

JANUARY 2010
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NEW YORK STATE BAR ASSOCIATION

Journal



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by David C. Wilkes

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A Matter of Due Process, the Rule of Law and Fundamental Fairness

"Let us trust that this association may endure, and that it may exercise a collective and permanent influence."

John K. Porter, New York State Bar Association's first president, 1876-1877

The State Bar Association recently turned 133. Like most associations, the State Bar was not immune to the economic difficulties that our nation has faced over the past year. Yet, as we enter 2010, I am pleased to say that the state of the State Bar is good. Our membership numbers remain healthy, and our voice for the profession remains strong. I believe we can safely say that our Association has endured the worst of the recession and, through it all, we met the challenge from our first president, John K. Porter, that the State Bar endure, even through tough times, and maintain its collective and permanent influence.

Promoting reform in the law and facilitating the administration of justice are two mandates found in our enabling act, which resulted from a meeting held in the Assembly Chamber of the Old Capitol on November 21, 1876. We are always striving to meet these obligations, and in the recent weeks and months, we have fulfilled this mandate on several fronts.

Seeking to encourage the Legislature to bring to a vote the issue of legalizing marriage for same-sex couples, we have asserted, in accord with State Bar policy adopted by the House of Delegates this past June, that marriage equality is a matter of fundamental fairness and that all New Yorkers should have the equal protections, responsibilities and dignity associated with marriage. This includes basic legal rights in critical areas such as health care, hospital visitation and child custody issues.

When U.S. Attorney General Eric Holder announced that the Guantanamo Bay detainees charged with the September 11 attacks would be tried in federal court, we asserted that this course of action comports with due process, on the basis of State Bar policy adopted by the House in June 2008 and a resolution co-sponsored by the State Bar and adopted by the American Bar Association earlier this year. Our federal courts are capable of handling high-profile cases that are legally and emotionally challenging. Holder has since stated his belief that federal court is the surest way to guarantee both the convictions and punishments that his office will seek. As the lead prosecutor, the forum decision is his to make.

When capping the compensation owed to victims of medical malpractice entered the health care debate, we asserted that this so-called tort reform would unjustly discriminate against persons who have already suffered devastating losses. When someone is injured due to medical malpractice or any other tort, there is a cost. The question becomes one of who should bear the burden of that cost. Surely not the victim. One of the cornerstones of our democracy is a legal structure that allows the judicial system to assess damages against parties found responsible for doing harm.

These positions may be unpopular to some, but where justice is concerned, it is better to do what is right and not merely what is popular. In speaking out on these and other important



issues, we are fulfilling our role as the chief proponent of the rule of law. Through our advocacy efforts, we are carrying out the mandate, set forth in our enabling act, to promote legal reform and facilitate the administration of justice – for the benefit of the profession and the public.

Advocacy on behalf of the public and the profession has been and will remain a top priority for the State Bar. It is an important part of our mission and a service that we provide to our members and their clients. This past year, we have spoken out against attempts to increase court filing fees and the fee associated with registering for the bar exam. We successfully fought for the extension of the effective date of the new Power of Attorney law, and we continue to monitor corrective legislation. We have urged the state Legislature to provide adequate funding for civil legal services, and we have called upon Congress to eliminate the restrictions placed upon civil legal services funding.

As the new year begins, our advocacy efforts are, for the first time, guided by state *and* federal legislative priorities. We initiated our state legislative

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PRESIDENT'S MESSAGE

priority program in 2003, and we are launching our federal legislative priority program this year. We begin compiling our priority lists by first seeking input from our membership. To be considered a priority, an issue must be supported by State Bar policy. Potential priority issues are then brought before our Steering Committee on Legislative Priorities, which in turn recommends a list of state and federal priorities to the State Bar Executive Committee for approval. State legislative priorities for 2010 are (1) integrity of New York's justice system, which includes funding for civil legal services for the poor, the establishment of an independent Indigent Defense Commission, judicial salary reform and the implementation of recommendations pertaining to wrongful convictions; (2) the enact-

ment of the Uniform Mediation Act; (3) the Compact for Long-Term Care; (4) equal legal rights for same-sex couples; and (5) support for the legal profession, which reflects our core mission to promote legislative proposals that benefit the profession and to oppose those proposals that would burden it.

Our federal legislative priorities for 2010 are (1) the repeal of the Defense of Marriage Act (DOMA); (2) support for the Reporter Shield Law (Free Flow of Information Act); (3) the reduction of global warming; and (4) the integrity of the justice system, including funding and restrictions on funds for civil legal services, protection of the attorney-client relationship, and the creation of additional federal judgeships.

I am grateful for the guidance from our Sections and Committees, which

provide a breadth of expertise that lends credibility to our positions on a wide range of issues. Policy-makers know that State Bar positions are the product of the collective input and debate of lawyers from all backgrounds. We have worked with combinations of our Sections and Committees in our advocacy efforts, including the Elder, Health Law and Real Property Law Sections, and the Civil Rights and LGBT People and the Law Committees. To continue to meet our mandate – and Past President Porter's challenge – we need to be advocates for our core values. Our ability to allow all sides of an issue to be heard, to seek consensus, and zealously advocate for our positions are the strengths that make our Association the champion of access to justice and the rule of law. ■

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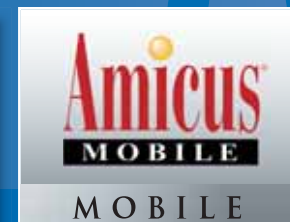
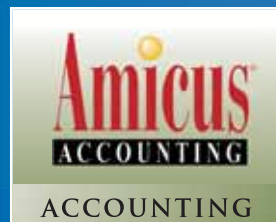
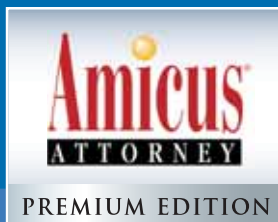


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February 25 New York City

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March 18-19 New York City

Bridging the Gap - Spring 2010
(two-day program)
March 24-25 New York City (live session)
Albany; Buffalo
(video conference from NYC)

Ethics and Civility
(9:00 am - 1:00 pm)
April 16 Buffalo; New York City
April 23 Albany; Long Island; Rochester

14th Annual New York State and City Tax Institute
April 22 New York City

Women on the Move
(12:30 pm - 5:00 pm)
April 29 Albany

†**Ethics and Professionalism (video replay)**
April 30 Canton

Immigration Law
(two-day program)
May 4-5 New York City

Commercial Real Estate Titles
May 5 New York City

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Revealing the Naked Truth About Solos

By Gary A. Munneke

The tabloid headlines would be clear: there is some mysterious secret that solo practitioners are hiding. Readers will learn the salacious details by turning to their *Journal* for the unfolding story, the naked truth, about this secretive clan who eschew partnerships with other lawyers, the clan's mysterious rituals and its clandestine practices. It is a story that would make Dan Brown drool.

Like most tabloid journalism, the truth about solos is a lot less titillating than the headlines. This group of lawyers makes up the largest segment of legal practitioners in New York and every other state in the United States. Outside of metropolitan areas, solos represent the bulk of most law practices, and even a "large" firm in many small towns likely will have five lawyers or fewer. The decision to become a solo practitioner may have been driven by any number of considerations:

- Family and personal contacts in a particular geographical area – the lawyer may have been born in a particular county, moved there at some point in life, or spent a significant amount of time there;
- A spouse or significant other with family and contacts in the area;
- Clients or business contacts from the area;
- Attendance at law school or college in the area;
- Opportunities found through research on the geographical area, including the legal needs of the community; or
- Whimsy – as in, "You know, I've always wanted to live in the Adirondacks, and I'm not getting any younger."

People become solos for different reasons. It is worth noting that regardless of why one made the decision to go solo, the reality for solos is that they are where they are. There is evidence to suggest that many lawyers move in and out of solo practice and small firm partnerships throughout their career. A partner in a two-lawyer firm may spin off her own solo practice, only to become partners with another lawyer several years later, and still later end the partnership to form an office-sharing arrangement as a solo again. But to the extent that the original motivations to go solo are related to long-term career expectations, these motivations may be useful to consider:

- Some lawyers become solos because they read *To Kill a Mockingbird* in high school and retain the vision of Atticus Finch, the independent, respected and prosperous small town lawyer, who serves justice and lives out the American dream.
- Some may have decided in law school that they do not want to work for a law firm and so opened a law office right out of school (over the past 30 years, this number has hovered at around 5% of law school graduates, according to the National Association for Law Placement).

- Some graduates may take the solo plunge because they do not find jobs with law firms (or at least the law firms of their choice). This group has swelled for the 2008 and 2009 graduating classes, and may continue to grow in 2010.
- An even larger number of law school graduates work as associates for several years with a law firm, learning the ropes of practicing law before leaving to start their own firm.
- A subset of this group, described as "suddenly solo," consists of lawyers who have been laid off by employers squeezed by the economic downturn – although, to be fair, even in the good times involuntary attrition from law firms drives many lawyers to solo practice.
- Although much of the conversation about hanging out a shingle focuses on recent law school graduates and younger lawyers, the majority of all solo startups are by experienced lawyers who leave partnerships both voluntarily and involuntarily.
- The last group comes from corporate and government jobs. These lawyers have learned commensurately with their peers in private practice how to deliv-

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er legal services, but they may lack the business and marketing skills to manage an independent private practice where profit and salary are identical.

Solos practice in a variety of different settings, reflecting where they are, whom they represent, and what they want out of the practice of law. One lawyer may practice alone because he just doesn't want to have to answer to anyone else, especially a law partner. Another lawyer may form a partnership with the espoused goal of building a larger law firm. It is worth noting that Skadden, Arps started out as two lawyers and a dream. The traditional model for the solo practice consisted of a single lawyer with a jack-of-all-trades secretary who ran the back side of the business while the lawyer practiced law. Over the years, many variations on this theme have emerged:

- Some lawyers have expanded the traditional model to include multiple paralegals and other support staff. A lawyer who retains a staff of 10 secretaries and paralegals is still a solo.
- A few lawyers, while operating as sole proprietorships, employ additional lawyers as associates or contract lawyers with no realistic prospect for partnership.
- Two or more solo lawyers may decide to share office space. They may purchase a building together, or take advantage of a lease conducive to a multi-lawyer practice, but have no interest in forming a partnership; they may even be former partners who dissolved their partnership, but continue to practice in the same physical space.
- A true solo lawyer may be described as one who practices with no staff at all. This solo may practice in what looks like a traditional law office, nest in another law office or business, or work from home, but the distinguishing element of this model is that the lawyer does not employ anyone on a regular basis.
- Some new lawyers lease office space from existing firms, frequently under a work-for-space arrangement, and benefit from the use of the existing firm's staff, conference rooms and other facilities.
- An increasing number of lawyers lease space in legal suites where a management company provides the space and all the back office support to a number of solos and small firms within the suite.
- Finally, this list would be incomplete without mentioning the emergence of Internet lawyers, whose practice is in cyberspace. These lawyers may have a home base, but they are just as likely to be mobile practitioners whose office is wherever they are, provided they have an Internet connection.

The variety of solo practices illustrates the difficulty of describing the typical solo lawyer, especially for a magazine like the *Journal*. Yet, the editors believed that it was important for the *Journal* to address questions relevant to solos. Not only are solos the largest cohort of lawyers licensed in New York, they are also the least likely to join the New York State Bar Association. In 2008, NYSBA created a Special Committee on Solo and Small Firm Practice to study and make recommendations concerning solo and small firm practice in New York. The Committee Report, which was released in April 2009, was adopted by the State Bar House of Delegates in June. The recommendations are incorporated in this issue, and many of the recommendations relate to increasing the focus of communications to solo and small firm lawyers. Recognizing the challenge of reaching such a diverse group of lawyers, the *Journal*, in cooperation with the Law Practice Management Committee, has assembled what we believe is a lineup of useful and interesting articles:

- David Wilkes leads off with an examination of the essence of solo in "What It Takes to Market Yourself and Your Practice," look-

ing first at the decision to become a solo practitioner, and then describing what someone choosing to become a solo needs to do to market that practice.


- A related topic is addressed in a short article by Cynthia Feathers, titled "How to Fly Not-So Solo." She argues that by participating in bar association activities, solos can reap many of the benefits of group practice without the hassles.
- Next, Nancy Schess, in "Get It Right From the Start: Human Resources Compliance for the New Law Practice," provides an excellent overview of how employment laws apply to law firms. Although most lawyers know generally that these laws exist, many do not think about how the provisions apply to them.
- In "Smartphones, Laptops, Clouds and Tweets: The Reluctant Entrepreneur Builds an Office," Carol Schlein offers suggestions for lawyers opening their own practice regarding the technology they will need in order to practice law efficiently and successfully.
- Finally, this issue includes a summary of the recommendations of the Report of the Special Committee on Solo and Small Firm Practice, for your information.

This certainly is not the end of what could be or needs to be said about solos. Watch for future solo-oriented articles in the *Journal*. Read the two electronic newsletters of the Law Practice Management Committee, the monthly *T-News* (on technology) and the quarterly *LPM e-Newsletter*. Look for additional resources – programs, books, articles, Web links and blogs – on the NYSBA Solo Web page, <http://www.nysba.org/solo>. If you have questions about the solo practice of law, you can contact NYSBA's Director of Law Practice Management, Pam McDevitt (pmcdevitt@nysba.org), who will either answer your questions or refer you to someone who can. ■

What It Takes to Market Yourself and Your Practice

By David C. Wilkes





In the practice of law, misery often does not love company. Many lawyers prefer to experience all on their own the stress, anguish, and sleepless nights that go with a legal career, or to share the burdens with only a few companions. These lawyers cannot rely on a smooth-talking senior partner in a Brooks Brothers suit to land a big client they will feed on for years; they cannot let the billing department worry about issuing invoices and ensuring clients pay. Big-firm lawyers do not need to consider whom to hire and when to hire more staff, and how much to pay them with what benefits; how much office space is enough for the next five years; how to decorate the offices; what an advertisement should look like; what quality of paper is sufficient for a respectable business card; what to do when the receptionist is out on leave; or any of the remaining items on the endless list of solo practice worries.

But then, the solo or small-firm practitioner is unlikely to find a pink slip on his or her desk one morning. A well-run small practice allows far greater control over the fate of your employment than you will ever find in a big firm or corporation, where the decisions that affect you are often made without your input or knowledge. For many lawyers, having control vastly overrides the challenges of running a small practice and is motivation enough. But the challenges must be considered seriously. And, of all of those challenges, the most daunting and downright repugnant for many attorneys is that of the endless task of marketing to prospective clients and re-selling oneself to existing clients. Many books and seminars will tell you how to “sell,” but they will not tell you why you want to be in a small practice; assess your strengths and temperament, and your skills and weaknesses; or recommend the areas of practice in which you should concentrate (or not). All of this will translate directly into your ability to “sell” your practice and your level of success as a solo or small-firm practitioner.

Motivation

What is your motivation? Do you have a motivation? Or are you simply unsure what else to do with your career? At its core, forming a small or solo practice is about control and

confidence. Whether by choice or circumstance, attorneys who practice on their own control their environment, their lifestyle, and their level of income, to a far greater extent than those who work in a large firm. While any solo practitioner will be quick to tell you that there are many aspects of practice that seem oppressive at times, these practitioners will often also tell you that working for a large firm – and the consequent loss of control – is an unthinkable alternative. Generally, solo and small-firm attorneys possess a fairly high degree of confidence, not only in their ability to represent clients well, but, more significantly, in the likelihood that they will succeed in business.

Motivation sometimes arises from desperation. The loss of a big-firm job in a slumping economy; the need for flexible hours because of family demands; frustration with a seemingly arbitrary partnership track that fails to recognize your efforts. Motivation may also grow out of good fortune: a successful uncle is planning to retire with no one to take over his practice; an interest in a niche field opens up a career track; a law school buddy who is in-house counsel calls to ask if you could handle his company's work on retainer. Many attorneys think longingly for years about opening their own practice but wait cautiously, endlessly, for the right moment to arrive; often, that moment never comes. If you truly want to start your own practice, look for the best opportunities, plan well, evaluate your abilities, create useful alliances ahead of time, but don't rely on a chance break finding you – you need to push yourself out the mega-firm door.

As with any business, running a successful small or solo practice requires thinking about today at the same time you are thinking about tomorrow – and a year from now. To a far greater extent than in a large firm, you will take serious note of the conundrum you face when you resolve your most important case only to realize that you have nothing to occupy your time the next morning.

The motivation to start a practice of one's own is something different from the motivation to keep it running over the long term. Part of the day is spent providing the services clients have asked for, and part of the day is dedicated to targeting opportunities to generate demand for your legal services in the future.

Inevitably you will experience hot weeks, in which new matters seem to roll in the door effortlessly and seemingly out of nowhere, and then dry months, when despite your most fervent attempts at marketing you begin to wonder whether the “eat-what-you-kill” reality of a solo practice is right for you. You will also often wonder what in your marketing repertoire is actually having a positive effect, and what is simply a waste of time.

Most lawyers are prone to bathe in the synthetic security of remaining extraordinarily busy with the day-to-day work at hand rather than dealing with the truly daunting prospect of securing future legal work. The

greatest motivator is cash flow. And you will notice a strong correlation between your efforts to generate new work and your receipts, so do your best to motivate yourself to find work long before it runs out.

Of course, advice and suggestions from others never quite have the same impact as when things really happen to *you*. One may be warned a thousand times of what lies ahead but become a believer only when it actually comes true. Experience is the best and most reliable guide. Allow the reasons that originally motivated you to consider a solo or small practice, and the feelings of satisfaction you experience when things are going right, to carry you through the inevitable moments of indecision or self-doubt.

Marketing 101: What Do You Have to Offer?

What are your talents? This may seem like a question asked by a high school guidance counselor, but you will be surprised to find how often the answer to this question turns out to be a crucial determinant of whether you succeed or fail. It is also the primary reason one should never follow formulaic approaches to business, marketing, hiring decisions or perceived “hot” areas of practice, which are generally the result of someone else's personal – that is to say, non-universal – experience. The hard part is, just like in high school, we often don't have a very good read on our talents until we are forced to *use* them in practice. Before you can begin to think seriously about your approach to marketing, or the focus of your practice itself, you will need to understand that most of us are terrible at selling something we don't have a passion for or if we use means we don't believe in.

You may think you've tried. You may have worked for several years as a young associate attorney with a mid- or large-sized law firm and found your marketing skills to be dismal. Despite efforts to become involved in community organizations, attend networking breakfasts, and take an active role in your local bar association, you have managed to generate just a single real estate closing in three years. This would seem to foretell doom and starvation in a solo practice. Yet, the marketing giant within you may merely be sleeping.

