NEW YORK STATE BAR ASSOCIATION
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Lawyers in Transition

A Special Issue edited by Judith S. Kaye and Jessica Thaler

With Articles by

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Interviews by Jocelyn Cibinskas

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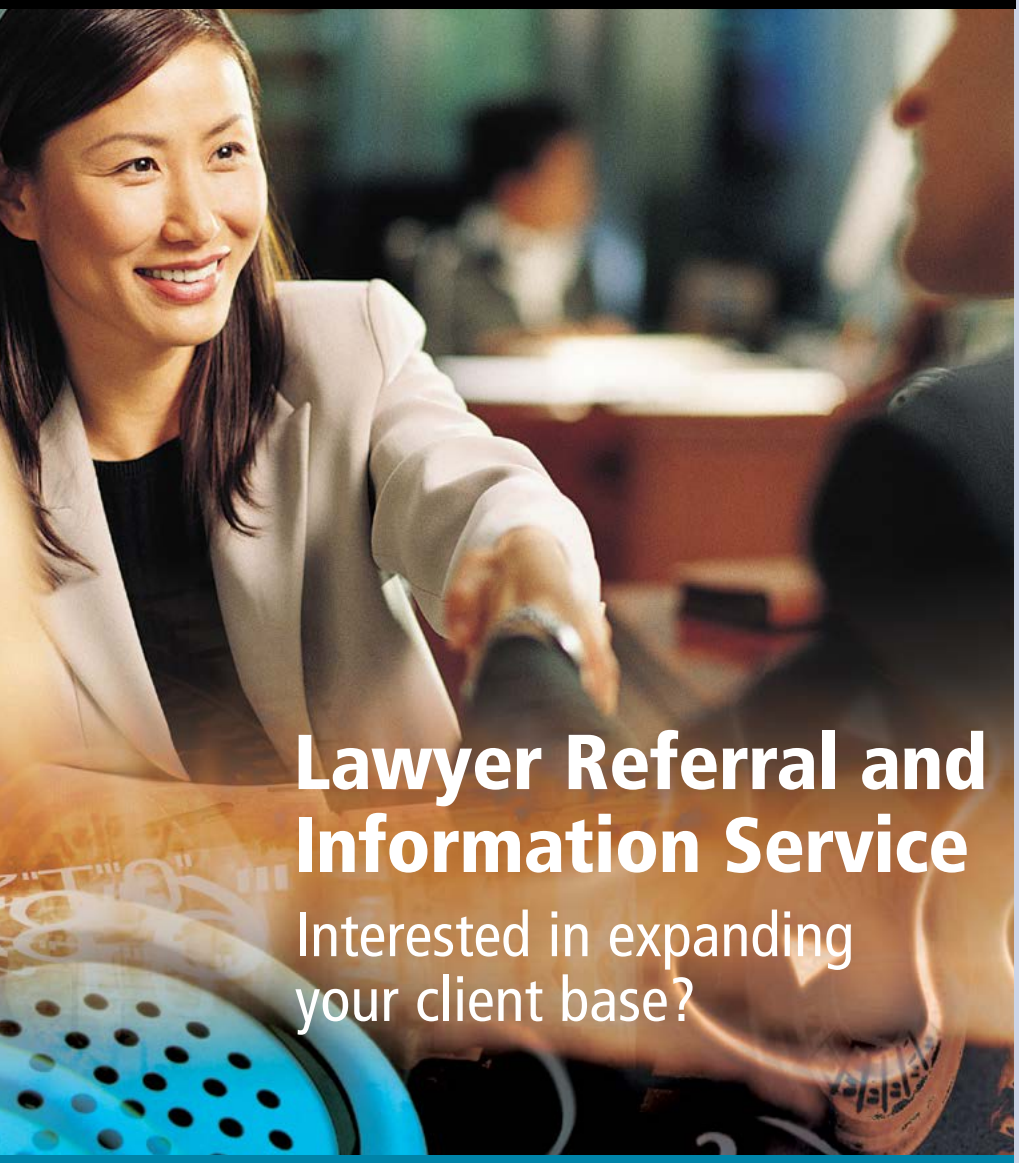

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Journal

CONTENTS

JANUARY 2014

LAWYERS IN TRANSITION

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10

DEPARTMENTS

Transitions: Interviews by Jocelyn Cibinskas

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media.

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Priorities for 2014

As we enter a new year, we continue work on our ongoing initiatives even as we have taken on new priorities. Our theme this year is "Serving the Profession, Serving the Public," and we are advancing that mission through various projects, including our continuing focus on legal education. The 2014 Presidential Summit at the Annual Meeting will feature panels on legal education and the future of the profession, and in the spring, we plan to bring stakeholders together to discuss these important issues. In addition, the Executive Committee recently adopted legislative priorities for 2014, reaffirming our commitment in a number of areas and adding some important new legislative initiatives to our slate of top priorities.

Presidential Summit

The Presidential Summit is scheduled for Wednesday, January 29, at 2:00 p.m. at our Annual Meeting in New York City. The Summit is the only plenary panel of the week, offering a three-hour CLE program free of charge to all Annual Meeting registrants. The first panel, titled "Educating Tomorrow's Lawyers," will bring together representatives from the judiciary, the practicing bar and law schools to discuss the rapid and dramatic changes that have taken place both in legal education and the job market in recent years. Our panelists will discuss possible strategies to address the cost of legal education, the extent to which curriculum prepares students for the practice of law, the need for greater diversity in the legal profession, and other important issues. Our second panel, "Supporting Today's Lawyers," will focus on the challenges and changes faced by practicing attorneys, including developments in the provision of law-related services, new technology, increased globalization, a changing economic climate and new client demands. We are pleased that the Founding Director of Educating Tomorrow's Lawyers, William Sullivan, will be delivering our keynote address on legal education, and noted strategic planning consultant Bruce MacEwen will serve as keynote speaker for our second panel on the future of the profession. They will be joined by terrific panelists for a lively discussion of these important issues.

2014 Legislative Priorities

At our November meeting, the Association's Executive Committee adopted state and federal legislative priorities for 2014. We will continue our commitment to the integrity of the justice system in New York State and at the federal level, and we will continue to advocate for adequate funding for the judiciary and civil legal services for the poor and to turn back the devastating impact of sequestration on the judicial branch of the federal government. We will also continue our support for sealing records of conviction of certain crimes; reforms to prevent wrongful convictions; the Rules Enabling Act rule-making process and maintenance of Rule 11 of the Federal Rules of Civil Procedure; state regulation of the tort system; repealing Section 2 of the Defense of Marriage Act; and measures that support the legal profession and judicial independence.

New legislative priorities we have adopted include:

- Creating additional Family Court judgeships throughout New York State to ensure justice for New York's children and families and to ease the burden on existing Family Court judges, as recommended by our Task Force on Family Courts.
- Expanding veterans treatment courts in New York State. These courts have been established in communities throughout New York to help deal constructively with veterans who have become involved in the court system, as discussed in the report of our Committee on Veterans.
- Lessening the use of solitary confinement in New York's correctional system, per the report and recommendation of our Committee on Civil Rights.
- Supporting increased voter participation through reforms at the state and federal levels, as set

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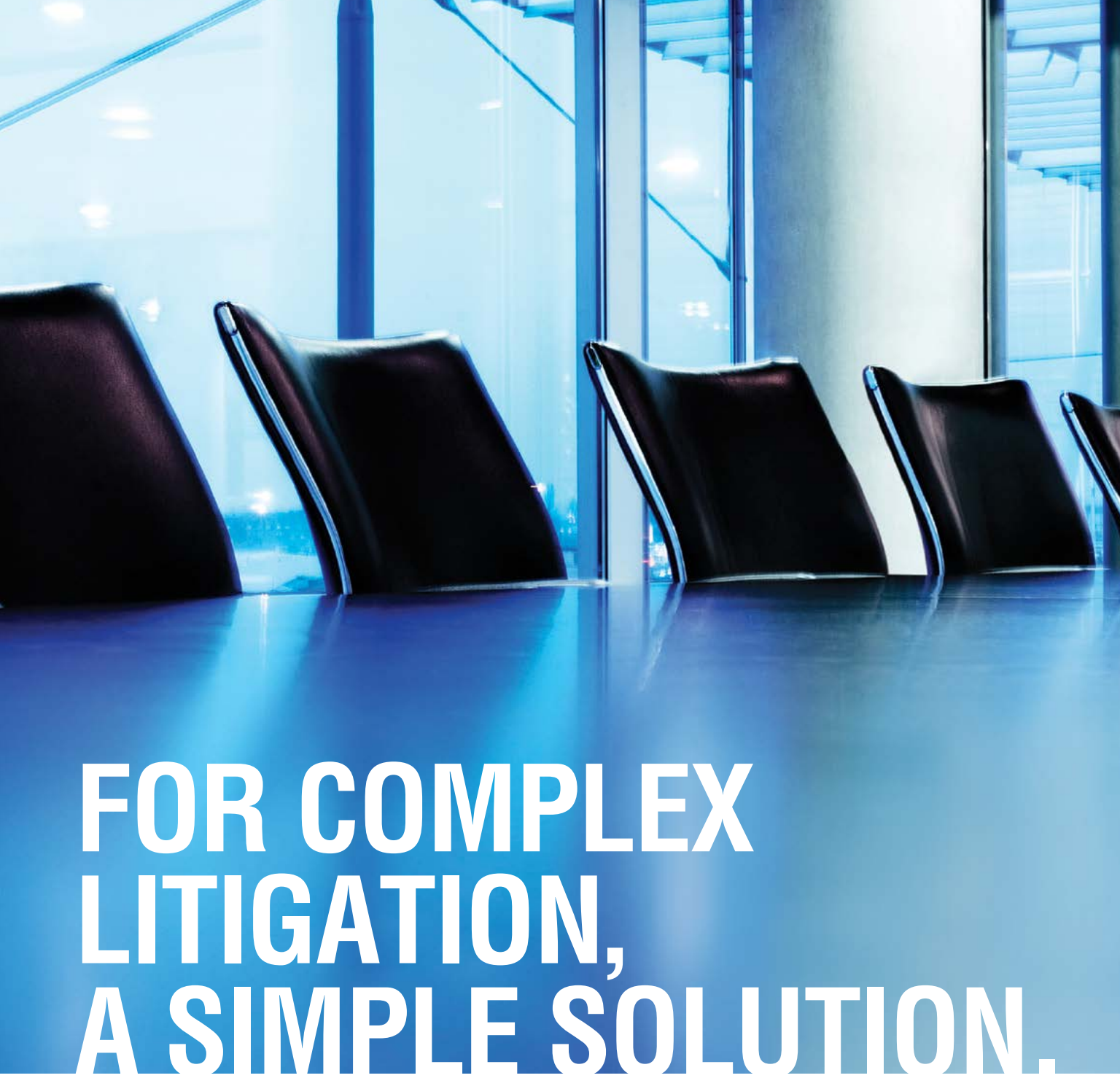
forth by the Special Committee on Voter Participation.

- Promoting civics education in New York's schools.
- Addressing the crisis in immigration representation and the need for a statutory right to appointed counsel in immigration proceedings for children and persons who are not legally competent.
- Amending New York's Franchise Act to conform to Federal Trade Commission rules.

We appreciate all of the proposals put forth by our sections and committees, and are proud to have substantial and well-developed legislative priorities for the coming year. You can learn more about our legislative priorities by visiting http://www.nysba.org/2014LPDescriptions/. I hope to see many of you at our Annual Meeting and the Presidential Summit. ■



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February 26 Albany

2014 March Marketing Program
March 5 New York City

Medical Malpractice
March 7 Long Island
March 14 Albany; Buffalo
March 21 Syracuse
March 28 New York City

Securities Arbitration
(live & webcast)
March 11 New York City

Practical Skills: Bridging the Gap
March 11–12 New York City (live program)
Albany; Buffalo (videoconference from NYC)

10th Annual International Estate Planning Institute
March 13-14 New York City

Construction Site Accidents
March 14 Albany; Long Island
March 21 New York City

CPLR Update 2014
March 15 Buffalo (9:00 a.m. – 12:40 p.m.)
March 21 Albany (9:00 a.m. – 12:40 p.m.)
March 22 Syracuse (9:00 a.m. – 12:40 p.m.)
April 10 Long Island (6:00 p.m. – 9:40 p.m.)
May 8 New York City (6:00 p.m. – 9:40 p.m.)

Introductory Lessons on Ethics and Civility
April 4 Long Island; Syracuse
April 11 Albany; Buffalo
April 25 New York City

Advanced Insurance Practice
May 2 New York City, Syracuse
May 9 Albany, Buffalo
May 16 Long Island

DWI: The Big Apple XIV
(live & webcast)
May 8 New York City

Commercial Litigation Academy
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Lawyers in Transition

Edited by Judith S. Kaye and Jessica Thaler

"Transition": today that word resounds throughout the legal profession. Between the changing nature of law practice, the economic downturn and the blessing of longer lives, many attorneys find themselves in repeated transition. Surely the days of joining a law firm for life are long gone. Young lawyers are transitioning into the profession, experienced lawyers are transitioning out of the profession, and lawyers of all ages are transitioning from large to small firms – perhaps even from law firms to in-house positions, from the private to public sectors, from legal to alternative careers and back again. This issue of the New York State Bar *Journal* is dedicated to exploring this modern-day phenomenon.

Despite the differences among the paths taken, the gates out of which lawyers launch their careers, the number of years in practice, and career and end-of-career goals, the experience of transition itself creates common ground among disparate people and interests. Among the shared experiences: the need for job search and career service advice; networking and volunteer opportunities; mentoring and career coaching; access to training, education and other information; and resources to maintain financial and mental stability. We hope this special issue of the *Journal* will provide the basis for helpful discussions, while also letting lawyers share what they have learned during their journeys.

First, John Feerick and Jessica Thaler discuss how volunteerism helped in their transitions from private practice to academia, and from large firms to solo practice to the nonprofit sector. Through volunteer service they sharpened their skill-building and networking practices and enjoyed the "feel good" nature of public service. Next, Warren Sinsheimer talks about how a chance communication as he pondered retirement led him down a whole new path to establishing the not-for-profit Partnership for Children's Rights. Jill Kristal looks at the area of personal well-being while in transition; she provides advice on supporting and maintaining emotional health during what can often be a time of uncertainty, discomfort and angst. Stephen Friedman was also looking at retirement when, instead, he started a whole new career. Stephen's article engagingly describes his leaps between private practice and academia, and all the interesting twists and turns along the way.

Money management is an essential skill at each stage of a lawyer's career, and Stacy Francis explores the financial considerations at each stage: entering a career, changing midcareer and approaching retirement. Sharon Katz recounts how one law firm has made it part of its culture to provide support services, such as office space, research tools and associate support, to retired partners so they can both devote themselves to pro bono work and mentor younger lawyers at the firm. Carol Greenwald offers suggestions on marketing and networking best practices and discusses the importance of "branding." Finally, Amy Gewirtz describes the basic tools all lawyers need in their toolbox, especially when transitioning, from a robust resume to a LinkedIn profile to a support network, including both cheerleaders and peer reviewers.

This issue of the *Journal* is meant to expand a dialogue about the needs of the many lawyers finding themselves in transition, which can be a very exciting and very daunting time. These topics and others are regularly considered through the discourse of panelists and facilitators participating in the panels and breakfast discussions organized by the Committee on Lawyers in Transition. We anticipate a continuing and robust discussion of issues at the 2014 Career Conference, and beyond.

NYSBA is well positioned to provide a diversity of resources to assist in the process, through thoughtful collaboration with its Sections and Committees, other bar associations and law schools, and varied professionals, benefiting from the experiences of those who have successfully managed career transitions, to better position lawyers in transition to navigate through the many steps, phases and changes that a dynamic and successful legal career will inevitably bring. ■

Judith S. Kaye is Of Counsel at Skadden Arps in the firm's New York City office. She was appointed to the Court of Appeals of the State of New York in 1983 and then served 15 years as Chief Judge until her retirement on December 31, 2008. She earned her B.A. from Barnard College (1958) and her LL.B., *cum laude*, from New York University School of Law (1962).

Jessica Thaler is the Chief Legal Officer of My Sisters' Place, a not-for-profit organization working to end violence in intimate relationships and combat the effects of domestic violence and human trafficking on victims throughout Westchester County. She is a graduate of UCLA, *cum laude* (1995), and Fordham University School of Law School (1999).

Volunteerism and Transition

By John D. Feerick and Jessica Thaler

John D. Feerick, the Founder and Director of the Feerick Center for Social Justice and Dispute Resolution, was the Dean of Fordham Law School from 1982–2002. He has held the Sidney C. Norris Chair of Law in Public Service since 2004 and was the Leonard F. Manning Professor of Law from 2002–2004. John began his career at Skadden, Arps, Slate, Meagher & Flom; he spent 21 years (1961–1982) there, developing and heading up its labor department.

Jessica Thaler is the Chief Legal Officer of My Sisters' Place, a not-for-profit organization working to end violence in intimate relationships and combat the effects of domestic violence and human trafficking on victims throughout Westchester County. Having had a rich experience as a corporate-transactional generalist, she now provides agency counsel and oversees the organization's Center for Legal Services, which affords victims greater access to legal protections and remedies crucial to their survival and safety, engages in legislative advocacy and provides legal education regarding the laws and regulations applicable to these victims. She is a graduate of UCLA, *cum laude* (1995), and Fordham University School of Law School (1999).

American society places a high value on community service and civic engagement. In 2010, 62.7 million volunteers accounted for 8.1 billion hours of community service, providing services worth an estimated value of $173 billion.[1] It is no different for lawyers. For many attorneys, a life in the law without experiencing and participating in some aspect of public service means they will miss out on the full potential of life. There are so many opportunities at hand – to represent people, to work in not-for-profit and government offices, to advance the state of the law, to teach and educate the next generation – that volunteering can and should be a part of every lawyer's professional identity.

Volunteering and "having a cause" are in vogue, but volunteering is a much more powerful experience. The volunteer gains much more than merely a throwaway line for a resume or an addition to the bottom of a LinkedIn page.

When we spoke with Justice Sandra Day O'Connor in 2012 we asked her what advice she would offer lawyers in transition, especially those who wanted to continue to have meaning and purpose in life. Justice O'Connor responded: "I like the nonprofit segment of society. I've been involved as a volunteer for most of my life with various community organizations that are trying so hard to provide services to people in a whole variety of ways. All of them welcome help from lawyers. You can think in your own community how many of these organizations there are."[2]

Volunteering Is an Education

Although volunteering is rarely seen as such, it is an extremely powerful tool for lawyers in transition. First, volunteering allows lawyers to develop skills in new areas. Volunteering provides an opportunity to develop, reconnect with and maintain the more general lawyering skills that the volunteer's specific practice area might not call for. By working with nonprofits that often serve underresourced populations while dealing with limited resources themselves, a lawyer has the chance to assume a great deal of responsibility very early on, often developing a new skill set in a previously unfamiliar area of law.

Volunteering also allows attorneys who are later in their careers to maintain skill sets and pass on the benefit of their experiences and knowledge to the next generation. Because nonprofits and community service organizations often have limited resources – especially compared to the tremendous needs that they serve – these organizations actively welcome volunteers and encourage them to take on substantive work early on. Not only will this help develop real skills for use in a variety of real-life situations, it will also promote the confidence that comes from project management and prioritizing work and interacting with clients with immediate needs.

The attorneys that work for and with nonprofits develop expertise both in an area of law and in the nuances associated with representing the specific type of client that nonprofit serves. The attorney volunteering with such agencies will gain an increased awareness and sensitivity to the needs of such clients while further expanding the attorney's repertoire and skill set. This expanded knowledge set thus benefits both this underserved community and the attorney's regular clients.

Volunteering Is a Networking Opportunity

Additionally, volunteering is a unique opportunity to build relationships with the community one is serving; it is an experience that allows transitioning lawyers to speak on new topics with the authority and maturity that come with contextualized practice. And it is a practical career advancement tool. Volunteering sends future employers the message that a lawyer is genuinely interested in and committed to the given practice area. It also exposes transitioning lawyers to other established and practicing lawyers in the practice area. This is an unparalleled chance to build the connections that will help a lawyer to serve the clients they are volunteering for and create the professional network that may lead to mentorship or even a job. Through their volunteer work, attorneys seeking employment will be able to demonstrate their capabilities, whether direct client-related skills like contract negotiation, trial experience, or research and drafting, or professional skills such as management, leadership, resourcefulness, work ethic and versatility.

Volunteering can also be a tool for transitioning lawyers to develop relationships with clients as well as with established practitioners in the field. By working directly with clients, lawyers can gain a sense of the issues that matter and the language and approach that is most effective within a given practice area. This experience will allow lawyers to speak with credibility and authority on the issues with a level of confidence stemming from their time "on the ground."

Volunteering is a unique opportunity to build relationships with the community one is serving.

Some people volunteer solely for the purpose of furthering their career and do so begrudgingly and incompletely. However, generally, those in senior or leadership volunteer roles are involved because they want to help others within the area and enhance the experience of those serviced by, and the reputation and perception of, the profession. These leaders generally serve in multiple roles, and many are willing to speak with people about career direction, collaborate with them on business development and act as mentors.

Volunteering Is a Resume Builder

Though enthusiasm, engagement, intellectual strength and curiosity are often among the most valuable qualities a professional breaking into a new field can possess, employers are often hesitant to take the risk of investing training time and resources in hiring a lawyer with an undemonstrated interest. The worry is that the prospective hire is exaggerating his or her commitment to the field in order to get a job, or that the lawyer's present skills will not translate successfully to the new practice area. Volunteer work can help allay both the perception and the substance of the fear itself. Employers will see that a lawyer's interest is not just "talk," because the lawyer will have a track record and sample work product to refer to in illustrating success in the field.

For attorneys who have recently received their law degrees and are seeking experience, and, increasingly,

Continued on Page 15

On a Personal Note…

"One of my most meaningful commitments included working on the committees of the New York City Bar such as the State and Federal Legislation Committee and, most especially as I look backwards, its first lawyer's in transition committee, charged with helping members of our professional at a time of great difficulty in the 1980s. The former committee allowed me to take an active role in shaping the dialogue surrounding developing laws that would affect not only lawyers, but society at large. The latter committee, a creation of several of us, allowed me to work with a wonderful group of colleagues, all invested in trying to help sisters and brothers at the bar. Maddy Stoller chaired that effort and Ken Standard, later to be president of the state bar, became my friends, which is another benefit of such bar work. Strangers, it might be said, become your friends for your professional life.

"As a lawyer for 52 years, I thank those who encouraged me to become engaged in the life of the organized bar, and I will never fail to appreciate the opportunities that came my way to handle a few cases pro bono and learn how much they can reach your inner core. Indeed, one remains my most treasured memory as a lawyer. It involved a young minority who was denied admission to the police department but through litigation had that result changed. Sometime later he tried to save the life of someone who fell on the subway tracks. He went on to have a distinguished 24-year career with the NYC Police Department, leaving as a detective first grade, and was followed by his son, Michael, who rendered important service at the World Trade Center site on 9/11/2001."

–John D. Feerick

John has been a dedicated public servant throughout his career. Most recently, he has served as a member of the three-person Special Master Panel in the McCain homeless family rights litigation (2003–2005); was appointed to a three-member Referee Panel in Campaign for Fiscal Equity v. State of New York *(concerning education equity; 2003); and was the Chair of the Commission to Promote Public Confidence in Judicial Elections (2003). From April 2007 to February 2009, John served as Chair of the New York State Commission on Public Integrity. Previously, John was the President of the Association of the Bar of the City of New York (1992–1994); Chair of the New York State Commission on Government Integrity (1987–1990); and President of the Citizens Union Foundation (1987–1999).*

"My volunteerism has assisted me personally and professionally in navigating the ups-and-downs of my career, the happy and sad moments of intimate relationships and the path of emotional growth and development. Most significant was my participation on the Membership Committee for the New York State Bar Association, which led to my chairing the Committee on Lawyers in Transition, as well as my service on, and ultimately chairing of, an alumni committee for Fordham Law School. Volunteering introduced me to many of my current mentors, confidants and friends. Those relationships, and the lessons learned through working with fellow committee members, panelists and other experts, provided me access to varied and informed opinions and a sooner exposure to potential opportunities.

