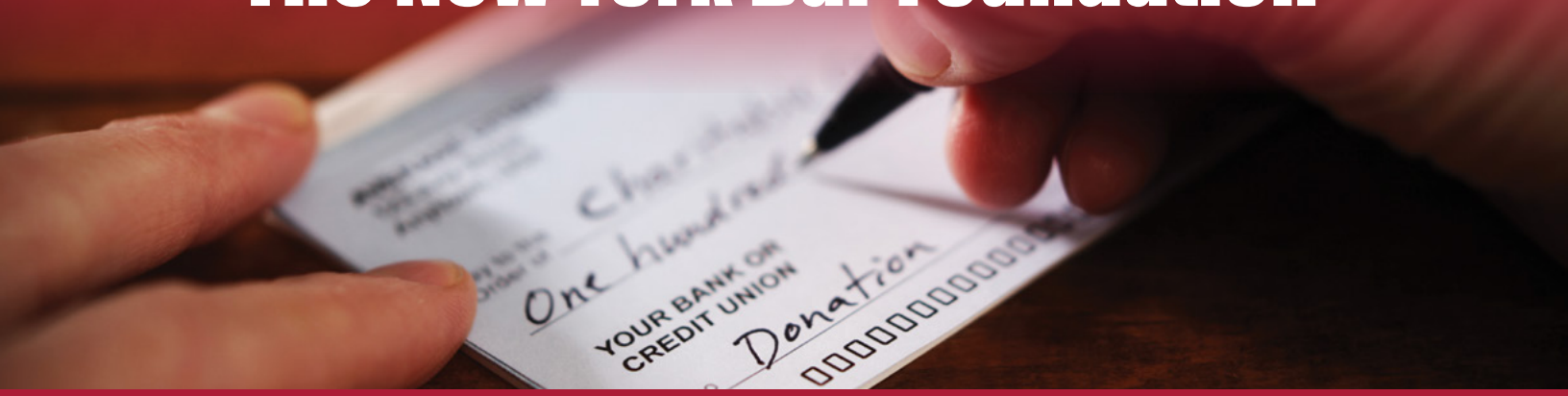
NYSBA FALL/WINTER 2018 | VOL. 10 | NO. 2

The Senior Lawyer

A publication of the Senior Lawyers Section
of the New York State Bar Association

In This Issue

Share Your Good Fortune
Make a year-end gift to
The New York Bar Foundation



Please give to the New York Bar Foundation. Help provide legal representation to children, seniors, veterans, and other New Yorkers in need of assistance with essentials of life:

- Guardianship of children whose parents are addicted to opioids
- Immigration help for migrant children separated from their parents
- Homelessness prevention
- Domestic violence help
- Access to health care and medicine
- Educational rights
- Subsistence income (including wages, disability, and other benefits)

By improving access to justice, together we can change lives. We can mend our civic fabric and improve perceptions of the Rule of Law.

Make your year-end gift today at www.tnybf.org/donation
or by mailing your tax-deductible donation to:
The New York Bar Foundation, 1 Elk Street, Albany, NY 12207

THE NEW YORK BAR FOUNDATION

Advancing Justice and
Fostering the Rule of Law

Table of Contents

NEW YORK STATE BAR ASSOCIATION

If you have written an article or have an idea you would like considered for publication, contact:

Carole A. Burns, Esq.
64 Twilight Road,
Rocky Point, NY 11778
cabb1@optonline.net

Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

REQUEST FOR ARTICLES

Message from the Chair

Trying to Help with Transitions

Dear Section Members:

The focus of the Senior Lawyers Section for this bar year is on helping our members transition into a senior status. In the Spring/Summer edition of this publication I introduced an article written by Stephen Gallagher that discussed lawyer well-being as senior lawyers transitioned their lives. He was NYSBA's first director of law office economics and management, 1990-2003. Stephen's article addressed the appropriateness of our Section looking at this issue of senior lawyers in transition. He helped me to focus on the fact that our Section has many solo and small firm attorneys who are also members of the General Practice Section. We started conversing, emailing, sharing ideas for programs that could help senior lawyers. We broached the subject of an even larger section of NYSBA, the Young Lawyers Section, that is made up of lawyers transitioning into the practice of law. Was there a commonality in these two transitions? Should we be talking to each other?

It seems to be common knowledge that for many lawyers, status and professional achievement have become inseparable from one's identity. The link becomes especially apparent when we are on the cusp of retirement; as we look toward the future, it is only natural to ask, "Who will I be when I am no longer a lawyer?" (See Stephen Gallagher and Leonard Sienko's article of that same name elsewhere in this publication.) I didn't really think about how my practice would change as I grew older. Like most attorneys I knew, I didn't plan what would happen to my practice. My planning was limited to financial planning. Having been in a mid-sized upstate firm, I knew that I had younger colleagues that could assist me. If I could think, they could do the heavy lifting. It really worked quite well. And I had role models to emulate in aging, in my community people like Justin Vigdor and Tony Palermo. Part of transitioning was also the opportunity to spend more time on community service and pro bono work. Support of the organized bar was always important.

Steve and I developed the concept of ***Meeting of the Minds*** as a series of regional "Gatherings" created by the SLS in partnership with county bar associations around the state. The goal is to connect senior lawyers looking to transition from full-time practice with younger attorneys seeking personal growth in the profession. These gatherings will bring lawyers together with a diverse group of speakers, coaches, medical professionals, and experienced attorneys to share their success in handling life transitions.

It also seems to be broadly understood—yet rarely discussed—that everyone will need a support team to help manage certain aspects of well-being, and as we age, this need will increase steadily and many of us will become caregivers for our loved ones. All of us need close family connections whenever available. If these are not possible, we can hope to find intimate friendships or form wider community connections. The planning committee for the upcoming *Gatherings* wants to explore what role the bar associations have in helping lawyers prepare for this aging workforce.

I informally explored this idea at the Section Leaders Conference in May and at the Sections Caucus in June at the Cooperstown House meeting. It got support from leadership at NYSBA's Young Lawyer Section and the General Practice Section. We attended meetings of both those Sections in spring/summer to further the discussions. Our Section hired Steve to plan the curriculum and develop the segments.

We decided to form our first "Gathering" in Rochester as a partnership between NYSBA's Senior Lawyers Section and the Monroe County Bar's Young Lawyers Section and Senior Lawyers Committee. We also invited regional Senior Lawyers Section members to join this community. We started with a half-day CLE that will be followed by regular conference calls, and other future in-person events. Going forward we want to involve NYSBA's General Practice Section, which works with small firms and solos and has an active blog. This is not Senior Lawyers Section members trying to help Young Lawyers Section members find jobs. Rather that we can share with each other experiences we have had that brought meaning to what we do. Young Lawyers Section members could help demystify technologies that stress seniors. Senior Lawyers Section members can share their passion for the rule of law. The legal profession is known to be one of high stress. Both the state bar and local bars have multiple programs and services to help members cope (Lawyers Assistance Program, Health & Well-Being, Lawyers Concerned for Lawyers). Senior lawyers may seek coaching on how to transition and what to transition to. Some are ready to hang the shingle up but want guidance on what to do with the rest of their lives. There are attorneys in firms where the firm wants them to retire to make room for younger attorneys with growing practices. They may want help in setting up a part-time practice. This time can be an opportunity for them to give back to the profession and increase access to justice. Community service boards are always looking for new volunteers. Or maybe more time to travel and learn, or just spend time with your grandchildren. The communities

Continued on page 5

Message from the Editor

Continuing the discussion on lawyer well-being and transition begun in our 2018 Spring/Summer issue by Stephen P. Gallagher ("Senior Lawyers Section: Exploring Lawyer Well-being"), in this issue Mr. Gallagher and Leonard E. Sienko, Jr., ask "Who Will I Be When I Am No Longer a Lawyer?" As described in C. Bruce Lawrence's *Message from the Section Chair*, these issues are being further explored in a series of regional "Gatherings" where a diverse group of participants will have an opportunity to discuss their transition concerns, strategies, and plans. If you are in the process of transitioning, or have made a transition, please consider sharing your experience in an article for *The Senior Lawyer*.

Pro bono work, although available to attorneys at all stages of their career/life, can, as I have found, be a satisfactory transition vehicle. In this issue you will find a very informative article on the Attorney Emeritus Program, which acts as a liaison between attorneys, retired or not, and approved AEP host organizations or court-sponsored programs. Included is an explanation of how free CLE credits can be earned by volunteering under the auspices of AEP.

Also in this issue is an article describing the Consumer Legal Advice and Resource Office (CLARO) project. I had an opportunity to participate in the CLARO-Queens Consumer Debt Clinic, which I think could be a viable option for both busy practitioners and retired attorneys.

CLARO clinics can be found in all five boroughs of New York City, in Westchester, and in Erie County (Buffalo).

In addition in this issue you will find:

- The third and last installment of the Identity Theft Protection Series, "The Very Real Threat of Identity Theft: A Guide to Identity Recovery and Resolution";
- "Business Essentials for Neutrals: Starting, Growing, and Sustaining Your Practice";
- "Reflections on 'Aid in Dying' and the Paradox of 'Achieving Death': Avoiding the Confluence of Language and Ideology at Life's End," which is in part a response to "The Clinical, Ethical and Legislative Case for Medical Aid in Dying in New York," published in our 2018 Spring/Summer issue;
- "Settling a Personal Injury Claim While Providing Comprehensive Counsel," addressing the potential consequences of a large settlement and the need for proper planning to preserve assets for the future; and
- Of continuing interest, "Protecting Your Snowbird Clients from a New York Residency Audit."

Some of these articles are the result of requests from Section members, and I would encourage you to send me any requests/suggestions you may have. I also urge you to write for this journal; the more articles we have from Section members, the more relevant it will become to all of us. The deadline for our Spring/Summer issue is May 1, 2019.

Carole A. Burns

Message

Continued from page 4

we are talking about creating need to be a support system with practical advice for transition/succession planning.

The first Gathering held in early October got great reviews from attendees. The seniors in attendance loved the format of programing followed with breakout groups to discuss and comment on each program section. It was like their first opportunity to talk with contemporaries about transitioning. We have heard from NYCLA and the City Bar about an interest in holding joint gatherings with NYSBA. If you want to see the short videos and materials go to the NYSBA website (www.nysba.org), Sections & Committees, Senior Lawyer Section, then click on the Meeting of the Minds link on the left column.

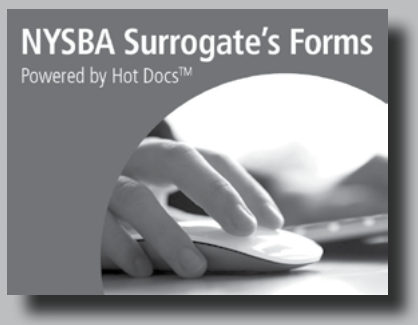
The plan for the Annual Meeting in New York City is to hold a symposium on Thursday, January 17, from 10 to 12 at the Hilton with invited speakers, including bar leaders, bar executives, those involved in Lawyers Concerned for Lawyers to come and speak, and invite Senior Lawyers Section members to attend. The program will include a roundtable discussion of the Gatherings being held by this Section, joint with all co-sponsoring entities including local bar associations, Young Lawyers Section and the General Practice Section. We do not want to overlook key Section and committee leaders who may share this same interest. We want to reach out to the courts, the law school community, and any health care providers who share our concerns about the aging legal workforce and the future of the profession.

C. Bruce Lawrence
cblawrence@boylancode.com

NEW YORK STATE BAR ASSOCIATION

From the NYSBA Book Store >

New York State Bar Association's Surrogate's Forms—Powered by HotDocs®



Now you can electronically produce forms for filing in New York surrogate's courts using your computer and a printer or to upload as a PDF for e-filing. New York State Bar Association's Surrogate's Forms is a fully automated set of forms which contains all the official probate forms as promulgated by the Office of Court Administration (OCA), as well as the forms used specifically by the local surrogate's court.

The New York State Bar Association's Surrogate's Forms—Powered by HotDocs® offer unparalleled advantages, including:

- The Official OCA Probate, Administration, Small Estates, Wrongful Death, Guardianship and Accounting Forms, automated using HotDocs document-assembly software.
- A yearly subscription service includes changes to the official OCA Forms and other forms related to surrogate's court practice, also automated using HotDocs.
- Links to the full text of the Surrogate's Court Procedure Act (SCPA); the Estates, Powers and Trusts Law (EPTL); and the Uniform Rules for Surrogate's Courts.
- Clear, easy-to-use graphical format that makes the forms tamperproof, protecting them against accidental deletions of text or inadvertent changes to the wording of the official forms.
- Practice tips to help ensure that the information is entered correctly; automatic calculation of filing fees; and warnings when affidavits need to be completed or relevant parties need to be joined.
- A history of forms you've used and when they were created for each client.
- A "find" feature that allows you to locate any form quickly and easily.

Key Benefits

- Generate New York surrogate's court forms electronically
- Eliminate the hassle spending countless hours trying to properly format a form

Product Info and Prices

PN: 6229E

NYSBA Members	$666
Non-Members	$781

Multi-user and annual renewal pricing is available.

Please call 1-800-223-1940 for details.

Prices subject to change without notice.

"Use of the program cut our office time in completing the forms by more than half. Having the information permanently on file will save even more time in the future when other forms are added to the program."

"The New York State Bar Association's Official Forms are thorough, well organized and a pleasure to work with."

Get the Information Edge

1.800.582.2452 www.nysba.org/pubs

Mention Code: PUB9111N

NYSBA

The Very Real Threat of Identity Theft: A Guide to Identity Recovery and Resolution—Part III

By James LaPiedra and Jeffrey A. Kerman

In this third and final article of our three-part identity theft protection series, we discuss the final phase of the identity security cycle, the recovery/resolution phase. As a friendly reminder, the first two articles identified the many forms of identity theft and the methods used by thieves to commit fraud, several measures to reduce the risk of identity theft, and how to be proactive in detecting this fraud. This recovery/resolution phase article will provide helpful guidance for disputing fraudulent claims, so that you can act quickly to greatly reduce the risk of becoming a victim.

Confronting a case of identity theft can be very challenging. Successful resolution requires the accurate and timely gathering, organization, tracking, and follow-up of information (often to multiple sources). Some cases may even require the specialized skills of an attorney, law enforcement professional, or company with services within the credit and/or identity fields. In all cases, your liability depends upon how quickly you act.

Outlined below are steps you can take if you suspect or discover fraudulent activity:

Taking Action

If you suspect fraud immediately contact the creditor and credit reporting agencies reporting the fraudulent activity.

In addition:

- Create a case folder containing all correspondence and supporting documentation.
- On the inside cover, attach a data sheet to conveniently and chronologically record all details.
- Include dates, times, types of communication (e.g., notification, follow-up), the names of company representatives with whom you've communicated, and in-depth descriptions and notes of all your discussions.

Disputing ATM, Debit Card, and Credit Card Transactions

The **Electronic Fund Transfer Act (EFTA)** highlights your rights and responsibilities regarding ATM and debit card fraud transactions. The **Fair Credit Billing Act (FBCA)** highlights your rights and responsibilities regarding credit card fraud transactions.

The following are several examples of billing errors under the **FCBA**:

- charges not actually made by the consumer
- charges in the wrong amount
- charges for goods or services not received by the consumer
- charges for goods not delivered as agreed
- charges for goods that were damaged on delivery
- failures to properly reflect payments or credits to an account
- calculation errors
- charges that the consumer wants clarified or requests proof of
- statements mailed to the wrong address.

If you detect unauthorized or fraudulent transactions involving your ATM, debit, or credit card, immediately report it to the issuer's fraud department. You must follow up your phone notification with a written letter detailing the disputed transactions. Keep the originals of all correspondence, and send copies to the address provided for ***billing*** inquiries, ***not*** the ***address for payments***. This

James LaPiedra is the President and CEO of ID360°, an identity theft risk management and recovery provider. He holds the Certified Identity Theft Risk Management Specialist (CITRMS®) designation, and frequently speaks at identity theft seminars and workshops. Jim is the author of *IDENTITY LOCKDOWN: Your Step-By-Step Guide to Identity Theft Protection*. He is also a Certified Financial Planner™ specializing in retirement and distribution strategies. Jim earned a BBA in accounting from St. John's University and holds general securities and investment adviser representative licenses, as well as life, accident, and health insurance licenses. He is a highly decorated veteran of the New York City Police Department, where he served as the commander of several investigative and patrol units before retiring as a deputy inspector. Please feel free to check out the co-author's identity services at www.id360.com. **Jeffrey A. Kerman,** JD, CWS is an independent financial advisor who enjoys working with his clients and listening to their unique stories. As the Senior Managing Director of Wealth Partners Advisors LLC, Jeff focuses on combining the estate planning, financial, investments, insurance, tax and the business planning processes for people who want more confidence and satisfaction in their financial matters. He helps clients align their values and goals into a rational financial and life Plan. Jeff has spoken and published articles on various financial, investment, and retirement planning topics for the New York State Bar Association. He recently presented on "The Financial Elements of Retirement Income Planning" to the Senior Lawyers Section at the 2017 NYSBA Annual Conference, and he holds the Certified Identity Theft Risk Management Specialist (CITRMS®) designation. Please feel free to check out the co-author's financial services at www.wealthpartnersadvisors.com.

notice must be mailed within 60 days of the date you received the first statement concerning the fraudulent charge.

Many major credit card issuers promote "*zero liability*" for fraudulent transactions involving their ATM or debit cards. There are exceptions, however—most are noted in the fine print of your cardholder agreement. This is why it's imperative to monitor your account regularly, and report suspicious activity and lost or stolen cards. If lost or stolen cards are reported before any fraudulent transactions take place, you will not be held responsible for those that occur after your notification to the issuer.

You may be liable for unauthorized withdrawals generally with the following liability limits:

For debit/ATM cards:

- Loss is limited to $50 if institution is notified within two business days.
- Loss is limited to $500 if institution is notified between three and 60 days.
- Loss liability is unlimited if loss is *not r*eported within 60 business days.

For credit cards:

- Loss is limited to $50 if your credit card is used at the point of purchase.
- There is no liability if the purchase was made by phone or online.
- Loss liability is unlimited if loss is *not r*eported within 60 business days.

Once the issuing agency receives your notification, it has 10 days to investigate and must notify you within three days of completing its investigation. If the investigation reveals an error or fraud, the issuer must correct the records and replace the funds within one day. If the issuer needs additional time to complete its investigation, the ***EFTA*** allows another 45 days—provided the issuer replaces the disputed funds, and notifies the consumer that the funds have been credited to his or her account.

If, at the conclusion of the investigation, the issuer determines that no error or fraud has occurred, the issuer can withdraw the credited funds and notify the consumer with a written explanation of its findings. Visit the Federal Trade Commission (FTC) site at **ftc.gov** for more information on your credit account consumer rights.

Disputing Information on Your Credit Report

Under the **Fair Credit Reporting Act (FCRA)**, both the credit bureau (e.g., Equifax) and the business that sent the information (e.g., your bank or credit card company) are responsible for correcting fraudulent or inaccurate information in your report.

To dispute inaccurate or fraudulent information, notify, **in writing**, all three credit bureaus and any companies or creditors whose information is in question. **Be sure to send all correspondence via certified mail, return receipt requested.** This provides a record that the correspondence was actually delivered.

This notification should include the following items:

- a detailed description of the account information and why you believe it to be inaccurate, along with copies of any additional supporting documentation;
- the unique **reference number** appearing on your credit report;
- copies of identification for verification; and
- an identity theft report (if you believe the information disputed is fraudulent).

An **identity theft report** is an extensive police report with enough detail for credit reporting agencies and businesses to verify that you are in fact a victim of identity theft, and to determine which inaccurate account information is a result of that theft. It facilitates your rights in the Recovery process.

Creating Your Identity Theft Report

1. File a complaint report with the *FTC* detailing the events of the theft. Once you write and print those details, an **identity theft affidavit** is created. It is a document critical to reporting and resolving fraudulent accounts. The identity theft affidavit includes general information about yourself, the theft, and the account(s) opened or affected in your name.
2. Bring your FTC identity theft affidavit with you when you file a police report.
3. Together, your FTC identity theft affidavit, and your police report make up an **identity theft report**. Be sure to get a copy of the police report or the report number.

For various reasons, it's not uncommon for victims requesting a police report to get pushback from local law enforcement. Don't get discouraged. Some people forget that identity theft is a federal crime that should be treated as such. Be persistent and know that there are additional outlets you can pursue.

Any local, state, or federal law enforcement agency is obligated to take your police report. If you still encounter resistance, your state attorney general's office will take it. To locate your state attorney general's office visit **usa.gov/state-attorney-general.**

Information Blocking Process

The **information block** process is another way for identity theft victims to manage fraudulent information. Upon accepting your identity theft report, the credit

bureau has four business days to **block** the fraudulent information in question until it's resolved. Your report is still accessible, just not the information in dispute. Note that the credit bureau must notify you and the creditor in writing if it places the block in effect. It must also notify you if it refuses to place the block in effect.

Reinvestigation is a process designed to help consumers dispute credit report errors or inaccuracies. Contrary to how it sounds, it is actually the *initial* investigation that follows a dispute. Upon accepting a dispute notification from the consumer, the credit bureau is required to investigate. Each has its own procedure. The credit bureau must forward your notification, along with all supporting documents and information, to the company reporting the disputed information. The creditor must then investigate the matter and report its findings back to the credit bureau. This process usually takes about 30 days.

If the creditor finds the disputed information to be inaccurate or unverifiable, it must correct or remove that information and notify each of the national credit bureaus. Contact the agency that has reported the inaccurate information to determine its current procedure.

Criminal Violations

It's frightening to think someone could commit crimes in your name. Even more disturbing is the fact that you could get arrested for those offenses. Unfortunately, it's a very real threat. In most cases, thieves use fraudulent addresses, and it's only after the victim has a police contact—like a minor traffic infraction—that he or she becomes aware of the impersonation.

If you become aware of violations falsely committed in your name, contact your state Attorney General's office. Procedures for disputing and correcting criminal records vary from state to state. Contact the local law enforcement agency that filed the charges on the thief, and file a criminal complaint of impersonation. Request that the agency take your fingerprints, photograph, and copies of other identifying documents (your driver's license and passport).