Perhaps working in a larger firm, in an area of law that is commonplace, has smothered your ability to catch clients – you are effectively competing with lawyers who have been shaking those same trees for years. Maybe your personality is better suited to “high end” marketing, such as article-writing and seminars, instead of more pedestrian attempts to glad-hand with a group of others who are equally desperate to wring a lead from somewhere, anywhere. Or it could be that you are pushing wares that you are not particularly committed to: selling discount divorces when you'd be happier planning estates; closing residential loans instead of securing cash

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for severed body parts; documenting IPOs when you might prefer to prove a lack of intent to kill. Marketing skill is of course crucial to the solo or small-firm lawyer, but spend time carefully evaluating your level of ability and, more important, whether a change in your situation and approach might result in a significant improvement of your fortunes. And bear in mind that many lawyers did not know they were especially good at rainmaking until their next meal depended on it. So, do not presume yourself dead on arrival if you do not feel you fit the prototype of a great marketer.

tial real estate stand a better chance of success, all things being equal. Some solo and small-firm practitioners also find great success exploiting an under-served niche area, such as tax certiorari, appellate work, or even homicide trials, in order to quickly build a name and reputation for great competency.

This all assumes that you believe the best way to succeed in a small or solo practice is to limit your services to one field of law or at least to a relatively narrow and related group of fields. Some will inevitably prefer to serve as the more traditional lawyer, a generalist, ready to take on virtually whatever walks in the door.

The fact that there are many practitioners already out there in your chosen field should never imply that there is no room for you.

Are you detail-oriented or are you a big-picture person? This assessment will predict much about the way in which your small office and practice is run. You may find that your books are perfectly balanced and you never miss a meeting, but your overall business strategy is lacking. It is rare to find anyone – much less an attorney – who excels in more than two or three aspects of running a small firm. Some of the best small firms succeed because one partner is particularly good at office administration, another is a great marketer, the other has a strong long-term vision, and each knows his or her own strengths and weaknesses.

In a solo practice you will need to be in charge of all these functions, whatever your level of ability, including marketing. But, even if you have partners or associates, and others are stronger than you at marketing, the promotion of the firm is everyone's responsibility, and everyone can stand some improvement in this area.

Practice Area and Marketing

Practitioners at the outset of their career will need to begin their planning by deciding which areas of law to concentrate in. There are few areas of practice that a solo or small-firm practitioner cannot pursue, although there are always exceptions, such as securities work; major commercial real estate transactions; large, international mergers and acquisitions. While it may be self-evident that you should aim to practice in a field that you enjoy, what may not be as obvious is the extent to which your chosen area will impact your success at marketing. It may be necessary to sacrifice idealistic notions of pursuing a passion in a particular area of law in order to build a practice that thrives. One hopes to find a practical marriage of the two.

For a small office, the more traditional solo practices such as family law, elder law, personal injury, and residen-

This certainly presents the opportunity to experience greater day-to-day variety, though over the last several decades the trend has moved in the opposite direction. As most areas of practice have become more complex, it has become difficult to be a jack of all trades. However, marketing a general practice often lends itself – for the younger attorney who is not well established – to drawing in overflow work and the odd one-off matter here and there, and if your temperament is suited to this, then by all means build your marketing efforts around the most likely sources of work. You may find that many people still prefer the concept of a single lawyer for all their needs and will be quite receptive to your practice. Recognize, though, that absent strong sources of referrals or a good self-promotion campaign to the general public, you will be competing with armies of specialists who will invariably know more detail about each practice area you hope to promote.

This brings us to the question of “the competition,” and whether it matters, particularly if you are *not* a generalist. On the surface it would seem simple enough: look in the telephone book and, based on the number of advertisements, one or another practice area would be foreclosed from consideration. But the fact that there are many practitioners already out there in your chosen field should never imply that there is no room for you, or that you could not quickly grab a significant piece of the market share. For example, one look at the listings under “personal injury” would quickly dissuade even the most confident lawyers contemplating a solo practice in that field, but obviously it does not. Very often the same names have been around for years, with many on the edge of retirement, and a new face in town – ambitious, flexible, receptive, innovative – is just what is needed.

The competition is, clichés aside, often what you make of it. The hardest competition is often from your

colleagues in a large firm who are scrambling to top you; now that you've decided to eschew the large firm, the competition should not overly worry you. Whether through developing a niche practice, using higher-end marketing, being a fresh face in a tired old field, or simply using superior interpersonal skills, you are likely to succeed no matter how many other practices in your chosen field are listed in the Yellow Pages.

Who Are You Marketing To?

Some lawyers market to clients and others spend more time marketing to other lawyers. Your marketing object will often depend greatly on your type of practice. In general, the more your practice area is a sub-specialty or niche, the more your focus will be on marketing to other lawyers. For example, if your practice concentrates in the litigation of estates, you may wish to concentrate your efforts on becoming known among the trusts and estates lawyers in your community, so you will do better to place ads in the local bar association's newsletter than the Yellow Pages (it is unlikely that a lawyer handling an estate will spend a moment looking in the Yellow Pages within his or her own practice area). Likewise, you will want to spend time participating in seminars provided to other lawyers rather than those aimed at the "end user" clients. If you want to obtain overflow work to get yourself started, you will need to seek out other lawyers with strong practices who seem overwhelmed with work.

On the other hand, if your practice will rely on clients finding you first, tailor your marketing program to becoming known in the relevant community of prospective clients. For example, get involved in local civic organizations, advertise, offer "free" seminars on your area of concentration to potential clients, and so on.

Getting Known

Imagine the mind works like Google. When someone is searching for a lawyer that can provide your services, you hope that your name consistently appears on the first "page" of that person's mental search results and is enticing enough to click on for more information. Likewise, self-promotion is more about consistently placing yourself in front of your intended audience, even in a small way, than making a single big splash that will soon be forgotten.

Once you have decided where to focus your marketing effort, you will have a better sense of which methods of promotion will work best so you can minimize expenditures of time and money. The following sections canvass some of the more common ways lawyers use to promote themselves efficiently and effectively.

Are You a Joiner?

Look to the broad array of legal associations and organizations for both professional development and generat-

ing new business. Aside from the more general-interest lawyers' organizations, such as local, state and national bar associations, lawyers often belong to specialty lawyer groups and non-lawyer trade and professional organizations.

Your choices will be guided partly by your intended audience: you may, for example, focus more on lawyer groups outside your specialty area because that will be a source of lawyer-to-lawyer referrals; you might instead wish to concentrate on trade organizations that will come to recognize you as their "in-house" source of legal expertise. In a lawyers' organization, such as a bar association, you will be interacting only with other lawyers – in many cases lawyers who are seeking the same business as you, though perhaps in a different geographic area or perhaps with a slightly different emphasis. In non-lawyer organizations, such as a group of municipal officials, you may be the only lawyer or perhaps the only one in your practice area – a clear advantage for marketing.

Evaluate an organization as best you can before joining. What are the annual fees or dues? Today, some professional associations levy fees close to, or sometimes in excess of, \$1,000 annually. And bear in mind that you will likely join several organizations over the coming years, in addition to bar associations; your annual dues budget will quickly swell.

Take a look at the membership list in advance, if you can. Do you know anyone? Are these the types of clients or leads to clients that you want to reach? Despite impressive names among the group, are they realistic targets for you? How large is the group? You may get lost in a very large group while a smaller group might allow you to be a bigger fish in a smaller pond, though if the group is too small the marketing opportunities may be limited.

Some groups are ostensibly built around professional development and the betterment of a particular practice area or trade interest. Much time will be dedicated to continuing education, improving relevant legislation, and discussing common problems and solutions. In these groups, the suggestion that anyone is there to "network" or "market" their services is usually frowned upon, though it is often obvious that most members are involved for precisely those purposes and freely hand out their business cards at any opportunity. Even if no direct networking occurs, membership in such organizations – as may be displayed on your curriculum vitae, Web site, brochures, and other matter – may signal to a prospective client that you are active in the right circles and your interest in a particular area of law is not a passing fancy.

This brings us to the question of exactly what you hope to get out of your various marketing efforts. Be clear and honest with yourself about your reasons for joining a group. In many instances, you will look back over a couple of years' commitment of time and energy and reflect

on the fact that your membership has not led directly to a single client. Yet, this is not necessarily a sign that your time has been wasted or that it's time to move on to something else – often, quite the contrary. Remember, some groups add panache and prestige to your resume. You may find that the people you met in a particular group show up in related organizations and thus your credibility is solidified. Sometimes membership in certain organizations helps to *keep* existing clients, and that is, of course, just as important as finding new ones. Time is also a factor: in some groups, dividends and community recognition will come many years down the line, but this is an investment in your future.

On the other hand, don't grow too comfortable with an organization that seems top-heavy with attorneys feeding on the same work you desire or that doesn't truly present either direct or indirect prospects for business generation. Be objective and critical of your decisions and move on when you feel you are wasting effort.

The High Road(s) in Self-Promotion

Consider more education. Depending on your age, available time, economic resources, and, above all, motivation, an added degree or certificate may give you an edge in marketing. Practitioners in specialty areas may distinguish themselves by showing a far deeper or more sophisticated understanding of a given area than their colleagues, as well as a more genuine interest in the field. Some certificates are a dime a dozen and produce more self-gratification than clients, so be cautious about entering a long-term program. On the other hand, high-quality degree programs at reputable institutions may begin to open up new opportunities for your practice before you have even completed them: very often, as an advanced student with a law degree already in hand, professors and other advanced degree students will present terrific networking opportunities in your field.

You can also distinguish yourself through writing and lecturing. The greatest advantage is that aside from your time commitment – which should not be underestimated – this is free self-promotion that is generally targeted to an ideal audience which will meet you under ideal circumstances. Not everyone has the talent or inclination to write and lecture, but if you do you will be able to take advantage of the highest end of the marketing spectrum. You may find that in doing so you begin to be drawn in to focus on a range of related issues within a fairly narrow field and, after a few publications or lectures, you are viewed as one of the experts. Some of the most satisfying results of this type of effort are invitations to lecture or write about your topic area of interest and calls from local media sources seeking quotes and observations.

Similarly, don't hesitate to take what you've developed and then use it. If you've recently published an article or two on a topic of hot local interest, research the name

and contact information for the local print, television and radio news editors; send them your articles along with a cordial – and not overly presumptive – letter that offers yourself as a subject matter resource in the future. If you develop a Web site, post your articles and summaries of your lectures there too.

The Not-So-High Road

Most attorneys advertise in some form or another. The New York Rules of Professional Conduct 7.1–7.5 cover advertising. These Rules are not as restrictive as some lawyers may think. They generally target false, deceptive and misleading communications to prospective clients and prohibit in-person solicitation of legal work for profit. The Rules, however, should be carefully considered by all lawyers contemplating marketing activities.

The prototype for law firm advertising is best illustrated by the ads that appear in the Yellow Pages, in trade publications, and on local television and radio stations. This is the most expensive type of advertising and requires careful research and consideration of the potential audience. Often, however, the reality is that the newly minted solo attorney receives a call from a sales representative and is quickly sold on a very expensive proposition.

Whether and where to advertise will depend largely on your type of practice and the sources of work you desire – whether primarily from attorney referrals or direct client walk-ins. For some practices, the goal of advertising is to catch a potential client's eye with the result that you get a call requesting a consultation or "Help – immediately!" For others, advertising is about gaining exposure in the marketplace and making the firm's name one that prospective clients will begin to recognize; eventually, it will also serve to remind existing clients that their attorney is still there.

Whatever your reason for advertising, your campaign is unlikely to succeed without long-term commitment and regularity. So budget accordingly and have the wherewithal and stamina to stick to it even when times are lean. An aborted campaign can mean a wasted investment. That being said, do not be afraid to reevaluate your advertising approach and retool it where necessary. It is often helpful to solicit the candid (sometimes painful) comments of those who know you, assuming they can be trusted to not simply provide hollow reassurances.

A Web Presence

Your Internet presence is a close cousin of advertising. Fewer and fewer attorneys run their practices without a Web site, though many are unclear about their objectives. You may well decide that a Web site is unnecessary – for instance, if your sources of business are fairly well established and you have neither a need to be "found" on the Web nor a need to present yourself to existing clients through an online presence. But, for most

lawyers, the Internet serves one or more useful purposes that are worth the cost.

Generate New Business

Most of us think of a firm Web site as a means of attracting new business. Usually, if this works as intended, someone who seeks your services will type relevant words into a search engine and your Web site will appear somewhere near the top of the results list. There are many techniques for accomplishing this, all of which are beyond the scope of this material, but, basically, to make this happen you will need to try to think like the person who is searching for you.

Next, and equally important, what will potential clients see when they arrive at your site? Again, a discussion of the design and content of a firm Web site is beyond these materials, but here are a few simple pieces of advice on what to avoid.

Do not give in to the temptation to

- include much personal information – someone approaching you for legal services is likely to be confused (or turned off) by your political commentary, pets, hobbies, spouse's name, etc.
- use much animation or "flash" effects, which are highly overdone and irritating to many Web users;
- include a group picture of "the firm," however small;

- include an overabundance of text describing in great detail your areas of practice or your successful cases. Your Web site is an introduction and most viewers will begin to yawn after too much online reading – definitely *not* the intended effect.

Web sites can be expensive, but not necessarily so. Template Web sites that you create yourself or that are mass produced by some Web designers generally *look* like it and are not worth the discounted price. Don't assume that Internet users will be impressed simply because you have a Web site. If they are already Internet savvy, and particularly if they are comparison shopping for lawyers online, potential clients will likely discriminate between the sites that were created with care and those that look like an afterthought.

Also, you will likely provide an e-mail address on your Web site. Here are two points of advice: (1) make sure to *check* your e-mail daily (really, several times a day) so that you can respond to inquiries promptly; and (2) make sure your e-mail appears to be based at your Web site's domain name (such as dcwilkes@huffwilkes.com) as opposed to an "AOL," "Yahoo," or other Internet Service Provider (as in dcwilkes@aol.com).

Maintain Old Business

In many cases law firms do not create Web sites to generate new business. This may sound counterintuitive. In

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fact, for some practices, such as those catering to large corporations that do not generally search for attorneys through Google, Web-based traffic tends to generate undesirable leads and clients whose e-mail inquiries and telephone calls require polite and occasionally time-consuming responses. For these firms, their Internet presence provides a malleable firm brochure that is useful when prospective clients wish to learn more about your background and experience, or existing clients need some reassurance that you are as established as you say you are. Some clients will be concerned about your apparent lack of sophistication and savvy if they cannot find you on the Internet. And don't be surprised to be on the telephone with a new client as they tell you they are simultaneously "checking you out" on the Web.

Asking for Work and Keeping It

Two areas of marketing are frequently overlooked, yet they are without doubt the most crucial: asking for work, and keeping your existing clients.

The hardest part first: the set of lawyers who relish asking a prospective or existing client for the opportunity to provide legal services is exceedingly small. Some lawyers may seem smoother at asking for work than others, but few can honestly say they look forward to it, and most feel it is the most demeaning and embarrassing part of the private practice of law. Indeed, many lawyers eschew "soliciting" (not surprisingly a synonym for prostitution) altogether by going into public service. But, as a solo or small-firm practitioner, there is no avoiding it; in fact, it will do you no good to close your eyes and hope it goes away (or as many lawyers do, in an almost passive-aggressive approach, hope desperately that the would-be client gets the sense that he or she ought to retain you without a word being spoken). You must embrace the practice of asking for work every day; you are unlikely ever to fully enjoy it (those who do are a sick breed), but you will get better at it and, after a few successes, it will come just a bit more naturally. Lawyers are sometimes confused by the use of solicitation in the ethics rules and the demands of selling themselves to prospects in order to get and keep clients. Rule 7.3 prohibits lawyers from initiating face-to-face contact with prospective clients who have not contacted them first. It does not prevent lawyers contacted by prospective clients from selling themselves and their services. Nor does the Rule prohibit lawyers from communicating their qualifications generally, or even in-person. Similarly, there is no rule against soliciting existing clients for continued business.

Before you simply start asking for work, it is wise to take some objective stock of yourself and your approach. Asking for work can be both the easiest way to obtain it and the quickest way to turn a lead away. Consider the setting: is your "mark" at a function in which he or she is deeply engaged in conversation with a close friend so

you will be perceived as intruding and disruptive? If the person you want to reach doesn't know you, is there an intermediary you could ask to make an appropriate introduction? Don't beat around the bush (the passive-aggressive idea), but also don't hit the person too hard: make time for small talk, show an interest in the other person's interests, and gradually guide the person into a discussion of your area of practice and then, without waiting too long, tell him or her that you would like to have the opportunity to provide legal services – don't mince words. Over the course of your career this approach will be shot down many times – sometimes more coldly and directly than you would expect – but it will also yield better results than almost any other.

The other part of marketing that is so often forgotten is the promotion you do – or *should* do – to your existing clients. (No matter how well you served them, you would be amazed at how quickly clients can forget your name.) Particularly if your practice involves repeat work, your existing clients are the most easily approachable; plus, you know them, their needs, their practices, and their views on legal costs better than anyone else. Once you have managed to secure a client's business and the matter is closed, diary for follow-up contact and explore the possibility of additional work. There are many ways to do this: send a news item that may be of interest to them, keep them on a mailing list for your seminars and articles, develop a periodic practice newsletter, or just call to say you regularly follow up with your clients. Satisfied clients will be open to using your services again – or perhaps they know others within their line of business and will refer them to you.

Show What You Can Offer

Opening a solo or small-firm practice is frightening and exhilarating. It affords opportunities that cannot be found in large-firm life, not the least of which is having control – your success depends on you. In large part, your measure of success will be greatly influenced by how people perceive you – as a person and a lawyer. So here is one last piece of advice: Never be cheap with the amount of free advice you provide, both to existing clients and to random callers seeking assistance. Most outside the profession have a distinctly negative perception of us, particularly as it relates to being always "on the clock." You will receive many calls from people who have perhaps found your name in the telephone book or were provided your name by another lawyer, but who do not, at first glance, appear to have a matter that is within your scope of practice or of sufficient economic importance to justify your services. Ignore these thoughts and be as helpful as you can, within the limits of what is practical and ethical; you will be surprised at how easy it is to change a negative perception and let word-of-mouth – often the best form of marketing – take off. ■

IMPORTANT NEWS FOR SENIOR NEW YORKERS

- *Are you suffering from medical disabilities – and on a limited income?*
 - *Do you wish to remain at home and avoid a nursing home?*
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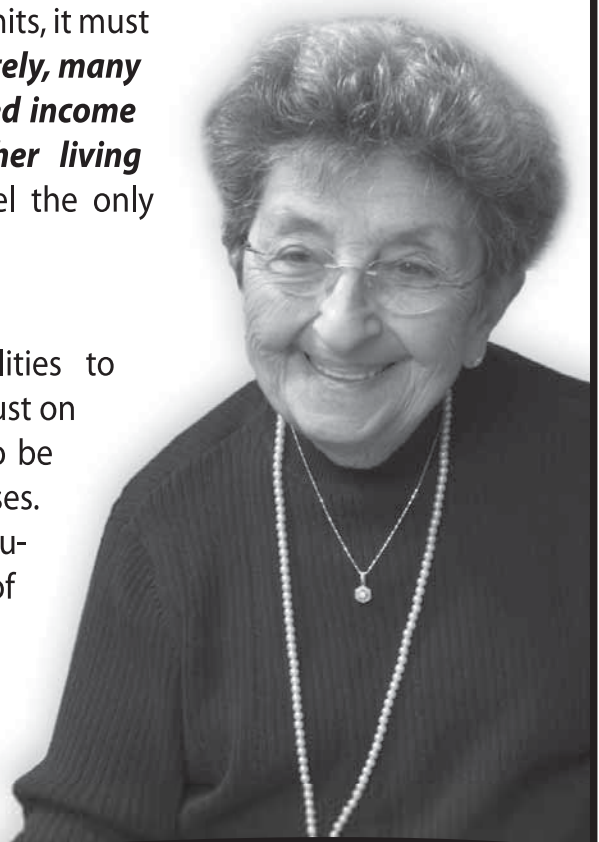
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CPR for the CPLR

Introduction

My breaking point arrived along with my 2010 New York State Court Rules. Two volumes. Neither containing the CPLR.

