NEW YORK STATE BAR ASSOCIATION

TRIAL LAWYERS SECTION

Summer Meeting 2018

MYSTIC, CT

August 2–5, 2018

Hyatt Place Mystic
224 Greenmanville Avenue

www.nysba.org/TRIASU18

Accessing the Online Electronic Course Materials

Program materials will be distributed exclusively online in PDF format. It is strongly recommended that you save the course materials in advance, in the event that you will be bringing a computer or tablet with you to the program.

Printing the complete materials is not required for attending the program.

The course materials may be accessed online at:
http://www.nysba.org/TRIASU18Materials/

A hard copy NotePad will be provided to attendees at the live program site, which contains lined pages for taking notes on each topic, speaker biographies, and presentation slides or outlines if available.

Please note:

- You must have Adobe Acrobat on your computer in order to view, save, and/or print the files. If you do not already have this software, you can download a free copy of Adobe Acrobat Reader at https://get.adobe.com/reader/
- If you are bringing a laptop, tablet or other mobile device with you to the program, please be sure that your batteries are fully charged in advance, as electrical outlets may not be available.
- NYSBA cannot guarantee that free or paid Wi-Fi access will be available for your use at the program location.

MCLE INFORMATION

Program Title: **Trial Lawyers Section Summer Meeting 2018**
Dates: August 2-5, 2018 Location: Mystic, CT

Evaluation: https://nysba.co1.qualtrics.com/jfe/form/SV_3JFxHheVfET8353
This evaluation survey link will be emailed to registrants following the program.

Total Credits: **6.0 New York CLE credit hours**

Credit Category:
2.0 Areas of Professional Practice 3.0 Skills
1.0 Ethics and Professionalism

This course is approved for credit for **both** experienced attorneys and newly admitted attorneys (admitted to the New York Bar for less than two years). For information about the CLE Rules, visit www.nycourts.gov/attorneys/cle

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff

2) Complete and return a **Verification of Presence form** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Verification of Presence form certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also listed above.

Additional Information and Policies

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

In accordance with New York CLE Board Regulations and Guidelines (section 2, part C), newly admitted attorneys (admitted to the New York Bar for less than two years) must complete **Skills** credit in the traditional live classroom setting or by fully interactive videoconference. **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as a live-streamed webcast that allows questions during the program. **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or (800) 582-2452 (or (518) 463-3724 in the Albany area).

SCHEDULE OF EVENTS

Thursday, August 2

3:00 – 5:00 p.m. **Executive Committee Meeting** – Meeting Place 1 & 2

6:00 – 7:30 p.m. **Welcome Cocktail Reception** – Meeting Place 1 & 2

7:30 p.m. Dinner on Your Own

Friday, August 3

7:00 – 9:00 a.m. **Breakfast** for Hotel Guests at the Hotel Cafe
(Included in Room Rate for those booking accommodations in our Room Block)

7:30 – 8:30 a.m. **Executive Committee Meeting** – Meeting Place 1 & 2
Breakfast will not be served

8:00 a.m. – 12:00 p.m. **Registration** – Foyer

9:00 a.m. – 12:00 p.m. **General Session** – Meeting Place 1 & 2

9:00 – 9:15 a.m.

NYSBA Welcome
Sherry Levin Wallach, Esq.
NYSBA Secretary

Trial Lawyers Section Welcome
Violet E. Samuels, Esq.
Section Chair

9:15 – 10:05 a.m.

How to be a "Super Lawyer":
Success at Trial – Suggestions on Techniques and Handling Challenges
Our "Blue Ribbon" panel of experts will discuss preparation and use of visual aids and records, using expert witness responses to advance Article 16 defenses, direct and cross examination of plaintiffs and experts (including difficult witnesses), working with a hostile judge, jury selection and summation.

Panelists:
Alfred P. Vigorito, Esq., Vigorito, Barker, Porter & Patterson, LLP, Valhalla
J. K. Hage, III, Esq., Hage & Hage LLC, Utica
W. Russell Corker, Esq., Law Offices of W. Russell Corker, PC, Huntington
John L.A. Lyddane, Esq., Dorf & Nelson LLP, Rye
Alicia Ouellette, Esq., President and Dean, Albany Law School, Albany

10:05 – 10:15 a.m. Refreshment Break

10:15 – 11:55 a.m. **Panel Presentation Continues**

1:00 – 5:15 p.m. **Golf at Lake of Isles**, 1 Clubhouse Road, North Stonington
Since opening in 2005, Lake of Isles has consistently been ranked as one of the top golf facilities in the country. The Rees Jones designed layout gives guests the ultimate golf experience. **$205 per person.** Fees include: greens fees, golf cart and box lunch. **Preregistration required**. Course directions will be provided. Meet in lobby to car pool to course.

12:25 – 5:15 p.m. **Optional Activity: Mystic Seaport Museum**, 75 Greenmanville Avenue
Tickets: $24 per person. **Preregistration required**.

6:30 – 10:00 p.m. **Cocktail Reception & Lobster Bake at Mystic Yachting Center**, 100 Essex Street
Join us at the Yachting Center located at the Mystic Shipyard with panoramic views of the river from it's lovely wrap-around porch. We will be regalled with tales of the sea and songs from chanteyman and banjo picker, **Don Sineti**. Don served as a consultant for the 20th Century Fox movie, "Master And Commander, The Far Side of The World". Meet in lobby for bus – it will make two trips to the Yachting Center at 6:15 pm sharp and 6:25 pm. **Preregistration required.**

SCHEDULE OF EVENTS

Saturday, August 4

7:00 – 9:00 a.m.	**Breakfast** for Hotel Guests at the Hotel Cafe (Included in Room Rate for those booking accommodations in our Room Block)
8:30 a.m. – 12:00 p.m.	**Registration** – Foyer
9:00 a.m. – 12:00 p.m.	**General Session** – Meeting Place 1 & 2
9:00 – 9:10 a.m.	Program Introduction Peter C. Kopff, Esq., Program Chair
9:10 – 10:00 a.m.	**2018 ETHICS UPDATE**
Speaker:	**Patrick Connors**, Albert and Angela Farone Distinguished Professor in New York Civil Practice, Albany Law School, Albany
10:00 – 10:15 a.m.	Refreshment Break
10:15 – 11:05 a.m.	**2018 CPLR Update**
Speaker:	**Patrick Connors**, Albert and Angela Farone Distinguished Professor in New York Civil Practice, Albany Law School, Albany
11:05 – 11:55 a.m.	**Social Media Discovery** Screening of clients, adverse parties, evidentiary issues and recent case law including Forman v Henkin 30 NY3D 656 (2018)
Speaker:	**Robert Gibson, Esq.**, Heidell, Pittoni, Murphy & Bach, LLC, White Plains
1:00 – 5:00 p.m.	**Golf at Pequot Golf Course**, 127 Wheeler Road, Stonington **$55 per person.** Fees include greens fees, golf cart and box lunch. **Preregistration required**. Course directions will be provided. Meet in lobby at 12:20 p.m. to car pool to course.
3:30 – 5:00 p.m.	**Optional Activity: Group Cruise on The Steamboat Sabino**, Mystic Seaport The steamboat *Sabino* is the oldest wooden, coal-fired steamboat in regular operation in the U.S. Built in 1908 in East Boothbay, Maine, she spent most of her career ferrying passengers and cargo between Maine towns and islands. Still powered by the two-cylinder Paine compound steam engine installed in 1908, The *Sabino* was purchased by Mystic Seaport in 1974 to serve as a working exhibit. She was designated a National Historic Landmark in 1992. She recently received *extensive* restoration before returning to service in August 2017. **Preregistration required. Tickets: $18 per person.**
6:30 p.m. –10:00 p.m.	**Cocktail Reception & Dinner at Mystic Museum of Art**, 9 Water Street, Mystic Two shuttle runs from the hotel: 6:15 p.m. and 6:30 p.m. Meet in Lobby.

Sunday, August 5

7:00 – 10:00 a.m.	Breakfast for Hotel Guests at the Hotel Cafe (Included in Room Rate for those booking accommodations in our Room Block)
	Checkout

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

Join Our Section

☐ As a NYSBA member, **PLEASE BILL ME $40 for Trial Lawyers Section dues.** (law student rate is $15)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Trial Lawyers Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ / _____ / _____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:
MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

Join a Trial Lawyers Section Committee(s)

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space availability permits.

___ Appellate Practice (TRIA1100)
___ Arbitration and Alternatives to Dispute Resolution (TRIA1200)
___ Commercial Collections (TRIA4200)
___ Construction Law (TRIA3000)
___ Continuing Legal Education (TRIA1020)
___ Criminal Law (TRIA3300)
___ Diversity (TRIA4100)
___ Employment Law (TRIA3700)
___ Family Law (TRIA4000)
___ Lawyers Professional Liability and Ethics (TRIA3800)
___ Legal Affairs (TRIA2900)
___ Legislation (TRIA1030)
___ Medical Malpractice (TRIA2200)
___ Membership (TRIA3200)
___ Motor Vehicle Law (TRIA3400)
___ No Fault Law (TRIA3500)
___ Real Property Law (TRIA3900)
___ Trial Advocacy Competition (TRIA2700)
___ Trial Practice (TRIA2800)
___ Website (TRIA4400)
___ Workers Compensation (TRIA3600)

2018 MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2010 and prior	$275
Attorneys admitted 2011-2012	185
Attorneys admitted 2013-2014	125
Attorneys admitted 2015 - 3.31.2017	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2010 and prior	$180
Attorneys admitted 2011-2012	150
Attorneys admitted 2013-2014	120
Attorneys admitted 2015 - 3.31.2017	60

OTHER

Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2016

NYSBA

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How to be a "Super Lawyer": Success at Trial - Suggestions on Techniques and Handling Challenges

Alfred P. Vigorito, Esq.
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President and Dean, Albany Law School, Albany

NEW YORK STATE BAR ASSOCIATION
TRIAL LAWYERS SECTION
SUMMER MEETING

SUCCESS AT TRIAL – AUGUST 3, 2018

MODERATOR'S COMMENTARY

By: Peter C. Kopff, Esq.

I. RECORD REVIEW

Personal injury cases require scrupulous review of the medical records in order to effectively represent your client. Medical records are organized in sections by physician's progress notes, orders, medications, and nursing notes. It is important to prepare a chronology early in the case where you take the important notations from each of the various types of notes in a hospital record and organize them chronologically so that nothing is overlooked. A nurse notes the patient had a carbuncle on her nose nine days prior to the diagnosis of her brain abscess. The defendant is claimed to have failed to give antibiotics to the patient to prevent complications from a bacteremia during dental treatment 21 days prior to the diagnosis of the brain abscess. At trial, plaintiff's expert, the treating neurosurgeon, conceded that a carbuncle on the nose nine days prior would be a more probable cause of a brain abscess filled with peptostreptococci than dental treatment 21 days prior. When confronted with the nurse's note, the witness was stunned. He had never read the nurse's note. The plaintiff's case was lost. An attorney must scrupulously review all the records and digest them prior to depositions and certainly prior to the trial.

II. IDENTIFY FACTS THAT CONTRADICT

As you review the hospital chart, police reports or ambulance reports, isolate statements that should be the basis of a question at deposition or trial to contradict the claims of your

adverse party. Jurors may question the veracity or reliability of a witness who gives one history to an emergency room physician or nurse and a totally different version at a deposition or trial.

III. TREATING PHYSICIAN AS EXPERT WITNESS

It is important in the above-referenced case that counsel used a treating physician as his trial expert. Such a choice is tempting for any plaintiff's attorney. The witness effectively treated the brain abscess in the young plaintiff, a nurse. But, many treating doctors are vulnerable to cross-examination on their own notes and certainly vulnerable to cross-examination on the treatment notes in the hospital record when they are not familiar with the details.

IV. PREPARATION ON THE MEDICINE

Preparation of a meticulous chronology is critical to your effectively representing your client. Basic research, reading a medical textbook or online literature on the subject involved in your case is essential for the attorney to be familiar with the vocabulary that you must know to cross-examine an adverse expert witness. You also must learn the basic methods of treatment involved with the medical condition at issue.

V. SUMMATION

The most effective way to prepare your summation is to take time near the end of each trial day to outline the important facts obtained during that day's testimony with respect to key witnesses. It is also recommended that you order the daily transcript of every witness and review the same with an eye toward your summation. On careful review of trial testimony, you will find statements that help your case that you may have missed in the courtroom. Review of the transcript will stimulate ideas for undermining certain witnesses and bolstering other witnesses.

When you have made daily notes on each witness, it will be much easier to organize your summation the weekend or the night before you have to give it.

VI. *IN LIMINE* MOTIONS

Do not surprise the judge. Submit a memorandum of law on controversial issues so the judge can make a correct ruling.

VII. DEMANDS OF TRIALS

You owe your client a duty to be physically fit to endure and prevail in a demanding trial. Trials require hard work and organization. You need to get sufficient sleep to be alert for the next day of trial.

Long term you need to deal with stress constructively. Physical exercise is one option.

You owe your clients a duty to be the best lawyer you can be, knowing the law, knowing the evidence, and being physically fit to zealously represent your clients.

Respectfully submitted,

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How to be a "Super Lawyer": Success at Trial - Suggestions on Techniques and Handling Challenges

W. Russell Corker, Esq.
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TECHNOLOGY AS A TOOL OF PERSUASION IN THE TRIAL OF A MEDICAL MALPRATICE CASE

W. Russell Corker, Esq.

INTRODUCTION

In the six years since this chapter first appeared in this book, the use of technology in the courtroom for the trials of medical malpractice actions has changed from novelty to expectation. The digital revolution is now solidly ensconced in the courtroom and available to all trial attorneys. Even the most skeptical of medical malpractice litigators, long schooled in the oral tradition, now embrace technology as another tool to assist them in presenting their cases more effectively. It is now easier than ever before to create professional looking presentations for any size case. Even judges now welcome the use of technology in their courtrooms to speed up trials. As the use of technology in litigation increased, so also did significant improvements in the hardware and software necessary for the presentation, making it more reliable and easier for any practitioner to use.

Medical malpractice cases are uniquely suitable for the use of technology because of the complexity of the cases and the ability of technology to both organize and present evidence more efficiently and effectively. There are now multiple products to choose from to suit the needs and abilities of every trial attorney. The presentation technology and equipment is now so affordable that no case is too small for its use. Having the necessary knowledge to know when and how to use technology in a trial of a medical malpractice case is now a required litigation skill.

In addition to keeping the evidence more organized, easier to access and present, technology keeps the jury more engaged with the presentation of your evidence. Not only does a technology-based presentation permit simultaneous viewing of documents, images and videos, but it increases the pace of the presentation. Trial attorneys know the importance of an effective trial presentation in the art of persuasion. Many studies have demonstrated that most jurors are primarily visual learners, processing, comprehending and retaining information better when it is presented in a visual format. Developing a visual strategy to harness the infinite number of facts in every medical malpractice action is a critical skill required of all successful medical malpractice litigators. This chapter will focus on the basic technology tools and skills required to make an effective presentation. The companion skills of imagination and creativity, necessary for an effective presentation, do not come easily for most left brain thinking lawyers, but can be acquired with practice and study. The focus of this chapter will be to acquaint medical malpractice litigators with the equipment, methods and means to effectively harness the power that technology can bring to a courtroom presentation.

EQUIPMENT

First comes a brief discussion of the equipment (hardware) required for a proper presentation. The LCD projector is the critical link between your computer or iPad, with the data, and the image displayed to the jury. Projectors currently are not only significantly cheaper to purchase, but considerably lighter in weight and have more features then even a few years ago. Projectors come in many degrees of brightness and resolution, but to make your presentation with the lights on in the courtroom, the

projector should have at least between 2000 to 3500 lumens in brightness, be high definition and project at a native 16:10 aspect ratio, which matches most laptops. A projector with a wide angle lens and the ability to project at short distances works best in cramped and less than optimal courtroom situations. An LCD projector that displays an image that is large and clear is essential when presenting medical records with a great deal of text that is difficult to read at a distance.

A portable screen is required in any courtroom that is not equipped with monitors, which means just about every courtroom. I have three screens that I use depending on the layout of the courtroom. My smaller screen folds down into a very convenient carrying case and can be set up on counsel table when space is limited. My medium sized screen is on a conventional tripod, and my very large screen is braced in the back, sits on the floor without a tripod and folds into a metal carrying case.

It is helpful to carry a large assortment of adapters that permit your computer or iPad to be plugged into a courtroom monitor system or hardwired to the projector. If you are hardwiring your computer or iPad to the LCD projector, you will need to have HDMI cables of varying lengths, again depending on the courtroom. A 25-foot cable, which is the maximum length that will still permit a good transmission of data, is long enough for most courtrooms. A shorter cable, always preferred, can be used when the distance between the computer or iPad is close to the projector. A large extension cord, a shorter one, and power strip, are necessary because most courtrooms do not have easy access to an outlet. A roll of duct tape should also be in your bag to tape the cords down when necessary. You will need a small portable table to position your projector and possibly

an Apple TV module if you are going wireless. Of course, a notebook computer and/or an iPad to store your data and presentation software.

COURTROOM SETUP

The court rooms where most medical malpractice cases are tried were built long before technology evolved to the level that it is today, and consequently there are very few courtrooms that are technologically friendly. Visiting the courtroom in advance is more important then ever before to see how technologically challenging the forum is going to be. Never assume that any courtroom has any of the necessary equipment for your presentation. Check with the clerk of the part, ask where prior presenters positioned their equipment and find out if the judge has any particular requirements.

As in all courtroom presentations, the ability of the jury, judge, witness, adversary and yourself to view the presentation must be taken into account. The optimum setup permits all to see the image at the same time, but this is rarely possible in most courtrooms. The majority of presentations utilize a projection screen to display the image, which must be large enough for the image to be clearly seen by the jurors from across the room, while not obstructing the view of the opposing counsel and judge. To accomplish this goal, position the screen in the middle of the courtroom, between counsel tables and far enough from the jury so that the judge can also see it from the bench. This requires the image to be as large and clear as possible, permitting the jury to see the image clearly, otherwise they will stop looking.

Once the position of the screen is determined, consideration must be given to the placement of the projector. The bulb in an LCD projector runs very hot, requiring a fan to keep it cool. When purchasing a projector, it is prudent to evaluate the noise made by the fan, and purchase one that is as quiet as possible. Also, an LCD projector with a short throw can be positioned closer to the screen and further away from the jury, so that the noise does not distract them. The portable table holding the LCD projector must be on axis with the screen and not in the area between the lectern and the witness stand, if possible, to permit ease of movement if necessary. Depending on where the computer or iPad is located, it may be necessary to bring an additional table for that purpose, since many lecterns are too small to accommodate a computer, notes and exhibits at the same time, and it is desirable to always be close to your computer or iPad. If you have no other options, the computer can be placed on counsel table, but frequently results in the questioner repositioning to that location.

It is always important to know in advance whether the courtroom is equipped with Wi-Fi, the lifeblood of technology. Most courthouses now have Wi-Fi available in the common areas, but the signal frequently does not penetrate into every courtroom. If you are using a wireless set up, discussed in more detail later, you will likely need to bring your own hotspot, which is a separate piece of small equipment supplied by your cell phone provider. Do not rely upon your Wi-Fi hotspot on your telephone, because there are other resources that will interfere with the signal, causing a disruption between your computer or iPad and the projector. Beware, however, if you must bring in your own Wi-Fi hotspot, you will be using a tremendous amount of data. ß

ORGANIZE YOUR EVIDENCE

An often overlooked advantage of technology is its ability to organize evidence. Medical malpractice cases invariably involve hundreds if not thousands of pages of medical records that must be organized in such a way that they can be accessed quickly and predictably when needed. Long pauses during the trial, while a litigator searches for the correct page in a hospital chart, promotes boredom with the jury and makes him seem unprepared. Litigators who can present the desired document quickly are perceived as being more prepared and in control by the jury. A number of tips will be discussed later in this chapter to improve this necessary skill. It goes without saying, however, that modern litigation software is extremely effective at organizing data, but many practitioners lack the experience to use these features effectively. A majority of medical malpractice trial attorneys have been using a paper-based method for most of their careers, and old habits are difficult to overcome.

In most medical malpractice cases, the medical records are the largest group of documents to be managed. All of the currently available litigation software programs can accommodate large amounts of data. A typical presentation during a trial, however, rarely requires more than a limited number of documents to prove the case. I recommend creating a separate folder on your computer for every hospitalization and health care provider during the discovery phase of litigation. In preparing for trial, these folders can be imported easily into the software programs. The actual paper copies of these medical records will physically be in evidence. Numbering the pages (Bates Stamp) of a hospital record before bringing them into your litigation software program makes coordinating the presentation images with the hardcopy that is in evidence that much easier. Witnesses often use the hardcopy records that are in evidence, so

coordinating the pages makes the process faster. There are many software programs that will place numbers on your documents, such as Adobe Acrobat Pro or DocReviewPad.

When naming documents before bringing them into the litigation software program, is best to limit the number of characters if a search becomes necessary on-the-fly. All of the litigation software programs permit thumbnails and indexes to be printed in hard copy, and I have found annotating the summary documents with longer names, such as the pathology report, or operative report, is the most efficient way to handle the problem. Many of the programs do permit renaming of exhibits once they are in the software, but this involves duplicating efforts and is unnecessary if the appropriate advance preparation is taken.

Litigation software permits a robust and quick search of stored documents, making it is usually fairly easy to find the required document when necessary. I would recommend keeping the most important documents in separate and smaller folders for ease-of-use. All of the primary litigation software programs permit evidence to be organized in subfolders for ease-of-use as well. I also recommended that separate folders be set up for openings, each witness and summation in order to make finding the document easier.

It is important to keep in mind when you are digitizing medical records, graphics or other images, the best format for the particular software program that you will be utilizing. Additionally, if your iPad is going to be your principal presentation tool, some consideration to using smaller files is important. A good practice to get into is to put all of your trial documents into your litigation software program early on in the litigation. I

find having all of my documents available on my iPad to be very convenient when I attend conferences in depositions.

CIRCUS PONIES NOTEBOOK

One of my favorite programs is Circus Ponies Notebook, an electronic notebook that permits you to keep notes, documents and images all in the familiar format of a multi-tabbed notebook. Finding documents, transcripts, medical records or outlines is easy and fast, permitting the notebook to be used as a standalone program during the trial.

As the name implies, the program creates a separate notebook for each of your cases. The organization of the notebook is facilitated by tabs. You can create as many tabs as needed, and each can all be customized with text and by color. A typical notebook might be organized as follows: a separate tab entitled "General," which has subsections for the chronology, notes, insurance information, etc. A tab entitled "People," containing the cast of characters. When you click on one of the names, a new page opens for this person, where you can add your notes, transcripts, copies of his/her medical records, photos, or any other digital data relevant to the person. Another tab might be entitled “Legal” into which you can bring copies of the bills of particulars, expert exchange information, court orders and discovery responses. A tab for all of the "Medicals,", which will create a list, which will open when selected to the scanned copy of the actual medical record. Perhaps another tab, entitled “Medicine,” to keep all of your notes and actual medical articles. The iPad version synchronizes with your computer version automatically. Bringing items just into your iPad, is accomplished by using Drop Box. The computer version supports drag and drop. Having the entire case,

organized and accessible, on your iPad permits you to carry your entire file to every deposition, court conference and trial.

One feature that I find useful when using the “Person” tab is viewing the document in “Steno.” First, I bring in the complete transcript, which until opened, is represented by a small copy of the first page. I then make an outline of the deposition, including page numbers, below the actual transcript. In “Steno” view, a line down is drawn down the middle of the page, with my outline of the deposition testimony on the left side and additional notes or questions on the right side. You can enhance your notes with annotations, such as highlighting, stickers, sticky notes, and keywords. I then use these notes in this format to cross-examine the witness at the time of trial, sometimes using my iPad or often printing the notes out to hardcopy.

BASIC POWERPOINT FOR TRIAL LAWYERS

The mother of all presentation software programs is PowerPoint (1990), by far the most well known and most used presentation software. It is inexpensive, versatile and easy to use. Its use as a presentation tool at trial was immediately obvious. My first courtroom presentations in the early 1990s were made using PowerPoint. Although originally designed for the Macintosh computer, PowerPoint became PC based when Microsoft bought the company. Since that time, PowerPoint has been introduced in many versions, now up to Microsoft PowerPoint 2013, with an update in 2015. There is also a Mac version, as well as a competing product by Apple called Keynote.

Although newer dedicated litigation software is now available, PowerPoint has continued to improve and is now easier to use than ever before. PowerPoint is still frequently used when the presenter has complete control over the sequence of the

images and presents them in sequential, linear fashion. This use adapts well to openings and summations. When greater flexibility is needed, however, dedicated litigation software programs permit random-access to the data, permitting any document or image to be brought up at any time and in any order. Although PowerPoint/Keynote is usually thought of as a linear presentation program, typing the number of the desired slide will cause that slide to be presented. Additionally, right clicking a slide, presents a screen the permits navigation to any slide in your presentation.

All of the functions or tools for creating a presenting slideshow are located at the top of the application, and over time have been perfected so that now the icons are familiar to most people, making them easier to use. One simply has to decide what they want to do next, find the appropriate icon and the process becomes somewhat mechanized.

When creating a new presentation for use at trial, the basic setup goes as follows. Start with a blank slide by clicking on the ‘New Slide’ icon. Decide on the slide’s orientation; if the presentation is going to be primarily photographs or bullet points, landscape is the preferred mode. For medical records and documents, select the portrait mode. Set up the basic background for the slides, which should be conservative, free from extraneous clutter and consistent throughout the presentation. This is done by going to the menu bar, selecting “Format” and then clicking the background option. Select a color, and check the small box to apply this format to all of the slides in the presentation. Do not worry too much about the order of the slides, since the slides can be easily rearranged once they have been set up by clicking and dragging them to the desired location.

Here are a few presentation tips. To go to the next start slide, hit the “N” key or click the mouse or spacebar. To return to the previous slide, select backspace or “P.” If an objection is made during the presentation, or you simply want the screen to go black or white while you speak to the jury to keep the attention on you, hit “B” on your keyboard for a black screen or “W” for a white screen; hitting the key again returns to the presentation. To get completely out of the presentation, hit the “Esc” key.

The best formats for PowerPoint are .jpg (photos, images), .gif (animation), .tiff (large format, good detail), .bmp. and PDF, as well as many other less popular formats. To insert a PDF file, bring it in as an object. PowerPoint also easily handles most video file formats, as well as audio file formats. There are selection buttons on the ribbon for movie and sound, accessed through the insert button.

One feature not available until fairly recently, is the “Presentation View,” which makes a presentation so much easier. The view permits the speaker to see his/her speaker notes, the next slide, and a timer while the jury sees only the notes-free presentation slide on the LCD projector. You can even bring up out of the view of the jury thumbnails of all of your slides, and select the slides out of sequence. To set Presentation View up, first go to the computer’s preferences or control panel. In the Display Settings dialog box, on the monitor tab, select the monitor icon that you want to use to view your speaker notes, and then select this as the main monitor. Select the monitor icon for the second monitor (LCD projector) seen by the jury, and then check the extend my Windows desktop onto this monitor check box. In PowerPoint, select Slide Show tab, in the setup group, and select use Presenter View. On a Mac, in preferences, click Display, and make certain that the monitor is not in “Mirror View,”

which would create identical images on your computer and to the audience. Click on “Arrangement” tab and make sure the “Mirror Displays” is unchecked (deselected), which permits the computer and LCD projector to show two different screen views. In PowerPoint, click on the Slide Show tab, and you will see the setting for “Two Displays”, and select Presenter View.

BULLET-POINT PRESENTATIONS

Bullet point presentations, with or without scanned documents, should be used to augment, not replace, the oral argument. Bullet point presentations are only headliners; they should be kept brief, unnecessary words should be edited and phrases should be used rather than sentences. Jurors remember short phrases and words better than long sentences, and retention is one of the goals of your presentation. Bullet-point slides should be kept to four or five lines to avoid visual clutter; use two slides if necessary rather than having too many lines on one slide. Most experts recommend using no more than six or seven words for each bullet point, but less is even better. The basic bullet point slide also has a title, which should be made as memorable and descriptive as possible, rather than simply putting on a label that does not convey a message.

To create a bullet point slide, select “new slide”, and then select the “bullet slide layout” from the group of presented layouts. The layout involves a title with bullet points. The title and the bullet point working spaces are separate, and can be resized separately to make them more visually appealing. The initial word of each bullet point should be capitalized, with the remaining words in lower case. The “enter key”

advances to the next bullet • point. Bullet points can be put into a different order by clicking and dragging. Animation can be added to the slides by assessing the “animation tool.” Animation permits each line to appear on the screen one at a time, thus preventing jurors from reading ahead, and also adds a dynamic sense to the presentation. Select a simple animation scheme, such as “dissolve in one line at a time”, which displays one line at a time and advances with a simple touch of the space bar. The same is true for transitions from one slide to the next; keep it simple and not flashy.

INSERTING PHOTOS AND GRAPHICS

Bringing photographs into a PowerPoint presentation is a simple process. From the insert tab, you will be presented with a number of options, including bringing in a picture from your computer or going straight to your photo album. There is also a picture icon in the toolbar. One image per slide can be brought in, or multiple images for a side-by-side presentation. If you are using labels, you can bring the image into a slide, resize it to leave room for text, and then add the text quite easily. To bring a photograph into the slide, simply select the layout entitled ‘picture with content’ or ‘title and content’, click on the picture icon of a mountain. Navigate to where the picture or graphic is stored on your computer, click on it and add it to the slide. When importing images, photographs or graphics, it is important to use the proper resolution and size. If you have to make the image larger by 20% to 25%, the image may pixelate and become fuzzy. A PowerPoint slide works effectively with a resolution of 72 DPI (a PowerPoint slide is 960 pixels wide by 720 pixels high). Resizing, cropping, adding text and annotations can then be

performed as desired, although it us usually best to resize the original image in its native environment first to ensure the best detail.

LINKING DOCUMENTS, PHOTOS AND INTERNET WEBSITES

There are situations where you may want to link a document, hospital record, medical image or internet website to a PowerPoint slide, particularly if you are showing a timeline and want to display a hospital chart entry. A basic bullet point/talking point slide can be expanded to link additional information to the text. For instance, if you have four bullet points, each can be linked through action settings to the specific document or image that supports the specific talking point. When you click on to the bullet point, it links to a slide with a copy of the actual document. Adding a hyperlink to a relevant document is easy. For instance, if you have a graphic that contains shapes, such as rectangles with text in it, you can link this graphic to the actual document, such as a page in a hospital record. First, select the shape or text that you want to use as the base object. In the ribbon, select ‘Insert” and choose “Hyperlink”. In the “Insert Hyperlink” dialog box, under “Link To”, click “Place in This Document”. Click the destination slide. To check to see what it looks like, select “Custom Shows”, select “Show and Return.”

SMART ART

PowerPoint has a useful feature called, "Smart Art Graphics" that can significantly reduce the amount of time to create a design. First, go to the “Insert Tab” of the PowerPoint ribbon and click on the smart art button, which will open a dialog box. You will then see a number of different configurations, many of which are excellent for courtroom presentations. You are limited only by your imagination as to how to

effectively use the many shapes during your courtroom presentation. Creating a graphic presentation of an argument by using the templates and smart art is easy and very effective. You can create lists, hierarchies, cycles, relationships and pyramids with a click. For instance, if you want to demonstrate a positive feedback system that is often seen in a disease process, click on “Cycles” where you will see arrows pointing to the next arrow in a clockwise fashion, with space to add text. Hierarchy templates can be used to create algorithms, which received approval in the *Hinlicky v Dreyfuss,* 6 N.Y.3d 636 (2006) case.

EMPHASIS TOOLS: GET IN FOCUS

One of the goals of a good visual is to get the audience to look at and actually see what you want them to see. For example, if you display an important document, there are usually just one or two lines that support your theory of the case; this is where you want the jurors’ eyes and attention. PowerPoint has very useful highlighting, underlining and color tools, which are easy to use, and help bring focus to the presentation. Boxes, which can be placed around words, phrases or objects, arrows and other shapes, are also available and easy to use tools which add focused emphasis. To underline or highlight the important line, click on the tool palette desired, such as a straight line, select the desired color, and then using the mouse, underline the selection. The same process is used when putting a box around the desired text or object, with the additional step of removing the “fill color” to permit the text or object to be seen. Go to the “Fill Tool”, and instead of selecting a color, select “None”, which will then expose the desired text or object. There is also a transparency tool that will highlight the box while still permitting the text to be viewed.

To create a slide, select “New Slide”, and for “Content Layout” choose the icon with a picture of the sun coming over a mountain. This will bring up a dialog box that permits importing the photograph into the PowerPoint slide. Navigate to the folder where the image has been scanned and stored, insert it and click import. To resize the image to fill the slide, while maintaining the same proportions in the photograph, activate the workspace by clicking on it, and click and drag from the corner. To view two photographs side-by-side, select the appropriate template for two photographs, and import the images into each section. Presentation software permits cropping of photographs within the program, which can be used to eliminate unnecessary clutter and provide greater focus. Labels can be added to the photograph by using the toolbar, selecting “text box”, placing the mouse where the text box needs to be positioned, eliminating the fill, typing in the text, and resizing when necessary. The borders to the text box can be edited by selecting the appropriate tool from the toolbar, choosing a color and, in most cases, increasing the size of the lines that make up the box. Instead of eliminating all of the fill color, utilize the transparency slider to make the color more transparent so that the text shows through. Adding an arrow is done much the same way. Select the arrow from the toolbar, and while holding the left mouse button, move to where the front of the arrow should be positioned. Utilizing the “line color tool” in the toolbar, change the color and size of the line as desired.

EXHIBIT NUMBERS

Electronic exhibits are easy to edit. Exhibit numbers can be put onto the slide, which are scanned and digitized copies of the originals, to correspond to the actual exhibits that are marked into evidence. The preferred method is to put the exhibit

numbers onto the slides before using the exhibit slide during a trial to promote clarity for the record. The same format should be used with all of the slides. In PowerPoint, select the “text box” tool, place it on the exhibit, remove the “fill color” and type in the appropriate exhibit number. Trial Director has a dedicated exhibit slide tool for doing the same task.

TITLES

Attention must be given to titles when creating graphics. Titles quickly convey important information to the viewer about the graphic, such as what the graphic is all about, and frequently is the most memorable part of the display for jurors. Titles must not waste key informational real estate. Putting useful information in the title, rather than merely identifying a document is more effective. If there is something within the document itself that is useful, turning that into the title can be effective. In addition to a memorable title, where appropriate, a citation should also be added at the bottom of the exhibit to show the jury the connection to the original document.

LITIGATION SOFTWARE

PowerPoint was the first product used in the courtroom for presentations. Since that time, numerous dedicated litigation software products have become available to the medical malpractice litigator, for both PCs and Macs, as well as iPads. All of these programs have the capability of making multimedia trial presentations. Each of these programs has certain pros and cons discussed below. When deciding which program best suits your needs, download the demo first and try it out before committing to purchasing it. While the interfaces for these various programs often have similar features, the programs that will accomplish your goals and are the easiest to use are

usually best; more is not always better. It has been my experience that there are a limited number of features necessary to present even the most complicated medical malpractice case.

Almost all of the major litigation software programs have both a computer and an iPad version, with the latter usually having fewer features but with every bit the functionality of its larger brother, the computer. I always have a computer, in my case an Apple air, in the courtroom as well as two iPads, one of which is my principal tool for presentation. I match the software on each piece of equipment. Perhaps the biggest distinction between computer software and iPad software is how the majority of the data copies into the program. Computer programs typically permit you to drag-and-drop the documents into the software. The iPad software programs require syncing to a cloud-based product, such as DropBox, and importing the documents by way of Wi-Fi. I do not find this to be a problem since I store all of my documents in DropBox as a matter of routine as one of my several backup strategies.

The three major trial presentation programs for the computer are Trial Director, Sanction, and Visionary. They all perform many of the same basic tasks, and are very feature rich but can be technologically challenging to the newly initiated. When I began using litigation software in the courtroom for the first time, Trial Director was my tool of choice. These programs do offer the advantage of having a much larger storage capacity compared to the iPad, which is currently limited to 128 GB. The interface for all of these programs has improved over time, permitting a solo litigator to operate his equipment on trial without the assistance of a technology expert being in the courtroom. I have never used a technology assistant, but many trials lawyers find it helpful. Trial

Director 6 permits hosting of your video in the cloud. These programs also permit video editing to create video clips for use at trial, unlike most of their iPad rivals. With all of this advanced capability, much of which is unnecessary for presenting most medical malpractice cases, comes a hefty price. A single user license for Trial Director 6 is $795, plus an annual maintenance fee, which compares to $89 for the iPad applications, which do not have annual maintenance fee requirements. Trial Director is a PC based product.

IPAD LITIGATION SOFTWARE

Since the introduction of the iPad in 2010, it did not take too long for developers to come up with dedicated litigation software that took advantage of the iPad's size, easy to use touch screen, and ability to store large amounts of data. The iPad has been my tool of choice for some years, primarily because I can do everything that I need to do with it, and it is much easier to handle in the courtroom, particularly now that I have the ability to go wireless.

Litigation software for the iPad has all of the important features found in the more robust computer-based programs, with the ease and functionality found in the iPad's touchscreen. Because the software utilizes familiar iPad functionality, including icons and a touch screen, these programs are familiar to most and are considerably easier to learn and to use in a courtroom. The software for iPads has all of the significant annotation tools to help bring focus into any courtroom presentation. Creating a callout on the fly is as simple as touching the icon and then using your finger to block the area in question. The text becomes significantly larger and is brought to the foreground, making even the most cluttered medical record easier to read. Standard tools, such as a

highlighter, arrows and circles are readily available, and all you need is your finger to use them. There is even a redirect tool that permits you to hide text from the view of the jury. Any exhibit that is annotated utilizing the software can be saved without changing the original image. The saved images can then be sent to a printer and a hard copy made if required. The programs have the ability to display two documents at the same time (TrialDirector can display four, but this is rarely needed in a medical malpractice case). The screen is cleared of the annotations by the “Clear” button.

The two main iPad programs are TrialPad (my favorite) and ExhibitView iPad, both of which are full-featured courtroom presentation tools for an iPad. The two programs are very similar, and although I own both programs, I use TrailPad when on trial, so my remarks are specific to Trialpad. This program supports multiple file formats, including PDF, JPEG, PNG, TIF, Multi-Page Tiff, TXT, and all audio and video file formats supported by iPad. When holding the iPad horizontally, all of your exhibits are located on the left side in an exhibit library and easily viewed and selected. The presentation area is on the right side with all of the annotation tools. There is also a feature permitting side-by-side document comparisons. TrialPad has five presentation tools: call out, highlight, pin, redact and laser. The program permits bringing an exhibit into the presentation screen, making certain that it is the one that you want, annotating and when the slide is ready, with the touch of your finger on the presentation button, the slide is then exhibited to the jury. Having this feature avoids the jury viewing unwanted documents while you are searching for the one that you wish to display. Because they utilize retina graphics for iPad, the images are very crisp and clear. There is a feature that permits putting exhibit labels on the presentation documents and another that

permits tracking admitted evidence. An entire document or a single page from a document can be marked as a "key document." Accessing the important documents is easy, efficient and saves time from scrolling through numerous document thumbnail images on the left side of the screen to find the correct one. When there are numerous pages in a hospital record or trial transcript, this feature is a real timesaver. If your expert marks up an exhibit, it can be saved as a key document, together with the original unedited image. These programs also have the capability of displaying video files.

The iPad Air 2 supports a “split view”, permitting two apps to run side-by-side. By having two apps open, the presenter can have all of the medical records in TrialPad and then immediately switch to a 3-D anatomy program to demonstrate an anatomical structure. Similar, although not identical, is the ability for an updated iPad to use “slide over”, which reveals a list of other apps very quickly. One use of this feature would be to have your presentation outline in one program, such as Note, and then quickly bring up TrialPad when necessary. To engage this function all that is required is to sweep from the right edge with your finger, and all of the programs on your iPad are displayed as icons in a scroll down menu. The audience will not be able to see your outline, and the outline will not project onto the output screen. To get back into TrialPad, simply tap on the TrialPad side to bring it back into full view. To see a different secondary app, bring up the app again and tap the scroll down line at the top, and pull down, revealing all your apps on the iPad.

WIRELESS

The ability to present your evidence wirelessly using an iPad, communicating through a small Apple TV device that is connected to the LCD projector, literally cuts the cord between the iPad and the projector, permitting the attorney more options in moving around the courtroom without the added concern of dealing with a connected HDMI cable. I initially tried using a Wi-Fi hotspot on my telephone for service but discovered that telephone calls and data interfered with the signal, resulting in a loss of communication. I then purchased a dedicated Wi-Fi receiver, which worked fine, but used a great deal of data on my phone plan. The best situation is to be in a courtroom that has Wi-Fi. Setting up a wireless connection is not difficult, and is the same process used to connect your iPad to your home television set via Apple TV. Both the Apple TV and the iPad must have Wi-Fi access and be on the same network. Swipe up on the iPad screen to reveal Control Center. Tap Airplay and then the name of your device, and you are connected. The Apple TV connects to the projector by way of an HDMI cable.

DEPOSITION TRANSCRIPT SOFTWARE

The stenographic industry has kept pace with developing technology, and almost all agencies provide transcripts in multiple formats, which easily import into a computer or iPad. Once the transcript is imported, it can be brought into one of the dedicated transcript managers, for more effective use. These programs permit you to read and review legal transcripts more efficiently than ever before. The programs permit the transcripts to be highlighted, annotated and used with presentation software. Another interesting feature is that they permit the trial attorney to create issues, and then block

relevant deposition testimony from various witnesses and assign it to the appropriate issue. Reports can then be generated of the verbatim testimony of each witness on a particular point. The issue assignment ability also permits the attorney to create a digest of selected questions and answers that can be used as the basic structure for cross-examination. Additionally, because all the words are indexed, searching for a relevant answer during a trial is infinitely more efficient and faster than looking at the index in a hardcopy transcript.

A program, such as TranscriptPro 2, supports PDF, ASCII and video synchronize transcripts. TranscriptPad is made by the same company which makes TrialPad, and is my favorite transcript software. The universally accepted file format for transcripts created by court reporters/stenographers is an ASCII file that is delivered in TXT format. Transcripts must be in TXT format to work in TranscriptPad (exhibits can be in PDF format). This format preserves all of the original formatting contained in the hard copy transcript.

VIDEOTAPED DEPOSITION

Impeaching a witness with his transcript is effective, but using a videotaped deposition of that same exchange is far more persuasive. Anyone who has ever read a deposition transcript during a trial to the jury knows how boring it can be. Where a witness has given several contradictory answers during his deposition, it is much more powerful to display the video to the jury than merely reading the transcript. Although there is no obligation to read the entire deposition transcript, for whatever reason, many lawyers feel compelled to do so. This practice violates many of the cardinal rules of

persuasion, not the least of which is that the message might get buried in the tedium. The same is true with videotaped depositions. There is no obligation to start the video at the beginning and run it to the end in a linear manner. Editing video to enhance focus and eliminate boredom is essential. Once converting video into digital format, it is easy to bring up the segment desired immediately, which is unlike analog videotape that must be advanced or rewound to get to the desired point. If the videotape is used during the trial, when a witness testifies in a matter inconsistent with his prior videotaped deposition, immediately displaying the video to the jury testifying in a contrary fashion is simple and fast. VHS video, which is analog, can be easily converted into a digital format and brought into dedicated software programs for editing. Trial Director has a built-in video editing feature that is easy to use and very effective. Once converted into digital format, it is much easier to edit and present in the order and manner desired. The software for doing this editing is readily available, and with more families making home videos, the expertise for such editing is now within the realm of many trial lawyers. However, there are many commercial businesses that will do video editing. The only issue sometimes is on deciding where the edit cuts should be placed, which requires a great deal of coordination. On the other hand, there are few more effective techniques than presenting short snippets of edited videotaped depositions by several witnesses on the same point contradicting each other.

3D ANATOMY SOFTWARE FOR IPAD

Presenting anatomy to the jury using an iPad has been one of the best tools for a medical malpractice attorney. Instead of presenting a flat, two-dimensional blow up or a static digital image from your computer, there are now available a number

of reasonably priced anatomy programs that make the presentation in 3D. There are so many programs available that contain a complete Atlas of the human body, as well as dedicated programs for muscles, skeleton, nervous system, digestive system, heart, kidneys, brain, respiratory system and urinary system. These programs permit the attorney to manipulate the orientation, for instance of the heart, in a 360 degree, up and down manner, thereby permitting the desired area to be displayed. It is easy to zoom in or out on a structure for better focus using familiar iPad movements. There are tools that permit marking up the image. By touching an area, a dialogue box gives you an identifying label, and even will pronounce the name of the structure. These programs also permit the overlying anatomy to be removed to permit viewing of structures beneath, something that can be particularly effective when trying a surgery case, where the overlying structures can be removed quite easily from the image to permit exposure of the area in question. There is also a short videos demonstrating function. One of my favorites, Human Anatomy Atlas, Visible Body only cost $19.99. This 3-D anatomical model of the human body has over 4600 structures in both a male and female model. It also includes microanatomy models of senses, 3-D animated models of muscle actions. I have all of the systems listed above on my iPad at all times. Beware, these programs are very large and take up a considerable amount of space, so always buy an iPad with the maximum amount of storage available.

MEDICAL ILLUSTRATIONS

Medical illustrations can assist medical witnesses to explain anatomy, surgical procedures and equipment/instruments relevant to the case. Because of the

ease of use, many more images can be scanned and presented with PowerPoint than might otherwise be used with a standard blow-up on foam board presentation.

One of the concerns when using anatomy drawings from a standard textbook is the amount of excessive detail which frequently obscures the point of interest. As with most exhibits, the less clutter, the better. The Internet can be a great source for medical images, but many of these images are too small to be effectively used in PowerPoint because they lose their definition and clarity when enlarged to fill the screen. The classic textbook of human anatomy, entitled “Atlas of Human Anatomy” by Frank H. Netter, M.D., is wonderfully illustrated but in many cases has much to much detail for effective use. Children’s books can be a good source of simple diagrams and graphics that can be effectively used in the courtroom.

VIDEO

Video can dramatize what would otherwise be hard to imagine, eliminating the need for prolonged presentations of proof. Video cameras have been in common use for many years and offer many opportunities for use at trial. Pre-accident videos, such as marriage ceremonies, sporting events, and family gatherings frequently convey important pre- injury information concerning a physical condition much more effectively than an oral description. Conversely, a video taken by the adversary frequently can be devastating to claims of inability to function. There is no limit to how to use video during a trial. In addition to using a traditional videotape machine, all of the presentation software discussed above will display video.

Many events can be videotaped for more effective presentation. For instance, videotaping the monitor during an EMG study showing spikes in the waves, can

augment the doctor's testimony at trial as he explains how the study demonstrates damage to the nerve. Videotaping a physical therapy session can be effective where the patient is unable to go through a normal range of motion.

IMAGING STUDIES

Imaging studies, such as x-rays, MRIs, and CT scans, are critical for diagnosing conditions and are therefore an important piece of demonstrative evidence in most personal injury actions. Traditionally, the physician testifying concerning the significance of the imaging study does so utilizing a small shadow box, either at the witness stand or directly in front of the jury. MRIs and CT scans used to come in sheets containing multiple smaller images presented in a serial fashion. Observing detail at a distance is very difficult.

Most imaging facilities now only use digital data displayed on computers, printing hardcopy only upon request. Digital images can be obtained and loaded directly onto your computer and displayed through presentation software, which usually comes with the disc. On those occasions where you can not get the images to open, a free software program, OsiriX, will convert almost any study. If only one or two images are needed for your presentation, I would recommend simply taking a screenshot of the image and bringing it into your presentation software. Presentation software permits blowing up of smaller images so that the detail can be appreciated better by the jury. Enlarging imaging studies are not objectionable, except where the imaging study itself is in controversy, such as the proper interpretation of a mammogram, where at least one court ruled that a blow up unfairly represented the image seen by the radiologist at the time of the interpretation.

The major advantage is that annotation tools embedded in the software permit greater flexibility in bringing focus for maximum impact. Putting a circle around, or an arrow pointing to, the point of interest on an imaging study is more effective in most cases than having someone merely verbally describe it or put a finger on it. Because images can be displayed so quickly, it is often easier to organize and then present a serial presentation of imaging studies in sequence over time to illustrate a point. For instance, when following degenerative changes in a knee, showing imaging studies over time can demonstrate the joint space getting smaller. Presentation software permits side-by-side comparisons not afforded when using a single shadowbox in the courtroom.

TRIAL GRAPHICS

Trial graphics can be another tool in the teaching process and used at trial. Transforming a concept into a trial graphic can be very challenging. Illustrating important parts of your case can be a useful organizing tool as well. The goal of graphics is to simplify information and present it in a manner that will be memorable to the jury. There are no limits to the types of different graphics that can be used to convey effectively information. Successful trial lawyers spend a great deal of time at trial educating jurors, and graphics can be of great assistance. Graphics can also help make the case easier to understand. First, the trial lawyer must have the imagination to identify critical concepts that need to communicated to the jury. Coming up with the most effective graphic is frequently more challenging. Deciding which medium to use to display best the trial graphic to the jury is the last and easiest part of the process. A

visual presentation in conjunction with oral information can make a more effective impact on the jury than mere testimony alone.

Presenting information in graphic form one piece at a time can enhance focus. Presenting the first piece of information causes the jury to focus on it. When adding the second piece of information, the jurors' attention naturally goes to that, to the exclusion of the first piece. Completing the graphic, using the same baseboard but adding to it step- by-step can be very effective. With presentation software like PowerPoint, this is very easy to do. Start with a basic slide. Click on the slide in the slide/outline section that is displayed on the left side when not in slide show mode. Click 'CTRL' 'D' to duplicate the slide; click on that slide and bring it into the workspace, add additional information, and continue in the same manner, completing the final slide. This layering effect also acts as a good pacing device to assist the lawyer in the presentation. By presenting the information step-by-step, and breaking the whole into smaller, but related parts, the jurors will not be overwhelmed as they might otherwise be if presented with the information all at once.

