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By David C. Wilkes

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NEW YORK STATE BAR ASSOCIATION
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BY DAVID C. WILKES

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STEPHEN P. YOUNGER

Our Cause: Access to Justice for All

"[O]ur responsibility is, as servants of society, to make our professional competencies readily available for the benefit of our communities and all their members." Past President Hugh R. Jones

Upon becoming State Bar President, one of my most trusted mentors, Hugh R. Jones, who later became a judge of our Court of Appeals, reminded the Association that we all owe a duty to lend our expertise, training and experience to better "our communities and all their members."

Numerous New Yorkers who cannot afford lawyers face legal problems every day. These legal matters span a wide range of issues, from foreclosure actions to eviction cases to losses of benefits and family law matters.

Unfortunately, given the economic decline, the need for legal services has grown dramatically. But given our state's fiscal crisis, government support for legal services for the poor has dropped. This has created a harsh double whammy for indigent New Yorkers, who are not receiving the legal representation they need.

Many of you have answered the call to do the public good, generously giving your time and talents to the poor by volunteering your pro bono services. Last year alone, the members of our Empire State Counsel program donated nearly a quarter of a million hours of free legal services to the poor. Yet, as the need for legal services continues to grow, we know that pro bono service alone will not close the justice gap in this state.

Civil Gideon

We will not achieve truly equal access to civil justice for all New Yorkers until there is a comprehensive, permanent, and adequately funded mechanism to provide counsel to the poor in civil matters where basic needs – such as shelter, sustenance, and safety – are at stake. To make access to justice a reality, we need the collective concern and ingenuity of each of you as we join with our colleagues in the Judiciary to move this cause forward.

This important work is already under way. Last spring, Chief Judge Jonathan Lippman called for the establishment of a comprehensive approach to providing legal representation for poor people in civil cases. He launched a Task Force to Expand Access to Civil Legal Services in New York. He announced that hearings would be held in all four Judicial Departments of our state to assess the extent and nature of the unmet need for civil legal services, and announced that the New York State Bar Association would co-chair these hearings.

As this message goes to press, we are gearing up for these hearings, at which Chief Judge Lippman, Chief Administrative Judge Ann Pfau, and I or a designated State Bar representative will preside. Information developed at these hearings will be used to form the basis for recommendations we can make to the Legislature as to the types of civil matters in which legal representation ought to be provided to indigent litigants and the funding required to meet this need.

Given the troubled economy and the financial straits that New York State is facing, the obstacles before us are clear. However, the situation we are facing is indeed a crisis. More than two million New Yorkers a year lack legal representation in cases that raise fundamental issues. At the same time, critical funding sources, such as the Interest on Lawyers Account program, are drying up. In these challenging times, it is incumbent on us, as a profession, to use our abilities to assist both those in need and those who provide civil legal services.

It is quite an honor for us to partner with Chief Judge Lippman and the Judiciary on this critical endeavor. The State Bar has a strong record of supporting the recognition of a Civil Gideon right, which derives from the United States Supreme Court's holding in *Gideon v. Wainwright* that all persons accused of a felony are entitled to legal representation. In 2006, we supported an American Bar Association resolution urging states to provide legal counsel as a matter of right to low-income persons in adversarial proceedings where basic human needs are at stake. In 2008, our own House of Delegates adopted a resolution calling for the right to counsel to be granted to vulnerable low-income people facing eviction or foreclosure and to unemployment insurance claimants who

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

have received a favorable determination that is challenged on appeal.

Our participation in the upcoming hearings and our position on possible legislative reforms are the next steps on the path toward recognizing Civil Gideon in New York. I hope we can count on your continued support on this and other important initiatives that shine a spotlight on the need for access to justice in our state.

National Pro Bono Week

October is an ideal time to advance this worthy cause. This month marks the second annual celebration of National Pro Bono Week, to be held this year October 24–30. We set aside this time each year to recognize the significant pro bono contributions that attorneys make and to raise awareness about the unmet need for civil legal services. Like last year, the 2010 National Pro Bono Week will feature free training for pro bono volunteers and free legal clinics for the public.

We will be kicking off the week with a celebration at the Court of Appeals on October 22. Bar associations and legal services providers across the state will hold events throughout the week. Visit our website at www.nysba.org/2010NPBWCOE to learn how you can get involved in this celebration.

Finally, this is the time of year when we seek applications for our Empire State Counsel program. It is simple to apply. You need only complete a form affirming that you provided 50 or more hours of free legal services to the poor during 2010. The form is available at www.nysba.org/2010ESCVF. Last year, we welcomed more than 1,400 members into this important program. I would like to see us double that level this year.

If you qualify for this designation, please apply now. We would be delighted to recognize the good that you have done for those in need.

We would also like to hear your stories about how pro bono service has affected you or changed the lives of others. Share them with us at thegoodwedo@nysba.org.

