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Demystifying ESQrow Ethics

by Devika Kewalramani, Jason Canales and Michelle Cox

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DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $30. Library subscription rate is $200 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

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SEYMOUR W. JAMES, JR.

Thank You for Making a Difference

When I took office in June 2012, several former presidents told me the year would pass by in a flash, but it's still hard to believe my term is almost over. Serving as your president has been a remarkable experience and undoubtedly one of the highlights of my professional career. It has been a year filled with activity, and I thoroughly enjoyed every minute of it. In this final President's Message, with my term drawing to a close, I would like to review some of the key accomplishments of the past year and thank the many Bar Association leaders, staff and volunteers who have made all of this possible. Our theme this year was "Making a Difference," and I am pleased to share some of the ways our Association is making a difference, thanks to the efforts of our dedicated members.

Special Committee on Voter Participation

New York State suffers from one of the lowest voter participation rates in the nation, ranking 47th in average voter turnout in the last three federal elections. New York's voter registration also consistently lags behind the national average. Less than 64% of eligible citizens were registered to vote in 2010, and only 35.5% of the voting-eligible population cast votes for the highest office in the general election that year.

At the start of my term as president, I designated voter participation as a top policy priority. We created the Special Committee on Voter Participation, led by former U.S. Assistant Attorney General and New York State Senator John R. Dunne (Whiteman Osterman & Hanna) and Daniel F. Kolb (Davis Polk and Wardwell), to consider possible reforms that would remove obstacles to registration and voting, while maintaining the integrity of the process. After careful study by its bipartisan team of experts, the special committee recommended a slate of reforms designed to improve voter participation in the state. The committee's recommendations included modernizing the voter registration process, changing voting practices to make voting easier and more convenient, and increasing penalties for deceptive election practices that suppress votes. I am pleased that the committee's recommendations were adopted by the House of Delegates in January 2013. We have begun advocating for these reforms before the state Legislature, and we are hopeful that many of the committee's recommendations will be enacted into law.

Special Committee on Human Trafficking

In many nations worldwide, human trafficking has become a form of modern slavery. The victims of this crime, many of them women and children, are often exposed to physical and emotional abuse at the hands of traffickers. Victims may be especially vulnerable to intimidation because of their immigration status or fear of retaliation. As a result, victims may be reluctant to report their plight to law enforcement agencies, making it difficult to define the magnitude of the problem.

Shortly after I became president, we formed a Special Committee on Human Trafficking, chaired by Past President Bernice Leber (Arent Fox) and Sandra Rivera (Manatt, Phelps & Phillips). The committee is currently finalizing its recommendations, which will address state and federal laws related to sex trafficking, labor trafficking and child trafficking. The committee made an informational presentation before the House of Delegates in April 2013 and will submit its final report at our June meeting. Human trafficking has also been a major priority for the American Bar Association this year and I look forward to opportunities for the State Bar and the ABA to collaborate in this important area.

Task Force on Criminal Discovery

Another top priority this year has been our Task Force on Criminal Discovery Reform, which is studying the widely varied discovery policies in place around the state. In most counties, defendants routinely receive limited information from prosecutors about their cases before trial, and important information is too often revealed so late in the proceedings that defense attorneys may be unable to properly investigate the evidence, fairly weigh plea offers or mount a legitimate defense. The committee has looked at the current discovery laws, standards adopted by other states, and "open-file" discovery practices (like those used in certain counties in New York

SEYMOUR W. JAMES, JR., can be reached at sjames@nysba.org.

State and elsewhere), which provide for the sharing of all or most of the information in prosecutors' case files well in advance of trial.

The task force is finalizing its recommendations for reforms that would facilitate the early exchange of critical information by prosecutors and defense attorneys, prior to trial. These proposed changes to New York's Criminal Procedure Law would remove some of the barriers that make it difficult for defense counsel to quickly and accurately assess a case and provide appropriate advice and representation. The task force is co-chaired by Court of Claims Judge Mark R. Dwyer and Peter Harvey (Patterson Belknap Webb & Tyler) and it is expected to issue its report and recommendations for consideration by the State Bar's House of Delegates at an upcoming meeting.

Special Committee on Prisoner Reentry

Each year, tens of thousands of individuals are released from New York's correctional facilities, and too many of them face major challenges that can make it difficult to successfully reintegrate into our communities. These challenges can lead to unemployment, homelessness, untreated substance abuse and health problems, family disruptions and recidivism. We have established a Special Committee on Prisoner Reentry to address these concerns and develop recommendations to stem discrimination against former prisoners and improve educational, housing and employment opportunities. These reforms could have a significant impact on achieving successful reentry and preventing re-offense. The work of the Special Committee, ably chaired by Ron Tabak (Skadden, Arps, Slate, Meagher & Flom) and Sheila Gaddis (Hiscock & Barclay), is still under way, and we look forward to receiving its recommendations.

Diversity

Achieving diversity and inclusion is an ongoing and multi-faceted goal for the State Bar and our profession. In our increasingly diverse society, a representative legal profession is necessary to maintain the legitimacy of our legal system and respect for the rule of law. A diverse legal profession allows us to better represent our clients and helps to ensure the fair administration of justice.

Having embraced diversity as an official Association policy, we believe that it is our responsibility as the largest voluntary state bar association to set an example and to play a leading role in supporting diversity in the law. Last August, we submitted an amicus curiae brief in the case of *Fisher v. University of Texas*, which highlighted the importance of racial and ethnic diversity in the legal profession and the need to maintain an adequate flow of diverse students in the undergraduate pipeline. We are also continuously working to improve the diversity of our own membership.

In 2011, Past President Vincent E. Doyle issued the President's Section Diversity Challenge, and we were thrilled to receive a prestigious ABA Partnership Award in recognition of our efforts. We continued the Section Diversity Challenge with this year's theme, "Reaching for the Next Level." I challenged each Section to strive for diverse representation in section activities, committee participation, CLE presentations and to increase their efforts to collaborate with minority bars to create meaningful, lasting opportunities for participation by diverse members.

The Sections met the challenge by designating diversity seats on section executive committees; creating scholarships to section events and meetings; developing a resource guide emphasizing training and mentoring resources, outreach and publication strategies, and best practices; instituting targeted outreach to diversity committees and organizations at law schools; participating in NYSBA law school events; and establishing "Under 10" groups, allowing new attorneys to serve as a resource for professional development. Focus on issues affecting female lawyers also increased, with efforts to draw attention to different career options including government, academia and in-house opportunities. Sections also demonstrated a strong commitment to reflecting diversity in their CLE panels and section publications.

As the Diversity Challenge drew to a close, NYSBA Sections joined together to roll out a new, pilot Association-wide Mentoring Program, designed to build relationships between experienced attorneys and diverse attorneys who are interested in becoming future section leaders. Among the many goals of this new mentoring program is the development of a diverse network of colleagues, allowing young attorneys to build perspective and become adept at meeting the demands of the legal profession in the 21st century. We are thankful to retired Court of Appeals Judge Carmen Beauchamp Ciparick and President-Elect Designee Glenn Lau-Kee for co-chairing this initiative, and I am confident that it will be of tremendous benefit to our members.

State Legislative Priorities

We continue to advance our legislative priorities. These include reinforcing the integrity of New York's justice system; supporting appropriate judicial compensation; advocating for adequate financial support for civil legal services and indigent criminal defense, and measures to increase the age of criminal responsibility to 18; supporting the sealing of records pertaining to certain criminal offenses; and supporting modernization of the laws governing non-profits in New York State. We actively supported the Judiciary Budget request, which proposed $40 million for civil legal services, $15 million to assist the Interest on Lawyer Account Fund, and more than $8 million for the continued implementation of long-overdue judicial pay raises. We were pleased that the budget was passed without any reductions.

We will continue to support a package of bills intended to prevent wrongful convictions, with a particular focus on mandatory video recording of custodial interrogations. We were pleased that Governor Cuomo

discussed that provision, as well as another proposal we support, reforming identification procedures, during his State of the State address. In addition, the New York City Police Department announced that it will begin recording all post-arrest interrogations in sex-crime and murder cases. We are hopeful that this development will pave the way for legislation mandating recording of interrogations during the 2013 legislative session.

Sequestration and Federal Court Funding

At the federal level, we have been very vocal about the potential negative impact of sequestration on the federal courts and the Legal Services Corporation (LSC). We have called on Congress to fund these institutions at levels that are adequate to permit them to function effectively. We have been collaborating with local bar presidents, NYSBA leaders and New York's business community to carry our message regarding the impact of sequestration to many audiences. We have issued joint letters and press statements and brought leaders together for lobbying visits in Washington, D.C.

On January 1, Congress enacted the American Taxpayer Relief Act of 2012, which delayed sequestration until March 1. Facing this calendar, we proposed a resolution at the ABA meeting in February calling on officials to protect the federal courts and LSC. We were pleased that the resolution passed. Unfortunately, sequestration was implemented on March 1 and the debate continues in Congress. We will continue our advocacy on behalf of our courts and civil legal services providers to enable our citizens to have access to justice.

Superstorm Sandy Relief Efforts

When Superstorm Sandy struck in late October and devastated communities in downstate New York, the State Bar's Lawyer Referral and Information Services Department responded within days by implementing an emergency hotline and recruiting volunteer attorneys to field calls from distressed residents. We quickly organized a CLE training at the Bar Center which was simultaneously webcast to more than 2,000 viewers. That program provided an overview of the legal issues that arise due to natural disasters, identified relevant state and federal relief programs and discussed best practices in client counseling in disaster relief situations. In addition, we co-sponsored other legal training programs to provide lawyers with the information they needed to assist the storm's survivors. We have also been working closely with local bar associations and legal service providers in the affected areas and holding regular conference calls to ascertain the types of assistance needed, share information on legal issues that arose, help publicize legal clinics and recruit attorney volunteers.

In conjunction with the New York Bar Foundation, we have established a fund to support local bar associations and legal services providers that have been assisting people affected by the storm. We have raised more than $60,000 for that fund and have begun the grant application process.

Conclusion

Our accomplishments this year were the result of the hard work of our officers, executive committee, committee and section chairs, members and staff, and I cannot thank them enough for their dedication and support of the Association. I have been fortunate to work with an excellent team of officers: Treasurer Claire Gutekunst, Secretary David Miranda and President-Elect David Schraver. Dave has been a tremendous partner and his leadership will take our Association to even greater heights in the coming year. In addition, our superb Executive Director Patricia Bucklin and the State Bar staff do an outstanding job of managing operations and helping us to implement the policies of our Association. Of course, all of our work is made possible by the thousands of dedicated attorney volunteers who take the time to share their expertise for the good of the profession and the public. I must give special thanks to my wife, Justice Cheryl Chambers, whose support for me has been unwavering, and thank my colleagues at The Legal Aid Society who regularly filled in for me when I was working on Bar Association matters.

It has been an honor and a privilege to be your president during such a productive and exciting year and I thank each and every member for the opportunity to have served. I look forward to continuing to work with you in the years to come as a member of the House of Delegates. ■

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May 9 — New York City

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May 9 — Long Island
June 7 — Albany
June 14 — New York City

Contested Accounting Proceedings
May 14 — Albany (9:00 a.m. – 1:00 p.m.)
May 15 — Long Island; Rochester (9:00 a.m. – 1:00 p.m.)
May 29 — Westchester (1:00 p.m. – 5:00 p.m.)
May 30 — New York City; Syracuse (9:00 a.m. – 1:00 p.m.)

Starting a Practice in New York
May 16 — New York City

Article 81 of the Mental Hygiene Law
May 17 — Albany
May 31 — New York City
June 14 — Syracuse

Practical Skills: Basic Elder Law Practice
May 20 — Long Island; Syracuse
May 21 — Westchester
May 23 — Albany; New York City
May 29 — Buffalo

HIPAA Omnibus Rule
Live & Webcast (9:00 a.m. – 11:00 a.m.)
June 5 — New York City

Ethics 2013: Who, How, Why, What (and Not): Marking a Path Through Ethical Pitfalls
(9:00 a.m. – 1:00 p.m.)
June 6 — New York City
June 10 — Rochester; Westchester
June 12 — Long Island
June 14 — Buffalo
June 24 — Albany
June 27 — Syracuse
June 28 — Ithaca

Practical Skills: Nuts and Bolts of Contract Drafting – Basic to Advanced
June 10 — Long Island
June 14 — New York City

Employment Law for the General Practitioner and Corporate Counselor
June 12 — New York City
June 19 — Albany

EASL Music Licensing
Live & Webcast (9:00 a.m. – 1:00 p.m.)
June 13 — New York City

Bridging the Gap
June 25–26 — New York City (live program)
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Demystifying ESQ

row Ethics

By Devika Kewalramani, Jason Canales and Michelle Cox

"Escrow" rhymes with "death row." This is a handy way to remember how carefully a New York lawyer should treat an escrow account.Unlike the American Bar Association Model Rules of Professional Conduct (the ABA Model Rules) and rules in other states, New York is the only state whose ethics rules specifically prescribe disciplinary action for mishandling escrow accounts.[1] In addition, New York lawyers are required to certify their familiarity with the escrow funds rule, Rule 1.15, when they biennially register to practice. Clearly, when it comes to escrow funds held by a lawyer, New York means business.

Yet, despite these specific warnings, many lawyers still run afoul of Rule 1.15. Some violations are deliberate and flagrant, but others are mere mistakes – subtle and unintentional. Irrespective of intent, however, lawyers who violate the escrow rules are exposed to censure, suspension or disbarment.

This article reviews some common ideas about what constitutes ethical conduct in handling escrow funds and suggests best practices to avoid violations.

Escrow Ethics: True or False?

As long as lawyers do not commingle client funds, they have fully complied with the escrow rules.

False: Implicit in the attorney-client relationship is a fiduciary and ethical obligation to the client to properly handle client and third-party funds by establishing and maintaining an attorney trust or escrow account. This duty is governed by specific ethics rules. Avoiding the commingling of client funds is only one of the many duties under those rules.

New York's Rule 1.15 contains strict and strongly enforced rules for escrow accounts. It has a long and detailed list of do's and don'ts. In addition to prohibiting commingling client or third-party funds with the lawyers' funds (or, of course, misappropriating them), it requires:

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- separate and specially designated accounts for escrow funds;
- notification to a client or third person upon the receipt of escrow funds;
- prompt payment from escrow accounts on proper request;
- complete and accurate record-keeping procedures;
- disbursements to be made only by New York-admitted lawyers; and
- account withdrawals to be made only to a named payee and not to cash.

he lacked venal intent.[8] Similarly, in *In re Tepper,* the First Department found that a two-year suspension was appropriate for "careless and nonvenal invasion of client funds for personal and business uses."[9]

One example of how unintentional conversion can occur is when multiple client or third-party funds are held together in a single master escrow account. Many lawyers maintain multi-client escrow accounts where the funds of different clients or third parties are commingled. Although Rule 1.15 explicitly prohibits commingling the lawyer's funds with client or third-party funds,[10] the

Even if a lawyer is not directly responsible for the mishandling of escrow funds, he or she may still be held accountable.

The Preamble to the Rules states that failing to comply with a rule is a "basis for invoking the disciplinary process."[2] This warning statement is repeated in the final section of Rule 1.15. Rule 1.15(j) cautions: "A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings."[3]

Both intentional and unintentional conversion of client funds can result in disciplinary charges.

True: When a lawyer acts with the motive or intent to convert client escrow funds and deliberately withdraws or uses such funds without the client's permission or authority, courts refer to such conduct as acting with "venal" intent.[4] The fact that the lawyer planned to return the funds does not mitigate the offense. In *In re Birnbaum*, the Appellate Division, First Department, observed, "This Court has consistently found that '[a]bsent extremely unusual mitigating circumstances,' an attorney who has intentionally misappropriated client funds is presumptively unfit to practice law and that such conduct warrants disbarment."[5]

Repayment of converted escrow funds has not been considered an "extremely unusual mitigating circumstance" and "does not excuse the wrongful conduct."[6] As stated by the Appellate Division, First Department, in *In re Baumgarten*, "[t]he fact that [a lawyer] intended to replenish the funds he utilized and did in fact pay back his clients is not relevant to the issue whether he acted with venal intent. Attorneys, such as respondent, who have intentionally converted client funds, must be disbarred."[7]

Unintentional conversion, referred to as "nonvenal," can still result in disciplinary charges. In *In re Altomerianos,* the Appellate Division, First Department, found a two-year suspension was warranted where an attorney commingled and converted escrow funds even though

rule does not require the lawyer to segregate funds of multiple clients or third parties. However, conversion of escrow funds in such joint accounts can take place if a withdrawal is made for the benefit of a client whose deposits have not yet cleared the account. In such a case, the withdrawn amount comes from funds that had been deposited on behalf of other clients or third parties. In *In re Joyce*, the Appellate Division, Second Department, suspended an attorney for three years after he issued checks from his escrow account in excess of the amount available for the client and in advance of a deposit which was to be the source of the funds, causing the checks to be cleared against other client or third-party funds.[11]

Even innocent mistakes in handling an attorney's escrow account may subject a lawyer to disciplinary proceedings. For instance, a lawyer may innocently issue a check from the attorney trust or escrow account to "cash," but this violates the rule because checks drawn on an attorney escrow account must be made payable to a named payee.[12] Although such errors can be innocuous, courts have repeatedly held that acting without venality is merely a mitigating factor in determining sanctions, but not probative of whether the lawyer has committed an ethical violation.[13]

No harm, no foul!

False: Although in violating the escrow rules a lawyer may not have harmed his client or a third person, the lawyer may still be in trouble. Courts have held that, "[i]n determining an appropriate measure of discipline to impose, we have considered the respondent's alleged lack of venal intent, the fact that he did not use the escrow funds for his own benefit, *and the lack of ultimate harm to any clients or third parties*. The [attorney] is, nevertheless, guilty of gross mismanagement of his escrow fund and failing to supervise and review his escrow account."[14]

In *In re Francis,* the grievance committee filed charges against an attorney for commingling personal funds with client escrow funds and for failing to maintain an escrow

ledger after a check drawn on his escrow account was dishonored.[15] The attorney represented mainly poor and unemployed clients and in attempting to help his clients would make mortgage and application fee payments on their behalf. The attorney also deposited personal money into the account to provide a cushion for these withdrawals. After making payments and returning fees to clients in need of money, there was a discrepancy in the escrow account which resulted in a dishonored check. Although the attorney never converted money for personal use and was helping those less fortunate, the Appellate Division, First Department, found that his "commendable intentions did not excuse his failure to familiarize himself with the rules."[16] The attorney was censured for nonvenal escrow violations under then-Disciplinary Rule 9-102(a) and (b) (the pre-2009 escrow fund rule, which was substantially similar to the current rule, Rule 1.15).[17]

Rule 1.15 covers only client funds held in escrow, not funds of third persons held in escrow.

False: Rule 1.15 is applicable both to funds held in escrow for clients and funds held in escrow for third persons. The account establishment, maintenance, segregation, notification and recordkeeping duties for funds held in escrow for clients also apply to funds held in escrow for third persons.[18] Holding the funds of a third party in an attorney escrow account creates a fiduciary duty to those parties as well as to clients.

If one partner in a firm violates an escrow fund ethics rule, the other partners are not responsible.

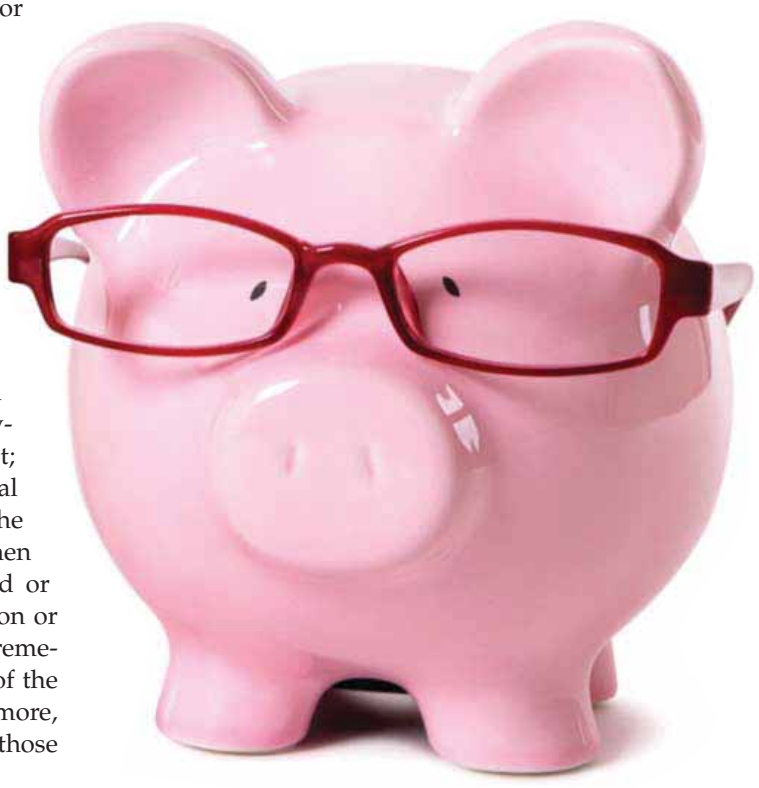
False. Even if a lawyer is not directly responsible for the mishandling of escrow funds, he or she may still be held accountable under Rule 5.1, which is titled "Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers."

Rule 5.1(a)–(c) requires law firms and lawyers with management responsibility and direct supervisory authority over other firm lawyers to make reasonable efforts to ensure that all lawyers in the firm conform to the Rules and to adequately supervise the work of partners and associates, as appropriate. Rule 5.1(d) imposes personal responsibility on the lawyer for an ethical violation by another lawyer if the supervising lawyer (1) orders, directs or ratifies the specific conduct; or (2) is a partner, possesses comparable managerial responsibility or has supervisory authority over the other lawyer and (i) knows of such conduct when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action or (ii) should know of the conduct so that reasonable remedial action could be taken when the consequences of the conduct could be avoided or mitigated.[19] Furthermore, New York Rules, unlike the ABA Model Rules and those of some other states, also place responsibility on the law firm itself for the unethical conduct of its lawyers.

In *In re Cardoso*, an attorney was found guilty of professional misconduct for failing to review for irregularities the financial and bookkeeping records of his firm after his partner deposited and withdrew personal funds into the attorney escrow account for personal use, including making payments to himself and to his brother. After discovering the improprieties, the attorney dissolved the partnership and contacted the grievance committee.[20] The Appellate Division, Second Department, held that, as a partner in the law firm, he had "a responsibility to oversee his partner's handling of the escrow account."[21] The absence of venal intent does not excuse the failure to properly monitor an escrow account, although it can be a mitigating factor in the severity of the sanction imposed.[22]

If lawyers delegate their fiduciary duties to suitably qualified non-lawyers, such as bookkeepers or paralegals, and a mistake is made, they will not be held accountable.

False. Similar to Rule 5.1, which imposes ethical responsibility for the conduct of other lawyers, Rule 5.3 imposes ethical responsibility for the conduct of non-lawyers ("Lawyer's Responsibility for Conduct of Nonlawyers"). Rule 5.3(a) requires law firms and lawyers with direct supervisory authority to adequately supervise the work of non-lawyers. Its structure parallels that of Rule 5.1: Rule 5.3(b) imposes personal responsibility on the



lawyer for a violation of the Rules committed by a non-lawyer retained by or associated with the lawyer if the lawyer (1) orders, directs or ratifies the specific conduct or (2) is a partner, possesses comparable managerial responsibility or has supervisory authority over the non-lawyer and (i) knows of such conduct when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action or (ii) should know of the conduct so that reasonable remedial action could be taken when the consequences of the conduct could be avoided or mitigated.[23]

The lawyer's fiduciary and ethical duty to clients and third parties to safeguard escrow funds cannot be delegated away. While lawyers may have non-legal personnel deal with escrow funds, failing adequately to supervise the non-lawyers is in itself a violation of the Rules,[24] and any misuse or conversion of escrow funds by the non-lawyers may be deemed a breach of that duty by the lawyer. By way of example, in *In re Iaquinta-Snigur,* the Appellate Division, Second Department, suspended an attorney for three years for, among other things, "[failing] to adequately supervise, oversee, inspect, or examine the foregoing work of her nonlawyer staff during the aforesaid period, thereby contributing to numerous account errors, anomalies, and fiduciary improprieties that occurred in connection with that account during that time."[25]

Merely giving access to a lawyer's escrow account to non-lawyers is not prohibited. Only a lawyer may control and be a signatory to an escrow account, but a New York State Bar Opinion concluded that a paralegal, under the close supervision of an attorney, may properly be delegated the use of a signature stamp to execute transactions from an escrow account.[26] However, the attorney can be held responsible for inadequate supervision in any wrongdoing committed by the subordinate.

