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by Steven C. Bennett

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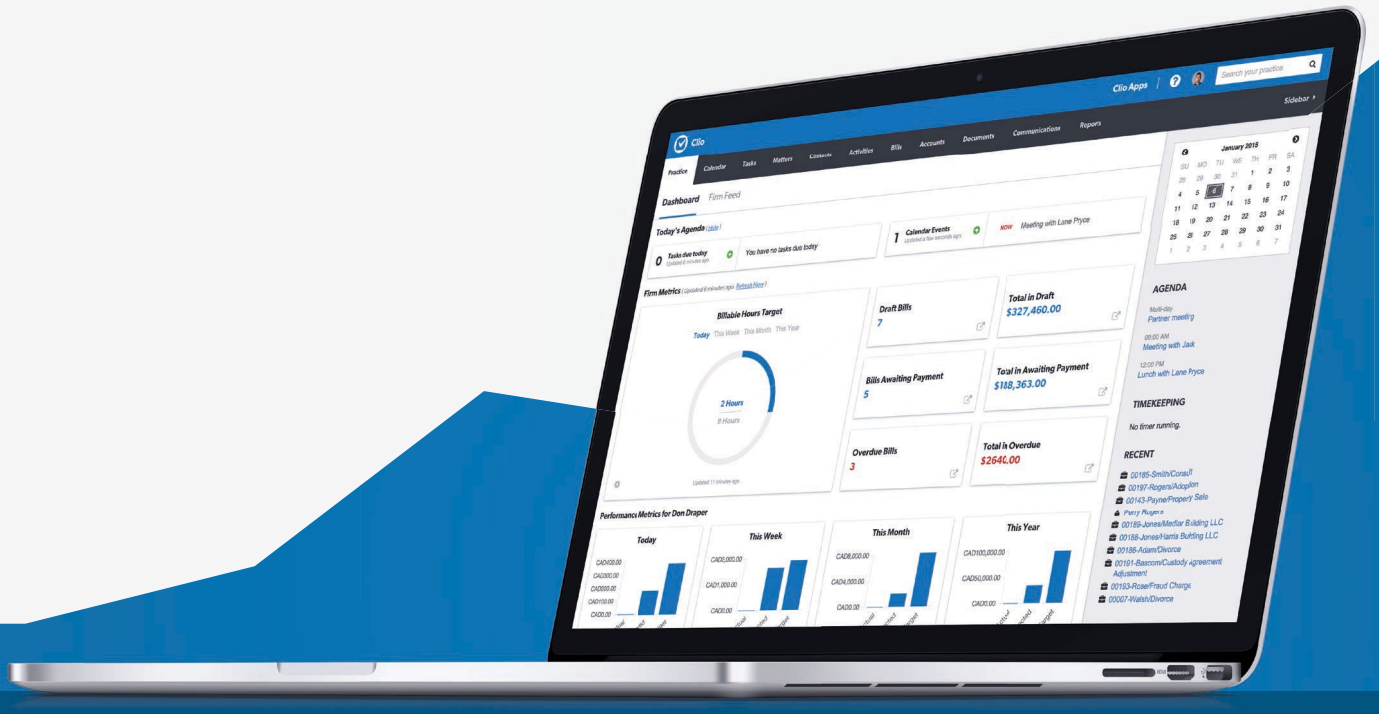

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BY STEVEN C. BENNETT

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DEPARTMENTS

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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DAVID P. MIRANDA

Say No to Nonlawyer Ownership (NLO)

The law is a treasured legacy. The bar is heir to that legacy. And we attorneys are custodians of that inheritance. It is our awesome privilege to preserve that bequest as we received it, autonomous, passionate and committed to the public interest. The solutions we forge today will paint the picture of what our profession is to become and what our legacy will be. Let then our bequest to the next generation of attorneys and to society be an independent profession, improved but undiminished, free and unfettered, respected and renewed.

NYSBA President Thomas O. Rice to ABA House of Delegates, August 1999

Early in my career, I had the good fortune and privilege of serving as the NYSBA Young Lawyers Section delegate to the American Bar Association House of Delegates. As a young attorney, I was given the opportunity to be part of discussions on important issues affecting our profession on a national level and to work with and learn from the great leaders in our New York delegation. Although my involvement with the bar association required taking precious time away from my new law practice and family, I returned from these meetings rejuvenated and proud of my profession, and excited about my career in the law.

Around that time, the ABA appointed a Commission on Multidisciplinary Practice (MDP) to study the issue of professional service firms owned by nonlawyers (NLOs) adding the provision of legal services to their mix. The ABA Commission issued a report proposing that entities owned or controlled by nonlawyers be allowed to engage in multidisciplinary practice with lawyers and that appropriate changes be made to the rules of ethics and professional responsibility. In response, NYSBA's House of Delegates adopted a resolution opposing such changes in the absence of a sufficient demonstration that these were in the best interests of clients and society and would not undermine or dilute the integrity of the delivery of legal services by the legal profession.

When the MDP report was submitted to the ABA House at its 1999 annual meeting, the New York State Bar Association, led by its then-President Thomas O. Rice, voiced its opposition to the proposal. President Rice addressed the ABA House, simply and eloquently stating that long-term independence of our profession should not be compromised for short-term financial gain. He had laid out his case in his first President's Message, published in the July-August *Journal.* In it he noted that proponents of business expansion plans cannot be permitted to make market-based proposals that allow businesses to dictate how law is practiced. Claimed increases in efficiency cannot be allowed to preempt a lawyer's duty to a client. Our highest priority must be to advance the profession's duties to society by preserving uncompromised loyalty to client interests. NYSBA and other likeminded bar associations around the country voted down the ABA Commission's MDP proposal.

Our Association also undertook a study of the issue. In 2000, the NYSBA Special Committee on the Law Governing Firm Structure and Operation, chaired by Robert MacCrate, former president of both the ABA and the NYSBA, issued its comprehensive report. The report concluded,

> Thus, we have considered and rejected the suggestion that rules against nonlawyer participation in the practice of law should be relaxed. We do so mindful of the fact that denying nonlawyers the ability to have a financial interest or otherwise to participate in law firm governance deprives lawyers of significant opportunities for financial gain. Nevertheless, we believe that it is in the public interest that lawyers forgo this opportunity.

Twelve years later, the ABA Commission on Ethics 20/20 proposed a limited form of nonlawyer ownership of law firms and the sharing of fees with firms that have offices in jurisdictions where nonlawyer ownership is permitted. After substantial opposition from many state bar associations, including ours, the proposal was withdrawn. Again our Association studied the issue, when then-President Vincent Doyle III formed a committee, chaired by past President Stephen Younger, to take a fresh look; the committee

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affirmed the findings of the MacCrate Report.

Yet, the ABA continues to pursue nonlawyer ownership of law firms. The ABA Commission on the Future of Legal Services has asked ABA delegates to adopt proposed model regulatory objectives at the ABA House of Delegates Meeting in February 2016, to "identify and implement regulations related to legal services beyond the traditional regulation of the legal profession."

If approved, the Commission would likely propose amendments to Model Rule 5.4 to allow lawyers and law firms to share legal fees with nonlawyers, who could hold a financial interest in the practice, in the delivery of both legal and nonlegal services.

We have some evidence of how nonlawyer ownership can work from a regulatory standpoint. Australia, whose practitioners are primarily small firms and solos, has set up a structure called incorporated legal practices, with each state setting up rules governing the practices in its jurisdiction. Each entity's legal practitioner director is ultimately responsible for managing the legal services provided and for reporting any misconduct by the practice, its employees or directors. It is difficult to see how well this self-reporting works because of the legal practitioner director's vested interest in the entity.

In the U.K., change came about because of a perceived lack of competition among firms and what had been called a crisis of confidence in the legal system. The U.K. established a national non-governmental regulator of all groups that regulate the legal profession. There are concerns about the top-down structure of legal regulation and the layers of bureaucracy it creates. Also, the regulations permit law shops in shopping areas, similar to tax preparation shops that proliferate in the United States during tax season.

In our own country, only the District of Columbia has allowed nonlawyer ownership of law firms. For 25 years, D.C.'s version of Model Rule 5.4 has allowed nonlawyers to hold a financial or managerial interest in a partnership with a lawyer. The nonlawyer may perform services that help the firm provide legal services to clients and must abide by the Rules of Professional Conduct. However, it is not widely used because a lawyer practicing outside of D.C. would almost certainly run afoul of rules in other states.

The ABA's latest proposal regarding nonlawyer ownership of law firms cites the need to improve delivery of and access to legal services and driving forces such as technology, globalization and market pressures. The ABA has proposed a series of "Model Regulatory Objectives" to create a framework within which the variety of types and delivery methods of legal services can be regulated.

It has been argued that any attorney with a bank loan is beholden to corporate interests, but an attorney's banker doesn't control the clients accepted or the cases pursued. Nonlawyer ownership of law firms creates a whole new set of fiduciary responsibilities, which have nothing to do with clients or their interests. Investors want to see a profit; shareholders are owed a fiduciary duty. Of course all attorneys need to make a living, but professional judgment should not be compromised by the need to hit certain quarterly goals.

The MacCrate Report still rings true. It noted that any nonlegal entity likely to be attracted to making such an investment would want to be financially dominant in the law firm, and it is reasonable "to assume that financial dominance confers control, either through outright ownership, or through the functional equivalent of outright ownership." Such investment would impose a duty on the principals of the law firm to operate it for the "financial benefit of the investors." Outside investment would create a minefield for lawyers, between legal ethics and independence on the one hand, and investors on the other. As the MacCrate Report noted, "this financial aspect of nonlawyer control of legal practice presents considerable risks to the legal system and the justice system," urging "the greatest caution" about permitting a "dominant nonlegal participant to influence the professional judgment of lawyers and to pass on matters of legal professional ethics." Even so-called passive investment in law firms is problematic. Nonlawyer owners might view "their" law firm as yet another profit center and would be less likely to encourage pro bono or public interest work because there would be no return. The financial objectives of nonlawyer management would be in perpetual competition with lawyers' professional ethics and independent judgments, which are in the best interests of legal clients and the legal system.

First and foremost, lawyers have a duty and responsibility to serve their clients. The attorney-client relationship forms an inviolable bond, and the attorney-client privilege, the hallmark of that relationship, is a seal that under the Rules of Professional Conduct cannot be broken. There simply is no such connection, no such code of professional responsibility in the business world.

We are a proud, strong, and noble profession; we are sworn in as officers of the court, part of a legal system that our society relies on for justice and fairness. Yes, our profession will change, but change should not be determined by profit-seeking entrepreneurs unencumbered by rules of ethical conduct and responsibility. It is incumbent upon us as attorneys and as representatives of the organized bar to remain guided by the Rules of Professional Conduct in our pursuit of ethical and responsible ways to use the new technologies to help us better connect with and serve our clients.

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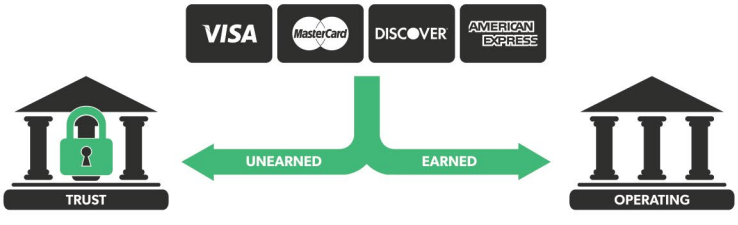

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Is America Ready for the Right to Be Forgotten?

By Steven C. Bennett

Recent developments in Europe and other countries suggest that a form of the "right to be forgotten" may become a major issue for businesses operating outside the United States.[1] The precise reach of such a "right to be forgotten" is a matter of debate. Does it mean deletion of self-posted information? Does it include deletion of subsequent re-posts and copies of information, and deletion of information about an individual but posted by a third party? One commentator suggests that the term "right to be forgotten" may be misleading as to the nature of the right, opining that a "right to erasure" of one's own data is the minimalist form of the right.[2] But will America itself ever adopt a version of this right? This article suggests that American courts, regulators and legislatures may recognize some forms of such a right, and that businesses should prepare, now, for the practical effects of the "right to be forgotten."

European Developments

In 2014, the Court of Justice of the European Union, in *Google Spain SL v. Agencia Española de Protección de Datos* (*AEPD*),[3] issued a major decision on the right to be forgotten.[4] The decision grew out of a complaint by a Spanish citizen against a Spanish newspaper and Google Spain (a subsidiary of Google USA), claiming that a 12-year-old story about the plaintiff's former financial troubles should be removed from the Internet and links to the story extinguished. The Spanish data protection authority denied the request as to the newspaper (which had lawfully published the story), but granted the request as to Google. The Court of Justice affirmed, on both points. The decision turned on the conclusion that Google Spain is subject to EU regulation, that its service "retrieves, records or organizes" data (within the meaning of the EU Data Protection Directive),[5] and that Google is thus a "controller" of data, subject to regulation under the Directive. The EU Court of Justice, moreover, held that the Directive establishes fundamental rights of privacy, including a right to expunge information that no longer serves its original purpose.

Implementation of the *Google v. AEPD* decision has proven controversial. A Google advisory group recommended, based in part on the principles of "proportionality and extraterritoriality," that the decision apply only to "de-listing" of data subject names from the local (European) version of Google's search engine.[6] The Working Party, an independent EU Advisory Body on Data Protection and Privacy, by contrast, concluded that limiting delisting to EU domains "cannot be considered a sufficient means" to satisfy the ruling. In practice, this means that de-listing "should also be effective on all relevant domains, including .com." A U.S. commentator, however, argued that data should be "subject to the laws not of where it was generated, nor written, uploaded nor processed, but to the laws of wherever it is viewed."[7]

The ruling produced thousands of requests for delisting, many of which were denied.[8] Even advocates of the

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right to be forgotten recognize that the right is not "absolute" and could be abused.[9] Because the ruling requires review of requests on a case-by-case basis, however, search engine businesses such as Google, Microsoft and Yahoo were forced to hire a large number of analysts to respond to the ruling.[10] To clarify the ruling, the EU Commission published its own "myth-busting" set of facts, countering arguments that, for example, the ruling limits freedom of expression: "The ruling does not give the all-clear for people or organisations to have search results removed from the web simply because they find them inconvenient." It noted that delisting occurred only after a process that requires balancing the right to be forgotten against "other fundamental rights, such as freedom of expression and of the media."[11] Although some claims for civil damage have resulted,[12] to date, very few rejected claims have been passed to data protection authorities.[13]

Meanwhile, the EU is in the process of considering a General Data Protection Regulation[14] to update and expand the terms of the 1995 Directive.[15] Despite the existence of the *Google v. AEPD* decision (recognizing a form of the right to be forgotten), one of the many purposes of the proposed Regulation is express recognition of such a right, giving a data subject the ability to delete personal data.[16] Negotiations on the Regulation continue. Even when agreed to by all constituents (including the European Parliament and Council of the European Union, as well as the European Commission), a two-year window of implementation will apply.[17]

Developments in Other Jurisdictions, Outside the United States

The 1995 EU Data Protection Directive has influenced enactment of data protection laws in other countries[18] and in particular has encouraged countries without traditions of data protection to enact laws based on the EU model.[19] Regional efforts at privacy protection, like the Asia-Pacific Economic Cooperation (APEC) privacy framework, have largely taken their inspiration from the EU.[20] As one commentator noted, "The principles in the EU Directive . . . have considerable influence in Acts and Bills in APEC member economies, as seen in the Hong Kong SAR, Korean and Macau SAR legislation, and bills in China and the Philippines."[21] Thus, in addition to the prospect of a European right to be forgotten applying on an extra-territorial basis (especially if a broad form of EU data protection regulation is adopted),[22] the EU view of the right to be forgotten may influence other countries to recognize similar rights.

Indeed, requests for the delisting of names and removal of content are not confined to Europe.[23] Mexican officials, for example, recently considered imposing sanctions based on an alleged failure to erase personal data from search engine results.[24] Hundreds of lawsuits have been filed in Argentina on related grounds.[25] In Brazil, legislation giving citizens a right to request removal of Internet links has been offered.[26] A court in Japan issued an order directing removal of information (later reversed on appeal).[27]

United States Developments

Although there may be broad (theoretical) support for a right to be forgotten,[28] in practice U.S. consumers appear unwilling to pay even a nominal fee to obtain such service.[29] Commentators in the U.S., moreover, vigorously debate whether a European-style "right to be forgotten" can prove successful in America. The debate has ranged from the notion that implementation of such a law would be impossible in this country because our privacy laws are not like Europe's to some who feel that the "right to be forgotten" is an idea whose time has come.[30] Despite the extremely unsettled nature of the theoretical and political bases for a right to be forgotten, U.S. legislators have already begun to take steps toward implementing such a right (at least in some limited form).

Since 2011, various forms of a "Do Not Track Kids" bill have been introduced in the U.S. Congress.[31] These bills have generally incorporated an "eraser button" element that would allow children (or their parents) to remove content. A recently introduced version[32] would direct the Federal Trade Commission to promulgate regulations that require Internet site operators to implement mechanisms that permit underage users to erase content. The bill is intended as an extension of the existing Children's Online Privacy Protection Act (COPPA).[33] To date, no national legislation of this kind has become law.

In 2013, however, the California legislature passed, and the governor signed into law, the "Privacy Rights for California Minors in the Digital World" law, known as the "eraser" law.[34] The law, which came into effect January 1, 2015, provides that any operator of an Internet website that is "directed to minors" (18 years old or younger) must permit minors to "remove or, if the operator prefers, to request and obtain removal of, content or information posted" on the operator's site by the user. The website operator must also provide notice and "clear instructions" as to the means of erasing information. Exceptions include conflicts with other federal or state law, content stored by a third party, content that has been "anonymized," failure to follow the site operator's instructions, and circumstances where the minor has "received compensation or other

consideration" for providing the content.[35] It is still not known whether the law will survive challenges in court.

The California law has received some intense criticism[36] – that, among other things, the law does not make sense and is "riddled with ambiguities" – and that it may be subject to litigation on constitutional and other grounds.[37] What the law illustrates, however, is that there is strong political support (at least in some states) for enactment of Internet protections,[38] which may include some form of the "right to be forgotten."[39] The question for American businesses is how to prepare for such regulation.

There is strong political support (at least in some states) for enactment of Internet protections.

Next Steps for American Business

The arc of development of privacy law, through courts, legislators and regulators, has been long, and complicated. Privacy law, moreover, is intimately bound up in developing cultural norms, technological improvements and evolutions in business practice.[40] For any business involved in the movement of personal data, careful monitoring of these developments is an essential first step. Participation in industry groups and subject matter associations is one basic method of keeping abreast of changes and of maintaining a voice in the regulatory process.

Businesses should periodically review their privacy policies, to ensure that they conform to existing regulations. As part of that periodic review, discussion of anticipated laws and regulations may be appropriate. Improvements in privacy practices, moreover, may be identified, based on guidelines from various sources.[41] Especially where a business is in the process of revamping some portion of its operations (due to merger, divestiture, changes in technology systems, or development of new lines of business), a review of privacy policies and practices should be on the to-do list.

Regarding the California eraser law, in particular, commentators suggest avoidance of collection of age information (to blunt the impression of targeting minors), and the creation of some manual request form for erasure (permitted under the law).[42] Online businesses may take other steps to avoid creating content that appears geared toward younger users. The law applies only to California users. Thus (in theory) a disclaimer ("not available for use by California residents") might also provide some protection. ■

1. For background on the "right to be forgotten," *see generally* Steven C. Bennett, *The "Right to Be Forgotten": Reconciling EU and US Perspectives*, 30 Berkeley J. of Int'l L. 161 (2012).

2. On the precise reach of the "right to be forgotten" *see* Jeffrey Rosen, *The Right to Be Forgotten*, 64 Stan. L. Rev. Online 88 (2012); Christian Markou, *The "Right to Be Forgotten": Ten Reasons Why It Should Be Forgotten*, in 20 Reforming European Data Protection Law, at 203 (2014).

3. C-131/12 (May 13, 2014), www.curia.europa.eu.

4. For a summary of the *Google v. AEPD* decision, see *Google Spain SL v. Agencia Espanola de Protección de Datos: Court of Justice of the European Union Creates Presumption That Google Must Remove Links to Personal Data Upon Request*, 128 Harv. L. Rev. 735 (2014).

5. *See* Directive 95/46 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1005 O.J. (L 281) (EC).

6. *See* Advisory Council to Google on the Right to be Forgotten, *Final Report* at 20 (Feb. 6, 2015), www.google.com/advisorycouncil.

7. *See* Article 29 Data Protection Working Party, *Guidelines on the Implementation of the Court of Justice of the European Union Judgment On [Google Spain v. AEPD]*, at p. 3 (Nov. 26, 2014), www.ec.europa.eu; *see also* Tim Worstall, *Google Advisory Group Has Completely Misunderstood Territoriality in the Right to Be Forgotten* (Feb. 6, 2015), www.forbes.com.

8. *See* Google response to Questionnaire Addressed to Search Engines by the Article 29 Working Party Regarding the Implementation of CJEU Judgment on the "Right to Be Forgotten," July 31, 2014 (as of July 2014, 91,000 removal requests, involving more than 328,000 URLs), www.wsj.com/public/resources; Google Transparency Report: European Privacy Requests for Search Removals, www.google.com (58.7% of requests for de-listing denied).

9. *See* Sam Pfeifle, *Contentious Nature of "Right to Be Forgotten" Hits DPC Stage* (Nov. 24, 2014), www.privacyassociation.org (quoting Joaquin Rodriguez, lawyer for plaintiff in *Google v. AEPD* case).

10. *See* Roberta Holland, *Court Data Ruling Causing Host of Compliance Issues* (Aug. 6, 2014), www.complianceweek.com (noting that Google has not automated responses to requests).

11. Myth-Busting: The Court of Justice of the EU and the "Right to Be Forgotten"(Sept. 18, 2014), www.ec.europa.eu/justice.

12. *See* Miguel Peguera, *Right to Be Forgotten: Google Sentenced to Pay Damages in Spain* (Oct. 14, 2014), www.cyberlaw.stanford.edu (attaching copy of Barcelona Court of Appeals decision, in Spanish); Mark Scott, *A Question Over the Reach of Europe's Right to Be Forgotten*, www.bits.blogs.nytimes.com (Feb. 1, 2015) (noting French court decision imposing fines).

13. *See* Duncan Robinson, *European Court Ruling: Storm Over the "Right to Be Forgotten" Rumbles On* (May 20, 2015), www.ft.com.

14. *See* European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Protection of Personal Data and on the Free Movement of Such Data (Jan. 25, 2012), www.ec.europa.eu.

15. *See* European Commission – Fact Sheet, *Data Protection Day 2015: Concluding the EU Data Protection Reform Essential for the Digital Single Market* (Jan. 28, 2015), www.ec.europa.eu (outlining benefits of proposed regulation).

16. *See* Jan Philipp Albrecht, *EU General Data Protection Regulation: State of Play and 10 Main Issues* (Jan. 7, 2015), www.janalbrecht.eu (noting need for Regulation, as "different laws and implementation have led to different data protection levels across the EU").

17. *See* John Bowman, *EU Data Protection Regulation: A Tipping Point Has Been Reached* (Nov. 7, 2014), www.privacyassociation.org.

18. *See* Paul De Hert & Vagelis Papakonstantinou, *Three Scenarios for International Governance of Data Privacy: Towards an International Data Privacy Organization, Preferably a UN Agency?*, 9 I/S: A Journal of Law & Policy for the Info. Soc. 271 (2013).

19. *See* Lee A. Bygrave, *Transatlantic Tensions on Data Privacy* (Apr. 2013), www.transworld-fp7.eu ("overwhelming bulk" of countries that have adopted data privacy laws have followed the EU model "to a considerable degree"); Graham Greenleaf, *The Influence of European Data Privacy Standards Outside Europe: Implications for Globalization of Convention 108*, 2 Int'l Data Privacy Law 68 (2012); *see generally* Lee A. Bygrave, *Data Privacy Law: An International Perspective* (2014).

20. *See* APEC, Privacy Framework at 4 (2005), www.apec.org (APEC framework is "consistent with the core values of the OECD's 1980 Guidelines on the Protection of Privacy and Trans-Border Flows of Personal Data"); *see also* Anna von Dietze, *Australian Privacy Management Framework Launched* (May 6, 2015), www.privacyassociation.org (noting recent privacy enactments in Canada, Hong Kong, France, New Zealand and New South Wales).

21. Graham Greenleaf, *Five Years of the APEC Privacy Framework: Failure or Promise?*, 25 Computer L. & Sec. Rev. 28 (2009).

22. *See* Omer Tene & Christopher Wolf, *Overextended: Jurisdiction and Applicable Law Under the EU General Data Protection Regulation* at 2 (Jan. 2013), www.futureofprivacy.org (suggesting that the proposed Regulation "marks a significant expansion of the extraterritorial application of EU data protection law").

23. *See* Trevor Callaghan, *Transparency Report: New Numbers and a New Look for Government Requests* (Dec. 22, 2014), www.googlepublicpolicy.blogspot.com (noting that Google received 3,105 requests from governments around the world to remove 14,637 pieces of content); Taier Perlman, *Disclose All Things! Access Launches Transparency Reporting Index* (Nov. 19, 2014), www.accessnow.org (noting increased availability of "transparency" reports for Internet service providers, including information on take-down requests).

24. *See* Charlie Osborne, *Mexico Debates Google Sanction Over Data Breach Protection* (Jan. 28, 2015), www.zdnet.com; *see also* Angelique Carson, *The Responsibility of Operationalizing the Right to Be Forgotten* (Mar. 12, 2015), www.privacyassociation.org (noting Mexican constitutional right of "cancellation" of information, and possibility of complaints when data controller does not comply with requests to remove data).

25. *See* Edward L. Carter, *Argentina's Right to Be Forgotten*, 27 Emory Int'l L. Rev. 23, 35 (2013) ("Argentina's courts appear willing at this point to grant celebrity plaintiffs an effective right to control use of their images online even if not broadly instituting a new right to be forgotten.").

26. Albert Gidari, Jr., *My Vote for Privacy Person of the Year* (Dec. 3, 2014) (noting PL 7881/2014, to provide Brazilians with a right to be forgotten: "It is required, by request of any citizen or person involved, to remove links from Internet search engines that make reference to irrelevant or outdated data.").