Imagine. In order to ascertain the rules of practice in our state courts, three volumes of material must be referenced. That's three volumes, none of them annotated. Just rules!

I have practiced in our state courts for over 20 years and taught New York Practice for almost 10 years, yet frequently I find myself saying, when a judge or colleague mentions a particular rule, "I didn't know that."

I used to be thrilled that I could go into any court in the state, from Riverhead to Buffalo, confident that I knew the general rules of practice and, with relatively little effort, could learn the quirks of a particular court or judge. Now I find myself worrying when I take the subway two stops from 60 Centre Street in Manhattan to 360 Adams Street in Brooklyn that I no longer know which rules are followed, modified, superceded, or simply ignored.

What happened?

What It Was

No doubt, the passage of time has played a role. The CPLR took effect on September 1, 1963, replacing the CPA.¹ John F. Kennedy was president. Hawaii had been a state for just over four years. And the Yankees were coasting toward the playoffs.² Oops, some things don't change.

It was a simpler time, illustrated by an early treatise covering the CPA, by

A.L. Sainer, Esq., titled *The Adjective Law of New York*.³ In a scant 300 pages, Mr. Sainer addressed civil pleadings and practice forms, evidence, criminal procedure, surrogate's practice, damages, and the Canons of Ethics. Disclosure did not warrant a section, or even chapter of its own. It was covered in just 10 pages, as a subtopic of evidence.

The function and goal of the new CPLR was simply and eloquently set forth in CPLR 104: "The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding."

What Changed

In that long ago, simpler time, both the Legislature and the New York Judicial Conference were empowered to make necessary changes in the CPLR. This is no longer the case:

CPLR 102 provides that all changes to the CPLR must be done by the State Legislature. The CPLR cannot be changed via rule making authority, as was the case in the past when the New York Judicial Conference was authorized to enact changes to civil practice rules. That authority was rescinded in 1978. Even the legislature is limited in its ability to modify or amend the CPLR. The legislature may not adopt any amendment or new provision to the CPLR, which abridges substantive rights.⁴

With the CPLR solely the province of the Legislature, rulemaking by the

Chief Administrator of the Courts has become the primary basis for implementing changes in civil practice:

While the CPLR itself cannot be altered except by legislation, there are "Uniform Rules" of court promulgated by the Chief Administrative Judge for each court in New York State. These rules contain important provisions not covered by the CPLR, governing such matters as engagement of counsel, motion practice, notes of issue, and compulsory arbitration of certain disputes. These rules may not be inconsistent with the CPLR, but can only supplement it. The rules are found at 22 NYCRR 202 *et seq.*

In addition, individual judges sometimes have their own rules of proceeding for cases assigned to them. These rules can be located in a publication such as the *New York Law Journal* or from the clerk of the court in which that judge sits. These individual rules also may not conflict with either the CPLR or the Uniform Rules. To the extent that they do, they are invalid.⁵

"Not that there's anything wrong with that," to quote Jerry Seinfeld, but the present system is a response to a problem rather than a solution crafted to offer the optimal method for making necessary changes to civil practice.

What It Has Become

An almost impenetrable maze or, to borrow Karl Llewellyn's title, a procedural "Bramble Bush."⁶

Some rules are merely hard to find. Suppose, for example, your case is dismissed for failure to prosecute pursuant to CPLR 3216. It might be of interest to the attorney whose case was just dismissed to know that the judge dismissing your case is required to “set forth on

“emergency” nature of the application. Putting aside the question of whether a non-emergency order to show cause is an oxymoron, an attorney who doesn’t know about the special form and has a clerk or service submit the order will have the papers returned, unreviewed

Tinkering around the margins is likely to increase rather than decrease confusion, and with such a vast and complex set of rules, the specter of the law of unintended consequences lurks if changes are made piecemeal. Witness our hapless Note of Issue.⁸

Like a first-year law student, I can spot the issue, but a solution eludes me.

the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.”⁷ The failure of the judge to do so may form the basis for reviving the action (allowing the client’s case to be decided on the merits, and sparing the attorney a steep increase in malpractice premiums).

Where in CPLR 3216 does this important mandate appear? Nowhere. Is there a reference or cross-citation in CPLR 3216 to direct you to this language? No. Instead, you have to know to look in CPLR 205(a) for this language, which was added to that statute in 2008.

Some rules are impossible to find. They lurk, hidden from view, until you are confronted with a mistake based upon the violation of the rule. Practitioners statewide know that a party seeking expedited relief may move by order to show cause. An order to show cause is typically utilized when the hearing of a notice motion will not take place before the relief sought is needed or if interim relief, such as an order to preserve evidence, is required. However, in at least one downstate county, there are, in fact, two kinds of orders to show cause: “regular” orders to show cause and “emergency” orders to show cause. The difference? Emergency orders to show cause are put to the head of the line and are reviewed in an expedited manner. The problem? An emergency order to show cause requires a special affidavit or affirmation explaining the

and unsigned, causing unexpected delay in what is supposed to be an expedited process.

Some rules are unintelligible. Read CPLR 208. Seriously. Imagine you are reading it for the first time, are fairly new to practice, and are trying to calculate how much time an infant has to sue for a medical malpractice case (and, to make your task easier, you do not have to consider whether continuous treatment extends the time to sue). Good luck!

Some rules aren’t even rules. For years, my colleagues have been describing the practice in the Commercial Division, which routinely includes the exchange of expert reports and depositions of experts. This, of course, is heresy in traditional New York State practice. After spending a considerable amount of time unsuccessfully searching for the Commercial Division Rules authorizing this expansion of expert disclosure, I was informed by a commercial division judge that there are no such rules. Instead, it is the practice in the Commercial Division, encouraged by the bench, acquiesced to by the bar, and accomplished by agreement between the parties, “so ordered” by the court. There is even a form stipulation in Robert L. Haig’s *Commercial Litigation in New York State Courts*.

What to Do?

I don’t know. Like a first-year law student, I can spot the issue, but a solution eludes me.

Under the heading “Current Processes and Institutions Relevant to Amending CPLR and Improving Civil Practice,” Weinstein, Korn & Miller set forth the current mechanism for effecting changes in the rules:

The legislature is the first institution to look to for amendment and improvement of the CPLR. The Chief Judge of the State of New York and the Chief Administrator of the Courts, however, play an increasingly important role in recommending legislation to the legislature and in promulgating rules for the administration of the courts. The Chief Judge and the Chief Administrator are assisted in the legislative efforts by their Advisory Committee on Civil Practice and by the Law Revision Commission. More relevant to the upkeep of the CPLR are the Office of Court Administration’s CPLR Advisory Committee and the New York State Bar Association’s CPLR Committee.⁹

A top-to-bottom overhaul of the rules of practice appears impossible under our current system. Since the CPLR may be amended only by the Legislature and is not a topic with much of a constituency in good times, let alone the tough economic climate of 2010, help from this direction is unlikely. The ability of the Chief Administrator of the Courts to promulgate rules of practice to supplement the CPLR, while useful as an interim mea-

sure, cannot effect a systemic revision of the rules governing civil practice. It is, at best, CPR for the CPLR.

Conclusion

Change may be unwelcome to those comfortable with current New York practice. While I count myself in that group, I believe change is needed, provided it is systemic and is arrived at in a thoughtful and systematic manner. However it is accomplished, the process will likely be difficult, as illus-

trated by the children's rhyme that gave *Bramble Bush* its title:

There was a man in our town
and he was wondrous wise;
he jumped into a bramble bush
and scratched out both his eyes –
and when he saw that he was blind,
with all his might and main
he jumped into another one
and scratched them in again.¹⁰

1. Civil Practice Act, enacted in 1921.
2. In that simpler time there was a single round of league playoffs.
3. In *A Dictionary of Modern Legal Usage*, Bryan Garner offers this definition: “[A]djective law is not a set of rules governing words that modify nouns, but rather the aggregate of rules on procedure.”
4. Weinstein, Korn & Miller ¶ 102.00.
5. *Id.*
6. Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 1930.
7. The Note of Issue was the subject of the May 2009 column, “It’s the Note of Issue, Stupid.”
8. See CPLR 205(a); see also Siegel, McKinney’s Practice Commentary, NYCPLR 3216 (2008).
9. Weinstein, Korn & Miller ¶ Intro.02.
10. Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 1930.

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How to Fly Not-So Solo

By Cynthia Feathers

Practicing law can be stressful. For a solo practitioner, enduring the challenges alone can be daunting. What's the answer? Giving up the autonomy you covet? Instead, consider greater involvement in bar associations. It could transform your life.

Expand Your Network

Lawyers who are part of a firm or other entity have their own built-in community to sustain them. Solo practitioners can also achieve connectedness – through an active bar life. You may know how vital bar association CLE programs are and may be familiar with NYSBA Law Practice Management and Solo and Small Practice resources. Perhaps you do not know, though, about the value to solo attorneys of actively participating in a committee or section of your legal peers.

You may be amazed at how enjoyable it can be to discuss with colleagues your professional passions. Practitioners with greater expertise than your own may inspire you and be inspired by you. You can keep abreast of – and sometimes help shape – changes in the law. You may have the opportunity to play a leadership role in creating programs that can have a statewide impact. And observing those who are masters at planning and implementing projects, delegating authority, and holding effective and efficient meetings can teach you skills you can apply in other areas of your life.

Do you want appropriate opportunities to talk to judges outside of the courtroom? Through bar life, you can spend time with judges at receptions and other events. You may even have chances to do CLE train-

ings with judges or to engage in substantive discussions about the law at committee meetings attended by judges. Serving on a Judicial Screening Committee may also be an option.

Do you have a desire to write articles to offer your insights about some aspect of the law? Many of us have no time or desire to write a scholarly piece for a law journal. A bar association publication can offer the perfect vehicle for your contribution, and you may find that some readers send you not only kudos but also referrals.

Broaden Your Views

The next time you need to brainstorm or could use a template to draft a new type of document or want someone to moot court you for an oral argument, you'll know where to turn – to your bar-group friends. You may be surprised how often your busy colleagues graciously say yes, and you'll return the favor.

The psychic rewards of an active bar life can be just as invaluable as the concrete ones. When you work on bar activities with your frequent opposing counsel, it can elevate your dealings the next time you face that attorney in court. You'll still be a fierce litigator for your client. But you may enjoy a more cooperative and pleasant relationship with the attorney who has perhaps shown an amiable and admirable side you did not know existed. In any event, the collegiality that bar association activities nurture is invaluable.

Another reward is the sense of professional balance bar participation can cultivate. How wonderful to supplant, or at least take the edge off, a gnawing sense of

anxiety or an obsession about your latest thorny litigation matter by filling some time and thought with the fascinating issues your bar committee is tackling. It can lighten your mood and broaden your perspective.

Expand Your Practice

Perhaps the most important benefit for lawyers in private practice comes from the contacts they develop with other lawyers who may become the source of cross-referrals; either you do work that they do not, and they send you cases, or you send them cases that you are not able or do not want to take. As you develop relationships with other lawyers, they gain an appreciation for your skill and knowledge as a practitioner, just as you appreciate them. This mutual confidence provides the basis for referrals – and referral fees (see New York Rules of Professional Conduct, Rule 1.5(e)).

Broaden Your Horizons

My own experience has dramatized the power of bar life. It has been like emerging from a cocoon to go from flying very solo in an appellate practice to embracing bar life with gusto. The catalyst for the change was a stint at

the State Bar Association as director of pro bono efforts, which gave me a front-row seat to witness how savvy, dedicated members of our profession throughout the state flourish through bar life.

Becoming involved in bar activities has borne unexpected fruit – from becoming an adjunct professor to gaining new business, from serving on boards to finding law clerks, from locating the perfect office suite to learning about pro bono opportunities, from writing better briefs to becoming more sociable. As an appellate attorney for a government agency and a Manhattan criminal appeals office, I was part of teams of attorneys possessing similar talents and missions. Bar life brings different dynamics and joys, as you find yourself among attorneys of different stripes and sensibilities who can expand your horizons.

State Bar and local and specialty bar groups all offer unique ways of enriching your solo practice. Your colleagues there will welcome your involvement in programs that interest you. All you have to do is volunteer your time and talent. The chances are that you will find yourself in very good company that will sustain you on your not-so-solo journey. ■

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Get It Right From the Start: Human Resources Compliance for the New Law Practice

By Nancy B. Schess

You have made that difficult, but exciting, decision to start your own practice and the doors are ready to open. Your first clients are eager to engage your services. Your office space is set, and your technology and insurance are in place. Now it is time to consider hiring your first employee, whether it is a secretary to help you organize or a part-time associate to help with your overflow. Before forging ahead, it is crucial to pause.

Being an employer in New York is fraught with rules and regulations. Without a proper understanding of the rules that apply to a law firm as a workplace, a costly misstep is virtually guaranteed. Consequently, the entrepreneurial attorney must first be cognizant of the various laws governing employment and then take proactive steps to comply with those laws and protect the new firm against future lawsuits.

To help you start on the path towards compliance, this article will address two areas. First, it will provide an

overview of some of the more significant laws and legal theories with which every employer should be familiar. Second, it will address some best practices for developing and implementing the policies and procedures necessary to help protect your fledgling firm.

I. Employment Law

Employment law in New York comprises a myriad of sometimes overlapping laws that govern nearly every aspect of the “employer-employee” relationship, ranging from hiring through firing. One of the most important aspects of the “employer-employee” relationship is employment at will. Most people in business have heard the phrase “employment at will,” but this legal concept is perhaps among the most misunderstood. In order to grasp the full scope of an employer’s obligations, it is important to first understand the parameters and limitations of the “at will” doctrine.

A. How Employment at Will Works

In New York, an employer may terminate an employee for any, or no, reason at all, with or without notice. The corollary is also true: an employee can terminate his or her employment at any time, for any reason or no reason, and with or without notice. This defines the concept of at will employment.¹

At first blush, “at will” status would appear to be the ultimate defense to an employment claim since it seems to afford employers an unfettered right to terminate employees. Consequently, this status should be zealously protected. Unfortunately, it can be forfeited in many sometimes unintended ways. For example, promises made to an employee upon hire can be construed to waive “at will” status.² Similarly, inartfully crafted “at will” language in letters and handbooks may not sufficiently protect that status.³

Of course, an employer may knowingly choose to enter into an employment agreement that gives up “at will” status by guaranteeing, for example, a term of employment or specified reasons for termination. Intentionally undertaking contractual obligations is one thing; unintentionally doing so can lead to unwanted, and costly, outcomes, with or without litigation. There are some simple steps an employer can take to help to prevent such an occurrence, some of which are discussed below.

B. An Employer May Not Discriminate Against Workers

Notwithstanding the “at will” nature of employment in New York, there are many provisions of law that trump this status. Perhaps the most significant are the multiple, and sometimes overlapping, discrimination laws. Federal, state, and local law all prohibit discrimination in the workplace on the basis of specific protected characteristics, in all aspects of the employment relationship. As you are starting your practice, consider that some laws require that a workplace employ a threshold number of employees in order to invoke coverage. As your firm grows, the number of laws that apply to your practice will also grow. Here is a brief synopsis of some of the discrimination laws that affect New York employers.

1. Federal Anti-Discrimination Laws

a. *Title VII of the Civil Rights Act of 1964*:⁴ Title VII prohibits discrimination in employment based on an individual’s race, color, religion, sex (including pregnancy), genetic information, and/or national origin. Title VII also prohibits harassment (e.g., offensive or derogatory comments) on the basis of any protected characteristic. Title VII applies to employers with 15 or more employees.

b. *Section 1981 of the Civil Rights Act of 1866*:⁵ Section 1981 prohibits racial and ethnic discrimination in the terms and conditions of employment and has a broader

scope than Title VII. For example: (i) Section 1981 applies to all employers regardless of size; (ii) under Section 1981 claims need not be first filed with an administrative agency, as required under Title VII;⁶ (iii) there is no cap on damages under Section 1981 as there is under Title VII;⁷ (iv) personal liability does exist under Section 1981 but does not under Title VII;⁸ and (v) Section 1981 offers a significantly longer statute of limitations (three years) as compared to the very short limitations period contained in Title VII (300 days).⁹

c. *Age Discrimination in Employment Act (ADEA)*:¹⁰ The ADEA prohibits discrimination in employment based on an individual’s age (over 40). The ADEA applies to employers with 20 or more employees.

d. *Americans with Disabilities Act (ADA)*:¹¹ The ADA prohibits discrimination in employment against qualified individuals with a disability (or perceived disability) who are able to perform the essential functions of their job with or without reasonable accommodation. The ADA also requires that employers make reasonable accommodation for an employee’s limitations occasioned by a disability, unless accommodating the employee would pose an undue burden. The ADA applies to employers with 15 or more employees.

e. *Family and Medical Leave Act (FMLA)*:¹² The FMLA applies to all employers with 50 or more employees, which excludes virtually all solos and most small firms, but its provisions are worth understanding. The act provides for up to 12 weeks of unpaid leave for certain medical and family situations of an eligible employee. Specifically, FMLA leave is available (i) for the birth and care of the employee’s child; (ii) for the placement of a child for adoption or foster care with the employee; (iii) to care for an immediate family member (e.g., spouse, child or parent) who has a serious health condition; (iv) for the employee’s own serious health condition; or (v) in order



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to deal with a qualifying exigency arising out of the active duty, or call to active duty, of a qualified military member. Eligible employees may also request up to 26 weeks of unpaid leave to care for a covered family member in the Armed Forces who has suffered a serious injury or illness in the line of duty. The FMLA also prohibits covered employers from retaliating against employees who exercise their leave rights.

f. *Equal Pay Act (EPA)*:¹³ The EPA requires that male and female employees receive equal pay for performing equal work. There is no requirement for a minimum number of employees.

2. State and Local Anti-Discrimination Statutes in New York¹⁴

a. *New York State Human Rights Law (NYSHRL)*:¹⁵ The NYSHRL prohibits discrimination on the basis of race, color, sex (gender), age, national origin, creed, disability, predisposing genetic characteristics, sexual orientation, military status, marital status, domestic violence victim

than a ceiling above which the local law cannot rise.”²¹ Following this expanded view of the law, several recent court decisions narrowed defenses under the city law that are available to employers under federal and state law.²²

3. Summary of Retaliation Claims

Most anti-discrimination statutes also prohibit an employer from retaliating against an employee who either opposed a discriminatory practice (e.g., filed an internal complaint) or participated in an investigation or enforcement proceeding relating to a discrimination claim.²³ The potency of a retaliation claim is that it may succeed even if the underlying discrimination claim fails.