In *In re Galasso*, the Court of Appeals affirmed sanctions for a lawyer's failure to monitor and properly supervise his non-lawyer brother, who was the bookkeeper for the law practice. The brother converted funds from an escrow account after altering the account application to include himself as a signatory.[27] Finding that the lawyer "ceded an unacceptable level of control"[28] over the account to a non-lawyer, the Court held that the lawyer thereby created the opportunity for misuse of the escrow funds and violated the Rules.

The most prudent way to prevent ethical violations resulting from non-lawyer access to escrow funds is diligent lawyer supervision, monitoring and management.

Escrow violations arise only in small or solo law practices and lead only to disciplinary charges.

False: Law firms of all sizes are at risk. Law firms that have transactional or commercial practices, such as real estate, may be at greater risk of an escrow violation because they routinely hold funds belonging to the client or others. In addition, the consequences can go beyond disciplinary sanctions. Misappropriation of client escrow funds can result in civil liability to the client; even criminal charges are possible.[29]

Best Practices

Segregate, Segregate, Segregate

Although the Rules do not require that attorneys maintain separate escrow accounts for each client and permit client and third-party funds to be held in a single master escrow account, segregating escrow funds into separate accounts ensures that no client's funds are used for the benefit of another client. If the lawyer is unable to open separate accounts for each client or third party, the lawyer should keep scrupulous and detailed records of deposits into and withdrawals from the master escrow account.

Records, Records, Records

Key to avoiding escrow issues is implementing a standardized recordkeeping process. Lawyers should keep detailed records of dates of deposits and withdrawals to ensure that funds withdrawn are already available. Although Rule 1.15 requires only notification of receipt of funds, lawyers may want to make it a practice to give written notification to the client of payments or disbursements being made from the escrow account on the client's behalf.

Another good practice is to regularly reconcile escrow account records and monitor accounts, particularly if a lawyer has delegated this access or control over the funds to another lawyer or non-lawyer employee. In California, for example, lawyers are required to keep records of deposits, disbursements, sources of funds, balances of bank accounts, bank statements and canceled checks.[30] Each month, lawyers are required to reconcile these records with one another. Although monthly reconciliation is not specifically required in New York, a monthly reconciliation of records associated with the lawyer escrow accounts may help prevent inadvertent mistakes and also assist in promptly identifying any mishaps so that they can be quickly remedied. In addition, lawyers should have their records periodically audited by outside accountants to make sure that their records are in order, thereby reducing the possibility of violating Rule 1.15.

Supervise, Supervise, Supervise

As noted above, while a non-lawyer is prohibited from being a signatory on an attorney escrow account, non-lawyers may be permitted to stamp the lawyer's signature. To reduce the likelihood of misuse or abuse of the signature stamp, lawyers should restrict or limit access to the signature stamp, providing access only upon review or approval of the documentation requiring the stamp. Providing periodic training for non-lawyers can also help reduce or avoid mistakes in the proper handling of escrow funds and accounts.

Finally, when it comes to your escrow accounts, do not trust anyone but yourself. As emphasized by the Court of Appeals in *Galasso*, "[i]t is the ethical responsibility of the attorney – not the bookkeeper, the office manager or the accountant – to safeguard client funds."[31] Attorneys should implement appropriate practices and procedures to ensure that lawyers and non-lawyers who have access to their firm's escrow account are always acting in compliance with the Rules.

Conclusion: Escrow Accounts Require Continual Attention

Dealing with attorney escrow accounts requires complete honesty, but complete honesty is not enough. Care must be taken in the structure and handling of escrow accounts, including active supervision and monitoring if escrow duties are delegated. Anything less is inviting serious trouble. ■

1. New York Rules of Professional Conduct Rule 1.15(j) (the Rules or NYRPC).
2. NYRPC Preamble.
3. NYRPC Rule 1.15(j).
4. *In re Squitieri*, 88 A.D.3d 380, 382 (1st Dep't 2011).
5. *In re Birnbaum*, 308 A.D.2d 180, 183 (1st Dep't 2003).
6. *Id.* (citing *In re Landau*, 180 A.D.2d 257, 258 (1st Dep't 1992) ("Ultimate repayment of the misappropriated funds does not excuse the wrongful conduct.").
7. *In re Baumgarten*, 236 A.D.2d 30, 34 (1st Dep't 1997) (citing *In re Glazer*, 218 A.D.2d 411, 413 (1st Dep't 1996)). *See also In re Kirschenbaum*, 29 A.D.3d 96, 101 (1st Dep't 2006) ("the fact that he intended to and did in fact repay the funds, does not negate venal intent").
8. *In re Altomerianos*, 559 N.Y.S.2d 712, 717 (1st Dep't 1990).
9. *In re Tepper*, 286 A.D.2d 79, 81 (1st Dep't 2001).
10. NYRPC Rule 1.15(a).
11. *In re Joyce*, 236 A.D.2d 116 (2d Dep't 1997).
12. *In re Abbatine*, 263 A.D.2d 228, 231 (2d Dep't 1999).
13. *See In re Galasso*, 19 N.Y.3d 688, 694 (2012).
14. *In re Joyce*, 236 A.D.2d at 121 (emphasis added). *See also In re Klugerman*, 189 A.D.2d 284 (1st Dep't 1993).
15. *In re Francis*, 78 A.D.3d 106, 107 (1st Dep't 2010).
16. *Id.* at 109.
17. Roy Simon, *Comparing the New NY Rules of Professional Conduct to the NY Code of Professional Responsibility* (2009) *at* http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/CorrelationtableofnewNYrules.pdf.
18. *See* NYRPC Rule 1.15 (c), (d).
19. NYRPC Rule 5.1.
20. *In re Cardoso*, 152 A.D.2d 157 (2d Dep't 1989).
21. *Id.* at 159.
22. *In re White*, 9 A.D.3d 163, 165 (2d Dep't 2004).
23. NYRPC Rule 5.3.
24. *Id.*
25. *In re Iaquinta-Snigur*, 30 A.D.3d 67, 76 (2d Dep't 2006).
26. NY State Bar Ass'n, NY Comm. on Prof'l Ethics, Op. 693 (Aug. 22, 1997).
27. *See In re Galasso*, 19 N.Y.3d 688 (2012).
28. *Id.* at 694.
29. Ashley Post, *Crowell & Moring Faces Third Lawsuit Tied to Former Employee's Theft*, Inside Counsel, Nov. 18, 2011, http://www.insidecounsel.com/2011/11/18/crowell-moring-faces-third-lawsuit-tied-to-former; *see also* Leigh Jones, *Crowell & Moring Settles $5.5 Mln Suit Involving Fugitive Lawyer*, Thomson Reuter, http://newsandinsight.thomsonreuters.com/Legal/News/2011/12_-_December/Crowell___Moring_settles_$5_5_mln_suit_involving_fugitive_lawyer/.
30. *See* Cal. Rules of Prof'l Conduct R. 4-100 Standard (d).
31. *Galasso*, 19 N.Y.3d at 694.

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for over 25 years and is of counsel to Ressler & Ressler in New York City. He is the author of New York Civil Disclosure and Bender's New York Evidence (both by LexisNexis), as well as the 2008 and 2013 Supplements (to be issued June 2013) to Fisch on New York Evidence (Lond Publications). Mr. Horowitz teaches New York Practice at Columbia Law School, and Professional Responsibility and Electronic Evidence & Disclosure at Brooklyn Law School. In addition to presenting NYSBA's Annual CPLR Update Program statewide, he serves on the Office of Court Administration's CPLR Advisory Committee, as Associate Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee, and is a frequent lecturer and writer on these subjects.

"No Role Means No Role"

Introduction

As readers of this column are no doubt painfully aware, I have been obsessed with a 2010 decision from the Fourth Department, *Thompson v. Mather*,[1] wherein a unanimous panel of that court, in a memorandum opinion, 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.[2]

In short, counsel for the non-party has no role to play.

The first trial level decision to apply *Thompson*, in 2011, was *Sciara v. Surgical Associates of Western New York, P.C.*,[3] where Justice Curran, while agreeing that *Thompson* did not permit counsel for a non-party witness to "actively participate" in the deposition, held that

> . . . *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." 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.
>
> * * *
>
> Based on the above, the request by Dr. Chopra's counsel to "actively" participate and represent his client's interests during the deposition is denied. Rather, his role during the deposition is limited to the situations governed by Uniform Rules §§ 221.2 and 221.3.[4]

In short, no role could not possibly mean no role.

On March 15, 2013, the Fourth Department decided the appeal of Justice Curran's order in *Sciara*. By a 3-2 decision, the majority held that counsel for the non-party may not participate in the deposition in a limited manner based upon §§ 221.2 and 221.3, but affirmed the right of the non-party to seek a protective order.[5]

In short, no role means no role.

The *Sciara* decision is important for two reasons. First, in affirming *Thompson* and eschewing any carve-out for privilege or other sensitive matter, the Fourth Department decision, which I believe is controlling statewide,[6] represents a significant change in the practice of conducting and defending non-party depositions from what had been accepted as the norm by the vast majority of attorneys in the state, *to wit*, that counsel for the non-party had the right to participate in the deposition in the same manner as counsel for a party. Second, the majority and dissenting opinions offer alternative views on how to resolve the tension between a statute, the CPLR, and a regulation, the Uniform Rules for the Trial Courts, when the two are, or appear to be, in conflict.

The Majority's Opinion

The majority's opinion was short and to the point:

> As we stated in *Thompson*, "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," and it is axiomatic that counsel for a nonparty witness is not permitted to object or otherwise participate in a trial. We recognize that 22 NYCRR 221.2 and 221.3 may be viewed as being in conflict with CPLR 3113(c) inas-

much as sections 221.2 and 221.3 provide that an "attorney" may not interrupt a deposition except in specified circumstances. Nevertheless, it is well established that, in the event of a conflict between a statute and a regulation, the statute controls.

refers to objections "made by any of the *parties* during the course of the deposition" (emphasis added). Here, the deposition was not taken pursuant to that rule, but rather was taken pursuant to 22 NYCRR part 221, entitled Uniform Rules for the Conduct of Depositions, which

guage of a statute is ambiguous or uncertain, the construction placed on it by contemporaries . . . will be given considerable weight in its interpretation," as in the case of a practical construction that has received general acquiescence for a long period of time. In that regard,

Sciara represents a significant change in the practice of conducting and defending non-party depositions, *to wit*, that counsel for the non-party had the right to participate in the deposition in the same manner as counsel for a party.

We also recognize the practical difficulties that may arise in connection with a nonparty deposition, which also have been the subject of legal commentaries. However, we decline to depart from our conclusion in *Thompson* that the express language of CPLR 3113(c) prohibits the participation of the attorney for a nonparty witness during the deposition of his or her client. We further note, however, that the nonparty has the right to seek a protective order, if necessary.[7]

The Dissent's Opinion

The dissenting Justices would have affirmed Justice Curran's holding:

> We respectfully dissent in part because we cannot agree with the majority that Supreme Court erred in granting in part the cross motion of Usha Chopra, M.D. (respondent), a nonparty, by permitting respondent's counsel to participate in a limited fashion during plaintiffs' continued deposition of respondent. We therefore would affirm the order. The majority relies on the statement of this Court in *Thompson v Mather* that "counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pretrial deposition." We note that *Thompson* involved 22 NYCRR 202.15, which concerns the videotaping of deposition testimony that may be filed with the clerk of the trial court and specifically

permits *deponents*, not merely "parties," to raise objections during the course of the deposition. We note that, in *Thompson*, the plaintiff moved for an order precluding the nonparty deponent's counsel from objecting to the videotaped trial testimony "except as to privileged matters or in the event that she were to deem questioning to be abusive or harassing." Thus, even the plaintiff's counsel in *Thompson* recognized that a nonparty has certain rights at the deposition.

The majority also relies, as did this Court in *Thompson*, on CPLR 3113(c), which provides that the examination and cross-examination of deposition witnesses "shall proceed as permitted in the trial of actions in open court." The majority thus concludes that, because counsel for a nonparty witness is not permitted to object or otherwise to participate at a trial, counsel for the nonparty witness likewise is not permitted to object or otherwise participate at the nonparty's deposition. The majority believes that there is a conflict between CPLR 3113(c) and 22 NYCRR 221.2 and 221.3, which regulations permit an "attorney" to interrupt a deposition in specified circumstances.

We do not believe that CPLR 3113(c) must be interpreted in a manner that establishes a conflict with the Uniform Rules for the New York State Trial Courts. "Where the lan-

CPLR 3113(c), which became effective in 1963 with the adoption of the CPLR in place of the prior Civil Practice Act, does not have a direct corollary in the Civil Practice Act. Former section 202 of the Civil Practice Act discusses the "[m]anner of taking testimony" in a deposition, but there is no identical predecessor to CPLR 3113(c).

The rules in question here, namely, 22 NYCRR 221.1 and 221.2, became effective in 1986,[8] approximately 23 years after the adoption of CPLR 3113(c). As one commentator has stated, numerous cases over the years addressing issues arising at depositions of nonparties have noted, without comment or criticism, the active participation of counsel for the nonparty at the deposition (David Paul Horowitz, *May I Please Say Something*, 83 NY St BJ 82, 83 [July/Aug. 2011], citing *Horowitz v Upjohn Co.*, 149 AD2d 467). We can only presume that the Chief Administrator of the Courts was aware of CPLR 3113(c) when the Uniform Rules regarding depositions were adopted and that the Chief Administrator would not create a direct conflict with a statute.

The long-standing practice of counsel for a nonparty witness objecting at a deposition is exemplified by the Second Department's decision in *Horowitz*. There, the Second Department stated that the nonparty witness, a partner

of the defendant physicians at the time the infant plaintiff's mother was their patient, was entitled to refuse to answer questions that sought testimony in the nature of opinion evidence. There was no discussion of CPLR 3113(c) or the rules. The relief fashioned by the Second Department "was favorable *to the objections raised by counsel for the non[]party at the deposition*. The Second Department evinced no problem with the participation of counsel for the nonparty at the deposition, thereby, at the very least impliedly countenancing the practice" (Horowitz, 83 NY St BJ at 83 [emphasis added]).

In our view, the result reached by the court here was reasonable. It is beyond cavil that trial courts have broad discretion in supervising discovery. For example, CPLR 3101(b) provides that, "[u]pon objection by a person entitled to assert the privilege, privileged matters should not be obtainable." That section suggests that a nonparty may not be required to disclose privileged matter whether it be at a deposition or at trial. The question of what constitutes "privileged matter" is a significant legal one and we fail to see how a nonparty witness at a deposition, without the benefit of counsel, would be so knowledgeable as to assert the privilege in the appropriate circumstance. Similarly, CPLR 3103(a) authorizes a court, on its own initiative, "or on motion of any party or of any person from whom discovery is sought," to issue a protective order denying, limiting, conditioning or regulating the use of any disclosure device. That section similarly would allow a nonparty witness, as "any person from whom discovery is sought," to seek a protective order conditioning the use of a deposition by allowing the nonparty to have counsel at the deposition for the purpose of raising appropriate objections.

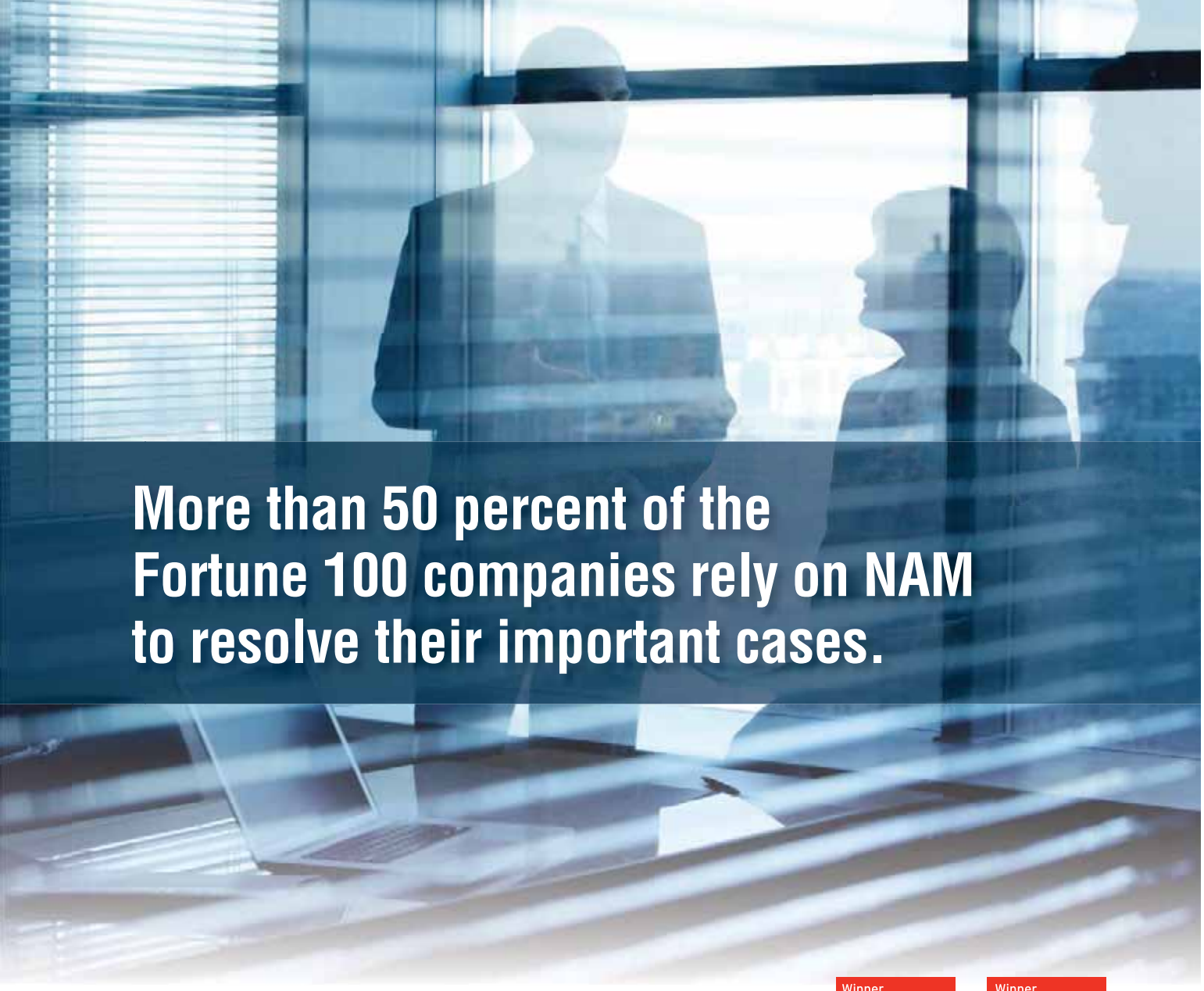
There is also the practical question faced by a nonparty at the deposition, when the statute of limitations has not yet run against that nonparty. Indeed, the decision in *Thompson* encourages a plaintiff, faced with commencing an action against several defendants, whether in the medical malpractice realm or some other area of law, to name the seemingly least culpable party as a defendant and depose ostensibly more culpable parties, with the idea that information, perhaps incriminating and always under oath, may be gleaned from the "nonparties" who do not have the right to have counsel present.

In conclusion, we do not believe that there is a direct and obvious conflict between CPLR 3113(c) and the Uniform Rules, and we further conclude that the court did not abuse its discretion in allowing the nonparty witness here to have counsel present at the deposition for a limited purpose. We therefore would affirm the order.[9]

Conclusion

For the 2013 legislative session, the OCA CPLR Advisory Committee has once again proposed a bill to legislatively overturn *Thompson*. The bill was drafted prior to the release of the decision in *Sciara*, which by rejecting a narrow carve-out for privilege, adds additional support for those in favor of the proposed legislation. Whether the proposed bill, or others like it, gain any traction this spring is beyond my prognosticative abilities. What I can say with certainty is that "no role means no role," and that everyone should put aside all legal work and enjoy Memorial Day weekend! ■

1. 70 A.D.3d 1436 (4th Dep't 2010).
2. *Id*.
3. 32 Misc. 3d 904 (Sup. Ct., Erie Co. 2011).
4. *Id*. at 913–14 (citations omitted).
5. *Sciara v. Surgical Assocs. of W. N.Y., P.C.*, 2013 WL 1064824, 2013 N.Y. Slip Op. 01741 (4th Dep't 2013). The Fourth Department also issued a memorandum decision that same day affirming the grant of "defendants' motion seeking a court appointed referee to supervise any future depositions in this matter." *Sciara v. Surgical Assocs. of W. N.Y., P.C.*, 2013 WL 1064827, 2013 N.Y. Slip Op. 01742 (4th Dep't 2013)
6. *See Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663 (2d Dep't 1984).
7. *Sciara*, 2013 N.Y. Slip Op. 01741 (citations omitted, emphasis added).
8. 2006.
9. *Sciara*, 2013 N.Y. Slip Op. 01741 (most citations omitted).



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Hon. John M. Curran is a Justice of the Supreme Court in Erie County. He currently presides over the Medical Malpractice Part and previously served as the Justice presiding over the Eighth Judicial District Commercial Division. He serves as chairman of the education subcommittee for the New York court system's Electronic Discovery Working Group and was the primary draftsman of its *Bench Book for Electronic Discovery*.

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Gremlins and Glitches

Using Electronic Health Records at Trial

By Hon. John M. Curran and Mark A. Berman

Electronic health record (EHR) systems are computerized systems that medical practices are implementing to replace traditional paper record-keeping.[1] EHR systems combine the functions of scheduling and claims, as well as information about all clinical events, including, for instance, a patient's original complaint on admission, "history," progress notes, course of treatment, and discharge, into one integrated electronic system. Individuals with appropriate access privileges can view and modify a patient's record. A physician using an EHR system can send electronic messages and is able to electronically transmit diagnostic test images, results and reports.

The New York Times[2] recently reported that

> [t]he case for electronic medical records is compelling: They can make health care more efficient and less expensive, and improve the quality of care by making patients' medical history easily accessible to all who treat them.

The above description merely scratches the surface of the benefits EHRs may provide to the medical profession. To a litigator, however, EHR systems provide a "treasure trove" of discoverable evidence. Indeed, also noted in the *Times*,

> as health care providers adopt electronic records, the challenges have proved daunting, with a potential for mix-ups and confusion that can be frustrating, costly and even dangerous.[3]

Attorneys must be aware of the electronically stored information (ESI) that is maintained as part of an EHR system. If you are a plaintiff's attorney, you will need to make a demand for all such relevant ESI, and then you need to ensure that all of it is produced. A plaintiff's medical expert is an excellent resource to use in crafting a document demand seeking such particularized information. If you are defense counsel, you also need to know what ESI is maintained and to determine, in addition to the review required to assess your client's liability, whether

there are any problems with the "integrity" or "quality" of your client's ESI. *The New York Times* noted that

> [a] recent study commissioned by the government sketches the magnitude of the problem [in the electronic systems], calling for tools to report problems and to prevent them.
>
> Based on error rates in other industries, the report estimates that if and when electronic health records are fully adopted, they could be linked to at least 60,000 adverse events a year.[4]

As discussed below, the recent appellate decision in *Karam v. Adirondack Neurosurgical Specialists, P.C.*[5] highlights issues that counsel must consider when reviewing ESI maintained by an EHR system, and how to utilize such ESI at trial.

The *Karam* Decision

In *Karam*, the Fourth Department affirmed a defense verdict dismissing a medical malpractice action. The decision refers to testimony that the hospital's electronic records were likely incorrect because the hospital's computer system sometimes appeared "as if there were gremlins" in it.

According to hospital records, the decedent was admitted at 10:26 a.m. and examined by an emergency room (ER) physician at 11:01 a.m. A CT scan was performed between 11:39 a.m. and 11:46 a.m., which revealed a subdural hematoma. At 12:05 p.m., the ER physician advised the neurosurgeon on call of the decedent's hematoma, but that the decedent was otherwise neurologically normal. At 12:58 p.m., after learning of the deterioration of the decedent's neurological condition, the ER physician once again contacted the neurosurgeon. The neurosurgeon ordered another CT scan, which showed that the hematoma was becoming significantly worse.