27. *See* Cheryl Kemp, *Right to Be Forgotten Spreads to Japan* (Oct. 10, 2014) (noting Tokyo District Court decision), www.thewhir.com; Tomoko Atake, *"Right to Be Forgotten" on the Internet Gains Traction in Japan* (Dec. 9, 2014), www.japantimes.com (noting Tokyo High Court decision).

28. *See U.S. Attitudes Toward the Right to Be Forgotten*, www.softwareadvice.com (2014) (61% of surveyed adults believe some form of a right to be forgotten is "necessary"); Allstate News, *New Poll Shows Americans Anxious About Privacy* (June 13, 2013), www.allstatenewsroom.com (88% of persons polled favor a federal policy to permit deletion of personal information).

29. *See* Mark Keith & Jeffry Babb, *The Right to Be Forgotten: Exploring Consumer Privacy Attitudes About the Final Stage of the Information Life Cycle* at 32 (Feb. 2015), www.ssrn.com (study shows no consumer desire to pay for privacy rights, but authors suggest that, "if consumers can be convinced that proper implementation of the [right to be forgotten] effectively mitigates a serious technology threat, they may be more willing to pay for that right").

30. *Compare, e.g.*, David Rodin, *There Is No Right to Be Forgotten*, www.huffingtonpost.com (Feb. 10, 2015) ("[T]here is no right to be forgotten. There is not even a right to be remembered fairly."); Julian Hattem, *Should the U.S. Have Right to Be Forgotten?*, www.thehill.com (May 15, 2014) ("A U.S. version of what Europeans call the 'right to be forgotten' seems impossible in this country[.]"); Victor Luckerson, *Americans Will Never Have the Right to Be Forgotten*, www.time.com (May 14, 2014) ("The U.S. has no privacy protections that even approach the broad aims of Europe's laws."); *with The U.S. Should Adopt the Right to Be Forgotten Online*, www.intelligencesquaredus.org (Mar. 11, 2015) (commentary on debate regarding right to be forgotten); John Simpson, *Restore Privacy By Obscurity*, www.usnews.com (Dec. 5, 2014) ("The right to be forgotten offers a clear path forward to help protect our privacy in the digital age.").

31. *See* Ed Markey, *Do Not Track Kids Act of 2011*, www.wsj.com (May 5, 2011); *see also Kirk, Markey, Barton, Rush Introduce "Do Not Track Kids" Act*, www.kirk.senate.gov (Nov. 14, 2013).

32. *See* S.547 – Do Not Track Kids Act of 2015, www.opencongress.org.

33. *See Congressional Privacy Bill: Do Not Track Kids Act of 2015*, www.natlawreview.com (Mar. 30, 2015) (summarizing bill).

34. California S.B. 568, leginfo.legislature.ca.gov; enacted as Cal. Bus. & Professions Code Secs. 22580–22582.

35. For a more complete summary of the California law, *see* James Lee, *SB 568: Does California's Online Eraser Button Protect the Privacy of Minors?*, 48 U. Cal. Davis. L. Rev. 1173 (2015).

36. *See, e.g.*, Gregory Ferenstein, *On California's Bizarre Internet Eraser Law for Teenagers*, www.techcrunch.com (Sept. 24, 2013) (law "doesn't make a whole lot of sense"); Eric Goldman, *California's New Online Eraser Law Should Be Erased*, www.forbes.com (Sept. 24, 2013) (law is "riddled with ambiguities").

37. *See* Signe Okkels Larsen, *New State Law Lets California Teens Erase Digital Footprints More Easily*, www.neontommy.com (Dec. 28, 2014) ("the law may not survive if challenged in the courts"); *see also* Theron Christensen & Chad Marler, *Social Media Mistakes and the California Eraser Bill*, 28 BYU Prelaw Rev. 105 (2014) (arguing that bill should be repealed).

38. *See* Eric Goldman, *California's Latest Effort to Keep Some Ads From Reaching Kids Is Misguided and Unconstitutional*, www.blog.ericgoldman.org (Oct. 4, 2013) (noting 15-plus year history of state legislatures attempting to regulate the Internet).

39. *See* Andrew McDevitt, *California Leads the Way on Children's Privacy Protection Laws*, www.truste.com (Apr. 23, 2015) (passage of California law reflects "heightened [public] awareness and concern about data privacy matters"); Paul Martino, *Inside California's New Online Privacy Law for Minors*, www.law360.com (Oct. 11, 2013) (California law "may also influence the debate over, and development of, new privacy laws").

40. For one example of developments in this area, *see* Steven C. Bennett, *Regulating Online Behavioral Advertising*, 44:4 John Marshall L. Rev. 899 (2011).

41. Various lists of "Fair Information Practices" are available. Many of these lists emphasize minimization of use of information and requirements to maintain only accurate and relevant information. Thus, these guidelines already suggest some of the essential elements of a "right to be forgotten," in certain circumstances. *See, e.g.*, Fair Information Practice Principles (FIPPS), www.nist.gov; FTC, Privacy Online: Fair Information Practices in the Electronic Age (2000), www.ftc.gov.

42. *See* Goldman, *supra* note 38.

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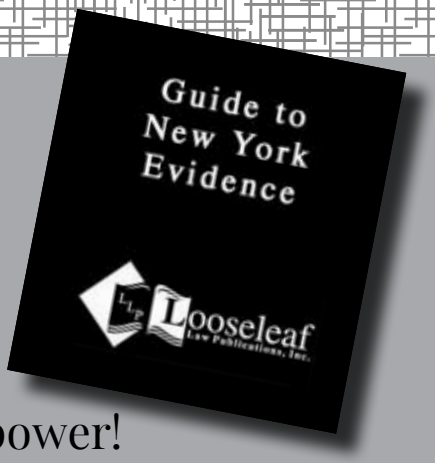

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Just Don't Do It

Introduction

Recent columns addressed the related subjects of deposition testimony that was precluded because the changes set forth in *errata* sheets were not accompanied by an adequate reason, and affidavit testimony that was precluded because it was determined to be "feigned" or "tailored." Having opined that, in some of those decisions, courts usurped the jury's role in determining credibility issues in precluding testimony, it nonetheless remains a sad fact that there are times when witness testimony, whether offered *via* affidavit or oral testimony at deposition or trial, is false. Sadder yet is the fact that some false testimony is proffered with the acquiescence, or at the direction, of counsel.

Perjury is an omnipresent element of litigation. While its prevalence may be debated, its existence cannot. Yet perjury prosecutions are rare, and disciplinary action against attorneys suborning perjury equally so.

For this reason, the December 2015 First Department decision in *In re Meltzer*[1] is noteworthy, and hopefully will serve as a cautionary tale to attorneys contemplating suborning, or acquiescing in, perjured testimony.

In re Meltzer

As all disciplinary decisions do, *In re Meltzer* begins with the date of admission and office location of the subject attorney:

> Respondent Ronald J. Meltzer was admitted to the practice of law in the State of New York by the First Judicial Department on March 26, 1990, under the name Ronald Meltzer. At all times relevant herein, respondent maintained a registered address within the First Department.[2]

This first sentence hit home. Twenty-five years, a quarter century, at the bar, roughly my own tenure, and a lawyer's career is at an end.[3] What does life look like after that? I have, on occasion, thought about what I could possibly do if I couldn't practice law anymore, and none of the possibilities were appealing.

Why did this lawyer's long legal career come to an end?

> Respondent states further that he is aware that he is the subject of a disciplinary investigation into allegations that, inter alia: in preparing his client, and his client's friend, for the client's criminal trial involving charges of driving while intoxicated, he suborned the perjury/false trial testimony of the friend by instructing him to "downplay" the number of times he met with respondent to prepare for trial in the event that he was asked such a question on cross-examination.
>
> Respondent states that his instruction to his client's friend was given about six to eight months before the actual trial; and, on June 21, 2012, at the trial, the friend testified that he and respondent met a total of three times to discuss his testimony. In fact, they met a total of five to six times. Further, the friend testified that he did not meet with respondent the night before his trial testimony when, in fact, he did. Respondent admits that he did nothing to correct the friend's false testimony, though he knew it was false at the time.
>
> Respondent states that the reason he instructed the friend to "downplay" the number of times that they met was so that it did not appear to the jury that they had rehearsed the "perfect story." Respondent avers that he always believed his client had a valid defense in that his friend was present on the night of his arrest, and that they both went to the two venues they testified about. His client was arrested, while legally parked with the engine running, in the vicinity of one of the venues. Respondent states further that he

always believed that this was a valid defense "at least up until many months after the trial when I learned that [they] had given false testimony about [the friend] being present on the night of the incident."

In addition, respondent states that he is aware that he is the subject of allegations that during the trial he knowingly made a false statement to the trial judge and the prosecutor when at a side-bar conference he falsely stated to the court that there was no written material that he was obligated to turn over to the prosecution pursuant to *People v Rosario*. In fact, respondent knew that such material existed in the form of a memorandum that he had prepared based on his conversations with his client and the friend, but he concealed its existence from the court and the prosecutor so that the prosecution could not use the document for purposes of cross-examination/impeachment.[4]

The decision highlights three separate transgressions: suborning perjury, failing to take steps to correct testimony known to be false, and making a false statement to the court and counsel.

Suborning Perjury

Suborning perjury is both a violation of the Rules of Professional Conduct, and a crime. Rule 8.4(b)–(d) prohibits conduct that constitutes dishonesty, fraud, deceit or misrepresentation, and Rule 1.2(d) provides that a lawyer cannot counsel the client to engage in illegal or fraudulent conduct. N.Y. Penal Law §§ 215.10–215.13 set forth the different degrees of witness tampering. Penal Law § 215.10 provides:

> § 215.10. Tampering with a witness in the fourth degree
>
> A person is guilty of tampering with a witness [in the fourth degree] when, knowing that a person is or is about to be called as a witness in an action or proceeding, (a) he wrongfully induces or attempts to induce such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at, such action or proceeding, or (b) he knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of such person.
>
> Tampering with a witness in the fourth degree is a class A misdemeanor.

Correcting Testimony Known to Be False

Failing to take steps to correct testimony known to be false also violates the Rules of Professional Conduct. Rule 3.3(a)(3) provides that a lawyer cannot knowingly use perjured testimony or false evidence.

In *People v. DePallo*,[5] the Court of Appeals addressed a longstanding ethical dilemma:

> A lawyer with a perjurious client must contend with competing considerations – duties of zealous advocacy, confidentiality and loyalty to the client on the one hand, and a responsibility to the courts and our truth-seeking system of justice on the other. Courts, bar associations and commentators have struggled to define the most appropriate role for counsel caught in such situations.[6]

Noting that a defendant's right to testify does not encompass the right to commit perjury, the Court held that defense counsel acted properly in balancing the competing considerations:

> In accordance with these responsibilities, defense counsel first sought to dissuade defendant from testifying falsely, and indeed from testifying at all. Defendant insisted on proceeding to give the perjured testimony and, thereafter, counsel properly notified the court.[7]

Addressing a witness's perjury in the setting of a civil deposition, 2010 N.Y. County Lawyers' Association Formal Ethics Opinion No. 741 opined:

> Perjury is an omnipresent element of litigation.

> A lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case must take reasonable remedial measures, starting by counseling the client to correct the testimony. If remonstrating with the client is ineffective, then the lawyer must take additional remedial measures, including, if necessary, disclosure to the tribunal. If the lawyer discloses the client's false testimony to the tribunal, the lawyer must seek to minimize the disclosure of confidential information. This opinion supersedes NYCLA Ethics opinion 712.

Making a False Statement to Court and Counsel

It goes without saying that making a false statement to the court and counsel violates the Rules of Professional Conduct:

Rules 1.2(e) and 4.2(b), and 3.3(a)(3) (second sentence), and Rule 3.3(c) provide that a lawyer must promptly reveal fraud to a tribunal by his client or another person unless the information is protected as a confidence or secret.

In addition, making a false statement violates Rule 130-1.1(c)(3):[8]

> (c) For purposes of this Part, conduct is frivolous if:
>
> * * *
>
> (3) it asserts material factual statements that are false.

Conclusion

As attorneys, we are required to advocate zealously for our clients, and the Court of Appeals has noted that "our

adversarial system cannot function without zealous advocacy."[9] As litigators, we want to win. If trials were like the Olympics, coming in second might be more palatable: we would have a silver medal to show for our efforts. Unfortunately, clients don't congratulate counsel on winning silver, and we lawyers often think of litigation as a zero-sum game (though often that is not the case).

In a perfect world, lawyers would universally follow the Rules of Professional Conduct because they represent the right thing to do.

However, we do not live in a perfect world, so perhaps fear of disbarment (and possible imprisonment) will accomplish the same goal. It goes without saying that Mr. Meltzer did not think to himself while in law school "one day I will suborn perjury," but somewhere along the way a line was crossed. Whatever motivation or temptation you encounter, just don't do it. ■

1. 2015 N.Y. Slip Op. 08945 (1st Dep't Dec. 3, 2015).

2. *Id.*

3. Mr. Meltzer submitted his resignation, having acknowledged "that if disciplinary charges were brought against him predicated on these allegations, he could not successfully defend himself on the merits against such charges," and the First Department Disciplinary Committee moved to accept the resignation and strike his name from the roll of attorneys.

4. *Id.* (citations omitted), n.1: "Respondent further states that on cross examination Nunez testified that he and respondent met once about two weeks before trial; and that on redirect examination he 'rehabilat[ed] [the friend] to some extent by asking him questions and having him testify that we also met a couple of times over the winter.'"

5. 96 N.Y.2d 437 (2001).

6. *Id.* at 440 (citations omitted).

7. *Id.* at 441 (citations omitted).

8. 22 N.Y.C.R.R. § 130-1.1(c)(3).

9. *Bd. of Educ. v. Farmingdale Classroom Teachers Ass'n*, 38 N.Y.2d 397 (1975).

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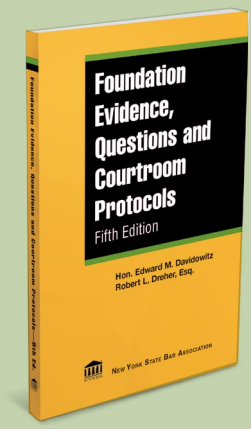

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Moments in History

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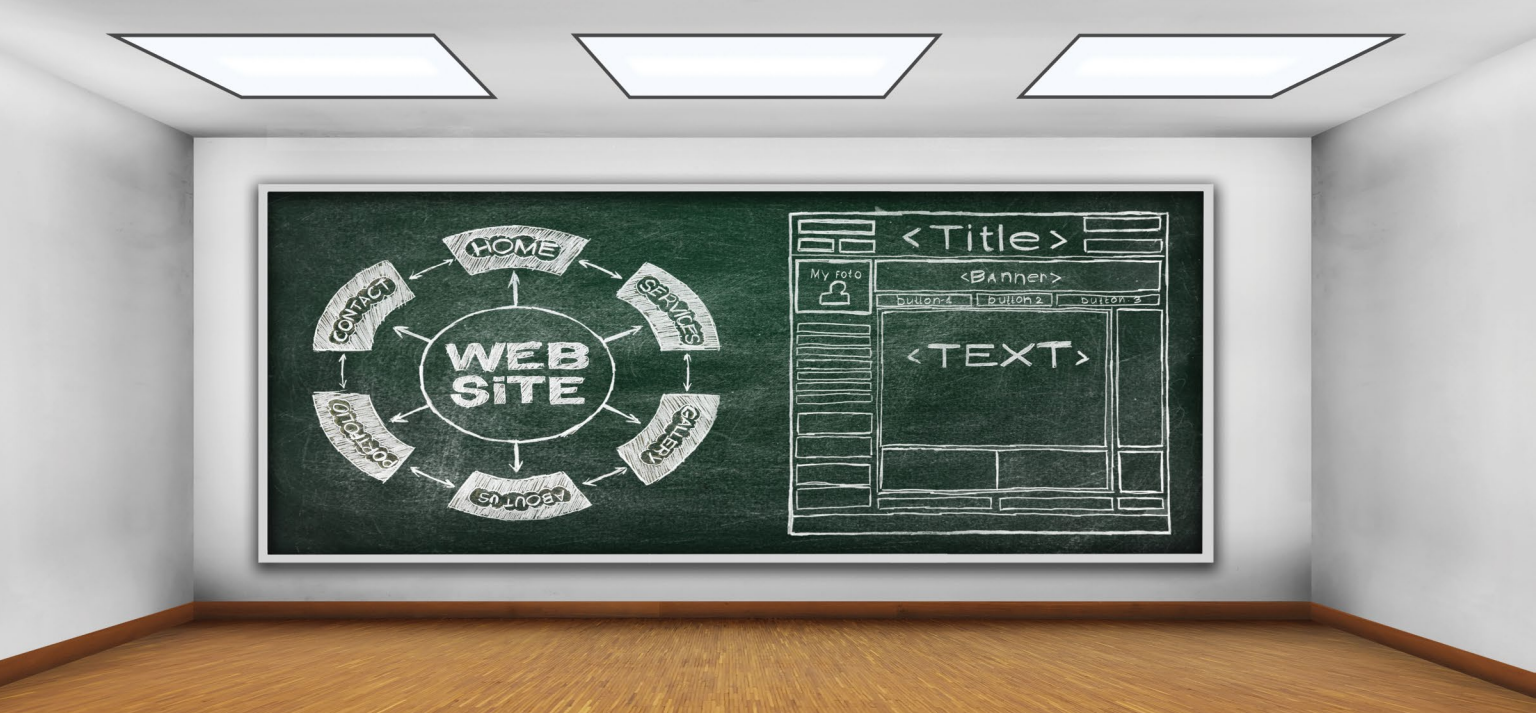

How Effective Is Your Law Firm's Website?

By Ken Matejka

How can you determine whether your website is up to the task of getting legal consumers to your law practice? Two factors to consider are: how effective is the website in getting visitors to make contact with you, and how easy is it for a legal consumer to find you on the web?

First Things First

Of course, the first step is to have a website. Every law firm needs a website. Even if you get most of your cases through referrals from colleagues, today's legal consumers will want to research you online first to make sure you have the expertise that they've been told you have. And if you don't have an extensive referral network, you need a website so consumers can find you.

So, you have a website. Now get a mobile version of your website. Every law firm needs to have a version of its website formatted properly for smartphones.

Why? More than half the Google searches worldwide are performed on a mobile device. The data for law-related Google searches (data drawn from the delivery of more than one billion law-related Google ads over the last nine years) show that today's consumer is much more likely to make contact with a law firm from a smartphone if the website is mobile-ready. And, maybe most important, Google announced in April 2015 that if your website is not formatted for mobile devices, it will be penalized in its smartphone search results, which makes it harder for legal consumers on smartphones to find you.

Now the big question: is your website (and its mobile version) doing all it can to get visitors to make contact with you?

How Do We Know if Your Website Is Doing Its Job?

There are several ways to answer this. Three good information sources will help you figure out how effective your website is as a lead generator: (1) your anecdotal data, (2) Google Analytics, and (3) Google advertising data. This is not to be confused with how good your website is at bringing in a lot of traffic. Right now we are only talking about how the existing traffic, whether it's a lot or not very much, is responding to your website.

What Is the Anecdotal Information Telling You About Your Website?

The answer to this question is partly your gut feeling and partly what people who contact you tell you. How do

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you feel about your website's performance and what are people saying?

When you ask people how they found out about you – and you always should – how often do they say "website" or "Internet" or "Google"? Anytime someone makes any reference to finding you online, that is a vote in favor of your website. If you haven't been asking people how they found you, start asking and enter the data into a spreadsheet for future reference.

For example, if someone emails you or contacts you through your website's contact form, then that's a strong vote in favor of your website. If you find people referencing your website, the Internet, or Google frequently and you receive emails through it, then that's an indicator that your website is doing its job.

If you seldom receive emails or contact form submissions from your website and no one ever mentions your website when you ask how he or she found you, that may be cause for concern. Absent any other reliable data, it may be time to start thinking about a website facelift or overhaul.

Even so, if no one ever references your website, the website may still be good. It could be that no one can find it. Evaluating the visibility of your website is a topic we briefly touch upon at the end of this article, but it's otherwise beyond the scope of this discussion.

What Is Your Google Analytics Data Telling You About Your Website?

The second way to measure the effectiveness of your website is Google Analytics (Analytics). This is a free data-gathering tool that Google makes available to anyone who wants it. The amount of data you can access through it is staggering, but we're going to focus on the analytics data that pertain to how people are responding to your website.

Note: If you do not have Google Analytics in your website or if you are not sure whether you do, please get it as soon as possible. Having this data will give you a tremendous amount of very useful information about what is working and not working on your website and, therefore, your law practice. And, again, it's free.

Analytics provides a wide variety of data about your website's traffic, including how much is coming in and where it is coming from. For our purposes here, we're using the Analytics data to see what it can tell us generally about how people are responding to your website.

Visitor Behavior

When you have the Analytics code in your website, you log in to your dashboard to get general information about what your visitors are doing once they get to your site. A lot of extremely useful data is available, but here are some of the key pieces you need to help you begin to evaluate your web presence.

The figure below shows a portion of a typical Analytics dashboard. Each category of data allows you to drill down to more specific information. For example, in the category "Users" (i.e., visitors) you can drill down to which pages they viewed or which websites they came from to get to yours.

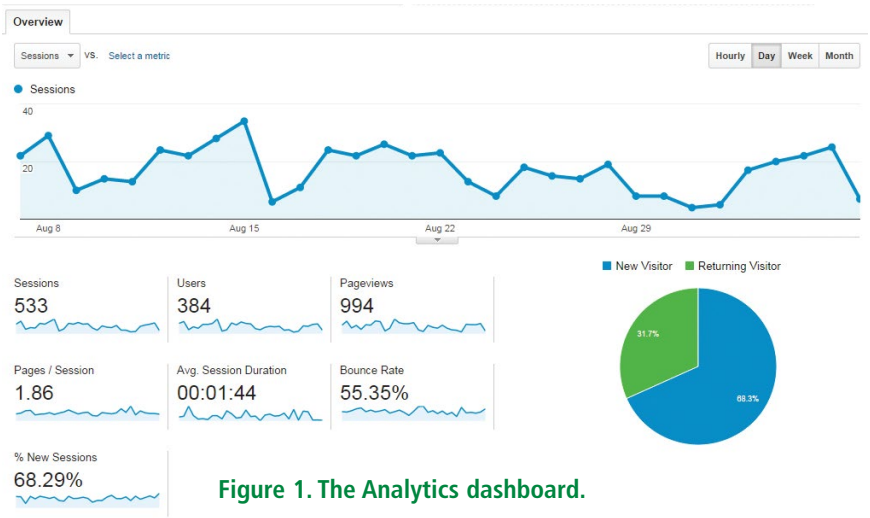

Figure 1. The Analytics dashboard.

What Does This Data Tell Us About How People Are Responding to Your Website?

The first piece of information to look at is your website's "bounce rate." A "bounce" is when someone visits your website and leaves without viewing a second page. That is to say, the visitor bounces out. Bounce rate is the percentage of people who bounce out of your website as compared to all visitors.

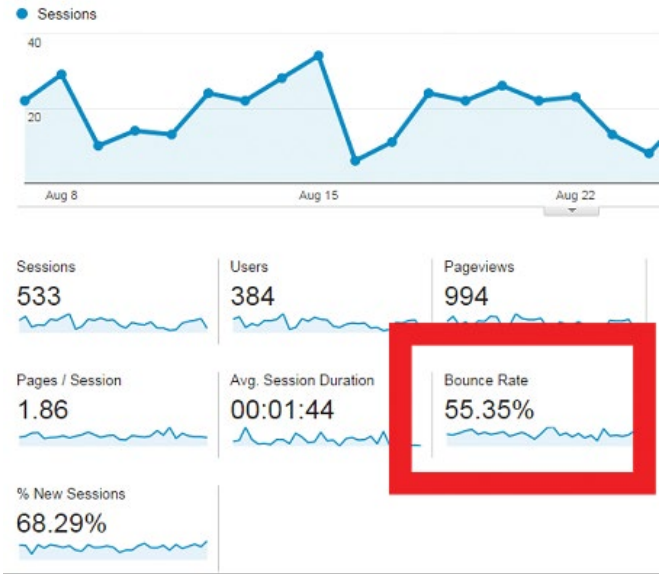

Figure 2. A website's "Bounce Rate."

Your website's bounce rate is important because it tells us how inviting people find your content. If, for example, your bounce rate is 80% that is a clear indication of problems. A bounce rate of around 50% is considered adequate. The lower your bounce rate, the better the website.

Google has said that it views a 75% bounce rate as acceptable, but that seems much too high. The 55.35% bounce rate shown in Figure 2 is good but not great.

A high bounce rate is not decisive, however. If your traffic is low-quality or robotic, then your bounce rate may be artificially high. If the bulk of your traffic is coming to your blog, that will also cause an artificially high bounce rate because people learn from your blog posts what they need, then leave your website. There are other ways to gauge the quality of your traffic, but that is beyond the scope of this article. For present purposes, use the bounce rate as one of several general factors that may indicate a good user experience or a bad one.

Other important metrics are pages viewed per session and average session duration. These tell how much of your content people are looking at and how much time they spend reading it. The more pages they view and the more time they spend, the better. Figure 3, below, shows where to find the information relating to pages per session (meaning how many pages your visitors viewed on average) and average session duration (meaning how much time on average people stayed on your website).

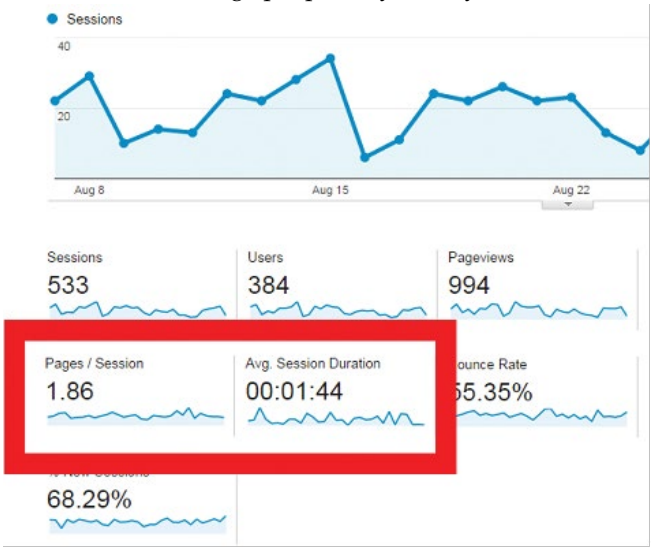

Figure 3. A website's pages per session and average session duration.