To compound the significance of these claims, in 2006, the United States Supreme Court decided *Burlington Northern and Santa Fe Railway Co. v. White*,²⁴ which lowered the standard for proving retaliation by broadening the types of conduct that can be considered actionable. Prior to this case, in order to establish retaliation, the

Remedies available under the various discrimination laws are broad and can be dramatic.

status, as well as a prior arrest or conviction record. The New York State Human Rights Law applies to employers with four or more employees.

b. *New York City Human Rights Law (NYCHRL)*:¹⁶ The NYCHRL prohibits discrimination based on race, color, creed, age, national origin, disability, alienage or citizenship status, gender (including gender identity), sexual orientation, marital status, and partnership status. The law also protects against discrimination based on an arrest or conviction record, or a person’s status as a victim of domestic violence, stalking, and sex offenses. The NYCHRL applies to employers with four or more employees.

c. *Distinctions from Federal and State Law*: Both state and city law overlap with federal law but each is also broader in certain respects. For example, while the ADEA protects only individuals over the age of 40,¹⁷ the NYSHRL covers all persons age 18 and older,¹⁸ and the NYCHRL has no age requirements.¹⁹ Each statute provides different, albeit overlapping, remedies.

Of particular significance, the NYCHRL, which applies to employment in New York City, was amended in 2005 because the commission believed the city law was being applied too narrowly.²⁰ The amendments specifically clarify that federal and state interpretations of strikingly similar discrimination laws serve “as a floor below which the City’s Human Rights law cannot fall, rather

standard required proving a tangible adverse job action (i.e., denial of a wage increase, promotion, etc.). Under *Burlington Northern*, retaliation now exists where, in the context of a particular case, materially adverse action is taken which would dissuade a reasonable person from making, or supporting, a charge. An adverse job action is no longer required.

4. Remedies Available for Violation of Discrimination Laws

Remedies available under the various discrimination laws are broad and can be dramatic. A prevailing plaintiff may be awarded any combination of remedies from the panoply available including back pay, reinstatement, compensatory and punitive damages, and front pay.²⁵ The ADEA even provides for mandatory liquidated damages up to the amount of back pay awarded where a willful violation is found.²⁶ Moreover, in light of recent amendments to state law, civil penalties are now available under both the NYSHRL and NYCHRL.²⁷ Most statutes also provide that the plaintiff is entitled to reimbursement of attorney fees if he or she prevails.²⁸

C. Other Laws Regulating the Workplace

While this article has focused on federal, state, and local anti-discrimination laws, there are many other laws with which an employer must be familiar. For example:

1. Wage/Hour Laws²⁹

Federal and state law govern how, when, and in what amounts employees must be paid. The federal Fair Labor Standards Act (FLSA) regulates minimum wage and overtime, including very specific rules concerning who is eligible for overtime and how it must be calculated.³⁰ The New York State Labor Law governs those same topics and a multitude of others such as the frequency of payment,³¹ whether an employer must pay for unused vacation at termination,³² deductions from wages,³³ and much more. Be aware that you cannot get around the FLSA's overtime rules simply by declaring an employee "salaried" or "professional." That determination depends on such factors as what kind of work the employee does, the employee's training and education, and the kind and amount of supervision of the employee.

Remedies associated with violation of the wage and hour laws can be dramatic and in certain circumstances may include liquidated damages, attorney fees, personal liability, and even criminal liability.³⁴ With these remedies in play, wage and hour compliance should take a top priority in establishing your personnel compliance program. Keep in mind that although civil remedies for, say, gender discrimination are available only if a business reaches a minimum number of employees, an employer could still be subject to penalties for sexual harassment, if the employer is found to have created or condoned a hostile work environment.

2. Employee Retirement Income Security Act (ERISA)³⁵

ERISA governs benefits that are offered in the workplace. As you consider whether to offer a medical insurance plan to your employees or implement a 401(k) savings plan, make sure to investigate the obligations imposed by ERISA in connection with the offering of such programs.

3. Obligation to Protect Social Security Numbers and Other Personal Identifying Information³⁶

Effective January 2009, the New York Labor Law was amended to protect employees from identity theft. Under these amendments, among other things, employers are strictly prohibited from (a) publicly posting or displaying an employee's social security number; (b) printing an employee's social security number on an identification badge or card, including a time card; and (c) keeping employee social security numbers in files with unrestricted access.

The Labor Law now further prohibits employers from communicating an employee's "personal identifying information" to the public. An employee's "personal identifying information" includes the employee's social security number, home address, telephone number, personal e-mail address, Internet identification or password, last name prior to marriage, and/or driver's license number.

4. Immigration Compliance³⁷

All employees must be legally authorized to work in the United States and demonstrate such authorization to their employer. No later than three days from the commencement of employment, a Form I-9 must be completed for the purpose of demonstrating the employee's legal authorization to work.³⁸ The employee must present specified types of proof and the employer must review the documents and certify that the required proof has been presented. The I-9 forms must be kept for three years after the hiring of an individual, or one year after termination, whichever is longer, and in a file separate from the employee's personnel file.³⁹

II. Best Practices for Core Personnel Policies

The number of lawsuits and agency proceedings stemming from the workplace is staggering – and on the rise. No industry and no business of any size has been spared. Particularly in light of the troubled economy, employment claims are increasingly popular. That said, a proactive employer can protect itself from potential exposure arising from the workplace. The steps are not difficult, but they do require education, attention, thought, time and resources. While this may seem too burdensome for a small firm with limited resources, the investment in best practices will pay off, particularly by helping the firm avoid problems that could otherwise arise and which could prove devastating.

The first step is to establish policies and procedures that are intended both to comply with legal obligations and to address issues that apply to your particular workplace. An employee handbook is the ideal means for compiling and communicating your firm's policies to your staff. Even for the smallest law firm, a handbook of proportionate scope is a necessary tool.

A. The All-Important Employee Handbooks

An employee handbook is the focal point for both legal compliance and the practical operation of your firm. The handbook should be the first place an employee turns to with day-to-day questions; likewise, it is the first place an attorney will look when either contemplating a claim against your firm or assisting in preparing your defense. A poorly constructed and/or poorly implemented handbook can turn into a compliance and litigation nightmare. Conversely, the best handbooks evolve into an essential management tool and the starting point for a strong litigation defense.⁴⁰ The best handbooks have definite similarities.

1. They Include Appropriate Disclaimers

The employee handbook should fastidiously protect the "at will" status of employment by including a clear and complete statement of employment status.⁴¹ Similarly, clearly delineate that nothing contained in the handbook,

nor any other document, confers any contractual right, either express or implied, to remain in the firm's employ. Only specific individuals in the firm should have authority to enter into an agreement for employment of any specific duration.

To minimize any argument that your handbook has created a contract between your firm and your staff, reserve the firm's right to modify, revoke, suspend, terminate, or change any or all policies, with or without prior notice.

2. They Include Legally Required and Recommended Policies

The handbook is a compilation of both legally required and recommended policies. Before proceeding, investigate and understand those laws that apply to your workplace as well as those policies that are needed to help your practice run smoothly. A host of policies typically found in handbooks range from Equal Employment Opportunity to time-off policies.

3. They Communicate the Firm's Expectations

A well-crafted handbook is an effective employee communication tool. The document should let employees know what you expect of them and what they can expect of you as their employer. Explain performance expectations and standards of conduct required by your firm. For your practice, this could include anything from personal appearance requirements to alcohol and drug policies to the importance of keeping client information confidential.

4. They Make It Easy to Consistently Apply Workplace Rules

Discrimination claims are born from inconsistent treatment. When rules are applied differently to different workers, at a minimum, a question can be raised as to whether the employee's protected characteristic was a motivating factor in the decision. When the policy manual says that employees will be treated one way and they are actually treated in another arguably illegal way, the language in the manual may be problematic.

Conversely, having clear rules that are consistently applied is often the best defense to a claim of discrimination. In fact, proof of consistent treatment can be an insurmountable hurdle for a plaintiff to overcome in a discrimination claim.⁴²

5. They Are Written Clearly

An effective handbook is organized, clear and concise, and readily understandable. As with many legal disputes, problems start with ambiguous language. While it may seem counterintuitive, one of the most important sections of a handbook is a detailed table of contents, which makes it simple for employees to find the policies relevant to any particular question.

B. The Top Five Important Handbook Policies

1. Employment at Will

As discussed above, clearly communicate the "at will" nature of employment with the firm. Repeat the language in the body of the handbook and again in the acknowledgement that each employee must sign when receiving the handbook.

2. Equal Employment Opportunity/Prohibition of Workplace Harassment

Prior to 1998, written policies that prohibited discrimination and harassment in the workplace were used as one important element of an employer's defense to workplace claims. In 1998, the United States Supreme Court decided two landmark cases which elevated the importance of a compliant written policy.

In *Burlington Industries, Inc. v. Ellerth*⁴³ and *Faragher v. Boca Raton*,⁴⁴ the Supreme Court laid out a roadmap for employers to completely avoid liability under federal law for a hostile work environment.⁴⁵ This affirmative defense starts with a compliant written policy.⁴⁶ The policy must contain specific "magic" clauses. It is not sufficient to state simply that discrimination and harassment are prohibited. The policy must explain in some detail the types of conduct prohibited and include a complaint procedure that describes the steps an employee should take to file an internal complaint as well as how that complaint will be handled.⁴⁷

3. Workplace Technology

Workplace technology raises legal and practical issues ranging from privacy to preserving client confidentiality to workplace harassment. As technology has expanded to blogs and social networking sites, such as Facebook and LinkedIn, both the legal and practical issues implicated for employers have been further complicated. Consequently, in today's hi-tech, Internet-driven world, a well-thought-out and explicit technology policy is an imperative.

The policy should cover the full array of technology offered in the workplace (e.g., computers, electronic mail, laptops, BlackBerrys, cell phones, Internet access, voicemail, etc.) and define how such technology can, and cannot, be used by employees. It should incorporate your firm's expectations with respect to use of social media, within limits imposed by law. Last, the policy should make clear that employees do not have privacy rights in their use of the technology systems provided by the firm and reserve the firm's right to monitor all technology usage.

4. Vacation

New York employers are not required to offer paid vacation. If an employer chooses to do so, however, the policy must be set out in writing – and failure to do so can

subject the employer to a civil penalty.⁴⁸ The employer is free to impose any conditions it chooses – for example, how much vacation time will be available and how it accrues – but again, those conditions must be stated in writing. Similarly, in New York an employer may choose whether to pay a terminated employee for unused but accrued vacation, but any forfeiture requirement must be in writing.

5. Time Keeping and Employee Classifications

An effective employee handbook should be “Exhibit A” in the defense to any wage and hour claim arising from the workplace. Given the prominence of wage and hour litigation, coupled with Department of Labor activity at both the federal and state level, attention to the time keeping and employee classification sections of a handbook is vital. The handbook should define who is, and who is not, eligible for overtime; it should follow federal and state guidelines as well as the logistics of how overtime works.

The law requires that specific time records be kept for employees eligible, and not eligible, for overtime. Explain your recordkeeping process in the handbook so employees always have a resource to consult.

Last, include a “safe harbor” provision with respect to deductions from pay for exempt employees which conforms to the requirements of the FLSA. This “safe harbor” policy may provide protection from liability for unpaid overtime if an exempt employee’s pay is reduced, thus placing his or her exempt status in jeopardy.

III. Conclusion

Failure to properly anticipate workplace issues can sidetrack your practice and have costly consequences. With some planning and thought, however, your new firm can be prepared to handle the range of compliance issues that arise in the workplace. ■

1. See *Murphy v. Am. Home Prod. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983) (dismissing cause of action based on wrongful discharge of “at will” employment, noting that New York has a long-settled rule that, where an employment is for an indefinite term, it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason).

2. See, e.g., *Mitchell v. Leahey*, 289 A.D.2d 1002, 734 N.Y.S.2d 780 (4th Dep’t 2001) (where agreement provided that it was “for the year 1999,” the court concluded it was for a definite term, stating “[i]f the employer made a promise, either express or implied, not only to pay for the service but also that the employment should continue for a period of time that is either definite or capable of being determined, that employment is not terminable by him ‘at will’”).

3. See *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441 (1982) (finding that an employment contract existed based on, among other things, the pre-offer negotiations and language in the handbook, and further noting that “at will” employment in New York is a “rebuttable presumption” that can be overcome by taking into account the “‘course of conduct’ of the parties, including their writings and their antecedent negotiations”).

4. 42 U.S.C. §§ 2000e–2000e-17.

5. 42 U.S.C. § 1981.

6. *Johnson v. Ry. Exp. Agency*, 421 U.S. 454 (1975) (stating “it has been noted that the filing of a Title VII charge and resort to Title VII’s administrative machinery are not prerequisites for the institution of a section 1981 action”).

7. See 42 U.S.C. § 1981a.

8. See *Patterson v. County of Oneida*, 375 F.3d 206 (2d Cir. 2004).

9. See *id.*

10. 29 U.S.C. §§ 621–634.

11. 42 U.S.C. §§ 12101–12213.

12. 29 U.S.C. §§ 2601–2654.

13. 29 U.S.C. § 206(d).

14. Other state laws in New York prevent employers from, among other things, discriminating against military personnel (see N.Y. Executive Law § 296 (Exec. Law)), jurors (see N.Y. Judiciary Law § 519 (Jud. Law)), ex-convicts (see Exec. Law § 296; N.Y. Correction Law § 23-A), and even taking action based on certain types of off-duty conduct.

15. Exec. Law §§ 290–301.

16. N.Y.C. Administrative Code §§ 8-101–8-131 (N.Y.C. Admin. Code).

17. 29 U.S.C. § 631.

18. See Exec. Law §§ 296(5)(f), 296-a(12).

19. N.Y.C. Admin. Code §§ 8-101–8-131.

20. The Local Civil Rights Restoration Act of 2005, 2005 N.Y.C. Local Law No. 85.

21. *Id.* at § 1.

22. See *Williams v. N.Y. City Hous. Auth.*, 61 A.D.3d 62, 872 N.Y.S.2d 27 (1st Dep’t 2009). In *Williams*, the New York Appellate Division determined that the “severe or pervasive” standard, which is used under federal and state law to determine whether actionable harassment has occurred, does not apply to claims brought under the New York City Human Rights Law. Rather, the new and lower standard to be applied is “whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender.” Further, the proper affirmative defense is proof “that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider ‘petty slights and trivial inconveniences.’” See also *Zakrzewska v. The New School*, 598 F. Supp. 2d 426 (S.D.N.Y. 2009). In *Zakrzewska*, the Southern District held that employers may not use the *Farragher/Ellerth* affirmative defense in cases involving the New York City Human Rights Law. (See text II.B.2 *infra*.) Instead, an employer is liable where a manager or supervisor engaged in the conduct and, if between co-workers, where the employer knew or should have known of the conduct. Given the significance of this change in the law, the district court certified a question to the Second Circuit Court of Appeals asking if the affirmative defense applies under the NYCHRL. In July 2009, the Second Circuit certified the question for determination to the New York Court of Appeals.

23. See, e.g., 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. § 623 (ADEA); Exec. Law §§ 296, 296-a; N.Y.C. Admin. Code § 8-107.

24. 548 U.S. 53 (2006).

25. See, e.g., 42 U.S.C. §§ 2000e-5 (Title VII); 42 U.S.C. § 1981a (Section 1981); 29 U.S.C. § 626 (ADEA); 42 U.S.C. § 12117 (ADA); 29 U.S.C. § 2617 (FMLA); 29 U.S.C. § 216 (EPA); Exec. Law § 297; N.Y.C. Admin. Code §§ 8-107, 8-126.

26. See 29 U.S.C. § 626(b).

27. See Exec. Law § 297(4)(e) (amended to include civil penalty for acts occurring on or after July 6, 2009); N.Y.C. Admin. Code §§ 8-107, 8-126.

28. See 29 U.S.C. § 626(b).

29. See, e.g., 29 U.S.C. §§ 201–219; N.Y. Labor Law §§ 190–199A (Lab. Law).

30. 29 U.S.C. § 207.

31. Lab. Law § 191.

32. Lab. Law §§ 190, 191, 195(5); Whether an employer is obligated to pay for unused vacation time depends upon the terms of the company’s written policies. New York courts have held that an employer is free to determine the conditions of its policies relating to benefits or wage supplements, such as vacation, and that can include a requirement that employees forfeit accrued time off benefits under certain conditions. However, in order to do so, the policy must be in writing and the conditions which trigger a forfeiture must be explained to the employees. See *Glenville Gage Co., Inc. v. Indu. Bd. of Appeals of*

the State of N.Y., Dep't of Labor, 70 A.D.2d 283, 421 N.Y.S.2d 408 (3d Dep't 1979), *aff'd*, 52 N.Y.2d 777, 436 N.Y.S.2d 621 (1980). If the written policy does not specifically state that an employee will forfeit unused but accrued vacation time at termination, then the employer must pay for unused time when the employee leaves for any reason.

33. Lab. Law § 193.

34. Lab. Law §§ 197, 198, 198-a, 214, 218; N.Y. Business Corporation Law § 630; 29 U.S.C. § 216.

35. 29 U.S.C. §§ 1001-1461.

36. Lab. Law § 203-d; *see also* N.Y. General Business § 399-dd(2) (amended in January 2009 similarly related to protecting social security numbers).

37. 8 U.S.C.A §§ 1101-1107.

38. 8 U.S.C. § 1324a. The United States Citizenship and Immigration Services administers I-9 compliance. The I-9 Form was revised during 2009 and the USCIS issued new forms and a new Handbook for Employers to assist in complying with I-9 procedures. These documents are available at the USCIS website at www.uscis.gov under the section entitled "For Employers."

39. *Id.*

40. *See* Demetrios Dimitriou, *Law Office Procedures Manual for Solos and Small Firms*, Third Edition (American Bar Association 2005).

41. Employers frequently ask for a notice period when an employee is choosing to resign. In a true "at will" relationship, however, notice cannot be

required. Nonetheless, advance notice may be requested and can even be tied to payout of a benefit at termination such as unused but accrued vacation.

42. Exceptions are sometimes necessary. When considering an exception, however, think critically about the legitimate, non-discriminatory grounds for your decision and carefully document that process.

43. 524 U.S. 742 (1998).

44. 524 U.S. 775 (1998).

45. *See supra*, note 22, regarding the status of this defense under the NYCHRL.

