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NEW YORK STATE BAR ASSOCIATION
Journal

The Mobile Law Office – From Lincoln to the Lincoln Lawyer

By Gary Munneke

A special issue on law practice management

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VINCENT E. DOYLE III

NYSBA's Lawyer Assistance Program Continues to Guide Us Through Difficult Times

As lawyers, we focus our professional efforts on helping others – our clients, the legal system and the public. There are times, however, when we must take notice of our own needs, when we must address our own issues and problems. We are not immune from the burden of our professional responsibilities and the strain of our significant workloads. Our profession involves high levels of stress. Research tells us that substance abuse, depression and mental health issues abound within the legal profession at rates dramatically higher than in the general population. The toll on our professional and personal lives is significant.

As an association, our greatest obligation is to take care of our own. For lawyers struggling with stress, depression or addiction, we fulfill this obligation by providing support and services through our Lawyer Assistance Program (LAP). The LAP serves as a beacon for individuals in need, and a paragon of the State Bar's volunteer culture. The efforts of the LAP are ably guided by our Committee on Lawyer Assistance, and overseen by LAP Director Pat Spataro. Countless volunteers work tirelessly to see that every lawyer who contacts us gets help. We at the State Bar are committed to making sure resources remain available to maintain these crucial services.

For many of us, the past few years have been exceptionally difficult. At the same time that many attorneys are feeling the strain of the "Great Recession," some financially strapped support programs have had to close their doors. For example, faced with major cuts to the Judiciary budget, the Office of Court Administration recently defunded the Lawyer Assistance Trust, an entity established to provide resources to prevent and treat alcohol and substance abuse in the legal community. Fortunately, our LAP, which we fund entirely ourselves, remains alive and well.

This past spring, I attended the LAP retreat in Silver Bay. I was moved to see firsthand the significant impact of our program, and how greatly it has improved the lives of so many lawyers. Participants shared personal stories of their struggles with addiction and mental health issues. Over and over again, the support of our LAP was cited as a major factor in helping these attorneys back to health. One program beneficiary told me that LAP services literally saved his life, and the program continues to save lives year after year. What greater service can we provide our fellow attorneys in need than to continue to support our LAP zealously?

The LAP offers its confidential support services free of charge to all attorneys, judges and law students in New York State regardless of NYSBA membership status. The LAP aims to identify drug abuse, alcoholism, depression, and other mental health issues as early as possible. A lawyer assistance professional can also help develop a treatment plan or refer attorneys and their families to appropriate resources such as counseling, support groups, or substance abuse treatment and rehabilitation services.

And the State Bar is working to make LAP resources even more accessible to even more attorneys. I'm pleased to announce the upcoming launch of the new eLAP website, a secure, encrypted and completely confidential resource that will be available 24 hours a day, seven days a week. The site will feature self-evaluation tools and helpful educational materials including more than 2,000 articles about substance abuse, depression and other mental health issues. Through eLAP, attorneys can even receive individualized assessment and support. All of these services will be provided electronically by a lawyer assistance professional, trained to help with counseling, appropriate referrals and connection to peer assistance.

The same time and work demands that contribute to the issues we confront can also make it difficult to find time to seek assistance. That is why this innovative, first-of-its-kind online support program is so important. The eLAP website will provide an accessible resource while maintaining confidentiality and offering meaningful support. I believe the site may prove especially helpful to young, tech-savvy lawyers, who may

VINCENT E. DOYLE III can be reached at vdoyle@nysba.org.

be more comfortable using the Internet to reach out for help.

Everyone from newly admitted attorneys to senior lawyers can benefit from the services and support the LAP offers. The eLAP website is scheduled to launch this fall, but our LAP's existing resources are available now, and will continue to be available going forward. I would like to encourage any attorney in need of assistance – whether related to stress management, substance abuse, depression or other mental health issues – to reach out to the State Bar's LAP and take advantage of its effective, compassionate and confidential support. You can reach our LAP by calling 1-800-255-0569 or visiting www.nysba.org/lap.

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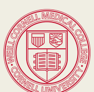

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Tentative Schedule of Fall Programs *(Subject to Change)*

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Same-Sex Marriage in New York: What Every Practitioner Needs to Know

(9:00 am – 1:15 pm)

September 9 — New York City (live in NYC with simultaneous webcast)

Bridging the Gap

(two-day program)

September 12–13 — New York City (live session); Albany (video conference from NYC)

Henry Miller – The Trial

- September 22 — Albany
- October 6 — Rochester
- November 3 — Long Island
- November 16 — New York City

Law School for Insurance Professionals

- September 23 — Albany; Syracuse
- September 28 — Buffalo
- October 6 — Long Island
- October 12 — New York City

Conservation Easements

- September 30 — Syracuse
- October 28 — New York City

Practical Skills: Basic Matrimonial Practice

- October 3 — Syracuse
- October 4 — Westchester
- October 5 — Albany; Buffalo
- October 6 — Long Island; New York City

New York Appellate Practice

- October 4 — Albany
- October 26 — Long Island
- October 27 — Rochester
- November 18 — Westchester
- December 2 — New York City

Successfully Handling Custody and Vocational Expert Witnesses in Your Matrimonial Practice

(9:00 am – 12:35 pm)

- October 14 — Syracuse
- October 28 — Long Island
- November 18 — Buffalo
- December 2 — Albany
- December 9 — New York City

The Art of Deposition in the Digital Age

- October 20 — Long Island
- October 21 — Albany; Buffalo
- October 27 — New York City
- October 28 — Syracuse; Westchester

Update 2011

(live sessions)

- October 25 — Syracuse
- November 1 — New York

Fourth Corporate Counsel Institute

October 27 — New York City

Practical Skills: Basics of Civil Practice

- November 15 — New York City; Syracuse
- November 16 — Albany
- November 17 — Buffalo; Long Island; Westchester

Ninth Annual Sophisticated Trusts and Estates Institute

(two-day program)

November 17–18 — New York City

Construction Site Accidents

- December 2 — Long Island; Syracuse
- December 9 — Albany; New York City

Advanced Real Estate Practice Institute

December 8 — New York City

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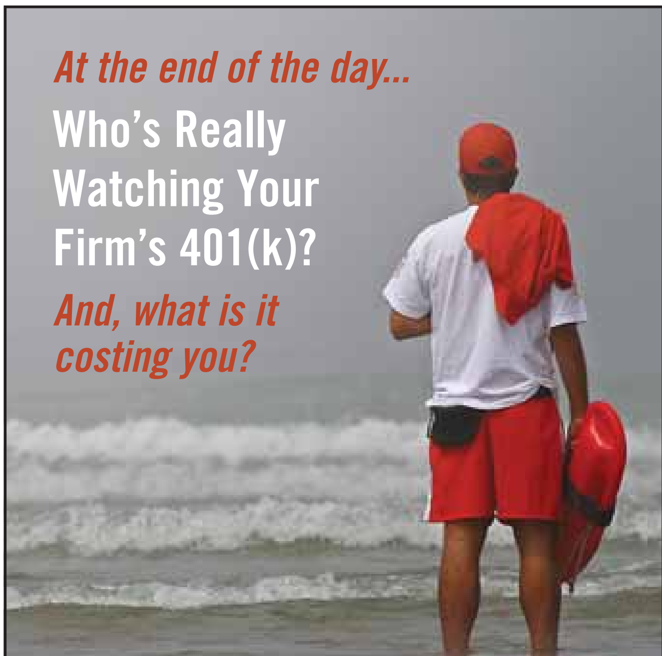

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C11-0318-012 (3/11)

Gary Munneke (GMunneke@law.pace.edu) is a professor of law at Pace Law School in White Plains, New York, where he teaches Professional Responsibility, Law Practice Management and a Seminar on the Legal Profession. He is Chair of the New York State Bar Association's Law Practice Management Committee and a member of the Board of Editors of the New York State Bar Association *Journal*.

The Mobile Law Office – From Lincoln to the Lincoln Lawyer

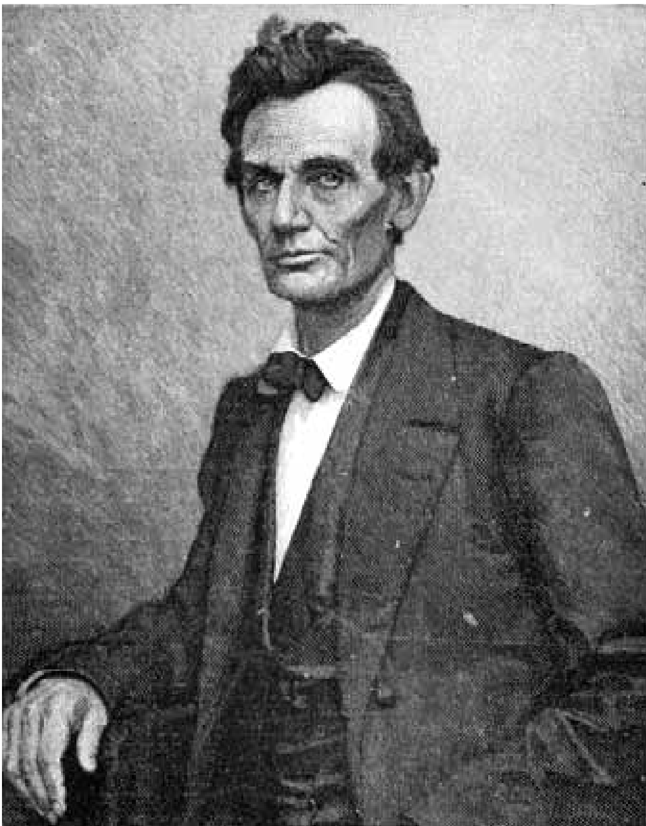
By Gary Munneke

Mickey Haller runs his practice from the back of a Lincoln Town Car, with the help of an ex-con driver, traversing the freeways and surface roads of L.A. Working from the back of his mobile office, Haller is able to interview clients and witnesses, to make required court appearances and to enjoy the other accoutrements of Angelino life. Perhaps this is author Michael Connelly's idiom for the fractured life of the 21st century lawyer.

The story of the Lincoln lawyer, however, really starts out with Lincoln, the lawyer. The other Lincoln, who practiced law in the 1830s to the 1850s in central Illinois, before going on to bigger things as an icon of American history, was then and now the quintessential trial attorney. As a boy, I lived in Decatur, the self-proclaimed "Soybean Capital of the World," an agrarian metropolis about halfway between the capital – Springfield – and the campus of the University of Illinois – "Fightin' Illini" – Urbana-Champaign. None of this would be germane to this article but for the small log cabin, which was used as a courthouse, located in Decatur's Fairview Park, where Lincoln, the lawyer, tried several cases as a circuit-riding lawyer.

After learning the law by reading legal commentaries at night, because he couldn't quit his day job, Lincoln was admitted to the Illinois bar on September 9, 1836, after successfully passing an oral, not written, examination, and being certified as possessing good moral character. In the spring of 1837, Lincoln associated himself with J.T. Stuart, in Springfield, and later a partner, Stephen T. Logan, before taking on William Herndon as his junior partner. During this period, Lincoln customarily spent about six months of every year "riding the circuit," trying cases in local communities too small to have permanent courthouses or established local practitioners.

The elegant Greek Revival Lincoln-Herndon Law Offices in Springfield attest to Lincoln's success in the practice of law. The building is fit for a respected barrister and budding politician on the American stage. Lincoln's office would be at once familiar to visitors from our era, who would observe a receiving area, plush offices for the two partners, and back office spaces for files, supplies, and real work. To this day the Lincoln-Herndon model epitomizes law offices throughout the United States.



Lincoln the circuit rider traveled by horse following the courts from county to county in a land where the legal system was still in its infancy. Lincoln found work by traveling to the work. He built a clientele by representing real people in real disputes. When he returned to a circuit venue, so did his clients, and they recommended him to their friends and neighbors, eventually leading him to bigger clients like the Illinois Central Railroad, and the good life in the capital. In one sense, Michael Connelly's Mickey Haller is a modern-day paean to the original Lincoln Lawyer.

This leads to the question: (with apologies to the Bard) "What's in an office? A workplace by any other address would smell as sweet." What is the purpose of this brick-and-mortar edifice that most of us commute to daily to carry out our work? For many of us, in order to reach this home away from home, we sit in congested traffic or battle the mobs on commuter trains on a daily basis. A lawyer who spends 10 hours in the office, five days a week, 50 weeks each year, will spend 2,500 hours over the course of 250 days in a year at this place – and if we are honest, many of us spend many more hours and many more days than that in the office. For what?

The traditional answer is that we go to a place to do work. For lawyers, the office was the physical location where they went to carry out the multitude of tasks associated with the practice of law. It was a place where they could meet with clients, confront adversaries, conduct negotiations and confer with their partners and associates about cases; it was where the business of delivering legal services took place. The law office was the physical repository of files and records associated with client matters, a storage facility for supplies, and a home for office machines and equipment ancillary to the practice of law. The office was also a workplace for support staff, where lawyers would go to manage and supervise the people who worked for them.

For Lincoln, the office in Springfield was a base of operations from which he launched his circuit practice and political campaigns, but it was also convenient to the two courts in which he appeared most often, the United States District Court for Illinois and the Illinois Supreme Court, where his reputation as an advocate was legendary. With a partner back in Springfield, Lincoln could represent clients on the circuit while still maintaining a visible presence and servicing clients at the home base.

Arguably, electronic communication systems offer an efficient alternative to the traditional model epitomized by the Lincoln-Herndon office. Today, lawyers and staff can work at home (or wherever they might be), access files and other resources via the Internet, and handle all those contacts with clients, other lawyers and third parties without ever going to their law office. Like the movable practice of Mickey Haller and Abe Lincoln before him, the 21st century law office is not anchored to the ground. This mobility presents a number of questions and opportunities.

As a law professor, I find that students (my clients) can reach me easily and instantly 24-7-365. Sometimes it's necessary to arrange a face-to-face appointment, but most contacts are accommodated by email, social media, or the old-fashioned way – by telephone. In fact, students today are much more willing to contact their professors electronically than when they had to actually set up an appointment and go to the professor's office.

Moreover, an increasing number of bar association and law school committee meetings are disposed of by conference calls and listservs. As I travel to and from my office to multiple homes (in multiple states) I ask myself: What is the purpose of an office? Is it just an anachronistic throwback to an era when electronic communication did not exist? If I can handle most of my business online, do I need a physical office at all? Should the Law School simply provide work and conference space on an as-needed basis to faculty members who come in at varying times? The only time we are all on campus at once is when we have faculty meetings – and these could be replaced in short order with video conferencing.

Teaching presents a different set of issues. Assuming that there are certain benefits to live classroom experiences, especially in doctrinal, Socratic courses or live client clinics, we might ask whether other courses might better be offered through distance learning formats. Perhaps legal educators need to recognize that a one-size-fits-all

Continued on Page 14

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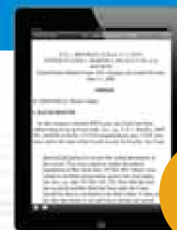

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Continued from Page 12

model for law school is not the most effective or efficient way to prepare students for the practice of law.

We all know that the law school will not shutter my office any time soon to make way for an office hotel or get rid of live classes, for that matter. Nor will law offices disappear from the scene. Both legal educators and practitioners have a great deal invested in having an office – if it was good enough for Lincoln, it should be good enough for us. Somewhere in the back of my mind, however, a little voice keeps repeating that the future might not be the same as the past.

Law offices are the product of an era when workers had to go to a central location to do their jobs. Whether they worked in a factory or an insurance company, one had to be there or be square. The Industrial Revolution introduced the concept of aggregating a workforce that could deliver products and services on an exponentially larger scale than the cottage industries that preceded industrialization. The late J. Harris Morgan, the father of modern law practice management, often said that lawyers were like tailors, handling one case at a time, when they should be delivering their services on an assembly line. Whether or not Morgan was right about the need to automate the delivery of legal services, he assumed (in the 1970s and 1980s) that lawyers would provide these services out of a law office. The sea change that now confronts us is the notion that the physical office may be superfluous.

An office, however, provides lawyers more than a desk and chair. An office imbues its occupants with a professional identity – an ephemeral sense that they belong somewhere that they can call their work home: "If you want me, you can find me here." Arguably, this sense of connection between us and our work in a physical space is more important than many people realize. It may also be the case that for lawyers trying to strike a balance between their personal and professional lives, having an office to go to in the morning is as important as having a home to go back to in the evening.

A law office creates a visual identity for the law firm. Whether it is located in an old house on "lawyers' row," a high-rise office tower in Center City, a downtown storefront, a multi-lawyer suite, or a strip mall in the 'burbs, the setting of the office says volumes about its occupants. Inside, the furniture, art, floors and other visuals contribute to the unique identity of each and every firm, reflecting the collective personality of the organization that inhabits this environment. Whether this *je ne sais quoi* reflects an institutional culture or the particular personalities of firm leaders, the law office embodies the lifeblood of the firm. We might fairly ask whether a law firm can exist without the law office to capture its personality and culture. We might also ask whether a law firm can stay together for long if its workers are dispersed to the four winds and they have no core, no hive, to which they can return.

Perhaps the most important aspect of the law office is the human contact among the people who work there and the visitors who pass through. In a workplace, we get to know our fellow workers. We laugh and cry with them; we fight with them; we face mutual challenges with them. We get to know them as individuals, and we share with them the camaraderie of a common enterprise. Sometimes, face time matters. It might be possible to restructure the office to eliminate the extraneous influences, to improve efficiency, and to support flexibility, but these improvements have to be weighed against what is lost, which may be the *esprit de corps* that translates into loyalty to the organization and its leaders. Maybe the physical law office has a value organizationally, which cannot be quantified, which many of us take for granted, but which we dispense with at our peril.

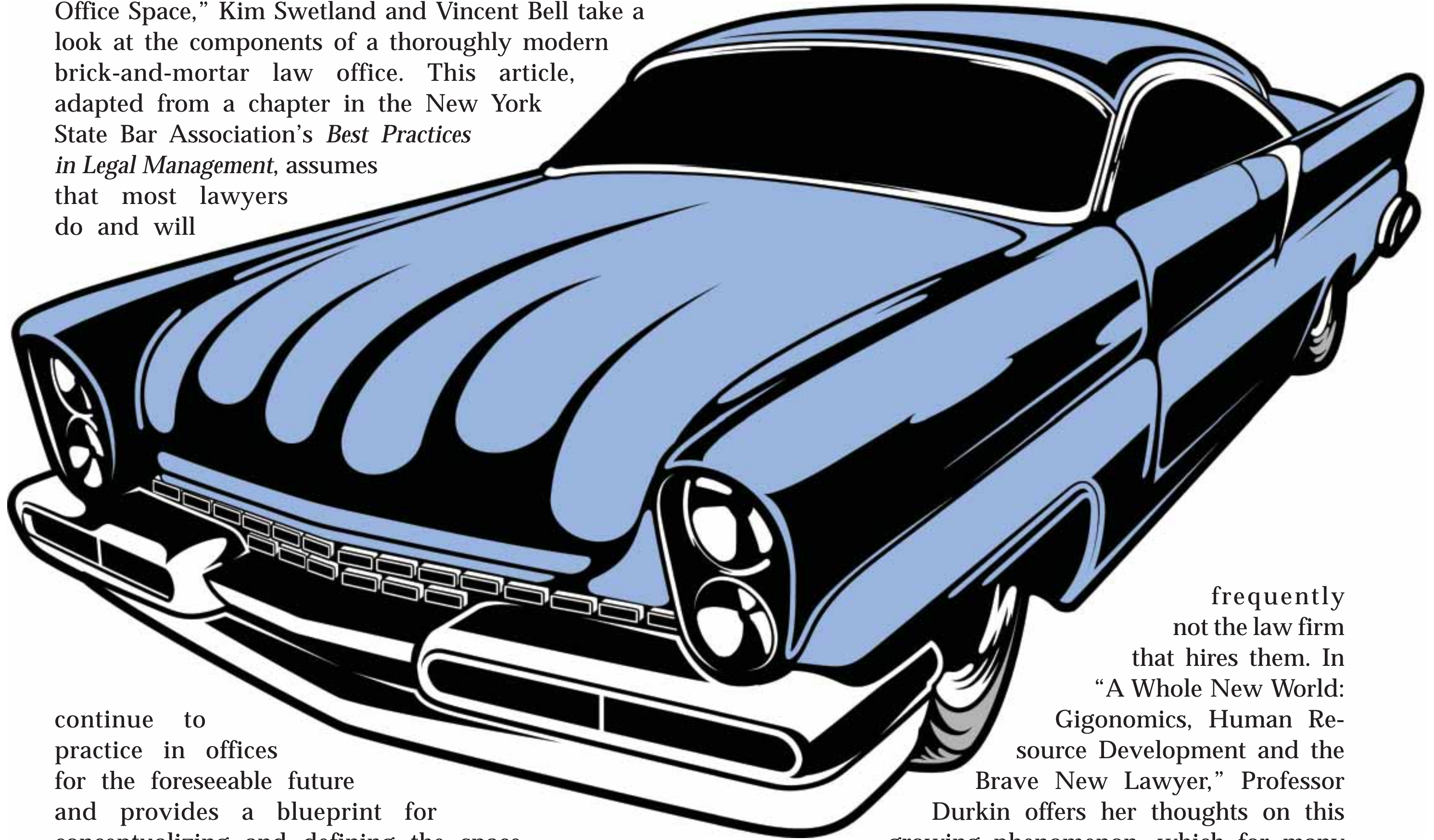
We might fairly ask whether a law firm can exist without the law office to capture its personality and culture.

