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NEW YORK STATE BAR ASSOCIATION

# Journal



## The Dutch, Munsees and the Purchase of Manhattan Island

*by Paul Otto*

*from Opening Statements – Law, Jurisprudence,  
and the History of Dutch New York*

*Albert M. Rosenblatt and Julia C. Rosenblatt, eds.*

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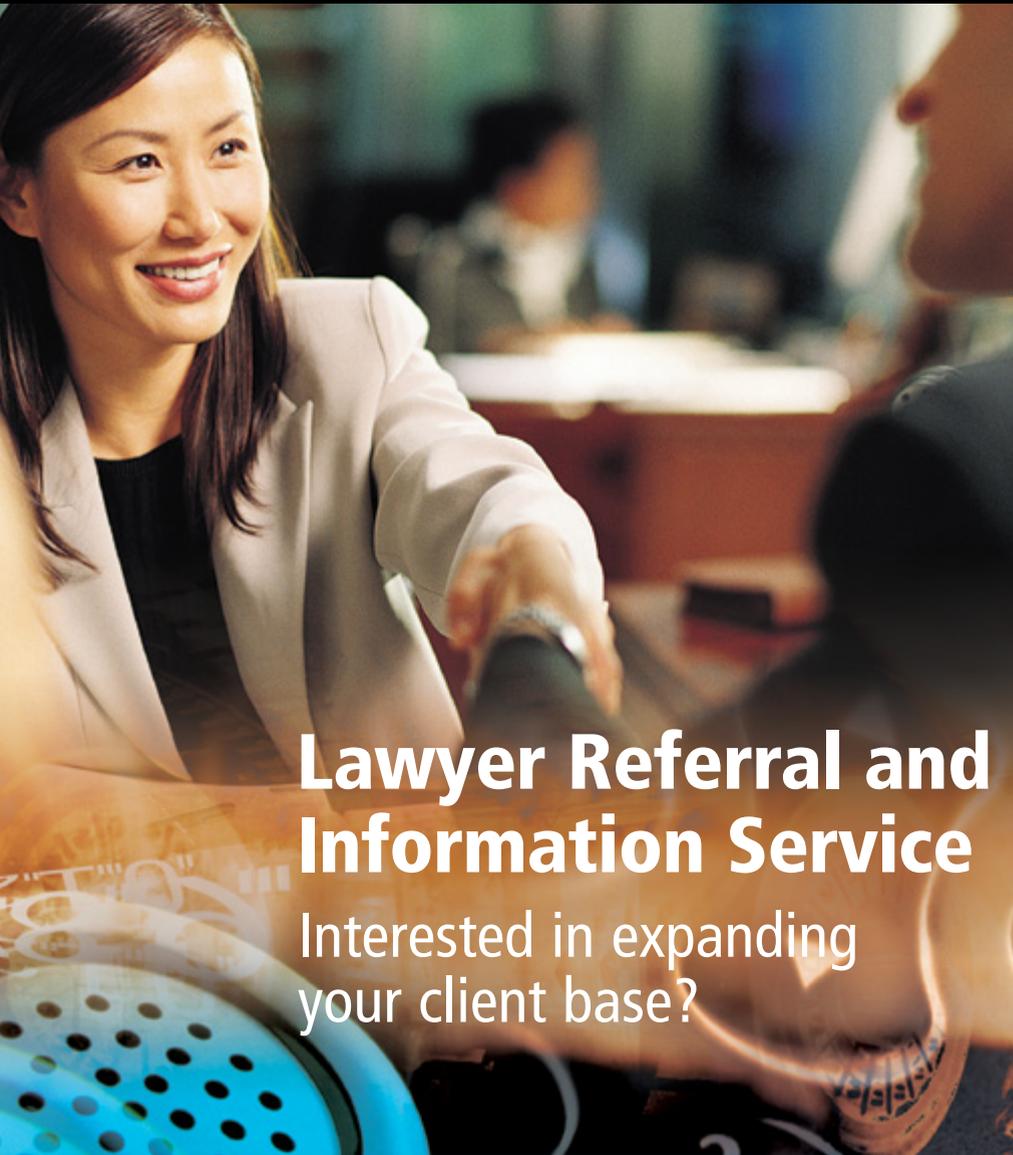
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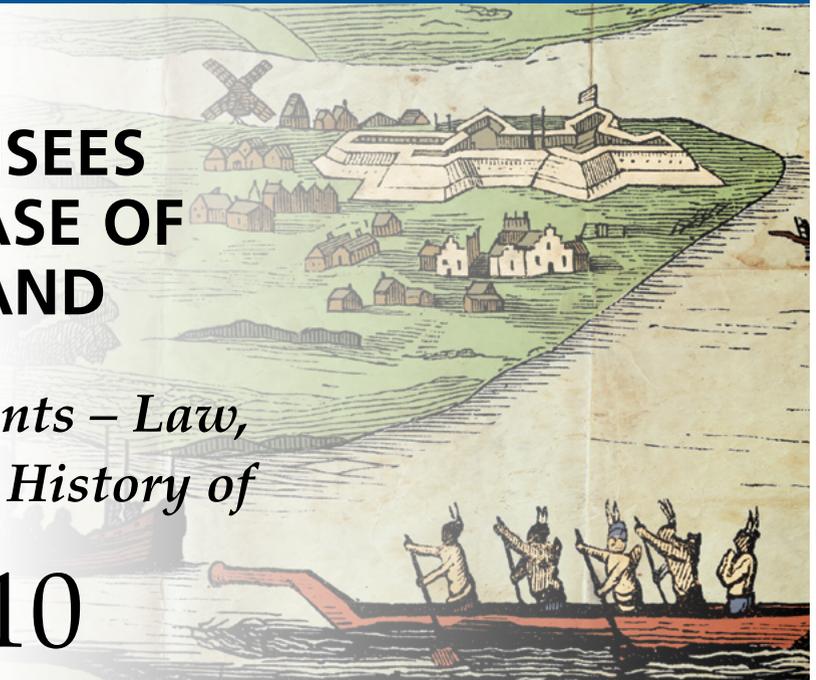
## THE DUTCH, MUNSEES AND THE PURCHASE OF MANHATTAN ISLAND

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from *Opening Statements – Law,  
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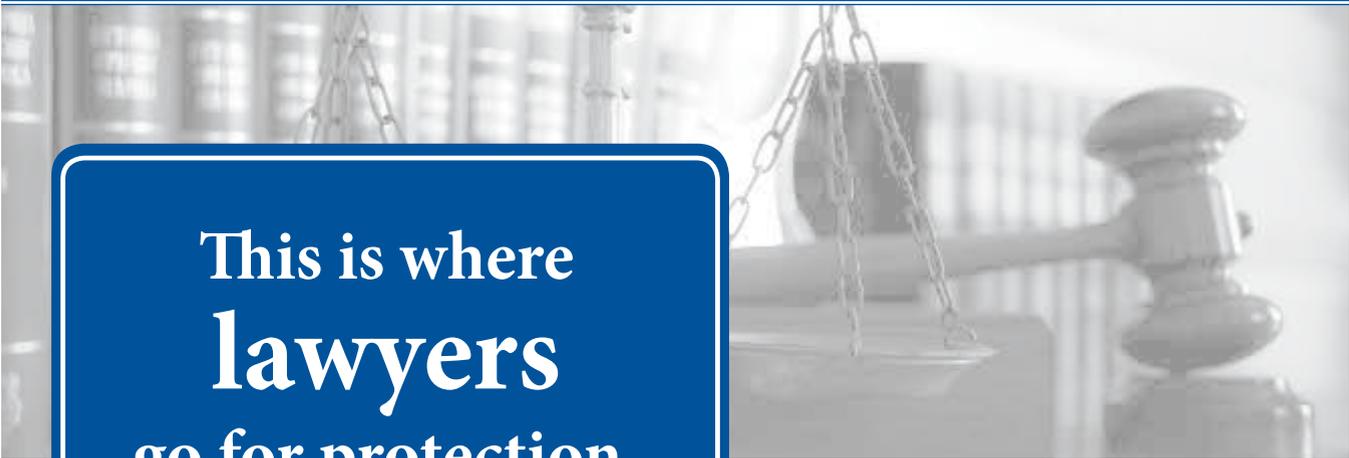
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## A Mid-term Perspective

We all know that issues and events don't fit into neat time frames and often take on lives of their own. That is particularly true for an organization as complex and far-reaching as the New York State Bar Association. So, I thought that it might be useful at the midpoint of my presidency to take a snapshot of some of the major matters that have occupied the Association at various levels for the past six months and put these matters into context.

### Mandatory Pro Bono Reporting and Access to Justice

During the past six months, the issue of mandatory pro bono reporting has occupied much of the time of the Association's Executive Committee and House of Delegates. The issue has certainly caught the attention of other bar associations and attorneys throughout the state as well. In Chief Judge Jonathan Lippman's February 2013 State of the Judiciary address, he addressed the unmet need for legal services in the State of New York and announced the requirement that attorneys report the number of pro bono hours performed and the amount of monetary contributions made to legal service providers. In June of that year, the Association's Executive Committee directed then-President David Schraver to send a letter expressing the Association's opposition to the requirement. Soon thereafter, David Schraver and I met with Chief Judge Lippman to discuss our members' deep concerns, including issues of privacy and fairness. In the following months, the issue became the subject of much debate and comment among the members of the Association

and county and local bar associations. Robert Ostertag, a former president of the Association, played a central role in articulating the objections of many lawyers and bar associations against the reporting requirement, particularly as it pertained to solo and small firm practitioners. At the same time, a report was being prepared by the President's Committee on Access to Justice examining the experience of other states in adopting a pro bono reporting requirement. The debate and comments in the House of Delegate meetings were heated, and feelings ran high.

However, the vote by the House of Delegates on a resolution presented by Scott Karson on behalf of the Association's Executive Committee was postponed to give time for the report to be prepared. This report was presented to the House of Delegates, at its June 2014 Cooperstown meeting, by Judge George Lowe, William Russell and Andrew Scherer. When I assumed the presidency of the Association this past June, I asked the House of Delegates to again postpone the vote to give David Miranda, the president-elect, and myself time to try to settle this matter directly with the Chief Judge. I was deeply appreciative that the House honored my request at a time when there was tremendous pressure to take action.

I had met with Chief Judge Lippman at his request, and we had agreed to have Chief Administrative Judge A. Gail Prudenti, Helaine Barnett (Chair of the Chief Judge's Task Force on Access to Justice), David Miranda and me meet to discuss ways of accommodating the concerns of the



Association with the pro bono reporting requirements.

Over the course of four meetings that were both collegial and productive, this group reached agreement on three main areas of concern to our members: (1) reporting on pro bono service and contributions would be anonymous, (2) any public reporting of this data would be in the aggregate only, and (3) the reporting requirement would expand the categories of pro bono and public service to better reflect all the contributions attorneys make to their communities. We also agreed that any information reported by attorneys before these changes were made would be designated as confidential by the Office of Court Administration.

On December 18, 2014, the Administrative Board of the Courts unanimously approved modifications to Section 118.1 of the Rules of the Chief Administrator to conform to the recommendations of our group. By agreement, a committee of six persons – three designated by the Chief Judge and the other three designated by me – has been formed to oversee the details and implementation of the pro bono

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## PRESIDENT'S MESSAGE

reporting requirement. I will be reporting to the House of Delegates on this matter in future meetings.

While this issue has been extensively reported on and subject to extensive comment, there are two additional points I wish to make.

First, I believe that the data that will be compiled from this reporting requirement will be useful. During my most recent presentation before the House of Delegates, I spoke about how the discussions regarding access to justice and pro bono have been evolving. We need data to help us determine the most effective ways to use resources to address access to justice issues. Our Association has long been interested in addressing these issues, through seed-money grants from the New York Bar Foundation, by encouraging our members' thousands of hours of pro bono service through incentives such as our award programs, and by advocating for sufficient funding for legal services at both the state and federal level. The data will also help bar associations throughout the state let the public know about all the contributions that attorneys make to their communities, at so many different levels and in so many ways.

Second, a significant outgrowth of dealing with this mandatory pro bono issue has been the establishment of a stronger, more positive working relationship between this Association and the Chief Judge and the Office of the Court Administration (OCA). This intense conversation has also strengthened the lines of communication between this Association and other bar associations in the state.

### The Uniform Bar Examination and Legal Education

Our strengthened working relationship with the Chief Judge and the OCA was helpful in communicating the Association's concerns to Chief Judge Lippman when he announced, in October 2014, his interest in having New York become the 15th state to adopt the Uniform Bar Exam (UBE). His announcement suggested that the

UBE could be administered in New York State as early as July 2015. The time periods for comments and implementation were too short, and at its November 2014 meeting the House of Delegates voted to ask Judge Lippman to extend the comment period from 30 days to 90 days and to forestall implementing the change in July of 2015.

After the House of Delegates vote and after having met with several law school deans who had similar concerns, Judge Lippman agreed to extend the time for comment to March 1, 2015. The Chief Judge also created a working group, headed by Associate Judge of the Court of Appeals Jenny Rivera, to study the bar exam proposals. Additionally, Judge Lippman put off indefinitely the implementation of the UBE. As the working group studies this issue, the Association is helping gather information about the UBE from the 14 states where it is used, including data on whether UBE has a disparate impact on minority attorneys.

Our Association's main concern is that the New York bar examination plays a critical role in helping drive legal education toward an emphasis on giving lawyers entering the profession the skills they will need as members of the New York Bar. A major goal of our Association is that lawyers newly admitted to the bar in New York have the knowledge and skills necessary to practice law in this state. This is important not only for prospective employers but also for their clients. While a new lawyer can use bridge-the-gap CLE programs to get oriented to the actual practice of the profession, law schools need to provide a solid foundation in New York law. In an effort to give their students a successful start, many New York law schools formulate their curricula with an eye toward this state's bar examination. What is tested on the bar examination is, therefore, in many ways relevant to the readiness of new attorneys to practice law in New York.

The UBE and, in particular, the issue of how bar applicants will be tested on

New York law, is a significant topic for discussion in the coming months.

### The Judicial System and Law Reform

This year, the Association played a major role in the establishment of 25 new Family Court judgeships. Advocating for the establishment of these new positions, and their funding, was the Association's top legislative priority for 2014. Working with a coalition of other organizations, the Association was finally successful in addressing this desperate need.

In 2015, the Association will be advocating, in Albany and in Washington, D.C., for funding for the state and federal court systems, as well as for legal services programs. On non-budgetary items, we will focus on various reforms of the criminal justice system and bills to enhance voter participation. We will also be advocating for a revision of the state franchise law and, in Washington, assuring counsel for individuals in immigration proceedings and repeal of the Defense of Marriage Act.

### New York Law on the International Scene

The course of my presidency has also involved several international meetings and initiatives. In October, the Association, recognized as a non-governmental organization to the United Nations, and its International Section participated in a program held at the United Nations Office in Vienna, Austria. The program was opened by the Chancellor of Austria, which I believe is the first time that an Association event was opened by a head of state, and we were also addressed by a judge of the Austrian Supreme Court. We are grateful to the members of the International Section, particularly Otto Wächter in Vienna, for organizing such a significant and successful event.

Part of the program was held at the United Nations offices in Vienna under the auspices of the United Nations Commission on International

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(9 a.m. – 1 p.m.)  
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March 13 Albany (9 a.m. – 12:40 p.m.)  
March 14 Syracuse (9 a.m. – 12:40 p.m.)  
March 26 Long Island (5:30 p.m. – 9:10 p.m.)  
April 18 Buffalo (9 a.m. – 12:40 p.m.)  
May 14 New York City  
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### **Bridging the Gap**

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March 24 Albany

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April 14 Westchester  
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(9 a.m. – 1 p.m.)  
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April 24 Albany; Buffalo; Long Island  
May 1 New York City (live & webcast)

### **Social Media Ethics**

(12 p.m. – 5 p.m.; live & webcast)  
April 22 New York City

### **Trademark**

April 24 New York City

### **Divorce Anniversaries II: Valuation and Executive Compensation**

(9 a.m. – 1:35 p.m.)  
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**JULIA CARLSON ROSENBLATT**, Ph.D. is a writer and former psychology professor at Vassar College. Her articles on skiing have appeared in *Ski*, *Skiing*, and other publications. She is author of *Dining with Sherlock Holmes* and is a member of the Baker Street Irregulars. **ALBERT M. ROSENBLATT**, a graduate of the University of Pennsylvania and Harvard Law School, presently teaches at NYU Law School, having served as a Judge of the New York Court of Appeals, and as Chief Administrative Judge of New York State. He is with McCabe and Mack in Poughkeepsie, where he does arbitrations and mediations. The couple share an interest in history, particularly of New York State's origins.

**PAUL OTTO**, author of "Real Estate or Political Sovereignty? The Dutch, Munsees, and the Purchase of Manhattan Island," chapter 5 in *Opening Statements*, is professor of history at George Fox University, Newberg, Oregon. His research focuses on European-Native American relations in early America; he is currently examining the role of wampum in the colonial northeast. His book *The Dutch-Munsee Encounter in America: The Struggle for Sovereignty in the Hudson Valley* won the Hendricks Award for the best volume on colonial Dutch studies. He has been the recipient of a Mellon Fellowship and an Earhart Research Grant and is a fellow of the New Netherland Institute and the Holland Society of New York.



# The Dutch, Munsees, and the Purchase of Manhattan Island

by Paul Otto

## *from Opening Statements – Law, Jurisprudence, and the History of Dutch New York*

Albert M. Rosenblatt and Julia C. Rosenblatt, Eds.

### **From the Introduction to *Opening Statements***

We may call England our “mother country,” but our culture, political system, and jurisprudence have a more varied heritage. Each state with its own settlement history has a unique flavor. Our nation’s lineage, and New York’s in particular, has an often-overlooked Dutch component. Scholars differ as to how much of New Netherland, or Dutch New York, survived in present-day institutions. Some commentators say that the heterogeneous, commerce-oriented nature of the 40 years or so of Dutch settlement gave New York a character that persists to this day. Others contend that little, if anything, survives.

By the beginning of the 17th century, Western Europe had a long-established trade relationship with the East, from which it desired luxuries such as spices and precious stones. In exchange, the East valued European goods, silver, and manufactured articles.

Europeans had few trade routes. One was across the desert and mountains to the Caspian and Black Seas; another from the Arabian and Red Seas into the Indian Ocean; still another around the Cape of Good Hope. Because these routes were long and controlled by rival countries, each sought alternate passageways to the East, including a “Northeast passage” to Asia.

The Netherlands, at the time a center of trade and commerce, hoped to find such a route. In 1609, the Dutch East India Company engaged Henry Hudson, an Englishman, for the venture. He did not find the route and is best known for exploring the river that now bears his name.

Not long after Hudson’s exploration, the Dutch sent others to examine the territory. Adriaen Block explored the coast all the way to Cape Cod and mapped the region. When in 1613 his ship burned near the shore of lower Manhattan, he and his crew built a new one on the spot.

Although the Dutch never found the hoped-for “Northeast passage,” they found a land teeming with resources to trade, especially a wealth of beavers, whose pelts found favor in European fashion. From 1624 through 1664, the Dutch colonized and controlled a large area – “New Netherland,” including “New Amsterdam” as its

nerve center. For that near half-century, the Dutch established government, trade, and institutions that helped shape the future of what would become New York.

For years, the history of New York under Dutch rule languished in what Washington Irving called “the regions of doubt and fable.” He used this phrase in his preface, “an author’s apology,” to the 1848 edition of his whimsical history of New York as told by an imaginary Diedrich Knickerbocker.

Irving penned his fictional history in 1809, the bicentennial year of Hudson’s exploration of the river so vital to New Netherland. Irving never intended his writing to substitute for true historical scholarship, merely using the gap in recorded history to write something entertaining. Indeed, he was one of the citizens who banded together in 1804 to form the New-York Historical Society, which took steps to acquire and preserve New York’s historical record. Ironically, his “history” plunged the Dutch epoch even deeper into the shadowy realm of legend.

The Dutch period would have remained in Washington Irving’s land of doubt and fable were it not for people who had a passion to preserve and study documents from the era. Many records, letters, diaries, and the like have perished through neglect or disaster. Others have been spared. The saga of the archives is an adventure story in itself.

...

Much of the contemporary writing about New Netherland shows the place to be rife with drunkenness, brawling, and adultery – truly disorderly. Disorder endows writing with the dramatic tension that makes exciting reading, and many primary sources lead directly to this aspect of life. A significant part of New Netherland documents comes from court records, which by their very nature chronicle crime and conflict.

...

The recent quadricentennial of Henry Hudson’s 1609 exploration has brought renewed interest in the period and new scholarly accounts. The recent flurry of interest comes from more than the current century marker. Several events have brought the study of this period to light:

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First, scholars have access to more primary source material than ever before, owing to the work of the New Netherland Project under the direction of Charles Gehring. Second, the best-selling *The Island at the Center of the World* by Russell Shorto has brought this facet of our history to public attention. Examining Dutch influence on America is too interesting to be a once-a-century phenomenon. Many avenues of research lie before future scholars. Let us hope they maintain a steady stream of new information and further illumination from historians.

In the present volume, a broad spectrum of eminent scholars treat the legal heritage New Netherland bequeathed to New York. This volume covers a number of issues that speak to that heritage, including concepts of governance, liberty, women's rights, and religious freedom. In many ways, those fundamental concepts resonate in today's legal culture. Not all our authors agree with each other about everything, and that is fine. Controversy advances scholarship.

### **Real Estate or Political Sovereignty? The Dutch, Munsees, and the Purchase of Manhattan Island** By Paul Otto

*One legacy of New Netherland is legend. A particularly persistent story is of Peter Minuit's "purchase" of Manhattan from the Native Americans for \$24. In the essay that follows, Paul Otto describes relationships between the Dutch and Native Americans and debunks some of the popular myths about how the Dutch acquired Manhattan.*

A.R. & J.R., eds.

In 1626, Pieter Schagen, representative of the States General in the West India Company, wrote of the arrival in the fatherland of a ship, the Arms of Amsterdam, from New Netherland. He reported news from the colony and listed the goods arriving in the Dutch Republic. He also nonchalantly reported that the Dutch in New Netherland "have purchased the Island Manhattes from the Indians for the value of 60 guilders; 'tis 11,000 morgens in size." A seemingly innocuous statement of fact about a land transfer between Native Americans and the Dutch, the statement is nonetheless of profound significance. For New Yorkers, this letter, the primary documentation of the transfer of Manhattan Island to the hands of Europeans, serves as a kind of birth certificate for New York City.

This is the closest thing we have to a formal notice of this purchase, but it provides little of the information we might hope for from official documents, leaving us many questions. As a birth certificate, the document fails to provide an exact date of the "birth," and it does not identify where the event took place. As documentation for the most infamous land transfer in American history, it also falls short of the mark. Besides not identifying the place and date of this historic transfer, it does not itemize the goods in the exchange or the exact identity of the parties to the exchange. More importantly, it is not an

official land deed (nor does one exist). Despite all these imperfections, and in the absence of a true deed, New Yorkers must satisfy themselves with this document, which they have done since it was first uncovered in 1844. But even if a deed did exist, New Yorkers would still be left with some important questions. First, deed or no deed, confusion surrounds the amount paid for Manhattan Island. The Schagen letter records the figure of 60 guilders while American tradition holds that it was \$24. Second, it is not clear why Native Americans would sell or transfer the island for this or any amount of money. Third, and most important, what did the Indians mean by "selling" the land?

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In the heart of the territory where New York City and portions of New York and New Jersey would someday be located, lived the Munsee people. These Native Americans had lived in the region for at least hundreds of years. They have also been known as Lenapes and Delawares. No term adequately describes the group, in part because it is not fully accurate to describe them as a single Indian tribe. Instead, the Munsees represented a collection of villages, clans, and larger groupings sharing a common language and cultural practices. The Munsees were also linguistically linked to their southern and western neighbors, the Unami, who have also been known as the Delawares or Lenni Lenape. In the 17th century, these people would find themselves the "hosts" of wave after wave of European "guests." In the earliest years, native people may have welcomed these visitors and the advantages a relationship with them brought in trade, but eventually they found control of their territory challenged and their sovereignty in the land threatened.

Dutch colonization of New Netherland did not begin with settlement or land acquisitions. It began, rather, with a series of trading voyages to the Hudson River valley and elsewhere along the Atlantic coast. By 1611, Dutch captains plied American waters seeking to exchange European wares for North American furs. The Munsees mostly welcomed these voyages and for more than 10 years a thriving fur trade existed in lands occupied by Munsee Indians and labeled on Dutch maps as "Nieu Nederlandt." Most of these trade expeditions consisted of ships traveling the marine and riparian coasts and making exchanges where they could. Certain locales became particularly important, such as the region where Albany now stands. There, in 1614, Dutch traders established an outpost, Fort Nassau, which was abandoned after 1616. But for the most part, in this era of trade, the Indians remained the masters of their lands. Dutch traders did not establish long-term outposts and apparently did not purchase land from the Indians. Certainly no settlers came to live there. As far as the scarce records indicate, this situation was mutually acceptable and beneficial to European and Indian alike. The Indians of the Hudson

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River valley happily exchanged the products of the forest for goods that they found both exotic and useful.

After 1621, this situation began to change. In the Dutch Republic, the West India Company was created and given a monopoly of Dutch commercial activity throughout the Atlantic world. While the West India Company's earliest activities in New Netherland centered mostly upon trade, the WIC had considered the possibility of settlement almost from the beginning and soon took more concrete steps in that direction. France and England began to challenge the Dutch Republic's claims in the New World based primarily on the right of first discovery. With the States General adding pressure to the West India Company to respond to this crisis, the Company decided to establish a permanent settlement in New Netherland. The availability of several Walloon families (Francophones from the southern Netherlands) willing to immigrate to New Netherland helped finalize their decision.

live among us, a contract being made thereof and signed by them in their manner, since such contracts upon other occasions may be very useful to the Company." Thus, the Company was willing to accommodate Indian claims to the land, but not, in the final analysis, to bow to those claims. In later instructions, Verhulst was ordered to find a place to establish the Company headquarters that was "abandoned by the Indians or unoccupied," and if he could obtain "none but those that are occupied by the Indians, they shall see whether they cannot, either in return for trading-goods or by means of some amicable agreement, induce them to give up ownership and possession to us." Thus, the acquisition of some Indian land would have to be accomplished, but the means would be dictated by concerns of fairness and justice: "without however forcing them thereto in the least or taking possession by craft or fraud."

Verhulst did not accomplish this task of purchasing a site for the administrative headquarters of the colony,

Dutch colonization of New Netherland did not begin with settlement or land acquisitions. It began, rather, with a series of trading voyages to the Hudson River valley and elsewhere along the Atlantic coast.

