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Journal



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By Nancy Franklin and Michael Greenstein

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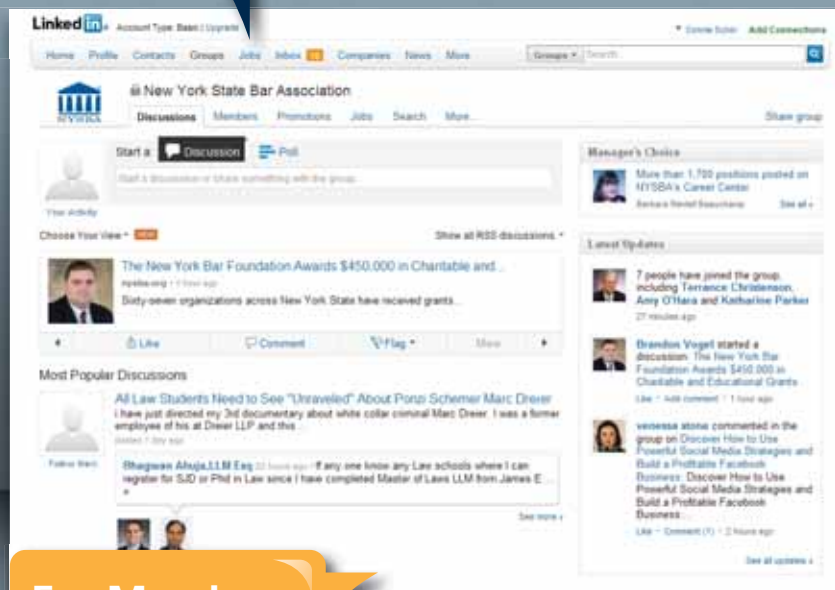
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PRESIDENT'S MESSAGE

SEYMOUR W. JAMES, JR.

Committee on Civil Rights Brings Needed Reforms to Light

Each year, the Sections and Committees of the New York State Bar Association undertake projects and produce reports focusing on current topics in their respective areas of the law and suggesting reforms as needed. It is thanks to their extensive research and thoughtful analysis that the Association is able to take well-reasoned positions on a wide variety of important issues involving the law and the legal profession. One recent example of this outstanding work is the report of the State Bar's Committee on Civil Rights, calling for restriction of the use of solitary confinement in prisons throughout our state. The Committee's report was approved and adopted as Association policy by the House of Delegates during our Annual Meeting in January.

In its report, the Committee on Civil Rights provided an overview of the use of solitary confinement in New York state, described the devastating harm such isolation can cause prisoners and contradicted the claim that solitary confinement improves safety or facilitates rehabilitation. In the 18th and 19th centuries, advocates for solitary confinement claimed that it had rehabilitative benefits as a meaningful punitive tool that was also humane. Experience, however, showed solitary confinement to have an extraordinarily degrading impact on prisoners' mental health, and the practice was almost universally regarded as a failure and largely abandoned by late the 1800s.

In recent decades, there has been a resurgence in the use of solitary confinement in our correctional system. Today, solitary confinement can be implemented by correction officials for reasons related to disciplin-

ary issues, security or personal safety. Often referred to as "supermax" confinement or "secure housing," solitary confinement is used to isolate problematic inmates from the rest of the prison population.

Solitary confinement typically involves one of two possible settings. Approximately half the prisoners in our state currently placed in solitary confinement are held in single cells of approximately 56 square feet. The other half reside in "double cells" the size of a parking space, which they share with another inmate, deprived of any privacy whatsoever, even when using the bathroom or showering. Prisoners are allowed one hour per day for recreation, which usually takes place in another small cage. Inmates in special housing are restricted from educational programming or other transitional services, not only depriving prisoners of opportunities to rehabilitate themselves, but also creating serious health and safety issues for the communities into which they are released. Each year, approximately 2,000 prisoners are released into our communities directly from solitary confinement.

There is no limit on the amount of time that can be imposed in solitary confinement, and, in the past 30 years, the average sentence to solitary confinement has doubled to 5 months, from 2.5 months in 1983. Approximately 4,500 prisoners are currently being held in solitary confinement in New York state's prisons, with 2,782 of them serving more than one year in secure housing.

The negative effects of solitary confinement have been well-documented. They include emotional breakdowns, chronic depression, uncontrollable



rage, self-mutilation, dissociative episodes, amnesia, hypertension and suicidal thoughts and behavior. According to experts, mental deterioration can begin as early as 10 days into a secure housing sentence. A recent investigative news report found that about one-third of all prison suicides are committed by individuals who are in solitary confinement, a disproportionate amount given that 8% of the total prison population is in secure housing. Further exacerbating this problem is the solitary confinement of especially vulnerable individuals such as the elderly, the mentally ill and juveniles serving sentences in state prisons.

On the other hand, courts, scholars and the international human rights community have acknowledged that long-term solitary confinement is counterproductive to penological goals such as prisoner protection, discipline, rehabilitation and reintegration, and that any benefits it may offer can be achieved through other more humane and productive means. To be sure, correction officials must be permitted to manage problematic inmates, and prisoner separation – which allows officials to remove prisoners without

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PRESIDENT'S MESSAGE

subjecting them to the physical and psychological deprivation inherent in solitary confinement – is a widely accepted alternative.

The Committee on Civil Rights provides one somewhat counterintuitive illustration of a Mississippi supermax correctional facility called “Unit 32,” which responded to a troubling spike in violence by loosening restrictions. Unit 32 allowed group dining, additional physical activity and access to work opportunities and rehabilitative services. The changes resulted in decreased incidents of violence and a 70% drop in the number of prisoners in solitary confinement. Within three years, so many prisoners were moved from that supermax unit into the general population of other prisons that the facility itself was no longer necessary and was closed – saving taxpayers millions of dollars. Other states are now following this example, and implementing reforms similar to those at Unit 32 in hopes of achieving similar success.

In its report, the Committee on Civil Rights noted that “the security gained by isolating prisoners in long term solitary confinement is largely illusory” and “has yet to be documented in any convincing manner,” while other methods of prisoner separation “are not only adequate, but in some cases more effective at addressing the legitimate concerns of institutional safety,

security and discipline in corrections facilities.”

The report recommended adopting strict standards to ensure that solitary confinement is used only in very limited circumstances. It also recommended that correction officials adopt stringent criteria for separating violent and nonviolent prisoners and set standards for ensuring separation under the least restrictive conditions practicable. The report also calls for identifying inmates who should not be in solitary confinement, reducing the overall number of secure housing unit beds and limiting the duration of solitary confinement sentences to no more than 15 days. Finally, the report calls upon the New York State Legislature to enact measures necessary to restrict the use of solitary confinement and to conduct hearings to examine the harmful effects of long-term solitary confinement. I am pleased that the State Bar has adopted these recommendations as our official policy. We have joined a large and growing number of well-regarded organizations advocating for the restriction of solitary confinement and I look forward to working to advance these important reforms.

This report is a prime example of the importance of the research conducted by the Association's Sections, Committees and Task Forces. The State Bar brings together experienced prac-

titioners in nearly every practice area, and their substantive work on pressing issues helps to shape and inform the public conversation and allows policymakers to benefit from their extensive expertise.

If you do not belong to a section, committee or task force, I would encourage you to consider becoming more involved with one or more of the Association's many entities. You can join a practice area- or affinity-based section anytime by visiting the Sections area of the NYSBA website. In addition, we have begun the committee appointment process for 2013–2014, and you may have already received an email from President-Elect David Schraver inviting you to apply to be considered for one of our committees. Many members feel that section and committee involvement is one of the most engaging and rewarding parts of bar association membership. Getting involved can be a great way to meet new colleagues from across the state, to learn from their experiences and to share your knowledge and expertise with others and the public. It is thanks to these collaborative efforts that the New York State Bar Association remains such an influential voice for the legal profession in New York State and beyond, and we are proud and appreciative of all of our members' terrific work. ■

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March 12-13 Albany; Buffalo
(video conference from NYC)

Basics of Criminal Law for the Criminal and Civil Lawyer

March 13 Buffalo
March 15 New York City

CPLR Update 2013

March 13 New York City (5:30 p.m. – 9:10 p.m.)
March 22 Albany (1:00 p.m. – 4:40 p.m.)
March 23 Syracuse (9:00 a.m. – 12:40 p.m.)

† 9th Annual International Estate Planning Institute

March 14-15 New York City

Ethics for Business and Transactional Lawyers

Live & Webcast (9:00 a.m. – 1:00 p.m.)
March 18 New York City

Legal Malpractice

(9:00 a.m. – 1:00 p.m.)
March 22 Rochester; Westchester

Practical Skills: Family Court Practice

April 8 Syracuse
April 9 Albany
April 10 Buffalo; Long Island
April 12 New York City; Westchester

Basics of Trial Practice – After the Verdict

(9:00 a.m. – 12:45 p.m.)
April 12 Long Island; Syracuse
April 19 New York City
April 26 Albany; Buffalo

Ethics and Civility 2013

(9:00 a.m. – 1:00 p.m.)
April 12 Albany; Buffalo
April 19 Long Island; Rochester
April 26 New York City

New York Evidence Rules: Criminal and Civil

April 16 New York City
April 18 Albany

Matrimonial Trial Institute III

April 19 Westchester
April 26 Rochester
May 9 Long Island
June 7 Albany
June 14 New York City

Meet the Justices of the Third Department

(3:00 p.m. – 6:00 p.m.)
April 24 Albany

Practical Skills: Purchases and Sales of Homes

April 29 Buffalo
April 30 Long Island; Rochester
May 1 New York City; Syracuse
May 2 Albany; Westchester

† Advanced Insurance Practice 2013

May 3 New York City; Syracuse
May 10 Albany; Buffalo
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| May 29 | Buffalo |

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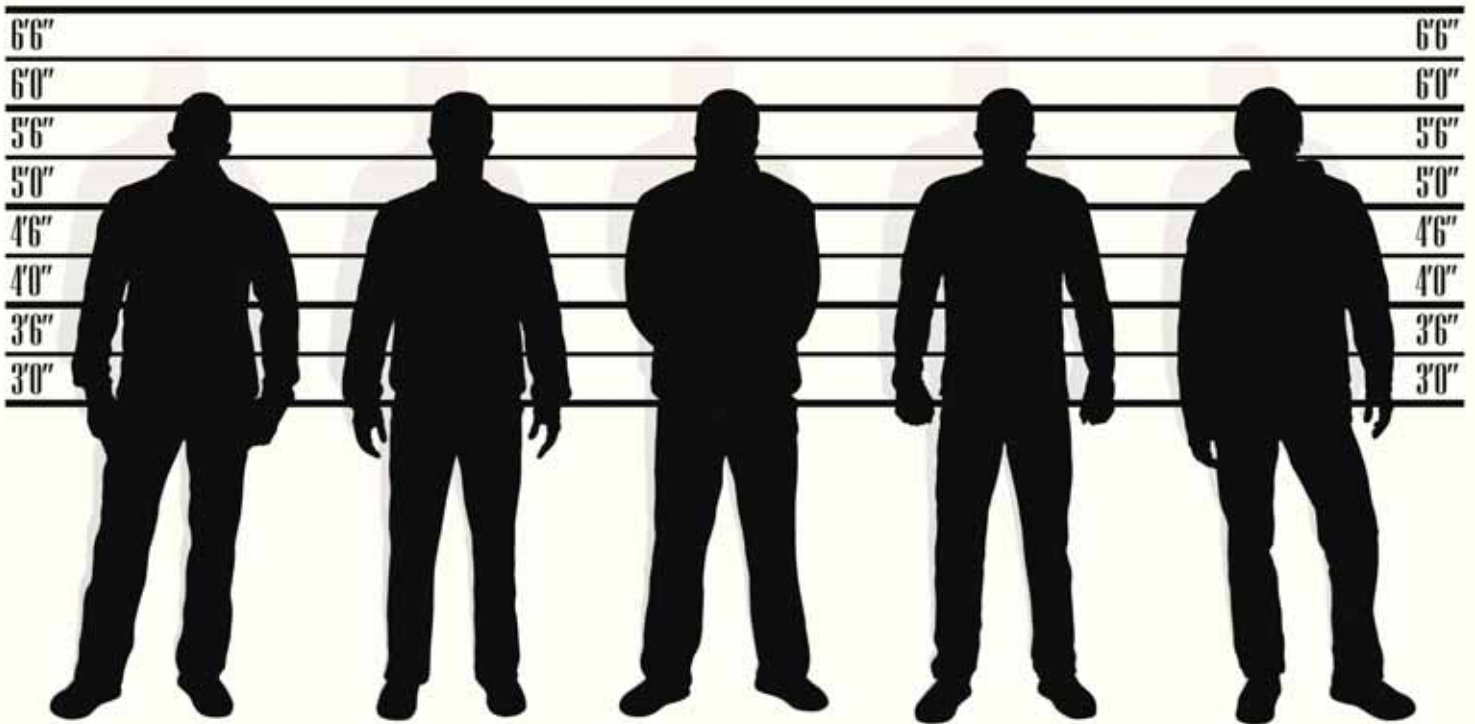
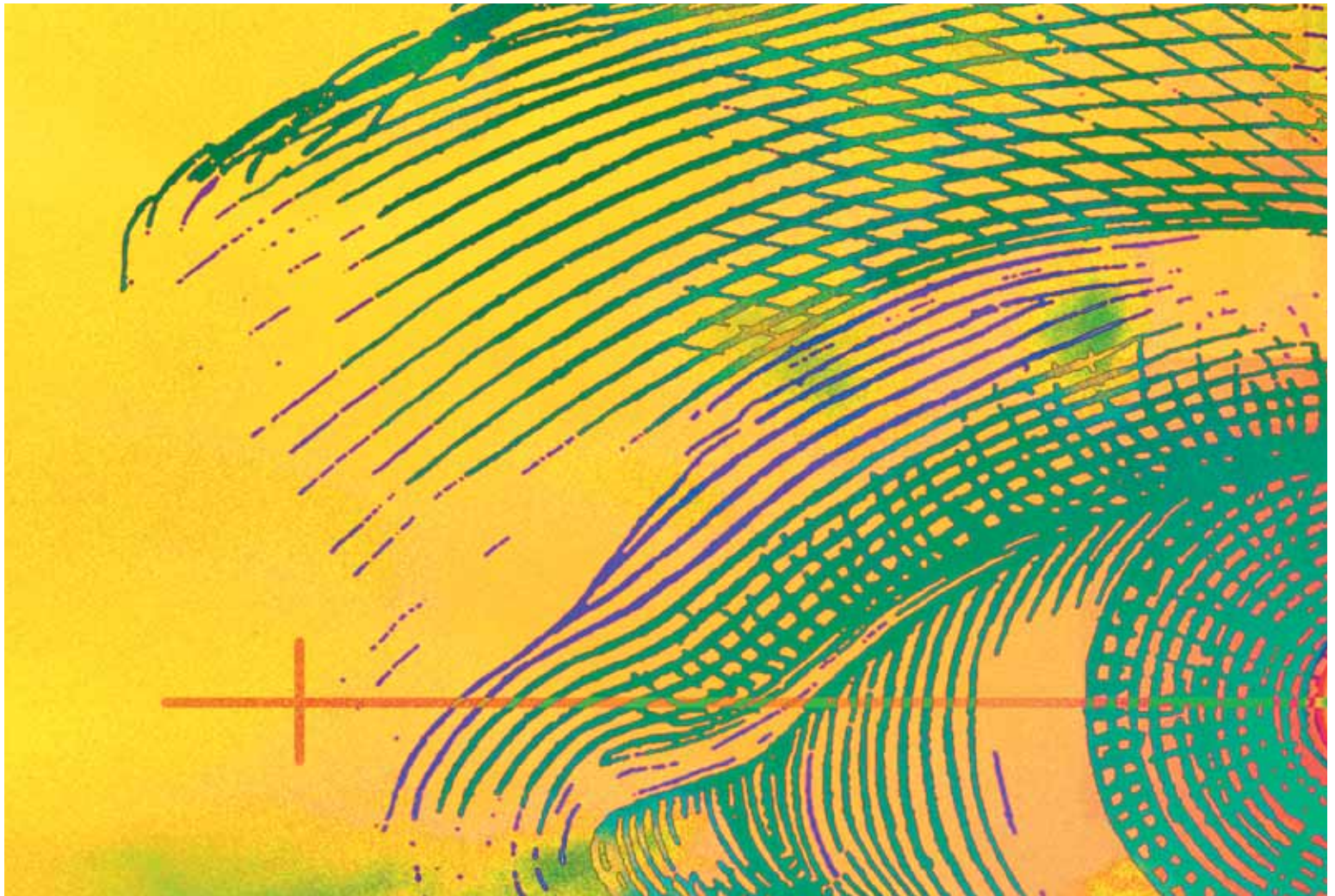
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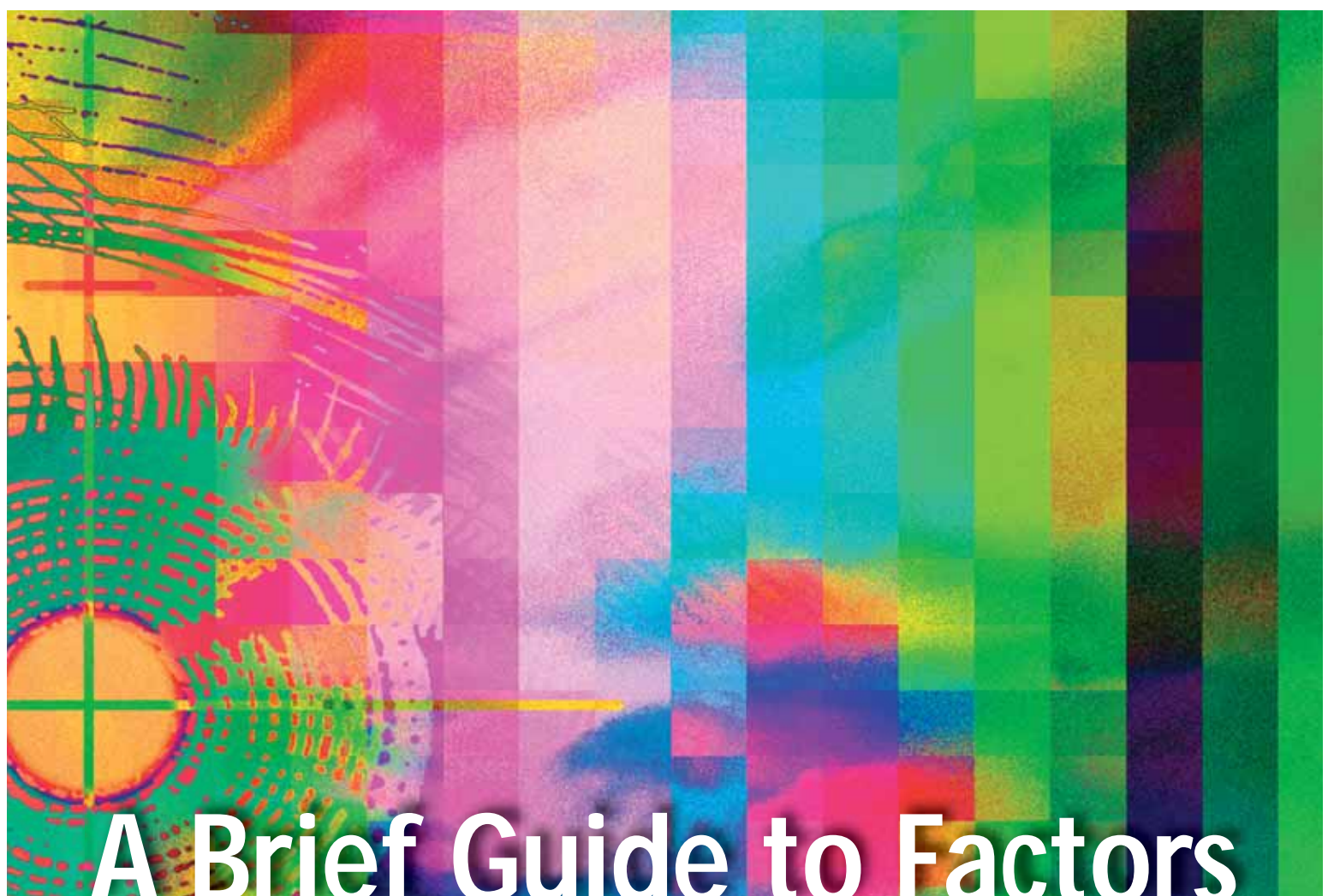
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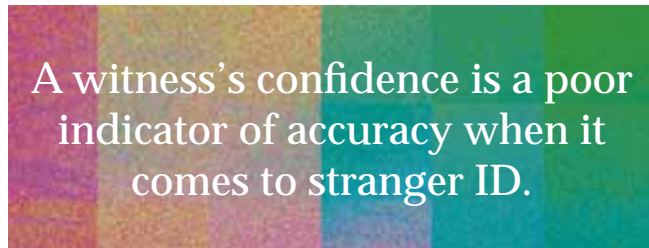
A Brief Guide to Factors That Commonly Influence Identification and Memory of Criminal Events

By Nancy Franklin and Michael Greenstein

By a conservative estimate, mistaken IDs lead to thousands of wrongful convictions each year. Even under the best circumstances – good perceptual conditions, no stress, and an ID made soon after exposure – people correctly identify unfamiliar faces only about half the time and make misidentifications about a quarter of the time. Several factors, many of which are characteristic of criminal situations, not only further reduce the number of correct IDs but also increase false IDs. This article provides a (by no means exhaustive) review of some of the factors known to affect ID accuracy.