"My volunteer experience also provided me with the skills to use the transition tools that allowed me to reassess my career goals and shift the direction and focus of my career with confidence and certainty. I have become one of the lucky ones. I am able to spend my entire work day applying the skills I have acquired, experience I have gained and knowledge I have obtained to public service. This opportunity, and the satisfaction, the meaningful professional relationships and the continued and expanded learning opportunities presented by it, grew directly out of my former and continuing volunteerism."

–Jessica Thaler

Jessica is also a member of the New York State Bar Association and acts as the Committee Chair for its Committee on Lawyers in Transition and is Co-Chair of Membership for its Entertainment, Art and Sports Law Section. She is a member of the Westchester County Bar Association. Jessica is heavily involved in the alumni associations for both universities.

Continued from Page 13

for those who have had long and storied careers and are seeking to "give back," there are fellowship opportunities which permit attorneys to serve the underserved communities through the nonprofits with which they partner while receiving some monetary compensation for their efforts. For the more junior lawyer, such fellowships provide a stipend, substantive experience, training by skilled practitioners and a consistent schedule and work environment, developing their professionalism, honing a proactive sensibility and giving actual legal training. This enhances the lawyer's chances with prospective employers. For the senior lawyer, such an opportunity allows the lawyer to prolong his or her professional service to clients, teach the next generation of lawyers and benefit from continued structure, collaborative environment and camaraderie, which are important for emotional and mental well-being.

Through volunteer efforts, transitioning attorneys have substantive and tangible experiences and acquire skills to enumerate on their resume, in cover letters and during interviews. Employers will consider those proficiencies in their evaluation of the transitional candidate and see the candidate's determination and desire to gain and maintain legal knowledge and ability.

Volunteering Gives a Sense of Perspective

Finally, volunteering is an unparalleled opportunity for social and personal growth. Good work done for the primary purpose of assisting others will benefit the "do-gooder" by providing something to feel good about, a distraction from life's day-to-day chaos, information about the cause for which a person is volunteering, the ability to utilize that information for personal benefit or the benefit of another, the experience needed to see subtle nuances in situations and an understanding of how individual circumstances shape reactions and perceptions. The opportunity afforded volunteers can also come from the creation or extension of a new network, personal or professional, of others with similar interests, issues or life experiences.

Even when one is no longer a "lawyer in transition," volunteer work can, and should, play an important role in one's professional and personal work ethic. The late Mary Daly, a former Dean of St. John's University School of Law, described a law degree as performing an "access function . . . enabling bright, energetic members of the working class to transcend economic and social obstacles" to achieve mobility in American society. Even beyond this threshold access function is the understanding of being part of a larger scheme. Service in the organized bar has been a constant in our lives and has allowed each of us to develop personal values and interests and participate in important subjects of the time. ■

1. *See* Corporation for National and Community Service, http://www.volunteeringinamerica.gov/national.

2. John D. Feerick et al., *A Conversation with Justice Sandra Day O'Connor and Judge Judith S. Kaye*, 81 Fordham L. Rev. 1149, 1160–61 (2012).

TRANSITIONS

Amy Gewirtz is the Director of the New Directions for Attorneys program at Pace Law School, which provides practical skills and career counseling to lawyers seeking to return to the legal profession or an alternative legal career. Amy began her career in the private sector, working as an entertainment lawyer in the theater industry. "My goal before, during, and after law school was to be an entertainment lawyer. When I graduated from law school, I was fortunate to work with an entertainment lawyer who represented set, costume, and lighting designers on and off-Broadway, as well as producers of Broadway-bound plays. In connection with those clients, I did a lot of contract negotiation and some securities law work as part of the process of financing these plays."

Amy then joined the Motion Picture Association of America as an anti-piracy attorney. In this role, she worked with the attorneys of MPAA-member studios to prevent piracy of their films. "We hired counsel all over the world to assist the MPAA with this goal, as well as to assist with monitoring and, in some cases, creating intellectual property legislation." Amy's transition from the entertainment industry began while she was on maternity leave, and she started thinking about working in academia. "I was fortunate enough to be offered a three-month position with the Career Office of my law school. This temporary position turned into a year-long position in that office and then into a nine-year position with the Admissions Office. One of the many lessons I learned from this experience is how important it is to maintain ties with people, both personally and professionally, including the career office of your alma mater."

– Jocelyn Cibinskas

Warren J. Sinsheimer is founder and president of Partnership for Children's Rights, a not-for-profit law firm dedicated to helping disadvantaged children throughout New York City.

The Water's Fine. Jump Right In!

A Personal History

By Warren J. Sinsheimer

Since I was admitted to the bar in 1950, my life and career have taken many twists and turns. Upon graduation from law school, I joined my father in his law practice. It was a difficult experience because I felt that I was treated as a summer associate rather than as a member of the bar. My tenure at the firm came to an abrupt hiatus when I was called to active duty in the U.S. Air Force as an officer of the Judge Advocate General's division.

JAG

With my wife accompanying me, I reported to Wright Patterson Air Force Base in Dayton, Ohio. We looked for an apartment in which to spend the two years of my service agreement. We learned about the neighborhoods in Dayton, the ground transportation and even asked about child-care centers. We were planning for a long stay. Well, the best laid plans . . .

One afternoon, I was summoned to the office of the Staff Judge Advocate. Apparently, there was a requisition for a JAG officer in Korea. He explained the last in, first out rule. I, being the "last in," had been elected to fill the post.

Off I went. I reported to the port in San Francisco for embarkation to Japan, the first stop on the way to Korea. Twelve JAG officers were on the boat. My 11 colleagues were scheduled to go to Japan. They carried golf clubs and tennis racquets. I carried a gas mask and an automatic .45 caliber pistol. Well, that's the luck of the draw, I thought.

I will never forget arriving in Japan. The ship landed in Yokohama after almost 20 days at sea. We took a train to Tokyo, where the Headquarters of Fifth Air Force was located. When the train arrived, I noticed a huge crowd in the streets. How did they know we were coming? I soon learned that, rather than gathering to welcome First Lieutenant Warren Sinsheimer, the crowd was there to say farewell to General Douglas MacArthur. President Harry Truman had relieved MacArthur of his command.

Each of us JAG officers had an interview with the Judge Advocate General of Fifth Air Force in Tokyo. I know neither how nor why, but I was assigned to a B29 base near Tokyo instead of Korea, and my 11 colleagues were each sent to different bases in Korea. I sometimes wonder how the tennis and golf were there.

My assignment was at Yokota Air Base, about 20 miles from Tokyo. It was the Headquarters of Far East Air Forces Bomber Command, which flew B29 bombers to targets in Korea. I was the second lawyer in the JAG office at Yokota, but soon I was the only lawyer on this huge base. The Judge Advocate of the base rotated back to the States (or, as it was called in the service, "The Zone of the Interior") several months after I arrived. I was an almost brand new lawyer and now I was alone in the office. And I was responsible for military justice and all of the legal and most of the quasi-legal problems for the entire base.

My office was next door to the base commander's. One morning Colonel Tull screamed, "LEGAL!" I immediately responded. Colonel Tull explained that the infirmary was full of B29 pilots who were refusing to fly. These pilots had been recalled to duty in the Korean War. They had no trouble flying during WWII, when they were young "hot shots," but now they were married and had families

and they did not want to fly. The Colonel asked me what should be done. (To be frank, I did not have the slightest idea!) After a moment's thought, I said that we should ask Headquarters USAF in Washington for instructions. I was quite proud of that solution.

During my two years in Japan, I learned a lot about the problems of people who need legal advice and help. Even though Yokota Air Base was the main combat air command during the Korean War, while I was there it housed a large number of dependents who had arrived before the conflict. Each day I was called upon to handle all the problems that military families face. I developed a keen regard for all of the many vicissitudes facing people without access to legal help.

Return to Civilian Life

I am tempted to fast forward almost 45 years, but I believe that each day is an important stepping-stone that determines who we are and what we accomplish at each stage of our lives.

My return to civilian life was with neither fanfare nor sadness; I just returned to civilian life. Something, however, was different. Now, I was a seasoned lawyer who had prosecuted those accused of murder, rape and other heinous offenses. I had defended the same type of cases on an adjoining airbase. I had listened to a multitude of problems faced by the families on the base. I counseled airmen about the problems they might face if they a married a Japanese woman.[1] In sum, my experience enabled me to be accepted into the firm. My father no longer viewed me as a summer associate.

My civilian legal practice was of a completely different character. For one, I represented a huge British company, The Plessey Company, plc, which employed over 80,000 people, as well as other corporate clients. I eventually became Deputy Chief Executive of Plessey with responsibility for the overseas assets of the company. It had subsidiaries outside of the United Kingdom in the United States, Brazil, Hong Kong, Australia, South Africa, Singapore, France, Belgium, New Zealand and others that I am certain I have forgotten.

I was constantly on the go. *The Financial Times* said that I was industry's answer to David Frost.

Reaching Out

After many years of travel and corporate responsibility, I realized that the one thing lacking in my life was contact with ordinary people who needed help. Yes, one can contribute financially to organizations that help people who need legal intervention, but that is far different from the hands-on work of trying to help a distraught family on a military base or assisting people who have legal problems but cannot afford legal representation.

To help to fill that void, in 1992 my wife and I created a scholarship that would pay 100% of a student's tuition for three years of law school. The payback was that the student had to agree to spend three years after law school in an organization that provided legal assistance to poor people. I had a meeting with John Sexton, who was then Dean of the NYU Law School. John explained that it was not possible to have just one Sinsheimer Scholar. The first, he said, would become a second-year student after the first year and then there would be no recipient in the first year. He then moved the first recipient to the third year and the second to the second year, leaving a void in the first year. "Wow!" I said. "That would be awful." So we now have three scholars at all times. I originally thought that NYU had bested me. However, based on the pleasure we have received from knowing these wonderful young people, it is my wife and I who have made the better deal!

Our first Sinsheimer Scholar graduated in 1996. His name is Christopher Meade. He was the editor-in-chief of the *Law Review*. He graduated first in his class and then went on to clerk for Harry Edwards, Chief Judge of the Federal Circuit, and then for Justice John Paul Stevens in the United States Supreme Court. President Obama has recently appointed him and the Senate confirmed him to be General Counsel of the United States Treasury. My wife and I are as proud of him as his family is.

All of the other Sinsheimer Scholars have had impressive careers – not one of them has left the field of public interest and, over the years, many disadvantaged persons have benefited from their service.

Next Steps

As with most of us, the time came for me to retire. I was unprepared – what was there for me to do? As I was pondering my future, I received a letter from the Executive Director of Westchester-Putnam Legal Services. She announced that because of severe cuts in funding of the Legal Services Corporation by Congress, her organization was experiencing financial difficulties. She urged the recipients to contribute an amount equal to the billing rate for one hour of their time. In addition, she said that some 100 lawyers had given 500 hours of their time as volunteers. I decided to go to their office in White Plains. The remnants of what the radio called a blizzard was still on the ground as I skidded toward their office. It was a journey that would have a profound effect on the rest of my life.

When I met the Executive Director, I told her that I wanted to be a volunteer lawyer. She asked me how many hours a week I was prepared to give. I replied, "40." I thought that she would take out handcuffs and shackle me to the stairway. Instead, we sent a truck to the office of Patterson Belknap Webb and Tyler, a firm well known for its pro bono activity, where I had been a partner prior to retirement. The truck picked up my office furniture, which was then placed in an empty office at Westchester-Putnam Legal Services. I became a public interest lawyer. I did not know exactly what Legal Services did other than provide legal services to those in need,

but I knew I would soon learn. At that moment, almost 18 years ago, my retirement became a beginning, not an end.

The attorney who handled the special education cases was about to go on maternity leave, and I was elected to take her place. My knowledge of education law was about the same as my knowledge of nuclear fission (I did realize that one helped children). However, with the help of my new colleagues and hours of late-night reading, I started to grasp the meaning of the Individuals With Disabilities Education Act, which Congress had enacted in 1975 to ensure that children with disabilities have the opportunity to receive a free appropriate public education.

told them what would be required during the first year. The next morning, I received a call advising me that they wanted to fund 10% of the first year's expenses. Very shortly thereafter, a foundation that wished to remain anonymous made a significant grant to our infant organization.

Two pieces of the puzzle remained: management and a place in which to manage. The management side was solved by the president of the foundation that had given us the grant. He had met a man while skiing who, he thought, would be a perfect fit. I met with this person, who said that although it sounded interesting, he had just founded his own not-for-profit and could not leave it.

As with most of us, the time came for me to retire. I was unprepared – what was there for me to do?

My first case was a frightening experience. Mr. and Mrs. T., a disadvantaged couple who lived in Peekskill had adopted one child and wanted to adopt another. When they arrived at the adoption agency they were told that the only child available for adoption was a boy with Down syndrome. The couple was told that they did not have to adopt this child because of his disability. Mrs. T. replied that God would want them to adopt the child. And they did.

When the child turned five years old, his parents enrolled him in a parochial day school where he needed a 1:1 aide. The school district contended that it could not provide an aide in a parochial school. The parents asked for an Impartial Hearing to determine the issue. I had not tried a case since my days in the Air Force, yet despite my lack of experience in Education Law, we prevailed at the hearing. The School Board appealed to the State Review Officer. I returned to my law school days and went to the library to do research. We won the appeal! Now, I was a fully tried education lawyer.

I remained at Westchester-Putnam Legal Services for three years before deciding to form a not-for-profit law firm dedicated to helping disadvantaged children with education problems. The process was much simpler than I had anticipated. I formed a not-for-profit corporation; I filed a tax exemption form with the Internal Revenue Service; my wife and I held a meeting of directors; and we were off and running. We were still missing a few things: money, an office, lawyers and clients.

I was amazed at how quickly the missing pieces fell into place. My wife and I were having dinner with friends and told them about Legal Services for Children (as it was then called). They inquired about the budget and I

He suggested, however, that I meet with his wife who, he thought, would be interested. I met her and we decided that she should join the organization. She, in turn, recommended a man who had just left The Legal Aid Society. So the current Executive Director of Partnership for Children's Rights[2] was hired. We now had two employees and one volunteer (me).

It was a very hot summer. The three of us wandered around Manhattan and in and out of buildings that looked affordable. We finally found our current premises on 39th Street and Madison Avenue. As we knew that our clients would live in all parts of the city, a spot close to the subways at Grand Central looked perfect to us. And so we began. As my pro bono activities had revolved around special education, we decided we would pursue that field.

We recognized that we needed to recruit volunteer lawyers. As our financial situation did not permit the hiring of many lawyers, I started to go to meetings of retiring lawyers and bar association senior lawyer events. When I was asked to speak, I explained what we did and how important it was for poor children to have representation in this field. I always ended the talk with the following: "The water's fine. Jump right in!" And they did!

We have had the services of a large number of volunteer lawyers since our founding 15 years ago. They are all wonderful people, and I have had great pleasure working with them. We help more than 1,000 children a year and commence Impartial Hearings for more than 125 of them. Our record of success over the years has been remarkable. Our clients have received educational benefits to which they are entitled, enabling them to have meaningful and productive lives.

To those who are thinking of a pro bono career or after-career, either before or after retirement, I say: The water's fine. Jump right in!

1. In the early 1950s many of the Southern States did not permit interracial marriage.

2. The name Legal Services for Children was changed to Partnership for Children's Rights in 2008 to reflect the large social service staff which is now a part of the organization.

TRANSITIONS

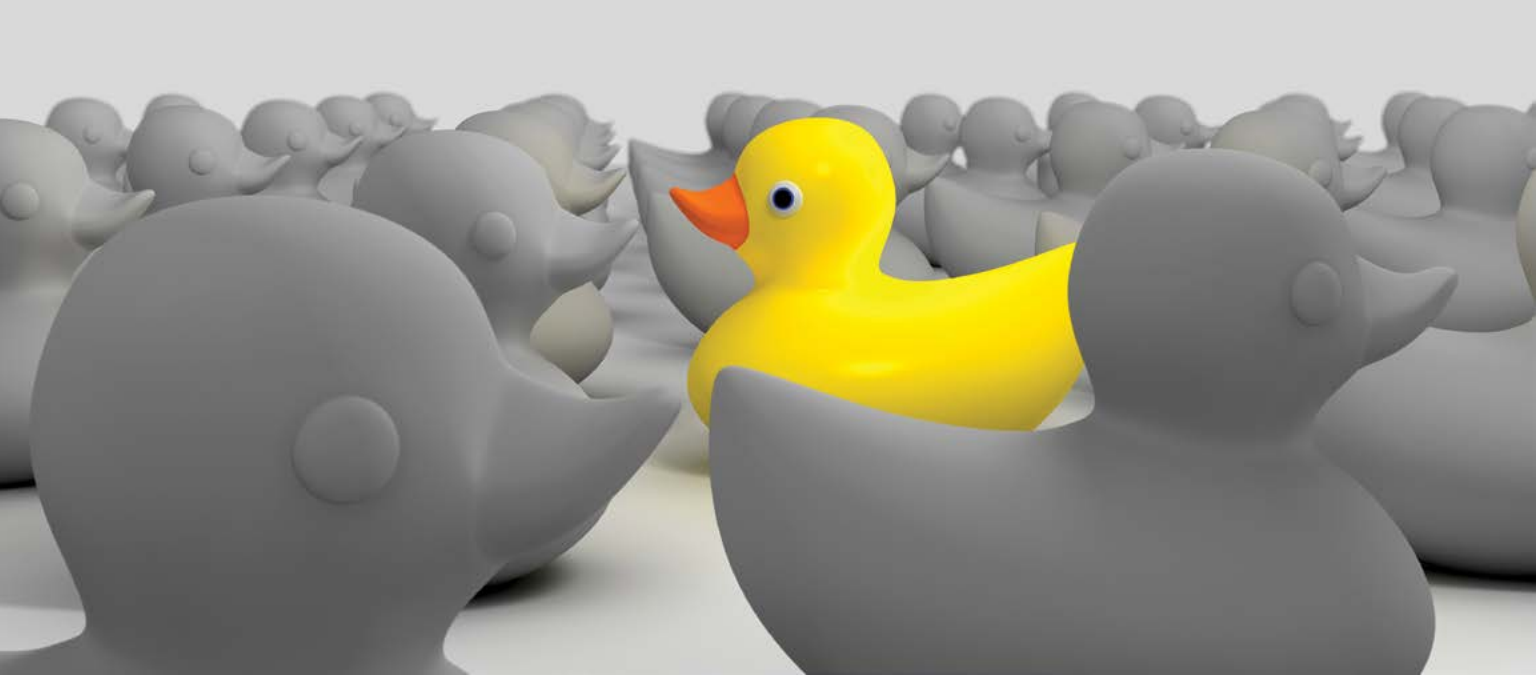
Upon graduation from Georgetown University Law Center, **Anthony Palermo** started his legal career at the U.S. Justice Department in Washington, D.C., becoming a trial attorney in the DOJ's internal security division. After that, he became the Assistant U.S. Attorney in New York City. From there he transferred to the U.S. Attorney's office in Rochester, N.Y. and, ultimately, joined the private sector. He is currently Of Counsel to Woods Oviatt Gilman LLP.

In 1960, when he and his wife were newly married, and had just signed a three-year lease for an apartment in Riverdale, New York, Anthony was offered the position in Rochester. "My wife was very supportive of the decision to move, as she has been throughout my professional career." His intent was to remain in Rochester for only a year or so, before returning to New York City. Instead, Anthony and his wife raised six children in Rochester, three of whom became lawyers and now live in the city with eight of their grandchildren.

Is there anything he wished he'd done differently? "I regret not having expressed, timely and adequately, my sincere gratitude to each person who has guided and assisted me in my journey through life, personally and professionally, especially my wife and all my legal mentors, young and old."

Since entering private practice, Anthony has had to adapt to a variety of practice settings. He started in a three-person firm, which grew and then merged into a larger 75-person firm. At the age of 65 he became a contractor partner in an international law firm that had more than 200 attorneys. For the past 14 years, he has been Of Counsel at the third-largest regionally based law firm in Rochester. "Transition is a lifelong experience. You must think ahead, early and often, about changes, both planned and unplanned, in your personal and professional life."

– Jocelyn Cibinskas



Changing Course

Maintaining and Protecting Emotional Health During Transition

By Jill Kristal, Ph.D.

It's not that some people have will power and some don't.
It's that some people are ready to change and others are not.
James Gordon, MD

Life is full of change, from the obvious – school to career, to marriage, to parenthood, to retirement – to the less so – moving, switching firms, re-entering the workforce, downsizing. Some changes are welcome and chosen; others may be unwanted, yet unavoidable.

Given the frequency with which all humans endure "life-shifts," it would seem that everyone would be expert at maneuvering through life's varied phases and have a ready toolkit for navigating those changes. However, it seems that the opposite is true. The constancy of change renders it un-noteworthy, and the challenges change brings make it something worth avoiding. In addition, change involves emotion, and emotions are often messy and uncomfortable. The upside is that there is a method to the process of change which includes a beginning, a middle and, finally, resolution. Though the process may not be straightforward, there are steps and tools to help you move through it successfully.

Change is really hard. Humans are creatures of habit; we cling to familiarity and often prefer the well-worn path. What piece of exercise equipment is collecting dust in your basement awaiting your promise to "just make a habit of exercising"? Change is scary and fear of change can take many forms: the fear of failure or fear of regret; the fear of making the wrong decision or of not making a decision; the fear of letting oneself or others down. Fear can become an obstacle, especially when it turns into anxiety. As you evaluate your choices, your options and your own abilities, you may question if you have what it takes to change.

Change impacts identity; it throws into flux your sense of who you are. It impacts your life and the lives of those around you. So, why do people choose to make changes in their lives? Curiosity, drive, the need for a challenge or a creative outlet, the desire for innovation, are but a few reasons. Pushing yourself in a new direction allows for personal growth, and the opportunity to advance and become something more than you were before. Change lets you know you are alive, and it can help you discover what you are capable of. Change is exciting, and it can be invigorating. Change often connects you to people who add something to your life. And reaching out to help and be helped, to bond with others and do something new is fundamentally human.

The Process

The more that is known about the process of transition that accompanies any life change, the easier it is to traverse it. There is no way around the process – only

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through it. Accepting this will help when things don't happen as expected, when others aren't being supportive or the lights at both ends of the proverbial tunnel have shut off.

What does a transition involve? Curiously, at the beginning, change is about endings. It includes a period of letting go and shifting away from what is familiar; there is a sense of loss, even if that which is familiar is uncomfortable. Next it involves stepping into uncertainty, taking risk and living with not knowing. It forces you beyond your comfort zone, pushes you to tackle situations in ways you haven't in a long time, or maybe even never. It may include dusting off long-shelved aspects of who you are or were and putting them to use again. Finally, change involves reintegration of old and new.

A new chapter opens when you make the decision to shift directions. Even with careful consideration and planning, there is some aspect of change that requires a leap of faith. At some point, you just have to take that step and jump. The process of jumping, free-falling and landing on your feet again involves distinct, though overlapping, stages. Generally, these can be described as Perfection, or "best decision I ever made"; Rejection, or "worst decision I ever made"; Accommodation – "there are good and bad aspects to this decision"; and Realignment – "every decision has positives and negatives, but focus is on the positives."

Once a decision is made and initial steps are taken in pursuit of a new goal, there is often a feeling of euphoria. The decision seems so right; confidence is high, all seems good and wonderful . . . until there's an unanticipated glitch. Something doesn't go your way; it's harder than you thought; and now everything seems awful. There can be dread and questioning, "What have I done?" "How could I have made this choice?" "What was I thinking?"

Fear creeps in. This is not a time for making drastic decisions or undoing what you've begun, because this is part of the transition. This phase is followed by a more realistic view of what you are doing. The result is a better balanced perception of what you are trying to accomplish. This internal evaluation leads to awareness and acceptance of the truth – every change has positive and negative aspects. Once you have seen the situation from varied perspectives, you can make adjustments and carry on, more secure in the decision you made and your ability to manage it.

