NEW YORK STATE BAR ASSOCIATION

Journal

SEPTEMBER 2014
VOL. 86 | NO. 7

THE DRONES ARE COMING!
IS NEW YORK READY?

by Joseph M. Hanna

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Glenn Lau-Kee
President

NYSBA

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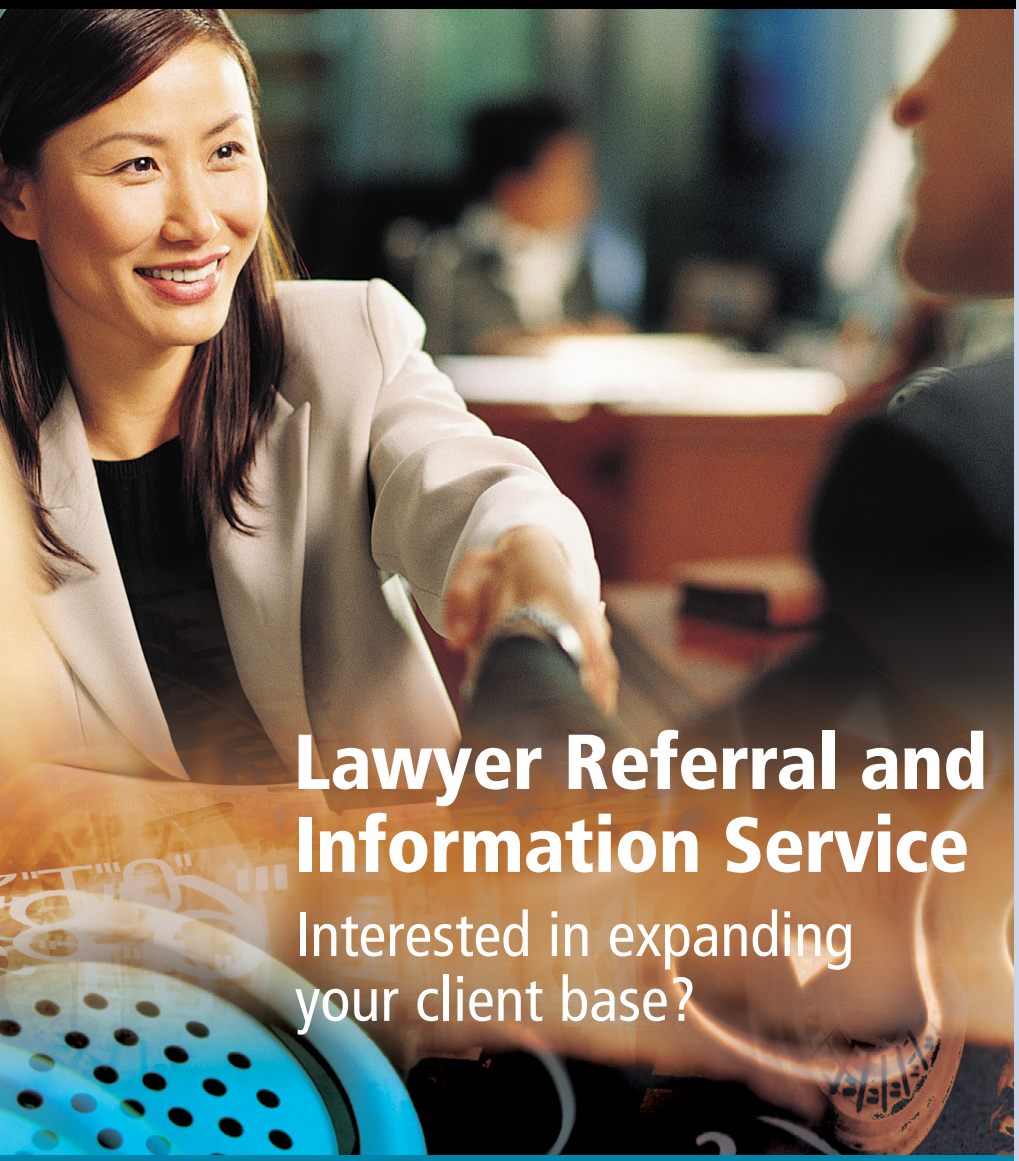

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NEW YORK STATE BAR ASSOCIATION
Journal

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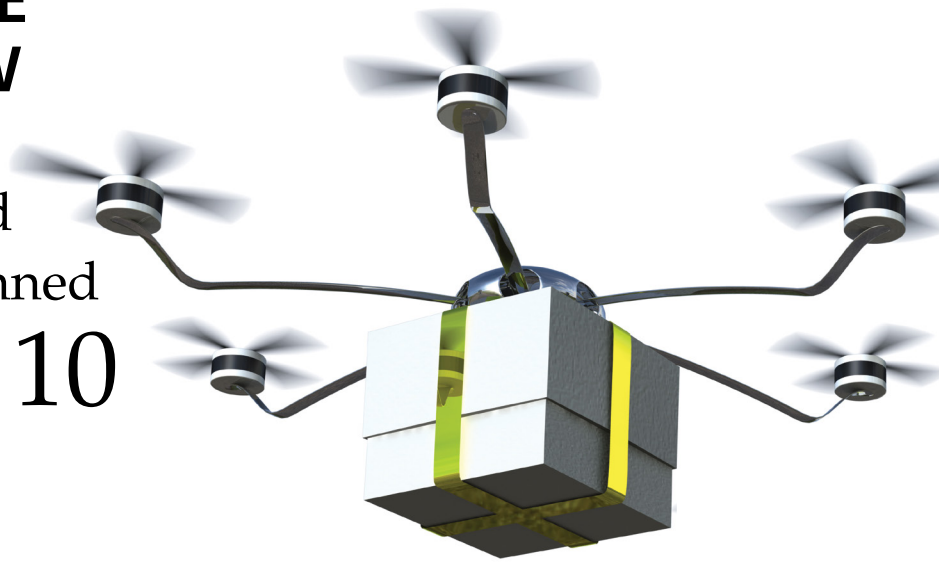

DEPARTMENTS

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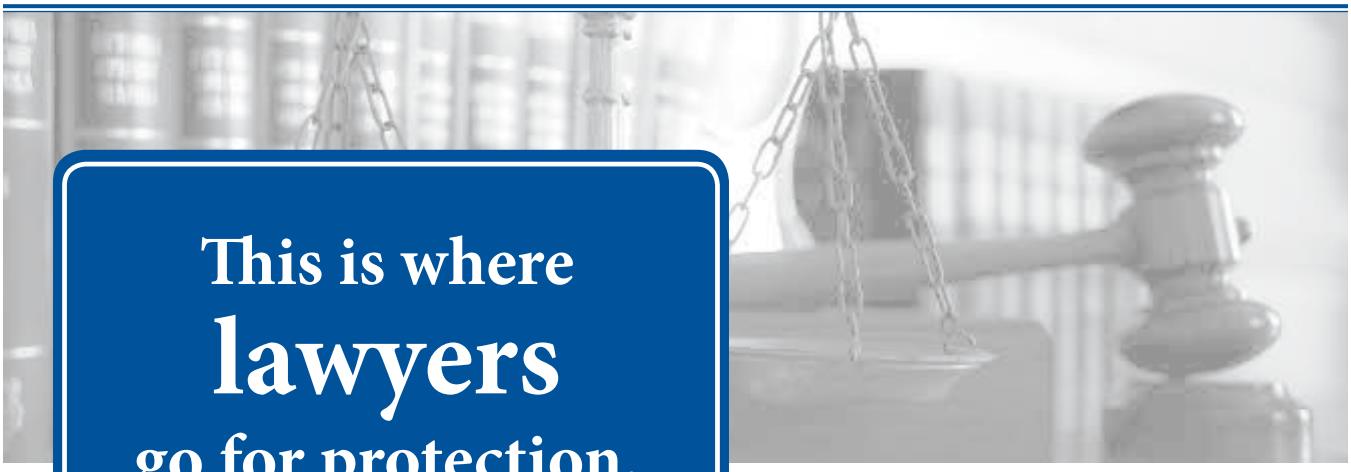

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GLENN LAU-KEE

Creating Priorities as a Team, Advocating as One

Family Court

On June 26, when the bill creating 25 new family court judges became law, more than a few people at the State Bar Association cheered and sent each other congratulatory emails and texts. Passage of this law – creating nine new judges in New York City and 16 upstate – was the Association's top legislative priority in 2014.

The path to the creation of these judgeships bears the strong imprint of the New York State Bar Association. Our Task Force on Family Court worked diligently studying and exploring the issues facing these important courts, ultimately issuing a final report and recommendation calling for more Family Court judges. This report was followed with the skilled and passionate legislative advocacy that is a hallmark of the Association. Serving the greater legal profession and the public through advocacy on behalf of the courts, attorneys and the public is one of the core missions of our Bar Association. We have a long history of effective legislative legacy, a legacy of which I am very proud.

In July 2010, then-President Stephen Younger established the Task Force on Family Court to examine the crisis in the over-burdened and under-funded court. Family Court filings had reached a record high of nearly 750,000 in 2009, about 4,601 annual filings for each judge. These filings often represented critical flash points in families that could be aided by judicial intervention; for example, filings related to family violence had increased 30% in the previous two years, years marked by the effects of the economic recession.

The Task Force undertook its mission with the systematic and engaged approach for which our Association is known. Soon after establishing the Task Force, Younger and Susan Lindenauer, co-chair of the Task Force, sat side by side with Bronx Family Court judges for a day at the invitation of LIFT – Legal Information for Families Today. There, they saw firsthand the problems faced daily by the Family Court in triaging multiple, serious custody, foster care and family violence cases on a daily basis. Over the next two years, the Task Force held hearings in each of the state's four Judicial Departments. It took testimony from more than 60 witnesses, including scholars, judges, practitioners, litigants, court personnel, state and local public officials, human service providers and mental health professionals.

In its report, the Task Force's number one recommendation was the creation of additional judgeships. In the previous 20 years not a single new Family Court judgeship was created in New York City, despite a 23% increase in filings, according to 2012 testimony by Edwina Richardson-Mendelson, the Administrative Judge for the New York City Family Courts. And, in the previous decade, only four Family Court judgeships were created outside of New York City – an area including 11.3 million residents in 57 counties covering 301 square miles. In January 2013, the House of Delegates approved this report.

The *need* for additional Family Court judgeships was not the issue; there was general agreement among all interested parties. *Resources* were the stumbling block. Last fall, my predecessor, then-President Dave Schraver, advocated for more Family Court judgeships in a meeting with Chief Administrative Judge Gail Prudenti in the Office of Court Administration offices in Lower Manhattan. Schraver, along with the co-chairs of the Task Force and two Governmental Relations staffers, spoke of the critical need for more judges, as the greatly increased burdens facing the court were affecting the safety and well-being of children and families. Judge Prudenti shared our profound concerns and was cautious in response, recognizing the considerable pressure to produce an acceptable budget as the state continues its recovery from the recession.

In a bold move, on December 1, 2013, Chief Judge Jonathan Lippman included funding for 20 new Family Court judgeships in his 2014–2015 Judiciary Budget request – a budget that included a 2.7% increase in spending for court operations over the previous year. A month later, however, Governor Andrew Cuomo noted that this judicial budget was "out of step with our fiscally responsible goal" and urged the Legislature and Judiciary to reduce the Judiciary budget to at or below a 2% spending increase.

The Chief Judge's move, however, had put 20 additional judgeships on the table, so advocating for this funding became the Association's top legislative priority for 2014. The months that followed were marked by steady and multi-faceted Association advocacy: testimony submitted to the fiscal committees of the state Legislature, three waves of press releases and Dave Schraver writing legislators at key points in the process. Association leaders and Governmental Relations staffers made per-

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sonal contact in packed days of lobbying at the state Capitol, holding numerous meetings with key players in the Assembly, Senate and Executive chamber.

By April, the Legislature passed and the Governor approved the funding for 20 additional judges. The Association shifted gears and began advocating for authorization of the newly funded, though still non-existent, judgeships. The Legislature held discussions on this. Dave Schraver and the Association's team kept up the pressure for enactment of a bill.

The Association did not act alone in advocating for these new judges. After our Task Force's early and substantive work, staff often communicated with the Fund for Modern Courts, part of an impressive coalition of more than 100 advocacy groups that lobbied for the judgeships.

This recent victory is just one of many that highlight the resources and expertise the Association devotes to the mission of advocacy. This year, when the state sought to license title insurance agents – an issue of significant importance to our Real Property Law Section – the Section, working with the Governmental Relations staff, successfully advocated for language to ensure that lawyers can continue to act as title insurance agents. In 2013, the Association's advocacy, led by members of the Business Law Section, played an integral role in the Legislature's passing the Nonprofit Revitalization Act, which streamlines and modernizes the laws affecting New York's non-profits. Also in 2013, the state enacted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act based on the draft proposed by the Elder Law Section and endorsed by the Executive Committee. In 2010, the Association's Family Law Section's strenuous advocacy over more than five years culminated in New York's enactment of no-fault divorce, saving countless families from the cost and prolonged agony of unnecessary litigation on the grounds for granting divorce.

Current Association legislative priorities include sufficient funding for both the state and federal courts, raising the age of criminal responsibility from 16 to 18, reducing the overuse of solitary confinement, and enacting reforms to the criminal justice system designed to prevent wrongful convictions and to give a second chance to those who have earned one. The Association was also a leader in lobbying members of Congress for sufficient funding for the federal courts in the face of the imposition of sequestration and in opposing an effort in Congress to revert Rule 11 of the Federal Rules to the days when sanctions were sought in just about every federal case.

How an Interest Becomes a Priority

Each fall the State Bar selects the priorities for the upcoming year. To become a priority, a proposal must have been previously approved as Association policy. Members of the Association's 26 Sections and more than 45 Committees collaborate with their colleagues to suggest tailoring legislation to the real situations they encounter in their practices. Section and Committee leaders submit recommendations on proposed legislative changes to the Department of Governmental Relations. After proposals are submitted in early September, the State Bar's Committee on Federal Legislative Priorities, chaired by John Nonna, New York City, and the Committee on Legislative Policy, chaired by Hermes Fernandez, Albany, meet to review the current priorities, sift through recommendations and make their own. In October, the two chairs report on their committees' recommendations to the Steering Committee on Legislative Priorities, composed of the president, president-elect, chairs of the committees on Legislative Policy and Federal Legislative Priorities, and the executive director.

The Steering Committee then submits a report to the Executive Committee for approval prior to commencement of the legislative session in January. Once the priority list is approved, the cycle of advocacy begins again. The Association's leaders work closely with our Governmental Relations staff, whose lawyers have served as special counsel to the governor, first assistant Attorney General, executive director of the State Ethics Commission, legislative counsel to the Department of Labor, assistant attorney general, staff to a legislator and program staff to the Assembly Speaker.

One Voice

The Association's influence is strongest when the three stakeholders work together: the Association leadership, Department of Governmental Relations and Section and Committee leadership. During my term as president, one of my priorities is to make our great bar association even stronger through looking at ways to better harness the knowledge of our members and channel this tremendous resource most effectively. Over its 128 years, our Association has been a respected player in New York State and Washington, D.C., for its expert engagement with legislation.

For our advocacy efforts to succeed, we need to deliver a clear and consistent message to state and federal policy makers. Coordination of public activities and statements – by me as president and by others on behalf of Sections and Committees – is critical, both strategically and to ensure that the Association is operating within the boundaries of applicable law and regulations.

As I meet with Section and Committee leaders during my term, I will reinforce the importance of this coordinated approach to advocacy. Having an early discussion with our Governmental Relations staff before going forward with public activity is very important. Doing so permits us to engage strategically. Moreover, speaking with a unified voice is paramount to maintain and enhance the Association's integrity and image, which is at the heart of my role as president. I need the support of every Section and Committee; we need to show unity when we contact a public official or otherwise make a public statement.

These past few years have demonstrated the great work of our Association. Each of our legislative victories represents countless hours of coordinated effort. The laws enacted with Association input and advocacy improve the lives of thousands of New Yorkers in ways both profound and ordinary. We have made a difference and, with your help, will continue to do so. ■

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Criminal Law for Civil and Criminal Lawyers: Law, Procedure and Strategies
September 9 Albany
September 10 Buffalo
September 16 New York City (with webcast)

Buying or Selling a Law Practice
(live & webcast; 9:00 a.m. – 11:00 a.m.)
September 10 Westchester

Telehealth and Telemedicine: Progress and Barriers in New York State
(live & webcast; 12:30 pm – 4:30 pm)
September 17 Albany

U.S. Supreme Court Wrap-Up 2013–2014
(live & webcast; 12:00 pm – 2:15 pm)
September 23 Albany

What Makes Lawyers Happy: Embracing Optimism in a Profession Where Pessimism Is Prudent – What Law Firms Can Do
(live & webcast; 2:00 pm – 4:00 pm)
September 30 Albany

Practical Skills: Basic Matrimonial Practice
September 30 New York City
October 1 Long Island; Rochester
October 2 Westchester
October 7 Albany
October 8 Buffalo; Syracuse

Handling the DWI Case in New York
September 30 Buffalo
October 6 Long Island
October 7 New York City
October 21 Albany (with webcast)

Henry Miller – The Trial
September 30 Long Island
October 15 Albany
November 13 New York City

Introduction to Bitcoin
(live & webcast; 9:00 am – 1:00 pm)
October 2 New York City

Women on the Move 2014
(1:00 p.m. – 5:00 p.m.)
October 8 Westchester

Intellectual Property Valuation
(live & webcast; 12:00 pm –2:00 pm)
October 15 New York City

Taking on Dodd-Frank Series: Systemic Risk, Prudential Standards and Volcker Rule
(live & webcast; 12:00 p.m. – 1:00 p.m.)
October 16

Honing Your Deposition Skills
(9:00 a.m. – 1:00 p.m.)
October 16 Long Island
October 17 Albany
October 23 Buffalo
October 24 New York City (with webcast)

Practice in the Second Circuit Court of Appeals
(1:00 p.m. – 4:30 p.m.)
October 17 New York City

Risk Management 2014
(9:00 a.m. – 1:00 p.m.)
October 17 Westchester
October 24 Long Island
October 30 Albany
November 14 New York City
November 21 Buffalo
December 5 Syracuse

Divorce Anniversaries 2014: CSSA, Equitable Distribution and Maintenance
(9:00 a.m. – 1:00 p.m.)
October 17 Syracuse
October 24 New York City
October 31 Albany; Buffalo; Long Island

Workers' Compensation Update 2014
October 17 Buffalo; Long Island
November 21 Albany (with webcast); New York City; Syracuse

Representing the Start-Up Business
(live & webcast)
October 22 New York City

Social Media Issues in Labor and Employment Law
(9:00 a.m. – 1:00 p.m.)
October 24 Albany
November 14 New York City (with webcast)

Representing Comic Book Properties: From Creation to the Panel to the Silver Screen
(live & webcast; 12:00 pm – 2:00 pm)
October 29 New York City

Update 2014
(live & webcast)
October 29 New York City
November 14 Syracuse

Emerging Issues in Environmental Insurance
(live & webcast; 9:00 am – 1:00 pm)
October 30 New York City

3D Printing and the Future of IP Law
(live & webcast; 12:00 pm – 2:00 pm)
November 5 New York City

Intermediate Elder Law Update
November 5 Albany
November 6 New York City
November 18 Buffalo
December 2 Long Island
December 4 Westchester

Practical Skills: Probate and Administration of Estates
November 5 Buffalo
November 7 Rochester
November 18 Westchester
November 19 New York City; Syracuse
December 8 Long Island
December 12 Albany

Taking on Dodd-Frank Series: The Consumer Financial Protection Bureau
(live & webcast; 12:00 p.m. – 1:00 p.m.)
November 6 New York City

Gain the Edge! Negotiation Strategies for Lawyers
November 6 Albany
November 7 New York City

Practical Skills: Mortgage Foreclosures and Workouts
November 13 Long Island; Westchester
November 14 Albany; Buffalo
November 17 New York City

Hot Topics in Law Practice Management 2014 Summit
(live & webcast)
November 20 New York City

A Primer on Intellectual Property
November 20 New York City
November 21 Albany

HIPAA/HITECH for Lawyers Update 2014
(live & webcast; 1:00 pm – 3:00 pm)
December 3 Albany

Taking on Dodd-Frank Series: Systemic Risk, Prudential Standards and Volcker Rule
(live & webcast; 12:00 p.m. – 1:00 p.m.)
December 4 New York City

Advanced Real Estate
(live & webcast)
December 5 New York City

Commercial Division Practice: What You Need to Know
(live & webcast; 12:00 pm – 2:25 pm)
December 5 New York City

Bridging the Gap
December 10–11 New York City (live program)
Albany; Buffalo (video conference from NYC)

12th Annual Sophisticated Trusts and Estates Institute
December 11–12 New York City

Cybersecurity for Lawyers: 12 Ways to Protect Yourself and Your Data
(live & webcast; 9:00 am – 1:00 pm)
December 12 Albany

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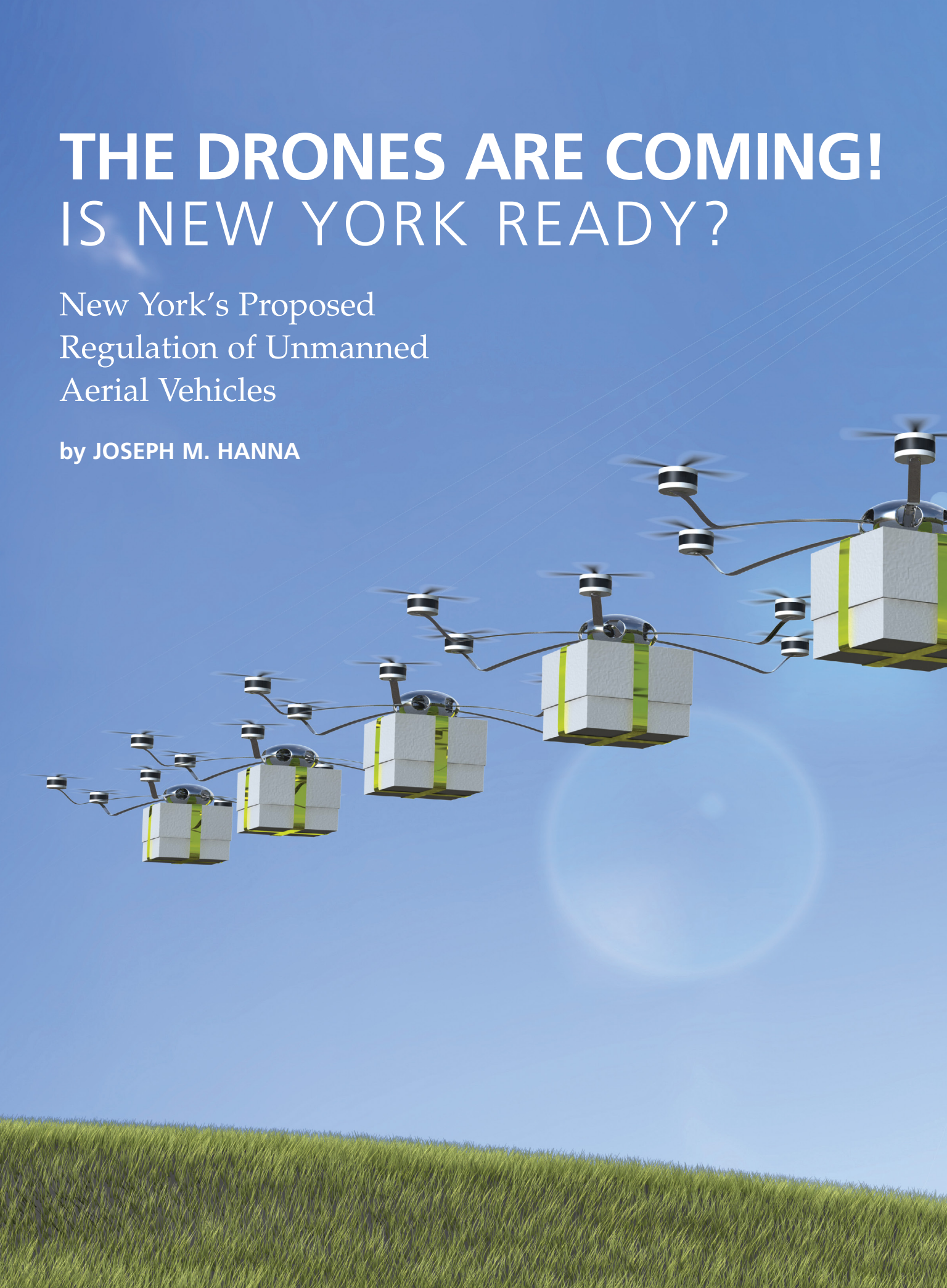
THE DRONES ARE COMING!
IS NEW YORK READY?

New York's Proposed Regulation of Unmanned Aerial Vehicles

by JOSEPH M. HANNA



Joseph M. Hanna (jhanna@goldbergsegalla.com) is a partner at Goldberg Segalla, where he leads the firm's Sports and Entertainment Practice Group and is Chair of its Diversity Task Force. He represents professional athletes, along with management, ownership, and companies that serve the sports and entertainment industries, in commercial and litigation matters. In recognition of his work defending major media and entertainment clients, Mr. Hanna was named a Law360 Rising Star for 2014 and is Chair of Goldberg Segalla's Diversity Task Force. Mr. Hanna graduated *summa cum laude* from the State University of New York at Buffalo and *cum laude* from its law school. He received his Master of Public Administration degree with a concentration on Public and Nonprofit Management from Syracuse University's Maxwell School of Citizenship and Public Affairs.

If many public- and private-sector interests get their way, Amazon's promotional video of a drone delivering a package to a customer's doorstep provides an early glimpse at what will soon be the widespread proliferation of drones in our everyday lives. Although the technology of drones – officially, unmanned aerial vehicles (UAVs) – has been primarily utilized in the military, technological innovation has broadened the market. The emergence of smaller, cheaper, and more capable UAVs has spawned a seemingly endless array of potential business and other applications, but it has also sparked legislative debates about the pros and cons of drone usage nationally. One of the biggest concerns hovering over lawmakers is striking the right balance between privacy and beneficial UAV usage.

This article will explore the routes that the states with drone legislation have taken to find that balance and compare those laws with the UAV bills currently pending in New York. First, this article gives a general overview of current regulatory landscape and domestic drone usage. Second, it examines the pending drone bills in New York. Third, it looks at similar bills in Texas, Utah, and Oregon to identify any loopholes in New York's bills that could potentially disturb the fine balance needed. Fourth, it looks closely at the loopholes revealed in the analysis and suggests ways to improve New York's proposed policies. Last, it provides case studies to give readers more concrete examples of drone usage and any red flags associated with such usage.

National Perspective

Signaling that its 2015 deadline for establishing UAV regulations is likely to be pushed back, the Federal Aviation Administration (FAA) has attempted to clarify some public misconceptions about drone usage.[1] First, the FAA claims U.S. airspace from the ground up.[2] Second, flying commercial drones below 400 feet, three miles from an airport and/or away from populated areas does and will still violate the FAA regulations.[3] Third, any aircraft, manned or unmanned, needs some form of FAA approval.[4] As of this writing, the FAA has approved one commercial UAV use – by BP for oil-related surveys in Alaska.[5] In the absence of federal regulations, more pressure has fallen on the states to regulate drone-related activity. In the context of the national economy, although the numbers will depend heavily on the level of government regulations, the Association of Unmanned Vehicle Systems International (AUVSI) estimates the domestic industry will grow to be a $13.6 billion market by 2018 and an $82.1 billion market by 2025, with 103,000 new jobs by 2025.[6]

The states definitely have recognized the need for drone regulations. Eighty-eight percent of the states either have laws in place or bills pending or failed, while 12% or six states – Colorado, Delaware, Nevada, Missouri, South Dakota, and West Virginia – have not joined the trend yet. Twelve states have passed laws restricting drone usage; however, the group includes both North Carolina and Virginia, which passed a moratorium on drone usage until 2015 in place of establishing actual regulations.

A closer look at all available current legislation reveals common provisions that address some of the concerns by lawmakers as well as the public.

Warrant Requirement for Use

Most of the current legislation that governs law enforcement use of drones requires a search warrant or some form of court order. The bills without the warrant requirement allow only private or emergency use. Except for Virginia and North Carolina, the states that passed the bills require a warrant to prevent any abuse by law enforcement agencies.

Data Minimization Provision

This provision attempts to control the scope, use, and retention period of data collected by law enforcement agencies using UAVs. Typically, data collected outside the scope of the search warrant must be deleted immediately. Data captured in violation of the state's UAV law is inadmissible in court. More than half the states that have either passed bills or have bills pending include a provision regulating data collection and treatment.

Prohibition of Weaponization

To ensure public safety, 17 states have laws or bills banning weaponization of drones. For example, one of New York's bills prohibits drones capable of firing kinetic projectiles that can cause harm and makes using such drones a criminal offense.

Civil Remedies

Currently, 20 states provide civil remedies for an aggrieved party against a person or an entity for illegal drone usage. Interestingly, while New York's Bill S04537 allows such an aggrieved party to bring a civil action against a law enforcement agency, it has no provision for law enforcement to recover any damages by an individual's interference with its drone usage.

Domestic UAV Usage

The debate over UAVs tends to focus on the use of the technology in other countries, such as Afghanistan and Pakistan, to target terrorists. Because of rapidly improving UAV technology and the potential threats the technology poses to domestic privacy, it is important to consider how UAVs are currently being used in the United States. It is legal for Americans to fly recreational model airplanes without restriction in most cases; however, it is illegal to operate a UAV above 400 feet and beyond line of sight for any private or commercial reason without FAA approval. The FAA issues "certificates of authorization" to public organizations, such as NASA, the National Oceanic and Atmospheric Administration, police departments, and universities.[7] In anticipation of UAV proliferation, the 2012 FAA reauthorization requires the FAA to establish guidelines by 2015 to safely integrate unmanned aircraft systems (UAS) into the nation's airspace.[8]

A few examples of how UAVs are used once the FAA has certified them:

1. The Department of Homeland Security (DHS) operates Predator B UAVs to patrol the nation's northern and southern borders for illegal crossing activity.[9] The UAVs have wingspans of 66 feet and are 36 feet long. They can carry more than 400 pounds of sensors internally and bear over 2,000 pounds in external under-wing pods.[10]
2. NASA and the U.S. Forest Service utilized Predator UAVs to capture real-time wildfire imaging and mapping during a series of research UAV flights in the summer and fall of 2007.[11]
3. Colleges and universities are beginning to offer UAV degree programs. Kansas State University-Salina, the University of North Dakota, and Embry-Riddle Aeronautical University are just a few of the schools that offer degrees in UAV technology.[12] More than a third of 81 publicly funded entities that applied to the FAA for a UAV certificate of authorization in 2011–2012 were colleges.[13]

In addition to the public organizations operating UAVs, media organizations such as the *New York Times*, the Associated Press, and the *Washington Post* argue that the use of UAVs for reporting purposes should be a First Amendment right.[14] As the FAA clarifies its standards

for issuing certificates of authorization to operate UAVs, questions regarding the First Amendment and what qualifies as an educational program in UAV technology must be considered.

The UAV Debate in New York State: Analyzing New York's UAV Bills

The national and international debate over the use of UAVs continues to rage, and New York State is no exception. Currently, New York has four bills crafted to regulate the use of UAVs within the state:

- Bill No. S07639 (7639), the "Personal Privacy Protection Act" sponsored by Senator Greg Ball[15]
- Bill No. S04537 (4537), the "Empire State Citizens' Protection From Unwarranted Surveillance Act," sponsored by Senator Carl Marcellino[16]
- Bill No. S04839 (4839), sponsored by Senator George Latimer[17]
- Bill No. S07474 (7474), sponsored by Senator Phil Boyle[18]

The following analysis will discuss only the first three bills, as bill 7474 has a limited focus on prohibiting the hunting or taking of wildlife by using a UAV.

