NEW YORK STATE BAR ASSOCIATION
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Are You Being GREENWASHED?

by Devika Kewalramani and Richard J. Sobelsohn

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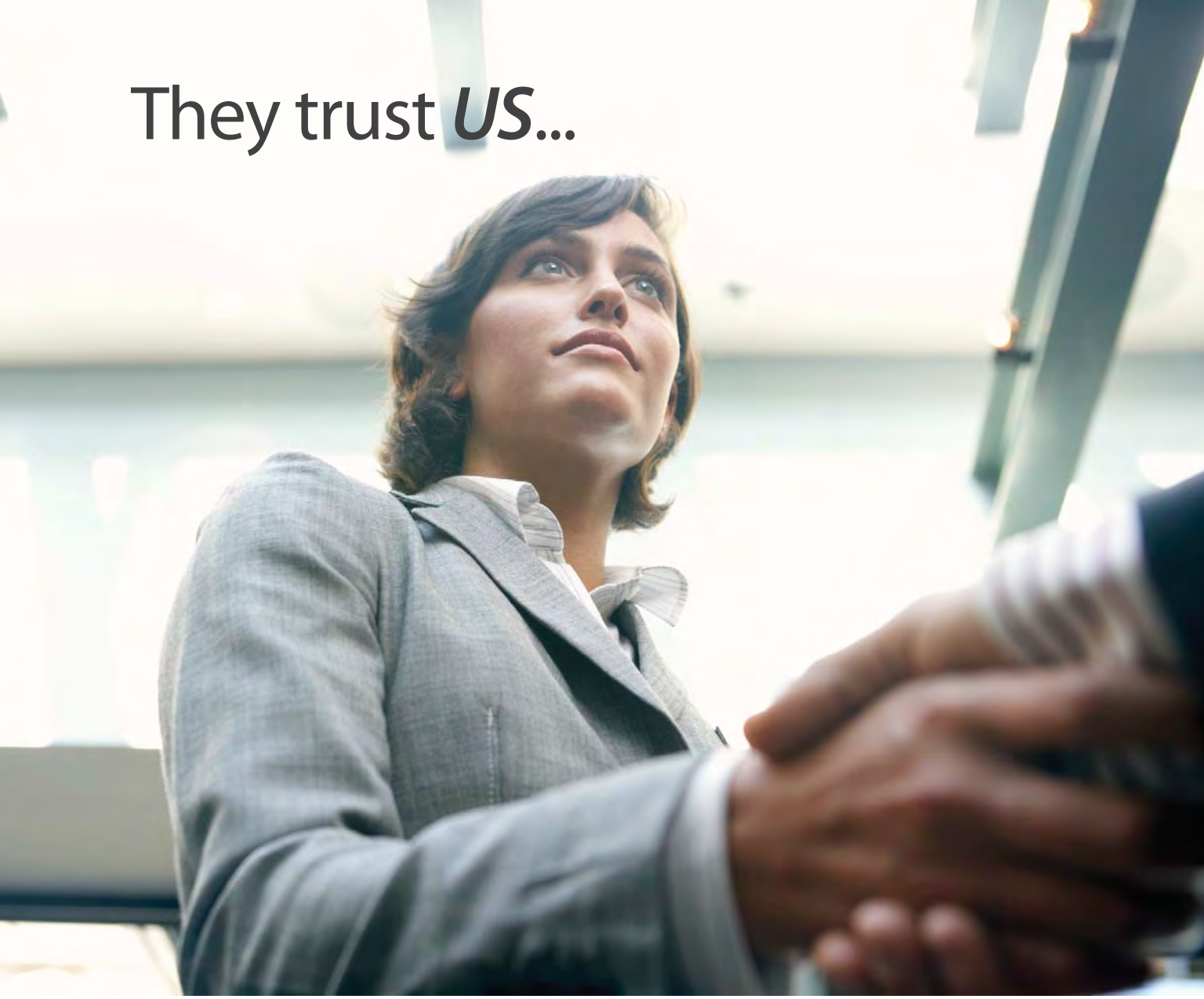

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SEYMOUR W. JAMES, JR.

Making a Difference

In preparing to take office as president of the New York State Bar Association and in developing initiatives for the coming year, I have spent time reflecting upon the evolution of my career and the unique role attorneys play in our society. As a senior in college I attended a conference for prospective law students which focused on law careers designed to have an impact on public policy and social justice. After that conference, I found myself drawn to public interest law and eventually sought a position with The Legal Aid Society, where I have worked for nearly 38 years. Before my legal career began, I learned firsthand about the effect attorneys can have on the lives of the people who rely on their assistance. As a law student, I interviewed prisoners for a project examining legal representation, and I heard, again and again, about their frustration with the justice system and their concerns about the quality of representation they received.

I have been fortunate to spend my entire career working to improve indigent criminal defense, and throughout my career at The Legal Aid Society I have had many rewarding opportunities to make an impact on people's lives and improve the justice system. And through participation with Bar Association projects and committees, I have been able to amplify the effectiveness of that work by bringing my experiences together with those of attorneys in related fields throughout the state to address important issues from a thoroughly informed statewide perspective.

Although State Bar presidents come and go, and initiatives change and evolve over time, the Association's mission remains at the heart of our work: we exist "to cultivate the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, to elevate the standard of integrity, honor and courtesy in the legal profession" and to nurture a spirit of camaraderie in the legal community. The State Bar provides important membership benefits and services that improve the practice of law and help lawyers to provide better services to their clients. It also provides an influential vehicle to uphold the values and principles underlying our profession. In addition, the Bar Association helps us to effect change and improve the justice system by bringing us together to work on shared priorities in every area of practice. Attorneys from varied practices, with a wide variety of concerns, have come together through our Bar Association to maximize the results of their work and have been performing these important functions for over 135 years.

As president, I look forward to bringing the vast knowledge, experience and expertise of our large and diverse membership to bear on some pressing issues facing our society. I plan to pursue initiatives examining issues involving criminal discovery reform, prisoner re-entry, human trafficking, and increased voter participation. In addition, we will continue to fight for adequate funding for our court system, as well as appropriate support for indigent criminal defense services and comprehensive reforms that can prevent wrongful convictions.

We will also continue to vigorously advocate for increased funding for civil legal service providers, a long-standing priority of the State Bar. This year marks the 50th anniversary of the Supreme Court's decision in *Gideon v. Wainwright*. Although that decision guaranteed state provision of counsel in serious criminal cases for defendants who cannot afford an attorney, no such right exists for needy individuals and families dealing with civil legal issues related to their basic life necessities. We plan to take advantage of the 50th anniversary of *Gideon* to raise awareness of this problem as we continue our ongoing efforts to ensure adequate funding for civil legal services.

At the State Bar, we know how much we benefit from having diverse perspectives inform our work, and we continue to work to make our association more inclusive. A long-standing priority at the State Bar has been to ensure that our association reflects the diversity of our profession and our society. We have been making steady progress in that area and, through his President's Section Diversity Challenge, our immediate past president Vince Doyle has done an outstanding job continuing this tradition. I look forward to building upon his work and that of past presidents

Seymour W. James, Jr., can be reached at sjames@nysba.org.

and bar leaders who have recognized the value of a diverse membership as we seek to further enhance inclusiveness throughout the Association.

Vince Doyle has been an exceptional president during this past year, and it has been a privilege to partner with him as he advocated for Association priorities and pursued initiatives designed to achieve justice for all. I will continue those efforts and know that our president-elect, David Schraver, shares that commitment. It will be a tremendous honor to assume the presidency of this Association. More important, I look forward to meeting you, participating in many of the wonderful events and programs organized and inspired by our talented volunteers and working with the skilled, knowledgeable and dedicated members of our sections and committees as we address issues of importance to the profession and the public. Thank you for giving me the opportunity to serve the Association. ■

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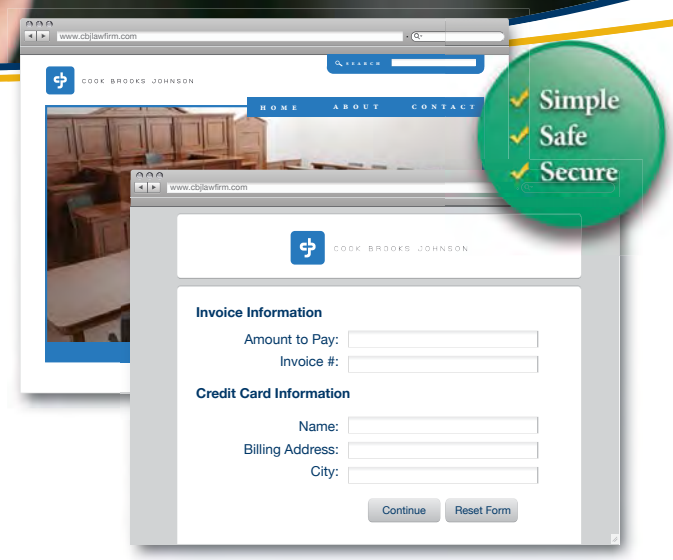

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June 11 New York City

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June 12 Long Island
June 13 Buffalo
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June 15 Long Island; Syracuse
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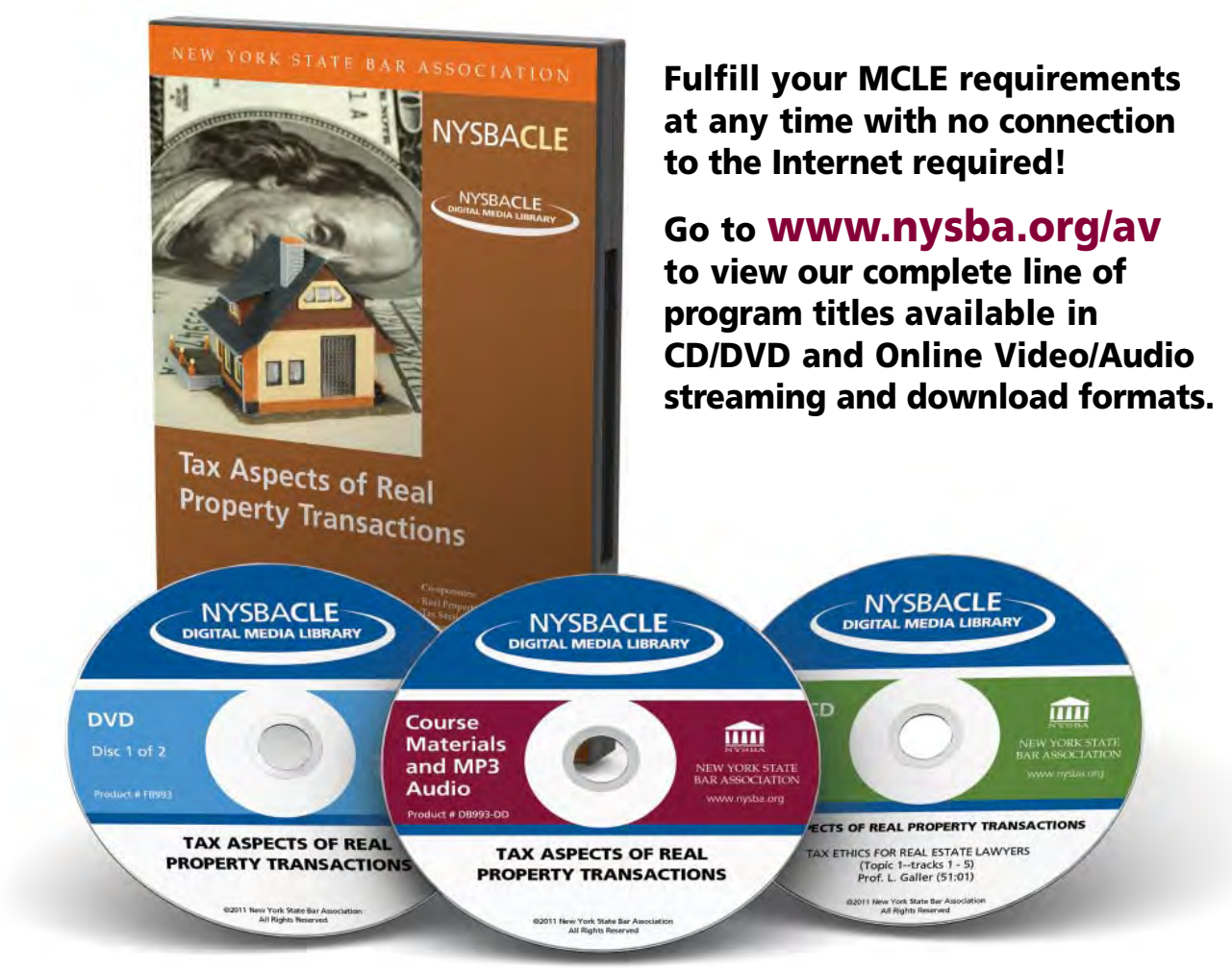

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Are You Being GREENWASHED?

Devika Kewalramani is a partner and co-chair of Moses & Singer LLP's Legal Ethics & Law Firm Practice group. **Richard J. Sobelsohn** is an attorney in Moses & Singer's Real Estate practice and is a LEED® Accredited Professional. Moses & Singer is a full-service law firm in New York City.

By Devika Kewalramani and Richard J. Sobelsohn

Look at these labels: "Eco-Friendly," "Organic," "Natural" and "Green." Do they say what they mean and mean what they say?

What Is "Greenwashing"?

Greenwashing is a novel word that merges the concepts of "green" (environmentally sound) and "whitewashing" (to gloss over wrongdoing) to describe the deceptive use of "green marketing" to promote a misleading perception that a company's policies, practices, products or services are environmentally friendly. "Greenwashing" officially became part of the English language in 1999 with its entry into the *Oxford English Dictionary*. It defines the term as "disinformation disseminated by an organization so as to present an environmentally responsible public image." The term is generally used when an organization expends more time and resources marketing its "greenness" than actually adopting procedures that are environmentally beneficial. It includes the practice of misleading customers regarding the environmental advantages of a specific product or service through deceptive advertising and unsubstantiated claims.

Regulation of "Green" Claims

The growing global trend in greenwashing claims and the rising demand for tighter government oversight has led many countries around the world to consider, develop and implement appropriate regulatory measures to combat or at least curb this phenomenon. While some countries use the International Standard on Environmental Claims ISO 14001, others such as Canada, Australia and England, have developed their own set of guidelines. The challenge facing regulators today is how to protect consumers by monitoring and enforcing green-marketing claims without creating consumer confusion with multiple environmental claims and caveats on a product or service label. What complicates the problem further is that greenwashing does not have the same meaning everywhere. In addition, what companies may think "green" means and what consumers understand it to mean may be entirely different.

United States

The Federal Trade Commission (FTC) is the U.S. governmental agency responsible for enforcing federal consumer protection laws that prevent fraud, deception, and unfair trade practices under § 5 of the FTC Act. The FTC has the power to prosecute false or misleading advertising claims, including environmental or "green" marketing claims.

In October 2010, the FTC issued proposed revisions to its Part 260–Guides for the Use of Environmental Marketing Claims,[1] popularly known as the "Green Guides." These were first issued in 1992 and last updated in 1998. The FTC's latest proposals are aimed at bringing the Guides into the 21st century to respond to the realities of the modern marketplace. They are designed to provide guidance on how companies can avoid misleading consumers when marketing the "greenness" of products or services.

The updates for the Guides are instructive on the proper use of general environmental benefit claims, "recyclable" claims and claims that a product is "ozone friendly" or "non-toxic." They propose new guidelines

for certain claims that were not covered by the old Guides such as "renewable energy," "renewable materials" and "carbon offsets."

Ultimately, what impact the not-yet-adopted Green Guides update may have will depend largely on the individual organizations making green claims. At the very least, the Guides would offer clearer instructions for developing environmentally responsible products or services. Stricter guidelines coupled with greater consumer scrutiny will engender a tougher environment for false environmental claims. In any event, in the short term, businesses should take a closer look at their marketing or advertising materials to determine whether any environmental benefit claims they make satisfy the FTC's new substantiation and specificity standards, and if not, what qualifications should apply.

Green claims have spurred some recent lawsuits. But these initial cases are only the beginning.

Other Countries[2]

Countries such as Australia, Canada, France, Norway and the United Kingdom are among those taking proactive steps to tackle greenwashing claims through a variety of regulatory, legislative and enforcement efforts. Many impose serious penalties on companies for falsely advertising their products or services or for using vague or misleading environmental claims. Such penalties could include requiring the guilty organization to pay all expenses and damages incurred and to set the record straight regarding its product's actual environmental impact. Some countries have developed procedures to investigate a potentially bogus claim based on public complaints regarding dubious marketing practices. Others have adopted green guidelines that warn businesses that substantiating green claims is not only good practice but is the law.

- Under the auspices of Norway's Marketing Control Act,[3] the Norwegian Consumer Ombudsman has authority to issue warnings to automobile manufacturers who falsely advertise their cars as "green" or "environmentally friendly," "natural" or "clean."
- Canada's Competition Bureau, in collaboration with the Canadian Standards Association, discourages businesses from making "vague claims" regarding the environmental impact of their products. Claims must be backed up by "readily available data."[4]
- Australia's Competition and Consumer Act of 2010[5] provides for punishment of companies that use misleading environmental claims. Organizations that are found guilty under the act could face up to $1.1 million in fines and must pay for all expenses incurred as well as set the record straight regarding their product's actual environmental impact. Australia's published guide, *Green Marketing and Trade Practices Act*, warns businesses that substantiating green claims is not only good practice, but it's the law, and cautions that attempts to mislead or deceive consumers can carry serious penalties.
- The British Code of Advertising, Sales Promotion and Direct Marketing, § 49, specifically focuses on environmental claims. England's guidance on advertising green claims directs companies on how to avoid misleading environmental claims. England's Advertising Standards Authority can proactively investigate a potentially bogus claim based on public complaints regarding dubious marketing practices.[6]
- France has taken a slightly different approach. Building on the work of the Bureau de Verification de la Publicité, which became a moral but not legal arbiter on green claims in 1998, French authorities launched the "Charte d'engagement et d'objectifs pour une publicité eco-responsible."[7] Led by a jury of advertising professionals, the Charte enables the authorities to impose fines and enforce the withdrawal of environmentally misleading campaigns.

Litigation

Green claims have spurred some recent lawsuits. But these initial cases are only the beginning. As more businesses jump on the green bandwagon, greater governmental oversight is exercised over environmental marketing claims, and rising public intolerance for false green claims is experienced, it is only a matter of time before there is a groundswell in court actions or other proceedings.

In one recent case, the California state attorney general filed an action[8] alleging a violation of the California Business and Professions Code that prohibits untruthful, deceptive or misleading environmental marketing claims and of the Federal Trade Commission's *Guides for the Use of Environmental Marketing Claims*, against a water bottler that claims its bottles are "biodegradable" and "recyclable." Why? Because the plastic bottles "will not biodegrade as claimed." In the brief, the attorney general argued, the "Guides specify that the use of the claim 'bio-

degradable' should be substantiated by competent and reliable scientific evidence" that the entire product will decompose in a reasonably short time period, a protocol the bottler has not followed.

In another recent California case,[9] a water bottler's claim that its bottled water was "environmentally friendly and superior" was challenged. The "greenness" of the bottled water was not disputed, but rather that the bottler's overall manufacturing, distribution and packaging of the water cause "as much, if not more, of an adverse environmental impact when compared to similar bottled waters." The allegations state that the water bottler uses a "greater amount more of natural resources" in the creation and transportation of its bottled water than competitors, which results in the use of "46 million gallons of fossil fuel, producing approximately 216,000,000 billion pounds of greenhouse gases per year."

And in yet another 2011 California case,[10] the plaintiff sued a manufacturer for misleading the public into thinking that its product is better for the environment because it is energy efficient – when in fact it is not.

But the problem with greenwashing goes well beyond the greenwasher and the greenwashed end user – that is, the consumer who fails to receive the benefit of the bargain by not getting the green product or service he or she expected. This can be especially problematic when it is third parties that require that greenness, such as a local municipality's requirements or rating agency mandates. Thus, there may be a domino effect triggered by greenwashing.

Greenwashing and the Domino Effect

Let's suppose a property owner called "Jade" is "greening" her building with a retrofit of the systems, lighting and materials she incorporates into the property. To do so, the products she will use have to be environmentally friendly, not only in name but also in content. For example, a product guaranteed by its manufacturer to have low volatile organic compounds (VOCs) must in fact have low VOCs. Low VOCs help prevent adverse health effects on those working near the product (high-VOC-containing products emit gases that have been shown to result in people becoming sick).[11]

Going for Gold

Jade wants her existing building to receive a LEED Gold Certification from the U.S. Green Building Council. "LEED" stands for the Leadership in Energy and Environmental Design rating systems which are products of the U.S. Green Building Council (USGBC). Jade carries out the retrofit of the building and applies for the certification, including in her application reference to the materials used in her retrofit, namely those with low VOCs. The benefit of incorporating low VOC products is not only that her building's occupants will be healthier, but that she will receive points toward the coveted LEED Gold certification.[12] One of the reasons Jade has her eye on "Gold" is to attract more credit-worthy tenants in her building and, with them, higher rents. Against counsel's advice, Jade advertises that her building has applied for LEED Gold Certification; she signs a lease with a major tenant who has a corporate mandate to rent space only in LEED Gold facilities.[13]

No Silver Lining

Thirty days prior to the expected date of receiving the LEED Gold Certification, Jade discovers that the *so-called* low VOC products she paid for and installed are anything but low. Jade has been *greenwashed* and taken to the cleaners (so to speak). Now she has impending problems with her new major tenant, which sets into motion the domino effect.

The lease the major tenant signed gives it the right to terminate if LEED Gold is not delivered on the commencement date of its lease. When USGBC unexpectedly delivers LEED Silver Certification, the tenant (who, incidentally, had signed a 15-year lease) terminates its lease. The bank that lent money to Jade for her retrofit based on this lease, provided in the loan agreement that Jade would be in default if LEED Gold or LEED Platinum Certification is not awarded to her building. Upon notice that the building is only LEED Silver certified, the lender declares a default and requires Jade to immediately repay her loan in full. Jade of course cannot, as she put her last cent into the retrofit (above and beyond what the bank lent to her for the renovation). Without that major tenant in place paying rent, Jade has no expected material income on the basis of which another lender might offer her financing to pay off her outstanding construction loan.

Tip of the Iceberg

The lender commences a foreclosure action and Jade loses her property, all due to greenwashing. And this is only the beginning of her problems, because a promise of LEED certification can add to the consequential damages Jade may face. For instance, the failure to deliver LEED Gold Certification could result in the major tenant asserting its own damages against Jade. Let's assume that the major tenant, when deciding to rent in Jade's building, was looking at a comparable building across the street which was also LEED Gold certified. The rent was also comparable to that in Jade's building. But Jade's retrofit was newer and the amenities in her building were more appealing, so it signed the lease with Jade.

Now with Jade unable to deliver a LEED Gold Certification, the major tenant contacted the property owner across the street to see if the same space was still available. Although it was, the rent was 150% higher than originally negotiated. The major tenant, forced to comply with its LEED Gold mandate, signs a new lease with the across-the-street landlord for the same 15-year term.

Counsel reviews the lease the major tenant signed with Jade and, although the termination option was given to the major tenant, the tenant's recourse for not receiving LEED Gold is not limited just to termination of the lease. The lease was silent as to any other tenant-related damages, so Jade may face additional liability amounting to the difference between her rent to the major tenant and that which the tenant is paying the landlord across the street – and for 15 years!

> Greenwashing is not limited only to greenwashed products.

And this is just one of the consequential damages Jade could face for relying on the purported low VOC products, losing LEED Gold Certification and being deprived of the major tenant's rent to help pay her debt service on a loan that has been called.

Greenwashed Services

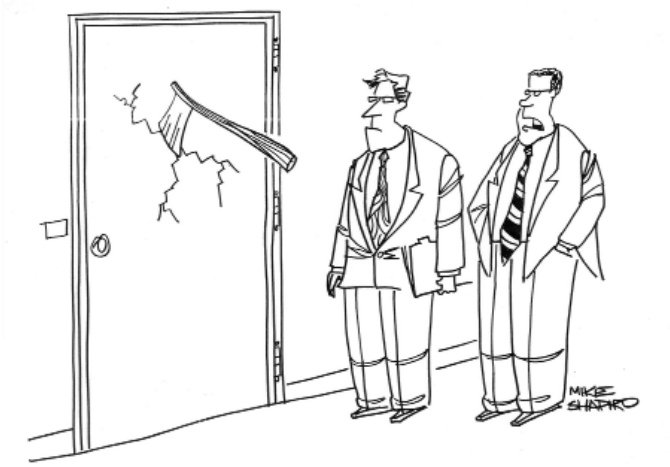
Greenwashing is not limited only to greenwashed products. Although there has been little discussion to date about greenwashed services, it could similarly be related to greenwashed products. For example, Jade could have been able to deliver to the same major tenant the LEED Gold Certification contracted for in the lease discussed above by relying on a green cleaning company for green cleaning services (and the points derived from green cleaning). Let's suppose that Jade believes that there was no concern about losing the LEED Gold Certification for her building for any services performed therein. Jade is wrong.

