FEBRUARY 2011
VOL. 83 | NO. 2

NEW YORK STATE BAR ASSOCIATION

Journal

Requiem for a GP

The End of an Era

by Gary Munneke

The solo/small firm issue

My NYSBA membership allows me to network, and it fosters collegiality. It's a great benefit to me both personally and professionally. Particularly, as a member of the Young Lawyers Section, I gain tremendous and diverse experiences — I develop and coordinate CLE programs and I serve as a Section officer. I have the opportunity to meet and work with like-minded attorneys from across New York state on shared issues that are important to my career, to my profession, and to my Bar Association.

Michael L. Fox
NYSBA member since 2004
Jacobowitz & Gubits, LLP
Walden, NY

Renew today for 2011.

www.nysba.org/renew2011

Thank you for your membership support.

NYSBA

BESTSELLERS

FROM THE NYSBA BOOKSTORE

February 2011

Attorney Escrow Accounts – Rules, Regulations and Related Topics, 3rd Ed.

This new edition provides useful guidance on escrow funds and agreements, IOLA accounts and the Lawyers' Fund for Client Protection. The greatly expanded appendix features statutes, regulations and forms.

PN: 40269 / **Member $45** / List $55 / 330 pages

With CD of forms, regulations and statutes.

Best Practices in Legal Management

The most complete and exhaustive treatment of the business aspects of running a law firm available anywhere.

PN: 4131 / **Member $139** / List $179 / 498 pages

Choose a CD or USB flash drive containing all the forms.

Consumer Bankruptcy, 2nd Edition

This new edition covers consumer bankruptcy from both debtor and creditor perspectives. It provides official and procedural forms, as well as the local bankruptcy rules for New York's federal districts.

PN: 40456 / **Member $125** / List $170 / 770 pages

Counseling Content Providers in the Digital Age

Written and edited by experienced media law attorneys from California and New York, this book is an invaluable guide for anyone in the field of pre-publication review as well as attorneys responsible for vetting their clients' or firm's Web site. Includes forms, checklists and charts on CD.

PN: 4063 / **Member $50** / List $65 / 480 pages

Medical Malpractice in New York, 3rd Ed.

This book provides advanced insight into many aspects of the trial of a medical malpractice case.

PN: 41309 / **Member $95** / List $125 / 654 pages

Model Partnership Agreements (2009)

Here is a guide for solo and small-firm practitioners who wish to establish a partnership or other business form, or to formalize relationships in a law practice that has no formal structure.

PN: 41358 / **Member $50** / List $60 / 142 pages

New York Municipal Formbook, 3rd Ed., Revised 2010 (Forms on CD)

More than 230 new forms expand the scope of the premiere formbook for anyone whose practice touches on municipal law – includes topics such as agreements, bidding, environmental law, FOIL, labor law, liability, permits and zoning.

PN: 41606 / 2010 / **Member $150** / List $185

The Plaintiff's Personal Injury Action in New York State

This treatise answers the tough questions faced by the plaintiff's personal injury attorney every day – liens, special needs trusts, structures, Medicare and Medicaid, conflicts of interest, workers' compensation, no-fault, bankruptcy, representing a party in infancy, incompetency and wrongful death.

PN: 4181 / **Member $175** / List $225 / 1,734 pages

Post-Trial Practice and Procedures

The end of the trial is not necessarily the end of the civil litigation process. *Post-Trial Practice and Procedures* is the comprehensive guide to dealing with complex post-trial issues. The authors – experienced trial attorneys and an appellate justice – cover everything from challenging verdicts before and after the jury has been discharged, to post-verdict setoffs, to understanding the interest categories on damage awards and money judgments.

PN: 4175 / **Member $45** / List $60 / 242 pages

The Practice of Criminal Law Under the CPLR and Related Civil Procedure Statutes, 5th Ed. (2009)

A book that pulls together the rules and provisions of law not covered in NY's CPL or Penal Law.

PN: 40698 / **Member $45** / List $55 / 206 pages

Protecting the Catastrophically Injured Personal Injury Plaintiff's Recovery

A must-have for personal injury attorneys, this book provides the most current insights into the field of structured settlements and analyzes the alternatives available to protect catastrophically injured plaintiffs' recoveries.

PN: 42230 / **Member $20** / List $30 / 82 pages

Public Sector Labor and Employment Law, 3rd Ed. (2009 Supplement)

This landmark text has been revised to include recent developments in case and statutory law that are useful to practitioners representing public sector employees, unions or management.

PN: 42057 / **Member $150** / List $185 / 1,550 pages

NEW!

Commercial Leasing, 2nd Ed.

This new edition addresses a multitude of issues critical to both the tenant and the landlord. Especially useful are the sample model leases that cover conditions favorable to both the landlord and the tenant. Includes forms, instructions and charts on CD.

Construction Site Personal Injury Litigation (2010)

Newly revised with updated case and statutory law, this book covers all aspects of actions under N.Y. Labor Law §§ 200, 240(1) and 241(6).

Depositions: Practice and Procedure in Federal and New York State Courts, 2nd Ed.

A detailed text designed to assist young attorneys and experienced practitioners with all aspects of depositions.

Foundation Evidence, Questions and Courtroom Protocols, 3rd Ed.

This new edition, along with its collection of forms and protocols, has two new chapters: Direct Examination and Cross-Examination.

Insurance Law Practice, 2nd Ed. (2010)

Completely updated in 2010, *Insurance Law Practice* is an exhaustive and invaluable reference for attorneys who practice insurance law in New York State.

New York Lawyer's Deskbook and Formbook (2010–2011)

Award-winning and packed with new information and forms for use in over 25 practice areas.

New York Practice Monograph Series 2010–2011

This 16-book set comprises chapters excerpted from the 2010–2011 edition of the *New York Lawyer's Deskbook* and *Formbook*.

COMING SOON!

NYSBA Practice Forms on CD-ROM 2010–2011

More than 600 of the forms from *Deskbook* and *Formbook* used by experienced practitioners in their daily practice.

N.Y. Criminal Practice, 3rd Ed.

This valuable text of first reference has been reorganized and rewritten to reflect all changes in the law and practice since the publication of the second edition in 1998.

Expand your professional knowledge

1.800.582.2452 www.nysba.org/pubs **Mention Code: PUB0999**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

NYSBA

NEW YORK STATE BAR ASSOCIATION
Journal

CONTENTS

FEBRUARY 2011

REQUIEM FOR A GP
The End of an Era

BY GARY MUNNEKE

10

18 Social Media for Solos and Small Firms: What It Is and Why It Matters
BY NICOLE BLACK AND CAROLYN ELEFANT

24 Attorney Websites for Solos and Small Firms
BY JOHN R. MCCARRON, JR.

30 Succession Planning for Solos and Small Firms
BY ARTHUR G. GREENE

36 Contract Attorneys: How a Small Firm Can Reap Huge Benefits
BY CYNTHIA FEATHERS AND CRAIG S. BROWN

40 Economic Abuse: The Unseen Side of Domestic Violence
BY SUSAN L. POLLET

46 The Implications of Responding to Pleadings if a Motion to Dismiss Is Denied
BY JOSEPH F. CASTIGLIONE

DEPARTMENTS

5 President's Message
8 CLE Seminar Schedule
16 Burden of Proof
BY DAVID PAUL HOROWITZ
56 Language Tips
BY GERTRUDE BLOCK
58 New Members Welcomed
60 Classified Notices
60 Index to Advertisers
63 2010–2011 Officers
64 The Legal Writer
BY GERALD LEBOVITS

The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $30. Library subscription rate is $200 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

because we offer comprehensive, cost-effective coverage

The NYSBA endorses the Lawyers' Professional Liability plan administered by USI Affinity* and underwritten by CNA. The NYSBA LPL plan offers broad and affordable coverage tailored to suit the needs of law firms like yours.

Find out why USI Affinity is the right choice for your practice. Call or go online today.

USI AFFINITY

To request your **FREE** quote call
800.727.7770
or visit
www.mybarinsurance.com

*USI Affinity is the brand and marketing name for the licensed entity USI Insurance Services, LLC

LPL : Medical : Life & Disability : Personal & Financial : Other Liability

STEPHEN P. YOUNGER

Task Force on New York Law in International Matters

Re-establishing the Importance of New York Law in International Matters

As many readers of the *Journal* are aware, New York domestic law plays a critical role in governing a large number of cross-border business and international commercial transactions. For decades, New York has rightly assumed the moniker "financial capital of the world," a place where CEOs, business investors, entrepreneurs, bankers and attorneys meet to do business.

However, the economic challenges that have confronted the legal profession and the global economy generally over the last two years, coupled with strong competition from emerging financial centers abroad, have made it necessary to re-examine the role of New York law as an international standard. Given this new era of international business, it is imperative that lawyers, business leaders, bankers and commercial investors understand the global role that New York law plays in guiding cross-border transactions and resolving international disputes.

Last October, I announced the formation of our Task Force on New York Law in International Matters. The task force was first proposed by our International Section, and I owe special thanks to Carl-Olof Bouveng and Michael Galligan for pursuing this initiative. The main goal of the task force is not just to educate the legal community and the business world about the benefits of using New York law, but also to ensure that New York law retains its position as an international legal standard of choice for commercial transactions in the global marketplace of choice.

Led by Joseph T. McLaughlin of New York (Bingham McCutchen) and James B. Hurlock, former chairman of White & Case LLP, the task force is made up of a group of experts in the fields of finance, business law, arbitration, and litigation. The task force will advance comprehensive recommendations to promote New York as an attractive environment for investment from around the world and as a preferred site from which to launch business, commercial and cultural endeavors. The task force is also examining the important role that New York courts and arbitration forums play in resolving international business disputes.

Specific issues being addressed by the task force include: increasing awareness among New York lawyers of the role domestic New York law plays in cross-border commerce, examining the competition between New York law and other legal systems in the global legal marketplace, studying the advantages and disadvantages of litigating in New York courts and arbitration facilities, and examining the use of New York law in other areas, such as trusts and non-profit law.

Increasing Awareness

The importance of New York domestic law in the formation, documentation and administration of numerous cross-border transactions and other business dealings needs to be better understood and appreciated by attorneys and business leaders. It has been estimated that perhaps as many as 90% of cross-border transactions are drafted and negotiated in the English language. A large number of these transactions are governed – per agreement of the parties – by New York law.

It is essential to note, however, that these transactions are not governed by special rules of New York law directed at international issues. Rather, these are the same rules of domestic New York law – particularly those of New York contract, commercial, corporate and franchise law, but also those of New York agency law and trust law – that apply to New York residents and New York transactions. This has significant implications for members of the State Bar Association because any of our sections and committees that work to reform or strengthen New York law need to realize that their proposed recommendations could have important impacts on the reputation of New York law around the globe.

Stephen P. Younger can be reached at syounger@nysba.org.

Competition in the Global Legal Marketplace

There is little doubt that the pre-eminence of New York as a world financial and economic center helped to establish New York law as a "law of choice" in international commerce. Not surprisingly, U.S. banks, investment firms and major companies have preferred to use a body of law with which they were already familiar. However, with the emergence of other financial centers around the world and the growth of regional economic markets such as the European Union, there has been a heightened effort to promote competing international legal standards, such as English common law.

Part of the mission of our new task force is to critically examine these endeavors with an eye toward promoting New York domestic law as an international standard and also to suggest ways to strengthen New York law and make it an attractive option for use by attorneys across the globe.

The Task Force on New York Law in International Matters is an important part of our efforts to shape the future of the legal profession. It is my hope that our recommendations will help re-establish New York law as a key standard in private international law and a force throughout the world. ■

EXCELLENCE | ORGANIZED

Announcing
Telecommunications Law Resource Center™

The Latest Addition to our Portfolio of Resource Centers

Start your free trial to any BNA Resource Center
CONTACT your BNA Representative
VISIT bna.com/resource2

BNA

NYSBACLE

Tentative Schedule of Spring Programs *(Subject to Change)*

The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

CPLR Update
February 16 New York City (6:00 pm – 9:00 pm)
February 28 Long Island (6:00 pm – 9:00 pm)
March 18 Buffalo (1:00 pm – 4:00 pm)

Basics of Intellectual Property
March 3 New York City
March 10 Albany

Legal Malpractice
(9:00 am – 1:00 pm)
March 4 New York City; Syracuse
March 11 Albany; Long Island; Rochester
March 18 Westchester

Bridging the Gap 1
(two-day program)
March 8–9 New York City (live session)
Albany (video conference from NYC)

Automobile Litigation
March 18 New York City; Syracuse
March 25 Albany; Buffalo; Long Island

7th Annual International Estate Planning Institute
(two-day program)
March 24–25 New York City

Get (and Keep) the Clients You Want
(1:00 pm – 5:00 pm)
March 25 New York City

Hot Topics in Elder Law and Special Needs Planning
March 28 New York City
March 29 Rochester
March 30 Albany; Westchester
April 1 Long Island

Hot Topics in Real Property Law
(video replay)
March 31 Jamestown

Practical Skills: Family Court Practice
April 5 Long Island
April 6 Syracuse
April 7 Albany; Buffalo
April 14 New York City; Westchester

Premises Liability
April 8 Albany; Long Island
April 15 New York City; Syracuse

Benefits, Health Care and the Workplace in a Difficult Economy
April 15 New York City

Ethics and Civility
(9:00 am – 1:00 pm)
April 15 Long Island; Rochester
April 29 Albany; Buffalo; New York City

15th Annual New York State and City Tax Institute
April 27 New York City

Matrimonial Practice: Knowing the CPLR and Preparing Your Case
April 29 Rochester
May 13 Westchester
May 20 Long Island
June 10 Albany
June 17 New York City

Ethics for Business and Transactional Lawyers
(9:00 am – 1:00 pm)
May 2 Long Island
June 1 New York City
June 7 Albany

Practical Skills: Basic Elder Law
May 3 Albany; Long Island; Rochester
May 4 Buffalo; New York City; Syracuse
May 5 Westchester

Commercial Litigators – Primer
(two-day program)
May 5–6 New York City

DWI on Trial – The Big Apple XI
(one-and-a-half-day program)
May 5–6 New York City

Health Care Decision Making and New Legislation
May 6 Albany
May 13 New York City
May 20 Buffalo

Insurance Coverage

May 6	Buffalo
May 13	Long Island; Syracuse
May 20	Albany; New York City

Securities Law Primer: What You Need to Know

May 11	New York City

Estate Litigation

May 12	Buffalo
May 17	Long Island
May 19	Syracuse
May 24	Rochester
June 2	Albany
June 3	Westchester
June 9	New York City

Starting Your Own Practice

May 20	New York City (live session) Albany (video conference from NYC)

Practical Skills: How to Commence a Civil Lawsuit

May 23	Syracuse; Westchester
May 24	Albany; Buffalo; Long Island
May 25	New York City

Practical Skills: Basics of Bankruptcy Practice

June 14	Albany; Buffalo; Long Island
June 15	New York City; Syracuse

To register

or for more information call toll free

1-800-582-2452

In Albany and surrounding areas dial (518) 463-3724 Or fax your request to (518) 487-5618

www.nysba.org/CLE

(Note: As a NYSBA member, you'll receive a substantial discount)

NYSBA

NYSBA's CLE Online

ONLINE | iPod | MP3 PLAYER

Bringing CLE to you... *anywhere, anytime.*

All online programs available in MP3 format to download to your iPod or other MP3 player

NYSBA is proud to present the most flexible, "on demand" CLE solutions you could ask for.

With ***CLE Online***, you can now get the valuable professional learning you're after

...at your convenience.

> Get the best NY-specific content from the state's ***#1 CLE provider.***

> Take "Cyber Portable" courses from your laptop, at home or at work, via the Internet.

> Download CLE Online programs to your iPod or MP3 player.

> Everything you need to obtain full MCLE credit is included ***online!***

Come click for CLE credit at:
www.nysbaCLEonline.com

NYSBA

Features

Electronic Notetaking allows you to take notes while listening to your course, cut-and-paste from the texts and access notes later – (on any computer with Internet access).

Audio Seminars complement the onscreen course texts. You control the pace, and you can "bookmark" the audio at any point.

Bookmarking lets you stop your course at any point, then pick up right where you left off – days, even weeks later.

MCLE Credit can be obtained easily once you've completed the course – the form is part of the program! Just fill it out and mail it in for your MCLE certificate.

Requiem for a GP

The End of an Era

By Gary Munneke

Gary Munneke (gmunneke@law.pace.edu) is a Professor of Law at Pace Law School, in White Plains, New York, where he teaches Professional Responsibility and Law Practice Management. He chairs the New York State Bar Association Law Practice Management Committee, serves on President Steve Younger's Task Force on the Future of the Legal Profession, the Solo and Small Firm Coordinating Council and the New York State Bar Association *Journal* Board of Editors.

Sometime in the mid-21st century, an event will pass almost unnoticed in the public eye, a short announcement in *The Global Lawyer*, successor to the present day publication *The American Lawyer*. It will read something like this:

Last GP Closes Doors

Harvey Witsworth, 79, of Elizabethtown, New York, shuttered his office door, handed over his few remaining files to other lawyers, and headed into the mountains for a well-earned retirement, photographing flora, fauna and landscapes of the Adirondacks. He leaves behind his secretary of 52 years, Mavis Blanchard, who it was said by locals ran both his office and his life. Witsworth, a general practitioner, once described himself as a "womb-to-tomb lawyer," adding that he could "handle every legal problem a person might have, from the day they were born 'til the day they died." Members of the North Country Bar Association recalled Witsworth as the last bastion of an era when lawyers took whatever cases came their way, regardless of the type of law or complexity. Ada Rondack, a tax lawyer and president of NCBA, mused, "It's truly amazing. A lot of lawyers didn't even know that GPs still existed, and now, I guess they don't. We'll miss you Harvey."

By the time Harvey Witsworth heads for the hills, lawyers will have stopped being jacks and jills of all trades and become a variety of very specific subspecies in the genus *advocatus*. They will have traded the mantle of GP for the labels of Tax Lawyer, Divorce Lawyer, Real Estate Lawyer and every other imaginable substantive field of law. They will identify themselves as Civil Trial Lawyers, Criminal Defense Lawyers, Appellate Lawyers and Transactional Lawyers as well.

Even in 2011, while Harvey is still a young lawyer learning his craft, people do not look for just a lawyer; they want a Tax Lawyer or a Divorce Lawyer or a Real Estate Lawyer. And practitioners oblige them, by telling potential clients what cases they do (and do not) handle. Lawyers who cannot describe what kind of work they do simply cannot attract clients seeking counsel expert in specific fields of practice. Lawyers who do not have a practice concentration cannot concentrate on becom-

ing really good in any field of law. Lawyers who take whatever cases come their way will lose the good cases to other lawyers who are more focused.

Practice concentration leads to more successful outcomes than generalization, because more efficient economic models will supplant less efficient ones in the marketplace. Assume that there are two practice models and one of them produces better services at a lower cost to clients, with a higher return for the lawyers, than the other. In such a situation, over time, lawyers will gravitate to the more efficient model. In the practice of law, niche practices win out over general practices and, eventually, through a process of natural selection, the Harvey Witsworths of the world will decline and eventually disappear, as the Ada Rondacks proliferate and prosper.

One stumbling block in this economic Darwinian scenario is that inefficient economic systems can be perpetuated by government policy and/or regulation. Remember the old socialist economies of Eastern Europe? Although those systems proved economically unsustainable, they were held in place for years by repressive governments that blocked reform. Some would say that the British royal family represents such an anachronistic system as it lumbers on, supported by the will of the British people, long after most of the old European monarchies were swept away by reform or revolution.

In the case of the legal profession, the GP model is kept alive by a system of licensure and discipline, which perpetuates the myth that lawyers in America practice law the way Atticus Finch practiced in *To Kill a Mockingbird*.[1] The truth is that even in small towns in rural county seats, lawyers like Atticus are a dying breed. Why is our allegiance to the Atticus myth so strong? Perhaps we admire the Finch values of honesty, integrity, loyalty and fairness that underscore the Atticus figure in the book. We want to be like Atticus, and we have ensconced these core professional values in our ethics rules. Atticus would take on a just cause, no matter what the odds against him and no matter how unpopular his client. Atticus was a pillar of the community and a beloved parent at the same time. Atticus could handle any case that came along, because, well, because he was Atticus.

Further, in the world of Atticus Finch, clients came to see him because he had a reputation as a good lawyer, and he earned this reputation by being all things Atticus for so long. Atticus did not have billboards along the highway or an ad in the Yellow Pages. Despite his many fine qualities, he was not listed as a SuperLawyer, and we like to believe that if Atticus were alive today, he would reject such tawdry efforts to attract new clients. Atticus would bristle at the thought that practicing law was a business.

Most commentators point to *Bates v. State Bar of Arizona*[2] as the watershed moment when law became a business. In *Bates*, the U.S. Supreme Court held that lawyers had a constitutional right to truthfully communicate their availability to potential clients. A little more than a year earlier, the Court, in *Goldfarb v. Virginia Bar Association*,[3] struck down a minimum fee schedule that was imposed on all lawyers in the state. Together, these decisions had the effect of partially deregulating the practice of law, at least with respect to fees and advertising, because firms were free to compete in an open market for legal services customers. In the more than three decades since these cases were decided, the world of Atticus Finch has been turned upside down. We might debate whether these changes have been good for the profession, but whether we like them or not, lawyers in 2011 will compete fiercely to get and keep good clients, and pricing is a major component of the marketplace for legal services.

What does this have to do with generalists and specialists? It is noteworthy that the legal marketplace is not a totally free market, because it is regulated in a number of ways. One of these regulations restricts the use of specialty status by lawyers. In *Peel v. Attorney Registration and Disciplinary Commission*,[4] the Supreme Court permitted lawyers to call themselves "specialists" but permitted ethics rules to require additional restrictions to prevent the term specialist from being misleading.[5] This has had a chilling effect on the growth of legal specialties in the United States. Although the legal profession will probably never follow the path of the medical profession and limit practice in specialty areas to certified specialists, lawyers are moving inexorably in the direction of specialization. Despite the regulatory system propping up a mythical world of generalists, the marketplace favors specialists and, just as the Berlin Wall fell, Harvey Witsworth will retire.

The primary reason practice concentration prevails over general practice is that lawyers who limit their services to narrow fields of practice can master the legal knowledge and skill necessary to practice in their field at a high level of competence. A general practitioner may have some knowledge about many things, but a specialist is likely to have a great deal of knowledge about a small number of things. Despite the appeal of a renaissance legal mind, the truth is that greater is better, and renaissance minds may be ideal for conversation over a bottle of wine, but they come up short in legal services.

Lawyers who concentrate on limited types of cases can build efficiency into their delivery systems by leveraging the knowledge they amass. If Ada Rondack handles 100 tax cases per year for 15 years, she will have 1,500 tax cases under her belt. Based on her volume of cases, she can create systems, recycle forms, retrieve content and reduce throughput of legal work. She can purchase sophisticated software tools to support her system, because the cost of the technology can be amortized across all her cases. If Harvey Witsworth, the GP, takes on three or four tax cases during his career, which argu-

ably he shouldn't, it will take him more time to get up to speed, produce the work, and deliver it to the client. Not just for tax cases, but throughout his practice, Harvey is consistently reinventing the wheel. The appeal of such a practice is that the work is always new and interesting, compared to the work of the dull specialist, who sees the same basic cases over and over. But GPs cannot pay for software systems to support their ever-changing caseload, because they do not do enough work in any one area to justify the expense.

Lawyers who possess greater knowledge of a practice area and implement systems to assure quality output are less likely to be sued for malpractice than lawyers who lack such knowledge or systems. Let's say that another way: experts are less likely to make professional errors than non-experts. Malpractice carriers are helping to drive the move to specialty practice by requiring lawyers to state their areas of practice and not insuring against malpractice that results from the insured taking on a case outside the areas listed. If Harvey does not do any municipal bond work, he will not list it as a field of practice on his malpractice policy, and if he takes on a municipal bond case, his carrier will not protect him if he makes a mistake.

Lawyer specialists can communicate their availability more efficiently than generalists, because they target a narrower audience. If the lawyer's target audience is "people with legal problems," then the marketing objective is to reach the entire population; whereas, the lawyer who concentrates her practice in a narrow field can target a smaller audience of potential clients defined by the services she intends to provide. The simple economics of marketing dictate that it is cheaper to reach fewer people than more people but, beyond the general proposition, it is also true that the more finely tailored the target audience, the more surgical the marketing message can be. So not only does the specialist spend less money on marketing than the generalist, the money is better spent.

Collectively, these advantages mean that lawyer specialists can deliver better services at a lower price and still earn a greater return than generalists who cannot leverage their intellectual work product. This does not mean that generalists cannot be excellent lawyers or that specialists always deliver a faster, better, cheaper product. It does mean, however, that, on the whole, specialists trump generalists when it comes to providing the best service at the best price with the best return for the lawyer. It follows that, over time, lawyers will choose the more efficient model and become specialists, and the ranks of generalists will decline.

If generalists have an advantage in the marketplace, it may be their adaptability. Because they have some exposure to many areas of law, they may be better equipped to shift professional gears to coincide with economic changes. A lawyer who has invested in a narrow practice concentration may wake up to find that a once-booming practice area has withered almost overnight, and a lucrative business has become a worthless pit. This may be a legitimate concern, but in actuality the generalist's slight knowledge advantage may not be all that great if the level of the GP's knowledge is so basic that the specialist can reach the same level of expertise quickly or transfer skills from the old specialty area to a new one.

What will it mean for solo and small firm lawyers if they can no longer make a living as general practitioners?

What will it mean for solo and small firm lawyers if they can no longer make a living as general practitioners? First, it will mean that solo/small firm lawyers will be forced to develop a cognizable expertise, by associating with a senior lawyer experienced in a chosen field; pursuing education and training in a specialty at the JD, LLM or CLE level; or by spending time in a larger firm mastering a field of practice before going out on their own. It will be more difficult for someone to simply hang out a shingle and start practicing law, taking whatever cases happen along. It will place greater pressure on law students and recent graduates to make specific career choices at an earlier time than they have in the past.

Second, specialization will manifest itself in virtual practice. For example, a lawyer who concentrates her practice in the area of patent law may not have enough patent work in the small town where she lives to sustain a practice. A GP could have done a little of this, a little of that, and gotten by. As a specialist, she will need to have an online presence to draw clients from a larger pool to maintain sufficient volume to keep her practice afloat. More online practitioners providing similar services will drive down the price of services and challenge practitioners to distinguish themselves in the eyes of potential clients. Online lists, referral systems, social media and peer networks will become commonplace tools to connect with clients. Other forms of electronic marketing will also become common, and online practices will predominate the legal marketplace.

Third, not all lawyers will provide services directly to clients; many solo and small firm lawyers will work with

other organizations, both inside and outside the private practice of law, to complete discrete legal tasks. These contract lawyers will perform outsourced work from law firms and law departments on a project-by-project basis.[6] They will compete with off-shore outsourcers for this work. The model for the future solo lawyer will be someone who has a specific legal expertise and skill set, works virtually from home, rents conference space as necessary to meet clients or others, and handles projects for clients and/or other lawyers.

Fourth, as lawyers go virtual, they will in turn rely upon virtual staff. Although many functions once handled by paralegals and secretaries will be assumed by technology applications, when a human touch is needed, lawyers will hire support, online, for specific projects. In this sense, the cost of running a practice will be significantly reduced, because the two largest overhead expenses in the bricks-and-mortar practice world are staff and space. Virtual lawyers will have to spend more money on technology than their precursors, but the cost of this technology will be amortized across all the work they do.

Finally, the more routine the work in the virtual marketplace, the more price sensitive it will be. Generic services will provide the narrowest profit margins, and many solo and small firm lawyers will have to compete in this environment. As services move away from generic in the direction of unique, they become less price-sensitive. Lawyers will be challenged to add value to the work they do, communicate this value to clients, and gain recognition as experts in their fields of practice. The generalists, like Harvey Witsworth and Atticus Finch, endangered species in 2011, will become extinct in the not-so-distant future.

