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Government Law and Policy and the Indian Child Welfare Act

By Carrie E. Garrow

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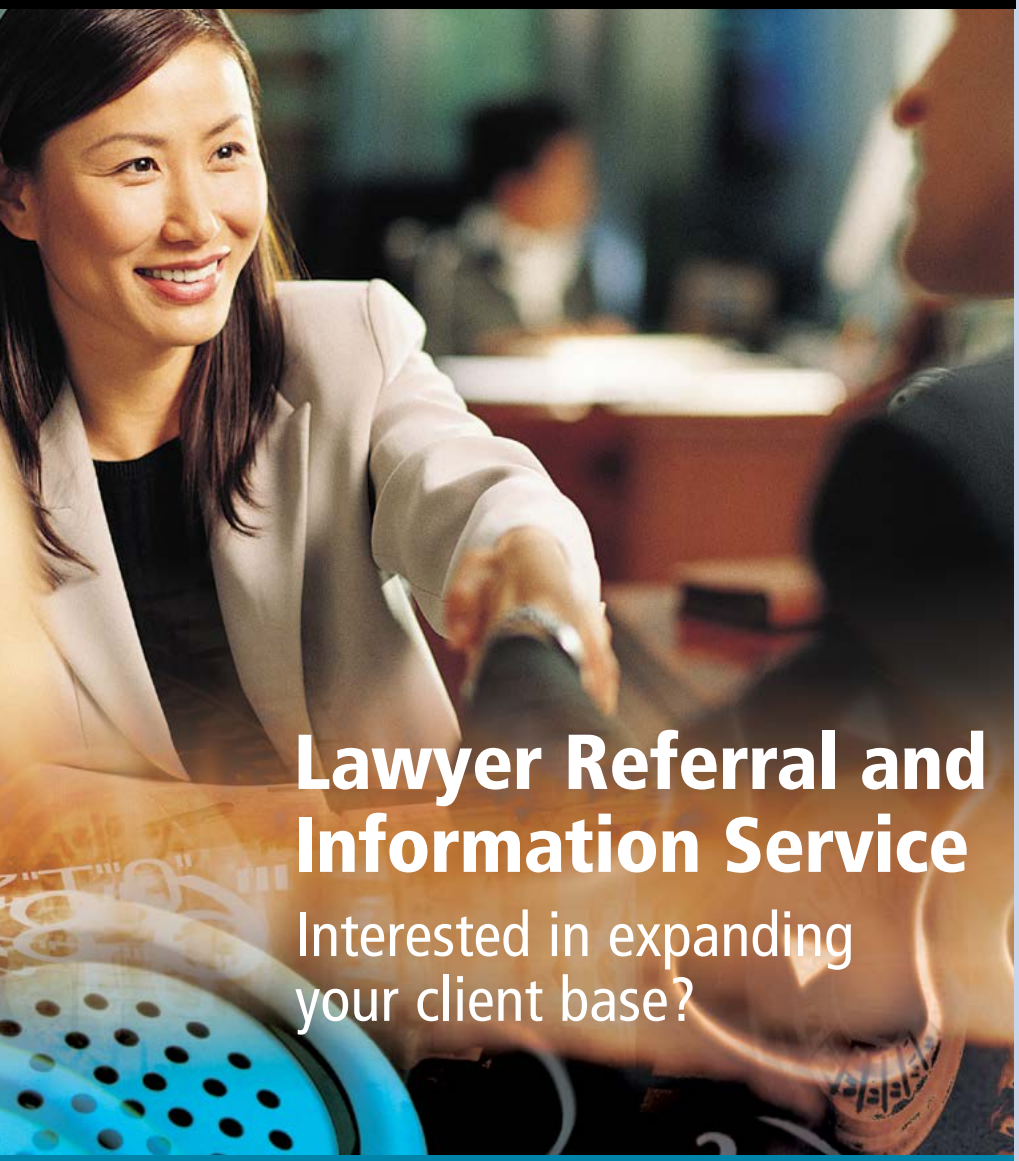

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(1912–2007)
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CONTENTS

MARCH/APRIL 2014

GOVERNMENT LAW AND POLICY AND THE INDIAN CHILD WELFARE ACT

BY CARRIE E. GARROW 10

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DAVID M. SCHRAVER

Education, Democracy and an Informed Citizenry

I begin this President's Message having recently returned from our Annual Meeting, a week filled with educational programs sponsored by our committees and sections, the Presidential Summit on educating tomorrow's lawyers and supporting today's lawyers, meetings of our Executive Committee and House of Delegates, and various breakfasts, lunches and dinners, many of which featured the presentation of awards to lawyers and judges from across the State recognizing their contributions to the Association, the profession and the public. I extend my thanks to all of our members and staff who worked so hard to make our Annual Meeting a great success.

In February, I traveled to ABA headquarters in Chicago to participate on a plenary session panel of the National Conference of Bar Presidents. Titled *Legal Education Reform Update: Frontline Leaders Share Perspectives on the Road Ahead*, this program provided an opportunity for us to share with bar leaders from across the country what our Association has been doing to educate lawyers about the challenges and changes in legal education, to distribute the September 2013 issue of our *Journal* as a resource for them, and to provide a model for possible actions they might take in their states. I am pleased that the New York State Bar Association is recognized as a leader on an issue that is so important to the future of our profession. Again, I thank our Committee on Legal Education and Admission to the Bar, co-chaired by Eileen Millett and Ian Weinstein, for their tireless efforts.

It is not too early to be thinking about Law Day. The American Bar Association Division for Public Education has established as the theme for Law Day 2014 *American Democracy and the Rule of Law: Why Every Vote Matters.* In New York, Law Day is an opportunity to take up the call for all lawyers and judges across the State to be personally and actively engaged in civics education in their communities and schools and work to increase Americans' understanding of the role of fundamental principles in our constitutional democracy. This year's Law Day theme, emphasizing the importance of voting, is particularly timely for us in view of the report of our Special Committee on Voter Participation. This report, which was adopted by our House of Delegates last year, proposed a number of reforms at the state and federal levels to help increase voter participation. Since its adoption, we have carried our voting rights message to our State Legislature and will continue to do so in 2014. We expect that voting rights will also be a subject when we attend ABA Day in April in Washington, D.C., in view of President Obama's State of the Union Address. In that address, he called for strengthening the Voting Rights Act, saying, "Citizenship means standing up for everyone's right to vote."

Civics education is another of the Association's key priorities. At its February 1, 2014 meeting, our House of Delegates unanimously approved the Report and Recommendations of the Law, Youth and Citizenship Committee, establishing NYSBA policy on civics education. The report, presented by Committee Chair Richard Bader and former Chief Judge Judith Kaye, noted the urgency of the issue, stating that "[p]reserving the fundamental civic mission of schools is vital to the continued success of American constitutional democracy." Please review the report, which is available at www.nysba.org/LYCcivicsreport2014/. We as an Association are committed to this effort, and I urge all lawyers and judges to join us. ■

David M. Schraver can be reached at dschraver@nysba.org.

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March 14 Long Island
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March 15 Buffalo (9:00a.m. – 12:40 p.m.)
March 21 Albany (1:00 p.m. – 4:40 p.m.)
March 22 Syracuse (9:00 a.m. – 12:40 p.m.)
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Practical Skills: The Nuts and Bolts of Contract Drafting: From Basic to Advanced Topics
(live & webcast)
July 21 New York City

Government Law and Policy and the Indian Child Welfare Act

By Carrie E. Garrow

Carrie E. Garrow is the Chief Appellate Judge of the St. Regis Mohawk Tribal Court and the Executive Director of the Center for Indigenous Law, Governance & Citizenship at Syracuse University College of Law and an Adjunct Professor. She'd like to thank her Research Assistant, Michelle E. Hollebeke (J.D. Candidate 2015), for her hard work on this article, and the New York State Federal-State-Tribal Courts and Indian Nations Justice Forum for their work in educating and training on ICWA issues.

Introduction

Since the formation of the United States, Indian nations and Indian people have been impacted by the numerous laws and policies focused on acquisition of Indian lands and assimilation of Indian people. These federal laws and policies led to states, such as New York, breaking up Indian families and removing Indian children from their homes in order to achieve assimilation. This article provides an overview of these laws and policies, which led to the need for the Indian Child Welfare Act (ICWA). It then discusses ICWA's requirements and New York's implementation. With awareness of these issues, attorneys will be better equipped to represent their clients in family law cases when application of ICWA is required.

Overview of the Federal Government's Indian Laws and Policies

The federal government's laws and policies regarding Native Americans have fluctuated throughout the years; however, all eras were driven by the question of how to deal with Indian nations, people and their land.[1] Early in our history, European nations and a young United States dealt with Indian Nations using treaties, thus recognizing the sovereignty of Indian nations. This changed as the courts began to develop the foundation of federal Indian law, recognizing only limited sovereignty, and the Removal Era was ushered in. Beginning its foray into Indian law, the U.S. Supreme Court in *Johnson v. M'Intosh*[2] incorporated the Doctrine of Discovery into U.S. law.

The doctrine, based on papal bulls,[3] gave recognized title to land to the United States, along with the right to extinguish the Indian Nations' title by purchase or by conquest.[4] The Court ruled Indian Nations were vested only with a permanent right of occupancy to their lands.[5] The Doctrine of Discovery continues to be cited by the Supreme Court.

Building upon *M'Intosh*, the Court in *Cherokee Nation v. Georgia* held that Indian Nations are in a "guardian/ward" relationship with the federal government and are not foreign nations but rather "domestic dependent nations."[6] The Court followed with *Worcester v. Georgia*, holding that although they were domestic dependent nations, state law did not apply in Indian territory.[7] Despite the Court's rulings, states wanted jurisdiction and pressured the federal government for access to Indian lands.

The Removal Act,[8] passed by Congress in 1830, provided for the relocation of numerous Indian Nations to lands west of the Mississippi. The forced march of the Cherokee, known as the Trail of Tears, was emblematic of the process by which thousands of Indian people were removed from their lands and relocated to present-day Oklahoma and beyond the Mississippi valley.

Reservations

The Removal Era was followed by the Reservation Era. Using treaties, statutes, and executive orders, along with force, starvation and disease, the federal government moved Indian people onto smaller plots of lands, or reservations, so the government could access to gold mining and encourage the building of railroads.[9] Provided with schools and missionaries, reservations were "envisioned as schools for civilization, in which Indians under the control of the [Bureau of Indian Affairs (BIA)] agent would be groomed for assimilation."[10] Indian families could not leave the reservations, even to obtain food, practice their culture, or visit family members. The BIA established Courts of Indian Offenses on the reservations and used the law to criminalize and eliminate Indian cultural practices. The Major Crimes Act, adopted in 1885, granted federal courts concurrent criminal jurisdiction over enumerated serious crimes "committed in Indian country."[11]

Allotment and Assimilation

As the 19th century came to a close, states were still demanding that the Indians give up more of their lands. The prior laws and policies had not been successful in assimilating the Nations. The Indian tenet of communal ownership of land was viewed as the stumbling block preventing the Indians from assimilating into white society. As a result, the Dawes Act,[12] often referred to as the General Allotment Act, was passed, and the Allotment Era began.

The Allotment Act converted tribal lands into individual allotments. Heads of households received an allotment of 160 acres and individuals received 80 acres. The Secretary of Interior was granted the power to negotiate with the Tribes to obtain the remaining land. The allotments were held in trust for 25 years, although land owners could petition the federal government to take the land out of trust, if the Indian land owner was deemed "ready." Due to allotment, 65% of tribal land was transferred to non-Indians.[13] Indian lands were reduced from 138 million acres in 1887 to 48 million acres in 1934.[14]

In the State of New York, the Seneca Nation was specifically exempted from the Dawes Act due to a cloud over the title of their land, the result of land barons purchasing the right to buy the Seneca land. Other Indian Nations within the state were not exempt from the Dawes Act, however, and New York repeatedly passed legislation in attempts to allot those lands. However, the land holdings were so small they were never the focus of federal legislation.

The federal government provided funding for Indian boarding schools beginning in 1879, which government officials hoped would hasten the assimilation of Indian people. Education was an important tool to reach that goal, and the focus changed from keeping Indians on the reservation to the removal of their children from the home to separate them from the influence of their families, who reinforced cultural teachings. Captain Richard H. Pratt, the founder of the Carlisle Indian Industrial School, summed up the philosophy: "Kill the Indian, and Save the Man."[15]

The Meriam Report, published in 1928, revealed that allotment and its attendant assimilationist policies had failed. The Report noted assimilation "has resulted in much loss of land and an enormous increase in the details of administration without a compensating advance in the economic ability of the Indians."[16] Several other studies and congressional investigations "led to important changes in federal Indian policy, changes that favored restoration of some measure of tribal self-rule. Of course, the federal strategy was to employ tribal culture and institutions as transitional devices for the gradual assimilation of Indians into American society."[17] The Indian Reorganization Act[18] (IRA) put an end to allotment and legislated a process by which Indian nations could reorganize their governments under the IRA by adopting written constitutions and, as a result, become eligible for federal funding. The IRA constitutions, often drafted by the Bureau of Indian Affairs, contained requirements for secretarial approval for any amendments, solidifying the BIA's role in Indian Affairs.

From Termination to Self-Determination

After the end of World War II, the federal government began to abandon all attempts to protect and strengthen tribal self-government and began the Termination Era.

The federal government began relinquishing federal supervision to the states by terminating federal recognition of the government-to-government relationship with Indian nations. Historian Laurence Hauptman noted

> [T]he movement encouraged assimilation of Indians as individuals into the mainstream of American society and advocated the end of the federal government's responsibility of Indian affairs. To accomplish these objectives, termination legislation fell into four general categories: (1) the end of federal treaty relationships and trust responsibilities to certain specified Indian nations; (2) the repeal of federal laws that set Indians apart from other American citizens; (3) the removal of restrictions of federal guardianship and supervision over certain individual Indians; and (4) the transfer of services provided by the BIA to other federal, state, or local governmental agencies, or to Indian nations themselves.[19]

During this period, federal recognition was denied or terminated for 109 Indian nations. The largest impact was the loss of protection for land, as once federal recognition was terminated tribal lands were no longer held in trust and became subject to state property taxes. The BIA also began relocation programs to move Indian people off the reservations and into urban areas to find work. Congress also began delegating concurrent criminal jurisdiction and limited civil jurisdiction to states. The first grant was to Kansas,[20] followed by New York.[21] Then PL 280[22] was enacted, which delegated to California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska concurrent criminal jurisdiction and limited civil jurisdiction.

Termination came to an end when President Nixon announced that termination was "morally and legally unacceptable, because it produces bad results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups."[23] Subsequently, the Self-Determination Era began with legislation that sought to strengthen tribal sovereignty, while still continuing the federal government's control over Indian affairs. Federal recognition was restored to several Indian nations that were the subject of termination. Several bills were passed to support self-determination, including the Indian Child Welfare Act.

The Need for the Indian Child Welfare Act

Removal of Children – Congressional Hearings, 1974–1978

The previously discussed federal laws and policies had significant impact on Indian nations and families. The taking of land, removal of children, imposition of western education, and criminalization of Indian culture all sought to change the Indian family. Congressional hearings, beginning in 1974 and continuing through 1978, on the widespread removal of Indian children by state welfare agencies illustrated that state governments followed the federal government's lead and focused on assimilating Indian families. Senator James Abourezk of South Dakota opened the congressional hearings, noting,

> Up to now, however, public and private welfare agencies seem to have operated on the premise that most Indian children would really be better off growing up non-Indian. The result of such policies has been unchecked: abusive child-removal practices, the lack of viable, practical rehabilitation and prevention programs for Indian families facing severe problems, and a practice of ignoring the all-important demands of Indian tribes to have a say in how their children and families are dealt with. . . . It has been called cultural genocide.[24]

Testimony demonstrated the high rates of removal of Indian children in numerous states. In Minnesota, Indian children were placed in foster or adoptive homes at a rate of five times greater than non-Indian children.[25] In South Dakota, since 1948, 40% of adoptions involved Indian children, but Indian children made up only 7% of the population.[26] Indian children in South Dakota were in foster care at a rate of 1,600% greater than non-Indians.[27] The State of Washington's Indian adoption rate was 19 times greater and the foster care rate was 1,000% greater than for non-Indians.[28] Indian children in Wisconsin were at risk of being separated from parents at a rate of 1,600% greater than non-Indian children.[29] And, in Oklahoma, 4.7 times more Indian children were in adoptive homes and 3.7 times more Indian children were placed in foster care than non-Indian children.[30]

> Provided with schools and missionaries, reservations were "envisioned as schools for civilization, in which Indians . . . would be groomed for assimilation."

In New York, 1 out of 74.8 Indian children were in foster care, while the non-Indian rate was 1 out of every 222.6.[31] An estimated 96.5% of those Indian children were placed in non-Indian foster homes.[32] And New York's Indian children were placed for adoption at a per capita rate 3.3 times the rate of non-Indian children.[33]

In addition to foster care and adoption, Indian children were still being placed in boarding schools run by the BIA. In 1971, 35,000 Indian children were living in boarding schools (17% of the Indian school-age population); 60% of all the Indian children enrolled in BIA schools.[34] One witness noted,

> [O]n some reservations, the Bureau of Indian Affairs (B.I.A., part of the Department of the Interior) has made it policy to send children as young as six years

> to a distant boarding school. This had formerly been widespread practice, with the overt aim of "helping" Indian children enter the mainstream of American life. Now, supposedly, the practice is confined to regions where other educational opportunities have not developed, where there are difficult home situations, or where behavior has been deviant. In the past, this educational practice has had a devastating effect on several generations of Indian children. It has affected their family life, their native culture, their sense of identity, and their parenting abilities. It is quite likely that the continuation of these practices today will have the same destructive impact. Ultimately the message is the same: It is better for Indian children to be reared by others than by their parents or their own people.[35]

The processes used by state social workers to remove Indian children were riddled with problems. Only 1% of children removed from a North Dakota tribe were removed for physical abuse, while all others were removed based on "such vague standards as deprivation, neglect, taken because their homes were thought to be too poverty stricken to support the children."[36] Parents were infrequently informed about any legal recourse and rarely even saw a judge as social workers frequently used voluntary waivers to remove children.[37] As noted in the congressional hearing on July 24, 1978,

> [t]he decision to take Indian children from their natural homes is, in most cases, carried out without due process of law. For example, it is rare for either Indian children or their parents to be represented by counsel or to have the supporting testimony of expert witnesses. Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of the waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments. In a recent South Dakota entrapment case, an Indian parent in a time of trouble was persuaded to sign a waiver granting temporary custody to the State, only to find that this is now being advanced as evidence of neglect and grounds for the permanent termination of parental rights. It is an unfortunate fact of life for many Indian parents that the primary service agency to which they must turn for financial help also exercises police powers over their family life and is, most frequently, the agency that initiates custody proceedings.[38]

The impact on families and children was devastating. Children suffered from abandonment issues, depression and anger.[39] Testimony during congressional hearings noted the high number of school dropouts, the increasing rate of juvenile drug and alcohol abuse,[40] and the high percentage of youth involved in the criminal justice system who came from foster or group homes.[41] The removal of children also often resulted in parents splitting up.[42] Removed children often returned to their Nations as young adults, but continued to face difficulties. They would not know who their relatives were or have any connection to people on the reservation.[43] Additionally, "they were not adept at hunting or fishing or wild rice harvesting – skills useful on the reservation – nor had they obtained the skills or education necessary for a job in town. Appended to this were the psychosocial disabilities associated with the foster child syndrome (inability to trust, insecurity, free floating anxiety, difficulty in maintaining satisfying family living)."[44]

The Indian Child Welfare Act

The Indian Child Welfare Act, adopted in 1978, enacts minimum federal standards to protect Indian children from unwarranted removal.[45] ICWA applies to child custody proceedings, which it defines as foster care placement, termination of parental rights, pre-adoptive placement, and adoptive placement.[46] An Indian child is defined as an unmarried person under the age of 18 who is a member of a Tribe or is eligible for membership and is the biological child of a member of an Indian Tribe.[47] The Tribe is the only entity that can determine membership or eligibility for membership and will do so upon receipt of notification, which is required by ICWA.[48]

ICWA recognizes Indian Nations' exclusive jurisdiction over child custody proceedings when the Indian child "resides or is domiciled within the reservation of such tribe."

ICWA recognizes Indian Nations' exclusive jurisdiction over child custody proceedings when the Indian child "resides or is domiciled within the reservation of such tribe."[49] The statute does not define domicile, but the U.S. Supreme Court has held that children born out-of-wedlock to enrolled members domiciled on a reservation resulted in the children being also domiciled on the reservation.[50] Additionally, if the Indian child does not reside or is not domiciled within the reservation, the state court must transfer the proceeding to the tribal court "absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe."[51] Last, should the parent, Indian custodian or Indian child's tribe wish to, they may intervene at any point in the proceeding regarding the Indian child.[52]

In addition to jurisdictional requirements, ICWA requires notice to Indian parents, custodians, and Indian Nations, along with a raised burden of proof prior to

removal. First, the party seeking to take custody of the Indian child must notify the parent or Indian custodian and the Indian child's tribe of the pending proceedings and of their right of intervention.[53] If a party cannot identify or locate the Nation or Indian parent or custodian, the notice shall be given to the Secretary of Interior.[54] Second, in order for a foster placement to be determined, there must be clear and convincing evidence, which includes input from a qualified expert witness, "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[55] Finally, when parental rights are to be terminated, evidence, this time beyond a reasonable doubt must support "the conclusion that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[56]

ICWA also creates requirements for voluntary foster care placement and termination of parental rights. First, the consent of the parent must be in writing and recorded before a court with proper jurisdiction.[57] Additionally, the parent or legal guardian must be fully aware of the consequences of the provided consent.[58] When voluntary consent is given for foster care, the parent may withdraw at any time and the child shall be returned.[59] In a voluntary proceeding for termination of parental rights or adoptive placement, consent may be withdrawn at any time prior to entry of a final decree and the child shall be returned.[60]

ICWA outlines preferences for foster care placement and adoption; however, the Indian child's tribe may establish a different order of preference for placement.[61] The extended family of the child in question shall be given preference when adoption is necessary.[62] If no member of the child's extended family wishes to adopt the child, preference is then given to a member of the child's tribe and, last, other Indian families.[63] For foster care and pre-adoption placements, ICWA requires that the child "be placed in the least restrictive setting . . . within reasonable proximity to his or her home."[64]

New York's Laws and Policies Impacting Indian Families

New York also has a long history of laws and policies focused on assimilating Indian children and families, resulting in separation of children from families, as illustrated by the statistics above. The state viewed the federal policies as supporting its work toward assimilation, for example, "[t]he granting of [U.S.] citizenship had the earmarks of an invitation to the states to work toward further assimilation of Indian populations."[65]

In 1888, as a reaction to the Seneca Nation of Indians' exemption from the Dawes Act, New York created the Whipple Commission, whose purpose was to investigate the social, moral, and industrial condition of the Nations, along with the status of their lands and treaties.[66] The Commission examined Indian children's progress in several schools built on the Six Nations' territories.

During the hearings, William A. Duncan[67] testified that it was necessary to combine education and removal of Indian children, to keep them from the influence of their families.

> [B]ut if you educate an Indian and leave him with his father and mother and tribe, he will always remain a savage; to my mind, these children are not being educated in the right way, even on our Onondaga reservation; that little school-house isn't worth that, so far as the education of these children is concerned, because they simply come in for two or three hours, and they go back into their homes and dwell with their pagan parents; they are brought up in the pagan religion and their pagan customs; I believe that the Indians on the Onondaga reservation ought to be saved, and they ought to be made good citizens; it can not be done in one year, and never will be done by keeping a nation within a nation; they should be made, as soon as possible, citizens.[68]

The Commission opined that, the pagan way of life eradicated anything taught in the schools. "The influence of the pagan Indians is keenly felt against the schools here as elsewhere, and the home life of the children tends to undo much that is accomplished for their good during the day at school."[69]

The Whipple Commission opined that the Thomas Asylum for Orphan and Destitute Indian Children. It was started as a collaboration between the Quakers and Presbyterian Church on Cattaraugus Seneca Indian Territory in 1855 and was run by New York State from 1875 to 1957. The Whipple Report noted, "The institution is a model one, and its present management well nigh perfection. A serious mistake, however, connected with this school is in the regulation which discharges these children from the care of the teachers when they reach sixteen years of age. At this age a large share of the expense upon the children has been incurred, while the benefits derived are not in proportion to the outlay. If these children could remain for even two or three years longer, until their character and habits should become matured and strengthened before again placing them among the often demoralizing influences of their people, it is believed that the results would be eminently more satisfactory."[70]

Jon Van Valkenberg, Superintendent of the Thomas Asylum, was a firm supporter of removal of Indian children from the influence of their families and believed that the Nations should be reformed for the benefit of assimilated children.