Weapon Focus

Natural selection, over millions of years, has favored directing our attention to threatening objects, such as the breakaway rock hurtling toward you, the predator's claws, or the weapon in your attacker's hand. Eye-tracking studies in the lab have corroborated this, showing that attention is diverted toward weapons and away from other details, including the perpetrator's face. Despite this, witnesses' tendency to later choose someone in an ID task – a lineup, for example – is high, leading to high rates of misidentifications for situations that involved a weapon.



Stress

When people are under stress, the increased activity of the brain's primary threat-processing structure, the amygdala, fundamentally impacts cognition. Stress narrows attention and perception, even when no weapon is present, and thus identification suffers. Although most of the research in this area has been in the lab, we can illustrate this with a study conducted by the U.S. military. In that study, military personnel underwent an intensive training exercise to simulate capture, detention, and interrogation. All of the trainees were interrogated for 40 minutes under either high or low levels of physical confrontation and threat. After release, all were given an ID task. Even though all recently had 40 minutes of clear, close, well-lit exposure to the interrogator, the high-stress captives made correct lineup IDs only about 30% of the time and made misidentifications about twice as often. The lower-stress captives also performed rather poorly, making false IDs 38% of the time.

Flashbulb Memory

The above findings may seem counterintuitive because some personally salient memories ("flashbulb memories") feel emblazoned immutably, as if the experience can be re-played in all its detail. For Jennifer Thompson, a rape victim, the face of her attacker was there in her memory, hovering over her whenever she re-played her memory of the rape. When the police named Ron Cotton as a suspect and she identified him as the perpetrator, she had a clear and deliberate look at him. His face then replaced whatever memory she may have had of her actual attacker, Bobby Poole, to such an extent that when she was later presented with Poole, she angrily denied that he was the rapist. (We'll discuss the phenomenon likely underlying her error, the "Mugshot Exposure Effect," below.)

Flashbulb memories are characterized by people's extremely high levels of confidence in their accuracy. But, in fact, they produce patterns of forgetting and distortion similar to those of more mundane memories. Flashbulb memories are an impressive example of the low correlation between confidence and accuracy that is often observed with memories surrounding crime.

Confidence

A witness's confidence is a poor indicator of accuracy when it comes to stranger ID, for at least two major reasons. First, people tend not to realize how unreliable memory is for accurate recall of strangers' faces. Second, several factors in criminal ID procedures artificially inflate witness confidence. For example, a witness's perceived completeness and vividness of the memory increase simply as a result of repeatedly thinking or speaking about the event. Although the genuine memory is slowly decaying with time, confidence often increases, for both accurate and false details, making confidence an even poorer indicator of accuracy as time progresses.

Post-Event Information/Suggestibility Effects

The function of human memory and the goals of the criminal justice system are somewhat at odds. The justice system seeks an accurate report of the crime itself from the witness, with no additional assumptions beyond what was seen and no supplementary information that the witness may have gotten afterwards. The function of human memory, on the other hand, is to create as coherent and complete a model of the event as possible. Because of this, memory frequently updates as one is exposed to new information, or other people provide input, or the original memory is reinterpreted or filled in. Memory is a product of all these sources and is *always* subject to further change. Humans are excellent at these sorts of embellishments, but we are lacking in our ability to keep track of where the various aspects of a memory came from. It is thus very easy, and very common, to sincerely but mistakenly "remember" details that were actually incorporated into memory after the fact.

Social Contagion

When multiple witnesses see a crime, they are very likely to discuss it. One witness's report of a false event may lead co-witnesses to incorporate and later falsely remember that same information. This *social contagion* of information is especially problematic because courts generally consider multiple witnesses to be independent sources. This may help to explain the disturbing finding that in 38% of cases later overturned on DNA evidence, multiple eyewitnesses had identified the same innocent suspect.

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Leading Questions

Police officers have to articulate their questions somehow, and the form of the question may influence the memories that witnesses report to them. In one classic demonstration, subjects viewed a traffic accident. They were then asked about the speed of the cars, a piece of information that a police officer typically might ask of a witness. Those asked how fast the cars were going when they “smashed into each other” gave higher speed estimates than those asked about the speed when the cars “bumped into each other.” The “smashed” group also tended to falsely remember broken glass at the scene, while the “bumped” group did not.

Salient personal events from one’s own life are not immune to these effects. In 1995, Dr. Elizabeth Loftus and her student Jacqueline Pickrell asked their participants to recount details of various events from childhood, including one event that was known to have not actually occurred – getting lost in a mall at age 5, being rescued by an elderly person, and then reuniting with their family. Simply being asked about this non-event in three interviews produced detailed false memories for 25% of participants. Other research using a similar technique has produced even more fantastical childhood “memories,” complete with details and high confidence in the accuracy of the memory. This technique, being asked to report any remembered details about a particular event, is essentially what a witness would encounter during a series of interviews by police, detectives, and attorneys.

The Identification Procedure

Witnesses bring decision biases with them to the identification. For example, people have a tendency to choose *someone*, typically choosing the person most closely resembling their memory of the perpetrator. Some municipalities have adopted ID procedures intended to lower the risk of such relative judgments. One of these methods is sequential presentation, with no indication of how many will be presented, and with each face shown only once. If the witness says “no,” the face is not presented again.

Show-Ups

A show-up is when a single suspect is viewed by a witness or victim. The risk of false identifications of police suspects, coupled with inflated confidence in one’s own memory, is particularly high with show-up procedures. This may be due both to the suggestive nature of show-ups themselves and to witnesses’ tendency to make an ID.

Filler Selection

Lineup fillers should be selected to match the witness’s description, rather than to match the suspect. The gold

standard for a fair lineup is that a naïve person would do no better than chance at choosing the real suspect simply by reading the witness’s description. Real-world criminal lineups often fail this test. This certainly contributes to the rate of false IDs and helps to explain the high rate of multiple-witness false IDs mentioned earlier.

Instructions

The information witnesses are given before attempting to make an ID is crucial. The officer who invites a witness to the ID procedure should avoid implying that the police have a suspect, and the ID administrator should clearly state that the perpetrator may not be present. In addition, witnesses can be easily swayed by seemingly innocuous questions (“Could that be him?”) and seemingly conservative instructions (“Take your time” or “Look at each picture carefully”). These latter instructions may imply to witnesses that the perpetrator is indeed present, and their rate of making any ID, including a false ID, increases. Appearance change instructions, which, for example, highlight the fact that the perpetrator may have altered his or her hair, also increase false IDs by making witnesses more willing to tolerate feature mismatches.

Feedback

One might think that positive feedback from the administrator after an ID is made would carry no risk. However, positive feedback leads witnesses to overestimate the clarity and duration of the initial view, and it boosts their confidence. Because of the risks of instructions and feedback, and because cues can often be unintentional and subtle, the ID procedure should be administered by an officer who does not know who the police suspect is.

Identification Time

Genuine face recognition tends to occur quickly and, indeed, rapid IDs are more likely to be accurate than those following prolonged scrutiny. Care should be taken in applying this principle, though, since recognition as a result of Unconscious Transference or Mugshot Exposure (see below) may be rapid but may not accurately reflect memory of the *perpetrator*.

Unconscious Transference and Mugshot Exposure

People are very good at incorporating post-event information and suggestion into memory for an event, but not very good at identifying where each detail came from. Simply put, we are better at recognizing something than we are at identifying its source. We often use inferences to judge a memory’s original source, and we may well be wrong.

Now, imagine how this can lead to error in an ID situation. A sense of familiarity indicates that you’ve seen the person before. You are not aware that you have simply seen him dozens of times around the neighborhood.

Instead, in the suggestive context of an ID procedure, you mistakenly ID the person as the perpetrator. This is *unconscious transference*.

The *mugshot exposure effect* is related to unconscious transference and presents real concerns for a criminal justice system that considers show-up, mugshot, lineup, and courtroom IDs all to be independent sources. Prior

how profound these effects can be. For example, changes in *lighting*, *shadows*, and *angle of exposure*, even relatively minor ones, can be devastating to ID accuracy. People may recognize that longer *exposure duration* increases ID accuracy (within limits), but it is important to note that witnesses frequently overestimate duration by a factor of 2 or 3. Then there is *distance*. With regard to the distance



Positive feedback leads witnesses to overestimate the clarity and duration of the initial view, and it boosts their confidence.

exposure to a face may increase its familiarity but may not be accompanied by the memory's source. So when one sees the familiar face during a criminal ID procedure, the risk of a misidentification is increased. This can happen in a variety of circumstances, including a show-up followed by a lineup, inspection of a mug book showing multiple instances of the same person on different pages, or a witness's repeated consideration of a lineup member or mugshot during the course of a single ID procedure.

This increased likelihood of an ID does not require that the person be selected in the initial encounter; simple exposure is enough. But if a witness incorrectly identified a face during mugshot exposure, the likelihood of a false ID later increases even more – called the *commitment effect*. While multiple identifications of the same suspect by the same witness may seem compelling to triers of fact, this consistency may be the unfortunate result of exposure.

Perpetrator's Race

The best way to process a face is holistically, noting the *relations between* its parts. People tend toward this type of processing for faces of their own race but rely on individual features for other-race faces. This reflects a selective perceptual expertise that is already in place in infancy. The outcome is that cross-race identification is consistently worse (with both lower correct IDs and higher false IDs) than own-race identification. Most of the studies have involved black and white witnesses and target faces, but the same selective-perception effect has also been shown with many other combinations. Although it appears that having close relationships among members of the other race can reduce the effect, simple exposure within an integrated community does not help much.

Perceptual Factors

While it seems self-evident that perceptual factors affect identification accuracy, you might be surprised to find out

from which a crime is witnessed, there is a dramatically rapid reduction of optic information, even at medium ranges, which leads to surprisingly poor ID performance.

Partial Disguise

Perpetrators often wear hats, hoodies, sunglasses, or bandanas, covering important features that witnesses might have used to identify them. Correct IDs are reduced by more than half as a result. And, as so often happens, because the impulse to choose remains high, false IDs increase by quite a bit. This becomes an especially high risk in cross-race identifications. Unfortunately, placing hats on all of the lineup members cannot make up for the lost information, though it can increase the risk of false IDs even further.

Consequences

Crime victims and witnesses likely realize that their behavior at a lineup or show-up could have life-altering consequences for the person they identify. So, one might expect real-world witnesses to be more conservative than subjects in the lab, where identifications carry no such consequences. The data don't consistently bear this out, however, and this may be because victims and witnesses are strongly motivated not to let the perpetrator get away. In fact, real-world witnesses show a strong tendency to choose, and it appears that bias to make an ID may increase as a crime becomes more reprehensible.

Voice Identification

Despite its flaws, identifying individuals' faces is superior to identifying their voices. People attempting a voice ID tend to show both high false identification rates and extreme overconfidence.

Characteristics of the Witness

Several variables that characterize individual witnesses or their current state have been investigated. We will address two here.



Training does not appear to reliably benefit ID performance.

Age

Young adults tend to be better witnesses than children or older adults, with declines in the older group starting in middle age. Thus, the findings from lab studies, which rely heavily on young adult participants, may actually *underestimate* error rates.

“Trained Observers”

Contrary to a commonly held belief, training does not appear to reliably benefit ID performance. For example, police officers are no better at identification than laypeople, and they show typical patterns of misses and errors.

Considerations Regarding Pre-trial Hearings

Prior to trial, the factors described above (and many others) are frequently subjected to hearings in which the judge first determines which topics, if any, a memory expert will be allowed to address at trial. Two important criteria contributing to the judge’s decision are (1) whether there is sufficient agreement among experts in the field on the various findings under consideration, and (2) whether these findings are beyond the ken of the average juror.

Expert Agreement

To address the issue of scientific consensus in a way that would be easily interpretable in a courtroom, a handful of scientific surveys have directly asked relevant experts to assess the quality of evidence concerning various topics. These surveys provide some value, though they certainly have limitations. First, a survey can only include so many questions, so some will always be left out. This exclusion should not be taken to mean that the factors are not important or agreed upon. Second, the precise wording of a question might have significant impact on answers, which may suggest disagreement when in fact there may simply be more than one legitimate interpretation of the question. Third, surveys are frozen in time, while science is ever-evolving. Many experts have little choice but to refer in court to a survey that is now more than 10 years out of date. Although none of the topics that were considered reliable in 2001 has fallen out of favor, several now have stronger consensus for reliability than are reflected in that classic survey.

Most important, scientists don’t evaluate the general acceptance of principles by taking votes. (Imagine a roomful of physicists deciding, by a show of hands,

whether they agree on the reality of gravity.) We subject our work to ongoing scrutiny by colleagues, through grant applications, conference presentations, and manuscript submissions to scholarly journals. All of us are motivated not to waste time studying non-effects. Through a scientific evolutionary process, the real, replicable, and stable phenomena emerge. General acceptance is the product of good science, the application of statistical techniques, and collegial communication.

Beyond the Ken?

Laypeople have it wrong much of the time. For example, nearly 90% believe that stranger identifications are likely to be “very” or “somewhat” reliable.

Laypeople’s intuitions about many of the factors affecting eyewitness memory tend to be similarly off. While it is encouraging when their intuitions point in the right direction, laypeople often substantially underestimate the degree to which an eyewitness’s memory of an event is influenced by both outside and internal factors. Laypeople may not understand that a real impairment exists (e.g., cross-race ID) or may believe that certain witnesses are not affected (e.g., the superiority of trained observers). Occasionally, lay intuitions are diametrically opposed to reality, as when the majority of people believe that the more violent the criminal act, the more accurate will be the memory of the details of that crime. Altogether, this poses a risk that jurors will evaluate the facts of the case ineffectually.

Judges are in a difficult position when they use their intuitions about whether particular topics are beyond the ken of jurors. To correctly make this assessment, they need to see past their own knowledge, a very difficult thing to do. In fact, once people become aware of a fact, they often forget what their *own* previous beliefs had been.

Conclusions: What Can We Say About Eyewitness Memory and Identification?

Is memory terrible? No! Perception is largely selective and constructed, and memory is selective and reconstructed. These principles allow the cognitive system to be powerful in an imperfect world where recording every detail of every moment of one’s life simply isn’t an option. Our cognitive system is amazingly sophisticated but ill-suited to the type of task required for courtroom examination. We’re simply not equipped to disentangle our interpretations, inferences, and post-event information from a memory, and we’re relatively poor judges of our own and each other’s abilities. It is easy to see how sincere, honest witnesses can make false identifications and report details that didn’t happen, and it is easy to see how jurors may rely heavily on this testimony when making their decisions. ■

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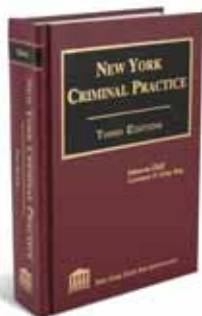
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“How Much Is That Witness in the Window?”

Introduction

Jokes about witnesses (especially expert witnesses) being paid for their testimony are legion.¹ A recent example:

Q: “Doctor, you are being paid \$750 an hour for your testimony in court today, correct?”

A: “No, counselor, I am not paid for my testimony, I am paid for my time.”

Q: “Doctor, isn’t that sort of like a call girl saying she is paid for her time, not for the sex?”

“OBJECTION!”

“SUSTAINED!”

Jokes notwithstanding, it is permitted and, in some circumstances, required, to pay certain fees to witnesses. These include statutory witness fees, reimbursement for certain expenses, and compensation for time lost from work.

CPLR Statutory Witness Fees

While parties to an action, together with their agents, servants, employees, family, friends, and others aligned with their interests, will generally appear willingly in court to give testimony, those without a connection to the parties are apt to be reluctant to appear in court. Witnesses subpoenaed to testify at trial are entitled to be paid statutory fees for appearing in court, and witnesses may request compensation for, *inter alia*, time lost from work as a result of their appearances in court.

CPLR 8001(a) governs the payment of witness fees:

§ 8001. Persons subpoenaed; examination before trial; transcripts of records

Persons subpoenaed. Any person whose attendance is compelled by a subpoena, whether or not actual testimony is taken, shall receive for each day’s attendance fifteen dollars for attendance fees and twenty-three cents as travel expenses for each mile to the place of attendance from the place where he or she was served, and return. There shall be no mileage fee for travel wholly within a city.

The sums, while not princely, are extravagant in comparison to the statutory fees available prior to the most recent amendment in 1988, when the daily attendance fee was \$2, and the mileage reimbursement fee was set at eight cents.²

The subject of witness fees has not, until recently, been a fertile ground for case law. A number of cases have addressed ministerial issues; for example, CPLR 2303(a) requires that “[a]ny person subpoenaed shall be paid or tendered in advance authorized traveling expenses and one day’s witness fee.” A trial court determined that the tender of witness and mileage fees at the time the subpoena was served was best practice; it was sufficient if the payment was made prior to the return date of the subpoena.³ In another proceeding, to hold a witness in contempt, the Second Department held the contempt application had to

be denied because where the subpoena was unaccompanied by payment of the statutory witness fee: “Witness fees must be tendered when the subpoena is served or within a reasonable time before it is returnable.”⁴

In another action, a trial court had to determine who bore the cost of transporting a prisoner to appear at a correction officer’s disciplinary hearing. The trial court determined that there was no statutory exception permitting the Department of Corrections to be paid an amount greater than the statutory rate, concluding “that the Department should be required to produce the inmate at the Otisville facility hearing solely upon the payment of \$2 witness fee and 8 cents per mile.”⁵

Payment for a Witness’s Testimony

What fees may be paid to a witness, in excess of the statutory fees, was addressed 100 years ago in a case where the Court of Appeals affirmed the disbarment of an attorney for, *inter alia*, improper payments to witnesses.⁶ The Court of Appeals affirmed a decision by the First Department,⁷ which described in detail the conduct at issue:

A considerable number of these vouchers represented disbursements to or with the defendant’s witnesses by these investigators or detectives, and there seem to be many cases where sums of money were paid far in excess of any proper compensation to witnesses for the time lost in attend-

ing court. Thus on October 20, 1909, there was paid in the Nowak case three hundred and thirty-five dollars to different witnesses, the amount paid to each ranging from sixty-five dollars to ten dollars. In another case one hundred dollars was paid to a witness for time lost and expenses attending court, and payments of twenty-five dollars and ten dollars to witnesses were quite numerous. These, standing alone, might not justify action, but they tend to sustain the conclusion that the payments were made in these cases out of all proportion to the proper allowance to a witness for lost time or expenses in attending court.⁸

The First Department explained what may, and may not, be paid to witnesses:

To procure the testimony of witnesses it is often necessary to pay the actual expenses of a witness in attending court and a reasonable compensation for the time lost. It is often necessary to pay a reasonable fee to an expert in preparing to testify for a party in an action. And there are many incidental expenses in relation to the prosecution or defense of an action at law which can with propriety be paid by a party to the action. But on the other hand, the payment of a sum of money to a witness to testify in a particular way; the payment of money to prevent a witness' attendance at a trial; the payment of money to a witness to make him "sympathetic" with the party expecting to call him; these are all payments which are absolutely indefensible and which are really included in the general definition of subornation of perjury. The payment of a sum of money to a witness to "tell the truth" is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true. The prevalence of perjury is a serious menace to the administration of justice, to prevent which no means have as yet been satisfacto-

rily devised. But there certainly can be no greater incentive to perjury than to allow a party to make payments to its opponent's witnesses under any guise or on any excuse, and at least attorneys who are officers of the court to aid it in the administration of justice must keep themselves clear of any connection which in the slightest degree tends to induce witnesses to testify in favor of their clients. The action of the respondent in controlling and managing a system which had a direct tendency to accomplish that purpose is one that we cannot too severely condemn. Attorneys, whether representing corporations or individuals, must clearly understand that any conduct which tends to participate in or approve the payment of money to witnesses or public officials to influence the administration of justice will

be most severely condemned and considered a case for disbarment.⁹

Nearly a century later, the Second Department, in *Caldwell v. Cablevision System Corp.*,¹⁰ held that, while CPLR 8001(a) does not bar compensation to a fact witness in excess of \$15 per day and payment for travel expenses in excess of 23 cents per mile, a trial court erred, nonetheless, when it failed to charge the jury that the witness's testimony was suspect based upon the amount of the payment to the witness. The physician's fee to testify at trial was \$10,000:

In this case, the Supreme Court properly allowed the plaintiffs' counsel to cross-examine Dr. Krosser without limitation regarding the \$10,000 payment that was made to him, and also properly permitted counsel to adequately address the issue in summations. The Supreme



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Court erred, however, in denying the plaintiffs' request for an explicit instruction to the jury regarding witness compensation.