As with the bounce rate in Figure 2, above, this website's numbers in these two areas are good, not great. If your pages per session are 1.2 and your average session duration is 45 seconds, that is a sign that people are not finding your website very interesting. As with bounce rate, these are general measures, not hard and fast data, because your numbers may be artificially low depending on the quality of your traffic.

Traffic Sources for Your "Thank You" Page

If you have a page after your contact form that says something to the effect of "Thanks for your inquiry. We'll get back to you soon," then you can look at the traffic to that page to determine how often people use your contact form, which speaks to the effectiveness of your website in getting people to use the contact form. The traffic source data to that page will also tell you which of your referral sources results in the most inquiries.

You may not have a "Thank You" page, or even a contact form for that matter, in which case this isn't going to work. If you are not sure whether you have a stand-alone "Thank You" page, simply send yourself a test submission through the form and check the name of the page in the address bar at the top of your browser. If the address of the page changes in your browser, then you probably have a static "Thank You" page, and all is good. If the address doesn't change, but instead is the same address as the contact form page, then the "thank you" message is probably dynamically generated and this Analytics data will not be obtainable.

Figure 4 shows what the data could look like.

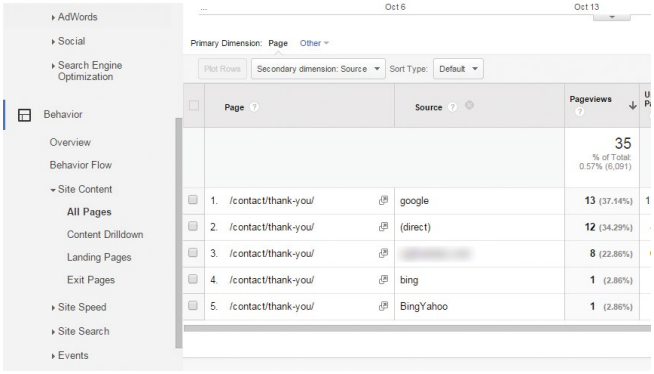

Figure 4. Traffic sources to "Thank You" page.

Figure 4 shows the various channels people use to reach this page. The only way people can view this page is by successfully filling out your contact form.

This data is useful for determining which advertising channels are leading to visitors who use your contact form, which is very important because it tells you which advertising channels are working and which are not. For example, if you are spending a lot of money on a directory listing but that directory website is not a significant traffic source to your "Thank You" page, your marketing dollars may be better spent elsewhere. Conversely, if you are spending very little on what appears to be a productive referral source, you may want to allocate more marketing dollars toward that resource.

Measuring Website Effectiveness Using Google AdWords

The most reliable data comes from Google advertising. If you have run ads in Google's Sponsored Listings and

used "conversion tracking" (more on that later), you will have very good information about how many people came to your website through one of those ads.

In Google advertising, the term "conversion" is used to describe a person making contact with you after clicking on one of your ads, usually through your contact form, or clicking to call you through a mobile device. Earlier we talked about the "Thank You" page that people see after they successfully fill out your contact form. With "conversion tracking," Google records the event when it is triggered by someone who came in through one of your ads and counts it as a conversion.

Once you have this information, look at your "conversion rate," which is expressed in AdWords as a percentage. A conversion rate of 10% means that 1 out of 10 people made contact with you after clicking on one of your ads. Depending on how competitive your practice area is and how many lawyers are advertising for the same client type, your conversion rate may change – that is, it might be a little higher for niche areas (like federal workers compensation in a rural area) and lower for highly competitive areas (like car accidents in a large metropolitan area).

What is a good conversion rate? A conversion rate of 3%, regardless of your practice area or community, is not very good and strongly indicates that your website needs a facelift or an overhaul. Conversely, if your conversion rate is 12% or better, this is a strong sign that your website is doing what it's supposed to be doing.

Figure 5, below, shows data from a Google advertising account that my firm manages for a law firm in a large southern U.S. metropolitan area. In this graphic, you will see that this law firm had 498 visitors ("clicks") for the time frame of this graph, and 98 of these visitors made contact with the law firm ("converted clicks"). In the last column, Google does the math, showing that this website causes more than 19% of its visitors to make contact with the law firm. This is an extraordinary conversion rate, indicating that people respond very positively to this law firm's website. If you have advertising data, but are not using conversion tracking, we highly recommend getting the code into your website so you can start gathering this important data.

Campaign type	Clicks	Impr.	Converted clicks	Click conversion rate
Search Network only	498	13,103	98	19.84%

Figure 5. Conversion rate.

To summarize, if the referral source information you get verbally from clients is often Internet-related, and if your Analytics and AdWords data are showing a lot of traffic to your "Thank You" page, then your website may be very good and perhaps no work needs to be done to it at this time (outside of changes to increase visibility).

If no one ever references your website and if there is never any traffic to your "Thank You" page, your website may be in trouble.

In the next section, we consider some changes to make to your website that will help it bring more inquiries from your visitors.

What to Do if Your Data Suggests That Your Website Needs Work

If there are signs that your website isn't as productive as it should be, it doesn't necessarily mean that you need to throw everything away and get a new website. An underperforming website can be improved to acceptable productivity levels by adding calls to action, tweaking the content, adding good stock photography, moving a contact form, getting a mobile version of the website in place, and the like.

What You Need to Do

Make Your Website Mobile Ready

What does your site look like on a smartphone? If you need to zoom in to read it or scroll left-to-right to see it all, then the website is not mobile-ready – and it should be.

Getting a mobile-ready website is easier and cheaper than you think. A competent web developer can create a mobile website for you without having to recreate your current website. Many hosting companies offer a mobile website set up free of charge if you host it there for about $5 per month.[1]

If your website is built in WordPress, free plug-ins are available to create a basic mobile version of your website. WPtouch is a very popular WordPress plug-in that will generate a highly functional mobile version of your website in minutes.

Appeal to Your Ideal Client

It may not be the look of your website that causes people to leave it before making contact with you. It may be how it's written.

Read your key pages, including your homepage, bio, and practice area pages. Are they merely informational, or do they speak to people on a more personal level?

If your pages are purely about the law and don't convey any particular empathy for people looking for legal help, it may not move them to reach out to you as it could.

Think about your ideal client when creating content for your website and write to that person. The tone of your website is very important, and that will depend in part on your practice area. For example, criminal defense attorneys may want to give the impression that they are passionate, tough-as-nails defenders of civil rights,

whereas Medicaid lawyers may want to describe themselves as compassionate, caring and approachable.

Also, be mindful of what people want to know. It has been found that Millennials – a group of 77 million Americans born between the late 1980s and 2000 – are more interested in why you became a lawyer and what you do to help the community than where you went to law school.

Add Testimonials and Case Results

Testimonials from satisfied clients can help visitors feel comfortable with you, and case results can give them confidence that you're the successful lawyer they've been looking for. If you don't have any testimonials on your website, see if there are good reviews of your law firm on other review sites and copy them on to yours.

Call to Action

Website visitors often need to be told what to do next. A large, colorful button saying "Contact us for a free consultation" can sometimes make a big difference. Adding contact forms throughout your website – in the same location on every page – can also motivate people to make contact with you in greater numbers.

Install Chat Software

Chat software helps your website be more productive in a few ways. First, it gives people another way to reach out to you. Second, when you're online – that is, signed in and available to chat – it lets the website visitor know there are real people behind the website with whom they can communicate if they wish.

Chat software is available through Zopim and Olark, among others. Choose a vendor, go to its website and set up an account. It will give you a code that your website content manager will need to insert into every page on the website on which you want the chat bubble to appear.

You can add a thumbnail of yourself or your logo into the chat bubble, or if you prefer, you can leave it in its default state and it will look something like the image in Figure 6.

At about $15 per user per month, it's remarkably affordable and easy to use. Keep in mind, however, that you or someone on your staff must be personally logged in to chat with people. Keeping it open in the background is simple, but you have to be ready to start a chat session when someone "pings" you.

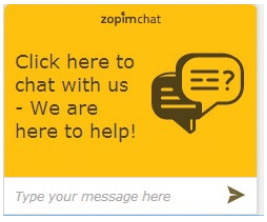

Figure 6. Zopim chat dialogue balloon.

If you'd prefer not to be on-call during business hours to chat with possible leads, there are other services that provide complete 24/7 chat coverage. ApexChat is one such provider. These vendors charge per chat session and their chat operators use a script that you can adapt to your needs. This option may be better if you can't be drawn away from your work to respond to people contacting you at random times during the day.

Use Stock Photography

If your website is underperforming, it may help to liven it up with some practice area-specific stock photography.

When selecting images for your site, avoid legal clichés like scales of justice, courthouse steps, and gavels. If you are a criminal defense lawyer, a high-quality image of a police car can resonate for many defendants. A photo of a busy highway can work well for attorneys who concentrate in DUI/DWI and/or car accidents. For family law, nothing speaks to a client like photographs of adorable children.

A vast inventory of royalty-free stock photography can be viewed and purchased at iStockPhoto or Shutterstock, usually for about $30 per image. You can sometimes find high-quality free stock photography at websites like Pixabay.com.

Translate Some or All of It to Spanish or Other Languages Spoken in Your Office

If you speak Spanish or someone in your office does (or another language spoken by potential clients in your community), you have a terrific opportunity to reach the Spanish-speaking community, especially through Google advertising. If you have a lot of content translated, Google should also reward you for it in its organic results. In many markets, this population is underserved and can be reached relatively easily, and often there is very little competition.

There are click-to-translate applications, but it's preferable to manually translate the pages and put them in a Spanish language part of your website so Google has Spanish language content to index. Link your Spanish language ads directly to Spanish language pages. When you bring someone browsing in Spanish on a translated smartphone version of your website to a Spanish language page, the inquiry rate can be as high as 20% to 30%.

I have found that the Spanish-speaking community is especially likely to use mobile click-to-call. Consequently, it is very important to have a version of your website formatted for a mobile device, and that there is a click-to-call button always visible on your website without having to scroll.

A Website Beyond Repair

If you feel that your website is beyond repair or if you're ready for a fresh look, you are lucky. There is so much competition in the website development industry that websites are getting inexpensive.

Beware of law firm website development companies that want to rent you a website and charge you $10,000 to $15,000 for the build. The reality is that most law firm websites are not that complicated. If you're a solo practi-

tioner or law firm with only a few attorneys, your website shouldn't cost more than $5,000, if that.

We strongly advise against renting your website. It is akin to renting a car that you must give back at the end of the lease term. In the long run, it's cheaper and much more efficient to own a website that you can update and change as needed.

Conclusion

Remember that you can bring thousands of visitors to a bad website and have nothing to show for it, and you can bring half as many visitors to a very good website and have a robust law practice. Make sure that you analyze your data closely and ask people how they found out about you when they contact you. Without this information, you won't know whether your website works.

There is no timeline for the website build – or facelift. It is not to be rushed, unless the lead generation is urgent. The time and care spent in developing and building your website will help ensure it is a good foundation and portal to your practice and will make the rest of the lead generation go well. ■

1. A list of hosting companies can be found at http://go.mobi/app/buy-a-gomobi-site/3563818/36/.

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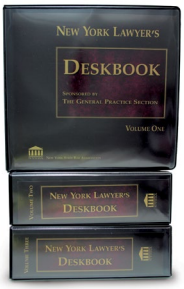

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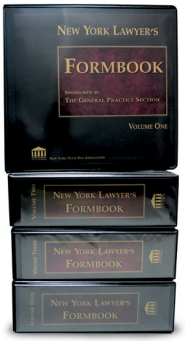

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Guiding Principles on the Discoverability and Admissibility of Social Media

By Katherine W. Dandy and Ginette M. Portera

The Internet is a very powerful litigation research tool. Attorneys who are not taking advantage of the Web to aid in the prosecution or defense of their cases are missing out on a potential treasure trove of material, and are doing their clients a disservice. These days, many people live their lives online, frequently posting photographs, comments, and even their innermost thoughts and feelings, to social media websites, or through blogs, chat rooms, or other online forums. When a litigant has an online presence, attorneys must make every effort to obtain relevant content, as it can be used in all aspects of litigation, from impeachment to assessing damages to simply getting a fuller picture of the client and/or the adverse party in a case. However, while courts will apply some of the basic principles of discovery to electronically stored information, attorneys seeking to find and use such information will face additional procedural obstacles in the complex and ever-changing world of technology. Indeed, courts are continuing to grapple with and formulate guidelines for discovery of online content such as social media records. To prepare for potential challenges to the discoverability and admissibility of material gathered from the Web, attorneys must lay the proper foundation, both during discovery and at trial.

Discoverability of Social Media

The first step in online discovery is for the attorney or the attorney's investigator or paralegal to search public websites for information concerning the other parties in the litigation. (The same holds true for the attorney's own client – it helps avoid any surprises.) Currently, some of the most popular social media sites are Facebook, Twitter, LinkedIn, Tumblr, Snapchat, and Instagram. If the adverse party has used his or her own name on the account, and not restricted access, the online research will be rather straightforward. Most social media sites, however, let users activate privacy settings, allowing only their followers or "friends" to view their postings. Attor-

Katherine W. Dandy and **Ginette M. Portera** are partners at Brown, Gruttadaro, Gaujean & Prato, PLLC.

neys cannot just demand passwords to private social media accounts as part of discovery. It is at this point in the game that the parties will likely find themselves before the court to work out a discovery dispute.

Fortunately, courts have observed that while social media websites may represent a relatively new phenomenon, the liberal interpretation of the words "material and necessary" in CPLR 3101(a) remains applicable.[1] Once a court determines that content in the accounts is material and necessary, it will balance whether production of the content would result in a violation of the account holder's privacy rights.[2] As the whole point of social networking websites is to share information, it is difficult to imagine a court would find that someone who posts to Facebook, or its ilk, has a reasonable expectation of privacy sufficient to overcome the broad scope of discovery.[3]

That said, absent some facts that the party disclosed some information about the subject matter of the pending lawsuit, the court will likely conclude that granting *carte blanche* discovery of every litigant's social media records is tantamount to a costly, time-consuming fishing expedition.[4] For example: To warrant discovery of online content, defendants must establish a factual predicate for their request by identifying relevant information in the plaintiff's social media account that contradicts or conflicts with the plaintiff's alleged restrictions, disabilities, losses, and other claims.[5] Thus, where review of the public portions of a plaintiff's MySpace and Facebook pages revealed that she enjoyed an active lifestyle and traveled out of state during the time period she claims that her permanent injuries prohibited such activity, the court concluded,

> [T]here is a reasonable likelihood that the private portions of her sites may contain further evidence such as information with regard to her activities and enjoyment of life, all of which are material and relevant to the defense of [the] action.[6]

In arguing for disclosure, attorneys should keep in mind that while it's obvious that a posting reflecting engagement in a physical activity that would not be feasible given the plaintiff's claimed physical injury would be relevant, the relationship of routine expressions of mood to a claim for emotional distress damages is much more tenuous.[7] As such, in terms of the relevance of social networking postings in cases involving claims for emotional distress damages, some courts have taken a more restrictive approach, noting that the fact that an individual may express some degree of happiness or sociability on certain occasions sheds little light on the issue of whether the individual is actually suffering emotional distress.[8] The courts are more likely to take a broader approach to discovery of social media postings where the plaintiff claims physical injury.[9]

Once the court determines that postings on the plaintiff's Facebook account are relevant, the postings will not be shielded from discovery based on the plaintiff's having restricted access to the entries by making his profile private.[10] Procedurally speaking, where counsel has demonstrated that the plaintiff's public Facebook profile contained photographs that were probative of the issue of the extent of her alleged injuries, the court may allow an *in camera* review of the private portions of the account.[11] Courts have noted, however, that *in camera* inspection in disclosure matters is the exception, not the rule.[12]

Keeping these principles in mind, attorneys need to lay the proper foundation for discovery of online content. Discovery demands for social media should be narrowly tailored, and attorneys should request only social media–based information that relates to the plaintiff's claims and/or alleged injuries, and not the party's entire account.[13] During deposition, all witnesses should be asked whether they have or have had social media accounts; whether they have posted anything about the case, their injuries, or any of the claims made; and whether anyone else has access to their accounts (for authentication purposes, discussed below). Because some people use pseudonyms on their profiles, witnesses should be asked the username on each of the accounts they have. They should also be questioned as to whether they have deactivated any social media accounts, as this must be disclosed as well.[14] Even photographs/postings from a deactivated social media site or previously deleted or archived postings/photographs may be subject to disclosure.[15] To avoid issues of spoliation, attorneys should consider sending preservation notices to the social media sites the party or witness has identified.

Potential Ethical Concerns

There are ethical considerations for attorneys to keep in mind when they are exploring social media sites and investigating a party's online presence. The New York State Bar Association issued an ethics opinion in 2010,[16] which concluded that a lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in the litigation, may access and review the *public* social network pages of that party to search for potential impeachment material. The NYSBA reasoned that obtaining information about a party, publicly available in the Facebook or MySpace profile, is similar to obtaining information available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, which is plainly permitted. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate New York's Rules of Professional Conduct (Rules).[17] On June 9, 2015, the NYSBA's Commercial and Federal Litigation Section issued Social Media Ethics Guidelines (ComFed Guidelines), a clear and concise guide to the pitfalls and ethics issues in discovery and social media.[18] ComFed Guideline No. 4.A, "Viewing a Public Portion of a Social Media Website," provides the following:

> A lawyer may view the public portion of a person's social media profile or public posts even if such person is represented by another lawyer. However, the lawyer must be aware that certain social media networks may send an automatic message to the person whose account is being viewed which identifies the person viewing the account as well as other information about such person.

For example, if an attorney searches for information on a party on the website LinkedIn, the party will be notified that the profile was viewed and given the name of the person who viewed the profile. Such conduct by an attorney may be viewed as an improper communication to a represented party and should be avoided. The same holds true for viewing a juror's social media accounts.[19]

As for the restricted (i.e., non-public) portions of a person's social media profile, the ComFed Guidelines provide that "[a] lawyer shall not contact a represented person to seek to review the restricted portion of the person's social media profile unless an express authorization has been furnished by the person's counsel."[20] Such communication is "categorically prohibited."[21]

By contrast, the ComFed Guidelines permit attorneys to request permission to view the restricted portion of an *unrepresented* person's social media profile, as long as they use their full name and an accurate profile.[22] That is, a lawyer may not create a different or false profile in order to mask his or her identity.[23] However, the lawyer is *not* required to disclose the reasons for making a "friend" request to an unrepresented party.[24]

It should be noted that the ComFed Guidelines do provide that a lawyer may review the contents of the restricted portion of the social media profile of a represented person *that was provided to the lawyer by his or her client*, as long as the lawyer did not cause/assist the client to

1. inappropriately obtain private information from the represented person;
2. invite the represented person to take action without the advice of his or her lawyer; or
3. otherwise overreach with respect to the represented person.[25]

This guideline could be particularly useful in a situation where the opposing parties to a case know each other and may be "friends" or otherwise have access to the restricted portions of a social media website.

Admissibility of Social Media

Once discovery of social media has been obtained, the next hurdle is getting the material admitted at trial. Traditional principles of authentication and foundation apply to the data obtained from the social media websites. The threshold for authentication is fairly low, both in federal and New York state courts.[26] Generally, a document is properly authenticated if a reasonable juror could find in favor of authenticity.[27] When content from websites is printed out for use at trial, the proponent of the evidence must prove that (1) it is actually a printout from the social media site it purports to be from; and (2) the posting originated from the source that the proponent claims.

Is It Actually From That Site?

The first requirement may be satisfied by a witness testifying that he or she is the person who printed the photograph or posting from the website; the witness recalls the appearance of the printout that was made from the site; and the witness recognizes the photo or posting as that printout. If such a witness is not available, then a person could testify that he or she visited the site, viewed the site and recalls its contents; viewed the printout of the photograph or posting; and that the printout accurately depicts what was seen on the site. Authentication may also be achieved if the author/photographer admits to being the one who posted a particular writing/photograph, and that what is depicted is an accurate representation of that posting. This is the same type of authentication that is needed for a photograph. Significantly, it is unlikely that Internet service provider evidence or other technical evidence will be required for authentication.

> New York courts have held that the fact that electronic communications could have been intentionally or inadvertently altered should affect the weight, not the admissibility, of the evidence.

Did the Posting Originate From That Source?

Satisfying the second prong is more complicated, however, particularly in the age of hackers. Unlike a simple telephone call or a face-to-face conversation, technology has made proving who *is* on the other end of the "line" more challenging. For example, what is referred to as a parallel or "parody" account can be created on Twitter by an individual impersonating someone else. These and other scenarios raise serious concerns about the reliability of electronically stored information. Because information on a social media page possibly could be created by anyone with knowledge of the individual at issue, the trial court may conclude there is insufficient basis to deem that the printout of the page is authenticated.[28]

In a 2014 case, the Second Circuit held that the trial court erroneously admitted a web page into evidence because it was not authenticated properly.[29] In particular, there was no evidence that the defendant even had a profile page on the Russian website in question or that the website required identity verification in order to create

a profile page.[30] The Second Circuit rejected arguments that the web page could be authenticated because it had "distinctive characteristics," noting that the information on the web page, such as the defendant's name, Skype username and employment history, was general and likely known by others.[31] The court also stated that none of the categories of self-authentication set out in Federal Rule of Evidence 902 applied to the web page.[32] Notably, the Second Circuit declined to state what would be sufficient to authenticate the web page, instead noting that authentication always depends on context. Other courts have taken different approaches. For example, the Fourth Circuit held that screen shots of Facebook pages and YouTube videos retrieved from a Google server were self-authenticating business records under Federal Rule of Evidence 902(11), when accompanied by certifications from Facebook and YouTube records custodians.[33]

Significantly, New York courts have held that the fact that electronic communications could have been intentionally or inadvertently altered should affect the weight, not the admissibility, of the evidence, as it is ultimately up to the jury to decide the reliability of evidence before it.[34] The Second Circuit has held that as long as a reasonable juror could have found that emails and transcripts of online instant-message chats represented the conversations contained therein, they were properly admitted, notwithstanding that they were "editable."[35]

To lay the proper foundation for authentication, and avoid a "fake posting" challenge, an attorney may use circumstantial evidence, such as whether the witness or party has any social media accounts; whether identity verification was required to create the profile; whether anyone else had access to the account at issue; whether the person has shared his or her social media password with anyone; and whether there is personal information (i.e., date of birth, photograph) on the page that corresponds with known information about the person to whom the proponent attributes the posting.[36] Where possible, these foundation questions should first be asked during depositions.

Conclusion

Litigators cannot and should not ignore the Internet as a valuable source of discovery regarding adverse parties, witnesses, clients, and even jurors. They do so at their clients' peril. There is a plethora of information to be unearthed with just a few simple searches and some narrowly tailored discovery demands, supported by the appropriate factual basis, to be established during depositions. The widespread use of social media sites by people of all ages and backgrounds, combined with its easy accessibility by the public, means that the proverbial smoking gun could be just a click away! ■

1. *See Fawcett v. Altieri*, 38 Misc. 3d 1022 (Sup. Ct., Richmond Co. 2013).
2. *Id.*
3. A court may conclude that there is a reasonable expectation of privacy in the one-to-one messaging option that is available through some social media accounts (such as Facebook) and limit disclosure, absent any evidence such routine communications with family and friends contain information that is material and necessary to the defense. *See Melissa "G" v. N. Babylon Union Free Sch. Dist.*, 48 Misc. 3d 389, 393 (Sup. Ct., Suffolk Co. 2015).
4. *See Pecile v. Titan Cap. Grp., LLC*, 113 A.D.3d 526, 527 (1st Dep't 2014) (vague and generalized assertions that information might contradict plaintiff's claims provides no basis for discovery of social media accounts); *Tapp v. N.Y. State Urban Dev. Corp.*, 102 A.D.3d 620, 621 (1st Dep't 2013) (argument that Facebook postings *may* reveal information contradicting plaintiff's disability amounts to request for fishing expedition).
5. *See Patterson v. Turner Constr. Co.*, 88 A.D.3d 617 (1st Dep't 2011); *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524 (4th Dep't 2010).
6. *Romano v. Steelcase, Inc.*, 30 Misc. 3d 426, 430 (Sup. Ct., Suffolk Co. 2010).
7. *See Giacchetto v. Patchogue-Medford UFSD*, 293 F.R.D. 112, 116 (E.D.N.Y. 2013) (court directed production of limited social networking postings, including "any specific references" to the emotional distress plaintiff claims she suffered or treatment she received for same, as well as postings that refer to an "alternative potential stressor").
8. *See Melissa "G,"* 48 Misc. 3d 389 (quoting *Giacchetto,* 293 F.R.D. 112).
9. *See Offenback v. L.M. Bowman, Inc.*, 2011 WL 2491371 (M.D. Pa. June 22, 2011) (certain postings reflecting that the plaintiff rode a motorcycle, possibly rode a mule, and hunted after the alleged accident were relevant).
10. *See Patterson*, 88 A.D.3d 617; *Richards v. Hertz Corp.*, 100 A.D.3d 728 (2d Dep't 2012); *Romano,* 30 Misc. 3d 426 (just as relevant matter from a personal diary is discoverable, social media–based information that relates to the negligence, injuries, or claims alleged in an action is discoverable, even if the service's privacy settings were used).
11. *See Richards*, 100 A.D.3d 728; *Imanverdi v. Popovici*, 109 A.D.3d 1179 (4th Dep't 2013); *Nieves v. 30 Ellwood Realty LLC*, 39 Misc. 3d 63 (App. Term, 1st Dep't 2013) (*in camera* inspection appropriate course since it is possible that not all Facebook communications are related to the events giving rise to plaintiff's cause of action).
12. *See Melissa "G,"* 48 Misc. 3d 389.
13. *See Kregg v. Maldonado*, 98 A.D.3d 1289 (4th Dep't 2012).
14. *See Forman v. Henkin*, 2014 WL 1162201 (Sup. Ct., N.Y. Co. 2014).
15. *Id.*; *see also Romano*, 30 Misc. 3d 426; *Jenkins v. TD Bank*, 2013 WL 5957882 (Sup. Ct., Nassau Co. 2013).
16. NYSBA Comm. on Professional Ethics, Formal Op. 843 (Sept. 10, 2010).
17. Rule 8.4 prohibits deceptive or misleading conduct. Rule 4.1 prohibits false statements of fact or law. Rule 5.3(b)(1) imposes the responsibility on lawyers for unethical conduct by non-lawyers acting at their direction.
18. The report can be found on the NYSBA website at http://www.nysba.org/socialmediaguidelines/.
19. ComFed Guideline No. 6.B.
20. ComFed Guideline No. 4.C.
21. *Id.*
22. ComFed Guideline No. 4.B.
23. *Id.*
24. New York City Bar Ass'n, Formal Op. 2010-2 (2010).
25. ComFed Guideline No. 5.D.
26. *See U.S. v. Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007).
27. *Id.*
28. *See U.S. v. Vayner*, 769 F.3d 125 (2d Cir. 2014) (despite State Department security agent testifying that he retrieved data personally from website, because defendant may not have created or controlled the profile page at issue, even though it contained his name and photograph, court concluded document was not properly authenticated).
29. *See id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *U.S. v. Hassan*, 742 F.3d 104, 132–33 (4th Cir. 2014).
34. *See Gagliardi*, 506 F.3d 140; *U.S. v. Tropeano*, 252 F.3d 653, 661 (2d Cir. 2001).
35. *See Gagliardi*, 506 F.3d 140.
36. For example, the social media site Tumblr only requires an email address to set up an account.