On behalf of the State Bar, thank you so much for the good you do! ■

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October 1 Buffalo; Long Island; Westchester

Practical Skills: Basic Matrimonial Practice
October 6 Albany; Buffalo; Long Island
October 7 New York City; Syracuse; Westchester

Henry Miller – The Trial
October 8 Buffalo
November 4 New York City

Bridging the Gap
(two-day program)
October 13–14 New York City

Expert Testimony – What You Need to Know in New York
October 15 New York City
October 22 Syracuse
November 5 Albany; Long Island
November 18 Buffalo

Practical Skills: Probate and Administration of Estates
October 19 Albany; New York City; Rochester
October 20 Buffalo; Long Island; Syracuse
October 21 Westchester

Jim McElhaney's Day in Discovery
October 19 Long Island
October 21 New York City
November 10 Albany

Litigating Forensic Evidence
October 21 New York City

Matrimonial Law: New Legislation, Counsel Fees Relocation and Ethics
(9:00 am – 1:00 pm)
October 22 Long Island
October 29 Buffalo
November 19 Syracuse
December 3 Albany
December 10 New York City

Ethics for Real Estate Lawyers
(9:00 am – 1:00 pm)
October 26 Long Island; Rochester
November 19 New York City
December 15 Westchester
December 16 Albany

Representing the DWI Defendant From Arraignment to Disposition
October 28 Albany

Emerging Issues in Environmental Insurance
(9:00 am – 1:00 pm)
October 29 New York City

Practical Skills: Purchases and Sales of Homes
November 2 Albany; Long Island; New York City; Rochester
November 3 Buffalo
November 4 Syracuse; Westchester

Update 2010 – Live Session
November 5 Syracuse
November 12 New York City

Building a Successful Solo/Small Firm Practice: Taking Steps to Achieve Success
November 8 New York City (live session)
Albany (video conference from NYC)

Hot Topics in Real Property Law
November 8 New York City
December 2 Long Island
December 3 Rochester
December 6 Albany
December 8 Syracuse
December 9 Westchester

Practical Skills: Collections and Enforcement of Money Judgments
November 9 Albany; Long Island; Westchester
November 10 New York City; Syracuse

Representing Investors: Securities Arbitration and Mediation
November 17 New York City

† Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

†Eighth Annual Sophisticated Trusts & Estate Institute
(two-day program)
November 18–19
New York City

Construction Site Accidents
November 19 Albany; Long Island
December 3 New York City; Syracuse
December 10 Buffalo

Accounting for Lawyers
December 1 Albany
December 7 Rochester
December 10 New York City
December 16 Long Island

†Update 2010 – Video Replay
December 2 Albany
December 3 Buffalo; Loch Sheldrake
December 10 Canton; Plattsburgh; Westchester
December 15 Jamestown
December 16 Binghamton
December 17 Corning; Long Island; Watertown

Negotiation Strategies for Litigators
(9:00 am – 12:35 pm)
December 8 New York City

Negotiation Strategies for Transactional Attorneys
(1:30 pm – 5:05 pm)
December 8 New York City;

Gain the Edge: Negotiation Strategies for Lawyers
December 9 Albany

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December 13 New York City

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Authors
Brendan F. Baynes, Esq.
Eileen E. Buholtz, Esq.
J. Peter Coll, Jr., Esq.
Gary A. Cusano, Esq.
Barbara Decrow Goldberg, Esq.
Joseph M. Hanna, Esq.
Richard A. Jacobsen, Esq.
Matthew S. Lerner, Esq.
Justice Sallie Manzanet-Daniels
Thomas J. Maroney, Esq.
Michael F. Perley, Esq.
Carl J. Schaerf, Esq.
Saul Wilensky, Esq.

EDITOR-IN-CHIEF
Dennis P. Glascott, Esq.

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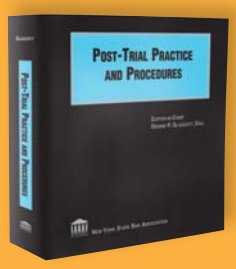