While the Supreme Court instructed the jury that it should consider bias or prejudice in determining the weight to be given to any particular witness's testimony, this general charge was insufficient under the circumstances. Just as a jury that hears testimony in a criminal trial from a witness who is testifying in exchange for a promise of leniency is given a specific instruction regarding the possibility of bias, we conclude that, in light of the important public policy considerations concerning fees paid to fact witnesses, more than the general credibility charge is also warranted where, as here, a reasonable inference can be drawn that a fact witness has been paid an amount disproportionate to the reasonable value of his or her lost time. In crafting an appropriate instruction, trial courts should bear in mind the general principles regarding fact-witness testimony heretofore discussed, including a fact witness's public duty to testify for the statutory fee of \$15; the permissibility of voluntary compensation for the reasonable value of time spent in testifying; the goal of drawing the line between compensation that merely eases the burden of testifying and that which tends to unintentionally influence testimony; the inference, which may be drawn from the disproportionality of the payment to the reasonable value of lost time, that a fee for testimony has been paid; and the potential for unconscious bias that such a fee may create.¹¹

PJI Includes Charge Based on *Caldwell*

Reflecting the Second Department decision in *Caldwell*, the New York Pattern Jury Instructions – Civil were revised to include a new instruction based upon that court's holding:

Where a fact witness has received compensation in excess of that provided by CPLR 8001(a), the court may use the following instruction:

PJI 1:90.4 Compensation of Fact Witnesses

In addition to what I just told you about expert witnesses who give you their opinions about certain aspects of the case, when a person like EF is subpoenaed to come to court as a witness to tell you what he/she (saw, heard or did) with respect to anything that happened relating to the case and not as an expert, the subpoenaed witness is entitled to receive \$15 per day and 23 cents per mile for travel to and from the court for each day he/she attends. That amount of money may not fully compensate the witness for loss of time from work or from business, so the party who subpoenaed the witness may, but is not required to, pay the person for the reasonable value of the time away from work or the business lost in coming to and from the court, waiting and testifying, as long as the amount paid is not disproportionately more than what is reasonable compensation for the time away from work or business that the witness lost. A payment is disproportionately more than what is reasonable compensation if it is substantially, or significantly, more than such reasonable compensation. If, on the basis of EF's testimony about how much he/she received and the work time or business lost, you conclude that the amount was disproportionately more than what was reasonable for the loss of work time or business, you may take that into consideration in deciding whether the amount paid to EF influenced what he/she told you about what he/she (saw, heard, did) in connection with what happened in this case.¹²

***Caldwell*¹³ in the Court of Appeals**

On appeal to the Court of Appeals, that Court framed the issue on appeal

and its holding affirming the Second Department as follows:

At issue on this appeal is whether the testimony of a subpoenaed fact witness, who receives a fee alleged to be disproportionately in excess of CPLR 8001(a)'s mandatory fee requirement for attendance at trial, is inadmissible as a matter of law. We conclude that such testimony is generally admissible, but that the trial court should, in a proper case, charge the jury as to the witness's potential bias, in light of the perceived excessiveness of the fee. Where, as here, the party that subpoenaed the witness offers no explanation for a fee that is seemingly in excess of reasonable compensation for lost time and incidental expenses, the trial court, upon a timely request by an objecting party, must charge as to the witness's potential bias.¹⁴

The Court gave a detailed recitation of the facts of the case and the progress of the trial:

In September 2006, defendant Communications Specialists, Inc. (CSI), per its contract with Cablevision Systems Corporation, began the installation of high-speed fiber-optic cable underneath Benefield Boulevard in Peekskill, New York. The work required CSI to cut a two-foot-deep and four-or-five-inch-wide trench along the entire length of the 3,000-foot street. CSI also dug 58 one-foot-wide "test pits" in certain locations adjacent to the trench in order to locate pre-existing utility lines. CSI backfilled the trench and test pits but, at the time of the incident giving rise to this action, the street had not been re-paved.

On October 11, 2006 at approximately 10:00 p.m., plaintiff Bessie Caldwell, who resided on Benefield Boulevard, took her dog out for a walk. She crossed Benefield Boulevard and walked the dog for a short distance. As she was crossing the street again, returning to

her residence, plaintiff tripped and fell, injuring her leg.

Plaintiff and her husband (suing derivatively) commenced this negligence action against, among others, CSI for creating a hazardous and unsafe condition in the road by failing to properly backfill the trench and test pits, failing to properly or adequately pave over those areas, and failing to install temporary asphalt. After CSI answered and

The Court continued with the plaintiff's request for a charge tailored to the doctor's testimony:

The following day, before summations, plaintiff's counsel asked that the court charge the jury that, pursuant to CPLR 8001, the doctor, as a fact witness, was entitled to a witness fee of \$15 per day and \$.23 per mile to and from the place where he was served with the subpoena. Defense counsel countered that the

The Court explained its concern with the witness fee paid to the physician:

We, like the Appellate Division, are troubled by what appears to be a substantial payment to a fact witness in exchange for minimal testimony. Such payments, when exorbitant as compared to the amount of time the witness spends away from work or business, create an unflattering intimation that the tes-

The subject of witness fees has not, until recently, been a fertile ground for case law.

the parties conducted discovery, the matter proceeded to a bifurcated trial with liability being tried first.

Plaintiff testified that she stepped into a "dip in the trench" that caused her to fall. To rebut this testimony, CSI subpoenaed a physician who had treated plaintiff in the emergency room shortly after the accident. The doctor was called merely as a fact witness to testify concerning his entry in the "history" section of his consultation note that plaintiff "*tripped over a dog* while walking last night in the rain." He testified consistently with his documented note. During cross-examination, plaintiff's counsel elicited from the doctor that CSI had paid him \$10,000 for appearing and testifying. The doctor denied that his testimony was influenced by the payment, stating simply that he was there to "testify to my records." His testimony consisted only of his verification that he made the entry into the emergency room record. No professional opinion was sought nor given. Plaintiff's counsel requested that the court strike the doctor's entire testimony or, in the alternative, issue either a curative instruction or a jury charge concerning monetary influence.¹⁵

witness fee was the statutory minimum and that there was no prohibition against paying a fact witness for time missed from work. The court suggested that, rather than issuing a charge, the parties could address the issue during summation and the jury could draw whatever inference it wished from those facts. The court cautioned the parties against referencing the statutory criteria of CPLR 8001.

After summations, where the parties addressed the doctor's fee payment in detail, the court gave the jury a general bias charge but made no specific reference to the doctor's testimony or the payment he received for appearing at trial. Following deliberations, the jury found CSI negligent, but that such negligence was not a substantial factor bringing about the accident. Supreme Court denied plaintiff's motion to set aside the verdict. The Appellate Division affirmed, holding that although CSI's "substantial payment" to the doctor did not warrant exclusion of his testimony, Supreme Court erred in failing "to adequately charge the jury regarding the suspect credibility of factual testimony by a paid witness," but that reversal was not required because the error was harmless.¹⁶

timony is being bought or, at the very least, has been unconsciously influenced by the compensation provided. While we are concerned by the amount the witness was paid for this minimal attendance and testimony, we conclude that the Appellate Division's order should be affirmed under the circumstances of this case.

CPLR 8001(a) provides that one who is compelled by subpoena to appear at trial is entitled to a \$15 daily attendance fee and \$.23 per mile in mileage fees. Although this is only the minimum that must be paid to a subpoenaed fact witness, that does not mean that an attorney may pay a witness whatever fee is demanded, however exorbitant it might be. Our courts and disciplinary rules have long acknowledged that "[t]o procure the testimony of witnesses it is often necessary to pay the actual expenses of a witness in attending court and a *reasonable compensation* for the time lost." "[T]here are [also] many incidental expenses in relation to the prosecution or defense of an action at law which can with propriety be paid by a party to the action."

What is not permitted and, in fact, is against public policy, is any agreement to pay a fact witness in

exchange for favorable testimony, where such payment is contingent upon the success of a party to the litigation. Of course, that situation is not presented here. The doctor's testimony was limited to what he had written on his consultation note less than 12 hours after the accident and well before plaintiff commenced litigation. Nor can it be argued that the doctor tailored

Caldwell is likely to be the final word on this topic for some time to come.

his testimony in exchange for the fee or that there is any record evidence that the doctor's consultation note was fabricated.

Plaintiff argues that, having been subpoenaed, the doctor had a legal duty to appear and a legal right to only a \$15 attendance fee, and because he was paid in excess of that amount, Supreme Court should have stricken his testimony. That argument, however, is without merit since the fee set forth in CPLR 8001(a) is a minimum fee. Nonetheless, the payment of such a disproportionate fee for a short amount of time at trial is troubling, and the distinction between paying a fact witness for testimony and paying a fact witness for time and reasonable expenses can easily become blurred. A line must therefore be drawn "between compensation that enhances the truth seeking process by easing the burden on testifying witnesses, and compensation that serves to hinder the truth seeking process because it tends to 'influence' witnesses to 'remember' things in a way favorable to the side paying them."¹⁷

The Court concluded that a specific bias charge should have been fash-

ioned by the trial court to address the compensation paid to the witness:

In addition to asking the trial court to strike the doctor's testimony, plaintiff's counsel asked the court to charge the jury that, per the subpoena, the doctor was required by law to appear at trial and was entitled to a \$15 attendance fee and \$.23 per mile and "let [the jury] do with it what they will." This was tantamount to a charge request for a special jury instruction relative to the doctor's potential bias.

We agree with plaintiff that Supreme Court should have issued a bias charge specifically tailored to address the payment CSI made to the doctor. Supreme Court generally instructed the jury that bias or prejudice was a consideration that it should consider in weighing the testimony of *any* of the witnesses, but this was insufficient as it pertained to CSI's payment to the doctor. To be sure, Supreme Court properly acted within its discretion in concluding that the fee payment was fertile ground for cross-examination and comment during summation. But because CSI did not even attempt to justify the \$10,000 payment for one hour of testimony, Supreme Court should have also crafted a charge that went beyond the CPLR 8001 requirements. Supreme Court should have instructed the jury that fact witnesses may be compensated for their lost time but that the jury should assess whether the compensation was disproportionately more than what was reasonable for the loss of the witness's time from work or business. Should the jury find that the compensation is disproportionate, it should then consider whether it had the effect of influencing the witness's testimony. Of course, such a charge must be requested in a timely fashion. Additionally, it is within the trial court's discretion to determine whether the charge is warranted in the context of a particular payment

to a witness, and to oversee how much testimony should be permitted relative to the fact witness's lost time and other expenses for which he is being compensated.

We conclude that, although a more specific jury charge should have been given, Supreme Court's failure to issue one in this case was harmless. The dispute underlying the doctor's testimony was not whether he fabricated the contents of the consultation note. In other words, the substance of the doctor's testimony was such that the jury's assessment was only tangentially related to the doctor's credibility.¹⁸

Conclusion

Since it may be another hundred years before the Court of Appeals weighs in on the issue, *Caldwell* is likely to be the final word on this topic for some time to come. Ironically, it looks as though the witness in the joke had it right all along: being paid for his time was permitted, while being paid for his testimony was not. ■

1. For those too young to recall, this column's title was pirated from the 1952 Patti Page hit song "How Much Is That Doggie in the Window?"

2. See 1988 Recommendations of the Advisory Committee on Civil Practice. Change comes slowly in this area. In 1840 the daily witness fee was 50 cents; thereafter, it was increased to a dollar and then, with the enactment of the CPLR in 1962, to \$2. See Advisory Committee Notes.

3. *Liebowitz v. State*, 95 Misc. 2d 183 (Ct. Claims 1978).

4. *Bobrowsky v. Bozzuti*, 98 A.D.2d 700 (2d Dep't 1983) (citations omitted).

5. *N.Y. State Dep't of Corr. Servs. v. C.S.E.A.*, 142 Misc. 2d 380 (Sup. Ct., Orange Co. 1989).

6. *In re Robinson*, 209 N.Y. 354 (1913).

7. *In re Robinson*, 151 A.D. 589 (1st Dep't 1912).

8. *Id.* at 595.

9. *Id.* at 600.

10. 86 A.D.3d 46 (2d Dep't 2011).

11. *Id.* at 55-56 (citations omitted).

12. N.Y. P.J.I.2d, Civil 1:90.4.

13. 2013 WL 451322 (Feb. 7, 2013).

14. *Id.*

15. *Id.*

16. *Id.* (citation omitted).

17. *Id.* (citations and parentheticals omitted).

18. *Id.* (citation omitted).



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Summary Judgment Do's and Don'ts

By John R. Higgitt



Summary judgment is serious business. It's the procedural equivalent of trial that, when granted, results in judgment as a matter of law in favor of one or more parties. But the opportunity to obtain (or defeat) that coveted remedy is often lost, sometimes irretrievably, because of a misstep in preparation of the motion papers. This article offers 10 tips – 5 do's, 5 don'ts – to avoid frequently recurring missteps in accelerated judgment practice.

Do Calculate the Deadline for Seeking Summary Judgment in a Given Case

CPLR 3212(a) provides that a summary-judgment motion must be made within 120 days of the filing of the note of issue unless the court sets a different deadline. If the deadline is missed, a party still can make a summary-judgment motion if, and only if, the party can demonstrate "good cause." Good cause here means a reasonable excuse for the untimely motion; neither the merits of the motion nor the lack of prejudice to the other parties is relevant in gauging good cause.¹ Thus, the good cause standard is not easily satisfied.

Because a movant's failure to make a timely summary-judgment motion may preclude the court from considering the merits of the motion, counsel should calculate accurately the deadline for making the motion. To do this, counsel must (1) ascertain the period of time the parties are afforded to make summary-judgment motions (e.g., the 120-day default period of CPLR 3212(a), a shorter period set by the court in a court order or part rule), and (2) determine the date on which the note of issue was filed. Running the relevant period of time from the filing date of the note of issue yields the deadline.

If seeking summary judgment, make the motion² before the deadline (or demonstrate in the underlying motion papers that you have a reasonable excuse for the untimely motion). If opposing the motion, review whether it was made timely and, if it was not, insist that the movant demonstrate good cause before the court considers the merits.³

Don't Omit the Pleadings if You Are Moving for Summary Judgment

CPLR 3212(b) requires the movant to submit with the summary judgment motion a complete set of the pleadings in the case. This straightforward requirement is often overlooked. While some courts will forgive a movant's failure to submit the pleadings (especially if they were supplied by another party or by the movant belatedly),⁴ others will not, and denials of summary judgment motions that do not contain the pleadings are common.⁵ The movant must therefore ensure that a complete set of the pleadings accompanies the underlying motion papers. A party opposing summary judgment should check the motion papers for the pleadings and may argue for denial of the motion if any of the pleadings are absent.

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Don't Ignore the Burden Imposed on the Party Seeking Summary Judgment

A party seeking summary judgment must demonstrate the absence of any triable issues of fact.⁶ It does this by *affirmatively* showing, through evidence in admissible form, the merits of its cause of action or defense.⁷ Merely pointing to gaps in the evidence produced in the discovery process is insufficient to satisfy the moving party's burden.⁸

A different rule applies in federal court. There, on an issue on which the non-moving party bears the burden of proof at trial (e.g., where the defendant seeks summary judgment dismissing the plaintiff's complaint), the burden on the moving party may be satisfied by showing (i.e., pointing out to the court) that there is an absence of evidence to support the non-moving party's cause of action or defense.⁹ In such a situation, the moving party is not required to negate with evidence the non-moving party's claim.¹⁰

Do Avoid Boilerplate Language Regarding General Summary-Judgment Principles in Your Affirmation in Support of or Opposition to the Motion

The attention of a court is a precious commodity. Don't waste it by reciting chapter and verse the often-echoed general rules of decision underlying summary judgment.¹¹ The court is already aware of these principles, and larding up an affirmation in support of or opposition to a motion may lead the court to skim the affirmation and miss the substance of counsel's argument.¹² Sparing reference to general principles may be useful to highlight or reinforce why summary judgment is appropriate (or inappropriate) in a given case. Such references should be supported by a single citation to a recent Court of Appeals decision; uncontroversial, well-established summary-judgment principles need not be evidenced by anything more.

Do Ensure That Your Evidence Is in Admissible Form

We've made this point before,¹³ but it's worth repeating: counsel for the movant should review each piece of evidence that will be included with the motion and ensure that it is in admissible form.¹⁴ Start with the affidavits. Is each signed by the witness and properly notarized? And, if acknowledged outside of New York, is each affidavit accompanied by the appropriate certification "flag" demonstrating the authority of the oath taker, that the oath was taken in accordance with the laws of the state or country in which it occurred, or both?¹⁵

Next, check the deposition transcripts. Is each transcript certified by the court reporter and signed by the deponent? A transcript that has not been signed by the deponent may still be admissible, but counsel must demonstrate that (1) execution of the transcript is unnecessary because it was forwarded to the deponent, but he or she did not sign and return it within 60 days,¹⁶ or (2)

the unsigned deposition is being used against a party-deponent as an admission.¹⁷

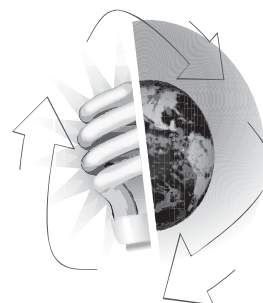
A foundation should be laid for each record relied on in the motion, especially business and medical records,¹⁸ which are so frequently utilized in motion practice. And any statement in the evidence that is hearsay should, if possible, be qualified for the court's consideration under an exception to the hearsay rule.¹⁹

Don't Ignore the Flexibility of the Evidence-in-Admissible-Form Requirement With Respect to Evidence Submitted by the Party Opposing the Motion

The rigidity of the rule requiring the movant to tender evidence in admissible form should be contrasted with the principle that, under certain circumstances, a party opposing summary judgment may rely on evidence that is not in admissible form. "The rule with respect to defeating a motion for summary judgment . . . is more flexible, [because] the opposing party . . . may be permitted to demonstrate [an] acceptable excuse for [the] failure to meet the strict requirement of tender in admissible form."²⁰ Thus, a party opposing summary judgment may defeat the motion if the party can provide the court with a *reasonable* excuse for the failure to submit evidence in admissible form.²¹

Additionally, a party opposing summary judgment may rely on hearsay, provided it is not the only evidence

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submitted by the party.²² And the benefit of the doubt as to the admissibility at trial of a particular item of evidence submitted by a party opposing summary judgment is resolved in favor of that party: if the admissibility of the non-movant's evidence is arguable, the motion should be denied.²³

Don't Forget That Unpleaded Causes of Action and Defenses Can Be Considered on the Motion

Unpleaded causes of action or defenses may be considered on a motion for summary judgment. So held the Court of Appeals in *Alvord & Swift v. Stewart M. Muller Construction Co., Inc.*, in which the Court stated that “[m]odern principles of procedure do not permit an unconditional grant of summary judgment against a plaintiff who, despite defects in pleading, has in [it]s submissions made out a cause of action.”²⁴ The Court also observed that, “[w]ith the advent of the modern principles underlying the CPLR, application of the archaic rule [allowing a court to grant summary judgment for a defendant when a plaintiff's submissions, but not its pleadings, made out a cause of action] is no longer merited.”²⁵ Therefore, a party opposing summary judgment may attempt to defeat the motion by asserting an unpleaded cause of action or defense, provided the claim finds evidentiary support in the party's papers.²⁶ Moreover, a party may seek summary judgment on an unpleaded cause of action or defense if the party's evidence establishes its entitlement to judgment as a matter of law on the unpleaded claim, and the party opposing the motion will not be surprised or prejudiced by the assertion of the unpleaded claim.²⁷

Do Remember to Demonstrate That Your Expert Is Qualified to Render an Opinion

Expert evidence plays a critical role in summary-judgment practice. Expert affidavits (or, where appropriate, affirmations)²⁸ are used to support or defeat summary judgment in myriad types of cases. The party offering expert evidence must establish that the putative expert is qualified to render an opinion on the relevant subject matter. While the issue of the qualification of a witness to render an expert opinion customarily arises at trial, the requirement that a witness be so qualified applies with equal force to a witness offering an opinion in connection with a motion. Therefore, if counsel is submitting an expert's affidavit on a summary-judgment motion, counsel must ensure the expert demonstrates that he or she possesses sufficient skill, training, education, knowledge, or experience from which it may reasonably be inferred that the information the expert imparts and any opinion that the expert states is reliable.²⁹ The expert's affidavit should contain detailed information regarding the expert's background in the subject matter on which he or she is offering an opinion, and that information should evince that the expert is qualified to render the proffered opinion.³⁰

Do Consider Disclosing Your Expert Prior to the Filing of the Note of Issue

Much ink has been spilled on the issue of *when* a party must disclose its expert.³¹ We focus on the matter as it relates to the use of experts on a summary judgment motion. A line of cases from the Second Department held or indicated that a party's failure to disclose its expert in accordance with CPLR 3101(d)(1)(i)³² prior to the filing of the note of issue should result in the party being precluded from offering the expert's opinions on a summary-judgment motion, unless the party can demonstrate good cause for belated disclosure.³³ The First Department signaled that it may agree with that approach.³⁴ However, the majority of one panel of the Second Department has sought to clarify that court's jurisprudence on the timing-of-expert-disclosure issue, holding that

the fact that the disclosure of an expert pursuant to CPLR 3101(d)(1)(i) takes place after the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely. Rather, the fact that pretrial disclosure of an expert pursuant to CPLR 3101(d)(1)(i) has been made after the filing of the note of issue and certificate of readiness is but one factor in determining whether disclosure is untimely. If a court finds that the disclosure is untimely after considering all of the relevant circumstances in a particular case, it still may, in its discretion, consider an affidavit or affirmation from that expert submitted in the context of a motion for summary judgment, or it may impose an appropriate sanction.³⁵

The foregoing suggests that the issues of whether a party must disclose its expert prior to the filing of the note of issue and, if it fails to do so, the extent of a trial court's discretion to forgive that failure, are not settled concretely.³⁶

To avoid a finding that a party's expert disclosure is untimely and preclusion of the use of the expert on a motion, the party can disclose its expert before the filing of the note of issue. A safe play, but the party may not want to do that. Maybe the party is trying to resolve the case before retaining (and paying) an expert, a course of action that spares the client a potentially significant expense. If post-note disclosure is counsel's preferred route, he or she should address the timeliness issue in the affirmation in support of or opposition to a summary-judgment motion. Counsel should, if possible, attempt to demonstrate that the disclosure, although occurring after the filing of the note of issue, was timely.³⁷ Counsel should also argue in the alternative that, assuming the disclosure was untimely, the court should exercise its discretion to consider the expert's affidavit.³⁸

Don't Misuse the Reply

A reply serves valuable functions: it allows the movant to answer points made by the party opposing the motion and to reiterate central points made by the movant in its

underlying motion papers. It cannot be used to introduce new arguments, new grounds or new evidence in support of the motion.³⁹ The rule serves to prevent a movant from remedying in reply basic deficiencies in its prima facie showing of entitlement to judgment as a matter of law.⁴⁰ So, counsel for the movant should ensure that all arguments in favor of the motion and all evidence necessary to support them are included in the underlying motion papers. Note, too, that the practice of using “supplemental submissions,” that is, papers that parties attempt to submit beyond reply, has fallen into disrepute.⁴¹ Counsel should therefore lay bare the client’s proof at the appropriate time (for the movant, in the underlying motion papers; for the party opposing the motion, in opposition papers) and not count on any additional chance to submit evidence in connection with the motion.⁴² ■

1. See *Brill v. City of N.Y.*, 2 N.Y.3d 648 (2004).

2. Generally, service of the motion – not its filing – will determine when the motion was “made” and whether it was timely. See CPLR 2211; cf. *Corchado v. City of N.Y.*, 64 A.D.3d 429 (1st Dep’t 2009) (where so-ordered stipulation stated that filing of motion was act that had to occur by deadline, court required motion to be filed not served before deadline).

