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Preserving Social Media Is a Must – but How?
Andrew Weinstein and Barrie A. Dnistrian

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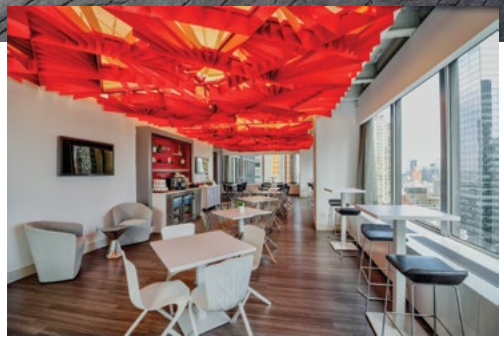

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Onward to the Future!

The Moving Hand Writes, and Having Writ, Moves On.

It has been the greatest privilege and honor of my professional life to serve as the 121st president of the New York State Bar Association, an extraordinary position previously held by so many legal luminaries. I am deeply grateful to have had a front-row seat to witness the many great and inspiring things being done by our members and by lawyers throughout the state, across the country and around the world.

We have had a very ambitious agenda and our task forces, Sections, committees and working groups have been productive, helping us provide a meaningful membership experience, set association policy, support the rule of law and enhance access to justice. We have achieved a great deal on topics as diverse as wrongful convictions, incarceration release planning, Judiciary Law 470, evaluation of candidates for election to judicial office, and standards of civility.

We have also had tremendous advocacy achievements, as demonstrated by the recently adopted 2019-2020 New York State budget. NYSBA has lobbied long and hard for criminal discovery, bail and pretrial detention reform, and we are delighted by their inclusion in the budget. I am also pleased to report that thanks in large part to our unrelenting advocacy – including meetings with legislators, e-blasts to members and legislators and a full-court press in the media – we were successful in persuading the legislature to reject the Governor's proposed increase in the biennial attorney registration fee.

This past year, we reinforced our excellent dialogue with the court system, based upon mutual respect and common interests. In Chief Judge Janet DiFiore's recent State of the Judiciary address, she announced a renewed effort toward long overdue court reform, something NYSBA has advocated for more than half a century. Judge DiFiore specifically thanked NYSBA for "it's strong support of our Judiciary in general and court modernization in particular." She went on to note that our Committee on the New York State Constitution, which was chaired by President-elect Hank Greenberg, had "issued a comprehensive report with excellent recommendations that closely parallel our own proposals."

I have been consistently and constantly inspired by the contributions and efforts of NYSBA members to improve access to justice and support the rule of law. I attended many events throughout our state – in Buffalo, Syracuse, Albany, Poughkeepsie, Manhattan, Nassau, Suffolk, Westchester, to name but a few – where lawyers were honored for making special contributions to the profession and the community.

Some have been recognized for a lifetime of achievement, like the great former New York State Senator John Dunne of Nassau, Tom Myers of Syracuse, former Court of Appeals Associate Justice Eugene Pigott, and the late Appellate Division Justice William Thompson. Others have been recognized for specific programs and projects, like Camille Mackler and Sarah Rogerson, for the extraordinary work they have done and continue to do to ensure that asylum seekers and separated immigrant families receive effective legal counsel. All have made our world a better place.

It is also inspiring to observe the dedication of the leaders of our great association. There are so many examples of our members devoting countless hours and knowledge – what Abraham Lincoln referred to as "an attorney's stock in trade" – to improve the law, the profession and the administration of justice, to enhance access to justice and so much more. It is also inspiring to observe the commitment of so many others, like President-elect Greenberg's determination to reform New York's dysfunctional court system, and the countless hours spent by Section, committee and task force leaders and members working to bring about positive change in our profession and our world.

Our superb Executive Committee and officers, President-elect Hank Greenberg, President-elect Designee and outgoing Treasurer Scott M. Karson, Secretary Sherry Levin Wallach, and Immediate Past President Sharon Stern Gerstman, have been incredibly committed to our important work. These people have been profound reminders that ours is called a noble profession for very good reason.

NYSBA's staff, led by Executive Director Pamela McDevitt, has transformed the association this past year in so many ways. Our physical plant has been modernized. We are in the process of building a new website with state-of-the-art technology that will enable us to be more relevant and responsive, with features that will include more personalized content, improved delivery of Section publications and searchable directories.

I have often said that "all roads lead to membership." One of the most important vehicles to travel those roads is effective communications. Under the leadership of Senior Director of Communications Dan Weiller, our flagship publications, the NYSBA *Journal* and the *State Bar News*, have both been transformed and significantly improved over the past year. Content from both the *State Bar News* and the *Journal* is now also disseminated through our Wednesday email blast, the *NYSBA Weekly* – a new publication that was introduced last year – and is posted on our blog on our website.

We have experienced tremendous and steady growth across our social media platforms. This isn't happening by accident but is due to carefully curated posts that highlight the best of our association and profession, better use of the various platforms, and strategic promotion efforts. This enhanced and coordinated use of social media is vital to our efforts to recruit and retain young members. Our new NYSBA Podcasts, hosted by past president David Miranda, launched last June and are available for streaming on our website, Apple Podcasts, Google Play and Spotify. If you haven't tuned in, you're missing some excellent and interesting discussions.

Membership is always a challenge and much work remains. I am pleased to report that we have the highest retention rate since 2013 and there are promising signs the positive trend will continue. NYSBA is fiscally sound, despite significant dues declines over the past several years. Our Finance Committee, led by T. Andrew Brown, worked incredibly hard and made very difficult decisions to protect our resources while still allowing NYSBA to meet its mission. Also, I am pleased to report that NYSBA had a substantial surplus in 2018, due, in part, to the fact that we generated unprecedented non-dues revenue, having developed and coordinated more non-dues revenue streams than ever before, boosting such revenue by 50 percent – and it will continue to grow.

I am most grateful to our staff for their dedication and commitment to our mission. Kim McHargue, Executive Assistant to our Executive Director, General Counsel Kathy Baxter, Senior Director of Communications Dan Weiller and Executive Director Pamela McDevitt were especially helpful to me.

Kim did so much in so many ways to be of assistance. Kathy provided reliable counsel with an encyclopedic knowledge of past reports and positions taken by the association. Dan worked closely with me to make certain that the voice of the association was strong, clear and effective. Pam, an extraordinarily gifted and dedicated bar executive and a delightful person with whom to work, supported me in every way possible. I will be eternally grateful.

There is so much in our world today to be concerned about – the decline of civility, threats to the rule of law, coarsened social discourse. It is comforting to have observed the dedication of so many of you to the finest principles of our profession. NYSBA's voice is strong and its future sound, as we strive to do as the prophet Amos instructed – to "Let justice roll down like waters, and righteousness as an ever-flowing stream."

The future of this association is very bright; indeed. Hank Greenberg, who will be this association's 122nd president, is very smart, creative and has rock-solid judgment. He is dedicated to the finest ideals and principles of our great profession and has been the perfect partner on this remarkable journey. I am confident that Hank will be a superb leader of our great association.

In his masterpiece of verse, *The Rubaiyat of Omar Khayyam*, the extraordinary Persian mathematician, astronomer and poet wrote, "The moving hand writes; and having writ, moves on." It is my time to move on. I am confident that I leave this great and noble association in good shape and in excellent hands.

MICHAEL MILLER can be reached at mmiller@nysba.org

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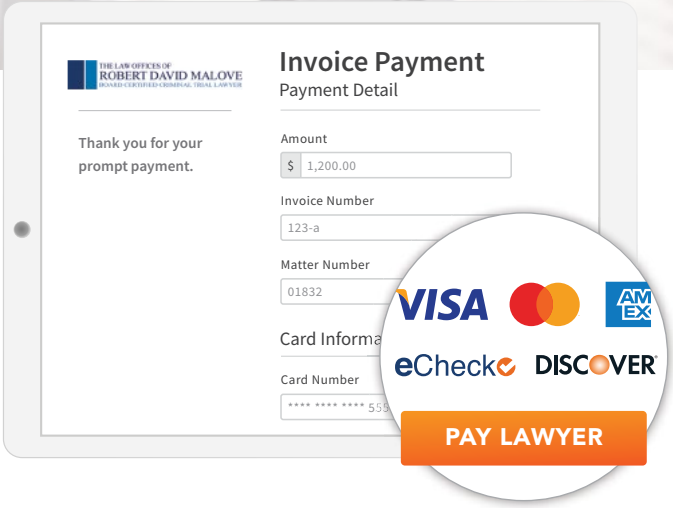

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Preserving Social Media Is a Must – but How?

By Andrew J. Weinstein and Barrie A. Dnistrian

Andrew J. Weinstein is the founder of The Weinstein Law Firm PLLC, a boutique litigation firm located in New York City that represents clients in a wide array of criminal and administrative investigations and in all phases of criminal and civil litigation.

Barrie A. Dnistrian is counsel at the firm.

In recent years, courts have routinely recognized social media's increasing role in litigation and made clear that a party's fiery Facebook post or racy Instagram photo may be discoverable pursuant to Federal Rule of Civil Procedure (FRCP) 26(b) (or applicable New York state discovery rules) if relevant to any party's claim or defense.[1]

THE DUTY TO PRESERVE

By extension, it is now well-established that parties have an affirmative duty to preserve social media content just as they would more traditional materials and other electronically stored information (ESI).[2]

Where case law falls short, however, is in addressing *how* a party should preserve social media material to satisfy its preservation obligations.[3] Other than ordering parties to refrain from "deleting, altering, or moving any social media posts,"[4] courts have provided little guidance on this topic. While the law traditionally lags behind emergent technology, the fact that social media is routinely and easily altered, modified and updated exacerbates the uncertainty resulting from the absence of any bright line rules regarding preservation.[5]

Because an attorney is obligated to "advise his [or her] client of the type of information potentially relevant to [a] lawsuit and of the necessity of preventing its destruction,"[6] the uncertainty in preservation requirements for social media presents a virtual legal minefield. While the safest course would be to universally advise clients not to alter or delete a single megabyte of their social media, such advice is somewhat impractical in the fleeting digital world. Accordingly, we outline below some pertinent guidelines for attorneys to consider when counseling clients with respect to preservation of their social media.

KNOW YOUR CLIENT'S SOCIAL MEDIA

As an initial matter, social media materials must be included in any litigation-hold notice provided to clients, even if it does not appear at first blush that social media will play a significant role in the dispute. Courts have shown little tolerance for attorneys who fail to adequately advise clients of the need to preserve their social media once litigation is reasonably anticipated or commenced, or worse, direct clients to destroy or alter such evidence.[7]

In addition, attorneys should become familiar with their clients' social media use, including the types of social media accessed, the privacy settings employed, and their social media habits (such as frequent updates or deletions).[8] From there, an appropriately customized preservation plan may start to take shape in order to avoid inadvertent spoliation.

Notably, a client's last post or upload shared via social media need not exist in perpetuity for fear of destroying relevant evidence. Indeed, an attorney may advise clients to hide, "take down" or modify information from their social media accounts, provided that an appropriate record or archive of the content is maintained.[9] Although changing a Facebook or Instagram profile from public to non-public arguably conceals relevant content, the content is neither destroyed nor altered by a change in the user's privacy settings; rather, as long as the content is properly preserved, it remains accessible to the opposing party in the course of discovery.[10] Provided that there is no violation of common law "or any statute, rule, regulation or other requirement" relating to preservation, there appears to be no ethical bar in counseling clients to this effect.[11]

THE MECHANICS OF PRESERVATION

Next comes the pivotal question of *how* a client's social media content should be preserved. To answer this inquiry, attorneys must consider the proportionality theme underlying FRCP 26(b)(1), which addresses the scope of discovery, and FRCP 37(e), which codifies remedial action in the case of spoliated ESI.[12]

Notably, in evaluating which of the available preservation options is most "proportionate" to the matter at hand, attorneys should remain mindful of the fact that "[FRCP 37(e)] recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection."[13] Among the factors to be considered in effectuating a preservation plan for social media are: (i) the issues presented by the case and whether social media may play a role in the claims or defenses; (ii) the extent and import of social media content; (iii) the complexity and value (monetary or otherwise) of the case; and (iv) the client's resources.[14]

As with other forms of potentially relevant ESI, attorneys should confer with opposing counsel as early as possible regarding their respective intended preservation methods. If the parties can agree to a manner and scope of preservation for social media at the start of litigation, undue costs, burden and potential discovery disputes attendant to preservation issues will likely be avoided.

OPTION #1: FORENSIC COLLECTION AND PRESERVATION SOFTWARE

The safest and most pragmatic method of preservation is to either engage a reputable third-party eDiscovery vendor to forensically collect and preserve a client's social media using preservation software, or to otherwise directly invest in preservation software. These methods, however, may pose significant costs which, in many cases, may be disproportionate to the overall value of a particular matter, particularly one that never reaches formal litigation.[15]

If a case enters the discovery or trial phase of litigation, however, these more robust methods may have practical value beyond preservation itself. With respect to preservation software (such as X1 Social Discovery, for example), all critical metadata is consistently captured and the program uses the same court-accepted mathematical algorithm as digital forensics and eDiscovery professionals to authenticate data. These features will therefore satisfy not only a litigant's preservation obligations, but will also fulfill production and evidentiary demands as well.

OPTION #2: DIY DOWNLOADS

A second option is for clients to "self-preserve" their social media content. This option allows social media users (or their authorized representatives) to download their content via free tools available on particular social media platforms. For example, using the "Download Your Information" option, Facebook users can download a zip file containing, *inter alia*, posts and messages, as well as IP access information and other user data, including some metadata. Twitter allows users to download their data archive (including, *inter alia*, Tweets, direct messages, follower lists, and media images), but requires that users first send requests to Twitter for this information. Instagram and Snapchat similarly require download requests and, in turn, provide zip files that include certain metadata.

Notably, self-help preservation becomes increasingly difficult with more ephemeral platforms like Snapchat, which purposely auto-erases user chats from its servers (with minimal exceptions). Snapchat users and their counsel also need to be aware of and utilize the platform's "save" feature to avoid any prospective or ongoing automatic erasure. Even when the content of historical chats may no longer be available, however, Snapchat's "Download My Data" feature will nevertheless provide basic chat history in archived form, such as sender/recipient, type of "Snap," and date.[16]

While courts have found user downloads to pose little burden in terms of cost and time, this method has certain disadvantages. Most significantly, unlike a professional eDiscovery vendor or social media preservation software, the DIY methods of preservation will likely fall short in terms of complete forensic preservation (including preservation of all metadata and the capture of all available user features or linked content embedded in posts and photos), and may also raise chain of custody concerns.[17]

Nevertheless, user downloads *may* be enough – depending on the factors outlined above – to satisfy a client's preservation (and production) obligations. Although there is a dearth of case law explicitly addressing whether the user-download method satisfies the duty to preserve, at least a handful of courts appear to be comfortable with the method or, at a minimum, have not rejected it outright.[18] Moreover, some courts have explicitly directed parties to use this method in order to comply with production requests.[19]

OPTION #3: SCREENSHOTS AND PRINTOUTS

While screenshots and printouts may seem crude in today's hi-tech world of eDiscovery, they may nevertheless be sufficient to satisfy production obligations, and possibly even preservation duties as well. In several cases, courts appear to have been satisfied with, or ordered the production of, *copies* of relevant posts and photographs uploaded to social media.

For example, in *A.D. v. C.A.*,[20] the court directed the defendant (the wife in a marital dispute) to turn over "printouts of her Facebook postings depicting or describ-

ing her whereabouts."[21] Although spoliation concerns had been raised, the court did not address these concerns beyond ordering production of the printouts.[22]

Likewise, in *Chapman v. Hiland Operating, LLC*,[23] the court ordered the plaintiff to produce information from her Facebook account "in the form of a screen shot."[24] In *Ehrenberg v. State Farm Mutual Auto. Ins. Co.*,[25] the court ordered the plaintiff to produce "copies of her Facebook, Instagram and Twitter records" in response to the defendant's discovery requests. Although the defendant feared spoliation and requested that plaintiff download her social media content as a means of production, the court in *Ehrenberg* held that global production of the metadata associated with all of plaintiff's photos and posts was "not proportional" at the time but could be "revisited" in a targeted fashion if necessary.[26] Implicit in the court's ruling was that the plaintiff would be able to later produce the metadata if necessary which, in turn, presumed that it had been or would be adequately preserved.

CONCLUSION

As social media use continues to grow, attorneys must understand the preservation and discovery implications of this significant evidentiary source in order to provide competent representation. By making sure that clients are adequately informed of their duty to preserve, and advising them as to the "reasonable steps" necessary to fulfill this obligation, attorneys can avoid unnecessary discovery disputes and the risk of spoliation.

1. *See, e.g., Giacchetto v. Patchogue-Medford Union Free School Dist.*, 293 F.R.D. 112, 117 (E.D.N.Y. 2013) ("seeking social networking information as opposed to traditional discovery materials does not change the Court's analysis" under Rule 26(b)); *Forman v. Henkin,* 30 N.Y.3d 656, 664 (2018) (applying CPLR 3101(a)'s "material and necessary" relevance standard to social media disclosure).

2. *See, e.g., Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 138 F.Supp. 3d 352, 390 (S.D.N.Y. 2015) (village sanctioned for failing to preserve relevant Facebook posts).

3. *See, e.g., Caputi v. Topper Realty Corp.*, 2015 WL 893663, at *8 (E.D.N.Y. Feb. 25, 2015) (ordering the preservation of all Facebook activity but failing to outline any method for doing so).

4. *See Thurmond v. Bowman*, 2016 WL 1295957, at *2 (W.D.N.Y. March 31, 2016).

5. This article is limited to the preservation of "stored" social media content within the meaning of FRCP 34(a)(1) and the forensic recovery or preservation of deleted or ephemeral social media are beyond its scope.

6. *Nutrition Distrib. LLC v. PEP Research, LLC*, 2018 WL 3769162, at *16 (S.D.Cal. Aug. 9, 2018).

7. *See, e.g., Lester v. Allied Concrete Co.*, 736 S.E.2d 699 (Va. 2013) (in addition to party sanctions, attorney fined $542,000 for directing client to "clean up" his Facebook page during pending litigation).

8. *See* Advisory Committee Notes to the 2015 Amendments to FRCP 37(e) ("Rule 37(e) Advisory Committee Notes").

9. *See* NYSBA's 2017 Social Media Guideline No. 5.A (May 11, 2017).

10. *See* Mark A. Berman, *Counseling a Client to Change Her Privacy Settings on Her Social Media Account*, New York Legal Ethics Reporter (Feb. 2015).

11. *See* NYSBA's 2017 Social Media Guideline No. 5.A. (comment).

12. *See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, Cmt. 2.b, 67 (2018) ("Proportionality should be considered and applied by the court and parties to all aspects of the discovery and production of ESI including [ ] preservation"); Rule 37(e) Advisory Committee Notes (explaining that subsection (e) was amended to address concerns that parties were incurring significant burdens and expense as a result of overpreserving data). Similar considerations guide discovery under New York law as well. While "the CPLR does not contain a 'proportionality' rule per se . . . usefulness and reason have long been the applicable standard in determining the scope of discovery under CPLR 3103." Robert M. Abrahams, Scott S. Balber, 3 N.Y.Prac., Com. Litig. In New York State Courts § 27.31 (4th ed. Sept. 2018). Further, the Commercial Division Rules now explicitly incorporate the doctrine of proportionality throughout its guidelines governing electronic and other discovery. *See id.*; *see also* Rules of the Commercial Division of the Supreme Court, 22 N.Y.C.R.R. § 202.70.

13. Rule 37(e) Advisory Committee Notes.

14. *See id.*; *The Sedona Principles*, *supra*, Cmt. 2.a, at 65–66.

15. *See Abrahams, et al.*, *supra*, at § 27:26. Regardless of the preservation method employed, given that since social media platforms are designed to enable users to modify their content, preservation efforts need to remain ongoing during the life of a dispute in order to be complete.

16. *See* Snapchat Support, Download My Data (*available at* https://support.snapchat.com/en-US/a/download-my-data).

17. *See Abrahams, et al., supra*, at § 27:26.

18. *See Johnson v. BAE Systems, Inc.*, 106 F. Supp. 3d 179, 190 n.2 (D.C. Cir. 2015); *Higgins v. Koch Dev. Corp.*, 2013 WL 3366278, *1 (S.D.Ind. July 5, 2015).

19. *See, e.g., Matthews v. J & J Service Solutions, LLC,* 2017 WL 2256963, *11 (M.D. La. May 23, 2017; *Rhone v. Schneider Nat'l Carriers, Inc.*, 2016 WL 1594453, *3 (E.D. Mo. April 21, 2016).

20. 50 Misc. 3d 180 (Sup. Ct., Westchester Co. 2015).

21. *Id.* at 184.

22. *Id. See also Melissa "G" v. North Babylon Union Free School Dist.*, 48 Misc. 3d 389, 393 (Sup. Ct., Suffolk Co. 2015) (directing plaintiff to turn over a "print out" of material from her Facebook account).

23. 2014 WL 2434775 (D. N.D. May 29, 2014).

24. *Id.* at *2.

25. 2017 WL 3582487 (E.D. La. Aug. 18, 2017).

26. *Id.* at *3–4.

New York Removes the Blindfold

Under new law, prosecutors must provide evidence to defendants within 15 days of arraignment

By Christian Nolan

There may be no better example for why New York needed criminal discovery reform than the 1991 wrongful conviction of Jeffrey Blake.

Blake was convicted because of one witness, Dana Garner, who said he and his girlfriend saw Blake fire a machine gun at a vehicle in Brooklyn, killing two men. Blake was actually having lunch at his sister's apartment at the time of the double murder and arrived back at work just 15 minutes after the shooting.

Prosecutors did not reveal Garner's identity as the key witness to Blake's defense attorney until the trial began, so the defense was unable to conduct its own investigation. Not until after Blake served roughly eight years behind bars did the truth fully come to light.

Defense investigators tracked down Garner's now ex-girlfriend who said she never witnessed the shooting. They also discovered evidence that Garner was not even in the state of New York when he allegedly witnessed the shooting.

Michelle Fox, the Legal Aid Society lawyer who handled Blake's appeal, described it in a *1998 New York Times* article[1] as "a case of a lifetime . . . that has been haunting me for six years."

During Garner's deposition for Blake's wrongful conviction lawsuit, he claimed he had been fed details by police and pressured to identify Blake as the shooter. Blake's case later settled for $1.2 million.

The Blake case is just one of numerous examples over the years illustrating what could have been prevented if New York had a fairer and more reliable system of criminal discovery.

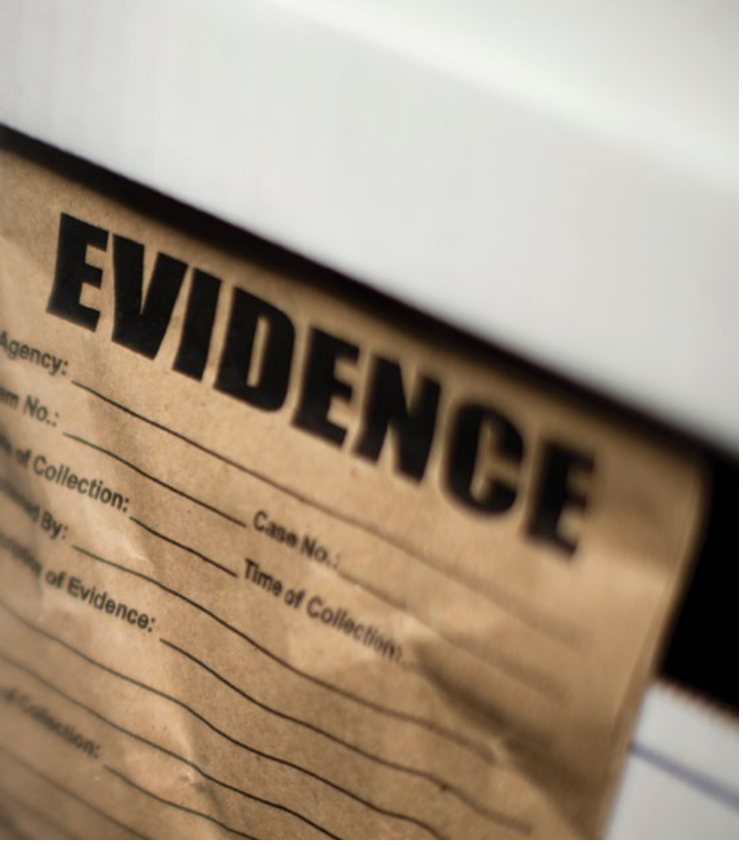
Often called the blindfold law, defendants routinely received limited information, which was turned over so late that it became virtually impossible for the defense to properly investigate, obtain any potentially exculpatory evidence, fairly weigh a guilty plea offer, or develop an effective trial strategy.