The trial focused on the time when the decedent began to deteriorate neurologically. A nurse's note, reportedly made at 11:23 a.m., indicated that the decedent was vomiting and complaining of a severe headache. Apparently entered at the same time, the note also indicated that decedent's speech was "clear" and "normal." Several witnesses testified that the decedent began to deteriorate between 11:00 a.m. and 11:30 a.m. The plaintiff claimed that the hospital and ER physician were negligent in failing to apprise the neurosurgeon in a timely manner of changes in the decedent's condition.

On the plaintiff's side, the nurse, when cross-examined by the hospital's attorney, testified that the hospital's new computer system had "gremlins in it." The ER physician testified on cross-examination that the 11:23 a.m. entry, in fact, may have been made at 12:35 p.m. The hospital's counsel admitted that, by procuring such testimony from the physician, he was impeaching the hospital's own record.

The court denied the plaintiff's request for a cautionary instruction that any belated evidence concerning computer "gremlins" should be disregarded by the jury. Concomitantly, the trial court denied defendants' request to permit evidence of an "audit trail" of the computer system seeking to establish that much of the 11:23 a.m. nurse's note was made at a later time. Plaintiff's counsel did not request a mistrial and opposed defense's request for a mistrial, which was denied.

> The hospital's computer system sometimes appeared "as if there were gremlins" in it.

The Appellate Division concluded, among other things, that the plaintiff failed to preserve her contention that she was denied a fair trial by defendants' presentation of evidence regarding the computer problems with respect to the 11:23 a.m. note because the plaintiff had failed to seek an adjournment of the trial or a mistrial. With respect to the computer "gremlins," the plaintiff argued on appeal that she had been victimized by "unfair surprise" and "trial by ambush" committed by defense counsel. The issues on appeal were whether (1) defense counsel must have "known" prior to trial that the hospital's EHRs were incorrect or incomplete; (2) defense counsel had an obligation, pursuant to CPLR 3101(h), to amend or supplement its previous production of the "erroneous" EHRs; and (3) plaintiff's counsel was on notice of inconsistencies in the EHRs and thereafter failed to pursue discovery on this issue. The Appellate Division never reached these issues, however, because it concluded that no error on this point had been preserved.

Problems with EHRs highlighted by *Karam* were foreshadowed in *Lobiondo v. Leitman*,[6] where a non-party's electronic medical records produced to the plaintiff and defendant during discovery each differed, which then differed from the records produced pursuant to subpoena for trial. The trial court granted the plaintiff a mistrial and then post-trial held that the health care professional

> was unable to account for the significant discrepancies among the three versions or account for the existence of three separate versions, and had no knowledge as to who imputed, generated or printed the information in those records or when they were inputted. . . .
>
> Tsolis' [the owner of the health care provider producing the records] inability to account for the contradictory and materially different versions of the same purported records, other than to surmise that the existence of three sets containing markedly different information may be attributable to a "computer glitch" caused by a virus . . . and that the information may have been changed subsequently to its original entry, leads this Court to conclude that none of the computer records of any of the three versions are reliable as business records.

The ESI Issues

The arguments raised on appeal in *Karam* highlight significant ESI disclosure and evidentiary issues. The plaintiff argued, but had no direct evidence, that counsel must have "known" prior to trial of the computer "gremlins" and the EHRs' inaccuracy, and that this could not have been a sudden revelation given his cross-examination of his client's own nurse and ER physician. Assuming *arguendo* that defense counsel "knew" of the problem on the eve of trial or during trial, CPLR 3101(h) provides that the party discovering the problem "shall not thereupon be precluded from introducing evidence at the trial solely on grounds of non-compliance with this subdivision." Under those circumstances, CPLR 3101(h) provides that, upon motion, "the court may make whatever order may be just," which presumably could include a mistrial, an adjournment, sanctions, or a curative instruction to the jury. Issues arising under CPLR 3101(h) are left to the sound discretion of the trial court.[7] Thus, where counsel fails to seek such an order, preclusion of "gremlin"-type evidence may not be authorized by CPLR 3101(h), and without such order, the plaintiff, when appealing this issue, would have to overcome the heightened abuse-of-discretion standard.

Where counsel fails to seek such an order, preclusion of "gremlin"-type evidence may not be authorized by CPLR 3101(h).

Defense counsel's position that it was allegedly clear that something was amiss with the timed entries in his clients' EHRs and that plaintiff's counsel failed to pursue purported discrepancies during discovery also raises important disclosure issues. In medical malpractice litigation, the ramifications of this argument are significant. This would require that the plaintiffs' bar conduct invasive and expensive discovery to confirm the accuracy of entries contained in EHRs. Moreover, because the law in New York is that the producing party presumptively bears the cost of an ESI production,[8] it is unlikely that hospitals and physicians would want to be subject to such probing and expensive discovery.

A further concern is the hospital's argument that its certification does not vouch for the accuracy and correctness of each entry in its records. This raises the issue of the evidentiary use of medical records and the intersection of CPLR 2306 (hospital records), 3122-a (certification of business records), 4518(c) (business records – other records) and 4539 (reproductions of originals).

CPLR 2306 and 3122-a both obviate the necessity of producing original records and, often, the need for testimony from a records custodian. Under CPLR 2306, the hospital certifies the records as "correct" and CPLR 3122-a(a)(2) and (3) require a certification that the documents are "complete" and "accurate versions of the documents described in the subpoena duces tecum" after "reasonable inquiry." CPLR 3122-a then sets forth the content of the required certification. A standard form of certification from a hospital provides, in pertinent part, that

> the attached hospital records rendered by said hospital are photocopies of the original record and that said records of hospital herein were "made in the regular course of business of said hospital and were made at the time of such transaction or event recorded or reasonable time thereafter."[9]

There is ordinarily nothing in the certification stating that the information is "accurate."[10]

However, CPLR 4518(c), which governs the business records exception to the hearsay rule, provides that "hospital records" produced with a certification, pursuant to CPLR 2306, "are admissible in evidence under this rule and are prima facie evidence of the facts contained therein." In accordance with CPLR 2306, the Court of Appeals, in *Commissioner of Social Services v. Philip De G.*,[11] held that hospital records introduced pursuant to this section are "prima facie evidence of the facts stated." *Philip De G.* held that "[i]n the absence of contradictory evidence, these hospital entries were sufficient to permit but not require the trier of fact to find in accordance with the record . . . ."[12]

CPLR 4539(b) also needs to be complied with. It provides that

> [a] reproduction created by any process which stores an image of any writing, entry, print or representation and which does not permit additions, deletions, or changes without leaving a record of such additions, deletions, or changes, when authenticated by competent testimony or affidavit which shall include the manner or method by which tampering or degradation of the reproduction is prevented, shall be as admissible in evidence as the original.[13]

While not specifically covered by CPLR 2306, physician office records, qualifying for treatment under CPLR 4518, appear to be subject to an analysis similar to that of hospital records.[14] Under CPLR 4518(a), certified or authenticated business records, including physician office records, are deemed to be "admissible into evidence in proof of that act, transaction, occurrence or event." The business records exception to the hearsay rule is founded upon the trustworthiness and reliability of the information contained in the business record.[15] Thus, entries in a physician's office records also are, likewise, "presumed" to be true.

The point is that once hospital records and physician office records are admitted into evidence upon certification, disputes over the "accuracy" of the entries go to their

weight. However, the question is now whether hospitals and physicians are presently able, in the first instance, to certify the "accuracy" of information contained in their EHRs and, if not, that is a problem for the Bar. The *Karam* decision, highlighting the potential for "gremlins," puts lawyers on notice to probe these issues.[16]

Lessons From "Gremlins" and "Glitches"

The first lesson is that lawyers and the courts must continue their adjustment to problems associated with e-discovery and the admissibility of ESI, including medical records, as systems are converted into an electronic format. Hybrid record keeping, involving both paper and electronic records, will continue until the national conversion to EHRs is complete, which may not be for years. Lawyers and the courts will have to continue to grapple with the ripple effect of this difficult conversion process and, thus, the inevitable problems and "glitches" that result. The bottom line, however, is that all sides and parties involved in litigation want the same result: accurate medical records so that cases are decided on the merits and not due to erroneous ESI.

The second lesson is that there must be cooperation among the plaintiffs' lawyers, defense lawyers and health professionals because they are faced with the same issues. Both plaintiff and defense lawyers will be burdened with difficult and expensive ESI production and evidentiary issues during discovery and at trial which, in the absence of cooperation, will delay litigation and, more important, potentially subvert justice through a jury verdict predicated on erroneous ESI. Likewise, the medical community must understand the benefits of transparency if it does not want to burden its professionals with having to testify concerning computer "gremlins," which raise costly reputational and credibility issues. The health care profession cannot ignore the need to ensure accurate reporting of information and the legal community's need for admissible evidence.

The third lesson is that the plaintiffs' lawyers need to ensure that they have been provided with accurate and complete medical records and communications in response to a document demand, subpoena or patient authorization. In medical malpractice actions, when health care professionals are defendants, this can be addressed, at least in part, through notices to admit served early in a case. The notice may seek an admission that entries are true and accurate, and that they occurred at the time and date reported. If a certification addressing the issues set forth in CPLR 4539(b) has not been provided, the notice may also inquire whether the entries have not been amended, supplemented, changed, tampered with or degraded since first made. Anything other than a total admission would require expensive and extensive follow-up.

For defendants' lawyers, they too will want to ensure that their client can vouch for the accuracy of their computerized EHRs. If, upon inquiry with the client, the client is unable to admit to the accuracy of its records, defense counsel will need to conduct inquiry as to why and to then ensure that responses are accurate and complete, as well as timely (and supplemented, as appropriate). Pointed inquiries to health care professionals about the "quality" or "integrity" of their EHRs would significantly ease disclosure and evidentiary problems. The "gremlins" in *Karam* suggest that producing medical records without "true" consideration of their accuracy and relying solely upon a client's certification may be insufficient.

Conclusion

Commercial litigation lawyers have been forced to learn how costly and time consuming e-discovery can be, let alone that a mistake in the production of ESI can be outcome determinative. Now, lawyers and their clients in the tort context need to be versant in e-discovery and would be well served by cooperating in the production of EHRs and their admission into evidence and not to take advantage of computer "glitches." Lawyers and the courts need to find ways to deal with "gremlins" proactively, with the least expense and delay possible to ensure that justice is served. ■

1. This is one of the goals of the Health Information Technology for Economic Clinical Health Act, 42 U.S.C. §§ 201 *et seq.*, a subset of the American Recovery and Reinvestment Act of 2009, 123 Stat. 115.

2. Milt Freudenheim, *The Ups and Downs of Electronic Medical Records*, N.Y. Times, Oct. 8, 2012.

3. *Id.*

4. *Id.*

5. 93 A.D.3d 1260 (4th Dep't), *reargument denied*, 96 A.D.3d 1513 (4th Dep't), *lv. denied*, 19 N.Y.3d 812 (2012).

6. Index No. 10037/04 (Sup. Ct., Queens Co. Sept. 25, 2007).

7. *Frenk v. Frederick*, 38 A.D.3d 593 (2d Dep't 2007).

8. *U.S. Bank N.A. v. Greenpoint Mortg. Funding, Inc.*, 94 A.D.3d 58 (1st Dep't 2012).

9. The quoted language comes from an actual certification provided by a hospital which produced medical records in an actual medical malpractice case presided over by one of the authors of this article, Justice Curran.

10. CPLR 4518(a) provides, in part, that the "court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record." *See Palisades Collection v. Kedik*, 67 A.D.3d 1329 (4th Dep't 2009) (affidavit did not establish "when, how, or by whom the electronic spreadsheet submitted in paper form was made" and did not establish that it was a "true and accurate representation of the electronic record kept by plaintiff").

11. 59 N.Y.2d 137, 140 (1983).

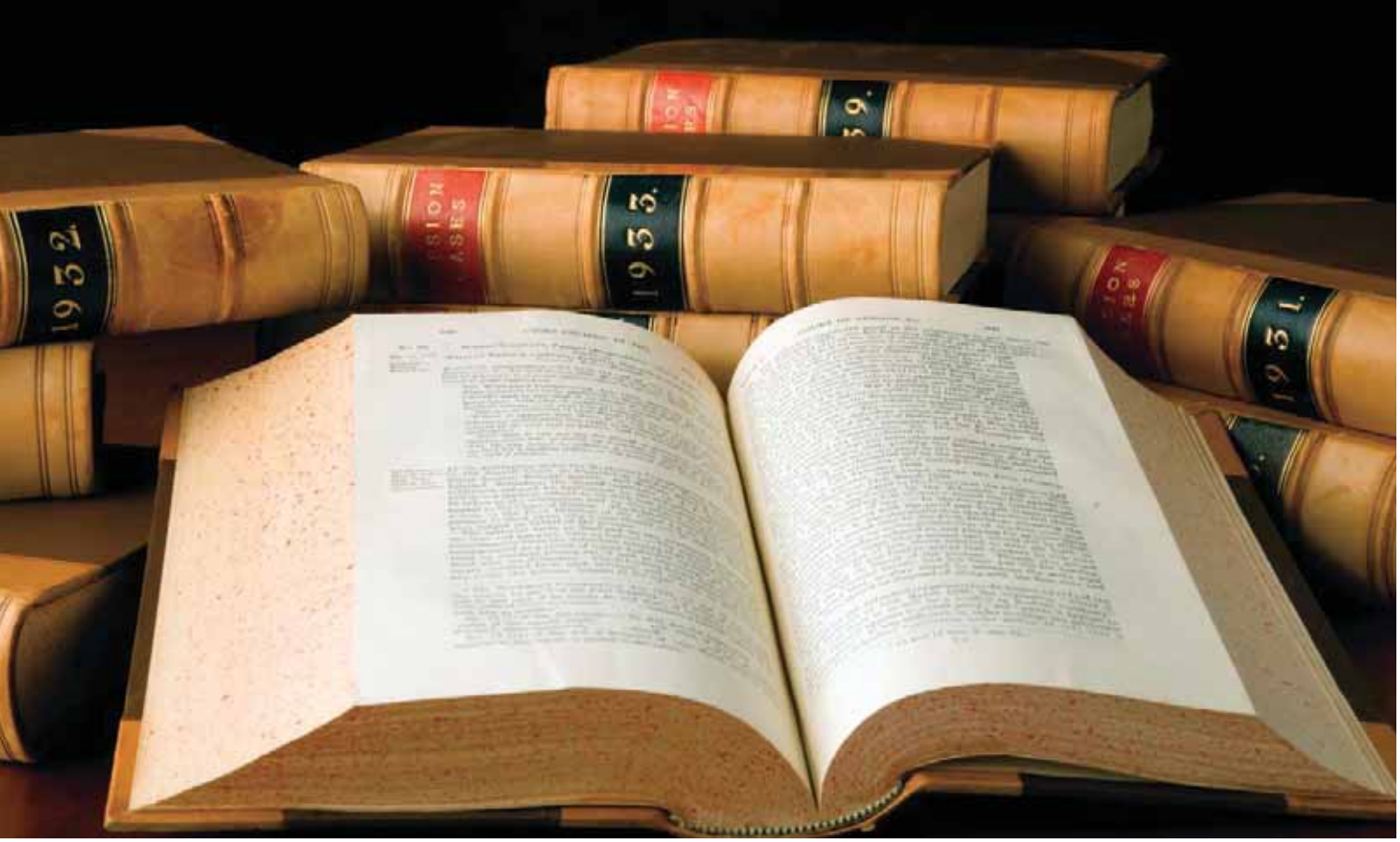
12. *Id.* at 140.

13. *See People v. Manges*, 67 A.D.3d 1328 (4th Dep't 2009) (computer printout was not admissible under CPLR 4518(a); bank teller testified that anyone at the bank could enter the information that was reflected in the printout).

14. *Wilson v. Bodian*, 130 A.D.2d 221 (2d Dep't 1987).

15. *Williams v. Alexander*, 309 N.Y. 283 (1955).

16. Grievance committees may become involved upon an allegation that Rule 3.4 of the New York Rules of Professional Conduct was violated where a lawyer may have "knowingly" offered false evidence in the form of incorrect or incomplete EHRs, which the lawyer failed to amend or supplement. *See Honzawa v Honzawa*, 268 A.D.2d 327 (1st Dep't 2000).



Can an Arbitrator Conduct Independent Legal Research? If Not, Why Not?

By Paul Bennett Marrow

Do arbitrators have authority to undertake independent legal research without authorization by the parties? Or, are they prohibited from doing so, as many arbitrators believe? These are vexing questions. For answers, this article looks for guidance in the Federal Arbitration Act (FAA),[1] state arbitration statutes, case law, and the rules of several arbitration institutions, as well as the Code of Ethics for Arbitrators in Commercial Disputes. The takeaway is that if an arbitrator wants an award that will withstand an attack based on "evident partiality," "misconduct" or the "exceeding of powers," there are good reasons to refrain from *unauthorized* legal research.

Why even consider the question, since the parties' attorneys (are supposed to) provide the arbitrator with briefs. The problem arises when the legal picture presented by the briefs is inadequate or just plain wrong, or where one or both parties fail to provide the arbitrator with a brief. Under these circumstances may the arbitrator research the legal issue or is it best to assume that had the parties intended to give that power to the arbitrator they would have indicated so in the arbitration clause in clear and unambiguous terms? Would it make a difference if the contract designated the governing law and required the arbitrator to apply the law, and/or called for a reasoned award?

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Looking at these questions from the perspective of an arbitrator's obligation to be diligent and thorough, and to produce fair and impartial decisions, doesn't the suggestion that independent legal research might be inappropriate seem counterintuitive? After all, if arbitrators are barred from assuring themselves of the correct law in a case, how can they meet expectations that justice will be achieved? Taking it one step further, if there is unauthorized legal research, is that action sufficient for one party to object on the grounds that the arbitrator's impartiality has been compromised?

The reader might ask if there is something about arbitration and the role that law plays that make arbitration so different from litigation; the answer is "yes." Arbitration is a consensual contractual process intended to be an alternative to (and not a copy of) litigation. In arbitration, parties can contractually agree to give up strict adherence to the law (which *must* be applied in court), in favor of a more informal process customized to their needs. They can decide for themselves what law they want to govern their agreement and any dispute that may arise, and they can even go so far as to mandate that an arbitrator not apply law and instead prescribe principles they deem fair and just. As Judge Richard Posner famously noted ". . . short of authorizing trial by battle or ordeal, or more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract."[2] And even if parties want the law to apply, there is nothing to stop them from requiring that a version of law mutually agreed to shall govern, even if that version is seen by the arbitrator to be just plain wrong. Decisions about law are for the parties to make, and they may do so without accounting to an arbitrator. Parties may have good reasons for not wanting the arbitrator to research law, reasons they need not share.

Does the emphasis on the freedom to contract open the door for awards that are strange, if not bizarre? Perhaps, but remember that decisions by an arbitrator are confidential and not available as precedent.

Step back and consider the following example: Both sides disagree about whether a widget is blue. Each says the widget is their version of blue. The arbitrator sees what one side calls blue is really red and what the other side sees as blue is really white and concludes that both sides are wrong. But the arbitrator also understands that the parties don't appear to care about what blue really looks like, let alone have any interest in the arbitrator correcting them both. What they have asked is for the arbitrator to decide whose version of blue is really blue – that is, they want the arbitrator to tell them who is right and who is wrong *given their narrow definitions of what is blue*. If the arbitrator says that white is blue for the arbitration, that ruling isn't precedent that can be used in other cases. It's a ruling that reflects the wishes of the parties who, let's face it, from the get-go are blind to what blue really looks like.

Does the emphasis on the freedom to contract open the door for awards that are strange, if not bizarre?

Does this analysis encompass both federal and state laws applicable to arbitration and, in particular, the FAA? Assume that the parties have indicated they want an arbitrator to decide whether a certain state's arbitration statute is preempted by the FAA. Both sides file briefs. Side A says state law is preempted but gives a legally incorrect reason. Side B claims state law isn't preempted but gives a legally incorrect reason that's different from that offered by Side A. Are the parties asking the arbitrator to decide what the legally correct reason is or are they asking the arbitrator to decide which party is correct based on the law as the parties see it? It's the latter, even though that seems counterintuitive. In *Steelworkers v. Warrior & Gulf Navigation Co.*, the U.S. Supreme Court instructs that an arbitrator "has no general charter to administer justice for a community which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties."[3] It follows that the arbitrator is bound by the wishes of the parties, even if the arbitrator thinks that the law as stated by both parties is wrong.

In both examples, while the outcome contravenes the reality of the rules dictated by our legal system, neither the parties nor anyone else is harmed. The parties get what they bargained for, and the legal system suffers no adverse impact because the ruling isn't binding on anyone but the parties.

Silence on any issue, independent legal research being no exception, requires the arbitrator to pause before considering an action not otherwise provided for in the parties' written instructions. (This view squares with all the major *domestic* arbitration authorities discussed in this article.)

Remarkably, it seems to make a difference if the analysis involves domestic authorities as opposed to those in the international arena. Many of the legal systems outside the United States favor giving arbitrators broad discretion, especially where the parties have failed to express their wishes. Why this is so is not clear, but for whatever reason, the practitioner must be mindful of this difference.

Domestic Vacatur Statutes and Related Case Law

The FAA and all state arbitration statutes focus on the enforceability of agreements to arbitrate and arbitration awards. These statutes were not designed to mandate the contents of agreements to arbitrate, leaving it to the par-

ties to decide on the terms of their agreement. The only statutory mandate found in 9 U.S.C. § 2 is that the agreement be unequivocal, valid, irrevocable and otherwise enforceable.

What about the conduct of the arbitrator? The main limitations placed on arbitrator conduct are found in the vacatur provisions in the FAA and most state statutes based on the Uniform Arbitration Acts. These provisions allow a court to vacate an award upon a showing of evident partiality, misconduct, or the exceeding of arbitral authority.[4] Significantly, these provisions do not give courts an opportunity to review the arbitrator's decision on the merits.

Supplementing statutory grounds is the common law doctrine manifest disregard of law, which has long been a worry for arbitrators. Many courts consider this doctrine to have survived the recent Supreme Court decision in *Hall Street Associates v. Mattel Inc.*[5]

Let's look at each of these vacatur grounds in turn.

Evident Partiality

Exactly what constitutes "evident partiality" is a troublesome question. Answering it requires an analysis of the standard of proof required to establish intent. Some courts hold that showing an *appearance of bias* is sufficient while others hold this standard is not stringent enough – *actual bias* must be shown. Grappling with the question, the Second Circuit pointed out that "[b]ias is always difficult, and indeed often impossible, to 'prove,'"[6] unless an arbitrator were to publicly announce partiality. As an alternative, this court fashioned a *reasonable person* standard, which is to say that evident partiality is shown "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. In assessing a given relationship, courts must remain cognizant of peculiar commercial practices and factual variances."[7]

Does an arbitrator's unauthorized independent legal research constitute "evident partiality"? If the appearance of bias standard is applied, the answer probably turns on what happens once the independent research has been completed. If the research turns up nothing in opposition to what the parties have presented, it's hard to see any basis for such a claim. But suppose that the research uncovers something entirely new and yet relevant, assuming the case was before a court. For example, research uncovers a valid theory overlooked or ignored by a party. Can the arbitrator make inquiry about the discovery without being accused of being partial? This kind of inquiry is party-specific and goes to the heart of that party's substantive case. So the inquiry could be characterized as an offer to provide assistance or, worse yet, an effort to warn. The inquiry suggests that the arbitrator hasn't thought things through. Perhaps the parties have considered the issues involved and resolved them to their mutual satisfaction. And perhaps one or both of the parties are aware of the omission and, even so, have good reasons not to want the issue raised.

The claim that an arbitrator has exceeded his or her powers means that the arbitrator allegedly went beyond the authority specified in the parties' agreement.

While the courts have yet to speak on the subject, it's hard to see how a court wouldn't find such an offer evidence of a failure to maintain the evenhandedness required by the FAA and the ethical rules and codes of conduct cited in this article.