The youngest but most extensive of the three bills is 7639, which was reported and committed to the finance committee on May 28, 2014.[19] Proposed by Senator Greg Ball, the Chairman of the Senate Committee on Veterans, Homeland Security and Military Affairs, the purpose of 7639 as stated in the Senate's memorandum in support of legislation is to "establish guidelines for the use of commercial satellites and unmanned aerial vehicles over New York State airspace, and criminal penalties for the unauthorized use of such satellites and unmanned aerial vehicles."[20]

The biggest difference between 7639 and the other two bills is that it regulates the use of commercial UAVs.[21] The bill lists allowed uses of commercial UAVs and conversely criminalizes all other uses. It defines a "Commercial Unmanned Aerial Vehicle" as an "unmanned aerial vehicle that is placed into flight and/or controlled by a person, corporation, limited liability company, organization or government, other than the federal or state government."[22] However, the definition carves out an exception for recreational aircraft with limited size and flight altitude.[23]

The first half of Bill 7639 lays out 15 exceptions in the following fields: education; military operations; national security;[24] mapping, construction or maintenance of utilities facilities; news reporting; traffic maintenance or control; real property construction or maintenance; weather forecasting; nature conservation; agriculture; natural or man-made disasters; and UAV manufacturing.[25] Included in the exceptions is a provision that permits capturing an image or recording if the subject of such an image or recording gives a written consent.[26]

The second half of the bill focuses on the criminal offenses involving commercial use of UAVs. New York classifies such offenses into three felonies. It is a Class E felony, the third degree, to "intentionally use[] a commercial satellite or commercial unmanned aerial vehicle to capture, collect, maintain, post, transmit, or broadcast an image or recording of a person or his or her property" unless it is one of the uses authorized by the bill.[27] It is a Class D felony, the second degree, to

> intentionally use[], operate[], hijack[] or control[] any satellite or any unmanned aerial vehicle, without the permission of the owner thereof, if such satellite or unmanned aerial vehicle has the capability of capturing, collecting, maintaining, posting, transmitting or broadcasting an image or recording or deploying, firing, launching or transmitting an electronic signal or kinetic projectile, that can cause harm or destruction to a person or property.[28]

Finally, it is a Class C felony, the first degree, to "intentionally use[], operate[], hijack[] or control[] any satellite or any unmanned aerial vehicle, without the permission of the owner, to deploy, fire, launch or transmit an electronic signal or kinetic projectile, that can cause harm or destruction to a person or property."[29]

Bills 4537 and 4839 primarily cover governmental use of UAVs, although 4537 includes some provisions pertaining to non-governmental uses. Bill 4537 amends the civil rights law in relation to regulating the use of UAVs.[30] While the bill permits non-governmental use for "lawful purposes, including recreational or hobby purposes,"[31] it completely bans the use of a UAV by any person or entity "to conduct surveillance of or to monitor any individual" inside "locations where a person would have an expectation of privacy."[32]

AUVSI estimates the domestic industry will grow to be a $13.6 billion market by 2018.

While generally prohibiting governmental use of UAVs, the bill makes some exceptions, including use under "exigent circumstances . . . if a law enforcement agency possesses reasonable suspicion that swift action is necessary to prevent imminent danger to life."[33] It defines "exigent circumstances" as "conditions requiring the preservation of secrecy, and whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact that

such surveillance had occurred."[34] Other allowed uses are those pursuant to a search warrant in an active enforcement of Article 220 of the Penal Law, Controlled Substance Offenses; to guard a national border; or to combat a high risk of a terrorist attack.[35] Nevertheless, any information obtained or derived in violation of the provisions of the bill is inadmissible as evidence in any New York court or in an administrative hearing.[36] Furthermore, 4537 defines a violation of its provisions as a Class B misdemeanor. If such a violation is committed "in the course of or in conjunction with the commission of a felony," then the violation becomes a Class C felony.[37] The bill also includes a civil remedies provision allowing anyone to bring a civil suit against a law enforcement agency.[38]

admissible as evidence in judicial proceedings, administrative hearings, or for any intelligence purpose.[43]

The most distinguishable features of Bill 4839 are its data retention, discipline for misuse, and reporting provisions. The data retention provision requires any non-target information to be deleted "as soon as possible" or at least within 24 hours after collecting the information.[44] The disciplinary clause provides that when a court or appropriate government body finds an intentional violation, it would determine whether to issue a disciplinary order through a proceeding.[45] If no disciplinary action is necessary, the grounds for such a decision must be notified to the state inspector general with jurisdiction over the concerned government entity.[46] The bill establishes

Bill 4839 focuses solely on controlling the governmental use of a UAV so that it "complies with the level of privacy that New Yorkers have come to expect in their lives."[39] Requiring that the acquisition and any use of UAVs be in compliance with the FAA's requirements and guidelines, the bill bans using a UAV or revealing or obtaining information gathered by using a UAV, with four exceptions: First, disclosing or obtaining such information is permissible so long as the subject of the information or the owner of the subject property gives a written consent.[40] Second, it is permissible to use a UAV when it is "reasonable to believe that there is an imminent threat to the life or safety of a person," provided that a supervisory official submits to a court a sworn statement explaining the grounds for the emergency use.[41] Third, the bill allows UAV use pursuant to an eavesdropping warrant and/or a video surveillance warrant.[42] Finally, governmental use for research purposes is acceptable, provided that no information gained from the use is

when, to whom, where, and what to report. Any government using a UAV must report its usage on or before June 1 each year to the legislature and post the report on its public website.[47] The report must contain the following:

- The number of times a UAV was used, categorized by the types of incidents and the types of reasons for the usage.
- The number of times a UAV assisted in criminal investigation with a description of how it helped in each investigation.
- The number of times a UAV was used in non-criminal matters with a description of how it helped each matter.
- The frequency and type of non-target data collected.
- The total cost of the government entity's UAV program.[48]

In sum, while Bill 7639's prominent concern is commercial UAV uses, Bills 4537 and 4839 cater to governmental uses.

Comparing New York's UAV Bills and Equivalent Laws in Texas, Utah, and Oregon

Currently, 12 states have enacted UAV legislation and more states have bills in the pipeline. Three of these states – Texas, Utah, and Oregon – passed bills with provisions analogous to those of the New York bills.

Texas: Tex. Gov't Code § 423

Although Texas's UAV law served as a model for New York's 7639, it differs from Bill 7639. The major difference is the degree of specificity of the enumerated exceptions. Section 423 allows UAV usage in determining and managing a state of emergency and in activities related to a spill, fire, and pipeline management.[49] While 7639 lacks provisions regarding a state of emergency, spill, or fire, the bill has a provision that covers natural or man-made disasters.[50]

Similarly, the provisions regulating UAV uses in criminal matters differ in their level of specificity. Since New York's Bill 7639 focuses on commercial UAV usage, an appropriate comparison would be between Texas's § 423 provisions related to criminal matters and the provisions in New York's Bills 4537 and 4839. While the two New York bills limit government uses to either controlled substance cases or exigent circumstances, Texas has more specific provisions: hot pursuit, crime scene documentation/investigation, investigation for human fatality or motor vehicle accident, and the search for a missing person.[51]

In the absence of more specific provisions regulating government use in New York's UAV bills, the probability of a state agency justifying its use under exigent circumstances or under other broadly defined provisions may increase. Such a broad provision cuts both ways, however. It provides flexibility to a law enforcement agent in its use of a UAV, but it also creates room for misuse or abuse that could result in the invasion of privacy.

> Currently, 12 states have enacted UAV legislation.

There are a number of other notable differences between Section 423 and Bill 7639. Section 423 allows UAV usage in port authority surveillance and security,[52] institutes a two-year statute of limitation for bringing a civil action by an aggrieved party,[53] allows the admissibility as evidence of information from a prohibited UAV usage to establish the violation,[54] and includes statutory defenses to criminal offenses. Section 423 establishes a defense to prosecution if a person uses a UAV to collect images with the intent to spy on an individual or property but deletes the captured images as soon as he or she finds out before revealing, displaying, or distributing the images.[55] Furthermore, it is a defense to stop revealing, displaying, or distributing the images once the person learns that the images were captured in violation of Section 423.[56]

The current New York bills lack the above provisions; however, not all of them may be necessary. For example, UAV usage for port authority surveillance can be covered under Bill 4537's border patrol provision. It may be beneficial, however, to add a clause authorizing the information from an illegal use of UAV to be admissible to prove that illegal use. Such a provision would provide direct evidence of a violation for prosecution rather than mere circumstantial evidence. On the other hand, imposing a statute of limitation may be too harsh because it is possible for the subject to be completely unaware of the captured image or anyone using the image for a long time. Additionally, since the major purpose of the law is to protect privacy, having only an intent to conduct surveillance may be punishable regardless of the treatment of the illegally obtained data.

Utah: SB 167

Utah's UAV law is distinguishable from other UAV laws in the country because of its extensive provisions on data retention and reporting. New York's 4839 has a data retention provision but simply requires immediate deletion of non-target data, whereas Utah provides several exceptions. Utah allows its law enforcement agencies to retain data from UAVs if the data "relates to the target," is "requisite for the success of the operation," is required to be disclosed by a court order, is received from a "nongovernment actor,"[57] was collected "inadvertently," relates to the commission of a crime, relates to an emergency and if the data would help alleviate the emergency or was collected while operating a UAV in a public area outside municipal boundaries.[58]

Compared to New York's 4839, Utah's data retention statute provides more leeway for how government actors treat data as the law employs ambiguous terms such as "relates to the target" or "inadvertently." Furthermore, the provision fails to include any limits on the treatment of the data retained pursuant to the exceptions, opening a wide door to potential abuse or misuse. One way for New York to find a balance between proposed Bill 4839 and Utah's data retention provision may be to more clearly define what constitutes a "target." Although it appears to be a crucial term in relation to privacy, none of the bills provide a definition.

While requiring similar content in its usage reports to the Utah Department of Public Safety, a law enforcement agency in Utah also must report the number of times it received data captured by a UAV from an entity that is not a law enforcement agency.[59] A law enforcement agency may for one year delay disclosing data related to an ongoing investigation.[60] Further, the Utah Department

of Safety must collect all the usage reports, submit them to the Government Operations Interim Committee, and post a report on the department's website.[61] The report must provide a summary of the usage reports and the total number of warrants authorizing UAV activity as well as the number of warrants denied.[62]

Because there is not enough data related to UAV usage in New York, requiring more detailed usage reporting may be crucial. The empirical data collected over time would help find the right balance between privacy and effective UAV usage.

Oregon: ORS §§ 837.300–837.390

Oregon's UAV law differs from that of other states in three areas: UAV registration, information on a search warrant, and civil remedies for the owner of a UAV.[63] First, the state requires a public body to register its UAV with the Department of Aviation and the department to establish a registry.[64] Second, Oregon allows a law enforcement agency to use a UAV with a warrant; however, it requires the warrant to specify the duration of the UAV operation and limits the maximum duration to be no more than 30 days.[65] Third, the law explicitly allows the government owner to recover damages from a person who intentionally interferes with its UAV operation.[66]

Although New York's Bill 4839 similarly requires law enforcement agencies to obtain authorization prior to the acquisition of UAVs, none of the proposed UAV bills establish any registration requirements or designate any governing body to maintain a registry. Without such requirements, it would be difficult to regulate illegal governmental uses and even more difficult to regulate commercial UAVs. The other two provisions may not be crucial. Requiring that a warrant state the duration of the UAV operation may be redundant, as a search warrant typically specifies the time period during which a search can be conducted. Regarding interference with a UAV operation, New York makes controlling a UAV without permission of the owner a criminal offense.[67] Nonetheless, Bill 4537 provides civil remedies for any aggrieved party against a law enforcement agency but not vice versa.

Furthermore, Oregon makes an interesting exception by allowing a law enforcement agency to use a UAV for training purposes.[68] The exception also provides that any image or information collected during a UAV training is not admissible as evidence and may not be used to establish probable cause to an offense.[69]

Even though New York was selected to be a UAV testing site by the FAA in 2013,[70] none of the bills have provisions allowing training on or testing of a UAV. While the most closely related provisions would be those permitting UAV usage for research purposes,[71] the bills still lack regulations covering data collected during a training or testing session. Considering that such sessions typically involve UAVs whose advanced technology overcomes a barrier faced by UAVs currently available, a provision regulating use of any data collected, similar to that of Oregon, is crucial.

The Other Nine States

In addition to Texas, Utah, and Oregon, nine other states – Florida, Idaho, Illinois, Indiana, Montana, North Carolina, Tennessee, Virginia, and Wisconsin – have enacted UAV laws as of June 2014.[72] Typically, UAV laws in these states allow governmental use in exigent circumstances such as the search for a missing person or rescue operations. UAV use with a valid warrant is also generally permissible, except in Virginia, which completely bans drone usage for law enforcement purposes.[73]

Given the FAA's 2015 deadline for establishing federal UAV regulations,[74] Virginia has imposed a moratorium on UAV use by a law enforcement agency until July 2015.[75] The only uses currently permitted are for the search for missing persons and by the Virginia National Guard in an emergency situation.[76] North Carolina also has a moratorium in place.[77] Although North Carolina made the list of states with UAV laws, its law simply bans any UAV use until July 2015,[78] although it has two UAV bills pending that contain more detailed provisions.[79] So far, none of these nine states has reporting requirements, and only Tennessee has a provision on data retention.[80] Generally, the UAV laws in these states are less sophisticated than those of Texas and New York. With the FAA signaling that the 2015 deadline will be pushed back,[81] the burden of regulating drone usage is shifting to individual states.

> One of the New York bill's most innovative features is its limitations on the use of commercial satellites to engage in surveillance.

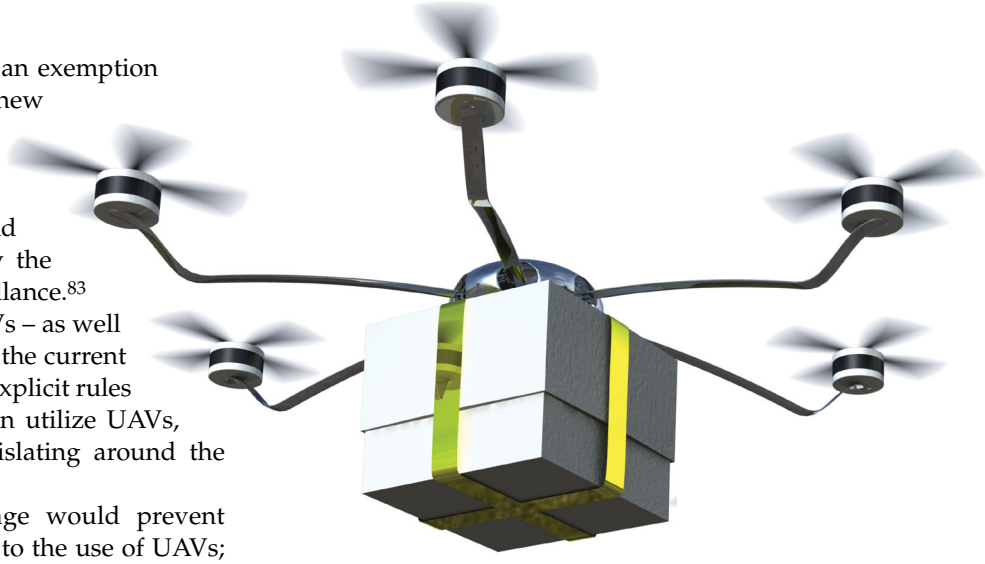
N.Y. Bill 7639: Flags and Concerns

Bill 7639, the "Personal Privacy Protection Act," includes some important provisions designed to protect New Yorkers' privacy from surveillance and recording by private use of UAVs.[82] However, there are a number of substantive and political vulnerabilities. These are areas where improvement could make for better UAV policy in New York State and allow for easier passage into law.

Law Enforcement Provisions

As it stands today, the bill provides an exemption for law enforcement, creating no new rules or regulations for how the police and other public safety officials can utilize UAVs in their work.

New York State does have rules and regulations in place governing how the police can conduct electronic surveillance.[83] However, the unique abilities of UAVs – as well as concerns about the inadequacy of the current network of laws – make the case for explicit rules laying out how and when police can utilize UAVs, something most states that are legislating around the police use of UAVs are doing.



At best, including such language would prevent future abuses by police with respect to the use of UAVs; at worst, the language may be redundant with some of the surveillance protections within New York law. A cursory review of the other legislation introduced within the New York Legislature provides some model language that could be inserted in 7639 to alleviate these concerns.

For example, a bill sponsored by State Senator Carl Marcellino lays out specific guidelines for how police can utilize UAVs, with provisions for activities such as surveillance of someone for whom a warrant has been issued, patrolling the border, and responding to terrorism.[84] With these specific provisions, there is no ambiguity about the purposes for which police can utilize UAVs. These provisions also clarify the matter for police units and for members of the public who may have concerns. Incorporating some form of the Marcellino language would improve 7639 in terms of both policy and politics.

As we have discussed, such provisions are common in a number of other states, as concerns about privacy and the possible misuse by law enforcement are paramount. For example, Florida, which is responsible for protecting a massive seaside border from international security threats, recently passed a law explicitly requiring a warrant in most cases before police can use UAV surveillance.[85]

Additionally, no section of 7639 addresses what is done with the data collection derived from aerial surveillance. As pointed out earlier, this issue has arisen in other states and is included in legislation being considered throughout the country. This will likely be a future flashpoint as the use of UAVs ramps up, particularly by law enforcement. Including some language on this point may help curtail this imminent issue.

First Amendment Issues

Another area for improvement is in the bill's protections for lawful, private use of unmanned aerial vehicles. Currently, the bill offers a few protections, including use by academic institutions and by broadcast or print media journalists.[86] However, there is a great deal of ambiguity as the language could defensibly be interpreted as protecting the rights of *New York Times* reporters or Syracuse University professors conducting academic research, but not bloggers at major nonprofit outlets like *ThinkProgress* or student reporters at *The Daily Orange*, Syracuse University's nonprofit student newspaper.

One model for improving the language would be the federal media shield law sponsored by Senator Charles Schumer, which explicitly includes student journalists, covers those who have published as print journalists in the past and are now freelancing, and allows judges some latitude in making a determination of whether someone is conducting journalism.[87] Updating the New York bill in this manner would allow innocuous use of UAV journalism by students and nonprofits, such as the student journalists at Dos Pueblos High School in Santa Barbara, California, who used UAVs to shoot a promotional school video.[88]

Enforceability of Satellites Provision

One of the New York bill's most innovative features is its limitations on the use of commercial satellites to engage in surveillance. While these satellites present a difficult-to-detect threat to privacy – they would not be detectible by the naked eye and can be operated by potentially thousands of different organizations and individuals – regulating them may well be beyond the scope of New York State's abilities.

Oversight of commercial satellites and their remote sensing systems are the purview of the National Oceanic and Atmospheric Administration, under the National and Commercial Space Programs Act.[89] This means that not only may it be infeasible for New York State to monitor commercial satellite surveillance, but it may be beyond the state's abilities under current law.

The New York Reaction to UAVs

The municipal reaction to the widespread introduction of UAVs in Central New York has been varied, and a few red flags were raised.

In June 2014, the Amherst Town Board moved to have its Government Studies Committee look into the use of UAVs, with the possibility of prohibiting "the use of drones by the municipality or one of its contractors until the state and federal governments put regulations in place," which was recommended by Supervisor Barry Weinstein.[90] Amherst appears to be moving toward a position similar to that of Syracuse, which last December moved to ban the use of police UAVs until state and federal governments put together a legal framework that "adequately protects the privacy of the population."[91]

The pushback against UAVs in Central New York is, at least partly, because UAVs used by the military overseas are housed in the region. Although these UAVs are completely unrelated to the ones private and public entities plan to fly over New York, the conflation of the two issues is likely.[92] New Yorkers' reactions to UAVs represent a desire to get in place common-sense regulations that respect privacy – particularly with respect to law enforcement use of UAVs, on which almost all the skepticism has been focused.

Discussion/Conclusion

According to the American Civil Liberties Union's (ACLU) recent recommendation, a UAV law should have safeguards that address the following areas: usage limits, decision-making entity, data retention, abuse, and weaponization.[93] Thus far, New York's Bills 7639, 4839, and 4537 collectively provide some safeguards that address all of these concerns. The issue going forward seems to be the sufficiency of these safeguards.

Beyond the recommended safeguards, we have also identified several red flags that may arise in the implementation of 7639. Addressing these would make the bill more comprehensive and more effective. As the potential for widespread use of drones grows daily – and seemingly exponentially – having a more effective regulatory framework in place will help New York avoid a number of headaches down the road. A review of some of the current case studies starts on page 20. ■

1. *See Busting Myths about the FAA and Unmanned Aircraft*, FAA (Feb. 26, 2014), http://www.faa.gov/news/updates/?newsId=76240.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Ryan Delaney, *Domestic Drone Industry Could Bring $443 Million to New York*, Innovation Trail (Mar. 12, 2013), http://innovationtrail.org/post/domestic-drone-industry-could-bring-443-million-new-york. For the state of New York, the UAV industry would create 2,267 new jobs by 2016 and would generate $443 million. *Id.* Now that New York has been selected to be one of the test sites, these numbers are expected to grow. *Id.*
7. Larisa Epatko, *How Are Drones Used in the U.S.?*, PBS.org (Apr. 18, 2013), http://www.pbs.org/newshour/rundown/how-are-drones-used-in-us/.
8. *FAA Makes Progress with UAS Integration*, Fed. Aviation Admin. (May 14, 2012), http://www.faa.gov/news/updates/?newsId=68004.
9. Declan McCullagh, *DHS Built Domestic Surveillance Tech into Predator Drones*, Cnet.com (Mar. 2, 2013), http://www.cnet.com/news/dhs-built-domestic-surveillance-tech-into-predator-drones/.
10. *NASA Armstrong Fact Sheet: Ikhana/Predator B Unmanned Science and Research Aircraft System*, NASA.gov (Feb. 28, 2014), http://www.nasa.gov/centers/armstrong/news/FactSheets/FS-097-DFRC.html#.U_NUF8VdWE4.
11. *NASA Dryden Past Projects: Western States Fire Mission*, NASA.gov (June 14, 2012), http://www.nasa.gov/centers/dryden/history/pastprojects/WSFM/index.html#.U5B7IJRdXvd.
12. Sydney Kashiwagi, *Looking for a College Major? How About Drone Technology*, USA Today, (Jan. 2, 2014), http://www.usatoday.com/story/news/nation/2013/12/31/drone-technology-uav-unmanned-aircraft/3683835/.
13. *2011–2012 FAA List of Drone License Applicants*, Elec. Frontier Found. https://www.eff.org/document/2012-faa-list-drone-applicants (last visited June 9, 2014).
14. Jason Koebler, *Drone Journalism is a First Amendment Right, Major Media Companies Say*, Motherboard.com, (May 6, 2014), http://motherboard.vice.com/read/drone-journalism-is-a-first-amendment-right-says-coalition-of-media-giants-1.
15. S.B. 7639, 237th Leg., Reg. Sess. (N.Y. 2014), http://assembly.state.ny.us/leg/?default_fld=&bn=S07639&term=2013&Summary=Y&Actions=Y&Text=Y.
16. S.B. 4537, 236th Leg., Reg. Sess. (N.Y. 2013), http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=S04537&term=2013&Summary=Y&Actions=Y&Text=Y.
17. S.B. 4839, 236th Leg., Reg. Sess. (N.Y. 2013), http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=S04839&term=2013&Summary=Y&Actions=Y&Text=Y.
18. S.B. 7474, 236th Leg., Reg. Sess. (N.Y. 2013), http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=S07474&term=2013&Summary=Y&Actions=Y&Text=Y.
19. *See supra* note 15.
20. 2013 Legis. Bill Hist. N.Y. S.B. 7639 (May 22, 2014).
21. *See supra* note 15.
22. *Id.* at 2.
23. *Id.*
24. The exemptions that may be classified as governmental include but are not limited to: protecting and monitoring airspace, national disaster recovery, or being under contract of a federal agency such as the Department of Defense, the Department of Justice, or the Department of Homeland Security.
25. *Id.* at 3–4.
26. *Id.* at 4.
27. *Id.* at 5.
28. *Id.* at 7.
29. *Id.*
30. *See supra* note 16, S.B. 4537.
31. *Id.* at 2.
32. *Id.* at 1.
33. *Id.*
34. *Id.* at 2.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *See supra* note 17.
40. *Id.* at 2.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 3.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. Tex. Gov't Code § 423.002(a)(9)–(11), (17)–(18), http://www.statutes.legis.state.tx.us/Docs/GV/pdf/GV.423.pdf.
50. *See supra* note 15 at 4.
51. Tex. Gov't Code § 423.002(8).
52. Tex. Gov't Code § 423.002(19).

53. Tex. Gov't Code § 423.006(f).

54. Tex. Gov't Code § 423.005(b).

55. Tex. Gov't Code §§ 423.003(c), 423.004(d).

56. Tex. Gov't Code § 423.004(e).

57. "Nongovernment actor" essentially means a private citizen who has no immediate ties to the government. S.B. 167, 2013 Leg., Gen. Sess. at 2 (Utah 2014), http://le.utah.gov/~2014/bills/static/SB0167.html. Furthermore, a nongovernment actor can only disclose data related to the commission of crime or imminent danger/emergency. *Id.*

58. Utah S.B. 167, 2013 Leg., Gen. Sess. at 4.

59. *Id.* at 5.

60. *Id.*

61. *Id.*

62. *Id.*

63. Or. Rev. Stat. § 837.360, https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2013ors837.html.

64. *Id.*

65. Or. Rev. Stat. § 837.320(2).

66. Or. Rev. Stat. § 837.375.

67. *See supra* note 15 at 7.

68. Or. Rev. Stat. § 837.345(1).

69. Or. Rev. Stat. § 837.345(2).

70. *FAA Selects Six Sites for Unmanned Aircraft Research*, Fed. Aviation Admin. (Dec. 30, 2013), http://www.faa.gov/news/updates/?newsId=75399.

71. *See supra* note 15 at 3; *supra* note 17 at 2.

72. Allen Bohm, *Status of 2014 Domestic Drone Legislation in the States*, Am. Civil Liberties Union (June 6, 2014), https://www.aclu.org/blog/technology-and-liberty/status-2014-domestic-drone-legislation-states.

73. *See* 2013 Va. Adv. Legis. Serv. 755 (LexisNexis).

74. Andrea Shalal-Esa, *FAA Unveils Plan for Integrating Drones into U.S. Airspace*, Reuters.com (Nov. 7, 2013), http://www.reuters.com/article/2013/11/07/us-faa-drones-idUSBRE9A61H220131107.

75. *See supra* note 73.

76. *See id.*

77. *See* 2013 N.C. Sess. Laws 360 § 7.16.

78. *See id.*

79. *See* H.B. 312, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013); H.B. 1099, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013).

80. Tenn. Code Ann. § 39-13-609(f).

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Drone Case Studies

Seattle, Washington

In 2010, the Department of Homeland Security (DHS) offered grants to help local law enforcement buy UAVs.[1] This grant coincided with UAV manufacturers' increased efforts to market small, lightweight devices specifically for policing.[2] UAVs have been used to monitor movement along the northern and southern U.S. borders.[3] A few police departments and emergency services agencies around the country were also just beginning to explore their potential uses.[4]

The DHS grant was administered via the Urban Areas Security Initiative (UASI) of the Federal Emergency Management Agency (FEMA).[5] The purpose of the initiative is to "address the unique planning, organization, equipment, training, and exercise needs of high-threat, high-density urban areas, and assists them in building an enhanced and sustainable capacity to prevent, protect against, mitigate, respond to, and recover from acts of terrorism."[6] Federal funding for the initiative totaled $490,376,000 in 2012.[7]

After receiving the grant from UASI, the Seattle Police Department purchased two Dragonflyer X6 Helicopter UAVs, which weigh 3.5 pounds each and can carry a payload of about 2 pounds.[8] They each cost $40,000 and can fly for about 10 minutes at a time with a full payload before needing a new charge.[9] The Seattle Police Department argued that it needed UAVs to search for missing persons and to aid in certain criminal investigations.[10] The department also attempted to reassure the public that the UAVs in question would not carry weapons or any other equipment besides surveillance cameras.[11]

Seattle, however, has a history of privacy concerns going back to incidents involving use of surveillance cameras in Cal Anderson Park and the installation of 30 waterfront cameras.[12] This history, in addition to the UAVs acquired by the Seattle Police Department, helped position public opinion against police surveillance activities.[13] After residents and privacy advocates protested, Mayor Mike McGinn ordered the police department to abandon its plan to use UAVs.[14] This eventually motivated Seattle's City Council to pass a bill in response to the public outcry. As a result, the department returned the two UAVs to the manufacturer and has not purchased any new UAVs since the city council passed 117730.[15]

On March 18, 2013, the Seattle City Council voted unanimously for Council Bill 117730, which requires approval and review of equipment and operation protocol.[16] "With this inclusive legislation, the council is proactively setting up a framework to ensure the public is involved regarding the use of surveillance equipment," said council member Bruce Harrell, chair of the Public Safety, Civil Rights, and Technology Committee.[17] Police, however, would still be able to bypass the new law to use surveillance technology such as a handheld or body-worn device or a camera installed in or on a police vehicle.[18] Moreover, the City Council hoped that requiring a prior approval from the council under 117730 would answer privacy concerns.[19]

According to Council Bill 117730, the information required for the operational and data management protocols includes:

A. A clear statement describing the purpose and use of the proposed surveillance equipment.
B. The type of surveillance equipment to be acquired and used.
C. The intended specific location of such surveillance equipment if affixed to a building or other structure.
D. How and when a department proposes to use the surveillance equipment, such as whether the equipment will be operated continuously or used only under specific circumstances, and whether the equipment will be installed permanently or temporarily.
E. A description of the privacy and anonymity rights affected and a mitigation plan describing how the department's use of the equipment will be regulated to protect privacy, anonymity, and limit the risk of potential abuse.
F. A description of how and when data will be collected and retained and who will have access to any data captured by the surveillance equipment.
G. The extent to which activity will be monitored in real time as data is being captured and the extent to which monitoring of historically recorded information will occur.
H. A public outreach plan for each community in which the department intends to use the surveillance equipment that includes opportunity for public meetings, a public comment period, and written agency response to these comments.
I. If a department is requesting to acquire or use drones or other unmanned aircraft, it shall propose the specific circumstances under which they may be deployed, along with clearly articulated authorization protocols.
J. If more than one department will have access to the surveillance equipment or the data captured by it, a lead department shall be identified that is responsible for maintaining the equipment and ensuring compliance with all related protocols. If the lead department intends to delegate any related responsibilities to other departments and city personnel, these responsibilities and associated departments and personnel shall be clearly identified.
K. Whether a department intends to share access to the surveillance equipment or the collected data with any other government entity.
L. A description of the training to be provided to operators or users of the surveillance equipment.[20]

Mesa County, Colorado

Among all the uses of UAVs by police departments across the country, Mesa County, Colorado, features

perhaps the single most comprehensive use of UAVs by law enforcement anywhere in the country. Documents released by the county demonstrate that it has been a "beta test site" for two different UAV manufacturers since 2009, which served to familiarize the area with the use of these vehicles.[21] Unlike some other cities in the U.S. that saw a backlash against the use of UAVs, Mesa County has fully embraced the use of this technology by law enforcement.[22]

Despite laws in other regions strictly defining the zones in which UAVs can be utilized, Mesa County has placed no geographic boundaries on the use of UAVs by law enforcement.[23] This allows for deployment of UAVs anywhere within the county's 3,300 square miles.[24] From January 2010 to June 2013, the department used its two UAVs for a total of 171 hours.[25] The original intent was to use the UAVs for search-and-rescue-style missions, but only two such missions occurred within this time frame.[26] Instead, the UAVs were primarily used instead of police chases and for crime scene reconstruction.[27]

According to a June 2012 report from the Government Accountability Office (GAO), Mesa County is one of nine law enforcement departments to have a waiver from the FAA to utilize UAVs:

> [The] FAA's goal is to eventually permit, to the greatest extent possible, routine [UAV] operations in the national airspace system while ensuring safety. As the list of potential uses for UAS grows, so do the concerns about how they might affect existing military and non-military aviation as well as concerns about how they might be used.[28]

Mesa County's UAVs were donated to the department. Dragonfly Innovations, based in Canada, donated a helicopter-style UAV estimated to cost $20,000.[29] Falcon UAV, which is based in Aurora, Colorado, donated a fixed-wing aircraft that is valued at around $30,000.[30] In exchange for the donations, the county made an agreement to buy parts and equipment exclusively from these companies.[31]

What stands out in Mesa County's drone usage is that Sheriff Stan Hilkey made the decision to fund and operate UAVs.[32] As an elected county sheriff, Hilkey has the legitimacy to make decisions about security and public safety matters.[33] "That's one of the benefits of a sheriff's office. You work for an elected official. Had this been a police department, it would have been more complicated running it up the food chain," says Ben Miller, who heads up the program.[34] "The sheriff thought about the potential risks involved and it didn't take long to realize that we had no intentions of doing stuff that gets people nervous."[35]

It should be noted that Mesa County's program has not been met with universal praise. A number of concerns are raised by privacy advocates as the program expands in Mesa County and into neighboring Arizona. For example, Maricopa County Sheriff Joe Arpaio, who has earned international notoriety for his harsh policing methods (including housing inmates in tents, making them wear pink underwear, and targeting individuals believed to be undocumented immigrants[36]), has said he would like to utilize the technology.[37] This has rankled privacy advocates. "Arpaio tries to say, 'Who cares about the privacy—we're only after criminals?' as if you know when the thing takes off that it's only going to be looking at criminals," says the ACLU's Dan Pochoda.[38] "As usual, it's round 'em up first and sort 'em out later. It's been a concern of residents around the country, particularly now that a lot of the NSA [National Security Agency] stuff has fallen on fertile ground with people's concerns. This could be even more invasive."[39]

Although Colorado has not passed any sort of comprehensive legislation regulating the use of UAVs by law enforcement, the Mesa County Sheriff's Office claims it respects privacy concerns[40] and issued a Frequently Asked Questions document to address the safety and privacy concerns arising from drone use.[41] Therein, Sheriff Hilkey states that the sheriff's office uses drones mainly for crime scene photography and search-and-rescue missions.[42] Hilkey notes that because weaponized drones are unnecessary in civilian law enforcement, the drones do not carry weapons.[43] Further, he reassures that the sheriff's office would never jeopardize anyone's Fourth Amendment rights. Hilkey states, "For example, our equipment does not allow us to see through walls, listen to conversations, monitor cell phones, etc." He says that they use the system to respond to specific missions or incidents and not to constantly monitor anything. Images collected with the use of this technology are handled and retained within industry standards, "consistent with images collected with any camera by law enforcement and are subject to professional standards, codes of conduct, case law and with the public's trust in mind."[44]

Regardless of Sheriff Hilkey's assurances, privacy and safety concerns still weigh on the minds of Mesa County residents. Naturally, with ever-expanding UAV use on the horizon, some form of legislative response is warranted. While the GAO report recognizes it is "not clear what entity should be responsible for addressing privacy concerns,"[45] Colorado Senator Mark Udall, serving on the Senate's Select Committee on Intelligence, intends to write such legislation.[46]

Senator Udall believes Coloradans "hold sacred their open spaces, seclusion and privacy both in the furthest wilderness areas and in the center of their greatest cities. It's part of who we are in the West."[47] Stephen Saint, who left his job with the Mesa County Sheriff's Department offers real concerns regarding drone use: "Mesa County is a very private community. They want to be left alone out there . . . [y]ou gotta worry about someone being

elected sheriff and going rogue. You gotta consider that drones could get in the hands of the wrong people."[48]

Grand Forks, North Dakota

Beyond Mesa County, Colorado, the sheriff's department in Grand Forks, North Dakota is the only other police department in the country that has actively used UAVs authorized by the Federal Aviation Administration.