Beginnings Start With Endings

People tend to focus on the exciting, post-adjustment parts of change. However, to start well it is important to have brought to completion whatever came before. Good endings enhance new beginnings. This is a much-neglected aspect of managing life change. Saying good-bye, acknowledging that one aspect of life is coming to an end, is hard. Most people prefer to avoid dealing with these endings and make use of denial and/or anger: "I can come back"; "It's no big deal"; or "I never liked this situation anyway." But making closure an active part of the change process provides an opportunity to evaluate what has been. Done well, an ending allows for a mental and emotional "mind cleaning" of those aspects from the past that must be left behind, those that are worth bringing into the new situation, and those needing to be jettisoned. It can be a time of grief but also freedom. Acknowledging endings creates a chance to say thank you to who and what have been important to you and to resolve any unfinished business. Ultimately, the "good" in good-bye means traveling into the future with minimal emotional baggage.

Ideally, there is time in between the ending and new beginning. A concrete break can be a long weekend away or a vacation. Mentally, this time is a period in which to begin the emotional mind-shift between the former and the anticipated. William Bridges, in his book, *Transitions: Making Sense of Life's Changes*,[1] identifies this as a middle phase, which he calls "The Neutral Zone." He describes this as a period of "fertile emptiness" where a psychic reorientation occurs, much of which happens outside conscious awareness. It can be unpleasant and can include feelings of confusion and uncertainty, a sense of "chomping at the bit" to move on, and/or a feeling of time being wasted. It is crucial, though, to let this stage happen, as it is laying the foundation for what is to come.

It is the time prior to the burst of psychic or mental energy, where new ideas and strategies for how to achieve them are generated.

Your Change Affects Others

As if dealing with your own reactions to change isn't enough, it is important to consider how those around you will be affected by your choices. When a person makes a life change, it is like casting a stone into a pond. That stone hitting water creates ripples that spread far and wide. Toss another stone into the pond and the varying ripples will collide in waves that are in and out of sync with each other.

It is important to communicate with those around you about what you are doing and why, and to make efforts to elicit their support. Reactions to what you are doing will tend to fall into one of two categories: "That's great!" will be the reaction from your spouse, children, friends and family members who can rise to the occasion, show a willingness to take on extra tasks or become more independent in order to help you achieve your goal. But "How could you?" is the response that may come from these same people if they are feeling needy or resentful because of what you want to do. "What do you mean you want to go back to school and won't be here to make my dinner?" Some people will fall cleanly into one camp or the other; some may vacillate.

Others' resistance to change can make your resolve difficult to maintain. Your change forces them to consider what could be different in their lives. Making a life change takes courage, and you will find that not everyone in your pond has it. Those who don't may be fearful and try to project that fear onto you: "How can you switch careers?" "What about your income/family/existing connections?" People may be jealous of the circumstances that are allowing you to consider or to engage in the pursuit of a new path. They may be resentful of your decision because they can't or wouldn't make a similar choice for themselves.

There will be enough internal stress and self-doubt as you pursue life change. So it is important to find and lean on people who are supportive and to move away from those who can't be there to help you through. Even your supporters may question you at times, but their queries will be coming from a desire to help you achieve the goals you've set. You may find support in places and from people where you least expect it. Look for others you know who are also in the process of change, as these people, even if they are strangers in every other way, will truly understand and relate to what you are experiencing.

Making Choices for Managing Change

Regardless whether you are changing by desire or force, choices are always involved. How you choose to manage change, through acceptance or avoidance, will impact your experience of the transition. There are times where avoidance is exactly what you'll want. And sometimes, crawling into bed with a box of chocolates and the remote control is just what you need. Pity parties, feeling sorry for yourself or feeling bad about where you are, are normal responses both to situations of your choosing and those not of your choosing. Make these behaviors brief; use them as ways of restoring energy and motivation. Sometimes brains and bodies need to shut down and cool off prior to re-igniting.

Journaling is helpful because writing down thoughts and feelings is a means of externalizing what is within. It can help you organize your thoughts and, ultimately, provide a record of your path to change. Below is a series of questions that can help you manage the process of change.

Regardless of what part of the transition you are in, it is worth beginning by looking back to what prompted your desire to change:

- What was/has been happening within you that brought you to a place of considering making a major life change?
- How have circumstances with family or friends, the economy, your current employment status impacted your thinking about or choice to change?
- How did the decision come about? Was there a defining moment? Was this a long, slow process? Did the choice involve struggle?

Next, do a personal evaluation; take stock to see who you are and how you develop as the process progresses:

- Who were you when you began this process?
- What are your skills and abilities?
- Who are you today?
- Describe the values that are most important to you.
- What have you learned about yourself?
- What are you capable of now that you weren't capable of before starting this transition?
- Who will you become?

Since change touches virtually every aspect of your life, it is worth exploring the ways in which it does or will impact you:

- Identity – What is your current professional identity and what do you want it to become?
- Roles – What do you do now, what will have to shift, what can you let go of as you pursue change?
- Physical changes – Will you dress differently, and how will that impact how you view yourself?
- Mental changes – How will you think of yourself, or view yourself differently?
- Emotional changes – How much value do you place on yourself and what you do? To what degree are you waiting for others to value you before you value yourself?
- Financial – How will making this change impact your finances? Will changes have to be made to accommodate this situation?

As stated earlier, change begins with ending. So ask:

- What will need to end in order to begin anew?

- What aspects of your life and yourself are you happy to let go of? What will be hard to let go of? What do you want to hang onto?

Change is challenging and can often be lonely. However, developing an "emotional tool box" of management techniques can help get you through the tough times and increase resiliency.

- To begin with, return to basics and ensure that you are: getting enough sleep, eating well, engaging in some type of exercise and avoiding excessive use of unhealthy substances.
- Work to reduce stress by using varied techniques, including relaxation, meditation, mindfulness and imagery. The Internet makes it easy to find a plethora of techniques. Try several and find what works for you.
- Make and take time for yourself. Work to be adaptable and flexible, but also avoid putting your needs last. It is acceptable to make changes in your life, even if aspects of those changes cause some inconvenience to others.
- Work on communication. Let people know when you need to be alone and when you are ready to engage. Share thoughts and ideas about what you want to be doing, what you are experiencing and what you need. Let others do this as well, but work together to problem-solve around uncomfortable aspects of this situation. Negotiate for what you want rather than ask permission to do what you want.
- Find supporters and stay connected to them. Avoid detractors.
- Hang on to humor; what is annoying or frustrating now can be funny down the road.
- Give yourself time to be upset/unhappy/miserable. And then move on.
- Accept that you can't have it all or do it all. Balance doesn't really exist. Recognize your own need to be in control and work to let go of things you cannot control. Ask for help.
- Avoid being self-critical in a way that is demeaning to you. Step out of your own way when it becomes evident that you are your own biggest roadblock.
- Pat yourself on the back: Literally. Acknowledge every time you do something small or big on the road to achieving your goal; this allows for the buildup of a necessary reservoir of positive self-regard.
- Look ahead to what you want to achieve and determine the steps you need to take to get you there. What do you need to do three months from now? One month? Next week? Tomorrow? Today?

Time

Remember that transition, chosen or not, takes TIME. It is physically, mentally and emotionally exhausting. Give yourself permission to deal with change.

To quote Woody Allen,

> I've often said, the only thing standing between me and greatness is me.

Go find your greatness. ■

1. William Bridges, Transitions: Making Sense of Life's Changes (Da Capo Press, 2004). *See also* Laura Moncur's Motivational Quotations *at* www.quotationspage.com.

TRANSITIONS

John D. Feerick is the Founder and Director of the Feerick Center for Social Justice at Fordham Law School; he was the law school's dean from 1982–2002. The move to Fordham Law was a major transition but, he pointed out, transitions take place all our lives. "When I left law school, I began at a small firm, which grew from 10 or 11 lawyers to about 300. When I chose at age 45 to make a complete switch into academic life, I deliberated for about five months before putting in my application. I was of two minds, to stay and grow in place, or try something quite different in the nature, as I saw it, of a total public service commitment rather than the part-time public services I performed as a practicing lawyer."

Starting his new position as dean was just as difficult as making the decision to apply. "I had to engage in the new experience of fundraising, for a new building expansion, academic chairs, scholarship support of students, and other areas of need. I hated to ask others to give, but I had to, and I had to learn to accept no for an answer sometimes." John explained that he had to deal with the high expectations of students and alumni. "I felt enormous pressure and at first often wondered if I had made the right decision. After my first two years, I settled into the position and had more to do than ever before, with little time to look back or worry. What made the difference for me was hard work and developing relationships with all segments of the community, so that my caring and commitment would never have to be doubted."

Once John turned 65, he decided it was time to go. "There are no second acts, I thought, which made the decision difficult as I found being dean very fulfilling. At the same time, I thought I was 'young' enough to take on another career, but I wasn't sure where and what. I had no need to rush, however, as I was a tenured faculty member at my school, but the stress was elsewhere: where was my continued purpose in life? As I contemplated, I met my responsibilities at the law school, and accepted requests to render various public services, largely of a pro bono nature. These services made all the difference for me and made clear to me that staying in place was the right thing to do because I could continue in the service of others, public and private." John said that as he enters his late 70s "that restless quality that can be stressful has given me a more than sufficient purpose in life."

– Jocelyn Cibinskas

What, Me Retire?

Encore Careers for Lawyers

By Stephen J. Friedman

Stephen J. Friedman is president of Pace University. Prior to being named president in 2007, he served three years as dean of the Pace Law School. He received his AB *magna cum laude* from the Woodrow Wilson School of Public and International Affairs at Princeton University and his JD *magna cum laude* from Harvard Law School, where he was an editor of *Harvard Law Review* and a recipient of the Sears Prize. After earning his J.D., he clerked for U.S. Supreme Court Justice William J. Brennan, Jr.

Chief Judge (ret.) Judith Kaye suggested that I tell the story of my own transition to a new career after law practice as a foil for discussing some of the challenges and great satisfactions that are offered by the transition to this third period of our lives. This transition – the journey from what we have been doing for most of our lives to what we are going to do for the next 10 years or so – is one of the most challenging and least well-marked that we travel. It is filled with uncertainty, fears, surprises and unknown ground. But when you get to the other side, the rewards can be really astounding.

It is most useful to think of this critical and magical moment in your life not as an ending, not "retirement," which connotes a stepping back, but as the beginning of the third great stage of our lives. It raises for all of us the question, "Next?" Framing it that way requires that we face a series of crucial and tough decisions.[1] I call the moment "magical" because it commences one of the few life transitions in which we have a real opportunity to consciously shape a major part of our lives.

Why Not Just Retire?

Retirement brings great personal freedom of a sort that most people have never experienced in their professional lives. The origin of most of the constraints and obligations in our lives shifts from being heavily professional – no "more senior" partners, no relationship partner and, most of all, no clients – to being self-imposed and voluntarily assumed. That shift also means there no longer is an externally imposed structure to your life, and many of us feel keenly the loss of that structure. As our responsibilities drop away, however, there is a corresponding drop in our level of stress, including stress we didn't fully appreciate was there. Visit friends about three months after their retirement – they are likely to look alarmingly relaxed! One observer put it well when he said that retirement is the end of all possibility of failure. But, he said, it is also the end of all possibility of success.

That observation captures the retirement dilemma perfectly. If it is important to you to continue to grow as a person, to learn about new things, to meet new people of all ages who are deeply involved in what they are doing, then you need to take on significant challenges and to take them seriously. That is another way of describing "work." And along with that "work" comes constraints on your freedom, stress and the possibility of failure. I truly believe that one can't have the best of both worlds. If you decide to craft a new career, that doesn't mean you have to be paid – indeed, if you decide to go for an advanced degree, or study piano or painting, you would

be doing the paying. But make no mistake – that's work. It also doesn't mean you have to work full time. For me, answering this question was easy. I had no desire to stop working.

First, a little background about my career and the beginning of my transition. I spent about 30 years as an associate and partner at Debevoise & Plimpton in New York City. Along the way, I had three stints of government service and two as general counsel of a securities firm (E.F. Hutton) and a life insurance company (Equitable). In 1993 I again returned to my firm, where I remained until 2004, when I started a new career at the age of 66. I loved being a corporate lawyer, and I am eternally grateful for the flexibility that the law and my partners afforded me.

When Do You Need to Start Thinking About These Questions?

Early! I was facing a mandatory retirement age at my firm, so I began thinking about what I was going to do about a year and a half before I left. It is important to start thinking through these issues at least a year, and preferably two or three, before you retire. If you are like most lawyers, you have been immersed in your practice and will not have any idea how to construct this next phase in your life. I assure you, it takes a lot of time, a lot of false starts and a lot of conversations with spouses and friends. Even if you have a clear idea of what you want to do, the chances are great that it will not work out for one reason or another.

Be prepared for a lot of rejection. In my carefully prepared game plan, I was the perfect candidate to run an international nonprofit, for which I had some background. In any event, no international nonprofits wanted me to run them, and I got my first rejection. Then my name was included on the independent Judicial Nominating Commission's list as a candidate for a vacancy on the New York Court of Appeals. After a lot of soul-searching, I concluded that I would be a good candidate for that wonderful job, notwithstanding that I had been a corporate lawyer, not a litigator, and that I was a registered Democrat and there was a Republican administration in Albany. To no surprise on the part of my friends, Governor Pataki did not agree. More rejection.

Even if your idea of a new career does work, remember that in most cases you have to find a job. Finding a new job takes a lot of time – especially at this age. It is certainly not impossible or even that hard. But it takes time, perseverance, patience and a willingness to tolerate rejection. You are, after all, a "non-conventional candidate."

Why Not Just Keep Working But Put in Fewer Hours?

One of the wonderful things about being a lawyer is that this is a real possibility – open to everyone from single practitioners (like my father, who simply reduced the size of his law practice as he got older) to some partners in large law firms who become of counsel and continue to practice at a reduced level. The good news is that you don't have to look for a new job and, unlike starting something new, you begin with expertise and a reservoir of experience to draw upon. The transition is easy and the risk of failure is low. The bad news is that you forgo one of the great opportunities presented by this transition – the challenge, excitement and satisfaction of doing something very different, learning a whole new area, interacting with a new group of talented people and having an entirely new set of satisfactions. For me, the lure of something entirely different was compelling.

A compromise, of course, is to continue as a lawyer, but in a very different environment – at a government agency, an arts organization, a social service organization or a university. There, you would exercise known skills in an entirely different context.

Why Not Work in a New Area Part Time or on a Project Basis?

Why not, indeed? In my conversations with men and women contemplating retirement, this always comes up as a preferred route, sometimes coupled with a desire to work part-time in Florida or Tuscany. If you can find a job like that, grab it. Our economy is, by and large, not organized to offer this alternative, even in the nonprofit sector. There are organizations dedicated to putting talented retirees to work with nonprofits on a project basis, usually without compensation, and you should explore whether what they offer is right for you

If money is important, it is hard to find a paying part-time job. Many lawyers think that they can retire and become part-time arbitrators or mediators, and some successfully do so. But unless you already have an active practice in that area, building a practice as an arbitrator or mediator from scratch is no easier than building a law practice from scratch. It takes a lot of effort and a lot of time.

And, to be sure, full-time work involves the sacrifice of many of the advantages of retirement. You have no more time to smell the flowers than you had when you worked full time before retirement. If no good part-time alternatives are available to you, your choice is either full-time work or a more conventional retirement. It is an intensely personal decision, turning upon whether you can have enough stimulation and personal growth in a life composed of family, various projects, volunteer activities, interests and hobbies. The answer for many people is clearly "yes."

I decided that I would work full time. I wanted the discipline and structure of a regular job and significant challenges. I had the support of a wife who was working full time and clearly thought it would be a big mistake for me to do otherwise. A friend suggested that I put my name in for consideration in an ongoing search for a new Dean of Pace Law School. That suggestion changed my life.

Do Not Be Afraid to Look at Jobs You Have Never Done.

The plain fact is that most of us find it scary to contemplate doing something we have never done before. The risk of failure rears its ugly head. It is a mistake, however, to reject potential new jobs because you think that you don't know how to do them. For the most part, the people trying to fill a job will do enough rejecting for both of you. But if those people are prepared to consider you, it is because they believe you may have the qualities they are looking for. When I talked to friends about what I was going to do next, a number of them suggested academic jobs – teaching, law school deanships, the presidency of a new graduate school of international relations and a few other similar positions.

In my initial planning, I had not even considered academia, and it had never occurred to me that becoming a law school dean, no less a college or university president, was even a possibility. However, I thought it would be interesting to talk to some search committees. It was that process of talking with search committees, learning more about the challenges facing American law schools, and "trying on" the role of a law dean in my mind, that made me think seriously about my skill set and experiences and how they matched up with the demands of a deanship. I talked to two law school search committees and some other institutions. The Pace Law School search committee brought me back for a second round of interviews, then campus interviews and then, much to my delight, the President of the University offered me the job. I concluded that my background could, in fact, be useful to a law school and that I had the right skill set for this law school at this point in its history.

My three years as Dean at Pace Law School began with a very steep learning curve – and they were among the most satisfying, challenging and fun years of my life. They called on all the skills and experience I had acquired through a long career in the law and in government – and then some. But most of those skills and that experience were there. They simply needed to be assembled in a different way and applied in a different context. The point is that you have more of the pieces of the puzzle required for a new job than you probably realize.

Enjoy the Fact That You Are Liberated From Ambition

For most of our lives, we put a lot of energy into thinking about how we are going to become partners, or get clients, or build a bigger practice – or, if we work for a company, how to get promoted, how to become general counsel or CEO, how to make more money.

With this transition, we are pretty much beyond these concerns, not because we have lost our ambition, but because it is hard to do much about it at this stage. You should enjoy the fact that this might well be your last full-time job, and that you are doing it primarily for the contribution you can make, its intrinsic interest, and the gratification that comes with helping others or working for a worthy cause. It is a wonderful feeling.

After three years as Dean of the Law School, I became President of Pace University. As of this writing, I have served in that role for more than six years. Pace is a wonderful university with 13,000 students, multiple campuses, an admirable history and a very exciting future. It was a total surprise when the Board asked me to step into this role. I have never been happier, more committed and more excited by what every new day brings. I am constantly gratified by the palpable transformation that takes place in our students as they proceed down the Pace Path.

In part because of my own experience in working through this transition, we have started at Pace University an Encore Transition Program to help senior professionals and business men and women navigate their own transitions to a new stage in their lives. This program is a "giving back" of a different sort, for a goal in which I deeply believe. The future of our country can be greatly enhanced by drawing on the talent, skills and experience of this group of Americans of which I am proud to be a part. ■

1. *See generally*, Marc Freedman, The Big Shift: Navigating the New Stage Beyond Midlife (2011). Freedman is a wise, thoughtful re-framer of our understanding of this stage of life.

TRANSITIONS

Stacy Francis, CFP®, CDFA™ is President and CEO of Francis Financial Inc., a wealth management firm specializing in personalized financial consulting for higher net worth individuals and families. Her advice for lawyers going through a transition is to have a financial plan. Having money saved helped Stacy start her own company and she believes it's partly why she was so successful in transitioning. "Money gives you options. It allows you to retire early or take a position where you love what you do but receive less pay." Stacy added that having a financial cushion gives you increased confidence and that alone is extremely important. She explained that her clients who are lawyers are not often as financially prepared as they should be, not because they don't want to be but because they don't have enough time. "Those lawyers should be looking to a financial expert to obtain assistance."

– Jocelyn Cibinskas

Practical Skills: Money Management

By Stacy Francis

Times of transition are now the norm. Whether you are a recent law school graduate, a pink slip casualty, ready to reenter the workforce or an about-to-be-retired lawyer, this is an article you have to read.

It is more important than ever to master the practical skills of money management and get a firm handle on your finances. Here is some advice to get you on the right path . . . fast!

Law School Grad

Life is not so grand for newly minted law school graduates. We are in the fifth straight year of a depressed job market for new graduates. According to new U.S. Labor Department data,[1] the legal services sector added 2,700 jobs in August, the second highest single-month jump in the past year but still well below pre-recession employment levels. Instead of $150,000 a year salaries, many grads are earning as little as $25 an hour for contract work. At the same time expenses – especially in the Big Apple – continue to rise. Rents and home prices are at the highest levels we have seen in the last six years.

Don't Stop Learning Just Because You Are Out of School

When you needed to learn about contracts, you took Contracts. The same should be true about managing money. In fact, the practical skills of money management are much more important to your overall financial security than any course you took in law school.

Stacy Francis is president and CEO of Francis Financial, Inc., a boutique wealth management and financial planning firm in New York City. A Certified Financial Planner, she attended the New York University Center for Finance, Law and Taxation. In 2013, she was listed as a National Money Hero by *CNN Money Magazine*.

Get smart and learn about money. Start with a book that is geared toward individuals in their 20s and 30s. Set yourself a goal to read at least one personal finance book a quarter.

Start an Emergency Fund

Before putting your student loan debt repayment plan in high gear, start to build an emergency fund. Put at least three months of living expenses in a high-interest savings account to ensure that you never have to move back home. Online savings accounts at Ally Bank and Capital One offer some of the highest interest rates. Remember that an emergency might occur due to a medical issue, job loss or unforeseen major expense. Please note, the release of the latest iPhone 5S is not an emergency.

Pay Off Your Debt

The average law school debt is upwards of $100,000 and it can even top out at $150,000. While your interest rate may be low, it is wise to start paying off your student loan debt now to ensure that you are not still making payments in 20 years' time. Be sure to make on-time payments; this will start to build your positive credit history.

Credit Score

While a credit score of 850 would not have gotten you into an Ivy League law school, it may help you get the job of your dreams. According to many employers, your credit score clearly defines how fiscally responsible you are and how you manage your obligations.

Be sure to pull your free credit report by visiting www.annualcreditreport.com. Review your report to make sure all information is accurate.

On Your First Day, Think About Retirement

Most likely you have not even had a chance to hang up your shiny new law school diploma, so retirement is most likely not on the top of your mind; however, it should be. The best time to start to plan for retirement is your first day of work. Sign up for your employer's 401(k) plan as soon as you are eligible. You can contribute up to $17,500 for the year. If you are not able to part with this much cash, be sure to contribute at least the amount required to get your employer's match.

Pink Slip Position

A sad part of working in the law field is that sometimes, despite your hard work and effort, you get laid off. All of a sudden you are without a paycheck and the security that comes with it.

Difficult as this may seem, a pink slip can give you the opportunity to re-assess your career. Which areas of law are you most passionate about? What aspects of your last position did you love or hate? What skills do you want to develop further?

An in-depth review of these questions and their answers will give you the direction you need to make smart moves with your career. The most lucrative investment vehicle you have is neither your investment accounts nor your home – it is your career. By mapping out a strategy that adds critical skills to your career portfolio, you will be adding major earnings potential.

Secure Heath Insurance

While your career plan and next steps are important, there are other vital decisions you need to make immediately. One of these critical decisions is regarding health insurance. You have the ability to maintain your current health insurance through COBRA. This may be a good option for you; however, it can be expensive. Another option is to get insurance through New York State of Health, New York's health plan marketplace.[2] This is an organized marketplace designed to help people shop for and enroll in health insurance coverage. Individuals, families and small businesses will be able to use the health plan marketplace to help them compare insurance options, calculate costs and select coverage.

American Express, Visa and MasterCard Are NOT Your Friends

Studies have shown that you are more likely to spend more if you use your credit card to pay versus paying cold hard cash. Resist the urge to whip out your credit card and if you do use your plastic, be sure to pay your balance in full every month. Pay your rent and mortgage first. Keeping a roof over your head is most important.

The "B" Word

Don't get turned off by the "B" word. Your budget plan is the path to financial security and the vacation, home and retirement of your dreams. Track your expenses for one month. Record what you pay right down to the newspaper, bagel and latte you grab on your way to an interview. Evaluate the results and pinpoint where you are spending your money. Cut out expenses that are unnecessary.

Roll Over Your 401(k)

Many job changers get burned because they leave their 401(k) at their old employer and forget about it. Be sure to roll over your 401(k) to a rollover IRA and rebalance your portfolio every year. Another option is to roll your 401(k) into your new employer's retirement plan. Strong arguments can be made on both sides. You need to weigh all the factors and make a decision based on your own needs and priorities.