Perhaps there is a window of opportunity for the generalists. Just as the medical profession has created the primary care physician, who serves as the first point of contact for patients, and a referral source for medical specialists, there may be room for a primary care lawyer, who sees clients when they are legally injured and refers them to a legal specialist who can serve their needs. Such a lawyer could be funded by referral fees from the specialists, because we do not have an insurance system that pays the primary care professional as medicine does. The primary care lawyer would have to be trusted by people in the community, possess a broad general knowledge of legal problems, and maintain contacts with a wide variety of specialists in order to make the right referral in the right circumstances. Just imagine:

Atticus Finch
Primary Care Lawyer
Case Evaluation and Referrals

Conclusion

Much has been written about the transformation of large firms from big, to bigger, to colossal, but much less about the future of solo and small firm practice. Yet it should be clear from this article that the changes that have transformed BigLaw have not left LittleLaw unscathed. In order to survive in these times, lawyers have to develop a cognizable expertise. Whether we call this expertise a concentration, a niche, or a specialty, the shift away from general practice is changing the way that solo practitioners and small firm lawyers work, including the way they connect with clients, deliver their services and charge fees.

The implications of this transformation are affecting the timing and process of making career choices, as well as the ways that young lawyers gain experience and training. Technology contributes to this paradigm shift by making information available in more places and in greater quantity and by forcing small firms and solos to focus on the qualitative aspects of the advice they give and how to compete with virtual service providers in the marketplace.

This issue of the *Journal* includes other articles on how the world of solo and small firm practitioners is changing:

- Nicole Black and Carolyn Elefant examine the emerging use of social media by solos and small firms, including the ethical considerations that online lawyers face, in their article, "Social Media for Solos and Small Firms." Based on their best-selling American Bar Association book *Social Media for Lawyers*, the article provides a jumping-off point for solo and small firm lawyers ready to take the plunge into social media.
- Also in the area of legal technology, practitioner/technology consultant John McCarron provides guidance for solos and small firms in their efforts to create and operate websites. His advice may also be relevant to lawyers in larger organizations, but larger firms often have tech support that handles website management and a host of other technology applications. Solo and small firm lawyers often make decisions about technology with only their wits and vague advice to guide them. McCarron offers specifics that people can use.
- In "Succession Planning for Solos and Small Firms," Arthur Greene, who has contributed previously to the *Journal*, offers practical advice about the options available to solo practitioners and small firm lawyers planning to retire from practice. Too often lawyers fail to deal with succession issues, with unfortunate results for themselves, their families and the lawyers with whom they practice. Greene reminds us that it does not have to be that way and offers us practical help to reach our retirement goals.

- Cynthia Feathers, another previous contributor, and co-author Craig Brown address the use of contract attorneys by small firms in their article, "Contract Attorneys: How a Small Firm Can Reap Huge Benefits." If small firms can reduce overhead by reducing the size of their permanent payroll, they can improve their efficiency and profitability in these competitive times.

As the *Journal* showcases articles on solo and small firm practice, the editors hope that the issues raised in these articles not only provide practical advice on successfully running a practice, but also generate serious conversation about the future of solo and small firm practice. While this article predicted – half tongue-in-cheek – the end of general practitioners, it categorically did not suggest an end to solo and small firm practice. The nature of legal work is such that much of it can be handled by individual lawyers, and it follows that some individual lawyers will deliver services alone, rather than as part of a larger organization. It is also fair to say that small law firms, comprising no more than a handful of lawyers, will continue to operate, even if the largest corporate firms continue to grow. Solo and small firm practitioners do themselves a disservice, however, when they do not take the time to think about how the world around them is changing and to position themselves to weather the monsoons most effectively. ■

1. Harper Lee (1960).
2. 433 U.S. 350 (1977).
3. 421 U.S. 773 (1975).
4. 496 U.S. 91 (1990).
5. *Id.*
6. *See* Tina Brown, "The Gig Economy: Now That Everyone Has a Project-to-Project Career, Everyone is a Hustler," The Daily Beast Blogs & Stories (Jan. 12, 2009, 5:34 a.m.), *available at* http://www.thedailybeast.com/blogs-and-stories/2009-01-12/the-gig-economy. The "Age of Gigonomics" is discussed in the first part of Rachel Littman's article "Training Lawyers for the Real World," in the September 2010 issue of the *Journal.*

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) practices as a plaintiff's personal injury lawyer in New York and is the author of *New York Civil Disclosure* (LexisNexis), the 2008 Supplement to *Fisch on New York Evidence* (Lond Publications), and the *Syracuse Law Review* annual surveys on Disclosure and Evidence. Mr. Horowitz teaches New York Practice, Evidence, and Electronic Evidence & Discovery at Brooklyn, New York and St. John's law schools. A member of the Office of Court Administration's CPLR Advisory Committee, he is a frequent lecturer and writer on these subjects.

More "Enjoyment of Life" (Part II)

Introduction

The previous issue's column began a review of the divergent treatment that claims for "loss of enjoyment of life" receive in the four appellate divisions. This issue's column completes that review.

The Door Opens Again in the Fourth Department (Maybe)

In 2009, the Fourth Department, while reiterating that claims including "loss of enjoyment of life" do not place the plaintiff's entire medical history in controversy, nonetheless directed that an *in camera* review of certain medical records of the plaintiff be conducted:

> In bringing the action, plaintiff waived the physician/patient privilege only with respect to the physical and mental conditions affirmatively placed in controversy. Here, all of plaintiffs' claims of injury and damages arise from the alleged undiagnosed cancer and its sequelae. Contrary to defendants' contentions, the allegations in the bill of particulars that plaintiff sustained, inter alia, mild cachexia and anorexia, loss of enjoyment of life, disability, disfigurement, fear of death, and extensive pain and suffering do not constitute such "broad allegations of injury" that they place plaintiff's entire medical history in controversy. Thus, as previously noted, the court abused its discretion in compelling plaintiff to provide authorizations with no date restrictions without first conducting an in camera review of the records of treatment outside the specified time periods.[1]

It is interesting to note that the *Tabone* court cited a 1998 Fourth Department case, *Geraci v. National Fuel Gas Distribution Corp.*,[2] as authority. The Fourth Department, in that case, affirmed a trial court's order directing the plaintiff to exchange the names of all those who provided him with medical care beginning five years prior to the date of the alleged accident and the medical authorizations as demanded by the defendant:

> We affirm that part of the order requiring plaintiff to execute the broad medical authorizations demanded by National Fuel and to disclose the names of medical providers who treated other illnesses and conditions of plaintiff. In bringing an action for personal injury, a plaintiff waives the physician/patient privilege with respect to any physical or mental condition affirmatively placed in controversy. The waiver extends not only to records of postaccident treatment, but also to records of preaccident treatment of the same anatomical parts to which plaintiff claims injury. Here, the complaint alleges that plaintiff has suffered injury, pain, emotional upset, confinement to bed and house, and loss of enjoyment of life as a result of the accident. Given those broad allegations of injury and disability, we conclude that plaintiff's entire physical condition has been placed in controversy, especially insofar as plaintiff may have experienced other potentially debilitating medical problems before or since the accident. Such other medical conditions are relevant to damages.[3]

Late in 2010, the Fourth Department cited both *Tabone* and *Geraci* in *Tirado v. Koritz*.[4] In the portion of the opinion citing *Geraci*, the court held:

> We conclude, however, that plaintiffs' "broad allegations of injury" also place the medical history of plaintiff predating the hysterectomy in controversy. The court therefore should have directed plaintiffs to submit to the court for in camera review a certified complete copy of plaintiff's records from Community Blue and Empire Medical Services prior to October 15, 2007.[5]

It is difficult to parse the differences in the plaintiffs' allegations resulting in seemingly contradictory findings, and while *Geraci* may have been ignored in recent years, its citation by the Fourth Department in its October 1, 2010, decision in *Tirado* certainly revives it. Given the recent and clear mandate in *Tabone*, and earlier decisions such as *Bozek*,[6] it would appear that it is safe to allege "loss of enjoyment of life" in the Fourth Department without automatically effecting a complete waiver of the physician-patient privilege. However, an *in camera* review may be ordered and an exchange of records directed as a result thereof.

And What About the First Department?

The situation in the First Department is a bit murkier. In a 1998 decision, *L.S. v. Harouche*,[7] the First Department reviewed an action where the plaintiff withdrew, prior to trial, claims of emotional and psychological damage. Accordingly, the First Department held that the plaintiff's psychiatric records were properly held inadmissible, and the court rejected as well the defendants' argument that the records were admissible as to credibility, holding "it was properly ruled inadmissible as collateral."[8] The court then addressed the trial testimony in light of the plaintiff's claim of loss of enjoyment of life, which had not been withdrawn:

> Contrary to defendant's argument, plaintiff's testimony regarding her loss of enjoyment of life was limited to the physical effects of defendant's malpractice. In the few instances where plaintiff testified about being "upset," the court struck her responses. Since plaintiff's psychiatric history was not probative of her claimed injury, it was properly excluded.[9]

Does this mean that the First Department limits testimony on a claim of loss of enjoyment of life to the physical effects of an injury and bars testimony concerning any emotional component of that injury? This was the conclusion of Justice Joan B. Carey in *Mora v. St. Vincent's Medical Center*:[10]

> With respect to the question posed to the plaintiff regarding whether she had ever been diagnosed with a psychological disorder, the record before the court is insufficient to make a determination concerning the propriety of the plaintiff's refusal to answer that question. In the event that the plaintiff's claim for loss of enjoyment of life is limited solely to the physical effects of the defendants' alleged malpractice, then questioning regarding the plaintiff's mental state would be improper. Conversely, if the plaintiff seeks to recover for any specie of emotional or psychological damage, then defense counsel would be entitled to probe the plaintiff on the issue of her mental health history at her continued deposition and obtain authorizations to obtain copies of medical records related thereto. Accordingly, the plaintiff may, if she has claims for emotional or psychological damages, execute an unequivocal stipulation withdrawing such claims, or, alternatively, the plaintiff may answer questions posed to her at her continued deposition regarding her mental health history and provide defense counsel with HIPAA compliant authorizations for mental health care providers.[11]

Justice Michael D. Stallman offered a thoughtful analysis of the issue in *Richman v. Ilan Properties, Inc.*:[12]

> The Court does not find that the record supports that plaintiff has placed her mental condition at issue in this case. Allegations of pain and suffering are not sufficient to place the plaintiff's mental condition in controversy. The allegations of anxiety and mental anguish must be understood in the context of consistent representations by plaintiff's counsel that plaintiff is claiming pain and suffering resulting from physical injuries, not emotional injuries separate from pain and suffering. "The term 'pain and suffering' encompasses all items of general, non-economic damages. . . ." 1 NY PJI3d 2:280, at 1538 (2009). Thus, "pain and suffering" includes mental suffering and shock and fright. Plaintiff's alleged severe headaches, migraines, dizziness, and vertigo are not mental health injuries. Ilan Properties, Inc. apparently believes, erroneously, that a neurological condition or physical impairments resulting from neurological injuries is synonymous with a mental condition.[13]

Whether there is a true difference in the decisions of Justices Carey and Stallman is unclear, although "any specie of emotional or psychological damage" and "mental suffering" do appear to overlap.

Conclusion

Until such time as the Court of Appeals weighs in on the issue, the extent, if any, to which a claim of loss of enjoyment of life will open the door to additional disclosure is dependent upon the department in which an action is brought and may be dependant upon the individual justice or appellate panel assigned to a case. ■

1. *Tabone v. Lee*, 59 A.D.3d 1021, 873 N.Y.S.2d 401 (4th Dep't 2009) (citations omitted); *cf. Geraci v. Nat'l Fuel Gas Distrib. Corp.*, 255 A.D.2d 945, 946, 680 N.Y.S.2d 776 (4th Dep't 1998).
2. *Geraci*, 255 A.D.2d 945.
3. *Id.* at 946 (citations omitted).
4. 2010 N.Y. Slip Op. 6919, 2010 N.Y. App. Div. LEXIS 6996 (4th Dep't 2010).
5. *Id.* (citation omitted).
6. *Bozek v. Derkatz*, 55 A.D.3d 1311, 865 N.Y.S.2d 163 (4th Dep't 2008).
7. 260 A.D.2d 250, 690 N.Y.S.2d 1 (1st Dep't 1999).
8. *Id.*
9. *Id.* (citations omitted)
10. 8 Misc. 3d 868, 800 N.Y.S.2d 298 (Sup. Ct., N.Y. Co. 2005).
11. *Id.* (citations omitted).
12. 2009 N.Y. Slip Op. 31059U, 2009 N.Y. Misc. LEXIS 5157 (Sup. Ct., N.Y. Co. 2009).
13. *Id.* (citations omitted).

Editor's Note: This article was adapted from *The Lawyer's Guide to Social Media*, by **Nicole Black** (nblack@nicoleblackesq.com) and **Carolyn Elefant** (carolyn@carolynelefant.com) published by the American Bar Association Law Practice Management (available at http://ababooks.org), and included in Ms. Elefant's presentation on social media for solos and small firms at the New York State Bar Association's November 2010 Conference for Solo and Small Firm Lawyers. Although many of the observations apply to all lawyers, they are particularly apropos to practitioners in the solo and small firm environment.

Social Media for Solos and Small Firms: What It Is and Why It Matters

By Nicole Black and Carolyn Elefant

Let's face it, social media can be overwhelming. You've probably been inundated with articles, emails and free webinars from self-professed social media experts who rave about the magical power of social media to attract dozens of clients, invigorate your practice and transform a kid out of law school into an insta-expert on a specific legal topic in 60 days or less. On the other end of the spectrum are the naysayers, who, of course, warn that social media is at best a frivolous time sink and at worst a risky proposition that exposes lawyers to ethics violations and jeopardizes their privacy and reputations.

From our perspective, though, social media is neither inherently wondrous nor worthless, but rather it derives its value from what you make of it. We believe in lawyers using a practical, goal-centric approach to social media, with the goal of enabling lawyers to (1) identify the social media platforms and tools that fit their practices and (2) implement their use easily, efficiently and ethically.

With that in mind, here are three themes that lawyers must grasp in order to use social media effectively today and beyond:

- Social media is not a fad or frivolity, but a paradigm shift sweeping both the legal profession and society at large;
- A social media presence is a tool for achieving your goals and not, in itself, a goal;
- The use of social media does not transform otherwise appropriate conduct into something unethical.

If solo and small firm lawyers understand these three concepts, their use of social media and the results they achieve will prove more positive over time. We discuss these below.

Social Media Is Not a Fad

Many lawyers view social media either as a passing fad or a frivolity for those with too much time on their hands. But lawyers who dismiss social media do so at their peril. Not only is social media gaining traction within the public at large, but it is permanently altering the way that potential clients – from individual consumers to the in-house counsel of mega-corporations – evaluate their need

for legal services and identify and select the lawyer best suited to serve those needs.

There are several reasons why social media will continue to grow in prominence.

The Face of the New Generation

Social media is no longer just for kids. Consider Facebook, a top-three social media platform with more than 400 million users worldwide.[1] Facebook initially launched across college campuses in 2003 and its first generation of users are entering the workforce en masse, poised to become tomorrow's potential law firm clients, if they haven't already. Rather than abandoning Facebook after leaving campus, they are integrating Facebook into their professional lives, using it to stay in contact with friends and co-workers, network, make hiring decisions (or at least vet potential candidates) and promote their companies. Moreover, these early adopters are converting others; the fastest growing demographic on Facebook is 35 years old and older.

The Informed Consumer

When is the last time you called a travel agent for assistance in planning a trip or consulted the Yellow Pages to find a pet sitter or a music teacher? Chances are that you – and most other consumers – jump right online instead, not just to find hotels or service providers but also to see how they've been rated by other users.

Not surprisingly, this applies when individuals seek legal assistance. Gone are the days when consumer clients pick up the Yellow Pages to find a lawyer or that corporate counsel crack open a tome of Martindale-Hubbell to locate representation in another jurisdiction. Instead, empowered by the deep pool of resources available online, consumers and corporate counsel alike are inclined to educate themselves about various legal issues through blogs, online video and conversations in online community sites before they even compile a list of potential lawyers. Moreover, once prospective clients start to gather names of lawyers – either directly through Internet searches or via personal referrals – they then go back online to check out the lawyers' credentials, experience and testimonials and get feedback from other clients and colleagues.

Further, recent studies show that consumers trust the information they locate online. The Pew Report[2] found that nearly 40% of Americans doubted a medical professional's opinion or diagnosis because it conflicted with information they had found online. Likewise, consumers take peer reviews seriously, with 78% relying on ratings and reviews in making purchase decisions.[3]

Social media gives lawyers the tools to provide potential clients with the kind of in-depth information that they've come to expect to find online prior to making any kind of decision requiring a significant commitment of resources. Bottom line: If you're not using social media, you can't deliver the kind of information that today's clients demand before they hire a lawyer.

The Need for Personal Connections

Even as we spend more time online, as humans we crave some form of personal connection. Even in business, personal connections matter because we're more likely to do business with people we enjoy spending time with.

Social media satisfies our longing for human contact and provides a tool for building trusted, multidimensional relationships. Platforms like Twitter and Facebook give lawyers a chance to reveal a little piece of personality or share tidbits about their family, hobbies and quirky likes and dislikes. Meanwhile, for those uncomfortable mixing business with pleasure, there are other tools – like blogging – for expressing opinions and engaging in conversation about court cases or other legal matters. Whether it's a recipe exchange or a discussion about your favorite sports team on Twitter, or a heated exchange through blogging, the interactive nature of social media helps build deeper and more meaningful connections online, which eventually translate into offline business and friendship.

Social Media Is Fast and Cheap

In a society that's on the go 24-7, social media delivers the news at a record pace. In a few minutes a day on Twitter, participants can get the news more quickly than by scanning the newspaper. And as society continues to move at this pace, social media's currency will become even more valuable. What's more, social media is largely free, which makes it harder to ignore.

Social Media Is a Tool for Achieving Your Goals

You may be familiar with some of social media's power users owing to the media coverage that they've garnered: David Barrett, who describes himself as "the most linked in lawyer in the world" with over 12,000 connections on LinkedIn; solo lawyer Richard Vetsein, who gathered 600 fans for his law firm's Facebook Fan Page in a matter of weeks; or Rex Gradeless, a recent law grad who has over 73,000 followers on Twitter.

While these numbers are impressive, don't let them intimidate you about jumping on board with social media. We can't emphasize enough that social media is a tool to achieve your professional goals, not a goal in and of itself. In contrast to a frequent flier program where accumulated miles translate into a free trip, racking up friends, followers or blog visitors just for the sake of doing so won't necessarily confer rewards like more referrals or clients. Moreover, you're likely to annoy your colleagues and waste your time with obsessive efforts to gain more followers.

Actually, social media eliminates the need to generate presence through big numbers, which is a loser's game,

particularly for solo and small firm lawyers. Instead, social media gives you the ability to focus your message on your specific target audiences and develop a strategy tailored to carry out your goals.

Social Media Doesn't Make Ethical Conduct Unethical

Appropriate Conduct

Many lawyers are hesitant to adopt social media, concerned that unresolved ethics issues could put them at risk of a grievance. What's important to understand, however, is that social media changes the medium, not the message. In other words, lawyers don't check their ethics obligations at the social media portal. Even in this new frontier, the same familiar ethics rules guide lawyers' conduct.

For example, a communication that's inherently unethical – such as revealing a client confidence – doesn't become any more unacceptable when the information is disclosed in a 140-character tweet, e.g., "In NYC court. Client just told me that the heroin belonged to him! Ugh, case ruined." Conversely, a blog post analyzing a recent case or explaining how to file for bankruptcy isn't transformed into bar-regulated advertising merely because it's self-published online. It would be viewed as harmless if published in a law journal or as a newspaper column.

Once lawyers recognize that communications on social media don't differ much from those in other arenas, they can conform their use of social media tools to existing ethics requirements, just as they do for other areas of their practice. The ethics issues that relate to social media raise the broader question of whether some lawyers do not utilize many online tools because of concerns about violating ethics rules.

Are Ethics Rules Keeping Lawyers Offline?

The summary results of the ABA 2008 Technology Survey reveal a tremendous disconnect between lawyers' use of the Internet as a source of information as compared to their use of online tools for marketing. According to the survey, 79% of lawyers receive information through news websites, while 59% subscribe to email newsletters. By contrast, substantially fewer lawyers blog (just 2%) or participate in social networks (15%). In fact, barely more than half of solo and small firms – just 52% – even have a website.

On one level, the disparity between lawyers' use of the Internet as a source for news and for marketing and online relationship-building on the other might be attributed to lawyers' lack of time. After all, blogging or actively engaging in social networking consumes more time than scanning a few newspapers online. But increasingly, I'm convinced that fear of sanction for marketing conduct deters lawyers from truly exploiting the potential of online marketing.

In addition to the statistics, several anecdotes corroborate this theory. In a recent listserve discussion, several colleagues shared that they would not use Twitter because of concerns that their participation could inadvertently breach client confidences or expose them to a potential grievance or malpractice liability (for example, an offhand tweet reading, "The judge was really a jerk" might lead a client to complain that the lawyer should have filed a motion to recuse the judge).

> Gone are the days when consumer clients pick up the Yellow Pages to find a lawyer or corporate counsel crack open a tome of Martindale-Hubbell to locate representation in another jurisdiction.

The spate of well-publicized lawsuits against commercial companies involved in lawyer marketing further fuels lawyers' fears. For example, earlier this year, a lawyer filed ethics complaints in 47 jurisdictions against Total Attorneys, arguing that the company's performance-based online marketing lead generation system was tantamount to an impermissible for-fee referral service. Likewise, Avvo and SuperLawyers, two companies that rate and list lawyers and allow lawyers to post the resulting ratings on their websites, were the subject of lawsuits or ethics complaints charging that these ratings systems are misleading to consumers and thus violate proscriptions on deceptive advertising. Though Avvo and SuperLawyers eventually prevailed, their victory offers little comfort to solo and small firm lawyers contemplating online marketing who lack the resources to serve as an ethics test case.

Still, lawyers must not allow the hype surrounding these isolated cases to deter them from engaging in online marketing. By familiarizing themselves with applicable ethics rules, understanding some of the best practices outlined below, and consulting with bar regulators when uncertain, lawyers can inoculate themselves against grievances and, more important, exploit the enormous marketing and relationship-building potential that the Internet offers.

Continued on Page 22

Announcing the **newest principals** in our New York office

Brett Cooper

Rick Halper

Kyle Lonergan

The **world's leading companies** take us to court.

McKool Smith

A PROFESSIONAL CORPORATION • ATTORNEYS

www.mckoolsmith.com

888.978.0213 | 212.402.9400

Dallas | Austin | Marshall | New York | Washington DC

Continued from Page 20

Best Practices

1. Read the Bar Rules.

It is absolutely imperative that you, personally, take the time to read and familiarize yourself with your jurisdiction's ethics rules governing advertising. All too frequently, lawyers will rely on rumors that certain conduct is not permitted, when in fact, the situations that were the basis for the rumors involved conduct in another jurisdiction, were distinguishable on their facts – or the rumors were just plain wrong. A recent ABA Teleconference on Ethics in Web 2.0 Marketing emphasized the importance of reviewing ethics rules since each jurisdiction takes a different approach. The ABA conveniently provides links to each state's advertising ethics rules to make it easy for lawyers, particularly those licensed in several jurisdictions, to check them.

2. Understand the Categories of Conduct That May Raise Red Flags.

You'd go crazy trying to memorize the specifics of every ethics rule. And the crazy-patchwork of ethics regulations for 50 different jurisdictions certainly can't be summarized in a blog post. As a first step, what's more important than the specifics is issue spotting – the ability to recognize those categories of conduct that may raise ethics red flags. Once you encounter an activity that you think may raise an ethics issue, you can review your ethics rules and any related ethics opinions to determine whether the activity is permissible. To help with the process, what follows are most of the most popular online marketing tools and the corresponding ethics issues that they may implicate:

- *Social Networking Sites.* Social networking sites like Facebook or MySpace allow users to upload photos and exchange personal information. Though there's certainly plenty of opportunity for stupidity in this regard (such as uploading photos of yourself drunk or wearing a skimpy swimsuit), stupidity alone won't necessarily trigger an ethics complaint. When it comes to social networking sites like Facebook, lawyers and even judges run into trouble when they attempt to use the site in a deceptive manner or engage in ex parte communications. In 2009, a North Carolina judge was reprimanded for "friending" one of the lawyers in a case before him. Also that year, the Philadelphia Bar Association ruled that a lawyer could not ask a third party to "friend" a potential witness in a case in order to gain access to the witness's Facebook page.
- *Websites.* In many jurisdictions, a law firm website is considered "advertising," just like a newspaper ad or a law firm brochure. As such, a website may be subject to certain bar regulations that govern print ads, such as prior review or a requirement that the site contain a disclaimer or notice stating that the site constitutes advertising. Prohibited communications include the same types of communications prohibited in print ads or brochures such as: (1) deceptive and misleading statements (such as guaranteed results) or statements that cannot be factually substantiated (e.g., "We are the best lawyers in town!"), (2) claims of specialization may also be prohibited, and (3) use of monikers or prohibited logos (such as "The Heavy Hitter" or a pit bull logo, which isn't allowed in Florida).

  In contrast to print ads or brochures, websites also present special ethics considerations. Because websites are viewable anywhere in the world rather than just a specific geographic location, they can give rise to potential claims of unauthorized practice of law (UPL). Accordingly, your website should specify the states where you are licensed to practice and can handle cases. Also in contrast to a brochure, a website opens the door for readers from anywhere to contact you by email, so be sure to include a disclaimer that sending an email does not trigger an attorney-client relationship. This prevents a user from claiming that you never responded to her email and caused her to miss the statute of limitations on her suit.
- *Blogs.* If you publish an article in a journal or newspaper, you typically aren't required to include a disclaimer that your article is advertising. That's because many bars treat articles as educational tools rather than communications intended to attract paying clients. Under some bar rules, this same reasoning might apply to blogs that merely provide commentary or discuss case law rather than solicit business, thus exempting blogs from regulation as lawyer advertising. Again, check your bar rules, because some specifically include blogs within the definition of "advertising" or define advertising in such a way that blogs fall within the scope of the definition.

  So what types of issues do blogs raise? In addition to the considerations that apply to websites, one concern about blogs is that readers may rely on your advice and then try to hold you accountable if they relied on it to their detriment. Include a disclaimer on a blog that the posts address general matters and should not be relied on by readers or considered legal advice. Lawyers who blog should also avoid discussing "live" cases to avoid running afoul of court gag orders or inadvertently disclosing a strategy to opposing counsel. Finally, a recent law review article suggests that blogging can raise ex parte concerns, though others disagree (as do I).

  Though not necessarily an ethics issue, for the sake of transparency, lawyers who blog should disclose whether they have a personal interest in one side of

an issue or another (e.g., if you blog about a client that your firm represents, you ought to disclose that to readers). And if lawyers make recommendations about a product where they retain a financial interest (such as affiliate fees), they should be wary of proposed Federal Trade Commission rules which may crack down on undisclosed blogger endorsements.

- *URLs.* A website's URL, or Web address, can raise ethics issues in some jurisdictions. For example, some states that prohibit use of phrases like "State X Law Clinic" or "Jones Legal Aid" because of the potential for confusion with bonafide legal aid organizations likewise prohibit use of these names for a website address, e.g., statexlawclinic.com. However, don't assume that all states apply the same rules to law firm names and website URLs. In New York, law firms are barred from using trade names (e.g., BlueSky Law Firm) but may use a trade name for a website or blog (so BlueSky Law Firm as a firm name is prohibited, but www.blueskylawfirm.com as a website name is not). Many states also allow lawyers to use descriptive names for websites – such as NewYorkCollectionsLawyer.com or MadisonWisconsinTrustsAttorney.com – so long as the names are not deceptive or misleading.

  Most state ethics codes offer fairly clear guidance on trade names and website names. Take the time to review them or you could potentially miss out on a desirable name because you mistakenly assumed that your ethics rules wouldn't allow it.
- *Rating Sites.* As already mentioned, sites like Avvo and SuperLawyers rate lawyers. While lawyers won't be subject to an ethics complaint when a rating is performed by a third party, lawyers may, in some jurisdictions, be prohibited from using those ratings in ads and on websites.
- *Testimonial Sites.* Testimonials and endorsements are ethical red flags in advertising because they can create an expectation of success or discuss matters that cannot be factually verified (e.g., "My lawyer was the best!"). Websites like Avvo or LinkedIn allow clients and lawyers to post endorsements or testimonials and where a third party outside the lawyer's control posts the testimonial (as opposed to the lawyer himself), it's doubtful that the bar would have the jurisdiction to require a take-down.