The police in Grand Forks use a carefully marked small helicopter equipped with both a standard video camera and a temperature-scanning infrared camera.[49] So far, the UAV has not been used regularly for any criminal pursuit, setting it apart from the uses in Mesa County.[50] As of October 2013, it had been used on seven occasions.[51]

These cases are instructive as to how this technology can be used by law enforcement without substantially sacrificing privacy. Here's how the seven incidents were described by local media in an interview with Alan Frazier, a University of North Dakota professor and deputy sheriff:

- [On] May 3, a drone was used to search flooded fields near Minto, 30 miles northwest of Grand Forks in Walsh County, that were not passable on foot, by boat or vehicle, for Guy Miller, a local farmer last seen April 29 in a nearby flooded coulee.
- [On] May 12, a drone was used to provide high-definition photos of a low-head dam near Minto to help searchers decide Miller's body was not hung up there. His body was found September 7 by a passer-by in the Forest River, about a mile from where he last was seen.
- [On] May 21, a drone was used to search for a reported missing person after a car accident near Manvel, north of Grand Forks. The drone's images helped searchers conclude there was no missing person, which helped convince the young man who concocted the story – to avoid being charged with drunk driving – to admit his lie, said Sheriff Bob Rost.
- [On] August 21, a drone was used to photograph and measure the scene of an accident on the west side of Grand Forks in which a mosquito control vehicle was hit by a freight train, injuring the men in the city-owned vehicle. The GPS-referenced images aid in accident reconstruction work.
- [On] August 30, a drone was used to photograph and video an erosion control project on a riverbank in Turtle River State Park near Arvilla, so park officials can evaluate the project's success.
- [On] September 24, a drone was used in the search for a fugitive from Thief River Falls, Minnesota, who fled law enforcement west of Portland running into a large cornfield. The drone's infrared imaging that picked up body heat helped searchers decide the suspect was no longer in the field. . . . The suspect stole a car, police said, and last was seen in South Dakota, [and has not been] caught.
- [On] October 3, a drone was used by Grand Forks police to map the area around the scene of the sexual assault and robbery of two women [on] Sept. 30 near Gateway Drive and Stanford Road.[52]

As can be seen from the incidents listed above, police have deployed UAV technology in response to a variety of events, ranging from search-and-rescue type operations to actively searching for a criminal fugitive. There is no public evidence that the UAVs have been used to spy on private residences or engage in more intrusive activities. ■

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2. *See id.*

3. *Id.*

4. *Id.*

5. *See* Grant Details, *Urban Areas Security Initiative (UASI)*, U.S. Dept. of Homeland Sec. http://www.homelandsecuritygrants.info/GrantDetails.aspx?gid=17162 (last visited June 23, 2014).

6. *Id.*

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11. *See id.*

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18. *Id.*

19. *Id.*

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32. *Id.*

33. *See id.*

34. *Id.*

35. *Id.*

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39. *Id.*

40. *See* Unmanned Aerial System Team, Mesa Cnty. Sheriff's Office Law Operations Div., http://sheriff.mesacounty.us/uav/ (click "Click Here for Frequently Asked Questions" hyperlink) (last visited June 23, 2014).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Unmanned Aircraft Systems, *supra* note 28.

46. Greene, *supra* note 23.

47. *Id.*

48. *Id.*

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BURDEN OF PROOF

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"Heaven?" Part 3

Introduction

Last issue's column continued to review newly promulgated rules of the Commercial Division, focusing on rules of expert disclosure. Since that time, additional rules have been approved and new rules proposed, all of which have been added to the mix as this review of Commercial Division rules is completed.

Approved Rules

A number of proposals pending when the last column was written have been adopted.

One was an amendment to Rule 8(a). The Rule requires parties to consult, prior to court conferences, on a voluntary exchange of information to aid early settlement:

> Rule 8. Consultation prior to Preliminary and Compliance Conferences.
>
> (a) Counsel for all parties shall consult prior to a preliminary conference or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery and any other issues to be discussed at the conference; [~~and~~] (iii) the use of alternate dispute resolution to resolve some or all of the issues in the litigation; and (iv) any voluntary and informal exchange of information and that the parties agree would help aid early settlement of the case. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.[1]

A detailed procedure for utilizing privilege logs has been adopted as Rule 11-b:

> Rule 11-b. Privilege Logs.
>
> (a) Meet and Confer: General. Parties shall meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order. To the extent that the collection process and parameters are disclosed to the other parties and those parties do not object, that fact may be relevant to the Court when addressing later discovery disputes.
>
> (b) Categorical Approach or Document-By-Document Review.
>
> (1) The preference in the Commercial Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs. The parties are expected to address such considerations in good faith as part of the meet and confer process (see paragraph (a) above) and to agree, where possible, to employ a categorical approach to privilege designations. The parties are encouraged to utilize any reasoned method of organizing the documents that will facilitate an orderly assessment as to the appropriateness of withholding documents in the specified category. For each category of documents that may be established, the producing party shall provide a certification, pursuant to 22 NYCRR § 130-1.1a, setting forth with specificity those facts supporting the privileged or protected status of the information included within the category. The certification shall also describe the steps taken to identify the documents so categorized, including but not limited to whether each document was reviewed or some form of sampling was employed, and if the latter, how the sampling was conducted. The certification shall be signed by the Responsible Attorney, as defined below, or by the party, through an authorized and knowledgeable representative.
>
> (2) In the event the requesting party refuses to permit a categorical approach, and instead insists on a document-by-document listing on the privilege log, the requirements set forth in CPLR 3122 shall be followed. In that circumstance, however, the producing party, upon a showing of good cause, may apply to the court for the allocation of costs, including attorneys' fees, incurred with respect to preparing the document by-document log. Upon good cause shown, the court may allocate the costs to the requesting party.
>
> (3) To the extent that a party insists upon a document-by-document privilege *log* as contemplated by CPLR 3122, and absent an order to the contrary, each uninterrupted e-mail chain shall constitute a single entry, and the description accompanying the entry shall include the following;

(i) an indication that the e-mails represent an uninterrupted dialogue;
(ii) the beginning and ending dates and times (as noted on the emails) of the dialogue;
(iii) the number of e-mails within the dialogue; and
(iv) the names of all of authors and recipients – together with sufficient identifying information about each person (e.g., name of employer, job title, role in the case) to allow for a considered assessment of privilege issues.
(c) Special Master. In complex matters likely to raise significant issues regarding privileged and protected material, parties are encouraged to hire a Special Master to help the parties efficiently generate privilege logs, with costs to be shared.
(d) Responsible Attorney. The attorney having supervisory responsibility over the privilege review shall be actively involved in establishing and monitoring the procedures used to collect and review documents to determine that reasonable, good faith efforts are undertaken to ensure that responsive, non-privileged documents are timely produced.
(e) Court Order. Agreements and protocols agreed upon by parties should be memorialized in a court order.[2]

An option for accelerated adjudication of commercial matters, on a consent basis, has been adopted:

Rule 9. Accelerated Adjudication Actions.
(a) This rule is applicable to all actions, except to class actions brought under Article 9 of the CPLR, in which the court by written consent of the parties is authorized to apply the accelerated adjudication procedures of the Commercial Division of the Supreme Court. One way for parties to express their consent to this accelerated adjudication process is by using specific language in a contract, such as: "Subject to the requirements for a case to be heard in the Commercial Division the parties agree to submit to the exclusive jurisdiction of the Commercial Division, New York State Supreme Court, and to the application of the Court's accelerated procedures, in connection with any dispute, claim or controversy arising out of or relating to this agreement, or the breach, termination, enforcement or validity thereof."
(b) In any matter proceeding through the accelerated process, all pre-trial proceedings, including all discovery, pre-trial motions and mandatory mediation, shall be completed and the parties shall be ready for trial within nine (9) months from the date of filing of a Request of Judicial Intervention (RJI).
(c) In any accelerated action, the court shall deem the parties to have irrevocably waived:
(1) any objections based on lack of personal jurisdiction or the doctrine of forum non conveniens;
(2) the right to trial by jury;
(3) the right to recover punitive or exemplary damages;
(4) the right to any interlocutory appeal; and
(5) the right to discovery, except to such discovery as the parties might otherwise agree or as follows:
(i) There shall be no more than seven (7) interrogatories and five (5) requests to admit;
(ii) Absent a showing of good cause, there shall be no more than seven (7) discovery depositions per side with no deposition to exceed seven (7) hours in length. Such depositions can be done either in person at the location of the deponent, a party or their counsel in real time by any electronic video device; and
(iii) Documents requested by the parties shall be limited to those relevant to a claim or defense in the action and shall be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain.
(d) In any accelerated action, electronic discovery shall proceed as follows unless the parties agree otherwise:
(i) the production of electronic documents shall normally be made in a searchable format that is usable by the party receiving the e-documents;
(ii) the description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute; and
(iii) where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the court will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final judgment.[3]

Finally, amendments relating to assignment of cases to the Commercial Division, relating to the use of interrogatories in the Commercial Division, and a proposal creating a pilot mediation program in the Commercial Division have been adopted.[4]

Newly Proposed Rules

A number of new rules have been proposed since the last column. While the proposed rules provide for a period of public comment, that period will have ended before this issue of the *Journal* hits your doorstep.

The first proposal is for a preamble to the Commercial Division Rules (referred to as a "Rule" in the supporting memorandum) addressing the imposition of sanctions:

Proposed Preamble to Commercial Division Rules:[5]
The Commercial Division understands that the businesses, individuals, and attorneys who use this Court have expressed their frustration with adversaries who engage in dilatory tactics, fail to appear for hearings or depositions, unduly delay in producing relevant documents, or otherwise cause the other parties in a case to incur unnecessary costs. The Commercial Division will not tolerate such practices. The Commercial

Division is mindful of the need to conserve client resources, promote efficient resolution of matters, and increase respect for the integrity of the judicial process. Litigants and counsel who appear in this Court are directed to review the Rules regarding sanctions, including the provisions in Rule 12 regarding failure to appear at a conference, Rule 13(a) regarding adherence to discovery schedules, and Rule 24(d) regarding the need for counsel to be fully familiar with the case when making appearances. Sanctions are also available in this Court under Rule 3126 of the Civil Practice Law and Rules and Part 130 of the Rules of the Chief Administrator of the Courts. The judges in the Commercial Division will impose appropriate sanctions and other remedies and orders as is warranted by the circumstances. Use of these enforcement mechanisms enables the Commercial Division to function efficiently and effectively, and with less wasted time and expense for the court, parties and counsel. Nothing herein is intended to expand or alter the scope and/or remedies available under the above-cited sanction rules.[6]

Also newly proposed is an amendment to Rule 9 imposing limitations on depositions:

Rule 9. Limitations on Depositions.[7]
(a) Unless otherwise stipulated to by the parties or ordered by the court:
(i) the number of depositions taken by plaintiffs, or by defendants, or by third-party defendants, shall be limited to 10; and
(ii) depositions shall be limited to 7 hours per deponent.
(b) Notwithstanding Rule 9(a)(i), the propriety of and timing for depositions of non-parties shall be subject to any restrictions imposed by applicable law.
(c) For the purpose of Rule 9(a)(i), the deposition of an entity pursuant to CPLR 3106(d) shall be treated as a single deposition even though more than one person may be designated to testify on the entity's behalf.
(d) For the purposes of this Rule, each deposition of an officer, director, principal or employee of an entity who is also a fact witness, as opposed to an entity representative pursuant to CPLR 3106(d), shall constitute a separate deposition.
(e) For good cause shown, the court may alter the limits on the number of depositions or the duration of an examination.
(f) Nothing in this rule shall be construed to alter the right of any party to seek relief that it deems appropriate under the CPLR or other applicable law.[8]

Previously Proposed Rules Still Pending

A rule has been proposed mandating specific time slots for oral argument on motions:

Rule on Staggered Court Appearances
(a) Each appearance before a Commercial Division Justice for oral argument on a motion shall be assigned a time slot. The length of the time slot allotted to each matter is solely in the discretion of the court.
(b) In order for the court to be able to address any and all matters of concern to the court and in order for the court to avoid the appearance of holding *ex-parte* communications with one or more parties in the case, even those parties who believe they are not directly involved in the matter before the court must appear at the appointed date and time assigned by the court unless specifically excused by the court. However, if an individual is appearing as a self-represented person, that individual must appear at each and every scheduled court appearance regardless of whether they anticipate being heard.
(c) Since the court is setting aside a specific time slot for the case to be heard and since there are occasions when the court's electronic or other notification system fails or occasions when a party fails to receive the court-generated notification, each attorney who receives notification of an appearance on a specific date and time, is responsible for notifying all other parties by e-mail that the matter is scheduled to be heard on that assigned date and time. All parties are directed to exchange e-mail addresses with each other at the commencement of the case and to keep these e-mail addresses current, in order to facilitate notifications by the person(s) receiving the court notification.
(d) Requests for adjournments or to appear telephonically must be e-filed and received in writing by the Court no later than 48 hours before the hearing.[9]

Still pending is a proposal relating to guidelines for discovery of electronically stored information from nonparties in Commercial Division cases and for the creation of a Special Masters pilot program in the Commercial Division.

Conclusion

This concludes my review of the Commercial Division rules, subject to an update, if and when appropriate, regarding the disposition of proposals currently pending.[10] Whether the Commercial Division is heaven, or not, is, I suspect, in the eye of the beholder.

With Labor Day just a memory, and everyone back in full swing, next issue's column will hopefully address newly enacted CPLR provisions, which passed both houses of the state Legislature but await, as of the date of this writing,[11] action by Governor Cuomo.

1. http://www.courts.state.ny.us/rules/comments/index.shtml.
2. *Id.*
3. *Id.*
4. *Id.*
5. The public comment period ended August 26, 2014.
6. http://www.courts.state.ny.us/rules/comments/index.shtml.
7. The public comment period ended August 19, 2014.
8. http://www.courts.state.ny.us/rules/comments/index.shtml.
9. *Id.*
10. At some future point.
11. August 12, 2014.

The Duty to Preserve and the Risks of Spoliation

How Organizations Can Preemptively Limit the Costs of Electronic Discovery

By Jamie Weissglass and Rossana Parrotta

Introduction

The best defense against spoliation sanctions is preserving evidence. However, in the era of Big Data, organizations often face a Goldilocks dilemma: preserve too much electronically stored information (ESI) and discovery becomes unwieldy and expensive; preserve too little and face sanctions, which can range from shifting the costs of discovery to adverse inference instructions to dismissal.[1] Moreover, the more data an organization has, the more difficult it is to find needed information; delays in response can lead to noncompliance with court and government agency rules and result in penalties. Consequently, saving everything is risky and not economically feasible. On the other hand, it is clear that failing to retain the right information is equally, if not more, risky. Fortunately, there is a solution that is "just right": developing an information governance and management program that provides for routine, defensible destruction of data pursuant to well-researched and documented retention schedules. Under Rule 37(e) of the Federal Rules of Civil Procedure, federal courts cannot impose sanctions for data lost "as a result of the routine, good-faith operation of an electronic information system." In other words, routine, automatic deletions of electronic records that have met their retention requirements and are not subject to a duty to preserve should not be penalized. The best defense against discovery sanctions, therefore, starts with comprehensive information governance and litigation readiness programs that begin well before litigation is on the horizon.

Litigation Readiness

Litigation readiness begins with an organization focusing on managing information responsibly. The core of this responsibility is consistently following an information governance and management program that addresses the entire life cycle of information, from creation or receipt to disposition.

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Establish a Litigation Readiness Team

First, the organization should establish a team to create and oversee its litigation readiness program. In implementing the program, the team will be responsible for working with the records and information management group (RIM) to confirm that there is a defensible records retention policy, establishing procedures relating to preservation of information when there is a duty to preserve, creating and monitoring litigation holds to ensure preservation, and training employees on the program. The team should consist of representatives from the Legal, RIM, IT, and Compliance departments, as well as representation from the business units. The team may also include outside partners, such as e-discovery specialists and third-party vendors that the organization will rely upon in the event of litigation.

Assess the Information Landscape

The next task is to identify likely locations of information typically sought in litigation. Many organizations find it helpful to create a data map that memorializes the locations and types of the organization's most commonly requested forms of ESI. In creating the map, the team should not overlook legacy data or emerging forms of information, such as voicemail, social media, and text messages. It should also account for any data stored in the Cloud or on mobile devices. If the team cannot determine what is stored in a particular repository, sometimes sampling or cataloging the data may be of some help. As important as creating the data map is maintaining it in what is a very dynamic and constantly changing information management landscape. Data maps can quickly become stale without this vigilance.

Create a Defensible Disposal Program

The organization's information governance program should define records retention periods and provide for routine destruction of records, including ESI, whose retention requirements have expired and are not subject to a preservation hold order. The records and information management team typically develops the retention schedule by working with the business unit representatives to identify their information and related systems, as well as the business needs for the records – their purposes and useful life. The records and information management team will then conduct the legal research into the applicable recordkeeping regulations, validated and approved by the team's legal experts. The legal and operational needs for the records are then used to determine the appropriate retention period, and the sensitivity classification of the information determines the method of disposal. It is particularly important to work with IT to understand the disposal of ESI, because often those processes can be automatic. (For example, many organizations have systems that automatically delete emails after a certain period.)

A key procedure to develop is one that addresses records and information of departing employees to ensure responsibilities for on-going retention are defined, and to ensure information is available and accessible. Otherwise, the information may be lost. For example, data can be lost if the former employee's computer is wiped and given to another employee, if a mailbox or the exchange server is shut down, or if a file share that belonged to the former employee is deleted.

Note that the information governance program and records retention policy is regarded as "best practice" and is not something to institute in anticipation of litigation. Instituting a program or changing its rules after learning of a potential dispute may give rise to an inference that the party enacted its policy to facilitate the destruction of evidence.[2]

Determine When the Duty to Preserve May Be Triggered

Once the information governance program is in place, it can be helpful for the team to anticipate scenarios when the duty to preserve will be triggered. Pre-planning can mitigate the risk of *ad hoc* decisions that could prove inefficient and inconsistent.

Unfortunately, there is no bright-line test to determine when the duty is triggered. Under New York federal and state law, the duty to preserve arises when litigation is "reasonably anticipated."[3] Obviously, initiating litigation, retaining counsel or receiving a complaint, subpoena, or notice of government inquiry puts a party on notice. But New York courts have established that the duty to preserve can arise well before a party receives notice of a claim.[4] Consider the following common, thought-provoking scenarios.

Does a triggering dispute exist? The "mere existence of a dispute between two parties does not necessarily mean that a party should reasonably have anticipated litigation and taken steps to preserve evidence."[5] Some courts have excused parties from the duty to preserve where they show that claims similar to those in the lawsuit usually do not lead to litigation;[6] other courts disagree.[7]

Who knows about the dispute? Key personnel must be aware that litigation is likely.[8] If only a few employees in a firm or municipality are aware that litigation may be imminent, it will not necessarily trigger the duty. However, if a lawyer receives notice, a higher standard may apply: in one case, receiving a letter terminating an attorney's representation "for some reasons not yet fully defined" established the duty.[9]

Is litigation foreseeable for other purposes? At least one court has found that designating documents as protected work product prepared "in anticipation of litigation" triggers the duty to preserve.[10] The court ruled that if "litigation was reasonably foreseeable for one purpose . . . it was reasonably foreseeable for all purposes."[11]

What is the regulatory environment? New York courts have found regulations requiring the retention of records sufficient to warn an organization to preserve documents, even if litigation involving those records is not reasonably foreseeable.[12] Similarly, a duty to preserve can arise as early as the inception of a relationship between regulated parties.[13] For example, one court relied on the rules of professional responsibility and ethics opinions in finding the obligation to preserve documents arose when lawyers began to represent a party.[14]

When does the duty end? At some point, the duty to preserve will end and organizations can resume programmatic

destruction. Settlement talks do not "vitiate the duty to preserve"; such a standard "ignores the practical reality that parties often engage in settlement discussions before and during litigation . . . . [A contrary] argument would allow parties to freely shred documents and purge e-mails, simply by faking a willingness to engage in settlement negotiations."[15]

Given the range of circumstances that can create reasonable anticipation, when in doubt, parties should err on the side of presuming the duty exists.

Determine the Scope of the Litigation Hold

Once the duty to preserve is triggered, the next step is to figure out what data to save. A party must preserve "what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request."[16] This does not mean parties must preserve "every shred of paper, every e-mail or electronic document, and every backup tape."[17] Instead, they must preserve ESI that is relevant and unique; it is unnecessary to retain multiple copies.

The NYSBA's E-Discovery Committee suggests using the following criteria to determine what to preserve: "the facts upon which the triggering event is based and the subject matter of the triggering event; whether the ESI is relevant to that event; the expense and burden incurred in preserving the ESI; and whether the loss of the ESI would be prejudicial to an opposing party."[18]

Some courts outside New York have directed parties to *The Sedona Conference Commentary on Proportionality,* which suggests weighing the burden of preservation against the data's potential value and uniqueness, in setting the scope.[19] Some federal courts also tend toward considerations of proportionality, and a proposed amendment to Fed. R. Civ. P. 26(b) would limit the scope of discovery to information "proportional to the needs of the case." However, New York courts have not been receptive to this concept. One judge explained that the proportionality "standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle."[20]

As with other aspects of preservation, a conservative approach is best. In consultation with key stakeholders counsel can identify issues likely to arise; they can then pinpoint the types of documents likely to be relevant and the probable key custodians. Before deeming ESI inaccessible because of undue burden, counsel should consider whether the data is available elsewhere; if it is not, courts can override considerations of undue burden where the "requesting party shows good cause."[21]

One of the best ways to limit the scope of preservation and manage costs is to reach an agreement with opposing counsel regarding the scope of discovery. For example, agreement can be reached on issues such as the identity of key custodians, types of information sought, etc. The "meet and confer" process in federal court and in New York Commercial Division cases provides structured venues for discussions with opposing counsel, but counsel can also reach agreements without formally required meetings.

Stop the Destruction of Data to Be Preserved

Satisfying the duty to preserve requires organizations to suspend their routine destruction mechanisms.[22] A litigation hold is the communication mechanism typically used to document and inform employees of the need to suspend destruction. It has been held that the "utter failure to establish any form of litigation hold at the outset of litigation is grossly negligent."[23] However, the proper form of litigation holds is an open question: must they be in writing, or will oral holds suffice? There is arguably a mix of opinions on the subject.

While at least one federal court held that the failure to issue a written litigation hold constituted gross negligence,[24] the Second Circuit rejected that position.[25] New York state courts have also declined to follow that stance. For example, one court found "the functional equivalent of a litigation hold" where a company's policy was "to retain all information relevant to the claims and litigation."[26] Furthermore, it ruled "a directive to refrain from purging documents is unnecessary and unwarranted . . . [and] would risk confusion regarding the policy and practice to preserve all documents in all formats for all files."[27]

At least one New York court has supported tailoring a litigation hold's form to the organization's size.[28] The court noted that in smaller organizations, "issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be."[29]

Even so, the best practice is to issue a clearly written litigation hold, to provide tangible evidence of a party's good-faith attempt to meet its discovery obligations.[30] Litigation holds should describe the subject matter and relevant date ranges, instruct recipients to preserve ESI until notified otherwise, and provide a contact person in case of questions.[31]

In preserving ESI, it is important for the legal department to collaborate with IT in stopping automatic destruction and in issuing the legal hold. Discussions should cover the types of data that may be implicated and the names of key custodians. If any of these types of data are subject to automatic destruction, IT should halt that process for those categories of data. Some organizations find it useful to adopt a "triage" approach – immediately addressing data for the most critical custodians while continuing to identify additional relevant information. In addition to stopping automatic destruction and issuing a legal hold, counsel can consider whether there is the need for IT to collect any data immediately; for example, if certain employees may not follow the directive to preserve data.

Identifying the sources of data early can also help determine whether collecting that data may place an undue burden on the organization, necessitating discussions with opposing counsel or motions to the court for protection.

Ensure Compliance With the Litigation Hold

Issuing a litigation hold is not the final word in meeting the duty to preserve. Organizations should take affirmative steps to ensure compliance throughout the organization; leaving preser-

vation up to lay employees without adequate guidance is asking for trouble. Counsel too, should work to ensure compliance.[32]

Some organizations require employees to sign an acknowledgment that they have read, understood, and agree to the terms of the litigation hold. Tracking the distribution of the holds as well as any employee acknowledgements is important in demonstrating the organization's efforts to ensure preservation.

In addition, organizations should reissue and update litigation holds periodically to ensure their effectiveness.[33] It is also counsel's responsibility to remind custodians of their duty to preserve, communicating directly with key players.[34] Again, keep in mind that documentation of these reminders may be important in establishing the company's good faith effort to preserve evidence.

In fact, it is a best practice to record every step of the litigation hold process to ensure defensibility, including the reasoning for determining when the duty to preserve was triggered and decisions for what data to preserve. If the scope of the litigation shifts, not only should the litigation hold be updated to reflect new claims, date ranges, and custodians, but the reasoning for doing so should be memorialized. It is also important to record critical dates, including when the initial hold and reminders are issued. Although litigation holds are typically privileged, courts have required their production when spoliation has occurred.[35]

To help ensure consistency in following litigation hold procedures, the team may want to consider litigation hold software, which can build in rules consistent with a retention policy and document employees' receipt and acknowledgement of the hold and reminders.

Educate Employees and Monitor Compliance

A litigation readiness program is only as good as the degree to which its policies and processes are adhered to. Because employees are on the front lines, they may be the first to become aware of circumstances giving rise to potential litigation. Therefore, they should be coached to approach management or legal counsel as soon as they learn of any risk. The litigation readiness team can establish a training program that simply explains the company's discovery process, legal hold policies, and document retention protocol. To reinforce the training, the team may want to share examples of the negative ramifications of failing to follow policy.

Conclusion

A proactive litigation readiness program can move an organization from a reactive to a proactive stance. When controlled in a systematic, consistent fashion, the disposal of ESI in compliance with the organization's retention policy can enhance defensibility, reduce the likelihood of spoliation claims and sanctions, and save significant expense. Furthermore, better information management leads to more efficient searches for information, faster decision making, and better compliance with recordkeeping rules. In sum, litigation readiness programs that incorporate strong information governance will lead to controlled discovery costs and minimize the risks of unwelcome budget surprises. ■

1. *Fitzpatrick v. Am. Int'l Grp., Inc.*, 10 Civ. 142 (MHD) (S.D.N.Y. May 29, 2013) (footnotes and citation omitted); *QK Healthcare, Inc. v. Forest Labs., Inc.*, No. 117407/09 (Sup. Ct, N.Y. Co. May 13, 2013).
2. *See, e.g., Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 642 (S.D. Tex. 2010) (where one former employee claimed emails were destroyed pursuant to an email destruction policy at the new competing entity; the court held that, even if that was true, because any such policy was selectively implemented, the Rule 37 safe harbor would not apply).
3. *Zubulake v. UBS Warburg LLC*, 220 F.RD. 212, 216 (S.D.N.Y. 2003) *(Zubulake IV); Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93A.D.3d 33, 36 (1st Dep't 2012).
4. *Voom HD Holdings*, 93 A.D.3d at 40 (citation omitted).
5. *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006).
6. *See, e.g., Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc.*, No. 05-CV-6734T (W.D.N.Y. Mar. 22, 2012) (finding it unreasonable to anticipate litigation where data showed that "out of approximately 3,800 billing disputes filed during 2005 and 2006, only three customers (including the plaintiffs) commenced litigation").
7. *Field Day, LLC v. Cnty. of Suffolk*, No. 04-2202 (S.D.N.Y. Mar. 25, 2010) (rejecting the argument that a defendant's duty to preserve was triggered only when it received notice of a claim because "it receives thousands of claims a year while the percentage of notices that result in actual lawsuits is small").
8. *Toussie v. Cnty. of Suffolk*, No. CV 01-6716 OS) (ARL) (E.D.N.Y. Dec. 21, 2007) (citing *Zubulake IV*, 220 F.RD. 212, 217 (S.D.N.Y. 2003)).
9. *DiStefano v. Law Offices of Barbara H. Katsos, PC*, CV 11-2893 (JS) (AKT) (E.D.N.Y. Mar. 29, 2013) (citation omitted).
10. *Siani v. State Univ. of N.Y. at Farmingdale*, No. CV09-407 (JFB) (WDW) (E.D.N.Y. Aug. 10, 2010).
11. *Id.*
12. *Byrnie v. Town of Cromwell*, 243 F.3d 93, 109 (2d Cir. 2001).
13. *FDIC v. Malik*, 09-CV-4805 (KAM) (JMA) (E.D.N.Y. Mar. 26, 2012).
14. *Id.* (noting that the defendants failed to contest this assertion).
15. *Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93A.D.3d 33, 40 (1st Dep't 2012).
16. *Zubulake IV*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).
17. *Id.*
18. NYSBA E-Discovery Comm., Best Practices in E-Discovery in New York State and Federal Courts (2011), http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=58331(NYSBA Best Practices).
19. The Sedona Conference, The Sedona Conference Commentary on Proportionality (2013), https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary"/%20 on%20Proportionality.
20. *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.RD. 429, 436 (S.D.N.Y. 2010) (citation omitted).
21. Fed. R. Civ. P. 26(b)(2)(B).
22. *915 Broadway Assocs. LLC v. Paul, Hastings, Janofsky & Walker, LLP*, No. 403124/08 (Sup. Ct., N.Y. Co. Feb. 16, 2012); see also Kravtsov v. Town of Greenburgh, No. 10-CV-3142 (CS) (S.D.N.Y. July 9, 2012) (finding the failure to suspend the automatic deletion of video recordings at least grossly negligent).
23. *Heng Chan v. Triple 8 Palace, Inc.*, No. 03 Civ. 6048 (GEL) (JCF) (S.D.N.Y. Aug. 11, 2005); *Einstein v. 357 LLC*, No. 604199/07 (Sup. Ct., N.Y. Co. Nov. 12, 2009).
24. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs.*, 685 F. Supp. 2d 456, 471, 476–77 (S.D.N.Y. 2010).
25. *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012).
26. *Estee Lauder Inc. v. One Beacon Ins. Grp., LLC*, No. 602379/05 (Sup. Ct., N.Y. Co. Apr. 15, 2013).
27. *Id.*
28. *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 441 (S.D.N.Y. 2010).
29. *Id.; see also Steuben Foods, Inc. v. Country Gourmet Foods, LLC*, No. 08-CV-561S(F) (W.D.N.Y. Apr. 21, 2011) (finding "series of oral communications" from counsel to senior staff in a company of 400 employees sufficient to avoid sanctions).
30. NYSBA Best Practices.
31. *Id.*
32. *915 Broadway Assocs. LLC v. Paul, Hastings, Janofsky & Walker, LLP*, No. 403124/08 (Sup. Ct., N.Y. Co. Feb. 16, 2012) ("Counsel must oversee compliance with the litigation hold.").
33. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 433–34 (S.D.N.Y. 2004).
34. *Id.*
35. *See, e.g., Tracy v. NVR, Inc.*, No. 04-CV-6541L (W.D.N.Y. Mar. 26, 2012).