> After several years experience among the Indians, I have become fully convinced that the means of education and improvement will never be productive of the highest good as long as their tribal relations are continued. With a division of the lands, a home would not only be secured to the pagans and to their families, but

> would provide such for the orphans and destitute children. It must indeed be humiliating for the intelligent and educated to live under laws established for their uncivilized ancestors of sixty or seventy years ago. The severalty act seems to me to be one of the most important steps toward the elevation of this people.[71]

In 1942, the Second Circuit ruled New York law did not apply on Indian territories,[72] halting many years of the state's efforts to implement its laws on those territories. To overcome this ruling, New York formed the Joint Legislative Committee on Indian Affairs, which held numerous hearings across the state on various Indian territories. An early Committee report emphasized its focus: "An early settlement of the jurisdictional problem is believed imperative. The present system of dual responsibility is fostering disunity and internal strife among the Indians of this State and is further seriously retarding their assumption of the responsibilities and enjoyment of the privileges of citizenship."[73]

The Committee subsequently submitted to Congress a bill for obtaining concurrent criminal jurisdiction and limited civil adjudicatory jurisdiction. Congress granted New York concurrent criminal jurisdiction in 1948.[74] New York celebrated the initial grant of concurrent jurisdiction, and the Committee wrote, "[Adoption] marks the next great forward step toward absorption of Indians into the general community of citizens."[75] Concurrent adjudicatory civil jurisdiction, granted in 1950,[76] was sought because it "would end their long isolation and inevitably work toward complete assimilation with the main body of citizens."[77] The state hoped eventually, through assimilation, the Nations "will reach the point of desiring to hold their lands in severalty as do western tribes, and to abandon present restrictions against ownership by non-Indians, even at the cost of having all such lands bear a fair proportion of the tax burden. Not until then will Indians complete the transition from hermithood to the vigorous and responsible citizenship assured by their intelligence, independence and courage."[78]

New York's Implementation of ICWA

To implement ICWA, New York amended § 39 of the Social Services Law (SSL) and issued regulations found at 18 N.Y.C.R.R. § 431.18, which provide additional protections to Indian children. Unlike federal law, New York State does not require the child to be a biological child of a member of a tribe within the state.[79] New York's regulations include biological children of a member of any federally recognized tribe, who live on a reservation or tribal land, regardless of enrollment, to be covered under the act as well.[80] Last, New York includes children ages 18 to 21 who are in foster care, are attending school, or lack the ability to live independently, to encompass a larger population of Indian children.[81]

Congress's grant of concurrent civil jurisdiction to New York affected the state's implementation of ICWA, as the Nations are required to obtain approval of the Secretary of the Interior for assumption of exclusive jurisdiction.[82] The Office of Children and Families may enter into an agreement with the Tribe for the Tribe to assume the provision of foster care, preventive and adoptive services to Indian children.[83] A state-recognized Tribe may reassume exclusive jurisdiction, provided that the local commissioner has granted approval.[84] Once this is granted, the Tribe has exclusive jurisdiction over a child who resides with the Tribe or is domiciled there or when the child is a ward of the tribal court.[85]

Unlike ICWA, New York's regulations include a definition of a qualified expert who may testify as to whether continued custody is likely to result in serious physical or emotion harm to the child. A qualified expert witness may be a member of the Indian child's Tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organizations and child-rearing practices.[86] Likewise, an expert witness may be a layperson who has substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child's tribe.[87] An expert witness may be a professional person having substantial education and experience in the provision of services to Indian children and their families.[88]

Finally, an additional protection is provided at the beginning of the child welfare process. When a social services official initiates a child custody proceeding involving an Indian child, the official must demonstrate to the court that, prior to the commencement of the proceeding, reasonable efforts were made to alleviate the need to remove the child from the home.[89] And the efforts shall include the Tribe's available resources.[90]

Conclusion

A critical component to the implementation of ICWA is the understanding of the federal and state governments' history in Indian affairs. Numerous laws and policies were implemented to assimilate Indian people, and one result was the high rate of removal of Indian children from their families and Nations. The passage of ICWA created federal standards to protect families from unwarranted removal of their children. With these protections and an understanding of the need for these protections, attorneys will be better equipped to assist their clients in what can be difficult family law cases. ■

1. Robert Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. Mich. J. L. Reform 900 (1998).

2. 21 U.S. 543 (1823).

3. U.N. Econ. & Soc. Council [ECOSOC], Permanent Forum on Indigenous Issues, *Preliminary Study on the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery*, U.N. Doc. E/C.19/2010/13 (April 2010) (*prepared by* Tonya Gonnella Frichner).

4. *M'Intosh*, 21 U.S. at 587.

5. *Id.* at 574.

6. 30 U.S. 1 (1831).

7. 31 U.S. 515 (1832).

8. Act of May 28, 1830, §§ 2, 7, 4 Stat. 411.

9. David E. Wilkins & K. Tsianina Lomawaima, Uneven Ground: American Indian Sovereignty and Federal Law 108 (Univ. of Okla. Press, Norman 2001).

10. Nell Jessup Newton & Robert Anderson, Cohen's Handbook of Federal Indian Law 65 (LexisNexis 2005).

11. 18 U.S.C. § 1153.

12. 25 U.S.C. § 331.

13. Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 13 (1995).

14. Vine Deloria, Jr. & Clifford M. Lytle, American Indians, American Justice 10 (Univ. of Tex. Press, Austin 1984).

15. Cohen's Handbook, *supra* note 10 at 81, n. 518.

16. David E. Wilkins, American Indian Politics and the American Political System 118 (2nd ed. 2007) (citing Lewis Meriam, The Problem of Indian Administration 41 (Baltimore: Johns Hopkins Univ. Press 1928)).

17. *Id.* at p. 119.

18. 25 U.S.C. §§ 461 *et seq.*

19. Laurence M. Hauptman, *Congress, Plenary Power, and the American Indian, 1870 to 1992*, *in* Exiled in the Land of the Free 329 (Oren Lyons, et al. eds., Clear Light Publishers 1992).

20. 18 U.S.C. § 3243.

21. 25 U.S.C. §§ 232–233.

22. 18 U.S.C. § 1162.

23. H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970).

24. *Problems that American Indian Families Face in Raising their Children and How these Problems are Affected by Federal Action or Inaction: Hearings before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 93rd Cong. 1–2 (1974).

25. *Id.* at 3.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 40.

31. Report on Federal, State, and Tribal Jurisdiction, at 83 (1976).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Indian Child Welfare Act of 1977: Hearing before the United States Senate Select Committee On Indian Affairs on S. 1214*, 95th Congress 112–113 (1977) (statement of Carl E. Mindell and Alan Gurwitt in The Placement of American Indian Children – The Need for Change, American Academy of Child and Adolescent Psychiatry) at http://www.aacap.org/AACAP/Policy_Statements/1975/Placement_of_American_Indian_Children.aspx.

36. *Id.* at 4.

37. *Id.* at 5.

38. *Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Committee of the Whole House of the State of the Union*, 95th Cong, 11 (1978); *see* H.R. Rep. 95-1386, P.L. 95-608, ICWA of 1978.

39. *Problems that American Indian Families Face in Raising their Children and How these Problems are Affected by Federal Action or Inaction: Hearings before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 93rd Cong. 56 (1974) (statement of Dr. Alan Gurwitt).

40. *Id.* at 128–29 (statement of Dr. Robert Bergman).

41. *Id.* at 369 (statement of William Blackwell, Grand Portage Ojibwa Band).

42. *Id.* at 514–15 (citing Joseph J. Westermeyer, *Indian Powerlessness in Minnesota*, Society, Mar./Apr. 1973, at 47–50).

43. Report on Federal, State, and Tribal Jurisdiction, at 78 (1976).

44. *Id.* at 514–15 (citing Westermeyer, *supra,* note 42).

45. The Indian Child Welfare Act, 25 U.S.C. §§ 1903–1963.

46. 25 U.S.C. § 1903(1).

47. 25 U.S.C. § 1903(2).

48. 25 U.S.C. § 1912(a).

49. 25 U.S.C. § 1911(a).

50. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

51. 25 U.S.C. § 1911(b).

52. 25 U.S.C. § 1911(c).

53. 25 U.S.C. § 1912(a).

54. *Id.*

55. 25 U.S.C. § 1912(e).

56. 25 U.S.C. § 1912(f).

57. 25 U.S.C. § 1913(a).

58. *Id.*

59. 25 U.S.C. §1913(b).

60. 25 U.S.C. § 1913(c).

61. *Id.*

62. 25 U.S.C. § 1915(a).

63. *Id* .

64. 25 U.S.C. § 1915(b).

65. Report of New York Joint Legislative Committee on Indian Affairs, at 3–4 (1946).

66. Report of Special Committee to Investigate the Indian Problem of the State of New York, at 3 (1888).

67. Mr. Duncan was a resident of Syracuse, Secretary of the Chautauqua Assembly, and Field-Secretary of the Congregational Sunday School. He was the originator of the committee advocating for a change of governance for the Onondaga Nation in the early 1800s.

68. Report of Special Committee to Investigate the Indian Problem of the State of New York, at 1219 (1888).

69. *Id.*, at 50–51.

70. *Id.*, at 60–61.

71. *Id.*, at 70.

72. *United States v. Forness*, 125 F.2d (2d Cir. 1942).

73. Report of the Joint Legislative Committee on Indian Affairs, at 7 (1944).

74. 25 U.S.C. § 232.

75. Report of Joint Legislative Committee on Indian Affairs, at 3 (1949).

76. 25 U.S.C. § 233.

77. Report of Joint Legislative Committee on Indian Affairs, at 3 (1950).

78. Report of Joint Legislative Committee on Indian Affairs, at 5 (1951).

79. 18 N.Y.C.R.R. § 431.18(a)(1)(ii).

80. 18 N.Y.C.R.R. § 431.18(a)(1)(ii)(c).

81. 18 N.Y.C.R.R. § 431.18(a)(1)(i).

82. 25 U.S.C. §§ 1911(a), 1918(a); SSL § 39.

83. SSL § 39.2.

84. SSL § 39.4.

85. SSL § 39.5(a).

86. 18 N.Y.C.R.R. § 431.18(a)(5)(i).

87. 18 N.Y.C.R.R. § 431.18(a)(5)(ii).

88. 18 N.Y.C.R.R. § 431.18(a)(5)(iii).

89. 18 N.Y.C.R.R. § 431.18(d).

90. *Id.*

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Proving the Value of Life (Part 3)

Introduction

Again, picking up from last issue's column, the *Burden of Proof* continues to review the nature and extent of proof necessary to support a claim of pecuniary damages in a wrongful death action.

Determining Whether Distributees Suffered Pecuniary Loss

Whether or not a distributee has suffered pecuniary loss is not always readily apparent. In *Clark v. Weinstein*,[1] the decedent was survived by his spouse, daughter, and two grandchildren. The two grandchildren had lived with the decedent and his wife from birth, and the grandparents had been awarded custody of the children. While the grandchildren were growing up, the decedent's daughter had minimal contact with her children and provided no financial support to them.

After the action was commenced, the plaintiff successfully moved to serve an amended complaint "asserting a wrongful death cause of action on behalf of the decedent's daughter resulting from the pecuniary loss of support provided by decedent to the children."[2] The defendant appealed, and the Fourth Department affirmed:

> As the court properly determined, plaintiff is entitled to assert the cause of action at issue herein on behalf of decedent's daughter for wrongful death damages arising from the loss of voluntary support provided by decedent to her children.
>
> Pursuant to [Estates, Powers & Trusts Law] EPTL 5-4.4(a), wrongful death damages "are exclusively for the benefit of the decedent's distributees and, when collected, shall be distributed to the persons entitled thereto [by statute]." Here, it is undisputed that decedent's daughter is a distributee of decedent and is entitled to recover for the voluntary assistance provided by decedent directly to her. Damages in a wrongful death action are limited to "fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought," including financially independent adult distributees. Here, decedent's daughter was legally obligated to provide support for her children despite the fact that her parents were awarded custody of them. Thus, the loss of decedent's support to the grandchildren has resulted in a direct loss to decedent's daughter, a distributee who must replace the support previously provided by decedent. Contrary to defendants' contention, the pecuniary loss to decedent's daughter arises from her need to replace the support previously provided by decedent and does not constitute a recovery on behalf of the grandchildren, who are non-distributees, for their direct loss of support.[3]

Pecuniary damages for loss of household services for a child who is a distributee may extend beyond the age of majority:

> In light of the evidence, inter alia, regarding the special, lifetime needs of the disabled infant plaintiff, which were projected to continue throughout his adulthood, the damages awards for past and future loss of the decedent's household services were "reasonably certain to be incurred and necessitated."[4]

Loss of Parental Guidance

Recoverable pecuniary damages include those for loss of parental guidance and are not limited to children or by the age of majority. In *Gonzalez v. New York City Housing Authority*,[5] the decedent was survived by her daughter-in-law and two grandchildren, aged 19 and 21 at the time of the decedent's death. On appeal, the Court of Appeals considered whether the grandchildren were entitled to an award for loss of parental guidance:

> Decedent had raised [both grandchildren], because their father (her son) had died in 1965 and their mother (her daughter-in-law) was mentally ill; as the Appellate Division observed, decedent had for many years been a "mother" to her grandchildren. At the time of the murder, however, both plaintiffs were financially independent and they no longer lived with her. The granddaughter lived separately with her husband, and the grandson had a construction job and an apartment a few blocks away.
>
> Although decedent had retired from her job as a housekeeper sev-

eral years before the crime, she remained active. She prepared dinner every night for her daughter-in-law, who was unable to cook for herself. Marta Gonzalez went to her mother's house every day, and frequently had her meals with them. She testified that her grandmother had more patience with her mother than she did, and would help her cope with her mother's condition. Antonio Freire testified that he visited his grandmother every other day, and that she frequently prepared his meals as well.

The decedent also helped her granddaughter in other ways. The month before the crime, when her granddaughter was having marital problems, decedent permitted her to live with her for a week until she could return home. At the time of the murder, Marta Gonzalez was pregnant, and together she and her grandmother planned that the grandmother would care for the child while she returned to school.[6]

With the facts established, the Court considered whether the law permitted recovery for loss of guidance to adult distributees:

> Applying these principles to the facts before us, we first conclude that plaintiffs' status as adult financially independent grandchildren does not, of itself, preclude their recovery.
>
> While defendant asks us to restrict recovery for loss of guidance to a decedent's children, the statute defines the class entitled to recover in a wrongful death action as distributees. There is no question that decedent's grandchildren were her distributees, and thus that they are members of the class the Legislature intended should be permitted to maintain this action.
>
> Nor is recovery barred solely because plaintiffs were self-supporting adults at the time of their grandmother's death. The argument that an adult distributee cannot state a claim for pecuniary injuries based on the loss of a parent's guidance was long ago rejected by this Court. In *Tilley v The Hudson Riv. R. R. Co.*, a wrongful death action brought on behalf of the decedent's five surviving children, the oldest child was 23 and married at the time of her mother's death, and the next oldest 21. We held that the trial judge properly declined to limit damages to the minority of the children, finding in the wrongful death statute no "peremptory injunction to confine the damages absolutely to the minority of the children."
>
> Defendant points to *Bumpurs v New York City Hous. Auth.* as support for its contention that adults cannot claim pecuniary injuries from loss of a parent's guidance. There, adult children were denied recovery for loss of their mother's "companionship, comfort and assistance" on the ground that such injuries were not pecuniary in nature, citing *Liff v Schildkrout*; the court went on to note that the adult claimants could not state a claim for loss of their mother's nurture. However, the *Bumpurs* decision was properly distinguished by the Appellate Division in the present case: unlike the decedent here, the decedent in *Bumpurs* had provided no services to her adult children.[7]

Having determined that recovery was permitted for adult distributees, the Court considered whether the plaintiff had adduced proof sufficient to support an award:

> Plaintiffs' status being no bar to recovery, the question then becomes whether the damages they have shown fall within the statutory confines of "pecuniary injuries."
>
> Defendant urges that the only service decedent rendered to plaintiffs was the preparation of occasional meals outside their residences, which was not a compensable injury both because it was occasional and gratuitous and the plaintiffs therefore had no reason to rely on it, and because the service was not performed in their own households and plaintiffs therefore would not need to replace it.
>
> As the record establishes, however, decedent contributed far more than "occasional meals," and her grandchildren relied upon her contributions. Decedent provided shelter for her granddaughter during a marital crisis, and helped both grandchildren cope with their mother's condition. The child care plan was more than occasional. Even the meals she furnished cannot accurately be called occasional – Marta Gonzalez testified that she ate dinner with her mother and grandmother every other day, while Antonio Freire testified that he visited his grandmother every other day and she frequently prepared his meals.
>
> Nor is it significant that the decedent prepared meals in her daughter-in-law's home rather than in plaintiffs' homes. Wherever provided, the decedent's services would have to be replaced by plaintiffs. The same is equally true of her counselling, the shelter she provided for her granddaughter, and the meals she regularly prepared for both grandchildren.
>
> Based upon this record, therefore, we conclude that plaintiffs presented evidence of "pecuniary injuries" they suffered by reason of their grandmother's wrongful death.[8]

Reasonable Medical Expenses "Incident to the Injury Causing Death"

While numerous cases mention the recovery of reasonable medical damages incident to the injury causing death, none that I can find furnish any detail beyond stating the ability to recover these damages, and none detail any specific items of damages – for example, see *Sutherland v. State*.[9] In order to recover, the expenses will have to be proved and must be reasonable.

Reasonable Funeral Expenses

Reasonable funeral expenses for the decedent's burial are recoverable when the distributee pays, or is responsible for paying, those expenses. In an action reminiscent of *Thurston v. The State of New York*,[10] the decision that prompted this series of columns, the claimant, a

Continued on Page 20

Continued from Page 19

resident of a state facility, suffered an epileptic seizure, was allowed to return to work and thereafter to the cottage where he resided, where he was found some time later lying bent over into a slop sink full of scalding water; he died two days later.[11] After determining that an award for conscious pain and suffering was warranted, the court addressed the pecuniary loss claim:

> However, in view of the decedent's physical and mental condition, the persons for whom the wrongful death action is brought have sustained no pecuniary loss and there can be no recovery of damages under section 130 of the Decedent Estate Law except for the funeral expenses. The funeral expenses amounted to $125 and an award in that amount is directed together with interest thereon from the date of decedent's death.[12]

The funeral expenses must be the responsibility of a distributee to be recoverable. Thus, where funeral expenses are reimbursed to the distributee, the funeral expenses may not be recovered.[13]

Calculating Interest

In addition to the other items of damage recoverable in a wrongful death action, "[i]nterest upon the principal sum recovered by the plaintiff from the date of the decedent's death shall be added to and be a part of the total sum awarded."[14]

The Court of Appeals, in *Toledo v. Iglesia Ni Christo*,[15] recently resolved the "question whether the trial court properly discounted the future wrongful death damages back to the date of death, and awarded interest thereon from the date of death to the date of judgment":

> Defendant argues that our holding in *Milbrandt* prevents a plaintiff from collecting preverdict interest on future damages in a wrongful death action, because the interest from the date of death to the date of verdict has already been included in the discounted award at the time of the verdict, and that any additional interest would be an impermissible windfall to the plaintiff. Defendant further argues that awarding interest on future damages that have yet to be realized also constitutes an unfair windfall for plaintiff. We disagree.
>
> * * *
>
> Applying [EPTL 5-4.3] and its predecessor statutes, this Court and the courts below have long held that "prejudgment interest in a wrongful death action is 'part of the damages,'" and that such interest should run from the date of death to the date of verdict.
>
> Furthermore, it has long been the rule in New York that the damages on a wrongful death action are due on the date of the death of the plaintiff's decedent. Future damages are thus a debt owed entirely as of the date of liability – the date of death – and such damage award properly should include preverdict interest calculated from the date of death.
>
> Consistent with this analysis, in *Milbrandt* we ruled "that no preverdict interest should be added to an award for postverdict losses if the award has not been discounted to a time prior to the award." There, we observed that since the verdicts in *Milbrandt* and in the companion case *Schmertz v Presbyterian Hosp. in City of N.Y.* had not been properly discounted, preverdict interest on future damages awards would have been improper as it would indeed constitute a windfall. Following the adoption of CPLR articles 50-A and 50-B, however, discounting is performed by the trial court and juries are specifically instructed, pursuant to CPLR 4111(e), to award a *full* amount of future damages, without a reduction to present value.
>
> Moreover, in *Rohring* we stated "that future damages should be discounted to the date of liability, which by statute is the date of death, before interest is calculated on them." We now conclude that the proper method for calculating preverdict interest in a wrongful death action is to discount the verdict to the date of liability, i.e., the date of death, and award interest on that amount from the date of death to the date of judgment.[16]

Conclusion

Until such time as the Legislature sees fit to address the manifestly unfair result typified by *Thurston*, damages recoverable for wrongful death in New York will continue to be limited to those set forth in EPTL 5-4.3(a). Until that time, attorneys representing estates in wrongful death actions should take care to claim, prove, and obtain maximum damages for all recoverable losses recognized by the statute. And maybe, just maybe, a litigator will come along with the drive, creativity, and deep pockets required to mount a challenge to the statute. ■

1. 23 A.D.3d 1054 (4th Dep't 2005).
2. *Id.*
3. *Id.* at 1054–55 (citations omitted).
4. *Vasquez v. Cnty. of Nassau*, 91 A.D.3d 855, 858–59 (2d Dep't 2012) (citations omitted).
5. 161 A.D.2d 358 (1st Dep't 1990), *aff'd*, 77 N.Y.2d 663 (1991).
6. *Id.* at 668–69.
7. *Id.* at 669 (citations and parentheticals omitted).
8. *Id.* at 669–70.
9. 189 Misc. 953 (Ct. of Claims 1947).
10. *Laurie A. Thurston v. The State of New York*, 2013-031-019, NYLJ 1202602796553, at *1 (Ct. of Claims, NY, Decided May 2, 2013).
11. *Martinez v. State*, 28 Misc. 2d 1094 (Ct. of Claims, 1961) (case was decided under the predecessor statute, § 130 of the Decedent Estate Law).
12. *Id.* (citation omitted).
13. *Johnson v. Richmond Univ. Med. Ctr.*, 101 A.D.3d 1087, 1089 (2d Dep't 2012).
14. EPTL 5-4.3.
15. 18 N.Y.3d 363 (2012).
16. *Id.* (footnotes, parentheticals and citations omitted). The Court did not address the "question whether the trial court properly discounted the future wrongful death damages back to the date of death, and awarded interest thereon from the date of death to the date of judgment."

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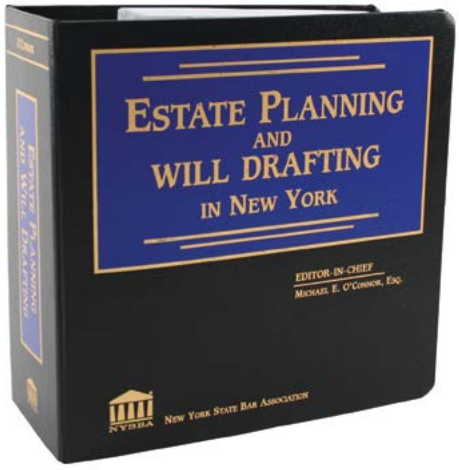

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NYSBA

Hon. Peter J. Herne is the Chief Judge of the St. Regis Mohawk Tribal Court. He graduated from SUNY Buffalo School of Law, is a Member of NYSBA and has worked in both private and public practice. He resides on the St. Regis Indian Reservation with his wife and two children. The following is based on a CLE program on Indian Law at Syracuse University's Center for Indigenous Law, Governance, and Citizenship. This CLE course was centered upon 25 U.S.C. §§ 232 and 233, the New York Indian Country jurisdiction-granting statutes.

Best Interests of an Indian Child

By Hon. Peter J. Herne

Family law treatises summarize New York's "Best Interest of a Child" standard as follows:

1. Maintaining stability for the child(ren)
2. Child(ren's) wishes
3. Home environment with each parent
4. Each parent's past performance and relative fitness
5. Each parents ability to guide and provide for child(ren's) overall well-being
6. Each parent's willingness to foster a positive relationship between the child(ren) and other parent.[1]

Abundant case law in New York has identified factors (e.g., drug use, employment, health, history, etc.) which will have an impact on this standard. These factors will then help guide the court in making a custody determination that is in the best interests of the child.