But on Jan. 1, 2020 this practice, long considered a tactical advantage for prosecutors in New York, will no longer be allowed. The New York State budget for fiscal year 2019-2020, approved on April 1, included discovery reform as well as bail and pre-trial detention reform and improvements ensuring the right to a speedy trial.

Now both prosecutors and defense lawyers will be required to share information in their possession well in advance of trial. Specifically, prosecutors must share evidence within 15 days of a defendant's arraignment and defendants will be allowed to review all evidence in the prosecution's possession prior to pleading guilty to a crime.

This includes all written or recorded statements, grand jury testimony, witness names and contact information, expert opinions, all tapes and electronic recordings including 911 calls, photos, scientific tests, mental evaluations and other tests and exams, and any promises made to testifying witnesses.

If prosecutors are unable to meet that deadline, they may have an additional 30 days to turn the evidence over to the defense. Once the defense receives a certificate of compliance from the prosecution, they must turn over



their own discovery materials to the prosecution within 30 days.

In an effort to alleviate concerns from longtime critics of discovery reform, the legislation seeks to protect victims and witnesses from intimidation and other forms of coercion by providing prosecutors with the ability to petition a court for a protective order. According to lawmakers, the order will enable the shielding of identifying information, when necessary, to ensure victim and witness safety and the sanctity of the judicial process.

BEARING FRUIT

Seymour W. James, Jr., president of the New York State Bar Association in 2012-13 and a criminal defense lawyer for over four decades, prioritized criminal discovery reform during his term and created the Task Force on Criminal Discovery. The task force issued a report[2] in 2015 urging large-scale reform of the state's criminal discovery rules.

"I had seen the problems lack of discovery caused for defense attorneys and their clients," said James, who is now a partner at Barket Epstein Kearon Aldea & LoTurco in New York City. "I felt it also contributed to wrongful convictions because attorneys didn't have adequate information to investigate cases and when they did get it, it was too late to investigate. Witnesses may not have been there anymore; memories fade as time goes on."

James said he was "thrilled" to see the state Legislature enact criminal discovery reform. He said many of the main criminal discovery reforms in the legislation were in the task force's report. In fact, he noted that the legislation actually went further than some of the recommendations made in the report.

"I think the task force report actually sparked some discussions within the Legislature and the Governor's Office," said James. "There had been periodic discussions the last couple of decades about discovery reform, but the report took it to another level and got the parties looking carefully at the issues. To see it actually bear fruit was quite rewarding."

James said the vast majority of criminal cases are resolved through a plea bargain. He said the new law will allow defense lawyers to help their clients make more informed decisions regarding plea deals without costly delays now that they will have access to the state's evidence.

"Attorneys were being forced to advise their clients about whether it was in their interest to take a plea without having adequate information," said James. "Unfortunately, because of the harsh penalties that can be imposed after a trial conviction as compared with a plea deal, even those defendants who were innocent were tempted to take the plea offer and not risk going to jail for 25 years."

STARK CONTRAST

Previously, New York's criminal discovery laws were more restrictive than most states, including all of the other states in which the 10 largest cities in the U.S. besides New York City are located. Further, Louisiana, South Carolina, and Wyoming were the only other states that prevented criminal defendants from learning witness identities before a trial began.

Some jurisdictions, including Kings County, voluntarily offered less restrictive "open-file" discovery but by and large most did not. Additionally, no states have enacted open discovery rules, only to later go back and limit the information made available to the defense.

In its 2015 report, the task force was mindful of the safety concerns of witnesses and believed the recommended protections struck the right balance between protecting witnesses and affording defendants the information they need to prepare their cases. The legislation that ultimately passed included protective orders as recommended by the task force's report.

New York's restrictive criminal discovery rules stood in stark contrast with its liberal discovery in civil proceedings. Ironically, New York has long embraced early and open discovery in civil matters under the rationale that surprise is undesirable in litigation and that both parties should be entitled to know and develop all the relevant facts.

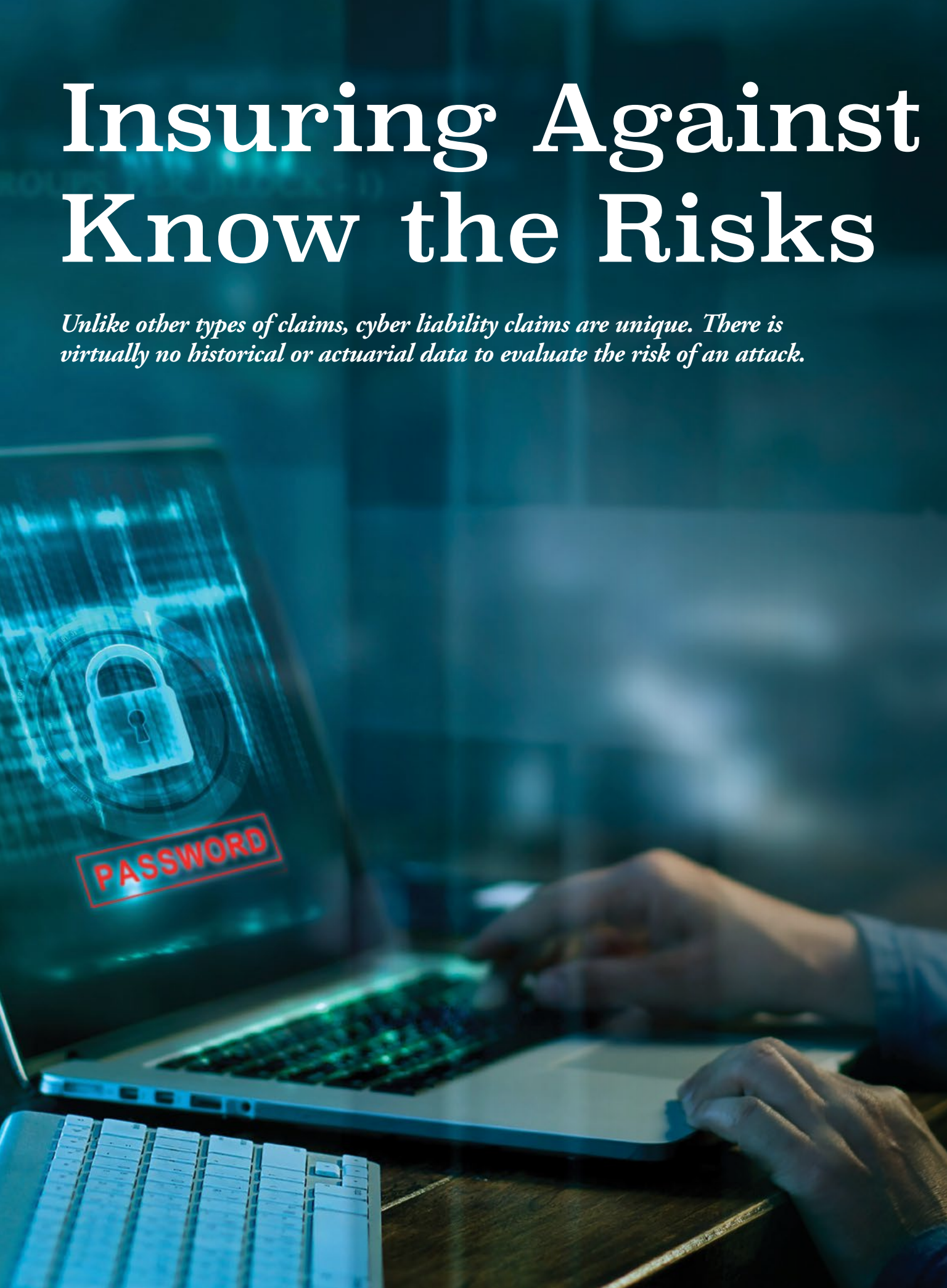
Nolan is NYSBA's senior writer.

1. https://www.nytimes.com/1998/10/29/nyregion/man-is-cleared-in-murder-case-after-8-years.html.

2. http://www.nysba.org/workarea/DownloadAsset.aspx?id=54572.

Insuring Against Know the Risks

Unlike other types of claims, cyber liability claims are unique. There is virtually no historical or actuarial data to evaluate the risk of an attack.



Cybercrime –

By James A. Johnson

What do the U.S. Office of Personnel Management, Target, Home Depot, Kmart, American Express, the IRS and Walmart have in common?

They all have experienced data breaches exposing personal records. Thousands of smaller businesses, government entities and nonprofits, along with millions of individuals, have been similarly victimized. Almost anything you do on the internet can be observed by other people. Cybercrime is an emerging risk evidenced by a plethora of news stories of hacking. Cybercrime liability is the new body of insurance law. When a new risk emerges so, too, does new coverage issues. The focus of this article is for informational purposes only and is not intended to constitute legal advice or any endorsement.

UNDERSTAND CYBER RISKS IN ORDER TO ADVISE BUSINESS CLIENTS AND PROTECT LAW FIRMS

Lawyers must understand cyber risks in order to advise their business clients and to protect their own law firms. Cyber law is a generic term which refers to all legal and regulatory aspects of the internet In May 2016, the Ponemon Institute's Sixth Annual Benchmark Study on Privacy & Security of Healthcare Data showed the magnitude of cyber risks in the health care industry. Criminal attacks were up compared to the previous years. The study also found most organizations were unprepared to address new threats.[1]

The growth of cyber security and privacy regulations makes maintenance for cyber security a requirement, not an option. Regulators are investigating breaches and imposing substantial penalties and fines.[2] For a company that maintains personal identification information or protected health information, notification of a data breach is necessary and required by law in many states.[3]

The U.S. Senate on October 27, 2015 passed the Cybersecurity Information Act of 2015, creating a voluntary cybersecurity information-sharing process between private companies and the federal government. In short, it requires the Director of National Intelligence and the departments of Homeland Security (DHS), Defense and Justice to develop procedures to share cybersecurity threat information with private entities, nonfederal government agencies, state, tribal and local governments, the public and entities under threats.

If you have information about a cybercrime or any information that will assist the federal government, you should contact the Cyber Task Force or the FBI at cywatch@ic.fbi.gov In addition, the FBI, through the American Bar Association, is sending out security alerts to its members about security threats targeting law firms. The State Bar of Texas, Massachusetts Board of Bar Overseers and the American Bar Association have issued warnings about email scams, bogus disciplinary violations, hackers and cybercrimes. Moreover, lawyers must be cognizant of their ethical responsibility in transmitting by email a client's privileged or confidential information.

CYBER INSURANCE

Cyber insurance is used to protect businesses and individuals from internet-based risk. Companies that use a computer; receive or transmit electronic data; store information; or connect to the internet are exposed to cyber liability. *Cyber liability encompasses first and third party risks such as privacy issues, virus transmission and infringement of intellectual property.* Privacy exposure can also involve human error, such as a lost laptop.

Computer-specific policies provide specific grants of coverage. Coverage is limited to defined persons, acts and

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injuries. Thus, cybercrime claims implicate new policy forms and terms. A common question in cybercrime claims is whether the policy applies to acts of the person who used the computer to cause the injury. *Computer specific policies often limit coverage to bad acts of the person who is not authorized and exclude acts by employees.*[4]

First-party insurance is coverage against what happens to the insured when injury and damage are caused to it. Third-party insurance protects the insured by means of indemnity or indemnification from actually having to pay all or part owed for causing injury and damages to someone else.

Traditional liability products do not address internet exposures and risks or at best only provide limited coverage. The standard Commercial General Liability policy has excluded data related liability. Cyber-related losses generally involve loss or damage to data, extortion, customer notification, forensic experts, legal and public relations experts. These losses do not fall within the Commercial General Liability (CGL) or property damage coverage. Moreover, the ISO has developed a form exclusion for cyber-related losses.[5] This exclusion provides a limited exception when the breach results in bodily injury arising out of electronic data.

Unlike other types of claims, cyber liability claims are unique. There is virtually no historical or actuarial data to evaluate the risk of an attack. Also, many damages resulting from an attack are intangible and hard to quantify, such as, loss of goodwill. Every business is unique and has its own vulnerability. However, some core elements a quality cyber insurance policy should cover for first party liability include:

- Legal and forensic services to determine if a breach has occurred and to assist with regulatory compliance;
- Notification of affected customers and employees;
- Business interruption expenses;
- Crisis management and public relations to educate the company's customers; and
- Cyber extortion reimbursement.

Third party coverage should provide defense and liability costs for:

- Settlements, judgments, civil awards after a data breach;
- Employee privacy liability; and
- Infringement of copyright, trade name, domain name and service mark.

Also important is consideration of items that may not be covered, such as:

- Loss of future revenue;
- Loss of value of the company's own intellectual property; and
- Loss of reputation.

First Party Property, Expense & Income covers direct financial and consequential losses arising out of data damage, business income and extra expense, crime, extortion and crisis management.

Third Party Liability Coverage covers defense and legal liability arising out of unauthorized access, use, disclosure or theft of private consumer information. It also covers extortion, terrorism or espionage, misuse of the company's computer system, email and other electronic communications resulting in harm to third parties. Coverage should also extend to civil and regulatory defense costs and compensatory and punitive damages for accidental and intentional acts of third parties.

A common question in cybercrime claims is whether the policy applies to acts of the person who used the computer to cause the injury. Computer specific policies often limit coverage to bad acts of the person who is not authorized and exclude acts by employees.

Under most forms for third-party cyber liability, coverage is provided on a *claims made* and reported basis. Most policies provide for a defense with defense expenses charged against and reducing the aggregate limit of liability. Under most policies, the wrongful act or breach need not take place during the policy period for coverage to apply, so long as the claim is first made and reported to the insurer within the inclusive dates of coverage.[6]

The Fifth Circuit in 2016 decided a case that required it to construe computer fraud coverage in a crime protection policy. In *Apache Corp. v. Great American Insurance Co.*, Apache had a crime protection insurance policy that covered losses by computer fraud:

> We will pay for loss of, and loss from damage to, money, securities and other property *resulting directly from the use of any computer to fraudulently cause a transfer of that property* from inside the premises or banking premises: (a) to a person (other than a messenger) outside those premises; or (b) to a place outside those premises (emphasis supplied).

Apache received a fraudulent email from a vendor's account resembling the vendor's email address attaching a false letter on the vendor's letterhead. The email and the attached letter directed Apache to direct payments to

a new account. Great American denied Apache's claim on the basis that the loss did not result directly from the use of a computer nor did the use of a computer cause the transfer of funds. The email was merely incidental to the fraudulent scheme. Losses due to email-based fraud schemes that do not involve actual hacking are not covered by typical computer provisions.[7]

The Texas Supreme Court has a strong preference for cross-jurisdictional uniformity in cases involving insurance provisions. In deciding Apache, the court first analyzed a Ninth Circuit case, *Pestmaster Services, Inc v. Travelers Casualty & Surety Co. of America*. In *Pestmaster*, a payroll contractor diverted payments to himself. Although the payments were made using a computer there was no coverage because the transfers were authorized and therefore the transfers themselves were not fraudulent.[8]

Similarly, in *Brightpoint, Inc. v. Zurich Am Ins, Co.* the court in the Southern District of Indiana held there was no coverage because the faxed fax purchase orders did not "fraudulently cause" a business to transfer prepaid phone cards to fraudsters.[9]

INSURANCE PROFESSIONALS

Experienced insurance professionals, such as an insurance agent or broker, can provide advice and solutions to potential financial and reputation loss due to cyber risk. The identification of risks associated with business operations is the first step. Next is education on prevention, risk mitigation, transfer and risk financing techniques.

Cyber insurance policies differ by insurer and there is no standard cyber first-party insurance policy. Wording used by an insurer is critical to the extent of coverage provided. Wording in insuring agreements, definitions and exclusions must be carefully reviewed to ensure that the coverage provided meets the actual exposures of the organization.

Enter insurance professionals in New York. For information, visit the New York State Bar Association Torts, Insurance & Compensation Law Section at www.nysba.org/TICL. Once you have decided on the appropriate insurance professionals they can review policy language for basic coverage, deductibles, total limits, specific exclusions and offer advice and solutions. They may suggest to purchase additional polices to prevent gaps in coverage.

INCIDENCE RESPONSE PLAN

According to Sharon D. Nelson and John W. Simek, experiencing a law firm data breach is not an *"if"* but a *"when."* They maintain that it is imperative to be ready with an incidence response plan (IRP). The IRP should designate the positions in the firm who will be responsible for functions set out in the plan. For example, identify a data breach lawyer, insurer's contact information, law enforcement officials, a digital forensics company, damage control, notice to employees, notice to third parties and many other pertinent functions.[10]

According to the American Bar Association, Chicago's Johnson & Bell is the first U.S. law firm publically named in a data security class action lawsuit. The suit claims Johnson & Bell had security holes in its email. However, the suit does not allege that any data was stolen.

On February 28, 2017, the American Bar Association announced that it was adding Cyber Liability coverage to its insurance offerings for law firms as a member benefit. The cyber insurance, underwritten by Chubb Limited, covers law firm expenses associated with hacking, including the costs of network extortion, income loss, forensics, liability protection and defense costs.[11]

NEW YORK STATE CYBERSECURITY REGULATIONS

Effective March 1, 2017 the New York State Department of Financial Services (NYDFS) developed Cybersecurity Requirements for Financial Services Companies.[12] The law has requirements for direct board involvement with cybersecurity of companies regulated by the NYDFS, such as insurance companies and other financial institutions. It also applies to companies that are third-party service providers for *covered entities.*[13]

The board of directors is required to take control and responsibility for the cybersecurity program. *Annually, the board's senior officer or chairman must sign a written certification of compliance.*[14] The purpose of the regulations is to ensure the protection of customer information by establishing minimum standards. In addition, the regulations require covered entities to obtain contractual assurances that companies they do business with have sufficient cybersecurity safeguards and comply with provisions of the cybersecurity regulations.

In short, each company must design a program, develop policies and designate a chief information security officer. Senior management must file an annual certification of compliance. Subject to a few exemptions, a plethora of industries and companies will be directly and indirectly affected by the regulations. The objective is to protect the confidentiality of customer information and the integrity of information technology systems of businesses. *Therefore, these regulations will have worldwide impact.* However, companies still need conventional insurance protection.

CONCLUSION

Cyberattacks are an epidemic and getting worse. According to the Lansing State Journal on November 30, 2016, Michigan State University estimates it spent $3 million responding to its data breach. Lawyers need to understand cyber insurance for their clients and their own law

firms. A data breach is a nightmare. But, if you have an incidence response plan in place you will be better prepared to survive it. Assemble a team with members who have the types of expertise to address the organization's risk exposure. Law firms have a special exposure when hacked because of client files with personal and other sensitive information. This could trigger notification obligations on the part of the law firm.

There is limited coverage for cyber liability under general commercial policies. An effective cybersecurity policy should be a primary policy. A primary policy responds first. Cyber exposures are not static and evolve as society continues to use and rely on computers. Individuals continue to find ways to invade computers for malicious purposes. The procurement process for cyber insurance policies is no different than the process used to obtain any other type of insurance. The decision to choose one company over is based on the coverage differences of each policy, limits, retentions, exclusions and actual policy language terms and conditions. Attorneys should have a basic understanding of cyber risk to guide and advise clients how they can protect their businesses. The retention of insurance professionals can greatly enhance this understanding and process.

Consider joining the New York State Bar Association Torts, Insurance & Compensation Law Section. Irrespective of your area of practice, your personal and professional liability, collection and satisfaction of judgments and settlements in significant measure will involve insurance.

1. Ponemon Institute's Sixth Annual Benchmark Study on Privacy & Security of Healthcare Data at https://ponemon.org/library/sixth-annual-benchmark-study-on-privacy-security-of-healthcare-data-1.

2. *Rizkallah, The Cybersecurity Regulatory Crackdown*, Forbes (Aug. 25, 2017), https://www.forbes.com/sites/forbestechcouncil/2017/08/25/the-cybersecurity-regulatory-crackdown/#afbb3314573d.

3. Conn Gen Stat § 38a-999b (2015) and § 4e-70 (2015); Cal Civ Code § 1798.81.5 (2016) and § 1798.91.04 (2019); Colo Rev Stat § 6-1-713.5 (2018).

4. *Stop & Shop Co. v. Federal Ins. Co.*, 136 F. 3d 71 (1st Cir.1998).

5. ISO Endorsement CG 21 06 05 14 (Exclusion-Access Or Disclosure of Confidential Or Personal Information And Data-Related Liability-With Bodily Injury Exception).

6. Travelers Cyberrisk Form CYB-3001 (Ed 07-10); Chubb Form 14-02-22815TX (10/2017) and Chubb Forefront Portfolo 3.0 Cybersecurity Coverage Part 14-02-17276 (12/2010).

7. *Apache Corp. v. Great Am. Ins. Co.*, 2016 WL 6090901 (5th Cir. 2016). *See also Great Am. Ins. Co. v. AFS/IBEX Fin. Servs., Inc.*, CIV. A. 307-CV-924-O, 2008 WL 2795205 (N.D. Tex. July 21, 2008), *aff'd*. 612 F. 3d 800 (5th Cir. 2010).

8. *Pestmaster Services, Inc. v. Travelers Casualty & Surety Co. of America*, 656 Fed. Appx. 332, 333 (9th Cir. 2016).

9. *Brightpoint, Inc. v. Zurich Am. Ins. Co.*, 1:04-cv-2085-SEB-JPG, 2006 WL 693377 (S.D. Ind. Mar. 10, 2006).

10. Sharon D. Nelson and John W. Simek, *What Will You Do When Your Law Firm is Breached?*, Texas Bar Journal, May 2016, Vol. 79, No. 5, P. 348–50.

11. ABA Cyber Liability Insurance, www.abajournal.com/news/article/aba_to_offer_cyber_liability_insurance_as_one_of_its_member_benefits.

12. 23 N.Y.C.R.R. § 500.

13. 23 N.Y.C.R.R. § 500(c).

14. 23 N.Y.C.R.R. § 500.04.

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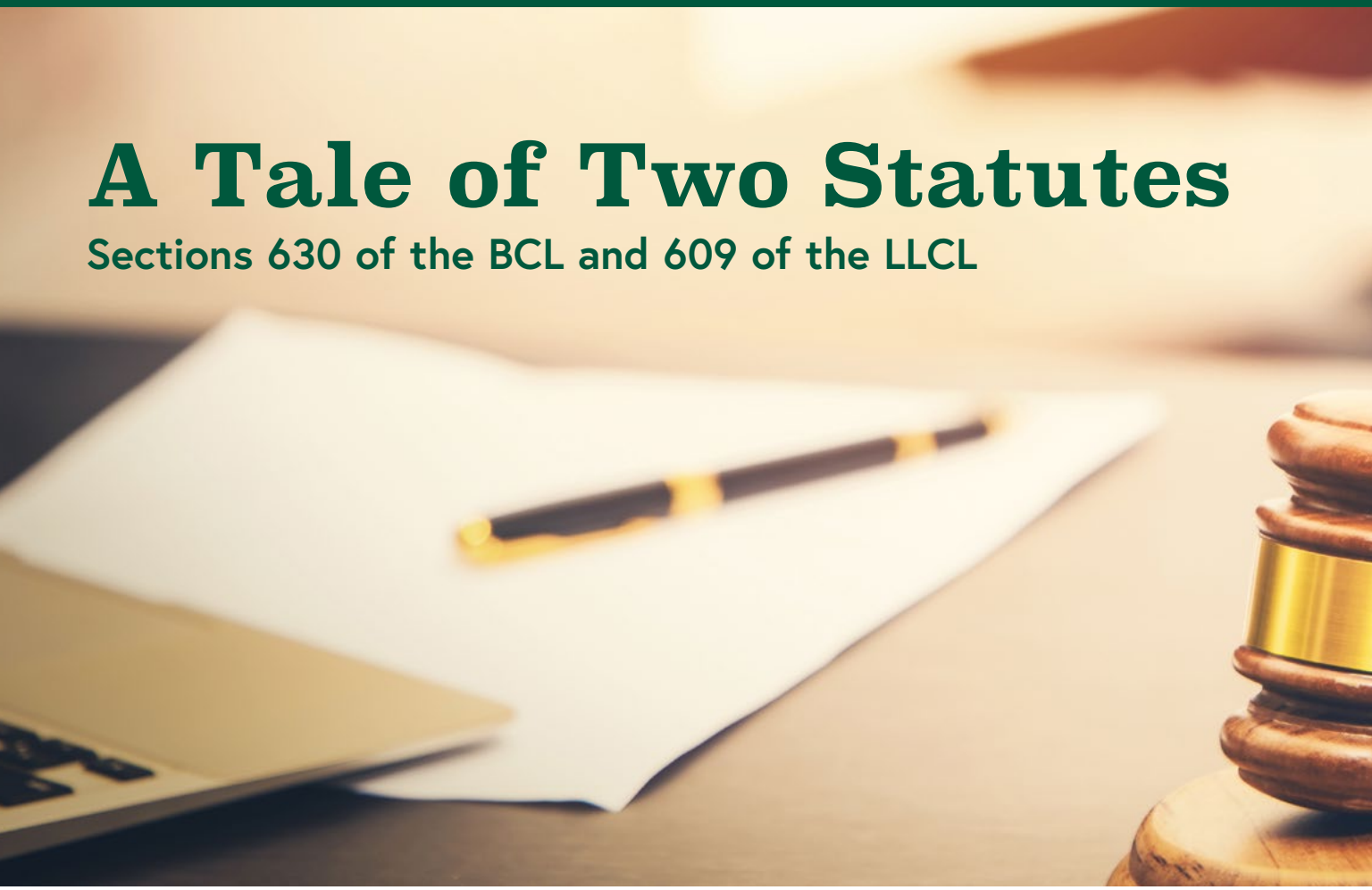

A Tale of Two Statutes

Sections 630 of the BCL and 609 of the LLCL

Section 630 of the N.Y. Business Corporation Law (BCL) and Section 609 of the N.Y. Limited Liability Company Law (LLCL) invade the sanctity of the protection afforded shareholders of corporations and members of limited liability companies against personal liability for the debts of the company.