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The Supreme Court Holds Genes Are Patent-Ineligible Products of Nature

By Teige P. Sheehan

Introduction

In June 2013, the U.S. Supreme Court issued its third decision in as many years on judicially created doctrines of patent ineligibility.[1] In *Association for Molecular Pathology v. Myriad Genetics, Inc.*,[2] the Court held that an "isolated" DNA molecule is patent-ineligible if its sequence is the same as a naturally occurring sequence, although a molecule whose sequence does not occur in nature is patent-eligible. This article discusses the *Myriad* decision in the context of recent Supreme Court jurisprudence on the doctrines of patent ineligibility, and its possible effects on intellectual property protection in biotechnology and other technology areas.

Summary of *Myriad*

The claims at issue in *Myriad* were to sequences of DNA based on human genes known as BRCA1 and BRCA2 and portions thereof.[3] The patentee (Myriad) had identified the location of these genes in the human genome, where a heritable mutation can confer an increased susceptibility to developing breast cancer.[4] In patenting the sequences, Myriad was able to exclude others from offering genetic tests to patients and clients to determine whether they carried the susceptible mutation, in competition with Myriad's own proprietary tests.[5]

Several plaintiffs sued Myriad in the Southern District of New York seeking a declaration that the claims are invalid.[6] Among their contentions was that DNA sequences that can be found in nature, such as within human genes, should be excluded from patent eligibility because they are products of nature.[7] Myriad disagreed, contending that because it specifically claimed "isolated" DNA, in keeping with U.S. Patent and Trade Office (U.S.P.T.O.) guidelines,[8] the claimed subject matter was not a product

of nature because such molecules do not naturally exist in an isolated form.[9] The district court held for the plaintiffs, finding the claims invalid as being impermissibly drawn to patent-ineligible subject matter.[10]

The Federal Circuit reversed, holding that isolated DNA molecules are chemically distinct from sequences of nucleotides found within genes and therefore were products not of nature but of human manufacture.[11] The plaintiffs petitioned for certiorari to the Supreme Court, which granted the petition, vacated the holding, and remanded the case to the Federal Circuit in light of its holding in another patent-eligibility case it had handed down in the interim, *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*[12] On remand, the Federal Circuit again found the claims to isolated DNA to be valid, and the plaintiffs again were granted review by the Supreme Court.[13]

In a unanimous decision, the Court held that "a naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated."[14] In reaching its decision, the Court addressed the requirements of 35 U.S.C. § 101[15] and the exceptions from patent eligibility it had carved from that section, stating that it had "long held that this provision contains an important implicit exception[:] Laws of nature, natural phenomena, and abstract ideas are not patentable."[16] In turn, it held that isolated DNA molecules are "products of nature" and therefore fall "squarely within the law of nature exception," at least insofar as the same sequence occurs naturally.[17]

However, the Court also found that some of the claimed subject matter at issue may be patent-eligible. Specifically, Myriad had also claimed BRCA1 and BRCA2 sequences in the form of a synthetic type of DNA molecule known as cDNA.[18] The sequence of nucleotides in a cDNA molecule often differs from that of naturally occurring genomic DNA in that interspersed throughout a sequence of genomic DNA are portions called introns that are removed in the creation of cDNA.[19] Therefore, notwithstanding its prohibition on patenting isolated genes, the Court held that cDNA is not categorically excluded from patent eligibility.[20] Rather, the patent eligibility of a given cDNA molecule will depend on whether its sequence matches that of a naturally occurring DNA or, alternatively, reflects the removal of an intronic sequence.[21]

An important aspect of this portion of the holding – that a cDNA molecule is ineligible for patenting if its sequence matches that of a naturally occurring molecule such as genomic DNA – is that the test for whether a DNA molecule is patent-eligible is not merely whether or not it is synthetic. All cDNA molecules are, by definition, synthetic, yet the Court ruled that some are not patent-eligible. Rather, whether assembled in a laboratory, nucleotide by nucleotide (which is the practical embodiment of a claim to an "isolated" gene) or plucked from within a cell and shorn of all other associated genetic materials, proteins, and other molecules with which it is naturally associated (which, in fact, is not how genes are actually "isolated" for genetic testing),[22] a DNA molecule with a naturally occurring sequence is not patent eligible.[23] By the same token, the Court noted that molecules of recombinant DNA, whose sequence is cobbled together from disparate sources of material and thus is artificial, remains eligible for patenting.[24]

Impact of *Myriad* in Light of *Prometheus* and *Bilski*

In many respects, the direct, practical consequences of *Myriad* have yet to be determined. Although there are estimated to be several thousand patents in force that claim endogenous human gene sequences, many are expected to begin expiring in the not too distant future.[25] For example, the claims invalidated by the *Myriad* decision itself would have expired in 2015 in any event.[26] Furthermore, since the advent of gene patenting in the 1980s,[27] public disclosure of unpatented human gene sequences in publicly available databases already profoundly minimized the patentable scope of new claims to human gene sequences, having deprived them of novelty.[28] Nevertheless, the U.S.P.T.O. issued preliminary guidance to its examiners to comply with *Myriad* by rejecting "product claims drawn solely to naturally occurring nucleic acids or fragments thereof."[29]

The patent-eligibility of methods of using gene sequences was not before the Court.[30] Underscoring this is the fact that, after *Myriad* was handed down, the patentee proceeded to assert other claims, drawn to methods of using BRCA1 and BRCA2 sequences in performing genetic testing.[31] Thus, conclusions that the Supreme Court's *Myriad* decision would unleash a multitude of new providers of genetic testing for breast cancer susceptibility, and thereby drive down the price of such tests, may have been premature, as such claims were not even before the Court.[32] From that perspective, it may appear that the direct effect of the decision on the field of diagnostic genetic testing – and on the related, nascent field of personalized medicine, which is thought to hold such promise – may be quite small because companies' patent portfolios do not rely exclusively on claims to compositions of isolated DNA.[33]

And yet, it remains possible that the claims newly asserted by Myriad may ultimately be invalidated as well. In part of its holding that was not presented to the Supreme Court in *Myriad*, the Federal Circuit held that some diagnostic method claims, "comparing" and "analyzing" an individual's genetic sequences to reference sequences of BRCA1 and BRCA2, were ineligible for patenting, falling within the exclusion of "abstract mental processes."[34] In so holding, the court quoted the Supreme Court's 2010 decision in *Bilski v. Kappos*,[35] in which the Court held that "the prohibition against abstract ideas cannot be circumvented by attempting to limit the use of [a] formula to a particular technological environment."[36]

In last year's *Prometheus* decision, on which the initial remand of *Myriad* to the Federal Circuit was predicated,[37] the Court held that methods drawn to determining a safe but effective dose of a particular medicine to administer

to a patient was patent-ineligible because it fell within the exclusion from eligibility of laws of nature.[38] In describing how to determine whether a method is excluded from patent eligibility under this exception, the Court stated that an "inventive concept" that is something more than a "well-understood, routine, conventional activity previously engaged in by scientists who work in the field" must be included in a claim reciting a natural law in order for it to be patent-eligible.[39] In turn, the Federal Circuit held that the "challenged method claims [in the *Myriad* case] were indistinguishable from the claims" held to be patent ineligible in *Prometheus* and therefore excluded from patent eligibility themselves.[40] Thus, to the degree that claims to genetic testing methods may be considered drawn to "abstract mental processes" in view of *Bilski*, or "laws of nature" without an "inventive concept" in view of *Prometheus*, they may well be found invalid for failing to satisfy the patent eligibility requirements of § 101,[41] notwithstanding the Court's dicta in *Myriad* that eligibility of "applications of knowledge about the BRCA1 and BRCA2 genes" had not been challenged in that case.[42]

In another respect, however, the decision that at least certain cDNA molecules remain patent-eligible would seem to provide patent applicants and litigants with an argument that the requirement of something more than "routine, conventional activity" for patent eligibility articulated by the Court in *Prometheus* is a limited one.[43] The process for synthesizing cDNA is certainly a "routine, conventional activity" by molecular biologists, provided that some of the endogenous sequence it is based upon is known.[44] And, in a broader sense, the differences between cDNA and the naturally occurring molecule that its sequence is directly derived from, referred to as mRNA, may be no greater than differences between endogenous genes and synthetic copies thereof from the perspective of chemical structure if not function.[45] Thus, cDNA molecules can be eligible for patenting, even though they are made by using patent-ineligible DNA molecules in a "routine, conventional" way,[46] which would seem to cabin the holding in *Prometheus* that something more is necessary for patent eligibility.

Beyond Genes

The Court may have considered that it was crafting a compromise by allowing some cDNA molecules to retain patent-eligible status while excluding isolated genomic DNA.[47] cDNA has long been recognized as a particularly valuable type of DNA because it codes for therapeutic proteins yet lacks the introns present in genomic DNA, making it shorter and easier to manipulate and use.[48] However, at least with regard to the potential for future therapeutic usefulness of portions of genomic DNA from which cDNA cannot be derived, the decision may have been shortsighted. It is believed that only a very small percentage of the human genome encodes exons, with introns, sequences between genes, and other sequences from which cDNA cannot be produced constituting the remainder.[49] Although this vast proportion of the genome does not encode proteins, it has other functions related to regulating protein expression in ways that are continuing to be investigated, with potential diagnostic and therapeutic applications.[50] Thus, an over-emphasis on the historically significant value status of cDNA may have come at the expense of recognizing new and future applications of other genetic molecules.

> In many respects, the direct, practical consequences of *Myriad* have yet to be determined.

Furthermore, although on its face *Myriad* may appear limited to genetic material, its rationale may be just as easily applied to other molecules that are discovered in nature but "isolated" and purified from naturally occurring contaminants and associated molecules, or synthetic replicas of such molecules (e.g., a bactericide produced by a mold, a protein produced by an animal that has therapeutic properties or by a plant that affects vegetable longevity, a chemical produced by a plant that can function as a drug, or a compound found in crude oil that functions as a lubricant).[51] For example, in a letter addressed to the U.S. Attorney General and the Solicitor General when *Myriad* was on remand to the Federal Circuit, numerous "industrial, environmental, food and agricultural biotechnology companies" warned against a ruling that would overturn the more than 100-year-old policy of the U.S.P.T.O. of granting "patents on new and useful preparations of naturally-sourced chemicals; fungal, bacterial, or algal cultures; enzyme preparations; and other isolated, purified, or modified biological products," which would "create significant uncertainty" as to patent strength and value in their industries.[52]

Indeed, there are many examples of U.S. court decisions holding that naturally occurring molecules, in addition to DNA, that are isolated and purified can be patented, including the porcine enzyme chymosin,[53] vitamin B-12,[54] prostaglandins,[55] a compound produced by strawberries that is responsible for their flavor (2-methyl-2-pentenoic acid),[56] and adrenaline.[57] However, there are also numerous examples where patent protection for molecules that were purified from natural sources was denied, including a synthetic replica of a naturally occurring dye (alizarine),[58] purified tungsten,[59] cellulose,[60] vanadium,[61] uranium,[62] and ultramarine.[63]

During oral argument in *Myriad*, Justice Breyer, at least, appeared to wrestle with this issue. He stated his understanding that the exclusion from patent eligibility for

products of nature was "hornbook law"[64] – a characterization that may be considered overly assured, at least with regard to purified or isolated products, considering the seemingly contradictory precedents cited above. Justice Alito asked why isolated DNA ought to be excluded from patent eligibility if a medicinal compound isolated from a plant is patent-eligible.[65] Although counsel responded that functional alteration is required for patent-eligibility of isolated natural products and that isolating DNA does not alter its function[66] – a dubious contention in and of itself – this line of reasoning did not make its way into the written decision. Thus, it remains unclear whether *Myriad* will be brought to bear on other isolated natural products.[67] In at least one case so far, a patent challenger has asked the Federal Circuit to invalidate claims to human embryonic stem cells on the basis that they are drawn from patent-ineligible products of nature under *Myriad*.[68]

In fact, the Court did not cite the varied, if somewhat aged, case law cited above on whether isolated molecules fall within the "products of nature" exclusion, although the district court did cite some of it in its ruling.[69] The omission may be because most of the decisions were not issued by the Supreme Court, which elected to rely on its own precedents, although there are Supreme Court cases from the 19th century denying patent protection to molecules that were purified from natural sources.[70]

The legal foundation for the prevailing policy of considering isolated genes to be patent eligible is commonly believed to be traceable to a decision from 1911 by then-District Court Judge Learned Hand, *Parke-Davis & Co. v. H.K. Mulford Co.*[71] Although characterized as dicta, and from a trial court no less,[72] Judge Hand's conclusion that adrenalin purified from adrenal glands can be patented[73] is regarded as a seminal case on the general question of whether molecules purified from natural sources can be patented.[74]

The *Myriad* Court referred instead, however, to its own precedents in *Funk Brothers Seed Co. v. Kalo Inoculant Co.*, in which it had held that combinations of naturally occurring strains of bacteria for use as agricultural inoculants are not patent eligible,[75] and *Diamond v. Chakrabarty*, in which it had held that genetically modified bacteria are patent eligible,[76] although neither case dealt directly with the question of whether isolated, naturally occurring molecules fall within the "product of nature" exception to patent eligibility. The Court found that the patentee's claims were more akin to the patent-ineligible claims in *Funk Brothers* than to the patent-eligible claims in *Chakrabarty*.[77] In this way, it reiterated the products of nature exclusion and may also have pulled into the exclusion a broader category of products isolated from natural sources, intentionally or otherwise.

The Specter of Preemption

What is the purpose of the doctrines of exclusion from patent eligibility? Why did the Court in *Myriad* consider it important to categorically exclude isolated genes from the realm of patents? The ostensible answer is an apparent concern that overreach of patenting may impede, rather than promote, the "Progress of Science and useful Arts," the constitutional purpose underlying the patent regime.[78] Much as the Court stated in *Bilski*[79] and *Prometheus*[80] that patents should not go so far as to "preempt" the use of a natural law lest such preemption have the counterproductive effect of inhibiting innovation,[81] here the Court expressed its belief that patents should not "tie up" the "basic tools of scientific and technological work" and thereby "inhibit future innovation."[82]

But is this concern justified here? And is the Court the appropriate body to make that determination in any case? For example, Myriad's policy was that it "allowed scientists to conduct research studies on BRCA1 and BRCA2 freely, the result of which has been the publication of over" 8,000 research papers, "representing the work of over 18,000 scientists."[83] This continued study of the patented genes by basic researchers throughout the life of the patents, is in keeping with evidence that basic science researchers are generally unencumbered by concerns that their work may infringe third-party patent rights.[84] Among the reasons accounting for this general lack of "preemptive effect" of patents on basic research is that basic researchers simply infringe on patents anyway, either because they are unaware of them or because they consider their conduct to fall within a "research exemption" from infringement liability.[85] For their part, industrial patent holders tolerate infringement of their patent rights by basic researchers in part because the "small prospective gains," coupled with "bad publicity" from bringing suit against such defendants and universities, discourage them from doing so, whereas permitting such infringement "can increase the value of the patented technology."[86] If the Court were so concerned with patents impeding progress, it is curious that it did not address the strong evidence that gene patents actually do not preempt scientific progress and, in fact, promote it. Indeed, the Court's 1980 *Chakrabarty* decision,[87] conferring patent-eligibility status on genetically modified bacteria, is widely credited with enabling a strong biotechnology industry to flourish in the United States.[88]

There are, however, those whose activities have been curtailed because of third-party gene patents. Specifically, patent holders, such as the patentee in *Myriad*, have enforced their patents against clinical laboratories that offer fee-for-service genetic diagnostic testing covered by claims to genetic sequences, which has caused the laboratories to stop offering testing and to forgo their own research.[89] Thus, gene patents do in fact have a preemptive effect. But whether this effect goes beyond the preemption patents generally are designed to effect – e.g., by enabling patentees to exclude competitors[90] – and has a more profound effect on squelching scientific inquiry in general is less clear.

Thus, the Court may not be in the best position to resolve this question and its reinvigorated focus on § 101 may be ill-conceived.[91] Chief Judge Randall R. Rader of the Federal Circuit, speaking at the Annual Meeting of

the New York State Bar Association's Intellectual Property Law Section in January 2013, stated that the Supreme Court was exerting undue judicial activism in its § 101 jurisprudence.[92] Discussing *Prometheus*, he noted that the exclusion from patent eligibility of natural phenomena was judicially created and unnecessary.[93] Elsewhere, Judge Rader has lamented the extent to which courts have strayed from the course laid out in *Chakrabarty*, wherein the Court stated that its task in interpreting § 101 was a "narrow one of determining what Congress meant by the words it used in the statute; once that is done our powers are exhausted,"[94] as a reason for the disorienting proliferation of § 101 case law.[95]

As it had in *Prometheus*,[96] the Court stated that a proper balance was needed to foster a patent regime that provides incentives to drive innovation and that "all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas, and too broad an interpretation of this exclusionary principle could eviscerate patent law."[97] Perhaps, however, Congress is in the better position to determine whether the doctrines of exclusions from patent eligibility are a needed and beneficial way to promote scientific progress and to craft policy accordingly.[98] For example, if it were determined that gene patents may have a net effect of promoting scientific progress, provided proper safeguards of basic research are in place, Congress could codify an appropriately targeted version of the common law "research exemption" to patent infringement.[99] Or perhaps health care or consumer protection legislation could be brought to bear to assure availability and affordability of medical diagnostics and treatment, while allowing patentees to profit reasonably from their investments in research and development,[100] matters the patent laws are not generally designed to address.

A related issue is the Court's difficulty with, and shortcomings in addressing, the technical details of *Myriad*.[101] Of particular note was a one-paragraph concurring opinion by Justice Scalia, in which he declared that he was "unable to affirm those details on [his] own knowledge or even [his] own belief" yet felt sufficiently informed to concur in the judgment.[102] Some have opined that such a statement sends a poor message to lower courts and juries, who wrestle mightily with complex technical issues in patent litigation.[103] In this regard, it is interesting to note that Judge Hand, in the *Parke-Davis* case that is credited with establishing the legal foundation that eventually culminated in rendering gene patents eligible for patenting, also noted "the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of chemistry to pass upon such questions" as were before him.[104] In that respect, Justice Scalia's concurrence has brought us full circle. ■

1. The Court had ruled on patent eligibility issues in June 2010 (in *Bilski v. Kappos*, 561 U.S. 593 (2010) and in March 2012 (in *Mayo Collaborative Servs. v. Prometheus Laboratories, Inc.*, 132 S. Ct. 1289 (2012)).

2. 133 S. Ct. 2107 (2013).

3. *Id.* at 2113.

4. *Id.* at 2118, n.6.

5. *Id.* at 2113.

6. *Id.* at 2114.

7. *Id.*

8. "A patent on a gene covers the isolated and purified gene but does not cover the gene as it occurs in nature * * * DNA compounds having naturally occurring sequences are eligible for patenting when isolated from their natural state and purified. . . ." Utility Examination Guidelines, 66 Fed. Reg. 1092, 1093.

9. *Myriad*, 133 S. Ct. at 2118.

10. *Id.* at 2114.

11. *Id.*

12. 132 S. Ct. 1289. *See* Teige P. Sheehan, *Mayo v. Prometheus: The Overlap Between Patent Eligibility and Patentability*, 21 Bright Ideas No. 2, 3, 6 (Fall 2012).

13. 133 S. Ct. at 2114.

14. *Id.* at 2111.

15. "'Whoever invents or discovers any new and useful . . . composition of matter, or any new and useful improvement therefor, may obtain a patent therefor, subject to the conditions and requirements of'" the Patent Act. *Myriad*, 133 S. Ct. at 2116 (quoting 35 U.S.C. § 101).

16. *Id.* at 2116 (internal quotation marks omitted).

17. *Id.* at 2117. Note the that the transferrable nature of the Court's analysis between, here, "products of nature" and "laws of nature" as excluded from patent eligibility is not uncommon in its § 101 jurisprudence, which occasionally goes so far as to characterize in one opinion an invention as falling within one exception, then subsequently classifying that holding as pertaining to another exception. Sheehan, *supra* note 12, at 3, 6 & n.14.

18. *Myriad*, 133 S. Ct. at 2119.

19. *Id.* at 2112.

20. *Id.* at 2119.

21. *Id.*

22. Brief of Professor Christopher M. Holman as Amicus Curiae Supporting Neither Party at 6, 689 F.3d 1303 (Fed. Cir. 2012) (Appeal No. 2010-1406); Posting by Kevin E. Noonan to Patent Docs, http://www.patentdocs.org/2012/07/scientist-law-professor-files-amicus-brief-in-myriad-case.html (July 11, 2012).

23. *Myriad*, 133 S. Ct. at 2118–19.

24. *Id.* at 2120.

25. Gregory D. Graff, Devon Phillips, Zhen Lei, Sooyoung Oh, Carol Nottenburgh, & Philip G. Pardey, *Not Quite a Myriad of Gene Patents*, 31 Nature Biotechnology 404 (2013); posting by Kevin E. Noonan to Patent Docs, http://www.patentdocs.org/2013/05/the-myriad-case-and-gene-patents-much-ado-about-nothing.html (May 14, 2013).

26. *Stakeholder Reactions Varied on Impact of Supreme Court's* Myriad *DNA Decision*, [2013] 86 Pat. Trademark & Copyright J. (BNA) No. 2119, at 402 (June 21, 2013) (*Stakeholder Reactions*).

27. *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, 689 F.3d 1303, 1333 (Fed. Cir. 2012).

28. 35 U.S.C. § 102.

29. Letter from Andrew H. Hirshfeld, Deputy Comm'r Patent Examination Policy, U.S.P.T.O., to Patent Examining Corps, dated June 13, 2013, available at http://patentdocs.typepad.com/files/uspto-myriad-memorandum.pdf.

30. *Myriad*, 133 S. Ct. at 2119–20.

31. Posting by Kevin E. Noonan to Patent Docs, http://www.patentdocs.org/2013/07/myriad-genetics-files-infringement-suit-against-gene-by-gene-for-genetic-diagnostic-testing-of-brca-.html (July 10, 2013); posting by Kevin E. Noonan to Patent Docs, http://www.patentdocs.org/2013/07/myriad-genetics-files-suit-against-ambry-genetics-for-genetic-diagnostic-testing-of-brca-genes.html (July 9, 2013).

32. Posting by Kevin E. Noonan to Patent Docs, http://www.patentdocs.org/2013/06/does-the-myriad-decision-presage-a-golden-age-of-patent-free-personalized-medicine.html (June 19, 2013).

33. *Stakeholder Reactions, supra* note 26, at 402–03.

34. 689 F.3d 1303, 1334 (2012).

35. *Id*.

36. 561 U.S. 593 (internal quotation marks omitted).

37. *Myriad*, 133 S. Ct. at 2114.

38. 132 S. Ct. at 1305.

39. *Id*. at 1298–99.

40. 689 F.3d at 1335.

41. Myriad *Criticized for Lack of Guidance, Putting Too Much Focus on Section 101*, [2013] 86 Pat. Trademark & Copyright J. (BNA) No. 2119, at 405 (June 21, 2013) (Myriad *Criticized for Lack of Guidance*).

42. 133 S. Ct. at 2120.

43. Posting by Grantland Drutchas to Patent Docs, http://www.patentdocs.org/2013/06/the-myriad-supreme-court-decision-where-does-it-leave-the-inventive-concept-test.html (June 16, 2013).

44. *Id*.

45. Brief of Professor Christopher M. Holman as Amicus Curiae Supporting Neither Party at 8, 11, 689 F.3d 1303 (Fed. Cir. 2012) (Appeal No. 2010-1406).

46. Posting by Grantland Drutchas to Patent Docs, http://www.patentdocs.org/2013/06/the-myriad-supreme-court-decision-where-does-it-leave-the-inventive-concept-test.html (June 16, 2013).

47. Posting by Kevin E. Noonan to Patent Docs, http://www.patentdocs.org/2013/04/what-we-may-learn-from-the-myriad-oral-argument.html (April 18, 2013).

48. *Stakeholder Reactions supra* note 26, at 402, 402–403.

49. Matthew J. Hangauer, Ian W. Vaughn & Michael T. McManus, *Pervasive Transcription of the Human Genome Produces Thousands of Previously Unidentified Long Intergenic Noncoding RNAs*, 9 PLOS Genetics 1 (2013).

50. Kevin Chen & Nikolaus Rajewsky, *The Evolution of Gene Regulation by Transcription Factors and microRNAs*, 8 Nature Rev. Genetics 93 (2007); Jakub O. Westholm & Eric C. Lai, *Mirtrons: microRNA Biogenesis Via Splicing*, 93 Biochimie 1897 (2011).

51. Posting by Kevin E. Noonan to Patent Docs, http://www.patentdocs.org/2013/04/what-we-may-learn-from-the-myriad-oral-argument.html (April 18, 2013); posting by Sean Brennan to Patent Docs, http://www.patentdocs.org/2013/07/after-myriad-a-herd-of-elephants-in-the-room.html (July 3, 2013).

52. Letter to Hon. Eric H. Holder, Jr., U.S. Attorney General and Hon. Donald Verrilli, Jr., U.S. Solicitor General (June 12, 2012), http://patentdocs.typepad.com/files/myriad-letter-1.pdf.

53. *Blumenthal v. Burrell*, 53 F. 105, 107 (2d Cir. 1892).

54. *Merck & Co. v. Olin Mathieson Chem. Corp.*, 253 F.2d 157, 164 (4th Cir. 1958).

55. *In re Bergstrom*, 427 F.2d 1394 (C.C.P.A.1970).

56. *In re Kratz*, 592 F.2d 1169 (C.C.P.A. 1979).

57. *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95, 103 (S.D.N.Y. 1911).

58. *Cochrane v. Badische Anilin & Soda Fabrik*, 111 U.S. 293 (1884).

59. *Gen. Elec. Co. v. De Forest Radio Co.*, 28 F.2d 641 (3d Cir. 1928).

60. *Am. Wood Paper Co. v. Fibre Disintegrating Co.*, 90 U.S. 566 (1874).

61. *In re Marden*, 47 F.2d 958 (C.C.P.A. 1931).

62. *In re Marden*, 47 F.2d 957 (C.C.P.A. 1931).

63. *In re Merz*, 97 F.2d 599 (C.C.P.A. 1936).

64. Transcript of record at 49:16–50:3.

65. *Id*. at 7:2–8:20; posting by Kevin E. Noonan to Patent Docs, http://www.patentdocs.org/2013/04/what-we-may-learn-from-the-myriad-oral-argument.html (Apr. 18, 2013)

66. Transcript of record at 8:21–9:14.

67. *Stakeholder Reactions supra* note 26, at 402, 403 (June 21, 2013).

68. Ryan Davis, *Stem Cell Patent Case Will Be Early Test of Myriad's Reach*, LAW360, July 10, 2013, http://www.law360.com/ip/articles/456259/stem-cell-patent-case-will-be-early-test-of-myriad-s-reach (subscription required).

69. 702 F. Supp. 2d 181, 223–27.

70. *Cochrane*, 111 U.S. at 293; *Am. Wood Paper Co.*, 90 U.S. at 566.

71. 189 F. 95, 103.

72. Jon M. Harkness, *Dicta on Adrenalin(e): Myriad Problems with Learned Hand's Product-of-Nature Pronouncements in Parke-Davis v. Mulford*, 93 J. Pat. & Trademark Off. Soc'y 363, 367 (2011).

73. 189 F. at 103.

74. Michael D. Davis, *The Patenting of Products of Nature*, 21 Rutgers Computer & Tech. L.J. 293, 334 (1995).

75. 333 U.S. 127, 132 (1948).

76. 447 U.S. 303, 310 (1980).

77. *Myriad*, 133 S. Ct. at 2117.

78. U.S. Const. art. I, § 8, cl. 8.

79. 130 S. Ct. at 3253 (2010).

80. 132 S. Ct. at 1294.

81. Sheehan, *supra* note 12, at 3, 5.

82. 133 S. Ct. at 2116.

83. *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, 702 F. Supp. 2d 181, 210 (S.D.N.Y. 2010).

84. Posting by Timothy Caulfield to Science Progress, http://scienceprogress.org/2009/10/do-gene-patents-hurt-research (2009); John P. Walsh, Charlene Cho & Wesley M. Cohen, *View From the Bench: Patents and Material Transfer Agreements*, 309 Science 2002 (2005) (Walsh, Cho & Cohen); John P. Walsh, Ashish Arora & Wesley M. Cohen, *Working Through the Patent Problem*, 299 Science 1021 (2003) (Walsh, Arora & Cohen); *Momenta Pharmaceuticals, Inc. v. Amphastar Pharmaceuticals, Inc.*, 686 F.3d 1348, 1375 (Fed. Cir. 2012), J. Rader, dissenting ("The reason that patents have not been proven to impede more than stimulate technological advance is simple: it does not happen.").

85. Walsh, Cho & Cohen, *supra* note 84; Walsh, Arora, & Cohen, *supra* note 84.

86. Walsh, Arora, & Cohen, *supra* note 84.

87. 447 U.S. 303.

88. Heather Hamme Ramirez, *Defending the Privatization of Research Tools: An Examination of the "Tragedy of the Anticommons" in Biotechnology Research and Development*, 53 Emory L.J. 359, 372 (2004).

89. *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, 702 F. Supp. 2d 181, 205–08 (S.D.N.Y. 2010); Mildred Cho, *Patently Unpatentable: Implications of the* Myriad *Court Decision on Genetic Diagnostics*, 28 Trends Biotechnol. 548 (2010) (Cho).

90. *Ultramercial, Inc. v. Hulu, LLC*, 2013 WL 3111303, at *10 (Fed. Cir. 2013); Sheehan, *supra* note 12, at 3, 5 & n.44.

91. Myriad *Criticized for Lack of Guidance supra* note 41, at 405.

92. Ryan Davis, *Rader Calls Out High Court's "Activism" in IP Law*, LAW360, Jan. 22, 2013, http://www.law360.com/articles/408846/rader-calls-out-high-court-s-activism-in-ip-law (subscription required).

93. *Id.*

94. 447 U.S. at 318.

95. *CLS Bank Int'l v. Alice Corp. Pty. Ltd.*, 2013 WL 1920941, at *60 (Fed. Cir. 2013).

96. Sheehan, *supra* note 12, at 4 n.20.

97. 133 S. Ct. at 2116 (internal quotation marks omitted).

98. Myriad *Criticized for Lack of Guidance supra* note 41, at 405.

99. *In re Rosuvastatin Calcium Patent Litig.*, 703 F.3d 511, 527 (Fed. Cir. 2012).

100. *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, 702 F. Supp. 2d 181, 211 (S.D.N.Y. 2010); Cho, *supra* note 89.

101. *Stakeholder Reactions supra* note 26, at 402, 404.

102. 133 S. Ct. at 2120.

103. *Stakeholder Reactions supra* note 26, at 402, 404.

104. *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D.N.Y. 1911).

O'Bannon

What Is the Right of Publicity?

By James A. Johnson

Now that the college basketball season and the NCAA Championships are long over, merchandisers have been scrambling to secure images and action shots of the best of the best to enhance sales of their goods and services. But what happens to the players whose images are bought and sold? Can they too benefit from the post-season merchandising frenzy? In other words, do they have the right of publicity? This has been playing out in court at the federal level, and what follows is an explanation of the Right of Publicity, a discussion of how its application differs in various states, and provides guidance on the subject for general practitioners, intellectual property lawyers and entertainment law attorneys.

In 2009, former UCLA basketball star Ed O'Bannon filed a lawsuit against the NCAA and the Collegiate Licensing Company for their failure to compensate him *during and after his collegiate athletic career* for the use of his name, image and likeness on trading cards, DVDs, video games and other materials.[1] Subsequently, the O'Bannon lawsuit was consolidated with one brought by former University of Nebraska quarterback Sam Keller, to form what is now called *In re: NCAA Student-Athlete Name and Likeness Litigation*.[2] In a July 5, 2013, ruling, Chief U.S. District Judge Claudia Wilken, sitting in the Northern District of California, ruled that the plaintiffs' attorneys would be allowed to amend their complaint against the NCAA and two co-defendants to include current college student-athletes.

On July 19, 2013, the plaintiffs added Vanderbilt linebacker Chase Graham, Clemson cornerback Darius Robinson, linebacker Jake Fischer and kicker Jake Smith from Arizona, and tight end Moses Alipate and wide receiver Victor Keise of Minnesota. They join 16 former NCAA athletes already listed as plaintiffs.