3. For a thorough charting of the various issues associated with calculating the deadline, as well as a detailed discussion of the good cause requirement, see Patrick M. Connors, *CPLR 3212(a)’s Timing Requirement for Summary Judgment Motions*, 71 Brook. L. Rev. 1529 (2006).

4. See *Avalon Gardens Rehabilitation & Health Care Ctr., LLC v. Morsello*, 97 A.D.3d 611 (2d Dep’t 2012); *Crossett v. Wing Farm, Inc.*, 79 A.D.3d 1334 (3d Dep’t 2010).

5. See, e.g., *Weinstein v. Gindi*, 92 A.D.3d 526 (1st Dep’t 2012); *Ahern v. Shepherd*, 89 A.D.3d 1046 (2d Dep’t 2011); *Riddell v. Brown*, 32 A.D.3d 1212 (4th Dep’t 2006).

6. See *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 (2012).

7. *Velasquez v. Gomez*, 44 A.D.3d 649 (2d Dep’t 2007); *George Larkin Trucking Co. v. Lisbon Tire Mart, Inc.*, 185 A.D.2d 614 (4th Dep’t 1992); see *Chow v. Reckitt & Coleman, Inc.*, 17 N.Y.3d 29 (2011); *Smalls v. AII Indus., Inc.*, 10 N.Y.3d 733 (2008); *Sosa v. 46th St. Dev. LLC*, 101 A.D.3d 490 (1st Dep’t 2012).

8. See *River Ridge Living Ctr., LLC v. ADL Data Sys., Inc.*, 98 A.D.3d 724 (2d Dep’t 2012); *Lane v. Texas Roadhouse Holdings, LLC*, 96 A.D.3d 1364 (4th Dep’t 2012); *Alvarez v. 21st Century Renovations Ltd.*, 66 A.D.3d 524 (1st Dep’t 2009).

9. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); see *Chow*, 17 N.Y.3d at 36 (Smith, J., concurring).

10. *Celotex Corp.*, 477 U.S. at 323.

11. Here are some examples of first principles of summary-judgment motion practice:

- summary judgment is a drastic remedy;
- issue finding, rather than issue-determination, is the key to the summary-judgment procedure;
- matters of credibility cannot be resolved on a summary-judgment motion;
- the facts must be viewed in the light most favorable to the non-moving party;
- the moving party’s failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers.

See generally Siegel, N.Y. Practice § 278 (5th ed.).

12. See generally Gerald Lebovits, *Do’s, Don’ts and Maybes: Legal Writing Don’ts – Part I*, N.Y. St. B.J. 64 (July/Aug. 2007).

13. John R. Higgitt, *Ten Tips to Improve Your Motion Practice*, N.Y.L.J., Apr. 3, 2012, p. 4.

14. See *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067 (1979).

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15. See Connors, McKinney's Practice Commentary, CPLR 2309 (2013).
16. See Connors, McKinney's Practice Commentary, CPLR 3116 (2008).
17. See *Morchik v. Trinity Sch.*, 257 A.D.2d 534 (1st Dep't 1999); see also *Delishi v. Prop. Owner (USA) LLC*, 31 Misc. 3d 661 (Sup. Ct., Kings Co. 2011).
18. See CPLR 4518.
19. See *JP Morgan Chase Bank, N.A. v. RADS Grp., Inc.*, 88 A.D.3d 766 (2d Dep't 2011); *Whitfield v. City of N.Y.*, 48 A.D.3d 798 (2d Dep't 2008). The following are commonly invoked hearsay exceptions:
 - an admission by a party;
 - a present sense impression;
 - an excited utterance;
 - a statement reflecting the declarant's state of mind or physical condition;
 - a statement made for the purpose of medical diagnosis or treatment.
- See generally Barker and Alexander, Evidence in New York State and Federal Courts, §§ 8:15-8:22, 8:29-8:33 (5A West's N.Y. Prac. Series 2012).
20. *Friends of Animals, Inc.*, 46 N.Y.2d at 1068.
21. See *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557 (1980); *Phillips v. Joseph Kantor & Co.*, 31 N.Y.2d 307 (1972) (party can defeat summary judgment by submitting affidavit setting forth names of witnesses, the substance of their testimony, how it was known what their testimony would be, and how the witnesses acquired their knowledge). Furthermore, CPLR 3212(f) provides that, "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had. . . ." See John R. Higgitt, *Opposing Summary Judgment Motions Under CPLR 3212(f)*, N.Y.L.J., Oct. 17, 2005, pp. 4, 8.
22. See *Sumitomo Mitsui Banking Corp. v. Credit Suisse*, 89 A.D.3d 561 (1st Dep't 2011); see also Vincent C. Alexander, *Opposing Summary Judgment With Hearsay*, N.Y.L.J., Mar. 15, 2004, pp. 4, 8.
23. See Siegel, N.Y. Practice § 281.
24. *Alvord & Swift v. Stewart M. Muller Constr. Co., Inc.*, 46 N.Y.2d 276, 279 (1978).
25. *Id.* at 281; see *Perry v. Edwards*, 79 A.D.3d 1629 (4th Dep't 2010); but see, e.g., *Ostrov v. Rozbruch*, 91 A.D.3d 147, 154 (1st Dep't 2012) ("A court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint" (quoting *Mezger v. Wyndham Homes, Inc.*, 81 A.D.3d 795, 796 (2d Dep't 2011))).
26. See *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 N.Y.2d 175 (1982); *Preferred Capital, Inc. v. PBK, Inc.*, 309 A.D.2d 1168 (4th Dep't 2003); see also Siegel, Practice Commentaries, *supra*, CPLR 3212, C3212:10.
27. See *Herbert F. Darling, Inc. v. City of Niagara Falls*, 69 A.D.2d 989 (4th Dep't 1979), *aff'd*, 49 N.Y.2d 855 (1980); *Rosario v. City of N.Y.*, 261 A.D.2d 380 (2d Dep't 1999); *Weinstock v. Handler*, 254 A.D.2d 165, 679 N.Y.S.2d 48 (1st Dep't 1998); see also Siegel, Practice Commentaries, *supra*, CPLR 3212, C3212:11. If the client is relying on an unpleaded cause of action or defense in support of or opposition to a summary judgment motion, counsel should, in his or her affirmation, highlight the new claim and, if possible, explain why the claim was not asserted sooner. *Cf.*, e.g., *Comsewogue Union Free Sch. Dist. v. Allied-Trent Roofing Sys., Inc.*, 15 A.D.3d 523 (2d Dep't 2005). Also, counsel in his or her affirmation should quote the operative language from *Alvord* permitting the use of unpleaded claims. This strategy may help counsel deal with case law suggesting that reliance on unpleaded claims is prohibited. See, e.g., *Ostrov*, 91 A.D.3d 147; *Mezger*, 81 A.D.3d 795; *Abalola v. Flower Hosp.*, 44 A.D.3d 522 (1st Dep't 2007).
28. An expert may be allowed to submit a sworn statement in an affirmation instead of an affidavit (which obviates the need for a notary public or other similar official), but only certain expressly listed professionals are authorized to use an affirmation (see CPLR 2106). Care must therefore be taken in utilizing an affirmation. See generally Alexander, Practice Commentaries, *supra*, CPLR 2106).
29. *Matott v. Ward*, 48 N.Y.2d 455, 459 (1979); see *Price v. N.Y. City Hous. Auth.*, 92 N.Y.2d 553, 562 (1998) (neither formal training nor attainment of academic degree is a precondition to witness being deemed qualified; qualification may be demonstrated by showing practical experience in relevant field).
30. See *Steuer v. HSBC Bank USA, NA*, 82 A.D.3d 1680 (4th Dep't 2011); *Shank v. Mehling*, 84 A.D.3d 776 (2d Dep't 2011); *Schechter v. 3320 Holding*

LLC, 64 A.D.3d 446, 883 N.Y.S.2d 193 (1st Dep't 2009). In his or her affidavit, the witness need only make a prima facie showing that he or she is qualified to render an expert opinion (see *Breese v. Hertz Corp.*, 25 A.D.2d 621, 267 N.Y.S.2d 703 [1st Dep't 1966]; see also *Lack v. E.P. Lawson Co.*, 16 N.Y.2d 942, 264 N.Y.S.2d 926 [1965]), a point counsel should stress in his or her affirmation. Once that showing has been made, any challenge to the scope or caliber of the witness' qualifications relates to weight the opinion will be afforded by the trier of fact. See *Miele v. Am. Tobacco Co.*, 2 A.D.3d 799 (2d Dep't 2003).

31. See, e.g., Connors, Practice Commentaries, CPLR 3101, C3101:29A; David Paul Horowitz, *If a [Singletree] Falls . . .*, 84 N.Y. St. B.J. 16 (Nov./Dec. 2012); David Paul Horowitz, *A [Single]tree Grows in Manhattan*, N.Y. St. B.J. 22 (Oct. 2012); Patrick M. Connors, *Case Law on CPLR 3101(d)(1)(i), Expert Disclosure, Is in Shambles*, N.Y.L.J., Jan. 20, 2009, pp. 3, 6.
32. CPLR 3101(d)(1)(i) provides, in relevant part, that

[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just.

33. See, e.g., *Stolarski v. DeSimone*, 83 A.D.3d 1042 (2d Dep't 2011); *Gerardi v. Verizon N.Y., Inc.*, 66 A.D.3d 960 (2d Dep't 2009); *Constr. by Singletree, Inc. v. Lowe*, 55 A.D.3d 861 (2d Dep't 2008).
34. See *Garcia v. City of N.Y.*, 98 A.D.3d 857 (1st Dep't 2012).
35. *Rivers v. Birnbaum*, 102 A.D.3d 26 (2d Dep't 2012); see *Jacobs v. Nussbaum*, 100 A.D.3d 702 (2d Dep't 2012).
36. The court in *Rivers* stated that a trial court can impose a specific deadline (e.g., prior to the filing of the note of issue) for the disclosure of experts. Such deadlines can appear in an order, a judge's part rules or the rules of a court or judicial district. When the court has set a specific deadline, the issue of whether a given disclosure is timely should be clear-cut. Additionally, the parties should be free to enter into a so-ordered stipulation in the nature of a scheduling order to set the deadlines for expert disclosure. These so-ordered stipulations may be particularly useful in commercial actions, since many members of the commercial bar are accustomed to stipulating to engage in expert disclosure within designated timeframes (see Haig, Commercial Litigation in New York State Courts, § 11:16 (2 West's N.Y. Prac. Series 3d ed.) ("[I]n New York's Commercial Division, parties often stipulate to expert disclosure similar in breadth to that required in federal court. Indeed, some commercial division form pretrial orders anticipate expert depositions. In many such cases, counsel on both sides prefer the ability to take such discovery.")).
37. *Rivers*, 102 A.D.3d at 27 ("[T]he fact that the disclosure of an expert pursuant to CPLR 3101(d)(1)(i) takes place after the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely. Rather, the fact that pretrial disclosure of an expert pursuant to CPLR 3101(d)(1)(i) has been made after the filing of the note of issue and certificate of readiness is but one factor in determining whether disclosure is untimely.").
38. *Id.* at 27 ("[I]f a court finds that the disclosure is untimely after considering all of the relevant circumstances in a particular case, it still may, in its discretion, consider an affidavit or affirmation from that expert submitted in the context of a motion for summary judgment, or it may impose an appropriate sanction."). In determining whether to exercise its discretion to consider the affidavit of an expert who was not disclosed timely, a court may give particular weight to whether the party proffering the expert offers a reasonable excuse for the failure to disclose timely the expert, whether that party intentionally or willfully failed to disclose timely the expert and whether the opposing party was prejudiced (see, e.g., *Kozlowski v. Oana*, 102 A.D.3d 751 (2d Dep't 2013); *LeMaire v. Kuncham*, 102 A.D.3d 659 (2d Dep't 2013)).
39. *Dannasch v. Bifulco*, 184 A.D.2d 415 (1st Dep't 1992).
40. *Kennelly v. Mobius Realty Holdings LLC*, 33 A.D.3d 380 (1st Dep't 2006).
41. See *Ostrov*, 91 A.D.3d at 155 (trial court has inherent discretion to consider supplemental submissions, but they "should be sparingly used to clarify limited issues, and should not be utilized . . . to correct deficiencies in a party's moving or answering papers").
42. See Patrick M. Connors, *Just One More Thing: Supplemental Submissions on Summary Judgment*, N.Y.L.J., Sept. 17, 2012, pp. 4, 8.

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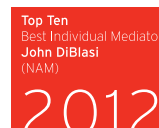
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Corporate Governance: Lessons From Life and Litigation – With Implications for Corporate Counsel

By H. Stephen Grace Jr. and John E. Hauptert

This article¹ will discuss the evolution of corporate governance that is so obvious today, and the lessons we are continuing to learn from that evolution. The goal of this article is to examine the impact of this governance evolution on corporate counsel. It should be noted that the role of corporate counsel is becoming more complex and defining that role is becoming that much more difficult.

First we will focus on some general lessons emerging from corporate governance studies and then on specific lessons from the well-known Walt Disney Shareholder Derivative Litigation.

Lesson I: Tone at the Top

The first lesson is that a well-written, interesting statement of “Tone at the Top” may imply that senior managers are good stewards of corporate assets but, in practice, may be meaningless. The four “Tone at the Top” state-

ments shown in Exhibit I are thoughtfully written and clearly emphasize the importance of tone at the top.

Exhibit I

- “You’ll see people who in the early days . . . took their life savings and trusted this company with their money. And I have an awesome responsibility to those people to make sure that they’ve done right.”
- “We are offended by the perception that we would waste the resources of a company that is a major part of our life and livelihood, and that we would be happy with directors who would permit that waste. . . . So as a CEO, I want a strong, competent board.”
- “It’s more than just dollars. You’ve got to give back to the community that supported you.”
- “People have an obligation to dissent in this company.”

However, as all of you may know, the four individuals connected to these statements (Exhibit II) are currently serving time or have served time in federal penitentiaries.

Exhibit II

- “You’ll see people who in the early days . . . took their life savings and trusted this company with their money. And I have an awesome responsibility to those people to make sure that they’ve done right.”
– **Bernard Ebbers**
- “We are offended by the perception that we would waste the resources of a company that is a major part of our life and livelihood, and that we would be happy with directors who would permit that waste. . . . So as a CEO, I want a strong, competent board.”
– **Dennis Kozlowski**
- “It’s more than just dollars. You’ve got to give back to the community that supported you.”
– **John Rigas**
- “People have an obligation to dissent in this company.”
– **Jeffrey Skilling**

The actions of the people at the top did not track what they preached; instead, they looted their companies. Obviously it is necessary that tone at the top statements be backed up by the actions taken by senior staff, which leads to the next lesson.

Lesson II: Checks and Balances

Lesson II is that “Tone at the Top” must be supported by governance tools that make sure that every action can withstand close scrutiny. One way this can be accomplished is with a policy that relies heavily on “Checks and Balances,” which play a critical role in assuring that every action is consistent with the firm’s stated “Tone at the Top.” A firm’s “Checks and Balances” must include a working environment characterized by transparency, ensure that the responsibilities of each individual in the organization are well defined, hold all individuals accountable for properly addressing their responsibilities, and make clear and well-understood that there are consequences associated with failing to do so.²

There is much to be learned regarding “Checks and Balances” from “ethicless” organizations. By ethicless organizations we mean criminal enterprises, terrorist organizations and other such groups, which we would basically view as being “ethicless.” Interestingly, these organizations often have long-standing, highly successful records of operation. At the core level, these organizations’ operating structures incorporate well-defined

responsibilities for each of the individuals in the organization, hold each individual strictly accountable for the proper addressing of those responsibilities, and have in place well understood and severe consequences for failing to properly address one’s responsibilities.³

Lesson III: Division of Labor

Turning to Lesson III, it is important to keep in mind a fundamental economic principle – that the division of labor is specific to a firm at a point in time. This basic economic principle is so well understood that you find it stressed in virtually all management and organization 101 texts. This principle explains why the NY Yankees when they acquired Alex Rodriguez – the National League’s all-star shortstop and league MVP – placed him at third base. They already had an outstanding team leader at shortstop. Other teams would more than likely have kept Rodriguez at shortstop, but that did not fit the Yankees’ labor needs.

In the same vein, corporate governance structures and processes are specific to a firm at a point in time. Two firms might be in the same industry, perhaps even have the same ownership, and appear identical in many respects. Yet these firms may have very different governance structures and processes. The differences in structures and processes are not important. What is important is whether corporate governance responsibilities are being properly addressed to ensure the effectiveness of the organization’s operations and will be adequate to justify the organization’s actions in any litigation that might develop.

The board, senior management, and corporate counsel must avoid the practice, too often employed, of simply incorporating a variety of “best practices” into their firm’s governance structures and processes. Their objective should be to put in place a governance structure and processes that effectively address their organization’s needs and responsibilities at that point in time.

Corporate counsel must be involved in the formulation of the firm’s “Tone at the Top” and can be an important resource to the board and senior management in ensuring that the proper “Checks and Balances” are in place – for example, checks and balances that discourage unhealthy concentrations of power, encourage transparency, and create an environment that encourages and supports ethical behavior and deters inappropriate behavior. Corporate counsel helps define “what” has to be done, but is not necessarily responsible for determining “how” to do it – that is the responsibility of the board and senior management. However, corporate counsel should assist the board and senior management in examining whether

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the governance structure and processes in place are satisfactorily addressing “what” needs to be done.

Lesson IV: Code of Ethics and Conduct vs. Contract

Lesson IV addresses the issue of Code of Ethics and Conduct vs. Contract of Employment. In a recent matter in which the authors were involved, highly contentious litigation had arisen between an ex-CEO and his former firm in determining if the CEO’s resignation was

Lesson V: An Effective Ethics Culture

Lesson V looks at the challenge of building an effective ethics culture in an organization. The lesson here is that simply encouraging ethical behavior is not enough. You will hear senior staff and managers saying, “What we have to do is keep talking; tell people to work ethically, tell people to live ethically.” Quite frankly, while we think that is a nice try, it seems naïve in many respects. If the desire of an organization is to achieve ethical behavior, it

Violations of the code of ethics were grounds for a “for cause termination,” notwithstanding employment contract limitations.

a “qualifying” resignation, which entitled him to a nine-digit sum of compensation and benefits, or whether the resignation met the requirements of a “for cause” resignation, in which case the CEO would be owed no further compensation by the firm. The matter was clouded by the nature of the CEO’s employment agreements, which had evolved over time and appeared to give the CEO considerable flexibility in the discharge of his responsibilities, thus limiting the grounds for a “for cause” termination.

In examining the CEO’s actions, however, we found violations of the company’s code of ethics. The CEO had the company make investments in entities in which he was an investor. He bypassed board approvals in awarding incentive compensation, misled the board regarding a deferred benefits program he had set up and, in several years, failed to properly acknowledge his compliance with the company’s code of ethics, in fact hiding his non-compliance. Our position was that violations of the code of ethics were grounds for a “for cause termination,” notwithstanding employment contract limitations. While the “code trumps contract” stance was not without legal issues, the point stressed was that codes of ethics are vitally important to organizations, and violations of these codes of ethics are universally not tolerated. Further, the New York Stock Exchange, on which the firm was listed, has made clear its recognition of the importance of compliance with a firm’s code of ethics – although at the time of the ex-CEO’s resignation this was not set out as clearly as it is now. These points aided the company in achieving a favorable settlement with the ex-CEO.

This case demonstrates the importance of a strong code of ethics, which was useful in supporting the firm’s position. To build on this, corporate counsel should consider including in all employment contracts and other such documents a basic statement that, notwithstanding what is written in the various contracts, nothing written constitutes a waiver of the firm’s code of ethics, code of conduct, or corporate governance guidelines.

needs an approach that not only encourages and supports all in the organization to live and work ethically, but also deters those who do not. We suggest a method we call the “ESD” approach – Encourage, Support, and Deter (Exhibit III).

Exhibit III

- Encouraging Ethical Behavior Is Not Enough
- An “ESD” Approach
 - Encourage
 - Support
 - Deter

We believe that establishing an effective ethics culture is actually an exercise in “control theory”: putting in place responsibilities, accountability and consequences that help ensure ESD is at work.⁴ Here again, corporate counsel should be an important player, especially in helping to determine rewards for ethical employees and the price paid for violations.

The Walt Disney Shareholder Derivative Litigation

Our organization had a role as the expert for the primary D&O carrier (directors and officers liability insurance) on the Disney litigation regarding termination of Michael Ovitz’s employment. The carrier gave us the opinion that the damages being sought by the plaintiffs were excessive, without disclosing the amount of damages being sought. The carrier asked us to make a determination of the settlement value of the case. Our assignment was to arrive at a settlement value based on the merits of the case, as opposed to undertaking a comparison of certain parameters of this shareholder derivative case with other shareholder derivative cases and arriving at some statistical approximation.