The USGBC has the right to decertify or lower certification status if a building fails to comply with its LEED rating system requirements. Let's assume that although Jade's building is LEED Gold certified (partly due to the points derived from green cleaning), it is discovered that the green cleaner is using toxic chemicals, fails to train its staff on green cleaning practices and is, as a result, unable to report and certify that green cleaning is being performed in Jade's building. USGBC is given notice of Jade's failure to maintain green cleaning (probably from the across-the-street landlord), and lowers her building's certification level from Gold to Silver. The major tenant has the same termination right if the building loses Gold Certification; the major tenant terminates the lease. One can only imagine the lender's reaction, the major tenant's damages (in attempting to find substitute LEED Gold premises, the expense of moving, and other related concerns), and of course Jade's predicament!

Labels (Don't?) Lie

Every day, businesses, individuals and governments are striving to fight the many tentacles of greenwashing which are rapidly having a negative effect wherever there are products or services being offered on our planet. Ultimately, the bottom line is ethics: "going green" is all about doing the right thing. ■

1. 15 U.S.C. § 45.
2. *See* http://en.wikipedia.org/wiki/Greenwashing.
3. Act No. 2 of January 2009 relating to the Control of Marketing and Contract Terms and Conditions, etc.; The Consumer Ombudsman's Guidelines on the Use of Environmental and Ethical Claims in Marketing (Sept. 2009).
4. CAN/CSA – ISO 14021; Competition Act (R.S.C., 1985, c. C-34); Consumer Packaging and Labelling Act (R.S.C., 1985, c. C-38); Textile Labelling Act (R.S.C., 1985, c. T-10); Environmental Claims: A Guide for Industry and Advertisers (Draft Environmental Claims Guide) (2008).
5. This law superseded the Trade Practices Act of 1974; Act No. 51 of 1974 as amended.
6. The UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code) Sept. 2010 (12th Edition).
7. Charter of Eco-Responsible Commitment and Publicity Objectives.
8. *California v. Enso Plastics*, 30-211, 00518091 (filed Oct. 26, 2011 in Super. Ct., Orange Co., Cal.).
9. *See Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 128 Cal. Rptr. 3d 109 (Ct. App. 2011).
10. *See Douglas v. Haier Am. Trading LLC & Gen. Elec. Co.*, No. 5:11-cv-02911 EJD (PSG), No. 5:11-cv-02950 EJD (PSG) (N.D. Cal. Aug. 17, 2011).
11. The National Resources Defense Council has noted that "[h]igh concentrations of VOCs are known to cause a number of health problems, including eye and throat irritation, headaches, and damage to the liver and nervous system. In addition, some VOCs are thought to cause cancer." *See* http://www.nrdc.org/enterprise/greeningadvisor/aq-low_voc.asp.
12. The LEED systems use a point structure for awarding certification levels: Certified: 40-49 points, Silver: 50-59, Gold: 60-79, Platinum: 80 and above.
13. Note that some organizations will not lease space unless that space has a minimum LEED certification level. For example, the General Services Administration requires LEED-Silver certification for new construction lease projects of 10,000 square feet or more. *See* http://www.greenbiz.com/news/2010/11/03/gsa-requires-new-federal-buildings-achieve-leed-gold-standard.



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BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for more than 23 years and is "of counsel" to Ressler & Ressler in New York City. He is the author of *New York Civil Disclosure* and *Bender's New York Evidence* (both LexisNexis), the 2008 and 2012 Supplements to *Fisch on New York Evidence* (Lond Publications), and the annual "Evidence Survey" for the *Syracuse Law Review*. Mr. Horowitz teaches New York Practice, Professional Responsibility and Electronic Evidence & Disclosure at Brooklyn Law School. He serves on the Office of Court Administration's CPLR Advisory Committee and the New York State Bar Association's CPLR Committee, and is a frequent lecturer and writer on these subjects.

Electronic Trilogy

Introduction

The May 2012 *Burden of Proof* column discussed the most recent in a trilogy of First Department cases involving electronic disclosure. Individually, each represents a significant contribution to the law of e-discovery in New York. Collectively, they establish a paradigm for e-discovery statewide, providing clarity in what has been, until now, a confusing landscape. A benefit of the holdings is that two of the three, involving adverse party disclosure, largely track the model utilized in most federal courts, adopted from Southern District of New York Judge Shira Sheindlin's *Zubulake*[1] decisions and the more recent *Pension Committee* decision, a canon already familiar to most litigators.[2] Adopting this model has the added benefit of providing uniformity between state and federal courts in New York, particularly important when parties are often involved in litigation on related issues spanning both court systems. An excellent example is the *MBIA* litigation that was profiled in a front-page *New York Law Journal* article on March 13, 2012, titled "Lawyers Cross Swords in Rare Joint Hearing on MBIA Discovery," reporting on a joint discovery hearing conducted by Justice Barbara R. Kapnick of Supreme Court, New York County, and Judge Richard J. Sullivan of the Southern District of New York.

The Trilogy

The most recent decision, *U.S. Bank N.A. v. GreenPoint Mortgage Funding, Inc.*,[3] adopted for New York courts the straightforward rule that the party producing disclosure in New York bears the responsibility, in the first instance, of paying the costs associated with the disclosure. The earliest decision, *Tener v. Cremer*,[4] addressed a subpoena for disclosure of nonparty ESI, while the middle child, *Voom HD Holdings, LLC v. EchoStar Satellite, LLC*,[5] clarified the law surrounding litigation holds and the preservation of ESI.

Disclosure of Nonparty ESI

The costs, both direct and indirect, of nonparty disclosure were at issue in *Tener*: "This appeal provides us with the first opportunity to address the obligation of a nonparty to produce electronically stored information (ESI) deleted through normal business operations."[6]

The plaintiff's action was for damages for a defamatory statement published *via* an Internet posting. The plaintiff sought the identity of the owner of the IP address from which the post originated, which the plaintiff determined was a computer under the custody and control of New York University. To this end, "plaintiff served a subpoena on NYU seeking the identity of all persons who accessed the Internet on April 12, 2009, *via* the IP address plaintiff previously identified,"[7] along with "a preservation letter advising NYU that the identity of the person who posted the remarks was at issue and that NYU should halt any normal business practices that would destroy that information."[8]

When NYU failed to respond to the subpoena, the plaintiff moved for contempt:

> In opposition to plaintiff's contempt motion, NYU's Chief Information Security Officer stated that "[c]omputers that simply access the web through NYU's portal appear as a text file listing that is automatically written over every 30 days. NYU does not possess the technological capability or software, if such exists, to retrieve a text file created more than a year ago and 'written over' at least 12 times."
>
> Plaintiff, in reply, submitted an affidavit from a forensic computer expert opining that NYU could still access the information using software designed to retrieve deleted information. The expert stated that "the term 'written over' is deceptive" because what really occurs is that "'old' information or data is typically allocated to 'free space' within the system." Plaintiff's expert suggested using "X-Rays Forensic" or "Sleuth Kit" to retrieve the information from unallocated space.[9]

The trial court denied the motion, holding that NYU did not have the ability to produce the demanded information, and that the plaintiff failed to rebut this allegation, notwithstanding the affidavit by its expert. The First Department began by pointing out that this conclusion was incorrect, as "plaintiff had interposed an affidavit in reply from an expert detailing the steps NYU could take to obtain the data, including the utilization of forensic software."[10]

After discussing the burden of proof on a motion for contempt, the court examined the CPLR, various state court rules and bar association guidelines, and federal rules. The appellate court focused on Rule 8(b) of the Commercial Division, Nassau County: "While aimed at parties, the Nassau Guidelines are appropriate in cases, such as this, where a nonparty's data is at issue":[11]

> The Nassau Guidelines urge that parties should be prepared to address the production of ESI that may have been deleted. The Nassau Guidelines state that at the preliminary conference, counsel for the parties should be prepared to discuss:
>
> "identification, in reasonable detail, of ESI that is or is not reasonably accessible, without undue burden or cost, the methods of storing and retrieving ESI that is not reasonably accessible, and the anticipated costs and efforts involved in retrieving such ESI."
>
> The Nassau Guidelines also suggest that the parties be prepared to discuss "the need for certified forensic specialists and/or experts to assist with the search for and production of ESI." Most important, the Nassau Guidelines do not rule out the discoverability of deleted data, but rather suggest a cost/benefit analysis involving how difficult and costly it would be to retrieve it:
>
> "As the term is used herein, ESI is not to be deemed 'inaccessible' based solely on its source or type of storage media. Inaccessibility is based on the burden and expense of recovering and producing the ESI and the relative need for the data."

* * *

Based on the specific facts of this case, we find that the Nassau Guidelines provide a practical approach. To exempt inaccessible data presumptively from discovery might encourage quick deletion as a matter of corporate policy, well before the spectre of litigation is on the horizon and the duty to preserve it attaches. A cost/benefit analysis, as the Nassau Guidelines provide, does not encourage data destruction because discovery could take place regardless. Moreover, similar to rule 26(b)(2)(C)(iii), the approach of the Nassau Guidelines, has the benefit of giving the court flexibility to determine literally whether the discovery is worth the cost and effort of retrieval.

Here, plaintiff has variously described the information it seeks as stored in a "cache" file, as "unallocated" data or somewhere in backup data. Data from these sources is difficult to access. But, plaintiff's only chance to confirm the identity of the person who allegedly defamed her may lie with NYU. Thus, plaintiff has demonstrated "good cause" necessitating a cost/benefit analysis to determine whether the needs of the case warrant retrieval of the data.[12]

Adopting the *Zubulake* model has provided uniformity between state and federal courts in New York, particularly important when parties are often involved in litigation on related issues spanning both court systems.

Having concluded that the plaintiff was entitled to disclosure from the nonparty, the First Department remanded the case to the trial court for specific fact finding:

> However, the record is insufficient to permit this court to undertake a cost/benefit analysis. Accordingly, we remand to Supreme Court for a hearing to determine at least: (1) whether the identifying information was written over, as NYU maintains, or whether it is somewhere else, such as in unallocated space as a text file; (2) whether the retrieval software plaintiff suggested can actually obtain the data; (3) whether the data will identify actual persons who used the internet on April 12, 2009 via the IP address plaintiff identified; (4) which of those persons accessed Vitals.com and (5) a budget for the cost of

the data retrieval, including line item(s) correlating the cost to NYU for the disruption.[13] Some of these questions (particularly [1] and [2]) may involve credibility determinations. Until the court has this minimum information, it cannot assess "the burden and expense of recovering and producing the ESI and the relative need for the data" (Nassau Guidelines) and concomitantly whether the data is so "inaccessible" that NYU does not have the ability to comply with the subpoena. That NYU is a nonparty should also figure into the equation. Of course in the event the data is retrievable without undue burden or cost, the court should give NYU a reasonable time to comply with the subpoena.

Further, it is worth mentioning that CPLR 3111 and 3122(d) require the requesting party to defray the "reasonable production expenses" of a *nonparty*. Accordingly, if the court finds after the hearing that NYU has the ability to produce the data, the court should allocate the costs of this production to plaintiff and should consider whether to include in that allocation the cost of disruption to NYU's normal business operations. In this latter consideration, the court should also take into account that plaintiff waited one year before sending the subpoena and preservation letter.[14]

Litigation Holds and Preservation of ESI

In *Voom HD Holdings, LLC v. EchoStar Satellite, LLC*,[15] the First Department confronted the preservation of ESI and the appropriate penalty for a failure to preserve:

> This case requires us to determine the scope of a party's duties in the electronic discovery context, and the appropriate sanction for failure to preserve electronically stored information (ESI). We hold that in deciding these questions, the motion court properly invoked the standard for preservation set forth in *Zubulake v UBS Warburg; Pension Comm. of the Univ. of Montreal Pension Plan v Banc of Am. Sec., LLC*, which has been widely adopted by federal and state courts. In *Zubulake*, the federal district court stated, "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." The *Zubulake* standard is harmonious with New York precedent in the traditional discovery context, and provides litigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered.[16]

As often happens, emails that a party claimed were no longer available in a particular action, the case under review, came to light through other litigation.

The chronology of events in this commercial litigation relating to the identification and escalation of the dispute between the parties, and the realization that litigation might ensue is critical to understanding this, and any other ESI spoliation issue, and interested readers should be certain to review the facts of the case. As often happens, emails that a party claimed were no longer available in a particular action, the case under review, came to light through other litigation. The First Department explained the fortuitous circumstances under which critical emails came to light, and the trial court's resolution of the motion:

> The emails described above, from September 27, 2007 and January 23, 2008 – reflecting EchoStar's intention to terminate the agreement unless Voom agreed to be tiered – were only produced due to the fortunate circumstance that they were captured in unrelated "snapshots" of certain executives' e-mail accounts taken in connection with *other litigations*. Voom moved for spoliation sanctions, arguing that EchoStar's actions and correspondence demonstrated that it should have reasonably anticipated litigation prior to Voom's commencement of this action.[17]

The First Department discussed the trial court's fact finding and decision:

> The motion court granted Voom's motion for spoliation sanctions. The court found that "EchoStar's concession that termination would lead to litigation, together with the evidence establishing EchoStar's intent to terminate, its various breach notices sent to VOOM HD, its demands and express reservation of rights, all support the conclusion that EchoStar must have reasonably anticipated litigation prior to the commencement of this action." The court, citing *Zubulake*, concluded that EchoStar should have reasonably anticipated litigation no later than June 20, 2007, the date Kevin Cross, its corporate counsel, sent Voom a written letter containing EchoStar's express notice of breach, a demand, and an explicit reservation of rights. The court found that EchoStar's subsequent conduct also demonstrated that it should have reasonably anticipated litigation prior to the filing of the complaint, citing correspondence during the summer and fall of 2007, and EchoStar's own privilege log, which showed that EchoStar designated docu-

ments as "work product" relating to "potential litigation" with Voom as early as November 16, 2007, the date of the EchoStar breach letter to Voom.[18]

After examining alternative triggers for the duty to preserve to attach, and rejecting those advanced by *Voom*, the First Department turned to the penalty assessed by the trial court:

> The motion court found that EchoStar's failure to preserve electronic data was more than negligent; indeed, it was the same bad faith conduct for which EchoStar had previously been sanctioned. EchoStar had been on notice of its "substandard document practices" at least since the *Broccoli* decision, yet continued those very same practices. The court determined that EchoStar's conduct, at a minimum, constituted gross negligence. The court found that Voom had demonstrated that the destroyed evidence was relevant to its claims; in any event, relevance is presumed when a party demonstrated gross negligence in the destruction of evidence. The court ruled that a negative, or adverse inference against EchoStar at trial was an appropriate sanction, rather than striking EchoStar's answer, since other evidence remained available to Voom, including the business records of EchoStar and the testimony of its employees, to prove Voom's claims.[19]

The First Department affirmed, and discussed the elements of a litigation hold:

> In *Zubulake*, the court stated that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." As has been stated, "[I]n the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as e-mail, it is necessary for a party facing litigation to take active steps to halt that process."
>
> Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data.[20] Regardless of its nature, a hold must direct appropriate employees to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting the preserved records so they might be searched by someone other than the employee. The hold should, with as much specificity as possible, describe the ESI at issue,[21] direct that routine destruction policies such as auto-delete functions and rewriting over e-mails cease, and describe the consequences for failure to so preserve electronically stored evidence. In certain circumstances, like those here, where a party is a large company, it is insufficient, in implementing such a litigation hold, to vest total discretion in the employee to search and select what the employee deems relevant without the guidance and supervision of counsel.[22]

As for when the preservation duty arises, the appellate court held "*Zubulake*'s reasonable anticipation trigger for preservation has been widely followed."[23]

Conclusion

Now that electronic disclosure rights and obligations of both parties and nonparties have been clarified in the First Department, it remains to be seen whether trial courts in the other Departments will follow this trilogy of cases. Next issue's column will discuss a number of trial court decisions applying the First Department guidelines, as well as a number of novel issues. With a relaxing Memorial Day weekend behind you, now might be a good time to back up all of your electronic devices. ■

1. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) *et seq.*
2. An element of the third case, *Cremer,* below, involving preservation would be controlled by the First Department's subsequent decision in *Voom*, below. *See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).
3. 94 A.D.3d 58 (1st Dep't 2012).
4. 89 A.D.3d 75 (1st Dep't 2011).
5. 93 A.D.3d 33 (1st Dep't 2012).
6. 89 A.D.3d at 76.
7. *Id.* at 77 (emphasis added).
8. *Id.*
9. *Id.*
10. *Id.* at 78.
11. *Id.* at 79.
12. *Id.* at 79–82 (citations omitted).
13. It is likely inappropriate to allow outside forensic computer experts access to NYU's computers because of privacy concerns.
14. *Id.* at 82 (citations omitted).
15. 93 A.D.3d 33 (1st Dep't 2012).
16. *Id.* at 36 (citations omitted).
17. *Id.* at 39 (emphasis in original).
18. *Id.*
19. *Id.* at 40–41 (citations omitted). The court noted that had this other evidence not been available, it would have imposed the harsher standard of striking the answer, based on the egregiousness of EchoStar's conduct.
20. While it is the best practice that this litigation hold be in writing, we recognize that there might be certain circumstances, for example, a small company with only a few employees, in which an oral hold would suffice.
21. For example, ESI may exist on employees' home computers, on flash drives or Blackberrys, in a cloud computing infrastructure or off-site on a remote server or back-up tapes.
22. *Id.* 41 (citations omitted). *See* Shira A. Scheindlin & Daniel J. Capra, The Sedona Conference, *Electronic Discovery and Digital Evidence: Cases and Materials* 147–49 (West 2009).
23. *Voom*, 93 A.D.3d at 41.

David Perry (davidperrysaddress@gmail.com) is a freelance tax writer and editor in New York City. He was a tax associate at Caplin & Drysdale, Washington, D.C., after earning his J.D. from Georgetown University Law Center. He earned his undergraduate degree in history from Brown University.

Image courtesy of Albany Law School

How Did Lawyers Become "Doctors"?

From the LL.B. to the J.D.

By David Perry

American law schools award a basic degree called the J.D. or *juris doctor*, giving each graduate the Latin title "doctor of law," although, occasionally, "J.D." is thought to stand for "doctor of jurisprudence." As "doctors," attorneys are in prestigious company – along with many medical practitioners and those academics who have been through around five years of graduate school and have written a doctoral dissertation. An attorney's work is not medical, and it is rarely academic; but each of this year's 44,000 law grads is a doctor – and after attending just three years of law school and writing a law review "note"-style paper.

Legum Baccalaureus

Lawyers weren't always "doctors," and skeptical law school faculties and administrations took 70 years to adopt the J.D. as the first degree in law. It is only since 1971 (since 1969 in New York) that every ABA-accredited American law school has awarded all its graduates the J.D. Until then, most law graduates received a degree called the LL.B. This *legum baccalaureus* or "bachelor of laws" was originally an undergraduate degree – appropriate because an aspirant did not need to have a college degree to matriculate in law school.

The LL.B., first awarded in 1840 at the University of Virginia,[1] had two predecessors: The first law degree in the United States had been instituted in 1792 at the College of William and Mary and had been called the "Batchelor [sic] of Law"; Virginia had, since 1829, been awarding each new lawyer a "Graduate of Law" degree.[2] Virginia's switch to the LL.B. was inspired by the undergraduate LL.B. offered at the University of Cambridge in England. By 1849 the LL.B. was adopted by Harvard's law school.[3] Its adoption soon spread to other law schools in the northeast and then to the rest of the country.

The LL.B. was intended as a bachelor's and not a graduate degree, as the law degree is today. Law schools did not require college degrees because they had to compete with much cheaper law office study. In fact, almost no jurisdictions required a college degree (or in the 19th

century, a law degree either) for bar admission.[4] It was not until the 1930s that many law schools required two or three years of college and even then took in high school graduates. Despite the lax requirements, though, after 1900 the more prestigious law schools admitted mostly college graduates.[5] Students at these law schools were accumulating bachelor's degrees – the B.A or B.S. – *and* the LL.B. At the same time, their peers in the arts and sciences and in medicine received *graduate* degrees (the Ph.D. and M.D.) instead of a second bachelor's. To erase this inequity, in 1900 Harvard students suggested that their school award the J.D. and in 1902 petitioned their faculty to do so.[6] The Harvard students based the term J.D. on "J.U.D." or *juris utriusque doctor*, granted by universities in the German-speaking countries,[7] meaning the recipient was "doctor of both of the laws" – that is, canon and civil.

Juris Utriusque Doctor?

The Harvard Law School faculty requested that the Harvard Corporation, the governing body of the university, make the change to awarding the J.D.[8] The Corporation never did, but the idea was picked up by the new law school established in 1902 at the University of Chicago. For University of Chicago president William Rainey Harper, the J.D. was part of "establish[ing] its law school upon the foundation of academic work."[9] The J.D. had to be a graduate degree, too, because only college graduates were to be admitted to the Chicago law school.[10]

However, the curriculum itself, which yielded but an LL.B. back at Harvard, did not change to reflect this new graduate degree status.[11] (The Harvard Corporation might have been troubled by this failure to change the requirements when it turned down the J.D.-seekers.) Because the curriculum stayed the same, when Chicago eventually agreed to admit law students who had not graduated college, the law school had to retain the LL.B. Thus, students with no B.A. or B.S. would get an LL.B. for the same course of study as J.D. recipients pursued.

After Chicago's adoption of the J.D., other prominent law schools followed. New York University offered the J.D. in 1903; Berkeley and Stanford did so in 1905; and Michigan in 1909.[12] As at Chicago, all these schools offered both the J.D. and the LL.B., and J.D. recipients were distinguished from LL.B. recipients by having college degrees. Newer and less prominent law schools joined in: by the 1925–1926 academic year, 80% of law schools were using the same two-degree structure.[13] Faculties and administrations, and sometimes state governmental bodies, were in control of adopting the J.D. The ABA Committee on Legal Education, an early supporter of the J.D., had no authority to dictate the degrees (or the curriculum) schools gave their students.[14]

Despite these moves, the three most elite eastern schools – Harvard, Columbia, and Yale – never offered the *juris doctor* as a first law degree.[15] While many schools began calling their three-year law degree the J.D., these eastern leaders focused on expanding programs for a fourth year of law school[16] – typically intended for law teachers. Today, similar courses of study lead to the LL.M., but Harvard and Yale underscored their rejection of the LL.B.-to-J.D. switch by naming this fourth-year degree the J.D. (*not* the LL.M.) and keeping the LL.B. as the first law degree.[17] At the same time, many other J.D.-granting schools adopted the LL.M. for fourth-year programs, or kept it, as they had offered LL.M.s in the 19th century. This is the root of the unusual bachelor's-to-doctorate-to-master's program available at law schools. Yet here, the trend of awarding J.D. degrees comes to a halt.

Almost no jurisdictions required a college degree (or in the 19th century, a law degree either) for bar admission.

Juris Doctor – Mortis?

Harvard's refusal to adopt the J.D. spelled the end of the first era of the J.D. Why?

Robert Stevens, in *Law School: Legal Education in America from the 1850s to the 1980s*, shows that Harvard was the trendsetter for American law schools. When Harvard began to require a three-year course of law study at the end of the 19th century, three years became standard in law schools. When Harvard restricted admission to students with college degrees in 1909, many accredited law schools did the same, and by the early 1970s, all accredited law schools had implemented this standard. When Harvard's dean, Christopher Columbus Langdell (serving 1870–1895), famously instituted the case method – training students to deduce legal rules from cases in casebooks – to replace the old method of simply lecturing on black-letter law, the case method rapidly overtook the lecture method and, by the 1920s, became the *only* way to teach law. So when Harvard stayed silent on the matter of adopting the J.D. as a first law degree, Harvard was heard and followed.

The rejection of the J.D. at Harvard (and Yale and Columbia, too) stemmed and then reversed the tide of the J.D. degree. Stanford eliminated the J.D. for those admitted after 1927; Boalt Hall at Berkeley did so in 1930; NYU in 1934. By the late 1930s, the New York State Board of Regents found the J.D. to be inappropriate as a first graduate degree in New York law schools.[18] From the 1920s through the 1950s, many midwestern and western schools, Michigan and Ohio State among them,[19] made

the J.D. an honors degree, given to LL.B. candidates for good grades or superior writing ability. This led to an anomaly: a few schools in the Midwest occasionally gave the honors J.D. to students who had not graduated college, contrary to the usual, post-graduate significance of the J.D.[20] The state of Illinois was an exception. Most Illinois law schools awarded the J.D. to all college-graduate students. The University of Chicago had never abandoned the standard, three-year J.D., and Chicago's neighbors accepted its influence.[21] Elsewhere, however, by 1962, the J.D. was moribund.