Section 630 of the BCL provides that the 10 largest shareholders of *privately held domestic and foreign corporations* are jointly and severally personally liable for the compensation obligations of the company for services performed in New York. The 10 largest shareholders are determined by the fair value of their beneficial interests in the company. The statute makes no distinction between common and preferred shares. Compensation obligations include – in addition to wages and overtime, vacation, holiday and severance pay – payments on account of insurance and welfare benefits and contributions to pension and annuity funds.

Section 609 of the LLCL differs in some respects from Section 630 of the BCL. Section 609 provides that the 10 members with the largest percentage ownership interests of a *domestic LLC* are jointly and severally personally liable for the compensation obligations of the company. Further, Section 609 does not limit its application to services performed in New York. Compensation under Section 609 is defined as it is under BCL Section 630.

As of the writing of this article, the New York legislature is considering amendments to conform Section 609 to Section 630 of the BCL. The bill originally proposed in the senate, S.5966, states that its purpose is to guard against "wage theft" by LLCs organized in jurisdictions other than New York.The definitions of "Foreign corporation" and "Foreign limited liability company" include corporations and LLCs organized in foreign countries. See Section 102 of the BCL and Section 102 of the LLCL.

Two issues immediately come to mind in respect of these two statutes.

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First, can the provision of the statutes be waived? I don't think so given the legislative purpose: To ensure against "wage theft." However, the courts might tolerate an exception for compensation payable to members of an LLC and to shareholders of a corporation who perform services for the company. I suggest placing such a waiver in the LLC operating agreement and in a shareholder agreement, making sure that any new member or shareholder becomes party to the agreement. I would also include a severability clause along the following lines:

> The invalidity or unenforceability of any provision of this agreement under any present or future law, rule, regulation or ordinance, or under any judicial decision, will not affect any other provision of this agreement, and the remaining provisions of this agreement shall continue with the same force and effect as if such invalid or unenforceable provision had not been inserted in this agreement.

Second, will the courts of another state (not to mention those of a foreign country),

> (A) honor a New York judgment against shareholders or LLC members (i) of a corporation or an LLC organized in that other state or (ii) residing in that other state; and
>
> (B) enforce in that other state the New York law against shareholders or LLC members (i) of a corporation or an LLC organized in that other state or (ii) residing in that other state?

"Of course," one might argue, they must under the full faith and credit clause of the U.S. Constitution (Article 4, Section 1), which provides that each state must honor the public acts, records, and judicial proceedings of every other state. However, the courts have recognized an exception to this rule based on the public policy of that "other" state. Enforcement might well be denied by those states that honor the protections granted by their laws to shareholders and LLC members from the liabilities of their companies.

If enforcement in the United States is questionable because of the public policy exception, enforcement will surely be at risk in foreign countries.

I think these two statutes will provide a field of dreams for litigators.

Dismissal of Abandoned Cases Revisited

A Conflict Among the Departments

By Kenneth R. Kirby

After a note of issue is vacated because discovery is not complete and a plaintiff takes no action to restore the case to the trial calendar within one year, does CPLR 3404 apply to automatically dismiss the case? Disagreeing with the Third Department, in *Bradley v. Konakanchi, D.O.*[1] the Fourth Department answered this question in the negative.

Nothing in the language of either CPLR 3404 or CPLR 3402 supports the conclusion reached by not only the Fourth Department in Bradley, but also by the First and Second departments,[2] that a vacatur of a note of issue due to discovery being, contrary to erroneous representations contained in a certificate of readiness, incomplete – effecting, as it does, the "strik[ing] [of the case] from the calendar"[3] so as to permit ongoing discovery that would otherwise be closed in the face of an extant note of issue[4] – does not result in a CPLR 3404 automatic dismissal of the action once the plaintiff takes no action to restore the case to the trial calendar within one year.

In *Bradley*, the Fourth Department, citing *Meidel v. Ford Motor Co.,*[5] adopted the First and Second departments' formulations that the vacatur of a note of issue due to incomplete discovery constructively returns the case to "pre-note-of-issue status," notwithstanding the undeniable fact that a note of issue actually was filed, by which filing the case was immediately placed upon the court's trial calendar.[6] The Fourth Department said this:

> More significantly, we have previously recognized that an order vacating the note of issue places the case in "pre-note-of-issue status"[7] (*Meidel v. Ford Motor Co.*, [*supra*]). Our reasoning in *Meidel* essentially foretold the foundational premise of the First and Second Department rule – i.e., that CPLR 3404 does not apply when the note of issue has been vacated because the case is thereby returned to pre-note of issue status, as opposed to being "marked off" or "struck" from the calendar.[8]

Yet, in *Meidel*, the Fourth Department also wrote, "By striking the case form the calendar, the note of issue and nonjury demand also fell."[9] In *Meidel*, therefore, the Fourth Department previously acknowledged the essential synonymy, in the absence of a court order expressly directing otherwise, of the vacatur of a note of issue with the striking of the case from the trial calendar,[10] an acknowledgment that does not jibe with its holding in *Bradley*.[11]

ANALYSIS

When construing a statute, it is axiomatic that "the Legislature is presumed to mean what it says, and if there is no ambiguity in the act, it is generally construed according to its plain terms."[12]

As stated, in pertinent part, in 1 McKinney's Cons. L. of N. Y. (Annot.), Statutes, § 76:

> Some statutes are framed in language so plain that an attempt to construe them is superfluous. The func-

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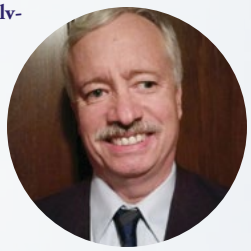

> tion of the courts is to enforce statutes, not to usurp the power of legislation, and to interpret a statute where there is no need for interpretation, to conjecture about or to add to or to subtract from words having a definite meaning, or to engraft exceptions where none exist are trespasses by a court upon the legislative domain. [13]

As the Court of Appeals held in *Roosevelt Raceway, Inc. v. Monaghan, as Commissioner of Harness Racing*:[14]

> We have often held that, if the language of a statute is plain and unambiguous, there is neither need nor warrant to look elsewhere for its meaning. (Citations omitted.) This principle is, of course, no less compelling because 'the other means of interpretation' urged is a later so-called clarifying statute. The Legislature has no power to declare, retroactively, that an existing statute shall receive a given construction when such a construction is contrary to that which the statute would ordinarily have received. (Citations omitted).

Applying these maxims to, first, CPLR 3402(a), that statute prescribes the *sole* method by which, *and when*, a case is placed on the (trial) calendar:

> **R 3402. Note of issue.**
>
> (a) Placing case on calendar. At any time after issue is joined, or at least forty days after service of a summons has been completed irrespective of joinder of issue, any party may place a case upon the calendar, by filing within ten days after service, with proof of such service two copies of a note of issue with the court and such other data as may be required by the applicable rules of the court in which the note is filed. *The clerk **shall** enter the case upon the calendar as of the date of the filing of the note of issue.*
>
> (**Bold** and *italics* supplied).

Per the statute's clear and unambiguous mandatory language, there is no discretion in the clerk of the court. As soon as the note of issue with proof of service of the note of issue and the "data" required by the first sentence of CPLR 3402(a) is filed, "The clerk *shall*[15] enter the case upon the calendar as of the date of [such filing]."[16]

If, therefore, a note of issue is vacated *for whatever reason*, the above statutory condition precedent to its being on the trial calendar ceases to exist, such that in the absence of an extant note of issue, the case must and is, by virtue of that vacatur,[17] stricken from the trial calendar. Why else does 22 N.Y.C.R.R. § 202.21(e) mandate, "If the motion to vacate a note of issue is granted,[18] a copy of the order vacating the note of issue shall be served upon the trial court"? It is, self-evidently, so that the case can be "marked 'off' or struck from the [trial] calendar"[19] by the trial court's clerk so as to permit outstanding discovery – which would otherwise be precluded by an extant, i.e., unchallenged or un-vacated note of issue[20] – to be completed.

Proceeding to apply the foregoing maxims to CPLR 3404, CPLR 3404 mandates as follows:

> **R 3404. Dismissal of Abandoned cases.**
>
> A case in the supreme court or a county court marked "off" or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.

Crucially, the legislature worded the first sentence of this statute, in its initial clause, in the disjunctive: "A case in the supreme court *or* a county court marked 'off' *or*

struck from the calendar *or* unanswered on a clerk's calendar call" (*italics* supplied) that "[is] not restored within one year thereafter *shall* be deemed abandoned and *shall* be dismissed without costs for neglect to prosecute." (*Italics* supplied.)

The word "shall" is primarily defined in Black's Law Dictionary as:

> "**shall**, vb. (bef. 12c) **1.** Has a duty to; more broadly, is required to <the requester shall send notice> <notice shall be sent>.
>
> • This is the mandatory sense that drafters typically intend and that courts typically uphold [Cases: Statutes [Westlaw Key section] 227."[21]

The word "shall," when employed by legislators in an enacted statute, is, presumptively, a word of command.[22]

Hence, if any of the disjunctive conditions precedent to the statute's operation occurs, along with the one conjunctive condition precedent to the statute's operation that appears in the second clause of the statute's first sentence (that the case is "not restored within one year thereafter"), CPLR 3404 *mandates* that the case "shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute."

There is, in other words, no basis for the courts to "look elsewhere for its meaning."[23] Neither is there warrant for courts "to conjecture about or to add to or to subtract from [the] words [of CPLR 3404] having a definite meaning, or to engraft exceptions where none exist[,] [which] are trespasses by a court upon the legislative domain."[24] Rather, as once did the Second Department correctly construe CPLR 3404 and 3402(a) in *Damas v. Barboza,*[25] "there [being] no ambiguity in the act, it is . . . construed according to its plain terms,"[26] that is to say, neither narrowly[27] nor expansively, but literally, according to its plain terms, CPLR 3404, in the light of CPLR 3402(a), applies even when a note of issue is vacated for incomplete discovery, provided no action is taken with one year to restore the action to the trial calendar.

In Damas, the trial court twice struck notes of issue *due to incomplete discovery* – once on April 15, 1987 and again on July 14, 1988. Later, the case was ordered dismissed as abandoned. Upon the plaintiff's appeal from the trial court's order denying the plaintiff's motion "to vacate a dismissal which occurred pursuant to CPLR 3404," the plaintiff contended, "The striking of a note of issue because the Plaintiff had not allotted time for the defendant to complete discovery does not constitute a striking from the calendar under CPLR 3404."[28] Agreeing with the defendants that "the above captioned matter has been placed upon the Trial Calendar *and 'marked off' or otherwise had its Note of Issue stricken removing the same from the Trial Calendar,*'"[29] the Second Department rejected the plaintiff's argument, stating:

> The plaintiff's contention on appeal that the action was not on the trial calendar and therefore was not struck from the calendar when the court struck the note of issue is without merit. Filing of the note of issue and certificate of readiness placed the action on the calendar *[see, CPLR 3402{a}, 22 N.Y.C.R.R. 202.21{a}; 22 NYCRR 202.22{a}{3}, {a}{4}]*. The court properly struck the note of issue and struck the case from the calendar because the plaintiff's failure to comply with discovery rendered the case unready for trial *(see,* 22 NYCRR 202.21 [e]). Damas v Barboza.[30]

CPLR 3404, by its plain language, contains no exception for cases struck from the trial calendar for any particular reason – such as incomplete discovery – as opposed to another.

Subsequently, the Second Department eschewed this common-sense, literal, and correct construction of Rules 3404 and 3402(a). In *Galati v. C. Raimondo & Sons Constr. Co., Inc., et al.,*[31] the Second Department held that when a court grants an order vacating a note of issue because discovery is incomplete, such an order "[i]s not the equivalent to an order marking 'off' or striking the case from the trial calendar pursuant to CPLR 3404. Rather, [such an order] place[s] the action back into pre-note of issue status (citations omitted)."

How did such a drastic shift in the Second Department's construction of the unchanged words of these two statutes[32] occur? It occurred over time, born of the phrase "pre-note of issue cases."

In *Cubed Enterprises, Inc., et al. v Roach.,*[33] the Second Department correctly held, "[s]ince no note of issue placing the action on the court's calendar was filed *(see*, CPLR 3402), the court incorrectly dismissed the action pursuant to CPLR 3404."

Two years later, citing *Cubed*, the Second Department observed, "There are two lines of cases in this court applying CPLR 3404 to pre-note of issue cases. In the first line of cases, this court has properly held that CPLR 3404 is inapplicable to pre-note of issue cases (citations omitted)."[34] Notably, in *Lopez*, Justice Feuerstein framed the issue confronting the Second Department thusly:

"The issue presented in this case is whether CPLR 3404, which provides that a case marked 'off' or struck from the calendar * * * and not restored within one year, shall be deemed abandoned and shall be dismissed," should be applied to cases *where* ***no*** *note of issue has been filed, i.e., cases which have not reached the trial calendar*"[35]

Citing *Lopez*, in *Johnson v. Sam Minskoff & Sons, Inc.,*[36] the First Department held CPLR 3404 "inapplicab[le] to cases in which *no* note of issue has been filed"[37] (*italics* supplied). Distinguishing between CPLR 3404 and CPLR 3216 (the 90-day demand for note of issue provision), the court in *Johnson* stated:

> In brief, according to *Lopez*, the history of CPLR 3404, which was derived from a rule[38] that specifically referred to the "trial term" or "special term" calendar, and its chronological placement in the statutory scheme – i.e., immediately following the procedures for filing a note of issue (CPLR 3402) and for seeking a trial preference (CPLR 3403)[39] – demonstrate that CPLR 3404 governs cases marked off[40] a trial calendar only. The language of CPLR 3216 (want of prosecution) requiring the service of a 90-day demand to file a note of issue demonstrates that CPLR 3216 is intended to apply to cases not yet on the trial calendar.[41]

To hold, as did the Second Department in *Cubed Enterprises*[42] *and the First Department in Johnson*[43], that CPLR 3404 has no application to cases in which *no* note of issue was ever filed is far different from excepting from CPLR 3404's application – via the constructive fiction that a case in which a filed note of issue is vacated for incomplete discovery is, somehow, transmogrified into a "pre-note of issue" case in which it is pretended that no note of issue was ever filed – a discrete class of cases in which a note of issue has, in fact, been filed, placing the case on the trial calendar.[44] To so truncate CPLR 3404's application based on the reason for which a note of issue is vacated and the case is, therefore, stricken from the trial calendar *finds no basis in the language of CPLR 3404*. For the First, Second, and, now, the Fourth Department all "to engraft [this] exception[] [onto CPLR 3404] where none exist[s][45] [constituted] trespasses by [these] courts upon the legislative domain."[46]

CPLR 3404, by its plain language, contains no exception for cases struck from the trial calendar for any particular reason – such as incomplete discovery – as opposed to another. Yet, the phrase "pre-note of issue cases," as it was employed, initially, to denote cases in which – as was the circumstance in *Lopez,* as well as in *Johnson* and *Cubed Enterprises* – "**no** note of issue has been filed, i.e., cases which have not yet reached the trial calendar,"[47] has been improperly expanded by the courts to encompass not only that subset of cases, but also, improperly, to encompass the subset of cases in which a note of issue has been filed but vacated because discovery was inaccurately represented[48] to be complete or waived when, in fact, it was not. Given, however, that a court's vacating of a note of issue operates, *perforce,*[49] to strike a case from the court's trial calendar,[50] this extension of the phrase "pre-note of issue case[]" to encompass the aforesaid second subset of cases was contrary to the clear language of Rules 3404 and 3402(a).

In *Hebert v. Chaudrey,*[51] the Third Department recognized this. The defendant moved to vacate the note of issue for plaintiffs' failure to comply with outstanding discovery. Two years after supreme court vacated the note of issue and concomitantly struck the matter from the trial calendar, the plaintiff filed another note of issue. The defendant moved to dismiss the complaint pursuant to CPLR 3404. Correctly construing CPLR 3404, the Third Department reversed supreme court's denial of the defendant's motion, correctly holding, "Supreme Court's order striking the matter from the calendar places this case within the plain language of the statute [referencing CPLR 3404](cases omitted)."[52]

In *Bradley v. Lampkin,*[53] conversely, the Fourth Department applied the First and Second Departments' constructive fiction that vacating a filed note of issue "returns the case to pre-note of issue status"[54] (because, supposedly, "The vacatur of a note of issue[55] . . . does not constitute a marking 'off' or striking from the calendar within the meaning of CPLR 3404"[56]). Yet, this cannot be, given that a vacatur of a note of issue due to incomplete discovery must, in the absence of an express order to the contrary, effectuate a striking of the case from the trial calendar *so that remaining discovery may be completed, given that further discovery is prohibited in the face of an extant, i.e, an un-vacated, note of issue.* [57] Moreover, given that notes of issue are, in the Eighth Judicial District,[58] almost always stricken only as a result of a 22 N.Y.C.R.R. 202.21(e) motion to vacate note of issue,[59] the Fourth Department's holding in *Bradley* will, in the Eighth Judicial District at least, virtually construe CPLR 3404 out of existence.

CONCLUSION

Construed, as it must be, according to its plain terms, CPLR 3404 applies to all actions in which a note of issue is vacated[60] and the case, therefore, is "marked 'off' or struck from the [trial] calendar"[61], and a plaintiff does not take action within one year to restore the action to that calendar.

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1. 156 A.D.3d 187 190–91 (4th Dep't 2017).

2. *E.g.*, *Turner v. City of New York*, 147 A.D.3d 597, 597 (1st Dep't 2017); *Montalvo v. Mumpus Restorations, Inc.*, 110 A.D.3d 1045, 1046 (2d Dep't 2013), *contra*, *Domas v. Barboza*, 206 A.D.2d 346, 346–47 (2d Dep't 1994) (discussed below).

3. CPLR 3404.

4. *See* Kirby, Kenneth R., *CPLR 3404 Dismissal of Civil Causes for "Neglect to Prosecute*," N.Y. St. B.J. May 2016, 44–46.

5. 117 A.D.2d 991, 991 (4th Dep't 1986).

6. *See* CPLR Rule 3402(a)'s final sentence, which mandates, "The clerk shall enter the case upon the [trial] calendar *as of the date of the filing of the note of issue*" (italics supplied).

7. Albeit, in *Meidel v. Ford Motor Co.*, *supra*, the Fourth Department so "recognized" in order to rule that the trial court had, in its order, improperly prohibited the plaintiff from noticing the matter for a jury trial.

8. *Bradley v. Konakanchi, D.O.*, 156 A.D.3d 187, 190 (4th Dep't 2017).

9. *Id.* at 991 (emphasis supplied).

10. For, in the absence of a court order explicitly directing otherwise, once a note of issue has been filed and the case, simultaneously, goes onto the trial calendar, discovery is, in the absence of special or extraordinary subsequent circumstances (22 N.Y.C.R.R. § 202.21[d]), considered closed in the absence of a timely motion to vacate note of issue pursuant to 22 N.Y.C.R.R. § 202.21(e). *Stanovick v. Donner-Hanna Coke Corp. v Modern Refractories Service Corp.*, 116 A.D.2d 1000, 1000 (4th Dep't 1986).

11. *Bradley*, 156 A.D.3d at 189–91.

12. 1 McKinney's Cons. L. of N. Y. (Annot.), Statutes, § 94, p. 190 (main vol.).

13. 1 McKinney's Cons. L. of N. Y. (Annot.), Statutes, § 76, p. 168, "Statutes too clear for construction.

14. 9 N.Y.2d 293, 304–05 (1961). Notably, in *In re Roosevelt Racetrack* (*id.* at 304), the Court of Appeals applied the statute as written and enacted, even though such application seemed unfair ("To be sure, under present tax rates this [formula prescribed by section 45-a of the Par-Mutuel Revenue Law {L.1956, ch. 837}] requires payments amounting to approximately twice the cost of any capital improvement and also fails to take into account the tax benefits which the track realizes from depreciation of the new facilities. This consequence, unfair though it might seem, does not, however, warrant disregard of the clear and unequivocal terms of the statute."

15. See, immediately below, discussion of the significance of the legislature's use of the word "shall."

16. CPLR 3402(a), second sentence (italics supplied).

17. Unless the court, as it is (impliedly) authorized to do by the first sentence of 22 N.Y.C.R.R. § 202.21(d), expressly directs to the contrary.

18. Obviously, in most instances, due to discovery being incomplete.

19. *Lopez v. Imperial Delivery Services, Inc.*, *supra*, at 191, quoting CPLR 3404.

20. *See*, in this regard, note 10, *supra*.

21. Black's Law Dictionary (Deluxe 9th ed.), 2009.

22. *Metro Burak, Inc. v. Rosenthal & Rosenthal, Inc.,* 83 Misc. 2d 637, 643 (Sup. Ct., Richmond Co. 1975), *mod on other grds*, 51 A.D.2d 1003 (2d Dep't 1976) ("It is presumed that the word 'shall' when used in a statute is mandatory [citation and authority omitted]").

23. *In re Matter of Roosevelt Raceway, Inc.*, 9 N.Y.2d at 304–05).

24. 1 McKinney's Cons. L. of N. Y. (Annot.), Statutes, § 76.

25. 206 A.D.2d 346 (2d Dep't 1994).

26. 1 McKinney's Cons. L. of N. Y. (Annot.), Statutes, § 94, p. 190 (main vol.).

27. As did the Fourth Department in Bradley, incorrectly adopting what it termed "the First and Second Departments' consistently narrow construction of CPLR 3404 (citations omitted)." *Bradley v. Konakanchi, D.O.*, *supra* note 8, at 189–90.

28. Plaintiff's Appellant's Brief, p. 4.

29. Respondents' Brief, p. 10 (emphasis in original).

30. 206 A.D.2d 346, 346–47 (2d Dep't 1994).

31. 35 A.D.3d 805, 806 (2d Dep't 2006).

32. Unchanged since their enactment into law, together, in chapter 308 of the Laws of 1962, except for immaterial amendments of Rule 3402(a) to insert a number-of-days requirement for service of the note of issue prior to its filing. See, as to these amendments, McKinney's 1963 Session Laws of New York, c.530, § 1; McKinney's 1968 Session Laws of New York, c.19, § 1. See also, in this regard, Legislative Documents for 1962. No. 8 ("Sixth Report to the Legislature by the Senate Finance Committee relative to the Revision of the Civil Practice Act"), recommending the enactment of an Article 34 entitled, "Calendar Practice; Trial Preferences," in the [then] new Civil Practice Law and Rules, consisting of Rules 3401, 3402, 3403 and 3404, *themselves comprising a statutory scheme independent and apart from CPLR Article 32 ["Accelerated Judgment"]) and its Rule 3216 ("Want of prosecution"*).