If the plaintiff has a permanent injury and can be expected to experience pain for the rest of her life, it is often difficult to get jurors to comprehend the concept of time. One way to do this is to take a graphic using small icons of calendars to display 10, 20 or 30 years. Leaving a simple graphic such as this on the screen while you talk about permanency will cause some jurors to reflect upon the difficult concept of "duration of time."

If the case has multiple characters, and identifying each person's respective role is important, using a graphic with the icons of people with their names underneath

organized in such a manner as to make their roles clearer is easy and effective to do. The organization or labeling of each person's involvement can help bring focus on the individual or individuals who are most important to your case.

There are many ways to present information, some more effective than others. Trial lawyers seem to have a preference for information rather than putting pictures into their graphics. Symbols, or icons, can be effectively used on graphics, and frequently are more powerful. Using icons as symbols frequently permits more information to be put into the graphic utilizing less space, and is often easier for the jurors to comprehend. For instance, demonstrating a series of telephone calls on a graphic timeline by using telephone icons is more effective than writing the word "telephone call", or using 20 or 30 icons of a therapist to represent physical therapy visits rather than putting in the name of the therapist.

TIMELINES

Medical cases are frequently presented in a chronological structure. Having an effective timeline often serves as the underlying foundation for the flow of all information presented to the jury throughout the trial. Technology has made creating professional quality timelines accessible to any litigator, facilitating transforming case facts into high-quality visual timelines very quickly and easily. Timelines usually have a time bar that has important events connected to it. In addition to written entries, time bars can utilize icons (small pictures, such as of a doctor demonstrating doctor's visits), that frequently can be more convincing and easier for the jury to comprehend when there are many entries. When setting up a time bar, selecting the appropriate unit of time and its position in the graphic is the key to an effective visual. For the timeline to be effective,

the graphic must not be visually cluttered. When necessary, break the timeline into multiple graphics. Alternatively, present a timeline that spans a longer period, and then use additional graphics to focus in on key periods. As in other graphics, do not feel compelled to cram in every single fact of the case; remember, focus is the key. When putting in the written entry connected to the timeline, edit down to the bare essentials to eliminate visual clutter.

Litigation support software programs, such as Timemap, TimelineXpress, Easy Time Line and Beedocs are inexpensive and cost effective. MS PowerPoint and Keynote also create timelines but require greater expertise. Many of the dedicated software timeline programs, however, can be imported directly into PowerPoint for presentation purposes. Built in templates (TimeMap has 30 pre-set templates) make creation of professional looking timelines easy. Adding dates and events to a New Fact Box, which can be customized for such things as color, and then added to the timeline, which will automatically rebuild, making all of the necessary adjustments. Fact boxes can be adjusted up or down or side to side so as to not compete with an adjacent fact box. If using a companion product, such as Casemap, the data can be directly imported into a timeline without recreating the fact boxes. These timelines can be printed and then blown up and presented on foam board if desired, or displayed using a computer and LCD projector. TimeMap's timelines can be transferred to PowerPoint using a simple one step operation, which then permits presenting the events of the timeline, one event at a time by pressing the spacebar on your computer. PowerPoint's annotation tools can be used to create timelines by using text boxes and joining them to a horizontal or vertical timeline.

An added feature to these products is the capability to link an actual exhibit to a timeline entry. Being able to have the document zoom out from a time entry can be very visually compelling. MS PowerPoint has had this capability for many years, but creating timelines is more technologically challenging than in the dedicated software programs. Now, the dedicated software programs can also add hyperlinks to documents. In TimeMap, for instance, an image is selected and hyperlinked to the timeline. To add a link, choose “Edit,” Add Link,” then type or paste the URL. The main difference between this program and MS PowerPoint is that when the attached exhibit is clicked on, TimeMap opens a new window and launches the default software for the linked image. To facilitate easier viewing, the linked image can be prepared in advance for optimal viewing by having the specific text already placed in a call out or annotated. Moreover, most of these programs can expand or compress to show more or less detail. To ensure the degree of focus you want from the jury, it is often a good idea to display one event at a time and build the timeline by adding one event at a time.

CHRONOLOGICAL LISTS

Chronological lists display important dates but do not necessarily relate them temporally. The list has a column with dates and next to which a written description that corresponds to the date. While timelines are better for showing temporal relationships, there are times when a simple chronological list, showing important dates, can be more effective. Chronological lists generally are presented vertically rather than in the landscape format frequently utilized for timelines. A chronological list can be an effective reminder during opening statements and summations, and can assist in delivery. Chronologies can be digitally created using PowerPoint and bullet-points.

FLOW CHARTS

Flow charts condense evidence and allow for presentation in both a visual and linear fashion. The information exhibited on the flowchart often comes from the oral testimony at trial. Flowcharts are particularly convincing when attempting to demonstrate cause and effect relationships. Flow charts can also summarize voluminous records, and merely act as proxies and organizational tools for matters already admitted into evidence.

The verdict form is, in essence, a flowchart. A well-constructed flowchart, incorporating the evidence, can be an effective way to assist the jury to analyze the evidence as it relates to the law of the case. Utilizing the concepts in the jury interrogatory, a flowchart that addresses the major questions that the jury will be required to answer, arms the jurors who are in your favor so that they can argue your case for you during deliberations. An effective flowchart shows the jury how to get to where you want them to be.

CHECKLISTS

A checklist is usually a series of rhetorical questions followed by boxes that can be checked “yes” or “no.” The answers are revealed one at a time, while the evidence is examined, and acts as a pacing device with the attorney making a presentation. Using a checklist tends to keep the jurors more involved each time the trial lawyer returns to it to make the next point.

Checklists can be made using PowerPoint with successive slides checking off the correct answer. Once the master slide is created with the rhetorical questions, a duplicate slide is created by typing “CTL D.” With a little bit of practice, a checkmark can

be animated to duplicate the two strokes necessary to create a checkmark, or can fly into the box at the appropriate time. PowerPoint has animation tools that control how characters appear and disappear on a graphic slide. Checklists can also be effectively presented using foam boards and blowups. This approach can be particularly persuasive if multiple witnesses will be testifying on the same point and giving the same answer. Checklists are persuasive for framing the questions in a manner that is most beneficial to your case. Clearly, there is an advantage if the jury adopts your questions from the checklist as the critical questions to be answered in deciding the case.

OPENING STATEMENTS

The purpose of the opening statement is to explain to the jury what the case is about, what the issues are, and what the proof will be at trial. The jury is given a chronological overview of what happened, the key players are introduced, critical technical terms are explained, and important documents and exhibits discussed. CPLR §4016 does not address the permissible scope of opening statements. In most cases, the court will limit the use of graphs, charts, photographs or other exhibits in the opening statement without the consent of your adversary, or unless the parties have pre-marked exhibits. As long as it is not an improper argument, there should be no objection to allowing a party to state its intention to introduce into evidence, subject to the court's discretion pursuant to CPLR §4011 and §4016, and then to show that evidence in graphic or other demonstrative form, as long as there is a reasonable basis for believing it will be admissible at trial.

Many trial courts permit writing part of the opening on a blackboard for emphasis. Presentation software is the functional equivalent of a blackboard. If you can say it in

opening statements, there should be no prohibition against writing it. Bullet point presentations, which are not actual exhibits, should be permitted even if documents and other exhibits are not permitted to be used.

There are unique issues, however, associated with using visuals during an opening statement, and certain precautions that should be undertaken. There is also a distinction between using PowerPoint with bullet points to augment the oral argument, and displaying documents that are not yet admitted into evidence. While there is a trend to pre-mark documents that will be going into evidence once the trial commences, there is no guarantee that your adversary or the court will do so.

Several things should be done to facilitate the use of demonstrative evidence during opening statements. First, notify the Court and your adversary in advance that you intend to use PowerPoint during your opening to avoid interruptions during your opening statements. An opening statement should not be an argument, but should be a statement of the facts that you intend to prove at trial. When using a PowerPoint presentation, avoid the use of “adjectives” and “adverbs” during any bullet point presentation to avoid the objection that the opening statement is being argumentative. Frequently, your adversary will ask to preview the PowerPoint presentation. In those situations, attempt to have the judge preview the presentation out of the presence of your adversary. If that fails, it is still better to permit your adversary to preview your PowerPoint presentation rather than to have frequent interruptions during opening statements. Another objection frequently encountered is that PowerPoint slides come up so quickly that your adversary has insufficient time before the jury sees the visual. Previewing the PowerPoint presentation effectively deals with this objection. Unlike

traditional hardcopy blowup exhibits, a PowerPoint presentation can be edited immediately, and slides removed or changed quickly if there is an objection, thus offering a tremendous amount of flexibility not afforded by hardcopy exhibits. Additionally, if there is an objection to a PowerPoint presentation, merely pressing the letter “B” immediately blacks out the screen, pressing the letter “B” again resumes the presentation.

The purpose of any argument is to persuade; to persuade you must bring focus to your presentation. When presenting documents to the jury during opening statements, ideally the jury should be focused on the points in the document that reinforce your theory of the case. Keywords can be underlined or labels used to accomplish this goal. It is very easy to do this using PowerPoint. It is important, however, when using documents with added focus during opening statements that all labels are fair and noncontroversial.

An effective way to bring focus to your message is to use a “text pull.” An image of the original document is displayed, with highlighting of the portion of the document that is important to your case. The highlighted section is linked to a callout or text pull, which is enlarged for easier reading by the jury as well as reinforcing the desired focus. In many situations, a citation can be placed in the corner of the slide presentation to show where the document originated. To do that most effectively,

Complex cases frequently involve many key players that are difficult to keep straight. A simple graphic, using clipart for the people with their names and titles, can assist both the attorney making the presentation and the jurors. Actual pictures of the individuals can be obtained from their videotaped depositions or other sources if

available. Simple graphics can also be produced that place individuals in certain locations, such as at an accident scene or perhaps in a factory setting.

EXAMINATION OF WITNESSES

Direct and cross examination of witnesses is considered by many trial attorneys to be the most significant events that take place in a courtroom. Well-choreographed examinations are one of the most important skills required of any trial attorney. Technology can be an effective tool to keep your own witness on message, lend credibility to the oral testimony, as well as providing a structured foundation for cross-examining an adverse medical witness. Medical records are the foundation of most medical malpractice cases, and technology not only assists in organizing the multitude of documents but facilitates their use in a much more streamlined fashion. I have seen experienced trial attorneys trying medical malpractice cases using hundreds of blowups of the pages from a hospital chart. After only several days of trial, it becomes exceedingly difficult to find the desired blowup of the document without disrupting the flow of the examination, with a corresponding drop-off in interest by the jury. Technology, if properly used, facilitates the easy handling of these documents. Moreover, with the use of the animation tools and callouts, the information is usually easier for a jury to see because it is not only larger but in the age of HDMI, sharper and clearer.

All of the litigation software programs have features that permit all of the documents needed for a particular witness to be arranged in a defined folder, either as key documents or by witness name. It has been my experience that most cases only

require a limited number of pages from a hospital record to prove or disprove a case. In preparing your documents, is often better to copy key exhibits and rename them using the witnesses first initial for ease of ready access.

When preparing to examine or cross-examine a witness, a decision must be made as to which exhibits to use with the witness in what order to introduce these exhibits. Medical records usually are already in evidence, but medical illustrations, graphics in other argumentative slides must be reviewed in advance with the witness to ensure that the proper predicate foundation questions permit their use. Most medical illustration exhibits are used for demonstrative purposes only, so that when using technology, the attorney has a far greater opportunity to present a more complete the monster presentation then when he attempts to do so through the use of blowups.

When examining your expert witness on direct, it can be effective to have the witness step down from the stand and interact directly with the media being presented on the screen. The witness should stand on the right side of the screen facing the jury if he is right-handed so that he does not block the jury during his presentation. Prepare the witness to use the iPad software annotation tools when necessary, saving a copy of the edited image for later use. On the other hand, when cross-examining an adverse medical witness, you should do all of the underlining.

Preparing a series of bullet point words and phrases that are relevant to the lawsuit can be easily displayed to the jury while the witness is asked to define the term and explain its significance to the case. In most medical malpractice cases, teaching the important terms not only helps win cases but build credibility with the witness. A timeline, can be brought into the litigation presenting software or PowerPoint, and the

witness can use it as a foundation for his testimony. When you are attempting to explain a complex medical issue, using a linear slide presentation that addresses the fundamentals of the principle is an effective teaching tool. A presentation that not only defines the key medical terms but explains the expert's methodology for arriving at his opinions, can be very persuasive. Imaging studies and medical records can be integrated into this linear presentation very easily. By presenting the evidence through the use of technology, the presentation becomes much more streamlined and organized. Moreover, because you are not limited by the number of graphics or medical images that you use, it is considerably easier to layer your information, one slide at a time.

When it comes to cross examination of an adverse medical witness, very few things are more important then preparation and control. Technology can help organize information and how it is presented to the witness. Organizing your notes for cross-examination of a medical witness can be a daunting task, even for the most seasoned trial attorney. Circus Ponies Notebook can be useful when cross-examining a defendant doctor, as explained above. I also use TrialPad's feature that permits the creation of issues and the assignment of deposition testimony to that specific issue. A report can be created and printed if you feel more comfortable using hardcopy, or an iPad can be used, keeping the podium uncluttered. I often use a dedicated iPad when questioning a witness, so that my connected iPad remains free for visual displays. On those occasions when you obtain significant concessions from a prior witness, daily transcripts can be either digitized or obtained in electronic form, and quickly and easily put into a litigation presentation program and displayed to the witness for added control.

Because the exact response from the witness is being displayed, it also avoids the usual objection that the witness did not so testify from his attorney.

There are few things more powerful than a concession obtained during cross-examination. One method is to prepare in advance a limited number of major points already established during the deposition of the adversary witness. As you ask the question and get the locked in response, bring it up one at a time on the screen. For instance, if the witness concedes that a radiologist is required to identify all abnormal findings on a CT scan, bring that up on the screen as: “identify all abnormal findings.”

SUMMATION

Summations afford a perfect opportunity to use litigation software, which can not only facilitate the trial lawyer’s delivery but make for a more coherent and understandable argument to the jury. Making a proactive argument is easily accomplished with PowerPoint if you are able to stick to a script. The simple act of putting together a well thought out PowerPoint presentation will help the trial attorney organize his thoughts and lead to a more coherent and organized presentation. Moreover, using a wireless, Bluetooth mouse, or even an application on your iPhone, the trial attorney can advance the slides and still have the freedom to not be in front of the computer.

For instance, the jury questionnaire that they will be called upon to answer can be easily scanned and used as a talking point for closing remarks. Make a slide with the significant words, such as “Reasonably Prudent Doctor,” and then orally explain that this means a doctor who acts reasonably and is cautious (prudent) when treating a patient. Repetition of trial themes can be easily displayed and discussed. Rhetorical questions

can be presented to the jury in visual form for more effect. Presenting damages, likewise, can be effectively presented using presentation software that permits adding new lines of items until the total is reached. 'Yes' and 'no' checklists can be easily created using PowerPoint, again to add focus to your case. Such techniques deliver a logical message intended to illustrate the theory of your case. Decision tree charts, utilizing easy-to-use templates provided by PowerPoint, can help reinforce your trial message. The decision tree can be revealed, one piece at a time, for greater effect. Making a list of the facts and issues that the witnesses agreed upon can limit the issues for the jury to resolve, and can quickly be created on the evening before summations. Portions of the trial transcript can be scanned and displayed, with emphasis on the desired portion, while discussing its significance at the same time. Presenting a document with argument points next to it on a screen can reinforce important portions of your argument. Linking a graphic to the jury instructions or jury questionnaire is always a good idea when possible. It is often best, particularly when using a program like PowerPoint, to either use blank slides or to hit the B key, which automatically brings up a black screen, when you do not want the jury looking at the screen.

CONCLUSION

Trial lawyers are always looking for an "edge", a better way to present their case and more effectively represent their client. It is not sufficient to have the better case; you must be able to present your case effectively to the decision makers, the jury. It only takes being upstaged one time by an attorney who effectively uses technology in a courtroom, to make you realize how powerful technology has become as a tool of persuasion in the courtroom.

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CROSS-EXAMINATION IN THE MODERN ERA

W. Russell Corker

INTRODUCTION

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. 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 the case is destroyed. 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 deciding factor in the outcome of a trial. The behavioral scientist who studied how and why juries make decisions agree that information obtained through cross-examination has more weight than most other evidence. If these two points are true, then trial lawyers of today must balance the caution advocated by the past with the challenge of using cross-examination to prove their case. The method for constructing a fact-based cross-examination was first discussed in the 1993 in one of the best books on the subject, "*Cross-Examination: Science and Techniques*" by Larry Pozner and Roger Dodd. This article is a short introduction to a methodology of constructive cross-examination that limits the opportunity for cross-examination to go wrong while maximizing the dramatic impact of an effective cross-examination to teach and prove the 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 provided to them to prove the 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 will stop listening once the material seems too complicated or disorganized. Even a reluctant listener is easier to engage when 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, stepwise, to a conclusion. Additionally, this must be done with a limited amount of questions because

even attentive juror's minds tend to wander off. The method must engage the minds of the jurors. It the information is not presented this way, as is frequently the case, without tight organization and in a particular sequence, then each juror must re-organize all of these facts into their own coherent story. It does not require further comment that getting a group of people to re-organize the facts, in the same manner, is near impossible.

Knowing how jurors process information and make decisions is vital to constructing meaningful cross-examination. In 1956, Professor George A. Miller, 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 desperate 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, poorly organized, and not presented in such a way so as to lead to a definite conclusion. Merely 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 it can be written out and visualized.

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 can. 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 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 rather than to get him to agree with your conclusion or your opinion. Effective cross-examination is about controlling the information presented to the jury and controlling the witness 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 explicitly requiring the witness to roll over on the stand and admit defeat. Presenting questions in such a way there can be only one conclusion, which the jury will understand without additional help.

After the facts are gathered, the facts are analyzed and broken down into various categories. Every case has large groups of uncontested fact 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 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 can be proved.

DETAILS

This method requires a greater focus on facts and paying closer attention to details. Most people 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. For instance, 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 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 essential point in a few steps, or questions and answers, that same point if 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 the message moving along without interruption and speeds up the overall presentation. Often it is these long arguments about the question that takes up so much time, permitting jurors to mentally wander off. Moreover, when the question is a short leading 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. 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 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. This organizational structure can, and should, be started at the beginning of the case,

continued throughout 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 apparent 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 remember the information and make the necessary connections to establish your case.

Every case, even simple ones, often involve a series of scenarios. Scenarios are outlines or synopsis of the entire case and are comprised 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, such as the initial office, the hospitalization, and the immediate after care. 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. 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 the theory of the case.

Obviously, those that are the most important to establish the theory of the case deserve the most attention to detail. This requires more focused attention on developing the facts that best support the theory of the case. I have found 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, a closer analysis of the various issues and topics within those events become 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

There are several other 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. Much of what I am discussing 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. It is important to use this method at the deposition, not only to get the practice, but lock in the answers in way that will be most useful at trial. The cross-examiner at trial begins with a tight script that he rarely needs vary from if he 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 based upon a close analysis of all the events, issues and topics in the case. Each group of questions is given its own page. Each page should generally have no more than ten 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 goal that is being established. Such as, to prove that the witness was in a position to have seen the accident, or the witness has a bias. The facts that support this 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 agree with your conclusion, which is a logical inference that the jury 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 close attention to movies, you will notice just how quickly the camera angle changes, creating different effects and inviting the viewer's eye to capture small images in their minds, all leading to an overall impression.

Once these pages are created using as many facts beyond change as possible, then the pages must be appropriately sequenced. 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 relevant at the deposition, these words should seldom be used during the cross-examination at trial.

When preparing the separate topic pages, place the goal of the line of questions at the top of the page. Place the facts that support this goal into short, simple questions, one fact per question, and proceed from general facts to more specific. With practice, only the facts will need to be listed; the questions will flow naturally from knowing what fact you want to establish. Next to the question, if possible, should be the source of the fact. 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. Much has been written about this subject, but using the method described here will make doing so much easier. There is an enormous advantage to the questioner being the teacher. Leading questions permit control of the vocabulary, topics discussed, the 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, you lose control. 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 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, but it 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, organize questions in such a way that

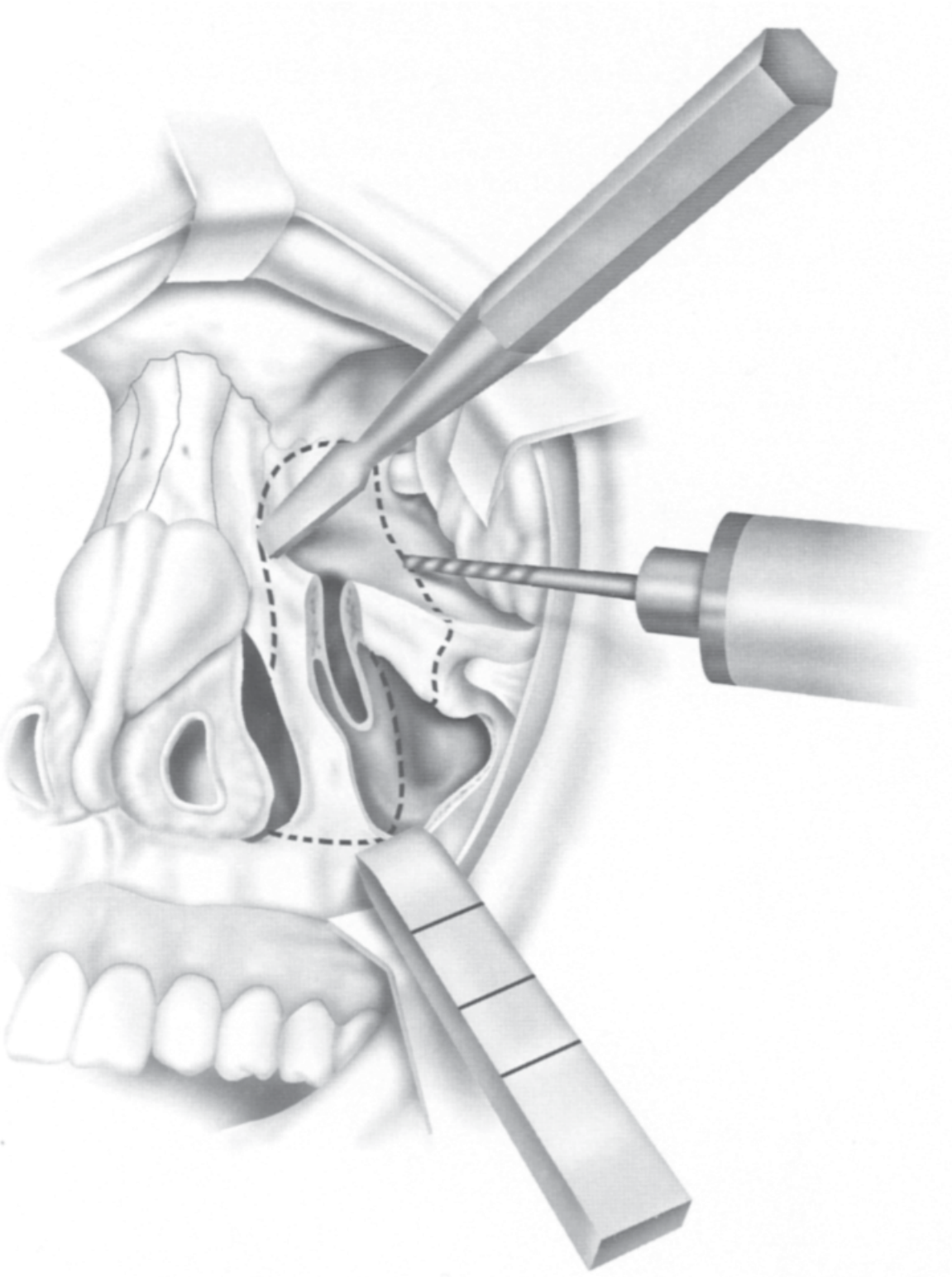
they progress logically to a specific goal. The goal in this context means what particular point the examiner is trying to make.

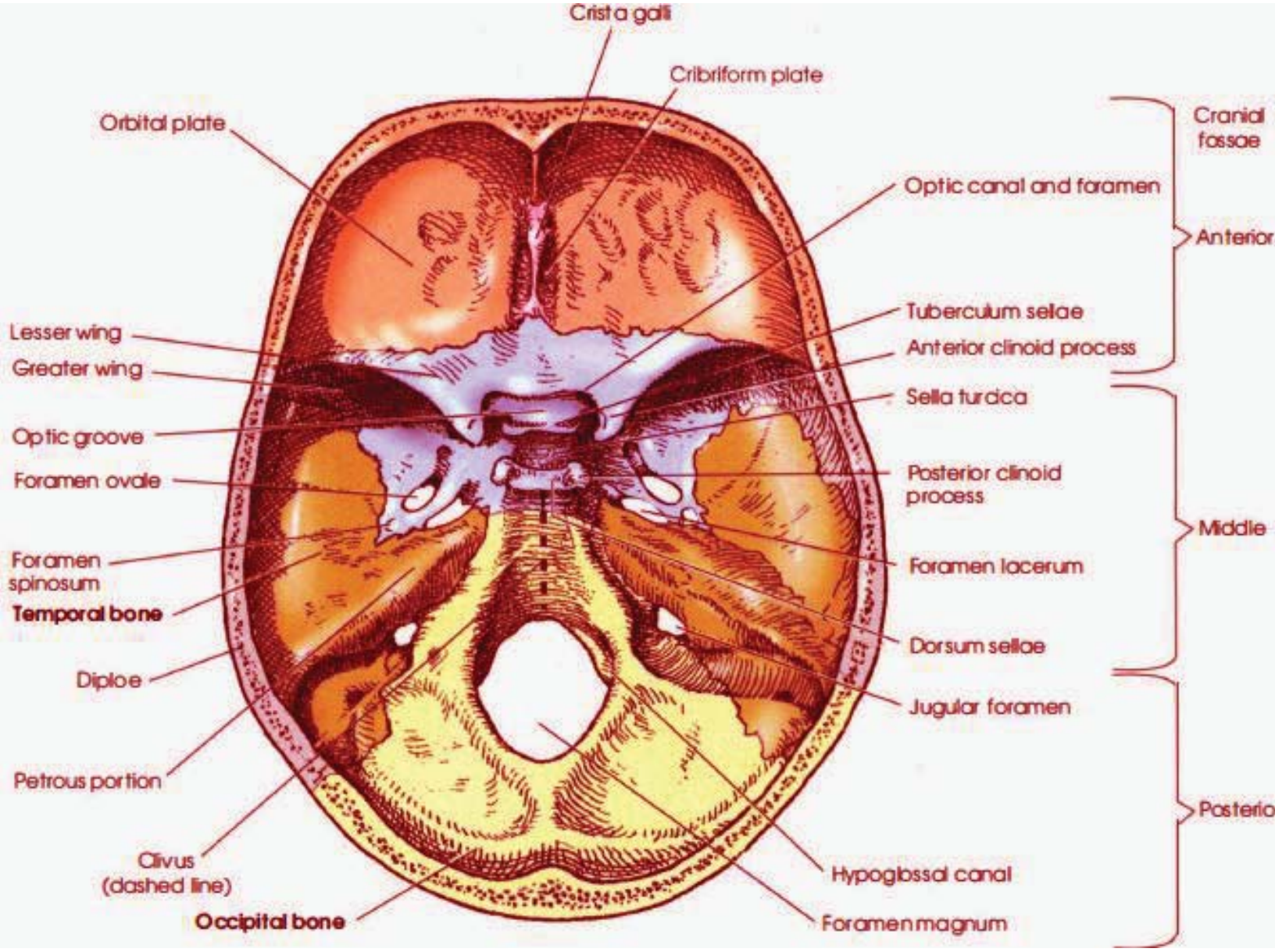
CONCLUSION

Fact-centric cross-examination has many advantages. Learning to see our cases in more detail helps the questioner present facts that create better images for the jurors. Most importantly, 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.

How to be a "Super Lawyer":
Success at Trial -
Suggestions on Techniques and Handling Challenges

John L.A. Lyddane, Esq.
Dorf & Nelson LLP, Rye

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Optic groove
Foramen ovale
Posterior clinoid process
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Foramen spinosum
Foramen lacerum
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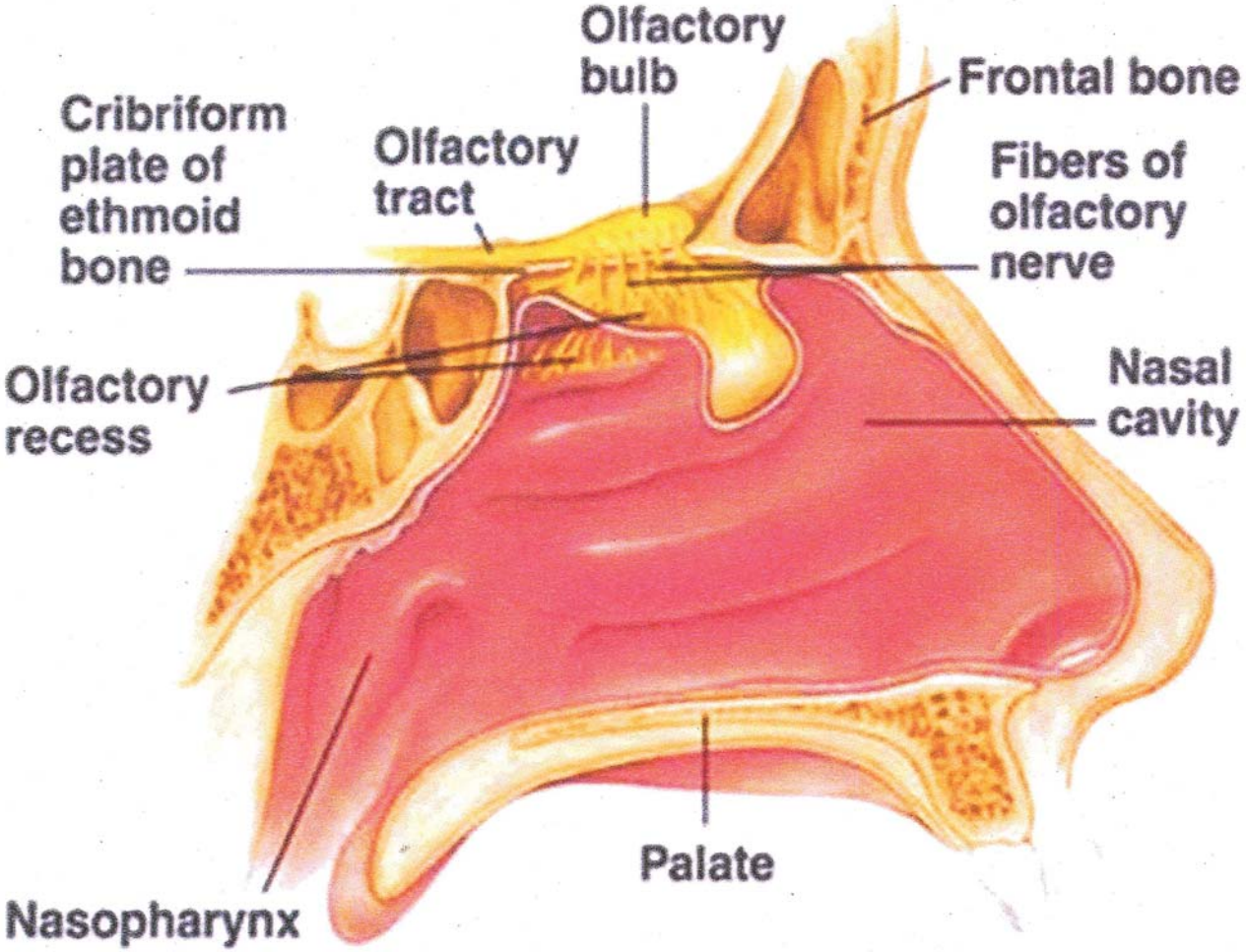


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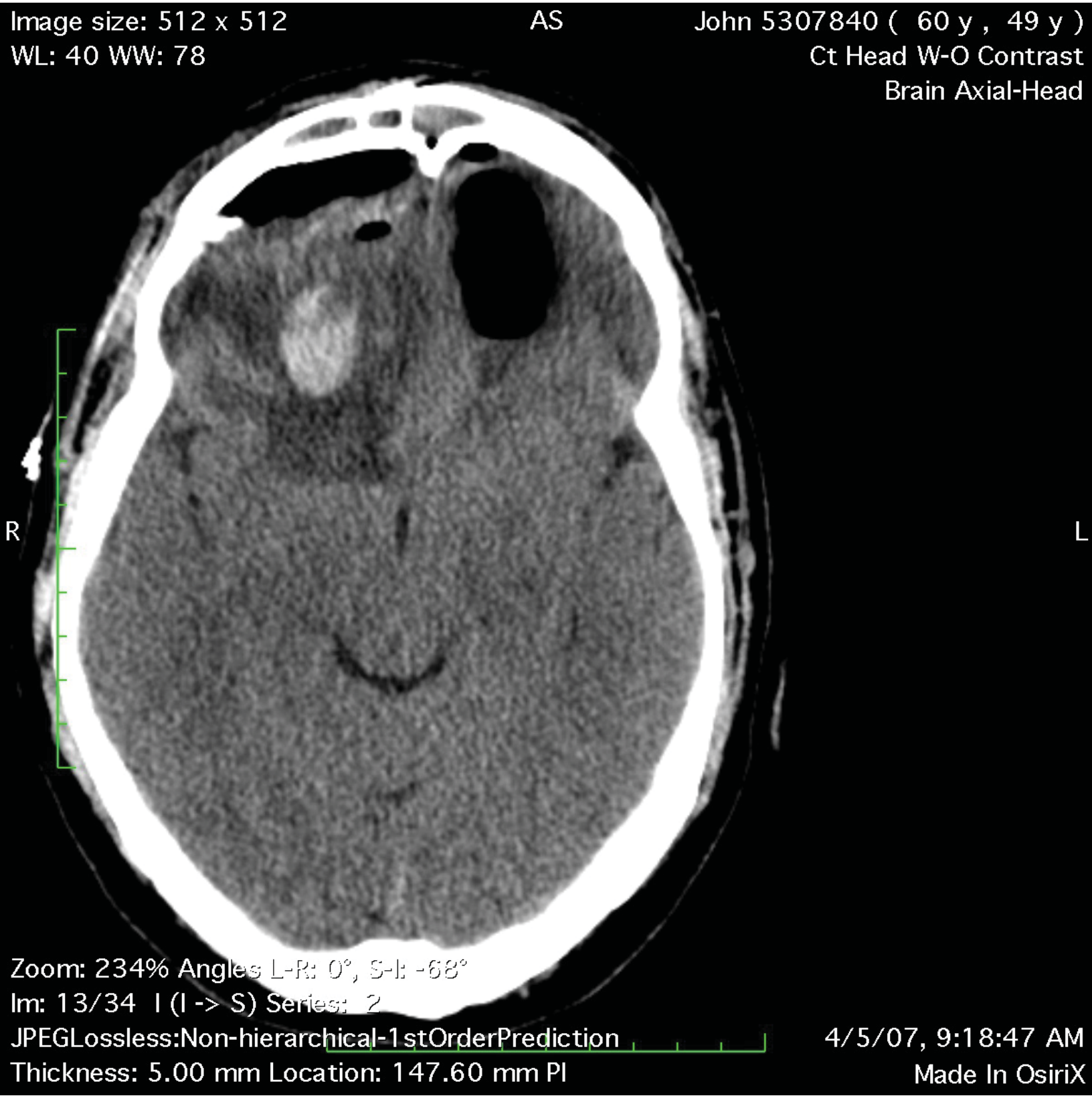
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2018 Ethics Update

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ETHICS UPDATE 2018

NYSBA TRIAL Meeting
Mystic, August 2018

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Table of Contents

I. Threatening Ancillary Proceedings Against an Adverse Party

Rule 3.4(e) of the New York Rules of Professional Conduct states:

"A lawyer shall not…present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

Comment 5 thereto states:

The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).

* * *

In Formal Opinion 2017-3, entitled "Ethical Limitations on Seeking an Advantage for a Client in a Civil Dispute by Threatening Ancillary Non-Criminal Proceedings against an Adverse Party," the Association of the Bar of the City of New York's Committee on Professional Ethics ("ABCNY") opined that "Rule 3.4(e) the New York Rules of Professional Conduct (the "Rules") prohibits lawyers from threatening criminal charges solely to obtain an advantage in a civil matter, but does not apply to threats to instigate ancillary non-criminal proceedings against an adverse party, e.g., where a lawyer, on behalf of a client, threatens to report an adverse party's misconduct to an administrative or regulatory agency unless the adverse party agrees to the client's settlement demand."

Nonetheless, even though Rule 3.4(e) does not apply to threats to instigate ancillary non-criminal proceedings, that:

> does not mean that lawyers are free to make such threats with impunity. Such threats may violate criminal laws against extortion, and, if so, they will likely violate Rules 8.4(b) and Rule 3.4(a)(6). Where such threats do not violate criminal law, they may nonetheless violate Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice. Whether such a threat violates Rule 8.4(d) will generally depend on whether the threat

> concerns matters extraneous to the parties' dispute or, conversely, would serve as an alternative means of vindicating the same alleged claim of right or of obtaining redress for the same alleged wrong. Additionally, if such a threat is made without a sufficient basis in fact and law, it may violate, inter alia, Rule 4.1 or Rule 8.4(c).

New York's Rule 3.4(e) is the same as its predecessor, New York Disciplinary Rule ("DR") 7-105(A). New York's DR 7-105(A) was identical to DR 7-105(A) of the Model Code of Professional Responsibility of the American Bar Association ("ABA"). The provision does not, however, exist in the ABA Model Rules of Professional Conduct.

ABCNY Formal Opinion 2017-3 notes:

> In 1983…the ABA Commission on Evaluation of Professional Standards decided to eliminate DR 7-105(A). The Commission's reasoning, as described in Formal Opinion 92-363 (July 6, 1992) of the ABA Standing Committee on Ethics and Professional Responsibility, was that DR 7-105 was both redundant and overbroad. The rule was redundant in that it prohibited extortionate conduct that violated criminal law and was therefore barred by other ethical rules. At the same time, the rule was overbroad because it prevented lawyers from threatening prosecution in legitimate furtherance of a client's interests.

As ABA Formal Op. 92-363 explained:

> Model Rule 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." If a lawyer's conduct is extortionate or compounds a crime under the criminal law of a given jurisdiction, that conduct also violates Rule 8.4(b). It is beyond the scope of the Committee's jurisdiction to define extortionate conduct, but we note that the Model Penal Code does not criminalize threats of prosecution where the "property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services." . . . .

> [A] general prohibition on threats of prosecution . . . would be overbroad, excessively restricting a lawyer from carrying out his or her responsibility to "zealously" assert the client's position under the adversary system. . . . Such a limitation on the lawyer's duty to the client is not justified when the criminal charges are well founded in fact and law, stem from the same matter as the civil claim, and are used to gain legitimate relief for the client. When the criminal charges are well founded in fact and law, their use by a lawyer does not result in the subversion of the criminal justice system that DR 7-105 sought to prevent.

ABA Formal Op. 92-363 identified several additional provisions of the ABA Model Rules that addressed threats of criminal prosecution including: Model Rules 3.1 (assertion of frivolous claims); 4.1 (truthfulness in statements to others); 4.4(a) (conduct with no substantial purpose other than to embarrass, delay or burden a third person); 8.4(d) (conduct prejudicial to administration of justice); and 8.4(e) (stating or implying ability to improperly influence government agency or official).

Despite the ABA's actions, New York and several other jurisdictions still retained the rule. *See, e.g.*, Ala. R. Prof. Cond. 3.10; Conn. R. Prof. Cond. 3.4(7); Ga. R. Prof. Cond. 3.4(h); Haw. R. Prof. Cond. 3.4(i); Idaho R. Prof. Cond. 4.4(a)(4); La. R. Prof. Cond. 8.4(g); N.J. R. Prof. Cond. 3.4(g); S.C. R. Prof. Cond. 4.5; Tenn. R. Prof. Cond. 4.4(a)(2); Vt. R. Prof. Cond. 4.5. Some states explicitly prohibit lawyers from threatening criminal, disciplinary or administrative action. *See, e.g.*, Cal. R. Prof. Cond. 5-100 (A); California Rule 3.10, Threatening Criminal, Administrative, or Disciplinary Charges (Rule Approved by the California Supreme Court, Effective November 1, 2018); Colo. R. Prof. Cond. 4.5; Me. R. Prof. Cond. 3.1(b).

California Rule 3.10, going into effect on November 1, 2018 states:

> (a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
>
> (b) As used in paragraph (a) of this rule, the term "administrative charges" means the filing or lodging of a complaint with any governmental organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

> (c) As used in this rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more persons* under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

New York Rule 3.4(e), like its predecessor DR 7-105(A), is silent as to non-criminal charges. For this reason, the New York State Bar Association (“NYSBA”) Committee on Professional Ethics declined to extend DR 7-105(A) to threats to file non-criminal complaints with regulatory agencies. NYSBA Ethics Opinion 772 (Nov. 14, 2003). The inquiry raised in Opinion 772 is as follows:

> May a lawyer representing a client seeking the return of funds alleged to have been wrongfully taken by a stockbroker ("Broker"): (a) make a demand or file a lawsuit on behalf of the client for the return of such funds and thereafter file a complaint against the Broker with either a prosecuting authority ("Prosecutor") or a self-regulatory body having jurisdiction over the Broker, such as the New York Stock Exchange ("NYSE"); or (b) send a demand letter on behalf of the client either (i) stating the client's intention to file a complaint with a Prosecutor about the Broker's conduct unless the funds are returned within a specified period of time, or (ii) pointing out the criminal nature of the allegedly wrongful conduct and requesting an explanation of the Broker's actions?

The Committee concluded that:

> the lawyer would not violate DR 7-105(A) by the actual or threatened filing of a complaint against the Broker with the NYSE. The filing of a complaint about the Broker's conduct with a Prosecutor would not violate DR 7-105(A) unless the lawyer's sole purpose in filing such a complaint was to obtain the return of the client's funds in dispute. A letter from the lawyer that threatened the filing of such a complaint unless the Broker returned the funds to the client would violate DR 7-105(A). Under the circumstances described above, a letter from the lawyer that threatened the filing of such a complaint unless the Broker provided information about his or her conduct would not violate DR 7-105(A) because obtaining an advantage in a civil matter would not be the sole purpose of such a threat.

In Nassau County Bar Association Committee on Professional Ethics Opinion 1998-12 (Oct. 28, 1998), however, a lawyer had information indicating that opposing counsel had made a misrepresentation to the court. Opinion 1998-12 concluded that the lawyer could communicate with opposing counsel about the necessity of correcting the misrepresentation, but that "an actual threat to file a [disciplinary] grievance if [opposing counsel] would not offer a better settlement would . . . violate DR 7-105." In reaching this conclusion, Opinion 1998-12 explained that "[t]hreatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges," citing People v. Harper, 75 N.Y.2d 313 (1990). *See also* Illinois Opinion 87-7; Maryland Opinion 86-14.

NYSBA Opinion 772 rejected the reasoning of these opinions:

> in light of the specific language of DR 7-105(A), which concerns only 'criminal charges.' In our view, DR 7-105(A) is limited in scope to actions related to "criminal charges." We assume the term "criminal charges" has its ordinary meaning in New York State substantive law. *Cf.* District of Columbia Opinion 263 (1996) (finding that a criminal contempt proceeding growing out of a failure to abide by a Civil Protective Order in a domestic relations matter does not involve "criminal charges" under the substantive law of the District of Columbia).

In ABCNY Formal Op. 2015-5 (June 26, 2015), the Committee agreed with NYSBA Opinion 772 and similarly concluded that such a threat would not violate Rule 3.4(e) because that rule, by its terms, applies only to threats of criminal charges. The Committee reasoned that "the plain language of Rule 3.4(e) should govern," and "declin[ed] to extend the rule by analogy to threats of disciplinary action against attorneys." The Committee also observed that "it may be appropriate to threaten disciplinary action in order to induce the other lawyer to remedy the harm caused by his misconduct, such as returning improperly withheld client funds or correcting a false statement made to the court."

In Formal Opinion 2017-3, the ABCNY Ethics Committee listed several other applicable rules and statutes that may govern such threats:

1) *Threats in Violation of Law; Extortion.*

> Whether a particular threat constitutes criminal extortion is a substantive legal issue outside the purview of this Committee. For our purposes, it is sufficient to note that under certain circumstances, threats to instigate non-

criminal proceedings in order to obtain an advantage in a civil matter may violate laws against extortion or other criminal statutes, just as certain threats to file disciplinary or criminal charges may violate such laws. See NYCBA Formal Op. 2015-5 (discussing N.Y. Penal Code § 115.05); Rule 3.4 Cmt. [5] (use of threats in negotiation may constitute crime of extortion). A threat that constitutes criminal extortion or a similar offense will likely violate Rule 3.4(a)(6), which provides that "[a] lawyer shall not . . . engage in . . . illegal conduct," and Rule 8.4(b), which provides that "[a] lawyer. . . shall not . . . engage in . . . illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer." Such a threat may also violate Rule 8.4(h), which provides that "[a] lawyer. . . shall not . . . engage in any . . . conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

2) *Threats without Sufficient Basis in Law or Fact.*

In some circumstances, a lawyer will be subject to discipline for threatening an ancillary non-criminal proceeding that the lawyer knows is legally or factually baseless. Such knowingly baseless threats, including a definitively stated threat to instigate a proceeding that the lawyer does not in fact intend to instigate, may violate Rule 4.1or Rule 8.4(c). Rule 4.1 provides that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person," while Rule 8.4(c) provides that "[a] lawyer . . . shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." See District of Columbia Ethics Op. 339 (April 2007) (threat to report debtor to criminal authorities if debt is not paid may be impermissibly misleading if a selective and inaccurate reference is made to the applicable law).

This is not to say that all legally or factually unsupported threats are impermissibly misleading. Especially in the course of negotiations with another lawyer, a threat may not rise to the level of an express or implied assertion of fact or law or of the lawyer's intended future conduct. See Rule 4.1, cmt. [2] ("Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of fact."). But if a lawyer makes a threat that is baseless either because the lawyer has unequivocally stated an intention that does not exist or because the threatened proceeding would lack a sufficient legal or factual basis under Rule 3.1, it may be knowingly false or misleading to seek an

advantage by making such a threat. This is especially so if the lawyer is making the threat to a non-lawyer who might reasonably be expected to rely to his detriment on the lawyer's express or implied assertion that there is a legitimate basis for the threat.

3) *Threats for No Substantial Purpose Other Than Harassment or Harm*

Rule 4.4(a) provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person." Rule 3.1(b)(2) similarly provides that a lawyer's conduct is "frivolous" for purposes of Rule 3.1 if it "serves merely to harass or maliciously injure another." There could be circumstances where a threat to instigate a non-criminal proceeding against an adverse party is largely or entirely the result of a client's desire to embarrass, harm, harass or maliciously injure an adverse party, in which event these rules would be implicated. In most cases, however, a substantial purpose of the threat will be to gain advantage in the underlying civil dispute by causing the adverse party to settle or drop his claims. Where that is so, the threat would not appear to "serve[] merely to harass or maliciously injure another" or "have no substantial purpose" other than to cause embarrassment or harm.

4) *Threats Prejudicial to Administration of Justice.*

A threat that is adequately grounded in law and fact, has a substantial purpose other than harassment or harm, and is not extortionate under criminal law may nonetheless violate Rule 8.4(d), which provides: "A lawyer . . . shall not . . . engage in conduct that is prejudicial to the administration of justice." Rule 8.4(d), which addresses conduct that may or may not be addressed by other ethical rules, seeks to prevent substantial harm to the justice system:

> The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding. . . . The conduct must be seriously inconsistent with a lawyer's responsibility as an officer of the court."

> Rule 8.4, Cmt. 3.
>
> Clearly, a baseless threat may be prejudicial to the administration of justice where it would tend to undermine the truth-seeking process or otherwise distort the adjudicative proceeding. See, e.g., NYCBA Formal Op. 2015-5 (opining that a threat to file disciplinary charges against opposing counsel, if not supported by a good faith belief that opposing counsel is engaged in unethical conduct, would violate Rule 8.4(d)); In re Smith, 848 P.2d 612 (Or. 1993) (finding that it was prejudicial to the administration of justice for a lawyer to baselessly threaten to sue a doctor if the doctor did not render a helpful expert opinion).
>
> The question, then, is whether a threat that does have a sufficient basis may nonetheless violate Rule 8.4(d). Two ABA opinions, ABA Formal Op. 92-363 (July 6, 1992) and ABA Formal Op. 94-383 (July 5, 1994), recognize that it may be improper to threaten to take otherwise lawful action, such as filing criminal or disciplinary charges for which there is an adequate legal and factual basis, in order to pressure an opposing party to settle a civil case on favorable terms. These opinions suggest that the propriety of such a threat turns on whether the threatened proceeding provides an alternative means of vindicating the rights at issue in the civil case or whether the lawyer is threatening unrelated harm in order to obtain leverage or a bargaining chip for settlement.

The duty to report professional misconduct under ABA Model Rule 8.3 can also have an impact here. That rule provides:

> Rule 8.3 Reporting Professional Misconduct
>
> (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
>
> (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a)

> and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

II. Ethics Issues in Social Media and Electronic Disclosure

A. NYCLA Ethics Opinion 745 (2013)

In Formal Opinion 745, the New York County Lawyers Ethics Committee concluded that attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas including Rule 3.1(“Non-Meritorious Claims and Contentions”), 3.3 (“Conduct Before a Tribunal”), and 3.4 (“Fairness to Opposing Party and Counsel”).

The opinion noted that:

> The personal nature of social media posts implicates considerable privacy concerns. Although all of the major social media outlets have password protections and various levels of privacy settings, many users are oblivious or indifferent to them, providing an opportunity for persons with adverse interests to learn even the most intimate information about them.

