizens – including persons with long ties to the United States, families here, and gainful employment – based on convictions of even minor offenses, such as marijuana possession.[3]

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A legal foundation for potentially harsh actions against immigrants who commit crimes was laid a century ago. In 1917, Congress made classes of noncitizens deportable based on conduct committed on American soil.[4] However, there were no automatically deportable offenses. Even as such offenses expanded, judges retained broad discretion to ameliorate unjust results on a case-by-case basis.

That changed in 1996, by virtue of amendments to the Immigration and Nationality Act. Under contemporary law, discretionary relief from deportation has been virtually eliminated. Thus, deportation is practically inevitable for a noncitizen who commits a removable offense. These changes greatly raised the stakes of a noncitizen's criminal conviction. Deportation has become an integral part of the penalty that may be imposed on noncitizen defendants convicted of specified crimes.[5]

In recognition of these changes, the U.S. Supreme Court provided greater protections to noncitizen criminal defendants. The Court noted that counsel who understands the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor to craft a conviction and sentence that reduce the likelihood of deportation.[6] Observing that no criminal defendant, whether a citizen or not, should be left to the mercies of incompetent counsel, the *Padilla* court held that counsel must inform the client whether his or her plea carries a risk of deportation. Counsel's failure to perform such duty will be deemed ineffective assistance of counsel, requiring reversal if the defendant establishes prejudice.[7]

In light of the complexity of immigration law, several years after *Padilla v. Kentucky* was decided, New York State-funded Regional Immigration Assistance Centers (RIACs) were established throughout the state to help the defender community better understand the immigration consequences of criminal convictions and render effective legal assistance to noncitizen clients.[8]

LEGAL PROTECTIONS IN NEW YORK

New York courts have erected protections to noncitizen criminal defendants, based on recognition of the profound consequences of deportation as a penalty for many crimes.[9] As our state's high court has observed,

once a defendant is identified as a potentially removable alien, he or she may be detained, potentially for years.[10] The conditions of that detention are often dire; criminal inmates may fare better than civil detainees.

Yet it is actual removal from the country that exacts the greatest toll. The defendant rarely has further in-person contact with family members remaining in America. Deportation strips the defendant of the job held in this country, thus depriving the defendant and family of critical financial support. The defendant is banished to a country that is often more foreign to him or her than this country, where he or she may have lived since early childhood.[11]

In light of such realities, the *People v. Peque* court held that deportation is a plea consequence of such "tremendous importance, grave impact and frequent occurrence" that due process compels a trial court to apprise a defendant that, if he or she is not an American citizen, deportation may result from a guilty plea to a felony.[12] Reversal is not automatic; the defendant must show a reasonable probability that, if properly advised, he or she would not have pleaded guilty.

Recently, in another important immigration decision, the Court of Appeals held that a noncitizen defendant who demonstrates that the charged crime carries the potential penalty of deportation is entitled to a jury trial.[13] The court reasoned that the constitutional right to a jury trial extends to serious offenses; seriousness can be measured by the severity of the maximum penalty; and penalties encompass not only prison time, but also deportation. Deportation is a penalty of such severity that it rebutted the presumption that that defendant's crimes – class B misdemeanors arising from a domestic violence incident – were petty for Sixth Amendment purposes.[14]

In sum, federal laws, policies, and authorities control the entry of immigrants, as well as the deportation of noncitizens convicted of crimes. However, given the draconian consequences of permanent exile from this country, critical legal protections have been provided by New York courts to noncitizen defendants whose crimes were alleged to have occurred here.

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1. Alex Nowrasteh, *Criminal Immigrants in Texas*, Cato Institute, https://www.cato.org/publications/immigration-research-policy-brief/criminal-immigrants-texas-illegal-immigrant (Feb. 2018, updated Aug. 2018).

2. Michael T. Light and Ty Miller, *Does Undocumented Immigration Increase Violent Crime?,* 56 Criminology 370–401 (Mar. 2018), *at* https://onlinelibrary.wiley.com/doi/pdf/10.1111/1745-9125.12175.

3. Governor Cuomo recently issued pardons to numerous individuals who – despite leading crime-free lives and contributing to their communities – faced deportation due to decades-old New York convictions for low-level, non-violent offenses, https://www.governor.ny.gov/news/governor-cuomo-grants-clemency-29-individuals.

4. *Padilla v. Kentucky*, 559 U.S, 356, 361 (2010), citing the Immigration Law of 1917.

5. *Id.* at 363–64.

6. *Id.* at 373.

7. *Id.* at 374.

8. https://www.ils.ny.gov/content/regional-immigration-assistance-centers.

9. Long before *Padilla*, New York held that an affirmative misrepresentation about deportation consequences of a guilty plea may constitute ineffective assistance of counsel. *See People v. McDonald*, 1 N.Y.3d 109 (2003).

10. *People v. Peque*, 22 N.Y.3d 169, 188–89 (2013), *cert denied sub nom. Thomas v. New York,* 574 U.S.__ (2014).

11. *People v. Peque*, *supra* note 10, at 189.

12. *Id.* at 176.

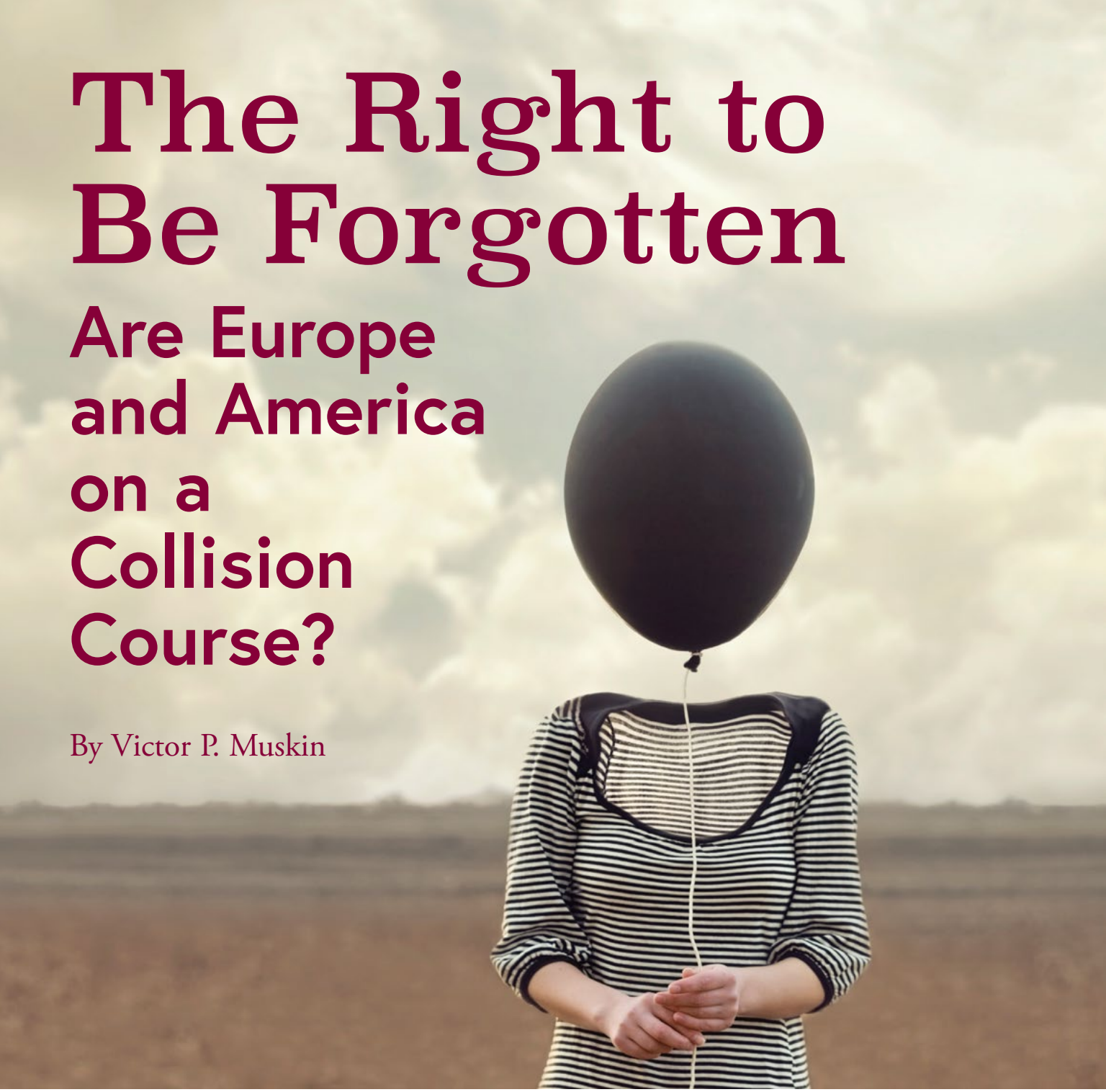
13. *People v. Suazo*, ___ N.Y.3d ___ (Nov. 27, 2018) (WL 6173962).

14. CPL § 340.40 permitted bench trials for criminal defendants in New York City facing such charges since amendments to the statute in 1984 – at a time when, unlike now, criminal convictions triggered deportations in a very limited set of circumstances.

The Right to Be Forgotten

Are Europe and America on a Collision Course?

By Victor P. Muskin



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In 1918, a New Orleans prostitute named Gabrielle Darley, abandoned by a lover who had promised to marry her, tracked him to California and promptly shot him. After a long and dramatic murder trial, she was acquitted. Gabrielle soon gave up her membership in the world's oldest profession, married one Bernard Melvin, and under her married name embarked upon an "exemplary, virtuous, honorable and righteous life," making many friends. None of her new friends knew about her past. Some years later, Hollywood discovered Gabrielle's story buried in the court archives and made it into a sensational 1925 movie featuring Tyrone Power, Sr.

called *The Red Kimono*.[1] Without Gabrielle's knowledge or consent, the lead character used her actual name. The film was completely truthful and faithfully based on the court record. However, the revelation of Gabrielle's past exposed her to "obloquy, contempt and ridicule," causing her friends to abandon her.