33. 265 A.D.2d 537, 538 (2d Dep't 1999).

34. *Lopez v. Imperial Delivery Service, Inc.*, 282 A.D.2d 190, 198 (2d Dep't 2001), *lv dism'd.*, 96 N.Y.2d 937 (2001).

35. *Id.* at 191 (bold and italics supplied).

36. 287 A.D.2d 233, 235 (1st Dep't 2001).

37. *Id.* at 237.

38. See "Notes," Legislative Documents for 1960, No. 20 (4th Preliminary Report of the Advisory Committee on Practices and Procedures), discussing the predecessor to CPLR Rule 3404, [Civil Practice] Rule 36.4 ("Dismissal of abandoned cases"), stating as follows: "This rule is derived from subdivision 2 of rule of civil practice 302 without change of substance. * * * The phrase 'neglect to prosecute' Is used to conform to proposed section 5.5, *so that a dismissal under this rule will not provide a [new] six-month period [under, now, CPLR §205{a}] to begin a new action which would otherwise be barred by the statute of limitations*" (italics supplied).

39. See, McKinney's 1962 Session Laws of New York, c. 308, pp. 725–26 (captioned "Article 34 – Calendar Practice – Trial Preferences"); see also, Legislative Documents for 1962, No. 8, discussed in note 33, *supra*.

40. Or, "struck from" (CPLR 3404), its functional equivalent. Lopez, *supra* note 34, at 191.

41. *Johnson*, 287 A.D.2d at 235–36.

42. *Cubed Enterprises*, 265 A.D.2d at 538.

43. *Johnson*, 287 A.D.2d at 235.

44. S*ee* CPLR 3402(a).

45. In the language of the statute, that is.

46. 1 McKinney's Cons. L. of N. Y. (Annot.), Statutes, § 76 ("Statutes too clear for construction"), quoted hereinabove.

47. *Lopez*, 282 A.D.2d at 191 (bold supplied). Note the (implicit) synonymy drawn by the Second Department in this quoted passage from Lopez between the filing of a note of issue and a case "reach[ing]," i.e., being on, the trial calendar; – the latter does not occur in the absence of the former: "In New York practice under the CPLR, the filing of a 'note of issue' is the thing that gets the case onto the court's 'calendar' to await trial." 7B McKinney's Cons. L. of N. Y. (Annot.), C3402:1, Professor David D. Siegel's Practice Commentaries (main vol., pp. 14–15).

48. In an accompanying certificate of readiness.

49. In the absence of a court order expressly directing to the contrary.

50. See earlier discussion of CPLR 3042(a).

51. 119 A.D.2d 1170, 1171 (3d Dep't 2014).

52. *Id.* at 1171.

53. 156 A.D.3d 187 (4th Dep't 2017).

54. *Id.* at 189.

55. For incomplete discovery.

56. *Id.* at 189 (citing Second Department opinions).

57. *See Stanovick v. Donner-Hanna Coke Corp.*, *supra.*

58. Where calendar calls are virtually unheard-of.

59. Typically, for incomplete discovery.

60. Whether the ground for such vacatur is incomplete discovery.

61. CPLR 3404. Unless the court expressly orders a case to remain on the trial calendar despite the court's vacating of the note of issue.

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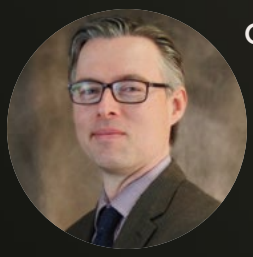
‘You Have to Be Crazy to Plead Insanity’

How an Acquittal Can Lead to Lifetime Confinement

By Christopher Liberati-Conant and Sheila E. Shea

Editor’s note: The following article has been excerpted from a Report to the Executive Committee of the New York State Bar Association on the Use and Efficacy of Penal Law § 40.15 and Criminal Procedure Law § 330.20. The full report can be accessed at www.nysba.org/mandatedrep0419.

The report was approved by the Executive Committee at the April 12, 2019 meeting.



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Thousands of individuals with mental illnesses are incarcerated in New York's prisons and jails. At the same time, the so-called "insanity defense" is so rarely invoked that it is arguably moribund. In order to examine why a defense that could lead to treatment instead of incarceration is so rarely invoked, NYSBA's Committee on Mandated Representation, under Chair Robert Dean, and Former Chair Andrew Kosover, and the Mental Health Subcommittee, traced the origins of the insanity defense, its history in New York, the effects of past reforms, and the post-acquittal commitment scheme.

The Subcommittee concluded that both the narrowness of the defense and the indefinite confinement that can follow an insanity acquittal likely restrict its utility. Although the insanity defense has often been portrayed as allowing guilty people to escape punishment, the reality is that even individuals acting under severe, pervasive delusions may still be convicted. As Charles P. Ewing, SUNY distinguished professor at the University of Buffalo Law School, warns, "You have to be crazy to plead insanity . . . and I say that because the consequences are so grave."

M'NAGHTEN'S LEGACY IN NEW YORK

New York's "insanity defense" has its roots in ancient common law.[1] As in nearly every state, New York's statutory provisions applicable to criminal defendants who lack criminal culpability due to a mental illness stem directly from the English common law *M'Naghten's Case*. In that case, a woodturner who suffered from delusions of political persecution was acquitted of the murder of a civil servant and committed to a mental institution.[2] In 1843, following public outcry at the acquittal and inquiry from the House of Lords, the Court of Common Pleas announced the rule that criminal liability could be excused only if the accused "clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."[3]

When the rule was imported to New York, the courts placed on the prosecution the burden of proving beyond a reasonable doubt that the defendant was not insane.[4] The difficulty of carrying this burden was eased by a presumption of sanity that required the defendant to introduce substantial evidence of his insanity.[5] By 1964, the harshness of New York's strict adherence to *M'Naghten* led to legislative reform.[6] The legislature enacted Penal Law § 30.05,[7] which provided: "A person is not criminally responsible for his conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to know or appreciate either: (a) The nature and consequences of such conduct; or (b) That such conduct was wrong." The revision ameliorated the strict *M'Naghten* rule in that a defendant's lack of capacity to know or appreciate was not required to be total, but substantial.[8] It also changed "nature and quality" to "nature and consequences." The legislature declined, however, to accept in full the recommendation of the Temporary Commission on Revision of the Penal Law and Criminal Code, which followed the Model Penal Code in providing that the defense applies to one who, due to a mental disease or defect, lacked substantial capacity "to conform his conduct to the requirements of law."[9]

By 1970, the Court of Appeals had restricted the defense by approving of a jury instruction that explained that to be held criminally responsible, "the defendant must have realized that the act was against the law and against the commonly accepted standards of morality."[10] Thus, regardless of how pervasive a delusion, so long as a defendant understood that conduct was illegal and generally considered immoral, the insanity defense would fail as a matter of law.[11]

In 1984, following the attempted assassination of Ronald Reagan and the public furor at his would-be assassin John Hinckley's insanity acquittal,[12] the federal government and multiple states, including New York, tightened insanity statutes.[13] The New York legislature repealed Penal Law § 30.05 and replaced it with Penal Law § 40.15,[14] thereby shifting the burden to the defendant, making insanity an affirmative defense to be proved by a preponderance of the evidence. The statements of agencies and stakeholders contained within the bill jacket for Penal Law § 40.15 overwhelmingly supported the change.[15] Most echoed the arguments offered by the Governor's statement in support: that insanity acquittals had risen in the decade prior and that placement of the burden of disproving insanity on the prosecution favored the defendant too heavily, thus creating a risk that defendants would "get away with murder."

The statute has not been amended since 1984 and *Kohl* remains good law. Two cases, one from 1994 and one from 2018, illustrate the insanity defense's continued narrowness in practice.

In 1994, brandishing a rifle, Ralph Tortorici took a classroom full of University of Albany students hostage. "He claimed that he was the victim of an experiment in which a microchip was implanted in his brain, and [he] wanted to expose the people responsible for victimizing him."[16] One of the student hostages, Jason McEnaney, charged Tortorici and managed to wrestle the rifle away from him, allowing other students to pin him to the ground. During the struggle, Tortorici shot and wounded McEnaney.[17] Tortorici was indicted on 15 counts, including attempted murder, kidnapping, and first-degree assault.

Once the trial began, Tortorici declined to attend, instead remaining in his holding cell.[18] The People did not present any psychiatric evidence, while the defense presented four psychiatric experts, all of whom agreed that Tortorici did not understand the nature and consequences of his conduct.[19] The jury, deliberating for an hour, convicted Tortorici of multiple felonies, including kidnapping and assault, but acquitted him of attempted murder. The court sentenced Tortorici to an aggregate term of 15½ to 40 years' imprisonment.[20] The Appellate Division and Court of Appeals affirmed the verdict.[21]

The insanity defense's low usage rates paired with the high incidence of mental illness in prisons raises a question: why are more defendants not invoking a defense that would send them to treatment instead of prison?

Despite receiving Office of Mental Health services while in custody, Tortorici hanged himself in his cell in 1999.[22]

A juror explained why they had rejected Tortorici's insanity defense: "if he had just grabbed a gun and run into a McDonald's, it would have been a different situation. We would have looked at it differently. The fact that [there] was so much planning weighed heavily on us."[23] The juror's interpretation of the insanity defense is consonant with the Pattern Jury Instructions for Penal Law § 40.15, which describe a lack of substantial capacity to know the nature and consequences of an act or that it was wrong in terms of children who "sometimes recite things that they cannot understand."[24] Although people with mental illnesses were once thought of as insensible wild animals or infants,[25] we have long known that even where a mental illness impairs reasoning in some areas (i.e., so that a person believes that taking a college class hostage will stop the government from experimenting on him), it does not often destroy all rational thought.[26]

In 2013, Lakime Spratley, seemingly at random and without planning or provocation, shot a woman in a grocery store, killing her.[27] The evidence at trial indicated that he suffered from schizoaffective disorder, heard voices, and suffered from delusions of persecution. In a police interview he offered as a partial explanation that he believed the victim had stolen his clothes and was wearing his shorts, and that she had made trigger gestures at him.[28] A jury convicted him of murder in the second degree and criminal possession of a weapon in the second degree. The Appellate Division, Second Department, reversed the verdict, explaining that "the rational inferences which can be drawn from the evidence presented at trial do not support the conviction," finding as a matter of law that the defendant had established that he lacked substantial capacity to know or appreciate that his conduct was wrong.[29] One justice dissented.

These cases highlight the narrowness of New York's ostensibly evolved *M'Naghten* rule. For the defense to succeed, the defendant must have been insensible to the point that the line between lack of mens rea and the insanity defense disappears. But mental illness is not all or nothing; one need not conform to the medieval notion of lunacy by howling at the moon to lack – or have diminished – criminal culpability.[30]

In response to an inquiry sent by the Committee on Mandated Representation's Mental Health Subcommittee to chief defenders, 18 of 19 respondents endorsed the belief that Penal Law § 40.15 is insufficient to ensure justice for criminal defendants who lack criminal culpability due to mental disease or defect. In addition, multiple respondents questioned the all-or-nothing nature of the defense, noting that culpability, ability to appreciate the nature of one's conduct, and the ability to tell right from wrong are more appropriately viewed as matters of degree. Unfortunately, while societal and medical understanding of mental illness has evolved, the insanity defense has stood still.

THE INSANITY DEFENSE IN PRACTICE

The comments in support of the enactment of Penal Law § 40.15 in 1984 would suggest that the insanity defense was being routinely abused.[31] In the eyes of the public and legislators, it presented an unacceptable opportunity for murderers to walk free by faking a mental illness. Attorneys and the public alike "believe that the defense is invoked frequently and principally in cases involving murder."[32] Yet social science research suggests that the insanity defense may only be invoked in one percent of felony cases, and that, when invoked, it is rarely successful.[33] While research varies widely, some studies conclude that the defense succeeds in only one out of four cases, while others have found a success rate as low as one in 1,000.[34] New York State does not track how often the defense is invoked, but the Department of Criminal Justice Statistics reports that over the five-year period from 2013-2017, only 11 defendants, out of 19,041 felony and misdemeanor trials statewide, were found not responsible by reason of mental disease or defect after a trial. During the same five-year period, 241 defendants entered a plea of not responsible, compared to 1,375,096 convictions for felonies and misdemeanors.[35] According to the Office of Mental Health, as of June 30, 2018, 260 insanity acquittees were in secure confinement and 452

were in the community subject to orders of conditions. Meanwhile, as of 2016, approximately 20 percent of sentence-serving inmates in New York State correctional facilities carried mental health diagnoses that required Office of Mental Health services.[36] In other words, based on a reported total prison population of 51,000, over 10,000 inmates receive services from Office of Mental Health.[37]

The insanity defense's low usage rates paired with the high incidence of mental illness in prisons raises a question: why are more defendants not invoking a defense that would send them to treatment instead of prison? First, the overall low success rate may deter defendants from interposing the defense. Second, defendants pay a penalty for arguing insanity and losing.[38] Defendants whose insanity defenses are unsuccessful – which, as noted above, represents the vast majority of those who raise it at trial – receive significantly longer sentences than those who are convicted without having argued insanity.[39] Third, defendants may be unwilling to assert the defense because they decline to accept a mental illness diagnosis. Fourth, as discussed in the next section, New York's civil commitment system may itself deter defendants with viable insanity defenses from raising them. For example, defendants acquitted based on insanity may remain confined for longer than the maximum term of the prison sentence they would have served if convicted.[40] Thus, Professor Ewing's warning on grave consequences.[41]

GET OUT OF JAIL FREE? CRIMINAL PROCEDURE LAW § 330.20

Whether the insanity defense should be reformed cannot be considered absent an examination of what happens to an individual after an insanity acquittal. The retention, care, treatment, and release of persons found not responsible of crimes after successfully invoking the insanity defense is a complex process involving the balancing of individual liberties and the protection of society.[42] In New York, the current procedures that follow a verdict or plea of not guilty by reason of mental disease or defect were enacted in 1980[43] following a study by the New York State Law Revision Committee and to comply with the constitutional mandates of *In re Torsney*.[44]

In *In re Torsney,* the Court of Appeals held that, because insanity acquittees lack criminal culpability, "[b]eyond automatic commitment . . . for a reasonable period to determine [acquittees'] present sanity, justification for distinctions in treatment between persons involuntarily committed under the Mental Hygiene Law and persons committed under CPL § 330.20 draws impermissibly thin."[45] Nevertheless, due to a judicially imposed presumption that the defendant acquitted by reason of mental disease or defect is perpetually dangerous, in practice the CPL § 330.20 commitment scheme has become "increasingly onerous, bearing little resemblance to [Mental Hygiene Law] article 9 (civil) commitments."[46]

STAGES OF THE PROCEEDING

"Track status, as determined by the initial commitment order, governs the acquittee's level of supervision in future proceedings and may be overturned only on appeal from that order, not by means of a rehearing and review."[47] Following an insanity verdict or plea, the trial judge must immediately order a psychiatric examination of the defendant, to be followed by an initial hearing to determine the acquittee's mental condition.[48] This hearing, in which the district attorney continues to participate, determines the level of judicial and prosecutorial involvement in future decisions concerning the acquittee's confinement, transfer and release.[49] Based on its findings at the initial hearing the court then assigns the acquittee to one of the three "tracks."[50] Track-one acquittees are those found by the trial judge to suffer from a dangerous mental disorder that makes them "a physical danger to [themselves] or others."[51] Track-two acquittees are mentally ill, but not dangerous,[52] while track-three acquittees are neither dangerous nor mentally ill.[53]

The most onerous aspect of the statutory scheme is the "recommitment" process, which is used to return outpatient acquittees to inpatient status in the event of psychiatric decompensation. As interpreted by the Court of Appeals, an acquittee on conditional release can be committed to secure confinement under the Criminal Procedure Law without the enhanced procedural due process protections afforded to people subject to civil hospitalization under section 9 of the Mental Hygiene Law even if at the initial hearing the defendant was found not dangerous and placed in track two or three.[54] In other words, a defendant who was not committed to begin with can nevertheless be "recommitted" under CPL § 330.20. Appellate courts in New York have been completely unpersuaded that the initial findings of a criminal court placing defendants in one of the three available "tracks" have any constitutional significance.[55] "All such persons have committed criminal acts, and this underlies the permissible distinction between them and all others."[56] Federal constitutional challenges to the New York statutory scheme have to date failed, albeit narrowly.[57]

In 1995, in *In re George L.,*[58] the Court of Appeals determined that section 330.20 does not constrain a court to determining dangerousness as of the time when the hearing is conducted.[59] Instead, the Court held that the State was permitted to engage in a presumption that the causative mental illness continues beyond the date of the criminal conduct.[60] Stated another way, George L. adopted a presumption that the mental illness that led to the criminal act continues after the plea or verdict of not responsible and that assessments of dangerousness should

not be limited to a point in time, but rather should be contextual and prospective in nature.[61] Further, the presumption of dangerousness continues, in fact, and is not extinguished by a subsequent finding that the defendant no longer suffers from a dangerous mental disorder.[62]

LENGTH OF STAY

In addition to the judicial interpretations of CPL § 330.20 discussed above, Office of Mental Health policy has led to an increase in length of stay for confined acquittees. Over time, OMH has become "increasingly risk averse."[63] Lengths of stay have become longer for people committed under the CPL despite the fact that the length of hospitalization has little or no effect on re-arrest.[64]

Unlike in other states, the maximum term to which an acquittee could have been sentenced does not limit the time that an acquittee may be confined at a secure forensic facility or subject to an order of conditions. In other words, a defendant whose maximum sentence would have been five years can be confined and/or subject to an order of conditions for the rest of his life. As aptly noted by one commentator, if one asks the question what happens after a defendant successfully invokes the insanity defense, "often the answer is involuntary confinement in a state psychiatric hospital – with no end in sight."[65]

In sum, once a defendant has been acquitted based on insanity and thereby adjudged to lack criminal culpability, she faces indefinite detention that can exceed the maximum time for which she could have been imprisoned. She enters an increasingly risk averse milieu that has enforced an increasing length of confinement despite falling admissions.[66]

CONCLUSION

Penal Law § 40.15 and the post-acquittal commitment scheme under Criminal Procedure Law § 330.20 deserve close examination with an eye toward reform. At the very least, legislation should be passed limiting the time a person found not guilty by reason of mental disease or defect can be confined to the maximum term for which they could have been incarcerated had they been convicted.

Of course, reform of the insanity defense is not the only way to address the issue of mental illness in prisons and jails. For instance, mental health courts have shown promise in diverting defendants with mental health issues to treatment.[67] But only 27 such problem-solving courts operate in New York, and they are inconsistent in their diagnostic techniques and in matching the intensity of the intervention to the intensity of the risk.[68]

Nor is New York's restrictive approach to post-acquittal confinement the only model for insanity acquittees. In Tennessee, for example, 45 percent of insanity acquittees are never civilly committed; instead they are treated on an outpatient basis, and the average length of confinement is two years.[69] Its recidivism rates have not changed since it changed its approach to insanity acquittees.[70] Whatever the avenue or avenues of reform, the issue of mental illness in the jail and prison population demands attention.

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1. *See People v. Kohl*, 72 N.Y.2d 191, 203, 532 N.Y.S.2d 45 (1988) (Hancock, Jr., dissenting); Michael Perlin, The Jurisprudence of the Insanity Defense (1994).

2. 8 Eng. Rep 718 (1843).

3. *People v. Schmidt*, 216 N.Y. 324, 332–33 (1913).

4. *Kohl*, 72 N.Y.2d at 202–03 ("Our earliest statute on the subject declared that '[n]o act done by a person in a state of insanity can be punished as an offence' (Rev Stat of 1828, part IV, ch 1, tit 7, § 2)." The dissenting opinion provides a further history of the prosecution's burden in these matters.

5. *People v. Silver*, 33 N.Y.2d 475, 482 (1974), defined substantial evidence as "the degree of proof required to rebut 'most, but not all' presumptions recognized in this State (Richardson, Evidence [10th ed.], § 58, p. 37)."

6. Note, *Legislative Changes in New York Criminal Insanity Statutes*, 40 St. John's L. Rev. 75, 80–81 (1965).

7. N.Y. Law 1965, ch. 593, § 1.

8. Note, *Legislative Changes in New York Criminal Insanity Statutes*, 40 St. John's L. Rev. 75, 78–81 (1965).

9. *Id.* at 81. Under the Model Penal Code, a defendant is not guilty if a mental illness renders him unable to conform his conduct to the law. MPC § 4.01. The Model Penal Code has been adopted by a majority of states. *See* Henry Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-*Clark *Era*, 18 U. Fla. J.L. & Pub. Pol'y 7 (2007).

10. *People v. Adams*, 26 N.Y.2d 129, 135–36 (1970).

11. The Pattern Jury Instructions describe lack of substantial capacity to know or appreciate that conduct is wrong as "either that the conduct was against the law or that it was against commonly held moral principles, or both." CJI2d[NY] Defenses: Insanity. Lack of substantial capacity to know or appreciate the wrongfulness of an act need not be so restricted. Arguably, a defendant acting on beliefs caused by mental illness may lack substantial capacity to appreciate the wrongfulness of an act despite being able to articulate that it is both illegal and against commonly accepted moral principles.

12. According to an ABC news poll taken the day after the verdict, 83% of Americans believed "justice was not done." Douglas O. Linder, *The Trial of John W. Hinckley, Jr.,* http://www.famous-trials.com/johnhinckley/537-home.

13. *Id.* (The House and Senate began hearings regarding shifting the burden of the insanity defense within one month of the Hinckley verdict. Within three years, two-thirds of the states shifted the burden to the defense to prove insanity, eight states adopted the verdict of "guilty but mentally ill," and Utah abolished the insanity defense). *See also* Joe Palazzolo, *John Hinckley Case Led to Vast Narrowing of Insanity Defense*, Wall St. J., July 27, 2016, https://www.wsj.com/articles/john-hinckley-case-led-to-vast-narrowing-of-insanity-defense-1469663770. (Following the Hinckley verdict, Kansas, Idaho, and Nevada also abolished the insanity defense, although Nevada later reinstated it.)

14. Not Guilty By Reason of Mental Disease or Defect.

15. *See, e.g.*, Memorandum from Linda J. Valenti, NYS Division of Probation General Counsel, to Gerald C. Crotty, Counsel to the Governor, et al. (June 25, 1984); Letter from Paul Litwak, N.Y.S. Office of Mental Health, to Gerald C. Crotty, Counsel to the Governor (June 21, 1984); Memorandum from Jay M. Cohen, N.Y.S. Division of Criminal Justice Services to Matthew T. Crosson (June 19, 1984) (included in N.Y. Laws 1984, ch. 668 legislative bill jacket).

16. *People v. Tortorici*, 92 N.Y.2d 757, 759, 686 N.Y.S.2d 346 (1999).

17. Jacques Steinberg, *He Disarmed a Gunman But Insists He's No Hero*, N.Y. Times, Dec. 28, 1994, https://www.nytimes.com/1994/12/28/nyregion/he-disarmed-a-gunman-but-insists-he-s-no-hero.html. *But see* Paul Grondahl, *20 years after Ralph Tortorici took class hostage at UAlbany*, Times Union, Dec. 17, 2014, https://www.timesunion.com/local/article/Recalling-three-hours-of-terror-in-Lecture-Center-5961566.php (according to this account, McEnaney grabbed and held onto the barrel of Tortorici's gun, and another student, Jason Alexander, was the first to tackle Tortorici).

18. *Tortorici*, 92 N.Y.2d at 762.

19. A Crime of Insanity, *The Defense's Summation*, Frontline, https://www.pbs.org/wgbh/pages/frontline/shows/crime/ralph/dsummation.html (excepts from the defense summation including discussion of Tortorici's medical history and medical expert testimony).

20. *Tortorici*, 249 A.D.2d 588, 589 (3d Dep't 1998), *aff'd,* 92 N.Y.2d 757 (1999), *cert. denied,* 528 U.S. 834 (1999).

21. *Id.*

22. Press Release, N.Y.S. Dep't of Corr. Servs. Inmate Tortorici hangs self in prison cell (Aug. 10, 1999), http://www.doccs.ny.gov/PressRel/1999/torthang.html.

23. A Case of Insanity, *Interview: Norm LaMarche*, Frontline, https://www.pbs.org/wgbh/pages/frontline/shows/crime/interviews/lamarche.html (last visited July 6, 2018); *see also* James C. McKinley Jr. & Jan Ransom, *Manhattan Nanny Is Convicted in Murders of Two Children*, N.Y. Times, April 18, 2018, https://www.nytimes.com/2018/04/18/nyregion/nanny-trial-verdict.html ("The prosecutors . . . also focused on evidence suggesting that Ms. Ortega had planned the murders.").