Juris Doctor – Vivo

Yet, today, the J.D. degree is the universal first law degree. When the J.D. was reintroduced in 1962, there was no decades-long equivocation: universal acceptance of the J.D. and elimination of the LL.B. came in less than 10 years. Why?

In 1963 and 1964, committees of the Association of American Law Schools (AALS) and the ABA's Section of Legal Education recommended its use[22] – apparently at the suggestion of John G. Hervey, dean of the Oklahoma City University School of Law.[23] The trend started among the smaller schools, mostly midwestern and western schools that were not nationally prominent. This time the more conservative faculties of Harvard, Yale and Columbia could not buck the resolve of the smaller schools. Note that, again, while the ABA and the AALS backed the change, neither issued a directive requiring it, and in any event schools did not need their permission to do so. By 1968, the clamor of students and alumni even at prestigious LL.B. holdouts became too great for faculties and administrations to ignore.

The administrations of the smaller or less-prestigious schools brought up arguments put forth in 1902 by Harvard's and Chicago's J.D.-proponents that the LL.B., as a bachelor's degree, did not recognize the post-graduate nature of legal study. By the 1960s, most law students were college graduates, and by the end of that decade, almost all were required to be.[24] Dean Hervey and other law teachers called the *juris doctor* a "professional doctorate," but (as in 1902) they planned no actual change in the basic legal curriculum to match the new degree.

Juris Doctor

Proponents of the J.D. were far more focused on the professional advantages a professional doctorate could confer. At the first schools reintroducing the J.D., faculty and some students expressed concern about preferential hiring of J.D.s over LL.B.s. Evidence was adduced that, when some government agencies determined an employee's pay grade, the employee received more credit for a "doctorate" J.D. than a "bachelor's" LL.B. Many alumni reported problems, too, in their hiring or promotion at universities: LL.B.-holders were not considered to have the doctoral degree that universities prized in their

American Law Degrees

There used to be much more variety in American law schools' degrees than with the J.D.–LL.M. sequence we are used to.

The B.L. Initiated at William and Mary in 1792. Some southern schools offered the bachelor of law, or in Latin the L.B., *legis baccalaureus*. It survived as late as the 1922–1923 academic year. The degree used the singular "of law" (*legis*) rather than the plural "of laws" (*legum*, as in LL.B.) to emphasize that the common law, and no civil law, was taught.

The B.C.L. The 19th-century bachelor of civil law was for those who did not intend to practice and had studied Roman law and the laws of Europe.

The J.B. A few schools, like Northwestern from 1913 to 1919, offered the J.B., or *juris bachelor*, instead of the LL.B.

The B.S.L. The bachelor's in legal science was offered in the mid-20th century by a few schools that accepted non-college graduates. A student could be considered to have completed college class requirements in law school and was awarded the B.S.L. to acknowledge their completion; he or she then proceeded to earn his or her LL.B. or J.D. The B.S.L. was not a professional law degree.

The M.C.L. The master's in civil law is sometimes awarded to foreign students studying law in America for a year, and has been mostly replaced by the LL.M.

The J.S.M. or M.J.S. The master's in juridical science is offered as a fourth-year law degree.

The J.S.D. or S.J.D. The doctorate in juridical science is occasionally offered as a Ph.D.-like research degree.

The LL.D. Today an honorary degree, in the 19th century it occasionally was used as an advanced law degree.

instructors.[25] Aspirants' concern was increased by how *unaccredited* law schools, still common in California and a few other states, tended to admit students without college degrees and to give only LL.B.s.[26]

The *image* of lawyers was a less commonly stated reason, but just as strong. Being a "doctor" looks better than being a college graduate to clients and the public. The enthusiasm of alumni for making the change spotlights this. At the same time that law schools began awarding their current students the J.D., they gave their alumni the opportunity to exchange their LL.B. degrees for J.D. degrees.[27] A small fee was usually required; many schools treated it as a way to stay in touch with and gratify their alumni. And what an alumni-relations opportunity it was! Valparaiso University awarded 400 J.D.s to its LL.B. alumni in a Law Day ceremony in May 1970, a few years after current students began receiving them.[28] "Almost half" of the living alumni of the Vanderbilt Law School (including some who had graduated in 1912) came back to campus for the 1969 "J.D. Investiture" ceremony.[29] One-third of living Columbia alumni took part in a poll on whether this *nunc pro tunc* award of the J.D. to LL.B. holders would be acceptable to them; 80% said yes.[30]

Alumni embraced their new image enhancer. State bar ethics opinions, in New York and elsewhere, from the 1960s and 1970s, refused lawyers the right to say that they hold an LL.B. *and* a J.D. when they had earned only *one* of them.[31] A score of opinions were issued on the right of lawyers to announce themselves as "Doctor" so-and-so.[32] American lawyers may call themselves "doctor" in a university setting or overseas, wherever native lawyers use the title. A few states, like New York and, recently, Texas, have allowed a practicing attorney to call himself or herself "doctor."[33]

Sceptici

Despite the enthusiasm, "reactionary" faculty members insisted that the traditional LL.B. was sufficient. The faculties of prominent eastern schools – Harvard, Yale, and Columbia – as well as Texas and Georgia denied the existence of prejudice in government or academic hiring. While Oklahoma City's Dean Hervey may have thought that "receipt of a second bachelor's degree by law school graduates tends to impair the image of the legal profession,"[34] those from prestigious or established schools faced fewer image problems, and the reactionaries attacked the innovation as a mere grab for credentials. The dean of the Buffalo Law School in New York (which has its roots in the 19th century) accused Dean Hervey of hunting only for prestige: "[C]ertain small law schools, with a wide proliferation of evening schools heading the group, have decided to by-pass [sic] a period of normal school development and attempt to attain for themselves and their graduates a form of professional recognition which could not properly be theirs for many years."[35] Columbia faculty insisted any given degree was prestigious because of the *awarding institution*, not because of the name of the degree itself.[36] And Columbia's dean suggested that if Harvard, Yale and Columbia awarded only the LL.B., the LL.B. would be the degree regarded as prestigious.[37]

Resistance Is *Futilis*

Conservatives resisted until student pressure became too insistent.[38] Student newspapers and spokesmen from one school would monitor each new adoption of the J.D. by another school and use it to pressure unwilling faculty and administrators. Columbia Law School is a powerful example: At Columbia, student demands for the J.D. began in earnest in 1966[39] and became more insistent leading up to Columbia's student protests of 1968.[40] Both faculty and students explicitly associated the faculty's refusal to adopt the J.D. as yet another instance of the faculty's refusal to adapt the curriculum, class schedules and attitudes to students' desires.[41] The dean's stuffy refusal to progress to the J.D. seemed similar to the dean's insensitivity to student resistance to the Vietnam War.[42] Some students were even concerned (although the rules were changed as early as 1962) that LL.B. candidates, as bachelor's students, were more liable to be drafted into the military than if they were termed graduate students.[43] After 1968, faculties and administrations relented.

> By 1968, the clamor of students and alumni even at prestigious LL.B. holdouts became too great for faculties and administrations to ignore.

With the last few holdouts, including Yale, moving to the J.D. in 1971, every law student in America would leave school as a "doctor of law." The curriculum and the level of deliverable work required had not changed appreciably since 1900, but the profession now had the trappings of a "professional doctorate" instead of the naïf's bachelor's. Even now, law degrees are continuing to develop. In the past decade, most Canadian law schools have switched from the LL.B. to the J.D. (again, without any concomitant change in requirements). The Canadians seem to be seeking prestige and to be keeping up with their neighbor lawyers in the United States. And then, there's the rush among law schools to offer LL.M.s and similar fourth-year degrees – maybe being even a "doctor" is not enough. Resumes require yet another

degree, and more tuition and other costs to students, to look as "professional" and employable as possible. ■

1. *See* Alfred Zantzinger Reed, Training for the Public Profession of the Law 166 n.2 (1921); John Ritchie, The First Hundred Years: A Short History of the School of Law of the University of Virginia for the Period 1826–1926 21–22 (1978).

2. Ritchie, *supra* note 1 at 15.

3. Twenty-Fourth Annual Report of the President of Harvard College to the Overseers, Exhibiting the State of the Institution for the Academical Year 1848–49 13 (1850).

4. Robert Stevens, Law School: Legal Education in America From the 1850s to the 1980s 99 (1983).

5. *Id.* at 37 nn. 22, 23.

6. *The Law School Degree*, Harvard Crimson (Apr. 26, 1902), *available at* http://www.thecrimson.com.

7. James Parker Hall, *American Law School Degrees*, 6 Mich. L. Rev. 112, 113 (1907).

8. *Id.* at 114.

9. Frank L. Ellsworth, Law on the Midway: The Founding of the University of Chicago Law School 120 (1977) (citing William Rainey Harper, 7 The University Record 199 (1902–03)).

10. *Id.*, p. 120.

11. *See, e.g.*, Ernst Freund, *The Correlation of Work for Higher Degrees in Graduate Schools and Law Schools*, 11 Ill. L. Rev. 301, 301–02 (1916).

12. New York University, "Special Announcement for 1903" 3 (appended to New York University Law School Announcements for 1903–1904); Sandra P. Epstein, Law at Berkeley: The History of Boalt Hall 38 (1997); Marion Kirkwood & William B. Owens, A Brief History of the Stanford Law School, 1893–1946 18 (1961), *available at* http://www.law.stanford.edu/school/history/historysls.pdf; *Notes and Personal*, 2 Am. L. Sch. Rev. 291, 300-301 (1909).

13. Alfred Zantzinger Reed, Present Day Law Schools in the United States and Canada 78 (1928).

14. *See Report of the Committee on Legal Education and Admissions to the Bar*, 29 Ann. Rep. Am. Bar Ass'n 487, 496 (1906).

15. *Special Committee on Advanced Academic and Professional Degrees*, 1937 Proceedings of the American Association of Law Schools 292, 298.

16. Reed, *supra* note 13, at 80 n.1.

17. *See* Harvard Crimson, Apr. 14, 1910; W. Lee Hargrave, LSU Law: The Louisiana Law School from 1906 to 1977 47 (2004) (citing many professors who took the fourth-year J.D. program). Boalt Hall at Berkeley did the same in the late 1920s, making the LL.B. a three-year degree and awarding the J.D. for a fourth year. Epstein, *supra* note 12, at 125.

18. Kirkwood, History of the Stanford Law School at 43; Epstein, *supra* note 12, at 125; New York University, New York University Bulletin, School of Law Announcements for the Session 1934–35 17 (1934); Miguel de Capriles, *The Escalating Battle of the Degrees*, Trial, June/July 1967 at 54.

19. *E.g.*, Jay W. Stein, *The Juris Doctor*, 15 J. Legal Educ. 315, 318 (1963) (the law schools of the Ohio State University, the University of Oregon, the University of North Dakota, and Wayne State University); William Wleklinski, A Centennial History of the John Marshall Law School (1998) at 27; Reed, *supra* note 13, at 80 n.10.

20. *See 1936 Report (With Corrections) of the Committee on Advanced Academic and Professional Degrees*, 1937 Proceedings of the American Association of Law Schools 306, 307; Reed, *supra* note 13, at 80 n.1.

21. See the report Section of Legal Education of the American Bar Association, Law Schools and Bar Admission Requirements in the United States: 1959 Review of Legal Education, and the reports for subsequent years for adoptions of the J.D. by all American law schools.

22. *Report of the Special Committee on Graduate Instruction*, 1963 Proceedings of the American Association of Law Schools 154, 171; John G. Hervey, *Law School Graduates Should Receive Professional Doctorates: Time for a Change from LL.B. to J.D. Degree*, Student Law. (June 1965) at 6; Stevens, *supra* note 4, at 247 n.6.

23. *See Report of the Special Committee on Graduate Instruction*, *supra* note 22, 154, 168–69.

24. Section of Legal Education of the American Bar Association, Law Schools and Bar Admission Requirements in the United States: 1959 Review of Legal Education and succeeding annual editions; Stevens, *supra* note 4, at 46 n.22, 193.

25. *E.g.*, Daniel Gutman, *The Escalating Battle of the Degrees*, Trial June/July 1967 at 55; *A Matter of Degree*, Time, Dec. 30, 1966 at 42; Hervey, *supra* note 22, at 5.

26. Section of Legal Education of the American Bar Association, Law Schools and Bar Admission Requirements in the United States: 1959 Review of Legal Education and succeeding annual editions.

27. For a summary of 10 years of this enthusiasm, see Tamar Lewin, *The Great Degree Sale*, Nat'l L.J., May 5, 1980 at 14 ("No one has exact figures, but registrars at law schools estimate that perhaps 100,000 LL.B. holders have taken up the offer" for the change to the J.D.).

28. Michael I. Swygert, "And, We Must Make Them Noble": A Contextual History of the Valparaiso University School of Law, 1879–2004 259 (2004).

29. Don Welch, The Vanderbilt Law School: Aspirations and Realities 14 (2008).

30. *The J.D. Degree at Columbia*, Law Alumni Bulletin [Columbia], Winter 1969, at 6–8.

31. NYSBA Committee on Professional Ethics, Op. 488 (July 17, 1978); Olavi Maru, Digest of Bar Association Ethics Opinions (1970 & Supps. 1970, 1975 and 1980) §§ 6548 (Fla. 1968), 7279 (Tex. 1970).

32. *E.g.*, Maru, Ethics Opinions, §§ 8503 (Kentucky, 1971); 10787 (Fla. 1974); 12256 (Ore. 1975) (all yes); 7169 (Ohio, 1967); 7962 (Col. 1974); 8366 (Ill. 1975) (all no).

33. NYSBA Committee on Professional Ethics, Op. 105(a) (1969); New York City Bar Op. 876 (1971); Kathleen Maher, *Lawyers Are Doctors, Too*, ABAJournal.com, Nov. 24, 2006, *available at* http://www.abajournal.com/magazine/article/lawyers_are_doctors_too/; *contra* A.B.A. Formal Op. 321 (1969) (refusing a lawyer the right to use the title "doctor").

34. John G. Hervey, *Evaluate J.D. Degree on Merit*, Trial June/July 1967, 56.

35. George P. Smith, *J.D. Only Instant Status Symbol*, Trial, Aug./Sept. 1967 at 18.

36. *Faculty Split Over Student Degree Vote*, Colum. L. Sch. News, Nov. 20, 1967 at 1.

37. *Profs. Lusky, Farer Disagree on JD-LL.B. [sic] Controversy*, Colum. L. Sch. News, Nov. 20, 1967 at 5.

38. David N. Hollander, *Law Faculty Approves Awarding J.D. Degree in Place of the LL.B.*, Harvard Crimson, Mar. 12, 1969.

39. *E.g.*, *Around the Circuits*, Colum. L. Sch. News, Oct. 18, 1965 at 5; *Around the Circuits*, Colum. L. Sch. News, Oct. 18, 1965, at 5; Columbia University Faculty of Law Meeting Minutes, Dec. 15, 1967 at 3,423.

40. *See* Steve Schwarz, *Students to Vote Thursday on J.D.-LL.B. Controversy*, Colum. L. Sch. News Oct. 30, 1967 at 1; *Overwhelming Student Vote Supports Change From LL.B.*, Colum. L. Sch. News Nov. 20, 1967 at 1; *Profs. Lusky-Farer Disagree on JD-LL.B. [sic] Controversy*, *supra* note 37, at 5; *Faculty Rejects J.D. Degree[,] Remains Indifferent to Issue*, Colum. L. Sch. News Mar. 27, 1968 at 1; *Student Council Unanimous[:] Pursue J.D. Degree Again*, Colum. L. Sch. News Oct. 28, 1968 at 4; and various letters to the editor in Columbia Law School News; Columbia University Faculty of Law Meeting Minutes, Jan. 17, 1969 at 3526–27.

41. Columbia University Faculty of Law Meeting Minutes, Feb. 14, 1969, at 3537–38.

42. *See Students Meet Opposition From Dean on JD [sic] Issue*, Colum. L. Sch. News Feb. 19, 1968 at 1.

43. *Draft Board Surprise for LL.B. Seekers*, Colum. L. Sch. News, Mar. 23, 1966 at 6.

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New York's Engagement Letter Rule and Fee Dispute Resolution Program: The Process of Fee Collection

By Kristin Pratt

Attorneys who have unsuccessfully attempted to collect payment for their professional services face a difficult dilemma – whether to institute formal proceedings against a client or simply to move on. Many attorneys will at some point find themselves in this predicament. This article explores: (1) the impact of not obtaining an engagement letter upon the ability to collect fees; (2) whether arbitration under the Dispute Resolution Program is required; and (3) the procedure to follow if the attorney is counsel of record in pending litigation.

Letter of Engagement

Attorneys in New York should be well aware of the requirement to provide a client a written letter of engagement or to execute a written retainer letter with a client[1] under Uniform Rule for New York State Trial Courts (Uniform Rule(s)) 1215 (Uniform Rule 1215) and Rule 1.5(b) of New York's Rules of Professional Conduct (RPC). This letter must be signed before commencing the representation or within a reasonable time thereafter.[2] The letter of engagement must address: (1) the scope of

Kristen Pratt (kpratt@youngsommer.com) is an associate at Young Sommer, Albany, NY, where she focuses on environmental law, commercial litigation, and real property law. She earned her law degree from Albany Law School and her undergraduate degree in communications from the state University at Buffalo.

legal services to be provided; (2) an explanation of attorney fees to be charged, expenses and billing practices; (3) and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.[3] However, no written letter of engagement is required (1) if the fee to be charged is expected to be less than $3,000; (2) where the services are of the same general kind as previously rendered to and paid for by the client; (3) if the representation relates to domestic relations matters covered by 22 N.Y.C.R.R. part 1400 of the Uniform Rules; or (4) where the attorney is admitted to practice in another jurisdiction and does not maintain an office in the state of New York or no material portion of the services is to be rendered in New York.[4] In contrast to the exceptions for Uniform Rule 1215, under Rule 1.5(b) an attorney need not provide the letter only where the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered and paid for by the client.[5] Uniform Rule 1215 does not expressly state what consequences apply for failure to comply. Rule 1.5(b) is a disciplinary rule that has been in existence since April of 2009 which, if violated, may expose an attorney to disciplinary action.[6] Rule 1.5(b) requires an attorney to create a writing, but only when such a writing is required by statute or court rule. Since Uniform Rule 1215 is a court rule, then a writing is also required under Rule 1.5(b). Rule 1.5(b) states that the writing must include: (1) the scope of the representation; and (2) the basis or rate of fees and expenses. As both rules contain very similar requirements, a single writing is likely sufficient to cover both.

While compliance with the letter of engagement rule is required, it is likely that attorneys, at some point in their career, will be faced with a situation where, for one reason or another, a letter of engagement is never drafted or cannot be found. Luckily this problem has arisen before and there is case law providing guidance on how to proceed.

Case Law

The case law is forgiving. The lack of an engagement letter or retainer agreement does not bar the attorney's claim for recovery for the value of services rendered on a quantum meruit basis. The leading case is *Seth Rubenstein, P.C. v. Ganea*,[7] from the Appellate Division, Second Department. There, the court, recognizing the differing results reached by trial courts that previously addressed this issue, found that so long as the client knowingly agreed to pay legal fees, the attorney could recover the fair and reasonable value of the services rendered, despite the fact that an engagement letter was never executed. The court in *Seth Rubenstein, P.C.* suggests that the ability to recover the full fee is not viable without an engagement letter. The First, Second, and Fourth Departments have all followed *Seth Rubenstein, P.C.* and have held that noncompliance with Uniform Rule 1215 does not bar recovery on a quantum meruit basis.[8] The First Department also has held that the failure to provide a written retainer agreement does not bar an attorney's claims for account stated.[9]

Attorneys faced with this difficult situation should be aware there is lower court authority that predates *Ganea*, holding that an attorney's failure to comply with the engagement letter requirement precludes the attorney from recovering fees.[10] In fact, one lower court denied an attorney's request to collect his entire fee for a real estate transaction where the attorney failed to furnish a letter of engagement, despite the fact that the attorney had only four days' notice before the closing.[11] Additionally, attorneys seeking to recover in quantum meruit who did not furnish a written letter of engagement must remember that they bear the burden of establishing the fair and reasonable value of legal services.[12] Therefore, while attorneys who failed to comply with the written requirement of Rule 1215 face a mixed bag of case law on the issue of whether a recovery of fees is possible, recovery on a quantum meruit basis is likely to be a viable option.

Malpractice Carrier

Before commencing a legal action, it is prudent to check with the firm administrator or managing partner to determine if there are any restrictions or guidelines imposed by the firm's malpractice insurance carrier. Insurers may

require the firm to commit to certain guidelines and protocols regarding collection actions. It is not unusual for carriers to require firms to commit to such guidelines in the application process, and there may be limits on the minimum amount of a claim that can be pursued (e.g., $5,000). Apparently, it is common for defendants in such suits to assert counterclaims for legal malpractice, which has resulted in carriers attempting to manage the risk.

Before commencing a legal action, it is prudent to check with the firm administrator or managing partner to determine if there are any restrictions or guidelines imposed by the firm's malpractice insurance carrier.

One should also consider the impact of collection actions on malpractice premiums. An excessive number of collection actions filed in prior years may lead to higher premiums. The risk of higher insurance premiums may provide another incentive to forgo an action if the amount in dispute is not significant.

Fee Dispute Resolution Program

Attorneys need to consider the forum in which to pursue claims for unpaid fees when amicable collection methods prove ineffective. First, one must determine whether arbitration under the New York State Chief Administrator's Rules is required under the Fee Dispute Resolution Program (DRP). The DRP provides for the informal resolution of fee disputes between attorneys and clients[13] and applies where representation in a *civil matter* commenced on or after January 1, 2002. The rule provides certain exceptions, including: (1) where amounts in dispute are less than $1,000 or more than $50,000 (unless the parties previously consented to arbitration); (2) claims involving substantial legal questions, including professional malpractice or misconduct; (3) claims against an attorney for affirmative relief other than just adjustment of the fee; or (4) where no attorney services have been rendered for more than two years.[14] Regardless of whether the attorney has already received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration under the DRP, and arbitration shall be *mandatory* for an attorney if requested by a client.[15] Attorneys should also consult the rules of the Judicial District in which the majority of the legal services in the case were performed for additional details on program rules and procedures.[16] Additionally Rule 1.5(f) provides that, where applicable, a lawyer must resolve fee disputes by arbitration at the election of the client under the DRP.

While an attorney may be wondering whether the lack of payment for a fee constitutes a "dispute" under the DRP, the court in *Messenger v. Deem* construed the term broadly, finding that the pleadings and totality of the testimony revealed that the client "took issue" with the billings[17] and that the attorney's failure to notify the client of her right to seek arbitration in accordance with the DRP and to plead such compliance divested the court of subject matter jurisdiction. The case illustrates the potential pitfall resulting from non-compliance with the rule: the court dismissed the action without prejudice.[18] Therefore, the safest practice when seeking to recover a fee is to follow the procedure set forth in DRP's rule 137.6.

Where an attorney and client cannot agree on the fee amount, the attorney shall forward, by certified mail or personal service, a written notice to the client entitled "Notice of Client's Right to Arbitrate." The notice should advise the client that he or she has 30 days from receipt to elect to resolve the dispute under the DRP. The notice must be accompanied by the written instructions and procedures for the arbitral body having jurisdiction over the fee dispute, which explain how to commence a fee arbitration proceeding. Finally, the notice must also be accompanied by a copy of the "request for arbitration" form necessary to commence the arbitration proceeding.[19] The client then has a short window of just 30 days to demand arbitration. If the client fails to demand arbitration after receipt of the notice, then the attorney may commence an action in a court of competent jurisdiction, and the client shall no longer have the right to request arbitration under the DRP.[20]

An important point for an attorney instituting a court action after following this procedure is that the complaint must state: (1) that the client received the notice under Part 137 of the client's right to pursue arbitration and the client did not file a timely request for arbitration; or (2) that the dispute is not otherwise covered by Part 137.[21] Compliance with 22 N.Y.C.R.R. part 137's requirement that Notice of Client's Right to Arbitrate should be completed before an attorney commences any action to recover unpaid legal fees – even in a circumstance where there was no disagreement regarding the amount of attorney fees due.[22]

Removal as Counsel in Pending Litigation

Before undertaking formal steps to collect unpaid attorney fees, attorneys must determine whether they are

still counsel of record in pending litigation for the client against whom they seek to collect – otherwise the attorney faces a potential violation of RPC Rule 1.6[23] and Rule 1.7.[24] A party may change his or her attorney of record in a civil action by filing a consent to change attorney signed by the retiring attorney and signed and acknowledged by the client.[25] Additionally, an attorney of record in a pending action may withdraw by order of the court in which the action is pending, upon a motion of the withdrawing attorney with notice to the client and to all other parties in the action.[26] The best practice is to obtain the written consent of the client agreeing to the withdrawal. The motion procedure is available to attorneys who are unable to obtain consent, however. If confidentiality is a concern, an attorney making a motion to withdraw can submit a confidential affidavit solely to the judge deciding the motion and ensure that the confidential submission is not filed with the clerk or provided to the other parties in the action. If the moving attorney submits a confidential affidavit, he or she should also submit an affidavit supporting the motion, and which does not include confidential information, upon all other parties to the action who are required to receive notice.