Our focus is on Indian children, and our legal research did not disclose any New York cases containing the words "best interest of an Indian child."[2] We also did not discover any New York statutes or rules containing those terms, so we pose the following question:

> "Where should the fact that the child is an *Indian child* be placed in New York's best interests of the child standard?"

It is likely that most attorneys simply consider Indian child merely as a racial factor in the standard. This response, however, fails to recognize that a best interest of an Indian child standard is inherently different from New York's best interest of a child standard.

Best Interests of an Indian Child and Tribal Nation Citizenship

While we could easily author a treatise on the subject of federal Indian law, discussing the foundational "trinity" of Supreme Court cases,[3] the hundreds of Treaties entered into between the United States and Tribal Nations[4] or the progeny of cases that have been decided since, most important for our discussion is to recognize that Tribal Nations are possessed with inherent sovereignty and that relationships between a Tribal Nation and its members are within the exclusive jurisdiction of the Tribal Nation.[5]

Due to this, Indian children possess "different interests," which can be affected by a custody determination. This is not due to any race factor, but rather to the political status of the child's being "Indian." An Indian child enjoys certain rights and privileges by virtue of being a Tribal Nation citizen/member.[6] These include:

1. Certain Rights and Privileges by Operation of Federal Law: A multitude of federal laws and programs are specifically addressed to, or involve, Native Americans; the least of these are the Treaties between the United States and the Tribal Nations. Another example of federal legislative involvement is the Indian Child Welfare Act (ICWA).[7]
2. Health Care: Currently the United States Bureau of Indian Affairs (BIA) and Department of Health and Human Services (USDHHS) have a unique relationship with Indian Health Services (IHS). IHS operates numerous health clinics and hospitals on many Tribal Nation territories throughout the country. It is the primary health care delivery system for many Native Americans and is often the mechanism by which the United States meets its treaty obligations and/or trust responsibilities.[8]
3. Educational Benefits: BIA offers numerous primary schooling benefits as well as college assistance. New York State also offers educational benefits, and some Tribal Nations are now in the position to offer additional college assistance to Tribal Nation members.
4. Border Crossing Rights: Although for many years an issue for Tribal Nations in New York, this is actually related to the historic Jay Treaty which recognized the right of Native Americans to cross and re-cross the international border.[9]
5. Right to Own and Inherit Reservation Property: Although common legalese states that a respective Tribal Nation owns all the real property comprising an Indian Reservation, the reality is that in many Tribal Nations there is a historic and customary allocation of "real property" held by individual Tribal Nation citizens/members and their families.
6. Right to Participate in Tribal Nation Governance: Irrespective of the nature of the Tribal Nation government, nearly every Tribal Nation has some type of governance system. To hold office or participate in that system, one generally has to be a member/citizen of that Tribal Nation.
7. Direct Assistance: Some Tribal Nations are now in a position to offer a periodic payment to their citizens/members (often called per-capita payments).
8. Belonging: Many Tribal Nations recognize that the *best interests of an Indian child* can only be realized when an "Indian child" can establish, develop, and maintain political, cultural, and social relationships with their Indian family, community, and Nation.[10]

The foregoing list is synonymous with the rights and privileges of citizenship, and like such rights, it often does not require any level or degree of participation by an Indian child. Likewise, it very often also does not require the Indian child to "join" the Tribal Nation, and in many instances does not require residency within a Tribal Nation.[11]

The point is, these rights and privileges are not the product of any racial consideration and/or classification. Instead, they originate and flow from a political classification, recognized in the law, due to the Tribal Nations' inherent sovereignty. Simply by being born, the Indian child is possessed with these rights and privileges, which is very often recognized by numerous Tribal Nations (if not universally) as being inherent. As such they are not benefits one acquires by joining the Tribal Nation. A Tribal Nation is not a fraternal organization.[12]

It is also important to recognize that the granting and defining of the rights and privileges is within the exclusive jurisdiction of the Tribal Nations themselves.[13] These are *not* subject to the rulings of any state or federal court.

Joining of "Best Interest" and "Indian Child" Language

ICWA contains "best interest" and "Indian child" language for the establishment of minimum federal standards in relation to Indian child welfare matters,[14] but this must be read with other parts of ICWA. For instance, ICWA also recognizes the right of Indian parents and Indian children to be maintained as an Indian family.[15] ICWA weaves this interest with the Tribal Nations' interests in children of their Tribal Nations.[16] Therefore, ICWA's best interest of an Indian child language is intertwined with the interests of Indian parents and Tribal Nations. This structure recognizes that, for Tribal Nations, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[17]

ICWA is not the only place to find the phrases "best interest" and "Indian child," however. In fact, it has been at the state level that some of the most noteworthy efforts at joining these terms into a "best interest of an Indian child" standard can be found.

Jurisdiction

As one can imagine, numerous states must address jurisdiction issues with various Tribal Nations; these states include Washington, Wisconsin, and Minnesota.

These states are noteworthy not only because they have a best interest of an Indian child standard in their domestic law, but also because they are Public Law (PL) 280 states.[18] Under PL 280, the federal government in essence grants states the right to exercise state jurisdiction within a Tribal Nation territory, which may include some civil jurisdiction inclusive of family law matters. We note this because the PL 280 scheme is very similar to that found in New York, which is under 25 U.S.C. § 233.[19]

Like New York, Washington, Wisconsin, and Minnesota have multiple Tribal Nations and territories located within their external boundaries.[20] Nonetheless, in many instances Tribal Nations in these PL 280 states continue to exercise family law jurisdiction over their members even in light of (or, in spite of) the jurisdiction-granting statute.

Each of these states has seen recent changes to its domestic laws and policies with respect to Indian children in the state. In Wisconsin, this may have been prompted by a U.S. Department of Health and Human Services review; in Minnesota, by a study that identified disparities in the treatment of Indian children; or, in Washington, due to a concerted effort by Tribal Nations to have jurisdiction retro-ceded to the Tribal Nations and/or federal government and away from the state.[21] In any event, the result has been policy changes creating and incorporating a best interest of an Indian child standard.

Now both Washington and Wisconsin provide for this basic definition of a best interest of an Indian child standard:

> [It] reflects and honors the unique values of the child's tribal culture and is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, social, and spiritual relationship with the child's tribe and tribal community.[22]

Minnesota has taken a different approach.[23] Although Minnesota is also a PL 280 state, it is unique from Washington and Wisconsin in that although it has not made any recent legislative changes to its Indian child welfare laws, it has made significant changes in how the existing laws are implemented – that is, policy changes. Most noteworthy was the state's entering into Social Service Agreements with Tribal Nations in 2007.

The Minnesota agreements not only echo the best interest of an Indian child standard found in Washington and Wisconsin, but go even further by providing that the Tribal Nation defines the best interests of Indian children and Indian families, that the intent of the state's laws is to protect Indian children's sense of belonging with their family and Tribe, and that child-rearing practices are best obtained from each Tribe.[24]

Perhaps the most interesting aspect of the Minnesota/Tribal Nation agreements is the treatment of foster care payments. In changes brought on by the agreements, Minnesota also permitted Indian children to receive foster care support irrespective of the court that placed them into foster care.[25] Therefore, in Minnesota an Indian child who may have been placed into a Native American foster home by a Tribal Nation court would still receive a foster care payment from the state.

Best Interest of an Indian Child Standard in New York

New York has no mention of the best interest of an Indian child standard in any statute, case, or regulation. In fact the closest thing to such a standard can be found in N.Y. Court Rules applicable to N.Y. Supreme, Family, and County Courts. The Rules simply mandate those courts to "proceed . . . in accordance with" ICWA.[26]

An interesting twist to the New York statutory scheme is that, like Minnesota, there are provisions for Tribal Nations to enter into agreements with the New York State Office of Child and Family Services for social services inclusive of foster care.[27] Although these Section 39 agreements provide for reimbursement to Tribal Nations, those reimbursements can be made only if the Indian child has "been remanded, discharged, or committed pursuant to the Family Court Act of the State of New York."[28] Therefore, these agreements result in an Indian child only being able to access foster care support if he or she goes through a New York family court, a court system that has not recognized, nor has been legislatively mandated to follow, a best interest of an Indian child standard.

Next, it is not only foster care which could result in the removal of an Indian child. Other N.Y. court proceedings may also have the same result (e.g., a person in need of supervision or PINS proceeding). It is interesting to note that Wisconsin has extended both ICWA and its best interest of an Indian child standard to proceedings commonly involving adolescents: uncontrollability, habitual truancy, school dropouts, and habitual runaways.[29] As of now, New York appears to have no inclination to do the same.

We could easily be left with the impression that it is simply a matter of advocating for a legislative fix. Perhaps it is better to recognize that it may be time to modernize the legal representation of the Indian child. Perhaps it is time to recognize, as Justice Antonin Scalia succinctly stated in his *Baby Girl* dissent: "We do not inquire whether leaving a child with his parents is 'in the best interests of the child.' It sometimes is not; he would be better off raised by someone else. But parents have their rights, *no less than children do*."[30]

> Indian children possess "different interests," due to being "Indian."

As members of the legal profession, we must recognize that every foster care placement order, adoption decree, or termination of parental rights decision involving an Indian child has the very real possibility of disenfranchising or alienating an Indian child from his or her respective rights and privileges as a citizen of a Tribal Nation. Very often this occurs without due process protections. In simplest terms, when does an Indian child get to present to a court?

> "By operation of federal law I have the right to receive any rights and privileges due to me being a Tribal Nation member. I have the inherent rights to: own property within my Tribal Nation, to be the next leader of my Nation, or to decide who is going to be the next leader of my Tribal Nation. Furthermore, I have the right to know who my family and Nation is, and to enjoy the liberty and right to be with them."

There are very few reported cases addressing these issues, including the *Baby Girl* case. ■

1. This best interest of the child standard is primarily case-law driven and is passively included in some N.Y. statutes. *See* N.Y. Social Services Law §§ 358-a, 384-b (SSL).

2. We will use the term "Indian child" as it is that term is the one used in many legal documents (laws, regulations, decisions, etc.).

3. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 [1831]; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 [1832]; *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 [1823].

4. *See* Indian Affairs Laws and Treaties Vol. II (Compiled and edited by Charles J. Kappler, Wash. GPO 1904).

5. *See United States v. Mazurie*, 419 U.S. 544 (1975) "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and territory. They are a separate people possessing the power of regulating their internal and social relations." (citation omitted) (citing *United States v. Kagama*, 118 U.S. 375 (1886); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

6. We use "citizen" and "member" interchangeably, as many Tribal Nations vary in their use of the terms.

7. *See* 25 U.S.C. §§ 1901 *et seq.*

8. It should be noted that this care is portable. Thus, by being a citizen of a Tribal Nation any Indian child will have access to this care at any I.H.S. facility (e.g., a St. Regis Mohawk child can receive care at the Seneca Nation I.H.S. facility, and vice versa).

9. *See generally* 8 U.S.C. § 1359 codifying this right. See also the cases decided under it.

10. It is interesting to note that on the International level this sense of belonging is an actual right for children. *See* United Nations "Convention on the Rights of the Child."

Provisions from the UN "Convention on the Rights of the Child" include:

> 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without lawful interference.
>
> 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.
>
> 3. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
>
> 4. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

Please also note that currently the United States is *not* a signatory to this convention.

11. Similarly, ICWA does not require any domicile/residency on an Indian reservation for it to apply. *See Mississippi Band of Chocktaw Indians v. Holyfield*, 490 U.S. 30 (1989).

12. *See United States v. Mazurie*, 419 U.S. 544 (1975): "Cases such as [*Worcester* and *Kagama*] surely establish the proposition that Indian tribes within 'Indian Country' are a good deal more that 'private voluntary organizations.'"

13. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Patterson v. Council of Seneca Nation*, 245 N.Y. 433 (1927).

14. "The Congress declares that it is the policy of this Nation to protect the *best interests* of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing assistance to Indian tribes in the operation of child and family service programs." *See* ICWA at 25 U.S.C. § 1902.

15. Mandated remedial services efforts are supposed to be provided prior to removal, and active efforts to re-unite are required, and certain evidentiary standards must be met to break up an Indian family. *See* ICWA § 1912(d), (e), (f).

16. Notice requirement to Tribal Nations, intervention right for Tribal Nations, placement selection right for Tribal Nations, and full faith and credit for Tribal Nation acts, orders, judgments. *See* ICWA § 1911, § 1912.

17. *See* ICWA at § 1901.

18. *See* 18 U.S.C. § 1162; 25 U.S.C. §§ 1321–1326; 28 U.S.C. § 1360.

19. We must also note that although the purported purpose of PL 280 and 25 U.S.C. § 233 are similar with respect to civil jurisdiction transfer, they are separate statutes. Wherein, PL 280 is more exacting in the forms of civil jurisdiction which were transferred from federal to state government and 25 U.S.C. § 233 is more akin to a choice of forum statute.

20. In New York these are the Shinnecock and Unkechaug on Long Island; Oneida, Onondaga and Cayuga in Central New York; St. Regis Mohawk in Northern New York; and Seneca, Tonawanda and Tuscarora in Western New York.

21. Washington has become the first state to ratify legislation in which a Tribal Nation can seek retrocession of state jurisdiction. *See* Washington State Statutes, Indians and Indian Lands – Jurisdiction, Chap. 37.12.160 (2012); *Governor Signs Tribal Retrocession Bill Into Law*, Seattle Times, Mar. 19, 2012.

22. *See* Washington Statute Indian Child Welfare Act Chapt. 13.38, 13.38.040 (2011). *See also* Wisconsin Laws Ref. § 48.01(2); § 938.01(3), which provide that: "when an out-of-home care placement, adoptive placement, or pre-adoptive placement is necessary, *placing an Indian child in a placement* that reflects the unique values of the Indian child's tribal culture and that is *best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child's tribe and tribal community.*" (emphasis added).

23. In 1999, Minnesota passed the Minnesota Indian Family Preservation Act (MIFPA Minnesota Laws 260.751). This Act contains many of the provisions contained in ICWA. Interestingly though, in 2007 Minnesota entered into a comprehensive child welfare "Tribal/State Agreement, February 22, 2007" with many Tribal Nations there.

24. See 2007 Minnesota-Tribal Nation Social Service Agreement:

> The purpose of this Agreement is to protect the long term best interests, as defined by the tribes, of Indian children and their families, by maintaining the integrity of the Tribal family, extended family, and the Child's Tribal relationship. The best interests of Indian children are inherently tied to the concept of belonging. Belonging can only be realized for Indian children by recognition of the values and ways of life of the child's Tribe and support of the strengths inherent in the social and cultural standards of tribal family systems. Family preservation shall be the intended purpose and outcome of these efforts. See "Tribal/State Agreement" at 2, 3.
>
> The State recognizes its responsibilities to protect Indian children as required by the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act and the clear intent of those laws to protect and Indian child's sense of belonging to family and tribe. The State further recognizes that executing these responsibilities will require collaboration with the tribes and the use of the guidance, resources and participation of a child's tribe." *Id.* at 3.
>
> "The parties recognize that the necessary understanding of an individual tribe's history, religion, values, mores, and child rearing practices is best *obtained from each tribe*. . . . *Id.* at 4.
>
> The Best Interests of an Indian Child" means compliance with and recognition of the importance and immediacy of family preservation, using Tribal ways and strengths to preserve and maintain an Indian child's family. The *best interests of an Indian child* will support the child's sense of belonging to family, extended family, clan and Tribe. Best interests must be informed by an understanding of the damage that is suffered by Indian children if family and child tribal identity and contact are denied. . . . *Id.* at 11.

25. *See* Minnesota Dep't of Human Services Bulletin #07-68-08.

26. *See* N.Y. Uniform Rules for the Family Court § 205.51 (Family Court), and § 202.68 (Supreme and County Court). Note that there is some debate as to whether this applies to ALL proceedings touching upon custody determinations (e.g. Matrimonial, Juvenile Delinquency, and Persons in Need of Supervision) or is it limited to just proceedings where ICWA specifically applies (e.g., TPR, Foster Care, Pre-Adoptive, and Adoptive placements).

27. *See* SSL § 39.

28. *See* SSL § 153(1)(f)(4).

29. *See* Wisc. Ref. § 48.02; § 938.00, 938.13 (making provisions applicable to these adolescent proceedings).

30. *See Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2572 (2013) (emphasis added).

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Adoptive Couple v. Baby Girl

A Summary

By Carrie E. Garrow and Michelle E. Hollebeke

On June 25, 2013, the U.S. Supreme Court handed down its decision in *Adoptive Couple v. Baby Girl*, only the second decision interpreting the Indian Child Welfare Act. The Court, by a 5-4 majority, held the Act did not bar the termination of the Indian father's paternal rights.

The Facts

Baby Girl's non-Indian mother and Cherokee father were engaged one month prior to the pregnancy. The father attempted to move up the wedding date, but the mother refused. The couple's relationship deteriorated and the engagement was broken off. Prior to the birth of Baby Girl, the mother sent the father a text message asking if he would rather pay child support or relinquish his parental rights. He responded, indicating that he relinquished his rights. The mother decided to put the baby up for adoption without informing the father. She and her attorney arranged a private adoption with a couple in South Carolina. The attorney contacted the Cherokee Nation regarding Biological Father's citizenship in the Nation, misspelling his first name and erroneously indicating his date of birth (despite the mother having known the father since she was 14). The Nation was unable to identify the father with the information given.

With the help of an adoption agency, the mother found Adoptive Couple, who supported the mother throughout her pregnancy. Baby Girl was placed with Adoptive Couple at birth, and an adoption petition was filed a few days later. Biological Father had no contact with the mother or Baby Girl throughout the pregnancy or after Baby Girl's birth. The father was served with the adoption petition by a process server and he signed the papers. Biological Father believed he was signing his parental rights to the birth mother and did not know Baby Girl had been placed for adoption. He later testified that if he had known about the adoption, he would not have relinquished his rights. When he discovered this was not the case, he retained an attorney, filed a challenge to the adoption and for custody, and sought a stay of the proceedings as he was being deployed to Iraq.

Procedural History

The South Carolina Family Court denied Adoptive Couple's petition for adoption because they had not proven that Baby Girl would suffer serious emotional or physical damage if Biological Father was awarded custody, as is required by § 1912(f) of the Indian Child Welfare Act (ICWA).[1] On appeal, the South Carolina Supreme Court affirmed the Family Court's ruling and also held that Adoptive Couple had not shown that efforts to provide remedial services and programs designed to prevent the breakup of the Indian family had been made, as per § 1912(d) of the ICWA.

The Supreme Court's Majority Opinion

In his majority opinion, Justice Samuel Alito first assumed that Biological Father is a "parent" as defined by the ICWA.[2] The Court then focused on the provisions of ICWA §§ 1912(f) and (d) and 1915(a). ICWA § 1912(f) requires "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." The Court stated that the word "continued" indicates a pre-existing state and, therefore, "continued custody" refers to custody that the parent already has. According to the Court, since Biological Father never had pre-existing custody, § 1912(f) does not apply to him. Examining ICWA's purpose, the Court reasoned that since the goal of the ICWA was to counteract unwarranted removal of Indian children from intact Indian families, this situation does not fail to achieve this goal as the Indian child's adoption is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights. A finding of serious emotional or physical damage to the child, the Court reasoned, can be found only where there is a pre-existing, physical custody that can be evaluated. For these reasons, the Court found that § 1912(f) does not bar termination of Biological Father's parental rights.

Section 1912(d) requires that any party seeking to terminate an Indian parent's rights make active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to prove that these efforts were unsuccessful. The Court found that since Biological Father had relinquished his parental rights prior to the birth of Baby Girl, there would be no relationship to terminate, and the breakup of the Indian family had long since occurred, making § 1912(d) inapplicable in this case. The Court noted, "[I]f prospective adoptive parents were required to engage in the bizarre undertaking of 'stimulat[ing]' a biological father's 'desire to be a parent,' it would surely dissuade some of them from seeking to adopt Indian children."[3]

Last, the Court turned to § 1915(a) of the ICWA, relating to the placement preferences for adoption of Indian children. Preference is to be given, in the absence of good cause, to a member of the child's extended family, other members of the Indian child's family, or other Indian families. The Court reasoned that this section was inapplicable in this instance because no alternative party had formally sought to adopt Baby Girl. Since Biological Father, another Indian guardian, or the Cherokee Nation did not attempt to adopt Baby Girl, § 1915(a) of the ICWA did not apply here to protect the interests of the biological father.

Concurring Opinions

In his concurring opinion, Justice Clarence Thomas approached the case through a lens of constitutional avoidance. The ICWA asserts that the Indian Commerce Clause gives Congress plenary power over Indian affairs. Since the case concerns a contested state-court adoption proceeding, a subject matter typically reserved for the states, the Indian Commerce Clause, which covers commercial interactions with tribes, does not allow Congress to override the jurisdiction of the states. Likewise, Congress's sole power to manage affairs with the Indians applies only where states do not exercise jurisdiction. From his reading of the Constitution, Thomas concluded that "the ratifiers of the Constitution understood the Indian Commerce Clause to confer [nothing] resembling plenary power over Indian affairs."[4]

Thomas went on to note that placement of Indian children in non-Indian homes has nothing to do with commerce, the power that Congress holds over Indian affairs. With respect to this, "[n]othing in the Indian Commerce Clause permits Congress to enact special laws applicable to Birth Father merely because of his status as an Indian."[5] Since the Constitution does not allow Congress to override state law, application of the ICWA would be unconstitutional in these proceedings. But since the majority opinion avoids application of ICWA, he concurred with its decision.

Justice Stephen Breyer's concurrence set forth three observations. "First, the statute does not directly explain how to treat an absentee Indian father who had next-to-no involvement with his child in the first few months of her life."[6] Next, Breyer said that the Court should not decide any more than is necessary, namely the application of the ICWA to fathers in differing circumstances from Biological Father. Last, he noted that "other statutory provisions not now before us may nonetheless prove relevant in cases of this kind."[7]

Dissenting Opinions

Justice Antonin Scalia's dissent rejected the Court's interpretation of the word "continued" within the context of the ICWA. Scalia maintained that "continued custody" should refer to custody in the future, since under the ICWA, the determination needs to be made while considering if the Indian child will suffer emotional or

physical harm with continued custody. By finding this, Scalia believed the Court should "respect the entitlement of those who bring a child into the world to raise that child."[8] Since Biological Father wants to raise his daughter, the statute should protect his right to do so in this instance.

Justice Sonia Sotomayor's dissent took issue with the majority's neglect of the ICWA's purpose and, thus, its narrow interpretations of the Act's provisions. She argued that the majority's opinion has force only when a birth father has had physical or recognized custody of the Indian child, thus going against Congress's intent in enacting the statute. First, she pointed out, the ICWA defines "parent" broadly, thus qualifying Biological Father as a parent. Since ICWA provides uniform federal standards, applying this broad definition over a narrow, state-constructed one serves the ICWA's purpose. Second, the ICWA deals with all child custody proceedings, including termination of parental rights and, therefore, Biological Father is protected by the Act. To this end, the voluntary consent Biological Father gave to Baby Girl's adoption must be in writing and executed before a judge in order to be valid. Likewise, he had the right to revoke the consent until the final decree of adoption was granted. Additionally, Biological Father had the right to be at the proceeding that terminated his parental rights. Since these protections of the ICWA were not afforded to Biological Father, the majority applies the ICWA only to a specific subset of parents, namely, those who have had physical custody of their child. Another point Sotomayor raised is that the parent-child relationship should be preserved if possible; however, the Court found that the relationship between Biological Father and Baby Girl did not rise to the level of warranting the effort to preserve it. Although the Court was willing to assume that Biological Father was a parent under the ICWA, the Court neglected to provide him the protections he deserved with respect to the custody proceedings relating to Baby Girl.