24. "Children can sometimes recite things that they cannot understand. In those circumstances, the children may be said to have surface knowledge of what they recited, but no true understanding. Thus, a lack of substantial capacity to know or appreciate either the nature and consequences of the prohibited conduct, or that such conduct was wrong, means a lack of substantial capacity to have some true understanding beyond surface knowledge" CJI2d[NY] Defenses: Insanity.

25. For a discussion of the origins of the idea of people with mental illness as wild animals or children, see Anthony M. Platt, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, Vol. 1, Issues in Criminology, No.1, Criminal Responsibility (Fall 1965) at 1.

26. *See People v. Jackson*, 60 A.D.3d 599 (1st Dep't 2009) ("Although two psychiatric examiners opined that defendant was not competent because he insisted on pursuing a defense of posthypnotic suggestion derived from his delusions, the ultimate determination of whether a defendant is an incapacitated person is a judicial, not a medical, one Defendant expressed a rational understanding of the judicial proceedings, the charges against him, the choices available to him, and the consequences of his decision to pursue a hypnosis defense rather than an insanity defense.") (citations omitted). For an examination of the decision making abilities of those diagnosed with mental illness as compared to those without, see Paul Appelbaum & Thomas Grisso, *The MacArthur Treatment Competence Study*, MacArthur Research Network on Mental Health and the Law (May 2004), http://www.macarthur.virginia.edu/treatment.html.

27. *People v. Spratley*, 159 A.D.3d 725 (2d Dep't 2018).

28. *Id.*

29. *Id*. at 731.

30. *Rivers v. Katz*, 67 N.Y.2d 485, 494 (1986) (regarding mentally ill patients' ability to make decisions regarding their own care, "neither the fact that appellants are mentally ill nor that they have been involuntarily committed, without more, constitutes a sufficient basis to conclude that they lack the mental capacity to comprehend the consequences of their decision to refuse medication that poses a significant risk to their physical well-being").

31. *E.g.,* Letter from Paul Litwak, N.Y.S. Office of Mental Health, to Gerald Crotty, Counsel to the Governor (June 21, 2018); Memorandum from Jay M. Cohen, N.Y.S. Division of Criminal Justice Services, to Matthew T. Crosson (June 19, 1984); Memorandum in Support, From Robert B. Tierney, City of New York Office of the Mayor (included in N.Y. Laws 1984, ch. 668 legislative bill jacket).

32. Bonita M. Veysey, *Gender Role Incongruence and the Adjudication of Criminal Responsibility*, 78 Alb. L. Rev. 1087, 1088 (2014-2015) (citing Eric Silver et al., *Demythologizing Inaccurate Perceptions of the Insanity Defense*, 18 Law & Hum. Behav. 63 (1994)).

33. Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study,* 19 Bull. Am. Acad. Psychiatry & L. 331, 334–35 (1991); Jeffrey S. Janofsky, MD, et al., *Defendants Pleading Insanity: An Analysis of Outcome*, 19 Bull. Am. Acad. Psychiatry & L. 203, 205–07 (1989).

34. Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post*-Clark *Era*, 18 U. Fla. J.L. & Pub. Pol'y 7, 11–12 (2007) (citing a success rate of under 25 percent); Heather Leigh Stangle, *Murderous Madonna: Femininity, Violence, and the Myth of Postpartum Mental Disorder in Cases of Maternal Infanticide and Filicide*, 50 Wm. & Mary L. Rev. 699, 728 (2008) (citing a success rate of 1 in 1,000 criminal trials); Stephen G. Valdes, Comment, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. Pa. L. Rev. 1709, 1723 (2005) (citing success rates ranging from 0.87 percent to 26 percent).

35. Division of Criminal Justice Services, emails dated April 9, 2018 (on file with authors).

36. N.Y.S. Corrections and Community Supervision, Under Custody Report: Profile of Under Custody Population as of January 1, 2016, at 25, http://www.doccs.ny.gov/Research/Reports/2016/UnderCustody_Report_2016.pdf.

37. *See id*.; Emily Masters, *By the Numbers: New York's Prison Population*, Times Union, Sept. 21, 2017, https://www.timesunion.com/news/article/By-the-numbers-New-York-s-prison-population-12216340.php.

38. Fatma Marouf, *Assumed Sane*, 101 Cornell L. Rev. 25, 30 (2016).

39. Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 Bull. Am. Acad. Psychiatry & L. 5, 12 (1996); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 Case W. Res. L. Rev. 599, 650 (1990); Joseph Rodriguez et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 Rutgers L.J. 397, 40102 (1983).

40. Mac McClelland, *When Not Guilty Is a Life Sentence*, N.Y. Times Mag., Sept. 27, 2017, https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html; *People v. D.D.G.*, 27 Misc. 3d 1224(A) (Sup. Ct., Queens Co., 2010). In determining whether to release a defendant from custody following an adjudication of not guilty by reason of mental disease or defect, "a court may consider the length of confinement and treatment [and] the lapse of time since the underlying criminal acts" (internal citations omitted). In this case, defendant was released after more than 20 years of confinement, but the length of confinement was not the only factor the court considered, and standing alone would have been insufficient to secure his release.

41. Russ Buettner, *Mentally Ill, but Insanity Plea Is a Long Shot*, N.Y. Times, April 3, 2013, https://www.nytimes.com/2013/04/04/nyregion/mental-illness-is-no-guarantee-insanity-defense-will-work-for-tarloff.html; *see, e.g.*, Michael Perlin, *The Borderline Which Separated You from Me: The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 Iowa L. Rev. 1375 (1997); Mac McClelland, *When 'Not Guilty' Is a Life Sentence*, N.Y. Times Mag., Sept. 27, 2017, https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html.

42. Barbara E. McDermott et al, *The Conditional Release of Insanity Acquittees: Three Decades of Decision-Making*, 36 J. Am. Acad. Psychiatry & L. 329 (2008).

43. *In Defense of Insanity in New York State, 1980 Report of N.Y. Law Rev. Comm'n,* Reprinted in 1961 McKinney's Session Laws of N.Y.

44. 47 N.Y.2d 667 (1979).

45. *Id*. at 674–75.

46. Sheila E. Shea & Robert Goldman, *Ending Disparities and Achieving Justice for Individuals with Mental Disabilities*, 80 Alb. L. Rev. 1037, 1089 (2016/2017) (citing *In re Torsney*, 47 N.Y.2d 667 (1979)).

47. *In re Norman D*., 3 N.Y.3d 150, 152 (2004). As observed by the Court of Appeals in *In re Norman D.*, "track one status is significantly more restrictive than track two status." *Id*. at 155.

48. CPL § 330.20(2)–(6).

49. *In re Brian HH*, 39 A.D.3d 1007, 1009 (3d Dep't 2007).

50. *In re Norman D*, 3 N.Y.3d at 154. The "track" nomenclature does not appear in CPL § 330.20 but is derived from the Law Revision Commission report that accompanied the proposed legislation, which states that "[t]he post-verdict scheme of proposed CPL § 330.20 provides for three alternative 'tracks' based upon the court's determination of the defendant's mental condition at the time of [the initial] hearing." (1980 Report at 2265).

51. CPL § 330.20(1)(c), (6).

52. CPL § 330.20(1)(d), (6), (7).

53. CPL § 330.20(7); *People v. Stone*, 73 N.Y.2d 296 (1989).

54. *People v. Stone,* 73 N.Y.2d 296 (1989).

55. *In re Zamichow*, 176 A.D.2d 807 (2d Dep't 1991).

56. *Id., citing Jones v. United States,* 463 U.S. 354, 364–65 (1982).

57. *See Francis S. v. Stone*, 221 F.3d 100, 112 (2d Cir. 2000).

58. *In re George L.,* 85 N.Y.2d 295 (1995).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Francis S. v. Stone,* 221 F. 3d 100, 112 (2000). The Second Circuit observed that a track two defendant's equal protection argument that following his release he could not be recommitted to a secure hospital under the provisions of the Criminal Procedure Law had "considerable force," but denied habeas relief because of the restricted scope of review imposed on federal courts. His claim was premised upon two prior explicit state court findings in his case that he did not suffer from a dangerous mental disorder.

63. Richard Miraglia & Donna Hall, *The Effect of Length of Hospitalization on Re-arrest Among Insanity Plea Acquittees,* 39 J. Am. Acad. Psychiatry & L. 524, 526 (2011).

64. *Id*.

65. Mac McClelland, *When 'Not Guilty' Is a Life Sentence*, *supra,* N.Y. Times Mag., Sept. 27, 2017.

66. *Id.* "The question 'becomes one of risk tolerance. America has become – to an extreme level that's almost impossible to exaggerate – a risk-intolerant society.' Fears of people with mental illness persist, even though, according to the best estimates, only 4 percent of violent acts in the United States are uniquely attributable to serious mental illness." *Id*.; Richard Miraglia & Donna Hall, *The Effect of Length of Hospitalization on Re-arrest Among Insanity Plea Acquittees*, 39 J. Am. Acad. Psychiatry & L. 526 (2011).

67. *See generally* Carol Fisler, *Toward a New Understanding of Mental Health Courts*, Judges J. 54:2, 8-13 (Spring 2015).

68. *Problem Solving Courts: Mental Health Courts Overview*, New York State Unified Court System (January 26, 2017), https://www.nycourts.gov/courts/problem_solving/mh/home.shtml; *New York State Mental Health Courts: A Policy Study*, Josephine W. Hahn, Center for Court Innovation, Dec. 2015, at 11.

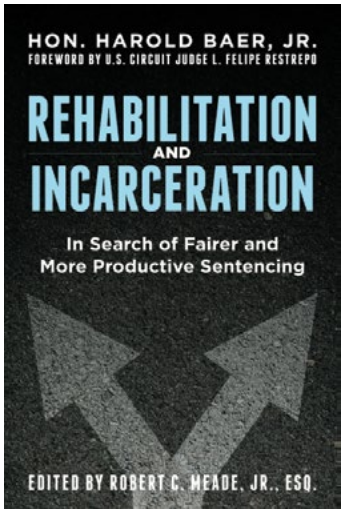
69. Mac McClelland, *When 'Not Guilty' Is a Life Sentence*, *supra,* N.Y. Times Mag., Sept. 27, 2017.

70. *Id.*

Rehabilitation and Incarceration: In Search of Fairer and More Productive Sentencing

By Hon. Harold Baer, Jr.
Edited by Robert C. Meade, Jr.

During his lifetime, Judge Harold Baer, Jr. devoted a great deal of time and energy focusing on and criticizing what he saw as the growing industry of mass incarceration and the failures of the American justice system. He was deeply troubled by conditions in our jails, the collateral consequences of felony convictions, and the need for reform and focus on rehabilitation and alternatives to incarceration.



Judge Baer had an extraordinary career. He served for a decade as a N.Y. State Supreme Court Justice and then for another decade as U.S. District Judge for the Southern District of New York until taking senior status. Among many public service positions, Judge Baer was an Assistant U.S. Attorney for the Southern District of New York, where he was Chief of the Criminal Division, served as executive director of the Civilian Complaint Review Board of the New York City Police Department, and had the unique perspective of overseeing New York City's jail system as the judge so designated in a consent decree.

In his final book, *Rehabilitation and Incarceration: In Search of Fairer and More Productive Sentencing,* published posthumously earlier this year by the American Bar Association, Judge Baer explains how incarceration became a crisis in America, and looks at the serious collateral consequences and penalties beyond sentencing that lead to recidivism. He argues in the book that to live up to its promise, America needs fundamental reform of its attitudes about crime and punishment. In many ways, Judge Baer foresaw today's shifting views of crime and punishment. Focusing on alternatives to incarceration and "the path toward rehabilitation" for many years, he was well ahead of his time.

In this compelling volume, Judge Baer maintains that there has been "an over-reliance on imprisonment as a response to criminal activity" and that we "have emphasized retribution too heavily while unwisely and shortsightedly giving too little weight to the goal of rehabilitation." He discusses where we are and how we got here, and argues that fundamental reform to promote rehabilitation and alternatives to incarceration is not only the right thing, it is also economically sound policy which promotes and enhances public safety.

Judge Baer lays out how our reliance on a punitive approach resulted in the establishment of mandatory minimum sentences and a reduction of judicial discretion. He very effectively argues that removing judicial discretion has had very serious consequences, both for those incarcerated and the public. He also notes that the punitive approach has greatly increased the financial burden on taxpayers, even as recidivism also increased.

Judge Baer's perspective as a prosecutor, defense attorney, and state and federal judge informed his enlightened views on the role of federal courts in prison reform. He had deep concern that our jails and our approach to incarceration reflected America's failure to live up to its promise. One of the more prolific writers on the bench, Judge Baer had an expansive view of civil liberties. He wrote, "As Nelson Mandela teaches, prison conditions reflect the core values of a society and test a nation's commitment to its self-proclaimed ideals."[1]

I knew Judge Baer for around 20 years. We served together on the Board of Directors of the New York County Lawyers Association (NYCLA), where we both served as president, he from 1979-1981 and me approximately 20 years later. We also served together as delegates to NYSBA's House from NYCLA. His passion and scholarship were inspiring and this final publication, edited by Judge Baer's longtime friend, Robert C. Meade, Jr., with whom he previously collaborated in producing NYSBA's treatise on depositions, is a fitting epilogue to a lifetime of advocacy for the rule of law with compassion and sensitivity.

1. New York Law School Law Review, *A Necessary and Proper Role for Federal Courts in Prison Reform: The Benjamin v. Malcolm Consent Decrees*, Vol. 52, p. 4, 2007-2008.

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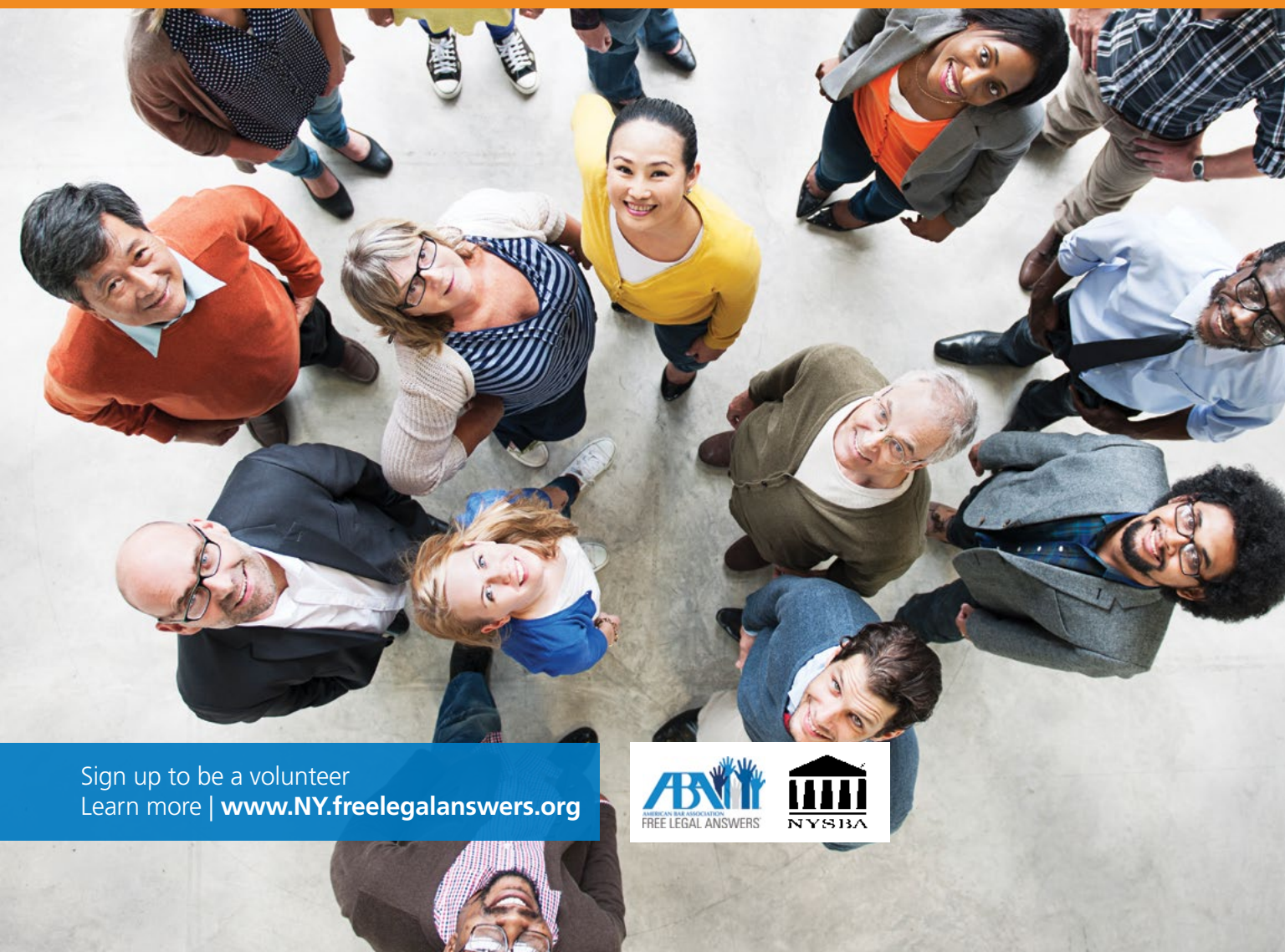

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NYSBA

ROFR Redux: Its Bite Is as Effective as Its Bark

By Robert Kantowitz

In June 2018 issue of the *Journal*, I published an article – *Ruff! Ruff! ROFR!*[1] – analyzing a case in which the holder of a right of first refusal (ROFR) cried foul and alleged bad faith on the part of the property owner in circumventing his ROFR. The holder of the ROFR ("ROFR Holder") claimed that the property owner ("Seller") had agreed to sell the property to another party, whom I referred to as "Interloper," under a contract that included a provision that Interloper intended and knew, and that Seller also knew, would serve no purpose whatsoever other than to make it untenable for ROFR Holder to buy the property on the same terms as in the proposed sale, as required under the ROFR.

THE CASE AND THE APPEAL

Seller and Interloper prevailed at trial in *Clifton Land Co. v. Magic Car Wash, LLC*.[2] The trial court held that any allegation of bad faith was speculative. In *Ruff! Ruff! ROFR!* I demonstrated, based on the limited facts that were included in the trial court's opinion, that that holding was indefensible. This past October, the Appellate Division, Third Department, unanimously reversed the trial court and concluded, in even more unambiguous terms, that Seller's behavior constituted bad faith as a matter of law.[3]

In vindicating the rights of ROFR Holder, the Appellate opinion also marshaled and recited some new factual material (which one must assume was part of the record below) that showed the machinations of Seller and Interloper and demonstrated a backdrop of bad faith. In particular, an email from Interloper referred to the ROFR as "a serious sticking point" because Interloper did not want to spend a lot of time on negotiations and then have ROFR Holder step in front of him.[4] Interloper indicated that he had "already spent a lot of money with [his] attorney discussing how to structure [an agreement] as a 'poison pill' for [the ROFR Holder] and . . . they planned to do[ ] very unusual things with deed restrictions to accomplish this."[5]

To review the salient facts:

- Seller owned and operated a car wash on the subject property.
- ROFR Holder was another a car wash operator who had procured the ROFR from Seller in the hope of eventually buying and operating the car wash on the property, if and when Seller was interested in selling the property.
- Interloper owned a competing car wash across the street from the property.
- Interloper wanted to buy the property to develop it, not to operate a car wash.
- The so-called poison pill was a covenant that a car wash could not be operated on the property.

WHAT WAS SO BAD ABOUT THIS COVENANT?

The covenant plainly benefited Interloper, in that it would give Interloper's car wash across the street protection from competition, and on that basis one might ask why it was inappropriate. The answer, as I pointed out previously, is that any such benefit should be disregarded because it did not have to be included in the sales contract. Rather, if Interloper had been successful in buying the property, Interloper would have been free to close the car wash and even to add a covenant in the event he wanted to resell the property. The act of including the covenant in the sales contract (consistently with Interloper's colorful "poison pill" description) served only to destroy the value of the ROFR to ROFR Holder.[6] The Appellate Division therefore correctly focused on the latter effect as violating Seller's duty of good faith toward ROFR Holder and rightly held that Seller acted in bad faith in adding this covenant to the sales contract in order to accommodate Interloper.

The Appellate Division also noted that Seller presented ROFR Holder with a completed purchase contract rather than a mere offer, observing that had the Seller acted sooner and presented merely an offer to ROFR Holder, the latter might have made a counteroffer. The court took that sequence of events as further proof of bad faith on the part of Seller and Interloper.[7]

These ugly revelations about the covenant collectively are a smoking cannon, not just a mere gun, but, troublingly, they were not discussed or even mentioned in the trial judge's opinion. Indeed, a key portion of the trial opinion stated:

> [ROFR Holder] has not provided evidence that the 2016 Purchase and Sale agreement was the result of any collusion between the defendants. [ROFR Holder] is merely speculating that it was done in bad faith or the result of wrongful conduct.[8]

It is hard to see how the trial judge could have justified that statement. There plainly was collusion in that Seller added an unnecessary covenant that served only to defeat ROFR Holder's bargain.

Robert Kantowitz has been a tax lawyer, investment banker and consultant for more than 35 years. He is responsible for the creation of a number of widely used capital markets products, including "Yankee preferred stock" and "trust preferred," as well as numerous customized financial solutions and techniques for clients. He is a longtime member of the New York State Bar Association Committee on Attorney Professionalism and, as such, co-authored the Committee's "Report on Attorney Ratings" dated December 7, 2015 and has contributed to the monthly Attorney Professionalism Forum feature in this *Journal*.

THE CORE FUNCTION OF A ROFR: WHAT IS OR IS NOT ENTAILED?

One might infer that the trial judge was miffed at ROFR Holder, from the opinion's citation of a fact which ROFR Holder did not contradict:

> [Seller] asserts that she sought to engage [ROFR Holder] in discussions for purchase of the property in 2016 and received no response, so she began to explore other opportunities.[9]

That observation may be true, but it injects an irrelevant issue. When a property is subject to a typical ROFR (as opposed to a "right of first offer"[10] and as opposed to a ROFR modified as I suggest below), the owner wishing to sell need not approach the ROFR Holder first. Even if the owner does approach the ROFR Holder, the latter has every right to sit back smugly on his verandah sipping mint juleps waiting for another offer to materialize and has no contractual or good-faith duty to engage in purchase negotiations independently of any other offers. That is the point of a ROFR: it confers no rights or responsibilities on either party unless and until there is another offer on the table in place of the bottle of bourbon, and at that point it becomes no more or less than an option in the hands of the ROFR Holder to purchase the property on the same terms as are on the table.

As a matter of practicality and efficiency, of course, it will often behoove a property owner who is interested in selling to approach the ROFR Holder first, in order to gauge interest, before investing any time or effort looking for another buyer. By the same token, a ROFR Holder can advance his case commercially by keeping in touch with the owner to make sure to be able to commence serious discussions as soon as he catches a whiff of the owner's interest in selling. In many cases, those approaches could result in a completed contract of sale between two happy parties. But, on the other hand, the owner has no responsibility to approach the ROFR Holder, and even if the owner does and ROFR Holder refuses to negotiate at that point, the owner has no recourse and the ROFR Holder retains all rights under the ROFR.

The practical lesson is that an owner of property is often better off granting only a right of first offer or, if he grants a ROFR, including in it a provision under which the ROFR Holder agrees to provide some indication of interest, or to negotiate in good faith, if approached even before there is another offer on the table. The purchaser of a ROFR, on the other hand, may resist those additional terms because the value of a ROFR, in part, inheres in being able to match an offer and not to have to negotiate with oneself before others have clarified the contours of the market.

RESOLVING THE TENSION BETWEEN GOOD FAITH AND FREEDOM TO EXPLOIT PROPERTY

There may also be a very thin line between actions that violate the property owner's duty of good faith toward a

ROFR Holder (including the inclusion of a particular term in a proposed sale with another party) and actions that do not violate that duty of good faith.