Gabrielle's case against the filmmaker for inflicting "grievous mental and physical suffering" was initially dismissed, but the appeals court upheld her claim as an infringement of her right "to pursue happiness" under California's constitution.[2] The wrong committed against Gabrielle was not the telling of her story but the use of her true name. The Court of Appeals stated:

> We believe that the publication by respondents of the unsavory incidents in the past life of appellant after she had reformed, coupled with her true name, was not justified by any standard of morals or ethics known to us, and was a direct invasion of her inalienable right guaranteed to her by our Constitution, to pursue and obtain happiness. Whether we call this a right of privacy or give it any other name is immaterial, because it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others.[3]

Forty years later, the California Supreme Court had occasion to revisit the issue in a case involving one Marvin Briscoe. With an accomplice, Briscoe had hijacked a truck in Kentucky and fought a gun battle with police. After the case was over, Briscoe abandoned his criminal past, moved to California, became entirely rehabilitated, and led an "exemplary, virtuous and honorable life." Like Gabrielle's, his anonymity was not to last. Eleven years later, *Reader's Digest* magazine published a truthful article called "The Big Business of Hijacking." One sentence in the article referred to Briscoe's case and identified him by name. He was promptly ostracized by his family, including his 11-year-old daughter, and abandoned by his friends. Following the precedent of *Melvin v. Reid,* the California Supreme Court did not dispute the newsworthiness of the event, but it did uphold Briscoe's right to sue *Reader's Digest* for damages caused by the invasion of his privacy interests and allegedly reckless disclosure of his name.[4]

Long before the age of the internet and search engines, Gabrielle Melvin and Marvin Briscoe sued for and won the right not to have their disreputable pasts return to haunt them in later years. Their cases marked the beginning, at least in California, of what might have been, but never became, a right to be forgotten in U.S. law.

As compelling as the *Melvin* and *Briscoe* cases were, there was and remains in American law an inherent tension between privacy rights and freedom of speech and the press. California's infant right to be forgotten was soon laid to rest by the U.S. Supreme Court. In *Cox Broadcasting Corp. v. Cohn*,[5] a television station had broadcast the name of a deceased rape victim in violation of Georgia state law. Her father sued the station and the broadcaster for damages. He succeeded in Georgia's state courts, but the U.S. Supreme Court reversed. The high court ruled that the press freedoms enshrined in the First and Fourteenth Amendments to the U.S. Constitution make it unconstitutional to hold the press liable for truthfully publishing information that has been made public in court records. *Cox* obliterated the nascent privacy rights embodied in *Melvin* and *Briscoe* and effectively ended any movement toward a right to be forgotten in U.S. law.[6]

In Europe, the fortunes of the right to be forgotten have been radically different. In 1998, a Spanish lawyer named Mario Costeja Gonzalez faced a judicial auction of his property to pay off his debts. A Spanish newspaper called *La Vanguardia* routinely published the auction notices. Attorney Costeja was able to contend with his financial problems but not with Google, which continued, year after year, to publish links to the notices in *La Vanguardia* on every search for his name. There was never any dispute that the published information was truthful.

Living in Europe, Mr. Costeja had behind him something stronger than the limited privacy rights available in U.S. law; he had the sweeping rules of the European Community's Directive 95/46. Tracing its origins to the horrific abuses of personal data by the Nazi state,[7] Europe's community-wide legislation has governed data privacy policy in all 28 member nations since 1995.[8] It embodies far broader privacy protections than exist in the U.S. and has produced a major confrontation between Google and Europe.

The national enforcement arm in Spain for the EC privacy law is the Spanish Data Protection Authority (DPA). In 2010, Attorney Costeja filed requests with the DPA to require the newspaper to remove the items from its website and Google to remove the links to the notices. He was partly successful: while the DPA allowed the notices to remain on the newspaper's website, it ordered Google to remove the links to the newspaper from its search engine.[9]

On Google's appeal, the case ended up in the European Court of Justice (ECJ), the supreme court for member states of the European Union. In a landmark ruling extending far beyond any relief permissible under U.S. law, the ECJ in 2014 confirmed the actions taken by Spain's DPA. No longer would Google searches be permitted to turn up Costeja's financial past; in fact, the right he vindicated would apply in all 28 EU nations. Costeja's financial history, though personally and professionally embarrassing, involved no sensational crimes as in *Briscoe* or moral indelicacies as in *Melvin*. That it nonetheless justified the court-ordered erasure[10] of Google's links illustrates the breadth of Europe's right to be forgotten.

The *Costeja* case was only the beginning of Google's troubles in Europe. France was the next to act. As the newly affirmed right to be forgotten became known, France's data protection authority, CNIL (Commission Nationale de l'Informatique et des Libertés) stepped into the picture in other cases.

CNIL is known for its aggressive enforcement of data privacy rights. In June 2015, after receiving several delisting requests, it ordered Google to erase links pertaining to certain French complainants. The order directed Google to remove the listings on its full search engine. Google appealed on the ground, among others, that by requiring actions having an effect outside of France, CNIL was asserting extraterritorial jurisdiction. CNIL denied the appeal in September 2015. Google responded by expanding its delisting procedure to its European search engine extensions, e.g., google.fr and google.de, but not to google.com, which is accessed from outside Europe. In February 2016, perhaps anticipating that its measures would be deemed insufficient, Google further expanded its delisting process to google.com, but only for searches originating in France. This still left google.com users outside France with links to information pertaining to the French complainants that CNIL had ordered Google to erase. Not unexpectedly, CNIL deemed Google's steps to be noncompliant and, in March 2016, fined it 100,000 euros.[11] Google appealed to France's Conseil d'Etat (the supreme tribunal for administrative appeals). In July 2017, the Conseil d'Etat deferred its decision, instead referring the case to the ECJ for a preliminary ruling.[12] This placed the case squarely before the same tribunal that decided *Costeja* in 2014. The matter remains unresolved at this writing.

As compelling as the* Melvin *and* Briscoe *cases were, there was and remains in American law an inherent tension between privacy rights and freedom of speech and the press.

Meanwhile, an important extraterritoriality data issue arose in the U.S. As part of a 2013 investigation into drug trafficking, the U.S. government obtained a warrant requiring Microsoft to produce the electronic records of a particular email account. Microsoft produced non-content information located in the United States, but declined to produce the account contents located at a Microsoft data center in Ireland. Microsoft argued that the federal laws involved were not intended to apply extraterritorially and cited the European and Irish data privacy violation penalties that were implicated by the warrant. A lower court judge nevertheless ordered Microsoft to produce the records. Microsoft refused and was held in contempt. The Court of Appeals reversed, citing, among other things, the presumption against extraterritorial application of U.S. laws. The appeals court also found it "difficult to dismiss" the foreign sovereign's interests in its data protection laws and upheld Microsoft's refusal to comply.[13]

The government appealed to the Supreme Court, which dismissed the case in April 2018,[14] citing 2018 federal legislation called the "CLOUD" Act.[15] The CLOUD Act removes any doubt as to the intended extraterritorial application of the law, at least in law enforcement cases, as it obligates U.S. parties to disclose information regardless of whether it is stored within or outside of the United States.[16] Whether this legislation will resolve or merely reinforce conflicts between U.S. document production orders and European privacy law remains to be seen. Since the U.S. government has now obtained a new warrant against Microsoft under the CLOUD Act,[17] the courts may soon speak on this point.

While the *Microsoft* case was working its way through the U.S. courts, the European Commission in 2016 adopted comprehensive new privacy rules in its General Data Protection Regulation (GDPR). The GDPR superseded EC Directive 95/46 as of May 25, 2018. The new erasure provisions revamp and strengthen the prior law.[18]

The expanded right to be forgotten is defined in GDPR Article 17. A data controller (e.g., a search engine) is now obligated to erase personal data at the request of the data subject (e.g., an individual or other complainant) without undue delay when:

(a) The data is no longer necessary in regard to the purpose for which it was collected;

(b) The data subject withdraws consent that was previously given;

(c) The data subject objects *and* there is no necessity for retention (e.g., public interest or legal claims);

(d) The data was unlawfully processed;

(e) Erasure is required in order to comply with EU or a member state's law; or

(f) The data pertains to underage children.[19]

Under listed exceptions, erasure need not be affected when retention is justified by:

(a) Freedom of expression and information;

(b) Compliance with a legal obligation;

(c) Reasons of public health;

(d) Public interest or scientific or historical research; or

(e) The establishment or defense of legal claims.[20]

The penalties for violation under the new law are dramatically enhanced. EU member governments can now impose fines for data breaches in amounts up to the greater of 20 million euros or 4 percent of a company's worldwide revenue.[21] The fines are required to be "effective, proportionate and dissuasive."[22] In addition, private individuals have a private right of action for damages[23] and member states are authorized to implement penal sanctions.[24] Google has implemented a procedure for requesting erasure under the GDPR,[25] but it remains to be seen whether it complies with the legislation. The GDPR will likely be brought to bear by the ECJ as it considers *Google v. CNIL* and charts the way forward. In all events, given the onerous penalties for violation, a data processor now ignores a request for erasure at its peril.

Adding to the difficulties presented by Europe's strict data privacy rules is the fact that in U.S. civil cases, owing to a 1987 Supreme Court decision,[26] and notwithstanding a long-standing international treaty governing the cross-border production of evidence,[27] the courts typically give scant deference to the data protection rules of other countries. As a result, a U.S. civil disclosure order that mandates production of records protected by European privacy law can confront the receiving party with a veritable Hobson's choice. It can comply and risk heavy European fines or even imprisonment for violating the GDPR, or it can resist the order, comply with European restrictions and risk crippling litigation sanctions in the U.S.

The broad scope of Europe's right to be forgotten, its sharp contrast with U.S. law and the increasing number of intersecting legal proceedings make future conflicts inevitable. Consider the following possibilities:

- If the ECJ sustains CNIL's position on Google's appeal, might CNIL expand its order to direct Google to delist links to the French complainants from its websites in the U.S.?
- Would U.S. courts enforce such an order?
- If Google refuses to comply, would it be at risk of a "dissuasive" fine in France of up to 4 percent of its global revenues, *exceeding $1 billion*, under the new GDPR rules?
- What would happen if France prevails in *Google*, orders it to effectuate delistings in the U.S., and attempts to punish non-compliance by ordering the arrest of Google's officers in France?
- How will the increased penalties under the GDPR affect the tendency of U.S. courts to give little more than lip service to foreign law when ordering disclosure of information held abroad?
- How will the CLOUD Act affect extra-territorial confrontations between Europe's data privacy legislation and U.S. disclosure requirements?
- Will Europe impose a fine against Facebook of more than $1.5 billion following disclosure of a recent data breach affecting 50 million users?
- Will Europe order Facebook to erase data now out of its control, and penalize it for failing to comply?
- Will American users try to find data hosts in Europe in order to seek the benefit of privacy rights not available in the U.S.?

These questions only scratch the surface. Are Europe and America on a collision course? Indubitably. The courts on both sides will be challenged to find creative solutions. Gabrielle Melvin could hardly have imagined that her fateful story would resurface in a discussion of major international legal issues a century later.