  The real ethics question arises where lawyers want to link to testimonials posted at a third-party site or put those testimonials up at their websites. Check whether your bar's rules permit use of testimonials in advertising; but again, read the rules carefully. Some states ban testimonials by clients, but still allow endorsements from lawyers or colleagues.
- *Twitter.* At first blush, Twitter, a micro-blogging tool which allows users to exchange 140 character sound-bites seems harmless enough. After all, how many ethics rules can you violate in just 140 characters?

  Plenty, if you're not careful. A lawyer who tweets about a bad day in court ("Bad day. Case is a dud and we will lose.") may inadvertently convey client confidences or private deliberative work product to opposing counsel. Similarly, a lawyer who asks a follower who tweeted about a car accident whether she needs a lawyer may run afoul of bar rules prohibiting solicitation. Ethics rules don't prohibit lawyers from participating in Twitter, but neither does the limited scope of a tweet absolve lawyers from adhering to ethics requirements.
- *Listserves, Chat Rooms and Q&A Fora.* The Internet affords lawyers many opportunities to interact with lawyers and non-lawyers in a variety of settings. When participating in chat rooms or responding to questions, lawyers should avoid giving specific advice or they run the risk of potential UPL claims or exposure to liability where another party relies on the advice.

3. Serving Consumers of Legal Services.

State bars developed ethics rules to protect the public from predatory lawyers who engage in deceptive advertising. Unfortunately, stringent regulation of online lawyer marketing has the unintended consequence of deterring lawyers from using online tools like websites or blogs, which can provide valuable information to consumers, or engaging in social networking sites where clients can learn more about lawyers whom they might want to hire. Ultimately, instead of protecting the public, strict oversight of online advertising has left consumers with fewer options and less information about lawyers and the law. Not only do we lawyers owe it to ourselves to engage in as much online marketing activity as is ethically permissible to build profitable practices, but we owe it to the public to disseminate as much information about our practices as possible so that consumers can make informed decisions when they hire a lawyer.

Conclusion

We end this article with a reminder: Social media is neither inherently wondrous nor worthless. It is a tool. Its value is derived from what you make of it, and its value will increase along with your skills in using it. ■

1. http://www.facebook.com/press/info.php?statistics.
2. http://hbr.harvardbusiness.org/2009/11/community-relations-20/ar/1.
3. http://itpromarketer.com/2009/11/social-media-revolution.

Attorney Websites for Solos and Small Firms

By John R. McCarron, Jr.

It's a decade into the 21st century. As an attorney, if you don't have a website, you need to get one (and soon). Websites are the 21st century calling card. Whether simple or complex, every attorney needs some sort of Web presence. Clients WILL look you up on the Internet. Even if your business is almost completely referral based, clients will look you up. If you don't have a Web presence, they will at best wonder why and, at worst, move on to another referral. Just like you wouldn't dare walk the streets without a business card in your pocket, you should not have a presence on the Internet without a website detailing you and your practice.

Small firms and solo practitioners are not immune from the trend for law firms to establish a Web presence. In fact, a good argument can be made that smaller practices need websites even more than larger ones. Although this article should be relevant to all lawyers, it is intended to speak especially to practitioners who will not have the benefit of an in-house IT department to create and manage a website.

The Good News (and the Bad News) About Websites

The good news is that putting up a website is easy, even for those who do not consider themselves technologically savvy. There is a plethora of services available on the Internet that will create a basic website for you, utilizing existing templates and designs, for as little as $5/month. Services such as these provide you with a basic website, allowing you to publish your law firm's information, pages about the attorneys at your firm, firm contact information, basic information on your practice areas and so on. Many of these services will even purchase your domain name for you, handling all of the back end routing of IP (Internet protocol) addresses, DNS (domain

John R. McCarron, Jr. (john@mccarron.net) is owner, McCarron Consulting Group LLC, and partner, Montes & McCarron, Attorneys & Counselors at Law, PLLC. He is a graduate of Western Connecticut State University and received his J.D. and certificate of concentration in International Law from Pace University School of Law and an LLM in Real Estate Law.

name system) and other technical areas that most attorneys will not want even to think about. Further, most of these services will give you access to an email address with your domain name, so you can stop using that @aol.com email address you got in 1998.

Much debate and some mysticism surround the ultimate selection of a domain name. Should you select a keyword-rich domain name such as new-york-dwi-lawyer.com or a name more readily identifiable with your firm, such as smith-smith-smith-llp.com? At conflict are Rule 7.5(e)(1)–(4) of the New York Rules of Professional Conduct, which attempts to place a strict bridle on the use of domain names that don't include the attorney and/or firm's name and the use of such keyword-rich domain names which may tempt and ultimately tame the Google search algorithm. It should be noted that in *Alexander v. Cahill*,[1] the U.S. Court of Appeals for the Second Circuit upheld the constitutionality of the content-based restrictions of 22 N.Y.C.R.R. § 1200.50(c)(7), that is, utilizing a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter. This may ultimately apply to domain name usage, so one should exercise caution as to the choice of the motto-type domain, so that it does NOT "imply an ability to retain a result in the matter."[2] On the non-legal end of the spectrum, Google seems to have made this topic somewhat moot by significantly reducing algorithmic weight of keyword-centric domain names in its formula and resultant output. Google likes longevity more than anything else when it comes to domain names. The longer a domain name has been registered and tied to a website with meaningful content, the more weight that name carries. John-Smith-Esq.com and a 10-year online track record will far outweigh a newcomer with best-dwi-lawyer-in-new-york.com.

The bad news is that just having a website will not translate into a windfall of new clients ringing your phone off the hook (although this *can* happen on occasion); that takes a lot of work (and sometimes, a lot of money). Having your website optimized to be found in Web searches (Google, Yahoo, AOL, . . .), often referred to as SEO (search engine optimization), can be an exhausting task, one best left to the experts. We'll explore this later in the article.

Websites come in all different shapes and sizes and have commensurate costs. To make an overly simplified analogy to automobiles, they can range from a Ford Focus (not to knock Ford . . . they make a great product) to a Mercedes S-Class (or even a Ferrari). A Ford Focus does its job and does it well. It gets you from point A to B, is good on fuel consumption, and has a low total cost of ownership. But let's face facts: it doesn't get a lot of attention or turn many heads. On the other hand, a Ferrari still gets you from A to B, with much more speed and infinitely more head turning, but with a price tag that most people cannot justify. The point is: if you need a car, you will find one somewhere along the vast array of available automobiles. The same thing goes for attorney websites. Just as we all need transportation, we all need (yes *need*, not should have) a website. Where you fall within the continuum of websites is a decision based upon what you want it to provide for your practice.

The Quick and Easy (Do It Yourself, or Have Your Computer Geek Nephew Do It)

If you don't have a website – get one. As previously stated, there are many services that will provide you with a very inexpensive, generic website, for little more than the cost of a cup of gourmet coffee. A few examples are Intuit Small Business (www.intuit.com), GoDaddy (www.godaddy.com), 1&1 (www.1and1.com/hosting), Yahoo Small Business Web Hosting (smallbusiness.yahoo.com/webhosting). All these services charge a small monthly fee and provide a website, domain registration and basic email service with your personalized domain.

Most of the services in this range offer tools to create basic web pages, edit text, add and edit photographs and even include basic "get yourself started with SEO" modules. Using the editing function of these web packages is usually no more difficult than creating a Word document. The interface shares many of the basic text editing features you are likely used to, including text font selection, size, bold/italics, centering and so on. Also provided are selections of templates geared to many types of businesses. Several of these would be more than fitting for an attorney's first foray into a Web presence. Some offer basic SEO strategies such as the placement of keywords, back-end coding of keywords, and even a free starter package with Google Ad-Words.

The next best option to do-it-yourself could be described as have someone do it for you. If all you are looking for is a basic website, a family member or friend who knows even a little about HTML (the basic markup language that Web pages are written in) can devise you a website and have it hosted for a few dollars a month. In this scenario, you would procure a domain name from one of the major domain registry services such as Network Solutions (www.netsol.com), GoDaddy (www.godaddy.com), Register.com (www.register.com). After procuring the domain name, the website would be written, loaded onto a Web hosting company's server, and the domain name servers (DNS) at the registrar would be pointed to your Web hosting server.

If computing is totally foreign to you, but you have someone, even an assistant, who has basic computer skills, he or she could utilize one of the services mentioned previously. Even the most neophyte computer user can usually construct an acceptable website in an afternoon or two using the tools mentioned thus far. Put on a pot of coffee, lock your office door and turn off your phone. It's not as hard as you think.

These approaches fall under the "Ford Focus" approach to a website. It's quick, easy and simple, can be accomplished in a few short hours, and will give you a basic presence on the Web.

Custom Website Development

The next step up in website solutions, say the mid-range car . . . maybe a Honda Accord, is custom development of a website. Hiring someone who specializes in website construction and development will incur a somewhat significant upfront cost, ranging from $500 to $15,000, and even more, depending on how intricate you wish the site to be. Custom development will give you the ability, however, to really customize the fit and finish of the website . . . its optical appeal, how pages flow from one to the other, customized menus and forms and even allow you to start integrating Web tools such as blogs, RSS feeds, custom forms, and so on. RSS (really simple syndication) is an often overlooked but somewhat powerful tool. RSS feeds allow search engines, news aggregators and Internet users in general to follow frequently updated works. If you plan on making textual changes/additions to your site often (which is a good thing), RSS is a great way to get the changes in front of a reader's eyes, without him or her having to visit your site to see the change. RSS can be loosely analogized as the social media methodology of distributing Web-based informational updates.

Web developers are everywhere, with abilities ranging from basic to comprehensive, and price tags to match. It is often best to work with a developer that has done work on attorney websites in the past, so that your developer has a general understanding of what you are looking for in a Web presence. Believe it or not, a fantastic resource for this type of work is your local law school student population. Many aspiring lawyers in law school today are coming off of another career. As one of those law students with a heavy tech background, I found that after a year or two in school, I was poised to integrate my budding legal knowledge with my technology skills. I was NOT alone. Several of my classmates had similar backgrounds. It is worth a call to your local law school's career development office.

As mentioned, for a custom-developed website the development cost is usually paid up front; then there will be a nominal hosting fee (or you can host it yourself). A word about hosting: Web hosting refers to "where" in cyberspace your actual website resides. While in theory it could be hosted on your own PC, it is more often the case that websites are housed on servers in data centers where they enjoy, among other things, redundancy, guaranteed uptime, and a staff of experts to keep the data center running well. In addition, there may be service contracts available to keep the developer on retainer to make changes to the website or at least make periodic changes to the site's content. A word of advice: nothing is more boring than a website that doesn't make some changes to its content on a regular basis. Simply adding pictures, changing the focus of your home page text or adding snippets about recent accomplishments or cases in the news will liven things up.

While we are on the topic of changing the text over time, you will need to consider Google and SEO. Google absolutely loves websites that change on a regular basis. The more often you make substantial yet applicable textual changes, the more often Google will come back and index your site. So occasional updates serve two constituent bases at once: keeping human readers interested and keeping the Google spiders looking at you.

> Just having a website will not translate into a windfall of new clients ringing your phone off the hook; that takes a lot of work (and sometimes, a lot of money).

A custom developer should be able to set up the website so that it's search engine friendly, employing basic SEO techniques so that search engines will start to index the site and report it in searches not only for you or your firm's name, but for the areas of practice in which you specialize, the geographical area you serve and other identifiers. While SEO is a very complex subject, there are simple rules of the road in SEO that you should understand and follow – things such as placing proper keywords in proper headings, proper page titles, proper usage of meta-tags and so on. Another often overlooked practice is that of tagging the photos on your website properly. The hope is that when someone searches your name and hits the images tab on Google, *your* photo from *your* website shows up. If your name is at least somewhat unique, you should have a lot of luck with this. If your name is John Smith, Esq., it is going to be a little more challenging.

Custom Development and Ongoing Web Optimization

As the Internet has progressed, so has the fury to have the "best" website – one that is not only optically appealing but is interactive and well-placed in a Google search. There is a LOT of work that goes into constructing a website that is search engine friendly. In addition to that up-front work, a website needs constant monitoring, updating and

oversight to keep it relevant to the ever-changing rules and desires that Google (and other search engines . . . but we'll keep with Google as it controls 70% or more of the search market) promulgates in its search engine criterion. If you want your website to come up near the top of the searches, you have left the realm of a website as a calling card and entered the realm of a website as an active advertising tool. For this, you'll need either to quit practicing law and dedicate yourself to your website or hire a service to manage this for you.

There are many services that will construct your website and actively manage it to keep it within the ever-changing temperatures of the search engines. These companies are part website construction engineers and part SEO managers. Two of the players in this field (not surprisingly) are LexisNexis (www.lexisnexis.com/legal-marketing) and FindLaw by Thomson Reuters (www.lawyermarketing.com). Both offer website construction and optimization products on a contractual-term basis. The fee can range from a few hundred dollars per month to several thousand dollars per month. These companies offer *a la carte* and fully customizable solutions and build the cost of development into the monthly service bill. You basically wind up financing the cost of the website over the term of the contract. As you get into the higher end of these services (and going back to the car analogy . . . we have reached the Mercedes and Ferrari), they will provide constant updates to workings of your website to ensure the highest compatibility with SEO standards. This is not just an information website. It is a website with specific information, which is geared not only for potential clients to read but for the search engines to read and send you potential clients. All of this is tracked in very granular detail, and the services provide comprehensive reports to show you the clients that they steer your way.

Lexis and FindLaw gear their services directly to attorneys. Another company in this market space is Justia.com (www.justia.com). All three unashamedly profess to be legal marketing firms for attorneys and not just website developers. Justia is considered a second-tier provider in this market, but the company is quite strong in some geographical locations, often outpacing Lexis and FindLaw. While many services provide this hybrid Web development and full-throttle SEO, companies that focus on legal marketing generally have a better overall success rate than generic SEO providers. All three providers mentioned here employ attorneys, developers and marketers whose sole area of concentration is the legal website marketplace. This is a quickly developing area of legal marketing, and these three are very competitive.

SEO – Search Engine Optimization

Search engine optimization is the practice of optimizing a website so it can obtain the highest rankings in an organic search.[3] It is a highly technical practice that evolves on a daily basis. Search engine optimizers, such as the services mentioned previously, continuously mine Web data, update data, and analyze web traffic and search results to find what one might call the "secret formula" for getting to the top of a Google search (again, focusing on Google, as it is the overwhelmingly dominant player in the search engine field, but the same applies to Yahoo, AOL, or Bing searches).

Like the secret formula for Coca-Cola, the formula for Google is not published. No one knows what it is. Google publishes guidelines to follow, but the framework is at best cursory in nature. Unlike the secret formula for Coca-Cola, the Google formula changes often. How often? It has been surmised that Google has changed the formula over 600 times in the last year alone. With the constant changes that Google makes (without always telling us what they are), the SEO game is one best left to the SEO experts. SEO is expensive, but when properly done can yield great results in additional traffic to your website, which, hopefully, turns into paying clients. When done in a piecemeal fashion, SEO may work for a brief period of time, but will most likely become stale and result in a drop in your search rankings as other more optimized sites pass you by. If your practice has a significant advertising budget, you may want to look at the possibility of

provisioning some of those funds to SEO. Google is the new Yellow Pages. SEO is the way to get you a full-page ad or even the cover.

The science of SEO is too technical for an article of this nature. Volumes can be written on it, only to have those volumes become obsolete in a relatively short time period. Keywords, meta-tags, <h1> menus, inbound linking are just the beginning. If a full on assault on the Web is what you desire, contracting with a serious SEO firm is a very important, and non-delegable, step to take.

Keep in mind that the purpose of marketing, regardless of the medium, is to bring in new clients who will pay you money to represent them.

SEO can be a very powerful tool for the solo practitioner and the small law firm. The Internet is the great informational equalizer, and SEO is an integral part of that equalization. Even a small amount of properly executed SEO can bring your website to the forefront of search results in the target market and practice area you desire. For example, a solo may be competing with several well-established firms, and the solo is being overlooked only because of a lack of name recognition. SEO can be the key to boosting and/or creating that name recognition. SEO can give solos and small firms with limited resources the ability to get their name out there, as a so-called boost in "Internet credibility" with their search results showing up alongside and even ahead of the bigger firms in their targeted demographic.

The following account is somewhat anecdotal, illustrative in purpose, but a true account of the marvel of SEO. A friend of mine worked for a small three-attorney firm in the suburbs of New York City. The firm had absolutely no Web presence whatsoever. Indeed, upon Google searching the firm to find its phone number, the only results were old and inaccurate. Ultimately I called my friend on his cell phone to ask for the firm's number. During that call I mentioned that I was unable to find them on the Web, and that they should at least make a Google Local Business Directory Listing (free from Google). He said this was not the first time he heard this complaint and that he would endeavor to make the listing that day. Not 24 hours later, I received a call from my friend thanking me for his new client. When I replied that I had not sent him any clients, his retort was that not two hours after posting his firm's Google Local Business Listing, the firm received a call from a now new client, who was from out of town, but needed an attorney in that town, and had found the firm using Google Local. SEO isn't just the optimizing of your website. It is the optimizing of your entire web presence. This small firm was lucky enough to get off to a very productive start.

Legal Websites and Ethics

Attorney ethics as they relate to websites are a constantly evolving topic throughout the Bar Associations both in New York and nationwide. In New York, Rule 7.1, Advertising, in the New York Rules of Professional Conduct provides initial guidance. Websites, like any other form of advertising, must comply with the Rule 7.1, which prohibits false, deceptive or misleading communications to prospective clients. The fact that lawyer advertising appears online does not exempt it from the restrictions on attorney ads. Specifically, as with a print ad, a website should at a minimum include on the home page a statement designating the site as "Attorney Advertising." More stringent rules apply when the domain name utilized for the website contains a motto and not the actual name of the firm.[4]

To avoid any issues that may arise where the client arrived at your site on a page other than the home page, the best practice may be to notate each and every page with such a disclaimer. Keep in mind that not only do the visible portions of the website have to comply with Rule 7.1, but also any meta-tags or coding used in the markup language. Because of the intricacies inherent in website coding and construction, it may be best to work with a developer or company familiar not only with such technology, but also with the ethical framework within which attorneys must work within. Ultimately, it is the attorney, and not the developer, who is responsible to the public and the bar for the contents of the website. The Web developer won't be with you if you should have to appear in front of the grievance committee for a violation stemming from your website!

The Economics of Legal Websites

As mentioned earlier, you can spend very little or a lot on your website. However, you need to keep in mind that the purpose of marketing, regardless of the medium is to bring in new clients who will pay you money to represent them. Your website must generate more revenue than the costs associated with creating and operating it. To assure that this happens, you need to take a few simple steps: Set a budget on money and time. If you have nothing more than a computer, items numbered one through eight on the list below can be accomplished on your own for less than $500 a year – and that is being very generous. Hosting will cost less than $100 per year. If you don't have a camera for photos and video, that will cost at most another $200. Maybe you want to get creative and have a blog. The rest of the $500 will go toward domain name registration, upgraded email service, coffee and maybe

a cocktail to celebrate the launch of your site. As far as time, you may need 10 hours of setup and an hour a week to keep things fresh. If you spend an hour a week and the site brings you just one new client a month, are you happy? What if it grows to one client a week? In the end, the investment in your website should pay for itself in new legal work.

The Top 10 Things You Need to Do to Move Forward

Here is a simple roadmap to get you on your way to a simple Web presence. Keep these 10 suggestions in mind as you move forward:

1. If you don't have a website, stop and go back to the beginning of this article. Come back here when you do.
2. Keep it original. Nothing is worse than reading text on a website that you know you have read elsewhere. Write your own copy. Put YOUR voice into your copy on the website. Your readers will thank you. Google will reward you.
3. Keep it fresh. People will come back to read if they know you frequently update your site. Google will too.
4. Take advantage of simple SEO principles to leverage your advertising message.
5. Google your name . . . often. It's great when your site comes up on page one of a Google search. It is absolutely TERRIBLE when a grievance matter comes up on page one. Know what information is out there on the Web. One fairly insignificant but aggrieved client can wreak havoc on your good name. Use Google Local Business Listings to get your name on Google quickly!
6. Use pictures on your website, including you and the people in your firm. Stock photography can be boring. Some ethical rules actually prohibit the use of character actor portrayals on attorney media. Even today's simplest cameras take fantastic photographs. Make it interesting: Don't do your headshots in front of your law library stacks! (A picture of you using Westlaw, Lexis or Google may be more appropriate in this day and age.) Make it candid. Get out in the community, take pictures of you there. Nothing makes people more comfortable on a website than seeing the places they are familiar with.
7. Experiment with video. When people ask what search engine is most important, of course the answer is Google. Most people don't realize that 25% of Google's searches emanate from YouTube; Google (quietly) purchased YouTube in October 2006. Since then, video has become more and more relevant in Google's search criteria. Attorneys love to talk, so use the camera built into your laptop (or even your iPhone or other smartphone) to record short two- to three-minute videos of yourself speaking about interesting areas of your practice.
8. Even if your practice area isn't flashy, such as criminal defense or even matrimonial law, you can still experiment. Yes, 1031 transfers aren't flash to *most* of us, but if you are the only person with a 1031 transfer video . . . guess who gets all that traffic? Upload them to YouTube and link to them from your website. Don't forget to alert everyone via social media.
9. See what the competition in your area is doing. Are you one of the top practitioners in your geographic and practice area, yet clients seem to be heading to the newbies in town? Check out their Web presence. See what they're doing. More often than not, they're just doing things "right" when it comes to their Web presence and not really spending much money on it.
10. If you're just too busy . . . hire someone to do it for you. It may not be relevant to your practice now, but it will be "someday." Someday may be sooner than you expect.

Conclusion

All of this may seem daunting to the technologically challenged, but it's not as bad as it may seem. The resources you use every day are at your disposal. Local law schools have tech-savvy budding young attorneys who may be more than willing to trade their expertise for yours. Local, county and state bar associations, specifically in the law practice management sections and committees, offer lawyers a wealth of information. These groups are usually filled with techie-type lawyers who have great contacts you can mine. Finally, look at other attorney websites for practitioners in your and surrounding areas. Google search your practice area. Who comes up? Look at the sites that come up and see who developed them. In places like Manhattan, the hyper-competitiveness may be difficult to overcome on a modest budget, but there are numerous untapped markets across the state with little or no attorney Web presence.

It's the start of a new decade in the 21st century, it's time to get started. ■

1. 634 F. Supp. 2d 239 (N.D.N.Y. 2007).

2. *See also* Kathryn Grant Madigan (Past President of NYSBA), *Striking a Balance on Lawyer Advertising*, July 26, 2007, *available at* http://nysbar.com/blogs/president/2007/07/striking_a_balance_on_lawyer_a.html .

3. Organic search results are listings on search engine results pages that appear because of their relevance to the search terms, as opposed to their being advertisements.

4. The Commentary to Rule 7.5 of the New York Rules of Professional Conduct provides the framework of a safe harbor to work within.

Arthur G. Greene
(agg@boyergreene.com) is a Principal of Boyer Greene, L.L.C., a law firm consulting organization with a focus on both law practice management and the strategic and financial aspects of maintaining a healthy law firm. Following a successful career as a practicing lawyer, Mr. Greene has turned his professional focus to management consulting with law firms. He has lectured, conducted workshops and authored articles and books on a variety of law firm issues, most recently *Increasing Revenue: Unlocking the Profit Potential of Your Firm* and *The Lawyer's Guide to Governing Your Firm*, both available on the American Bar Association website. He is a long-standing member of the American Bar Association and has served as Chair of its Law Practice Management Section.

Succession Planning for Solos and Small Firms

By Arthur G. Greene

Are you a solo practitioner or the founder of a small first-generation law firm? If so, what is your plan for improving your law firm? Have you thought about it? Or, will you be one of those lawyers who continue working, doing the same thing day after day, until the day you drop, largely because you haven't planned ahead? Some lawyers never get beyond their present existence. They die at their desks, leaving the cleanup to other lawyers or family members. Other lawyers wind down their practices and close the doors.

There is another alternative that may be the best choice – that is, to develop a growing and successful practice and at the same time create something of value, which will allow you to retire gracefully on your own terms, while transitioning the law practice to a successor.

Let's understand that succession planning is not a large firm issue. Any large firm that has survived the transition from its first generation of lawyers to the second generation understands the succession concept and has successfully navigated through that transition. The solos and the first-generation firms are at risk of not surviving the retirement, disability or death of their founder. Ironically, the stronger and more successful the founder and the leader of a first-generation small law firm, the less prepared the other lawyers will be to step up and successfully lead the firm.

Consider the consulting client who called for help: He is the 70-year-old founder of a 12-lawyer firm, he has been the leader and the manager of the firm for its 30-year existence, he originated 60% of the firm's business, and he is worried that the firm will not survive his eventual departure. His worry is clearly well placed, and his call for help probably too late.

Solos face similar issues. Mostly, they are lawyers who have found that working alone suits them, and the thought of working with a peer may not seem attractive. Solos have to be remarkable lawyers in skill and flexibility, but fewer young lawyers may be attracted to the

solo life. The question is, What do solos do at the end of their careers? What do they do with their practice? Wind it down? Take in a younger partner? Try to sell the practice? Making the decision may be tough; implementing the decision may seem formidable. Long-range planning, with an eye to retirement, may seem daunting. This can lead to inaction.

The key to succession planning is to recognize that it is a process, not an event. That process should begin five to 10 years before the solo approaches retirement age. Identifying a successor and developing a step-by-step transition process takes time. The succession plan will require the successor lawyer to develop leadership abilities, understand management responsibilities, and participate in an orderly plan for the transition of client relationships.

The goals of a succession plan should be (1) to make sure your clients' on-going needs are well taken care of, (2) to provide you with the flexibility you need to enjoy some personally rewarding retirement years, and (3) to maximize the value you receive for the law practice you have built through many years of hard work. The goals are achievable, but only through a planning process. In most circumstances, age 65 is too late to successfully address the necessary planning. If you are in your mid-50s and do not have a succession plan in place, now is the time. What are you waiting for?

Succession Planning for Solo Practitioners

Succession planning for the solo practitioner involves building a successful practice and being in a position to transition the practice to another lawyer or law firm. Unfortunately, many solos have worked alone for years and the thought of having another lawyer join the practice does not resonate well when thinking of an exit strategy.

When it comes to an exit strategy, the solo practitioner has the following choices:

1. Wind Down and Close the Office

If the solo has not considered or has not accepted the possibility of a succession plan, the result will be an eventual closing of the law office. In many respects, this will be easier than grooming a successor; on the other hand, this approach will not capture any value for the retiring solo. The closing can be either abrupt or gradual, but either way, the solo starts by not accepting any new matters. In the abrupt approach, the solo announces the closing of the office as of a given date, thereby providing all clients with the time to select a new lawyer to take over their business. In the gradual approach, the solo stops taking new matters and goes into a wind-down mode, which involves completing most or all existing projects. A transactional lawyer can successfully wind down a practice in three to six months. A trial lawyer may be tied into existing cases for two or three years.

2. Recruit a Successor

Solos who want their law office to survive them can engage in a process to hand-pick a successor to whom they will entrust their clients' legal matters. The successor can be a younger lawyer who will be groomed to become the owner of the business. After a few years, the new lawyer can be offered a partnership, which can be tied to an exit strategy with an appropriate compensation arrangement for the retiring solo. This succession approach requires a five- to 10-year process.

But there is no guarantee that a designated successor will decide to stay for the long term, which means the solo will need to be prepared to give it a second try if the first effort fails. The most common causes of failed plans are either a lack of mutual understanding or having selected a person whose values or priorities are inconsistent with the solo's. Don't be discouraged; learn from any failed effort.

3. Merge

The solo can merge with another solo or with a small law firm. This type of arrangement involves careful positioning and takes several years to accomplish. Often the retiring solo is provided an Of Counsel arrangement with appropriate compensation. The Of Counsel duties may vary, but a critical component is continued involvement with the clients as matters are transitioned to different lawyers. Experience has shown that the retiring lawyer's continuing involvement is critical to the new firm retaining the clients.