Once your identity has been verified, the law enforcement agency and the local district attorney's office *should* issue some form of a clearance letter or, in the case of an arrest, a certificate of release. Monitor the investigation and confirm that any follow-up findings supporting your innocence are filed with the appropriate District Attorney's office and court. A criminal defense attorney may be required to help fully reconcile your status, and correct criminal records filed with prosecutors and law enforcement.

Driver's License ID Theft

- If you suspect that someone has illegally obtained a driver's license in your name, contact your state department or the Department of Motor Vehicles (DMV).
- Some states add fraud alerts to your file if you are a victim of identity theft.
- Request your driving record once a year from your state DMV office to proactively detect any fraudulent activity. Visit **dmv.org** to locate your local DMV office.

Medical Identity Theft

Medical identity theft occurs when someone uses your personal information without your knowledge or consent to obtain, or receive payment for, medical treatment, services, or goods. Victims of medical identity theft may find that their medical records are inaccurate, which can have a seriously negative impact on their ability to obtain proper medical care and insurance benefits.

- If you discover inaccurate information or suspect fraudulent activity in your medical records, immediately request that the health care provider amend the record.
- If the provider created the record in question, it *must* correct the inaccurate information.
- If the provider disagrees with your claim, submit your statement of disagreement in writing. This statement of disagreement *must* be added to your record.
- You can also exercise the following rights under federal law:
  - the right to request copies of your current medical files from each health care provider;
  - the right to have your medical records amended to remove inaccurate or incomplete information;
  - the right to an accounting of disclosures—a record of who has been given access to your medical records—from your health care providers and health insurers, which is very important in tracking down where inaccurate information may have been sent; and
  - the right to file a complaint with the Office of Civil Rights at the U.S. Department of Health and Human Services, if a health care provider does not comply with these rights. In addition, many hospitals have patient advocates who may be able to help you obtain medical records and access information. Review your rights in greater detail at the Department of Health & Human Services site at **HHS.gov**.

Genetic Material (DNA) Identity Theft

With the emergence and growing popularity of Genetic and DNA testing for ancestry purposes, people should be aware of having one's personal DNA compromised. Millions of people have used the direct-to-consumer ge-

netic tests. Many of these genetic test companies allow their customers to download files containing their personal genetic information. This has created several third-party services from other companies that source multiple databases of genetic information in order to conduct long-range family searches. The true effect of having this genetic personal information available for cross-referencing databases is still not known.

Law enforcement agencies are now utilizing these databases as a standard investigative tool to help solve crimes. A serial killer was caught earlier this year after eluding authorities for over 32 years when investigators used his crime scene DNA to conduct a long range family search using the available public genetic databases. It is vital that people understand the privacy rules for each of these genetic testing companies, and take measures to opt out of sharing their genetic information if they so desire. This area of genetic identity theft is likely to continue changing at a rapid pace, and should be watched for future identity protection measures as it evolves.

Phone Fraud

If you suspect that an account for phone service has been fraudulently opened in your name, contact the service provider immediately and cancel the account. Open a new account using a different PIN for access. If you experience any difficulty having the fraudulent charges removed by your service provider, the following agencies can assist you:

- For local service, contact your state's Public Utility Commission.
- For cellular phones and long distance, contact the Federal Communications Commission (FCC), at 1-888-CALL-FCC.

Mail Fraud

If you suspect mail theft or tampering, notify the U.S. Postal Inspection Service (USPIS) immediately and file a complaint. To locate your USPIS district office online visit **uspis.gov** or call your local post office.

Passport Fraud

If you believe your passport is lost, stolen, or used fraudulently, contact the U.S. Department of State (USDS) online visit **travel.state.gov.** When not traveling, secure your passport in a safe or secure file cabinet. When traveling, make a color copy of your passport's first page, and store it separately from the original in case it's ever lost or stolen on your trip. You can also scan and save a copy in an email or a cloud computing folder like Dropbox, which allows you to store virtual files online and access them from virtually anywhere by connecting to the online service if the original is lost or stolen.

Thefts of American tourist passports are on the rise. A U.S. passport is very valuable to a thief, or worse—a terrorist. Take extra precautions to secure your passport abroad and at home.

Identity Theft Insurance, Credit Monitoring and Recovery/Resolution Services

Before you choose **credit monitoring and recovery/resolution** services or **identity theft insurance,** understand that they often have significant limitations and that neither can fully protect you from becoming a victim. Many policies only cover nominal out-of-pocket expenses—photocopying documents, mailing correspondence, and filing fees relative to your case. Further limiting coverage are significant deductibles and maximum caps on reimbursements, which may require pre-approval by the insurance company.

Credit monitoring by itself is a limited form of protection that *cannot* protect against criminal, medical, Social Security, tax return, existing account, or synthetic identity fraud. Credit monitoring won't alert you if someone obtains employment, a driver's license, a birth certificate, a social security card, or other documents in your name. Try to use a reputable company offering a combination of these professional services to best protect your identity from theft.

Words of Caution

While some identity theft protection and credit monitoring services are legitimate, many are marketing companies skilled at selling fear and a false sense of security. Some businesses claiming to monitor all elements of your identity in "real time" and perform a full recovery if you become a victim. In actuality many of these companies have little to no security experience to back up their claims and actually help victims recover or resolve their identity theft issues.

Service agreements can be complicated and misleading. Get the details in writing, read the fine print, and know what you're paying for.

Conclusion

The goal of our three part identity theft article series has been to provide our readers with a real world overview of the many ways that our identities can be compromised. In a world where one's personally identifiable information is often left unprotected, the co-authors sought to create a powerful resource and guide for the protection, detection and recovery of identities. It is our hope that our three identity theft articles can be shared with many people to help educate and protect them from this growing and ever changing problem.

Protecting Your Snowbird Clients from a New York Residency Audit

By Karen Tenenbaum and Lance E. Rothenberg

As winter sets in, we envy those who can easily travel to warmer climates. However, snowbirds may pay a steep cost if they aren't careful. A New York personal income tax residency audit may be the most difficult and personally intrusive type of audit to endure. The purpose of the audit is to establish whether a taxpayer accurately filed a New York personal income tax return as a nonresident, part-year resident, or resident. However, these audits are very fact-intensive, requiring a detailed review of voluminous records to determine the taxpayer's intentions, whereabouts, and movements.

More than most states, New York aggressively enforces its residency audit program. New York residents are required to pay tax on all worldwide income, while nonresidents are subject to tax only on income allocable to New York, such as wages earned for services provided within the state, rents from property located within the state, or income attributable to a New York trade or business. Accordingly, a determination that a taxpayer is a New York resident has significant tax consequences. To protect against an audit, it is essential to understand New York's two tests for determining residency for income tax purposes:

1. Domicile

A taxpayer may have more than one house, but he can have only one "domicile." Under New York's rules, an individual's domicile is his true, fixed, permanent home. It's the place he returns to after having been absent.[1] Legal domicile requires both a subjective intention and physical presence within the jurisdiction.

Once established, a domicile continues until the taxpayer can demonstrate that he has abandoned one domicile and established a new one outside of the state. This change must be supported by evidence that is clear and convincing. The burden of proof rests with the party asserting the change, typically, the taxpayer.

New York looks to five primary factors in evaluating a claim of a change of domicile.[2]

a) Home Factor: comparison of size, value, and usage in each jurisdiction;

b) Business Factor: comparison of business ties in each jurisdiction;

c) Time Factor: comparison of days spent in each jurisdiction;

d) Near & Dear Items Factor: comparison of where a taxpayer keeps his financially and sentimentally important items that make a home a home; and

e) Family Factor: comparison of family members in each jurisdiction.

A good example of these factors at work is the 2017 Tax Court decision in *In re Blatt*.[3] The case involved a taxpayer who moved from New York to Texas for a new job. He initially maintained a residence in each state, but over time committed to living in Texas. He subsequently returned to New York for a new position. While he was living in Texas, he stopped paying tax to New York as a resident. Among the various domicile factors weighed by the court were the taxpayer's "near and dear" items. The court was particularly persuaded by evidence introduced at trial that Mr. Blatt moved his beloved dog from New York to Texas. While he maintained a home in each jurisdiction, the fact that he brought his dog to Texas was compelling evidence of his intention to commit to Texas as his domicile.

Additional factors may be relevant. However, only after first examining the five primary factors listed above will residency auditors look to secondary factors, such as a taxpayer's driver license, voter registration, auto registration, etc. These data points can be very useful and important in telling a complete story, but they can be more easily manipulated than the primary factors.

It should be noted that there are two exceptions when a taxpayer will not be taxed as a resident for personal income tax purposes, even though domiciled in New York.

Exception 1:

Taxpayers who (1) do not have a permanent place of abode in New York and (2) spent fewer than 30 days in New York will not be considered a resident for income tax purposes.

Lance E. Rothenberg, J.D., LL.M. (Tax) is a Senior Manager at CohnReznick LLP in the State and Local Tax Services practice. Lance can be reached at lance.rothenberg@cohnreznick.com and at 862-245-5059. **Karen Tenenbaum,** Esq., LL.M. (Tax), CPA is Founder and Managing Partner of Tenenbaum Law, P.C. (www.litaxattorney.com), a tax law firm in Melville, N.Y., which focuses its practice on the resolution of IRS and New York State tax controversies. Karen can be reached at ktenenbaum@litaxattorney.com and at 631-465-5000. Disclaimer: The information contained in this article does not constitute tax advice and is for informational purposes only.

Exception 2:

A taxpayer who (1) is in a foreign country for at least 450 of any 548 consecutive day period and (2) neither he nor his family spends more than 90 days in New York will not be treated as a resident for income tax purposes. This exception typically applies when New York residents are positioned in overseas offices of their multinational employers.

2. Statutory Residency

Where an individual is domiciled outside of New York, he may still be taxed as a "statutory resident" of New York if he meets a two-prong test: (1) the individual must maintain a permanent place of abode in New York; and (2) he must spend, in the aggregate, more than 183 days of the year in New York.

A typical audit case might involve an individual who is domiciled in Florida, but who maintains an apartment in Manhattan and travels to New York for both work and pleasure frequently. Would this taxpayer meet both prongs of the statutory residency test?

a) **Permanent place of abode.** New York defines *a permanent place of abode*[4] as a residence (building or structure in which a person can live) that is maintained by the taxpayer for substantially all of the year and is suitable for year-round use. It doesn't matter whether the taxpayer owns the place or stays there during visits to New York. Even if others are using the place (relatives, renters, etc.), it could still be considered the taxpayer's abode under certain circumstances.

   The auditor would consider factors such as whether the taxpayer uses the apartment or leases it out to a third-party? Is the third-party a stranger or is it rented to a relative? Does the taxpayer have a key and unfettered access to the place? Is it habitable and being maintained for more than 11 months of the year?

   In the recent case of *In re Mays*,[5] New York's Tax Appeals Tribunal examined what it means to maintain an abode in New York for purposes of statutory residency. The taxpayer was domiciled outside of New York City, and argued that a temporary, corporate apartment available to her in Manhattan did not qualify as her abode for the statutory residency test. Examining prior case law, the Tribunal set forth the proper analytical decision-tree: Does the dwelling exhibit the physical characteristics for year-round habitation? Does the taxpayer have a legal right to occupy the dwelling? If the taxpayer does not, does she nevertheless have access to and use of the dwelling? If she has a legal right, has she exercised that right by enjoying her residential interest in it?

b) **Day count.** Let's say the taxpayer commutes from New Jersey to Manhattan for work. If he spends greater than 183 days in New York, this element of the test is met. When it comes to counting days spent in New York, generally the rule is that a partial day counts as a full day, with some limited exceptions. Overnights are not required so even catching a Broadway musical on a Sunday will count as a day.

   The difficulty with day count is establishing evidence to document the taxpayer's daily whereabouts. New York may ask to analyze documentation including diaries, appointment logs or calendars, credit card and bank statements, detailed cell phone bills, EZ Pass records, ATM receipts, passport records, and data from building security or swipe cards. Furthermore, smart phone applications have been developed (two such examples include TaxDay and Monaeo) to track and record an individual's location using GPS signals. This is why proper recordkeeping is essential and can help avoid or fight a tax audit.

Successfully defending against a residency audit may also include an examination of whether a nonresident has properly computed and reported tax to New York on income from New York sources. Nonresident allocation audits can involve complex issues over the proper sourcing of deferred compensation, employee stock options, and pass-through business income, among other issues.

New York State residency audits can be burdensome, complex and invasive. If your client has or is considering moving or purchasing a second home, careful planning is critical. In the event they receive a residency questionnaire or audit notice, they should speak to a qualified tax advisor for help in responding to the state.

Endnotes

1. *See* 20 N.Y.C.R.R. 105.20(d); *see also In re Newcomb*, 192 N.Y. 238 (N.Y. 1908).
2. *See, e.g.*, NY Nonresident Audit Guidelines (2014).
3. *In re Blatt*, DTA No. 826504 (Div. Tax App. 2017).
4. *See Gaied v. New York State Tax Appeals Tribunal*, 22 N.Y.3d 592 (N.Y. 2014) (concluding a taxpayer must have a residential interest in the abode).
5. *In re Mays*, DTA No. 826546 (Tax App. Trib. 2017).

Settling a Personal Injury Claim While Providing Comprehensive Counsel

By Deidre M. Baker

Many special needs cases begin with a personal injury that resulted from medical malpractice or some other tragic event. Often, injuries result in civil suits with the potential for large settlements. In creating a strategy to best benefit the client once he or she receives an award, a consultation by the personal injury attorney with an elder law, estate planning, and/or special needs attorney can be very helpful to determine the best strategy.

After all of the effort expended on behalf of the client in order to obtain the best possible settlement given the facts and circumstances surrounding his or her claim, the personal injury attorney needs to be certain to finalize the representation just as effectively as it began. Once the settlement or trial award is secured, the advice of an attorney versed in elder law, estate planning, and/or special needs planning can allow a personal injury plaintiff to preserve his or her settlement assets long into the future.

Medical Coverage and Expenses

Often there are sizable medical expenses or liens that need to be dealt with as the result of the personal injury claim. These expenses are typically assessed during the negotiation process as they will have an impact on the client's net proceeds. While identifying, addressing, and negotiating these issues is often just as time consuming and frustrating for the personal injury attorney as obtaining the actual settlement, it is critical they are resolved prior to accepting the settlement.

Following the resolution of the personal injury claim, the type of medical coverage and services that the plaintiff receives or is eligible for is especially important as these individuals are often disabled, or have some type of preexisting condition, which limits their health care coverage. In addition to basic health insurance, personal injury plaintiffs may come to rely on expensive medications and physical therapy to help them recover from injuries. Determining whether or not the personal injury plaintiff has sufficient medical coverage is important as there are common misconceptions surrounding what government programs actually cover.

While the personal injury attorney may not be familiar with the types of services and benefits to which his or her now-disabled client may be entitled, the attorney should direct the client to seek advice regarding entitlement benefits. It must be determined what benefits or services the disabled individual is already receiving or may be entitled to receive in order to protect the settlement and maintain eligibility for critical benefits. Those clients who receive Medicaid, for example, need to ensure that assets and income remain below the requisite allowances as determined by Medicaid. These clients, in particular, should seek the counsel of an elder law attorney to shelter as much of their income and assets as possible.

Medicare Secondary Payor Act

Medicare is the federal health insurance program for individuals over the age of 65 or those individuals with a permanent disability. Medicaid is a joint federal-state program that provides health coverage or nursing home coverage for certain categories of low-asset individuals, including children, disabled individuals, or individuals over 65. The programs are administered by the Centers for Medicare and Medicaid Services (CMS). Both programs reserve the right to be paid back by a recipient for funds spent on care, in the event the recipient becomes financially able to do so. In an effort to reduce federal health care costs, several years after the Medicare regulations became effective, Congress enacted the Omnibus Reconciliation Act of 1980 (ORA).[1] Within the Act was a series of provisions, known as the Medicare Secondary Payer Act (MSP),[2] that designated Medicare as the secondary payor when other groups were available to assume primary responsibility for an injury. These other groups include auto, no-fault, group health plan, general liability, and accidental injury insurers. For all medical services related to the injury at issue, these groups are considered "primary" payers and Medicare is considered the "secondary" payer.

The MSP applies to your case if the plaintiff is a current or potential Medicare beneficiary. An individual is considered a "potential" Medicare beneficiary when they have a reasonable expectation of becoming a Medicare beneficiary within 30 months and the settlement amount is $250,000 or more. In an effort to clarify some of the confusion around what is meant by "reasonable expectation," CMS issued a memorandum providing guidance.[3] CMS indicates that a claimant has a reasonable expectation when they have applied for Social Security Disability (SSD), if they have previously been denied for SSD and are in the process of appealing or refiling, if they have end-stage renal disease, or if they may be eligible

Deidre M. Baker is an associate attorney with the law firm of Makofsky & Associates, P.C. The firm focuses on estate planning, Medicaid planning and applications, estate administration, and guardianships. The office can be reached at 516-228-6522. *Reprinted with permission by the Nassau County Bar Association.*

for Medicare within 30 months (i.e. they are 62 ½ years old or older).

While the general rule is that Medicare and Medicaid liens are to be settled along with the underlying claim, these liens are often regarded as afterthoughts. CMS has made it clear that moving forward, it will enforce the Secondary Payor Act for liability cases. For impacted clients, this means that they will need to establish Medicare Set-Aside (MSA) accounts in order to avoid liability. When settling a claim involving a potential Medicare beneficiary, the attorney and the client should consider whether any future medical treatment will be required. Attorneys should also discuss, in writing, with their opposing counsel their mutual obligations to identify Medicare's liens and they should agree to not settle without consideration of Medicare's interest.

Properly drafted and validly executed estate planning documents are important for all individuals. They become critical tools once a person has suffered debilitating injuries or comes into a large sum of money. If your client already had estate planning documents in place prior to his or her accident, they may now need to be updated as the injuries sustained could be to the point of a permanent disability. The right estate planning tools can allow a now-disabled person to effectively manage both their settlement funds as well as potential future incapacity.

A focal point of settlement planning is often a Special or Supplemental Needs Trust. These trusts are tailored to each client's specific needs and goals and differ based upon the age of the beneficiary, his or her medical requirements, family structure, public benefit requirements, and ability to self-manage a settlement. These are especially important when the injured plaintiff is a minor, as he or she is likely to be receiving public benefits. It is also important that the parents' estate planning documents not leave any assets directly to the disabled child, but rather to a third party special needs trust. This will avoid the disabled child from losing government benefits, while still enjoying the use of trust monies for certain allowed expenses.

"Clients must be made aware of their current and future government benefits, including any benefits not utilized, as well as the impact a settlement could have on their eligibility and long-term care, including the potential for Medicare and Medicaid liens."

Clients must be made aware of their current and future government benefits, including any benefits not utilized, as well as the impact a settlement could have on their eligibility and long-term care, including the potential for Medicare and Medicaid liens.

Public Benefit Programs and the Importance of Estate Planning Documents

A personal injury plaintiff may be receiving benefits from a number of public benefits programs either as a direct result of his or her underlying claim or prior to the incident. The primary public health care programs are Medicaid and Medicare and the primary public income support programs are Supplemental Security Income (SSI) and Social Security Disability Income (SSDI).

These programs, as well as any other program of which the plaintiff may be a beneficiary, have their own eligibility rules, and receipt of the settlement could result in the loss of benefits. In order to receive benefits through SSI, for example, an individual must be blind, disabled, or over sixty-five. In addition to these basic requirements, an individual may have no more than $2,000 in assets and earn no more than the Federal Benefit Rate (FBR) in countable income, which is $735. Even a small financial settlement will render an individual ineligible for this program without proper planning.

The job of the personal injury attorney is to win cases. The goal of the elder law, estate planning, and special needs attorney is to identify the potential consequences of a large settlement and assist individuals in preserving assets and planning for an uncertain future. It is critical that personal injury plaintiffs be urged to consult with attorneys who specialize in special needs trusts, preservation of assets and public benefits, estate planning, and tax law, to maximize the value of his or her settlement.

Endnotes

1. *Omnibus Reconciliation Act of 1980,* Pub. L. No. 96-499, §953, 94 Stat. 2599, 2647 (1980).
2. 42 U.S.C. §1395y (b)(2)(A)(ii).
3. Centers for Medicare & Medicaid Services; *Medicare Secondary Payer—Workers' Compensation (WC) Frequently Asked Questions* (April 22, 2003).

Reflections on "Aid in Dying" and the Paradox of "Achieving Death": Avoiding the Confluence of Language and Ideology at Life's End

By Joseph J. Fins and Mary Beth Morrissey

I. Introduction

The subject of aid in dying has been front and center in New York for several years in the context of legalization debates that have been spearheaded principally by two advocacy organizations, End of Life Choices New York and Compassion & Choices. These debates have intensified in light of activity in other states and high-profile media attention to individual cases, such as that of Brittany Maynard. New York has seen the introduction of an aid in dying bill,[1] as well as litigation in the case of *Myers v. Schneiderman*.[2] The New York Court of Appeals handed down its decision in the case in September 2017, ruling that there is no fundamental constitutional right to aid in dying in New York as defined by the plaintiffs. A recent article in this New York State Bar Association *Health Law Journal* reviewed in detail legislative efforts in New York to establish medical aid in dying as a right.[3]

The focus of our particular commentary is to address in a non-ideological manner bioethical, clinical, and public policy issues about aid in dying that have not received sufficient attention in public forums to date, or have perhaps been given an ideological and libertarian slant. Drawing on interdisciplinary perspectives, the authors seek to reframe the debate about a complicated problem not amenable to technical or simplistic fixes that will not meet the need of most patients and families.