Law and Business

As should be apparent, fee disputes with clients present a difficult intersection of law and business. Although no attorney wants to have an unhappy client, disagreements and clients who are unwilling to pay are inevitable if one practices long enough. To best manage that potential, it is suggested that attorneys: (1) promptly bill clients for services; (2) communicate often with clients; (3) do not let unpaid amounts accumulate without action; (4) insist on a retainer agreement; (5) enlarge a retainer amount and seek to keep it replenished; (6) realize that collection actions against clients are a leading cause of malpractice claims; and (7) consider the impact on malpractice premiums if multiple suits are instituted to collect fees. ■

1. Uniform Rule 1215 requires that either a letter of engagement be furnished to a client or that the attorney and client execute a retainer letter. For purposes of this article, where reference is made to a letter of engagement, such reference includes a written retainer letter with a client.

2. 22 N.Y.C.R.R. § 1215.1(a).

3. 22 N.Y.C.R.R. § 1215.1(b).

4. 22 N.Y.C.R.R. § 1215.2.

5. This exception in Rule 1.5 is similar to the exception found in Uniform Rule 1215 for services of the same general kind but is narrower in that it applies only to regularly represented clients.

6. RPC Preamble, Scope (6) and (11), published by the New York State Bar Association, as amended through June 25, 2011.

7. 41 A.D.3d 54 (2d Dep't 2007).

8. *See Miller v. Nadler*, 60 A.D.3d 499, 499–500 (1st Dep't 2009) (attorney entitled to summary judgment on claims for account stated and quantum meruit for unpaid attorney fees incurred by defendant despite attorney's failure to provide a written retainer or engagement letter); *Nabi v. Sells*, 70 A.D.3d 252, 253 (1st Dep't 2009) (noncompliance with 22 N.Y.C.R.R. § 1215.1 does not bar recovery in quantum meruit); *Utility Audit Grp. v. Apple Mac & R Corp.*, 59 A.D.3d 707 (2d Dep't 2009) (attorney's failure to comply with 22 N.Y.C.R.R. § 1215.1 did not prevent him from recovering legal fees under theory of quantum meruit); *Chase v. Bowen*, 49 A.D.3d 1350, 1350 (4th Dep't 2008) (attorney entitled to trial to establish quantum meruit of his services despite his failure to provide client with written letter of engagement or retainer); *Strobel v. Rubin*, 24 Misc. 3d 144(A) (App. Term, 1st Dep't 2009) (attorneys' failure to comply with 22 N.Y.C.R.R. § 1215.1 did not provide basis for return of retainer fee).

9. *See Kramer, Levin, Naftalis & Frankel, LLC v. Canal Jean Co., Inc.*, 73 A.D.3d 604 (1st Dep't 2010) (account stated claims not barred where law firm failed to provide written retainer agreement).

10. *Lewin v. Law Offices of Godfrey G. Brown*, 8 Misc. 3d 622 (N.Y. City Civil Ct. 2005) (failure of an attorney to provide an engagement letter or enter into signed retainer letter precludes attorney from recovering fees for services performed; however, it does not entitle the client to a return of legal fees for services already rendered), *disagreed with by Seth Rubenstein, P.C.*, 41 A.D.3d 54; *Feder, Goldstein, Tanenbaum & D'Errico v. Roman*, 195 Misc. 2d 704 (Dist. Ct., Nassau Co. 2003) (reaching the same conclusion as courts that determined the effect of failure to comply with Rule of the Appellate Divisions, All Departments 22 N.Y.C.R.R. § 1400.3 related to domestic relations matters in which attorneys were precluded from recovering legal fees where the attorney failed to provide a written retainer agreement), *disagreed with by Seth Rubenstein, P.C.*, 41 A.D.3d 54. Additionally, in *Estate of Feroleto,* 6 Misc. 3d 680 (Sur. Ct., Bronx Co. 2004), the court found that where an attorney fails to provide an engagement or retainer letter, any misunderstanding arising out of the lack of the required writing should be resolved in favor of the client. The court in *Estate of Feroleto* further noted that unlike 22 N.Y.C.R.R. § 1400.3 which was promulgated to address abuses in the practice of matrimonial law and to protect the public, Uniform Rule 1215.1 was promulgated to prevent a misunderstanding about fees between attorneys and clients. Therefore the court rejected the outright bar to collection of fees for a violation of Rule 1215.1.

11. *Grossman v. W. 26th Corp.*, 9 Misc. 3d 414 (N.Y. City Civil Ct., Kings Co. 2005). The holding in *Grossman* may have limited precedent because the court did engage in an analysis of the amount recoverable on a quantum meruit basis.

12. *Seth Rubenstein, P.C.*, 41 A.D.3d at 64 (noting that the express language of 22 N.Y.C.R.R. § 1215.1 did not contain a penalty for noncompliance).

13. 22 N.Y.C.R.R. pt. 137.

14. 22 N.Y.C.R.R. § 137.1(a), (b).

15. 22 N.Y.C.R.R. § 137.2(a).

16. The New York State Unified Court System website maintains links to the rules of procedure for each judicial district.

17. *Messenger v. Deem*, 26 Misc. 3d 808, 813 (Sup. Ct., Westchester Co. 2009).

18. *Id*. at 813–14.

19. 22 N.Y.C.R.R. § 137.6(a)(1).

20. 22 N.Y.C.R.R. § 137.6(b).

21. *Id*.

22. *Messenger*, 26 Misc. 3d 808.

23. Rule 1.6(a) provides that a lawyer shall not knowingly reveal confidential information or use such information to the disadvantage of the client or for the advantage of the lawyer. However, a lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary, including to establish or collect a fee (Rule 1.6.(b)(5)(ii)).

24. Rule 1.7 states that a lawyer shall not represent a client if a reasonable lawyer would conclude that the representation will involve the law in representing differing interests or there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial or other personal interests.

25. CPLR 321(b)(1).

26. CPLR 321(b)(2).

Gary E. Bashian (GaryBashian@BashianFarberLaw.com) is a partner in the law firm of Bashian & Farber, LLP with offices in White Plains, New York and Greenwich, Connecticut. Mr. Bashian is a past President of the Westchester County Bar Association. He is presently on the Executive Committee of the New York State Bar Association's Trusts and Estates Law Section as Vice Chair of the Estate Litigation Committee, and is a past Chair of the Westchester County Bar Association's Trusts & Estates Section.

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How to Win Summary Judgment for Objectants in Contested Accounting Proceedings

By Gary E. Bashian

In contested accounting proceedings, summary judgment has traditionally been an almost exclusive tool of fiduciaries seeking to have their accounts approved. The case law is replete with examples of fiduciaries who have successfully moved the court to dismiss objections to their accounts as a matter of law pursuant to N.Y. Civil Practice Law & Rules 3212.

There are several reasons for this. Fiduciaries often have little trouble establishing the propriety of expenses incurred on behalf of an estate or showing that an objecting beneficiary has offered insufficient proof to rebut an accounting. Fiduciaries are also often successful when objectants pursue liability for failure to maximize the value of estate assets, particularly where objectants allege speculative or potential losses that the court will, and should, not consider under the principles of the Prudent Investor Act. Finally, motions for summary judgment challenging an accounting are often denied due to issues of fact regarding the appropriateness and legitimacy of expenses or, in some cases, because the fiduciary is shielded by having acted in good faith.

Nevertheless, the path to summary judgment for the objectant to an accounting is not as Sisyphean a labor as it might seem. Despite the challenges described above, an objectant can achieve a pre-trial victory by moving for summary judgment against a fiduciary if the objectant is careful in choosing the issues and avoids falling into the types of arguments regarding issues of fact that a fiduciary's counsel will undoubtedly pose. Indeed, the party who frames the issues in a litigation very much becomes the architect of the proceeding as a whole, a principle that comes into sharp focus in contested accounting proceedings.

The discussion below is a conceptual blueprint that may help litigators construct the best arguments avail-

able when moving for summary judgment on behalf of an objectant in a contested accounting proceeding.

The Burden of Proof

The burden for a movant on summary judgment is that he must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact."[1] Where the movant's burden has been satisfied by a showing of sufficient proof, the burden then shifts to the opposition to show that there are questions of fact regarding the movant's claims that preclude the granting of summary judgment.[2]

In an accounting proceeding, the initial burden is on the fiduciary to prove the propriety of expenses and administration costs.[3] This initial burden is admittedly low, as a fiduciary need only make a prima facie showing that the nature and character of the expenses incurred were fair and reasonable[4] and that they were incurred on the estate's behalf.[5] Thereafter, the beneficiary objecting to an accounting bears the burden of showing that the account is inaccurate or incomplete. If the objectant can show, by a fair preponderance of the evidence, the lack of sufficiency of the account as a matter of law, the burden then shifts back to the fiduciary to prove that the account is accurate and complete.[6]

Accounting proceedings often seem to present questions of fact that at first glance make it appear impossible for objectants to meet their burden of proof. The nature and character of objections to an accounting almost inevitably lend themselves to the assumption that their legitimacy cannot be determined as a matter of law. The reasons for this are clear: objectants to an accounting contest the amounts paid for individual expenses check by check, dollar by dollar. They essentially allege that the amounts a fiduciary paid or received on behalf of an estate were not fair prices for services rendered or assets sold. Objectants then argue all of the ways a fiduciary mismanaged the assets to the detriment of the estate and its beneficiaries or the failure to obtain a better price for the same.

Where an objectant alleges an expense to be improper, and the allegation is supported by sufficient proof, the fiduciary simply has to offer sufficient proof establishing the legitimacy of the expense in rebuttal. Before long, each and every contested expense sufficiently rebutted, no matter how innocuous, becomes a viable issue of fact ripe for trial and, more important, a roadblock to relief for an objectant on summary judgment.

In light of these constraints, the objectant's counsel must carefully select issues when moving for summary judgment. Clearly, simply contesting the value or cost of estate expenses offered in an account will not be a path to success.

In some situations, the objectant can move for summary judgment in challenging not the amount of an expense but the propriety or legitimacy of the expense in the context of the fiduciary's duty of loyalty. For example: was the expense reasonable and necessary and did it benefit the estate? Was the expenditure a product of self-dealing? Did the fiduciary reap a gain from the estate in connection with the expense? Alternatively, the entirety of the fiduciary's account can be challenged by an objectant, and shown to be insufficient as a matter of law, for failure to detail the financial history of the estate with necessary particularity. In either of the above situations, and absent any questions of fact, a fiduciary can be surcharged with the statutory 9% interest for any improper expenses that he or she authorized to be paid by the estate.[7]

The objectant's counsel must carefully select issues when moving for summary judgment.

Duty of Loyalty

The foundation of a successful strategy for summary judgment lies in the fiduciary's duty of loyalty to the estate. This is the first and primary duty the law imposes upon a fiduciary, measured by something stricter than the ". . . morals of the marketplace. Not honesty alone, but the punctilio of an honor most sensitive, is the standard of behavior."[8]

Implicit in this principle, indeed the most fundamental characteristic of the duty of loyalty, is the duty not to self-deal.[9] It is only when acting on behalf of the estate with this highest loyalty, without accruing any benefit to himself in the execution of this duty, that a fiduciary is authorized to undertake his charge. A fiduciary may not make unreasonable and unnecessary payments from estate assets, or to himself, his family or his friends, unless so directed by the terms of a will. This necessarily high standard is designed to protect not only the estate and its beneficiaries but to preserve a testator's intent as closely as possible.

Importantly, a fiduciary's duty of loyalty to the estate is also an integral part of his duty to account. "As accountability is the primary principle of the fiduciary relationship,"[10] the account can be nothing less than a complete history of the estate administration.[11] It is no surprise that both accuracy and transparency are essential to all accounts and that each account must provide everything necessary to make the story of the administration intelligible to those who read it.[12] Clearly, a fiduciary's duty to "account" is no small undertaking; indeed, the Surrogate's Court Procedure Act devotes the entirety of Article 22 to "Accounting."

When an objectant moves for summary judgment in a contested accounting proceeding, it is counsel's task to

prove, where applicable, that the expenditures contained in the accounting were made in violation of the fiduciary's duties to the estate, i.e., to prove the impropriety of the expenses of administration as a matter of law. The successful strategy is not to argue that such expenses were merely excessive or a "bad deal," but to show that the expenditures were a breach of fiduciary duty as a matter of law.

Where the record establishes particularly egregious breaches of a fiduciary's duty to an estate, the task of the objectant's counsel is made easier. Missing sums of money or other assets, undervalued assets, exorbitant fees paid for simple services, fees paid for unauthorized or illegal services, etc., can all be surcharged against the fiduciary and are appropriate for determination on summary judgment.

Sometimes less obvious are payments made by a fiduciary to himself, his corporation, family or friends for tasks that could have been undertaken by neutral parties for an equal or lesser cost. Payments and expenses such as these can and often do qualify as self-dealing and are subject to surcharge.

The law is clear that the prohibition against self-dealing is absolute. There is a duty of undivided loyalty to the trust and to each of its beneficiaries. This duty is designed to prevent self-dealing. Hence, where a trustee is given absolute discretion, he must not use it to "feather his own nest." The trustee must avoid all situations where his interests or those of a third party with whom he is aligned conflict with those of the beneficiaries.[13]

Where there is evidence that an expenditure constituted self-dealing, an objectant can seize on the breach and move for a surcharge upon the fiduciary for the entire amount of the expenditure, with interest, from the date of payment. Again, the objectant's task is not to get bogged down in questions of the economic prudence or reasonableness of the expense but to attack the legitimacy of the expense as a whole in the context of fiduciary duty.

Completeness and Accuracy

Another less obvious but equally valid ground for summary judgment may arise if an account lacks transparency or is insufficient and fails to offer a complete and accurate accounting free of omissions. The expenses in an account that are incompletely disclosed, or worse, remain opaque, can be surcharged against the fiduciary in some scenarios. Commonly, a fiduciary will offer a line item expense for a professional, maintenance or other fee. A failure to itemize such an expense with enough specificity so that the beneficiaries can understand the nature of the transaction, the reason for the expense and its reasonableness in light of the benefits conferred to the estate, is a breach of the fiduciary's duty and constitutes an insufficient accounting.

Where a fiduciary is permitted to amend an accounting and fails to supplement or fully articulate the listing of expenses beyond line items or the bare offering of an amount without explanation where needed, the breach is only exacerbated and invites further scrutiny by both the court and objectant's counsel. Surcharges in situations such as these can be for the full line item amount if the fiduciary fails to cure the defect in the account when given the opportunity.

> The party who frames the issues in a litigation very much becomes the architect of the proceeding as a whole, a principle that comes into sharp focus in contested accounting proceedings.

All doubts about the sufficiency of the account will be resolved against a fiduciary who fails to keep accurate records.[14] Accordingly, an objectant need only show that the accounting fails to fully account or is not transparent to shift the burden back to the petitioner. No argument need be made about the validity or value of the actual expenses which would, in turn, potentially create fatal issues of fact.

Gifts

Gifts are another area that should be considered when drafting a motion for summary judgment on behalf of an objectant to an accounting by the executor of an estate. Some executors will attempt to remove assets from an estate for one reason or another by claiming that they were gifted by the decedent immediately prior to death. As a matter of law, an executor has the burden to show by clear and convincing evidence that donative intent existed for such alleged gifts and that delivery and acceptance of the gift were completed prior to death.[15] Furthermore, where there is a confidential relationship between a decedent and the executor, the executor must not only establish by clear and convincing evidence the three elements constituting a legally valid gift, but also that the transfer was made voluntarily and free from undue influence or restraint.[16] Notably, a confidential relationship may exist where there is a sibling relationship.[17] Failure by an executor to prove all of these elements can result in a

surcharge of the "gifted" asset for failure to include it as an estate asset.

Conclusion

When considering a motion for summary judgment on behalf of an objectant to an accounting, attorneys must first and foremost focus on issues of self-dealing and the fiduciary's duty of loyalty and on whether the fiduciary has met the duty to account accurately and completely. Although this strategy will not guarantee success in every matter, it should help practitioners avoid inadvertently creating issues of fact in a contested accounting proceeding where none exist. ■

1. *Alvarez v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).
2. *Id.*
3. *In re Taylor*, 251 N.Y. 257 (1929).
4. *In re Seabury*, N.Y.L.J. May 17, 1995, 82:3 (Sur. Ct., Bronx Co.).
5. *In re Basso*, N.Y.L.J. July 17, 1987, 14:6 9 (Sur. Ct., Nassau Co.).
6. I*n re Schnare*, 191 A.D.2d 859 (3d Dep't 2003).
7. *See generally In re Carbone* (unpublished) (Sur. Ct., Westchester Co. Apr. 13, 2011).
8. *Meinhard v. Salmon*, 249 N.Y. 458 (1928).
9. *In re Carner*, N.Y. Slip Op. 52317(U) (Sur. Ct., Westchester Co. 2009).
10. Groppe et al., 2 Harris N.Y. Estates: Probate Admin. & Litigation, "The fiduciary relationship and the duty to account," § 18:1 (2011).
11. *In re Iannone*, 104 Misc. 2d 5 (Sur. Ct., Monroe Co. 1980).
12. Groppe et al., 2 Harris N.Y. Estates: Probate Admin. & Litigation, "Contents of a fiduciary accounting," § 18:27 (2011).
13. *In re Estate of James*, N.Y.L.J., Oct. 23, 2002, p. 24 (Sur. Ct., Kings Co.).
14. *White v. Rankin*, 18 A.D. 293, 295 (2d Dep't 1997).
15. *See Gruen v. Gruen*, 68 N.Y.2d 48 (1986); *In re Kelly*, 285 N.Y. 620 (1941).
16. *Gordon v. Bialystoker Ctr. & Bikur Cholim*, 45 N.Y.2d 692 (1978).
17. *In re Silverman*, N.Y.L.J., Jan. 2, 2009, p. 25, col. 1 (Sur. Ct., Westchester Co.).

Richard A. Marchese, Jr. (rmarchese@woodsoviatt.com) is of counsel to Woods Oviatt Gilman LLP's Elder Law and Health Care Practice Group, which is responsible for handling all elder law and health care issues. He concentrates his practice in Medicaid eligibility and recovery matters, issues of spousal support, and the use of trusts in Medicaid planning. Prior to joining the firm, Mr. Marchese served for over 15 years as Chief Counsel to the Monroe County, NY Department of Social Services, advising the Chronic Care, Home Care and Adult Protective units at that agency. He received his J.D. from New York Law School and his B.A. from the State University of New York at Albany. This article first appeared, in a slightly different form, in the *Elder and Special Needs Law Journal*, Winter 2012, Vol. 22, No.1, a publication of the Elder Law Section of the NYSBA.

How to Prepare for and Win an Administrative Fair Hearing

By Richard A. Marchese, Jr.

As former Chief Counsel to the Monroe County Department of Human Services, I had many opportunities to both observe and advocate at Fair Hearings on behalf of the Department in cases which the Department's denial or discontinuance of Medicaid benefits was at issue. During the course of my 15 years as counsel to the Department, I came across several instances (actually, more than several) that left me perplexed and bemused by both the appellant's counsel's performance during the Fair Hearing and the lack of preparation for the hearing itself. I came away from many of these hearings with the same thought – my opposing counsel had not treated the matter as seriously as he or she should have treated it. In these cases, the generally relaxed attitude of counsel toward the preparation and conduct of the Fair Hearing inevitably resulted in mistakes and errors of judgment that could have easily been prevented. Now that I have joined private practice and have an opportunity to represent and litigate on behalf of clients in need of Medicaid services, I would like to pass on some words of wisdom, if you will, as to how I believe one should prepare for and conduct oneself at an Administrative Fair Hearing.

Carefully Review the Notice Sent to Your Client

The regulations governing Fair Hearings are set forth in 18 N.Y. Comp. Codes R. & Regs. (N.Y.C.R.R.) Part 358. All Medicaid applicants and recipients are entitled to written notice of any agency action which results in a denial or discontinuance of Medicaid benefits.[1] A Medicaid applicant is entitled to *adequate* notice of any action taken in accepting or denying the application. Medicaid recipients are entitled to *timely and adequate* notice of any agency action to discontinue, suspend, reduce or restrict Medicaid benefits. Timely notice means a notice which is mailed at least 10 days before the date upon which the proposed

action is to become effective.[2] "Adequate notice" means a notice that, among other things, sets forth the following:

1. the action that the agency proposes to take or is taking, and the effect of such action;
2. the effective date of the action (except in the case of a denial);
3. the specific reasons for the action;
4. the specific laws and/or regulations in support of the action; and
5. a recitation of the client's right to an agency conference, the procedure for requesting such conference, an explanation of the time frame in which the client must request a hearing, and an explanation of how to request the hearing.[3]

The notice requirements are usually strictly construed by the Administrative Law Judge (ALJ). As a practitioner you must carefully review the adequacy of the notice. Did the agency cite any regulation or statute as justification for the intended action? If so, was the correct regulation cited? Did the notice provide any explanation whatsoever for the intended action? If the notice appears to be deficient, this should be immediately brought to the attention of the ALJ right at the commencement of the hearing. ALJs are required to conduct an on-the-record assessment of the notice, and "must determine whether to find a notice void, require the social services district to provide additional information, or grant a recess or adjournment on the appellant's behalf."[4] Very often you will find in busy districts that notices lack the proper citations to the laws and regulations in support of the intended action and/or the notice is confusing in its explanation of the intended action. Please make sure that this argument is made on the record in case of appellate review.

The timeliness of the notice must also be closely scrutinized. Make sure that the notice was mailed at least 10 days before the date upon which the proposed action is to become effective.[5] Again, in busy districts it often happens that case examiners send out notices that take effect immediately, or within five days of the intended action. In the case of a discontinuance of Medicaid benefits, any notice that does not provide at least 10 days' notice is defective and will result in the ALJ voiding the agency's action and directing that the agency issue a new timely and adequate notice to the client.[6]

Request a Fair Hearing and, if Appropriate, Aid Continuing

The request for a Fair Hearing must be made within 60 days after the Social Services agency's "Determination, Action, or Failure to Act About which you are complaining. . . ."[7] The notice itself will contain the date by which the client must request the Fair Hearing. The request may be made by telephone or by mail to the number and address cited in the notice. Such a request can also be made via email through the website offered by the Office of Temporary and Disability Assistance.[8] In cases in which the agency is required to issue timely notice because of a discontinuance of Medicaid benefits and/or services, if the client requests a Fair Hearing before the effective date of a proposed action as contained in the notice, the recipient will be entitled, in most instances, to aid continuing until the Fair Hearing decision is issued.[9] Obviously, the provision of continued aid is critical to clients who have received notices indicating that their benefits will be discontinued or changed. Therefore, it is imperative that a client request a Fair Hearing before the deadline (i.e., the effective date of the notice) or else the client's Medicaid case will be closed or modified pursuant to the language indicated in the notice.

Review the Case Record and Evidence Packet of the Agency

As the representative of your client, you have the right to examine and receive copies of documents in your client's case record, which you will need to prepare for the Fair Hearing.[10]

This examination of the case record may take place at any reasonable time before the date of the Fair Hearing.[11] Exercise this right. The packet of evidence that the agency will introduce at the hearing contains documents that support only the agency's action or contention. The *case record* may very well be replete with documents, bank records, etc., that not only help to negate the agency's argument, but that serve to prove your contention that the agency is in error. Furthermore, upon an oral written request, the agency must provide you, as representative, with copies of any documents in the case file that you request for the purposes of hearing preparation. This must be done without charge to the client, and these documents must be provided by the agency at a reasonable date and time before the hearing, as long as the request is made five or more business days before the date of the

hearing.[12] Litigating at an administrative Fair Hearing on behalf of your client without looking at the case record is like walking into a darkened alley without a flashlight.

The same right to examine the case record applies to the documents and records that the agency will submit into evidence at the Fair Hearing. In this respect, the regulations afford your client the ability to fully see all of the evidence that will be offered by the agency in support of his or her position, a right that does not exist for the agency with respect to any records that your client will submit. The due process rights to examine the case record and records that will be offered into evidence at the hearing are for the benefit of your client and provide you with a distinct advantage when arguing your position at the hearing.