Arbitrator Misconduct

"Misconduct" requires a showing that the arbitrator's actions resulted in an unfair proceeding.[8] The inquiry is about the conduct of the arbitrator and the impact that his or her conduct has on the proceeding. In this context unauthorized independent legal research is problematic for a number of reasons. By definition such research would be conducted outside of the view of the parties, raising the question of how do the parties control for the possibility that the arbitrator might not conduct an exhaustive examination of applicable law? What assurances do the parties have that the research will consider the concerns of all sides? In addition, how can the parties assure themselves that the sources uncovered are current and germane to the dispute? Given this, in all likelihood courts will disallow independent legal research conducted without expressed consent because there is no way to ensure that the results will not be fundamentally unfair.

Exceeding of Powers

The claim that an arbitrator has exceeded his or her powers means that the arbitrator allegedly went beyond the authority specified in the parties' agreement.[9] Where the terms are definitive, there is no problem; expressed wishes govern.

What happens if an instrument is silent about a given action? Silence alone doesn't necessarily lead to a conclusion that a given power isn't authorized. The Supreme Court has instructed that, at least in cases involving arbitrability, when silence comes into play, a two-step analy-

sis is required before a power can be implied. First it must be determined if the power in question is one reserved by law for the courts. Where such is the case, it cannot be *presumed* that the parties intended to take the matter from the courts and give it to an arbitrator. It is only where there is "clear and convincing evidence" of such intent that a court will imply the power absent.[10]

The power to conduct unauthorized legal research is not one reserved by law for courts, so the way is cleared for implication. But the *appropriateness* of implying such a power involves other considerations. If parties wish law to be applied, they can say so; absent any such mandate, implying a power would appear to be tantamount to permitting courts to rewrite the agreement between the parties.[11] Implication becomes less problematic, however, where the power implied does no more than supplement an existing power. Consider an agreement that requires an arbitrator to do no more than issue a reasoned award. Assume that the parties have failed to provide briefs on the applicable law. Under such circumstances is it now appropriate to imply a power to conduct independent research? Reasoned awards that speak solely to facts are commonplace and proper, and there is no reason to assume that a reasoned award *must* also speak about law. But where a reasoned award based solely on a determination of facts is unsupportable without a discussion of law, a court should be comfortable concluding that the implied power complements a power already granted by the parties.

Manifest Disregard of the Law

The doctrine is one of last resort created by the judiciary – not by statute.[12] The doctrine holds arbitrators to account for manifestly disregarding a law that has been brought to his or her attention by the parties or by their agreement. Significantly, the doctrine does not speak to an error in the application of law. To be invoked, the arbitrator must be shown to have ignored a law

1. that was clear and explicitly applicable to the matter before the arbitrator;
2. that if properly applied, the outcome would have been different;
3. that the arbitrator had actual knowledge of the law not applied.[13]

The doctrine is about knowledge acquired by an arbitrator from a source other than his or her own research. No court has found that an arbitrator has a duty to independently investigate issues of law and apply what was discovered. In *Wallace v. Buttar*,[14] the Second Circuit appears to have found the opposite holding that, until such time as all arbitrators are required to be attorneys, an arbitrator does not have "a duty [under the FAA] to ascertain the legal principles that govern a particular claim through . . . independent legal research."[15] In arriving at this conclusion, the court expressly rejected the argument by Professor Norman Posner.[16]

> [Posner] argued that "there are powerful reasons why the manifest disregard standard shall be replaced by a broader standard . . . Because the manifest disregard standard protects an arbitral award from vacatur if the arbitrators did not know the law, it encourages arbitrators not to find out what the law is." We disagree with this contention because it seems to imply that arbitrators will not approach their task in a professional manner. . . . As decision-makers, they have an obligation to ascertain what the law is and to apply it correctly. But until the FAA is amended to require that arbitrators be attorneys, or that they possess a certain standard of legal knowledge, we see no basis upon which we can impose a duty upon arbitrators to ascertain the legal principles that govern a particular claim through the conduct of independent legal research. *That is, we expect arbitrators to ascertain the law through the arguments put before them by the parties to an arbitration proceeding.* We recognize the possibility that a case may arise that presents concerns about the relative capacities of the parties to put the law before an arbitral panel; that is, a case where "the dispute is not between roughly equal commercial entities but between parties that are unequal in wealth and sophistication." This is clearly not such a case, however.[17]

In *Metlife Securities, Inc. v. Bedford*,[18] a district court citing *Wallace* reached a similar conclusion in a Financial Industry Regulatory Authority (FINRA) case, finding the doctrine not applicable where the "petitioner failed entirely to educate the Panel as to the legal principles which ought to have been applied to these facts – the law governing liability of corporate affiliates, which would have apprised the Panel of the legal significance of the factual arguments made. It is well established that there is no 'duty upon arbitrators to ascertain the legal principles that govern a particular claim through the conduct of independent legal research.'"

In sum, the doctrine of manifest disregard and the issue of unauthorized research are totally separate, although it can be said that both appear to involve facts suggesting overreaching by an arbitrator.

The International Arena

The UNCITRAL Model Law on Commercial Arbitration, Article 28(2), allows parties to specify applicable law or, absent a directive, requires application of "the law determined by the conflict of laws rules which [the arbitrator] considers applicable." Some countries have their own unique statutory schemes, an example being the English Arbitration Act of 1996, and in recent years several countries have adopted the UNCITRAL Model Law.[19] Unlike the provisions found in the FAA, specific mention is made of the doctrines of *ex aequo et bono* ("what is just and fair") and *amiable compositeur* (unbiased third party). Article 28(3) directs that an arbitrator can apply these principles "only if the parties have expressly authorized" the arbitrator to do so.

But the UNCITRAL Model Law doesn't completely address the questions we are exploring. If the parties select a law but fail to brief the arbitrator on their respective positions or leave it to the arbitrator to designate law and then fail to advise as to their respective positions on that law, the arbitrator would appear to be within bounds to do independent legal research to comply because, without such research, the requirement that the arbitrator "apply" the law selected would be meaningless. But it isn't at all clear whether the arbitrator can conduct independent legal research once the parties make their respective positions known.

The rules of the major institutions administering arbitrations provide an assortment of schemes running along a continuum from total silence to specificity.

Article 34(2)(a) and (b) provides a list of grounds for refusing to recognize or enforce an award. The grounds involving arbitrator misbehavior are limited to making an (1) award that deals with "a dispute not contemplated by or falling within the terms of the submission to arbitration" or (2) an award that contains "decisions on matters beyond the scope of the submission to arbitration . . ." Both grounds focus on overreaching by an arbitrator, grounds that roughly approximate the FAA injunction against exceeding the powers specified in an arbitration agreement. The first ground speaks to limitations created by parties on disputes within the terms of the submission to arbitration. Independent legal research could conceivably be included here if an arbitrator were to research, identify and decide the merits of a cause of action not advanced by a party. The second ground speaks to a decision on matters beyond the scope of those submitted to arbitration. In the event that parties restrict an arbitrator from doing independent legal research, the argument might be made that violating that restriction would result in a decision beyond the scope of the arbitration clause.

Institutional Rules

The rules of the major institutions administering arbitrations provide an assortment of schemes running along a continuum from total silence to specificity. There are those that

1. are entirely silent on the issue but require the arbitrator to follow the law designated by the parties without indicating what the arbitrator should do if no designation is made;
2. are entirely silent but give the arbitrator great discretion in the conduct of the arbitration process;
3. require the arbitrator to follow the law designated by the parties, give the arbitrator authority to decide what law to apply should there be no designation by the parties and give the arbitrator limited authority to exercise discretion in the conduct of the hearing;
4. require the arbitrator to follow the law designated by the parties and give the arbitrator authority to decide what law to apply should there be no designation by the parties and also give the arbitrator broad discretion in the conduct of the arbitration process;
5. require the arbitrator to follow the law designated by the parties, give the arbitrator authority to decide what law to apply should there be no designation by the parties, give the arbitrator broad discretion in the conduct of the arbitration process and automatically vest the arbitrator with the power to conduct independent legal research subject only to a written directive from the parties that they wish to "opt out" and preclude the arbitrator from conducting independent legal research.

When considering the role that institutional rules play in answering these issues, the principles governing the implying of a power appear to come directly into play.

Recall that implying a power is acceptable where that power (1) is not reserved in the first instance to the courts, (2) supplements an existing power and (3) is otherwise appropriate. Where an arbitration clause incorporates by reference institutional rules, the question becomes whether the rules so incorporated resolve item (2) – the issue of when a power being implied is supplemental to an existing power. If the rules incorporated state that such is the purpose, there is no challenge. But most, if not all institutional rules don't include such a pronouncement. Instead, institutional rules focus on providing an arbitrator with a set amount of discretion. The more limited the discretion the less likely that the power thought to supplement an existing power does so. The greater the discretion, the more likely it is that the power thought to supplement an existing power does so.

Consider first the institutional rules commonly incorporated into domestic arbitration clauses. Start with the Commercial Rules of the American Arbitration Association (AAA):[20] these rules have nothing to say about the selection and implementation of law. If parties fail to make provision, the power to apply law may not exist leaving the arbitrator to resolve the dispute in whatever manner he or she deems fair and just. By incorporating these rules and saying nothing further, the parties would not create a power supplementing one that already exists because there is no existing power concerning applying law.

International Institute for Conflict Prevention and Resolution (CPR) Rule 10 requires that the arbitrator apply whatever law the parties designate; absent a designation, the arbitrator has the power to select whatever law or rules he or she deems appropriate. Unlike the

rules at JAMS, applying law isn't necessarily a given. In theory at least, the arbitrator is not barred from concluding that no law need be applied and instead may opt to do whatever seems fair and just. The CPR rules grant the arbitrator authority to vary from the prescribed procedures as necessary. But that authority is not unlimited. It is confined by the scope of the rules themselves,[21] meaning that which is "reasonable and appropriate."

The rules at JAMS anticipate the existence of such a power concerning law. Rule 24(c) instructs that the arbitrator "*shall* be guided by the rules of law" designated either by the parties in the first instance or by the arbitrator. Incorporating the JAMS rules into an arbitration clause establishes that, no matter what, applying some law is a given. The arbitrator has sufficient discretion to fill in the selection of law if the parties are silent. But the arbitrator may not proceed without applying law.[22]

None of the domestic rules reviewed here directly addresses an arbitrator's ability to conduct independent legal research when the parties present what the arbitrator believes to be an incomplete legal analysis of the issues in a case.

In the international arena things are very different. The International Arbitration Rules of the AAA,[23] UNICITRAL[24] and the International Chamber of Commerce (ICC)[25] require an arbitrator to follow the law designated by the parties and, failing such designation, allow the arbitrator to apply such law and rules as he or she deems appropriate. They all endow the arbitrator with reasonable discretion respecting the conduct of the proceeding and emphasize a need for equality and fairness for all parties.[26] Application of law being a given, the door opens for an arbitrator to conduct independent legal research if the parties fail to brief their positions on the law. If only one party provides a brief, in all likelihood the arbitrator would be barred from doing research without the consent of the other party or parties because of the mandate that all parties must be treated equally. Under such circumstances, the better solution would be for the arbitrator to bring the matter to the attention of all the parties and to follow their wishes.

The rules of the London Court of International Arbitration (LCIA) and JAMS International Rules take things to another level.

The LCIA rules not only allow arbitrators to fill a void if one is created by parties, but also empower an arbitrator to (1) adopt procedures suitable to the circumstances of the arbitration and (2) exercise the "widest" discretion with the proviso that (a) the parties can "opt out" and (b) when exercising discretion, ensuring that the results are fair, efficient and expeditious.[27] By allowing discretion that is the "widest . . . to discharge its duties allowed under such law(s) or rules,"[28] the power to conduct independent legal research is subject only to the constraint that all parties must be treated "fairly and impartially." In a situation where the parties fail to brief their positions, the arbitrator appears to have sufficient authority to proceed without the consent of the parties, although the arbitrator would still be required to advise the parties of the details of the research and provide adequate assurances that all positions were researched and carefully considered.

JAMS International Arbitration Rules (2011) go even further. Article 20.4 provides:

> Unless the parties at any time agree otherwise in writing, the Tribunal will have the power, on the application of any party or on its own motion, to identify the issues and to ascertain the relevant facts and the law or rules of law applicable to the arbitration, or to inquire into the merits of the parties' dispute.

Article 20.4 doesn't condition the ability of an arbitrator to do independent legal research on the failure of the parties to brief their positions. Theoretically, even if the parties brief their positions, the article appears to allow the arbitrator to independently conduct legal research if the parties' briefs seem inadequate or otherwise problematic.

Ethical Standards

While the canons and/or codes of professional conduct don't have the force of law, they establish standards of conduct that an arbitrator cannot ignore; they form a valuable benchmark for measuring the quality of service provided by an arbitrator.

Most institutions providing arbitration require arbitrators to comply with the canons adopted and approved by the AAA and the American Bar Association (ABA).[29] There are several individual canons that must be read together to appreciate their impact on the issue of independent legal research.

Canon I(D) requires that arbitrators "conduct themselves in a way that is fair to all parties . . ." Canon I(F) requires that the arbitrator "conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision." Canon IV(A) speaks to the need for an arbitrator to "conduct proceedings in an even-handed manner." Part IV(E) states that if an arbitrator determines that "more information than has been presented is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses and request documents or other evidence, including expert testimony." Finally, Canon V(A) dictates that the arbitrator "should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues." Still, the Canons stop short of offering a specific mandate about an arbitrator's obligation concerning independent legal research.

In the field of domestic labor and management, arbitrators are expected to comply with the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.[30] Section 2 G(1) of the Code has a provision that appears to touch on the issue at hand.

> An arbitrator must assume full personal responsibility for the decision in each case decided.
>
> a. The extent, if any, to which an arbitrator properly may rely on precedent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties on these matters, as expressed in the contract, or other agreement, or at the hearing.
> b. When the mutual desires of the parties are not known or when the parties express differing opinions or policies, the arbitrator may exercise discretion as to these matters, consistent with the acceptance of full personal responsibility for the award.

Arbitration is all about what the parties contract for.

Without question, this provision goes further than any other in recognizing independent research as an issue and sanctioning arbitral discretion absent a mutually acceptable mandate by the parties.

The International Bar Association (IBA) has developed "Rules of Ethics for International Arbitrators."[31] In the Introduction to its Rules, the IBA explains:

> International arbitrators should be impartial, independent, competent, diligent and discreet. These rules seek to establish the manner in which these abstract qualities may be assessed in practice. Rather than rigid rules, they reflect internationally acceptable guidelines developed by practicing lawyers from all continents. They will attain their objectives only if they are applied in good faith.

Rule 3 of the IBA discusses elements of bias. Rule 3.1 focuses on the definition of partiality. "Partiality arises when an arbitrator favors one of the parties, or where he is prejudiced in relation to the subject matter of the dispute." Rule 3.2 adds that "[f]acts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has . . . already taken a position in relation to it."

The AAA/ABA Canons and the IBA Rules, when read together, emphasize the need for an arbitrator to maintain an atmosphere of fairness, objectivity and focus on the issues as presented by the parties. Given the relative clarity of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, implying from quoted portions of the Canons and Rules of the AAA/ABA and IBA a sanction for independent legal research seems inappropriate. Had the authors of those Canons and Rules wished to directly address issues involving independent conduct by an arbitrator, they could have followed the example set by the Code applicable to arbitrators for labor-management disputes.

Conclusion

Arbitration is all about what the parties contract for when settling on an alternative to traditional litigation in a courthouse. The law imposes no restrictions on the freedom to contract other than to require that all terms must be "valid, irrevocable and enforceable in law or equity for the revocation of a contract."[32]

In court, judges must apply the law; rulings by some courts can form precedent and bind other courts. So it is consistent that judges are allowed to independently review the law without consent of litigants. In arbitration things are different, not because of disrespect for the law, but because of the priority given to the parties' wishes.

At least in domestic arbitration, arbitrators are well advised to seek consent from the parties before researching the law on their own. While international arbitration rules may seem to give broader authority, the same caution is advisable. The reality of non-enforcement provisions in international arbitration laws and treaties suggests that an award based on the arbitrator's independent legal research may be subject to challenge. Therefore, an arbitrator who feels compelled to research the law to make sure his or her award will be correct should not act on this feeling without first securing written permission to do so from all parties.

For the still skeptical reader: Assume you're an arbitrator in a domestic matter that involves a contract thought by the claimant to be unconscionable. At the hearing, the claimant offered proof of procedural unconscionability but failed to offer proof of substantive unconscionability. The respondent did not object or even mention the lack of proof concerning the substantive issue. You have been provided with briefs from all sides and as you read through them you become convinced that both sides have missed a critical issue. Neither party has addressed whether or not proof of procedural unconscionability alone is sufficient for you to declare the contract unenforceable. Your case manager has sent you an email reminding you that you must submit your award the next day. It is now 9:00 in the evening, and you decide to research the issue on your own. You draft a reasoned award discussing the fruits of your research and state that, based on your research, you find for the respondent.

Fast forward: six months later you receive a call from the case manager. She wants you to know the award was vacated and that she has received a nasty letter from the claimant's attorney. It seems it cost the claimant $15,000 to undo your award. The claimant's attorney is demanding your removal from the roster of arbitrators because of your conduct.

The case manager reminds you of the policy of the institution concerning independent legal research by an arbitrator. She asks for an explanation. What is your response? ■

1. 9 U.S.C. §§ 1–16.

2. *Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704, 709 (7th Cir. 1994).

3. 363 U.S. 574, 581 (1960).

4. 9 U.S.C. § 10(a)(2)–(4); Uniform Arbitration Act § 12 (a)(2-3); California and New York have enacted unique statutes not fashioned after the Uniform Arbitration Acts. *See* Cal. Code. Civ. Proc. § 1286.2(a)(3)–(5); CPLR 7511(b)(1)–(5). The statute enacted in Georgia allows for the vacating of an award where an arbitrator manifestly disregards law. See O.C.G.A. § 9-9-13(b)(5).

5. 552 U.S. 576 (2008).

6. *Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984).

7. *Id.*

8. *Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, UAW*, 500 F.2d 921, 23 (2d Cir 1974) (the arbitrator "need only grant the parties a fundamentally fair hearing").

9. *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 824 (2d Cir. 1997).

10. *First Options v. Kaplan*, 514 U.S. 938, 945 (1995).

11. *Collins & Aikman Floor Coverings Corp. v. Froehlich*, 736 F. Supp. 480, 484 (S.D.N.Y. 1990); *accord*, *In re Texans Cuso Ins. Grp., LLC*, 421 B.R. 769 (2009).

12. *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953), *overruled on other grounds, Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

13. *Duferco Int'l Steel v. T. Klaveness Shipping*, 333 F 3d 383, 389–90 (2d Cir. 2003).

14. 378 F.3d 182 (2d Cir. 2004).

15. *Id.* at 190.

16. *See* Norman S. Posner, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 Brook. L. Rev. 471, 515 (1998).

17. *Wallace*, 378 F.3d at 191, n.3 (emphasis added).

18. 456 F. Supp. 2d 468, 473 (S.D.N.Y. 2006), *aff'd*, 254 F. App'x 77 (2d Cir 2007).

19. According to the UNCITRAL website, at least 64 nations have adopted the Model Law. In addition four territories of Australia, three within Canada, two within China and two overseas territories of the United Kingdom of Great Britain and Northern Ireland have adopted the Model Law. The Model Law has been adopted by at least seven American states: California, Connecticut, Florida, Georgia, North Carolina, Ohio and Texas. *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

20. The FINRA Code of Arbitration Procedure – Customer Code and Industry Code – follows the same substantive format of the Commercial Rules of the AAA.

21. CPR Rule 9.1.

22. JAMS Rule 22(a):

> The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined reasonable and appropriate to do so.

23. AAA art. 28:

> 1. The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.

24. UNCITRAL art. 35:

> 1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

25. ICC art.21:

> 1. The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

26. Compare:

> AAA Article 16, Conduct of the Arbitration:
>
> 1. Subject to these Rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
>
> UNCITRAL Article 17:
>
> 1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.
>
> ICC Article 22:
>
> 4. In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

27. LCIA arts. 14.1, 14.2; art. 22.3.

28. LCIA art. 14.2.

29. Code of Ethics for Arbitrators in Commercial Disputes (2004).

30. As amended and in effect September 2007 and approved by the AAA, the Federal Mediation and Conciliation Service and the National Academy of Arbitrators.

31. Available at: www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#ethics.

32. FAA § 2.

BY LAWRENCE N. GRAY

Ballot Rigging – How It's Done in New York

Democracy, premised on counting heads instead of cracking them, is collective intelligence with votes, somewhat informed by flapdoodle. Would intelligently voting people be easily governed? Whatever one's view, elections are not supposed to be prix fixe menus. New York's Election Law forbids *quid pro quo* agreements corrupting the franchise but also invites them. And ballot rigging defies easy detection. N.Y. Criminal Procedure Law § 60.22 (CPL), New York's "corroboration rule," renders it virtually immune from prosecution. It is a consensual crime.[1]

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Criminally corrupt arrangements involve *quid pro quo* agreements or understandings which are operations of the mind communicated to others. Such agreements or understandings are not tangible physical objects that may be connected to a defendant. There is no smoking gun or dead body. Absent a surreptitiously tape-recorded capture of a verbalized agreement or understanding – or an admission made to an innocent third party – it is nearly impossible to satisfy the corroboration rule. A defendant may not be convicted based upon the uncorroborated testimony of an accomplice, defined as a person who may reasonably be said to have participated in the crime with which the defendant is charged or participated in some of the same facts constituting the crime with which the defendant is charged. In federal court, an accomplice turned government witness may have his or her credibility challenged on the witness stand, but it is up to the jury to believe or disbelieve the witness. Because of CPL § 60.22, Watergate could never have been prosecuted in a New York courtroom.

The Common Law Principle

Hook and Gray (maybe an ancestor) were applicants for the Office of New York City Flour Inspector. Their chances being equal, they agreed that Hook would withdraw and assist Gray in securing the office. In return, Gray agreed to give Hook one-half the fees and emoluments, also promising to appoint Hook as his deputy. The agreement was unenforceable. It was a contract of turpitude, violating a statute forbidding the buying and selling of offices. "No citizen can . . . legally stipulate to embarrass the operations of government, by diminishing its means to execute its powers."[2]

Corrupt Use of Position and Authority

The big gun is 1882's N.Y. Penal Law § 775, later N.Y. Election Law § 448, now Election Law

§ 17-158 titled Corrupt Use of Position or Authority. Its first subsection reads:

> Any person who: 1. While holding a public office, or being nominated or seeking a nomination therefor, corruptly uses or promises to use, directly or indirectly, any official authority or influence possessed or anticipated, in the way of conferring upon any person, or in order to secure, or aid any person in securing, any office or public employment, or any nomination, confirmation, or promotion or increase of salary, upon consideration that the vote or political influence or action of the person so to be benefited or of any other person, shall be given or used in behalf of any candidate, officer or party or upon any other corrupt condition or consideration [is guilty of a class E felony].

Its second subsection forbids affecting votes by other corrupt means. The third prohibits tendering or offering a nomination or appointment "upon the payment or contribution of any valuable consideration, or upon an understanding or promise thereof." The fourth proscribes making any gift, promise or contribution to any person, upon the condition or consideration of receiving an appointment or election to public office. "Position" is not limited to public office, nor is "authority" restricted to official authority.[3] Corrupt Use of Position or Authority has its Penal Law counterparts, Bribe Giving for Public Office and Bribe Receiving for Public Office.[4] All have 18 U.S.C. § 600 – Promise of Employment or Other Benefit for Political Activity – as their kinfolk.