Most individuals decide to roll their plan into a rollover IRA, as it generally offers more investment choices than an employer's 401(k) plan. You also may be interested in eventually converting your IRA to a Roth IRA. You'll have to pay taxes on the amount you

roll over from a regular IRA to a Roth IRA, but any qualified distributions from the Roth IRA in the future will be tax-free.

Roughly 75% of 401(k) plans allow you to borrow money, making the option of rolling your 401(k) into your next employer's plan more appealing. If you roll over your retirement funds to a new employer's plan that permits loans, you may be able to borrow up to 50% of the amount you roll over, up to $50,000.

- Chiropractic treatment
- Laboratory fees
- Over-the-counter items
- Prescriptions
- Mental health counseling

Dependent Care FSA

If you have kids, most likely you will have additional child care costs. You can contribute up to $5,000 a year to this account. All contributions are pretax, thus reducing your taxable income and cutting the money due to Uncle Sam. You can use a Dependent Care FSA to reimburse you for the work-related cost of care for a child who is under age 13, or any other tax dependent, such as an elderly parent or spouse, who is physically or mentally incapable of self-care. Note that they must reside in the same principal residence as you.

> Retirement can be the saddest or happiest day of your life. It is the extent of your preparation that will determine which it is for you.

Returning to the Workforce

Whether it is because your kids are getting older, your partner lost a job or you are looking to get back into the career you love, returning to the workforce can be a major adjustment financially.

Rework Your Cash Flow

It is indeed a material world. However, don't let a "sudden money" mentality take hold of you now that more income is coming in the door. New cars, trips and even a larger home might be on your mind. Hold off on these purchases and maintain your pre-work level of spending.

Review your current budget and be sure to add new expenses such as child care, work clothing, dry cleaning and commuting costs. Be sure to calculate how much of a bite these new expenses will take out of your budget each month and make adjustments as needed.

Spending Accounts Save You Money in Taxes

Using a spending account is like getting a discount on certain expenses – not because the expenses are less, but because you are paying them with money that has not been taxed.

Medical Flexible Spending Plan

Medical costs have skyrocketed, so be sure to enroll in the Medical Flexible Spending Plan (FSA) at your new job. The limits are $2,500 per person, per employee for 2013.

Here are just some of the expenses that you can pay with your Medical FSA:

- Health plan copays and more
- Dental work and orthodontia
- Doctor's fees
- Eye exams and eyeglasses
- Contact lenses and saline solution
- Hearing aids

Catch Up on Retirement

Many people reentering the workforce need to make up for lost time, because their retirement savings are nowhere near the levels they should be. The goal is to save as much of your new income as possible. Therefore, enroll in your company 401(k) or 403b plan on your first day of work, if you are eligible. Your contributions will be taken directly out of your paycheck – before taxes. This has the added benefit of lowering your taxable income and allowing you to pay less to the government come April 15th. Once you have maxed out your employer retirement plan, open an IRA. You can put $5,000 a year into your IRA and up to $6,000 a year if you are over age 50.

Review Your Benefits

Many employers offer plush employee benefits such as life and disability insurance. Understand your benefits and whether you need to supplement them with a private policy outside of work. Now that you are earning a salary, you need to make sure that you have insurance to replace income that would be lost to your family if you were to die or be unable to work due to health reasons.

You Are a Retiree . . . Finally!

Retirement can be the saddest or happiest day of your life. It is the extent of your preparation that will determine which it is for you.

Make Your Money Work for You

The investment selection in your retirement plan is more important today than ever. Many soon-to-be retirees have chosen conservative investments to be "safe." While this may seem like a wise choice, you should realize that this portfolio must last you another 25, or even 40, years. You must be careful about the "decumulation" phase and make sure that you have enough money to see you and your family through retirement. Choose an appropriate mix of stocks and bonds based on your age and risk tolerance. A fantastic resource to help you discover your hidden risk tolerance is Morningstar.[3]

Are You Ready to Retire?

Before you hand in your notice, make sure that you are well positioned for retirement. Do a retirement calculation. Do you know how much you need to have saved to live comfortably after retirement? About half of people queried in retirement confidence surveys think they'll need less than 70% of their pre-retirement income. However, we suggest that you have at least 90% of your pre-retirement wages.

Use a retirement needs calculator to determine how well you have prepared and what you can do to improve your retirement outlook. It is important that you periodically re-evaluate your preparedness. Changes in economic climate, inflation, achievable returns, and in your personal situation will impact your plan.[4]

Rome Wasn't Built in a Day and Not by One Person Alone

You only get one chance to retire successfully, but an experienced financial planner has been through this many times before. You will want to select a competent, qualified professional with whom you feel comfortable as well as one whose expertise and business style suits your financial planning needs.

The term "financial planner" is used by many financial professionals (and many non-professionals). Ask the planner what qualifies him or her to offer financial planning advice and whether he or she holds a financial planning designation such as the Certified Financial Planner™ mark.

Look for a Fee-Only Financial Planner

These advisors receive no compensation from any product recommended (like insurance or annuities) and do not represent any product or company. They never accept commissions, trails, cross-selling fees, referral fee arrangements, kickbacks, surrender fees, sales contests, "educational cruises" and vacations, or "free" gifts. For a fee-only advisor in your area visit the website www.NAPFA.org.

Conclusion

Transition is the new normal. You may not be able to predict or anticipate when and how change will come, but a firm financial foundation will help maintain stability – no matter what the future brings. ■

1. *See* Tom Huddleston, Jr., *Legal Sector Adds 2,700 Jobs in August*, The AmLaw Daily, Sept. 6, 2013.
2. https://nystateofhealth.ny.gov/.
3. http://corporate.morningstar.com/us/documents/NASDCompliance/IWT_CurrentReport_RiskToleranceQuest.pdf.
4. http://finance.yahoo.com/calculator/retirement/ret02/.

TRANSITIONS

As a Senior Associate in the Corporate Restructuring Group at Skadden, Arps, Slate, Meagher & Flom LLP, **Suzanne Lovett** represents corporations, boards of directors, shareholders and creditors. She joined Skadden six years ago, after taking six years off to raise her three children. Prior to that, Suzanne had worked as a restructuring lawyer for almost nine-and-a-half years. While she found fulfillment in her job and career, the competing demands of raising her children won out. When asked what inspired her to go back to work, she said that she always missed the challenge of her job but needed to be sure that her children were settled in school and ready to have a working mom. She also indicated how incredibly fortunate she is to have a supportive husband who helped make the transition possible. Suzanne's advice for others going through transition is to "talk to everyone about your plans. I have heard from women who say they are reluctant to ask friends for help. Don't view it as asking for a favor; instead, just speak from your heart. Your passion will come through and you would be surprised how many people are willing to help with an introduction or a job lead."

– Jocelyn Cibinskas

Making Pro Bono Work

A Pro Bono Practice in Retirement

By Sharon Katz

The past several years have seen a growing number of lawyers searching for meaningful and interesting post-retirement activities where they can make use of a lifetime's accumulation of skills and experience. The past several years have also seen a growing number of individuals struggling to meet basic needs and to secure justice for themselves and their families, but having problems navigating the complex and arcane administrative and judicial systems that hold the key to their relief. Once becoming aware of these issues, it was only a matter of time before bar associations, law firms and other institutions began developing ways to help retiring lawyers and persons in need by making post-retirement pro bono practice a part of the pro bono landscape.

On January 1, 2010, New York State commenced its Attorney Emeritus Program. The program is designed to engage persons 55 years of age and over, including those who have retired from the practice of law, to help meet the ever-growing need for pro bono legal services. This initiative recognizes that retirement offers tremendous opportunities for lawyers to make use of their skills to aid those in need, to remain active in professional life and connected to colleagues and organizations, to learn new skills and explore new areas of competency and to transmit and share their wisdom and experience with young lawyers.

True Emeriti

The Attorney Emeritus Program Statement of Participation, which law firms are asked to sign, acknowledges that facilitating retired attorneys' meaningful and effective engagement in pro bono requires considerable law firm support. It calls upon participating law firms to provide retired attorneys with four essential items: work space, professional support, administrative and technological support, and malpractice insurance coverage. It further provides that retirement benefits, if any, should not be negatively impacted by the retiree's participation in pro bono activities.

Non-profit legal service providers, such as the Legal Aid Society, have implemented programs, including the Second Acts program, that enable retirees to continue working, often in areas of the law that were not the primary focus of their pre-retirement practices, to the benefit of the retirees and the non-profit's clients. These programs also recognize the need for law firm involvement, as the non-profit organizations often lack sufficient office space and support services to enable retirees to provide legal services at the requisite level. Law firm/non-profit partnerships thus provide one way to implement a meaningful retiree pro bono practice.

For many years, Davis Polk & Wardwell has provided the benefits and supports noted in the Attorney Emeritus Program Statement of Participation to those partners who seek to remain active after retirement and take on the role of "Senior Counsel." As a result, a pro bono "program" staffed by retired partners has developed organically, as a natural outgrowth of a culture that has long respected and fostered civic, public and pro bono service. The "program" continues to evolve and takes its shape from a melding of Davis Polk's larger pro bono goals with the interests, commitments and availability of the individual retired partners. It is a win-win situation for everyone: the firm, the retired partners, the associates and the clients.

I spoke with five retired partners, each of whom has an active "pro bono practice" at Davis Polk. In our discussions, we look at the very different forms those practices take and see how and why retirees incorporate pro bono work as a part of their post-retirement lives.

It will come as no surprise that every one of these retired partners viewed the firm's support as critical to their ability to engage in pro bono work on behalf of clients. Having a work space, access to administrative assistance, computers, technological support, librarians, legal assistants, a managing attorney's office and all of the other supports of a large law office is not only helpful but also allows a wider range of work to be undertaken. For much of the pro bono work the retired partners do, such support systems are absolutely essential.

Hitting a Trifecta

Number one on everyone's list, again not surprisingly, is the ability to continue to work with associates. The retired partners vary in their approaches, depending on the nature of their work, the age and experience of the associates involved and their own desires to be more or less

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hands-on in a particular matter. But continuing to have contact with young lawyers (who can keep them on their toes), to mentor and help associates enhance and develop skills, all while helping a needy client, is like hitting a trifecta.

The five lawyers I spoke with have more than 186 years of experience as successful litigators and transactional lawyers. In retirement, they have contributed more than 5,500 hours to Davis Polk's pro bono work. Each retiree began doing pro bono work while still in active practice (thus reinforcing the idea that it is easier to make pro bono part of your retirement life if it is already a part of your DNA). Two were members of the firm's Pro Bono Committee and continue post-retirement in an emeritus capacity. All of them were and continue to be active members of boards of environmental, educational, civil rights, arts and legal services organizations, and of bar committees. They are, in short, a public-spirited bunch. When it came to pro bono, no arm-twisting was needed.

Continuing to have contact with young lawyers, to mentor and help associates enhance and develop skills, all while helping a needy client, is like hitting a trifecta.

James W.B. Benkard

James Benkard has been at this the longest, having retired in 2005 after a 45-year career in the firm's litigation department. Upon his retirement, Jimmy, who had done some criminal appeals and death penalty work over the years, simply shifted gears, taking a deeper dive into the world of criminal defense work. As he explains, it was a perfect segue. While an active partner, pro bono could have been characterized as somewhat of a "hobby" – a serious "hobby" but nevertheless something that was limited by time constraints. So retirement presented an opportunity to build on the "hobby," and the firm's support made it possible.

This is now very much a full-time job for Jimmy, though he spends his summers out of the office – a luxury made possible by today's technology. He works extensively with organizations such as the Legal Aid Society and the Innocence Project. He has supervised associates on many dozens of pro bono criminal appeals and resentencing matters. He cares deeply about seeing justice done and spent five years litigating *Disability Advocates, Inc. v. New York State Office of Mental Health*,[1] a challenge to New York State's practice of locking seriously mentally ill prisoners in segregated housing units, and another two years on *D.B. v. Richter*,[2] a challenge to New York City's failure to provide adequate housing for young adults being discharged from the foster care system. He has immersed himself in death penalty litigation and wrongful conviction work. In July 2013, the City Bar honored him with the Norman Redlich Capital Defense Pro Bono Award for his extraordinary work on behalf of persons on death row. Last year also saw the release of one of his clients who had served 15 years on death row in Tennessee. Nothing is more rewarding.

While Jimmy is a great mentor, he is the first to acknowledge that the dedication and commitment of the associates who go above and beyond is essential to his work. And like the other retired partners working on pro bono matters, he is grateful to a partnership that recognizes the importance of pro bono work – which, notwithstanding its name, can be very expensive.

Jimmy's plunge into pro bono work charged the imaginations of others for whom pro bono in post-retirement became a real option.

John Fouhey

John Fouhey was a partner in Davis Polk's bank financing and restructuring area for almost 30 years. He also, on a regular basis, handled a wide variety of corporate pro bono matters, including ongoing representation and multiple projects for two significant non-profits which have been clients for over 20 years. Like Jimmy, John was a member of the Pro Bono Committee (and remains an emeritus member) and clearly has a passion for doing this work and doing it well.

When John approached retirement in 2009, he realized that "the model of allowing retired partners to provide pro bono assistance was evolving in a way that was beneficial to the firm, the non-profit clients, the associates, and those retired partners who seek to continue with an active and meaningful practice." Because the firm's support of his efforts makes it possible, he is able to continue being the senior lawyer on matters for existing pro bono clients as well as taking on new projects. Even when out of the office, technology allows him to stay actively engaged.

Having trained as a lawyer during a time when there was less of an emphasis on specialization, he has a breadth of experience and knowledge that allows him to take on non-profit corporate matters of all stripes, including incorporations of non-profit entities, corporate governance, facility financings, government contracts and mergers. In addition, he is actively involved in pro bono business development, trying to identify new opportunities and helping evaluate requests for legal assistance from organizations such as Lawyers Alliance of New York. And he provides additional supervision and mentoring whenever attorneys need greater support or run up against new issues.

Jack McCarthy

Jack McCarthy retired at the end of 2010, after 35 years of practice in the corporate department. While an active partner, Jack became interested in the work being done on behalf of veterans who were having terrible difficulty securing benefits from the Veterans Administration. Jack took the training offered by the City Bar and supervised litigation and corporate associates handling these matters. He chose an area of pro bono that was very far removed from his "day job" but to which he was drawn by a generational affinity: so many of the clients were Vietnam veterans and evoked an era with which Jack identified.

It was an easy call for Jack, as he approached retirement, to conclude that this work was something he wanted to continue. What was less clear was whether Davis Polk would be comfortable with his continuing those efforts. So he was delighted to find that his desires fit in perfectly with the emerging "pro bono program" for retirees. Jack now spends, on average, 10 hours a month supervising work on veterans' matters.

Jack speaks eloquently about the recurring scenario of hollowed-out men, clients whose very tough lives are reflected in their demeanor, their stories and their lack of direction. Clients are buoyed by associates who through their doggedness, perseverance, and skill help those clients penetrate the rather convoluted and difficult bureaucracy that is the Veterans' Administration. The work brings its own rewards.

Dan Kolb

Dan Kolb, who retired in June 2011 after 46 years of practice, sees great benefits in the opportunity to handle significant matters with Davis Polk's backing and support. Dan has long been active with the boards of the Lawyers Committee for Civil Rights, the Brennan Center and Legal Aid, and remains so. The systemic issues that those organizations themselves face and address in the public forum often serve as the basis for Dan's pro bono work, enabling him to seamlessly bring together different interests as he continues to practice law post-retirement.

Mediation and arbitration, through state and federal court-sponsored programs, make up a large part of Dan's post-retirement activities, as does his continued service on the non-profit boards and various bar committees. But Dan spends more than one third of his time engaged in pro bono work with associates, bringing in some of the most interesting and cutting-edge legal issues in civil rights and criminal justice.

For example, building on his work with the Brennan Center, Dan has supervised more than a half dozen amicus briefs to the Supreme Court in the past few years (most recently in *McCutcheon v. FEC*[3]). He has also represented the Legal Aid Society in landmark case cap and funding efforts which more closely align the public defender system in this state with the effective assistance mandate of *Gideon v. Wainwright*. Along with the Lawyers Committee for Civil Rights, Dan has been a leader in the Election Protection program. And he took on the problem of "loan scammers" – people who employ fraudulent tactics to prey on poor and low-income homeowners facing foreclosure. With a team of associates, he developed a litigation model for shutting down loan scam operations. That model is now being used in other parts of the country.

Dan takes great pride in the associates who work on these and other matters. "These cases have offered numerous young lawyers multiple opportunities to stand up in court, develop litigation and alternative problem-solving strategies, and research and write on issues of public concern. It is rewarding to be able to contribute to their development and growth, all while being engaged in good things that are beneficial to the public."

Scott Wise

Scott Wise, who retired in December 2011 after 32 years of practice, has been able to turn his abiding interest in the arts into a pro bono practice that comprises about 15% of his retirement time. Scott focuses his efforts on matters from Volunteer Lawyers for the Arts, an organization with which he was involved while an associate and an active partner. Scott notes that "being able after retirement to supervise and back up others on pro bono matters would be impossible without the firm's support."

Scott has always supported VLA "because it serves an under-represented group of creative people and helps young attorneys at the firm get experience. It's not just litigation matters, but corporate and tax lawyers who get involved with artists and arts organizations, assisting on 501(c)(3) formations, trademark and IP protection, corporate governance, compliance, tax and First Amendment issues."

Scott has recently supervised young associates in litigation matters taken from VLA. The size and scope of these matters enable very small teams of associates, with Scott's supervision, to litigate a case from start to finish, with all of the twists and turns and problems and unexpected difficulties that have to be addressed along the way.

A Model Program

There are many ways in which firms can implement an Attorney Emeritus Program to make pro bono work. Providing the resources to allow retired attorneys to continue to pursue pro bono interests they developed while active partners is only one way – but it is something that has greatly enhanced our firm culture and life. It has benefited everyone: associates, partners, retired partners and clients. ■

1. 02 Civ. 4002 (GEL) (S.D.N.Y. Apr. 2007).
2. Index No. 402759/11 (Sup. Ct., N.Y. Co.) filed Oct. 17, 2011.
3. Docket No. 12-536 argued Oct. 8, 2013.

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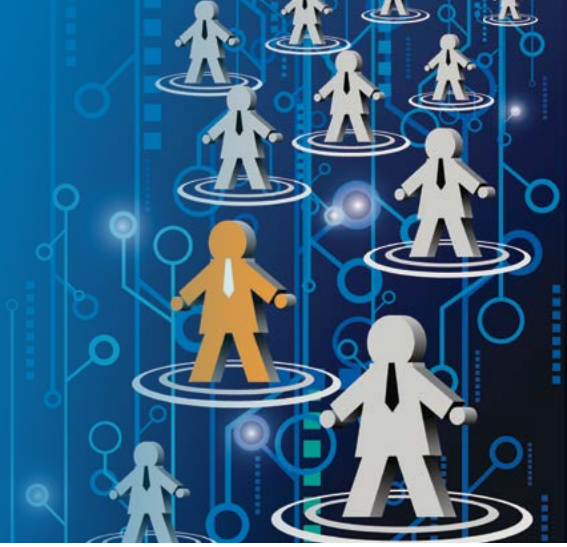


Build Your Career on Your Professional Brand and Personal Network

By Carol Schiro Greenwald

Welcome to the tough task of transitioning in the 21st century. Employers are more selective in hiring; they interview fewer candidates; they take longer to decide. How can you thrive in this kind of difficult environment? Take control of the situation beginning with developing your own brand and then putting it into practice.

Everyone has a brand, and so do you – whether you pay attention to it or not. Your brand is that first impression people get in the instant they grasp your hand for a handshake and take in the image you present. So it behooves you, as a professional, to craft a brand you are comfortable with – one that conveys the personality, value, achievements and vision germane to your transition goals. How do you do this? Let's step back and review the key aspects of a brand, the process of branding, and how branding interacts with networking and career transitions.

Brands and Branding

A brand is a mnemonic – a kind of shorthand that people use to categorize individuals, soda, toothpaste, and so on, so that when they come across each item again they can begin from where they left off in the previous encounter. Your personal brand is a distillation of your personality, who you are, what you do, how you do it, why you do it and how this knowledge, expertise and approach benefit others. Taken together, these characteristics blend into a promise – an expectation – that you will act in certain ways, with certain consequences to those actions. There are six main components of a personal brand:

- Who you are – the summation of your experiences both good and bad
- Key personality traits
- Primary values and goals
- What you do and don't know
- Your business resume: what you do and how you do it
- What others can expect from you

Together these form an emotional and logical connection between you and others.

As you move through networking and marketing activities, in a job, between jobs or in a career transition, you will convey a perception of who you are and how you are with everyone you meet. Everything you do and say becomes part of your brand. It grows out of what you say about yourself; it is your unique selling proposition (USP). Branding thus becomes a cornerstone of reputation building. It is your distillation of the "you" which you want to be the quintessence of your reputation – what other people think about you.

You articulate your brand to others through stories. While the purpose of the story is to make your brand real to others, the details will change because you want to place your philosophy, your past activities and your aspirations in the context of the listener's expectations and interests. Transitions become growth opportuni-

ties, a chance to reinvent yourself as you look for the next career landing. Your story becomes a vehicle to connect with people so that they see you as someone who can solve their problems. Stories should answer the big why: "Why should I hire you?" "Why will you add value to my endeavor?" "How will you fit into my world?"

These stories don't pop out of thin air. They embody past experiences put together within the framework of your goals, values and aspirations. So, creating an authentic brand begins with a hard look into your past. Ask yourself four questions:

- What kind of work do I like to do?
- What kind of people do I like to work with?
- What aspects of lawyering do I find most rewarding?
- What expertise do I have that I want to apply in the next stage of my career?

For example, you might be a matrimonial lawyer who likes to work with professional couples who want to divorce with a minimum of disruption. You find the advising and counseling aspects of the job the most rewarding. You want to use your ability to help people in emotionally trying situations in your next position.

Answer the four questions honestly. Use your answers to build a public persona – the face you want to show your professional world. The persona and stories then become building blocks for

- your elevator speech – the initial snappy description you share with strangers to begin a conversation;
- your profile on LinkedIn and in your resumes;
- your business cards;
- your search strategy – the research, preparation and actions that move you toward your goal,

Personal Branding Tools

Personal branding tools are both intangible and tangible. Tangible tools include your personal image and the actions you take to showcase your qualities such as speaking, writing or mingling with your chosen audiences. Intangibles include your attitude, aptitudes, personality, and approach to life. Ninety-three percent of all communication is non-verbal, so your image is perhaps the most important conveyer of your brand. Let's look at some of these in more detail to understand what and how they communicate about your intentions.

- *Attire:* "Dress for success" means dressing professionally. Wear clothing that mirrors others at the same event and evokes the image associated with the position you seek to attain.
- *Color:* Colors often reflect personality. For example, if you wear bright colors such as yellow-gold and red you are conveying a sense of intelligence and energy. Green and blue are solid earth colors, inviting feelings of comfort, dependability and peace. Be neither too flashy nor too dull. Choose colors and styles that not only signify important components of your brand, but also meld with the situation you are in, so that those you meet with feel a sense of commonality and shared beliefs.
- *Attitude:* Think positively, stand tall, smile and make eye contact. Incorporate enthusiasm and energy into your conversations. Show signs of interest such as making eye contact, periodic nodding, tilting your head to one side as a sign of interest, and leaning slightly forward. People with opinions, ideas and questions who contribute to conversations are perceived as leaders. Be memorable by staying in the moment and focusing your spotlight of attention on the person or group with whom you are conversing.
- *Language:* Your use of language demonstrates both your knowledge of issues and your approach to problem solving. Adjectives often define a person, so use positive adjectives and active verbs. Don't speak in shorthand; present ideas in a context so your audience can more easily follow your thinking.

All these elements contribute to a picture of you. This picture is your brand.

Networking and Search: The Need for an Integrated Strategy

Having defined who you are and how you want to be known in the marketplace (your brand), you are ready to create a networking strategy designed to bring you into contact with people and places that may be able to help you achieve your career goals. Personal networking, whether online or in person, is usually the marketing technique of choice for professionals. Networking is the process of meeting people for the purpose of getting to know them in order to create mutually beneficial relationships. As a process it has a beginning, middle and end.