The answer may be that we need our law offices more for our own self-image and professional peace of mind than as a necessary element in the legal service delivery process. To the extent that a law firm develops an institutional identity, the law office might be the glue that holds the firm together. Will employees have the same loyalty to the institution if it does not exist anywhere in the temporal world? Will the next generation of lawyers, raised on computer games and social networking, find the current crop of lawyers' need for face-to-face contact as strange as they would find riding a horse around the circuit to represent their clients? The answers to these questions are less than clear.

There is little doubt that the physical law office is changing. Libraries, which, not too long ago, took up considerable space in most law firms, are ancient history for many firms that do their legal research electronically. File rooms in many firms have shrunk as paper records have been digitized and stored electronically. Secretarial pools have disappeared as the role of legal secretaries has evolved. And if predictions hold true that many firms will be hiring fewer associates in the years ahead, the footprint of the law firm will continue to shrink. Given the facts that law firms spend more on office space than any overhead expense except salaries, and that the cost of office space has risen dramatically in recent years,

this is not a bad thing. To the extent that economic considerations drive the way law offices use physical space, it will not be surprising to see firms choose alternatives that cost less money and further reduce the brick-and-mortar workplace.

The September *Journal* examines several issues related to the law office. In "Building and Understanding Law Office Space," Kim Swetland and Vincent Bell take a look at the components of a thoroughly modern brick-and-mortar law office. This article, adapted from a chapter in the New York State Bar Association's *Best Practices in Legal Management*, assumes that most lawyers do and will continue to practice in offices for the foreseeable future and provides a blueprint for conceptualizing and defining the space needs for a law firm. Whether the firm consists of a solo practitioner or a thousand lawyers, the basic principles are the same: The firm needs enough space to house its workers and to provide the resources for them to do their work. The authors offer solid guidance for lawyers opening an office for the first time, reassessing their space needs, or moving to new space when they have outgrown their existing office space.



Stephanie Kimbro, author of the American Bar Association's book *Virtual Law Practice*, examines the differences between a traditional law office and a virtual practice in "The Law Office of the Near Future: Practical and Ethical Considerations for Virtual Practice." Even a virtual lawyer has to work somewhere, and many lawyers are choosing to work virtually anywhere. For some, this may mean literally a virtual practice; for others it may mean working from a home office; for others it may mean working with clients away from the office; and for still others it may mean using a computer for litigation support or research. "Dome" firms may combine the virtual and the traditional law office in a hybrid practice model. As the title of her article suggests, Ms. Kimbro addresses both the practical and ethical considerations of virtual practice, because the two go hand in hand.

Finally, Barbara Durkin, a lawyer/management professor at SUNY-Oneonta, looks at lawyers who work on a contract basis rather than as employees. Like virtual lawyers, contract lawyers need a home base, which is frequently not the law firm that hires them. In "A Whole New World: Gigonomics, Human Resource Development and the Brave New Lawyer," Professor Durkin offers her thoughts on this growing phenomenon, which for many law graduates may be the norm as firms hire fewer and fewer of them as associates.

The story does not end here. Many law firms are experimenting with office alternatives. Given that more than a few law firm dissolutions have been triggered at least in part by rent and other occupancy expenses, there are powerful incentives to build a better mousetrap. Technology provides the tools to innovate change, but the risk of getting it wrong is formidable as well. Will lawyers in the next generation work from home, a Lincoln Town Car, a professional hive, an office hotel, or just practice wherever they happen to be? Will law firms in office buildings and Lincoln-Herndon offices be recognizable to lawyers of the next generation? Will we all be chauffeured around in Lincoln Town Cars to ply our trade? Will lawyers exist only in cyberspace, delivering e-services to clients they never see, assisted by staff they never meet? Will the brick-and-mortar law office survive, and if so, will it need to evolve to do so? Only time will tell. ■

BY DAVID PAUL HOROWITZ

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You May Say Something

Introduction

Last issue's column promised some suggestions for ameliorating the impact of the Fourth Department's decision in *Thompson v. Mather*.[1] If you missed the last two issues of the *Journal*,[2] and were not made aware of the decision from another source, the *Thompson* court held:

> We agree with plaintiff that counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pretrial deposition. CPLR 3113(c) provides that the examination and cross-examination of deposition witnesses "shall proceed as permitted in the trial of actions in open court."[3]

In addition to sparking a lively debate among practitioners and commentators, *Thompson* has already resulted in a trial-level decision thoughtfully analyzing *Thompson*'s holding, and the consequences of that holding. Far superior to my prognostications is an examination of the *Thompson*-esque dispute presented in *Sciara v. Blessios*,[4] together with the analysis and resolution crafted by Justice John M. Curran of Supreme Court, Erie County.

Sciara's Issues

Like *Thompson*, *Sciara* was a medical malpractice action where the plaintiff conducted a deposition of a nonparty physician:

> Dr. Chopra's deposition proceeded uneventfully until plaintiff's counsel asked Dr. Chopra about a sentence in the operative report referring to what the "initial frozen section evaluation revealed." Plaintiff's counsel asked Dr. Chopra whether this reference in the report refreshed her recollection about whether she spoke with the defendant surgeon on the day of the surgery. Dr. Chopra began her answer to this question by stating: "we always talk about the section to the surgeon –." At that point, without invitation from plaintiff's counsel or a request by Dr. Chopra's counsel to communicate with his client, Dr. Chopra's counsel interrupted the answer stating: "Mr. Fitzgerald's question though is does this –." According to Dr. Chopra's counsel, through this interruption, he "tried to point out that (Dr. Chopra) either misheard or misunderstood the question" (Powers Aff., ¶ 7). At oral argument, Dr. Chopra's counsel also stated that he was trying to assist plaintiff's counsel by interrupting the doctor's answer.
>
> Immediately upon the uninvited interruption by Dr. Chopra's counsel, plaintiff's counsel instructed Dr. Chopra's counsel that he was not permitted to "interrupt or coach" and cited to the Fourth Department's recent decision in *Thompson v. Mather* (70 AD3d 1436 [4th Dept 2010]). A moment later, Dr. Chopra's counsel terminated the deposition. An unpleasant exchange thereafter occurred between plaintiff's counsel and Dr. Chopra's counsel, apparently fueled by personal animosity based on previous cases in which they were engaged (*see e.g.*, Fitzgerald Aff., ¶ 21; Powers Aff., ¶ 7).[5]
>
> Plaintiff has moved to compel Dr. Chopra's deposition and to have the Court impose costs and sanctions for frivolous conduct against Dr. Chopra's counsel. Dr. Chopra has cross-moved for an order limiting, conditioning and/or regulating Dr. Chopra's deposition.

Putting aside the "unpleasant exchange," the scenario is straightforward. The comment made by counsel for the nonparty clearly violated the Uniform Rules for the Conduct of Depositions § 221.1(b):[6]

> Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

After reviewing CPLR 3113 and prior decisions, Justice Curran turned to the application of *Thompson* to the dispute before the court:

> The language of this decision merely sets forth what is already the procedure for a nonparty who testifies at trial in open court.

Counsel for a nonparty does not have standing to object on any evidentiary basis and does not otherwise participate at trial. As depositions are to be conducted "as permitted in the trial of actions in open court," the Fourth Department's decision in *Thompson* does nothing more than apply well-accepted trial procedures to depositions.[7]

Rejecting attempts to distinguish *Thompson*, the court held:

> Because *Thompson* is directly applicable here, it must be applied by this Court. While the interruption of the deposition by Dr. Chopra's counsel was brief, it was nevertheless in violation of CPLR § 3113(c), the Uniform Rules for the Conduct at Deposition, contrary to controlling case law, and contrary to the Fourth Department's decision in *Thompson*. It follows therefore that the termination of Dr. Chopra's deposition by her counsel also was not in accordance with these controlling authorities.[8]

The court acknowledged the tension inherent in representing a nonparty at a deposition under *Thompson*:

> Nevertheless, during the discussion between counsel at the deposition which followed the interruption, Dr. Chopra's counsel stated that he was "just trying to explain to (Dr. Chopra) that she didn't understand your question" and that Dr. Chopra had never testified before. While these reasons are not a proper basis for interrupting the deposition, they highlight the tension between the ethical obligations a nonparty witnesses's counsel has to represent his or her client and the trial procedures applicable to depositions. On the one hand, the lawyer for the nonparty has no right to object or otherwise participate. On the other hand, the lawyer has a duty under the Rules of Professional Conduct to represent his or her client competently (Rule 1.1) and diligently (Rule 1.3). Undoubtedly, it is this tension which causes lawyers to bristle at the perceived requirement that they sit by as a "potted plant."[9]

Sciaria's Resolution

The court first decided the plaintiff's motion:

> Under the circumstances presented by this motion, however, Dr. Chopra's counsel had no basis for interjecting himself into the deposition. The question presented to Dr. Chopra did not seek to invade a privilege, was not prohibited by any court order, and was not plainly improper. Even if he were representing a party, Dr. Chopra's counsel would have been without any basis in law to interrupt the proceedings in the way he did. If Dr. Chopra's counsel attempted at trial to interrupt a witness's answer and rephrase the question, irrespective of whether he represented a party or nonparty, it is likely he would receive a swift rebuke from the court. If the behavior occurred repeatedly at trial, it is likely that Dr. Chopra's counsel would be running afoul of the Rules of Professional Conduct which state that a lawyer appearing before a tribunal shall not "intentionally or habitually violate any established rule of procedure or of evidence" or "engage in conduct intended to disrupt the tribunal" (Rule 3.3[f] [3] & [4]).
>
> At oral argument, counsel for plaintiff and Dr. Chopra agreed that, when conducting a deposition, a lawyer is appearing before a tribunal for the purpose of invoking the pertinent Rules of professional Conduct, *i.e.*, Rule 3.3 (Conduct Before a Tribunal) and 3.4 (Fairness to Opposing Party and Counsel). This understanding is consistent with the concept that depositions shall be conducted "as permitted in the trial of actions in open court." Thus, while a lawyer representing a nonparty witness at a deposition must act competently and diligently, he or she also must abide by the rules governing the privilege of representing clients before a tribunal.[10]

Because the interruption was "singular," the court declined to impose sanctions but did impose costs on the motion. The court turned next to the cross-motion by Dr. Chopra's counsel and quoted a federal district court decision, *Women in City Government United v. The City of New York*,[11] addressing the role of counsel for a nonparty at a deposition:

> As a general rule, a person being deposed, whether a party or a nonparty witness, is entitled to have counsel present at his deposition. This rule is intended to allow the deponent to intelligently exercise testimonial privileges – chief among them being the privilege against compulsory self-incrimination. Counsel is not present to keep the deponent from making a statement against his interest in the absence of a testimonial privilege and he is not present to object on evidentiary grounds. A nonparty witness' counsel is also not present to participate generally in a deposition by cross-examination or otherwise. Counsel for the deponent does, on the other hand, have standing to move to terminate the deposition pursuant to FRCP 30(d) and for a protective order pursuant to FRCP 26(c).[12]

Justice Curran denied Dr. Chopra's counsel's request to "actively represent and participate" during the deposition,

Thompson has sparked a lively debate among practitioners and commentators.

holding such participation was barred under *Thompson*; the judge was not persuaded that a different result was compelled because Dr. Chopra could be named as a party in the action at some future time: "There is no privilege shielding testimony which may expose a nonparty witness to civil liability and questions which could lead to information uncovering the basis of such liability are not plainly improper."[13]

However, the court rejected the argument that a "literal and broad reading of *Thompson*" may result in questions that invade a privilege or are plainly improper and cause substantial prejudice:

> This Court does not read *Thompson* for such a broad proposition. Rather, *Thompson* should be read in light of its facts. There, the Fourth Department addressed attempts by a nonparty witness's counsel to object to form and relevance. The relief requested by plaintiff on the motion involved in *Thompson* excepted out objections for "privileged matters" and questions deemed "abusive or harassing" (70 AD3d at 1437). Thus, the facts in *Thompson* do not support a conclusion that counsel for a nonparty witness is prohibited from protecting his or her client from an invasion of a privilege or plainly improper questioning causing significant prejudice if answered.
>
> Uniform Rules §§ 221.2 and 221.3 are not limited to parties but apply to "deponents." Thus, in the event that a question posed to a nonparty fits within the three exceptions listed in § 221.2, the nonparty's attorney is entitled to follow the procedures set forth in §§ 221.2 and 221.3. In accordance with these rules, the examining party is entitled to complete the remainder of the deposition. In the event a dispute arises regarding the application of the Uniform Rules, CPLR § 3103(a) authorizes any "party" or "person from whom discovery is sought" to apply for a protective order. Either a "party" or "person from whom discovery is sought" is therefore entitled to suspend the deposition to serve such a motion. The deposition is stayed while the motion is pending (CPLR 3103[b]).[14]

The court agreed that the procedure of suspending the deposition to seek a protective order was "apparently condoned in *Thompson*" and declined to issue any order concerning possible questions calling for "legal or factual conclusions or questions asking the witness to draw inferences from the facts" or questions in the form of a hypothetical:

> At the time Dr. Chopra's counsel interrupted his client's answer and the deposition, the question pending was entirely proper. The question was not in the form of a hypothetical and did not seek opinion testimony. It also did not seek a legal or factual conclusion, and was not argumentative. Accordingly, there is no basis in this record to instruct plaintiff's counsel not to ask such questions. It also is the better and fairer course of action to await a full record of the deposition containing the specific questions and their context. The Court also is entitled to rely upon the "good faith obligation" of plaintiff's counsel to ask questions which "comply with the spirit as well as the letter of the statute and procedure." If a further motion regarding this deposition is required, whether a particular question is proper will be subject to the ultimate test of "usefulness and reason" in light of the liberal interpretation afforded to the statutes and rules governing disclosure.[15]

Conclusion

Now that summer is over, litigators are in the midst of the post–Labor Day resumption of daily depositions and court appearances. Some of those depositions will involve non-parties, and *Thompson* conflicts are bound to arise. Of particular interest going forward will be the manner in which trial courts in the other Departments apply *Thompson*. While *Thompson* is controlling authority statewide in the absence of contrary appellate authority,[16] lower courts in the other Departments will have to decide whether related case law, some of which was cited in last month's column, provides a basis for departing from a "strict construction" of *Thompson*.

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1. 70 A.D.3d 1436 (4th Dep't 2010).
2. I can only assume that a Post Office snafu would prevent you from reading the *Journal*.
3. *Thompson*, 70 A.D.3d at 1438.
4. No. 4659/10, 2011 WL 2749654 (Sup. Ct., Erie Co. Jul. 15, 2011).
5. *Id.* at *2.
6. Justice Curran explained the genesis of the deposition rules:

   > Despite the language of CPLR § 3113(c), and the above-quoted case law, the conduct during depositions in New York by some segments of the Bar necessitated the adoption in 2006 of Part 221 providing for the Uniform Rules for the Conduct at Depositions. These uniform rules also were nothing new but rather a useful regulatory guide to effectuate application of CPLR § 3113(c), and to otherwise reconfirm controlling case law.

7. *Sciara*, 2011 WL 2749654 at *2.
8. *Id.* at *3.
9. Justice Curran explained in footnote 1 the origin of the references to a "potted plant":

   > This reference to a "potted plant" was used by both Dr. Chopra's counsel and by counsel for the defendants. It is a reference to the statement made by Brendan V. Sullivan, Jr., Esq., while representing Oliver North during Congressional hearings, during which Sullivan stated: "I am not a potted plant. I am here as the lawyer. That's my job."

10. *Id.* at *4–*5.
11. 112 FRD 29 (S.D.N.Y. 1986).
12. *Sciara*, 2011 WL 2749654 at *5.
13. *Id.* at *6. This issue was raised in *Thompson*, as well.
14. *Id.* at *7.
15. *Id.* at *8 (citations omitted).
16. *See, e.g.*, *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664 (2d Dep't 1984) ("The Appellate Division is a single State-wide court divided into departments for administrative convenience and, therefore, the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule" (citations omitted)).

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Building and Understanding Law Office Space

Adapted by Kimberly A. Swetland and Vincent M. Bell, from *Best Practices in Legal Management: A Comprehensive Guide*

The legal services industry continues to face an increasingly competitive marketplace along with the added pressure of clients expecting more for less. Keeping overhead costs down and focusing on delivering quality services will help in maintaining a competitive edge. Cost control can be accomplished by making prudent real estate and office design decisions.

Real estate costs are one of the largest overhead expenses for law firms; controlling these costs necessitates maximizing the use of space. Even if you are not relocating, or not relocating soon, it is possible to achieve greater efficiencies in your current space and make many enhancements to improve productivity, increase collaboration and create a positive work atmosphere. Good space design should reflect your practice and meet your clients' expectations when they arrive at the office.

How to optimize the use of space is a critical challenge for all firms regardless of size, practice or location. An informed managing partner, who carefully considers the options available for innovative space planning and design, will ensure that the design maximizes the use of the square footage while promoting the most effective practice of law.

Whether relocating or remodeling your office, you and your architect should address the following: office space flexibility; advances in technology that will reduce the need for paper files and hard-copy materials; security concerns; the creation of centralized and multiple-use conference facilities and internal stairways; office size; and office sharing.

Office Space

Build in Office Space Flexibility

In today's rapidly changing environment, it is essential to have flexible office space. Technology and user requirements continue to advance, so built-in flexibility is critical, especially for the support personnel and administrative staff work spaces. Consider systems furniture, as opposed to custom built-in workstations, which can be easily moved as the size and nature of practice groups evolve.

Technological advances have led to reductions in law library and record-retention areas, and wireless access enables lawyers to work from various locations both within the office and remotely. When designing for the future, it is important to consider the expectations and habits of future legal talent and your clients, which involves being constantly connected in a more collaborative digital setting.

> Real estate costs are one of the largest overhead expenses for law firms; controlling these costs necessitates maximizing the use of space.

Address Security Concerns

As part of a more efficient office, client meeting rooms are now located in centralized conference areas, often adjacent to the reception area. Increased (but discreet) security is another consideration when planning and designing new space. One of the reasons for increased security is confidentiality. Legislation, including the Sarbanes-Oxley Act,[1] has raised the consequences for breaches in confidentiality to new levels. Be mindful of designing a secure conference area that is simultaneously welcoming and comfortable.