The opinion observes that “[i]t is now common for attorneys and their investigators to seek to scour litigants’ social media pages for information and photographs” and that “[d]emands for authorizations for access to password-protected portions of an opposing litigant’s social media sites are becoming routine.”

The Committee opined that:

> There is no ethical constraint on advising a client to use the highest level of privacy/security settings that is available. Such settings will prevent adverse counsel from having direct access to the contents of the client’s social media

> pages, requiring adverse counsel to request access through formal discovery channels.

Furthermore, an attorney "may advise clients as to what should or should not be posted on public and/or private pages." Finally, "[p]rovided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on 'private' social media pages, and what may be 'taken down' or removed."

There are issues of substantive law in this realm, also noted in the opinion, but these are beyond the jurisdiction of an ethics committee. For example, lawyers advising clients regarding the contents of a social media site must be aware of potential disclosure obligations and the duty of preservation, which begins at the moment litigation is reasonably anticipated. *See Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 N.Y.3d 543 (2015) (Court of Appeals essentially adopted the standards set forth by the First Department in its *VOOM* decision); *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dep't 2012); 2012-13 Supplementary Practice Commentaries, CPLR 3126, C3126:8A ("Sanction for Spoliation of Evidence"). The ethics opinion also notes that "a client must answer truthfully (subject to the rules of privilege or other evidentiary objections) if asked whether changes were ever made to a social media site, and the client's lawyer must take prompt remedial action in the case of any known material false testimony on this subject." *See* Rule 3.3(a) (3); 22 N.Y.C.R.R. Part 130 ("Costs and Sanctions").

Formal Opinion 745 states "we note that an attorney's obligation to represent clients competently (RPC 1.1) could, in some circumstances, give rise to an obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the clients' position emanating from the clients' use of social media."

Comment 8 to New York Rule 1.1 ("Competence") now states:

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

See North Carolina Bar Association: Advising A Civil Litigation Client About Social Media (July, 2015)(agreeing with New Hampshire Bar Association, N. H. Bar Ass'n Op. 2012-13/05, which concluded that "counsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.").

B. Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association (June 9, 2015).

These Guidelines are available at: http://www.nysba.org/socialmediaguidelines/ (see pp. 15–22, citing NYCLA Op. 745). Guideline No. 5.A, entitled "Removing Existing Social Media Information," states:

> A lawyer may advise a client as to what content may be maintained or made private on her social media account, including advising on changing her privacy and/or security settings. A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media information or data is preserved, a party or nonparty, when appropriate, may not delete information from a social media profile that is subject to a duty to preserve.

Guideline No. 5.B, entitled "Adding New Social Media Content," states:

> A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim."

Guideline No. 5.C, entitled "False Social Media Statements," provides:

> A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion.

C. Forman v. Henkin, 30 N.Y.3d 656, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018)

Court of Appeals Applies CPLR Article 31's "Well-Established" Rules to Resolve Dispute Regarding Disclosure of Information on Facebook

In *Forman v. Henkin*, 30 N.Y.3d 656, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018), the Court applied longstanding principles under CPLR Article 31 to resolve the issue of disclosure of information on a Facebook page.

As the *Forman* Court notes, CPLR 3101 grants certain categories of relevant information an immunity from disclosure. CPLR 3101(b) grants absolute immunity to any information that is protected by any of the recognized evidentiary privileges, while CPLR 3101(c) grants a similar immunity to the "work product of an attorney," which has been accorded a very narrow scope by the courts. *See* Siegel & Connors, New York Practice, §§ 346-47. CPLR 3101(d)(2) grants a conditional immunity to "materials. . . prepared in anticipation of litigation," commonly known as work product. *Id.*, § 348.

In *Forman*, plaintiff's alleged injuries were extensive, and included claims that she could "no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, … [and] that the accident negatively impacted her ability to read, write, word-find, reason and use a computer." *Forman*, 30 N.Y.3d at 659-60.

Many courts faced with motions to compel the production of materials posted by a plaintiff on a private social media site required the seeking party to demonstrate that information on the site contradicted the plaintiff's claims. *See, e.g., Kregg v. Maldonado*, 98 A.D.3d 1289, 1290, 951 N.Y.S.2d 301 (4th Dep't 2012); *McCann v. Harleysville Ins. Co. of New York*, 78 A.D.3d 1524, 910 N.Y.S.2d 614 (4th Dep't 2010). This hurdle could be satisfied if there was material on a "public" portion of the plaintiff's site, which could be accessed by most anyone, that conflicted with the alleged injuries. If so, the courts deemed it likely that the private portion of the site contained similarly relevant information. *See Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 430 (Sup. Ct., Suffolk County 2010)(discussed in notes 30-31 and accompanying text). If, however, the defendant simply claimed that information on plaintiff's private social media site "may" contradict the alleged injuries, the disclosure request was deemed a mere "fishing expedition" and the motion was denied. *See, e.g., Tapp v. New York State Urban Dev. Corp.*,

102 A.D.3d 620 (1st Dep't 2013); *McCann*, 78 A.D. 3d at 1525, 910 N.Y.S.2d at 615.

The plaintiff sought to invoke the above precedent in *Forman*, but the Court of Appeals rejected the argument, noting that it permits a party to "unilaterally obstruct disclosure merely by manipulating 'privacy' settings or curating the materials on the public portion of the account." *Forman*, 30 N.Y.3d at 664, 70 N.Y.S.3d at _, 93 N.E.3d at 889. Moreover, the Court noted that "New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information." *Id.* In sum, the standard for obtaining disclosure remains one of relevance, regardless of whether the material is in a traditional print form or posted in an electronic format on a "private" Facebook page.

With the *Forman* decision on the books, disclosure of materials on social media websites should be easier to obtain. In the last paragraph to this section, we discuss CPLR 3101(i), which expressly allows disclosure of any picture, film or audiotape of a party, is another tool that can be used to secure materials posted on a social media site. The Court declined to address this subdivision in *Forman* because neither party cited it to the supreme court and, therefore, it was unpreserved. It should be noted, however, that the Court of Appeals previously observed that CPLR 3101(i) does not contain any limitation as to relevancy or subject matter, although a party is still free to seek a protective order to restrict disclosure under the subdivision. *See Tran v. New Rochelle Hosp. Medical Center*, 99 N.Y.2d 383, 756 N.Y.S.2d 509, 786 N.E.2d 444 (2003), 99 N.Y.2d at 388 n.2.

The *Forman* Court noted that a social media account holder, like any party to litigation, can seek to prevent the disclosure of sensitive or embarrassing material of minimal relevance through a motion under CPLR 3103(a). *See* Siegel & Connors, New York Practice § 352. In *Forman*, for example, the supreme court exempted from disclosure any photographs of plaintiff on the Facebook site depicting nudity or romantic encounters. (Just how "private" was this site?).

Moving forward, lawyers might consider requesting that their clients deactivate a social media site, as the plaintiff did in *Forman*, or remove certain postings from the site. Is such conduct ethical? In New York County Lawyers Association Ethics Opinion 745 (2013), the ethics committee concluded, among other things, that a lawyer is permitted to advise a client to use the highest level of privacy settings available on a social media site to prevent others, such as adverse counsel, from

having direct access to the contents of the site. From an ethics standpoint, an attorney is permitted to advise a client to remove postings from a social media site, but cannot advise the client to destroy such information. In this regard, Rule 3.4 (a)(1) of the New York Rules of Professional Conduct provides that a lawyer "shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce." Furthermore, under Rule 3.4 (a)(3), a lawyer may not "conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."

While not addressed in *Forman*, lawyers advising clients regarding the contents of a social media site must be aware of potential disclosure obligations and the duty of preservation, which begins at the moment litigation is reasonably anticipated. *See VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33 (1st Dep't 2012); Siegel & Connors, New York Practice §§ 362, 367 (discussing litigation holds and penalties for spoliation); McKinney's CPLR 3126 Practice Commentaries, C3126:8A ("Sanction for Spoliation of Evidence"). Once litigation is reasonably anticipated, anything of potential relevance that is removed from a site must be preserved so a party can comply with any future obligations to produce the materials in disclosure.

D. The Ethical Implications of Attorney Profiles on LinkedIn

1) New York County Lawyers Association Professional Ethics Committee Formal Opinion 748 (2015)

In Formal Opinion 748 (2015), the New York County Lawyers Association Professional Ethics Committee observed that "LinkedIn, the business-oriented social networking service, has grown in popularity in recent years, and is now commonly used by lawyers… Lawyers may use the site in several ways, including to communicate with acquaintances, to locate someone with a particular skill or background—such as a law school classmate who practices in a certain jurisdiction for assistance on a matter—or to keep up-to-date on colleagues' professional activities and job changes."

The current version of LinkedIn allows:

> users and their connections to list certain skills, interests, and accomplishments, creating a profile similar to a resume or law firm biography. Users can list their own experience, education, skills, and interests, including descriptions of their practice areas and prior matters. Other users may also "endorse" a lawyer for certain skills—such as litigation

> or matrimonial law—as well as write a recommendation as to the user's professional skills.

The opinion addressed three ethical issues arising from an attorney's use of LinkedIn profiles:

> 1) whether a LinkedIn Profile is considered "Attorney Advertising" under the New York Rules of Professional Conduct;
>
> 2) whether an attorney may accept endorsements and recommendations from others on LinkedIn;
>
> 3) what information attorneys should include (and exclude) from their LinkedIn profiles to ensure compliance with the New York Rules of Professional Conduct

1) Whether a LinkedIn Profile is considered "Attorney Advertising" under the New York Rules of Professional Conduct?

Under New York's ethics rules, an "advertisement" is defined in Rule 1.0(a) as:

> [A]ny 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.

The comments to the rules make clear that "[n]ot all communications made by lawyers about the lawyer or the law firm's services are advertising" and the advertising rules do not encompass communications with current clients or former clients germane to the client's earlier representation. Rule 7.1, Comment 6. Similarly, communications to "other lawyers . . . are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm." *Id.*, Comment 7.

Applying the above Rules, the Committee concluded that:

> a LinkedIn profile that contains only biographical information, such as a lawyer's education and work history, does not constitute an attorney advertisement. An attorney with certain experience such as a Supreme Court clerkship or government service may attract clients simply because the

> experience is impressive, or knowledge gained during that position may be useful for a particular matter. As the comments to the New York Rules of Professional Conduct make clear, however, not all communications, including communications that may have the ultimate purpose of attracting clients, constitute attorney advertising. Thus, the Committee concludes that a LinkedIn profile containing only one's education and a list of one's current and past employment falls within this exclusion and does not constitute attorney advertising.

2) Whether an attorney may accept endorsements and recommendations from others on LinkedIn?

The Committee noted that:

> additional information that LinkedIn allows users to provide beyond one's education and work history, however, implicates more complicated ethical considerations. First, do LinkedIn fields such as "Skills" and "Endorsements" constitute a claim that the attorney is a specialist, which is ethically permissible only where the attorney has certain certifications set forth in RPC 7.4? Second, even if certain statements do not constitute a claim that the attorney is a specialist, do such statements nonetheless constitute attorney advertising, which may require the disclaimers set forth in RPC 7.1?

In Formal Opinion 972 (2013) of the New York State Bar Association, the question before the Committee was whether an individual lawyer or law firm could describe the kinds of services they provide under the LinkedIn section labeled "Specialties."

New York's Rule 7.4(a) allows lawyers and law firms to make general statements about their areas of practice, but a "lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law." Rule 7.4(c) provides an exception and "allows a lawyer to state the fact of certification as a specialist, along with a mandated disclaimer, if the lawyer is certified as a specialist in a particular area" approved by the ABA or appropriate authority. *See* ABA Model Rule 7.4(d) ("A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar

Association; and (2) the name of the certifying organization is clearly identified in the communication.").

The Committee opined that by listing areas of practice under a heading of "Specialties," a lawyer or law firm makes a claim that the lawyer or law firm "is a specialist or specializes in a particular field of law." Thus, proper certification would be required as provided in Rule 7.4(c). *See also Hayes v. Grievance Comm. of the Eighth Jud. Dist.*, 672 F. 3d 158 (2d Cir. 2012) (striking down as unconstitutional portions of New York Rule 7.4(c)'s disclaimers including the language that "certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law"). If, however, "a lawyer has been certified as a specialist in a particular area of law or law practice by an organization or authority as provided in Rule 7.4(c), then the lawyer may so state if the lawyer complies with that Rule's disclaimer provisions."

The NYSBA opinion did not address whether the lawyer or law firm could, consistent with Rule 7.4(a), list practice areas under other headings in LinkedIn, such as "Products & Services" or "Skills and Expertise." In Formal Opinion 748, the New York County Lawyers Association Professional Ethics Committee concluded that:

> With respect to skills or practice areas on lawyers' profiles under a heading, such as "Experience" or "Skills," this Committee is of the opinion that such information does not constitute a claim to be a specialist under Rule 7.4. The rule contemplates advertising regarding an attorney's practice areas, noting that an attorney may "publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c)." RPC 7.4(a). This provision contemplates the distinction between claims that an attorney has certain experience or skills and an attorney's claim to be a "specialist" under Rule 7.4. Categorizing one's practice areas or experience under a heading such as "Skills" or "Experience" therefore, does not run afoul of RPC 7.4, provided that the word "specialist" is not used or endorsed by the attorney, directly or indirectly. Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists.

LinkedIn allows others to include endorsements and recommendations on an attorney's profile, which raises additional ethical considerations. "While these endorsements and recommendations originate from other users, they nonetheless appear on the attorney's LinkedIn profile." The Committee concluded that

> because LinkedIn gives users control over the entire content of their profiles, including 'Endorsements' and 'Recommendations' by other users (by allowing an attorney to accept or reject an endorsement or recommendation), we conclude that attorneys are responsible for periodically monitoring the content of their LinkedIn pages at reasonable intervals. To that end, endorsements and recommendations must be truthful, not misleading, and based on actual knowledge pursuant to Rule 7.1.

The Committee provided certain examples:

> if a distant acquaintance endorses a matrimonial lawyer for international transactional law, and the attorney has no actual experience in that area, the attorney should remove the endorsement from his or her profile within a reasonable period of time, once the attorney becomes aware of the inaccurate posting. If a colleague or former client, however, endorses that attorney for matrimonial law, a field in which the attorney has actual experience, the endorsement would not be considered misleading.

3) What information attorneys should include (and exclude) from their LinkedIn profiles to ensure compliance with the New York Rules of Professional Conduct?

If an attorney chooses to include information such as practice areas, skills, endorsements, or recommendations, the Opinion concludes that the attorney must treat his or her LinkedIn profile as attorney advertising and include appropriate disclaimers pursuant to Rule 7.1. While not opining on the requirements for all potential content on LinkedIn, the Committee concluded that:

> If an attorney's LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words "AttorneyAdvertising" on the lawyer's LinkedIn profile. See RPC 7.1(f). If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer's services with the services of other lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the attorney

> should also include the disclaimer “Prior results do not guarantee a similar outcome.” See RPC 7.1(d) and (e). Because the rules contemplate “testimonials or endorsements,” attorneys who allow “Endorsements” from other users and “Recommendations” to appear on one’s profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e). An attorney who claims to have certain skills must also include this disclaimer because a description of one’s skills—even where those skills are chosen from fields created by LinkedIn—constitutes a statement “characterizing the quality of the lawyer’s [] services” under Rule 7.1(d).

2) New York City Bar Association Formal Opinion Number 2015-7 (2015)

In Opinion 2017-7, the New York City Bar Association Opined that:

> An attorney's individual LinkedIn profile or other content constitutes attorney advertising only if it meets all five of the following criteria: (a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising. Given the numerous reasons that lawyers use LinkedIn, it should not be presumed that an attorney who posts information about herself on LinkedIn necessarily does so for the primary purpose of attracting paying clients. For example, including a list of “Skills,” a description of one's practice areas, or displaying ““Endorsements” or “Recommendations,” without more, does not constitute attorney advertising.If an attorney's individual LinkedIn profile or other content meets the definition of attorney advertising, the attorney must comply with the requirements of Rules 7.1, 7.4 and 7.5, including, but not limited to: (1) labeling the LinkedIn content “Attorney Advertising”; (2) including the name, principal law office address and telephone number of the lawyer; (3) pre-approving any content posted on LinkedIn; (4) preserving a copy for at least one year; and (5) refraining from false, deceptive or misleading statements. These are only some of the requirements associated with attorney advertising. Before disseminating any advertisements, whether on social media or otherwise, the attorney should ensure that those advertisements comply with all requirements set forth in Article 7 of the New York Rules.

The New York City Bar expressed significant disagreement with NYCLA Opinion 748:

> Given LinkedIn's many possible uses, there should be clear evidence that a lawyer's primary purpose is to attract paying clients before concluding that her LinkedIn profile constitutes an "advertisement." In this regard, we differ sharply from Opinion 748 issued by the Professional Ethics Committee of the New York County Lawyer's Association ("NYCLA"), which concluded that "if an attorney chooses to include information such as practice areas, skills, endorsements, or recommendations, the attorney must treat his or her LinkedIn profile as attorney advertising and include appropriate disclaimers pursuant to Rule 7.1." NYCLA Ethics Op. 748 (2015) (emphasis added). This conclusion focuses exclusively on the content of a LinkedIn profile, and ignores the other factors that must be considered in determining whether a communication is an ""advertisement," such as the primary purpose of the communication and the intended audience. Including a list of "Skills" or a description of one's practice areas, without more, is not an advertisement. Likewise, displaying Endorsements and Recommendations can have several purposes, beyond the goal of attracting paying clients. Accordingly, the inclusion of Endorsements or Recommendations does not, without more, make the lawyer's LinkedIn profile an ""advertisement."

The City Bar did, however, "concur with the conclusion in NYCLA Ethics Op. 748 that attorneys are responsible for periodically monitoring third party Endorsements and Recommendations on LinkedIn "at reasonable intervals" to ensure that they are "truthful, not misleading, and based on actual knowledge." *See also* NYSBA 2015 Social Media Guidelines, at 9 ("A lawyer must ensure the accuracy of third-party legal endorsements, recommendations, or online reviews posted to the lawyer's social media profile" and "must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.")."

Furthermore, the City Bar also:

> agree[d] with the conclusion in NYCLA Ethics Op. 748 that listing practice areas under the heading "Skills" or "Experience" does not "constitute a claim to be a specialist under Rule 7.4." We also agree with guidance in the NYSBA 2015 Social Media Guidelines, which states that "a lawyer may include information about the lawyer's experience elsewhere, such as under

another heading or in an untitled field that permits biographical information to be included." NYSBA 2015 Social Media Guidelines, at 7-8.

III. Communicating With Represented and Unrepresented Parties and Persons

New York Rule 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

(c) A lawyer who is acting pro se or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and un-counseled disclosure of information relating to the representation.

[2] Paragraph (a) applies to communications with any party who is represented by counsel concerning the matter to which the communication relates.

[3] Paragraph (a) applies even though the represented party initiates or consents to the communication. A lawyer must immediately terminate communication with a party if after commencing communication, the lawyer learns that the party is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented party or person or an employee or agent of such a party or person concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person or between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented party or person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer having independent justification or legal authorization for communicating with a represented party or person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement (as defined by law) of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the state or federal rights of the accused. The fact that a communication does not violate a state or federal right is insufficient to establish that the communication is permissible under this Rule. This Rule is not intended to effect any change in the scope of the anti-contact rule in criminal cases.

[6] [Reserved.]

[7] In the case of a represented organization, paragraph (a) ordinarily prohibits communications with a constituent of the organization who: (i) supervises, directs or regularly consults with the organization’s lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization’s lawyer is not required for communication with a former unrepresented constituent. If an individual constituent of the organization is represented in the matter by the person’s own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. In communicating with a current or former

constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rules 1.13, 4.4.

[8] The prohibition on communications with a represented party applies only in circumstances where the lawyer knows that the party is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such knowledge may be inferred from the circumstances. See Rule 1.0(k) for the definition of "knowledge." Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious.

[9] In the event the party with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[10] A lawyer may not make a communication prohibited by paragraph (a) through the acts of another. See Rule 8.4(a).

Client-to-Client Communications

[11] Persons represented in a matter may communicate directly with each other. A lawyer may properly advise a client to communicate directly with a represented person, and may counsel the client with respect to those communications, provided the lawyer complies with paragraph (b). Agents for lawyers, such as investigators, are not considered clients within the meaning of this Rule even where the represented entity is an agency, department or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so. A lawyer may also counsel a client with respect to communications with a represented person, including by drafting papers for the client to present to the represented person. In advising a client in connection with such communications, a lawyer may not advise the client to seek privileged information or other information that the represented person is not personally authorized to disclose or is prohibited from disclosing, such as a trade secret or other information protected by law, or to encourage or invite the represented person to take actions without the advice of counsel.

[12] A lawyer who advises a client with respect to communications with a represented person should be mindful of the obligation to avoid abusive, harassing, or unfair conduct with regard to the represented person. The lawyer should advise the client against such conduct. A lawyer shall not advise a client to communicate

with a represented person if the lawyer knows that the represented person is legally incompetent. See Rule 4.4.

[12A] When a lawyer is proceeding pro se in a matter, or is being represented by his or her own counsel with respect to a matter, the lawyer's direct communications with a counterparty are subject to the no-contact rule, Rule 4.2. Unless authorized by law, the lawyer must not engage in direct communications with a party the lawyer knows to be represented by counsel without either (i) securing the prior consent of the represented party's counsel under Rule 4.2(a), or (ii) providing opposing counsel with reasonable advance notice that such communications will be taking place.

*** * ***

New York RULE 4.3: COMMUNICATING WITH UNREPRESENTED PERSONS

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. As to misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(a), Comment [2A].

[2] The Rule distinguishes between situations involving unrepresented parties whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation,

the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented party, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

IV. ABA Formal Opinion 479: The "Generally Known" Exception to Former-Client Confidentiality (December 17, 2017)

Digest: A lawyer's duty of confidentiality extends to former clients. Under Model Rule of Professional Conduct 1.9(c), a lawyer may not use information relating to the representation of a former client to the former client's disadvantage without informed consent, or except as otherwise permitted or required by the Rules of Professional Conduct, unless the information has become "generally known."

The "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

*** * ***

Rule 1.6(a) of the New York Rules of Professional Conduct provides:

> (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

> (1) the client gives informed consent, as defined in Rule 1.0(j);
>
> (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
>
> (3) the disclosure is permitted by paragraph (b).
>
> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

* * *

Comment 4A thereto provides:

> Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information is not "generally known" simply because it is in the public domain or available in a public file.

Rule 1.8(b) of the New York Rules of Professional Conduct provides:

> (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

Rule 1.9(c) of the New York Rules of Professional Conduct provides:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

> (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
>
> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.
>
> * * *

In *Jamaica Pub. Serv. Co. v. AIU Ins. Co.*, 92 N.Y.2d 631, 684 N.Y.S.2d 459,707 N.E.2d 414 (N.Y. 1998), the New York Court of Appeals applied former DR 5-108(a)(2), the predecessor provision to Rule 1.9(c), and held:

> Unlike the confidentiality protections afforded a current client (see, Code of Professional Responsibility DR 4–101 [22 NYCRR 1200.19]), however, DR 5–108(A)(2) recognizes that an attorney may divulge "generally known" information about a former client. Here, we are satisfied that Samaan's first affidavit comfortably falls within that exception. Plaintiff correctly notes, and defendant does not controvert, that information regarding the interrelationship of AIG and its member companies was readily available in such public materials as trade periodicals and filings with State and Federal regulators. It was thus "generally known."

ABA Formal Opinion 479 quoted the following passage:

> [T]he phrase "generally known" means much more than publicly available or accessible. It means that the information has already received widespread publicity. For example, a lawyer working on a merger with a Fortune 500 company could not whisper a word about it during the pre-offer stages, but once the offer is made—for example, once AOL and Time Warner have announced their merger, and the Wall Street Journal has reported it on the front page, and the client has become a former client—then the lawyer may tell the world. After all, most of the world already knows. . . .[O]nly if an event gained considerable public notoriety should information about it ordinarily be considered "generally known."

ROY D. SIMON & NICOLE HYLAND, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 685 (2017)

The Opinion also noted that:

> under Massachusetts Rule of Professional Conduct 1.6(a), a lawyer generally is obligated to protect "confidential information relating to the representation of a client." MASS. RULES OF PROF'L CONDUCT R. 1.6(a) (2017). Confidential information, however, does not ordinarily include information that is generally known in the local community or in the trade, field or profession to which the information relates." *Id.* at cmt. 3A.

Finally, Formal Opinion 479 provided what it called "A Workable Definition of Generally Known under Model Rule 1.9(c)(1)":

> Consistent with the foregoing, the Committee's view is that information is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession, or trade. Information may become widely recognized and thus generally known as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media. With respect to category (b), information should be treated as generally known if it is announced, discussed, or identified in what reasonable members of the industry, profession, or trade would consider a leading print or online publication or other resource in the particular field. Information may be widely recognized within a former client's industry, profession, or trade without being widely recognized by the public. For example, if a former client is in the insurance industry, information about the former client that is widely recognized by others in the insurance industry should be considered generally known within the meaning of Model Rule 1.9(c)(1) even if the public at large is unaware of the information.

Unless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client's industry, profession, or trade, the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes. Information that is publicly available is not necessarily generally known. Certainly, if information is publicly available but requires specialized knowledge or expertise to locate, it is not generally known

within the meaning of Model Rule 1.9(c)(1).

V. ABA Formal Opinion 480: Confidentiality Obligations for Lawyer Blogging and Other Public Commentary

Digest: Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.

ABA Formal Opinion 480 observed that:

> Lawyers comment on legal topics in various formats. The newest format is onlinepublications such as blogs, listserves, online articles, website postings, and brief online statements or microblogs (such as Twitter®) that "followers" (people who subscribe to a writer's online musings) read. Lawyers continue to present education programs and discuss legal topics in articles and chapters in traditional print media such as magazines, treatises, law firm white papers, and law reviews. They also make public remarks in online informational videos such as webinars and podcasts (collectively "public commentary").
>
> Lawyers who communicate about legal topics in public commentary must comply with the Model Rules of Professional Conduct, including the Rules regarding confidentiality of information relating to the representation of a client. A lawyer must maintain the confidentiality of information relating to the representation of a client, unless that client has given informed consent to the disclosure, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Rule 1.6(b). A lawyer's public commentary may also implicate the lawyer's duties under other Rules, including Model Rules 3.5 (Impartiality and Decorum of the Tribunal) and 3.6 (Trial Publicity).

As to the lawyer's confidentiality obligations, the opinion notes:

> Unless one of the exceptions to Rule 1.6(a) is applicable, a lawyer is prohibited from commenting publicly about any information related to a representation. Even client identity is protected under Model Rule 1.6. Rule 1.6(b) provides other exceptions to Rule 1.6(a). However, because it is highly unlikely that a disclosure exception under Rule 1.6(b) would apply to

> a lawyer's public commentary, we assume for this opinion that exceptions arising under Rule 1.6(b) are not applicable.
>
> Significantly, information about a client's representation contained in a court's order, for example, although contained in a public document or record, is not exempt from the lawyer's duty of confidentiality under Model Rule 1.6. The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.
>
> A violation of Rule 1.6(a) is not avoided by describing public commentary as a "hypothetical" if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical. Hence, if a lawyer uses a hypothetical when offering public commentary, the hypothetical should be constructed so that there is no such likelihood.
>
> The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client's informed consent or the disclosure is not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a). Rule 1.6 does not provide an exception for information that is "generally known" or contained in a "public record." Accordingly, if a lawyer wants to publicly reveal client information, the lawyer15 must comply with Rule 1.6(a).

As for "First Amendment Considerations," Formal Opinion 480 notes:

> While it is beyond the scope of the Committee's jurisdiction to opine on legal issues in formal opinions, often the application of the ethics rules interacts with a legal issue. Here lawyer speech relates to First Amendment speech. Although the First Amendment to the United States Constitution guarantees individuals' right to free speech, this right is not without bounds. Lawyers' professional conduct may be constitutionally constrained by various professional regulatory standards as embodied in the Model Rules, or similar state analogs. For example, when a lawyer acts in a representative capacity, courts often conclude that the lawyer's free speech rights are limited.

VI. Attorney-Client Privilege; Common Interest Doctrine; Protecting Confidential Information

A. New York Rules of Professional Conduct: RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

*** * ***

B. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 36 N.Y.S.3d 838 (2016)

Court of Appeals Refuses to Expand Common Interest Doctrine of Attorney-Client Privilege

One of the more important tasks for lawyers conducting disclosure is asserting the attorney client privilege in response to a CPLR 3120 document demand. CPLR 3101(b) provides absolute immunity from disclosure for any information protected by the privilege. This objection, and any other relevant one, must be timely asserted in what is generally referred to as a privilege log. *See* CPLR 3122(b);

Siegel, New York Practice § 362. The privilege log provides bare bones information regarding the document that is withheld so the party seeking it can at least mount an argument that the privilege does not apply.

In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*., 27 N.Y.3d 616, 36 N.Y.S.3d 838 (2016), the discovery dispute centered on whether defendant Bank of America was required to produce approximately 400 documents that were withheld on attorney-client privilege grounds. The documents contained communications between Bank of America and codefendant Countrywide that transpired while they were contemplating a merger. The privilege log claimed that the documents were immune from disclosure by the attorney-client privilege because they pertained to various legal issues the two companies needed to resolve together to successfully complete the merger closing. Plaintiff made a motion to compel production of the documents under CPLR 3124, arguing that Bank of America waived the privilege by sharing the information with Countrywide before the merger.

The Court of Appeals noted that the social utility of the attorney client privilege "is in '[o]bvious tension' with the policy of this State favoring liberal discovery" and, therefore, "must be narrowly construed." *Id.* The Court quoted from its prior opinion in *Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588, 593–594 (1989), which provides a procedural blueprint for attorneys asserting the privilege in litigation. The Court again held:

> The party asserting the privilege bears the burden of establishing its entitlement to protection by showing that the communication at issue was between an attorney and a client 'for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship,' that the communication is predominantly of a legal character, that the communication was confidential and that the privilege was not waived.

In response to plaintiff's argument of waiver, Bank of America contended that it communicated with counsel for Countrywide under the common interest doctrine of the attorney-client privilege. That doctrine generally allows two or more clients who have retained separate counsel to represent them "to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest." The common interest doctrine has been applied by New York courts for over twenty years, but only in situations when the attorney-client communications took place while the clients faced "pending or reasonably anticipated litigation."

In *Ambac*, the documents withheld from disclosure contained communications shared in anticipation of a merger. While Bank of America and Countrywide certainly had a common legal interest in successfully completing the merger, they did not reasonably anticipate litigation at the time of the communications. The Court rejected Bank of America's argument that the common interest doctrine should be expanded to include communications made in furtherance of "any common legal interest" and adhered to the litigation requirement. Therefore, the documents will need to be disclosed.

The Court's decision in *Ambac* highlights the importance of preserving privileged information at every step of the representation. This obligation requires intimate knowledge of both the elements of the privilege and the disclosure rules in Article 31 of the CPLR.

C. Amendments to Rule 1.6 Effective January 1, 2017

Rule 1.6(c): "A lawyer *make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).*"(amendment in italics).

Comments 16 and 17 to Rule 1.6 now provide:

> **Duty to Preserve Confidentiality**
>
> [16] Paragraph (c) imposes three related obligations. It requires a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. Confidential information includes not only information protected by Rule 1.6(a) with respect to current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients. Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by Rules 1.6, 1.9, or 1.18, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of

disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. For a lawyer's duties when sharing information with nonlawyers inside or outside the lawyer's own firm, see Rule 5.3, Comment [2].

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. Paragraph (c) does not ordinarily require that the lawyer use special security measures if the method of communication affords a reasonable expectation of confidentiality. However, a lawyer may be required to take specific steps to safeguard a client's information to comply with a court order (such as a protective order) or to comply with other law (such as state and federal laws or court rules that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information). For example, a protective order may extend a high level of protection to documents marked "Confidential" or "Confidential – Attorneys' Eyes Only"; the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") may require a lawyer to take specific precautions with respect to a client's or adversary's medical records; and court rules may require a lawyer to block out a client's Social Security number or a minor's name when electronically filing papers with the court. The specific requirements of court orders, court rules, and other laws are beyond the scope of these Rules.

*** * ***

ABA Formal Opinion 477R: Securing Communication of Protected Client Information

Digest: A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client

information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

VII. New York State Adopts Rules Governing Multijurisdictional Practice

A. Background of Multijurisdictional Practice Issues

***Birbrower, Montalbano, Condon & Frank v. Superior Court of Santa Clara*, 949 P2d 1 (Cal. 1998)**

A New York law firm represented a California company in an arbitration. The arbitration required lawyers in the firm to travel to California to prepare for the arbitration. These lawyers were admitted in New York, but not California.

When the New York law firm sought to enforce its written fee agreement in California state court, the court held that the fee agreement violated public policy and that the firm had engaged in the unauthorized practice of law. In *Birbrower*, the California Supreme Court "decline[d] ... to craft an arbitration exception to [the California] prohibition of the unlicensed practice of law in this state." *Birbrower*, 949 P2d at 9. The court held that the unauthorized practice of law in California "does not necessarily depend on or require the unlicensed lawyer's physical presence in the state." A lawyer could be deemed to be engaged in the unauthorized practice of law in California "by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means."

The ruling in *Birbrower* was promptly overruled by the California legislature. *See* Cal.Civ.Proc.Code § 1282.4 (providing an arbitration exception to unauthorized practice rules).

B. ABA Model Rule 5.5: Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

Law Firms And Associations

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when

performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

* * *

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a

jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer

licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer,

however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [*Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*].

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. See also *Model Rule on Temporary Practice by Foreign Lawyers*. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to

practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See *Model Rule for Registration of In-House Counsel*.

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., *Model Rule on Practice Pending Admission*.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

* * *

13 states have adopted a MJP Rule virtually identical to ABA Model Rule 5.5. They are: Arkansas, Arizona, Illinois, Indiana, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, Rhode Island, Vermont, Washington, and West Virginia.

34 states have adopted a MJP Rule that is similar to ABA Model Rule 5.5. They are, with certain distinctions noted:

Alabama – Rule 5.5 (b) permits out-of-state lawyers to practice in Alabama on a temporary basis "including transactional, counseling, or other nonlitigation services" related to the lawyer's home-state practice.

Arizona – see below

California – California Court Rule 9.47, entitled "Attorneys practicing law temporarily in California as part of litigation," states that "[f]or an attorney to practice law under this rule, the attorney must:

> (1) Maintain an office in a United States jurisdiction other than California and in which the attorney is licensed to practice law;
>
> (2) Already be retained by a client in the matter for which the attorney is providing legal services in California, except that the attorney may provide legal advice to a potential client, at the potential client's request, to assist the client in deciding whether to retain the attorney;
>
> (3) Indicate on any Web site or other advertisement that is accessible in California either that the attorney is not a member of the State Bar of California or that the attorney is admitted to practice law only in the states listed; and

(4) Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency.

An attorney who satisfies these requirements may provide services that are part of:

(1)A formal legal proceeding that is pending in another jurisdiction and in which the attorney is authorized to appear;

(2)A formal legal proceeding that is anticipated but is not yet pending in California and in which the attorney reasonably expects to be authorized to appear;

(3)A formal legal proceeding that is anticipated but is not yet pending in another jurisdiction and in which the attorney reasonably expects to be authorized to appear; or

(4)A formal legal proceeding that is anticipated or pending and in which the attorney's supervisor is authorized to appear or reasonably expects to be authorized to appear.

The attorney whose anticipated authorization to appear in a formal legal proceeding serves as the basis for practice under this rule must seek that authorization promptly after it becomes possible to do so. Failure to seek that authorization promptly, or denial of that authorization, ends eligibility to practice under this rule.

To engage in the above activities in California, the lawyer cannot be a California resident.

Colorado – Colorado Rule of Civil Procedure 220 does not state any specific exceptions to the general prohibition against unauthorized practice. The Rule provides that if a lawyer is licensed elsewhere and in good standing, she may perform nonlitigation services in Colorado so long as the lawyer is not domiciled in Colorado and does not keep an office in Colorado from which they hold themselves out as practicing Colorado law.

Connecticut – Rule 5.5(c) contains a reciprocity requirement. Rule 5.5 (f) provides:

(f) A lawyer desirous of obtaining the privileges set forth in subsections (c) (3) or (4): (1) shall notify the statewide bar counsel as to each separate matter prior to any such representation in Connecticut, (2) shall notify the statewide bar counsel upon termination of each such representation in Connecticut, and (3) shall pay such fees as may be prescribed by the Judicial Branch.

Delaware – Rule 5.5(d) states:

> A lawyer admitted in another United States jurisdiction, or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
>
> (1) are provided to the lawyer's employer or its organizational affiliates after compliance with Supreme Court Rule 55.1(a)(1) and are not services for which the forum requires pro hac vice admission; or
>
> (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

District of Columbia – Rule 49 of the Rules of the District of Columbia Court of Appeals is a very detailed Rule which, among other things, allows lawyers licensed elsewhere to provide legal services in DC "on an incidental and temporary basis."

Florida

Georgia

Idaho

Kansas

Kentucky

Louisiana

Maine

Michigan

Minnesota

Missouri

Nevada

New Jersey

New Mexico

New York

North Carolina

North Dakota

Ohio

Oklahoma

Oregon

Pennsylvania

South Carolina

North Carolina

Tennessee

Utah

Virginia

Wisconsin

Wyoming

Texas has created a committee to study the adoption of MJP rules.

The ABA's Commission on Multijurisdictional Practice has a helpful website containing information on the adoption of MJP rules in various jurisdictions:

http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice.html

* * *

In ABA Formal Opinion 469 (2014), the Committee concluded that:

> A prosecutor who provides official letterhead of the prosecutor's office to a debt collection company for use by that company to create a letter purporting to come from the prosecutor's office that implicitly or explicitly threatens prosecution, when no lawyer from the prosecutor's office reviews the case file to determine whether a crime has been committed and prosecution is warranted or reviews the letter to ensure it complies with the Rules of Professional Conduct, violates Model Rules 8.4(c) and 5.5(a).

The opinion also observes:

> The participation by a prosecutor in the conduct described in this opinion, wherein the prosecutor supplies official letterhead to a debt collection company and allows the debt collection company to use it to send threatening letters to alleged debtors without any review by the prosecutor or staff lawyers to determine whether a crime was committed and prosecution is warranted, violates Rule 5.5(a) by aiding and abetting the unauthorized practice of law.

C. ABA Model Rule 8.5: Disciplinary Authority; Choice of Law

Maintaining The Integrity Of The Profession

Rule 8.5 Disciplinary Authority; Choice Of Law

a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

*** * ***

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22,

ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

D. Temporary Practice of Law in New York-Part 523 of Court of Appeals Rules

The unauthorized practice of law is a crime in New York. *See* Judiciary Law § 485-a (making certain violations of Judiciary Law §§ 478, 474, 486 and 495 a class E felony); Judiciary Law § 495 (No corporation or voluntary association shall (i) practice or appear as an attorney-at-law for any person in any court in this state, (ii) hold itself out to the public as being entitled to practice law, or (iii) furnish attorneys or counsel); Judiciary Law § 478 (unlawful for any natural person (i) to practice or appear as an attorney-at-law in a court of record in this state, (ii) to furnish attorneys or to render legal services, or (iii) to hold himself out in such manner as to convey the impression that he or she either alone or together with any other persons maintains a law office); § 484 (no natural person shall ask or receive compensation for preparing pleadings of any kind in any action brought before any court of record in this state).

Effective December 30, 2015, 22 N.Y.C.R.R. section 523 (Section 523), permits temporary practice of law in New York by out-of-state and foreign attorneys for the first time. The Court of Appeals website states:

> The Court of Appeals has amended its rules to add a new Part 523 pertaining to the temporary practice of law in New York by out-of-state and foreign attorneys. The amendment sets forth the circumstances under which an attorney not admitted in New York may provide temporary legal services in the State. An attorney providing such temporary legal services may not establish an office or other systematic presence in the State or hold out to the public or otherwise represent that the attorney is admitted to practice here. Additionally, an attorney practicing pursuant to Part 523 is subject to the New York Rules of Professional Conduct and the disciplinary authority of this State.
>
> The Court also has amended its Rules for the Registration of In-house Counsel (Part 522). Under the newly amended rules, registration is now available to a foreign attorney who is a member in good standing of a recognized legal profession in a non-United States jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority.
>
> The rule amendments are effective December 30, 2015. A copy of the Court's orders amending the rules is below.
>
> *** * ***

Rules of the Court of Appeals for the Temporary Practice of Law in New York

§ 523.1 General regulation as to lawyers admitted in another jurisdiction

A lawyer who is not admitted to practice in this State shall not:

> (a) except as authorized by other rules or law, establish an office or other systematic and continuous presence in this State for the practice of law; or
>
> (b) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this State.

§ 523.2 Scope of temporary practice

(a) A lawyer who is not admitted to practice in this State may provide legal services on a temporary basis in this State provided the following requirements are met.

(1) The lawyer is admitted or authorized to practice law in a state or territory of the United States or in the District of Columbia, or is a member of a recognized legal profession in a non-United States jurisdiction, the members of which are admitted or authorized to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority; and

(2) the lawyer is in good standing in every jurisdiction where admitted or authorized to practice; and

(3) the temporary legal services provided by the lawyer could be provided in a jurisdiction where the lawyer is admitted or authorized to practice and may generally be provided by a lawyer admitted to practice in this State, and such temporary legal services:

(i) are undertaken in association with a lawyer admitted to practice in this State who actively participates in, and assumes joint responsibility for, the matter; or

(ii) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer or a person the lawyer is assisting is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; or

(iii) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services are not services for which the forum requires pro hac vice admission; or

(iv) are not within paragraph (3)(ii) or (3)(iii) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted or authorized to practice.

* * *

Rule 1.5(g) of the New York Rules of Professional Conduct, which addresses a lawyers' fee split with a lawyer outside her firm, states:

> A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:
>
> (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, *each lawyer assumes joint responsibility for the representation* (emphasis added);
>
> (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
>
> (3) the total fee is not excessive.

Are Lawyers Providing Legal Services in New York Pursuant to Part 523 Required to Adhere to Letter of Engagement Rule (Part 1215) and Attorney-Client Fee Dispute Resolution Program (Part 137)?

22 N.Y.C.R.R. section 1215.2, entitled "Exceptions," provides that the Letter of Engagement Rule does not apply to "(d) *representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York*, or where no material portion of the services are to be rendered in New York." (emphasis added).

22 N.Y.C.R.R. section 137.1, entitled "Application," provides that "(a)[t]his Part shall apply where representation has commenced on or after January 1, 2002, *to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter*." (emphasis added). The section also provides that "(b) [t]his Part shall not apply to …(7) *disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York*, or where no material portion of the services was rendered in New York." (emphasis added).

Reciprocity

There is no reciprocity requirement in section 523.

Malpractice

What standard will apply to lawyers who practice here temporarily? *See* NY PJI 2:152, jury charge for legal malpractice.

* * *

(b) A person licensed as a legal consultant pursuant to 22 N.Y.C.R.R. Part 521, or registered as in-house counsel pursuant to 22 N.Y.C.R.R. Part 522, may not practice pursuant to this Part.

§ 523.3 Disciplinary authority

A lawyer who practices law temporarily in this State pursuant to this Part shall be subject to the New York Rules of Professional Conduct and to the disciplinary authority of this State in connection with such temporary practice to the same extent as if the lawyer were admitted or authorized to practice in the State. A grievance committee may report complaints and evidence of a disciplinary violation against a lawyer practicing temporarily pursuant to this Part to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted or authorized to practice law.

§ 523.4 Annual report

On or before the first of September of each year, the Office of Court Administration shall file an annual report with the Chief Judge reviewing the implementation of this rule and making such recommendations as it deems appropriate.

* * *

In a March 10, 2016 piece titled Connors “No License Required: Temporary Practice in New York State,” the new Part 523 is examined in further detail.

* * *

E. Licensing of In-House Counsel in New York

22 N.Y.C.R.R. Part 522: Rules of the Court of Appeals for the Registration of In-House Counsel; effective December 30, 2015

22 N.Y.C.R.R. 522.1 Registration of In-House Counsel

(a) In-House Counsel defined. An in-house counsel is an attorney who is employed full time in this State by a non-governmental corporation, partnership, association, or other legal entity, including its subsidiaries and organizational affiliates, that is not itself engaged in the practice of law or the rendering of legal services outside such organization.

(b) In its discretion, the Appellate Division may register as in-house counsel an applicant who:

> (1)(i) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia; or (ii) is a member in good standing of a recognized legal profession in a foreign non-United States jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority;
>
> (2) is currently admitted to the bar as an active member in good standing in at least one other jurisdiction, within or outside the United States, which would similarly permit an attorney admitted to practice in this State to register as in-house counsel; and
>
> (3) possesses the good moral character and general fitness requisite for a member of the bar of this State.

22 N.Y.C.R.R. 522.2 Proof required

An applicant under this Part shall file with the Clerk of the Appellate Division of the department in which the applicant resides, is employed or intends to be employed as in-house counsel:

(a) a certificate of good standing from each jurisdiction in which the applicant is licensed to practice law;

(b) a letter from each such jurisdiction's grievance committee, or other body entertaining complaints against attorneys, certifying whether charges have been filed with or by such committee or body against the applicant, and, if so, the substance of the charges and the disposition thereof;

(c) an affidavit certifying that the applicant:

(1) performs or will perform legal services in this State solely and exclusively as provided in section 522.4; and

(2) agrees to be subject to the disciplinary authority of this State and to comply with the New York Rules of Professional Conduct (22 N.Y.C.R.R. Part 1200) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration will be issued; and

(d) an affidavit or affirmation signed by an officer, director, or general counsel of the applicant's employer, on behalf of said employer, attesting that the applicant is or will be employed as an attorney for the employer and that the nature of the employment conforms to the requirements of this Part.

(e) Documents in languages other than English shall be submitted with a certified English translation.

22 N.Y.C.R.R. 522.3 Compliance

An attorney registered as in-house counsel under this Part shall:

(a) remain an active member in good standing in at least one state or territory of the United States or in the District of Columbia or a foreign jurisdiction as described in section 522.1(b)(1);

(b) promptly notify the appropriate Appellate Division department of a disposition made in a disciplinary proceeding in another jurisdiction;

(c) register with the Office of Court Administration and comply with the appropriate biennial registration requirements; and

(d) except as specifically limited herein, abide by all of the laws and rules that govern attorneys admitted to the practice of law in this State.

22 N.Y.C.R.R. 522.4 Scope of legal services

An attorney registered as in-house counsel under this Part shall:

(a) provide legal services in this State only to the single employer entity or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer entity, and to employees, officers and directors of such entities, but only on matters directly related to the attorney's work for the employer entity, and to the extent consistent with the New York Rules of Professional Conduct;

(b) not make appearances in this State before a tribunal, as that term is defined in the New York Rules of Professional Conduct (section 1200.0 Rule 1.0[w] of this Title) or engage in any activity for which pro hac vice admission would be required if engaged in by an attorney who is not admitted to the practice of law in this State;

(c) not provide personal or individual legal services to any customers, shareholders, owners, partners, officers, employees or agents of the identified employer; and

(d) not hold oneself out as an attorney admitted to practice in this State except on the employer's letterhead with a limiting designation.

22 N.Y.C.R.R. 522.5 Termination of registration

(a) Registration as in-house counsel under this Part shall terminate when:

(1) the attorney ceases to be an active member in another jurisdiction, as required in section 522.1(b)(2) of this Part; or

(2) the attorney ceases to be an employee of the employer listed on the attorney's application, provided, however, that if such attorney, within 30 days of ceasing to be such an employee, becomes employed by another employer for which such attorney shall perform legal services as in-house counsel, such attorney may request continued registration under this Part by filing within said 30-day period with the appropriate Appellate Division department an affidavit to such effect, stating the dates on which the prior employment ceased and the new employment commenced, identifying the new employer and reaffirming that the attorney will provide legal services in

this State solely and exclusively as permitted in section 522.4 of this Part. The attorney shall also file an affidavit or affirmation of the new employer as described in section 522.2(d) of this Part and shall file an amended statement within said 30-day period with the Office of Court Administration.

(b) In the event that the employment of an attorney registered under this Part ceases with no subsequent employment by a successor employer, the attorney, within 30 days thereof, shall file with the Appellate Division department where registered a statement to such effect, stating the date that employment ceased. Noncompliance with this provision shall result in the automatic termination of the attorney's registration under this Part.

(c) Noncompliance with the provisions of section 468-a of the Judiciary Law and the rules promulgated thereunder, insofar as pertinent, shall, 30 days following the date set forth therein for compliance, result in the termination of the attorney's rights under this Part.

22 N.Y.C.R.R. 522.6 Subsequent admission on motion

Where a person registered under this Part subsequently seeks to obtain admission without examination under section 520.10 of this Title, the provision of legal services under this Part shall not be deemed to be the practice of law for the purpose of meeting the requirements of section 520.10(a)(2)(i) of this Title.

22 N.Y.C.R.R. 522.7 Saving Clause and Noncompliance

(a) An attorney employed as in-house counsel, as that term is defined in section 522.1(a), shall file such an application in accordance with section 522.2 within 30 days of the commencement of such employment;

(b) Failure to comply with the provisions of this Part shall be deemed professional misconduct, provided, however, that the Appellate Division may upon application of the attorney grant an extension upon good cause shown.