It begins when you create goals to guide your transition activities. Once you know where you want to go, you can begin to identify people you know or want to know who can help you with the search you have already defined. A goal is key: without a goal and a purpose, networking becomes an aimless, generally unrewarding activity. A goal creates a framework for choosing a networking path, researching useful locations along the way, and reworking the basic story to make it relevant to each audience.

Using the work persona you created and the networking goals you established, begin researching places on- and off-line where the kinds of people you want to meet can be found. Typically these can be divided into four categories:

- *Work-related:* Colleagues, clients, vendors who supply services to your firm, people in complementary professions who focus on similar client types, issues or industries.

- *Personal:* Family, friends, mentors, teachers, religious leaders, colleagues on non-profit boards.
- *Venue-specific:* Members of trade associations, professional associations, government entities.
- *Strategic:* People and groups you need to pursue because they can help you grow, bring you in contact with new ideas, broaden your horizons.

Networking opportunities emerge through research in these four areas. There will always be more opportunities than time. Be selective, and focus on those people and entities that seem most relevant.

> Your personal brand is a distillation of your personality, who you are, what you do, how you do it, why you do it and how this knowledge, expertise and approach benefit others.

The middle segment of networking consists of preparation for and participation in activities, including one-on-one meetings, seminars, committee involvement, phone calls, online activities, the list goes on and on. Each opportunity consists of four parts:

- *Research:* Prepare for your conversations, focus your stories and define your goals for each encounter. If you are meeting with specific individuals, Google them and read their LinkedIn profiles, paying attention to where they have been and what they are interested in as evidenced by the groups they belong to and the details of their past. If you are going to an association meeting, go to the group's website and read its statement concerning the group's goals. Try to keep abreast of current trends and events that are important to you and others in your network.
- *Conversation preparation:* Prepare to ensure that you can project the image discussed above. Conversation preparation has three segments: (1) develop three questions you would like to ask people at the event; (2) identify three points (personal, work-related, context-related) that you would want to share with people at the event; (3) create a goal specific to the activity as a way of measuring its value to you.
- *Behavior at the event:* Project yourself in the best possible light. Always act like a host, not a guest. Remember to greet each person with a smile, eye contact and a firm handshake. Remind yourself that networking is a process, and this is one step in a series of steps toward creating a trusted relationship. Begin this rapport-building with small talk about families, sports, weather, the speaker, etc. If you meet someone you want to get to know better, conclude the conversation with an agreement on next steps.
- *Notes:* Bring business cards, pen and paper with you so that as soon as possible after a conversation with someone you can make a few notes as to the most salient points, items for follow up, and the role of the person in terms of your goals.

The third networking stage – follow up – is perhaps the most important. This is where you fold the activity into the networking process. Follow up has four aspects:[1]

- *Assessment:* When you get home, replay the activity and think about what went well and what could be improved upon next time. Many times your assessment may be negative, meaning you will cross the person or venue or event off your list. This is just as important as a positive reaction because effective networking must be controlled as to scope and continually refocused on the goal.
- *Connections:* Thank the appropriate people and send LinkedIn invites to those you would like to add to your contacts list. Recap next steps in a follow-up email where that is appropriate.
- *Documentation:* Transfer your notes from your briefcase to your contact system, making sure to add each person's name, event/activity title, location and date, plus what you want to do next with the person. Options range from "do nothing" to "another get together," to looking for joint networking opportunities, sending them relevant information or introducing them to one of your contacts.
- *Scheduling:* Determine when you are going to do the follow-up activity and add it to your calendar.

Time Management

Sounds forbidding and time consuming, doesn't it? And it can be. Networking is like a sponge – it will soak up as much time and effort as you are willing to give it. The following guidelines may help you to keep these activities in perspective:

- *Be strategic:* Know your priorities and goals and select only those activities that reflect those preferences.
- *Be selective:* A marketing rule of thumb says it takes eight to 12 "touches" to move from stranger to trusted colleague. With this in mind, triage connections down to a manageable few.
- *Be interested:* Show interest in the people you meet; be more willing to "give to others" than "get for yourself." Successful networkers are interested, interesting, polite, respectful, courteous and engaging.
- *Constantly evaluate:* Assess and measure results in terms of time, money and effort.

Conclusion

Remember the importance of visuals and constantly seek to embody your brand. Become aware of the messages you send and identify the ones that work best for you. Take pleasure in the things you do and the people you meet. ■

1. *See, e.g.*, Amy Gewirtz, *What's in* Your *Transition Toolbox*, on p. 38 in this issue of the *Journal*.

TRANSITIONS

Jessica Thaler is the Chief Legal Officer at My Sisters' Place, an organization providing services to victims of domestic violence and human trafficking. She also serves as the Chair of the Lawyers in Transition Committee for the New York State Bar Association and is a member of various other committees and sections of NYSBA as well.

After spending much of her career working as lender's counsel at large New York City firms, Jessica started a solo practice and became a corporate-transactional generalist. Many of her clients were in or were serving the sports and entertainment industries in New York City. Why did she choose to undergo such a major transition?

"I worked at various large law firms and never fully felt satisfied. That's when I decided to branch off to start my own practice, and was encouraged to so by my clients. Unfortunately, it was 2008 and it wasn't the best timing. I became of counsel to a firm formed by a friend from law school and took on contract work to help make ends meet. I continued to keep an eye open for an in-house position, ideally in sports, as I had spent my entire career since college working toward that." This past spring, however, Jessica received a call from My Sisters' Place. "After my interview with My Sisters' Place, I was so blown away by the organization and the people who work there that I knew that this was what I needed to do. It's a complete shift from where I was headed but I haven't looked back since. Something just felt 'right.'"

Is there anything she would have done differently during her transition? "I may have made certain financial shifts earlier. Maybe taking some of the temp positions I was offered, rather than holding out for the 'perfect position.' But, the one thing I really wish I had done was seek out substantive support from the people around me early on. It takes a lot of courage to ask and allow someone to help you, but letting them do so isn't a weakness, I have learned, it's a strength."

Jessica attributes part of her success to having had a great support system, which is at least partly the result of her volunteerism. As chair of the Committee on Lawyers in Transition, she met an amazing group of people, including career coaches and other lawyers on the committee who know what transition means and understand that the process can be a stressful one. "You can feel exceptionally alone when going through a transition, and that no one else can quite get what you are going through, but having a community of people around you who do understand is such a huge help."

– Jocelyn Cibinskas

Amy Gewirtz is the Director of Pace Law School's New Directions for Attorneys program. A graduate of Barnard College and the Benjamin N. Cardozo School of Law, she worked as an entertainment lawyer in theatre and for the Motion Picture Association of America. She shifted gears and began working as a career counselor at Cardozo and then Pace Law School, where she conceived the idea of a program for reentering attorneys. She is an active member of the NYSBA Committee on Lawyers in Transition

Note: The views and recommendations are the author's own. Those reading this article should follow the advice that resonates with them.

What's in *Your* Transition Toolbox?

15 Essential Tools for an Effective Move Forward

By Amy Gewirtz

Derived from its root "transit," the word "transition" connotes movement. And movement implies action. Picture a commuter train carrying passengers from one destination to another.

As human beings, we are regularly moving, shifting, and repositioning ourselves and our career goals, ambitions and paths. Even when *contemplating* our next career steps, our brain, and its "wheels," are in motion (there's that train image again). Professional transitions can occur at any stage of your career, whether voluntarily or involuntarily. As a result, and given the challenges of today's uncertain economy and the restructuring of the legal profession, it's essential to have a full transition toolbox ready at all times to help prepare for a planned or unplanned transition. This article sets forth 15 essential tools to help those in transition move forward professionally.

Self-Assessment (Exercises/Assessments)

Taking the time to look inward to determine what is most important to you in your next career move is often the hardest, yet always the most critical, step. As Director of Pace Law School's New Directions for Attorneys program, which assists attorneys with their return to traditional law practice or an alternative legal career after stepping aside from the profession for some period of time, I am often asked how much homework is involved. My answer is always that the biggest piece of homework is the self-assessment. This task may start during the program but should continue well beyond the end of their participation in the program.

At New Directions, we present a workshop and exercises on self-assessment, but we also point out that self-assessment should be a lifelong exercise to be used as your life circumstances and personal and professional goals change. Whether you are experiencing a voluntary or involuntary transition, ideally your next move will be a good professional fit and in a place you would like to remain. Essential to the self-assessment is asking the important questions, such as: "What are your core values?" "What trade-offs are you able to make?" "Where have you been the most successful professionally and why?" "What skills have you developed during your career and other activities, whether professional or personal?" "Did you enjoy using those skills?" This is not an indulgence – people are generally happier, and therefore more productive, when they are in a professional environment that suits them.

There are any number of self-assessment exercises available on the Internet that you can do on your own. Additionally, there are a number of other self-assessment tools such as the Myers Briggs Type Indicator (MBTI), The Highlands Ability Battery, and the Strong Interest Inventory, which are done with a counselor or coach certified to administer them and to evaluate the results. However you use the self-assessment tool, the key is to take this tool out of the toolbox and to use it.

Resume

Your resume is a living, breathing document and, as such, it should always be up-to-date and ready for a prospective employer. It is often the first impression you make on a prospective employer, and it must be *perfect* – no typos, grammatical errors, or unusual fonts. Ideally, it will reflect how your experience makes you a good fit for a position by including language that reflects (not necessarily parrots) the job description. A resume is not a one-size-fits-all document. Resume content and format will vary based on numerous factors, including the position for which you're applying, the particular experiences and skills you wish to highlight for that particular opportunity, and the career stage you're in.

If you are applying for different types of positions simultaneously – for example, a traditional position with a law firm and also a less traditional, law-related position – career counselors will often recommend having more than one resume, each of which is tailored to the position you are seeking. The traditional format is the reverse chronological resume in which your most recent employment is listed first. Another resume format is the functional, or skills-based, resume, in which you first list your skill sets rather than a reverse chronological order of your employment history. This type of resume may be a good choice for those who have had an employment gap or who are seeking to transition to an alternative legal career. Because this tool is so important, I recommend meeting with a career counselor or coach to see which format will work best for you.

LinkedIn Profile

If you don't already have one, you *must* create a LinkedIn profile. LinkedIn has a Help Center that offers webinars to help get you started, as well as a webinar on job search tips. To access these seminars, go to the LinkedIn home page at www.linkedin.com, scroll down to the bottom of the page, click onto Help Center, then type "LinkedIn Learning Webinars" in the search field. LinkedIn experts (searching the Internet is a great resource for finding numerous helpful resources about how to use LinkedIn) recommend that your profile be as complete as possible, which includes having a professional-looking photo. At the risk of sounding like a spokeswoman for LinkedIn, it is a fantastic tool for networking, job searching, and client development. Don't just create a profile – join groups such as law school alumni, bar associations, and affinity groups surrounding your areas of interest. Follow companies, invite people to connect with you (however, connect only with those you know or who may have been introduced to you by someone you know and respect) and ask for introductions to those who may be connected to an organization to which you recently applied for a job. There is enough to be said about the value of LinkedIn to fill several articles, but suffice to say, this is an indispensable tool.

Note: Attorneys who are currently employed but who wish to transition to another organization or opportunity may have valid concerns about signaling on LinkedIn that they are seeking another job. For those in this situation, googling "keeping your job search secret on LinkedIn" will yield a number of helpful articles.

Elevator Speech/Pitch

We've all heard of the "elevator speech," meaning what you can tell a fellow elevator passenger about yourself in the course of a 30-second elevator ride. I prefer a term that I heard an excellent career coach use at a recent NYSBA Lawyers in Transition program – "professional history." What you choose to include in your elevator speech may vary depending upon the environment (bar association event versus wedding) and the listener (prospective employer versus a neighbor).

In a professional setting, your elevator speech is basically a brief summary of your professional history and what you are transitioning toward. There are numerous approaches to developing your elevator speech, and many resources and examples may be found on the Internet. If you are consulting a career counselor or coach, creation of your elevator speech(es) should be made part of the conversation. Although it's commonly referred to as a "speech" or a "pitch," it should above all sound natural and not rehearsed or forced. You may want to practice it several times on a friend, trusted colleague, or career counselor.

Business Card

If you are currently employed, you will most likely have a business card identifying you as an employee of a particular organization. If you are between positions, however, you may not have one, or even see the need for one. Please get one. It is common practice to exchange business cards at professional and some personal events. The playing field is not level if someone hands you a business card and you either don't have one or you hand that person a resume. Even if you are not currently employed, get a very simple business card, on good card stock, white or ivory, with your name, and either "Counselor-at-Law" or "Attorney-at-Law," a phone number (that has a professional voicemail message – generally a cell phone) and an email address. Some people feel uncomfortable including their home address; that is fine, it does

not need to be included. Increasingly, professionals are starting to include the link to their LinkedIn profile on both their business card and resume. Career counselors may have different opinions on this, but, if it is included, your LinkedIn profile should be fairly complete and be consistent with what's on your resume.

Facebook/Twitter

There are differences of opinion on the professional usefulness of Facebook and Twitter. That said, many organizations have Facebook and Twitter accounts on which they include the latest information about their organizations, as well as job postings. These are probably reason enough to establish Facebook and Twitter accounts and to have them in your toolbox. Much has been written about the "dangers" of including "too much information" on Facebook. Be warned: prospective employers are looking at your online presence and it should be as professional as possible. Google your name periodically to see what others see.

Smartphone

Many organizations have a 24/7 culture and thus have an expectation that their employees will have access to their email when they're away from the office. It is not enough simply to have a phone these days; and, in fact, having a phone that is *just* a phone, may date you and signal to a prospective employer that you are not current with technology.

Active Bar Status

If you've "retired" from the profession and are contemplating a return to traditional law practice, reactivate your license as soon as possible. You don't want to find yourself in a position in which you're being considered for a job opportunity and when you are asked if your license is current having to say no. You want to be able to say yes immediately.

Bar Association Membership

Bar association memberships make up another important tool in your transition toolbox. By definition, a bar association is populated with professional colleagues who can be excellent networking resources and sources of information about potential job opportunities and practice areas you may be exploring as part of your transition. Additionally, they offer continuing legal education classes that can bring you up to speed on the latest developments in a particular practice area. In a large bar association such as NYSBA, for example, there are committees and/or sections covering myriad practice areas and interests. Join one or more and assist with their panels and programs. Write posts for a committee blog. Get involved!

Networking Log

Since networking is such an important part of a transition, you will undoubtedly be meeting a number of people along your journey. It is very helpful to establish a system for keeping track of the contacts you have made, people to whom you've reached out, people to whom you'd like to reach out, dates of your outreach and follow up dates, results of your outreach efforts, and so on. Your system should be what works for you, whether it's an Excel spreadsheet or a chart. The format doesn't matter as long as you consistently review and update it.

Your resume is a living, breathing document and, as such, it should always be up-to-date and ready for a prospective employer.

An Accountability Wingman/ Personal Board of Directors

It's important during a transition to surround yourself with people who support you and your decisions – the "yay-sayers" rather than the "nay-sayers." These are often friends, family and colleagues. They have your best interests at heart and want to see you succeed. As well-intentioned as they are, however, they are not always the best choices to help you maintain the discipline involved in a job search. It's important to find someone to whom you feel professionally accountable – someone whose opinions you respect and who will be firm in ensuring you adhere to whatever schedule you have established for your transition. The person should feel comfortable providing you with constructive criticism, and you should feel comfortable receiving it. You should develop a plan as to what goals you would like to accomplish and by when, and then establish a method of accountability to your wingman. A weekly email? A meeting once a month?

Similarly, a personal board of directors is a group of people who know and support you. The people you choose to be on that board will have various strengths, and you can look to them to assist you with different aspects of your transition. For example, one board member may be your personal motivator, an enthusiastic person who will inspire and energize you by reminding you of your strengths, and give you the confidence that you can be successful in this transition. Another may be someone with a large personal and professional network, who is happy to introduce you to those in that network for informational interviewing purposes. Yet another

may be a meticulous writer with excellent legal research and writing skills. That's the person who will review your writing sample and resume.

Email Alerts

Email alerts are yet another essential tool for your toolbox. Whether for job postings tailored for criteria you specify, such as through www.indeed.com or Google alerts for topics in which you are interested or that relate to a position or organization to which you are applying, email alerts can be a wonderful resource when you are making a transition.

Current References

As with your resume, you will want to be sure you are ready to provide references to a prospective employer. Prepare a reference sheet with your name and contact information on the top, and the names of three or four references, their titles, organizations, contact information and the context in which they know you. If you have been out of the paid workforce for some period of time and are transitioning back, this may mean that you will need to reach out to colleagues or a supervisor from quite some time ago. Don't hesitate to do so; in most instances they will be happy to serve as a reference. When you reach out to them, be sure to remind them of projects you worked on together. If you are not able to find previous or current professional references, it is perfectly acceptable to list a fellow committee or board member, or your supervisor in a volunteer role you may have. The most important factor is that these are not character references; they are references from those who have seen your work ethic and skills.

Current Writing Sample

Some prospective employers may ask for a writing sample in connection with their application process. You will want to be sure you have one to submit. In general, it should be no longer than five to 12 pages. If the position is a traditional legal job, it should reflect legal analysis and proper citation. If you are using a writing sample from a prior employer, you should ask that employer for permission to use that piece and redact any identifying information. If you don't have a writing sample that you feel comfortable using, or if the last one you wrote was from a number of years ago, think about selecting a topic (legal or law-related) that is of interest to you and writing a short article about it. Even if you never submit the article for publication, the process of researching and writing it will get those wheels turning again. It may also generate an interesting conversation with a prospective employer as to why you chose that particular topic, the results of your research, and why you are arguing in favor of one position over another. Remember to be thoroughly familiar with the content of your writing sample when you go for an interview, as the interviewer may ask you about it.

An Action Plan

And last, but certainly not least, is an Action Plan. We've come full circle to the concept of transition as movement, motion, action. I started this article by noting that transition means moving from one state to another. I am going to end it by providing what I consider last transition essential – the Action Plan.

A transition can have so many moving parts that it can feel overwhelming. It's easy to become stuck because it can be so hard to know where to begin. One way to counteract that feeling is by taking action in an ordered, disciplined way. The first item on your Action Plan can simply be "Day 1, appointment 1 – sit and think for an hour or two about what makes me happy." Reflect. Clean off your desk so that nothing is on it to distract you. It could be identifying a place, whether in your home, office, or a café, that you are now going to associate as your "transition planning" place. Pick your transition music, or turn off the music. Do whatever it is that gets you into the frame of mind in which you're determined to treat this transition process with the seriousness and attention it warrants. In New Directions, toward the end of the session we provide our participants with a 30-Day Action Plan Form that we encourage them to start completing even before they've finished the program. We encourage them to make unbreakable appointments with themselves – sacred time in which they are not to be disturbed, during which they devote time to their job search. You're reading this in January – what better time to make resolutions! And the first resolution is to fill your transition toolbox with these 15 essential tools. ■

TRANSITIONS

Christopher J. Muller is currently Of Counsel to the Commissioner at the Columbia County Department of Social Services in Hudson, N.Y., having worked previously for the New York City Law Department's Family Court Division. When Christopher moved to Hudson, he had no previous ties to the area. "This type of transition is long and involves a lot of things professionally as well as personally. Rushing it isn't the recipe for success and you want to be in the best possible position to succeed." Christopher's transition was not a quick one. "It took almost a year to get everything finalized, from the point of considering this transition to finding housing and physically relocating." Christopher explained that it's important to be diligent by broadening your search and exploring various possibilities in the area you want to work in.

– Jocelyn Cibinskas

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for over 25 years and is of counsel to Ressler & Ressler in New York City. He is the author of *New York Civil Disclosure* and *Bender's New York Evidence* (both by LexisNexis), as well as the 2008 and 2013 Supplements to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches New York Practice at Columbia Law School, and Professional Responsibility and Electronic Evidence & Disclosure at Brooklyn Law School. In addition to presenting NYSBA's Annual CPLR Update Program statewide, he serves on the Office of Court Administration's CPLR Advisory Committee, as Associate Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee, and is a frequent lecturer and writer on these subjects.

Proving the Value of Life (Part 1)

Introduction

Last issue's column reviewed the Court of Claims decision in *Thurston v. The State of New York*.[1] In *Thurston*, the trial court granted summary judgment to the State, dismissing claimant's claims for wrongful death,[2] concluding, "It is repugnant to the Court to have to enforce this law which places no intrinsic value on human life and is 'no longer relevant and applicable to our contemporary social structure and mores.'"[3]

This issue's column will begin an examination of various claims that may be brought in a wrongful death action, and the nature and extent of proof necessary to support those claims.

Law Governing Recovery in Wrongful Death Actions

In *Thurston*, the court explained that "[c]laimant's action for wrongful death is governed by statute. In accordance with Estates, Powers and Trusts Law (EPTL) 5-4.3(a), damages in a wrongful death action are to be 'fair and just compensation for the *pecuniary* injuries' resulting from the decedent's death for the distributees for whom the action was brought."[4] EPTL 5-4.3(a) provides:

> § 5-4.3. Amount of recovery
>
> (a) The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. In every such action, in addition to any other lawful element of recoverable damages, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by the distributees, or for the payment of which any distributee is responsible, shall also be proper elements of damage. Interest upon the principal sum recovered by the plaintiff from the date of the decedent's death shall be added to and be a part of the total sum awarded.[5]

Thus, the statute permits recovery for wrongful death for:

1. pecuniary injury;
2. reasonable medical expenses "incident to the injury causing death";
3. reasonable funeral expenses paid by the distributees or for which the distributees are responsible; and
4. interest from the date of death.

Pecuniary loss has been recoverable since New York's original wrongful death statute took effect in 1847:

> The qualifying phrase "pecuniary injuries" has been retained since the enactment of the first wrongful death statute in this State and has been consistently construed by the courts as excluding recovery for grief, and loss of society, affection and conjugal fellowship – all elements of the generic phrase "loss of consortium."[6]

Since EPTL 5-4.3 is in derogation of common law,[7] it has been strictly construed: "The remedy provided by the statute, the recovery of compensatory damages, is exclusive and may not be expanded by the courts. The statute expresses the Legislature's considered judgment on the issue."[8]

Accordingly, loss of consortium is not recoverable on a wrongful death cause of action, as explained by the Court of Appeals in *Liff v. Schildkrout*:[9]

> The first issue for our resolution is whether a surviving spouse, in his or her individual capacity, may maintain a common-law cause of action in this State for loss of consortium due to death which is independent and distinct from a statutory action for wrongful death. While we recognize the attractive nature of plaintiffs' arguments, we decline the invitation to change the law of this State and adhere to our pronouncement in that all causes of action arising from the death of an individual must be maintained in accordance with statutory authority.[10]

Similarly, the Second Department has explained that certain other damages are not be recovered in a wrongful death action:

> The plaintiff recognizes that in *Amerman v Lizza & Sons* this court, under the rule of *stare decisis*, held that it could not allow a recovery under the terms of the statute for grief, loss of society or loss of companionship, but argues that we should change our views. If the law in this regard is to be changed it must be by an amendment of the statute, or by its reinterpretation by the Court of Appeals.[11]

Instructions to the Jury

Had *Thurston* proceeded to trial it would, of course, have been a bench trial. For jury trials, most judges utilize the New York Pattern Jury Instructions – Civil (PJI) in formulating their charge to the jury.

Many practitioners start their analysis of a potential new matter by consulting the PJI, referencing both the model charges and their accompanying commentary. Many consider the PJI to be the best tool to determine both the element(s) of a cause of action and the type and quantum of proof required for a particular element of a cause of action.