Unfortunately, there are more examples of failed mergers than successful ones. The financial models must be comparable. The cultures must be compatible, too, as more often than not cultural and/or staff issues are the cause of failed mergers. Most important, merge for the right reasons. Avoid merging two struggling firms, thinking the resulting firm will not have the problems of the individual firms. Proceed with caution.

4. Be Acquired by a Large Firm

Solo practitioners with a high-level practice and a strong client base can be attractive to larger firms. There have been numerous instances where larger firms (from 10 lawyers to mega-firms) have brought in successful solo practitioners and offered a mutually advantageous exit strategy for the solo. It must be noted, however, that only a few solos have practices that would be attractive to a large firm.

For an acquisition to work, the revenue of the solo must meet the financial requirements of the larger firm, which likely will have both a higher overhead and higher average gross revenue per lawyer. Assuming the revenue flow is satisfactory, the lawyers most attractive to larger firms are those with specialized practices that either fit a need or include a client base that can be transitioned to

other lawyers upon the retirement of the acquired solo practitioner. Even if the larger firm makes an attractive offer, the question is whether the solo can tolerate giving up the autonomy of a solo practice and being subjected to the culture and the procedures of the larger firm. This issue is not to be underestimated.

5. Sell

Rule 1.17 of the New York Rules of Professional Conduct now provides for the sale of a law practice. The rule sets out certain requirements designed to protect the clients and to reinforce their rights to select other counsel. The rule is of recent origin, so it is difficult to evaluate the effectiveness of a straight sale of a law practice.

The Right Option for You

Given this array of possibilities, the solo needs to consider which choice best suits his or her needs in achieving identifiable personal goals. While a wind-down to close an office requires a lot of administrative detail work, it can be easier than grooming a successor. Finding a successor or identifying the appropriate lawyer can be difficult. Not only must you be concerned with legal competence and client service requirements, but shared values and work ethic are critical. You need to recognize that no matter how careful the selection process, it may take a year or two before you know if you have the right match. Failure, and the need to restart the process, is always a possibility.

And there are financial considerations: How much value have you created? Do you have a client base that has value to another lawyer or firm? What is the likelihood that the successor lawyer can successfully retain your clients? What level of compensation can you expect in an Of Counsel arrangement involving a reduced role during a two- or three-year period of transition? Or, are you willing to accept minimal compensation in order to transition your clients to a successor lawyer in whom you have confidence?

Here is the main point: Solo practitioners have choices, perhaps many choices. But most solo practitioners approach their retirement age without a plan, which has the effect of reducing the choices available. Many solos close their doors because they failed to consider the alternatives in advance of their retirement age.

Succession Planning for Small Firms

The considerations that go into succession planning for small firms are similar to, but not identical to, those that face solo lawyers. Many small law firms are first-generation firms, led by their founders during their 20-, 30- or 40-year existence. Clearly, the retirement of the founder challenges the continued existence of any small firm.

The small firm has many of the same choices that the solo practitioner has, with one important difference: In the small firm, the successor (or successors) may be lawyers already working in the firm. While that should make succession easy, most small firms do not plan and succession becomes hard to accomplish.

The founders of most successful small firms are both strong leaders and rainmakers. When they grow the firm, they tend to look for lawyers who can service the clients that the founders have generated. Rarely do they look for lawyers with the same leadership and marketing skills that they possess. As a result, the other lawyers assume a supportive role and do not develop the skills necessary to successfully lead the firm.

> The key to succession planning is to recognize that it is a process, not an event.

Succession planning for a small firm involves several specific considerations, which every firm should address:

1. Making sure the ages of the firm's lawyers are balanced across more than one generation.
2. Making hiring decisions based on the eventual future need for leaders and rainmakers.
3. Educating all lawyers in the business of law; that is, how the financial model works and what is necessary to attract clients and make the firm financially successful.
4. Looking for opportunities to involve all lawyers in some aspect of management, in order to evaluate whether they have the skills to be future leaders of the firm.
5. Making sure the evaluation of the firm's lawyers includes contribution to the culture of the firm and its shared values, in order to reinforce the importance of those qualities in the future leaders of the firm.
6. Developing a client transition plan that involves the next generation of lawyers participating with the firm's most important clients, while protecting the more senior lawyers on issues of compensation and status.

All of this takes time. The succession planning process starts with hiring decisions and continues with activities designed to train future leaders. Any firm with senior lawyers in their late 50s should be addressing succession planning.

Continued on Page 34

Forms Products

Electronic and Print

NYSBA's Document Assembly Products.

Automated by industry-leader HotDocs® software. Increase accuracy, save time and money. Access hundreds of forms, including many official forms promulgated by the Office of Court Administration.

New York State Bar Association's Surrogate's Forms—Powered by HotDocs®
NYSBA's Trusts & Estates Law Section,
Wallace Leinheardt, Esq.
Product Code: 6229
Non-Member Price: $561.00
Member Price: $479.00

New York State Bar Association's Family Law Forms—Powered by HotDocs®
Willard DaSilva, Esq.
Product Code: 6260
Non-Member Price: $514.00
Member Price: $440.00

New York State Bar Association's Residential Real Estate Forms—Powered by HotDocs®
Karl B. Holtzschue, Esq.
Product Code: 6250
Non-Member Price: $613.00
Member Price: $523.00

New York State Bar Association's Guardianship Forms—Powered by HotDocs®
Howard Angione, Esq. & Wallace Leinheardt, Esq.
Product Code: 6120
Non-Member Price: $618.00
Member Price: $528.00

NYSBA's Form Products on CD.

Access official forms, as well as forms, sample documents and checklists developed by leading attorneys in their fields of practices. Avoid reinventing the wheel in an unusual situation, and rely instead on the expertise and guidance of NYSBA's authors, as they share their work product with you.

Estate Planning and Will Drafting Forms on CD-ROM—2010
Michael O'Connor, Esq.
Product Code: 60957
Non-Member Price: $115.00
Member Price: $95.00

New York Municipal Law Formbook and Forms on CD-ROM (Revised 2010)
Herbert A. Kline, Esq.
Nancy E. Kline, Esq.
Access more than 1,350 forms (over 230 are new) for matters involving municipalities.
CD-ROM Only • Product Code: 616009
Non-Member Price: $170.00
Member Price: $130.00

New York Practice Forms on CD-ROM—2010-2011
Access more than 600 forms for use in daily practice.
Product Code: 615011
Non-Member Price: $315.00
Member Price: $280.00

Commercial Leasing
Joshua Stein, Esq.
Access over 40 forms, checklists and model leases.
Book with Forms on CD-ROM • Product Code: 40419
Non-Member Price: $210.00
Member Price: $165.00

CD-ROM Only • Product Code: 60410
Non-Member Price: $90.00
Member Price: $70.00

Adoption Law:
Practice and Procedure in the 21st Century
Golda Zimmerman, Esq.
Access over 50 forms used in adoption practice.
Book with Forms on CD-ROM • Product Code: 40204C
Non-Member Price: $200.00
Member Price: $165.00

CD-ROM Only • Product Code: 60204
Non-Member Price: $55.00
Member Price: $40.00

ALSO: NYSBA Downloadable Forms
Visit **www.nysba.org/pubs** for a list of all forms by practice area that you can download for instant use

$5.95 shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be based on destination and added to your order. Prices do not include applicable sales tax.
***HotDocs pricing includes shipping and handling.**

To Order call **1-800-582-2452** or visit us online at www.nysba.org/pubs Source Code: PUB1003

NYSBA

Continued from Page 32

Succession Planning Considerations for Solos and Small Firms

Succession planning is based on an assumption that it is desirable for the law firm to grow and/or evolve from one generation of lawyers to the next. In a sense, succession planning institutionalizes the firm, which means that the health of the firm, as an entity, will supersede the needs or desires of any partner. Decisions are made based on what is best for the firm, not what is best for any particular individual. Putting the firm first is truly transformative.

1. Establish an Identity

As small firms grow, they need to transition from a group of individual lawyers to a true law firm, which is an institution with its own identity. Decisions are based on the good of the firm as a whole. A stronger firm means that each of the partners within the firm will do better. It is the "raise all the boats" approach.

2. Create Value

One important consideration in any exit plan is how to maximize the value of the professional business you have created. Simply winding down a practice and closing the doors may satisfy a solo's need to make an exit with no strings attached, but it will not maximize the monetary value you achieve in the exit process. In fact, continuing expenses may exceed revenue in the final months. For lawyers who want to maximize monetary value, grooming a successor to continue the practice and transitioning clients over time is the best bet. Transitioning clients in an abrupt sale, as contemplated by Rule 1.17 of the New York Rules of Professional Conduct, will be more challenging than in a less direct sale involving a gradual process.

3. Partnership Structure

Regardless of whether your firm is a sole proprietorship, a partnership, a professional association, or a limited liability company, there are many ways to structure a succession plan. The non-equity partnership concept can be incorporated into any ownership structure; it is a good way to get a lawyer involved in some management issues and learn whether that lawyer has potential to be a future leader of the firm. It is a good transitional step between associate and equity partner.

Too many small firms hire because they need to cover an existing workload – not with the idea that they are choosing future partners. This common approach to recruiting not only discourages the best candidates, but results in associates who want a job, not those with an entrepreneurial spirit who are looking for an opportunity to own or lead a law firm. Small firms need to do a better job of recruiting future owners, providing partnership criteria information, and then assisting their associates with career plans.

When it comes to structuring an exit plan, Of Counsel arrangements or consulting agreements are excellent vehicles for providing the retiring partner with a reduced role and appropriate compensation, based on a variety of factors, which may include the value of the business being transitioned. Lawyers structuring such a deal have great flexibility. The entity structure should not stand in the way of creating innovative approaches for succession from one generation to the next.

4. Generational Spread of Partners

Some aspects of succession planning are pretty simple. For example, as you grow your firm, make sure to hire from different generations. You would be surprised by how many small firms grow by adding lawyers from the same generation as the founder; they end up with all their partners in one age group. It is not uncommon to have firms beginning to think about succession planning and realizing that all the lawyers are in their 60s.

5. Leadership Requirements and Management Responsibilities

Rarely do we see a successful firm without strong leadership, which makes leadership a critical succession planning issue. Some believe leaders are born, not developed. Others embrace the concept of leadership training for associates. We won't solve that debate, but the point here is that successful succession involves identifying or developing one or more effective leaders.

Management is unlike leadership; it involves different skills. Every law firm needs individuals who are organized and have the ability to carry out policies and effectively implement new plans. The majority of the management duties can be delegated to an office manager or a senior secretary.

6. Entrepreneurial Spirit

Lawyers who are solo practitioners or who are founders of small law firms are likely to have an entrepreneurial spirit. Without it, they would be out of business. Lawyers added to the firm may or may not have an entrepreneurial spirit. In fact, we know from unscientific surveys of lawyers that close to 90% do not see themselves as entrepreneurial. Unless you focus on this factor in the recruiting process, you will likely surround yourself with lawyers who are not and never will be entrepreneurial.

7. Transitioning Clients

Clients are not commodities that can be easily transferred from one lawyer to another. They cannot be transitioned like a mortgage from one bank to another, with little notice by the consumer. The lawyer-client relationship is intensely personal. The Rules of Professional Conduct

require that it is always the client's choice as to the lawyer who will represent him or her. (Rule 1.17.)

8. Other Issues

Other challenges are associated with succession planning. One is control. The sole practitioner, or the founder of a small firm, may have been in control for several decades and is now inherently unable to give up control. Some senior lawyers struggle with the issue and find a way to make a transition work; other lawyers end up closing their office rather than giving up control.

Compensation is an issue closely associated with control. A proper succession plan requires that the senior lawyer transition clients to younger lawyers over a three- to five-year period prior to an anticipated retirement. This raises issues about partner compensation. Most small firm compensation systems would be structured in a way that would reduce the compensation of the senior lawyer who shares his clients with others. As one can imagine, the senior lawyer is not incentivized to share clients or to reveal retirement plans. While compensation is a major hurdle, there are a number of techniques that have been employed by innovative firms to protect the compensation of senior partners during such a transition.

Conclusion

But back to the main point, which is that solo practitioners and small firms need to get beyond the day-to-day workload and plan a future. Make decisions about growing the firm and creating an institutional identity. Address succession planning and have an exit strategy that will allow your clients to continue to be well represented and will, at the same time, permit you to retire gracefully, achieving rewards for the value of the firm you have created. ■

Cynthia Feathers (cfeathers@appealsny.com) is an attorney in Saratoga Springs whose practice focuses on appeals and on research and writing services as a contract attorney.

Craig S. Brown (cbrown@b3legal.com) is President of Balint Brown & Basri LLC, a national contract attorney staffing agency headquartered in New York City.

Contract Attorneys: How a Small Firm Can Reap Huge Benefits

By Cynthia Feathers and Craig S. Brown

Introduction

The outsourcing of legal work may conjure up images of major law firms and Fortune 500 corporations using outside and even overseas entities to handle administrative tasks and routine legal projects. Yet outsourcing is also a vital tool for small firms, including solo practitioners. This is especially true when it comes to using contract attorneys to provide highly skilled legal work.

Outsourcing can have a direct impact on firm profits and client satisfaction. Contract attorneys offer at least seven potential advantages:

1. allowing small firms to become full-service firms;
2. leveling the playing field vis-à-vis large-firm competition;
3. producing better results, even in the firm's areas of expertise;
4. freeing up time for rainmaking and growing the practice;
5. providing a testing ground for potential permanent staff;
6. serving as a personnel cushion; and
7. providing an alternative to hourly rate billing.

The myth that law firms must overcome is that contract attorneys are by definition inferior to permanent staff; but the contrary is true. These attorneys are often high-caliber legal professionals possessing greater expertise regarding the relevant project than their permanent counterparts. They may be former practicing partners with extensive experience in the subject area, who are now happy to provide the same services for a lower cost. Such contract attorneys may have thrived in their permanent jobs but decided to seek alternative ways to practice that offer more autonomy, control, and flexibility. The types of projects contract attorneys can handle range from document review to trials, from acquiring public companies to writing memoranda of law. Any work a law firm attorney can do, a contract attorney can be hired to do.

The Benefits

1. Become a Full-Service Law Firm

Before the contract attorney industry existed, a small firm generally had two choices when clients or prospective clients requested legal services outside the firm's areas of expertise: turn away the work or refer the client to another firm.

Both options had obvious downsides. Turning away business has financial ramifications in the short and long term. Referring work elsewhere typically yields no

financial benefit (with the exception of personal injury matters). Further, while the recipient firm may refer matters back to the small firm, this can be problematic. The cross-referrals may not be at the same level. For example, the small firm could refer out a lucrative antitrust case, but in return receive a simple real estate closing. Also, the recipient firm may decide to enter the small firm's area of practice and keep those clients.

Outsourcing to contract attorneys may offer a superior solution to the problem of representing clients in areas outside the small firm's expertise. If a client comes to the firm with a matter the firm does not normally handle, it can retain an expert contract attorney. By taking this route, the firm keeps the client, makes a profit on the new matter, and avoids the risk of referring to a potential competitor a client who might represent profitable repeat business.

2. Level the Playing Field

Another issue for small firms is how to compete in complex litigation against much larger firms with their seemingly unlimited resources. Similarly, in a non-litigation context, some corporate, real estate, and financing transactions may be too large for a small firm to handle. In both arenas, contract attorneys can provide a potential solution. No matter how large the matter, by adding contract attorneys to the team, small firms can level the playing field. Contract attorneys might be junior attorneys hired to review thousands of documents or seasoned attorneys retained to handle motions, depositions, trials, and appeals. By assembling such teams on a per-project basis, a firm converts labor from a fixed to a variable cost. Once the project ends, the small firm disbands the team and incurs no additional labor costs.

3. Win More Cases

There can be a thin line between maximizing the use of associates and risking malpractice. Contract attorneys can help the small firm avoid crossing that line. Here's an example of a too-typical scenario: A small matrimonial firm had an associate with virtually no experience and yet delegated to him the task of doing all motions and appeals – with only minimal supervision. As a result, many motions and appeals that could have been won were lost, and clients paid for time inefficiently and ineffectually spent.

Consider the path taken by another small firm. An insurance defense firm used a contract attorney to handle opinion letters, motions, memoranda of law, and briefs. The firm's two senior attorneys were freed to do what they did best – depositions and trials. The small firm's motions and briefs were more polished, persuasive, and successful. Their profits were greater, too. The contract attorney did this work in a fraction of the time spent by the associate. She also offered flexible payment options, ranging from a fixed-fee project cost, to a relatively modest hourly fee, to a blended fee that was part hourly, part contingency.

4. Gain Time to Grow Your Practice

One common dilemma faced by small firms, and especially solo practitioners, is being constantly overwhelmed by the demands of handling the substantive, administrative, and business aspects of their practices. These competing demands may leave little time for other vital activities, such as networking in the community to sustain and grow the practice. By judicious use of contract attorneys on an as-needed basis, a firm can free up time and energy to handle important activities like rainmaking. The small firm attorney may also gain more time to relax and regroup – a luxury for chronically overworked attorneys – and may thereby become more productive, creative, and strategic over the long term.

5. Test Potential Permanent Staff

For small firms in particular, a hiring mistake can be deadly. A new hire cannot hide in the back office for months. On day one, that person needs to hit the ground running. To ensure that a candidate has the right skills and temperament for the firm and its clients, the small firm should consider engaging the candidate as a contract attorney. Only when the firm is sure that the candidate is a good fit, and that it has the flow of work to keep the new hire busy full-time, should it seek to convert the contract attorney to a permanent employee.

6. Create a Personnel Cushion

Contract attorneys can provide a personnel cushion. They can allow small firms to ramp up during peak busy periods; they can fill in gaps when key attorneys are on leave; they can help avoid hasty over-hiring and layoffs; they can help free up permanent attorneys to concentrate or more important matters; and they can make it possible for a small firm to accept matters the firm might otherwise decline due to lack of staff.

7. Offer Hourly Rate Alternatives

Decades ago, legal fees were generally based not only on the time spent but also on the nature of the services, the result achieved, the amount at stake, and the attorney's professional judgment.[1] Today, lawyers are typically paid like hourly laborers, but at a higher rate. This approach can breed dissatisfaction among clients, and it is not surprising that firms of every size are facing client pressure to provide greater value in legal services. Indeed, clients are driving the bargain. They are demanding faster, cheaper, and more effective results from their attorneys.[2] After all, using hours spent as a measure of legal service costs fails to address the service's value, worth, and benefit to the client, and the proportionality to the task at issue of time spent and fees charged. Further, the billable

hour can create a conflict. What is good for the lawyer is bad for the client. The more time the lawyer spends, the more the lawyer makes – and the more money the client spends. The client may be justifiably concerned that self-interest could impact the lawyer's judgment. What is good for the client – a clear and fair price – may be bad for the firm, if the firm cannot reasonably predict how much time is needed to do a job.

Outsourcing to contract attorneys offers a way to reduce costs and increase value to clients, while maintaining or even increasing firm profits. The concept is simple. The firm should focus on its attorneys' core skills and let them do what they do best. Contract attorneys should be hired to do what they do best, providing services in their areas of expertise more efficiently and effectively than the firm's permanent personnel.[3]

For billing purposes, a contract attorney need not be an out-of-pocket cost that is simply passed on to the client. Firms can bill at a partner's rate, an associate's rate, a standard flat rate, or any rate that is established in the retainer agreement and is acceptable to the client. The results can be a win-win. For the client, contract attorneys can offer better services at lower cost. The cost to the firm can be less than that for associates, since no salary, benefits, taxes, and other carrying charges must be paid. Moreover, the firm can mark up the rate charged to the client in order to cover overhead and yet still provide value to the clients and a profit to the law firm.

The Ethics of Outsourcing: ABA Formal Opinion 08-451

A 2008 ABA Formal Opinion[4] contains an expansive discussion on ethical issues raised by outsourcing. If certain conditions are met, there is nothing unethical about outsourcing legal services. Model Rule 1.1, requiring the provision of competent legal services to the client, does not specify that tasks must be done in a special way. Lawyers may decide to outsource tasks to independent legal service providers, as long as the outsourcing attorney satisfies his or her duty to render legal services competently.

Model Rule 5.1(b) requires a lawyer with direct supervisory control over another lawyer to make reasonable efforts to ensure that the latter attorney conforms to the Rules of Professional Conduct. This duty applies whether or not the lawyer is directly affiliated with the supervising lawyer's firm. Obviously, to meet this duty, the outsourcing lawyer should delegate tasks only to individuals who are competent to perform them and should appropriately oversee execution of the project. The 2008 ABA Formal Opinion on outsourcing reiterated a previous position: Client consent should be obtained if a temporary lawyer is to perform independent work without the close supervision of the hiring lawyer's firm.[5]

> Outsourcing to contract attorneys may offer a superior solution to the problem of representing clients in areas outside the small firm's expertise.

Another reaffirmed ABA position is that a law firm that engages a contract lawyer may add a surcharge to the cost paid by the billing lawyers – as long as the total charge to the client is reasonable and otherwise complies with Rule 1.5.[6]

Finally, the 2008 ABA Formal Opinion explains the rationale behind a surcharge on fees paid to contract attorneys – to yield a profit to the law firm:

> This is not substantively different from the manner in which a conventional law firm bills for the services of its lawyers. The firm pays a lawyer a salary, provides him with employment benefits, incurs office space and overhead costs to support him, and also earns a profit for his services; the client generally is not informed of the details of the financial relationship between the law firm and the lawyer. Likewise, the lawyer is not obligated to inform the client how much the firm is paying the contract lawyer; the restraint is the overarching requirement that the fee charged for the services not be unreasonable. If the firm decides to pass those costs through to the client as a disbursement, however, no markup is permitted.[7]

Three Ways to Hire a Contract Attorney

Perhaps now you are sold on the virtues of contract attorneys, but you wonder how to find the right ones. There are at least three ways to hire contract attorneys.

1. Contract Attorneys as Independent Contractors

Cost is the primary advantage of hiring a contract attorney directly as an independent contractor. The firm avoids the expense and paperwork of paying taxes and providing benefits, as it does for its own employees. Unless the firm knows of qualified contract attorneys in the legal community, however, there is a downside to this approach. The firm may have to spend some time and effort to search for contract attorneys by placing ads online or in legal publications. Then, the firm will need to conduct interviews, verify education and legal credentials, check references, assess writing skills, evaluate analytical skills, and review other relevant skills and expertise. Moreover,

if the contract attorney ultimately hired decides to leave, all this work would have to be repeated.

There is also a risk in hiring a contract attorney as an "independent contractor." The firm may consider that attorney to be an independent contractor, but the attorney may properly be considered an "employee" and might successfully seek benefits that are provided to employees.

2. Contract Attorneys as Your Employees

Law firms can hire contract attorneys as their own employees. However, the firm may spend much time and effort to procure the services of such personnel on a purely temporary basis. This option is rarely used for another reason: by hiring temporary workers directly as their own employees, firms face the same liabilities as they do with their permanent employees. These include employee benefits (health care, 401(k) plan, unemployment insurance, Workers' Compensation) and wrongful discharge and discrimination actions.

3. Legal Staffing Agencies

Finally, legal staffing agencies can be utilized to bring on board the right contract attorneys. Such agencies typically treat contract attorneys as their own employees. They pay all employer-related taxes and offer employee benefits. This can make for a content contract staff. It can also absolve the hiring firm of any liability for employment-related disputes. There are several additional benefits of legal staffing agencies:

- The agency can provide access to top legal talent. Most agencies maintain a list of qualified candidates. Many require candidates to meet key criteria, such as years of experience and expertise in a particular area. Since contract placement is the business of the agency, it is constantly meeting and testing new talent, as compared to a firm that sporadically runs ads seeking contract attorneys.
- The agency handles the candidate-screening process. It verifies the attorney's academic degrees and legal credentials, including admission to the bar, current good standing, past employment, and references.
- The agency can help you find the ideal candidate quickly. With a comprehensive candidate database, the agency can assemble a large number of qualified candidates to meet urgent needs.
- The agency has already met the candidate in person. Checking resumes and references can take you only so far. A personal interview is the best way to assess the attorney's strengths, weaknesses, appearance, poise, and personality. This is important to ensure that the candidate fits in well with the hiring law firm's culture. An experienced staffing company will be adept at identifying qualified candidates and weeding out those who are unsuited to a particular assignment at a particular firm.

Be a Contract Attorney

Small firm attorneys may want to consider not only utilizing contract attorneys but also offering their services as contract attorneys. If an attorney is in a fledgling practice or has extra time available, he or she may be able to offer contract services on a temporary or per-project basis. This could afford the attorney the opportunity to make additional money and introduce his or her services to potential new clients and referral sources.

The most effective way to promote availability as a contract attorney is through a legal staffing agency. To do otherwise could limit prospects and confuse clients as to why two sets of rates are offered. As a contract attorney, the attorney's rate would typically be lower than that charged to his or her regular clients.

There is another huge benefit to proceeding through an agency. The agency, not the law firm or client, is the entity that pays the contract attorney, so the attorney avoids having to chase down the client for fees or having to write off any amounts owed. Assuming the attorney works with a reputable agency, he or she will be paid for all hours worked, no questions asked.

Conclusion

The use of contract attorneys to provide legal services is a relatively new phenomenon, but one whose time has come for large firms, as well as small firms, in urban centers and rural communities. By utilizing contract attorneys, small law firms can keep clients; attract new business; become more competitive; save money, time, and space; and make the best use of the firm's own expertise and resources. The recession, downsizings at firms, and other market forces brought a growing acceptance of the use of contract attorneys to handle functions normally done internally. The trend, however, is growing for reasons that transcend any temporary economic condition. Simply put, it makes good business sense for a small law firm to incorporate contract attorneys into its practice. ■

---

1. Edward Poll, *Outsourcing: A Multi-Level Solution to the Cost/Value Dilemma*, Law Practice Today, American Bar Association Law Practice Management Services, July 2005.

2. Richard A. Matasar, *Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (or Anyone Else?)*, N.Y. St. B.J. (Oct. 2010), p. 20.

3. *See id.*

4. ABA Committee on Ethics and Professional Responsibility, Formal Op. 08-451 (Aug. 5, 2008) (Outsourcing Legal and Nonlegal Support Services).

5. ABA Committee on Ethics and Professional Responsibility, Formal Op. 88-356 (Dec. 16, 1988).

6. ABA Committee on Ethics and Professional Responsibility, Formal Op. 00-420 (Nov. 29, 2000) (Surcharge for Contract Lawyer).

7. Formal Op. 08-451, *supra* note 4.

Susan L. Pollet (SPollet@courts.state.ny.us) is the Coordinator of the New York State Parent Education and Awareness Program, an initiative of former Chief Judge Judith S. Kaye and now Chief Judge Jonathan Lippman. She earned her law degree from Emory University School of Law and her undergraduate degree from of Cornell University. Prior to her position at the Office of Court Administration, Ms. Pollet was the Executive Director of the Pace Women's Justice Center.

The views expressed in this article belong to Susan L. Pollet and do not reflect the views of the New York State Unified Court System. I am grateful to Debra Mechanick, a Pace Law Student, for her assistance with the research for this article.

Economic Abuse: The Unseen Side of Domestic Violence

By Susan L. Pollet

"Money is better than poverty, if only for financial reasons." Woody Allen

What do you call it when a partner does some or all (and perhaps more) of the following:

- puts all family property in his or her name;
- prevents the partner from going to work or school;
- controls the partner's money;
- steals property from the partner;
- destroys the partner's property;
- withholds information and access to family resources such as credit cards or a car;
- upon separation, terminates utilities and phone; and
- fails to pay child support while lavishing the children with gifts to buy loyalty?[1]

The answer is economic abuse, which has long been recognized as a form of domestic violence.[2] In addition to the actions listed above, many abusers use the legal system to "maintain contact and harass their ex-partners"[3] by initiating extensive and lengthy litigation, including filing repeated, frivolous or unnecessary petitions and motions. This is just another tactic in the wide range of tactics constituting economic abuse.[4]

Domestic violence has been defined as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner."[5] Domestic violence can be any "physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person."[6] The economic abuse component of domestic violence has been defined as "[m]aking or attempting to make an individual financially dependent by maintaining total control over financial resources, withholding one's access to money, or forbidding one's attendance at school or employment."[7] Economic abuse is specifically listed on what is known as the Power and Control Wheel,

a model that is used "extensively in women's shelters and support groups."[8] While domestic violence in general and economic abuse in particular are perpetrated and suffered by both men and women, the sad truth is that the most of such victims are women.