22 N.Y.C.R.R. 522.8 Pro bono legal services

Notwithstanding the restrictions set forth in section 522.4 of this Part, an attorney registered as in-house counsel under this Part may provide pro bono legal services in this State in accordance with New York Rules of Professional Conduct (22 N.Y.C.R.R. 1200.0) rule 6.1(b) and other comparable definitions of pro bono legal

services in New York under the following terms and conditions. An attorney providing pro bono legal services under this section:

(a) shall be admitted to practice and in good standing in another state or territory of the United States or in the District of Columbia and possess the good moral character and general fitness requisite for a member of the bar of this State, as evidenced by the attorney's registration pursuant to section 522.1(b) of this Part;

(b) pursuant to section 522.2(c)(2) of this Part, agrees to be subject to the disciplinary authority of this State and to comply with the laws and rules that govern attorneys admitted to the practice of law in this State, including the New York Rules of Professional Conduct (22 N.Y.C.R.R. Part 1200.0) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration is issued;

(c) may appear, either in person or by signing pleadings, in a matter pending before a tribunal, as that term is defined in New York Rules of Professional Conduct (22 N.Y.C.R.R. 1200.0) rule 1.0(w), at the discretion of the tribunal, without being admitted pro hac vice in the matter. Prior to any appearance before a tribunal, a registered in-house counsel must provide notice to the tribunal that the attorney is not admitted to practice in New York but is registered as in-house counsel pursuant to this Part. Such notice shall be in a form approved by the Appellate Division; and

(d) shall not hold oneself out as an attorney admitted to practice in this State, in compliance with section 522.4(d) of this Part.

*** * ***

Part 522 of the Rules of the Court of Appeals for the Registration of in-House Counsel allows certain foreign in-house lawyers to register to practice in New York State.

Although 46 U.S. jurisdictions have adopted a form of Model Rule 5.5, the template for Part 523, only 11 have expanded it to lawyers from other countries.

Recent amendments to Part 522 allow registration as in-house counsel not just by lawyers admitted to practice in other states and the District of Columbia, but also to those who are "member[s] in good standing of a recognized legal profession in a foreign non-United States jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective

regulation by a duly constituted professional body or public authority." 22 N.Y.C.R.R. § 522.1(b)(ii). This change was consistent with a recommendation by the Conference of Chief Justices, as well as with 15 other U.S. jurisdictions that have similarly expansive in-house counsel registration rules. See NYSBA Comments on Proposed Changes to the Rules of the Court of Appeals, Nov. 9, 2015 (NYSBA Comments) at 15. The language used was the same as that used to define those who can apply to be foreign legal consultants in New York. *Id.*

Nevertheless, the change was controversial, because at least some commentators felt the new rule did not go far enough. As the NYSBA Comments noted [at 16], "in-house counsel in many foreign jurisdictions, particularly in Europe, are not admitted to the bar and would apparently not qualify under this definition." The NYSBA proposed giving the Appellate Divisions discretion to allow these in-house lawyers to register, but this suggestion was rejected. Id. The ABA is also considering whether to amend its model in-house registration rule to address this issue.

VIII. Judiciary Law Section 470

Court of Appeals Holds That Judiciary Law Section 470 Requires Nonresident New York Attorneys to Maintain Physical Office in State and Second Circuit Declares Statute Constitutional

CPLR 2101(d) provides that "[e]ach paper served or filed shall be indorsed with the name, address and telephone number of the attorney for the party serving or filing the paper." In *Schoenefeld v. State*, 25 N.Y.3d 22, 6 N.Y.S.3d 221, 29 N.E.3d 230 (2015), an attorney residing in Princeton, New Jersey commenced an action in federal district court alleging, among other things, that Judiciary Law section 470 was unconstitutional on its face and as applied to nonresident attorneys. The federal district court declared the statute unconstitutional and, on appeal to the Second Circuit, that court determined that the constitutionality of section 470 was dependent upon the interpretation of its law office requirement. Therefore, it certified a question to the New York Court of Appeals requesting the Court to delineate the minimum requirements necessary to satisfy the statute.

Citing to CPLR 2103(b), the Court of Appeals acknowledged that "the State does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here." It noted, however, that the logistical difficulties present during the Civil War, when the statute was first

enacted, are diminished today. Rejecting a narrow interpretation of the statute, which may have avoided some constitutional problems, the Court interpreted Judiciary Law section 470 to require nonresident attorneys to maintain a physical law office within the State.

The case then returned to the Second Circuit and on April 22, 2016, that court held that section 470 "does not violate the Privileges and Immunities Clause because it was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law." *Schoenefeld v. State*, 821 F.3d 273 (2d Cir. 2016). Rather, the court concluded that the statute was passed "to ensure that nonresident members of the New York bar could practice in the state by providing a means, i.e., a New York office, for them to establish a physical presence in the state on a par with that of resident attorneys, thereby eliminating a service-of-process concern."

The case is discussed in further detail in Siegel, New York Practice § 202 (Connors ed., July 2016 Supplement) and in Connors, "The Office: Judiciary Law § 470 Meets Temporary Practice Under Part 523," where we addressed the interplay between the new Part 523 and Judiciary Law section 470's requirement that nonresident lawyers admitted to practice in New York maintain an office within the State.

The United States Supreme Court denied certiorari on April 17, 2017. *Schoenefeld v. State*, --- S.Ct. ----, 2017 WL 1366736 (2017).

The April 17, 2017 edition of the NYLJ reported:

> Now that the legal case is over, New York State Bar Association president Claire Gutekunst said in a statement, a group, chaired by former bar president David Schraver of Rochester, would review the issues and consider recommendations for changing § 470. The working group will be composed of state bar members who live in and outside New York.
>
> * * *
>
> The New Jersey State Bar Association also submitted an amicus brief to the Supreme Court.
>
> "The NJSBA feels New York's bona fide office rule is an anachronism in today's modern world, where technology and sophisticated forms of digital

> communication are standard throughout the business community, the bar and the public at large," president Thomas Prol said in a statement. "Indeed, the bona fide office rule, which New Jersey did away with in 2013, seems oblivious to modern attorneys who are increasingly mobile, some of whom may spend no time at the office because they have no need for one, at least not the traditional version contemplated by the rule."

In *Arrowhead Capital Finance, Ltd. v. Cheyne Specialty Finance Fund L.P.*, 2016 WL 3949875 (Sup. Ct., New York County 2016), the court noted that "[n]umerous case[s] in the First Department have held, before the recent *Schoenfeld* rulings, that a court should strike a pleading, without prejudice, where it is filed by an attorney who fails to maintain a local office, as required by § 470. *Salt Aire Trading LLC v Sidley Austin Brown & Wood, LLP*, 93 AD3d 452, 453 (1st Dept 2012); *Empire Healthchoice Assur., Inc. v Lester*, 81 AD3d 570, 571 (1st Dept 2011); *Kinder Morgan*, 51 AD3d 580 (1st Dept 2008); *Neal v Energy Transp. Group*, 296 AD2d 339 (2002); *cf Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 (1st Dept 2014) (finding no § 470 violation where firm leased and used New York office with telephone)."

The *Arrowhead* court concluded that:

> Receiving mail and documents is insufficient to constitute maintenance of an office. *Schoenfeld*, supra. This court holds that hanging a sign coupled with receipt of deliveries would not satisfy the statute. Furthermore, there is evidence that [plaintiff's attorney] criticized defendant for serving documents at 240 Madison and directed [defendant's attorney] to use the PA Office address, an address he has consistently used in litigation.

The court dismissed the complaint without prejudice. The First Department affirmed. 154 A.D.3d 523, 62 N.Y.S.3d 339 (1st Dep't 2017). The Court of Appeals has granted leave to appeal. 30 N.Y.3d 909 (2018).

IX. Michael Cohen, President Trump, Stormy Daniels & Rule 1.8(e)

Rule 1.8(e) of the New York Rules of Professional Conduct provides:

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

*** * ***

New York Rules of Professional Conduct, Comments 9B and 10 provide:

Financial Assistance

[9B] Paragraph (e) eliminates the former requirement that the client remain "ultimately liable" to repay any costs and expenses of litigation that were advanced by the lawyer regardless of whether the client obtained a recovery. Accordingly, a lawyer may make repayment from the client contingent on the outcome of the litigation, and may forgo repayment if the client obtains no recovery or a recovery less than the amount of the advanced costs and expenses. A lawyer may also, in an action in which the lawyer's fee is payable in whole or in part as a percentage of the recovery, pay court costs and litigation expenses on the lawyer's own account. However, like the former New York rule, paragraph (e) limits permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above.

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses,

including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

* * *

X. Issuing Subpoena to Current Client

Serving a Subpoena on Behalf of Client #1 on Current Client #2 Results in Conflict of Interest

In Formal Opinion 2017-6 (2017), the New York City Bar Association Committee on Professional Ethics concluded that it is generally a conflict of interest when a party's lawyer in a civil lawsuit needs to issue a subpoena to another current client. The conflict, which arises under Rule 1.7(a) of the New York Rules of Professional Conduct, will ordinarily require the attorney to obtain informed written consent under Rule 1.7(b) from both clients before serving the subpoena. *See* Rule 1.0(j)(defining "informed consent"). As comment 6 to Rule 1.7 notes, "absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated." The committee acknowledged that there may be "exceptional cases where subpoenaing a current client will likely not give rise to a conflict of interest," but cautioned that "as a matter of prudence, a lawyer would be well advised to regard all of these situations as involving a conflict of interest."

The committee recommended that an attorney run a conflict check prior to preparing and issuing a subpoena to avoid any conflicts. *See* Rule 1.10(e) (requiring law firms to maintain conflicts checking system to perform conflict checks when: (1) the firm represents a new client; (2) the firm represents an existing client in a new matter; (3) the firm hires or associates with another lawyer; or (4) an additional party is named or appears in a pending matter). As the opinion notes, it may also be advisable to run a conflicts check at the outset of the representation "not just for any adverse parties in a litigation, but also for any non-parties from whom it is anticipated that discovery will be sought."

If the need to subpoena a current client arises during the course of the representation of another current client, the lawyer may have to withdraw from the representation under Rule 1.16 or make arrangements for the retention of "conflicts counsel" to conduct the discovery. The opinion also noted that "an attorney may seek advance conflict waivers from a client or prospective client to waive future conflicts," which "may include an agreement in advance to consent to be subpoenaed as a non-party witness by the lawyer or law firm in its representation of other clients in unrelated lawsuits." *See* Rule 1.7, cmts. 22, 22A (discussing client consent to future conflict).

XI. Fee Agreements

A. New York Rule 1.5: FEES AND DIVISION OF FEES

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

> **(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
>
> **(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
>
> **(3) the fee customarily charged in the locality for similar legal services;**
>
> **(4) the amount involved and the results obtained;**
>
> **(5) the time limitations imposed by the client or by circumstances;**
>
> **(6) the nature and length of the professional relationship with the client;**
>
> **(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and**

(8) whether the fee is fixed or contingent.

*** * ***

New York State Bar Association Committee on Professional Ethics Formal Opinion 1112 (2017), the inquirer sought to add this provision to its fee agreement:

> In the event of your failure to pay any bill for legal fees, costs and/or disbursements in excess of 20-days from the date of the bill, you hereby authorize the undersigned attorney to bill your credit card for the full amount of the unpaid balance of the bill, without further notice to you. Your credit card information is as follows: X*%###

The opinion concludes that a lawyer's retainer agreement may provide that (i) the client secures payment of the lawyer's fees by credit card, and (ii) the lawyer will bill the client's credit card the amount of any legal fees, costs or disbursements that the client has failed to pay after 20 days from the date of the lawyer's bill for such amount.

The opinion noted that the client must be expressly informed of the right to dispute any invoice of the lawyer (and to request fee arbitration under Part 137 of the Uniform Rules) before the lawyer charges the credit card. Furthermore, the lawyer may not charge the client's credit card account for any disputed portion of the lawyer's bill. Cf. Rule 1.15(b)(4)(if the client disputes the lawyer's right to funds, the lawyer may not withdraw the disputed funds from the lawyer's special account until the dispute is finally resolved).

Previously, the Committee had approved the client's payment of a lawyers fee using a credit card as long as:

> (i) the amount of the fee is reasonable; (ii) the lawyer complies with the duty to protect the confidentiality of client information; (iii) the lawyer does not allow the credit card company to compromise the lawyer's independent professional judgment on behalf of the client; (iv) the lawyer notifies the client before the charges are billed to the credit card and offers the client the opportunity to question any billing errors; and (v) in the event of any dispute regarding the lawyer's fee, the lawyer attempts to resolve all disputes amicably and promptly and, if applicable, complies with the fee dispute resolution program set forth in 22 N.Y.C.R.R. Part 137.

*** * ***

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(1) a contingent fee for representing a defendant in a criminal matter;

(2) a fee prohibited by law or rule of court;

(3) a fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or

(5) any fee in a domestic relations matter if:

(i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or
(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a Statement of Client's Rights and Responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

*** * ***

Lawyer Who Refers Matter to Another Lawyer Undertakes Representation of Client

ABA Formal Opinion 474 (2016) concludes that "[a] lawyer who refers a matter to another lawyer outside of the first lawyer's firm and divides a fee from the matter with the lawyer to whom the matter has been referred, has undertaken representation of the client." Therefore, "[f]ee arrangements arrangements under Model Rule 1.5(e) [New York Rule 1.5(g)] are subject to Rule 1.7" and its conflict of interest provisions. "Unless a client gives informed consent confirmed in writing, a lawyer may not accept a fee when the lawyer has a conflict of interest that prohibits the lawyer from either performing legal services in connection with or assuming joint responsibility for the matter. The opinion also cautions that "[w]hen one lawyer refers a matter to a second lawyer outside of the firm and the first lawyer either performs legal services in connection with or assumes joint responsibility for the matter and accepts a referral fee, the agreement regarding the division of fees, including client consent confirmed in writing, must be completed be-fore or within a reasonable time after the commencement of the representation."

Court of Appeals Resolves Disputes Over Fee Splitting Agreements

In *Marin v. Constitution Realty*, LLC, 28 N.Y.3d 666, 49 N.Y.S.3d 39, 71 N.E.3d 530 (2017), the Court of Appeals resolved a fee dispute between the plaintiffs' attorney of record in a Labor Law action (L-1), and two attorneys L-1 engaged to assist her in the litigation: L-2 and L-3.

L-1 initially engaged L-2 to act as co-counsel and provide advice in the action. Their written agreement provided that L-2 would receive 20% of net attorneys' fees if the case settled before trial, and 25% once jury selection commenced. Neither L-1 nor L-2 informed the clients of L-2's involvement in the action, although L-2 believed L-1 had informed the client. The Court noted that the failure to inform the clients of L-2's involvement in the matter violated both the former Code of Professional Responsibility, DR 2–107(a), and the current Rules of Professional Conduct, Rule 1.5(g)(if lawyer is sharing fees with a lawyer outside her firm, the client must "agree[] to employment of the other lawyer after a full disclosure that a

division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing").

Six months later, L-1 wrote to L-2 "unilaterally discharging him and advising him that his portion of the fees would be determined on a quantum meruit basis." L-2 did not respond to L-1 and did no further work on the case.

L-1 ultimately obtained partial summary judgment on liability under Labor Law § 240(1) on plaintiffs' behalf and then sought the assistance of L-3 for a mediation of the matter. Under L-1's agreement with L-3, L-3 was entitled to 12% percent of all attorneys' fees whenever the case was resolved. The agreement provided that "[a]fter … mediation," L-3 "will be entitled to forty (40%) percent of all attorneys' fees whenever the case is resolved."

After the one-day mediation session concluded, L-3 continued to have discussions with the mediator and, ten days after the session, accepted a settlement offer of $8 million on behalf of plaintiff, which was tendered by the mediator.

L-1 moved for an order establishing L-3's attorneys' fees at 12% of net attorneys' fees and, after L-2 intervened, L-1 also moved for an order setting his fees on a quantum meruit basis. L-2 and L-3 each cross-moved: L-2 to fix his fee at 20% of net attorneys' fees and L-3 to fix his fee at 40% of net attorneys' fees.

The Court of Appeals concluded that L-1's agreements with L-2 were enforceable, despite the failure to comply with Rule 1.5(g)'s fee splitting provisions, and entitled L-2 to 20% of net attorneys' fees. While the Court classified L-1's "failure to inform her clients of [L-2]'s retention" as "a serious ethical violation," it did "not allow her to avoid otherwise enforceable contracts under the circumstances of this case (see Samuel v. Druckman & Sinel, LLP, 12 N.Y.3d 205, 210, 879 N.Y.S.2d 10, 906 N.E.2d 1042 [2009])." The Court stressed that "it ill becomes defendants, who are also bound by the Code of Professional Responsibility, to seek to avoid on 'ethical' grounds the obligations of an agreement to which they freely assented and from which they reaped the benefits." The Court found this to be "particularly true here, where [L-1] and [L-2] both failed to inform the clients about [L-2]'s retention, [L-1] led [L-2] to believe that the clients were so informed, and the clients themselves were not adversely affected by the ethical breach."

Applying "general principles of contract interpretation," the Court concluded that L-3 was only entitled to 12% of the net attorneys' fees because the matter was essentially resolved through mediation.

* * *

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.
Comment

[1] Paragraph (a) requires that lawyers not charge fees that are excessive or illegal under the circumstances. The factors specified in paragraphs (a)(1) through (a)(8) are not exclusive, nor will each factor be relevant in each instance. The time and labor required for a matter may be affected by the actions of the lawyer's own client or by those of the opposing party and counsel. Paragraph (a) also requires that expenses for which the client will be charged must not be excessive or illegal. A lawyer may seek payment for services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer, provided in either case that the amount charged is not excessive.

[1A] A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information. Thus, under an hourly billing arrangement, it would be fraudulent to knowingly and intentionally charge a client for more than the actual number of hours spent by the lawyer on the client's matter; similarly, where the client has agreed to pay the lawyer's cost of in-house services, such as for photocopying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual costs incurred. Fraudulent billing requires an element of scienter and does not include inaccurate billing due to an innocent mistake.

[1B] A supervising lawyer who submits a fraudulent bill for fees or expenses to a client based on submissions by a subordinate lawyer has not automatically violated this Rule. In this situation, whether the lawyer is responsible for a violation must be determined by reference to Rules 5.1, 5.2 and 5.3. As noted in Comment [8] to Rule 5.1, nothing in that Rule alters the personal duty of each lawyer in a firm to abide by these Rules and in some situations, other Rules may impose upon a supervising lawyer a duty to ensure that the books and records of a firm are accurate. See Rule 1.15(j).

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Court rules regarding engagement letters require that such an understanding be memorialized in writing in certain cases. See 22 N.Y.C.R.R. Part 1215. Even where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the excessiveness standard of paragraph (a). In determining whether a particular contingent fee is excessive, or whether it is excessive to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may regulate the type or amount of the fee that may be charged.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(e). A lawyer may charge a minimum fee, if that fee is not excessive, and if the wording of the minimum fee clause of the retainer agreement meets the requirements of paragraph (d)(4). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). A fee paid in property instead of money may, however, be subject to the requirements of Rule 1.8(a), because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made if its terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that

more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. In matters in litigation, the court's approval for the lawyer's withdrawal may be required. See Rule 1.16(d). It is proper, however, to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[5A] The New York Court Rules require every lawyer with an office located in New York to post in that office, in a manner visible to clients of the lawyer, a "Statement of Client's Rights." See 22 N.Y.C.R.R. § 1210.1. Paragraph (e) requires a lawyer in a domestic relations matter, as defined in Rule 1.0(g), to provide a prospective client with the "Statement of Client's Rights and Responsibilities," as further set forth in 22 N.Y.C.R.R. § 1400.2, at the initial conference and, in any event, prior to the signing of a written retainer agreement.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained or upon obtaining child custody or visitation. This provision also precludes a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders. See Rule 1.0(g) (defining "domestic relations matter" to include an action to enforce such a judgment).

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not affiliated in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Paragraph (g) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole in a writing given to the client. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the client's agreement must be confirmed in writing. Contingent fee arrangements must comply with paragraph (c). Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. See Rule 5.1. A

lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (g) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Paragraph (h) recognizes that this Rule does not prohibit payment to a previously associated lawyer pursuant to a separation or retirement agreement.

Disputes over Fees

[9] A lawyer should seek to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. The New York courts have established a procedure for resolution of fee disputes through arbitration and the lawyer must comply with the procedure when it is mandatory. Even when it is voluntary, the lawyer should conscientiously consider submitting to it.

*** * ***

B. 22 N.Y.C.R.R. Part 1215 Written Letter of Engagement

Section 1215.1. Requirements

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter:

(1) if otherwise impractible; or

(2) if the scope of services to be provided cannot be determined at the time of the commencement of representation.

For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term client shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

(1) explanation of the scope of the legal services to be provided;

(2) explanation of attorney's fees to be charged, expenses and billing practices; and

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b) of this section.

Section 1215.2. Exceptions

This section shall not apply to:

(a) representation of a client where the fee to be charged is expected to be less than $3,000;

(b) representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client;

(c) representation in domestic relations matters subject to Part 1400 of this Title; or

(d) representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

*** * ***

C. Appellate Division Rules

Appellate Division Rules 22 N.Y.C.R.R. §§ 603.7, 691.20, 806.13, 1022.31 also contain provisions governing contingent fees in personal injury and wrongful death actions. The Third Department’s rule is included below:

Section 806.13. Contingent fees in claims and actions for personal injury and wrongful death

(a) In any claim or action for personal injury or wrongful death, other than one alleging medical, dental or podiatric malpractice, whether determined by judgment or settlement, in which the compensation of claimant's or plaintiff's attorney is contingent, that is, dependent in whole or in part upon the amount of the recovery, the receipt, retention or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than that contained in the schedule of fees in subdivision (b) of this section is deemed to be fair and reasonable. The receipt, retention or sharing of compensation which is in excess of such schedule of fees shall constitute the exaction of unreasonable and unconscionable compensation, unless authorized by a written order of the court as provided in this section. Compensation of claimant's or plaintiff's attorney for services rendered in claims or actions for personal injury alleging medical, dental or podiatric malpractice shall be computed pursuant to the fee schedule in Judiciary Law, section 474-a.

(b) The following is the schedule of reasonable fees referred to in subdivision (a) of this section: either,

SCHEDULE A

(1) 50 percent on the first $1,000 of the sum recovered,

(2) 40 percent on the next $2,000 of the sum recovered,

(3) 35 percent on the next $22,000 of the sum recovered,

(4) 25 percent on any amount over $25,000 of the sum recovered; or

SCHEDULE B

A percentage not exceeding 33 1/3 percent of the sum recovered, if the initial contractual arrangement between the client and the attorney so provides, in which event the procedure provided in this section for making application for additional compensation because of extraordinary circumstances shall not apply.

(c) Such percentage shall be computed by one of the following two methods to be selected by the client in the retainer agreement or letter of engagement:

(1) on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action; or

(2) in the event that the attorney agrees to pay costs and expenses of the action pursuant to Judiciary Law section 488(2)(d), on the gross sum recovered before deducting expenses and disbursements. The retainer agreement or letter of engagement shall describe these alternative methods, explain the financial consequences of each, and clearly indicate the client's selection. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered. For the following or similar items there shall be no deduction in computing such percentages: liens, assignments or claims in favor of hospitals, for medical care and treatment by doctors and nurses, or self-insurers or insurance carriers.

(d) In the event that claimant's or plaintiff's attorney believes in good faith that Schedule A, of subdivision (b) of this section, because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the client and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the trial term calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to a special term of Supreme Court in the judicial district in which the attorney has an office. Upon such application, the justice, in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in Schedule A, of subdivision (b) of this section; provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the client and the attorney. If the application be granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application.

(e) Nothing contained in this section shall be deemed applicable to the fixing of compensation for attorneys representing infants or other persons, where the statutes or rules provide for the fixation of such compensation by the court.

(f) Nothing contained in this section shall be deemed applicable to the fixing of compensation of attorneys for services rendered in connection with collection of first-party benefits as defined in article XVIII of the Insurance Law.

XII. New York State Bar Exam Replaced by Uniform Bar Exam

The Court of Appeals appoints and oversees the Board of Law Examiners and promulgates the rules for the admission of attorneys to practice. In a February 26, 2016 Outside Counsel piece in the New York Law Journal, we discussed the Court's changes to the New York State Bar Exam, which will essentially be replaced with the Uniform Bar Exam. *See* Patrick M. Connors, "Lowering the New York Bar: Will New Exam Prepare Attorneys for Practice?," N.Y.L.J, Feb. 26, 2016, at 4. Given the scant knowledge of New York law required to pass the new bar exam, it is highly probable that there will be an increase in the number of newly admitted attorneys who have minimal knowledge of our state's law.

Law firms and lawyers with managerial responsibility or supervisory authority will now have additional responsibilities. They must be especially mindful of ensuring that newly admitted lawyers practicing in areas requiring knowledge of New York law are competent to do so. *See* New York Rules of Professional Conduct, Rule 5.1 ("Responsibilities of Law Firms, Partners, Managers, and Supervisory Lawyers"); Rule 1.1 ("Competence").

Enrollments in New York Civil Procedure courses have dropped dramatically since the change in the Bar Exam and are now less than 20% of what they were before the change.

XIII. Misconduct Under Rule 8.4

A. ABA Model Rule 8.4: Misconduct (amended August 2016)

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Rule 8.4 Misconduct – Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious

interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] **Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.** Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations. (emphasis added)

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

* * *

New York's Rule 8.4(g) provides:

> A lawyer or law firm shall not:
>
> (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

* * *

ABA Model Rule 8.4(g)'s reach is more expansive, as noted in Comment 4 thereto. An ABA report noted evidence of sexual harassment at "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law."

On April 23, 2018, the Tennessee Supreme Court rejected a proposed revision to their rules of professional conduct that would have incorporated Rule 8.4(g) of the ABA Model Rules of Professional Conduct. This is the second time in five years the Tennessee Supreme Court has rejected similar proposals. It was reported that the proposal generated numerous comments from law professors, practitioners, and religious groups. "Many commenters didn't see the need for such a rule and opposed 'big brother' looking over a lawyer's shoulder." ABA/BNA Lawyers'

Manual on Professional Conduct, Current Reports, May 02, 2018. The ABA/BNA Article also notes:

> South Texas College of Law constitutional law professor Josh Blackman told Bloomberg Law that lawyers "don't forsake all of [their] free speech rights by becoming an attorney." And the bar doesn't have the same interest in disciplining lawyers for conduct at a bar association dinner or at continuing legal education classes, as it does in disciplining lawyer conduct in a courtroom, deposition or mediation, Blackman said. The rule is a tool "to silence and chill people."
>
> Blackman was recently protested and heckled by students at CUNY Law School for speaking about free speech. Blackman said those kids will be enforcing 8.4(g) in a few years and "if you give these kids a loaded weapon, they'll use it to discipline people who speak things they don't like."
>
> But Rule 8.4(g) has vocal proponents as well. New York University School of Law professional responsibility professor Stephen Gillers advocated for the ABA's adoption of 8.4(g) and said that "[n]o lawyer has a First Amendment right to demean another lawyer (or anyone involved in the legal process)."
>
> …To date, only Vermont has adopted the Model Rule's version of 8.4(g). Many other states have anti-discrimination provisions, but they have been described as being more narrow than 8.4(g).

The South Carolina Supreme Court and Montana legislature have also rejected a proposal based on ABA Model Rule 8.4(g). The South Carolina Supreme Court received comments from 29 individual attorneys and three groups, and it was reported that a majority of the comments were in opposition to the rule.

It has been reported that 24 states already adopted an anti-discrimination provision in their rules of professional conduct before the ABA adopted 8.4(g) as part of the Model Rules in August of 2016.

Illinois Rule of Professional Conduct 8.4(j) provides that it is professional misconduct for a lawyer to "violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer."

Indiana's Rule of Professional Conduct 8.4(g) states that it is professional misconduct for a lawyer to "engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status or similar factors."

B. Rule 8.4(a)(1): "[A]ttempt to violate the Rules of Professional Conduct."

***Geauga County Bar Association v. Bond*, 146 Ohio St. 3d 97 (2016)**

The Supreme Court of Ohio affirmed the Board of Professional Conduct's sanctions against an attorney who loaned money to a person he believed was his client. The sanctions consisted of a public reprimand. Although the purported client was really a thief who was trying to steal money from the attorney, the Court agreed with the Board that the attorney violated Ohio Professional Conduct Rule 8.4(a) in his attempt to violate Ohio Professional Conduct Rule 1.8(e), which prohibits attorneys from loaning money to clients.

Ohio Rule 1.8(e) prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation, with limited exceptions. Ohio Rule 8.4(a) provides that "[i]t is professional misconduct for a lawyer to …(a) violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." *See* ABA Rule 8.4(a)("It is professional misconduct for a lawyer to…violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another").

New York Rule 1.8, Comment 9B states that "[e]xamples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above."

The opinion states:

> On February 18, 2014, Bond filed a report with the Chardon Police Department alleging that he had received a phone call earlier that month from Patrick Paul Heald, who stated that he had been referred to Bond to discuss his personal-injury case. Bond reported that when he met Heald at a

> diner in Willoughby, Ohio, on February 3, 2014, Heald's right arm was bandaged and he was limping. Heald claimed that he had been badly burned in an industrial accident and requested financial assistance to pay for medication and living expenses until he received his next paycheck. Later that day, Bond entered into a contingent-fee agreement to represent Heald in his personal-injury matter. He also had Heald sign a photocopy of seven $100 bills with the notation, "Temporary loan of $700.00 cash advanced 2/3/14 by Daniel E. Bond to Patrick Paul Heald" and then gave him the cash and a check for $1,300. Heald did not repay the loan as agreed and made excuses for his failure to do so.

Subsequently, the attorney received another inquiry about a personal-injury matter and this prompted him to contact the police. As a result, the fake-client Heald was arrested, sentenced to jail for 8 months and ordered to pay restitution of $2,000.

The Board found that the attorney violated Ohio Professional Conduct Rule 8.4(a). The Court, in agreeing with the Board, found that there was not an attorney-client relationship present and thus, there was not a violation Ohio Professional Conduct Rule 1.8(e). Nevertheless, the court found the attorney's attempt to violate Ohio Professional Conduct Rule 1.8(e) led to an actual violation of Ohio Professional Conduct Rule 8.4(a)(misconduct). In accordance with the Board, the Court also dismissed the complaint's allegations that included violations of Ohio Professional Conduct Rules "1.18(a) (providing that a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client to whom the attorney may owe certain duties) and 8.4(h) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law)."

In support of the sanction of a public reprimand, the court cited two cases where a lawyer violated the predecessor provision to Rule 1.8(e), DR 5–103(B). *See Cleveland Bar Assn. v. Nusbaum*, 93 Ohio St.3d 150, 753 N.E.2d 183 (2001) (publicly reprimanding an attorney with no prior discipline who advanced $26,000 to a personal-injury client); and *Cleveland Bar Assn. v. Mineff*, 73 Ohio St.3d 281, 652 N.E.2d 968 (1995) (publicly reprimanding an attorney who provided $5,300 to a client to cover the client's living expenses during the pendency of his workers' compensation claim).

C. "The ABA Overrules the First Amendment"

See Ron Rotunda, *The ABA Overrules the First Amendment*, THE WALL STREET JOURNAL (Aug. 16, 2016 7:00 p.m.), http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418 ("Consider the following form of 'verbal' conduct when one lawyer tells another, in connection with a case, 'I abhor the idle rich. We should raise capital gains taxes.' The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.").

See also Ron Rotunda, The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought, The Heritage, (Oct. 6, 2016), http://www.heritage.org/research/reports/2016/10/the-aba-decision-to-control-what-lawyers-say-supportingdiversity-but-not-diversity-of-thought.

D. New York State Bar Association Committee on Professional Ethics Opinion 1111 (1/7/17)

Topic: Client representation; discrimination

Digest: A lawyer is under no obligation to accept every person who may wish to become a client unless the refusal to accept a representation amounts to unlawful discrimination.

Rules: 8.4(g)

FACTS

1. A lawyer has been requested to represent a person desiring to bring a childhood sex abuse claim against a religious institution. The lawyer is of the same religion as the institution against which the claim is to be made. Because of this religious affiliation, the lawyer is unwilling to represent the claimant against the institution.

QUESTIONS

2. Is a lawyer ethically required to accept every request for representation?

3. Does the refusal to accept a representation under the facts of this inquiry amount to illegal discrimination?

OPINION

Lawyer's Freedom to Decide Which Clients to Represent

4. It has long been a principle of the practice of law that a "lawyer is under no obligation to act as advisor or advocate for every person who may wish to become a client . . ." EC 2-35 [formerly EC 2-26] of the former Code of Professional Responsibility (the "Code"). Although this language was not carried over to the current Rules of Professional Conduct (the "Rules"), the principle remains sound. The principle that lawyers have discretion to determine whether to accept a client has been "espoused so repeatedly and over such a long period of time that it has virtually reached the level of dogma." Robert T. Begg, *Revoking the Lawyer's License to Discriminate in New York*, 7 Geo. J. Legal Ethics 280, 280-81 (1993). *See also Restatement (Third), The Law Governing Lawyers* § 14 cmt. b (Am. Law Inst. 2000) ("The client-lawyer relationship ordinarily is a consensual one. Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination"); Henry S. Drinker, Legal Ethics 139 (1953) ("[T]he lawyer may choose his own cases and for any reason or without reason may decline any employment which he does not fancy"); Canon 31, ABA Canons of Professional Ethics (1908) ("No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment."); George Sharswood, *An Essay on Professional Ethics* 84 (5th ed. 1884) (stating, in one of the earliest American works on legal ethics, that a lawyer "has an undoubted right to refuse a retainer, and decline to be concerned in any cause, at his discretion").

5. We applied this principle in N.Y. State 833 (2009), where we held that a lawyer ethically was not required to respond to an unsolicited written request for representation sent by a person in prison.

Prohibition Against Unlawful Discrimination

6. However, a lawyer's unfettered ethical right to decline a representation is subject to federal, state and local anti-discrimination statutes.

7. For example, N.Y. Exec. Law § 296(2)(a) provides: "It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation ... because of the race, creed, color, national origin, sexual orientation, military

status, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof ....” In *Cahill v. Rosa*, 674 N.E.2d 274, 277 (N.Y. 1996), a case involving a dentist in private practice who refused to treat patients whom he suspected of being HIV positive, the Court of Appeals held that a dental practice is a “place of public accommodation” for purposes of the Executive Law. At least one scholar has argued that *Cahill v. Rosa* prohibits lawyers from discriminating as well. *See* Robert T. Begg, *The Lawyer’s License to Discriminate Revoked: How a Dentist Put Teeth in New York’s Anti-Discrimination Disciplinary Rule*, 64 Albany L. Rev 153 (2000) (discussing whether discrimination by New York lawyers is illegal after *Cahill*); *but see* G. Chin, *Do You Really Want a Lawyer Who Doesn’t Want You?*, 20 W. New Eng. L. Rev. 9 (1998) (arguing that a lawyer should not be required to undertake representation where the lawyer cannot provide zealous representation).

8. Rule 8.4(g) recognizes that anti-discrimination statutes may limit a lawyer’s freedom to decline representation, stating that a lawyer or law firm “shall not ... unlawfully discriminate in the practice of law . . . on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. ...” What constitutes “unlawful discrimination” within the meaning of Rule 8.4(g) is a question of law beyond the jurisdiction of this Committee. Consequently, we do not opine on whether a lawyer’s refusal to represent a prospective client in a suit against the lawyer’s own religious institution constitutes “unlawful discrimination.”

CONCLUSION

9. A lawyer is under no obligation to accept every person who may wish to become a client unless the refusal to accept a person amounts to unlawful discrimination. Whether a lawyer’s refusal to represent a particular client amounts to unlawful discrimination is a question of law beyond this Committee’s jurisdiction.

E. Kellyanne Conway Complaint, February 20, 2017

GEORGETOWN LAW

Abbe Smith
Professor of Law

February 20, 2017

Office of Disciplinary Counsel
Board on Professional Responsibility
District of Columbia Court of Appeals
515 5th Street NW
Building A, Suite 117
Washington, DC 20001

To the Office of Disciplinary Counsel:

Please be advised that the below signed law professors, all of whom teach courses relating to legal ethics, are hereby filing a disciplinary complaint against District of Columbia bar member Kellyanne Conway, currently listed as a member of the bar under her name before marriage, Kellyanne E. Fitzpatrick,[1] under DC Rule of Professional Conduct 8.4(c) [hereinafter DC Rules].

As Rule 8.4(c) states, "It is professional misconduct for a lawyer to [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." This is an admittedly broad rule, as it includes conduct outside the practice of law and, unlike 8.4(b), the conduct need not be criminal. We are mindful of the Rule's breadth and aware that disciplinary proceedings under this Rule could lead to mischief and worse. Generally speaking, we do not believe that lawyers should face discipline under this Rule for public or private dishonesty or misrepresentations unless the

[1] Ms. Conway, née Fitzpatrick, was admitted to the DC bar on January 19, 1995 and is currently suspended for nonpayment of dues. Presumably, if she resumes payment she would be readmitted.

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lawyer's conduct calls into serious question his or her "fitness for the practice of law," DC Rule 8.4, Comment 1, or indicates that the lawyer "lacks the character required for bar membership." DC Bar, Ethics Opinion 323, *Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties*, at https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion323.cfm.

However, we believe that lawyers in public office—Ms. Conway is Counselor to the President—have a higher obligation to avoid conduct involving dishonest, fraud, deceit, or misrepresentation than other lawyers. Although the DC Rules contain no Comment specifically relating to 8.4(c), the American Bar Association's Model Rules of Professional Conduct (MR) make this point. MR 8.4(c), Comment 7 states that "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers." *Cf.* DC Rule 1.11 (on the special conflict of interest rules for lawyers who have served in government).

It is not surprising that the Model Rules distinguish lawyers in public office from other lawyers. The ABA knows well the history of professional responsibility as an academic requirement in American law schools: following the Watergate scandal, which involved questionable conduct by a number of high-ranking lawyers in the Nixon administration, the ABA mandated that law students take such a course in order to graduate.

Some of the signers of this complaint practice in the District of Columbia and/or are members of the DC Bar. We feel compelled to file such a complaint under DC Rule 8.3(a), which states that "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

Those of us who do not practice in DC are members of other state and federal bars. We all believe it is critically important that lawyers in public office—especially those who act as spokespersons for the highest levels of government—be truthful.

The DC Bar has issued an Ethics Opinion on lawyers working in government in a non-representational capacity that supports this complaint. *See generally* Ethics Opinion 323, *Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties*, https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion323.cfm. In addressing an inquiry about attorneys employed by an intelligence or national security agency who engage in clandestine activities, the Opinion distinguishes those government officials whose official duties require them to "act deceitfully" from other lawyers in government. Though the Opinion finds lawyers "whose duties require the making of misrepresentations as authorized by law as part of their official duties" do not violate Rule 8.4(c), the drafters emphasize the Opinion's narrow scope: it applies "only to misrepresentations made in the course of official conduct when the employee…reasonably believes that applicable law authorizes the misrepresentations."

Significantly, for purposes of this complaint, Ethics Opinion 323 makes plain that its conclusion in the above narrow context does not provide "*blanket permission for an attorney employed by government agencies to misrepresent themselves.*" [Emphasis added] The drafters further explain:

> Nor does [the Opinion] authorize misrepresentation when a countervailing legal duty to give truthful answers applies…. And, of course, this opinion does not authorize deceit for non-official reasons, or where an attorney could not, objectively have a reasonable belief that applicable law authorizes the actions in question.

Ms. Conway's misconduct under DC Rule 8.4(c) is as follows:

- On several occasions, including in an interview on MSNBC in early February, 2017, Ms. Conway referred to the "Bowling Green Massacre" to justify President Donald Trump's executive order banning immigrants from seven overwhelmingly Muslim countries. Not only was there no "massacre" in Bowling Green, Kentucky (or Bowling Green, New York, for that matter), but Ms. Conway knew there was no massacre. Although Ms. Conway claimed it was a slip of the tongue and apologized, her actual words belie her having misspoken: "I bet it's brand-new information to people that President Obama had a six-month ban on the Iraqi refugee program after two Iraqis came here to this country, were radicalized, and were the masterminds behind the Bowling Green Massacre. Most people don't know that because it didn't get covered." *See generally* Clare Foran, *The Bowling Green Massacre that Wasn't*, THE ATLANTIC, February 3, 2017, at https://www.theatlantic.com/politics/archive/2017/02/kellyanne-conway-bowling-green-massacre-alternative-facts/515619/. Moreover, she cited the nonexistent massacre to media outlets on at least two other occasions. *See* Aaron Blake, *The Fix: Kellyanne Conway's 'Bowling Green Massacre' wasn't a slip of the tongue. She has said it before.* WASH. POST, February 6, 2017, at https://www.washingtonpost.com/news/the-fix/wp/2017/02/06/kellyanne-conways-bowling-green-massacre-wasnt-a-slip-of-the-tongue-shes-said-it-before/?utm_term=.b2de9c3f0582.

- Compounding this false statement, in that same MSNBC interview Ms. Conway also made a false statement that President Barack Obama had "banned" Iraqi refugees from coming into the United States for six months following the "Bowling Green Massacre." *Id.* However, President Obama did not impose a formal six-month ban on Iraqi refugees. He ordered enhanced screening procedures following what actually happened in Bowling Green—the arrest and prosecution of two Iraqis for attempting to send weapons and money to al-Qaeda in Iraq. The two men subsequently pled guilty to federal terrorism charges and were sentenced to substantial prison terms. *See* Glenn Kessler, *Fact Checker: Trump's facile claim that his refugee policy is similar to Obama's in 2011*, WASH. POST, January 29, 2017, at https://www.washingtonpost.com/news/fact-checker/wp/2017/01/29/trumps-facile-claim-that-his-refugee-policy-is-similar-to-obama-in-2011/?utm_term=.87f35b046de2.

- This was not the first time Ms. Conway had engaged in conduct involving "dishonesty, fraud, deceit, or misrepresentation." On January 22, 2017, on the NBC television show *Meet the Press*, Ms. Conway said that the White House had put forth "alternative facts" to what the news media reported about the size of Mr. Trump's inauguration crowd. She made this assertion the day after Mr. Trump and White House press secretary Sean Spicer accused the news media of reporting falsehoods about the inauguration and Mr. Trump's relationship with intelligence agencies. *See* Nicholas Fandos, *White House Pushes 'Alternative Facts.' Here are the Real Ones*. N.Y. TIMES, January 22, 2017, at https://www.nytimes.com/2017/01/22/us/politics/president-trump-inauguration-crowd-white-house.html. As many prominent commentators have pointed out, the phrase "alternative facts" is especially dangerous when offered by the President's counselor. Moreover, "alternative facts' are not facts at all; they are *lies*. Charles M. Blow, *A Lie by Any Other Name*, N.Y. TIMES, January 26, 2017, at https://www.nytimes.com/2017/01/26/opinion/a-lie-by-any-other-name.html.

- Ms. Conway has also misused her position to endorse Ivanka Trump products on February 9, 2017 in an interview on Fox News from the White House briefing room with the White House insignia visible behind her. While this conduct does not fall within DC Rule 8.4, it is a clear violation of government ethics rules, about which a *lawyer* and member of the Bar should surely know. Federal rules on conflicts of interest specifically prohibit using public office "for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives or persons with whom the employee is affiliated in a nongovernmental capacity." The government's chief ethics watchdog denounced Conway's conduct in a letter to the White House. Richard Perez Pena, *Ethics Watchdog Denounces Conway's Endorsement of Ivanka Trump Products*, N.Y. TIMES, February 14, 2017, at https://www.nytimes.com/2017/02/14/us/politics/Kellyanne-Conway-ivanka-trump-ethics.html. *See also* DC Rule 1.11, Comment 2 (noting that, in addition to ethical rules, lawyers are subject to statutes and regulations concerning conflict of interest and suggesting that, given the many lawyers who work in the federal or local government in the District of Columbia, "particular heed must be paid to the federal conflict-of interest statutes.")

We do not file this complaint lightly. In addition to being a member of the DC Bar, Ms. Conway is a graduate of the George Washington University Law School, one of the District's premier law schools. We believe that, at one time, Ms. Conway, understood her ethical responsibilities as a lawyer and abided by them. But she is currently acting in a way that brings shame upon the legal profession. As the Preamble to the Model Rules states, a lawyer plays an important role as a "public citizen" in addition to our other roles.

If Ms. Conway were not a lawyer and was "only" engaging in politics, there would be few limits on her conduct outside of the political process itself. She could say and do what she wished and still call herself a politician. But she is a lawyer. And her conduct, clearly intentionally violative of the rules that regulate her professional status, cries out for sanctioning by the DC Bar.

Respectfully submitted,

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Northern Kentucky University

Susan Brooks
Professor of Law
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Lawrence Fox
Visiting Lecturer in Law
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F. *In the Matter of Richard M. Nixon, an Attorney*, 53 A.D.2d 178 (1st Dep't 1976)

Per Curiam.

The respondent, formerly the President of the United States, is an attorney, admitted to the practice of law in the State of New York on December 5, 1963.

An investigation of allegations of professional misconduct on the part of respondent was begun by the Grievance Committee of the Association of the Bar of the City of New York in September, 1974.

A petition containing five specifications of misconduct was mailed to Mr. Nixon's attorney on January 21, 1976, which attorney ultimately informed counsel to petitioner that Mr. Nixon would not accept service of the papers.

On January 28, 1976, personal service was attempted via the Sheriff's office of Orange County, California. When this attempt was unsuccessful, an order of this court dated February 4, 1976 authorized service of the necessary papers upon Mr. Nixon by regular mail addressed to Casa Pacifica, San Clemente, California.

The material mailed included a notice that responsive papers were due before February 19, 1976. On March 18, 1976, the Appellate Division directed a reference and appointed a Justice of the Supreme Court, New York County to take testimony regarding the specifications alleged. Copies of the order of reference and notice of conference were mailed to the respondent.

Mr. Nixon has neither responded personally nor appeared by counsel. No papers have been filed with the court on his behalf, nor has he served any papers upon the petitioner.

The specifications, succinctly stated, allege that Mr. Nixon improperly obstructed an FBI investigation of the unlawful entry into the headquarters of the Democratic National Committee; improperly authorized or approved the surreptitious payment of money to E. Howard Hunt, who was indicted in connection with the Democratic National Committee break in, in order to prevent or delay Hunt's disclosure of information to Federal law enforcement authorities; improperly attempted to obstruct an investigation by the United States Department of Justice of an unlawful entry into the offices of Dr. Lewis Fielding, a psychiatrist who had treated Daniel Ellsberg; improperly concealed and encouraged others to conceal evidence relating to unlawful activities of members of his staff and of the Committee to Re-elect the President; and improperly engaged in conduct which he knew or should have known would interfere with the legal defense of Daniel Ellsberg.

Each of the allegations is substantiated by documentary evidence, such as the tapes of Mr. Nixon himself, excerpts of testimony of individuals given to various Congressional committees, and affidavits. This material, which is uncontested and unrebutted, forms a prima facie case and warrants our sustaining of the charges.

The failure of the respondent to answer the charges, to appear in the proceeding, or to submit any papers on his behalf must be construed by this court as an admission of the charges and an indifference to the attendant consequences (*Matter of Liesner*, 43 AD2d 223; *Matter of Schner*, 5 AD2d 599, 600).

As we have already indicated, we find the documentary evidence submitted sufficient to sustain all of the charges preferred.

At this juncture, we pause to consider the points advanced in the dissent. It is apparently critical of our procedure on two scores: first, that respondent has not been served, with process in the sense that papers have not been put into his hand; and second, that we have rushed to judgment. As to the first objection, it is elementary that the purpose of service is notice, and quite obviously that was accomplished some months ago, as is set forth early in this writing. Nothing further is to be achieved by a forceful attempt at actual personal service except, quite possibly, an ugly confrontation. Even if successful, it would add nothing to the full information as to the charges already possessed by respondent. Indeed, respondent not alone has had full notice of these proceedings for a long time, but has so acknowledged by his abortive attempts, both here and in the Second Department, to circumvent the proceedings by submitting a resignation from the Bar, but which did not contain the required admission of culpability referred to in the dissent.

As to the second objection, no reason whatever has been shown why a respondent who has chosen to reject or ignore service may by stony silence postpone judgment indefinitely. We have not ‘on the basis of alleged inability to make personal service ... proceed[ed] forthwith to judgment.’ Following the March 18 order of reference, respondent was notified of proceedings to be held before the Referee on April 13. Default was noted then. More than two months have passed since, and it is now more than four months since respondent received the petition. Charges have been ‘properly proffered with the opportunity to defend’; that opportunity has been rejected. There is neither defense nor acknowledgment except as herein before indicated. We should proceed to conclude the matter.

The petitioner has moved this court to sustain the charges preferred on default, or, in the alternative to grant additional time for the petitioner to conduct hearings before the Referee. As we have noted, the respondent has defaulted in appearance before the Referee after due notice. Furthermore, the Referee has permitted a motion to be made before this court for default judgment, which we hereby grant to the extent hereinafter set forth. The further services of the Referee previously appointed by this court are dispensed with, and the documents submitted in support of this motion are considered by this court in the manner of an inquest. Upon such inquest, we find that the conclusions of fact pleaded as specifications in the petition have been supported by those documents. We have accordingly sustained all of the charges preferred against the respondent.

The gravamen of respondent's conduct is obstruction of the due administration of justice, a most serious offense, but one which is rendered even more grievous by the fact that in this instance the perpetrator is an attorney and was at the time of the conduct in question the holder of the highest public office of this country and in a position of public trust.

We note that while Mr. Nixon was holding public office he was not acting in his capacity as an attorney. However, the power of the court to discipline an attorney extends to misconduct other than professional malfeasance when such conduct reflects adversely upon the legal profession and is not in accordance with the high standards imposed upon members of the Bar (*Matter of Dolphin*, 240 NY 89, 92-93; Matter of Kaufman, 29 AD2d 298). We find that the evidence adduced in the case at bar warrants the imposition of the most severe sanction available to the court and, accordingly, we direct that respondent should be disbarred.

Kupferman, J.

(Dissenting in part).

My dissent is with respect to the procedural aspects and not as to the substantive aspects, except, of course, in the sense that the procedure raises questions of substance.