Turning to the plaintiffs’ allegations, first there was the issue that Michael Eisner, the CEO of Disney, recruited Michael Ovitz as a result of their personal friendship. Then there was the allegation that the hiring of Ovitz was facilitated by Irwin Russell in his role as the chair of the Compensation Committee. Further, there was the allegation

that the Compensation Committee “inadequately” investigated the proposed terms of the Ovitz Employment Agreement (OEA). Another allegation was that, at the September 1995 Compensation Committee meeting, more time was spent on Russell’s special compensation for handling the negotiations with Ovitz than on the terms of the OEA. The purpose of this article is not to discuss in depth our work on Disney. The Delaware Chancery Court found 100% in favor of the defendants, and we highly recommend reading Chancellor William B. Chandler’s absolutely fascinating opinion. It is very insightful and interesting.

The lessons from Disney are many, and we expect there to be more over time. Our purpose here is to focus on the lessons that have emerged from the litigation that have implications for corporate counsel. In our most recent article published in the ABA’s *Business Law Today*,⁵ we touch upon three lessons that emerge from Chancellor Chandler’s opinion and that we believe merit careful consideration.

Compensation Cultures

The first lesson concerns the question of compensation cultures. The issue of compensation cultures is currently a very hot topic in the governance evolution. A careful reading of the Disney trial materials, and our work wherein we compared the hiring of Ovitz with that of five other senior executives, makes clear that Disney had a defined compensation culture in place. Further, Disney stuck to this compensation culture in its negotiations with and hiring of Michael Ovitz. In simple terms, Disney’s approach seems to have been to price the job and then find the best talent available to take the job at the price Disney determined the job merited. That differs significantly from the approach being taken in many cases, which is paying what is required to get the executive that the firm wants to hire, as its CEO or otherwise.

The Disney case strongly suggests that it is time for firms to establish their own compensation cultures. If so, the question that follows is, Who should formulate the compensation culture of the organization? More than likely, it would not be the compensation committee. That committee has responsibility for ensuring that the compensation programs operate inside the established compensation culture. It would appear that the responsibility for the creation of compensation culture could lie with the governance committee and, ultimately, the entire board. This is a challenging issue, and one in which corporate counsel certainly has a significant role.

A Proper Record

The next lesson concerns the issue of board and board committee minutes. In the past, the thinking was “less is best.” That is no longer the case. Developing a proper record of the actions of the board and board committees is important in creating a history of what was done and why it was done, as well as being very valuable informa-

tion should litigation arise. The Disney case is interesting in that the question arose as to whether the Compensation Committee minutes for its September 26, 1995, meeting could, or possibly should, have been drafted differently. If those minutes had incorporated a discussion of the work that had been done in connection with the negotiations with Ovitz and his team, the individuals by whom the work was done, the consultant they employed and perhaps a description of the negotiations, they might have been sufficient to prevent the case from going forward. Again, the role of corporate counsel is critical in the development and circulation of board and board committee meeting minutes.

Vigilance

A third lesson that emerges from Disney concerns the “vigilance” of a board and its board committees. Chandler’s thoughtful opinion raises the issue of the board’s addressing its responsibilities, as well as the ties many board members had developed with Michael Eisner.

A board must stay vigilant, notwithstanding how spectacular the success of its management team may be, such as was the case at Disney under Eisner and Wells. The board and corporate counsel have got to make sure that the i’s are dotted and t’s are crossed. Not to do so is to expose an organization’s management and board to problems such as arose in the Disney case.

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Ongoing Issues

Let us summarize ongoing issues in corporate governance, issues that are of concern to boards and senior management, including corporate counsel. First we believe there is a need to consider putting in place a fundamental management/board focus that fits the organization. Directors come from many different backgrounds. They come with a portfolio full of different activities and an agenda. Having a practice or a process that aids management and the board in focusing on the objectives and the important issues facing the organization would be of considerable value.⁶

A second ongoing issue concerns effective performance measurement. We recognize that there is presently too much reliance on complex financial statements, which are often confusing. Each firm must consider and select from the options it has available to effectively monitor the performance of its organization.⁷

A third issue concerns the industry knowledge, or lack of industry knowledge, of the independent directors. What we have is an issue of the requirement for independence versus the need for industry knowledge on the part of members of the board and the board committees. This issue is front and center, and it is currently receiving a substantial amount of attention. Certainly independence is needed on the board. However, it has also become clear that industry knowledge is a tremendous asset for a board.

Building off the issue of the need for industry knowledge, there is, perhaps, the question of whether a board and its board committees would benefit from the presence of literally a “full-time director” – an individual who is a member of senior management in the company

and continues to be employed by the company but has no operating responsibilities. The individual’s responsibilities are assisting fellow board members. Such full-time directors do exist. While such individuals are not former CEOs, they bring to the board a potentially valuable depth of knowledge of the firm.

The proper forum for addressing these and other ongoing issues seems to be the governance committee. Our sense is that the governance committee is continuing to emerge, and it appears to be a committee well situated to address the evolving range of corporate governance issues. Corporate counsels should play an important part in providing guidance to that committee. ■

1. This article is based on a speech delivered at the SMU Dedman Law School Corporate Counsel Symposium, October 14, 2011.
2. All individuals in an organization, from entry level to CEO, should have their work subject to oversight and review by others. For further discussion see H. Stephen Grace, Jr., “From ‘Tone at the Top’ to ‘Checks and Balances,’” co-authored with James N. Clark, R. Hartwell Gardner, John E. Hauptert and Robert S. Roath, *The CPA Journal*, March 2002, p. 63.
3. See H. Stephen Grace, Jr., *Effective Governance in an Ethicless Organization*, CPA J. (May 2005), pp. 6, 8.
4. H. Stephen Grace, Jr. & John E. Hauptert, *How to Make an Ethics Program Work*, CPA J. (Apr. 2006), pp. 66–67.
5. H. Stephen Grace, Jr. & John E. Hauptert, *Governance Lessons From the Disney Litigation*, *Business Law Today* (ABA) Sept. 2011; H. Stephen Grace, Jr., *Plaintiff Expert Reports: An Insider Revisits Disney*, N.Y. St B.J. (July/Aug. 2009), p. 24; H. Stephen Grace, Jr., *An Insider Revisits the “Disney Case,”* *Directors Monthly* (Aug. 2008).
6. An article we authored in the November 2011 issue of *Financial Executive*, “Still Searching for the Missing Management Model,” discusses an approach that can be taken to create this fundamental management/board focus, which can be so helpful.
7. In the March/April 2010 issue of *The Corporate Board*, we authored an article titled “Cash Flow Monitoring as a Governance Tool,” which sets out what we believe is a valuable approach to the issue of performance measurement.



Fund Available To Assist Superstorm Sandy Victims In Obtaining Legal Help

Nearly \$50,000 has been pledged to the “Superstorm Sandy Relief Fund” to lend financial support to local bar associations and legal service providers, helping those organizations reach out to those in need and provide essential legal services to storm victims.

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Tax-deductible donations may be sent to the New York Bar Foundation, One Elk Street, Albany, New York 12207. Checks should be made payable to: The New York Bar Foundation, with the notation, “Superstorm Sandy Relief Fund.” Donors also can contribute online by visiting www.tnybf.org, clicking “Make a Donation,” and choosing this fund from the “Restricted Funds” drop-down menu.

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DAVID P. QUINN is Associate Counsel and Director of Litigation at the New York State Public Employment Relations Board. The opinions stated herein are his own and do not necessarily reflect those of the Board. He notes that much of the development of PERB's administration of the Taylor Law's injunctive relief provisions is the product of the work of his predecessors, Gary Johnson, William Busler and Sandra Nathan. This article first appeared, in a slightly different form, in the Spring 2012 *Labor and Employment Law Journal*, a publication of the Labor and Employment Law Section of the New York State Bar Association.

Injunctive Relief Under the Taylor Law: A Primer

By David P. Quinn

Effective January 1, 1995, Civil Service Law Article 14 (the Taylor Law) was amended by adding § 209-a.4, which provides for injunctive relief in aid of improper practice charges before the New York State Public Employment Relations Board (PERB) and the New York City Board of Collective Bargaining (BCB). This article takes a look at the statute and its history; it also describes PERB's Rules of Procedure and offers some practice tips.

History

Under Civil Service Law (the Act) § 205.5(d), PERB is authorized to issue an order directing an offending party in an improper practice proceeding to "cease and desist from any improper practice, and to take such affirmative action as will effectuate the policies of [the Act]." By directing an offending party to "cease and desist," PERB provides prospective relief to the charging party. Retroactive relief is granted under PERB's authority to direct the offending party to "take such affirmative action as will effectuate the policies of [the Act]," which restores the *status quo ante* as nearly as possible.

However, occasionally, by the time the improper practice charge is finally decided and a remedial order is

issued, no order of the Board can adequately effectuate the policies of the Act by restoring the *status quo*.

Such a situation arose in *Schenectady PBA v. City of Schenectady*.¹ There, the Appellate Division held that supreme court was authorized to grant an injunction under the CPLR to enjoin the city from unilaterally implementing a polygraph test for represented police officers – conduct that was at issue in an improper practice charge before PERB. The Appellate Division observed: "But for the injunction, respondent would administer the polygraph, petitioner would have no relief and the PERB matter would be ineffectual." Likewise, in *CSEA v. Hudson Valley Community College*,² supreme court enjoined the college from conducting a disciplinary hearing until the propriety of the disciplinary charges was decided by PERB in an improper practice proceeding.

Soon after *Schenectady* and *Hudson Valley Community College*, however, the Court of Appeals held that the supreme court was not authorized to grant injunctive relief in aid of an improper practice charge that was pending before the New York City Board of Collective Bargaining.³ In *Uniformed Firefighters Association*, the Court reasoned that judicial involvement in improper practice proceedings is "inconsistent with the basic purposes of the doctrine of primary jurisdiction" because it interferes

with the authority of administrative agencies that have the “principal responsibility for adjudicating the merits of disputes requiring special competence.”⁴ It emphasized that “early judicial assessment of the merits in public sector labor disputes would be particularly inappropriate because such disputes often require ‘a balancing of the interests’ and an evaluation of subtle questions for which ‘[n]o litmus test has yet been devised’ in an area where the courts have little experience or expertise.”⁵

In response to *Uniformed Firefighters*, the Legislature passed a bill to amend the Taylor Law in order to empower charging parties in improper practice proceedings before PERB and BCB to apply directly to supreme court for injunctive relief under CPLR Article 63.⁶ PERB and BCB were given no role in assessing the merits of the injunctions. Thus, the bill did not address the doctrine of primary jurisdiction that figured so prominently in *Uniformed Firefighters*.

Governor Mario Cuomo, though, appears to have had the doctrine of primary jurisdiction in mind when he vetoed the bill. While agreeing with the need for injunctive relief in appropriate circumstances, in his June 7, 1993, veto message, the Governor stated: “[S]ince the special expertise for reviewing improper practice charges rests with PERB, I would prefer that the remedy be provided through PERB, instead of directly from the courts.”

In the following year, the Legislature passed, and Governor Cuomo signed, the bill that now provides for injunctive relief in aid of improper practice charges before PERB and BCB.⁷ First effective on January 1, 1995, the statute expires every two years, but has, to date, been renewed each time. Its current incarnation expires on December 31, 2013.

The Statute

Now, under § 209-a.4(a) of the Act, a party filing an improper practice charge may petition the Board

to obtain injunctive relief, pending a decision on the merits of said charge by an administrative law judge, upon a showing that: (i) there is reasonable cause to believe an improper practice has occurred, and (ii) where it appears that immediate and irreparable injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual necessitating the maintenance of, or return to, the status quo to provide meaningful relief.

Notably, the standards for a Taylor Law injunction are not the same as those for an injunction under CPLR Article 63.

A preliminary injunction may be granted under CPLR Article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party’s favor.⁸

In *PERB v. Town of Islip*,⁹ citing the standards for a Taylor Law injunction, the Court of Appeals observed: “The applicable standard for granting injunctive relief [under the Taylor Law] differs significantly from the familiar three-part standard that applies to most requests for injunctive relief.” In addition, a CPLR injunction may require the moving party to post an “undertaking” sufficient to compensate the other party if the movant does not prevail in the underlying action. No such undertaking is required for a Taylor Law injunction.¹⁰

If PERB determines that the elements warranting injunctive relief are shown, it is authorized to petition in Supreme Court, Albany County, on notice to all parties, to obtain the appropriate injunction.¹¹ Alternatively, PERB may authorize the charging party to file the petition, in which event PERB must be named as a necessary party in the judicial proceeding.¹² Supreme court is authorized to grant the appropriate injunctive relief if the standards are satisfied.¹³ The statute contains virtually identical language covering injunctive relief in aid of improper practice charges before BCB, except that such proceedings originate in New York County Supreme Court.¹⁴

The standards for a Taylor Law injunction are not the same as those for an injunction under CPLR Article 63.

As a rule, PERB does not authorize the charging party to petition the court for the injunction. To date, consistent with the doctrine of primary jurisdiction, PERB has preferred to retain control over the theories advanced in support, particularly because it is the effectiveness of its remedial order that is ultimately at stake. However, when PERB petitions for injunctive relief, the charging party is permitted, on motion, to intervene in the proceeding.¹⁵ Such motions are governed by the CPLR, not the injunctive relief provisions under the Act.¹⁶

PERB has 10 calendar days after receipt of an application for injunctive relief to petition supreme court for the appropriate injunction or to authorize the charging party to initiate the proceeding or to issue a decision explaining why it is denying the application.¹⁷ If PERB does none of those things, the application is deemed denied. An application that is denied (or deemed denied) is subject to review under CPLR Article 78.¹⁸

Because the denial of an application for injunctive relief is not based on the record of a hearing, the standard of review is whether it was arbitrary and capricious, an abuse of discretion or affected by error of law under CPLR 7803(3).¹⁹ In *New York State Supreme Court Officers*

Association v. PERB,²⁰ the court observed that it may not issue an injunction if it disagrees with PERB's denial.

If an injunction is granted, the judicial order may be appealed.²¹ Therefore, under CPLR 5519, where the appellant or moving party is the state, any political subdivision of the state, or officer or agency of the state or of any political subdivision, service of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the injunction pending the appeal or determination on the motion for permission to appeal.²²

If an injunction is granted, the ALJ assigned to the underlying improper practice charge must establish a hearing schedule that will enable a decision to be issued in 60 days or, by mutual agreement, to extend that period.²³ Improper practice charges that have injunctions must be given a preference over all other matters before the Board.²⁴

the Office of Counsel determines that injunctive relief is appropriate, the affidavit(s) and exhibits in support of the application are used by PERB to support its petition to supreme court for an injunction. Therefore, they should be clear, concise and convincing. Conclusory allegations in the affidavits will not suffice.²⁹

A memorandum of law in support of an application for injunctive relief is optional³⁰ and is not used by the Office of Counsel as evidence in support of the injunction. However, it is here that the charging party can effectively argue to the Office of Counsel why the injunction is warranted, including reference to PERB precedents regarding the merits of the charge and why the alleged harm is irreparable.

An application for injunctive relief is a separate filing from the improper practice charge. While an improper practice charge is filed with the Director of Public Employment Practices and Representation, a

The Act does not provide for the resurrection of an injunction if the ALJ dismisses the charge and the Board reverses and finds that an improper practice, in fact, occurred.

If the ALJ finds that the respondent committed an improper practice, the injunction continues to the extent it implements the ALJ's remedial order, unless the respondent satisfies the remedial order and files no exceptions with the Board or successfully vacates or modifies the injunction.²⁵ If exceptions are filed, and the Board finds that the respondent has committed an improper practice, the injunction continues to the extent it implements the Board's remedial order.²⁶ The injunction expires if the Board finds that no improper practice has occurred.²⁷ The Act does not provide for the resurrection of an injunction if the ALJ dismisses the charge and the Board reverses and finds that an improper practice, in fact, occurred.

The Rules of Procedure

The procedures governing applications for injunctive relief are provided in §§ 204.15–204.18 of PERB's Rules of Procedure (Rules, 22 N.Y.C.R.R.). In § 204.17, the Board delegated the responsibility for administering the Rules and for making the appropriate determinations to PERB's Office of Counsel, currently headed by the Associate Counsel and Director of Litigation.

A complete application for injunctive relief consists of an original and two copies of a form, the underlying improper practice charge and affidavit(s) of person(s) with personal knowledge of the relevant facts establishing that an injunction is warranted, as well as any relevant exhibits.²⁸ The form is fairly self explanatory and may be downloaded from PERB's website (www.perb.ny.gov). If

charging party filing an application for injunctive relief must separately file it with PERB's Office of Counsel at the Board's Albany address.³¹ If filed by mail, the envelope must bear the legend "INJUNCTIVE RELIEF APPLICATION."³² In that way it will signal the need for prompt action.

The application and all supporting documents must be delivered to the respondent(s) in an envelope bearing the legend "ATTENTION: CHIEF LEGAL OFFICER" before they are filed with PERB, and the application must show proof of the date of actual delivery to the respondent(s).³³ The Office of Counsel will not consider the merits of an application for injunctive relief that fails to show that it has been actually delivered to the respondent(s). An application that includes an affidavit of service by mail on the respondent(s) is not evidence that it has been actually delivered. If the application is served on the respondent(s) by mail, evidence that it has been actually delivered could be an executed return receipt, or some other acknowledgment of receipt, or tracking data from the delivery service showing delivery.

Unlike filing an improper practice charge, which requires an original and four copies, an application for injunctive relief requires an original and only two copies. That is because the charging party has previously served a copy of the application on the respondent(s), unlike an improper practice charge, which is served on the respondent(s) by the Director of Public Employment Practices and Representation.

A respondent to whom an application has been delivered may (but is not required to) file with the Office of Counsel a verified response to the application within five calendar days of such delivery,³⁴ unless an earlier time is directed by the Office of Counsel.³⁵ The response is deemed filed when the Office of Counsel receives it, not when it is posted.³⁶ Therefore, the Rules permit filing by fax under certain circumstances. As with the application, the response should be directed to PERB's Office of Counsel. If not so directed, the response might be delivered to the wrong office and cause unnecessary, if not seriously problematic, delays.

The response must be supported by affidavits of person(s) with personal knowledge of the facts asserted. The response (if any) must be accompanied by proof of service on the charging party. Unlike the application itself, actual receipt by the charging party is not a prerequisite to filing the response. As with the application, a memorandum of law in support of the response is optional.

The time for a respondent to file a response (if it chooses) commences when it receives the application from the charging party, not when the Office of Counsel receives it. There is no need to call the Office of Counsel to find out whether it has received an application to which a response will be filed. Indeed, only after the charging party has confirmation that the application has been delivered to the respondent may it file the application with the Office of Counsel. Therefore, occasionally, the Office of Counsel receives a response before it receives the application.

The response is not an answer to the underlying charge.³⁷ Although the response may contain affirmative defenses to the charge, the failure to raise them in the response to the application does not constitute a waiver of those affirmative defenses in the underlying improper practice proceeding.

Although a response is optional, if none is filed the Office of Counsel has only the charging party's evidence and arguments to consider. What may appear to be a meritorious application for injunctive relief may be rejected based on information provided in the response. Examples of such circumstances are where the respondent raises a meritorious affirmative defense or where the application is based on hearsay which is directly rebutted by the respondent's affidavit(s). Sometimes allegations of harm are questionable and the respondent has information that defeats them. Although the respondent always has the opportunity to answer PERB's petition to supreme court, nipping the application in the bud at the administrative level is usually less burdensome and costly.

PERB's Review

When the Office of Counsel receives an application for injunctive relief, it first ascertains whether a charge

has been filed with the Director of Public Employment Practices and Representation and, if so, whether that office is processing the charge. It then determines whether the application has been properly filed and is complete, including whether there is proof that it has been previously delivered to the respondent. If the answer to any of those questions is "no," the Office of Counsel will not process the application. Many applications for injunctive relief are denied based on this preliminary review.

PERB's Rules do not provide for replies or sur-replies, and, because of the very tight time frame to decide the merits of an application, the Office of Counsel does not encourage them. For the same reason, the Office of Counsel does not usually pursue clarifications to allegations in the application and supporting documents regarding the merits of the application.

However, neither the Act nor the Rules provides a statute of limitations regarding applications for injunctive relief, nor do they prohibit a charging party from filing a new application if an earlier one is deficient or denied on the merits.³⁸ But, a second application alleging substantially similar facts will likely receive the same result.³⁹ Moreover, if possible, charging parties should seek injunctive relief sufficiently in advance of the alleged harm to enable the Office of Counsel to assess the merits and prepare a petition.⁴⁰

Of the applications for injunctive relief that were not technically deficient, most have been denied on their merits – usually because the alleged harm is insufficient to warrant an injunction.⁴¹ In contrast to the threshold "reasonable cause to believe an improper practice has occurred," which is a comparatively low standard, the standard for the necessary degree of harm is high.

When considering the harm, the Office of Counsel is guided by PERB's jurisdiction and remedial authority under § 205.5(d) of the Act. For example, in *CSEA & Village of Hempstead (Barrows)*,⁴² the Office of Counsel denied an application for injunctive relief associated with an alleged breach of the duty of fair representation under § 209-a.2(c) of the Act, because the alleged harm was owing to the breach of the contract over which PERB lacked jurisdiction. Similarly, in *County of Suffolk (Communications Workers of America)*,⁴³ an application was denied concerning conduct allegedly affecting the outcome of an election being conducted by the Suffolk County mini-PERB, which had jurisdiction to remedy the effect of the conduct on the charging party.