Buying a Supreme Court Nomination

A century ago, the Court of Appeals reviewed laws forbidding corruption of the franchise. William Willett bought a Supreme Court Justice nomination from a party boss sufficiently influential among judicial convention delegates to control the nomination. The Court quoted from *The American Commonwealth* (1891):

> There is usually some one person who holds more strings in his hand than do the others. Like them, he has worked himself up to power from small beginnings gradually extending the range of his influence over the mass of workers and knitting close bonds with influential men, outside as well as inside politics, perhaps with great financiers or railway magnates whom he can oblige and who can furnish him with funds. He dispenses places, rewards the loyal, punishes the mutinous, concocts schemes, negotiates treaties. Another useful expedient has been borrowed from European monarchies in the sale of nominations and occasionally of offices themselves. A person who seeks to be nominated as a candidate for one of the more important offices . . . is often required to contribute to the election fund a sum proportioned to the importance of the place he seeks, the excuse given for the practice, being the cost of elections; and the same principle is occasionally applied to the gift of non-elective offices, the right of appointing to which is vested in some official member of a ring – *e.g.*, a mayor.[5]

After Willett's nomination, *The Standard Union* exposed "Tammany's Tainted Touch on a Judiciary Ticket." It said that the "'people had nothing to do with these nominations. The candidates are boss nominees pure and simple, and as to one of them there is already a rumor of a shocking scandal involving the payment of a large sum of money.'"[6] A day prior to his nomination Willett asked a bank to lend him $10,000. "'He said there was a chance for him to get the nomination for Supreme Court judge and . . . it took some money, and . . . whatever money he used would have to be used in advance and . . . after the nomination he would have to sit up and look dignified . . . . He certainly said it took money to get the nomination.'"[7] The morning of the convention Willett appeared at the bank and received 10 $1,000 bills. Days before, he had borrowed $15,000. Louis Walter, a political power broker, voted for Willett at the convention in return for this money, as previously promised and paid by Willett to Walter and Queens County Chairman Joseph Cassidy. Willett and Cassidy bought prison stripes. Walter was called as a witness in the Willett case, so he received immunity.[8]

New York's Supreme Court Justice Convention System

New York still retains a judicial-district-convention system (no primaries) for Supreme Court nominees. There are 13 judicial districts, each spanning multiples of the state's 150 Assembly Districts. In biannual primary elections, party members elect Judicial Delegates from each judicial district. An individual may run for judicial delegate by submitting a designating petition signed by 500 enrolled party members (or 5% of them, whichever is less) residing in his or her Assembly District. A judicial district may have close to a hundred or more delegate slots. For an insurgent to circumvent party machinery he or she would have to obtain 500 signatures for a majority of individual judicial delegates. These signatures must be obtained within a 37-day signature-gathering period preceding a filing deadline, which is about two months before September's Primary Day.[9] A typical Judicial Delegate petition, carried door to door during the signature-gathering period, may have 50 to 100 or more names on it. These delegates are uncommitted. The primary ballot itself does not specify the judicial nominee they will support. Rarely is a rival slate of candidates circulated on a petition. An unopposed judicial delegate will receive a Certificate of Election from the Board of Elections certifying that he or she is a delegate for his or her Assembly District. The delegates vote or give their proxies to party chairs who essentially nominate the Supreme Court candidates.

If, in a given year, multiple judgeships are up for election, a voter may notice that the candidates occasionally appear on more than one party ballot line. One may

simultaneously see a Democrat on all four lines, next to a Republican on all four lines, with only two open seats. It's no mystery. And it's not because they are Cardozo cheating off Holmes. Without endorsing New York's convention method the United States Supreme Court upheld its constitutionality.[10] It did not dispute its deficiencies. "'But as I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: The Constitution does not prohibit legislatures from enacting stupid laws.'"[11]

"Advantage" means *any* advantage.

Now Who Is Being Naïve?

Justice Scalia is of the view that "there is good reason to believe that the elected members of the New York Legislature remain opposed to the primary, for the same reasons their predecessors abolished it 86 years ago: because it leaves judicial selection to voters uninformed about judicial qualifications, and places a high premium upon the ability to raise money."[12] Justices Kennedy and Breyer have an "observation," quoted at length:

> When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence. The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections. Still, though the Framers did not provide for elections of federal judges, most states have made the opposite choice, at least to some extent. In light of this longstanding practice and tradition in the States, the appropriate practical response is not to reject judicial elections outright but to find ways to use elections to select judges with the highest qualifications. A judicial election system presents the opportunity, indeed the civic obligation, for voters and the community as a whole to become engaged in the legal process. Judicial elections, if fair and open, could be an essential forum for society to discuss and define the attributes of judicial excellence and to find ways to discern those qualities in the candidates. The organized bar, the legal academy, public advocacy groups, a principled press, and all the other components of functioning democracy must engage in this process. Even in flawed election systems there emerge brave and honorable judges who exemplify the law's ideals. But it is unfair to them and to the concept of judicial independence if the State is indifferent to a selection process open to manipulation, criticism, and serious abuse. Rule of law is secured only by the principled exercise of political will. If New York statutes for nominating and electing judges do not produce both the perception and the reality of a system committed to the highest ideals of the law, they ought to be changed and to be changed now.[13]

Election lawsuits must be brought in Supreme Court (Election Law § 16-100) where they are given a calendar preference. Venue is frequently changed; justices often recuse themselves *seriatim*. Reading between the lines of Appellate Division and Court of Appeals reported opinions reversing eclectic Supreme Court decisions either throwing people off or putting them back on the ballot would provide its own commentary on our Election Law.

Supreme Court Nominations Used to Clear Ballot Lines

Election Law § 6-122 forbids the designation or nomination of a person who "if elected will not at the time of commencement of the term of such office or position, meet the constitutional or statutory qualifications of such office or position." New York Constitution Article VI, § 20(b)(1) forbids a Justice of the Supreme Court to "hold any other public office." Here are two not-so hypothetical hypotheticals showing how a nomination for Supreme Court is used to clear a ballot line for a substitute candidate.

1. A Conservative has his party's designation and also the cross-designations of the Republican and Independence Parties for Highway Superintendent. The time for declining designations has passed by the time the Conservative *loses* a Republican primary challenge mounted by a registered Republican who was *not* originally designated by his party. Being a sore loser, the Conservative wants to betray everyone who previously supported him by giving "his" Conservative and Independence ballot lines to the incumbent Democratic Highway Superintendent. He secures a Supreme Court Justice nomination *via* a phone-booth judicial convention. The moment he accepts the nomination § 6-122 makes him automatically ineligible to be the Conservative and Independence Parties' Highway Superintendent candidate. Those ballot lines are cleared, ready for the Independence and Conservative Parties' Committees to Fill Vacancies to substitute the incumbent Democrat on their ballot lines.[14] Article VI, § 20(b)(1) is the state constitution's enshrinement of the common law principle that one cannot hold incompatible public offices where there is a built-in right in one to interfere with the other, or review and subordinate the other, vested in the same person.[15]

2. At the gubernatorial level, a Supreme Court nomination can clear a line. A Republican convention nominates a regular for Governor, also nominated by the Conservatives. An insurgent Republican was not allowed to address the convention. He decides to run a primary and wins handily. But he has only one line against a Democrat running on multiple lines. As luck would have

it, the regular Republican defeated in the primary is an attorney of 10 years' standing. Another phone booth judicial convention is called, this time by Conservatives. It nominates the Republican loser for the Supreme Court. If elected in November, he will preside in Bronx County. At the moment the Republican's acceptance of the Conservative judicial nomination is filed he is ineligible to run on the Conservative line for Governor. Its Committee to Fill Vacancies then substitutes the *insurgent* Republican on its line. Now the insurgent has two lines, and the Conservative Party will live for another four years as a legally recognized party since it is assured of getting "at least fifty thousand votes for its candidate for governor."[16] New York's "third parties" are Wilson-Pakula dependent for their automatic place on ballot lines for all elections in the state. More on Wilson Pakula later.

Quid Pro Quos Financed by No-Shows on the Public Payroll

Corrupt Use of Position and Authority surfaced again in 1976. I stumbled onto this while looking for a crime matching suspicious conduct then under way.

The late *Village Voice* columnist Jack Newfield had brought Charles Rosen to the Attorney General's Office where Rosen, a former Trotskyite, described what he termed a "third party bribe" offer from Assemblyman Alan Hochberg of the 81st Assembly District, comprising the Bronx's Co-op City and Pelham Park. The 81st AD is solidly Democratic, so a primary election winner *is* the Assemblyman. Rosen was the very popular leader of a Co-op City rent strike against the state – a strike supported by 86% of the tenants. A year earlier, it was discovered that City Councilman Stephen Kaufman, a Co-op City resident, had deceived the tenants and was thus considered unelectable. Kaufman's actions were defended, however, by the regular Democratic leadership, which was lukewarm to the strike. Larry Dolnick, the strike's Vice Chairman, and Elliot Engel formed the New Democratic Club for the 81st A.D.

Hochberg did not want a primary for his Assembly seat because it would be expensive; rather, he wanted to run for a Civil Court judgeship during his next term, leaving his Assembly seat vacant. A primary for the seat would cost him $25,000 and ruin his judgeship race. Initially, he approached Engel and Dolnick, offering support for Dolnick as his Assembly replacement, and a $20,000-a-year job on his Assembly payroll. But Dolnick couldn't take the job – he was *of* the rent strike and Hochberg was *of* the Democratic regulars. Hochberg then offered Dolnick a no-show job for less money. A number of times Hochberg asked if Rosen, the strike's Chairman, intended to challenge him in a primary. He wanted a reply from the horse's mouth because Rosen would be a very viable candidate.

Rosen, Dolnick and Hochberg held a meeting. It was tape-recorded by the Attorney General's Office. After confirming his prior dealings with Dolnick, Hochberg offered Rosen the $20,000 job. On top of that, after being elected a judge and leaving his Assembly seat, Hochberg would raise $5,000 for Rosen's special election campaign to fill the vacancy. During the conversation, Hochberg, who was then Chairman of the Assembly's Ethics Committee, made a contribution to the political lexicon. Referring to his chairmanship, or to politics generally, he said, "Ethics is nice, but it's not bread and butter." A week later, Rosen and Hochberg met at New Rochelle's Larchmont Diner. A tape recording of it disclosed that Hochberg offered Rosen a $3,000 job. They agreed that Rosen could not take the job but any name would be acceptable as a "stand-in" for Rosen. Hochberg then said, "I will give you ___" and then wrote $5,000 on a napkin, asking if it would be acceptable. Further, once the rent strike was over, Rosen's stand-in could be placed in the $20,000 job. When Rosen asked Hochberg not to put the stand-in's name on the payroll until the following Wednesday instead of Monday, Hochberg said that the stand-in would be losing money. Rosen replied, "Schmuck, he's losing nothing. I'm getting the money." Hochberg agreed, saying, "but that's it, you're losing." Placing a "no-show" on the public payroll for whatever purpose is, of course, larceny. By inescapable inference, one who places or causes the placement of a person on a public payroll is representing that the person will perform work, labor and services for the salary paid. Falsely doing so is larceny by false pretense.[17]

Days later, Rosen told Hochberg that the stand-in would be in Albany the following day. Rosen telephoned his brother-in-law Charles Christopher Johnson and told him that some men would be coming to see him the next day in Middletown and would be taking him to Albany. Don't ask questions, he said, just to do what they say. Attorney General investigators picked up Johnson, wired him up and sent him into the Assembly to meet Hochberg, where he accompanied Johnson to the necessary offices so he could be put on the payroll. Hochberg got a year for Corrupt Use of Position and Authority.[18] He was also convicted of Fraudulently Affecting the Outcome of a Primary Election, and Unlawful Fees and Payments, which makes it a felony for any member of the state Legislature to ask, receive, consent or agree to receive "any money, property or thing of value or personal advantage" for performing any discretionary act which he may exercise by virtue of his office. "Advantage" means *any* advantage.[19] Unlawful Fees and Payments has been repealed by the Legislature.

A Job for a Fundraiser

While presenting the Hochberg case to an Albany County Grand Jury, I met the Counsel to the Speaker of the Assembly. Agitated, he asked, "Does the Speaker have anything to worry about?" I told him I didn't know because I *didn't* know. I later learned what he was concerned about.

Assembly Speaker Stanley Steingut and his son Robert, while at a luncheon meeting at Ratner's just over the Williamsburg Bridge in Manhattan, promised to assist Hans Rubenfeld in obtaining an appointment to the position of Advisor to the Civilian Complaint Review Board of the New York City Police Department. In exchange, Rubenfeld promised to arrange a fund-raiser dinner for Robert, who was seeking election as City Councilman at Large from Kings County. Rubenfeld contributed $2,500 to Robert's campaign but the fundraiser was never held. The Steinguts were indicted for Corrupt Use of Position and Authority in Kings County. They obtained a writ of prohibition. Their indictment should have been brought in New York County even though the luncheon meeting in Manhattan was to fix a Brooklyn election.[20] The Steinguts were not prosecuted by the New York County District Attorney's Office. The case went the way of old soldiers.

Buying Off the Opposition With Cash

Fraudulently and Wrongfully Affecting the Outcome of Primary Election – 1881 Penal Law § 751, later Election Law § 421(5), now § 17-102(5) – punishes "any person who . . . fraudulently or wrongfully does any act tending to affect the result of any primary election, caucus or convention." (A general election is not within its ambit.) It is not unconstitutionally vague. Patricia Lang offered Thomas Patton $1,000 to induce him not to run as an insurgent in the Democratic primary for City of Long Beach Councilman. Lang was affiliated with the Democratic incumbents. Over lunch, Lang offered Patton several jobs with the city, which he declined. So, she said, "Why don't you take some money?" She offered Patton $500 before and $500 after the primary. Her secretary later appeared at Patton's home and handed him a book with five $100 bills in an envelope taped inside. Under immunity, the secretary testified that Lang told her Patton "was bought off very cheap." Convicted of the attempt, Lang was fined and given 15 days, which was later stricken on appeal. Any person of ordinary intelligence would know that it is fraudulent and wrongful to pay someone not to engage in the primary-political-elective process.[21]

Cold Cash and Tammany Hall Policemen

Turn of the 20th Century New York City had a Tammany Hall Police Department, all appointments courtesy of political bosses. It was awash in bribery and extortion and brutality. Protection money from gambling dens and brothels in Manhattan's Tenderloin District was handed up the ranks, minus transmittal fees, to the Police Commissioner, over to the Mayor's office and on to Tammany Hall on 14th Street. Police Lieutenant Charles Becker, who died in Sing Sing's electric chair for the murder of gambler Herman Rosenthal, was a brute of a corrupt cop who captured the warp and woof of a time when the populace looked upon its police as an occupying army. The rich and well-connected were favored – like the son of a Civil War General, the poisoner Roland Molineux, who eventually succumbed to syphilitic infection and brain paresis in 1917 while confined at the Kings Park Psychiatric Center.[22]

New York's Wilson-Pakula Law Preordains Felony *Quid Pro Quos*

So far as research shows, New York is one of the few states that allows a candidate registered in one party to be cross-designated to run on another party's ballot line. This is courtesy of the Wilson-Pakula Law, named after two Assemblymen, one of whom – Malcolm Wilson – became Governor. Here is how Wilson Pakula works. A party's chairman or executive committee must give a "Certificate of Authorization" to a nonparty candidate authorizing him or her to run as that party's designated candidate; the party files the certificate with the Board of Elections.[23] The nonparty candidate designee must sign a "Certificate of Acceptance" and then file it with the Board. Party cross-designations do not spring out of the ground like mushrooms after a rainstorm. Rather, antecedent agreements, the consideration for which is rarely if at all a collegial assessment of the cross-designee's splendid attributes, are their genesis. When the races for District Attorney, County Comptroller, Treasurer, Clerk and Sheriff feature four candidates occupying all four ballot lines it beggars belief to tell people that every vote counts because none of them need *their* votes. Each candidate can vote for themselves and go back to bed knowing he or she was 100% victorious.

Pre-Fixed Ballot Lines

Republicans square off against Democrats to fill four town offices. They want an extra ballot line *via* Conservative Party cross-designations. They get them for *three* of their four candidates by trading off *one* Republican cross-designation to a Conservative in return for the three Conservative cross-designations. The mechanics are as follows: First, the Republicans put the Conservative on their designating petition with their three Republicans. Next, the Conservatives put the three Republicans on their petition with their one Conservative. Result: three Republicans and one Conservative wind up on the Republican and Conservative ballot lines. Chances are that they will win election over Democrats because of their extra ballot line's kick.

Shadow-Placeholder Candidates

It gets worse, with shadow candidates also known as placeholders. To get on the ballot – primary or general election – a candidate must obtain the statutorily prescribed number of signatures on the party's designating petition from voters registered in the party, the same requirement applying to a non-party, cross-designated candidate. Voters sign for Jane when a party committee-

man or notary comes to the door with the petition, which has imprinted on it "Committee to Fill Vacancies" next to the names of the party chairman and two lieutenants. A few days after the petition is filed with the Board of Elections, Jane – who was a shadow-placeholder all along – signs and files a Certificate of Declination, declining the party's designation as it appeared on the petition when it was previously circulated to voters.[24] Contemporaneously, the Committee to Fill Vacancies files a "Certificate of Substitution," substituting Hack for Jane.[25] Hack then signs and files a "Consent by Substituted Candidate Certificate." *Not one* voter signed a designating petition for Hack. Jane was the shadow of Hack. She held the place on the designating petition for him.

Bait and Switch

A pre-petition agreement between the Independence and Democratic parties puts a member of the Independence Party – Jill – on the Independence petition for the Office of Clerk along with a shadow-placeholder – Linda – on an Independence petition for the Office of Councilperson. The same agreement also puts a member of the Democratic Party – Pat – on the Democrats' petition for the Office of Councilperson with a shadow-placeholder – Laura – on the Democratic petition for the Office of Clerk. After these petitions are filed – using the certificates described above – shadow-placeholder Linda declines the Independence designation for Councilperson while shadow-placeholder Laura declines the Democratic designation for Clerk. The Independence candidate, Jill, is substituted for the Democrats' Laura thus giving Jill the Democratic and Independence lines for Clerk. This is the *quid*. The Democrats' Pat is substituted for shadow-placeholder Linda, thus giving Pat both the Democratic and Independence lines for Councilperson. No member of the Independence Party signed an Independence Designating Petition for Democrat Pat for Councilperson. No member of the Democratic Party signed a Democratic Designating Petition for the Independence Party's Jill for Clerk. This is the *quo*. The bait-and-switch's extra ballot kick hands the Council Office to the Democrat-Independence Pat over her Republican one-line opponent.

Conclusion

Supreme Court "[c]ases invalidating ballot-access requirements have focused on the requirements themselves, *and not on the manner in which political actors function under those requirements.*"[26] None of its cases suggest that the hypothetical shenanigans outlined above match a reasonable person's idea of an open, fair and honest election. Why would a voter tolerate in a political race what he would not tolerate at the racetrack? Criminal prosecutions involving elections or the looting of the public payroll by officials are the most personal and viciously nasty I know of. Politics is supposed to be built around ideas, issues and principles. As Special Assistant Attorneys General under Louis Lefkowitz, this author, Robert Schwartz and Edward Rothman convicted Assemblyman Hochberg (DL) and a New York City Councilman Vincent Riccio (RC) in the Albany County Courthouse just down the street from the New York State Bar Association. The difference between the guilty verdicts and the *bipartisan* indifference, treachery and hostility of the political establishment is still troubling. As long as CPL § 60.22 remains unmodified, official corruption of any stripe – especially ballot rigging – will remain very difficult to prosecute. If repeal of § 60.22 continues to be a dead end, repeal of Election Law § 6-120(3), which allows candidates to obtain authorization from political party chairmen to run on multiple ballot lines, would put a stop to the *quid pro quo* backroom deals that constitute felony violations of Election Law § 17-158 (Corrupt Use of Position or Authority). We need to look into the current state of elections in New York, starting with cross-party designations. Work from there forward. ■

1. As a former 30-year prosecutor and husband of a former eight-year Smithtown Councilwoman, this writer sees New York's politics as being top-down and reform resistant. I speak to ballot mechanics, not politics *per se*.
2. *Gray v. Hook*, 4 N.Y. 449, 456 (1851).
3. *People v. Willett*, 213 N.Y. 368, 380 (1915).
4. Penal Law §§ 200.45, 200.50.
5. *Willett*, 213 N.Y. at 376.
6. *Id.* at 381.
7. *Id.* at 382–83.
8. *People v. Cassidy*, 213 N.Y. 388 (1915); *People ex rel. Willett v. Quinn*, 150 A.D. 813, 821–30 (2d Dep't 1912).
9. *Lopez Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212 (E.D.N.Y.), *aff'd*, 462 F.3d 161 (2d Cir. 2006), *rev'd*, *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).
10. *N.Y. State Bd. of Elections*, 552 U.S. 196.
11. *Id.* at 209 (Stevens, J.).
12. *Id.* at 206.
13. *Id.* at 212–13.
14. Election Law § 6-148.
15. *O'Malley v. Macejka*, 44 N.Y.2d 530, 535 (1978).
16. Election Law § 1-104(3).
17. *People v. Ohrenstein*, 77 N.Y.2d 38 (1990).
18. *People v. Hochberg*, 87 Misc. 2d 1024 (Sup. Ct., Albany Co. 1976), *aff'd*, 62 A.D.2d 2 39 (3d Dep't), *lv. denied*, 44 N.Y.2d 953 (1978); *see also People v. Riccio*, 91 A.D.2d 693 (3d Dep't 1982) (Grand Larceny), *lv. denied*, 58 N.Y.2d 1122 (1983), *cited in People v. Ohrenstein*, 77 N.Y.2d 38, 55–66 (1990) (Simons J. dissenting).
19. *People v. Feerick*, 93 N.Y.2d 433 (1999).
20. *Steingut v. Gold*, 42 N.Y.2d 311 (1977).
21. *People v. Lang*, 36 N.Y.2d 366 (1975).
22. Mike Dash, Satan's Circus (Random House 2007); Harold Schechter, The Devil's Gentleman (Ballantine Books 2007).
23. Election Law § 6-120.
24. Election Law § 6-146.
25. Election Law § 6-148.
26. *N.Y. State Bd. of Elections*, 552 U.S. at 196, 197 (emphasis added).

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Developing a Successful Law Practice a Century Ago

Ideas That Remain Relevant Today

By Matthew L. Lifflander

If William Sulzer is known today, it is as the 41st Governor of the State of New York – the only governor of New York ever impeached. He took office on January 1, 1913 and was impeached and removed by October the 17th of the same year. That story captured my attention and led me into years of research to learn what kind of a man he was. Why was he impeached by his own party only eight months after being very popularly elected? Until 1913 he had enjoyed an exemplary career, first as a very successful young lawyer in the New York City of gaslights, cobblestones, and horse-drawn vehicles; then a successful Tammany Hall vote-getter who amassed a superb legislative record as an assemblyman from the Lower East Side; then, at age 30, the youngest Speaker of the Assembly in New York history. He followed up by running for Congress. He was continually re-elected for 19 years, becoming chairman of the House Foreign Affairs Committee before he was elected governor in November 1912 – winning a three-way race by a significant plurality.

The story of Sulzer's brief governorship encompasses so many aspects that remain relevant an entire century later. It is full of history lessons for those who want to understand politics today. This article, however, will focus on Sulzer's formative years and his rapid rise as a successful solo practitioner. The fact that Sulzer started from zero and built that practice for himself was powerful evidence of his self-confidence and a fabulous lesson for any young lawyer who wants to build a practice and enjoy the genuine security that the ability to attract business creates.

Extensive research on Governor Sulzer, at the Cornell University library where he had sent his papers, revealed several chapters of an unpublished autobiography, which provided great material for a biographer who did not have a chance to interview his subject. The obvious qualities of curiosity and courage demonstrated by young Sulzer's teenage activities added a special dimension to his quest to build his law practice. The secrets of his early professional success were especially interesting. Sulzer's writings provided a clear picture of how a young man beginning a New York law practice in 1884 could attract enough clients to become financially independent. Every

lawyer in private practice, especially young ones, could learn from these 100-year-old techniques for attracting business, most of which are still relevant today.

Early Years

Sulzer was raised by immigrant parents on a New Jersey farm. He demonstrated his curiosity about the world early on – leaving home to join a circus at age 13. At age 16, in 1879, William Sulzer entered the legal profession as a law clerk to a Wall Street law firm. Law clerks began their day at 8 a.m., sweeping floors, dusting offices, and carrying coal to make the first fires to warm up the offices of the lawyers who arrived between 9 and 10 a.m. The clerks also made tea and tediously copied legal papers by hand. In exchange for these and similar chores, the clerks were given the opportunity to read and study law books and observe the work of real lawyers.

Then, as now, a lawyer had to be 21 years old to be admitted. Sulzer arranged to leave his Wall Street office at 2 p.m. to take a horse-drawn stage up to Columbia College to attend law lectures. (In those days an applicant to the bar could offer a law school degree or a clerkship as qualifications.) During his first year clerking, he switched firms to get more courtroom experience.

A year later, at age 17, he switched again because he was offered $8 per week, a $5 raise over his previous salary at the first two firms. Before the year was over, he was promoted and named managing clerk at the firm of Parish and Pendleton, at a salary of $10 per week, where he was allowed to argue matters and take part in pre-trial activities. But the new job required him to give up attending classes at law school and he never got a law degree.