Another of Sotomayor's criticisms dealt with the patchwork effect that the outcome has on application of the ICWA. She noted that Congress's intent surely was not to use state law to interpret the ICWA because that would lead to it being applied differently based on where a child custody proceeding took place. With respect to making efforts to preserve the relationship between Biological Father and Baby Girl, required by § 1912(d), Sotomayor noted that this provision of the ICWA does not require Adoptive Couple to affirmatively act but, rather, just to show that such efforts have taken place. That being said, the Family Court found that Biological Father was a fit and proper person to take custody of Baby Girl; therefore, no rehabilitation would be needed. Although the laws protecting a biological father's parental rights may lead to harsh outcomes, "these rules recognize that biological fathers have a valid interest in a relationship with their child."[9] Sotomayor noted that the majority is concerned about their result interfering with the adoption of Indian children; however, the manner in which the Court interprets the ICWA goes against the wishes and aims of Congress in enacting it. Since Congress created the statute to sweep broadly, the Court cannot go against the construction that Congress enacted in the ICWA. Sotomayor also criticized the majority for its questioning the membership of Baby Girl in the Cherokee Nation, pointing out that it is not for Congress or the Court to tamper with the membership laws of the Nations, because that would raise unnecessary constitutional issues. Sotomayor concluded by saying that if Baby Girl's paternal grandparents or another member of the tribe seek adoption, they will be given the preference established in § 1915 of the ICWA because, as an Indian child, Baby Girl is undoubtedly protected by the Act. ■

1. 25 U.S.C. §§ 1901 *et seq.*
2. 25 U.S.C. § 1903(9).
3. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563–64 (2013).
4. *Id.* at 2569.
5. *Id.* at 2570.
6. *Id.* at 2571.
7. *Id.*
8. *Id.* at 2572.
9. *Id.* at 2582.

Hon. Lizbeth González is an Acting Supreme Court Justice presiding in Bronx County; she was appointed to the NYC Housing Court in 2005, elected to the NYC Civil Court in 2005, appointed to the NYC Family Court from 2010 – 2011 and thereafter appointed to the NYS Supreme Court in 2011. She received her B.A. from Stony Brook University and her J.D. from New York University School of Law. She is a member of the NYSBA Judicial Section's Diversity Committee, past president of Network of Bar Leaders and immediate past president of the Association of Judges of Hispanic Heritage. Justice González thanks the American Indian Community House, American Indian Law Alliance, fellow "Team ICWA" members Judge P.J. Herne, Judge Carrie Garrow and Judge Sharon Townsend, in addition to the other Nation representatives and Judges who comprise the New York State Federal-State-Tribal Courts and Indian Nations Justice Forum, for their hard work on behalf of Native Peoples.

The Real Meaning of ICWA Noncompliance

By Hon. Lizbeth González

During my tenure as Director of Legal Services of the American Indian Law Alliance, then located at the American Indian Community House in Manhattan, I represented several expatriated Native young adults. Their protracted attempts to reunite with their people had been remarkably unsuccessful; my work on their behalf was difficult, but our combined efforts were ultimately rewarded. Below are the stories of two people who were removed from their families at a young age and who eventually found them. I didn't represent Larry Ahenakew or Susanne (Bone) Vander Laan, but I am honored to have interviewed them and to share their stories.

Larry Ahenakew (Cree)

I currently live in New Windsor, New York, and work as a computer software analyst for the New York City Office of Payroll Administration. My father's people are the Ahtahkakoop Cree in Saskatchewan, Canada; my mother's people are the Rocky Boy Chippewa in Montana. My family lived in Great Falls, Montana. According to Cree tradition, the maternal grandmother raises the oldest boy of the family. When I was about 3½ years old, Social Services took me from my grandmother while I was eating breakfast and placed me in a black car. This is my very first memory. My siblings were removed from our mother's home. My younger sister Yvette and I were adopted by the last foster family with which we were placed in New York; my brother Tracy was placed elsewhere by the same New York City agency; and Paul and Heather were adopted by another foster family in Montana. When I was finally reunited as an adult with my siblings, mom, grandmother and aunties, they told me that Social Services didn't believe that I was properly cared for. I don't remember my grandmother as feeble or incapacitated.

At some point during the year that I lived in my first foster home, I was told that I was going on a plane trip to be with another family. A Social Services worker accompanied me and my sister Yvette to Idlewild Airport (now Kennedy International Airport). I believe that I was adopted when I was seven or eight. I knew I was Native American but I didn't know which Nation or tribe. I knew I was different growing up in Newburgh, which had a large African American and a small Hispanic population at the time. I might have looked somewhat like a Hispanic kid, but I struggled with self-esteem. Back then, I felt uncomfortable. We didn't have TV in Montana, but there was TV in New York, and no one looked like me. Kids said that if I washed myself with soap I could become white, so I would scrub myself but I didn't become white.

It was only as a young adult that I learned that other Native Americans and Native Canadians were similarly adopted and living in New York like me. I met them at the American Indian Community House (AICH) in New York City; most of them came from the West, Southwest and Canada – Lakota, Dakota, Pima, Diné – not from the East Coast. There was such a sense of being removed; all of us kids felt that we had no identity growing up.

I didn't find my birth family until I was much older. My adoptive parents recalled that my mother was Chippewa and that I was born in Great Falls but the Chippewa inhabit three different regions. Books were my only association: at the library I read books by Vine Deloria and books about Native history. I left my adoptive parents when I was 18, angry and self-destructive. I called Spence-Chapin and made an appointment there with an adoption specialist who over time provided cookie-cutter information. She eventually told me that she could facilitate my enrollment with the Chippewa Cree Tribe of Rocky Boy, Montana. I learned that my dad was working in Montana and returned to Saskatchewan shortly after I was born. My dad's family kept current on my situation and tried to get me placed in Canada but they were denied. By the time that I made contact with my dad's family, my dad had passed away.

I always wanted to go home and belong to my own people, values and traditions. I always had a sense of longing. For a long time I was angry at my adoptive family which honored military traditions, kept my hair short and brought me to church. When I was arrested for DWI, someone at the Department of Sanitation said that the AICH provided alcohol counseling, so I searched in the phone book. The City adjusted my schedule since I had to go to AA meetings at the Community House for a year and serve 26 weekends in the Ulster County Jail. Being steered by my counselor to a group of similarly adopted Native kids who met at AICH changed things for me. Some knew the circumstances of their adoption; others didn't. I was able to turn things around; some kids died of alcoholism, drug overdoses and suicide. We stay in touch. We all know adoptees that didn't make it.

Things are much better with my adoptive parents: now we can agree to disagree. The best thing after meeting my wife and getting married was finally meeting my family when I was 31 years old. We went to my mom's reservation – me, my wife and our children. My family said I had a really good grasp of Cree and English when I was removed but I couldn't speak Cree with my grandmother at the reunion. Reuniting with my family gives my kids aunties and uncles. I can give them what I didn't have.

My aunties told me that my grandmother had vowed not to pass away until she found me. My grandmother asked me to recognize my father by changing my name legally. It was a lot of work to add my father on my birth certificate and essentially undo the adoption but I was able to finalize the name change after my grandmother died.

I met my family without the alcohol and drugs that had replaced them. I now practice our traditions. I am reintegrated into our ceremonies and tribal customs. I have a sense of spirituality on a daily basis. I learned that one of my uncles is a medicine man. When we first returned, he woke me and my brother for a morning sweat at sunrise. It was incredible. At that moment I knew that I would always follow the Red Road and be okay. I was going to make it.

Susanne (Bone) Vander Laan (Ojibway)

I met and worked with Larry at the American Indian Community House; like others in our group we were adopted by non-Native families. My parent's people are from the Keeseekoownenin Ojibway First Nation, a reservation two hours southwest of Winnipeg. My mother kept my oldest sister although my grandmother raised her. My brother Patrick was adopted by a New Jersey family and I was adopted when I was five years old. I was raised in an upper-middle-class non-Native neighborhood. I was constantly reminded by people that I would likely end up just another "dirty Indian," so at age five, I tried to scrub myself clean. I hated being brown. Although I was afraid of drinking, being on welfare and having kids, I started drinking at 11, detoxed when I was 12 and finally became sober by age 17. In Canada, they allow us to open adoption records at age 18 and contact our birth family if they agree. I found my family when I was 18; I started looking for my brother and found him when I was 20 years old. After talking and writing and getting to know each other, Patrick traveled to Canada to meet me. I was already sober; he was 21 years old, angry and confused. Growing up, I saw Native people in the poor part of town; he had no connection to Indian people in New Jersey and had tried to run away to find me.

I took Patrick to our Ojibway reservation because his adopted family said he was out of control. I wasn't going to give up on him – I always kept looking for him and he did for me. One afternoon, we took a canoe out on the lake. My brother kept rocking the boat. It tipped over and he drowned. Eleven days after meeting my brother, I returned his body to New Jersey. I now live in New Jersey, too. Foster care robs you of being who you are so I turned to our traditions and work extensively in the Native community in the area of substance abuse. I'm also a writer and use that as a source of strength and empowerment. I wrote a screenplay about healing. Knowing your history helps deal with wounds, and who we are, and who we don't have to be. This need to connect brings you home. ■

Hon. Lizbeth González is an Acting Supreme Court Justice presiding in Bronx County; she was appointed to the NYC Housing Court in 2005, elected to the NYC Civil Court in 2005, appointed to the NYC Family Court from 2010–2011 and thereafter appointed to the NYS Supreme Court in 2011. She received her B.A. from Stony Brook University and her J.D. from New York University School of Law. She is a member of the NYSBA Judicial Section's Diversity Committee, past president of Network of Bar Leaders and immediate past president of the Association of Judges of Hispanic Heritage. Justice González thanks the American Indian Community House, American Indian Law Alliance, fellow "Team ICWA" members Judge P.J. Herne, Judge Carrie Garrow and Judge Sharon Townsend, in addition to the other Nation representatives and Judges who comprise the New York State Federal-State-Tribal Courts and Indian Nations Justice Forum, for their hard work on behalf of Native Peoples.

Hon. Sharon S. Townsend is Vice Dean for Family and Matrimonial Law of the New York State Judicial Institute and is a Justice of the New York State Supreme Court in the Eighth Judicial District. Justice Townsend was elected to the New York State Supreme Court in November 2003. She previously served as an elected Erie County Family Court Judge from 1992 through 2003. Justice Townsend received a B.A. from the University of Rochester and J.D. from the University of Connecticut School of Law. Justice Townsend has been a Lead Judge and member of the National Council of Juvenile and Family Court Judges and a member of the New York State Federal-State Tribal Forum where she has been involved in leading national and state-wide policy and practice reform in child welfare and ICWA.

The Teach ICWA Initiative

An Action Plan

By Hon. Lizbeth González and Hon. Sharon S. Townsend

Indian Child Welfare Act compliance protects Native traditions and families; noncompliance can have far-reaching and even tragic consequences. Consider these suggestions so you can play a greater role in increasing ICWA compliance within your local, state and national community:

1. Interview your client to determine whether any party in a custody action or foster care matter (or the child) is Native American. Don't rely on physical appearances. Develop a family tree that includes the maternal branches of your client's family, identifying their mother and grandmother by maiden name. Identify the individual Native nation(s) for each family member where possible.
2. In each case where your client identifies a tribal connection, contact Native American Services at NYS Office of Children and Family Services (716-847-3123) for help. Click http://ocfs.state.ny.us/main/nas/ to access a model Tribal Notification Letter (where the Nation/tribal affiliation is known) and draft Notification Letter to the Secretary of the Interior (where the information is incomplete). The PDF version of the ICWA Compliance Desk Aid is an excellent resource.
3. Organize a speaker or CLE in your region or community to provide ICWA information to other attorneys and judges in your community in order to change the culture to emphasize the importance of ICWA compliance in every case. The New York Federal-State-Tribal Courts and Indian Nations Justice Forum can help you access resources and speakers. You can contact us at TeachICWA@nycourts.gov.
4. Use every opportunity to foment ICWA awareness when you speak with colleagues and fellow practitioners.
5. Lobby your local law school or alma mater to include an expanded ICWA curriculum in all family law classes and clinics.

Who We Are

There are nine recognized Native American nations in New York State: Cayuga, Oneida, Onondaga, St. Regis Mohawk, Seneca, Tonawanda, Tuscarora, Shinnecock and Unkechaug. The New York Federal-State-Tribal Courts and Indian Nations Justice Forum seeks to promote understanding and reduce jurisdictional conflicts by bringing together representatives from the New York state courts, federal courts and Indigenous Nations, including chiefs, judges and clan mothers.

Most Native Americans live outside their nation-territories in both rural and urban areas, with an estimated 52,000 Native persons living in New York City and on Long Island. In the 1980s, the Conference of Chief Justices launched a national project to encourage conversation and cooperation among the various state, federal and Native adjudicatory systems. To this end, then-New York State Chief Judge Judith Kaye and Chief Judge John Walker of the U.S. Court of Appeals for the Second Circuit established the Tribal Courts Committee of the Unified Court System in 2003, chaired by Supreme Court Justices Marcy Kahn and Edward Davidowitz (now retired), to "explore ways in which the state, federal and tribal court systems can work to improve our understanding of one another's justice systems and establish better ways of sharing information."

In keeping with this mandate, the Tribal Courts Committee helped establish the New York Federal-State-Tribal Courts and Indian Nations Justice Forum. During the course of our existence, the Forum has worked on many issues, including the recognition of domestic protection orders issued by Native courts and adjudicatory systems; recognition of marriages solemnized by officiants designated by Native nations; reauthorization of the Violence Against Women Act, which extends new protections to Native American women by empowering Native authorities to prosecute non-Natives for abuses committed on tribal lands; and expansion of ICWA awareness through training for New York state court judges and family law practitioners. ■

Auqui v. Seven Thirty One Limited Partnership

An Update on Preclusion Issues in Work-Related Injury Cases

By Ralph M. Kirk and Justin S. Teff

It is not often that an otherwise innocuous personal injury case, while en route through the courts, gathers the attention and participation of a diverse array of statewide legal organizations. Rarer still is it that the N.Y. Court of Appeals will unanimously reverse itself upon the rehearing of an appeal. Yet both may be said of *Auqui v. Seven Thirty One Limited Partnership*.[1]

Because a single work injury can give rise to multiple legal claims in various forums, consideration must always be given to the possible preclusion issues that can arise by virtue of the interplay between these claims. *Auqui* addressed the novel but important question of whether a Workers' Compensation Board (the Board) finding regarding a claimant's period of causally related disability and need for medical care could have collateral estoppel effect in a state court third-party action. Ultimately the Court decided, to the great relief of injured workers, that there is no identity of issue between the Board's determination and the inquiry in the state court context. This article surveys the *Auqui* case as well as several other notable estoppel and election situations that can arise in the context of work-related injuries.

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Justin S. Teff is a partner at Kirk & Teff, LLP. Mr. Teff obtained his law degree from Albany Law School in 2001. He is second vice president of the New York Injured Workers Bar Association and has lectured on workers' compensation subjects throughout New York State.

Collateral Estoppel and Administrative Findings: The *Auqui* Dilemma

The familiar principle of collateral estoppel, also known as "issue preclusion," is a more particular form of the res judicata (or "claim preclusion") doctrine that precludes relitigation in a subsequent action of distinct facts and issues that have already been decided in a prior proceeding.[2] New York courts have long held that, in general, findings made by administrative agencies, such as the Workers' Compensation Board, may be accorded estoppel effect in subsequent proceedings, including state court actions.[3]

Because a single work injury can give rise to multiple legal claims in various forums, consideration must always be given to the possible preclusion issues that can arise.

Issue preclusion may be invoked only against a party (or one in privity with a party) to the prior proceeding.[4] Beyond this there are two requirements. First, there must be a true "identity of issue" between a determination necessarily made in the prior action and the point sought to be relitigated in the later proceeding.[5] Second, the party against whom estoppel is to be applied must have had a "full and fair opportunity" to litigate the issue in the first action.[6]

The identity of issue inquiry can be especially troublesome in the administrative context, as manifest in *Auqui*. In terms of procedure, agencies with an adjudicative function hold trial hearings and render findings of fact and/or law, similar to courts, in furtherance of ascertaining the substantial rights of the parties. Yet because each agency is generally set up for a particular purpose, with an individualized enabling statute and unique legal definitions and regulations, some of these findings may contain elements or factors that vary from what might be the same nominal conclusion in a different context. A fair question thus arises as to which agency findings can properly be accorded estoppel effect.

To assist in resolving this identity of issue dilemma, the courts fashioned a legal distinction between two types of agency determinations. Specifically, an agency's finding as to a pure or "evidentiary" fact is entitled to preclusive effect, but an agency's "final conclusion, characterized as an ultimate fact or mixed question of fact and law," will not be given estoppel effect.[7] For example, courts have given estoppel effect to factual findings of the Board: (1) that the plaintiff was standing on the ground, not a ladder, when he fell;[8] (2) as to the status of the general contractor on the job site;[9] (3) that the plaintiff failed to demonstrate that the injuries were the result of a fall from a ladder;[10] and (4) as to the validity of an insurance policy exclusion.[11] In contrast, a finding relative to employer-employee relationship has been deemed an ultimate fact/conclusion and, in and of itself, not entitled to preclusive effect.[12] While the distinction is often reasonably apparent, there is no set test to ascertain which agency findings are evidentiary and which are ultimate.

Determinations regarding disability and medical care arguably present a unique situation in workers' compensation, by virtue of the fact that compensation claims exist for the life of the claimant, absent a final settlement, and the Board has continuing jurisdiction to determine issues on an ongoing basis.[13] Although the Board does make findings regarding disability and medical care that can reasonably be considered final, it still retains continuing jurisdiction in most instances to modify prior findings or make additional findings of change in condition or further disability. Moreover, during any period of causally related wage loss, a compensation claimant's level of disability (and hence rate of ongoing payment) may fluctuate numerous times, either by operation of law, stipulation, or litigation. Prior to *Auqui*, no court had squarely addressed whether preclusive effect could be given in a state court action to workers' compensation findings relative to disability and need for medical care.

The *Auqui* Case

Jose Verdugo was injured on December 24, 2003, while in the course of his employment as a food service deliveryman, when he was struck by a sheet of plywood that fell from a nearby building under construction.[14] Mr. Verdugo commenced a workers' compensation claim, as well as a state court third-party action against several parties, including the building owner Seven Thirty One Limited Partnership.[15] After litigation in the compensation claim, a Workers' Compensation Law Judge (WCLJ) found that the claimant had no further causally related disability or need for medical treatment after January 24, 2006.[16] The WCLJ decision was affirmed by the Board on appeal.[17]

The defendants in the third-party negligence action thereafter moved to preclude the plaintiff from rearguing the issue of causally related disability beyond January 24, 2006, contending that collateral estoppel should apply to the Board's determination.[18] The supreme court granted the motion.[19]

The Appellate Division reversed in a 3-2 decision.[20] The majority noted the legal distinction between administrative findings of pure evidentiary fact and ultimate fact, and held the Board's finding relative to causally related disability to be of the latter type, not entitled to preclusive effect.[21] The dissent argued that the duration of the claimant's disability was a matter of pure eviden-

tiary fact, decided after a trial of conflicting medical and other evidence, and the Board's finding should bind the plaintiff in the state court action.[22]

The Court of Appeals handed down its initial decision in *Auqui* on February 14, 2013.[23] The Court reiterated the legal principle relative to pure findings of fact versus ultimate conclusions of fact and law, and determined without extended discussion that the Board's finding should be given preclusive effect.[24] The Court noted only, "The issue of continuing benefits before the administrative agency necessarily turned upon whether Jose Verdugo had an ongoing disability after a certain date, which is a question of fact, as distinguished from a legal conclusion and a conclusion of mixed law and fact."[25] Judge Pigott authored a lone dissenting opinion, explaining that in his estimation the issue of disability, as determined by the Board, was a mixed question of fact and law.[26]

Following the Court's February decision, the plaintiff submitted a motion for reargument. Numerous amicus briefs from various statewide legal organizations were submitted to the Court in support of the motion (as well as ultimately in support of reversal).[27] On June 27, 2013, in a relatively rare decision, the Court of Appeals granted the plaintiff's motion and continued the case for further proceedings.[28] The Court heard additional argument on November 12, 2013.

As an aside, during the pendency of the appeals the Assembly passed a bill to amend § 11 of the Workers' Compensation Law (WCL) as follows: "Determinations by the board as to cause of injury, degree of disability, lost earnings, need for future medical care, and/or permanency of injury shall not be given preclusive effect in any other forum, court or proceeding."[29] The Senate did not pass a companion bill.

On December 10, 2013, the Court of Appeals held unanimously that the Board's findings regarding disability and medical care were not entitled to collateral estoppel effect in the state court action, as no identity of issue existed.[30] The Court took particular note of the differences between the inquiries in each context, explaining that the workers' compensation system is concerned primarily with a claimant's ongoing ability to work, whereas the state court must assess in a single determination the cumulative effects of the occurrence on the claimant's entire life.[31] The Court likened this conceptual distinction to one it had propounded in *Bissell v. Town of Amherst*,[32] where the Court had also noted the distinction between a jury's one-time assessment of damages and the Board's lifetime continuing jurisdiction over a claim.[33] Importantly, the Court stated in closing: "We stress that this holding should not be read to impair the general rule that the determinations of administrative agencies are entitled to collateral estoppel effect. . . . That rule is well-settled and should continue to be applied where, unlike here, there is identity of issue between the prior administrative proceeding and the subsequent litigation."[34]

The Court's ultimate decision provides substantial relief to injured workers and their counsel. Given the perpetual nature of disability and medical findings in workers' compensation, whether from litigation, stipulation, or operation of law, the threat of collateral estoppel could have, as in other areas of law, a dramatic chilling effect on a worker's pursuit of the compensation remedy. In light of the remedial and humanitarian nature of the compensation scheme, its primary purpose being to prevent injured workers from sinking into destitution in the aftermath of injury, the removal of the preclusion threat in this context is sound public policy.

Election of Remedies

Election of remedies can arise in numerous contexts, with authority grounded in common law or statute, usually for the purpose of preventing duplicative or inconsistent recovery. Relative to work injuries, election issues tend to appear in connection with a few distinct scenarios, which will be explored below. Some overlap occurs with the doctrines of res judicata and judicial estoppel, but the concepts can fairly be explored together, as the practical effect in all instances is the possibility of preclusion regarding other claims.

Uninsured Employer

For injuries arising out of and in the course of employment, workers' compensation coverage is, subject to limited exception, the injured employee's exclusive remedy as against his or her employer or co-employees, and the worker is strictly prohibited from direct civil suit against either. The primary exception to the exclusive liability rule, relative to the employer (but not co-employees), involves situations in which the employer has failed to secure compensation insurance as required by the WCL.[35] In such cases, WCL § 11 provides that the employee "may, at his or her option, elect to claim compensation . . . or to maintain an action in the courts for damages on account of such injury," in which the employer is barred from pleading certain key defenses. The claimant may institute both claims simultaneously, but the election is deemed effectuated either by actual acceptance of benefits in the compensation claim or successful conclusion of the civil action by settlement or judgment.[36] As will be explored below, the claimant will be permitted, in most instances, to return to the compensation forum if the civil action proves unsuccessful.

Intentional Torts

Another exception to the exclusivity doctrine involves intentional torts committed by an employer or co-employee. In such cases, neither the employer[37] nor a claimant's co-employees[38] are immune from direct civil liability. However, the Court of Appeals has drawn a distinction between the employer and co-employee as to whether, in essence, an election is required. Here a

finding by the Board that the injury is compensable (i.e., an accidental injury), or acceptance of compensation benefits, bars a direct action against the employer for intentional tort based upon principles of res judicata and the finality provisions of the WCL.[39] On the other hand, the injured worker need not make an election as to a direct suit against a co-employee, for the reason that "the same acts involving an assault by a coemployee may be accidental as to the employer but intentional as to the coemployee."[40] In the latter situation, double recovery will be prevented by the lien and offset provisions of the compensation law.[41]

It is important to note that, in this context, res judicata will operate to bar a civil action upon either the acceptance of benefits[42] or the Board's finding that the claimant suffered an accidental injury. In *O'Connor v. Midiria*, for instance, the Court of Appeals held the claimant's civil tort action barred by virtue of the Board's finding that her injury was accidental, "even though the employee did not herself apply for or accept benefits. . . ."[43] The Court explained that "a finding by the board that the injury is compensable is, until set aside, a final and conclusive determination which bars an action at law."[44]

Questionable Compensability

While the WCL is emphatic that the employer's liability under the statute shall be "exclusive and in place of any other liability whatsoever . . . ,"[45] a valid compensation claim has several prerequisites, among them the defined elements of employer-employee relationship and accident arising out of and in the course of employment. In cases of questionable WCL compensability, a claimant will often protectively institute or include a direct negligence action against the employer itself. While not a true exception to exclusivity, the case law makes plain that the injured worker will have elected her remedy by successful pursuit of either the compensation claim or the direct civil action.