Perhaps the clearest illustration of irreparable harm warranting an injunction is where an employer unilaterally requires employees or a union to disclose confidential information, as in *City of Schenectady*. If a violation is found, an order of the Board cannot restore the privacy interests so compromised.⁴⁴

To date, the Office of Counsel has not pursued injunctive relief where the harm is limited to the pecuniary losses of individuals who have lost their jobs allegedly in

violation of the Act, finding that reinstatement with back pay is an effective remedial order under § 205.5(d) if a violation is found.⁴⁵ On the other hand, PERB obtained an injunction preventing a city from refusing to deduct and remit union dues and agency fees on the ground that the union required the funds to effectively represent the unit.⁴⁶ Similarly, PERB obtained an injunction against the state, requiring it to resume payments into a union health fund that provided prescription drugs to all unit employees for a variety of life-sustaining purposes.⁴⁷

In addition, PERB obtained an injunction to prevent a unilateral change in vacation bid procedures affecting outside employment and planned vacations;⁴⁸ a unilateral change in sick leave procedures, which resulted in overtime assignments in derogation of doctor's restrictions;⁴⁹ and a unilateral directive requiring an employee to undergo a medical assessment and to enroll in a substance abuse treatment program.⁵⁰

PERB unsuccessfully sought an injunction to require a town to reinstate a cadre of union organizers and negotiators allegedly terminated in retaliation for their exercise of protected rights.⁵¹ The court rejected PERB's argument that the employer's action had a chilling effect on the remaining unit employees. Likewise, PERB's applications for injunctive relief were denied in *PERB v. Buffalo Water Board*⁵² and in *PERB v. Town of Orangetown*.⁵³

When the Office of Counsel decides to seek an injunction, it sends to each party a formal notice of intent that includes how and when it will proceed. As a rule, PERB seeks an injunction by Order to Show Cause and Petition, and requests a Temporary Restraining Order. In such cases, the notice of intent advises the respondent when PERB will appear in Albany County Supreme Court, affording it an opportunity to be heard on the request for the temporary relief. At that time, the court usually sets a time for the respondent to answer the petition and schedules a date for argument on the preliminary injunction.

Of the more than 350 applications for injunctive relief that PERB has received since 1995, only 12 (about 3.3%) resulted in a judicial order. One of the reasons that so few meritorious applications for injunctive relief result in a judicial order is that many are settled before a petition is filed or before the judgment is issued. Often, respondents are willing to voluntarily stay their hands regarding the at-issue conduct pending final disposition by the Board on the merits of the charge.

Although the Office of Counsel will consult with the charging party regarding such settlements, ultimately, if the Office of Counsel is satisfied that the alleged harm is no longer "irreparable" under the terms of the respondent's agreement, it will ask the charging party to withdraw the application, or it will deny it.⁵⁴ Occasionally, such settlement efforts resolve the underlying improper practice charge as well. However, because settlement efforts often take more than the statutory 10 days within

which PERB must petition the court, they are undertaken only if the respondent agrees to waive the timeliness of the petition – a waiver that many respondents are willing to enter if it means that they might avoid costly litigation.

Conclusion

The Taylor Law has been amended several times to address deficiencies in PERB's remedial powers. The injunctive relief provision is the most recent. It is, as the others that preceded it, a tool to enable PERB to issue a meaningful remedial order in an improper practice proceeding that can effectuate the policies of the Act. ■

1. 158 A.D.2d 849, 23 PERB ¶ 7507 (3d Dep't 1990).
2. 24 PERB ¶ 7511 (Sup. Ct., Ulster Co. 1991).
3. See *Uniformed Firefighters Ass'n of Greater N.Y. v. City of N.Y.*, 79 N.Y.2d 236 (1992).
4. *Id.* at 241.
5. *Id.*
6. Senate Bill No. 1767, 1993.
7. 1994 N.Y. Laws ch. 695.
8. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988).
9. 41 PERB ¶ 7005 (Sup. Ct., Albany Co. 2008).
10. Civ. Serv. Law § 209-a.4(b).
11. *Id.*
12. *Id.*
13. Civ. Serv. Law § 209-a.4(d).
14. Civ. Serv. Law § 209-a.5.
15. See, e.g., *PERB v. City of Troy*, 28 PERB ¶ 7002 (Sup. Ct., Albany Co. 1995). Intervention may be advisable because subsequent litigation can be undertaken by the charging party. See, e.g., *PERB v. City of Troy*, 28 PERB ¶ 7003 (3d Dep't 1995).
16. See, e.g., *PERB v. Cnty. of Monroe*, 42 PERB ¶ 7007 (Sup. Ct., Albany Co. 2009) (motion to intervene denied).
17. Civ. Serv. Law § 204-a.4(b).
18. Civ. Serv. Law § 209-a.4(c).
19. See, e.g., *N.Y. State Supreme Court Officers Ass'n v. PERB*, 35 PERB ¶ 7009 (Sup. Ct., Albany Co. 2002); *Local 100, Transp. Workers Union v. PERB*, 28 PERB ¶ 7010 (Sup. Ct., Albany Co. 1995).
20. 35 PERB ¶ 7009 (Sup. Ct., Albany Co. 2002).
21. Civ. Serv. Law § 209-a.4(e).
22. CPLR 5519. The Appellate Division, Second Department, has held that the automatic stay on behalf of governmental appellants applies only to mandatory injunctions ordering the performance of some affirmative act — those that usually result in a change in the *status quo*. *State v. Town of Haverstraw*, 219 A.D.2d 64, (2d Dep't 1996). The court held that the stay does not apply to prohibitory injunctions, which are self-executing and need no enforcement procedure to compel inaction on the part of the person or entity restrained. In addition, courts will not suffer lightly any perversion of the Legislature's intention in affording governmental entities such an automatic stay on appeal. See *Troy Police Benevolent & Protective Ass'n v. City of Troy*, 223 A.D.2d 995 (3d Dep't 1996). An appeal for the removal of such a stay may be given a preference under CPLR 5521. See Civ. Serv. Law § 209-a.4(h).
23. Civ. Serv. Law § 209-a.4(d).
24. Civ. Serv. Law § 209-a.4(g).
25. Civ. Serv. Law § 209-a.4(e).
26. *Id.*
27. *Id.*
28. Rules § 204.15(b), (c).
29. See, e.g., *N.Y. State Supreme Court Officers Ass'n v. PERB*, 35 PERB ¶ 7009 (Sup. Ct., Albany Co. 2002).

30. Rules § 204.15(c)(5).

31. Rules § 204.15(a). The address is 80 Wolf Rd., Room 500, Albany, NY 12205.

32. If the charge and the application are filed in the same envelope, it is possible that one office or the other will not receive the material that is intended for that office in a timely fashion.

33. Rules § 204.15(c).

34. Rules § 204.16(a).

35. Rules § 204.16(c).

36. Rules § 204.16(a).

37. Rules § 204.16(b).

38. See, e.g., *Town of Orangetown (Orangetown PBA)*, 38 PERB ¶¶ 6006, 6008 (2005).

39. See, e.g., *N.Y. State Unified Court Sys. (McConnell)*, 41 PERB ¶¶ 6004, 6006 (2008).

40. See, e.g., *PERB v. City of Buffalo*, 34 PERB ¶ 7014 (Sup. Ct., Albany Co. 2001) (PERB's petition for an injunction was denied as moot because the harm had already occurred).

41. Between 1995 and 2002, decisions of the Office of Counsel denying applications for injunctive relief were in the form of brief orders, and none was published. In 2002, the Office of Counsel began publishing denial decisions (other than those for technical deficiencies) in the form of full PERB decisions, and, although not required under the statute, from 2002 until 2007, the office published decisions in like form explaining why it was going to seek an injunction. Because such decisions are not precedential, they were published only to serve as guides for practitioners. Currently, the office will publish a decision denying an application for injunctive relief only if it raises novel issues that will serve as further guidance to practitioners. It no longer publishes decisions explaining why it will seek an injunction.

42. 42 PERB ¶ 6010 (2009).

43. 42 PERB ¶ 6008 (2009).

44. See, e.g., *PERB v. Cnty. of Monroe*, 42 PERB ¶ 7007 (Sup. Ct., Albany Co. 2009); *PERB v. Town of Islip*, 41 PERB ¶ 7005 (Sup. Ct., Albany Co. 2008); *PERB v. City of Buffalo*, 28 PERB ¶ 7008 (Sup. Ct., Albany Co. 1995).

45. See, e.g., *City Univ. of N.Y. (Prof'l Staff Congress)*, 42 PERB ¶ 6003 (2009).

46. *PERB v. City of Troy*, 28 PERB ¶ 7002 (Sup. Ct., Albany Co. 1995).

47. *PERB v. State of N.Y.*, 29 PERB ¶ 7006 (Sup. Ct., Albany Co. 1996).

48. *PERB v. Cnty. of Rockland*, 29 PERB ¶ 7002 (Sup. Ct., Albany Co. 1996).

49. *PERB v. Cnty. of Onondaga & Sheriff of Onondaga Cnty.*, 29 PERB ¶ 7010 (Sup. Ct., Albany Co. 1996).

50. *PERB v. N.Y. City Transit Auth.*, 36 PERB ¶ 7012 (Sup. Ct., Albany Co. 2003).

51. *PERB v. Town of Lewiston*, 31 PERB ¶ 7005 (Sup. Ct., Albany Co. 1998).

52. 30 PERB ¶ 7005 (Sup. Ct., Albany Co. 1997) (alleged unilateral transfer of exclusive bargaining unit work to private company).

53. 38 PERB ¶ 7015 (Sup. Ct., Albany Co. 2005) (disciplinary proceeding under unilaterally imposed procedures).

54. See, e.g., *Town of Woodbury*, 40 PERB ¶ 6004 (2007).



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Electronic Signatures in New York: An Update on Recent Developments

Electronic transactions increasingly dominate commerce, in the U.S. and worldwide.¹ To facilitate such transactions, in 1999 the National Conference of Commissioners on Uniform State Laws approved the Uniform Electronic Transactions Act (UETA).² Shortly thereafter, in response to non-uniform state laws, and in an attempt to address writing and signature requirements in federal law, Congress passed the Electronic Signatures in Global and National Commerce Act (ESIGN),³ which became effective in 2000.⁴

Perhaps less well-known among these legislative schemes is the New York Electronic Signatures and Records Act (ESRA), adopted in 1999 and amended periodically thereafter.⁵ The ESRA scheme, that “an electronic signature may be used by a person in lieu of a signature affixed by hand,” and that the “use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand,”⁶ essentially mirrors (but does not precisely duplicate) the terms of UETA and ESIGN.⁷ Recent cases implementing ESRA, and to some extent corollary decisions under UETA and ESIGN, have begun to illustrate the practical application of this powerful tool.⁸

The ESIGN law includes a preemption provision that permits state law to operate, even in the interstate commerce arena, so long as the state law embodies UETA. Because ESRA does not precisely parallel UETA, some question may arise as to the preemptive

effects of ESIGN in New York cases involving interstate (or international) commerce. The court in *Naldi v. Grunberg*⁹ considered that question, noting that “New York’s lawmakers appear to have chosen to incorporate the substantive provisions of ESIGN into New York state law.”¹⁰ Thus, in a case involving an Italian party, the court held that it “need not determine” whether the transaction was “in or affecting interstate or foreign commerce,” because under either law, the electronic communication at issue satisfied New York’s statute of frauds.¹¹

The ESRA scheme does not, on its face, confine the effect of the law to the civil context. In *People v. Hernandez*,¹² however, the trial court noted that the “main focus” of the law was on “commercial and public record applications,” not the criminal context. The court emphasized that the law does not *compel* any party to use electronic signatures (and the criminal defendant certainly did not agree to use such signatures). The court also held that the introduction of electronically signed DWI reports, without satisfactory “authenticating certificates” regarding the manner of producing the reports, was unacceptable. The court suggested that the Legislature consider amendments to the law to address the authentication of such records for use in criminal cases.¹³ By contrast, in *People v. Patanian*,¹⁴ the court held that a police officer’s affirmation of a traffic ticket could be accomplished via an electronic signature, where the ticket itself was prepared electronically, and

a more complete form of signature would be “redundant in nature.” A recent Appellate Term decision adopts the latter view.¹⁵

The definition of “electronic signature” in ESRA (as in ESIGN and UETA) is deliberately broad and includes “an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record.”¹⁶ The breadth of the definition is confirmed by the decision in *Prudential Insurance Co. of America v. Dukoff*,¹⁷ in which the court indicated (consistent with the opinion of the New York State Insurance Department) that a “checked box on an electronic form on the Internet” may constitute a valid electronic signature. The court also found that disputed issues of fact arose as to whether the identifying information provided in connection with the “click-through” contract sufficed as “logically associated” with a specific individual.

The use of electronic signatures in the conduct of litigation has received considerable attention. In one recent case, the court held that a stipulation of settlement is not “subscribed” by an attorney, under the terms of CPLR 2104, where the emails reflecting the stipulation did not include “anything that may be considered an electronic signature, including manual, typewritten, or automatic insertion” of the names of the counsel.¹⁸ Similarly, a split has arisen in the courts on application of CPLR 2106, which also contains a requirement that an attorney or

physician affirmation be “subscribed” by the affiant.¹⁹ Finally, interpreting CPLR 4539,²⁰ a court held that a lawyer’s assertion as to the legitimacy of electronically stored records could not suffice to authenticate such records for use in court proceedings.²¹

The existence of some form of electronic signature does not necessarily suffice; a factual dispute may arise as to whether the signature was actually placed by the affected party. Thus, in *Adler v. 20/20 Cos.*²² the court denied a motion to dismiss based on a forum selection clause in an agreement purportedly signed, in electronic form, by employees. The court held that the evidence proffered “raised a factual dispute as to whether those plaintiffs actually electronically signed” the agreements.²³

Courts in other jurisdictions, applying UETA or ESIGN, have struggled with the question of what forms of electronic signature may suffice. Thus, for example, where a non-party, without authority, forwarded an email from the computer of a party, purporting to set forth terms of a settlement agreement, a Colorado court held that evidence that the electronic signature on the email was “adopted by a person with intent to sign” was absent.²⁴ Similarly, a Texas court held that an email “signature block,” without an “s/” or other symbol that “unequivocally indicates a signature,” was insufficient, where the record did not disconfirm the likelihood that the signature block was “generated automatically” by the email system versus the party “personally typ[ing]” a signature.²⁵ A California court, moreover, held that a statute requiring that a voter “personally affix” his or her signature to an initiative petition could not be satisfied via the use of an electronic form (even though the form was specifically designed to address the circumstance of voter signatures).²⁶ Another California court held that the electronic exchange of a contract, with the names of the parties printed on it, could not suffice as a “signature” where it appeared that a blank signature block (suitable for a “wet” signature) was included,

but never executed.²⁷ The Kentucky Supreme Court, moreover, held that a surreptitious electronic tape recording of a conversation in which an oral agreement was memorialized did not suffice, under ESIGN, because the electronic “signature,” even if identifiable to an individual, was not “executed or adopted” with intent to sign the contract.²⁸

Courts have also struggled with the question of what evidence suffices to show that parties intended to use electronic signatures as their method for completing an agreement. Some relatively easy cases arise, such as *Berry v. Webloyalty.com, Inc.*,²⁹ where a California court held that “affirmative steps,” including twice entering an email address, and clicking “yes” to accept terms of an online club membership, sufficed to show an intent to contract by electronic agreement. Similarly, in *Polly v. Affiliated Computer Services, Inc.*,³⁰ the execution of an electronic signature page, coupled with proof that the plaintiff received a copy of the page, and participated in training that referenced the agreement, indicated that the parties intended to contract electronically. In *Scott v. Fire Star Development, Inc.*,³¹ an Arizona court noted that

A “checked box on an electronic form on the Internet” may constitute a valid electronic signature.

“[a] person may be deemed to have consented to electronic communications [as a means to contracting] via ongoing participation in such communications, or by primary use of that medium.”³² The court nevertheless held that, where parties initially corresponded via email but later began to exchange drafts of a written agreement with “traditional signature” blocks, the parties manifested an intent not to use the electronic method for the final form of signature. Similarly, in *B. Riley & Co. v. NXTV, Inc.*,³³ a California court held that, even though the parties had used email exclusively to negotiate an agreement, and even though the plaintiff had stated “okay by me” with

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regard to proffered terms, the parties had not sufficiently manifested an intent to contract electronically, where thereafter they continued to exchange proposed term sheets for a deal.

The electronic signature laws, ESRA, ESIGN and UETA, act as statutory overlays,³⁴ specifying in broad terms that “electronic signatures” and “electronic records” must be given the same legal force and effect as traditional records and signatures.³⁵ These statutory schemes, however, do not provide a complete regulatory system for contracts, and they do not speak to the enforceability of specific terms in electronic contracts.³⁶ These laws do, however, create an essential presumption of enforceability, which should help facilitate electronic commerce.³⁷ ■

1. See Federal Trade Commission, Electronic Signatures in Global and National Commerce Act (June 2001), www.ftc.gov.

2. See Uniform Electronic Transactions Act (1999), text available at www.law.upenn.edu.

3. 15 U.S.C. ch. 96.

4. Jeremiah S. Buckley & Margo H.K. Tank, *Electronic Signatures and Records Under ESIGN, UETA and SPeRS*, at 1 (2003), www.euro.ecom.cmu.edu.

5. See N.Y. Technology Law, Article III. Most recently, ESRA was amended, in 2011 (with effectiveness in 2012) to permit electronic recording by county clerks of deeds and other instruments affecting real property. See N.Y. State Assembly Bill 6870A (also Senate Bill 2373A), text available at www.assembly.state.ny.us; see also Craig Price, *Electronic Recording Comes to New York*, www.nyrej.com (Jan. 2013) (summarizing changes); Joanna K. Slusarz, *New York Law Permits Electronic Recording of Real Property Conveyances*, www.realestateandconstructionlawmonitor.com (Oct. 13, 2011) (amendment is “modeled on” UETA).

6. ESRA § 304.

7. For a summary of differences between UETA and ESIGN, see Documenting E-Commerce Transactions (Thomson Reuters 2011) § 4:12.

8. This article does not address the international context for the use of electronic signatures. For more on that subject, see Ruth Opwood, *Electronic Contracts: Where We’ve Come From, Where We Are, And Where We Should Be Going*, 1:3 Int’l In-House Counsel J. 455 (2008).

9. 80 A.D.3d 1 (1st Dep’t 2010).

10. *Id.* at 12.

11. See *id.* at 10; see also *PEPCO Energy Servs., Inc. v. Geiringer*, 2010 WL 318284, at *2 (E.D.N.Y. Jan. 21, 2010) (noting that both “federal and state law” permit electronic signature via “electronic sound, symbol or process”); *People v. McFarlan*, 191 Misc. 2d 531, 540 (Sup. Ct., N.Y. Co. 2002) (despite “clear conflicts” between ESRA and ESIGN, “same result”

would apply under either law, and thus preemption issue “need not be reached”).

12. 31 Misc. 2d 208 (Rochester City Ct. 2011).

13. See *id.* at 219 (noting that Legislature proposed, but did not pass, specific legislation to address use of electronic signatures in criminal cases); see also *People v. Rose*, 11 Misc. 3d 200 (Rochester City Ct. 2005) (suggesting legislative revisions of Vehicle & Traffic Law to deal with electronic records).

14. 20 Misc. 3d 298 (Sand Lake Justice Ct. 2008).

15. *People v. Johnson*, 2011 WL 2086372 at *1 (App. Term. 2011) (noting “clear legislative policy to promote the use of electronic signatures,” and upholding validity of electronic signature on traffic ticket).

16. ESRA § 302.

17. 674 F. Supp. 2d 401 (E.D.N.Y. 2009).

18. *Paloger v. Cohen*, 2012 WL 5504014 at *2 n.2 (Sup. Ct., Nassau Co. Sept. 7, 2012). The court distinguished this situation from a case where emails exchanged between counsel “contained their printed names at [the] end.” *Id.* at *5 (citing *Williamson v. Delsener*, 59 A.D.3d 291 (1st Dep’t 2009)). Rule 2104 of the CPLR provides that a stipulation of agreement between parties must be “in a writing subscribed by him or his attorney or reduced to the form of an order and entered.”

19. See 2012 WL 5187445 at *2 (Sup. Ct., Kings Co. Oct. 19, 2012) (noting division between *Martin v. Portexit Corp.*, 98 A.D.3d 63 (1st Dep’t 2012), permitting use of electronic signature, and *Vista Surgical Supplies, Inc. v. Travelers Ins. Co.*, 50 A.D.3d 778 (2d Dep’t 2008), rejecting use of electronic signature).

20. Rule 4539(b) of the Civil Practice Law and Rules provides that a “reproduction created by any process which stores an image of any writing, entry, print or representation and which does not permit additions, deletions, or changes without leaving a record of such additions, deletion, or changes,” may be admitted “when authenticated by competent testimony or affidavit which shall include the manner or method by which tampering or degradation of the reproduction is prevented[.]”

21. See *Am. Express Bank, FSB v. Dalbis*, 30 Misc. 3d 1235(A) (N.Y. City Civ. Ct. 2011) (affirmation must be made “by someone who is aware of the manner in which the plaintiff’s records are compiled and maintained as well as the system employed by plaintiff to prevent tampering”) (rejecting affirmation where “counsel [has not] indicated that he has such required knowledge”); see also *Am. Express Centurion Bank v. Badalamenti*, 2010 WL 5186698 at * (Dist. Ct., Nassau Co. Dec. 21, 2010; affidavit from assistant custodian of records inadequate where witness did not have personal knowledge of methods used to avoid tampering; representatives of plaintiff in various locations presumably “had access to defendant’s records, and absent evidence to the contrary, the Court assumes that representatives had the ability to make and revise electronic entries on those records from time to time”).

22. 919 N.Y.S.2d 38 (2d Dep’t 2011).

23. *Id.* at 40 (noting possibility that “agreements were signed electronically on their behalf by a representative of [the employer], without giving those plaintiffs an opportunity to review the agreements and assent to their terms”).

24. *Buckles Mgmt., LLC v. InvestorDigs, LLC*, 728 F. Supp. 2d 1145, 1151 (D. Colo. 2010) (applying ESIGN).