His two years' experience as a serious law clerk provided Sulzer with most of the qualifications he would need to take the bar when he reached the age of 21. Then, as he approached his 18th birthday, he decided to take a break from his clerkship and go to sea as a cabin boy. His great adventure involved sailing from New York City to Florida, then the Caribbean and South America, where he learned the business of sailing and the business of trading with indigenous peoples.

After a warm homecoming with his family and several weeks regaling his friends and neighbors in New Jersey about the details of his adventures, Sulzer decided that the time had come to make a decision about his future. He made some visits to the ships massed at the South Street port in New York City where he was advised that he was still too young to take the examination for a master's certificate. The red tape and delays involved in pursuing a serious career as a sailor so discouraged him that he chose to end his pursuit of the sea as a career.

He also visited his old employers at Parrish & Pendleton, who were genuinely delighted to see him back in the city and looking so well. He was a very handsome young man, obviously mature beyond his years and attractive to his peers and seniors alike. His former colleagues were intrigued by Sulzer's stories about his experience at sea. They offered him his former position as managing clerk. Several other acquaintances in the legal profession also offered him jobs and encouraged him to pursue his legal studies and take the bar exam. All this encouragement from respected professionals persuaded Sulzer to finally commit himself to pursue the law as his career. He had saved enough money from his two years as a sailor, so he decided that he would not take another job as a law clerk but rather would continue to attend trials and study law independently so that he could be well prepared for the bar examination when he reached the age of 21 in 1884.

> Sulzer was dedicated to building a clientele to support his practice.

When he became eligible, Sulzer left the family farm and established his residence in New York City. According to Sulzer's writings, he appeared before the New York Supreme Court with 50 other applicants, 37 of whom passed the written exam they took on the first day. Sulzer was one of nine whose papers were so good that the judges waived the oral exam scheduled for the next day and admitted them directly.

As a result, his inherent self-confidence was enhanced by his passing the bar so easily that, despite having been offered employment opportunities at several excellent law firms, he decided to open his own law office and "never work for anyone again except myself." The 21-year-old attorney opened his first office at the corner of Centre and Chambers Streets, close to all the courthouses.

Getting Business

Any practicing lawyer can attest to the most basic lesson of law school – whatever the particular challenge or objective of any advocate in an adversarial situation, success usually depends on good research and thorough preparation. However, even the best-prepared lawyer depends for his success upon having clients who benefit from the lawyer's skills.

Obviously, Sulzer anticipated that his relationship with the various firms he had clerked for might lead to some early referrals. He also had a handful of contacts from his earlier days as a successful salesperson for a tea company owned by a neighbor he knew from his family home in New Jersey.

But Sulzer would not sit still and wait for a visit from anyone. He had a plan. Today we would call it a marketing plan, but lawyers didn't use such crass words in those days, indeed, until very recently, advertising was not allowed. His methods worked well and provide many lessons that can be adopted today by those who are fortunate enough to have the inherent talent to do so. He set out to become acquainted with politicians and newspapermen who gathered regularly in the area, as well as the lawyers, judges, clerks, and court attendants.

Sulzer was dedicated to building a clientele to support his practice. In his writings he explained that he was always careful to dress well. He also began to join organizations that would enable him to meet prospective clients. Already admitted to the Masonic Lodge in New Jersey, he had his membership transferred to a lodge in Manhattan and began a serious lifelong pursuit of Masonry. Sulzer developed his flair for catching clients and he worked hard at it – purposely doing all that he could to meet people, especially businessmen, who might help him develop a successful practice. A young lawyer today who wants to build a successful practice can learn a great deal from Sulzer's approach to his independence. Sulzer studiously sought and took advice from older lawyers who encouraged him, and some began to refer matters to him to handle in the courts. Whenever he had nothing else to do he would methodically visit with people he knew and urge them to let him handle any law business they had. This approach landed him the Merchant's National Bank as a client very early in his career. It seems that the official cashier of the bank, Mr. C.V. Baila, had a farm adjacent to that of Sulzer's father, and Baila had known William Sulzer since his boyhood. Mr. Baila wanted to encourage the young lawyer, which he was best able to do by delivering some of the bank's more routine business. Having the bank as a client was a very prestigious credential for a lawyer in his first year of practice.

At the same time, Sulzer pursued his interest in politics. He attended political meetings and made himself known to judges and politicians. In 1884, his first year as a lawyer, he made "back of the cart" speeches on behalf of Grover Cleveland's presidential campaign. As part of that campaign, he organized the Young Men's Democratic Club in New York and became its first president. Years later this club became the National Democratic Club.

Moving Up

Toward the end of his first year in practice, Sulzer moved to a small, $20-per-month suite in an office building at 71 Broadway that housed several large law firms and various business concerns. A principal reason for moving was to get more exposure to more people who could help him develop his law practice. As part of his campaign, Sulzer made it a point to introduce himself to most of the office building's occupants as he encountered them in the hallways and elevators. He became known as an attractive and outgoing young man who would not hesitate to introduce himself to everyone he met, especially in a business context. And Sulzer diligently followed up on every contact he made.

On one memorable occasion, the aggressive, but quite charming young lawyer encountered Jay Gould, as the railroad tycoon was leaving 71 Broadway, where he had an office on the floor below Sulzer's. Gould was friendly and asked young Sulzer how his law practice was getting along. Before taking his leave, Mr. Gould asked him to call upon him at 3 o'clock the next afternoon.

When Sulzer arrived, Gould invited him into his large and ornately paneled office, and Sulzer took a chair at the side of the railroad tycoon's desk. "Mr. Sulzer," Gould said, "do you know anything about railroad law, and the court's decisions affecting railroads?" Sulzer frankly admitted that he knew very little about the subject, but expressed his confidence that he was well trained to discover anything he needed to know. Impressed with the candor and self-confidence with which Sulzer had expressed himself, Gould gave him a small assignment involving the analysis of the legality of a Missouri Pacific Railroad bond. Sulzer offered to research and brief the issues within 10 days. Gould said, "Take your time, but do it thoroughly." Excited by the prospect of having Jay Gould as a client, Sulzer devoted the entire next week to doing the necessary research and provided a careful brief of some 20 handwritten pages. When Sulzer presented his brief, it so impressed Gould that he sent Sulzer a $2,500 check in response to his bill for $250, along with a great compliment about the job he did.

By the end of his second year as a lawyer, Sulzer was doing so well developing his own clientele and receiving referrals from lawyers who retained him to do their trial work that he was "making ten times more money than I spent." Yet he did not let up and constantly pursued more relationships with businessmen, lawyers and judges. He became counsel to a major silk importer and, by making the acquaintance of the President of the New York Pie Baking Company, "got all of its business."

As part of his business-oriented self-promotion, Sulzer took up residence at the International Hotel on Park Row, which he saw as another opportunity to expand his contacts. Once again, he made it his business to meet as many people as he could. At the International Hotel, for example, he met Henry George, the great teacher of economics, and dined frequently at his table discussing economic theory.

The ambitious and energetic Sulzer also went out almost every night, making a point of frequenting the large number of leading hotels and restaurants (which he referred to as "resorts") where he could count on encountering the rich and famous of old New York. On the second floor of the Astor House at Vesey Street and Broad-

way was one of his favorite spots, called "Room No. 1," where editors, newspapermen, lawyers, judges and well-known politicians would gather every afternoon. There he met more important men and deliberately cultivated their acquaintance, which he claimed was a great help to him later in his career. For example, he made the acquaintance of W. S. Porter, the writer who became known as "O. Henry," who introduced him to Joseph Pulitzer, the famous publisher. Among the hostelries in the immediate area which Sulzer favored for companionship, food, and drink were the Cosmopolitan Hotel, on the corner of Chambers and West Broadway, and the Stevens House, where Sulzer claimed to have made the acquaintance of Robert Louis Stevenson when he visited New York.

Throughout the early years of building his downtown New York law practice, Sulzer also pursued a genuine interest in the theater, cultivating a theatrical practice and attending shows at such memorable places as the Bailey Theater, Harrigan and Harts, Tony Pastor's, the Union Square Theater, the Academy of Music, and Daly's Theater, among others. Some of the actors and actresses he met in these days became his clients. And some of the theatrical cases he tried attracted a great deal of valuable newspaper publicity. That helped him get talked about as a lawyer by fellow members of the bar and the public in general. Sulzer understood the value of being known and talked about, and the young lawyer continued his effort to be out more or less every night, going around here and there.

Sulzer would frequently travel up Broadway, taking the brightly colored stage drawn by two horses. He considered Broadway to be the center of significant social activity because so many important people of his day walked up Broadway to their homes. There were a number of famous places where people would stop to socialize, have a drink, or break bread.

During his early years at the bar, he was impressed with the quality of New York's newspapers and what he considered to be the courage of conviction evidenced by many of the editors and critics of the day who molded public opinion. Whenever he could do so, he also sought the acquaintance of newspapermen, both reporters and editors, which he did by frequenting their favorite bars and restaurants and writing letters to the editor. Of course, he hoped that some of these contacts would result in favorable publicity.

After successfully trying a significant commercial case in 1887, his fourth year as a sole practitioner, Sulzer was induced to join a law firm that offered him an attractive partnership. The firm became known as Henderson, Sulzer & Forster, and it occupied the entire first floor of a large, old brownstone building at 24 Park Place. He became the firm's leading trial lawyer; again, Sulzer went out of his way to make new contacts and cultivate relationships with all of the other tenants of the building.

Expanding His Horizons

At this time in his life, Sulzer, who would eventually acquire a justified reputation as an excellent speaker, worked at perfecting his speechmaking ability by studying English classics in order to improve his command of the language. As he described it,

> [i]n my speeches I made it a rule to use plain, simple, well-understood Saxon words, and endeavored to confine myself to one, or two, or three syllables. I used short sentences, and eschewed foreign words, and their derivatives. In this way I acquired a good vocabulary, and a multitude of simple words and short sentences that could be utilized at any time for their effect on my hearers, not only in the courtroom, but at other places where I attended meetings and made addresses.

He made it a rule to attend every meeting he could and, if the opportunity was offered, "to deliver an address more or less appropriate to the occasion." As a result, he made many new contacts and became known as an eloquent speaker.

In 1888, in his fifth year of practicing law, Sulzer moved his residence again, this time uptown to the Morton House – well known as a center of activity for prominent politicians, business, and theater people. It had an excellent bar and restaurant, as well as banquet rooms. Sulzer admitted that his object in moving to the Morton House was to meet people who he could make friends with and increase his law practice. He was shameless in his pursuit of people who could be helpful to him. As he once said, "I was always busy, and I always worked fast." His pursuit of power and financial independence was certainly succeeding.

After a year with the firm of Henderson, Sulzer & Foster, a relationship that had been very satisfactory, Sulzer told his partners that he wanted to withdraw to have more time to pursue other interests. They were unable to dissuade him and, after an amicable parting, he opened his own office again, this time taking three rooms at 24 Park Place; the 25-year-old lawyer hired two younger associates to assist him with his growing practice.

It was 1888. Among the activities Sulzer wanted more time for was the pursuit of politics, an interest since childhood. His appetite for politics had been developed during his youth in New Jersey, his experience as a speaker in the 1884 presidential campaign, and his attendance at whatever political meetings he could could get to. He was encouraged by the favorable response he received from so many of the people he met.

William Sulzer's compelling political journey – from assemblyman to speaker to congressman to governor who was impeached – lay ahead. It turned out to be an intriguing story. Stay tuned. ■

How to Avoid Sibling Warfare

Drafting for the Vacation Home

By Edward V. Atnally

Many owners of vacation homes – and their eventual beneficiaries – have as an estate planning goal "keeping the property in the family as long as possible." This article discusses the problems often encountered by estate planners in drafting will or trust language providing for the disposition of vacation homes and other residences to a group of individuals as joint owners.[1] The problems are many, but with proper planning, it is possible to achieve this goal.

Vacation homes come in various forms, from the simple Cape Cod beach house to the Florida condominium, to the Irish cottage, etc. These properties and their contents often have considerable economic value, but more important, they may have enormous sentimental value in the minds of the clients and their children as a way of enriching family life for the present and, hopefully, in the future. Yet, because of the possibility of disagreements and other problems among the joint owners, many lawyers often attempt to discourage joint ownership arrangements. The client's reaction in many cases is to minimize these problems and insist that the property be placed in some type of trust or other legal entity so that it is not sold at the client's death, but held for the use and enjoyment of all of the client's children and future generations. Drafting language to achieve this result is a fairly daunting task considering the manifold ownership issues and other uncertainties that could arise in the future. Nevertheless, many satisfactory arrangements for joint ownership exist and will continue to exist in the future.

In some cases, the will or trust agreement leaving vacation-type or other properties in joint ownership comes to the lawyer after the testator or trust grantor has died and when it may be too late to change the dispositive language. Dealing with the "too late to do anything" situation will also be discussed.

The Problems of Joint Ownership

Few lawyers need to be told about the problems of joint ownership because they see them every day. Assuming the vacation-type property is to be or has been left to adult devisees (infants and incompetent devisees create especially difficult situations) such as children, adult

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grandchildren or siblings, each of the owners may have different ideas as to what is to be done with his or her share of the property (including the contents thereof). Some may want to sell it, or at least their share, because of personal economic problems; others may desire to rent the property during peak rental periods; and others would prefer to leave it just "as is." Each of the alternatives brings its own set of problems, such as for how much to sell or rent the property, when to do so, and how to provide funds to maintain it if it is to be held "as is." Trying to anticipate and plan for all of the problems that could arise beforehand will help considerably.

Assuming the vacation home can be placed in some type of trust or other legal entity, how can it be managed successfully, and by whom? Some children may want to "buy out" the others. Creditors of the children or their divorced spouses may eventually make claims against the property and one or more may become bankrupt. Some of the children may ask, "Why should I contribute money so that other children can enjoy the vacation property?" A partition action[2] may be necessary with all of its costs and delays and, very often, an unsatisfactory outcome. All of these problems may completely frustrate the owner's desire to keep the vacation property or other residence in the family.

Finding Possible Solutions to the Problems of Joint Ownership With Other Than Trust Arrangements

While trusts and other arrangement of various kinds are often considered and will be discussed in detail later, more simple solutions should first be explored. The "direction to sell with a right of purchase" approach may satisfy many clients who have vacation properties that they wish to leave to multiple beneficiaries. While there is no perfect solution in any of the proposals considered in this article, there are considerably fewer tax[3] issues and general family distress to contend with when utilizing the "sell with right of purchase" or precatory language approaches discussed below.

Direction to Sell and Right of Purchase Approach

This arrangement, which I refer to as the "conventional wisdom" approach, requires that the will or trust agreement directs the sale of the vacation property after the testator/grantor's death. (All of the solutions offered in this article apply to residences of any kind, vacation or otherwise, where continued co-ownership or control by multiple devisees is desired.) Adding language such as the following in the will or trust agreement may be helpful:

> "I direct that my real property (and the contents thereof) located at . . . . be sold on such terms and conditions as my executors [in the case of wills] and trustees [in the case of *inter vivos* trusts] shall determine and the net proceeds shall be paid over to my descendants, *per stirpes*; provided, however, that one or more of my adult children shall each be entitled to purchase said property by filing an instrument in writing with my executors/trustees within six (6) months of the date of my death indicating their desire to do so for an amount established by appraisal or as finally determined in my federal or state estate tax proceedings. If two or more of my adult children shall wish to purchase said property, the purchaser shall be determined by the casting of lots."

While the "conventional wisdom" approach has much to recommend it, many clients simply do not want to see their beloved beach house sold to the highest bidder, unless it is to a family member.

While it is obvious that such a sell provision is not what the "keep it in the family" testator wants, it may be what he or she should choose for the benefit of all devisees depending, of course, on the value of the real estate, the mix of estate assets and various other estate planning considerations.

It may be that no single child will have sufficient funds to buy (and maintain) the vacation property from the estate. The benefit of the provision for mandatory sale is that it assures, as far as possible, that each child receives a proportionate share of the sales proceeds in cash and can "go his or her own way" with the money. Selling real estate in the current market may take many years and, hopefully, the power provisions of the will or trust agreement will give the executors sufficient holding authority to get the best price on the sale.

The Precatory Language Approach

Under the right circumstances, this approach could make it possible to keep the vacation home in the family for several generations or more. There should be a "family oriented" individual to whom the property is left who will try to carry out the wishes of the testator but has no legal obligation to do so. The provision to use (often devising the property outright to the chosen child) might be something like the following:

> "It is my wish, without intending to impose any legal obligation, that [name of chosen child or sibling inheriting] shall permit my other children or siblings to occupy and enjoy fully the vacation home from time to time as he/she shall see fit in his/her sole and uncontrolled discretion and without any obligation or liability to my children or others for so long a period as he/she shall determine. Upon his/her death, it is my wish that he/she leave the property to another family member who will permit my children and their descendants to similarly occupy and enjoy the vacation home all without imposing any legal obligation or liability on the owner of the vacation home to do so."

Trusting ownership of the vacation home to a particular family member and requesting that person to comply with the testator's wishes may accomplish nothing if the recipient of the property does not wish to take on the considerable burdens of providing a vacation home for

others at his or her sole expense (of course, the others could be charged some rental expense). In certain cases, however, someone may be there who is willing and able to do so.

Another possible alternative is to leave the vacation house to one child and make adjustments in the will to equalize the value of all property passing to the children. Whether one child will be satisfied with getting a vacation home rather than its equivalent in cash is another question. In addition, the vacation property may constitute a substantial part of the estate assets and there may be insufficient other property to make the equalizing distributions. Presumably, the selected child inheritor will allow the others to use the property, but that child is not required to do so.

The precatory language arrangement eliminates various tax issues and the many problems of joint ownership. Instead, it simply relies on the good faith and generosity of the property recipient and the cooperation of other family members – without which it is impossible for any arrangement to work. Will litigation ensue? Possibly, but it is probably less likely than if the more complex arrangements mentioned below are adopted.

The More Complex Arrangements

Now we consider other arrangements (to avoid a partition lawsuit) for holding jointly owned vacation and other properties. These usually take the form of a trust created before the grantor/testator's death and continuing thereafter or a trust created by will or trust agreement coming into existence after the testator's death. If that fails, the trust could also be created by the joint owners after the testator's death where the will simply says, as it does in many cases, "I leave my vacation home (or all of my property) to my three children in equal shares *per stirpes*." Ownership by limited liability companies, family limited partnerships, S corporations, life estate, personal residence trusts, and so forth are possible solutions but are beyond the scope of this article. Nevertheless, many of the provisions mentioned below may be suitable for use in the operating or partnership agreements.[4]

The Grantor Trust Agreement "Wait and See" Approach

Under this approach, the trust grantor and owner of the vacation home transfers title to himself or herself as trustee (or perhaps to a family member as trustee, hereinafter "administrator"); the trust is fully revocable by the grantor. Upon the grantor's death, the trust continues, assuming it has not been revoked during the grantor's lifetime. While the grantor is living, he or she would pay all expenses of the trust, or possibly apportion some of them against the users of the property on an equitable basis, depending on their usage. After the grantor's death, the administrator (successor trustee) would "step into the grantor's shoes" and, based on the provisions hereafter mentioned, would continue to hold the vacation home for some fixed period of time, such as until the death of the survivor of the children living at the time of the grantor's death.[5]

If the grantor is dissatisfied with the operation of the trust during his or her lifetime, the grantor could revoke the trust and recover its property. In addition, the grantor could amend the trust from time to time to include provisions (such as funding the trust with sufficient assets and otherwise to ease its administration) that will be useful after his or her death.

After the grantor's demise, the trust continues with the named successor trustee – this would be a fully funded trust with a reserve sufficient to continue so that the children could use the property during their lives. The trustee could sell the property at any time and distribute the proceeds to the children then living in equal shares and the trust would terminate on the death of the last surviving child. This arrangement is fairly standard for trusts holding vacation and other residences for the benefit of children or grandchildren (usually with corporate trustees or co-trustees) and could work well provided the situation is favorable – for example, low maintenance costs, and trustees who are interested and well compensated.

The Corporate Trustee Solution

Assuming a corporate trustee has been found that will agree to acquire title (by devise or gift) and maintain the vacation home for the benefit of the family and its future generations, typical trust language might include the following:

1. The trustee may allow any income beneficiary of the trust to occupy and use any trust real estate upon such terms and conditions as it may determine in its sole and uncontrolled discretion including free of rent or in consideration of the beneficiary paying real taxes, maintenance, repairs, capital improvements and other similar carrying charges.

2. The trustee shall be entitled, but not required, to sell, lease or otherwise dispose of the property in its sole discretion, nor be liable for any loss relating to the retention of the property.

3. The usual real estate trust powers (selling at public or private sale, managing, altering, improving, granting easements, and so forth) should be included.

4. Adequate funding for future expenses (which should be included) and trustee compensation are major issues to be addressed.

Obviously the corporate trustee in this type of trust will need wide discretion if the trust is to function successfully for years into the future. The trustee will also need complete authority to terminate the trust at any time and sufficient assets in the trust to pay all of the expenses that are not absorbed by the income beneficiaries. Upon termination of the trust, the assets should be paid over to the then-living descendants of the testator,

in equal shares *per stirpes*. A child or a family member as co-trustee is probably desirable.

The testator's will should provide for this trust; being irrevocable and strictly discretionary, it should provide creditor protection[6] and avoid most of the joint ownership problems mentioned earlier in this article. If the will or trust agreement does not contain such trust provisions but only the simple "I leave everything to my descendants in equal shares *per stirpes*," it may be possible for them to agree to transfer their interests irrevocably to the corporate trustee, in which case gift tax issues may arise but these may in many cases be relatively minimal.[7]

The more difficult situation arises after a testator's death, when a corporate trustee cannot be found or the children are unwilling to transfer their interests to a corporate trustee. Often, the testator's will or trust simply says, "I leave my vacation (or other) home to my children in equal shares *per stirpes*," and the testator wants the attorney to find a way to let them, as joint owners, continue to keep the vacation home in the family. But one child could say, "I want out right now," and in this case, or if the children cannot all agree to sell or transfer to a trustee, a partition action may be the only possible solution.

Assuming the testator's children insist on going forward despite potential problems, point out the pitfalls and mention that the most difficult problem relating to the vacation home or other residence to be owned jointly is who will pay the maintenance and other costs, and under what circumstances.

Assuming that the property has been left to three adult children, questions arise, including: what should they do about (1) paying expenses such as real estate taxes, utilities, capital improvements and ordinary repairs; (2) rental income; and (3) handling the sale of the property, if necessary, along with the sometimes extremely valuable tangible personal property located in it. Most important, which individual will be responsible for doing all of these things?

If "Child A" is expected to use the property most of the time, and is generally reliable and fair in his or her dealings with the others, the other two children might be willing to transfer the vacation property into a revocable trust where Child A is the trustee. Upon the death of Child A, Child B would serve in his place, and if Child B dies, the beneficiaries could decide whether Child C should become trustee or some other person. Sample provisions for such a trust follow.

The "Child A Trust"

Assuming the corporate trustee arrangement is not available, the creation of what I call a "Child A Trust" may be considered. In this scenario, Child A will act as trustee of the trust to which he or she and each of the devisees will convey their interests. The trust will be revocable and amendable with the devisees as grantors and income beneficiaries. On the death of the last surviving child, the trust will terminate with the principal and accrued income payable to the descendants of the children in equal shares *per stirpes*.

> The "conventional wisdom" approach requires that the will or trust agreement directs the sale of the vacation property after the testator/grantor's death.

A variety of potential problems must be considered, including appointing successor trustees, terminating the trust when a majority[8] of the children wish to do so, the death of a child and his ability to transfer his interest to his descendants, buy-out provisions and preparing an exit strategy allowing all or any of the children to get out of the arrangement at any time, if desired. In addition, more mundane considerations arise such as regular maintenance and operating expenses, rental, and the use of the vacation home and its contents. Routine maintenance might include spring/fall cleanup, lawn care, painting and repairs, and so forth. Regular operating expenses include real estate taxes, insurance and utilities. Develop a schedule for the personal use of the children as well as possible rental during peak seasons – a sale provision with a right of first refusal should also be included along with a plan for what happens when a child dies or becomes incompetent.

It is impossible to plan for all the problems that can occur, and it goes without saying that only if the children are extremely cooperative can these provisions be effective. Being able to amend the trust in the future by majority vote of the children can be helpful to deal with later issues that arise.