The respondent attempted to resign while under investigation. His resignation was rejected because he did not submit the affidavit required by the rules governing the conduct of attorneys, which in section 603.11, entitled 'Resignation of attorneys under investigation or the subject of disciplinary proceedings,' requires an acknowledgment that 'he could not successfully defend himself on the merits against such charges.' (22 NYCRR 603.11.) The purpose of the affidavit requirement is well set forth in the Report of the New York Committee on Disciplinary Enforcement (Eighteenth Annual Report of NY Judicial Conference, 1973, pp 234, 275 [Problem 12]). That report suggested for codification the specific language of this court's section 603.11. To every extent possible, matters were not to be left in limbo, but charges were either to be acknowledged or properly proffered with the opportunity to defend, and prosecuted to a conclusion. We now have a situation where, on the basis of alleged inability to make personal service, we proceed forthwith to judgment, no matter how justified it may seem to some. If this procedure is satisfactory, then a resignation in the face of the charges would have been at least as acceptable.

***In the Matter of Richard M. Nixon, an Attorney*, 53 A.D.2d 881 (2d Dep't 1976)**

The above-named attorney, formerly the President of the United States, who was admitted to the practice of law in the State of New York on December 5, 1963 at a term of the Appellate Division of the Supreme Court, First Judicial Department, has submitted his resignation from the Bar of this State after the filing of a complaint with the Joint Bar Association Grievance Committee for the Ninth

Judicial District (the Committee) by its Chief Counsel. In that complaint Mr. Nixon is charged with professional misconduct as a consequence of his refusal to co-operate with the Committee in its investigation of the conduct of an attorney who was allegedly involved with other individuals in certain monetary transactions which came to light during the "Watergate" inquiry. Specifically, Mr. Nixon declined to furnish certain affidavits requested of him indicating whether he would answer any written interrogatory concerning the attorney under investigation and certain other named individuals, and, if not, indicating his grounds for refusal to answer.

In an affidavit, sworn to on January 23, 1976, submitted to the Committee and filed by it with this court on January 26, 1976 pursuant to section 691.9 of our rules (22 NYCRR 691.9), Mr. Nixon tendered his resignation, stating therein, inter alia, that: (a) he had been made aware of the complaint by the Committee's Chief Counsel; (b) he was informed that he is the subject of an investigation based upon that complaint; and (c) he acknowledged that if a disciplinary proceeding were commenced against him upon the charge of the Committee's Chief Counsel, he could not successfully defend himself on the merits. He concluded by requesting that this court accept his resignation and enter an order striking his name from the roll of attorneys and counselors at law in the State of New York as of the date of such affidavit. Accordingly, the affidavit contained the required prerequisites for consideration of Mr. Nixon's resignation by this court which, pursuant to our rules, permitted the entry of an order either disbarring him or striking his name from the roll of attorneys.

However, on February 4, 1976, when the matter of Mr. Nixon's resignation came up for consideration by this court, it was learned that (a) since 1974, Mr. Nixon had been the subject of an investigation into allegations of misconduct by the Committee on Grievances of the Association of the Bar of the City of New York, the Departmental Disciplinary Committee for the First Judicial Department and (b) a petition, dated January 15, 1976, containing charges of professional misconduct, and a notice of petition, dated January 16, 1976, had been prepared and mailed to Mr. Nixon's attorney during the week of January 19, 1976. Predicated thereon, this court, in keeping with established principles of comity, deferred action on Mr. Nixon's attempted resignation pending the conclusion of the proceedings stemming from the foregoing investigation and action by the Departmental Disciplinary Committee for the First Judicial Department.

In a *Per Curiam* opinion the Appellate Division of the Supreme Court for the First Judicial Department sustained charges of misconduct preferred against Mr. Nixon as a respondent in a disciplinary proceeding instituted by said court, and directed that he be disbarred. An order disbarring the respondent was entered in said court on this date.

Accordingly, consideration of Mr. Nixon's offer to resign filed with this court, is rendered academic.

G. *Neal v. Clinton*, 2001 WL 34355768 (Ark. Cir. Jan. 19, 2001).

AGREED ORDER OF DISCIPLINE

Come now the parties hereto and agree to the following Order of this Court in settlement of the pending action:

The formal charges of misconduct upon which this Order is based arose out of information referred to the Committee on Professional Conduct ("the Committee") by the Honorable Susan Webber Wright, Chief United States District Judge for the Eastern District of Arkansas. The information pertained to William Jefferson Clinton's deposition testimony in a civil case brought by Ms. Paula Jones in which he was a defendant, *Jones v. Clinton*, No. LR-C-94-290 (E.D.Ark.).

Mr. Clinton was admitted to the Arkansas bar on September 7, 1973. On June 30, 1990, he requested that his Arkansas license be placed on inactive status for continuing legal education purposes, and this request was granted. The conduct at issue here does not arise out of Mr. Clinton's practice of law. At all times material to this case, Mr. Clinton resided in Washington, D.C., but he remained subject to the Model Rules of Professional Conduct for the State of Arkansas.

On April 1, 1998, Judge Wright granted summary judgment to Mr. Clinton, but she subsequently found him in Civil contempt in a 32-page Memorandum Opinion and Order (the "Order") issued on April 12, 1999, ruling that he had "deliberately violated this Court's discovery orders and thereby undermined the integrity of the judicial system." Order, at 31. Judge Wright found that Mr. Clinton had "responded to plaintiff's questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process .... [concerning] whether he and Ms. [Monica] Lewinsky had ever been alone together and whether he had ever engaged in sexual relations with Ms. Lewinsky." Order, at 16 (footnote omitted). Judge Wright offered Mr. Clinton a hearing, which he declined by a letter from his counsel, dated May 7, 1999. Mr. Clinton was subsequently ordered to pay, and did pay, over $90,000, pursuant to the Court's contempt findings. Judge Wright also referred the matter to the Committee "for review and any action it deems appropriate." Order, at 32.

Mr. Clinton's actions which are the subject of this Agreed Order have subjected him to a great deal of public criticism. Twice elected President of the United States, he became only the second President ever impeached and tried by the Senate, where he was acquitted. After Ms. Jones took an appeal of the dismissal of her case, Mr. Clinton settled with her for $850,000, a sum greater than her initial *ad damnum* in her complaint. As already indicated, Mr. Clinton was held in civil contempt and fined over $90,000.

Prior to Judge Wright's referral, Mr. Clinton had no prior disciplinary record with the Committee, including any private warnings. He had been a member in good standing of the Arkansas Bar for over twenty-five years. He has cooperated fully with the Committee in its investigation of this matter and has furnished information to the Committee in a timely fashion.

Mr. Clinton's conduct, as described in the Order, caused the court and counsel for the parties to expend unnecessary time, effort, and resources. It set a poor example for other litigants, and this damaging effect was magnified by the fact that at the time of his deposition testimony, Mr. Clinton was serving as President of the United States.

Judge Wright ruled that the testimony concerning Ms. Lewinsky "was not essential to the core issues in this case and, in fact, that some of this evidence might even be inadmissible...." *Jones v. Clinton*, 993 F.Supp. 1217, 1219 (E.D.Ark.1998). Judge Wright dismissed the case on the merits by granting Mr. Clinton summary judgment, declaring that the case was "lacking in merit-a decision that would not have changed even had the President been truthful with respect to his relationship with Ms. Lewinsky." Order, at 24-25 (footnote omitted). As Judge Wright also observed, as a result of Mr. Clinton's paying $850,000 in settlement, "plaintiff was made whole, having agreed to a settlement in excess of that prayed for in the complaint." Order, at 13. Mr. Clinton also paid to plaintiff $89,484 as the "reasonable expenses, including attorney's fees, caused by his willful failure to obey the Court's discovery orders." Order, at 31; *Jones v. Clinton*, 57 F.Supp.2d 719, 729 (E.D.Ark.1999).

On May 22, 2000, after receiving complaints from Judge Wright and the Southeastern Legal Foundation, the Committee voted to initiate disbarment proceedings against Mr. Clinton. On June 30, 2000, counsel for the Committee filed a complaint seeking disbarment in Pulaski County Circuit Court, *Neal v. Clinton*, Civ. No.2000-5677. Mr. Clinton filed an answer on August 29, 2000, and the case is in the early stages of discovery.

In this Agreed Order Mr. Clinton admits and acknowledges, and the Court, therefore, finds that:

A. That he knowingly gave evasive and misleading answers, in violation of Judge Wright's discovery orders, concerning his relationship with Ms. Lewinsky, in an attempt to conceal from plaintiff Jones' lawyers the true facts about his improper relationship with Ms. Lewinsky, which had ended almost a year earlier.

B. That by knowingly giving evasive and misleading answers, in violation of Judge Wright's discovery orders, he engaged in conduct that is prejudicial to the administration of justice in that his discovery responses interfered with the conduct of the Jones case by causing the court and counsel for the parties to expend unnecessary time, effort, and resources, setting a poor example for other litigants,

and causing the court to issue a thirty-two page Order civilly sanctioning Mr. Clinton.

Upon consideration of the proposed Agreed Order, the entire record before the Court, the advice of counsel, and the Arkansas Model Rules of Professional Conduct (the "Model Rules"), the Court finds:

1. That Mr. Clinton's conduct, heretofore set forth, in the Jones case violated Model Rule 8.4(d), when he gave knowingly evasive and misleading discovery responses concerning his relationship with Ms. Lewinsky, in violation of Judge Wright's discovery orders. Model Rule 8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

WHEREFORE, it is the decision and order of this Court that William Jefferson Clinton, Arkansas Bar ID #73019, be, and hereby is, SUSPENDED for FIVE YEARS for his conduct in this matter, and the payment of fine in the amount of $ 25,000. The suspension shall become effective as of the date of January 19, 2001.

IT IS SO ORDERED.

2018 CPLR Update

Patrick Connors
Albert and Angela Farone Distinguished Professor in New York Civil Practice,
Albany Law School, Albany

RECENT DEVELOPMENTS IN NEW YORK CIVIL PRACTICE

NYSBA TRIAL Meeting
Mystic, August 2018

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Does General Municipal Law § 50-e Require That Defendant Employees of Municipal Entity Be Named in Notice of Claim?

There is currently a conflict on whether employees of a municipal entity who are named as defendants in actions against their municipal employers must also be named in the notice of claim. The Second Department has "held that the plain language of General Municipal Law § 50-e(2) does not require a notice of claim to '[list] the names of the individuals who allegedly committed the wrongdoing.'" *Williams v. City of New York*, 153 A.D.3d 1301, 1305, 62 N.Y.S.3d 401, 406 (2d Dep't 2017); *see Blake v. City of New York*, 148 A.D.3d 1101, 1105–06, 51 N.Y.S.3d 540, 545 (2d Dep't 2017). The Third and Fourth Departments agree. *See Pierce v. Hickey*, 129 A.D.3d 1287, 1289, 11 N.Y.S.3d 321, 323 (3d Dep't 2015); *Goodwin v. Pretorius*, 105 A.D.3d 207, 216, 962 N.Y.S.2d 539, 546 (4th Dep't 2013). The First Department, has held that "General Municipal Law § 50-e makes unauthorized an action against individuals who have not been named in a notice of claim." *Tannenbaum v. City of New York*, 30 A.D.3d 357, 358, 819 N.Y.S.2d 4, 5 (1st Dep't 2006); *see Alvarez v. City of New York*, 134 A.D.3d 599, 22 N.Y.S.3d 362 (1st Dep't 2015)(explaining the rule and its rationale); Siegel & Connors, New York Practice § 32.

II. CPLR 103. Form of civil judicial proceedings

Action Converted to a Special Proceeding under CPLR 103(c)

The bringing of a special proceeding when an action is appropriate does not require a dismissal. Rather, if the court has obtained jurisdiction over the parties, it can convert the special proceeding into an action. *See* Siegel & Connors, New York Practice § 4. CPLR 103(c) is usually invoked by a party that has mistakenly brought a special proceeding when an action was required, but it can work the other way. In *Jackson v. Bank of Am., N.A.*, 149 A.D.3d 815, 818, 53 N.Y.S.3d 71, 75 (2d Dep't 2017), for example, the plaintiffs moved pursuant to CPLR 103(c) to convert their cause of action alleging violations of the EIPA into a special proceeding pursuant to CPLR 5239 and 5240. The Second Department affirmed the order granting the motion on the authority of CPLR 103(c), noting that the fact that plaintiffs

sought certain relief that is not available in a special proceeding under CPLR Article 52 did not require that the action be dismissed in its entirety. *See also CSX Transportation, Inc. v. Island Rail Terminal, Inc.*, 879 F.3d 462 (2d Cir. 2018)(in federal action, court cited to CPLR 103(c) in permitting plaintiffs to pursue turnover order by mere motion rather than via a special proceeding or separate action); *see* Siegel & Connors, New York Practice § 510.

III. CPLR 201. Application of article [Limitations of Time]

Court Upholds Provision Shortening Statute of Limitations to 1 Year Following Completion of Services Rendered under the Agreement

In R&B Design Concepts Inc. v. Wenger Const. Co., Inc., 2016 WL 10746770 (Sup. Ct., Nassau County 2016), *aff'd on other grounds*, 153 A.D.3d 864, 60 N.Y.S.3d 364 (2d Dep't 2017), the defendant moved to dismiss under CPLR 3211(a)(5), relying on a provision in the agreement that shortened the statute of limitations to one year after substantial completion of plaintiff's work.

The court cited to CPLR 201, which permits parties to agree to shorten the statute of limitations period prescribed in CPLR Article 2 as long as it is done by "written agreement." The court rejected plaintiff's argument that the contract was one of adhesion, noting that each page of the agreement was initialed by plaintiff's representative. Furthermore, the court found no indication that plaintiff did not have an opportunity to adequately review the agreement and there was no evidence of high pressure tactics or deceptive language contained within the agreement. Finally, the court found the one-year contractual period to be reasonable.

Although plaintiff commenced the action approximately 18 months after the work was substantially complete, well within the 6 year period generally applicable in contract actions, *see* CPLR 213(2); § 35, the court granted defendant's motion to dismiss for failure to comply with the shortened statute of limitations.

Plaintiff Saved by the General Construction Law, On Two Counts!

When the last day of the statute of limitations falls on a Saturday, Sunday, or public holiday, the time for commencing the action is extended to "the next succeeding business day." *See* General Construction Law § 25–a; Siegel & Connors, New York Practice § 34.

In *Wilson v. Exigence of Team Health*, 151 A.D.3d 1849, 57 N.Y.S.3d 602 (4th Dep't 2017), the action was commenced via e-filing on Tuesday, October 13, 2015. Defendant moved to dismiss the complaint under CPLR 3211(a)(5), arguing that the statute of limitations expired 3 days earlier on October 10, 2015. The Fourth Department reversed supreme court's order granting the motion and reinstated the complaint. The General Construction Law needed to be turned to twice here. First, for the rule that states that when a time period expires on a Saturday, it is extended until "the next succeeding business day." Gen. Constr. Law § 25–a. Then section 24 of the law came to the rescue, as it designates the second Monday in October, known as Columbus Day, as a holiday. In 2015, Columbus Day was happily celebrated on Monday, October 12, meaning that the action was timely commenced on the next business day, Tuesday, October 13.

IV. CPLR 202. Cause of action accruing without the state.

Court of Appeals to Resolve Whether Foreign Statute of Limitations Will Govern Claim Under Contract with Broad New York Choice of Law Provision

In *2138747 Ontario, Inc. v. Samsung C & T Corp.*, 144 A.D.3d 122, 123, 39 N.Y.S.3d 10, 11 (1st Dep't 2016), the First Department ruled that "a broadly drawn contractual choice-of-law provision, that provides for the agreement to be 'governed by, construed and enforced' in accordance with New York law" does not preclude the application of CPLR 202, New York's borrowing statute. The Court of Appeals affirmed, ruling that "CPLR 202…applies when contracting parties have agreed that their contract would be 'enforced' according to New York law." _ N.Y.3d _, 2018 WL 2898710 (2018).

V. CPLR 203. Method of computing periods of limitation generally

CPLR 203(g) Amended, in Conjunction with CPLR 214-a, to Provide for Discovery Rule in Medical Malpractice Actions Based on Negligent Failure to Diagnose Cancer or Malignant Tumor

Effective January 31, 2018, CPLR 203(g) was amended to add a new paragraph (2), with the previously existing material now included in CPLR 203(g)(1). CPLR 203(g)(2) is part of a package of legislation that extends periods within which to serve a notice of claim and to commence an action in certain medical, dental, and podiatric malpractice actions. The amendments only apply "where the action or claim is based upon the alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission." CPLR 203(g). In these actions, the time within which to commence an action or special proceeding or to serve a notice of claim, *see* Siegel & Connors, New York Practice § 32, "shall not begin to run until the later of either (i) when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury, … or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition." CPLR 203(g)(2); *see* Siegel & Connors, New York Practice § 42 (discussing continuous treatment doctrine in medical malpractice actions).

There is a maximum built into the amendment adding CPLR 203(g)(2). If relying on the first time period above, no action can be commenced beyond seven years from the date of the misdiagnosis. There is no maximum time period imposed on the application of the continuous treatment rule.

VI. CPLR 205(a). Six Month Extension.

CPLR 205(a) now provides:

> Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall

> demonstrate a general pattern of delay in proceeding with the litigation.

At first blush, the amendment to CPLR 205(a) might seem to be primarily a matter of concern for the plaintiff who is attempting to commence a new action within the six-month extension. However, it is actually the defendant moving to dismiss the earlier action for neglect to prosecute under one of these miscellaneous provisions who will want to ensure that the court sets forth the "specific conduct constituting the neglect" and the plaintiff's "general pattern of delay in proceeding with the litigation" so as to prevent the plaintiff from invoking CPLR 205(a) in a subsequent action.

While the new language added to CPLR 205(a) specifically refers to dismissals under CPLR 3216, which are usually based on a failure to timely serve and file a note of issue, it also applies to any dismissal "otherwise" granted for a "neglect to prosecute." Therefore, the new requirement applies to the full panoply of dismissals grounded upon a neglect to prosecute. *See* CPLR 3126 (dismissal for failure to provide disclosure); CPLR 3404 (failure to restore case to trial calendar within a year after being marked "off" constitutes a "neglect to prosecute"); CPLR 3012(b) (dismissal for failure to timely serve complaint in response to demand; caselaw holding that this dismissal is one for "neglect to prosecute"); Connors, McKinney's CPLR 3012 Practice Commentaries, C3012:13 ("Dismissal Is Neglect to Prosecute for Limitations' Purposes"); CPLR 3012-a (requiring filing of certificate of merit in medical malpractice cases); CPLR 3406 (requiring filing of notice of medical malpractice action; McKinney's Practice Commentary CPLR 3012-a, C3012-a:3 ("Commencing a New Action After Dismissal for Failure to Comply with CPLR 3012-a")).

Plaintiff in Mortgage Foreclosure Action Entitled to CPLR 205(a)'s Six Month Gift Where Prior Action, Brought by a Different Plaintiff, Was Dismissed Under CPLR 3215(c)

In *Wells Fargo Bank, N.A. v. Eitani*, 148 A.D.3d 193 (2d Dep't 2017), the court permitted a second mortgage foreclosure action to be commenced under CPLR 205(a) after first action was dismissed pursuant to CPLR 3215(c). The court determined that the requirements of CPLR 205(a) were met in that:

> (1) there is no dispute that this action would have been timely commenced when the prior action was commenced in 2005; (2) the moving defendant, Cohan, was served within the six-month period after the prior action was dismissed; and (3) this action is based on the same occurrence as the prior action, namely the default on the payment obligations under the note and mortgage. Further, it is undisputed that the dismissal of the prior action was not based upon a voluntary discontinuance, lack of personal jurisdiction, or a final judgment on the merits (see CPLR 205[a]).

The order dismissing the first action tracked the language in CPLR 3215(c) by simply stating that the plaintiff "failed to proceed to entry of judgment within one year of default," and that "[t]ime spent prior to discharge from a mandatory settlement conference [was not] computed in calculating the one year period." "The order did not include any findings of specific conduct demonstrating 'a general pattern of delay in proceeding with the litigation'."

The Second Department also ruled "that a plaintiff in a mortgage foreclosure action which meets all of the other requirements of the statute is entitled to the benefit of CPLR 205(a) where, as here, it is the successor in interest as the current holder of the note."

CPLR 205(a) Only Applies Where Action #1 Was Commenced in a Court in New York State

In *Guzy v. New York City*, 129 A.D.3d 614 (1st Dep't 2015), the plaintiff commenced Action #1 against the New York City Transit Authority in the Superior Court of New Jersey in July 2013. That action was dismissed based on lack of personal jurisdiction.

Plaintiff commenced Action #2 in New York Supreme Court. The First Department ruled that plaintiff's New Jersey action was not timely commenced and was dismissed for lack of personal jurisdiction. Therefore, plaintiff could not invoke the six-month gift for Action #2. "Moreover," the court noted in dicta, "CPLR 205 [a] does not apply when the initial action was commenced in a state or federal court outside of New York (see Siegel, NY Prac § 52 at 75 [5th ed 2011]….)."

In *Deadco Petroleum v. Trafigura AG*, 151 A.D.3d 547, 58 N.Y.S.3d 16 (1st Dep't 2017), Action #1 in a California federal court was timely commenced, but was dismissed based on a forum selection clause designating the New York courts as the exclusive forum for any litigation. After Action #2 was commenced in New York, the First Department ruled that "the tolling provision of CPLR 205(a) does not avail plaintiff, because an out-of-state action is not a 'prior action' within the meaning of that provision."

VII. CPLR 214-a. Action for medical, dental or podiatric malpractice to be commenced within two years and six months; exceptions.

CPLR 214-a Amended Effective January 1, 2018 to Provide for Discovery Rule in Medical Malpractice Actions Based on Negligent Failure to Diagnose Cancer or Malignant Tumor

CPLR 214-a has long contained a discovery rule in medical malpractice actions based on a foreign object left in the body. *See* Siegel & Connors, New York Practice § 42. That exception has now been placed under a new paragraph (a) and a new discovery rule, governing a doctor's negligent failure to diagnose cancer or a malignant tumor, has been placed in new paragraph (b). Under CPLR 214-a(b):

> where the action is based upon the alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission, the action may be commenced within two years and six months of the later of either (i) when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury, provided, that such action shall be commenced no later than seven years from such alleged negligent act or omission, or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition.

By its terms, it will only apply to an action based on a "negligent failure to diagnose cancer or a malignant tumor," and not to an action based on negligent treatment of cancer or a malignant tumor that has, in fact, been identified. What about the situation in which the doctor actually diagnoses the cancer, but negligently fails to communicate that diagnosis to the patient

and treat the condition? *See Young v. New York City Health & Hospitals Corp.*, 91 N.Y.2d 291, 293, 670 N.Y.S.2d 169, 171, 693 N.E.2d 196, 198 (1998)(mammogram report revealing nodular densities in breast and recommending a biopsy to rule out malignancy never communicated to plaintiff). Many other aspects of the amendment are addressed in Siegel & Connors, New York Practice § 42 (July 2018 Supplement).

Parents' Claim for Wrongful Birth Accrued on Birth of Impaired Child, Even Though Defendants' Treatment Concluded More Than 6 Months Earlier

In *B.F. v. Reproductive Medicine Associates of New York, LLP*, _ N.Y.3d _, 2017 WL 6375833 (2017), the Court noted that in *Becker v. Schwartz*, it had "recognized a new cause of action permitting parents to recover the extraordinary expenses incurred to care for a disabled infant who, but for a physician's negligent failure to detect or advise on the risks of impairment, would not have been born (46 N.Y.2d 401, 410, 413 N.Y.S.2d 895, 386 N.E.2d 807 [1978])." In *B.F.*, the issue was "whether the statute of limitations for such an extraordinary expenses claim runs from the date of the alleged negligence or the date of birth." The Court held that the "[d]ue to its unique features, … the cause of action accrues upon, and hence the limitations period runs from, the birth of the child."

Previously, the Court held that if the child is injured by medical malpractice while in the womb, the child's malpractice claim starts at birth. *LaBello v. Albany Medical Center Hosp.*, 85 N.Y.2d 701 (1995).

Is the Plaintiff in a Derivative Action Entitled to a Continuous Treatment Toll?

Recently, in addressing derivative actions commenced by parents who alleged that they sustained injuries due to medical malpractice arising from the treatment of their children, the First and Third Departments have concluded that the continuous treatment toll is personal to the patient and does not apply to the derivative claim. *See, e.g., Baer v. Law Offices of Moran & Gottlieb*, 139 A.D.3d 1232, 1234 (3d Dep't 2016) (legal malpractice action alleging that defendants negligently failed to assert plaintiffs' derivative claims before statute of limitations expired thereon);

Devadas v. Niksarli, 120 A.D.3d 1000, 1008 (1st Dep't 2014) (derivative claim for loss of services).

The Second Department has recently concluded that "[t]he continuous treatment toll is personal to the child and is not available to extend the time by which the plaintiff was required to assert her derivative claim." *Reeder v. Health Ins. Plan of Greater New York*, 146 A.D.3d 996, 1000 (2d Dep't 2017).

The Fourth Department, citing to a prior Second Department decision, now stands alone by adhering to the rule that if the continuous treatment doctrine applies to toll the statute of limitations with respect to the main claim, it will similarly toll the statute of limitations on the derivative claim. *See Dolce v. Powalski*, 13 A.D.3d 1200 (4th Dep't 2004)

There is another related issue under CPLR 214-a that does not seem to receive the same attention in the caselaw: whether a derivative claim should receive the benefit of a medical patient's foreign object toll?

VIII. CPLR 301. Jurisdiction over persons, property or status.

Court Holds Foreign Corporation with Principal Place of Business in Ohio to be "At Home" in New York

The standard used for decades to measure whether a corporate defendant is subject to general jurisdiction in New York, the famous "corporate presence" or "doing business" test, has been all but declared unconstitutional by the Supreme Court in its 2014 decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). *See* Siegel & Connors, New York Practice § 82.

In *Aybar v. Aybar*, 2016 WL 3389889, at *1 (Sup. Ct., Queens County 2016), plaintiffs alleged that they were injured in an auto accident in Virginia while passengers in a car equipped with defendant Goodyear's defective tire. Although Goodyear is an Ohio corporation with its principal place of business in that state, it obviously has a substantial presence in New York. Plaintiff alleged, and Goodyear did not deny, that the tire company "owns and operates nearly one hundred storefront tire and auto service center stores located in every major city and throughout New York State,

and it employs thousands of New York State residents at those stores," while distributing "its tires for sale at hundreds of additional locations throughout New York State." *Id*. Goodyear moved to dismiss the action for lack of personal jurisdiction based on the Supreme Court's decision in *Daimler*.

The court initially ruled that CPLR 302, New York's longarm statute, could not provide a basis of personal jurisdiction over Goodyear because it manufactured and sold the tire out of state and the plaintiffs' injuries were sustained in Virginia.

Turning to general jurisdiction under CPLR 301, which was the stuff of the Supreme Court's 2014 decision in *Daimler*, the court relied on plaintiffs' unrefuted allegations that Goodyear had operated numerous stores in New York since approximately 1924 and employed thousands of workers who engaged in daily activities in those stores. Based on this conduct, the *Aybar* court held that Goodyear's activities within New York were "so continuous and systematic that the company is essentially at home here," and therefore subject to general jurisdiction. *Id*. at *3.

The court also found an additional basis for personal jurisdiction over Goodyear, deeming it to have consented to general jurisdiction in New York by obtaining a license to do business here and designating the secretary of state as its agent for service of process. *Aybar*, at *3; *see* Siegel & Connors, New York Practice § 95.

The *Aybar* court issued a separate decision denying co-defendant Ford's motion to dismiss for lack of personal jurisdiction, which was based on the same reasoning. *Aybar v. Aybar*, 2016 WL 3389890, at *1 (Sup. Ct., Queens County 2016).

SCOTUS Stands by *Daimler* Holding

In *BNSF Ry. Co. v. Tyrrell*, _ U.S. _ , 137 S.Ct. 1549 (2017), the Supreme Court reaffirmed its holding in *Daimler*, once again announcing "that the Fourteenth Amendment's Due Process Clause does not permit a State to hale an out-of-state corporation before its courts when the corporation is not 'at home' in the State and the episode-in-suit occurred elsewhere." In *BNSF*, two suits involving plaintiffs injured while working for defendant were commenced in Montana state courts, and then consolidated.

The Court, in an opinion by Justice Ginsburg, the author of *Daimler*, observed that defendant BNSF "is not incorporated in Montana and does not maintain its principal place of business there. Nor is BNSF so heavily engaged in activity in Montana 'as to render [it] essentially at home' in that State." The Court acknowledged that BNSF has over 2,000 miles of railroad track and more than 2,000 employees in Montana, yet concluded that "the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts…. Rather, the inquiry 'calls for an appraisal of a corporation's activities in their entirety'; '[a] corporation that operates in many places can scarcely be deemed at home in all of them'."

While "the business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana," that in-state business "does not suffice to permit the assertion of general jurisdiction over claims like [plaintiffs'] that are unrelated to any activity occurring in Montana."

Justice Sotomayor, who concurred in part and dissented in part, observed:

> The majority's approach grants a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions. Under its reasoning, it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation. Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts within the United States.

IX. CPLR 302. Personal jurisdiction by acts of non-domiciliaries.

Longarm Jurisdiction Sustained Against Foreign Corporation

CPLR 302(a)(1)'s "transacts any business" clause played a starring role in *D & R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292 (2017), where plaintiff, a Spanish limited liability company, entered into an oral agreement with defendant, a winery located in Spain. Neither

plaintiff nor defendant had offices or a permanent presence in New York, but plaintiff performed services for defendant here, which included finding a distributor to import defendant's wine into the United States. Defendant paid plaintiff commissions for wine sold through the distributor for a period of time, but then stopped, which triggered the lawsuit in New York County Supreme Court.

Addressing the first part of the jurisdictional inquiry under CPLR 302(a)(1), the Court agreed with the appellate division's determination that defendant transacted business in New York. While the oral agreement between the parties was formed in Spain, it required plaintiff to locate a United States distributor to import defendant's wine. To achieve this goal, defendant accompanied plaintiff to New York on several occasions to attend wine industry events at which plaintiff introduced defendant to a New York-based distributor.

The Court emphasized that defendant was physically present in New York on several occasions and that its activities resulted in "the purposeful creation" of the exclusive distribution agreement with the New York distributor. It is interesting to note that the Court particularly focused on defendant's transactions in New York with the distributor, rather than the plaintiff. *Compare Fischbarg v. Doucet*, 9 N.Y.3d 375, 377 (2007) (holding that "defendants' retention and subsequent communications *with plaintiff* in New York established a continuing attorney-client relationship in this state and thereby constitute the transaction of business under CPLR 302(a)(1)")(emphasis added).

Defendant's conduct also satisfied the second part of the jurisdictional inquiry under the longarm statute because plaintiff's claim arose from defendant's business activities in New York with both the plaintiff and the New York based distributor.

Business Corporation Law Section 1314

One may wonder what the *D&R Global* action was doing in the New York State court system given that the plaintiff and defendant were both foreign corporations with no offices or permanent presence in New York and their contract was formed in Spain. A statute in the Business Corporation Law, section 1314(b), governs in such situations and requires that the action

satisfy one of five grounds set forth therein. *See* Siegel & Connors, New York Practice § 29. The fourth ground in Business Corporation Law section 1314(b) allows such suits to proceed if the foreign corporation would be subject to personal jurisdiction under CPLR 302. Having found jurisdiction under CPLR 302(a)(1) satisfied as against defendant, the *D&R Global* Court ruled that there was "subject matter jurisdiction over the parties' dispute under Business Corporation Law § 1314(b)(4)."

This quote is somewhat startling. If one of the five grounds in Business Corporation Law section 1314(b) is not met in an action between two foreign corporations, does that mean the supreme court lacks subject matter jurisdiction to entertain the matter, even if the parties have consented to New York jurisdiction in a forum selection clause? *See* Siegel & Connors, New York Practice § 28. Can this ground be raised at any time, or even sua sponte, as with most matters falling under the umbrella of subject matter jurisdiction? Could a supreme court judgment be subsequently deemed void based on the action's failure to satisfy section 1314(b), or can the parties waive the defect? These issues go hand in hand with the rigid law of subject matter jurisdiction. *See* Siegel & Connors, New York Practice § 8.

X. Commercial Division of Supreme Court.

Amendments to Commercial Division Rules

Several amendments were made to the Rules of the Commercial Division, 22 NYCRR 202.70, which are tracked in Siegel & Connors, New York Practice § 12A, a new section added to the Sixth Edition. For example, the Commercial Division recently adopted the following new measures:

APPENDIX C. COMMERCIAL DIVISION SAMPLE CHOICE OF FORUM CLAUSES

Purpose

The purpose of these sample forum-selection provisions is to offer contracting parties streamlined, convenient tools in expressing their consent to confer jurisdiction on the Commercial Division or to proceed in the federal courts in New York State.

These sample provisions are not intended to modify governing case law or to replace any parts of the Rules of the Commercial Division of the Supreme Court (the "Commercial Division Rules"), the Uniform Civil Rules for the Supreme Court (the "Uniform Civil Rules"), the New York Civil Practice Law and Rules (the "CPLR"), the Federal Rules of Civil Procedure, or any other applicable rules or regulations pertaining to the New York State Unified Court System or the federal courts in New York. These sample provisions should be construed in a manner that is consistent with governing case law and applicable sections and rules of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, the Federal Rules of Civil Procedure, and any other applicable rules and regulations. Parties which use these sample provisions must satisfy all jurisdictional, procedural, and other requirements of the courts specified in the provisions.

The Sample Forum Selection Provision

> To express their consent to the exclusive jurisdiction of the Commercial Division, parties may include specific language in their contract, such as: "THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCEMENT OR TERMINATION THEREOF."

Alternatively, in the event that parties wish to express their consent to the exclusive jurisdiction of either the Commercial Division or the federal courts in New York State, the parties may include specific language in their contract, such as: "THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, OR THE FEDERAL COURTS IN NEW YORK STATE, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSEY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCMENT OR TERMINATION THEREOF."

APPENDIX D. COMMERCIAL DIVISION SAMPLE CHOICE OF LAW PROVISION

Purpose

The purpose of this sample choice of law provision is to offer contracting parties a streamlined, convenient tool in expressing their consent to having New York law apply to their contract, or any dispute under the contract.

This sample provision is not intended to modify governing case law or to replace any parts of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, or any other applicable rules or regulations. This sample provision should be construed in a manner that is consistent with governing case law and applicable sections and rules of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, and any other applicable rules and regulations. Parties which use this sample provision must meet any requirements of applicable law.

The Sample Choice of Law Provision

To express their consent to have New York law apply to the contract between them, or any disputes under such contract, the parties may include specific language in their contract, such as: “THIS AGREEMENT AND ITS ENFORCEMENT, AND ANY CONTROVERSY ARISING OUT OF OR RELATING TO THE MAKING OR PERFORMANCE OF THIS AGREEMENT, SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK, WITHOUT REGARD TO NEW YORK'S PRINCIPLES OF CONFLICTS OF LAW.”

XI. Uniform Rule 202.5-bb. Electronic Filing in Supreme Court; Mandatory Program.

There continues to be frequent expansion of e-filing throughout the state. These developments are tracked in Siegel & Connors, New York Practice § 63A, entitled “Commencement of Actions by Electronic Filing (“E-Filing”),” a new section added to the Sixth Edition.

By Administrative Order AO/192/18 dated May 22, 2018, the Chief Administrative Judge established or continued mandatory e-filing in certain additional actions in the following counties:

Supreme Court, Albany County-Tax certiorari proceedings (excluding RPTL 730 proceedings).

Supreme Court, Bronx County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial matters, Mental Hygiene Law matters, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Broome County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, emergency medical treatment applications, matrimonial and Mental Hygiene Law matters, name change applications, consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304, and RPTL 730 proceedings.

Supreme Court, Cortland County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Essex County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f); "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Jefferson County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78

proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Lewis County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Livingston County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Monroe County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Nassau County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Ontario County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Orange County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene

Law matters, consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304, and RPTL 730 proceedings.

Supreme Court, Oswego County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, in rem tax foreclosures, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Otsego County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Putnam County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Queens County-commercial actions have been added to the list of actions in which e-filing is mandatory.

Supreme Court, Richmond County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters, applications to extend mechanics liens, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Suffolk County-The categories of action for mandatory e-filing have substantially changed and are now as follows: "Mandatory in part" (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary) for consumer credit actions as defined in CPLR 105(f); "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, civil forfeiture proceedings, Election Law proceedings,

emergency medical treatment applications, matrimonial and Mental Hygiene Law matters, and name change applications.

Supreme Court, Tompkins County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Warren County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Washington County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Surrogate's Court-Mandatory e-filing has now been recently authorized in the Surrogate's Court in Allegany, Cattaraugus, Genesee, Niagra, Orleans, Oswego, Suffolk, Ulster and Wyoming Counties for all probate and administration proceedings and related miscellaneous proceedings. *See* Administrative Order AO/192/18 dated May 22, 2018.

By Administrative Order AO/192/18 dated May 22, 2018, the Chief Administrative Judge established or continued consensual e-filing in certain additional counties for various types of actions including: Chenango, Delaware, Essex, Jefferson, Lewis, Madison, Monroe, New York, Oswego, Putnam, Seneca, Tioga and Wayne.

Parties to matrimonial actions should take note of Appendix B to Administrative Order AO/192/18. The appendix sets forth additional rules and conditions for the consensual electronic filing of matrimonial actions in supreme court.

By Administrative Order AO/292/17 dated November 8, 2017, the Chief Administrative Judge authorized a pilot program for consensual e-filing in civil actions commenced by e-filing in Supreme Court, New York County and subsequently removed to the New York City Civil Court pursuant to CPLR 325(d). Any party to such action can opt out of e-filing by serving on all parties, and filing with the court, a declination of consent within 20 days of entry of the order of removal.

Effective January 27, 2017, e-filed documents in newly initiated cases in New York County will be available immediately for online public viewing through the New York State Courts Electronic Filing system ("NYSCEF"). Such filings will be available for immediate online public viewing PRIOR to any examination of the document or assignment of an index number to the matter by the Office of the New York County Clerk.

Documents available for online viewing at this early stage will contain the following annotation in the margin:

> *Header:*
>
> *CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)*
>
> *Footer:*
>
> *This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR § 202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk in the county of filing. Because court rules (22 NYCRR § 202.5[d]) authorize the County Clerk to reject filings and attempted filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.*

These marginal annotations will be removed when the documents have been reviewed and approved for filing by the County Clerk and an index number has been assigned to the matter pursuant to 22 NYCRR § 202.5-b(d)(3).

Because these documents are available for public view prior to examination by the County Clerk, filers are advised to take special care to assure that the filings comply with State law and court rules addressing confidentiality of personal information (see, e.g., Gen. Bus. L. § 399-ddd [confidentiality of social security account number]; 22 NYCRR § 202.5[e] [omission or redaction of confidential personal information]).

The status of e-filing, including the actions to which it applies and the pitfalls associated with it, are discussed in further detail in Siegel & Connors, New York Practice § 63A.

E-filing Comes to the Appellate Division Effective March 1, 2018

Effective March 1, 2018, the Appellate Division has instituted e-filing in certain appellate matters through the New York State Courts Electronic Filing system (NYSCEF). The joint Electronic Filing Rules of the Appellate Division are contained in 22 N.Y.C.R.R. Part 1245. The actions in which e-filing in the Appellate Division is required as of March 1, 2018 differ for each Department. They are as follows:

> **First Department:** All appeals in commercial matters originating in the Supreme Court, Bronx and New York Counties.
>
> **Second Department**: All appeals in matters originating and electronically filed in Supreme and Surrogate's Courts in Westchester County.
>
> **Third Department**: All appeals in civil actions commenced by summons and complaint in Supreme Court originating in the Third Judicial District.
>
> **Fourth Department**: All appeals in matters originating in, or transferred to, the Commercial Division of Supreme Court in the Fourth Judicial Department.

Things have started off slowly, but the above listings will be supplemented in each Department as the e-filing program expands. Lawyers handling appeals must be certain to check the most current listings at the NYSCEF website: www.nycourts.gov/efile.

XII. CPLR 308. Personal service upon a natural person.

Service on the Sabbath with Knowledge That Person Served Observes the Sabbath Constitutes Malice Voiding Service

Service of process on a Saturday can be set aside and deemed a nullity if it is "maliciously procure[d]" to be served on one who "keeps Saturday as holy time." Gen. Bus. Law § 13; *see* Siegel & Connors, New York Practice § 63. In *JPMorgan Chase Bank, Nat. Ass'n v. Lilker*, 153 A.D.3d 1243 (2d Dep't 2017), supreme court denied the defendants' motion pursuant to CPLR 5015(a) and 317 to vacate a default judgment of foreclosure and sale, and to dismiss the complaint for lack of personal jurisdiction, based on a violation of General Business Law section 13.

According to the affidavits of service, after four unsuccessful attempts at personal service, the process server served the defendants by "affix and mail" service under CPLR 308(4). The affixation portion of the service was accomplished on a Saturday afternoon when the process server affixed two copies of the summons, complaint, and related documents to the door of the subject premises. In support of their motion to vacate the default judgment and dismiss the complaint, plaintiffs argued that personal jurisdiction was not secured over them because service of process was carried out in violation of General Business Law section 13, since, despite knowledge by the plaintiff's counsel that they are observant, Orthodox Jewish persons who adhere to the Sabbath, the affixation portion of service under CPLR 308(4) was improperly performed on a Saturday.

The Second Department held that General Business Law section 13 "applies not only to personal service upon a defendant, but also to the affixation portion of 'nail and mail' service pursuant to CPLR 308(4) on the door of a defendant's residence." Furthermore, under the statute, "[t]he knowledge of a plaintiff or its counsel [that the person to be served observes the Sabbath]

is imputed to the process server by virtue of the agency relationship." In support of their motion, the defendants submitted a letter from their counsel allegedly forwarded almost 8 weeks prior to service of process advising plaintiff's counsel that the defendants are "observant, Orthodox Jews," who cannot be served on a Saturday. Plaintiff's counsel denied receiving the letter and the Second Department reversed supreme court, ruling that a hearing on the dispute was necessary to ascertain if service was made in violation of General Business Law section 13.

Delivery to Defendant's Mother at Multiple Dwelling Building Where Defendant Resided, but Not at Defendant's Apartment, Is Not Proper Service

In *Thacker v. Malloy*, 148 A.D.3d 857 (2d Dep't 2017), "the plaintiff failed to meet her burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process." The evidence at the traverse hearing showed that the process server walked up to the window of the defendant's mother's ground-floor apartment to give her the summons and complaint as he stood on the sidewalk and she stood inside her apartment. The defendant resided in the same multiple-dwelling building as his mother, but "his apartment was on a higher floor, and it was separate and distinct from his mother's apartment." Therefore, the court ruled that, "in serving the defendant's mother with the summons and complaint while she was inside her own apartment, service was not made at the defendant's actual dwelling place." *See* CPLR 308(2)(requiring delivery of the summons "within the state to a person of suitable age and discretion at the actual place of business, *dwelling place or usual place of abode of the person to be served*").

XIII. Business Corporation Law § 304. Statutory designation of secretary of state as agent for service of process.

Can Corporation's Designation of Secretary of State as Agent for Service of Process Be Deemed Consent to Personal Jurisdiction in New York?

When the defendant is a licensed foreign corporation, it will have designated the secretary of state as its agent for service of process on any claim. Bus.

Corp. Law § 304. In section 95 Siegel & Connors, New York Practice, we explore the issue of whether such designation constitutes the corporation's consent to personal jurisdiction in New York. The issue has become an important one in light of the Supreme Court's decision in *Daimler*. In *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016), the court examined "the applicable Connecticut law" and ruled "that by registering to transact business and appointing an agent under the Connecticut statutes—which do not speak clearly on this point—Lockheed did not consent to the state courts' exercise of general jurisdiction over it." The court also observed that New York's Business Corporation Law section 304 "has been definitively construed" to vest the New York courts with general jurisdiction over a corporation that designates the New York Secretary of State as its agent for service of process.

In *Famular v. Whirlpool Corp.*, 2017 WL 280821 (S.D.N.Y. 2017), nine different plaintiffs from nine different states brought suit in the Southern District of New York, alleging that the Whirlpool washing machines the plaintiffs had purchased were mislabeled. One plaintiff, Famular, was a resident of New York who bought the Whirlpool washing machine in New York. Whirlpool conceded that specific jurisdiction existed in reference to Famular, but moved to dismiss against the other eight plaintiffs due to a lack of general personal jurisdiction.

The plaintiffs argued that Whirlpool and the other defendants were "subject to general personal jurisdiction in New York on a theory of consent by registration with the State of New York." The defendants countered that "the consent-by-registration theory of general personal jurisdiction is no longer viable in light of *Daimler*." The *Famular* court held that "a foreign defendant is not subject to the general personal jurisdiction of the forum state merely by registering to do business with the state, whether that be through a theory of consent by registration or otherwise." *See also Amelius v. Grand Imperial LLC*, 2017 WL 4158854 (Sup. Ct., New York County 2017)("For the dual reasons that the statutes do not adequately apprise foreign corporations that they will be subject to general jurisdiction in the courts of this State and that foreign corporations are required to register for conducting a lesser degree of business in this State than the Supreme Court of the United States has ruled should entail general jurisdiction, this Court finds that Yelp is not subject to general jurisdiction merely because it has registered to do business here."; *but see Aybar v. Aybar*, 2016 WL 3389889,

at *1 (Sup. Ct., Queens County 2016)(deeming Goodyear and Ford to have consented to general jurisdiction in New York by obtaining a license to do business here and designating the secretary of state as its agent for service of process).

XIV. CPLR 312-a. Personal service by mail.

Service By First Class Mail Plus Acknowledgement Is Fraught With Danger

The Third Department's recent decision in *Komanicky v. Contractor*, 146 A.D.3d 1042 (3d Dep't 2017), contains several lessons on the subject of service of process. *Komanicky* was a medical malpractice action naming 16 defendants who plaintiff attempted to serve via first class mail pursuant to CPLR 312-a. This method of service only works if defendant sends back the acknowledgement of service within 30 days after its receipt. CPLR 312–a(b); *see* Siegel & Connors, New York Practice § 76A. The only possible penalty for failing to send back the acknowledgment is that the defendant may be required to pay "the reasonable expense of serving process by an alternative" method of service under CPLR 308. CPLR 312–a(f).

None of the 16 defendants in *Komanicky* returned the acknowledgement. Plaintiff was then required to serve process via alternative methods and elected to personally serve defendants under CPLR 308(1), but the personal service did not occur within 120 days of the filing of the initiatory papers. CPLR 306–b.

The Third Department affirmed the order granting defendants' pre-answer motion to dismiss the complaint on several grounds, including lack of personal jurisdiction due to improper service. *See* CPLR 3211(a)(8). The court noted that "[t]o the extent that plaintiff's papers in opposition to the motions can be read as requesting an extension of time to serve defendants pursuant to CPLR 306–b, such affirmative relief should have been sought by way of a cross motion on notice." *See* CPLR 2215.

While a motion to extend the 120-day period most certainly should be made before it expires, it can be made after the period has run or in response to a motion to dismiss for lack of proper service. *See* Siegel & Connors, New

York Practice § 63 ("Extending Time for Service"). The extension can be sought via a cross motion, but should not be sought informally in answering papers served in response to a motion to dismiss. Several decisions, including *Komanicky*, have rejected that approach. *See Matter of Ontario Sq. Realty Corp. v LaPlant*, 100 A.D.3d 1469 (4th Dep't 2012)(petitioner "was required to serve a notice of cross motion in order to obtain the affirmative relief of an extension of time to serve the [petition with a notice of petition or an order to show cause] upon [respondent] pursuant to CPLR 306–b").

XV. CPLR 403. Notice of petition; service; order to show cause.

Omission of Return Date in Notice of Petition Can Be Disregarded under CPLR 2001

In *Oneida Public Library Dist. v. Town Bd. of Town of Verona*, 153 A.D.3d 127 (3d Dep't 2017), petitioner brought a special proceeding to challenge respondents' separate rejections of a bonding resolution that would have financed the construction of a new library. Petitioner filed a notice of petition and verified petition on November 30, 2015 and personally served these documents on the respondents on the same day. The notice of petition did not set forth a return date as required by CPLR 403(a), which provides: "[a] notice of petition shall specify the time and place of the hearing on the petition and the supporting affidavits, if any, accompanying the petition."

The Third Department had previously taken a somewhat strict stand in such matters, ruling that the omission of a return date was a fatal defect beyond the reach of CPLR 2001's powers of dispensation. *See, e.g., Matter of Common Council of City of Gloversville v. Town Bd. of Town of Johnstown*, 144 A.D.2d 90, 92 (3d Dep't 1989) (service of "notice of appeal," instead of "notice of petition" with return date, failed to result in acquisition of personal jurisdiction that "was a prerequisite to the exercise of a court's discretionary power to correct an irregularity or permit prosecution of a matter brought in an improper form" under CPLR 2001).

Applying a kinder, gentler interpretation of CPLR 2001, the Third Department recognized that "the primary purpose of a petition is to give notice to the respondent that the petitioner seeks a judgment against [a] respondent so that it may take such steps as may be advisable to defend the

claim." The "return date accomplishes this purpose by notifying the responding party when responsive papers must be served and when the petition will be heard ."

The court found that the appellate record supported the contention that respondents had sufficient notice of the petition, especially because "respondents' counsel conceded at oral argument before Supreme Court that they had 'plenty of time to respond' and, on appeal, they d[id] not contend that they suffered any prejudice." *Id.* Therefore, the *Oneida Public Library* court ruled that the omission of a return date on the notice of petition should have been disregarded by supreme court as a mere technical infirmity under CPLR 2001. *See also Bender v. Lancaster Cent. School Dist.*, 155 A.D.3d 1590 (4th Dep't 2017)(holding that the omission of a return date in a notice of petition does not "deprive a court of personal jurisdiction over the respondent….[S]uch a technical defect is properly disregarded under CPLR 2001 so long as the respondent had adequate notice of the proceeding and was not prejudiced by the omission"); *Kennedy v. New York State Office for People With Developmental Disabilities*, 154 A.D.3d 1346 (4th Dep't 2017) (reversing judgment dismissing petition on jurisdictional grounds because the notice of petition served and filed by petitioner omitted a return date in violation of CPLR 403(a), Fourth Department reinstated the petition and remitted the matter to supreme court "to exercise the discretion afforded to it under CPLR 2001").