The three categories in which men, for example, economically abuse their partners are summarized as follows: preventing women from acquiring resources, preventing women from using resources and exploiting women's resources.[9] Some of the tactics are "putting the victim on a strict 'allowance,' withholding money at will and forcing the victim to beg for the money until the abuser gives them some money. It is common for the victim to receive less money as the abuse continues."[10] Other ways the abuser asserts control include making the victim account for every penny she spends, exploiting her assets for personal gain, withholding basic necessities (food, clothes, medications, shelter), and sabotaging employment by making the victim miss work and by calling constantly.[11] This is just a sampling of the many forms that economic abuse can take.

One commentator noted that although some men are victims of economic abuse, information gleaned from divorce cases and women's shelters "tend to show that women more often than not are the victims."[12] Researchers note that "[e]conomic abuse can seriously impede women's economic, physical, and psychological health. One direct consequence of economic abuse is that the survivor becomes economically dependent on the abuser."[13] During economic downturns, domestic violence calls and requests for shelter beds increase, according to national research.[14] Advocates advise victims to be aware of economic abuse tactics as the financial "squeeze" in a household becomes tighter.[15] Victims have reported that the psychological effects of "Coercive Controlling Violence" (economic abuse is one form of it) are worse than the physical effects and can include "fear and anxiety, loss of self-esteem, depression and post-traumatic stress."[16] When litigation is added in, women sometimes experience "ongoing manipulation and coercion by their partners when they feel pressured or are forced to cooperate with perpetrators due to fears of losing their children or needed child support."[17]

Why does economic abuse matter? According to the National Coalition Against Domestic Violence,

> [d]omestic violence can create serious obstacles that prevent victims from achieving economic security and self-sufficiency. By controlling and limiting the victim's access to financial resources, a batterer ensures that the victim will be financially limited if he/she chooses to leave the relationship. As a result, victims of domestic violence are often forced to choose between staying in an abusive relationship and facing economic hardship, which could possibly result in extreme poverty and homelessness.[18]

Research has shown a "pivotal link" between partner abuse and poverty, and that "unequal economic power and poverty place women at greater risk for abuse."[19]

When divorces do take place, financial settlements can be unfair when judges fail to consider how women's contributions to the family has impacted their earning potential following divorce, the cost of child care, and "the loss of earning by women who have paid jobs but who have nonetheless subordinated their careers to the needs of their husbands and children."[20]

According to a national poll released by the Allstate Foundation, "[w]hile 70 percent of Americans know people who are or have been victims of domestic violence, nearly the same percentage of Americans fail to see a connection between domestic violence and 'economic abuse.'"[21] Unfortunately, economic abuse is on the rise, likely because of the current economy.[22]

Research About Economic Abuse

Domestic violence experts have long understood the link between money and abuse. One expert notes that "[e]mpirical information about the full extent of economic abuse, its short- and long-term impacts, and how best to structure economic empowerment approaches for domestic violence survivors is in its infancy."[23]

One study reported that "56 percent of domestic violence survivors said abusers prevented them from having money of their own and 59 percent reported money was hidden from them."[24] Other studies show that a quarter to one half of employed victims lost their jobs because of domestic violence at home.[25]

No measure of economic abuse had existed until researchers at Michigan State University designed a scale and conducted a study.[26] The purpose of the study was "to develop a comprehensive measure that captures the economically abusive behaviors used by men who batter,"[27] adding that "a measure of economic abuse will enable researchers to examine the nature and extent of this form of abuse; the impact that it has on women's economic, physical and mental health; and the implications that it has on women's ability to escape abusive partners."[28]

Other researchers developed a "comprehensive assessment of the unique financial issues facing female victims of [intimate partner violence] using a sheltered sample."[29] Their preliminary findings, in part, support the assertion that economic abuse should be conceptualized as a form of psychological abuse[30] and also indicate that the level of financial income was significantly associated with women's stay/leave decisions.[31]

What Can Be Done About Economic Abuse?

Awareness comes first. Domestic violence advocates report that women do not always know that economic abuse is part of the domestic violence spectrum.[32] Some

victims think that a lot of people live the same way and since they do not have a job, they do not deserve to have any money.[33]

Individuals

Some practical tips for victims and survivors of domestic violence include contacting the National Domestic Violence Hotline, watching their credit reports, opening a post office box, calling utility companies, contacting their wireless telephone service as well as their financial institutions to secure private financial information, and changing ATM, credit card and email passwords.[34] A number of websites provide other resource information of use to victims of economic abuse.[35] Lawyers of victims should make certain that they are educated as to the resources and referral sources in this area in case their clients are not accessing this information already.

Organizations

Increasingly, domestic violence organizations have started including economic justice and financial literacy programs as part of their services to provide help and educate victims of economic abuse.[36] They include the National Coalition Against Domestic Violence, the Iowa Coalition Against Domestic Violence, Redevelopment Opportunities for Women's Economic Action Program (REAP) in St. Louis, Missouri, and the Allstate Foundation in partnership with The National Network to End Domestic Violence (NNEDV).[37] Financial literacy has been defined as the "knowledge of personal money management concepts and skills" including the principles of "earning, spending, saving and investing."[38]

Financial Empowerment Curriculum

The Allstate Foundation, in partnership with The National Network to End Domestic Violence (NNEDV), developed a Financial Empowerment Curriculum to "help victims achieve financial independence."[39] The curriculum was developed with the recognition that victims of domestic violence experience unique challenges in becoming financially secure, which includes searching for jobs, housing and childcare; repairing credit damaged by abusive partners; and all the work involved in taking care of a family. The curriculum addresses such subjects as "how to budget, how to deal with the misuse of financial records and how individuals can protect themselves financially while involved in an abusive relationship."[40]

One study that examined financial literacy outcomes of an economic education program created specifically for victims of domestic violence[41] found "limited gains in financial knowledge and significant improvements in financial self-efficacy" and the need for further research.[42] One commentator noted that early studies suggest that "financial literacy and economic empowerment programs are indeed effective in assisting survivors to improve their financial knowledge, increase their confidence about managing their financial affairs, and enhance financial behaviors that will improve their financial safety and security."[43] She suggested, in part, that more research be conducted to "understand how financial literacy and economic empowerment programs can be best delivered in a way that meets the unique safety issues faced by survivors and the impact of having experienced financial abuse."[44]

Economic abuse can seriously impede economic, physical, and psychological health. One direct consequence of economic abuse is that the survivor becomes economically dependent on the abuser.

Legal Issues

Experts have maintained that attorneys "must recognize the full range of abusive behaviors and relationships in order to appropriately serve the needs of abused women."[45] "Not only is a thoughtful and accurate assessment of a client's situation crucial to her economic well-being, but also to her physical and emotional safety."[46] If the client is a divorcing woman who is a victim of domestic violence, there are special concerns in a bankruptcy situation such as current or foreseeable debt problems, credit card debt, automobile loans and other issues.[47] Such women have difficulties trying to gain financial independence from their abusers at the same time that they are trying to "achieve an economic fresh start."[48] Attorneys must be knowledgeable about how the bankruptcy laws impact victims of domestic violence in order to help them achieve the financial independence they will need.

In a treatise on domestic violence, abuse and child custody, attorney Barry Goldstein lays out certain strategies to overcome the perpetrator's hiding of income and assets.[49] He recommends that attorneys for protective mothers "point out when abusers are using superior financial resources to gain unfair advantages in custody litigation."[50] These mothers, he says, need to learn about the finances and, when necessary, the attorney must plan to do discovery.[51] In addition, "[l]aws and practices should be changed so that the burden of proof in financial matters is on the party in possession of the information."[52]

Experts in the international community deem it essential to have legislation that expands the definition of domestic violence to include economic abuse in order to provide women with remedies for all forms of this "social

oppression."[53] One expert noted that only one-third of the states within this country remedy psychological, emotional or economic abuse.[54] She maintains that the civil protective order (CPO) laws should not only remedy physical violence or criminal acts, but should include all the harms of domestic violence and its "operation of systemic power and control over women" here in this country.[55] She notes that research shows that "the systematic operation of power and control is at the center of most abuse and that all forms of abuse are interrelated."[56]

The CPO process is important because it "provides the woman with an opportunity to restructure how the couple interacts between themselves and with their children, and how they maintain their real and personal property, thereby changing the power dynamics."[57] Since CPOs have successfully decreased abuse and attacked power imbalances, the argument is that a CPO could "potentially remediate the harms of emotional, psychological, and economic abuse."[58] A commentator notes that "[c]ourts often place crimes such as stalking and harassment, which are crimes that sometimes address psychological abuse, at the bottom of their hierarchical ranking."[59]

Scholars have suggested that CPO laws be amended to define abuse as physical, sexual, psychological, emotional and economic.[60] In addition, CPO statutes could provide additional remedies, including monetary damages, which could address, in part, the harm from economic abuse.[61] Other laws, including those within the immigration, welfare, tort and divorce arenas, already recognize that domestic violence is "broader than only severe physical violence and crimes."[62]

One commentator suggested a new statute creating a new crime of domestic violence. Titled "Domestic Oppression," the statute would define "pattern of oppression" to include economic abuse.[63] It would "criminalize the methods of power and control that distinguish social scientists' understanding of ongoing domestic violence from isolated arguments, disputes, and fights between intimates or housemates."[64]

Recently in New York State, then-Governor Paterson signed three bills into law which domestic violence advocates have indicated have "the potential to significantly impact domestic violence victims" – some are thinking for the better.[65] The first law is the new "no-fault" divorce law, effective October 12, 2010, which allows spouses to divorce on the ground that the relationship has been irretrievably broken for at least six months.[66] All financial, custody and visitation issues must be resolved and incorporated into the divorce judgment prior to the divorce being granted.[67]

The second law requires courts to "assess the respective incomes of divorcing parties and award temporary maintenance, determined by an established formula and set of factors, to the less moneyed spouse."[68] The third law "establishes a presumption that the less moneyed spouse is entitled to payment of counsel and expert witness fees and requires the parties to submit financial information to the court to determine payment by the other spouse."[69]

Some domestic violence advocates have opined that these three laws will help victims of domestic violence, who are overwhelmingly women, since "abusive spouses often will withhold money to control their partners."[70] Under the old laws, if the perpetrator with the higher income made the divorce drag on, the victim was left penniless.[71] It is hoped that the new laws will help to prevent that.

Conclusion

Economic abuse has for too long remained a relatively "unseen side" of domestic violence. Both the social science research and the laws need to catch up to what the domestic violence victim advocates have known for some time – that economic abuse can be more harmful than other forms of abuse. Simultaneously, the public needs to recognize and acknowledge this aspect of domestic violence so as to best protect victims in their communities. The development of financial literacy programs for domestic violence victims is an important step in reintegrating them into the community in an empowered manner. With the current, troubled economy, there is an increased sense of urgency. More research will need to be done to best determine how to proceed with victims of economic abuse. Domestic violence advocates believe that New York State has taken some important legislative steps to protect victims of economic abuse. Perhaps other states will follow suit. ■

1. Nancy S. Erickson, *Economic Abuse: A Form of Abuse That Needs More Scrutiny*, N.Y. Fam. L. Monthly (L.J. Newsl., Philadelphia, Pa.), Oct. 2008, at 3, 3.

2. *Id.*

3. Daniel G. Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns*, Nat'l Online Resource Center on Violence Against Women (Oct. 2007), http://new.vawnet.org/category/Main_Doc.php?docid=1134.

4. *Id.*

5. *About Domestic Violence*, Off. on Violence Against Women, http://www.ovw.usdoj.gov/domviolence.htm (last visited Nov. 23, 2010).

6. *Id.*

7. *Id.*

8. Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 Fam. Ct. Rev. 476, 478 (2008).

9. Adrienne E. Adams et al., *Development of the Scale of Economic Abuse*, 14 Violence Against Women 563, 567 (2008), http://vaw.sagepub.com.rlib.pace.edu/content/14/5/563.full.pdf+html.

10. *Domestic Violence Awareness*, Women's Self Defense-Instructions Online, http://www.womens-self-defense-instruction-online.com/domestic-violence-awareness.html (last visited Nov. 23, 2010).

11. Melinda Smith & Jeanne Segal, *Domestic Violence and Abuse: Signs of Abuse and Abusive Relationships*, helpguide.org, http://helpguide.org/mental/

domestic_violence_abuse_types_signs_causes_effects.htm (last reviewed Nov. 2010).

12. Karen Stephenson, *Financial Abuse is Fraud: Controlling the Finances Against the Will of Another is a Crime,* Suite 101.com (June 30, 2009), http://www.suite101.com/content/financial-abuse-is-a-form-of-fraud-a128860.

13. Adams et al., *supra* note 9, at 568.

14. Chris L. Jenkins, *Victims of Abuse, and the Economy: Rise in Domestic Violence Cases Strains Fairfax's Services,* Wash. Post (June 16, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071403618.html.

15. Matthew Scott, *Domestic Violence & Economic Abuse Increase as Economy Goes South,* blackvoices (Mar. 19, 2009, 5:31 PM), http://www.bvonmoney.com/2009/03/19/domestic-violence-and-economic-abuse-increase-as-economy-goes-south/.

16. Kelly & Johnson, *supra* note 8, at 483.

17. Sharon K. Araji & Rebecca L. Bosek, *Domestic Violence, Contested Child Custody, and the Court: Findings From Five Studies, in* Domestic Violence, Abuse, and Child Custody. Legal Strategies and Policy Issues 6-1, 6-5 (Mo Therese Hannah & Barry Goldstein eds., 2010).

18. *Economic Abuse,* Nat'l Coalition Against Domestic Violence, http://www.uncfsp.org/projects/userfiles/File/DCE-STOP_NOW/NCADV_Economic_Abuse_Fact_Sheet.pdf (last visited Nov 25, 2010).

19. Cynthia K. Sanders & Meg Schnabel, *Organizing for Economic Empowerment of Battered Women: Women's Savings Accounts,* J. Community Prac., 2007, at 47, 48, http://dx.doi.org/10.1300/J125v14n03?04.

20. Molly Dragiewicz, *Gender Bias in the Courts: Implications for Battered Mothers and Their Children, in* Domestic Violence, Abuse, and Child Custody. Legal Strategies and Policy Issues, *supra* note 17, at 5-1, 5-16.

21. *National Poll Reveals Economic Abuse Defined Differently on Main Street Than Wall Street,* Nat'l Network to End Domestic Violence, http://www.nnedv.org/projects/ecojustice/280-new-national-poll-reveals-economic-abuse-defined-differently-on-main-street-than-wall-street.html (last visited Nov. 23, 2010).

22. Anita Creamer, *Domestic Violence Can Also Include Economic Abuse,* Sacramento Bee (July 4, 2009), *available at* Gale Databases CJ202985947.

23. Judy L. Postmus, *Economic Empowerment of Domestic Violence Survivors,* Nat'l Online Resource Center on Violence Against Women (Oct. 2010), http://new.vawnet.org/category/Main_Doc.php?docid=2540.

24. Shannon Buggs, *Exploiting Cash Counts as Abuse,* Houston Chron. (Jul. 12, 2009), http://www.chron.com/disp/story.mpl/business/buggs/6524646.html.

25. *Id.*

26. Adams et al., *supra* note 9, at 563–88.

27. *Id.* at 569.

28. *Id.*

29. Terri L. Weaver et al., *Development and Preliminary Psychometric Evaluation of the Domestic Violence-Related Financial Issues Scale (DV-FI),* 24 J. of Interpersonal Violence 569, 569 (2009), http://jiv.sagepub.com/content/24/4/569.full.pdf+html.

30. Adams et al., *supra* note 9, at 583.

31. *Id.* at 582–83.

32. *Economy Takes Toll on Victims of Abuse*, Fla. Today (Oct. 26, 2009), 2009 WLNR 26386122.

33. *Id.*

34. Susan Tompor, *Programs Empower Women Affected by Economic Abuse,* Freep.com (Jul. 9, 2009), http://www.freep.com/article/20090709/COL07/907090584?

35. *Know the Laws: Financial Abuse,* Women'sLaw.org (May 5, 2010), http://www.womenslaw.org/laws_state_type.php?id=14107&state_code=PG&open_id=all.

36. Postmus, *supra* note 23

37. *Id.*

38. Cynthia K. Sanders et al., *Economic Education for Battered Women: An Evaluation of Outcomes,* 22, J. of Women & Social Work 240, 240 (2007), http://aff.sagepub.com.rlib.pace.edu/content/22/3/240.full.pdf+html.

39. Nat'l Network to End Domestic Violence, *supra* note 21. The curriculum can be found at www.ClickToEmpower.org.

40. Rick Malwitz, *Rutgers Professor Studies 'Economic Abuse' as Tactic to Control Women in Relationship,* myCentralJersey.com (July 25, 2010), http://www.mycentraljersey.com/article/20100725/NEWS/100726018/Rutgers-professor-studies-economic-abuse-as-tactic-to-control-women-in-relationship.html.

41. Sanders et al., *supra* note 38, at 240–54.

42. *Id.* at 240.

43. Postmus, *supra* note 23.

44. *Id.*

45. Michael Satz & Elizabeth Barker Brandt, *Representing Victims of Domestic Violence in Property Distribution Proceedings After the Bankruptcy Abuse Prevention and Consumer Protection Act of 200*5, 41 Fam. L.Q. 275, 278 (2007–09).

46. *Id.* at 278.

47. *Id.* at 279.

48. *Id.* at 297.

49. Barry Goldstein, *Recognizing and Overcoming Abusers' Legal Tactics, in* Domestic Violence, Abuse, and Child Custody. Legal Strategies and Policy Issues, *supra* note 17, at 18-1, 18-28.

50. *Id.*

51. *Id.*

52. *Id.*

53. Pami Vyas, *Reconceptualizing Domestic Violence in India: Economic Abuse and the Need for Broad Statutory Interpretation to Promote Women's Fundamental Rights*, 13 Mich. J. Gender & L. 177, 204–05 (2006).

54. Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. Davis L. Rev. 1107, 1134 (2008–2009).

55. *Id.* at 1107.

56. *Id.* at 1113.

57. *Id.* at 1129.

58. *Id.* at 1138.

59. *Id.* at 1143.

60. *Id.* at 1154.

61. *Id.* at 1155.

62. *Id.* at 1156.

63. Steve Mulligan, *Redefining Domestic Violence; Using the Power and Control Paradigm for Domestic Violence Legislation*, Child. Legal Rts. J., Spring 2009, at 33, 37.

64. *Id.* at 33.

65. Jennifer Barrios, *Praise for NY's New Divorce Law,* Newsday (Aug. 19, 2010), 2010 WLNR 16500135.

66. N.Y. State Assembly, A. 3890-A (N.Y. 2009), http://www.assembly.state.ny.us/leg/?default%20fld=&bn=s03890%09%09&Text=Y.

67. *Id.*

68. *Legislative Summaries by Year: 2010 New York State Domestic Violence and Related Laws,* Off. for the Prevention of Domestic Violence, http://www.opdv.state.ny.us/law/summ_year/sum10.html (last visited Nov. 22, 2010). *See* N.Y. State Assembly, A. 10984-B (N.Y. 2010), http://www.assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=a10984%09%09%&Text=Y.

69. *Fall 2010 OPDV Bulletin: Legislative Update,* Off. for the Prevention of Domestic Violence, http://www.opdv.state.ny.us/public_awareness/bulletins/fall2010/legisupdate.html (last visited Nov. 22, 2010). *See* N.Y. State Assembly, A. 07569-A (N.Y. 2009), http://www.assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=a07569%09%09&Text=Y%20.

70. Lois Schwaeber, *Praise for New Law Granting Financial Help in Divorce,* Coalition Against Domestic Violence, http://www.cadvnc.org/cadv/media/ (last visited Nov. 22, 2010).

71. *Id.*

New York Lawyers – The Good We Do

EXPRESSIONS

Do you have a story to tell….

Have you worked on a special Pro Bono project?

Have you had a poignant experience you'd like to share?

Has your community service work improved the lives of others?

We invite you to submit your own stories of inspirational experiences, community service, pro bono activities or cases that have changed your life and your practice of law. Stories submitted may be featured in "Expressions," an online collection of essays that collectively highlight "New York Lawyers, The Good We Do." As a general guideline, submissions should be in the range of 750 to 1,000 words.

For a complete set of instructions please go to
www.nysba.org/thegoodwedoguidelines.

Remarkable stories may be selected for expansion into video vignettes and will be posted under Expressions on the NYSBA website. Please join us in sharing the untold stories of New York lawyers making a difference – celebrate your good work and inspire others.

Email your submissions to
thegoodwedo@nysba.org.

NYSBA

Joseph F. Castiglione (jcastiglione@youngsommer.com) is a senior litigation associate with the law firm Young, Sommer, Ward, Ritzenberg, Baker & Moore LLC, in Albany, New York (www.youngsommer.com). The author primarily practices in commercial, land-use, environmental and municipal litigation, and appellate practice, in both actions and special proceedings. This article was prepared in part with the helpful research assistance of law school student Taber Ward.

The Implications of Responding to Pleadings if a Motion to Dismiss Is Denied

By Joseph F. Castiglione

The grounds generally identified for a motion to dismiss in Civil Practice Law and Rules 3211 (CPLR), although not necessarily addressing the merits, are legitimate means of accomplishing the desired end in litigation: winning. As lawyers and officers of the court, practitioners are obviously obligated to act in good faith when asserting arguments or facts on a motion to dismiss under § 3211. No amount of good faith or sincere belief in an argument will ensure that a motion is legally correct or factually indisputable; there is always the reality that the motion may not prevail. The question practitioners must ask themselves when making a motion to dismiss – before their clients are on the wrong side of prevailing – is, "Can I still respond to the pleadings if the motion is denied?"

Making a CPLR 3211 motion to dismiss can affect the client's ability to respond to pleadings, both in actions and special proceedings, under the CPLR. This article addresses procedural distinctions in the CPLR, and related case law, between actions, special proceedings under CPLR Article 4, and special proceedings under CPLR Article 78, relevant to the possible, but significant, impact that a motion to dismiss may have on the ability to respond to pleadings.

The Procedures Governing "Civil Judicial Proceedings" Under the CPLR

The New York State Legislature enacted the CPLR to "govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute."[1] The CPLR explains that "[a] 'civil judicial proceeding' is a prosecution, other than a criminal action, of an independent application to a court for relief."[2] A "civil judicial proceeding" includes those civil prosecutions identified both as "actions" and "special proceedings."

An action is generally defined as "the plenary prosecution of a right in a court of law, seeking the vindication of that right in a final judgment."[3] While an action is based upon a party's "right" and vindication of that right, a special proceeding is primarily predicated upon statute, that is, "[a] special proceeding is a form of a civil judicial proceeding which must be based on specific statutory authorization."[4] The CPLR directs that all civil judicial proceedings are either actions or special proceedings. In fact, "[a]ll civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized."[5] The

definition of the word "action" in the CPLR reiterates this interpretation, as the "word 'action' includes a special proceeding."[6]

The procedures for prosecuting actions and special proceedings are generally prescribed by the CPLR. The CPLR directs that, "[e]xcept where otherwise prescribed by law[7], procedure in special proceedings shall be the same as in actions, and the provisions of the civil practice law and rules applicable to actions shall be applicable to special proceedings."[8] In other words, "under the Civil Practice Law and Rules, special proceedings are to be treated in the same manner as regular actions with respect to form and procedure generally."[9] However, special proceedings are further regulated by other laws that otherwise address procedures in special proceedings, such as Articles 4 and 78 of the CPLR.

As indicated by the title – "Special Proceedings" – the "procedures for 'special proceedings' are set forth in CPLR article 4."[10] In that regard, "[t]he purpose of CPLR Article 4 is to provide a uniform procedure for special proceedings *other than* those for which a different procedure is prescribed by statute."[11] Article 4 does not authorize or empower a party to challenge any specific issue or matter; rather, it supplies the procedures to prosecute challenges to specific issues or matters authorized by other statutes.[12]

Akin to an Article 4 proceeding, an Article 78 proceeding is statutorily identified as "a special proceeding."[13] However, rather than only supplying the procedures for other statutory authorized proceedings, like Article 4, the provisions in Article 78 authorize and provide the means to challenge certain actions and determinations. The authorized challenges include, *inter alia,* contesting actions or decisions of a governmental body or officer, such as "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion."[14] As a special proceeding, "[a] proceeding pursuant to CPLR Article 78[] 'is governed by Article 4 of the CPLR, except when Article 78 contains a specific provision that is contrary to Article 4. If a procedural problem arises that is covered in neither Article 4 nor Article 78, then the procedure is the same as in an ordinary action.'"[15]

Significantly, Articles 4 and 78 look to the CPLR's general procedure for actions for a motion to dismiss. The provisions in CPLR 3211 provide the primary, but not exclusive, grounds and procedure for a party to move to dismiss an action entirely or to dismiss a specific cause of action or a defense in an action.[16] The provisions in § 3211 are generally incorporated into special proceedings through CPLR 404(a) and also separately into Article 78 proceedings through § 7804(f).[17] There are significant procedural distinctions between how the terms of § 3211 are applied in actions, special proceedings under Article 4, and special proceedings under Article 78, concerning a party's ability to answer a pleading after a motion to dismiss is denied by a court.

The Implications of a CPLR 3211 Motion to Dismiss in an Action

A party moving to dismiss a pleading in an action under CPLR 3211 is given the express right to answer the assaulted pleading if the motion is denied. In particular, § 3211 states: "Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until 10 days after service of notice of entry of the order."[18] The procedure in § 3211 for a motion to dismiss, therefore, apparently provides an unqualified right to serve responsive pleadings if the motion is denied.

Practitioners should note that "[a] motion to dismiss pursuant to CPLR § 3211 will extend the time in which a defendant may serve a responsive pleading only if the motion is made before that pleading was originally due and will not operate to relieve a party's default in pleading[.]"[19] Additionally, it has been held "'that a CPLR § 3211 motion made against any part of a pleading extends the time to serve a responsive pleading to all of it.'"[20] It has also been held that a defendant who served a counterclaim, after the defendant made a motion to dismiss and the motion was still pending, effectively waived the stay provided by § 3211(f). In other words, a defendant "cannot serve part of a responsive pleading, a counterclaim, while at the same time seeking the benefit of the automatic stay as to the other part."[21]

There are seemingly no adverse implications on the right to answer a pleading if a party makes a § 3211 motion in an action. However, there are significant implications concerning the ability to submit responsive pleadings if a party makes a § 3211 motion to dismiss in Article 4 and Article 78 proceedings.