The only exceptions to the document discovery provisions cited above are records from Child Protective Services and files that are maintained by the County Attorney (or Welfare Attorney) for the agency. Besides these exceptions, the right to examine both the case record and agency evidence packet should be exercised as a standard step in your preparation for the hearing.

Request an Agency Conference

18 N.Y.C.R.R. § 358-3.8 provides that a client may request an agency conference at "any reasonable time before the date of your Fair Hearing." The agency *must* hold the conference when such is requested by the client.[13] The agency must bring the necessary information and documentation to the conference (including a telephone conference) to explain the reason for the agency's determination and to provide a meaningful opportunity to resolve the problem.[14]

There seems to be a split of opinion on whether an agency conference is necessary and/or helpful. I have always been of the opinion that one should request a conference if only because it can be to your advantage to meet with the case examiner and perhaps the examiner's supervisor who will be presenting on behalf of the agency at the Fair Hearing. You may also be able to glean information ahead of the hearing that will be helpful to you in the presentation of your case. The best reason for holding an agency conference is that many times these conferences will result in a resolution of the issues, thus obviating the need for a Fair Hearing. Obviously, there is a cost factor with both requesting and participating in a conference, but I look at it more as a discovery proceeding with an added benefit that you get to "know your enemy" and perhaps convince the other side before the Fair Hearing that you are indeed correct.

Prepare Documents for Submission at the Fair Hearing

There is nothing that an ALJ likes more than having the relevant laws, regulations and policy directives provided in a packet at the time of the Fair Hearing. It just makes the judge's life a lot easier. Providing these citations saves the judge the time and effort needed to pull down the relevant regulations when he or she gets around to writing the decision and also serves to clearly focus the judge on the issues at hand. If in your review of the case record you find documents that are helpful to your client, by all means submit those as well. It is best to have all of these documents numbered sequentially (just as the agency does) for easy reference, not only at the Fair Hearing, but for reference by the ALJ when writing his or her decision.

> Witnesses who are not prepared by their attorney might blurt out information unfavorable to their case or, even worse, fail to address issues vital to their position.

If you have witnesses who are unable to come to the hearing and give testimony, consider drafting an affidavit for their signature and submission as part of your evidentiary presentation. ALJs will usually accept affidavits into evidence, and their submission will help fill out the record in the event of a subsequent Article 78 proceeding (see "Make a Complete Record," below).

Finally, conduct a search for prior Fair Hearing decisions on point and submit these as well. The Western New York Law Center has a wonderful database of Fair Hearing decisions that is searchable by word (www.wnylc.net). Also, the State Office of Temporary and Disability Assistance has recently developed its own database of decisions going back to November 2010 that is very extensive and also searchable by word.[15]

Prepare Your Witnesses

This is the number one mistake that I have seen counsel make at Fair Hearings. Again, for reasons that I can only attribute to the fact that these are proceedings conducted with less formality than those in a courtroom, time and time again witnesses who were not prepared by their attorney blurted out information unfavorable to their case or, even worse, failed to address issues that were vital to their position and which could have resulted in

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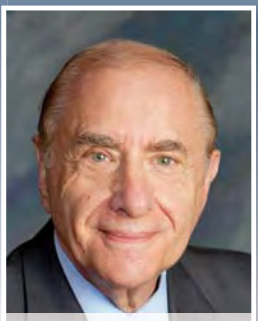

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A sample of cases resolved by our commercial panel:

- Claim against indenture trustees for not making appropriate claims in bankruptcy of major airline, resulting in loss of $75 million.
- Dispute between two hedge funds and Russian mathematicians concerning codes and models involving statistical arbitrage.
- Alleged breach of fiduciary duty by lawyers hired to represent former finance minister of oil-rich country.
- Accounting malpractice claim by high-income clients based on tax shelter recommendations made by national accounting firm.
- Dispute between satellite company and giant entertainment network about appropriate charges for television channels.
- Commercial libel and tortious interference claim on media personality's contract covering his on-air statements.
- Dispute concerning control of a magazine between popular television host and publishing company.
- Dispute between prominent film maker and financial backer concerning allocation of costs and profits on a series of six movies.
- Dispute between a landowner and a municipality regarding road construction and drainage easement.
- Dispute about quality of manuscript submitted by popular author and book publisher.
- Brokerage fee dispute involving properties sold for over of $20 million.
- Breach of an agreement to insure against the criminal acts of Bernard Madoff in his capacity of financial advisor/security broker which resulted in an investor loss in excess of $20 million.
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a favorable decision. Also, talk to your client about how to dress for the hearing. Appearing at the hearing in a fur coat with a large diamond ring will not help the client's cause. Prepare your witness. If you do so, you will stand a much better chance of winning your case.

For example, if you will be asking for an increase in the community spouse minimum monthly maintenance allowance, citing "exceptional circumstances causing significant financial distress" (the *"Gomprecht"* standard[16]) as justification for the increase, you must sit your client down well before the hearing and go over his or her testimony. Certain things that your client believes constitute financial distress (i.e., not being able to dine out five times a week) obviously will not help the client's cause at the hearing, and such statements will inevitably be blurted out by your client if you have not spent the necessary time going over the facts of the case and the applicable legal standards. This means conducting a mock cross examination prior to the hearing, and "playing the devil's advocate" with your client.

Treat the Matter as a Trial in a Court of Law

Yes, the rules of evidence are relaxed (hearsay is admissible). Yes, you are appearing in a conference room instead of a courtroom without a stenographer and without a bailiff. And yes, the ALJ has no robes to wear. However, this is still critical litigation and probably represents your one and only shot at convincing a tribunal that the agency has acted in error. A relaxed atmosphere does not mean you should relax yourself. Arrive on time, dress for court, and above all, give the ALJ the deference that he or she deserves – use phrases such as "may it please the court" and "your honor." Sloppiness begets sloppiness. You cannot expect the ALJ to treat the matter with the seriousness it deserves if you are treating the case as a walk in the park. Let the ALJ know through your body language and through your words that this case is vitally important to your client, and that the agency has acted incorrectly and contrary to the laws and policies of the state of New York.

The ALJs I know usually perk up if an attorney will be presenting on behalf of a client, as this is not the norm. Remember, ALJs hear all types of cases, from food stamps and housing denials to calculations of cash grants. Most of these cases are rote applications of the regulations to the facts. The ALJs assume that if counsel is present, the case must be different and that important issues will be discussed. Don't disappoint them with lackluster performance.

Make an Opening Statement

It does not have to be a soliloquy, but by all means prepare and give an opening statement at every Fair Hearing. This essentially lets the judge know what the issues are, what the evidence will show in support of your contention, and what laws and regulations apply. Look the judge in the eye and let the judge know why you are correct and the agency is wrong. Remember that the ALJ has heard many cases before yours and will hear many afterward. It is your job to make sure that the ALJ remembers your case and will afford it the serious time and deliberation necessary to render a decision in your favor.

Relate the Client's Story

Personalize your client. How did he or she end up in this situation? What is your client's background? What did he or she do for a living prior to his or her health diminishing? While such information may not be germane to the legal issue at hand, it is important for the ALJ to put the matter in dispute in context. Too often we as practitioners get caught up in this arcane area of Medicaid rules and regulations, and in our eagerness to make a legal point we neglect to paint a full picture of our client for the judge's consideration. Relating the client's story through testimony of the client, spouse, children, etc., will serve as an appropriate introduction to the legal issue in dispute, and will help the ALJ get to know your client in a way that is normally not addressed in the myriad of hearings over which he/she presides.

Make a Complete Record for Article 78 Purposes

This point is critical. Because the proceedings are tape recorded, it is important that everyone testifying speaks up and enunciates clearly, or else you run the risk of a transcript that comes back with the dreaded word "unintelligible" on it. Make sure that you "shoot all of your bullets" (i.e., produce all of your evidence and all of your arguments) and make sure everything gets on the record. The worst feeling when reviewing a transcript of a hearing for a possible Article 78 appeal is to find that a certain document was never submitted or that a critical policy directive was not brought to the attention of the ALJ.

Submit a Memorandum of Law

The best practice is to always request at the end of the hearing an opportunity to submit a memorandum of law for the judge's consideration. This allows you an opportunity to digest what occurred at the hearing and gives you the freedom of time to cogently get your arguments down on paper. I always submit my memos in letter form and make them brief (no more than three pages) and to the point.

If for some reason you forget to cite a regulation or ADM (Administrative Directive Memorandum) favorable to your case, do not hesitate to include this in your memo, with a request that the judge please consider the cited law/policy directives in rendering a decision.

Don't Leave the ALJ Out on a Limb

The seven words that every ALJ hates to hear are "this is a case of first impression." I have not met an ALJ yet who

wants to be a hero and make trailblazing new law for the state of New York. Even if it is a new issue, let the judge know that the law is on your side and that any decision that he or she renders will have a sound legal basis in the laws of the state of New York. Believe me – the opportunity to make new law, which may excite you, will not excite the ALJ.

Appellate Review of Adverse Decisions

In the event of an adverse decision, the client has four months in which to seek appellate review by way of an Article 78 proceeding.[17] The respondent in such a proceeding will be both the local agency and the state of New York. The state will be represented by the New York State Attorney General's office, and will usually take the lead in the defense of the appeal.

There is an interim step that a practitioner may wish to consider in the event of an adverse Fair Hearing decision. Department regulations provide: "The Commissioner [i.e. of the State Office of Administrative Hearings] may review and issue fair hearing decisions for purposes of correcting any error found in such decision."[18] After such review, "[t]he Commissioner may correct any error of law or fact which is substantiated by the fair hearing record." The trigger for this review process is informally known as a Request for Reconsideration. The request is made by letter to the Office of Administrative Hearings on notice (of course) to the agency and counsel for the agency. Please note that during the pendency of this review, the original decision is still binding and must be complied with by the agency. Also, please note that such a request does not toll the time in which the client is to request an appeal of the decision via Article 78, unless the state so stipulates.

It is my experience that such a request for reconsideration should be used judiciously. Such a request should also be made only in cases where it is readily apparent that the ALJ "got it wrong," and where the agency was acting without any legal justification or authority in taking the action at issue.

Conclusion

I hope that these pointers are helpful to you as an elder law practitioner, and that your next opportunity to litigate at a Fair Hearing will result in a positive result for your client. ■

1. N.Y. Social Services Law § 22; 18 N.Y.C.R.R. § 358-3.3.
2. 18 N.Y.C.R.R. § 358-2.23.
3. 18 N.Y.C.R.R. § 358-2.2.
4. *See Memorandum DSS-524EL*, Resource Center of the Western New York Law Center, *available at* http://www.wnylc.net/web/ welfare-law/main.htm (Dec. 11, 1996) (From Russell J. Hanks to all hearing officers and supervising hearing officers, addressing the issue of inadequate notices, Office of Temporary Disability Assistance, Office of Administrative Hearings).
5. 18 N.Y.C.R.R. § 358-2.23.
6. 18 N.Y.C.R.R. § 358-3.3.
7. 18 N.Y.C.R.R. § 358-3.5(b)(1).
8. *See Fair Hearings*, Office of Temporary Disability Assistance, *available at* www.otda. state.ny.us/oah/ (last visited Nov. 4, 2011).
9. 18 N.Y.C.R.R. § 358-3.6.
10. 18 N.Y.C.R.R. § 358-3.4(b).
11. 18 N.Y.C.R.R. § 358-3.7.
12. 18 N.Y.C.R.R. § 358-4.2(c).
13. 18 N.Y.C.R.R. § 358-4.2(f).
14. 18 N.Y.C.R.R. § 358.4.2(g).
15. *See Fair Hearing Decision Archive*, Office of Temporary Disability Assistance, *available at* http://otda.ny.gov/oah/FHArchive.asp (last visited November 4, 2011).
16. *Gomprecht v. Gomprecht*, 652 N.E.2d 936 (1995).
17. CPLR 217.
18. N.Y. Comp. Codes R. & Regs. tit. 18, § 358-6.6.

Bradley M. Pinsky (brad@emsfirelaw.com) is an attorney and firefighter in Syracuse, New York with the law firm of Scicchitano & Pinsky, PLLC. His law firm represents hundreds of ambulance services, fire departments and fire districts throughout New York and serves as special counsel to several municipalities. He lectures nationally, has a monthly radio show with a major publishing company, and has authored the popular *Fire Department Law & Management Resource Manual*. His firm maintains a website at www.emsfirelaw.com. He is also a part owner of IamResponding.com, a web-based system that tracks and displays responders. This article first appeared, in a slightly different form, in the *Municipal Lawyer*, Spring 2012, Vol. 26, No.1, a publication of the Municipal Law Section of the NYSBA.

Municipal Contract Issues Involving Emergency Medical Services

By Bradley M. Pinsky

The phone rings at the 911 dispatch center. A call taker answers the phone and hears a cry for help from the babysitter of a nine-month-old child. The child is not breathing. The dispatcher looks at the dispatch protocols to determine which ambulance will be dispatched to the emergency. Which service should be dispatched? Should it be the volunteer service which has proven only partially reliable? Can the dispatcher afford to wait 10 minutes to determine if enough volunteers respond to the station or scene? Should the dispatcher ignore choices made by a municipality to dispatch its contracted service, rather than dispatching another service with an ambulance which is closer to the emergency? These questions plague dispatcher entities every day.

In order to understand the issues involved in arranging and contracting for ambulance services, municipalities must understand the basic legal framework of ambulance services, the rights of dispatch entities, the limitations of the present system and the available solutions.

Certificates of Need

Municipalities have limited choices when determining which ambulance service(s) should provide care to their residents. Article 30 of the Public Health Law restricts the territories in which ambulance companies may receive patients. With few exceptions, an ambulance company may only receive patients in a territory for which it has been provided a "Certificate of Need."[1] Certificates of Need (CONs) are not easily obtained. Among other factors, an ambulance company must prove to the state that a need exists for its services in addition to those of the other existing ambulance companies. Thus, only those ambulance companies which hold a CON may provide ambulance services to a municipality.

This CON requirement was created in the mid-1970s. When the CONs were distributed to existing ambulance companies, such companies were provided CONs for the territories they served at that time. Although new companies have obtained CONs in areas of the state, and some

companies have expanded their operating territory to permit them to legally serve additional areas, the ambulance company CONs were not originally distributed in an attempt to equalize the availability of services or to ensure the most prompt response times. Thus, companies hold CONs but may not be located in or near the entities to best serve their patients.

The Public Health Law does permit a municipality to obtain its own CON for two years and then grants a presumption of need to the municipality when it applies for a permanent CON.[2] Thus, a municipality may not be restricted to existing ambulance services when considering potential solutions.

Municipal Involvement

Municipalities have no legal duty to provide or arrange for ambulance services, unless the municipality has established one or more ambulance districts. Understandably, many municipal boards feel compelled to arrange for services in order to provide for the health, safety and welfare of their residents. State law provides municipalities with the authority to contract for ambulance services, to provide their own ambulance services or to engage a variety of options to arrange for ambulance services.[3]

Municipalities vs. Dispatchers

It should be argued that the municipality's selection of an ambulance provider under the General Municipal Law was designed to instruct the dispatcher which company to select to respond to an emergency. While municipalities are statutorily authorized to provide and/or arrange for ambulance services,[4] dispatch entities have no statutory authority to disregard the instructions of a municipality or to choose their own service in place of that of the municipality. Despite this fact, several dispatch entities make their own decisions which run contrary to the instructions of a municipality, possibly in an effort to reduce response times and increase the reliability of the ambulance service being provided for any given request for help. However, these actions, while maybe based on good intent, frustrate the efforts of the municipality.

Volunteer Organizations on the Decline

Many ambulance corps became successful from the efforts of volunteers. However, as volunteers become less available to provide their time, the reliability of some volunteer ambulance corps has declined. As a result, although the 911 service may dispatch the volunteer ambulance corps, the 911 center frequently has no idea whether any volunteers have left their homes or work to respond to the emergency. It is common in New York to wait five or ten minutes before the dispatch center seeks another ambulance company to respond to the emergency.

Even though the "closest available ambulance" may be the best choice to provide ambulance services, only holders of a CON for such territory may legally be dispatched. An exception exists only if there are no other holders of CONs available or willing to respond. Thus, the CON system may actually result in increased response times, forcing 911 services to dispatch ambulance companies that have no vehicles in a reasonable vicinity of the emergency and to overlook other services that could respond in a timely manner.

For-Profit Companies

For-profit companies frequently have a CON for entire counties. These companies staff their ambulances with paid employees. In many areas, for-profit companies are the best choice to be the provider, as no other reliable options are available. These services frequently provide non-emergency transfers to or from hospitals or other health care facilities and may not be available to respond to emergencies. Volunteer services generally do not participate in non-emergency transfers and remain available for emergency responses only. Moreover, for-profit companies cannot afford to locate ambulances in areas with low call volumes, such as rural areas. Thus, the response times of for-profit companies may be extended due to the distance that they must travel to arrive at the emergency.

Fire Department Rescue Squads

Fire Departments have traditionally provided ambulance services in addition to providing fire protection. General Municipal Law § 209-b deems these services "Rescue Squads." Rescue squads are much like any other ambulance company, except that the law strictly prohibits them from billing for services. Rescue squads also commonly suffer from lack of volunteers to staff their ambulances. Unfortunately, the squads cannot afford to hire staff to fill the gaps without increasing the public tax burden.

Private Services vs. Volunteer Services

Many for-profit companies respect the volunteer corps' missions to respond to emergencies in their territories and do not act in a predatory nature by attempting to take over the service contracts. Some for-profit companies are willing to supplement the not-for-profits while others actively attempt to put not-for-profits out of business.

While a municipality may contract with a for-profit company in lieu of a not-for-profit ambulance corps, it may also create a long-term issue for the residents. First, removing the volunteer corps from the response plan may lead to the end of the volunteer corps. This in turn destroys competition and limits a municipality's options and negotiating power in the future. Some for-profit companies have offered significant contractual concessions to a municipality during contract negotiations against a not-for-profit ambulance corps, but one must question the for-profit company's willingness to provide the same level of service, under the same conditions, when the competition has disappeared. The existence of the volunteer corps cre-

ates competition which can be better for the municipality and its residents.

Solutions for Reliability and Predictability

Reliability and predictability are the keys to ambulance protection. Volunteer ambulance and fire services offer the best bargain but reliability may be questionable. For-profit companies may not be available, may demand too high a contract fee or may not guarantee a response rate. So what are some solutions being tried today?

Paid Employees.

Paid employees are one good answer to the problem. Staffing an ambulance service creates reliability and ensures that at least the first ambulance can respond, but staffing takes money. Where does the money come from? Taxes alone cannot be the answer. The solution lies in the ability of an ambulance company to bill for its services. Billing can generate revenues averaging about $325 per call, for basic life support level calls. The revenue generated by advanced life support level calls is higher. Thus, an ambulance company which transports even 300 patients can collect enough revenue to afford a daytime staff five days a week.

Can the patients afford to be billed? Persons over 65 receive Medicare. The extremely poor receive Medicaid. Persons involved in car accidents receive no-fault coverage and persons injured at work are covered by workers' compensation. Veterans have coverage, and persons with insurance are certainly covered. Billing can be the answer. Moreover, not billing patients can actually be costly to a patient. Medicare will deny payment to an advanced life support (ALS) company if the company provided ALS care while assisting a basic life support ambulance company which does not bill for services. However, Medicare permits the ALS company to bill the patient directly. Thus, elderly residents will receive a bill for services from the ALS-only provider up to almost $1,000 for advanced life support services, even if the transporting ambulance does not impose charges for its service.

Fire Department Billing

As mentioned, General Municipal Law § 122-b prohibits fire departments from billing. However, nothing prevents the members of the fire department from forming a truly separate not-for-profit corporation with its purpose to provide ambulance services. So long as this new ambulance service is legally and ethically structured to act as a separate organization, it can bill for its services. The fees can be utilized to hire employees. As a bonus to the municipality, if the new organization hires persons who are also qualified volunteer firefighters, the employees can leave work to staff a fire engine in the event of a fire call, thus ensuring enhanced fire services!

Crew Confirmation

What about volunteer responses? The system works when volunteers respond to emergencies. The system does not work efficiently when dispatchers are required to wait to see if volunteers arrive at the station or respond to the scene. Waiting can take 15 minutes or more! However, if a dispatcher could know in a minute that a crew was in route to the station or scene, the system improves dramatically. Numerous New York State counties have turned to systems that permit responders to immediately notify dispatch that they are responding to the station or scene, simply by pressing a button on their phone. Dispatchers and persons at the station can view the list of responders and know within seconds following the dispatch whether a crew will arrive or whether mutual aid services are required. Putman County's dispatchers, for example, monitor their system's display and announce each responder or lack of responder. If there is insufficient manpower available, the call is quickly turned over to another agency. The patient is not forced to wait. This saves time and, potentially, lives.

> While a municipality may contract with a for-profit company in lieu of a not-for-profit ambulance corps, it may also create a long-term issue for the residents.

Conclusion

Ambulance service issues are complicated, but response reliability can be obtained. Billing revenue can permit the not-for-profit to employ staff; utilizing a crew confirmation system will decrease response times. By preserving the not-for-profit services, the for-profit services can be utilized as back-up services or to provide advanced life support services, without being overtaxed. There are answers, but the municipality needs to be creative. Dispatch entities are part of the solution, but must be given the tools to help solve the problem. Dispatchers cannot be forced to hope that an ambulance responds, and patients cannot keep waiting for a response that may not be quickly forthcoming. The solutions are out there. ■

1. N.Y. Public Health Law § 3006 (PHL).
2. PHL § 3005(4).
3. General Municipal Law § 122-b.
4. PHL § 3003.

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Doug Goggin-Callahan is the Medicare Rights Center's Director of Education and New York State Policy Director. Most recently he was the Client Services and Program Counsel at the Medicare Rights Center. Mr. Goggin-Callahan received his law degree from Fordham Law School, and his B.A. from New York University. This article first appeared, in a slightly different form, in the *Elder and Special Needs Law Journal*, Winter 2012, Vol. 22, No.1, a publication of the Elder Law Section of the NYSBA.

Medicare Prescription Drug Coverage: Barriers to Access at the Pharmacy Counter

By Doug Goggin-Callahan

In 2006 Congress added a prescription drug benefit to the Medicare program. Unlike other Medicare benefits, it requires the beneficiary to opt in by purchasing a Medicare Part D prescription drug plan. This article will review the complex methodology of appealing the refusal by a Medicare Part D insurer to pay for a prescription drug.

Since its inception in 2006, Medicare Part D, Medicare's voluntary outpatient prescription program, has grown to include 35 million of the total 49 million Medicare beneficiaries in the United States.[1] In addition to increased enrollment, the Part D market has developed considerably both in terms of plan selection and price range. In 2012, Medicare's administrative agency, the Center for Medicare & Medicaid Services (CMS), expects 29 stand-alone prescription drug plans to be offered in New York State, with premiums as low as $15.10 per month.[2] Despite a relatively robust plan landscape and high rates of enrollment, people with Medicare Part D may experience difficulty obtaining prescribed medications at the pharmacy.[3] In order to overcome these obstacles, beneficiaries must understand Medicare's drug utilization controls and appeals process.

Medicare Part D insurance plans must develop both a formulary and a prescription utilization management program.[4] As part of their utilization management programs insurers may require the following: (1) prior authorization for medications; (2) that a beneficiary try a particular medication on the plan's formulary before paying for the prescribed medication; or (3) limits on the dosage or amount of medication that may be covered.[5] And unlike in the Medicaid program, prior authorization may be required before a beneficiary can access a medication that is on the formulary.[6] Therefore, a medication's presence on a plan formulary and a prescription in hand is not a guarantee that the insurance plan will cover the drug at the pharmacy counter.

Consequently, many Medicare beneficiaries first become aware of a barrier to accessing their medication at

the pharmacy counter.[7] At this point the beneficiary has already seen his or her doctor, been prescribed a medication and brought the prescription to the pharmacy, only to find that there is a stop on the plan's coverage. Utilization restrictions not known to the beneficiary or the doctor at the time the prescription is written frequently account for these coverage denials.[8]

At present, pharmacies are required only to post a generic notice that instructs beneficiaries to contact their plan if they disagree with the stop on their coverage. The pharmacist is not required to, and often cannot, provide detailed information as to why the medication is not covered by the insurer.[9] Beginning in 2012, beneficiaries will be provided with a generic notice instructing them they have a right to request a coverage determination from their plan if they believe the medication should be covered by their insurer.[10] It will not, however, contain detailed information as to why the coverage is being withheld (e.g., prior authorization requirement, dosing above the quantity limit, etc.). The lack of specific information may leave beneficiaries confused as to the necessary next steps to obtaining coverage of the medication.