The result was the establishment of a settlement colony in New Netherland. Thus, with the creation of the West India Company and the choice to establish European settlers in their North American territory, came a significantly different focus in Dutch attitudes toward a region that was also claimed, inhabited, and controlled by the Munsees. The West India Company was still committed to an emphasis on the fur trade and no plans were initially laid for large-scale settlement as was happening in Virginia and would later occur in Massachusetts Bay. But the presence of the Company nevertheless affected Dutch-Indian affairs in a number of ways. Because the West India Company needed to secure a solid legal claim to the territory and defend it against European competitors, it purchased land from the Indians and established settlements there. Furthermore, land exchanges signified presumed Dutch sovereignty over the region and its inhabitants.

In 1625, the Company instructed Director Willem Verhulst to acquire land from the Indians on which to establish a headquarters for the colony. Their instructions demonstrate the Company's approach to the native people – apparently respecting their indigenous rights on the one hand, but also to some degree presuming Dutch sovereignty over the region. In acquiring their land, the Indians were not to "be driven away by force or threats, but by good words be persuaded to leave, or be given something therefor to their satisfaction, or else be allowed to

but in the spring of 1626, his successor, Director Peter Minuit purchased Manhattan Island. In addition to Pieter Schagen's reference to the purchase cited at the beginning of this chapter, other records also refer to it. West India Company director Johannes de Laet wrote in 1630 that there was an island at the mouth of the Hudson called "Manhattes or Manhatans Island, because this nation of Indians happened to possess the same, and by them it had been sold to the Company." In 1633 he also stated that "our people have bought from [the Manathans] the island separated from the rest of the land by the Hellgate, and have there laid the foundations of a fort, and of a town called New Amsterdam."

Tradition holds that the island was purchased with "glittering beads and baubles," but the actual nature and content of the goods traded to the Indians for the island is unknown. It can be surmised that the Indians accepted the typical trade items. When the Dutch purchased Staten Island a few years later, they paid the Indians with "Duffels, Kittles, Axes, Hoes, Wampum, Drilling Awls, Jews harps, and diverse other small wares." The value of the goods – 60 guilders – is documented, but here, too, tradition is misleading. Most Americans who have heard the price paid for Manhattan Island cite the figure of \$24. This figure appeared in 1846 when E. B. O'Callaghan, who had access to the recently discovered Schagen letter, published his *History of New Netherland*. It was there that O'Callaghan introduced the figure of \$24 by using

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current rates of conversion. Since that time, the story of Manhattan Island being sold for \$24 in trade goods has been retold and republished many, many times, leaving the original Dutch amount of 60 guilders lost in translation, as it were.

But the value of the guilder or dollar in the 19th century tells us little about the actual price the Dutch paid in 1626. Even to calculate the value in dollars today, given inflation, of 60 17th-century guilders misses the point. Sixty guilders was not a large sum at the time, but neither was it minuscule. According to historian A. Th. van Deursen, it equaled three or four months' wages for an average artisan in the province of Holland. . . . Sixty guilders was also the amount the Company paid a colonist (and presumably an Indian as well) for 30 beaver skins or 12 fathoms of wampum.

To the Dutch, the land was certainly valuable at the time (it would be anachronistic to consider its value today as the commercial capital of the world). The 14,000 acre island became the Company's headquarters and the location of the Company's farms and agricultural endeavors. Domine Michaëlius reported that "this island is the key and principal stronghold of the country, and needs to be settled first, as is already done." In fact, since controlling Manhattan Island meant controlling the Hudson River, which reached deep into fur country, the island's value can be understood in terms of the value of the fur trade. It is perhaps not without coincidence that Schagen's letter reporting the purchase of Manhattan Island also reports the importation of 45,000 guilders worth of furs from New Netherland. It is possible that the Dutch attraction to Manhattan Island was also connected to the trade in wampum. The Dutch had early on discovered that wampum, or *sewant* as it was known among the Indians of Manhattan and vicinity, was highly valued by the Iroquoians and other inland tribes. These peoples exchanged various goods to coastal wampum makers for the beads. Although the heart of wampum production lay in eastern Long Island, it was manufactured throughout New York's coastal regions. Whatever the case may have been regarding wampum, the Dutch certainly recognized at the time that they had purchased the Indians' land for a very low price, for Domine Michaëlius also noted, presumably referring to the purchase of Manhattan Island, that "for a small sum of money we can buy from them a large quantity of land," and elsewhere noted that there is land "which can be bought from the savages for a trifle."

From the Indians' perspective, 60 guilders of trade goods was of enormous value to them. At the first, the Munsees may have valued European goods because they assigned spiritual or ceremonial power to items handled by those they animistically perceived as "other-than-human." But within a relatively short amount of time, this perception would have passed. While the exchange of goods still functioned in a socially cohesive way, the utilitarian function of the goods became impor-

tant in native demand for certain products. Axes and hoes, for example, quickly became employed by Indians in place of native stone tools even though one oral tradition repeated by the Indians in the 18th century indicates that their forebears first wore axeheads received from Europeans around their necks as tokens of power. For wampum producers, Indians who crafted the shell of the coastal whelk into strings of beads with significant social and religious power, the iron drills and awls they received greatly enhanced their manufacture of this vital artifact. Duffels – a coarse cloth – had become an important item of trade in the 1620s. The Munsees began to substitute duffels for deerskins, using it for clothing during the day and for blankets at night. The native people preferred it in dark colors such as blue, grey, and black, possibly because they believed these would provide them better camouflage while hunting in the woods, but also likely because they attached dark colors to sources of power. Demand for duffels also indicates the Indians' growing dependency upon European goods. As the Munsees increased the time they spent harvesting furs or producing wampum, they would have less time to produce basic necessities such as clothing, forcing them to acquire these items from the Dutch. [Colonial secretary Isaac] de Rasière made clear the importance of duffels to the Indians when he suggested to the Company directors that if they could "supply me continually with duffels, I shall know how to get wampum and stock Fort Orange." de Rasière promised the directors 10,000 furs if they could provide him with sufficient duffels. The Munsees' northern neighbors, the Mohawks, prized it so highly that they announced they should not bother trading with the Dutch if they could not get it. It was so crucial, De Rasière pointed out, that without it they might lose the trade. "Why should we go hunting?" the Mohawks asked. "Half the time you have no cloth." Thus, the goods offered by the Dutch for Manhattan Island satisfied important Munsee needs.

The transfer of Manhattan Island and other territories from the Munsees to the Dutch signified a great deal about the relationship between them. In the first place, they followed a formal protocol when conducting land transactions. Company regulations required Dutch officials to preside over agreements between Europeans and Indians and to create legal deeds. As historian Patricia Seed has shown, this reflected a long-standing Dutch tradition in which property conveyances took place before a district judge. Consequently, the native representatives were obligated to appear before the council at Fort Amsterdam for land sales. When circumstances prevented them from doing so, such as when the Unamis on Delaware Bay sold land, officials from the fort journeyed to the Indians' territory. The Indians were more than happy to oblige such formalities, since they too regarded these exchanges as significant affairs. Those who sold the land were usually tribal or village leaders or some other

group representatives. For example, on July 12, 1630, Arromeauw, Tekwappo, and Sackwomeck, “co-owners of the land named Hobocanhackingh,” according to one Dutch deed, appeared before the director and his council when they sold a tract of land to Michael Pauw. The next month, Waerhinnis Couwee (Wieromies), a minor Hackensack sachem, along with Krahorat, Tamekap, Tetemakwemama, Siearewach, Sackwewew, Wissipock, and Saheinsios also presented themselves to [Director Wouter] van Twiller and his council in order to seal the transfer of Staten Island to Michael Pauw. Similar transactions between Munsee leaders and Dutch officials occurred through the remainder of this period.



Such formality in conducting land sales indicated that neither group saw the transaction as the ordinary exchange of land from one person or group of persons to another. Dutchmen could not simply move to New Netherland and purchase a tract of land from its indigenous owners. This was due, on the Dutch side, to West India Company recognition of Indian occupation of the land (remember Company dictates not to force “them thereto in the least or [take] possession by craft or fraud”), and the Dutch penchant for documenting such transactions. They insisted that colonial officials negotiate formal treaties ceding property rights to the Dutch. Therefore, individual Dutchmen could not purchase land directly from the Indians. The initial transfer of land was restricted to negotiated treaties between the West India Company and Indian representatives.

Munsees who signed documents ceding territory to the Dutch also viewed the transactions as carrying considerable consequence. Like Dutch officials, Indian leaders represented their people; any changes regarding their people’s land had to be endorsed by them. However, the Indians’ view of land ownership or sovereignty differed radically from that of the Dutch, and they initially understood these land transactions differently than did the Europeans. First, the Munsees did not recognize personal ownership of any particular tract of land. As a group, their band or village used different territories for hunt-

ing, fishing, agriculture, and habitation. When Indian leaders signed agreements “selling” their land, they were allowing for its joint use and occupancy by the Dutch and their own people. They did not envision a permanent transfer of land to the Dutch. For example, when Indians of Long Island sold a sizable portion of the island in 1639, they reserved the right to remain upon the land. While other deeds did not always specify such rights, it is clear from Munsee actions that they must have had similar intentions at other times. The Indians who sold Manhattan Island continued to live there, indicating that they assumed that they still retained possession of the land, not to mention sovereignty over it. Similarly, Munsee people also remained on Staten Island after selling it, and over the years, resold it several times.

Furthermore, land transfers in the Munsees’ perspective must be understood in terms of the Indians’ emphasis upon social cohesion. In the perspective of the Munsees, as with so many other native people of the northeastern woodlands, maintaining social balance was of utmost importance. Establishing and continuing relationships held a greater priority than amassing wealth, but such relationship building usually included the exchange of goods. Colonial secretary de Rasière understood that the Indians always embellished trade with considerable ceremony and was careful to maintain it. “These people must . . . be kept on friendly terms by kindness and occasional small gifts,” he wrote, and “one must be familiar with them and allow them to think that one trusts them fully.” When a delegation of “thirty or forty” Indians presented de Rasière “with ten beavers,” he responded by giving them “in return a fathom of duffel-cloth and a small quantity of beads, two hatchets, and a few other things.” De Rasière noted that this “was done reciprocally in token of sworn friendship.” Transferring land, including the exchange of goods and attendant ceremonies, was a means to build and reinforce social relations. The Munsees saw the Dutch as more than just trading partners – they were allies and powerful neighbors with whom it was good to establish and maintain strong ties.

Moreover, land transfers served other purposes to the Munsees and did not reflect the natives’ intentions to permanently alienate the land from themselves. As the Indians’ population declined and their subsistence shifted from wide-ranging hunting to more intensive farming and wampum production, large hunting areas became less valuable. In the sachems’ minds, the exchange of land for trade goods seemed reasonable. Such an exchange would also secure an alliance with the Dutch who would live among them and could help the Munsees defend themselves against their enemies. In fact, the same Indians on Long Island who reserved the right of occupancy in their deed of land in 1639, gained from the Dutch an agreement to protect them against their enemies. This pattern was not unusual for the

Munsees or other Indian groups. As populations would increase or decrease for whatever reasons, native people would expand or contract their settlements and temporarily transfer unused land in the process. As population shifts again took place, land might be transferred back to the original occupants. In no case were the transfers considered permanent since Indian neighbors tended to recognize that possession or occupation of a territory was dependent upon the good graces of the group who had earlier established sovereignty over the land. Also, with economic changes brought by the presence of the Dutch, the Munsees' growing dependency upon the Dutch may have compelled them to sell their lands, especially if they believed that doing so would ensure them continued access to European goods.

In selling Manhattan Island and other properties, the Munsees did not intend to permanently transfer their land to the Dutch. Instead, they granted the Dutch the privilege of sharing the land with them.

But the exchange of land led to unpredictable changes in Native American relations with the Dutch. While the Munsees did not knowingly relinquish their permanent rights to the land when they sold it, they soon discovered that they had surrendered permanent control over the territory, along with their political sovereignty. Indeed, Dutch colonization brought some presumption that the Dutch were extending their sovereignty over all the lands claimed under the name of "New Netherland." The Company regulations for the colony that most clearly related to the Indians were ambiguous at times and did not clearly define the relationship of the Indians to the colony. On the whole, however, the regulations indicate that the West India Company claimed some political sovereignty over the indigenous inhabitants of the region, but also respected some degree of native autonomy for the sake of maintaining a successful trade relationship. These instructions included guidelines for Dutch interaction with their native hosts and required both settlers and colonial administrators to treat the Indians fairly and maintain peaceful interaction. The Amsterdam chamber commanded the

Walloons in 1624 to "take especial care, whether in trading or in other matters, faithfully to fulfill their promises to the Indians or other neighbors and not to give them any offense without cause as regards their persons, wives, or property, on pain of being rigorously punished therefor." The following year, Director Verhulst was similarly instructed to "see that no one do the Indians any harm or violence, deceive, mock, or condemn them in any way, but that in addition to good treatment they be shown honesty, faithfulness, and sincerity in all contracts, dealings, and intercourse, without being deceived by shortage of measure, weight, or number, and that throughout friendly relations with them be maintained."

A second set of instructions to Verhulst a few months later provides a better indication of the relationship which the directors believed should exist between their colony and the Indians who lived within its boundaries. While on the one hand expecting justice accorded to their own people, the Company apparently respected tribal authority. In case any settler "suffer violence or be wronged by any Indian or native either in his person or with regard to the property entrusted to him, they shall notify the tribe to whom such Indian belongs of the wrong done and the person who committed it, demanding that he be punished therefor and that our people be notified of the punishment." Ultimately, though, the Dutch reserved final political authority for themselves.

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In selling Manhattan Island and other properties, the Munsees did not intend to permanently transfer their land to the Dutch. Instead, they granted the Dutch the privilege of sharing the land with them. The Munsees could not foresee the future, however. What they did not anticipate was that the Dutch presence corresponded to a conflict of claims over control of the whole region. From the moment that the West India Company established European settlements and sought to purchase land from the Indians, the Munsee people would struggle to maintain their own autonomy while increasingly being forced to recognize Dutch control. Ultimately, the importance of the selling of Manhattan had more to do with the Indians' loss of sovereignty in the long run than their loss of land in the short run. Neither was intended by the Munsee people. However, after decades of contact with Europeans, the Munsees experienced growing dependency upon European goods and suffered increasing population losses through disease and warfare. The effects wrought upon Munsee society as a result of Dutch colonization made the temporary transfer of Manhattan Island and other Munsee lands a permanent one. The Munsees could not have foreseen the permanent loss of their lands to the Dutch. And if the Dutch could have imagined the eventual loss of that same land to the English, none of them could have anticipated that Manhattan Island would become the metropolis that emerged in the 19th and 20th centuries. ■

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## Bibliography

Portions of chapter 5 in *Opening Statements* first appeared as part of chapter 3. "Trade and Settlement, 1624–1638," in Paul Otto, *The Dutch Munsee Encounter in America: The Struggle for Sovereignty in the Hudson Valley* (New York: Berghahn Books, 2006) and are used here by permission of the author and the publisher.

Van Cleef Bachman, "Peltries or Plantations: The Economic Polities of the Dutch West India Company in New Netherland, 1623–1639," *Johns Hopkins University Studies in Historical and Political Science*, 87th ser., no. 2 (Baltimore: Johns Hopkins University Press, 1969).

Alfred Cave, "The Pequot War," in *Native Americans of the Northeast: Culture, History, and the Contemporary*, ed. Cohn G. Calloway and Barry O'Connell (Amherst: University of Massachusetts Press, 1996).

William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983).

Johannes de Laet, "New World," in *Narratives of New Netherland, 1609–1664*, ed. J. Franklin Jameson (New York: Charles Scribner's Sons, 1909).

"De Nieuw Nederlanse Marcurius," 25, no. 4 (Dec. 2009), <http://www.nnp.org/nni/Marcurius/marc25-4.pdf>.

Margriet de Roever, "Merchandises for New Netherland: A Look at Dutch Articles for Barter with the Native American Population," in *One Man's Trash is Another Man's Treasure: The Metamorphosis of the European Utensil in the New World*, ed. Alexandra van Dongen (Rotterdam: Museum Boymans-Van Beunigen, 1995).

*Documents Relative to the Colonial History of New York: Procured in Holland, England, and France*, ed. E. B. O'Callaghan, Vol 1, *Holland Documents: 1–8, 1603–1656* (Albany: Weed, Parsons and Company, 1856).

Peter Francis Jr., "The Beads That Did Not Buy Manhattan Island," *New York History* 67, no. 1 (Jan. 1986).

Charles T. Gehring, "Dutch Colonial Manuscripts," *de Halve Maen* 54, no. 3 (Fall-Winter 1979).

Charles T. Gehring, "New York's Dutch Records: A Historiographical Note – Updated," *The Hudson River Valley Review* 25, no. 2 (Spring 2009).

Charles T. Gehring, "Peter Minuit's Purchase of Manhattan Island – New Evidence," *de Halve Maen* 55, no. 1 (Spring 1980).

Charles T. Gehring, trans. and ed., *Land Papers, NYHM*, vols. GG, HH, and II (Baltimore: Genealogical Publishing Co., 1980).

Charles T. Gehring, William A. Starna, and William N. Fenton, "The Tawagonshi Treaty of 1613: The Final Chapter," *New York History* 68, no. 4 (October 1987).

Robert S. Grumet, "The Selling of Lenapehoking," *Bulletin, Archaeological Society of New Jersey* 44 (1989).

Robert S. Grumet, "'We Are Not So Great Fools': Changes in Upper Delawaran Socio-Political Life, 1630–1758" (PhD diss., Rutgers, The State University of New Jersey, 1979).

"Instructions for Director Willem Verhulst," appeared in *Documents Relating to New Netherland, 1624–1626*, in the Henry E. Huntington Library, ed. and trans. A. J. Evan Laer (San Marino: Henry E. Huntington Library and Art Gallery, 1924).

Jaap Jacobs, "Soldiers of the Company: The Military Personnel of the West India Company in New Netherland," in Jacob Leisler's, *Atlantic World in the Later Seventeenth Century. Essays on Religion, Militia Trade, and Networks* by Jaap Jacobs, Claudia Schnurmann, David W. Voorhees, and Hermann Wellenreuther, ed. Herman Wellenreuther (Münster: LIT Verlag, 2009).

E. B. O'Callaghan, *History of New Netherland; or, New York under the Dutch* (New York: D. Appleton, 1846).

Paul Otto, "Henry Hudson, the Munsees, and the Wampum Revolution," in *Henry Hudson, New Netherland, and Atlantic History*, ed. Jaap Jacobs and Lou Roper, forthcoming.

Oliver Rink, *Holland on the Hudson: An Economic and Social History of Dutch New York* (Ithaca: Cornell University Press; and Cooperstown: New York State Historical Association, 1986).

Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640* (New York: Cambridge University Press, 1995).

Adriaen van der Donck, *A Description of New Netherland*, ed. Charles T Gehring and Wilham A. Starna, trans. Diederik Willem Goedhuys (Lincoln: University of Nebraska Press, 2008).

Christine W. Ward, "The New York State Archives – 25 Years Old This Year," *New York Archives* 3, no. 2 (Fall 2003).

Charles A. Weslager, "Did Minuit Buy Manhattan Island from the Indians?," *de Halve Maen* 43, no. 3 (Oct. 1968).

# BURDEN OF PROOF

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## “You Better Object . . . Now!”

### Introduction

So many critical litigation decisions often come down to a careful, scientific, and systematic analysis of . . . your gut. More specifically, what your gut tells you is the best course of action in an area where there is not an absolutely unambiguous statute, rule of court, or decision to guide you. How often does this happen? Ask any trial attorney, and the answer is bound to be, “a lot.”

One area of decision-making where the use of oracles, voodoo dolls, and Ouija boards is particularly prevalent is the exchange of experts in New York state courts. The timing and adequacy of expert exchanges, in my experience, produces greater anxiety, among even the most seasoned litigators, than any other strategic aspect in a case. Much ink, including my own, has been spilled on this topic.

Just when to make a motion where an expert exchange is late, or inadequate, or both, is particularly vexing. There is no statute or rule that addresses the issue. Case law does not offer concrete guidance. And the vehicle to make an application to the court to preclude or limit an expert’s testimony, the motion *in limine*,<sup>1</sup> is one of the least understood tools in the lawyer’s toolbox. So, because it offers guidance, albeit somewhat harsh, last month’s First Department decision in *Rivera v. Montefiore Medical Center*<sup>2</sup> warrants the attention of any lawyer whose practice involves the use of experts.

### Rivera

*Rivera* was a medical malpractice action for the wrongful death of Wilbur Rodriguez.<sup>3</sup> Mr. Rodriguez, age 44, arrived at Montefiore Medical Center’s emergency room with respiratory distress at 15 minutes before midnight, was admitted with a working diagnosis of pneumonia, and died in the hospital between 4:00 and 4:40 early the next morning.<sup>4</sup>

At trial, the jury held for the plaintiff,

finding the hospital liable for failing to place the decedent in a ward where his vital signs could be continuously monitored, and award[ed] plaintiff \$40,000 for past economic loss and \$680,000 for future economic loss over 17 years, and \$0 for the decedent’s conscious pain and suffering.<sup>5</sup>

Following the verdict:

Both parties moved to set aside the verdict. Supreme Court denied plaintiff’s motion to strike from the record all testimony that the decedent’s death was caused by a sudden cardiac event and set aside the award of \$0 for the decedent’s pain and suffering, or for a new trial on the issue of the decedent’s pain and suffering. The court granted in part defendant’s motion to set aside the award by reducing the jury award for loss of future household services from \$680,000 to \$340,000. Both sides appeal from this order.<sup>6</sup>

The First Department affirmed:

We reject plaintiff’s challenge to the aspect of the order that declined to strike the testimony of

defendant’s expert, Dr. Marc Silberman, in which he asserted that the cause of the decedent’s death was a sudden, unexpected cardiac arrhythmia. Plaintiff’s *in limine* application during trial to preclude Dr. Silberman’s testimony was properly denied as untimely. Plaintiff’s argument at trial for precluding Dr. Silberman’s testimony was based on the lack of specificity of defendant’s CPLR 3101(d) statement. The statement recited, with regard to the causation of the decedent’s death, that defendant’s expert would “testify as to the possible causes of the decedent’s injuries and contributing factors . . . [and] on the issue of proximate causation”; also included in its formulaic recitation was the assertion that “the grounds for the expert’s opinion will be said expert’s knowledge and experience . . . and [the] trial testimony.”

CPLR 3101(d)(1) requires expert disclosure, “in reasonable detail,” of “the substance of the facts and opinions on which each expert is expected to testify,” in order to provide the plaintiff with the defendant’s theories of the case in advance of trial. Here, upon receipt of this 3101(d) statement, the only objection that plaintiff voiced was that the expert’s qualifications failed to include the dates of his residency, which deficiency defendant then cured. Plaintiff neither rejected the document nor made any objection to

the lack of specificity regarding the cause of death.

Having failed to timely object to the lack of specificity in defendant's expert disclosure statement regarding the cause of the decedent's death, plaintiff was not justified in assuming that the defense expert's testimony would comport with the conclusion reached by the autopsy report, and plaintiff cannot now be heard to complain that defendant's expert improperly espoused some other theory of causation for which there was support in the evidence.<sup>7</sup>

The First Department made quick work of the plaintiff's other arguments concerning the defense expert's testimony:

Plaintiff now argues that the testimony that the decedent's death was caused by a sudden, unexpected cardiac event should be stricken because it came as a surprise. However, after plaintiff's own experts acknowledged on cross-examination that such a sudden cardiac event was a possibility based on the decedent's medical history and condition, defendant's expert appropriately elaborated on that theory of causation, and there is no valid basis on which to strike either side's experts' testimony as to the decedent's death from a sudden cardiac event.

The decedent's emergency room attending physician, Dr. Mukherji, testified that based on his review of the medical record, he believed the decedent died of a cardiac arrest that was not preceded by respiratory failure, since the decedent's vital signs would have progressively worsened throughout the night had he died of respiratory failure. And, while plaintiff's internal medicine and cardiology expert, Dr. Mark Schiffer, offered the opinion that the decedent's death from pneumonia was preceded by 5 to 10 minutes of a painful struggle to breathe, he acknowledged on cross-examination that, particularly in view of

the left ventricular hypertrophy found at autopsy, there was a possibility that the decedent's death occurred as a result of a sudden and unexpected cardiac event.

Not only did Dr. Silberman's properly admitted testimony comport with plaintiff's experts' testimony on cross-examination, it comported with evidence showing that the decedent was not in any respiratory distress the last time he was seen before the 40-minute window of his death; that he had a call button, but never used it, suggesting he died suddenly; and that he had a heart abnormality and other ailments that made him more susceptible to sudden cardiac arrest. All the foregoing sufficiently supports the jury's rejection of plaintiff's pain and suffering claim.<sup>8</sup>

### Motions in Limine

Motions *in limine* ("on or at the threshold" or "in the beginning") are requests that a court rule on an evidentiary objection prior to the time when a trial objection is possible, which is at the time evidence is actually offered by a party at the trial. While there is no specific statutory basis for a motion *in limine*, the court's inherent power to admit or exclude evidence provides the basis for the motion.<sup>9</sup> While motions *in limine* are often made prior to the

to the lack of specificity in defendant's expert disclosure statement regarding the cause of the decedent's death"? There is none cited. What is the authority for the holding that the plaintiff waived the right to object to the expert's testimony because, "upon receipt of this 3101(d) statement, the only objection that plaintiff voiced was that the expert's qualifications failed to include the dates of his residency . . . and [p]laintiff neither rejected the document nor made any objection to the lack of specificity regarding the cause of death"?<sup>11</sup> There is none cited. Finally, what is the authority for the holding that the plaintiff waived objection by failing to reject the exchange? There is none cited.<sup>12</sup>

The only case cited by the First Department is *Chapman v. State*,<sup>13</sup> where the Third Department reversed a trial court's decision permitting an expert to testify where the CPLR 3101(d)(1)(i) exchange "[was] wholly inadequate and, in fact, 'so general and nonspecific that the [State] has not been enlightened to any appreciable degree about the content of this expert's anticipated testimony.'"<sup>14</sup> Interestingly, citing CPLR 3126, the Third Department remanded the case to the trial court to determine the appropriate relief:

So many critical litigation decisions often come down to a careful, scientific, and systematic analysis of . . . your gut.

start of the trial, they may be made at any point prior to the time the evidence is offered, when the court has had an opportunity to rule on the admissibility of the evidence.<sup>10</sup>

So what is the authority cited for the First Department's holding that the plaintiff "failed to timely object

Because the conclusion that claimants failed to comply with the State's discovery notice does not require the unconditional grant of the State's preclusion motion, we remit the matter to the Court of Claims for determination thereof.<sup>15</sup>

As for statutory authority, the First Department cites, along with *Chapman*, CPLR 3101(d)(1),<sup>16</sup> regarding the requirement to provide “reasonable notice” of the substance of the expert’s facts and opinions.

Just when to make a motion where an expert exchange is late, or inadequate, or both, is particularly vexing.