II. From Ideology to Understanding

Proponents of aid in dying have framed the goals of the movement as an extension of patient self-determination that would encompass a right to aid in dying, also known as physician-assisted suicide (PAS).[4] In this article, we address ethical issues related to the practice known as physician or medical aid in dying. Under either term, this practice involves physician-prescribed lethal medication to a terminally ill, competent patient for the purposes of such patient's self-administration of such medication to end his or her own life as he or she chooses. (Other practices that would involve intentional acts by a third party to bring a physically or mentally ill person's life to an end through administration of lethal medication or injection, such as euthanasia, are legally permitted in some countries, but are not legal or under active consideration in the United States at this time and will not be discussed here.)[5]

Often motivated by libertarianism or neoliberal ideology,[6] [7] [8] which may be less progressive than it seems, this expansion of patient autonomy represents an illusory desire to control the timing and manner of death. But it is a hollow quest. Physician aid in dying will neither negate the dread of death nor its sad aftermath. As the bioethicist Daniel Callahan has wisely written, no matter the desire for control, we cannot escape our mortality.[9] It is simply out of our hands.

Moreover, death is not an atomistic event affecting only the patient taking her/his own life. Most of us are embedded in families and larger social and cultural contexts, and there can be consequences for complicated bereavement when aid in dying occurs and there is unresolved conflict over the action.

All this complexity is obscured by the language of those who favor aid in dying. At a conference held at the Sandra Day O'Connor Law School focusing on dementia, brain injury and disorders of consciousness, a national proponent of aid in dying spoke rather eloquently and convincingly not about dying, but rather what was described as "achieving death."[10] It was not clear what this meant, and whether the speaker intended to frame death and dying as a type of accomplishment.

Efforts to reduce aid in dying to an individual achievement or "good death" fail to account for the complexity in experience of suffering and death, dying, and bereavement. Dying is not a usual sort of achievement, but a passage with consequences. Changing the language leads to conflations that obscure differences with serious implications both for professional practice and for patients. For example, PAS is represented as aid in dying, seeking to conflate the multiple ways in which doctors help patients die, such as withdrawal or withholding of life-sustaining therapies (LST) and DNR orders. Indeed, language in the New York State Bill on "Medical Aid in Dying" suggests that PAS is no different from other ways that patients receive care at life's end. This obscures important differences that we need to explicate.

Previously, each one of us has argued that there is a valid distinction between PAS and decisions to withhold or withdraw life-sustaining therapies.[11, 12] While this itself warrants an essay-length explication and is not the subject of our article here, suffice it to say that the argument hinges on causality and intent. Consider the example of two patients on a ventilator. The first has Acute Respiratory Distress Syndrome (ARDS) and respiratory failure. The second had general anesthesia for an operative procedure. If the ventilator is removed from both patients, once the second patient has recovered from anesthesia, death will occur in the first but not the second case. In this case, the mere removal of a ventilator is necessary for the first

patient to die but insufficient in the second. In the first patient, extubation removes an impediment to death, allowing a natural process (ARDS) to proceed to its biological conclusion. The same action in the second patient leads to the recovery room because there was no longer a need for ventilation once the patient's level of arousal returned to normal. Thus, a withdrawal of LST only leads to death in patients who continue to need LST. A similar argument can be made for decisions to withhold LST. Only patients who are having a cardiac arrest need resuscitation.

Contrast these actions, whose outcomes are predicated upon specific biological realities (ARDS and cardiac arrest), with assisted suicide. When a patient is given a lethal dose of medication to self-administer, the medication, versus an underlying disease process, is the proximate cause of death. While one could argue that medication is only provided to patients who have a terminal illness, this stipulation does not address the causality question, which is further compounded by the challenge of accurate prognostication at the end of life as carefully explicated by Nicholas Christakis.[13]

Another key distinction is that of intention. In the context of intending to treat pain with escalating doses of medication necessary to achieve analgesia versus a fixed dosage that is known to cause death, the former action may have a double effect, a foreseeable but not intended consequence of death, but the latter is meant to unambiguously cause death. In sum, both causality and intentionality distinguish PAS from decisions to withhold or withdraw LST and the provision of high doses of pain medication to alleviate significant patient distress.

There also is an attempt here to say that the public needs aid in dying because we have no other remedy to "achieve death," as many proponents would assert. Indeed, the New York State Bill suggests that medical aid in dying is an *alternative* to palliative care. This seems to undermine the importance of palliative care and its known efficacy. Such conflations only breed fear, and prompt people to support desperate measures because they worry that they will be abandoned and die in pain.

We can mitigate these fears with good palliative care by teaching it well in New York State[14,15] and not undermining its legitimacy as the New York State Bill seems to do by casting PAS as an equal alternative. Medicine is not powerless. We can control the pain and symptom burden that may occur at life's end. We can temper the use of aggressive, but disproportionate, medical technology. We can talk with patients and families about forgoing resuscitation and opting for comfort measures.

We can even withdraw LST when it no longer serves a patient-centered purpose. And, if the pain is too great, we can sedate patients with strong medications to ease their passage. These palliative care interventions are distinct from deliberately ending one's life and consistent with long-established medical and ethical norms. In a moral universe where *intent and intentionality matter,* these decisions must be distinguished from physician-assisted death.

III. *Vacco v. Quill* and *Washington v. Glucksberg*

This concern about intent was notable in the 1997 U.S. Supreme Court assisted suicide cases, *Vacco v. Quill*[16] and *Washington v. Glucksberg*.[17] In rejecting a constitutional right to assisted suicide, the Court—Chief Justice Rehnquist himself—affirmed a right to palliative care, including pain medications, which might secondarily hasten death. Notably, it was asserted that pain management efforts were not intended to cause respiratory cessation, but that because this outcome was secondary to the goal of pain management, it was morally acceptable. This became known as the doctrine of "double effect," which clarifies that such instances are not assisted suicide but appropriate palliative care. The late Robert Burt, then Sterling Professor of Yale Law School, made this point in a *New England Journal of Medicine* at the time.[18]

Quill v. Vacco[19] was also important because the litigants sought to conflate withholding and withdrawing LST (which law and ethical consensus support) with PAS. Invoking the Equal Protection Clause of the Fourteenth Amendment, litigants in the Second Circuit *Quill v. Vacco*[20] case asserted that if there were a right to withhold or withdraw LST, there should also be a right to PAS. The Second Circuit agreed and SCOTUS reversed, rightly noting that the Equal Protection Clause only guaranteed equal protection to folks who were *similarly situated*.[21] As noted, patients on a ventilator that might be withdrawn, or those who are in imminent need of LST that might be withheld, are in quite a different position than those who need an affirmative action to end a life with PAS.

There is another potential consequence to conflating PAS with LST. Should the political tides change, one could see the rejection of PAS extending in a retrograde fashion to decisions to withdraw or withhold LST. Here the false invocation of the Equal Protection Clause would have a regressive effect. It would paradoxically erode liberties by bringing additional scrutiny to decisions at life's end that are now more routinely approached.

An expansion of rights to include assisted suicide could also undermine well worn rights at the end of life by forcing a more critical examination of motivations for acts that might either be construed as falling under "double effect" or a proper withdrawal of LST or as assisted suicide. This concern is more than hypothetical if we consider arguments made by Supreme Court Justice Neil Gorsuch in his volume, *The Future of Assisted Suicide and Euthanasia*.[22] In the book's final chapter, arguments are made that might either be construed as falling under double effect or as relitigating well-established rights of surrogate decision makers at the end of life. While Gorsuch accepts the right to refuse LST, he does so with the provision that these refusals are only acceptable when death is not the goal,

that is, when it is not sought. He argues that any decision or action that would involve the intentional taking of human life would contravene what he describes as "the inviolability-of-life principle." Those who seek to expand rights to include assisted suicide should be careful not to engender regressive responses that would undermine the liberties that have been hard won at life's end.[23]

The risk of constricting rather than expanding rights in the current environment is further complicated by the tragedy of the current opioid epidemic. We already see how access to opioid pain relief for people with chronic pain and at the end of life has been adversely affected by the national epidemic of opioid abuse and how this has been politicized. Those who live by the proverbial ideological sword can also have their arguments undercut when the same logic is applied in reverse. Hannah Arendt called this the error of logicality, in which acceptance of a first false premise can lead to logical conclusions that are wrong because of the initial predicate being erroneous.[24] Here the false conflation of PAS with other end-of-life choices leads to the potential error of logicality.

The best remedy to avoid such errors is to be sure that the application of these principles fits the evidentiary predicate in the first place. Patients receiving or in need of LST are different from patients who are fearful of future distress and want to invoke a negative right to be alone. Those who would forgo treatment in order to die are in a fundamentally different position than those who want, and request, an affirmative action so as to die.

IV. The Language of Good Intentions

The ideological manipulation of language at life's end to achieve political goals has important clinical repercussions because it recasts how doctors think about their obligations. It will become easier to jump to unexamined conclusions about patient wants and needs, sometimes distorting the very autonomy that "death with dignity" seeks to protect. While this is speculation, this is an arena for potential abuse.

Consider the case of a patient with endocarditis secondary to intravenous drug abuse who was hospitalized in the intensive care unit with a spinal cord abscess involving cervical spine level c3-c5.[25] He had septic emboli to his brain and lungs, compromising both his level of arousal and his respiration. Because of cervical cord compression at the origin of the phrenic nerve, the patient needed to be ventilated.

Unconscious and in critical condition, the patient's mother consented to a DNR order. A few weeks later the patient regained consciousness. Essentially locked in because of his spinal cord lesion, he began to communicate with his eyes. His doctors called for an ethics consult because he had indicated that he wanted to die and have his endotracheal tube removed. They asked for an ethics consultation to validate this request so that they could honor his wishes and allow a "dignified death."

When the consultant met the patient, he was alert and clearly able to signal *yes* and *no* with his eyes. After some preliminary questions to ensure that he could follow instructions and answer consistently by blinking his response, and after some additional neutral queries, he was asked if he wanted to die as had been indicated by the clinical team.

He answered, *No*.

The consultant sought to confirm that this was his answer and continued to ask about his endotracheal tube. *Do you want the tube out?*

Yes, he responded with his eyes.

You would like the tube out?

Yes, again with his eyes.

You know that if I take the tube out you could die?

Yes, he said looking directly at the consultant.

So you still want it out?

Yes.

So you want to die?

No, he responded.

The consultant repeated the sequence several times and in different ways and came to the conclusion that the patient wanted the tube out, understood that taking it out would cause him to die, and that he did *not* want to die.

There was an inconsistency and the consultant felt obliged to offer an explanation. After all, all the patient could do was to respond to his questions. He could neither generate his own questions nor explain himself. He was voiceless and at the mercy of others.

So, let me summarize. You don't want to die, but you want the tube out? Correct?

Yes.

And then the consultant's hypothesis, *Does the tube hurt you?*

The question was met with a massive swooshing of downward gaze of his eyes and even something of a grimace, which would be fair to translate as an emphatic, *Yes*.

So, the consultant suggested, *You want the tube out because it hurts?*

Another expressive, *Yes*.

Adopting a more prudential stance, the consultant suggested that if he wanted to live, then the tube would be kept in place until it was safe to take it out or place a more comfortable tracheostomy tube. That option was not

currently possible because he was on a significant amount of pressure support so the procedure could not be done safely.

The patient and consultant agreed to a number of things now that his goals were clear. First, the DNR order would be rescinded as he wanted to live. Second, he would be put under general anesthesia for a week to see if his lungs would heal thereby making tracheostomy placement possible. If that became an eventuality, he would be awakened to obtain his consent for that procedure. On the other hand, if his condition worsened and he were unable to come off the tracheostomy tube he asked that the DNR order be reinstated and that a terminal extubation be performed.

For comfort relief, the patient was placed under general anesthesia and continued to receive antibiotic treatment for his systemic endocarditis. He emerged a week later as a candidate for tracheostomy placement. This was done and he eventually went to rehabilitation.

A fortuitous outcome, but whatever had occurred it is important to return to how the case was too easily framed as a right to die case and how this changed. Over the course of 40 minutes of "discussion" with this patient, a "routine" withdrawal of care—presented by the patient's medical team with much self-satisfaction—had become something quite different. Through a deeper exploration of the patient's narrative, the consultant was able to clarify that the patient *never* wanted a withdrawal of life support and did *not* desire death. His request to have his tube removed, too easily interpreted as a euphemism, "like pulling the plug," was actually a call for pain relief in a patient who had become voiceless due to his paralysis and intubation.

The desire to provide this patient a "dignified death" also suffered from a lack of credible evidentiary information about the patient's prognosis. His fate was presumed by the treating team to be far worse than his actual prognosis. After additional consultation, it was estimated that he had a 50% chance of independent respiration after the abscess was drained and treated with antibiotics. Why the "treating" team so quickly saw the patient's situation as terminal can only be surmised. We might speculate that it may be related to prejudicial views towards his substance abuse and the "self-inflicted" nature of illness or be a cognitive bias stemming from a framing about paralysis and disability. Whatever the explication, unexplored attitudinal biases were working upon this case in a manner that distorted decision making to the point of almost sacrificing a patient's life.

We view these possibilities as antithetical to the origins of palliative care as means of providing comfort and relief, an evolving tradition dating back to the Irish Sisters of Charity who opened Our Lady's Hospice in Dublin in 1879.[26]

According to an account by Dame Cicely Saunders, herself the founder of the modern palliative care movement, the Sisters' sole focus was on the care of the dying.[27] Describing their hospice, it has been said that the Sisters observed, "It is not a hospital, for no one comes here expecting to be cured. Nor is it a home for incurables, as the patients do not look forward to spending years in the place. It is simply a 'hospice' where those who are received have very soon to die, and who know not where to lay their weary heads."[28] Here the Sisters capture the distinction between the balance of cure and care, the epitome of hospice and palliative care as contrasted with hospital acute care.

That phrase, "lay their weary heads," lingers in the heart and mind, embodying that empathy, that compassionate care that had so informed the palliative care movement as it marched through the 1990s fighting for legitimacy in clinical circles and fighting off those who more narrowly sought to use the movement as an ideological means to advance the case for PAS.

As practiced by its most thoughtful proponents, palliative care originated from a patient/family-centered stance that focused on relief of distress and closure, as well as an appreciation that patients and families came to their decisions in their own way and in their own time. Each patient's trajectory would be unique, and the key to formulating a smooth glide path to a peaceful death was to help articulate goals of care. Decisions to withhold or withdraw care were never goals in that framework. They were the means, meant to be derivative of a prior articulation of goals, desires and aspirations, some of which could be satisfied in other ways.

In the intervening decade, much has changed. In too many cases, the clinician's angst of an impending death and sense of causality, or even responsibility, for a patient's demise has been replaced by the consolation that those who withhold or withdraw LST are acting in a progressive fashion, invariably in the right, acceding to patient or family wishes. And if such consolation is wanting, then the default is clinical decision-making based on the superior judgment on such matters that is expected to come with medical practice. There is a certainty to these decisions replacing the ambiguity of clinical intentions and the moral angst that used to be felt. In short, this ideological belief becomes a prescriptive way to die that has taken some of the gravitas out of dying, and not in a manner that either benefits or consoles patients and families.

No longer is it just about securing a right to die. Practices and beliefs have morphed so that a timely death has become proper and prescriptive. When patients don't die as expected, or on time, one hears house staff using the phrase, "failure to die"—an echo of the earlier geriatrician's, "failure to thrive"—to describe terminally ill patients who lingered and refused to die. A failure to die … *we used to call that survival*. Now that is being seen as a failure, a strange twist since Wanzer wrote of death as a medi-

cal failure back in 1989.[29] That classic essay will celebrate its jubilee in 2019, but so much has changed. From death as medical failure to a failure to die: *Everyone is in such a hurry*. The risk of rushing to judgment at life's end could be further accelerated by having a PAS option.

V. Fears of Abuse: Oregon

Some will counter and say that the New York State Task Force's unanimous reservations about the legalization of assisted suicide articulated in its 1994 *When Death Is Sought*[30] have not been realized. The evidence in states where it has been legal has not shown tremendous abuse.

There is much to say here, but let us focus on one clinical and epidemiological issue. First is the question of how we would determine that a patient has the capacity to make a voluntary decision about PAS. This hinges on the dual questions of capacity and voluntariness. In Oregon, capacity is not the threshold—instead they use a vaguer term about being capable. The statute reads:

> (3) "Capable" means that in the opinion of a court or in the opinion of the patient's attending physician or consulting physician, psychiatrist or psychologist, a patient has the ability to make and communicate health care decisions to health care providers, including communication through persons familiar with the patient's manner of communicating if those persons are available.[31]

There is the need for a concurring physician. Also, there is no mandate for a psych referral unless a psych disorder is suspected. "Capable" is the threshold and not formal decision-making capacity, which is usually the predicate for competence to make medical decisions. A decision to willfully end one's life would seem to require legal competence, not mere capability, which seems to be a term of art. This is a rather low threshold.

How applicable would this be to our highly regulated context in New York State? This was a point recently made by the Bar Association of the City of New York in its examination of the proposed legislation.[32] Tellingly, New York State regulates surrogate decision-making *more* rigorously than Oregon regulates PAS.

All kinds of questions arise about the regulation of PAS. We presume the law would continue to be limited to adult competent patients. But beyond that are several important questions: What illnesses would qualify? Who would evaluate patients for their ability to make decisions and determine their medical eligibility? What sort of training would these practitioners require? Would they need to be certified or credentialed? Could a hospitalist just meeting a patient make this judgment? Would these assessments require that a patient have an ongoing doctor-patient relationship? Would that limit this service to those without access to primary care? Speaking of the poor, would this further limit their equitable access to care or make them more vulnerable?

Let us return to what exactly can be inferred from Oregon's experience and examine the epidemiological evidence. There has not been a high incidence of cases in Oregon. No matter how normative proponents of PAS want to make the act out to be, it is still but a small fraction of cases. From 1998-2017, only 1,967 patients obtained a prescription for lethal medication under Oregon's Death with Dignity Law. This is against the backdrop of 30-35,000 adult deaths per year in Oregon over this 20-year span.[33] That would equal approximately 0.28 to 0.32% of all adult deaths in the state. These data suggest that assisted suicide remains an exceptional action, chosen by a very small minority of dying patients, with an even smaller number bringing their decision to completion. And of the 1,967 who obtained a prescription since 1997, only 1,275 patients died from a legal ingestion, just under two thirds of patients who obtained medication.

This experience suggests that the needs of most dying patients cannot be addressed by pharmacology alone. Legalization of PAS is not a remedy for the vast majority of patients who will never consider, much less avail themselves of, this option. In Oregon, 99.7% of patients did not take advantage of the law. These data suggest that the focus on PAS is misplaced and constitutes a distraction from more compelling clinical need. Good end-of-life care is more complicated than having a stash of pills in the medicine cabinet. Patients need comprehensive palliative care, including psychological support to address their suffering and fears.

Whatever one thinks of PAS, it is *not* a population-based public health remedy for the vast majority of patients. Nonetheless, it consumes a disproportionate amount of our attention, at the expense of more productive conversation. This begs the question, why?

VI. Brittany Maynard and the Need for Better Palliative Care

If we think of the Brittany Maynard case, we can begin to understand assisted suicide's appeal.[34] The images are heart-wrenching: A young woman, newly married, in her prime, dying of a *glioblastoma multiforme*. She decided not to seek treatment for her tumor, convinced it would be burdensome, if not futile. Moving to Oregon where physician-assisted suicide is decriminalized and regulated, she bravely expressed her desire to die. She wanted to end her life on her own terms before the tumor made a free choice impossible. But at the end she wavered, taken over by ambivalence. It is hard not to admire Ms. Maynard's courage and to mourn this tragic loss.

Yes, we feel for Ms. Maynard, but does that make her choice a good one? Does her compelling narrative make for good public policy?

The great jurist Oliver Wendell Holmes, Jr. once said that, "hard cases make bad law." He worried about the misinterpretation of facts and the miscarriage of judicial reasoning, "… because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."[35] Such is true in the Maynard case. Her youth, the tragedy of her circumstances, and yes, the media appeal of her story, can distort judgment and lead us to conclude that what seems right for her is good for others.

But it is not so simple. The care of the dying is a challenge that American medicine has yet to fully embrace. In 2014, the Institute of Medicine (IOM) of the National Academies of Sciences issued a report, *Dying in America: Improving Quality and Honoring Individual Preferences Near the End of Life*,[36] which outlined the clinical, financial and cultural barriers to good palliative care and made constructive recommendations for reform. An endorsement of physician-assisted suicide was not one of them.

In the 19 years since the last IOM report,[37] progress at the end of life has been spotty. Although medical education has improved and palliative medicine became a nascent medical specialty, we have a long way to go to ensure that all Americans die well, or as well as can be expected. We remain wedded to ever-more medical technology, often in the face of futility.[38] Intensive care has become more *intense* fueled by a medical arms race, unthinkable even a decade ago.

We still have inadequate access to hospice and palliative care. Referrals are difficult and length of stay an issue.[39] Families may be insensitively asked about discharge plans upon arrival to in-patient hospice even when death is imminent.[40] Such callousness is prompted by CMS regulation of in-patient hospice length of stay with fiscal claw-backs.[41] These policies make hospice hard to access substantively and in a timely fashion. This becomes more complicated as most hospice care is provided at home, and that requires a home and an unpaid caregiver. So what happens if you're dying and single, or homeless, how do you get hospice care?

It shouldn't be that way, and as long as it remains so difficult to get competent and accessible palliative care, people will be susceptible to easy answers like assisted suicide, which now sounds so much more appealing when dressed up with polished phrases like "achieving death." It is also cheaper, creating a perverse conflict of interest in times of scarcity.

V. Conclusion

In the aggregate, these tensions illustrate the true complexity of end-of-life care, a complexity not subsumed by a solitary position on PAS. More fundamentally, America remains deeply divided. We remain a country that denies death.[42,43] Instead of planning for end-of-life care with sensible interventions such as advance care planning and goals of care discussions, we become enmeshed in ideological debates about so-called (and fictional) "death panels." The force of denial is also part of the appeal of assisted suicide. By pursuing this agenda, we gain psychological reassurance that somehow we can avoid life's final chapter.[44] It will provide the illusion of solace, but if the Oregon demographics are dispositive about utilization, this change in law will do little more for the vast majority of New Yorkers, and as noted potentially will have unintended consequences for decisions at the end of life.