New York Environmental Laws Affecting Commercial Leasing Transactions

By Larry Schnapf

This is the second of three articles discussing environmental laws affecting commercial leasing transactions. The first installment appeared in the May 2015 issue of the Journal.

New York Inactive Hazardous Waste Disposal Site Law

Under the State Superfund (SSF),[1] the New York State Department of Environmental Conservation (NYSDEC) is authorized to establish a registry of sites contaminated with hazardous waste.[2] The NYSDEC must notify owners of sites that are proposed to be placed on the registry. Owners or operators of sites that are listed on the registry may petition the NYSDEC to have the site de-listed or to have the classification changed. The NYSDEC is required to convene an adjudicatory hearing within 90 days of receiving a de-listing petition and provide at least 30 days' notice of a scheduled hearing. The NYSDEC is required to issue a ruling within 30 days after the hearing.[3]

If the NYSDEC determines that a site poses a "significant threat" to the environment, it may order the owner of the site and/or any other person responsible for the disposal of the hazardous waste to develop a remedial program acceptable to the NYSDEC and to implement the remedial program.[4] However, the NYSDEC cannot issue a cleanup order until after the alleged responsible party is provided with a hearing. Moreover, a party who has been issued an order after an administrative hearing may seek judicial review of that decision.[5] If the NYSDEC cannot identify or locate the responsible person, the agency may implement the remedial action.

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The categories of potentially responsible parties (PRPs) under the SSF are similar to those under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) since PRPs include anyone who might be liable under a statutory or common law liability scheme. The SSF has the same third-party and innocent landowner defense, but no bona fide protective purchasers (BFPP) or contiguous property owner (CPO) protections. However, because the NYSDEC does not have authority to seek cost recovery under the SSF, the agency and private parties use CERCLA and common law theories of liability to seek reimbursement of their response costs.

If the NYSDEC determines that contamination at a site poses a significant threat and therefore is eligible for listing, a purchaser/lessor of the site might be able to defer the listing by enrolling the site in the state Brownfield Cleanup Program (discussed below). However, this must be done before a final listing decision is made.

New York Oil Spill Law

Petroleum-contaminated sites comprise the largest category of contaminated sites in New York. Indeed, there are approximately 15,000 to 20,000 new petroleum spills each year in New York. Because of the number of sites that are potentially subject to article 12 of the Navigation Law,[6] the Oil Spill Law may be the most significant source of liability to owners and operators of commercial properties in New York.

The Oil Spill Law prohibits the unpermitted discharge of petroleum into the waters of the state or onto land from which the petroleum might drain into state waters.[7] Dischargers of petroleum are strictly liable without regard to fault for all cleanup and removal costs, as well as direct and indirect damages.[8] The statute does not define the term "discharger" and the courts have broadly interpreted the term so that it has been applied to owners and possessors of land. However, mere ownership of contaminated land is not enough, by itself, to impose liability on a property owner.[9]

The NYSDEC is authorized to clean up discharges of petroleum and may enter contaminated property without first obtaining a warrant or other court order.[10] Usually, the NYSDEC will first offer the alleged discharger an opportunity to implement a cleanup by entering into a short-form Stipulation Agreement (STIP); the party does not admit liability and will not be assessed any penalty. If the discharger declines to enter into the STIP, the NYSDEC may commence formal administrative proceedings to require clean up and collect fines for failure to report or to clean a contaminated site. Frequently, these cases are settled using a traditional consent order but the settling party will have to pay fines, which can be significant.[11]

For more complex remediation projects, the NYSDEC may require the responsible party to enter into a long-form consent order. The long-form order is drafted to address site-specific issues, and its terms are subject to negotiation. While the STIP will address only the cleanup portion of a spill site, the long-form order may address other aspects of the situation, including possible fines and/or penalties.

Some cases have held liable as dischargers owners who unwittingly purchased property with abandoned underground storage tanks (USTs) that had previously leaked.[12] The leading case on liability of lessors under the Navigation Law is *State v. Green*.[13] This case involved a discharge of oil from a 275-gallon aboveground storage tank (AST) owned by a tenant at a mobile home park. In holding the lessor liable for the cleanup costs, the N.Y. Court of Appeals ruled that a landowner could be liable as a discharger where it had both control over activities occurring on the property and reason to believe that its tenants would be using petroleum products. The Court found that the owner of the trailer park had through its lease the ability to control potential sources of contamination on its property, including the maintenance of a 275-gallon AST, and that the owner's "failure, unintentional or otherwise, to take any action in controlling the events that led to the spill or to effect an immediate cleanup renders it liable as a discharger."

In *State of New York v. Speonk Fuel Inc.*,[14] the Court of Appeals reaffirmed that liability may be imposed on property owners not just for active conduct, but also based on their "*capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill.*"[15] As a result, the court found Speonk liable as a discharger because it knew about the spill, but failed to clean it up.

A number of appellate courts have held lessors liable for tanks operated by their tenants under a "capacity to control" analysis even in the absence of any evidence that the lessor caused or contributed to the discharge.[16] Other courts have found that lessors may be owners of the USTs since they become trade fixtures, usually after tenants have vacated the premises. Many of these cases tend to involve former gas stations.[17] At least one court has held lessors liable even when they were not aware of the existence of the USTs or failed to remediate the contamination after purchasing the property and discovering the contamination.[18]

Dischargers are required to report any unauthorized spills of petroleum within two hours of discovery to the NYS Spill Hotline.[19] The NYSDEC spill reporting regulations also impose reporting obligations on the owner or operator of the facility where the spill occurred, as well as the person who was in actual or constructive control of the petroleum.[20]

A "faultless landowner" who is liable as a discharger simply because of its status as the owner of the property impacted by the discharge may seek contribution.[21] Innocent parties may also seek reimbursement from the Oil Spill Fund. However, lessors or tenants who are considered dischargers may not obtain reimbursement from

the Oil Spill Fund even if they paid more than their fair share of the cleanup costs. Claims for reimbursement must be made within three years after discovery of the damage and no later than 10 years after the incident.[22]

The Navigation Law also authorizes the state to file a lien against the land where the discharge took place when the Oil Spill Fund incurs costs to clean up or remove a discharge or makes payment to satisfy claims asserted by injured parties and a landowner fails to make payment within 90 days of a demand. The lien is a non-priority lien that does not subordinate previously perfected security interests.[23]

Petroleum Bulk Storage Act

The Petroleum Bulk Storage Act (PBSA)[24] complements the Oil Spill Law. Like the federal UST program, owners and operators of USTs and ASTs with a combined storage capacity of 1,100 gallons of petroleum are required to register their tanks and to comply with certain design and operational standards and requirements, as well as closure requirements.[25]

For purposes of determining if a property is subject to the PBSA program, heating oil tanks that have capacities of less than 1,100 gallons are not counted. Thus, a property with three 500-gallon heating tanks would not be subject to the PBSA, even though the total storage capacity of the tanks is 1,500 gallons.

The PBSA imposes reporting obligations on "any person with knowledge of a spill, leak or discharge" of petroleum that exceeds 25 gallons or creates sheen on nearby surface water.[26] While this reporting obligation was traditionally viewed as applying only to parties who own or operate facilities that store more than 1,100 gallons of petroleum, an administrative law decision extended the reporting obligation to environmental consultants.[27] Reporting obligations for smaller facilities are governed by the Oil Spill Law.

If the NYSDEC suspects or believes that a UST is leaking, it may order the owner to perform a tightness test. If the owner fails to conduct the test within 10 days, the NYSDEC may conduct the test and seek reimbursement of its reasonable expenses.[28]

USTs that are temporarily out of service (30 days or more) must be drained of product to the lowest draw-off point. Fill lines and gauge openings must be capped or plugged, and inspection and registration must continue. Those tanks that are permanently out of service must be emptied of liquid, sludge and vapors. The USTs that are permanently out of service must then either be removed or, if left in place, tanks must be filled with solid, inert material such as sand or concrete slurry. The NYSDEC must be notified 30 days prior to filling or removal.

The performance and operating standards for regulated USTs under the PBSA program are considerably more extensive than those for ASTs. However, the rules for classifying a tank as a UST or AST are quirky. A tank located in a building basement or on a below-grade floor that is encased in a vault that does not have any "weep holes" or a manway, so that the tank cannot be observed, will be considered a UST. Owners and operators of such tanks would be subject to the full panoply of UST requirements under the PBSA regulatory program, such as periodic tightness testing. Thus, it is particularly important to ensure that tanks in commercial buildings are properly registered.

Nassau, Suffolk, Rockland, Westchester and Cortland Counties have been authorized by the NYSDEC to administer the program for tanks located in those areas. Because these counties may have more stringent requirements than the state, owners and operators should contact the county to learn of specific local requirements.

> Petroleum-contaminated sites comprise the largest category of contaminated sites in New York.

The NYSDEC PBSA program has some odd rules for heating oil tanks as well. Regulated PBSA tanks that are out of service for more than one year must undergo closure. However, unlike the federal UST program, the NYSDEC PBSA program does not require an environmental assessment to close heating oil tanks. The tank has to be cleaned out and visually inspected for holes but soil or groundwater samples are not ordinarily required to achieve closure of heating oil tanks unless there is visual evidence of a leak. Thus, it is possible that a heating oil tank that was closed in place and obtained regulatory closure by the NYSDEC may have impacted the property. Accordingly, it is advisable for purchasers and prospective tenants of property with abandoned heating oil tanks to review the closure documentation to see if sampling was conducted. In the absence of such documentation, the purchaser should consider conducting its own sampling since the purchaser could be strictly liable under the state Navigation Law if an abandoned tank that was closed in place has impacted the environment.

Brownfield Cleanup Program

The Brownfield Cleanup Program (BCP) is the state's voluntary cleanup program.[29] Applicants may include current property owners, prospective purchasers, devel-

opers and tenants. There are two types of applicants and the applicant category influences the potential scope of the cleanup.

A "volunteer" is an applicant that is not responsible for the contamination. This could include purchasers, new tenants and developers. It could also include existing owners or tenants provided that they did not cause or contribute to the contamination. Applicants that would be considered "responsible parties" would be accepted as "participants." The key distinction between a "volunteer" and a "participant" is that the volunteer is required only to clean up on-site contamination, while participants have to remediate off-site, as well as on-site, contamination. The ability to confine the cleanup to the brownfield site is an extremely important benefit since it not only limits the cleanup costs but also helps eliminate uncertainty about the ultimate costs of cleanup since parties can develop worst-case scenarios on the volume of soil that would have to be removed from a site.

An important benefit of the BCP is that applicants receive a no further action letter known as a Certificate of Completion (COC), after they complete a NYSDEC-approved cleanup. The COC contains a covenant not to sue from the State of New York that runs with the land and will also provide contribution protection.

The tax credits available under the BCP (discussed below) were scheduled to expire at the end of 2015. The looming sunset meant that existing applicants had to obtain a COC by the end of the year to be able to claim the BCP tax credits.

After several unsuccessful efforts, Governor Andrew Cuomo and the Legislature were able to reach an agreement on sweeping reforms to the BCP as part of the 2015–2016 budget agreement.[30] The legislation, which took effect on July 1, extended the BCP for 10 years, curtailed the tax credits available to applicants and amended the definition of a brownfield site. The changes to the calculation of the tax credits and eligibility for certain tax credits do not apply to applicants that were accepted into the BCP prior to the July 1 effective date.

Under the 2015 amendments, current applicants will be grandfathered under the existing BCP tax credit framework, provided they comply with one of the following COC deadlines: Applicants who were accepted into the BCP prior to June 23, 2008, must obtain their COCs by December 31, 2017, while applicants accepted after that date and before the July 1 effective date of the changes will have until December 31, 2019, to receive COCs.

Applicants that receive a notice of acceptance between July 1, 2015 and December 31, 2022, will have until March 31, 2026, to obtain their COCs. Existing applicants who fail to obtain COCs by the applicable date for their project will not be terminated but will be treated as though they were accepted after July 1 and will be subject to the new tax credit framework.

What Is a Brownfield Site?

The newly revised definition of a brownfield site is now any real property with contamination that requires remediation. An applicant must demonstrate that a site has contamination in excess of applicable NYSDEC standards based on the reasonably anticipated use of the property. Applicants will have to include at least a Phase 2 assessment (e.g., soil or groundwater samples) to establish the presence of contamination requiring remediation. It is unclear if the applicant or the NYSDEC will be the final arbiter of what is the reasonably anticipated use.

Sites may be accepted into the BCP where the contamination is from a source on the property or where the groundwater beneath the property or contaminated vapors in the soil are migrating from an off-site source. However, the applicants of such sites will not be eligible for the tangible property tax credits, though they will be able to claim the site preparation tax credit (discussed below).

Sites will not be eligible for the tangible property tax credit where the property was previously remediated under a NYSDEC remedial program, and the site could be developed for its then-intended use. It is unclear how this provision will be interpreted in circumstances where, for example, a prior cleanup achieved a commercial level of cleanup and the applicant would like to enroll the site in the BCP to perform an unrestricted residential cleanup to support a multi-family development.

Sites that are already subject to an enforcement order are not eligible for the BCP. This prohibition does not apply to petroleum-contaminated sites with STIPs. Effective July 1, sites that were on the state Registry of Inactive Hazardous Wastes Sites (state Superfund list) or were under the federal Resource Conservation and Recovery Act (RCRA) may be eligible for the BCP where the site is owned, or under contract to be purchased at the time of the application, by a volunteer, and the NYSDEC has not identified a responsible party with the ability to pay for the investigation or cleanup of the site. The new RCRA exemption should be particularly useful for abandoned RCRA-regulated properties in upstate or western New York, as well as downsized RCRA-regulated facilities, by allowing portions of these sites subject to RCRA permits to be sold to developers.

Brownfield Tax Credits

In addition to liability protections, the BCP offers the most generous tax credits in the country. The Brownfield Tax Credits (BCTs) are refundable, so to the extent that the credits exceed the applicant's tax liability, the credit is treated as a tax overpayment and the state will issue a check. Applicants can claim three types of tax credits.

The first tax credit is known as the Site Preparation Cost (SPC) credit. Applicants accepted into the BCP prior to July 1, 2015, are entitled to two categories of SPC credits. The first category includes those costs necessary to qualify the site for a COC, while the second category

includes those costs incurred to prepare the property for development. Thus, for grandfathered sites, the SPC includes not only cleanup costs but also demolition, soil excavation, scaffolding, support of excavation and dewatering expenses. Depending on the cleanup track achieved, applicants may claim between 28% and 50% of their SPCs and five years of groundwater remediation costs.

Because of the perception that excess SPCs were being claimed for excavation and foundation costs unrelated to contamination (e.g., excavating clean dirt to make room for subgrade parking), the 2015 amendments to the BCP program severely curtailed the eligible SPCs to only those expenses necessary to implement a site investigation or remediation, or to otherwise qualify for a COC. These changes apply to applications accepted on or after July 1. For example, if a site has five feet of contaminated soil but the soil is excavated to a depth of 15 feet to accommodate the development, it is conceivable that the state Department of Taxation and Finance (DTF) will take the position that only the expenses related to excavating the first five feet of contaminated soil will be eligible for SPC treatment. Furthermore, eligible SPCs will include only foundation costs required as to construct a cover system (e.g., engineering controls).[31]

The change in the SPC definition will not only reduce the amount of SPC tax credits that an applicant may claim, but it will also serve to reduce the SPC cap for a site since the costs used to calculate the 3x cap will be reduced.

The amendments also clarify that costs for abatement of asbestos-containing building materials, lead-based paint or PCBs in existing buildings qualify for the SPC tax credit. In addition, SPCs can be claimed for up to five years after issuance of a COC for costs of implementing institutional and engineering controls, an approved site management plan, and an environmental easement.

The second, and arguably the most generous, BTC that is available is the qualified tangible property (QTP) tax credit, which ranges from 10% to 24% of the value of the improvements constructed on the brownfield site, subject to a cap of $35 million or three times the site preparation costs, whichever is less. For sites accepted after July 1, applicants will be eligible for an extra 5% for affordable housing projects as defined by the NYSDEC, sites located in Environmental Zones (En-Zones),[32] sites located within a Brownfield Opportunity Area (BOA) where the development conforms to the plan for a BOA certified by the Department of State, and sites used primarily for manufacturing activities. Applicants (or their transferees) will have up to 120 months after the issuance of a COC to place a building into service (i.e., obtain a Certificate of Occupancy) and claim the QTP credit.

In order to curtail some applicants' claiming costs of artwork and furniture for hotels or rental property, the 2015 amendments limit QTPs to tangible property with a useful life of at least 15 years. QTP-eligible costs now expressly include demolition and foundation costs that are not included in the SPC component, as well as costs associated with non-portable equipment, machinery and associated fixtures and appurtenances used exclusively on the site, regardless of their depreciable life for federal income tax purposes.

The 2015 BCP amendments eliminate the QTP as an "as of right" credit for BCP sites in New York City. After July 1, applicants for NYC sites have to satisfy one of the following criteria to be eligible for the QTP credit:

- at least half of the site is located in an En-Zone;
- the property is an "affordable housing" project;
- the property is "upside-down" – the projected remediation costs are at least 75% of the appraised value of the property at the time of the application. The appraised value must be based on an "as if" hypothetical assumption that the property is not contaminated. It should be noted that while there are a variety of ways to calculate property value (e.g., income stream, cost to repair and comparison sales), the law does not specify which approach is to be used; or,
- the property is "underutilized."

The definition of an "affordable housing" project was not defined in the statute. Instead, the NYSDEC was required to propose a definition, which was published in the June 10 issue of the *State Register*. Unlike the "underutilized" definition, the NYSDEC was not required to adopt the "affordable housing" definition by a specific date. Although the definition has not been finalized, the NYSDEC did not receive significant adverse comments to its proposed definition. Applicants of affordable housing projects may elect to use the proposed definition if they want a determination that they qualify for the "affordable housing" gate.

The term "underutilized" was also not defined in the legislation. Instead, the NYSDEC was required to publish a definition in the *State Register* by July 1, 2015, after consultation with New York City and the business community, and the rule had to be adopted by October 1, 2015. The NYSDEC's proposed definition was very narrow and the agency received numerous negative comments. As a result, the agency is in the process of revising the underutilized definition.

While the NYSDEC is making eligibility determinations for NYC sites, the agency cannot yet make any determination if the project qualifies for the underutilized gate since the definition has not been adopted. In other words, an applicant may be accepted into the BCP but it will not learn if it qualifies for the underutilized gate until the NYSDEC finalizes its rule. Since the NYSDEC failed to adopt the underutilized definition by the October 1 deadline, it is quite possible that the QTP changes are not in effect and that the QTP remains "as of right" for NYC sites.

The final tax credit available for post-COC groundwater monitoring costs is at the same percentage of the SPC credit. This credit may be claimed annually for the five-year period following the issuance of the COC.

Prior to the 2015 amendments, BCP applicants had been eligible to receive two additional types of tax credits: (1) credits against eligible real property taxes based on the number of jobs at a brownfield site and (2) environmental remediation insurance credits. These two credits are no longer available for sites accepted after July 1. However, grandfathered applicants can still claim them.

The potential for BCP eligibility raises a number of issues in commercial leasing transactions.

BCP Eligibility and Commercial Leasing

The potential for BCP eligibility raises a number of issues in commercial leasing transactions. The challenges are different for a new lease, where the parties contemplate submission of a BCP application, as opposed to an existing lease, where the tenant may want to take advantage of the BCP to help finance building renovations or expansions.

The first question is, Who can claim the tax credits? Remember that only the party that actually incurs eligible costs and is named on the COC may claim the BCP tax credits. The lessee would be the logical party for submitting the application if it is going to be incurring the costs of the project.

However, as explained below, because the applicant has to obtain the consent and cooperation of the property owner at several stages in the BCP process, the lessor may have leverage to seek to participate in the BCP tax credits. The lessor can participate in the BCP tax credits; this can be accomplished in a number of ways. The parties can submit a joint application so that both the lessee and lessor sign the Brownfield Cleanup Agreement (BCA). If the lessee has already submitted the BCP application and executed the BCA, the lessor can be added to the BCA by filing a BCA amendment – but only before the COC is issued. Finally, the application could be submitted by a joint venture of the lessor and lessee, or by an entity in which the lessor owns or purchases membership interests.

Since a Phase 2 assessment will have to be included in the BCP application, a new tenant considering applying to the BCP will have to negotiate the right to collect soil and groundwater before it takes possession of the premises. If acceptance into the BCP will be a condition to entering into the lease, this work may have to be scheduled several months before the commencement date of the lease because of the time it takes for an application to be accepted by the NYSDEC.

If the cleanup does not achieve an unrestricted residential standard, the NYSDEC will require the use of institutional and engineering controls. These controls will be memorialized in an environmental easement that must be executed and recorded by the lessor. The environmental easement must be recorded before the NYSDEC issues its COC. If the lessor refuses to execute or record what amounts to use restrictions on its fee, the lessee/BCP applicant will have to implement a more costly unrestricted cleanup to obtain a COC. Thus, the lease should contain a covenant requiring the lessor to cooperate and execute any documents required by the NYSDEC in connection with the BCP.

When the applicant does not own the land, the NYSDEC will require that the applicant have access to the site to implement all requirements of the BCP. The tenant can demonstrate access by either having the access set forth in the lease or through a separate access agreement. Obviously, the standard environmental contingency clause that prohibits the tenant from notifying the NYSDEC of the sampling results will be inadequate. For existing leases and long-term ground leases that were executed before the potential for a BCP application was contemplated, a separate access agreement is likely the easiest route for satisfying this requirement.

There is an important cautionary note about including the property owner on the application or the BCA. If the NYSDEC considers the lessor to be a responsible party, this could expand the scope and complexity of the cleanup. The reason is that if an application is jointly submitted by a "volunteer" applicant (i.e., the tenant) and a participant (property owner), the application will be treated as one submitted by a participant and the BCA would identify the applicants as participants. As explained previously, this means that the applicants would have to address any off-site contamination that may be emanating from the site. Thus, the lessor status should be considered and discussed with the NYSDEC before including the lessor in the application or on the BCA.

Of course, the reverse situation could also occur where there is a purchaser but also an existing lessee who would be considered a participant – likewise, if a seller wants to participate in a proposed brownfield application by a purchaser.

BCP-EZ Program

The BCP-EZ program is directed toward the swift remediation of lightly contaminated sites. The BCP's remediation requirements mandate extensive public participation, which often leads to longer project completion

times and substantially higher costs. While this can be a reasonable tradeoff in exchange for generous BTCs, some may, for various reasons, prefer to instead obtain the liability protection provided by COCs. Because of this, the BCP amendments authorize, but do not require, the NYSDEC to establish a streamlined cleanup program for parties that are willing to waive tax credits – the BCP-EZ program. Cleanups under this program must still satisfy set minimum requirements, but the NYSDEC is permitted to waive certain public participation requirements and, under certain circumstances, allow applicants to petition for more permissive cleanup standards. The NYSDEC hopes to promulgate rules for the BCP-EZ in 2016. It is anticipated that the Voluntary Cleanup Program (VCP), administered by the New York City Office of Environmental Remediation (OER), will serve as the BCP-EZ program for NYC sites. The OER VCP will be discussed in the next installment of this series.

Hazardous Waste Program Fee Waiver

Urban fill material often contains metals and other contaminants that are unrelated to any on-site spills but are associated with the source of the fill material (e.g., coal ash). New York State law imposes a program fee on parties that generate and dispose of hazardous waste,[33] some of which can be substantial, running into the hundreds of thousands of dollars. The program fee is in addition to the costs for disposing of the hazardous fill material.

The hazardous waste program fee was intended to incentivize manufacturers to reduce the use of hazardous substances in their operations. However, the NYSDEC has applied the fees to parties that have excavated contaminated urban fill material that qualifies as hazardous waste. While there was an exemption for cleanups conducted under the SSF program or the BCP, many projects excavating fill material had not enrolled in any NYSDEC remedial programs when they learned the soil had to be managed as hazardous waste, since they thought the site was not contaminated. As a result, they unexpectedly found themselves having to pay a significant program fee. In addition, sites remediated under the OER VCP or "e" designation program were not covered by those exemptions.[34] The 2015 amendments extend the hazardous waste program fee for waste generated in connection with cleanups enrolled in OER VCP. However, the waiver does not apply to sites generating hazardous waste as part of cleanups to comply with the "e" designation program.