There is no CPLR rule on motions *in limine*. There is no provision in the general provisions of the Uniform Rules for Trial Courts governing, or even discussing, motions *in limine*. In fact, the only Uniform Rule I am aware of discussing motions *in limine* appears in the Commercial Division Rules:

Rule 27. Motions in Limine. The parties shall make all motions in limine no later than ten days prior to the scheduled pre-trial conference date, and the motions shall be returnable on the date of the pre-trial conference, unless otherwise directed by the court.<sup>17</sup>

So, had this motion *in limine* been made in a trial court in the Commercial Division at least 10 days prior to the pre-trial conference, seeking to preclude an expert economist rather than an expert physician, would the motion have been untimely, even if a prior objec-

tion had been made to a different portion of the expert economist’s CPLR 3101(d)(1)(i) exchange?<sup>18</sup> Would the earlier objection have been considered a waiver of any other objections?

### Conclusion

*Rivera* begs the question as to whether the plaintiff was, in fact, penalized for making an initial objection (presumably shortly after receipt) to the defendant’s expert exchange. Certainly the rule cannot be that there is only one opportunity to object to an expert exchange, and anything not included in the first objection is deemed waived. The adequacy of the exchange, as opposed to the failure to provide expert credentials, is something that may not be apparent until some time after receipt, and perhaps not until the expert is on the stand testifying.<sup>19</sup> How long could the plaintiff have safely waited before serving an objection or serving a subsequent objection? Would rejection of the defendant’s expert exchange, in and of itself, without a detailed explanation of why the exchange was being rejected, be enough?

So what does a practitioner do in the face of *Rivera*’s holding that the plaintiff’s objections were not timely, and that objecting to one inadequate aspect of the defendant’s exchange,<sup>20</sup> and no others, waived subsequent objection to other inadequacies in the exchange?

Upon receipt, object to the expert exchange (making certain to object to each and every potential defect and/or inadequacy in the exchange)?

Upon receipt, reject the expert exchange?

Upon receipt, make a motion *in limine*?<sup>21</sup>

All three would be consistent with *Rivera*’s holdings, and doing some combination of the three actions, soon after receipt of an expert exchange, would be the safest course. As for me, since the

decision is, as of this writing, only five days old, I have not had much time to reflect. But if I have to make a decision about what to do upon receipt of an inadequate expert exchange, I will listen very carefully to what my gut tells me. ■

1. Motions *in limine* were the subject of a Burden of Proof column, *In the Beginning, Motions In Limine*, N.Y. St. B.J. (May 2005), p. 16.

2. 2014 N.Y. Slip Op. 08469 (1st Dep’t Dec. 4, 2014).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* (citation omitted).

8. *Id.*

9. See, e.g., *People v. Michael M.*, 162 Misc. 2d 803 (Sup. Ct., Kings Co. 1994).

10. See, e.g., *Coopersmith v. Gold*, 223 A.D.2d 572 (2d Dep’t 1996), *aff’d*, 89 N.Y.2d 957 (1997).

11. 2014 N.Y. Slip Op. 08469.

12. CPLR 2101(f) is the only statute I am aware of requiring rejection of a paper, and only applies to form defects:

Defects in form; waiver. A defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given. The party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within fifteen days after the receipt thereof, the party on whom the paper is served returns the paper to the party serving it with a statement of particular objections.

13. 189 A.D.2d 1075 (3d Dep’t 1993).

14. *Id.* at 1075 (citation omitted).

15. *Id.* (citation omitted).

16. 2014 N.Y. Slip Op. 08469.

17. 22 N.Y.C.R.R. § 202.70.

18. These are valid questions notwithstanding the additional expert disclosure set forth in the Commercial Division Rules inasmuch as those procedures cannot be considered mandatory. See *Burden of Proof – “Heaven?” Part 2*, N.Y. St. B.J. (July-Aug. 2014), p. 18.

19. Presumably, the inadequacy of the exchange was patent upon receipt.

20. Correctly, as it turns out, since the defendant “cured” the defect.

21. Such a motion would, since it pertains to disclosure, require a good faith affidavit pursuant to 22 N.Y.C.R.R. § 202.7.

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# *In re Kramer* and the Enforceability of Charitable Pledges

By Spencer L. Reames



Lawyers and lawyers alike often take the enforceability of charitable subscriptions or pledges as a given. This assumption is well grounded in the case law in New York, where the weight of legal precedent is so firmly tilted toward charities that it is rare to find a case in which a charity cannot make a case for enforcement.<sup>1</sup> The recent Kings County Surrogate's Court decision in *In re Kramer*,<sup>2</sup> however, is one such case where a charity did not prevail. *Kramer* serves as a useful reminder that the enforcement of charitable pledges should not be taken for granted and, despite the generally broad judicial policy favoring charities, a charity must demonstrate some adherence to the established legal framework in order to justify enforceability.

## Enforcement as a Matter of Public Policy

Historically, the characterization and enforcement of charitable pledges in New York was unsettled and a "prolific source of controversy."<sup>3</sup> Courts struggled to reconcile promises, which were clearly motivated by the principles of gift-giving, with the strict elements of contract, principally the requirement of consideration.<sup>4</sup> It was unlikely that the proponent of enforcement could show the requisite bargained-for exchange, or *quid pro quo*, that contract principles demand, and consequently in early decisions subscription agreements were deemed void and unenforceable.<sup>5</sup>

Over time, however, decisions shifted toward the benefit of charities, and defenses grounded upon lack of consideration came to be disfavored. Judge Cardozo, writing for the Court of Appeals in *Allegheny College v. National*

*Chautauqua County Bank of Jamestown*, recognized that "[v]ery likely, conceptions of public policy have shaped, more or less subconsciously, the rulings thus made,"<sup>6</sup> as judges subscribed to the belief that defenses against the enforcement of charitable pledges constituted breaches of faith toward the public. With this in mind, Judge Cardozo declared that decisions in favor of pledge enforcement "which are supported by so many considerations of public policy and reason" would not be overruled.<sup>7</sup>

*Allegheny* laid the foundation for the principles of charitable pledge enforcement as they exist today. The Court of Appeals further ratified and strengthened this public policy in cases such as *I. & I. Holding Corp. v. Gainsburg*<sup>8</sup> and *Woodmere Academy v. Steinberg*.<sup>9</sup> Judicial support of charitable pledges was important because "[t]he philanthropic work carried on by organized charities, made possible through voluntary subscriptions, is a distinguishing and distinguished feature of our free society. It is a demonstration of the human sympathy, mercy, consideration and good will borne by those more fortunately endowed towards their less fortunate fellow-men."<sup>10</sup>

A major step toward this judicial support came from a determination that parol evidence, or evidence outside the subscription agreement or pledge itself, would be admissible to prove consideration by the charitable donee.<sup>11</sup> Thus, a charity seeking enforcement may bring forward useful evidence for the purpose of demonstrating consideration and to elaborate upon the transactions or acts surrounding the pledge.<sup>12</sup>

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Weighing this admissible parol evidence, courts have utilized three legal theories to sustain the enforceability of charitable pledges: the creation of a bilateral contract, the completion of a unilateral contract, and the equitable remedy of promissory estoppel.

### Bilateral Contract

The bilateral contract theory is based upon the traditional contract principles of a mutual exchange. In such a case, the donor is found to have given the pledge in return for something of value from the charity. This usually arises in the case where the donor seeks a memorialization or remembrance as a condition of the pledge in the form of a named building, endowed scholarship, or the like. The key difference from a non-charitable contract is that the charity's return promise is often not spelled out but, rather, is implied by the charity's very acceptance of the conditional pledge. Bilateral contract cases are typified by the Court of Appeals case *Allegheny College* in which the donor pledged money to establish a memorial scholarship in her name. The Court found that, by accepting the pledge, and an advance payment on account, the college had made a return promise and created an obligation to the donor, albeit implied. This constituted consideration and created an enforceable contract.<sup>13</sup>

### Unilateral Contract

Perhaps the most commonly utilized theory in the enforcement of charitable contracts is that of unilateral contract. This theory comes into play when the pledge is more gratuitous in nature, such as a contribution to a charity's general fund or for a fundraising campaign. Unlike a bilateral contract, a unilateral contract is not deemed binding at inception but, rather, is an offer conditioned upon the charity performing some act at a future date, or within a reasonable time. If the charity performs, then the contract offer is deemed to have been accepted and the contract matures into an enforceable obligation. The Court of Appeals case of *I. & I. Holding* is an example of the unilateral contract rationale. In this case, the donor made a pledge to "aid and assist the Beth Israel Hospital Association in its humanitarian work."<sup>14</sup> The Court held that "[o]ur courts have definitely ruled that such subscriptions are enforceable on the ground that they constitute an offer of a unilateral contract which, when accepted by the charity by incurring liability in reliance thereon, becomes a binding obligation."<sup>15</sup> A request or invitation for a charity to go on with its charitable work, even if merely implied, was deemed a sufficient offer and was found to have been accepted, providing the requisite consideration.<sup>16</sup>

The theory of unilateral contract is frequently invoked in cases involving fundraising campaigns, such as building campaigns. In these cases, even if the building project has not been completed or has been modified, courts will usually uphold the pledge as long as the charity has taken some action toward completion of the campaign.<sup>17</sup>

### Promissory Estoppel

The promissory estoppel theory is based upon an equitable remedy rather than contract theory; it supports enforcement of a charitable pledge where the charity has taken action in direct reliance on the promise of the donor. In these cases, the charity has incurred liability to its detriment and would suffer damages were the pledge not enforced. As noted in *Allegheny College*, the promissory estoppel doctrine was invoked by courts as a work-around to the failure of consideration defense before the Court of Appeals made clear that charitable subscriptions would generally be enforced as a matter of public policy.<sup>18</sup> Based upon *I. & I. Holding*, it seems that an appeal to promissory estoppel should only be utilized as a final resort when a charity cannot justify enforcement under a bilateral or unilateral contract theory.<sup>19</sup>

### In re Kramer

In light of the favorable history and case law preceding *Kramer*, where did the charity go wrong? In short, the Kings County Surrogate's Court found that the charity had done next to nothing in reliance upon the pledge, and, thus, consideration could not be found under any of the three rationales.

*Kramer* involved a motion by a charity, Educational Institute Oholei Torah-Oholei Menachem, for summary judgment dismissing objections to its petition to determine the validity and enforceability of its claim against the Estate of Isaac Kramer. The charity's claim was based upon a pledge card and promissory note, in the face amount of \$1.8 million, allegedly signed by the decedent approximately a year and a half before his death, and ostensibly payable six months prior to the decedent's death. The pledge was allegedly given for the purpose of supporting a building campaign proposed by the charity to construct a new ritualarium, or mikveh, for the use of the charity's members. No payment on the pledge had been made by

Over time, decisions shifted toward the benefit of charities, and defenses grounded upon lack of consideration came to be disfavored.

the decedent or demanded by the charity prior to the decedent's death. Representatives of the charity claimed they consciously withheld demands for payment because of the decedent's illness shortly before his death.

Objections to the charity's petition were filed by the Kings County Public Administrator, as fiduciary of the decedent's estate, and the four additional groups representing various purported testamentary legatees and distributees.

The respective objections raised multiple theories for rejection of, and affirmative defenses against, the charity's claim including (1) forgery of the decedent's signature, (2) lack of due execution, (3) lack of consideration, (4) lapse upon the decedent's death, (5) laches and unclean hands, (6) expiration of the statute of limitations, (7) fraudulent inducement, and (8) the decedent's lack of capacity. Upon the charity's summary judgment motion, two of the respondents cross moved for summary judgment upon an additional theory of the charity's failure to demonstrate acceptance of the pledge by taking action in reliance thereon.

The court granted the charity's motion for summary judgment concerning the objections based upon lack of due execution, laches, unclean hands, expiration of the statute of limitations, fraudulent inducement, capacity and forgery of the decedent's signature, because they were either unsupported or raised no triable issues of fact.

The defense of lack of consideration, however, turned out to be dispositive against the charity. The court noted that the pledge was ostensibly made in furtherance of a fundraising campaign, so it must be examined under the theory of a unilateral contract. Thus, the pledge would not become binding until the charity had sufficiently acted upon the pledge so as to incur liability on the part of the donor.

Referring to the public policy history in this area of law, the court stated that it has been the "noted policy of the courts to sustain the validity of subscription agreements whenever a counter promise of the donee can be sustained from the actions of the parties or it can be demonstrated that any legal detriment has been sustained by the promise in reliance upon the promised gift."<sup>20</sup> For instance, the court noted that charitable subscriptions have been deemed enforceable where the donee has made some substantive progress toward the charitable goal for which the pledge was made. This would include starting construction, employing architects and paying for plans, raising additional pledges based upon the disputed pledge, or taking on a construction loan for the project. The donor's partial payment of the pledge, whether alone or in conjunction with concrete action on the part of the charity, has also been deemed sufficient to indicate acceptance of the unilateral contract. The court cited as examples, among other cases, *Allegheny College*,<sup>21</sup> *I. & I. Holding*,<sup>22</sup> and *Woodmere Academy*,<sup>23</sup> along with some other notable cases such as *In re Lord*,<sup>24</sup> *In re Lipsky*,<sup>25</sup> *In re Metz*,<sup>26</sup> and *In re Field*.<sup>27</sup>

Despite the broad policy in favor of enforcement, the court found that the charity in *Kramer* was unable to meet the burden of showing it had meaningfully acted in reliance upon the pledge. Indeed, it was undisputed that no actual construction had begun on the proposed building project. Nor was there any specific date upon which construction was to begin, or any reasonable time frame for completion of the project. The Court characterized the construction project as more of a "hoped-for occurrence" than an actual plan.<sup>28</sup> Moreover, despite its claims to the contrary, the charity could not prove that it had expended any sums of money

on any construction-related expenses, such as soil samples or architectural plans. Nor could the charity produce any contracts or engagement letters from architects, engineers, or contractors. There was also no proof of building permit or zoning applications. Finally, though the charity claimed to have used the decedent's pledge to solicit other pledges, no independent evidence of receipt or fulfillment of such additional pledges was offered.

In sum, the court found that the charity had done nothing meaningful or substantive in reliance on the decedent's pledge. Thus, the charity's motion for summary judgment on the consideration issue was denied, and the cross-motions dismissing the charity's petition were granted. It is worth noting that the lack of any material reliance would also have foreclosed a claim under the promissory estoppel theory. Nor could the charity have proceeded under a bilateral contract theory, as the pledge was not conditioned on receiving something in return. ■

1. "[R]ecoverry upon subscription agreements has become the rule rather than the exception." *In re Lord*, 175 Misc. 921, 923 (Sur. Ct., Kings Co. 1941). *In re Lord* provides a useful and comprehensive overview of the history and case law in the area of charitable pledge enforcement.
2. N.Y.L.J., Apr. 21, 2014, p. 24, col. 6 (Sur. Ct., Kings Co.).
3. *Allegheny Coll. v. Nat'l Chautauqua Cnty. Bank*, 246 N.Y. 369, 372 (1927).
4. *See In re Field*, 15 Misc. 2d 950, 951 (Sur. Ct., Suffolk Co. 1959).
5. *See Allegheny Coll.*, 246 N.Y. at 372; *see also In re Lord*, 175 Misc. at 922-23.
6. *Allegheny Coll.*, 246 N.Y. at 374.
7. *Id.* at 375.
8. 276 N.Y. 427, 433 (1938). "We realize that the principles upon which courts of differing jurisdictions have placed their decisions sustaining subscriptions for charitable purposes are all subject to criticism from a legalistic standpoint. Nevertheless, we feel that we should follow the decisions of our own courts, extending, as they do, over a long period."
9. 41 N.Y.2d 746, 749 (1977). "Preliminarily, we observe that, as a matter of public policy, pledge agreements calculated to foster eleemosynary enterprises are enforceable."
10. *In re Lipsky*, 45 Misc. 2d 320, 322 (Sur. Ct., N.Y. Co. 1965).
11. *See I. & I. Holding*, 276 N.Y. at 432; *see also In re Lord*, 175 Misc. 923.
12. *See id.*
13. *See Allegheny Coll.*, 246 N.Y. at 377-78.
14. *I. & I. Holding*, 276 N.Y. at 432.
15. *Id.* at 433.
16. *See id.* at 434.
17. *See In re Metz*, 262 A.D. 508 (1st Dep't 1941) (while the central building was not completed as originally planned, construction was completed on portions and, thus, there was no frustration of the project so as to relieve the donor of liability).
18. *See Allegheny Coll.*, 246 N.Y. at 374.
19. *See I & I Holding*, 276 N.Y. at 434 ("it is only when a request or invitation [for the charity to perform] cannot be implied in fact that it is necessary to invoke that doctrine"); *see also In re Lord*, 175 Misc. at 926.
20. *Kramer*, N.Y.L.J., Apr. 21, 2014, p. 24.
21. 246 N.Y. 369 (1927).
22. 276 N.Y. 427 (1938).
23. 41 N.Y.2d 746 (1977).
24. 175 Misc. 921 (Sur. Ct., Kings Co. 1941).
25. 45 Misc. 2d 320, (Sur. Ct., N.Y. Co. 1965).
26. 262 A.D. 508 (1st Dep't 1941).
27. 15 Misc. 2d 950 (Sur. Ct., Suffolk Co. 1959).
28. *See Kramer*, N.Y.L.J., Apr. 21, 2014, p. 24.

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# Buying or Selling a Small or Solo Practice – Part 2

By Nat Wasserstein

## The Advantage for New Lawyers of Buying a Law Practice

Purchasing a law practice can be just as advantageous to newer lawyer purchasers as to retiring sellers. By purchasing a practice, newer lawyers are able to hang out their own shingle with an established client base, a built-in mentor, a trained staff, and equipment. Granted, fewer and fewer newer lawyers are willing to enter solo practice, and even fewer may have the financial means to buy a firm outright. Many beginning lawyers might immediately discredit the idea of purchasing a legal practice. Instead, they continue to pursue the diminishing opportunities of large law firm employment while living in the basement of their parents' home, unemployed. However, golden opportunities exist for entrepreneurial beginning attorneys, big firm refugees, or other small or solo practitioners wanting to grow their practice areas and client base, who are willing to take a risk on an established clientele.

## Liability Considerations Involved in the Selling and Purchase of a Law Practice

Additional consideration should be paid to the extension of liability coverage post-sale. Many malpractice carriers will automatically extend a reporting period of 60 to 90 days following the termination of coverage while also providing the option to buyers to purchase an extended reporting period endorsement for additional coverage. Moreover, absent a written agreement between the parties, buyers may even have the duty to report any malpractice violations of the selling attorney to the clients if those violations are discovered post-purchase.

## General Steps to Selling a Law Practice

Once an attorney has committed to selling his or her practice and has carefully considered the relevant ethical and professional issues surrounding retirement and cessation from practice, the attorney must take steps to implement his or her plan and begin the selling process.



## Strategic Succession Planning, the Key to Success

Too often, attorneys fail to consider their practice as an asset. Many attorneys fail to have anything close to resembling a defined income plan to pay them income during their retirement, and not thinking of the firm as an asset may lead to a large loss of potential retirement-age income. It is also needless for a practitioner to throw away a book of business and referral network he or she has spent decades building. So, attorneys approaching retirement age must begin to think of their practices, regardless of size, as assets that can provide them with a source of funds for their retirement. By so doing, a practitioner can stop dreading the loss of a future stream of income and celebrate ending the practice by getting back some of the value invested into it.<sup>1</sup>

But appropriately including the practice itself as an asset requires practitioners to undertake succession planning wherein they consider all aspects of the practice. A strategic and well-thought-out succession plan is needed for a successful (and ethical) sale. Because attorneys have spent their lifetimes issue-spotting and devising strategies, strategically planning their own practice succession, though time consuming, should be manageable. Attorneys should look first at their crisis plan, which can be used to help prepare the practice's succession strategy.

The foremost consideration should be a procedure for client transition, and, for this, timing is critically important. A successful client transition plan allows retiring attorneys to ease out of practice while gradually transitioning clients over a period of several years before their anticipated retirement date. Considerations for such a transition may include closed client files, notification systems and updated contact information for current files, and a streamlined process for substituting out the retiring attorney as counsel on active cases.<sup>2</sup>

In addition, attorneys must think not only about the hardware equipment, which might be sold as part of a practice, but also the other electronic aspects of the firm, such as trademarks, photographs, cloud management software, and other online accounts. For example, during a disability requiring him to implement his own crisis system, one Ohio-based practitioner suggested memorializing the details for such technology-based items in an easily accessible form such as a computer, cloud file, or memory stick.<sup>3</sup> For old-fashioned practitioners who prefer pen and paper, using a Key Technology Information Form, such as the one provided by the ABA in partnership with Active Online, Inc., is a way to start thinking about the technical aspects of the practice.<sup>4</sup>

## Connecting Sellers With Buyers

### For Sellers: Identifying a Potential Buyer

Rule 1.1 requires that sellers exercise competency in identifying prospective buyers for the practice.<sup>5</sup> Finding a potential buyer requires maximum due diligence as the seller will be turning over the reins on client matters. The attorney-seller also is giving away the goodwill of his or her name and firm to an unknown practitioner who may very well be a recent law school graduate. The assistance of an advisor or consultant with divestiture experience to evaluate and deliver to the seller potential purchasers can prove invaluable in this process and ensure the success of the transaction. Among other advantages, such an advisor can assist the seller in ensuring the purchaser can competently handle all current matters, has no history of malpractice or bar complaints, and has an active license.

Take advantage of services offered by State Bar and law school career centers, which can prove very helpful during this process; they have the systems in place to offer confidential practice listings as well as to assist with buyer inquiries.<sup>6</sup>

### For Buyers: Identifying a Potential Target Firm

Prospective buyers must understand that when they purchase a law firm, they are obligated to undertake the representation of all of the clients in a book of business, and to represent them competently, irrespective of whether said clients generate high fees.<sup>7</sup> Here, too, the use of a third-party advisor with law practice transactional experience can prove helpful in identifying, evaluating and conducting due diligence, structuring the deal and payment, and assisting the seller with the technical and ongoing obligations post-purchase.

The due-diligence obligations of purchasers are made difficult by the doctrine of attorney/client privilege, which may prevent, in some instances, the potential buyer from inspecting the clients' payment status and files. One way around this potential issue is to complete an inspection of the practice's books instead, reviewing financial statements and tax records over the last three to five years. In addition, potential buyers should do a lien and title search on the business, ensuring no outstanding lines of credit exist for which the buyer may become

The foremost consideration should be a procedure for client transition, and, for this, timing is critically important.

responsible for repaying. Finally, potential buyers, like sellers, must review the selling attorney's malpractice and complaint history.

### Evaluating the Value of the Practice

Naturally, a portion of the value of a firm comes from the real and personal property it owns. For instance, a firm may own an office space, desks and chairs, copy machines, filing cabinets, and computer equipment. It may also own a well-recognized address and phone number, a web domain and custom computer software, the value of which, for the most part, is determinable.

However, while it is easy to place a value on real and personal property owned by a practice, one of the greatest challenges and also, perhaps, the most critical to selling a firm, is the valuation of its goodwill, includ-

ing name and referral network. This is in addition to its book of business, which is often made up of sporadic or one-time clients or those whose continued business is dependent on longstanding mutual trust and goodwill, making it difficult to evaluate current and future cash flow. Although the rules regarding the sale of legal practices have changed, the truth in ABA Opinion 266 has not: "Clients are not merchandise."<sup>8</sup> Thus, in reality, the sale of a book of business is merely a recommendation or referral of past, present, and future clients to the purchaser, backed by the earned goodwill of the selling attorney.

Unfortunately, there is no universally accepted method of valuing a legal practice. Thus, once the seller and purchaser have been identified, obtaining the services of valuation experts may be a prudent course of action.

Given the unique nature of the practice of law, combined with the immaturity of the market for buying and selling law practices, the valuation of a book of business is difficult to determine on one's own, using traditional methods. These might include using industry multiples, although some estimation of a practice's value may be determined by looking at recent sales in the same geographic area, practice area, practice size and niche practice genre. Compounding this, the details of many sales are kept confidential to protect attorney/client privilege, practice sizes are always changing, and trends in the profession may not be positive. Also, the existence of a "taxonomy" problem in the naming of practice areas (e.g., Elder Law vs. Wills and Estate Planning), and economic outlooks for the legal practice may be grim on both a local and national scale.

Likewise, it is impracticable to value firms based on how they might have been valued during divorce proceedings, as in divorces there is relative certainty the business will move forward and the divorce should have little impact on the future goodwill of the practice.

Let's say Timothy Hildey, an attorney with a solo estate-planning practice of 20 years' duration, wants to sell his law firm. Mr. Hildey declared an income of \$200,000 from his practice when he and his first wife divorced five years ago, but, as he looks toward selling, he is unable to claim the same value for his firm – because he won't be a part of the firm's future. Fortunately for Mr. Hildey, the estate planning practice is one of the easiest types of practices to value as there is a somewhat consistent stream of clients whose documents need to be updated and revised as well as the continual probate of deceased clients' estates. For bankruptcy or criminal practices, for instance, valuation may be significantly more difficult as such clients are unpredictable and typically one-off.

An experienced advisor can assist the seller and purchaser in structuring a deal and placing a value on the practice. One of the methods for valuation of a firm is called applying a "rule-of-thumb." This assigns a multiple to the book of business based on the number of clients

The New York State Bar Association, in Ethics Opinion 961, found that future fees are the only way to effectively capture a practice's "goodwill."

and cases expected to transfer to the new owner, tangible assets, and other intangibles, which is then multiplied by the firm's annual net revenue to derive a value. However, this method is inherently difficult to use, and, in truth, no rule of thumb exists for determining the multiple to be used.

For example, looking at Mr. Hildey's practice, let us assign the practice a rule-of-thumb multiple of 50%. When this is multiplied by the firm's annual revenue of \$200,000, the sale price of Mr. Hildey's practice would be \$100,000. Such a method is not, of course, without its drawbacks, including a standard deviation of between .3 and 1.0,<sup>9</sup> and the unpredictability of client conduct post-sale.

A second valuation method may also be used to determine the value of the firm after the fact. Using the earn-out method, after an initial down payment for the firm's tangible assets, the purchaser would pay the seller a percentage of its net revenue over a fixed period of time for the goodwill of the firm.<sup>10</sup> Applying this method to our hypothetical case study, the purchasing attorney and Mr. Hildey may agree the buyer would pay one-third of the practice's revenue for a period of five years for the goodwill of Mr. Hildey's practice. Should the firm earn \$200,000 per year post-sale, Mr. Hildey would be entitled to approximately \$66,000 per year, or \$330,000 over a period of five years.

Given the unpredictability of retaining the firm's book of business post-sale, the inability to secure future cash flow, and the risk-adverse nature of attorneys, the earn-out method is the preferable valuation method of buyers. It allows purchasers to pay only for realized business plus tangible assets without having to go through the difficult determination of the fair market value of the firm's goodwill and book of business. This allows the market value to determine itself. Conversely, sellers would prefer a rule-of-thumb method as it provides for a lump payment and is not dependent on the future business success and acumen of the purchaser.<sup>11</sup> Of course, the latter method assumes the purchasing attorney has enough resources to purchase a firm, which may be difficult for newer attorneys who may already have a lot of debt.