Dr. Joseph J. Fins presented remarks on aid in dying to the New York City Bar Association Bioethical Issues Committee on December 5, 2016. The City Bar issued a commentary on aid in dying in June 2017, citing Dr. Fins' remarks before the Bioethical Issues Committee. This article draws on Dr. Fins' presentation to the Bioethical Issues Committee. Both Dr. Fins and Dr. Morrissey gratefully acknowledge the comments of members of the Bioethical Issues Committee for their fruitful dialogue.

Endnotes

1. Medical Aid in Dying Act, A.2383-A/S.3151-A, 241st N.Y. Leg. Sess. (2018), *amending* A.2383/S.3151, 240th N.Y. Leg. Sess. (2017). A previous version of the bill (S.7579, 239th N.Y. Leg. Sess.) was voted out of the New York Assembly Health Committee in the 2016 legislative session.
2. *Myers v. Schneiderman*, 2017 N.Y. Slip Op. 06412, 30 N.Y.3d 1 (2017) (per curiam).
3. David Leven & Timothy Quill, *The Clinical, Ethical and Legislative Case for Medical Aid in Dying in New York*, N.Y.St.B.A. Health L. J. (Winter 2017), 2(3):27-29.
4. The term "physician aid in dying" has been used to describe physician-aided dying practice, which proponents seek to differentiate from "physician assisted suicide." The language of "to hasten death" or "wish to hasten death" has also been examined in this context (Albert Balaguer et al., *An International Consensus Definition of the Wish to Hasten Death and Its Related Factors*, PLOS ONE 11(1): e0146184 (Jan. 4, 2016), https://doi.org/10.1371/journal.pone.0146184 (last visited March 10, 2018).
5. Commentary on New York Medical Aid in Dying Proposal, New York City Bar Association (Reissued June 2017), http://s3.amazonaws.com/documents.nycbar.org/files/2017130-AidinDyingNY_WhitePaper_FINAL_5.30.17.pdf.
6. McGuigan J, *The Neoliberal Self*, Culture Unbound (2014), 6:223-240 (Linköping, Sweden: Linköping Univ. Electronic Press 2014), doi: 10.3384/cu.2000.1525.146223.
7. Sugarman J, *Neoliberalism and Psychological Ethics*, J. Theoretical & Phil. Psychol. (May 2015), 35(2):103-116, http://dx.doi.org/10.1037/a0038960.
8. Morrissey MB, Lang M, Newman B, *A Public Health Strategy to Living, Aging and Dying in Solidarity*, Ch. 1 (CRC Press, forthcoming Jul. 2018).
9. Callahan J, *When Self-Determination Runs Amok*, The Hastings Center Report (1992), 22(2):52-55, doi:10.2307/3562566.
10. *The Aging Brain Workshop*, Center for Law, Science & Innovation, Sandra Day O'Connor School of Law, Arizona State University, Phoenix, Arizona (Nov. 18, 2016).
11. Miller FG, Fins JJ, Snyder L, *Assisted Suicide Compared with Refusal of Treatment: A Valid Distinction?*, Ann Intern Med. (2000), 132:470-475, doi:10.7326/0003-4819-132-6-200003210-00008.
12. Morrissey MB, and Jennings B, *A Social Ecology of Health Model in End-of-Life Decision-Making: Is the Law Therapeutic?*, N.Y.St.B.A. Health L. J. (Winter 2006), 11(1):54.
13. Christakis N, *Death Foretold: Prophecy and Prognosis in Medical Care* 5 (University of Chicago Press April 1999).

14. Meekin SA, Klein JE, Fleishman AR, Fins JJ, *Development of a Palliative Education Assessment Tool for Medical Student Education*, Acad Med. (2000), 75(10):986-992.

15. Wood EB, Meekin SA, Fins JJ, Fleishman AR, *Enhancing Palliative Care Education in Medical School Curricula: Implementation of the Palliative Education Assessment Tool*, Acad Med. (2002), 77(4):285-91.

16. *Vacco v. Quill*, 521 U.S. 793 (1997).

17. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

18. Burt RA, *The Supreme Court Speaks—Not Assisted Suicide but a Constitutional Right to Palliative Care*, N. Eng. J. Med. (1997), 337(17):1234-6, doi:10.1056/NEJM199710233371712.

19. *Quill v. Vacco*, 80 F.3d 716 (1996).

20. *See id.*

21. *Vacco*, 521 U.S. at 799.

22. Gorsuch NM, *The Future of Assisted Suicide and Euthanasia* (Princeton University Press 2009).

23. Fins JJ, *Senators Should Question Gorsuch About Views on 'Right to Die'*, The Hill (Mar. 20, 2017), http://thehill.com/blogs/pundits-blog/the-judiciary/324814-senators-should-question-gorsuch-on-right-to-die.

24. Fins JJ, *Logicality and the Reassessment of Regulatory Ethics: Lessons from the Bucharest Early Intervention Project*, The Hastings Center Report (2014), 44(4):13-17.

25. Fins JJ, *On the Lingua Franca of Clinical Ethics*, J. Clin. Ethics (Winter 2013), 24(4):323-321.

26. Fins JJ, *A Palliative Ethic of Care: Clinical Wisdom at Life's End* (Sudbury, MA: Jones and Bartlett 2006).

27. Saunders C, *The Evolution of Hospices* 19-23, Free Inquiry (Winter 1991/92).

28. Goldin G, *Work of Mercy* 270 (Ontario, Canada: Associated Medical Services and the Boston Mills Press 1994).

29. Wanzer SH, Federman DD, Adelstein SJ, Cassel CK, Cassem EH, Cranford RE, Hook EW, Lo B, Moertel CG, Safar P, et al., *The Physician's Responsibility Toward Hopelessly Ill Patients. A Second Look*, N. Eng. J. Med. (1989); 320(13):844-9.

30. New York State Task Force on Life and the Law, *When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context*, N.Y.S. Department of Health (1994), https://www.health.ny.gov/regulations/task_force/reports_publications/when_death_is_sought/.

31. Or. Rev. Stat. § 127.800 1.01(3) (1994).

32. Commentary on New York Medical Aid in Dying Proposal, New York City Bar Association (Reissued June 2017), http://s3.amazonaws.com/documents.nycbar.org/files/2017130-AidinDyingNY_WhitePaper_FINAL_5.30.17.pdf.

33. Oregon Health Authority, Death with Dignity Act Annual Reports, Released February 9, 2018, http://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Pages/ar-index.aspx (last visited Feb. 23, 2018).

34. Fins JJ, *Private Decisions & Public Lessons*, CONSIDER: Magazine at the University of Michigan (Dec. 3, 2014), 30(2), http://considermag.org/issues/2014-12-03-assisted-suicide.

35. *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904).

36. Institute of Medicine, *Dying in America: Improving Quality and Honoring Individual Preferences Near the End of Life* (Washington, DC: The National Academies Press 2015), https://doi.org/10.17226/18748.

37. Institute of Medicine, *Approaching Death: Improving Care at the End of Life* (Washington, DC: The National Academies Press 1997), https://doi.org/10.17226/5801.

38. Knowlton SF, Fins JJ, *Mediative Fluency and Futility Disputes*, Perspectives in Biology and Medicine (2017), 60(3):373-382.

39. Fins JJ, *Towards a Pragmatic Neuroethics in Theory and Practice*, In: Debates about Neuroethics: Perspectives on the Field's Development, Focus, and Future 45-65 (Racine E & Aspler J eds., Berlin: Springer, 2017).

40. *Id*.

41. 42 C.F.R. § 418.202(e).

42. Becker E, *The Denial of Death* (New York: Simon & Schuster 1973).

43. Fins JJ, *The Face of Finitude* (A Review of *How We Die: Reflections on Life's Final Chapter*, Sherwin B. Nuland, New York: Alfred A. Knopf, 1994), The Hastings Center Report (1995), 25(2):38.

44. Fins JJ, *Death and Dying in the 1990s: Intimations of Reality and Immortality*, Generations: J. Am. Society on Aging (1999), 23(1):81-86.

Joseph J. Fins, M.D., M.A.C.P., F.R.C.P., is the E. William Davis, Jr. M.D. Professor of Medical Ethics and Chief of the Division of Medical Ethics at Weill Cornell Medical College where he is a Tenured Professor of Medicine, Professor of Medical Ethics in Neurology, Professor of Health Care Policy and Research, and Professor of Medicine in Psychiatry. He is the founding Chair of the Ethics Committee of New York-Presbyterian Weill Cornell Medical Center where he is an Attending Physician and Director of Medical Ethics. A member of the Adjunct Faculty of Rockefeller University and Senior Attending Physician at The Rockefeller University Hospital, he co-directs the Consortium for the Advanced Study of Brain Injury (CASBI) at Weill Cornell Medicine and Rockefeller. In 2015, he was appointed the Solomon Center Distinguished Scholar in Medicine, Bioethics and the Law at Yale Law School. Dr. Fins is an elected Member of the National Academy of Medicine (formerly the Institute of Medicine) of the National Academy of Sciences, a Fellow of the American Academy of Arts and Sciences, and an Academico de Honor (Honored Academic) of the Real Academia Nacional de Medicina de España (the Royal National Academy of Medicine of Spain) and a Master of the American College of Physicians.

Mary Beth Quaranta Morrissey, Ph.D., M.P.H., J.D., is a gerontological health and social work researcher and New York health care attorney. She holds the appointments of Fellow at Fordham University's Global Healthcare Innovation Management Center, and Senior Policy Advisor in Health and Ethics and Aging & Health Workforce Development Institute Director, Finger Lakes Geriatric Education Center, University of Rochester Medical Center. Dr. Morrissey is President-elect and Treasurer of the American Psychological Association Society for Theoretical and Philosophical Psychology; President of the National Committee for the Prevention of Elder Abuse; President of the Collaborative for Palliative Care, New York; Chair of the New York City Bar Association Bioethical Issues Committee, and Chair of the Westchester County Bar Association Health Law Committee. She is a member of the New York State Bar Association Health Law Section, Ethical Issues Committee and Public Health Committee, and is past president of the State Society on Aging of New York and immediate past president of the Public Health Association of New York City.

The authors wish to acknowledge the assistance of Ivelina V. Popova, Esq., Goldberg & Cohn, LLP, in editing the manuscript.

This article originally appeared in the Spring 2018 issue of NYSBA's Health Law Journal*, a publication of the Health Law Section.*

Business Essentials for Neutrals: Starting, Growing, and Sustaining Your Practice

By Reginald A. Holmes and Merriann M. Panarella

Introduction:

Congratulations! You are or have decided to consider a career as a neutral. And whether you are or intending to ply your trade in the commercial world or in the community, pro bono or non-profit space, the felicitation stands. Few professions provide such a consistently rich platform for pursuing a life of Tikkun Olam.[1] However, unless you master the business essentials necessary for a financially successful neutral practice, you will likely stumble over obstacles that will derail all your lofty 'better the world' goals.

Fortunately, a knowledge of the business essentials that will permit you to pursue your desire to do all of the good you wish to do as a neutral and still do well enough to support yourself and your family are not deep dark, mysterious, or indecipherable secrets. Indeed, the approaches, strategies, and tactics best calculated to establish a financially successful neutral practice are well known to savvy legal services marketers, DR service providers, and successful neutrals. The authors, independent and successful neutrals in their own right, have distilled these approaches, strategies, and tactics, updated them for the current industry landscape, and combined all of that with their decades of professional observations, experiences and knowledge. The results of those efforts are summarized and shared in this article. The objective of this article is to better equip you with the perspectives, education, and skills you will need to successfully start, grow, and sustain your neutral practice and of course to aid you in doing all of the good you are called to do. Our earnest desire is to help you do well while doing good.

Let's start our journey through this material with the definition of a few terms. First, let's describe the "DR industry." The DR industry is a multi-billion dollar industry consisting of any private entity or person that provides services focused on the resolution of disputes outside of the public courts. The field is broad enough to encompass not just arbitrators, mediators and the like but also service providers, professional and trade associations, educators, settlement counsel, and law firms and suppliers.

This article will utilize the term "neutral" to refer to any person who works or engages a process to resolve disputes, conflicts, or disagreements between parties without representing either of the parties and while acting impartially. Neutrals who offer their services for money and adhere to a professional code of conduct are the focus of this article. While the reader should ideally have some basic knowledge and work experience in the DR field, anyone looking to enter the profession will also benefit greatly from the insights presented here.

Our arc through this material will begin with a discussion of the business realities that should be considered by any prospective neutral before entering the profession. We will then discuss the business essentials and the practical considerations that should be a part of any practitioner's plan for business success.

After that, we provide insight, strategies, and best practices for starting, marketing, and growing your neutral practice. We will also touch upon servicing your caseload and sustaining your earned success. Additionally, we will explore the unique considerations, concerns, obstacles, and opportunities that often confront diverse neutrals. Penultimately, we will discuss the quality of life factors for neutral. Finally, we offer our observations about the future of the DR industry. Will it be bright and growing or dark and declining?

The Business Realities of Being a Neutral

Anyone exposed to the lengthy, expensive, and inflexible court system often thinks that there has to be a better way to resolve disputes. After some experience with DR processes, many are hooked and start seriously considering whether being a neutral is something they could either do full time or when they retire. If you are one of these people, before jumping in it's good to have a sense of the business realities neutrals face including the basics of supply and demand, what work is out there and how many are hoping to obtain it?

Both anecdotally and statistically, mediation work is growing. Mediation work increases as litigation grows. According to U. S. District Court statistics, total cases filed from 2015-2016 rose 4.6 percent.[2] In 2016, parties filed

Reginald A. Holmes is an arbitrator/mediator with a multinational practice in the IP, employment and international areas. He has offices in Los Angeles, Chicago and New York. You may connect with him at rholmes@theholmeslawfirm.com, 646.416.8141 or at www.theholmeslawfirm.com. **Merriann M. Panarella** is an arbitrator and mediator with offices in Boston and New York. She is a Fellow of the CIArb, a member of the AAA, CPR, WIPO and other DR panels, and on the Silicon Valley Arbitration and Mediation Tech List. You may connect with her at mpanarella@panarellaADR.com or at www.panarellaADR.com.

This article originally appeared in the Spring 2018 issue of the New York Dispute Resolution Lawyer, *a publication of the Dispute Resolution Section.*

291,851 complaints in U.S. District Courts. According to this barometer, disputes for potential mediations exist and are growing in many areas.

Moreover, corporations have embraced mediation as a way of controlling costs and resolving matters expeditiously. A 2011 study stated:, "today corporate experience with mediation is virtually universal. Ninety-eight percent of respondents indicated that their company had used mediation at least once in the prior three years, a ten percent jump from the 1997 figure."[3] Although recent accredited studies are difficult to locate, anecdotal reports and observations by the AAA, CPR and IMI suggest that the use of mediation has continued to grow at a similar pace though 2017. Gone are the days when a suggestion to try mediation in stalled negotiations is deemed a sign of a weak case by opposing counsel.

Given these statistics, the number of potential mediations should be growing. Courts also encourage the parties to mediate, which is admirable, However, many jurisdictions offer mediation to the parties for free, thus decreasing the cases available for professional mediators. For example, the Ninth Circuit provides free mediation to litigants because the process helps resolve disputes quickly and efficiently; the Circuit has eight paid full-time mediators on its staff for this purpose.[4] In the U. S. District Court in Boston, the Magistrate Judges have taken over the mediation program so there is no cost to the parties. Many other courts also offer court-connected mediation of one type or another, so knowing what programs are available at the local, state, and federal level will provide more information on the demand side.

On the supply side, as mediation has caught on, many lawyers find it an appealing process for dispute resolution. From semi-retired lawyers and judges who merely desire to keep their toe in the legal waters, to those who aspire to build a practice, more people seek to mediate disputes than there are disputes. Again, case availability may well depend on whether there are court-connected matters in the local jurisdiction that funnel cases to a volunteer court-connected panel or to a panel of pre-qualified mediators.

Domestic commercial arbitration has not fared quite as well. According to the 2011 study referenced above, while companies recounted using mediation for nearly all kinds of disputes, fewer are using arbitration in key categories; "[s]ubstantial drops were reported in the number of companies reporting arbitration usage in commercial/contract disputes (from 85% in 1997 to 62.3% in 2011)…."[5] As was the case with mediation, more recent validated studies on the growth of the use of arbitration are difficult to locate. However, anecdotal reports and observations from the AAA, the world's largest provider of arbitration services, and others suggest that the use and demand for domestic commercial arbitration services has remained relatively flat through 2017. Arbitration, which historically has been an efficient, cost-effective, and flexible adjudication process, may have suffered from an importation of litigation processes in recent years. Most service providers have revised their rules and encouraged arbitrators on their panels to manage their matters as cost-effectively as possible, with the hope that arbitration will again become a preferred adjudicatory method for the resolution of business disputes.

On the other hand, international arbitrations appear to be on the rise and are likely to continue to grow as global commerce increases. Also, parties are attracted to international arbitration because the awards are generally enforceable under the New York Convention. In the American Arbitration Association's B2B Dispute Resolution Impact Report, in 2015, 8,360 domestic *and* international business cases were filed with transportation, commercial insurance, entertainment/media, and pharma/biotech cases significantly up over 2014.[6]

As with mediation, it appears that there are more arbitrators than disputes. Arbitrators have tended to be homogeneous and primarily white, male and older individuals. Efforts are under way by most service providers to encourage parties to choose diverse and women neutrals. Research the panels you are able to join in your jurisdiction, the number of arbitrators on those panels and the number of cases available so you can plan accordingly.

Preliminary Preparation

To become a competent neutral, your preparatory steps should include taking a self-inventory, engaging in necessary training and then advanced and specialty training, affiliating with relevant organizations, and exploring apprenticeship and mentoring opportunities.

Why conduct a self-inventory? Earning a living as a neutral is nuanced and starting a full-time practice will be challenging. Before investing the necessary time and energy to develop a practice, it is useful to consider your professional objectives, background and experience, temperament, and perspective.

Regarding professional goals, is this a full-time endeavor, a part-time exploration, or an avocation? Be clear on both the time and energy you are willing to devote to your practice and what you expect to achieve professionally. A consideration of relevant background and experience up front will help direct both your training and later marketing efforts. You don't need to be a lawyer to be a mediator or arbitrator in many fields, but you do need to be known and respected in your industry. While neutrals vary in their substantive areas of expertise, to practice at the highest level a neutral should have the right temperament for the task at hand. For most neutral activities, this means the ability to actively listen, be patient, withhold quick judgments, and have a high emotional IQ. Former litigators need to leave advocacy behind, and retired judges need to recognize that mediation and arbitration are flexible processes determined by the parties' needs,

not theirs. Finally, a neutral, by definition, must, in fact, be neutral and impartial to their very core.

Prospective neutrals should ask two fundamental questions: 1) Am I right for the neutral profession? and 2) Is the neutral profession right for me? If you answer one question in the negative, save yourself a lot of time, money, and heartache and consider another line of professional work. However, if you answer yes to both, apply the principles and suggestions in this article and move forward with the establishment of your practice.

Generally, there are no state or federal requirements for mediation training although you should check the law of the state where you want to practice. In Massachusetts, for example, while there's no '"formal" training requirement, in order to enjoy the statutory protection of confidentiality accorded a mediator, you must have at least 30 hours of training in addition to other requirements.[7] Also, most panels that you seek to join do have basic training requirements. For example, the AAA requires "the completion of at least 24 total hours of training in mediation process skills…."And, in New York, mediators who wish to serve on court rosters must have taken at least 40 hours of mediation training.[8] The safest course is to take one of the many 40-hour mediation programs offered by law schools, bar associations, private practitioners, and service providers.[9] The ABA maintains on its website a list of ADR Training Providers organized by state.[10]

Regarding arbitration, there are again, generally, no state or federal licensing or training requirements. Basic training in arbitration case management is highly recommended, especially for those with little experience in arbitration. Arbitration, while adjudicatory, is not litigation. Attending courses will also increase your chances of getting on prestigious panels as you will be asked on panel applications to list your DR training. Again, arbitration courses are widely offered by law schools, bar associations, private practitioners, and service providers.

Advanced and specialty training helps sharpen your skills, enhance your credentials, and demonstrates your expertise in substantive areas. The World Intellectual Property Organization (WIPO) offers a Workshop for Mediators in Intellectual Property Disputes as well as arbitration training, and the American Health Lawyers Association offers both mediation and arbitration training tailored to health law disputes. Depending on your area of concentration, you will be able to find advanced courses. Also, after you have received "basic" training, attending an "advanced institute" not only satisfies CLE requirements but introduces you to new ways to resolve issues.

Affiliation with professional organizations and bar associations provides opportunities to further enhance your expertise as well as network with colleagues. Regarding bar associations, many have robust dispute resolution sections with active committees in different types of dispute resolution as well as specialty areas. For example, the ABA has a Dispute Resolution Section that hosts an annual conference and has committees that focus on mediation, arbitration, conciliation and ombuds, as well as employment, health, international and intellectual property, among others. Similar the NYSBA has an active Dispute Resolution Section with excellent programs, webinars, and conferences. The list of potential professional associations is limited only by your desired subject matter focus and imagination. A few that you might consider joining include the American Intellectual Property Law Association, the American Health Lawyers Association, the National Employment Lawyers Association and, if applicable, the Association of Corporate Counsel. In the international sphere, you might consider the Chartered Institute of Arbitrators, which provides both training and credentialing, and the International Bar Association.

Finally, an apprenticeship or mentor can provide enormous assistance when starting out. Several organizations have apprenticeship opportunities such as the AAA's Higginbotham Program, and the ICC's Young Arbitrator's Forum for those under 40 years old. Many court-connected mediation programs offer training, observation, and apprenticeship opportunities as well. If you are able, we strongly encourage you to find an experienced DR practitioner who is willing to mentor you and allow you to observe mediations or arbitrations. Such experience would be invaluable.

Starting Your Practice

Once you have affirmatively answered all the gateway questions and completed the preliminary work to become a neutral, you have set the stage to start your practice. What do you do next? First, determine whether you intend to pursue your neutral career as an avocation, a business, or a calling. Your answer will have important implications as to how you start your practice.