Vapor Intrusion Disclosure Law

Vapor intrusion refers to the vertical or lateral migration of volatile organic compounds (VOCs) from soil or groundwater into buildings. In extreme cases, these vapors can accumulate at levels that create immediate safety hazards (such as explosions), illness, or aesthetic problems (such as odors). More typically, however, when VOC vapors migrate into buildings, the levels are much lower, creating the more insidious risk of chronic health problems arising from long-term exposure. The contaminants that typically pose a risk of vapor intrusion are chlorinated solvents, like those used in dry cleaners; benzene from gasoline; naphthalene from heating oil; and mercury.

Urban fill material often contains metals and other contaminants that are unrelated to any on-site spills but are associated with the source of the fill material.

Historically, the NYSDEC focused primarily on soil and groundwater contamination and did not regard vapor intrusion as a significant potential risk unless VOC contamination occurred directly next to an occupied building or directly below its foundation. Therefore, the NYSDEC remediation programs usually focused on reducing soil or groundwater contamination, or at least eliminating pathways by which such contamination could reach people.

The regulatory landscape changed a few years ago after the NYSDEC discovered significant levels of VOCs in residences near a number of contaminated sites. The NYSDEC subsequently announced that it would re-evaluate up to 721 sites across the state where cleanups had been considered complete. In addition, both the NYSDEC and the New York State Department of Health (NYSDOH) have issued guidance on evaluating the vapor intrusion pathway.

Title 24 of the ECL[35] requires responsible parties remediating a site under the state Superfund program or another remedial program to give landowners copies of air contamination reports. Originally, this law did not require property owners to disclose those reports to tenants and occupants. In 2008, the law was amended to require landlords to disclose to existing and prospective tenants "test results" received from responsible parties indicating levels in excess of NYSDOH or federal Occupational Safety and Health Administration (OSHA) guidelines for indoor air quality. The disclosure statute does not distinguish between residential and commercial property.

Within 15 days of receiving an "air contamination report" from the responsible party, the property owner must provide a fact sheet (generic fact sheets are to be

developed by NYSDOH) identifying the contaminant of concern and a means to obtain more information, as well as timely notice of any required public meetings to be held to discuss such results. In addition, if a tenant requests a copy of the test results and any closure letter, the property owner must provide the documents within 15 days of receipt of such request.

If a property has an "engineering control" in place to mitigate indoor air contamination, or a monitoring program as part of a continuing remediation program, the property owner must provide the same notice. The property owner must do this before a prospective tenant signs any "binding lease or rental agreement."

In addition, a property owner subject to the disclosure obligation must include a disclosure notice in rental or lease agreements for the location and must include the following language in 12-point boldface type on the first page of any lease or rental agreement:

> NOTIFICATION OF TEST RESULTS The property has been tested for contamination of indoor air: test results and additional information are available upon request.

A property owner that violates the disclosure requirement could face general criminal or civil penalties provided by the ECL. If the indoor air contamination is determined to create an imminent and substantial endangerment, the property owner could face injunctive relief as well as fines of up to $2,500 for each violation and $500 per day for each day it continues. If the property owner becomes a responsible party under the state Superfund law, the violations could cost as much as $37,500 per day.

The disclosure law does not require property owners to conduct their own tests or to perform any retesting. In cases where test results did not use actual indoor air samples but instead were extrapolated using modeling based on soil or groundwater samples, a property owner may (but also may not) want to take samples to confirm that air within the building complies with applicable guidelines.

The vapor intrusion disclosure law does not seem to apply if a property owner unilaterally discovers air contamination problems such as from public records or transactional due diligence. Of course, the property owner might have disclosure obligations under other environmental laws or the common law. Moreover, a violation of the new statute might serve as evidence of breach of duty in a negligence action against the property owner.

To avoid liability to its own tenants, the property owner might need to take abatement measures to prevent vapors from migrating into its building. When the vapors are migrating from an off-site source or the current owner is not considered a responsible party, the owner will not typically be required to remediate the contaminated soil or groundwater but simply to have a vapor venting system installed to capture the fumes and redirect them into the outside air. These venting systems can be relatively inexpensive if installed as part of new construction. Retrofitting an older building can be more challenging and expensive, though. If the responsible party is subject to a federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or SSF order, it will often be required to install the venting system. For voluntary cleanups, though, the property owner would have to install the system and then decide if it wants to try to recover the costs from a responsible party in a CERCLA contribution or cost-recovery action, or common law theory. Alternatively, the owner could try to treat the costs of the venting system as operating expenses for purposes of operating expense escalations in its leases. Whether tenants will accept that may represent another issue entirely.

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1. N.Y. Environmental Conservation Law (ECL) §§ 27-1301 *et seq*.

2. There are five classifications of sites on the SSF list: The sites are to be classified as follows: Class 1 (poses an imminent danger of causing irreversible or irreparable damage to the public health and the environment. Immediate action is required. The only Class 1 site that was assigned this designation was the infamous Love Canal site); Class 2 (poses significant threat to public health or the environment. Action is required. This is equivalent to the federal NPL); Class 3 (does not present a significant threat to public health or the environment. Action may be deferred); Class 4 (site properly closed but continued management is required); and Class 5 (site is properly closed and there is no evidence of present or adverse impact so no further action is required).

3. ECL § 27-1305(4)(d).

4. ECL § 27-1313(3)(a).

5. ECL § 27-1313(4).

6. Navigation Law §§ 170–197.

7. Navigation Law § 173.

8. Navigation Law § 181.

9. The same third party defense contained in CERCLA and the SSF was added to the Oil Spill Law in 2003. However, state courts have not had an opportunity to address this defense.

10. Navigation Law § 176.

11. Indeed, some apartment buildings have paid fines in excess of $1 million for failing to promptly report and clean up spills from heating oil tanks.

12. *State v. Tartan Oil Corp*., 219 A.D.2d 111 (3d Dep't 1996); *White v. Regan*, 171 A.D.2d 197 (3d Dep't 1991); *State v. King Serv. Inc*., 167 A.D.2d 777 (3d Dep't 1991).

13. 96 N.Y.2d 403 (2001).

14. 3 N.Y.3d 720 (2004).

15. *Id*. at 724 (emphasis added).

16. Subsequent cases finding lessors liable as dischargers based on sufficient control. *See In re Huntington & Kildare*, 89 A.D.3d 1195 (3d Dep't 2011); *State of N.Y. v. C.J. Burth Servs*, 79 A.D.3d 1298 (3d Dep't 2010); *State of N.Y. v. LVF Realty Co.*, 59 A.D.3d 519 (2d Dep't 2009); *State v. B & P Auto Serv. Ctr., Inc.*, 29 A.D.3d 1045 (3d Dep't 2006); *State of N.Y. v. Dennin*, 17 A.D.3d 744 (3d Dep't 2005); *Roosa v. Campbell*, 291 A.D.2d 901 (4th Dep't 2002).

17. *Veltri v. N.Y. State Office of the State Comptroller*, 81 A.D.3d 1050 (3d Dep't 2011); *Golovach v. Bellmont*, 4 A.D.3d 730 (3d Dep't 2004); *310 S. Broadway Corp. v. McCall*, 275 A.D.2d 549 (3d Dep't 2000).

18. *Sunrise Harbor Realty, LLC v. 35th Sunrise Corp*., 86 A.D.3d 562 (2d Dep't 2011).

19. 1-800-457-7362. The reporting requirement does not apply to spills that meet all of the following criteria: (i) The quantity is known to be less than 5 gallons; (ii) the spill is contained and under the control of the spiller; (iii) the spill has not and will not reach the state's water or any land; and (iv) the spill is cleaned up within two hours of discovery. Navigation Law § 175.

20. N.Y. Comp. Codes R. & Regs. tit. 17, pt. 32.3 (N.Y.C.R.R.).

21. Navigation Law § 181(5).

22. Navigation Law § 182.

23. Navigation Law § 181-a. The notice of lien is indexed in the same manner as a lien under Lien Law § 10. An action to vacate an environmental lien is governed by Lien Law § 59, and should not be brought as an Article 78 proceeding. *Art-Tex Petroleum, Inc. v. N.Y. State Dep't of Audit & Control*, 93 N.Y.2d 830 (1999).

24. ECL § 17-0101, "Control of the Bulk Storage of Petroleum."

25. 6 N.Y.C.R.R. pts. 613, 614.

26. 6 N.Y.C.R.R. pt. 613.8.

27. *In re Middletown Kontokosta Assocs., Ltd.*, NYSDEC Case No. R1-6039.

28. ECL § 17-1007(2).

29. ECL §§ 27-1401 *et seq.*

30. 2015 N.Y. Laws ch. 56.

31. Eligible costs include those related to engineering and environmental consulting costs, legal costs, transportation and disposal of contaminated soil, remediation measures taken to address contaminated soil vapor; cover systems consistent with applicable regulations; physical support of excavation; dewatering and other work to facilitate or enable remediation activities; sheeting, shoring, and other engineering controls required to prevent off-site migration of contamination from the qualified site or migrating onto the qualified site; and the costs of fencing, temporary electric wiring, scaffolding, and security facilities until such time as the certificate of completion has been issued.

32. An En-Zone is a census tract with a poverty rate of at least 20% and an unemployment rate of at least one and one-quarter times the statewide unemployment rate based on the most recent five-year American Community Survey (ACS) or areas with a poverty rate of at least two times the poverty rate for the county in which the areas are located based on the most recent five-year ACS.

33. ECL § 72-402.

34. ECL § 72-0402(1)(d). These will be discussed in the next part of this series.

35. ECL § 27-2405.

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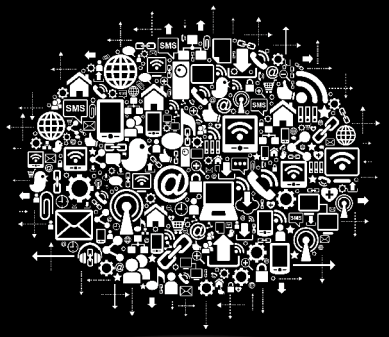

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Sticks and Stones Will Break My Bones but Whether Words Harm Will Be Decided by a Judge

By Mary Noe

While walking home from middle school Sara posted on Yik Yak, a social media site available on cell phones, that Susan, another sixth grader, was fat, ugly, gay and had AIDS. The posting spread like wildfire. The next day Susan's parents demanded the school principal take action against Sara. The school has a policy against cyberbullying but the principal hesitated before disciplining the student because her speech may be protected by the First Amendment.

Courts have struggled with the clash between students' exercise of free speech and a school's authority to discipline students' speech. The only Supreme Court case on students' free speech rights, *Tinker v. Des Moines Independent Community School District*,[1] gave us a pre-Internet standard. For today's students who use the Internet to create speech off school property, the Supreme Court standard is clumsy and difficult to apply. The result has been confusing and conflicting lower court opinions.

The 1969 Supreme Court Standard

In 1969, the Supreme Court carved out some free speech rights for elementary and secondary school students. A review of the facts of that case raises questions as to whether this case is still relevant.

Tinker concerned six students, ages 8 to 15, who, in 1965, wore armbands to school to protest the Vietnam War. The protest against the war was planned by the students' parents, who were paid for their anti-war efforts.

At school, the students were directed to remove the armbands or be suspended. The students refused. The students brought an action against the school in federal district court to enjoin the suspension. The district court denied the students' request. The Eighth Circuit, en banc, affirmed the district court, by an equally divided court, and did not issue an opinion.

The Supreme Court decided that students do not surrender their First Amendment rights when they open the door of the school. The Court applied a standard of whether the students' actions materially and substantially interfered with the education of other students, finding that hostile remarks to the students and disputes in class did not substantially interfere with educating students. The majority also stated that for school officials to prohibit students' speech or expression, there must be

more than "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[2]

Student's Speech Outside of School

The problem for schools today is not students protesting in school but instead a student posting vicious comments about another student off school property. How wide of a net did the Supreme Court intend to cast when it carved out the students' First Amendment rights? Can a court apply the substantial disruption standard in school when the speech occurred off school premises? The following is a survey of cases that seem to confuse rather than clarify.

The 1979 case of *Thomas v. Board of Education, Granville Central School District*[3] concerned a group of middle school students who created a satirical publication that was "conceived, executed, and distributed" outside the school. The paper addressed the school community and included such topics as masturbation, prostitution, and attacks against classmates and teachers. The only connection to the school was the students' occasional use of school typewriters; unknown to others the newspapers were stored in a teacher's closet. The school disciplined the students, and the students brought an action against the school. The Second Circuit was clear about its findings: school administrators could not punish students for expression that principally took place off school property.

Fast forward 32 years to 2011, when, in *Kowalski v. Berkeley County Schools*,[4] the Fourth Circuit struggled to apply the Supreme Court's decision to speech created outside of the school premises.

The facts of the case were as follows: while at home, a high school senior created an online group targeting another student at her school.[5] The web page was called "S.A.S.H.," an acronym for "Students Against Sluts Herpes" or possibly "Students Against [student's name] Herpes." One hundred "friends" were invited to post comments. One student uploaded a picture of the targeted student with red dots on her face to simulate herpes and a sign near her pelvic region that read, "Warning: Enter at your own risk." Another student posted the student's face with the caption, "Portrait of a whore." After an investigation, school administrators found the website in violation of the school policy against "harassment, bullying, and intimidation." The student who created the page was suspended from classes for five days, prevented from attending certain school events for 90 days and suspended from the cheerleading squad for the remainder of the year.

The student brought an action against the school district asserting that the school violated her First Amendment rights.

The district court granted summary judgment to the defendant school stating that the defendants could legitimately take action against the student because her webpage invited others "to indulge in disruptive and hateful conduct which caused an in-school disruption."[6]

Kowalski – Disruption Standard Extended

On appeal, the Fourth Circuit first examined whether the student's actions actually caused a disruption in school. There was no actual disruption, but after examining the words the court concluded that the student's website *must have* interfered and disrupted the school educational environment.

This court's stray from actual disruption was not the first time a court applied a somewhat different standard: disruption inferred. In 2008, in *Doninger v. Niehoff*, the Second Circuit had extended the actual disruption standard to foreseeable disruption,[7] holding that a school need not wait for the disruption to occur in school but instead can infer that the student's speech "would foreseeably create a risk of substantial disruption within the school environment."[8]

Nexus Standard – The School and Speech Outside of School

In addition to the disruption standard, the Fourth Circuit in *Kowalski* addressed the Supreme Court standard of speech that occurs in school in relation to the fact that the speech was created outside of school. The Supreme Court has not ruled on whether there could be a nexus between out-of-school speech and in-school consequences, but the Fourth Circuit decided there was a nexus between the website created out of school and the target school. The Fourth Circuit relied on a Second Circuit case decided in 2007, *Wisniewski v. Board of Education of Weedsport Central School District*,[9] which found a nexus between the school and speech outside of school.

Wisniewski concerned an eighth-grader who, in using instant messaging (IM) with other IM "buddies,"[10] created a violent icon of a teacher with a gun pointed at his head and blood dripping. The Second Circuit did not address the "true threat" of the violent icon,[11] but it decided that although the student's speech was created wholly off the school premises there was "a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school.'" Although the court cites to the disruption, it implies the nexus.

The Fourth Circuit relied on *Wisniewski* to explain how electronic devices such as computers and smartphones satisfy the nexus requirement not by a geographic or physical connection but instead by connecting the student who created the website and the school students or faculty who are the target of the communication. If the targets of the speech are students at school, said the court, then the nexus has been established.

Students' Vulgar Speech

Vulgar or offensive speech of students has been prohibited since the Supreme Court addressed such an issue in 1986 in *Bethel School District No. 403 v. Fraser*.[12] There, the Court found vulgar speech was contrary to a school's mission to educate students about "habits and manners of civility."[13] Once again the issue arose when the vulgar speech occurred outside of school and targeted a student in school.

> The problem for schools today is not students protesting in school but instead a student posting vicious comments about another student off school property.

In *Kowalski*, the Fourth Circuit found the "S.A.S.H" website language to be vulgar as described by the Supreme Court in *Fraser*[14] and extended the Court's decision regarding vulgar speech within the school to include vulgar speech created outside of the school building.[15]

Substantial Disruption Defined

The Supreme Court standard that speech must cause a substantial disruption in school has posed just as many problems for the courts as students' speech spoken outside of school. What can be considered substantial disruption in school? It is a subjective standard.

J.C. ex rel. R.C. v. Beverly Hills Unified School District, a California case, concerned a malicious attack made on a middle-school student in a video created by another student. Despite that, the district court did not find there was a substantial disruption or a foreseeable disruption in school.[16]

The facts of the case are these: In 2008, outside of school, a group of middle-school students created a video targeting a classmate – calling her a "slut" and "spoiled," talking about "boners," and using profanity during the recording.[17] The video was posted on YouTube. One student contacted five to 10 other students to view the video, and the student creator notified the student who was the subject of the video. The video had 15 viewers and 90 "hits." At school, 10 students discussed the video. The next day the student came to school with her mother. The student spoke to a counselor for approximately 25 minutes and the counselor convinced the student to go back to class. There was no evidence that any student had accessed the video at school.

The district court acknowledged that "[o]ne court has held that a substantial disruption requires something more than 'a mild distraction or curiosity created by the speech' but need not rise to the level of 'complete chaos.'" The court found that no reasonable jury would conclude there was a substantial disruption of education at school or a foreseeable risk of disruption in this case.

S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District, an Eighth Circuit case from 2012, concerned a website accessed by students in school, which "caused considerable disturbance and disruption."[18] The facts of the case were as follows: twin brothers created a website with a blog. The purpose of the blog was to discuss, satirize, and vent about school events. The site was not password-protected. The website posts contained a variety of offensive and racist comments, as well as sexually explicit and degrading comments about a particular female classmate, whom they identified by name. The website also mocked black students. The school district's computer records showed students had been on the website while at school. The twins were suspended for 180 days and allowed to enroll in a different school.

While both the district court and the Eighth Circuit found that the website caused "considerable disturbance," they had differing opinions as to the appropriateness of the school's penalty. The district court sent the students back to school claiming the students would be irreparably harmed by staying out of school. However, the Eighth Circuit reversed the district court's decision and reinstated the suspension, finding no irreparable harm to justify the injunction.

Student Speech That Attacks School Officials

The cases discussed above considered communications between students. However, the courts have applied the same substantial disruption standard when students' words attack school officials. In a pre-Internet era, students would whisper to each other and make nasty comments about the principal or a teacher. Today, that speech is often posted on a website or social media site and made available for the entire community to read.

Unfortunately, two Third Circuit cases provide little clarity and more confusion on whether these communications are protected.

In the first case, *Layshock v. Hermitage School District*,[19] the district court, the Third Circuit panel and the Third Circuit en banc were in agreement and found a student's speech was protected.

In the 2010 *Layshock* case, a high school student created a website containing a bogus profile of the school principal, using the principal's picture from the school's web page. The profile portrayed the principal as a drug and alcohol user, contained sexual innuendos and listed his interest in "transgender."[20] Students were able to access the website at school. The school disciplined the

student-creator with a 10-day, out-of-school suspension, placement in an Alternative Education Program for the remainder of the school year, a ban from all extracurricular activities, and a ban on participation in the graduation ceremony. The student filed a complaint against the school district under a federal civil rights statute, 42 U.S.C. § 1983, alleging that school officials deprived him of his First Amendment rights.

The gates have been opened and the cases continue to stream through the courts.

The district court found that the school had violated the student's First Amendment rights because there was no substantial disruption of the school environment and no nexus to the school. A Third Circuit panel affirmed and the Third Circuit en banc[21] found the student's speech was protected. Applying the substantial disruption standard, the en banc court refused to find a nexus between the student's home-created website and the school. This decision conflicts with the Fourth and Second Circuit decisions that have found a nexus between the creator and the school if the target is the school, or someone at the school, despite its creation outside of school.

In the second Third Circuit case, *J.S. v. Blue Mountain School District*,[22] just one year later, the student's language was more egregious and the attack on the school principal was worse. Both the district court and Third Circuit panel found the speech was not protected. But the Third Circuit en banc reversed and found the speech protected.

J.S. concerned an eighth-grade student who created a personal profile of the school principal on a social media website, including a picture of the principal taken from the school's website. The profile presented the principal as bisexual and possibly a pedophile. It made degrading sexual comments about him and added a slur about the principal's wife.[23] The website was password-protected so that only "friends" could access it.

The district court found the student's speech was not protected because of the prohibition against use of lewd and vulgar language in school.[24] Therefore, the school could discipline the student without a finding of disruption at school. The court found a nexus to the school because the website's subject was the principal and his picture had been taken from the school's website; the target audience was students at the school; a printout of the website was brought into school; and there was discussion in school about the website.

The district court distinguished this case from the prior Third Circuit case based on the level of vulgarity and the crude nature of the website stating, "[T]he facts of our case include a much more vulgar and offensive profile."

The Third Circuit panel affirmed, but for different reasons. It did not review the lewdness standard but instead found that there was a "reasonable possibility of a future disruption." The panel stated, "Particularly disturbing were the profile's references to pedophilia" and that the students "embarrassed, humiliated, belittled, and possibly defamed" the principal. The court found a nexus existed because it is foreseeable that it "threatens to cause a substantial disruption of or material interference with a school."

The Third Circuit sitting en banc reversed the panel with eight judges in the majority and six judges dissenting.[25]

The majority court viewed the website as vulgar, absurd, juvenile "humor" with viewing limited to the creators' friends and not to the larger school community. The website did not identify the principal or school by name, although it contained his photograph. The website was blocked by school computers and therefore could not be viewed at school. There was some talk in class but it did not rise to a disruptive level. The court determined there was no evidence the principal's reputation was tarnished and refused to extend the standard of prohibiting lewd speech in school to student's speech outside of school.

Severity of the Discipline

Some courts, such as the Fourth and Second Circuits, have mentioned the severity of discipline meted out by schools. The Second Circuit's *Donniger*[26] case highlighted the court's ambivalence about creating a precedent if the school penalty was of a more serious nature. In other words, the school's penalty may impact whether the student's words should be protected.

Conclusion

In 1969, Justice Black wrote a dissenting opinion in *Tinker*. He predicted the following:

> [I]t is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary . . . Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.[27]

The gates have been opened and the cases continue to stream through the courts. Until the Supreme Court provides clarity on out-of-school speech directed at students and school personnel, the courts will continue to apply differing standards and issue conflicting opinions.

Schools have become targets for lawsuits and through it all the victims continue to be targets of cyberbullies.

Legislative action has been unable to stave off the occurrences. Twenty states have enacted cyberbullying laws; 14 states included criminal sanctions and 13 state laws target "off campus" Internet communications.[28] In June 2014, New York State's highest court struck down a New York criminal cyberbullying statute.[29]

Defamation suits are nearly impossible to prove. Unless things change, some loud-mouthed, and maybe not the brightest, students will continue to bully fellow students under the shield of free speech.

However, there may be a retort if the victims bring an action for intentional infliction of emotional distress, forcing the bullies to defend their offensive language and possibly suffer a financial loss. Such action may be the only answer to entice bullies to pause before pressing the post button.

1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
2. *Id.* at 509.
3. *Thomas v. Bd. of Educ.*, 607 F.2d 1043 (2d Cir. 1979).
4. 652 F.3d 565 (4th Cir. 2011).
5. *Id.* at 567.
6. *Id.* at 570.
7. 527 F.3d 41, 48 (2d Cir. 2008). A student, who was a class officer, posted a message on her publicly accessible web blog about a cancelled school activity. She encouraged others to contact the central office to "piss [the district superintendent] off more." The school prevented her from participating for reelection because of her lack of "civility and good citizenship expected of class officers." The student brought an action against the school. The district court denied the student relief and the court of appeals affirmed. The court held the student's speech "created a foreseeable risk of substantial disruption to the work and discipline of the school."
8. *Id.* at 53 (quoting *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007)).
9. 494 F.3d 34.
10. *Id.* at 35.
11. *Id.* The Court did not resolve whether transmission of the icon constituted a "true 'threat' " within the meaning of the Supreme Court's decision in *Watts v. U.S.*, 394 U.S. 705, 708 (1969). Watts concerned a criminal prosecution for violating 18 U.S.C. § 871(a), which provides punishment for "knowingly and willfully . . . mak[ing][a] threat against the President." The Court noted that "a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind," and added, "What is a threat must be distinguished from what is constitutionally protected speech." *Id.* at 707.
12. 478 U.S. 675 (1986).
13. *Id.* at 683.
14. *Kowalski*, 652 F.3d at 571.
15. The district court in *J.S. v. Blue Mountain Sch. Dist.*, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008), refused to extend *Bethel Sch. Dist.*, 478 U.S. 675, to out-of-school speech.
16. *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1122 (C.D. Cal. 2010).
17. *Id.*
18. 696 F.3d 771, 775 (8th Cir. 2012).
19. 496 F. Supp. 2d 587 (W.D. Pa. 2007).
20. *Id.*
21. 650 F.3d 205 (3d Cir. 2011).
22. 650 F.3d 915 (3d Cir. 2011).
23. *J.S.*, 2008 WL 4279517.
24. *See Bethel Sch. Dist. No. 403*, 478 U.S. 675; *see supra* note 9 and accompanying text.
25. *J.S.*, 650 F.3d at 941.
26. *Doninger*, 527 F.3d at 48.
27. *Tinker*, 393 U.S. at 518, 525.
28. Cyberbullying Research Center, www.cyberbullying.org.
29. *People v. Marquan*, 24 N.Y.3d 1 (2014).

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BY PETER SIVIGLIA

Peter Siviglia (psiviglia@aol.com) has practiced law in New York for 50 years, representing clients both domestic and foreign, public and private. He has served as special counsel to other firms on matters within his expertise. He is the author of *Commercial Agreements – A Lawyer's Guide to Drafting and Negotiating*, Thomson Reuters, supplemented annually; *Writing Contracts, a Distinct Discipline*, Carolina Academic Press; and numerous articles on writing contracts and other legal topics, many of which have appeared in this *Journal*.

Confidentiality Agreements

The purpose of a confidentiality agreement is to protect trade secrets and other proprietary information that are not protected by patent or copyright. As a general rule, the confidentiality agreement precedes discussions and precludes both disclosure and use of confidential information.