The Implications of a CPLR 3211 Motion to Dismiss in an Article 4 Special Proceeding

The CPLR empowers a party in a special proceeding governed by Article 4 to "raise an objection in point of law . . . by a motion to dismiss the petition."[22] As opposed to the apparently unqualified right to respond to a pleading after a § 3211 motion is denied in an action, in an Article 4 special proceeding, however, "[i]f the motion is denied, the court may permit the respondent to answer, upon such terms as may be just."[23] While Article 4 provides for procedures "otherwise prescribed by law," the right to submit a responsive pleading provided in CPLR 3211(f) is superseded by the conflicting procedures otherwise prescribed by CPLR 404(a). For instance,

> while CPLR 404(a), which applies to special proceedings generally, provides that a respondent in a special proceeding may move to dismiss within the time

> allowed for answer and that, if the motion is denied, the court may permit the respondent to answer, this provision, unlike CPLR 3211(f), which is applicable in plenary actions, does not automatically extend the respondent's time to answer.[24]

The New York Court of Appeals has specifically acknowledged that there is no "right" to respond to a pleading after a motion to dismiss is denied, based upon "the express language of CPLR § 404 (subd. [a])."[25] Rather, "[l]eave to answer is a matter within the sound discretion of the court"; in other words, a court can dispose of an Article 4 special proceeding on the motion to dismiss, if the motion is denied, by not allowing any responsive pleading.[26] The discretion to allow or refuse a responsive pleading in an Article 4 special proceeding is not unlimited and is subject to review based upon the standard of abuse of discretion.[27]

Appellate courts have identified several considerations when reviewing the propriety of a lower court's exercise of discretion to preclude a responsive pleading in an Article 4 special proceeding. In affirming a lower court's decision not to allow an answer in an Article 4 special proceeding after a motion to dismiss, the Court of Appeals noted that the lower court properly determined that

> no useful purpose can be served by any answer interposed and especially does this hold true by virtue of the fact that it has been indicated that the answer would refute the factual background set forth by the petitioner, which factual background the Court deems to have no bearing on the simple legal issue involved.[28]

In *Lefkowitz v. Therapeutic Hypnosis, Inc.*, the Appellate Division, Third Department overturned a lower court's denial of an answer in an Article 4 proceeding, noting the lack of notice of a summary disposition of the proceeding, as well as a general lack of clarity "that no factual issue exists which may be raised by answer," as grounds for allowing a party to answer.[29] The court appeared to highlight the lack of notice of the potential for summary disposition because of the losing party's pro se status in the case.[30]

The Appellate Division, Second Department, in annulling a lower court's determination to preclude an answer in a proceeding subject to Article 4, permitted an answer based upon a meritorious showing for conducting disclosure in the proceeding.[31] In addition, the Appellate Division, First Department, in affirming a lower court's denial of a request to answer in an Article 4 proceeding, held that "the absence of a factual showing of meritorious defenses" was sufficient to determine that the lower court did "not abuse its discretion" in prohibiting an answer.[32] The First Department subsequently adhered to its "factual showing" inquiry and seemingly agreed with the Third Department's analysis in *Lefkowitz*, when it recently annulled a lower court's determination to preclude an answer; the appellate court determined that "a 'factual issue exists which may be raised by answer.'"[33]

The underlying "policies of CPLR article 4 favor[] swift adjudication of special proceedings."[34] These policies are unequivocal, as Article 4 simultaneously prohibits disclosure as of right and empowers courts with exclusive discretion to decide to allow an answer when a motion to dismiss is made.[35] There is no apparent direct standard to determine when an answer should be allowed if a motion to dismiss is denied in an Article 4 special proceeding, other than the standard of abuse of discretion. A reasonable, but broad, test may be that used in *In re Dodge's Trust* in which the Court questioned whether any "'useful purpose can be served by any answer interposed.'"[36] Practitioners are advised, however, to make that determination using their own sound discretion.

The Implications of a CPLR 3211 Motion to Dismiss in an Article 78 Special Proceeding

Similar to CPLR 404(a), a party in an Article 78 special proceeding is allowed to "raise an objection in point of law . . . by a motion to dismiss the petition."[37] As opposed to the discretionary power of a court to allow a party to respond to a pleading in an Article 4 proceeding, a party in an Article 78 proceeding is purportedly given the right to answer a pleading after a motion to dismiss is denied. Specifically, "[i]f the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just."[38] As such, while Article 4 and Article 78 proceedings are both special proceedings, the procedures regarding responding to pleadings in an Article 4 proceeding after a motion to dismiss is denied do not apply to the provisions "otherwise prescribed by law" that govern the procedure to respond to pleadings after a motion to dismiss is denied in an Article 78 proceeding.[39]

At first glance, CPLR 7804(f) appears consistent with the right in an action provided by § 3211(f) to respond to a pleading after a motion to dismiss is denied. However, the language of § 7804(f), which states that "the court shall permit the respondent to answer," has been qualified by case law over the years. The First Department previously explained that "[n]otwithstanding the clear meaning and intent of the relevant language in CPLR § 7804(f), some authority has developed to the effect that a court need not permit a respondent to answer upon denial of its § 7804(subd [f]) motion."[40] As the Court of Appeals said,

> [t]he mandate of CPLR 7804 (subd [f]) . . . proscribes dismissal on the merits following such a motion [(i.e. a motion to dismiss)], unless the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer.[41]

The necessary showing to preclude a court from denying the right to answer includes "factual and legal issues" that "are in dispute and have not been fully addressed by the parties."[42] In other words, before a party can be deprived of responding, "all legal and factual issues" must have been raised and fully addressed by the parties on the motion, and "no prejudice will result from the failure to require an answer."[43] The purported case law qualification on the right to respond may not apply if parties are not given the opportunity for "development of the facts,"[44] such as allowing a losing party to "complete any relevant discovery" in the appropriate circumstances, if the motion to dismiss is denied.[45] But, as long as "the dispositive facts and the positions of the parties are fully set forth in the record, thereby making it clear that no dispute as to the facts exists and that no prejudice will result," case law seemingly allows a court to unilaterally dispose of an Article 78 proceeding when the court denies a motion to dismiss.[46]

Although authority has developed purporting to allow a court to preclude answering after a motion to dismiss is denied, courts have concomitantly cautioned about exercising that authority, in light of the intent and clear language in CPLR 7804(f). The Court of Appeals directly held that "in light of the express direction of CPLR § 7804(f)" a court "shall" permit a party to answer. Specifically, "the petition in such a proceeding should not be granted before the respondent has filed an answer."[47] The First Department separately questioned the legitimacy of prior case law, seeming to allow courts to deny an answer on a motion to dismiss in an Article 78 proceeding based on the clear language in § 7804(f).

In *230 Tenants Corp. v. Board of Standards and Appeals of the City of New York*, the First Department, while acknowledging the theoretical utility of such power and noting that it could be useful on "occasions in which the efficient and economical disposition of article 78 proceedings would best be served," questioned the precedential "validity" of the prior case law and annulled the lower court's decision to preclude an answer on a motion to dismiss.[48] The appellate court explained that "the procedural shortcut adopted [by the lower court] cannot be reconciled with the clear language and intent of the controlling section"[49] and concluded that, based upon the word "shall" in § 7804(f), "the Legislature meant what the statutory language so clearly states."[50]

As indicated above, based upon reasons founded on law and perhaps reasons of fairness to litigants – courts are generally reluctant to endorse summary disposition of an Article 78 proceeding on a motion to dismiss, seemingly endeavoring to limit its use to "the rare case."[51] There appears, however, to be a greater willingness to accept such summary disposition if notice and an opportunity to be heard is afforded parties in an Article 78 proceeding, similar to what is required under CPLR 3211(c) when a motion to dismiss is treated as a motion for summary judgment.

There are significant implications concerning the ability to submit responsive pleadings if a party makes a § 3211 motion to dismiss in Article 4 and Article 78 proceedings.

In reviewing a lower court's summary disposition of an Article 78 proceeding on a motion to dismiss, the Court of Appeals explained that

> [a]lthough, as respondents argue, an article 78 proceeding "on analysis closely correspond[s] to an action if a motion for summary judgment could be made simultaneously with the commencement of the action" . . ., it is also true that a motion for summary judgment is usually made only "after issue has been joined" (CPLR 3212, subd [a]) and that a motion to dismiss may be treated as a motion for summary judgment only when the parties have had the opportunity to "submit any evidence that could properly be considered on a motion for summary judgment" (CPLR 3211, subd [c]). Thus, notice that a motion to dismiss under CPLR 3211 will be treated as a motion for summary judgment is required prior to dismissal on the merits unless it is clear from the papers that no prejudice has resulted from omission of notice . . . . The more particularly is this so with respect to an article 78 proceeding, in light of the express direction of CPLR 7804 (subd [f]).[52]

The Court was referring to "[t]he mandate of CPLR 7804 (subd. [f]) that, 'If the motion is denied, the court shall permit respondent to answer.'"[53]

The Court of Appeals ultimately held that "the motion papers clearly did not establish that there were no triable issues of fact and the procedure dictated by CPLR § 7804 (subd. [f]) should have been followed."[54] The Court did not say it was requiring § 3211(c) notice and opportunity to be heard as a mandatory predicate to summarily disposing of an Article 78 proceeding on a motion to dismiss; however, the Court indicated that notice was a "particularly" important consideration in determining prejudice and then employed an apparent summary judgment standard in reviewing the propriety of the lower court decision.

In *230 Tenants Corp.*, the First Department made similar remarks about requiring notice and opportunity to be

heard under § 3211(c) before a court summarily disposes of an Article 78 proceeding on a motion to dismiss.

> [I]t may well be that there is sufficient flexibility in the statutory pattern to permit adaptation of the procedure set forth in CPLR 3211 (subd [c]) in which the court, after adequate notice to the parties, may treat a motion to dismiss pursuant to CPLR 3211 (subd [a] or [b]) as a motion for summary judgment.[55]

In *Phillips v. Town of Clifton Park Water Authority*,[56] the Third Department appears to have been more direct about the issue. The record in *Phillips* showed that the lower court "failed to provide any notice to the parties that it intended to treat respondents' motion as one for summary judgment" in an Article 78 proceeding.[57] The appellate court, after first citing the notice and opportunity requirements in § 3211(c) for treating a motion to dismiss as a motion for summary judgment in an action, explained

> that in a CPLR article 78 proceeding, prior notice must be afforded due to the clear mandate of CPLR 7804(f) which details that when an objection in point of law is raised pursuant thereto, the denial thereof mandates that the court shall permit the respondent to answer.[58]

The Third Department concluded, however, that "[w]hile such failure [to provide notice to treat a motion as one for summary judgment] has not been held to be fatal in appropriate circumstances, we cannot find that the parties herein were 'deliberately charting a summary judgment course' . . . by laying bare their proof."[59] The court, therefore, seemingly qualified the requirement of notice and an opportunity to be heard under § 3211(c), before precluding an answer in an Article 78 proceeding, explaining that lack of notice would not be fatal "in appropriate circumstances."[60]

New York courts have clearly cautioned against unilaterally denying a party the opportunity to answer in an Article 78 proceeding. While there may be some preference for requiring the same or similar notice requirements from § 3211(c), when reviewing any summary disposition of an Article 78 proceeding on a motion to dismiss, it has not been directly imposed as a prerequisite to any such summary disposition in an Article 78 proceeding. If the "rare case"[61] exists where a motion purports to show there are no issues of law, no issues of fact, and no prejudice to the party, summary disposition of an Article 78 proceeding will seemingly be forgiven. However, apart from the general "strong public policy favoring disposition of cases on the merits,"[62] the CPLR's direction that its general provisions be applied to special proceedings when there is no statute otherwise prescribing the procedures, seemingly already requires that parties be afforded the notice and opportunity required in § 3211(c), before summarily disposing of an Article 78 proceeding on a motion to dismiss.

Notice and an Opportunity to Be Heard Before Summarily Disposing of an Action

The provisions in CPLR 7804(f) direct that an answer "shall" be allowed if a motion to dismiss is denied. There is no language in Article 78 generally, or even in Article 4, otherwise prescribing how to accomplish the summary disposition of an Article 78 proceeding or individual cause of action on a motion to dismiss under § 7804(f). Unlike the lack of direction in § 7804(f) for summary disposition of an Article 78 proceeding on a motion to dismiss, CPLR 3211(c) promulgates procedures to summarily dispose of an action, any cause of action, or defense, on a motion to dismiss in an action:

> Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment.[63]

CPLR provisions governing summary judgment motions further address how a party can obtain final judgment in any action, or on any cause of action or defense, in an action.

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. . . . The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party . . . [and] the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.[64]

A court can also, in the appropriate circumstances, award summary judgment to a non-moving party.[65]

As such, the language in CPLR 3211(c) and 3212(b), when read together, seemingly fills the gap and prescribes the procedure for how to summarily dispose of an Article 78 proceeding (or any cause of action/defense in an Article 78 proceeding) on a motion to dismiss and issue a final judgment disposing of the proceeding. No provisions otherwise prescribe the procedure, so the CPLR's general procedure for an action should govern.[66]

Imposing the same notice and opportunity to be heard requirements under § 3211(c) in an action, as a prerequisite to summarily disposing of an Article 78 proceeding on a motion to dismiss, also addresses the problem imposed by the lack of disclosure as of right in Article 78 proceedings. Unlike an Article 78 proceeding, disclosure is allowed in an action as of right.[67] A party in an action can

oppose a motion for summary judgment under the CPLR by showing that "facts essential to justify opposition may exist but cannot then be stated" and require disclosure.[68] A court can treat a motion to dismiss as a motion for summary judgment if proper notice and opportunity to submit all relevant evidence is provided because, under § 3211(c) and § 3212(b) and (f), parties have the statutory right to oppose summary judgment if they show disclosure is necessary. In an Article 78 proceeding, however, without any ability to obtain evidence through disclosure as of right, parties are generally relegated to the record for the proceeding.

"Swift adjudication" should not subvert the "just, speedy and inexpensive determination of every civil judicial proceeding."

In general, the record in an Article 78 proceeding is not prepared before a motion to dismiss is made.[69] Any co-respondents not responsible for preparing the record, and even petitioners, typically rely on the record to provide some of the necessary evidence to support their claims.[70] Requiring notice and an opportunity to be heard before a court summarily disposes of an Article 78 proceeding on a motion to dismiss would afford opposing parties the ability to show that summary disposition of the proceeding on the motion is inappropriate by showing a need to obtain evidence from the potential record that has likely not yet been prepared for the proceeding.

The Legislature intended that "swift adjudication . . . be achieved by way of a special proceeding."[71] However, swift adjudication should not subvert the Legislature's concomitant direction that there be "just, speedy and inexpensive determination of every civil judicial proceeding."[72] Regardless of procedures under the CPLR, the Legislature intended that there be a distinction in the right to answer in a CPLR Article 4 special proceeding and in an Article 78 proceeding, after a motion to dismiss was denied. For instance, the Legislature included the term "may" in CPLR 404(a) versus the word "shall" in CPLR 7804(f).[73] There are no apparent provisions of law in Article 78 that otherwise prescribe how a court can summarily dispose of an Article 78 proceeding when a motion to dismiss is denied; however, CPLR 3211(c) directly addresses the procedures, including notice and an opportunity to be heard, for a court to summarily dispose of an action, or any cause of action or defense, on a motion to dismiss under § 3211 in an action. The judicial inclination generally favoring notice and an opportunity to be heard before summarily disposing of an Article 78 proceeding on a motion to dismiss is just. It adheres to the CPLR's most fundamental direction regarding procedures in civil judicial proceedings: "Except where otherwise prescribed by law[], procedure in special proceedings shall be the same as in actions, and the provisions of the [CPLR] applicable to actions shall be applicable to special proceedings."[74]

Conclusion

Significant issues may arise regarding a party's ability to respond to pleadings after making a motion to dismiss. Practitioners should always remember to ask themselves whether they will be able to answer or respond if they make a motion to dismiss and the motion is denied. Unfortunately, the only available answer is the often unsettling and inclusive – maybe. ■

1. CPLR 101; *see also* CPLR 105(o) (providing the CPLR definition of the term "law," to also mean "any statute").

2. CPLR 105(d).

3. *See, e.g.*, *Freudenthal v. Cnty. of Nassau*, 283 A.D.2d 6, 10, 726 N.Y.S.2d 116 (2d Dep't 2001), *aff'd*, 99 N.Y.2d 285, 755 N.Y.S.2d 56 (2003).

4. *See Town of Johnstown v. City of Gloversville*, 36 A.D.2d 143, 144, 319 N.Y.S.2d 123 (3d Dep't 1971).

5. CPLR 103(b); *see also Freudenthal*, 283 A.D.2d at 10; *City of Syracuse v. Pub. Emp't Relations Bd.*, 279 A.D.2d 98, 105, 719 N.Y.S.2d 401 (4th Dep't 2000).

6. CPLR 105(b), (a); *see also City of Syracuse*, 279 A.D.2d at 105.

7. The CPLR provides that "[t]he word 'law' means any statute or any civil practice rule." CPLR 105(o).

8. CPLR 103(b).

9. *See 1825 Realty Co. v. Gabel*, 44 Misc. 2d 168, 170, 253 N.Y.S.2d 269 (Sup. Ct., N.Y. Co. 1964).

10. *See City of Syracuse*, 279 A.D.2d at 105.

11. *See Allyn v. Markowitz*, 83 Misc. 2d 250, 252, 373 N.Y.S.2d (Rockland County Ct. 1975) (emphasis in original).

12. *See generally* CPLR Art. 4; *see also, e.g.*, *In re Foley*, 140 A.D.2d 892, 892–93, 528 N.Y.S.2d 709 (3d Dep't 1988) (applying CPLR 404 as the procedures in a proceeding under Mental Hygiene Law Art. 77); *see also Ford v. Pulmosan Equip. Corp.*, 52 A.D.3d 710, 710, 862 N.Y.S.2d 56 (2d Dep't 2008) (applying CPLR Art. 4 for procedures for proceeding under Business Corporation Law § 1008).

13. *See* CPLR 7804(a).

14. CPLR 7803(3); *see generally* CPLR 7801.

15. *See Long Island Citizens Campaign, Inc. v. County of Nassau*, 165 A.D.2d 52, 54, 565 N.Y.S.2d 852 (2d Dep't 1991); *see also* CPLR 103(b).

16. *See* CPLR 3211(a), (b).

17. *See* CPLR 404(a); *see also* CPLR 7804(f); *see also Bernstein Family Ltd. P'ship v. Sovereign Partners, L.P.*, 66 A.D.3d 1, 5, 883 N.Y.S.2d 201 (1st Dep't 2009) (stating about CPLR 404(a) that "its evident purpose is to permit a motion to be made on all grounds available in an action under CPLR 3211"); *see also 230 Tenants Corp. v. Bd. of Standards & Appeals of the City of N.Y.*, 101 A.D.2d 53, 56, 747 N.Y.S.2d 498 (1st Dep't 1984) (determining CPLR 3211 applied in Art. 78 proceeding based upon § 7804(f)).

18. CPLR 3211(f); *see also Wenz v. Smith*, 100 A.D.2d 585, 586, 473 N.Y.S.2d 527 (2d Dep't 1984); *Salzman & Salzman v. Gardiner*, 100 A.D.2d 846, 846, 474 N.Y.S.2d 86 (2d Dep't 1984).

19. *See Wenz*, 100 A.D.2d at 586; *see also Miller v. Weyerhaeuser Co.*, 179 Misc. 2d 471, 685 N.Y.S.2d 393 (Sup. Ct., N.Y. Co. 1999) (quoting *Wenz*, 100 A.D.2d 585).

20. *See United Equity Servs., Inc., v. First Am. Title Ins. Co.*, 75 Misc. 2d 254, 255, 347 N.Y.S.2d 377 (Sup. Ct., Nassau Co. 1973); *see also Chagnon v. Tyson*, 11 A.D.3d 325, 326, 783 N.Y.S.2d 29 (1st Dep't 2004) (finding that defendant that

moved to dismiss one cause of action "extended his time to respond to the other causes of action as well").

21. *See Design Strategy Corp. & Network Integration Servs., Inc. v. Spicehandler*, 2 Misc. 3d 1004(A), *1, 784 N.Y.S.2d 920 (Sup. Ct., N.Y. Co. 2004).

22. CPLR 404(a).

23. *See id.*

24. *See 860 Nostrand Assocs., LLC v. WF Kosher Food Distribs. Ltd.*, 27 Misc. 3d 16, 18, 898 N.Y.S.2d 753 (App. Term 2d Dep't 2010) (citing *In re Dodge's Trust*, 25 N.Y.2d 273, 286, 303 N.Y.S.2d 847 (1969)); *see also Eklecco Newco, LLC v. Chagit, Inc.*, 12 Misc. 3d 143(A), *1, 824 N.Y.S.2d 762 (App. Term. 9th and 10th Dists. 2006) (stating "[i]n addition, tenant's contention that CPLR 3211(f) automatically extended its time to answer is without merit since said section is inapplicable in a summary proceeding (*see* CPLR 404[a]")).

25. *See Dodge's Trust*, 25 N.Y.2d at 286; *see also In re Application of Cunningham*, 75 A.D.2d 521, 522, 426 N.Y.S.2d 765 (1st Dep't 1980) (stating, after losing a motion to dismiss, that the party "has no absolute right to answer").

26. *See Application of Cunningham*, 75 A.D.2d at 522; *see also State v. Spodek*, 89 A.D.2d 835, 836, 454 N.Y.S.2d 4 (1st Dep't 1982) (holding that the lower court "did not abuse its discretion in not granting . . . permission under CPLR 404(a) to answer"); *Ford v. Pulmosan Safety Equip. Corp.*, 52 A.D.3d 710, 711, 862 N.Y.S.2d 56 (2d Dep't 2008); *Huber v. Mones*, 235 A.D.2d 421, 422, 653 N.Y.S.2d 353 (2d Dep't 1997) (holding "the submission of an answer following denial of a motion to dismiss a special proceeding is subject to the discretion of the court (CPLR 404[a])").

27. *See Spodek*, 89 A.D.2d at 836 (holding that the lower court "did not abuse its discretion" in denying ability to answer); *In re Foley*, 140 A.D.2d 892, 893, 528 N.Y.S.2d 709 (3d Dep't 1988) (stating "we see no abuse of discretion here"); *see also Varkonyi v. S.A. Empresa De Viacao Airea Rio*, 22 N.Y.2d 333, 337, 292 N.Y.S.2d 670 (1968).

28. *See Dodge's Trust*, 25 N.Y.2d at 286–87.

29. 52 A.D.2d 1017, 1018, 383 N.Y.S.2d 868 (3d Dep't 1976) (stating "[a]lthough this was a special proceeding and not an action (*cf.* CPLR 3211, subd [c]; . . .) it does not appear that Special Term advised the parties it would proceed to consider the matter in a summary fashion should appellant's motion be denied").

30. *See Lefkowitz*, 52 A.D.2d at 1018 (stating, "[g]iven the pro se nature of appellant['s] appearance and petitioner's request, we believe the circumstances demanded that appellant [ ] be made aware of the possibility of a summary disposition").

31. *See Lev v. Lader*, 115 A.D.2d 522, 522, 496 N.Y.S.2d 52 (2d Dep't 1985).

32. *See Spodek*, 89 A.D.2d at 836.

33. *See In re Cline*, 72 A.D.3d 471, 473, 901 N.Y.S.2d 2 (1st Dep't 2010) (quoting *Lefkowitz*, 52 A.D.2d 1017).

34. *See Lev*, 115 A.D.2d at 522.

35. *See* CPLR 408.

36. 25 N.Y.2d at 286–87.

37. CPLR 7804(f).

38. *Id.*

39. *See also 230 Tenants Corp., v. Bd. of Standards & Appeals of the City of N.Y.*, 101 A.D.2d 53, 56, 474 N.Y.S.2d 498 (1st Dep't 1984); *see also Lefkowitz*, 52 A.D.2d at 1018.

40. *See 230 Tenants Corp.*, 101 A.D.2d at 56.

41. *See Nassau BOCES Cent. Council of Teachers v. Bd. of Coop. Educ. Servs.*, 63 N.Y.2d 100, 102, 480 N.Y.S.2d 190 (1984); *see also Timmons v. Green*, 57 A.D.3d 1393, 1393, 871 N.Y.S.2d 562 (4th Dep't 2008).

42. *See Wood v. Glass*, 226 A.D.2d 387, 388, 640 N.Y.S.2d 234 (2d Dep't 1996).

43. *See Vill. of Delhi v. Town of Delhi*, 72 A.D.3d 1476, 1478, 900 N.Y.S.2d 168 (3d Dep't 2010) (noting possible defenses of lack of "necessary parties and statute of limitations issues"); *see also Wood*, 226 A.D.2d at 388 (holding that "[t]he record reflects several factual and legal issues which are in dispute and have not been fully addressed by the parties"); *see also Laurel Realty, LLC v. Planning Bd.*, 40 A.D.3d 857, 860, 836 N.Y.S.2d 248 (2d Dep't 2007) (looking to see if both "the dispositive facts . . . and the arguments of the parties were fully set forth in the record" before the lower court).

44. *See Nassau BOCES Cent. Council of Teachers*, 63 N.Y.2d at 102.

45. *See Vill. of Delhi*, 72 A.D.3d at 1479; *see also Lev v. Lader*, 115 A.D.2d 522, 522, 496 N.Y.S.2d 52 (2d Dep't 1985) (allowing a party to answer in Article 78 proceeding, based upon a meritorious showing for conducting disclosure in the proceeding).

46. *See Kuzma v. City of Buffalo*, 45 A.D.3d 1308, 1311, 845 N.Y.S.2d 880 (4th Dep't 2007) (internal quotes and brackets omitted); *see Laurel Realty, LLC*, 40 A.D.3d at 860 (holding that lower court properly denied the opportunity to answer, "since the dispositive facts were undisputed, and the arguments of the parties were fully set forth in the record"); *but see also Karedes v. Colella*, 306 A.D.2d 769, 769, 761 N.Y.S.2d 534 (3d Dep't 2003) (stating that there were "other defenses involving allegations" that the party alleged "would be pleaded" to support its case); *but see also Miller v. Regan*, 80 A.D.2d 968, 968, 438 N.Y.S.2d 622 (3d Dep't 1981) (holding that a party "raised a question of substantial evidence").

47. *See Nassau BOCES Cent. Council of Teachers*, 63 N.Y.2d at 102.

48. *See 230 Tenants Corp., v. Bd. of Standards & Appeals of the City of N.Y.*, 101 A.D.2d 53, 57, 474 N.Y.S.2d 498 (1st Dep't 1984).

49. *See id.* at 57.

50. *See id.*

51. *See also Vill. of Delhi*, 72 A.D.3d at 1478.

52. *See Nassau BOCES Cent. Council of Teachers*, 63 N.Y.2d at 103 (case and treatise citations omitted).

53. *See id.* at 102.

54. *See id.* at 104; *see also* CPLR 3212(b).

55. *See 230 Tenants Corp.*, 101 A.D.2d at 57–58; *see also Laurel Realty, LLC v. Planning Bd.*, 40 A.D.3d 857, 860, 836 N.Y.S.2d 248 (2d Dep't 2007) (affirming lower court determination on motion to dismiss without allowing "an answer pursuant to CPLR 7804(f) and 3211").

56. 215 A.D.2d 924, 626 N.Y.S.2d 865 (1995).

57. *Id.* at 924. The matter had been initiated as an Article 78 proceeding, but was converted to a declaratory judgment action by the lower court. The appellate court did not appear to endorse the conversion and treated the appeal as an appeal "in a proceeding pursuant to CPLR article 78." *See id.* at 924.

58. *Id.* at 926.

59. *Id.*

60. The Third Department subsequently referred to *Phillips*, in *Karedes v. Colella*, 306 A.D.2d 769, 770, 761 N.Y.S.2d 534 (3d Dep't 2003), as authority for requiring notice in an Article 78 proceeding before a court could convert a motion to dismiss to a motion for summary judgment, citing to the right to answer in CPLR 7804(f), as the basis for requiring notice. *See Karedes*, 306 A.D.2d at 770.

61. *See Vill. of Delhi v. Town of Delhi*, 72 A.D.3d 1476, 1478, 900 N.Y.S.2d 168 (3d Dep't 2010).

62. *See, e.g., Castell v. City of Saratoga Springs*, 3 A.D.3d 774, 776, 772 N.Y.S.2d 97 (3d Dep't 2004).

63. CPLR 3211(c).

64. CPLR 3212(b).

65. *See id.*

66. *See* CPLR 103(b).

67. *See generally* CPLR Art. 31; *but see* CPLR 408 (providing disclosure by court order in special proceedings).

68. CPLR 3212(f).

69. *See* CPLR 7804(e), (f).

70. *See generally, e.g., Simpson v. Wolansky*, 38 N.Y.2d 391, 380 N.Y.S.2d 630 (1975).

71. *See Lev v. Lader*, 115 A.D.2d 522, 522, 496 N.Y.S.2d 52 (2d Dep't 1985).

72. CPLR 104.

73. *See also 230 Tenants Corp., v. Bd. of Standards & Appeals of the City of N.Y.*, 101 A.D.2d 53, 56, 474 N.Y.S.2d 498 (1st Dep't 1984) (reiterating "'this difference was intended'").