Additionally, the New York State Bar Association, in Ethics Opinion 961, has specifically supported such an earn-out method.<sup>12</sup> The NYSBA found that future fees are the only way to effectively capture a practice's "goodwill," saying, as an example, that 20% of a buyer's net income over a three-year period was a reasonable structure that did not violate any fee sharing rules.<sup>13</sup>

Thus, if Mr. Hildey were a New York practitioner, he could not go wrong with structuring a deal for the sale of his practice where the purchaser paid him 20% of the firm's net revenue for a three-year period post-sale. Taking the above figures of \$200,000 per year post-sale, this would result in Mr. Hildey earning \$40,000 per year or \$120,000 over the course of the three-year sale period. Clearly, a period greater than three years could be used.

The best method for valuation most likely combines the two methods, satisfying both the buyer and seller: Mr. Hildey may want to consider structuring a deal with his buyer whereby he receives 5% during the due-diligence phase, 20% upon closing, and the remainder under a multi-year earn-out structure.

Another win-win option for everyone involved is the "of counsel" format. This method is effective, especially when used as a part of a long-term client transition plan. It allows the purchasing attorney to gradually take on more and more client matters until eventually the selling attorney is phased out; thereby, the purchasing attorney retains the seller's book of business. At the same time, the seller is also mentoring a new attorney and overseeing the practice during the transition process. It also allows attorneys to mitigate any ethical dilemmas related to fee sharing during the transition process.

Alternative methods exist for evaluating a practice, such as the asset-based approaches of book value, adjusted book value, debt assumption, economic value and combinations thereof.<sup>14</sup>

## Conclusion and Sample Timeline

In conclusion, there has been no better time to sell or buy a law practice, and doing so can be manageable for both parties if strategically planned for and structured. Sellers and buyers must remember to keep the client at the forefront of all sales by following five key guidelines: (1) protecting client confidences and confidentiality, (2) conducting due diligence, (3) ensuring the entire practice has been sold, (4) notifying all clients of the sale and the right to request their files and obtain alternative counsel, and (5) ensuring billing rates are not raised as a result of the sale.

Sample steps of such a sale, taking into account the foregoing, may look as follows from a seller's perspective:

1. Development and implementation of succession plan, including a client transition plan
2. Valuation of the legal practice and goodwill of the law firm

3. Communication of intent to sell
  4. Qualifying of prospective buyers through robust due diligence by a third-party
  5. Negotiations with prospective buyers
  6. Conflicts check by prospective buyers
  7. Modification of purchase price for clients removed through conflicts check
  8. Renegotiation
  9. Signature of the purchase agreement
  10. Communication of the sale to all clients
  11. Implementation of the client transition plan
- And sample steps of such a sale from a buyer's perspective would largely be the same, differing only in steps one and two:
1. Honest evaluation of legal skills and ability to manage the seller's practice
  2. Qualifying of prospective target practices through robust due diligence by a third-party

One existing rule of thumb in the practice of law is to "never be your own client"; thus, the services of an experienced independent facilitator and negotiator may prove invaluable. As Yogi Berra would say, "[t]he future isn't what it used to be." For buyers and sellers of solo and small practices, the future is getting brighter every day. ■

1. The type of practice, clientele, and geographical location are just some of the variables that determine the viability and reliability of income.
2. See Dennis A. Rendleman, *The Evolving Ethics of Selling a Law Practice*, 29 GPSolo 4 (2012). For transition planning for small- to medium-sized firms that are not solo practices, see Roy S. Ginsburg, *Successful Succession: Keep Your Best Clients When Boomer Lawyers Leave*, [www.royginsburg.com/successful-succession-keep-your-best-clients-when-boomer-lawyers-leave](http://www.royginsburg.com/successful-succession-keep-your-best-clients-when-boomer-lawyers-leave).
3. Lloyd D. Cohen, *How My Emergency Plan Saved My Practice*, 29 GPSolo 4 (2012).
4. See Wells H. Anderson, *How a Key Technology Information Form Can Save Your Practice*, 29 GPSolo 4 (2012). A sample Key Technology Information Form can be found at <http://www.activeonlineinc.com/forms>.
5. N.Y. Rules of Professional Conduct, Rule 1.1.
6. Washington State Bar Ass'n, Practice Transition Opportunity, <http://www.wsba.org/Resources-and-Services/Ending-Your-Practice/Sell-a-Practice>.
7. *Id.*
8. ABA Opinion 266 (1963).
9. See Roy S. Ginsburg, *Selling Your Law Firm: What It's Worth*, <http://www.royginsburg.com/selling-your-law-firm-what-its-worth>.
10. While sales may be financed based on revenue earned over a period of time, Rule 1.17 prohibits such sales where such revenue is the result of increases in fees charged to the clients. See Comment [10] to Rule 1.17.
11. See Ginsburg, *supra* note 9.
12. N.Y. Bar Ass'n Comm. on Professional Ethics Op. 961 (2013).
13. *Id.*
14. For an excellent and analytical review of these alternative valuation methods, see William F. Brennan, "Law Firm Valuation Part III" in *Report to Legal Management*, Altman Weil.



# Aftereffects

## New Legislation Addresses the Inheritance Rights of a Posthumously Conceived Child

By Anthony T. Selvaggio and Nancy E. Klotz

Advances in biotechnology have outpaced New York inheritance laws, enacted long before posthumously conceived children were a reality. In the past 10 years, the use of assisted reproductive technologies has doubled; in 2012 these methods resulted in the birth of more than 65,000 infants.<sup>1</sup> Although it is unknown how many of these infants were posthumous conceptions, as of 2011 the Social Security Administration reported claims from over 100 posthumously conceived children.<sup>2</sup> “[T]here is a need for comprehensive legislation to resolve the issues raised by advances in biotechnology,” implores Surrogate Renee Roth in *In re Martin B.*<sup>3</sup> This case is the only published opinion in New York confronting the question of the inheritance rights under a trust of a posthumously conceived child.

The New York State Assembly responded through State Assembly Bill A07461A.<sup>4</sup> The bill, which adds to the Estates, Powers and Trust Law (EPTL) a new section

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4-1.3 (titled “Inheritance by Children Conceived After the Death of a Parent”) and amends existing EPTL 11-1.5,<sup>5</sup> was prompted by a request from the Chief Administrative Judge in response to a call for action from the Surrogate’s Court Advisory Committee. The bill passed in both the Assembly (98-36) and the Senate (59-0). It was signed into law by Governor Cuomo on November 21, 2014.

This article addresses the inheritance rights of posthumously conceived children under New York law and the new statute. It begins by reviewing advances in biotechnology that allow a child to be conceived posthumously and providing a brief history of the law in this area. Key elements of the statute are then outlined. Finally, the authors conclude by discussing a few of the issues and planning considerations raised by the new law.

### Methods of Posthumous Conception

There are a number of reasons for the increase in the use of assisted reproductive methods. These include the decreasing stigma associated with these techniques and improvements in technology, which have resulted in lower costs. The average age of women giving birth to a first child is rising, which may also result in a more frequent need for these methods.

As the use of reproductive technology increases, so also has the decision to store genetic material in anticipation that one’s fertility may be compromised. Cryopreservation is a method of storing human genetic material, including sperm, ova and embryos, outside the human body at very low temperatures. It is the standard storage method used at fertility clinics, and human reproductive material can be preserved in viable condition in this manner for as long as a decade.<sup>6</sup> Because of the length of time genetic material can be preserved, the opportunities for posthumous conception have increased.

Two primary reproductive techniques use cryopreserved material: intrauterine insemination (IUI) and in vitro fertilization (IVF). IUI is a medical procedure that involves placing sperm into a woman’s uterus to facilitate fertilization.<sup>7</sup> IVF involves removing eggs from a woman’s ovaries and fertilizing them outside her body. The resulting embryos are then transferred into a woman’s uterus.<sup>8</sup> The woman can be either the genetic mother or a gestational carrier, a woman with no genetic connection to the child.

### Background and Current New York Law

Case law addressing the rights of a posthumously conceived child has primarily arisen in the context of Social Security law. In the landmark case of *Astrue v. Capato*,<sup>9</sup> the U.S. Supreme Court held that the Social Security Administration could determine eligibility for survivor benefits based on state intestacy laws. If a child is a distributee of the decedent under state law, then the

child is eligible for Social Security survivor benefits of a deceased parent.

In New York, the statutory law governing descent and distribution was enacted long before advances in biotechnology allowed for a posthumously conceived child. EPTL 4-1.1(c) specifically provides that distributees take as if born during the decedent’s lifetime only if conceived prior to the decedent’s death and born alive thereafter. Based on this language, posthumously conceived children are not considered heirs and are not eligible for Social Security survivor benefits under current New York statutory law.

*In re Martin B.*<sup>10</sup> is the only published opinion outside the context of Social Security eligibility to address the rights of posthumously conceived children. In this case, Surrogate Roth examined the question of whether the terms “issue” and “descendant” as used in trust documents included two posthumously conceived children. The court concluded that the two posthumously conceived children were trust beneficiaries.

*Martin B.* was an advice and direction proceeding brought by the trustees of seven trusts created by the Grantor in 1969. The Grantor, also the life income beneficiary, died in July 2001. He was survived by his wife and a son. He was predeceased by only a few months by a second son, James, who had died in January 2001 of Hodgkin’s lymphoma. James had no children, but he had cryopreserved semen and his directions provided that in the event of his death it was to be held subject to his wife’s instructions. Three years after James’s death, his wife, Nancy, used the cryopreserved semen to conceive a child through IVF; she had a son. Two years later she gave birth to another son using the same method. Thereafter the cryopreserved semen was destroyed.

In determining that these two boys were beneficiaries of the 1969 trusts, the court noted the father’s assumption that his children would be beneficiaries of the trusts and the principal. Indeed, the Restatement (Third) of Property states that if an individual considered the child his own then society through its laws should do so, too. However, this was not the controlling factor. Rather, the controlling factor was the grantor’s intent as determined by a reading of the trust documents. Although the documents were silent on the question of posthumously conceived children, the court concluded that a sympathetic reading of the documents led to the conclusion that the grantor intended to benefit his bloodline. As a result, the two posthumously conceived children were deemed to be beneficiaries of the trusts.

### EPTL 4-1.3

The statutory framework of EPTL 4-1.3 includes nine subparagraphs (a)–(i). Space limitations do not allow a detailed exploration of each subsection of the statute; accordingly, we focus primarily on the substance of the first three subparagraphs.

The first section, EPTL 4-1.3(a), sets forth key definitions pertinent to interpreting the statute. The term “Genetic Parent” is defined as meaning either a man who provided sperm or a woman who provided ova that was subsequently used to “conceive a child after the death of the man or the woman.” Next, “Genetic Material” is defined as the “sperm or ova provided by the genetic parent.” Finally, “Genetic Child” is defined as the child of the “sperm or ova provided by a genetic parent, but only if and when such child is born.” While these definitions are simple, they represent a monumentally significant change in the arena of estate planning. Prior to this legislation, attorneys had to be concerned with two categories of descendants – biological children and adopted children. When EPTL 4-1.3 became law, it introduced a third type of descendant of which attorneys will need to be cognizant – the “genetic child.”

Case law addressing the rights of a posthumously conceived child has primarily arisen in the context of Social Security law.

### Requirements

EPTL 4-1.3(b) sets forth four requirements that must be met before a genetic child will be included in a disposition of property which provides for issue. This is very important because it establishes that merely meeting the definition of a genetic child is insufficient for the child to be included in a class eligible to receive a disposition of property pursuant to a will or trust. To qualify a genetic child as issue, the following four requirements must be satisfied:

*Written Instrument Requirement EPTL 4-1.3(b)(1).* The genetic parent must execute a written instrument expressly consenting to the use of his or her genetic material for the purposes of posthumous reproduction. The written instrument must also authorize a specific person to make decisions regarding the use and application of his or her genetic material after the genetic parent’s death.

*Notice Requirement EPTL 4-1.3(b)(2).* The genetic parent’s authorized representative must provide notice of the existence of the genetic material to either the personal representative of the genetic parent’s estate or, in certain cases, to a distributee of the genetic parent. Notice to a personal representative must be made within seven months from the date of issuance of letters testamentary or administration, but if such letters have not been issued within four months after the genetic parent’s date of death, then such notice must instead be made to a distributee of the genetic parent within seven months of the genetic parent’s date of death.

*Filing Requirement EPTL 4-1.3(b)(3).* The genetic parent’s authorized representative must record the written instrument in the Surrogate’s Court granting

letters (or in the Surrogate’s Court having jurisdiction over the genetic parent in the event no letters are issued) within seven months of the genetic parent’s date of death.

*Time Requirement EPTL 4-1.3(b)(4).* The genetic child must be in utero no later than 24 months after the genetic parent’s death or actually born no later than 33 months after the genetic parent’s death.

### Principles

EPTL 4-1.3(c) provides the requirements for the execution of the written instrument demanded by EPTL 4-1.3(b)(1) and a statutory form to satisfy this requirement. This section of the statute enumerates four principles regarding this written instrument:

*Manner of Execution.* It must be signed by the genetic parent in the presence of two adult disinterested witnesses who must also sign the instrument. The statute particularly precludes the authorized representative from serving as a witness.

*Revocation.* It may only be revoked by a written instrument executed in the same manner as the original written instrument.

*Alteration or Revocation by Will Prohibited.* The statute expressly prohibits the ability to alter or revoke the written instrument by means of the genetic parent’s will.

*Provision for Successor Representative.* The statute allows the genetic parent to name a successor to his or her authorized representative who would act if the primary representative was unwilling or unable to act.

After setting forth these four principles, EPTL 4-1.3(c)(5) provides a statutory form to satisfy the written instrument requirement. The statute notes that the written instrument “may be substantially in the following form,” which leads to the conclusion that attorneys will have some freedom to alter this form, unlike the more stringent requirements which govern the statutory New York Statutory Power of Attorney. A copy of the form is included as a sidebar to this article.

### Implications of the Statute

EPTL 4-1.3 represents a significant leap forward in addressing this nascent area of the law. Clarity is needed, and this statute will provide welcome guidance to testators, grantors, fiduciaries and their attorneys. While the statute is helpful, it is also quite circumscribed and may give rise to new issues that will need to be addressed by attorneys as they assist clients in crafting estate plans.

### Limitations on Eligibility

One of the most striking aspects of the statute is its limited scope. EPTL 4-1.3 creates a new classification of potential heir in the genetic child, but it also severely restricts those who will qualify to be included under this definition. The statute does this by establishing a series of layered requirements which must be met before a genetic child will receive inheritance rights.

## Statutory Form: EPTL 4-1.3(c)(5)

(c) The written instrument referred to in subparagraph (1) of paragraph (b) of this section: (5) may be substantially in the following form and must be signed and dated by the genetic parent and properly witnessed:

I, \_\_\_\_\_

\_\_\_\_\_  
(Your name and address)

consent to the use of my (sperm or ova) (referred to below as my "genetic material") to conceive a child or children of mine after my death, and I authorize

\_\_\_\_\_  
\_\_\_\_\_  
(Name and address of person)

to decide whether and how my genetic material is to be used to conceive a child or children of mine after my death. In the event that the person authorized above dies before me or is unable to exercise the authority granted I designate

\_\_\_\_\_  
\_\_\_\_\_  
(Name and address of person)

to decide whether and how my genetic material is to be used to conceive a child or children of mine after my death.

I understand that, unless I revoke this consent and authorization in a written document signed by me in the presence of two witnesses who also sign the document, this consent and authorization will remain in effect for seven years from this day and that I cannot revoke or modify this consent and designation by any provision in my will.

Signed this day of \_\_\_\_\_, \_\_\_\_\_,  
\_\_\_\_\_.

\_\_\_\_\_  
(Your signature)

Statement of witnesses:

I declare that the person who signed this document is personally known to me and appears to be of sound mind and acting willingly and free from duress. He or she signed this document in my presence. I am not the person authorized in this document to control the use of the genetic material of the person who signed this document.

Witness: \_\_\_\_\_

Address: \_\_\_\_\_

Date: \_\_\_\_\_

Witness: \_\_\_\_\_

Address: \_\_\_\_\_

Date: \_\_\_\_\_

The first layer consists of the written instrument, notice and filing requirements set forth in EPTL 4-1.3(b)(1)–(3). A failure on any of these points will bar the posthumously conceived child from inheriting. The fourth requirement set forth in EPTL 4-1.3(b)(4), that the child must be in utero within 24 months or born no more than 33 months after the genetic parent's death, adds yet another restriction which will further reduce the number of posthumously conceived children who will inherit pursuant to this law.

The bill provided no background commentary on why the 24/33 dates were chosen. In comparison to the New York law, the Uniform Probate Code (UPC) requires that a child must be in utero within 36 months or born within 45 months of death.<sup>11</sup> The comments to the 2008 UPC say that this allows for a surviving spouse to grieve and then make a decision to move forward with a pregnancy.<sup>12</sup> Certainly, a time requirement is necessary to close the window for the appearance of posthumously conceived genetic children. Without a time limitation, fiduciaries

would never have any certainty that they have accurately identified the beneficiaries. However, this relatively narrow time frame will reduce the number of eligible posthumously conceived children.

Yet another limiting factor is the effective dates of the statute. The statute makes clear that a genetic child will be classified as a distributee of the *genetic parent* if the requirements of EPTL 4-1.3(b) are met regardless of when the *genetic parent* created the effective instrument.

potential posthumously conceived children. Below we discuss several issues likely to arise in such client planning conferences.

The effective dates of EPTL 4-1.3(f) raise an important issue because a testator or grantor who is subject to the effective date will in turn be subject to this statute unless he or she includes language in the instrument expressly prohibiting the application of the statute to his or her planning. Attorneys will need to discuss this

## The new statute provides much needed legislative guidance in a critical area where rapidly developing biotechnology has collided with traditional law.

Notwithstanding the broad applicability for a genetic parent, EPTL 4-1.3(f) provides an effective date with regard to instruments created by persons other than the genetic parent. In most cases, this will be the ancestors of the genetic parent. First, this section sets an effective date for wills created by persons other than the genetic parent. In this case, the effective date, September 1, 2014, applies to the date of death of such person and not the date the instrument was created. Accordingly, all wills of persons who die after September 1, 2014, are subject to the provisions of this statute. The effective date also applies to *all* lifetime trusts executed by persons other than the genetic parent on or after September 1, 2014, and to all lifetime trusts created by persons other than the genetic parent prior to that date in which the grantor has the power to revoke or amend the trust as of the effective date, without regard to the date of execution.

These effective dates will further restrict the number of posthumously conceived children who will qualify as issue of the ancestor of the genetic parent.<sup>13</sup> The reasoning behind these limitations, particularly the September 1, 2014, effective date, is not difficult to discern. The effective date essentially excludes the innumerable existing irrevocable trusts, created by will or agreement, which would otherwise be impacted by the possibility of new, posthumously conceived heirs. The effective date avoids creating a legal nightmare for trustees, particularly those who have already terminated trusts and distributed the remaining principal to what they thought was a fixed class of heirs.

### Planning Considerations

While the statute limits the number of qualifying posthumously conceived children, it still has broad implications for clients and their attorneys. It appears that at least a cursory discussion of the statute will arise in nearly every conference regarding estate planning, with much more detailed discussions occurring in cases of parents who desire to plan for their own

matter with their clients and ask them whether they wish to restrict the inheritance rights of posthumously conceived genetic descendants. Such a restriction could be quite appealing to testators and grantors considering the settlement delays and additional costs that could result if they allow for the possibility of posthumously conceived genetic descendants. This, coupled with the reality that such genetic descendant could possibly be born to a parent with whom the client has no connection, leads the authors to believe that such restrictions may prove popular. Additionally, attorneys may want to counsel clients so that any existing documents to which the new law may apply can be amended consistent with the grantor's wishes.

The question also arises regarding the choice of the authorized representative of the genetic parent. Who, other than a surviving spouse or partner, would be willing to serve as an authorized representative?<sup>14</sup> This newly created role, with the attendant risk of liability, could be a precarious office and is one that comes without compensation. If the primary authorized representative's authority is revoked due to divorce as provided in the statute, how might an alternate receive notice of this individual's new obligations? What if the authorized representative is not aware of the appointment and fails to satisfy the statutory notice requirements? Might a non-spouse, non-partner authorized representative have some exposure for failing to notify a surviving partner about stored genetic material for possible use within the statutory time frame, even if the other notice requirements of the statute are satisfied?

Other areas of risk for the authorized representative include the following considerations. What if the authorized representative fails to give timely notice or fails to properly record the written instrument? Would the genetic child have a cause of action against the authorized representative for breach of duty? Just imagine if the genetic child was a potential heir to a large trust. Consider also the 24/33 month time constraints.

Often the type of reproductive techniques employed with genetic material are not always successful on the first attempt. One can imagine an authorized representative prodding the process along in fear that the child will be in utero or born outside the bounds of the 24/33 month requirement. It seems likely that the only persons who would be willing to subject themselves to such potential risks of liability would be the uninformed or the prospective parent of the genetic child.

Finally, the amendment also provides useful guidance on the issue of disposition of stored genetic material. EPTL 4-1.3(i) states that genetic material will be exclusively governed by the terms of this statute and the contractual agreement made with the facility providing storage of the genetic material. This section makes clear that a person cannot dispose of his or her genetic material by other means, including a will or other written instrument. Given potential risks to an authorized representative, it may be important to stress to clients the value of conversations with the named authorized representative and any alternates similar to recommended conversations with any agents named in a health care proxy.

## Conclusion

The new statute provides much needed legislative guidance in a critical area where rapidly developing biotechnology has collided with traditional law. As clients and attorneys work with the new law, issues and planning considerations will inevitably arise. Ironically, the case that spurred the legislative process, *In re Martin B*,<sup>15</sup> would have had a very different result under the new law. Neither of the two children in *Martin B*, who were held to be beneficiaries of their grandfather's 1969 trusts, would have qualified as genetic children under the new law. Both boys were posthumously conceived and born outside the 24/33 month requirements of the statute.<sup>16</sup> ■

1. Centers for Disease Control and Prevention, *Assisted Reproductive Technology (ART)*, <http://www.cdc.gov/art> (last visited Nov. 1, 2014)

2. Benjamin C. Carpenter, *Sex Post Facto: Advising Clients Regarding Posthumous Conception*, 38ACTEC L.J. 187, 196 (2012) (citing Petition for Writ of Certiorari at 19, *Astrue v. Capato*, 132 S. Ct. 2021 (2012) (No. 11-159)).

3. 17 Misc. 3d 198 (Sur. Ct., N.Y. Co. 2007).

4. New York State Assembly, [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A07461&term=2013&Summary=Y&Actions=Y&Memo=Y&Text=Y#jump\\_to\\_Text](http://assembly.state.ny.us/leg/?default_fld=&bn=A07461&term=2013&Summary=Y&Actions=Y&Memo=Y&Text=Y#jump_to_Text) (last visited Nov. 3, 2014).

5. This article covers EPTL 4-1.3 exclusively and does not deal with the amendments to EPTL 11-1.5. However, the main point of those amendments to EPTL 11-1.5 are to clarify the issues related to a fiduciary's duty with regard to the timing of distributions in cases where the birth of a qualifying genetic child is anticipated.

6. Sheri Gilbert, Note, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 Hofstra L. Rev. 521, 525 (1993).

7. Centers for Disease Control and Prevention, 2012 Assisted Reproductive Technology, Fertility Clinic Success Rates Report, Appendix B: Glossary of Terms.

8. Centers for Disease Control, *2012 Assisted Reproductive Technology National Summary Report*, Appendix B: Glossary of Terms.

9. 132 S. Ct. 2021 (2012).

10. 17 Misc. 3d 198 (Sur. Ct., N.Y. Co. 2007).

11. Uniform Probate Code §§ 2-120(k), 2-121(h).

12. Comments to Uniform Probate Code §§ 2-120(k), 2-121(h).

13. Note that in addition to the new statutory limitations, prior limitations in the EPTL still apply. The memo accompanying the statute (see [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A07461&term=2013&Summary=Y&Actions=Y&Votes=Y&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A07461&term=2013&Summary=Y&Actions=Y&Votes=Y&Memo=Y)) provides examples. These examples assume that all requirements of EPTL 4-1.3(b) have been met for the husband as the deceased genetic parent:

Example 3: Shortly after husband's death, husband's mother dies intestate survived by her spouse and issue. Child is a distributee of the husband's mother only if child is living at mother's death (or is en ventre sa mere and is then born alive and survives 120 hours) because under EPTL 4-1.1(c) all of mother's distributees must at least be conceived before her death.

Example 4: Shortly after husband's death, mother dies testate and her will, duly admitted to probate, includes a general disposition of \$10,000 "to each of my grandchildren living at my death." Child participates in the gift only if child is living at mother's death (or is en ventre sa mere and is then born and survives for 120 hours).

14. EPTL 4-1.3(d) expressly revokes the authority of an authorized representative named in a written instrument if such authorized representative is a spouse of the genetic parent and a judgment of divorce has been issued terminating the marriage.

15. 17 Misc. 3d 198 (Sur. Ct., N.Y. Co. 2007).

16. The memo accompanying the statute is at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A07461&term=2013&Summary=Y&Actions=Y&Votes=Y&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A07461&term=2013&Summary=Y&Actions=Y&Votes=Y&Memo=Y).

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# Should Non-Attorneys Represent Parties in FINRA Arbitration for Compensation?

## Introduction

New York Judiciary Law § 484 governs the unauthorized practice of law; it holds the formidable title: “None but Attorneys to Practice in the State.”<sup>1</sup> The statute’s legislative intent is to protect the public and promote New York’s policy against the unlicensed practice of law within the state.<sup>2</sup> Together, Judiciary Law §§ 478 and 484 prevent non-attorneys from among other legal and quasi-legal services: performing closing services for real estate transactions;<sup>3</sup> prosecuting minor, non-jury criminal cases;<sup>4</sup> marketing and selling do-it-yourself divorce kits;<sup>5</sup> advising debtors during bankruptcy;<sup>6</sup> and giving tax advice outside of preparing a tax return.<sup>7</sup> The Judiciary Law, however, does not actually define the “practice of law” and thus does not

prohibit non-attorneys from charging fees to represent parties in Financial Industry Regulatory Authority (FINRA) arbitration.<sup>8</sup>

First, we address whether representation of parties in FINRA arbitration involves significant legal practice. Then we look at how the N.Y. Rules govern non-attorney conduct. Third, we look at how other states address the issue. Finally, we discuss what measures New York can take to resolve the issue of non-attorney representation in FINRA arbitrations.