XVI. CPLR 501. Contractual provisions fixing venue.

First and Second Departments Enforce Forum Selection Clauses in Resorts' Rental Agreements

In *Molino v. Sagamore*, 105 A.D.3d 922 (2d Dep't 2013), the Second Department reversed the trial court and granted the defendant's motion pursuant to CPLR 501 and 511 to change the venue of the action from Queens County to Warren County. Upon her arrival at the defendants' facility, the plaintiff signed a "Rental Agreement" which contained a provision stating that "if there is a claim or dispute that arises out of the use of the facilities that results in legal action, all issues will be settled by the courts of the State of New York, Warren County." The Second Department concluded that the supreme court erred in determining that the Rental

Agreement was an unenforceable contract of adhesion and that enforcement of the forum selection clause contained therein would be unreasonable and unjust.

"A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." (citation omitted) (internal quotation marks omitted).

Similarly, in *Bhonlay v. Raquette Lake Camps, Inc.*, 120 A.D.3d 1015, 991 N.Y.S.2d 765 (1st Dep't 2014), the First Department affirmed supreme court's order granting defendants' motion to change the venue of the action from New York County to Hamilton County, and denied plaintiffs' cross motion to retain venue in New York County. Citing to *Molino*, the court concluded that there was no basis for disregarding the venue agreement because "[p]laintiff has not demonstrated that enforcement of the venue clause would be unjust or would contravene public policy, or that the clause was rendered invalid by fraud or overreaching." The action was actually "transferred to Fulton County, because there are no Supreme Court sessions held in the parties' selected venue of Hamilton County"! *See also Karlsberg v. Hunter Mountain Ski Bowl, Inc.*, 131 A.D.3d 1121 (2d Dep't 2015) (affirming order granting that branch of the defendant's motion which was pursuant to CPLR 501 and 511 to change the venue of the action from Suffolk County to Greene County).

Second Department Enforces Forum Selection Clause in Residential Health Care Facility's "Admission Agreement"

In *Puleo v. Shore View Center for Rehabilitation and Health Care*, 132 A.D.3d 651, 17 N.Y.S.3d 501 (2d Dep't 2015), plaintiff's decedent was a resident of a residential health care facility located in Brooklyn.

Upon the decedent's admission to the facility, her daughter, the plaintiff, signed an "Admission Agreement" that contained a forum selection clause stating that "[e]ach of the parties to this Agreement irrevocably (a) submits to the exclusive jurisdiction of the courts of the State of New York in the County of Suffolk ... for purposes of any judicial proceeding that may be

instituted in connection with any matter arising under or relating to this Agreement." The Agreement also provided that "[i]n addition to the parties signing this Agreement, the Agreement shall be binding on the heirs, executors, administrators, distributors, successors, and assigns of the parties."

After the decedent died, the plaintiff, as the administrator of the decedent's estate, commenced a medical malpractice action against the operator of the facility in Supreme Court, Kings County. Defendant moved to change venue of the action from Kings County to Suffolk County based on the Agreement's forum selection clause.

The Second Department ruled that the defendant was not required to serve the plaintiff with a written demand to change venue pursuant to CPLR 511(a) before making its motion. Relying on its prior decisions, including *Molino*, the court ruled that "the plaintiff failed to show that enforcement of the forum selection clause would be unreasonable, unjust, or in contravention of public policy, or that the inclusion of the forum selection clause in the agreement was the result of fraud or overreaching." Furthermore, "the plaintiff failed to demonstrate that a trial in Suffolk County would be so gravely difficult that, for all practical purposes, she would be deprived of her day in court." Therefore, the Second Department reversed the supreme court and granted the motion to change venue.

Court Orders Hearing to Determine Validity of Nursing Home's Forum Selection Clause Signed by Decedent

In *Howard v. Dewitt Rehabilitation and Nursing Center, Inc.*, 2018 WL 452009 (Sup. Ct., New York County 2018), the court distinguished *Puleo* and ruled that the record raised:

> issues of fact as to whether the forum selection clause in the Agreement is invalid as the product of overreaching. In particular, while in *Medina* supra and *Puleo* supra. the nursing home admission agreement was signed, respectively, by the nursing home resident's attorney-in fact and daughter, in this case the nursing home resident signed the agreement. Moreover, contrary to Dewitt's position, the absence of medical evidence that decedent was incapacitated at the time she signed the Agreement, is not conclusive since plaintiff has

> submitted evidence that when decedent was admitted to Dewitt, she had a tracheotomy tube, which severely limited her ability to communicate, and did not have her glasses, without which she could not read. This evidence is sufficient to warrant a hearing as to whether the forum selection clause should be invalidated as the product of overreaching.

Therefore, the court ordered a hearing to determine "the validity of the forum selection clause in the Agreement and, in particular, the circumstances surrounding decedent's execution of the Agreement, including her mental and physical condition at the time she executed the Agreement."

XVII. CPLR 503. Venue based on residence.

(a) Generally. Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; the county in which a substantial part of the events or omissions giving rise to the claim occurred; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county.

This new amendment, which went into effect on October 23, 2017, apparently cannot be invoked in actions commenced prior to that date. See Chapter 366 of the Laws of 2017, § 2 ("This act shall take effect immediately and shall apply to actions commenced on or after such date.").

The amended provision bring New York venue practice closer to that in the federal courts, but there are still several significant distinctions. 28 U.S.C. § 1391 governs venue in federal courts and the statute was substantially amended in 2011. Section 1391(a)(1) provides that it will "govern the venue of all civil actions brought in district courts of the United States," except where a special venue provision in another law may govern. *See* 28 U.S.C. § 1400(b) (patent venue statute). The amended section 1391(b) eliminates prior distinctions between actions grounded in federal question jurisdiction and diversity jurisdiction. In both categories, venue may be laid in the district of any defendant's residence as long as all defendants reside in the

same state. So provides section 1391(b)(1). Note that this provision does not authorize venue in the plaintiff's own district of residence, as § 1391 had done before its amendment in the Judicial Improvements Act of 1990 (Pub.L. 101-650).

Alternatively, under section 1391(b)(2), venue may be laid in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred" or where "a substantial part of property that is the subject of the action is situated."

Paragraph (3) of section 1391(b) can't be invoked unless the options of paragraphs (1) and (2) prove unavailing. It permits venue in "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action."

Venue in federal actions with corporate parties is a bit more involved. For a discussion of venue in these instances, see Siegel & Connors, New York Practice (6th ed. 2018). Essentially, if the plaintiff is a corporation, it usually has to bring suit in the defendant's district or in the district where the claim arose. But if the defendant is a corporation, the plaintiff's choice of venue expands. For venue purposes, the corporate defendant is deemed a resident of (and may be sued in) any district in which it is amenable to personal jurisdiction with respect to the claim in question. 28 U.S.C. §§ 1391(a), (c); *see TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, _ U.S._, 137 S. Ct. 1514, 1517 (2017)(discussing 28 U.S.C. § 1391, but "hold[ing] that a domestic corporation 'resides' only in its State of incorporation for purposes of the patent venue statute [28 U.S.C. § 1400(b)]").

XVIII. CPLR 1003. Nonjoinder and misjoinder of parties.

Party Added Without Leave of Court Outside CPLR 1003's Time Frames Waives Defect by Failing to Promptly Assert It

The 1996 amendments to CPLR 305(a) and 1003 allow the plaintiff to add additional parties to an action without court leave if the plaintiff acts no later than the 20th day after the defendant's service of the answer. *See* Siegel & Connors, New York Practice § 65. If a party is improperly added outside the time frames in CPLR 1003, she had better raise a prompt objection. In *Wyatt*

v. City of New York, 46 Misc. 3d 1210(A), 2015 WL 232918 (Sup. Ct., New York County 2015), the court ruled that plaintiffs added MTA Bus Company as a defendant without court leave outside the time periods in CPLR 1003. Nonetheless, the court concluded that defendants waived their right to assert the issue because they failed to plead a proper objection in either their original or amended answer to the amended complaint. *Id.* at *5.

Despite the fact that defendants' amended answer contained thirteen affirmative defenses, including lack of personal jurisdiction based on the ground that "plaintiffs have failed to properly serve defendants with the Summons in this matter," it still missed the mark.

The decision is discussed in further detail in section 65 Siegel & Connors, New York Practice.

XIX. CPLR 1601. Limited liability of persons jointly liable.

Split Decision from Third Department Permits Apportionment of State's Fault in Supreme Court Action

In *Artibee v. Home Place Corp*, 28 N.Y.3d 739 (2017), plaintiffs sued defendant for injuries sustained while driving on a state highway when a branch from defendant's tree fell and struck plaintiff's car. Plaintiff also sued the State of New York in the Court of Claims.

In the supreme court action, defendant moved in limine to have the jury apportion liability between the defendant and the state. Supreme court ruled that evidence with regard to the state's liability for plaintiffs' alleged damages would be admissible at trial, but denied defendant's request for an apportionment charge.

The Third Department ruled that defendant was entitled to an apportionment charge to permit it to establish that its share of fault was 50% or less. The Court of Appeals reversed, concluding that the factfinder in supreme court cannot apportion fault to the State under CPLR 1601(1) when a plaintiff claims that both the State and a private party are liable for noneconomic losses in a personal injury action.

The Court noted that apportionment of fault against a nonparty tortfeasor is available under CPLR 1601(1), unless "the claimant proves that with due diligence he or she was unable to obtain jurisdiction over" the nonparty tortfeasor "in said action (or in a claim against the state, in a court of this state)" CPLR 1601(1). The statutory language permits the State to seek apportionment in the Court of Claims against a private tortfeasor subject to jurisdiction in any court in the State of New York. *See* Siegel & Connors, New York Practice § 168C at 290. "The statute does not, however, contain similar, express enabling language to allow apportionment against the State in a Supreme Court action (see id. [acknowledging that such a rule has derived from case law, rather than any "statute in point"])."

The *Artibee* Court stressed that "[m]oreover, even apart from the absence of language permitting apportionment against the State in Supreme Court, CPLR 1601(1) provides that a nonparty tortfeasor's relative culpability must not be considered in apportioning fault "if the claimant ... with due diligence ... was unable to obtain jurisdiction over such person in said action….Inasmuch as no claimant can obtain jurisdiction over the State in Supreme Court and the statute does not, by its terms, otherwise authorize the apportionment of liability against the State in that court, we agree with plaintiff that defendant was not entitled to a jury charge on apportionment in this action." In this respect, the *Artibee* Court ruled that the term "jurisdiction" in CPLR 1601(1) means both personal and subject matter jurisdiction.

The Court stressed that "if a defendant believes that it has been held liable in Supreme Court for what is actually the State's negligent conduct, the defendant can sue the State for contribution in the Court of Claims." It must be noted, however, that the State will not be bound by the amount of the judgment or the apportionment of fault in the supreme court action. *See* Siegel & Connors, New York Practice § 470 ("Nonjury Determinations; Court of Claims Problems").

The dissent in *Artibee* observed:

> the majority's holding creates anomalous situations that I do not believe were intended by the legislature: (1) a defendant in Supreme Court cannot shift liability to the nonparty State, but a state defendant in the Court of Claims can shift liability to a private party; and (2) a

> plaintiff in the Court of Claims will face apportionment with the State pointing to an empty chair, but a plaintiff in the Supreme Court will not face apportionment where the empty chair is the State.

In an analogous context, courts have held that where a nonparty tortfeasor has declared bankruptcy and cannot be joined as a defendant, the liability of the bankrupt tortfeasor can been "apportioned with that of the named defendants because the plaintiff has failed to demonstrate that it cannot obtain personal jurisdiction over the nonparty tortfeasor, and equity requires that the named defendants receive the benefit of CPLR article 16." *See, e.g., Kharmah v. Metropolitan Chiropractic Ctr.*, 288 A.D.2d 94, 94–95 (1st Dep't 2001). Given *Artibee's* conclusion that the term "jurisdiction" in CPLR 1601(1) means both personal and subject matter jurisdiction, this area of the law needs to be reexamined. *Artibee*, 28 N.Y.3d at 747-48.

XX. CPLR 2101. Form of papers.

New Court Rule Requires Attorneys to Redact Certain Confidential Information from Papers Filed in Court

The Administrative Board of the Courts recently promulgated Uniform Rule 202.5(e), which requires the redaction of certain confidential personal information ("CPI") from court filings. Compliance with the rule—effective January 1, 2015—was voluntary through February 28, 2015, but is now mandatory. The new rule covers actions that are using the New York State Courts Electronic Filing System ("NYSCEF"), *see* Siegel & Connors, New York Practice § 63, as well as those proceeding with actual hard copy papers.

Under the rule, CPI includes "(i) the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof; (ii) the date of an individual's birth, except the year thereof; (iii) the full name of an individual known to be a minor, except the minor's initials; and (iv) a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof." 22 N.Y.C.R.R. § 202.5(e)(1).

The new rule is discussed in further detail in Siegel & Connors, New York Practice § 201.

Court of Appeals Holds That Judiciary Law Section 470 Requires Nonresident New York Attorneys to Maintain Physical Office in State, Second Circuit Declares Statute Constitutional, U.S. Supreme Court Denies Leave

CPLR 2101(d) provides that "[e]ach paper served or filed shall be indorsed with the name, address and telephone number of the attorney for the party serving or filing the paper." In *Schoenefeld v. State*, 25 N.Y.3d 22, 6 N.Y.S.3d 221, 29 N.E.3d 230 (2015), an attorney residing in Princeton, New Jersey commenced an action in federal district court alleging, among other things, that Judiciary Law section 470 was unconstitutional on its face and as applied to nonresident attorneys. The federal district court declared the statute unconstitutional and, on appeal to the Second Circuit, that court determined that the constitutionality of section 470 was dependent upon the interpretation of its law office requirement. Therefore, it certified a question to the New York Court of Appeals requesting the Court to delineate the minimum requirements necessary to satisfy the statute.

Citing to CPLR 2103(b), the Court of Appeals acknowledged that "the State does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here." It noted, however, that the logistical difficulties present during the Civil War, when the statute was first enacted, are diminished today. Rejecting a narrow interpretation of the statute, which may have avoided some constitutional problems, the Court interpreted Judiciary Law section 470 to require nonresident attorneys to maintain a physical law office within the State.

The case then returned to the Second Circuit and on April 22, 2016, that court held that section 470 "does not violate the Privileges and Immunities Clause because it was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law." *Schoenefeld v. State*, 821 F.3d 273 (2d Cir. 2016). Rather, the court concluded that the statute was passed "to ensure that nonresident members of the New York bar could practice in the state by providing a means, i.e., a New York office, for them to establish a physical presence in the state on a par with that of resident

attorneys, thereby eliminating a service-of-process concern." *See Connors*, "The Office: Judiciary Law § 470 Meets Temporary Practice Under Part 523," New York Law Journal, May 24, 2016, at 3 (addressing the interplay between the new Part 523 allowing temporary practice in New York State and Judiciary Law section 470's requirement that nonresident lawyers admitted to practice in New York maintain an office within the State).

The United States Supreme Court denied certiorari on April 17, 2017. *Schoenefeld v. State*, --- S.Ct. ----, 2017 WL 1366736 (2017).

The April 17, 2017 edition of the NYLJ reported:

> Now that the legal case is over, New York State Bar Association president Claire Gutekunst said in a statement, a group, chaired by former bar president David Schraver of Rochester, would review the issues and consider recommendations for changing § 470. The working group will be composed of state bar members who live in and outside New York.
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> * * *
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> The New Jersey State Bar Association also submitted an amicus brief to the Supreme Court.
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> "The NJSBA feels New York's bona fide office rule is an anachronism in today's modern world, where technology and sophisticated forms of digital communication are standard throughout the business community, the bar and the public at large," president Thomas Prol said in a statement. "Indeed, the bona fide office rule, which New Jersey did away with in 2013, seems oblivious to modern attorneys who are increasingly mobile, some of whom may spend no time at the office because they have no need for one, at least not the traditional version contemplated by the rule."

In *Arrowhead Capital Finance, Ltd. v. Cheyne Specialty Finance Fund L.P.*, 2016 WL 3949875 (Sup. Ct., New York County 2016), the court noted that "[n]umerous case[s] in the First Department have held, before the recent *Schoenfeld* rulings, that a court should strike a pleading, without prejudice, where it is filed by an attorney who fails to maintain a local office, as

required by § 470. *Salt Aire Trading LLC v Sidley Austin Brown & Wood, LLP*, 93 AD3d 452, 453 (1st Dept 2012); *Empire Healthchoice Assur., Inc. v Lester*, 81 AD3d 570, 571 (1st Dept 2011); *Kinder Morgan*, 51 AD3d 580 (1st Dept 2008); *Neal v Energy Transp. Group*, 296 AD2d 339 (2002).

The *Arrowhead* court concluded that:

> Receiving mail and documents is insufficient to constitute maintenance of an office. *Schoenfeld*, supra. This court holds that hanging a sign coupled with receipt of deliveries would not satisfy the statute. Furthermore, there is evidence that [plaintiff's attorney] criticized defendant for serving documents at 240 Madison and directed [defendant's attorney] to use the PA Office address, an address he has consistently used in litigation.

The court dismissed the complaint without prejudice. The First Department affirmed. *Arrowhead Capital Finance, Ltd. v. Cheyne Specialty Finance Fund L.P.*, 154 A.D.3d 523, 62 N.Y.S.3d 339 (1st Dep't 2017). The Court of Appeals has granted leave to appeal. 30 N.Y.3d 909, 2018 WL 358301 (2018).

The decision, and its impact, is discussed in further detail in Siegel & Connors, New York Practice § 202.

XXI. CPLR 2103. Service of papers.

CPLR 2103 Amended to Allow for Service Via Regular Mail Outside New York

While CPLR 2103(b) allows for service of interlocutory papers during an action via several methods, regular mail is still the most popular. Up through 2015, service via "[m]ailing" under CPLR 2103(b)(2) required that the paper be deposited with "the United States Postal Service *within the state*." *See* CPLR 2103(f)(1) (defining "Mailing") (emphasis added).

Effective January 1, 2016, lawyers may deposit interlocutory papers in mailboxes outside New York thanks to an amendment to CPLR 2103(f)(1),

which now defines "[m]ailing" as depositing the interlocutory paper with the "United States Postal Service *within the United States*." (emphasis added)

CPLR 2103(b)(2) grants a five-day extension to the recipient of a paper to perform any act where: (1) the time to perform the act runs from the service of a paper, and (2) the paper is served by regular mail. The five days now become six if a party avails itself of the amendment and deposits the interlocutory paper for first class mailing with the United States Postal Service outside New York, "but within the geographic boundaries of the United States." CPLR 2103(b)(2).

The amendment to CPLR 2103 is discussed in further detail in Siegel & Connors, New York Practice § 202.

XXII. CPLR 2106. Affirmation of truth of statement by attorney, physician, osteopath or dentist.

Affirmation of Doctor Not Authorized to Practice Medicine in New York Does Not Constitute Competent Evidence

Tomeo v. Beccia, 127 A.D.3d 1071 (2d Dep't 2015) highlights one of the pitfalls of the statute. In *Tomeo*, the plaintiff failed to raise a triable issue of fact in opposition to defendant's prima facie showing on its motion for summary judgment. "The affirmation of the plaintiff's expert, Dr. Richard Quintiliani, did not constitute competent evidence, because Quintiliani was not authorized by law to practice medicine in New York State." Therefore, defendant hospital was granted summary judgment dismissing the action against it. *See Sul-Lowe v. Hunter*, 148 A.D.3d 1326, 48 N.Y.S.3d 844 (3d Dep't 2017)(unsworn affidavits by physicians who averred that they were licensed in Massachusetts, but did not claim to be licensed in New York, were without probative value).

XXIII. CPLR 2215. Relief demanded by other than moving party.

Improper Cross Motion Seeking Relief Against Nonmoving Defendants Could Not Relate Back to Main Motion to Establish Timeliness

The caselaw continues to demonstrate that attorneys use the cross motion authorized by CPLR 2215 for improper purposes, and in many instances to their detriment. A recent example of the problem arose in *Sanchez v. Metro Builders Corp.*, 136 A.D.3d 783, 25 N.Y.S.3d 274 (2d Dep't 2016), where plaintiff, who had fallen from a roof, moved for summary judgment on liability against the defendant in a Labor Law action. Defendant cross moved for summary judgment dismissing the complaint insofar as asserted against it, and for partial summary judgment on liability against two codefendants for indemnification. The supreme court denied the cross-motion as untimely.

The Second Department modified the supreme court's order by concluding that the branch of defendant's cross-motion that was for summary judgment dismissing the complaint insofar as asserted against it was timely pursuant to CPLR 2215. In this portion of its cross-motion, defendant was seeking affirmative relief against the plaintiff, who was the moving party, and it therefore properly denominated the request for relief as a cross-motion. The cross-motion was, of course, subject to the shorter notice periods in CPLR 2215 and was deemed timely by the Second Department.

The remaining branches of defendant's motion seeking partial summary judgment on liability against the two codefendants could not, however, be considered as a cross motion because defendant was seeking affirmative relief against nonmoving parties. *See* CPLR 2215 ("a party may serve *upon the moving party* a notice of cross-motion demanding relief") (emphasis added). The court ruled that these branches of the motion were untimely because they were made "after the deadline to make a motion for summary judgment had passed, and failed to demonstrate good cause for the delay." *See* CPLR 3212 (a).

The *Sanchez* court did not discuss the point, but a cross-motion for summary judgment that is served after the statutory deadline in CPLR 3212(a) can be entertained if it is sufficiently related to a timely motion for summary judgment. *See* Siegel & Connors, New York Practice § 279. The close

relationship between a timely motion for summary judgment and an untimely cross-motion can provide "good cause" for a court to entertain the cross-motion. *See Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281, 824 N.Y.S.2d 244 (1st Dep't 2006). In *Sanchez*, those branches of defendant's cross-motion seeking relief against the nonmoving defendants could not rely on this doctrine to establish good cause.

More recently, in *Rubino v. 330 Madison Co., LLC*, 150 A.D.3d 603, 56 N.Y.S.3d 55 (1st Dep't 2017), a codefendant made a cross-motion for summary judgment against another codefendant to dismiss a contractual indemnification claim against it. The supreme court granted the motion, but the First Department reversed, concluding that the cross-motion should have been denied as untimely since it was made after the applicable deadline for summary judgment motions and the codefendant failed to show "good cause" for the delay. *See* CPLR 3212(a); Siegel & Connors, New York Practice § 279. Furthermore, the court observed that the "purported cross motion…was not a true cross motion" because it was not made against a moving party. *Rubino*, 150 A.D.3d at 604, 56 N.Y.S.3d at 57.

XXIV. CPLR 2219. Time and form of order.

Delays Ranging from Six to Eighteen Months in Issuing Orders on Four Motions Warrant Issuance of Judgment to Compel

If a judge inordinately delays in rendering an order on a motion, a party may commence an Article 78 proceeding in the nature of mandamus to compel the determination of the motion. This course of action is not highly recommended, but it was followed in *Liang v. Hart*, 132 A.D.3d 765, 17 N.Y.S.3d 771 (2d Dep't 2015), where petitioner made four separate motions that were fully submitted on June 17, 2013, July 24, 2013, November 26, 2013, and June 19, 2014. In February of 2015, the petitioner commenced an Article 78 proceeding against the judge to compel her to issue orders. Citing to CPLR 2219(a), the Second Department concluded that "the petitioner demonstrated a clear legal right to the relief sought" and directed the respondent judge to issue written orders on the four motions within 30 days.

XXV. CPLR 2220. Entry and filing of order; service.

Appeal from Order That Was Not Filed or Entered "Must Be Dismissed"

CPLR 2220(a) provides that "[a]n order determining a motion shall be entered and filed in the office of the clerk of the court where the action is triable…." In *Merrell v. Sliwa*, 156 A.D.3d 1186 (3d Dep't 2017), the court noted that "an appeal is not properly before this Court if the order appealed from 'was not "entered and filed in the office of the clerk of the court where the action is triable" '(People v. Davis, 130 A.D.3d 1131, 1132 [3d Dep't 2015])." The order at issue in *Merrell*, which dismissed petitioner's application, was neither entered nor filed and, therefore, the appeal was dismissed.

The court noted:

> petitioner provided us with a copy of the order that reflects that it was "received" by the Albany County Clerk's office. However, there is no indication that the order was filed or entered as required by CPLR 2220. We note that Supreme Court's order explicitly stated that it was transferring the papers to the Albany County Clerk and returning the original order to counsel for respondents. Significantly, Supreme Court notified the parties that the signing of the order did not constitute entry or filing or relieve them of the obligation to do so pursuant to CPLR 2220.

XXVI. CPLR 2221. Motion affecting prior order.

Court Treats an Order Denying a Motion to Reargue as a Grant of the Motion, with the Original Determination Adhered To, and Entertains Appeal

While an order denying a motion for reargument is not appealable, in rare instances an appellate court may elect to treat a denied motion to reargue as one that was granted with the original determination adhered to, so as to preserve an appeal from the order. *See Jones v. City of New York*, 146 A.D.3d 690, 690, 46 N.Y.S.3d 57, 59 (1st Dep't 2017); *HSBC Mortg. Corp.*

(USA) v. Johnston, 145 A.D.3d 1240, 43 N.Y.S.3d 575 (3d Dep't 2016). In *Lewis v. Rutkovsky*, ___ A.D.3d ___, --- N.Y.S.3d ----, 2017 WL 3707298 (1st Dep't 2017), the First Department ruled that while the supreme court "purported to deny the motion to reargue," it nonetheless considered the merits of the defendants' contention that inclement weather on the due date for summary judgment motions provided good cause for the delay in making the motion. *See* CPLR 3212(a); Siegel & Connors, New York Practice § 279. Therefore, the *Lewis* court ruled that supreme court, "in effect, granted reargument, then adhered to the original decision." That paved the way for the First Department to not only deem the order appealable, but to reverse supreme court's determination that the motion for summary judgment was untimely.

XXVII. CPLR 2303. Service of subpoena; payment of fees in advance.

Serving a Subpoena on Behalf of Client #1 on Current Client #2 Results in Conflict of Interest

In Formal Opinion 2017-6 (2017), the New York City Bar Association Committee on Professional Ethics concluded that it is generally a conflict of interest when a party's lawyer in a civil lawsuit needs to issue a subpoena to another current client. The conflict, which arises under Rule 1.7(a) of the New York Rules of Professional Conduct, will ordinarily require the attorney to obtain informed written consent under Rule 1.7(b) from both clients before serving the subpoena. *See* Rule 1.0(j)(defining "informed consent"). As comment 6 to Rule 1.7 notes, "absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated." The committee acknowledged that there may be "exceptional cases where subpoenaing a current client will likely not give rise to a conflict of interest," but cautioned that "as a matter of prudence, a lawyer would be well advised to regard all of these situations as involving a conflict of interest."

The committee recommended that an attorney run a conflict check prior to preparing and issuing a subpoena to avoid any conflicts. *See* Rule 1.10(e) (requiring law firms to maintain conflicts checking system to perform conflict checks when: (1) the firm represents a new client; (2) the firm represents an existing client in a new matter; (3) the firm hires or associates

with another lawyer; or (4) an additional party is named or appears in a pending matter). As the opinion notes, it may also be advisable to run a conflicts check at the outset of the representation "not just for any adverse parties in a litigation, but also for any non-parties from whom it is anticipated that discovery will be sought."

If the need to subpoena a current client arises during the course of the representation of another current client, the lawyer may have to withdraw from the representation under Rule 1.16 or make arrangements for the retention of "conflicts counsel" to conduct the discovery. The opinion also noted that "an attorney may seek advance conflict waivers from a client or prospective client to waive future conflicts," which "may include an agreement in advance to consent to be subpoenaed as a non-party witness by the lawyer or law firm in its representation of other clients in unrelated lawsuits." *See* Rule 1.7, cmts. 22, 22A (discussing client consent to future conflict).

XXVIII. CPLR 2308. Disobedience of subpoena.

Issuance of Warrant Directing Sheriff to Bring Witness Into Court Discretionary

CPLR 2308(a) lists the penalties applicable to the disobedience of a judicial subpoena. One of the penalties listed is the issuance of "a warrant directing a sheriff to bring the witness into court." CPLR 2308(a). In *Cadlerock Joint Venture, L.P. v. Forde*, 152 A.D.3d 483, 54 N.Y.S.3d 878 (2d Dep't 2017), the Second Department emphasized that the imposition of this penalty is within the discretion of the court. In *Cadlerock*, the supreme court denied the plaintiff's motion under CPLR 2308(a) for the issuance of a warrant of arrest to bring the defendant before the court based on his alleged failure to comply with a postjudgment judicial subpoena duces tecum and a prior order of contempt. The Second Department ruled that the denial of this relief was within the court's discretion, and affirmed the order of the supreme court, which declined to issue the warrant "finding that the plaintiff could avail itself of 'all other remedies pursuant to the CPLR to collect' a judgment in favor of the plaintiff and against the defendant." *Id.*

XXIX. CPLR 2309. Oaths and affirmations.

Plaintiff Afforded Third Opportunity to Correct of Out-of-State Affidavit to Conform to CPLR 2309(c)

Lawyers continue to have problems complying with CPLR 2309(c)'s requirements when submitting affidavits signed outside New York State. In *JPMorgan Chase Bank v. Diaz*, 56 Misc.3d 1136, 57 N.Y.S.3d 358 (Sup. Ct., Suffolk County 2017), the plaintiff submitted an out-of-state affidavit of service in support of an application for a default judgment in a mortgage foreclosure action. The court denied the application because it did not contain a certificate of conformity as required by CPLR 2309(c), but allowed a second application, where the defect was still not remedied.

Rather than attempting to comply with the statute, "plaintiff argue[d] that 'it was inappropriate for the Court to, *sua sponte*, [raise the CPLR § 2309(c) issue] on the Defendants' behalf,' and that, pursuant to the provisions of CPLR 2001, a certificate of conformity is not required with an out-of-state affidavit of service." The court rejected the argument, ruling that CPLR 2001 could not be invoked to permit the court to disregard a defect in an out-of-state affidavit of service.

While acknowledging that the absence of a certificate of conformity is typically not treated as a fatal defect, the court distinguished the situation before it which involved "jurisdiction over the defendant in the first instance." In this setting, the court ruled that CPLR 2001 could not support "disregard[ing]" the defect in proof of proper service because it would prejudice a substantial right of the defendant.

Plaintiff's motion for a default judgment and order of reference in the foreclosure action was denied, but plaintiff was "afforded one final opportunity" to correct the defect. Maybe the third time will be the charm!

XXX. CPLR 3012. Service of pleadings and demand for complaint.

Defendant Can Demand Complaint after Receiving Summons and CPLR 305(b) Notice, Even Though Service Is Not "Complete" Under CPLR 308(2)

In *Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt. LLC*, 150 A.D.3d 427, 55 N.Y.S.3d 1 (1st Dep't 2017), plaintiff commenced a securities fraud action against 26 defendants with a summons and CPLR 305(b) notice and made service pursuant to CPLR 308(2), the "deliver and mail" method of service. *See* Siegel & Connors, New York Practice § 72. Service is not "complete" under this method until 10 days after the filing of proof of service. CPLR 308(2); *see id.* A defendant in *Wimbledon* served a demand for the complaint under CPLR 3012(b) before plaintiff had filed proof of service, and plaintiff contended that the demand was a "nullity" because service was not yet complete. Risky business indeed!

Defendant called plaintiff's bluff, refused its request to allow service of the complaint late the following month, and moved to dismiss the action on the 21st day after service of its demand. Plaintiff ultimately served a complaint approximately one month later. Nonetheless, the supreme court granted the defendant's motion to dismiss the action pursuant to CPLR 3012(b) and denied plaintiff's cross motion pursuant to CPLR 3012(d) for an extension of time to serve its complaint.

The plaintiff appealed, seeking mercy from the First Department. The appellate division agreed with supreme court that CPLR 3012(b) permitted defendant to serve a demand for a complaint after being served with a summons and CPLR 305(b) notice. While service under CPLR 308(2) was not technically "complete," the court reasoned that "[t]he time frames applicable to defendants set forth in CPLR 3012(b) are deadlines, not mandatory start dates."

The First Department did, however, reverse to the extent of granting plaintiff's cross motion under CPLR 3012(d) for an extension of time to serve the complaint.

Conflict Between First and Second Departments on Requirements for CPLR 3012(d) Application for Extension of Time to Appear

CPLR 3012(d) addresses an "[e]xtension of time to appear or plead" and permits the court to extend "the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." While the statute does not expressly require it, the Second Department has repeatedly held that a defendant must not only provide a reasonable excuse for the delay in appearing, but also must "demonstrate a potentially meritorious defense to the action." *KI 12, LLC v. Joseph*, 137 A.D.3d 750, 26 N.Y.S.3d 573 (2d Dep't 2016); *see HSBC Bank USA, N.A. v Powell*, 148 AD3d 1123 (2d Dep't 2017). The First Department does not require a defendant to demonstrate the existence of a meritorious defense on an application under CPLR 3012(d). *See Hirsch v. New York City Dept. of Educ.*, 105 A.D.3d 522, 961 N.Y.S.2d 923 (1st Dep't 2013).

The issue is explored in further detail in Siegel & Connors, New York Practice § 231.

XXXI. CPLR 3012-a. Certificate of merit in medical, dental and podiatric malpractice actions.

Certificate of Merit Based Upon Affidavit of Plaintiff's Physical Therapist Insufficient to Satisfy CPLR 3012-a

CPLR 3012-a generally requires that the certificate of merit demonstrate that the attorney for the plaintiff has consulted with a "physician," "dentist," or "podiatrist." In *Calcagno v. Orthopedic Assocs. of Dutchess County, PC*, 148 A.D.3d 1279, 48 N.Y.S.3d 832 (3d Dep't 2017), defendants moved for dismissal of the action based upon the plaintiffs' failure to timely comply with the requirements in CPLR 3012-a. In response to the motion, the plaintiffs submitted a certificate of merit based upon an affidavit of plaintiff's physical therapist, who opined, "as a physical therapist," that defendants' actions were "departures from good and accepted medical practice." Plaintiffs also cross-moved for an extension of time to file and serve the certificate. The supreme court granted defendants' motion to

dismiss the action and denied plaintiffs' cross motion, finding that plaintiffs' certificate of merit was inadequate.

The Third Department affirmed, finding the certificate defective because "by definition, a physical therapist cannot diagnose and is incompetent to attest to the standard of care applicable to physicians and surgeons." The court found no merit to plaintiffs' contention that the certificate should be deemed adequate because it was also based on medical reports, plaintiff's testimony, and the pleadings.

Plaintiffs conceded that the certificate of merit was filed approximately 17 months late. On this point, the court relied upon its 1999 decision in *Horn v. Boyle*, 260 A.D.2d 76, 699 N.Y.S.2d 572 (3d Dep't 1999), in noting that the mere failure to timely file a CPLR 3012-a certificate does not support dismissal of the action. *See* Practice Commentary C3012-a:2 ("Consequence of Failing to File and Serve the Certificate"). Nonetheless, because plaintiffs failed to provide a reasonable excuse for the delay and to establish the merits of the action, the court ruled that they were not entitled to an extension of time under CPLR 2004. In other words, the action had to be dismissed because CPLR 3012-a could not be satisfied.

CPLR 3012-a Is Substantive Law That Applies in Diversity Action in Federal Court

In Finnegan v. University of Rochester Medical Center, 180 F.R.D. 247, 249 (W.D.N.Y. 1998), the court ruled that "a state statute requiring a certificate of merit is substantive law that applies in a federal diversity action." More recently, a federal district court in the Sothern District reached the same conclusion in a medical malpractice action. *Crowhurst v. Szczucki*, 2017 WL 519262, at *2–3 (S.D.N.Y. 2017). The *Crowhurst* court ruled that plaintiff's failure to submit a certificate of merit, or to excuse the submission, warranted dismissal of the medical malpractice claim. The court dismissed the complaint without prejudice to allow the plaintiff to cure this defect, and the additional failure to allege the citizenship of the parties, through the submission of an amended complaint.

XXXII. CPLR 3015. Particularity as to specific matters.

CPLR 3015(e) Defect Permitted to be Cured by Amendment

CPLR 3015(e) imposes special pleading requirements on business plaintiffs who must be licensed by the consumer affairs departments of New York City and certain other downstate suburban counties. In 2012, the statute was amended to require the plaintiff to plead that she was duly licensed at the time the services were rendered, rather than at the time the litigation was commenced. *See* Siegel & Connors, New York Practice § 215.

In the main practice commentary to CPLR 3015, we note that if any defect connected with the statute proves to be only a pleading omission, remediable by amendment, an amendment should be the cure rather than dismissal. *See* Commentary C3015:1 ("Special Provisions for Certain Matters"); Siegel & Connors, New York Practice § 237. That was the approach taken by the court in *Best Quality Swimming Pool Serv., Inc. v. Pross*, 54 Misc. 3d 919, 43 N.Y.S.3d 867 (Sup. Ct., Nassau County 2016), where the court granted plaintiffs' cross-motion to amend the complaint to plead the license held by one of the plaintiffs and denied defendant's motion to dismiss.

XXXIII. CPLR 3016. Particularity in specific actions.

First Department Concludes That Plaintiffs' Failure to Allege Applicable Saudi Law with Particularity Warranted Dismissal of Claim

In *Edwards v. Erie Coach Lines Co.*, 17 N.Y. 3d 306, 929 N.Y.S. 2d 41 (2011), the Court observed that the failure to plead foreign law should not ordinarily prove fatal given that the court can on its own volunteer to give the foreign law judicial notice under CPLR 4511(b). In *MBI Intern. Holdings Inc. v. Barclays Bank PLC*, 151 A.D.3d 108, 57 N.Y.S.3d 119 (1st Dep't 2017), however, the First Department observed that "the motion court properly dismissed [plaintiff's breach of fiduciary duty] claims pursuant to CPLR 3211(a)(7) and CPLR 3016(e), for plaintiffs have failed to allege with particularity the applicable Saudi law and only generally discuss the Saudi concepts of 'hawalas' and 'wakalas' without citation to any law (see CPLR 3016[e])."

XXXIV. CPLR 3019. Counterclaims and cross-claims.

Federal Courts' Compulsory Counterclaim Rule Bars Assertion of Claim in State Court Despite New York's Permissive Counterclaim Rule

All counterclaims are "permissive" in New York practice. This is in contrast with federal practice, where the defendant must plead a counterclaim that arises out of the same transaction or occurrence as plaintiff's claim, or it is deemed waived. *See* Federal Rules of Civil Procedure ("FRCP") 13(a); Siegel & Connors, New York Practice §§ 224, 632.

What happens if the plaintiff commences an action in federal court, where counterclaims are "compulsory," and the defendant withholds a counterclaim that arises out of the same transaction or occurrence as plaintiff's claim. Can the defendant in the federal court action then turn to New York State court and commence an action to assert that claim here under our permissive counterclaim rule?

In *Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 141 A.D.3d 464, 36 N.Y.S.3d 11 (1st Dep't 2016), the appellate division ruled that "the later assertion in a state court action of a contention that constituted a compulsory counterclaim (FRCP rule 13[a]) in a prior federal action between the same parties is barred under the doctrine of res judicata." *Id.* This principle of law required dismissal of the complaint in the state court action, which sought damages of $8 million, representing attorneys' fees incurred in the federal action, plus interest.

A fractured Court of Appeals affirmed, with a plurality, a concurrence, and a dissent. *Paramount Pictures Corp. v Allianz Risk Transfer AG*, _ N.Y.3d _, _N.Y.S.2d _, _ N.E.2d _, 2018 WL 942329 (2018). The plurality ruled that Paramount's state court action was barred by res judicata because the claim asserted therein should have been asserted as a compulsory counterclaim in the prior federal action.

Failure to Raise Counterclaim for Legal Fees in State Court Malpractice Action Does Not Bar Assertion of Claim in Federal Court

What happens when we examine the problem from the opposite direction posed by *Paramount Pictures*, where a defendant in a New York State Court action does not assert a related counterclaim, and then tries to pursue relief in a federal court action? The issue arose in *In re Ridgmour Meyer Properties, LLC*, 2016 WL 5395836 (Bankr. S.D.N.Y. 2016), where a law firm represented the debtor and filed a claim for over $300,000 in the bankruptcy proceeding. The debtor and several proponents of the bankruptcy plan objected to the claim and sued the law firm in state court for legal malpractice. Following dismissal of the state court malpractice lawsuit, the law firm filed a motion in bankruptcy court seeking to reopen the chapter 11 case and to direct the debtor to pay the claim.

The debtor argued that the law firm, which did not assert a counterclaim for its fees and expenses in the state court malpractice action, was precluded from pursuing the claim in the bankruptcy court under the doctrine of res judicata. Quoting from the First Department's *Paramount Pictures* decision, the court rejected the argument and noted that "New York is a permissive counterclaim jurisdiction," which generally permits a party to bring a claim in an action that it could have injected as a counterclaim in a prior action. While such claims are not barred by the doctrine of res judicata, they can be hindered by the doctrine of collateral estoppel if a factual determination in the prior action precludes the plaintiff in the subsequent action from proving all of the elements of her claim. *See Henry Modell & Co. v. Minister, Elders & Deacons of Reformed Protestant Dutch Church of City of New York*, 68 N.Y.2d 456, 462-63 n. 2, 510 N.Y.S.2d 63, 66 n. 2, 502 N.E.2d 978, 981 n. 2 (N.Y. 1986); Siegel & Connors, New York Practice § 224.

XXXV. CPLR 3020. Verification.

Decedent's Mother, Who Was Issued Letters of Administration Prior to Commencement, Can Verify Claim in Accordance with Court of Claims Act

In *Austin v. State*, 49 Misc.3d 282 (Ct. of Claims 2015), the State moved to dismiss the claim, which was verified by decedent's mother, on the ground

that it did not comply with the verification requirement in section 8-b of the Court of Claims Act.

The court stated that no case had been brought to its attention involving a claimant who had died before having an opportunity to verify a claim brought under section 8-b of the Court of Claims Act. In an analogous situation, the specific verification requirements in section 8-b of the Court of Claims Act were held to govern in *Long v. State*, 7 N.Y.3d 269 (2006), to the exclusion of CPLR 3020(d)(3), resulting in the dismissal of a claim that had been verified by the claimant's attorney. *See* McKinney's Practice Commentary, CPLR 3020, C3020:8 ("Verification by Attorney").

Although the option of an attorney's verification was not available to the claimant in *Austin*, the court observed that the administrator of the estate "stands in the shoes" of the deceased for purposes of bringing a lawsuit. *See* CPLR 1004 (permitting the executor or administrator of a decedent's estate to sue on behalf of decedent).

XXXVI. CPLR 3025. Amended and supplemental pleadings.

Second Department Cites Failure to Include Proposed Amended Pleading as Basis to Affirm Denial of Motion to Amend

Several trial courts have denied motions to amend for failure to include a copy of the proposed pleading, as is required by the 2012 amendment to CPLR 3025(b). *See* Siegel & Connors, New York Practice § 237. We now have authority from the appellate division reaching the same conclusion. In *Drice v Queens County District Attorney*, 136 A.D.3d 665, 23 N.Y.S.3d 896 (2d Dep't 2016), for example, the Second Department cited several of its prior cases in concluding that "the supreme court providently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to serve an amended complaint, since he did not provide a copy of his proposed amended complaint, and the proposed amendments were palpably insufficient or patently devoid of merit." *See also G4 Noteholder, LLC ex rel. Wells Fargo Bank, Nat. Ass'n v....*, _ A.D.3d _, 2017 WL 4159236 (2d Dep't 2017)("Moreover, relief pursuant to CPLR 3025(b), which requires the movant to include any proposed amendment or supplemental pleading

with the motion, was properly denied, as [defendant] failed to include any proposed amended pleadings").

XXXVII. CPLR 3101. Scope of Disclosure.

Court of Appeals Applies CPLR Article 31's "Well-Established" Rules to Resolve Dispute Regarding Disclosure of Information on Facebook

In *Forman v. Henkin*, 30 N.Y.3d 656, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018), the Court applied longstanding principles under CPLR Article 31 to resolve the issue of disclosure of information on a Facebook page.

As the *Forman* Court notes, CPLR 3101 grants certain categories of relevant information an immunity from disclosure. CPLR 3101(b) grants absolute immunity to any information that is protected by any of the recognized evidentiary privileges, while CPLR 3101(c) grants a similar immunity to the "work product of an attorney," which has been accorded a very narrow scope by the courts. *See* Siegel & Connors, New York Practice, §§ 346-47. CPLR 3101(d)(2) grants a conditional immunity to "materials. . . prepared in anticipation of litigation," commonly known as work product. *Id.*, § 348.

In *Forman*, plaintiff's alleged injuries were extensive, and included claims that she could "no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, … [and] that the accident negatively impacted her ability to read, write, word-find, reason and use a computer." *Forman*, 30 N.Y.3d at 659-60.

Many courts faced with motions to compel the production of materials posted by a plaintiff on a private social media site required the seeking party to demonstrate that information on the site contradicted the plaintiff's claims. *See, e.g., Kregg v. Maldonado*, 98 A.D.3d 1289, 1290, 951 N.Y.S.2d 301 (4th Dep't 2012); *McCann v. Harleysville Ins. Co. of New York*, 78 A.D.3d 1524, 910 N.Y.S.2d 614 (4th Dep't 2010). This hurdle could be satisfied if there was material on a "public" portion of the plaintiff's site, which could be accessed by most anyone, that conflicted with the alleged injuries. If so, the courts deemed it likely that the private portion of the site contained similarly relevant information. *See Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 430 (Sup. Ct., Suffolk County 2010)(discussed in notes 30-31 and

accompanying text). If, however, the defendant simply claimed that information on plaintiff's private social media site "may" contradict the alleged injuries, the disclosure request was deemed a mere "fishing expedition" and the motion was denied. *See, e.g.*, *Tapp v. New York State Urban Dev. Corp.*, 102 A.D.3d 620 (1st Dep't 2013); *McCann*, 78 A.D. 3d at 1525, 910 N.Y.S.2d at 615.

The plaintiff sought to invoke the above precedent in *Forman*, but the Court of Appeals rejected the argument, noting that it permits a party to "unilaterally obstruct disclosure merely by manipulating 'privacy' settings or curating the materials on the public portion of the account." *Forman*, 30 N.Y.3d at 664, 70 N.Y.S.3d at _, 93 N.E.3d at 889. Moreover, the Court noted that "New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information." *Id.* In sum, the standard for obtaining disclosure remains one of relevance, regardless of whether the material is in a traditional print form or posted in an electronic format on a "private" Facebook page.

With the *Forman* decision on the books, disclosure of materials on social media websites should be easier to obtain. In the last paragraph to this section, we discuss CPLR 3101(i), which expressly allows disclosure of any picture, film or audiotape of a party, is another tool that can be used to secure materials posted on a social media site. The Court declined to address this subdivision in *Forman* because neither party cited it to the supreme court and, therefore, it was unpreserved. It should be noted, however, that the Court of Appeals previously observed that CPLR 3101(i) does not contain any limitation as to relevancy or subject matter, although a party is still free to seek a protective order to restrict disclosure under the subdivision. *See Tran v. New Rochelle Hosp. Medical Center*, 99 N.Y.2d 383, 756 N.Y.S.2d 509, 786 N.E.2d 444 (2003), 99 N.Y.2d at 388 n.2.

The *Forman* Court noted that a social media account holder, like any party to litigation, can seek to prevent the disclosure of sensitive or embarrassing material of minimal relevance through a motion under CPLR 3103(a). *See* Siegel & Connors, New York Practice § 352. In *Forman*, for example, the supreme court exempted from disclosure any photographs of plaintiff on the

Facebook site depicting nudity or romantic encounters. (Just how "private" was this site?).

XXXVIII. CPLR 3101(d)(1)(i). Scope of Disclosure; Trial preparation; Experts.

Plaintiff, Who Failed to Comply With Expert Disclosure Deadline in Scheduling Order, Precluded from Offering Expert Proof, Resulting in Dismissal of Action

In *Colucci v. Stuyvesant Plaza, Inc.*, 157 A.D.3d 1095 (3d Dep't 2018), *lv. denied*, 2018 WL 2055723, the Third Department affirmed the order granting defendant's motion for summary judgment dismissing the complaint based, in part, on plaintiff's failure to provide timely expert disclosure. After issue was joined and years of ongoing discovery, the supreme court issued a scheduling order requiring that the parties exchange expert disclosure by May 1, 2015, and that dispositive motions be filed by August 1, 2015, and set a trial date in November 2015. Defendant complied with the order by timely serving expert disclosure on plaintiffs' then-counsel, but plaintiffs failed to do so.

Defendant moved for summary judgment in July 2015 based upon, among other grounds, plaintiffs' complete lack of expert disclosure and failure to submit any expert proof that plaintiff's injures and damages were caused by defendant's actions. Defendant contended that plaintiffs should be precluded from presenting any expert proof. While plaintiff submitted several expert affidavits in response to defendant's motion, the court refused to consider them because of plaintiff's failure to comply with the expert disclosure deadlines.

The Third Department emphasized that plaintiffs failed to comply with the deadlines in the scheduling order and first identified their experts, and submitted their affidavits in opposition to defendant's summary judgment motion, over one year after the deadline for expert disclosure. Plaintiffs did not request an extension "or provide a viable excuse or good cause for failing to comply over this protracted period, and the numerous adjournments were granted at their request with the express condition that the court-ordered discovery and disclosure schedule was not being

extended." In that the supreme court did not abuse its discretion in precluding plaintiffs from submitting the expert affidavits in opposition to the motion for summary judgment, the Third Department affirmed the order granting defendant summary judgment.

The Third Department also reaffirmed its interpretation of CPLR 3101(d)(1)(i) as "requiring disclosure of any medical professional, even a treating physician or nurse, who is expected to give expert testimony." *See Schmitt*, 151 A.D.3d at 1255 (discussed below).