I have probably written more confidentiality agreements than any other type of agreement. Clients invariably request them when they are about to enter into discussions with another company to explore a transaction that will involve material that requires protection. But although drafting and negotiating these agreements are a fine source of income, I frequently convince clients, *under appropriate circumstances*, that a confidentiality agreement is not

Sample Confidentiality Agreement

ON LETTERHEAD OF DISCLOSING ENTITY
NAME, ADDRESS AND FAX NUMBER OF
ENTITY TO WHICH DISCLOSURE IS MADE
DATE

Gentlepeople:

You and we plan to discuss the acquisition by you of an interest in our subsidiary, NAME OF COMPANY, a corporation (the "Company").

To enable you to evaluate the Company and to determine whether you wish to acquire an interest in the Company, either we or the Company have furnished and/or will furnish you with – or have provided or will provide you with access to – information about the Company and about its businesses and the products that the Company produces (collectively called "Confidential Information"). Except as provided in the next three paragraphs, you agree that (A) you will not use any Confidential Information for any purpose other than to evaluate the Company and to discuss with us the acquisition by you of an interest in the Company, (B) you will not disclose any Confidential Information to anyone other than your officers, directors, employees, accountants, attorneys and other advisors who need to know that Information for purposes of the evaluation and discussions, and (C) and you will cause your officers, directors, employees, accountants, attorneys and other advisors to abide by and comply with the requirements of this agreement as if they were you.

The restrictions of the foregoing paragraph will not apply to (i) any information that is in the public domain or that comes into the public domain in a manner that does not involve a breach of any obligation of confidentiality, or (ii) any information that was available to you on a non-confidential basis prior to its disclosure to you provided that you immediately advise us in writing of the information of which you have prior knowledge accompanied by appropriate proof of that prior knowledge.

If a third party makes a demand on you for the disclosure of any Confidential Information, you will immediately notify us, including with that notice a copy of the demand. You will not disclose any Confidential Information that is the subject of the demand except to the extent you are required to do so by law (including, without limitation, the order of any court or governmental agency or administrative body), and you will have no obligation to contest such demand. We, however, may contest the demand at our expense; and you will, upon our request, cooperate in that contest at our expense.

If you are required by law to make a disclosure, you will not make that disclosure prior to the last day on which the disclosure may be made.

At any time, at our request, (i) you will return to us all copies of Confidential Information and all copies made from those copies, (ii) you will permanently delete from your computers and other systems all Confidential Information and all information based on Confidential Information, (iii) you will destroy all notes, memoranda and other writings based on Confidential Information, and (iv) you will verify such return, deletion and destruction to us in a writing signed by one of your executive officers.

necessary – at least at the flirtation stage of the discussions – and that the client should not waste its money to enhance the inheritance of my children. For example . . .

Let's say that technology is essential to the business of one of your clients, as it was to one of mine. That client may explore deals with other companies involving its own technology or the technology of the other company. At these exploratory stages, the parties are not disclosing "how" to create the technology or its workings, that is, information that requires protection. Instead, they are disclosing what the technology "does" – in essence, promoting the product. Until the flirtations progress to "how," confidentiality is not an issue. Well, my client came to agree with me, and in most cases convinced the other party that both of them did not need to make the attorneys wealthy for these preliminary discussions.

Of course, if discussions advance beyond the preliminary, a confidentiality agreement is in order. But clients should be cautioned that even the best written confidentiality agreement affords less than robust protection. People make mistakes; accidental disclosures happen; and some people are just dishonest. Further, it is difficult and costly to prove a breach and damages. So, even with a confidentiality agreement in place, information crucial to a business and to its advantage over the competition should not be disclosed.

Further, apart from the caution just noted, there are a few aspects of confidentiality arrangements that require particular attention:

First, a confidentiality agreement *must not*, as many versions do, contain an expiration date. A secret is forever! Can you imagine Coca Cola entering into a confidentiality agreement concerning the "Coke" formula with an expiration date on the requirement of confidentiality?

Second, the obligation of confidentiality must be absolute. Mandates that require the recipient of information to protect that material in the same way that it protects its own secrets are unac-

You also agree that you will not, without our prior written approval, contact anyone at the Company or disclose to anyone that you are evaluating the Company or that you are considering an investment in the Company or that you are in discussions with us concerning the Company.

Violation of any of the foregoing provisions will cause us and the Company irreparable harm. Thus, in addition to any other remedies that we and the Company have, we and the Company each will be entitled to injunctive and other equitable relief to enforce those provisions and to prevent or cure any breach or threatened breach thereof; and in any such proceeding neither we nor the Company will be required to post bond or other security.

The Company is a third party beneficiary of this agreement.

For purposes of any proceeding involving this agreement, you and we submit to the jurisdiction of the courts of the State of New York and the courts of the United States having jurisdiction in the State of New York; and you waive any defense or claim based on personal jurisdiction, venue or inconvenient forum. Further, neither we nor you will bring any action in any other court unless the courts of the State of New York and of the United States having jurisdiction in the State of New York deny jurisdiction.

This agreement may be amended only by an instrument in writing signed by you and us.

This agreement will be governed by the law of the State of New York.

This agreement may be executed and delivered by exchange of facsimile copies or portable document format [PDF] copies showing the signatures of you and us, and those signatures need not be affixed to the same copy. The facsimile copies or portable document format [PDF] copies showing the signatures of you and us will constitute originally signed copies of the same agreement requiring no further execution.

Very truly yours,
[NAME OF DISCLOSING ENTITY]
[Type of company and jurisdiction of organization]
By:_____
[Name of signatory]
[Title of signatory]

AGREED:

[NAME OF DISCLOSEE]
[Type of company and jurisdiction of organization]

By:_____
[Name of signatory]
[Title of signatory]

ceptable because (A) the recipient's methods of protection may not be adequate, and (B) if there is a leak and the recipient's methods of protection were followed, the disclosing party is damaged but is without remedy against the disclosee and may well be burdened by litigation to protect against the use of that information by others.

And finally, the exceptions to the requirements of confidentiality must be crafted with great care. The universal exception is information that is in the public domain. Other common exceptions are for prior knowledge, for information developed independently, and for information received from someone else. Too often confidentiality agreements merely recite these last three without appropriate qualifications. I will include the first two (information in the public domain and prior knowledge), but I resist the last two: information developed independently (not likely after disclosure), and information received from someone else (information on hand at the time of disclosure – prior knowledge – regardless of the source, is excluded, while thereafter, at least for me, the balance tilts strongly in favor of protecting confidential information regardless of the recipient's source).

The sidebar to this article contains a sample confidentiality agreement used for an acquisition. It contains only the first two exceptions: information in the public domain and prior knowledge. Below, though, is a sample provision that treats all four exceptions with appropriate protections.[1]

> The restrictions of the foregoing paragraphs will not apply to (i) any information that is in the public domain or that comes into the public domain in a manner that does not involve a breach of any obligation of confidentiality, or (ii) any information that was available to you on a non-confidential basis prior to our disclosure to you of any Confidential Information of that kind provided that you immediately advise us in writing of the information of which you have prior knowledge accompanied by appropriate proof of that prior knowledge, or (iii) any information disclosed to you by a third party without the disclosing party's breaching any obligation of confidentiality to us or to anyone else with respect to that information provided that you immediately advise us in writing of that information and of the individual or entity that disclosed it to you, or (iv) any information or derivative of Confidential Information that you develop independently without use of or reference to, in whole or in part, any Confidential Information provided that before using or disclosing any such information or derivative, you first advise us in writing of that information or derivative accompanied by appropriate proof that you developed it independently without use of or reference to, in whole or in part, any Confidential Information. You will have the burden of proving that you developed information and derivatives of Confidential Information independently without use of or reference to, in whole or in part, any Confidential Information.

The exclusion under item (i) for information "that comes into the public domain in a manner that does not involve a breach of any obligation of confidentiality" is often written ". . . in a manner that does not involve a breach of any obligation of confidentiality" *by the recipient*. The foregoing sample omits "by the recipient" because it would create a loophole by expanding the exclusion to improper disclosures by others. For example, in any proposed transaction such as an acquisition, confidential information may well be disclosed on a confidential basis to several parties. Even in the ordinary course of business, confidential information may be disclosed on a confidential basis – for example, for purposes of a joint venture or perhaps to a manufacturer to produce a product incorporating proprietary data belonging to the buyer.

1. The model in this article will be part of the 2018 supplement to *Commercial Agreements – A Lawyer's Guide to Drafting and Negotiating*, copyright © 2015 Thomson Reuters/West. It is preprinted here with the permission of Thomson Reuters/West. For more information about this publication please visit http://legalsolutions.thomsonreuters.com/. Additional comments and samples of confidentiality agreements can be found in, *Commercial Agreements*.

BY SOUREN A. ISRAELYAN

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Verdict Sheet Interrogatories

Verdict sheet interrogatories separating negligence from proximate cause often trigger juror confusion, burdening the parties, the courts and the society with prolonged court proceedings in the form of post-trial motions, appeals and new trials.

"Substantial Factor"

The issue that often baffles reasonable people sitting as jurors in civil cases is the "substantial factor" language in verdict sheet interrogatories. The primary meaning of the word "substantial" is "large in amount, size or number"[1] and "of considerable importance, size or worth."[2]

The jury charge on proximate cause reads:

> An act or omission is regarded as a cause of an injury [*in bifurcated trial, substitute:* accident or occurrence] if it was a substantial factor in bringing about the injury [*in bifurcated trial, substitute:* accident or occurrence], that is, if it had such an effect in producing the injury [*in bifurcated trial, substitute:* accident or occurrence] that reasonable people would regard is as a cause of the injury [*in bifurcated trial, substitute:* accident or occurrence]. [The remainder of the charge should only be provided where there is evidence of comparative fault or concurrent causes.] There may be more than one cause of injury [*in bifurcated trial, substitute:* accident or occurrence], but to be substantial, it cannot be slight or trivial. You may, however, decide that a cause is substantial even if you assign a relatively small percentage to it.[3]

The jury charge on proximate cause, contained in the court's final instructions to a jury, which is read aloud and typically lasts 30–45 minutes, directs the jury to deliberate in terms of percentages. The verdict sheet interrogatories reaffirm the directive that jurors should make a determination in terms of percentages. Below is the typical language found in most verdict sheet interrogatories:

Question number __:
Apportion the fault between the parties:
Defendant: ____%
Plaintiff: ____%
Total must be 100%

What do reasonable people think "substantial factor" means when they are directed to deliberate and render a verdict in terms of percentages? The common usage for "substantial" means more than one half – that is, more than 50%. The net effect is that plaintiff and defendant have the elevated burden to establish that the other party's negligence was more than 50% of the accident or injury. This is the law in states where modified contributory negligence is still alive; New York, however, abolished contributory negligence in 1975 and is a pure comparative negligence state.

Alcantara and *Kumar*

Two recent appellate court cases, *Alcantara v. Knight*[4] and *Kumar v. PI Assoc., LLC*,[5] illustrate the problem of having this elevated burden. In *Alcantara*, the jurors found that the defendant's conduct was negligent but was not a substantial factor of the accident, and apportioned 5% fault to the defendant. Then the jury found that the plaintiff's conduct was negligent and was a substantial factor of the accident, and apportioned 95% of the fault to the plaintiff. The problem is not unique or uncommon. The jurors understood and interpreted 5% to be insubstantial, and 95% to be substantial. Who could quarrel with such a conclusion?

In *Kumar*, the jury found that the first defendant's conduct was negligent and a substantial factor of the accident, and that while the second defendant's and the plaintiff's conduct was negligent, their conduct was not a substantial factor bringing about the accident. The jury went ahead and apportioned fault between the three parties as follows: 80% to the first defendant, 10% to the second defendant, and 10% to the plaintiff. As in *Alcantara*, the jurors understood 80% to be substantial, and 10% to be insubstantial.

In *Alcantara*, the First Department dismissed the case on the ground that the jurors should have not answered any more questions once they determined that the defendant's conduct was not a substantial factor. In *Kumar*, the Second Department ordered a new trial on the ground that the verdict was internally inconsistent.

Unfortunately, these situations are not uncommon or unusual in New York.[6] Most jurors, however, follow the written instructions on verdict sheets and will not continue answering the questions. Thus, empirical studies could not be performed and we will never know how many injured plaintiffs lost their cases or how many plaintiffs' negligent conduct

was not accounted for because of similar understandings of the word "substantial." It is up to the bench and the bar to come up with better solutions to assist the people who sit as jurors in civil cases in carrying out their sworn oaths to render just verdicts.

Causation Is Clear-Cut

In many motor vehicle and premises liability cases, the issue of causation is clear-cut and only one conclusion may be drawn from the facts. Therefore, the issue could be resolved as a matter of law and removed from jury consideration. "There are certain instances, to be sure, where only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law."[7] In a typical motor vehicle case, the verdict sheet should ask jurors to deliberate and decide as follows:

1. Was the defendant's operation of the motor vehicle negligent?
   If yes, proceed to the next question.
   If no, proceed no further and report to the Court.
2. Was the plaintiff's operation of the motor vehicle negligent?
   If yes, proceed to the next question. (In unified trial cases, if no, proceed to Question 4 [damages].)
   If no, proceed no further and report to the Court.
3. Apportion the fault between the parties:
   Defendant: ____%
   Plaintiff: ____%
   Total must be 100%

Report your verdict to the Court. (In unified trial cases, proceed to Question 4 [damages].)

Courts and parties should be diligent about making sure that in cases where causation is clear-cut, the issue is not presented for jurors' consideration. The risk that reasonable people would interpret "substantial factor" to mean more than 50% is multiplied exponentially in cases where only one conclusion could be drawn from the facts; and yet the jurors are still directed to deliberate and decide whether a party's conduct is a "substantial factor."

Negligence and Causation Intertwined

In the vast majority of motor vehicle collision and premises liability negligence cases, however, the issues of negligence and causation are inextricably intertwined to make it illogical to separate one from the other. Yet, the practice shows that jurors are often given a separate interrogatory whether the defendant's negligence and the plaintiff's negligence was a substantial factor. This interrogatory is often the cause for juror confusion and resultant verdicts that do not withstand judicial scrutiny.

A very cursory review of recent Appellate Division cases shows that despite the due respect accorded to jury verdicts, the appellate courts regularly set aside jury verdicts and order new trials where jurors answered "yes" to the negligence question and "no" to the proximate cause question when the issues of negligence and proximate cause are inextricably interwoven or intertwined.[8]

When the issues of negligence and proximate cause are inextricably intertwined or interwoven, there is no need to pose a separate interrogatory on the proximate cause issue, and they could appropriately be placed before a jury in a single interrogatory. It is proper for a trial court to frame negligence and proximate cause in a single interrogatory.[9] There are simply too many instances in practice where the words "substantial factor" cause juror confusion, resulting in verdicts that require costly and burdensome post-trial motions and appeals necessitating setting aside the hard-earned verdicts by defendants or plaintiffs. The following interrogatories would obviate the possible juror confusion and the resultant injustice to the parties and the burden on the courts:

1. Was the defendant's conduct negligent in bringing about the accident?
   If yes, proceed to the next question.
   If no, proceed no further and report to the Court.
2. Was the plaintiff's conduct negligent in bringing about the accident?
   If yes, proceed to the next question. (In unified trial cases, if no, proceed to Question 4 [damages].)
   If no, proceed no further and report to the Court.
3. Apportion the fault between the parties:
   Defendant: ____%
   Plaintiff: ____%
   Total must be 100%

Report your verdict to the Court. (In unified trial cases, proceed to Question 4 [damages].)

The court's charge with the above interrogatories would correctly instruct the jury on the issues to deliberate and decide.[10] The propriety of verdict sheet interrogatories is examined in the context of the court's charge.[11]

There are, of course, cases involving multiple parties or even two parties where colorable positions exist that the conduct of parties was not a proximate cause bringing about the accident or injury, in which a separate interrogatory as to proximate cause is necessary; but in the vast majority of motor vehicle and premises cases, no such need exists. If a party requests a separate interrogatory on proximate cause, the better practice would be for the court to ask that the requesting party articulate the reasons for the request on the record. Based on the trial evidence, how could a reasonable jury determine the issue of negligence affirmatively and the issue of proximate cause negatively, and why would the court's charge and the verdict sheet combined not appropriately relay to the jury the issues to be decided?

Substantial Factor, Contributing Factor or Proximate Cause

When there is need for a separate interrogatory as to proximate cause, the word "proximate" often would

be more appropriate in verdict sheets, better relaying the information to a jury whether the cause is proximate (close) or remote (far) in time, space or significance. The words "contributing factor" would also better relay the correct legal standard while obviating juror confusion. The best practice would be to maintain flexibility based on what best describes the particular case so as to appropriately draft the verdict sheet. The terms "proximate cause" and "substantial factor" are synonymous and a trial court may properly use the term "a proximate cause" in a verdict sheet.[12]

These are small steps, but ones that would assist jurors in rendering verdicts that are final. These steps would remove confusion and uncertainty, relieve the parties and the courts from the burden of expensive and time-consuming post-trial motions and appeals, obviate the need for re-trials, and assist in better administration of justice. ■

1. Merriam-Webster Online Dictionary.

2. Google Online Dictionary.

3. 1A N.Y. Pattern Jury Instructions 3d 2:70 (2015) (PJI).

4. 123 A.D.3d 622 (1st Dep't 2014).

5. 125 A.D.3d 609 (2d Dep't 2015).

6. *See also D'Annunzio v. Ore*, 119 A.D.3d 512 (2d Dep't 2014) (jury found that defendant's negligence was not a substantial factor, but attributed 30% of the fault to defendant); *Allen v. Lowcsuz*, 118 A.D.3d 1258 (4th Dep't 2014) (jury found that plaintiff's negligence was not a substantial factor, but attributed 30% of the fault to plaintiff); *Dubec v. N.Y. City Hous. Auth.*, 39 A.D.3d 410 (1st Dep't 2007) (jury found that plaintiff's negligence was not a substantial factor, but attributed 25% of the fault to plaintiff); *Palmer v. Walters*, 29 A.D.2d 552 (2d Dep't 2006) (jury found that defendant's negligence was not a substantial factor, but attributed 33% of the fault to defendant); *Mateo v. 83 Post Ave. Assocs.*, 12 A.D.3d 205 (1st Dep't 2004) (jury found that plaintiff's negligence was not a substantial factor, but attributed 25% of the fault to plaintiff); *DePasquale v. Morbark Indus., Inc.*, 254 A.D.2d 450 (2d Dep't 1998) (jury found that defendant's negligence was not a substantial factor, but attributed 20% of the fault to defendant); *Kim v. Sippola*, 210 A.D.2d 946 (4th Dep't 1996) (jury found that plaintiff's negligence was not a substantial factor, but attributed 30% of the fault to plaintiff).

7. *Derdiarian v. Felix Constr. Corp.*, 51 N.Y.2d 308, 315 (1980).

8. *See, e.g., Ahmed v. Port Auth. of N.Y. & N.J.*, 131 A.D.3d 493 (2d Dep't 2015) (door falling off its hinges and striking plaintiff); *Stewart v. Marte*, 91 A.D.3d 754 (2d Dep't 2012) (motor vehicle collision); *Alli v. Lucas*, 72 A.D.3d 994 (2d Dep't 2010) (motor vehicle pedestrian collision); *Dessasore v. N.Y. City Hous. Auth.*, 70 A.D.3d 440 (1st Dep't 2010) (trip and fall on a staircase); *Bailey v. Daly*, 61 A.D.3d 1335 (4th Dep't 2009) (slip and fall on ice); *Rodriguez v. Elmont Sch. Dist.*, 37 A.D.3d 448 (2d Dep't 2007) (negligent maintenance of school playground equipment); *Kardson v. Barringer*, 20 A.D.3d 551 (2d Dep't 2005) (fall into an open cellar stairwell); *Travessi v. Command Bus Co.*, 7 Misc. 3d 128(A) (App. Term, 2d & 11th Jud. Dists. 2005) (jerk and lurch of a bus); *Murphy v. Holzinger*, 6 A.D.3d 1072 (4th Dep't 2004) (negligent installation and maintenance of a wedding tent).

9. *See Sookraj v. Schindler El. Corp.*, 279 A.D.2d 371 (1st Dep't 2001); *Tucker v. Elimelech*, 184 A.D.2d 636 (2d Dep't 1992).

10. PJI3d 2:70.

11. *See Maurer v. Tops Mkts., LLC*, 70 A.D.3d 1504 (4th Dep't 2010); *Smith v. Taylor*, 304 A.D.2d 902 (3d Dep't 2003); *Szeztaye v. LaVacca*, 179 A.D.2d 555 (1st Dep't 1992); *Rubin v. Pecoraro*, 141 A.D.2d 525 (2d Dep't 1988).

12. *Martonick v. Pudiak*, 285 A.D.2d 935 (3d Dep't 2001).

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am an income partner at a 100-lawyer firm. I was made partner just two years ago. Six months after making partner, I became pregnant with my third child. After making it through my first trimester, I started to share the happy news with my colleagues. When I told a senior partner in my group that I was expecting, he remarked, "Wow! Haven't you already done your fair share of overpopulating the earth?" I didn't know how to respond. I felt both defensive and uncomfortable, but I chuckled along anyway, hoping to dissolve the awkwardness. In the months and weeks leading up to my maternity leave, I made sure to communicate effectively both internally at the firm with my colleagues, and externally with my clients, about my anticipated three-month leave and made sure that all of my cases would be accounted for and covered during my absence.

Upon returning to work three months later, I was greeted with further offensive comments. On my first day back to work, the managing partner casually strolled into my office asking, "How was your vacation?" I responded that I was not on vacation, but on maternity leave for the birth of my son. The managing partner laughed and stated, "Same difference!" and walked out.

The following week, I attended a meeting with a client at opposing counsel's office on a case that I had been working on before my maternity leave. When I made a suggestion about a possible resolution of the matter that I felt would achieve the client's goals, my adversary's snide response was, "Did it take you nine months to come up with that idea?" I honestly did not know what to say and did my best to ignore the comment.

I have also noticed that the quality and quantity of my workload have changed since I've returned from maternity leave. Not only do I have a lower volume of work, but the level of interesting work is also lower. Even though I have returned to the firm full-time, my billable hours have decreased significantly. During my first year as partner, I billed 2,500 hours. During my second year as partner, when I had my son and was on maternity leave for three months, I billed 1,800 hours. This leads me to what happened at my end-of-the year meeting with the firm's Compensation Committee. During that meeting, one of the partners remarked that my hours were very low for the year. When I responded by reminding the Committee that I had been on maternity leave for three months, another partner said something along the lines of: "Well, if you had spent as much time billing as you did breast-feeding, you would have had more billables this year."

I cannot believe that in this day and age I should be subjected to these types of comments and behavior. I am outraged. Is the conduct described above acceptable professional behavior?

Sincerely,

Pumped Up

Dear Pumped Up:

Your question raises issues involving gender discrimination, a hostile work environment, and unequal pay for women in the legal profession. We will primarily focus on the ethical and professional implications of your question and will also briefly touch upon some of the legal issues.

The behavior you have described is not only offensive, it is unethical and unlawful. Many studies have documented the challenges facing working mothers in the legal profession and have revealed that the problems are far from eradicated, even in 2016. *See, e.g.*, Marlisse Silver Sweeney, *The Female Lawyer Exodus*, The Daily Beast (July 31, 2013), http://www.thedailybeast.com/witw/articles/2013/07/31/the-exodus-of-female-lawyers.html; Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 Duke J. Gender L. & Pol'y 1, 4–5 (2010). Indeed, the concept of a "maternal wall bias," which refers to stereotypes and various forms of gender discrimination that working mothers may encounter, continues to be pervasive in the workplace. The so-called "maternal wall" typically arises at one of three points: when a woman gets pregnant, after a woman gives birth, or when a woman begins working either part-time or on a flexible schedule. *See* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 Harv. Women's L.J. 77, 78 (2003).

The comments made to you about your pregnancy and maternity leave and the fact that the quality of your assigned work and quantity of your workload have sharply declined since returning from maternity leave are clear examples of the maternal wall bias at play. This bias can often have severe consequences for a woman's career. According to the chair of the American Bar Association Gender Equity Task Force, Roberta Liebenberg, even star attorneys may be relegated to the sidelines because of what is known as benevolent paternalism. Sweeney, *The Female Lawyer Exodus*, at 3. "Partners will assume that the young moth-

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 email to journal@nysba.org.**

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er won't be interested in cases that take travel or more time away from the house. But the same assumptions often are not made about new fathers." *Id*. This type of discriminatory case assignment can have long-term career repercussions for women lawyers. Every decision, whether it be to staff a woman attorney on a case, or alternatively to leave her off, will impact that individual's professional development, including her development of valuable skills, experience and contacts. These are the building blocks and necessary professional development milestones that will eventually become vital to a woman's career advancement to partner. Ashley Kissinger, *Civil Rights and Professional Wrongs: A Female Lawyer's Dilemma*, 73 Tex. L. Rev. 1419, 1432–33 (1995).

Unfortunately, this type of behavior also often leads to gender disparity in compensation. Several studies have identified a large compensation gap between male and female lawyers, which tends to widen over time as attorneys gain seniority. Gender discrimination, whether conscious or unconscious, has been identified as one of the reasons male lawyers have a significant earnings advantage over female lawyers. Lauren Stiller Rikleen, *Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation*, ABA Presidential Task Force on Gender Equity and the Commission on Women in the Profession 1, 10–11 (2013). Not only are women generally earning less than their male counterparts, but over the past decade, although the number of women entering the profession of law has increased, which logically should have led to significantly more women being promoted to equity partner, women have in fact remained completely underrepresented at the highest levels of law firm practice, consisting as of 2013 of only approximately 15% of the equity partner totals nationally. *See id*. This issue is particularly timely – just recently, a paycheck bias suit was brought by a class of female lawyers who worked in the Farmers Insurance claims litigation department and allege that they were paid less than their male counterparts. The female lawyers are pursuing a collective action under the federal Equal Pay Act. Marisa Kendall, *Paycheck Bias Suit by Female Lawyers Gets Green Light*, Law.com (Dec. 10, 2015), http://www.law.com/sites/articles/2015/12/10/paycheck-bias-suit-by-female-lawyers-gets-green-light/.