If for example, you want to pursue "neutraling" as an avocation, you can achieve that objective by creating a relationship with a service provider that will give you occasional cases. If you choose this route your capital, time commitment, and marketing effort requirement should be minimal. The business essential here for you is to focus on finding, defining, and forging a satisfactory relationship with a source of cases. Thereafter, to sustain that relationship you must service those cases promptly, cost-effectively, and fairly with due regard for the financial interest of your service provider. This option is appropriate for and popular with (and sometimes uniquely available to) retired judges.

If, on the other hand, you are pursuing your neutral practice as a business that will be used to support you

and/or your family, you must ask and answer a few more preliminary questions. Among them are these:

1) Are you financially prepared for the likely initial (and sometimes permanent) drop in income that often occasions the start-up of a neutral practice?

2) Do you possess the passion, drive, and willingness to commit the copious amounts of energy required to power up a new neutral practice in today's climate?

3) Will your physical and mental health permit you to do what you must do to have a successful practice?

4) Do you possess or can you develop the necessary reputation for being successful in your area of focus? A solid reputation is a crucial characteristic of financially successful neutrals.

If and only if the above questions are answered in the affirmative should you proceed to start your practice with the possibility that you will be able to earn a full-time income from it.

If you are pursuing your neutral practice in response to a calling (as is the case with the authors) you will have even more in-depth questions to ask. Is this really what you want to do or is it just a potential escape from the demands of your current professional focus? In what ways do you feel that being a neutral will provide the satisfying work you are called to do? Proceed to start your practice when you have a realistic sense of your attraction to the profession. Can you add this to your other legal work rather than jump in to an exclusive practice?

Whether you approach starting your practice as an avocation, business, or calling, you will be well served to conceive, structure, and write out a business plan as to how you intend to achieve your goals. Creating a written business plan for your prospective neutral practice is a critical factor that should not be ignored. See it as the roadmap to take you from where you are to the successful neutral practice that you are seeking to establish. Your journey may be long, complicated, and difficult. Don't leave home without your map.

What should be in your business plan? Consider addressing areas including finances, basic business start-up necessities, and panel affiliations. Among the financial matters you will want to reflect on are hourly/daily rates, billing practices, anticipated expenses, and cash flow. When you start to think about what you want to charge, you should research the going rates in your region for those with experience commensurate to yours. Often, neutrals beginning a practice believe that if they price their services lower relative to others, they will attract more business. Paradoxically, this strategy may backfire as DR users may view the lower rate as indicative of a lower level of quality. Once you establish your pricing structure, determine what billing practices you plan on using. Some neutrals use tools such as Clio.com while others just create timesheet and invoice templates which they use to bill clients on a monthly basis. Whatever you decide to do, record the time you spend on your matters on a daily basis to ensure accuracy and completeness.

There are potentially endless expenses when starting a DR practice, so your business plan should reflect your view of what you need to do and your priorities. Budget for necessary training, conferences, subscription agreements, panel and bar association fees, office or virtual office expenses, website creation and maintenance, and public relations, marketing, or other consultants. In the beginning, your expenses will likely exceed your income, so consider your cash flow needs over a comfortable period of time for you.

Your business plan should also include basic start-up necessities such as creating a new resume, and bio, obtaining business cards, using social media, and developing a contact list. As you begin, take a look at what past experience you can leverage to create a DR resume. Spend time and thought on this exercise as it will inform both your website, your LinkedIn account should you choose to have one, and the short bios you use for speaking and writing. Also, obtain business cards early on. Many vendors offer inexpensive options such as Vistaprint and Staples. Moo claims to offer "Uniquely premium Business Cards for everyone." So have fun with the look of what you will present to the people that you meet.

A website is no longer a luxury for practitioners, it is a necessity. To get started, research the websites of neutrals you know and neutrals whose practices you seek to emulate. Ask other neutrals or sole practitioners what web designers they used. Consider whether you want or need a search engine optimization consultant to maximize your exposure. Find a professional photographer for your headshot and aim for a picture that reflects confidence, as well as your personality. Consider whether you want a blog associated with your website for posting your own newsletters or a discussion of recent cases. And, strive to keep your website updated. As you speak, write, teach, and gain experience, it should all be reflected on your website.

While a website is essential, there is a divergence of opinion on the use of other forms of social media. The use of Facebook, for example, raises the question of whether your "friends" might create conflicts if they are related to the parties or counsel in an arbitration before you.

Many neutrals do maintain a LinkedIn page which allows them to post links to articles they have written as well as provide notice of presentations they are planning. However, they neither solicit nor accept endorsements to avoid creating a future conflict.

In leveraging your prior experience in your new DR endeavor, use your former contact list to keep in touch with colleagues and acquaintances. And, as you engage in the DR community, keep your contact list up to date.

Your business plan should also include your research on the service provider panels with which you seek to associate yourself. These panels, especially in the case of arbitration, can be an important source of cases. On the mediation front, look for local panels including court-connected rosters. While the latter may require volunteer services for all or part of mediations, they are often an excellent opportunity to gain experience. If you can find the opportunity, mediate with others. As an arbitrator, look into the panels available for your level of experience. FINRA, the Financial Industry Regulatory Authority, has an arbitration panel with relatively low barriers to entry and provides free online training, an online exam, and distributes arbitrators names to potential parties by random computer allocation. Other panels such as the AAA and CPR require substantially more experience and credentials. If you aspire to be on a panel, understand their requirements and plan accordingly.

Writing out a business plan, whether detailed or simple, will help you organize your thoughts, drill down on your finances, and prioritize your approach to starting your practice.

Marketing Your Practice

Now that you have the start of a business plan, the next component of your plan will be a written marketing strategy. Depending on your style, a written marketing plan may include publicizing your new focus, pitching your business, choosing a marketing approach, increasing and maintaining your DR visibility, joining organizations relevant to your marketing approach, volunteering, marketing with others, and ethical considerations. Diverse and women neutrals may have unique issues that also should be addressed.

After all the work you've done, now is NOT the time to be shy and retiring. Announce your new DR focus enthusiastically to you contact list. Consider writing a short article to include with your announcement. Decide how you want to pitch your business—what makes you uniquely situated to be the parties' best choice for their dispute?

Most experienced neutrals are process management experts. Many believe that expertise in the subject matter of the mediation or arbitration before them is not as important as their process management skills. However, it's better to go narrow and deep rather than shallow and wide. While you may be able to handle a variety of disputes, and may over time, start with a niche that results organically from your experience and background. You can choose a specialty practice such as employment, health, intellectual property, environmental or family law. One well-respected mediator focuses on disputes involving animals. Also decide on what services within the DR field you will be offering: mediation, arbitration, conciliation, special discovery master, eDiscovery master, etc. Finally, think about where you will focus your practice geographically. While sticking to the deep/narrow initial focus, look at where your work is likely to come from and plan accordingly.

Visibility is critical to any successful marketing effort. Many bar associations publish newsletters and welcome articles so submit a paper in your chosen area of expertise. DR presentations also offer opportunities for people to hear you talk authoritatively. Consider organizing and moderating a panel on a subject and inviting others with more experience to speak. Indicate your willingness to make presentations, whether in person or by webinar, and seek opportunities to do so. Use social media including, as mentioned earlier, a website which you keep updated, and a LinkedIn account on which you post your speaking engagements and links to your articles. Once you have decided upon the organization affiliations that make sense given your focus, get out and attend meetings and network with others in your chosen field. The idea is for people to think of you when an appropriate case comes their way. Let your light shine brightly. Finally, try to leverage what you do. Can you turn a paper you researched into a presentation? How can you repurpose your efforts to maximize your results?

At the outset, you may want to consider volunteering to gain experience. Many regional courts have court-connected mediation programs that provide mediators to parties at no cost. Volunteering can help hone your skills, introduce you to other local mediators or arbitrators, and provide references for you down the road.

Marketing with others is not only useful but fun and provides each of you with an opportunity to tout the other's accomplishments. Find a presentation partner or someone with whom you can co-author an article, with the result that you both have the marketing visibility but half of the work otherwise involved. Everyone appreciates being recognized, so look for opportunities to reward colleagues, to recommend other neutrals when appropriate, and to work to increase the number of cases available to all.

Marketing a neutral practice presents a bit of a conundrum and a few ethical considerations. As a neutral, you have disclosure responsibilities to the parties to ensure your impartiality. As an arbitrator, it is particularly important that your "conflict awareness radar" is up and running at all times. The viability of your award depends on avoidance of partiality or even the appearance of it. If you market your neutral services to a law firm and shortly after that are chosen by that firm as an arbitrator, you will need to disclose the contacts that you had. Avoid situa-

tions, to the extent that you can, that will create conflicts or disclosable events.

While everyone wants to promote themselves in the best possible light, be careful to honestly describe your experience and background. Parties and counsel are more closely scrutinizing the experience and background claims of neutrals and there are indications that they are increasingly willing to take action or even sue when misrepresentations are discovered or suspected.[11] Such claims of misrepresentation could be devastating, if not fatal, to any effort to develop a neutral practice. Honesty and integrity are not only essential components of a personal marketing plan but are also critical to maintaining the public's trust in the neutral profession.

Here are a few considerations for diverse and women neutral in marketing their practices. Diverse/women neutrals may undervalue their skill set and services, believe that they need far more experience than is required, and set their rates at too low a level. Underestimating one's services or skill set may lead to overdoing pro bono work. Diverse/women neutrals may also experience being viewed as either overly aggressive or too timid. Awareness and humor can dispel any awkward encounters. Finally, rather than divisive competition, diverse/women neutrals will gain much by working together to expand the use of ADR and shared opportunities in the field. A rising diverse tide lifts all diverse boats.

With active patience, persistence and the artful use of technology, marketing your neutral practice can be both energizing, satisfying, and rewarding.

Servicing and Supporting Your Caseload

Once you are up and running, how can you best service and maintain your caseload? To begin with, continue to work closely with service providers. Service providers and case managers can be instrumental for a smoothly functioning arbitration. A mutually respectful relationship with a case manager will inure to your benefit. Case managers often have an early read on counsel; they are service provider insiders and experts, and can, while not affecting your ultimate responsibility as the arbitrator, help you look good. In addition, sometimes case managers help decide who will be on lists provided to parties. Be aware that the way that you treat them has a direct bearing on your success.

Next, use technology to maximize your efficiency. You will need a robust conflicts program that includes not only the parties but also the lawyers and experts. Create a file management system that will allow you to organize and find documents relevant to your arbitration or mediation matter quickly. For example, you may want to create a folder for each arbitration and include within that folder subfolders for pleadings, orders, exhibits, time sheets, and invoices. You may also have a folder with arbitration templates containing a preliminary hearing checklist, a pre-hearing order, confidentiality agreements, subpoenas, time sheets or other documents you find yourself using regularly. If you choose to maintain your files electronically, which most do, be sure to back up your system with cloud storage such as Backblaze, Carbonite, or iDrive.

Many arbitrators use iPads or tablets to maintain files, take notes, and otherwise manage arbitrations. Tools such as Documents by Riddle allow you to keep all your documents in one place by accessing Drop Box, Google Drive files, Box, or other cloud storage. PDF Expert allows you to edit PDFs as text documents. One Note by Microsoft offers note taking capabilities as does GoodNotes 4, which provides searchable notes. Depending on your style and priorities, there are many more tools to help you service and maintain your caseload.

For arbitrators, service providers can act as a buffer between the arbitrator and counsel as well as provide financial case management services, handle administrative matters, and resolve arbitrator challenges. If parties contact you directly with an ad hoc matter, consider informing them that it is your preference to work with the AAA or CPR. In the event the parties opt not to have an administered arbitration, the AAA, for example, offers À La Carte Services, which allows the parties and arbitrators to choose the services needed, including Case Financial Administrative Services and Arbitrator Challenge Review Procedures, among others.

Growing and Sustaining Your Practice

While starting and growing a neutral practice may be difficult**,** sustaining your success may be even harder. If starting and building your practice is comparable to an airplane taking off and reaching cruising altitude, then maintaining your practice can be compared to maintaining a stable altitude. The key to achieving a sustained practice is finding a pace that provides the level of income and satisfaction that you seek while demanding no more energy and expenses then you wish to expend.

Here are the keys to sustaining a successful practice:

1) Stabilize your organizational structure—Lock in the personnel structure that helped you achieve your prior success. Maintain your service provider relationships as well as other relationships that provide your pipeline of cases and assist you in the servicing your cases. Never take any relationship for granted, always express gratitude for the values that both of you bring to your joint enterprise.

2) Service all of your cases to the best of your abilities. Exceed the standard expectations of all stakeholders (parties, attorneys, case managers, witnesses, etc). Make working with you an exceptional

professional experience. Measure your success by whether and how often those with cases return to you.

3) Maintain your visibility to the people, organizations, and professional associations that are sources of your work. Be disciplined (and kind) about weeding out of your professional life those associations that drain your time, energy, morale, resources and provide you little in return. Writing, speaking, and service engagements with organizations can be useful (and sometimes fun ways) of maintaining your visibility.

4) Continue to engage and use social and virtual media. They provide excellent platforms for generating visibility that work even when you are sleeping. But caution is in order. Injudicious use of social media can create conflicts, or the appearance of conflicts, by demonstrating or suggesting relationships that will bar you from or complicate your ability to take cases.

5) Continue to engage in professional and personal activity that gives you joy. Action that lifts your spirits or gives you energy and a sense of satisfaction and fulfillment will provide the necessary fuel to power you forward in achieving all of your life's mission (including your professional ones). After all, sustaining yourself is the *sine qua non* of supporting your practice.

The Future of the DR Industry

Dispute resolution's future likely includes both growth in the number of cases and an evolution of processes to catch disputes before they arise and to resolve those matters that do happen at the earliest possible time. DR practitioners are likely to continue to grow in numbers as well with increased emphasis on encouraging the parties to use diverse and women neutrals. It remains to be seen whether the growth in the number of neutrals and the size and importance of cases being committed to DR will lead to any licensing and/or certification requirements.

The industry is expected to continue to evolve both incorporating older practices with "twists" like med-arb[12] or arb-med[13] and settlement negotiations or variations on these themes and creating new approaches to satisfy the parties' needs.

Regarding newer approaches, neutrals and parties are working to use DR processes that work in one industry, such as alliance managers in the pharmaceutical industry who work to spot problems before they lead to project failure, to other industries. The AAA offers Judicial Settlement Conferences mirroring those offered by federal and state courts. Neutrals offer deal facilitation services for negotiations that have hit a wall. And, a promising new development is the Arbitration Settlement Conference in which the arbitrators, with deep knowledge of the dispute before them and consent of the parties, conduct settlement conferences.

Conclusion

Achieving business success as a neutral involves taking a dispassionate look at a passionate vocation. Once you have decided that this is the profession for you, dive on in. Do your research regarding necessary training, and associate yourself with organizations that will both support your practice, allow you to meet other neutrals, and provide cutting edge programs. Work on creating the best business plan that you can, with an eye toward not only the business essentials but also how you work and what you need to thrive. Take every opportunity to market your practice and increase your visibility while having your conflict radar awareness engaged. Use all the resources at your disposal to service your caseload as efficiently as possible and ultimately to grow and sustain your practice. And don't forget to enjoy your practice and your life; in other words, have fun!

Endnotes

1. Tikkun Olam is an ancient Hebrew term which in contemporary use refers to the duty of each human to work for universal justice, peace and the betterment of the world. The authors use the term here for its secular richness and not in its strict religious meaning.
2. *See* Table C-2A U.S. District Courts-Civil Cases Commenced by Nature of Suit; http://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2016.pdf.
3. *See* Thomas J Stipanawich and J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 Harvard Neg. Law Rev. 1, 41.
4. *See* https://www.ca9.uscourts.gov/mediation/.
5. Stipanawich and Lamare, *supra* note 3, at 46.
6. *See* American Arbitration Association," B2B Dispute Resolution Impact Report, Key Statistics," p. 3.
7. See M.G.L. c. 233 Sec. 23c.
8. *See* Part 146 of the Rules of the Chief Administrative Judge, NyCourts.gov.
9. For example, the Program on Negotiation at Harvard Law School offers a five-day course on mediating disputes as well as advanced mediation training. And the Straus Institute for Dispute Resolution of Pepperdine School of Law offers many mediation trainings both for those starting out and for those seeking specialized training.
10. https://www.americanbar.org/groups/dispute_resolution/resources/adr_training_providers.html.
11. *JAMS, Inc. v. Superior Court of San Diego (Kensella)*, No.D069862 — Cal.RPtr.3d —, 2016 WL4014068 (Ct. App. Jul 27, 2017).
12. A process in which a mediator serves as an arbitrator if the matter is not settled.
13. A process in which an arbitrator attempts to settle a matter before her.
14. *See* Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, NYSBA New York Dispute Resolution Lawyer, Spring 2009, Vol. 2, No. 1.

A Well-Kept Secret: The Attorney Emeritus Program

By Michael Siris and Cora Vasserman

If you are a practicing New York attorney, you know what it is like to scramble at the end of the two-year biennial registration period: One needs 24 hours of Continuing Legal Education (CLE) credits to complete one's registration. Many of those attorneys looking for CLE courses at the 11th hour are unaware that the New York State CLE Board provides that you may partially fulfill your CLE requirements by doing pro bono work though an approved provider (although on a two-for-one basis, i.e., two hours of approved pro bono work for one free CLE hour's credit up to a maximum of 10 credits in any two-year reporting cycle). Likewise, many of those attorneys are unaware of the Attorney Emeritus Program (AEP), which acts as a liaison between attorneys—retired or not—and approved AEP host organizations or court-sponsored programs.

"This service is critical, assisting low-income New Yorkers in essential matters including but not limited to housing, family, and education."

Founded in 2010 by former Chief Judge Jonathan Lippman, AEP's original purpose was to match retired attorneys with low-income New Yorkers in need of civil legal assistance. Retired attorneys, who are exempt from the $375 biennial registration fee and CLE requirements, may still continue to practice law with an approved AEP host organization or court-sponsored program. AEP helps those retirees match their skills and interests with an approved pro bono opportunity and makes sure that the provider offers the retiree malpractice insurance (some pro bono providers do not). AEP, in effect, functions as a clearinghouse between attorneys—retired or not—who wish to donate their legal services to New Yorkers in need in civil legal matters.

After AEP's creation, it became apparent that there was another category of attorneys who might benefit from AEP's services: those "senior" attorneys (55 or older) in practice for at least 10 years who were phasing down but not yet ready to check the "retired" box on their registration form. Such attorneys may choose "Emeritus" on their registration form and similarly match their skills and interests with an approved pro bono provider and not have to worry about malpractice insurance which the AEP makes sure is in place for you.

On your New York State Attorney Registration Form in Box "B" ("Registration"), after you check Option 1 (manner of payment of your registration fee), there is for non-retired attorneys a box entitled "Attorney Emeritus Program." The box states that you "wish to enroll…as an Attorney Emeritus and volunteer to perform pro bono services in New York State under the auspices of a qualified legal provider [screened by AEP]." One of the authors should know because he (guess who) checked that box and can attest to the AEP's value.

Another benefit of AEP is an increase in the number of free CLE credit hours one can obtain for pro bono work if you're an active, non-retired attorney. If one is volunteering under the auspices of AEP, the CLE Board's Regulations allow a maximum of 15 free CLE credits (for 30 hours of pro bono work) in any reporting cycle—an increase over the 10-credit limit if one is not working through AEP. Attorneys should consult the Regulations because more specific requirements apply. In any event, a classic example of serendipity if there ever was one.

Fordham University's School of Law's Feerick Center for Social Justice provides programmatic and administrative support for AEP. Feerick Center staff organize information sessions and assist attorneys in finding pro bono opportunities that best suit their interests, background, and schedule. Emeritus Attorneys have proved to be an integral force in New York State's fight for access to justice, with volunteers (there are approximately 1,000 Emeritus attorneys enrolled in the program) contributing an average of 150 hours of pro bono service annually. This service is critical, assisting low-income New Yorkers in essential matters including but not limited to housing, family, and education.

If you wish to enroll as an Emeritus attorney, you can do so by either going to NYcourts.gov/attorneys/volunteer/emeritus/index, checking the appropriate box on your biennial registration form or contacting the Feerick Center for Social Justice. If you wish to navigate through the various pro bono providers without the assistance of AEP, you are free to do so but AEP will make things a whole lot easier for you.

Michael Siris is of counsel to Solomon and Siris, PC, of Garden City, New York, a member of the board of directors of New York County Lawyers Association and Chair of its Senior Lawyers Committee. **Cora Vasserman** is an AmeriCorps VISTA Member at Fordham Law School's Feerick Center for Social Justice (FCSJ). As indicated above, FCSJ administers the AEP.

Reprinted with permission from the October 9, 2018 edition of the New York Law Journal *© 2018 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited.*

"Who Will I Be When I Am No Longer a Lawyer?"

(Is Retirement Still an Option for Aging Sole Practitioners?)

By Stephen P. Gallagher and Leonard E. Sienko, Jr.

For many aging lawyers, status and professional achievement have become inseparable from one's identity. The link becomes especially apparent when we begin thinking of retirement. As we look toward the future, it is only natural to ask, "Who will I be when I am no longer a lawyer?" We all experience difficult questions relating to our own aging process, but regardless of whatever financial planning you have done, most people still experience fears about their retirement.

"Ah, but I Was So Much Older Then, I'm Younger Than That Now… (Bob Dylan)"

Researchers say that half the people born today will live to be 100, and by 2030, people age 65 and older will comprise nearly 20 percent of the population. The United Nations predicts that there will be 2.2 million people over the age of 100 by 2050, making the idea of a universal longevity a real possibility for the first time in human existence.[1]

People of all ages, including lawyers, are embracing the idea of living longer, living better, and maintaining a more balanced, vital lifestyle. The aging process can no longer be seen as just the concern of individuals 50 and older. Aging affects lawyers of all generations, so it is important to involve mid-career lawyers and younger professionals in this dialogue. They too must balance busy work schedules with added responsibilities for supporting aging relatives, adult children, grandchildren and siblings. Multi-generational family dynamics is one of the new "wild cards" we have to build into this new retirement model.