Conflict on Whether CPLR 3101(d)(1)(i) Requires Disclosure of Treating Doctor Who Will Act As Expert

In *Schmitt v. Oneonta City School Dist.*, 151 A.D.3d 1254 (3d Dep't 2017), plaintiffs noticed the deposition of a treating doctor to preserve his testimony for trial. During the EBT, plaintiffs attempted to offer the treating doctor "as an expert in the field of orthopedic surgery." Defendant objected, citing plaintiffs' failure to provide any expert disclosure under CPLR 3101(d)(1)(i).

The Third Department noted that "[u]nlike the First, Second and Fourth Departments, this Court interprets CPLR 3101(d)(1)(i) as 'requir[ing] disclosure to any medical professional, even a treating physician or nurse, who is expected to give expert testimony' (Norton v. Nguyen, 49 AD3d at 929; compare Hamer v. City of New York, 106 AD3d 504, 509 [1st Dept 2013]; Jing Xue Jiang v. Dollar Rent a Car, Inc., 91 AD3d 603, 604 [2d Dept 2012]; Andrew v. Hurh, 34 AD3d 1331, 1331 [4th Dept 2006], lv denied 8 NY3d 808 [2007])." *See* Siegel & Connors, New York Practice § 348A (discussing caselaw). The court also noted that while a CPLR 3101(d)(1)(i) expert disclosure demand "is a continuing request, with no set time period for its compliance, where a party hires an expert in advance of trial and then fails to comply [with] or supplement an expert disclosure demand, preclusion may be appropriate if there is prejudice and a willful failure to disclose."

The court rejected plaintiffs' argument that the transcript of the doctor's videotaped testimony could serve as a substitute for the required CPLR 3101(d)(1)(i) disclosure. As for the appropriate remedy, the court determined that there was no indication that the disclosure violation was willful and, therefore, that preclusion was not appropriate. The court ruled

that if plaintiffs wanted to use the treating doctor "as an expert witness (or as both a fact witness and as an expert witness), they must—within 30 days of the date of this Court's decision—tender an expert disclosure that satisfies all of the requirements of CPLR 3101(d)(1)(i) and—within 60 days of the date of this Court's decision—produce [the doctor] (at their expense) for the purpose of being deposed as an expert."

A two-justice concurrence argued, among other things, that plaintiffs should be bound by the format that they selected when they sought to videotape the treating doctor's deposition for use at trial, and not be afforded a second opportunity to call the doctor as a live witness at trial. *See* 22 N.Y.C.R.R. § 202.15(a)(rules for videotaping of civil depositions).

XXXIX. CPLR 3103. Protective orders.

CPLR 3103(b) Only Provides for Stay of "Disclosure of the Particular Matter in Dispute"

CPLR 3103(b) imposes a stay of disclosure when a motion is made for a protective order. *See* Siegel & Connors, New York Practice § 353. In *Vandashield Ltd. v. Isaacson*, 146 A.D.3d 552, 46 N.Y.S.3d 18 (1st Dep't 2017), the defendants failed to comply with an order directing disclosure and the court imposed sanctions pursuant to both CPLR 3126 and Part 130. The First Department affirmed this order, and an additional order finding that defendants had waived their right to serve paper discovery demands by disregarding deadlines in two case management orders. Defendants argued that the sanction in the latter order was disproportionate because they had previously moved for a protective order, which stayed disclosure under CPLR 3103(b).

The First Department emphasized that the language in the statute provides that "[s]ervice of a notice of motion for a protective order shall suspend *disclosure of the particular matter in dispute*." *Vandashield*, 146 A.D.3d at 556, 46 N.Y.S.3d at 24. Therefore, the court reasoned, "[d]efendants' motion for a protective order against *plaintiffs'* discovery demands did not stay their obligation to serve their own discovery demands." *Id.* at 556, 46 N.Y.S.3d at 24-25.

XL. CPLR 3106. Priority of depositions; witnesses; prisoners; designation of deponent.

CPLR 3106(a)'s Priority Rules Do Not Apply in Action Removed to Federal Court

Priority in taking depositions is generally with the defendant in New York practice, as long as the defendant seeks it expeditiously. *See* CPLR 3106(a). In *Roth v. 2810026 Canada Ltd. Ltd.*, 2016 WL 3882914 (W.D.N.Y. 2016), a personal injury action was removed to federal court and the plaintiffs moved to compel defendants' depositions. Defendants objected, asserting that they secured priority under CPLR 3106(a) by noticing plaintiffs' depositions first. Therefore, they contended that they could not be deposed until plaintiffs' depositions had been completed.

The federal district court noted that, upon removal, "state procedure law is inapplicable to the action." *See* Fed.R.Civ.P. 81(c)(1) (Federal Rules of Civil Procedure "apply to a civil action after it is removed from a state court"). Under the federal rules, absent a stipulation or court order, the "method of discovery may be used in any sequence." Fed.R.Civ.P. 26(d)(3)(A). Defendants did not cite a stipulation or court order and the court rejected defendants' contention that CPLR 3106(a) applied in federal court. Therefore, the court granted plaintiffs' motion and ordered the defendants' depositions to be conducted within 45 days.

XLI. CPLR 3126. Penalties for Refusal to Comply with Order or to Disclose.

Third Department Outlines Standards for Issuing Order of Preclusion

The Third Department has issued a recent series of decisions that provide guidance, and warning, to lawyers regarding the possible penalties that can be imposed under CPLR 3126 for a failure to comply with disclosure obligations. For example, in *BDS Copy Inks, Inc. v. International Paper*, 123 AD3d 1255, 999 N.Y.S.2d 234 (3d Dep't 2014), the appellate court ruled that the supreme court did not abuse its discretion by striking plaintiffs' complaint under CPLR 3126(3). The record confirmed that during a period of twenty one months, the court met with counsel for the parties on at least

six occasions and issued at least two orders extending plaintiffs' time to comply with their disclosure obligations.

Plaintiffs argued that they complied with their disclosure obligations by repeatedly offering the defendants the opportunity to search through 60 to 80 banker's boxes stored in a warehouse. Furthermore, plaintiffs continued to maintain that this response was adequate, even after the court made it clear that it did not consider this offer to be adequate. The court seemed to emphasize that plaintiff's principal made no claim that he actually went to the warehouse to inspect the bankers boxes that were offered in document production, while he "continued to maintain that each document in each of the unspecified number of boxes was responsive to defendants' demand."

Noting that a disclosure sanction "is not disturbed in the absence of a clear abuse of discretion," the Third Department affirmed the order striking plaintiffs' complaint. Thus, plaintiffs' alleged damages in the amount of $1,500,000 are likely forfeited.

A more recent decision from the Third Department also involved a plaintiff who compromised their claim by failing to satisfy disclosure obligations. In *Citibank, N.A. v. Bravo*, 140 A.D.3d 1434, 34 N.Y.S.3d 678 (3d Dep't 2016), plaintiff bank commenced a foreclosure action on defendants' residential real property, which was mortgaged for approximately $82,600. Defendants' answer alleged that plaintiff was not the holder of the note, a common affirmative defense in today's mortgage foreclosure world. The Third Department recounted "a series of delays resulting primarily from conduct by plaintiff and its attorneys which prompted two preclusion motions by defendants." *Id.* at 1435, 34 N.Y.S.3d 679. The supreme court granted the second motion and issued an order under CPLR 3126(2) precluding plaintiff from offering proof of indebtedness as alleged in the complaint.

Among the facts demonstrating a pattern of noncompliance by plaintiff were: 1) its refusal to appear for a deposition, 2) the cancelling of depositions at the last minute, 3) a missed CPLR 3408 court-ordered mandatory settlement conference, 4) a failure to comply with a court-ordered deposition deadline, and 5) the confusion and delay caused by plaintiff's inadequate and unclear effort to substitute counsel.

While the action was not dismissed, we wonder if there are any options left for plaintiff bank? *See Citibank, N.A. v. Bravo*, 55 Misc.3d 879 (Sup. Ct., Tompkins County 2017)("Defendants' motion is granted and the complaint is dismissed, with prejudice; the mortgage which plaintiff seeks to foreclose in this action is discharged and cancelled, the notice of pendency filed in this action is cancelled, and the Tompkins County Clerk is ordered to mark her records accordingly.")

CPLR 3126 Preclusion Order Reversed Because of Absence of "Willful and Contumacious" Conduct by Incarcerated Defendant and His Lawyer

In *Crupi v. Rashid*, 157 A.D.3d 858, 67 N.Y.S.3d 478 (2d Dep't 2018), plaintiff commenced an action to recover on a promissory note by a motion for summary judgment in lieu of complaint pursuant to CPLR 3213. The supreme court, "sua sponte, precluded the incarcerated defendant, Syed Rashid, from testifying at trial." On appeal, the Second Department acknowledged that "[t]he nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion," but cautioned that "[b]efore a court invokes the drastic remedy of striking a pleading, or even of precluding all evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious."

The Second Department reversed the order of preclusion because "there [was] no evidence demonstrating either that the incarcerated defendant… willfully and contumaciously failed to be deposed, or that his attorney failed to secure his deposition."

Defendants Precluded from Introducing Facebook Printouts Unless Person Who Procured Them Is Produced for a Deposition

The decision in *Lantigua v Goldstein*, 149 A.D.3d 1057, 53 N.Y.S.3d 163 (2d Dep't 2017), addressed a disclosure dispute in a medical malpractice action in which plaintiff was confronted at his deposition with printouts of 13 pages that allegedly were from his Facebook account. The printouts depicted a gentleman of many pursuits who "allegedly talked about going out to a bar, having a great workout, and crossing the Williamsburg Bridge three times."

The plaintiff acknowledged that he had used a Facebook account, but denied that the printouts were from his account and denied making the statements.

The plaintiff then served disclosure requests of his own, seeking information about the individual who obtained the printouts and requesting a deposition of this witness. When responses were not forthcoming, plaintiff moved to, among other things, preclude the defendants from offering as evidence at trial the printouts of the Facebook pages.

The Second Department reversed the supreme court, ruling that the defendants should be precluded from offering as evidence at trial the printouts of Facebook pages that were marked at plaintiff's deposition unless those defendants produced the person who obtained the printouts for a deposition. The court emphasized that the plaintiff denied that the printouts were from his Facebook account, and he had no other means to disprove their authenticity.

XLII. CPLR 3211(a)(1). Motion to Dismiss Based on Documentary Evidence.

Can an Email Suffice as Documentary Evidence Under CPLR 3211(a)(1)?

In *Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d 47, 8 N.Y.S.3d 1 (1st Dep't 2015), the First Department rejected the supreme court's conclusion that correspondence such as emails do not suffice as "documentary evidence" for purposes of CPLR 3211(a)(1), and cited several decisions in which it has "consistently held otherwise." *See Amsterdam Hospitality Group, LLC v. Marshall–Alan Assoc., Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 (1st Dept.2014) ("emails can qualify as documentary evidence if they meet the 'essentially undeniable' test."); *see also Kany v. Kany*, 148 A.D.3d 584, 50 N.Y.S.3d 337 (1st Dep't 2017).

The Second Department takes a different view. *See JBGR, LLC v. Chicago Title Ins. Co.*, 128 A.D.3d 900, 11 N.Y.S.3d 83 (2d Dep't 2015) (emails, correspondence, and affidavits do not constitute "documentary evidence" under CPLR 3211(a)(1)); *Prott v. Lewin & Baglio*, LLP, 150 A.D.3d 908 (2d Dep't 2017) and *25–01 Newkirk Ave., LLC v. Everest Natl. Ins. Co.*, 127 A.D.3d 850, 7 N.Y.S.3d 325 (2d Dep't 2015) ("letters, emails, and affidavits

fail to meet the requirements for documentary evidence" on a CPLR 3211(a)(1) motion).

XLIII. CPLR 3212. Motion for Summary Judgment.

Court of Appeals Rules That Plaintiff Is Entitled to Partial Summary Judgment on Liability Without Demonstrating Freedom from Comparative Fault

This important issue has generated conflicting decisions in the appellate division, i.e., whether a plaintiff is entitled to partial summary judgment on liability even though plaintiff may be charged with some comparative fault. *See* Siegel & Connors, New York Practice § 280. The issue also generated substantial conflict in the Court of Appeals with a 4-3 decision in *Rodriguez v. City of New York*, _ N.Y.3d _, 2018 WL 1595658 (2018). The majority held that a plaintiff is entitled to partial summary judgment on the issue of a defendant's liability even where the defendant has raised an issue of fact regarding plaintiff's comparative fault. "Placing the burden on the plaintiff to show an absence of comparative fault," the Court concluded, "is inconsistent with the plain language of CPLR 1412." That section designates comparative fault as an "affirmative defense to be pleaded and proved by the party asserting the defense." *See* Siegel & Connors, New York Practice §§ 168E, 223. Therefore, requiring the plaintiff to prove an absence of comparative fault to establish entitlement to partial summary judgment on liability is contrary to the statutory scheme.

Timeliness of Cross Motion for Summary Judgment

In *Maggio v. 24 West 57 APF, LLC*, 134 A.D.3d 621, 625, 24 N.Y.S.3d 1 (1st Dept.2015), the court noted that in reviewing a summary judgment motion, it may search the record and grant summary judgment to any nonmoving party without the necessity of a cross motion. *See* Siegel & Connors, New York Practice § 282. Therefore, the court "may even disregard the tardiness of a cross motion and grant the cross movant summary judgment, on the theory that the cross motion was not necessary in the first place." The issue on which the nonmovant is awarded summary judgment must, however, be "nearly identical" to that on which the movant sought relief.

In *Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281–282, 824 N.Y.S.2d 244 (1st Dept.2006), *lv. dismissed* 9 N.Y.3d 862, 840 N.Y.S.2d 765, 872 N.E.2d 878 (2007), the main motion sought summary judgment dismissing certain Labor Law claims (section 200 and 241(6)), and the plaintiff's untimely cross motion sought summary judgment on his 240(1) claim. The First Department held that the cross motion was not sufficiently related to the main motion, and refused to entertain it. In *Maggio*, the scenario was the same. "Thus, even though plaintiff has presented facts and arguments in his cross motion suggesting that his accident was caused by defendants' failure to provide him with an adequate safety device, we are constrained by our own precedent to conclude that the court properly declined to consider it" as untimely.

Motion for Summary Judgment Deemed "Made" When Original Motion Papers Were Served Before Plaintiff's Death

In *Pietrafesa v Canestro*, 130 A.D.3d 602 (2nd Dep't 2015), defendant made a motion for summary judgment dismissing the complaint on May 20, 2013. On July 11, 2013, the plaintiff died. The Second Department noted that this automatically stayed the action and divested supreme court of jurisdiction to conduct proceedings until a personal representative was appointed for the plaintiff's estate and substituted in the action. The day after the death, plaintiff's counsel, who may not have been aware of her client's death, filed papers opposing the defendant's motion, made a cross-motion for summary judgment on the issue of liability, and filed a note of issue.

On February 20, 2014, the executor of plaintiff's estate was substituted as the plaintiff. On August 8, 2014, the defendant made a formal motion to restore the case to the active calendar and for a determination on the pending motion. Without specifically addressing defendant's motion to restore the case to the calendar, the supreme court denied the defendant's motion for summary judgment as untimely because it was "not made until August 8, 2014," more than 120 days after the filing of the note of issue. *See* CPLR 3212(a).

The Second Department reversed, citing to CPLR 2211 and holding that defendant's motion for summary judgment was "made" when the motion papers were served in May of 2013. The Second Department ruled that "[u]nder the circumstances presented here, the timeliness of the defendant's motion must be judged by the date of service of the original motion papers, rather than the renewed motion papers."

Local Rules in Sixth Judicial District (and Elsewhere) Require Summary Judgment Motions to be Filed, Rather Than Served, within 60 Days After Filing of the Note of Issue

Courts can prescribe short time frames for making motions for summary judgment in all sorts of places, including preliminary conference orders, scheduling orders, individual court rules, county rules, and rules of a judicial district. In *McDowell & Walker, Inc. v. Micha*, 113 A.D.3d 979, 979 N.Y.S.2d 420 (3d Dep't 2014), the Third Department applied the local rules of the Sixth Judicial District, which require that "[s]ummary judgment motions must be *filed* no later than [60] days after the date when the Trial Note of Issue is filed," unless permission is obtained for good cause shown. (emphasis added). Compliance with this local rule, covering Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga, and Tompkins Counties, can be tricky.

CPLR 3212(a) speaks in terms of when a summary judgment motion may be "made" and provides that the court may set a deadline for making such motions, as long as that date is no earlier than thirty days after the filing of the note of issue. Pursuant to CPLR 2211, a motion is "made" when the motion or order to show cause is "served," not when it is "filed." *See* § 243; McKinney's Practice Commentaries to CPLR 2211, C2211:4 ("When Motion on Notice Deemed 'Made'"). Lawyers making motions for summary

judgment in the Sixth Judicial District must take pains to not only make, i.e., serve, their motions for summary judgment within 60 days from the filing of the note of issue, but also to file them within that time frame. We suspect that there are other local or individual rules in the state that require the "filing" of a motion for summary judgment, rather than its mere service, within a specific time frame. Lawyers need to watch for those too. Finally, the filing may also be required under the terms of a stipulation. *See* Siegel & Connors, New York Practice § 279.

Similarly, in *Connolly v 129 E. 69th St. Corp.*, 127 A.D.3d 617, 7 N.Y.S.3d 889 (1st Dep't 2015), the supreme court's individual part rules required that motions for summary judgment be "filed" within 60 days of the filing of the note of issue. Since plaintiffs filed the note of issue on July 10, 2013, the motions for summary judgment were required to be filed by September 9, 2013. While defendant made (served) a motion for summary judgment on September 4, 2013, it did not file the motion until September 10, 2013, one day after the 60–day time period expired. Therefore, the First Department found defendants' motions to be untimely and reversed the supreme court's order granting defendants' motions for summary judgment dismissing the complaint.

Hearsay May Be Considered in Opposition to Motion for Summary Judgment As Long As It Is Not the Only Evidence Submitted

A rule has developed that occasionally permits the court to consider incompetent evidence, such as hearsay, in opposition to a motion for summary judgment. *See* Siegel & Connors, New York Practice § 281. Recently, the courts have emphasized that hearsay evidence may be considered to defeat a motion for summary judgment as long as it is accompanied by some other competent evidence. *See City of New York v. Catlin Specialty Insurance Company*, 158 A.D.3d 586, _ N.Y.S.3d _ (1st Dep't 2018).

Affirmations in Compliance with CPLR 2106 May Be Used In Lieu Of, or In Addition To, Affidavits on a Motion For Summary Judgment

Affidavits from those having personal knowledge of the facts are a primary source of proof on a motion for summary judgment. *See* Siegel & Connors, New York Practice § 281. In this regard, CPLR 3212(b) provides that "[a]

motion for summary judgment shall be supported by affidavit…." We have been informed that lawyers have recently argued that a summary judgment that fails to include an affidavit violates the statute and must be denied. Affirmations in compliance with CPLR 2106 can also be used on a motion for summary judgment, as that provision states that an affirmation "may be served or filed in the action *in lieu of and with the same force and effect as an affidavit*." CPLR 2106(a), (b) (emphasis added); *see* § 205.

XLIV. CPLR 3215. Default judgment.

Answer with Counterclaim, Verified by Defendants' Attorney, May Not Be Used as Proof of Claim on Default Judgment Application

In *Euzebe-Job v. Abdelhamid*, 2017 WL 1403896 (Sup. Ct., Kings County 2017), an automobile accident case, plaintiffs failed to serve a reply in response to defendants counterclaim and defendants applied for a default judgment. The court stressed that "[w]hile counterclaims are not specifically mentioned anywhere in CPLR 3215, the statute's legislative history reveals that it was intended to apply to claims asserted as counterclaims, cross claims, and third-party claims, in addition to those set forth in complaints (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 307 (2nd Dept 2011)." *See* Siegel & Connors, New York Practice § 294.

To demonstrate proof of the facts constituting its claim, as required by CPLR 3215(f), defendants submitted the answer with counterclaim, which was verified by the defendants' attorney pursuant to CPLR 3020(d). In that the attorney did not possess personal knowledge of the underlying facts supporting the counterclaim, the court ruled that "the verified answer with counterclaim may not be used in lieu of an affidavit by the movants pursuant to CPLR 105 (u)." *See* Siegel & Connors, New York Practice § 246. The application was denied without prejudice.

CPLR 2221 Motion for Reargument/Renewal Is Improper Vehicle to Challenge Default Judgment

In *Country Wide Home Loans, Inc. v. Dunia*, 138 A.D.3d 533, 28 N.Y.S.3d 319 (1st Dep't 2016), the supreme court granted defendant's motion

pursuant to CPLR 3215(c) to dismiss plaintiff's foreclosure action because plaintiff failed to move for a default judgment within one year of defendant's default. This is the classic "default within the default" scenario in which a plaintiff who fails to "take proceedings" to enter a default judgment within one year after the default occurs forfeits the right to proceed with the action. *See* Siegel & Connors, New York Practice § 294 ("Time for default application"). Remarkably, with the stakes seemingly so high, the defendant's motion was granted on default without any opposition. Plaintiff then moved for renewal under CPLR 2221.

The First Department affirmed the denial of plaintiff's motion to renew. In that the order was granted on default, the court held that the proper remedy for plaintiff was a motion to vacate under CPLR 5015(a)(1), not a motion to renew under CPLR 2221. *See also Hutchinson Burger, Inc. v. Bradshaw*, 149 A.D.3d 545 (1st Dep't 2017); *Atl. Radiology Imaging, P.C. v. Metro. Prop. & Cas. Ins. Co.*, 2016 WL 1064657 (App. Term 2016).

We report the decision here because we have seen recent decisions in which parties have sought to challenge orders issued on default through a motion to reargue or renew under CPLR 2221. The proper vehicle to challenge an order entered on default is CPLR 5015(a)(1). *See* Siegel & Connors, New York Practice § 427.

XLV. CPLR 3217. Voluntary Discontinuance.

CPLR 3211(a) Pre-Answer Motion to Dismiss Does Not Terminate Plaintiff's Right to Unilaterally Discontinue Action

CPLR 3217(a)(1) provides that "[a]ny party asserting a claim may discontinue it without an order ... by serving upon all parties to the action a notice of discontinuance at any time *before a responsive pleading is served* or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court." (emphasis added).

In *Harris v. Ward Greenberg Heller & Reidy LLP*, 151 A.D.3d 1808, 58 N.Y.S.3d 769 (4th Dep't 2017), several defendants made CPLR 3211 pre-answer motions to dismiss plaintiff's supplemental complaint and sought

sanctions. Prior to the return date of the motions, plaintiff served voluntary notices of discontinuance pursuant to CPLR 3217(a)(1) with respect to all defendants. The supreme court ruled that the plaintiff's voluntary discontinuance was untimely, granted the motions to dismiss, and imposed sanctions on plaintiff.

The Fourth Department reversed, ruling that the CPLR 3217 notices of discontinuance "were not untimely because a motion to dismiss pursuant to CPLR 3211 is not a 'responsive pleading' for purposes of CPLR 3217(a)(1)" and therefore did not cut off plaintiff's option of unilaterally discontinuing as of right pursuant to CPLR 3217(a)(1). The court concluded that "[i]t is clear from the language used throughout the CPLR that the Legislature did not intend a CPLR 3211 motion to be considered a 'responsive pleading.'"

The supreme court's order imposing sanctions against the plaintiff is, therefore, deemed a "nullity" and the appeal from it is deemed "academic."

The First Department has held that the service of a CPLR 3211(a) motion to dismiss terminates the plaintiff's right to unilaterally discontinue an action under CPLR 3217(a)(1). *BDO USA, LLP v. Phoenix Four, Inc.*, 113 A.D.3d 507, 979 N.Y.S.2d 45 (1st Dep't 2014); see Siegel & Connors, New York Practice § 297.

XLVI. CPLR 3408. Mandatory settlement conference in residential foreclosure actions.

Amendments to Mandatory Settlement Conference Procedures in CPLR 3408 to Take Effect on December 20, 2016

CPLR 3408 has been substantially amended to require, among other things, that the parties consider a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option at a mandatory settlement conference. CPLR 3408(a). CPLR 3408(c) was amended to require that "each party's representative at the conference … be fully authorized to dispose of the case."

The plaintiff must now bring the following forms, among others, to the conference: "the mortgage and note or copies of the same; standard

application forms and a description of loss mitigation options, if any, which may be available to the defendant; and any other documentation required by the presiding judge." CPLR 3408(e)(1). "If applicable," the defendant must bring the following to the conference: "information on current income tax returns, expenses, property taxes and previously submitted applications for loss mitigation; benefits information; rental agreements or proof of rental income; and any other documentation relevant to the proceeding required by the presiding judge." CPLR 3408(e)(2).

CPLR 3408(f) now provides:

> Compliance with the obligation to negotiate in good faith pursuant to this section shall be measured by the totality of the circumstances, including but not limited to the following factors:
>
> 1. Compliance with the requirements of this rule and applicable court rules, court orders, and directives by the court or its designee pertaining to the settlement conference process;
>
> 2. Compliance with applicable mortgage servicing laws, rules, regulations, investor directives, and loss mitigation standards or options concerning loan modifications, short sales, and deeds in lieu of foreclosure; and
>
> 3. Conduct consistent with efforts to reach a mutually agreeable resolution, including but not limited to, avoiding unreasonable delay, appearing at the settlement conference with authority to fully dispose of the case, avoiding prosecution of foreclosure proceedings while loss mitigation applications are pending, and providing accurate information to the court and parties.
>
> Neither of the parties' failure to make the offer or accept the offer made by the other party is sufficient to establish a failure to negotiate in good faith.

XLVII. CPLR 5015. Relief from judgment or order.

Second Department Concludes That Failure to Comply with Notice Requirements in CPLR 3215(g)(1) Renders Default Judgment Void

In *Paulus v Christopher Vacirca, Inc.*, 128 A.D.3d 116 (2d Dep't 2015), plaintiff failed to provide the required notice to the defendant under CPLR 3215(g)(1) before moving for leave to enter a default judgment. That provision requires that "whenever application [for a default judgment] is made to the court or to the clerk, any defendant who has appeared is entitled to at least five days' notice of the time and place of the application."

Defendant moved to vacate the default judgment under CPLR 5015(a)(1) and(4). The Second Department held that supreme court properly concluded that defendant was not entitled to vacatur of the default judgment pursuant to CPLR 5015(a)(1) because he failed to demonstrate a reasonable excuse for failing to answer the complaint. Nonetheless, the Second Department ruled, in an issue of "first impression" in that court, that the default judgment should have been vacated pursuant to CPLR 5015(a)(4) because the failure to comply with the notice requirements of CPLR 3215(g)(1) deprived the supreme court of jurisdiction to entertain the plaintiffs' motion for leave to enter a default judgment.

The First, Third, and Fourth Departments have addressed the issue of vacating a default judgment for an appearing party who received no notice of the motion for leave to enter a default judgment, but have reached different results. *See Fleet Fin. v. Nielsen*, 234 A.D.2d 728 (3d Dep't 1996) (concluding that failure to provide notice in accordance with CPLR 3215(g)(1) and (3) does not, standing alone, warrant vacatur of a default judgment); *Walker v. Foreman*, 104 AD3d 460 (1st Dep't 2013) (vacating judgment, court noted that the failure to give proper notice under CPLR 3215(g)(1) requires a new inquest, on proper notice); *Dime Sav. Bank of N.Y. v. Higner*, 281 A.D.2d 895 (4th Dep't 2001) (granting motion to vacate default judgment and foreclosure sale based upon failure to provide notice to defendant homeowner who appeared informally by sending a letter to the bank's attorney denying the validity of the bank's claim). For further discussion of the matter, see Siegel & Connors, New York Practice § 295.

XLVIII. CPLR 5019. Validity and correction of judgment or order; amendment of docket.

Court of Appeals Holds That Statutory Interest Cannot Be Pursued After Judgment Is Entered

Lawyers attempting to secure 9% statutory interest under CPLR Article 50 for their clients should be careful to resolve all matters relating to interest within the action, and before the final judgment is entered. *See* Siegel & Connors, New York Practice §§ 411–12 (discussing recent caselaw under CPLR Article 50).

The Court of Appeals recent decision in *CRP/Extell Parcel I, L.P. v. Cuomo*, 27 N.Y.3d 1034 (2016), makes the point. In *CRP/Extell*, the Attorney General ordered the sponsor of a condominium offering to return down payments to purchasers. The sponsor then commenced an Article 78 proceeding challenging the Attorney General's determinations as arbitrary and capricious and seeking reformation of the purchase agreements based on a claimed "scrivener's error."

The supreme court denied the petition, directed the release and return of the down payments with accumulated escrow interest, and dismissed the proceeding. The sponsor returned the down payments and accumulated escrow interest, but the purchasers also made a motion and obtained an award of statutory interest under CPLR 5001 totaling $4.9 million! Unfortunately, they did not seek this substantial relief until after the final judgment dismissing the proceeding was entered. *See* CPLR 7806. The Court of Appeals affirmed the appellate division's vacatur of the award, holding that "[o]nce Supreme Court dismissed CRP's petition and judgment was entered, the court was without jurisdiction to entertain the purchasers' postjudgment motion for statutory interest." *See* Siegel & Connors, New York Practice § 420.

Stipulation as to Liability Does Not Trigger Accrual of Category II Interest

In *Mahoney v. Brockbank*, 142 A.D.3d 200, 205, 35 N.Y.S.3d 459, 463 (2d Dep't 2016), *lv. granted* 2017 WL 1224136 (2017), the parties in a personal injury action resolved the issue of liability by stipulation. Almost 2 ½ years

later, a trial was held on the issue of damages. The issue presented on appeal was whether, pursuant to CPLR 5002, prejudgment interest on the award should be computed from the date of the jury verdict on the issue of damages or, instead, from the date of the stipulation on the issue of liability. The Second Department concluded that the supreme court correctly computed prejudgment interest from the date of the jury verdict because a stipulation as to liability does not trigger the accrual of category II interest under CPLR 5002.

XLIX. CPLR 5222. Restraining notice.

Court of Appeals Holds That "Separate Entity" Rule Prevents Judgment Creditor from Ordering Garnishee Bank with Branch in New York to Restrain Debtor's Assets Held in Bank's Foreign Branches

In *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 996 N.Y.S.2d 594, 21 N.E.3d 223 (2014), the Court held that the "'separate entity' rule prevents a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a judgment debtor's assets held in foreign branches of the bank."

The decision is discussed in further detail in Siegel & Connors, New York Practice §§ 487, 491, 510.

L. CPLR 5225. Payment or delivery of property of judgment debtor.

Fourth Department Addresses Right to Jury Trial in Proceedings Under CPLR 5225 and 5227

In *Matter of Colonial Surety Co. v. Lakeview Advisors, LLC*, 125 A.D.3d 1292, 3 N.Y.S.3d 800 (4th Dep't 2015), the Fourth Department concluded that a special proceeding "under CPLR 5225 and 5227 against a party other than the judgment debtor is an outgrowth of the 'ancient creditor's bill in equity,' which was used after all remedies at law had been exhausted." The judgment creditor in this situation is seeking legal relief to the extent she desires an adjudication of whether the third-party owes a money debt to the judgment debtor and also equitable relief in that she wants any such debt to

be paid to her and not the judgment debtor. In that the judgment creditor's use of CPLR 5225 and 5227 in *Colonial Surety* was "in furtherance of both legal and equitable relief," the court ruled that it was not entitled to a jury trial. *See* CPLR 4102(c).

The decision is discussed in further detail in Siegel & Connors, New York Practice § 510.

LI. CPLR 5231. Income execution.

CPLR 5231 Amended to Address Income Executions

CPLR 5231 contains one of the CPLR's most popular, but complicated, judgment enforcement devices: the 10% income execution. The statute sets up a procedure that most often leads to a two-step service of the income execution. The "first service" is made by the sheriff upon the judgment debtor, and it requires the debtor to make installment payments. *See* CPLR 5231(d). This service affords the debtor the opportunity to honor the execution and avoid the embarrassment of any "second service" of the execution on the person who owes the judgment defendant money, such as an employer.

If the judgment debtor fails to pay installments for a period of twenty days, or if the sheriff is unable to serve an income execution upon the judgment debtor within twenty days after the execution is delivered to the sheriff, the second step service is required. *See* CPLR 5231(e). This second step service is not on the judgment debtor, but rather on the person "from whom the judgment debtor is receiving or will receive money." CPLR 5231(e).

On December 11, 2015, the Governor signed into law several amendments to CPLR 5231 designed to clarify and modernize the procedure for income executions. The new last sentence in CPLR 5231(e) clarifies that the "second service" of the income execution can be made in "any county in which the person or entity from whom the judgment debtor is receiving or will receive money has an office or place of business . . . ." This revision recognizes the reality that "second service" is not made on the judgment debtor, but rather on "the person or entity from whom the judgment debtor is

receiving or will receive money," which is most typically the judgment debtor's employer.

The amendments to CPLR 5231 are discussed in further detail in Siegel & Connors, New York Practice § 502.

LII. CPLR 5515. Taking an appeal; notice of appeal.

New 2015 Legislation Expanding Judiciary's Powers to Adopt E-filing Affects Filing and Service of Notice of Appeal

We address this new legislation in Siegel & Connors, New York Practice §§ 11, 63, 531, 533. We note it under CPLR 304, above, and again here because if mandatory e-filing in a particular category of action has been adopted in the county where the action was commenced, the filing and service of a notice of appeal under CPLR 5515(1) is subject to the e-filing rules. CPLR 2111(c). That means that any notice of appeal in those actions must be electronically filed and served. The new legislation will also have an impact on the time to serve and file the notice of appeal under CPLR 5513(a).

LIII. CPLR 5713. Content of order granting permission to appeal to court of appeals.

Court of Appeals Not Bound by Appellate Division's Characterization in Its Certification Order Granting Leave

In an order granting leave to appeal from a nonfinal order, the appellate division certifies the question of law deemed decisive of its determination. *See* CPLR 5713. Even if the certified question states that the "determination was made as a matter of law and not in the exercise of discretion," the Court of Appeals is not bound by the appellate division's characterization in its certification order. *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543 (2015). Instead, the Court will make an independent determination of whether the appellate division's decision nonetheless reflects a discretionary balancing of interests. If an appellate division's determination is deemed to be discretionary in nature, the Court of Appeals' review is limited to whether the intermediate appellate court abused its discretion as a matter of law. This issue is discussed in further detail in Siegel & Connors, New York Practice §§ 528-529.

LIV. CPLR 6312. Motion papers; undertaking; issues of fact [for preliminary injunctions]

Matter Remitted to Supreme Court to Fix an Undertaking Required by CPLR 6312(b)

CPLR 6312(b) requires that a plaintiff provide an undertaking in an amount to be fixed by the court as a precondition to obtaining a preliminary injunction. *See* Siegel & Connors, New York Practice § 329. Sometimes the parties and the court forget this important statutory requirement, which cannot be waived. *Confidential Brokerage Servs., Inc. v. Confidential Planning Corp.*, 85 A.D.3d 1268, 1270, 924 N.Y.S.2d 207, 209 (3d Dep't 2011). If a preliminary injunction is granted, but an undertaking is not fixed by the court, an appellate court will typically remit the matter to the supreme court to set an appropriate undertaking, as occurred recently in *Mobstub, Inc. v www.staytrendy.com.*, 153 A.D.3d 809, 60 N.Y.S.3d 356 (2d Dep't 2017).

LV. CPLR 7501. Effect of arbitration agreement.

Court Enforces Arbitration Clause in Nursing Home Admission Agreement

In *Friedman v Hebrew Home for the Aged at Riverdale*, 131 A.D.3d 421, 13 N.Y.S.3d 896 (1st Dep't 2015), plaintiff sued to recover for injuries sustained by his mother at defendant nursing facility. The supreme court denied defendant's motion to stay the action pending arbitration, but the First Department reversed and granted the motion. The court concluded that the arbitration clause in the admission agreement that plaintiff executed in placing his mother in defendant's care did not run afoul of Public Health Law § 2801–d ("Private actions by patients of residential health care facilities"), which was preempted by the Federal Arbitration Act because defendant was engaged in interstate commerce.

Furthermore, the court found that the arbitration clause was "not unconscionable, either procedurally or substantively."

LVI. CPLR 7803. Questions raised.

Court of Appeals Holds That Writ of Prohibition Is Appropriate To Prevent Judge from Compelling Criminal Prosecution

In *Soares v. Carter*, 25 N.Y.3d 1011 (2015), the Court of Appeals affirmed the granting of a writ of prohibition enjoining the City Court Judge from enforcing his orders compelling the People to call witnesses and prosecute a criminal matter after the District Attorney had decided to discontinue the prosecution. "Under the doctrine of separation of powers, courts lack the authority to compel the prosecution of criminal actions. Such a right is solely within the broad authority and discretion of the district attorney's executive power to conduct all phases of criminal prosecution." (citations omitted) Therefore, any attempt by the Judge to compel prosecution through the use of his contempt power exceeded his jurisdictional authority and warranted the granting of the writ of prohibition. *See* Siegel & Connors, New York Practice § 559.

LVII. CPLR 7804. Procedure.

Court of Appeals Remits Proceeding to Supreme Court to Allow Respondent to Serve Answer in Article 78 Proceeding

CPLR 7804(f) provides that if a motion to dismiss in an Article 78 proceeding "is denied, the court *shall* permit the respondent to answer." (emphasis added). Despite the mandatory tone of this subdivision, in *Kickertz v. New York University*, 25 N.Y.3d 942, 944, 6 N.Y.S.3d 546, 547, 29 N.E.3d 893, 894 (2015), the Court of Appeals observed that a court need not permit a respondent to serve an answer after denying a motion to dismiss "if the 'facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer.'"

In *Kickertz*, the First Department reversed supreme court and denied respondent's motion to dismiss the petition. Rather than allowing respondent to now answer the petition, the court granted the petitioner judgment on the merits. The Court of Appeals concluded that there were several triable issues of fact with regard to whether the respondent, a private educational institution, substantially complied with its established disciplinary procedures before expelling the petitioner. Therefore, the Court vacated that portion of the order granting the petition and remitted the proceeding to supreme court to permit the respondent to serve an answer to the petition.

LVIII. Judiciary Law § 753. Power of courts to punish for civil contempts.

Court of Appeals Outlines Elements Required to Establish Civil Contempt

In *El-Dehdan v. El-Dehdan*, 26 NY3d 19, 29, 19 N.Y.S.3d 475, 481, 41 N.E.3d 340, 346 (2015), the Court of Appeals outlined the elements necessary to establish civil contempt under Judiciary Law section 753:

> First, "it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect." Second, "[i]t must appear, with reasonable certainty, that the order has been disobeyed." Third, "the party to be held in contempt must have had knowledge of

> the court's order, although it is not necessary that the order actually have been served upon the party." Fourth, "prejudice to the right of a party to the litigation must be demonstrated."

The plaintiff in *El-Dehdan*, a matrimonial action, sought civil contempt penalties against her spouse who failed to comply with an order requiring him to deposit in escrow the proceeds of the sale of properties which were the subject of a prior equitable distribution determination. The Court held that plaintiff met her burden by establishing the above four elements by clear and convincing evidence.

The *El-Dehdan* Court also stressed that neither Judiciary Law section 753 nor its prior case law impose a "willfulness" requirement for civil contempt. Judiciary Law section 750, which governs criminal contempt, does contain such a requirement as it only permits a court to impose punishment for criminal contempt for "[w]illful disobedience to its lawful mandate." Judiciary Law § 750(A)(3).

For further discussion of civil contempt, see Siegel & Connors, New York Practice §§ 481-484.

LIX. New York State Bar Exam Replaced by Uniform Bar Exam.

The Court of Appeals appoints and oversees the Board of Law Examiners and promulgates the rules for the admission of attorneys to practice. In a February 26, 2016 Outside Counsel piece in the New York Law Journal, we discussed the Court's changes to the New York State Bar Exam, which will essentially be replaced with the Uniform Bar Exam. *See* Patrick M. Connors, "Lowering the New York Bar: Will New Exam Prepare Attorneys for Practice?," N.Y.L.J, Feb. 26, 2016, at 4. Given the scant knowledge of New York law required to pass the new bar exam, it is highly probable that there will be an increase in the number of newly admitted attorneys who have minimal knowledge of our state's law.

LX. 22 N.Y.C.R.R. Part 523: Rules of the Court of Appeals for the Temporary Practice of Law in New York

Part 523 of the Rules of the Court of Appeals, which became effective on December 30, 2015 allows lawyers not licensed in New York to practice here temporarily. The new rules track much of the language in Rule 5.5 of the ABA Model Rules of Professional Conduct, which provides for the "Multijurisdictional Practice of Law." The new Part 523 is discussed in Connors, *No License Required: Temporary Practice in New York State*, New York Law Journal, March 10, 2016, at p. 4.

New York lawyers will not likely be concerned with Part 523's workings unless they are assisting a non-New York lawyer in negotiating its provisions, or actively participating in, and assuming joint responsibility for, the matter. *See* 22 N.Y.C.R.R. § 523.2(a)(3)(i). New York lawyers will be most concerned with multijurisdictional practice rules in other states where they are not licensed. The ABA Commission on Multijurisdictional Practice maintains a helpful website that tracks these developments: http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice.html

Are Lawyers Providing Legal Services in New York Pursuant to Part 523 Required to Adhere to Letter of Engagement Rule (Part 1215) and Attorney-Client Fee Dispute Resolution Program (Part 137)?

22 N.Y.C.R.R. section 1215.2, entitled "Exceptions," provides that the Letter of Engagement Rule does not apply to "(d) *representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York*, or where no material portion of the services are to be rendered in New York." (emphasis added).

22 N.Y.C.R.R. section 137.1, entitled "Application," provides that "(a)[t]his Part shall apply where representation has commenced on or after January 1, 2002, *to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter*." (emphasis added). The section also provides that "(b) [t]his Part shall not apply to …(7) *disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York*, or where no material portion of the services was rendered in New York." (emphasis added).

LXI. Federal Rules of Civil Procedure Rule 4. Summons.

Time Limit for Service Upon a Defendant in Rule 4(m) Reduced to 90 Days

Effective December 1, 2015, Rule 4(m) was amended to reduce the presumptive time for serving a defendant from 120 days to 90 days. This change was designed to reduce delay at the beginning of litigation. *See* Siegel & Connors, New York Practice §§ 624-625.

LXII. Federal Rules of Civil Procedure Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.

Rule 37 Amended to Provide Uniform Standards for a Party's Failure to Preserve Electronically Stored Information

Rule 37 contains provisions addressing sanctions for the violation of disclosure obligations in federal practice. *See* Siegel & Connors, New York Practice §§ 638. Substantial amendments to this Rule became effective on December 1, 2015.

Rule 37(a)(3)(B)(iv) was amended to reflect the common practice of producing copies of documents or electronically stored information ("ESI"), rather than simply permitting inspection of one's electronic database.

Rule 37(e), adopted in 2006, was replaced in its entirety and is now entitled "Failure to Preserve Electronically Stored Information." Rule 37(e)(2) only allows the court to presume that lost information was favorable to a party, or to charge the jury with an adverse inference instruction, upon a "finding that the party acted with the intent to deprive another party of the information's use in the litigation." The Advisory Committee notes emphasize that the amendment "rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence."

Coincidentally, just after the amendment to Rule 37(e) took effect, the New York Court of Appeals issued a decision addressing sanctions for the failure to preserve ESI. *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 N.Y.3d 543 (2015).

The amendment to Rule 37 is discussed in further detail in Siegel & Connors, New York Practice § 638.

LXIII. Federal Rules of Civil Procedure Rule 84. Forms.

Rule 84, Which Authorized Use of Official Forms in Federal Court, Abrogated Effective December 1, 2015

The Advisory Committee Notes explain that "[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted [in 1938], has been fulfilled." *See* Siegel & Connors, New York Practice § 620 (discussing forms in federal court). Therefore, "recognizing that there are many excellent alternative sources for forms, including the Administrative Office of the United States Courts, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated."

As a result of the abrogation of Rule 84 and the official forms, former Forms 5 and 6 were directly incorporated into Rule 4. Rule 4 now contains these forms entitled "Notice of a Lawsuit and Request to Waive Service of Summons" and "Rule 4 Waiver of the Service of Summons."

Similarly, the New York courts rescinded the Appendix of Official Forms for the CPLR, which were adopted in 1968. The administrative order became effective on July 1, 2016. *See* AO/119/16, dated May 23, 2016. *See* Siegel & Connors, New York Practice § 7.

LXIV. Issues Regarding Removal of Actions from State to Federal Court

The potential pitfalls of any delay in seeking removal when an action is commenced in New York State court with a CPLR 305(b) notice are demonstrated in *Jones Chemicals, Inc. v. Distribution Architects Int'l*, 786 F. Supp. 310 (W.D.N.Y. 1992), where the arguable basis of federal jurisdiction

was the diversity of citizenship of the parties. The defendants were served with a summons and CPLR 305(b) notice setting forth some information that did indicate the potential existence of diversity jurisdiction, including the plaintiff's residence, the names of co-defendants, etc. There was nothing on the face of the summons and notice, however, to indicate that federal jurisdiction was certain. The defendants were nevertheless held subject to the 30-day removal period running from service of the summons with notice, with the court holding that they had a duty to investigate promptly after service so as to be able to act within the 30 days.

Duty to Investigate Federal Jurisdiction?

Although the *Jones* decision has not been overruled or criticized by other courts, it may not square with some more recent holdings. The Second Circuit has since held that a defendant has no independent duty to investigate whether a case is removable. *See Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 206 (2d Cir. 2001). "If removability is not apparent from the allegations of an initial pleading or subsequent document, the 30-day" period in 28 U.S.C. § 1446(b) does not begin to run. *Cutrone v. Mortg. Elec. Registration Sys., Inc.*, 749 F.3d 137, 143 (2d Cir. 2014)(discussing 30 day removal periods under 28 U.S.C. §§ 1446(b)(1) and (b)(3) in Class Action Fairness Act cases). However, defendants must still "apply a reasonable amount of intelligence in ascertaining removability." *See Whitaker*, 261 F.3d at 206; *see also Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1140 (9th Cir. 2013). While the "reasonable amount of intelligence" standard "does not require a defendant to look beyond the initial pleading for facts giving rise to removability," *Whitaker*, 261 F.3d at 206, the line is not always clearly drawn.

Some corporate defendants with inefficient bureaucracies can find themselves in perpetual forfeit of federal jurisdiction if they do not set up a system for transmitting summonses and their accompanying papers—in New York practice, either the CPLR 305(b) notice or the complaint—into the hands of their lawyers promptly, so that a possible removal to federal court can be timely considered. Lawyers regularly representing a client sued frequently in state courts should remind the client at periodic intervals of the timeliness issues regarding removal and recommend a process that ensures an immediate forwarding of the initiatory papers.

Starting the Removal Clock

Another problem, unique to the diversity case because of its monetary threshold, is how to time removal if the action is for money and the complaint does not state the sum demanded. The defendant is then unable to determine whether the case involves more than $75,000, the current requirement for federal subject matter jurisdiction in diversity cases. 28 U.S.C. § 1332(a). The predicament exists in personal injury and wrongful death actions—numerous categories in New York practice—because CPLR 3017(c) explicitly forbids the inclusion of an explicit monetary sum in the complaint in those categories of actions.

The remedy for the curious defendant in that situation is to use the supplemental demand procedure supplied by CPLR 3017(c). It permits the defendant to serve a demand on the plaintiff for a statement of the sum sought, and requires the plaintiff to respond within 15 days. Assuming the response asks for more than $75,000, the response constitutes the "other paper"—a paper other than the complaint—that § 1446(b)(3) also recognizes as an alternative starting time for the 30-day removal period.

In *Moltner v. Starbucks Coffee Co.*, 624 F.3d 34 (2d Cir. 2010), the personal injury complaint alleged several injuries but, as required by CPLR 3017(c), no monetary amounts were stated. D requested a supplemental demand for the damages sought under CPLR 3017(c), and P sent a letter in response stating entitlement to damages not to "exceed $3 million." D removed the case less than two weeks afterwards. The Second Circuit concluded that these steps satisfied the 30-day period for removal dictated by 28 U.S.C. § 1446(b). Under the law of inferences, a $3 million dollar statement, in any form, can be deemed on the upper side of $75,000.

The court concluded that "the time for removal runs from the service of the first paper stating on its face the amount of damages sought." *Moltner*, 624 F.3d at 35. The court rejected plaintiff's argument that defendant, "applying 'a reasonable amount of intelligence' to its reading of the complaint, should have deduced from the complaint's description of her injuries that the amount in controversy would exceed $75,000." *Id.* at 37. Rather, the court opted for a "bright line rule" and held that "the removal clock does not start to run until the plaintiff serves the defendant with a paper that explicitly specifies the amount of monetary damages sought." In *Moltner*, that "paper"

was plaintiff's letter sent in response to defendant's CPLR 3017(c) demand stating that the amount sought would not exceed $3 million.

An important lesson to be drawn from the *Moltner* decision is that the removal period in a personal injury or wrongful death action may be triggered by something other than a response to a supplemental demand served pursuant to CPLR 3017(c). In *Warfield v. Conti*, 2010 WL 2541168 (S.D.N.Y. 2010), for example, the court ruled that the 30-day removal period began to run when plaintiff's counsel sent defendants' counsel a letter asserting that plaintiff had suffered severe permanent injuries and demanding the defendants' full primary policy, which had a $300,000 limit, and any excess and/or additional policy under which they may be covered.

There are pitfalls faced when removing an action too soon. In *Noguera v. Bedard*, 2011 WL 5117598 (E.D.N.Y. 2011), for example, the court remanded the action to Supreme Court, Kings County for lack of subject matter jurisdiction. The district court concluded that defendants' notice of removal did not properly allege the amount in controversy, relying on the Second Circuit's conclusion in *Moltner* that "the amount in controversy is not established until the 'plaintiff serves the defendant with a paper that that explicitly specifies the amount of monetary damages sought.'" *Noguera*, 2011 WL 5117598 at *1. The court noted that CPLR 3017(c) provides "defendants with an explicit remedy in the face of plaintiff's failure timely to respond to the *ad damnum* demand: the state court, on motion, may order plaintiff to respond." *Id.* at *2. In *Noguera*, plaintiff's time to respond to the CPLR 3017(c) demand had not yet expired at the time the action was removed. The court indicated that removal might ultimately be appropriate after plaintiff provides a response to the CPLR 3017(c) demand.