## FINRA Arbitration and the Practice of Law

At its most basic level, arbitration is similar to litigation in that both enlist uninterested third parties to resolve a dispute between two or more parties. FINRA operates

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the largest arbitration forum in the United States, resolving disputes between customers and member firms, as well as between employees and their brokerage firms. The 60-page FINRA Code of Arbitration for Customer Disputes contains more than 80 rules, each with numerous subparts.<sup>9</sup> Many of these rules have been frequently amended and contain further advisory notices. And the FINRA guidelines describe motion practice and discovery as “often complicated.”<sup>10</sup>

Aside from the complex nature of many FINRA arbitrations, non-attorneys representing parties in FINRA arbitration are not bound by the New York Rules of Professional Conduct (N.Y. Rules).<sup>11</sup> Other states with statutes similar to Judiciary Law §§ 478 and 484, relating to the unauthorized practice of law, prohibit non-attorneys from representing parties in FINRA arbitration for compensation.

In 1997, for example, the Florida Bar found that compensated non-attorney representation of investors in securities arbitration constitutes the unauthorized practice of law and enjoined non-attorneys from representing investors for compensation in securities arbitration proceedings.<sup>12</sup> The injunctive order applied to people who were not licensed to practice law in any jurisdiction and represented investors in securities arbitration for compensation. The Florida Bar decision was narrowly crafted to eliminate non-attorney companies from soliciting and practicing in the state, while keeping in line with the public policy supporting arbitration as an efficient means to resolve commercial disputes. As the panel noted, “the services provided by nonlawyer representatives in the alternative but still adversarial context of securities arbitration constitutes the practice of law.”<sup>13</sup> The Florida Bar found that non-attorneys committed the unlicensed practice of law in at least 12 different areas during securities arbitrations.<sup>14</sup>

Supporting that decision, the Florida Bar followed *State ex rel. Florida Bar v. Sperry*, and found

in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.<sup>15</sup>

The *Sperry* decision reflects the opinion that defining what constitutes “legal practice” requires examining the relationship between the attorney, the client and the matter at issue, instead of the forum where the attorney practices.

In order to ensure that the Florida Bar’s ruling is followed, FINRA Dispute Resolution requires that persons representing investors in Florida affirm in writing that they are duly licensed to practice law or, alternatively, that they are not receiving compensation for their services. Additionally, FINRA requires that those affirming they are lawyers provide their state bar identification number.

### The N.Y. Rules Do Not Govern Non-Attorneys

The N.Y. Rules establish “the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action” and are designed to “further the public’s understanding and confidence in the rule of law.”<sup>16</sup> Failure to meet these responsibilities “compromises the independence of the profession and the public interest that it serves.”<sup>17</sup>

Aside from the complex nature of many FINRA arbitrations, non-attorneys representing parties in FINRA arbitration are not bound by the New York Rules of Professional Conduct.

However, the N.Y. Rules govern only the conduct of attorneys and have no bearing on non-attorneys representing parties in FINRA arbitration for compensation. In a 2010 article titled “Swatting at Wall St. From a Bunker in Brooklyn,” the *New York Times* investigated the business practices of non-attorney companies that represent claimants for compensation in FINRA arbitration.<sup>18</sup> The article revealed a litany of practices, which – if done by an attorney – would constitute a violation of the N.Y. Rules; however, for a non-attorney these abusive practices go unregulated.<sup>19</sup> The most significant and systemic of these activities spanned the gamut from deceptive advertising practices to charging excessive contingency fee contracts for services and last-minute withdrawal of representation. While the N.Y. Rules protect attorneys’ clients from this practice, it cannot protect clients of non-attorneys from this conduct.<sup>20</sup>

### How Other States Look at the Issue

Judiciary Law §§ 478 and 484 do not explicitly allow non-attorneys to represent claimants in FINRA arbitration for compensation; neither do they expressly prohibit the practice. While it may seem logical that FINRA arbitration

## POINT OF VIEW

involves the practice of the law, another interpretation allows non-attorneys to practice in FINRA arbitration for compensation because of the Judiciary Law's failure to explicitly include the practice under its construction of "legal services."<sup>21</sup>

Yet, the language of Judiciary Law §§ 478 and 484 is not significantly different from the corresponding laws of other states. The highest courts in Ohio, Arizona and Arkansas have all ruled that non-attorney representation in arbitration constitutes the unlicensed practice of law.<sup>22</sup> As in New York, the Ohio law prohibits anyone who is not licensed in the state from providing legal services.<sup>23</sup> However, in Ohio, legal services include representing individuals in discovery, settlement negotiations and pre-hearing conferences to resolve claims of legal liability, regardless of the forum.<sup>24</sup> In this respect, Ohio is different from New York in that it recognizes that dispute resolution before an arbitral forum, like FINRA, is the practice of law and as such should be regulated in such forums, as well as in state and federal courts.

In Arizona, the Law on the Regulation of the Legal Practices defines the practice of law as "representing another in a judicial, quasi-judicial, or administrative proceeding or other formal dispute resolution proceeding such as arbitration and mediation," among other practices.<sup>25</sup> In Arizona, the judiciary explicitly stated that legal practice includes representation of parties before *any* arbitral forums. As such, Arizona regulates the unauthorized practice of law in arbitration, which likely applies to FINRA arbitration as well.

New York's Judiciary Law §§ 478 and 484 are most similar to the Arkansas Code Annotated § 16-22-211(a), which has been applied by the Arkansas Supreme Court to prevent non-attorney officers from representing corporations as *pro se* litigants in any "any court in this state or before any judicial body."<sup>26</sup> Even without clear textual guidance, the Supreme Court of Arkansas in *NISHA* held that arbitration proceedings bore "significant indicia" of legal proceedings and, as such, found a corporation could not represent itself, *pro se*, through non-attorney officers in an arbitral proceeding.

All three state courts found, as did the Florida Bar, that of the representative activities necessary to competent advocacy in FINRA arbitrations, including negotiating settlements, conducting discovery and drafting statements of claim, each constitutes legal services and involves the significant practice of the law. These rulings represent a growing understanding that arbitration necessarily involves the practice of law. As such, the practice of non-attorneys representing claimants in FINRA arbitration for compensation appears to abrogate the legislative intent behind Judiciary Law §§ 478 and 484.

### How to Resolve the Issue in New York

The issue of whether non-attorney representation of parties in FINRA arbitration for compensation constitutes the unauthorized practice of law would be an issue of first impression for New York state courts.<sup>27</sup> This issue could come to the attention of the courts in four different ways.

First, the New York State Legislature could amend the language of Judiciary Law § 484 to include FINRA arbitration proceedings. Second, the Legislature could draft a more concrete definition of what constitutes legal services that includes representing parties in arbitration for compensation. Third, counsel facing a non-attorney in FINRA arbitration could move by order to show cause to enjoin the unauthorized practice of law by the non-attorney adversary. Finally, a party could challenge a contingent retainer fee with a non-attorney on the grounds that the contract is unconscionable.

### Conclusion

Adequate representation in FINRA arbitration involves legal practices that a growing number of states have expressly recognized as legal in nature. While arbitration is viewed as a private dispute resolution mechanism, the power that state courts have to confirm or vacate awards makes arbitration minimally a quasi-legal proceeding. New York's legislature drafted Judiciary Law §§ 478 and 484 to protect the public from unscrupulous business practices by unskilled persons performing legal services for pay. While New York State has a strong public policy against interfering with parties' ability to decide their preferred forum for resolving conflicts, New York also has a strong public policy against the unlicensed practice of law. Preventing non-attorneys from representing parties in FINRA arbitration for compensation will not place these two policies in conflict with each other. ■

1. See N.Y. Judiciary Law § 484 (Jud. Law).

2. *Spivak v. Sachs*, 16 N.Y.2d 163, 168 (1965); *Jemzura v. McCue*, 357 N.Y.S.2d 167, 168 (3d Dep't 1974); *Dacey v. New York County Lawyers' Ass'n*, 290 F. Supp. 835 (S.D.N.Y. 1968); *People v. Black*, 156 Misc. 516 (N.Y. Co. Ct., Otsego Co. 1935).

3. *Garas v. Grievance Comm. of the Eighth Jud. Dist.*, 65 A.D.3d 164 (4th Dep't 2009).

4. *People v. Wood*, 151 Misc. 66 (Co. Ct., Broome Co. 1934).

5. *Roschko v. Roschko*, 130 Misc. 2d 827, 829 (Sup. Ct. N.Y. Co. 1985).

6. *In re McDonald*, 318 B.R. 37 (Bankr. E.D.N.Y. 2004).

7. *Application of N.Y. Cnty. Lawyers Ass'n*, 273 A.D. 524 (1st Dep't 1948), *aff'd*, *In re Bercu*, 299 N.Y. 728 (1949).

8. See Jud. Law § 484; Jud. Law § 478 (practicing or appearing as attorney-at-law without being admitted and registered).

9. See FINRA Rule 12000, *et seq.* Code of Arbitration for Customer Disputes (2007), [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=4096&](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096&).

10. See FINRA Dispute Resolution Arbitrator's Guide at 27, 40 (2014), <http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtorbs/documents/arbmed/p009424.pdf>.
11. See 22 N.Y.C.R.R. pt 1200 *et seq.*
12. *Fla. Bar Re Advisory Opinion on Nonlawyer Representation in Sec. Arbitration*, 696 So. 2d 1178, 1180 (Fla. 1997).
13. *Id.* at 1183.
14. Those areas are: (1) advising investors as to whether or not they are compelled to arbitrate under their investor-broker agreement; (2) advising investors of the eligibility rules and statute of limitations for any potential claims; (3) advising investors as to the scope of the arbitrators authority; (4) advising investors whether to settle the dispute before filing a claim; (5) advising investors as to the merits of specific claims and defenses; (6) advising investors whether attorneys or expert witnesses should be hired; (7) advising investors whether a petition to stay the arbitration should be filed; (8) advising investors on the possibility and merits of related or alternative civil actions; (9) conducting discovery including depositions; (10) oral advocacy including; presenting evidence, raising objections, examining witnesses and voir dire of experts, preparing opening and closing arguments; (11) written advocacy including preparing and filing the initial written states of claims, answers, counter-claims, motions, and legal memoranda; (12) confirming, collecting or vacating and arbitral award. *Id.* at 1180-81.
15. *Id.* at 1182.
16. See N.Y. Rules pmb1. (Apr. 2009), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=50671> (last visited Oct. 16, 2014).
17. *Id.*
18. Ariel Kaminer, *Swatting at Wall St. From a Bunker in Brooklyn*, N.Y. Times (May 21, 2010), <http://www.nytimes.com/2010/05/23/nyregion/23critic.html>.
19. In our opinion, the article suggested that two non-attorneys – one of which alleged that he was a former trader, but had no corresponding CRD indicating he was ever registered with FINRA; and the other, with a previous fraud conviction – had, in the past, misrepresented themselves as lawyers to at least one client. Additionally, in our reading, the article seemed to suggest that the non-attorneys took on the representation of claimants in FINRA arbitration without the intent to zealously prosecute their claims and, instead, sought to barter claims with opposing counsel for sub-nuisance-value settlements. The non-attorneys explicitly stated that they took half of any client recovery. Furthermore, they utilized a trade name for their business and made further guarantees about future performance through the use of unverified statistics. Finally, they cited to their complete lack of any legal training as the reason why they were more suited than attorneys to represent claimants in FINRA arbitration.
20. Rule 7.1 of the N.Y. Rules prohibits attorneys from making statements that are false, deceptive, or misleading. Even a truthful statement can be misleading when it omits necessary information. See N.Y. Rules 7.1 (2009). Comment 3 to Rule 7.1 gives an example where the phrase: "I have never lost a case" may be simultaneously truthful and misleading when every case that attorney litigated has ended through a settlement. See N.Y. Rules 7.1, cmt. [3] (2009). Rule 1.5 of the N.Y. Rules governs attorney fees and prohibits attorneys from charging excessive fees for their services. See N.Y. Rules 1.5. Finally, N.Y. Rules Rule 1.16 prohibits attorneys from withdrawing from a case when their withdrawal will have a materially adverse effect on their client without first showing good cause. See N.Y. Rules 1.16; see also *J.M. Heimike Assocs., Inc. v. Liberty Nat'l Bank*, 142 A.D.2d 929 (4th Dep't 1988).
21. Jud. Law §§ 478, 484.
22. See *NISHA, LLC v. TriBuilt Constr. Grp., LLC*, 2012 Ark. 130 (Ark. 2012) (a non-lawyer employee's representation of a corporation in an AAA arbitration proceedings constitutes the unauthorized practice of law); *Disciplinary Counsel v. Alexicole, Inc.*, 105 Ohio St. 3d 52 (Ohio 2004) (neither a corporation, nor its non-attorney representative may represent individuals in securities arbitration); *In re Creasy*, 198 Ariz. 539 (Ariz. 2000) (a disbarred attorney's representation of his client in an arbitration with an insurer constituted the unlicensed practice of law).
23. See Ohio Gov. Bar. Rule VII § 2(A)(1).
24. *Ohio State Bar Ass'n v. Kolodner*, 103 Ohio St. 3d 504 (Ohio 2004).
25. See Ariz. Sup. Ct. R. 31A(3).
26. Ark. Code Ann. § 16-22-211(a) (Supp. 2011).
- It shall be unlawful for any corporation or voluntary association to practice or appear as an attorney at law for any person in any court in this state or before any judicial body, to make it a business to practice as an attorney at law for any person in any of the courts, to hold itself out to the public as being entitled to practice law, to tender or furnish legal services or advice, to furnish attorneys or counsel, to render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner to assume to be entitled to practice law or to assume or advertise the title of lawyer or attorney, attorney at law, or equivalent terms in any language in such a manner as to convey the impression that it is entitled to practice law or to furnish legal advice, service, or counsel to advertise that either alone or together with or by or through any person, whether a duly and regularly admitted attorney at law or not, it has, owns, conducts, or maintains a law office or any office for the practice of law or for furnishing legal advice, services, or counsel.
27. In *Prudential Equity Grp., LLC v. Ajamie*, 538 F. Supp. 2d 605, 612 (S.D.N.Y. 2008), the Southern District found that non-New York State licensed attorney did not commit the unauthorized practice of law by representing a party in FINRA arbitration. That decision has since been interpreted as covering non-attorney representation as well in dicta to a holding that arbitral immunity applies to allegedly libelous statements made by non-attorneys in FINRA arbitration. See *Depalo v. Lapin*, No. 114656/2008, 2009 N.Y. Misc. LEXIS 5963, \*6 (Sup. Ct., N.Y. Co. June 30, 2009) (New York has no prohibition preventing non-attorneys from representing parties in FINRA arbitration). However, the significant difference between the holding in *Ajamie* and the dicta in *Depalo* is that the *Depalo* court failed to recognize that all admitted attorneys are subject to the regulation of the bar they associate with and that regulation extends to their out-of-state activities.

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**Peter Siviglia** is an attorney in Tarrytown, NY. He is the author of *Commercial Agreements: A Lawyer's Guide to Drafting and Negotiating*, West 2014 (supplemented annually), and *Writing Contracts: A Distinct Discipline*, Carolina Academic Press.

## Writing Contracts: Suggestions for Law Schools and Young Attorneys

### Preface

My wife, the English teacher, once said, "In this world, Peter, there are two forms of writing: Creative, such as novels, plays and poetry; and Expository such as treatises, letters, memoranda and briefs." This author has tried both, but prefers a third: Contracts, which do not entertain, do not convey information or ideas, and do not try to persuade.

The English teacher now agrees that there are, indeed, three forms of writing. And that the third, Contracts, is a distinct discipline.

Unfortunately, the writing of contracts has been sorely neglected by law schools, perhaps, in part, because teaching writing is a labor-intensive exercise; and perhaps, in part, because a course in this discipline would best be taught by lawyers practicing in the commercial, transactional field. Consequently, the criticisms of this neglect are numerous, and the consequences are significant. For example:

It should not be surprising to practicing lawyers that new associates come to work without the slightest idea about how to draft a contract. . . . [I]f you assign them a contract to draft, they will freeze like a deer in your headlights.<sup>1</sup>

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. . . I have been shocked by the number of times in litigation that I have asked more senior lawyers – including some fairly good lawyers – to explain the meaning of some provision in a document they prepared

and found out they had no idea what it meant. Indeed, I have just finished litigating one such case. The litigation did no one any good and would not have happened but for some sloppy drafting.<sup>2</sup>

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Muddled prose can have real costs. In one of the few attempts to calculate the impact, a Harvard Law School study years ago suggested that a quarter of all contract disputes arose because of poor drafting.<sup>3</sup>

The balance of the article from which this last piece is taken goes on to suggest content that could comprise the body of one or more courses on contract writing. It also contains suggestions that young practicing attorneys might find useful.

### What Is a Contract?

In the beginning, to write a proper contract, the student must first understand intellectually and then appreciate viscerally what a contract really is. "An agreement between or among two or more persons" provides but a bare hint. Precisely, a contract is simply a set of instructions for a transaction (the purchase of real estate), or for a relationship (a partnership), or for a combination of the two (a partnership to purchase and develop real estate). It is no different from the plans and specifications to build a bridge. And if there is a flaw in those plans or specifications, problems will arise – in the case of a contract, a table set for the litigators, as the letter from

Mr. Jenkins and *The Wall Street Journal* article observed.

### Contract Formation

Any course or group of courses that teach contract writing must include a study of those laws and principles that bear on contract formation, for a contract is nothing if it is not enforceable. An awareness of these rules is fundamental, lest the draftsman sink piles into sand. A former partner – yes, a partner – closed a secured financing in the erroneous belief that a Uniform Commercial Code financing statement also constituted the security agreement required by the Code.

However, a detailed knowledge of these legal considerations is not necessary. This would be in the nature of a survey – or perhaps, to some extent, a recapitulation of lessons learned in other courses – in order to establish an alertness to those requirements of the law to which the contract must conform in order to assure its enforceability. The course should instill a knowledge of the basics and a sensitivity to know when they are applicable to the job at hand.

"Consideration," the *quid pro quo*, the basic element in the universe of contracts, is the place to start: What constitutes proper consideration and, perhaps more important, what does not; and what contracts do not require consideration.<sup>4</sup>

Next explore the "Statute of Frauds," beginning, perhaps, with § 2-201 and § 2A-201 of the UCC, and then move on to other statutory

provisions such as Titles 7 and 11 of Article 5 and Title 3 of Article 15 in the General Obligations Law, which deal with various requirements bearing on the enforceability of a contract.

Then, make several other stops along the UCC: Articles 2 (Sales) and 2A (Leases), which emphasize the warranty and disclaimer of warranty requirements; Article 3, which focuses on the requirements for negotiable instruments; and Article 9 and its requirements for a proper security agreement. If time allows, make a brief stop at Article 5 (Letters of Credit) and the ICC Uniform Customs and Practice for Documentary Credits and its rules for Standby Credits.

In the discussion of UCC Article 9, emphasize the need to understand each transaction and its collateral before carefully examining the Code to determine what must be done to perfect the security interest. Avoid the details of perfection, for Article 9 of the Uniform Commercial Code rivals the Internal Revenue Code in complexity. It is a conundrum that must be solved transaction by transaction.

Of course, other legal requirements apply to contract formation such as employment law, corporate law, tax considerations, real estate law, . . . and straight on 'til morning. So students must be made aware that, when they find themselves outside their area of expertise, they must consult with colleagues who have expertise in those areas. For example, a client called one day and said, "We have a problem, Peter. When we bought Fiddley Dee Company [at that time my client was represented by another attorney], we gave the sellers rights to buy shares in Fiddley Dee; and we also gave them the right to sell those shares back to Fiddley Dee simultaneously with the purchase. The sellers have exercised both options, the buy and the put, but it will cripple Fiddley Dee to buy back the shares."

The fact was that Fiddley Dee had lost money for many years, but was now quite profitable. The formula to determine the buy-back price was based on those recent earnings. Fiddley Dee still had an accumulated deficit.

Well, under applicable corporate law, the company could not buy back its shares. It was illegal. The company could only buy its shares from surplus.

The lawyer for the shareholders agreed. However, if he had done his research or asked an expert during the original transaction, he would have focused on the legal requirement that redemptions be made only from surplus, and he might have insisted on a guarantee from the parent company, that is, the buyer of Fiddley Dee; or he might have arranged the put to the parent company rather than to Fiddley Dee. (For those curious of the outcome, the issue was resolved amicably by an alternate, deferred compensation arrangement.)

#### *In Contracts, Know Your Limitations.*

As Dirty Harry observed in *Magnum Force*: "A man's got to know his limitations." This is important in commercial practice. Law students must be made aware that when working on a transaction in a foreign state or other foreign jurisdiction, counsel in that state or other jurisdiction must be consulted. The transaction involved in *IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.*,<sup>5</sup> addressed by the New York Court of Appeals in a 2012 decision, provides an excellent study of this too-often overlooked mandate.

*IRB-Brasil Resseguros, S.A.* involved a conflict of laws issue to which the court applied § 5-1401 of the General Obligations Law. That section permits parties to a contract involving at least \$250,000 to select New York as the governing law. The plaintiff had brought suit to enforce payment under a guarantee issued by a Brazilian guarantor. The guarantee contained a New York choice of law clause. An agency agreement that applied to both the guarantee and the guaranteed debt stated that both "shall be governed by, and construed in accordance with, the laws of the State of New York," without regard to conflict of laws principles.

Under Brazilian law, the guarantee was "void" because it was not authorized by the guarantor's board of directors. New York law does not con-

tain that requirement. Of course, the guarantor argued that Brazilian law governed the guarantee. The plaintiff-beneficiary argued that New York law governed. The Court of Appeals held that "New York substantive law" governed and, accordingly, that the guarantee was enforceable. So, what's the point? That the choice of law clause prevailed? Well, there are at least two other points.

*First:* Though the plaintiff prevailed, the plaintiff's lawyer could have easily avoided the lawsuit at far less cost to the client by consulting with Brazilian counsel regarding the enforceability of the guarantee and requiring proper authorization by the board. Failure to consult with local counsel could well constitute malpractice.

*Second:* Assume that the winning plaintiff has to enforce the guarantee in Brazil because that is where the assets of the guarantor reside. Will the Brazilian courts honor the New York ruling or will they find, instead, that enforcing an instrument "void" under Brazilian law is against public policy, and, therefore, deny collection? For example, just reverse the situation:

Section 505 of the New York Business Corporation Law requires, with certain exceptions, that the board of directors of a corporation fix the consideration, terms and conditions of any option to acquire shares of that corporation. Thus, it is the stated policy of New York that an option issued in violation of that requirement is unenforceable. Would the New York courts, then, enforce a foreign judgement declaring enforceable an option on which the board of directors had been required to act and had not acted? That is a risk no attorney should take.

## **Elements of Basic Contracts**

Following their education in the legal considerations in drafting contracts, introduce the students to the considerations involved in certain basic contracts such as a promissory note, a guarantee, security agreements, employment contracts, shareholder arrangements, the sale and purchase

of goods, acquisitions, leases, licenses and options.

## Boilerplate

The term “boilerplate” refers to clauses commonly and variously included in most contracts. But the use of that term is misleading and dangerous because it carries with it a prejudice that these clauses need little or no scrutiny when added to a contract. Not a clause or a form exists, however, that can or should be added to a contract without critical examination to determine whether any changes are needed; virtually always, changes are needed in order to adapt the provision to fit properly to the deal. Below is a list of some of these clauses.

- 1.1.1 Termination
- 1.1.2 Assignment
- 1.1.3 Governing Law
- 1.1.4 Arbitration
- 1.1.5 Notice
- 1.1.6 Amendment
- 1.1.7 Waiver
- 1.1.8 Warranties
- 1.1.9 Indemnities
- 1.1.10 Remedies

By way of example, below are a few simple variations on assignment clauses; but, as noted above, any one of these variations is subject to modification based on the particulars of the transaction being addressed.

- Neither party may transfer or assign any of its rights or obligations under this agreement without the written consent of the other, and any transfer or assignment without such consent will be null and void.
- Neither party may transfer or assign any of its rights or obligations under this agreement without the written consent of the other. A merger or consolidation, regardless of which participant therein is the surviving entity, will constitute a transfer. Any transfer or assignment in violation of the requirements of this paragraph will be null and void.
- Neither party may transfer or assign any of its rights or obligations under this agreement

without the written consent of the other except that either party may, without the consent of the other, transfer its rights and obligations hereunder to a successor to all or substantially all of its business and assets. Any transfer or assignment in violation of the requirements of this paragraph will be null and void.

- Licensee may not transfer or assign any of its rights under this agreement without Licensor’s written consent.
- Licensor may not transfer or assign any of its rights under this agreement without Licensee’s written consent except that Licensor may transfer and assign its rights and obligations under this agreement to any transferee of the intellectual property licensed hereunder, and licensor may assign its rights to the royalties under this agreement. Notwithstanding any such permitted transfer or assignment, Licensor will remain liable for its obligations under this agreement.
- Any transfer or assignment in violation of the requirements of this section will be null and void.

## Drafting Exercises

Finally, we get to drafting – what this course is all about. And an understanding of the basics discussed above provides the foundation to the writing phase.

Again: A contract is no more than a set of instructions. The prime directive in writing any contract is “accuracy stated as simply as possible.” Accuracy, though, must be the controlling feature, for sometimes the concepts are so complex – not due to the lawyer, but due to the deal concocted by the client – that simplicity in the purest sense is not possible.

Because teaching the writing segment of the course is so labor intensive, a procedure that might prove helpful and productive is for two or three students to work together on assignments, especially the longer and more complex ones. Their

collaboration should add perspective, which is essential to the drafting process, helping to produce a better product and, more important, helping to develop and improve technique and skills more quickly.

A variation on this approach is to have the teams prepare different assignments which would be presented at different times during the course. Copies of completed assignments would be distributed to the other students for comment during class sessions. The object of this critique is not to attack and defend. The goal is to determine whether the agreement adequately and comfortably houses the transaction and whether the construction work (i.e., the drafting) is sound, and then to decide how best to correct any deficiencies. Guidance by the teacher in these discussions will be essential to focus attention on critical issues and to avoid digressions into minutia. My wife has successfully used a similar technique in her writing classes. She has observed that meaningful comments from peers often carry greater weight with students than those from teachers.

In contracts, there is either good writing or bad writing. And if the writer properly executes the prime directive – that is, accuracy stated as simply as possible – the writing will be good. But if the writer fails to execute the prime directive, that writer will be setting the stage for litigation.

## Ethical Considerations

Even the discipline of contract preparation engenders ethical considerations.

One of these is the mandate that the draftsman prepare a fair agreement. The reasons are simple:

- a one-sided contract – especially when the bargaining positions are relatively equal – will invariably be negotiated back to the middle;
- an even-handed contract will result in minimal, non-confrontational negotiation and a quick conclusion of the deal;
- an even-handed contract, raising few issues, will result in less cost to the client in terms of legal fees.

That's right, lower legal costs. And yes, that's good; and it's also right. The lawyer is a fiduciary and, as a fiduciary, the lawyer owes a duty to the client to keep those legal fees on a diet. Those lawyers with high IQs ("I" for Integrity and "Q" for Quality of Performance) will not have to pan-handle for lunch. The Clint Eastwood character in the movie *In the Line of Fire*, a Secret Service agent assigned to protect the President, teaches us this lesson: The client comes first.