At this juncture, no appeal rights have been triggered; the only right that exists is the right to request a coverage determination from the insurance carrier.[11] A plan's decision not to provide or pay for a Part D drug, which triggers appeal rights, is defined as a "coverage determination."[12] Surprisingly, a coverage denial at the pharmacy counter is not considered a coverage determination under Medicare law.[13]

Instead, the beneficiary must contact his or her plan and proactively request a coverage determination if he or she wishes to pursue an appeal. Beneficiaries may request coverage determinations orally or in writing from their plan.[14] CMS recently adopted regulations that allow for the electronic submission of coverage determination requests beginning January 1, 2012.[15]

Before filing a coverage determination request, a beneficiary may need to contact his or her plan to determine what utilization tool is being applied to the medication. If the utilization tool being applied is step therapy, a quantity limit, or a higher pricing tier, the coverage determination must include a supporting statement from the prescribing physician.[16] The statement must tell the plan that a substituted medication would be less effective or harmful – or both – to the beneficiary.[17] Because of these exacting language requirements, the prescription itself does not satisfy the requirement of physician support.

In practice, regardless of the reason why coverage is being withheld, it is useful to have the support of a prescribing physician. The coverage determination is usually made by computer algorithms based on the answers to a series of yes or no questions.[18] Decisions that cannot be made by the algorithm or require more technical expertise are forwarded to clinical staff.[19] Because plans have only 72 hours to make a non-expedited coverage determination, there is an increased likelihood that plan staff will simply deny the request if information is missing or incomplete.[20] Physician information that is tailored to the particular utilization denial will thus increase the likelihood of a plan approving the coverage request.

If a beneficiary receives an unfavorable coverage determination, he or she may continue to appeal the decision, first through the plan's internal appeals process, then through an independent adjudicator and ultimately through the federal courts. One of the most critical junctions for beneficiaries, however, is the coverage denial at the pharmacy counter. It's important for beneficiaries and their attorneys to understand the rights that are trigged by this denial, the parties that need to be involved in the appeal, and the steps that are necessary to obtain coverage of the medication. ■

1. 2011 Annual Report, The Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/ReportsTrustFunds/downloads/tr2011.pdf.

2. 2012 CMS Fact Sheet, The Center for Medicare and Medicaid Services, http://www.cms.gov/Partnerships/downloads/state-fact-sheets-all-2012.pdf (Medicare beneficiaries who qualify for the federal subsidy, Extra Help, may pay no monthly premium for their prescription drug plan).

3. U.S. Gov't Accountability Office, GA0-08-47, Medicare Part D: Plan Sponsors' Processing and CMS Monitoring of Drug Coverage Requests Could Be Improved (2008) (*GAO Report 2008*) (finding that 11.3% of surveyed beneficiaries reported utilization controls were placed on medications they were taking).

4. *See generally* Dep't of Health & Human Services, Medicare Prescription Drug Manual, Ch. 7, Medication Therapy Management and Quality Improvement Program, § 60, Drug Utilization Management Program, https://www.cms.gov/Medicare-Prescription-Drug-Coverage/PrescriptionDrugCovContra/Downloads/chapter7.pdf.

5. *Id.* at § 60.1.

6. *See* Vicki Gottlich, *Beneficiary Challenges in Using the Medicare Part D Appeals Process to Obtain Medically Necessary Drugs* (Kaiser Family Found., Sept. 2006).

7. *Id.*

8. *GAO Report 2008*, *supra* note 3, at 22 (finding 34% of appeals to the independent external adjudicator were in regard to utilization restrictions).

9. *See* Gottlich, *supra* note 6, at ii.

10. Codified at 42 C.F.R. §§ 423.128, 423.562.

11. Medicare Prescription Drug Benefit Manual, ch. 18, § 10.1 (the presentation of a prescription at the pharmacy counter does not need to be considered a coverage determination).

12. 42 C.F.R. § 423.566.

13. Medicare Prescription Drug Benefit Manual, Ch. 18, § 10.1.

14. 42 C.F.R. § 423.568(a)(1).

15. Uniform Exceptions and Appeals Process for Prescription Drug Plans and MA-PD Plans, *supra* note 10.

16. 42 C.F.R. § 423.578.

17. *Id.*

18. *GAO Report 2008*, *supra* note 3, at 12.

19. *Id.*

20. *Id.* at 13.

MEET YOUR NEW OFFICERS

President
Seymour W. James, Jr.

Seymour W. James, Jr., of New York City, took office on June 1 as the 115th president of the 77,000-member New York State Bar Association.

The House of Delegates, the Association's decision and policy-making body, elected James at the organization's 135th annual meeting, held this past January in Manhattan.

He is the attorney-in-charge of the Criminal Practice of The Legal Aid Society in New York City. In that capacity, he is responsible for the Society's trial, parole revocation and appellate criminal practice.

Active in the State Bar since 1978, James most recently served for the past year as the Bar Association's president-elect. As president-elect, James chaired the House of Delegates and co-chaired the President's Committee on Access to Justice. He previously served three terms as treasurer.

He is a member of its House of Delegates, the Finance Committee, the Membership Committee, and the Special Committee on Strategic Planning. Within the Criminal Justice Section, James serves as a member-at-large of its Executive Committee.

He served as the vice president for the 11th Judicial District from 2004–2008 and on numerous committees, including the Nominating Committee, the Special Committee on Association Governance, the Committee on Legal Aid, the Committee on Attorneys in Public Service, the Task Force on Increasing Diversity in the Judiciary, and the Committee on Diversity and Leadership Development. He is a Fellow of the New York Bar Foundation.

James is a past president of the Queens County Bar Association and has served on its Judiciary Committee. He serves as a member of the board of directors for the New York State Defenders Association and as a member of the Defender Policy Group of the National Legal Aid and Defender Association. He also is a member of the Macon B. Allen Black Bar Association and a former member of the Board of Directors of the Metropolitan Black Bar Association.

A resident of Brooklyn, James received his undergraduate degree from Brown University and earned his law degree from Boston University School of Law. He is married to Cheryl E. Chambers, a judge in the Appellate Division, Second Department.

President-elect
David M. Schraver

David M. Schraver of Rochester took office on June 1 as president-elect of the 77,000-member New York State Bar Association.

The House of Delegates, the Association's decision and policy-making body, elected Schraver at the organization's 135th annual meeting, held this past January in Manhattan. In accordance with NYSBA bylaws, Schraver will become the Bar Association's 116th president on June 1, 2013.

Schraver is a partner of Nixon Peabody LLP, where he practices business and commercial litigation, with a particular expertise in Indian law.

He has been a member of the State Bar Association's Finance Committee since 2003 and its chairman since 2007. He also has served as the association's president-elect designee; vice-president for the Seventh Judicial District and member-at-large of the Executive Committee; and member of the House of Delegates, the Committee on Standards for Attorney Conduct, and the Commercial and Federal Litigation Section.

At Nixon Peabody, Schraver is a founding member of the firm's Indian Law & Gaming team, which has been recognized as a nationally ranked practice by Chambers USA: America's Leading Lawyers for Business. Schraver has served as a member of the firm's Governing Committee, Partner Evaluation Committee, Professional Responsibility Committee, and Operations Committee, and as chair of the Personnel Committee. He has been actively involved in the firm's continuing legal education program and has served as an instructor in interviewing, counseling, and negotiating skills.

Schraver, a native of Albany, graduated *cum laude* from Harvard University and *magna cum laude* from the University of Michigan Law School, where he was note and comment editor for the *Michigan Law Review*.

He has been elected by his peers to be included in *The Best Lawyers in America* for Commercial Litigation and *Super Lawyers*.

Schraver is admitted to practice in New York, Florida, several U.S. district courts and courts of appeals, and the Supreme Court of the United States.

Schraver is past president of the Monroe County Bar Association, past president of The Metropolitan Bar Caucus of the National Conference of Bar Presidents; former member of the American Bar Association House of Delegates and member of the ABA Litigation Section; and has served on the boards of a number of community organizations.

He is an author and speaks regularly on Indian law and on matters of legal ethics and professionalism. Before joining Nixon Peabody (then Nixon, Hargrave, Devans & Doyle), he was on active duty in the United States Navy Judge Advocate General's Corps.

Secretary
David P. Miranda

David P. Miranda, a partner of the Albany intellectual property law firm of Heslin Rothenberg Farley & Mesiti P.C., has been re-elected to a third term as secretary of the New York State Bar Association.

Miranda is an experienced trial attorney whose intellectual property law practice includes trademark, copyright, trade secret, false advertising, and patent infringement, as well as licensing, and Internet-related issues.

Heslin Rothenberg Farley & Mesiti P.C. is the largest law firm in upstate New York dedicated exclusively to the protection and commercialization of intellectual property. He is an arbitrator of Intellectual Property disputes for the National Arbitration Forum and American Arbitration Association.

In 2009, 2010, 2011, and 2012 Miranda was one of five partners from his firm selected as a "Super Lawyer" by the publication, *Super Lawyer Magazine*.

A past chair of the Electronic Communications Committee, Miranda is the Executive Committee Liaison for that committee. He served as a member-at-large of the State Bar's Executive Committee from 2006–2010, and chaired the Young Lawyers Section from 2002–2003 and was the NYSBA's Young Lawyer delegate to the American Bar Association from 1998 to 2000. He is Chair of the Resolutions Committee, and member of the Intellectual Property Law Section, Commercial and Federal Litigation Section, the Committee on Continuing Legal Education, the Committee on the Annual Award, and the Membership Committee. Miranda also co-chaired the Committee on Strategic Planning and served on the Task Force on E-Filing and the Special Committee on Cyberspace Law.

Miranda is a past president of the Albany County Bar Association. In 2009, he served on the Independent Judicial Election Qualification Commission for the Third Judicial District of the State of New York. In 2002, then-Chief Judge Judith Kaye appointed him to the New York State Commission on Public Access to Court Records.

A resident of Voorheesville, Miranda received his undergraduate degree from the State University of New York at Buffalo and earned his law degree from Albany Law School.

In 2001, he received the Capital District Business Review's 40 Under Forty Award for community involvement and professional achievement.

He was editor-in chief and contributing author of *The Internet Guide for New York Lawyers* in 1999 and 2005, published by the NYSBA, is the author of "Defamation in Cyberspace: *Stratton Oakmont, Inc. v. Prodigy Services Co.*," published in the *Albany Law Journal of Science & Technology*, and the author of "New York Intellectual Property Law Review" published in the New York Appeals issue of the *Albany Law Review* in 2012.

Treasurer
Claire P. Gutekunst

Claire P. Gutekunst of New York City has been re-elected to a second term as Treasurer of the New York State Bar Association.

Since April 2012, Gutekunst has been the Special Master for the New York City Asbestos Litigation, as well as an independent mediator and arbitrator for commercial and other disputes. As Special Master, she is responsible for resolving disputes concerning discovery and trial readiness issues, conducting settlement conferences and assisting administrative and trial judges in managing the dockets of all asbestos personal injury and wrongful death cases filed in New York City. Until April, Gutekunst was a partner in the Litigation Department at Proskauer Rose LLP in New York City. During her nearly 30 years at Proskauer, she was an advocate for corporate, law firm and individual clients in resolving complex commercial disputes. She practiced in the state and federal courts and in domestic and international arbitrations and served as an advocate or mediator in mediations.

Active in the State Bar for 24 years, Gutekunst previously served on the State Bar's Executive Committee as Vice President for the First Judicial District and as a Member-at-Large. Gutekunst previously chaired the Membership Committee, Committee on Women in the Law and Strategic Planning Advisory Committee and co-chaired the Special Committee on Rules for Consideration of Reports. She is a member of the Commercial and Federal Litigation Section's Executive Committee, the Committee on Diversity and Inclusion and the Membership Committee. She also is a Maryann Saccomando Freedman Fellow of The New York Bar Foundation.

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a partner in a 10-person law firm and I regularly see prospective clients for initial consultations, which I provide at no charge. We do not take every case presented to us. When we decline a representation, do we have a duty to provide a non-engagement letter or to warn the person about statutes of limitations that may apply to his or her case? What is our risk of malpractice exposure, if we decline a representation although the person did have a viable claim and, if the person later pursues it on his/her own, finds that the claim is time-barred? Finally, if a prospective client provides me or one of my partners with confidential information during that initial consultation and I do not take the case, am I obligated to keep the person's confidential information confidential, and can information acquired that way create a conflict that would prohibit me from taking some future litigation? Recently, we had a situation where one of my partners met someone at a Friday evening cocktail party who talked with her about a potential litigation. By coincidence, I had met the opposing party and had set up a meeting in our office to take the case. We ended up deciding not to take on the matter which we thought was the only possible decision that we could make. Were we correct?

Sincerely,
W.E. Declined

Dear W.E. Declined:

Every attorney faces, at one time or another, the situation you describe. It is important to know that attorneys owe certain duties to prospective clients under the Rules of Professional Conduct and they should also be aware of any issues which may arise concerning the receipt of confidential information from a prospective client as well as the potential for imputation of conflicts of interests that almost certainly will come up in connection with such a representation.

Rules 1.18(a) defines a prospective client as "[a] person who discusses with a lawyer the possibility of forming a client lawyer relationship with respect to a matter…." Under the Rules, there is no specific duty to provide a non-engagement letter to a prospective client that does not retain an attorney, however, best practice suggests that the issuance of a non-engagement letter to the prospective client which you describe (who we'll refer to as "AA") is an appropriate way of confirming that an attorney-client relationship has not been created. In addition, the non-engagement letter should spell out any potential statute of limitations issues arising from AA's potential claim.

With regard to confidential information that the prospective client has communicated to the attorney, Rule 1.18(b) states: "Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client." Although Rule 1.9 does not expressly set forth duties owed to prospective clients, pursuant to Rule 1.9(a), "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." In essence, the duties owed to a prospective client under the Rules concerning information learned from the prospective client are treated similarly as those duties that would be owed by attorneys who receive information from a former client.

Furthermore, Rule 1.6(a) requires that "[a] lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person" except under certain specific circumstances as defined in Rule 1.6. Moreover, Rule 1.6(a) defines confidential information as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." Whether or not an individual or entity retains an attorney, the duties owed by an attorney to preserve confidential information are of tremendous importance.

It is also stated in Rule 1.18(c) that

> [a] lawyer subject to paragraph (b) [of Rule 1.18] shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the

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

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

> matter, except as provided in paragraph (d) [of Rule 1.18]. If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d) [of Rule 1.18].

Moreover, Rule 1.18(d) provides that

> [w]hen the lawyer has received disqualifying information as defined in paragraph (c) [of Rule 1.18], representation is permissible if: (1) both the affected client and the prospective client have given informed consent, confirmed in writing; or (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and (i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client; (ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm; (iii) the disqualified lawyer is apportioned no part of the fee therefrom; and (iv) written notice is promptly given to the prospective client; and (3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

It was entirely proper for your firm to pass on representing the opposing party that your partner had met at the cocktail party (we'll refer to the opposing party as "BB"). Rule 1.10(e) requires all lawyers to maintain "a written record of its engagements." With respect to prospective clients, the Rule states that "lawyers shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when: (1) the firm agrees to represent a new client; (2) the firm agrees to represent an existing client in a new matter; (3) the firm hires or associates with another lawyer; or (4) an additional party is named or appears in a pending matter." Although Rule 1.10(e) uses the words "proposed engagements" in contrast to Rule 1.18's use of the words "prospective client," it would seem that the best practice in the situation you describe would be to implement a system at your firm which records all such contacts in your firm's records to deal with a conflict as soon as possible and allow for screening.

Since you are part of a relatively smaller firm, setting up screening mechanisms to deal with potential conflicts of interest requires greater vigilance since information within a smaller firm environment could easily be communicated to all attorneys and staff of the firm. Comments [7B] and [7C] to Rule 1.18 contain an extensive discussion on the establishment of appropriate screening mechanisms, with a particular emphasis on establishing screening mechanisms in a small firm environment. One of the factors in determining if disqualification would be appropriate under Rule 1.18(c) is if the information learned from the prospective client would be "significantly harmful" to that prospective client. Although Rule 1.18(d) could potentially allow a firm to represent BB even if the information previously received from AA was significantly harmful to AA's interest, the fact that you are at a smaller firm would suggest that unless you established very clear and detailed screening mechanisms, it would be significantly more difficult to screen out any attorney who receives information from someone in AA's position who does not retain your firm.

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

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

My client is currently engaged in a child-support action against her former husband. She is trying to get $300/month more in child support.

At her deposition, my client testified that she had no income other than the support that her former husband was providing. I had been planning on negotiating with my adversary to see if we could settle the case before an upcoming child support hearing, and I had called my client for some final settlement authority.

On the call, my client told me that she now "remembers" something she "forgot" to mention at her deposition. Previously, she had testified that she had no other source of funds besides the child support she received. Now she remembers she had received $50,000 from her recently deceased uncle a few weeks before her deposition when his estate was distributed based on his will. She does not want me to tell her ex-husband or the court about the $50,000 since she wants her ex-husband to suffer for cheating on her during their marriage. Still, she's worried that the court might find out about the $50,000 since her uncle's will is a matter of public record. So, she'd settle for an additional $150/month.

Meanwhile, the private investigator I had previously hired just reported to me that the former husband's statement in his affidavit that he is unable to work because he is injured is false. In fact, the former husband has been working off the books as a messenger at the law firm of his attorney, Fraud U. Lent. By my calculation, if my client's former husband had reported the additional income, the court would order him to pay $300/month more in child support.

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Andrea Christine Zakoo
Emily Deborah Zand
Ronald Paul Zapata
Maja Zerjal
Yan Zhou
Xinping Zhu
Aron Meir Zuckerman
Tara Marie Zurheide

SECOND DISTRICT

Janelle D. Allen
Michael Rock Arthus
Alexi Linden Ashe
Adam K. Axel
Elyse Michelle Bataller-Schneider
Rovena Beqiri

Robert Joseph Berding
Joel Patrick Bermejo
Elizabeth Ann Blackstone
Sarah Rebecca Boyette
Michael Lawrence Boykin
Grace Lynne Brainard
Yosef Bresko
Oliver Oneil Brewster
Vanessa Buch
Dina Chelst
Elena Louisa Cohen
Tania Cohen
Chad Harris Dauman
Anne Del Castillo
Luisa Antonia Enriquez
Wendy Nicole Ferguson
Daniel Benjamin Fromm
Joshua Joseph Gange
Pouya Gharavi
Jason Michael Goldberg
Jacquelyn Leah Griffin
Jonathan Matthew Guerra
Joseph Hamel
Mark Howard Hatch-Miller
Christopher Hickman
Lee M. Hirsch
Roman Edwards Ivey
William Jennings
Hanna Leah Karsevar
Raymond Kisswany
Elyse Sara Kleinberg
Ashley Elizabeth Kloepfer
Antonia Konkoly
Matthew Richard Koreiwo
Alexander Henry Kuehling
Katherine Elizabeth Latawiec
Catherine Ka Bo Lee
Michael Kangkook Leigh
Daryl Gregory Leon
Hela Shifra Levi
Jessica Ilene Levy
Ke Li
Zachary Wagner Lider
Lindsay Beth Lieberman
Melissa Livingston
Francesca Lulgjuraj
Marissa Kannika Marco
Daphney Marin
Kyle Andrew Marler
Gamaliel Marrero
Natoya Lamore McGhie
Timothy John McKeon
Carolyn Ann McMenemy
Christine Elizabeth Meyer
Jillian Alyssa Moo-young
Kaitlin A. Morris
Daniel Mulhall
Elisabeth Bach Muller
Brian Benton Murphy
Theodore Harmon Nadler
Jacob Hershel Nemon
Lynn Chi Nguyen
Malky Nissenbaum
Samuel Palmer-Simon
Neel Patel
Brooke Riane Peltz
Kristin Ann Perry
Matthew Jason Rabin
Lauren Michelle Reiff
Aaron Charles Retter
Alejandro Eduardo Rodriguez
David Joseph Rosen
Yacov Rubin
Nissan Zadok Zvi Sabghir
Judith Saintvil
Nicholas Marcelo Sarta
Sunil Persaud Satnarain
Michael Vincent Scarpati
Schneur Zalman Schapiro
Brian John Schott
Geoffrey Howland Schotter
Marissa Kate Sherman
Ruth Strandness Shnider
Yulian Shtern
Marc Andrew Sittenreich
Christopher Bond Smith
Frank Alfred St. Jacques
Jason Edward Starr
David Jonathan Stolzberg
Stephen Matthew Suhovsky
Anna Caroline Tavis
Elana Gillian Tawil
Andrew Tran
Natalie Claire Webb
Zipporah Golda Wielgus
Destyni Naomi Neifa Williams
Jared Andrew Williams
Lisa Kline Williams
Dylan Anthony Yaeger
Ronen Benjamen Yair
Iris Ying
Jolie A. Zangari
Maria Zhynovitch
Rebecca Dince Zipkin

THIRD DISTRICT

Alima M. Atoui
Carl Gardner Becker
Merrill Elizabeth Bent
Allison Bradley
Jessica C. Caggiano
Patrick Joseph Collins
Joanne Darcy Crum
Margaret C. Doody
David Antos Fallon
Claire Fraze Galbraith
Adam Gregory Giangreco
Caitlin Ashley Goetz
Charles J. Gottlieb
Fatin F. Haddad
Timothy Charles Hannigan
Ashley Manning Hart
William Franklin Howard
Bryan Joseph Huebner
Erin Patricia Kandel
Justin Adam Law
Timothy D. Lawson
Benjamin A. Lee
Meredith Grace Lee-Clark
Stephen Thomas Lydon
Luke S. Malamood
Greg Eric Mann
Sarah Merritt
Peter G. North
Alexander Jordan Pacheco
Donald Partyka
Elise C. Powers
Jason William Riegert
Matthew Duell Robinson-loffler
Rita Anne Romani
Brendan Martin Sheehan
Elizabeth Sullivan
Matthew Austin Toporowski
Jessica R. Vigars

FOURTH DISTRICT

Stephan Emil Andersson
Andrew Thomas Botts
Kevin Cheung
Amanda E. De Vito
Kathleen Hoffman
Lisa Ann Robbins Hoover
Eric M. Leander
Anson E. Rhodes
Amanda Rose
Bruce Steves

FIFTH DISTRICT

Brittany Eileen Aungier
Amanda Dox
Michael Gadarian
Jessica Kelly Guzewich
Brian Hartmann
Elizabeth Anne Hennigan
Sara Elizabeth Keller
Kara Krueger
Kara Jo Krueger
Mary Elizabeth Langan
Mark P. Lawrence
Thaddeus Matthew Lenkiewicz
Scott Raymond Leuenberger
Daniel K. Mannion
Melissa Ashley McQueen
Frederick Arthur McRoberts
Matthew McGregor Midey
Chadd Spain Montgomery
Asish Nelluvely
Brady John O'Malley
Jeremiah James Ouimette
Jeffrey James Pack
Margaret Priest
Kate I. Reid
Brian Daniel Roy
Brandon William Sawyer
Anas Selah
Jessica Grace Trombetta
Patrick Raymond Vanderpool
Matthew Earl Ward

SIXTH DISTRICT

Brady Begeal
Matthew John Buzzetti
Alexander W. Dunshee
Sara Korol
Elizabeth Veronica Marchionni
Alson James McKenna
Reuben Mark Monastra

SEVENTH DISTRICT

Felipe Alexandre
Rachel Catherine Baranello
Jeffrey Michael Beadnell
Allison Anne Bosworth
Geoffrey Guy Brougher
Amanda Brooke Burns
John David Callan
Neil Thomas Campbell
Kristin Amanda Cavuoto
Brian Joseph Chavanne
Min Won Cho
Thomas Joseph Beattie Cole
Joseph David Coppola
Samantha Jean Crane
Roberto Gilbert Cruz
Joseph Kevin Dier
Mark Richard Garvey
Timothy Joseph Garvin
Michael Frank Geraci
Daniel A. Gross
Neil William Gunther
Megan Leigh Hausner
Julia Jane Henrichs
Rachelle Marie Hoeflschweiger
Justin Thomas Huffman
Alishba Irshad Kassim
Lee Jeffrey Kelly
Katherine Wood Kenney
Max Gerard Kinsky
Anant Kishore
Jeffrey Michael Kowalski
Christopher Merriell Kvam
Candace Mee Lee
William Raymond Leinen
Hillary Molly Levitt
Daniel Ryan Magill
Marianne Maher
Roman Arthur Misula
Stephanie Lauren Nott
Bridget O'Toole
Kristopher N. Ostrander
Anthony Louis Pitnell
Reyna Ramolete Hayashi
Michael Lawrence Robertson
Helen Katherine Root
Daniel Ryan Rose
John Joseph Runfola
Carrie Ann Scrufari
Miranda Sharlette
Mark Vaughn Smeltzer
Danielle Elisabeth Smith
Amanda Marcella Stankus
Helen Amy Syme
Angela Szewczyk
Lucia Alexandrea Thayer
Jennifer Marie Townsend
Michael Yonkovig