Create Centralized and Multi-Use Conference Facilities

With a centralized conference center, you save money and can economize on lawyers' office space. Higher-end finishes and furnishings used to be a priority when meetings were held in lawyers' offices. Private offices can now be equal in size because clients do not see them, and amenities associated with conferencing areas (e.g., restrooms, pantries, closets) can be consolidated.

Centralize Internal Stairways

Most large firms, and some smaller firms, do not have the luxury of maintaining their offices on a single floor in a building. The convenience stairway (i.e., the central staircase that connects the different floors a firm occupies) is expensive when you consider the real estate used and the cost of construction, but the value it adds is significant. Stairs provide easy access to centralized, shared amenities, such as conference rooms, support areas, war/caucus rooms and the law library; they unify the firm and improve communication. You may also be able to negotiate with the landlord for the use of fire stairways for access to your other floors.

Office Size

Traditionally, the size of one's office reflects the lawyer's place in the firm's hierarchy. However, scaling back to uniform and modestly sized offices has an appreciable effect on the bottom line; consequently, law firms are moving to offices of equal size for all lawyers. If uniform offices do not quite suit the firm culture, another option is to revise the standards for private offices to a ratio where two partner offices are equal to three associate's offices.

Relocation Considerations

Comparable to managing a case, a successful relocation must be managed by an individual who understands the overall project and knows the many steps involved in an office move, the timing for each of those steps and professional assistance required to achieve the move. Equally important, but sometimes less achievable, is a clear, unambiguous decision-making process whereby the firm's designated project manager is empowered to make timely decisions that are not overturned at a later date. Finally, a savvy project manager will allot more time for the relocation than he or she thinks is needed to allow for unforeseen circumstances and delays.

Firms needing office space of approximately 2,500 to 5,000 square feet will have a good chance of finding space that already has an acceptable layout. Finding a "ready-to-wear" office will considerably shorten the time needed for the move. As space requirements increase (10,000 square feet and more), the specific needs of the firm often dictate whether to build from scratch or use an existing installation with modifications. Also, for larger space requirements, the firm should consider the need for outside expertise; in addition to a real estate broker, this may include an architect/space planner (designer), a furniture consultant; a telecommunications consultant, a general contractor and a project manager.

Before beginning the relocation process, consider retaining an experienced commercial real estate broker. A broker can help approximate the square footage you will need by looking at your ideas for the new office (e.g., how many offices, what size, conference rooms, support areas,

etc.). The broker can also explain the general economics of office space in locations that are of particular interest to the firm. The experienced broker will also be able to refer professionals for the services you need related to the move.

Select a broker the way you would select any important service provider. Some firms will initiate a more formal request for proposal process to identify a broker; others will take an informal approach, which includes asking associates and friends about their experiences, interviewing two or three people, checking references and selecting a broker. Once your broker is selected, let the relocation planning begin.

> Good space design should reflect your practice and meet your clients' expectations when they arrive at the office.

Plan Your Relocation Carefully

A successful relocation requires thoughtful planning and follow-through. You should consider the following steps to ensure a smooth transition:

- Once a broker has been selected, establish a team of vendor-experts to help answer important questions and to provide structure and direction to the relocation process. Although this step is a necessity for larger organizations, smaller ones will find that going outside for help can reduce the costs and improve the results of planning for an office relocation.
- Allow the designer to meet with key people in the firm to learn about the overall objectives of the relocation, including staffing requirements, image projection, location, and any other aspects of the practice that will affect the design of the space. The study will yield both a needs assessment and related space measurement, which the broker will use to survey the market for suitable spaces. It is very important for the firm's decision makers to sign off on the final space study before entering the market to look at space.
- Develop a budget with the help of the broker and the designer. This approved budget will drive all decisions from this point forward. When establishing a project budget, utilize the following categories:
- Construction
  - Architectural fees
  - Engineering fees
  - Floor coverings
  - New furniture or furniture refinishing fees
  - Amenities (such as artwork, signage, plants, etc.)
  - Moving costs
  - Disposal of items to be discarded
- Ask the broker to survey the market and present alternatives that generally fit the plan's criteria and objectives.
- Select a space and begin lease negotiations. Lease negotiations usually take four to six weeks, although it is not uncommon for some negotiations to take significantly longer (timing usually depends on market conditions and the amount of space). Landlords will try to complete the transaction (and the onset of cash flow) as quickly as possible – an easily achievable task when competition exists for the space, but not so easy when vacancy rates are high.

Assemble the Vendor-Expert Team

Before selecting a team, check with the landlord to verify that the vendors are on the building's approved vendor list. If not, take steps to add them.

Architect/Interior Designer

Because the business operations of a law firm are unique, choose a design firm that has experience working with and designing law offices. When selecting designers consider the following:

- Interview at least two architectural firms and request that the team who will be working on your project be present at the interviews.
- Ask to see photographs of and to visit other law firms they have designed.
- Ask the designer whom he or she will add to the team of experts to provide advice in areas such as heating, ventilation and air conditioning (HVAC) and engineering (for issues such as floor support requirements if you plan to install high-density shelving).
- Request the hourly rates for each member of the team who will be working on your project. You may also decide to negotiate a flat fee for the project.
- Ensure that your architect understands the style and quality of the project that you plan to build.
- Agree on an overall budget.

General Contractor/Construction Manager

The general contractor (GC) is responsible for the complete build-out and for the selection of subcontractors (excluding your furniture dealer) necessary to complete your project.

- Interview at least two general contractors and request that the construction managers and others who will be working on your project be present at the meeting.

- Ask to see photographs of and visit other law firms they have constructed.
- Negotiate their percentage fee based on the total construction cost.
- Make sure the GC you select understands the style and quality of the project you want to achieve.

Furniture Dealer

Initially you should assess your current furniture inventory to determine if it is cost-effective to move it to the new space, or if it is more prudent to work with a furniture dealer to purchase new furniture (which can be new or even pre-owned, like new). Trying to make current built-in furniture fit into new, different spaces may be cost prohibitive. It is important to consider and weigh the potential long term savings of maximizing space utilization versus designing space to fit oversized and/or outdated furniture.

In the past, partners typically furnished their offices to fit their individual style, and firms would provide each partner with a stipend to cover the costs. The current trend is to furnish partner offices with standard, built-in furniture and create a uniform look throughout the firm. (This greatly reduces costs associated with relocating partners and moving or right-fitting furniture throughout the term of the lease.)

If the decision is made to purchase furniture, interview at least two dealers and request that the team (e.g., salesperson, project manager, etc.) who will be working on your project be present at the meeting. Request a list of the furniture manufacturers that the dealers represent. This is very important because furniture dealers do not represent all manufacturers, and you may want to choose products from manufacturers different from ones that a furniture dealer represents. (Work with only one furniture dealer to avoid confusion with delivery and installation schedules.) Determine whether the selected furniture dealer's fee is paid hourly (not recommended), or if the fee is included in the cost of the furniture.

Mover

Interview at least two moving companies and request written estimates. Confirm with building management that the mover is on the approved vendor list and is able to provide the required insurance certificates.

Needs Assessment

When starting a real estate project, the first step is to determine how much space the firm will need. The precise way space is measured can vary widely from building to building. Space in the commercial office marketplace is always identified by rentable square feet. This method of measurement reapportions common space in the building to each tenant space based upon the percentage of the total building that the tenant space represents.

The space identified in rentable square feet will be larger than the actual floor area, called *usable space*. Usable space includes the areas under columns and heating and cooling equipment, which, in older buildings, can extend a foot or more from the window line. The term also encompasses electrical closets, common hallways and restroom areas. For space planning purposes, *usable square feet* is the relevant measure; to determine the cost to occupy the space, *rentable square feet* is the key number.

The design team should gather information to assess the existing population's space requirements as well as *future growth plans*. Information can be gathered through questionnaires, interviews with selected individuals and group meetings to address specific issues and needs.

A combination of all approaches is recommended. All the items on your wish list should be evaluated and discussed with the managing partner before any design is finalized. The information-gathering process should address the areas discussed below.

Personnel
Supply the design team with a list of all personnel by department. During the design process, it is very important to keep the design team apprised of any personnel changes, including new hires and terminations.

Office Sizes
Determine the standard office sizes for partners, of counsel, associates, paralegals and administrative assistants. Keep in mind that office size is usually dictated by window sizes and mullions.

Technology Requirements
Include the technology department (or a system consultant) in the initial planning discussions with the architects (before the architects do their first drawings) to determine the following: location of server room; location of LAN wiring closet(s); location of data ports for computers and telephones in offices, secretarial stations, mail/copy rooms, conference rooms and "war rooms" (discussed below); location of card key system(s); and location of printers (network and individual).

Mail/Copy Room
Prepare a list of all equipment (including size and electrical specifications) and the number of personnel who will occupy the mail/copy department. Identify the supply storage area needed and determine where to locate the supplemental HVAC.

Satellite Copy Areas
Determine the number and location of copy areas to accommodate the size of the copy machines.

Pantry/Lunchroom
To determine the size, consider the number of tables and chairs. Decide what types of appliances you plan to install (e.g., refrigerator, dishwasher, ice machine, coffee maker, soda machines, vending machines, etc.).

Conference Rooms
Establish how many conference rooms will be needed and the size of each conference room. Consider wiring the conference room tables for telephones, videoconferencing, and wireless access. Decide if you will need visual boards and/or projectors in the conference rooms and screens, credenzas, and supplemental HVAC. Also review conference room locations in proximity to service pantries, copy/scanning rooms, telephone booths, breakout rooms and reception/waiting areas.

War Rooms
Determine the number of war rooms needed, the size of each room, how much steel shelving is needed for files or boxes and the types of tables needed (e.g., reconfigurable tables).

Accounting Department
Verify the number of accounting personnel in the department. Determine how much space will be allocated to filing and develop a list of equipment (including size and electrical specifications).

Records Room
The size of the records room will depend on whether you have a central or decentralized model. If you decide to use mobile units, find out if the floor needs to be reinforced, which will substantially add to the cost of the project. Verify the number of records personnel. The trend is toward smaller records rooms and firm libraries. Firms that have moved to a cloud-based records-retention system will require considerably less physical space for this purpose than firms tied to paper systems.

Library
In the past, law firm libraries and space dedicated to legal research books were expansive and formidable. Many firms have eliminated or substantially reduced the size or need for a formal library (or dedicated shelving) by purchasing online subscriptions. Since technology continues to substantially change how legal research is performed, research different types of work areas (carrels or counters). Develop a list of equipment and software (e.g., Lexis, Westlaw, satellite PCs, high-speed printers, etc.) and consider providing satellite library areas (e.g., a tax library) in lieu of a centralized, dedicated library, if hard copy materials are needed at all. Verify the number of personnel for library services and legal research.

Word Processing/Document-Production Center
Current legal trends include outsourcing or decentralizing word processing, but some firms still maintain a centralized facility. When evaluating your space needs for a word processing and document production center, consider the hours of operation of your personnel and determine if centralized, dedicated space and supplemental HVAC will be needed. Evaluate equipment requirements and verify number of personnel.

Signage
Consider what signage will be needed in the lobby, entrance and reception areas; nameplates outside attorney offices and at administrative and paralegal workstations; signs outside conference rooms and lavatories, and at exits.

Supplemental Air Conditioning

The decision to install supplemental air conditioning units will depend upon your lease arrangements and the cost of after-hours HVAC in your building. It may be more economical to install supplemental air conditioning units in certain locations (e.g., conference rooms, war rooms, copy/mailroom, and document production center).

Lawyer File Space Allocation

Make sure that you plan for adequate file space in the public areas. The number of file drawers that will be allocated to each lawyer, as well as the standards and policies applicable thereto, should be determined before the space is designed. As more firms store their records digitally, the trend is toward less paper file storage space per lawyer.

Finishes, Flooring, Furniture, Lighting

It is important to carefully review and understand the types of finishes the architect plans to use (e.g., wood paneling, doors, fabric wall coverings, carpeting, tile, table finishes, desk finishes, lighting, etc.), all of which will have a significant impact on the cost of your project. Keep in mind that while you want to build an attractive space, it is important to be practical. For example, you would not want to install a table that costs $15,000 to $20,000 in a war room, and you likely would not want to install a fabric wall covering in your mail/copy center. Maximize the use of natural lighting throughout your office and dedicate lighting to showcase special artwork in your high traffic areas. Carefully review the recommendations and the finishes before the plans are finalized and delivered to the contractor.

Other Space Needs

Some firms might have additional needs, such as a day care facility, a formal cafeteria or lunchroom, workout space, an ancillary business, and on-site parking associated with the clientele, lifestyle of the lawyers and staff, and market in which the firm is located. These unusual space requirements should be incorporated into the planning process as well, keeping in mind that when it comes to law offices, one size does not fit all.

Understanding an Office Lease

Before a lease agreement is executed, all the basic business terms, rent, escalations, term, landlord work, etc., must be agreed to and confirmed in writing. The confirmation is usually accomplished through the exchange of proposals and counterproposals until an agreement can be reached. In times of high vacancy rates and low demand, the negotiation process tends to take longer than when space is in short supply and tenants are competing for the same space. Once the parties agree to the basic business terms, a draft lease is issued. The combination of a seasoned broker, reputable landlord and a complete accounting of all the costs the firm will incur to complete the relocation should result in productive, efficient negotiations and an executed lease.

Types of Leases

The vast majority of office leases are known as *gross leases*, meaning that you, the tenant, make rent payments to the landlord that include the costs to operate, insure and pay real estate taxes on the building. Basic cleaning services are also included. Charges for electricity can be assessed three ways:

- *Inclusion* – charges are included in the rent payment as additional rent.
- *Sub-meter* – provides an accurate assessment of usage from which a monthly bill is generated; a

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landlord surcharge (usually negotiable) is often added to cover the cost of a third-party meter reading and maintenance company;
- *Direct meter* – tenant has an account with the utility company.

Of the three options, sub-metering with a low surcharge is often the least expensive way to pay for electrical service.

Escalation Provisions

In addition to base rent, escalations have a significant impact on the overall cost to occupy the space. *Escalations* refer to items usually identified as "additional rent" in the lease and are made up of two different components: real estate taxes and operating expenses. There are endless variations on how escalations can be constructed; the most common forms are discussed below in general terms. Keep in mind that there are no "good" or "bad" escalations. The escalations and other aspects of the lease have to be carefully evaluated within the context of the entire transaction to determine if the overall economics of the deal work for the firm.

- *Real estate tax escalation.* The real estate tax escalation stipulates that the tenant will pay its proportionate share of any increase in the building's real estate taxes over a base year, which is generally the first year of the lease. For example, if the taxes on the building increase $1,000 in the second year of the lease and your firm occupies 10% of the building, your firm would pay a real estate tax escalation of $100 in the second year of the lease. How the amount is paid (e.g., biannually, quarterly, etc.) depends on your lease.
- *Operating escalation.* In its simplest form, the operating escalation is a way for the landlord to pass along to the tenants increases in operational costs. The method of apportioning the increase is the same as the one used for the real estate tax increase – each tenant assumes its proportionate share of any increase over a base year.
- *Porter's wage escalation.* Instead of the relatively straightforward operating escalation, landlords often use an annual fixed percentage increase over the base rent in lieu of a direct operating clause, commonly known as the porter's wage escalation,[2] where the base rent is increased by 3% per year. Because this method compounds the increase each year, it can quickly become significant, especially if the baseline rent is high. Although operating expenses have little to do with the wage scale of unionized building workers, it is a way to grow the rent each year to cover increases in operational costs and possibly produce some profit.

Construction Cost Provisions

In addition to rent and escalations, the cost to build the space – who pays for the build-out and how it is paid – can have a significant impact on the firm's occupancy costs. As with all lease components, the landlord's work contribution for construction of the premises varies significantly, depending on market conditions. At the height of a landlord's market, with high demand and little available space, it is not uncommon for space to be offered "as is," with the tenant absorbing 100% of the cost to design and build the space. Conversely, in a market where there is an abundance of vacant space, it is not uncommon for the landlord to finance a portion of the tenant improvement (commonly referred to as TI) build-out installation.

Negotiating a work contribution or work letter is important in any market. The expertise of the architect is critical for giving the firm a clear understanding of construction costs before beginning negotiations over who pays for what.

Sublease Clause

Another important component of the lease is the sublease clause. Think of the sublease clause as an exit strategy. The landlord (rightfully so) wants to maintain maximum control over space in the building; the tenant wants the most freedom and flexibility to sublet space whenever and to whomever the tenant chooses. Therein is the starting point for sublease clause negotiations.

Negotiate a sublease clause that allows your firm to sublet some fixed portion of the space (e.g., 25%) without triggering the landlord's right to recapture the space. The recapture provision gives the landlord the right, not the obligation, to take the space back based on the tenant's desire to sublet all or most of the space. If the firm is looking to sublet all the space, recapture by the landlord is probably the best outcome. There can also be a partial recapture provision permitting the landlord to take back only that portion of space offered for subleasing. The landlord will want to recapture in a market of rapidly rising rents; in a falling rent market it is highly unlikely that the landlord would exercise recapture rights.

In most market conditions, subleased space is offered at a discount below what the lessee tenant is actually paying. If the space is worth more under a sublease, a profit-sharing provision will ensure the tenant's right to keep some of the proceeds that are in excess of the actual rent. A commonly accepted profit-sharing provision splits the profits 50-50 between the landlord and the tenant. The tenant is usually able to deduct expenses associated with the sublease, such as commissions, advertising and legal fees, before profits are calculated.

The prospective subtenant is powerless to negotiate or change any provision contained in the lease. The sublease provisions are generally limited to term, rent and other

expenses; the sublease mirrors or references the primary lease for all other aspects of the deal.

Finally, subleased space must be legally demised, meaning it must be separated from the primary tenant's space and built in a way that fully complies with applicable building codes. Here again, you will need the services of an architect in order to determine the cost of demising the space and to create construction drawings.

If you are looking to simply rent a few offices and do not mind other people having access to your common areas, a desk-sharing provision is often the better alternative. Under a desk-sharing agreement, the individual occupies the space through a license agreement, and no construction is required for demising separate space.

Preliminary Space Design During Lease Negotiation

Preliminary design work can begin on the space during the lease negotiation stage. If the tenant is paying for architectural services, it may be necessary to incur costs (and the associated risks) before a lease is executed. It is often the best course of action to ensure that the full build-out costs and who is responsible for those costs are identified and negotiated as part of the final terms before work begins. It is important to deal with a reputable landlord, one who has a demonstrated history of working with tenants constructively to close deals, so you can invest your pre-lease dollars with a high degree of confidence.

Furniture Plan

Once the space is approved, a furniture plan is prepared and presented to the furniture dealer. The plan should include *all* items of furniture to be placed in each office and all other work areas. This plan should be *carefully* reviewed by you and the architect. Consider the following:

- Decide which items of existing furniture can be used in the new space.
- Refinish the existing furniture on the new floor plan.
- Repaint file cabinets that are in good condition.
- Refinish desks that are in good condition.
- Refinish conference tables.

With respect to new furniture, there are several key points to consider before ordering your furniture, including the following:

- *Ordering.* Furniture should not be ordered until your design plan has been finalized.
- *Seating plan.* Make sure that key partners have reviewed and approved the seating plan for partner and associate offices. Note: The furniture setup (especially in a partner's office) will be dictated by the door location (e.g., left versus right return).
- *Measurements.* It is essential that the dealer take his or her own measurements and *carefully* review the furniture plan to confirm that the type of furniture specified by the designer will, in fact, fit into the designated space.
- *Seating.* Bring in a few models of desk chairs and allow your staff to participate in the decision.
- *Finishes.* Review the finishes (e.g., wood, laminate, metal, fabric versus leather seating, etc.) that the designer specifies for each area because finishes have a significant impact on your budget.
- *Partner furniture.* Choose one manufacturer for partner offices to obtain a deeper discount. Note: Request that your design team assemble (on presentation boards) photographs of each furniture style that the selected manufacturer has to offer. It is helpful to have a visual of what to choose from, and it will accelerate the decision-making process.
- *Furniture delivery.* Before placing the final furniture order, be sure that the installation and delivery dates conform to the construction completion schedule.