25. *Cunningham v. Zurich Am. Ins. Co.*, 2011 WL 4345214, at *7 (Tex. Ct. App. Sept. 15, 2011) (unpublished) (applying UETA).

26. See *Ni v. Slocum*, 196 Cal. App. 4th 1636 (Cal. Ct. App. 2011).

27. See *Kaminski v. Land Tec, Inc.*, 2011 WL 1035533 (Cal. Ct. App. Mar. 23, 2011) (unpublished) (applying UETA); see also *City of Newton v. Shaver Wood Prods., Inc.*, 364 N.C. 562 (N.C. Sup. Ct. 2010) (applying UETA) (electronic exchange of settlement agreement, with request that plaintiff “sign” the agreement indicated that no electronic “signature” occurred); *May Trucking Co. v. Northwest Volvo Trucks, Inc.*, 238 Or. App. 21 (Or. Ct. App. 2010) (applying UETA) (“no authority” for proposition that “an unsigned signature line is itself a ‘signature’”) (emphasis in original); *Sigg v. Coltrane*, 45 Kan. App. 2d 65 (Kan. Ct. App. 2010) (same).

28. *Sawyer v. Mills*, 295 S.W.3d 79 (Ky. Sup. Ct. 2009).

29. 2011 WL 1375665 (S.D. Cal. Apr. 11, 2011).

30. 2011 WL 93715 (E.D. Ky. Jan. 11, 2011); see also *Westmeier v. Meijer Grocery Store*, 2010 WL 5104825 (S.D. Ind. Dec. 7, 2010) (typing name into box on signature field for online employment application constituted consent to use electronic format).

31. 2011 WL 540292 (Ariz. Ct. App. Feb. 15, 2011).

32. *Id.* at 4 (internal citations omitted).

33. 2010 WL 5396006 (Cal. Ct. App. Dec. 30, 2010).

34. Parties may separately agree to permit electronic signatures not specifically addressed by the statutes. Thus, for example, in *MTA Bus Co. v. ACE USA*, 36 Misc. 3d 1204(A) (Sup. Ct., N.Y. Co. 2012), the court upheld the validity of an arbitration award, although not physically signed by the arbitrators, where the rules of the arbitration forum (accepted by the parties) permitted electronic signature on an award. See also *Wen Zong Yu v. Charles Schwab & Co., Inc.*, 34 Misc. 3d 32 (App. Term. 2011) (electronic signature on brokerage agreement, including arbitration provision, valid under ESRA).

35. For further guidance on the operation of ESRA, see NYS Office for Technology, *Electronic Signature and Records Act (ESRA) Guidelines* (2001), www.nysl.nysed.gov; NYS Chief Information Officer, *Electronic Signatures and Records Act (ESRA) Guidelines* (2004), www.cio.ny.gov.

36. See *United States Life Ins. Co. v. Wilson*, 198 Md. App. 452, 480 n.5 (Md. Ct. Spec. App. 2011) (“[N]either UETA nor E-SIGN is intended to provide substantive rules of law; rather, each is essentially designed to validate electronic transactions.”) (quotation omitted).

37. See *Campbell v. Gen. Dynamics Gov’t Sys. Corp.*, 407 F.3d 546, 556 (1st Cir. 2005) (ESIGN “likely precludes any flat rule that a contract to arbitrate is unenforceable under the ADA solely because its promulgator chose to use e-mail as the medium to effectuate the agreement”); *Blake v. Murphy Oil USA, Inc.*, 2010 WL 3717245 (N.D. Miss. Sept. 14, 2010) (ESIGN “established a general rule of validity for electronic signatures in transactions in or affecting interstate commerce . . . [a]ccordingly, the Court rejects Plaintiff’s argument that an electronic signature has no legal effect”).

BY JESSICA THALER



JESSICA THALER (jthaleresq@gmail.com), Law Offices of Jessica Thaler Esq., chairs the Committee on Lawyers in Transition of the New York State Bar Association. She received her undergraduate degree, cum laude, from UCLA and her law degree from Fordham University.

A Tool for Lawyers in Transition: LinkedIn

LinkedIn can be one of the most powerful tools in your arsenal during a time of career transition. It not only allows you to research people and companies who may ultimately serve as future employers, colleagues, collaborators or clients, but also introduces you to an expanded group of mentors, advisors and sources of relevant information. No matter your current position, having an extensive network is important, and LinkedIn is a great instrument for the maintenance and growth of that invaluable network.

When I speak to people in transition, or those who are thinking about exploring the possibilities, after ensuring they have an up-to-date resume, I inquire if they are on LinkedIn. Too often, the answer is that they are not. People often express concerns about their employer finding out about their LinkedIn profile – thus fearing that they are putting their job at risk – or will make the excuse that there just has not been enough time to set up a profile. “Is it *really* that helpful?”, they will ask. Without hesitation or qualification, my answer is “yes.” And although the task might seem daunting, LinkedIn makes the profile-creation process easy.

Head Shots

In setting up a profile, it is important to keep in mind that this is a professional venue. I have seen friends post the fun-loving profile shot that they use on Facebook; I have also seen head shots taken with cell phones while

the subject was looking into a bathroom mirror. (This makes me shake my head like a disapproving mother.) Make sure your profile picture is of the type you would expect to see on a firm’s webpage. Don’t have the financial resources to hire a professional photographer? When I was developing my profile, I put on a suit, grabbed my camera and a friend, went to a library, and had her photograph me in front of a wall of books. I (we) felt silly but it was better than the bathroom-mirror shot. Eventually, through alumni and bar association involvement, I participated in professional photo shoots so that those organizations could have photographs of me that they could use in their materials. I asked permission to use several of these photos to update my LinkedIn profile picture, as well as my professional biography.

Work History and Educational Experience

Once your profile picture is chosen and uploaded, complete your work history and educational experience. Some people list only the names of what they think are the relevant entities and the titles of the positions they have held. Others, like me, more or less populate these fields with the extensive information contained in their resumes, and everything in between. In my opinion, the more information the better, so long as that information is germane, as it allows people a complete picture of your qualifications and experience. There is a caveat, however. There is such a thing as “too much” informa-

tion, especially if the information is irrelevant or can become overwhelming to the reader. Where to draw the line depends on your preferences and those of the intended consumer of the information. The rule I use is if I cannot read it through two or three times without getting distracted or losing interest, it is too long. Also, when I first put up my profile and whenever I make any significant changes, I ask a few trusted friends (a former supervisor and other career professionals I have worked with) to read my profile. As it so often happens, of course, if you ask six people, you will get six opinions. Ultimately, you have to decide what you are comfortable with. You can control how you present yourself and not how you are perceived. Accept the risk that someone may not like your profile and hope that is the exception and not the rule.

Making Connections

When your profile is up, it is time to start making connections. In my first attempt, I made a rookie mistake. LinkedIn will prompt you to allow it to tap into your email address book, wherever it is stored, and retrieve contact information. Once retrieved, it is very easy to click, click, click and send a mass invitation to connect. This sounded like a fantastic, easy and efficient way to get a LinkedIn network together. What I did not realize at the time was that not everyone is on or wants to be on LinkedIn and, once the request goes out, the system will continue to “remind,” possibly to the

point of annoyance, invitees of the outstanding and yet-to-be-accepted invitation. Then I realized that when LinkedIn pulled my contacts into the system, it marked those who were also on LinkedIn with a little blue box containing the word “in” next to their names. So I focused on pursuing those contacts to be my LinkedIn connections, understanding that they would likely be more likely to accept because they too are using LinkedIn to expand their network.

Once your initial connections are established, LinkedIn will provide you

est in a particular subject, industry or other issue.

Recommendations

A great feature of LinkedIn is the ability to receive and post recommendations from former clients, employers or colleagues. As wonderful as it may be to have nice things published about you, it is still important that the recommendations are relevant and realistic. If the recommendations are “just too much” or if they appear contrived (i.e., a friend’s recommendation is on a personal rather than a professional level),

is easy to identify and understand – someone part of your LinkedIn community is currently, or was previously, at that company. Where I find such a connection, I immediately reach out to that person, ask about the company, the person(s) I am scheduled or trying to meet, the position or project and possibly get the assistance of that person in getting ahead in the process. Even an indirect connection can be just as useful. The indirect connection shows someone in your network who has someone in his or her network who is at or was at that company. When I

LinkedIn also allows you to look up someone you do not know and want to connect with, but do not yet have a meeting with. You can see if there is someone in your network who might be willing to make an introduction.

with a list of “people you may know.” LinkedIn surprised me with its accuracy. I suspect that the LinkedIn system uses a matrix to compare common connections, common learning institutions, common employers and the like in compiling these suggestions. I continue to look at LinkedIn’s suggestions for potential connections. As I meet people through the more traditional methods of networking, I add them to my network, and LinkedIn’s suggestions continue to grow.

Another option for enhancing a profile and, therefore, LinkedIn presence, is to join groups. I looked at professional groups, those based on my past employers, school affiliations and associations I was a part of, as well as other affinity groups. There really isn’t a downfall to joining many groups outside of the fact that each group may send multiple notices to its members and your inbox may get flooded. (You can change your settings to manage how often emails are received.) Groups often use listserves to share information on trends, current issues, job opportunities and otherwise. Joining a group demonstrates to the LinkedIn community your inter-

they are probably more detrimental than beneficial. I have sought, and continue to seek, recommendations from people in each stage of my personal and professional career but only after I have had the opportunity to work and collaborate in some real and significant capacity with them. This allows each person to honestly and knowledgably speak to my skills, strengths and otherwise. I provide recommendations to others utilizing a similar “rule.” I only offer recommendations for people, focusing on the skills and strengths of those people, with whom I am very familiar.

Research

LinkedIn can also be utilized to obtain relevant information about people and companies. When trying to connect with a company, whether in anticipation of an interview for employment or business development purposes, search for the company on LinkedIn. If the company has a profile, it provides a source of information that can supplement the information available in periodicals or on the company’s proprietary website. LinkedIn will also show who you know, directly or indirectly, at that company. The direct connection

have this “second degree” connection, I will request that my “first degree” connection make an introduction to that “second degree” connection who can then provide me with the information or “in” I am seeking.

Similarly, before a scheduled meeting, check to see if the person with whom you are meeting is on LinkedIn. If he or she is, you can get information about that person, his or her interests, background and network; that knowledge can aid in your trying to connect. For example, it has allowed me to mention people known-in-common (granted, only after confirming that relationship is a current and amicable one), recognize and reminisce about a common university experience and so on. LinkedIn also allows you to look up someone you do not know and want to connect with, but do not yet have a meeting with. You can see if there is someone in your network who might be willing to make an introduction. Just like with anything else, however, you need to consider how often you ask someone, respect what, if anything, the person is willing to do and the manner in which he or she is willing to do it. And be willing to reciprocate.

I personally have not made great use of the LinkedIn groups feature, although I know many who have, and I have only rarely posted into discussion groups. A danger with becoming too involved with posting is that, in attempting to get your name out, it can be easy to become an annoyance. Every time there is a post into a group's discussion page, the site sends out a notice of a new post to the group's members; so, if a member (who may be just the person someone is trying to impress) has not altered the default email settings, his or her inbox may be loaded with notices about the "serial" poster's latest musing. I have actually heard some colleagues commenting that they have unsubscribed from a group because of serial posts, and their impression of that poster is irreversibly marred.

Should You Get a Subscription?

Finally, do you need to get a paid subscription to get true benefit from using LinkedIn? My opinion is that it is not necessary. I like that the subscription service provides the ability to email people directly even if they are not a connection through the "in-mail" feature, that I can see who has viewed my profile as well as statistics regarding the number of views my profile receives and, when I submit for a job requisition, I am provided with greater information about the position, such as salary information, and can check a box to make my resume a "featured" application. Whether you need or want those or the other additional features that a paid subscription may provide depends on your personal goals and intended usage of the site.

Conclusion

Maintaining a network and a LinkedIn profile needs to be an ongoing endeavor. LinkedIn should be used, in whatever manner and however extensively a person is comfortable with, as a tool for professional networking and development. Most great opportunities come from whom you know, and LinkedIn provides a way to know more people. LinkedIn is also a great marketing tool. It is a personal website, demonstrating experiences and expertise and providing forums in which to share and from which to gather information. Like any other tool, however, you need to use it properly and appropriately not to be injured rather than assisted by it. ■

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To the Forum:

I serve as outside counsel to a large multi-national company. Jacob Sladder, the company's in-house counsel, has asked me to become involved in a matter involving a disgruntled former employee who claims that she was fired from the company after reporting that she was harassed by a number of her supervisors based upon her religious beliefs.

Sladder advised me that the company had received a claim letter from an attorney for the former employee, asserting that the company has a culture that promotes religious discrimination, demanding a fat settlement, and threatening suit if the matter is not resolved promptly. He explains, obviously within the boundaries of the attorney-client privilege, that he is concerned that the former employee's discrimination claims may have merit, both with respect to the individual complaining ex-employee and other potentially aggrieved employees. In particular, Sladder worries that company emails, both recent and extending as far back as five years, may include inculcating material. He explains that although he has not examined the emails and does not know whether they contain any smoking guns, statements to him from corporate employees lead him to believe that the contents of some messages may be problematic.

From my work with the company over the years, I am aware that under its records retention protocol, each month the company's management information system (MIS) personnel remove from the company's active system emails sent during the same month a year earlier, and that emails for each such purged month are retained on back-up tapes, with separate tapes for each month. Because of the company's large-scale, worldwide operations, each month the company thus removes thousands of email messages. Inside counsel has asked me whether, on the basis of the letter from the lawyer for the former employee threatening litigation, the company has any obligation to alter its

purge-and-retention procedure. What should I tell him?

The company's MIS personnel further informed me that as long as emails remain on the company's active system (that is, are less than a year old), they may be located and searched by author, recipient, or any words or combination of words that appear in the text. Once, however, they have been purged from the system and stored on tape, they are in effect "read only" and may not be searched by any of the means available for current emails.

The net result is that if litigation begins and the company is called upon to disgorge its relevant emails, the cost to search currently maintained messages will be far less than the burden of searching the historical messages stored on the monthly tapes. I know that the company's emails include many items subject to the attorney-client privilege, and others that, although non-privileged, nonetheless contain sensitive business information that is unrelated to the claims asserted by the former employee and the company does not want outsiders to see.

Accordingly, Sladder suggests that perhaps it is time to alter the company's records retention policy to provide for purging of emails, and storage on back-up tapes, after six months or three months, not one year. If nothing else, he adds tartly, changing the policy would make it more difficult for this ex-employee, and other potential underfunded claimants, to get access to company emails. What advice do I give him?

Sincerely,
Noah Zark

Dear Noah Zark:

Electronic discovery is a rapidly evolving world that attorneys cannot ignore – and they must learn. Although the Rules of Professional Conduct (RPC) do not directly address an attorney's obligations regarding electronic discovery, numerous provisions of the RPC (and particularly, some of the Comments to the Rules) are instructive regarding the obligations of

an attorney to identify, preserve and produce relevant electronically stored information (ESI) in a given matter.

To start, Rule 1.1 establishes a lawyer's ethical obligation to provide competent representation. In particular, Rule 1.1(a) provides that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Though admittedly a very broad statement, in our view, this rule requires that attorneys have a basic understanding of the technologies used in the identification and preservation of ESI.

Rule 3.4 is also applicable. It requires that an attorney act with fairness to the opposing party and opposing counsel. At the outset, Rule 3.4(a)(1) states that "[a] lawyer shall not . . . suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce . . ." Additionally, Rule 3.4(a)(3) states that "[a] lawyer shall not . . . conceal or knowingly fail to disclose that which the lawyer is required by law to reveal . . ."

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The Comments to Rule 3.4 are of particular importance. Comment [1] states that:

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructionist tactics in discovery procedure, and the like. The Rule applies to any conduct that falls within its general terms (for example, “obstruct another party’s access to evidence”) that is a crime, an intentional tort or prohibited by rules or a ruling of a tribunal

Comment [2] is also relevant:

Documents and other evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Paragraph (a) protects that right. Evidence that has been properly requested must be produced unless there is a good-faith basis for not doing so. Applicable state and federal law may make it an offense to destroy material for the purpose of impairing its availability in a pending or reasonably foreseeable proceeding, even though no specific request to reveal or produce evidence has been made. Paragraph (a) [to Rule 3.4] applies to evidentiary material generally, *including computerized information*. (emphasis added.)

These specific provisions of the RPC suggest that an attorney must be proactive and non-evasive in the discovery process and, in particular, be fully knowledgeable in the areas of identifying, preserving and producing relevant ESI. As we have recently seen, the consequences for spoliation

of ESI have been at times drastic and decisions on these issues are often widely disseminated quickly to put attorneys on notice that spoliation of ESI will not be tolerated by the courts.

Rule 3.3 requires proper conduct before a tribunal. At the outset, Rule 3.3(a)(3) states that “[a] lawyer shall not knowingly . . . offer or use evidence that the lawyer knows to be false.” Comment [5] to Rule 3.3 further provides that “[p]aragraph (a)(3) [of Rule 3.3] requires that the lawyer refuse to offer or use evidence that the lawyer knows to be false, regardless of the client’s wishes. This duty is premised on the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence”

Furthermore, Comment [6] to Rule 3.3 states that:

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness’s testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false.

The duties deriving from these provisions of Rule 3.3 would suggest that in the context of the discovery process, it is necessary for counsel to act in a manner in which he or she may (without waiving any privilege issues) be fully responsive on any and all discovery questions arising in a matter and, in particular, on issues involving electronic discovery. This is of even greater importance when taking the necessary steps toward the production of ESI, since the preservation of ESI requires the attorney to take proactive measures to identify and then preserve ESI when litigation is reasonably anticipated. *See VOOM HD Holdings*

LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 36 (1st Dep’t 2012).

Turning now toward your question, the letter sent to the company by counsel to your client’s former employee would almost certainly trigger the client’s obligation to preserve ESI relevant to the alleged claim and require the suspension of its purge and retention procedure. We believe that both the content of the letter, which threatens a lawsuit, as well as Sladder’s statement to you that he is concerned that the former employee’s discrimination claims may have merit, trigger the duty to preserve and the initiation of a litigation hold. As was held in *VOOM* and further articulated in the recently released report of the E-Discovery Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, titled *Best Practices in E-Discovery in New York State and Federal Courts Version 2.0* (available at <http://www.nysba.org/AM/TemplateRedirect.cfm?Template=/CM/ContentDisplay.cfm&ContentID=150025>), the duty to preserve ESI may arise not only when litigation is reasonably anticipated, but also “when a client . . . knew or should have known that information may be relevant to a future litigation.” *Id.* at 3 [Guideline No. 1]. Thereafter, a party “must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” *VOOM*, 93 A.D.3d at 36 (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).

The *Best Practices* also provide a blueprint by outlining the factors to be considered when preparing an ESI preservation plan. As Guideline No. 2 states:

In determining what ESI should be preserved, clients should consider: the facts upon which the triggering event is based and the subject matter of the triggering event; whether the ESI is relevant to the event; the expense and burden in preserving the ESI; and whether the loss of the ESI would be prejudicial to an opposing party.

See id. at 5.

As demonstrated here, the issues raised in Guidelines Nos. 1 and 2 with regard to preserving ESI for discovery can relate both to lawyers' obligations in their conduct before a tribunal (Rule 3.3) as well as the requirement that lawyers conduct themselves with fairness toward the opposing party and counsel (Rule 3.4).

It is also worth noting that your duties to oversee the preservation process may invoke the ethical obligations contained in Rule 5.3, especially if litigation is reasonably anticipated and you are advising the client's employees to assist in the preservation of relevant ESI. As stated in Rule 5.3(a):

A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

Furthermore, Rule 5.3(b)(1) provides that:

A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if . . . the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it . . .

Therefore, you need to work closely not only with Sladder, but also with any and all of the client's employees tasked with preserving ESI relevant to the claims asserted by the aggrieved employee.

Your follow-up question concerning Sladder's request to alter the company's records retention policy to provide for a shortened period to maintain company emails raises a flurry of ethical issues, especially in light of the fact that the company is currently facing a potential religious discrimination claim from one

of its former employees. Rule 8.4 (which governs attorney misconduct) provides that "[a] lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." See Rule 8.4(a). Furthermore, Rule 8.4(c) states that "[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." To be in compliance with these provisions of the RPC, we believe it would be best to advise Sladder to maintain the company's existing records retention policy which provides for the purging of emails from the company's active computer system and subsequent storage of those emails on back-up tapes after one year. If for some reason you endorsed the reduction in time of your client's retention period with the knowledge that the company is already anticipating a discrimination claim against it, and if the company ended up in litigation with another aggrieved employee (and that is always a possibility for any large and notable company), then you and your client could run the risk of a spoliation claim. On the other hand, just because archived emails are transferred over to back-up tapes that may not be readily accessible does not necessarily deem them to be inaccessible and therefore subject to a potential spoliation claim. That being said, the better practice is for the company to maintain its existing records retention policy in a manner allowing the most convenient access and review, thereby creating a more level playing field if litigation arises and ESI would need to be produced in discovery.

The world of electronic discovery is a potential minefield that can expose both you and your client to unnecessary scrutiny. In advising clients, and as demonstrated here, it is always best to be overly protective in preserving a client's ESI.

Sincerely,

The Forum by

Vincent J. Syracuse, Esq., and

Matthew R. Maron, Esq.,

Tannenbaum Helpert Syracuse &

Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

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

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

Sincerely,

Tech Geek

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Testimony at an EBT must be admissible — the equivalent of testimony at trial — for you to use as summary-judgment evidence.