The Second Circuit has recently cautioned district courts to "'construe the removal statute narrowly, resolving any doubts against removability.'" *Stemmle v. Interlake Steamship Co.*, 198 F. Supp. 3d 149, 156 (E.D.N.Y. 2016). Therefore, a defendant seeking removal of an action to federal court must take great pains to ensure that the removal papers are in order. *Hughes v. Target Corporation*, 2017 WL 2623861 (E.D.N.Y. June 15, 2017)(remanding action to state court because "a barebones, general pleading does not suffice to establish that this action involves an amount in controversy adequate to support federal diversity jurisdiction.").

LXV. Monitoring the Docket

In *Sable v. Kirsh*, 2017 WL 4620997 (E.D.N.Y. 2017), plaintiff filed a complaint against defendant on July 27, 2015. The court did not issue a summons, although the complaint was served on the defendant.

On March 21, 2016, the clerk issued a notice requesting the plaintiff's counsel "to inform the Court within ten (10) days of this notice, why an order should not be entered dismissing this action for failure to prosecute pursuant to FED. R. CIV. P. (or "Rule") 41(b)."

The Court received no response from either party by the requested date and on April 1, 2016 issued an order dismissing the case for failure to prosecute pursuant to FED. R. CIV. P. 41(b) and directed the clerk to close the case. On April 6, 2016, the clerk entered a judgment, which stated "that Plaintiff Michael Sable take nothing of Defendant Edward Kirsh; that this action is dismissed pursuant to FED. R. CIV. P. 41(b) for failure to prosecute; and that this case is hereby closed."

According to plaintiff, he learned about the Court's actions in May, 2016. When plaintiff confronted his attorney at the time, the attorney asserted that he did not receive any emails from the court. In June 2016, plaintiff asked his attorney to file a motion to vacate the judgment. After numerous unsuccessful attempts to contact his attorney, plaintiff filed a grievance with the Second Department.

The plaintiff then hired a new attorney who filed a motion to vacate the default judgment pursuant to Rule 60(b)(1) and 60(b)(2).

The court noted that under Rule 60(b), a party can be relieved from a final judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or

> discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

See Siegel & Connors, New York Practice § 629 (6th ed. 2008) ("Vacating Defaults in Federal Court").

"A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order." FED. R. CIV. P. 60(c).

The court ruled that the motion to vacate was untimely, as it was filed on July 6, 2017, "ninety-one days after the one-year period ended." The court refused to apply the doctrine of "equitable tolling" to extend the one year period, observing that "lack of due diligence on the part of plaintiff's attorney is insufficient to justify application of an equitable toll." *South v. Saab Cars USA*, 28 F.3d 9, 12 (2d Cir. 1994).

The court went on to note that:

> the negligence of a party's attorney is insufficient grounds for relief under Rule 60(b)(1). *See Nemaizer*, 793 F.2d at 62; *see also U.S. ex rel. McAllan v. City of New York*, 248 F.3d 48, 53 (2d Cir. 2001) (noting that "parties have an obligation to monitor the docket sheet to inform themselves of the entry of orders" (internal citations omitted)). "[A]n attorney's actions, whether arising from neglect, carelessness or inexperience, are attributable to the client, who has a duty to protect his own interests by taking such legal steps as are necessary. To rule otherwise would empty the finality of judgments rule of meaning." *Nemaizer*, 793 F.2d at 62-63 (citing *Ackerman v. United States*, 340 U.S. 193, 197-98, 71 S.Ct. 209, 95 L.Ed. 207 (1950)); *see also Carcello v. TJX Companies, Inc.*, 192 F.R.D. 61, 65 (D. Conn. 2000) ("[A] client makes a significant decision when he selects counsel to represent him. Once this selection has been made, the client cannot thereafter avoid the consequences of that counsel's negligence. Rather, his recourse is limited to starting anew, assuming the statutes of limitations and other applicable laws permit, or pursuing a negligence action against counsel." (internal citations and quotations omitted)); *Klein v. Williams*, 144 F.R.D. 16, 18 (E.D.N.Y. 1992)

(noting that "[a] client is not generally excused from the consequences of his attorney's negligence, absent a truly extraordinary situation" (internal citations and quotations omitted)).

Moreover, "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect.' " *Pioneer Inv. Servs., Inc. v. Brunswich Assocs. Ltd. P'ship*, 507 U.S. 380, 391-92, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). "[T]his is because a person who selects counsel cannot thereafter avoid the consequences of th[at] agent's acts or omissions." *Nemaizer*, 793 F.2d at 62 (citing *Link v. Wabash*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 8.Led.2d 734 (1962)).

In the case at issue, it was Mr. Rosenberg's "ultimate responsibility to prosecute his client's claim, keep track of deadlines and respond to motions filed on the docket." *Lapico v. Portfolio Recovery Assocs.*, LLC, No. 06-cv-1733, 2008 WL 1702187, at *3 (D. Conn. Apr. 11, 2008) (internal citations omitted). His alleged inability to properly file a complaint, respond to the orders of this Court and communicate with his client is a failure to observe the clear, unequivocal rules that govern an attorney's conduct and this Court. See e.g., NEW YORK RULES OF PROFESSIONAL CONDUCT, Rules 1.3, 1.4; FED. R. CIV. P. 4. Furthermore, the Plaintiff has failed to cite a single case with similar circumstances, where a court in this circuit has found that similar conduct constitutes excusable neglect. Where, as here, a party's attorney fails to adhere to an unambiguous rule, Second Circuit jurisprudence precludes recovery. *See e.g., Klein*, 144 F.R.D. at 18; *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 250–51 (2d Cir. 1997). For this reason, the undersigned concludes that the Plaintiff's claim lacks merit sufficient to justify granting a Rule 60(b)(1) motion.

Social Media Discovery

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Effective Use and Ethical Considerations of Social Media Discovery

By: Robert B. Gibson, Esq.

I. What is Social Media?

1. Romano v. Steelcase, Inc., 30 Misc. 3d 426, 907 N.Y.S.2d 650 (Supreme Suffolk 2010) "Both Facebook and MySpace are social networking sites where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking. Indeed, Facebook policy states that 'it helps you share information with your friends and people around you," and that "Facebook is about sharing information with others…"MySpace [is] an "online community" where "you can share photos, journals and interests with your growing network of mutual friends…"

II. Screening of Clients and Adversaries

1. ABA Model Rules of Prof. Conduct, Rule 1.1, Comment 8 - lawyers have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.

2. New York State Bar Association's Social Media Ethics Guidelines (May 2017) – Guideline No.1.A - A lawyer has a duty to understand the benefits, risks and ethical implications associated with social media, including its use for communication, advertising and research and investigation.

3. Duty to Client

    i. Jessica Weltge and Myra McKenzie-Harris, Esq. "The Mindfield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology" American Bar Association Section of Labor and Employment Law Ethics & Professional Responsibility Committee Midwinter Meeting March 24, 2017. Lawyers have a duty to be competent that requires them to "maintain the knowledge and awareness about technological changes that could impact the legal profession."

    ii. New York Rules of Professional Conduct – Rule 1.1(a) - A lawyer should provide competent representation to a client. Competent

representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

iii. New York State Bar Association's Social Media Ethics Guidelines (May 2017) – Guideline No.5.A - A lawyer may advise a client as to what content may be maintained or made nonpublic on her social media account, including advising on changing her privacy and/or security settings. A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else. However, the lawyer must be cognizant of preservation obligations applicable to the client and/or matter, such as a statute, rule, regulation, or common law duty relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media content is preserved, a party or nonparty may not delete information from a social media account that is subject to a duty to preserve.

- Defendants should demand preservation of social media.

4. Techniques to Screen Parties

i. Start with Google.

ii. Social Media Sites

a. Facebook Search by name.

b. Twitter/Instagram Search by hashtags "#"

5. Ethical Considerations of Findings

i. Plaintiff's Considerations

a. New York Rules of Professional Conduct – Rule 3.1(a) - A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.

b. New York Rules of Professional Conduct – Rule 3.3(a)(3) – A lawyer shall not knowingly offer or use evidence that the lawyer knows to be false.

a. Duty of the lawyer as an officer of the Court to prevent the trier of fact from being misled by false evidence. See Comment #5.

c. New York Rules of Professional Conduct – Rule 3.4(a)(1) A lawyer shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce.

d. New York State Bar Association's Social Media Ethics Guidelines (May 2017) Guideline No. 5.B - Adding New Social Media Content. A lawyer may advise a client with regard to posting new content on social media, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim."

ii. Defendant's Considerations

a. New York Rules of Professional Conduct – Rule 4.2(a) - In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law

b. New York State Bar Association's Social Media Ethics Guidelines (May 2017) - Guideline No. 4.C - A lawyer shall not contact a represented person or request access to review the restricted portion of the person's social media profile unless express consent has been furnished by the person's counsel.

c. Mark Barry, M.D. v. Medtronic, Inc., Case No. 1:14-CV-104 (E.D. Tex. Oct. 2016). The District Court provided a list of potential jurors to counsel and issued guidelines on the use of social media to research jurors. The Court prohibited the parties from communicating with any potential juror, from sending an access request to a potential juror, and from performing a search that would notify the juror of same, such as viewing the juror's LinkedIn profile. If the prohibitions were violated, the Court stated that it could sanction, refer the attorney to the State Bar, or institute criminal proceedings against an attorney.

iii. Duty to Preserve Evidence and Spoliation

a. Kirkland v. New York City Housing. Authority, 236 A.D.2d 170, 173 (1st Dep't 1997) "Spoliation is the destruction of evidence…Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them."

b. Would spoliation sanctions be appropriate if relevant social media posts that are removed or taken down, could not be recovered?

III. Is it Effective?

1. The Benefits of Conducting Social Media Research

1. Information Obtained From Facebook and Other Social Media Sites Can Significantly Inform and Influence the Discovery Process

i. It may obviate the need for other discovery tools.

2. Information obtained that is relevant to liability

i. How the accident occurred

3. Information obtained that is relevant to damages

i. Extent of plaintiff's injuries

ii. Extent of plaintiff's physical limitations

iii. Ability of plaintiff to work

iv. Extent of plaintiff's daily activities

v. Credibility

IV. Disclosure Generally

1. Discovery Standard

a. CPLR 3101(a) – There shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof. See Kapon v. Koch, 21 N.Y.3d 975 (2013).

b. CPLR 3101(a) is not unlimited and requires the party seeking disclosure to satisfy the requirement that the request is reasonably calculated to yield information that is material and necessary. See Forman v. Henkin, 30 N.Y.3d 656 (2018).

c. E.E.O.C. v. Simply Storage Mgmt, LLC, 270 F.R.D. 430, 437 (S.D. Ind. 2010). Relevant social media material includes "any profile, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and social networking site applications for the claimant… that reveal, refer, or relate to any emotion, feeling, or

mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state."

d. Richter, Jeffrey Brian, "Discovery of Social Network Data in Litigation" (2014). Law School Student Scholarship. Paper 554. http://scholarship.shu.edu/student_scholarship/554 "Basically, if the information being sought is relevant to the claims or defenses of the parties to the case, then it should be discoverable."

V. History of Social Media Discovery in New York

1. Factual Showing Prior to Disclosure

a. Tapp v. New York State Urban Dev. Corp., 102 A.D.3d at 620 (1st Dep't 2013). "…defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account – that is, information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims."

b. Nieves v. 30 Ellwood Realty LLC, 39 Misc.3d 63 (1st Dep't 2013). The infant-plaintiff alleged physical and psychological damages. The Court held that defendant made showing that plaintiff's Facebook profile contained photographs that were probative as to the extent of the infant-plaintiff's injuries and that they were discoverable after an *in camera* review. If the trial court determined that the *in camera* review would be unduly burdensome, the trial court could direct plaintiff to review her own Facebook account.

c. Spearin v. Linmar, 129 A.D.3d 528 (1st Dep't 2015). Plaintiff alleged damages as a result of a piece of falling wood. Plaintiff's Facebook profile picture depicted him sitting in front of a piano, which the Court held tended to contradict the plaintiff's testimony that he was unable to play the piano.

d. McCann v. Harleysville Ins. Co. of N.Y., 78 A.D.3d 1524 (4th Dep't 2010). In an action involving a motor vehicle accident, the defendants sought the plaintiff's Facebook account information. Defendant claimed that the information was relevant in determining whether the plaintiff met the serious injury threshold, but the Court reasoned that it was a mere "fishing expedition" based on the mere hope that it would reveal relevant evidence.

e. Richards v. Hertz Corp., 100 A.D.3d 728, 730 (2d Dep't 2012). Defendants demonstrated that plaintiff's Facebook profile contained a photograph that was probative as to the extent of the plaintiff's injuries. Therefore, the defendants made a showing that "at least some" of the discovery sought would be relevant or "lead to the discovery of information bearing on her claim."

2. Tailored Demands

a. Kregg v. Maldonado, 98 A.D.3d 1289, 1290 (4th Dep't 2012). Defendant sought disclosure of all of plaintiff's social media account records. The Court held that the demand was not narrowly tailored and that the proper procedure was to demand disclosure that "relates to the claimed injuries arising from the accident."

b. Patterson v. Turner Constr. Co., 88 A.D.3d 617 (1st Dep't 2011). Defendant sought an authorization to obtain all of plaintiff's Facebook records after the incident complained of in the complaint. Court found that it is possible that not all of plaintiff's Facebook posts and records would be relevant. In reversing, the court held that a more specific demand was required to determine relevant information, such as whether the posts contradict the plaintiff's alleged injuries.

c. Ronald Hedges "Limitations on Discovery of Social Media" American Bar Association https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2017/limitations-on-discovery-of-social-media.html

3. Privacy Settings

a. Patterson v. Turner Constr. Co., 88 A.D.3d 617 (1st Dep't 2011). The court previously allowed discovery of a personal diary. Therefore, disclosure of a plaintiff's "private" Facebook posts, if relevant, were discoverable.

4. Jones, Alexandra D., "Forman v. Henkin: The Conflict Between Social Media Discovery and User Privacy" (2016). The Circuit. 87. http://scholarship.law.berkeley.edu/clrcircuit/87

5. Rick E. Kubler & Holly A. Miller, Recent Developments in Discovery of Social Media Content, ABA 3 (March 2015), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_inscle_materials/written_materials/24_1_recent_developements_in_discovery_of_soci al_media_content.authcheckdam.pdf [https://perma.cc/T8TD-RP83]

VI. Recent Updates in Social Media Discovery

1. The Court of Appeals Set a New Standard in Forman v. Henkin, 30 N.Y.3d 656 (2018)

i. Open questions prior to Forman

1. If a party has their Facebook account settings on private, how does an adversary make the factual showing required for production of Facebook records?

2. Would courts be deterred from determining if a sufficient factual showing had been met given the *in camera* review requirement?

3. Would courts be overburdened with performing *in camera* reviews if the party met the threshold factual showing?

ii. Factual Background

a. A personal injury action in which the plaintiff was injured after a fall from the defendant's horse. At her deposition, she testified that she posted on Facebook prior to the accident, but deactivated her account at some point after. She alleged that she no longer engages in various activities, had impaired memory that impacted her ability to read and write, and has been unable to compose e-mails and text messages. She also testified that she could not recall whether she posted any photographs on Facebook since her injury.

b. Defendant sought the plaintiff's Facebook photographs after her injury, and her pre- and post-injury writings.

iii. Prior Legal History

a. The Trial Court found that any photographs posted on Facebook which depict the plaintiff engaging in various activities after her injury, "particularly any activities she claims she no longer is able to engage in due to her fall…" are probative and discoverable. Plaintiff's writings for a limited period of time prior to the accident and post-injury were discoverable to assess the plaintiff's ability to "read, reason, find words, write, and communicate effectively." See Forman v. Henkin, 2014 NY Slip Op 30679(U) (Supreme New York).

b. The plaintiff appealed to the Appellate Division First Department. The Court found that "a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims." The Court held that the defendant failed to establish entitlement to the plaintiff's photographs and messages. See Forman v. Henkin, 134 A.D.3d 529 (1st Dep't 2015).

c. In dissent, Justice David Saxe questioned why there was a heightened rule for social media discovery that required (1) the defendant to produce something from the plaintiff's public social media information that contradicts plaintiff's claims and (2) an *in camera* review to ensure that the defendant is only provided relevant materials.

a. Left open was how a defendant could meet the requirement of producing contradictory information where Facebook privacy settings can effectively limit a party from viewing anything more than the profile picture.

iv. Court of Appeals Sets Standard

a. General Protections from Disclosure

    a. Three categories of protected materials

        i. Attorney work product

        ii. Privileged matter

        iii. Trial preparation materials

    b. Palpably Improper

        iv. Gilman & Ciocia, Inc. v. Walsh, 45 A.D.3d 531 (2d Dep't 2007). Demands are palpably improper if they seek information that is irrelevant or confidential, or are overbroad and burdensome.

    c. Overly broad

        v. Spearin v. Linmar, 129 A.D.3d 528 (1st Dep't 2015). Defendant's demand for all of plaintiff's post-accident Facebook postings was overbroad, but an *in camera* review of plaintiff's post-accident Facebook postings was necessary to identify information that would be relevant to his alleged injuries.

        vi. McCann v. Harleysville Ins. Co. of N.Y., 78 A.D.3d 1524 (4th Dep't 2010). An authorization to obtain the plaintiff's Facebook account is overly broad.

        vii. Harrison v. Bayley Seton Hosp., 219 A.D.2d (2d Dep't 1995) If demands for discovery are "overly broad and vexatious and tend to confuse, rather than sharpen, the central issue," a motion to compel discovery should be denied.

        viii. Ganin v. Janow, 86 A.D.2d 857 (2d Dep't 1982). Use of the phrases "all," "any," or "any and all" is improper and does not satisfy CPLR 3120's requirement that documents be "specifically designated" and "specified with reasonable particularity in the notice."

            1. Exceptions

                a. When use of the above phrases "may relate to specific subject matter" (See In re Citibank, N.A., 100 A.D.2d 784 (1st Dep't

1984) holding that all Federal tax returns over a 5-year period not overly broad; Palmieri v. Kilcourse, 457 N.Y.S.2d 104 (2d Dep't 1982) holding that all medical records pertaining to treatment of patient by a particular doctor discoverable).

d. Evaluated on a "case-by-case" basis. See Andon v. 302-304 Mott St. Assocs., 94 N.Y.2d 740 (2000). The plaintiff-mother brought suit on behalf of the infant-plaintiff alleges damages due to lead paint. Defendants sought to compel the plaintiff-mother to undergo an IQ examination. The Appellate Division found that the defendant failed to offer evidence as to why the plaintiff-mother's IQ was relevant in this case aside from conclusory opinions made by a pediatrician.

b. Forman does away with the requirement that a party identify relevant information prior to disclosure.

a. A party can manipulate privacy settings to frustrate obtaining information.

b. The "threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information." Id. at 666.

c. Considerations for Courts based on Forman

i. The nature of the event giving rise to the suit. Id. at 665.
ii. The injuries claimed. Id.
iii. Any other information specific to the case. Id.
iv. Courts must balance i. – iii. above against the account holder's "privacy concerns" and tailor the order to identify the types of materials that are relevant and should be disclosed. Id.

v. Open questions not resolved by Forman

a. What warrants disclosure of a party's entire Facebook account, including posts?

a. The Court did not reach the question of whether the plaintiff's writings, given her claims that she had impaired memory that impacted her ability to read and write, were discoverable. Rather the Court deferred to allow the defendant to pursue a follow-up request for disclosure depending on what the information ordered to be disclosed revealed. See Forman, 30 N.Y.3d 656, 667, n.7.

b. If a party makes a misrepresentation about the existence of a Facebook account, would the number of posts be relevant to credibility?

b. CPLR 3101(i)

a. CPLR 3101(i): "…there shall be full disclosure of any films, photographs, video tapes or audiotapes, including transcripts or memoranda thereof…There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use."

b. Would a demand under CPLR 3101(i) cover photographs and/or videotapes on Facebook? Instagram? Twitter?

c. The defendants were denied disclosure of evidence that could potentially be relevant to the defense. The parties failed to cite to CPLR 3101(i) and the Court noted that it would not address its applicability in this case. Forman, 30 N.Y.3d 656, 667 n.6.

d. Should CPLR 3101(i) include disclosure of films, photographs, video tapes or audiotapes, including transcripts of memoranda thereof, **including but not limited to those on social media**, involving a person referred to in paragraph one of subdivision (a) of this section?

i. Is that even required?

V. Lessons from *Forman*

1. Tailor social media discovery demands as to both subject matter and time period.

2. Avoid overly broad terms such as "all" and "any."

3. Make a preservation demand for social media.

Effective Use and Ethical Considerations of Social Media Discovery

Robert B. Gibson

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What Is Social Media?

Romano v. Steelcase, Inc., 30 Misc. 3d 426, 907 N.Y.S.2d 650 (Supreme Suffolk 2010)

- Both Facebook and MySpace are social networking sites where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking…

Indeed, Facebook policy states that 'it helps you share information with your friends and people around you,' and that 'Facebook is about sharing information with others'…

MySpace [is] an 'online community' where 'you can share photos, journals and interests with your growing network of mutual friends…'

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Screening of Clients and Adversaries

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Screening of Clients and Adversaries

ABA Model Rules of Prof. Conduct, Rule 1.1, Comment 8

- Lawyers have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation

New York State Bar Association's Social Media Ethics Guidelines (May 2017)

- A lawyer has a duty to understand the benefits, risks and ethical implications associated with social media, including its use for communication, advertising and research and investigation

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Duty to the Client

Lawyers have a duty to be competent that requires them to "maintain the knowledge and awareness about technological changes that could impact the legal participation

-Jessica Weltge and Myra Mckenzie-Harris, Esq.
"The Mindfield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology," American Bar Association Section of Labor and Employment Law Ethics & Professional Responsibility Committee Midwinter Meeting March 24, 2017

A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation

-New York Rules of Professional Conduct—Rule 1.1(a)

A lawyer may advise a client as to what content may be maintained or made nonpublic on her social media account, including advising on changing her privacy and/or security settings. A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else.

However, the lawyer must be cognizant of preservation of obligations applicable to the client and/or matter, such as statute, rule, regulation, or common law duty relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media content is preserve, a party or nonparty may not delete information from a social media account that is subject to a duty to preserve

-New York State Bar Association's Social Media Ethics Guidelines (May 2017)—Guideline No. 5.A

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Techniques to Screen Parties

Step 1

Start with Google

Step 2

Next, investigate social media websites

- Facebook (**search by name**)
- Twitter/Instagram (**search by hashtag "#"**)

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Ethical Considerations of Findings

Plaintiff's Considerations

- New York Rules of Professional Conduct—Rule 3.1(a)
  - A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous

Hypothetical: Plaintiff has social media posts which indicate that he/she is working after the alleged accident.

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Ethical Considerations of Findings

Plaintiff's Considerations (cont'd)

- New York Rules of Professional Conduct—Rule 3.3(a)(3)
  - A lawyer shall not knowingly offer or use evidence that the lawyer knows to be false
  - Duty of the lawyer as an officer of the Court to prevent the trier of fact from being misled by false evidence. See Comment #5

Hypothetical: Plaintiff has social media posts depicting him/her on vacation. Plaintiff testifies that he/she has been unable to travel since the accident.

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Ethical Considerations of Findings

Plaintiff's Considerations (cont'd)

- New York Rules of Professional Conduct—Rule 3.4(a)(1)
  - A lawyer shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce

Hypothetical: Defense counsel demands photographs that depict the plaintiff traveling after the accident.

Ethical Considerations of Findings

Plaintiff's Considerations (cont'd)

- New York State Bar Association's Social Medial Ethics Guidelines (May 2017) Guideline No. 5.B Adding New Social Media Content
  - A lawyer may advise a client with regard to posting new content on social media, as long as the proposed content is not known to be false by the lawyer
  - A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim"

Ethical Considerations of Findings (cont'd)

Defendant's Considerations

- New York Rules of Professional Conduct—Rule 4.2(a)
  - In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law
- New York State Bar Association's Social Medial Ethics Guidelines (May 2017) Guideline No. 4.C
  - A lawyer shall not contact a represented person or request access to review the restricted portion of the person's social media profile unless express consent has been furnished by the person's counsel

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Ethical Considerations of Findings (cont'd)

Defendant's Considerations (cont'd)

- Mark Barry, MD v. Medtronic, Inc., Case No. 1:14-CV-104 (E.D. Tex. Oct. 2016)
  - The District Court provided a list of potential jurors to counsel and issued guidelines on the use of social media to research jurors. The Court prohibited the parties from communicating with any potential juror, from sending an access request to a potential juror, and from performing a search that would notify the juror of same, such as viewing the juror's LinkedIn profile. If the prohibitions were violated, the Court stated that it could sanction, refer the attorney to the State Bar, or institute criminal proceedings against an attorney

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Ethical Considerations of Findings (cont'd)

Duty to Preserve Evidence and Spoliation

- Kirkland v. New York City Hous. Authority, 236 A.D.2d 170, 173 (1st Dep't 1997)
  - "Spoliation is the destruction of evidence... Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them"

Hypothetical: Would spoliation apply if plaintiff deletes information from social media and cannot recover it?

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Is Social Media Discovery Effective?

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The Benefits of Conducting Social Media Research

- Information obtained from Facebook and other social media sites can **significantly inform and influence the discovery process**
- It may obviate the need for other discovery tools

- Information obtained is **relevant to liability**
- How the accident occurred

- Information obtained is **relevant to damages**
- Extent of plaintiff's injuries
- Extent of plaintiff's physical limitations
- Ability of plaintiff to work
- Extent of plaintiff's daily activities
- Credibility

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Disclosure Generality

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CPLR 3101(a)

- There shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof. See generally Kapon vs. Koch, 21 N.Y.3d 975 (2013)

CPLR 3101(a) is not unlimited and requires the party seeking disclosure to satisfy the requirement that the request is reasonably calculated to yield information that is material and necessary

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E.E.O.C. v. Simply Storage Mgmt, LLC, 270 F.R.D. 430, 437 (S.D. Ind. 2010)

- Relevant social media material includes "any profile, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and social networking site applications for the claimant…that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state"

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Richter, Jeffrey Brian, "Discovery of Social Network Data Litigation" (2014)

Law School Student Scholarship. Paper 554
http://scholarship.shu.edu/student_scholarship/554

- "Basically, if the information being sought is relevant to the claims or defenses of the parties to the case, then it should be discoverable"

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History of Social Media Discovery in New York

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Factual Showing Prior to Disclosure

- **Tapp v. New York State Urban Dev. Corp.**, 102 A.D.3d at 620 (1st Dep't 2013)
  - "…defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account—that is, information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims"
- **Nieves v. 30 Ellwood Realty LLC**, 39 Misc.3d 63 (1st Dep't 2013)
  - The infant-plaintiff alleged physical and psychological damages
  - Court held that defendant made showing that plaintiff's Facebook profile contained photographs that were probative as to the extent of the infant-plaintiff's injuries and that they were discoverable after an in-camera review
  - If the trial court determined that the in-camera review would be unduly burdensome, the trial court could direct plaintiff to review her own Facebook account

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Factual Showing Prior to Disclosure (cont'd)

- **Spearin v. Linmar**, 129 A.D.3d 528 (1st Dep't 2015)
  - Plaintiff alleged damages as a result of a piece of falling wood
  - Plaintiff's Facebook profile picture depicted him sitting in front of a piano, which Court held tended to contradict the plaintiff's testimony that he was unable to play the piano
- **McCann v. Harleysvill Ins. Co. of N.Y.**, 78 A.D.3d 1524 (4th Dep't 2010)
  - In an action involving a motor vehicle accident, the defendants sought the plaintiff's Facebook account information
  - Defendant claimed that the information was relevant in determining whether the plaintiff met the serious injury threshold, but the Court reasoned that it was a mere "fishing expedition" based on the mere hope that it would reveal relevant evidence

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Factual Showing Prior to Disclosure (cont'd)

- **Richards v. Hertz Corp.**, 100 A.D.3d 728, 730 (2d Dep't 2012)
  - Defendants demonstrated that plaintiff's Facebook profile contained a photograph that was probative as to the extent of the plaintiff's injuries
  - Therefore, the defendants made a showing that "at least some" of the discovery sought would be relevant or "lead to the discovery of information bearing on her claim"

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Tailored Demands

- **Kregg v. Maldano**, 98 A.D.3d 1289, 1290 (4th Dep't 2012)
  - Defendant sought disclosure of all plaintiff's social media account records
  - The Court held that the demand was not narrowly tailored and that the proper procedure was to demand disclose that "relates to the claimed injuries arising from the accident"
- **Patterson v. Turner Constr. Co.**, 88 A.D.3d 617 (1st Dep't 2011)
  - Defendant sought an authorization to obtain all of plaintiff's Facebook records after the incident complained of in the complaint
  - Court found that it is possible that not all plaintiff's Facebook posts and records would be relevant
  - In reversing, the court held that a more specific demand was required to determine relevant information, such as whether the posts contradict the plaintiff's alleged injuries

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Privacy Settings

- **Patterson v. Turner Constr. Co.**, 88 A.D.3d 617 (1st Dep't 2011)
  - The court previously allowed discovery of a personal diary
  - Therefore, plaintiff's "private" Facebook posts, if relevant, were discoverable

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Recent Updates in Social Media Discovery

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The Court of Appeals Sets New Standard in Forman v. Henkin, 30 N.Y.3d 656 (2018)

Open questions prior to *Forman*

1) If a party has their Facebook account settings on private, how does an adversary make the factual showing required for the production of Facebook records?
2) Would courts be deterred from determining if a sufficient factual showing had been met given the in-camera review requirement?
3) Would courts be overburdened with performing in-camera reviews if the party met the threshold factual showing?

Factual Background of Forman

- A personal injury action in which the plaintiff was injured after a fall from the defendant's horse
  - At her deposition, she testified that she posted on Facebook prior to the accident, but deactivated her account at some point after
  - She alleged that she no longer engages in various activities, had impaired memory that impacted her ability to read and write, and has been unable to compose e-mails and text messages
  - She also testified that she could not recall whether she posted any photographs on Facebook since her injury
- Defendant sought the plaintiff's Facebook photographs after her injury, and her pre- and post-injury writings

Prior Legal History

- The Supreme Court found that any photographs posted on Facebook, which depict the plaintiff engaging in various activities after her injury, "particularly any activities she claims she no long is able to engage in due to her fall…" are probative and discoverable
- Plaintiff's writings for a limited period of time prior to the accident and post-injury were discoverable to assess the plaintiff's ability to "read, reason, find words, write, and communicate effectively"

See Forman v. Henkin, 2014 NY Slip Op 30679(U) Supreme New York

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Prior Legal History (cont'd)

- The plaintiff appealed to the Appellate Division First Department
- The Court found that "a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims"
- The Court held that the defendant failed to establish entitlement to the plaintiff's photographs and messages

See Forman v. Henkin, 134 A.D.3d 529 (1st Dep't 2015)

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Prior Legal History (cont'd)

- In dissent, Justice David Saxe questioned why there was a heightened rule for social media discovery that required
  1) The defendant to produce something from the plaintiff's public and social media information that contradicts plaintiff's claims, and
  2) An in-camera review to ensure that the defendant is only provided relevant materials

Left open was how (1) could be solved when Facebook privacy settings can effectively limit a party from viewing anything more than the profile picture

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Court of Appeals Sets Standard: General Protections from Disclosure

- Categories of protected materials
  - Attorney's work product
  - Privileged matter
  - Trial preparation materials

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Court of Appeals Sets Standard: General Protections from Disclosure (cont'd)

- Palpably improper
  - **Gilman & Ciocia, Inc. v. Walsh**, 45 A.D.3d 531 (2d Dep't 2007)
    Demands are palpably improper if they seek information that is irrelevant or confidential, or are overbroad and burdensome

Court of Appeals Sets Standard: General Protections from Disclosure (cont'd)

- Overly broad
  - **Spearin v. Linmar**, 129 A.D.3d 528 (1st Dep't 2015)
    Defendant's demand for all of plaintiff's post-accident Facebook postings in overbroad, but in camera review of plaintiff's post-accident Facebook postings necessary to identify information that would be relevant to his alleged injuries
  - **McCann v. Harleysville Ins. Co. of N.Y.**, 78 A.D.3d 1524 (4th Dep't 1995)
    An authorization to obtain the plaintiff's Facebook account is overly broad
  - **Harrison v. Bayley Seton Hosp.**, 219 A.D.2d 1524 (2d Dep't 1995)
    If demands for discovery are "overly broad and vexatious and tend to confuse, rather than sharpen, the central issue," a motion to compel discovery should be denied

Court of Appeals Sets Standard: General Protections from Disclosure (cont'd)

- Overly broad (cont'd)
  - **Ganin v. Janow**, 86 A.D.2d 857 (2d Dep't 1985)
    Use of the "all", "any", or "any and all" is improper and does not satisfy CPLR 3120's requirement that documents be "specifically designated" and "specified with reasonable particularity in the notice"

Exceptions:
- When the use of above phrases "may relate to specific subject matter"
  (See In re Cititbank, N.A., 100 A.D.2d 784 (1st Dep't 1984) holding that all Federal tax returns over a 5-year period not overly broad; Palmieri v. Kilcourse, 457 N.Y.S.2d 104 (2d Dep't 1982) holding that all medical records pertaining to treatment of patient by a particular doctor discoverable)

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Court of Appeals Sets Standard: General Protections from Disclosure (cont'd)

- Evaluated on a "case-by-case" basis
  - **Andon v. 302-304 Mott St. Assocs**, 94 N.Y.2d 740 (2000)
    - The plaintiff-mother brought suit on behalf of the infant-plaintiff alleges damages due to lead paint. Defendants sought to compel the plaintiff-mother to undergo an IQ examination
    - The Appellate Division found that the defendant failed to offer evidence as to why the plaintiff-mother's IQ was relevant in this case and that defendant's expert pediatrician offered conclusory opinions

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Forman: Relevance of Information

- Forman does away with requirement that a party identify relevant information prior to disclosure
  - Party can manipulate privacy settings to frustrate obtaining information

"Threshold inquiry is not whether that materials sought are private but whether they are reasonably calculated to contain relevant information"
Id. at 666

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Forman: Considerations for Courts

- Nature of the event giving rise to the suit. Id. at 665
- Injuries claimed. Id.
- Any other information specific to the case. Id.
- Courts must balance i-iii (above) against the account holder's "privacy concerns" and tailor the order to identify the types of materials that are relevant and should be disclosed. Id.

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Forman: Open Questions Remain

What warrants disclosure of a party's entire Facebook account, including posts?

- The Court did not reach the question as to whether the plaintiff's posts, given her claims that she had impaired memory that impacted her ability to read and write, were discoverable. Rather the Court deferred to allow the defendant to pursue a follow-up request for disclosure depending on what the information ordered to be disclosed revealed. See Footnote 7
- If a party made a misrepresentation about the existence of a Facebook account, **would the number of posts be relevant to credibility?**

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Forman: Open Questions Remain

CPLR 3101(i)

- CPLR 3101(i): "…there shall be full disclosure of any films, photographs, video tapes or audiotapes, including transcripts or memoranda thereof…There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use."
  - **Would a demand under CPLR 3101(i) cover photographs and/or videotapes on Facebook? Instagram? Twitter?**
- Forman Footnote 5 – Defendants denied disclosure of evidence that could potentially be relevant to the defense. Parties failed to cite to CPLR 3101(i) and the Court noted that it would not be addressed nor would the Court express any views as to its application.
  - Should CPLR 3101(i) include disclosure of films, photographs, video tapes or audiotapes, including transcripts of memoranda thereof, **including but not limited to, those on social media**, involving a person referred to in paragraph one of subdivision (a) of this section?
  - **Is that even required?**

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Forman: Lessons Learned

Tailor social media discovery demands as to both **subject matter** and **time period**

Avoid terms such as **"all"** and **"any"**

Demand preservation of social media material

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Thank You

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Speaker Biographies

PROFESSOR PATRICK M. CONNORS
BIOGRAPHY

Patrick M. Connors is the Albert and Angela Farone Distinguished Professor in New York Civil Practice at Albany Law School where he has taught New York Practice and Legal Ethics since 2000. Commencing with the January 2013 supplement, Professor Connors became the author for the treatise Siegel, New York Practice. The publication's sixth edition, "David D. Siegel & Patrick M. Connors, New York Practice (6th ed. 2018)," was released in March, 2018. The treatise has been cited in thousands of reported decisions and has been called "The Bible" for litigation in New York State courts.

He received his B.A. degree from Georgetown University and his J.D. degree from St. John's Law School, where he was an editor of the Law Review and research assistant to Professor David D. Siegel. Upon graduation from St. John's in 1988, Professor Connors served as a personal law clerk to Judge Richard D. Simons of the New York Court of Appeals until 1991. From 1991 until May of 2000 he was an associate and then member of the litigation department at Hancock & Estabrook, LLP, in Syracuse, New York.

Professor Connors is also the author of the McKinney's Practice Commentaries for CPLR Article 22, Stay, Motions, Orders and Mandates, Article 23, Subpoenas, Oaths and Affirmations, Article 30, Remedies and Pleading, and Article 31, Disclosure. He also authored the Practice Commentaries for the former New York Rules of Professional Conduct and several articles in the Surrogate's Court Procedure Act. He is currently an author of the New York Practice column and the annual Court of Appeals Roundup on New York Civil Practice, which are published in the New York Law Journal. From 1992 through 2003, he was a Reporter for the Committee on New York Pattern Jury Instructions ("PJI"), the panel of New York State Supreme Court Justices that drafts and oversees the frequent revisions of the standard jury charges in civil cases. His publications have been cited in hundreds of reported cases.

He was a member of the New York State Bar Association's Committee on Professional Ethics from 1996 through 2016. He served on the New York State Attorney Grievance Committee for the Fifth Judicial District from 1997 until 2000. He was the Reporter for the New York State Bar Association's Special Committee on the Code of Judicial Conduct, which published a report recommending substantial amendments to New York's Code of Judicial Conduct. He was also the Reporter for the New York State Bar Association's Task Force on Non-lawyer Ownership of Law Firms. He is a member of the Office of Court Administration's Advisory Committee on Civil Practice and served as a member of the New York State Bar Association's CPLR Committee from 2003 through 2007.

Professor Connors is a frequent lecturer at continuing legal education seminars on recent developments in New York Practice, professional ethics and legal malpractice. He has also served as an expert witness and consultant on issues pertaining to attorney ethics, legal malpractice, and civil procedure.

W. RUSSELL CORKER, ESQ.

Biography

W.Russell Corker's life as a trial lawyer began in 1973 while still a student at Boston University School of Law where, as part of a special trial advocacy program, he was permitted to litigate cases in the District Courts of Boston. During law school, he also interned at the United States Attorney's Office in Boston for two years, where he assisted in and observed many trials. Upon his graduation in 1974, he moved to Long Island and took a position as an Assistant District Attorney in Nassau County. Initially Corker started in traffic court, trying twenty or more cases a day. That experience let him move through the ranks to eventually prosecute major felonies. In 1978, he moved from criminal law to the civil side, taking a position as a trial attorney for a firm that exclusively represented physicians and hospitals in medical malpractice lawsuits. Medical malpractice litigation was still relatively uncommon at that time. Over the next thirty plus years, the area of law known as medical malpractice litigation continued to change along with the American culture. In 1980, Corker's career path changed again when he switched sides and began representing patients in medical malpractice lawsuits. He took a position as the principal trial attorney for a major Long Island plaintiff's firm. From then until now, his practice has been focused primarily on representing patients and their families in medical malpractice lawsuits and severe personal injury cases. During this period, he also began taking classes at night at local universities in the field of medicine and the human body, which he did for the next five years. Corker remained with that firm until 2012, when he opened his own office on Main Street in Huntington Village and a second office on Franklin Avenue in Garden City, to continue representing primarily victims of medical malpractice.

In 1980, Corker also began lecturing to the legal profession, and has continued to do so, on a regular basis. He has taught trial practice, medicine, principles of persuasion, courtroom technology, and a host of other subjects to thousands of lawyers over the succeeding 34 years. He has always been committed to sharing what he has learned with other lawyers in order to benefit their clients and our judicial system. Teaching others has the added advantage of keeping him abreast of current trends and techniques in his field, and he continuously strives to be a better trial attorney. While Corker has received a number of honors during his career — such as Best Lawyers in New York, New York Metro Super Lawyers, the highest rating by Martindale Hubbell, and Ten Leaders in Civil Trial Practice on Long Island — he is most proud of being an active member of the legal community. Corker is honored by being consistently asked to chair and speak at programs to teach practicing lawyers to become better trial attorneys.

ROBERT B. GIBSON, ESQ.

Biography

Robert B. Gibson is a partner at HPM&B and manages its White Plains, New York office. Rob's practice focuses on the representation of major teaching hospitals and individual physicians in high exposure medical malpractice actions. He is a trial lawyer with 20 years of experience representing clients in all phases of litigation, from inception through trial, and has successfully defended many clients through verdict. Rob has been repeatedly selected for inclusion in New York Super Lawyers® and has earned Martindale-Hubbell's highest rating, AV Preeminent®.

Rob lectures nationwide on medical malpractice litigation and trial tactics. In 2015, Rob was a featured speaker at the DRI Medical Liability and Health Care Law Annual Conference in San Francisco. He is also regularly invited to speak at Grand Rounds at hospitals throughout the New York area.

Rob writes frequently on medical malpractice topics, with his publications being featured in *The New York Law Journal* and the *New York State Bar Association Journal*. His articles have also appeared in nationally distributed publications from the Defense Research Institute and the Physician Insurers Association of America.

Rob is a member of the Firm's Executive Committee. After graduating from Pace University, he received his Juris Doctor degree from New York Law School. Rob is a member of the New York State, Bronx and Westchester County Bar Associations.

J.K. HAGE, III, ESQ.

Biography

J.K. Hage III is the owner and managing attorney at Hage & Hage LLC, an 87+ year old law and consulting firm that advises public and private utility, energy, communications, business and technology (including research and technology transfer) clients, and others, both for-profit and non-profit, in the areas of business organizations, governance, new ventures, strategic planning, capital formation, sustainability, mergers, acquisitions, negotiation of transactions, succession and estate planning.

J.K. Hage III has represented public and private utilities for 40 years, with extensive federal and state utility experience in electricity, gas, water, microwave, telecommunications, Cable TV, fiberoptics, wind, solar, broadband, geothermal, hydro-electric generation, landfill electricity generation, sustainable infrastructure, energy-efficient construction, emerging technologies and federal, state and local regulation.

J.K. Hage III is of counsel to Lukas, La Furia, Gutierrez and Sachs, a Washington, D.C. public utility, communications law and engineering firm. Mr. Hage has initiated numerous business ventures including Independent Wireless One Corporation (aka U.S. UNWIRED), a national Sprint PCS affiliate and was the organizer and the first Executive Director of the Griffiss Institute, a market driven national collaboration of industry, the academy and government dedicated to applied research, training, and services in information security.

J.K. Hage III serves as a director of the national Economic Crime and Cybersecurity Institute of Utica College, the Albany Law School Board of Trustees (Co-Chair of Finance Committee), the Albany Law School Center for Innovation, and, formerly, the Glimmerglass Opera Board of Trustees (Chair of Finance Committee). Mr. Hage is a member of the City of Utica Master Plan Steering Committee, the Cornell University R2G Committee, the Multi-Cultural Committee of the Hamilton College Alumni Counsel and a former member of Oneida County, EDGE Board of Directors.

J.K. Hage III is an entrepreneurial activist investor in public and private ventures and has extensive personal experience on public, private, for-profit and non-profit boards and management teams. Mr. Hage is a frequent lecturer in the areas of business organizations, governance, mergers, acquisitions, information security, succession and estate planning, telecommunications regulation, sustainable design, construction and green initiatives.

J.K. Hage III is a member of the American Bar Association, New York State Bar Association and the Oneida and Herkimer County Bar Associations. He was appointed to the New York State Commission of Corrections by Governor Hugh L. Carey in 1982. Mr. Hage is a member of the New York State Bar Association Committee on Public Utility Law and the New York State Bar Association Committee on Trusts and Estates. He is a Vice President of

the Oneida County Bar Association and is a Delegate to the New York State Bar Association House of Delegates.

J.K. Hage III is a life-long resident of the Mohawk Valley and is a small business owner in downtown Utica. Mr. Hage transformed and developed the former Homestead Savings Bank building at 283 Genesee Street into the first and only LEED Gold Certified "green" office building in the City of Utica.

J.K. Hage III, a 1978 graduate of Albany Law School, attended Hamilton College and Oxford University, England. Mr. Hage studied for a Ph.D. in languages at New York University and the University of Madrid. He also lived and studied as an exchange student in Peru and in Mexico. He is the recipient of numerous academic honors and was engaged as an instructor at Albany Law School while still a student himself. In addition, Mr. Hage was the first oralist on the National Moot Court Trial competition team at Albany Law School. Mr. Hage has won numerous public speaking awards.

JOHN L.A. LYDDANE, ESQ.

Biography

John L.A. Lyddane is the Group Head of the Medical Malpractice Defense Group at Dorf & Nelson. Mr. Lyddane has been a medical malpractice and personal injury defense attorney for over forty years and has tried close to 300 cases to dismissal or verdict. In addition, he has briefed and argued cases in the appellate courts including the New York Court of Appeals. He has been involved in every aspect of teaching of litigation and trial skills in university, bar association, Continuing Legal Education, and risk management programs, including six separate four-hour programs on ethics for the litigator. He is a frequent contributor to the legal literature on practical trial skills and the defense of medical malpractice cases, and has co-authored a regular column in the New York Law Journal on Medical Malpractice Defense for many years.

Mr. Lyddane lives with his family in Greenwich, Connecticut, where he has served his community as President of the Belle Haven Landowners' Association, Commodore of the Belle Haven Club, Commissioner of the Belle Haven Tax District, District Leader of District 2 of the Greenwich Republican Town Committee, Sunday school teacher and soccer coach.

Prior to joining the firm, Mr. Lyddane was a Senior Partner at Martin Clearwater & Bell LLP. Earlier in his career, Mr. Lyddane served as Deputy Attorney General for the State of New York.

Mr. Lyddane received a AB in History from the University of Rochester.

He received a Juris Doctor from Syracuse University College of Law. In 1972, Mr. Lyddane was admitted to practice in all courts of New York State. In addition, Mr. Lyddane is also to admitted to practice before the United States Supreme Court; the United States Second Circuit Court of Appeals; the United States Southern, Eastern and Northern District Courts of New York.

ALICIA OUELLETTE, ESQ.

Biography

Alicia Ouellette is the 18th President and Dean of Albany Law School. As Dean, she led the law school in the development, adoption, and implementation of a new strategic plan, led and consummated an institutional affiliation with the University at Albany, and has introduced to the Law School innovative educational programs.

Prior to her appointment as Dean, she served as Associate Dean for Academic Affairs and Intellectual Life and a Professor of Law. Her research focuses on health law, disability rights, family law, children's rights, and human reproduction. Her book, Bioethics and Disability: Toward a Disability Conscious Bioethics, was published in 2011 by Cambridge University Press. She has authored numerous articles published in academic journals such as the American Journal of Law and Medicine, the Hastings Center Report, the American Journal of Bioethics, the Hastings Law Journal, the Indiana Law Journal and Oregon Law Review.

Before joining the law faculty, Dean Ouellette served as an Assistant Solicitor General in the New York State-Attorney General's office. As ASG, Prof. Ouellette briefed and argued more than 100 appeals on issues ranging from termination of treatment for the terminally ill to the responsibility of gun manufacturers for injuries caused by handguns. Before that, Dean Ouellette worked in private practice and served as a confidential law clerk to Judge Howard A. Levine on the New York State Court of Appeals. She has continued her advocacy work in select cases and was lead counsel on the law professors' brief submitted in support of same-sex couples who sought the right to marry in New York State.

A.B., Hamilton College

J.D., Albany Law School

Editor-in-Chief, Albany Law Review

ALFRED P. VIGORITO, ESQ.

Biography

Alfred P. Vigorito is the firm's senior trial partner, bringing 35 years of litigation experience to the courthouse on behalf of his clients. Recently, elected to the prestigious Litigation Counsel of America, Mr. Vigorito has tried over 100 cases to verdict in New York State Supreme Court and Federal Court for the Southern District. The majority of those verdicts were taken in Bronx and Kings County, notoriously dangerous venues, where his clients received verdicts in their favor countless times.

Never one to shy away from the difficult case or represent a recalcitrant client, Mr. Vigorito, a native New Yorker, brings a skill set that combines his street sense with an intimate knowledge of the facts and medicine to each case. While respected for his trial skills, Al takes pride in dealing fairly with his adversaries, resolving cases early when warranted so as reducing litigation costs for his clients. Mr. Vigorito will oftentimes gain discontinuance of initial claims by candidly discussing the case after thorough investigation of the facts and medicine.

Mr. Vigorito has been selected by his peers to SuperLawyers since 2010 and has received an AV rating from Martindale-Hubbell, their highest rank for ethics and ability. Al frequently lectures on medical negligence and trial practice, and regularly conducts Grand Rounds orientations at area hospitals as part of their continuing medical education programs.

Mr. Vigorito, a graduate of Brooklyn Technical High School, St. John's University and Pace University School of Law began his legal career in the Bronx County District Attorney's Office under the Hon. Mario Merola. He served as a Special Assistant U.S. Attorney in the Southern District under the Hon. Rudolph Giuliani, prosecuting high profile public corruption cases. In 1988, Al joined Bower & Gardner, the largest firm defending medical negligence cases in N.Y. and quickly rose to Partner. He continues to represent the healthcare profession and all professional insurance programs.