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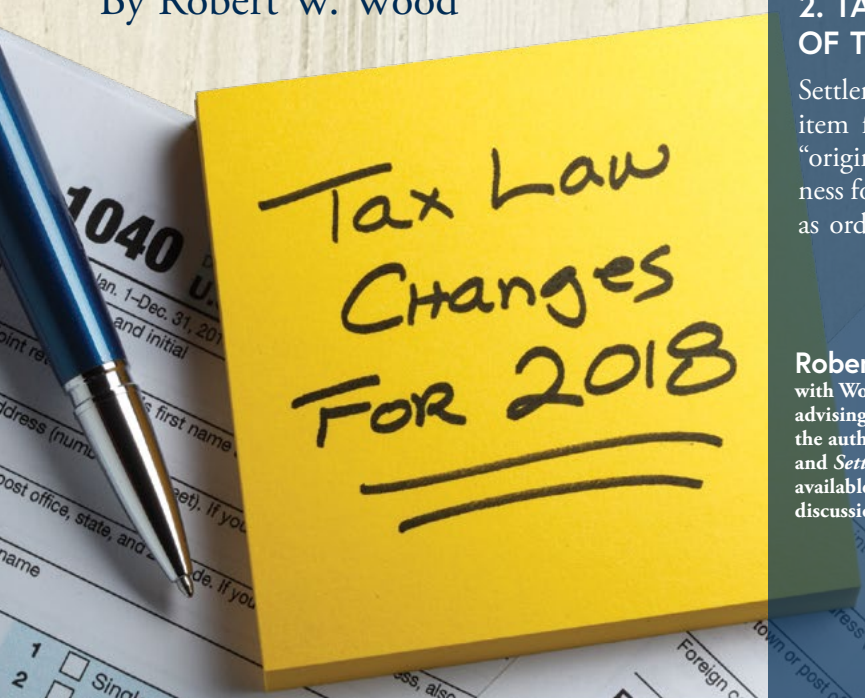
1. The film is available for purchase on Amazon.com.
2. *Melvin v. Reid*, 112 Cal. App. 285 (1931).
3. *Id.* at 292.
4. *Briscoe v. Reader's Digest Ass'n*, 4 Cal.3d 529 (1971).
5. 420 U.S. 469 (1975).
6. *See Garcia v. Google, Inc.*, 786 F.3d 733, 745–46 (9th Cir. 2015) (right to be forgotten not recognized in the United States); *Manchanda v. Google, Inc. et al.*, 2016 U.S. Dist. Lexis 158458 (S.D.N.Y.16-cv-3350 JPO) at n. 2 (so-called "right to be forgotten" recognized in legal systems other than our own); Note, *The Right to Be Forgotten*, 64 Hastings L.J. 257 (2012).
7. Bertelsmann Foundation, *Freude, Echos of History: Understanding German Data Protection* (2016), https://www.bfna.org/research/echos-of-history-understanding-german-data-protection/.
8. EC Directive 95/46 has been superseded by the new General Data Protection Regulation (GDPR) effective May 25, 2018.
9. *Google Spain SL and Google Inc. v. Agencia Espanola de Proteccion de Datos and Mario Costeja Gonzalez*. (No. C-131/12).
10. The right to be forgotten is referred to in European privacy law as the right of "erasure."
11. CNIL Restricted Committee Decision No. 2016-054 of March 10, 2016.
12. *Google v. CNIL*, Case No. C-507/17; CE No. 399922, 19 juillet 2017, GOOGLE, INC. (in French).
13. *Microsoft Corp. v. United States*, 837 F.3d 197 (2d Cir. 2016), *granted*, 138 S.Ct. 356, 2017 US Lexis 6343.
14. *United States v. Microsoft Corp.,* 584 U.S. ____ (2018) (No. 17-2).
15. Pub. Law 115-141 (2018), the Clarifying Lawful Overseas Use of Data Act.
16. CLOUD Act, §103(a)(1).
17. *United States v. Microsoft Corp.*, *supra* note 14, at 3.
18. Compare, e.g., EC Directive 95/46 Article 12(a) (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31995L0046) with EU Regulation 2016/679 Article 17 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0679).
19. GDPR, EU Reg. 2016-679, Article 17(1).
20. *Id.*, Article 17(3).
21. *Id.*, Article 83(5).
22. *Id.*, Article 84(1).
23. *Id.*, Article 82(1).
24. *Id.*, Articles 58(5), 84.
25. https://www.google.com/webmasters/tools/legal-removal-request?complaint_type=rtbf&hl=en&rd=1.
26. *Societe Nationale Industrielle Aerospatiale et al. v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987).
27. Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

How Settlements and Legal Fees Are Taxed Post-Tax Reform

By Robert W. Wood



Lawyers and clients resolve disputes all the time, usually with an exchange of money and a release. There are always tax considerations, and some of these rules changed with the passage of the Tax Cuts and Jobs Act[1] in December 2017. The tax changes impact the treatment of attorney fees in a variety of cases, as well as sexual harassment and abuse cases.

Lawyers and their clients should know the basics and a few trouble spots. The tax treatment can vary enormously, depending on how you were damaged, how the case was resolved, how checks and IRS Forms 1099 are issued, etc.

1. SETTLEMENTS AND JUDGMENTS ARE TAXED THE SAME

The same tax rules apply whether you are paid to settle a case or win a lawsuit judgment, or even if your dispute only reached the letter-writing phase. Despite the similarities, though, you'll almost always have more flexibility to reduce taxes if a case settles rather than goes to judgment.

If you are audited, you'll need to show what the case was about and what you were seeking in your claims. Consider the settlement agreement, the complaint, the checks issued to resolve the case, IRS Forms 1099 (or W-2), etc. You can influence how your recovery is taxed by how you deal with these issues.

2. TAXES DEPEND ON THE "ORIGIN OF THE CLAIM"

Settlements and judgments are taxed according to the item for which the plaintiff was seeking recovery (the "origin of the claim").[2] If you're suing a competing business for lost profits, a settlement will be lost profits, taxed as ordinary income. If you get laid off at work and sue

Robert W. Wood practices law with Wood LLP (www.WoodLLP.com), advising litigants about tax issues. He is the author of *Taxation of Damage Awards* and *Settlement Payments* and other books available at www.TaxInstitute.com. This discussion is not intended as legal advice.

for discrimination seeking wages and severance, you'll be taxed as receiving wages.

In fact, your former employer will probably withhold income and employment taxes on all (or part of) your settlement. That is so even if you no longer work there, even if you quit or were fired years ago. On the other hand, if you sue for damage to your condominium by a negligent building contractor, your damages usually will not be income.

Instead, the recovery may be treated as a reduction in your purchase price of the condominium. That favorable rule means you might have no tax to pay on the money you collect. However, these rules are full of exceptions and nuances, so be careful. Perhaps the biggest exception of all applies to recoveries for personal physical injuries (see point 3).

3. SOME RECOVERIES ARE TAX-FREE

This important rule causes almost unending confusion among lawyers and clients. If you sue for personal physical injuries like a slip-and-fall or car accident, your compensatory damages should be tax-free. That may seem odd, since you may be seeking lost wages because you couldn't work after your injuries.

But a specific section (26 U.S.C. § 104) of the tax code shields damages for personal physical injuries and physical sickness. Note the "physical" requirement. Before 1996, "personal" injury damages were tax-free. That meant emotional distress, defamation, and many other legal injuries also produced tax-free recoveries. That changed in 1996.[3]

Since then, your injury must be "physical" to give rise to tax-free money. Unfortunately, neither the IRS nor Congress has made clear what that means. The IRS has generally said that you must have visible harm (cuts or bruises) for your injuries to be "physical."[4] This observable bodily harm standard generally means that if you sue for intentional infliction of emotional distress, your recovery is taxed.

If you sue your employer for sexual harassment involving rude comments or even fondling, that is not physical enough for the IRS. But some courts have disagreed. The Tax Court, in particular, has allowed some employment lawsuits complete or partial tax-free treatment where the employee had physical sickness from the employer's conduct or the exacerbation of a preexisting illness.[5]

Taxpayers routinely argue in U.S. Tax Court that their damages are sufficiently physical to be tax-free. Unfortunately, the IRS usually wins these cases.[6] In many cases, a tax-savvy settlement agreement can improve the plaintiff's tax chances.

4. EMOTIONAL DISTRESS SYMPTOMS ARE NOT PHYSICAL

The tax law draws a distinction between money for physical symptoms of emotional distress (like headaches and stomachaches) and personal physical injuries or physical sickness.[7] Here again, these lines are not clear. For example, if in settling an employment dispute you receive $50,000 extra because your employer gave you an ulcer, is an ulcer physical or is it merely a symptom of your emotional distress?

Many plaintiffs end up taking aggressive positions on their tax returns, claiming that damages of this nature are tax-free. But that can be a losing battle if the defendant issues an IRS Form 1099 for the entire settlement. Getting an agreement with the defendant about the tax issues can help. Otherwise, you might end up surprised with Forms 1099 you receive the year after your case settles. At that point, you will not have a choice about reporting the payments on your tax return.

5. MEDICAL EXPENSES ARE TAX-FREE

Even if your injuries are purely emotional, payments for medical expenses are tax-free, and what constitutes "medical expenses" is surprisingly liberal.[8] For example, payments to a psychiatrist or counselor qualify, as do payments to a chiropractor or physical therapist. Many nontraditional treatments count, too.

However, if you have previously deducted the medical expenses and are reimbursed when your suit settles in a subsequent year, you may have to pay tax on these items. The "tax benefit" rule[9] says that if you previously claimed a deduction for an amount that produced a tax benefit (meaning it reduced the amount of tax you paid), you must pay tax on that amount if you recover it in a subsequent year. Conversely, if you deducted an amount in a previous year, and that deduction produced no tax benefit to you, then you can exclude the recovery of that amount in a later year from your gross income.[10]

6. ALLOCATING DAMAGES CAN SAVE TAXES

Most legal disputes involve multiple issues. You might claim that the defendant kept your laptop, frittered away your trust fund, undercompensated you, failed to reimburse you for a business trip, or other items. In fact, even if your dispute relates to one course of conduct, there is a good chance the total settlement amount will involve several types of consideration.

It is usually best for plaintiff and defendant to try to agree on what is being paid and its tax treatment. Such agreements are not binding on the IRS or the courts in later tax disputes, but they are rarely ignored. As a practical matter, what the parties put down in the agreement is

often followed. And in the real world, there are usually multiple categories of damages.

For all of these reasons, it is more realistic – and more likely to be respected by the IRS and other taxing authorities – if you divide up the total and allocate it across multiple categories. If you are settling an employment suit, there might be some wages (with withholding of taxes and reported on a Form W-2); some nonwage emotional distress damages (taxable, but not wages, so reported on a Form 1099); some reimbursed business expenses (usually nontaxable, unless the employee had deducted them); some pension or fringe benefit payments (usually nontaxable); and so on. There may even be some payment allocable to personal physical injuries or physical sickness (nontaxable, so no Form 1099), although this subject is controversial (see points 3 and 4 above).