Unfortunately, aging has always been seen as a personal matter, rarely discussed outside one's immediate family, so it is understandable that in many law firms, individuals are reluctant to let anyone else know about their aspirations. In many law firms today, it may be the younger partners who push for greater clarity in terms of transition strategy and succession planning. If baby boomers are comfortable with denial and silence in dealing with aging concerns, equally large number of Millennials want to know and understand the process—even to help.

The legal profession, and all of us, are being challenged to design new approaches that give lawyers more and better choices for living longer and better lives. The sheer number of baby boomers born between the years 1946 and 1964 will change the traditional demographic shape of our society, while reshaping the legal profession.

If aging is the new normal, we need to explore how a new retirement model for lawyers may be needed to help experienced senior lawyers move away from full-time practice—on their own terms. The survival of the profession may depend on how well the profession and individual lawyers respond to this call for a new retirement model.

I'm Broke…I Live from Check to Check…I'm Caught in a "Sandwich"...

In November 2017, co-author Leonard E. Sienko, Jr., who has worked as a sole practitioner in rural, upstate, Hancock, N.Y., for the past 40 years, and I wrote an article, *The Legal Profession in Transition,* for the NYSBA *Journal*. We opined about how the profession could no longer ignore the phenomenon of aging in the workforce. We thought the profession needed to start a dialogue about the need for change.

In our conversations regarding retirement planning and the possibility of being able to move away from the winters of upstate New York, Lenny felt that "The single greatest challenge to the profession is the number of senior lawyers who actually cannot or will not retire." Lenny explained: "Over the past 30 to 40 years, the number of solo and small firms has expanded to meet market demands, and today, many of these same practitioners find themselves unable to retire and still maintain anything even close to their current standard of living." We wanted to explore whether Lenny's assumptions about sole practitioners were correct.

Looking Back in Time to See Forward

In 2008, the New York State Bar Association conducted a Senior Lawyer Survey in which they examined what planning and preparations for retirement senior lawyers

Stephen P. Gallagher (Sgallagher@leadershipcoach.us) was the first Director of Law Office Economics and Management for NYSBA from 1990 thru 2003. He now spends his time in coaching lawyers through transition, teaching marketing strategy to MBA students; and commiting time each day to moving his personal journey through growth and renewal forward. He remains eternally grateful to the NYSBA community and staff for the time he spends with them.

Leonard E. Sienko Jr. is a solo practitioner in Hancock, NY. A general practice lawyer for 40 years, he is well-known for his pioneering use of the internet in legal practice and love of gadgets. He graduated from Boston College, received a master's in divinity from Andover-Newton Theological School, and a J.D. from Boston College Law School. He is reachable via email: lennyesq@hancock.net.

had undertaken or were planning to undertake. This comprehensive study is a valuable starting point for us in tracking senior lawyers' thinking regarding interest and preparedness for retirement.

It is important to note that responses were received from 1,732 lawyers. Of these, only 527 were "solo" (i.e., employed no other lawyers). Since a separate survey to assess sole practitioners' readiness for retirement has not yet been conducted, it is difficult to confirm objectively Lenny's hypothesis about sole practitioners' inability or unwillingness to retire, but actual comments from the Senior Lawyer Survey express fears, doubts and personal concerns regarding the very concept of retirement.

Several of the statements from the Senior Lawyer Survey confirm the hypothesis:

1. I am a sole practitioner with no substantial assets accumulated for retirement. I wish to learn some practical ideas about how to prepare and manage the retirement challenges from the Association or other senior attorneys.
2. I am vaguely concerned about retirement, but not focused on this issue right now, because I still have a young child, as well as elderly parents—I'm a classic "Sandwich Generation" lawyer.
3. I have young pre-college age children and, my retirement plan is presently best characterized as "never." Since this survey primarily concerns post-retirement planning, I am sorry that I could not be of much help to you.
4. I believe guidance and experience of others who have retired or simply changed career focus would be extremely helpful. Many of us will be coming of "retirement age" shortly and ideas and guidance would be great. It would also be a wonderful opportunity to segue into pro bono work.

The Senior Lawyer Survey was a two-part survey, including both retired lawyers and those approaching retirement. The survey showed that attorneys 55 and older anticipating and preparing for retirement expected to work longer and have more concerns about retirement than their colleagues who had already retired. Only 8 percent of respondents actually planned to retire and not work at all, while 53 percent were planning on working part-time. Twenty-four percent planned to work as long as they were able.

The need to continue working part time reflects how respondents felt about the retirement resources they expected to count on as a source of income during their retirement years. *Social Security* was listed by 81 percent of respondents for retirement income*; IRA, 401(k), or other retirement savings account* came in at 78.8 percent; *income or money from after-tax savings and investments* came in at 49%; while *income from part-time work* came in fourth at 44.9 percent.

Personal Concerns Regarding Retirement or "Where Do I Go After I Get Up and Get Dressed in the Morning?"

If you've spent the last 40 years going to the office every day, including weekends, what do you do now?

People don't live their lives in silos, and lawyers looking to move away from full-time law practice cannot make this transition without forming new, sustainable working relationships. Because the legal profession has always stressed self-sufficiency, we tend to forget that needing help does not mean lack of control over our affairs.

"People don't live their lives in silos, and lawyers looking to move away from full-time law practice cannot make this transition without forming new, sustainable working relationships."

At some point in time, many of us will need a support network of caring individuals to help us manage certain aspects of our well-being. Some large firms keep some shared space and shared clerical assistance for retirees and those in transition. Where does the sole practitioner go?

Many will rely on family and friends while others will turn to a wider range of community connections. We suggest the bar association has a broader role to play in keeping its aging workforce together as a way of helping younger lawyers grow their own practices.

Law Practice Continuity—What Do I Do for Clients ?…for Myself?

Of the attorneys responding to the *Senior Lawyer Survey* who were still working in 2008, 48 percent said that they had not made any practice continuity arrangements. Of those who have made a designation of an "Assisting" or "Successor" attorney, only 15 percent had informed their clients of the arrangement. Another 21.3 percent, *have arranged with their firm to handle the transition of client matters and files*. These respondents were obviously not the 527 solos who practiced alone.

A few more statements from the Senior Lawyer Survey about solos' doubts and fears:

1. I have attempted, with limited success, to have my clients picked up and/or designate/instructions for original wills, other documents. Simultaneously, I have not been able to find a notable assisting attorney.
2. I like the thought of a confidential registry where I could identify those I think best able "to pick up the pieces" of my practice should I die or become disabled and should my partners need assistance with my area of practice.

Of the sole practitioners, only *11.1 percent have arranged with another attorney (Assisting Attorney) to assume their practice or to assist in the transfer of client matters and files*. Only 2.9 percent have made any arrangement with an assisting attorney who has agreed to close their practice if they are no longer able to practice. Without more current data, we can only speculate on how prepared solos are to protect client interests. Our suspicions are that solos who do not see retirement in their future may not be as interested in devoting time and resources to protecting client interests. Giving solos hope about their own retirement paths may be a good place to start in better protecting client interests.

"Survey Says"

The Senior Lawyer Survey asked respondents about their personal concerns regarding retirement. The Number One concern listed was ***loss of intellectual stimulation*** (35.6 percent), while ***loss of opportunities to use professional skills and experience*** came in a close second at 30 percent. Not surprisingly, ***loss of professional identity*** came in third at 23 percent. We have no reason to believe that lawyer concerns have changed in any substantial part these last 10 years.

The NYSBA Senior Lawyers Section (SLS) was established as a response to concerns expressed in the Senior Lawyer Survey.

Senior Lawyers Section—Priorities

At the time of the 2008 survey, 41.5 percent of the respondents listed "Employment opportunities for senior lawyers" as the number one priority for the new Section. Other services listed highly were, "Health and wellness information at programs" listed at 31 percent, and "Retirement planning information" at 30 percent. Fast forward to today, according to an Altman Weil's 2016 Flash Report on Law Firms in Transition, the majority of law firms are practicing some form of labor arbitrage, either shifting work to less costly lawyers or to part-time and contract lawyers to meet demand while lowering costs. Do senior lawyers have a fast track to these jobs, and can the bar association do more to help make these connections?

Reflecting on the Past—Looking Ahead

Around the same time NYSBA' was conducting the 2008 study of senior lawyers, Theodore Roszak, a professor of history at California State University, who was known for coining the term "counterculture" in the late 1960s, wrote *The Making of an Elder Culture* (2009) where he laid out his vision for the emerging elder culture.

Professor Roszak's vision at the time was that,

> Boomers who will usher us into senior dominance are the best-educated, most socially conscientious, most politically savvy older generation the world has ever seen…. Given sufficient awareness and inspiration, I believe that generation will want to do good things with the power that history has unexpectedly thrust upon it in its senior years.[2]

Could Professor Roszak be correct? Should the bar association bring together these senior lawyers, no matter what Sections, committees or outside affiliations come together, *"to do good things with the power that history has unexpectedly thrust upon us in our senior years"*?

The Senior Lawyers Section is in the process of expanding the range of community initiatives aimed at bringing its aging workforce together in a series of regional meetings (Gatherings) designed to bring individuals together as resources to encourage individuals and to serve as a sounding board for peers in a safe, neutral place to relax, talk and learn. The first Gathering was held in partnership with the Monroe County Bar Association in October 2018. Lawyers came together to explore business opportunities and retirement options with younger lawyers looking to gain a foothold in the profession.

We do believe the Senior Lawyers Section is in a unique position to provide leadership in bringing lawyers together in new ways. The complexity of the aging workforce mandates that bar associations need to come together to build new pathways for sole practitioners to gain renewed hope for retirement possibilities. The demand for change will remain unresolved, until the talent found in each "siloed" Section and committee and bar association can come together to design new approaches and new solutions for retirement planning.

Endnotes

1. Matthew Bandyk, *The Future of the Economy: 2050*, US News, accessed February 2, 2010, http://usnews.com.
2. Theodore Roszak, The Making of an Elder Culture: Reflections on the Future of America's Most Audacious Generation (Gabriola Island, BC: New Society Publisher, 2009), 8.

A Litigator's Guide to the Management of New York Limited Liability Companies

By Michael J. Firestone

I. INTRODUCTION

Since the adoption of the New York Limited Liability Company Law (the "LLC Law") in 1994, the limited liability company (LLC) has become the most popular type of entity for organizing privately owned businesses in New York. While New York-based commercial litigators generally do not advise their clients on the formation of LLCs and the various tax and corporate law issues that are involved in their operation, they are often called upon to represent parties in disputes concerning the extent of the LLC manager's (or majority member's) right to control the business and operations of the LLC, the manager's fiduciary duties to the LLC and its members, and the minority members' rights to consent or oppose certain business decisions. Litigators should therefore be conversant in the basic statutes and case law applicable to the management of New York LLCs.

This article has two purposes. First, to provide litigators with both a legal and practical understanding of how New York LLCs are managed. Second, to outline the LLC manager's fiduciary duties under New York law and to examine the limits placed on managers as a result of those duties, as well as those areas where the duties can be carved back or even eliminated.

II. DETERMINING HOW AN LLC IS MANAGED

A. The Management Framework

Three sources provide the framework under which an LLC is managed: (i) the LLC Law; (ii) the LLC's articles of organization; and (iii) the LLC's operating agreement.

1. The LLC Law

The LLC Law covers, among other things, the process by which an LLC is formed and dissolved, the rights of members and the processes by which the LLC is managed, and the rules applicable to mergers. Many provisions of the LLC Law only apply to the extent they are not overridden by the articles of organization or the operating agreement. Thus, the LLC Law constitutes a set of "default" rules applicable only where the members fail to agree otherwise in writing, or where their written agreement fails to address an issue otherwise covered by the LLC Law.

2. The Articles of Organization

An LLC is formed by filing articles of organization with the New York secretary of state. Pursuant to § 203(e) of the LLC Law, the articles of organization must provide basic information regarding the LLC, such as its name and a designation of the New York Secretary of State as the agent of the LLC upon whom process may be served.

The articles of organization are relevant to the management analysis in two respects. First, Section 203(e)(7) of the LLC Law states that the articles of organization shall set forth:

> Any other provisions, not inconsistent with law, that the members elect to include in the articles of organization for the regulation of the internal affairs of the limited liability company, including, but not limited to, (A) the business purpose for which the Company is formed, (B) a statement of whether there are limitations on the authority of members or managers or a class or classes thereof to bind the limited liability company and (C) any provisions that are required or permitted to be included in the operating agreement of the limited liability company pursuant to section four hundred seventeen of this chapter.

In practice, most articles of organization include only the bare minimum required by § 203(e), with provisions concerning the internal governance of the LLC set forth in the operating agreement. This results from two factors. First, the articles of organization is a public document (while the operating agreement is a private contract), and LLC members have no reason to make public their internal business arrangements. Second, the articles of organization must be filed in order to form an LLC, while the operating agreement can be executed at a later date. The LLC may need to be formed quickly (particularly if there is a pressing business opportunity), in which case the members will draft a bare-bones articles of organization and put off negotiating and drafting an operating agreement until a later date.[1] Nevertheless, because the members are permitted to include management provisions in the articles of organization, it is imperative that the articles be reviewed whenever analyzing the management of an LLC. Indeed, even a bare-bones articles of organization will often include, at the very least, an indemnification provision.

Michael J. Firestone is Principal of Firestone Law PLLC in New York.

This article originally appeared in the Fall 2017 issue of NYSBA's NY Litigator, *a publication of the Commercial and Federal Litigation Section.*

Second, § 401(a) of the LLC Law states as follows:

> Unless the articles of organization provides for management of the limited liability company by a manager or managers or a class or classes of managers, management of the limited liability company shall be vested in its members...subject to any provisions in the articles of organization or the operating agreement...

Based on this language, the LLC Law implicitly requires the articles of organization to state whether the LLC is managed by a manager or by its members.[2]

3. The Operating Agreement

Section 417 of the LLC Law states that the members of an LLC

> shall adopt a written operating agreement that contains any provisions not inconsistent with law or its articles of organization regarding (i) the business of the limited liability company, (ii) the conduct of its affairs and (iii) the rights, powers, preferences, limitations or responsibilities of its members, managers, employees or agents, as the case may be.

"The LLC Law defines an 'operating agreement' as 'any written agreement of the members concerning the business of a limited liability company and the conduct of its affairs...'"

The LLC Law defines an "operating agreement" as "any written agreement of the members concerning the business of a limited liability company and the conduct of its affairs..."[3] As one New York court has said, the operating agreement is the "primary document defining the rights of members, the duties of managers and the financial arrangements of the limited liability company."[4] Thus, the operating agreement is a contract among the members reflecting how they want the LLC to be run.

Whenever it is necessary to understand the management of an LLC, the starting point is the operating agreement. Operating agreements vary depending on the nature of the LLC's business and the relationship among the members. While there are virtually unlimited ways in which to structure management, operating agreements are generally designed to vest managerial authority with the member who has the most equity in the LLC, and/or the highest degree of expertise in the business being run.

B. Management of the LLC by a Manager

In managing an LLC with multiple members, it is most efficient for one person, known as a manager, to be responsible for the LLC's day-to-day operations and most of its significant business decisions.[5] In practice, the manager is often a member with a significant ownership interest in the LLC, though she need not be a member if the articles of organization and/or operating agreement so provides.[6] The manager only has "such responsibilities accorded to him or her by the members as provided in the operating agreement."[7] Thus, an operating agreement must identify the manager by name and describe the scope of the manager's authority, either by (i) identifying a set of specific acts for which the manager is responsible and can authorize on her own, while leaving all other actions to the consent of the members or (ii) granting the manager sole and exclusive authority to make all decisions, and then carving out a series of specific exceptions for which member consent is required.[8]

A good operating agreement should provide the manager and the members with certainty about their respective roles, and leave no ambiguity regarding those areas over which the manager has authority. For example, the operating agreement might provide that the manager has sole and exclusive authority to make all decisions with respect to the LLC's business and operations, except that members holding a majority of the membership interests must approve any decision to amend the operating agreement, sell all or substantially all of the LLC's assets, or commence a bankruptcy proceeding. By contrast, a poorly written operating agreement might provide that the manager has sole and exclusive authority to manage the LLC except that all members must approve "major decisions" without defining the term. This language is vague, and may lead to clash between the manager and the members over which sorts of decisions are "major" and which are not.

An LLC may have more than one manager or multiple "classes" of managers. If multiple managers are designated, the operating agreement should state whether all managers must agree for an action to be taken, whether only a majority of managers are required, or whether each manager may act on his or her own. Similarly, if the LLC has "classes" of managers, the operating agreement will identify those business decisions over which each class may exercise control.[9] To the extent there are multiple managers, the operating agreement

should include some mechanism for resolving a deadlock between them.

There are various ways in which the members can structure the authority of the manager under the operating agreement. Indeed, as one New York court aptly said, "one of the beauties of the LLC is that members can specifically and explicitly determine how their company is to be run."[10] The following four scenarios demonstrate a variety of management structures that are available for a manager-managed LLC; they are by no means exhaustive, but rather illustrative of the flexibility afforded by the LLC form.

1. Scenario 1: The Real Estate Investment, Case 1

In this scenario, the LLC has three members. Member A owns 60 percent of the LLC's equity, and Members B and C each own 20 percent. The LLC's sole asset is a valuable commercial property. Member A is in the business of real estate management, while Members B and C are longtime acquaintances of Member A whom he invited to participate in the investment but who have no prior experience investing in or managing a commercial real estate property or participating in the management of an LLC. The operating agreement provides that Member A is the managing member, with absolute discretion to make all decisions relating to the business and operations of the LLC, except that Members B and C must consent to a decision to sell the existing property, acquire a new property, or take on new debt.

The operating agreement recognizes that Member A, as the owner of more than half of the LLC, is entitled to make nearly all management decisions. From the perspective of the LLC members, this is sensible because Member A has experience in the real estate industry while they do not. At the same time, while Members B and C have no say over the day-to-day running of the business (e.g., creating a budget, hiring building employees and service providers, negotiating leases, etc.), Member A cannot fundamentally alter the nature of the investment without first obtaining the other members' consent to do so.

2. Scenario 2: The Real Estate Investment, Case 2

The LLC has three members, A, B and C, each of whom own one-third of the membership interests, and all three of whom are experienced real estate investors. The LLC owns an apartment building. At least two of the three members must approve all major management decisions, including but not limited to the building's annual budget, the hiring of any employees or contractors, the refinancing of the mortgage, a sale of the building, and any lease for more than 2,000 square feet. Member A is the manager of the LLC, but the operating agreement limits his authority to overseeing the building's daily operations and executing the decisions of the members. The operating agreement authorizes Member A to hire his wholly owned management company to manage operations at the building, for which the management company will receive market-rate compensation.

Here, Members A, B and C all have equal interests in the property and significant experience with real estate. The operating agreement therefore provides for "majority rule." In return for serving as manager and carrying out the members' decision, Member A has the right to receive compensation that is not available to Members B and C.

3. Scenario 3: The Service Business

The LLC has two members, each of whom owns 50% of the LLC. The LLC's sole asset is a public relations firm. The members are longtime friends and colleagues who worked together for many years before opening their business. The operating agreement provides that Members A and B are both managing members who must agree in order for any decision to be made. In the event that they cannot reach agreement, the operating agreement requires that they enter into mediation. If mediation fails, the LLC is required to be dissolved.

Here, the members are equal investors and each has the particular knowledge required for the running of the business. Moreover, the members have already built a relationship based on trust and mutual respect from years of working together. Thus, they are comfortable sharing management rights and anticipate that they will either not have fundamental disagreements or they are confident that such disagreements can be amicably resolved. At the same time, the operating agreement recognizes that relationships change, and that a time may come when the members cannot resolve a deadlock on their own. The operating agreement therefore provides a mechanism for dispute resolution and, if it becomes necessary because of an unresolvable deadlock, the orderly dissolution of the business without either member having to commence a judicial proceeding.

4. Scenario 4: The Equity Investment

The LLC has 18 members. Seventeen of the LLC members are a mix of individuals, other LLCs, and trusts (the "Minority Investors"). The Minority Investors each own various amounts of equity ranging from 20 percent to 2 percent. The 18th member is another LLC which acts as manager (the "Manager LLC") and owns 0.01 percent of the LLC's membership interests. The LLC's operating agreement provides that the Manager LLC has the sole and absolute right to manage the LLC, while the Minority Investors have no rights whatsoever to participate in the management of the LLC. The Manager LLC is run by its three members, A, B, and C (the "Managers"), at least two of whom must consent to any decision. If at any time there are fewer than three Managers, the remaining two must appoint a third so that there cannot be a deadlock among them as to management decisions.

The Managers are all partners at a private equity firm and have experience in the aerospace industry. The LLC's

sole asset is a controlling interest in a privately held corporation (the "Corporation") that is in the business of manufacturing jet engine components. Through its controlling interest, the LLC appoints a majority of the Corporation's directors and its key officers, and has consent rights over certain major business decisions. In return for managing the LLC and its investment in the Corporation, the Manager LLC is paid a management fee by the LLC, as well as a share of profits if the Corporation hits certain profitability targets.

Here, the Minority Investors have all of the equity and no control over management, while the Managers have control over management and essentially no equity, but an incentive to run a profitable business. This makes sense, as the LLC is essentially an investment vehicle for the Minority Investors, who are relying on the business acumen of the Managers to successfully navigate a unique and highly sophisticated investment. In order to reassure the Minority Investors that their investment will function smoothly, the operating agreement provides mechanisms to prevent a deadlock among the Managers.

C. Management of the LLC Where No Operating Agreement Exists

Section 417(a) of the LLC Law provides that LLC members "shall adopt a written operating agreement."[11] Courts have nevertheless interpreted this provision of the LLC Law to mean that even where the members do not adopt an operating agreement, an LLC maintains its corporate character as a limited liability entity and may conduct business as such.[12] In such circumstances, however, the LLC is governed solely by the provisions of the LLC Law.[13] Similarly, even if an operating agreement exists but is silent with respect to certain issues that are addressed by the LLC Law, the LLC Law, where applicable, applies to those areas.[14]

Allowing the LLC to be governed by the LLC Law rather than the operating agreement carries significant implications for the management of the LLC. Article IV of the LLC Law, which concerns management of the LLC, contains various provisions, discussed below, that may be at odds with how the members want or expect their business to be run. These provisions may all be altered or removed by the members in an operating agreement.[15] Thus, to the extent there is no operating agreement, or the operating agreement is silent on certain issues, the following rules will apply to the management of the LLC.