A leading decision in this area is *Martin v. C.A. Productions Co.*[46] The claimant in *Martin* was employed by C.A. Productions Co. as a dancer in a musical show and was injured while attending a closing night cast party, when he was assaulted by an intoxicated visitor.[47] The claimant filed a compensation claim, which was controverted on the basis that the accident did not arise out of and in the course of his employment.[48] He also filed a personal injury action against several parties, including his employer.[49] The compensation claim was closed pending the outcome of the personal injury lawsuit, which was subsequently settled for $7,500, of which $2,500 was paid on behalf of C.A. Productions Co.[50] The claimant then attempted to reopen his compensation claim.[51]

The Court of Appeals ultimately held the compensation claim barred as a result of the claimant's successful conclusion of his personal injury action.[52] The Court likened the situation to an earlier case, *Russell v. 231 Lexington Avenue Corp.*,[53] in which the element of employer-employee relationship had been in dispute, rather than the element of accident arising out of and in the course of employment, and in which the compensation claim had been similarly precluded.[54] Notably, in addition to an election rationale, the Court utilized a judicial estoppel rationale, explaining that a successful prosecution of the civil action in either case could legitimately proceed only on the basis that there was no employment relationship and no accident arising out of and in the course of employment, and the claimant would not later be permitted to reverse his legal posture.[55]

Martin and cases since have confirmed that the election is binding in this context upon successful conclusion of the direct action against the employer.[56] The *Martin* decision also suggests that an election is effectuated by acceptance of workers' compensation benefits.[57]

Jones Act and FELA Claims

The Jones Act[58] and the Federal Employers Liability Act (FELA)[59] confer upon certain injured seamen and interstate railway workers, respectively, a right to maintain a civil negligence action against the employer itself for damages resulting from a work-related injury. In contrast to some federal claims, the remedies created pursuant to these statutes do raise important election concerns relative to New York workers' compensation. In this regard, WCL § 113 provides that "in respect of injuries subject to the admiralty or other federal laws," the Board is permitted to make a compensation award only when "the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies." Indeed, the courts have held that in the case of these statutes, "the federal scheme 'covers the field' and provides the *exclusive remedy* for such injuries, therefore precluding the Board from exercising jurisdiction," except in waiver situations.[60] In such cases, the compensation claim cannot proceed absent a waiver of the federal rights, at which time the Board may properly reopen and consider the claim.[61]

However, if the Board does make an initial award of compensation, the courts are equally clear that this fact does not itself bar a claimant from pursuing federal statutory remedies.

In this reverse situation, the courts have held that only an express waiver of the federal remedies, or "an unqualified acceptance of compensation payments over a period of years," will act as a bar to the federal claim.[62]

It has been held that the above provision does not apply to bar WCL benefits in cases of land-based injuries which are also covered under the Longshore and Harbor Workers' Compensation Act (LHWCA),[63] as there exists "concurrent jurisdiction among state workers' compensation laws and the LHWCA"[64] relative to such occurrences.

Unavailable Remedy Exception

At times the injured worker's first choice of compensatory remedy is held legally unavailable, or is otherwise unsuccessful. In such situations, the courts have held that the claimant will not be without recourse, based upon "the well-settled principle that there is no binding election when an employee pursues a remedy which is unavailable."[65]

If the claimant's first resort is to an unsuccessful civil action, the case law makes clear that, given the intended liberality of the compensation law, an injured worker will have wide latitude upon return to the compensation forum. The Third Department has explained that "the remedy of an action at law will be found to have been 'unavailable' in substantially any case where the claimant is unsuccessful in obtaining an award of money damages against the employer."[66] Distinguish, however, the situation where a civil action produces a successful settlement or judgment, which later proves to be uncollectable – here the courts have held that the election has been effected and the compensation claim is precluded.[67]

"Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."

What if the claimant first elects to try his or her lot in the compensation forum, only to discover that this remedy is unavailable for some particular reason? Does the claimant still have the option of a civil court remedy? Certainly if the Workers' Compensation Board makes a finding that the claimant's accident did not arise out of and in the course of employment, or that a particular entity is not the claimant's employer with respect to the occurrence, there should be no exclusivity bar to pursuit of a negligence action against that party/entity.[68] Decisions from *Ryan* to *Auqui* suggest, however, that certain factual findings (i.e., bases for denial) could be deemed to have collateral estoppel effect, which in itself may work to defeat some or all aspects of a proposed civil claim.

Judicial Estoppel (Estoppel Against Inconsistent Positions)

Judicial estoppel, or estoppel against inconsistent positions, is yet another common law doctrine, the purpose of which, plainly put, is to prevent litigants from "playing fast and loose with the courts."[69] The modern rule remains, as expressed by the U.S. Supreme Court in 1895, that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position" in another proceeding.[70] Proper application of the doctrine requires both a separate legal proceeding and a successful outcome therein for the party to be estopped.[71]

The Third Department's 2011 decision in *Kilcer v. Niagara Mohawk Power Corp.*[72] tells a cautionary tale that, like its relatives in the res judicata family, judicial estoppel is equally applicable to the work injury context. The plaintiff in the case, Joseph Kilcer, was employed at a hazardous waste remediation site, and also served as a local volunteer firefighter and a fire investigator with the Columbia County Cause and Origin Team (CCCOT).[73] He began experiencing symptoms associated with toxic brain injury after investigating a fire scene at which he was exposed to smoke over an extended period.[74]

Two compensation claims were initially filed, one against the CCCOT under the Volunteer Firefighters' Benefit Law (VFBL) as a result of the above fire scene, and another against his employer under the WCL, alleging that the toxic brain injuries resulted from inhaling fumes at the toxic remediation site.[75] The claim against the employer was closed for lack of medical evidence.[76] The VFBL claim was ultimately established as compensable, and a finding made that the claimant's injuries arose out of his volunteer activities; the WCLJ declined to apportion the awards between CCCOT and the employer, as the treating physician could not relate any part of the claimant's injury to exposure at the remediation site.[77] The Board affirmed the findings of the WCLJ.

During the pendency of the compensation claims, Kilcer instituted a separate civil action against multiple parties alleging that his toxic brain injury arose from exposure to harmful chemicals at the remediation site (the employer was impleaded on an indemnification theory).[78] On appeal, the court held simply, as to all defendants: "The complaint should be dismissed based upon judicial estoppel."[79] The court noted that the claimant had, at the Compensation Board, argued consistently that his toxic brain injury was the result of exposures at the fire scene, and against any apportionment otherwise.[80] The court explained,

> Now that he has commenced a tort action, he desires to establish that his brain injury was caused by exposure at the remediation site, thereby creating liability against defendants and third-party defendant. The doctrine of judicial estoppel does not permit him to assert this inconsistent position merely because his interests have changed.[81]

Thus, even apart from the obvious dangers of inconsistent evidentiary assertions, *Kilcer* makes plain that the

doctrine of judicial estoppel may work to entirely preclude a subsequent action based upon the outcome of the prior proceeding.

Practical Considerations

A single work injury will often give rise to multiple legal claims in various forums, particularly in situations of long-term disability. For counsel who handle industrial injury and associated claims, preclusion and estoppel issues are of utmost concern at all stages. The claims the injured worker pursues, the evidence adduced in these proceedings, and the findings made in various forums can all pose significant consequences relative to the client's overall recovery and best interests. It is essential that close coordination be undertaken at all times, particularly if the claimant has different counsel handling multiple claims.

In the immediate aftermath of an injury, it is important for counsel to carefully consider and advise the claimant on possible election and preclusion issues that can arise from pursuit of various claims. As noted above, successful pursuit of certain claims (or acceptance of benefits) can constitute a total bar to pursuit of other claims. Coordination should be undertaken to identify all available sources of recovery, assess the viability of various actions and of recovery against various parties (and programs), and create an overall plan designed to maximize compensatory recovery to the injured worker over both the short and long term.

Coordination is critical not only at the outset, but during the pendency of all claims. For one, *Auqui* and like decisions underscore the need to consider collateral estoppel at all times. While determinations as to disability may be safe in this regard, there are numerous other findings the Board (or another agency or arbitrator) can make that could have a potential effect on other actions. Given that compensation claims are ongoing for the life of the claimant, a multitude of issues can arise, including subsequent accidents or conditions. At times it may be advisable to forgo litigation in a particular forum or to stipulate, if possible, to the most beneficial interim resolution of an issue. Whatever course is collectively charted, the client must be fully advised of potential risks and benefits.

Beyond formal estoppel, counsel must consider the consequences of evidence adduced in various forums, even apart from any eventual findings. It is beyond cavil that inconsistent evidentiary submissions must be avoided, another justification for close cooperation among various counsel. This is especially true in multiple accident cases, which are common before the Board, again because of the ongoing nature of the compensation claim.

Yet it may also be observed that certain aspects of compensation proceedings can be of value to the third party action. Often useful evidence, medical and otherwise, is procured (by the claimant or insurance carrier) during the course of the claim. The claim may also assist the third party attorney to evaluate the strength of the claim, the veracity of witnesses, and/or the quality of medical experts. While the Board's findings will not be binding in another forum (except perhaps as against a party to the compensation claim), the persuasive value of such findings, in negotiations, settlement conferences, or even at trial, should not be underestimated. ■

1. 22 N.Y.3d 246 (2013).
2. *See generally* Restatement (Second) of Judgments § 27, *et seq.* (1982).
3. *See, e.g., Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494 (1984); *Brugman v. City of N.Y.*, 64 N.Y.2d 1011 (1985); *Vogel v. Herk El. Co.*, 229 A.D.2d 331 (1st Dep't 1996); *Lee v. Jones*, 230 A.D.2d 435 (3d Dep't), *lv. denied*, 91 N.Y.2d 802 (1997). This subject should be distinguished from those cases referred to the Board by the courts for a determination on employer-employee relationship. *But see Liss v. Trans Auto Sys.*, 68 N.Y.2d 15 (1986).
4. *See Liss,* 68 N.Y.2d 15.
5. *See Schwartz v. Public Administrator*, 24 N.Y.2d 65 (1969).
6. *See id.*
7. *See Auqui v. Seven Thirty One Ltd. P'ship*, 83 A.D.3d 407, 408 (1st Dep't 2011). It should be noted, however, that while the ultimate finding cannot in itself be used as preclusive, the underlying factual findings which constitute the ultimate finding can themselves be given estoppel effect.
8. *See Rigopolous v. Am. Museum of Natural History*, 297 A.D.2d 728 (2d Dep't 2002).
9. *See Singh v. Congregation Bais Avroham K'Krula*, 300 A.D.2d 567 (2d Dep't 2002).
10. *See McRae v. Sears, Roebuck & Co.*, 2 A.D.3d 419 (2d Dep't 2003).
11. *See D'Angelo v. State Ins Fund*, 48 A.D.3d 400 (2d Dep't 2008).
12. *See, e.g., Lee v. Jones*, 230 A.D.2d 435 (3d Dep't), *lv. denied*, 91 N.Y.2d 802 (1997).
13. *See* WCL § 123.
14. *See Auqui*, 222 N.Y.3d 246. Maria Auqui was appointed legal guardian of Jose Verdugo's property, and became a named plaintiff in the case, together with Maria Verdugo, Jose Verdugo's wife.
15. *See id.* at 254.
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. 83 A.D.3d 407 (1st Dep't 2011).
21. *See id.* at 408.
22. *See id.* at 408–12.
23. 20 N.Y.3d 1035 (2013).
24. *See id.* at 1037.
25. *See id.*
26. *See id.* at 1038–40.
27. Mr. Teff authored the Injured Workers Bar Association *amicus* brief in support of the motion for reargument. *See Auqui v. Seven Thirty One Ltd. P'ship*, 21 N.Y.3d 996 (2013).
28. 21 N.Y.3d 995 (2013).
29. 2013-2014 A. 7757-A. The Assembly bill was similar to the amendment to § 623 of the Labor Law passed by the Legislature in the wake of *Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494 (1984) which effectively overruled that decision in the context of unemployment determinations.
30. *Auqui*, 22 N.Y.3d 246.
31. *See id.*
32. 18 N.Y.3d 697 (2012).

33. *See Auqui*, 22 N.Y.3d at 256.

34. *See id.* at 257–58.

35. *See* WCL §§ 11, 29(6) ("The option to maintain an action…based on the employer's failure to secure compensation shall not be construed to include the right to maintain an action against another in the same employ"). An additional statutory exception exists relative to third-party impleader in cases of grave injury (*see* WCL § 11), but that subject will not be addressed in this article.

36. *See, e.g.*, *Ocasio v. Sang Soo Kim*, 307 A.D.2d 662 (3d Dep't 2003).

37. *See Jones v. State of N.Y.*, 33 N.Y.2d 275 (1973).

38. *See Maines v. Cronomer Valley Fire Dep't*, 50 N.Y.2d 535 (1980).

39. This should be distinguished from actions based upon civil and human rights violations, which are not generally barred by the WCL.

40. *See Werner v. State*, 53 N.Y.2d 346 (1981).

41. *See Hanford v. Plaza Packaging Corp.*, 2 N.Y.3d 348 (2004)..

42. *See Werner*, 53 N.Y.2d 346; *see also Orzechowski v. Warner-Lambert Co.*, 92 A.D.2d 110 (2d Dep't 1983).

43. 55 N.Y.2d 538, 539 (1982).

44. *See id.*

45. *See* WCL § 11.

46. 8 N.Y.2d 226 (1960).

47. *See id.* at 228.

48. *See id.* at 229.

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

53. 266 N.Y. 391 (1935).

54. *Martin*, 8 N.Y.2d at 229–30.

55. *See id.* at 230–31.

56. *See id.* at 231; *Green v. Kamalian*, 141 A.D.2d 936 (3d Dep't 1988).

57. *See Martin*, 8 N.Y.2d at 231 (noting, "This, of course, is also binding on those claimants who first seek and recover in compensation proceedings, and then attempt an additional recovery, on an inconsistent theory, in an action at law"). At least one court has held, however, that even in the face of circumstances supporting an initial dismissal motion in state court, if the claimant can convince the compensation board to issue a formal finding that the injury is not compensable, the claimant may properly seek to vacate the prior dismissal. *See Dupkanicova v. James*, 17 A.D.3d 627 (2d Dep't 2005).

58. 46 U.S.C. §§ 30104, *et seq.*, formerly 46 U.S.C. § 688.

59. 45 U.S.C. §§ 51, *et seq.*

60. *See Rodriguez v. Reicon Grp., LLC*, 77 A.D.3d 1105, 1107 (3d Dep't 2010); *Ahern v. S. Buffalo Ry. Co.*, 303 N.Y. 545 (1952), *aff'd sub nom. S. Buffalo Ry. Co. v. Ahern*, 344 U.S. 367 (1953); *Orr v. City of N.Y.*, 304 A.D.2d 541 (2d Dep't), *lv. denied*, 100 N.Y.2d 508 (2003).

61. *See Hyde v. N.Y. City Dep't of Transp.*, 37 A.D.3d 892 (3d Dep't 2007) (noting, "Here, claimant announced on the record that 'he is not waiving his right to file [a Jones Act claim]'.").

62. *See Dacus v. Spin-Nes Realty & Constr. Co.*, 22 N.Y.2d 427 (1968); *Pederson v. Manitowoc Co.*, 25 N.Y.2d 412 (1969); *Reyes v. Delta Dallas Alpha Corp.*, 199 F.3d 626 (2d Cir. 1999); *Mooney v. City of N.Y.*, 219 F.3d 123 (2d Cir. 2000).

63. 33 U.S.C. §§ 901 *et seq.*

64. *See Rodriguez*, 77 A.D.3d 1105 (emphasis in original); *see also Sun Ship, Inc. v. Penn.*, 447 U.S. 715 (1980).

65. *See Martin*, 8 N.Y.2d at 231.

66. *See Zatz v. Moscovici*, 258 A.D.2d 850 (3d Dep't 1999); *Hyde*, 37 A.D.3d 892 (noting, "in the event claimant's federal claim is withdrawn or unavailable, he may seek to reopen his workers' compensation claim").

67. In *Dickinson v. Port Dick Coal & Supply Co.*, 162 A.D.2d 788 (3d Dep't 1990), for example, the claimant brought a civil action against his employer, as his election based upon the employer's failure to secure insurance, and obtained a judgment in the amount of $8,540.50. The judgment ultimately proved uncollectable based upon the employer's insolvency. The Court affirmed the Board's denial of benefits, distinguishing *Tate v. Estate of Dickens*, 276 A.D. 94 (1949), a seminal case on this subject.

68. *See, e.g., Rohan v. N. Main St. Dev. Corp.*, 146 A.D.2d 687 (2d Dep't 1989) (plaintiff injured by actions of co-employee on employer premises, three hours after going off duty, while waiting for a ride home); *Mohn v. Smith*, 271 A.D.2d 662 (2d Dep't 2000); *Rivera v. Lopez*, 167 A.D.2d 953 (4th Dep't 1990). Note that generally only a proper decision of the Board will be determinative in cases of dispute, and a claimant will not be permitted to merely abandon the compensation claim in that forum in pursuit of a more desired direct civil action. *See Gyory v. Radgowski*, 89 A.D.2d 867 (2d Dep't 1982); *Valenziano v. Niki Trading Corp.*, 21 A.D.3d 818 (1st Dep't 2005).

69. *See Hinman, Straub, Pigors & Manning v. Broder*, 124 A.D.2d 392, 393 (3d Dep't 1986).

70. *See Davis v. Wakelee*, 156 U.S. 680, 689 (1895); *see also Hinman*, 124 A.D.2d at 393.

71. *See Olszewski v. Park Terrace Gardens, Inc.*, 18 A.D.3d 349 (1st Dep't 2005) (noting, "the doctrine of judicial estoppel does not apply here because, first, the verdict against the owners cannot be considered a ruling in their favor, and second, the inconsistent positions are being asserted in the same action"); *see also Rosario v. Montalvo & Son Auto Repair Ctr., Ltd.*, 76 A.D.3d 963 (noting, "[s]ince there was no prior legal proceeding wherein the defendant had successfully argued that the plaintiff was its employee, the doctrine of judicial estoppel was not applicable").

72. 86 A.D.3d 682 (3d Dep't 2011).

73. *See id.* at 682.

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.* at 683.

79. *See id.*

80. *See id.* at 683–84.

81. *See id.* at 684.

Internal Investigations in Overseas Workplaces

By Donald C. Dowling, Jr.

Internal investigations in the United States have become high profile and big business. Corporate investigations can be hugely expensive: One American personal care products company disclosed in an SEC filing that it had spent *U.S.$247.3 million* on a single investigation.

The highest-profile internal investigations tend to be complex and drawn-out, as well as expensive. Stakes are high when an allegation involves millions of dollars and serious charges – bribery, sabotage, embezzlement, tax fraud, insider trading, antitrust collusion, workplace violence, environmental crime, audit/accounting fraud, conflict of interests. That said, huge internal investigations are the exception. Most internal investigations tend to be fairly streamlined, inexpensive and fast. Investigations into, for example, run-of-the-mill claims of petty theft, bullying, harassment, workplace accidents and expense-account fraud often get wrapped up quickly and at little cost. But in this era of Sarbanes-Oxley, Dodd-Frank and close scrutiny into corporate compliance and ethics, an internal investigation, be it slow and expensive or fast and streamlined, needs to be done right. Wrongdoers need to get punished.

U.S. multinationals conducting cross-border internal investigations inevitably want to export and use their sophisticated toolkit of American investigatory strategies, which they see as vital in confronting a border-crossing criminal prosecution or civil lawsuit such as a charge under extraterritorial U.S. federal laws like the Foreign Corrupt Practices Act, terrorism financing rules, trade sanctions laws, the Alien Tort Claims statute, international-context violations of Sarbanes-Oxley and Dodd-Frank, extraterritorial provisions of U.S. discrimination laws – even the UK Bribery Act 2010 (which can reach U.S.-based employers).

Increases in international criminal and civil charges have focused multinationals on the legal challenges to border-crossing internal investigations. Recent conferences and articles (even some books) explicate many of the legal issues in play here. These conferences and articles

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tend to focus on the *U.S. law doctrines* reaching U.S.-driven international investigations. Common themes include:

- Attorney-client privilege abroad as contrasted with the privilege in the U.S.
- Effect of foreign "blocking statutes" and foreign data protection laws on U.S. litigation "e-discovery"
- Contrasts between the U.S. Foreign Corrupt Practices Act and the UK Bribery Act 2010
- U.S. bank secrecy laws in the international context
- "Suspicious activity reports" of infractions committed abroad and "self-reporting" to U.S. government agencies
- Overseas whistleblower denunciations under the U.S. Dodd-Frank whistleblower "bounty" program and the extraterritorial reach of U.S. Sarbanes-Oxley "report procedure" provisions
- U.S. "deferred prosecution" and "non-prosecution" agreements in the cross-border context
- Prosecutorial cooperation among enforcement authorities, parallel criminal proceedings in foreign jurisdictions and cross-jurisdictional settlements of criminal charges
- Credit for foreign corporate compliance programs under U.S. criminal sentencing guidelines

These issues can be vital when investigating border-crossing charges that implicate U.S. criminal or civil laws and litigation (although these issues are less relevant to an overseas investigation into charges under foreign domestic law with no U.S. exposure). But because these issues are all anchored in U.S. law, they are distinct from the separate challenge in a cross-border or foreign-domestic internal investigation, of complying with the local domestic law of the overseas workplace. Of course, a U.S. multinational conducting a local investigation abroad needs to comply with local host-country law as well as U.S. law.

Indeed, U.S. headquarters may have to investigate not only the occasional "extraterritorial" charge under U.S. federal law but also far more common claims under foreign local laws that do not trigger exposure under U.S. laws. These foreign domestic investigations are becoming increasingly common. Companies based in Australia, Canada and England have adopted U.S.-like investigatory practices. In some parts of the world, conducting an internal investigation is actually mandatory in certain contexts. For example, Austria's Supreme Court requires employers to investigate sex harassment complaints,[1] as do statutes in Chile, Costa Rica, India, Japan, South Africa, Venezuela and elsewhere. The British Columbia Workers Compensation Act requires employers to conduct immediate investigations into workplace accidents that require medical treatment, as do other workplace safety laws.

Because American investigatory tools were forged in the uniquely American environment of employment-at-will, U.S. multinationals exporting and using these tools in overseas investigations run into problems. The law of the U.S. workplace imposes fairly few constraints on how American employers can investigate suspicions of employee wrongdoing (*Weingarten* rights and *Upjohn* warnings aside). Overseas, though – especially in Europe – the environment differs greatly. Internal investigations abroad are subject to a panoply of restrictions under the local law and culture of the foreign workplace. A General Electric in-house lawyer, speaking at an American Bar Association conference in Atlanta in November 2012, put it simply: "One of the biggest mistakes an investigator can bring to a foreign investigation is an American mindset."

So a U.S.-headquartered multinational conducting an internal investigation across borders needs to retool American-forged investigatory practices for the very different workplace regulatory environment abroad. Because foreign workplace laws that reach internal investigations tend to have no counterpart under U.S. employment-at-will, they often spring up and catch American investigators off-guard. In this particular respect, lawyers and investigators based overseas actually wield an advantage over their U.S. counterparts because they escape the counterproductive "American mindset." A London solicitor addressing American lawyers about internal investigations outside the U.S. explains:

> Most corporations that have faced a significant [international] investigation will be familiar with the need to balance the thoroughness of the investigation with the need to *respect the* [overseas] *suspect and the informant's data protection rights*. Increasingly we are seeing [overseas employee] *suspects and their advisors seek to exercise these rights to slow down or halt an investigation* [outside the U.S.]. In at least one case where I have been involved, *injunction proceedings were threatened* [to stop the U.S.-driven internal investigation].[2]

Having to retrofit investigatory tools for more-regulated overseas environments can frustrate an American investigator reluctant to tamper with effective strategies and unwilling to compromise best investigatory practices. But *failing* to modify American investigatory practices abroad when necessary threatens a serious consequence: it exposes the investigator to a charge of breaking the law. Investigators might be denounced (perhaps over a company whistleblower hotline) for breaking the local law of the workplace if they investigate illegally. Then another investigatory team might have to investigate the original investigators. Just as no police detective ever wants to face charges of violating suspects' rights in a criminal investigation, no corporate internal investigator ever wants to stand charged with breaking the law.