Even if your injuries are purely emotional, payments for medical expenses are tax-free, and what constitutes "medical expenses" is surprisingly liberal.

7. CAPITAL GAIN INSTEAD OF ORDINARY INCOME

Outside the realm of suits for personal physical injuries or physical sickness, just about everything is income. However, that does not answer the question of *how* it will be taxed. If your suit is about damage to your house or your factory, the resulting settlement may be treated as capital gain. Long term capital gain is taxed at a lower rate (15 percent or 20 percent, not 39.6 percent), so it is much better than ordinary income.

Apart from the tax rate preference, your tax basis may be relevant too. This is generally your original purchase price, increased by any improvements you have made, and decreased by depreciation, if any. In some cases, your settlement may be treated as a recovery of basis, not income.

A good example would be harm to a capital asset, such as your house or your factory. If the defendant damaged it and you collect damages, you may be able to simply reduce your basis rather than reporting gain. Some settlements are treated like sales, so again, you may be able to claim your basis.[11] In fact, there are many circumstances in which the ordinary income versus capital distinction can be raised, so be sensitive to it. For example, some patent cases can produce capital gain, not ordinary income.[12] The tax rate spread can be nearly 20 percent.

8. DEDUCTING ATTORNEY FEES IS TRICKY

This area has major changes under the Trump tax law. Whether you pay your attorney hourly or on a contingent fee basis, legal fees will impact your net recovery and the type of deduction you can claim for the legal fees can vary materially.

Say you settle a suit for intentional infliction of emotional distress against your neighbor for $100,000, and your lawyer keeps 40 percent or $40,000. You might think that you would have $60,000 of income. Instead, you will have $100,000 of income. Up until the end of 2017, you could claim a $40,000 miscellaneous itemized deduction for legal fees.[13]

That meant you faced several limitations (including alternative minimum tax (AMT)), but at least the fees were deductible. In 2018 and thereafter, there is *no* deduction for these legal fees. Yes, that means you collect 60 percent but are taxed on 100 percent. Notably, not all lawyers' fees face this draconian tax treatment.

If the lawsuit concerns the plaintiffs' trade or business, the legal fees are a business expense. Those legal fees can be deducted above the line, the best kind of deduction.[14] If your case involves claims against your employer, or involves certain whistleblower claims, there is also an "above-the-line" deduction for legal fees.[15]

That means you can deduct those legal fees before you reach the adjusted gross income (AGI) line on the first page of your Form 1040. But outside of employment and certain whistleblower claims or your trade or business, be careful. There are sometimes ways of circumventing these attorney fee tax rules, but you'll need sophisticated tax help before your case settles to do it.

Caution. Some advisers are worried that the above-the-line deduction is in jeopardy too. Section 62 allows an above-the-line deduction for a "deduction allowable under this chapter." Technically, it promotes an existing below-the-line deduction, to make it a (better) above-the-line deduction. Thus, there is at least an argument that this is a problem Congress or the IRS should clarify. But it is mostly a glitch that is being ignored. Congress

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surely did not mean to impact the above-the-line deduction. Moreover, after the Tax Cuts and Jobs Act, Congress subsequently *extended* the above-the-line deduction to SEC whistleblower claims, suggesting that the deduction is still in the law.

9. PUNITIVE DAMAGES AND INTEREST ARE ALWAYS TAXABLE

Punitive damages and interest are always taxable, even if your injuries are 100 percent physical. Say you are injured in a car crash and get $50,000 in compensatory damages and $5 million in punitive damages. The $50,000 is tax-free, but the $5 million is fully taxable. What's more, you may be unable to deduct your attorney fees (on this point, see item 8 above). Because the case does not arise out of employment or a trade or business, any taxable money can be 100 percent taxable even if 40 percent goes to the lawyer. The lack of tax deduction for legal fees commencing in 2018 is likely to catch many people by surprise in 2019 at tax return time.

The same can occur with interest. You might receive a tax-free settlement or judgment, but pre- or post-judgment interest is always taxable.[16] As with punitive damages, taxable interest can produce attorney fee deduction problems. These rules can make it more attractive (from a tax viewpoint) to settle your case rather than have it go to judgment.

10. SEX HARASSMENT AND ABUSE

Under the new tax bill, confidential sexual harassment or abuse settlements face special tax rules.[17] If the settlement is confidential, the defendant cannot deduct the settlement payment or the legal fees.[18] As written, this no deduction rule seems to apply to plaintiff legal fees, too.

Most sexual harassment cases arise in the employment context, in which an above-the-line deduction for plaintiff legal fees applies. But this deduction is now called into question. That surely unintended result for plaintiffs may be corrected. The pending "Repeal the Trump Tax Hike on Victims of Sexual Harassment Act of 2018" would do so.

No plaintiff wants to pay tax on 100 percent and receive 40 percent. Some plaintiffs insist on omitting the nondisclosure provision or a tax indemnity if the plaintiff has his or her tax deduction for legal fees denied. Others agree to a set (usually small) amount of the settlement allocated to sexual harassment. But this may be unrealistic where the whole case is about sexual harassment, and there is no guarantee the IRS will agree.

11. CONSIDER THE DEFENSE

Plaintiffs are generally much more worried about tax planning than defendants. Defendants paying settlements or judgments always want to deduct them, and usually they can. A notable new exception applies to confidential sexual harassment or abuse settlements, and related legal fees. Outside this context, even punitive damages are tax deductible by businesses. Only certain government fines cannot be deducted. And even then defendants can sometimes find a way if the fine is in some way compensatory.

CONCLUSION

Nearly every piece of litigation eventually involves tax issues. For many, the tax issues are tougher and more important for cases that are resolved in 2018 and thereafter. Where possible, urge clients to get some tax help early. It is usually much harder to achieve a positive tax result if the first time someone raises tax issues is when they are doing tax returns (with Forms 1099 in hand) at tax time the year after the settlement.

---

1. P.L. 115-97.

2. *See, e.g., United States v. Gilmore*, 372 U.S. 39, 49 (1963); *Hort v. Commissioner*, 313 U.S. 28 (1941); *Arrowsmith v. Commissioner*, 344 U.S. 6 (1952).

3. *See* Section 1605(a) and (b) of the Small Business Job Protection Act of 1996, Public Law 104-188, 110 Stat. 1838. The legislative history of the 1996 amendments to IRC § 104(a)(2) provides that the reason for the change is because "[t]he confusion as to the tax treatment of damages received in cases not involving physical injury or physical sickness has led to substantial litigation, including two Supreme Court cases within the last four years. The taxation of damages received in cases not involving a physical injury or physical sickness should not depend on the type of claim made." H.R. Rep. No. 104-586, at 143 (1996) (Conf. Rep.).

4. *See* LTR 200041022 (July 17, 2000): "We believe that direct unwanted or uninvited physical contacts resulting in observable bodily harms such as bruises, cuts, swelling, and bleeding are personal physical injuries under section 104(a)(2)."

5. *See, e.g., Domeny v. Commissioner*, T.C. Memo. 2010-9 (exacerbation of multiple sclerosis symptoms); and *Parkinson v. Commissioner*, T.C. Memo. 2010-142 (heart attack from job stress).

6. *See, e.g., Sharp v. Commissioner*, T.C. Memo. 2013-290; *Molina et ux. v. Commissioner*, T.C. Memo. 2013-226.

7. *See* I.R.C. Section 104.

8. *See* I.R.C. Section 213.

9. *See* I.R.C. Section 111(a); *Hornberger v. Commissioner*, 4 Fed. Appx. 174 (4th Cir. 2001).

10. See *Hillsboro Nat'l Bank v. Commissioner*, 460 U.S. 370, 377 (1983).

11. See *Doud v. Commissioner*, 1982-158 (1982) (recovery for a stamp collection was not taxable income where Doud's basis in his collection was less than he recovered).

12. *See, e.g., Kucera v. Commissioner*, 1951 T.C. Memo LEXIS 269; *E.I. du Pont de Nemours and Co. v. U.S.*, 432 F.2d 1052, 1055 (3d Cir. 1970).

13. *See Commissioner v. Banks*, 543 U.S. 426 (2005).

14. I.R.C. Section 162.

15. *See* I.R.C. Section 62(a)(20).

16. *See Kovacs v. Commissioner*, 100 T.C. 124 (1993), *aff'd*, 25 F.3d 1048 (6th Cir. 1994) (holding that despite a lump-sum payment for wrongful death damages, the interest portion of the award simply did not constitute excludable damages under Section 104); Letter Ruling 199952080 (Sept. 30, 1999). This Letter Ruling involved the application of Section 104(a)(2) prior to its amendment by the 1996 Act. In order for amounts to be excludable under Section 104(a)(2) after the 1996 Act, they must be paid on account of personal physical injury or physical sickness.

17. Public Law No. 115-97, Section 13307.

18. I.R.C. Section 162(q) provides:

> (q) PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE. — No deduction shall be allowed under this chapter for —
>
> (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or
>
> (2) attorney's fees related to such a settlement or payment.

NEW YORK STATE BAR ASSOCIATION
State Bar News

2019 Annual Meeting

Presentation of the Ruth Schapiro Award by the Women in Law Section. Left to right: NYSBA Past President Claire Gutekunst; NYSBA President Michael Miller; Schapiro honoree Deborah Scalise; NYSBA Secretary Sherry Levin Wallach; Women in Law Section Chair Susan Harper; Jacqueline Hattar and Frettra Miller De Silva, co-chairs of the Women in Law Awards Committee.

NY Court of Appeals Chief Judge Janet DiFiore receives NYSBA's Gold Medal award from President Michael Miller at the President's Dinner.

Left to right: NYSBA Executive Director Pamela McDevitt, University at Buffalo School of Law Dean Aviva Abramovsky, Finance Committee Chairman T. Andrew Brown and Immediate Past President Sharon Stern Gerstman.

NYSBA member Peter Coffey speaks at the House of Delegates meeting.

NYSBA President Michael Miller addressing the International Section luncheon.

Former U.S. Attorney for the Southern District of NY Preet Bharara in a 'fireside chat' with Fordham University School of Law Dean Matthew Diller at the Judicial Section luncheon.

The Law360 Pro Say podcast hosts talking with NYSBA President Michael Miller, during their live-audience recording of the podcast.

Jennifer Ismat, editor-in-chief of the *NY International Law Review*, speaking at the International Section luncheon.

Brett Figlewski, legal director of the LGBT Bar Association, and Brooke Barone, petitioner in the landmark Court of Appeals ruling *Brooke S.B.*, taking audience questions during the Family Law Section meeting.