PJI 2:320 sets forth the charge given to a jury where claims of wrongful death and pain and suffering are brought in the same action; it begins by differentiating the two claims:

> As you have heard, the plaintiff, EF, is the representative of the estate of AB. EF makes two claims: the first claim seeks damages on behalf of [*list distributees*] resulting from the death of AB and the second claim seeks damages for the injuries suffered and losses sustained by AB before (he, she) died. You must separately consider each of these claims.[12]

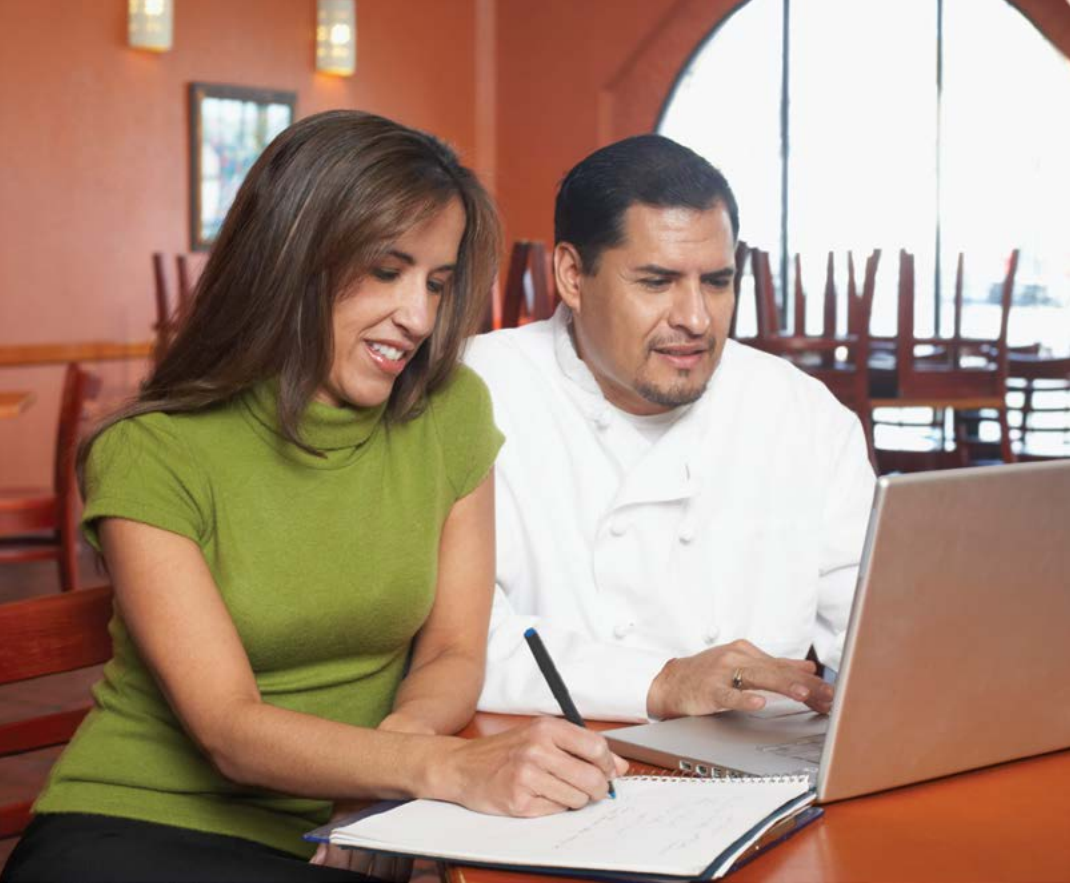
The charge goes on to explain how the jury is to determine the pecuniary loss claim:

> As to the first claim, damages are the amount that you find to be fair and just compensation for the pecuniary injuries, that is economic losses, resulting from AB's death to each of the persons for whom this claim is brought. Those persons are: [*list the distributees by name and state their relationship to decedent*].
>
> EF claims that these individuals have sustained monetary loss as a result of AB's death in that [*state items of pecuniary loss claimed by plaintiff*]. Defendant CD claims [*state CD's claims in relation to distributees' alleged pecuniary loss*].
>
> The law limits damages resulting from AB's death to monetary injuries. You may not consider or make any award for sorrow, mental anguish, injury to feelings, or for loss of companionship. You must decide the monetary losses to [*list the distributees by name*] caused by AB's death on [*give date of death*]. In deciding the amount of monetary losses, you should consider the character, habits and ability of AB; the circumstances and condition of [*list the distributees by name*]; the services that AB would have performed for (him, her, them); the portion of (his, her) earnings that AB would have spent in the future for the care and support of [*list the distributees by name*]; the age and life expectancy of AB; the ages and life expectancies of [list the distributees by name]; and [*where the distributees include children*] the value of the intellectual, moral, and physical training, guidance and assistance that AB would have given the children had (he, she) lived. You should also consider the amount, if any, by which AB, if (he, she) had lived, would have increased (his, her) estate from (his, her) earnings and thus added to the amount that would have been inherited from (him, her), provided that you and that at least one of [*list the distributees by name*] would have been alive to inherit from (him, her) had AB not died on [*state date of death*].[13]

The charge, after explaining the use of life expectancy tables with regard to the decedent and the distributees, gives the following instruction:

> You must decide what portion of (his, her) earnings AB would have spent for the care and support of [*list the distributees by name*]. In making your decision, you must consider: the amount AB earned per (week, month, year) prior to (his, her) death; the part of those earnings that AB contributed to the care and support of each of the distributees and the pattern of those contributions; the position that AB had with (his, her) employer at the time that (he, she) died; (his, her) prospects for advancement and the probabilities with respect to (his, her) future earnings; the risks of (his, her) occupation; the condition of (his, her) health and the length of time that (he, she) would reasonably be expected to continue working. As to this last factor, the work expectancy of AB was, according to work expectancy tables, [*state number of years*]. That figure, like the life expectancy figures I mentioned earlier, is only a statistical average and is furnished simply as a guide. In determining what portion of (his, her) available earnings AB would have applied in the future to efthe care and support of (his, her) children, you should consider that AB was not legally obligated to contribute to the support of any child who became 21 years old. However, AB could have stopped supporting a child under 21 who [*e.g., became self-supporting*] or could have decided to continue to support a child who was older than 21. If, on the evidence, you deem it reasonably probable that any of the children would have [*e.g., become self-supporting*] prior to age 21, or that AB would have contributed to the support of any of them beyond age 21, you may use as the date of termination of support of that child a date which is earlier or later than 21 as you deem proper.

Continued on Page 54



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Family Business and Positive Psychology: A New Planning Paradigm

By Scott E. Friedman and Eliza P. Friedman

Background

Family business is big business. There are approximately 5.5 million family businesses in the U.S., accounting for 75% of all new jobs generated and nearly two-thirds (64%) of the nation's gross domestic product (GDP). It is estimated that approximately 60% of all publicly held U.S. companies are family-controlled.[1] A recent article published in the *American Journal of Economics and Business Administration* suggests that 90% of all businesses in the United States are family owned or controlled.[2]

In spite of their enormous influence on our economy and culture, and at a time when the largest wealth transfer in history has begun,[3] the dynamics of family businesses remain extremely challenging. Sadly, approximately 70% of family businesses fail to successfully complete a transition to the second generation, and a staggering 90% of family businesses fail to complete a transition of ownership to the third generation.[4] The commonality of family business struggles is often expressed through the well-known proverb "shirtsleeves to shirtsleeves in three generations" and brought to our attention through endless published accounts of prominent business families, including Gucci, Guinness, and Gallo, whose infighting has become known through the public litigation process.[5] We are quite confident that anyone who works with family businesses on a regular basis has his or her own personal experience involving family business dysfunction and crisis.

Despite family business struggles that go back to Adam and Eve (whose son, Cain, worked their fields and whose other son, Abel, tended their sheep, until a jealous Cain killed his brother) and, more recently, in spite of

endless professional seminars on subjects like succession planning, not much has changed, and family businesses continue to struggle.

Famed jurist Learned Hand anticipated the need for new planning strategies when he asked, "How long shall we blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some change."[6] The fact that so many families in business together continue to struggle – including some of the wealthiest and most successful families who have access to preeminent professional advisors – suggests that this is a field desperately in need of a new planning paradigm.

Thankfully, we no longer need to blunder along. Insights and advances in science – particularly the fields of evolutionary biology, neuroscience, and positive psychology – suggest new planning strategies for lawyers (and other professionals) working with family businesses. Many of these insights have become well known through bestselling books like *Blink* by Malcolm Gladwell and *Thinking, Fast and Slow* by Daniel Kahneman. Others have been addressed in prestigious journals like *Harvard Business Review*, which devoted its January-February 2012 cover story to the correlation of happy people working in "positive" cultures with bottom-line business success.[7] As a result, many more insights are familiar, or accessible, to lay audiences, and translatable by professionals into actionable ideas, plans and strategies. The balance of this article explains both why appreciating certain basic (and easily understood) scientific insights are important, and how these insights can be applied in practice to help family businesses.

Why Traditional Planning Strategies Are Insufficient

Traditional planning strategies and techniques that principally focus on how to efficiently "transfer assets" to family members (with little, if any, substantive focus on how to prepare family members to work together) are simply insufficient to help family businesses flourish from generation to generation.[8]

Our traditional planning strategies are informed by assumptions that date centuries back to economists like Adam Smith and John Stuart Mill, who posited that individuals are "rational" and act on the basis of complete knowledge and the desire to maximize economic returns and wealth. Specifically, the legal profession's traditional family business planning strategies are fundamentally driven by a set of relatively narrow financial considerations: mostly how money can be saved from estate taxes (estate planning), used to fund retirement years (retirement planning), or used to fund business and financial plans (financial and business planning).

While the field of economics has advanced due to great thinkers like Thorstein Veblen and John Maynard Keynes, who offered compelling critiques of the "rational man model," the legal profession has been slow to incorporate bodies of knowledge from other disciplines that empirically demonstrate that we are not always rational thinkers nor do we always make decisions with sufficient awareness of relevant facts and information.

While some law schools are beginning to incorporate courses in psychology (for example, Harvard's Extension School offers PSYC E-1870 Law and Psychology, a course that studies neuroscience to compare "legal and psychological approaches to human behavior" in topics like criminal confessions, the insanity defense, eyewitness identification and testimony[9]), the importance of psychology in legal theory, studies and practice has been sadly underappreciated as it relates to the needs of business organizations, including family businesses. The stark reality is that personalities and family dynamics are complex, often quietly at work behind closed doors and outside the awareness of even trusted professional advisors. Like icebergs, what we see is often much less significant than what we don't see.

Understanding Family Business Problems Through Science

In *Thinking, Fast and Slow*, Nobel Prize–winning author and professor Daniel Kahneman observes that "[b]y and large . . . the idea that our minds are susceptible to systematic errors is now generally accepted."[10] For example, natural selection favored the development of the "fight or flight" response to danger – both real and perceived – by enabling our ancestors to react almost immediately when faced with situations where a delay would be fatal. While modern civilization has reduced or eliminated many of these threats, our brains continue to react in fight or flight mode when we feel threatened, regardless of whether or not these are "real" threats.

Dr. Dan Baker describes this phenomenon in his bestselling book *What Happy People Know*:

> The forces of evolution, by their very nature, endowed [our neurological] fear system with tremendous power, because in the brutal early epochs of mankind, it alone kept us alive. It gained us the hair-trigger capacity to spring into action at the first hint of threat. The automatic fear response became faster than the process of rational thought, faster than experiencing the feeling of love, faster than any other human action. . . . Unfortunately, in modern life, what is good for survival is often bad for happiness and even for long-term health.[11]

Inside a family business, stakeholders might experience countless types of "fear," such as fear that they are undercompensated, that someone else is overcompensated, that they don't have sufficient control, or that they are losing control. Parents might fear that their children won't get along while grown children fear that their children might not have a family business to work in. These

and many other fears manifest themselves in negative (and counterproductive) behaviors like greed, arrogance, anger, insecurity, turf-ism, lying, cheating – all of which are simply modern day forms of fighting or fleeing.

Over time, such negative emotions and behaviors almost inevitably lead to infighting and short-term thinking that, in turn, results in wasted time and resources, decreased productivity and diminished bottom lines. The Gallup organization estimates that U.S. companies lose $360 billion each year due to lost productivity from employees who don't work well with their supervisors![12] No less important are the attendant resulting personal costs, including depression, frustration and anger that can cause high blood pressure, heart attacks and strokes.

Professor Kahneman's observation about the susceptibility of our brains to systematic errors extends far beyond those errors that result from our uncontrolled and ineptly deployed "fight or flight" response to modern day slights. Over time, and left unmanaged, our inherited propensity for systematic errors in how we process information can prove disastrous in a family business, as decisions driven by fear, irrationality, forgotten promises, inattention and simple incompetence can diminish trust as family members come to view each other as unreliable, insincere and incompetent.[13] These views make virtually impossible the collaboration required to work together successfully in business. This explanation is supported by accumulating data, such as a survey of 3,500 families by Roy Williams and Vic Preisser, which found that only about 5% of family business failures in this data pool were attributable to poor tax and financial planning. Instead, most of the failures were attributed to intra-family mistrust and miscommunication.[14]

While insightful advisors have long encouraged attention to organizational dynamics and related psychological insights, there has been a general reluctance by professionals and their clients to do so for a number of factors. These include (1) misconceptions that these are "soft skills" that simply aren't useful in a sophisticated business, (2) the fact that benefits have been difficult to quantify, and (3) just plain ignorance of the nature of the advice being offered (and often misunderstood as advice to "not worry, be happy," or look in the mirror, smile, and tell yourself that today will be a great day).

Fortunately, there are antidotes to the various challenges posed by our evolutionary legacy that are informed by science, principally the developing field of positive psychology, that suggest new planning strategies to complement traditional ones. Importantly, these new strategies and insights are sophisticated, empirically validated, and demonstrably correlated to enhanced productivity and bottom-line success and, best of all, relatively easy to implement.

The Science of Positive Psychology

Positive psychology is the scientific study of factors that contribute to the optimal functioning of people, groups and organizations. This field of study offers important insights into the correlation of a positive workplace culture with individual happiness and organizational success. Shawn Achor, a former professor at Harvard who is now a prominent consultant to major organizations around the world, provides a wonderfully readable account of some of the voluminous data on this subject in *The Happiness Advantage*. For example, Achor notes that

1. happy people (where happiness is defined as "the experience of positive emotions")[15] are more productive, work longer hours and take fewer sick days compared to unhappy people;[16]
2. people who express positive emotions are more effective negotiators than those who are neutral or negative;[17]
3. happiness increases dopamine and serotonin levels, which increase neural connections and allow us to be more thoughtful and creative;[18] and
4. teams with encouraging managers perform better than teams whose managers praised them less.[19]

Findings like these explain why organizations with positive cultures are less burdened by "politics" than are their counterparts with negative cultures. They also have higher morale, spend more time engaged in strategic thinking focused on the pursuit of exciting possibilities (rather than negative energy expended on problem solving), and are able to attract and retain great talent. Individuals working in organizations with positive cultures build strong interpersonal relationships and generally enjoy work. These findings also explain why organizations with positive cultures outperform those organizations with negative cultures. As Shawn Achor explains, happiness does not follow success; by fueling performance, it precedes it.[20]

> Approximately 70% of family businesses fail to successfully complete a transition to the second generation, and a staggering 90% of family businesses fail to complete a transition of ownership to the third generation.

Family businesses can significantly benefit from these insights and, in so doing, increase their likelihood of succeeding over the generations by following seven simple steps.

Step 1: Cultivate a Positive Culture

In *What Happy People Know*, Dr. Dan Baker describes how the human mind evolved to allow not for only primitive behaviors like those driven by fear ("fight or flight"), but also more rational ("higher order") thinking that allows us to create art and send astronauts to the moon. This modern brain functionality also allows us to experience higher order emotions, like love, compassion and empathy, and to appreciate the benefits of forgiveness. Dr. Baker argues that the human mind can't be in a state of appreciation and fear, or anxiety, at the same time:

> [d]uring active appreciation, the threatening messages from your amygdala [fear center of the brain] and the anxious instincts of your brainstem are cut off, suddenly and surely, from access to your brain's neocortex, where they can fester, replicate themselves, and turn your stream of thoughts into a cold river of dread. It is a fact of neurology that the brain cannot be in a state of appreciation and a state of fear at the same time. The two states may alternate, but are mutually exclusive.[21]

The more time spent using our higher brain functionality, the more we can begin to realize the benefits Shawn Achor has described. One easy step family businesses can take to help create (or reinforce) a positive culture marked by mutual respect and kindness is to develop a code of conduct. Typical codes might include basic rules of communication that encourage listening without interrupting, communicating critical feedback constructively and respectfully, asking questions to discover information (not to demean one another) and, when relevant, seeking to disagree "agreeably."

Without a carefully thought out family meeting agenda, discussions tend to focus on problems that often shift to identifying blame for those problems. Family members who might feel like scapegoats often disagree, and disagreements turn into arguments (fighting) or clamming up (fleeing), all of which reinforce a negative feedback loop. Even if fighting is avoided, the time spent on problem solving is time not spent on possibility seeking. As Jim Collins has observed, "managing your problems will make you good but building on your opportunities is the only way to become great." Readers interested in learning more about how to spend time in the pursuit of opportunities should explore the field of Appreciative Inquiry, an approach that brings stronger focus to what an organization does well rather than on seeking to address what problems need to be fixed.[22]

Not only will families benefit from designing an agenda intended to maximize focus on the pursuit of exciting possibilities and opportunities, but work done by Dr. Barbara Fredrickson, the Kenan Distinguished Professor of Psychology and Principal Investigator of the Positive Emotions and Psychophysiology Lab at the University of North Carolina, suggests that families should consider aiming for a ratio of at least three positive encounters to every one negative encounter.[23] Fredrickson and her colleagues have found that experiencing positive emotions enhances cognition and improves the quality of relationships. Over time, positive encounters enhance social bonds that endure into the future.

Step 2: Educate and Prepare Family Members

Starting in childhood, families can take steps to ensure that members are prepared for adult responsibilities, including, if appropriate, those that accompany working in a family business. Preparation might include, for example, educating children about the many dimensions of wealth through volunteer work, philanthropy, and household chores in exchange for an allowance.

Ground rules can be established to clarify the preparation required of a family member in order to work in the business. Some families might find it helpful to require a college education; others might require graduate degrees and/or experience working outside the family business. Family employment decisions should be based on both a need *and* a good "fit" between the job opening and a family member's talents and experience. Too many parents have ignored Harry Truman's observation that "the best way to give advice to your children is to find out what they want and then advise them to do it." As a result, job decisions are often made on the basis of status, convenience, entitlement, or money, and not on the basis of helping individuals discover their interests, passions and skills. A variety of validated assessment tools can help ensure that individuals are assigned to fill a role based on their strengths and interests. Once employed, family members can be assigned positions that continue the never ending "preparation process" by building experience and understanding, including understanding clients, vendors, partners, and so on.

Ultimately, senior family members must prepare themselves to hand over their leadership reins to the next generation if the succession process is to be successful.

Step 3: Foster a Culture of Understanding

While the importance of effective communication is well known, experience suggests that families "under-communicate," the unfortunate and unintended by-product of which is the impairment of intra-family trust and the quality of family relationships. Properly structured, family meetings can enhance trust by creating a forum for open and constructive conversations. Subjects that might be discussed include the history of the family business, family values, and other topics of interest (such as opportunities relating to the business, or roles of various participants). Family understanding might be enhanced

through the use of genograms, a graphic way of organizing family information that can offer powerful insights into family culture and patterns.[24]

Families benefit not only from well-structured meetings with constructive agendas but adherence to a code of conduct that incorporates common "communications tips" (such as no cell phones during a meeting, repeat what has been said, if necessary, to ensure understanding, look someone in the eye when speaking or being spoken to, etc.).

Even though families benefit from a code of conduct and regular meetings, science suggests that there will always be inherent limitations in our ability to communicate effectively owing to the variety of mental foibles noted above. Accordingly, families would be well served to complement traditional communication improvement techniques with an increasingly appreciated leadership trait: humility. According to Bradley Owens, a Research Fellow at the Center for Positive Organizational Scholarship at the University of Michigan's Ross School of Business,[25] successful leaders admit their mistakes, highlight team members' strengths and demonstrate their willingness to learn. Owens and other researchers continue to develop empirical data on the benefits of promoting humility, a value long recognized by many major religions and philosophers, confirming that humility is positively related to team cohesion, task allocation effectiveness and team performance.[26] A number of great resources are available to help "teach" humility.

Step 4: Clarify and Commit to Core Principles

There is a very successful entrepreneur who describes his decision-making style as "ready-fire-aim." That approach worked for him over the years as he moved quickly and deftly to capitalize on opportunities that helped build a large and successful business. Family businesses, however, are inherently much more complex organizations than those controlled by a single entrepreneur, as they are made up of multiple individuals with some degrees of legal and/or practical decision-making influence who have their own distinct personal view about what is good for their business. As a result, a "ready-fire-aim" decision-making process that appears random and ad hoc can easily become divisive, with heated emotional arguments stemming from someone's sense of unfairness.

Families can benefit from thoughtfully articulating and adhering to core principles, including a statement of values, a mission statement, a vision statement and appropriate policies. Indeed, the recognition that bottom-line profitability correlates with culture suggests that families would be well served by attending to a new "P/E ratio" (not simply the traditional price/earnings ratio): that of the number of "principled" actions and decisions to "expedient" actions and decisions. The goal is to function in an entirely principled manner or what we refer to as "P/E Max." Decisions and actions that are inconsistent with core principles are referred to as "P/E Low." Articulating core principles can serve as a decision-making compass, often helping ensure that families are not making ad hoc choices based, alternatively, from a "family only perspective" or a "business only perspective." As Roy Disney wisely observed, "It's not hard to make decisions when you know what your values are."

Step 5: Establish Professional Governance Structures

Bestselling books like *Predictably Irrational* by Dan Ariely and *Freakonomics* by Steven D. Levitt and Stephen J. Dubner explain that many of the amazingly dumb decisions we make can be traced to brains that evolved to increase the odds of our ancestors surviving in dangerous times. This evolutionary heritage, however, is often ill-suited for modern day tasks and, so, we are prone to irrationality and overconfidence, as well as making biased or snap decisions, without recognizing it. To help counteract these tendencies, family businesses would be well served to seek advice and perspective from individuals who are capable of more objective (and less emotional) analysis. This is one of the most important benefits of forming a board of directors (or advisors) with capable non-family members. To ensure that family stakeholders (members and spouses) have a forum to communicate with each other, learn about the business, and ask questions, establish a family council for that purpose. The family council and board of directors/advisors can agree on the appropriate allocation of responsibilities and duties.

Family members working in the business should also be encouraged to learn skills that will be helpful in their continuing preparation for what the future brings. A variety of formal and informal learning opportunities exist, including reading, joining professional organizations like YPO or Vistage, working with an Executive Coach, or signing up for a college- or university-based family business program.

Step 6: Preempt Conflict

Individuals will always have differences of opinion. Constructively discussing those differences is a sign of a healthy family and a healthy business as such exchanges can promote creative strategies and powerful insights that often result in better decisions. The high rate of family businesses failing to transition successfully over the generations suggests that many disagreements are not easily resolved with differing perspectives being successfully reconciled. Lawyers often include a provision in a shareholder (or similar) agreement that specifies how conflicts might be resolved if and as they arise, typically by arbitration, mediation or litigation. Unfortunately, by the time a family gets to this stage, relationships are so impaired that it can be nearly impossible for family members to work together after "resolving" their conflict.

Accordingly, families should consider changing their planning paradigm to develop new mechanisms designed to help resolve differences constructively before they get out of hand. Strategies might include providing in an agreement an order by which disputes should be resolved: first by the participants directly, relying on agreed-upon core principles; then by seeking the advice of a family elder or a non-family director; and finally, perhaps, through the assistance of a mediator. Additionally, approaches based on collaborative law and game theory might be considered strategies to help preempt conflict. For example, We recently met with two brothers who asked us to help them unwind their business. We asked them to consider how much they would realize if their business assets were sold at auction in the very near term (hundreds of thousands of dollars) and then consider how much they would realize if they sold their business in a more thoughtful approach that might take as long as a year (millions of dollars). By appreciating the benefits of cooperating, the brothers realized their need to figure out how to compromise and get along.

Step 7: Plan Holistically

Because of the complexity of individual and family dynamics, only a few of which are highlighted here, "technically" designed plans that ignore human emotions and foibles are unlikely to work. Professional advisers must learn to appreciate these dynamics and expand their planning tool kit to address them. A more holistic planning process, informed by science, particularly the science of positive psychology, can offer enormous benefits. Many exciting opportunities continue to emerge on how more constructive plans can be designed. For example, traditional retirement planning might evolve to help senior family members think about how they might prepare for their "second-act careers" as much as they think about financial arrangements. Estate plans might benefit by focusing not only on the transmission of tangible assets like stocks, bonds and real estate, but also on the creation of an ethical will to transmit intangible assets like insights, experiences and lessons. Surveys suggest that parents worry about the impact money will have on their children: whether their children will spend beyond their means, will be ruined by affluence, or won't do well financially.[27] Holistic plans can incorporate strategies to help prepare heirs for their roles and to handle money.