74. CPLR 103(b).

Solo/Small Firm Resource Center

www.nysba.org/Solo

Visit www.nysba.org/solo and find the tools, advice and resources you need to thrive as a solo or small firm practitioner

- Download Business Continuity Planning tools
- Read excepts from solo guru Carolyn Elefant's *Solo by Choice*
- Learn how to market your solo or small firm
- Download forms and document assembly products to make you more efficient
- Get a free copy of Computer Help for Busy Lawyers
- Stay on top of industry trends with alerts, reference books, links, articles and more
- Check out upcoming events tailored to your needs
- Review insurance and other benefit programs for members
- Make those all-important connections through blogs, listserves, and online directories.

The tools you need – all in one place. NYSBA's Solo/Small Firm Resource Center – Working for You.

Continued from Page 64

sult earlier *Legal Writer* columns in this multi-series article on pleadings.

Expedition is the goal of special proceedings. Motion practice in special proceedings is rarer than in plenary actions. A respondent may move to dismiss, for example, on the basis of jurisdiction. In lieu of a motion, a respondent may assert lack of jurisdiction as a defense in the answer and supply proof of it in a supporting affidavit.[19] A motion may prove helpful when it would obviate the need for an answer, such as threshold defenses like jurisdiction, statute of limitations, and res judicata.[20]

> Expedition is the goal of special proceedings.

Disclosure in special proceedings is available only by leave of court. Notices to admit[21] are available, however, without leave of court.

A bill of particulars, which is only an amplification of the pleadings and is not a form of disclosure, is less needed in a special proceeding than in a plenary action. The pleadings should already be amplified by the affidavits attached to the petition.

Article 78 Proceedings

CPLR 7803 provides the scope of Article 78 proceedings. Article 78 proceedings are used to review administrative decisions. The party bringing the Article 78 proceeding is called the petitioner; the petitioner is one who has been aggrieved by the administrative result. Under CPLR 7802(a), the respondent — the party against whom the proceeding has been brought — "includes every court, tribunal, board, [public or private] corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article."

Article 78 proceedings are sometimes brought against justices, judges, referees, and judicial hearing officers. Unless a court orders it, a judicial respondent need not appear in the Article 78 proceeding; the results of the Article 78 proceeding, however, bind the judicial respondent. A judicial respondent who appears may be represented by the attorney general under Public Officers Law § 17(2)(b).

The statute of limitations in Article 78 proceedings is four months. Consult CPLR 217(1) to determine when the four-month period runs.

Pleadings in Article 78 proceedings must be verified. Another pleading nuance is that a "reply is mandatory not only when the respondent's answer contains a counterclaim, but also when there is 'new matter in the answer or where the accuracy of proceedings annexed to the answer is disputed.'"[22] Thus, submit a reply if you're the petitioner and you're disputing the "correctness of the administrative record."[23]

As in special proceedings, you may bring an Article 78 proceeding by order to show cause; the order to show cause is in lieu of a notice of petition.

The case gets assigned to a judge once you've made a request for judicial intervention (RJI).

A respondent must give the court the record if it doesn't have it already. Usually the record is voluminous. The respondent must file a certified transcript of the record of the proceedings with the answer.

If a respondent has an objection in point of law to the petition, the respondent has the option to include it as a defense in the answer or to make a motion to dismiss[24] based on the objection.[25]

Article 78 proceedings are brought in Supreme Court. The Supreme Court may transfer the proceedings to the Appellate Division if a "substantial evidence" question arises.[26]

Article 78 proceedings are usually resolved on the papers. Rarely does an issue of fact warrant a trial. If triable issues are raised, a court will conduct a trial forthwith.[27]

As in other special proceedings, Article 78 proceedings end in a judgment. The court may grant a judgment to the petitioner for the relief sought. The court may also dismiss the proceeding. The court may further "annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent."[28]

Family Court Proceedings

Although the CPLR does not list them as special proceedings, cases started under the Family Court Act (FCA) are just that. Family Court proceedings include juvenile delinquency, custody and visitation, support, paternity, child-protective, adoption, foster-care, permanent termination of parental rights, guardianship, family offenses, and PINS (person in need of supervision) proceedings.

Each type of case under the FCA is different. Consult with the court clerk and the court rules to determine what you need to do before commencing these proceedings. The petition is the pleading that's common to all Family Court cases.

Summary Proceedings

A summary proceeding is "a category of special proceeding."[29] A summary proceeding refers to a landlord-tenant case in which the landlord seeks dispossession because the tenant failed to pay rent or because the tenant is holding over after the lease has expired. Real Property Actions and Proceedings Law (RPAPL) Article 7-A and lockout proceedings and, in New York City, repair (Housing Part, or HP) and harassment proceedings are also summary proceedings. Guidance for nonpayment and holdover comes from RPAPL Article 7.

The notice of petition and petition are the two documents necessary to commencing a summary proceeding. The notice of petition must specify the time and place of the hearing; it requires the respondent to answer and assert defenses affirmative or be barred from asserting them later. Check the court rules and the clerk of the court before setting a hearing date.

The essential parts of the notice of petition are (1) the caption; (2) the petitioner's name; (3) the date of verification; (4) the money and other relief sought; (5) the address of the premises sought to be recovered, including the apartment or room number and the county where it is located; (6) the court's address; (7) the date; and (8) the petitioner's (or attorney's) name, address, and telephone number.[30] The notice of petition should inform the respondent that an answer is required orally or in writing and must be served and filed with the clerk of the court. It should also provide that the answer may contain a defense or counterclaim. The notice of petition should additionally inform the respondent of the ramifications of not answering or appearing in court, namely, a default judgment followed by warrant to dispossess the respondent. The notice of petition should also inform the respondent that if the respondent fails to comply with an initial deposit or payment order, the court may enter a final judgment against the respondent without holding a trial. The notice should provide that if the respondent fails to make a deposit or payment, the court may conduct an immediate trial on the issues raised in the answer.

In special proceedings, unlike in other contexts, courts might "treat as jurisdictional defects things which in other contexts might prove innocent and ignorable irregularities."[31] A court may find that a defect in the caption is fatal if the respondent is prejudiced.

RPAPL 741 provides what the petition must contain. Courts will dismiss summary proceedings for defective pleadings. Petitions must contain allegations of the petitioner's and the respondent's interest in the premises and their relationship to one another (a tenant, a sub-tenant, or someone in possession of the property for some other reason); a description of the premises; the facts on which the proceeding is based, including whether a written lease or a verbal agreement exists; and the relief sought, such as a judgment for rent or the fair value of the use or occupation of the premises for that period.

If you had to provide notice to the respondent before commencing the proceeding, you must state that you fulfilled the notice requirement. In a nonpayment case, for example, the petitioner must allege that it demanded rent in writing or orally in a demand that you've annexed to the petition.

In New York City, the petition must also provide whether the premises are part of a multiple dwelling. If the premises are part of a multiple dwelling, the petition must provide that an "effective registration statement is on file with the office of code enforcement in which the owner has designated a managing agent, a natural person over 21 years of age, to be in control of and responsible for the maintenance and operation of the dwelling."[32] The petition should also allege the multiple dwelling registration number, the registered managing agent's name, and either the residence or business address of the managing agent.

A petition identifies the parties, sets out the factual basis of the claim, and prays for a legal remedy.

The petition must be verified.[33] Generally, the petitioner should verify the petition, unless an authorized representative, attorney, or agent brings the case on the petitioner's behalf.[34]

The various parts of the notice of petition must identically match the corresponding parts of the petition. Any deviation might result in dismissal. If, for example, you've written "Apartment 2A" in the petition, but "Apartment 3A" in the notice of petition, that might result in dismissal.

Disclosure devices available to parties in an action are not as readily available in summary proceedings. Disclosure is discouraged in most cases. You'll need a court order for disclosure. Motion practice, such as a motion to dismiss or a motion for summary judgment, is applicable in summary proceedings.

In next issue's column, the *Legal Writer* will continue with techniques on writing pleadings, such as the answer. ■

Gerald Lebovits is a New York City Criminal Court judge in New York County and an adjunct professor at St. John's University School of Law and Columbia Law School. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's e-mail address is GLebovits@aol.com.

1. David D. Siegel, New York Practice § 547, at 943 (4th ed. 2005).
2. *Id.*
3. RPAPL Article 7.
4. Siegel, *supra* note 1, at § 547, at 943.
5. *Id.*
6. *Id.* at § 547, at 944.
7. CPLR 105(b).
8. *Id.*
9. CPLR 402.
10. CPLR 403(a).
11. Siegel, *supra* note 1, at § 553, at 949.
12. *Id.*
13. *Id.* at § 553, at 952.
14. CPLR 402.
15. Siegel, *supra* note 1, at § 552, at 948–49.
16. *Id.* at § 552, at 949.
17. N.Y. St. B. Ass'n, Committee on Continuing Legal Education, *Practical Skills — How to Commence a Civil Law Suit* 3, 9 (2009).
18. Siegel, *supra* note 1, at § 178, at 307.
19. *Id.* at § 554, at 952.
20. *Id.* at § 554, at 953.
21. CPLR 3123.
22. Siegel, *supra* note 1, at § 567, at 979.
23. *Id.*
24. CPLR 3211(a).
25. CPLR 7804(f).
26. CPLR 7804(g).
27. CPLR 7804(h).
28. CPLR 7806.
29. Siegel, *supra* note 1, at § 571, at 986.
30. For a sample form, see the official notice of petition in the rules of the New York City Civil Court, Uniform Rule 208.42(b).
31. Siegel, *supra* note 1, at § 573, at 991.
32. N.Y City Civ. Ct. R. 208.42(g)(2).
33. CPLR 3020–3023.
34. RPAPL § 721.

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Whatever has happened to the past tense of *shrink*? The former past tense *shrank* seems to have disappeared and has been replaced by the past perfect tense *shrunk*. Not only has the perfectively good verb *shrank* disappeared, but it has been followed by the loss of the past tense of *stink*. The old past tense *stank* is gone and now seems to be *stunk*. What's going on?

Answer: A majority of Americans have apparently decided that the traditional past tenses, *shrank* and *stank,* are not really necessary. All countries are democratic in their language, no matter what their politics. The majority of the public makes decisions about language; dictionaries only record that choice. So whatever language the majority chooses becomes correct, and the majority of English speakers have apparently decided that the past-perfect tenses *shrunk* and *stunk* are acceptable.

Dictionaries now list *shrunk* as acceptable in constructions in which only *shrank* used to be correct. *Stunk* is acceptable as well as the traditional *stank.* Other verbs have followed. *Sunk* is now common along with the traditional *sank*. The only past tenses listed for *sling* and *sting* are *slung* and *stung*; no *slang* and *stang* ever existed in modern English. Perhaps the *(s)* verbs that have lost their traditional past tense were influenced by *slung* and *stung*, though that theory seems far-fetched.

The old past tense *drank* is still the only approved past tense for *drink*, despite the growing popularity of *drunk* in the ungrammatical "He drunk himself into a stupor." And the ungrammatical past tense *brung*, although common among some groups, has not replaced *brought*.

The singular personal pronoun *I* has narrowed in usage. People used to consider "It's me" ungrammatical. Now "It's me" is standard. Even the phrase, "Her and me went to the mall" is replacing "She and I went to the mall," among teenagers. On the other hand, "*I*" is now common in the (still ungrammatical) phrase, "Give it to John and I."

The plural Latin nouns *media* and *data* traditionally had singular forms: *medium* and *datum*. *Datum* has all-but disappeared, and *data* is now used as both a singular and a plural, "The data is . . . " perhaps having become more common than "The data are . . . . " In some contexts, *medium* is still singular, but to describe forms of communication *media* has replaced it, and a new (still unacceptable) plural, *medias*, is seen. The *(s)* ending of the singular noun *kudos* is so often assumed to be a plural, and a "new" singular (*kudo*) has emerged. Regarding *kudo*, a reviewer of *The Random House Dictionary* (*RH-II*) asked, "What next, will a single instance of *pathos* be called a *patho*?" And – one might add – what about *etho* as the singular of *ethos*?

RH-II also ignores some former distinctions in meaning. One of my favorites was the difference between *disinterested* (impartial) and *uninterested* (indifferent). *RH-II* labels the two words "synonyms." It also ignores the distinction between *imply* and *infer*, but then adds that the distinction is "widely observed." All of us have our favorite distinctions. But at what point should we admit that the majority considers them unimportant?

For example, do you still observe the distinction in meaning between *notorious* and *famous*? Between *widespread* and *prevalent*? Between *terrify* and *terrorize*? Between *reticent* and *reluctant*? Between *farther* and *further*? How about *perspicacity* and *perspicuity*? I could go on for pages, and you probably could too. The popular response would probably be that the pairs are synonyms, which means that their differences in meaning have become insignificant.

Modern English has discarded many Old English words. If I were writing this in Old English (from about 500 A.D. to 1400 A.D.), you could not read it. The Angles, Saxons, and Jutes, who invaded and subjugated what is now England in 449 A.D., and subsequent "Christian invaders" under St. Augustine spoke a much more intricate, complex language than we do.

For one thing, Old English contained grammatical gender – of nouns, verbs, and adjectives. (Languages like German still do.) For instance, English now has only one form for the definite article *the*. Old English had three, and modern German still does (*der*, *die*, *das*). Modern English nouns express only singular and plural; Old English had, in addition, three singular forms for nouns and three different plural forms. While modern English would contain only *tree* or *trees*, in Old English you would also have to decide among six choices for nouns: nominative, genitive, and dative/accusative.

All these forms have disappeared in English, our ancestors having decided they were dispensable – and we manage well without them. The size of our vocabulary, however, has proliferated, every new invention increasing it, even as the speakers discard grammar they find unnecessary.

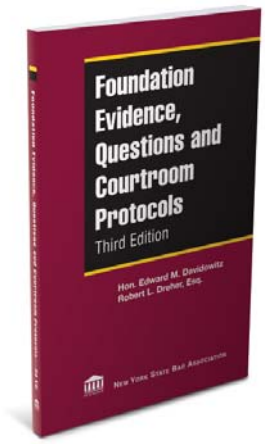
Linguists maintain that every language possesses all the vocabulary it needs. For example, the Eskimo language has 15 words for *snow*; English finds one word sufficient. But Eskimos may have limited language to describe the huge number of electronic terms we have created to describe technological developments.

Perhaps each individual should decide on a case-by-case basis whether to join the avant garde or to retain traditional usage. Poet John Ciardi argued that we should fight change. He said, "Those who care have a duty to resist. Changes that occur against such resistance are tested changes. The language is better for them – and for the resistance." ■

Gertrude Block is lecturer emerita at the University of Florida College of Law. She is the author of *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co.); *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association).

NYSBA**BOOKS**

NEW



Foundation Evidence, Questions and Courtroom Protocols

Third Edition

Unless parties have stipulated to the introduction of a specific piece of evidence or testimony, an attorney wishing to present that evidence must ask proper questions to ensure that the court will permit its introduction.

Attorneys who do not ask correct foundation questions may find themselves frustrated by a string of sustained objections. If precise evidentiary rules are addressed inarticulately, or carelessly, or not at all, the impact or importance of the evidence may be affected.

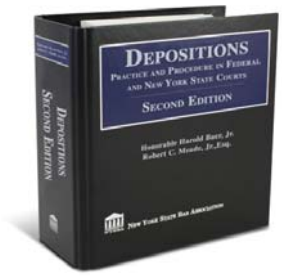
Foundation Evidence, Questions and Courtroom Protocols aids litigators in preparing appropriate foundation testimony for the introduction of evidence and the examination of witnesses.

In addition to updating case and statutory references, the third edition expands the coverage of the second edition, including two new chapters on Direct Examination and Cross Examination. Written by Hon. Edward M. Davidowitz and Executive Assistant District Attorney Robert L. Dreher, the third edition will prove to be even more valuable than the extremely popular first two editions.

AUTHORS & PRODUCT INFORMATION

Hon. Edward M. Davidowitz
Bronx County Supreme Court, Criminal Court (Retired)
Robert L. Dreher, Esq.
Office of the Bronx County Executive Assistant District Attorney

PN: 41070 | 2010 | softbound | **NYSBA Members $55** Non-Members $65



Depositions: Practice and Procedure in Federal and New York State Courts, Second Edition

This is a detailed text designed to assist young attorneys and experienced practitioners with all aspects of depositions. The second edition substantially revises the first edition. In addition to updating case law, statutory material and the rules, this edition includes an expanded legal section (Part One), a new section (Part Two) on ethics, including coverage of the new rules of professional conduct and an expanded practical advice section (Part Three).

AUTHORS & PRODUCT INFORMATION

Honorable Harold Baer, Jr.
District Court Judge, Southern District of New York
Robert C. Meade, Jr., Esq.
Director, Commercial Division, New York State Supreme Court

PN: 40749 | 2011 | approx. 738 pages | loose-leaf | **NYSBA Members $75** Non-Members $90

To order call **1.800.582.2452**
or visit us online at **www.nysba.org/pubs**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

Mention code: PUB1000 when ordering.

NYSBA

NEW MEMBERS WELCOMED

FIRST DISTRICT
Cassandra Anne Adams
Howard Bryan Adler
Jessee Cheyne Alexander-Hoeppner
Sean Whitley Lane Alford
Ayman Fahad Aljarbou
Reid Andrew Aronson
Lara Chandana Bakshi
Mary Christine Basile
George A. Bermann
Herbert H. Blum
Benjamin Caplan Bluman
Suzanne Smith Blundi
Josh Jonathan Boaz
Sahand Boorboor
Ryan Patrick Buechner
Bevin A. Butler
David Alexander Carpenter
Brooke Laurel Cavanaugh
Jennie Eun Yong Choe
Joyce Choi
Stephen Daryl Chu
Linda Jane Clarke
Armita Schacht Cohen
Michelle Crosby
Thomas Gerard Daly
Marek Denisiuk
Christophe Robert Difo
Joshua Andrew Dilk
Caeden Curtis Drayton
Samuel M. Duncan
Drew Lawrence Fabrikant
Jill Catherine Falor
Ilya Fayerman
Siddharth Ernest Fernandes
Brian Thomas Flynn
Joshua Saul Friedman
Robert E. Friedman
Charles Russell Fritch
Michael Anthony Garcia
Michael J. Goldstein
Shauna-kay Melecia Gooden
Sara Lyn Gottlieb
Megan Elizabeth Harmsen
Paul E. Harner
Leah Heifetz
Magdalena Hernandez
Lisa Duc Hin
Angela Nicole Hiner
Adam Lee Hoffman
Amanda Leigh Houle
Melissa C. Jackson
Meredith Leila Jason
Rebecca Anne Jenkin
Glenn Roy Kazlow
Alexandra Dmitrievna Khrebtukova
Hyun Jung Kim
James Richard Kostura
Cassey Ray Kroma
Joshua D'amico Kroot
Katherine R. Kruse
Stephen Makoto Kruse
Alykhan Kurji
Kathleen Elizabeth Lange
Ronald S. Languedoc
David Evan Lansky
Frank Lanza
Vanessa Allen Lavely
Benjamin James Oliver Lewis
Yi Li
Yuan Li
Ronald F. Lipsky
Mary Kristin Mace
Elizabeth Rachel Marks
Ray A. Mateo
Ian M. McClatchey
Robert L. Messineo
Carol Ann Meyer
Jacob Eugene Meyer
Paul Gordon Monte
Maria Del Alba Montilla
Angel M. Munoz
Chavi Keeney Nana
Mark Eli Nerenberg
Jasen Jose Nhambiu
Shawn Patrick O'Connor
Kristen Leigh O'Shaughnessey
Mercedes Noemi Odzak Della Penna
Romi Hahn Paek
Asen Svetlozarov Parachkevov
Anil Hasmukh Patel
Greg D. Perl
Maya Katherine Petrocelli
Christopher Peter Paul Pisciotta
Oliver Michel Plessis
Ilya Olegovich Podolyako
Barbara Politi
Andrew Scott Pompa
Joseph John Prisco
William Patrick Quigley
Maksim Rakhlin
Emmalyn Uy Ramirez
Suzanne M. Ratcliffe
Abbie Pugh Rea
Lindsey Nichole Roberson
Charles Oliver Rooker
Jessica Rosenraich
Leah Erin Rutman
Katherine Rose Ryan
Marcus Antonio Salva
Kathleen Marie Scanlon
Ray C. Schrock
Jamey Susan Seely
Adam David Senior
Gina N. Shishima
Ajita Shukla
Eric L. Sidman
Heather Wilkinson Smith
Elena Louise Snyder
Lance Anders Soderstrom
Steven G. Sonet
Jianlin Song
Yuwei Sui
Meagan Sophia Rockwell Sway
Eric Tsai Syu
James Nathaniel Truitt
Stefanie Heck Turner
Jianbin Wang
Joseph William Weissman
Eric Stephen Wolfish
Weiyun Yang
Yisu Yang
Lucy Yen
Stuart Andrew Youngs
Min Yuan
Ilya Yukhtman
Pei Zhao

SECOND DISTRICT
Andrea Azuka Adibe
Volha Balandzina
Kaitlyn Malia Beyer
Laurent Beaumont Chevalier
Julia Lucia Davis
Anderson Josiah Duff
Siobhan Foley
Komila Geroulakis
Michael Shawn Golik
Brian Philip Jones
Devra Sarah Lobel
Wesley Cash McMahon
Samuel P. Nitze
Jhon Jairo Sanchez Hurtado
Joshua Scott Tucker
Jason Patrick Vendzules

THIRD DISTRICT
Victoria E. Kossover
William Francis McLaughlin
Kathryn Larkin Shelly
Elizabeth Anne Silleck
Shontell Melissa Smith

FOURTH DISTRICT
Michael C. Barnas
Patrick Daniel Curtis

FIFTH DISTRICT
Melinda Lothes
William W. Rose

SIXTH DISTRICT
Robert D. Gould
Adam Patrick Haenel
Erica Lynn Lawson

SEVENTH DISTRICT
Sherry Coronas
Brian Patrick Riley

EIGHTH DISTRICT
Andrew D. Merrick
Aleksandra Stipanovich

NINTH DISTRICT
David Michael Bordoni
Boruch Burnham
Heather Lynn Kitchen
Hayley Mauskapf
Louis Gerard McCarthy
Joshua Jacob Mitzman
Kimberly Anne Pelesz
Esther Pollak
Kevin Michael Reverri
Rita C. Tobin

TENTH DISTRICT
Anthony John Addeo
Carla S. Aviles
Alexander Berger
Jose Fernando Canosa
Samuel Floyd Denny
Efstratios Thomas Diakoniarakis
Paula A. Ferreira
William Taber Ferris
James H. Friscia
Chae Young Kim
Paul Nicholas Lovegrove
Scott K. Maxwell
Edward W. McCarty
Anjana Nair
Gregg A. Novak
Meghan Lynn Plunkett
Kimberly J. Preston
Catherine Damaris Reyes-Tuzinkiewicz
Jamie Brooke Robbins
Christopher Joseph Rogers
Andrea Lisette Tse
Alessandro Giovanni Villanella
Colton P. Wagner
Jeremy Zenilman

ELEVENTH DISTRICT
Ursula Kathleen Clarke
Cristina Culicea
Anne Joy D'Elia
Juan Luis Garcia-paz
Li Han
Ahyoung Audrey Kim
Tashi Topgyal Lhewa
Hee Jae Park
Polina Parusis

TWELFTH DISTRICT
Katie Ellen Easley
Daniel Colella Haines
Megan Renee Roberts
Paul Joseph Whelan
Kathryn Allison Wozencroft

THIRTEENTH DISTRICT
Michael Bryantsev

OUT OF STATE
Babatunti I. Akilo
Ali Ryan Amin
Dustin Ryan Anderson
Karim Saifuddin Anjarwalla
Catherine Elizabeth Barnard
James Bartolomei
Rajiv Kumar Batra
James Andrew Sawyer Binkley
J. Manena Bishop
Eileen Patricia Blessinger
Brian Eric Bomstein
Brian K. Broughton
Jing Bu
Oliver Carter
Michael Hsin-chieh Ch'ang
Prema Chandra
Shane Katherine Chase
Sue Si Chen
Zi Chen
Fang Cheng
Sam Yeol Choi
Sung-Hwan Choi
Joie Chowdhury
Tanya Maria Chuck
Po-chun Chung
Harry Hancock Clayton
Andrew Brian Clubok
Jason Alan Coe
Ethan Jon Cohan
Jordan Michael Cohen
Stuart A. Cohen
Katsi A. Colon
Aine Sinead Corrigan
Patricia Kathleen Costello
Trisha Evans Cowart
Claire De Gerin-Ricard
Antonio Carlos Fernandes Deccache
Ara Derhartonian
Cathal Doran
Kelly Jane Dunn
Jeffrey G. Eng
Seth Ira Ericsson
Ronan Seamus Farrow
Alexander Fineman
Patrick F.X. Fitzpatrick
Stephen Michael Forte
Adam Lance Frankel
Yoko Funakoshi
Giulio Gambini Pierleoni
Yonghua Gao
Seth Mitchell Goodman
Sheryl Mintz Goski
Jonas Granofsky
Akvile Gropper
Amanda Michelle Grudinskas
Yan Guo
Lady Luz Guzman
Thomas Harding
Pedro Hernandez-Guilbe
Vanessa Kathryn Herzog
Guoliang Huang
Patrick Joseph Hughes
Sung Youl Hwang
Nelly Chidinma Iwobho

Vugar Jafarov
Rachel Yvonne Johnston
James Joonghyun Jung
Dimitrios John Karakitson
Jessica Marie Karbowski
Elisa Kathlena Kearney
Jonathan J. Kelson
Su Jung Kim
Wonhyuang Kim
Rita Kraner
Melissa Ann Krull
Richard Samson Krumholz
Christopher James La Piano
Stephanie Anick Lafrance
James Allen Lebovitz
Lisa Calkins Lightbody
Chan-ni Liu
Xiaoxia Liu
Yang-hao Liu
Yanjing Liu
Erica Joy Lubans
Brian Christopher Lundquist
Anna Magazinnik
Wendy Diane Mansfield
James Michael McDonough
Kora Manyu Mehta
Christian Alexander Melischek
James Adam Menefee
Ruth Anne Miller
Jan-axel Mollenkott
Ekaterina Molostova
Emma Clark Morris
Matthew Sinon Mulqueen
Kimberly Ann Murphy
Ben Nazmiyal
Michael T. Nedder
Yagya Prasad Nepal
Tomas Gerard Nilsson
Yue Niu
Kim Ornelas
Baron Taylor Oursler
Finn Overgaard
Francois Painchaud
Hyunho Park
John Evan Perigoe
Ashley Rian Perry
Michael Joseph Pinto
Andrew William Polay
Barry Joel Pollack
Faize Rasul
Birte Jasmin Rautenstrauch
Josef Dongjo Rawert
Mitchell J. Resnick
James V. Robertson
Amy Lara Rokuson
Henry Michael Rosenburg
Jennifer Maria Russoniello
Thomas Brenton Sanders
Ashley Lauren Santner
Asaf Jacob Sarno-naor
Kaleena E. Scamman
Leslie Marie Schmidt
Ronald J. Schutz
Cara Nicole Shafran
Michael P. Shepherd
Hyeon Hwa Shin
Jeffrey Marc Siegel
Maria Gema Simone Reis
Mwanaisha Atieno Sims
Dorothy Loretta Ann Smith
Lynda S. Smith
Rajat Soni
Todd James Stedeford
Louis Raymond Strubeck
James Arthur Sugarman
Sarah Rissman Taitt
Megan Tay
Gilles M.j.j. Teerlinck
Omolola Ladeinde Temple
Krystyn Tendy
Dara Ann Tesoroni
Samantha Naomi Thomas
Emily Sarah Ullman
Qing Jian Wang
Kristen McElligott Warden
Schuyler Klindt Weiner
Jesse Zachary Weiss
Brett Christopher Woodis
Charles Frederick Yager
Chia-hsin Yang
Rui Yang
Zhipeng Yang
Noah Simeon Young
Ling Yuan
Lyubomir Petrov Zabov
Mohsin Zaidi
Ran Zhang

In Memoriam

Jonas Aarons
Rhinebeck, NY

Owen B. Carragher
Jefferson Valley, NY

Susan M. Cohen
New York, NY

Marilyn C. Rubine
Mineola, NY

Ellen B. Simon
Hoboken, NJ

Roger Arthur Williams
Carthage, NY

Foundation Memorials

A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to The New York Bar Foundation. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

THE NEW YORK BAR FOUNDATION

One Elk Street
Albany, New York 12207

(518) 487-5651
FAX (518) 487-5699

CLASSIFIED NOTICES

RESPOND TO NOTICES AT:
New York State Bar Association
One Elk Street
Albany, NY 12207
Attn: Daniel McMahon

DEADLINE FOR SUBMISSIONS:
Six weeks prior to the first day of the month of publication.