In the consolidated lawsuit, commonly referred to as *O'Bannon*, the plaintiffs allege that the NCAA and its business partners made agreements that unreasonably restrain trade in violation of the Sherman Act and that the NCAA deprives former student-athletes of their right of publicity.[3] Keller and O'Bannon contend that, through these agreements, the NCAA prevents student-athletes from entering the licensing market and negotiating a

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price in exchange for their right of publicity. In addition, the plaintiffs contend that the NCAA's profits from these agreements constitute unjust enrichment. To prevail on their Section I Antitrust claim Keller and O'Bannon must show that (1) there was an agreement; (2) the agreement unreasonably restrains trade under a rule of reason analysis; and (3) the restraint affects interstate commerce.[4] The court has determined that there exists a relevant and sufficient market to support a Sherman Act claim.[5]

At the center of the plaintiffs' unjust enrichment claim is the required signing of form 08-3a at the beginning of each year by every student-athlete. This form authorizes the NCAA to use the athlete's name or picture to promote NCAA Championships and other NCAA events and programs. A student-athlete cannot participate in intercollegiate athletics until he or she has signed this form. O'Bannon and Keller claim this agreement restricts and precludes the student-athlete's ability to use his or her name, image or likeness for commercial purposes, *particularly after graduation.* The plaintiffs dispute that the signing of form 08-3a by each student-athlete gives the NCAA a right of publicity for commercial purposes.

College sports are a multi-billion-dollar industry, and in 2010 the NCAA signed a $10.8 billion, 14-year TV contract. So, what is the use of a student-athlete's name, image and likeness all about?

Distinction of Rights

The Genesis of the Legal Right of Publicity Is Rooted in and Intertwined With the Right of Privacy

The right of publicity is a protectable property interest in one's name, identity or persona. Every person, celebrity or non-celebrity has a right of publicity – that is, the right to own, protect and commercially exploit his or her own iden-

tity. The genesis of the legal right of publicity is rooted in and intertwined with the right of privacy.[6] Privacy and publicity rights become entwined when another's name or likeness is appropriated, without permission, for one's own benefit.[7] Notwithstanding, the right of privacy is distinguishable because it is a personal right, non-assignable and terminates at death.

To further clarify the difference and similarity between privacy and publicity rights, a photograph in an advertisement that causes injury to the plaintiff's feelings and dignity, resulting in mental or physical damages, implicates the right of privacy. Failing the elements of mental or physical injury invokes the right of publicity. This is the legal right to exploit for commercial purposes one's own name, character traits, likeness[8] or other indicia of identity. Depending on state law, use of a caricature,[9] popular phrase ("Here's Johnny"),[10] sound-alike voice,[11] name in a car commercial,[12] animatronic likeness,[13] and statistics of professional baseball players,[14] without consent, have all been held to come within the ambit of publicity rights, constituting infringement.

Proprietary Interest

An individual has the right to control, direct and commercially use his or her name, voice, signature, likeness or photograph. Publicity rights may include the right to assign, transfer, license, devise and to enforce the same against third parties. Today, 19 states have publicity statutes,[15] which differ greatly, and at least a half dozen more by common law. Thirteen states do not recognize the right of publicity.[16] It is the commercial value together with the commercial exploitation, without prior consent, that triggers a cause of action. The unauthorized use, in a commercial context, engenders money damages or equitable relief by way of an injunction, or both.

Supplemental Jurisdiction

Unlike other fields of intellectual property law, there is no federal statute or federal common law governing rights of publicity. Nevertheless, federal claims of unfair competition and false advertisement or false endorsement under the Lanham Act,[17] together with a state claim of right of publicity, can be asserted in federal court under pendent jurisdiction. In appropriate circumstances, a prevailing party can collect treble damages, costs and attorney fees on Lanham Act claims, by establishing unfair competition, dilution or the likelihood of public confusion.[18] Where the defendant's activities are also in willful disregard of the plaintiff's rights, punitive damages are warranted.[19]

Constitutional Protection

Reporting newsworthy events or newsworthiness, with nonconsensual use of a name or photo in a magazine, is afforded First Amendment guarantees of freedom of speech and the press.[20] There is no violation of publicity rights. It is this newsworthy dimension or article of public interest that provides constitutional protection, even for a newspaper selling promotional posters of NFL Quarterback Joe Montana's four Super Bowl Championships.[21] The posters were reproductions of actual newspaper pages. The California Court of Appeals opined that the posters depicted newsworthy events and the newspaper had a right to promote itself with them.

Similarly, the publisher of an artist's work depicting Tiger Woods' likeness, titled "The Masters of Augusta," is afforded First Amendment protection based on "fine art,"[22] despite the fact that 5,250 copies of the print had been sold. The court found, however, that the art print was not a mere poster or item of sports merchandise, but rather an artistic creation seeking to express a message. Further, the right of publicity does not extend to prohibit depictions of a person's life story in a television miniseries,[23] book[24] or film.[25] How is it that celebrities may prevent the use of their visual and audio images, yet cannot stop authors from writing about them? The courts do not draw a clear path between commercial exploitation and protected expression. In this morass, questions abound and answers elude.

The publicity statutes in the 19 states with such statutes vary widely, and so does post-mortem protection. For example, in Kentucky it's 50 years; in Ohio, 60 years; and in Tennessee, 10 years with a potential perpetual right, so long as there is no nonuse for two consecutive years. New York does not recognize a post-mortem right of publicity. In 2007 California amended its statute to include deceased personalities, providing a cause of action for the unauthorized use of a deceased personality's name, voice, signature, photograph or likeness for commercial purposes within 70 years of the personality's death.[26] Is it now time for a uniform federal statute governing the rights of publicity?

In *Cobb v. Time, Inc.*,[27] Randall "Tex" Cobb, a former professional boxer, sued *Sports Illustrated* for an article describing his alleged participation in drug use and a fixed boxing match. The Sixth Circuit affirmed summary judgment of the district court based on the actual malice standard because Cobb was a public figure.

Conclusion

O'Bannon's antitrust lawsuit against the NCAA challenges the right of the NCAA, the Collegiate Licensing Company and EA Sports to use commercially student-athletes' likenesses without paying them. It is interesting to note that the plaintiffs include NBA Hall of Fame legends Bill Russell and Oscar Robertson.

On July 31, 2013, the Ninth Circuit Court of Appeals affirmed the district court decision in *Keller v. EA Sports*, which said that the video game manufacturer cannot use former athletes' likeness without consent or compensation. This case had a significant impact on *O'Bannon v. NCAA* because U.S. District Judge Claudia Wilken was required to follow this precedent.

As of September 27, 2013, Electronic Arts and Collegiate Licensing Co., the other defendants in the *O'Bannon* case, have tentatively settled their roles and are prepared to pay $40 million to compensate college athletes. This is subject to court approval and an acceptable distribution plan. This

settlement leaves the NCAA as the lone defendant in the *O'Bannon* lawsuit.

On November 8, 2013, U.S. District Judge Claudia Wilken partially certified class-action status in *O'Bannon v. NCAA* for current and future college athletes, but not former ones. *O'Bannon* was argued before Judge Wilken from June 9 to June 27, 2014. On August 8, Judge Wilken ruled in favor of the plaintiffs in *O'Bannon*. She issued an injunction that will prevent the NCAA from enforcing any rules or bylaws that would prohibit member schools and conferences from offering a limited share of revenue generated from the use of player's names, images and likenesses over and above a full grant-in-aid.[28] The NCAA plans an appeal.

Wilken's ruling rejected the plaintiff's proposal that athletes be allowed to receive money for endorsements because it would undermine member schools and the NCAA to protect student-athletes from commercial exploitation. The 99-page opinion in favor of the plaintiffs has limits and space constraints precludes setting them all out.

The First Amendment requires that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information. This is congruent with the democratic processes under the constitutional guarantees of freedom of speech and of the press. Not all commercial unauthorized uses of identity violate the right of publicity. Violations turn on how the identities are used in a commercial context. Is the use solely to promote, sell or endorse products and services, or is it a fair use? The ultimate answer is based on the facts and circumstances of each case.

Fame is valued. The right of publicity protects the athlete's proprietary interest in the commercial value of his or her identity from exploitation by others.[29] The crux of the right of publicity is the commercial value of human identity. So, to borrow a phrase from basketball lexicon – *O'Bannon* did not make a clean sweep, but certainly made a game changer. ■

1. *O'Bannon v Nat'l Collegiate Athletics Ass'n*, No. C 09-3329 CW, 2009 WL 4899217 (N.D. Cal. Dec. 11, 2009).

2. No. CW, 2010 WL 5644656 (N.D. Cal. Dec. 17, 2010). *See Ryan Hart v. Elec. Arts Inc.*, No.11-3750 U.S.D.C. (3d Cir. May 21, 2013). Ryan Hart former Rutgers University quarterback alleged violation of his right of publicity by the misappropriation of his likeness and identity for commercial use in the NCAA Football videogames series without his consent. The court held that district court erred in holding that NCAA Football Series was shielded from right of publicity claims by the First Amendment. Electronic Arts NCAA Football Series based on the Transformative Use Test does not sufficiently transform Hart's identity to escape his stated right of publicity claim.

3. *Id.*

4. 15 U.S.C. ch.1 §§ 1 *et seq.*

5. *But see Agnew v. Nat'l Collegiate Athletics Ass'n*, 683 F.3d 328 (7th Cir. 2012) (Seventh Circuit affirmed a decision by a district court to dismiss a claim for failure to identify a relevant market in which the NCAA allegedly committed violations of the Sherman Act).

6. *Robertson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902). The Court rejected the common-law right of publicity, which led to the enactment of the New York privacy law, codified in the New York Civil Rights Law, 1903, N.Y. Civ. Rights, §§ 50–51. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905) (Georgia was the first state to recognize a personal privacy right against unauthorized commercial exploitation); *Pallas v. Crowley Milner & Co.*, 322 Mich. 411, 33 N.W. 2d 911(1948)

(Supreme Court of Michigan recognized a right of publicity where invasion of privacy was pleaded in preventing the nonconsensual use of a model's photograph in a local department store advertisement. The plaintiff was not a nationally known celebrity. Michigan recognizes publicity rights through a derivative privacy right at common law (*Janda v. Riley-Meggs Indus., Inc.*, 764 F. Supp. 1223 (E.D. Mich. 1991)). *Haelan Labs. v. Topps Chewing Gum*. 202 F. 2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953), is the seminal case that coined the term right of publicity.

7. *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031 (N.D. Ga. 1986), demonstrates the labyrinth of intellectual property rights in publicity issues such as copyright infringement and trademark dilution.

8. *Newcombe v. Coors*, 157 F.3d 686 (9th Cir. 1998) (Don Newcombe's stance and windup as pitcher for the Brooklyn Dodgers, displayed in a drawing in *Sports Illustrated*, created a triable issue of fact whether Newcombe is readily identifiable as the pitcher in the beer advertisement. It is interesting to note that Don Newcombe (Cy Young Award, MVP and Rookie of the Year) is the only player in major league history to have won all three awards).

9. *Titan Sports, Inc. v. Comics World Corp.*, 870 F. 2d 85 (2d Cir. 1989).

10. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

11. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1986), *Waits v. Frito Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

12. *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996).

13. *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997); *White v. Samsung Elecs. Am., Inc.*, 971 F. 2d 395 (9th Cir. 1992); 989 F.2d 1512 (9th Cir. 1993).

14. *Uhlaender v. Hendricksen*, 316 F. Supp. 1277 (D.C. Minn. 1970).

15. California: Cal. Civ. Code § 3344; Florida: Fla. Stat. Ann. § 540.08; Illinois: 765 Ill. Comp. Stat. § 1075/30; Indiana: Ind. Code 32-36-1-1; Kentucky: Ky. Rev. Stat. Ann. §391.170; Massachusetts: Mass. Gen. L. Ann., ch. 214, § 3; Nebraska: Neb Stat. §§ 20-201–20-211 and 25-840.01; Nevada: Nev. Stat. §§ 597.77–597.810; New York: N.Y. Civ. Rights L. §§ 50-51 N.Y. Gen. Bus. Law § 397, Ohio: Ohio Rev. Code Ann. § 2741.04; Oklahoma: 21 Okla. Stat. §§ 839.1–839.3; 12 Okla.§§ 1448–1449; Rhode Island: R.I. Gen Laws § 9-1-28; Tennessee: Tenn. Code Ann. §§ 47-25-1101–47-25-1108; Utah: Utah Code Ann. § 45-3-1; Virginia: Va. Code Ann. §§ 8.01-40, 18.2-216; Washington: Wash. Rev. Code §§ 63.60.030–63.60.037; Wisconsin: Wis. Stat. Ann. §§ 895.50; in Texas the tort of misappropriation protects a person's persona and the unauthorized use of one's name, image or likeness. *Brown v. Ames*, 201 F.3d 654 (5th Cir. 2000 (post-mortem right of publicity); Tex. Prop. Code §§ 26.001–26.015.

16. Alaska, Arizona, Connecticut, Idaho, Louisiana, Mississippi, New Hampshire, New Mexico, North Dakota, Oregon, South Carolina, Vermont and Wyoming.

17. Lanham Act § 43(a), 15 U.S.C. § 1125(a).

18. Lanham Act § 35(a), 15 U.S.C. § 1117(a).

19. *Frazier v. South Florida Cruises, Inc.*, 19 U.S.P.Q. 2d (BNA) 1470 (E.D. Pa. 1991) – defendant placed a full-page unauthorized advertisement in Ring Magazine inviting the public to cruise with former world heavyweight champion Smokin' Joe Frazier; Cecil Fielder, three-time MLB All-Star won over $400,000 in 2003 against a design firm for using his name without permission in commercial ads.

20. *Neff v. Time, Inc.*, 406 F. Supp. 858 (W.D. Pa. 1976); see, *Joe Dickerson & Assoc. v. Ditmar*, 34 P.3d 995 (Colo. 2001) – Colorado Sup. Ct. recognizes the tort of invasion of privacy by appropriation of name or likeness subject to First Amendment privilege where the use involves publication of matters that are newsworthy or of legitimate public concern.

21. *Montana v. San Jose Mercury News Inc.*, 34 Cal. App. 4th 790 (1995). *See, e.g., Hogan v. Hearst*, 945 S.W.2d 246 (Tex. App. 1997) – exemplifying the breadth of the newsworthy exception in negating a claim of invasion of privacy based on disclosure of highly embarrassing facts, obtained from a public record; *Peckham v. Boston Herald, Inc.*, 719 N.E. 2d 888 (Mass. App. Ct. 1999) – defense summary judgment on basis of newsworthiness to a statutory private facts claim.

22. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003); *see Comedy III Prods., Inc. v. Saderup, Inc.*, P. 3d 797 (Cal. 2001) (a T-shirt artist's realistic drawing of the Three Stooges was not sufficiently transformative to defeat a claim of California's publicity rights statute); *Brown v Elec. Arts, Inc.*, 724 F.3d 1235 (9th Cir. 2013) (NFL Legend Jim Brown sued video game manufacturer for use of his likeness in the Madden NFL series of football video games. The court ruled that the video games were expressive works entitled to protection under the First Amendment).

23. *Ruffin-Steinbeck v. Depasse*, 82 F. Supp. 2d 723 (E.D. Mich. 2000).

24. *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (applying Texas law).

25. *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (applying Pennsylvania law).

26. Cal. Civ. Code § 3344.1.

27. 278 F.3d 629 (6th Cir. 2002).

28. 4:09-cv-03329-CW (N.D. Cal. Aug. 8, 2014), http://www.cand.uscourts.gov/judges/cw/cases/NCAA.

29. *O'Brien v. Pabst Sales, Co.*, 124 F.2d 167, 170 (5th Cir. 1941). Davey O'Brien, famed Texas Christian University Heisman Quarterback & Philadelphia Eagle, opened the door to the professional athlete's right of publicity.

Asset Discovery Against Foreign Sovereigns After *NML*

By Robert K. Kry

In litigation against foreign sovereigns, a final judgment is often not so much the finish line as a mere waypoint. If the sovereign refuses to pay voluntarily, the plaintiff's options for collection are sharply limited by the Foreign Sovereign Immunities Act, which provides a broad immunity from attachment to most sovereign property. To locate assets that fall within one of the Act's exceptions, judgment creditors often seek discovery from the sovereign or third parties about potentially attachable assets. But those efforts themselves have provoked controversy, as foreign sovereigns have objected on immunity grounds.

In its recent decision in *Republic of Argentina v. NML Capital, Ltd.*,[1] the Supreme Court weighed in on that issue, rejecting Argentina's attempt to avoid asset discovery sought by holders of its defaulted sovereign debt. *NML* provides potent new tools to plaintiffs seeking to collect judgments from foreign sovereigns – tools that are potent not merely because they produce information but also because of the burdens they impose. Nonetheless, while cutting back on sovereign immunity, the Court was careful to preserve other sources of law as potential shields. Going forward, judgment creditors and sovereigns will both need to understand those other rules in litigating discovery disputes.

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Asset Discovery Under the Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act[2] provides two distinct forms of immunity. First, it provides jurisdictional immunity to foreign states and their instrumentalities.[3] That immunity is subject to a number of exceptions – for example, where the sovereign has waived immunity or engaged in certain commercial activities.[4] Second, the Act grants sovereign property immunity from attachment or execution.[5] That immunity is likewise subject to exceptions, but they are generally narrower than the ones that apply to jurisdictional immunity.[6] For example, while a waiver of immunity alone suffices to confer jurisdiction over a sovereign, the Act limits attachment and execution to assets "used for a commercial activity in the United States" even where the sovereign has purported to waive its property's immunity more broadly.[7]

All courts agree that a sovereign's jurisdictional immunity sharply limits discovery.[8] Enforcement of a discovery order against a sovereign necessarily entails an exercise of the court's jurisdiction over it. And although limited discovery may be appropriate to determine whether an exception to immunity applies, courts permit such discovery "circumspectly and only to verify allegations of specific facts crucial to an immunity determination."[9]

In the asset discovery context, however, jurisdictional immunity typically is not at issue. Asset discovery usually comes into play only after the plaintiff has obtained a judgment, in which case the court that entered judgment ordinarily will already have determined that the sovereign is subject to its jurisdiction.[10] In such cases, sovereigns have turned to the separate immunity from execution and attachment that the Foreign Sovereign Immunities Act affords to sovereign property.

Courts confronting that issue took two divergent views. In *Rubin v. Islamic Republic of Iran*,[11] the Seventh Circuit considered the issue in a case involving victims of terrorism who had obtained judgments against Iran under the Act's terrorism exception.[12] After the plaintiffs sought to execute their judgments against ancient Persian artifacts in American museums, Iran was forced to intervene to assert the property's immunity. The plaintiffs then sought general asset discovery against Iran, seeking information about all its property in the United States.

The Seventh Circuit refused to permit that discovery. As a general matter, it reasoned, the Foreign Sovereign Immunities Act aims to protect sovereigns from "the burdens of litigation, including the cost and aggravation of discovery."[13] Sovereign property in the United States is presumptively immune, and the exceptions are even narrower than those that apply to jurisdictional immunity. Accordingly, just as jurisdictional discovery must be ordered circumspectly, asset discovery had to proceed "in a manner that respects the statutory presumption of immunity and focuses on the specific property alleged to be exempt."[14] The practical upshot of that ruling was to foreclose blanket discovery demands inquiring into all of a sovereign's property and instead allow discovery only to verify claims that some specific property was attachable.

The Second Circuit took the opposite view in *EM Ltd. v. Republic of Argentina*, the case that later produced the Supreme Court's decision in *NML*.[15] That case arose out of Argentina's massive default on its external government debt in 2001. Hedge funds that had acquired the defaulted bonds obtained judgments against Argentina based on waivers of immunity in the bond indentures. They then sought discovery about Argentina's bank accounts and transaction history from third-party banks. Unlike the discovery in *Rubin*, the requests in *EM Ltd.* were not limited to U.S. property but instead sought discovery into Argentina's assets worldwide – on the theory that, even if a U.S. court could not attach the assets, the plaintiffs could later seek to execute against the assets in foreign courts.[16]

The Second Circuit upheld the discovery demands. Unlike the Seventh Circuit, it viewed asset discovery as implicating only a sovereign's immunity from jurisdiction, not sovereign property's immunity from execution and attachment. Because the bond indenture waivers authorized jurisdiction over Argentina, the court reasoned, a court could "exercise its judicial power over Argentina as over any other party," including by ordering discovery.[17] Although the plaintiff would have to overcome attachment immunity before ultimately seizing any property, it did not have to surmount that hurdle simply to receive information about Argentina's assets.[18]

Republic of Argentina v. NML Capital

Given the circuit conflict, the Supreme Court granted certiorari to review the Second Circuit's *EM Ltd.* decision in *Republic of Argentina v. NML Capital, Ltd.*[19] In a 7-1 decision authored by Justice Scalia, the Court affirmed.

The Court began by observing that Federal Rules of Civil Procedure (FRCP) Rule 69(a)(2) permits broad discovery in post-judgment collection proceedings.[20] The parties disputed whether that rule authorized discovery even into extraterritorial assets that the court ordering discovery could not ultimately attach. But the Supreme Court declined to resolve that dispute as beyond the scope of the question presented, instead assuming that such discovery was available as a general matter and focusing only on whether it would violate sovereign immunity.[21]

Turning to that issue, the Court emphasized the comprehensive nature of the Foreign Sovereign Immunities Act. "[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall."[22] And while the Act provided express immunities from jurisdiction and execution, "[t]here is no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets."[23] "Far from containing the 'plain statement' necessary to preclude application of federal discovery rules, the Act says not a word on the subject."[24]

Argentina urged that, prior to the Act, a foreign state's property was absolutely immune from both execution and

discovery, and that Congress lowered that bar only partially by permitting execution against narrow categories of assets in the United States.[25] But the Court observed that the Act provides *immunity* only to property "in the United States."[26] Thus, even if there were some basis for inferring discovery immunity from execution immunity, that would not shield Argentina's *foreign* assets from discovery.

Even as to property that was potentially immune from execution, the Court found Argentina's arguments unavailing. "[T]he reason for these subpoenas is that NML *does not yet know* what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's law."[27] And although subpoenas might be unenforceable if they sought discovery that could not possibly even lead to attachable assets, the reason would not be some "penumbral 'discovery immunity' under the Act" but rather the general requirement of relevance that governs all asset discovery.[28]

The U.S. government expressed grave concerns about the rule the Court ultimately endorsed. Broad discovery requests, it warned, threatened foreign states' sovereignty, undermining international comity and inviting retaliation.[29] In the Court's view, however, those concerns were better directed to Congress.[30]

Despite the sweeping language of its opinion, the Court was careful to note the decision's limited scope. "[W]e have no reason to doubt," it stated, that "'other sources of law' ordinarily will bear on the propriety of discovery requests of this nature and scope."[31] Those "other sources of law" include both "settled doctrines of privilege" as well as "the discretionary determination by the district court whether the discovery is warranted, which may appropriately consider comity interests and the burden that the discovery might cause to the foreign state."[32]

"Other Sources of Law" After *NML*

By sharply restricting the role of sovereign immunity, the Court significantly altered the landscape for asset discovery disputes. But by reaffirming the availability of "other sources of law" to restrict discovery, the Court made clear that its decision merely shifted the terrain for such disputes. Counsel representing both judgment creditors and sovereigns must fully understand those alternative doctrines to appreciate how the Court's decision will play out.

Other Immunities

NML by its terms addresses only the Foreign Sovereign Immunities Act. That limitation is important because asset discovery may implicate other immunities, many of which present stronger grounds for claiming immunity from discovery.

For example, *NML* does not address diplomatic immunity under the Vienna Convention. Unlike the Foreign Sovereign Immunities Act, the Vienna Convention expressly addresses discovery, providing that "archives and documents of the mission shall be inviolable at any time and wherever they may be," and that diplomats and their administrative staff may not be compelled to testify.[33] Although one district court nonetheless invoked *NML*-style reasoning to allow discovery into diplomatic assets,[34] its decision was short-lived. The Second Circuit stayed the ruling, finding "the applicability of *EM* to discovery claimed to be barred by the [Vienna Convention] to be of sufficient substance, and to raise issues of sufficient foreign relations sensitivity, to warrant a stay."[35]

Nor does the Supreme Court's decision in *NML* address common-law immunities, such as those applicable to heads of state and other foreign officials.[36] Discovery that implicates those immunities will still face hurdles. The Act's legislative history, for example, states that "if a plaintiff sought to depose . . . a high-ranking official of a foreign government, . . . official immunity would apply."[37] Given the Court's heavy reliance on statutory text in *NML*, courts will likely feel more free to imply restrictions on discovery from common-law immunities, whose scope is not bounded by particular statutory language.

Governmental Privileges

NML expressly mentioned "settled doctrines of privilege" among the "other sources of law" that survived its decision.[38] Congress clearly did not intend to displace such privileges by enacting the Foreign Sovereign Immunities Act. The Act's legislative history makes clear that "if a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply."[39] And a footnote attached to that sentence reads "e.g. 5 U.S.C. 552 concerning public information" – a reference to the federal Freedom of Information Act.[40]

Courts have recognized a number of privileges in litigation against the U.S. government. The government may withhold sensitive national security information under the "state secrets" privilege.[41] Executive privilege shields presidential and other high-level communications (although unfortunately for President Nixon, not absolutely).[42] More mundane privileges such as the "deliberative process" privilege cover internal agency working papers.[43]

Any privilege that the U.S. government may invoke in domestic litigation would seem to be fair game for a foreign sovereign as well. The legislative history's specific reference to the Freedom of Information Act suggests that courts will be receptive to such claims.[44] That statute sets forth a number of exemptions from disclosure.[45] By citing it, Congress appears to have envisioned that foreign governments could withhold information on similar grounds.

Foreign Prohibitions on Disclosure

Wholly apart from privileges under U.S. law, foreign sovereigns may also invoke their own laws to shield information from discovery. In that case, a court would apply comity principles to resolve the conflict between the foreign disclosure restriction and the U.S. discovery rules. The Supreme Court addressed such conflicts (somewhat obliquely) in *Société Nationale Industrielle Aerospatiale v. U.S. District Court*,[46] a case that *NML* cited in its "other sources

of law" discussion.[47] *Société Nationale* identified five factors a court should balance:

> (1) the importance to the . . . litigation of the documents or other information requested;
> (2) the degree of specificity of the request;
> (3) whether the information originated in the United States;
> (4) the availability of alternative means of securing the information; and
> (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.[48]

Those comity factors apply to discovery disputes involving foreign parties generally.[49] But they are particularly relevant to sovereigns. A sovereign's own documents and information are especially likely to implicate restrictions on disclosure under foreign law. And courts have been more sensitive to the interests underlying government secrecy than they have to other confidentiality restrictions such as bank secrecy laws and so-called "blocking statutes."[50] Thus, even where information would not be privileged under U.S. law, foreign sovereigns may seek to invoke their own laws to shield the information from discovery.

Discretionary Control

Finally, *NML* recognized that district courts have discretionary authority to tailor discovery, and that a court's exercise of discretion "may appropriately consider comity interests and the burden that the discovery might cause to the foreign state."[51] District courts have "broad discretion to limit discovery in a prudential and proportionate way."[52]

Those principles, applicable to all discovery, carry special force when the target is a foreign sovereign. Like any exercise of a court's coercive authority, discovery has the potential to disrupt foreign relations when directed against a sovereign. Even if Congress has not found those concerns compelling enough to warrant statutory immunity from discovery, courts may still consider them when exercising their discretion under the federal rules.

American-style discovery is often significantly broader than the procedures available in other jurisdictions; many countries descend from a civil-law legal tradition where discovery is essentially unheard of.[53] According to the *Restatement*, "[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States."[54] Those basic differences in legal culture – present in any dispute across national borders – are all the more pronounced when the opponent is the sovereign itself.

Asset discovery against foreign sovereigns also implicates practical concerns. Sovereigns are generally large bureaucracies whose records are strewn across many agencies and subdivisions. Particularly in the developing world, they lag behind private corporations in their technology and organizational infrastructure, making responses to discovery demands more difficult. Meanwhile, asset discovery is uniquely far-reaching, as it is not tied to a discrete claim or event the way pretrial discovery theoretically is. Courts will consider those sorts of factors when exercising their discretionary control.

Finally, even if attachment immunity does not imply immunity from asset discovery, it is still relevant to how a district court exercises its discretionary control. The Second Circuit emphasized a court's discretion to "limit discovery where the plaintiff ha[s] not demonstrated any likelihood that the discovery it s[eeks] relate[s] to attachable assets."[55] Even after *NML*, therefore, courts can consider the scope of potential attachment immunity in deciding whether particular asset discovery is warranted. For example, if a plaintiff sought discovery into assets located in a foreign country that accorded absolute attachment immunity to sovereign property, the sovereign would have a strong basis for opposing the discovery on the ground that it was not reasonably calculated to lead to attachable assets. Immunity will thus continue to figure prominently in asset discovery disputes, even if playing a different role.

District courts have "broad discretion to limit discovery in a prudential and proportionate way."

The Future of Asset Discovery Against Foreign Sovereigns

While *NML* leaves sovereigns with several tools to oppose discovery, it significantly alters the legal landscape for post-judgment enforcement proceedings. Plaintiffs and sovereigns must adapt their litigation strategies in light of the decision.

For plaintiffs seeking to execute a judgment, the decision offers important opportunities. The district court in *NML* offered to act as a "clearinghouse for information" in global collection efforts without any prior showing of "attachability" – a powerful tool in post-judgment collection proceedings.[56] Worldwide asset discovery not only offers a major new source of information for plaintiffs but also raises the costs of opposing collection efforts, precisely because it is so burdensome and intrusive.

As was true before *NML*, discovery directed at third parties will often prove more fruitful than discovery against the sovereign itself. A sovereign that has already refused to pay a judgment might or might not comply with asset discovery orders (depending in part, perhaps, on whether its refusal to pay reflects some legitimate ground for disputing the judgment or a more general contempt for the rendering jurisdiction's authority). By contrast, third-party banks and other

intermediaries subject to the court's jurisdiction have more to lose from noncompliance.

From the sovereign's perspective, the "other sources of law" that *NML* left on the table may provide only partial relief. Asset discovery is both burdensome and intrusive, and *NML*'s "other sources of law" do more to alleviate the intrusiveness than the burden. Even where a sovereign can assert privilege over sensitive documents, it may still have to shoulder the burden of locating them, reviewing them, and identifying them on a privilege log.

NML will also increase legal uncertainty by committing more decisions to the district court's discretion. Some questions invite bright-line answers. For example, the Supreme Court reserved judgment over whether Rule 69 permits discovery into extraterritorial assets at all.[57] Sovereigns will rely on that reservation to argue that district courts categorically lack discretion to order extraterritorial asset discovery.

For the most part, however, the federal rules assign decisions over the scope of discovery to the district court's discretion.[58] The five-factor comity test governing conflicts with foreign law is particularly subjective and open-ended.[59] By shifting the analysis from bright-line immunity rules to discretionary determinations by the district court, the Supreme Court's decision will increase not only the amount of discovery but the frequency of discovery disputes, as parties have less guidance over how much discovery a court will ultimately permit.

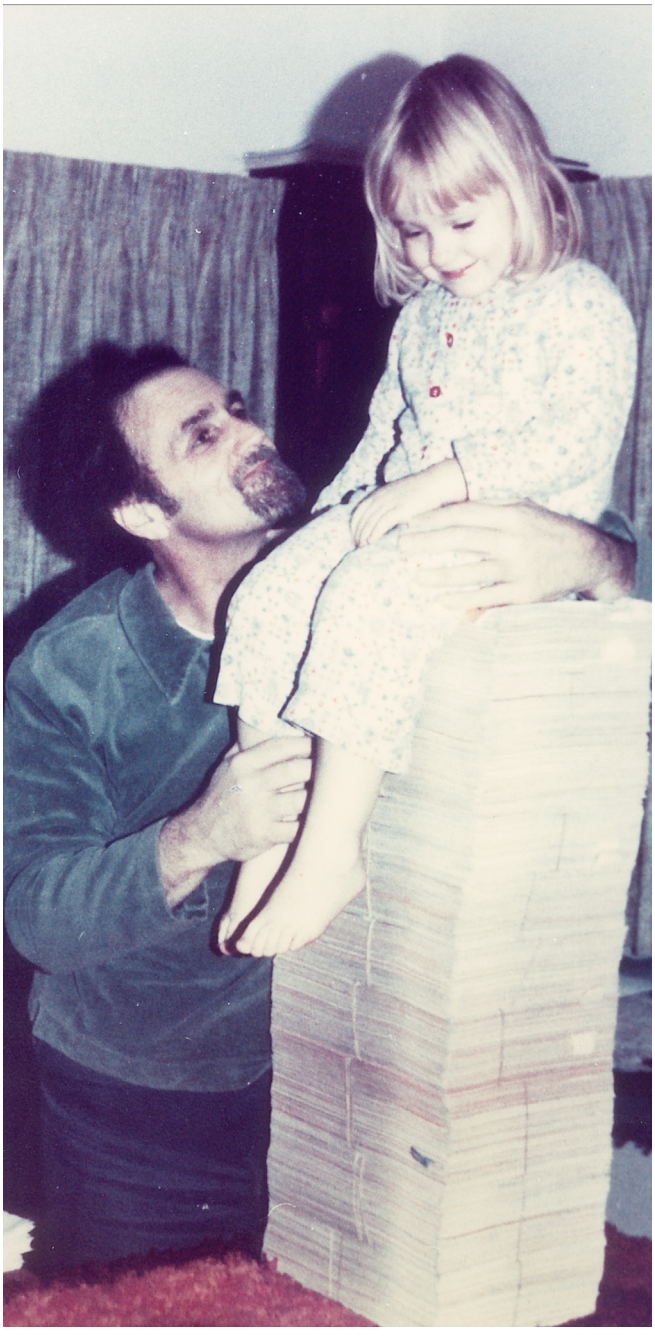
A related effect is to shift decision-making authority from courts of appeals to district courts. Discretionary rulings are by definition reviewed only for abuse of discretion, and thus are more likely to be affirmed on appeal. In many cases, moreover, appellate review may be denied or significantly delayed. Denials of immunity are immediately appealable under the collateral order doctrine.[60] But the appealability of privilege rulings is less clear. In *Mohawk Industries, Inc. v. Carpenter*,[61] the Supreme Court refused to allow immediate appeals from attorney-client privilege rulings. In a footnote, the Court declined to express a view on whether "certain governmental privileges" should be treated differently.[62] Sovereigns will rely on that footnote in seeking to appeal adverse privilege rulings, but it remains to be seen whether courts will be as receptive to those appeals as they were to immunity rulings.