EIGHTH DISTRICT

Aaron Morris Adoff
Kevin Richard Allen
Ashley Mae Arcangeli
James Matthew Bauer
Rachel Brown
Richard Buck
Luke James Cadin
Robert Christopher Carbone
James Joseph Cassar
Richard Elliott Chambers
Leo Jeremy Dandes
Katherine Lucy Dibble
Thomas Andrew Digati
Heather DiStefano
Heather Marie Distefano
Courtney Jean Donahue
Brenna Caitlin Drury
Kyle W. Dukmen
Kathleen Anna Ellis
Stanley L. Evans
Richard Patrick Fay
John Peter Fenski
Marshall Harris Fiese
Eric Andrew Fusco
Rita Ntanios Georges
Justin D. Ginter
John Pasquale Granchelli
Allison Noel Greene
Carlton James Hamann
Adam Christopher Hellwig
Michael Lawrence Hentry
Patrick John Hines
Christopher Joseph Hufnagel
Margaret Ann Hurley
Laura L. Jabrucki
Eric Kuzma
William Laakso
Mollie K. McCabe
Megan J. Michaloski
Robert Lawrence Mietlicki
Andrew Mark Molitor
Colleen Mary Mulvaney
Nevin Frederic Murchie
Arthur Musarra
Matthew Robert Musial
Louis Mussari
Leah Ramona Nuchereno
James Donald O'Donnell
Allison Ogorek
Joseph Petti
Leanna Marie Pilarski
Peter Michael Pinelli
Daniel James Punch
Jessica Nicole Reich
Lori Ann Roman
William Gerald Sacks
Elizabeth Marie Salzman
Angela Jo Schnell
Caitlyn Sarah Schultz
Miranda Lynn Sharlette
A. Peter Snodgrass
James Robert Stevens
Jillian Leigh Stiefel
Robert Donald Strassel
Michael Joseph Tadesco
Amanda Christine Townsend
Joseph Patrick Turner
Jason Aaron Urbaniak
Jillian Nicole Venci
Kim Vo
Niels Alexander Von Deuten
Christopher Walker
Jason Alan Zwara

NINTH DISTRICT

David Michael Allen
Andrew Andela
Andrew Hunt Baginski
Adele Bernhard
Corinne Shelov Beth
Matthew Robert Bremner
Kurt H. Bressler
Alissandra Celia Burack
Kathryn Alice Burkhardt
Barron Anthony Butler
David Camacho
Andrea Catalina
Leslie W. Chervokas
Matthew Clark
George G. Cornell

Daniela Vivian Crispi
Michelle Nancy Daly
Carolyn Emily Aimee Desiena
Melissa Ann D. Dizon
Daniel Bennett Feintuck
Kevin Thomas Fitzpatrick
Michael Rene Frascarelli
Bryn Nicole Fuller
Raymond P. Girnys
Richard Adam Goldman
Bryan Matthew Goldstein
Lindsey M. Goldstein
Michael Peter Gonzalez
Ariella Sara Hellman
William David Jennings
Edit Juhasz
Mathew T. Keller
Eric Tiernan Kolle
Anjella Mary La Barca
Robert H. Leventhal
Dudley David Loew
Walter Machnicki
Merry L. Manavalan
Daniel Fredric McGuire
Sarah Merkel
Anne Catherine Mulcahy
Eliza Pryor Nagel
Eustus Dwayne Nelson
Ryan Daniel O'Connor
Dana Marie Ricci
Jennifer Lee Schneider
Tania Valerie Schrag
Danielle Schreiber
Marc Daniel Schwarz
Daniel Robert Shortt
Danielle Strauch
Perry Tsao
Jacob Alexander Tuckfelt
Kiel Edward Van Horn
Michelle Sulpico Velasco

TENTH DISTRICT
Michelle Azoulay
Lauren Celia Ball
Brice Schroeder Beach
David Adam Beatty
Sirikit Benja-Athonsirikul
Emily Ann Bennett
Jacqueline Mary Blauvelt
Daniel Borgia
Maria Boultadakis
Siobhan Anne Breen
Christina Claire Bruno
Teresa Butler
Ryan Scott Caso
Dina Michelle Chadi
Christopher Thomas Chadzutko
Christopher Stephen Charnetsky
Vivan Chen
Adam Bradley Chertok
Adam Citron
Marcy M. Cohen
Jose Luis Corona
Christopher Bart Cosolito
Joseph N. Cotilletta
Michael P. Cotter
Gianna Crespo
Karen Ann Cullinane
Christian Doellinger Curtis
Maria Theresa Degennaro
Daniele Gia Dezago
Kristi DiPaolo
Matthew Anthony Duca
Barbara Emigholz
Timothy James Fallon
Nicholas James Fengos
Jon-Paul Gabriele
Vincent Gaudio
John Michael Gherlone
Naomi Giaccone
Jill L. Greenfield
Salvatore Aldo Grimaldo
Amanda Rae Griner
Mark R. Guarriello
Brett Philip Habermann
Bryan James Hall
Timothy Chang Han
Jason Harounian
Stephanie Michelle Herschaft
Fei Hu
Kevin Joseph Huber
Lisa Michelle Hughes
Audrey Lee Jacobs
Judy Rachel Jacoby
Da Un Jung
Priscilla Deling Kam
William Kang
Kristen Elisabeth Kelley
Noorzahan Begum Khan
Jason William Klimek
Yana Gennadyevna Knutson
Julianne Elaine Lewis
Wendy C.Y. Lo
Patricia R. Lynch
Stella Malayev
Diane Celia Mandleur
Christina Markarian
Andrew Kyle Martingale
Whitney Shavaughn Matthews
Shlomo Maza
Eric Russell McAvey
Kara Mary McDermott
Heather Sharon McFaulds
Courtney A. McManus
Justin Meyer
Adam D. Michaelson
William Lewis Murphy
Ryan Heath Nelson
Amy Ngai
Bianca Nicole Nicoletti
Christopher Robert Nicolia
Christine Arena Nugent
Danielle M. Nunziato
Ryan Osterweil
Alice Paszel
Sheel D. Patel
Alexi Theodore Poulianos
Darren John Pruslow
Gianna Lyn Rey
Alexandra Lee Robins
Allen Jay Rosner
Emily Grace Rothenberg
Monica P. Ruela
Melissa Beth Schlactus
Lisa E. Schwartz
Robert Philip Schwartz
Peter Andrew Scully
Matthew Mark Shatzkes
Daniel Shirazi
Brian Adam Shupak
Allyson Meredith Shuster
Tova B. Simpson
Cecilia E. Stacom
Kris Steckman
William Lawrence Teitler
Jonathan Eric Temchin
Nicole Marie Tobin
Danielle Erica Tricolla
Stacia Jaye Ury
Sabrina Verma
Roland Adrian Vitanza
Brian Robert Volk
Ryan Alexander Wagner
Amir-kia Waxman
Robert S. Weisberg
David Stanley Welch
Jeffrey Ira Wolter
Kunal S. Yadav
Erica Sari Youngerman
Colleen Elizabeth Zitman

ELEVENTH DISTRICT
Sara Acquista
Benjamin Agata
Keisuke Asami
Zarina Ashurova
Alina Austin
Richard N. Baddoo
Brian Thomas Barnwell
Nadely Marie Bataille
Suneet Bawa
Brittany Bisnott
Jeremy Scott Boczko
Jessica Lynn Bozarth
Ashley Brooke Caudill-Mirillo
Ammar Naeem Chatha
Jamie Lynne Cooper
Sabine K. Franco
Reuven S. Frankel
Krisen R. Freaso
Christine Fung
Joseph G. Giordano
Noah Goldstein
Perri Hack
Amy Lynn Hager
Rafi Hasbani
Briana Ashley Heymann
Christos Hilas
Erica Caroline Holder
Uri Horowitz
Aaron Eric Iny
Athas Constantine Ioannou
Mark Auguste Jean
Dov Ber Judowitz
Hasanmeet Kaur
Addrena J. Kim
Albert K. Kim
Brian Kim
Jisun Kim
Brian Alan Kimmelblatt
Chingfei Kong
Alexander Krul
Hyoung-jo Kwon
Matthew James Laudato
Dajie Li
Zelideth Paola Maguina
Nastaran Makhani
John R. Marrone
Maria Carmen Martinez
Ilya Mordukhaev
Laura Nazginov
Bryn Meredith Ostrager
Anamil Parkash
Amaninder Singh Parmar
Mona Patel
Deanna Michelle Paul
Jophiel Philips
Lauren Elaine Rodriguez
Russell Adam Rothbort
Anjali Sareen
Danielle Nicole Sennett
Yongmei Shen
Milena Shtelmakher
Daniel Eliot Silverman
Kara Sollecito
Jason Shorr Trager
Kimberlee F. Trigoboff
George Minas Tsiatis
Florence Emmanuel Ulysse
Liang-fu Wang
Syed Ahmer Wasim
Chak Lun Wong
Ruofei Xiang
Jennica Seong Hee Yu
Sam Yusupov
Nadav Zamir
Wen Wen Zhang

TWELFTH DISTRICT
Keith Lawrence Abrams
Sedira Sarah Banan
Elizabeth Anne Bender
Bridgette Lynn Bissonnette
Genia Helene Blaser
Sylvester Oppong Boateng
Diana Sophia Bonilla
Elena Camovic
Anne Huntting Dean
Joseph Anthony Dempsey
Elizabeth Adams Eisenberg
Daniel Ellman
Rhonda Baxter Evans
Dov Gibor Gold-Medina
Iyanna Ilexix Grissom
Ruth Ellen Lando Hamilton
David William Harrison
James Edward Hartmann
Samuel Robert Hodge
Jessica Horan-Block
Ashley Elizabeth Iodice
Aaron Russell Jacobs-Smith
Patrice Amber James
Stacey Elizabeth Kennard
Saira Blanche Khan
Janet Kim
Jung Mi Lee
Marne Lynn Lenox
Orrie Adam Levy
Joseph Loloi
Tyler Emrys Kent Maulsby
Jennifer Menna
Defne Canset Ozgediz
Emily Jeanne Prokesch
Jane T. Pucher
Michael Anthony Quesada
Michael Anthony Riordan
Zoe Elliott Root
Clara H. Salzberg
Megan Meiluta Teesdale
Shane Tela

THIRTEENTH DISTRICT
Nicole Atlas
Yasmin Davis
Stefanie Lynn Demario
Douglas Louis Godio
Karel Jaros
Jonathan Caruselle Macri
Cara Elizabeth Manz
Marissa Stern

OUT OF STATE
Jennifer Ann Abdella
Olivier Abelhauser
Cynthia Danielle Aby
Yaa Aba Acquaah
Hali MacLister Adair
Sarah A. Adam
Elizabeth A. Adekunle
Michael Jason Adler
Gwendolyn Lily Adrian
Destini Mia Aguero
Nadia Ahmad
Nakyung Ahn
Irma Melissa Akansu
Faisal Hussain Akhter
Andrea Joy Albrecht
Kenny Fred Alce
Helen Aldridge
Rory Paul Cameron Alegria
Marta Alfonso
Avita Anandi Ali
Tashmin Raza Ali
Mya Bretta Almassalha
Sharon S. Almonrode
Adam Matthew Alpert
Christine Marie Amara
Cerretta Geornell Amos
Hillary Warren Amster
Catherine Welsh Anderson
Phillip Anselmo
Angela K. Antoniewicz
Richard C. Arce
Michelle Marie Argueta
Bryan Arner
Christina Nicole Asbee
Sharo Michael Atmeh
Kristina Scurry Baehr
Katherine Marie Ball
Eduardo L. Ballori
Nicholas Alexander Banco
Sarah Elizabeth Barker
Carson Hilary Barylak
Jonathan Bernard Baselice
Benjamin Taylor Beasley
Mariel Lindsey Belanger
Isaac Chaim Belfer
Nabela Benaissa
Sara Malia Bengana
Annabel Benham De Camaret
James Benjamin
Julia Benke
Fannie Celine Bercez
Roy Berg
Joshua Glen Berman
Eli Kahn Best
Amanda Rose Marie Blackmer
Holly Lynn Blackwell
Emily Janet Blumberg
Danielle Gail Boland-Brown
Joshua Sean Bolian

Christopher Stephen Bolyai
JoAnne Marie Bonacci
Christopher Jerry Boone
Chesa Boudin
Skye Bougsty-Marshall
Stephen Andrew Bowne
Amy Breglio
Tara Alyssa Brennan
Erica Nicole Brewington
Theresa Ann Bridgeman
Stephanie Nicole Brockman
David J. Brooman
Nathaniel David Brower
Michael Lawrence Brown
Tara Nikole Brown
Sarah Rachel Brubaker
William James Bruno
Nolen Andrew Bunker
Jessica Megan Burstein
Howard Ross Cabot
Anitha Cadambi
Eduardo Calderon
Julia Rose Camarco
Aurelie Jacqueline Camard
James Robert Campbell
Matthieu Charles-antoine Candia
Andrew Laurence Caplan
Jeffrey Elliot Caplan
Ella Alves Capone
John Robert Caporale
Matthew Brendan Carney
Charlie Ezra Tom Carrillo
Brendan Ross Casey
Megan Elizabeth Castellano
Matthew David Catania
James Wickliffe Cauthorn
John Joseph Cavanaugh
Rachel Loren Cerqueira
Hugham Chan
Lemuel Gabriel Chan
Pearl Chi Pui Chan
Adam Daniel Chandler
Jaeyoung Chang
Sung Eun Chang
Yu-hsien Chang
Jennifer Lynn Charlton
David Scott Chase
Hao-wen Chen
Jian Chen
Lihua Chen
Qianning Chen
Xing Cheng
Samantha Cherney
Eirik James Cheverud
Kaitlyn Elizabeth Chinn
Michael Patrick Chipko
Muk Chivakul
Hanna Cho
Yoona Cho
Dom Thomas Choeh
Jung Hyun Choi
Kyung Hee Choi
Sarah Heajin Chon
Christine Chou
Ken Chuka-Obah
Christopher Campbell Cianci
Kathryn Elise Cipriani
Alexandra Rebecca Clark
James Wright Clayton
Kenneth G. Coffin
Susan Wexler Cohen
Scarlett Elizabeth Collings
Sarah Lynch Comeau
Matthew Alexander William Conrad
James Ross Cormie
Carolyn Marie Corrado
Amy Lynne Coryer
David Raymond Courchaine
David Dana Cramer
Deena Marie Crimaldi
Michelle Ana Cristaldi
Thomas Preston Crocker
David Richard Cubby
Nathan William Cunningham
Steven Matthew Cytryn
Rochelle Dalley
Matthew Scott Dana
Suparna Datta
Carlos Ivan Davila
Randal Paul Davis
Julio Alberto De Armas
Mario Ernesto De La Garza
Alicia Theresa De Praeter
Narin Xavier De Saini
Juliet Jude Defrancisco
Caitlin Frances Deguilo
Kyle Timothy Deighan
Teghan Marie Delane
Christine Marie Delaney
Kathleen Kies Demaria
Michael John Derderian
Amanda Brooke Devuono
William Robert Dewalt
Anthony Vincent DiAntonio
Jane J. Dickson
Katelyn Elizabeth Dieffenderfer
Nicholas Joseph Dimakos
Jeremy Timothy Dixon
Joseph Edward Dmochowski
Olga Dmytriyeva
Shinji Dohi
Katherine Neill Doorley
Bhavini Arvind Doshi
Jolene Kendall Duncan-Gould
Samantha Virginie Dupuch
Andrew John Ebersbach
Oby Regina Ejidike
Jennifer Ellis
David Eng
Whitney Noelle Eng
Ian Seth Epstein
Graham Clare Siemens Erion
Tito Escobar
Rebecca Brittany Evans
Benjamin Harris Ewing
Nicole Mary Falcey
Melissa Fallah
Christopher Anthony Fanelli
Brent Leason Farese
Samuel Joseph Farina-Henry
Sarah Mercer Farnham
Ciaran Farrell
Ana Rita Ferreira
Robert Glen Fewins
Alexander I. Fineberg
Phoebe Fischer-Groban
Jessica Ann Fitts
Daniel William Flynn
Laura Elizabeth Flynn
Denise Joanne Foley
Carrie Susan Ford
Anna Claire Forgie
Noah Jarrod Fortinsky
Andrew P. Foster
Joshua Dana Fox
Sarita Marie Frattaroli
Jason Elie Friedman
Susan Friedman
Jared Russell Frisch
Bruna Barros De Sousa Frota
Christopher Jude Fuller
Tomoyoshi Furukawa
Matthew Charles Fusina
Madeline Ariana Gallo
Stephen Patrick Gangemi
Daniel Alberto Garcia
Valerie Gareau
Anna Garlacz
Eric Garofano
Thomas Jean-jacques Gaultier
Karla Erika General
Elizabeth Lynn George
Megan Renee George
Marie Edith Giraud
Ardian Gjoka
Tina Glandian
Jenna Marie Godfrey
Laurie Tara Goldberg
Samuel Wilton Goldberg
Michael Jeffrey Goldfaden
Howard Bernand Goldman
Jessica Diane Goldman
Beth Anne Goldstein
Elena Gonzalez
Caroline Russell Goodman
Joshua Israel Gornitsky
Julie Renee Gosch
David Gottlieb
Christopher Philip Govey
Thomas Gregory Townsend Graham
Matthew Michael Grant
Marla Lauren Greenberg
Jacqueline Celeste Greene
Elana Jenice Greenway
Adam Andrew Gregory
Betsy Grobovsky
Joseph C. Guagliardo
Nino Guruli
David Brian Haber
John Daniel Haggerty
Enes Hajdarpasic
William David Halfon
Peter Nicholas Halpern
Xiaoyu Han
Jordan Fitzpatrick Harlow
Mark Spence Hartman
Benjamin Nicholas Hazelwood
Christopher Patrick Healey
Pierre Philippe Marie Heidsieck
Laura Beth Heiman
Jason Thomas Helm
Nicole Marie Heritage
Michael Abraham Hertzberg
Amanda Michelle Hiffa
Wararu Higuchi
Jennifer Claire Hildebrand
Meghan Elizabeth McGinnis Hill
Michiko Hirai
Chikako Hirano
James Francis Hlavenka
Yen Phi Hoang
Barry Joel Hockfield
Pascal Sacha Honold
Wei Hou
Chih-yun Hsi
Hsin-jui Huang
Matthew Robert Huppert
Shayna Amanda Hutchins
Alisa Marie Huth
William Huynh
Sarah Gordon Kellar Hvozda
Jason-Benjamin Masculino Hyndman
Andrea Marie Hynes
Mihoko Ida
Chinyere Gloria Iroegbunam
John Willand Jacobsen
Edward Henry Jacobson
Kate Elizabeth Janukowicz
Chase Alexander Jayasekera
Emily Catherine Jeffcott
Jan Jeram
Wenting Ji
Louise A. Johnson
Brittany Nicole Jones
Jessica Fae Jones
Morgan Jones
Burke Josslin
Elizabeth Ann Joyce
Hyung Jin Jun
Joanne Catherine Kalas
James Francis Kalec
Sarah Tedra Kanter
Noor Kapoor
Ben Desmond Kappelman
Ceylan Kara
Philip David Karnofsky
Christina Kaspar
Justin Alexander Kasprisin
Karen Katri
Danielle Elana Katz
Gregory Michael Katz
Gregory Milton Katz
Ryutaro Kawamura
Larry Kaye
Philip Joseph Kehl
Brigid Claire Kelly
Jacqueline Christine Kelly
Stacey Kelly
Alex Bakhyt Kenjeev
Thomas Michael Kenny
Elizabeth S. Kim
Grace Hannah Kim
Hyung Jin Kim
Kyung Jin Kim
Ungyong Kim
Youna Kim
Hudson Blake Kingston
Zina Kiryakos
Diane Kisler
Jared Cary Klebanoff
Amanda Nicole Kleinrock
Hwankyung Ko
Michelle Thaung Kobler
Suwit Kongkiatkamon
Daniel Christopher Koontz
Katherine Ann Kountzman
Carolyn Ryans Kovalerchik
Aaron Tarlow Kriss
Scott Laurence Kuchinsky
Michele Audrey Kulerman
Shivank Kumar
Kaoru Kuroda
Tina Carmelle Kushner
Young Sun Kwon
Jonathan James Labrum
Anna Karoleen Ang Lam
Katerina Lisa Lamarche
Matthew David Lamb
Hunter Rayborn Landrum
Zina Lapidus
Kevin Ross Larson
Christopher Kenneth Larus
Elena Rachel Laskin
Alice Alexandra Lasry
Gigi Che Man Lau
Seth Lawrence Laver
Gregory Todd Lawrence
Anderson Amorim Leal
Jason Alexander Lederman
Byung In Lee
Edmond Jeongjae Lee
Hubert Tae Lee
Hyejung Lee
James Yu-hsiung Lee
Myung Shin Lee
Taehee Lee
Elana Stiefel Lefkovitz
Alex Benjamin Leibson
Alicia Marie Lendon
Daniel Robert Lentz
Jacqueline Margaret Leonard
Scott Edward Lerner
Elaine Leung
John Joseph Levy
Kelly Elizabeth Levy
Guang Li
Wan Li
Xiang Li
Wei-ching Liao
Brooke Leah Lichtenstein
Clementine Marie Lietar
Jennifer Anne Lincoln
Bradley Scott Lipton
Cynthia Yi-Ting Liu
Lei Liu
Xiaoxiang Liu
Michelle Lo
Thomas Leslie Long
Erika Marie Lopes-McLeman
Tomas Lopez
Daria Loshkareva
Veronica Ann Louie
Peter A. Luccarelli
Camille Marie-seraphine Lucidi
Kevin Allyn Lumpkin
Dennis Alfred Lyle
Patrick Ferris Lynott
Jessica Louise Lyon
David Polasky Lyons
Altom M. Maglio
Thomas Joseph Major

Patricia Malley
Jose Luis Manjarrez
Theano Manolopoulou
Anthony James Marolda
Julia Marter
John Mercer Masslon
Tara Dahl Mattessich
Max William Matthews
Julie McAlarnen
Selina Valencia McDonald
Maeve Kennedy Townsend McKean
Meghan Travers Meade
Leslie Lynn Meredith
Leah Sue Mero
Jonathan William Meyer
Gregory David Miller
Ryne Vernon Miller
Emily Claire Mimnaugh
Kyle Lawrence Minch-Klass
Nicholas Aaron Misek
Stephanie Cara Mishler
Sharanya Mohan
Miguel Adrian Molina
Peter Armand Monaco
Camille Mondoloni
Jessica Lynn Montella
Rebecca Elizabeth Moseley
Marie-elodie Helene Moser
Gisela M. Munoz
Carolyn Annadell Mutrux
John Taylor Myrick
Jaejoon Justin Na
Kaoru Nakamura
Kristen Alexis Nardolillo
Ha-thanh Thi Nguyen
Rachel Terri Nilliasca
Chioma Claire Nnadi
Camille Noirot
Philip Nostrand
Kara Helen Novak
Ifiok Odudu-umoh Nwa
Brett John O'Brien
Melissa Margarita O'Connell
Ryan Patrick O'Connor
Patrick Jameson O'Hearn
Robert Edward O'Leary
Akachi Chinedu Ojimgba
John Zachary Oldak
Halil Emre Onal
Natalene Bernadette Ruth Ong
Leigh Brianne Orliner
Bomsu Park
Angira Jitendra Patel
Falguni Madhabhai Patel
Amy Danielle Paul
Douglas Alexander Carne Penrose
Jorge William Perdomo
Lisa Katherine Perfetto
Timothy James Petty
Hanne Philips
Amanda Nicole Pickens
Justin Duarte Pine
Alex Anthony Pisarevsky
Jeffrey Matthew Pitts
Elena Poleganova
Marianela Porres Vargas
Caitlin Kimberly Potratz
Zachee Pouga Tinhaga
Mark James Powell
Sean Jordan Pratt
Chad Eugene Priest
Chelsea Elisabeth Purvis
Xiaowen Qian
Yuanyuan Qin
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A court additionally has the discretion to "make such order as justice requires."[14] The court may consolidate actions pending in New York[15] or stay the instant action[16] until the first action is resolved in federal court or a sibling state court. A New York court may not consolidate a New York case with a case pending in another jurisdiction. Consolidation is appropriate when the two actions involve common questions of law and fact.[17] The parties needn't be identical for the court to consolidate the cases.