NONMEMBERS:
$175 for 50 words or less; plus $1 for each additional word. Boxholder No. assigned—$75 per insertion.

MEMBERS:
$135 for 50 words and $1 for each additional word. Payment must accompany insertion orders.

SEND ADS WITH PAYMENT TO:
Network Media Partners
Executive Plaza 1, Suite 900
11350 McCormick Road
Hunt Valley, MD 21031
(410) 584-1960
btackett@networkmediapartners.com

INCORPORATION SERVICES

Add business formation services to your practice without adding demands on your resources.

Help clients incorporate or form limited liability companies with America's leading provider of business formation services. We can also assist in out-of-state qualifications.

Call us today at 800-637-4898 or visit www.incorporate.com to learn more.

ARAB AMERICAN LAWYER

Joseph F. Jacob, BS, MBA, JD, admitted NY, NJ, Arabic Native is available for your Middle East/Arabic commercial transactions & documents drafting and review. Telephone: (518) 472-0230 or email: jfjacob@jacoblawoffices.com. Visit www.JacobLawOffices.com.

REFER US YOUR DISABILITY INSURANCE CASES

Attorneys Dell & Schaefer - Our disability income division, managed by Gregory Dell, is comprised of eight attorneys that represent claimants throughout all stages (i.e. applications, denials, appeals, litigation & buy-outs) of a claim for individual or group (ERISA) long-term disability benefits. Mr. Dell is the author of a Westlaw Disability Insurance Law Treatise. Representing claimants throughout New York & nationwide. Referral Fees 212-691-6900, 800-828-7583, www.diAttorney.com, gdell@diAttorney.com.

VISITING PROFESSORSHIPS

Short-term pro bono teaching appointments for lawyers with 20+ years' experience Eastern Europe and former Soviet Republics. See www.cils3.net. Contact CILS, Matzenkopfgasse 19, Salzburg 5020, Austria, email professorships@cils.org, US fax 1 (509) 356 -0077.

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS 1/1/11 - 1/6/11	11
NEW LAW STUDENT MEMBERS 1/1/11 - 1/6/11	30
TOTAL REGULAR MEMBERS AS OF 1/6/11	74,277
TOTAL LAW STUDENT MEMBERS AS OF 1/6/11	3,433
TOTAL MEMBERSHIP AS OF 1/6/11	77,710

INDEX TO ADVERTISERS

Arthur B. Levine Co., Inc.	27
Attorneys Dell & Schaefer Chartered	60
Bureau of National Affairs	7
Center for International Legal Studies	60
Law Offices of Joseph F. Jacob, PLLC	60
McKool Smith	21
The Company Corporation	60
The Law Offices of Adrian Philip Thomas P.A.	2
USI Affinity	4
West, a Thomson Reuters Business	cover 4

MOVING? let us know.

Notify OCA and NYSBA of any changes to your address or other record information as soon as possible!

OCA Attorney Registration
PO BOX 2806
Church Street Station
New York, New York 10008
TEL **212.428.2800**
FAX **212.428.2804**
Email **attyreg@courts.state.ny.us**

New York State Bar Association
MIS Department
One Elk Street
Albany, NY 12207
TEL **518.463.3200**
FAX **518.487.5579**
Email **mis@nysba.org**

Find us on the Web!

Just a click away: The NYSBA *Journal* is available to you anytime at all.

Log in as a member:
Membership gives you access to current issues and the *Journal* archive on HeinOnline. The archive offers the *Journal* in a word-searchable format, beginning with the first issue in 1928.

Find an article:
Our word-searchable index lists all *Journal* articles from 2000 through present.

Let us know:
Comment on any article you've read, topics you'd like addressed or the issues facing today's practitioners through the editor's blog.

The *Journal* at www.nysba.org/barjournal.

The Editor's blog at http://nysbar.com/blogs/barjournal/. Click on "comments."

HEADQUARTERS STAFF EMAIL ADDRESSES

EXECUTIVE
Patricia K. Bucklin
Executive Director
pbucklin@nysba.org
Keith J. Soressi
Associate Executive Director
ksoressi@nysba.org

BAR SERVICES
Mark Wilson, *Manager*
mwilson@nysba.org

MEETINGS
Kathleen M. Heider, *Director*
kheider@nysba.org

CONTINUING LEGAL EDUCATION
H. Douglas Guevara, *Senior Director*
dguevara@nysba.org
Debra York, *Registrar*
dyork@nysba.org

CLE PROGRAMS
Jean E. Nelson II, *Associate Director*
jnelson@nysba.org
Kimberly Hojohn, *CLE Program Coordinator*
khojohn@nysba.org
Katherine Suchocki, *Staff Attorney*
ksuchocki@nysba.org
Cindy O'Brien, *Program Manager*
cobrien@nysba.org

CLE PUBLICATIONS
Daniel J. McMahon, *Director*
dmcmahon@nysba.org
Kirsten Downer, *Research Attorney*
kdowner@nysba.org
Patricia B. Stockli, *Research Attorney*
pstockli@nysba.org
Joan Fucillo, *Publication Manager*
jfucillo@nysba.org

LAW PRACTICE MANAGEMENT
Teresa B. Schiller, *Director*
tschiller@nysba.org

FINANCE AND HUMAN RESOURCES
Paula M. Doyle, *Senior Director*
pdoyle@nysba.org

FINANCE
Kristin M. O'Brien, *Director*
kobrien@nysba.org
Cynthia Gaynor, *Controller*
cgaynor@nysba.org

LEGAL AND GOVERNMENTAL AFFAIRS
Kathleen R. Mulligan-Baxter, *Senior Director*
kbaxter@nysba.org

COUNSEL'S OFFICE
GOVERNMENTAL RELATIONS
Ronald F. Kennedy, *Director*
rkennedy@nysba.org
Kevin M. Kerwin, *Assistant Director*
kkerwin@nysba.org

LAWYER ASSISTANCE PROGRAM
Patricia F. Spataro, *Director*
pspataro@nysba.org

LAWYER REFERRAL AND INFORMATION SERVICE
Eva Valentin-Espinal, *Coordinator*
evalentin@nysba.org

PRO BONO AFFAIRS
Gloria Herron Arthur, *Director*
garthur@nysba.org

MARKETING AND INFORMATION SERVICES
Richard J. Martin, *Senior Director*
rmartin@nysba.org

DESKTOP PUBLISHING
MARKETING
MIS
John M. Nicoletta, *Director*
jnicoletta@nysba.org
Jeffrey Ordon, *Network Support Specialist*
jordon@nysba.org
Sonja Tompkins, *Records Supervisor*
stompkins@nysba.org
Lucian Uveges, *Database Administrator*
luveges@nysba.org
Paul Wos, *Data Systems and Telecommunications Manager*
pwos@nysba.org

WEB SITE
Barbara Beauchamp, *Editor*
bbeauchamp@nysba.org

MEMBERSHIP SERVICES
Patricia K. Wood, *Senior Director*
pwood@nysba.org
Megan O'Toole, *Membership Services Manager*
motoole@nysba.org

CHIEF SECTION LIAISON
Lisa J. Bataille
lbataille@nysba.org

PRINT AND FACILITIES OPERATIONS
Roger E. Buchanan, *Senior Director*
rbuchanan@nysba.org
BUILDING MAINTENANCE
GRAPHICS
PRINT SHOP
Gordon H. Ryan, *Print Shop Manager*
gryan@nysba.org

PUBLIC AFFAIRS AND ADMINISTRATIVE SERVICES

LAW, YOUTH AND CITIZENSHIP PROGRAM
Eileen Gerrish, *Director*
egerrish@nysba.org

MEDIA SERVICES AND PUBLIC AFFAIRS
Lise Bang-Jensen, *Director*
lbang-jensen@nysba.org
Nicholas Parrella, *Associate Director*
nparrella@nysba.org
Patricia Sears Doherty, *Editor, State Bar News*
psearsdoherty@nysba.org
Brandon Vogel, *Media Writer*
bvogel@nysba.org

THE NEW YORK BAR FOUNDATION
Rosanne M. Van Heertum
Director of Development
rvanh@tnybf.org

THE NEW YORK BAR FOUNDATION

2010-2011 OFFICERS

M. Catherine Richardson, *President*
One Lincoln Center, Syracuse, NY 13203

John J. Kenney, *Vice President*
10 East 40th Street, 35th Fl., New York, NY 10016

Patricia K. Bucklin, *Secretary*
One Elk Street, Albany, NY 12207

Paul Michael Hassett, *Treasurer*
1500 Liberty Building, Buffalo, NY 14202

Cristine Cioffi, *Assistant Secretary*
2310 Nott Street East, Niskayuna, NY 12309

DIRECTORS

James B. Ayers, *Albany*
Vice Chair of The Fellows
Lawrence R. Bailey, Jr., *White Plains*
Jonathan G. Blattmachr, *New York*
Charles E. Dorkey, III, *New York*
Emily F. Franchina, *Garden City*
Sharon Stern Gerstman, *Buffalo*
John H. Gross, *Hauppauge*
Robert L. Haig, *New York*
Frank M. Headley, Jr., *Scarsdale*
Stephen D. Hoffman, *New York*
John R. Horan, *New York*
Glenn Lau-Kee, *New York*
Kathryn Grant Madigan, *Binghamton*
Kay Crawford Murray, *New York*
Carla M. Palumbo, *Rochester*
Richard Raysman, *New York*
Lesley Friedman Rosenthal, *New York*
Sanford J. Schlesinger, *New York*
Justin L. Vigdor, *Rochester*
Lucia B. Whisenand, *Syracuse*

EX OFFICIO

Susan B. Lindenauer, *New York*
Chair of The Fellows

JOURNAL BOARD MEMBERS EMERITI

HOWARD ANGIONE
Immediate Past Editor-in-Chief

ROSE MARY BAILLY
RICHARD J. BARTLETT
COLEMAN BURKE
JOHN C. CLARK, III
ANGELO T. COMETA
ROGER C. CRAMTON
WILLARD DASILVA
LOUIS P. DILORENZO
PHILIP H. DIXON
MARYANN SACCOMANDO FREEDMAN
EMLYN I. GRIFFITH
H. GLEN HALL
PAUL S. HOFFMAN
JUDITH S. KAYE
CHARLES F. KRAUSE
PHILIP H. MAGNER, JR.
WALLACE J. MCDONALD
J. EDWARD MEYER, III
JOHN B. NESBITT
KENNETH P. NOLAN
EUGENE E. PECKHAM
ALBERT M. ROSENBLATT
LESLEY FRIEDMAN ROSENTHAL
SANFORD J. SCHLESINGER
ROBERT J. SMITH
LAWRENCE E. WALSH
RICHARD N. WINFIELD

2010-2011 OFFICERS

Stephen P. Younger
President
New York

Vincent E. Doyle III
President-Elect
Buffalo

David P. Miranda
Secretary
Albany

Seymour W. James, Jr.
Treasurer
New York

Michael E. Getnick
Immediate Past President
Utica

VICE-PRESIDENTS

First District
Claire P. Gutekunst, *New York*
Ann B. Lesk, *New York*

Second District
Manuel A. Romero, *Brooklyn*

Third District
Lillian M. Moy, *Albany*

Fourth District
Patricia L. R. Rodriguez, *Schenectady*

Fifth District
Thomas E. Myers, *Syracuse*

Sixth District
Mark S. Gorgos, *Binghamton*

Seventh District
June M. Castellano, *Rochester*

Eighth District
David L. Edmunds, Jr., *Buffalo*

Ninth District
John S. Marwell, *Mount Kisco*

Tenth District
Emily F. Franchina, *Garden City*

Eleventh District
David Louis Cohen, *Kew Gardens*

Twelfth District
Steven E. Millon, *Bronx*

Thirteenth District
Jonathan B. Behrins, *Staten Island*

MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

Samuel F. Abernethy
Timothy J. Fennell
Hermes Fernandez
Hon. Margaret J. Finerty
Glenn Lau-Kee
Ellen G. Makofsky
Eileen D. Millett
Sherry Levin Wallach

NYSBA

MEMBERS OF THE HOUSE OF DELEGATES

First District
Aaron, Stewart D.
Abernethy, Samuel F.
Abramowitz, Alton L.
Adler, Roger B.
† Alcott, Mark H.
Anello, Robert J.
Berke-Weiss, Laurie
Bohorquez, Fernando A., Jr.
Brown, Earamichia
Chambers, Hon. Cheryl E.
Chang, Vincent Ted
Christian, Catherine A.
Cohen, Carrie H.
Collazo, Ernest J.
* Cometa, Angelo T.
Conley, Sylvia Jeanine
DeMarco, Joseph V.
Di Pietro, Sylvia E.
Draper, Thomas G., Jr.
Drayton, Joseph Michael
Ellerin, Hon. Betty Weinberg
Eppler, Klaus
Finerty, Hon. Margaret J.
Finguerra, Dyan M.
* Forger, Alexander D.
Gallagher, Patrick C.
Galligan, Michael W.
Gesinsky, Loren
* Gillespie, S. Hazard
Glanstein, Joel C.
Goldberg, Evan M.
Gutekunst, Claire P.
Gutheil, Karen Fisher
Hanks, Kendyl T.
Hawkins, Dennis R.
Ho, John Si
Hoffman, Stephen D.
Hollyer, A. Rene
Honig, Jonathan
James, Hon. Debra A.
James, Seymour W., Jr.
Kahn, Michele
Kanter, Gregg Herbert
Kaplan, Matthew E.
Kennedy, Henry J.
Kera, Martin S.
* King, Henry L.
Kobak, James B., Jr.
Kornreich, Edward S.
Larson, Wallace L., Jr.
Lau-Kee, Glenn
† * Leber, Bernice K.L
Lesk, Ann B.
Levy, M. Barry
Lieberman, Ellen
Lindenauer, Susan B.
Lupkin, Jonathan D.
* MacCrate, Robert
Marino, Thomas V.
Medenica, Olivera
Miller, David S.
Miller, Michael
Minkowitz, Martin
Morril, Mark C.
Morton, Margaret S.
Moses, Barbara Carol
Nathanson, Malvina
Nelson, Lester
Nijenhuis, Erika W.
* Patterson, Hon. Robert P., Jr.
Prowda, Judith B.
Robertson, Edwin David
Rothstein, Alan
Russell, William T., Jr.
Safer, Jay G.
Schindel, Ronnie
Sen, Diana Sagorika
Seymour, Samuel W.
* Seymour, Whitney North, Jr.
Sigmond, Carol Ann
Silkenat, James R.
Smith, Hon. George Bundy
Sonberg, Hon. Michael R.
Spiro, Edward M.
† * Standard, Kenneth G.
Syracuse, Dana V.
Syracuse, Vincent J.
Tesser, Lewis F.
Walsh, Jean T.
Wolff, Adam John
Yates, Hon. James A.
Yavinsky, Hon. Michael J.
† Younger, Stephen P.
Zuchlewski, Pearl
Zulack, John F.

Second District
Bonina, Andrea E.
Doyaga, David J., Sr.
Gerber, Ethan B.
Hernandez, David J.
Kamins, Hon. Barry
Longo, Mark A.
Lonuzzi, John A.
McKay, Hon. Joseph Kevin
Park, Maria Y.
Romero, Manuel A.
Sunshine, Hon. Jeffrey S.
Sunshine, Hon. Nancy T.

Third District
Ayers, James B.
Barnes, James R.
Baynes, Brendan F.
Costello, Bartley J., III
Davidoff, Michael
DeFio Kean, Elena
Doherty, Glen P.
Fernandez, Hon. Henry A.
Fernandez, Hermes
Glasheen, Kevin P.
Greenthal, John L.
Hacker, James E.
Hanna, John, Jr.
Hurteau, Daniel Joseph
Kahler, Annette I.
Kaplan, Edward Ian
Liebman, Bennett M.
Miranda, David P.
Moy, Lillian M.
Pechenik, Stephen A.P
Pettit, Stacy L.
Privitera, John J.
Roberts-Ryba, Christina L.
Rosiny, Frank R.
Ryan, Rachel
Salkin, Prof. Patricia E.
Schneer, Hon. Deborah S.
* Yanas, John J.

Fourth District
Baker, Carl T.
Healey, Andrew J.
Herrmann, Diane M.
Hoag, Rosemary T.
Ladouceur, Michelle H.
Lais, Kara I.
Martin, Trinidad
McAuliffe, J. Gerard, Jr.
McNamara, Matthew Hawthorne
Onderdonk, Marne L.
Rodriguez, Patricia L. R.
Slezak, Rebecca A.
Stanclift, Tucker C.
Watkins, Patricia E.

Fifth District
Fennell, Timothy J.
Fish, Marion Hancock
Foley, Timothy D.
Gensini, Gioia A.
† * Getnick, Michael E.
Gigliotti, Hon. Louis P.
Gingold, Neil M.
Howe, David S.
Humphrey, Mary R.
Ludington, Hon. Spencer J.
McArdle, Kevin M.
Myers, Thomas E.
Pellow, David M.
* Richardson, M. Catherine
Stanislaus, Karen
Tsan, Clifford Gee-Tong
Virkler, Timothy L.

Sixth District
Barreiro, Alyssa M.
Denton, Christopher
Fortino, Philip G.
Gorgos, Mark S.
Grayson, Gary J.
Gutenberger, Kristin E.
Lewis, Richard C.
† * Madigan, Kathryn Grant
Mayer, Rosanne
Orband, James W.
Pogson, Christopher A.
Sienko, Leonard E., Jr.

Seventh District
Burke, Philip L.
† * Buzard, A. Vincent
Castellano, June M.
Chapman, Richard N.
Gould, Wendy Lee
Harren, Michael T.
Hetherington, Bryan D.
Jackson, La Marr J.
Kingsley, Linda S.
Kurland, Harold A.
Laluk, Susan Schultz
* Moore, James C.
Moretti, Mark J.
* Palermo, Anthony R.
Schraver, David M.D
Stapleton, T. David, Jr.D
Tilton, Samuel O.
* Vigdor, Justin L.
* Witmer, G. Robert, Jr.

Eighth District
Cassata, Hon. Joseph J.
Convissar, Robert N.
† Doyle, Vincent E., III
Edmunds, David L., Jr.
Effman, Norman P.
* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
Hager, Rita Merino
† * Hassett, Paul Michael
Manias, Giles P.
Russ, Arthur A., Jr.
Schwartz, Scott M.
Sconiers, Hon. Rose H.
Seitz, Raymond H.

Ninth District
Amoruso, Michael J.
Brown, Terryl
Burke, Patrick T.
Burns, Stephanie L.
Byrne, Robert Lantry
Cohen, Mitchell Y.
Cusano, Gary A.
Dohn, Robert P.
Fedorchak, James Mark
Fontana, Lucille A.
† Fox, Michael L.
Goldenberg, Ira S.
Marwell, John S.
Miklitsch, Catherine M.
* Miller, Henry G.
Nachimson, Steven G.
* Ostertag, Robert L.
Rauer, Brian Daniel
Sachs, Joel H.
Sanchala, Tejash V.
Sandford, Donald K.
Selinger, John
Singer, Rhonda K.
Starkman, Mark T.
Stone, Robert S.
Strauss, Barbara J.
Strauss, Hon. Forrest
Van Scoyoc, Carol L.
Wallach, Sherry Levin
Weis, Robert A.

Tenth District
Asarch, Hon. Joel K.
Block, Justin M.
* Bracken, John P.
Bucaria, Thomas A.
Chase, Dennis R.
Fishberg, Gerard
Franchina, Emily F.
Gann, Marc
Good, Douglas J.
Gruer, Sharon Kovacs
Hayden, Hon. Douglas J.
Hendry, Melanie Dyani
Karabatos, Elena
Karson, Scott M.
† * Levin, A. Thomas
Luskin, Andrew J.
Makofsky, Ellen G.
McEntee, John P.
Mejias, Linda Kelly
Pachman, Matthew E.
* Pruzansky, Joshua M.
Randazzo, Sheryl L.
* Rice, Thomas O.
Shulman, Arthur E.

Eleventh District
Cohen, David Louis
DeFelice, Joseph F.
Gutierrez, Richard M.
Lee, Chanwoo
Nizin, Leslie S.
Risi, Joseph J.
Taylor, Zenith T.
Vitacco, Guy R., Jr.

Twelfth District
Masley, Hon. Andrea
Millon, Steven E.
* Pfeifer, Maxwell S.
Price, Hon. Richard Lee
Quaranta, Kevin J.
Sands, Jonathan D.
Summer, Robert S.
Weinberger, Richard

Thirteenth District
Behrins, Jonathan B.
Dollard, James A.
Hall, Thomas J. J.
Mattei, Grace Virginia
Sieghardt, George A.

Out-of-State
* Fales, Haliburton, II
Kurs, Michael A.
Millett, Eileen D.
Perlman, David B.
Ravin, Richard L.
Torrey, Claudia O.
* Walsh, Lawrence E.
Weinstock, David S.

† *Delegate to American Bar Association House of Delegates*
* *Past President*

BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part V — Pleadings in Special Proceedings

The *Legal Writer* continues with techniques on writing pleadings. In earlier issues, the *Legal Writer* discussed pleading techniques specific to plenary actions. The *Legal Writer* now discusses general requirements applicable to special proceedings.

Special Proceeding: Overview

Unlike a plenary action, a special proceeding is a relatively fast and inexpensive way to secure your client's rights. Like a plenary action, a special proceeding ends with a court's issuing a judgment. CPLR Article 4 and other statutes authorize special proceedings. As important as CPLR 3013 is to the complaint, so, too, is it applicable in special proceedings. If an authorizing statute provides a pleading instruction, follow it. Otherwise, comply with the CPLR's liberal pleading requirements.

Special proceedings include "the proceeding to settle an infant's claim, the proceeding by an attaching plaintiff against a garnishee to compel the garnishee to deliver property to the levying sheriff, and the several supplied for the enforcement of a money judgment."[1] Other special proceedings include Article 78 CPLR proceedings and proceedings to test the arbitrability of a dispute or the validity of an arbitration award.[2] Another special proceeding is a landlord-tenant dispute to recover rent or repossession or both;[3] it's also known as a summary proceeding to recover possession of real property.[4] An election dispute, especially a pre-election dispute that must be resolved quickly, may also be commenced as a special proceeding.[5] Special proceedings are further permitted when you're seeking to destroy or confine a dangerous dog or when you're seeking to declare a person an incapacitated person and appoint a guardian for that person.[6]

In a special proceeding, the moving party is known as the "petitioner,"[7] the equivalent of a plaintiff in plenary actions. The proceeding is brought against the "respondent," the equivalent of a defendant in plenary actions.[8] The petitioner initiates the proceeding by filing a petition, which serves the same function as a complaint. For drafting purposes, the petition must comply with the CPLR's complaint requirements.[9] The petitioner must also attach and serve a notice of petition along with the petition.[10] Like a defendant in a plenary action, the respondent either files a pre-answer motion or an answer.

A petition identifies the parties, sets out the factual basis of the claim, and prays for a legal remedy. In special proceedings, you may attach affidavits and exhibits to the petition. This is unlike the procedure in commencing an action, in which a complaint is all you need. Affidavits and exhibits close any gap that might exist in a petition; they provide more detail than the petition alone. A petitioner brings a special proceeding by filing a petition with the court clerk. The notice of petition states the basis for the special proceeding, the time and place of the hearing on the petition, and "enumerates the supporting affidavits that accompany the petition."[11] The notice of petition is the counterpart of a summons in a plenary action.[12] The notice of petition must have a return date and a place for the proceeding. The return date may be changed after a judge has been assigned the case. But don't include a fictional return date and don't leave the date blank. Doing so might be a jurisdictional defect.[13] Check with the clerk in your county about this procedure.

A respondent's response to the petition is the answer, as in an action. An answer is required only when an adverse party exists.[14] Some special proceedings have no adverse party; this situation is similar to a party's making an ex parte motion in an action. An answer may contain counterclaims. If multiple respondents exist, your answer may contain cross-claims. A reply is required to a counterclaim, as it is in an action. Answer a cross-claim only if the pleading demands one.[15] In an action, court leave is required if you're seeking to reply to an answer that contains no counterclaim. In a special proceeding, you may reply to new matter in an answer even though the answer contains no counterclaim.[16]

Special proceedings may also be brought by order to show cause.

Except by leave of court, joinder, interpleader, third-party practice, and intervention are forbidden in a special proceeding.[17] Intervention is a procedure in which an outsider can become a party to a case on the outsider's own initiative;[18] intervention is available in actions and in special proceedings. For more information on joinder, interpleader, and third-party practice, con-

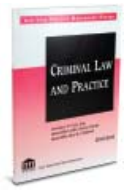
Continued on Page 54

The latest **NYSBA Monograph Series**

Business/Corporate Law and Practice

Authors: Michele A. Santucci, Esq.; Professor Leona Beane; Richard V. D'Alessandro, Esq.; Professor Ronald David Greenberg

2010-2011 • 860 pp. • PN: 405190
Non-Mmbr Price: $80 / **Mmbr Price: $72**



Criminal Law and Practice

Authors: Lawrence N. Gray, Esq.; Honorable Leslie Crocker Snyder; Honorable Alex M. Calabrese

2010-2011 • 160 pp. • PN: 4064990
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Debt Collection and Judgment Enforcement

Author: Paul A. Peters, Esq.; William Ilecki, Esq.

2010-2011 • 222 pp. • PN: 42380
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Elder Law and Will Drafting

Authors: Jessica R. Amelar, Esq.; Bernard A. Krooks, Esq.

2010-2011 • 318 pp. • PN: 40820
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Limited Liability Companies

Author: Michele A. Santucci, Esq.

2010-2011 • 326 pp. • PN: 41240
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Matrimonial Law

Author: Willard H. DaSilva, Esq.

2010-2011 • 314 pp. • PN: 412190
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Mechanic's Liens

Authors: George Foster Mackey, Esq.; Norman D. Alvy, Esq.

2010-2011 • 152 pp. • PN: 403190
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Mortgage Foreclosures

Author: Francis J. Smith, Esq.

2010-2011 • 90 pp. • PN: 41400
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Mortgages

Authors: Philip C. Kilian, Esq.; Christopher P. Daly, Esq.

2010-2011 • 246 pp. • PN: 41380
Non-Mmbr Price: $80 / **Mmbr Price: $72**

New York Residential Landlord-Tenant Law and Procedure

Authors: Honorable Gerald Lebovits; Damon P. Howard, Esq.; Victor S. Faleck, Esq.

2010-2011 • 366 pp. • PN: 41690
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Probate and Administration of Decedents' Estates

Authors: Jessica R. Amelar, Esq.; Arlene Harris, Esq.

2010-2011 • 188 pp. • PN: 419690
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Real Estate Transactions—Commercial Property

Author: Christina Kallas, Esq.

2010-2011 • 344 pp. • PN: 40370
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Real Estate Transactions—Residential Property

Authors: Kenneth M. Schwartz, Esq.; Claire Samuelson Meadow, Esq.

2010-2011 • 554 pp. • PN: 421400
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Representing the Personal Injury Plaintiff in New York

Author: Patrick J. Higgins, Esq.

2010-2011 • 454 pp. • PN: 41910
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Social Security Law and Practice

Author: Charles E. Binder, Esq.

2010-2011 • 196 pp. • PN: 422900
Non-Mmbr Price: $65 / **Mmbr Price: $57**

Zoning and Land Use

Authors: Michael E. Cusack, Esq.; John P. Stockli, Jr., Esq.; Herbert A. Kline, Esq.

2010-2011 • 210 pp. • PN: 42400
Non-Mmbr Price: $80 / **Mmbr Price: $72**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

To purchase the complete set of 16 Monographs, or for more information

Call 1-800-582-2452 *or visit us online at* ***nysba.org/pubs***

Mention Code: PUB1002

NYSBA

Periodicals

ADDRESS CHANGE – Send To:
Records Department
NYS Bar Association
One Elk Street
Albany, NY 12207
(800) 582-2452
e-mail: mis@nysba.org