Here is a 30-point checklist for adapting domestic American investigatory practices and tools for overseas investigations. The 30 points fall into the four stages of a thorough American-style internal investigation:

- Launching an international investigation protocol or framework
- Initial response to a suspicion or allegation arising abroad
- Interviewing witnesses outside the U.S.
- Communications, discipline and remedial measures in a cross-border investigation

Launching an International Investigation Protocol or Framework

Americans like flexibility. As to investigatory practices, Americans are reluctant to lock themselves into formal protocols or frameworks that mandate specific steps for conducting all internal investigations. But overseas, an investigation protocol or framework can be helpful for a number of reasons. An Australian law firm addressing Australian clients about internal investigations explains that "[l]ong before a complaint is made or an incident occurs, there are some steps an employer can take that will make it easier to conduct an [internal] investigation when the need inevitably arises."[3] To pave the way for future internal investigations overseas, take affirmative steps to empower investigation teams that will later look into overseas suspicions or allegations of wrongdoing. Build an investigatory protocol or framework to facilitate a rapid headquarters response.

1. Implement a Code of Conduct

Impose on all affiliate employees worldwide a well-thought-out internal code of conduct or business ethics. In the code, forbid all acts the organization has a compelling business reason to prohibit – insider trading, environmental crime, conflict of interests, bribery/payments violations, intellectual property infractions, audit/accounting impropriety, discrimination/harassment, and other offenses. Having drafted, communicated and imposed a tough internal code of conduct becomes essential when an allegation of wrongdoing surfaces later and the organization needs to point to a clear rule that prohibited the alleged misdeed. Without a tough code of conduct, the target may be able to argue he did nothing wrong or even claim he tried to help the organization by, say, paying a bribe or colluding with competitors or cutting corners in disposing of hazardous waste. Be sure both the code of conduct content and the code launch (roll out) comply with local employment law in each affected jurisdiction.

2. Launch a Whistleblower Hotline

In the U.S., having a whistleblower hotline is a clear best practice for eliciting allegations, complaints and denunciations for an employer to investigate and then remedy. By law, U.S. publicly traded companies and "foreign private issuers" must make available report "procedures" for the "confidential, anonymous submission by employees" of "complaints and concerns regarding questionable accounting or auditing matters."[4] Liberia and perhaps other jurisdictions have mandated whistleblower hotlines even at non-publicly traded organizations. Further, the U.S. Dodd-Frank government whistleblower bounty program motivates employers to launch robust international hotlines to attract whistleblower denunciations that might otherwise go straight to U.S. government enforcers.

So launch an effective global whistleblower hotline that complies with applicable laws. Overseas, especially in Europe, regulations specifically regulate whistleblower hotlines and are surprisingly complex – Europeans actively invoke their data protection laws to rein in American-style anonymous hotlines. Germany, the Netherlands and other EU member states require consultations with employees before launching a hotline. Belgium, France, Spain and other EU states require government filings that disclose hotlines – and in some cases a government agency must affirmatively approve a hotline. France, Germany and other countries confine hotlines to accepting denunciations about only a limited pool of infractions. Spain, Portugal and perhaps France prohibit employers from accepting anonymous whistleblower calls (or at least from disclosing that their hotlines accept anonymous calls; France's data protection authority has flip-flopped on this point). Beyond Europe, in Hong Kong and elsewhere, employees may need to consent to a whistleblower hotline.[5]

3. Build Channels for Cross-Border Data Exports

A U.S. multinational conducting a cross-border investigation inevitably sends ("exports") back to U.S. headquarters personal information that identifies overseas employees – whistleblowers, targets, witnesses. Data protection (privacy) laws in Europe and parts of Latin America and Asia prohibit exporting employee data without first building *data export channels*. In Europe these channels are currently "model contractual clauses," "safe harbor," "binding corporate rules" and (in some contexts only) employee consents. (Europe's data protection law regime will change under an incoming EU data protection "regulation" that will replace the 1995 EU data "directive.")

Local data protection laws in Belgium, the Netherlands and elsewhere specifically limit cross-border transmissions of *workplace accusations*, and the Article 29 Working Party (the EU's advisory data protection agency) has considered imposing EU-wide restrictions specifically on exporting *investigatory* data.

So before launching any overseas investigation in a jurisdiction with a comprehensive data protection law, build channels that facilitate the export of internal investigation data or expand any existing channels so they specifically reach internal investigation data. Building and expanding these channels can be slow and expensive, but waiting until a specific allegation or suspicion triggers an actual investigation will be too late.

4. Grant Necessary Data Subject Access

American investigators keep their investigation files confidential, safeguarding the integrity of investigations and protecting witnesses and whistleblowers. Counter-intuitively, data protection laws in Europe, Argentina, Canada, Hong Kong, Israel, Japan, Mexico, Uruguay and beyond expressly require "data controllers" such as employers to turn personal data, including internal investigation notes, reports and files, over to the very investigation targets and witnesses identified in these files, at least if they ask to see the information. This is because in Europe and elsewhere targets and witnesses in internal investigations, as "data subjects," enjoy broad rights to be told that investigation files exist in the first place, then to access the files, and ultimately to request deletion or "rectification" of information that names or identifies them. (The employer should redact *others'* names when showing each witness the file.) In jurisdictions like Hungary, such employee rights are particularly strong. One EU body has decreed that employers must tell investigation targets they are being investigated and that an investigation file exists as soon as there is no substantial risk that notice to the target "would jeopardize" the investigation.[6] That said, though, not all data protection laws are so strict in the investigatory context. The British Columbia (Canada) Personal Information Protection Act, for example, offers an investigatory exception that relieves certain obligations to collect employee consents to processing data.

Having to clue in investigation targets and witnesses about the existence of files naming them while an investigation is in full swing frustrates American investigators. Indeed, some investigators have actually breached data access laws in the name of upholding the integrity and confidentiality of the investigation. Yet again, a rogue investigation that breaches local laws is itself illegal and could itself become the target of denunciations and enforcement proceedings – a scenario every employer needs to avoid. So balance investigatory confidentiality against targets' and witnesses' legal rights to access data about themselves. Strike this balance *before* a real-world investigation target comes forward and demands access in the heat of a specific investigation. As part of an internal investigation framework, articulate a legitimate business case for delaying employee access until an investigation reaches a stable point. Then grant access requests later, after access becomes legally unavoidable.

5. Disclose Investigation Procedures

Europe and other jurisdictions with robust data protection laws might deem an employer's in-house internal investigation framework or protocol a system for processing personal data, and therefore subject to data laws, even before a specific investigation launches implicating actual personal data about individual employees. Many European jurisdictions affirmatively require that employers disclose, both to the local "Data Protection Authority" and to employee "data subjects," "personal data processing systems" including an investigatory framework. In addition, labor laws in Europe and elsewhere can require disclosing ("informing") in-house investigatory frameworks to employee representatives like "works councils" and "health and safety committees." Labor laws may also require bargaining ("consulting") over these frameworks with employee representatives. To Americans, all this disclosure and consultation over an investigation protocol seems intrusive – American multinationals like keeping their investigatory tactics confidential for the same reasons the Secret Service and the CIA do not broadcast investigatory techniques. But a multinational that "bites the bullet" and discloses the outline of its investigatory framework or protocol both complies with local data protection laws and frees itself to conduct broader international internal investigations when the need arises later.

Initial Response to a Suspicion or Allegation Arising Abroad

International internal investigation protocol/framework in hand, a multinational is ready to investigate any suspicion or whistleblower allegation that comes in from abroad. When one comes in, first decide whether it is investigation-worthy – too many multinationals claim to investigate "all" allegations when in fact many are unworthy of investigating (some are too vague, some are obviously groundless, some, even if true, amount to merely questionable judgment or rude behavior, and some are merely mischaracterized human resources gripes best referred to the HR team). Also be sure upper management will support an investigation, whatever the result – avoid the scenario of an investigation report that strongly points to firing a target whom the ultimate decision maker insists on protecting. In conducting an investigation of an investigation-worthy suspicion or allegation, tailor the investigation to the specific allegation and to local laws. Begin with a strategic initial response.

6. Appoint an Investigator or Investigation Team

An employer might conduct a streamlined investigation into a simple allegation using just a single investigator (supervisor, outside expert or lawyer) who checks a few records and asks a few questions. At the other end of the spectrum, a complex internal investigation can be a costly months- or years-long project that requires mobilizing a team of internal executives, experts, human resources leaders and in-house counsel as well as company directors, outside lawyers, accountants, consultants, forensic experts and translators.[7] Depending on the complexity of a given overseas investigation, either appoint a single investigator or assemble an investigatory team. Select an investigator or team leader competent in investigatory technique, familiar with applicable law and experienced with how investigations in the jurisdictions at issue differ

from U.S. domestic investigations. Avoid appointing an all-star team of Americans expert in U.S. law, U.S. investigatory best practices and U.S. criminal prosecutions but with little experience abroad. Many U.S.-led investigations purposely exclude target-country locals from the investigation team on the theory that locals might be incompetent investigators susceptible to bias, prone to confidentiality leaks, or too likely to fall under the influence of the local target himself. In some contexts these might be legitimate concerns. But where appropriate, consider including at least one local outsider (consultant or outside lawyer) on the investigation team who knows the local players, culture, language, and law.

employee dismissal for good cause "must occur within three working days from the moment the facts are known to the [employer, and then] the facts must be notified to the dismissed [employee] by registered mail within three working days from the date of dismissal."[8] In these jurisdictions, the "clock" might start as soon as an employer gets solid, credible evidence – not after it formally wraps up a full-blown internal investigation.

Even where local law does not require imposing fast discipline, at the outset of an internal investigation take any necessary interim personnel measures like imposing a suspension (paid or unpaid) or separating an accused harasser from an alleged victim.

Because American investigatory tools were forged in the uniquely American environment of employment-at-will, U.S. multinationals exporting and using these tools in overseas investigations run into problems.

Be sure no one on the investigation team has a conflict of interest or might be a witness. Include on the team someone with expertise in the subject of the allegation. Consider language fluency. Consider including someone from the internal audit function and an in-house or outside lawyer who can invoke attorney-client privilege (below, point 12). As to outside lawyers, consider tapping investigatory counsel who is *not* the organization's regular advisory counsel and so is less likely to trigger a lawyer-as-witness conflict.

7. Impose Immediate Discipline if Necessary; Take Interim Steps

Even where a target's guilt seems clear at the outset, employers conducting internal investigations never want to impose discipline until after they complete their investigation. After all, the very purpose of an internal investigation is to find out whether discipline is appropriate. To impose discipline at the outset of an investigation flies in the face of what an investigation is supposed to be. We do not "shoot first and ask questions later." Indeed, to fire even a seriously implicated employee at the launch of an investigation would defeat the purpose of the investigation itself.

This logic seems sound, but it betrays an American mindset. In an overseas investigation, immediately check whether local law imposes an almost-instant discipline deadline. Jurisdictions like Austria impose tight deadlines of only hours or days during which an employer can legally invoke evidence of misbehavior as good-cause support for a firing. In Iraq, an employer firing an employee for cause must notify the Iraqi Labour office within 24 hours of the time of the *incident* – not 24 hours after an internal investigation winds up. In Belgium, an

8. Define Investigation Scope and Draft an Investigation Plan

An investigation without a well-defined scope can take unpredictable turns. Remember the sharp criticisms Ken Starr drew when his Whitewater investigation abruptly shifted into an investigation of Monica Lewinsky?[9] Delineate the investigation's scope. Define its goals and set its boundaries. If a corporate board of directors' resolution is necessary to launch the investigation, the resolution should clearly define parameters.

In defining the scope of an overseas investigation, factor in the nature of the allegation and the logistical, linguistic and geographic barriers. In some European states, where a whistleblower allegation is anonymous, the fact of anonymity itself restricts the scope of the investigation – under data protection law in some European jurisdictions, an anonymous tip is *per se* less credible and hence weaker "probable cause" for conducting a broad internal investigation leading to employee discipline.

In an international investigation, a good practice is to draft an outline or plan of what the investigatory team will and will not do, consistent with the investigation's scope. According to an Australian law firm advising on internal investigations in Australia:

> An investigation plan should be drawn up. Key witnesses should be identified, and persons potentially affected by the investigation should be listed. Practical details, such as location and order of witnesses, should be set out. An outline of the questions to be asked should be drawn up. The objective of the investigation should be noted.[10]

Any investigative plan of this nature needs to account for data subject access rights in the plan itself (above, point 4). If the investigatory plan can somehow avoid

identifying the whistleblower, target and witnesses, then the plan will not be subject to data law disclosure.

9. Comply With Investigatory Procedure Laws

Under American law, a nongovernment employer's internal investigation for the most part is a business matter, not a matter of criminal procedure, because there is no "state action." Not so everywhere abroad. In some jurisdictions in Eastern Europe and beyond, local criminal procedure laws can restrict, even prohibit, private parties such as non-government employers from conducting an investigation – the theory is that private parties cannot intrude on the exclusive investigatory power of government law enforcement. In other countries, bar association rules may limit or prohibit lawyers (even American lawyers who are not members of the local bar) from conducting internal investigations – especially but not exclusively if the investigator needs someone to administer an oath, such as for an affidavit or deposition. Before embarking on any cross-border internal investigation, research local procedural rules restricting private-party and lawyer-led investigations. Adapt the investigation to conform. Sometimes it might be enough to recharacterize an internal investigation as mere "analysis," "checking," "verifying" or "asking questions" (below, point 19).

In some contexts it might be possible to conduct the investigation outside the territorial reach of local restrictions against private investigations.

Separately, comply with local laws that require disclosing evidence to law enforcement (below, point 28). And comply with local laws that restrict specific steps within an internal investigation, such as laws regulating how to conduct searches of employee emails/computers/Internet records (below, point 17); physical searches of lockers and desks; criminal background checking; video surveillance; and intercepting phone calls.

10. Research Substantive Law

The purpose of an internal investigation is to uncover evidence of wrongdoing or illegality. So always ask: Is the alleged behavior wrong or illegal? Violating an organization's internal policies is wrong; violating applicable law is illegal. So check internal policies and then ask: What is *applicable law*? In overseas investigations, U.S. investigators sometimes get consumed by U.S. laws with extraterritorial effect – U.S. trade sanctions laws; U.S. antitrust, securities and discrimination laws; the Foreign Corrupt Practices Act; the Alien Tort Claims Act. Yes, these U.S. laws are "applicable law" abroad to the extent they reach extraterritorially. But never forget *local substantive laws*. For example, a U.S. organization's international bribery investigation should of course investigate possible breach of the U.S. FCPA and maybe the UK Bribery Act 2010. But do not forget to check for a breach of *local domestic* bribery laws. For example, one "American businessman" found "guilty of taking nearly U.S.$5.5 million in bribes as head of [a] Dubai-based company" was sentenced to 15 years in a UAE prison, even as the U.S. government sought to defend him.[11]

Similarly, in an international investigation into audit/accounting fraud under SOX and Dodd-Frank, check whether the target violated local audit/accounting mandates.

11. Safeguard Confidentiality

To guard against data privacy and defamation claims, and to avoid human resources and public relations problems, contain investigation-uncovered information to those with an actual need to know – the investigation team, retained experts, auditors, counsel, upper management, maybe the board of directors. Resist the temptation to keep too wide a circle informed as the investigation proceeds. (Whom to brief about the *results* of an investigation at the end is a separate issue, below, point 25.) Also, transmit investigation data back to U.S. headquarters only pursuant to local legal restrictions on data exports (above, point 3).

Unless a self-identified whistleblower expressly consents otherwise, overseas data protection laws may in theory mandate preserving whistleblower confidentiality. But in practice, maintaining whistleblower (and witness) confidentiality can be a tough challenge where circumstances point to a source and where the whistleblower becomes a complaining witness. This is virtually inevitable with a harassment complaint. A best practice is never to *guarantee* whistleblowers or witnesses absolute confidentiality.

12. Secure Legal Advice and Attorney-Client Privilege

A Canadian law firm recommends, as to Canadian internal investigations: "Give some thought . . . at the very beginning of the process . . . as to whether you wish the investigation process, report and surrounding communications to be privileged. It is much easier to attempt to set this up at the beginning of the [investigation] than midway through."[12] While the attorney-client privilege can be vital in an internal investigation, discovery is far less robust abroad, so overseas attacks on the attorney-client privilege may be less frequent. But foreign government agents do seek documents from private parties, and a foreign privilege issue may arise in a U.S. proceeding. So preserving attorney-client privilege in an overseas investigation can be vital.

Decide who will advise the investigation team on applicable law in relevant jurisdictions. Account for lawyer-as-witness and legal privilege issues including any foreign law analogue for the U.S. domestic investigatory-context privilege.[13] Understand whether lawyers on the investigation team can implicate the attorney-client privilege under applicable law. Depending on the jurisdiction, the local privilege may reach locally licensed outside law

firm counsel and maybe locally licensed in-house counsel – although jurisdictions like China may not recognize any attorney-client privilege. Always check whether a jurisdiction extends its attorney-client privilege to foreign (such as U.S.) lawyers not in the local bar. Never assume a U.S.-licensed lawyer falls under a foreign-law attorney-client privilege.

Privilege issues are much less settled in most jurisdictions outside the common law world. In some jurisdictions the privilege belongs to the lawyer, not the client. Some European Union member states recognize a rudimentary in-house counsel privilege, but there is no European-wide doctrine protecting in-house counsel with attorney-client privilege.[14] Hungary, for example, recognizes no viable in-house lawyer privilege, and in France lawyers who go in-house must resign from the bar, therefore surrendering any claim to privilege. A broad overview published in *Inside Counsel*[15] lists the "EU member states that recognize privilege for the in-house bar" as including "Denmark, Germany, Ireland, Luxembourg, Netherlands, Portugal, Romania, Spain, UK" – but the *Akzo Noble* case seems inconsistent as to the Netherlands, so *Inside Counsel's* list seems wrong. Always check.

13. Account for U.S. Government Enforcement Issues

Increasingly, American multinationals launch cross-border internal corporate investigations responding to inquiries or enforcement actions from U.S. agencies such as the Department of Justice (DOJ), the Securities Exchange Commission (SEC) and (potentially) the Equal Employment Opportunity Commission. Internal investigations responding to U.S. government inquiries and proceedings raise unique issues of government-context attorney-client privilege waiver and advancing defense fees. The U.S. government has taken formal but changing positions here: Compare the SEC Seaboard Report and the DOJ McNulty Memorandum that replaced the DOJ Thompson Memorandum and the McCallum Memorandum, later withdrawn. Government context privilege waiver and defense fee issues *outside the U.S.* get even more complex; indeed, the various U.S. government positions and memos here have been criticized to the extent they are said to ignore issues under foreign law. Proceed carefully.

14. Safeguard Disclosures to and From Experts

Always have retained outside experts (including forensic accountant, forensic computer specialist, investigation consultant, e-discovery provider, translator) contractually commit to uphold confidentiality and applicable data laws. Safeguard the attorney-client privilege over disclosures to experts (above, point 12). In Europe and other jurisdictions with robust data laws, an expert's report that identifies specific individuals may be subject to witness disclosure, even to the investigation target (above, point 4). Proceed carefully.

15. Impose an Enforceable Litigation Hold

"Spoliation" claims (destruction of documents relevant to litigation) are increasingly common in U.S. domestic lawsuits. A strong best practice is to require that employees, worldwide, preserve data possibly relevant to a cross-border investigation at least until the investigation and any litigation wind down. During investigations, multinationals often order staff, across borders, to suspend routine data destruction practices like automatic email deletion and document-destruction policies. Software exists for implementing and enforcing these internal document retention orders, often called "litigation holds" or "DRNs" (document retention notices). Outside the U.S., litigation holds/DRNs are equally important but are less routine and so are less familiar. Fortunately, an overseas litigation hold/DRN rarely raises high legal hurdles, but better explanations and better enforcement become important in countries where these holds are unfamiliar. That said, in Europe and beyond an overbroad litigation hold/DRN in place too long butts into the data protection law prohibition against retaining obsolete personal information. In jurisdictions that require purging obsolete personal data, be sure to articulate a defensible business rationale for any long-term litigation hold. Review the need for the hold frequently.

16. Secure Evidence Within Management's Physical Custody

Actively collect and preserve documents and electronic files relevant to the investigation that management can readily get its hands on without breaking into employee-held files and systems. Data laws in Argentina, Canada, Costa Rica, Europe, Hong Kong, Israel, Japan, Mexico, Uruguay and elsewhere may prohibit management from "processing" for investigatory purposes even information already in company files unless the reasons the data had originally been collected expressly included "investigatory purposes" – which too often will not be the case. Therefore (as discussed above, point 5), when structuring HR data processing and export systems, be sure to include "processing/storing personal data and documents for internal investigatory purposes" as an express reason for processing. And because data laws can restrict "exporting" personal data to the U.S., consider warehousing investigatory information locally without transmitting it stateside (unless appropriate data export channels are in place – above, point 3).

17. Gather Evidence Outside Management's Physical Custody

Perhaps the highest legal hurdle in international investigations is gathering employee documents and data not yet in management's readily accessible files – emails on the company server, Internet-use records, Word documents on an employee's hard drive, papers in an employee's desk. Staff in Europe and elsewhere may firmly

believe that their personal business records, even though warehoused on company systems and on company property, are completely off-limits to their employer. And perhaps surprisingly, foreign local data protection laws may support this view even if the employer had issued a U.S.-style policy purporting to reserve its right to search and (ostensibly) defeating employee expectations of privacy in company systems. Employer reservation-of-right-to-search policies are as vital internationally as they are stateside, but American headquarters should not "believe its own PR" and assume its purported reservation of the right to search works overseas the same way it works stateside. Abroad, reservation-of-right-to-search policies may be a mere first step in analyzing whether, or how, the employer can legally access staff emails/Internet records/documents.

Understanding when and how foreign law lets employers conduct these searches is a research project unto itself. Do a country-by-country analysis in light of the specific facts. In Continental European jurisdictions like Austria, Italy, Germany and Poland, a key issue in this analysis will be whether the employer had previously forbidden local staff from using company-owned computers/systems for even incidental personal use. In other countries a key issue will be whether employees grant "unambiguous," situation-specific consents to search, especially in the "bring your own device" (BYOD) context.

Even where an employer purportedly reserved its "right" to access employee emails/Internet use/documents, always get tailored advice under foreign law before actually searching and before ordering polygraphs or drug tests, before launching surveillance tools or video monitoring, before surreptitiously monitoring employees in other ways and before invoking employer-favorable terms in a BYOD policy. Local laws on these issues can be unpredictable. In France, for example, an employer must bring in a court officer or bailiff to oversee its accessing of staff files and documents.

Interviewing Witnesses Outside the U.S.

After securing documents, the time comes to interview witnesses. Work out a strategic order for interviews, such as the accuser, then witnesses, then target. In conducting each interview, factor in overseas cultural and strategic issues. During interviews, comply with local workplace laws (employment laws and employment-context data protection laws).

18. Verify Sources

When interviewing a whistleblower or complainant, check whether the accuser will stand by the accusations. Firm up the source of the allegations and seek corroborating evidence and witnesses. As mentioned (above, point 8), under law in Europe an investigation into an anonymous whistleblower tip cannot plow as deep as an investigation into a tip from a verified source. So where channels to an anonymous overseas whistleblower remain open, try to get him to self-identify.

> Too many multinationals claim to investigate "all" allegations when in fact many are unworthy of investigating.

19. Neutralize or "Demilitarize" Interrogations

Sometimes an American interrogating an overseas employee conveys an air of professionalism and authority that may prove counterproductive and culturally inappropriate. The witness might "clam up." Consider neutralizing the international interrogation process by "demilitarizing" witness interviews, coaxing out better information with a softer touch. For example, an internal investigator's background as a former prosecutor enhances credibility stateside but overseas might be off-putting – foreign witnesses actually have alleged harassment when an interrogator introduced himself as an American ex-prosecutor and played up criminal law themes. American witnesses may respect police authority, but abroad, downplaying prosecutorial credentials and criminal issues may help open up a foreign witness.

During overseas employee questioning, actively neutralize the semantics of the interrogation itself. Investigators might refer to their internal investigation and their interrogations as merely "some questions," "talks," "checking" or "verifying." They might refer to an allegation, suspicion, complaint or denunciation as merely an "issue" or "question." Documentary evidence and proof can be mere "papers" or "files." Call whistleblowers, informants, sources and witnesses simply "employees" (those not on the payroll are "business partners"). Call the target of an investigation "our colleague." And an investigator zeroing in on a confession can request a mere "affirmation" or "acknowledgement."

When conducting staff interviews, always be sensitive to local conceptions of privacy. Outside the U.S., the Ken Starr/Monica Lewinsky investigation shocked foreigners – a sitting U.S. president actually had to answer a private lawyer's questions about his sexual life (foreigners often do not understand U.S. civil procedure and deposition testimony subject to the felony of perjury). Outside the U.S., expect staff actually to believe they have a right to refuse to answer questions about their sex lives, hobbies, workplace friendships and personal notes, documents, emails and social media postings. In investigatory interviews abroad, show sensitivity for this viewpoint.