At the end of its decision, the Supreme Court all but invited Congress to intervene.[63] Congress may ultimately do so, particularly if the Court's ruling ends up producing a foreign relations debacle. While it is too much to say the Court declared open season on asset discovery against foreign sovereigns, it dramatically changed the rules of the game. ■

1. 134 S. Ct. 2250 (June 16, 2014).
2. 28 U.S.C. §§ 1602 *et seq.*
3. 28 U.S.C. § 1604.
4. 28 U.S.C. § 1605.
5. 28 U.S.C. § 1609.
6. 28 U.S.C. § 1610.
7. *Compare* 28 U.S.C. § 1605(a)(1) *with* 28 U.S.C. § 1610(a)(1).
8. *See, e.g.*, *First City, Texas–Houston N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998); *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992).
9. *Arriba*, 962 F.2d at 534.
10. *See, e.g.*, *NML*, 134 S. Ct. at 2256 (noting that jurisdictional immunity "is of no help to Argentina here" because "[a] foreign state may waive jurisdictional immunity, and in this case Argentina did so" (citation omitted)).
11. 637 F.3d 783 (7th Cir. 2011).
12. Former 28 U.S.C. § 1605(a)(7), amended and recodified at 28 U.S.C. § 1605A.
13. 637 F.3d at 795.
14. *Id.* at 796.
15. 695 F.3d 201 (2d Cir. 2012), *aff'd sub nom. Republic of Arg. v. NML Capital, Ltd.*, No. 12-842 (June 16, 2014).
16. *Id.* at 203–04.
17. *Id.* at 209.
18. *Id.*
19. 134 S. Ct. 2250 (June 16, 2014).
20. *Id.* at 2254 (citing FRCP 69(a)(2)).
21. *Id.* at 2255.
22. *Id.* at 2256.
23. *Id.*
24. *Id.* (citation omitted).
25. *Id.* at 2257.
26. 28 U.S.C. § 1609.
27. *NML*, 134 S. Ct. at 2257.
28. *Id.*
29. *Id.* at 2258.
30. *Id.*
31. *Id.* at n.6.
32. *Id.* (quotation marks omitted).
33. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, arts. 24, 31.2, 37.2, 23 U.S.T. 3227, 3238, 3241, 3244.
34. *Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic*, 924 F. Supp. 2d 508, 526 (S.D.N.Y. 2013) (emphasis omitted).
35. *Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic*, No. 13-495, Dkt. 247 at 2 (2d Cir. May 28, 2013). The appeal was subsequently withdrawn without prejudice to reinstatement by stipulation of the parties, subject to the condition that the stay of diplomatic discovery would remain in effect. *See* Dkt. 321 at 3 (Nov. 4, 2013); Dkt. 328 (Nov. 7, 2013).
36. *See Samantar v. Yousuf*, 560 U.S. 305, 312 & n.6, 324–26 (2010) (recognizing foreign official immunity and holding that it is governed by common law principles rather than the Foreign Sovereign Immunities Act); *Manoharan v. Rajapaksa*, 711 F.3d 178 (D.C. Cir. 2013) (head of state immunity).
37. H.R. Rep. No. 94-1487, at 23 (1976).
38. *NML*, 134 S. Ct. at 2258 n.6 (quotation marks omitted).
39. H.R. Rep. No. 94-1487, at 23.
40. *Id.* at 23 n.11.
41. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1 (1953); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010).
42. *See United States v. Nixon*, 418 U.S. 683, 703–16 (1974).
43. *See, e.g.*, *Elec. Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 4 (D.C. Cir. 2014) (privilege "allows an agency to withhold 'all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be'").
44. H.R. Rep. No. 94-1487, at 23, n.2 (1976).
45. 5 U.S.C. § 552(b)(1)–(9).
46. 482 U.S. 522 (1987).
47. *NML*, 134 S. Ct. at 2258 n.6 (citing *Société Nationale*, 482 U.S. at 543–44 & n.28).
48. *Société Nationale*, 482 U.S. at 544 n.28 (quoting factors now appearing at Restatement (Third) of the Foreign Relations Law of the United States § 442(1)(c) (1987)).
49. *See, e.g.*, *Linde v. Arab Bank, PLC*, 706 F.3d 92, 109–10 (2d Cir. 2013).
50. *See Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548, 556 (S.D.N.Y. 2012) ("Ordering the production of the non-public regulatory documents of a foreign government may infringe the sovereignty of the foreign state and violate principles of international comity to a far greater extent than the ordered production of private account information in contravention of foreign bank secrecy laws . . . .").
51. *NML*, 134 S. Ct. at 2258 n.6 (quotation marks omitted).
52. *EM Ltd.*, 695 F.3d at 207 (citing FRCP 26(b)(2)).
53. *See Société Nationale*, 482 U.S. at 542; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 261–62 n.12 (2004).
54. Restatement (Third) of the Foreign Relations Law of the United States § 442 n.1 (1987).
55. *EM Ltd.*, 695 F.3d at 209.
56. *NML*, 134 S. Ct. at 2254.
57. *Id.* at 2254–55.
58. *Id.* at 2254.
59. *See Société Nationale*, 482 U.S. at 544, n.28.
60. *See Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 789–90 (7th Cir. 2011); *FG Hemisphere Assocs. v. République du Congo*, 455 F.3d 575, 584 (5th Cir. 2006).
61. 558 U.S. 100 (2009).
62. *Id.* at 113 n.4.
63. *NML*, 134 S. Ct. at 2258.

Professor David D. Siegel

Editor's note: *We were sorry to learn that Professor David Siegel, whose intelligence, insight and – most important – wit, have long been hallmarks of The New York State Law Digest, is retiring from editing the Digest. For our tribute to Prof. Siegel, we focus on his wit, reprinting two of his funniest and most memorable case discussions. In August 2001, these lead notes were reprinted in the 500th issue of the Digest. If you have read them already, enjoy them again. If you are not familiar with these pieces, you are in for a treat. Thank you, Prof. Siegel!*



TWO-AND-A-HALF-YEAR-OLD RACHEL SIEGEL SEATED ATOP HER FATHER'S FIRST MANUSCRIPT FOR WEST.

NEW YORK STATE LAW DIGEST 261, SEPTEMBER 1981:

Tax Exemption for 88% of Town's Landowners as "Ministers" of the Promised Land, With 12% Keeping the Promise

While the rest of the world awaited the second coming, some 88% of the landowners of Hardenburgh, New York, thought they experienced at least its beginnings. They all got from the tax assessor, who plays the messiah in this story, real estate tax exemptions as ministers of the Universal Life Church. According to one of the church's ads, brought to the *Digest*'s attention but not cited by the Court of Appeals in the fascinating cases that occasion this note, ordaining is "absolutely" free. "All you have to do is ask!" So 88% asked, and duly consecrated of heart, they now sought likewise of purse. They carried the message to the assessor, and he, probably while the town devout hummed "Amazing Grace" for background, duly exempted the 88%.

This left 12% not asking, and what they got for not asking was the privilege of paying the whole tax bill of the 88%, whom we may therefore cast, in the early pages of our story, as the chosen people.

This caused the cup of the unchosen to run over in a sense that the psalm did not contemplate, and so they sought to pass it back. The named passer was a Mr. Dudley, a resident of the town whom the assessor called with the new gospel: unless he joined the church, he and the other nonjoiners "would have to pay the full $500,000 annual governmental expense of the town." A weaker man would have shouted hallelujah and joined the pious. But no weakling was Mr. Dudley. He joined issue instead. The spirit had moved him, to court. Apparently Mr. Dudley and his fellow 12 percenters were feeling a bit begat.

Risking the wrath of heaven, or at least of the 88% who thought they had transported it to earth, Mr. Dudley stood at the threshold of the court system and awaited the word. Down it came. "Article 78," it said. And so it came to pass that Mr. Dudley brought an Article 78 proceeding against

the assessor and even prevailed on the State of New York, a secular unit, to do the same. The respondents argued that Article 78 is not available when the attack is on what the assessor has done unto others than the attacker, and so, they insisted, the proceeding doth not lie. "Oh yeth it doth," holds the Court of Appeals. *Dudley v. Kerwick*, 52 N.Y.2d 542, 439 N.Y.S.2d 305 (April 30, 1981, 5-1 decision).

The 1893 revelation of *VanDeventer v. Long Island City*, 139 N.Y. 133, was that a taxpayer has no standing to contest tax roll omissions. He now has, holds the Court, overruling *VanDeventer* and citing recent developments expanding the availability of taxpayer suits. The standing exists because the attacking taxpayer has to pay so much more when so many others pay so much less, or nothing at all.

It was argued that the exclusive remedy would be under Article 7 of the Real Property Tax Law, whose 30-day statute of limitations had passed. The four-month period applicable to an Article 78 proceeding was alive, however, and so the availability of Article 78 also preserved the suit from the bar of time. "Great is the power of Article 78," mumbled the respondents in wonder, but what then is the mission of Article 7? The Court of Appeals answered thus: Article 7 is the tool of an owner contesting his own assessment and does not apply where, as here, the petitioner accepts his own assessment but attacks "wholesale" exemptions made to others. "Great is the power to construe," chanted the respondents.

The Court stresses that the merits are not reached in this case; there is only a procedural sustaining of the suit. And since the Appellate Division had not reached issues about class form, which the petitioners had asked for, remand is to that court to treat those issues.

This case was only one of three involving the Hardenburgh assessments. It can be called the "pre-amendment" suit because it involves the legitimacy of these goings-on prior to a 1978 amendment of § 436 of the Real Property Tax Law, which controls exemptions for "officers of religious denominations". A second action, *Town of Hardenburgh v. State of New York*, 52 N.Y.2d 536, 439 N.Y.S.2d 303 (also April 30, 1981, 6-0 decision), considers the effect of the amendment. And while the pre-amendment decision treated above does not reach the merits, the post-amendment decision just cited does. It is the product of a declaratory action by the town along with a number of town officials in both an "official" and "individual" capacity, to contest the amendment, which imposes a set of requirements that apparently de-exempt a good many of the Hardenburgh hopeful.

Some points about appealability arose in these proceedings, but, sustaining the right of the exempted ones to sue and to appeal at least in their individual capacities, the Court meets the amendment on the merits and finds it valid. ("What profit a soul to be allowed into court if he then lose his case?" whisper the respondents to one another in continued wonder.) The amendment's purpose, says the Court, is "to distinguish church property diverted from the benefit of the congregation into private or non-religious use," so as "to protect the municipal tax base". It is a "reasonable regulation" by the state and offends nothing in the constitution. It applies "evenhandedly with regard to various religious groups" and interferes with no "particular religious practice or belief".

On this last point the Court may be in error. The amendment does seem to interfere with the worship of tax exemption. Perhaps the Court deems this a form of idolatry not included in the "religious" category to which the amendment is addressed.

"What profit a soul to be allowed into court if he then lose his case?" whisper the respondents to one another in continued wonder.

In yet another case, *State Board of Equalization and Assessment [SBEA] v. Kerwick*, 52 N.Y.2d 557, 439 N.Y.S.2d 311 (also April 30, 1981, 6-0 decision), the SBEA attacked the exemptions. This attack fails for the SBEA's lack of standing. The Court finds that the history behind its enabling act, Real Property Tax Law § 202, indicates only an advisory function for the SBEA and does not authorize so active a role as this lawsuit. Because the other two cases offered all the context needed to reach the merits in all respects, however, the barring of this suit by the SBEA is of no consequence. The law works in unmysterious ways.

One cannot predict what the merits result will be in the first (the pre-amendment) proceeding, but in the second (the post-amendment) action the merits are reached and the exemptions lifted. Should the exemptions be removed in the first as well, it will go hard, but never underestimate the faith of the formerly favored folk of Hardenburgh. Deprived of their hosannas and without reason to clap or to stomp, yet will they not be seen bereft of spirit. They will gather on their benches in the halls of the great assessor and they will turn to Stanza 21 in the first chapter of the Book of Job and they will all read together: "the Lord giveth and the Lord taketh away. . . ."

NEW YORK STATE LAW DIGEST 339, MARCH 1988:

Court of Appeals Goes To Letter-Size Paper; First Department, Too. Second Department a Holdout – Read All About It!!

"Legal size" has always imported something special. What other profession has had a paper size named after it? No one speaks of "architectural" size paper, or "medical" size paper, for example. The 8½ by 14 page has given us a great professional edge over the rest of the world, which is only 8½ by 11 inches long, "letter size" folk who never stopped to question their deprived status. Lawyers know the difference. Bursting with words and phrases, briefs and memos, opinions and orders, judgments and decrees, digests and reporters, the bench and bar have used their extra three inches for eons and never stopped to reflect on their good fortune. It was just taken for granted.

It had an esthetic side, too. Lawyers' file cabinets were often wider than other professionals' file cabinets. And as a consequence lawyers were often wider than other professionals. It therefore came as a breach of tradition, and as a shock, when, in 1974, the Judicial Conference, the predecessor of what is today the Office of Court Administration, decreed that letter size would henceforth be mandated for all papers used in litigation. The instruction was embodied in CPLR 2101(a), which right to the present day remains the repository of this scandal. The conference was acting under a power it then had to alter CPLR provisions. That power was afterwards withdrawn by the legislature, and now we know why. No organization that would deprive lawyers of three inches of paper can be trusted to make rules.

Irregardless, as lawyers who willingly accept short paper would say, all parties to litigation, with whatever emotion, began to use letter-size paper in 1974.

Why did the Judicial Conference, acting through its administrator on the authority of the judiciary's hierarchy – the Administrative Board (consisting of the Chief Judge and the four Presiding Justices, which is as hie as hierarchy can get) – make this change? One of the reasons we recall, not put into writing but released into the air and available to all who breathe, is that this would ultimately enable law offices to reduce the width of their file cabinets by three inches.

Speaking for ourselves – all of our cabinets were legal width at the time – we could not see much economy in the move. We felt that the words that would have gone onto the three inches of paper now being eliminated would just go somewhere else. The lawyer could of course just eliminate the extra verbiage, but knowing our brethren and sistren as we do we realized that that was not a viable alternative. We realized then – and we don't hesitate to claim that we were the first – that the three inches of verbiage lost on page one would just go onto page two, and that the three inches of verbiage eliminated from page two would just go onto page three along with the extra three inches now the responsibility of page two because of its inheritance from page one, and so on, and so on, just adding pages at the end for the inches lost at the bottom.

We calculated that by the time we got to page 12, for example, it would probably be page 15 or so. We reviewed relativity at some length, drew out and applied a few equations, and concluded that the total number of pages was going to be greater under the new system. This was going to have what we suspected would be the equalizing effect of making documents thicker even as it made them shorter. We were just going to have to pay in depth for what the court administrators were saving us in length.

Visions overtook us. We saw an office with skinny file cabinets, but with all of them sticking out much further from the wall. Anthropomorphically, the fantasy was of slender folks with big rear ends.

Like so many other discoverers of great things, we guarded this revelation with jealousy lest some academically based plagiarist – they're everywhere, you know – should come along and appropriate it. Why reveal it now? Give us three more paragraphs for background and we'll give you our reason.

It also occurred to us that since file cabinets in law offices include vast numbers of court papers – orders, judgments, decisions, opinions, and the like – the emergence of the thin file cabinet could not succeed unless the judiciary, too, were to dump its 8½ by 14 stock and buy small. But that did not happen. The judiciary, having directed the change to 8½ by 11 paper, exempted the judiciary. It surely exempted the appellate courts, those immovable repositories of prerogative.

Each always had its own way, and each always exercised its own way in its own way. Two used short paper. Others upheld tradition with long paper. One of the tradition preservers was the Court of Appeals itself, which somewhere along the way did take the modest step of using both sides of the page, but the page, and tradition along with it, remained 8½ by 14 inches long. The bar took note with gratitude and relief, even though the continued use of long paper by the Court of Appeals and two of the appellate divisions created a technological dilemma in law offices across the state.

What dilemma? How could the widths of file cabinets be reduced by three inches when several of the highest tribunals in the state were continuing to use 8½ by 14-inch paper? Many law offices came up with an ingenious solution. Onto the sides of letter-width cabinets went several elastic panels that would stretch to legal width if the file occupying that particular point in the drawer should happen to contain an opinion from the Court of Appeals or from the other appellate court that continued to use long paper. It was costly, but a fair price to pay for the preservation of a legal-size tradition. And it was principally the Court of Appeals that was upholding the faith.

Alas, perfidy has struck at the top, and we at last reach the occasion for this note. In a memorandum dated January 7, 1988, the Court of Appeals announced that henceforth all decision lists and opinions will be published on 8½ by 11-inch paper.

Until that moment it had always been our understanding that it's the judiciary that guards due process; that it's the judiciary that protects us from the divestiture of rights without notice and an opportunity to be heard. Will that still be true? Please note that the announcement itself was on a letter-size page!

The reason cited on the 8½ by 11-inch announcement had nothing to do with file cabinets, by the way. It was designed, said the memo, to "make handling and storage of the Court's decisions more convenient, as they will now fit inside a standard three-ring binder". Then the memo added, "Please let us have your comments on this change". This discourse is not just another lead note, as you now see; it is nothing less than a command performance.

Okay, the Court of Appeals had succumbed. But what about the appellate divisions? Without their cooperation, the problem of the elastic side panel would remain. Would they go along? Two of them, the Third and Fourth departments, had long been using the short page, albeit with different touches to assert their independence. The Third Department used (and still does) only one side of a page, but in single space. The Fourth used both sides of the page (which it apparently doesn't any more) but in double space (which it apparently still does).

The First and Second departments were the problem. They were long paper users with a reputation for both obstinacy, which preserved the size, and rivalry, which preserved distinctions inter se: the First Department printed on one side, the Second on two.

Now the next surprise. The last batches of opinions we received from the First Department have also been on 8½ by 11 paper. And, at least in what we received, there was not even a covering note to explain, or to warn, or to reassure.

All this was just after the beginning of January. We surmised that there must have been some kind of conference, or frantic telephoning anyway, among the various appellate courts to agree on paper size as a kind of 1988 New Year's resolution. So we tensely awaited the first envelope of 1988 from the Second Department, the only holdout. The envelope came in mid January. It was pretty wide – the usual size used for legal-size paper – but we drew no rash conclusions.

We opened the envelope. Out came an opinion on 8½ by 14! All was not yet lost. Perfidy there might be upstate, and in Manhattan, but in the formidable Second Department tradition had prevailed. Would this continue, or would the court yet succumb to the pressure? Should we call up and get the facts? No, we concluded, this was no time for facts.

Except one. In their continuing struggle for individuality, the First and Second departments have allowed their war of the paper to extend onto the field of the envelope. The First Department sends out its letter-size paper in a legal-size envelope. The Second Department sends out its legal-size paper in a letter-size envelope. (Do you know how the Second Department does that? They fold their opinions in half, the devils!)

In every appellate courthouse in the state the imaginative observer can see the magic words etched into the lobby ceiling: We have sworn upon the altar of God eternal hostility against every form of tyranny over the judicial prerogative.

It is of course a matter of opinion, but for us one of the appellate courts has a format that stands out by far as the easiest to read, the quickest to absorb, and the kindest to the eyes. One appellate court's page-size, type-size, and spacing is the out-and-out champ, and has always been so for us. And which one is that? Ahhh, we're not telling. We once recommended that format to another of the appellate courts, sending samples and everything. We got its response fast. A death threat from the clerk.

And so we learned our lesson. One does not tell a clerk what to do with paper, even though we once heard a frustrated lawyer make a wonderful suggestion on the subject. ■

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Indemnification for Attorney Fees: Supplemental

Part I

The July/August 2014 issue of the New York State Bar Association *Journal* published "First Party Indemnification for Attorney Fees," an article that should be read by all transactional attorneys. Authors Melissa Curvino and Liam O'Brien rightly warn that if the parties to a contract intend that a party seeking indemnification be reimbursed for the legal fees incurred to establish its claim for indemnification, then the contract must "unmistakably" state that intention. A general indemnity provision such as the following

> [e]ach party will indemnify the other for losses that it incurs, including reasonable legal fees, on account of a breach of this contract by the other party,

will not satisfy the *unmistakable* requirement and so, will not entitle a party to recover legal fees that it incurs to establish and enforce its claim for indemnification. The article laments that "the courts have not provided much guidance as to what language will satisfy" the *unmistakable* mandate. But it stops short of providing guidance of its own. So that void presents an invitation and a challenge to offer the solutions that this article provides.

Below is an adaptable example of a comprehensive, bilateral indemnity that will satisfy the mandate of the courts. Consistent with the bilateral nature of this provision, the third paragraph of the example contains a counter indemnity in the event the party seeking indemnification fails in its claim. The fourth paragraph, as a failsafe, treats the less likely result of the court's granting partial relief. And the fifth and sixth paragraphs contain limitations designed to preclude additional litigation.

> Each party (an "Indemnitor") will indemnify the other party (an "Indemnitee") against any liability and will hold the Indemnitee harmless from and pay any loss, damage, cost and expense (in-cluding, without limitation, reasonable legal fees and disbursements, court costs, the cost of appellate proceedings, and any other reasonable costs of liti-gation), which the Indemnitee incurs arising out of or in connection with any breach of this Con-tract by the Indemnitor. The In-demnitor will not be obligated to pay the Indemnitee's legal fees and dis-bursements, court costs, the cost of appellate proceedings, and any other reasonable costs of litigation during any period that the Indemnitor provides, at its expense, counsel for the Indem-nitee and assumes the other costs of the litigation; but any counsel furnished by the Indemnitor must be reasonably satisfactory to the Indemnitee. An Indemnitee will promptly notify the Indemnitor of any claim covered by the provisions of this Section. The Indemnitee will not settle any such claim without the Indemnitor's written consent unless the Indemnitee releases the Indemnitor from all of its obligations under this Section with respect to the claim.
>
> Further, the Indemnitor will indemnify the Indemnitee against any expenses (including, without limitation, reasonable legal fees and disbursements, court costs, the cost of appellate proceedings, and any other reasonable costs of litigation) that the Indemnitee incurs to establish and enforce its right to the indemnity and hold harmless provisions of this Section provided the Indemnitee is successful in establishing that right. However, if the Indemnitee is not successful in establishing that right, then the Indemnitee will indemnify the Indemnitor against any expenses (including, without limitation, reasonable legal fees and disbursements, court costs, the cost of appellate proceedings, and any other reasonable costs of litigation) that the Indemnitor incurs in its successful defense against the Indemnitee's claim.
>
> In the event that the court grants the claimant some but not all of the relief sought under the preceding paragraph, then each party will bear the costs and expenses which it incurs in the proceeding under that paragraph.
>
> The parties waive (i) trial by jury with respect to any determination under the second preceding paragraph, and (ii) the right to appeal that determination.
>
> Each party will bear any costs and expenses that it incurs to determine the amount of the legal fees and other costs to be reimbursed.

> The foregoing provisions will survive the expiration or termination of this Contract.

Part II

A broader issue pertaining to reimbursement for legal costs involves the often-found provision requiring the losing party in a litigation to reimburse the winner for its legal expenses. Here is a typical clause dealing with the reimbursement of legal fees from a contract that a client recently asked this writer to review:

> The prevailing party in any legal action shall be entitled to its reasonable attorneys' fees and costs.

Provisions such as these should be resisted vigorously because

(1) surely there will be further litigation about the amount of those "reasonable attorneys' fees and costs"; and, even more important,

(2) the party that is the winner is often not clear – just another invitation to further litigation.

For example, Party A sues Party B for $250,000 and is awarded only $25,000 in damages. Who is the winner – especially if Party A offered Party B $50,000 during settlement talks?

Another example: Party A sues Party B for injunctive relief and damages, but is awarded only injunctive relief or partial injunctive relief. Who is the winner?

And yet another example: Party A sues Party B on numerous counts and prevails, in part, on just one or two of them, while Party B asserts several counterclaims, winning, in part, only one. Again, who won? (The litigators. Lawyers certainly know a bit about job security.)

There, exists, though, an alternative and reasonable solution, which has been accepted in actual practice: If a party asserts a claim or defense that the court or the arbitrator determines is frivolous (that is, without a good faith basis in fact and law), that party will pay the litigation expenses which the other party incurs in respect of that frivolous claim or defense.

Following are adaptable samples of this type of solution, one for court cases and one for arbitration. Each contains provisions designed to limit litigation. And, if desired, each can be adapted for use in conjunction with the samples in Part I above and Part III below when there is no clear winner.

Court Cases

If the trial judge determines that a claim or defense asserted by a party is frivolous (that is, without a good faith basis in fact and law), that party will pay the reasonable legal expenses and other reasonable costs – all as determined by the trial judge – which the other party incurred with respect to that frivolous claim or defense. Each party will bear any costs and expenses that it incurs (1) with respect to the issue of frivolity and (2) to determine the amount of the legal expenses and other costs to be reimbursed. The parties waive trial by jury with respect to any determination under this paragraph and waive any right to appeal any determination by the trial judge.

Arbitration

If the arbitrator determines that any claim or defense asserted by a party is frivolous (that is, without a good faith basis in fact and law), that party will pay the reasonable legal expenses and other costs – all as determined by the arbitrator – which the other party incurred with respect to that frivolous claim or defense. Each party will bear any costs and expenses that it incurs (1) with respect to the issue of frivolity and (2) to determine the amount of the legal expenses and other costs to be reimbursed. The parties waive any right to appeal the decision of the arbitrator.

Part III

Another situation for which a party might seek reimbursement of the costs incurred to establish its right to relief is an action for an injunction – excluding, of course, any related claim for damages. Below, for consideration, is a sample provision – again bilateral – to recover legal fees when a claim is made for injunctive relief. Again, as in the case of a party seeking indemnification, there is a risk of partial relief. To address this issue, the first paragraph of the sample provides a narrow passage which the claimant must navigate to achieve indemnification. It is designed to avoid litigation in case the injunctive relief that is granted is less than the relief requested.

> If a claim is made for injunctive relief, and if, after all appeals or after the right to appeal has expired, it is determined that the party applying for that relief (the "Claimant") is, in fact, entitled to essentially the same relief that it requested or to even broader relief, then the other party (the "Defendant") will pay Claimant the reasonable legal expenses and other reasonable costs that the Claimant incurred to obtain that relief.
>
> If, on the other hand, after all appeals or after the right to appeal has expired, it is determined that the Claimant is not entitled to essentially the same relief that it requested or to broader relief, then the Claimant will pay Defendant the reasonable legal expenses and other reasonable costs that the Defendant incurred to obtain that determination.
>
> Each party will bear any costs and expenses that it incurs to determine the amount of the legal fees and other costs to be reimbursed. The trial judge will make the determinations under this paragraph and the two preceding paragraphs, and the parties waive any right to appeal those determinations.

Conclusion

As is evident, there is no boilerplate solution to indemnification. Each situation must be examined thoroughly to discover all applicable considerations. The lawyers and their clients must then determine how best and fairly to treat those considerations. As revealed by the examples offered above, the considerations can be numerous and complex, and their treatment requires more than a few words. Providing guidance on how to draft these clauses is not the province of the courts. That realm is reserved for the lawyers. ■

BY MARK A. BERMAN, IGNATIUS A. GRANDE & RONALD J. HEDGES

Mark A. Berman and **Ignatius A. Grande** are co-chairs of the Social Media Committee of the State Bar Association's Commercial & Federal Litigation Section, which issued the guidelines. **Ronald J. Hedges** is a member of the committee. A version of this letter originally appeared in the May 5, 2014, *New York Law Journal.*

Why ABA Opinion on Jurors and Social Media Falls Short

We write in response to ABA Formal Opinion 466, "Lawyer Reviewing Jurors' Internet Presence," issued April 24, 2014.[1] It provides in relevant part that it is not an ethically prohibited communication if "a juror or potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such."

We suggest that the ABA opinion does not appropriately protect jurors and insulate them from outside influences such as contact by counsel. We believe that the appropriate way to proceed when seeking to investigate jurors is set forth in the *Social Media Ethics Guidelines* issued on March 18, 2014, by the Commercial and Federal Litigation Section of the New York State Bar Association.[2] Guideline 5.B provides: "A lawyer may view the social media . . . of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer, agent or automatically generated by the social media network) with the juror."

This guideline is based on the well-reasoned New York County Lawyers' Association Formal Opinion No. 743[3] (May 18, 2011) and New York City Bar Association Formal Opinion 2012-02.[4] Specifically, the city bar opinion provides:

> A request or notification transmitted through a social media service may constitute a communication even if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the "sender" was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.

The ABA opinion, however, does make two recommendations: (1) that lawyers "be aware of these automatic, subscriber-notification procedures," and (2) "lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding." We agree with these recommendations, but believe that they do not go far enough.

The ABA opinion draws the following analogy: an automatic subscriber notification is "akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street."

The analogy proves the error of the ABA opinion's conclusion. We believe a more apt analogy is this: A lawyer purposefully drives down a juror's street, observes the juror's property (and perhaps the juror herself), and has a sign that says he is a lawyer and is engaged in researching the juror for the pending trial, knowing that a neighbor will see the lawyer and will advise the juror of this drive-by and the signage.

Might that communication or visit infect the juror's thought processes or the proceeding? We think so! Indeed, just last year, a juror in New York complained that an attorney had cyberstalked him on LinkedIn; the court considered declaring a mistrial and admonished counsel after the juror sent a note to the judge complaining "the defense was checking on me on social media."

In this age of limited digital privacy, we believe that social media interactions between jurors and lawyers should not occur and the ABA opinion does not sufficiently seek to ensure that this prohibition is not violated. Receiving multiple notifications indicating that individuals from a law firm or investigative agency are poring over one's social media profile surely would be disconcerting to most jurors, at best, and could result in a mistrial.

The ABA opinion suffers from a second, and perhaps more significant, flaw. It is inconsistent with a lawyer's duty of competence. Comment [8] to ABA Model Rules of Professional Conduct 1.1 provides that, "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

Granted, the ABA opinion noted that social media technologies change frequently and did acknowledge a lawyer's duty of competence. But, as written, where the opinion provides that such an automatic message is not a prohibited "communication," it encourages lawyers, and their agents, including investigators and jury consultants, not to be diligent in understanding the social media platform they are using.

The opinion leaves attorneys and their agents with no affirmative obligation to minimize their "communications" with jurors, as long as the "communication" is not a "friend" request or connection request, but is just an automated notification that a juror's profile has been viewed.

We believe that lawyers who conduct juror research through social media need to ensure that their research will not come to the attention of a juror or prospective juror. The approach of the *Social Media Ethics Guidelines*, which is elegant in its simplicity, establishes a better standard. ■

1. http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf.

2. http://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html.

3. https://www.nycla.org/siteFiles/Publications/Publications1450_0.pdf.

4. http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I just left a position at a large law firm to start work as an in-house attorney for a well-known multinational conglomerate. I am curious about the ground rules that apply to lawyers who make the switch from law firm practice to in-house counsel. Are there any particular ethical rules that I should be concerned with as I am transitioning to this new position? Have there been any recent developments applicable to in-house lawyers that I should know about?

Sincerely,

Moving Inside

Dear Moving Inside:

Your question gives us an opportunity to review the basic ground rules that all in-house counsel must know in order to comply with their ethical obligations under New York's Rules of Professional Conduct (the RPC).

Initially, we see that you have not disclosed the location of your previous job or where you are admitted to practice. If you are working as an in-house counsel in New York and are not admitted to practice here, you should know that an in-house attorney working in New York and who is licensed in another state must register with the local Appellate Division in order to practice as an in-house attorney in our jurisdiction. *See* 22 N.Y.C.R.R. § 522 (Part 522).