A second ethical principle is, There is no shame in helping the other guy. Commercial transactions should not be adversarial proceedings. The goal is not to win; the goal is to create. The goal is to do a deal that conforms to the intent of the parties. Thus, while attorneys must at all times represent the interests of their clients, attorneys must not seek to gain an advantage contrary to the terms of the deal because of a mistake by the other lawyer. An obvious example – and surely one that begs correction – is the inadvertent omission of a word:

"The Company will pay the following expenses . . ." vs. "The Company will not pay the following expenses . . ." Do unto the other lawyer as you would have that lawyer do unto you.

In the context of a commercial transaction, I doubt there is no better application of the Golden Rule than this: correct the drafting errors of the other attorney. In fact, because the object of a contract is to reflect accurately the intent of all parties, this principle is the ethical equivalent of the "given" in geometry. Allowing errors that one detects to remain uncorrected serves a perverse desire to gain an improper advantage and opens the door to possible litigation. The client is ill-represented by that type of practice.

### A Final Thought

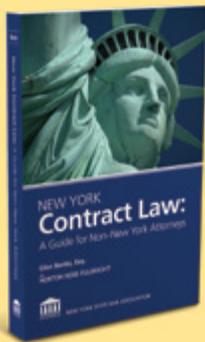
Ezra Pound once observed that the English language is the best language in which to write.

Though we, here, may have the best verbal means of communication on the planet, that facility is of little

benefit unless we writers have the ability to apply it properly. Between expository writing, like this article, and a contract, the objective is the same: "accuracy stated as simply as possible." To achieve that objective, the writer must have a command of the language. While the responsibility for teaching students a command of the language should not be the job of the law school – it is the responsibility of the primary and secondary schools and, to a lesser extent, the responsibility of the colleges – if those formative institutions did not succeed, law schools and the other institutions of higher learning must. ■

1. Lewis, *Turning the Firm into a School*, *Business L. Today*, Vol. 15, No. 3 (Jan./Feb. 2006) (American Bar Association). Mr. Lewis is a law school teacher.
2. Letter from Stephen E. Jenkins to the author, September 13, 1993. Mr. Jenkins is a trial lawyer with Ashby & Geddes in Wilmington, Delaware.
3. Richard B. Schmitt, *Lawyers and Clients, Law Schools, Firms Sending a Message: Polish Your Prose*, *Wall St. J.*, Aug. 28, 1995, p. B3.
4. See, e.g., N.Y. Uniform Commercial Code, § 2-205 (UCC); N.Y. General Obligations Law, §§ 5-1101–1115.
5. 20 N.Y.3d 310 (2012).

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# New York Contract Law

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## The Uniform Electronic Legal Material Act in New York

The trend among state governments is to move the publication of primary legal materials online.<sup>1</sup> This development will provide more transparency and allow for the timely and cost-effective distribution of information; however, it also raises several concerns regarding the trustworthiness of the material. The legal community and the public at large must be able to rely on the law being accessible, authenticated, and preserved for the future, but these essential qualities are frequently lacking from electronic government publications. Without a framework to protect digital material, the principle of open government suffers.

The Uniform Law Commission offers a solution through the Uniform Electronic Legal Material Act (UELMA). The UELMA was completed by the National Conference of Commissioners on Uniform State Laws in 2011<sup>2</sup> and approved by the American Bar Association House of Delegates in 2012.<sup>3</sup> It provides standards for the authentication, preservation and accessibility of official electronic legal publications by requiring that such online materials meet the same standards to which print materials have been held.<sup>4</sup>

The UELMA defines legal material as session laws, codified or consolidated laws, agency rules and decisions having the effect of law, and the state constitution.<sup>5</sup> Reported decisions and court rules are also recommended for inclusion by the Act,

but the drafters recognized that their inclusion may, in some cases, create a separation of powers issue between the state legislature and the judicial branch.<sup>6</sup>

Electronic legal materials designated as official are covered by the UELMA.<sup>7</sup> Also covered are any materials that were not previously designated as official, but the print option for which was eliminated after a state's enactment of the UELMA.<sup>8</sup> In these instances, the electronic versions must comply with the terms of the Act.

The UELMA does not require states to publish legal materials electronically,<sup>9</sup> and it does not apply retroactively to materials published before its enactment.<sup>10</sup>

The UELMA explicitly notes that it does not deal with copyright issues, affect or supersede rules of evidence, affect existing state law regarding the certification of print materials, or interfere with the contractual relationship between a state and its commercial publishers.<sup>11</sup>

### UELMA Standards

The first requirement of the UELMA is authentication. The Act defines an authentic document as "one whose content has been verified by a government entity to be complete and unaltered."<sup>12</sup> In other words, authentication verifies not only the content of a document but also validates the source of the file, thereby providing attorneys and the public with

trustworthy copies of the law on which they can rely.<sup>13</sup> So important is authentication, the *Bluebook* prefers a cite to an authentic authority before an official authority when one must choose between the two.<sup>14</sup>

Under the Act, a party who contests the authentication of legal material bears the burden of proof.<sup>15</sup> In addition, states that enact the UELMA enjoy a presumption by every other state that has enacted the UELMA that their official electronic legal material is accurate and unaltered.<sup>16</sup>

The second requirement of the UELMA is preservation. The Act recognizes the importance of retaining yesterday's legal materials that remain relevant to the outcome of current legal disputes.<sup>17</sup> It therefore provides that material governed by the Act be preserved and secured.<sup>18</sup> States may choose to do so in print or electronic format.<sup>19</sup> If done in electronic format, then the publisher must "ensure the integrity of the record; provide for backup and disaster recovery of the record; and ensure the continuing usability of the material."<sup>20</sup> These outcomes may be accomplished through several measures, including maintaining multiple copies, storing the copies in separate geographic and administrative locations, and migrating materials to new storage platforms as technology evolves.<sup>21</sup>

Finally, the UELMA requires that material subject to the authentication and preservation requirements of the

Act be made accessible. Specifically, it must be made “reasonably available” to the public on a permanent basis.<sup>22</sup> States have discretion to determine what is reasonable, but the standard should be made consistent with other state practices.<sup>23</sup>

### Who’s Enacted the UELMA

To date, the UELMA has been enacted in 12 states, including California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Minnesota, Nevada, North Dakota, Oregon, and Pennsylvania.<sup>24</sup> The UELMA has additionally been introduced elsewhere, including Massachusetts and the District of Columbia.<sup>25</sup>

### Current Publication of Official Materials in New York

At the same time that New York is a leader in providing substantial online access to electronic copies of its legal publications, it also continues to maintain a robust system of print publication through which nearly all of its official materials are produced.

For example, the *Laws of New York*, prepared by the New York Legislative Bill Drafting Commission, are statutorily required to be published in printed bound volumes.<sup>26</sup> Moreover, certification of session laws and consolidated and unconsolidated laws is limited to print only.<sup>27</sup> Similarly, administrative codes, rules, and regulations are certified by the Secretary of State in print.<sup>28</sup>

Judicial decisions have traditionally been required to be published and printed in bound volumes;<sup>29</sup> however, this requirement is evolving. The State Reporter recently began an initiative, approved by the Court of Appeals, to publish a limited number of trial court decisions exclusively online, with only an abstract published in the Advance Sheets.<sup>30</sup> It is possible that this is an example of an area of publication that may be immediately impacted by passage of the UELMA in New York, if judicial materials are included in New York’s version of the UELMA, and if New

York chooses to designate those electronic decisions as official.

### Cost

Eight of the 12 states that have enacted the UELMA did so with no fiscal impact.<sup>31</sup> Typically, this was because the states determined that they could meet the requirements of the UELMA without additional funds. Some, such as Minnesota, were able to use their current staff and existing information technology support to create a prototype for an authentication system.<sup>32</sup>

Those states that have experienced a fiscal impact have managed to keep costs low thus far. For example, North Dakota projects spending \$115,000 for the 2013–2015 biennium. Of this amount, \$85,000 is attributable to one-time software development costs, and the remaining \$30,000 is attributable to ongoing costs each biennium.<sup>33</sup>

In another instance, the District of Columbia has chosen to use open source software<sup>34</sup> to authenticate the D.C. Code and Statutes at Large, and estimates that the cost to do so may total less than \$2,000 per year.<sup>35</sup>

### Technology

The value of the UELMA is furthered by its flexibility. It is technology-neutral,<sup>36</sup> thereby allowing each state to choose the most appropriate option for the multiple entities responsible for publication, as well as account for the existing information technology structure.

Authentication is typically evidenced by electronic signature or digital watermark, but may also be accomplished through hashing algorithms, transient key technology, and other means.<sup>37</sup>

Many attorneys are familiar with the authentication process used by the U.S. Government Printing Office, which applies digital signatures to PDF documents using a digital certificate.<sup>38</sup> This is only one option and other locations, such as Minnesota<sup>39</sup> and the District of Columbia,<sup>40</sup> have chosen alternative technologies that better suit their needs.

### Support for the UELMA in New York

According to Richard Long, chair of New York’s Uniform State Laws Commission, the Commission has listed the UELMA in its Annual Legislative Report as an Act that it will seek to have introduced in New York in 2015. Commissioner Long elaborates, “New York’s Uniform Law Commissioners strongly support the enactment of UELMA in our state. The Act enhances New Yorkers’ online access to authenticated state law through a technologic-neutral approach.”<sup>41</sup>

In addition, the Law Library Association of Greater New York<sup>42</sup> and the Association of Law Libraries of Upstate New York<sup>43</sup> have both officially endorsed the enactment of the UELMA in New York.

### Why New York Needs the UELMA Now

New York is actively turning to electronic publishing of its legal materials. Not only are some cases now being published exclusively online, but voters approved a ballot proposal in November 2014 to amend Article III, § 14, of the New York Constitution to “allow electronic distribution of a state legislative bill to satisfy the constitutional requirement that a bill be printed and on the desks of state legislators at least three days before the Legislature votes on it.”<sup>44</sup>

The measure is an important one that will save significant amounts of money and paper. Logistically, it directs that bill text may not be modified “without leaving an adequate record thereof,”<sup>45</sup> but unfortunately does not include any explicit terms for authentication or permanent preservation of the new electronic bills.

New York is rightly moving forward to embrace the digital age. Introducing the UELMA now will allow for passage of the Act in a thoughtful and deliberate manner that meets the unique needs of our state while ensuring that the transition to electronic publication is done

well. The result will be a trustworthy system of official electronic publication on which everyone can rely. ■

1. Richard J. Matthews, et al., *State-by-State Report on Authentication of Online Legal Resources*, Am. Ass'n of Law Libraries (Mar. 2007), [http://www.aallnet.org/Documents/Government-Relations/authe\\_n\\_rprt/authefinalreport.pdf](http://www.aallnet.org/Documents/Government-Relations/authe_n_rprt/authefinalreport.pdf) ("Key Finding 1: States have begun to discontinue print official legal resources and substitute online official legal sources.").
2. The National Conference of Commissioners on Uniform State Laws, *Electronic Legal Material Act*, Unif. Law Comm'n, <http://www.uniformlaws.org/Act.aspx?title=Electronic+Legal+Material+Act> (last visited Nov. 25, 2014).
3. House of Delegates, *Resolution*, Am. Bar Ass'n (Feb. 6, 2012), [http://www.americanbar.org/content/dam/aba/directories/policy/2012\\_hod\\_midyear\\_meeting\\_102b.doc](http://www.americanbar.org/content/dam/aba/directories/policy/2012_hod_midyear_meeting_102b.doc).
4. Unif. Elec. Legal Material Act, Prefatory Note 7A U.L.A. 225-228 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
5. Unif. Elec. Legal Material Act, §2, 7A U.L.A. 229 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
6. Unif. Elec. Legal Material Act, §2 cmt, 7A U.L.A. 230 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
7. Unif. Elec. Legal Material Act, §3, 7A U.L.A. 232 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
8. Unif. Elec. Legal Material Act, §3 cmt, 7A U.L.A. 232 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
9. Unif. Elec. Legal Material Act, §4 cmt, 7A U.L.A. 232 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
10. Unif. Elec. Legal Material Act, §3, 7A U.L.A. 232 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).

11. Unif. Elec. Legal Material Act, Prefatory Note 7A U.L.A. 227 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
12. Matthews, et al., *supra* note 1, as cited in Unif. Elec. Legal Material Act, Prefatory Note 7A U.L.A. 227 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
13. Unif. Elec. Legal Material Act, §5, 7A U.L.A. 234 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
14. The Bluebook: A Uniform System of Citation R. 18.2.1(a)(ii), at 166 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).
15. Unif. Elec. Legal Material Act, §6, 7A U.L.A. 235 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
16. *Id.*
17. Unif. Elec. Legal Material Act, §7 cmt, 7A U.L.A. 236 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
18. Unif. Elec. Legal Material Act, §7, 7A U.L.A. 236 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
19. *Id.*
20. *Id.*
21. Unif. Elec. Legal Material Act, §7 cmt, 7A U.L.A. 237 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
22. Unif. Elec. Legal Material Act, §8 7A U.L.A. 238 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
23. Unif. Elec. Legal Material Act, §8 cmt 7A U.L.A. 238-239 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
24. *Uniform Electronic Legal Material Act – Enactments*, Am. Ass'n of Law Libraries, <http://www.aallnet.org/Documents/Government-Relations/UELMA/UELMAenactments.pdf> (last updated Sept. 25, 2014).
25. *Uniform Electronic Legal Material Act – 2014 Bill Tracking Chart*, Am. Ass'n of Law Libraries, <http://www.aallnet.org/Documents/Government-Relations/UELMA/uelmabilltrack2014.pdf> (last updated Sept. 25, 2014).
26. N.Y. Legislative Law §§ 44–44-a.
27. N.Y. Public Officers Law § 70-b.
28. N.Y. Executive Law § 106.

29. Judiciary Law § 433-a.
30. *New York Official Reports – Frequently Asked Questions*, State Reporter, <http://www.courts.state.ny.us/reporter/Faq.htm> (last visited Nov. 25, 2014).
31. *Uniform Electronic Legal Material Act – Enactments*, Am. Ass'n of Law Libraries, <http://www.aallnet.org/Documents/Government-Relations/UELMA/UELMAenactments.pdf> (last updated Sept. 25, 2014).
32. Office of the Revisor of Statutes, *Prototype for Authentication of Official Electronic Record and Pricing*, Minnesota Legislature (Aug. 2012), <http://www.aallnet.org/Documents/Government-Relations/UELMA/MNAAuthPrototype082012.pdf>
33. *Uniform Electronic Legal Material Act – Enactments*, Am. Ass'n of Law Libraries, <http://www.aallnet.org/Documents/Government-Relations/UELMA/UELMAenactments.pdf> (last updated Sept. 25, 2014).
34. *Data Seal*, GitHub, <https://github.com/unitedstates/authentication> (last visited Nov. 25, 2014).
35. Telephone Interview with V. David Zvenych, Unif. Law Comm'r (Nov. 19, 2014).
36. *Uniform Electronic Legal Material Act*, § 5 cmt, 7A U.L.A. 234 (Supp. 2011), [http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma\\_final\\_2011.pdf](http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf).
37. Anna Russell & Jane Larrington, *Authenticating the John Hancock of Online Primary Legal Materials*, AALL Spectrum, June 2013, at 17, <http://www.aallnet.org/mm/Publications/spectrum/Archives/vol-17/No-8/digital-authentication.pdf>. For a specific example of how a state authenticated its legal materials, see Konya Lafferty, *Revisor Michele Timmons and the Minnesota In-House UELMA Authentication System*, Chicago Ass'n of Law Libraries (Mar. 6, 2014), <http://new.chicagolawlib.org/blog/2014/03/06/revisor-michele-timmons-and-the-minnesota-in-house-uelma-authentication-system/>.
38. *Authentication Information*, U.S. Government Printing Office, <http://www.gpo.gov/authentication/> (last visited Nov. 25, 2014).
39. *Document Authentication*, Minnesota Legislature – Office of the Revisor of Statutes, [https://www.revisor.mn.gov/pubs/publish\\_hash.php?type=rules&rule\\_type=part&id=7890.0100](https://www.revisor.mn.gov/pubs/publish_hash.php?type=rules&rule_type=part&id=7890.0100) (last visited Nov. 25, 2014).
40. *Data Seal*, GitHub, <https://github.com/unitedstates/authentication> (last visited Nov. 25, 2014).
41. E-Mail from Richard Long, Chair, N. Y. Unif. Law Comm'n, to author (Nov. 12, 2014, 9:02AM EST) (on file with author).
42. Letter from William R. Mills, President, Law Library Ass'n of Greater N.Y., to Richard B. Long, Unif. Law Comm'r (October 2, 2012), <http://aallnet.org/Documents/Government-Relations/ChapterLetters/lt100212llagny.pdf>.
43. *A Resolution to Support the Uniform Electronic Legal Material Act in the State of New York*, Ass'n of Law Libraries of Upstate N.Y. (Oct. 19, 2014), <http://www.aallnet.org/chapter/alluny/UELMA%20Resolution.pdf>.
44. *Proposal Number Two – Permitting Elec. Distrib. Of State Legislative Bills*, N.Y. State Board of Elections, <http://www.elections.ny.gov/NYSBOE/Elections/2014/Proposals/ProposalTwoFinal.pdf>.
45. *Id.*



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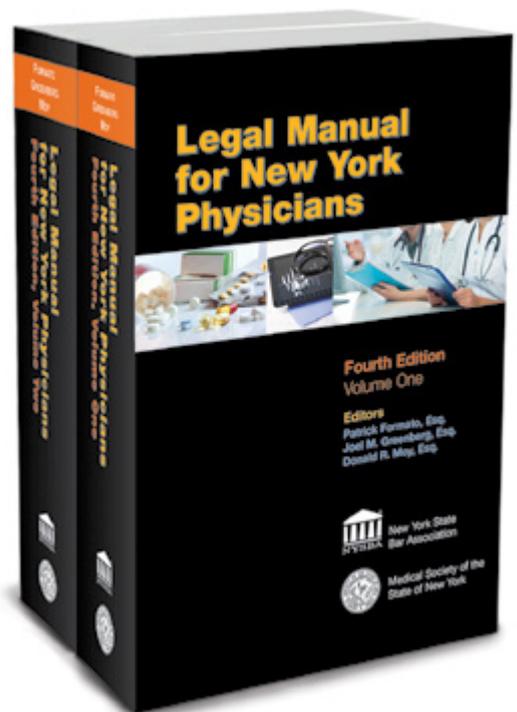
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# LAW PRACTICE MANAGEMENT

BY CHAD E. BURTON



**CHAD E. BURTON** is the founder of Burton Law, one of the leading virtual law firm structures. Formerly in a big law firm, he now represents technology-oriented companies from startups to multi-national corporations. Additionally, he started CuroLegal, an outsourced practice management company for lawyers.

## The Virtual Law Firm

Rewind four or five years, when the concept of virtual law firms still fell into the category of new-agey business models. Now, the emerging virtual law firm models are front and center to any future-of-the-profession conversation. (And people say the legal market is slow to evolve.) Virtual law firms provide sophisticated services, and real clients are served, ranging from large corporate clients to individuals.

The concept of virtual law practice originated in the solo-practice world where lawyers had begun serving clients through a website and an online client portal. Providing unbundled legal services to a segment of the population that would not necessarily want to meet face-to-face with a lawyer (or who could not afford traditional services) is a good thing. In fact, in early 2013, the American Bar Association approved a resolution supporting the delivery of unbundled legal services.

And the virtual arena is expanding to multi-lawyer law firms. Take your traditional brick-and-mortar office, blow the walls off of it, allow the lawyers to work where they are most productive, substitute on-site staff with virtual assistants and paralegals, replace in-house servers with cloud-based solutions and, voilà, you have a virtual law firm.

Really, we are talking about mobility – removing the proverbial chain-to-desk. Having the choice of where

and how to practice law is the result of the technology that is playing a growing and significant role in law firm operations. The barrier to starting a practice is lower, regardless of years of experience.

To understand these emerging business models and their role in the future of the profession, consider these three important questions: (1) What is driving such a change in operations?; (2) What are core concepts for lawyers to consider in developing such a model?; and (3) Where should lawyers look for help?

### Whose Idea Was This Anyway?

Answer: Consumers of legal services.

At this point it should be no mystery to any lawyer that the legal marketplace has changed. Client expectations have changed and will continue to evolve. People much smarter than this author – Richard Susskind, Jordan Furlong and Stephanie Kimbro, to name just a few – have been explaining the future of the profession for quite some time. They all discuss imminent changes that need to occur or are already occurring on a large-scale basis. Consumers are driving most of the change, and those lawyers who ignore what is happening risk alienation and/or irrelevance.

Lawyers must be able to provide more services for less cost to clients, regardless of the type or size of the client or practice area. In a global

marketplace, firms should be able to provide services to clients in different jurisdictions. This means that law firms have to engage in changes that go beyond cutting hourly rates or considering alternative fee structures in their efforts to keep their clients with them. This will just reduce the top side of the revenue stream. Law firms need to address the expense side.

This is where emerging business models, such as virtual law firms, can help through structuring effective work environments that have lower overhead. Think about these questions:

- Do your clients care where you produce their actual work product?
- Do your clients care whether the lawyers and staff for a firm are all under one roof?
- Do your clients care whether your meeting space is rented from a shared office model such as Regus?
- Do your clients care if your administrative help is outsourced to a virtual assistant or receptionist service?
- Are your clients looking for timely, quality work regardless of where it is produced?
- Are your clients looking for solutions that do not break the bank?
- Are your clients willing to engage in innovative delivery models that are more convenient for them?

Really looking at what clients care about can be an agent of change. The answers to these questions can help the leadership in a virtual law firm be more creative. And, if you do not know the answers to these questions, ask your clients. Honestly assessing their answers can be enlightening and can be used to help guide the law firm about how it should operate.

### **Core Considerations to Developing a Virtual Model**

To “pull off” a virtual law firm, the overall team is critical. Three primary components make up this team:

- lawyers;
- administrative support; and
- technology partners.

Let’s start with the lawyers. Just because a person is really smart and substantively proficient in a practice area does not mean he or she is cut out for a virtual or nontraditional work environment. When working in a virtual or “distributed” manner, each lawyer needs to possess an element of entrepreneurialism. This is true even for the lawyers who fall under the category of employee and are not developing external business.

Building a team of lawyers remotely is a challenge and takes extra effort because the members do not see each other regularly. They cannot pop into each other’s offices on a whim. As such, it is essential that the individual lawyers work to build relationships with each other and to establish trust in each others’ work and care of clients. This also means that the firm leadership must create a culture of collaboration through in-person or video connections and other technology platforms. The ability to adapt to new technology is obviously an important characteristic for any lawyer on this team.

Administratively, a virtual firm needs support regardless of the size. Even solos should have administrative support to whom they can effectively delegate work so they can focus on client service and the substantive work product. Depend-

ing upon the size of the firm, internal support through an operations manager may make sense. Otherwise, alternative sourcing is a great option for virtual models. Virtual assistants and virtual receptionists provide services to lawyers on a contract basis. In this way, the cost of outsourcing ebbs and flows with the firm’s workflow.

On the technology front, the choice of platforms is key to a cohesive virtual practice. This is true for solos providing services online and multi-lawyer firms operating in a distributed manner. Gone are the days when major tech platform providers are simply considered vendors. These providers should be considered partners in your client service efforts (not in the legal sense, of course). Working closely with these companies, lawyers can learn new and innovative ways to deliver services, and the providers also can learn from how lawyers have created innovative service models.

### **How Do You Get There?**

Analysis paralysis is often front and center when thinking of changing business models or creating something new. The Internet is a great place to find direction in bite-sized, blog-post snippets. However, that does not always help lawyers spring into action. The natural relationship that lawyers, especially young lawyers, should turn to is the one they have with their bar associations.

Bar associations have long been the backbone of legal communities. Unfortunately, it is no mystery that today’s younger lawyers are not as actively engaged as their “mature” counterparts. This is somewhat baffling because bar associations have a lot to offer young lawyers, particularly in an economy that lacks jobs. Our law schools are cranking out more lawyers than there are traditional legal jobs, which makes it incumbent on new lawyers to integrate themselves into the profession and to meet and network with lawyers who can serve as mentors or who may be future employers

or client referral sources. The bar associations should be the natural answers.

It is also incumbent on bar associations to truly be focused on the future of the profession and providing the tools needed for the profession to evolve, including helping young and mature lawyers embrace technology and think about their practice management game.

With the right support and resources, lawyers will be able to look forward into the future and change the way they operate. To this end, Prof. Richard Susskind often quotes Wayne Gretzky: “A good hockey player plays where the puck is. A great hockey player plays where the puck is going to be.” ■

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## To the Forum:

I am a mid-level partner in a firm that is considered the leader in advising a particular industry. Across the relevant practice areas, the law as it applies to this industry is unsettled and developing, so our activity calls for a lot of judgment. Clients often rely on our advice almost as if our judgments were the law . . . which, of course, they are not, and that is the nub of my problem.

In particular, based on our long-standing advice and the strength of our firm's reputation, no one in the industry engages in a particular practice I will call "X." Last week, a new entrant to the industry ("Client") asked about "X," and when I gave the stock "no" answer, Client handed me a research paper written by another lawyer who has never had contact with this particular industry. I read the paper with some skepticism and discovered, to my surprise, that it utterly demolishes our long-held position and proves, conclusively in my judgment, that X is permissible.

My boss (whose name is on our firm's door) cannot find a hole in the newcomer's analysis but yet still insists that "we have our story and we are sticking to it." I am not sure whether he concedes that he has been wrong or refuses to consider that possibility, but his main concern is that our firm and those whom we have advised have too much invested in the status quo to consider a change. He points out that all the leading industry players have been able to operate successfully (though at some additional cost) without doing X, so there is little to gain in our telling everyone that we have been wrong all along. On the other hand, if we say yes only to Client, it will gain an unfair advantage over the others, and when word inevitably gets out we will look silly (or worse) and may lose a lot of business.

To complicate matters, Client insists that the reasoning that they

and the new guy on the block have adduced in support of X is their proprietary information, insofar as it represents an ability to do something lucrative that the rest of the market has missed. Client has prohibited us from disclosing that anyone believes that X is permissible.

My boss has instructed me to tell Client that their other lawyer is mistaken and has no feel for this very specialized industry, and given our firm's reputation that might well be the end of the matter. But that will not be the end of the matter for me. I am not comfortable giving advice that I honestly believe to be wrong or in participating in what appears to me to be a cover-up. I have three questions:

1. May or must I tell Client my opinion, regardless of the directive from my senior partner?
2. Is Client within its rights in prohibiting our firm from disclosing to others the fact that someone has concluded that X is permissible (regardless of what we advise Client)?
3. If I leave my firm, may I disclose this sordid mess at least to justify why I am leaving or have changed my views, or am I bound to respect the firm's confidences even if they constitute, in my judgment, intentional malpractice?