46. As it has developed through case law and regulatory guidance, the affirmative defense has four basic elements: (1) employers must have a written policy that prohibits discrimination and harassment at work; (2) the policy must contain an internal complaint procedure; (3) complaints must be promptly and thoroughly investigated with appropriate remedial action taken; and (4) employers must train managers and staff about the prohibitions of inappropriate conduct, the complaint procedure and their respective obligations under the policy. *See, e.g., Cruz v. Liberatore*, 582 F. Supp. 2d 508 (N.D.N.Y. 2008); *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

47. In June 1999, the Equal Employment Opportunity Commission issued a guidance which, in part, explained what is required for a compliant written policy. *See Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisor*, EEOC Guidance No. 915.002, Section V.C (June 18, 1999) available at <http://www.eeoc.gov/policy/docs/harassment.html>.

48. Lab. Law §§ 195(5), 218.

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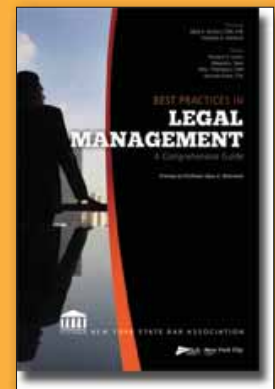
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CAROL L. SCHLEIN is an attorney and president of Law Office Systems, Inc., a training and consulting firm specializing in the automation needs of law firms and small businesses primarily in the New York metropolitan area.

Smartphones, Laptops, Clouds and Tweets

The Reluctant Entrepreneur Builds an Office

By Carol L. Schlein

The “Great Recession” has transformed and restructured the practice of law. Over the last year, the largest law firms have downsized and let many attorneys and support staff go while hiring fewer new graduates or delaying their start. As the clients of law firms have either gone out of business, merged or moved more of their legal functions in house, law firms of all sizes have seen changes in their client mix, the services they offer and their revenue.

Even before this recession, the ratio between the number of lawyers and the number of clients for them to serve has been shrinking as the number of lawyers increased. Over the next year few new jobs will be available for the lawyers who were laid off or recently graduated from law school, so many of them will strike out on their own or form small practices with colleagues.

Lawyers coming from large firms are used to having a cadre of staff to help with many of the administrative functions, including selecting and supporting equipment

and applications, as well as invoicing clients and taking care of all the firm’s finances. Recent grads have little or no experience in either the practice of law or the management of a firm. Technology will be key to building a viable, efficient practice. If you are not an unemployed lawyer but have read this far, you may realize that this influx of competition from new firms will put a strain on already established but financially precarious firms whose clients have cut back on their services. You too will be looking for ways to operate your practice more effectively and efficiently.

Plan Like It’s 2039

Plan how you want to deploy today’s technology while thinking about the changes coming in the next few decades – today’s profession wasn’t even imagined when I was growing up. Gordon Moore, the founder of Intel, once noted that each generation of computer chips will be geometrically faster than its predecessor. Predictions

are that technology generally will follow Moore's Law. Think about the changes in the last 100 years and expect similar changes over the next decade. This has profound implications for every profession, including law. I had a conversation with a colleague recently about what the computer profession might look like when computers are using artificial intelligence (think "Hal" from the movie *2001: A Space Odyssey* and put that functionality on a smartphone).

Think about almost any aspect of technology (hard-drive storage and speed of computers; size and functionality of laptops; the evolution of cell phones to smartphones and so on) and its progress since the early 1980s, and then imagine the pace of technology increasing geometrically over the next few decades. These changes will continue to have a profound impact on how and where we work. Lawyers who opened a practice in the 1980s needed bookcases for printed references, wires to connect computers, desks that could accommodate monitors that had large extensions off the back, and so on. Today, as we begin the second decade of the 21st century, we can and do work from almost anywhere at any time, hold video conferences using inexpensive equipment and do our research and get our data electronically. Lawyers and clients may still meet face-to-face, but it isn't hard to imagine that in a few years we may be able to conduct virtual video meetings through cellphone-sized devices. I can't help wondering what will happen to all the office space we use now.

Investment Strategies

This does not mean that no initial investment will be needed to start a new firm; instead, different investments will be required. For example, getting your firm started will require computers not only for yourself, but for everyone on your staff. You will probably want to equip your lawyers with laptops rather than desktops. Get them each a larger monitor and any accessories such as an external keyboard and mouse if it makes them more comfortable and productive. For those who don't need to be mobile, consider dual monitors. While your initial impression may be "this is only for geeks," you might be surprised to see how dual monitors will improve productivity by allowing users to have different applications on each screen. For example, the browser window could be open on one monitor while the word processor is open on the other to draft a legal pleading or other document.

The size of your firm will determine the size, capacity and functions you need from your printer/copier/scanner device. If you are determined to go (more) paperless, you may want to deploy a number of smaller desktop scanners to make it easy for everyone to scan their papers. In all but the smallest of firms, you should purchase a server unless you are setting up a virtual environment with "cloud"

applications. Disaster planning means having a backup scheme as well as a plan to reach your staff.

Remember, not long ago, when few if any commercials included "www dot something" in their ad copy? Over the last two decades, e-mail and the Internet have profoundly changed our world. In the past few years, "IMing" and "texting," posting on Facebook, sending or following a tweet and other technological applications have replaced telephone calls, e-mails and client newsletters. With wider access to Wi-Fi networks and continued improvements in speed and reliability, vendors are moving towards "cloud computing." You may have heard of the "ASP" or Application Service Provider model. The idea was that, rather than store applications and data on computers in your office, which required maintenance, backups, updates and replacements, you could, for a monthly fee, have everything hosted on a vendor's servers. Law firms, as well as other businesses, were reluctant to trust their key applications to these companies and cloud computing is the new attempt to solve this (see sidebar). To address the issue of controlling your own data, but having it accessible through an Internet connection, many vendors allow you to host your own data as well as have them serve as a backup in a remote location in case of a natural or man-made disaster.

The More Things Change . . .

While many things have changed over the years, many aspects of establishing a law practice are the same as they have been for eons.

- You still need to market your practice and obtain and retain clients, although the tools you use may be dramatically different than those of previous generations. For example, your online presence will be much more important than having an ad in the phone book.
- You still have to be careful about ethics and client confidentiality, even in these new arenas.
- You still get what you pay for. Don't skimp on equipment, training or getting the technical assistance you need to set up your applications and to streamline your workflow. Setting up your office efficiently from the beginning will pay off, especially if you plan to grow your firm. Working with the right legal technology consultant who understands your firm and can help you to select the right combination of hardware and applications and to plan for the future, will in the long run save your firm money by preventing expensive mistakes.
- You still need to choose the right mix of hardware and software that best meets your firm's current and future needs.
- You still need to surround yourself with the best people you can find but remember to build in controls and checks to avoid malpractice. Law firms often hold substantial amounts of money for their clients, mak-

ing it tempting for an unscrupulous employee. At a minimum, as a business owner, you should review the firm's bank and credit card statements monthly to ensure there are no unauthorized charges.

Setting Up Your Office – A Few Specifics

Most law firms (and their clients) are PC-based, although this may shift as we move towards more Web-based products which do not require Windows. If you plan to have more than three or four people who work physically within your firm or you want to perform functions remotely, you are well advised to invest in a server to store your data and applications. For small firms, the Windows Small Business Server bundles the operating system along with licenses for Exchange, terminal services for remote access and SQL, which is increasingly used to manage billing and practice management programs. If you plan on growing, you may want to consider having a second server to separate the e-mail functions of Exchange from your other applications. Lawyers who need to be mobile should have laptops or possibly even a netbook or tablet PC, depending on the nature of their work, although you may want to equip them with an external monitor and keyboard. As noted, dual monitors can be very useful. Being able to search the Web and manage e-mail on one screen while editing a document, tracking your time or taking notes during a phone conference on a second screen, means that your staff is more efficient (and possibly a little more distracted?).

While it is tempting to use a wireless network, your office applications should run on a wired network. You might consider having a wireless option for occasional access such as doing a presentation for a client in a conference room or sitting quietly checking e-mail. For database applications like practice management and billing systems, though, you are best off connecting to your network directly. High-speed digital copiers that also serve as printers, scanners and fax machines have become the norm in most firms. Desktop scanners like the Fujitsu Scan Snap can make it easier for everyone in your office to scan their papers directly into your system and create a more paper-less environment.

Consider a Voice Over Internet (VOIP) phone system when selecting your Internet connection. Make sure you have backup options that include both remote storage and local storage that can be taken off site regularly. Smartphones like the iPhone, Blackberry Tour and Palm Pre allow us to carry much of our office with us (with the prospect of being available to clients 24/7). We're just beginning to see applications that let us view our office desktop from our phone. You can expect that trend to continue.

Most firms purchase the Microsoft Office suite to create documents, spreadsheets and slide shows. Some firms still use WordPerfect, but they are a distinct minority today. Law firms should also maintain software to man-

Cloud Computing

Cloud computing refers to the software-as-a-service (SAAS) model of providing software applications. If you've ever used online banking you've done cloud computing. In cloud computing the end user accesses the services they need through their Web browser – the software is not resident on the user's specific computer. There are plenty of advantages to cloud computing (cost savings and convenience to name two) but there are things to be aware of as well. Many legal experts have concerns over security in the cloud and there are numerous opinions on where cloud computing fits in to e-discovery.

Barbara Beauchamp
Editor, NYSBA Web Site

age timekeeping, billing and accounting. There are many products, designed specifically for law firms, to choose from that will do the different types of billing arrangements needed by lawyers. Many of these programs either include or can be linked to practice management systems, enabling you to keep track of your matters and calendar as well as performing many other functions, depending on the specific product. If you are establishing a new firm, you would be well advised to either select a practice management system that includes document management or purchase a stand-alone document management program that can be tied to your other applications.

Depending on the nature of your practice, there may also be practice-specific programs that can assist with the preparation of documents or perform the calculations needed to manage your clients' work. In choosing your software, focus first on the functions you need to accomplish your tasks rather than the category of software. Many products cross over and perform functions from other categories. For example, a practice management system may have built-in document management or document assembly functions for merging documents from data within them.

Conclusion

For today's solo and small-firm practitioners, an efficient business and effective client service depends on smart use of the available technologies. Find a vendor you can trust to help create an approach that's best for you and help you choose the best tools for your practice. Don't skimp on equipment, setup, customization or training. This will help you prepare for the changes that are coming – and coming at an ever-faster pace.

Don't be alarmed. Yes, it can be hard, even frustrating, to build a business in this day and age, especially if you do not consider yourself as "tech-savvy." But, if you made it through law school and at least one bar exam, you are not the type of person to throw up your hands and give up. You are ready for the type of challenge that can inspire creative solutions. ■



Excerpts From the Report of the Special Committee on Solo and Small Firm Practice, June 2009¹

Executive Summary

On August 6, 2008, NYSBA President Bernice K. Leber appointed Past President Robert L. Ostertag to Chair a Special Committee on Solo and Small Firm Practice (the “Committee”) to research, consider and report on this important area of concern. Mr. Ostertag has extensive experience and involvement at state and national levels with issues of particular concern to solo and small firm practice. His committee comprised a select representative group from solo and small firm, academic and judicial settings, all well acquainted in one way or another with the unique problems that confront solos and small firms.

Of the Association’s approximately 74,000 members from all areas of New York, every state in the nation and 108 countries, the majority of them – some 55% – practice in solo or small firms of fewer than 10 attorneys. If firms of up to 20 attorneys are included, that figure increases to 64%.² The concerns, interests and everyday challenges faced by this significant portion of our membership are of

primary importance to this Association; their needs must comprehensively be addressed.

A thorough consideration of NYSBA’s role in providing support to solo and small firm practitioners raises important questions: For example, what programs and services does NYSBA offer to its members? What programs and services does NYSBA offer that may not be familiar to its members? What initiatives can we undertake to improve NYSBA’s direct services? How can we better coordinate our activities and resources with other associations and the courts of our state, and perhaps other entities as well, to enhance the practice environment for solo and small firm practitioners?

The mission of the Committee created by President Leber was to recommend ways by which NYSBA, alone or in collaboration with local bar associations, courts and other relevant entities, might better assist solo and small firm attorneys in meeting the practice and lifestyle challenges they face. To do so, the Committee was charged

with making a comprehensive study of the particular issues and challenges that confront solo practitioners and small firms in New York State from whatever source; to review the quality, accessibility and level of awareness of existing NYSBA programs that are designed to assist solo practitioners and small firms; and to recommend new programs, benefits, resources and services that should be developed to help such practitioners and their firms.

Further, the Committee was charged with evaluating the Unified Court System's implementation of recommendations proposed in 2006 by then Chief Judge Judith Kaye's Commission on Solo and Small Firm Practice in New York, and with recommending further measures appropriate to the achievement of particular goals set forth therein. That assignment, together with a general assessment of current litigation issues affecting solo and small firms, was delegated to the first of our Committee's four subcommittees. While the subcommittee undertook to address all such litigation issues, the Unified Court System's Office of Court Administration ("OCA") was preparing its own status report on the same issues. That Interim Report became available to us in late March 2009. Included in this Report are our comments responsive to those issues appearing in OCA's Interim Report that we believe are most appropriate to problems of our constituency.

A second subcommittee was charged with surveying a random sampling of solo and small firm practitioners (both NYSBA members and non-members) in New York State to identify their greatest challenges and concerns. Problems relating to finances or cash flow were reported as the most significant issues these practitioners face. Other important concerns expressed in the survey responses included marketing, time management, human resources and staffing.

A third subcommittee focused its attention specifically on the level of NYSBA's current support for solo and small firms. The subcommittee divided its efforts into five subject categories, viz., educational programs, publications, internet resources, member benefits and networking opportunities. It concluded that NYSBA currently offers a number of programs, resources or activities that should be better marketed or promoted successfully to reach a greater number of our solo and small firm practitioner members.

A fourth subcommittee focused its attention on the activities and resources of other bar associations. The subcommittee found that NYSBA fares well when compared to many other state, local or national bar associations. However, several important resources were identified that are not currently offered by NYSBA, but that deserve review and consideration as they may provide useful benefits to solo and small firm practitioners. Further, its review of other bar associations revealed the need for NYSBA to create a focal point, such as within an existing

section or committee of NYSBA, or a NYSBA staff-driven initiative, to address solo and small firm needs on an ongoing basis.

As detailed in the concluding section of this Report, our Committee has identified a number of action items recommended either for direct action by the Executive Committee or for adoption by the House of Delegates. The Committee divided these recommendations into short-term, mid-term and long-term objectives.

Short-term recommendations of the Committee focused on creating greater awareness of the issues detailed in this Report and permitting the Committee to continue its work in order to see through to completion many of the recommendations proposed herein. During this period the Committee also envisions the enhancement of the NYSBA web site to provide a wider range of, and greater access to, resources for solo and small firm practitioners; the creation of a permanent institutional home for the needs of these attorneys within the Association; and further development of a variety of resources that will aid solo and small firm practitioners in their practices, including an annual symposium dedicated to this constituency and these issues.

The Committee recommends implementing a number of mid-range initiatives, including the development of a membership plan that will significantly increase small firm membership over the next five years, and the coordination of better relationships with other bar associations with the goal of identifying opportunities for joint efforts to serve solo and small firm needs. Increased and improved educational programs and publications are envisioned, as well as the creation of greater access to high quality online legal research services for these lawyers.

Long-term goals recommended by the Committee in this Report include a carefully considered strategic plan for supporting solo and small firm practitioners in 2014, together with a similar review and analysis each five years thereafter. These goals also include improved coordination of efforts between NYSBA and OCA in order to improve access to the courts for solo and small firm practitioners, both through technology resources as well as better designs for case management.

The analysis of the Committee contained in this Report, and the recommendations that follow, are based on the recognition that the largest and fastest growing segment of NYSBA membership is that of solo and small firm practitioners. The Committee believes that its recommendations will enhance the professional and personal lives of these attorneys as well as ensure that NYSBA continues to be viewed as a vital, valuable, and necessary resource for the majority of practitioners.

The Committee's Recommendations

As a result of its work, our Committee has identified a number of action items, which follow, as recommenda-

tions either for direct action by the Executive Committee or adoption by the House of Delegates. These recommendations are divided into short-term (1-2 years), mid-term (3-5 years) and long-term (beyond 5 years), in order to capture the sequence of new programs and services for solo and small firm practitioners.

Short-term Recommendations

- This Report should be circulated widely within the state, and should be delivered electronically to all New York solo and small firm practitioners.
- Our Committee should continue to work for another year, in order to implement the recommendations in this Report in accordance with the direction of NYSBA leadership and to fully respond to the comments by OCA regarding those recommendations concerning court procedures and practices.
- The NYSBA Web site should be redesigned to provide greater and easier access to solo and small firm users, to offer a richer mix of information to assist these users, and to enhance networking and communication opportunities for users. This recommendation contemplates a greater use of listserves, blogs, social networking opportunities, and online continuing legal education offerings.
- NYSBA should create a permanent institutional home for solo and small firm practitioners within the Association. This entity should be funded through NYSBA, as opposed to through dues, and should take the form of a coordinating council. This council should include representation in key areas: the General Practice Section, the Executive Committee, the Law Practice Management Committee, the Membership Committee, the Continuing Legal Education Committee, the Publications Department, as well as other NYSBA sections and committees offering programs and services for solos and small firms. Rather than creating a redundant set of programs and services, the solo and small firm coordinating council should work through existing NYSBA entities charged with carrying out programs beneficial to solo and small firm lawyers. This council should be funded to meet at least twice each year to provide oversight of solo and small firm programs and activities. Working closely in support of and in tandem with this council, there should be a working group or team of staff from the association representing such departments as; Law Practice Management Department, CLE, Publications, Lawyers in Transition, Lawyer Assistance, Membership and Marketing, and a Liaison to the General Practice Section, who would work on developing programs and resources for solo and small firm practitioners.

- The council should work with the Law Practice Management Committee to assemble an online bank of forms and checklists designed to assist solo and small firm practitioners in their daily practice. This should be done in a manner that does not conflict with or frustrate our efforts to market forms and other publications and probably should focus on solo and small firm practice management.
- The council should work with the Law Practice Management Committee to develop and maintain a comprehensive database of print and online resources relevant to solo and small firm practice. These resources should be made available on an affordable basis or for free to solo and small firm practitioners, and archived to support future research into solo and small firm practice.
- The council should work with the Law Practice Management Committee, to develop specific services to assist solo and small firm practitioners, including more robust practice risk management assessment services, technology support, and assistance in overall law practice efficiency. Over the course of the next year, the Committee should investigate and make recommendations regarding the need for a practice management assistance program, the alternative models available to provide such services, and funding options, including direct payment by users for such services.
- The council should work with the Law Practice Management Committee to sponsor an annual two day Solo/Small Firm Practice Symposium, beginning in June 2010 and each June thereafter. This Symposium should not only provide a showcase for educational programs for solos and small firms, but it should provide networking opportunities for these practitioners, and showcase the benefits of NYSBA membership to solo and small firm lawyers.

Mid-term Recommendations

- NYSBA should develop a membership plan, which increases solo and small firm membership. Such a plan should address ways to attract new members, ways to retain current members, and ways to maintain a dues structure that is attractive to solo and small firm practitioners.
- NYSBA should work with other bar associations, including local bars, specialty bars and the American Bar Association to identify opportunities for joint efforts to serve the needs of solo and small firm members. NYSBA should assume a leadership role in building mutually supportive relationships with these other organizations.
- Over the next three to five years, NYSBA should increase the volume of educational programs and

publications targeted to solo and small firm practitioners, in print, live CLE and online formats.