The following language might be used in the "Child A Trust" scenario:

Providing for the Trustee and Successor Trustees

> "Child A is hereby designated to act as Trustee to serve without bond or other security and agrees to administer the property and manage it in accordance with the provisions hereof. Upon the death, resignation of the Trustee, or upon Child A becoming mentally incapable of functioning as such Trustee, Child B shall be entitled to act as Successor Trustee subject to the same conditions and responsibilities as Child A and similarly if Child B ceases for any reason to function as such Trustee, Child C is hereby appointed to serve as Trustee. Upon the death of all of said children, any

individual or corporate trustee may be designated as Successor Trustee by my last surviving child by an instrument in writing delivered to such individual or corporate Trustee. Each Trustee shall be entitled to resign at any time."

Providing for the Duration and Termination of the Trust

"The Trust shall continue during the lives of the then Grantors and their descendants for a period not to exceed twenty-one (21) years after the death of the Grantor or sooner upon the consent in writing of a majority of the Grantors. The overall intention is that the property be held for the benefit of the Grantors, their children and their descendants for the longest period of time that is allowed under the laws of the State of New York. If a decision is made to sell the property, the proceeds of sale of such property shall be divided among the Grantors or in equal shares *per stirpes* with the right of first refusal for a child or descendant who shall desire to purchase the property at its then appraised value."

Providing Funds for the Maintenance of the Trust Property

The issue of obtaining funds to maintain the property can cause many problems. Some children may want to contribute, whereas others may not. This becomes especially important where some of the children wish to use the property for a limited time only. The following draft language is designed to attempt a reasonable arrangement:

"The income and expenses of the Trust shall be shared pro-rata among the Grantors and their descendants. The Trustee shall endeavor to determine for each vacation period the anticipated rental income, ordinary maintenance, repairs and other expenses including real estate taxes, insurance coverage, legal fees, etc. and shall prepare a yearly budget at the beginning of each of the vacation periods indicating what the expected expenses for the year will be. The Trustee shall request a contribution based on the expected usage of the property by the particular individual involved and if a payment is not made promptly, the Trustee will ask the non-paying individuals to refrain from using the vacation property for a portion of the vacation period. The participating family members may supply additional capital so that there is a sufficient sum to provide for the anticipated maintenance expenses for the year. The Trustee shall receive $_____ annually as compensation for serving as Trustee. It is hoped that the family members will act in as cooperative a manner as possible in assisting the Trustee to provide the necessary funds for the various expenses which will be incurred during the vacation period. Any cost overruns should be promptly reimbursed to the Trustee pro-rata by all of the parties using the property."

Providing for Capital Improvements

A majority of the children must agree on any expenditure for major improvements. The Trustee should also obtain estimates and schedules for the performance of the work, and the reason why the work is desirable or necessary. Here is some language that may be useful:

"The Trustee shall consult with each of the children using the vacation property as to the desirability of making capital improvements from time to time and shall give each individual an opportunity to state their position on making the intended capital improvements. The desire of the majority of the children shall determine whether the work should proceed and the appropriate contractors to employ for such purpose. When cooperation among the family members is requested and a majority of the children conclude that the property should not be improved or that the expenses of restoring the property are excessive, then the majority decision shall apply and the property shall be improved on such terms and conditions as the Trustee can negotiate."

If only two of the Grantors are living, any decision for capital improvements or to terminate the trust must be agreed to by both Grantors.

Providing for the "Escape" Clause

Before going forward with the "Child A Trust," considerable thought must be given on how to exit the trust if all does not go well. Suppose Child B dies or wants to sell his or her share as a beneficiary of the trust. In this case one might use language to allow this to be done while still maintaining the viability of the trust:

A. "If one or more of the income beneficiaries shall desire to sell or otherwise dispose of his/her interest for any reason, he or she shall first offer to sell or otherwise dispose of his/her interest to the other children and if they are unwilling or unable to purchase such interest, the same shall be sold on such terms as the Trustee shall determine in his sole discretion and the net proceeds of sale shall be distributed to the remaining children then living in equal shares *per stirpes*."

B. "Upon the death or incompetency of any of the Grantors, the share of the deceased or incompetent child shall be transferred over and delivered by the Trustee to the remaining children (NOT TO THE DESCENDANTS OF THE CHILD OR TO HIS DEVISEES) and be subject to the terms of the trust agreement, provided however, that the Trustee may in his sole discretion allow the children of such deceased child to occupy and use the trust property on the same terms and conditions as the deceased or incapacitated child did."

Another variation is to permit the Grantors to dispose of their interests by gift or devise and language crafting such provisions could permit the recipients to take the interests of the deceased child subject to the terms of the trust agreement with similar buy-out provisions for beneficiaries of deceased children who do not want to hold the deceased child's interest. Suppose there are beneficiaries of deceased children who disagree on disposing of their inheritance. Then what? On balance, I would say that

allowing children to devise their interests to grandchildren or "outsiders" or anyone else while legally possible creates a potentially unmanageable situation and should be avoided if possible.

Miscellaneous Other Provisions

The usual trust provision that allows the trustee to sell the trust property upon such terms and conditions as the trustee shall determine in his or her sole discretion must be modified to subordinate this decision to the needs and desires of a majority of the children. The often-used provision exonerating the trustee from liability, except in the case of gross negligence, should probably not be used in a family situation since it might allow one of the children who acts as trustee to "run roughshod" over the other children. Nevertheless, if the trustee acts in good faith, he or she should not be liable for his or her actions as trustee. It is also desirable that the "Child A" trustee be required to file annual accountings with the other children. The trustee should be entitled to commissions and reimbursements for expenses based upon a written agreement entered into before each of the accounting periods. Other provisions may be appropriate depending upon the situation. For example, suppose there was beachfront property which required a perpetual easement to be signed allowing the Army Corps of Engineers to make the necessary replenishment to the sand on the beach. There should probably be permission for the trustee to act in such a case without the consent of the adult children.

Ownership of Foreign and Out-of-State Real Estate

The Irish cottage or the Florida condominium sometimes appear as an asset of substantial estates and, of course, require careful planning, usually involving lawyers located in foreign countries and other states who may or may not be familiar (or want to become familiar) with the arrangements discussed in this article. Nevertheless there are some individuals who own those "foreign" properties and would like to "keep them in the family." The French movie *Summer Hours* (2008) told a tale of the anguish suffered by children who inherit a Provence manor house full of extremely valuable Picassos and other works of art left to the children as joint owners. Eventually the property is sold to the public because none of the children is able to afford to keep it or agree to do otherwise.

Working closely with foreign or out-of-state counsel to understand and comply with local law is necessary in these situations. Where clients own foreign and/or out-of-state real estate, local counsel should be consulted whether or not the property is to be devised jointly. Ancillary probate and other proceedings may be avoided if the foreign or out-of-state property is held in trust. Some type of arrangement patterned after the corporate or "Child A" trusts or some better arrangement may be possible but, in all cases, the law of the location of the property must be dealt with.

Foreign law generally provides that the law of the situs of the real property and tangibles located there (immovables) govern their disposition rather than the law of the decedent's domicile. Having a foreign will to dispose of foreign assets and an American will to dispose of domestic property may also be desirable.

Where clients own foreign and/or out-of-state real estate, local counsel should be consulted whether or not the property is to be devised jointly.

Tax and Related Considerations

A number of estate tax issues arise in connection with the approaches suggested in this article. The approach least affected by tax considerations is the direction to sell, the right of purchase, as well as the precatory language approach.[9] The "Child A Trust" approach where the children convey the property over to one of their family members should not result in federal gift tax but the property owned by the trust would not receive a "step-up in basis" upon the grantor's death.[10]

Where the property is left outright to one child who will, presumably, allow the other children to occupy it for vacation purposes, the property will take as a cost basis the value of the property at the time of the decedent's death.[11] If a life estate situation (parent conveying property by deed to children equally but retaining a life estate), the children would be entitled to a separate "step-up in basis" when they receive the property which, of course, will be includible in the decedent's estate for estate tax purposes.[12]

In the qualified personal residence trust situation with the remainder interest left to joint owners, the same result would apply if the grantor income beneficiary predeceases the fixed term of the trust and the property will be includible in the grantor's estate, under § 2702 of the Internal Revenue Code, as amended.

Additional Considerations

While the emphasis of this article is on trust and testamentary dispositions to joint owners, lifetime acquisitions by deed (e.g., friends deciding to buy a vacation property jointly because one family does not have enough assets to do so alone), including life estates, are also possible and may be more commonplace due to the $5 million exemption for gift taxes during the 2011–2012 period.

The problems of joint ownership exist whether outright gifts, qualified personal residence trusts (IRC § 2702) or other entities are used. Additionally, some states may treat real estate held in trust rather than outright as intangible personal property allowing it to escape estate and inheritance taxation.

If a donor transfers a remainder interest and retains a life estate, then the vacation home would receive a step-up in basis but would be fully includable in the donor's estate for estate tax purposes.[13] Holding the vacation home in trust will usually result in the trust being excluded for probate purposes and this can be important to avoid waiting for ancillary probate proceedings to be completed.

Conclusions

Vacation homes (and other residences) deserve considerably more attention by estate planners in drafting language providing for their disposition than they are now receiving because of the various problems involved when the property is transferred to individuals on a jointly owned basis. It is simply not enough to say "let's keep everything simple" or that all of these problems "can be worked out."

The problems of co-ownership are many and can sometimes be avoided by using alternative directions for the disposition of the property including (1) directing the sale of the vacation home with the proceeds being distributed equally to all of the children, (2) using precatory language so that a particular child could inherit the poperty and make use of it for the benefit of the other family members, and (3) utilizing trust provisions designed to provide a fair arrangement for the shared use of the property over a period of years. Each of these approaches has its problems but leaving the vacation property to children as joint owners without saying more should be avoided, or sibling warfare will eventually result. ■

1. The use of the expression "joint owners" is intended to refer to forms of ownership of real property other than single ownership and is intended to include tenancies in common, joint tenancies with a right of survivorship and tenancies by the entireties. The words "testator" and "grantor" refer to single owners of vacation properties and where husband and wife hold real property jointly, it is presumed that one or the other predeceased.
2. *See* N.Y. Real Property Actions & Proceedings Law art. 16.
3. IRC § 1014(a).
4. An interesting article by William S. Forsberg, titled "Asset Protection and the Limited Liability Company – Not the Panacea of Credit Protection You Might Think!," dealt with the benefits and problems encountered in holding vacation homes in limited liability companies, FLPs and so forth. It appeared in *Probate & Property* (ABA) Nov./Dec. 2009.
5. N.Y. Estates, Powers & Trusts Law 10-8.1.
6. *In re Gruber's Will*, 122 N.Y.S.2d 654 (Sur. Ct., Monroe Co. 1953).
7. IRC § 2501.
8. Where an even number of children are involved or there is no clear majority, the facts and circumstances should be carefully considered in an effort to reach a consensus that respects the rights of all concerned. A solution will probably be found that avoids the expense, delays and often unfavorable results of a partition lawsuit.
9. Depending upon the date of death and the appraised value of the property, there may or may not be some capital gains tax involved, but probably not much because of the step-up in basis. IRC § 2501.
10. IRC § 2038.
11. IRC § 2501.
12. IRC § 2036.
13. *Id.*

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I just received a tablet device for my birthday. I not only use my tablet for personal reasons (i.e., surfing the Web, accessing my accounts on various social media websites, watching movies, as well as sending and receiving personal emails with family and friends) but I recently found that I can use my tablet for work related to my legal practice. The tablet allows me access to almost all of the same applications I use in the office (email, word processing programs, discovery and legal research software, billing systems, etc.) and I can access these applications (as well as most Internet websites and apps) through either a cellular data network or by way of accessing a wireless Internet hotspot. Most of the wireless hotspots I've accessed allow me to instantly connect to a wireless signal with the click of a few buttons. However, I am never asked to enter a password to access these various hotspots. I have recently read that cyber attacks are increasing at a disturbing rate and such activity oftentimes occurs through hacking over public wireless networks.

I want to act professionally and in a manner consistent with my ethical responsibilities to both my clients and opposing counsel. Are there certain obligations that I must abide by when using a mobile device for work-related purposes, especially with respect to accessing, transmitting and receiving confidential information through the device? How many passwords should I have on my device to make sure it is protected from unauthorized access? Am I obligated to stay informed of technological developments relating to the use of mobile devices? Last, am I required to set forth in the engagement letter with potential clients a stated protocol for the use of electronic communications in connection with a representation?

Sincerely,
Tech Geek

Dear Tech Geek:

At the risk of sounding like a couple of "techies," before we can address the issue of your professional responsibility here and the various ethical obligations associated with the use of mobile devices, it is important to have an understanding of how mobile technology is being utilized as part of current legal practice. Mobile devices and apps have become an integral part of practicing law. They allow you to be away from your physical office even when you need access to various electronic resources. In essence, mobile devices and apps allow your office to almost always be with you. Mobile devices allow us not only to have access to our work emails and voicemails but they have become convenient tools to access most if not all of the computer network applications that you would find on your office system. Examples include: document management systems, productivity applications (such as word processing, spreadsheet and presentation creation programs), discovery database programs, billing software and Internet work voicemail.

The state and federal courts in New York have embraced the use of mobile technology. Indeed, beginning in 2006, the New York State Office of Court Administration began installing free wireless Internet access in a number of New York state courthouses. As for their federal counterparts, in 2010, by Standing Order M10-468, the United States District Court for the Southern District of New York gave attorneys admitted to practice in the Southern District the opportunity to apply for a service pass which would enable them to bring one electronic device with them at a time into any of the courthouses in the district. Previously, all attorneys were required to turn over any and all electronic devices in their possession to security personnel before entering any of the courthouses in the Southern District of New York. However, the service pass program does not authorize attorneys to carry laptops into courtrooms and attorneys with service passes must request permission from individual judges to bring a laptop to court.

Another advantage of mobile technology is that it allows an attorney to conduct legal research and background searches almost instantly. Research database programs can be easily accessed in court from a mobile device either through a mobile web browser or through apps that many of the players in the research database industry have developed for use on both smartphones and tablets. Moreover, one can research prospective jurors while in court as jury selection unfolds. *See* Robert B. Gibson and Jesse D. Capell, *Researching Jurors on the Internet – Ethical Implications*, New York State Bar Association *Journal*, November/December 2012, Vol. 84, No. 9.

So where are the dangers? One of the most prevalent threats faced by those using mobile technology is the chance of physical access by unauthorized users. Almost everyone has either lost or had a device stolen. Lost or

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stolen devices are easily susceptible to access by a third party depending on what security measures are installed on the device, even though many devices contain a PIN (personal identification number) that if not entered correctly after multiple attempts will lock the device from access for a given period of time. Another threat to mobile device users comes from unauthorized hackers who access data exchanged over unsecured wireless networks. Your mobile device is at risk for unauthorized access if no encryptions are set for either the device or the network that the device is running on. *See* Vincent J. Syracuse and Amy S. Beard, *Attorney Professionalism Forum*, New York State Bar Association *Journal*, February 2012, Vol. 84, No. 2. *See also* State Bar of Calif. Standing Comm. on Prof. Resp. and Conduct Formal Op. No. 2010-179 (2010) (discusses various factors that attorneys should consider when accessing potentially unsecured wireless networks).

Turning to your first question, there are a number of ethical obligations associated with the use of mobile devices and the duties arising with regards to preserving confidentiality. Rule 1.1 of the New York Rules of Professional Conduct (RPC) establishes our ethical obligation to provide competent representation. This includes understanding how technologies are utilized in connection with a given representation and suggests that attorneys should be intimately familiar with those technologies.

Rule 1.6 of the RPC prohibits disclosure of confidential client information without the client's informed consent. Specifically, Rule 1.6(a) of the RPC states that "[a] lawyer shall not *knowingly* reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . . ." (emphasis added). As defined by the RPC, confidential information "consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential" but "does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." *Id.* Rule 1.6(c) states that "[a] lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) [of Rule 1.6] through an employee."

The Comments to Rule 1.6 also offer guidance on an attorney's duty to preserve and protect confidential information. Comment [16] to Rule 1.6 of the RPC states:

> Paragraph (c) [of Rule 1.6 of the RPC] requires a lawyer to exercise reasonable care to prevent disclosure of information related to the representation by employees, associates and others whose services are utilized in connection with the representation. *See also* Rules 1.1, 5.1 and 5.3. However, a lawyer may reveal the information permitted to be disclosed by this Rule through an employee.

Furthermore, Comment [17] to Rule 1.6 of the RPC provides:

> When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

Both Comments [16] and [17] are highly relevant, especially in situations where an attorney supervises those handling confidential and sensitive information on his or her behalf (i.e., document service providers, information technology (IT) staff, electronic discovery consultants, as well as contract or temporary attorneys). In addition, Comment [17] provides guidance as to how an attorney should utilize mobile devices when accessing confidential information. For example, it might not be a good idea for an attorney to check work email or document servers on a mobile device when using an unsecured wireless network. The use of an unsecured wireless network creates an increased risk that confidential information viewed on the device could come into the hands of an unintended recipient by way of hacking or improperly accessing data exchanged over that particular unsecured network. Even prior to the enactment of the RPC, an opinion published by the New York State Bar Association (NYSBA) Committee on Professional Ethics found that "[l]awyers have a duty under DR 4-101 [the former Code of Professional Responsibility] to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets." *See* N.Y. State Bar Op. 782 (2004).

With the constant advances in technology, we would suggest the following best practices for the use of mobile devices in your legal practice. First, if you have an IT staff at your firm, you should get to know them and make them your best friends. Or if you are

at a smaller firm, be sure to develop a close working relationship with any third-party IT vendors that may be hired to manage the firm's computer systems. Second, be competent in the areas of mobile technology usage. Last, and in direct response to your question, attorneys must keep pace with the ever-changing technological developments in mobile technology usage, and in particular, data security. *See* N.Y. State Bar Op. 842 (2010).

You should also be cautious when accessing wireless networks with a mobile device because it carries the risk of allowing others unauthorized access to confidential information. Some things to take into consideration include knowing what security measures are in place, the sensitivity of the information, how the potential dissemination of such information would affect the client, and the urgency to have access to a potentially unsecure wireless network based on the circumstances at issue, and client preference with regard to what forms of communication should be used. *See, e.g.*, State Bar of Calif. Formal Op. No. 2010-179. Very often, the potential for hacking or gaining improper access to data is far greater over a public wireless network than through the device's usual operating network (i.e., the 3G or 4G carrier network in which the device is normally operating or a secured and encrypted wireless network).

The factors set forth in the California Ethics Opinion are highly instructive for our modern and often virtual legal workplace, especially since Internet access has become so far-reaching that many airlines now allow passengers the ability to access their offices when in flight. Let's say for example that a lawyer is on a nonstop flight from New York to the Far East, and her client emails her requesting that she include, as part of a previously planned electronic court filing, a number of confidential documents under seal. Before she left for the airport, the lawyer had planned to have a colleague in her office transmit the electronic filing to the court while she was in flight since the filing deadline was to occur sometime when her plane was over the middle of the Pacific Ocean. Because of this request, however, the confidential documents in question must be emailed back and forth between the lawyer, the client and the lawyer's office during the flight. The lawyer did not have to enter any encryption passwords to access the plane's wireless network. An enterprising fellow passenger is somehow able to gain access to the lawyer's confidential communications (which include attachments consisting of the aforementioned confidential documents). Would that lawyer be protected because the urgency of the situation required her to access a potentially unsecured wireless network to meet a court deadline?

The opinion out of California suggests that, under these circumstances, accessing such a network may be permissible since a court filing deadline was imminent. That being said, absent a true emergency, why take the risk? Although many of us often act as if everything can wait until the eleventh hour, our clients deserve better. Attorneys should be forewarned not to leave such sensitive matters to the last minute, especially when their only option is to transmit confidential information over a network with little or no security. In addition, attorneys should be cautioned that unfamiliar wireless networks carry with them the risk that data exchanged on such networks could be breached.

It should be the basic rule of every law office that every mobile device used for work-related purposes contain password-protections, perhaps even utilizing multiple passwords throughout the device in question in order to access any confidential information contained therein. Confidential information may be included not only in email communications but also any documents located on a work server which can be accessed on the device. If you are at a firm and are permitted to use a personal mobile device for work purposes, make sure to follow all policies instituted by your firm as to the use of such device when handling confidential information.

Your last question asks whether you must set forth in the engagement letter with potential clients a stated protocol for the use of electronic communications in connection with a representation. We highly recommend making use of such protocol since email communications with clients have been and are an integral part of the attorney-client relationship. In our view, client engagement letters should include language disclosing the risks and confirming the client's consent to the use of electronic and mobile communications during the representation. Some sample language could include the following:

> In the course of our representation of our clients, we have a duty to preserve the confidentiality of our communications with our clients and other information relating to the representation. We need to recognize that all means of communication are, to some degree, susceptible to misdirection, delay or interception. Email and cellular telephone communications present special risks of inadvertent disclosure. However, because of the countervailing speed, efficiency, and convenience of these methods of communication, we have adopted them as part of the normal course of our operations. Unless instructed in writing to the contrary, we will assume that our clients consent to our use of email and cell phone communications in the course of our engagement.

Mobile device usage has completely altered the way we practice law and communicate with our clients. However, as with any emerging technology, one must always take all necessary precautions, especially when it comes to preventing confidential information from ending up in the hands of unintended recipients.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.,
and Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse
& Hirschtritt LLP

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I have found that accessing various forms of social media has become a highly useful tool in my practice. However, I want to know if there are limits as to how Facebook, Twitter, LinkedIn and the like can be used in connection with handling my various client matters. For example, what are the recommended methods for conducting research on adverse witnesses or potential jurors through the use of social media? What other electronic means can be utilized to conduct such research? Most important, what ethical obligations come into play when one uses social media in these contexts?

Sincerely,

I. Tweet

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In moving for relief under CPLR 3212(f), you must show two things: (1) that further disclosure will likely produce the facts you need to defeat your adversary's motion;[9] and (2) that you've made good-faith attempts in disclosure to obtain the facts you need or that you're unable right now to get those facts. If you can, tell the court that the facts you need are in the moving party's exclusive control.

CPLR 3212(f) requires you — the party opposing summary judgment — to satisfy the two-pronged test, explained above, with one or more affidavits. You may also use an attorney affirmation if the affirmation is based on the attorney's personal knowledge.

A court will likely order a continuance or deny a summary-judgment motion under CPLR 3212(f) if the moving party failed to comply with the nonmoving party's disclosure demands.[10]

A court will likely deny your CPLR 3212(f) motion if you've "dragged [your] feet"[11] in conducting disclosure. A court will also deny your CPLR 3212(f) motion if you don't have the information to oppose the motion because your "voluntary inaction . . . . [led you to] ma[k]e no reasonable attempt to ascertain the facts."[12] Also, a court will likely deny your 3212(f) motion if you "speculat[e] or hope"[13] that further disclosure "might turn up something useful."[14]

A court also will likely deny your CPLR 3212(f) motion if you can obtain the evidence you need from a source other than the moving party — if the evidence isn't in the moving party's exclusive control.[15]

Sometimes the evidence you need is available from a non-party. In its discretion, the court may deny the summary-judgment motion without prejudice to allow you to obtain additional disclosure from the non-party.[16]

A court will likely grant your CPLR 3212(f) motion for additional disclosure if you haven't "dawdled in trying to find" the evidence you need and if there's "a real possibility that important evidence will turn up."[17] Tell the court how additional disclosure will reveal material facts sufficient to defeat your adversary's summary-judgment motion.[18] If the court denies the motion without prejudice and grants additional disclosure, the moving party may move for summary judgment again once disclosure is complete.[19]

If you — the plaintiff — have already filed your note of issue (or the notice of trial in the lower courts), a court will likely deny your request under CPLR 3212(f) for a continuance or denial of your adversary's summary-judgment motion. By filing a note of issue (or notice of trial), you declare that disclosure is over and that you're ready to go to trial. You can't now benefit from CPLR 3212(f) to argue that disclosure isn't complete or that you need additional disclosure.

Summary Judgment and Preclusion Orders (or Stipulations)

During disclosure, the court might order you to respond to disclosure demands and turn over documents to your adversary by a date certain or be precluded from using that information at trial. This ruling is called a conditional order of preclusion. If you failed to respond to disclosure demands and the court precludes you from using that information at trial, the court's ruling is called a preclusion order.