1. Management by Members

In the absence of an operating agreement, Section 401(a) of the LLC Law vests management of a limited liability company in the LLC's members. Additionally, Section 401(b) deems any member exercising "management powers or responsibilities" to be a manager subject to all of a manager's duties and liabilities under the law. To illustrate the problems which may result in an LLC governed by the default rules of Section 401(b), consider *Laugh Factory, Inc. v. Basciano*, 608 F. Supp. 2d 549 (S.D.N.Y. 2009), a federal case applying New York law. There, two entities—Laugh Factory Inc. ("Laugh Factory") and 300 West 43 Street Realty, Inc. ("300 West")—formed an LLC for the purpose of operating a comedy club. The club was located in a Manhattan building controlled by 300 West's sole shareholder. The members never entered into an operating agreement. The members ultimately sued each other for various claims, including one by Laugh Factory that 300 West breached its fiduciary duties to the LLC. 300 West argued that it was not the manager and therefore owed no fiduciary duties to Laugh Factory. On motion for summary judgment, the Court held that there was sufficient evidence that employees of 300 West had handled many of the LLC's operations, such as bookkeeping and obtaining a liquor license for the comedy club. To the extent "that in so doing they were acting on behalf of [300 West]...there is evidence that could support a finding that [300 West]...was a managing member of the" LLC under Section 401 and that 300 West "accordingly owed—and potentially breached—a fiduciary duty to the other member."[16]

2. Voting Rights of Members

When entering into an operating agreement, the members can designate certain decisions that must be must be consented to by all or any percentage of the members, as opposed to actions which may be authorized on the manager's sole authority. In the absence of an operating agreement covering these issues, however, §§ 402(c) and (d) reserve to the members holding a majority of the membership interests the right to consent to certain key management decisions, regardless of whether the LLC is managed by a manager. Those decisions include:[17]

- admitting new members;
- incurring debt other than in the ordinary course of business;
- adopting, amending, restating or revoking the articles of organization or operating agreement;
- dissolving the LLC;
- selling, leasing, exchanging, mortgaging, pledging or transferring all or substantially all of the LLC's assets; and
- merging or consolidating the LLC with or into another LLC.[18]

While it is desirable for members to consider which decisions require member consent rather than rely on the items listed in § 402, members still need to be careful about which decisions they cede to managers and which they retain for themselves. *Ahmed v. Fulton Street Brothers Realty*, LLC, 107 A.D.3d 832 (2d Dep't. 2013), concerned an LLC with three members: Yasser Lewis, Wilfred Ward, and Latuit Ward. Lewis, who owned a 38 percent interest in the LLC, was the managing member; the Wards

together owned the remaining 62 percent. The members entered into an operating agreement which went beyond the provisions of § 402(d) by providing that the managing member could make decisions concerning the sale or disposition of the LLC's property without obtaining the other members' consent.

Apparently unbeknownst to the Wards, Lewis authorized the transfer of a property owned by the LLC to a different LLC that was also managed by Lewis. One month later, the Wards voted to remove Lewis as managing member and simultaneously authorized the LLC to enter into a contract to sell to a different purchaser the same property that Lewis had previously purported to transfer. The Wards then learned of Lewis's prior transfer of the property, and they sought to unwind the first contract and enforce the second. The Court, however, declined to reverse the original transfer authorized by Lewis because the members had specifically drafted the operating agreement to override Section 402 by providing Lewis—the owner of only 38% of the equity—with the authority to make those decisions on his own.[19]

3. Indemnification

Indemnification provisions allow a manager to be indemnified by the LLC for certain claims for which the manager is found liable and to advance funds to pay for his legal expenses. Indemnification and advancement are generally unavailable, however, if a court finds that the manager acted in bad faith or engaged in willful misconduct or breached the operating agreement. (Very often, the manager is required to provide an undertaking to the LLC by which he agrees to repay the LLC if it is determined that he had no right to advancement.) As managers are often personally exposed to increased litigation risk from disgruntled members, the right of indemnification is seen as a necessary prerequisite for managers to do their job effectively.

Indemnification provisions are either "permissive" or "mandatory." A permissive provision allows, but does not require, the LLC to indemnify the manager and advance his legal fees. A mandatory provision, on the other hand, obligates the LLC to do so. The members are free to include in the operating agreement a permissive or mandatory provision. If the operating agreement is silent and the LLC Law controls, however, then indemnification is permissive only. Specifically, § 420 of the LLC Law states as follows:

> Subject to the standards and restrictions, if any, set forth in its operating agreement, a limited liability company ***may***, and shall have the power to, indemnify and hold harmless, and advance expenses to, any member, manager or other person...from and against any and all claims and demands whatsoever...

(emphasis added).

Permissive indemnification provisions can be problematic. For example, assume that the LLC has three members. Although the LLC does not have an operating agreement, one of the members owns 70 percent of membership interests and in practice acts as the LLC's manager. The manager is the subject of a derivative lawsuit brought by the other members alleging that he breached his fiduciary duties. The manager is now faced with a dilemma. Under the LLC Law, he may authorize the LLC to advance his litigation expenses. However, the members purporting to sue him derivatively on behalf of the LLC may seek to oppose his doing so. If the members cannot find a way to resolve this among themselves, the manager may need to litigate his right to have his fees advanced by the LLC. Importantly, "fees on fees," i.e., legal fees spent by the manager seeking to establish his right to advancement, are only covered by an indemnification provision that specifically provides for such fees.[20] As Section 420 does not specifically cover "fees on fees," the costs of litigation related to advancement will not be covered by § 420.[21] Additionally, note that the LLC may indemnify "any person," such as a third-party professional or employee.

"Indemnification provisions allow a manager to be indemnified by the LLC for certain claims for which the manager is found liable and to advance funds to pay for his legal expenses."

4. Agency

An LLC is only capable of acting through its agents. To avoid internal conflict and confusion, most LLCs designate the manager as the sole agent in the operating agreement. Members may, however, determine otherwise and are free to designate any or all of the members as agents as well. So long as the members appropriately coordinate their actions, having multiple agents can be efficient, particularly if papers need to be signed and the manager is not available to do so. If the members do not designate an agent in the operating agreement, however, then the default rule under § 412 of the LLC Law will apply.

Under § 412(b)(1) and (2), if the LLC is managed by a manager, then the manager is deemed an agent of the LLC and no other member may act as the LLC's agent unless he or she has been delegated such authority by the manager. Section 412(b)(2) carves out an exception by noting that a manager cannot bind the LLC if in fact he has

no authority to act for the LLC in the particular matter and the person with whom he or she is dealing knows that the manager has no such authority.

Under § 412(a), if the LLC is managed by its members, then every member is deemed to be an agent of the LLC, except in a situation where the member in fact has no authority to act for the LLC in the particular matter and the person with whom he is dealing knows that the member has no such authority.

Sections 412(c) and (d) provide two additional rules relating to agency: First, the act of a manager or member that is not "apparently" for the purpose of carrying on the LLC's business "in the usual way" does not bind the LLC unless it was specifically authorized by the LLC.[22] Second, to the extent the member or manager is restricted in some way, either in the operating agreement or in any other form of agreement, and the manager purports to bind the LLC in contravention of such restriction, the LLC will not be bound so long as the person on the other side of the transaction was aware of the restriction.[23]

5. Multiple Managers

Where the operating agreement provides for multiple managers but does not indicate how they are to make decisions collectively, Section 408(b) provides that the managers will manage the LLC by affirmative vote of the majority of the managers.

6. Qualifications of Managers

Under Section 410, unless otherwise stated in the operating agreement, a manager may, but need not be, a member of the LLC.

7. Compensation of Managers

Many operating agreements expressly prohibit the managers from receiving compensation.[24] If the operating agreement does not include language prohibiting manager compensation, the LLC Law controls, and the manager is authorized to fix her own compensation.[25]

8. Election, Removal, and Resignation of Managers

In a manager-managed LLC, the operating agreement will often state that a manager serves until death, incapacity, or withdrawal as a member. The operating agreement may also discuss the circumstances under which a manager may be removed from office by the members, whether the manager has the right to resign, and the manner in which a successor manager is selected. If these matters are not covered in the operating agreement, the LLC Law will fill in the gaps as follows: First, Section 413(a) requires that the members are to vote annually on the election of a manager, who must receive the support of a majority-in-interest of the members. Second, Section 414 provides that a majority in interest of the members may remove a manager with or without cause. Third, Section 415 provides that the manager may resign at any time.

III. THE MANAGER'S STANDARD OF CONDUCT

A. The Business Judgment Rule

In making decisions on behalf of the LLC, under New York case law, the manager is protected by the familiar business judgment rule applicable to corporate officers and directors.[26] The business judgment rule bars judicial inquiry into actions of managers "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes."[27] Thus, if a manager's decision is challenged in a legal proceeding, the court will presume that he or she acted within his or her business judgment and will not overturn such decision unless it can be shown that the decision was made in bad faith or tainted by fraud.[28] Additionally, a manager is not protected by the business judgment rule to the extent that he or she has a financial interest in the transaction at issue.[29] The defense of the business judgment rule is key, particularly if the manager takes actions which are unpopular with members. For example, a manager may determine not to make distributions or to issue capital calls. These decisions are generally disfavored by members, who may allege that decisions are being made by the manager in order to oppress them and are in breach of his or her fiduciary duties. Yet, so long as the manager's decision merits the presumption of the business judgment rule, the court will uphold his or her decision. Indeed, "[s]o long as the managing member does not run afoul of his contractual and fiduciary obligations, his business decisions cannot be questioned, either by non-managing members or the court."[30]

B. The Manager's Fiduciary Duty

Managers and members, who exercise management powers or responsibilities pursuant to § 401(b), owe fiduciary duties of loyalty and care to the LLC and its members. Specifically, § 409(a) of the LLC Law provides that a "manager shall perform his or her duties as a manager... in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances."[31] The duty of loyalty requires the manager to refrain from using his or her position to gain a financial or other advantage that is not shared with the members.[32] Thus, courts have held that the duty of loyalty requires the manager to avoid situations in which his "personal interest possibly conflicts with the interest of those owed a fiduciary duty."[33] Courts have also held that the duty of loyalty requires a manager to disclose all material facts involving the LLC to members.[34] While little has been said regarding the duty of care in the context of an LLC, in the case of corporate directors, the duty has been defined as requiring the fiduciary "to act in an informed and 'reasonably diligent' basis in 'considering material information.'"[35]

C. Contractual Limitations on Fiduciary Duties

While managers owe fiduciary duties to the LLC and its members under the LLC Law, the extent of those du-

ties exist within the terms of the operating agreement. Thus, "when a member complains that his rights were violated based on traditional notions of equity and corporate fair play, courts must be wary not to lose sight of the nature of the LLC and provide members with rights they did not bargain for and, in many cases, expressly disclaimed."[36] In particular, members may agree in the operating agreement to "prospectively waive" certain potential future breaches of the manager's fiduciary duties. They may also grant the manager the right to enter into interested transactions or pursue business opportunities that compete with the LLC. Taken together, members have broad authority to limit the manager's fiduciary duties, should they choose to do so.

Under New York law, the LLC members have the right to prospectively waive the manager's duty of care, but not the duty of loyalty. Specifically, Section 417(a) of the LLC Law provides that the operating agreement,

> may set forth a provision eliminating or limiting the personal liability of managers to the limited liability company or its members for damages for any breach of duty in such capacity, ***provided that no such provision shall eliminate or limit***:
>
> (1) the liability of any manager if a judgment or other final adjudication adverse to him or establishes that his or her acts or omissions were in ***bad faith or involved intentional misconduct or a knowing violation of law or that he or she personally gained in fact a financial advantage to which he or she was not legally entitled***...[37]

Notwithstanding § 417(a)(1), there are circumstances in which even certain aspects of the duty of loyalty can be waived as well. For example, members often include in the operating agreement a provision allowing the manager to authorize a market-rate transaction between the LLC and an entity in which the manager has a financial interest, or to invest in a business that competes with the LLC without having to share profits with the other members. While New York courts have not examined these provisions in the specific context of § 417, they are widespread and presumed to be valid.[38]

The notion of how far members can go in circumscribing the duty of loyalty was explored by the Appellate Division, First Department and the New York Court of Appeals in the *Pappas v. Tzolis* decisions. That case concerned Vrahos LLC, formed by three members, Pappas, Ifantopolous and Tzolis, for the purpose of entering into a long-term lease of a building located in Manhattan.[39] The LLC's operating agreement included a clause providing that "any member may engage in business ventures and investments of any nature whatsoever, whether or not in competition with the LLC, without obligation of any kind to the LLC or to the other Members."[40] The operating agreement also granted Tzolis an option to enter into a sublease with the LLC, which could only be exercised if Tzolis made certain payments to the LLC. Tzolis exercised the sublease option, but failed to make the required payments. He explained to Pappas and Ifantopolous that rather than make the payments and keep the sublease, he preferred to buy them out of LLC and take over the prime lease. The other members agreed with this plan, and Tzolis bought them out for a total of $1.5 million. In connection with the buyout, Pappas and Ifantopolous executed a "certificate" which provided that:

> Each of the undersigned Sellers, in connection with their respective assignments to Steve Tzolis of their membership interests in Vrahos LLC, has performed their own due diligence in connection with such assignments. Each of the undersigned Sellers has engaged its own legal counsel, and is not relying on any representation by Steve Tzolis or any of his agents or representatives, except as set forth in the assignments and other documents delivered to the undersigned Sellers today. Further, each of the undersigned Sellers agrees that Steve Tzolis has no fiduciary duty to the undersigned Sellers in connection with such assignments.[41]

Six months after buying out Pappas and Ifantopolous, Tzolis assigned the lease to a third party for $17.5 million. Pappas and Ifantopolous claimed that Tzolis had begun negotiating the assignment of the lease prior to the time that the parties agreed to the buyout, and they alleged causes of action for, among other things, breach of fiduciary duty for failure to disclose such negotiations. Tzolis moved to dismiss, arguing that he did not owe Pappas and Ifantopolous a fiduciary duty because of the clause in the operating agreement and the certificate. The trial court granted Tzolis's motion, which was reversed on appeal. The Appellate Division held that the operating agreement,

> may have permitted Tzolis to pursue a business opportunity unrelated to Vrahos for his exclusive benefit, without having to disclose it to plaintiffs or otherwise present it first to Vrahos. However, we find that the provision does not 'clearly' permit Tzolis to engage in behavior such as that alleged here, which was to surreptitiously engineer the lucrative sale of *the sole asset owned by Vrahos* without informing his fellow owners of that entity.[42]

The Appellate Division also held that the certificate did not waive Tzolis's fiduciary duty, holding that Tzolis "had an overriding duty to disclose his dealings with [the

third party]...to plaintiffs before they assigned their interests in Vrahos to him."[43]

The Appellate Division's decision was reversed by the Court of Appeals.[44] The Court of Appeals did not address the clause in the operating agreement permitting Tzolis to engage in competitive business ventures, but instead, the court focused on the certificate. It found that plaintiffs were "sophisticated businessmen represented by counsel," and that by the time of the buyout "the relationship between the parties was not one of trust" such that "reliance on Tzolis's representations as a fiduciary would not have been reasonable."[45] In light of these facts, the Court found that Tzolis did not owe a fiduciary duty to plaintiffs because of the certificate. In reaching this conclusion, the Court relied on its prior decision in *Centro Empresarial Cempresa S.A. v. America Movil S.A.B. de C.V.*, where it held that:

> "A sophisticated principal is able to release his fiduciary from claims—at least where the fiduciary relationship is no longer one of unquestioning trust—so long as the principal understands that the fiduciary is acting in his own interest and the release is knowingly entered in to"...The test, in essence, is whether, given the nature of the parties' relationship at the time of the release, the principal is aware of information about the fiduciary that would make reliance on the fiduciary unreasonable.[46]

The Court of Appeals' decision in *Pappas* and Section 417(a) are in some degree of conflict, and it remains to be seen whether the New York legislature will follow Delaware and simply allow LLC members to prospectively waive the duty of loyalty. For now, however, two things are clear: First, for a manager to argue successfully that members waived their duty of loyalty, the relationship of trust between the manager and the members must have broken down, perhaps irretrievably.[47] Second, although the Court of Appeals reversed the Appellate Division, the former said nothing about the latter's consideration of the operating agreement provision allowing the manager to engage in competitive enterprises. Thus, even where the member may enter into a business venture in competition with the LLC, courts will not view this clause as providing the interested member with a blank check to cheat the other members out of the profits from their joint venture.

D. The Manager's Right to Rely on Experts

Recognizing that managers often must rely on third parties in order to reach business decisions, Section 409(b) of the LLC Law provides that a manager,

> shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:
>
> (1) one or more agents or employees of the limited liability company;
>
> (2) counsel, public accountants or other persons as to matters that the manager believes to be within such person's professional or expert competence; or
>
> (3) a class of managers of which he or she is not a member, duly designated in accordance with the operating agreement of the limited liability company as to matters within its designated authority, which class the manager believes to merit confidence, so long as in so relying he or she shall be acting in good faith and with such degree of care, but he or she shall not be considered to be acting in good faith if he or she has knowledge concerning the matter in question that would cause such reliance to be unwarranted.[48]

To the extent the manager complies with § 409(b), he or she "shall have no liability by reason of being or having been a manager of the limited liability company."[49]

This Section was examined by the Appellate Division, First Department, in *Pokoik v. Pokoik*. In that case, Gary Pokoik, the managing member, and Leon Pokoik, the non-managing member, had previously settled a dispute by having Leon pay $2.2 million to multiple LLCs from which it was alleged that Leon had misappropriated funds for his personal use.[50] Gary and Leon knew that the $2.2 million was less than the full amounts at issue in their dispute and that any discrepancy between the amount paid by Leon and the actual amounts allegedly misappropriated would be written off by the LLCs.[51] After Leon made the payments, Gary was informed by the LLCs' accountants that there was a $750,000 discrepancy between what had been misappropriated and what had been repaid, and that under the tax law, the properties would have to account for such funds. Gary was advised by the accountants to account for such discrepancy by writing down Leon's capital accounts, on the grounds that any discrepancy was a likely result of Leon's actions.[52] Gary followed this advice and also failed to inform Leon of the accountants' recommendation.[53] As a result of the reduction in his capital accounts, Leon stopped receiving distributions.

Leon argued that Gary breached his fiduciary duty by reducing Leon's capital accounts and denying him distributions, while leaving the capital accounts of all other members untouched. Gary argued that he had relied on the advice of the LLCs' accountants in determining to reduce Leon's capital accounts, and he was, therefore, not liable for breach under § 409(b). Gary moved for summa-

ry judgment on that basis. The trial court denied Gary's motion, finding that the reasons for writing down Leon's capital account and whether Gary had acted in bad faith or actually relied on the accountants were factual matters that could only be resolved at trial.[54] On appeal, the First Department affirmed the trial court's order on the grounds that Gary did not act in good faith. Specifically, the First Department found that:

> Gary had an interest in reducing plaintiff's capital accounts, as opposed to charging certain amounts to the LLCs, because the latter course of action would ultimately have had a negative financial impact on Gary. These failures to make truthful and complete disclosures...and Gary's conflict in choosing to burden only plaintiff and not all the LLCs members, including himself, does not show "undivided and undiluted loyalty."[55]

Pokoik is a problematic decision because there is no indication that the advice that Gary received from the accountants was wrong. Thus, how does a manager reconcile the need to follow accurate expert advice with his obligation to treat all members fairly when they are in conflict? The court gave no guidance on that issue. However, at the time they entered into the settlement, Gary and Leon knew that there would be a discrepancy, but failed to address it. They should have consulted with their accountants and resolved how to account for the discrepancy at the time of the settlement, rather than putting off the issue to the future. By failing to do so, they created a situation in which they had no written agreement to guide the manager's decision. A comprehensive agreement—either a settlement or operating agreement—is always preferable to relying on the manager's discretion, particularly where, as here, there has been a breakdown in trust between the manager and the member.[56]

E. Allowing the Manager to Enter Into Interested Transactions

Although managers must avoid any potential or actual conflicts of interest with the LLC, they are not prohibited from transacting business with the LLC, so long as certain requirements are met. As discussed above, the operating agreement may permit the manager to authorize interested transactions, subject to various conditions (e.g., that the amount paid by the LLC be the equivalent of what it would pay an independent third party for same work). To the extent that the operating agreement is silent on this issue, § 411 of the LLC Law provides a mechanism for "cleansing" an interested transaction between the LLC and a third party affiliated with the manager. Section 411 is one of the more complicated sections of the LLC Law, but it can be boiled down to a few key points:[57]

- If there is more than one manager, so long as all material facts related to manager's interest in the transaction are disclosed in good faith to the disinterested managers, the transaction can be authorized by the consent of a majority of the disinterested managers, or if that is an insufficient number of votes to constitute an act of the managers under the operating agreement, by the unanimous consent of all disinterested managers; or
- If the interested manager is the sole manager, so long as all material facts related to manager's interest in the transaction are disclosed in good faith to the members, the interested transaction can be authorized by consent of the members; but
- If there was no disclosure or if the manager's vote was required to approve the transaction, the transaction may be avoided unless the interested manager establishes that it was fair and reasonable to the LLC as of the time that it was approved.