Additional checklists, which include duties of a general contractor (GC) and preparing for an office move, can be found in chapter 9 of *Best Practices in Legal Management: A Comprehensive Guide*, published by the New York State Bar Association.

Final Thoughts

In closing, here are several unifying points, which must always be the organizing principles that drive your real estate space project:

One – How much space do you really need? One legal industry benchmark is 7% to 9% of revenue. Another is 600 square feet to 900 square feet of total space per lawyer. This should not be confused with the ideal size of lawyers' offices, which is a good starting point when combined with market pricing considerations.

Two – The best way to look at your ideal space needs is to make absolutely certain to never have too much space. Always be close to running out of space. It is much easier to get more space than it is to shed extra space.

Three – The real danger is to allow space issues to drive your business rather than allowing business needs to drive your space needs. Excess space or space that is *too* expensive can lead to firm insolvency.

To finesse your space, you need to utilize best practices in order to manage a multitude of variables in an environment where there are a few hard-and-fast rules. The best starting point is for the partners to talk and agree upon a limited set of achievable goals. If that is your starting point and you follow the best practice guidelines and tips outlined above, you should be successful in your space project. ■

1. The Sarbanes-Oxley Act is also known as the Public Company Accounting Reform and Investor Protection Act.

2. The porter's wage escalation is so called because it raises rents by referencing the increase in a class of building workers' wages.

The Law Office of the Near Future

Practical and Ethical Considerations for Virtual Practice

By Stephanie L. Kimbro

More attorneys and law firms are integrating into their practices some form of virtual delivery of legal services, whether within a traditional law firm structure or in the form of a completely virtual law office. The New York State Bar Association Committee on Professional Ethics in its Opinion 709 stated that it was permissible for attorneys licensed in New York to practice law over the Internet as long as they complied with the ethics rules.[1]

Many different structures and hybrids of virtual law practice have emerged in recent years.[2] Some small and medium-sized practices are creating multijurisdictional, multi-attorney virtual law firms. More solo practitioners are launching virtual practices from home-based offices. Larger law firms are creating customized, secure client portals to provide their sophisticated and often overseas clients with access to the firm online. Non-attorney–operated online companies are creating branded networks directly marketing legal forms and guidance to consumers online and inviting virtual attorneys to join these networks to pull in online prospective clients.[3] In order to remain competitive in a changing, client-based and increasingly e-commerce-oriented society, it will be necessary for attorneys to adopt some form of virtual legal services delivery.

An increasing number of attorneys use cloud-based technologies (software or services hosted by a third party on servers housed in remote data centers) to deliver legal services. These attorneys need to understand the potential ethical issues that may arise from this alternative or complementary form of legal services delivery. The ethics rules allow us to create and define virtual law practice, but they also place barriers and limitations on the scope of innovation in legal service delivery. Many of the ethics issues that may arise in virtual law practice are not that different from those in a traditional law practice. In fact, most traditional law firms have relied on cloud-based technology for many years now, even if they have not been aware of it. For example, they use online legal research services and store the research trail and history of their clients' legal matters within a third-party hosted system.[4] Additional concerns and rules of professional responsibility may come into play, however, when cloud-

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based technology is used to communicate and deliver services directly to clients online.

These unique responsibilities are briefly discussed in the New York State Bar Association's "Report of the Task Force on the Future of the Legal Profession," published this past April.[5] The Report devotes an entire section to virtual law firms and defines the online delivery of legal services, distinguishing it from extranets and other forms of mobile lawyering. Virtual law offices are seen by the authors as a significant and growing trend, a way to connect lawyers with each other for collaboration and with clients to deliver services online.

The Report also discusses new legal products and services that are being created through the use of technology-enabled law firms. The section of the Report covering these issues does not specifically mention that the primary delivery of these new services is online or through a secure virtual law office, but it acknowledges the use of newer knowledge-management systems and document-assembly and automation tools used in unbundling legal services.[6] The Report also recognizes that the use of this technology can create greater opportunity for unique legal service delivery systems to develop as well as facilitate multijurisdictional practice.

To understand which ethics issues might arise in virtual law practice, it is important to clearly define the structure of the virtual practice and what services are being delivered online. With online delivery of legal services, a secure client portal is used to connect the prospective client and existing clients with the virtual law firm. When prospective clients register, they are provided with a unique username and password. The clients are then allowed access to their own secure account platform where they may handle any number of transactions with the attorney including tasks such as requesting legal services, chatting with the attorney in discussion threads, reviewing drafts, scheduling web conferences or calls, reviewing invoices, paying legal fees with a credit card and receiving the final legal product online, typically in the form of unbundled legal services.

The majority of legal services delivered online are in the form of unbundled legal services. Some law firms are using virtual law offices to deliver full-service representation to their in-person clients as well as cultivating an online client base that receives unbundled legal services. The delivery of unbundled services carries its own separate set of ethics issues and best practices, of which the virtual attorney will need to be aware.[7]

Discussed below are ethics issues that apply to any form of virtual law practice where the attorney is delivering legal services to clients online, whether unbundled or in conjunction with full-service representation. While additional ethics issues may arise in the general use of cloud computing in law practice, the ethics issues listed below more specifically address online delivery of services to clients.[8]

Confidentiality

Rule 1.6 of the New York Rules of Professional Conduct requires that attorneys take reasonable care in protecting the confidentiality of their clients' information.[9] In terms of using cloud-based technology to create a virtual law office, this means that attorneys must be knowledgeable about how their law office data is being stored and transferred once control has been turned over to a third-party software provider. Any form of virtual law office should also have a secure socket layer (SSL) certificate, and provide the client and firm users with secure data transmission.

Typically, the technology chosen by a virtual firm is software as a service (SaaS), a form of cloud computing. The SaaS provider leases servers to store the data and these servers are housed by another third-party hosting company that owns a Tier 4 datacenter.[10] Law firms entering into a service level agreement (SLA) with a SaaS provider need to be aware of the provisions in the SLA regarding access and confidentiality among other items related to security of the hosted data. The law firm must also be aware of any agreements between the provider and its hosting company that might affect the confidentiality of and access to the data. New York State Bar Association Formal Ethics Opinion 842, issued September 10, 2010, specifically allows for the storage of confidential law office data by third-party online storage providers in an "online system," provided that reasonable care is taken to comply with Rule 1.6.[11]

Reasonable care is defined in Opinion 842 as conducting due diligence in researching the technology provider as well as staying up-to-date on the technology as it develops to make sure that it remains adequate to protect clients' information. In order to conduct due diligence, the attorney needs to understand what should be in the technology provider's SLA. Some provisions to look for in the SLA include the following:

- Data return and retention policies, including transferability and compatibility of the returned data so that it may be transferred to another system should something happen to the provider or service.
- Third-party hosting and server information, including information about the provider's relationships with other companies, where servers are located, if there is geo-redundancy of servers, if servers outside of the United States would be subject to international laws, if the provider offers data escrow, and assurance that the servers are housed in Tier 4 data centers.

> In order to remain competitive it will be necessary for attorneys to adopt some form of virtual legal services delivery.

- Policy for handling data breaches and proof that the provider maintains adequate business liability insurance.
- Policy stating how the provider would handle a government or civil search and seizure action.
- Compliance with federal regulations, including payment card industry (PCI) compliance if the technology provider will be collecting credit card information online rather than redirecting that service to another third-party hosting company.
- Security of the law office data, including information about which parties might have access to the data, how it is encrypted, and any confidentiality clauses, privacy policies and nondisclosure statements.
- How backups, maintenance and updates to the service affect the security of the law office data, including information about whether the provider conducts regular security audits and how often it backs up data.
- Other details to look for in the SLA might include subscription costs, training availability and cost, downtime, support, and infrastructure for growth.

The second component of protecting confidentiality of client information in a virtual law office involves the firm's policies for use of the cloud-based technology. Firms should create a policy that dictates members' use – from interacting with clients online to collaboration and sharing with other members of the firm. This policy should set clear expectations for attorneys and firm members who are increasingly reliant upon mobile devices to conduct work and handle personal tasks. As an example, a broad firm policy might include setting online response policies letting firm members know when and how they should interact with clients online. Attorneys individually and within a firm who use the technology should abide by the following daily practices, among others:

- Keep up to date on the security issues or designate a firm member or retain an IT consultant to be responsible for this task.
- Do not use public WI-FI connections; use a cellular phone modem adapter instead. Attorneys should ensure that all wireless traffic is encrypted with WPA2.
- Make sure that hardware used to practice law online should have antivirus software and all software patches updated as well as a software firewall turned on.
- Never write down or send via unencrypted email usernames and passwords. Attorneys should use a password generator to create strong passwords and change them regularly.

In addition to these best practices, the International Legal Technology Standards Organization (ILTSO), a non-profit organization, published standards for the use of technology in law practice.[12] This document may serve as an updated resource for attorneys, firm IT managers, and consultants regarding multiple uses of technology in practice management and includes a section on ethics considerations.

Avoiding UPL With Jurisdiction Checks

Virtual law firms must be careful to avoid the unauthorized practice of law (UPL) in other jurisdictions. This situation may be avoided by including information on the firm's website that the attorneys are licensed to practice law only in New York and any other jurisdiction(s) where licensed. This needs to be clearly stated throughout the website and again when prospective clients engage with the firm. The clickwrap agreement for registration on any client portal needs as well to remind prospective clients of the jurisdiction where the firm is licensed.

Additionally, the technology service may provide jurisdiction checks that can help prevent UPL by sending red flags to the attorney and the prospective client when he or she registers online and posts a zip code that is not within the jurisdiction of the firm. These red flags do not necessarily prevent the firm from delivering services online to the client if the legal matter relates to New York law and the client is, for example, located in New Jersey or Pennsylvania. With these multiple safeguards in place, the virtual law firm can avoid UPL in other jurisdictions.

Physical Office Address Requirements

Any attorney who is a member of the New York State bar who wishes to open a purely virtual law office should be aware of New York Judiciary Law § 470. If an attorney licensed in New York resides in another state, he or she must maintain a physical office that is located in the state of New York in order to practice New York law. Attorneys who reside in the state of New York are not required to

have a physical office location and may operate virtual law offices without providing a physical office address. However, in the case of a litigation-based practice, the attorney must provide an office address even if that address is a leased office space or one shared with other attorneys.

Online Conflict of Interest Checks

When a new prospective client registers for online legal services, the virtual law firm should run a thorough conflict of interest check on the individual or entity. This process should include checking the matter against both the existing in-person clients if the firm has a traditional brick-and-mortar office as well as against all existing online clients.[13] The online check should be run again as more information is gathered through the online client intake process about the matter and parties involved.

Clearly Establishing the Online Attorney-Client Relationship and Duty to Prospective Clients

Before beginning to work with an online client, the virtual law firm needs to clearly establish the formation of the attorney-client relationship or clearly decline the online representation.[14] This may be accomplished through the use of an online engagement agreement in the form of a customized clickwrap agreement and/or uploading to the client, online, a traditional engagement agreement for the prospective client to sign and upload back on the client portal. New York Court Rule, 22 N.Y.C.R.R. § 1210.1, requires that the attorney post a Statement of Client's Rights and Responsibilities in his or her law office.[15] Accordingly, a purely virtual law office without a brick-and-mortar component should include this Statement on its main website as well as within the secure client portal area.

If the virtual law firm is completely web-based, then a limited-scope engagement agreement that explains the nature of the unbundled, online legal services is necessary. If a traditional brick-and-mortar law office is adding a virtual component, then it may want to integrate provisions in the existing agreement that explain to the online client the nature of the online service and the use of the technology to deliver services. In either situation, these agreements may be provided in the form of clickwraps or digital engagement agreements. Firms may use electronic signature technology so that clients may sign the agreement online and upload it for storage into the online case management system for future reference.

Defining the Scope of Online Representation

Whether the virtual law firm is providing unbundled legal services or full-service representation to clients, the firm needs to clearly define the scope of online representation.[16] For a traditional law office, clients need to understand which tasks in their matter will be handled in person by the firm or at the courthouse and which will be handled online. If the firm is completely web-based, then the limitations of this form of delivery need to be made clear so the client understands which tasks he or she will be responsible for in the matters and which tasks the firm will handle. The client must actively consent to the scope of the online representation. Again, if the virtual law firm is providing unbundled legal services online, review best practices and ethics issues uniquely related to unbundling prior to engaging in this practice.

Determining Competency of the Online Client

Technology provides us with the tools necessary to determine competency of clients online and whether the prospective client is able to understand the nature of the legal matter, how it affects them and to make informed

decisions. Virtual lawyers may use web-conferencing tools with video to meet with clients face-to-face if they have doubts about a prospective client's competency. Other tools within the virtual law office may assist the attorney in making this determination, such as initiating text-based discussions or having clients answer questions in online client intake forms. Traditional phone calls may be used to reassure the attorney before beginning the online relationship. Determining competency of an online client may come down to the attorney's own judgment, just as it would at an in-person meeting at the law office.

The virtual law firm needs to clearly define the scope of online representation.

Authenticating Online Client Identity

There are various ways to authenticate and verify the identity of the online client. Web-conferencing tools may be used to hold video chats with the prospective client to see that client face-to-face and review his or her driver's license or other photo ID. A copy of the driver's license may be scanned and uploaded to the virtual law office with the client's signature below. The client is signing an agreement prior to the start of the relationship where the client states that he or she is who he or she claims to be. Clickwrap agreements are binding and enforceable contracts with the client, and identifying fraud is not the responsibility of the lawyer or firm. Attorneys must be able to rely on the information provided to them under contract by prospective clients whether online or off.

Supervision of Virtual Assistants and Paralegals Working With Online Clients

Virtual law firms may make use of virtual assistants and virtual paralegals to work with their clients and case files online. The duty of supervising nonlawyers in a virtual law office requires that the law firm educate nonlawyer assistants about the use of the technology and daily best practices to ensure that security is intact when firm members access the online law office.[17] Digital records should be kept of interactions and instructions to online assistants and paralegals as well as digital records of their work on individual client case matters. Confidentiality agreements must be signed with nonlawyer assistants and conflict checks conducted whether they are employed for the virtual law firm on a part-time, per-project basis or as full-time employees working remotely.

Online Client Development and Marketing for a Virtual Law Practice

Attorneys operating a virtual law office may need to rely on nontraditional forms of advertising to develop an online client base. If the practice is purely virtual, without a brick-and-mortar office, then it may be necessary to generate a greater number of leads or prospective clients through the virtual law office website. The most effective way to do this is to improve the search engine optimization (SEO) of the firm's website. Methods of increasing SEO may rely on online forms of advertising and marketing, such as lawyer-referral sites and directories as well as pay-per-click advertising. Accordingly, attorneys using online methods of advertising need to ensure that they are compliant with any ethics opinions and Rules 7.1–7.5.

Social media are increasingly relied upon by virtual law firms as part of an online marketing strategy. Virtual law firms should consider creating a social media policy in their general firm policy related to the use of technology. The firm should also educate its attorneys about how to adjust the security and privacy settings on different social media and networking applications to ensure that restrictions in the technology prevent the general public from actively engaging with the firm or firm members without prior consent. This is important to ensure there are no misunderstandings by prospective or existing clients and to aid in compliance with an attorney's duties to prospective clients under Rule 1.18.[18]

A virtual law firm could also minimize risks from social media use by adding a provision to its traditional or limited scope engagement agreement that notifies clients about the firm's use of social media. For example, virtual law firms may wish to notify clients that the members of the firm will not "friend" or "follow" clients or other parties involved in a case through social media applications. Firms may also wish to educate clients about the dangers of posting information online that is related to their legal matter and about ways to protect the confidentiality of their legal matter if they have an online presence.

A virtual law firm that engages in online advertising or maintains any form of online presence should consider assigning a single attorney in the firm with the responsibility of monitoring the firm's online reputation on a regular basis. Online monitoring techniques, such as setting Google Alerts and running searches on Tweetdeck or sites that aggregate social media, such as Addictomatic, are simple ways to monitor the firm and its clients and competitors online.[19]

Conclusion

The future of legal services will include online delivery to clients. Virtual law practice will take on new formats as the technology develops, and this delivery method will serve different functions for different firms, practice areas and client bases. It is in the best interest of the public we serve and our profession to keep up to date with the technology involved in virtual law practice. It is critical that attorneys stay alert to the ethics risks that

must be mitigated with this growing trend in law practice management and legal service delivery.

The New York State Bar Association Report cited above concludes with the recommendation that "NYSBA's Committee on Standards of Attorney Conduct should study and make recommendations concerning the ethical and risk management considerations associated with new technologies such as social networking, third party hosted solutions, and virtual law firms."[20] Attorneys practicing under the New York State bar who are interested in virtual law practice will want to watch closely for any guidelines that may be released to assist in mitigating these risks. ■

Further Resources

Stephanie Kimbro, Virtual Law Practice: How to Deliver Legal Services Online. ABA/LPM, October, 2010.

Stephanie Kimbro, Serving the DIY Client: Guide to Unbundling for the Private Practitioner. (Free ebook) (April, 2011)

International Legal Technology Standards Organization (ILTSO)

ABA Law Practice Management Section's eLawyering Task Force Website

ABA Standing Committee on the Delivery of Legal Services Pro Se/Unbundling Center

ABA eLawyering Task Force, "Suggested Minimum Requirements for Law Firms Delivering Legal Services Online"

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1. NYSBA Comm. on Professional Ethics Op. 709, 1998 WL 957924 (NYSBA Op.) (Sept. 16, 1998), http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&CONTENTID=6317&TEMPLATE=/CM/ContentDisplay.cfm.

2. For examples of New York virtual law practice, see Finkelstein & Partners LLP *at* https://www.clientspace.org/index.asp?firm=CF6BC39B; Law Office of Ellen S. Ross at http://www.site.ellenross.com/home.html; Law Office of Brad S. Margolis at http://www.nylegalstore.com/. For examples of other virtual law offices, see Rice Law, PLLC, www.ricefamilylaw.com; Texas Wills and Trusts Online, at http://www.texaswillsandtrustslaw.com/; Kassamali Law at http://kassimali.com/index.php and Frame Legal, http://www.framelegal.com.

3. *See, e.g.*, Rocket Lawyer, http://www.rocketlawyer.com.

4. For example, many firms commonly rely on Lexis or Westlaw for online, third-party hosted legal research. http://www.lexis.com; http://www.westlaw.com.

5. New York State Bar Association, "Report of the Task Force on the Future of the Legal Profession," April 2011 (NYSBA Report), http://www.nysba.org/AM/Template.cfm?Section=Task_Force_on_the_Future_of_the_Legal_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=4–8108.

6. Unbundling, also termed limited-scope representation, discrete task representation, or a la carte legal services, is a form of delivering legal services where the lawyer breaks down the tasks associated with a legal matter and provides representation to the client pertaining only to a portion of his or her legal needs. The client accepts the responsibility for doing the footwork for the remainder of the legal matter until it is completed. See the free ebook by Stephanie Kimbro, *Serving the DIY Client: A Guide to Unbundling Legal Services for the Private Practitioner* (Apr. 2011) *at* http://virtuallawpractice.org/wp-content/uploads/2011/05/Serving-the-DIY-Client-Ebook-2011.pdf.

7. *See id.* See also the resource center for the ABA Center for Professional Responsibility, http://www.americanbar.org/groups/delivery_legal_services.html.

8. For more information about cloud computing for lawyers, including a detailed chapter on ethics, see Nicole Black's *Cloud Computing for Lawyers*, to be published by the ABA Law Practice Management Section, expected 2011.

9. New York Rules of Professional Conduct, Rule 1.6 (Rule), http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConductasamended041511.pdf.

10. Tier 4 data centers are million-dollar investments with highly regulated environments with fire suppression, backup power, redundancy, security, and 24/7 monitoring. There are different levels of data centers labeled as Tier 1 through Tier 4 with different requirements at each tier. The highest requirements and the best security are found on the Tier 4–level data centers. Only high-level administrators have access to the server rooms of a data center. The building itself may have redundant climate control, a redundant physical power plant, generator backup, and encrypted electronic door locks. Rules of access will be set by the company owning the data center.