Shirani B. Ponnambalam receives the Senior Lawyers Section Jonathan Lippman Pro Bono Award from former NY Court of Appeals Chief Judge Lippman. Senior Lawyers Section Chair C. Bruce Lawrence is on the right.

5 questions and a closing argument

Member Spotlight with Michele Kahn

Kahn is a partner at Kahn & Goldberg, LLP. She lives in New York City.

What do you find most rewarding about being an attorney?

My practice includes "happy" legal matters, such as house closings, adoptions, employment contracts, and I also handle difficult matters like divorce and business litigation. Being able to help clients with real life issues, and to achieve the best possible result (or, sometimes, the least bad result) is very rewarding.

I also like the ability to handle whatever pro bono and reduced fee matters I want to take on. Once I agreed to represent someone who had been defrauded by her more sophisticated family member. I knew going into it that I would not be paid; I also knew it was a difficult case to win. But I obtained a collectible judgment and actually got a small fee. Sometimes a good deed *does* "go unpunished"! I also handled an appeal on a pro bono basis because I thought the appeal would establish an important point of law for the LGBT (lesbian, gay, bisexual, transgender) community – that a complaint for breach of an oral financial agreement between unmarried partners should not have been dismissed – and it did. (*Dee v. Rakower*, 112 A.D.3d 204 [2d Dept 2013]).

What do you find most challenging about being an attorney?

Balancing family and work is always a challenge and making time for yourself is nearly impossible. I try to make sure that clients have realistic expectations about what times of the day and what days of the week I will and will not be replying to non-emergency emails.

Weekends with my family are virtually sacrosanct, unless I am in the middle of a trial or there is another legitimate, crucial emergency.

What or who inspired you to become a lawyer?

My father was a lawyer and there is no doubt that he was the primary influence on my becoming a lawyer. He started out with a small practice and my mother, who was a teacher, helped him sometimes. When clients were in the office, my mother called my father "Mr. Kahn" so his clients would think he could afford a secretary! He became very successful later in his career. In his role as general counsel of Apple Records, he was essentially the lawyer for the Beatles, Rolling Stones, and other famous musicians. But throughout his career, he always helped out neighbors – the local mailman, the school custodian and other people who couldn't afford to pay his fees.

What do you think that most people misunderstand about lawyers and the legal system?

There seems to be a perception that lawyers lie or only want to make money. The truth is, the overwhelming majority of lawyers are very dedicated and professional and are trying to help their clients with whatever issue or problem their clients have. Lawyers believe in the law as the proper means to resolve disputes. I always say that the system is not perfect, but it's better than clubbing each other over the head. In the current climate, the law, the judiciary, other governmental institutions, and our civil and criminal justice systems are under attack. I think that lawyers have to continually remind the public that the law is the bedrock of our society and that the Constitution matters.

What is something that most people don't know about you?

I like video games where I get to shoot things (objects, not living things) with guns or arrows. I'd love to go skeet shooting. With that said, I am a staunch supporter of gun control.

Lawyers should join the New York State Bar Association because…

The association speaks for lawyers on professional matters such as whether pro bono work should be required. The association speaks to society on important issues such as support for the rule of law and the independence of the judiciary. A larger membership ensures a more powerful voice. Especially in these times, every lawyer should be a part of that voice.

The association also offers many opportunities to learn, have fun, and meet smart and interesting lawyers from all over the state. From section meetings to the Annual Meeting, committees, CLEs, and various receptions and programs, there is something for everyone. I have learned a lot and broadened my circle of colleagues and friends (and yes – even gotten and given some referrals) from my participation in the association. Try it! It's fun! And it's important!

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7 Questions Lawyers Should Ask Vendors About Their AI Products

By Maura R. Grossman and Rees W. Morrison

The frenetic and much-touted world of artificial intelligence (AI) has poured into the legal industry like a storm surge. Lawyers who lack technical expertise or feel overwhelmed by jargon and arcane mathematical concepts are at a distinct disadvantage in this technology-oriented new world. Vendors can make assertions with little risk of cross-examination.

If your law firm or department has invited a vendor to explain or demonstrate its AI software, you likely already know the foundational questions to ask about the vendor's company, competitive position, pricing, support, and user base. These days, you likely also know to ask about the vendor's data protection and data security practices. However, you are probably on less solid ground concerning the questions to ask about the underlying machine-learning software. This article proposes seven basic questions – and a framework for understanding the answers to those questions – that are specifically targeted at vendors that offer AI and machine-learning products and services.[1]

Maura R. Grossman, J.D., Ph.D., is a Research Professor and Director of Women in Computer Science in the David R. Cheriton School of Computer Science at the University of Waterloo, and an Adjunct Professor at Osgoode Hall Law School of York University, where she teaches interdisciplinary courses on *Artificial Intelligence: Law, Ethics, and Policy*. She also is Principal at Maura Grossman Law, an eDiscovery law and consulting firm in New York. Maura's scholarly work on technology-assisted review (TAR) has been widely cited in the case law, both in the U.S. and abroad. She has served as a court-appointed special master, mediator, and eDiscovery expert to the court in multiple high-profile U.S. federal cases. Websites: http://grossman.uwaterloo.ca and https://en.wikipedia.org/wiki/Maura_R._Grossman.

Rees W. Morrison, Esq., a Partner at Altman Weil, Inc., has for three decades consulted to law departments and law firms on management issues, data analytics and recently on machine learning. Rees has published 320 articles and a recent book on visualizing and analyzing law firm data. He has written extensively about 500+ surveys sponsored by law firms on his blog JurisDatoris.com. A member of the College of Law Practice Management, Morrison runs the LinkedIn group, Law Department Management, with more than 3,200 members.

1. WHAT DO YOU MEAN WHEN YOU SAY YOUR SOFTWARE USES "ARTIFICIAL INTELLIGENCE" OR "MACHINE LEARNING?"

A subcategory of artificial intelligence, machine-learning software finds patterns in data, and the software improves its performance (i.e., "learns") as it processes more data. Data can include the words in documents – such as those contained in emails in electronic discovery or in word-processing files in contract analytics – which are analyzed using natural language processing or statistical methods. Data can also include figures from time and billing systems, where regression and neural networks can provide insights. Or data may be derived from human resources files, where classification methods, such as support vector machines or decision trees, can help identify records of interest or improve the quality of predictions.

The vendor should explain whether their software uses supervised or unsupervised learning. If supervised, your data will need labels (corresponding to classes or categories of interest, such as whether the client is a public or private company, whether the documents are privileged or not, or whether the practice group of a lawyer is corporate, litigation, or tax). In unsupervised learning, such as k-nearest neighbor classification, the software detects patterns on its own, based on the numbers in the variables.

What you should not hear from the vendor are grand, vague assertions, or that they cannot answer your questions because their software is based on proprietary methodologies.

2. HOW MUCH WILL WE HAVE TO CLEAN OUR DATA FOR IT TO BE USED BY YOUR SOFTWARE?

Almost always, machine-learning programs require the data that they process be in an organized format, much like a spreadsheet (for example, if the data consists of

numbers, it is called a matrix). Typically, the data will be stored and presented in rows and columns.

Before the software can run reliably, your data will need to be cleaned, for example, by making sure that the columns of data do not mix numbers and text or that they do not have missing values. Sometimes the software can handle missing values, but other times you may need to impute a value which reasonably estimates the missing value. You will also need to make sure that the codes you use for labeled information are consistent; for example, the names of courts need to be in a standard format.

Another reason the software needs properly prepared data is that the most common machine-learning methods depend on linear algebra – powerful mathematics that multiplies and manipulates matrices – and possibly also calculus and trigonometry to draw inferences from the data and optimize the output. If your data are untidy, the program will typically falter or fail.

Under ideal circumstances, you should not have to pay the vendor extra to pre-process your data, and you have (or can assemble) the necessary data in the requisite format to be read by the software. If that is not the case, you will need to figure out how the pre-processing will be accomplished and include that time and cost in your budget.

3. WHAT AMOUNT OF DATA AND TRAINING DO WE NEED TO USE YOUR SOFTWARE EFFECTIVELY?

The vendor should realistically estimate how many observations you need (think rows in your spreadsheet, or numbers of documents) and how many pieces of information you need about each observation (referred to as variables). With machine learning, more data is almost always better, but law firms or departments hardly need to have Big-Data volumes to be able to derive useful insights using machine-learning tools.

Regression, neural nets, and other machine-learning tools create a model from the data you supply. Typically, you provide the software with a portion of your data, the training set, and then vet the results of the model on a validation set, before you finally try the model on a hold-out or testing set to determine how accurate the model is. Your goal is to avoid overfitting the model so that it hews closely to the training data, but cannot take on new data and do a good job of classification or prediction.

What is important to understand is not only how much data will be needed, but also how much training on the software itself will be necessary before the software works properly. Most vendors will not reveal, without pressing, that it is uncommon for their software to work immediately, off-the-shelf, on your data, without additional training. You need to know how much tweaking or customization will be necessary so that you can add that time and cost into your assessment.

4. WHAT ALGORITHMS AND ASSUMPTIONS DOES YOUR SOFTWARE RELY ON?

You should push the vendor to explain clearly the algorithms and assumptions that underlie their software. Algorithms include if-then rules or instructions (e.g., "minimize this value") in the software code of the vendor's program that convert data into output or answers. In essence, they are the recipes that accomplish the classifications, conclusions, or predictions. Furthermore, it is important to understand the features the algorithm is using – such as age, gender, race, and so forth – so you are aware of underlying biases that may be hidden from your view.

You should also understand the concept of "hyperparameters." As previously mentioned with respect to training the software, hyperparameters are akin to knobs for tuning the machine-learning software, such as higher-level decisions about the learning rate of the process, or how significantly the software will adjust calculations called weights (in neural networks) or the loss function (in regression, where the most common choice is called "ordinary least squares"). The bottom line is that more knobs mean more nuanced learning, but also more complexity. In the same way that an automatic transmission is preferable to stick shift for most drivers, so too, extensive knob twiddling may require data science expertise the firm or department will need to obtain.

What you want to avoid is proprietary algorithms that are black-box and hard-coded so that your understanding of their inner workings is limited and your flexibility to match the software to your data and needs is constrained.

5. WHAT RESOURCES WILL WE NEED TO IMPLEMENT YOUR SOFTWARE SUCCESSFULLY?

Many implementations of standard machine-learning algorithms are available. Free open-source software packages like LibLinear and Vowpal Wabbit apply these algorithms to a spreadsheet-like representation of the processed data. Many popular programming languages provide access to implementations of these algorithms through the use of a computer program. Among the most popular languages, Python and R are free and open-source, while others, like SPSS, SAS, Stata, and MatLab, are proprietary. Many vendors in the legal space offer machine-learning tools, some of which use the machine-learning implementations described above and some of which are vendor-specific. You need to know how widely

available the people and resources are that can use the vendor's particular software.