20. Instruct Witnesses to Cooperate, as Permissible

An American investigator ghostwriting an employers' staff memo announcing an internal investigation might announce that all employees "must cooperate" with the

internal investigation. And American investigators like to begin employee questioning by insisting that each witness "must cooperate." We get away with this in the United States because this approach works under U.S. employment-at-will. But this can backfire abroad. Almost universally outside the United States, foreign laws let employees refuse to cooperate with an employer investigation. Most overseas employees enjoy a labor-law right to remain silent roughly analogous to the American Fifth Amendment in the police-investigation context. Americans may think they have "good cause" to fire an employee for refusing to cooperate in an internal company investigation, but little if any authority abroad supports this view. Indeed, whistleblowing rules in Europe actually forbid employers from unilaterally imposing mandatory reporting rules, such as in codes of conduct, to force witnesses to disclose incriminatory information about their co-workers (above, point 2). An employer order (as opposed to request) to "cooperate" with an internal investigation likely triggers the same legal concerns and so is an impermissible mandatory reporting rule. The lesson: Investigators should speak accurately and think carefully before requiring overseas employees to cooperate in internal investigations or investigatory interviews.

21. Comply With Consultation and Representation Rules

Labor laws in many jurisdictions (France, for example) require consulting with employee representatives before launching a slate of staff interviews. American investigators who burst into an overseas workplace and question workers without any advance word to their local labor representative (union committee or works counsel) fall into a legal trap. A separate but related issue is foreign local *Weingarten* rights.[16] In jurisdictions including the U.S., to interrogate a specific employee witness implicated in an allegation without first notifying his labor representative is an unfair labor practice (just as a lawyer interrogating a witness known to be represented by counsel without first telling that employee's representative breaches ethics rules). Be sure to respect mandatory interview-context consultation and representation rights.

22. Notify the Target and Witness of Their Rights

Americans expect police to read criminal suspects their *Miranda* rights. But in the non-government American employer investigation context an employee witness enjoys few if any affirmative rights (beyond *Weingarten*, above point 21, and *Upjohn*, below, point 23). Not so abroad. Employees in many countries enjoy robust procedural rights in the workplace investigation context. One sweeping right, in Europe, is the right to be told precisely what your other investigatory rights are. Even in countries outside Europe where local law does not force internal investigators to brief witnesses on their rights, local best practices may be to begin an investigatory interrogation by advising each witness that he enjoys due process protections. Australian lawyers, for example, recommend this.[17] Further, data law in Europe and elsewhere requires telling targets and witnesses about internal investigation notes and files that identify them, and then requires offering targets and witnesses limited access to these files and a right to "correct" them (above, point 4) – even while the internal investigation is still pending. This obviously conflicts with the investigatory best practice of keeping evolving investigations strictly confidential. Strike a balance to comply with legal mandates. Genuinely "anonymizing" names and identities in investigation files eliminates the data-law disclosure obligation here. But in the context of an active investigation, anonymizing is rarely practical.

23. Give *Upjohn* Warnings, Demand Witness Confidentiality, and Conduct Interviews Legally

A lawyer interviewing domestic American employee witnesses in an internal investigation should always give so-called *Upjohn* warnings[18] telling each staff witness that the investigator represents the employer and may be covered by confidentiality obligations and attorney-client privilege, and explaining that the employer might waive its privilege and offer up interview information to third parties, including law enforcement.[19] As U.S. domestic law, *Upjohn* is not authoritative abroad, but giving *Upjohn*-style warnings is a clear best practice worldwide.

Beyond *Upjohn*, internal investigators should always warn overseas employee witnesses to keep the interrogation and investigation strictly confidential, not discuss it with other workers. Indeed, to let a (foreign) witness talk about a pending internal investigation could actually violate overseas data protection laws. However, American investigators have recently become reluctant to demand witness confidentiality because, as of 2012, demanding confidentiality in domestic U.S. investigatory interviews risks violating American labor law as an impermissible restriction on "protected concerted activity."[20] Therefore, as of 2012, many American investigators stopped demanding confidentiality of stateside investigatory witnesses. But this issue is confined to U.S. soil. The American "protected concerted activity" doctrine is all but unknown abroad – even in Canada. *Banner Health* raises a purely domestic U.S. issue; multinationals should always impose a confidentiality mandate on *overseas* witnesses.

Upjohn warnings and the *Banner Health System* confidentiality issue aside, be sure to conduct overseas investigatory interviews legally, complying with local laws. Be careful debriefing employees as to what they may have told local police in criminal-context interviews – some jurisdictions prohibit this line of questioning. When electronically recording staff interviews, get recording consents from witnesses that comply with local law (in writing as necessary).

Communications, Discipline and Remedial Measures in a Cross-Border Investigation

After collecting documents and conducting investigatory interviews in an internal investigation, what had been an information-gathering process becomes active decision making. Decide on the investigation findings. Address discipline and remedial measures. Take these steps consistent with investigation findings and with applicable employment, data protection and criminal laws. Memorialize, preserve and report on investigation results.

24. Involve the Audit Function and Comply With FCPA Accounting Rules

Where an investigation uncovered financial impropriety, money losses or bribery/improper payments, tackle the accounting and financial-statement issues. Comply with U.S. Foreign Corrupt Practices Act accounting (payment-disclosure-reporting) rules as well as SOX accounting mandates and foreign Generally Accepted Accounting Principles. Financial losses at an overseas affiliate reach the "bottom line" of a U.S. parent, so at a publicly traded multinational an overseas investigation might implicate U.S. securities mandates and auditing/accounting disclosures. Manage strategy with inside and outside auditors. Involve the audit function. Implement auditor/accountant recommendations.

25. Report to Upper Management

Consider the pros and cons of delivering an oral versus written report to upper management detailing investigation findings. Keep in mind data subject rights of access to a final written report and restrictions on "exporting" investigation data (above, point 3). Data protection laws and privilege rules may weigh against a written report. Draft any report carefully with findings of fact grounded in evidence. Refrain from declaring anyone guilty of a crime (internal investigators are powerless to declare guilt in any criminal justice system). And limit the circle of upper management receiving an investigatory report to those with a demonstrable need to know.

26. Impose Post-Investigatory Discipline

Where an investigation uncovers solid evidence of wrongdoing (and where the employer did not already take action at the beginning of the investigation, above, point 7), impose discipline consistent with investigation findings and upper management buy-in. If the investigation exposed enough evidence to dismiss the suspect for good cause under local law, structure the dismissal as for good cause. But sometimes an investigation uncovers enough evidence of wrongdoing to convince an employer to dismiss the target but not enough evidence to support a good-cause dismissal under tough local employment laws. In those situations the employer (where legal) might decide to dismiss the target for no good cause, paying notice and severance pay.

In dismissing a guilty target (whether or not for good cause), follow local-law dismissal procedures. Chad, France, UK and many other countries impose detailed dismissal procedures on employers firing even obviously culpable staff. When disciplining a witness, whistleblower or target who had lodged a workplace complaint, comply with anti-retaliation law, such as the laws in Europe that prohibit "victimising" whistleblowers. (U.S. anti-retaliation prohibitions are particularly strict, but most court decisions construing the extraterritorial reach of U.S. retaliation law tend to confine these rules to U.S. citizens or residents.)

Adapt U.S. investigatory strategies to the very different realities and the seemingly quirky mandates of the law of the overseas workplace.

27. Ensure Internal and External Communications Comply

With confidentiality paramount in internal investigations, a multinational might prefer to keep its investigation results under wraps. But in the real world, especially in high-profile cases, internal and even external communications can be necessary: Employees may demand to know what happened, and word of some internal allegations may inevitably make the newspaper.

As to post-investigation reporting, a good practice is to close the loop with the original whistleblower (where that channel is open) – tell him what the investigators found out and what the employer will do about it. In internal and external reporting about an investigation, be alert to defamation and tortious invasion of privacy claims. Ensure that mentions of the investigation and the fate of the target are defensible. Heed applicable data-law restrictions against disclosing and exporting personal information.

28. Disclose to Authorities Appropriately

Consider turning over to local police or enforcement authorities investigation-uncovered evidence of criminal acts, especially where local or U.S. law imposes a self-reporting obligation. However, absent a valid court order, data protection law in some jurisdictions actually restricts an employer's freedom to volunteer, even to government law enforcers, personal information learned in an investigation. Reporting to police could also raise an employment law challenge – fired staff in some jurisdictions can actually argue that a police denunciation amounts to additional, illegal employer discipline. Under local

employment law, a dismissal may be legal but a denunciation to police may be excessive. On the other hand, local law in other jurisdictions actively requires denunciations to local police. Slovakia, for example, requires that parties, including employers with knowledge of a criminal act, notify authorities[21] and New South Wales (Australia) requires parties, including employers, with evidence about a "serious indictable offence" report that to local police. Heed these laws.

29. Implement Appropriate Remedial Measures

Implement remedial measures – steps to prevent the problem from recurring, such as new work rules and new tools for oversight, security, monitoring and surveillance. Be sure new measures comply with substantive law, such as data protection rules that restrict employee monitoring: Overseas, an employer cannot always unilaterally start video or computer monitoring, for example, without employee consent. (For that matter, this is also the rule in the U.S. union context.[22])

Also comply with procedural rules. Overseas, collective labor representation laws as well as vested/acquired rights concepts restrict an employer from tightening terms and conditions of employment (such as by imposing unpopular new remedial measures) without first consulting with employee representatives.

30. Preserve Investigation Data Appropriately

Preserve the investigation file (notes, interview transcripts, expert reports, summary report) consistent with applicable law and investigatory best practices. In America, the best practice here is simple: "The details of every investigation should be memorialized in writing, regardless of the findings, including a description of the allegation, the steps taken to investigate it, factual findings and legal conclusions, and any resultant disciplinary or remedial actions" – of course, the employer then retains that "writing" in case it may be needed later.[23] Even where an investigation finds no probable cause, investigation records will be invaluable if a similar allegation later arises among the same suspects.

But this best practice of retaining investigation documents can be flatly illegal abroad. In some jurisdictions, investigatory file preservation conflicts with the data-law duty to purge obsolete personal information that there is no compelling business case to retain. Of course, any American multinational can articulate a business case for retaining investigation records indefinitely. The problem is that data protection authorities, at least in parts of Europe, will reject that argument as spurious. This can mean destroying or completely anonymizing an investigation file (including even an unanonymized summary report) surprisingly soon after an investigation ends – within two months, under one influential EU recommendation – particularly where the investigation did not lead to discipline.[24]

That said, an employer might be able to justify retaining an investigation file until any relevant statute of limitations runs. One tactic, probably not strictly compliant, is to export investigation data files outside those jurisdictions that impose strict duties to purge, maintaining the files (or copies) offshore, such as in the United States.

American best practices for investigating a suspicion or allegation of employee wrongdoing are well-developed and sophisticated. U.S. multinationals strongly believe in the value of our evolved American investigatory practices, preferring to export them when looking into an allegation overseas – especially when a domestic U.S. complaint alleging a violation of American law implicates evidence or witnesses abroad. But exporting U.S. internal investigatory practices requires advance planning, flexibility, adaptation and compromise. Adapt U.S. investigatory strategies to the very different realities and the seemingly quirky mandates of the law of the overseas workplace. ■

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20. *See Banner Health Sys.*, 358 NLRB No. 93 (2012), *questioned by Canning v. NLRB*, case no. 12-1115 (D.C. Cir. 2013).
21. Slovak Crim. Code no. 300/2006.
22. *Cf. Brewers v. Anheuser-Busch*, 414 F.3d 36 (D.C. Cir. 2005).
23. S. Folsom, V. McKenney & P.F. Speice Jr., *Preparing for a Foreign Corrupt Practices Act Investigation*, ABA Int'l L. News, Winter 2013 at p. 6.
24. Opinion 1/2006, *supra* note 6.

BY MICHAEL J. SIRIS

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RPL § 294-b: An Ineffective Law

Introduction

A law always has a purpose – an objective it seeks to accomplish. Originally enacted in 1982 and then amended in 2008, New York's Real Property Law (RPL) § 294-b was intended to protect brokers and their claims for commissions, but it really accomplishes nothing.

As first passed in 1982, the law allowed a licensed real estate broker to record with the county clerk an "affidavit of entitlement" to a commission in the event the broker claims "he or she has produced a person who was ready, able and willing to purchase or lease all or any part of a parcel of real property pursuant to a written or oral contract."[1] The law provided:

> § 294-b. Recording brokers (sic) affidavit of entitlement to commission for completed brokerage services
>
> 1. A duly licensed real estate broker who asserts that he or she has produced a person who was ready, able and willing to purchase or lease all or any part of a parcel of real property pursuant to a written or oral contract of brokerage employment between the owner of said parcel of real property and such broker, and who asserts that such person or a party acting on his or her behalf subsequently contracted to purchase or lease, or did purchase or lease such real property or any part thereof, and who asserts that he or she is entitled to a commission pursuant to such written or *oral* contract, may file an affidavit of entitlement to commission for completed brokerage services in the office of the recording officer of any county in which any of the real property is situated.
>
> * * *
>
> 3. Upon receipt by the county clerk of a broker's affidavit of entitlement to commission for completed brokerage services for the purpose of recording, entering and indexing, the clerk shall note thereon that such notice does not *constitute a lien nor shall it invalidate any transfer or lease*. In payment for said services the county clerk shall be entitled to receive a fee equivalent to that received for recording a deed and pages thereof (emphasis added).

Not surprisingly, given the fact that the law specifically provided that the recording of such affidavit shall "not constitute a lien," the law lay fallow, obscure and essentially unused until 2008 when the Legislature amended it supposedly to give it more bite.[2]

The 2008 amendment provided, among other things, that in cases involving one- to four-family dwellings, or cooperative or condominium apartments[3] with respect to which a broker had filed[4] an "affidavit of entitlement" which includes a "*written* contract of brokerage commission" (emphasis added):

> [T]he lesser of the net proceeds of the sale or the amount of the unpaid portion of the compensation agreed to in such written contract shall be deposited by the seller, at the time of delivery of the deed or delivery of the stock certificate and/or proprietary lease, with the recording officer in whose office such affidavit of entitlement had been recorded.

Still, the 2008 amendment – not to mention the original 1982 law – is completely ineffective.

History of the Statute

The original 1982 legislation was part of what the late Clarence Barasch described as "twin" efforts to assist real estate brokers.[5] One of those efforts resulted in an amendment to the Lien Law[6] which amended the definition of "improvements" to include "real estate brokerage services in obtaining a lessee for a term of more than three years of all or any part of real property to be used for other than residential purposes pursuant to a written contract." The other part of the "twin" 1982 efforts was the above-discussed addition to Real Property Law (§ 294-b), which allowed a broker to record an "affidavit of entitlement."[7]

Interestingly enough – given that the 2008 amendment did not give the broker any sort of lien against the real property involved – the 2008 amendment actually had a difficult time getting passed. The 2008 amendment first surfaced in 2006 but was vetoed by then-Governor Pataki who was concerned that the added escrow requirement would "unfairly burden consumers . . . [and] shift . . . the burden to them to initiate litigation [against a broker to recover the escrowed commission]"[8] – a completely unnecessary concern as history would later show. In any event, the same amendment presented and vetoed in 2006 was re-

presented in 2008 to then-Governor Paterson, who allowed the amendment to become law.[9]

While making minor changes to the existing subdivisions (1)–(3)[10] of RPL § 294-b, the 2008 amendment added subdivisions (4)–(5) to the same section (RPL § 294-b).[11] These subdivisions, (4) and (5), set forth the timing and method of service of the affidavit upon the broker (subdivision (4)) and the actual "deposit" mechanism itself (subdivision (5)).[12] However, just as the original (1982) version of RPL § 294-b(3) provided that the clerk shall "note" that such affidavit "does not constitute a lien nor shall it invalidate any transfer or lease," subdivision (5)(g) of the 2008 amendment (RPL § 294-b(5)(g)) provides that the obligation of the seller to deposit, or the seller's failure to deposit, monies under the law, shall "not constitute or be deemed to create a lien" or "invalidate" any transfer.[13]

Use of the Statute

Indeed, with very few exceptions,[14] it is difficult to find any case that has invoked the statute either before or after its 2008 amendment. Even with respect to the supposedly beefed-up statute resulting from the 2008 amendment's requirement of a "deposit," this should hardly come as a surprise. While the law (as amended in 2008) provides that the seller "shall" deposit the disputed monies with the county clerk, there is absolutely no penalty for the seller's refusing to do so.[15] If the seller simply ignores the filing of the broker's "affidavit of entitlement" and refuses to *make the required "deposit" with the county clerk, the seller is in no worse position – either way*, the seller faces a lawsuit by the disgruntled broker but impunity for ignoring the law's apparent requirement to escrow funds with the county clerk.[16] Sellers are left with little incentive to follow this meaningless requirement, as there are few, if any, consequences for not doing so.

Conclusion

The law in question, even as amended to supposedly give it more force, has been completely ignored and serves no useful purpose. No doubt some real estate brokers and their counsel will be tempted to file an "affidavit of entitlement" which clearly has no legal meaning. Either a claimed brokerage commission under the law in question should be elevated so as to support a lien (as is the case with commercial leases of three or more years) or the law should be scrapped in its entirety because it accomplishes nothing. ■

1. RPL § 294-b (amended 2008).

2. *Id*. Some commentators had predicted that the 2008 amendment might make the "seldom utilized" law a more powerful weapon for brokers but that has not turned out to be the case. *See, e.g.*, Eric C. Rubenstein, *Unpaid Brokers Get a Stronger Remedy*, N.Y.L.J., Jan. 12, 2009, p. S9, *at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202427323646&Unpaid_Brokers_Get_a_Stronger_Remedy&slreturn=20130725123537.

3. The original 1982 law quoted above contained no reference to cooperative or condominium apartments or four dwelling units. In the 2008 amendment, the Legislature apparently intended that the deposit would be restricted to transactions involving only such properties. *See* Michael Berey, *Broker's Affidavit of Entitlement to Commission*, Real Property Law Section Blog (Aug. 18, 2008, 2:31 PM), http://nysbar.com/blogs/RPLS/2008/08/. For any broker who wishes to take advantage of this "deposit" requirement, it is worth noting that the 2008 amendment also provided that the "written [brokerage] contract" supporting the affidavit must have the specific language that appears in RPL § 294-b(5)(j).

4. It seems odd that, in the 2008 amendment relating to the requirement of a "deposit," the Legislature required a "written" contract but yet the original statute – which remained in place as to a broker's right to file an "affidavit of entitlement" – applied to written or oral brokerage contracts. It may be an error in draftsmanship or it may be that the Legislature intended that the "deposit" requirement would be triggered only by a "written" brokerage agreement. *See infra* note 10.

5. *See* Clarence S. Barasch, *Amendment Requires Escrowing of Real Estate Brokerage Pay*, N.Y.L.J., Jan. 29, 2009, p. 4, *available at* http://www.law.com/jsp/article.jsp?id=1202427816517.

6. N.Y. Lien Law § 2(4) (amended 1983).

7. *See supra* note 1.

8. Barasch, *supra* note 5.

9. *Id*.

10. RPL § 294-b. The 2008 amendment, among other things, added "cooperative apartments" to subdivisions (1) and (2). Oddly while keeping intact the language in subdivision 3 that the affidavit shall "not constitute a lien," the 2008 amendment added to subdivision (3) a requirement that the county clerk "shall record such affidavit [of entitlement] in the *lien docket*. . . ." (emphasis added). Needless to say, the filing of an affidavit of entitlement cannot create lien – just as the statute provides. *See, e.g.*, *Homespring LLC v. Hyung Young Lee*, 55 A.D.2d 541 (2d Dep't 2008).

11. RPL § 294-b. The 2008 amendment has various "ambiguities." Barasch, *supra* note 5. For instance, the first subdivision (RPL § 294-b(1)) in the original law essentially left intact by the 2008 amendment refers to a "written or *oral* contract" (emphasis added). However, the 2008 addition of subdivision 5 (relating to the seller's obligation to escrow funds) mandates a "written contract." It is possible that the Legislature intended that the affidavit of entitlement could be invoked in cases of written or oral contracts but the requirement of the deposit would be triggered only by a written contract. Alternatively, the statute is not consistent internally.

12. *Id*.

13. *Id*.

14. One of the few cases (and perhaps the lone case) invoking RPL § 294-b to support a seller's deposit is *Nastri Real Estate, LLC v. Beblo*, 96 A.D.3d 1476 (4th Dep't 2012). It is not clear why the seller in that case apparently made the deposit with the county clerk, but the claim was sustained (in part).

15. RPL § 294-b. Subdivision (5)(f) of RPL § 294-b (which was part of the 2008 amendment), provides that "[i]n any action or proceeding pursuant to this subdivision [5] when the seller has not made the deposit required by this subdivision [5], and it is determined by a court the broker is entitled to compensation pursuant to the written contract of brokerage employment, the broker shall be awarded . . . reasonable attorneys' fees." Such an award might be an advantage for a broker and a reason for a broker to file an "affidavit of entitlement" – if the broker files such an affidavit and the seller fails to comply, the 2008 amendment provides for an award of attorney fees to the broker if he or she prevails (something not otherwise available). Interestingly, in *Nastri*, the Appellate Division held that the broker was not entitled to attorney fees in an action under RPL § 294-b "inasmuch as the statute does not authorize such an award in this proceeding." That result followed because the seller – again for reasons unknown – had made the deposit under the 2008 amendment (and was thus not liable for attorney fees). Presumably, had the seller not made the required deposit under the law, the seller might have been responsible for attorney fees – the only conceivable benefit the law confers on a broker.

16. *Id*. In fact, title insurers note in their underwriting guidelines available to the public that the filing of an affidavit of entitlement, if noted, is for information purposes only. *See, e.g.*, http://www.vuwriter.com/vusubtopics.jsp?displaykey=STSE00030301&parenttype=2.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

My firm represents Blackacre, a real estate investment trust (REIT) with real estate holdings located throughout many portions of the United States, and has represented the company in almost all of its real estate transactions. A wholly owned subsidiary of Blackacre owns a luxury ski resort development in Utah, and the principals of Blackacre have located a second resort property in Utah that they hope to purchase and add to the company's ever-growing real estate portfolio. My firm only has an office in New York and does not employ any attorneys who are admitted to practice in Utah. Would this transaction require Blackacre to hire local counsel in Utah to assist my firm in the deal? I have heard that if I do not retain local counsel, then I would potentially be engaging in the unauthorized practice of law. Is this true? What are the consequences for engaging in the unauthorized practice of law?

Sincerely,

I. Need Help

Dear I. Need Help:

The unauthorized practice of law is a complicated question, one which at times has been met with fiercely diverging viewpoints. Those who run afoul of unauthorized practice regulations, however, can be subjected to a variety of penalties including disgorgement of legal fees, disciplinary action, and possible criminal sanctions.

Lawyers are often asked by their clients to handle matters that may take them outside their home territory. For example, in the litigation realm, an attorney admitted in New York could be handling the representation of a client in a New York state court action which may require the attorney to conduct discovery in other jurisdictions in connection with the case, even though that attorney may not be admitted in those states. Corporate, real estate and other transactional attorneys admitted in New York may also be asked to represent their New York-based clients in mergers and acquisitions where the transaction at issue involves a purchaser or seller in another state.

Rule 5.5(a) of the New York Rules of Professional Conduct (the RPC) gives attorneys the rules of the road (at least from the New York perspective) when their practices take them to other jurisdictions. The Rule provides that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction."

Comment [1] to Rule 5.5 states:

> A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law in another jurisdiction by a lawyer through the lawyer's direct action, and paragraph (b) prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law.

New York may not always be the friendliest place for out-of-state attorneys who venture into our jurisdiction (even on a temporary basis) as part of their representation of a client. In the words of Professor Roy Simon, "Rule 5.5 is one of the great disappointments in the New York Rules of Professional Conduct." Simon's New York Rules of Professional Conduct Annotated at 1340 (2014 ed.). New York Judiciary Law §§ 478 and 484 make it a crime for a person to practice law in New York when not admitted to practice in this state, and the statutes do not distinguish "between nonlawyers who have never been admitted anywhere and lawyers who have been admitted elsewhere but not in New York." Simon's at 1340. Although enforcement of these statutes may be inconsistent, the message being sent by both the Legislature and the courts is that out-of-state attorneys should engage New York admitted counsel in connection with their matters in New York.