Consider that Interloper also was a car wash operator and had a facility across the street. This circumstance temptingly presents a facially reasonable basis, as noted above, for Interloper's desiring the covenant, namely to reduce competition.[11] But, as I also noted above, accepting that conclusion obscures the sequence of events and the fact that Seller had a duty of good faith toward ROFR Holder *personally*, which should have precluded adding the covenant *when its only effect was to eviscerate the value of the ROFR to ROFR Holder*. This duty of good faith becomes clearer if one simply observes that *any* would-be third party buyer who had no interest whatsoever in car washes, but who did not want his negotiation efforts to go for naught, might have inserted the same covenant to make the exercise of the ROFR far less likely.

More generally, I do not believe that the duty of good faith that attends the grant of a ROFR imposes an absolute limitation on what the property owner may do with the property that is not connected or associated with a sale or potential sale.

For example, suppose that the property owner had not been looking to dispose of the property, but instead had been approached by a nearby car wash operator with an offer of a large sum of money in exchange for shutting down the existing car wash and agreeing to a covenant not to operate a car wash on that property. Or suppose that a developer was looking to build an upscale hotel or theater in the neighborhood and thought that the presence of a car wash was inconsistent with that and therefore had offered the property owner money to close down the car wash and agree to the restrictive covenant.

Arguably, it would have been permissible for the property owner to accept offers like those. Two things distinguish those offers from the situation in the actual case. First, the property owner would be getting a benefit as a property owner and not as a seller, as a *quid pro quo* for voluntarily reducing the value of property it still was holding, as opposed to either getting no benefit or, at best, trying to create an incentive for a third party buyer by defeating the "drag" of the ROFR. Second, any challenge by the ROFR Holder would truly have been speculative unless and until there was a purchase offer on the table, or unless, possibly, there was already some expectation that there would be a purchase offer in the future during the term of the ROFR.[12]

In some cases, even proximate to an intended sale, the circumstances that lead to the addition of the covenant might actually raise the overall value of the subject property even though the originally intended use would be prohibited. In a situation like that, the ROFR Holder might be able to buy the property with no ability to use it as originally intended but with the opportunity to flip it for more. If the profit opportunity is high enough, the measure of damages for eliminating the originally intended use could be zero or close to it.

RECOMMENDATIONS

So when a ROFR is being considered and negotiated, what are the parties and the attorneys to do? The market and contract law provide the answers. Dust off those boilerplate forms, read and reread them with a critical eye and revise them as appropriate in plain English. Use hoary terms of art only when they have crystal-clear meanings, and avoid jargon that could be misunderstood or that admits of multiple interpretations.[13] Set out what the property owner may or may not do, or restrict doing, with the property during the term of the ROFR and what additional rights and responsibilities attach to the ROFR itself – all with a healthy appreciation of what it is over which the parties are bargaining, what is important, what is not important and what might be lurking around the corner.

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1. 90 N.Y. St. B.J. 26 (June 2018).

2. 2017 N.Y. Slip Op. 31303(U) (June 19, 2017, Sup. Ct., Broome Co.) ("Trial Court Slip Op.").

3. *Clifton Land Co. v. Magic Car Wash, LLC*, No. 526319 (Third Dep't, Oct. 18, 2018) (hereafter "App. Div. Slip Op.").

4. As I noted in the *Ruff! Ruff! ROFR!*, this is always an issue where there is an outstanding ROFR, and a property owner who grants a ROFR needs to give serious consideration to the chilling effect that it may have.

5. App. Div. Slip Op. at 4.

6. As I explain further below in the text, there could have been valid countervailing considerations if Interloper were not attempting to purchase the property but merely was trying to reduce competition for his car wash. In addition, the opinions in this case do not reveal the price at which the property sold or its actual value to ROFR Holder or to Interloper. As indicated below in the text, there is sometimes room to "square the circle" when there is a gap between the lowest price at which an owner is willing to sell and the highest value of the property based on permissible uses.

7. App. Div. Slip Op. at 5. n.2. I am not so sure this connotes bad faith. The distinction between an offer and a complete contract ready to be signed is often only a matter of degree, and Interloper easily could have included the so-called poison pill as a term in an offer.

8. Trial Court Slip. Op. at 5–6.

9. *Id.* at 6.

10. A "right of first offer" would require the owner-seller first to approach the holder of that right, and if the parties do not reach agreement on a sale, the owner-seller would be free to sell to others. Adding to the confusion, I have seen commentators who use the term "ROFR" to refer to what I call a "right of first offer" and the term "right of *last* refusal" to refer to what I call a ROFR.

11. I express no view on the antitrust implications of a maneuver like this.

12. How foreseeable does a potential sale or offer have to be to be relevant enough or for any current benefit to be seen as a sham or as "the tail wagging the dog"? The amount and relative size of a current benefit to the fair market value of the property and the term of the covenant are two indicators. The greater the current and ongoing benefit regardless of a sale, and the more likely that it will continue for some time, the less likely it is that the transaction is entered into in bad faith. The actual timing and the identities of the parties are also important. We tax lawyers have a way of expressing when two temporally related transactions – *e.g.*, an offer of money by an interested party in exchange for a covenant that just happens to be followed shortly by an offer to purchase the property – are linked: we call that a "step transaction." Justice Potter Stewart expressed a similar sentiment in his famous observation, "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

13. *See, e.g.,* note 10 *supra*. In practicing what I preach, I have resisted the urge to refer to the seller and the purchaser as "ROFRor" and "ROFRee," respectively, not because these whimsical terms are hard to remember but because it would be too easy to mix them up with unfortunate consequences. In the unlikely event that the profession takes a shine to these newly coined terms, I hereby claim credit for them.

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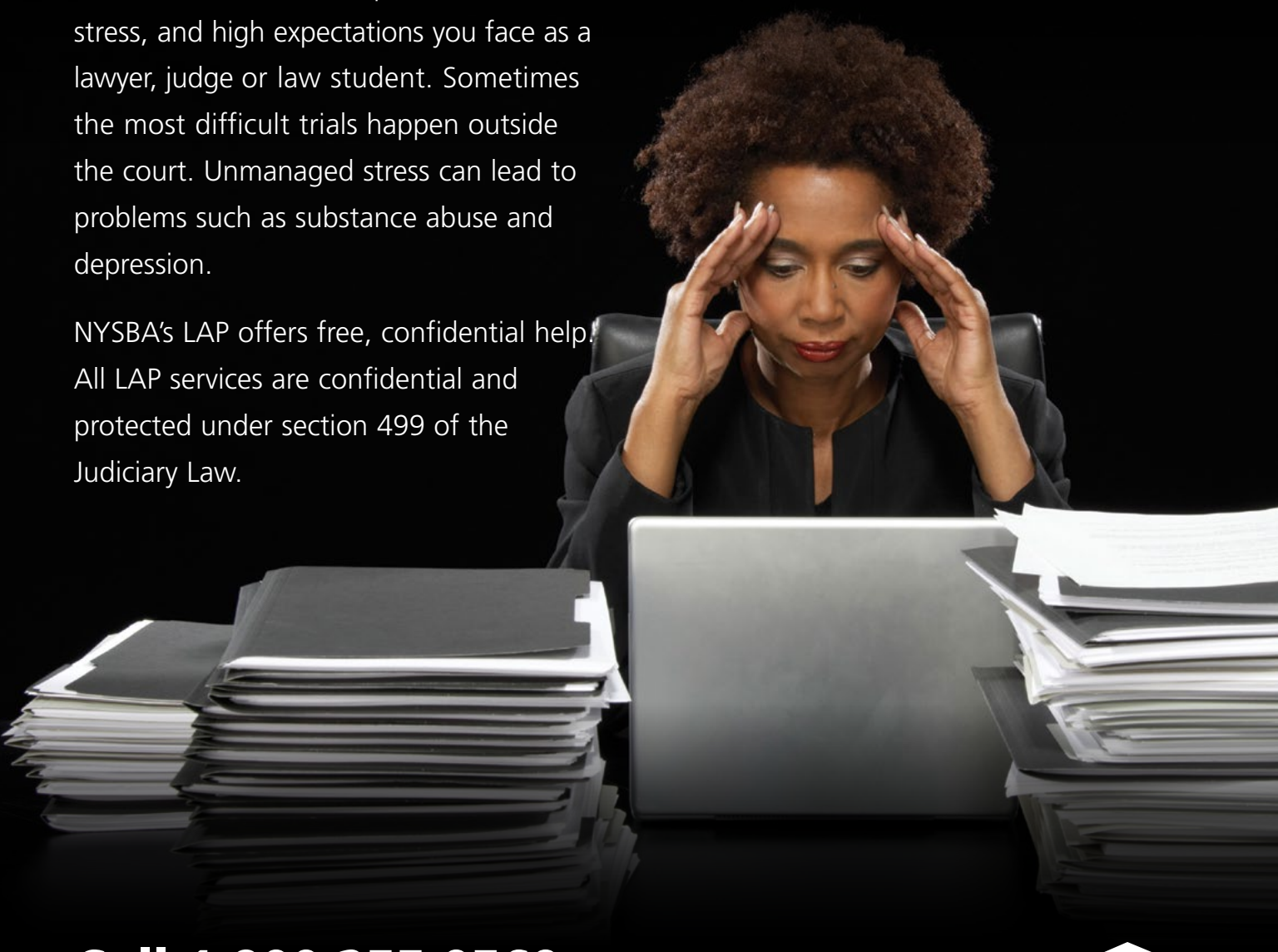

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State Bar News

HOD Approves Measures for Evaluating Judicial Candidates, Attorney Professionalism

By Christian Nolan

The New York State Bar Association has adopted new recommendations for the evaluation of judicial candidates, as well as approved an update to the Standards of Civility for the New York legal profession.

NYSBA also adopted a report on wrongful convictions that recommends the establishment of conviction integrity units. Each measure was approved at its April 13 House of Delegates meeting in Albany.

Evaluating Judicial Candidates

The recommendations were part of a report by the Task Force on the Evaluation of Candidates for Election to Judicial Office in connection with the disbanding of the statewide network of Independent Judicial Elections Qualification Commissions (IJEQCs).

While many local, affinity and specialty bar associations, including NYSBA, already had screening committees that effectively evaluate judicial candidates, some county bars did not have processes in place. Vetting processes needed to be in place for the next cycle of judicial elections.

NYSBA acted immediately, calling on a number of past and present local and state bar leaders to join a task force to assist and support local bars in setting up screening and evaluation mechanisms, and to develop best practice guidelines for the process. Because some local bar associations lack the resources and membership needed to establish such committees, task force members also developed guidance for establishing regional screening committees, as an alternative.

"Having effective, partisan-free judicial evaluation and screening processes in place throughout the state is critical to ensuring that candidates for judicial office in New York possess the essential qualities to be a good judge," said Chief Judge Janet DiFiore. "I am thankful to the New York State Bar Association for its prompt actions in response to the vacuum created by the disbanding of the IJEQCs, and commend Michael Miller and the task force members for their outstanding efforts as we strive to promote the highest standards of the judiciary."

The task force noted that its mission did not include tackling a split in the way judges in New York are selected: the state's appellate courts and the New York City Criminal and Family Court judges are all appointed; nearly all other judges and justices are elected. NYSBA supports a commission-based selection process for all judges, similar to the one used to appoint judges to the Court of Appeals.

President Michael Miller speaking at the April 13 House of Delegates meeting in Albany. Lower left to right: President-elect Hank Greenberg, President-elect designee Scott Karson, Secretary Sherry Levin Wallach.

Standards of Civility

NYSBA also approved an update to the Standards of Civility for the New York legal profession based on the report and recommendations of the Committee on Attorney Professionalism.

"The Standards of Civility have been modernized for the first time since their initial 1997 adoption, particularly with regard to communications where technological advances have been substantial, and also expanded to include transactional and other non-litigation settings," said NYSBA President Michael Miller. "This reflects NYSBA's continued commitment to civility and decorum in our profession."

Updated transactional and other non-litigation standards include:

- A lawyer should not impose

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NYSBA Joins With ABA to Lobby in Washington, D.C.

By Joan Fucillo

Left to right: Former NYSBA President Stephen Younger, President-elect Hank Greenberg, Congresswoman Grace Meng (D-NY) and President Michael Miller meeting during Lobby Day.

Advocacy has long been an important part of NYSBA's mission, at both the state and federal levels. On April 10 in Washington, D.C., NYSBA leaders joined state and local bar associations and the hundreds of attorneys representing them for the American Bar Association's (ABA) 23rd annual congressional lobbying day.

The NYSBA contingent included President Michael Miller, President-elect Hank Greenberg, former NYSBA president and ABA Delegate Stephen Younger, Committee on State Legislative Policy Chair Sandra Rivera and Committee on Federal Legislative Priorities Chair Hilary Jochmans, along with NYSBA and City Bar staff members.

Advocacy efforts for the day focused on increasing funding for the Legal Services Corporation (LSC), exempting Puerto Rico from the Jones Act, preserving the federal Public Service Loan Forgiveness (PSLF) program, the impact on the federal court system from sequestration and budget caps, and the effects of the recent partial federal government shutdown on court functioning, access to justice and public safety.

The LSC, which provides grants to local legal services programs, is a particular concern as the President has proposed eliminating its funding. Currently, New York State has seven LSC grantees, which help people who would not otherwise be able to get legal assistance. A high percentage of clients are women, many with children, veterans and people with disabilities.

Puerto Rico is subject to the Jones Act, which restricts the types of vessels that can transport goods between U.S. ports. This has caused island businesses and residents to pay more for the imports on which it relies and makes U.S. goods more expensive than those shipped from foreign countries – to devastating effect in the aftermath of Hurricane Maria. Other non-contiguous U.S. territories are fully or partially exempt.

For more than a decade, the PSLF program of student loan forgiveness has made it feasible for a young lawyer with large debts to enter public service rather than pursue a job in the private sector. Legal aid, public defender and district attorney offices benefit from having a greater pool of candidates for important but low-paying jobs.

"NYSBA has strong relationships with our federal and state elected officials, and we keep in touch with them throughout the year," said Miller. "In addition, it is always beneficial for NYSBA when we meet face-to-face with elected officials. It is another reminder that we are deeply committed to our advocacy efforts to ensure justice and fairness under the law for all."

7 questions
and a closing argument

Member Spotlight with Joseph Hanna

Hanna is a partner at Goldberg Segalla in Buffalo, NY. He lives in Amherst.

Who is your hero or heroine in the legal world?

My hero is my mentor and friend, Chris Belter. Chris is one of the most talented lawyers that I know, but more importantly, he's an even better person. He's taught me everything I know about practicing law – from cultivating relationships with clients to providing them with the best legal representation possible. Chris has been like an older brother to me, a great mentor, and an even better friend to me from my first day at the firm. I am lucky to learn from him every day and fortunate to have him teach me how to be the best lawyer I can be.

Did another lawyer mentor you or advise you on your career path?

As the first associate that Goldberg Segalla ever hired directly out of law school, I am grateful to our managing partner Rick Cohen for taking a flyer on me. Over the last 15 years, he has gone above and beyond to advocate on my behalf, support my ideas and projects, and inspire me to achieve great things.

What or who inspired you to become a lawyer?

When I was six years old, my father and I would walk to the North Park Library in Buffalo and read books about U.S. Presidents. I turned to him one day and told that I wanted to be a lawyer so that I could become the President of the United States. Education was a top priority in the Hanna house – my blue-collar parents went out of their way to stress the importance of a good education to me and my three sisters. I went through grammar school, high school, and college knowing that I was going to be a lawyer, and 30-plus years later, here I am: a partner at Goldberg Segalla and still contemplating that presidential run.

What advice would you give a young lawyer just starting her or his career?

You've worked hard enough to graduate law school, pass the bar, succeed in student clerkships, and maybe even land your first job. If you feel like good luck should be coming your way right now, you're half-right. You need to keep investing in yourself, your clients, your colleagues, and the causes that matter to you – and you'll put yourself in a position where good luck can happen. Read about developing areas of the law, take advantage of networking and professional development opportunities, and learn from your partners and senior associates. If you think you're the smartest person in the room, there's nothing you can learn there. Instead, surround yourself with smarter people and strive to be the hardest working and the best prepared.

What is your passion outside of work and the law?

Besides my family, my greatest passion outside of work is helping our troops and veterans through my non-profit charity, Bunkers in Baghdad. Bunkers collects and ships golf equipment to our brave men and women around the globe. We have sent more than 10 million golf balls and nearly 800,000 clubs to our troops and vets in 65 countries and all 50 states. Another important part of the charity is our Bunkers Buddies program. We have worked with over 600 schools across the country. The students write letters, draw pictures, and collect golf equipment for us. I love the opportunity to work with children and help teach them the importance of giving back to others and trying to make the world a better place.

What is your favorite book, movie or television show?

My favorite book is *Green Eggs and Ham*. And, you guessed it – I do not like them here or there. I do not like them anywhere!

What kind of music do you listen to or who is your favorite musician?

After a long drive or challenging day at work, Frank Sinatra and Billy Joel help me wind down.

Lawyers should join the New York State Bar Association because…

NYSBA has served as the best possible vehicle for me to advance and enhance my leadership skills throughout the last 15 years. It has given me a platform to work on diversity initiatives, professional development opportunities for young lawyers, and resources in the realm of sports and entertainment law. The opportunities for personal and professional growth are unlimited.

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I review for the New York State Office of Professional Medical Conduct and have had over ten years of experience in record review, determinations of standard of care, deposition and testimony in medical malpractice cases.

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HOD APPROVES MEASURES FOR EVALUATING JUDICIAL CANDIDATES, ATTORNEY PROFESSIONALISM

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deadlines that are more onerous than necessary or appropriate to achieve legitimate commercial and other client-related outcomes.

- A lawyer should focus on the importance of politeness and decorum, including such elements as the formality of the setting, the sensitivities of those present and the interests of the client.
- A lawyer should be careful not to proceed without proper authorization or otherwise imply that authority from the client has been obtained when such is not the case.

In 1997, the New York court system adopted the Standards of Civility as an appendix to the then-Code of Professional Responsibility, which is now known as the Rules of Professional Conduct. The Standards of Civility are intended to be principles of behavior to which the bar, the bench and court employees should aspire and are not intended to be used for sanctioning or disciplining attorneys.

Wrongful Convictions

A report from NYSBA's Task Force on Wrongful Convictions recommends forming conviction integrity units in each district attorney's office in the state, as well as a statewide fund to support the creation of these units and the review of individual cases.

The report further recommends a change in the law allowing new evidence claims after a guilty plea and calls for new legislation to improve the quality of forensic science admitted into evidence.

The House of Delegates also approved reports that explore ways to prevent the school to prison pipeline and reduce recidivism through better incarceration release planning and programs.

Links to all of these reports can be found at nysba.org/substantivereports. Additional coverage of the April House of Delegates meeting can be found at nysba.org/blog.

(*Joan Fucillo and Brendan Kennedy contributed to this report.*)

Network Your Way to the Career You Want

By Carol Schiro Greenwald

Paul Hardworker is a third-year litigation associate at an AmLaw 250 firm. Tired of the hours and a bit bored with the work he wants to move to a smaller firm where he can have more independence and a more varied caseload. He knows that "the best" jobs are filled through word of mouth, so he wants to network but doesn't know where to begin.

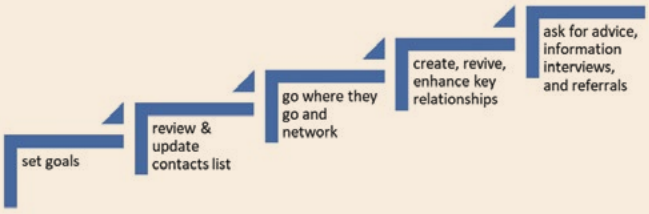
Many people can relate to this scenario. In this article we will help him and everyone who is intimidated by the number of networking choices and a limited amount of free time.

YOU NEED STRATEGIC NETWORKING

Strategic networking is a goal-driven process for creating personal relationships that helps individuals achieve economic, social and emotional ends. Strategic refers to intention, the networker's intention to create and implement a thought-out set of cumulative activities that lead toward a goal.

There are five stages to this process as outlined below. Taken together, the five steps help you create a detailed, focused set of goals that can be attained through a series of purposeful, cumulative networking activities with a minimum of false starts and wasted time.

DIAGRAM 1. THE FIVE STAGES OF THE STRATEGIC NETWORKING FOR CAREERS PROCESS.



GOALSETTING

Begin the process by asking yourself some hard questions. This is probably the most important part of the process because it influences the rest of the strategy, so take your time and answer honestly.

- *Work*: Why do you want to change jobs? What aspects of your current position do you want to change, and what aspects would you like to have in the next job? What are the key characteristics of the job you are looking for?
- *Longer-term aspirations*: Where do you want to be in 10 years? What kind of work life will you have? Where do you want to live? How do you want to live? What kind of work-life balance do you want to achieve?
- *Connections:* Whom do you know who currently works in the kind of position you want to have? Whom do you know who could refer you to such people? Who would be willing to do an information interview with you? Are these people already in your contact list?
- *Where do your desired connections go?* What groups do they belong to? Where do they go for information? How will you meld online and in-person networking activities?
- *What kind of networking do you like to do?* Where do you feel most comfortable? Do you prefer small groups and educational situations or large parties and fun events?

Use the answers to these questions to create one or two specific goals. Not, "I want to be rich"; rather, "I want to be an equity partner in a small to medium size firm litigating interesting cases."

REORIENT YOUR CONTACT LIST

You probably have a contact list that includes your closest friends and family, college friends, college professors and mentors, law school friends and mentors, and colleagues from your various work experiences. You will need to expand this list in two directions:

- *Broaden* your list: Create a brain-builder addition to your network that will include people you respect

whose ideas intrigue you or who are experts in areas that interest you.

  > Add thought leaders, futurists, industry gurus, authors, artists, etc. who you find through articles or blogs,seminars, work, networking activities, free time activities.

- *Deepen* the categories you have already: Add client contacts, other professionals who work with your clients, your own personal doctor, accountant, IT professional, members of your community, social, religious and school-centered groups, etc.

  > Look through your alumni lists to find people now working for places that interest you or who are doing the kind of work you want to do.

- Use LinkedIn to identify friends of your friends that you would like to meet. Then ask for introductions.

GO WHERE THEY GO

Now that you have one or two specific goals and an enhanced contacts list, the next step is to identify 10 to 20 people you would like to meet. Research them using LinkedIn and Google Search to identify their interests, work history, contacts and places where they network.

Some of them you can meet in person by sending them an invite through LinkedIn. You can also research the groups they belong to and select one or two to try out.

Most in-person groups allow potential members one or two free visits. You want to join a group where you will feel comfortable, so it is important to "test the waters" before you jump in.

Two types of groups may be especially useful:

- *Local mixed membership business people and professionals:* These groups typically meet monthly, sometimes more frequently, to discuss various topics of interest. Usually there is networking free time before and after meetings; time to make one-on-one plans with members.
- *Local single profession groups:* For lawyers these include bar associations and local membership groups.

  > In bar associations, consider attending meetings in areas outside your expertise to learn more about the issues, interests and kind of work in other areas of law. Many local bars have social events where you can meet a wide variety of

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people. Attend those that feature an activity that interests you, such as scotch tasting or bowling.

> Local single profession lawyer groups usually have members representing different areas of law and/or places to practice law. Usually each slot is represented by one person. For lawyers in boutique firms these groups provide resources for their clients and avenues for them to keep up with the latest news in other areas of law.

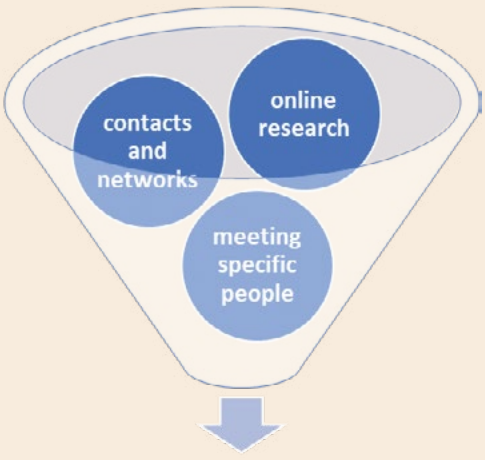
BUILD RELATIONSHIPS

Now create an activities plan that includes, if possible, several activities each month, where you will be surrounded by people who can help you build the career you want. Set time aside for breakfast, lunch or coffee one-on-ones for in-depth conversations about possible workplaces, companies, firms, and next steps for moving forward.

Diagram 2 illustrates an implementation sequence for activities:

- First, use online and in-person research to select the handful of people you want to meet at any time. More than a handful becomes unmanageable, because you will want to build strong, trust-based friendships with these individuals and this requires repeat meetings or interactions over time.