You generally do not need to know that much about hardware, since the relatively modest sizes of most legal data sets should not require specialized capabilities or power such as graphical processing units (GPUs). However, you may need to drill down on vendors who do computations and storage on a cloud server, such as Microsoft Azure or Amazon Web Services, for example, if you are handling huge electronic discovery datasets. With cloud providers, issues concerning data protection and data security will need to take more prominence.

6. WHAT TOOLS DO WE NEED TO INTERPRET THE MACHINE-LEARNING MODEL AND TO VISUALIZE IT, AND ARE THEY INCLUDED WITH YOUR SOFTWARE?

Data scientists have created a range of tables, decision trees, and graphs that can help users probe and understand the insights to be drawn from their data. Tools can display in different visual formats the calculations performed by the machine-learning algorithm and the results they produce.

You should ask the vendor to explain and show you the

You will need to have someone available on your staff – or hire someone – to help navigate through data preparation, running the software, and, perhaps most important, interpreting the results. These individuals are typically referred to as data scientists. As just one example, machine-learning software often works better when the data has been normalized, i.e., all the figures, such as collections per office, are converted into a standard scale between 0 (for the least) and 1 (for the most); someone needs to understand whether and how to normalize the data and then how to interpret the output.

tools they make available for graphical analysis, interpretation, and display of results. Further, the vendor should show you what typical output will look like so that you can assess how interpretable the software's results are. If the vendor is using a neural net (or a stack of neural nets, which is referred to as "deep learning"), the vendor needs to explain how much of their software's effectiveness lurks in a black box. If you cannot figure out how the algorithm achieved its results, it may not be the right tool for you, especially if you have to

explain the output to your clients, or to your adversary or the court in litigation.

7. HOW HAS YOUR TOOL BEEN VALIDATED FOR ITS INTENDED PURPOSE AND HOW RELIABLE IS IT?

Finally, before you license the tool, it is imperative to know what empirical support there is that the software you are about to purchase is valid and reliable. Has independent testing or verification been performed? By whom and on what data? Asking for references from current users of the software is helpful, but less authoritative.

"Validity" refers to the extent to which the tool measures what it is supposed to measure; the extent to which the input is relevant to the output being assessed, and the extent to which responses on a measure can accurately classify or predict future behavior. "Reliability" refers to the extent to which the tool yields the same results over multiple efforts.

The vendor's tool should be provably valid and reliable. Just because a vendor claims that their tool is 99 percent accurate does not mean that it will work for your intended purposes, particularly if your situation is substantially different from the use on which the tool was tested. For example, it is easy for a vendor to claim that a tool is 99 percent accurate in predicting privilege, if only 1 percent of the data is privileged. The tool can misclassify 100 percent of the privileged data by labeling every document in the collection as non-privileged and still be 99 percent accurate. Do not be fooled by claims that do not consider both false positive and false negative errors. Make sure you understand what testing has been done to demonstrate that the software works and works consistently, and better yet, demand a proof of concept and do a test run yourself so you can *vet the tool on your own data to make sure it works as promised.*

CONCLUSION

While the questions above do not represent *all* of the questions a lawyer considering an AI product should ask a vendor, the answers to these seven questions will put you well on your way to (1) making sure that you have a good grasp of the product you are purchasing, (2) understanding the choices your firm will need to make when you use the vendor's software, (3) accounting for the additional help you may need (and will have to pay for) to use the tool effectively, and (4) avoiding unnecessary professional or reputational risk.

Of course, equally important aspects of the AI vetting process, beyond the scope of this article, include clearly identifying the problem that needs to be solved, making sure the proposed solution addresses that problem, and assessing that the proposed solution will work as expected in your unique environment.

1. Specialized jargon abounds in the field of machine learning. At minimum, you should probably familiarize yourself with terms such as "regression," "neural net," "support vector machines," and "deep learning," as well as basic statistical concepts. A useful glossary of technical terms primarily but not exclusively related to electronic discovery can be found at Maura R. Grossman and Gordon V. Cormack, *The Grossman – Cormack Glossary of Technology-Assisted Review*, 7 Fed. Cts. L. Rev. 1 (2013), http://www.fclr.org/fclr/articles/html/2010/grossman.pdf.

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

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DEAR FORUM:

I am a patent attorney at a large firm with a background in chemical engineering. Although I enjoy practicing law, I would prefer to spend more of my time on traditional engineering work. My firm, however, only wants me to focus on my legal work and they have no interest in me doing any nonlegal engineering work for clients. So I decided that I am going to leave the firm and start my own practice where I can advise clients not only on legal matters, but also provide engineering consulting services. Before opening my new practice, however, I realize there are some ethics issues that I need to iron out.

For instance, do I need to form separate business entities for my engineering work and legal work or can I have one business entity to operate both? If I am able to create a single entity, which I would prefer to do, can I reference my engineering services in the name of the company? When I am performing work for my clients, do I have to delineate which work is legal work and which work is solely nonlegal engineering work? Are there any other issues I should be wary of in operating this practice to ensure that I am complying with my ethical obligations as well as protecting my clients?

Sincerely,
Molly Cule

DEAR MOLLY CULE:

Lawyers often wear many hats when they represent clients. Indeed, it is not uncommon for lawyers to offer clients both legal and nonlegal services. But, that is far from the end of the story. Multiple roles create numerous potential ethical and professional challenges that must be addressed as part of planning your new business.

Creating and Naming Your Entity

You tell us in your question that you would like to form a single entity in order to perform legal and engineering services for your clients. The New York Rules of Professional Conduct (RPC) permit the formation of a single entity for the performance of legal and nonlegal services; put simply, lawyers are allowed to "serve a broad range of economic and other interests of clients." RPC 5.7 Comment [1]; *see also* NYSBA Comm. on Prof'l Ethics, Op. 1157 (2018). A lawyer or law firm may provide nonlegal services to clients in three ways: (1) a lawyer with a personal nonlegal skill, such as in your case where you are both a lawyer and a professional engineer; (2) law firms that employ non-lawyers to provide their clients with nonlegal services; or (3) law firms that provide nonlegal services through a separate third-party nonlegal entity of which the law firm is affiliated. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1524 (2016 ed.).

There is a catch. Although you are permitted to perform nonlegal services for clients in connection with your law practice, you are not permitted to reference those nonlegal services in your firm's name. RPC 7.5(b) offers instructions on what lawyers are permitted to do when they name their law firms. "A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm." RPC 7.5(b). The prohibition against trade names is broad and "little beyond the names of lawyers presently or previously associated with the firm" is allowed in a firm name. *See* NYSBA Comm. on Prof'l Ethics, Op. 1157 (2018), *quoting* NYSBA Comm. on Prof'l Ethics, Op. 869 (2011). Language that must ordinarily be excluded from firm names, such as trade names, may be permissible as a separate firm "motto" on letterhead or advertising materials written below the firm name. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1862. For example, the Court of Appeals in *In re von Wigen,* 63 N.Y. 2d 163 (1984) allowed an attorney named von Wigen to use the phrase "The Country Lawyer" below his name on advertising materials. *Id.* at 1862–63, *citing In re von Wigen,* 63 N.Y.2d 163 (1984). Interestingly, to the extent you ever intend to open a sep-

arate engineering business completely distinct from your legal services, the rules set forth in RPC 7.5(b) would not apply. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1861 (2016 ed.).

While you are not permitted to refer to engineering services in the firm name, you are free to reference your engineering qualifications and experience on your firm website and marketing materials as long as it is consistent with the advertising rules in the RPC including restrictions on attorney advertising in RPC 7.1. RPC 1.0(a) defines "advertisement" as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers." RPC 7.1(a) prohibits any advertising that is false, deceptive, misleading or that violates any of the other RPC. "A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services, or about the results a lawyer can achieve, for which there is no reasonable factual foundation." *See* RPC 7.1 Comment [3].

Providing Nonlegal and Legal Services to Your Clients

Since your plan is to perform nonlegal and legal services within the same practice, it is also necessary for you to identify whether the nonlegal services that you plan to provide to a particular client can be considered distinct from your legal services. This analysis is essential because it dictates whether the RPC apply to the provision of all your services, legal and nonlegal.

RPC 5.7(a)(1) addresses the application of the RPC to nonlegal services that are not "distinct" from legal ones. The RPC, however, does not define the term "distinct." In NYSBA Comm. on Prof'l Ethics, Op. 1135 (2017), the New York State Bar Association (NYSBA) Committee on Professional Ethics relied upon the "ordinary and customary" dictionary meaning of the word distinct, "not alike, different, not the same, separate, clearly marked off." NYSBA Comm. on P rof'l Ethics, Op. 1157 (2018), *citing* NYSBA Comm. on Prof'l Ethics, Op. 1135 (2017). "The 'most important factor in determining distinctness is the degree of integration of the services.'" *Id., quoting* NYSBA Comm. on Prof'l Ethics, Op. 1155 (2018). If the legal and nonlegal services are not distinct, then the RPC always apply. *See* NYSBA Comm. on Prof'l Ethics, Op. 1155 (2018). This means that all of the obligations that lawyers have in their traditional client relationships, including the protection of client information, prohibition against conflicts of interests, and requirement of professional independence, apply to all services rendered including the nonlegal services. *Id.*

RPC 5.7(a)(2) governs nonlegal services that are distinct from legal services. In this instance, even though the nonlegal services are distinct from the legal services, the RPC still apply to nonlegal services when a client could reasonably believe that an attorney-client relationship has been established. *See* RPC 5.7(a)(2). RPC 5.7(a)(4) cre-

ates the presumption of a reasonable belief in the creation of an attorney-client relationship, but permits a lawyer to overcome this presumption by advising the client in writing that the nonlegal services provided are not afforded the protection of the attorney-client relationship. *See* RPC 5.7(a)(4); NYSBA Comm. on Prof'l Ethics, Op. 1157 (2018).

The NYSBA Committee on Professional Ethics recently opined that engineering and legal services may be considered distinct services within the meaning of RPC 5.7(a)(2). *See* NYSBA Comm. on Prof'l Ethics, Op. 1157 (2018). The Committee reasoned that "[a] clear demarcation exists between the scientific design and construction of tangible things and the use of legal knowledge and experience to advise a client on adherence to lawful behavior." *Id.* The Committee also specifically opined that other services, such as the provision of tax services, mediation in domestic relationships matters, and integrated real estate services, are not distinct from legal services. *See id.* If you intend to offer the same clients both legal and nonlegal services, however, steps should be taken so that clients are not confused as to when you are acting as their lawyer and when you are only acting in your capacity as an engineer. *See id.; See also* NYSBA Comm. on Prof'l Ethics, Op. 1155 (2018). "Whenever a lawyer directly provides nonlegal services, the lawyer must avoid confusion on the part of the client as to the nature of the lawyer's role, so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany a client-lawyer relationship." RPC 5.7 Comment [1]. Based upon the foregoing, you should be diligent in consistently communicating with your clients regarding the capacity in which you are acting in order to avoid any possible confusion concerning your role. This is especially important if you begin acting solely as an engineer for a client where you had previously acted as patent lawyer for the client, utilizing your engineering skills, and the client may have a reasonable belief that attorney-client protections will still apply.