So to answer your question in short: Is the behavior of your colleagues and adversary acceptable professional behavior? No! The behavior smacks of gender discrimination and is completely antithetical to an attorney's professional responsibilities and to the values of fairness and justice that are supposed to be the guiding principles of our profession. In our view, this type of behavior violates Rule 8.4(g) of the New York Rules of Professional Conduct (NYRPC). In the language of the rule, a lawyer or law firm shall not "unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation." Rule 8.4(g) further provides that

> [w]here there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

While the rules of professional conduct vary from state to state, many of these rules prohibit discrimination in four categories: (1) in all professional activities; (2) in the representation of a client; (3) in a tribunal; and (4) in employment. *See* Kissinger, *Civil Rights and Professional Wrongs: A Female Lawyer's Dilemma*, 73 Tex. L. Rev. at 1453. Some states, like New Jersey, have rules similar to New York prohibiting discriminatory treatment based on sex in the lawyer's professional activities. *See* Rule 8.4(g) of the New Jersey Disciplinary Rules of Professional Conduct (it is professional misconduct for a lawyer to "engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm"). In at least one state, Minnesota, the rules of professional conduct prohibit sex bias not only "in connection with a lawyer's professional activities" but also broaden the prohibition to include a lawyer's personal activities. *See* Rule 8.4(h) of Minnesota's Rules of Professional Conduct (it is professional misconduct for a lawyer to "commit a discriminatory act prohibited by federal, state, or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer"). Other states have rules more limited in scope, which prohibit gender discrimination only in the courtroom. *See, e.g.,* Rule 3.4(i) of the Massachusetts Rules of Professional Conduct (a lawyer shall not "in appearing in a professional capacity before a tribunal, engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person"); New Mexico's Rule 16-300 Prohibition Against Invidious Discrimination ("[i]n the course of any judicial or quasi-judicial proceeding before a tribunal, a lawyer shall refrain from intentionally manifesting, by words or conduct, bias or prejudice based on race, gender, religion, national origin, disability, age, or sexual orientation against the judge, court personnel, parties, witnesses, counsel or others").

The harder question to answer here is, what can or should you do about

this behavior? One option is to do exactly what you have done, which is to bring awareness to the problem and to promote an open dialogue about it. Another option is to pursue litigation or report certain individuals to the Disciplinary Committee. As discussed below, some women have sued their law firms and have brought claims under Title VII, the Americans with Disabilities Act, the Family and Medical Leave Act, and/or various other state and federal laws. Nancy Levit, *Lawyers Suing Law Firms: The Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. Pitt. L. Rev. 65, 94–95 (2011). We note that in 2013 New York City passed the Pregnant Workers Fairness Act, which expands the city's Human Rights Law to require most New York City employers to provide reasonable accommodations to pregnant workers. The goal of the new legislation is to protect pregnant women from workplace discrimination. KJ Dell'Antonia, *New York City Passes Law Defending Rights of Pregnant Workers*, N.Y. Times (Sept. 24, 2013), http://parenting.blogs.nytimes.com/2013/09/24/new-york-city-passes-law-defending-rights-of-pregnant-workers.

The facts you have described are similar to those addressed in several decisions in New York state and federal courts. Below we will discuss three pregnancy discrimination cases in the past 10 years commenced by women lawyers in those courts. First, in *Todaro v. Siegel Fenchel & Peddy, P.C.*, No. 04-CV-2939 JS/WDW, 2009 WL 3150408 (E.D.N.Y. Sept. 25, 2009), Jacquelyn Todaro, an associate attorney at Siegel Fenchel & Peddy, P.C., brought claims against her former firm and its partners asserting constructive discharge due to sex and pregnancy discrimination and a hostile work environment. *Id*. at *1. Between 1996 and 2002, Todaro received a salary increase each year. In November 2002, she told the firm she was pregnant, and on January 1, 2003, the firm cut Todaro's salary by 25% while at the same time increasing the compensation of another male associate. Todaro began maternity leave on April 25, 2003, and continued to receive her reduced salary through May 24, 2003. On July 21, 2003, Todaro resigned from the firm, claiming constructive discharge due to sex and pregnancy discrimination and a hostile work environment. *Id*. at *2.

The court held a jury trial in 2008, during which Todaro, and another female employee (a paralegal), presented evidence that the firm's employees made recurrent offensive comments about women and that the firm itself treated women differently. For example, testimony at trial revealed that defendant Bill Siegel consistently made comments about female attorneys being "difficult" and "obnoxious," and asked why "they let women into the courtroom." On one occasion, Siegel approached Todaro and two other female attorneys and asked, "What are you ladies doing here so late? Don't you have husbands or boyfriends to go home to?" And on another occasion, Siegel suggested that Todaro buy a "very skimpy . . . playboy bunny outfit" for her upcoming trip. Another attorney, Andy Cangemi, commented to female attorneys about paying them too much. Moreover, when a female associate left on maternity leave, the firm transferred her to a smaller office and awarded her larger office to a newly hired male associate. *Id.* at *2. The jury found in favor of Todaro's Equal Pay Act claim, awarding her $16,499.75 in damages. The Court ultimately ordered a remittitur of Todaro's compensatory damages to $8,089.25, but doubled the award as liquidated damages under the Equal Pay Act, and granted Todaro a total award of $16,178.50. *Id*. at *8.

Second, in a more recent case before the Appellate Division, *Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 A.D.3d 18, 20 (1st Dep't 2014), an action was brought by Ji Sun Jennifer Kim, an associate attorney, alleging gender and pregnancy discrimination, hostile work environment, and retaliatory treatment against her former law firm. Kim alleged that while she was visibly pregnant, she was reprimanded by a partner for allegedly reading a book during work hours and that the partner had screamed at her while standing so close to her that she was fearful he would hit her. *Id*. at 21. Kim emailed a complaint about the incident to two law firm partners explaining that while two other attorneys, both male, were engaging in similar behavior at the same time, they were not admonished. She expressed concern that she was singled out and treated unfairly due to her pregnancy. It was alleged that one of the partners told the plaintiff that she had exacerbated the situation by complaining about it. After returning to work following her maternity leave, she started to pump breast milk at the office. Kim alleged that in February 2010 she overheard a partner make an inappropriate gender based comment. Kim complained to this particular partner about the offensive comment, and after she did so, the partner barely spoke to her again. In April 2010, Kim was terminated, supposedly because of budget cuts. However, the record in this case contains evidence that the firm's tax certiorari department was actually expanding during the time that Kim was terminated. *Id.* at 19, 21, 25. The Appellate Division affirmed the trial court's decision denying defendants' motion to dismiss Kim's retaliation claims based on New York State and City Human Rights laws. However, Kim's hostile work environment and gender/pregnancy discrimination claims were dismissed on the basis that Kim cited only isolated remarks or incidents or otherwise vague allegations of unequal treatment.

Finally, in *In re Goldberg*, 487 B.R. 112, 118 (Bankr. E.D.N.Y. 2013), Mary J. Rocco, an attorney, filed a complaint against her former law firm for pregnancy discrimination and retaliation under the New York State Human Rights Law (NYSHRL). After filing the complaint with the New York State Division of Human Rights (NYSDHR) against Jeffrey L. Goldberg, his law firm, Jeffrey L. Goldberg, P.C., and

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Alvaro Almanza
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Elina Alperovich
Luisanne Alvarez
Donia Alwan
Erica Amin
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Erica Danielle Appelman
Patrick Allen Armstrong
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Tracey Lynn Chenoweth
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Wilson Y. Leung
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Sarah Elizabeth Levin
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Yunwei Liang
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Preston James Postlethwaite
Dmitriy Povazhuk
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Vivek Ratnam
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Nikolaus John Williams
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He Yang
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Zhijing Yu
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Julie Marie Zuccarelli

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Alysa Harder Ain
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Somalia L. Samuel-Frank
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Andrew Heller Ward
Adrienne Blizard Warrell
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Michele Yankson
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Evonne Opoku
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Alexandra Noel Stagi
Ryan Mark Williams

FOURTH DISTRICT
Alexandra Cree Davis
Kathryn Jean Swimm
Evan Patrick Thomson
Michael Louis Vild

FIFTH DISTRICT
Jacqueline Kay Lee

SIXTH DISTRICT
Xiayue Yin

SEVENTH DISTRICT
Jacob Richard Ark
Brian Thomas Holland
John Christopher Lyle
Anthony F. Mastrodonato
Justin Patrick McCombs
Hinna Upal

EIGHTH DISTRICT
John Drew Land
Anna Jennie Oakes
Steven Harrison Smith

NINTH DISTRICT
Suzanne Samera Adely
Jessica A. Amberg
Carol Arcuri
Janelle Gladys Armentano
Emily Barile
Jacques Pierre Beckerich
Inna A. Bilmes Mintskovsky
Charles D. Blackburn
Jacqueline Nicole Boone
Phionah N. Brown
Deirdre Ellen Burke
Robert Chang
Daniel Evan Cohen
Nicole Ann Collins
Brian Patrick Doohan
Melodie Marie Eastmond
Esmeralda Onaney Famutimi
Kathleen A. Feerick
Alexis Rachel Gruttadauria
Kirsten Elise Halbach
Deanna Lyn Himelson
Patricia J. Humphries
Takumi Iida
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Andrew Patrick Matera
Anika C. Mohammed
Clinton Wells Morrison
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Jennifer B. Pennington
Daniel Isaac Phillips
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Kathleen Ann Redalieu
Zuri Chin Sue Regisford
Michael Richard Saitta
Annmarie N. Sayad
Manu J. Sebastian
Kimberly Ann Sialiano
Judith Winters Spain
Rosalie Tanis
Marylaura Thomas Linares
Lincy Thomas
Vladislav Tomic
Andrew Raymond Weisfeld
Lawrence Y. Wynn
Gail Penny Zwiren

TENTH DISTRICT
Reef Hamad Al-yousefi
Emil Phillip Albanese
Ana Sophia Alexandra
Neilia Bernadette Amato
Maria G. Angelos
Brett Alexander Aurrichio
Kerrie Marie Barry
Christopher Michael Bergold
Nicole Antoinette Berkman
Lauren Marie Bernstein
Lois Ann Bladykas
Colin McCann Ceriello
Christopher McEneney Chan
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Neha Kiran Chopra
Sheryar Asif Choudhry
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Chelsea Alexandra Horowitz
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Crystal Theresa Travanti
Tela Loretta Troge
Nicholas Michael Vevante
Dwayne Steven Wagner
Alyssa Ronni Wanser
Shawn Nicholas Watro
Edward Brian White
Keith Erik Williams
Racquel Alexandria Williams
Jessika Wong
King Lun Wu
Michael John Zacharias
Steven Zundell

ELEVENTH DISTRICT
Mustafa Ali
Ashleigh Catherine Ballis
Alyssa Marie Barnard
Jennifer Allyn Beamish
Moshe Borukh
Alexandra Elizabeth Brandes
Amber Starr Brogdon-Johnson
Emily Ann Button Aguilar
Almerinda Centore-Sitaras
Shuye Chen
Nellie C. Chiu
Diana Christine Christenson
David Ari Cios
Matthew Mark Coffey

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Emily K. Corcione
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Hua Feng
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Roman A. Solonyy
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Christine Tsai
Pi Hui Tsai
Christina Tsirkas
Michael Noah Turi
Jacob Edmond Cole Vadeboncoeur
Deborah Edith Velez Cardec
Nicole M. Venditti
Christopher Vento
Daniel Peter Vince
Andrew Lite Wang
Xueying Wang
Marni Blair Weiner
Peter Shelton White
Meaghan Macroi Whyte
Feng Xia
Ying Xiang
Aicha Sarah Ziba

TWELFTH DISTRICT

Oliver Piga Baclay
Perry Maxwell Grossman
Ye Huang
Victor E. Negron
Florence Osabuohien Oyegue
Avalon Latoya Paul
Angelo Anthony Regina
Michalina Natalia Shuter

THIRTEENTH DISTRICT

Frankie James Alvarez
Jill Burton Bramwell
David Carter Casagrande
Taimour Tahir Chaudhri
Pasquale De Santis
Michael Joseph Di Paolo
Zara Elizabeth Libman
Matthew Frank Medaglia
Pamela Dawn Schwartz
Tina Mary Thomas

OUT OF STATE

Omolola Adekanye
Niranjan Adhikari
George Adjeisah Adjei
Ayodeji Sheriff Ahmed
Direnc Ak
Marina Aleksandrovna Akchurina
Reid Robertson Allison
Katherine Palmer Andrews
Ned Gregory Andrews
Paula Nadine Anthony
Fengjian Ao
Eric Lee Apar
Regina Blewitt Aposhian
Nicole Scott Arfuso
Basim Mohammed Arif-motiwala
Aaron Ben Tzion Ash
Jurgita Ashley
Upton Au
Bruno Dos Reis Neto Auada
Nancy Clare Auferio
Ilana Sara Avital
Timothy Luke Azarchs
Lukman Segun Azeez
Michael Hendry Baer
Keri Ann Bagala
Rachel Mae Bandli
Kaustuv Banerjee
Fengcan Bao
Krystle Maria Baptista
John Aaron Barker
Stefania Lombardi Bartlett
Blair Jenelle Barton
Cassandra Anne Beckman Widay
Bernhard Bell
Jonathan Stanley Bellish
Steven Paul Benenson
Adam Brett Berkowitz
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Lauren Ashley Bier
John David Black
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Katherine Murphy Bogard
Kevin Matthew Bond
Edouard Bourguet
William Todd Boyd
Alexandria Katherine Bradshaw
Michael Aaron Brandess
Daragh Michael Brehony
Erin Elizabeth Broderick
Yael Bromberg
Travis Alan Brooks
Robert Thomas Bryson
Christopher John Buggy
Samee Cormay Burrage
Lindsay Marie Butler
Lucas C Buzzard
Dennie Danielle Byam
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Jaewon Chang
Yu-hua Chang
Jacob David Charron
Aneesa Chatterji
Anirban Chatterji
Jixin Chen
Lei Chen
Chien-hung Cheng
Morgen Carol Cheshire
Mary Rose Chew
Lhakpa Chodon
Jason M. Chodos
Byoung-gon Choi
Mina Choi
Yuet Chee Eugenie Chung
Reina Jean Clark
Julian Christen Coat
Steven Bennett Cohen
Terry Jason Colberg
Jonathan Richard Cole
Zahava Elizabeth Colicelli
Bridget Ann Collins
Matthew Aaron Collins
Dylan Consla
Maria Michelle Cook Lowman
Ryan Coombes
Hayley Marie Cotter
Megan Marina Cowles
Collin Joe Cox
Angela Mae Coxe
Wade Benjamin Coye
Kathleen Marie-jeanne Pierre Crabbe
Theodore Michael Cropley
Alexandra Brisky Cunningham
Jill Marie Czeschin
Chuwen Dai
John William Dalo
Genevieve Helen Dame
Nova Damouni
David Burk Daniel
Timothy Archer Daniels
Samuel Alberto Danon
Anatoly M. Darov
Russell Garvey Davis
Robert L. Dawidiuk
Neresa Anne De Biasi
Matheus Francisco De Paula Oriolo
Cyrille Charles-louis Marie De Ponton D'amecourt
Domingo Mario De Prada
Joseph Anthony Deblase
Hendrik Raymond Deboer
Melanie Jane Debrosse
Timothy Lawrence DeGeorge
Erin Elizabeth Dempsey
Amit Deshmukh
Zain Dhareeja
Albert Diaz-Silveira
James Cummins Diefenbach
Thomas Joseph Dillon
Yun Ding
Zamira M. Djabarova
Erica Stephanie Dobson
Isla Jane Dowling
Brian Lee Duffy
Robert William Dunne
Matthew T. Dyson
Jorkeell Echeverria
Yechezkel Meir Edelman
Genevieve L Fairclough
Areej Faiz
Modgtaba Fallah Ramezan Nezhad Lialesta
Dinna Xiaoxia Fang
Subhan Farooqi
Na Fei
Jorge Jose Feliz
Luis Ernesto Fernandez De La Vara
Sarah Cristina Fernandez
Joseph J. Ferrini
Anastasia Filopoulos
Alexander David Fishbane
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Amanda Star Frazer
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David Eliot Friedman
Zhongqi Fu
Allyson B Fuchs
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Mehgan A. Gallagher
Thomas Alfred Gallo
Tian Gan
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Marcos David Garcia Dominguez
Christie Marie Garcia
Frances Klaire Concepcion Garcia
Alvaro Carlos Garcia-delgado Garcia
Hannah Reva Garden-Monheit
Trevor Thornton Garmey
Bryan Richard Gavin
Karnit Gefen
Tiffany Belle Gelott
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Chaim Gordon
Julie M. Gottselig
Ana Grabnar
Eugenio Grageda
Jonathan Shulman Greenstein
Blair Jessica Greenwald
Philippa Greer
Yulia Vladislavovna Gryaznova
Theresa A. Guertin
Miechia Loyce Gulley
Greg Garrell Gutzler
Morgan Marcel Samy Guyot
Senay Debrezion Habtezion

In Memoriam

Larry H. Abrams
Stamford, CT

Bruce A. Antonelli
New York, NY

Daniel W. Bishara
Lewiston, NY

Stanley D. Friedman
New York, NY

Nathan Lee Fudge
Issaquah, WA

Richard T. Horigan
Amsterdam, NY

Richard C. Jensen
New Hyde Park, NY

Michael T. Kelly
Buffalo, NY

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Flushing, NY

Raymond M. Loew
Islandia, NY

James E. Lyons
Woodside, CA

Betsy Malik
Lake Success, NY

Stephen P. Morris
Pittsford, NY

Ronnie Ann Powell
Florham Park, NJ

James Eugene Rogers
Brooklyn, NY

Matthew A. Rosen
New York, NY

Alfonse R. Russo
Teaneck, NJ

Charles W. Salter
Vista, CA

Milton B. Shapiro
Nanuet, NY

Martin S. Sussman
Jericho, NY

Elliot Aaron Hallak
Samuel Deschenes Halpert
Christian Wentworth Hambleton
Todd Harrison Hambrick
Jerry Ray Hamling
Jeong Won Han
Yu Han
Alex Hanna
Sam Fahmy Hanna
Sandra Maria Hanna
Joseph Francis Hansen
Sophia Harris
Faduma Abdullah Hassan Ali
Amelie Aziliz Hell
Paula Flora Henin
John Michael Hermann
Jacob Seth Herzek
Takuto Hirabayashi
Makiko Barbara Hiromi
Megan Louise Hjellelantsman
Gloria Ho
Jennifer Marie Hoffman
Drew Bennett Hollander
Rebecca Wallis Goldfischer Hollander
Daniel Joseph Hollis
Joseph Michael Holt
Jiebo Hong
Lauren Elizabeth Hopkins
Colby Paul Horowitz
Kai Hoshino
Philip Robert Hsiao
Elizabeth Marie Hugetz
Julie Stevenson Hunter
Rebecca Leigh Hutcheon
Samuel Hyde
Zainab Olubusola Ibraheem
Takeshi Iitani
Nathalie Iniguez
Jun Ishii
Richard Issa
Pedro Jose Izquierdo Franco
Tanisha Ann James
Bryant Tang Jiravisitcul
Camille Marie Johnson
Julia Elizabeth Johnson
Maryum Jamal Jordan
Ismael Moncera Jose
Jonathan Oliver Joseph
Robert Richard Jung
Andrew Joseph Kahn
Kelly Elizabeth Kalahar
Alessia Sara Kalish
Qingyi Kang
Justin Aaron Kanter
Jo-ann Tamila Karhson
Michal Hadara Kaufer
Ayla H. Kawachi
Lucy Anne Keane
Edward Emmett Keenan
Todd Michael Kellert
Caitlin Marie Kelly
Joseph Kernen
Amrita Hanuman Prasa Khemka
Vandad Khosravirad
Susanne Wanjiru Kihumba-Watts
Bohyung Kim
Chiseul Kim
David Hyunsuk Kim
Hongjoong Kim
Junmin Joseph Kim
Sang-eun Kim
Youngeun Kim
Kodai Kimura
James Edward Kingry
Timothy Raymond Koch
Christopher Todd Koenig
Binyomin Koff
Jacob Louis Kohn
Natalie Michelle Komari
Kelly Lynn Kopyt
Brian Andrew Koss
Martie Paula Kutscher
Alexandra Jeannine Kwasnik
John A. LaBoon
Michael Labriola
Myisha Lacey-Tilson
Laura Elizabeth Lagone
Kathryn Rose Lagrassa
Faiz Munir Lalani
Jeanna Lee Lam
Phillip Lewis Lamberson
Jaclyn Leigh Laporta
Courteney Brianne Lario
Uyen Phuong Le
Hector Andres Ledezma
Daniel Hyung Lee
Hang Pyo Lee
Sejoong Lee
Sunjae Lee
Susana May Yon Lee
Lauren Elizabeth Lefevre
Robert Alexander Leitch
Adrien Nicolas Leleu
Michael Scott Leonard
Amanda Marie Leone
Mallary Ann Lerner
Zoe Ruth Lester
Matthew David Levitt
Ayesha Elaine Lewis
Gege Li
Jing Li
Li Li
Na Li
Zhao Li
Xiaochen Liang
Steven Daniel Lickstein
Thomas Roger Yves Lieby
Christopher John Liegel
Ryan William Lifland
Heeseong Lim
Mujuan Lin
Yang Lin
Chang Liu
Diyang Liu
Paulina Lopez Caballero Ferrer
Cristina M. Lopez
Danielle Lopez
Aviva Tanya Love
Ian Moorehead Love
Jeffrey Marc Lynch
Candice Bridget Macario
Joanne Elizabeth Macmillan
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Megan Louise Mah
Santina Liliana Mangiafico
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Jean Znidarsic Matzeder
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James Robert McKee
Matthew Edward McMahon
Megann Katherine McManus
Tyler Roberts Meade
Brittany Kate Melone
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Diogo Philippe Metz
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Chloe Coenen Mickel
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Geoffrey John Miller
Morgan Alexis Miller
Danita Minnigan
Jordan Emma Mintz
Amanda Leigh Mitchell
Mindy Dawn Mitchell
Sakie Miwa
Kenta Mochizuki
Evan Andrew Mongiardo
Yesmina Vanessa Morales Nemez
Adam Robert Moreland
Andrew Joseph Morris
Andres Mosqueira Perez
Diane Lesley Moss
Michael Joseph Mouridy
Danny Kirera Muchoki
Evian Mugrabi
Christine Marie Mumma
Claire Elizabeth Murphy
Christopher Russel Murray
Carlos Jose Muskus Guardia
Evans Wani Muzere
Jonathan Edward Nagel
Edwin Arthur Nahas
Grace Nam
Heather Michelle Nappi
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William Joseph Neelon
Jamie Lorraine Newlon
Daniel Shun Yip Ng
Yuko Nitta
Benjamin Eli Notterman
Mitsuaki Nozue
Irena Nutenko
Nmachukwu Blessing Obi
Chiyoon Oh
Christabel Marie Oh
Matthias Josef Dietrich Ohm
Masafumi Ohsaki
Tsugihiro Okada
Kentaro Okamoto
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Anna Barbara Olszewska
Olamide Oladapo Omolaja
Derek William Orth
Kenneth Jay Ottaviano
Esther Ovadia
Hyunju Helen Pak
Hagar Palgi Hacker
Dongchang Pan
Elsa Anne Paparemborde
Daniel Eugenio Parga
Kyung Hwa Park
Nyasha Rose Pasipanodya
Dmitry Paskalov
Aparna Krishnaswamy Patrie
Richard Thomas Patterson
Spencer Patrick Patton
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Arvin Peltz
Aurelio Pena
Marco Pensato
Bryan Michael Pepper
Paulo Jose Silverio Pereira
Sonia Perez Romero
Celso Javier Perez
Simone Catherine Petrella
Tracy L. Pho
Lucia Piazza Dobarganes
Shlomo Pill
Callie Lawson Pioli
Christine Nerima Sophia Plagmeijer
Jose Fernando Plata Puyana
Michael Leo Pomeranz
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Nicholas Jon Pompeo
Hallie Jay Pope
Dharshini Prasad
Siddhartha Premkumar
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Meng Pu
Nathaniel Michael Putnam
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Josephine A. Reina
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Dominique Antoinnette Romano
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Shelagh Elizabeth Mary Rule
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Myung Hyun Ryu
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Mary Jacqueline Sagini
Tetsumichi Sakaki
Isidro Salcedo
Douglas V. Sanchez
Jason Levi Sanders
Gregory Ross Sarafan
Tanja Saravolac
David Gregory Sardarizadeh
Shigeru Sasaki
Giorgio Adib Sassine
Neil Robert Saunders
Florence Sauve-lafrance
Christiana Laure-marie Sawaya
Michael Scott Scerbo
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Robert Andrew Schafer
Martin B. Schnabel
Halsey Overton Schreier
Erik Nils Gustav Schultz
Christopher John Seelinger
Christopher J. Seusing
Kathleen Hunter Shannon
Michael Blair Shapiro
Zack Garway Sharpe
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Jianfei Shi
Jordan Elizabeth Shipley
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Amanda Caryn Shoffel
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Kimberly Ann Sierra
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John V. Silverio
Joshua Maxwell Silverstein
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Vinita Sithapathy
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Daniela Sorokko
Arthur Souza Rodrigues
Tamara Marie Spicer
Adam Israel Steene
Jeffrey A. Stein
Jessica Wirth Stiefler
Matthew Brian Stieglitz
Alexandra Georgiana Stoicescu Popescu
Peter Emil Strniste
Ryan Keith Stumphauzer
Elvis Sulejmani
Yasuyuki Suzuki
Mark Charles Svalina
Waeiz Ullah Syed
Helia Taheri
Shinya Takizawa
Alper Tasdelen
Paul G. Thompson
Victoria Helen Thompson
Takeshi Toyoda
Danielle Nicole Traylor
Timothy Devin Tremba
Christopher Henry Trivisonno
Scott Andrew Troia
Nicholas Foster Tsai
Fnu Tshibangu Mukendi
Emanwel Josef Turnbull
Rodica Turtoi
Sean Daniel Tyrer
Tugce Ugurlu
Suzzanne Uhland
Yoshinori Usui
Charles Waddi Uzochukwu
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Jared Scott Vega
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Nathan Paul Viebrock
Andrea Villiger
Therese McCabe Wales
Emma Louise Walker
Evan George Waller
Congheng Wang
Danyue Wang
Hanmo Wang
Jiayi Wang
Jiayin Wang
Lu Wang
Pei-ju Wang
Xiu Wang
Xue Wang
Samar Warsi
Ai Watanabe
Yuko Watanabe
Kurt Matthew Watkins
Qiana M. Watson
Genevieve Watt
Jinglan Wei
Jeffrey David Weinstock
Jesse Trent Weintraub
Samuel David-kinder Weiss
Randall Scott Wells
Steven Eugene Whelan
Mary Grace White
Ashley Trent Wilkinson
Brett Johnston Williamson

Rhonda Hunter Wills
Michael Stewart Woodruff
Yuting Xiang
William Zhichen Xu
Hua Yao
Shuomin Yao
Yao Yao
Sang W. Yi
Yalin Yin
Rie Yokota
Hiroyuki Yoshioka
Amanda May Yu
Young Yu
Maliheh Zare
Thalin Zarmanian
Yevgeniya Baraz Zarmon
Karim George Zein
Anqi Zhang
Yue Zhang
Zekun Zheng
Xueyin Zhong
Xiang Zhou
Yilei Zhou
Laszlo Ziegler
Jacqueline Leigh Zoller

Attorney Professionalism Forum
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the firm's managing attorney, she prevailed in an evidentiary hearing before an administrative law judge (ALJ) and a final order was entered by the NYSDHR. The administrative law judge's decision was subsequently affirmed by the New York State Supreme Court Appellate Division, Second Department, in June 2011, and judgment was entered in the amount of $244,665.05.