Another option for a court is to order the plaintiff to discontinue one of the cases and allow the other case to continue.[18]

Affirmative Defenses Under CPLR 3211(a)(5)

You may use any of the nine defenses in CPLR 3211(a)(5) in your motion to dismiss, or you may plead them in your answer.[19] If you move to dismiss under CPLR 3211(a)(5), clearly state the specific defense on which you rely. The nine defenses under CPLR 3211(a)(5) are arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, and statute of frauds.

Most of the defenses listed in CPLR 3018(b) are also listed in CPLR 3211(a)(5). The three not listed in CPLR 3211(a)(5) but which are included in CPLR 3018(b) are the comparative-negligence, illegality, and fraud defenses.[20] Most often, the comparative-negligence and fraud defenses involve issues of fact. Dismissal motions for these defenses are therefore rarely granted. The illegality defense may be used in a CPLR 3211(a)(7) dismissal motion for failure to state a cause of action.

Move to dismiss the complaint under CPLR 3211(a)(5) if the claim was arbitrated and you have an arbitration award.[21] If you're the defendant and you want your case arbitrated (perhaps because an arbitration clause is provided in your agreement), move to compel arbitration under CPLR 7503(a).

Move to dismiss the complaint under the doctrine of res judicata, or claim preclusion, if a claim between the same parties was already litigated to a final determination. Res judicata is applicable if the parties are identical to those in the earlier action, the cause of action is the same as in the earlier action, and the parties had a full and fair opportunity to litigate the cause of action in the earlier case.

The courts use a "transaction" test to determine whether the earlier litigation bars the present case under res judicata: "When the second action arises of the same transaction or series of transactions on which the first action is based, res judicata will bar all causes of action arising out of the transactions or series of transactions. This is so regardless . . . whether . . . the specific causes of action were raised in the first action."[22] Courts use a pragmatic approach to determine whether the transactions are related in "'time, space, origin, or motivation,' and whether there is significant judicial economy in trying the two claims together."[23]

Here are some examples when a cause of action hasn't been decided on the merits: lack of standing, mootness, no personal jurisdiction, calendar default, and failure to state a cause of action.[24] An order on the parties' consent or a stipulation of settlement, however, is a determination on the merits. A court would thus grant a party's dismissal motion and bar a later action on the basis of res judicata.

Res judicata will bar a second action even if the second action is based on causes of action that could have been, but weren't, raised in the first action.[25]

A motion to dismiss on res judicata will be granted even if the earlier action ended in a default judgment. In that scenario, the defaulting party had a full and fair opportunity to litigate the matter.[26]

Res judicata bars relitigating causes of action decided by arbitration.

If an administrative agency resolved the causes of action, res judicata will bar the action if the agency has adjudicative authority, the agency followed procedures that offered a full and fair opportunity to the parties to litigate the causes of action, and the parties reasonably expected the agency's determination to bind them.[27]

Res judicata will not bar a later action when a party withdrew claims or counterclaims in an earlier action before a court that decided the claims or counterclaims.[28]

Move to dismiss under CPLR 3211(a)(5) on the basis of collateral estoppel, or issue preclusion. A party is barred from relitigating an issue already determined in an earlier action. A later action is barred under collateral estoppel if the issue is identical, the issue was determined, the party against whom collateral estoppel is invoked is identified, and that party had a full and fair opportunity to litigate that issue in the earlier action.[29]

Issues aren't identical if the legal standards applicable to the current action and the earlier action are different, such as different burdens of proof or different elements of a cause of action. The party moving to dismiss under collateral estoppel needn't have been a party to the earlier action. If you're moving on the basis of collateral estoppel to dismiss against a party who wasn't a party to the earlier litigation, collateral estoppel might apply if privity existed with that party.

On a motion to dismiss for collateral estoppel, a court will consider several factors to determine whether a party

A court may grant a motion to dismiss under CPLR 3211(a)(4) if another action covering the same cause of action is pending between the parties in New York, a sibling state, or federal court.

had a full and fair opportunity to litigate an issue: the size of the claim; the forum; the initiative in litigating the case; the extent of the litigation; counsel's competence and experience; the availability of new evidence; indications of a compromise verdict; difference in applicable law; and the foreseeability of future litigation.[30]

Move to dismiss under CPLR 3211(a)(5) if you, the defendant, received a discharge in bankruptcy for the claim asserted in the current action.

Move to dismiss under CPLR 3211(a)(5) on the basis of infancy or incompetency.

Raise your defense of payment (or partial payment, also called accord and satisfaction) in your motion to dismiss under CPLR 3211(a)(5) or as an affirmative defense in your answer.

A motion to dismiss under CPLR 3211(a)(5) is also appropriate if a claimant has executed a written release that covers the causes of action alleged in the action. A release won't bar an action against a party not named in the release. A release bars only those causes of action specified in the release.

As the defendant, you may move to dismiss the entire complaint or cause of action under CPLR 3211(a)(5) if the cause of action is time barred. Give the court facts to show the date the cause of action accrued and that the claimant didn't file the action within that statutory period. Submit an affidavit, for example, of a person with personal knowledge of the facts. Once the moving party submits that proof, the burden then shifts to the claimant to rebut the accrual date or to show tolls or extensions to the period[31] or "relation back" to the filing of the claim.[32] In deciding a dismissal motion under CPLR 3211(a)(5), the court must determine whether the action was commenced within the statute of limitations. A court will deny the dismissal motion if a factual dispute arises.

Res judicata bars relitigating causes of action decided by arbitration.

Some contracts must be reduced to writing. Under General Obligations Law § 5-701, New York's statute of frauds, some contracts aren't enforceable unless in "writing signed by the party against whom the contract is sought to be enforced."[33] Move to dismiss under CPLR 3211(a)(5) if the contract falls under the state's statute of frauds. If you're the claimant opposing the motion and a written contract exists, you have the burden to produce the writing.

Improper (or Non-interposable) Counterclaim Under CPLR 3211(a)(6)

If a party has counterclaimed against you, you may move to dismiss the counterclaim under any CPLR 3211(a) ground.

You may move to dismiss an improper counterclaim under CPLR 3211(a)(6). Counterclaims that violate the "capacity" rule are improper: "A counterclaim may be interposed by or against a party only in the capacity in which that party is present in the case."[34] If the plaintiff is a partnership, the defendant may counterclaim only against the partnership. If the defendant counterclaims against one of the partners personally, move to dismiss under CPLR 3211(a)(6).

A counterclaim against a representative plaintiff who has a nonrepresentative capacity is improper.[35]

Also improper is a counterclaim against a parent who's suing on the child's behalf. For example, if the plaintiff is a parent who's suing for personal injuries the child sustained, counterclaiming against that parent for negligent supervision is improper.[36]

If a party under the terms of a contract waives the right to counterclaim, interposing a counterclaim in a current lawsuit is improper. Move to dismiss the counterclaim under CPLR 3211(a)(6).

If the plaintiff is the State of New York, any counterclaim in Supreme Court for money damages is improper. Move to dismiss the counterclaim under CPLR 3211(a)(6). The counterclaim must be brought separately in the Court of Claims.[37]

In the next issue of the *Journal*, the *Legal Writer* will discuss CPLR 3211(a)(7) (dismissal for failure to state a cause of action) as well as other CPLR 3211(a) dismissal grounds. ■

Gerald Lebovits, a New York City Civil Court judge, teaches part time at Columbia and Fordham law schools. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's email address is GLebovits@aol.com.

1. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 36:240, at 36-23 (2006; Dec. 2009 Supp.).
2. David D. Siegel, New York Practice § 262, at 458 (5th ed. 2011).
3. *Id.* § 262, at 459.
4. Barr et al., *supra* note 1, § 36:261, at 36-25.
5. *Id.* § 36:261, at 36-25 (citing *Forget v. Raymer*, 65 A.D.2d 953, 954, 410 N.Y.S.2d 483, 484 (4th Dep't 1978) (holding dismissal inappropriate because no substantial identity of the parties in the two actions and of the two causes of action: prior action had one plaintiff and second action had nine plaintiffs even though plaintiff in first action sought same injunctive relief as did nine plaintiffs in second action)).
6. 1 Byer's Civil Motions at § 27:12 (Howard G. Leventhal 2d rev ed. 2006; 2012 Supp.), *available at* http://www.nylp.com/online_pubs/index.html (last visited Apr. 27, 2012).
7. Barr et al., *supra* note 1, at § 36:262, at 36-25.
8. *Id.* § 36:262, at 36-25 (citing *Zirmak Invs., L.P. v. Miller*, 290 A.D.2d 552, 553, 736 N.Y.S.2d 421, 423 (2d Dep't 2002) (denying dismissal when second action included six causes of action on entire contract whereas first action addressed only attorney fees)).
9. *Id.* § 36:244, at 36-24.
10. *Id.* § 36:250, at 36-24. CPLR 327(a) explains forum non conveniens: "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the whole or in part on any conditions that may be just."
11. *Id.* § 36:510-36:512, at 36-38.
12. *Id.* § 36:250, at 36-24.
13. *Id.* § 36:251, at 36-24 (citing *Reliance Ins. Co. v. Tiger Int'l*, 91 A.D.2d 925, 926, 457 N.Y.S.2d 813, 814 (1st Dep't 1983) (staying state action to allow plaintiff to seek preliminary injunction in federal action; federal action could give complete relief that plaintiff sought)).
14. CPLR 3211(a)(4).
15. CPLR 602.
16. CPLR 2201.

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17. Barr et al., *supra* note 1, § 36:271, at 36-25.

18. Siegel, *supra* note 2, § 262, at 460 (citing *Cogen Props. v. Griffin*, 78 Misc. 2d 936, 937-38, 358 N.Y.S.2d 929, 931 (Sup. Ct. Sullivan County 1974) (discontinuing original action because second action against defendants sought same relief as in original action)).

19. For more information on affirmative defenses, see Gerald Lebovits, *The Legal Writer, Drafting New York Civil-Litigation Documents: Part VIII — The Answer*, 83 N.Y. St. B.J. 96, 96 & 88 (July/Aug. 2011).

20. Siegel, *supra* note 2, § 263, at 461.

21. Barr et al., *supra* note 1, §§ 36:340–36:341, at 36-30.

22. *Id.* § 36:352, at 36-31.

23. *Id.* § 36:353, at 36-31 (citing *Coliseum Towers Assocs. v. County of Nassau*, 217 A.D.2d 387, 387, 637 N.Y.S.2d 972, 975 (2d Dep't 1996)).

24. *Id.* § 36:360, at 36-32.

25. *Id.* § 36:370, at 36-32.

26. *Id.* § 36:371, at 36-32.

27. *Id.* § 36:381, at 36-32.

28. *Id.* § 36:372, at 36-32.

29. *Id.* § 36:390, at 36-33.

30. *Id.* § 36:410, at 36-33, 36-34 (citing *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 72, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 961 (1969)).

31. *Id.* § 36:452, at 36-35.

32. The "relation back" doctrine: "When there are defendants whose interests in the action are 'united,' N.Y. C.P.L.R. 203(b) and (c) provide that service on one defendant within the limitations period can preserve the claims against other defendants who are added to the action after expiration of the statute of limitations. To be 'united' within the meaning of this statute, the interests of the defendants must be the same and exist without any hostility between them. To invoke this 'relation back' principle, the plaintiff must prove that: 1) both the claim asserted against the new party and the claim previously imposed against the original named defendant arose out of the same conduct, transaction or occurrence; 2) that the new party is 'united in interest' with the original defendant and, by reason of that relationship, can be charged with such notice of the commencement of the action that the new defendant will not be prejudiced in maintaining a defense on the merits, and 3) the new party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him or her as well." 16 Lee S. Kreindler, Blanca I. Rodriguez, David Beekman, David C. Cook, N.Y. Prac., New York Law of Torts, § 19:13 (Aug. 2011).

33. Barr et al., *supra* note 1, § 36:460, at 36-35.

34. Siegel, *supra* note 2, § 264, at 462.

35. *Corcoran v. Nat'l Union Fire Ins. Co.*, 143 A.D.2d 309, 311, 357 N.Y.S.2d 376, 378 (1st Dep't 1988) (finding that counterclaims and affirmative defenses concerned plaintiff's role and conduct as regulator of insurance company, rather than against plaintiff as liquidator).

36. *Latta v. Siefke*, 60 A.D.2d 991, 992, 401 N.Y.S.2d 937, 938 (4th Dep't 1978) ("[T]o permit a counterclaim against a parent for negligent supervision of her child would be contrary to the legislative policy . . . because it would result in imputing the parent's negligence to the child.").

37. *State of New York v. Jones*, 210 A.D.2d 469, 470, 620 N.Y.S.2d 1012, 1012 (2d Dep't 1994) ("[I]t was proper for the Supreme Court to dismiss the defendant's counterclaims against the State of New York.").

EDITOR'S MAILBOX

Editor's Note:

We received the following from Ken Kamlet, author of "Land Banking, TIF Amendments, and the Tax Cap," which appeared in the May 2012 Journal.

Tucked among the endnotes in my article on land banking, tax increment financing, and the tax cap, was the important news that, as part of this year's budget amendments, the Governor and legislative leaders amended the TIF law to correct its most glaring defect – by authorizing school districts to opt-in to and participate in TIF-funded redevelopment plans. *It is now up to the municipalities, developers, and attorneys who spent many years fighting for this change to make sure that this newly invigorated law is put to good use.* TIF financing is especially useful to pay for infrastructure improvements and site preparation costs on blighted properties – including brownfield sites (and Brownfield Opportunity Areas), land bank holdings, and flood-damaged infrastructure.

Kenneth S. Kamlet
Binghamton, NY

Meet Your New Officers
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Gutekunst is a frequent speaker and author on issues relating to trial practice and alternative dispute resolution. She is a member of the Executive Committee, the National Task Force on Diversity in ADR and the Arbitration Committee of the International Institute for Conflict Prevention and Resolution (CPR). She also chairs the Advisory Council of the YWCA-NYC's Academy of Women Leaders. Between 1997 and 2005, Gutekunst served on the Governor's Temporary Judicial Screening Committee, the New York State Judicial Screening Committee and the First Department Judicial Screening Committee.

Gutekunst was born in western New York, was raised on Long Island and in the Glens Falls area and resides in Manhattan. Gutekunst received her undergraduate and master's degrees from Brown University and her law degree from Yale Law School.

Attorney Professionalism Forum
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Can I settle the case without admitting that my client had received the $50,000 from her uncle? If the case does not settle, and I am unable to convince my client not to correct her testimony, am I obligated to withdraw from her representation? Am I permitted to disclose the $50,000 to the court?

In addition, the other side has offered to pay $250/month in additional support. May I tell my adversary that I am aware that his client's affidavit is false to try to get $300/month?

May I tell Mr. Lent that I will not file a disciplinary grievance against him based on his role drafting the false affidavit if his client will just pay an additional $300/month instead of the $250/month that he offered on behalf of his client?

May I tell opposing counsel that my client will pursue criminal perjury charges against her former husband if her doesn't pay $300/month in child support?

Sincerely,
A. Lot Goingon

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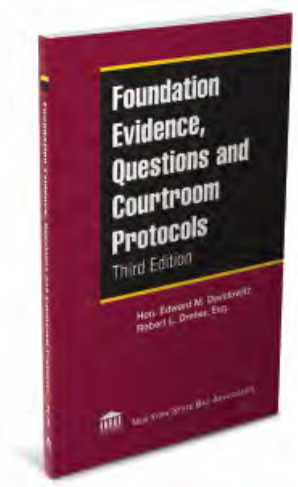

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AUTHORS & PRODUCT INFORMATION

Hon. Edward M. Davidowitz
Bronx County Supreme Court
Criminal Court (Retired)

Robert L. Dreher, Esq.
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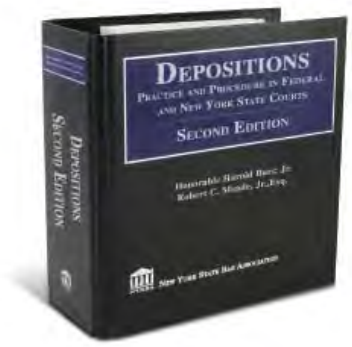

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Which is correct to indicate that statements will be mailed twice monthly: bi-monthly or semi-monthly? If meetings are scheduled for twice a week, same question: bi-weekly or semi-weekly?

Answer: The best tactic is to avoid these responses altogether. According to surveys, the majority of Americans believe that both *bi-weekly* and *semi-weekly* mean "twice a week." The same people understand that the terms *bi-monthly* and *semi-monthly* mean "twice a month." However, members of that majority are usually unaware that a sizable minority of Americans believe the opposite: that the prefixes *bi-* and *semi-*mean "every other" (week or month), not "twice a week or month." That can cause a significant confusion.

Dictionaries agree that the phrases *bi-* from the Latin "two" and *semi-* Latin for "half" are synonyms. But until the public also thinks they are, better substitute phrases like "every two months" and "twice a month" for the *bi-* and *semi-* compounds. (However, in the publishing industry, the phrase "bi-monthly" is unavoidable if a journal is published every other month.)

The reader who sent this valuable question added that she had read my column about the ambiguity of the word *next* ("What do you mean by 'next Friday'?") Can you imagine the confusion, she asks, when someone writes, "Next Friday will be the bi-monthly meeting of the 'Society to Avoid Ambiguity.'"

Question: Norristown, Pennsylvania, reader Charles Campbell writes that the improper use of the phrase, "One hundred and fifty dollars" disturbs him. Instead, he urges, avoid that phrase. Say, "One hundred fifty dollars." He points out that one should never use the word "and" when stating numbers greater than 99. He is right: because adding "and fifty" to those words usually implies that one means "fifty cents." (Even clearer would be "One hundred fifty dollars and fifty cents.")

However, *The Gregg Reference Manual*, Eighth Edition (at page 108) disagrees, saying, "In whole dollar amounts the use of *and* between hundreds and tens of dollars is optional." (It is, however, less clear, and clarity in legal documents is most important.)

Question: An increasing number of my graduate students have adopted the phrase *backwards* and choose it instead of *backward*, which used to be common in both speech and writing. Which form is preferable – or are they both acceptable?

Answer: The *s-less* form is preferable for *backward* and all similar pairs (like *forward*, *upward*, *onward*, *outward*, and *toward*), certainly in written and non-colloquial English. The *s-less* form is older and never violates grammar – and it indicates educated usage. The *-s* ending is new and grammatical only when it is an adverb modifying a verb. ("He walked backwards"). It is ungrammatical as an adjective modifying a noun ("His backwards position . . .). So it is simply better to choose *backward* in all cases.

Another reader asked about the acceptability of a different pair of forms: *anyway* and *anyways.* Here in the southeast one seldom hears *anyways*, and I think of that form as being used chiefly in the northeast, but that is only a guess. At best, however, *anyways* is acceptable only as slang, and seems to be widely disliked by educated speakers. The on-line journal *Daily Writing Tips* welcomes reader response, and its readers have vehemently responded against the term *anyways.*

Among the negative responses, these two were characteristic. One reader wrote, "I hate *anyways*; it is in the same category of "Alls you have to do is . . ." Another wrote, "[Anyways] is like *alot*, which bothers me a lot." A third correspondent wrote: "I am so happy to know that my mother did teach me correctly! I think *anyways* sounds like some fourteen-year-old Valley girl."

Given that strong majority and emotional dislike opposing *anyways*, it seems clear that *anyway* is the preferred form.

But then one might ask about the choice of *any way* versus the merged form *anyway*. These two forms look similar, but are quite different in category and in meaning. The compound *anyway* is an adverb meaning "nevertheless" or "at any rate." The phrase *any way* is an adjective plus a noun phrase. It would occur in "I am glad to help in any way I can."

Both forms follow the usual progression of English usage, the first from a phrase composed of two words that, due to wide usage, becomes a hyphenated two-word phrase and finally becomes a single-word compound. Here are a few: *ball park* to *ball-park* to *ballpark*; *mail man* to *mail-man* to *mailman*; *loop hole* to *loop-hole* to *loophole*; *iced cream* to *ice-cream* to (in some contexts) *icecream* – though my computer refuses to accept that final stage.

The hyphen sometimes changes the meaning of your sentence. Consider the difference between "a little-used car" and "a little used car"; "a re-covered sofa" and "a recovered sofa"; and "extra-judicial duties" and "extra judicial duties." In speech, that difference is expressed by intonation; in writing, by hyphens. Hyphenation indicates that the (usually two-word) phrase is to be read as a unit. For example, in the phrase "a large, well-lighted room," the word *large* is obviously a single-word modifier, but *well-lighted* is also to be read as a single modifier.

Potpourri

A television journalist recently asked this question of the president of a large

CONTINUED ON PAGE 61

GERTRUDE BLOCK (block@law.ufl.edu) is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co.).

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Language Tips
Continued from Page 60

jewelry firm that had been in business for 50 years: "In your opinion, do current additional regulations designed to protect consumers from unethical business practices indicate that business engages currently in more unethical practices than it used to?"

Here is the unedited answer offered by the president of the jewelry firm: "Well, you see, the problem from all this government regulation – and I'm sure there may have been some good results – is that businesses are forced by government to keep so many records that the products consumers buy have had to increase drastically in cost to pay for all these regulations."

So, is the answer to the question "yes" or "no"? ■

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BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XVI — Motions to Dismiss Continued

In the last issue, the *Legal Writer* discussed motions to dismiss, specifically CPLR 3211(a) motions. The *Legal Writer* discussed three possible CPLR 3211(a) dismissal grounds: a defense founded on documentary evidence (CPLR 3211(a)(1)); no subject matter jurisdiction (CPLR 3211(a)(2)); and lack of capacity to sue (CPLR 3211(a)(3)). We continue with more CPLR 3211(a) grounds.

Other Action Pending Under CPLR 3211(a)(4)

CPLR 3211(a)(4) is designed to prevent duplicative litigation. A court may grant a motion to dismiss under CPLR 3211(a)(4) if another action covering the same cause of action is pending between the parties in New York, a sibling state, or federal court.[1] The court may also grant relief other than dismissal: The court may stay the action pending resolution of the other action or consolidate the action with the pending action. But some exceptions exist.

First-in-time rule: For the court to dismiss the instant action under CPLR 3211(a)(4), the other action must have been commenced first — before the instant action began. The first-in-time rule isn't rigid. A court might ignore this rule if, for example, a claimant rushes to the courthouse to gain a tactical advantage.

Dismissal under CPLR 3211(a)(4) isn't appropriate unless a complaint was served in the first action. A court can't determine whether the causes of action in the first case are identical to the causes of action in the second case without seeing the complaint from the first case.

For a court to grant a motion for dismissal under CPLR 3211(a)(4), the two actions should be "essentially the same."[2] The parties also should be "substantial[ly] identi[cal]."[3]

If the parties in both actions are different, a court might grant the dismissal motion even if all the parties in the second action are named in the first action.[4] If the same party is named in a different way in the two actions (e.g., Jonathan Doe, John Doe, Joe Doe, and J. Doe), sufficient identity of parties might exist for the court to dismiss the second action. If the parties to the second action weren't named in the first action, dismissal is inappropriate.[5] Although complete identity of parties isn't required, "substantial identity" of parties must exist: at least one plaintiff and one defendant must be the same in each action.[6]

Dismissal is appropriate if the second action is based on the same actionable wrong as the first action and seeks the same relief, even if the theory in the second action differs from the theory in the first action.[7] Dismissal is inappropriate if the causes of action are different. Dismissal is inappropriate, too, if the second action seeks relief different from or in addition to that sought from the first action.[8]

Dismissal under CPLR 3211(a)(4) doesn't apply to actions pending outside the United States.

Likewise, dismissal under CPLR 3211(a)(4) doesn't apply if the previous action is completed. Dismissal, however, might be appropriate under CPLR 3211(a)(5) under res judicata or collateral estoppel grounds, discussed below. Relief other than dismissal might be appropriate if a successful appeal in the earlier action results in the pendency of a claim identical to that raised in the second action.[9] The court's relief might include staying the current action or consolidating the claims.

If the prior action is pending in a sibling state, a court will consider some of the same factors it uses in a motion for dismissal based on forum non conveniens.[10] The court may consider whether the other forum is more appropriate than the forum you're in. The court may also consider whether the parties will be subject to that forum's jurisdiction. Other factors the court may consider in dismissing the current action include (1) the financial and administrative burden on the court; (2) the applicability in the current forum of a different state's substantive law; (3) where the cause of action accrued; (4) the parties' residence; (5) any foreign witnesses; (6) whether disclosure is pending and where disclosure will be conducted; and (7) the availability of witnesses who aren't subject to subpoena power in New York.[11] If the out-of-state action has been pending for a while and disclosure has begun, a court is likely to dismiss or stay the New York action.[12]

If the prior action is pending in federal court, the New York court will look at the relief requested in each forum to determine whether either forum can give complete relief in one action.[13]

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