Imagine that you're the defaulting party — you failed to turn over documents or other information to your adversary — on the basis of a conditional order of preclusion (or a self-executing preclusion order) and you're seeking to prevent a court from precluding your evidence. What happens? "[T]o obtain relief from the dictates of a conditional order that will preclude a party from submitting evidence in support of a claim or defense, the defaulting party must demonstrate"[20] (1) a reasonable excuse for failing to produce the requested items and (2) a meritorious claim or defense to the action or proceeding.[21]

Once a court precludes you from using evidence at trial, be prepared for your adversary to move for summary judgment. Not all courts grant summary judgment based on a preclusion order,[22] but a court might grant summary judgment based on a preclusion order "where it appears that the precluded party cannot prove a prima facie case."[23] If the court precludes your evidence, move to renew and reargue the court's decision precluding your evidence. Perhaps the court will change its mind. You may also appeal the preclusion order.

Courts will likely grant summary judgment and dismiss the action or proceeding if the preclusion order is based on the plaintiff's failure to comply with a demand for a bill of particulars. In that event, the plaintiff would be "prevent[ed] . . . from establishing necessary elements of the cause of action."[24]

You can't circumvent a preclusion order by discontinuing the action or commencing a new action after a court awards summary judgment to your adversary. Even if you were to commence a new action, a court will likely give the former judgment res judicata effect.[25]

You and your adversary may also stipulate to disclose information by a date certain or be precluded from introducing that evidence at trial. If you've failed to disclose the information and you're facing preclusion, you have two options. You can ask your adversary to enter into another stipulation and agree to give you additional time to comply with disclosure or face preclusion. If your adversary refuses to enter into another stipulation, you may try to vacate it.

Vacating a stipulation is an uphill battle. You'll need to show proof sufficient to invalidate a contract: fraud, collusion, mistake, or accident.[26] To vacate the stipulation for mistake, you must prove unilateral or mutual mistake by clear and convincing evidence.[27] A court will void a stipulation on the basis of unilateral mistake if (1) enforcement would be unconscionable; (2) the mistake is material and made despite the erring party's exercise of ordinary care; (3) the innocent party didn't know of the error; and

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(4) it's possible to place the parties in status quo ante.[28] A court won't vacate a stipulation where inquiry or ordinary care would've elicited the correct information and revealed the mistake.[29] A court, acting in equity, may vacate a stipulation on a unilateral mistake "if failing to do so would result in unjust enrichment" of the innocent party.[30]

Immediate Trial

On a summary-judgment motion, the court will order an immediate trial if the only triable issue of fact "is the amount or extent of damages"[31] or if the motion is based on the grounds found in CPLR 3211(a) or CPLR 3211(b).[32] CPLR 3211(a) grounds include dismissal based on documentary evidence, subject-matter jurisdiction, legal capacity to sue, another action pending, arbitration and award, collateral estoppel, discharge in bankruptcy, infancy, payment, release, res judicata, statute of limitations, statute of frauds, improper counterclaim, failure to state a cause of action, lack of personal jurisdiction, out-of-state service or service by publication, absent necessary party, and immunity from liability. CPLR 3211(b) grounds provide that dismissal is appropriate when a defendant hasn't stated a defense or when the defense has no merit.

You have the choice to move to dismiss the case based on any ground under CPLR 3211(a) or to preserve those objections in your answer. If you choose to preserve those objections in your answer, you may move for summary judgment on CPLR 3211(a) grounds.

If an issue of fact exists about liability, the court may order an immediate trial under CPLR 3212(c) if you've made a CPLR 3212 summary-judgment motion "grounded on a 3211(a) objection pleaded as a defense."[33]

If the court orders an immediate trial on your summary-judgment motion, move to reargue your summary-judgment motion or appeal the court's determination to have an immediate trial.

Sometimes, an immediate trial might be advantageous to you and your client. If you can establish liability, move for summary judgment on the issue of liability and request an immediate trial on the issue of damages.[34]

Summary Judgment in Negligence Cases

Nothing forbids a court from granting a summary-judgment motion in a negligence case. But some judges rarely grant summary judgment in a negligence case. The Court of Appeals has recognized that "[n]egligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination."[35] Even if the parties concede the facts, "there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances. This can rarely be decided as a matter of law."[36]

In a negligence case, a court may decide legal issues on a summary-judgment motion. A legal issue a court may decide on summary judgment in a negligence case is an "alleged tortfeasor's duty to a plaintiff."[37]

Whether a plaintiff's injuries were foreseeable might be an issue of fact for trial. If the facts in the case aren't in dispute and only one inference can be drawn from the facts, the plaintiff's foreseeable injuries might be a question of law for the judge to decide on summary judgment.[38]

Lack of a defendant's due care might also be a trial issue. If the court finds based on the undisputed facts that the defendant's conduct didn't fall below the applicable standard of care, summary judgment might be appropriate.

The proximate cause of the plaintiff's injuries might be a factual issue for trial. If so, summary judgment is inappropriate. If the court has undisputed evidence of an intervening cause, summary judgment for the defendant would also be appropriate.[39]

Summary judgment might not be appropriate when the plaintiff's claim is based on a defendant-manufacturer's failure to warn.[40]

Summary Judgment in Contract Cases

Interpreting a contract is an appropriate legal issue for a court to decide on summary judgment. So, too, is whether a written document is an enforceable contract under the statute of frauds.

An issue of fact for trial might be the parties' intent as reflected by the contract's language and terms. In that case, summary judgment is inappropriate.[41]

Summary judgment is also inappropriate if the contract is ambiguous and "extrinsic evidence presents a question of credibility."[42]

A court may apply the terms of an insurance policy to the facts of the case on a summary-judgment motion if the materials facts aren't in dispute.

Summary Judgment in Lieu of Complaint Under CPLR 3213

Instead of commencing a case with a summons and complaint, you may commence an action with a summons, a notice of motion for summary judgment, and supporting papers under CPLR 3213.[43] This expeditious method of commencing a case is permitted in limited circumstances: if the case is based on "an instrument for the payment of money only" or on "any judgment."[44] The defendant should respond to the motion with answering, or opposition, papers. On the return date of the motion, the parties will appear to argue or oppose the motion.

A court may not enter a default judgment under CPLR 3215(a) before the hearing date — the return date — of the summary-judgment motion.[45]

If the court denies summary judgment on the return date, the court has the discretion to deem the moving and answering papers as the complaint and answer, respectively.[46]

Negotiable and non-negotiable instruments qualify under CPLR 3213: "Presumably any paper requiring the payment of money only and qualifying as a piece of 'commercial paper' under the Uniform Commercial Code would satisfy . . . . And if a given paper, although not formally a money 'instrument,' contains the requisite (and limited) terms, it will be accepted."[47]

To prove your case on summary judgment, you'll need to show the instrument itself and that the defendant didn't pay.

Any judgment qualifies under CPLR 3213: a domestic judgment or a federal or sister-state judgment requiring recognition under the full faith and credit clause of the United States Constitution.[48] Practitioners rarely use CPLR 3213 to get a New York court to recognize a judgment. Practitioners will use CPLR Article 54, "which allows a judgment to be converted through a mere registration procedure."[49] The only judgments that wouldn't qualify under CPLR 5401 but would qualify under CPLR 3213 "are those taken in the earlier forum either by default for non-appearance or by confession."[50]

In the upcoming issue of the *Journal*, the *Legal Writer* will discuss disclosure motions in its series on civil-litigation documents. ■

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1. CPLR 3214(b).
2. *Id.*
3. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 37:483, at 37-49 (2006; Dec. 2009 Supp.).
4. *Id.* § 37:483, at 37-49.
5. *Id.* § 37:512, at 37-51.
6. *Id.* § 37:513, at 37-51.
7. *Id.* § 37:514, at 37-51.
8. *Id.* § 37:480, at 37-48.
9. CPLR 3212(f); Barr et al., *supra* note 3, § 37:490, at 37-49.
10. Barr et al., *supra* note 3, § 37:483, at 37-49.
11. *Id.* § 37:491, at 37-49.
12. 1 Byer's Civil Motions § 77:19 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.), *available at* http://www.nylp.com/online_pubs/index.html (last visited Nov. 26, 2012).
13. Barr et al., *supra* note 3, § 37:493, at 37-50; *see* Byer's Civil Motions, *supra* note 12, at § 77:19 ("The opponent must demonstrate that the needed proof was within the exclusive knowledge of the moving party and the claims in opposition to summary judgment must be supported by something more than mere hope or conjecture.").
14. Barr et al., *supra* note 3, § 37:491, at 37-49.
15. *Id.* § 37:500, at 37-50.
16. *Id.*
17. *Id.* § 37:491, at 37-49.
18. Byer's Civil Motions, *supra* note 12, at § 77:08.
19. Barr et al., *supra* note 3, § 37:481, at 37-48, 37-49.
20. *Gibbs v. St. Barnabas Hosp.*, 16 N.Y.3d 74, 80, 917 N.Y.S.2d 68, 71, 942 N.E.2d 277, 280 (2010) ("[T]he defaulting party must demonstrate (1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim or defense.").
21. *Id.*; *Eaderesto v. 22 Leroy Owners Corp.*, 101 A.D.3d 450, 450–51, 955 N.Y.S.2d 328, 329 (1st Dep't 2012) ("The record shows that defendants provided a reasonable excuse for their default and subsequent 45-day delay in complying with the [self-executing preclusion] order, as the handling attorney in a two-partner firm had been stricken with a serious illness. Defendants also demonstrated a meritorious defense to the action by presenting evidence that plaintiff remained in the shower in defendants' building despite knowing that the water was too hot.") (citing *Gibbs*, 16 N.Y.3d at 80, 917 N.Y.S.2d at 71, 942 N.E.2d at 280).
22. *See, e.g.*, Byer's Civil Motions, *supra* note 12, at § 77:21 (citing *Crump v. City of N.Y.*, 67 A.D.2d 634, 635, 412 N.Y.S.2d 148, 149 (1st Dep't 1979)); *Mendoza v. Highpoint Assocs.*, IX, LLC, 83 A.D.3d 1, 6, 919 N.Y.S.2d 129, 133 (1st Dep't 2011) ("[S]ummary judgment should be granted where the non-disclosing defendant can establish entitlement to such relief despite the preclusion order . . . .").
23. *Id.*
24. *Id.*
25. *Id.*
26. *Hallock v. State of N.Y.*, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 512, 474 N.E.2d 1178, 1180 (1984) (citing *In re Frutiger*, 29 N.Y.2d 143, 149–50, 324 N.Y.S.2d 36, 40, 272 N.E.2d 543, 546 (1971)).
27. *Vermilyea v. Vermilyea*, 224 A.D.2d 759, 760–61, 639 N.Y.S.2d 953, 954 (3d Dep't 1996).
28. *Mazzola v. CNA Ins. Co.*, 145 Misc. 2d 896, 900–01, 548 N.Y.S.2d 610, 612–13 (Civ. Ct., Queens Co. 1989).
29. *In re Jones*, 13 Misc. 2d 678, 682, 177 N.Y.S.2d 307, 312 (Sur. Ct., Nassau Co. 1958); *Mazzola*, 145 Misc. 2d at 901, 548 N.Y.S.2d at 613.
30. *Weissman v. Bondy & Schloss*, 230 A.D.2d 465, 469, 660 N.Y.S.2d 115, 118 (1st Dep't 1997), *appeal dismissed*, 91 N.Y.2d 887, 668 N.Y.S.2d 565, 691 N.E.2d 637 (1998).
31. Barr et al., *supra* note 3, § 37:640, at 37-58.
32. CPLR 3212(c); Barr et al., *supra* note 3, § 37:640, at 37-58; Byer's Civil Motions, *supra* note 12, at § 77:23.
33. David D. Siegel, New York Practice § 284, at 485 (5th ed. 2011).
34. Barr et al., *supra* note 3, § 37:640, at 37-58.
35. *Ugarriza v. Schmieder*, 46 N.Y.2d 471, 474, 414 N.Y.S.2d 304, 305, 386 N.E.2d 1324, 1325 (1979).
36. *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 133, 320 N.E.2d 853, 855 (1974) (holding that summary judgment in automobile negligence case was appropriate when no conflicting evidence existed, defendant's conduct was not up to any proper standard of due care, and plaintiff's actions did not contribute to the accident).
37. Barr et al., *supra* note 3, § 37:140, at 37-20 (citing *Di Ponzio v. Riordan*, 89 N.Y.2d 578, 583, 657 N.Y.S.2d 377, 379, 679 N.E.2d 616, 618 (1997) (finding gas station had no duty to prevent plaintiff from being struck by another customer's vehicle); *Milliken & Co. v. Consol. Edison Co. of N.Y.*, 84 N.Y.2d 469, 477, 619 N.Y.S.2d 686, 688, 644 N.E.2d 268, 270 (1994) (finding lack of privity between utility and tenants; utility had no duty to tenants when contract was between utility and landlords); *Johnson v. Cherry Grove Island Mgmt., Inc.*, 175 A.D.2d 827, 828, 573 N.Y.S.2d 187, 189 (2d Dep't 1991) (finding that sponsor of swimming event had no duty to protect plaintiff from injury when plaintiff dived into shallow water)).
38. Barr et al., *supra* note 3, § 37:140, at 37-20.
39. *Id.* § 37:142, at 37-21 (citing *Olsen v. Town of Richfield*, 81 N.Y.2d 1024, 1026, 599 N.Y.S.2d 912, 913, 616 N.E.2d 498, 499 (1993) ("Defendant's submissions on its motion for summary judgment to dismiss the injured plaintiff's case support no other conclusion than that the sole legal cause of the accident was plaintiff's reckless conduct."); *Detko v. McDonald's Rests. of N.Y., Inc.*, 198 A.D.2d 208, 210, 603 N.Y.S.2d 496, 498 (2d Dep't 1993) ("[P]laintiffs have failed to come forward with any evidence that the intervening negligent conduct of [defendant] Negron was a normal or foreseeable event . . . to impose a duty on the McDonald's defendants to prevent the resulting harm to the plaintiffs . . . . and the plaintiffs' failure to raise a genuine and material triable issue of fact warrants the granting of the motion for summary judgment."), *lv. denied*, 83 N.Y.2d 752, 611 N.Y.S.2d 134, 633 N.E.2d 489 (1994).
40. Byer's Civil Motions, *supra* note 12, at § 77:22 (citing *Cooley v. Carter-Wallace*, 102 A.D.2d 642, 478 N.Y.S.2d 375 (4th Dep't 1984); *Lugo by Lopez v. LJN Toys Ltd.*, 146 A.D.2d 168, 539 N.Y.S.2d 922 (1st Dep't 1989); *Cover v. Cohen*, 61 N.Y.2d 261, 473 N.Y.S.2d 378, 461 N.E.2d 864 (1984)).
41. Barr et al., *supra* note 3, § 37:130, at 37-20.
42. Byer's Civil Motions, *supra* note 12, at § 77:29 (citing *Hartford Accident & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169, 172, 350 N.Y.S.2d 895, 898, 305 N.E.2d 907, 909 (1973); *Mallad Constr. Corp. v. County Fed. Sav. & Loan Ass'n*, 32 N.Y.2d 285, 290–91, 344 N.Y.S.2d 925, 930, 298 N.E.2d 96, 100 (1973); *Lachs v. Fidelity & Cas. Co of N.Y.*, 306 N.Y. 357, 364, 118 N.E.2d 555, 558 (1954)).
43. Byer's Civil Motions, *supra* note 12, § 77:40.
44. CPLR 3213.
45. *Id.*
46. *Id.*
47. Siegel, *supra* note 33, at § 289, at 489 (citing Uniform Commercial Code § 3-104; *Baker v. Gundermann*, 52 Misc. 2d 639, 640, 276 N.Y.S.2d 495, 498 (Sup. Ct., Nassau Co. 1966)).
48. Byer's Civil Motions, *supra* note 12, at § 77:40.
49. Siegel, *supra* note 33, at § 290, at 490.
50. *Id.*

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: As a devoted reader, I would appreciate it if you would clear up the phrase "begging the question," which is often used to mean both "raising and evading the question."

Answer: My thanks to New York City attorney Martin B. Adelman, who knows the answer: "a statement that assumes as true a fact that has not yet been proved or conceded." The logical fallacy, "begging the question" is often mistakenly defined to mean "raising the question, perhaps because 'begging,' currently means 'pleading.'" But the Latin phrase that gave "begging the question" its name is *petitio principii*, which means "to assume the principal part." So, "begging the question" means "to assume in the premise of an argument that the conclusion is correct" is clearer. My favorite illustration is, "When did you stop beating your wife?" Whatever response the person makes to that question, he has confirmed the truth of the accusation.

"Begging the Question" is one of the many informal fallacies that lawyers use to win cases. Another, the "Fallacy of Negatives," confuses the opposition with multiple negative statements *litotes*.

The word *meiosis* also connotes a negative meaning without using negative forms. An example is Abraham Lincoln's comment about a fellow lawyer: "He can compress the most words into the smallest idea of any man I know."

In *Logic for Lawyers: A Guide to Clear Legal Thinking*, Ruggero J. Aldisert includes the "Fallacy of Amphibology," in which grammatical structure causes the ambiguity, such as "I give and bequeath the sum of $5,000 to my cousins Ruth Henning and Sylvia Woodbury." (The counsel for each beneficiary will insist that each is entitled to $5,000, but the lawyer for the estate will claim $5,000 is the total amount of the bequest.) Another example: "I will send my client's letter to you within a few days." What does this mean? Was "my client's letter" originally meant to be sent to you? Or am I saying, "I will send you the letter that my client sent me"?

The "Post Hoc Fallacy," whose full name is: *Post Hoc ergo Propter Hoc* (Latin for "After That, Therefore Because of That") is based on the fallacious belief that an event that occurred before a second event caused the second event. A passenger on the ill-fated *Andrea Doria* happened to turn on the light switch in her cabin at the same moment the *Doria* collided with the Swedish ship the *Stockholm*. Convinced that she had caused the crash, the woman ran down the halls screaming "I did it, I caused the accident!"

Another common fallacy is "Hasty Generalization," the theory that a limited sampling justifies a broad conclusion; for example, "Seat-belts for backseat passengers are unnecessary; I've never worn one, and I've never been injured in an accident."

Less well-known is the opposite fallacy, *Dicto Simpliciter* ("The Fallacy of Accident"), in which a general rule is improperly applied to cases that are exceptions). "An individual who thrusts a knife into another person should be punished, so a surgeon operating on a patient should be punished."

The *Ad Hominem* ("an attack on the man") is a personal attack on one's opponent B sometimes because that seems the most effective attack to be made. An illustration: "The suspect's malevolent, unblinking stare proves his guilt." Another desperate logical fallacy is the *Argumentum ad Populum* ("the Appeal to the Masses"): "Don't vote for a Catholic! Catholics are loyal to the Pope not the President!" (This had helped defeat Catholic presidential candidates until John Kennedy's race.)

The *Either/Or* fallacy claims there are only two possible solutions to an argument, your own and your opponent's (wrong) solution, rather than multiple alternative solutions. Some critics claim that this fallacy succeeds because of the polar opposites embedded in Western languages: black/white; right/wrong; good/bad; old/new, which suggest an either/or answer to questions.

In a similar fallacy, the *Compound Question*, a question is propounded so that it requires a yes-or-no answer, although the question contains several parts, each requiring a separate answer. For example, Congress approves a bill that the President wants to sign. But at the last minute, opponents of the bill add an "earmark" that the President opposes, causing the President a dilemma. No matter what he does, he's wrong: either he must approve the bill he now opposes or he must veto the bill he wants to sign.

Then there is the *Tu Toque Fallacy* ("You do it yourself"): You cannot oppose someone's behavior if you practice it yourself. The classic example: a father who is a heavy smoker cannot persuade his son not to smoke. A legal illustration: Lawyer A moves the court for sanctions against Lawyer B. Lawyer B has a good defense if B can show that A was derelict in responding to B's request for another set of interrogatories.

Finally, the *Argument ad Nauseam* fallacy ("repetition of a statement to the point of nausea") argues that if a point is repeatedly stated it is true. Political campaigns take advantage of this fallacy, and Lewis Carroll spoofs it in his poem, "The Hunting of the Snark":

> "Just the place for a Snark!" the Bellman cried,
> As he landed his crew with care;
> Supporting each man on the top of the tide
> By a finger entwined in his hair.
> Just the place for a Snark! I have said it twice:
> That alone should encourage the crew.
> Just the place for a Snark! I have said it thrice:
> What I tell you three times must be true.

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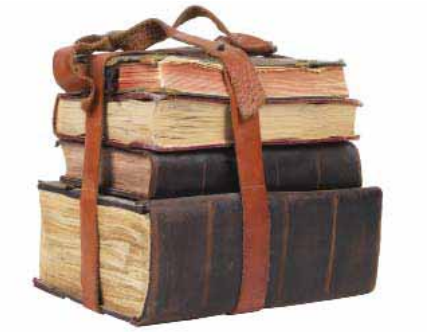

Drafting New York Civil-Litigation Documents: Part XXIV — Summary-Judgment Motions Continued

In the last issue, the *Legal Writer* discussed evidence in support of a summary-judgment motion as well as evidence in opposition to a summary-judgment motion.

In this issue of the *Journal*, we conclude our overview of summary-judgment motions. We'll discuss the effect of summary judgment on disclosure, moving to vacate a disclosure stay, summary judgment and preclusion orders, summary judgment and CPLR 3212(f), a court's ordering an immediate trial, summary judgment in negligence and contract cases, and commencing a case with a summary-judgment motion in lieu of a complaint.

Summary Judgment and Disclosure

Most practitioners move for summary judgment only after disclosure is complete.

When a party moves for summary judgment, disclosure is automatically stayed[1] until the court decides the motion.

Disclosure will continue if the court orders that it continue[2] or if the parties stipulate that disclosure will continue.

If you move for summary judgment before disclosure is complete and you've failed to comply with the non-moving party's disclosure demands, the court will likely deny your motion.

If you move for summary judgment before disclosure is complete, make sure you've responded to any pending disclosure request and that you've given your adversary plenty of opportunities to obtain the relevant facts.[3] Your client might still be entitled to summary judgment if disclosure isn't complete. The remaining or outstanding disclosure your adversary seeks might be irrelevant. Also, you might have all the material facts needed for a court to award you summary judgment regardless of your adversary's disclosure demands.[4]

Lifting Disclosure Stay

If your adversary moves for summary judgment and you need additional disclosure to oppose the motion, consider moving under CPLR 3214(b) to vacate, or lift, the disclosure stay. To move to vacate the disclosure stay, you'll need to submit an affidavit (or an attorney affirmation, if the attorney has personal knowledge) that (1) provides that your opposition to the summary-judgment motion is based on facts in another party's control, (2) explains the specific disclosure efforts you'll need to obtain the facts, and (3) contends that you haven't had sufficient opportunity to complete the necessary disclosure.[5]

When you've moving to vacate the disclosure stay, time is important — time is of the essence. Move by order to show cause to vacate the disclosure stay.[6] Moving by order to show cause will get your motion before the court fast. If the court signs your order to show cause, make sure its return date is before the return date of your adversary's summary-judgment motion.

If the court vacates the disclosure stay, you might have enough time to complete the necessary disclosure and oppose your adversary's summary-judgment motion.

If time is running out and the court can't hear your motion in advance of your adversary's summary-judgment motion, here's an option: Move to vacate the disclosure stay under CPLR 3214(b) and, at the same time, move for a continuance of your adversary's summary-judgment motion under CPLR 3212(f).[7] The return date of your motion should be the same as your adversary's summary-judgment motion.

> If a court precludes you from using evidence at trial, be prepared for your adversary to move for summary judgment.

Summary Judgment and CPLR 3212(f)

The non-moving party might not be able to oppose summary judgment effectively once the movant has filed its motion and disclosure is stayed. By moving for summary judgment, the moving party may thus prevent the non-moving party from conducting further disclosure.[8]

If you're the non-moving party but you can't yet state facts to oppose your adversary's summary-judgment motion, rely on CPLR 3212(f) to dispose of your adversary's summary-judgment motion.

The court has two options under CPLR 3212(f). The court may deny your adversary's motion. Or the court may order a continuance of the motion for you to conduct additional disclosure or to give you more time to obtain additional facts to supply in the affidavits you'll attach to your opposition papers.

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