Professionals working together can complement each other by sharing ideas informed by insights about family members, and, together, develop more informed and more successful plans. In a very real sense, a team of qualified professionals working together (perhaps even meeting together for regular quarterly meetings) can function much like a built-in and de facto advisory board. Professionals will enjoy the collaboration, and the family will benefit enormously.

Albert Einstein famously defined insanity as "doing the same thing over and over again and expecting different results."

Conclusion

Albert Einstein famously defined insanity as "doing the same thing over and over again and expecting different results." The unfortunate result of too many well-meaning and hardworking lawyers (and other professional advisors) who continue to limit their planning strategies to those based on traditional trusts and estates or corporate law practice tools is that family businesses continue to struggle and fail. It is time for the legal profession to develop new strategies and techniques that build on technically efficient traditional planning approaches while incorporating additional strategies and techniques that are based on a more nuanced appreciation of how the human mind works – and doesn't work. The suggestions offered above should be considered in context: some families might benefit from a concerted effort to incorporate all factors; other families might already be working smoothly and may only need help with a single factor. Advisors can assess the family dynamics and develop a plan tailored for the individual family's needs. Advisors who do so will function not just as tacticians but counselors and friends engaging in authentic discussions that are informed not only by legal insights but by experience and empathy as well. With a few simple steps, a family's odds of successfully transitioning its business over the generations should markedly improve. ■

1. *See Family Enterprise USA Appoints New Executive Director*, Sept. 17, 2013. http://www.familyenterpriseusa.org/?page=2013NewExecDirector&hhSearchTerms=statistics.

2. George S. Vozikis et al., *Reducing the Hindering Forces in Intra-Family Business Succession*, Am. J. Econ. & Bus. Admin. 4(1): 94–104, 2012.

3. *See Inheritance and Wealth Transfer to Baby Boomers*, A Study by the Center for Retirement Research at Boston College for theMetLife Mature Market Institute, December 2010 *at* https://www.metlife.com/assets/cao/mmi/publications/studies/2010/mmi-inheritance-wealth-transfer-baby-boomers.pdf.

4. George Stalk & Henry Foley, *Avoid the Traps That Can Destroy Family Businesses*, Harvard Bus. Rev., Jan.-Feb. 2012, http://hbr.org/2012/01/avoid-the-traps-that-can-destroy-family-businesses/ar/1.

5. *See* Grant Gordon & Nigel Nicholson, Family Wars: Classic Conflicts in Family Business and How to Deal with Them.

6. *Parke, Davis & Co. v. H. K. Mulford Co.* (1911) – Judicial opinion.

7. *See, e.g.*, Harvard Business Review's January-February 2012 cover, featuring the iconic yellow "smiley face" and highlighting "The Value of Happiness: How Employee Well-Being Drives Profits."

8. Scott Friedman married into a successful beverage bottling and distribution company that was sold to a strategic buyer before the third generation succeeded to control. His experience, both personal and professional, along with his knowledge of continuing studies over almost three decades, has led him to this conclusion.

9. *See* http://www.extension.harvard.edu/courses/law-psychology.

10. Daniel Kahneman, Thinking, Fast and Slow, p. 10.

11. Dan Baker, What Happy People Know, pp. 6–7.

12. Shawn Achor, The Happiness Advantage, p. 189.

13. A few of the countless books and articles explaining with scientific precision these systematic errors include Harvard Professor Daniel Schacter's description of how easily our mind forgets information in *The Seven Sins of Memory*; Daniel Ariely's description of our tendency to think irrationally in *Predictably Irrational*; Malcolm Gladwell's description of our propensity for making snap decisions in *Blink*, and Christopher Chabris' and Daniel Simons' description of how, all too often, we think we are paying close attention to what is happening around us when we actually aren't in *The Invisible Gorilla*. On the lighter side, some of these many mental foibles are highlighted in *You Are Not So Smart* by David McRaney and, on the more serious side, Dr. Marc Schoen, a professor at UCLA Geffen School of Medicine, has written a book with the ominous title *Your Survival Instinct Is Killing You*.

14. Roy Williams & Vic Preisser, Preparing Heirs, 35–49 (Robert D. Reed, 2003).

15. Happiness Advantage, p. 39.

16. *Id.*, pp. 42–43.

17. *Id.*, pp. 44–45.

18. *Id.*, p. 45.

19. *Id.*, pp. 43–45

20. *Id.*, pp. 3–4.

21. Dan Baker, What Happy People Know, p. 81. John Milton expressed a related thought about the power of our minds when he wrote in *Paradise Lost* that "The mind is its own place and in itself Can make a Heaven of Hell, a Hell of Heaven."

22. *See* Jim Collins, Good to Great; D. Cooperrider, P. Sorenson, Jr., D. Whitney & T. Yaeger, Appreciative Inquiry: Rethinking Human Organizations Toward a Positive Theory of Change (Stipes Publishing, 2000).

23. Barbara Fredrickson, Positivity 21 (NJF Books, 2009) ("unlike negative emotions, which narrow people's ideas about possible actions, positive emotions do the opposite: They *broaden* people's ideas about possible actions").

24. A classic text for those interested in the subject is *Geograms: Assessment and Intervention*, M. McGoldrich, R. Gerson, S. Petry (W.W. Norton & Co., Inc. 2008).

25. Bradley P. Owens, currently an Assistant Professor at University at Buffalo School of Management, was a Research Fellow at the University of Michigan from 2009–2011.

26. *See, e.g.*, Bradley P. Owens, Michael D. Johnson, Terrence R. Mitchell, *Expressed Humility in Organizations: Implications for Performance, Teams and Leadership*, 24, 25 Org. Sci., http://dx.doi.org/101287/orsc.1120.0795; Bradley P. Owens, Michael D. Johnson, Terrence R. Mitchell, *Humility Key to Effective Leadership*, Sci. Daily (Dec. 8, 2011), http://www.sciencedaily.com/releases/2011/12/111208173643.htm).

27. *See, e.g.*, U.S. Trust Survey of Affluent Americans, XIX.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a first-year associate in a large international law firm. Over the first few months of my employment, I have received extensive training concerning the available technological resources (including email, discovery software and document systems) which I will be using in my day-to-day practice. The partners have explained to the first-year associates time and time again that we are ethically obligated to understand how technologies are utilized in connection with a given representation and that we should be intimately familiar in the usage of those technologies.

My uncle, Lou Ludite, has been a solo practitioner for almost his entire legal career spanning nearly 40 years. For the most part, his only office staff has consisted of one secretary and one paralegal. He's never hired an associate (in his words, associates were "utterly useless"). During family holiday gatherings while I was in law school, I would share with him everything I was learning about electronic research tools and applications which I would need to master once I began practicing law. He would always tell me, "Ned, all this technology is hogwash. Real lawyers do not need email, and this whole thing with these hand-held devices, they look like something that Kirk, Spock and McCoy were playing with on *Star Trek*. It's all unnecessary."

Last week, Uncle Lou told me that Ted Techno, an attorney from a firm with whom he was working on a case, was repeatedly using emails and text messages to set up conferences to discuss strategy for an upcoming trial set to occur in three weeks. Uncle Lou boasted that he informed Ted that he doesn't read or write emails and his "policy" was to have his secretary look at his emails "no more than twice a week" and for her alone to "occasionally" reply to emails intended for Lou. Uncle Lou also told me that he had decided to take a vacation in Bali and didn't plan on returning stateside until the evening before the trial. He also said he told Ted Techno that he will be "completely unreachable" while he is away and "not even his secretary would be able to get a hold of him for any reason."

I have been taught that good communication and responsiveness are essential practice skills for all lawyers and that one cannot practice law without using email. I am very fond of my Uncle Lou and think that I should speak with him. I know that I am a novice in our profession especially when compared to my uncle, which is why I would appreciate some guidance from The Forum about whether he is behaving in a professional and ethical manner.

Sincerely,
Concerned Nephew

Dear Concerned Nephew:

A previous Forum reviewed various questions concerning an attorney's obligation to promptly respond to correspondence (including email) from clients and opposing counsel. We also made various suggestions that addressed situations where, for whatever reason, an adversary puts communications on hold and ignores them. *See* Vincent J. Syracuse & Amy S. Beard, Attorney Professionalism Forum, N.Y. St. B.J., Feb. 2012, Vol. 84, No. 2. Your letter raises broader issues, including the question of whether attorneys can choose to ignore electronic communications.

Let's start with that one first. Rule 1.1 of New York Rules of Professional Conduct (RPC) states the basic ethical obligation of lawyers to provide competent representation. Specifically, in the words of Rule 1.1(a), "[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In addition, competent representation of clients requires an understanding of how technologies are utilized in connection with the representation of a client. While some may wish that they were practicing law in simpler times, this is not a matter of choice and attorneys must be intimately familiar with the usage of those technologies. The importance of this point was recently underscored in an amendment to Comment [8] to Rule 1.1 of the ABA Model Rules of Professional Conduct (Model Rules) which states that, in maintaining competence, "a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." *Id*. (emphasis added.) At least one jurisdiction is already seeking to enact the amended Comment [8] of the Model Rules. *See The Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct Invites Comments on Proposed Amendments to the Massachusetts Rules of Professional Conduct*, http://www.mass.gov/courts/sjc/comment-request-rules-professional-conduct.html.

Literally from the first day of law school, future lawyers receive extensive instruction in electronic research tools, and once in practice, they learn first-hand the necessity of utilizing a variety of technological resources in their practice, including electronic discovery programs, document management and other productivity applications. In addition, most attorneys, in law firms of all sizes, utilize mobile devices in their respective practices to communicate (whether by email, text messaging or instant messaging) with clients, adversaries and other attorneys on a particular matter. As previously noted in this Forum, use of mobile devices is just one of many technologies that are integral to today's legal practice. *See* Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., May 2013, Vol. 85, No. 4.

With all respect to your Uncle Lou, to put it nicely, he is practicing law as if we were in the Stone Age. The disdain for using email not only may

be detrimental to the representation of clients but may also violate various ethics rules, specifically, Rule 1.1. Furthermore, Uncle Lou's "policy" of telling others that he doesn't read emails is problematic. Although he may be having his secretary occasionally read and respond to emails, lawyers should not isolate themselves from this basic method of everyday communication. Moreover, the use of a nonlawyer assistant to respond to email could raise issues under Rule 5.3, which governs a lawyer's responsibility for conduct of nonlawyers. Rule 5.3(a) states:

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

Id. (emphasis added.)

In addition, Rule 5.3(b) provides:

> A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:
>
> (1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or
>
> (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and
>
> (i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or
>
> (ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

Id.

Delegation may be a good thing for busy lawyers but trying to turn back the clock by giving a secretary or personal assistant what is essentially sole responsibility for receiving and responding to email communications directed to the employer creates a multitude of risks that could lead to violations of Rule 5.3. What if Uncle Lou's secretary is out of the office on vacation or is out sick for days on end? There is a fairly high probability that Uncle Lou will not be regularly reachable by email (via his secretary) under such a scenario; and therefore, he may be in breach of his diligence obligations pursuant to Rule 1.3, which will be discussed further below.

Your Uncle Lou's attempt to make himself totally unavailable while on vacation is also troubling. Although we believe that work/life balance is essential for everyone, we would not recommend an attorney going "off the grid" with a trial scheduled to commence almost immediately upon returning from vacation.

Turning to your other question, while it may be unclear whether the RPC imposes on lawyers an obligation to promptly communicate with co-counsel, Rule 1.3(a) requires that lawyers "shall act with reasonable diligence and promptness in representing a client." Moreover, Rule 1.3(b) states that lawyers "shall not neglect a legal matter entrusted" to them, and Rule 3.4(a)(6) provides that lawyers shall not knowingly engage in conduct contrary to the Rules; together, these rules do suggest that lawyers must communicate with co-counsel in a reasonably prompt fashion.

In our view, it is plainly apparent that ignoring communications from co-counsel constitutes neglect of a legal matter and is a breach of the lawyer's duty of diligence, regardless whether the duty is owed to the client or co-counsel. Furthermore, engaging in conduct contrary to the Rules – such as neglecting a legal matter – constitutes a breach of Rule 3.4(a)(6). Apart from ethics, as a matter of basic courtesy, a lawyer should promptly respond to communications from all counsel, especially co-counsel.

We suggest you tell Uncle Lou that we recommend the following best practices (which we would strongly suggest that he integrate into his practice). First, a variety of means of communications should be utilized when attempting to contact co-counsel, and all attempts to communicate should be documented. If a voicemail message is ignored,

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

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a follow-up email should be sent; if that email goes unanswered, try a phone call instead. If your co-counsel has communicated with you promptly in the past, give him or her the benefit of the doubt, but even if your co-counsel has a history of poor communication, always be civil in your own communications. This is especially critical given the fact that both attorneys share the same client and the client would not look kindly upon hearing that his two attorneys are not communicating regularly as would be expected in this particular representation. Ideally, the best way to resolve communication failures between co-counsel is for attorneys to sit down face-to-face and discuss how to better communicate with each other.

Second, if voicemails and emails alike do not spur a response, send your co-counsel a letter detailing the issue(s) about which you need to communicate and describing your attempts to reach him or her.

Third, and as a last resort, it may be necessary to let the client know that co-counsel has been unresponsive to your inquiries. However, this action carries with it the proverbial double-edged sword. On the one hand, the aggrieved attorney is making the client aware that by his efforts to communicate with co-counsel, he is acting with the utmost diligence in carrying out that client's representation pursuant to his obligations under Rule 1.3. On the other hand, complaining to the client about co-counsel's conduct could result in a deterioration of the relationship between the two attorneys, which could have a detrimental effect on carrying out the representation of their shared client.

Electronic communications have become the primary mechanism of communicating with clients, co-counsel, adversaries and any other relevant persons necessary to carry out a given representation. Although it should go without saying, attorneys cannot ignore the critical importance of using current technologies in their respective practices; technology is here to stay.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq. and
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

Jonathan Entrepreneur (Jonathan) had been a longtime client of my firm. Back in 2011, he decided that he wanted to set up a hedge fund with his friend, Paul Partner (Paul). At Jonathan's request, my firm did the work that resulted in the creation of Hedge Fund GP, in which Jonathan and Paul became equal partners. My firm also prepared the papers for Hedge Fund GP to become the general partner of Hedge Fund Partners, an onshore fund my firm organized. Because of my firm's long-standing relationship with Jonathan, we did not issue an engagement letter for this work. In addition, Jonathan asked that our firm also represent Paul in the formation of the fund entities, and we were happy to grant his request.

My firm generated a bill each month for legal services rendered to Hedge Fund GP, to Hedge Fund Partners, to Jonathan, and to Paul and addressed the bills only to Hedge Fund GP.

Hedge Fund GP was always behind on paying its bills. However, earlier this year, Hedge Fund GP ran into trouble and completely stopped paying our firm's bills.

We want to commence an action against Hedge Fund GP, Hedge Fund Partners, Jonathan and Paul to collect the fees that are owed. I have heard different views from several people on whether we were required to issue engagement letters to Hedge Fund GP, Hedge Fund Partners, Jonathan and Paul if they were all to be responsible for our fees, but I have been unable to get a definitive answer. What are the rules on engagement letters and is the absence of an engagement letter fatal to my firm's claim for unpaid legal fees?

Sincerely,
I.N. Confusion

> As I stated before, it is the monetary value of AB to each of the distributees that you must decide. That value is incapable of exact proof. Taking into account all the factors I have discussed, you must use your own common sense and sound judgment based on the evidence in deciding the amount of the monetary loss suffered by each of the distributees.[14]

In formulating the damages recoverable and the burden of proving those damages, the PJI furnishes a useful matrix for use from intake through trial.

Conclusion

Establishing wrongful death damages in New York can be a challenging task, even without the limitations imposed by EPTL 5-4.3(a). Next issue's column will continue this topic, commencing with damages recoverable and proof required on the pecuniary injury claim. ■

1. *Laurie A. Thurston v. The State of New York*, 2013-031-019, N.Y.L.J. 1202602796553, at *1 (Ct. of Clms., N.Y., decided May 2, 2013).
2. Claimant's pain and suffering claim was also dismissed.
3. *Id.* (citation omitted).
4. *Id.* at *1 (emphasis added).
5. EPTL 5-4.3 further provides:

> (b) Where the death of the decedent occurs on or after September first, nineteen hundred eighty-two, in addition to damages and expenses recoverable under paragraph (a) above, punitive damages may be awarded if such damages would have been recoverable had the decedent survived.
>
> (c) (i) In any action in which the wrongful conduct is medical malpractice or dental malpractice, evidence shall be admissible to establish the federal, state and local personal income taxes which the decedent would have been obligated by law to pay.
>
> (ii) In any such action tried by a jury, the court shall instruct the jury to consider the amount of federal, state and local personal income taxes which the jury finds, with reasonable certainty, that the decedent would have been obligated by law to pay in determining the sum that would otherwise be available for the support of persons for whom the action is brought.
>
> (iii) In any such action tried without a jury, the court shall consider the amount of federal, state and local personal income taxes which the court finds, with reasonable certainty, that the decedent would have been obligated by law to pay in determining the sum that would otherwise be available for the support of persons for whom the action is brought.

6. *Liff v. Schildkrout*, 49 N.Y.2d 622, 633 (1980) (citation omitted).
7. The Court of Appeals explained that "there is simply no room left for debate that the common law of this State, despite numerous opportunities and forceful requests to change, does not recognize suits to recover damages for the wrongful death of an individual," *Liff*, 49 N.Y.2d at 631–32.
8. *Robert v. Ford Motor Co.*, 73 A.D.2d 1025, 1026 (3d Dep't 1980).
9. 49 N.Y.2d 622.
10. *Id.* at 631 (citations omitted).
11. *Bell v. Cox*, 54 A.D.2d 920 (2d Dep't 1976). (citation omitted).
12. 1B NY PJI 3d 2:320 at 949 (2014).
13. *Id.* at 949–50.
14. *Id.* at 950–51.

In Memoriam

Peter M. Acton *North Chatham, MA*	John J. George *Santa Clara, CA*	Benjamin Podgor *New York, NY*
Robert A. Ades *Washington, DC*	Brian Glowacki *Erie, PA*	Frank J. Riccio *Bridgeport, CT*
Raymond W. Batt *Vero Beach, FL*	Michael A. Jacobs *Stamford, NY*	Daniel T. Roach *Buffalo, NY*
Willis B. Carman *Farmingdale, NY*	Kevin Keating *Jupiter, FL*	Louis H. Sherwin *Middletown, NY*
Julius L. Chambers *Charlotte, NC*	Susan Kemp *Ann Arbor, MI*	Peter C. Siegfried *New York, NY*
John S. Clark *Bronxville, NY*	John S. Kenny *Syracuse, NY*	Howard L. Stevens *New York, NY*
Dale S. Collinson *Chevy Chase, MD*	Charles J. Mango *Ballston Lake, NY*	James D. Wood *Albany, NY*
Garrison R. Corwin *Mamaroneck, NY*	Stephen P. Mayka *Rochester, NY*	William T. Yorks *Rochester, NY*
John Farrell *Jersey City, NJ*	Marshall B. Moroze *North Hampton, NH*	Mark Zuckerman *North Woodmere, NY*
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Continued from Page 64

No uniformity exists in how courts apply CPLR 3126 penalties. The penalties are determined differently between appellate and trial courts, between judges in the same judicial district, and with the same judge from one case to the next.[22]

An appellate court won't disturb the trial court's penalty absent a clear abuse of discretion.[23]

The Essentials: Your Moving Papers

If you're moving to compel disclosure or to obtain a penalty or sanction for nondisclosure, here's what you'll need to include in your motion:

• *Exhibits*. Attach as exhibits any earlier disclosure demands, preliminary-conference orders, compliance-conference orders, and any other disclosure orders.[24] Include any letter you've sent to your adversary relating to complying or failing to comply with disclosure. Arrange your exhibits in chronological order.[25] Your paper trail should be logically "clear to the reader that the demand or demands were proper, a proper response was not forthcoming, efforts were made to persuade the offending party to provide the disclosure prior to making the motion, and that the efforts were unsuccessful."[26]

• *Lay a foundation*. To win your motion, establish a few things in your affidavit or affirmation to obtain the relief you're seeking:[27] (1) that you've made a proper and timely request for disclosure from your adversary, or that a court issued an order directing disclosure; (2) that the disclosure you're seeking is material and necessary to your action; (3) that your adversary has refused to provide all or part of the requested disclosure; (4) that your adversary hasn't asserted a valid basis for objecting to the disclosure; (5) that your adversary is "deliberately frustrating the disclosure scheme"[28] by acting willfully, wantonly, or contumaciously, or that your adversary's refusal to provide disclosure may be inferred as willful, wanton, or contumacious;[29] and (6) that you'll be prejudiced if you don't obtain the disclosure you seek.[30]

• *A good-faith affirmation*. If you're the party moving for disclosure, you'll need an affirmation explaining that you've "conferred with counsel for the opposing party in a good-faith effort to resolve the issues raised by the motion."[31] If you fail to include the good-faith affirmation with your motion, a court will deny your motion.[32] In addition to their attorney affirmations, many attorneys will include a separate good-faith affirmation with their disclosure motions.[33] Including a separate good-faith affirmation, and labeling it "Good-Faith Affirmation," will make it easy for the court and court personnel to verify that your motion has the necessary components.

If your motion is based on a conditional order and your adversary hasn't complied with the condition(s), you don't need to include a good-faith affirmation.[34] In your motion, state that your adversary hasn't complied with the conditional order. Explain that you don't need to confer with your adversary about complying with the conditional order.[35]

The Essentials: Your Opposition Papers

If your adversary is moving for disclosure or for disclosure sanctions or both, you have a few options in how you respond in your opposition papers:

• Assert a privilege or a reasonable basis that your adversary's disclosure demand is improper.[36]

• Argue that you've already given your adversary all outstanding disclosure. As an exhibit in your opposition papers, attach the disclosure you've given to your adversary.[37]

• Respond in your opposition to your adversary's disclosure motion by providing the disclosure your adversary seeks.[38] Attach the disclosure as an exhibit.

• Respond with a combination of the above.

Regardless whether you've provided the disclosure or have refused to provide the disclosure, you'll still need to establish that your failure to disclose wasn't deliberate — that your behavior wasn't willful, wanton, or contumacious.[39] Also, explain that your adversary won't be prejudiced or wasn't prejudiced by your late disclosure.

If you've defaulted by failing to abide by the terms of a conditional order, you might overcome a default by demonstrating to the court that you have (1) a reasonable excuse for the default and (2) a meritorious claim or defense.[40]

When evidence is lost, destroyed, or altered, a party seeking the evidence may move for sanctions against the spoliator — the party who lost, destroyed, or altered the evidence.

Improperly Obtained Information

The court has all the remedies outlined in CPLR 3126 when you've improperly obtained disclosure: awarding monetary sanctions and costs, striking pleadings, deeming issues resolved, and precluding evidence.[41] The court might suppress information that's obtained through "improper or irregular disclosure procedures."[42] The court will determine whether the information so obtained prejudices a party's substantial rights.[43] A court may also dismiss a case when one party obtains too much disclosure, such as obtaining confidential files "on the sly."[44]

Spoliation of Evidence

Intentionally or negligently losing, destroying, or altering evidence that should be disclosed is called spolia-

Continued on Page 58

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tion.[45] When evidence is lost, destroyed, or altered, a party seeking the evidence may move for sanctions against the spoliator — the party who lost, destroyed, or altered the evidence.[46] A court may impose a spoliation sanction under CPLR 3126. The court may also impose a spoliation sanction — a per se penalty — under the common-law doctrine of spoliation.[47]

In evaluating a spoliation motion, the court may consider a number of factors:[48] (1) who lost, destroyed, or altered the evidence; (2) whether the spoliation was intentional or negligent; (3) when the spoliation occurred; (4) whether the evidence was relevant, i.e., "key evidence"; (5) what impact or prejudice to prosecute or defend its case inured to the party seeking the evidence; (6) whether the nature of the evidence or the conduct of the spoliator warrants a sanction; and (7) what penalty or sanction is appropriate. Discuss each of these factors in your spoliation motion, in your papers opposing the spoliation motion, and in your reply papers.