Sincerely,  
Painted into a Corner

## Dear Painted:

We sincerely sympathize with your predicament. This is the sort of situation that has come increasingly to characterize legal practice as it shifts from a learned profession to a business, albeit both a heavily regulated and self-regulated business, with unique traditions that we still strive to uphold. Perhaps it was never really as quaint as we might prefer to think – Abe Lincoln made a lot of money representing railroads – but we hope

you get the picture. And a general counsel of a company may have to face this type of pressure much more often than an outside advisor such as you.

Your first question – whether you may or must tell Client your personal opinion – turns in large part, in our view, on Client's relationship with you and with your firm.

If Client clearly relies principally on your senior partner's judgment or Client's main relationship is with another lawyer at your firm, your best course of action would be to ask that lawyer to convey the firm's position to Client. You do not have a duty to overrule the firm's consensus if you know that Client intends to rely on the firm's viewpoint as opposed to your own, but you also do not have a duty to be a shill for anyone. You cannot in good conscience be a mouthpiece for falsity, but as long as it is clear to you that Client is not

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asking specifically for *your* personal judgment, you can, if you want, pass the buck. We caution you that this may not endear you to your partners, who might see you as unwilling to “take responsibility,” and, in any event, you will have no control over how the communication is presented and whether Client infers or is told that this is *your* conclusion.

As a result, the approach set forth in the preceding paragraph may not be the one you want to take. In that case, and certainly if you believe that Client wants to rely on *your* judgment, you would be on solid ground to advise Client truthfully that the firm’s view is “no” but your personal view is “yes.” One way this finds expression in complicated areas like taxation is a formulation like, “It may be correct and reasonable advisors might so conclude, but as a firm we do not feel comfortable issuing that opinion.” You should not give in to the temptation to disclose why the firm’s view differs from yours or to denigrate your senior partner’s motivations, but you should feel free to tell Client that he can call your partners for further clarification. Obviously if you do this, you owe your partners and your firm the courtesy, if not the duty, of letting them know in advance what you intend to do so that they are not blindsided.

No matter how this plays out, you should be prepared for a potential showdown and for the possibility that you may need to find other employment rather soon. They may teach about that aspect of professional life in business school, but not in law school.

Turning to your second question – about who, in effect, owns the knowledge and the technology – we offer several observations. First, in view of the novelty of the conclusion that Client’s other lawyer has reached and the important commercial implications, we believe Client has a right to insist that you and your firm *not* disclose this information.

As we have discussed many times before in the *Forum*, Rule 1.6 of the

New York Rules of Professional Conduct (RPC) prohibits disclosure of confidential client information without the client’s informed consent. Specifically, Rule 1.6(a) of the RPC states that “[a] lawyer shall not *knowingly* reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . .” (emphasis added). As defined by the RPC, confidential information “consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential” but “does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.” *See id.*

Without even reaching the question of whether Client has a proprietary right in an item of intellectual property (the way Client might frame this), your discussions with Client, including his revelation to you of what the other lawyer had concluded, seem to be well within the scope of what is deemed “confidential information.” *See id.*

Second, if your firm discloses and criticizes the other lawyer’s conclusion, observers may come to think of your firm as a bully and question its motives. No private actor, regardless of how influential, should wrap itself in the mantle of “the system” and think that it has a duty to police what others do that overrides ethical and professional constraints.

On the other hand, no one “owns the law.” If you happen to have had occasion to think about the law, for any reason, and another person asks you a question, you are free to answer it as you believe is correct. So, should your partners reconsider or if you free yourself from the bonds that connect you to them, you are well within the

bounds of ethics and professionalism to give what you believe to be correct advice. But be vigilant not to cross the fuzzy line between answering a question when it is posed to you or is inherent in an analysis that you have been asked to do, and, on the other hand, volunteering information or inducing people to ask you that question.

Finally, the matter of confidentiality as to the legal conclusion and analysis, but still not as to details of your discussions with Client, will evaporate if and when there is general public awareness that someone says X is permissible. Our advice that you and your firm still tread carefully continues: fair comment, yes; calling out the attack dogs, no.

Your third question concerns the intersection of duty to clients and duty to partners. The answer is not all that difficult, though you may not be happy with it. Until the public becomes aware of the specifics, as noted in the preceding paragraphs, you cannot disclose the details to promote yourself or even to explain your departure. Depending on what actually happens, you can say something along the lines of, “I found myself disagreeing with my partners’ professional judgment or risk evaluation on one or more matters,” or even “I was forced out because I refused to counsel a client in a way that was contrary to my best professional judgment.” But beware that it is a cold world out there, and in our experience it is far from certain that people will not think of these as self-serving statements. There is really not much else you can say without actually accusing your firm of malpractice, and the life of a whistleblower is lonely save for the excitement of potentially having to defend a defamation lawsuit.

Do you remember “The Game of Life” in its original form, before the advent of political correctness? There were spaces marked “Revenge,” and with one spin of the wheel you could instantly win the game as a “Millionaire

Tycoon” or go to the “Poor Farm.” If you are prepared for long odds, consider how significant a breakthrough this is for Client. If you believe in each other and Client is prepared to provide enough business to anchor a practice, then hang out your own shingle, run with the innovation and grow with Client. Others have done worse in situations like this.

Sincerely,  
 The Forum by  
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**QUESTION FOR THE  
 NEXT ATTORNEY  
 PROFESSIONALISM FORUM**

A classmate of mine from law school (Anna Associate) works at a firm that

focuses on plaintiff’s side employment litigation. Her firm filed a complaint in New York State Supreme Court on behalf of a client against his former employer only. The claims asserted were for discrimination, retaliation and wage violations. Anna told me she advised her boss that they should be bringing claims against the company’s principals, but, she said, he ignored her suggestions even though the law was clear that principals should have been named in the suit.

The defendant-employer moved for summary judgment and the court dismissed the action. The statute of limitations has apparently run out on the claims which could have been asserted against the company’s principals.

Anna told me that she was incensed by the conduct of her boss and felt terrible for the client. She told me that she had evidence of her boss’s failure to acknowledge the well-settled law that supported her position that the individual principals should have

been defendants to the lawsuit. Her plan is to reach out to the client and assist the client in a potential malpractice case against the firm. After initially contacting the client, Anna threatened to destroy the evidence of malpractice to get the client to acquiesce to the financial recovery in the malpractice claim. She negotiated a 50% contingent fee as compensation for her efforts and because her testimony would require her to leave the firm. And to make matters worse, Anna and the client had apparently engaged in a brief romantic affair which began when his case came to the firm and ended shortly after the case against his former employer was dismissed.

The client is threatening to take both Anna and her firm to the Disciplinary Committee.

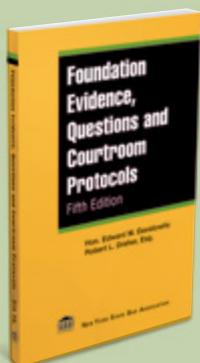
What ramifications would Anna face because of her conduct as described here?

Sincerely,  
 Not a Fan of Vengeance

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Jennifer M. Kirby  
Nathaniel James Kuo

Isabelle Laroche  
Bryan Lee  
Matthew W. Lewis  
Adriana Lima  
Clea Patricia Marie Liquad  
Leonard Joseph Mazzarisi  
Christopher Byron McLean  
Olivia Lorraine Meier  
Flora Melim Midwood  
Hannah Lee Miller  
Julian Tyler Johnstone Miller  
Addrana Rochelle Montgomery  
Christopher Lawrence Mooney  
Shlomo Steven Moshen  
Mairead Noelle Murray  
Marissa Shaindel Neuman  
Matthew Vincent Hamilton Noller  
Dustin Thomas Pangonis  
Shirley Paul  
Eric Gregory Pekar  
Genevieve Elizabeth Perez  
Rishi Raithatha  
Kendall Renee Randolph  
Phillip Andrew Raymond  
Chelsea Boehme Rice  
Gabriella Maria Ripoll  
Carmelle Robillard  
Evan Rosin  
Daniel Richard Secatore  
Patrick Michael Sellers  
Inna Shlapko  
Beryl Shurin  
Alexandra Houston Smith  
Mary Catherine Spooner  
Ethan Adam Stavsky  
Claire Hansen Suni  
David Grafton Switzer  
Peter F. Tringali  
Michael Wegh  
Jennifer Kathryn Williams-alvarez  
Seo Yun Yang

## THIRD DISTRICT

Kendre Henderson Keys

## SIXTH DISTRICT

Julia Berliner Bressman  
John Patrick Ciccarelli  
John J. Okray  
Bianna Kay Serrano  
Xueqing Wan

## SEVENTH DISTRICT

Bradley Edward Lewis

## EIGHTH DISTRICT

Paul Elyash

## NINTH DISTRICT

Jennifer George Arthungal  
Selina Ann Billington  
Sylvie Bourassa  
Jordan Courtney Conger  
Nadia Ann-marie Daley-blake  
Anne D. Davenport  
Rowena Dunga  
Monica Elbakry  
Katharine Carson Fendler  
Brian J. Freer  
Christopher C. Garitee  
Alyssa Chantel Gillespie  
Alexis M. Gregory

Isis Rakia Mattei  
Joanna Beth McCarty  
Talia Gottlieb Metson  
Michael Anthony Mrnacaj  
Teresa Grazia Neri  
Andromachi Efi Noula  
Elisabete Da Assuncao Tiago Pita  
David Anthony Ragonetti  
Dominick Rendina  
Anna Michelle Rudawski  
Charles G. Smith  
Brie Anne E. Steingarten  
Michael Joseph Turk  
Osato Osahon Ukponmwan  
Natalie Elizabeth Zaremba

## TENTH DISTRICT

Oren Agman  
Christopher John Ahern  
Ololade Teresa Ajifowobaje  
Rhoda Yohai Anders  
Tara M. Arzberger  
Garabet Vartan Badrajan  
Tommas F Balducci  
Liliana Birziche  
Jennifer Beth Cahn  
Eric Jason Canals  
Carol Megan Celestine  
Kevin John Corrigan  
Michael Patrick Coughlin  
Nicholas William Defraia  
Alfred Ernest Delgreco  
Brian J. Descovich  
Michael William DeTrano  
Alexander Ian Diamond  
Russell Jordan Edwards  
Marc Jordan Eisenberg  
Robert A. Ferrara  
Evan Scott Feldman  
Orlee Fishkin  
Thomas John Foy  
Jesse Michael Freeman  
Stephen Ghee  
Frank A. Gramarossa  
Brian Henry Guy  
Tiffany Antoinette Harris  
Meaghan Elyse Howard  
Robert T. Imrie  
Catherine Nicole Jones-hankins  
Herbert Steven Kellner  
Katelyn G. Kelly  
Phillip Khezri  
Tomas Andrius Klimas-mikalaukas  
Magdalena Alexandra Lynch  
Paul Nicholas Macerino  
Gregory Alan Marcus  
Nataliy S. McKinney  
Robert J. Mitchell  
Michael Moskowitz  
Erin Murtha  
Michael Thomas Nolan  
Jamal Akeem Perry  
Joseph W. Prokop  
Steven Craig Richman  
Rob Jon Rodgers  
Carolina Rodriguez  
David Z. Rotman  
David Zachary Rotman  
Dennis James Ryan  
Ariana Nushin Sanai  
Ashley Diana Sauerhof  
Madeline Shapiro  
Johnny Shin  
Raja Singh

# NEW MEMBERS WELCOMED

Glenn J. Sobel  
Nadia Tariq  
John Benjamin Telesca  
Keri Jean Wasson  
Jaclyn Ann Weber-cantrell  
Joshua M. Weiss  
Max Aaron Wolfson

## ELEVENTH DISTRICT

Melanie Abrams  
Gillian Anne Barkins  
Anna Berezovski  
Terence Bokosha  
Thomas D. Bradshaw  
Raluca Diana Bulai  
Samuel Joseph Capasso  
William Chung  
Alex Abner Cohen  
Ian Stuart Cole  
Diane Courtney  
Noelle Diaz  
Nhi Thao Dinh  
Xiu Mei Dong  
Leily Faridzadeh  
Konstantinos Gaisidis  
Tracy Ann Golden  
Robert Allen Greer  
Edwin Miguel Hernandez Garcia  
Benjamin Robert Humphreys  
Sergey Kalantarov  
Komal Kumari Keluskar  
Marin Stacie King  
Sara Anne Kirby  
Brandon Michael Kopcienski  
Michelle Lai-fong Lau  
Jessica Yessenia Lazo  
Malayika Augustin Lemoine  
Shaun Sarwar Lodi  
Matthew Alexander London  
Gabrielle Marie Martinez  
Alicia Ann Matusheski  
Emmanuel Mevs  
Sarah Millings  
Grant Daniel Munyon  
Sarowar Mustafa  
Yu Nie  
Wilson Y. Pok  
Miriam Pollack  
Ronald Wesley Popo  
Yi Ri  
James William Russell  
Joseph Michael Spadola  
Jason Andrew Speights  
Jason Anthony Swinburne  
Adam Mark Tavares  
Scarlett Taylor  
Christopher Alan Tellet  
Erik P. Vaklinov  
Susan Varghese  
Philip J. Velez  
Danny Hakim Josef Vogel  
Larisa Albertovna Voronina  
Anita Wu

## TWELFTH DISTRICT

Cindy Nicola Brown  
Eileen Burrowes  
Jordan Richard Gerow  
Illianov Alberto Lopez  
Larancuent

## THIRTEENTH DISTRICT

Andres Casas  
Gregory Santo Lombardi  
Michael Emeka Nwuba  
Joe Rubin

## OUT OF STATE

Tolulope Opeyemi Akinsanya  
David Benjamin Amerikaner  
Lauren Jeanene Anderson  
Maryam Arif  
Mariana Sofia Avendano Bolivar  
Yasuhide Ayabe  
Aliye Inci Aydogdu  
Sahar Sandra Azima  
Alexandra Mari Bachan  
Yvette Badu-nimako  
Dae Hyun Baek  
Diego Barrera Pieck  
Norman Bellil  
Ronny Samy Beshay  
Hartman Evans Blanchard  
Richard Stephen Bloomfield  
Michael Bradford  
Hilary Nayo Briscoe  
Wen Bu  
Robert Anthony Bucci  
Jared Serge Buszin  
Valerie Catherine Byrne  
Michael G. Cassidy  
Patricia Chang  
Sj Chapman  
Yan Chen  
Xiaoxi Cheng  
Ladan Danielle Cherenegar  
Solomon Jason Chouicha  
Kieman Duane Christianson  
Siena Byass Blake Colegrave  
Michael Anthony Collyard  
James Henry Cook  
Cesar Leonidas Coronel Ortega  
Kevin Coughlin  
Brooke Jennifer Daniels  
Jane Mackenzie Duane  
Trevor Richards Dubois  
Patrick El Hayek  
Sapir Elazar  
Niklas Teodor Elofsson  
Meghan Kelly Everlanka  
Morenike Fajana  
Deborah Farber-kaiser  
Jessica L. Finz  
Diana Cristina Gambone  
Ruth Yuanyuan Gao  
Michael Gebauer  
Elizabeth Geevarughese  
Stefana Laurentia Ghita  
Sharon Robles Glazier  
Mark Aaron Goldfeder  
Rafael Gomes Gobbi  
Jeffrey Samuel Greenberg  
Dimitri Gremont  
Srishti Gupta  
John Niel Guzman  
Tianji Han  
Elizabeth Davis Happel  
Nickolaus Martin Hastings  
Patrick Joseph Healey  
George Backus Hefferan  
David Scott Heier  
Christopher Michael Helsel  
Arielle Heo  
Adam T. Hoffman  
Wenyue Hou  
Yu Wen Huang  
Yuxi Huang  
Yerin Hur  
Mahdi Maher Ibrahim  
Jasmine Denise Lashae Johnson  
Richard M. Juang

Ashwin Kaja  
Tomoyuki Kanda  
Seo Gu Kang  
Kahori Kawata  
Nandini Khaitan  
Jung Hun Kim  
Mok Hong Kim  
Paul Jaewon Kim  
Janna E. King  
Jennifer Kirby  
Jordan Danielle Kohl  
Adam Hubbell Kol  
Dorothy A. Koncur  
Birgit Kuba  
Rishab Vijaykumar Kumar  
Kenneth Kei Lum Kwan  
Karen Laik  
Florent Pierre Alexandre Fra Lallemand  
Diane Stephanie Larmondixon  
Emma Rose Larson  
Anna Lasserri  
Mary Kathleen Leahy  
Vanessa Scott Lee  
Daniel Harrison Leff  
Clinton J Leite  
Wiebke Lemmer  
Christopher G. Leo  
Yitzchak Hillel Lieberman  
Chiayi Lin  
Jing-yi Liou  
Hang Liu  
Wei-li Liu  
Salvador M. Llach  
Eric Andrew Lowe  
Jingbo Ma  
Yong Quan Ma  
Lisa Marie Madalone  
Angelika Izabela Marek  
Erinn Denise Martin  
Richard Manuel Martinez  
James William McCarthy  
Caroline McKenna

Megan McLeod  
Cristina Mejia  
Marcella Berenice Mesquita De Mendonca Gurgel  
Adrian Piotr Michalak  
Sarah Margaret Mielke  
Charles Andrew Miller  
Kunio Miyaoka  
Lisa Marie Morel  
Yoshihiro Morisato  
Alexandra E. Mormando  
Emmaleen Simmone Muldoon  
Clara Gabriela Munoz Fernandez  
Stefanie Talena Murphy-boykins  
Yoji Nakamaru  
Michael Daniel Neff  
Esther Eguono Oisamoje  
Demar Gascon Osbourne  
Daniel Jerry Pacilio  
Yingfan Pan  
Zhenhua Pan  
Stephen J. Panico  
Ye Lim Park  
Joseph Carmen Patituce  
Joshua Seth Perlman  
Tilman Lorenz Petersen  
Claudia Pharaon  
Ailsa Hamilton Pierrepont  
Nicholas Alexander Pilgrim  
Meghna Shailesh Rajadhaksha  
Aslam Abdul Moiz Rawoof  
Vasileios Regkakos  
Wenxia Ren  
Rania K. Riad  
Cassandra Barbara Roth  
Katlynn Quinn Ryan  
Eiji Sakai  
Anna Rita Sakr  
Mark H. Schepps  
Britta Gunilla Schiebel

Edward Milo Schwab  
Allison Sebag  
Konstantin Shakko  
Hengda Shen  
Cesareo Antonio Serrano Singzon  
Kwangik Son  
Julie Song  
Joseph Stefanelli  
Elena Sudneko  
Ga-yoon Victor Suh  
Christine Sun  
Reid Weldon Swanson  
Steven James Talevi  
Tao Tao  
Kevin Lee Terry  
Chloe Thomson  
Roxane Tonnelier  
Christopher Frederick Treiber  
Renato Raymundo Treves  
Yuki Tsuda  
Tino Van Den Heuvel  
Julie Vandelloo  
Marc Joseph Veilleux  
Giannina M. Villa  
Ashley M. Viruet  
Jonathan Edward Vosper  
Katie Y. Wang  
Menghan Wang  
Yicen Wang  
Hung Chieh Wei  
Rachel Beth Weinberger  
Alexandra Williams Winter  
Jason Daniel Wright  
Scott Chi-kang Wu  
Yeyun Yang  
Keping Yin  
Wentao Yuan  
Petros Zerveas  
Chi Zhang  
Shen Zhao  
Yingqian Zhao  
Yuting Zhu

## In Memoriam

Samuel Adelson  
*New City, NY*

Casper Mark Ahasic  
*Kirkwood, MO*

Andrew Zachary Arnett  
*Dayton, OH*

Anthony J. Bellitto  
*Bronx, NY*

Susan Bender Capanelli  
*Farmingdale, NY*

James W.B. Benkard  
*New York, NY*

Alan Blum  
*Princeton Junction, NJ*

Daniel Boone  
*Savannah, GA*

Francis C. Brown  
*New York, NY*

Dave Capucilli  
*Baldwinville, NY*

Dennis Henry Cleary  
*Oceanside, CA*

Richard F. Coyne  
*Shaker Heights, OH*

Donald Sheldon Day  
*Buffalo, NY*

Jay M. Friedman  
*Pittsford, NY*

Charles A. Judelson  
*Goshen, NY*

Rebecca Sue Levine  
*New York, NY*

Henry P. Lucas  
*Brooklyn, NY*

Neil McDonell  
*New York, NY*

Jiro Murase  
*New York, NY*

William E. Murnighan  
*Toronto, ON*

John Ben Pessala  
*Westbury, NY*

Richard S. Ringwood  
*Endwell, NY*

Howard A. Ruditzky  
*Brooklyn, NY*

John F. Scheich  
*Richmond Hill, NY*

Shmuel Semel  
*Caesarea, Israel*

Walter Winfield Weber  
*Catskill, NY*

Lester P. Zander  
*Scarsdale, NY*

Trade Law (UNCITRAL). UNCITRAL has approached the Association to work with it in identifying future projects, and I have received a letter from the Secretary of UNCITRAL confirming this.

Also in October, on behalf of the Association, I attended the Brazilian Lawyers National Conference in Rio de Janeiro. Held every three years, it was attended by more than 16,000 attorneys. At the opening ceremony of the convention, I signed a memorandum of understanding, approved by the Association's Executive Committee, with the Ordem dos Advogados do Brazil (Brazilian Bar Association), which represents the more than 800,000 attorneys in Brazil. I then participated, alongside the attorney general of Brazil, in a panel on international arbitration. We are looking forward to future exchanges on this and other topics. As part of my visit, I presented the Brazilian Bar president with a copy of our Association's newly published book, *New York Contract Law: A Guide for Non-New York Attorneys*. Next year's International Section seasonal meeting will be held in Sao Paulo, Brazil, which should help cultivate the interaction between our two bars.

These opportunities to meet with UNCITRAL and the Brazilian Bar Association are further evidence of the trend toward globalization occurring in the legal and business world. There is strong recognition of the importance of New York law as the law of choice in international transactions, and it is clear that New York attorneys and this Association will be called upon to play an increasingly important role in the international legal sphere, and we must work to shape this role.

### The Association Staff

At the Association's headquarters on Elk Street in Albany, the State Bar has appointed several key top staff members during my term. These appointments reflect the Association's deep commitment to delivering excellent service to our members. In July, Dave

Watson joined the Association as its new Executive Director, after serving as the executive director of the Cleveland Metropolitan Bar Association, and at two other law-related associations and as a practicing attorney. In October, the Association appointed Elizabeth Derico to a new position as associate executive director of strategic member engagement. She brings to this position her 19 years of experience as associate director for the Division of Bar Services at the American Bar Association. David Schraver, the immediate past president of the Association, led the successful efforts to bring these two very highly qualified people to lead the Association staff, and the Association owes him our gratitude. The Association also hired a new marketing director, Grazia Yaeger, and a new director of the State Bar's award-winning Law, Youth and Citizenship program, Martha Noordsy.

We now have the leadership to help our excellent staff to evolve and to keep up with the changing demands on our Association. It is the role of the volunteer leadership to support the staff in its efforts to continue to provide outstanding service to our members and to attract new members.

### Which Brings Us to a Most Important Question

During my term, the most important question I have been discussing with Section members and leadership is, How does our bar association remain relevant to the younger generations of attorneys? In particular, how do we communicate with these attorneys?

How do we recognize and value what they bring to our profession? And how do we convey to them the many significant benefits that participation in our Association can provide over the course of one's legal career?

At our Annual Meeting, I have chosen to examine this issue as part of my Presidential Summit. The first part of the Summit will feature a panel discussion on the timely and important issue of Wrongful Convictions. Next will follow a discussion titled "Bridging Generational Fault Lines for the Future of the Legal Profession." A panel of leaders in the profession will discuss how today's generational mix of practicing attorneys can best work together in our profession's new normal of rapidly changing technology, increased client demands, global competition and changing business models. They will examine the different attitudes these generations have in their career approaches and expectations, and what this means for employers; the differences in their communication strategies, use of technology and expectations of privacy; whether and how ethics might evolve and fit into a new and changing culture; and their interest in professional development and mentoring.

How does our bar association remain relevant? This is a critical question for all bar associations, and we should work together to arrive at some answers to it.

I look forward to continuing to serve you in 2015. ■



**Exception:** If a defendant appears and opposes a plaintiff’s application for a default judgment, the defendant may appeal the entry of a default judgment or order.<sup>19</sup>

**Exception:** If a court enters a default judgment against a party on the basis of a disclosure sanction, a party that appeared and opposed the disclosure sanction may appeal the entry of the default judgment.<sup>20</sup> A party that doesn’t oppose a motion for disclosure sanctions may move to vacate its default under CPLR 5015(a).<sup>21</sup>

**Exception:** One scholar suggests that if a party doesn’t oppose a summary-judgment motion and the court enters a default judgment, the defaulting party should appeal or move to reargue or renew.<sup>22</sup> The defaulting party may not rely on CPLR 5015(a) to move to vacate.<sup>23</sup> But most practitioners move to vacate a default before appealing or moving to reargue or renew. A

Many of the same principles for vacating a default judgment, discussed below, apply to a plaintiff’s vacating a judgment of dismissal. A plaintiff may seek to vacate its default by showing a reasonable excuse for its default and a meritorious cause of action.

Public policy favors that a court, absent prejudice, dispose of a case on the merits.<sup>26</sup> Courts have a liberal policy to vacate default judgments to further justice and to give the parties their day in court to litigate their cases.<sup>27</sup>

### Motions to Vacate a Default Judgment

The relevant statutory provisions for moving to vacate a default judgment are CPLR 317 and 5015(a).

You may move to vacate a judgment under CPLR 317 or 5015(a)(1).<sup>28</sup> At the same time, you may also move to vacate under CPLR 5015(a)(2)–(5).<sup>29</sup>

CPLR 317 doesn’t apply in divorce, annulments, or partition actions.

if the “plaintiff properly effected service of process in some manner (other than by personal delivery).”<sup>32</sup> If the plaintiff served a corporate defendant by delivering the summons on the Secretary of State, that “does[n’t] constitute personal delivery on defendant’s agent for purposes of CPLR 317.”<sup>33</sup>

If the plaintiff didn’t serve you properly, move to vacate a default judgment under CPLR 5015(a)(4) and to dismiss the action under CPLR 3211(a). The *Legal Writer* will discuss 5015(a)(4) — moving to vacate a judgment on the basis of lack of jurisdiction — in the next issue.

A court has the discretion, regardless of the method of service, to vacate a judgment under 5015(a)(1) for excusable default, that is, if the defaulting party offers an excuse for its default. If a defendant was personally served, the defendant may move under CPLR 5015(a) to vacate a default judgment.<sup>34</sup> The *Legal Writer* discusses the CPLR 5015(a)(1) ground — excusable default — below.

Non-parties to an action may move to vacate a judgment if they demonstrate a legitimate interest in moving to vacate.

court might be persuaded to vacate your default even if you didn’t oppose your adversary’s summary-judgment motion. In deciding which option is best for you and your client, consider the time, money, and effort you’ll need to expend.