11. *See also* The Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Opinion 2008-1, "A Lawyer's Ethical Obligations to Retain and to Provide a Client with Electronic Documents Relating to a Representation," NYC Eth. Op. 2008-1, 2008 WL 3911383, July 2008, http://www.nycbar.org/ethics/ethics-opinions/799-a-lawyers-ethical-obligations-to-retain-and-to-provide-a-client-with-electronic-documents-relating-to-a-representation. This opinion addressed the lawyer's ethics obligation to retain and provide the client with electronic documents related to the legal representation. The opinion stated that the lawyer must take affirmative action to preserve any digital communication regarding the representation that may otherwise be deleted or lost from their digital filing system. The opinion also recommended that the lawyer discuss storage and retrieval of electronic documents and data at the beginning of the representation.

12. International Legal Technology Standards Organization (ILTSO), *2011 Guidelines for Legal Professionals*, http://www.iltso.org/iltso/standards_files/ILTSO%20master%20Document.pdf.

13. *See* Rules 1.7–1.10, http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConductasamended041511.pdf.

14. *See* Rule 1.18, http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConductasamended041511.pdf.

15. New York Court Rule, 22 N.Y.C.R.R. § 1210.1.

16. *See* Rule 1.2, http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConductasamended041511.pdf.

17. *See in general* Rules 5.1–5.3, http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConductasamended041511.pdf.

18. *See* Rule 1.18, http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConductasamended041511.pdf.

19. *See* Tweetdeck, http://www.tweetdeck.com; Google Alerts, http://www.google.com/alerts; Addictomatic, http://www.addictomatic.com.

20. NYSBA Report, *supra* note 5, at 10.

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A Whole New World

Gigonomics, Human Resource Development and the Brave New Lawyer

By Barbara J. Durkin

Introduction

The traditional law firm model has undergone a perfect storm. Clients are demanding increased efficiency and lower costs, refusing to pay for "armies" of junior associates to work on their litigation. Law firm leaders and managers are clamoring for more profits at the same time that costs, especially those related to labor, have increased dramatically. Associates, primarily those who are of the Gen X and Millennial generations, are finding that their needs and values are not always consonant with those of law firms. It is a challenging, but exciting, time to manage a firm and to practice law. It is, in many ways, "the end of the world as we know it."[1]

What will this new world look like? The landscape will be unrecognizable to those who have been isolated for so long. The promised land of partnership, flowing with milk and honey for those who have labored long and hard in the trenches, is gone.[2] In its place is a land of peaks and valleys with each person responsible for her own climb, for managing his own career. Lifelong, full-time employment in one job will be a thing of the past, replaced by a string of simultaneous positions or "gigs," successive employers and, as people's life spans expand, several career changes. The good news is that myriad resources are available to help navigate and succeed in this new world.

The New World of Gigonomics

Once upon a time, a person worked for the same employer, did a good job, stayed a very long time (maybe 25 years) until he or she got old and then retired, probably at age 62. Time passed and people began to live longer. It became acceptable to work for several organizations over the course of now-extended working lives, but there were still unwritten rules. If a person jumped from job to job, not staying at least five years or so, clearly something was wrong; employers shook their collective heads and put the person's job application in the "no" pile.

Fast forward to 2011. No longer do employers promise continued employment in exchange for doing a good job. A new generation of workers has entered the workforce, connected 24/7, lacking corporate loyalty engendered by the paternalism of the past, ready to do what it takes to make a living. This model has been aptly dubbed "Gigonomics" by Tina Brown.[3] Gigonomics – what the rest of us used to call "patching it together to make a living" – has become a term of art used to describe the trend where even college-educated professionals cobble together a string of jobs. These jobs, or "gigs," are "the sum of a bunch of free-floating projects, consultancies, and part-time bits and pieces, stitched together to make 'the Nut'," the amount needed to pay for basic life essentials.[4]

In a poll commissioned by the blog The Daily Beast, 22% of the respondents considered themselves to be "freelance workers." Almost a third of them were either working as freelancers or were working multiple jobs.[5] While possibly hired through a third-party source like a temporary agency, many are hired on a part-time or intermittent basis, depending on the needs of the organization. A recent survey revealed that one-fourth of the 200 largest law firms in the United States outsourced work to third-party lawyers.[6]

How Can Law Firms Recruit, Retain and Develop Lawyers?

How can law firms survive, and indeed prosper, in this world of Gigonomics? Perhaps their best chance is by examining the models used in other types of organizations and adapting some of the successful elements to their own unique environment.

All organizations, no matter what their product or service, need competent, high-performing workers who can maintain a high level of performance over the long term. The challenge is to recruit, identify and select qualified individuals and to help them adapt to the organizational culture, to ensure their skills and knowledge remain current, and to provide an efficient reward system through compensation and benefits.

Recruitment and Selection

Human resources planning involves "getting the right number of qualified people in the right job at the right time."[7] Once strategic long-term goals and objectives have been established, the company or firm develops a plan of action to ensure that resources are available including the right mix of trained and talented people.[8]

How many individuals will be needed to do the job? After assessing the staff's current capabilities and the firm's future needs, management can more accurately predict what staffing changes will be necessary. Where, for example, a decline in demand for certain types of products or services is anticipated, managers can pinpoint the tasks and individual positions affected. They can make informed decisions about whether to respond by retraining existing employees for new opportunities or by reducing staff, if necessary.

An alternative to recruiting and hiring employees includes the use of workers contracted from a temporary employment agency. This strategy has several advantages. Contract workers are paid only for the actual hours they work, although they cost more per hour, but recruitment expenses are minimized because the workers are easily and quickly available through the temp agency. Training costs are kept low because employees have been "pre-selected" and already have the skills necessary to hit the ground running. Although historically used for clerical and trades positions, this arrangement is available for a variety of professions including professionals.[9]

Many organizations choose to lease some employees and use their services over a longer period of time than would be available with temporaries. The employee-leasing firm or professional employer organization (PEO) recruits, hires, trains and compensates employees; the organization leasing them provides their work facilities, supervises them, and identifies the duties to be performed.[10] Alternatively, a company can subcontract with an outside firm to perform the entire function, either on or off the organization's premises. Similarly, a company may contract with a single individual or consultant on an individual basis.

> Once upon a time, a person worked for the same employer, did a good job, stayed a very long time (maybe 25 years) until he or she got old and then retired, probably at age 62.

Applying This Model to Law Firms

This contrasts sharply with the pyramid structure traditionally used by most law firms. In the pyramid, associates form the base of the pyramid. Over time, associates are weeded out and only some become partners; again over time, less productive partners are displaced until only the most senior-level partners achieve the pinnacle. To project their staffing needs under this structure, law firms are forced to focus on several elements: the appropriate number of attorneys entering the firm; the appropriate percentage of those attorneys leaving the firm at appropriate intervals, preferably by voluntary attrition; and continuous organizational growth. The ratio of partners to associates has varied from one to one to as many as one to three depending on the size and type of practice.[11]

Large law firms have traditionally hired a "class" of associates each year, anticipating the size of the group nearly two years before their graduation.[12] If a firm does not accurately project its hiring needs, the up or out policy does not operate efficiently, resulting in high levels of attrition. Because small and mid-size firms often lack coordinated procedures and a framework for recruitment, they often hire when they are "under the gun" or when the workload becomes too overwhelming.[13]

As a rule, law firms that can predict their hiring needs organize and conduct on-campus programs where students interview for summer and new associate positions.[14] Generally, the career services department of the law schools collects the resumes, sends them to prospective employers for selection of the candidates and arranges for the interviews to be conducted on campus. Many large firms and government agencies, knowing their needs months in advance, recruit in the fall. These employers often view class standing or grade point average as predictors of future success.[15] Smaller employers participate in the spring programs, because it is closer to the time when they plan to have new associates begin their employment. For these firms, credentials often take a back seat to availability. Increasingly, however, both large and small firms are moving toward a corporate model of personnel selection, reviewing the knowledge, skills and abilities needed to perform on the job.

> In a world where the risk of being sued by clients is on the rise, firms cannot afford to let associates learn by trial and error with real clients.

Today, many firms are moving from the pyramid model to a diamond shape, where senior associates and junior non-equity partners make up most of the middle level.[16] Drinker Biddle & Reath's chair, Alfred Putnam, Jr., noted, "The days of large law firms assigning (and clients paying for) 'armies' of very junior lawyers to large-scale litigation or transactions are over, likely never to return."[17] As a result, first-year associate class sizes will be smaller and firms will bill a smaller proportion of associates' time.[18]

Some firms have cut their summer programs and abandoned the concept of hiring first-year associates. Other than judicial clerks, these firms now hire only second- and third-year lawyers, an approach that is inconsistent with the traditional model, with its emphasis on hiring new graduates and teaching them the firm's way of doing business. This policy is justified by citing the benefit of having other firms train the new lawyers, the ability to maintain a reasonable starting salary, and the avoidance of the high cost of attrition in the first few years.[19]

Recruiting associates laterally from other firms can create other issues. Lateral hires may have already formed bad habits inconsistent with those of the new firm. If every firm hires already trained associates, no one will be left to train the new law school graduates. Lateral hiring is not without costs; legal search firms charge substantial fees to match the lawyer and the law firm.

Because firms can no longer afford to maintain a large number of associates, they will increasingly turn to contract attorneys and possibly to sending their work offshore.[20] Contract attorneys arguably provide a solution to the staffing and training dilemma.[21] Hiring employees through an agency or as independent contractors for the short term gives firms an opportunity to identify individuals who have already been trained in needed skills. No learning curve is involved; they are ready and able to jump in immediately. Because the firms are not the present employers, they avoid the expenses of payroll taxes and the possibility of providing additional benefits such as health insurance and pension contributions. The downside is the lack of continuity (a factor also cited in Tina Brown's discussion on Gigonomics) and loyalty to the firm.

Training

Law firms spend an estimated $1.5 billion each year on training and professional development for their attorneys.[22] It has been argued that law students are not adequately prepared to enter the practice of law, because they do not possess the knowledge or skills to produce even simple legal work.[23] In the past, individuals who had graduated from law schools would become comfortable with the culture of the firm and master the essential lawyering skills at the feet of seasoned lawyers.[24] The law firm assigned the cost of training the associate to each client for whom the associate worked. It was a unique model – having the customer pay for the training provided by the business owner for its employee.[25] As part of the cost charged to the client, law firms would directly bill to the client the time spent by the associate on the matter. Often the associate would research an issue or draft a document, perhaps performing tasks that had been performed similarly by others in the firm and for which there was already documentation and information.[26]

This model is no longer viable. Clients are dictating what they will pay, how many attorneys will work on a matter and even which attorneys they want to handle those matters.[27] They are averse to paying for first-year associates. At some firms, in response to these concerns, less experienced lawyers will accompany more senior attorneys to court as part of the associate's training rather than as a chargeable matter.[28]

Law firms today continue to experiment with in-house training models, relying on other lawyers or partners to provide on-the-job training, and encouraging mentoring. This effort has increasingly met with resistance, however. Partners complain that the billable time that could have been spent on client-related matters is not reimbursed by the firm. Profits per partner decrease as the amount of time spent on developing associates increases. The learning curve for new associates is steep, providing no immediate return on the firm's investment.

Most recently, the use of in-house "corporate universities," pioneered in the private sector, has gained popularity. Training modules use a variety of

media to develop or enhance those skills needed by the organization. In a unique partnership with The Wharton School of the University of Pennsylvania, Reed Smith University was launched in 2004, offering courses in specialties including legal skills, leadership, business development and technology.[29] Training has been expanded with courses and other opportunities in an additional talent management program, addressing nine core competencies divided into four categories:

Legal Skills
- practice skills and knowledge
- research and analysis
- written and oral communication

Business Skills
- matter and financial management
- leadership

Citizenship
- developing self and others
- teamwork and collaboration

Clients
- client relationships
- business development

As part of an on-site CareeRS program, each of the three associate levels will be tied to an "academy" with courses designed around the core competencies of each level.[30] Junior associates will have an orientation to the firm and the practice, together with what the firm has called a "mini-MBA" focusing on the quantitative and accounting aspects of the business. More senior associates will learn about matter management, client development and the more strategic aspects of a business degree. Although levels have been established based on class year, there is no set time for each associate to progress through the levels, and some associates may move faster than others. Additionally, Reed Smith has identified partners who are skilled at training associates to serve as advisors, guiding individuals through the new system. The program is designed to span an associate's career. Those who are traditional partners or supervisors are expected to be proficient in the competencies.[31]

Small firms, however, cannot afford these on-site programs and must rely on other approaches to supplement their training efforts. The time-honored sink-or-swim method of training employed by many small firms is not only inefficient, but in a world where the risk of being sued by clients is on the rise, firms cannot afford to let associates learn by trial and error with real clients. One alternative is to send new lawyers to continuing legal education programs designed to teach professional skills. By providing opportunities for off-site training, firms can control their costs since they do not have to support a training and development department.

Again, law firms of all sizes can benefit from using temporary or freelance contract lawyers that have precisely the set of skills the firm needs at a particular point in time.

Compensation

Compensation includes base wage or salary, incentives or bonuses, and any benefits.[32] When developing a compensation structure, organizations must balance both external and internal equity. Factors such as seniority, merit, skills and competencies are analyzed to determine how employees are initially compensated and how they advance through the pay ranges. As one expert noted, "slowly, but surely, we're becoming a skill-based society where your market value is tied to what you can do and what your skill set is. In this new world where skills and knowledge are what really count, it doesn't make sense to treat people as jobholders. It makes sense to treat them as people with specific skills and pay them for those skills."[33]

Many large law firms currently use a "lockstep" associate compensation model, increasing compensation each year based strictly on a lawyer's entry class.[34] In its place, however, some firms have established a model based on newly created levels, for example, junior, midlevel and senior associate. Associates may not move from one tier to the next until they have demonstrated proficiency in specific skills.[35] Rising to the next level triggers an increase in compensation.[36] For smaller firms, the custom is to pay associates what the market will bear, even though the market will bear salaries so low that new lawyers with student loans to repay can ill afford to accept positions at such low salaries, and some are forced to turn to more lucrative careers outside the practice of law.

The market rates for new lawyers may change significantly as more highly skilled temporary and contract attorneys become available to firms of all sizes. As law firms identify and assess the core competencies they value, they will be willing to pay a premium to hire those individuals who already possess those skills. As lawyers master each of the core competencies, perform more complex tasks and take on increased responsibilities and the associated risk, they will be rewarded with increased compensation. Temporary agencies will play a role in assessing the skills acquired by the prospective employee and in developing the compensation levels for those who have mastered each of the competencies.

Possible Solutions

Although the difficulties of hiring, training and compensating associate attorneys present a variety of challenges, this article does not suggest that firms will no longer retain law school graduates as full- or part-time employees. Rather, it is more likely that the number of associates hired using this traditional approach will decline. With respect to new lawyer employees, the question becomes, how can law firms continue to train associates while providing a cost-effective and valuable product to their clients? Several options have been proposed:

- Law firms can reduce the price of their product according to the proficiency of associates. They can set an initial fee at a lower rate and increase the rate as their associates demonstrate mastery of more core competencies. This approach recognizes the steep learning curve for new lawyers.
- Law firms can absorb the cost of training new employees, including professionals, in the overhead component of the cost of doing business.
- Law firms can reduce salaries paid to novice lawyers until these lawyers can work efficiently enough to cover their costs and produce a profit for the firm.
- Law firms share the costs of mastering skills with the associates by identifying the skills they value and encouraging associates to assume the cost of their own career planning and development.

> The development of lawyering skills and core competencies requires experiential learning.

In all these scenarios, formal training can be linked to the skills and competencies lawyers will need to succeed. When firms and individuals share the burden of job-related training, the arrangement can be a win-win proposition. Associates are rewarded with additional compensation, usually as an increase in salary, or full or partial reimbursement of tuition and fees when employees successfully complete pre-approved classes.

The projected decline in the hiring of permanent employees will inevitably produce an increase in the number of temporary or contract workers. Law firms will need to weigh the costs and benefits of hiring permanent versus temporary "gig" lawyers. Central to the new world of Gigonomics is the concept that each individual lawyer is an entrepreneur, selling a skill set on the open market to the highest bidder. For the legal profession, then, the onus on acquiring essential learning now is on this up-and-coming cadre of lawyers, who might be either employees or freelance contract workers.

The NYSBA Task Force on the Future of the Legal Profession[37] recently recommended the development of more professional tools to assess the skills, aptitudes, values and habits needed by lawyers. Citing the ABI-ALA Summit Recommendations,[38] which called for the training of law students and graduates in core competencies, the group noted that lawyers must be able to use their substantive knowledge and "to communicate, persuade, advise, draft and collaborate, all the while keeping track of their ethical obligations to clients, others and society."[39]

During law school, each student must assume responsibility for developing a career plan, identifying areas of interest and establishing goals and timetables. Using the myriad resources available, including the law school, its alumni and other lawyers in the student's chosen field of interest, the student will be able to develop realistic expectations concerning the actual work performed and the opportunities available in the practice area. The development of lawyering skills and core competencies requires experiential learning, and law schools and students must explore the opportunities offered by simulations, clinics and externships. Individuals must become more aware that getting a job and moving up the professional ladder will be linked to their proficiencies in the core competencies. Lifelong learning and acquiring new skills will be increasingly valued by law firms.

Law students will also need to recognize that there will be fewer opportunities for traditional law firm jobs as associates, and less likelihood of becoming a law firm partner. More students will have to embrace the world of Gigonomics. They will need to understand that the methods of training will be different than in the past, and that the onus will be more on them to make sure that they develop the skills they will need to become competent practitioners. Those who follow a gig-based career path will need to do whatever it takes to build their own skill set and establish their marketability.

Both large and small law firms benefit when new lawyers have mastered lawyering skills, including those identified as core competencies. As firms and freelance lawyers adapt to their external competitive environments, additional skills such as business development and client relations become invaluable.[40] Most important, new lawyers need to develop experience in forming judgments to balance the interests of professional identity, such as compliance with the ethics rules, and their own beliefs and values.[41]

Law schools will be compelled to assist new lawyers to achieve practice-ready proficiency by providing the tools graduates will need to succeed. Educators will need to be innovative, employing distance learning techniques, internships, externships, and skills courses. "Train the trainer" programs, a model popular with the American Management Association, could use local lawyers or in-house professional staff to train others. Law firms and bar associations or other continuing legal education (CLE) providers can collaboratively develop programs. Law school alumni can work closely with their career development centers to refine expectations concerning career paths and the skills needed to succeed. They can mentor and guide others, establish professional networks and identify experiential learning opportunities for students and new lawyers.

Building on their extensive ties to the legal community, bar associations can play a unique role in addressing the training needs of lawyers and law firms. Local bar associations, with their affiliation with state and national

professional associations, can be a liaison to interpret and implement the CLE requirements. In addition to offering courses for CLE credit, they are aware of other groups or individuals with expertise in specific legal specialties. This knowledge puts these associations in an excellent position to become a central resource for training programs, acting as a type of referral agency/clearinghouse for training programs available within a specific geographic area. They could also establish and maintain (for a fee) a central database of all the CLE courses taken by individual participants. This database, using already developed software, would help lawyers (including those who work on a freelance basis and those who are employed by firms) to keep track of their CLE requirements.

In its report, the NYSBA Task Force identified the pressing need to ensure consistent quality of instruction.[42] Bar associations could partner with law schools in developing assessment tools for programs, especially those related to the core competencies. This collaborative effort would address the NYSBA Task Force's recommendation that mechanisms be established to assess whether CLE programs and courses are effective. It would draw upon the law schools' expertise in developing and evaluating learning outcomes. Where, for example, programs are designed to cover specific topics, the trainee could be assured of the quality and scope of the material covered.

When the bar association or other provider delivers training, the costs could be borne initially by the individual lawyers with a subsequent reimbursement by their law firms, where applicable. Similarly, professional associations can provide additional training to those firms too small to retain an in-house training department, providing quality training at an affordable cost and incorporating the economies of scale.