Under Part 522, an in-house counsel is defined as:

> an attorney who is employed full time in this State by a non-governmental corporation, partnership, association, or other legal entity, including its subsidiaries and organizational affiliates, that is not itself engaged in the practice of law or the rendering of legal services outside such organization.

See 22 N.Y.C.R.R. § 522.1(a).

The scope of services that an in-house counsel registered (but not admitted) in New York may provide is stated in § 522.4:

> An attorney registered as in-house counsel under this Part shall:
>
> (a) provide legal services in this State only to the single employer entity or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer entity, and to employees, officers and directors of such entities, but only on matters directly related to the attorney's work for the employer entity, and to the extent consistent with the New York Rules of Professional Conduct;
>
> (b) not make appearances in this State before a tribunal, as that term is defined in [RPC Rule 1.0(w)] or engage in any activity for which pro hac vice admission would be required if engaged in by an attorney who is not admitted to the practice of law in this State;
>
> (c) not provide personal or individual legal services to any customers, shareholders, owners, partners, officers, employees or agents of the identified employer; and
>
> (d) not hold oneself out as an attorney admitted to practice in this State except on the employer's letterhead with a limiting designation.

Id.

The quoted subsection provides guidance as to what in-house attorneys who are not admitted in New York can and cannot do. The catch is that Part 522 creates a relatively short window (30 days from the commencement of employment in New York) for a new in-house counsel to register with the local Appellate Division. *See* 22 N.Y.C.R.R. § 522.7(a). Failure to register is professional misconduct, but "the Appellate Division may upon application of the attorney grant an extension upon good cause shown." *See* 22 N.Y.C.R.R. § 522.7(b). Therefore, if in fact you are not admitted in New York and you begin working as an in-house counsel in New York, we strongly recommend that you register with the Appellate Division almost immediately after you begin your job.

Part 522's registration requirements were designed to permit in-house attorneys who are not admitted in New York to lawfully work here. In a previous Forum, we explored the dangers arising from the unauthorized practice of law (UPL). *See* Vincent J. Syracuse and Matthew R. Maron, *Attorney Professionalism Forum: Must (should) attorneys engage local counsel when they represent clients in out-of-state matters and venture outside their home waters?*, New York State Bar Association Journal, Vol. 86, No. 3, March/April 2014). This is especially pertinent since the UPL can result in criminal charges against those who violate the relevant statutes. *See* Judiciary Law §§ 478 and 484. In addition, the requirements of Part 522 are meant to prevent any potential violation of Rule 5.5(a) of the RPC, which states that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction."

As previously noted in our earlier Forum (*see supra* Syracuse and Maron, *Attorney Professionalism Forum*, March/April 2014), when the RPC was enacted in April 2009, New York did not incorporate many of the "safe

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

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harbor" provisions in Rule 5.5 of the American Bar Association's Model Rules of Professional Conduct (the Model Rules) that permit lawyers to do work outside the jurisdiction where they are admitted. Therefore, the enactment of Part 522 was, to a lesser degree, a mechanism to allow attorneys who are admitted outside of New York to practice here, especially in the in-house realm, and brought New York in line with many other states that had enacted the Model Rules to lower any hurdles for out-of-state attorneys to work in a particular state.

Identification of the client is another issue that in-house counsel must address. Is it the company? Is it the company's officers, directors and/or the shareholders? Or is it a joint representation? Rule 1.13 is instructive in this regard.

The pertinent sections of the Rule provide:

> (a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.
>
> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. . . . Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include . . . referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

The Comments to Rule 1.13 are extensive, and space does not allow us to repeat them all here. However, for purposes of convenience, we believe that the following excerpts from the Comments to the Rule are the most applicable to you as a new in-house attorney. They include

- that the organizational client "is a legal entity, but it cannot act except through its officers, directors, employees, members, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. . . ." *See* Rule 1.13, Comment [1];
- that communications between a constituent and the organization's attorney when conducted "in that [constituent's] organizational capacity" are protected by the confidentiality provisions of Rule 1.6. *See id.*, Comment [2]; and
- that "[t]here are times when the organization's interests may differ from those of one or more of its constituents . . . [and] any attorney-client privilege that applies to discussions between the lawyer and the constituent belongs to the organization and may be waived by the organization." *See id.*, Comment [2A].

It is fair to say that Rule 1.13 sets forth a fairly straightforward blueprint for in-house counsel to comply with their ethical obligations in order to properly act on behalf of their respective organizations. Of particular note is the fact that that subdivision (b) of Rule 1.13 provides for an "up the ladder" reporting requirement. *See supra*.

The issue of the necessity for "up the ladder" reporting was recently on full display – involving the legal department of one of the most recognized companies in the world. Although ethical lapses by attorneys are not often front-page news for those outside of the legal profession, the necessity of compliance with Rule 1.13 was recently highlighted in connection with the massive recall by General Motors (GM) of millions of its vehicles which fell victim to ignition problems that resulted in 13 deaths and hundreds of injuries. *See* Jeff Bennett, *GM Recalls More Cars Over Ignition Switch Issues*, Wall Street Journal, June 16, 2014. As a result of GM's failure to have in place an "up the ladder" reporting policy to handle the fatal defects in their vehicles as well as the company's pervasive culture, which could be described simply as "hear no evil, see no evil," at least three members of GM's in-house counsel team were fired. This included the company's counsel in charge of in-house investigations and legal strategy for a variety of inactions including, but not limited to, failing to advise GM's general counsel about the fatalities resulting from the defective ignitions. *See* Bill Vlasic, *GM Lawyers Hid Fatal Flaw, From Critics and One Another*, N.Y. Times, June 6, 2014. The fallout at GM should serve as a cautionary tale for you or any attorney working for a large organization. Simply put, there needs to be clear lines of communication within an organization's legal department, especially when the company is subject to lawsuits that may result in significant liability. Indeed, the termination of these in-house counsel from the employ of GM is probably just the beginning of the problems for these terminated attorneys as there is a strong likelihood that disciplinary action will be commenced in the jurisdictions where they are admitted to practice as a result of violations of Rule 1.13, as enacted in their states, as well as other ethics rules.

Attorney-client privilege is another important issue for in-house counsel. Although it might seem obvious to say this, protection of the privilege in communications with company

employees should be of paramount concern to in-house counsel. First, we would strongly recommend that, if you are admitted outside of New York, you maintain your bar memberships in other states. The failure of one in-house attorney to maintain a bar registration resulted in a series of publicized decisions which discussed at length its effect on a claim of privilege by a person purporting to act as an in-house counsel. In *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58 (S.D.N.Y. 2010), the plaintiff submitted a privilege log and asserted the attorney-client privilege as a basis for withholding numerous communications with its in-house counsel. When the in-house counsel was deposed in the case, he revealed that he was an "inactive" member of the California Bar. The defendant demanded that the communications be produced since this individual was not an attorney because of his inactive bar status. Thereafter, the plaintiff moved for a protective order. The magistrate judge denied the plaintiff's motion and found that the communications were not protected by the attorney-client privilege. *Id.* However, the district court judge overseeing the case set aside the magistrate judge's order and granted the plaintiff's protective order on the grounds that the plaintiff demonstrated a "reasonable belief" that its in-house lawyer was an attorney when it communicated with him. *See Gucci America, Inc. v. Guess?, Inc.*, 2011 WL 9375 (S.D.N.Y. Jan. 3, 2011). Irrespective of the rulings in *Gucci*, we believe that the best practice for in-house counsel is to always maintain their law license and for employers to make sure that their in-house attorneys keep their law licenses active. Failure to do so exposes both the company and its counsel to drastic consequences.

Continuing with the privilege question, it is also important to note that not all communications with company personnel are privileged since many times, as an in-house attorney, you may wear both legal and business hats either separately or at the same time. The protection given to these communications depends on the context in which they are made. For example, if a company employee communicates with you on a non-legal matter, the communication may not necessarily be privileged. *Doe v. Poe*, 92 N.Y.2d 864 (1998). However, if someone in the organization is coming to you seeking legal advice, then the communication would be deemed privileged. *New York Times Newspaper Div. of New York Times Co. v. Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169 (1st Dep't 2002).

In order to protect the potentially privileged nature of a particular communication with company personnel, we recommend (1) that there be a clear paper trail of the nature of the communication, and (2) that you clearly identify your role in the communication in question (especially if it involves someone in the company seeking legal advice).

Your role as an in-house counsel places you in the unique position of being on the front line when company management has legal issues to confront. Therefore, it is critical that you comply not only with the RPC as a whole but also pay particular attention to the specific ethical provisions discussed here.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com) and
Matthew R. Maron, Esq.
(maron@thsh.com),
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am a partner in a 20-attorney firm that handles litigation and transactional matters. Most, if not all, of our work for our clients is done on a billable hour basis. My fellow partners have given me the task of improving our accounts receivable because we are finding that collecting fees from clients has become more and more difficult as time goes on. One of the suggestions made by the managing partner of my firm is to begin accepting credit card payments from clients both for retainer fees and charges for ongoing services. This sounds like a very practical way to get our fees paid. However, I am concerned about any ethical considerations that may arise if my firm begins accepting credit card payments from clients. What ethical considerations should I be aware of if we begin accepting credit card payments from clients? In addition, if we have a client's credit card number on file, what are the circumstances that would allow our firm to take automatic payment deductions from a client's credit card? And if we do take automatic payment deductions from a credit card, are they considered client funds? Last, what if a dispute over the bill ensues?

Sincerely,
Charlie Cautious

In Memoriam

Charles S. Brownstein
Dobbs Ferry, NY

Allen M. Hecht
Melville, NY

Eliot H. Lumbard
Nashua, NH

Laura Beth Monte
Newark, NY

Charlotte D. Natale
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CONTINUED FROM PAGE 64

The court's order must "recite that the contemptuous conduct was calculated to or actually did defeat, impair or prejudice the rights of the other party."[19] Under Judiciary Law §§ 753 and 770, a party may not be held in contempt without this recitation in the court's contempt order.[20]

A court's contempt adjudication may be conditional. The court may impose contempt unless the contemnor does something specific within a specified time.[21] A court that imposes a condition on the contemnor gives the contemnor a chance to purge the contempt.[22] (The *Legal Writer* discusses purging contempt below.)

A court may adjudicate you in civil contempt for failing to make payments under a matrimonial judgment. Consult Domestic Relations Law §§ 243-244 and CPLR 5242.

The Punishment for Civil Contempt

Even though criminal contempt sounds more severe than civil contempt, the punishment for civil contempt can be harsher than for criminal contempt. The punishment for civil contempt is a fine, jail, or both. But the fine or jail term for civil contempt isn't as restrictive as it is for criminal contempt.

The court may not hold in abeyance the determination of the contemnor's punishment.[23]

The fine for civil contempt may be "any sum that will indemnify the injured party [aggrieved party] for the actual loss caused by the contempt."[24] The fine goes to the aggrieved party.[25]

A fine is meant to compensate the aggrieved party. The fine must be remedial, not punitive; the fine may not include punitive damages.[26] The aggrieved party must prove the damages. Civil contempt also "serves functions such as indemnity."[27] If a party demonstrates actual loss or injury, a court may impose a fine to indemnify the aggrieved party.[28] The court may order the contemnor "to repair whatever damage [the contemnor] has caused."[29] The court may also award reasonable attorney fees.[30]

The court may award costs, attorney fees, and $250 to an aggrieved party who doesn't prove damages.[31]

> Courts have broad powers under the Judiciary Law to permit contemnors to purge their contempt.

Imposing a jail term for Judiciary Law civil contempt has some complicated nuances.

If the court's mandate "calls for the doing of an act which the contemnor still has the power to do,"[32] contemnors may be jailed until they do the act or until they pay the fine imposed, or both. The court's order (and the warrant of commitment, if the court issues one) must specify the act or duty to be performed and the sum to be paid.[33] The Judiciary Law's language implies that the contemnor's jail term might be unlimited unless the contemnor performs the act mandated in the court's order.[34] Contemnors thus "hold[] the key to [their] own jail cell."[35] A contemnor who performs the act may "not be imprisoned for the fine imposed more than three months if the fine is less than five hundred dollars, or more than six months if the fine is five hundred dollars or more."[36]

A court may impose a jail term on the contemnor "in every other case, where special provision is not otherwise made by law, . . . for a reasonable time, not exceeding six months, and until the fine, if any, is paid."[37] The court's order (and the warrant of commitment, if the court issues one) must specify the amount of the fine and the duration of the imprisonment. The six-month jail limit is for civil-contempt cases involving "the doing of a forbidden act which now can't be undone, or for some other past recalcitrance.[38] (For criminal contempt, the court may imprison a contemnor for up to 30 days.)

If the court doesn't specify the term of imprisonment in its order, the contemnor "shall be imprisoned for the fine imposed three months if the fine is less than five hundred dollars, and six months if the fine imposed is five hundred dollars or more."[39] If the court provides "a specified term of imprisonment [in its order] and . . . to pay a fine, [the contemnor] shall not be imprisoned for the nonpayment of such fine for more than three months if such fine is less than five hundred dollars or more than six months if the fine imposed is five hundred dollars or more in addition to the specified time of imprisonment."[40]

A court that imposed on the contemnor a jail term exceeding three months must review the jailing at intervals of not more than 90 days.[41]

The Appellate Division, First Department, has called the sentencing scheme for civil contempt under the Judiciary Law "aberrant" and "extraordinary."[42] Contemnors might argue that this sentencing scheme is unconstitutional given its punitive purpose and given that the burden of proof in civil contempt — clear and convincing, sometimes referred to as "reasonably certain" — is lower than the burden of proof for criminal contempt: beyond a reasonable doubt.[43]

A court may, in its discretion, refrain from punishing the contemnor who can't endure imprisonment, isn't able to pay, or can't perform the act or duty the court required.[44]

The court may impose consecutive or concurrent sentences.[45]

In determining the punishment for civil contempt, a court must be mindful that its jail term or fine, or both, not be punitive.

Review of Civil-Contempt Adjudication

Seek a review of a civil-contempt adjudication "either by direct appeal or [by commencing] a CPLR Article

78 proceeding in the nature of certiorari."[46]

Appealing a plenary-contempt adjudication is typically done by direct appeal.

A summary-contempt adjudication is typically reviewable on a CPLR Article 78 proceeding[47] if the adjudication record is too incomplete to allow a direct appeal. If the record is complete, appeal directly.

Summary-civil-contempt adjudications brought on by motion or order to show cause usually contain a complete record and therefore allow a direct appeal.

Bring the Article 78 proceeding in the Appellate Division if you're seeking to review a court's contempt order from Supreme Court, Surrogate's Court, Family Court, County Court, or Court of Claims. Bring the Article 78 proceeding in the state's Supreme Court if you're seeking to review a lower court's contempt order.

If the contempt is committed outside the court's presence and the court's adjudication of civil contempt occurs after a hearing, the minutes of the hearing itself becomes part of the record on appeal.[48]

You may appeal after you've purged the contempt.[49]

You may appeal even if you've served the jail term specified in the court's contempt order (and order of commitment).[50]

Purging Civil Contempt

Courts have broad powers under the Judiciary Law to permit contemnors to purge their contempt.[51] Although the court may condition the determination of the contemnor's punishment by giving the contemnor an opportunity to purge, it can't "employ it as a Damocles sword, based upon future conduct."[52]

Civil contempt "is concerned only with coercion and remediation or remediative reparation."[53] (Criminal contempt, on the other hand, is meant to punish past disobedience.[54]) A party purges civil contempt "by doing the act commanded or refraining from the act forbidden, paying money or taking other steps to make an aggrieved party whole."[55]

A court that imprisons a contemnor "seeks to coerce the [contemnor] to engage in the conduct commanded."[56]

If a court fines a contemnor, the contemnor has the "power to avoid the penalty unless the day for performance set by the court has passed."[57]

Enforcing a Money Judgment

Judiciary Law § 753(A)(3) generally forbids the remedy of civil contempt to enforce a money judgment.[58] Unless a statute expressly authorizes the remedy of contempt, a court won't grant your motion for civil contempt on the basis that the alleged contemnor failed to pay a money judgment.[59] Your remedy to enforce a money judgment is to commence an Article 52 proceeding.[60]

If you're moving for contempt to punish a party for refusing or neglecting to answer an information subpoena before executing a judgment, consult Judiciary Law § 753(A)(5) and CPLR 5251.[61]

In the next issue of the *Journal*, the *Legal Writer* will discuss motions to renew and reargue.

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1. Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 St. John's L. Rev. 337, 363 (1998).

2. *Id*.

3. *Id*. at 365.

4. *Id*.

5. *Id*.

6. 1 Byer's Civil Motions § 19:01, at 220 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.).

7. David D. Siegel, New York Practice § 482, at 838 (5th ed. 2011).

8. *Id*.

9. *See* Gerald Lebovits, The Legal Writer, *Drafting New York Civil-Litigation Documents: Part XXXII — Contempt Motions Continued*, 86 N.Y. St. B.J. 64, 57 (May 2014).

10. Judiciary Law § 751(1); Byer's Civil Motions, *supra* note 6, at § 19:04, at 223 (citing *Bing et al. v. Sun Wei Ass'n, Inc.*, 205 A.D.2d 355, 355, 613 N.Y.S.2d 371, 371 (1st Dep't 1994) ("Nor is there merit to appellant Ming's contention that a full-blown evidentiary hearing was required to hold him in contempt, the only due process requirements being that the party charged 'be notified of the accusation, and have a reasonable time to make a defense.'") (quoting Judiciary Law § 751(1))).

11. Judiciary Law § 751(1).

12. Siegel, *supra* note 7, at § 484, at 842 (citing Judiciary Law § 770).

13. Gray, *supra* note 1, at 402 (citing *Badgley v. Santacroce*, 800 F.2d 33, 36 (2d Cir. 1986) ("The purpose of civil contempt, broadly stated, is to compel a reluctant party to do what a court requires of him. Because compliance with a court's directive is the goal, an order of civil contempt is appropriate 'only when it appears that obedience is within the power of the party being coerced by the order.'") (quoting *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948)).

14. *Id*. at 398.

15. Byer's Civil Motions, *supra* note 6, at § 19:10, at 226 (citing *In re Solano v. Martin*, 55 A.D.2d 620, 620, 389 N.Y.S.2d 413, 413 (2d Dep't 1976) ("No review lies from a contempt citation which has not been reduced to writing."); *In re Lynch v. Derounian*, 41 A.D.2d 740, 741, 341 N.Y.S.2d 145, 146 (2d Dep't 1973) ("A written order is indispensable to a review of a contempt citation."); *In re Cleary*, 237 A.D. 519, 521, 262 N.Y.S. 288, 291 (1st Dep't 1933)).

16. Gray, *supra* note 1, at 399 (citing Judiciary Law § 775).

17. *Id*.

18. Byer's Civil Motions, *supra* note 6, at § 19:01, at 220.

19. *Id*. at 228 (citing *Raphael v. Raphael*, 20 A.D.3d 463, 464, 799 N.Y.S.2d 108, 110 (2d Dep't 2005) ("[S]ince the finding of contempt is supported by the record, including the husband's admission to his contemptuous behavior, the omission was a mere irregularity which may be corrected on appeal. Accordingly, we modify the order to include the requisite recital."); *Stempler v. Stempler*, 200 A.D.2d 733, 734–35, 607 N.Y.S.2d 111, 113 (2d Dep't 1994) ("The court, however, failed to find expressly that the defendant's actions were 'calculated to or actually did defeat, impair, impede or prejudice the [plaintiff's] rights or remedies.' Thus, this case must be remitted to the Supreme Court for the proper findings to be made.") (quoting *Fed. Deposit Ins. Corp. v Richman*, 98 A.D.2d 790, 792, 470 N.Y.S.2d 19, 22 (2d Dep't 1983))).

20. *Id*. § 19:11, at 228 (citing *Stempler*, 200 A.D.2d at 733, 607 N.Y.S.2d at 113; *Szalkiewics v. Szalkiewics*, 60 A.D.2d 855, 855, 401 N.Y.S.2d 4, 4 (2d Dep't 1978) ("In our opinion, statements by each party that the other had misstated his or her income during the period when the arrears accumulated, raised a question of fact as to whether appellant's alleged nonpayment of child support 'was calculated to, or actually did, defeat, impair . . . or prejudice [plaintiff's] rights.' Such a finding is necessary to sustain an order of contempt. A hearing is required to determine this issue.") (quoting Judiciary Law § 770); *In re Morris Cramer Bowling, Ltd. v. Cramer*, 38 A.D.2d 774, 774, 327 N.Y.S.2d 902, 903 (3d Dep't 1972) ("In a civil contempt proceeding the court must find that the person's conduct was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of a party to a civil action.")).

21. Siegel, *supra* note 7, at § 484, at 843 (citing *Denberg v. Denberg*, 21 A.D.2d 863, 863, 251 N.Y.S.2d 90, 90 (1st Dep't 1964)).

22. *Id*.

23. Byer's Civil Motions, *supra* note 6, at § 19:13, at 231 (citing *Zirn v. Bradley*, 263 A.D. 724, 724, 30 N.Y.S.2d 688, 688 (2d Dep't 1941)).

24. Siegel, *supra* note 7, at § 482, at 839.

25. *Id*. at 838.

26. Byer's Civil Motions, *supra* note 6, at § 19:13, at 230 (citing *Ellenberg v. Brach*, 88 A.D.2d 899, 902, 450 N.Y.S.2d 589, 592 (2d Dep't 1982) ("We note, however, that a fine for civil contempt cannot include punitive damages, for such a fine 'should

be formulated not to punish an offender, but solely to compensate or indemnify . . . complainants.'") (quoting *State of N.Y. v. Unique Ideas, Inc.*, 44 N.Y.2d 345, 349, 405 N.Y.S.2d 656, 658, 376 N.E.2d 1301, 1304 (1978))).

27. Gray, *supra* note 1, at 403.

28. *Id*.

29. *Id*.

30. *Jamie v. Jamie*, 19 A.D.3d 330, 330, 798 N.Y.S.2d 36, 37–38 (1st Dep't 2005) ("To hold that reasonable costs and expenses are recoverable only when an actual loss or injury is not shown would be to make recovery of an actual loss or injury anomalously disadvantageous where, as here, the claimed costs and expenses incurred in prosecuting the contempt are much larger than the claimed actual loss caused by the contempt. Accordingly, we overrule our prior holdings that attorneys' fees are not recoverable where actual damages are shown.").

31. Siegel, *supra* note 7, at § 482, at 839 (citing Judiciary Law § 773); Byer's Civil Motions, *supra* note 6, at § 19:13, at 230 (citing *Unique Ideas*, 44 N.Y.2d at 350, 405 N.Y.S.2d at 659, 376 N.E.2d at 1304) ("In keeping with this compensatory policy, where there is actual loss or injury the statute does not provide for a general $250 fine, single or multiple. It calls instead for an assessment that will indemnify aggrieved parties, in this case the persons who sent money to the defendants in response to the deceptive postjudgment solicitations. Although it has yet to be established exactly how many persons suffered losses, the existence of a substantial injury itself is not disputed. And the extent of that injury could not possibly be less than the $209,000 balance traced to receipts from the contemptuous solicitations and found by Special Term to represent 'but the residue of a larger amount of which consumers were defrauded.'") (quoting special Term); *Skoy v. Skoy*, 122 A.D.2d 262, 262, 504 N.Y.S.2d 774, 774 (2d Dep't 1986) ("However, in a case where it is shown that there may be prejudice to the complainant's rights but it is not shown that an actual loss or injury has been caused, the fine to be imposed may not exceed $250 plus costs and expenses.")); *Rechberger v. Rechberger*, 139 A.D.2d 906, 907, 528 N.Y.S.2d 452, 453 (4th Dep't 1988) ("Inasmuch as no actual damages were proven by plaintiff as a result of defendant's lack of compliance, the court's order should be modified to delete the imposition of a fine of $50 per day for 30 days, and replaced with a definite fine of $250. This $250 would be in addition to plaintiff's costs and attorney's fees, determined by the court to be $1,500.").)).

32. Judiciary Law § 774(1); Siegel, *supra* note 7, at § 482, at 839; Byer's Civil Motions, *supra* note 6, at § 19:16, at 233.

33. *Kaminski v. Kaminski*, 212 A.D.2d 1045, 1045, 623 N.Y.S.2d 671, 672 (4th Dep't 1995) (citing Judiciary Law § 774(1); *Astrada v. Archer*, 20 Misc. 3d 1130(A), *12, 2008 N.Y. Slip Op. 51675(U), *12, 2008 WL 3166060, at *12 (Sup. Ct. Kings County 2008) ("I then fined Ms. Felton, pursuant to Judiciary Law § 773, $500.00 for civil contempt, and, sentenced Ms. Felton, pursuant to Judiciary Law § 774(1), to six months jail or until she purged herself of contempt, by paying to Ms. Astrada's counsel the $30,000.00 down payment together with the accrued and statutory interest.").

34. *N.A. Dev. Co., Ltd. v. Jones*, 114 Misc. 2d 896, 899, 452 N.Y.S.2d 992, 994 (Civil Ct. Hous. Part N.Y. County 1982) ("Thus coercive imprisonment is unlimited in time, while punitive imprisonment is limited to six months."), *aff'd*, 99 A.D.2d 238, 242, 472 N.Y.S.2d 363, 366 (1st Dep't 1984).

35. Gray, *supra* note 1, at 402.

36. Judiciary Law § 774(1).

37. *Id*.

38. Siegel, *supra* note 7, at § 482, at 839 (noting that imposing jail time on contemnor as a punitive measure under civil contempt poses constitutional issues) (citing Judiciary Law § 774(1)).

39. Judiciary Law § 774(1).

40. *Id*.

41. Siegel, *supra* note 7, at § 482, at 840 (citing Judiciary Law § 774(2) & CPLR 2308(c)); *Kruszczynski v. Charlap*, 124 A.D.2d 1073, 1074, 508 N.Y.S.2d 861, 862 (4th Dep't 1986) ("We note that the court has the option to terminate the sentence when it comes up for review three months from its commencement, should conditions at that time so warrant.").

42. *N.A. Dev. Co., Ltd. v. Jones*, 99 A.D.2d 238, 242, 472 N.Y.S.2d 363, 366 (1st Dep't 1984) ("We note also that serious doubt has been cast upon the constitutionality of the provisions of [Judiciary Law § 774] insofar as they permit sanctions in civil contempt proceedings that 'are neither remedial nor coercive, but punitive.'") (quoting *Vail v. Quinlan*, 406 F. Supp. 951, 960 (S.D.N.Y. 1976), *rev'd on other grounds*, 430 U.S. 327 (1977)).

43. *Id.* at 245, 472 N.Y.S.2d at 368 ("[T]hese sections [, including Judiciary Law § 774,] are long overdue for legislative review and revision.") (Sandler, J., dissenting).

44. Judiciary Law § 775; Byer's Civil Motions, *supra* note 6, at § 19:16, at 233. The inability-to-pay defense is common in domestic disputes. *See* Domestic Relations Law § 246; *Isaacs v. Isaacs*, 2003 N.Y. Slip Op. 50637(U), *6, 2003 WL 1793076, at *6 (Sup. Ct. N.Y. County 2003) ("A hearing is unnecessary when a defendant's papers do not set forth sufficient facts to warrant a hearing. 'A hearing is required only when the affidavits demonstrate a genuine issue as to whether a party is able to abide by the terms of the order or judgment, such as, for example where the noncomplying party submits a detailed affidavit as to his inability to pay.'") (quoting *Farkas v. Farkas*, 209 A.D.2d 316, 318, 618 N.Y.S.2d 787, 788 (1st Dep't 1994)).

45. *Odimgbe v. Dockery*, 153 Misc.2d 584, 593, 582 N.Y.S.2d 909, 916 (Civ. Ct. Kings County 1992) ("The Court further finds Respondent guilty of civil contempt and sentences Respondent to imprisonment in the County jail for a period of 20 days, said sentence to run concurrent with the sentence imposed for criminal contempt, and further fines Respondent the sum of $250.").

46. Judiciary Law § 752; Gray, *supra* note 1, at 399; Byer's Civil Motions, *supra* note 6, at § 19:03, at 222.

47. *In re Loeber*, 256 A.D.747, 749, 681 N.Y.S.2d 416, 418 (3d Dep't 1998) (finding Article 78 a proper mechanism to review summary civil contempt "'summarily punishing a criminal contempt committed in the presence of the court.'") (quoting CPLR 7801(2)).

48. Gray, *supra* note 1, at 400.

49. *Ravnikar v. Skyline Credit-Ride Inc.*, 79 A.D.3d 1118, 1120, 913 N.Y.S.2d 339, 341 (2d Dep't 2010) ("Inasmuch as enduring consequences potentially flow from an order adjudicating a party in civil contempt, an appeal from a contempt adjudication is not rendered academic when the contempt is purged.").

50. *Storelli v. Storelli*, 101 A.D.3d 1787, 1788, 958 N.Y.S.2d 249, 250 (4th Dep't 2012) ("We note at the outset that respondent's appeal is not moot. 'Inasmuch as enduring consequences potentially flow from an order adjudicating a party in civil contempt, an appeal from that order is not rendered moot simply because the resulting prison sentence has already been served.'") (quoting Bickwid v. Deutsch, 87 N.Y.2d 862, 863, 638 N.Y.S.2d 932, 932, 662 N.E.2d 250, 250 (1995)).

51. *Midlarsky v. D'Urso*, 133 A.D.2d 616, 617, 519 N.Y.S.2d 724, 725 (2d Dep't 1987); *In re Nestler v. Nestler*, 125 A.D.2d 836, 837, 510 N.Y.S.2d 32, 33 (3d Dep't 1986) ("The decision of whether to punish as contempt noncompliance with a court's decree and the fixing of conditions by which the contemnor may purge himself rest in the sound discretion of the court.").

52. Byer's Civil Motions, *supra* note 6, at § 19:13, at 231 (citing *Seril v. Belnord Tenants Ass'n*, 139 A.D.2d 401, 402, 526 N.Y.S.2d 462, 464 (1st Dep't 1988) ("Although a contempt order may provide a party with an opportunity to purge the contempt, it cannot 'defer, dependent upon future conduct, the determination of what punishment shall be inflicted.'") (quoting 21 N.Y. Jur. 2d, Contempt, at § 30, at 330 (2014) (as updated))).

53. Gray, *supra* note 1, at 403.

54. *Id*.

55. *Id*.; Byer's Civil Motions, *supra* note 6, at § 19:04, at 223 (citing *In re Ferrara v. Hynes*, 63 A.D.2d 675, 675, 404 N.Y.S.2d 674, 675 (2d Dep't 1978) ("[W]e are constrained to hold that appellant, by appearing and testifying before the Grand Jury . . . has fully, albeit belatedly, complied with the subpoena and has thus purged himself of the contempt.")).

56. Gray, *supra* note 1, at 402.

57. *Id*.

58. CPLR 5104 ("Any interlocutory or final judgment or order, or any part thereof, not enforceable under either article fifty-two or section 5102 may be enforced by serving a certified copy of the judgment or order upon the party or other person required thereby or by law to obey it and, if he refuses or wilfully neglects to obey it, by punishing him for a contempt of the court."); Byer's Civil Motions, *supra* note 6, at § 19:09, at 226 (citing *Wiebusch v. Hayes*, 263 A.D.2d 389, 390–91, 693 N.Y.S.2d 120, 122 (1st Dep't 1999) ("Judiciary Law § 753(A)(3) generally forbids the use of the court's civil contempt powers to enforce such judgments, and none of the exceptions to the general rule are applicable here.")).

59. Byer's Civil Motions, *supra* note 6, at § 19:11, at 229.

60. *Id*. (citing *Wides v. Wides*, 96 A.D.2d 592, 593, 465 N.Y.S.2d 285, 287 (2d Dep't 1983) ("Enforcement of a judgment directing the payment of money is accomplished through execution rather than through contempt proceedings, absent statutory provision to the contrary. Since a direction to pay money is itself not a mandate issuing from a court, as that term is used in the criminal and civil contempt provisions of the Judiciary Law, contempt proceedings cannot be initiated against a recalcitrant judgment debtor absent a violation or impairment of legal process issued under the judgment, such as an execution pursuant to CPLR 5230(b). The use of contempt proceedings to enforce monetary obligations created by a matrimonial order or judgment, however, has been expressly authorized since 1880."); *accord* Domestic Relations Law § 245)).

61. *See generally Metro. Life Ins. Co. v. Young*, 157 Misc. 2d 452, 453, 596 N.Y.S.2d 653, 654 (Civ. Ct. N.Y. County 1993).