In exercising discretion, a court may vacate a default judgment on “payment of costs, disbursements, and expenses,” including attorney fees.<sup>24</sup>

A court won’t vacate a default unless you demonstrate in your moving papers a reasonable excuse for the default and a meritorious cause of action or defense.<sup>25</sup>

CPLR 5015(a) motions are available in all types of cases, including matrimonial cases.<sup>30</sup>

A plaintiff may move under CPLR 5015(a) to vacate a judgment or order of dismissal.<sup>31</sup>

**Overlap of CPLR 317 and CPLR 5015(a)(1).** CPLR 317 and 5015(a) provide the method by which defendants may move to vacate a judgment.

CPLR 317 applies when service is “by a method other than personal delivery to the defendant under CPLR 308(1) or to the defendant’s Rule 318 agent under CPLR 308(3).” CPLR 317 is thus applicable only

If you’ve moved incorrectly under CPLR 5015, a court may treat your motion as a CPLR 317 motion.<sup>35</sup>

**One Year to Move to Vacate.** You have one year to move under CPLR 317 or 5015(a)(1) to vacate a default judgment.

If you’re moving under CPLR 5015(a)(2)–(5), you’re not bound by the one-year period.<sup>36</sup> But the court may determine that laches applies.<sup>37</sup>

Under CPLR 317, the one-year period is calculated from the time the defendant “know[s] of entry of the judgment.” The defendant’s source of knowledge is irrelevant.<sup>38</sup>

If you're moving under CPLR 317 more than a year after entry of judgment, in your moving papers state "facts showing how and when [you] learned of the judgment's entry."<sup>39</sup>

Under CPLR 5015(a)(1), one year is calculated from the time a defendant "is formally served with 'written notice' of the entry of the judgment, apparently without regard to whether [the defendant] knew about it before then or not."<sup>40</sup> If you were never formally served with written notice, under CPLR 5015(a)(1), "the one year never starts [to run]."<sup>41</sup>

The one-year period "is[n't] a statute of limitations and is therefore not rigid."<sup>42</sup> Even if the one-year period expires, a court still has the discretion to vacate a judgment.<sup>43</sup>

**Cut-Off Period.** Under CPLR 317, you may move to vacate a judgment "in no event more than five years after such entry." Your motion to vacate a judgment will "not lie if more than five years have elapsed since the entry of judgment."<sup>44</sup>

No time limitation exists under CPLR 5015(a)(1).

**CPLR 5015(a).** CPLR 5015(a) allows you to move to vacate a judgment or court order. CPLR 5015(a) provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct upon . . . [five possible] ground[s]." The five grounds on which you may move to vacate a default are the following: (1) excusable default; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct; (4) lack of jurisdiction; and (5) reversal, modification, or vacatur of a prior judgment or order. Even though the grounds listed in CPLR 5015(a) might seem "thorough . . . [they are] not exhaustive."<sup>45</sup> A court has the "inherent discretionary power to vacate its judgments and orders for good cause shown, not limited by the CPLR 5015(a) list."<sup>46</sup>

**The Court That Rendered Judgment.** Bring your motion to vacate a judgment "to the court that rendered" the judgment.<sup>47</sup> No court, other than the court that rendered its judgment or an appellate court, may vacate the judgment.<sup>48</sup> For example, the New York State Supreme Court may not vacate a New York City Civil Court judgment. Likewise, the New York City Civil Court may not vacate a New York State Supreme Court judgment. A court in one county may not vacate a judgment of the same court from a different county: Civil Court, New York County, may not vacate a judgment from Civil Court, Bronx County, and Civil Court, Bronx County, may not vacate a judgment from Civil Court, New York County.

**Notice.** CPLR 5015(a) provides that a motion to vacate a judgment must be made on "notice as the court may direct upon." Scholars have noted that this means you must move by order to show cause if you're seeking to vacate a default under CPLR 5015(a).<sup>49</sup> Moving by order to show cause allows a court to set the method and manner in which service must be completed.<sup>50</sup> If your adversary has obtained new counsel, a court may direct you to serve your adversary's new counsel.<sup>51</sup> Moving by order to show cause allows a court to recognize "the applicable facts, including lapse of time, and direct accordingly about whom and how to serve" the order to show cause.<sup>52</sup> Practitioners move by order to show cause because it's an expedient way to have the court hear their motions to vacate judgments.

If you move by notice of motion, a court might deny your motion on the procedural ground that you didn't move by order to show cause. But a court might exercise its discretion. It might consider your notice of motion and discuss the merits of the motion if denying the motion on procedural grounds will prejudice your adversary and if considering the merits of the motion won't prejudice your adversary.<sup>53</sup>

**Interested Person.** Any interested person may move to vacate a judgment.<sup>54</sup>

A losing party is the one that usually moves to vacate a judgment. But a party that obtained a judgment in its favor — a winning party — may also move to vacate a judgment.<sup>55</sup> A winning party may move to vacate a court's judgment if, for example, it seeks to add a claim on the basis of newly discovered evidence.<sup>56</sup>

Non-parties to an action may move to vacate a judgment if they demonstrate a legitimate interest in moving to vacate.<sup>57</sup>

**Corporate Defendants.** A common reason that corporate defendants move to vacate defaults is that they don't receive notice of a summons served on the Secretary of State. Even if a corporate defendant failed to keep its address current with the Secretary of State, some courts forgive the omission and grant a vacatur.<sup>58</sup> If the address is correct and the defendant "merely den[ies] receipt of the summons and complaint . . . [that's] not sufficient to warrant vacatur under CPLR 317."<sup>59</sup> If a corporate defendant doesn't claim mail from the post office, a court might not vacate a default judgment under either CPLR 317 or 5015.<sup>60</sup>

**What You Must Demonstrate.** Under 5015(a)(1), you'll need to demonstrate in your moving papers a meritorious defense and a reasonable excuse for the default.

Under CPLR 317, you'll need to demonstrate in your moving papers a meritorious defense and proof of your basis for relief, such as no personal service. Although scholars disagree about whether you need to show a reasonable excuse for the default, caselaw suggests that you needn't show a reasonable excuse. The *Legal Writer* discusses this question below.

To vacate a default judgment, a defendant need not as a matter of law establish its defense.<sup>61</sup> Likewise, in vacating a dismissal, a plaintiff need not establish as a matter of law that it has a cause of action.

The “quantum of proof . . . [on] a motion to vacate a default is not as great as that which is required to oppose a motion for summary judgment.”<sup>62</sup>

**Stipulation.** Under CPLR 5015(b), if your adversary agrees to vacate a default judgment you may submit a stipulation to the court that the default judgment is vacated.<sup>63</sup> The

ous defense when moving to vacate a default under CPLR 317 or 5015(a)(1).

You show a meritorious defense by providing an affidavit from someone with personal knowledge of the defense. Some practitioners refer to it as an “affidavit of merits.”<sup>70</sup> A defendant may provide an affidavit of merits.<sup>71</sup> Someone other than the defendant may provide an

repeatedly failed to turn over disclosure to your adversary and the court enters a default judgment against you, one scholar suggests that doing so “does not support a motion to vacate the ‘default’” under CPLR 5015(a)(1).<sup>79</sup>

CPLR 5015(a)(1) contemplates not only a defendant’s but also a plaintiff’s motion to vacate a default judgment.<sup>80</sup> Upon showing good cause, plaintiffs may move to vacate a default judgment entered in their own favor.<sup>81</sup>

Because courts want to resolve disputes on the merits, they’ll accept a broad range of excuses to vacate a default.<sup>82</sup> A court has “wide discretion to determine what constitutes an excusable default.”<sup>83</sup> The moving party must offer “some excuse for the default — even if the excuse is[n’t] a compelling one.”<sup>84</sup> A court will consider the length of the delay in moving to vacate, whether a party will be prejudiced, whether the default was willful, and the strong public policy favoring decisions on the merits.<sup>85</sup>

The court has the discretion to consider law office failure in vacating a default.<sup>86</sup>

In the next issue of the *Journal*, the *Legal Writer* will continue with moving to vacate a default judgment. ■

## Under CPLR 5015(a)(1), you’ll need to demonstrate a meritorious defense and a reasonable excuse for the default.

parties, or their counsel, may sign the stipulation.<sup>64</sup>

But no stipulation will undo a marshal’s or “sheriff’s execution sale already conducted in enforc[ing] . . . [a] default judgment.”<sup>65</sup>

### Grounds to Vacate a Default Judgment Under CPLR 5015(a)

#### Excusable Default, CPLR 5015(a)(1).

The first ground under CPLR 5015(a) for which you may move to vacate a default is excusable default. The excusable-default ground under CPLR 5015(a) overlaps with CPLR 317.

Given the court’s broad discretion in vacating defaults, New York courts are liberal about vacating defaults.<sup>66</sup> One scholar has pointed out that providing a reasonable excuse for a default is required under both CPLR 317 and CPLR 5015(a)(1).<sup>67</sup> Another scholar suggests that you needn’t provide a reasonable excuse under CPLR 317.<sup>68</sup> Caselaw suggests that if a defendant that moves under CPLR 317 need not show a reasonable excuse, the defendant need show only that it didn’t receive notice in time to defend against the action.<sup>69</sup> Just to be sure, practitioners may want to demonstrate a reasonable excuse for the default and a meritori-

ous affidavit of merits if the affiant has personal knowledge of the facts.<sup>72</sup> A court will likely find that an affidavit that lacks personal knowledge of the facts has no probative effect; if so, the court will likely deny a motion to vacate a default judgment on the basis that the moving papers are deficient.<sup>73</sup> Likewise, an attorney’s affirmation is deficient if the attorney lacks personal knowledge of the merits of the case.

If you’ve defaulted in a medical-malpractice action and you’re moving to vacate the default, provide an affidavit of merits from a medical expert who has experience in the particular field.<sup>74</sup>

A court may vacate a default “in whole or in part.”<sup>75</sup> The court, for example, may vacate a default only to the extent of permitting a trial on damages but not on liability if the court determines that the movant “inadequately contested” liability in its moving papers.<sup>76</sup>

You needn’t wait until a judgment or order has been entered before moving to vacate.<sup>77</sup>

If you’ve had an opportunity in court to address the issue that’s the basis for the default, appeal the judgment; don’t move to vacate the judgment.<sup>78</sup> For example, if you’ve

1. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, *New York Civil Practice Before Trial* § 39:01, at 39-11 (2006; Dec. 2009 Supp.).

2. *Id.* § 39:02, at 39-11.

3. *Id.*

4. *Id.* § 39:91, at 39-17.

5. *Id.*

6. *Id.* § 39:100, at 39-18.

7. *Id.* § 39:101, at 39-18. Replies to counterclaims are mandatory except in the New York City Civil Court. In the New York City Civil Court, replying to a counterclaim is optional. N.Y. City Civ. Ct. Act § 907(a). Section 901 of that Act doesn’t mandate a reply. If the plaintiff doesn’t reply, the court will deem the counterclaim denied. *Perlson v. Titone*, 167 Misc. 2d 593, 596, 638 N.Y.S.2d 1000, 1001 (Civ. Ct. N.Y. County 1995).

8. Barr et al., *supra* note 1, § 39:103, at 39-18.

9. *Id.* § 39:102, at 39-18.

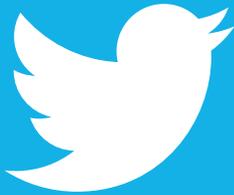
10. *Id.*

11. *Id.* § 39:110, at 39-19; CPLR 3215(i).

12. Barr et al., *supra* note 1, § 39:113, at 39-19.  
 13. *Id.* § 39:120, at 39-19.  
 14. *Id.* § 39:121, at 39-20.  
 15. *Id.* § 39:122, at 39-20.  
 16. *Id.* § 39:320, at 39-34; 1 Byer's Civil Motions § 23:01 at 253 (Howard G. Leventhal 2d rev. ed. 2006; 2013 Supp.).  
 17. Barr et al., *supra* note 1, § 39:320, at 39-34.  
 18. *Id.*  
 19. *Id.* § 39:321, at 39-34 (noting that if a defendant doesn't oppose the entry of a default judgment but appears at an inquest to contest damages, it may appeal the judgment on the issue of damages).  
 20. *Id.* § 39:322, at 39-34.  
 21. *Id.*  
 22. *Id.* § 39:323, at 39-34.  
 23. *Id.*  
 24. Byer's Civil Motions, *supra* note 16, § 23:02, at 254.  
 25. *Id.* § 23:03, at 255.  
 26. *Id.* § 23:01 at 252.  
 27. *Id.*  
 28. Barr et al., *supra* note 1, § 39:331, at 39-34.  
 29. *Id.* § 39:330, at 39-34.  
 30. *Id.* § 39:361, at 39-37.  
 31. *Id.* § 39:333, at 39-35.  
 32. *Id.* § 39:341, at 39-35; § 39:343, at 39-36 (noting that personal delivery under CPLR 317 means "in-hand" delivery) (citing *Nat'l Bank of Northern New York v. Grasso*, 79 A.D.2d 871, 871, 434 N.Y.S.2d 553, 554 (4th Dep't 1980)).  
 33. *Id.* § 39:343, at 39-36 (citing *Pabone v. Jon-Bar Enter. Corp.*, 140 A.D.2d 872, 873, 528 N.Y.S.2d 912, 913 (3d Dep't 1988)).  
 34. David D. Siegel, New York Practice § 108, at 202 (5th ed. 2011).  
 35. *Id.* § 108, at 204.  
 36. Barr et al., *supra* note 1, § 39:365, at 39-38.  
 37. *Id.* (citing *In re Felix v. Herman*, 257A.D.2d 900, 902, 684 N.Y.S.2d 62, 64 (3d Dep't 1999) (noting that laches may sometimes apply)).  
 38. Siegel, *supra* note 34, § 108, at 203.  
 39. Barr et al., *supra* note 1, § 39:342, at 39-35.  
 40. Siegel, *supra* note 34, § 108, at 203.  
 41. *Id.*  
 42. *Id.*  
 43. *Id.*; Byer's Civil Motions, *supra* note 16, § 23:02, at 254.  
 44. Siegel, *supra* note 34, § 108, at 203.  
 45. *Id.* § 426, at 750.  
 46. *Id.* (citing *McMahon v. City of New York*, 105 A.D.2d 101, 105-06, 483 N.Y.S.2d 228, 231-32 (1st Dep't 1984)); Byer's Civil Motions, *supra* note 16, § 23:02, at 253 (citing *Ladd v. Stevenson*, 112 N.Y. 325, 332, 19 N.E. 842, 844 (1889)).  
 47. Siegel, *supra* note 34, § 426, at 751.  
 48. *Id.*  
 49. *Id.*; Barr et al., *supra* note 1, § 39:420, at 39-42; *Smith v. Smith*, 291 A.D.2d 828, 828-29, 736 N.Y.S.2d 557, 558 (4th Dep't 2002) ("CPLR 5015(a) provides that such a motion shall be

brought 'with such notice as the court may direct.' Thus, the motion should have been brought on by order to show cause. Plaintiff's motion was not brought on pursuant to notice directed by the court and thus jurisdiction over defendant was not obtained. We conclude that the court properly granted defendant's motion to vacate both the 1999 judgment and the amended judgment pursuant to CPLR 5015(a) (1). The court did not abuse its discretion in determining that defendant demonstrated a reasonable excuse for the default by establishing that the court had not obtained jurisdiction over him . . . the court properly determined that defendant established a meritorious defense."').  
 50. Siegel, *supra* note 34, § 426, at 751.  
 51. *Id.*  
 52. *Id.*  
 53. *Rudgayzer & Gratt v. LRS Commuc'n, Inc.*, 3 Misc. 3d 159, 163, 776 N.Y.S.2d 158, 161 (Civ. Ct. Kings County 2003) ("The Court notes that plaintiff moved in the instant case by a motion, not by an order to show cause. CPLR Rule 5015 is clear that the instant motion should have been commenced by an order to show cause because the notice of motion should have been given 'as the court may direct.' However, as denial of the instant motion on procedural grounds would prejudice defendant, and proceeding on the merits of the instant motion will not prejudice defendant, the Court will proceed to the merits of the instant motion."').  
 54. Byer's Civil Motions, *supra* note 16, § 23:01, at 253.  
 55. Siegel, *supra* note 34, § 426, at 751.  
 56. CPLR 5015(a)(2); Siegel, *supra* note 34, § 426, at 751.  
 57. Siegel, *supra* note 34, § 426, at 751 (citing *Oppenheimer v. Westcott*, 47 N.Y.2d 595, 600-01, 419 N.Y.S.2d 908, 909-10, 393 N.E.2d 982, 984 (1979) (noting that a non-party may bring a plenary action to vacate a judgment or move under CPLR 5015(a) to vacate the judgment; the non-party here moved to vacate a judgment on the CPLR 5015(a) ground of fraud or misconduct)).  
 58. *Id.* § 108, at 204.  
 59. Barr et al., *supra* note 1, § 39:348, at 39-37.  
 60. Siegel, *supra* note 34, § 108, at 204.  
 61. Byer's Civil Motions, *supra* note 16, § 23:03, at 255.  
 62. *Id.*  
 63. Siegel, *supra* note 34, § 427, at 752.  
 64. Barr et al., *supra* note 1, § 39:410, at 39-42.  
 65. Siegel, *supra* note 34, § 427, at 753.  
 66. *Id.* § 108, at 203.  
 67. *Id.* § 108, at 204 ("The present structure of CPLR 317, requiring the defendant to show that he did not get notice 'in time to defend,' suggests that an excuse for the default is just as necessary on a CPLR 317 as on a 5015(a)(1) motion."').  
 68. Barr et al., *supra* note 1, § 39:330, at 39-34.  
 69. Siegel, *supra* note 34, § 108, at 204 (citing *Wharton v. 241 Corp.*, 99 A.D.2d 979, 980, 473 N.Y.S.2d 17, 19 (1st Dep't 1984) (citing *Taieb v. Hilton Hotels Corp.*, 60 N.Y.2d 725, 728, 469

N.Y.S.2d 74, 75, 456 N.E.2d 1197, 1198 (1983))).  
 70. *Id.* § 108, at 203 (citing *Benadon v. Antonio*, 10 A.D.2d 40, 42, 197 N.Y.S.2d 1, 4 (1960)).  
 71. *Id.*  
 72. *Id.*  
 73. *Id.* § 108, at 203-04.  
 74. Byer's Civil Motions, *supra* note 16, § 23:03, at 256.  
 75. Siegel, *supra* note 34, § 427, at 752.  
 76. *Id.*  
 77. *Id.*  
 78. *Id.*  
 79. *Id.* (citing *Achampong v. Weigelt*, 240 A.D.2d 247, 248, 658 N.Y.S.2d 606, 607-08 (1st Dep't 1997); *Pinapati v. Pagadala*, 244 A.D.2d 676, 678, 664 N.Y.S.2d 161, 163 (3d Dep't 1997)).  
 80. *Id.*  
 81. *Id.*  
 82. *Id.*  
 83. Barr et al., *supra* note 1, § 39:380, at 39-39.  
 84. *Id.*  
 85. Byer's Civil Motions, *supra* note 16, § 23:06, at 260.  
 86. Siegel, *supra* note 34, § 108, at 205.



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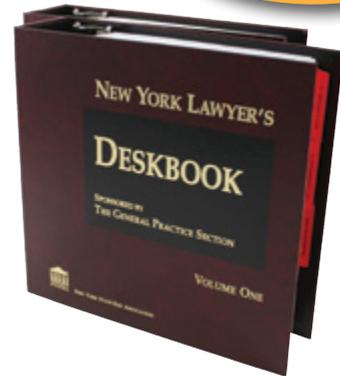
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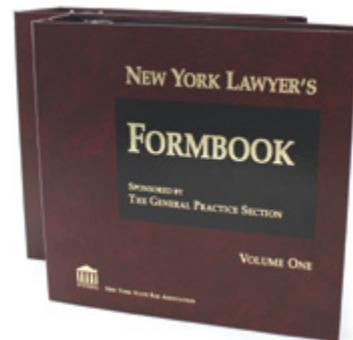


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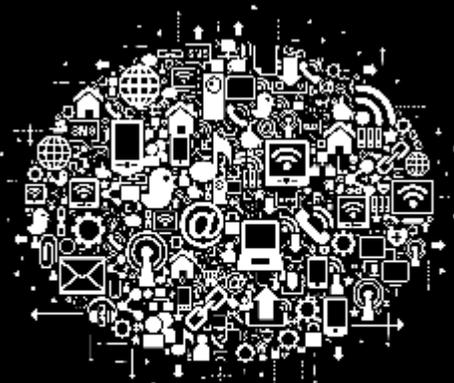
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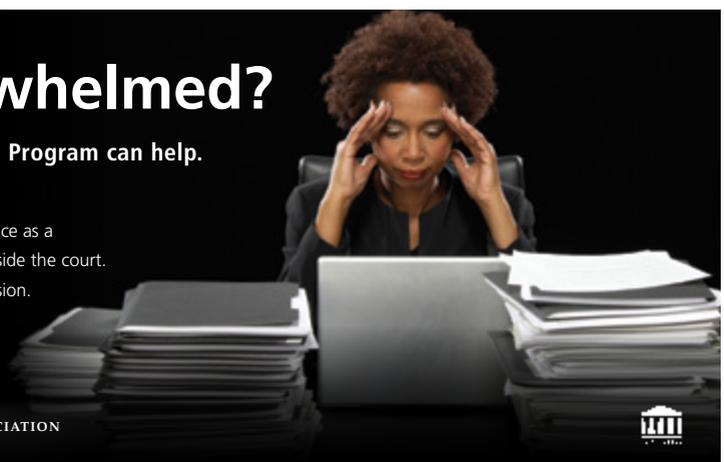
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## Drafting New York Civil-Litigation Documents: Part XXXVIII — Motions to Vacate Default Judgments

In the last issue, the *Legal Writer* continued the series on civil-litigation documents with motions to renew. The *Legal Writer* continues the series with motions to vacate default judgments.

### Default Judgments and Defaults

One of the most frequently used motions in civil litigation — in plenary actions and special proceedings — is a motion to vacate a default judgment. Before you understand the nuances of how to move to vacate a default judgment, you'll need to know about defaults and under what circumstances a party may be subject to a default judgment.

A party is in default when it "fails to do something required to proceed with the prosecution or defense of an action. . . . If a party defaults, the non-defaulting party may seek a default judgment or dismissal."<sup>1</sup> A court may issue a default judgment against a defendant that fails to appear in an action. When a plaintiff defaults, a court may dismiss the action: "If a judgment of dismissal against [a] plaintiff results from plaintiff's default, it may be considered a 'judgment upon a default.'"<sup>2</sup> A court may also issue a default judgment against a "counterclaim defendant ([a] plaintiff), cross-defendant, or third-party defendant."<sup>3</sup>

A party defaults in a number of ways.

After a plaintiff serves a defendant with process, the defendant must appear in the action.<sup>4</sup> A defen-

dant appears by serving an answer, filing a notice of appearance, or moving to extend the defendant's time to answer (such as moving under CPLR 2004 or moving to dismiss under CPLR 3211).<sup>5</sup>

Parties may be subject to a default judgment if they fail to respond to a pleading. Defendants may be subject to a default judgment if they fail to answer the complaint.<sup>6</sup> Plaintiffs or third-party defendants may be subject to a default judgment if they don't reply to a counterclaim.<sup>7</sup> Failing to respond to an amended pleading may subject the defaulting party to a judgment.<sup>8</sup> If a defendant "cross-claim[s] against another defendant, cross-defendant is not required to answer unless cross-defendant

lition expressly provides for a judgment on a party's failure to comply, a judgment may be entered against the defaulting party.<sup>12</sup> A court may default a party for disobeying a court's disclosure order or for willfully failing to disclose information that a party should've disclosed.<sup>13</sup>

A court may grant a default judgment against a defendant who doesn't appear for a calendar call or conference.<sup>14</sup>

Parties are also subject to a default judgment if they fail to appear for trial.<sup>15</sup>

The focus of this *Legal Writer* column and the next isn't on how to obtain a default judgment; the focus is on how to move to vacate a judgment after you've defaulted.

Courts have a liberal policy to vacate default judgments to further justice and to give the parties their day in court.

demand an answer."<sup>9</sup> If a cross-claimant demands an answer and a cross-defendant fails to answer, a cross-defendant may be subject to a default judgment.<sup>10</sup>

Violating a stipulation of settlement may also subject a party to a default judgment or a judgment of dismissal.<sup>11</sup> If a party defaults on a stipulation of settlement after an action is commenced and the stipu-

For more information about obtaining a default judgment, consult CPLR 3215.

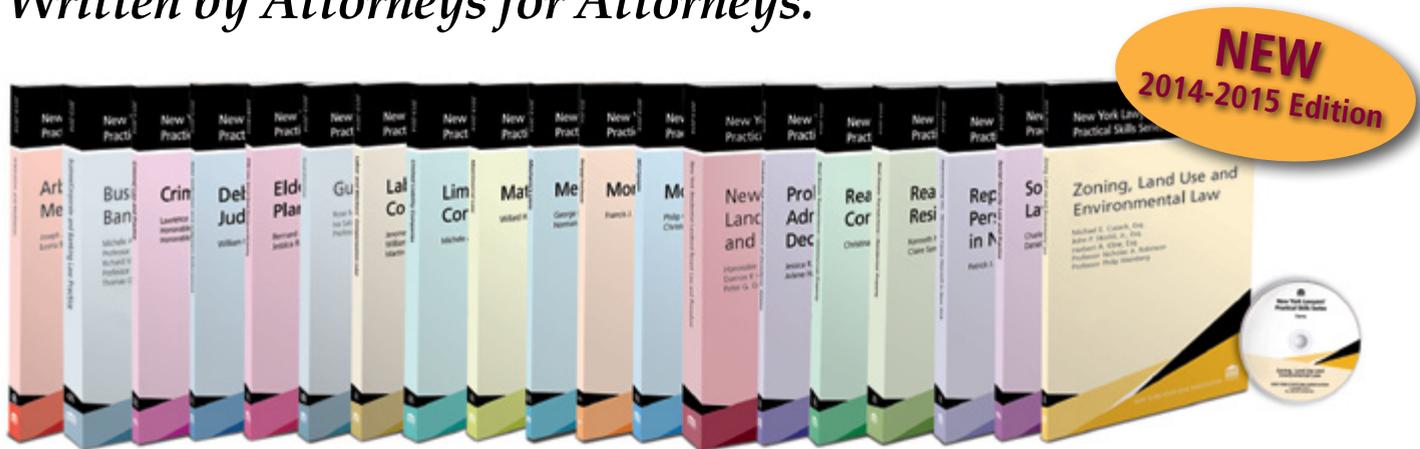
With a few exceptions, defendants may not appeal from a default judgment or order.<sup>16</sup> Defendants must first move to vacate the judgment or order.<sup>17</sup> If a court denies your motion to vacate, you may appeal the court's order.<sup>18</sup>

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