In anticipation of the increase in the number of contract attorneys, solo practitioners and members of small firms, professional organizations should become advocates for their members by investigating and coordinating government or grant programs to fund training for these constituents. If traditional bar associations do not fulfill this role, freelance lawyers will most likely create new professional associations to meet their needs.

The winds of change have been blowing in high-speed gusts lately, taking away the breath of all in their path. The law firms that are most willing and able to adapt to both external and internal challenges will survive and thrive. Their culture will recognize and reward the unique contributions of lawyers, whether associates who aspire to be partners or those on gig-based career paths. Those individuals who set a course to manage their own careers through lifelong learning and mastery of skills will prevail because they will be focusing on their distinctive competence – practicing law. Working together, law firms and lawyers will weather the storms and be a formidable force in a new world. ■

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18. *Id.* (citing Ward Bower of Altman Weill).

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25. In contrast, businesses traditionally consider employee training a cost of doing business and thus part of their overhead. While the actual cost of

training an employee may be charged as an expense to an internal cost center or department, it is not normally a direct expense identifiable in calculating the cost of goods sold or the service provided to the customer.

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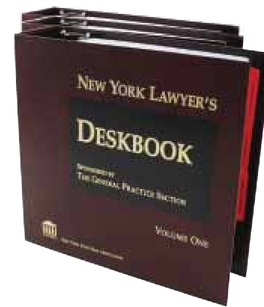

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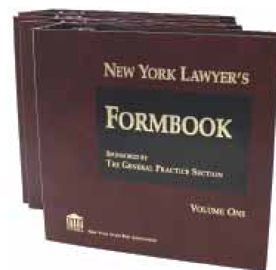

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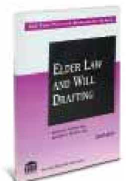

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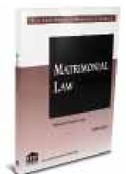

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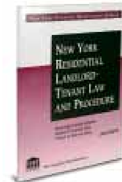

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Weinstein v. Islamic Republic of Iran

The Second Circuit Pierces the Corporate Veil Against Instrumentality of the Terrorist Party

By Inae Yang

Overview

Ira Weinstein was a victim of the February 25, 1996, suicide bombing in Jerusalem, orchestrated by the terrorist organization Hamas.[1] Weinstein, a U.S. citizen and New York resident, died on April 13, 1996, from the injuries sustained as a result of the bombing.[2] His widow, the administrator of his estate, and his children filed suit for wrongful death and related torts in the U.S. District Court for the District of Columbia against the Islamic Republic of Iran (Iran), the Iranian Ministry of Information and Society (MOIS), and three Iranian officials, asserting that these defendants provided material support and assistance to Hamas.[3] The district court entered a default judgment for the plaintiffs pursuant to 28 U.S.C. § 1608(e) and awarded them approximately $183.2 million.[4]

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After registering their judgment in the U.S. District Court for the Eastern District of New York on October 8, 2002, the plaintiffs served an information subpoena on the Bank of New York, which had maintained the accounts of Bank Melli Iran, asserting that it had deliberately served as an instrument of Iran's illegitimate scheme.[5] The district court held that Bank Melli's accounts at the Bank of New York were not subject to attachment under the Terrorism Risk Insurance Act of 2002 (TRIA).[6] Jennifer Weinstein Hazi, one of the plaintiff judgment creditors, filed a motion for appointment of a receiver in the Eastern District of New York in order to sell Bank Melli's Forest Hills property in Queens as partial fulfillment of the judgment against the defendants.[7] Bank Melli moved to dismiss and to stay the appointment of a receiver.[8] District Judge Wexler denied Bank Melli's motion to dismiss the proceeding and granted Hazi's motion for appointment of a receiver but stayed the proceeding.[9] Bank Melli then appealed the district court's decision.

On appeal, the U.S. Court of Appeals of the Second Circuit affirmed the district court's decision.[10] The Second Circuit held that (1) § 201(a) of the TRIA provides U.S. federal courts with subject-matter jurisdiction over an instrumentality of a sovereign state; (2) TRIA does not violate the separation of powers doctrine of Article III of the U.S. Constitution; (3) there is no conflict between TRIA and the Treaty of Amity, Economic Relations, and Consular Rights; (4) attachment of Bank Melli's assets does not constitute a taking under either the Fifth Amendment of the U.S. Constitution or the Treaty of Amity; and (5) the subsequent blocking of the assets under Executive Order No. 13,382 does not violate the Algiers Accords.

Subject-Matter Jurisdiction Over Foreign State Sponsors of Terrorism

The U.S. Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA) as the primary and decisive statutory framework for resolving any questions of sovereign immunity that may be raised by foreign states.[11] The FSIA grants federal courts jurisdiction over foreign state sponsors of terrorism when certain statutory exceptions from jurisdictional immunity are satisfied.[12] In 2008, Congress enacted the National Defense Authorization Act for Fiscal Year 2008, which revised the terrorism exception to the jurisdictional immunity of a foreign state by repealing § 1605(a)(7) and creating 28 U.S.C. § 1605A.[13] Section 1605A provides for a federal cause of action against foreign state sponsors of terrorism.[14] In such enumerated instances, "the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries from such death which were incurred by the persons for whose benefit the action was brought."[15]

In *Rein v. Socialist People's Libyan Arab Jamahiriya*, the Second Circuit reviewed the question of whether, after the passage of the FSIA, the State Department's designation of a foreign state as a sponsor of terrorism violates separation of powers.[16] The underlying suit in *Rein* arose out of the 1988 bombing of Pan Am Flight 103.[17] Family members of the victims of the December 1988 bombing brought suit against the Government of Libya, alleging wrongful death, pain, and suffering.[18] Libya argued that 28 U.S.C. § 1605(a)(7) of the FSIA is void as an unconstitutional delegation of the power to establish the jurisdiction of the federal courts.[19] The court rejected Libya's argument, finding that the provision of the FSIA does not constitute unconstitutional delegation because Libya had already been listed as a state sponsor of terrorism when § 1605(a)(7) was passed.[20]

TRIA § 201(a) permits attaching assets of any agency or instrumentality of the terrorist party to satisfy a terrorism-related judgment.

Attachment of Blocked Assets of Any Agency or Instrumentality of the Terrorist Party

The Terrorism Risk Insurance Act of 2002 (TRIA) was enacted to provide federal financial backup protection for the insurance market on claims relating to terrorist attacks.[21] On the question of whether a terrorist act has occurred, § 102(1)(D) of TRIA expressly prohibits the delegation of authority to any other officer, employee, or person.[22] Section 201(a) provides U.S. federal courts with subject-matter jurisdiction on execution and attachment proceedings to satisfy prior pecuniary judgments if the lower court granting the prior judgment had original jurisdiction under the FSIA.[23] Section 201(a) further permits attaching assets not only of any terrorist party, but also of any agency or instrumentality of the terrorist party to satisfy a terrorism-related judgment against the foreign sovereign.

On June 28, 2005, President George W. Bush issued Executive Order 13382, under the authority of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1706.[24] The Executive Order is aimed at blocking the assets of specifically designated proliferators of weapons of mass destruction and their supporters, and denying their access to the U.S. financial and commercial systems.[25] The names listed in the Annex and any parties designated subsequent to the Executive Order are prohibited from engaging in any transaction with any U.S. persons.[26]

The U.S. Supreme Court, however, also addressed the question of the separate juridical status of a foreign-state entity in *First National City Bank v. Banco Para el Comercio*.[27] In *Banco*, the Supreme Court held that the FSIA does not

control the determination of whether the petitioner may apply the setoff because the act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality or the allocation of liability between such instrumentalities. Duly created instrumentalities of a foreign state are to be accorded a presumption of being a separate juridical entity, said the Court.[28] In the case of any instrumentalities of Iran, however, there may still be a different basis for jurisdiction for these separate juridical entities.

The 1955 Treaty of Amity Between the United States and Iran

The Treaty of Amity was signed on August 15, 1955 by the United States and Iran[29] to address the freedom of commerce and shipping navigation between the two countries.[30] Article III, Section 1 provides a basis for a court's jurisdiction, providing that "[c]ompanies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party."[31] Article IV, § 2, of the treaty further states that property of nationals and companies of either High Contracting Party "shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation."[32]

In *Sumitomo Shoji America Inc. v. Avagliano*, the U.S. Supreme Court held that provisions of the Friendship, Commerce and Navigation (FCN) treaty between Japan and the United States are not designed to give separate juridical status to instrumentalities of the sovereign but "to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms."[33]

Algiers Accords of January 19, 1981, Between the United States and Iran

On January 19, 1981, the United States and Iran signed the Algiers Accords under the auspices of the Algerian government to resolve the 1979 Iranian hostage crisis,[34] which arose from the takeover of the U.S. embassy in Tehran on November 4, 1979, and the subsequent captivity of 52 U.S. citizens.[35] The Accords stipulates the United States's non-intervention policy toward Iranian affairs, providing that "[t]he United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs."[36] General principles in the Accords demonstrate the undertaking that "the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979," while committing "to ensure the mobility and free transfer of all Iranian assets within its jurisdiction."[37]

In *Roeder v. Islamic Republic of Iran*, the D.C. Circuit faced the question whether the Accords, on which the United States had relied as a ground for dismissal, survived a specific amendment to the FSIA, which allows abrogation of Iran's sovereign immunity if the foreign state had been designated as a state sponsor of terrorism when the act occurred.[38] The D.C. Circuit in *Roeder* found that plaintiff's action was barred according to the Accords because the suit was based on the events of the November 4, 1979, hostage crisis, noting that the amendments do not, on their face, address anything about the Accords.[39]

The Court's Decision

In *Weinstein*, the Second Circuit held that § 201(a) of the TRIA provides an independent source of jurisdiction over execution and attachment against agencies or instrumentalities of a sovereign state, even if the instrumentality is not itself a defendant in the underlying action.[40] Defendant Bank Melli contended that the parenthetical phrase "including the blocked assets of any agency or instrumentality of that terrorist party," which permits attachment of assets from agencies and instrumentalities, would be superfluous because the agency or instrumentality would itself have been a terrorist party against which the underlying judgment had been obtained.[41] By rejecting the defendant's argument, the Second Circuit pointed out that the TRIA clearly differentiates between the terrorist party that is the subject of the underlying action, Iran, and any agency or instrumentality of that terrorist party, including Bank Melli, by putting the parenthetical language in TRIA § 201(a).[42] The court also rejected the defendant's argument based on the statutory scheme – that § 201(a) had been codified as a note to FSIA § 1610 rather than as in other sections that more directly address exceptions to jurisdictional immunity – finding that the text of the statute cannot be trumped by its placement in the statutory scheme where the meaning of the text is clear.[43]

Next, the Second Circuit ruled that the TRIA did not violate the separation of powers of Article III of the U.S. Constitution. The defendant maintained that the TRIA has constitutional problems because it requires federal courts to retroactively reopen a final judgment in violation of the separation of powers, pointing out that the plaintiffs obtained the underlying judgment in February 2002, but defendant Bank Melli was later added to the list as a proliferator of weapons of mass destruction in 2007 under Executive Order 13382, after the TRIA's enactment in 2002.[44] The Court found that the 2002 underlying judgment itself was not effectuated by the attachment of Bank Melli's property pursuant to the TRIA because the effect of the TRIA was simply to render a judgment more readily enforceable against instrumentalities of a foreign state. As such, the separation of powers had not been offended.[45] Notably, the court's interpretation of the TRIA overrode the Supreme Court's reading in *Banco*, which held that a foreign government's instrumentality is to be accorded a separate legal status.[46] The Second Circuit

further mentioned that the presumption in *Banco* had nothing to do with the rendering of the 2002 judgment itself.[47]

Moreover, the court reviewed the question of whether there was an unconstitutional delegation of Congress's authority to the Executive Branch, particularly to the Office of Foreign Assets Control (OFAC).[48] The defendant argued that OFAC's determination that Bank Melli's assets be blocked did just that.[49] The court rejected the constitutional challenge, noting that a factual determination by the OFAC about Bank Melli's support for terrorist activities was not, on its own, a delegation of Congress's authority over the district court's jurisdiction that exceeded the boundaries of Article III.[50]

TRIA § 201(a) provides an independent source of jurisdiction over execution and attachment against agencies or instrumentalities of a sovereign state, even if the instrumentality is not itself a defendant in the underlying action.

The Second Circuit then examined the question of whether there is conflict between TRIA and the Treaty of Amity.[51] The defendant asserted that according to Article III, § 1 and Article IV, § 2 of the Treaty of Amity, Iranian companies should be treated as distinct and independent entities from their sovereign.[52] Citing *Sumitomo*, the Second Circuit found that Article III, § 1 is significantly identical to a provision found in several FCN treaties that had been negotiated by the United States after World War II.[53] The court decided that there is no conflict between the TRIA and the Treaty of Amity since the intent behind the FCN treaties was simply to grant corporations of each signatory country legal status in the other contracting country tantamount to those of the other country's domestic corporations.[54] Further, the court stressed that the TRIA has to be interpreted to abrogate that portion of the Treaty of Amity because TRIA § 201(a) expressly states that it supersedes all other laws.[55]

Moreover, the Second Circuit ruled that attachment of Bank Melli's assets does not constitute a taking under either the Fifth Amendment or the Treaty of Amity,[56] finding that where the 2002 underlying judgment against Iran has not been challenged, attachment of Bank Melli's property, as an instrumentality of Iran, does not constitute a taking under the Takings Clause.[57] Additionally, Bank Melli had a clear notice that its unlawful support for terrorism could result in the designation and freezing of its asset pursuant to the TRIA:[58] Bank Melli's voluntary conduct as a funder of weapons of mass destruction opened it to liability for judgments against Iran.[59]

Finally, the Second Circuit examined whether the Accords, after its enactment, shall perpetually prevent the United States from blocking Iranian assets.[60] The defendant argued that there is no expiration date in the Accords, the obligations of the United States under the Accords are ongoing and that therefore blocking Bank Melli's assets and subsequent attachment undeniably violates the Accords.[61] The court, however, found that the Accords does not suggest that the United States has an unrelenting and everlasting obligation to continually prevent blocking of Iranian assets based on subsequent events unrelated to the hostage crisis in 1979.[62]

Analysis

The Second Circuit in *Weinstein* has demonstrated its continuing commitment to extend subject-matter jurisdiction to any agency or instrumentality of the terrorist party by analyzing various legal regimes and congressional intent. By examining interactions between FSIA, TRIA, the U.S. Constitution, the Treaty of Amity, and the Accords, the Second Circuit has established a novel ground for piercing the veil of foreign sovereign immunity against any agency and instrumentality of a terrorist party by granting subject-matter jurisdiction.

First, the Second Circuit followed the traditional methodology when considering the jurisdictional challenge against a sovereign state's instrumentality in support for terrorism by analyzing 28 U.S.C. § 1605(a)(7) of the FSIA, which abrogates a foreign state's immunity when designated as a state sponsor of terrorism and provider of material support for the terrorist acts.[63] However, the court was progressive in upholding the implication of that section in light of TRIA § 201(a), providing jurisdiction for execution and attachment of assets from a terrorist party, its agencies, and its instrumentalities.[64] By rejecting Bank Melli's argument based on lack of independent grant of jurisdiction over the agencies and instrumentalities, the court confirmed the statute's clear implication of criminalizing any financing and support of terrorism by any agency and instrumentality of the terrorist party.[65]

Moreover, the Second Circuit derived an underlying principle of the TRIA from its legal history and congressional intent, pointing out that the phrase "[n]otwithstanding any other provision of law" in TRIA § 201(a), indicated that the force of the section extends everywhere.[66] The court also derived its interpretation

from Senator Harkin's statement that title II of the TRIA "does not recognize any juridical differences between a terrorist state and its agencies or instrumentalities" in light of the statute's purpose and deals comprehensively with the enforcement of judgments issued to victims of terrorism by enabling the victims to satisfy the judgments from the blocked assets of any terrorist parties including its agencies or instrumentalities.[67]

Furthermore, the rules enumerated in the TRIA are consistent with U.S. constitutional principles.[68] The Second Circuit pointed out that the intent behind enacting the TRIA was to render a judgment more readily enforceable against a related third party, and therefore it is not in conflict with the separation of powers of the Fifth Amendment.[69] The court also analyzed whether there was an unconstitutional delegation of Congress's authority to the Executive Branch's Office of Foreign Assets Control (OFAC),[70] determining that because the OFAC made a factual determination about Bank Melli's support for terrorist activities and it did not review the district court's original entry of the default judgment,[71] the attachment of Bank Melli's assets does not constitute a taking under either the Fifth Amendment or the Treaty of Amity because its unlawful support for terrorist attacks opened the liability of having its assets blocked under TRIA.[72]

Finally, the Second Circuit determined that the TRIA does not run afoul of the purposes and principles of the Treaty of Amity and the Algiers Accords.[73] Relying on the decision of *Sumitomo*, the court noted that the nature and functions of the Treaty of Amity are different from the TRIA because the Treaty of Amity is designed to give foreign corporations equal legal status to conduct their business, while the TRIA grants separate juridical status to any agency or instrumentality of the sovereign entity.[74] Based on the text and its interpretation of TRIA § 201(a), the court concluded that the TRIA will have to be read to abrogate the portion of the Treaty of Amity where there is a conflict.[75] The court further confirmed that the Accords does not suggest that the United States has an ongoing obligation to ensure that all Iranian assets remain free from attachment based on subsequent events unrelated to the hostage crisis in 1979.[76] The court highlighted the fact that the United States has even implemented some Iranian sanctions limiting the mobility of Iranian property subsequent to the Accords. [77]

Conclusion

The Second Circuit's holding in *Weinstein* has broad, far-reaching implications both for deciding in favor of granting subject-matter jurisdiction against a terrorist party's agencies and instrumentalities by restricting the sovereign immunity of the FSIA and for attaching their assets to satisfy the judgments against them under the TRIA. The court's unprecedented interpretation of TRIA § 201(a), in terms of its legal history, purpose, congressional intent, and Fifth Amendment separation of powers, aligns with the intent behind and the mandates of the Treaty of Amity and the Accords, which were enacted to facilitate relations between the United States and Iran. The Second Circuit's decision provides that an entity separate from the terrorist state will no longer be shielded from liability if the entity has in fact served as an agency or instrumentality for terrorist activities. ■

1. *Weinstein v. Islamic Rep. of Iran*, 609 F.3d 43, 46 (2d Cir. 2010).
2. *Id.* (citing *Weinstein v. Islamic Rep. of Iran*, 184 F. Supp. 2d 13, 16–17 (D.D.C. 2002)).
3. *Id.* (citing *Weinstein*, 184 F. Supp. 2d at 21–22).
4. *Id.* (citing *Weinstein*, 184 F. Supp. 2d at 22–26). The total amount of judgment consisted of $33.2 million in compensatory damages, of which $5 million was allocated to Hazi, and $150 million in punitive damages. *Weinstein*, 184 F. Supp. 2d at 22–25.
5. *Id.* (citing *Weinstein v. Islamic Rep. of Iran*, 299 F. Supp. 2d 63, 64–65 (E.D.N.Y. 2004)).
6. *Id.* (citing *Weinstein*, 299 F. Supp. 2d at 74–76).
7. *Id.*
8. *Id.* at 47.
9. *Id.*
10. *Id.* at 56.
11. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330.
12. 28 U.S.C. § 1605.
13. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44.
14. 28 U.S.C. § 1605A.
15. 28 U.S.C. § 1606.
16. 162 F.3d 748, 763 (2d Cir. 1998).
17. *See id.* at 753.
18. *Id.*
19. *Id.*
20. *Id.* at 764.
21. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 101(b)(1)(2), 116 Stat. 2322, 2323 (TRIA).
22. TRIA § 102(1)(D), 116 Stat. 2322, 2324.
23. TRIA § 201(a), 116 Stat. 2322, 2337 (emphasis added).
24. Exec. Order No. 13382, 70 Fed. Reg. 38567 (June 28, 2005).
25. *Id.*
26. *Id.*
27. 462 U.S. 611 (1983).
28. *Id.* at 619–33.
29. Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, August 15, 1955, 8 U.S.T. 899.
30. 8 U.S.T. 899, art. X.
31. 8 U.S.T. 899, art. III.
32. 8 U.S.T. 899, art. IV.2.
33. 457 U.S. 176, 185–86 (1982).
34. *Iran-United States: Settlement of the Hostage Crisis*, Jan. 18, 1981, 20 I.L.M. 223 (1981).
35. 20 I.L.M. 223, 224 (1981).
36. *Id.* at 224.
37. *Id.*
38. 333 F.3d 228, 235–36 (D.C. Cir. 2003).
39. *Id.* at 236. The Accords expressly requires the United States to "bar and

preclude the prosecution against Iran of any pending or future claim . . . [of] a United States national arising out of the events . . . related to (a) the seizure of the 52 United States nationals on November 4, 1979 [and] (b) their subsequent detention." 20 I.L.M. 223, 227.