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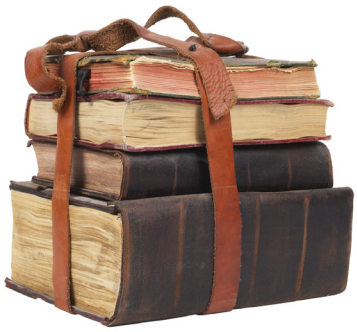

Drafting New York Civil-Litigation Documents: Part XXXV — Contempt Motions Continued

In the last issue, the *Legal Writer* discussed moving for civil contempt. We also began a discussion about opposing civil contempt: your defenses to a civil-contempt motion. In this issue, we continue our discussion of civil-contempt motions.

Opposing Civil Contempt, Continued

Appealed Orders and Reversals

If you disagree with the court's order, move to renew, reargue, or both.

If you don't prevail on your motion to renew or reargue, obtain a stay and appeal.

It is no defense to civil contempt that you appealed the court's order when you disobeyed it.[1] If you didn't get an appellate stay of the order, "the requirement of obedience is the same as though no appeal was taken at all."[2] To oppose civil contempt, tell the motion court, if accurate, that you've appealed the court's initial order and obtained a stay pending the appeal.

On appeal, the court's order "may be reversed for any number of reasons other than voidness or jurisdiction."[3] Civil contempt, unlike criminal contempt, "always depends upon the legality and authority of the court to issue the order in the first instance,"[4] including orders in which the court had no jurisdiction (personal or subject matter) or in which the court's order was void on its face, transparently invalid, or frivolous.[5] In a civil-contempt proceeding, a court may consider "the propriety of the order violated."[6] The "[p]unishment for civil contempt . . . is cancelled" when an appellate court determines that the lower court's order shouldn't have been issued.[7]

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> The court will hold an evidentiary hearing only if factual disputes prevent the court from determining, on the papers alone, whether to adjudicate the alleged contemnor in civil contempt.

A court might hold you in civil contempt if you didn't appeal the court's order and instead chose to disobey it. If you appeal the civil-contempt adjudication, you can't revive your "abandoned challenges" to the court's initial order.[8] Your appellate right to challenge the court's initial order ended when you failed to appeal. You're barred from collaterally attacking the court's initial order on an appeal of a civil-contempt adjudication. This is the collateral-bar rule.

The Court's Adjudication of Civil Contempt

To determine whether a civil-contempt adjudication is appropriate, the motion court will consider the parties' moving papers, opposition papers, and reply papers. The procedure is different for summary contempt.[9]

Before a court holds you in civil contempt, the court needn't hold an evidentiary hearing with testimony and exhibits.[10] Due process — notice and an opportunity to be heard — is the only requirement.[11]

The court will hold an evidentiary hearing only if factual disputes prevent the court from determining, on the papers alone, whether to adjudicate the alleged contemnor in civil contempt. At the hearing, alleged contemnors may testify, call witnesses, confront and cross-examine their adversary's witnesses, and introduce exhibits into evidence. Alleged contemnors may bring counsel to assist in their defense. In its discretion, the court may assign counsel.[12]

Civil contempt is appropriate when "obedience is reasonably perceived not to be within the capability of the contemnor."[13]

The court's civil-contempt adjudication must be in writing: "No appellate review of a contempt adjudication and punishment is possible unless it has been reduced to writing."[14] If it's not in writing, the contempt adjudication has no legal force and effect.[15] The court must specify in a written order the facts of and the punishment for the contempt adjudication.[16] A court's conclusory findings aren't enough.[17] If the court doesn't specify that its adjudication is for criminal contempt or doesn't find that the contemnor willfully — intentionally — disobeyed an order, the court's adjudication will be for civil contempt, not criminal contempt.[18]

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Diana Zeiger
Amy Michelle Zelcer
Katherine Huaxing Zhang
Xiaozhu Zhao
Eric M. Zisk
Darya Y. Zuravicky
Daniel Viktorovich Zybtsev

SECOND DISTRICT

Noor F Ahmad
Albert Solomon Antar
Hugo E. Arenas
Michael Andrew Belmont
Alyssa Zara Benson
Sara Ann Bernstein
Rachel C.E. Berzin
Paul Bolonik
Elizabeth Laura Brown
Piotr Michal Burdzy
Laurie J. Cartwright
Andrew David Cassady
Samantha Leigh Chetrit
Bobby Codjoe
Elizabeth P. D'Antonio
Vanessa L. Dell
Sarah Shoeleh Di Julio
Meaghan Marie Dwyer
Emily Susanne Farquharson
Alexa Jane Fritsche
Yuri Geylik
Menachem M. Gitlin
Samuel T. Gray
Emma Grunberg
Patrick Warren Hagerty
Stephanie Jill Hamberger
Elizabeth Margaret Hanly
Adam D. Hill
Gregory S. Hoffman
Noah Hussain
Hanna B. Jackson
Nesta Nicole Johnson
Simon Kabzan
Ra'shaun Jamar Kelley
Christine Zenaida Khaikin
Aleksandr Kheyman
Mina Kim
Michael James Knauss
Stephen Koppel
Andrew Chase Kurland
David Faber Lavery
Nicole Renee Lloret
Peter John Marshall
Anna Masliakova
Sarah Winifred McCarthy
Akiva Abraham Miller
Deaglan Micheal O Dubhda
Ramy Odeh
Artur Osmanov
Daniel Oxenkrug
Adeola Omotunde Oyelola
Susan Sisi Pan
Tamikka Faith Pate
Bhavin Patel
Loraine B. Peone
Pihra H. Pizzingrilli
Cassandra Jeanne Pond
Meezan Qayumi
Marissa Gabrielle Ram
Jesse Rhine
Sarah Marie Rocco
Justin M. Rosenblum
Al L. Roundtree
Ilana Jan Rubin
Hays Rudolph
Matteo Giuseppe Sandusky
Adam Bradley Schain
Brian Stephen Scherer
James Richard Schlosser
Mark Everett Schulte
Igor Shandler
Andrew Shlomovich
Edward Isaac Silvera
Radoslaw Smolinski
Bradley Jordan Sova
Genna D. Teitelbaum
Lane P. Thorson
Dina Tornheim
Anthony Charles Varbero
Inna Vernikov
Yonatan Yechezkel Wachspress
Nicholas David Wanger
Jonathan B. Weiss
Edward Meng Hua Yu
William A. Yukstas

THIRD DISTRICT

Jenelle Christine Arnold
Gideon Elliot
David Scott Fenichel
James B. Ferguson
Tamara S. Frazier
Deborah Gorman
Krystan Amore Hitchcock
Zane A. Illing
Sanjeevani S. Joshi
Daniella Elizabeth Keller
Maria Sue Knirk
Timothy M. MacPherson
Jonathan S. McCardle
Gracja M. Nowak
Robert J. Orapello
Diamond C. Overby
Ian E. Penders
Brandon D. Russell
Alison Russomano
Richard Walter Sawyer
Rebekah Bari Sokol
Joshua W. Stern
Alison VanDerVolgen

FOURTH DISTRICT

William W. Carlisle
Sherri L. Eckles
Megan Harris-Pero
Melissa L. Jordan
Jacqualine C. Lombardo
Erin N. Miter
Joseph Dominick Rossi
Melanie A. Spaulding

FIFTH DISTRICT

Kevin A. Barone
Richard Thomas Colonna
Richard S. Greenhaus
Brittney Marie Hodnik
Mark Allen Johnson
Franklin Millard Leve
Bryan J. Maether
Arthur C. Stever
Jennifer Lee Suwak

SIXTH DISTRICT

Grace I. Chiang
Daniel Jared Green
Thomas John Greene
Paula Highers
Shen Lin
Kathleen H. McGee
Colin Sinclair McKeon
Zachary Daniel Morahan
Joshua Nelson
Adam Lee Olin
Jinesh P. Patel
Afton Geraldine-Mary Pavletic
Palmer Pelella
Richard Porter
Richard Joseph Porter

SEVENTH DISTRICT

Michael Thomas Ansaldi
Jennifer L. Aronson
Daniel A. Berger
Laura Ann Burgess
David Den Houten
Stephen William Fantuzzo
Dominic Vincent Giacona
Kristie Leigh Gotwald
John Thomas Haran
Katherine B. Heeks
Andrew Joseph Lavigne
David Lin
Anne M. Lindenhovius
John Anthony Marsella
Margaret Grace Mastrodonato
Molly Katherine Owens
Gregory Paul Salmon
Kristin M. Small
Kari Ann Talbott
Gabriel W. Weiler
Adam Francis Zielinski
Collin David Zundel

EIGHTH DISTRICT

Anjelika Abrahamyan
Christina Lee Akers-Dicenzo
Lee M. Bender
Timothy John Brooks
Katie Lyn Buckley
Sean Bernard Bunny

Brenda A. Cisneros Vilchis
Claudia Victoria De Jesus
Alexander Dowd
Donald Wm. Driscoll
Lee Fabiatos
Anthony Rafael Faraco
Torrey Elizabeth Grenda
Cynthia Dilorenzo Gross
Amanda Michelle Jantzi
Dunya Jovanovic
Bridget Arendt Kleinfelder
Ryan J Leonard
Katri Lamb Linnamaa
Christopher David Lucchesi
Meredith Marjorie Mohun
Habriel Mykula
Vijey R. Nagarajah
Nicholas B. Pulvino
Micelle M. Ragusa
Elisabeth Marie Rossow
Thomas George Spanos
Mark Dewitt Thrasher

NINTH DISTRICT

Pamela Adewoyin
Thomas Peter Britz
Andrew Scott Burg
Lucy Calisi
Leon P. Cameron
Javier Fabian Diaz
Robert D. Giannattasio
Martus Granirer
Justine Robyn Gray
Alyssa Lucille Guarino
Kadeidra Honey
Kyle Matthew Joyce
Joseph Francis Kelly
Jared F. Kraminitz
Kelly Marie Kruszewski
Louis Anthony Levithan
Michael Qi-hui Li
Mario F. Lucero
Alexandra Valena Manes
Lucy K. Martucci
Sara A. Morton
Andrea Mueller-Manasseri
Casey Manning O'Donnell
Melanie Judith Omolau Okpaku
Olivia G. Peters
Olivia Gifford Peters
Jordan Louis Pietzsch
Matthew James Polus
Joseph Rapice
Fahd Ahmad Reyaz
Scott S. Ring
Karen Chana Rudnicki
Solomon Jacob Schepps
Meena Shah
Kerriann Stout
Michael Joseph Sussman
Jie Tan
Ingrid Borges Tavares
Madeleine Ann Vallely
David H Vickrey
Steven M Wrabel

TENTH DISTRICT

Jason Matthew Aaron
Ajoe P. Abraham
Michael Jun-bum An
Nicole I. Barnett
Alex Jeremy Berkman
Vincent Bertone
Brittney Anne Borruso
Matthew Joseph Boyle
David Matthew Bradford
John Patrick Brolly
Michael Carlos
Ravi Cattry
Jory Charles
Jesse S. Cohen
Joanna L. Cohen
Andrew M. Crystal
Diana Patricia Dileonardo
Neil Patrick Diskin
William Joseph Durcan
Anthony Joseph Durwin
Joshua Meir Elsant
Krista Faltin
Narine Galoyan
Adam D. Goldstein
Deon Jermaine Goodman
Samuel A. Griffel
Stefanie Faye Guarino
Ian H. Hayes
Daniel N. Hill
Thomas Alden Hooker
Michael Shea Kane
Lauren Elizabeth Karalis
Varun Kathait
Jeremy David Kaufman
Michael Daniel Kohanim
Jeffrey Y. Kret
Jessica Lynn Leuci
Amanda Anne Long
Iain Andrew McLeod
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Joan Efezino Owhe
William Joseph Palazzolo
Michael B. Penzer
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James P. Ratchford
Jason Noah Reisfeld
Rosemary L. Repetto
Frank Rizzo
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Krista Marie Rose
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Erin Marie Ross
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David Samuel Schwartz
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Joseph Patrick Sulzbach
Anna Borisovna Sytina
Matthew X. Travaglia
Natalia Carolina Villalba Gonzalez
Abigail L. Wallace
Alexandra A. Wheeler
Claire G. Young
Molly Zamoiski
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Richard Grant Zimmerman

ELEVENTH DISTRICT

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Michael M. Atzlan
Melissa S. Ayre
Latoya Sade Belle
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Joan Therese Fernandez Boma
Jonathan Verney Brewer
Nadia S. Budhai
Bianca Lucy Cappellini
Natasa Colovic
Vicki Dixit
Priscilla Escobedo
David John Feeser
Alejandra Sonia Franco
Benjamin Frenkel
John Hugh Gallagher
Yang Gu
Juanita Headley
Julia H. Iodice
Jimmy Johnson
Melissa Lynn Jordan
Allen J. Kim
Kyu Young Lee
Chang Liu
Sara Michelle Lubetsky
Brittany Nicole Mazzatto
Kyle T. McEwen
Anne M. McGinnis
Angela Marcela Navarro
Alexandru Necula
Scott C. Novakowski
James Patrick Peter O'Donnell
Roseline Adetola Odofin
Ernesto Papaleo
Anish Mayur Patel
Jonathan Pillischer
Danny Ramrattan
Vernika Lenora Ross
Laura Salerno
Puja Sharma
Samuel Harry Solomon
Joel L. Watson
Adam Chanan Weiss
Danny Ku Yo
Jie Yu

TWELFTH DISTRICT

Michael Low Bloch
Sansara A. Cannon
Margaret I. Corchado
Sarande Dedushi
Yitzhak Z. Dubitzky
Rinerys Garcia
Beverly Jan Gertler
Shouk Ul Hasan
Rosa Henriquez
Jacob S. Kutnicki
Trudy-ann Nicole' McKenzie
John Montoute
Kiran H. Rosenkilde
Yakov Yosef Sabghir
Ramandeep Singh
William Scott Terrell
Alyssa Roxanne Work

THIRTEENTH DISTRICT

Manuel L. Batista
Joseph M. Cammarata
Paul J. DeVito
Fouad Munzer Elayyan
Yehuda Farkas
Justin Anthony Guilfoyle
Colleen Silva Lima
Albert Won Suh
Christopher D. Volpe
Jessica Voto
Ella Michelle Yusim

OUT OF STATE

Nabeela Abid
Ibukun Oluwaseyi Abidoye
Kevin Tod Abikoff
Joseph Samuel Aboyoun
Kemal M. Abul-Hawa
Thomas Jameson Adair
Tanya Aggarwal
Albert Felix Aharonian
Serge Airut
Opeyemi Rabiat Akande
Fahed Al Sabouni
Nezar Mohamed-ali Al-abbas
Aseel Al-ramahi
Dina K. Al-Wahabi
John Spyros Albanes
Charrise Lanee Alexander
Abraham Alfaro
Lawrence Paul Almagno
Fernando C. Alonso
Alexander Steven Altman
Almudena Maria Alvarez Otero
Emilio Jose Alvarez
Babak Bob Amirian
Miryoung An
Christina Rae Anderson
Melissa Carmel Andre
Siena Sofia Magdalena Anstis
Alexander John Anzalone
Lakeisha Marie Applegate
Magaly Aranda Gracia
Eric Daniel Arbizo
Beren Argetsinger
William Edwin Arnold
Laina Behrends Arras
Mikhail Vladimirovich Arsentyev
Margaret Tanzman Artz
John Asher
Nazanin Aslani
Shana Tess Attas
Ana Carolina Botto Audi
Paige Parker Austin
Jonathan Robert Avolio
Naila S. Awan
Lauren A. Bachtel
Matthew Stephen Bailey
Richard Bailey
Jamie Kreeger Baker
Christine Lynn Baker-Rodriguez
Pablo Balana Vicente
Raymond Mario Baldino
Hyung Sik Bang
Sara Barin
Wendi Dawn Barish
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Michelle Barry
Ernesto Bartels
Vanessa Battaglia
Nicole Lauren Battle
Brian D. Bauman
Daniel Owen Baumann
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Stephanie Sophia Bazell
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Corinne Marie Bell
Isabella Del Socorro Bellera Landa
Voci Ravenell Bennett
Jared S. Berkowitz
Aaron Joseph Berman
Eric Neil Bernstein
Luca Bertazzo
Michael Biggiani
Alejandro Billinghurst
Tehi Julie Billon-lanfrey
Benjamin Powell Birchenall
Emily Marie Bisnauth
Sachiko Biyajima
Sara Elizabeth Blackwell
Jackson Allen Blair
Elizabeth Anne Blakely
Alexandre Joseph Paul-emile Blanchard
Peter Allan Bradley Blanchard
Tayo Massey Bland
Kelley Dunn Bledsoe
Kevin Robert Block
Nick Bluhm
Anthony Joseph Boccamazzo
Melissa Boey
Lewis Edward Morel Bollard
Marianne Borbar
Kendra Clare Borchardt
Sarah Clemens Borden
Ronald Peter Botelho
Brynn Bowen
Amiel Ewa Bowers
Erin Rose Boyd
Katelyn Mary Brack
Jessica Lea Paulsgrove Bradley
Leslie Frances Bradshaw
Alexia Renee Brancato
Sophia Madeleine Brill
Neal Paul Brodsky
Jay I Brody
Mykel William Warren Brooks
Colin Brown
Colin Graeme Brown
Emma Olabisi Brown
Nicole Marie Brown
Kira Bru
Michele Sherretta Budicak
Lydia Bull
Amanda Burkett
Shmuel Bushwick
Gino Joseph Butto
Jaclyn Maree Cahill
Julia R. Calnek
Cristina Calvar
Cristina Isabel Calvar
Amanda C. Campo
Kathryn Beatrice Carey
Michael Steven Carnevale
Cristina Caro Tovar
Daniel Carragher
Jessica Anne Carrier
Loretta Carty
Heeran Caselton
Gloria Mercedes Chacon
Siu Yan Chan
Siu Yan Chan
Yih-cheng Chang
Muhammad Umer Akram Chaudhry
Amit Singh Chauhan
Beichen Chen
Chun-han Chen
Qian Chen
Wenjia Chen
Xu Chen
Kathryn McGlenn Cherry
Tzu-hui Chien
Patricia Hayne Choi
Yong Jun Choi
Jonathan Alexander Chow
Raymond G Chow
Jennifer Miseong Chun
Hye-Yeon Chung
Jeannie Young Chung
Matthew Anthony Ciarleglio
Paige Meredith Clapp
Blake Austin Clardy
Patricia Clark
Tyler Sherwood Clarkson
Charles Cyrus Clawson
Bridgett Lashawn Clay
Cynthia Gail Claytor
Paul Clews
Zachary A Cloud
Jared Cogan
Nerissa Coker
Amy Coleman
Yongjian Cong
Nicholas R. Conlon
Nicholas Adam Connell
Luke Ramsay Conrad
Christian A. Conti
Seanna M. Conway
Gregory Joseph Cooper
Robert Willima Corbin
Simon Thomas Cornberg
Timothy Louis Cornelius
Laura Cowan
Dennis Michael Coyne
Ryan C. Craig
Leanne Michele Cronic-Powell
Jeremy Cronin
Darnell Crosland
Janice Elizabeth Cross
Elaine C. Crowley
Matthew George Sawers Crowley
Spencer Cuddy
Qiongyi Cui
Mark Steven Cullen
Elizabeth Anne Cuneo
Nicholas Curmi
Anntone He Denise Curran
Edward Albert D'Agostino
Karen A. Daley
Trayosha Darapuneni
Dmitry Darishchev
Vita Dauksaite
Jyoti Davendra Dave
Lee Charles Davis
Jimmy Dawson
Christian A. Dax
Kate Barber Deal
Courtney Agnes Deblis
Audrey Gabriella Decker
Melissa Defrances
Maria Katrina Garcia Del Rosario
Vanessa Del Valle
Elizabeth Amma Apomsah Dennis
Gregory Michael Dexter
Zijun Di
Celina Dobee
Brian Patrick Doherty
Adrianne Doll
Stephen Mark Dollar
Iacopo Donati
Xuchao Dong
Hetal Doshi
Katharine Lee Dougherty
Leszek Dowgier
Jasmin Drinkwater
Kaelyn Marie Drumm
Yang Du
Zhijie Du
Ludovica Ducci
Patrick Joseph Duffey
Michael A. Duffy
Christopher Dunham
Guillaume Raphael Dupont
Samuel Kuiper Dykstra
John Paul Duncan Dziuba
Sarah L. Eble
Mirentxu R. Echenique
Juan Crisostomo Echiverri
Joseph Edlow
Stella Edosomwan
Chizoba Frances Edozie
Drew Matthew Edwards

Khari Anais Edwards
Vedia Eidelman
Mircea Alexandru Eliad
Niklas T. Elofsson
Omar Mohamed Abdelrehim Elzorkany
Katharina Erbe
Mina Eto
Arthur Jacob Ewenczyk
Sydelle Thamar Exantus
Andrea M. Faes
Connor William Fallon
Derek John Famulari
Syed Kamil Fareed
Alexa Farmer
William Brandon Farris
Idris Oriade Fassassi
Kaitlyn Michelle Faucett
Edward Featherstone
Andreas Feith
Irina Feldman
Joshua Gardner Ferguson
Jeffrey Stephen Ferketic
Aaron Erik Fernandes
Vince Ferrito
Zachary R. Fey
Zachary Robert Fey
Taryn M. Filo
Kelsey E. Finch
Adair Fincher
Amelia Jane Gibbings Fink
Hayley Jade Fink
Ayline Finucane
Sarah Jane Fischer
Shannen Fish
Penelope Fisher-Birch
Cassandra Pearls Fishkin
Seth David Fiur
Katherine Barnett Bram Flannery
Paul K. Flavin
Adam Hoyt Fleischer
Natasha Flint
Christopher Mark Floyd
Tristan John Foley
Rodney Quinby Fonda
Thomas Daniel Forrester
Nabil Gallo Foster
Prithviraj Victor Francis
David Eric Freed
Bradley Edward Freedman
Theresa Anne Freitas
Brian Michael French
Sarah Alexandra Freuden
Benjamin Isaac Friedman
Sven Jean-jacques Rj Frisch
Pengyuan Fu
Eli Avery Fuchsberg
Shingo Fukuda
Kristin Fuller
Martin Futter
Irina Galabova
Ryan Michael Galler
Ron Gard
Wayne Ronald Gard
Ophelie Garnier
Rebecca L. Gaskin
Soleine Gautier
Vitus Gbang
Michael Genchi
Stephen Christopher George
Ushma Nilesh Ghatlia
Melanie Man-yu Ghaw
Darian Edward Ghorbi
Neil Peter Ghosh
Joseph James Gianetti
Kathryn Elena Gilbert
Alessandro Giordano
Jennifer Glaeser
Veronica Rose Glick
Laura Alda Godorecci
Yvette Golan
Katie Goldstein
Jeffrey Joseph Golimowski
Gustavo Machado Gonzalez
Matthew Demars Goodstein
Alexandre Adel Gourdan
Lauren Graham
Trisha Grant
David Grigoryan
Genna Grossman
Michelle Therese Gunderson
Charlotte Gunka
Sangwan Ha
Rachel Haber
Daniel Haboucha
Lejla Hadzic
Christopher Edward Halkitis
John Christopher Hall
Victoria Hall-Sturt
Kathy-ann Hamblin
Louise Ann Hamilton
Ebtihaj K. Hana
Samantha Leigh Hannan
Masanobu Hara
Katie Hardie
Shani S. Harmon
Daniel Max Harnick
Kapree Danyel Harrell
Samuel Batiste Hartzell
Mohamed Hasan
Elizabeth Tseik Hassan
Stephen Cooper Hawley
Bethanie S. Haynes
Jinglin He
Lingyun He
Melina Angelos Healey
Ann Marie Heimberger
Karl Christopher Helgerson
Mumal Hemrajani
Jeffery Robert Higgins
Cameryn Joy Hinton
Arti Hirani
Megan Guttery Holstein
Caylee Jean Hong
Daisuke Hoshi
Shaked Hoter
Amber Anastasia Hough
Marquise Lee Karoline Gisele Houle
Philip Paul Houle
Barbara Eletha Housen
Anqi Hu
Lin-Chun Huang
Yiyun Huang
Rutherford Winslow Hubbard
George Tai Yam K. Hui
James Monroe Hunter
Laura Page Huntley
Sana Fatima Hussain
Usra Syeda Hussain
Alvincent Hutson
Seung Jae Hwang
Dongyeop Hyun
Dominic Peter Iannarella
Jessica Maria Ibrahim
Jousset Ines
John Matthew Intili
Evin Farber Isaacson
Michael Carl Isak
Shingo Ito
Olivia Jackson
Dipti K. Jagtap
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Soonwon Jang
Sabina Jausovec
Gola Javadi
Zaira Jehangir
Naira Jejeebhoy
Eva Maria Jellinek
Caprice Jenerson
Nicole Kristen Jenkins
Sora Jeon
Eunson Jeong
Minchul Jeong
Hai Jiang
Shobita Abraham John
Joseph Gerald Jones
Nobuko Wako Jones
Andy Jong
Natasha D. Joseph
Ines Sophie Jousset
Allison Kahl
Allison Nicole Kahl
Eleni Kalmoukos
Karan Kalra
Chi Chung Kan
Ayako Kanamaru
Eun Mi Kang
Jihyun Kang
Sangwook Kang
Woo Min Kang
Woo Min Kang
Ngwoko Humphrey Kangha
Jordan Bryant Kaplan
Seth R. Kaplan
Bilge Esin Karadag
Andrew Karwoski
Chaitanya Katikala
Harry Katz
Marc Daniel Katz
Moorea Lynn Katz
Avraham Katzin
Shimpei Kawakami
Amane Kawamoto
Yuma Kawamura
Omar Mujid Kazimi
Heather Ann Keeton
Sean Craig Kellem
Mateya Beth Kelley
Brendan James Kelly
Danielle T. Kennedy
Jackson Shaw Kern
Andrew Jensen Kerr
Aleksey Khamin
Priyanka Kher
Lauren Antoinette Khouri
Junghyun Kil
Anne Sue Kim
Christine Kim
Diane Hyunjeong Kim
Hee Jeong Kim
Hyundong Kim
Jae Uk Kim
Jung Lim Kim
Jungrae Kim
Nam Ho Kim
Regina Jin Kim
Sung Jo Kim
Sung Hee Kim
Sung Jo Kim
Sung-kyu Kim
Taihyung Kim
Yoon Tae Kim
Yoon Tae Kim
Leslie Poirier King
Nicolas Klein
Susan Elizabeth Klock
Julian Dominic Klose
Jennifer Erin Kmieciak
Sarah Kmieciak
Aled Sikandari Knights
Toshiaki Kobayashi
Yuen Kobayashi
Petr Koblovsky
Benjamin Michael Kobren
Danielle Maria Koch
Sean Christopher Koehler
Raunaq Singh Kohli
Ashley Lynn Kolata-Guzik
Peter Joseph Koltak
Yoshimasa Kondo
Natalie Audrey Kone
Huanzhi Kong
Sung Wook Kong
David Harold Korn
Keerthi Kiran Kota
Natasa Kovacevic
Debolina Kowshik
Tatsuya Koyama
Peter Jacob Kozaczuk
Katlyn Elizabeth Kraus
Peter Christopher Krause
Joshua Aaron Kresh
Priya Krishan
Ashwin Krishnan
Natalie Jones Kronz
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Brian Tse-hua Ku
Neetu Nikki Kumar
Kate Donovan Kurera
Steven C. Kuza
Tatiana Kuzyaeva
Amanda Noelle Laber
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Lisette Afonso Esteves Lagoa
Fei Lai
Jacqueline Lam
Jil Lannders
Jil Lanners
Casandra Lee Lanton
Ronald Wayne Lanton
Kerry Elizabeth Lanzo
Laura Lapyte
Nadia Irene Lataillade
Chun Ming Lau
Angela Lavelle
Vincent Edward Lazar
Garrett Leahy
Antoine Michel Pierre Lebienvenu
Evan Philip LeBon
Aaron Lee
Bongsun Lee
Chang Kyoo Lee
Elizabeth Jooyoung Lee
Grace Sook Lee
Iching Lee
Jae Hoon Lee
Jeong Soo Lee
John Sae-won Lee
Ka Wai Lee
Karris Rashard Lee
Kenneth Lee
Myungjin Lee
Seulgee Sylvie Lee
Sophia Jeanette Lee
Sungwook Lee
Young Shin Lee
Nicole L. Leitner
Shannon Marie Leitner
Sarah Lemon
William Joseph Leone
Maria Cristina Leria Sirvent
Dominique Leroux
Jonathon Gin Man Leung
Thomas Mongeon Leung
Laura Felicia Levine
Anna Blythe Levine-Gronningsater
David Franklin Levy
Elsa Judith Levy
Alexander George Lewis
J. Elliott Lewis
Paul Michael Lewis
Sara Lewis
Sara Maria Lewis
Meixuan Li
Min Li
Timothy Q. Li
Xiameng Li
Xiaoyu Li
Yufei Liao
Jonathan Wei Zhong Lim
Yi-wen Lin
Joseph L. Linares
Carmine Louis Lippolis
Jennifer Rachel Lipshultz
Melissa Jane Lisenbee
William Edwin Litton
Bo Liu
Fang Liu
Jun Liu
Ling Liu
Michelle Xiao Liu
Nian Liu
Wenzhuo Liu
Yanyi Liu
Ying Liu
Yuan Liu
Jennifer Jascoll Ljungberg
Lilian Jessica Lo
Louise T. Loeb
Dmitri S. Lohvinski
Soterios Loizou
Jillian Nicole London
David Earle Long
Jingyao Long
Noemie Marie Lopes-Lemiere
Inez Eusebio Lopez
Jose Ricardo Lopez-Sanchez
Yiheng Lou
Cheng Cheng Lu
Yunguang Lu
Patricia M. Luce
Mareike Christiane Lucht
Andrew Charles Lucking
Varun Luthra
Varun Luthra
Yifan Lv
Alison Julia Lynch
Seung Bum Ma
Daniel Maalo
Julie Ann Machal-Fulks
David J. MacIsaac
Miriam Isha Mack
Juliana Gray Macpherson
Almat Madaliyev
Neepa Paresh Majmudar
Christine Mocheche Makori
Dillon Hoey Malar
Farheen Malik
Timothy Dennis Malloy
Binta Penda Mamadou
Kensuke Mamiya
Andrei Mamolea
Francis Xavier Manning
Torinto Marasco
Kelsey Hye Sun March
Kesley Hye Sun March
Edward Margulis
Ignacio Marin Garcia
Carolyn Alissa Marks
Ashlyn Marquez
Matthew Theodore Martens
Abbey Rebekah Martin
Allison Lynn Martin
Thomas Robert Martin
Andre Iglesias Marujo
Elizabeth L. Marvin
Elham Marzouk
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Jessica Matic
Masayuki Matsuura
David Paul Mattern
Veronique Segolene Caroline Mauduit
Anna Alexandrovna Mayorova
Noreen Ellen McCarthy
Mathew Brian McCullough
Mathilda Sage McGee-Tubb
Thomas McGimpsey
Erin Anne McGrath
Gregory McGuire
Rachel Deirdre McHugh
Leo R. McIntyre
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Kristen Lynn McKeon
Danielle McKinley
Anna Paffi McLane
Orla Margaret McMahon
Stephen M. McNamee
Miganoush Megardichian
Rochelle E. B. Mello
Marisa-lyn Menna
Juan Felipe Merizalde Urdaneta
Jonathan David Mervis
Katherine Lily Mesner-Hage
Simret Michael
John Gregory Middleton
Sarah Elizabeth Mielke
Marika Mikuriya
Yurika Mikuriya
Yurika Mikuriya
Kristin Marie Miller
Matthew Newton Miller
Neshan Minassian
Morgan Drew Mindell
Erika Maren Minerowicz
Ekaterina V. Mironchuk
Aayush Misra
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Yumiko Miyauchi
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Sojeong Moon
David Shaw Moore
Matthew Moore
Valerie Moore
Joseph Fawzy Morcos
Gabriella Morello
Janeth Berenisse Moreno
Masao Morishita
Masoo Morishtia
Cash Vandiver Morris
Valentina Sergeevna Morrison
Robert Adam Mosier
Monica Moyo
Stefan Mueller
Caleb Vern Muhs
Simone Mulla
Emma Louise Frances Mullins

Hiraku Murakami
Ciara Ann Murphy
Daniel Murphy
David George Murphy
Michelle D. Murphy
Sumana L. Murthy
Ioana Cristina Musat
Jason Todd Mushnick
Hayley Wynn Myers
Wasslia Bemba Nabourema
Takako Nagao
Annabelle Helene Nahra
Mary Najem
Kohei Nakagawa
Iris Nakov
John Edward Nappi
Thales A. Nazario
Adunagow Ndonga
Maria Ann Neal Soleimani
Tonya Oteka Adei Neequaye
Olga Nemoytina
Eliot Joel Nerenberg
Lauren Baird Neubauer
William Cirne Neves
Brian Ng
Vu Ngoc Anh Ngo
Patricia Cristina Tan Ngochua
Yue Niu
Yur Niu
Mohamad Nizam
Michael Paul Noonan
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