There is another layer to this onion. Even if the nonlegal services you are performing are distinct from your legal services, you still have to consider whether there are any conflicts of interest under RPC 1.7(a). RPC 1.7(a) prohibits a lawyer from representing a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer's own professional judgment on behalf of the client will be adversely affected by the lawyer's own business or financial interests (unless client consent is an option and the client provides such consent). *See* NYSBA Comm. on Prof'l Ethics, Op. 1155 (2018). The Committee has opined that when a lawyer seeks to provide both legal and nonlegal services the lawyer must determine whether there is a significant risk that the lawyer's professional judgment will be adversely affected. *See id.* The Committee noted that this "will depend on the size of the lawyer's financial interest in the nonlegal services, and whether the lawyer's actions in the legal matter may affect the lawyer's ability to receive the nonlegal fees." *See id.* In that instance, when there is a significant risk to the lawyer's professional judgment being adversely affected by the nonlegal financial interest, the lawyer must obtain informed consent in writing from the client. *See id.*

In the context of an attorney providing legal and nonlegal services, some conflicts are non-waivable. *See id.* Many of these situations involve a lawyer acting as both a lawyer and a real estate broker in the same transaction. *See id.* These types of conflicts are likely non-waivable because the broker/lawyer has a personal financial interest in obtaining the commissions, which would ultimately interfere with the lawyer's ability to provide independent advice concerning the transaction. *See id.* Similar conflicts exist with respect to brokers of financial products. *See id.* In a 1981 opinion, the NYSBA Committee on Professional Ethics addressed the issue of whether members of a law firm could conduct a financial planning business in the same office in which they practiced law and provide both financial planning and legal services to the same clients. *See id., citing* NYSBA Comm. on Prof'l Ethics, Op. 536 (1981). The Committee opined that this practice would not be unethical as long as the financial planning business did not offer any products for which they would receive a commission or other form of compensation for recommending such products. *See id.* In addition, the Committee noted that that it would also be unethical for the lawyers to act as legal counsel and broker in the same transaction. *See id.*

Good luck with your new career path. You can certainly provide separate engineering and legal services which will be beneficial to your clients while satisfying your personal interests. When charting a course through your ethical obligations as a lawyer we suggest that you think about the work you are providing for your clients from *their perspective* and what protections that they may reasonably believe are associated with your work.

Sincerely,
The Forum by
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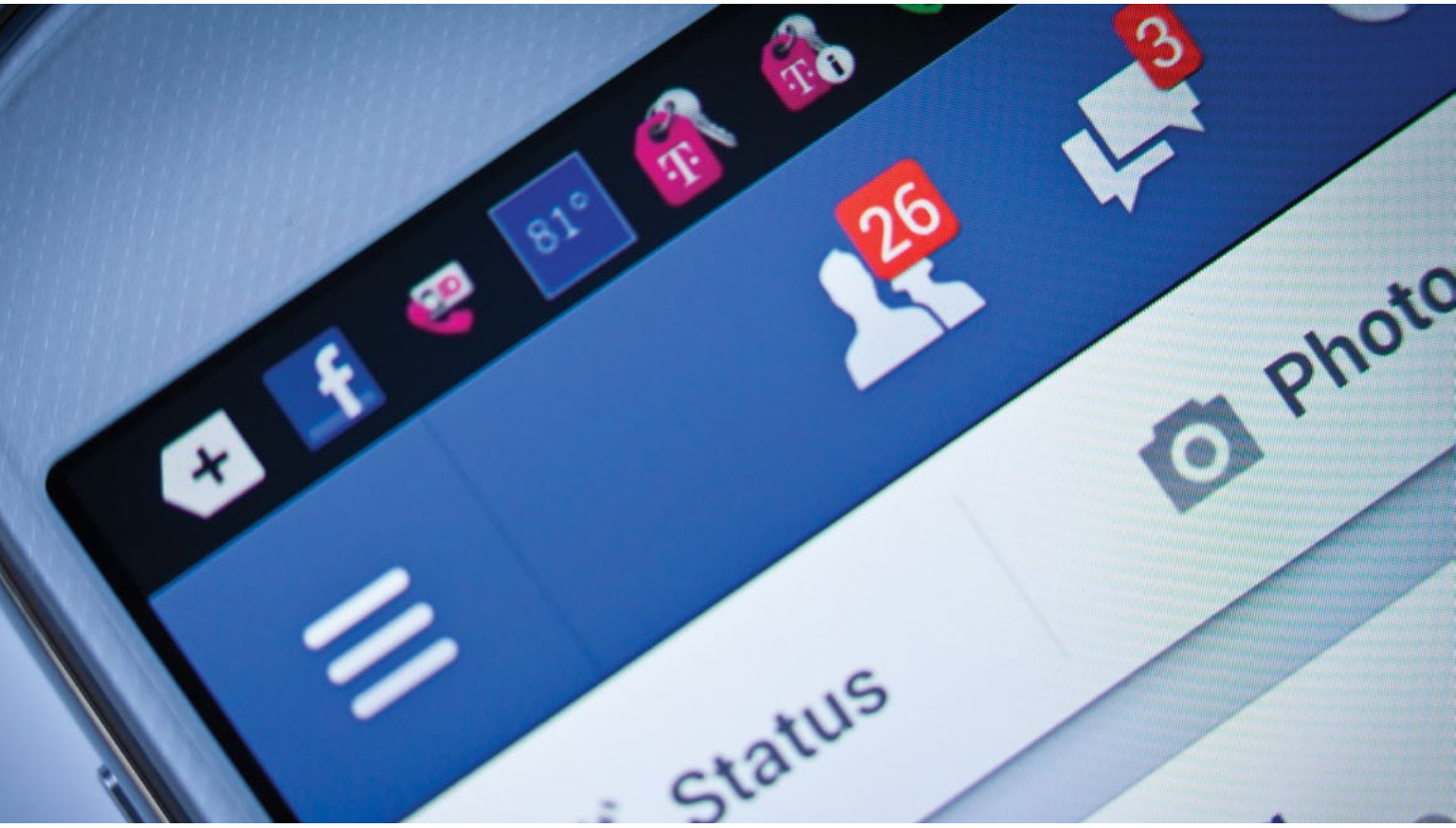
QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a judge who is old enough to remember practicing law without a computer. I have done a reasonable job of keeping abreast of recent technology, but it is a running joke in our house that my kids think I need help finding the power button on my laptop. I recently joined a social media site to keep up with photos of my grandchildren and have been connecting with some colleagues I have worked with over the years. I have been cautious with whom I connect, but as I connect with more friends in the legal community, I have been receiving more and more "friend" requests from people whose names I recognize from the courthouse or bar association events, but I am not sure I would consider them a "friend." One attorney I connected with asked me to subscribe to her blog on an area of law that she knows is of interest to me and asked if she could interview me for a podcast about my experiences as a practitioner and judge. At first I thought these "connections" were no different from any other attorney networking, but then I started to think about whether anyone could misconstrue this as inappropriate or as a violation of my ethical duties. Should I be concerned that by engaging in social media, I am violating any ethics rules, since I know that many of my online "friends" could appear before me in a case?

In one circumstance that I am particularly embarrassed about, I accidentally accepted a "friend" request and next thing I know, I am getting messages from a litigant in a case I was hearing. I quickly "unfriended" the person once I realized what happened, but I am worried that this could have a significant impact on the case. I know I need to disclose to the attorneys on the case that the communication occurred, but is this a situation where I should automatically recuse myself since I actively accepted the friend request?



There are so many new social media platforms that are showing up in court cases, it is hard to keep up with them all. I noticed recently that some attorneys appear to be using social media platforms as a means of gathering evidence for their cases while others appear to be advising their clients on how to restrict public access to their social media accounts during discovery. Do you have any advice for a social media newbie as to where to draw some lines in how attorneys use social media within the bounds of their ethical obligations?

Very truly yours,
Justice Online

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A Strong Network

When I was in elementary school, my mom used to tell me that I argued so much that I should become a lawyer. But it wasn't until I got to high school that I began to understand how much lawyers can help people and give back to their communities. That's when I knew I really did want to pursue a career as an attorney.

What I didn't know was all that would entail. I did not know any lawyers. I did not have family members or friends who were lawyers. I couldn't think of anyone I knew who even *knew* a lawyer. But the one thing I did know was that *I wanted to be a lawyer*.

I started college knowing that law school was my goal, and I chose to major in criminal justice. A professor of mine told me that my choice of major was a cliché and suggested that I might stand out more with a major in economics or English. So, I switched majors. And then I switched again. I ended up majoring in political science with a minor in law – talk about a cliché!

I spent my college years focused on maintaining a decent grade point average, which I knew would be important when it came time to apply to law school. It was not until the summer before my senior year of undergrad that I came to understand that, besides my GPA and deciding where to apply to law school, there was another hurdle I would need to contend with – the LSAT.

I know this sounds surprising, but I literally had no clue about the LSAT. Toward the end of my junior year of undergrad, an acquaintance mentioned the test in a casual conversation. I played along as if I knew exactly what she was talking about, but the voice inside of me was saying "Oh no! Not another standardized test! How much is this going to cost?! What am I going to need to do to prepare?!"

So I took the LSAT, of course. And I got into law school. As I entered my first year at Syracuse University College of Law, I naively thought that the hard part was over. Little did I know! In high school and college, getting good grades came relatively easily to me. But the first semester of law school showed me that getting those grades would not be nearly as simple as it used to be. In fact, being a 1L was the most pressure filled, demanding year of my life.

I was shocked to find out that grades were based on a curved system where there were a limited number of As or Bs that could be given. That just added to the pressure for me, because I knew that I would have to maintain my GPA at a certain level or face possibly getting kicked out of school. I simply could not imagine that happening to me, but I will admit to you that I came close to it that first semester. It was tough, but I hung in there. I was not going to disappoint all of the people who had supported me and helped me get as far as I did.

As it turned out, I did not disappoint them, and I graduated from law school this past year. I survived being a 1L, although I did not necessarily ace all of my classes. I discovered trial team, clinic and the externship programs – extracurricular activities that were interesting and fun, and helped remind me that law school was about more than just getting good grades.