DIAGRAM 2. THE CAREER NETWORKING PATH



- After selecting the people to focus on, select the venues where you plan to meet them. One way to determine if they too will be at an event is to connect with them ahead of time, ask if they will be there and suggest spending some time together.
  - Go to these activities with the intention of talking with people who can help your career search.
  - Prepare a personal "agenda" ahead of time with questions you want to ask, topics you can talk about, and a statement as to what you want to accomplish from this activity. Keep in mind how each endeavor moves your career search forward.
  - Plan how you will ask for advice, information interviews or referrals. Working it out in your mind ahead of time contributes to a sense of security and feeling of control.
  - Your sense of purpose and roadmap to achievement create confidence that will, in turn, be reflected in your body language and bearing. You will look and feel like the professional you are and you want to be.

PULLING IT TOGETHER

This process can be repeated as many times as you want with as many goals as you want. Always seek to grow your network, balancing strong relationships among best friends and family with weaker relationships with weaker links, acquaintances in your work world, and aspirational leaders. Such a network continually offers currently relevant information and thought-provoking knowledge – a strong basis for career growth.

Professional Obligations for Lawyers – Are You in Compliance?

By Sarah Diane McShea

Pop quiz for busy lawyers: Have you . . . completed your CLE required courses? Filed your attorney registration statement? Paid the $375 biennial registration fee? Updated the Office of Court Administration if you moved your office or home within the past month? Filed your personal tax returns? If you answered "no" to any of these questions (or know another lawyer who might), read on. Your law license may be at risk.

This two-part article will address the potentially disastrous consequences of not keeping up with personal professional obligations, which can happen to the best of lawyers and the most well-intentioned of friends and colleagues. Delay and procrastination are hardly exotic or rare issues for busy lawyers. We all occasionally put off an unpleasant or burdensome task for another day. For some, that day never seems to come.

Sarah Diane McShea is a sole practitioner in New York City who has practiced in the professional responsibility field since 1980. She advises lawyers, law firms, in-house counsel, and government lawyers, among others, on a wide variety of legal ethics and practice issues; represents lawyers in disciplinary proceedings and bar applicants in character and fitness proceedings; and also serves as an expert witness on professional responsibility issues. She is currently Chair of the Editorial Board of the *ABA/BNA Lawyers' Manual on Professional Conduct*, as well as a member of NYSBA's Committee on Standards of Attorney Conduct, Committee on Professional Ethics, Professional Discipline Committee, and Committee on Law Practice Management (she helped draft the NYSBA *Planning Ahead Guide*). Special thanks to Marianne Gagnier for her assistance in the preparation of this article.

Today's article focuses on attorney registration and CLE requirements. Part Two will explore the consequences of failing to file personal tax returns, a problem for more than a few prominent lawyers, including those without any intent to evade their tax obligations.

ATTORNEY REGISTRATION IN NEW YORK

New York lawyers are required to register every two years with the Office of Court Administration (OCA). Registration coincides with your birthday – the first reminder is sent out a month before. Registration has three key components: completing 24 CLE credits in the 24-month period *prior* to registration; paying the $375 fee (which may be increasing soon to $425); and actually filing the registration form.

Lawyers who do not file, pay, or complete their CLE courses can wind up in hot water. It turns out, perhaps

not surprisingly, that the Appellate Departments are not loath to suspend lawyers who are delinquent in meeting their registration obligations. Indeed, the courts now routinely suspend delinquent lawyers in bulk when they have missed more than two consecutive registration periods.

Just recently, the Attorney Grievance Committee for the Third Department petitioned the Appellate Division to suspend 2,601 attorneys for failing to re-register.[11] In the First Department, approximately 3,000 attorneys are listed on the Appellate Division's website as administratively suspended for failing to re-register.[22] Why do so many New York lawyers fail to re-register?

A lawyer who unwittingly continues to practice law while administratively suspended may be engaging in the unauthorized practice of law and risking disbarment.

Here are some of the proffered answers: "I did not receive the notices from OCA." "I was too busy and did not have time to take 24 CLE credits in the last two years." "I did not have the $375 to pay the fee." "I would have filed, but I never received the renewal notices." "I received the form, but misplaced it." "I meant to file, but just kept putting it off."

Delay is one of the tools of our trade – it serves some of our clients well in certain situations. Procrastination, like delay, may sometimes seem like an effective strategy for a thorny problem. If we just ignore a nettlesome issue, many times it will resolve itself without any effort. There is no shortage of pressing problems to juggle – work deadlines, family matters, health upheavals, financial stresses, just to name a few. Taking hours of CLE courses (after the deadline has passed) and filing overdue registration statements can easily get pushed to the bottom of the "to do" list.

That is unfortunate because the consequences of not re-registering can be harsh, even with the best of intentions. The Appellate Departments have held that failing to re-register is professional misconduct, sometimes warranting immediate suspension.[33] A lawyer who unwittingly continues to practice law while administratively suspended may be engaging in the unauthorized practice of law and risking disbarment.[44] The price of procrastination can be exorbitant.

The explanations that lawyers offer for not registering may fall on deaf ears. *In re Vayer* dealt with a lawyer who was administratively suspended in 2010, as part of a mass suspension proceeding, for failing to re-register and pay registration fees.[55] Years later, the Attorney Grievance Committee discovered that he was still practicing and moved to disbar him. Vayer protested, citing his intense involvement in major litigation; the serious personal and professional stressors in his life; the fact that he was not aware that he had been suspended in 2010 because he had moved both his office and residence and never received notices sent to him by OCA; and his inability to renew his biennial registration because he was unable to complete his CLE requirements. He testified that he believed that he "would be able to catch up on his CLE and registration obligations, but as more time passed the task became overwhelming." The court rejected all of these explanations and continued his interim suspension.[66] Vayer ultimately agreed to a final three-year suspension, effective December 2017.[77] He remains suspended.

In *In re Fitzsimons*, the Appellate Division suspended an attorney for failing to re-register for 12 years. Despite numerous notices from the Grievance Committee, and many chances to re-register, Fitzsimons failed to act. He blamed his failures on his wife's hospitalization and illnesses, and claimed at one point that he was unaware of his failure to re-register because his wife paid their bills. The court dismissed his explanations and suspended him for six months.[88]

Another lawyer who claimed she was confused about her CLE obligations was publicly censured for failing to re-register for 10 years.[99] In another case, the court imposed a one-year suspension on a lawyer who failed to re-register for three biennial periods, crediting her steps to develop coping skills in order to fulfill her responsibilities "during times of extreme stress and disruption," among other things.[10] The court rejected another lawyer's claim that he did not receive any of the communications sent to him by the Grievance Committee regarding his failure to re-register for 10 years and suspended him for six months.[11]

The consequences of failing to re-register can be severe. So, what is a delinquent lawyer to do?

The initial steps are obvious. Check your present attorney registration status online by visiting http://iapps.courts.state.ny.us/attorney/AttorneySearch. Update your home and office addresses, if necessary. Complete your

CLE courses (including four ethics credits and one diversity credit). Pay the outstanding fees. File the registration forms. Most lawyers who miss one, or even two, registration periods are not suspended. However, the longer you wait, the harder it is to comply.

THE BASIC REGISTRATION RULES

Every attorney admitted to practice in New York State, in good standing or not, whether resident or non-resident, active or retired, practicing law in New York or elsewhere, is required to renew their attorney registration every two years, within 30 days after their birthday. The registration fee is $375 for all attorneys except for those who certify that they are retired from practice.[12]

Registration may be accomplished by mail, online, or in person. Attorneys are required to update their office and home addresses if they move, "within 30 days of such change." This may be done online.[13]

For many attorneys, the biggest hurdle is completing the 24 CLE credits within the prior two-year period before registration. While requiring CLE was intended to benefit the profession and make sure lawyers were current in their knowledge of the law and ethics rules, the requirement can be burdensome and the benefits sometimes elusive. CLE courses can be expensive, the available options are not always interesting or convenient, and finding the time is never easy. If you do not complete your courses on time, apply to the CLE Board for a waiver and an extension. The forms can be found on OCA's website. Some lawyers are exempt from paying the registration fees and completing the CLE courses. If you are not practicing law in New York or are doing CLE in compliance with another state's rules, you may be exempt from some of the New York requirements.

WHAT HAPPENS IF YOU ARE SUSPENDED ADMINISTRATIVELY?

If you were suspended administratively for failing to register, you may apply for reinstatement. Each Appellate Department has different rules and procedures for seeking reinstatement from an administrative suspension. The Third Department is the most rigorous, requiring a full reinstatement application pursuant to the Uniform Rules for Attorney Disciplinary Matters. Lawyers seeking reinstatement must, among other things, take and pass the Multi-State Professional Responsibility Exam (MPRE), again! The First Department has established a specific, expedited reinstatement process for administratively suspended attorneys.[14]

At a minimum, a lawyer who has been administratively suspended for failing to re-register should get current as quickly as possible. Pay all back due registration fees, update all information on the registration forms, and, if necessary, seek a waiver and extension of the time to complete past CLE requirements. This is a prerequisite for reinstatement in any department.

THE CLE HURDLE

In re Vayer (discussed above) highlights the fact that falling behind on CLE credits creates a growing backlog which may cause a lawyer to put off re-registration because the lawyer cannot certify that he or she has completed the requisite number of CLE credits. CLE requirements are mandatory and substantial in New York, with different rules applicable to newly admitted attorneys (within two years of admission). With certain significant exceptions, every attorney admitted to practice in New York is required to certify on that he or she has completed CLE requirements when they re-register with the OCA.[15] Experienced attorneys must complete 24 credit hours of continuing legal education for each biennial period in designated course categories. More credit hours and different course distributions and modalities apply to newly admitted attorneys. The complete CLE Program Rules are listed on OCA's website.

Lawyers who fall behind on CLE courses may apply to the CLE Board for a waiver or modification of program requirements or a request for an extension of time to complete program requirements, or both. Application forms and instructions can be found online.[16]

GET AND STAY CURRENT

Take heart. Most delinquent lawyers are not suspended from practice. The mass suspensions of delinquent lawyers occur periodically and typically involve lawyers who have failed to re-register for more than four years and have missed two or more registration cycles. Lawyers who are late in filing their registration forms will find that their public listing reflects the fact that they are "delinquent."

The New York Times recently reported that procrastination is an emotional issue, not a time-management problem. Chronic procrastination is difficult to overcome because our brains are hard-wired to prioritize avoiding present threats (tasks that make us feel anxious) over making thoughtful decisions about the future. Although it brings momentary relief, putting something off, of course, simply compounds the negative associations with the task. The major cure for this trap may come as a surprise – forgive yourself for your past mistakes. Then, being aware of your emotional state as you face your task, consider the positive potential effects of action, strategize to put your favorite distractions at a distance, and focus solely on taking the first step.[17] If that sounds too

touchy-feely, the practical take-away is that it is important to begin to tackle the problem.

For most, this means checking your registration status and making sure your information is correct and up to date. Now. To prevent mishaps, calendar future re-registration dates. Sign up for some CLE courses. If you suspect that you might not be in compliance, find out and take steps to get up to date. Attorneys who are delinquent in registering for up to five biennial periods (10 years) may still re-register online.[18]

Go forth and prosper! Stay safe! Be well!

1. *Motion to Suspend Attorneys Alleged to be in Violation of Judiciary Law*, N.Y. Sup Ct. App. Div. 3d Dep't (returnable April 8, 2019), http://www.courts.state.ny.us/ad3/MotiontoSuspendAttorneys.html.

2. See hyperlink, *1/30/2017 – Suspension list* under *Delinquent Registration*, N.Y. Sup Ct. App. Div. 1st Dep't, http://www.nycourts.gov/courts/AD1/Committees&Programs/CFC/delinquent-registration.shtml.

3. *See, e.g.*, *In the Matter of Attorneys in Violation of Judiciary Law § 468-a*, 79 A.D.3d 81, 82 (1st Dep't 2010) ("failure to register or re-register, and pay the biennial registration fee constitutes professional misconduct warranting discipline").

4. *In re Hyde*, 148 A.D.3d 9 (1st Dep't 2017) (attorney disbarred for engaging in the unauthorized practice of law while suspended for failure to re-register).

5. *In re Vayer*, 160 A.D.3d 232 (1st Dep't 2018), *three-year suspension imposed*, 169 A.D.3d 78 (1st Dep't 2019).

6. *See id.* at 233–4.

7. *In re Vayer*, 169 A.D.3d 78 (1st Dep't 2019).

8. *See In re Fitzsimons*, 87 A.D.3d 41 (2d Dep't 2011).

9. *In re Frankel*, 45 A.D.3d 52 (2d Dep't 2007).

10. *In re Cave*, 31 A.D.3d 42 (2d Dep't 2006).

11. *In re Fontana*, 32 A.D.3d 70 (2d Dep't 2006). *See also In re Behensky*, 307 A.D.2d 138 (2d Dep't 2003) (depression, remorse, payment of arrears, no harm to any client, insufficient to avoid interim suspension and public censure of lawyer who failed to register for many years); *In re Chin*, 118 A.D.3d 61 (1st Dep't 2014) (interim suspension for 80-year-old attorney who admitted having never registered or taken any CLE courses).

12. Judiciary Law § 468-a; 22 N.Y.C.R.R. Part 118.1 (Rules of the Chief Administrator).

13. 22 N.Y.C.R.R. Part 118.1(f); detailed information about attorney registration, including online registration, is available at the website of the New York State Unified Court System, *Attorney Online Services - Attorney Registration, FAQs*, N.Y.S. Unified Ct. Sys., https://iapps.courts.state.ny.us/aronline/FAQ.

14. The First Department's instructions and form application for reinstatement for administratively suspended attorneys is located at: www.nycourts.gov/courts/AD1/Practice&Procedures/forms/InstructionsForReinstatement10-16.pdf; the Second Department's Rule is 22 N.Y.C.R.R. § 691.11(b); the Fourth Department's Rule is 22 N.Y.C.R.R. § 1020.10; in the Third Department, see 22 N.Y.C.R.R. §§ 1240.16 and 806.16.

15. Those exempt from the requirements include: attorneys who do not practice law in New York; full-time members of the armed forces; out-of-state attorneys temporarily admitted to practice; and attorneys who certify that they are retired from practice (22 N.Y.C.R.R. § 1500.5(b)(1-4), http://ww2.nycourts.gov/attorneys/cle/program-rules.shtml).

16 22 N.Y.C.R.R. § 1500.24; , *available at* http://ww2.nycourts.gov/attorneys/cle/extension_info.shtml (last viewed Mar. 26, 2019).

17. Charlotte Lieberman, *Why You Procrastinate and How to Break the Habit*, The New York Times, March 25, 2019 at B8, https://www.nytimes.com/2019/03/25/smarter-living/why-you-procrastinate-it-has-nothing-to-do-with-self-control.html.

18. *Attorney Online Services – Attorney Registration, FAQs*, *supra* at note 13.

Why Attorneys Should Take the Windows 7 End-of-Support Date Seriously

By Chris Owens

As IT consultants for attorneys, we are all for making your technology purchases last.

Windows 7, unfortunately, can't be one of them.

As of January 2020, Windows 7 will no longer receive security patches. If you are still running it next year, you will be actively posing a risk to your clients' data.

In 2017, Wired Magazine[1] published this evocative description of the expired Windows XP: "A computer running XP today is a castle with no moat, portcullis raised, doors flung open, greeting the ravaging hoards with wine spritzers and jam." In less than a year's time, Windows 7 users will find themselves in the same vulnerable situation.

THE HACKER-ROADMAP CONCEPT

Understandably, upgrading for its own sake seems like a waste of time and money. But this is not about keeping up with the trends. In this case, not upgrading can lead to major losses.

What makes running an expired operating system especially dangerous is something we refer to as the "hacker-roadmap." Each time Microsoft discovers a new bug or security hole, it will announce it to the world so that organizations can apply the appropriate repairs. It is probable that previous, unsupported versions of Windows will have those same security exploits. Microsoft, however, will not be releasing patches for them. By studying the new patches, hackers will find holes through which to target expired systems.

KEEPING UP WITH SECURITY STANDARDS

The new operating systems are also evolved to keep up with changes in security standards for the internet. This is important, as more and more programs are now partially or wholly online-based.

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With Windows 8, Microsoft introduced a major leap in security. Along with the enhanced framework, however, it also released a jarringly new user interface called Metro UX, which nixed the classic Start Menu. Windows 10 has added more security features for users and IT managers, and made big concessions to user-friendliness, such as re-introducing the Start Menu.

New hardware already does not support Windows 7. If you are planning on getting new PCs for the office, upgrading Windows is a prerequisite.

THE STORY OF WINDOWS XP

Windows XP offers a cautionary tale. When its end-of-life date arrived in 2014, many organizations were reluctant to upgrade despite the warnings from Microsoft.

In 2015, Windows XP was deemed a breach of HIPAA regulations—with good cause, it turned out. In a sobering example, the systems of one of Melbourne's largest hospitals were attacked by a virus when it was still on XP in 2016. The hospital released a statement saying, "While the virus has been disruptive to the organization, due to the tireless work of staff we have been able to minimize this disruption to our patients."[2] Without a doubt, this breach caused a major strain on the institution that could have been avoided with a timely upgrade. It happened again in 2017 when the UK's National Health Service XP system was infected with ransomware. No patches were available from Microsoft.

WHAT SHOULD MY FIRM DO?

Depending on the size of your firm and the complexity of your systems, upgrading to Windows 10 may be a three-to-12 month project. Start planning now so you can determine how long the process will take.

Which backend servers will need to be upgraded? Which applications will be implicated? Will you keep your systems on-premises or transition some or all of them to the cloud? Decide who on your staff will be helping, and how the project will fit into your budget. As the date draws closer, many IT companies will be fully booked with upgrades. To keep your clients safe, make sure you don't fall behind.

1. https://www.wired.com/2017/05/still-use-windows-xp-prepare-worst/.
2. https://www.thermh.org.au/news/update-regarding-melbourne-health-computer-virus.

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

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DEAR FORUM:

I am negotiating with an adversary over the terms of a complicated contract that has gone through numerous revisions. My adversary and I have been exchanging redlined Word documents and PDFs showing the edits. When one moves the cursor over the edits, the program identifies who made the changes and the date and time of the edits. This has been helpful to both sides because there have been so many revisions and sometimes it is difficult to remember who made each edit. Sometimes I add comments to my client in the document when I send proposed edits for her review. Before I send it back to my adversary, however, I always make sure to remove my comments to my client.

In the last draft I received from my adversary, it included a tiny note bubble that I clicked on because I thought the comment was intended for me. But when I opened it, I discovered the comment was my adversary's comment to *his* client. I am sure it wasn't for me since it said, "They'll never go for this sentence and I don't think we should push back if they strike it." I realized from the metadata in the edits that the sentence at issue was added by the adversary client, not the attorney. I am not sure what to do. My adversary was right; I wouldn't have gone for it and I am definitely going to strike that sentence in the next version. Do I have an obligation to tell my adversary that I saw his comment? I don't want this to derail all of the time and work we spent negotiating this contract and I really don't think the comment had any impact on me because I certainly would have rejected the proposal. Even if I do tell my adversary about the comment, what happens if I discover other metadata that is beneficial to my client? Am I permitted to review and use information I obtain from the metadata in the document?

This got me thinking about all of the information that gets embedded in documents that we are exchanging with adversaries. Although I am pretty familiar with the information that is embedded in the documents, these programs are adding new features all the time and there is probably some information that is embedded which isn't even on my radar. What are my obligations to my client when it comes to eliminating the metadata in documents I send to an adversary? In litigation discovery, are there any bright line rules as to what metadata I can use in documents produced by my adversary or what I should be removing before sending to an adversary?

Sincerely,
B. Hinds Sedock

DEAR B. HINDS SEDOCK:

Inadvertent disclosure is a subject that the *Forum* has addressed several times. *See, e.g.,* Peter V. Coffey, *Attorney Professionalism Forum*, N.Y. St. B.J., February 2010, Vol. 82, No. 2. Most of us communicate electronically with clients and opposing counsel on a daily basis. Based upon the sheer frequency of the electronic communications that we use in our practices, an inadvertent disclosure is a basic fact of life that all of us will experience at some point in our careers, either as the receiving attorney or transmitting attorney.

So how should one react, and what are our responsibilities as lawyers when faced with an inadvertent disclosure? Section 4.4(b) of the New York Rules of Professional Conduct (RPC) specifically addresses inadvertent disclosure and tells us that "A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender." A "writing" is defined by RPC 1.0(x) as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, email, or electronic communication or any other form of recorded communication or recorded representation." RPC 4.4(b) is intended to include not only "paper documents, but also email and other forms of electronically stored information – including embedded data (commonly referred to as 'metadata') – that is subject to being read or put into readable form." RPC 4.4(b) Comment [2]. A document, electronically stored informa-

tion, or other writing is "inadvertently sent" within the meaning of RPC 4.4(b) "when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or other writing is accidently included with information that was intentionally transmitted." *Id.* RPC 4.4(b) only applies to documents that were "inadvertently sent." Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1351 (2016 ed.). The rule would not apply if a lawyer received a document that was deliberately sent to that lawyer's attention. *Id.* For example, a document obtained improperly, and then transmitted by a person other than the original owner. *Id., citing* New York City Bar Association (NYCBA) Prof'l Ethics Comm. Formal Op. 2012-01 (2012).

Under RPC 4.4(b), a lawyer only has one affirmative obligation upon receiving materials that were inadvertently sent: the sender must be notified "promptly." *See* RPC 4.4(b). Promptly means, "as soon as reasonably possible, as the rule is designed in part to eliminate any unfair advantage that would arise if the lawyer did not provide notice." *See* NYCBA Prof'l Ethics Comm. Formal Op. 2012-01 (2012). While RPC 4.4(b) on its face does not specifically prohibit lawyers from indulging in their curiosity and reading an inadvertently sent document, even when the lawyer "knows or reasonably should know that it was inadvertently sent," you should be mindful of several pitfalls that may not be all that obvious. RPC 4.4(b) only goes so far as to address a lawyer's ethical obligations, but does not consider or address any other legal consequence that may come into play as a result of reviewing an inadvertently sent document.

The Comments to RPC 4.4 set forth explicit cautionary warnings to lawyers regarding the receipt of inadvertently sent materials and their treatment. For example, RPC 4.4 Comment 2 unequivocally warns that "a lawyer who reads or continues to read a document that contains privileged or confidential information *may be subject to court-imposed sanctions, including disqualification and evidence-preclusion.*" RPC 4.4 Comment [2] (emphasis added). RPC 4.4 Comment 3 explains that, "Refraining from reading or continuing to read a document or other writing once a lawyer realizes that it was inadvertently sent, and returning the document to the sender or permanently deleting electronically stored information, honors the policy of these Rules to protect the principles of client confidentiality." RPC 4.4 Comment [3]. RPC 4.4 Comment 3 goes on to note that substantive or procedural rules may require an attorney to stop reading, return and/or delete the material, but where the applicable law or rules don't address the circumstances, the decision is a matter of professional judgment for the attorney. *Id.,* citing RPC 1.2, 1.4.