40. *Weinstein v. Islamic Rep. of Iran*, 609 F.3d 43, 50 (2d Cir. 2010).

41. *Id.* 49 (emphasis added).

42. *Id.*

43. *Id.* (citing *Padilla v. Rumsfeld*, 352 F.3d 695, 721 (2d. Cir. 2003)).

44. *Id.* On October 25, 2007, Bank Melli was designated as a proliferator of weapons of mass destruction under the Executive Order 13382. *Id.* at 47 n.1.

45. *Id.* at 51.

46. *Id.* (citing *Banco*, 462 U.S. at 627–28).

47. *Id.*

48. *Id.* at 52.

49. *Id.* at 51 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)).

50. *Id.* at 52 (citing *Owens v. Rep. of Sudan*, 531 F.3d 884, 891 (D.C. Cir. 2008)).

51. *Id.* at 52–53.

52. *Id.* at 53.

53. *Id.*

54. *Id.* (citing *Sumitomo*, 457 U.S. at 185–86).

55. *Weinstein*, 609 F.3d 43, 53 (citing *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993)).

56. *Id.* at 54.

57. *Id.* (citing *Branch v. United States*, 69 F.3d 1571, 1577 (Fed. Cir. 1995)).

58. *Id.* (citing *Paradissiotis v. United States*, 304 F.3d 1271, 1275–76 (Fed. Cir. 2002)).

59. *Id.* (citing *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449, 455 (2d Cir. 1995)).

60. *Id.* at 55–56.

61. *Id.* at 55.

62. *Id.* at 56.

63. *See id.* at 47–48.

64. *Id.* at 49–50.

65. *Id.* at 50.

66. *Id.* at 49.

67. *See id.* at 50 (quoting 148 Cong. Rec. S11,528 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin)).

68. *Id.* at 50–51.

69. *Id.* at 51.

70. *Id.* at 52.

71. *Id.* at 51.

72. *Id.* at 54 (citing *Paradissiotis v. United States*, 304 F.3d 1271, 1275–76 (Fed. Cir. 2002)).

73. *Id.* at 53–55.

74. *Id.* at 53 (quoting *Sumitomo Shoji Am. Inc. v. Avagliano*, 457 U.S. 171, 185–86 (1982)).

75. *Id.*

76. *Id.* at 55–56.

77. *Id.* at 55.

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Foreclosing Mortgages on Multiple Parcels Securing a Single Debt

An Update on *Sanders v. Palmer*

By Joel David Sharrow

A procedural minefield must be negotiated by a lender seeking to foreclose one or more mortgages on multiple parcels securing a single debt, with each parcel being sold separately for less than the full amount of the debt. The problem, as dealt with by the Court of Appeals in *Sanders v. Palmer*,[1] arises out of N.Y. Real Property Actions & Proceedings Law § 1371 (RPAPL), our deficiency judgment statute. Pursuant to RPAPL § 1371(2), the amount of any deficiency judgment, the proceeding for which is deemed a part of the underlying foreclosure action,[2] is the difference between the amount due (as determined by the order and judgment of foreclosure and sale) less the higher of either the judicially determined fair market value of the mortgaged and sold realty or the proceeds of the foreclosure sale. To obtain a deficiency judgment, the mortgagee must make and serve its motion therefor within 90 days of delivery of the foreclosure referee's deed. The failure to timely do so means, as a matter of law, that the proceeds of the foreclosure sale constitute full satisfaction of the mortgage debt.[3] Consequently, when multiple parcels secure a single debt and the parcels are sold separately, must the lender seek a deficiency judgment after the sale of each parcel or, as suggested by the earlier decision of the Appellate Division in *Bodner v. Brickner*,[4] may the lender abide the sale of all parcels?

This article addresses how a number of courts have applied *Sanders* to various factual scenarios when no deficiency judgment is sought between seriatim sales of mortgaged realty.

The *Sanders* Case

In *Sanders*, a commercial debt was secured by several parcels and personal guarantees, one of which was further secured by a mortgage on guarantor Palmer's separate realty. *Sanders* stands for the proposition that where a single debt is secured by a mortgage of the borrower's realty and by another mortgage given by a guarantor on realty owned by the guarantor (with both parcels being subject to the jurisdiction of the same court (CPLR 507)), the failure to obtain a deficiency judgment after sale of the borrower's realty in the foreclosure action against it

and the guarantor, precludes foreclosure or any further proceedings as against the guarantor or the guarantor's separately pledged realty "unless the court orders otherwise."

In *Sanders*, there was a default. The lender commenced two foreclosure actions. One was brought to foreclose the mortgage upon one of the corporate borrower's pledged parcels – joining as a defendant guarantor Palmer who, as noted, had hypothecated her own realty to secure her guaranty. Shortly after bringing suit against the borrower and Ms. Palmer, and while that initial action was pending, the lender brought its second foreclosure action to foreclose upon Ms. Palmer's mortgaged parcel. The first action proceeded through sale of the corporation's pledged realty while continuing the second action against the Palmer parcel. The lender, however, did not seek a deficiency judgment in the first action, although such judgment would have determined the amount still due to be realized in whole or in part out of the later sale of the Palmer parcel. That was a fatal error.

Ms. Palmer argued that the amount realized from the sale of the borrower's realty constituted full satisfaction of the debt.[5] Thus, there no longer was any guaranteed debt, and without a debt to secure, the lender could not foreclose on the Palmer parcel. The courts agreed with Ms. Palmer's position. The Court of Appeals, holding that a guarantor is entitled to the protection afforded mortgagors under the deficiency judgment statute, set forth the procedure to be followed. Albeit *dicta*, the Court iterated the following:

> That several mortgages have been given to secure a single debt does not authorize separate foreclosure actions when the properties involved are all *subject to the jurisdiction of one court*. What is required, rather, is that, *unless the court orders otherwise*, there be separate sales of the security in such order as the court may fix, and an application after each sale and before the next occurs for determination of the deficiency resulting from the sale, for otherwise what remains due and payable from the additional security provided cannot be known. Were no deficiency application made after such sale, a guarantor who has provided security additional to that given by the debtor and who, like the debtor is entitled to the protection of RPAPL 1371(3) when no deficiency judgment is obtained would be deprived of that protection.[6]

The Court went on to conclude

> [t]hat the deficiency in a multiple security situation is determined following sale on foreclosure of the security first sold does not affect the applicability of the statute [RPAPL § 1371] or permit the institution of separate proceedings without permission of the court.[7]

The Application of *Sanders*

Despite the seeming generality of the stated rule in *Sanders*, a number of decisions have discerned ways to restrict *Sanders* to its specific facts or otherwise find it distinguishable.

Guarantor's Property Sold First; Impact of Bankruptcy

In *Joseph Parisi TTEE Parisi Enterprises, Inc., Profit Sharing Trust v. Black Meadow Estates*,[8] a corporate debt was secured by a mortgage on the corporation's property, personal guarantees, and the hypothecation of realty owned by the guarantors. The similarity to *Sanders* ends there.

> A number of decisions have discerned ways to restrict *Sanders.*

Upon default, the lender brought one action to foreclose both the corporate mortgage and the guarantors' mortgage. The judgment of foreclosure and sale provided for the sale of both pieces of realty "in one parcel." The day prior to the scheduled sale, the corporate borrower filed a bankruptcy petition thereby invoking as to it the automatic bankruptcy stay.[9] Nevertheless, the lender foreclosed on the guarantors' pledged realty and did not thereafter seek a deficiency judgment against the guarantors. Subsequent to an order of the bankruptcy court granting relief from stay, the lender foreclosed on the corporate borrower's mortgaged realty, and the guarantors moved to set aside that sale of the borrower's property. The I.A.S. Court granted the motion, but the Second Department reversed. The Appellate Division concluded that because the guarantors' parcel was sold first, the case was distinguishable from *Sanders*. Further, the court concluded that since the foreclosure judgment directed that all of the realty be sold "in one parcel," the general rule suggested by *Bodner* applied – i.e., that the right to apply for a deficiency judgment does not arise until all of the mortgaged parcels have been sold.

Parcels in Different Counties

In *Steckel v. Tom-Art Associates, Ltd.*,[10] the corporate loan was secured by a mortgage on its realty (located in Queens County), personal guarantees, and a mortgage on the guarantors' property (located in Nassau County). The guarantors' property was foreclosed upon, and no deficiency judgment was sought before the lender brought an action to foreclose upon the corporation's pledged realty. Citing its previous decision in *Parisi TTEE*, the Second Department again distinguished *Sanders* as an exception and chose to follow *Bodner*.

In *Steckel*, there was an additional basis for distinguishing *Sanders* but which the Appellate Division did not iterate. The *Sanders dicta*, as quoted above, speaks to where the multiple parcels "are all subject to the jurisdiction of one court." In *Steckel*, however, the multiple parcels secured by different mortgages were in Nassau and Queens counties. Thus, arguably, they were not "subject to the jurisdiction of one court" since an action to fore-

close a mortgage is to be brought in the county wherein the property is situated.[11]

Separate Debts

Bank Leumi Trust Co. of N.Y. v. Andrews[12] concerned a guaranteed corporate loan in the sum of $3 million. To increase it to $6.25 million, a mortgage on the corporate borrower's realty was given but limited to repayment of the amount of $499,000 of the $6.25 million debt. Upon default and in connection with an extension of time to pay, the guarantors subsequently granted a mortgage on their home to the extent of $1.2 million of the $6.2 million debt. After another default, the lender foreclosed on the corporate borrower's realty, obtaining a foreclosure judgment in the sum of $499,000, the maximum amount payable under the borrower's mortgage. It is not clear from the reported decision, but presumably the guarantors were joined as defendants to that foreclosure action.[13] The lender did not seek a deficiency judgment against the guarantors in that first action before bringing a separate foreclosure action against the guarantors' mortgage on their realty. Notwithstanding *Sanders*, the Appellate Division concluded that the failure to obtain a deficiency judgment in the foreclosure action on the corporate borrower's mortgage and sale of its realty did not bar the lender from commencing a separate foreclosure action on the guarantors' residence. That court so held because:

- "[u]pon the [lender's] foreclosure of the corporate property, it realized the maximum amount that mortgage had secured"; and,
- "[c]ontrary to the [guarantors'] assertion, their personal obligation under the guaranty and the debt secured by the mortgage on their residence were separate and distinct from the debt secured by the mortgage on the corporate property."[14]

Unless the Court Orders Otherwise

Giving effect to the "unless the court orders otherwise" language in *Sanders*, the Third Department, in *Adirondack Trust Co. v. Farone*,[15] found ways to avoid the harsh result emanating from *Sanders*. To secure various loans, Mr. Farone, the borrower, mortgaged multiple parcels he owned, property owned by his mother, and a parcel owned by a corporate entity; lastly, he mortgaged a parcel jointly owned by the entirety with his wife, who also guaranteed payment of the loans. Upon default, the lender foreclosed upon all of the parcels. At the referee's hearing in which the mortgagors actively participated, it was agreed to amalgamate all of the pledged realty into four large tracts designated as parcels 1, 2, 3 and 4. The amended judgment provided for a single sale of the four parcels and permitted the lender to abide the conclusion of such sale before having to move for a deficiency judgment. After the four parcels were sold, the lender moved for a deficiency judgment against Mr. and Mrs. Farone; they cross-moved to extinguish the debt and to set aside the sale of parcels 2, 3 and 4 because the lender had not sought a deficiency judgment after the sale of the lots comprising parcel 1. The Appellate Division held in favor of the lender and against the Farones on three separate grounds:

- distinguishing *Sanders* in that the *Farone* case involved realty securing only the primary obligation of the borrower and not that of a guarantor;
- implicitly applying *Sanders* in that the *Farone* case amended judgment of foreclosure provided for a single sale of and permitted the lender to wait until concluding the sale of all four parcels before moving for a deficiency judgment; and,
- finding that the Farones had waived application of the holding in *Sanders* by agreeing at the referee's hearing to the method and mode of the sale, and thus they were estopped from relying upon the *Sanders* holding.[16]

The rule in *Sanders* may, or may not, be applicable to a multi-parcel secured mortgage or set of mortgages.

Multiple Debts; Collateral in More Than One County

In *Volpe v. National Bank of Geneva*,[17] the plaintiff and related entities obtained several loans from the defendant, secured by various mortgages on realty situate in Ontario County. Thereafter, the plaintiff executed and delivered to the defendant a mortgage to secure all of his debts including then newly created ones; the pledged realty for that mortgage was located in Monroe County. The plaintiff filed for bankruptcy; the defendant obtained relief from the bankruptcy stay to foreclose on the properties in Ontario County. Judgment of foreclosure was entered providing that the Ontario County properties be sold in a single parcel and any deficiency be determined pursuant to a deficiency judgment under RPAPL § 1371. The Ontario County properties were sold, but no deficiency judgment was obtained. The plaintiff, relying upon *Sanders*, unsuccessfully brought a declaratory judgment action to declare null and void the mortgage on the Monroe County properties. The court denied such relief

because it found *Sanders* distinguishable in that: (1) *Volpe* involved numerous debts; (2) *Volpe* involved mortgages on parcels in different counties – thus, all of the pledged realty was not under the jurisdiction of just one court; and, (3) relief from stay was granted to foreclose on only the Ontario County properties. The court held that such "peculiar facts" brought the *Volpe* case outside the parameters of RPAPL § 1371 and *Sanders*.[18]

Continuing Viability of *Sanders*

Despite the foregoing cases, *Sanders* is alive and well.

In *United States v. Levine*,[19] as in *Sanders*, there was a note which was secured by the corporate borrower's realty and a personal guaranty secured by a (junior) mortgage on the guarantors' realty. The secured party accelerated the debt but then an involuntary bankruptcy petition was filed against the corporate borrower. After the debtor's bankruptcy estate was closed, the secured party foreclosed upon the corporation's realty – the secured party, however, unlike the situation in *Sanders*, did not join the guarantors as defendants to that action. After the foreclosure sale, the secured party sought to foreclose on the guarantors' residence but without having sought and obtained an interim deficiency judgment. The court found the case before it to be "indistinguishable" from *Sanders*. It concluded that the secured party had "lost the right to obtain a deficiency judgment and to enforce the guaranty [against the guarantors and the (junior) mortgage on their realty]."[20] No deficiency judgment against the mortgagor could be sought because of the bankruptcy discharge, and none could be sought as against the guarantors due to their non-joinder in the initial foreclosure action and the *Sanders* rule.

In *Goldberg Stillman Co., P.C. v. Bardey*,[21] Ms. Bardey granted a security interest on her cooperative apartment (situate in New York County), the instruments for which were to be returned to her upon the lender's receipt of a mortgage note and recorded mortgage on Ms. Bardey's Ulster County property. The mortgage documents were received by the plaintiff so that the security interest documents were to be returned to the defendant. The Appellate Division held, therefore, that there was no longer a valid security interest in the cooperative which could be enforced; and, further, that the failure of the lender to have obtained a deficiency judgment after the foreclosure sale of the Ulster County property barred any further proceedings to foreclose the security interest on the New York County cooperative.[22]

In *Mariani v. J.K.F.I. Management, Inc.*,[23] the plaintiff-guarantor mortgaged realty and delivered an affidavit for a judgment by confession to be entered at any time for the debt guaranteed and secured by the guarantor's mortgage. Unlike the situation in *Sanders*, though, the borrower itself had not given any mortgage to secure its loan, and a monetary judgment on the confession was entered against the guarantor and executed upon before the mortgage foreclosure began. The lender pursued the foreclosure action but did not seek a deficiency judgment. On motion by the guarantor/judgment debtor, the court directed that the judgment earlier entered pursuant to the confession be discharged. Citing *Sanders*, the court held that guarantors are entitled to the same protection under RPAPL § 1371(3) as are borrower/mortgagors; and that

> [t]o permit enforcement [of the monetary judgment] would allow [the lender] to circumvent the statutory protection intended to be afforded mortgagors by RPAPL § 1371 . . . as it would enable [the lender] to enforce the full guaranteed obligation without having a court determine the true value of the mortgaged property. . . . That [lender] had entered the judgment against movant prior to the commencement of the foreclosure action gives [lender] no further rights.[24]

Mariani was followed in *Putnam County Savings Bank v. Bagen (In re Bagen)*.[25] There, a monetary judgment was entered against the borrowers, prior owners of realty who subsequently filed for bankruptcy protection. The lender/judgment creditor then moved in state court for leave to commence an action to foreclose the mortgage previously given to secure it as against the entity then owning the realty, to wit: the successor-in-interest to the original borrowers, which entity took title to the realty subject to the mortgage. In that foreclosure action, the lender did not name or serve the bankruptcy/money judgment debtors. The Court, pointing out that no application for the right to seek a deficiency judgment had been timely made, concluded that *Mariani* and RPAPL § 1301 rendered the monetary judgment voidable.[26]

In *Wydra v. Chai*,[27] four Kings County parcels were directed to be sold in a particular order, whereafter the deficiency judgment could be sought. Although all of the realty was sold, the sale of one of the parcels was rescinded per stipulation. That left title in the name of the mortgagor. A deficiency judgment was entered. Almost 10 years later, the parcel that had its sale rescinded was conveyed by the mortgagor to a third party (the "grantee"). Nevertheless, the plaintiffs later obtained appointment of a substitute referee, who ultimately re-sold that parcel – at a much increased sales price. The Appellate Division granted the grantee's motion for leave to intervene and set aside that second foreclosure sale of its parcel. The court held that the plaintiffs' failure to have proceeded against the grantee's parcel promptly after the first sale of it was rescinded, and the lien thereon of the deficiency judgment having lapsed, called for application of the general rule that "failure to proceed against all the security is an abandonment of the lien on the portion omitted," citing, among others, *Bodner* and *Sanders*.