Thus, whenever § 411 is applicable, it is necessary for the manager to make full disclosure and obtain consent from either the disinterested managers, if any, or the members. As establishing the fairness of the transaction presents the manager with a difficult and potentially costly litigation burden, the best practice is to seek consent before entering into the transaction. Importantly, the LLC Law makes it clear that members are free to include "additional restrictions on contracts and transactions between a limited liability company and its managers" in the operating agreement, and it may even provide that all such transactions "shall be void or voidable by the limited liability company."[58]

Wilcke v. Seaport Lofts is the sole case interpreting § 411.[59] There, the two managers owned 40.9 percent of the LLC's membership interests.[60] An entity, in which the two managers and three other members had financial interests, sought to purchase the LLC's sole asset for $5 million. Two other members, the Wilckes, sought to purchase the same asset for $4.8 million. The operating agreement required that two-thirds of the membership interests approve a sale of the asset. A total of 72.4 percent of the membership interests voted in favor of selling the asset to the entity in which the managers' had a financial interest. The court noted that because the vote of the *interested* managers owning 40.9 percent of the membership interests was necessary to achieve a two-thirds majority and approval of the transaction under the operating agreement, it was "incumbent upon the interested parties to establish affirmatively that the transaction was fair and reasonable to the limited liability company at the time it was approved."[61] Importantly, the court found that the transaction was "fair and reasonable," based on an independent appraisal of the properties which were the subject of the transaction.[62]

IV. CONCLUSION

In advising a client who is an LLC manager or member concerning a dispute related to the management of the LLC, it is imperative that early on in the representation, the litigator gain a comprehensive understanding of how the LLC is managed and the extent of the manager's fiduciary duties. This requires (i) an in-depth reading of the operating agreement, (ii) a review of the articles of organization, (iii) determining whether any of the LLC Law's default rules are in effect, and (iv) consulting relevant case law. Doing so will allow the litigator to identify those areas where the manager or the members have leverage over each other in any dispute and will inform the litigation strategy going forward.

Endnotes

1. Delaying entry into the operating agreement until after the LLC is formed often leads to problems down the road, particularly if the members are ultimately unable to agree on the management of the business. *See infra*, n. 10,
2. *See* § 2.3(a), *infra*.
3. LLC Law § 102(u).
4. *Willoughby Rehabilitation & Health Care Ctr., LLC v. Webster*, 13 Misc. 3d 1230(A) at *3 (Nassau Sup. 2006).
5. As an alternative to manager-managed LLCs, the LLC may be managed by its members. In member-managed LLCs, the operating agreement will often provide that the members will make decisions by majority or supermajority vote. Control of the LLC will follow the member or members who hold sufficient membership interests to affect the outcome of a vote of the members. Generally speaking, a member-managed LLC will have one member who owns more than a majority of the membership interests and therefore is a manager by default (even if he is not identified as such in the operating agreement) and who will be subject to all duties and responsibilities of a manager (including fiduciary duties, as discussed below), even though he may need to obtain member consent for certain key business decision. *See* LLC Law § 401(b).
6. *See* LLC Law § 410(a).
7. LLC Law § 408(a).
8. In addition to management by managers, some LLCs are managed by officers and a board of directors appointed by the members. In those instances, the officer plays the same role as the manager and the board provides a mechanism by which members may grant or withhold their consent to certain acts of the officers.
9. *See* LLC Law § 419(a).
10. *Barry v. Clermont York Associates LLC*, 50 Misc. 3d 1203(A), *13 (N.Y. Sup. 2015).
11. Although not the subject of this essay, it should be noted that the Appellate Division, First Department recently interpreted the LLC Law to provide that an operating agreement need not be agreed to by all members, but rather may be adopted by a vote of a majority in interest of the members. *See Shapiro v. Ettenson*, 146 A.D.3d 650 (1st Dep't 2017).
12. *See In re Eight of Swords, LLC*, 96 A.D.3d 839 (2d Dep't 2012). *See also Spires v. Castlerine*, 4 Misc. 3d 428, 431 (Monr. Sup. 2004) (noting that there "is no provision in the Limited Liability Company Law imposing any type of penalty or punishment for failing to adopt a written operating agreement. The statute does not require an operating agreement prior to the formation" of the LLC.").
13. *See In re Eight of Swords*, LLC, 96 A.D.3d at 839.
14. *See In re 1545 Ocean Avenue, LLC*, 72 A.D.3d 121, 129 (2d Dep't 2010).
15. Sections 409 and 411 of the LLC Law, which concerns the fiduciary duties of managers, are discussed separately.
16. *Laugh Factory*, 608 F. Supp. 2d at 562.
17. The term "majority in interest of the members" is defined by the LLC Law as "the members whose aggregate share of the current profits of the limited liability company constitutes more than one-half of the aggregate of such shares of all members." LLC Law § 102(o).
18. It should be noted that Section 402(c), which includes the first three bullet points listed above, states that a vote "of a majority in interest" is required, while Section 402(d), which includes the last three bullet points listed above, states that a vote of "at least a majority in interest" is required. It is not clear why the legislature separately listed the acts described in Sections 402(c) and 402(d) or why it decided to differentiate between "a majority in interest" and "at least a majority in interest." *See* Miller, Meredith R. (2015), *The New York Limited Liability Company Law at Twenty: Past, Present & Future*, Touro Law Review, Vol. 31: No. 3, Article 9, at 406-07. Available at: http://digitalcommons.tourolaw.edu/lawreview/vol31/iss3/9
19. See *Ahmed*, 107 A.D.3d at 833. While not discussed in the opinion, the fact that Lewis failed to disclose and seek ratification from the other members to transfer the property to a different LLC with which he was affiliated could itself constitute a breach of the managing member's fiduciary duty to the other members and could be voided unless the transfer is found to be "entirely fair" to the LLC. *See infra*, § 3.5.
20. *See 546-552 W. 146th St. LLC v. Arfa*, 99 A.D.3d 117, 121 (1st Dep't 2012).
21. *See id*.
22. *See* LLC Law § 412(c).
23. *See* LLC Law § 412(d).
24. Distributions of cash to the members from the LLC are generally not considered "compensation," though some operating agreements will include language specifically prohibiting compensation of members, except for distributions.
25. *See* NY LLC Law § 411(e). As discussed below, a manager's decision to pay himself compensation must be guided by his fiduciary duties to the LLC and the members (i.e., a grossly inflated compensation package may be considered a breach of duty).
26. *See Barry*, 50 Misc. 3d at *10 (*citing Levandusky v. One Fifth Avenue Apt. Corp.*, 75 N.Y.2d 530 (1990)).
27. *Auerbach v. Bennett*, 47 N.Y. 2d 619, 629 (1979).
28. *Id.* at 631. *See also Shapiro v. Rockville Country Club*, 22 A.D.3d 657, 658 (2d Dep't 2005) ("In reviewing the reasonableness of the directors' actions, 'absent claims of fraud, self-dealing, unconscionability or other misconduct, the court should apply the business judgment rule . . .'") (internal citations omitted).
29. *See Wolf v. Rand*, 258 A.D.2d 401, 404 (1st Dep't 1999) ("the business judgment rule does not protect corporate officials who engage in fraud or self-dealing or corporate fiduciaries when they make decisions affected by inherent conflict or interest") (internal citations omitted).
30. *Barry*, 50 Misc. 3d at *12.
31. The language employed by LLC Law § 409(a) is identical to Section 717(a) of the New York Business Corporation Law (BCL), which imposes similar duties of loyalty and care on corporate directors. *See* BCL § 717(a) ("A director shall perform his duties as a director. . .in good faith and with that degree of care which an ordinarily prudent person in a like position use under similar circumstances.").
32. *See Higgins v. New York Stock Exchange, Inc.*, 10 Misc. 3d 257, 278 (N.Y. Sup. 2005) ("The fiduciary duty of loyalty imposes on

corporate directors an obligation not to 'assume and engage in the promotion of personal interests which are incompatible with the superior interests of their corporation. . .as [directors] owe [the corporation] their undivided and unqualified loyalty.'") (citations omitted).

33. *Pokoik v. Pokoik*, 115 A.D.3d 428, 429 (1st Dep't 2014) (*quoting Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989)).
34. *Salm v. Feldstein*, 20 A.D.3d 469, 470 (2d Dep't 2005). The LLC Law does not contain an affirmative obligation to make regular reports of material business matters to the members, although some operating agreements may require such reporting. Rather, the duty to disclose is activated when the manager is engaged in an interested transaction or seeks member consent to act on behalf of the LLC.
35. *Higgins*, 10 Misc. 3d at 283.
36. *Barry*, 50 Misc. 3d at *13.
37. In 2004, Delaware amended its LLC statute to allow LLC members to prospectively waive the duty of loyalty in addition to the duty of care. *See* DEL. CODE ANN, Title 6, § 18-1101(c) ("To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or another member or manager. . .the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company operating agreement, provided, that the limited liability company agreement may not eliminate the contractual covenant or good faith and fair dealing."). The New York legislature has not followed suit with a similar amendment to the LLC Law. *See generally* Graves, Jack and Davydan, Yelena (2015), *Fiduciary Duties of LLC Managers: Are They Subject to Prospective Waiver Under the New York LLC Statute?*, Touro Law Review, Vol. 31: No. 3, Article 11. Available at: http://digitalcommons.tourolaw.edu/lawreview/vol31/iss3/11.
38. Even if no such provision is extant in the operating agreement, the members may vote to approve an interested transaction that would otherwise be in breach of the duty of loyalty, so long as all material facts are disclosed. *See* LLC Law § 411, discussed *infra*, § 3.5.
39. *Pappas v. Tzolis*, 87 A.D.3d 889 (1st Dep't 2011).
40. *Id*. at 889-890.
41. *Id*. at 890.
42. *Id*. at 892-93 (emphasis in original).
43. *Id*. at 894.
44. *Pappas v. Tzolis*, 20 N.Y.3d 228 (2012).
45. *Id*. at 233. In particular, the Court of Appeals noted that there had been "numerous business disputes," that plaintiffs' affidavits portrayed Tzolis as "uncooperative and intransigent," and that the relationship between Tzolis and plaintiffs had become "antagonistic."
46. *Centro Empresarial Cempresa S.A. v. America Movil S.A.B. de C.V.*, 17 N.Y. 3d 269, 278 (2011).
47. *See DeBenedictus v. Malta*, 140 A.D. 3d 438, 439 (1st Dep't 2016) (citing *Pappas* and holding that managing member could only claim that he owed no fiduciary duty where there is no longer a relationship of trust). *See also McGuire v. Huntress*, 83 A.D.2d 1418, 1420 (4th Dep't 2011) (managing member owed continuing fiduciary duty to disclose a pending offer to the members, even though members had orally agreed to be bought out by managing member).
48. LLC Law § 409(b).
49. LLC Law § 409(c).
50. *okoik v. Pokoik*, 115 A.D.3d 429 (1st Dep't 2014). *See also Pokoik v. Pokoik*, 2013 WL 373432 (N.Y. Sup. Jan. 21, 2013).
51. *See Pokoik*, 115 A.D.3d at 429.
52. *See id.*
53. *See id.*
54. *See Pokoik*, 2013 WL 373432.
55. *Pokoik*, 115 A.D.3d at 430 (*quoting Birnbaum v. Birnbaum*, 73 N.Y.2d 461,466 (1989)).
56. It seems that the Court was concerned by Gary's failure to disclose to Leon that he had been advised to reduce Leon's capital accounts by the LLC's accountants. While simply disclosing the accountants' advice to Leon would not, by itself, have resolved the dispute between Gary and Leon, the failure to disclose made Gary look as if he had something to hide. While this is pure conjecture on the author's part, it is possible that disclosing the advice to Leon would have made it easier for Gary to later argue that he perceived there to be nothing wrong with the advice he received from the accountants. Failing to disclose that advice, by contrast, made it look as if Gary knew that he should not reduce Leon's capital accounts.
57. The relevant text of the statute is too lengthy to reproduce in this essay.
58. LLC Law § 411(d).
59. The 1st Department's opinion does not provide significant factual detail. The facts of the case are drawn from the parties' appellate briefs.
60. *Wilcke v. Seaport Lofts*, 45 A.D.3d 447 (1st Dep't 2007).
61. *Wilcke*, 45 A.D.3d at 447, *citing* LLC Law § 411(b).
62. *Wilcke*, 45 A.D.3d at 448.

CLARO-Queens to Celebrate 11th Anniversary

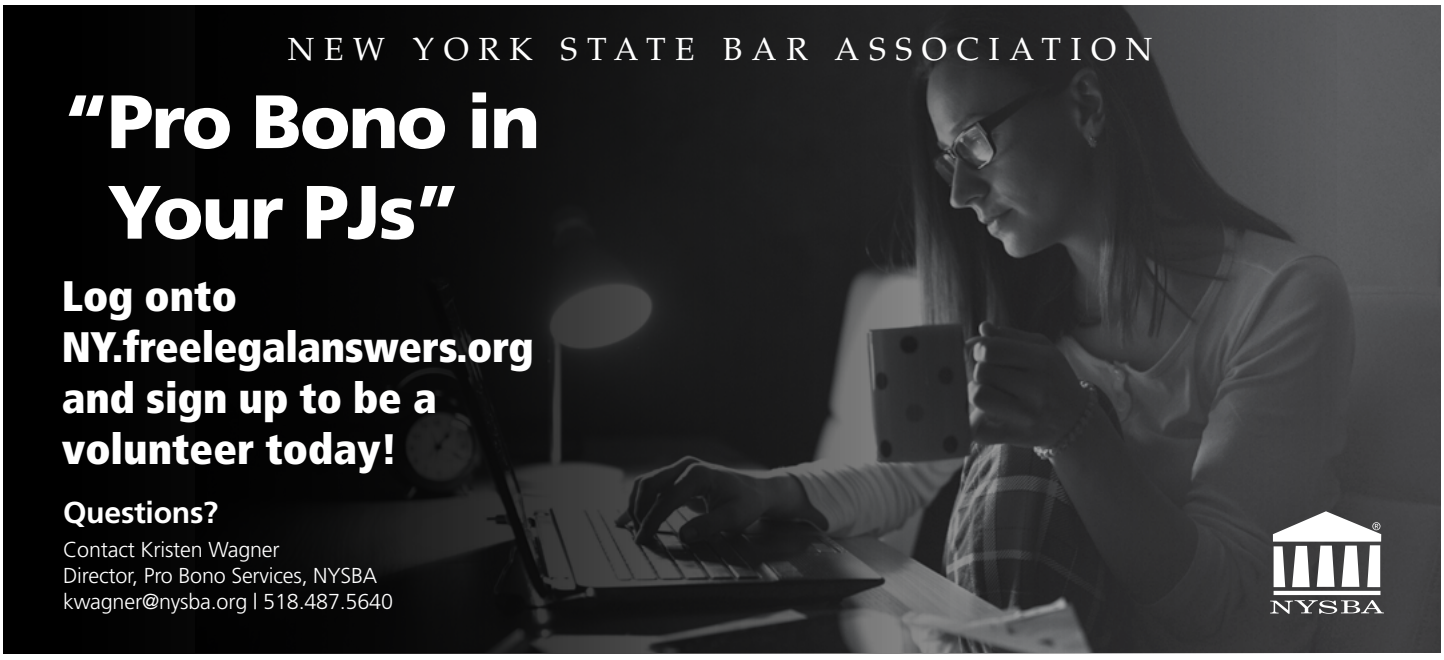
By Mark Weliky

In the years preceding the financial collapse of 2007-2008 banks were eager to offer credit card accounts to everybody and anybody (remember all of those offers in the mail every week?). Of course, when the economy tanked many of those accounts became delinquent. Many of those lenders were not interested in having huge collections departments so they sold portfolios containing tens of thousands of these accounts to debt collection companies and charged off the debt. These accounts were sold at pennies on the dollar and the business model did not include that the debt buyers would ever obtain the documentation to legally collect on the debts in court. This proved to be no problem for those firms. They filed millions of collection actions in courts throughout the country totally overwhelming the court systems. This resulted in cases being rubber-stamped by the courts due to the sheer volume of cases and cutbacks in court staffing. Plaintiffs didn't have the evidence to sustain a decision in their favor but they weren't being required to prove their cases. This resulted in countless judgments, many of them based upon sewer-service (fraudulent practices by process servers).

In response to the crisis caused by these dubious debt collection practices and the multitude of defendants in these cases who could not afford legal representation, the CLARO (Consumer Legal Advice and Resource Office) consumer debt clinic concept was born. The Honorable April Newbauer, who was then the Attorney-in Charge of the Queens Civil Division of the Legal Aid Society, was the person responsible for creating CLARO. At that time, as Chair of the City Bar Association's Civil Court Committee she helped form the first CLARO clinic in Kings County. That clinic was a collaboration of the Brooklyn Bar Association Volunteer Lawyers Project and Brooklyn Law School and continues today in its 12th year. In January, 2008 the CLARO-Queens Consumer Debt Clinic was initiated. CLARO-Queens is a partnership between the Queens Volunteer Lawyers Project (QVLP) and St. John's University School of Law. Legal information and advice is provided at the clinic by volunteer lawyers, QVLP staff attorneys, and with the assistance of volunteer law students. In January 2019 CLARO-Queens will celebrate 11 years of providing free legal assistance to pro-se defendants in consumer debt cases. Over that time the clinic has provided over 500 clinic sessions providing over 10,000 consultations. CLARO clinics now operate in all five boroughs of the New York City, in Westchester and in Erie County (Buffalo).

The CLARO-Queens clinic is provided every Friday afternoon beginning at 1:30 at Queens Civil Court, 89-17 Sutphin Boulevard, Room 116 in Jamaica. CLARO-Queens can assist pro-se defendants (persons being sued who cannot afford to hire an attorney) for cases involving credit cards, medical debts, student loans and breach of lease cases which are brought in Queens Civil Court. Consultations are free and no appointment is needed. Clinic visitors will be assisted on a first-come first-served basis. For more information about CLARO-Queens contact Mark Weliky, MWeliky@QCBA.org (718) 291-4500 ext. 225.

Mark Weliky is the Executive Director of the Queens Volunteer Lawyers Project, Inc.



Section Committees and Chairs

The Seniors Lawyers Section encourages members to participate in its programs and to volunteer to serve on the Committees listed below. Please contact the Section Officers or Committee Chairs for information about these Committees.

Age Discrimination
Gilson B. Gray III
Duane Morris LLP
1540 Broadway
New York, NY 10036-4086
gbgray@duanemorris.com

John R. Dunne
Whiteman Osterman & Hanna LLP
One Commerce Plaza, 19th Floor
Albany, NY 12260
jdunne@woh.com

Diversity
Susan B. Lindenauer
45 Gramercy Park North
New York, NY 10010
alindenauer@nyc.rr.com

Financial and Quality of Life Planning
Rosemary C. Byrne
Step-by-Step Coaching LLC
319 Audubon Road
Englewood, NJ 07631
rcbcci@aol.com

Law Practice Continuity
Anthony Robert Palermo
Woods Oviatt Gilman LLP
700 Crossroads Building
2 State Street
Rochester, NY 14614
apalermo@woodsoviatt.com

Robert L. Ostertag
Ostertag O'Leary Barrett & Faulkner
301 Manchester Road, Suite 201
Poughkeepsie, NY 12603
b.ostertag55@gmail.com

Legislation
A. Thomas Levin
Meyer, Suozzi, English & Klein P.C.
990 Stewart Avenue, Suite 300
P.O. Box 9194
Garden City, NY 11530-9194
atl@atlevin.com

Membership
Elizabeth J. McDonald
Rochester City Court
6 Hall of Justice
Rochester, NY 14614
bethmcd@att.net

Publications
Carole A. Burns
64 Twilight Road
Rocky Point, NY 11778-9790
cabb1@optonline.net

Technology
C. Bruce Lawrence
Boylan Code LLP
The Culver Road Armory
145 Culver Road, Suite 100
Rochester, NY 14620
cblawrence@boylancode.com

Jay Hollander
Hollander and Company LLC
5 Penn Plaza, 19th Floor
New York, NY 10001
jh@hollanderco.com

To update your information, please contact the Member Resource Center at 1-800-582-2452.

THE SENIOR LAWYER

Editor

Carole A. Burns
64 Twilight Road
Rocky Point, NY 11778
cabb1@optonline.net

Submission Guidelines

The Senior Lawyer welcomes the submission of articles of timely interest to members of the Section in addition to comments and suggestions for future issues. Articles should be submitted to the Editor whose name and address appears on this page.

For ease of publication, articles should be submitted via e-mail to the Editor, or if e-mail is not available, on a disk or CD, preferably in Microsoft Word or WordPerfect (pdfs are NOT acceptable). Accepted articles fall generally in the range of 7-18 typewritten, double-spaced pages. Please use endnotes in lieu of footnotes. The Editor requests that all submissions for consideration to be published in this journal use gender-neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Editor regarding further requirements for the submission of articles.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Editor, Board of Editors or the Section or substantive approval of the contents therein.

The Senior Lawyer is published for members of the Senior Lawyers Section of the New York State Bar Association.

We reserve the right to reject any advertisement. The New York State Bar Association is not responsible for typographical or other errors in advertisements.

Copyright 2018 by the New York State Bar Association.
ISSN 1949-8322 (print) ISSN 1949-8330 (online)

SENIOR LAWYERS SECTION

Section Officers

Chair
C. Bruce Lawrence
Boylan Code LLP
The Culver Road Armory
145 Culver Road, Suite 100
Rochester, NY 14620
cblawrence@boylancode.com

Chair-Elect
Anthony J. Enea
Enea, Scanlan & Sirignano, LLP
245 Main Street
White Plains, NY 10601
aenea@aol.com

Vice-Chair
Elizabeth J. McDonald
6 Hall of Justice
Rochester, NY 14614
bethmcd@att.net

Secretary

Treasurer
Charles E. Lapp, III
Lapp & Lapp
100 Cedarhurst Avenue
P.O. Box 435
Cedarhurst, NY 11516
lappandlapp@optimum.net

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

LAWYER ASSISTANCE PROGRAM

Call us when you see the early warning signs… missed deadlines, neglected email, not returning phone calls, drinking too much, feeling sad and hopeless.

Call us when you see the consequences of ignoring the early warning signs… work problems, relationship difficulties, an arrest, fired from your job, notice from grievance.

Call 1.800.255.0569

NEW YORK STATE BAR ASSOCIATION
LAWYER ASSISTANCE PROGRAM

www.nysba.org/lap

NYSBA

NEW YORK STATE BAR ASSOCIATION
SENIOR LAWYERS SECTION
One Elk Street, Albany, New York 12207-1002

NON-PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155

ANNUAL MEETING 2019

JANUARY 14–18

NEW YORK CITY | NEW YORK HILTON MIDTOWN

SENIOR LAWYERS SECTION PROGRAM
Thursday, January 17, 2019

REGISTER NOW!
www.nysba.org/am2019