Before submitting an EBT transcript in support of your motion, comply with CPLR 3116. Review the transcript for errors. Show the transcript to your client and other deponents.⁸ If your client or other deponents want to edit their transcript, have them complete an errata (correction) sheet. At the end

in support of a summary-judgment motion.¹⁴ The court's decision will depend on whether the discrepancies are about a material issue of fact to be resolved at trial.¹⁵

If an individual's EBT testimony contradicts the individual's affidavit submitted in support of your motion,¹⁶ the court might deny your summary-judgment motion, depending on the discrepancy between the transcript and the affidavit. The court will determine whether the discrepancies concern a material issue of fact. A court will

may use in support of your motion an unsigned but certified EBT transcript of your adversary, a party to the action, as an admission.²²

Attach as an exhibit the relevant portions of the EBT transcript. If you include everything, your motion papers will be voluminous. Explain in your attorney affirmation that the testimony came from the EBT. But attaching the EBT transcript alone won't help you secure summary judgment. Tell the story persuasively in your attorney affirmation.

A court may consider inadmissible evidence in the non-moving party's opposition papers if the evidence doesn't "form the sole basis for the court's determination."

of the errata sheet, the deponents will have to explain why they've made changes or edits to their transcript.⁹ A deponent has 60 days to review the transcript, make changes, sign the EBT transcript, and return it to you.¹⁰ Hold on to the EBT transcripts; you'll need them at trial if you lose your summary-judgment motion. If the deponent fails to sign and return the transcript, you may use it as if the deponent had signed it.¹¹ The stenographer who transcribes the EBT testimony must certify, in a document known as a certification, that the stenographer had the deponent sworn and that the EBT transcript "is a true record of the [deponent's] testimony."¹²

If the errors in the transcript are damaging to your client's case, move under CPLR 3116(e) to suppress all or part of it. Move under CPLR 3116(e) "with reasonable promptness after such defect is, or with due diligence might have been, ascertained."

A court might reject an errata sheet that isn't accompanied by the required statement setting forth the reasons for the corrections.¹³

A court might not grant your summary-judgment motion if discrepancies exist between the errata sheet and an individual's affidavit submitted

disregard "feigned factual issues."¹⁷ A court might grant your summary-judgment motion and find that the discrepancies between the EBT transcript and the affidavit are not "bona fide [material] issue[s] of fact."¹⁸

Don't tailor an affidavit that contradicts a witness's EBT transcript. You can't avoid the consequences of a witness's EBT testimony. A court might determine that the contradictory affidavit constitutes "feigned evidence" and then reject the affidavit in its entirety.¹⁹

Also, a court might deny your summary-judgment motion if an individual didn't know or remember material facts at the EBT but then knows or remembers those facts — months or sometimes years later — when you've submitted that individual's affidavit as part of your motion.²⁰

Most of the problems you'll have with EBT transcripts will occur when a deponent, a stenographer, or both fail to sign the transcript. Even if the deponent doesn't sign the transcript, you may still use the transcript in support of your summary-judgment motion. If you, as the party deponent, submit an EBT transcript as part of your summary-judgment motion, you've "adopted as accurate" the EBT transcript.²¹ You

You may use the EBT transcript of a non-party as part of your summary-judgment motion if your adversary had notice of the non-party's EBT.²³

If a witness authenticates a document during the EBT, you may use the EBT transcript to authenticate the same document in your motion.²⁴

Business Records

Practitioners frequently use business records to introduce evidence in their summary-judgment motion.

One way to submit business records is to offer certified business records. The certification will be from the "custodian or other qualified witness charged with responsibility of maintaining the records" in the form of an affidavit sworn to under the penalties of perjury.²⁵ The certification must comply with the requirements of CPLR 3122(a).

Another way to submit business records in support of your summary-judgment motion is to provide the records as well as an affidavit from someone with personal knowledge to explain how the business record meets the CPLR 4518(a) test. The affiant should identify the records and explain how and when those records are made and kept. Under CPLR 4518(a), the

affiant must explain that the “writing or record . . . was made in the regular course of [the] business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.”²⁶

As technology advances, much of the disclosure you’ll obtain will be from emails, facsimile transmissions, electronic files, Internet photos, Internet websites, flash disks, and diskettes. Print out the relevant portions and attach them as exhibits. Make sure you have an affidavit from an individual with personal knowledge who identifies and authenticates the document. If the tangible exhibit is a true and accurate representation of the electronic record, the exhibit will be admissible in support of your motion.²⁷ In determining whether the exhibit is a true and accurate representation of the electronic record, a court may consider how the electronic record was “stored, maintained or retrieved.”²⁸

Attach to your summary-judgment motion a copy of all the pleadings.

A court will not consider as part of your summary-judgment motion a document that isn’t either certified or accompanied by an affidavit — sworn to under the penalty of perjury — from an individual who can identify and authenticate the document. Reports (including accident, medical, and police), correspondence, or any other document not certified or accompanied by an affidavit are inadmissible.²⁹

Photographs

If you attach photographs as evidence in support of your summary-judgment motion, include an affidavit from an individual with knowledge about the photographs. In the affidavit, have the affiant identify and authenticate the photographs.³⁰ The affiant should explain what the photograph repre-

sents and that the photograph is a fair and accurate representation of the act, transaction, occurrence, or event depicted in the photograph.

Photographs capture a specific moment in time. Time is important. Many litigators are overly preoccupied about knowing from the affiant who took the photographs and when the person took the photographs. That isn’t so important. If you attach photographs depicting your client’s bodily injuries, what’s important is whether the injuries depicted in the photograph are a fair and accurate representation of your client’s injuries after the accident. If you attach photographs depicting your client’s vehicle before and after the accident, you’ll want to know from the affiant whether the photographs are a fair and accurate representation of the vehicle before and after the accident.

Attach the photographs as exhibits.

Your Pleadings

Remember to attach to your summary-judgment motion a copy of all the pleadings.³¹ Include not just your pleadings but also your adversary’s pleadings. A court might deny your summary-judgment motion if you don’t attach all the pleadings. Pleadings are required because the court might not have the court file when it decides your case. Besides, your set of motion papers should be complete so that, for fairness and due process, your adversary need not wonder whether the court will rely on papers outside the four corners of your motion.

If your adversary submitted inadmissible evidence as part of its opposition papers, object in your reply papers. Explain why you contend that the evidence is inadmissible. Persuade the court not to consider your adversary’s inadmissible evidence.

Evidence in Opposition to a Summary-Judgment Motion

You may use the same evidence explained above in opposition to your adversary’s summary-judgment motion.

The evidence you submit in opposition to summary judgment must also be in admissible form.³² But a court might give the non-moving party more leeway than the moving party when the non-moving party submits evidence in inadmissible form as part of its opposition papers. A court may consider inadmissible evidence in the non-moving party’s opposition papers if the evidence doesn’t form “the sole basis for the court’s determination.”³³

The non-moving party’s inadmissible evidence in its opposition might be enough to defeat summary judgment if the non-movant “provides a reasonable excuse for failing to submit the evidence in admissible form.”³⁴

A court may consider evidence subject to the dead man’s statute — CPLR 4519 — as part of opposition papers to a summary-judgment motion, but it may not consider the evidence in support of the moving party’s summary-judgment motion.³⁵

If a court precludes your witness from testifying at trial, you may use the witness’s affidavit in opposition to a summary-judgment motion if you demonstrate that you’ll produce admissible evidence at trial.³⁶

A court may also consider an affidavit in your opposition papers that’s been translated into English without the translator’s affidavit attached. But it may not consider the evidence in support of the moving party’s summary-judgment motion.³⁷

Also, the court may consider parol evidence — extrinsic evidence beyond the four corners of a document — in your opposition papers to defeat your adversary’s summary-judgment motion.³⁸

Use your adversary’s verified pleading or responses to a bill of particulars to oppose summary judgment.

Use your adversary’s responses to interrogatories or notices to admit in opposition to a summary-judgment motion.

In the upcoming issue of the *Journal*, the *Legal Writer* will conclude its discussion of summary-judgment motions. ■

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1. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 37:291, at 36-31(2006; Dec. 2009 Supp.).
2. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597, 404 N.E. 2d 718, 720 (1980).
3. Barr et al., *supra* note 1, at § 37:230, at 37-26.
4. *Id.* § 37:232, at 37-26.
5. *Id.* § 37:322, at 37-33.
6. *Id.*
7. *Id.* § 37:330, at 37-33 (citing *Reynolds v. City of New York*, 221 A.D.2d 185, 186, 633 N.Y.S.2d 300, 301 (1st Dep't 1995) ("[T]he statement in the offending driver's MV-104 report constituted an admission which could properly be considered as probative evidence by the motion court.")).
8. CPLR 3116(a).
9. *Id.*
10. *Id.* According to CPLR 3116(b), the stenographer must file the EBT transcript with the clerk of the court unless the parties agree to waive filing.
11. CPLR 3116(a) ("If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed.").
12. CPLR 3116(b).
13. David Paul Horowitz, 2012 Motion Practice Update, N.Y. St. Jud. Instit., 12th Jud. Dist. Legal Update Program 1, 49 (Apr. 18, 2012) (citing *Schat v. Bell Atl. Corp.*, 282 A.D.2d 329, 329-30, 723 N.Y.S.2d 465, 466 (1st Dep't 2001) (finding errata sheet without statement of reasons for the changes was a "wholesale attempt to change damaging testimony").
14. 1 Byer's Civil Motions § 77:03 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.), available at http://www.nylp.com/online_pubs/index.html (last visited Nov. 26, 2012).
15. See Horowitz, *supra* note 13, at 49 (citing *Rivera v. City of New York*, 6 Misc. 3d 829, 832-33, 791 N.Y.S.2d 306, 308-09 (Sup. Ct., Bronx Co. 2004) (finding that plaintiff offered reasonable explanation to change location of accident on errata sheet).
16. Byer's Civil Motions, *supra* note 14, at § 77:03.
17. *Id.* § 77:08.
18. *Id.*
19. Horowitz, *supra* note 13, at 50 (citing *Williams v. Baldor Specialty Foods, Inc.*, 70 A.D.3d 522, 523, 895 N.Y.S.2d 394, 395 (1st Dep't 2010)).
20. Byer's Civil Motions, *supra* note 14, at § 77:03.
21. Horowitz, *supra* note 13, at 29 (citing *Ashif v. Won Ok Lee*, 57 A.D.3d 700, 700, 868 N.Y.S.2d 906, 907 (2d Dep't 2008)).
22. Horowitz, *supra* note 13, at 29-30 (citing *Delishi v. Prop. Owner*, 31 Misc. 3d 661, 920 N.Y.S.2d 597 (Sup. Ct. Kings County 2011); *Garris v. City of New York*, 65 A.D.3d 953, 885 N.Y.S.2d 491, 492 (1st Dep't 2009); *Morchik v. Trinity Sch.*, 257 A.D.2d 534, 536, 684 N.Y.S.2d 534, 536 (1st Dep't 1999); *R.M. Newell Co. v. Rice*, 236 A.D.2d 843, 844, 653 N.Y.S.2d 1004, 1005 (4th Dep't 1997)).
23. Barr et al., *supra* note 1, § 37:301, at 37-31.
24. *Id.* § 37:302, at 37-32.
25. CPLR 3122-a(a).
26. CPLR 4518(a).
27. *Id.*
28. *Id.*
29. Barr et al., *supra* note 1, at § 37:222, at 37-26.
30. Byer's Civil Motions, *supra* note 14, at § 77:08.
31. CPLR 3212(b).
32. *Zuckerman*, 49 N.Y.2d at 562, 427 N.Y.S.2d at 597, 404 N.E.2d at 720.
33. Barr et al., *supra* note 1, at § 37:240, at 37-27 (citing *Thomas v. Our Lady of Mercy Med. Ctr.*, 289

- A.D.2d 37, 37, 734 N.Y.S.2d 33, 34 (1st Dep't 2001); *Sunfirst Fed. Credit Union v. Empire Ins. Co.*, 239 A.D.2d 894, 894, 659 N.Y.S.2d 656, 656-57 (4th Dep't 1997); *Wertheimer v. N.Y. Prop. Ins. Underwriting Ass'n*, 85 A.D.2d 540, 541, 444 N.Y.S.2d 668, 669 (1st Dep't 1981)); Byer's Civil Motions, *supra* note 14, at § 77:10.
34. Barr et al., *supra* note 1, § 37:241, at 37-27 (citing *Zuckerman*, 49 N.Y.2d at 563, 427 N.Y.S.2d at 598, 404 N.E. 2d at 721; *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 1068, 416 N.Y.S.2d 790, 792, 390 N.E.2d 298, 299 (1979)).
35. Barr et al., *supra* note 1, at § 37:242, at 37-27 (citing *Carrithers v. Delagera*, 2 A.D.3d 559, 768 N.Y.S.2d 380, 381 (2d Dep't 2003); *Lancaster v. 46 NYL Partners*, 228 A.D.2d 133, 140, 651 N.Y.S.2d 440, 446 (1st Dep't 1996)); Byer's Civil Motions, *supra* note 14, at § 77:10 (citing *Phillips v. Kantor & Co.*, 31 N.Y.2d 307, 313, 338 N.Y.S.2d 882, 886, 291 N.E.2d 129, 131 (1972); *Mayer v. Briggs*, 47 A.D.2d 64, 66, 364 N.Y.S.2d 532, 535 (1st Dep't 1975)).
36. Barr et al., *supra* note 1, at § 37:243, at 37-28.
37. *Id.* § 37:244, at 37-28; see CPLR 2101(b).
38. Byer's Civil Motions, *supra* note 14, at § 77:10 (citing *Leghorn v. Ross*, 42 N.Y.2d 1043, 1044, 399 N.Y.S.2d 206, 207, 369 N.E.2d 763, 763 (1977); *Mal-lad Constr. Corp. v. Cnty. Fed. Sav. & Loan Ass'n*, 32 N.Y.2d 285, 290, 344 N.Y.S.2d 925, 929-30, 298 N.E.2d 96, 99 (1973); *accord Farmers Coop., Inc. v. Levine*, 36 A.D.2d 656, 656, 318 N.Y.S.2d 68, 70 (3d Dep't 1971)).

CORRECTION:

In the February 2013 issue of the *Journal*, the biography for Philip L. Maier, author of "Protection Against Employment Discrimination Based on Prior Criminal Convictions – Correction Law Article 23-A," misstated his position. Mr. Maier is the General Counsel and Deputy Director for the New York City Office of Collective Bargaining.

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Please discuss the correct use of the words “affect” and “effect.” All too often I see those words used interchangeably, and sometimes in a single paragraph. Sometimes sentences use both words when only one is needed. And while you’re about it, you might clarify the distinction between the words “imply” and “infer.”

Answer: The question about “affect” and “effect” recurs regularly, so although I have discussed it in previous columns, it seems time to bring it up again. Pennsylvania reader Jean Spenser, who knows the difference between the two verbs but sees many errors by people who don’t, thinks a column on the subject would be helpful. So here it is. (My apologies to the readers who do not need the following explanations.)

The words “affect” and “effect” are not interchangeable, though many journalists seem to think they are; and because a large number of the public ignores the verb “affect,” we may eventually lose that verb and a valuable distinction. In language this process is sometimes called “leveling.” The loss of “affect” may not be very harmful in this pair since we may seem to get along without it, but that disappearance does result in a loss of specificity.

The similarity of the two verbs is the problem, as Attorney Spenser speculated. The verb “effect” can also be either an adjective or a noun, while “affect” – except in the field of psychology – is always an adjective. The specialized meaning of “affect” as a noun is: “the feeling of emotion, as distinguished from cognition, thought, or action.” That doesn’t create much confusion because it is used in this special sense by only a small group of people, psychologists.

A second problem with those two verbs is that their meanings are so closely related. You “affect” something – that is, influence it by modifying or changing it. By doing so, you create the noun “effect.” You also “effect” a change by “bringing it about,” “chang-

ing” it to do so because the verb “effect” means “to bring something about.” So you can effect a change by affecting a situation. (With such a complicated relationship, it’s easy to see why many people fail to distinguish the two verbs.)

The verb “affect” has another meaning that does not cause much confusion: “to pretend or imitate.” You might “affect” (“pretend”) an interest in a subject that actually bores you, in consideration for an individual who is interested in that subject.

As for the second request (the difference between “imply” and “infer”), if you are the speaker, you imply something, but if you are the listener, when you hear that implication, you “infer” what it means. Thus these verbs depend on one’s point of view. Compare the verbs “bring” and “take.” You “take” a package to me to my home if I am *not* at home to receive it. But you “bring” the package to me if I *am* at home to receive it. The same distinction occurs between “give” and “take.” “Give” that package to me if I am present and able to take it, but “take” it to someone else who may or may not be present to receive it. The construction “Bring it to Jane’s house” is considered substandard, although the meaning is probably clear.

Question: Every day I hear supposedly knowledgeable people breaking a well-known rule of grammar. Here it is in a statement made by a national climatologist: “Stormy weather has always and will always continue to bring worldwide crop failure.” Something is missing in this construction: the past participle form of the verb “bring” (“brought”). Shouldn’t he have said instead, “Stormy weather has always brought and will continue to bring worldwide crop failure”?

Have the rules of grammar changed? My English teacher taught me that that construction was incorrect.

Answer: Your English teacher was right; that construction is still not considered acceptable. But how many people use the correct construction by

including that entire verb? According to my limited and casual observation (mostly in newspapers and journals), so few that the correct usage could be called “rare.” And that means that even now, what used to be “incorrect” may now be labeled “idiomatic.” But don’t expect books on grammar to agree. Such books are often the last to change.

Along with missing verbs, conjunctions and prepositions are regularly absent in the press and in oral English – statements like, “Recovery from a cold without antibiotics is as quick or faster than with antibiotics.” The added conjunction “as” is still necessary “as quick as” or faster than.” And without the preposition “with,” the statement of a leading radio commentator, “Give me an idea what you’re confronted,” is ungrammatical.

That last sentence may be the due to the speaker’s memory of his elementary-school teacher admonishing his pupils never to end sentences with prepositions. (Winston Churchill disliked that rule and spoofed it in a comment: “A preposition is a terrible word to end a sentence with.”)

Potpourri

People who play cards may laugh when they read the following anecdote a correspondent recently sent:

“My grandson, having recently reached age four, is a member of a pre-school group whose instructor planned to teach her charges basic arithmetic. First she asked whether any child could already count, and my grandson eagerly raised his hand. Invited to go ahead, he began with great confidence: ‘One, two, three, four, five, six, seven, eight, nine, ten, Jack, Queen, King, Ace.’” ■

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

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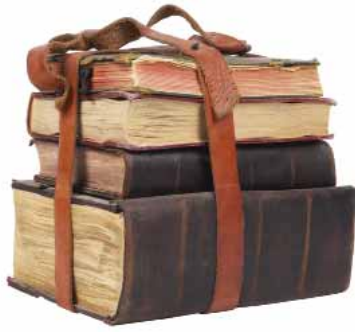
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Drafting New York Civil-Litigation Documents: Part XXIII — Summary-Judgment Motions Continued

In the last issue, the *Legal Writer* discussed expert-witness affidavits and affirmations in summary-judgment motions, moving for partial summary judgment, opposing a summary-judgment motion, cross-moving for summary judgment, replying to opposition papers, and opposing a cross-motion for summary judgment.

In this issue of the *Journal*, we continue our overview of summary-judgment motions. We'll discuss the evidence in support of a summary-judgment motion as well as the evidence in opposition to a summary-judgment motion.

Evidence in Support of a Summary-Judgment Motion

In the last two parts in this series, we discussed affidavits and affirmations — the foundation of your motion. In addition to affidavits and affirmations, include documents — exhibits — as evidence to support and give substance to your motion.

The exhibits you'll want to attach to your summary-judgment motion are those in your client's possession and documents you've obtained through disclosure.

Just because you've obtained evidence through disclosure doesn't mean that the evidence is admissible. The evidence you obtained in disclosure — interrogatories, requests to admit, and examinations under oath (EBT) testimony — might be inadmissible.

Although a court might consider the summary-judgment motion even if a document is in inadmissible form,¹ the evidence you offer on summary judgment must be in admissible form

— meaning that the evidence, if introduced at trial, would be admissible at trial.² For hearsay to be admissible, for example, the evidence must fall under an exception to the hearsay rule.³ You must explain in your motion that the document falls under a hearsay exception and how you've met that exception.

A court will not consider statements in your summary-judgment motion on "information and belief"⁴ unless you state your basis of belief. Statements based on "information and belief" aren't evidence or evidence in admissible form. Whatever statements you make in your motion, you must state your basis for them.

If you attach a document as an exhibit to your motion, offer an affidavit from a witness who identifies, authenticates, and explains the document.

Party Admissions

Use party admissions in support of your summary-judgment motion. A party admission is a statement a litigant makes against its own interest.

Responses to interrogatories or notices to admit are party admissions. Use them in support of your motion. Extract what's important from the responses and include portions as exhibits. Include only the relevant portions. If you include everything, the court won't know what's important.

If your adversary provides unresponsive responses to interrogatories or notices to admit, you might lose your motion. If your adversary's responses are evasive or incomplete, move for further answers under CPLR

3124 or 3126. You might have to wait to move for summary judgment until after you've received your adversary's complete answers.

A court will treat a verified — sworn under penalty of perjury — pleading or responses to a bill of particulars like a sworn affidavit.⁵ Facts in a verified

Examination before trial (EBT) transcripts are powerful weapons, not only at trial, but also on summary judgment.

pleading constitute evidence on summary judgment. Use your adversary's verified pleadings to your advantage. Unverified pleadings and general denials in a pleading, however, are not summary-judgment evidence.⁶

If a party's admission is unsworn, you may submit the evidence as part of your summary-judgment motion even if the admission would be inadmissible at trial.⁷

EBT Transcripts

EBT transcripts are powerful weapons, not only at trial, but also on summary judgment. Parties and other witnesses will often admit facts helpful to you and useful in support of your motion. Even if it limits the issues in your case, use the information you've obtained at an EBT to move for summary judgment or partial summary judgment.

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