- NYSBA should continue to investigate opportunities for discounted or free electronic research resources for solo and small firm practitioners. The current Loislaw program provides some assistance, but its limited features reduce its utility for users. In addition to the libraries provided by Loislaw we should create a cafeteria of research services giving solo and small firm lawyers affordable access to the same resources that lawyers in larger firms have.

Long-term Recommendations

- The Executive Director should explore the opportunity to enhance staff support and other resources of the Association providing assistance to solo and small firm lawyers, in order to increase the level of support for this important segment of bar membership.
- NYSBA should develop a long-term strategic plan for supporting solo and small firm practitioners. This strategic analysis should occur in 2014, following implementation of the foregoing short and mid term recommendations in this plan, in order to review the progress and assess the needs of solo and small firm practitioners at that time, and to make new recommendations, then and every five years thereafter.
- NYSBA should adopt as a core institutional goal support for and assistance to solo and small firm practitioners. The Association should provide sufficient resources to permit this goal to be achieved.
- OCA should continue to work with NYSBA to improve access to the courts for solo and small firm practitioners by enhancing online systems for e-Filing, calendar information, case tracking, forms and access to court files. In addition, the NYSBA

should cooperate with OCA to enhance its Web site, Wi-Fi access, e-filing and fax communications with the courts, teleconferences and videoconferences, summary jury trials, effective alternative dispute resolution programs and other recommendations of the Kay Commission Report discussed above.

These recommendations contemplate a major shift in the quantity and quality of NYSBA programs and services to solo and small firm practitioners. The recommendations are not intended to diminish the value of existing programs and services. Rather, our Committee finds that given the number of solo and small firm practitioners and their critical importance to the long-term health of NYSBA, greater emphasis on this group's needs should be provided. Our Committee notes that many of the recommendations require the allocation of resources in order to accomplish the identified objectives. Our Committee also notes that many of the problems solo and small firm lawyers face relate to the burdens they encounter in their dealings with the court system. Resolution of these problems will involve ongoing dialogue with the Office of Court Administration, as well as collaborative effort with local bar associations and courts. We thank President Bernice Leber for creating this Committee and providing it the opportunity to serve the New York State Bar Association to improve the lot of solo and small firm practitioners. We view this Report not as an ending, but as a renewal and redoubling of efforts to assist the solo and small firm lawyers of this state. ■

1. The entire Report is available at www.nysba.org/SSFReportJune09.
2. NYSBA Membership Profile Report November 2008. These figures are consistent with research conducted by the American Bar Foundation, which finds that approximately 56% of the lawyers in private practice are solos (38% of all lawyers). See Clara Carson, 2004 Lawyers Statistical Report ("ABF").

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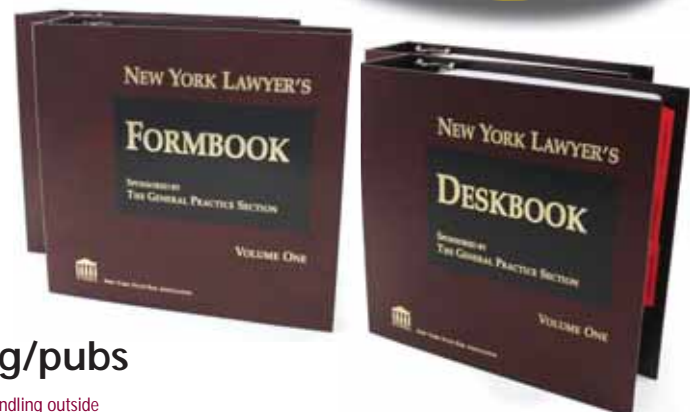
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The Conundrum of Preserving In-House Attorney-Client Privilege

By Thomas B. Cronmiller

The idea of a corporation or other business entity being an independent legal entity (such as a person) has posed unique challenges for lawyers. The application of the attorney-client privilege to protect communications between a corporation and its attorneys is no exception.¹

There are added challenges when dealing with communications between a corporation and its in-house counsel as opposed to outside counsel. The attorney-client privilege applies only to legal communications (not business communications), and there can be a blurry line between in-house counsel's legal role and business role. Because of this confusion, a line of cases has developed that seems to narrow the application of the attorney-client privilege to communications with in-house counsel.² This article discusses some pressing issues in this area.

Attorney-Client Privilege: The Basics

First, getting back to the basics: courts favor the admissibility of all relevant evidence. The United States Supreme Court has held that the public has the right to "every man's evidence."³ The attorney-client privilege is merely an exception to this broad public policy favoring admissibility and must be proved by the party asserting the privilege.

The classic definition of the attorney-client privilege is: "[w]here legal advice of any kind is sought from a professional legal advisor in his capacity, as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor, except the protection be waived."⁴ The attorney-client privilege only protects legal communications – not information. The privilege protects information only if disclosure of the information would reveal protected communications.⁵

The purpose of the attorney-client privilege is to encourage candid communication between a client and his attorney. By assuring the client that his statements will not be used against him, the client will speak more freely. As a result of the client's candor, the attorney will have complete information upon which to render advice. Theoretically, this will result in more informed and therefore more accurate and effective legal assistance, and clients will be able to conform their conduct to the requirements of the law.⁶

The definition of the attorney-client privilege appears straightforward, and the underlying rationale is equally applicable to a business entity, such as a corporation, as it is to an individual. However, the application of the privilege to in-house counsel is muddled by in-house

counsel's multiple responsibilities, which include both legal- and business-related functions.

Courts are aware that in-house counsel often have expertise in the business of the company and are therefore involved in making business decisions. Oftentimes, a company will try to cloak business communications as legal communications in order to protect them from disclosure in litigation. Consequently, the courts will not automatically presume that communications between the corporate client and in-house counsel are privileged (as they generally do with outside counsel) and will be more cautious in determining whether the privilege applies.⁷

The courts have developed two justifications for higher scrutiny in applying the privilege to in-house counsel: (1) to avoid protecting business communications (the protection of which would not further the underlying rationale of the attorney-client privilege); and (2) to prevent corporations from improperly protecting otherwise unprivileged communications and information by funneling them through in-house counsel.⁸

Unfortunately, the courts have not developed an effective, predictable "safe harbor" test to determine whether a communication is primarily for business or legal purposes, likely because most communications between a corporate client and in-house counsel have at least a tangential relationship to the corporation's business. Courts look to the totality of the facts on a case-by-case basis in order to ascertain which "hat" in-house counsel is wearing at the time the communication is made. Consequently, there remains uncertainty in this area.

Purpose of the Communications

Communications between a corporate client and in-house counsel regarding legal advice are entitled to the attorney-client privilege just as communications with outside counsel.⁹ However, communications between the corporate client and the in-house counsel regarding business advice are not so protected.¹⁰ Thus, the attorney-client privilege applies only where the *primary* purpose of the communication is to obtain legal advice.¹¹

Rossi

The seminal New York Court of Appeals case, *Rossi v. Blue Cross and Blue Shield of Greater N.Y.*, is instructive. There, the issue was whether in-house counsel's internal memorandum was protected by the attorney-client privilege. In discussing the difficulties arising from the application of the privilege to in-house counsel, and finding the privilege must be applied cautiously and with heightened scrutiny, Judge Kaye wrote:

[U]nlike the situation where a client individually engages a lawyer in a particular matter, staff attorneys may serve as company officers, with mixed business-legal responsibility; whether or not officers, their day-to-day involvement in their employers' affairs may

blur the line between legal and non legal communications; and their advice may originate not in response to the client's consultation about a particular problem but with them, as part of an ongoing, permanent relationship with the organization. In that the privilege obstructs the truth-finding process and its scope is limited to that which is necessary to achieve its purpose . . . , the need to apply it cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure.¹²

Judge Kaye confirmed that for the attorney-client privilege to apply, the communications "must be made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose."¹³ Judge Kaye found that there is no hard-and-fast test to make such a determination, but after looking at the specific facts of the case, the Court determined the subject communication concerned legal advice and was therefore privileged.

It is equally apparent that no ready test exists for distinguishing between protected legal communications and unprotected business or personal communications; the inquiry is necessarily fact-specific. However, certain guideposts to reaching this determination may be identified by looking to the particular communication at issue in this case. Here, as the Appellate Division noted, the "memorandum is clearly an internal, confidential document. Nothing indicates that anyone outside the defendant company had access to it." Moreover, there is no dispute as to the author's status or role. Blaney functioned as a lawyer, and solely as a lawyer, for defendant client; he had no other responsibility within the organization. His communication to his client was plainly made in the role of attorney.¹⁴

Although the Court found the subject communications to be privileged, the legal standard set forth in the decision is a difficult one to meet.

Georgia-Pacific Corp.

Another important case limiting application of the attorney-client privilege to in-house counsel is *Georgia-Pacific Corp. v. GAF Roofing Manufacturing, Corp.*¹⁵ The Court held that advice of a legal nature given by in-house counsel in connection with the negotiation of a contract was not privileged because the in-house counsel negotiated the contract and was therefore acting in a business capacity. The Court stated as follows:

The record indicates that Mr. Scott was asked to review GP's proposed agreement with respect to the environmental provisions. He then negotiated the environmental provisions of the agreement, and after execution of the agreement, he served as negotiator of the matters to be included in Schedule 1. As a negotiator on behalf of management, Mr. Scott was acting in a business capacity.¹⁶

This case is significant because the subject communications were of a legal nature – they concerned the nature and extent that certain events would be covered by the agreement and the extent of protection certain proposed terms afforded the company. However, the Court found

Communications arising out of corporate meetings intended to discuss business issues rather than legal issues are not protected by the privilege. An attorney’s attendance at a meeting “does not insulate business communications made in those meetings from disclosure.”²⁰

Another factor looked at by courts is in-house counsel’s place on the corporation’s organizational chart.

that the negotiation of a contract is a business function rather than a “lawyer’s traditional function.” Thus, in-house counsel’s advice relating to the contract was not subject to the privilege. It seems that because in-house counsel was the sole negotiator of business issues, the Court found his communications were not protected even though they related to legal issues – that is, the legal advice was inextricably intertwined with the business points he was negotiating.¹⁷

The Southern District of New York relied on *Rossi v. Blue Cross & Blue Shield* as well as *Cooper-Rutter Associates Inc. v. Anchor National Life Insurance Co.*,¹⁸ finding that a handwritten memorandum prepared more than six months prior to the action by an individual who acted as both in-house counsel and corporate secretary was not privileged. The Court found that the memorandum concerned both business and legal aspects; however, because it arose out of ongoing negotiations with the plaintiff in connection with a business transaction, “the documents were not primarily of a legal character, but expressed substantial non-legal concerns.” Again, even though the Court found the memorandum concerned legal aspects, the memorandum was not privileged because counsel was exercising a business function.

Legal Advice or Business Advice?

Often, as in *Cooper-Rutter Associates Inc.*, in-house counsel utilize both a legal and a business title. Where that is the case, a court may have difficulty determining the purpose of the subject communication by simply looking to in-house counsel’s title. It is, therefore, good practice for in-house counsel to use their legal title when giving legal advice.

Another factor looked at by courts is in-house counsel’s place on the corporation’s organizational chart. One court noted that a lawyer in the legal department or working for general counsel is presumed to be giving legal advice, while the opposite presumption applies to a lawyer working for a financial or other business-related department.¹⁹ A lawyer’s place on an organizational chart is not dispositive, however; the relevant presumption is rebuttable by the party challenging the presumption.

Conversely, where it is clear that the purpose of the meeting is to seek and obtain legal advice, a court will likely find the communications to be protected. When there is both legal and business discussion in a meeting, the court will consider several factors to determine the primary purpose of the meeting. For example, a court may examine the timing in which legal advice was rendered at a meeting. If there was a lengthy business discussion, and at the end, counsel makes some comments, it could appear that counsel was brought in to cloak the meeting in a privilege. But if legal advice is sought and given at the outset and continues throughout the meeting, a court is more likely to find the meeting was protected by the privilege.

Courts will ultimately look to the sum and substance of the communication to determine whether it concerns legal or business issues, as a corporation might attempt to improperly use in-house counsel to protect unprivileged business information. In *Abel v. Merrill Lynch & Co.*,²¹ the court found that a corporation may not insulate itself from liability by funneling otherwise unprivileged information through in-house counsel, destroying the underlying data, and then claiming the in-house counsel’s reports were privileged and not discoverable.

Unfortunately, courts have not set forth a consistent, predictable test to establish whether the privilege applies, leaving the prevailing law uncertain. Creating more confusion is the fact that, even though outside counsel tend to provide similar services as in-house counsel (including business services), they seem to get a free pass.

Clarifying Communications

There are steps that can be taken by in-house to substantially reduce the doubt associated with communications intended to be privileged. In-house counsel can clarify the nature of their advice and separate business advice from legal advice. In-house counsel should make it as easy as possible for a court to find that they were acting in a professional legal capacity – not in a business capacity – when they made the subject communication.

For example, when preparing written materials, whether memoranda, notes or reports, in-house counsel

should make clear that the corporate client has requested legal advice and that the content of the written materials responds to that request. Specific language should be used to demonstrate that counsel is acting in a lawyer's traditional capacity (*i.e.*, "this memorandum responds to your request for legal advice on the issue of . . ."). Legal material should be kept separate and distinct from business documents. Non-communicative information and facts should be separated from communicative legal advice and impressions.²² When a document must contain business information, in-house counsel should insert legal conclusions throughout. Counsel should stamp documents sought to be privileged as "confidential and privileged attorney-client communication." While a court may not find such language dispositive, it may serve as a factor in favor of the privilege while the lack of such language may cut against such a finding.

In-house counsel should also be aware that if they are performing a business function (such as negotiating the terms of a contract or voting on business decisions) in conjunction with giving legal advice, the privilege may be destroyed. Staffing decisions should be made accordingly. For instance, had in-house counsel in *Georgia-Pacific Corp. v. GAF Roofing Manufacturing Corp.* counseled a non-lawyer negotiator only on legal issues arising out of the agreement (as opposed to negotiating the agreement himself), the privilege may have been preserved. Specifically, in-house counsel should have drafted a memorandum that clearly indicated that the corporation asked for an opinion on the legal effects of the proposed terms or the agreement, and that the content of the memorandum constitutes legal advice.

The same applies to voting on a corporate board. Oftentimes in-house counsel serve as officers or directors of a corporation. However, a court will likely find that voting on business matters is a business function. Thus, it is good practice for in-house counsel to avoid voting on business matters if the company seeks to preserve such actions and communications as privileged.

The utilization of inside counsel to cloak otherwise non-privileged information was the concern of the authors of *The Moral Compass of the American Lawyer*.²³ If a corporate client's intention is to cloak unprivileged information, such conduct is unethical. However, companies should avoid the appearance of impropriety by being clear as to the nature of the communication. For instance, if a document generated by the corporation is intended to be privileged, the corporate representative should not merely carbon copy in-house counsel. The representative should frame the document as seeking legal advice, and the document should be directed primarily to in-house counsel. Similarly, if communications made at a meeting are intended to be privileged, in-house counsel should not merely attend the meeting. The meeting should be framed as a meeting to seek and obtain legal advice, and

in-house counsel should conduct the meeting accordingly.

Conclusion

In sum, when business and legal materials are separated, the legal material will more likely be subject to the privilege. Of course, the business advice will not be protected. That, however, is a small trade-off considering the alternative – that neither the business nor the legal communications would deserve protection. ■

1. See *Upjohn Co. v. United States*, 449 U.S. 383, 389–90 (1981) ("complications in the application of the [attorney-client] privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual").
2. See Amy L. Weiss, *In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 *Geo. J. Legal Ethics* 393, 398 (1998); see also Albert L. Vreeland & Jennifer L. Howard, *The Care and Feeding of In-House Counsel*, 67 *Ala. Law.* 340 (2006).
3. *United States v. Nixon*, 418 U.S. 683, 710 (1974) (citing *United States v. Bryan*, 339 U.S. 323, 331 (1950)).
4. 8 John Henry Wigmore, *Evidence in Trials at Common Law* 554 (rev. John T. McNaughton 1961); see also *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1036 (2d Cir. 1984); *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961).
5. *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d at 1037 (citing *United States v. Cunningham*, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982)).
6. See *Upjohn*, 449 U.S. at 387, 389.
7. See *Boca Investorings P'ship v. United States*, 31 F. Supp. 2d 9, 11 (D.D.C. 1998).
8. See Weiss, *supra* note 2, at 398.
9. *Boca Investorings P'ship*, 31 F. Supp. 2d at 11 (citing *Upjohn Co.*, 449 U.S. at 389–97).
10. *Id.* (citing *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d at 1036–37).
11. *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 542 N.Y.S. 2d 548 (1989).
12. *Id.* at 592–93 (internal citations omitted).
13. *Id.* at 593 (quoting *In re Grand Jury Subpoena Served upon Bekins Record Storage Co.*, 62 N.Y.2d 324, 329, 476 N.Y.S. 2d 806 (1984)).
14. *Id.* at 593 (internal citations omitted).
15. *Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp.*, 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. Jan. 24, 1996).
16. *Id.* at *11–12 (internal citations omitted).
17. See also Vreeland & Howard, *supra* note 2, at 346.
18. *Cooper-Rutter Assocs. Inc. v. Anchor Nat'l Life Ins. Co.*, 168 A.D.2d 663, 563 N.Y.S.2d 491 (2d Dep't 1990).
19. *Boca Investorings P'ship*, 31 F. Supp. 2d at 12.
20. See *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. L.L.C.*, 2003 U.S. Dist. LEXIS 1106 (S.D.N.Y. Jan. 29, 2003) (citing *Upjohn*, 449 U.S. at 396) ("A party cannot conceal a fact merely by revealing it to his lawyer."); *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 1995 U.S. Dist. LEXIS 14808, at *28 (S.D.N.Y. Oct. 10, 1995) ("Discoverability of a communication depends on its nature, rather than its source.").
21. *Abel v. Merrill Lynch & Co.*, 1993 U.S. Dist. LEXIS 1213, at *9–10 (S.D.N.Y. Feb. 3, 1993).
22. See Patrick J. Sweeney & William P. Corcoran, *Evidentiary Privileges for Corporate Counsel* ch. 1 (Voice of the Defense Bar CD-ROM, 2008).
23. Richard A. Zitvin & Carol M. Langford, *The Moral Compass of the American Lawyer* (Ballantine Publ'g Group 1999).



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Handling the Question & Answer Session

As the applause dies down, the emcee addresses you and says, “Thank you for speaking with us today— we really enjoyed it and received a lot of valuable information.” Without warning, she turns to the audience and asks, “Does anyone have any questions for our speaker?” Urp. You didn’t know they’d have a Q&A session after your presentation. What do you do?

If you’re speaking to promote your firm or legal expertise, you will have to deal with question and answer sessions. Handle them well, and you’ll appear to be the expert you say you are. Handle them poorly, and your expertise becomes suspect. Here are some tips for ensuring the success of a Q&A session.