The ALJ made the following detailed factual findings. Rocco was a 33-year-old mother of three children. In 2004, during Rocco's second pregnancy, and during a time when she was hospitalized due to pregnancy-related complications, Goldberg hired a male associate because, according to him, the male associate "couldn't have babies." *Id*. at 119. While Rocco was out on her second maternity leave, Goldberg hired an attorney named Eric Sanders, who was subsequently promoted to managing attorney in December 2004. When Rocco returned from her second maternity leave, she was routinely assigned undesirable work, given clerical tasks, and her direct contact with clients was reduced. When Rocco became pregnant for the third time, Goldberg and Sanders thought she was "hiding it with big clothing" and remarked that she must be having "Irish twins." When Rocco did announce her third pregnancy, Goldberg said, "Not again. I need to speak to Mr. Sanders." *Id*. Then, in February 2005, the firm revoked Rocco's company car, cell phone and credit card, while other firm employees retained those benefits. In March 2005, Rocco complained to Goldberg that she felt she was being retaliated against for her pregnancy. Goldberg apologized for revoking her car, cell phone and credit card and assured her there were no problems with her work product and he would discuss the situation further with Sanders. A few days later, just before Rocco left for her third maternity leave, Goldberg told Rocco that she should "go have babies." *Id*. While on maternity leave, Rocco called Goldberg and asked him to address her complaint of discrimination. On June 6, 2005, when Rocco returned from maternity leave, she was fired. There was a new attorney occupying her office and all of her belongings had been packed up. Rocco testified before the ALJ that she "felt humiliated, embarrassed and distraught over the loss of her job." *See id*.

With respect to your adversary's offensive comment to you, that incident appears to have been isolated and probably not something that warrants disciplinary action. But you do have recourse. You, or another trusted partner from your firm, may want to bring the offending lawyer's comment to the attention of another lawyer at his firm, with the understanding that if it happens again you will report him to the judge or alternatively, the Disciplinary Committee. We believe it is important to get the word out that this kind of behavior is entirely inappropriate and unprofessional.

In sum, the behavior you have detailed is emblematic of the larger problems many women lawyers face at some point in their legal careers. The unpleasant and offensive work environment you describe is not acceptable and violates NYRPC Rule 8.4(g), which prohibits lawyers and law firms from unlawfully discriminating in the practice of law. While there is no right or wrong approach on how to combat gender disparity and discrimination, we believe that engaging in open and frank dialogue about these issues in the first instance, as we are doing here, will lead to a better informed and more thoughtful professional legal community.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com),
Maryann C. Stallone, Esq.
(stallone@thsh.com), and
Hannah Furst, Esq.
(furst@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

Of late, I've noticed that many of my lawyer friends, and former law school colleagues, have been using social media outlets such as Facebook, Twitter and LinkedIn to market themselves and their recent victories in litigation or before the immigration board, etc. These are their personal (as opposed to professional) pages. I have always been wary of posting on my personal Facebook page because of attorney advertising rules. Are those rules more relaxed in the context of social media? What guidelines apply? I am considering whether to market my work on my personal social media pages, whether it be Facebook or LinkedIn, but I want to make sure I don't run afoul of the Rules of Professional Conduct. Are there any other rules that I should be aware of before doing so?

Also, I have seen some attorneys taking pictures in the courtroom, and later tweeting about what they observed during a trial or court proceeding. Is this acceptable? Again, I assume this is just another way to market themselves but are there other issues?

Sincerely,
#mediaphobic

engines like Google or Yahoo, and in legal-drafting books.[25]

Use forms only for guidance. Don't assume they're well-drafted or complete or that they apply the law of your jurisdiction.[26] Many first-year associates who've never drafted a contract before hold onto these form contracts for dear life.[27] Don't be one of those drafters. Form contracts serve merely as references.[28] Never blindly copy the language of form contracts.[29] Tailor your contract to your client's needs and to the transaction's nuances: "No one can ever hope to be even passably competent [in drafting], unless and until he recognizes that each legal document involves to a greater or lesser extent an effort in original composition."[30] If you use a form, add your unique construction to serve your client's interests and desires.

> Controlling the first draft is invaluable.

Another starting point to writing a contract is to use as your guide a contract you or your colleagues have already written. Modify that contract to meet the needs of your current client and transaction.[31] Using a contract you've worked on in the past will save you time, reduce your client's fees, and guide you toward drafting something complete.[32] Reading through samples will also give you an idea of the provisions that could be favorable to your client and which are absent from the draft.[33]

Another way to draft a contract is to write it from scratch.[34] Some offices don't have an extensive collection of contract templates. It's difficult to have successful law-firm template initiatives.[35] Firms draft contracts covering a wide range of topics. And firms often neglect to create templates — the work is non-billable.[36] Templates also take autonomy away from partners, so first-year associates often have few drafting templates to work from.[37] However you choose to draft the contract — whether you draft it from scratch, use a form contract, or copy a contract from an office file — always (1) compare the facts of each situation; (2) understand the substance of the transaction; (3) update the law; and (4) update the language. Once these tasks are completed, you can begin to build the contract's framework.[38]

Negotiating

Rarely will a contract be drafted in a vacuum. The process will often be a collaboration with other parties and the fruit of negotiation.[39] Unlike litigation, contracts aren't drafted under a judge's watchful eye. Because an objective judge will not be checking attorney behavior during the contract negotiations, "[t]he contracting parties, and, more important, their attorneys must police attorney conduct."[40] Policing might create ethical dilemmas. For example, an attorney is obligated to alert opposing counsel to scrivener errors, even those that benefit their client.[41] Drafters must prioritize their ethical obligations above all else. Although you must be steadfast in representing your client throughout the negotiations, "'[a]n attorney must obey his own conscience and not that of his client.'"[42] Shifting your legal mindset from competition to cooperation builds trust among parties and "is critical to the success of business relationships."[43]

The adversarial nature of the contract-drafting process makes it smart to gain the upper hand from the start.[44] One effective approach is to prepare the first draft. The first draft outlines the issues and structure for the final draft.[45]

Some lawyers surrender the opportunity to produce a first draft. They lack the interest, time, or skill.[46] Creating a first draft often consumes substantially more resources than reviewing and editing someone else's draft.[47] But controlling the first draft is invaluable.[48] It's to your client's benefit if you, as the attorney, write the first draft, and it's worth your time to tell your client why.[49]

After you finish the first draft, send it to your client for review.[50] Incorporate your client's suggestions. After getting your client's consent, send the contract to your adversary.[51] Have your adversary review it.[52] Revise the draft you receive from your adversary and send it to your client for review.[53] Continue this process until you have a polished document with terms on which all parties agree.

The standard practice is to send two copies of the contract to your adversary: one clean copy, and one with the changes highlighted. The copy with the marked changes is the "redlined" copy. Sending a redlined copy to your adversary makes your adversary aware of the changes made to the earlier draft.[54]

Redlining a document on Microsoft Word is simple. While the document you want to redline is open on the screen, click the "Track Changes" image on the review tab in the tracking group. The exactness of this illustration may vary slightly depending on whether you are using a PC or a Mac and which Microsoft Office version you're using, but all systems are similar. Once you select Track Changes, you can make the changes you want by inserting, deleting, or moving text.[55] All your changes will appear in a different color so that your adversary can clearly see the changes and respond to them.

Failing to redline might suggest to others that you're trying to hide your changes from the other side or that you're not allowing them the opportunity to respond or make their own changes.[56] If your adversary refuses to produce a redlined copy and you're forced to work with an unmarked draft, discuss the changes with your adversary and redline the draft based on your discussions.[57] Negotiate with your adversary to resolve any change to the contract.[58] After you and your adversary resolve your editorial differences, you'll have a final draft of a contract the parties can sign.[59]

The language of the contract is critical to your negotiations. Depending on your goal as the contract drafter, you

may keep the contract language vague or specific. Vague language might allow you to wrangle a good result for your client, but it can also be unclear and lead to litigation. A contract is a set of instructions for how the transaction should proceed. The contract's accuracy — arising from a clear set of instructions — will ensure that all parties achieve their goals.[60] The contract's language should be clear irrespective of the audience: "Awkward phrasing, confusing syntax, ambiguous terms, and 'legalese' should not creep onto the page. . . ."[61] You're writing a contract, not a persuasive appellate brief.

Use language all readers will interpret the same way.

If your adversary writes the first draft of the contract, a thorough initial review of the document is essential. Once you receive the first draft from opposing counsel, read through it to get a sense of how well-drafted and organized it is.[62] Scrutinize the draft for drafting errors, ambiguous terms, inconsistencies, typos, and other issues.[63] Once you've completed this read-through, review the draft again more closely.[64] This time, focus on what's missing, including provisions that might be helpful to your client.[65] If the draft contains complicated, specialized provisions, such as those addressing intellectual property, tax, or employee benefits, consider having someone with expertise review them.[66]

After you've made your changes to a draft, share a marked-up copy with your clients to see whether they have questions or comments of their own.[67] It might be helpful to prepare a cover memo to draw their attention to specific areas of the contract.[68] This memo can explain assumptions in the contract and the terms of the contract.[69] Point your client to anything you believe the other side's attorney left out and how you've addressed this.[70] This cover memo informs the client, but it also protects you, the lawyer.[71] If a written explanation isn't possible, then the best alternative is to call your client to go through the provisions one at a time.[72]

Once the client has signed off on your new comments, share them with the other side's drafting attorney.[73] That attorney will make changes to the contract in response to your comments but will likely reject some of them.[74] You then need to get feedback from your client about whether to push for any rejected change.[75] A client will normally ask you what you think on pushing for a particular comment. Think through your answer and reasoning in advance.[76]

The goal of effective contract drafting is to avoid "you-get-the idea" provisions.[77] If your contract has gaps, the law or your adversary will plug the holes for you. A systematic approach to contract drafting allows for "(1) meeting of the minds, (2) uncovering hidden ambiguities and topics not addressed, and (3) better understanding of the contract after it is entered into."[78]

Audience

Many people believe that a contract is only as good as your ability to enforce it in court. But effective contract drafters know that "'[a] contract is only as good as your counterparty's perception that you will seek to and successfully enforce it in court.'"[79] It's also prudent to account for "'your counterparty's assessment of any damage to its reputation should you seek to [and successfully] enforce it in court'"[80] along with "'any sense of moral obligation that your counterparty might have in performing its obligations under the contract.'"[81]

When drafting a contract, your goal is to use language all readers will interpret the same way.[82] Consider all possible audiences for your contract: the parties to the contract, their attorneys, a judge, and a jury.[83] This ensures that even the most basic and detached reader will be able to understand the contract's words and intent.[84]

Writing a contract requires drafters to be forward-thinking.[85] Envision how the parties' perspectives might change over time. Be aware of the future disputes that might arise from the contract.[86] Consider how possible litigation or other events will change the parties' perspective. The contract must answer all potential questions; possible audiences might have different perspectives and use the contract for different reasons.[87] Consider how you can poke holes in a particular contract. That's what an adversary will do. Think about how a contract might be enforced in the context of how a counterparty might comply with the contract's terms.

A Few Tips

The document shouldn't overload the reader with information.[88] Write clearly.[89] Make the language easy to follow.[90] Make the contract understandable, keeping in mind the reader's knowledge and experience with the contract's subject area.[91] Make the contract accessible to the least sophisticated audience that might review it.[92] Contract drafters who have that attitude will limit the ambiguity that could lead to litigation.

In the next issue of the *Journal*, the *Legal Writer* will discuss the different parts of a contract. ■

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1. Robin A. Boyle, *Contract Drafting Courses for Upper-Level Students: Teaching Tips*, 14 Perspectives: Teaching Legal Research and Writing 87, 87 (2006).
2. Charles M. Fox, Working With Contracts: What Law School Doesn't Teach You 2 (Practising L. Inst. 2d ed. 2013).
3. *Id.*
4. William K. Sjostrom, Jr., An Introduction to Contract Drafting 1 (2d ed. 2013).
5. *Id.* at 1.

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6. Scott J. Burnham, *Transactional Skills Training: Contract Drafting — Beyond the Basics*, 2009 Transactions: Tenn. J. Bus. L. 253, 253 (2009).

7. M.H. Sam Jacobson, *A Checklist for Drafting Good Contracts*, 5 J. Ass'n Legal Writing Directors 79 (2008).

8. Gregory M. Duhl, *The Ethics of Contract Drafting*, 14 Lewis & Clark L. Rev. 989, 991 (2010).

9. Sjostrom, *supra* note 4, at 2.

10. *See* James P. Nehf, *Writing Contracts in the Client's Interest*, 51 S.C. L. Rev. 153, 154 (1999).

11. *See* Scott J. Burnham, Drafting and Analyzing Contracts 216 (3d ed. 2003).

12. *Id.* at 217.

13. *Id.*

14. Sjostrom, *supra* note 4, at 43.

15. *Id.*; Robert A. Feldman & Raymond T. Nimmer, Drafting Effective Contracts: A Practitioner's Guide 1-5 (2d ed. 1995).

16. Sjostrom, *supra* note 4, at 43.

17. Jacobson, *supra* note 7, at 79, 84.

18. *Id.* at 84.

19. *See* Feldman & Nimmer, *supra* note 15, at 1-5–1-6.

20. *Id.* at 1-7–1-9.

21. Sjostrom, *supra* note 4, at 43.

22. *Id.*

23. *See* Feldman & Nimmer, *supra* note 15, at 1-11.

24. Sjostrom, *supra* note 4, at 44; Feldman & Nimmer, *supra* note 15, at 1-22–1-23.

25. Sjostrom, *supra* note 4, at 44.

26. *Id.*; Feldman & Nimmer, *supra* note 15, at 1-25.

27. Burnham, *supra* note 11, at 216.

28. *Id.*

29. *Id.*

30. Burnham, *supra* note 11, at 216 (quoting Sidney F. Parham, Jr., The Fundamentals of Legal Writing 11–12 (1967)).

31. *Id.*

32. *Id.*

33. *Id.* at 48.

34. *Id.* at 218.

35. Kenneth A. Adams, Outside Counsel, *The New Associate and the Future of Contract Drafting*, N.Y.L.J., Apr. 1, 2011, at 4, col. 4.

36. *Id.*

37. *Id.* at 7, col. 1.

38. Burnham, *supra* note 11, at 218.

39. Charles R. Calleros, Legal Method and Writing 519–20 (6th ed. 2011).

40. Duhl, *supra* note 8, at 992.

41. *Id.* at 1001.

42. *Id.* (citing Opinions of the Committees on Prof'l Ethics of the Ass'n of the Bar of the City of N.Y and the N.Y. County Lawyers' Ass'n 260, 260–61 (1958) (internal quotation marks omitted) (quoting Canon 15 of Prof'l Ethics of the Ass'n of the Bar of the City of N.Y. (1908)).

43. *Id.* at 1033.

44. Feldman & Nimmer, *supra* note 15, at 1-19.

45. *Id.*

46. *Id.* at 1-20.

47. *Id.*

48. *Id.*

49. *Id.*

50. Sjostrom, *supra* note 4, at 45.

51. *Id.*

52. *Id.*

53. Feldman & Nimmer, *supra* note 15, at 1-15.

54. Sjostrom, *supra* note 4, at 46; Feldman & Nimmer, *supra* note 15, at 1-21.

55. Microsoft Office Support, Track Changes While You Edit (2015), *available at* http://office.microsoft.com/en-us/word-help/track-changes-while-you-edit-HA001218690.aspx (last visited May 27, 2015).

56. Feldman & Nimmer, *supra* note 15, at 1-21.

57. *Id.*

58. Sjostrom, *supra* note 4, at 46.

59. *Id.*

60. Peter Siviglia, Helpful Practice Hint, *Fine Tuning*, 70 N.Y. St. B.J. 66, 68 (Sept./Oct. 1998).

61. Nehf, *supra* note 10, at 160.

62. *See* Jacobson, *supra* note 7, at 96.

63. *Id.* at 113.

64. Sjostrom, *supra* note 4, at 49.

65. *See id.* at 48.

66. *Id.* at 49.

67. *Id.* at 50.

68. Feldman & Nimmer, *supra* note 15, at 1-16.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 1-16–1-17.

73. Sjostrom, *supra* note 4, at 50.

74. *Id.* at 51.

75. *Id.*

76. *Id.*

77. Vincent R. Martorana, Supplemental Outline, The Nuts and Bolts of Contract Drafting: From Basic to Advanced Topics 6 (N.Y. St. B. Ass'n CLE, June 2015).

78. *Id.*

79. *Id.* at 9.

80. *Id.*

81. *Id.*

82. George W. Kuney, The Elements of Contract Drafting with Questions and Clauses for Consideration 7 (3d ed. 2011).

83. Nehf, *supra* note 10, at 2.

84. *Id.*

85. *Id.*

86. *See* Nehf, *supra* note 10, at 156.

87. *See* Susan L. Brody, Jane Rutherford, Laurel A. Vietzen, & John C. Dernbach, Legal Drafting 207 (1994).

88. Jacobson, *supra* note 7, at 85–86.

89. *Id.*

90. *Id.*

91. *Id.*

92. Brody, *supra* note 87, at 208.

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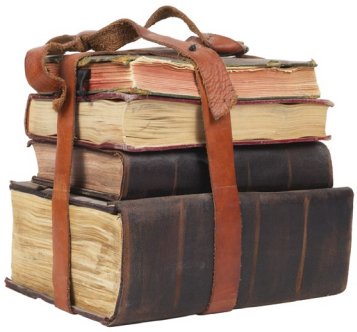

Making Offers No One Can Refuse: Effective Contract Drafting — Part 1

Contracts permeate our lives. Whatever you do, wherever you go, a contract is behind it all: agreements covering school honor codes, financial aid, credit cards, employment, cell phones and cable, prenuptials, mortgages and rentals, car purchases and leasing, partnerships, and everything in between. Each agreement is a promise that you and other parties will make and should keep. If you, or someone else, don't keep that promise, you'll face the consequences laid out in your contract. Maybe you'll even face a judge.

Contract drafting poses problems for many lawyers, especially first-year associates. Although contract-drafting classes are now prevalent in law-school curriculums,[1] transactional lawyers working in practice areas such as corporate, finance, commercial law, and real-estate often graduate from law school without the tools necessary to succeed.[2] Most associates learn on the spot by observing and doing.[3]

This five-part series discusses the basics of writing effective contracts. This first column describes the planning-and-negotiating process in contract drafting. The next columns will identify the different parts of a contract, explain contract concepts that give rise to liability, and illustrate how to write contracts that reduce potential liability and minimize risk. The final column will give tips on how to write contractual provisions clearly and unambiguously. The goal is to enable you to write concise and precise contracts that are easy to understand and will hold up in court.

Whether or not you're a transactional attorney, contract drafting is an important skill.[4] This series on contract drafting is for seasoned practitioners, newly admitted attorneys, eager law-school students, and anyone else interested in drafting a contract.

Preliminary Matters

Planning

The first step in writing a contract, after your client has told you about the transaction, is to outline the contract parties' duties and obligations. Drafting a contract is a unique form of legal writing.[5] It's an important part of preventive lawyering;[6] it protects clients from costly litigation. A well-written contract is clear, complete, effective, and enforceable.[7] As contract drafters, your goal is to capture an oral agreement's terms and put them in writing. You must not only be advocates, but also educators, wordsmiths, and scriveners.[8] You'll need to foresee the things that could go wrong with an agreement. Favorable outcomes emerge when contract drafters use language that future readers will interpret the same way you do.[9] If a dispute arises, a well-drafted contract will help others interpret the contract as the parties originally intended.[10] A way to accomplish this is to research the nature and basis of the agreement to understand the role of each provision.[11] Some lawyers don't or can't always allot the time to conduct in-depth research.[12] But so long as lawyers make forward-looking moves to determine the meaning of a contractual provision, they're on the right track to produce a well-defined contract.[13] Besides, your preliminary work will ensure you're writing a contract that'll best serve your client.[14]

Most contract drafting begins when a client telephones, emails, or texts you to explain a business transaction that should be memorialized.[15] Speak with your client about the essential terms and the nuances.[16] If your client doesn't spoon-feed you the information you need to draft a complete contract, you should know what information you must get from your client.[17] Find out the nature of your client's business operation, the parties' motivations, and the purpose of the contract, along with any future business goals.[18]

> Before you draft a contract, make sure to plan ahead.

Ask your client who the parties entering into the contract are and what your client seeks from the contract.[19] Then get the documents relating to the transaction.[20] This'll help you understand what each side is promising and alert you to aspects of the deal that your client hasn't mentioned to you.[21] Ask your client how quickly the contract is needed and when your client expects to see a draft.[22] Tell your client how much time you'll need to draft and finalize the document.[23]

As a starting point, it's often helpful to look at contract forms.[24] You can find forms on legal-search engines like Westlaw or Lexis, on general search

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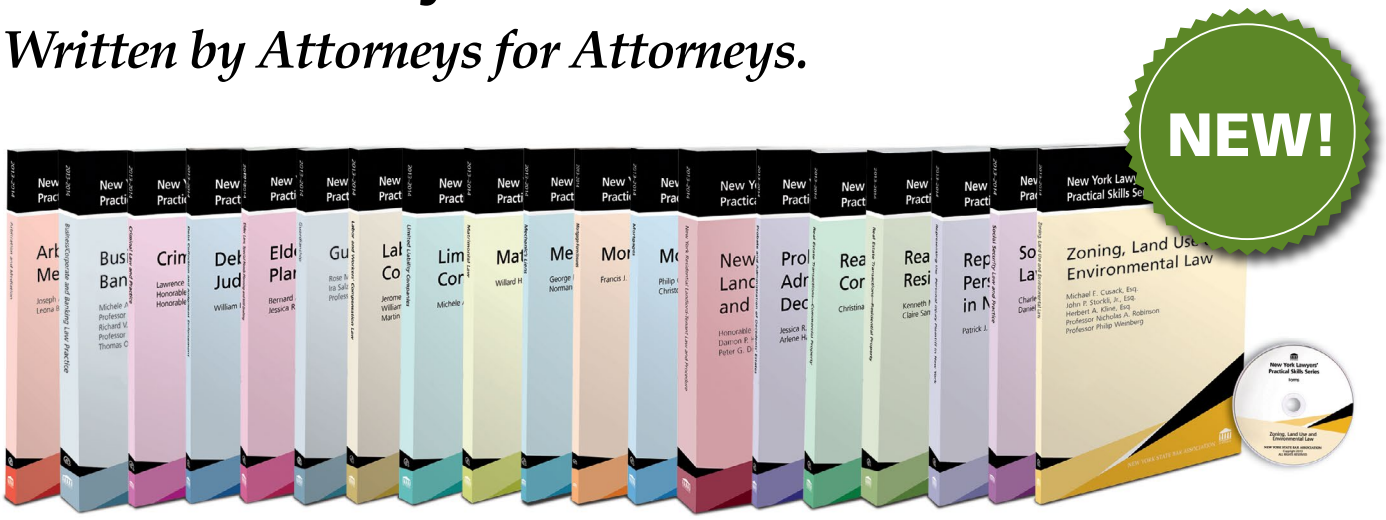

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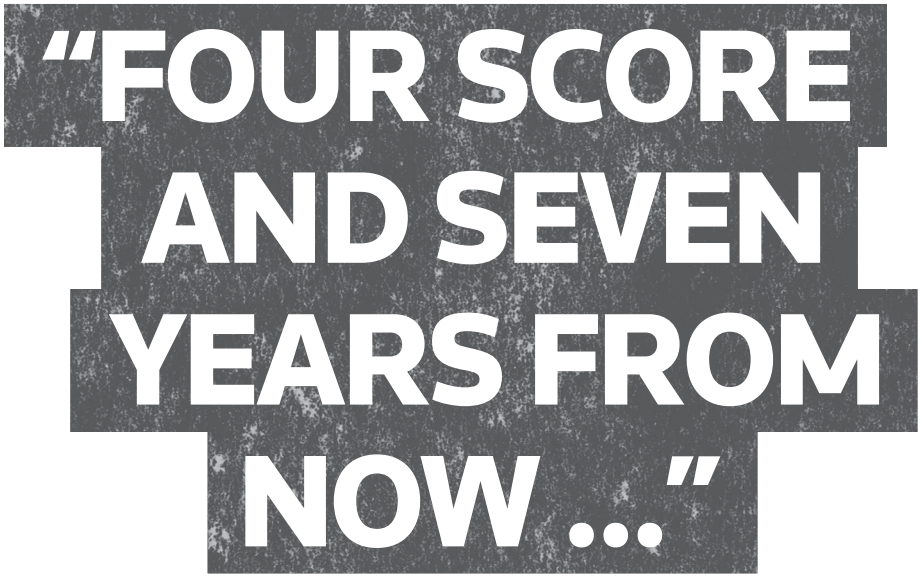

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