When the RPC was enacted in April 2009, New York did not incorporate many of the "safe harbor" provisions in Rule 5.5 of the American Bar Association's Model Rules of Professional Conduct (the Model Rules) that permit lawyers to do work outside the jurisdiction where they are admitted. Specifically, Rule 5.5(c) of the Model Rules tells our profession:

> A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
>
> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
>
> (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear

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

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in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Perhaps addressing the needs of a broader audience, the ABA made several comments to Rule 5.5(c) that assist lawyers with multijurisdictional practices. Comment [10] to Rule 5.5 of the Model Rules states:

> Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

In addition, Comment [13] to Rule 5.5 of the Model Rules provides:

> Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

Paragraphs (c)(2) and (c)(3) to Rule 5.5 of the Model Rules clearly were meant to lower the hurdles for attorneys to engage in multijurisdictional practice in both the litigation and alternative dispute resolution (ADR) forums, respectively. Moreover, Paragraph (c)(4) can be interpreted as permitting out-of-state attorneys to engage in the representation of a client in the transactional context in jurisdictions which have adopted this specific provision of the Model Rules. Indeed, one of our neighbors in the tri-state area (Connecticut) adopted these sections of Rule 5.5 of the Model Rules nearly verbatim so as to allow Connecticut to be more hospitable to multijurisdictional practitioners. Taking an even more enlightened approach to embracing out-of-state attorneys, our neighbors in the Garden State have adopted a version of Rule 5.5 which sets forth a number of varying situations where out-of-state attorneys could practice in New Jersey on either an occasional or temporary basis in connection with matters in their respective home states. The relevant provisions of Rule 5.5 of the New Jersey Rules of Professional Conduct provide:

> (b) A lawyer not admitted to the Bar of [New Jersey] who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:
>
> (1) the lawyer is admitted to practice pro hac vice pursuant to R. 1:21-2 [of the Rules Governing the Courts of the State of New Jersey (the New Jersey Rules)] or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or
>
> * * *
>
> (3) under any of the following circumstances:
>
> (i) *the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client* in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;
>
> (ii) *the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program and the services arise out of or are reasonably related to the lawyer's practice* in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission pursuant to R. 1:21-2 [of the New Jersey Rules] is required;
>
> (iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice;
>
> (iv) the out-of-state lawyer's practice in this jurisdiction is occasional and the lawyer associates in the matter with, and designates and discloses to all parties in interest, a lawyer admitted to the Bar of [New Jersey] who shall be held responsible for the conduct of the out-of-State lawyer in the matter; or
>
> (v) the lawyer practices under circumstances other than (i) through (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, *provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client* (emphasis added).

As demonstrated above, it appears that our neighbors in the tri-state area are more than happy to allow New

York attorneys on their turf. However, the feeling may not be mutual, and it is uncertain whether New York is likely to change its rules anytime soon.

With that in mind, we turn to your question. Obviously, in addition to being well-versed in the RPC, you should also make yourself familiar with the rules applicable to the jurisdiction where your client's matter may take you; in this case it would be the Utah Rules of Professional Conduct (the Utah Rules). The good news is that Rule 5.5 of the Utah Rules tracks the language of Rule 5.5(c) of the Model Rules and its respective comments.

The Utah Rules appear to have adopted the ABA Model Rules in order to embrace the concept of multijurisdictional practice. Being that your representation of Blackacre in connection with its real property purchase in Utah could be "reasonably related" to your ongoing representation of Blackacre as its New York counsel in its other real estate ventures, your representation of Blackacre under these circumstances would not be considered an unauthorized practice of law and would be permissible under Rule 5.5(c)(4) of the Utah Rules.

That being said, we believe that it is smart for you to engage local counsel in Utah to assist with Blackacre's resort purchase. While local counsel may not be an absolute necessity, we are guided by the competency requirements outlined in Rule 1.1 of the RPC. Rule 1.1 provides:

> (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

Attorneys often feel the need to handle everything on their own for a particular client. Nevertheless, you should not close your eyes to the fact that local counsel would most likely be more familiar with local procedures and requirements relating to this potential purchase by your client. With more and more clients involved in matters in other states and even overseas, the decision to engage local counsel under the circumstances you have described is clearly in line with your obligations under Rule 1.1.

Lawyers, like sailors, often find themselves navigating through the shoals of foreign waters. We have learned to heed the wisdom of an old racing adage: "A sailor knows when you enter a race away from home that local knowledge is always critical and can often determine the outcome of the race."

Sincerely,
The Forum by
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(maron@thsh.com),
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I graduated law school last year and was just admitted to the bar. With very few job prospects out there for young attorneys, I decided to hang out my own shingle. Lately I have encountered judges and counsel who give me strange looks when they see me in court or at a meeting. I have also lost a few clients and have come to realize – I am not sure why – that this may have something to do with my appearance. I never really understood the need for attorneys to dress formally. So I dress pretty much the way I did in law school. I don't wear a tie when I am in court. I usually sport a nice pair of expensive jeans and then finish the look with some brightly colored shoes. Some of the judges that I have appeared before have openly commented not only on my informal dress but also my piercings and my visible tattoos. To me, the way I dress is an expression of my basic rights to free speech. It is the quality of my arguments, not the way I dress, that should be important. I am the first member of my family to become a lawyer and do not have any mentors to help me. Do I have a professional obligation to wear a suit and tie when I am in court? What about meetings with clients or other lawyers?

Sincerely,
N. O. Fashionplate

under CPLR 2214(d), instead of serving a subpoena, for the nonparty to produce the items. The *Legal Writer* discussed spoliation of evidence in part XXIX of this series.[21]

Responding to a Subpoena

You have several options to respond to a subpoena: comply with the subpoena: appear for the examination before trial (EBT) or trial (subpoena ad testificandum); produce the records or items sought (subpoena duces tecum); or respond to the questions (information subpoena). You may also object to the subpoena. And you may move to quash, fix conditions, or modify a subpoena. But you may never ignore a subpoena.

• Complying. To comply with a subpoena duces tecum, nonparties must "sign a sworn certificate attesting that the documents are correct copies of documents prepared in accord with the business records requirements of CPLR 4518."[22] To comply with a subpoena ad testificandum, appear to testify on the date, time, and location specified.

All business records produced pursuant to a subpoena duces tecum under CPLR 3120 "must be accompanied by a certification, sworn in the form of an affidavit signed by the custodian or some other qualified witness responsible for maintaining the records."[23]

The custodian or qualified person must certify (1) that the person certifying the records is an appropriate person to certify; (2) that the person made a reasonable inquiry that the records produced are accurate versions of the documents sought in the subpoena; (3) that the documents produced represent all the documents demanded (if not all are produced, the person must describe the missing documents and explain their absence); and (4) that the documents produced were made in the regular course of business.[24]

• Objecting. If you're reluctant to comply with a subpoena, you don't need to move to quash the subpoena; you "need only serve written objections."[25] Under CPLR 3122(a), you may, within 20 days of being served a subpoena duces tecum,[26] object to the subpoena by serving a response, stating with reasonable particularity your reasons for objecting. No need to file your objections with the court.

Object in writing to the issuer of the subpoena, typically your adversary, about any irregularities in a subpoena. Point out the defects in the subpoena, either substantive or procedural. Depending on the procedural or substantive defects, you might have leverage over your adversary in putting limits on the scope of the subpoena, the time or the place for the appearance of a witness, or the production of documents.[27] If you and your adversary can't work it out, consider moving to quash the subpoena.

Serve written notice of errors or irregularities in a notice of deposition three days before the deposition. If you fail to point out those errors, they're deemed waived.[28]

• Moving to Quash, Fix Conditions, or Modify a Judicial Subpoena. You may also object to a subpoena by moving to quash, fix conditions, or modify the subpoena.[29]

You must have standing to move to quash a subpoena: "[T]he moving party must either be the person who is the object of the subpoena or whose property rights or privileges may be in jeopardy."[30] A party that doesn't have a proprietary interest in documents its adversary subpoenaed and which are in a third party's possession has no standing to challenge the subpoena.[31]

For a judicial subpoena, file your motion to quash in the court in which the subpoena is returnable.[32]

Move to quash a subpoena "promptly" — before the subpoena's return date.[33] If the subpoena's return date is approaching and you don't have enough time to move on notice, move by order to show cause for the court to hear your motion sooner.

A court may command a sheriff to produce a witness in court and to commit the witness to jail until the witness complies with the subpoena.

In your motion to quash, you may challenge the validity of a subpoena on procedural and substantive grounds. You may move to quash the subpoena on the basis that (1) service of the subpoena was improper; (2) the subpoena seeks documents or information irrelevant to the action or proceeding; (3) the person or court that issued the subpoena didn't have the jurisdiction (or authority) to issue the subpoena; (4) a privilege prevents you from turning over documents or testifying; (5) the subpoena is vague or overbroad; (6) complying with the subpoena is unduly burdensome; or (7) the party seeking the subpoenaed records is using the subpoena to harass you.

You may ask the court to fix conditions or modify the subpoena. If the demands in the subpoena are too costly for you to honor them, the court might impose the reasonable, actual cost of honoring the subpoena.[34] You might agree to produce the documents sought in a subpoena, but you may ask the court to modify the subpoena for you to produce the documents only at some designated time or place different from the time or place specified in the subpoena.[35] You may also ask the court to limit the scope of the documents you must produce.[36] You're not expected to "'cull the good from the bad'" items in the subpoena.[37] And, in any event, the court won't cull the

good from the bad items in the subpoena, either.[38]

A court will grant the moving party's motion to quash or modify a subpoena "'[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious' or where the information sought is 'utterly irrelevant to any proper inquiry.'"[39]

Like other civil-litigation motions, your motion to quash must include a notice of motion. Depending on the complexity of your arguments in the motion to quash, you might need to submit an affidavit and exhibits. If the legal issue is complex, consider submitting a memorandum of law. Serve copies of your motion on all the parties. Serve your motion in the same way you'd serve other civil motions.

In your opposition papers, address the moving party's substantive and procedural grounds for quashing, modifying, or conditioning the subpoena. Submit any affidavit and exhibit that support your position.

• Moving to Quash, Fix Conditions, or Modify a Non-Judicial Subpoena. Before you move to quash a non-judicial subpoena, you must request the issuer of the subpoena to withdraw or modify the subpoena.[40] If the issuer refuses to comply, you may move to quash the subpoena. But you don't need to move to quash the subpoena. You can wait until the issuer of the subpoena moves to compel you to comply with the subpoena.

If the subpoena is issued out of an administrative proceeding, move to quash or modify the subpoena in New York State Supreme Court. A motion to quash a non-judicial subpoena is similar to a CPLR Article 78 proceeding: The purpose is to review administrative action.[41] The proper venue is "a county in which an Article 78 proceeding could be brought against the agency."[42]

Disobeying a Subpoena: The Consequences

• Disobeying a Judicial Subpoena. Don't ignore a subpoena. If you disobey a judicial subpoena — issued by a court, clerk, or officer of the court "in conjunction with a court proceeding" — you'll be subject to contempt.[43] The disobeyer, whether a party or a nonparty witness, is also subject to paying the actual damages it causes the issuer of the subpoena and a penalty of up to $150.[44] If the disobeyer is a party to the action or proceeding, the court may also strike the disobeyer's pleadings.[45]

A court may also command a sheriff to produce a witness in court and to commit the witness to jail until the witness complies with the subpoena.[46]

• Disobeying a Non-Judicial Subpoena. If you've disobeyed a non-judicial subpoena, contempt isn't automatically the penalty.[47] The issuer of the subpoena must move in Supreme Court to compel you to comply; this is called a motion to compel compliance. If the court orders you to comply, violating the court's order will then subject you to the court's contempt powers.[48] In addition to contempt, the court may also impose a penalty up to $150, award damages, and incarcerate you.[49]

In the next issue of the *Journal*, the *Legal Writer* will discuss contempt motions, specifically civil and criminal contempt. ■

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1. David D. Siegel, New York Practice § 382, at 673 (5th ed. 2011).
2. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 26:392, at 26-45 (2006; Dec. 2009 Supp.).
3. Siegel, *supra* note 1, at § 383, at 674.
4. *Id.* § 383, at 673 (citing CPLR 2103(a)).
5. Barr et al., *supra* note 2, § 26:393, at 26-46.
6. *Id.* § 26:393, at 26-46 (citing CPLR 3106(b), 3120(2)).
7. Siegel, *supra* note 1, at § 382, at 672 (citing CPLR 2303(a)).
8. *Id.* § 382, at 672 (citing CPLR 2303(a)).
9. David Paul Horowitz, New York Civil Disclosure § 16.05[2], at 16-12, 16-13 (2014 ed.) (citing CPLR 3120(3)).
10. Siegel, *supra* note 1, at § 383, at 674.
11. *Id.* § 383, at 674 (citing *23/23 Commc'ns Corp. v. GM Corp.*, 172 Misc. 2d 821, 824, 660 N.Y.S.2d 296, 298 (Sup. Ct. N.Y. County 1997)).
12. *Id.* § 383, at 675 (citing CPLR 2303(a), 2103(b)).
13. *Id.* § 383, at 673.
14. *Id.*
15. *Id.* (citing New York City Civil, Uniform District, Uniform City, and Uniform Justice Court Acts §§ 1101 & 1201).
16. 1 Byer's Civil Motions § 76:03, at 852 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.).
17. Siegel, *supra* note 1, at § 383, at 675.
18. *Id.* § 383, at 674 (citing *Cherfas v. Wolf*, N.Y.L.J., July 22, 2008, at 29, col. 1 (Sup. Ct. Kings County)).
19. *Id.* .
20. David L. Ferstendig, New York Civil Litigation § 6.27[11], at 6-66 (2014).
21. *See* Gerald Lebovits, The Legal Writer, *Drafting New York Civil-Litigation Documents: Part XXIX — Disclosure Motions Continued*, 86 N.Y. St. B.J. 64, 56 (Jan. 2014).
22. Oscar G. Chase & Robert A. Barker, Civil Litigation in New York § 15.03[d], at 631 (6th ed. 2013).
23. Barr et al., *supra* note 2, § 26:414, at 26-47 (citing CPLR 3122-a).
24. Horowitz, *supra* note 9, § 16.13, at 16-25 (citing CPLR 3122-a(a)).
25. Chase & Barker, *supra* note 22, § 15.03[d], at 631.
26. *See* CPLR 3120, 3121.
27. Barr et al., *supra* note 2, § 26:400, at 26-46.
28. *Id.* § 26:401, at 26-47.
29. *Id.* § 26:410, at 26-47 (citing CPLR 2304); Siegel, *supra* note 1, at § 384, at 675.
30. Byer's Civil Motions, *supra* note 16, at § 76:04, at 853.
31. *Id.* § 76:04, at 854 (citing *Echel Gasoline Corp. v. N.Y.C. Dep't of Consumer Affairs*, 108 A.D.2d 717, 718, 484 N.Y.S.2d 284, 285 (2d Dep't 1985)).
32. Siegel, *supra* note 1, at § 384, at 675.
33. Barr et al., *supra* note 2, § 26:410, at 26-47 (citing CPLR 2304; *In re Brunswick Hosp. Ctr. Inc. v. Hynes*, 52 N.Y.2d 333, 339, 438 N.Y.S.2d 253, 256, 420 N.E.2d 51, 54 (1981)).
34. Siegel, *supra* note 1, at § 384, at 675-76.
35. Barr et al., *supra* note 2, § 26:410, at 26-47.
36. *Id.* § 26:410, at 26-47 (citing CPLR 2304).
37. Byer's Civil Motions, *supra* note 16, at § 76:10, at 857 (quoting *Grotallio v. Soft Drink Leasing Corp.*, 97 A.D.2d 383, 383, 468 N.Y.S.2d 4, 5 (1st Dep't 1983)).
38. *Grotallio*, 97 A.D.2d at 383, 468 N.Y.S.2d at 5.
39. Byer's Civil Motions, *supra* note 16, at § 76:06, at 855 (quoting *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 331–32, 525 N.Y.S.2d 816, 818, 520 N.E.2d 535, 537 (1988) (quoting *In re Edge Ho Holding Corp.*, 256 N.Y. 374, 382, 176 N.E. 537, 539 (1931); *In re La Belle Creole Int'l, S.A. v. Attorney-General of State of N.Y.*, 10 N.Y.2d 192, 196, 219 N.Y.S.2d 1, 5, 176 N.E.2d 705, 707 (1961))).
40. CPLR 2304; *Rubino v. 330 Madison Co., LLC*, 39 Misc. 3d 450, 452–53, 958 N.Y.S.2d 587, 589 (Sup. Ct. N.Y. County 2013) ("[I]n support of the within motion, movant non-party . . . has not supplied the court with a copy of such detailed response [stating the objections with reasonable particularity], nor has it alleged that such a response was supplied; therefore, the motion is denied as the correct procedure for objecting to a subpoena duces tecum has not been complied with.").
41. Siegel, *supra* note 1, at § 384, at 675.
42. *Id.*
43. *Id.* § 385, at 676.
44. Barr et al., *supra* note 2, § 26:431, at 26-48; Byer's Civil Motions, *supra* note 16, at § 76:13, at 858.
45. Siegel, *supra* note 1, at § 385, at 676 (citing CPLR 2308(a)).
46. *Id.* § 385, at 676.
47. Barr et al., *supra* note 2, § 26:420, at 26-48.
48. Siegel, *supra* note 1, at § 385, at 676 (citing CPLR 2308(b)); Barr et al., *supra* note 2, § 26:420, at 26-48.
49. Byer's Civil Motions, *supra* note 16, at § 76:13, at 858.

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INDEX TO ADVERTISERS

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Forgive me if you have already addressed this issue during the past year: Is the right word in this question *further* or *farther*? The question the New York City reader asked was: "Is it, 'Nothing is *further* from the truth' – or *'farther* from the truth'? Or are those two words synonyms?"

Answer: *Farther* and *further* are neither synonyms nor twins. The word *farther*, properly used, refers only to actual distance: "New York is farther from Mississippi than I thought." In all other contexts, choose *further:* "Have you anything further to say?" In that context *further* means "in addition." Another difference is that only *further* can add the suffix *more*. Many Americans still say *furthermore*, but currently the suffix *more* is sometimes dropped because it adds no meaning to *further* and therefore seems redundant.

Question: Do the following two sentences have the same meaning? (1) Under this contract, time is of the essence. (2) Time is essential to this contract.

Answer: Yes, *Ballentine's Law Dictionary* (1969 edition) defines *essence* as "the gist or substance of something, or a vital constituent of the contract." *West's Legal Thesaurus/Dictionary* agrees and provides synonyms (the heart, core, or quintessence of a thing) and unequivocally adds "that which is indispensable."

The idiom "time is of the essence" is surprisingly older than the other phrase, which the drafter seems to use in order to clarify the idiom. But because the first phrase "time is of the essence" currently has virtually replaced the second, there seems no need to explain its meaning. *Bartlett's Familiar Quotations* (1980 edition) lists "time is of the essence" as an "anonymous saying." It is also an idiom, which is "an expression that is peculiar to itself and to the users of the language in which it appears." Since it is well understood and well-respected by the courts, I would prefer it to its alternative.

Question: Are the adjectives *previous* and *prior* interchangeable?

Answer: Sometimes but not always, although dictionaries list each as a synonym of the other. The adjective *previous* derives from early French *prae* ("leading"), plus *via* ("way") and still retains the idea of occurring before, either in space or time. So you would say "previous owners," or "previous decisions." But *previous* also has a sense that *prior* does not have. When it follows *too* it can mean "hasty in acting" or "impatient or premature," as in "He was too previous in condemning the defendant."

The adjective *prior* is a synonym of *previous* when *prior* means "former." But *prior* also can mean "first" or "superior." In the phrase "a prior responsibility" it carries the sense of taking precedence in importance or value. And in the phrase "a prior commitment," it carries the sense of "preceding in time."

This question was answered before, and when the answer appeared in another journal, some readers pointed out that the phrase *first priority* was redundant because *prior* itself contained the sense of "first." Another reader based his reasoning on the fact that in Latin – from which the word was borrowed – the monastic officer in charge of a priory is called a "Prior."

That reasoning seems sound. As recently as 1987 *The American Heritage Dictionary* listed "first" as one meaning of *priority.* But current usage has diluted the meaning of *prior* to "choice," just as *unique* has become so diluted that it currently means "unusual," not "one of a kind." Even as recently as the 20th century, some writers disliked "prior." Theodore Bernstein, for example, argued that one should feel free to use that adjective only if one used the word *posterior* instead of *before*.

Writers with "sound stylistic priorities" also were advised to avoid the "bureaucratic bafflegab" of words like *prioritize.* That opinion was common during the middle of the 19th century when *prioritize* was introduced! But *prioritize* has become standard English in the opinion of many educated speakers.

Speaking of changing public opinions about language, have you noticed that while most people used to say "We'll see how things work out," the same people now say, "We'll see how things play out"? Can psychologists find some explanation for that?

And have you noticed that the small two-letter word *so* has greatly expanded in usage, while also losing meaning? That small word *so* used to be largely used in contexts in which it meant "therefore." Now it often appears as the first word in response to any question. But it has lost its meaning and is now replacing the meaningless *uh* as a device to delay a response to a question. ■

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BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XXXI — Subpoenas Continued

In the last issue, the *Legal Writer* discussed the basics of subpoenas, including the form and substance of subpoenas ad testificandum, subpoenas duces tecum, information subpoenas, deposition subpoenas, and the fees associated with subpoenas. We continue our discussion of subpoenas.

Subpoenas: The Basics, Continued

• Service. Serve a subpoena the same way you'd serve a summons.[1] Exceptions: Use (1) substituted service to serve a subpoena under CPLR 308(2) — delivery and mail — or (2) conspicuous-place service — nail and mail — to serve a subpoena under CPLR 308(4).[2] Consult CPLR 308 — personal service on a person — for service options. Choose the appropriate service method depending on when you need the witness to testify or produce documents or records.

When you serve a subpoena "on an entity or government unit of some kind, the person to be served may ordinarily be any person upon whom a summons could be served in an action brought against the entity or unit."[3]

Any person over 18 who isn't a party to the action or proceeding may serve a subpoena.[4] A court may allow a party to the action or proceeding to serve a subpoena.

You may serve a nonparty subpoena any time after the action has commenced.[5] When serving a subpoena duces tecum or a deposition subpoena, give the nonparty 20 days' notice.[6]

After you've served a subpoena duces tecum, you must "promptly" serve a copy of the subpoena on the other parties to the action.[7] The other parties must receive the subpoena "before the time scheduled for the [witness to] produc[e] . . . the papers or others things sought."[8] Within five days after you've received all or some of the items sought in the subpoena, give notice to the other parties that the items are available for inspection and copying. Specify the time and place for inspection.[9]

When you serve a subpoena duces tecum on a large entity that has a central office and multiple branch offices, you may serve the subpoena either at the central office or at a branch office.[10]

If you're seeking testimony from a corporate entity's employee, serving a subpoena ad testificandum on a corporation, instead of the specific employee, permits the corporation to produce the employee to testify; no "independent basis for jurisdiction of the witness is . . . needed."[11]

You may serve a subpoena ad testificandum on a witness's attorney if an attorney represents that witness.[12] Give the attorney enough time to produce the witness to testify in court.

• In-State and Out-of-State Subpoenas. You may not serve a New York subpoena outside New York "regardless of the court involved."[13] Subpoena service is available statewide in the Supreme, County, Surrogate's, and Family Courts as well as in the Court of Claims.[14] The lower courts — Civil, District, City, and Justice Courts — have territorial restrictions on subpoenas.[15]

A New Yorker need not respond to a subpoena issued in "an action or proceeding [that's] pending in a sister state." An out-of-state subpoena isn't covered by the long-arm statute and has "no legal effect."[16] The New Yorker's contacts with the sibling state might, however, require the New Yorker to respond to the out-of-state subpoena.[17]

If you serve a New York subpoena on an out-of-state witness and the witness appears voluntarily, a court might "direct the witness to return for further testimony on future days under penalty of contempt,"[18] even if the court never had jurisdiction over the person.

Any person over 18 who isn't a party to the action or proceeding may serve a subpoena.

A corporation might be required to produce in court its officers and employees, even those "stationed outside the state."[19]

Consult CPLR 3119 if you're seeking to depose a person in New York or to obtain documents located in New York for an out-of-state case or proceeding.[20]

CPLR 3119 provides that out-of-state judicial subpoenas may be submitted either to the county clerk where the discovery is to take place or to a New York-licensed attorney who represents the subpoenaed party.

• Order to Show Cause. If you believe that a nonparty will destroy evidence, move by order to show cause

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