Conclusion

The rule in *Sanders* may, or may not, be applicable to a multi-parcel secured mortgage or set of mortgages. Prudence dictates, though, that in any Order and

Judgment of Foreclosure and Sale, careful attention be paid to inserting a provision that the varied pledged realty be sold as a single parcel. Therefore, the need to seek a deficiency judgment would abide a sale of all the mortgaged realty – presuming that the referee has so determined they may be – and, in any event, a deficiency judgment would be made only after all of the mortgaged parcels have been sold. Furthermore, all of the mortgaged parcels should be foreclosed upon in the same or simultaneous actions (if the realty is located in several counties). Otherwise, the lender runs the risk of some court concluding that the mortgage debt has been satisfied out of the sale of the first sold parcel so that later sold or unforeclosed-upon parcels are discharged from the lien of the foreclosed mortgage, thus precluding the lender from seeking to enforce any money judgment against the borrower and any guarantors. ■

1. 68 N.Y.2d 180 (1986).
2. *Steuben Trust Co. v. Buono*, 254 A.D.2d 803, 804 (4th Dep't 1998) (citing *Sanders*, 68 N.Y.2d at 182–83; *In re Tyler*, 166 B.R. 21, 25 (Bankr. W.D.N.Y. 1994)).
3. RPAPL § 1371(3).
4. 29 A.D.2d 441, 445 (1st Dep't 1968).
5. *See* RPAPL § 1371(3).
6. *Sanders*, 68 N.Y.2d 180 (1986) (emphasis added) (citation omitted).
7. *Id.* at 187 (citation omitted).
8. 208 A.D.2d 597 (2d Dep't 1994).
9. *See* 11 U.S.C. § 362.
10. 228 A.D.2d 429 (1st Dep't), *lv. to appeal denied*, 88 N.Y.2d 1065 (1996).
11. CPLR 507.
12. 254 A.D.2d 445 (2d Dep't 1998), *appeal denied*, 93 N.Y.2d 806 (1999).
13. *See* RPAPL § 1301.
14. *Andrews*, 254 A.D.2d at 446 (citations omitted).
15. 245 A.D.2d 840 (3d Dep't 1997), *appeal dismissed*, 91 N.Y.2d 1002 (1998).
16. *Id.* at 842 (citation omitted).
17. 171 Misc. 2d 948 (Sup. Ct., Monroe Co. 1997), *aff'd on opinion below*, 249 A.D.2d 896 (4th Dep't 1998).
18. *Id.* at 955.
19. 902 F. Supp. 367 (S.D.N.Y. 1995).
20. *Id.* at 370.
21. 277 A.D.2d 62 (1st Dep't 2000).
22. *Id.* at 63 (citation omitted).
23. 158 Misc. 2d 938 (Sup. Ct., N.Y. Co. 1993).
24. *Id.* at 941.
25. 185 B.R. 691 (Bankr., S.D.N.Y. 1995).
26. *Id.* at 696, 697.
27. 50 A.D.3d 779 (2d Dep't 2008).

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claim against a party represented by a cross-defendant.

A defendant may counterclaim (or cross-claim) only in the capacity in which a plaintiff sued you. If, for example, you're a president of a corporation, you may not assert a counterclaim unrelated to your capacity as the president. As the plaintiff, you aren't subject to a counterclaim that's unrelated to your capacity as when you initiated the lawsuit. As the cross-defendant, you're subject only to cross-claims in the capacity in which the plaintiff sued the cross-defendant.

Counterclaims and cross-claims must conform to general pleading requirements.

Familiarize yourself with CPLR 203(d). As the defendant, you may counterclaim or cross-claim after the applicable statute of limitations has expired if the statute-of-limitation period hadn't expired on the date a plaintiff interposed the complaint. As the defendant's attorney, you may preserve your client's time-barred claim by interposing a counterclaim instead of bringing a separate lawsuit.

Pleading Requirements

Counterclaims and cross-claims must conform to the CPLR's general pleading requirements, specifically CPLR 3013 and 3014.

• Label your counterclaims and cross-claims. A plaintiff won't need to reply to a counterclaim if you fail to label it as a counterclaim.

Number each claim separately.

Examples:

First Counterclaim Against Plaintiff

Second Counterclaim Against Plaintiff

First Cross-Claim Against Defendant XYZ

Second Cross-Claim Against Defendant XYZ

• Separately number each paragraph in your answer. The numbering scheme in your answer should run from beginning to end, regardless of any divisions, defenses, or claims. Plead all your defenses first, your counterclaims second, and cross-claims last. You may have a short answer with one or two affirmative defenses and one counterclaim. By the time you're ready to draft your counterclaim, your paragraph number could be 10 or 100, depending on the complexity of the case. Recapping the Legal Writer's earlier issues, your answer might look like this.

Example 1:

Defendant Mary Sosume, by her attorney Joe Money, for her answer to plaintiff's complaint, states as follows:

1. Admits the allegations contained in paragraph 1 of the complaint.
2. Denies the allegations contained in paragraph 2 of the complaint.
3. Denies knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 3 of the complaint.
4. States that paragraph 4 of the complaint contains conclusions of law and that no response is required.
5. (Continue to address the allegations in the complaint, paragraph by paragraph.)

First Affirmative Defense

6. Plaintiff did not properly serve defendant. This Court has no personal jurisdiction over defendant.

Second Affirmative Defense

7. (State your defense.)

First Counterclaim Against Plaintiff

8. (State your counterclaim. Explain the facts.)

Second Counterclaim Against Plaintiff

9. (State your counterclaim. Explain the facts.)

First Cross-Claim Against Defendant Daniel Doe

10. (State your cross-claim. Explain the facts.)

Second Cross-Claim Against Defendant Daniel Doe

11. (State your cross-claim. Explain the facts.)

WHEREFORE, having fully answered the complaint, defendant requests judgment as follows:

a. Against plaintiff dismissing the complaint;
b. Against plaintiff on the counterclaim in the amount of $15,000, plus interest;
c. Against defendant Daniel Doe on the cross-claim in the amount of $25,000, plus interest;
d. Against plaintiff and defendant Daniel Doe for the costs of this action, including attorney fees incurred in this action; and
e. Such other and further relief as the Court deems just and proper.

• Write clear and concise statements. When practical, state one allegation in each paragraph.

• State your claims with particularity to give your adversary notice of the events and the material elements to your claim(s).[11]

Example 2, a landlord-tenant situation (summary proceeding). Assume that paragraphs 1–30 addressed your admissions, denials, and affirmative defenses:

First Counterclaim Against Petitioner

31. Petitioner breached the warranty of habitability. The premises continue to be plagued by excessive noise from Apartment 2H in the building.

32. The windows in the premises are deteriorating and need to be replaced or repaired. The petitioner never finished installing the windows. The windows are unusable.
33. Petitioner has repeatedly failed to correct the conditions; therefore, petitioner caused significant damage to respondents.
34. Respondents request the court to order petitioner to remedy, repair, or correct the continuing uninhabitable conditions.
35. Respondents seek to recover the sum of not less than $10,000 for breach of the warranty of habitability in that the landlord has failed to repair the subject premises and has allowed conditions detrimental to plaintiff's life, health, and safety.

• Counterclaims or cross-claims must include a demand for relief.[12] You may request alternative relief or different types of relief.[13] If the evidence supports the relief, a court may grant any type of relief you seek if it's within the court's jurisdiction.[14] A court may grant relief to you even if you don't specifically demand that relief.[15] Paragraph 35, just above, is one example of the relief sought in a warranty-of-habitability counterclaim.

Assume that in an answer to a complaint plaintiff pet owner, Caramia Schnouzer, alleges that two defendants, veterinarian Dr. Petlover and a veterinary hospital, Love-for-Animals Hospital, committed malpractice. Assume that paragraphs 1–30 addressed your admissions, denials, and affirmative defenses. *Example 3:*

First Counterclaim Against Plaintiff

31. Dr. Petlover and Love-for-Animals Hospital provided services at Caramia Schnouzer's request for her poodle, Bandit.
32. Caramia Schnouzer contracted with Dr. Petlover and Love-for-Animals Hospital to perform professional services, and Caramia Schnouzer agreed to pay for those services.
33. Those services were provided in New York, New York, in 2011.
34. Dr. Petlover and Love-for-Animals Hospital are due $10,000 for the services provided for Bandit, the poodle, at Caramia Schnouzer's request.

Assume that the plaintiff, Jane Inpane, sued the defendants for injuries she suffered in a car accident after her air bag did not deploy. She purchased the car from the defendant, Working Car World. She has also sued Magicalexus, the car manufacturer, and Airbag Pro, the airbag company. Assume that paragraphs 1–39 addressed your admissions, denials, affirmative defenses, and counterclaims. *Example 4*, a cross-claim in an answer:

First Cross-Claim Against Defendants Magicalexus and Airbag Pro[16]

Working Car World, by and through counsel, for its cross-claim against defendants, Magicalexus and Airbag Pro, states as follows:

40. Working Car World is incorporated in and has its principal place of business in New York.
41. Jane Inpane sued Working Car World as a result of an automobile accident alleged to have occurred on June 21, 2000, in Sunnyside, Queens, New York.
42. Jane Inpane has alleged that Working Car World defectively installed, repaired, distributed, or sold to plaintiff a defective airbag in the vehicle involved in the accident.
43. Magicalexus and Airbag Pro are or may be liable to Working Car World by way of contribution or indemnity for all or part of Jane Inpane's claims against Working Car World.
44. Working Car World seeks contribution or indemnity from the defendants, Magicalexus and Airbag Pro.

• If the same facts apply to both a defense and a counterclaim or cross-claim, incorporate and reallege the same fact allegations.

Example 5:

Second Counterclaim Against Plaintiff

31. The answers and defenses asserted in the answer to plaintiff's complaint are incorporated as if fully rewritten here.
32. (Explain your counterclaim.)

• Remember to conclude your answer with a demand for relief. Your relief should also include the relief you seek on any counterclaim and cross-claim. See the "wherefore" clause in Example 1, above.

Response to Counterclaims

• If you've formally labeled your counterclaim, a plaintiff must reply to it.[17]

• Replies to counterclaims are mandatory except in the New York City Civil Court. In the New York City Civil Court, replying to a counterclaim is optional.[18] If the plaintiff doesn't reply, the court will deem the counterclaim denied.[19]

• If you're the plaintiff, keep your reply to a counterclaim simple and brief. Limit your reply to the allegations in the counterclaim.

Response to Cross-Claims

• Without a court order, a cross-defendant may not answer the cross-claim unless a cross-claimant demands answer.[20] If a cross-claimant doesn't demand an answer, a court will deem the cross-claim denied.[21]

The next *Legal Writer* continues with drafting pleadings. ■

Gerald Lebovits, a Criminal Court judge in Manhattan, is an adjunct professor at St. John's University School of Law and a lecturer-in-law at Columbia Law School. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's email address is GLebovits@aol.com.

1. CPLR 3011.

2. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, *New York Civil Practice Before Trial* § 15:771, at 15-77 (2006; Dec. 2009 Supp.) (emphasis in original).

3. *Textile Tech. Exch., Inc. v. Davis*, 81 N.Y.2d 56, 59, 611 N.E.2d 768, 769, 595 N.Y.S.2d 729, 730 (1993) (noting that a counterclaim is "unrelated" if a defendant would not be collaterally stopped from bringing it in a later suit); *Sorrenti v. Shane*, 1 Misc. 3d 47, 48, 768 N.Y.S.2d 545, 546 (Sup. Ct. App. Term 2d Dep't, 2d & 11th Jud. Dists. 2003) (holding that by seeking leave to interpose counterclaims, defendant waived any defect in personal jurisdiction in underlying action).

4. N.Y. City Civ. Ct. Act § 208(b).

5. *Classic Autos. Inc. v. Oxford Res. Corp.*, 204 A.D.2d 209, 209, 612 N.Y.S.2d 32, 33 (1st Dep't 1994).

6. CPLR 3019(b).

7. *Id.*

8. J. Joseph Wilder & Laura A. Linneball, *Pleadings and Motions Directed to Their Faults*, N.Y. St. B. Ass'n 17, 74 (Cont'g Legal Educ. Prog., May 25, 2011) (citing *Dunn v. Commercial Union Ins. Co. of N.Y.*, 27 A.D.2d 240, 243, 277 N.Y.S.2d 940, 943 (3d Dep't 1967)).

9. CPLR 3014.

10. CPLR 3019(b).

11. *See Bramex Assoc. v. CBI Agencies, Ltd.*, 149 A.D.2d 383, 384, 540 N.Y.S.2d 243, 245 (1st Dep't 1989) (dismissing fraud counterclaims as insufficiently particular).

12. CPLR 3017(a).

13. *Id.*

14. *Id.*

15. *Id.*

16. 20B Am. Jur. Pl. & Pr. Forms § 155 (2011).

17. CPLR 3011.

18. N.Y. City Civ. Ct. Act § 907(a). Section 901 of that Act doesn't mandate a reply.

19. *Perlson v. Titone*, 167 Misc. 2d 593, 596, 638 N.Y.S.2d 1000, 1001 (Civ. Ct. N.Y. County 1995).

20. CPLR 3011.

21. *Id.*

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: A suggestion for a future column: the over-use of double negatives. They always slow me down when I come across them, and I stop to figure out what is supposed to be meant.

Answer: I fully agree with Pennsylvania reader Anthony R. Fantini, Esq., who sent this comment. Double negatives can be annoying. They cause wordiness and sometimes ambiguity, but the often-heard claim that they change meaning is untrue. Neither the speaker nor the listener would believe that "He ain't got no time to watch TV no more" means anything but an emphatic negative.

Even the best authors used them to create emphasis. The great Middle English author Geoffrey Chaucer used double, triple, and even quadruple negatives, for example, with his description of the noble Knight in the General Prologue to the *Canterbury Tales*, who, Chaucer declared: "He **nevere** yet **no** vileynye **ne** sayde . . ." (My **emphasis** added.)

But the Age of Reason in the 18th century brought a belief that the English language was in a deplorable state because even the most eminent authors failed to follow strict grammatical rules. These critics believed that the English language should be "corrected" and "fixed" (kept from changing) by reducing it to a system of rules, like the rules of mathematics.

One such well-intentioned clergyman, who knew nothing about language, designated the job to himself and his followers. That gentleman was Robert Lowth, theologian, Hebraist, professor of poetry at Oxford, and later Bishop of London and Dean of the Chapel Royal. We have him to thank for the rule against the use of the so-called "double negative," which, he maintained, was similar to mathematics in that two negatives created an affirmative. That rule perseveres in some circles and continues to be quoted even today.

The "rule" is valid, but for the wrong reason. Consider the following sentence from the Model Penal Code § 5.01(2). It exemplifies the damage that negatives can cause: "Without **negativing** the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose **shall not** be held **insufficient** as a matter of law." (My **emphasis** added.)

Just delete the three negatives in this sentence, and you clarify and shorten the statement. Notice, too, that when you state facts affirmatively rather than negatively the statement becomes more positive and forceful: Although other conduct may also suffice, the following, if strongly corroborative of the actor's criminal purpose, shall be held sufficient as a matter of law.

Negative statements are also sometimes ambiguous. The following sentence appeared in a recent news item: "Florida's greatest problem is not being able to attract and hold its schoolteachers." That short statement can convey two possible meanings. Does it mean, "Florida's biggest problem is that it cannot attract and hold its schoolteachers"? Or does it mean, "Florida's biggest problem is *not* that it cannot attract and hold its schoolteachers"? (Florida's biggest problem has other causes.) In other words, does the second clause modify the word "is" or does it modify the word "not"? The negative statement, with its so-called "squinting modifier," makes it all but impossible to tell.

Using the word *all* with a negative statement is also confusing. For example, when you make the positive statement, "All cats are gray," you are dealing with totality. But change the statement to a negative form, "Not all cats are gray." Now you are not dealing with totality, you are stating that *some* cats are gray. To change to a fully negative statement, you have to say, "No cats are gray," for the opposite of "All cats are gray" is "No cats are gray." (This entire argument is nonsense, of course, useful only to indicate the hazard of negative statements.)

The person who posted the following notice on the office bulletin board was obviously unaware of this curious characteristic of negative statements containing the word "all." The notice read, "On Tuesday, June 8, and Wednesday, June 9, all regularly scheduled classes will not meet." (That is, some classes *will*?)

The ambiguous negative is useful, however, to convey lukewarm enthusiasm. The poet Alexander Pope's description of it included the ability to "[damn] with faint praise, assent with civil leer/ And without sneering, teach the rest to sneer."

"I do not oppose the chairman's motion" does not mean that I favor it. "I had not been told that the plan was under consideration" does not mean that I did not know of it. A legal writing instructor says he tells students that their writing is "not bad," to avoid saying it is "not good."

Negative comments can also be disguised by intentional ambiguity. A professor responds to an undeserving student's request for a recommendation by writing, "I cannot recommend this individual too highly." A 1975 court, in permitting the removal of a kidney from an incompetent man, reasoned that although he had not given his permission for the surgery, "the transplant is not without benefit to him."

Speaking of negative statements, Rochester attorney Michael J. Kieffer recalls an incident that occurred in his first-year Contracts course. A fellow-student used the "word" *irregardless* (the subject of a reader's question in the June "Language Tips"). The professor simply replied, "Don't you mean *disirregardless*?" Mr. Kieffer commented, "To this day, some 37 years later, I remember that rejoinder!" ■

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.).

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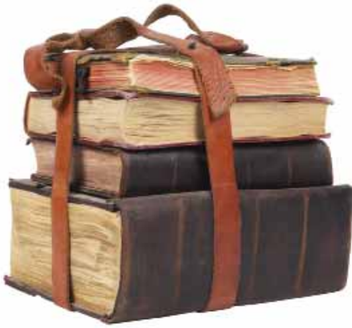

Drafting New York Civil-Litigation Documents: Part IX — The Answer

The *Legal Writer* continues with drafting the answer. This column focuses on counterclaims and cross-claims. Counterclaims or cross-claims go in your answer to the plaintiff's complaint.[1]

Counterclaims

Counterclaims are claims — separate and distinct causes of action — brought by you, the defendant, against a plaintiff. Counterclaims are not defenses. Counterclaims may "partially or fully offset [a] plaintiff's claims — or even *exceed* them."[2] You may seek any type of relief in your counterclaim: A plaintiff's claim for relief doesn't restrict the relief, equitable or legal, a defendant may seek.

As the defendant, you may interpose claims unrelated to a plaintiff's claims. Counterclaims obviate the need for multiple lawsuits. Litigating claims between parties becomes economical and efficient. *Example:* A plaintiff sues you for injuries she sustained after you drove your car over her foot. You may counterclaim against her for breach of contract, a claim unrelated to the accident. As the plaintiff, if the defendant interposes an unrelated counterclaim against you that is inconvenient for you to defend while pursuing your own claims or if a joint trial on both claims would prejudice you, move for a separate trial or to sever the defendant's counterclaim from the main lawsuit.

You waive the defense of lack of personal jurisdiction when you plead a counterclaim unrelated to a plaintiff's claim.[3]

Consider subject-matter jurisdiction when you counterclaim. Some courts might restrict the monetary limits on your counterclaim to the monetary limits of the main claim. Know the exceptions. The New York City Civil Court, for example, has unlimited jurisdiction over monetary counterclaims.[4]

Under New York's CPLR, counterclaims are permissive, not compulsory. You may bring an independent case without risk that you'll waive your claim.[5]

Cross-Claims

CPLR 3019(b) and (d) govern cross-claims. A cross-claim is a cause of action by one or more defendants against one or more co-defendants. Under CPLR 3019(b), you may cross-claim for "any" cause of action, even one unrelated to a claim in the complaint. You may use a cross-claim to bring a new party into the action if the cross-claim is for a cause of action against an existing defendant and the new party.[6] Your cross-claim may be against a party "liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."[7] You may use a cross-claim to "interpose a claim for indemnification against a co-defendant (or against a co-defendant and a third party)."[8]

Similarities Between Counterclaims and Cross-Claims

The CPLR doesn't limit the number of counterclaims or cross-claims you may interpose.[9] Under CPLR 3014, counterclaims and cross-claims may be pleaded alternatively or hypothetically. Counterclaims and cross-claims needn't be consistent with the denials in your answer. For example, a defendant may seek recovery from other defendants under inconsistent theories of contribution and contractual indemnity.

> Counterclaims obviate the need for multiple lawsuits.

All type of counterclaims and cross-claims are permitted, regardless whether they're related or unrelated to the events or transactions in the complaint. A court may sever a counterclaim or cross-claim or order a separate trial.

You may seek any form of relief when you interpose counterclaims or cross-claims.

In a summary or other special proceeding, if you seek in your cross-claim relief that exceeds the court's subject-matter jurisdiction, you need court approval before you plead a cross-claim.

A defendant may counterclaim or cross-claim on behalf of a person's representative capacity. For example, if a plaintiff sues a partnership, you as the individual partner may counterclaim against the plaintiff on behalf of all the members of the partnership even though the plaintiff didn't serve all the members of the partnership.[10] You, as the defendant, may cross-

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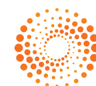

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