Tell them in advance. If no one asks any questions, the Q&A session feels awkward for both the speaker and the audience. Usually, the audience didn’t think of any questions because they didn’t know they’d get the chance to ask them. You can fix this by telling them about the Q&A session at the beginning of your speech (“I’m sure some of you will have some questions about this subject. Please hold them until the Question and Answer session after my presentation, and I’ll be happy to answer them then.”) Alternatively, ask your introducer to tell the audience about the Q&A session. (“After Shannon finishes speaking, she’ll be happy to answer your questions.”)

Prepare sample questions to prime the pump. Sometimes, even when you’ve notified them about the Q&A session, they’re so stunned by your

presentation that they forget to ask any questions. When that happens, kick-start the Q&A session with some sample questions. (“When I’ve presented this information before, someone in the audience usually asks, ‘But does that tax provision also apply to LLC’s?’ It does, and here’s why . . .”) No one wants to be the first to ask a question. Jump-start the process, and they’ll be more willing to ask questions.

Be prepared. Great! They’re asking questions, just like you’d hoped. Now comes the hard part – you need to answer them. This will be the smallest portion of this article, but it’s the most important. Just like the Boy Scouts, you must “Be Prepared.” Know your subject matter and what questions to expect from your audience. If someone asks a question that you don’t know the answer to, tell them you don’t know. Promise to get back to them, and keep your word.

Repeat the question. If you speak to large groups, use a microphone, or record presentations for later broadcast, you should repeat the audience’s questions. This helps everyone hear the question, and buys you a few additional seconds to compose your response.

Don’t let one person dominate the Q&A. Remember the guy in law school who always dominated the classroom conversation? The class didn’t like him then, and your audience doesn’t like him now, either. How do you prevent one person from controlling the Q&A session? Offer to answer their questions after the presentation. Take only

one or two questions from each person, to give everyone an opportunity to ask questions. Stop calling on that person.

You can even ask the emcee or meeting planner if anyone will give you problems during the Q&A. (“Oh yeah – Mr. Big always likes to heckle the speakers.”) If so, ask for help – tell them to tap Mr. Big on the shoulder, pretend he’s got a phone call, and walk him out of the room. They want your presentation to succeed, so they’re usually willing to help. Just remember – you’re onstage, so you’re the one in control of the room. Don’t cede your control to someone in the audience. Whatever you do, do it tactfully. Don’t embarrass an audience member, unless they really, *really* deserve it. Chances are, they don’t.

Don’t offer advice that applies to only one specific instance. To head this off in advance, tell them you can’t answer specific scenarios, since you won’t be able to give a valuable answer without knowing all the facts. As always, remind them that they would best benefit from retaining private counsel to deal with specific legal issues. If someone is obviously trying to grill you about a legal problem they have, offer to meet with them privately after the presentation. (“This would take longer to answer than we have time for. Please meet with me after the meeting, and I’ll be happy to speak with you then.”) If it can’t be answered during the Q&A period, it’s probably a situation they need to retain your services for, anyway.

“I’ll take two more questions.” Give them a clue that the Q&A will end soon by saying you’ll take two (or three) more questions. To ensure that the final question is worthwhile, try this technique: “Okay, this is going to be the last question. Please remember that I will be happy to meet with you afterwards for as long as I can. Now, let’s finish with whoever has the absolute best question that will help the greatest number of people.” When you phrase it like that, most people will drop their hands, and the remaining questions will usually be worthwhile.

Have a second close. Most Q&A sessions end on a low note. Take some advice from the bad guy in *Highlander*: “It’s better to burn out than to fade away.” Don’t let the impact of your presentation dwindle away. Have a second closing comment prepared to deliver after you’ve answered the final question. This statement can be anywhere from 30 seconds long to a minute or so. It should remind them of the main point of your speech, and also end the presentation on a high note.

Handling the Q&A session can be difficult and a bit uncomfortable at times, but if you will do your research, be prepared, and follow these tips, you’ll handle it with poise and polish. *Any questions?* ■

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Foundation Memorials

A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to The New York Bar Foundation. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I have been practicing law for 20 years. I am admitted to practice in New York, two other states, several United States Federal District Courts, and the United States Supreme Court. I started my career as a federal prosecutor and later worked for two other state governmental agencies. I now work in a private firm and have several cases pending before governmental agencies. I am not on the management committee, but recently I heard rumblings about cutbacks and even the possible dissolution of my firm because of the effects of the current economy. I have a family to support, and naturally I'm concerned.

I am thinking about applying for a job with the government, and would like to know if any problems might arise regarding pending cases on which I am presently working. Can you give me some guidance? Is there anything that my prospective governmental employers and I should be aware of before I interview?

Signed,

In Need of Job Security

Dear In Need of Job Security:

It is no secret that we are in the midst of tough economic times, and that many law firms have had to downsize by letting attorneys go or by furloughing their newly hired attorneys. However, no matter what the economic climate may be, lawyers looking for new jobs must remain mindful of their ethical obligations to their clients, their employers and even their prospective employers.

At the outset, the most important factor to consider is your obligation to maintain confidential information learned during the representation of a client. Any attorney will surely agree that this is paramount among our duties, but if that attorney is also searching for a new job there is a temptation to permit concern for his or her own future to become a factor in current professional decision-making. It therefore is possible that under these circumstances a tension may arise

between the client's interests and the lawyer's, but a lawyer always is bound not to allow personal concerns to affect the exercise of professional judgment. If a lawyer were to permit personal interests to lead him or her to reveal confidential information, a conflict of interest would arise.

Although there are some exceptions regarding the disclosure of client confidences, a lawyer's search for new employment does not fall within those exceptions. You are quite right to be concerned about the cases that you have pending before governmental agencies if you choose to seek employment with those agencies. You are obligated to maintain confidential information during an interview and thereafter, if you are hired. Likewise, the governmental agencies must be mindful of maintaining the confidences and secrets of their clients, but also must be respectful of your obligations to your clients. Thus, you should be aware of such obligations and tread lightly through the interview process.

As you may know, New York adopted the New York Rules of Professional Conduct, effective April 1, 2009 (the "Rules") and prior to that date we were governed by the New York Code of Professional Responsibility (the "Code"). However, the relevant portions of both the Rules and the Code are substantially similar in defining client confidences. 22 N.Y.C.R.R. Part 1200 Rule 1.6 of the Rules provides as follows:

(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) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime;

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

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(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

In addition, Rule 1.0(j) cited above states:

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

Moreover, Rule 1.9(c) specifies:

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.

See also the Code at 22 N.Y.C.R.R. § 1200.19 [DR 4-101] (Preservation of Confidences and Secrets of a Client) and § 1200.27 [DR 5-108] (Conflict of Interest – Former Client).

In light of the foregoing, any time a lawyer interviews for or obtains a new position, he or she must maintain confidential information unless the client waives confidentiality by giving informed consent. As a result, the lawyer and the potential employer must decide the appropriate time to disclose to their respective clients that the lawyer is contemplating such new employment. At the initial interview, the lawyer may discuss the work being done without revealing client confidences by describing only the legal issues involved, or by talking about cases in a hypothetical manner so that the client cannot be identified. Accordingly, it would appear that any actual disclosure would be premature and unnecessary at the initial stages of the interview process, because the lawyer may not be offered the job, and so there would be no need for the potential employer to know the names of cases and/or clients.

The real issue is the timing of such disclosure to obtain informed consent. Should the lawyer obtain informed consent from the client when the offer of employment is made, or when it is accepted? All lawyers and law firms are required to do conflicts checks. 22 N.Y.C.R.R. Part 1200 Rule 1.10 states in pertinent part:

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

(e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

(1) the firm agrees to represent a new client;

(2) the firm agrees to represent 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.

(f) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless or whether there is another violation of these Rules.

(g) Where a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

Thus, unless and until the client provides a waiver after receiving

CONTINUED ON PAGE 55

C. Plaintiff's Actions Did Not
Contribute to the Cause of the
Injuries.

Rules for Drafting Headings

Every word in a persuasive brief must advance the advocate's case.⁹ Point headings are no exception. Advocates should construct point headings when an argument is crystallized in their minds.¹⁰ Thought-out point headings are organized and assertive. They make it easy for the court to rule in the advocate's favor.

Divide headings and subheadings appropriately. Each independent ground for relief has a separate point heading. A point heading is complete if a judge who agrees with that point but disagrees with all else will grant the relief the client seeks.

Advocates who have only one point needn't designate the point heading numerically.¹¹

Advocates must never have a solitary subheading.¹² When a subheading has an "A" but no "B," advocates should incorporate subheading A into the point heading itself.¹³

Advocates must be prudent when dividing subheadings. Excessively subdividing an argument will interrupt the flow of a simple argument.¹⁴

Keep the number of point headings to a minimum. Advocates should use three or four point headings. Too many arguments suggest that advocates have non-meritorious arguments. That weakens an advocate's credibility. It also weakens good arguments.

Designate headings with numbers. Each point heading and subheading should have a roman numeral, letter, or figure to identify the heading's text. A roman numeral (I, II, III) precedes a point heading. Capital letters (A, B, C) precede subheadings. Arabic numerals (1, 2, 3) precede sub-subheadings.¹⁵ Lower-case letters (a, b, c) precede sub-sub-subheadings.¹⁶ Most advocates rarely go beyond sub-sub-subheadings. If they do, they're preceded by i, ii, and iii.

Order headings by strength.

Advocates should order their point headings from the strongest to the weakest. The advocate's strongest argument is the one most likely to convince a court to rule in the client's favor. Judges anticipate that advocates will present their strongest argument first and assume that weaker arguments will follow. Presenting the strongest points at the outset helps judges flag important points, follow the argument, and stay focused.

Advocates who have several equally strong arguments should lead with the one that obtains the greatest relief for the client. Relief for a defendant in a criminal appeal, for example, is ranked by outcome, ranging in strength from dismissal, to a new trial, to a reduced sentence.

Advocates should first present threshold issues,¹⁷ such as a lack of jurisdiction or a statute-of-limitations violation, before they argue the merits. Judges don't want to parse through an entire brief before realizing that they should dismiss the case on a threshold issue.

Advocates also use point headings to respond to an opponent's brief. Although some advocates match the format of an adversary's point headings, effective advocates order their opposing arguments based on the strength of their own arguments. To help judges understand how a brief rebuts an adversary's arguments, advocates may note the points addressed in the adversary's brief. For example:

I. THE MOTION TO QUASH
THE SUBPOENA DUCES
TECUM SHOULD BE GRANTED
BECAUSE DEFENDANT
HAS STANDING TO ASSERT
PRIVILEGES OVER DECEDENT'S
MEDICAL RECORDS.

(Addressing Appellant's Point III.)

Be concise. Judges lose focus when headings are wordy. Effective advocates include enough facts to make the argument's logic clear but avoid cluttering the heading with too much information. A heading that's too long

wastes an opportunity to persuade. Compare the following:

I THE TRIAL JUDGE WAS
ERRONEOUS IN DENYING
DEFENDANT'S MOTION
TO DISMISS BECAUSE THE
PROCESS SERVER DID NOT
PROPERLY SERVE PROCESS
TO THE DEFENDANT WHEN
HE IMPROPERLY SERVED THE
PETITION.

As opposed to:

I. THE TRIAL JUDGE LACKED
PERSONAL JURISDICTION
OVER DEFENDANT, WHO WAS
SERVED IMPROPERLY.

Write in the affirmative. Advocates present their arguments best with affirmative language. Negative statements are confusing and cowardly. For example:

I. THE TRIAL COURT DID NOT
ERR IN DENYING SUMMARY
JUDGMENT FOR THE
PLAINTIFF.

Affirmative language is assertive and readable. For example:

I. THE TRIAL COURT
RIGHTLY DENIED PLAINTIFF'S
SUMMARY-JUDGMENT
MOTION.

Avoid using "not" before "because" in the same sentence. If advocates must write in the negative, they should maximize readability by avoiding "not" before "because." Using "not/because" suggests that advocates have an explanation different from the one they intended. For example:

I. PLAINTIFF'S COMPLAINT
SHOULD NOT BE GRANTED
BECAUSE SHE FAILED TO
STATE A CAUSE OF ACTION.

The above example might mean that plaintiff's complaint should be granted, but for a reason other than plaintiff's failure to state a cause of action.

Advocates may, however, use "because" before "not." They should

use this technique sparingly. For example:

I. BECAUSE PLAINTIFF FAILED TO STATE A CAUSE OF ACTION, HER COMPLAINT SHOULD BE DISMISSED.

Avoid beginning with “because.” For example:

I. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION.

Use “because” in short clauses only. Complex clauses confuse. Beware the “because” that refers to more than one thing. For example:

I. PLAINTIFF ARGUES THAT DEFENDANT IS GUILTY AND SHOULD BE CHARGED WITH BURGLARY BECAUSE DEFENDANT ENTERED THE PREMISES AND WAS FOUND WITH BURGLAR’S TOOLS.

In this example, the “because” can refer to “plaintiff argues,” “that defendant is guilty,” or “that defendant should be charged with burglary.”

Here’s a better example:

I. DEFENDANT IS GUILTY OF BURGLARY BECAUSE HE ENTERED THE PREMISES WITH BURGLAR’S TOOLS.

Don’t exaggerate. Point headings should be cautious with the facts.¹⁸ Advocates should also eliminate adjectives and adverbs.¹⁹ They exaggerate. So do italics, underlining, and quotation marks used for emphasis or sarcasm. This point heading in a car-accident case is overzealous:

I. DEFENDANT VERY RECKLESSLY FLEW THROUGH THE INTERSECTION WITHOUT ANY REGARD FOR HUMAN LIFE AFTER THE LIGHT HAD BEEN RED FOR WHAT SEEMED LIKE AN *ETERNITY*, AND THEREFORE PLAINTIFF’S “MOTION” FOR SUMMARY JUDGMENT MUST OBVIOUSLY BE DENIED.

As opposed to:

I. DEFENDANT DROVE THROUGH THE INTERSECTION SEVERAL SECONDS AFTER THE LIGHT HAD TURNED RED; THEREFORE, PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

Avoid undermining an argument.

If the first argument might not persuade, advocates should include alternative arguments if they have any. Advocates should relate alternative arguments to preceding arguments in terms that assume the first argument’s correctness. For example:

I. THE LAW OF THIS JURISDICTION DOES NOT ALLOW RECOVERY FOR THE WRONGFUL DEATH OF A FETUS, EVEN IF THE FETUS WERE VIABLE AT THE TIME OF THE INJURY.²⁰

As opposed to:

I. EVEN IF THE LAW ALLOWED RECOVERY FOR THE WRONGFUL DEATH OF A VIABLE FETUS, THE LAWRENCE FETUS WAS ONLY IN THE FIFTH MONTH OF GESTATION AND THEREFORE NOT VIABLE.

Be tactful. A court is more receptive to the position of an advocate who abstains from attacking an adversary or a judge. For example:

I. THE TRIAL JUDGE WAS EGREGIOUSLY WRONG WHEN HE GRANTED PLAINTIFF’S FRIVOLOUS MOTION TO DISMISS.

Advocates should rephrase the above example:

I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF’S MOTION TO DISMISS.

Avoid conclusory statements. Advocates lose an opportunity to persuade

when they show without telling. This conclusory example is unhelpful:

I. THE TRIAL COURT ERRED.

Don’t assume. Advocates shouldn’t mention obscure cases or statutes as the point heading’s conclusion. For example, avoid stating: “The motion to dismiss should be granted because the contract complies with the ruling in *Smith v. Jones*.”²¹ Don’t assume that a judge will know the statute or case law. Advocates who name a well-known case, like *Brown v. Board of Education*, needn’t give the full citation. Full citations in headings and subheadings to cases, as opposed to statutes, are disfavored anyway. In addition, advocates mustn’t assume that a judge will be familiar with the facts or understand information not yet explicitly stated.²² For example:

I. DEFENDANT’S MOTION SHOULD BE GRANTED BECAUSE OF WHAT HAPPENED TWO WEEKS AGO.

Instead, the point headings must allow judges unfamiliar with the facts or law of a case to understand an argument when reading it for the first time. A better example:

I. THE MOTION TO QUASH THE SUBPOENA SHOULD BE GRANTED BECAUSE DEFENDANT HAS STANDING TO ASSERT PRIVILEGES OVER DECEDENT’S MEDICAL RECORDS.

Avoid vague words. Vague words compel judges to decipher an advocate’s argument and prevent them from understanding the advocate’s point.

I. THE POLICE HAD SUFFICIENT PROBABLE CAUSE TO ARREST DEFENDANT.

As opposed to:

I. THE POLICE HAD PROBABLE CAUSE TO ARREST DEFENDANT.

Eliminate vague referents. Vague referents are pronouns (e.g., “he,”

“she,” “it,” “they”) that might refer to more than one person or thing. Vague referents confuse. Who is the “he” — Jones or Andrew — in this example?

I. JONES ARGUES THAT ANDREW'S MEDICAL RECORDS ARE ADMISSIBLE BECAUSE HE WAIVED THE DOCTOR-PATIENT PRIVILEGE.

A clearer heading:

I. ANDREW'S MEDICAL RECORDS ARE ADMISSIBLE BECAUSE HE WAIVED THE DOCTOR-PATIENT MEDICAL PRIVILEGE.

Don't order judges around. Don't use “must.” Use “should.” For example:

I. THIS COURT MUST GRANT DEFENDANT'S MOTION TO DISMISS.

As opposed to:

I. THIS COURT SHOULD GRANT DEFENDANT'S MOTION TO DISMISS.

Avoid using “lower court.” When referring to a lower court, advocates must specify which lower court they're referencing. Here's an ambiguous point heading:

I. THE LOWER COURT LACKED PERSONAL JURISDICTION OVER DEFENDANT.

As opposed to:

I. THE TRIAL COURT LACKED PERSONAL JURISDICTION OVER DEFENDANT.

Keep the subject and the verb next to one another. Advocates who place their subjects and verbs far apart make their point hard to understand.²³ For example:

I. THE TRIAL JUDGE, BECAUSE DEFENDANT WAS IMPROPERLY SERVED, ERRONEOUSLY DENIED DEFENDANT'S MOTION TO DISMISS.

As opposed to:

I. THE TRIAL JUDGE ERRONEOUSLY DENIED THE MOTION TO DISMISS BECAUSE DEFENDANT WAS SERVED IMPROPERLY.

Use parallel structure. Parallel structure conveys the same grammatical form. Nouns must match nouns and verbs must match verbs. *Incorrect:* “The judge found the lawyer credible, logical, and argued well.” *Correct:* “The judge thought that the lawyer argued credibly, logically, and well.”