Before a court sanctions a party for spoliation, that party must have had an obligation to preserve the evidence.[49] If a non-party to the litigation has lost, destroyed, or altered evidence, the court must determine whether the non-party has an "agency or other legal relationship . . . so that the loss, destruction, or alteration of the evidence by one [non-party] may be imputed to the other" party to the litigation.[50] If the party's attorney takes custody of the evidence, responsibility for the evidence "may subsequently shift to the party's attorney."[51]

To obtain a sanction, you must establish that the evidence the spoliator allegedly lost, destroyed, or altered actually existed.[52]

New York doesn't recognize the tort of third-party negligent spoliation of evidence.[53]

Spoliation sanctions under CPLR 3126 include a resolving order, a preclusion order, or dismissal.[54] The court may also strike the spoliator's pleadings even if the spoliation was negligent rather than willful.[55] A court may impose sanctions less severe than striking the spoliator's pleadings "where the missing evidence does not deprive the moving party of the ability to establish his or her defense or case."[56] The court may also give an adverse inference charge to the jury if evidence is lost, destroyed, or altered.[57]

Spoliation and spoliation sanctions come into play in the area of electronic disclosure and electronically stored information (ESI), including emails. Once litigation is reasonably anticipated, a party must preserve — a "litigation hold" — all ESI.[58] Failing to preserve ESI might result in the court's choosing any sanction in CPLR 3126, including giving the jury an adverse-inference charge.[59]

Don't wait until trial — by moving for a directed verdict — to seek a spoliation sanction.[60] A trial court has no authority sua sponte to strike the spoliator's pleadings when you haven't moved timely for spoliation sanctions.[61]

When moving for spoliation sanctions, consider including with your motion an affidavit or affirmation from an expert. An expert's affidavit or affirmation "is particularly important in cases involving electronic evidence."[62]

In your opposition, consider "[o]ffer[ing] to accept a less severe sanction . . . [that] impacts in the least serious manner upon your party's ability to prove a claim or defense."[63]

Disclosure in Special Proceedings

Parties aren't entitled to disclosure as a matter of right in special proceedings. They must instead move the court for leave for disclosure. CPLR Article 4 governs special proceedings. Article 78 proceedings and summary proceedings to recover property under Article 7 of the Real Property Actions and Proceedings Law (RPAPL) are examples of special proceedings.[64]

Special proceedings are meant to be fast and economical. Parties may not dawdle or conduct lengthy and expensive disclosure. The only disclosure device you may use, without having to seek leave of the court, is a notice to admit.[65] Obtaining leave of court for disclosure isn't required in Surrogate's Court "even though its regular business is carried on in a series of special proceedings."[66]

Special proceedings are meant to be fast and economical.

You'll need a court order if you're seeking disclosure in a summary Housing Court proceeding.[67] Parties usually seek disclosure in two types of cases: nonprimary residence and owner's-use proceedings.[68] The court almost always automatically grants disclosure in these cases. A landlord, the petitioner, brings a primary-residence holdover when it believes that a tenant, the respondent, isn't using a rent-regulated apartment as the tenant's primary residence. In an owner's-use case, "the landlord seeks to recover a rent-regulated apartment based on the claim that the landlord or the landlord's family will reside in the apartment as their primary residence after possession of the apartment is obtained."[69] In illegal-sublet cases, unlike nonprimary residence and owner's-use cases, no presumption favors disclosure. A court might grant disclosure when a respondent asserts certain defenses: rent overcharge, horizontal multiple dwellings, illusory tenancy, succession rights, and economic infeasibility.[70] In these proceedings, you'll need to demonstrate ample need for the disclosure.[71]

In special proceedings, move under CPLR 3124 to compel disclosure, move under CPLR 3126 to sanction your adversary for nondisclosure, and move under CPLR 3103 for a protective order.

In the next issue of the *Journal*, the *Legal Writer* will discuss subpoenas, moving to quash subpoenas, and contempt motions. ■

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1. 1 Byer's Civil Motions § 24:50, at 318 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.).

2. David D. Siegel, New York Practice § 367, at 629 (5th ed. 2011) (citing *Fish v. Schindler*, 75 A.D.3d 219, 222, 901 N.Y.S.2d 598, 600 (1st Dep't 2010) (holding that "last chance" warning is not required before court strikes defendant's answer and sets case down for inquest)).

3. *Id.* § 367, at 632.

4. *Id.*

5. *Id.* § 367, at 629.

6. *Id.*

7. *Id.* § 367, at 632 (citing *Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 828–29, 860 N.Y.S.2d 417, 418, 890 N.E.2d 179, 180 (2008) ("[T]he court issued a self-executing conditional order directing defendants to comply by July 1, 2002 or their answers would be stricken. Having failed to comply, [defendant's] answer was stricken as of July 1, 2002.")).

8. *Id.* (citing *Lauer v. City of Buffalo*, 53 A.D.3d 213, 216, 862 N.Y.S.2d 675, 678 (4th Dep't 2008) ("But where, as here, a noncompliant party has defaulted on a motion seeking a conditional order to strike its pleading or had consented to the conditional order before failing to comply with it, that party has had no opportunity to offer a reasonable excuse for the default. Nor has that party had the opportunity to establish a meritorious claim or defense, the additional prerequisite to relief under CPLR 5015(a)(1).")).

9. *Id.* § 367, at 632.

10. *Id.* (citing *Mazarakis v. Bronxville Glen I Ass'n*, 229 A.D.2d 661, 661, 644 N.Y.S.2d 793, 794 (3d Dep't 1996) ("We conclude that Supreme Court's award of sanctions should not be disturbed as it was not an improvident exercise of the court's discretionary authority under CPLR 3126, which is separate and distinct from the authority granted by 22 NYCRR 130-1.1.").

11. *Id.* § 367, at 632.

12. David Paul Horowitz, New York Civil Disclosure § 24.05, at 24-7 (2012).

13. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 31:92, at 31-14 (2006; Dec. 2009 Supp.) (citing 22 N.Y.C.R.R. § 130-1.1); Horowitz, *supra* note 12, § 23.06, at 23-9.

14. Horowitz, *supra* note 12, § 23.06, at 23-9.

15. 22 N.Y.C.R.R. 130-1.2.

16. Horowitz, *supra* note 12, § 24.04, at 24-6 (citing 22 N.Y.C.R.R. 130-1.3).

17. *Id.* § 24.04, at 24-6.

18. *Id.*

19. Siegel, *supra* note 2, at § 367, at 632.

20. Horowitz, *supra* note 12, § 24.01, at 24-2.

21. *Id.* § 24.06, at 24-8.

22. *Id.* § 23.07, at 23-9.

23. *Id.* § 24.07, at 24-11 (citing *Myers v. Cmty. Gen. Hosp. of Sullivan County*, 51 A.D.3d 1359, 1360, 859 N.Y.S.2d 753, 755 (3d Dep't 2008) ("The penalty imposed will not be disturbed absent a clear abuse of the court's discretion . . . even if the sanction is dismissal of the underlying complaint.") (citations omitted)).

24. *Id.* § 23.07, at 23-10.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*§ 23.07, at 23-11.

29. The *Legal Writer* discussed willful, wanton, and contumacious behavior in Part XXVIII of this series. *See Drafting New York Civil-Litigation Documents: Part XXVIII — Disclosure Motions Continued*, 85 N.Y. St. B.J. 64 (Nov./Dec. 2013).

30. Horowitz, *supra* note 12, § 23.07, at 23-10, 23-11.

31. 22 N.Y.C.R.R. 202.7(a)(2); David L. Ferstendig, New York Civil Litigation § 7.15, at 7-112 (2013).

32. Horowitz, *supra* note 12, § 23.07, at 23-11 (citing *Molyneaux v. City of N.Y.*, 64 A.D.3d 406, 407, 882 N.Y.S.2d 109, 110 (1st Dep't 2009) ("The court improperly granted plaintiffs' CPLR 3126 motion in the absence of the required affirmation by their attorney that the latter had conferred with defendants' attorney in a good faith effort to resolve the issues raised by the motion."); *Dunlop Dev. Corp. v. Spitzer*, 26 A.D.3d 180, 182, 810 N.Y.S.2d 28, 30 (1st Dep't 2006) ("The court properly denied petitioner's motion for discovery, since petitioner failed to include an affirmation of good faith, as mandated by 22 NYCRR 202.7(a).")).

33. *Id.* § 23.07, at 23-12.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Siegel, *supra* note 2, July 2013 Pocket Part, at § 367, at 85 (citing *Gibbs v. St. Barnabas Hosp.*, 16 N.Y.3d 74, 80, 917 N.Y.S.2d 68, 71, 942 N.E.2d 277, 280 (2010) ("To obtain relief from the dictates of a conditional order that will preclude a party from submitting evidence in support of a claim or defense, the defaulting party must demonstrate (1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim or defense.")).

41. Barr et al., *supra* note 13, § 31:122, at 31-16.

42. *Id.* § 31:120, at 31-16.

43. CPLR 3103(c); Barr et al., *supra* note 13, § 31:121, at 31-16 (citing *In re Beiny*, 129 A.D.2d 126, 136, 517 N.Y.S.2d 474, 480 (1st Dep't 1987) (suppressing records attorney obtained from custodian of records without serving notice on opposing counsel.); *Wilk v. Muth*, 136 Misc. 2d 476, 477, 518 N.Y.S.2d 762, 763 (Sup. Ct. Suffolk County 1987) (suppressing medical report when attorney obtained it from client's doctor in preparation for malpractice action and misrepresented to doctor that attorney needed records because client was injured in accident); *contra In re Kochovos*, 140 A.D.2d 180, 181, 528 N.Y.S.2d 37, 38 (1st Dep't 1988) ("Notwithstanding our extreme disapproval of the tactics employed by counsel . . . . [n]one of the material obtained was privileged, and there is no showing that counsel would not have been entitled to obtain the documents at issue in the normal course of discovery, properly conducted. Thus, the contestants did not obtain an unfair advantage despite the use of impermissible tactics. The Surrogate, therefore, properly denied the broad scope of suppression requested by the proponents.")).

44. Siegel, *supra* note 2, at § 367, at 631 (citing *Lipin v. Bender*, 193 A.D.2d 424, 428, 597 N.Y.S.2d 340, 343 (1st Dep't 1993) (dismissing case when plaintiff stole privileged documents from his adversary and made copies of them in violation of court directive), *aff'd*, 84 N.Y.2d 562, 565, 620 N.Y.S.2d 744, 744, 644 N.E.2d 1300, 1300 (1994)).

45. Horowitz, *supra* note 12, § 26.01, at 26-3.

46. *Id.*

47. *Id.* § 26.03, at 26-5 (citing *DiDomenico v. C&S Aeromatik Supplies, Inc.*, 252 A.D.2d 41, 53, 682 N.Y.S.2d 452, 459 (2d Dep't 1998)).

48. *Id.* § 26.01, at 26-3.

49. *Id.* § 26.05, at 26-10.

50. *Id.* § 26.06, at 26-12.

51. *Id.* § 26.05, at 26-10.

52. *Id.* § 26.05, at 26-11 (citing *Lisa E.G. v. Genesee Hosp.*, 48 A.D.3d 1064, 1065, 850 N.Y.S.2d 734, 735 (4th Dep't 2008) ("[P]laintiffs failed to establish that the evidence allegedly lost or destroyed by defendants ever existed.").

53. *Id.* § 26.12, at 26-23 (citing *Ortega v. City of New York*, 9 N.Y.3d 69, 82, 845 N.Y.S.2d 773, 781, 876 N.E.2d 1189, 1197 (2007) ("The complexities inherent in any multiple party negligence action would be compounded in a spoliation claim since litigation emphasizing the impact of destruction of evidence would afford the jury no reasonable means of determining how liability might have been apportioned among tortfeasors in the original litigation or of assessing [the] plaintiff's own comparative fault, if any.")); Byer's Civil Motions, *supra* note 1, at § 24:51, at 324 (citing *MetLife Auto & Home v. Basil Chevrolet, Inc.*, 99 N.Y.2d 510, 760 N.Y.S.2d 101, 790 N.E.2d 275 (2003)).

54. Siegel, *supra* note 2, § 367, at 630 (citing *Ortega*, 9 N.Y.3d at 76, 845 N.Y.S.2d at 776, 876 N.E.2d at 1192 ("New York courts therefore possess broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action . . . . Where appropriate, a court can impose the ultimate sanction of dismissing the action or striking responsive pleadings, thereby rendering a judgment by default against the offending party.") (citations omitted); *Kirkland v. N.Y.C. Hous. Auth.*, 236 A.D.2d 170, 177–76, 666 N.Y.S.2d 609, 613 (1st Dep't 1997) (holding that even though destruction of stove was unintentional, impleader claim against stove maker had to be dismissed)).

55. Horowitz, *supra* note 12, § 26.01, at 26-3; § 26.06(2)(d), at 26-14.

56. *Wetzler v. Sisters of Charity Hosp.*, 17 A.D.3d 1088, 1089, 794 N.Y.S.2d 540, 542 (4th Dep't 2005) (citations omitted).

57. *Gogos v. Modell's Sporting Goods, Inc.*, 87 A.D.3d 248, 254, 926 N.Y.S.2d 53, 58 (1st Dep't 2011) (upholding adverse inference charge for destroying videotape); *Ahroner v. Israel Discount Bank of N.Y.*, 79 A.D.3d 481, 482, 913 N.Y.S.2d 181, 182 (1st Dep't

Continued on Page 61

LANGUAGE TIPS

BY GERTRUDE BLOCK

Editor's note: Gertrude Block is taking a well-deserved break from column writing. Below are a few of our favorite pieces, culled from columns first published in 2009.

Question: I have seen the word *zeugma* and looked up its meaning, but I still do not understand it. Can you provide a better definition than this one: "Zeugma is a construction in which a word is used to modify or govern two words, often so that its use is grammatically or logically correct with only one"?

Answer: That solemn definition is not much help without some examples. Zeugma is a literary device often used for humor because of the incongruity of the examples provided. Poets have always taken advantage of zeugma for that effect. For example, the English poet Alexander Pope used zeugma (in his poem "The Rape of the Lock") to describe the English Queen Anne in these words:

> Here Thou, great Anna! whom three Realms obey,
> Dost sometimes Counsel take – and sometimes Tea."

(Note: To hear the rhyme, you have to know that in the 18th century "tea" was pronounced "tay.")

The noun *zeugma* is derived from the Greek verb meaning "to yoke." Another way to define zeugma is to call it "semantic incongruity" – the yoking of two unrelated objects by a single verb, thus providing humor. You may not find Pope's description of his Queen to be uproariously funny, but neither does it fit the solemn definition the reader quoted.

Here are some more examples:

> The robber took my advice and my wallet.
>
> Are you getting fit or having a fit?
>
> [She] went straight home in a flood of tears and a sedan chair.
> (Charles Dickens)
>
> The Russian grandees came to Elizabeth's court dropping pearls and vermin. (Thomas Macaulay)
>
> There are three faithful friends – an old wife, an old dog, and ready money. (Benjamin Franklin)
>
> After three days men grow weary, of a wench, a guest, and rainy weather. (Benjamin Franklin)

(July-Aug. 2009)

Potpourri

A newspaper headline announced, "Rising Costs Soar Prices" accurately conveying the correct information, but inaccurately using an intransitive verb instead of a transitive verb. The verb *soar* is intransitive, so it cannot take an object. (Prices can soar, but they cannot "soar" anything.) The verb *rise* is also an intransitive verb, the transitive form being *raise*. Another intransitive verb, *lie*, is being ousted by its transitive form *lay*. In today's (still incorrect) usage, you can *lay down* as well as *lay something down.*

Unlike these errors, some language errors belong in "the wrong word department," the mistakes people make extemporaneously during discussion or debate. During the long presidential campaign, one participant acknowledged, "It will take time to restore order and chaos . . . in Iraq." (Instead of the word *and*, he meant to say *from*). President George W. Bush promised, "I am mindful not only of preserving executive powers for myself, but also for my predecessors" (*successors*). And: "We cannot let terrorists and rogue nations hold this nation hostile" *(hostage*).

When a news reporter commented: "Since Dick Gephardt lost his bid for the White House, his singular mission has been to elect Democrats to the House," he probably meant to say *single*. That adjective means "one," but *singular* means "rare or deviating from the usual." And, no doubt intending to compliment President Obama, another news reporter chose the wrong word when he said, "President Obama willfully kept the tone calm." A better adjective would have been *deliberately*, for *willfully* implies obstinacy.

Errors in language like that can occur even in court decisions. Here is one.

> Plaintiff requested that a physician employed by the Navy perform a vasectomy on him. Such request was refused on the ground that it was "unofficial Navy policy" not to perform vasectomies on Naval personnel. However, it was strongly encouraged that Plaintiff's spouse undergo a tubal litigation. *Smith v. United States*, 599 F. Supp. 606, 607 (S.D. Fla. 1984).

(June 2009)

Potpourri

You may have heard the often-quoted anecdote about Hoyt A. Moore, a partner Cravath, Swaine & Moore, whose colleague once told him that the firm ought to hire more associates because the staff was overworked. "That's silly," Moore replied, "No one is under pressure. There wasn't a light on in the office when I left at 2 o'clock this morning."

This is from *Time* magazine, January 24, 1964. The story was quoted in Schrader and Frost, *The Quotable Lawyer* (1986).

(Nov.-Dec. 2009)

Potpourri

National Public Radio commentator Daniel Schorr once commented on why compound terms are so popular in print journalism. He said that journalists began to substitute compounds for verb-adverb constructions because the cost of a cablegram depended on the number of its words. Hyphenated words were counted as single words, so hyphenation could

CONTINUED ON PAGE 61

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THE LEGAL WRITER
CONTINUED FROM PAGE 59

2010) (upholding adverse inference charge after finding that destruction of evidence was either intentional or grossly negligent).

58. *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 41, 939 N.Y.S.2d 321, 328 (1st Dep't 2012) (relying on federal decision, *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003), to hold that a party must preserve emails as part of litigation hold even if the party must suspend computer system's automatic-deletion function).

59. *VOOM HD Holdings*, 93 A.D.3d at 41, 939 N.Y.S.2d at 328 (finding that defendant's failure to preserve ESI constituted gross negligence and warranted an adverse inference charge).

60. Horowitz, *supra* note 12, § 26.03, at 26-6.

61. *Id.* § 26.03, at 26-7 (citing *Sisters of Charity Hosp.*, 17 A.D.3d at 1090, 794 N.Y.S.2d at 542).

62. *Id.* § 26.09(2), at 26-19 (citing *Ingoglia v. Barnes & Noble Coll. Booksellers, Inc.*, 48 A.D.3d 636, 637, 852 N.Y.S.2d 337, 338 (2d Dep't 2008) ("The defendant's expert found that after the defendant demanded inspection of the plaintiff's computer, a software program was installed on the computer which was designed to permanently remove data from the computer's hard drive.")).

63. *Id.* § 26.10, at 26-21.

64. Siegel, *supra* note 2, § 550, at 977.

65. *Id.* § 555, at 984 (citing CPLR 3123; *but see In re Western Printing & Lithographing Co. v. McCandlish*, 55 Misc. 2d 607, 607–08, 286 N.Y.S.2d 59, 60–61 (Sup. Ct. Dutchess County 1967) (permitting bill of particulars without leave of court in special proceeding under Article 7 of the Real Property Tax Law)).

66. *Id.* § 555, at 984.

67. *Id.* § 577, at 1027.

68. Gerald Lebovits, Rosalie Valentino & Rohit Mallick, *Disclosure and Disclosure-Like Devices in the New York City Housing Court*, 37 N.Y. Real Prop. L.J. 34 (Summer 2009).

69. *Id.* at 35.

70. *Id.* at 37–39.

71. *Id.* at 35 (citing *New York Univ. v. Farkas*, 121 Misc. 2d 643, 648, 468 N.Y.S.2d 808, 811–12 (Civ. Ct. N.Y. County 1983)).

LANGUAGE TIPS
CONTINUED FROM PAGE 60

significantly cut the cost of a cablegram. Therefore, *put off* soon became *off-put*; *play down* became *down-play*; and other new compounds emerged. He recalled one editor chiding a journalist whose story was too long, "For Christ's sake, off-lay!" Schorr ended his piece saying, "This is Daniel Schorr off-signing."

(July-Aug. 2009) ■

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BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XXIX — Disclosure Motions Continued

In the last issue, the *Legal Writer* discussed motions to compel disclosure and motions for sanctions and penalties for nondisclosure. We discussed that a court need not rely on the CPLR 3126 sanction remedies in fashioning a disclosure order. A court may create an order that's "just."

The "general rule is that a court should only impose a sanction commensurate with the particular disobedience it is designed to punish, and go no further . . . . [and] to avoid a sanction which will adversely affect the interest of an innocent party."[1] Because many judges are averse to the sanctions available under CPLR 3126, judges favor creating their own orders with built-in conditions that parties must obey — also known as conditional disclosure orders.

In a conditional order, the court will sanction the disobedient party unless the party discloses the required information within a specific period of time. A conditional order might be your last chance to obey the court; if you don't comply, you'll face the court's sanction. Don't assume that the court will give you a last-chance warning by fashioning a conditional order. The court might penalize you immediately and dismiss the case.[2] Courts generally favor conditional orders, though. Some courts will issue a conditional order regardless whether the disobedient party disobeyed a court's earlier disclosure order or disobeyed a notice for disclosure.[3] But the court's sanction might be harsher if the disobedient party disobeyed the court's earlier disclosure order.[4]

Courts favor conditional orders because "the court relieves itself of the unrewarding inquiry into whether a party's resistance [to disclosure] was willful."[5] A court will find the disobedient party's behavior willful if the court "is convinced not only that the party refused disclosure in the past, but apparently will not, without judicial prodding, make it in the future either."[6]

Courts haven't been consistent about when a penalty in a conditional order takes effect. One court might apply the penalty immediately.[7] Another court might give disobedient parties a chance to explain their reason for disobeying the court's conditional order.[8]

The court might also sanction you monetarily under CPLR 3126: "The authority for a money sanction under CPLR 3126 exists independent of the general sanctions provision applicable to frivolous conduct."[9] Thus, your misconduct need not be frivolous for the court to sanction you monetarily.[10] In its order, the court might require disobedient parties to pay their adversary's costs and attorney fees "to cover the extra time and expense engendered by the unwarranted resistance."[11] Under CPLR 3126, the court may sanction the disobedient party, the attorney, or both.[12]

A court also has "the power to award monetary sanctions and costs for 'frivolous conduct' during disclosure" under Rule 130-1.1 of the Rules of the Chief Administrator of the Courts.[13] Parties, attorneys, or both, who engage in frivolous conduct are subject to sanctions under Rule 130-1.1.[14] Sanctions shall not "exceed $10,000 for any single occurrence of frivolous conduct."[15] An attorney must pay the sanction to the Lawyers' Fund for Client Protection.[16] A non-attorney party must pay the sanction to the "clerk of the court for transmittal to the Commissioner of Taxation and Finance."[17] Sanctions under 130-1.1 aren't paid to the aggrieved party or the aggrieved party's attorney.[18]

Your misconduct need not be frivolous for the court to sanction you monetarily.

A court's power to impose a money sanction is discretionary. If the court determines that resisting disclosure was an attorney's fault — and not the client's fault — the court might order the attorney to pay the sanction "out of pocket, without reimbursement at any time from the client."[19]

A court that determines whether to award a penalty, sanction, or both might "consider the nature of the disclosure transgression, who is responsible [for the transgression], whether the conduct was willful, and the extent of the prejudice, if any, to the aggrieved party."[20] Courts will balance the equities and the prejudice: the extent to which the disobedient party acted in a willful, wanton, and contumacious manner with the extent to which the party seeking disclosure was prejudiced, if at all, by the delay in obtaining disclosure.[21]

Continued on Page 56

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