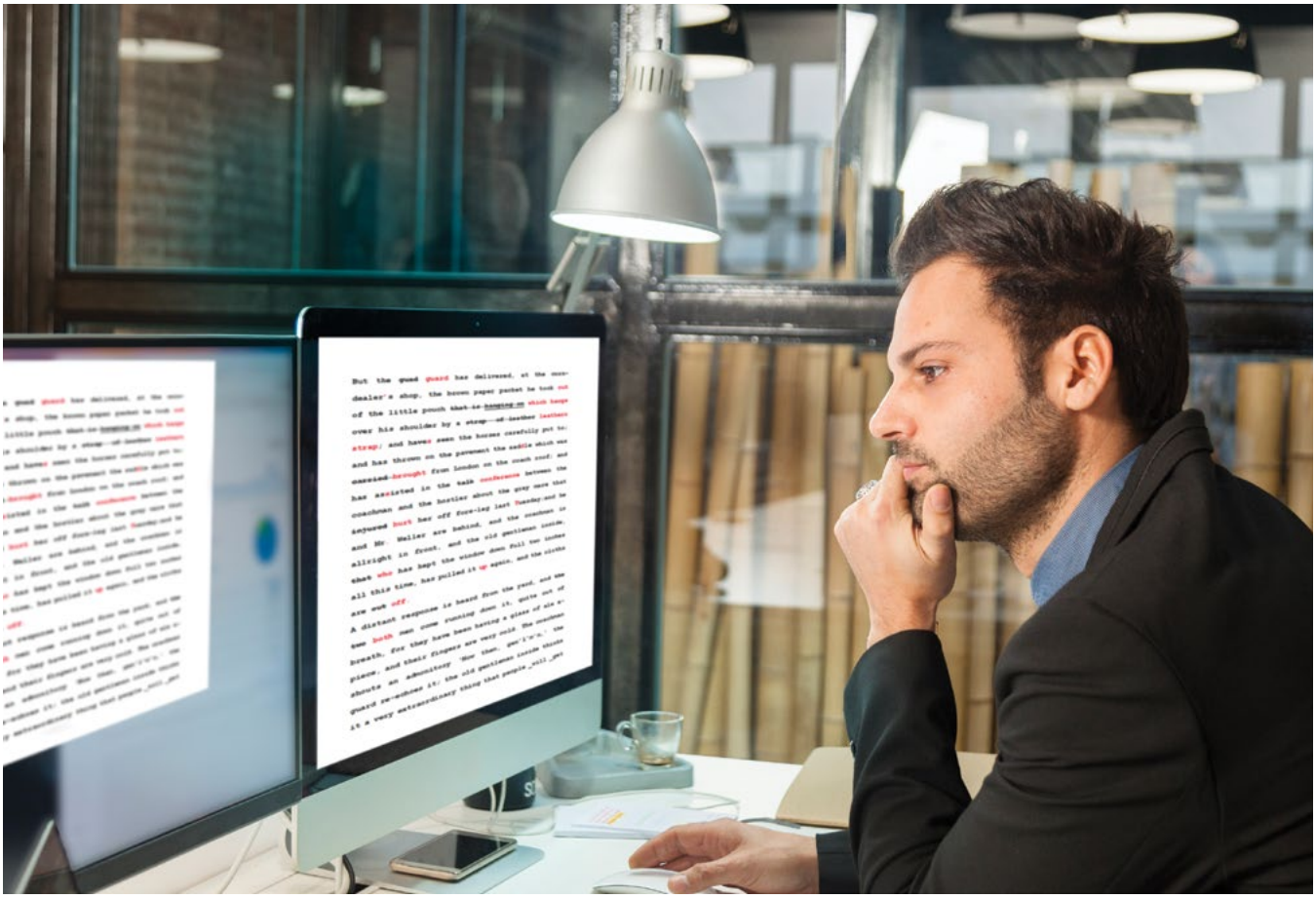
These concerns have prompted criticism of RPC 4.4(b) since its adoption, and recommendations have been made to amend the rule by adding several affirmative obligations. *See* James M. Altman and Glenn B. Coleman, *Inadvertent Disclosure and Rule 4.4(b)'s Erosion of Attorney Professionalism*, N.Y. St. B.J., November/December 2010 Vol. 82, No. 9. Indeed, in July 2011 the Committee on Attorney Professionalism proposed to NYSBA's Committee on Attorney Standards and Conduct (COSAC) that Rule 4.4(b) be amended and replaced with a new rule providing additional requirements on attorneys receiving an inadvertent disclosure. *See* Anthony E. Davis, *Inadvertent Disclosure – Regrettable Confusion*, N.Y. St. L.J., Nov. 7, 2011. The proposed amendments, if enacted, would have required that lawyers do more than notify the sender. The recommended changes were thought necessary to protect client information by requiring the recipient to: (1) cease reading the document once the recipient realizes the document was inadvertently disclosed; (2) notify the sender of the receipt; (3) return, sequester or destroy the materials; (4) refrain from using the inadvertently disclosed documents; and (5) take reasonable steps to retrieve any documents circulated prior to the realization that the documents were inadvertently sent. *See* Vincent J. Syracuse and Amy S. Beard, *Attorney Professionalism Forum*, N.Y. St. B.J., Febr. 2012, Vol. 84, No. 2. The fact that the proposed amendments were not enacted is not necessarily the end of the story, and there are many who still believe that, ethical rules aside, attorneys should still do much more than simply notify the producing party.

With respect to the inadvertent exchange of metadata specifically, ethics committees across the country have expressed different opinions. "Metadata" is "loosely defined as data hidden in documents that is generated during the course of creating and editing such documents." *See* NYSBA Comm. on Prof'l Ethics, Op. 782 (2004). In its 2004 opinion, the New York State Bar Association Committee on Professional Ethics ("NYSBA Committee") opined that attorneys receiving documents with metadata "have an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets" and cited to its prior opinion that using computer technology to intentionally mine metadata contained in an electronic document would constitute "an impermissible intrusion on the attorney-client relationship." *Id.*, citing NYSBA Comm. on Prof'l Ethics, Op. 749 (2001). In 2001, the NYSBA Committee observed, "[w]e believe that in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine or that may otherwise constitute a 'secret' of another lawyer's client would violate the letter and spirit

of these Disciplinary Rules." NYSBA Comm. on Prof'l Ethics, Op. 749 (2001).

Expressing a different view, the American Bar Association Standing Committee on Ethics and Professional Responsibility ("ABA Committee") opined that the lawyer was not prohibited from extracting metadata intentionally in ABA Comm. on Ethics and Prof'l Responsibility, Formal 06-442. (American Bar Association (ABA) Model Rule 4.4(b), also addressing inadvertent disclosures, is nearly identical to RPC 4.4(b).) The ABA Committee reasoned, "the [ABA Model Rules of Professional Conduct] do not contain any specific prohibition against a lawyer reviewing and using embedded information in electronic documents." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006). *See also* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1353 (2016 ed.). The New York County Lawyer's Association (NYCLA) Committee on Professional Ethics specifically rejected the ABA's position and opined that "[a] lawyer who receives from an adversary electronic documents that appear to contain inadvertently produced metadata is ethically obligated to avoid searching the metadata in those documents." NYCLA Prof'l Ethics Comm., Op. 738 (2002). Ethics committees in New York have been relatively consistent in stating that inadvertently produced metadata should not be examined by receiving attorneys. Thus, in your situation, the most prudent course of action is to promptly advise your adversary of the discovery of the inadvertent disclosure of his attorney-client communications, as required by RPC 4.4(b), and not engage in any further review or use of the metadata you discovered.

Various ethics committees have also expressed different opinions on a lawyer's duty to protect metadata when transmitting documents. The ABA Committee does not cite to any specific duty of a lawyer pertaining to metadata, but has offered options for eliminating metadata from documents, including "scrubbing metadata," printing or scanning documents so that only the image is transmitted to an adversary and negotiating a confidentiality agreement or protective order with an adversary that allows for the "claw back" or "pull back" of inadvertently sent embedded information. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006). The NYSBA Committee has opined that a lawyer who "uses technology to communicate with clients *must use reasonable care* with respect to such communication, and therefore must assess the risks attendant to the use of



that technology and determine if the mode of transmission is appropriate under the circumstances." *See* NYSBA Comm. on Prof'l Ethics, Op. 782 (2004) (emphasis added). It should also be noted that a lawyer is always bound by RPC 1.6(a) which prohibits an attorney from knowingly revealing a client's confidential information. Based upon the foregoing, best practices likely indicate engaging in routine scrubbing of documents, including

drafts of agreements (the situation you specifically raised in your inquiry) to prevent any inadvertent disclosure of attorney-client communications.

In the litigation context, there are rules that vary from court to court that may determine the required course of conduct. For example, for attorneys handling cases in Federal Court, Federal Rule of Civil Procedure (FRCP) 26(b)(5)(B), imposes specific obligations that go beyond the RPC 4.4(b). As stated in the rule, once a producing party notifies the receiving party of a claim of privilege, the receiving "party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim." A violation of this rule can have serious consequences for attorneys. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1353-54, citing *Am. Exp. v. Accu-Weather, Inc.*, 1996 WL 346388 (S.D.N.Y. June 25, 1996). (Even before F.R.C.P. 26(b)(5)(B) was introduced in 2006, the court relied upon ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92–368 and sanctioned attorneys who ignored opposing counsel's instructions to return a misaddressed unopened package containing privileged documents).

In addition, reaching an agreement with opposing counsel concerning the claw back of any privileged documents is also prudent for the exchange of discovery. The New York Commercial Division recently adopted new suggested claw back language in Rule 11-g(c) that parties are encouraged to agree to at the outset of a matter. 22 N.Y.C.R.R. § 202.70, Rule 11-g(c). The rule states that, "upon request by the Producing Party for the return of Protected Information inadvertently produced the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice." *Id.* at Appendix E. Reaching this type of agreement can alleviate many of the complicated issues pertaining to the inadvertent exchange of information. Generally, in the context of litigation discovery, attorneys should be preserving metadata contained in original documents collected from their clients that are responsive to discovery demands. Depending on the allegations and issues raised in the case, these documents may need to be produced with all of their applicable metadata if they are not protected by any available privilege or work-product protection.

In the end, what one does or does not do when one receives inadvertently produced material may not be a simple matter of applying the plain language of RPC 4.4(b) and any court rules that may be applicable. Basic concepts of attorney professionalism and yes, even civility, may often dictate a more nuanced approach. Lawyers must balance ethical obligations, legal obligations and their duties to the client when they respond to an inadvertent disclosure.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I represented a client in a dispute including allegations that my client improperly took confidential proprietary data from the plaintiff. In the course of discovery, my firm obtained a copy of that data from our client which we maintained on our computer network. After some initial discovery and motion practice in the case, we were replaced as counsel. At the time, I believed that we were not owed any additional fees by the now former client, and I turned over the files requested by the incoming counsel, including a copy of the data. I kept digital copies of all of the files in the case, however, including the data. I later learned that our firm was owed significant fees by the client and, when advised of this, the former client started to complain about our work in the case and refused to pay our fees. Although I believe that the former client's complaints were not serious, and were likely part of an attempt to negotiate a reduction in fees, we issued a retaining lien and declined to provide any further files requested by the new counsel until the payment issue was resolved.

I just received a call from the former client's new counsel who said that they settled the underlying matter with the plaintiff, but as part of the settlement, all copies of the data needed to be destroyed within the next week, including any copies we have in our files. I reminded the new counsel that we had a lien on the file, and we had not signed any agreement to destroy the data. The new counsel quickly said that we had no right to hold the client's data "hostage" and we had an obligation to destroy the client's data if the client directed it.

I don't believe that the new counsel is correct. I think that I have the right to retain copies of my former client's files (including discovery materials) in order to defend myself against any accusations of malpractice by the client. I don't want to prejudice the former client, but I think I have a legitimate reason to retain the data. Can I demand that my outstanding legal fees be paid and request a release from any wrongdoing from my former client as a condition of my destruction of the data?

Sincerely,
Lee Ninplace

Honoring Vincent J. Syracuse for his 20 years of leadership and service to the Ethics and Civility CLE program.

Vincent J. Syracuse was honored for 20 years of leadership and service to the Ethics and Civility Program in New York City in April. He is pictured with Committee on Attorney Professionalism Chair Andrew Oringer, above left, and Commercial and Federal Litigation Section Chair Robert Holtzman, above right. The program is co-sponsored by the Committee and the Section.

Overcoming Economic Sanctions and Cultural Divide

Getting into an LLM program to pursue a J.S.D. (Ph.D.) program at a New York City law school is hard enough. Add to the mix economic sanctions between Iran and the United States; a lack of a Social Security number; no way to open a bank account; and a language barrier – and it gets even more challenging.

With a master's degree in private law from one of the top universities in Iran, Imam Sadiq University, I started my professional career as a professor teaching International Law at Iranian E-University, Allame Tabatabaee Law and Ale-Taha University. But I had lofty ambitions. I wanted to pursue my J.S.D. at a university in the city that housed the headquarters of the United Nations.

The application process seemed simple, but I faced a lot of barriers. One of the main obstacles was economic sanctions due to my country of origin – Iran. I would not be able to pay the application fee because there was not any legitimate transnational wire transfer between Iran and the United States. In the end, Fordham and St. John's universities were willing to waive the application fee and I gained admission into the LLM programs at those two schools.

The next hurdle was getting a visa. Since the United States doesn't have an embassy in Iran, I went to a third country for my interview. The length of the administrative process barred me from attending Fordham, as I missed the orientation program, so I attended St. John's University as my second option.

Although I had received Dean's scholarships from both schools, it was not enough to cover my living expenses. In order, to support myself I needed to earn money. Because of the sanctions and not having a Social Security number, no bank would allow me to open an account. As a result, I couldn't rent an apartment and I was forced to hold all my money in cash.

I ended up securing a position as a research assistant in the first month through one of my professors at St. John's Law. I was lucky because this kind of position is rare in the first semester for an LLM international law student.

Being an international student in a new environment was a cultural shock and I faced a language barrier. One of the things that stands out to me was the relationship between professors and students. Back in Iran, the core role of the professor is more significant than students, in terms of respect, knowledge, responsibilities, and as a role model in the classroom. As the diversity in the program was limited and most of the other international students were from two specific countries, a majority of the time they spoke their native languages. I did not have that much connection with them as their English was difficult for me to understand.

Because of the lack of Iranian law students in New York, I received a lot of offers from Iranian NGOs to become their representative at the United Nations. I accepted the offer, I got the pass and walked in hallways of my dream organization almost every day.

After gaining experience at St. John's, I was able to transfer to Fordham to continue my education. It was a different atmosphere and environment. Fordham Law has a

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Seyed Mohsen Rowhani received an LLB in Islamic Law, *cum laude*, and a master's degree in private law, *summa cum laude*, from Imam Sadiq University in Tehran. He started his career as a director of public legal education administration of Iran's Judiciary. He also taught International Law in Iran. He started his education in New York City at St. John's Law School with an LLM in Transnational Legal Practice. He graduated from Fordham Law School with an LLM in International Law. Currently, he is a J.S.D. candidate at Cardozo Law School. He also serves in the Economic and Social Council of United Nations as a N.G.O. representative with a special consultant status.

BECOMING A LAWYER

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modern campus at the heart of Manhattan with diligent students. Almost all of the students in our program were lawyers and from approximately 50 countries. Also, as we were in the same ages and our English language level was equivalent, I found most of my good friends there. Since there had been other Iranian students prior to my arrival, Fordham faculties had a positive perspective about previous Iranian students.

Fordham also held legal events almost every day that helped to expand my network. After graduation, I noticed the Fordham affiliation made my resume decidedly stronger because of the excellent reputation and supportive alumni.

I am now a J.S.D. candidate at Cardozo Law School, where I am grateful for the extremely helpful professors and graduate program directors. There is much I like about Cardozo, including the religious diversity that I have experienced there. My legal education now ranges from Islamic Law School in Iran to St. John's, Fordham, and Yeshiva University, and given me a truly comprehensive view of the law. After all that has happened to me and to the Iranian people, I have decided to do my dissertation on U.S. trade control laws and bilateral economic sanctions.

These past few years have been an extraordinary experience for me, both educationally and personally. I recognize how far I have come, and it still fills me with wonder. I now work as a researcher at Cardozo Law, and I recently received my first ever office key. Here's what I posted on Twitter: "This scenery is literally what I always wanted to see, looking out on Fifth Avenue through my office window."

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Thoughts on Legal Writing from the Greatest of Them All: George Orwell

George Orwell, the great novelist, essayist, and critic, was a man of strong opinions — and strong writing. During his wide and varied career, he produced hundreds of articles and essays, six novels, and three works of non-fiction — including, most famously, *Animal Farm* and *1984*.

Here, we focus on Orwell's brief but influential 1946 essay *Politics and the English Language*.[1] In this essay, Orwell discussed how poor writing encourages poor thinking and suggested ways for writers to avoid flaws of contemporary writing.

Orwell emphasized above all that prose should convey the writer's ideas as simply and clearly as possible. Although *Politics and the English Language* is almost 75 years old and a product of the political and social scene of its time, its lessons remain valuable for legal writers today.[2]

In this column, we focus on Orwell's critique of poor writing and his explanation of basic principles for writers to improve their work.

THE PROBLEM OF WORDS THAT OBSCURE THOUGHTS, NOT CONVEY THEM

Orwell criticized poor writing as showing a "lack of precision": a writer "has a meaning and cannot express it," or "inadvertently says something else," or is "almost indifferent as to whether his words mean anything or not."[3]

Writers, Orwell argued, too often rely on rhetorical devices that seem meaningful but say little. For example:

- "Dying metaphors": phrases that "have lost all evocative power and are merely used because they save people the trouble of inventing phrases for themselves."[4] An example in modern legal writing is "second bite at the apple." Does anyone who uses this metaphor in a legal filing (or decision) know why it's bad for someone to bite an apple twice? Certainly we don't.
- Verbal scaffolding: taking a simple verb and tacking on nouns or adjectives around it.[5] The result? Phrases, says Orwell, like "be subjected to," "give rise to," "having the effect of," "serve the purpose of," "with respect to," and "in view of." Similarly, says the Legal Writer, like "in opposition to," "by means of," "in order to," "on the assumption that," and "with an eye toward." These phrases sound formal, but they're empty. They do little more than pad word count.
- Pretentious diction: using long or jargon-y words, often with Latin or Greek roots, to dress up simple statements or ideas.[6] Lawyers often suffer from this problem. *Arguendo*, *inter alia*, *ipso facto*, gravamen, or (shudder) *in haec verba*. Also "the case at bar," "to wit," "your affirmant," and so on. These instances of legalese, and others like them, add no precision or layer of meaning; they're merely harder to understand than any plain-English equivalent.

A BIG-PICTURE SOLUTION: GENERAL PRINCIPLES OF THINKING AND WRITING CLEARLY

Orwell contrasts the preceding three bad habits with questions that a "scrupulous writer" should always ask: What am I trying to say in this sentence? What words will best express my meaning? Can I express my idea more concisely? Have I said anything avoidably ugly?[7]

Know first what you're trying to say. Describing a statute? Understand fully how the statute works. Making an argument? Grasp each logical step.

Then, say it as simply and clearly as you can. Make sure that each sentence, and each phrase within a sentence,

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adds something to the whole — substance, precise and accurate description, persuasive rhetoric, and so on. And make it as easy to understand as possible.

MORE SPECIFIC SOLUTIONS: ORWELL'S SIX RULES FOR BETTER WRITING

These principles are straightforward, yet difficult to apply consistently. As Orwell himself said, "look back through this essay, and for certain you will find that I have again and again committed the very faults I am protesting as much."[8]

To aid writers in this task, Orwell's essay gives six "rules that one can rely on when instinct fails." He says these rules "cover most cases."[9]

1. "NEVER USE A METAPHOR, SIMILE, OR OTHER FIGURE OF SPEECH WHICH YOU ARE USED TO SEEING IN PRINT."[10]

- If you decide to use rhetorical imagery in a sentence, keep it fresh. Don't strive merely to avoid clichés; discard all oft-used figures of speech. Understand the particular metaphor or simile you're using, rather than merely resort to it out of habit. "Metaphors enrich writing only to the extent that they add something to more pedestrian descriptions," rather than "deaden[ing] our senses to the nuances of language."[11]
- If only stale metaphors or similes come to mind, consider whether using one in that particular sentence will add persuasive force to your point. You might decide that a phrase, though familiar, remains evocative; or that you have found a fresh way to employ old figurative language.[12] If not, leave it out.

2. "NEVER USE A LONG WORD WHERE A SHORT ONE WILL DO."[13]

- Keep it simple. Keep it short. You want to make your writing easy to read. Shorter words are easier to read and follow than long ones. If you can say it simply, you gain nothing by saying it with longer words. That said, sometimes short words won't do; sometimes you do need to resort to a more complicated vocabulary. That's fine. Just be conscious of what words you're using.

3. "IF IT IS POSSIBLE TO CUT A WORD OUT, ALWAYS CUT IT OUT."[14]

- Again, shorter is better. You want to make it easy for the judge to rule for you. A shorter filing takes less time and energy to get through. Legal readers always appreciate that. This way, they have more time and energy to think about your arguments. Your goal in each sentence is to make every word count, to cut every word that can be removed without losing substance. With practice, you'll develop a sense of when a sentence is as tight as it can get, and when flab remains.

4. "NEVER USE THE PASSIVE WHERE YOU CAN USE THE ACTIVE."[15]

- Most authors now endorse this rule.[16] Passive-voice sentences use more words than necessary. These extra words add to vagueness and tangled phrases. And that leads to reader uncertainty. Passive sentences often require one to re-read them for a reader to know who did what to whom.
- Using the active voice means that the subject of the sentence comes first and performs the action that the rest of the sentence describes. This is the most straightforward way to present ideas. It cre-

ates a clear image in the reader's mind of who's doing what. Writing in the active voice gives energy, sharpness, and directness to the sentences. It makes writing easier to understand. It keeps readers engaged.

5. "NEVER USE A FOREIGN PHRASE, A SCIENTIFIC WORD, OR A JARGON WORD IF YOU CAN THINK OF AN EVERYDAY ENGLISH EQUIVALENT."

- Don't make your legal writing hard to read and understand — legal readers are busy and skeptical. They don't enjoy extra work. The goal of legal writing isn't to show off your education or your vocabulary. It's to communicate your arguments effectively and persuasively.
- Lawyers in New York (and no doubt lawyers elsewhere) are prone to using legalese — legal jargon that adds nothing beyond what can be expressed in ordinary English. Legalese may overawe an unsophisticated reader. Judges aren't so easily swayed.
- Some legal jargon serves a purpose: for example, to describe concepts specific to law succinctly, or perhaps for rhetorical color in an appropriate context. (Just ask an appellant whose brief emphasizes that the trial court acted *sua sponte* in ruling against her.) Always remember, though, that most judges are generalists, and tune your language accordingly. Even in highly specialized areas of law, esoteric terms will usually have "a counterpart in ordinary English" that'll be easier for the reader to understand.[17] And if it's not necessary to use jargon, it's necessary not to use it.

6. "BREAK ANY OF THESE RULES SOONER THAN SAY ANYTHING OUTRIGHT BARBAROUS."

- Orwell's sixth rule is an odd but useful safety valve. He advises writers to deviate from any of his five earlier rules if following them will result in awkward prose. Orwell's rules are made for writers, not writers for his rules.
- Writers should follow a "rule of reason."[18] This leaves room for writers' personal judgment and common sense even when the outcome isn't otherwise "outright barbarous."[19] Good writing depends on sound grammar, spelling, style, and syntax. It also depends on a willingness to bend or break the rules to maintain the bond between writer and reader. As writers strive for clear and precise expression, they should avoid becoming prisoners of language.[20] Writing needn't conform to a particular style, lest it loses its charm.

CONCLUSION

Orwell's *Politics and the English Language* was revolutionary in its day. Today we accept and agree with his advice. He taught lazy, mediocre, and unskilled writers that clear and simple communication is honest communication. He taught that unpretentious communication makes what you mean obvious, so that all (including lawyers) should write like generalists. He taught readers how to detect falsehoods in writing when writers hide the ball with bureaucratic writing.

The modern message? Life's too short to drink bad beer or read bad writing.

The *Legal Writer* will continue its series on what we can learn from the great writing teachers — lawyers and non-lawyers.

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1. George Orwell, *Politics and the English Language*, in 4 Collected Essays, Journalism and Letters of George Orwell 127 (Sonia Orwell & Ian Angos, eds., 1968), https://www.orwellfoundation.com/the-orwell-foundation/orwell/essays-and-other-works/politics-and-the-english-language/.
2. *See generally* Judith D. Fisher, *Why George Orwell's Ideas about Language Still Matter for Lawyers*, 68 Montana L. Rev. 131 (2007).
3. Orwell, *supra* note 1, at 129.
4. *Id.* at 130.
5. *See id.* at 130–31.
6. *Id.* at 131.
7. *Id.* at 135.
8. *Id.* at 137.
9. *Id.* at 139.
10. *Id.*
11. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1054 (9th Cir. 2003) (Reinhardt, J., concurring).
12. D'Ann Rasmussen, *A Fresh look at Clichés,* 5 Scribes J. Leg. Writing 152, 152 (1994-1995).
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16. Douglas E. Abrams, George Orwell's *Classic Essay on Writing*, 8 Precedent 29, 30-31 (Winter 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406060.
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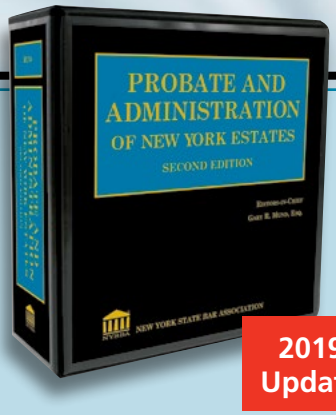

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