Compare the following:

I. DEFENDANT IS GUILTY OF BURGLARY BECAUSE OF THE STOLEN PROPERTY, BURGLAR'S TOOLS, AND HE WAS FOUND ON THE PREMISES.

with

I. DEFENDANT IS GUILTY OF BURGLARY BECAUSE HE WAS FOUND ON THE PREMISES WITH STOLEN PROPERTY AND BURGLAR'S TOOLS.

Also compare:

I. THIS COURT SHOULD FIND THAT WITNESS TESTIFIED CREDIBLY, AND THE DOCUMENTS ARE RELIABLE.

with

I. THIS COURT SHOULD FIND THAT WITNESS TESTIFIED CREDIBLY AND THAT THE DOCUMENTS ARE RELIABLE.

Avoid nominalizations. Nominalizations are verbs or adjectives converted into nouns. Nominalized sentences are abstract and lengthy. Compare the following:

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE OF PLAINTIFF'S FAILURE TO STATE A CAUSE OF ACTION.

with

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILED TO STATE A CAUSE OF ACTION.

Use the active voice. Advocates should strengthen point headings with the active voice. Two kinds of passives exist: single and double passives. Single passives occur when a sentence is converted to object, verb, and subject from subject, verb, and object. The active voice is succinct. It places the subject at the beginning of a clause or sentence. A single passive places the subject at the end of a clause or sentence. For example:

I. SUMMARY-JUDGMENT MOTION WAS INCORRECTLY DENIED BY THE TRIAL COURT.

As opposed to:

I. THE TRIAL COURT INCORRECTLY DENIED PLAINTIFF'S SUMMARY-JUDGMENT MOTION.

Advocates may use the double passive voice — in which the advocate doesn't identify the actor — to obscure the actor in the sentence. Advocates might use this technique to acknowledge that a crime was committed without admitting that their client committed the crime.²⁴ Advocates may also use double passives when the actor is unknown. Otherwise, integrity requires that advocates avoid double passives.

Include margins. An aesthetically pleasing format allows judges to pinpoint the headings quickly without searching the surrounding text. Advocates can achieve this format by centering headings and subheadings with extra margins on both sides of the document and by adding white space above and below the headings and subheadings.²⁵

Eliminate widow-orphan errors. Widow-orphan errors occur when advocates isolate the heading from its text by placing the heading at the bottom of the page, with no text below it. Headings or subheadings appearing at the bottom of the page should be moved to the top of the next page.²⁶ To resolve widow-orphan errors, advocates should do their final edits on hard copy and then add page breaks.

Keep it consistent. Point headings in the table of contents should be identical to the point headings in the argument section.²⁷ To ensure that advocates correctly copy their point headings into their table of contents, they should cut and paste the headings from the body of the argument when the brief is completed.

Condense the headings. Point headings and subheadings should be single-spaced. They should also be conveyed in a single sentence, although advocates may use semicolons. Point headings should be limited to four single-spaced lines.²⁸

Capitalize letters in the argument section. Point headings in the table of contents and in the argument section are written in capital letters. The first letter of each word in each subheading is capitalized.²⁹

Use bold-face print in the argument section. In the argument section, point headings and subheadings may be in bold to draw attention to the headings. In the table of contents, point headings shouldn't appear in bold.³⁰

Use the correct format. Readers prefer unjustified — or right-ragged — text. But point headings and subheadings should be tabbed and then justified to draw attention to them.

Advocates may use either of these formatting options:

I. THE TRIAL COURT ERRED
IN GRANTING PLAINTIFF'S
MOTION TO DISMISS.

or

I. THE TRIAL COURT ERRED
IN GRANTING PLAINTIFF'S
MOTION TO DISMISS.

Use the correct font and point size. The text of a brief should be in a serif typeface, like Century. But headings and subheadings should be in a sans-serif typeface. Examples of sans-serif typefaces are Arial, Helvetica, and Gill Sans.³¹ The contrast will make the headings and subheadings jump off the page. The point size for the headings and subheadings should be the

same size as the document's text but shouldn't exceed 14 points.³²

Italicize subheadings in the argument section. Subheadings may be in italics to distinguish them from the point headings. They shouldn't be italicized in the table of contents.

Don't underline. Underlined headings and subheadings are difficult to read. For example:

I. THIS COURT SHOULD
QUASH THE SUBPOENA DUCES
TECUM.

Instead:

I. THIS COURT SHOULD
QUASH THE SUBPOENA DUCES
TECUM.

Add page numbers at the end. The page numbers listed in the table of contents must correspond to the argument's point headings. Advocates can achieve this by waiting until the brief is complete to add page numbers.

Don't obscure page numbers following dot leaders. Headings and subheadings in the table of contents shouldn't obscure the page numbers after the dot leaders. Headings and page numbers should be placed close together so that a judge can easily locate a point heading's corresponding page number. For example:

I. THE TRIAL COURT ERRED
IN GRANTING PLAINTIFF'S
MOTION TO DISMISS 1

As opposed to:

I. THE TRIAL COURT ERRED
IN GRANTING PLAINTIFF'S
MOTION TO DISMISS . . . 1

Conclusion

Point headings set the stage for an advocate's argument and play a powerful role in persuasion. When used correctly, point headings let advocates navigate straight to their point. ■

- Objective memorandums also use point headings in the discussion section. For a good discussion on writing objective memorandums, see Helene S. Shapo et al., *Writing and Analysis in the Law* chap. 7 (5th ed. 2008).
- Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* 156 (2d ed. 2006).
- Board of Advisers Harvard Law School, *Introduction to Advocacy: Research, Writing, and Argument* 60 (7th ed. 2002).
- Mary Bernard Ray & Jill J. Ramsfield, *Legal Writing: Getting it Right and Getting it Written* 299 (4th ed. 2005).
- Board of Advisers, *supra* note 4, at 60.
- Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 309 (4th ed. 2006).
- Shapo et al., *supra* note 2, at 435.
- Michael R. Fontham et al., *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* 77 (2d ed. 2007).
- Carol M. Henderson, *22 Tips for Writing an Effective Appellate Brief*, 169 N.J. Law. 22, 24 (May/June 1995).
- Fontham, *supra* note 9, at 58.
- Richard K. Neumann, *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 349 (6th ed. 2009).
- Shapo et al., *supra* note 2, at 435.
- Id.*
- Id.* at 434.
- Beazley, *supra* note 3, at 156.
- Fontham, *supra* note 9, at 15.
- Elizabeth Fajans et al., *Writing for Law Practice* 303 (2004).
- Board of Advisers, *supra* note 4, at 60.
- This example and the next come from Edwards, *supra* note 7, at 314.
- Id.* at 274.
- Neumann, *supra* note 12, at 351.
- Ian Gallacher, *A Form and Style Manual for Lawyers* 33 (2005).
- Id.* at 29.
- Neumann, *supra* note 12, at 349.
- Id.*
- Gary Gaffney, *Drafting An Effective Appellate Brief*, 67 Fla. B.J. 43, 44 (Oct. 1993).
- Ray & Ramsfield, *supra* note 5, at 300.
- Id.*
- Neumann, *supra* note 12, at 349.
- Gerald Lebovits, *The Legal Writer, Document Design: Pretty in Print — Part I*, 81 N.Y. St. B.J. 64, 64 (Mar./Apr. 2009).
- Id.*

1. See Gerald Lebovits, *The Legal Writer, You Think You Have Issues? The Art of Framing Issues in Legal Writing — Part I*, 78 N.Y. St. B.J. 64 (May 2006); Gerald Lebovits, *The Legal Writer, You Think You Have Issues? The Art of Framing Issues in Legal Writing — Part II*, 78 N.Y. St. B.J. 64 (June 2006).

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: I have seen the noun *venue* used as a verb several times, most recently in a letter to my firm in the following context: “. . . a case that was *venued* in Philadelphia County.” However, dictionaries do not recognize *venue* as a verb. New Jersey lawyers, I believe, use the word *vicinage* instead of *venue*. Any comments?

Answer: My thanks to Attorney John F. Ledwith for this interesting question. The noun *venue* entered English as *visne* during the Middle Ages. New Jersey lawyers who use the noun *vicinage* (“neighborhood”) are more faithful to the Middle English spelling than the rest of us who use the spelling *venue*.

In Middle English a *venue* was a judicial writ sent to the sheriff of a county in which a cause was to be tried, directing him to summon 12 good and lawful men to be a jury in an action between two parties. Soon *venue* widened to mean the area of the dispute. Currently it means any designated place, and it has become the verb that Attorney Ledwith noted.

That verb illustrates an important characteristic of English speakers – their tendency to readily move words from one category to another – nouns to verbs, verbs to nouns, adjectives to verbs, verbs to adjectives, and so on. People love to move words into new categories. As Hobbes, in the comic strip “Calvin and Hobbes,” said, “I love to verb; verbing weirds words.” But many people are irritated by new words. Through the years important, well-educated people have decried the practice, and some have tried to prevent it.

In 1775, Samuel Johnson, in his famous *Dictionary*, announced his objective: to “ascertain, purify, and fix” the language – that is, to remove neologisms and keep the English language as it was. So did Benjamin Franklin, who wrote to the lexicographer Noah Webster:

During my late absence in France, I found that several new words have been introduced. From the noun “notice” a new verb “noticed” was

produced. Also “advocate” led to “advocated,” and “progress” to “progressed.” . . . If you should happen to be of my opinion with respect to these innovations, you will use your authority in reprobating them.

The effort, of course, was to no avail. Almost three centuries later, a Franklin biographer commented, “If Webster *advocated* such action it is unlikely it *progressed* very far, for little effect can be *noticed* in present usage.” (Seymour Stanton Block, *Benjamin Franklin, His Wit, Wisdom, and Women*.)

Nevertheless, people continue to dislike neologisms. My readers have protested the verb *incentivize*, created from the adjective *incentive* (as in *incentive pay*); that adjective had originally been a noun. Readers also indignantly protested the new past tense verbs *chagrined*, *conflicted*, *postaged*. Others disliked *gifted* and *motioned*, as in “The defendant was *gifted*” and “The Court *motioned*.”

A Chicago attorney protested the verb *desking*, as in “He’s just *desking* it up there.” Other readers also registered their protests, although one reader approved, writing that *desking* “creates an immediate and graphic picture.” Sports journalists created an adjective from the noun *strength*: “a *strength* program” (I used the noun *sports* as an adjective in this sentence).

During the Persian Gulf War, the military used the verbs *attrited* (as in Iraqi troops are *attrited*) and *caveated* (“warned”), from the English noun *caveat*, which came from the Latin verb *caveat* (“Let him beware”). Well-known columnist and author Nicholas von Hoffman coined the noun *think*: “If you think he’s stupid, you’ve got another *think* coming.” Readers seem to approve that new noun as well as the phrase *dumbing down*. Nor have I received any disparaging comments about the new noun *read*, as in “That book is a good *read*.”

The noun *fun* has been readily accepted as an adjective (“a *fun* time”). New York City judge Paul Klein informed me *fun* was also used as a

verb in the 1960s by comedian George Gobel, when he asked, “Are you *funnin’* me?” A new noun, *securitization* came from the verb *securitize*, which came from *security*, which came from the adjective *secure*. Enough already!

Sometimes the new word wipes out the old one. That happened to the verb *assail* when the noun *assault* also became a verb. (Have you recently read about anyone being *assailed*?) Older readers recall that it used to be impossible to “breach a contract.” Instead, one “broke a contract,” creating a breach. It was a mistake, they say, to make *breach* a verb.

Other readers noted that two nouns were coined from the verb *demur*, a *demurrer* being the person who demurred, and a *demurral* being the substance of the allegation. But legal dictionaries now define the *demurrer* as the allegation and define the seldom-used noun *demurrant* as the demurrer. (In actual usage, however, the word *demurrer* does double duty, referring both to the one who demurs and to the demurral itself.)

Many nouns have slipped unobtrusively into the adjective category. Most people would agree that the following phrases are useful: *head librarian*, *elevator shoes*, *brick house*, *state official*, *lung transplant*. In those last two phrases both words change categories. In *state official*, the noun *state* becomes an adjective, and the adjective *official* becomes a noun, and in *lung transplant*, the noun *lung* becomes an adjective and the verb *transplant* becomes a noun.

But don’t switch categories carelessly. On his television show, Phil Donahue said of a woman who had been wrongfully jailed for shoplifting: “She should have been *probated*.” ■

GERTRUDE BLOCK is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

informed consent, it would appear that the lawyer and law firm should have an understanding that the offer is contingent upon the conflicts check. It would appear that the new Rules prohibit a lawyer from accepting employment unless such waiver is provided, and thereby limit the lawyer's ability to switch jobs.

While the Rules do not permit screening where a lawyer has a conflict in moving to a new firm from a prior firm, the Rules do allow for screening when it comes to governmental employment. Specifically, 22 N.Y.C.R.R. Part 1200 Rule 1.11 states:

(a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:

(1) shall comply with Rule 1.9(c); and

(2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee there from; and

(iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter...

See also the Code at 22 N.Y.C.R.R. § 1200.45(B) [DR 9-101(B)] (Avoiding the Appearance of Impropriety).

Accordingly, lawyers can switch from private to public employment as long as they remain cognizant of their obligations to maintain confidential client information.

Simply stated, during the interviewing process, and thereafter in the event that you are hired, there is some confidential information that you may have to maintain and not disclose forever.

Good luck with the job hunt.

The Forum, by
Deborah A. Scalise
Scarsdale, N.Y.

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

As I write this the hour is late and it has been a long day. Just before shutting down my computer I took one last look at my e-mails and I saw an odd one from an adversary's law firm. The message was "fyi" and below was an attachment symbol. The message was "from" a paralegal in my adversary's office whom I had met and remembered. I double-clicked to check the "to" list and it was composed entirely of members of my adversary's law firm, individuals, including experts associated with my adversary's case and my adversary's client. I was on the list but I just did not seem to belong on it. Nevertheless I clicked on the attachment and saw the title of the attached "Confidential-Case Plan Report Analysis of Case Including Problems and Recommendations." At this point it became obvious that this was an internal memo sent to the law firm, associated support individuals and the client. It was not meant for me. My cursor is now at the bottom of the e-mail on the box with an arrow pointing down and the question is "Do I press down?" And further if I do press down and read, what do I do then? As I say it has been a long day, it is late at night, and I sure as hell could use some cheering up.

Sincerely,
Poised on the Edge ■

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Jean Chang Wen
Amanda Lee Wetzel
Samuel John Whittington
Renee Williams
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Damien Theodore Wint

In Memoriam

David Alter <i>New York, NY</i>	George S. Ives <i>Sarasota, FL</i>
Emerson R. Avery <i>Cortland, NY</i>	Alan S. James <i>West Falls, NY</i>
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Klein
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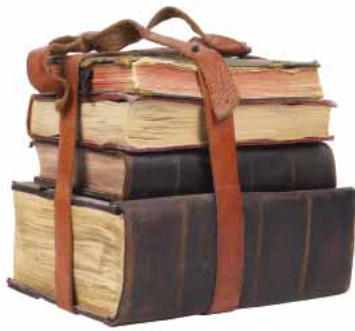
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Getting to the Point: Pointers About Point Headings

In earlier columns, the Legal Writer addressed deep issues in persuasive briefs.¹ The Legal Writer now journeys into structuring a key part of a brief's argument section: persuasive point headings.² Deep issues frame the advocate's questions. Point headings answer them.

Point headings are concise statements of the advocate's best arguments.³ They present a conclusion on the relief the advocate seeks and quickly explain why the court should grant that relief.

Good point headings give judges a glimpse of the facts and law in the table of contents, state why the advocate should win the case, and tell judges where to go for more information. Point headings help judges who don't have the time or interest to digest an entire brief to find the section they'd like to read. Point headings serve as transition points to alert judges to leading arguments. Point headings break the argument into comprehensible components. Instead of forcing judges to decipher the main points in the argument section, point headings convey arguments succinctly.

Point headings also help advocates. Point headings organize. Advocates should draft the point headings before they draft the brief's argument section. Doing so enables advocates to outline their arguments logically, eliminate gaps in analysis, and avoid repetitions. Point headings force advocates to make their arguments persuasive.

The Substance of Headings

Effective point headings provide a concise summary of the argument and

mirror each question presented.⁴ They inform judges of the advocate's legal points and outline those points.⁵ They argue applicable law, describe how the law applies to the facts, and lead to the advocate's conclusion.⁶ Winning advocates use point headings to explain the reasoning behind the outcome they want the court to adopt.

Advocates may use any of these formulas to draft their point headings:

(1) State the relief the client seeks.

and

(2) Advance the conclusion by applying the key facts to the controlling law.

or

(1) Advance the conclusion by applying the key facts to the controlling law.

and

(2) State the relief the client seeks.

or

(1) State why the court should rule in the client's favor.

Complex arguments should be broken down into subheadings. Subheadings are useful when advocates have an issue with more than one element or when several reasons justify the conclusion. Subheadings outline the arguments, focus on each subsection, and create a persuasive organizational structure.⁷

The subheadings must equal the point heading and relate to the point heading. Advocates strengthen a set of arguments by associating arguments with one another. Advocates then emphasize the association by placing them as multiple subheadings under

a point heading. Advocates should group similar ideas into one subheading to avoid a choppy brief.⁸

If advocates include subheadings, the point headings may be conclusory and short: The more specific the subheadings, the more conclusory and short the headings should be.

Advocates may draft subheadings in several ways. One way is to organize subheadings using the CRARC method. "CRARC" stands for "Conclusion," "Rule," "Application," "Rebuttal and Refutation," and "Conclusion." According to CRARC, advocates first present the conclusion on the issue. Then they state the rule, followed by statutes and case law. Then they support the argument by applying the law to the facts. Advocates follow this with the opponent's legal and factual arguments and then rebut the opposing arguments. Advocates finally conclude on the outcome they seek.

Subheadings can also trace the elements of a statute or a leading case. A plaintiff's point heading and subheading formula in a tort action could look like this:

I. PLAINTIFF'S SUMMARY
JUDGMENT SHOULD BE
GRANTED BECAUSE THE
EVIDENCE ESTABLISHES RES
IPSA LOQUITUR.

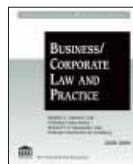
A. Plaintiff's Injuries Would
Not Have Occurred Absent
Defendant's Negligence.

B. Plaintiff's Injuries Occurred
While Under Defendant's
Exclusive Control.

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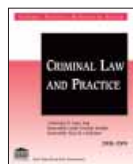
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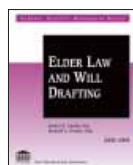
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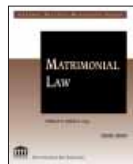
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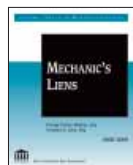
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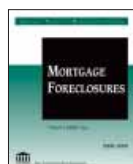
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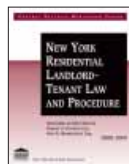
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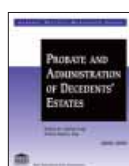
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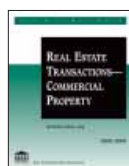
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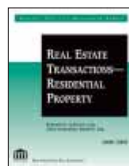
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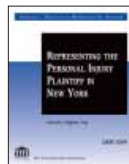
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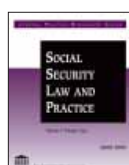
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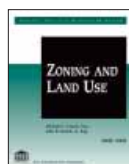
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