In retrospect, I can see that it was the friends I made and the mentors I found who helped me make it through law school. Yes, good grades are important, but it is just as important to have a strong network of people to help you through.

I suppose college and law school might have been easier for me if I knew from the start that there would always be people along the way who believe in me and are willing to help, and if I had never been hesitant to ask for assistance. Maybe it took me too long to understand that it might not be obvious who those supportive people are, and that I should always keep an open mind.

But here's the thing: Thanks to all those people who helped me and believed in me, I made it. I wanted to be a lawyer, and now I am one.

Stephanie M. Martin-Thom is an assistant district attorney in the Onondaga County District Attorney's Office. She was an MMTC Cathy Hughes Fellow, a Moot Court Honor Society Honorary Member, and a National Trial Team Arguing Member. She earned her J.D. from Syracuse University College of Law and a B.A. in Political Science from John Jay School of Criminal Justice.

Thoughts on Legal Writing from the Greatest of Them All: Irving Younger–Part I

Irving Younger was the master of legal writing and legal speaking.

Before commencing his brilliant 30-year career, he graduated from Harvard University in 1953 and from New York University School of Law in 1958.[1] After serving as an associate at Paul, Weiss, Rifkind, Wharton & Garrison and as an assistant U.S. attorney for the Southern District of New York, he established a law firm with his wife, Judith T. Younger.[2] In 1965, he began teaching full time at NYU.[3] He was then elected from Manhattan's Silk Stocking District — the storied Ninth Municipal Court District — to the New York City Civil Court, where he sat from 1968 to 1974. In that time he was promoted to New York County acting Supreme Court justice and served as an NYU Law adjunct.[4] Judge Younger retired from the bench in 1974 to teach at Cornell Law School as the Samuel S. Leibowitz Professor of Trial Techniques.[5] From 1981 to 1984, he became partner at Williams & Connolly in Washington, D.C.[6] Then he became the University of Minnesota's Marvin J. Sonosky professor of law until his untimely death in March 1988.[7] Judith T. Younger still teaches at the University of Minnesota Law School.[8]

Many consider Professor Younger the greatest speaker on the law in American history.[9] He lectured for BARBRI and created countless video and audio tapes for students on evidence, trial practice, and civil procedure.[10]

Professor Younger is almost as well known for his writing as he is for his speaking. As a great communicator, he wrote as eloquently as he spoke. He wrote two books on the law of evidence: *The Art of Cross Examination* in 1976 and, with Michael Goldsmith, *Principles of Evidence* in 1984.[11]

When the study of American-style legal writing was in its relative infancy, Professor Younger also wrote 26 columns on legal writing in the *American Bar Association Journal* as part of a series called *Persuasive Writing*. In 1990, his columns were compiled into a book: *Persuasive Writing*.[12]

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Five of his columns were republished in the Best Of series in the Scribes Journal of Legal Writing: *Symptoms of Bad Writing*, *Skimming the Fat Off Your Writing*, *A Good Example and a Bad*, *Lessons from a Bar Journal*, and *Culture's the Thing*.[13] Although he wrote his columns over 30 years ago, judges, lawyers, and law students can benefit forever from his timeless insights. This two-part column features his best insights on legal writing.

In the first of our two-part column, we focus on Professor Younger's suggestions to improve the mechanics of legal writing.

ROMANCING THE VERB

Professor Younger suggested using verbs. Verbs translate thought with "clarity and conviction."[14]

Verbs describe an action, event, or a state of being.[15] "Agree," "decide," "conclude," and "argue" are verbs. Verbs are essential. They follow the subject matter of every sentence.

Professor Younger offered three simple rules to improve your use of verbs:

- Use verbs "freely and frequently."[16] They identify the who and what of every sentence. They "give movement and life" to writing.[17]
- Replace verbs that convey no action — like "to be," "is," or "are" — with regular verbs as in the examples above.[18] Consider this issue statement using "is": "The question in this case is whether a contract is enforceable under the Statute of Frauds when the agreement is oral and by which goods of a greater than $500 value are sold."[19] The next issue statement, with regular verbs, sounds better: "This case raises the question whether the Statute of Frauds forbids enforcement of an oral agreement for the sale of goods valued at more than $500."[20]
- Use the active rather than the passive voice. For example, you should "discuss" the next issue rather than state that the next issue "is to be discussed." The active voice is more concise. And the active voice gives words an energetic flow to capture your reader's attention.

SKIMMING THE FAT OFF YOUR WRITING

Good legal writing takes time — time to edit and revise. Not every lawyer enjoys the luxury of time. Professor Younger identified two principles to streamline the editing process:

- Eliminate.[21] Review each word to determine the purpose it serves. Excise words that don't add to the main point: they're unnecessary. This first step separates the necessary and unnecessary components of your writing.
- Boil down.[22] Reflect on word choice and the length of your writing. As Professor Younger cautions, a "briefer version is always better than a longer."[23] Boiling down stresses the precise phrasing and verbiage you propose to use.

THE DEFINITIVE WORD ON DEFINITIONS

Definitions enhance clarity and reduce ambiguity. A definition states the exact meaning of a word.[24] Definitions can accomplish several objectives, including confining, expanding, and arbitrarily attributing a word's meaning.[25] Whether you're drafting a pleading, agreement, or statute, definitions will help make your point concisely. Professor Younger described four ways to define:

- A term should be defined by a simple and precise term.[26] For example, "infant" means "a person who has not attained the age of eighteen years."[27]
- A term should be analyzed by its components.[28] For example, "United States" means "the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States."[29]
- A term should be defined with reference to the whole of its parts.[30] For example, "complaint" includes "the notice of petition and the petition, respectively, in a special proceeding."[31]
- A term can be defined by listing all items the term encompasses.[32] Note the distinction between "means" and "include" in any list that follows a definition. "Means" will restrict a term to its stated definition.[33] "Includes" is used when a definition doesn't limit a term.[34]

CITING CASES FOR MAXIMUM IMPACT

Citations are the legal precedents that support your argument. Professor Younger outlined six ground rules for effective and authoritative citations:

- Cite sparingly.[35] Citations are necessary but needn't be redundant.
- An important case should be both cited and analyzed.[36] Your explanation assures that a judge will understand the case as you see it.[37]
- Avoid string citations.[38] Cite only the best case — the most recent case on point from the highest binding court. Cite more than one case only if doing so helps a reader, not to prove your research skills.
- Cite cases from an appropriate court.[39] Judges must pay attention to binding precedent. They needn't pay attention to persuasive precedent.
- Don't use long quotations.[40] Summarize important points and hope that the judge will read the original opinion if the citation is critical to your case.
- Be candid about the citation on which you rely.[41] Analogize and distinguish your citations.[42] Never mislead a court.

What should you do if no case supports your argument? Professor Younger suggested relying on "good sense, fairness, and decency."[43] On this occasion, you might find that your strongest citation is none at all.

". . . AND WRITE IN ENGLISH, PLEASE!"

Effective legal writing calls for more than placing English on a page. Professor Younger cited one example of ineffective writing from the Ninth Circuit. The defendants' brief described the "juxtaposition of the real world environmental encasement of the two sides."[44] In response, the Ninth Circuit commented that "[b]riefs should be written in the English language!"[45] To avoid a rebuke from the court, Professor Younger offered two ways to avoid incoherent sentences:

- Rather than immediately typing out the first thoughts that come to you, identify the exact words that convey what you intend to argue.[46] Saying your thoughts aloud will help you in this exercise. Clarity of thought precedes clarity in writing.
- Use simple and plain words.[47] You might struggle to identify the best words to describe your thoughts. Readers shouldn't.

READY, SET . . . WAIT!

Rewriting isn't a cure for "premature penmanship."[48] Don't just disgorge your thoughts randomly onto the page. Professor Younger proposed that writers follow five steps to set the stage for persuasive writing. He gave his advice in the context of drafting appellate briefs, but his methods apply universally to other pieces of persuasive writing:

- Read and reread the record until you've mastered the details.[49] During this process, prepare an index and chronology of events.

- Find a secondary source that explains an area of law.[50] At this stage, look at the big picture rather than the details.
- Think about your case.[51] Consider your audience — whether a judge, client, or opposing counsel — to identify what your audience will find most interesting about your case.
- Review the facts to ensure that the record reflects the issues you present for resolution.[52]

- Phrase the issues to engage the court's interest and help your client's case.[53]
- Once these five steps are complete, you're ready to put pen to paper, or fingers to keyboard.

SPELL IT OUT

A premise is the proposition on which a conclusion is based. For example, if Sally is a lawyer, and lawyers can give legal advice, the logical conclusion is that Sally can give legal advice. Every aspiring lawyer studying for the Law School Admission Test's logical-reasoning portion learns about the premise and conclusion. But not every lawyer will remember to use basic logical reasoning when forming legal arguments. If clearly stated logical reasoning is absent from your writing, fallacies and erroneous assumptions will undermine your argument. Professor Younger explained that you shouldn't state a conclusion without setting forth "step by step"[54] the thinking that led to it:

- Spell out each premise so that it forms a path to your desired conclusion.[55]
- Spell out every assumption when you use an analogy.[56] To craft the strongest analogy, demonstrate that A is the same as B, and not merely like B.[57]

LEGAL WRITING ALL-STARS

Reviewing strong legal writing can help to improve your own writing. Professor Younger selected from throughout the legal profession writers worth reading. His selection dates back 30 years:

- Of practitioners, there's New York's Joseph M. Proskauer[58] and Boston's Charles P. Curtis, Jr.[59]
- In academia, there's John H. Wigmore[60] and William L. Prosser.[61]
- From state courts, there's California's Roger J. Traynor[62] and New York's William S. Andrews.[63]
- The "lower federal courts" have John M. Woolsey, Henry J. Friendly, and Learned Hand.[64]

- At the Supreme Court are Charles Evans Hughes[65] and Robert H. Jackson.[66]

You might identify other excellent legal writers in the years since Professor Younger's columns were published.

CONCLUSION

In addition to Professor Younger's advice, good legal writing requires practice. In the *Journal*'s next issue, this column continues with Professor Younger's insights on style and legal writing.

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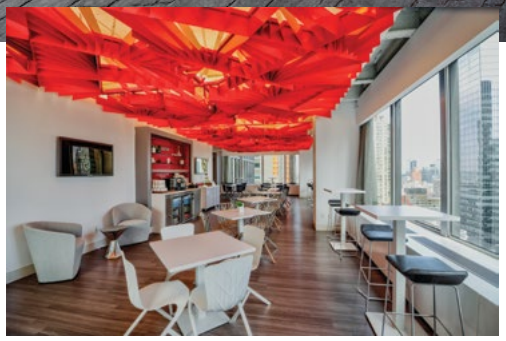

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