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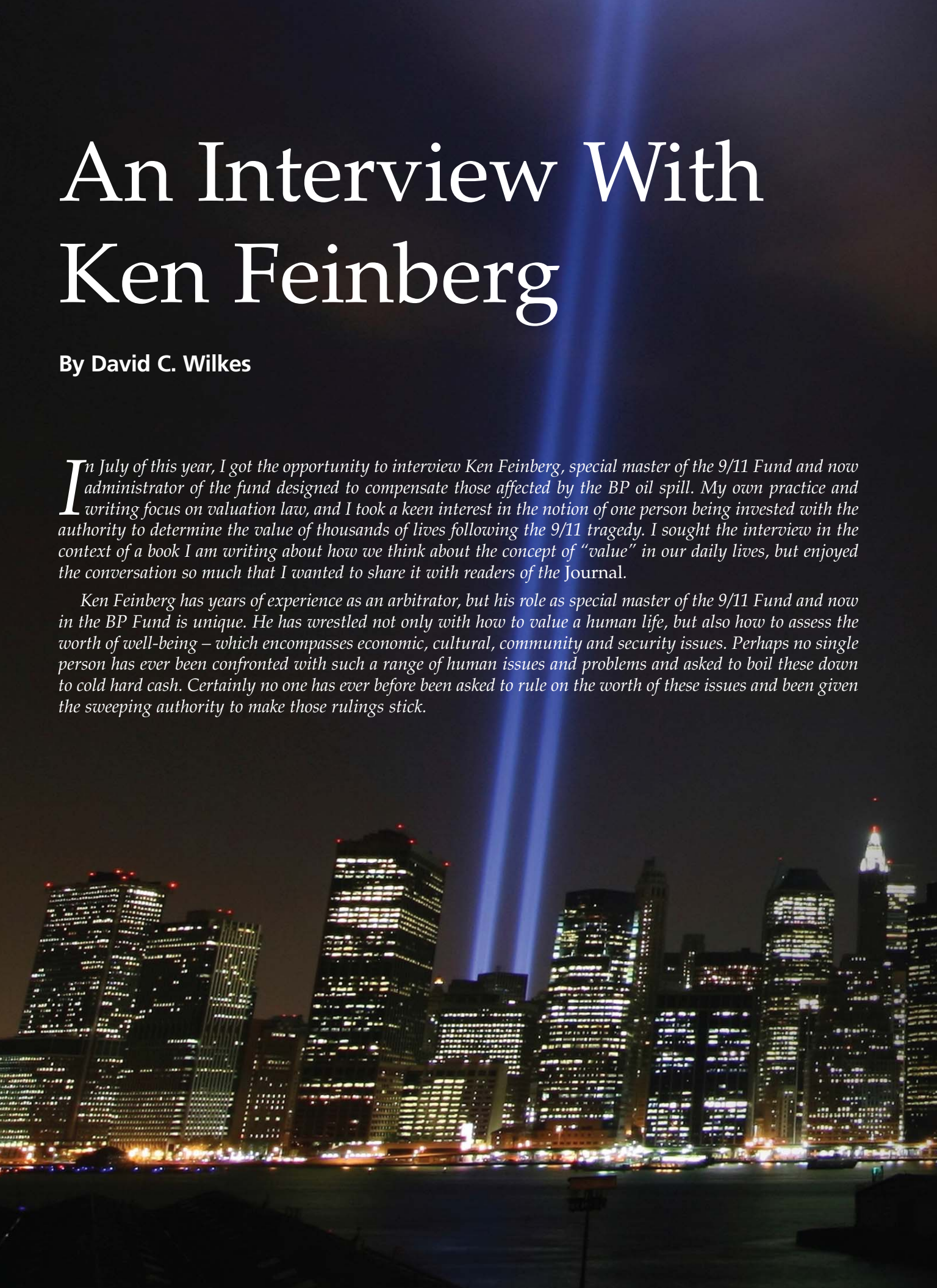
An Interview With Ken Feinberg

By David C. Wilkes

In July of this year, I got the opportunity to interview Ken Feinberg, special master of the 9/11 Fund and now administrator of the fund designed to compensate those affected by the BP oil spill. My own practice and writing focus on valuation law, and I took a keen interest in the notion of one person being invested with the authority to determine the value of thousands of lives following the 9/11 tragedy. I sought the interview in the context of a book I am writing about how we think about the concept of "value" in our daily lives, but enjoyed the conversation so much that I wanted to share it with readers of the Journal.

Ken Feinberg has years of experience as an arbitrator, but his role as special master of the 9/11 Fund and now in the BP Fund is unique. He has wrestled not only with how to value a human life, but also how to assess the worth of well-being – which encompasses economic, cultural, community and security issues. Perhaps no single person has ever been confronted with such a range of human issues and problems and asked to boil these down to cold hard cash. Certainly no one has ever before been asked to rule on the worth of these issues and been given the sweeping authority to make those rulings stick.



Wilkes: In 2005 you wrote a book titled "What Is Life Worth?" In your role as the 9/11 Fund Administrator, you were charged with deciding what thousands of lives were worth. What did a person's "worth" mean in that context?

Feinberg: For 100 years the courts have valued lives. It is so pedestrian now; it is so conventional. It's not rocket science, frankly, anymore, because, as you know better than anybody, compensation is a surrogate for worth when it comes to value in the courts. So, as my book points out, despite the fact that people believe that compensation should reflect intrinsic moral worth, that's not the way the system works. To the system's credit, I think the system is not really interested in the moral integrity of a human being – whether that person will go to heaven or hell, whether that person will be praised in the church or synagogue or damned by the police – when it comes to the narrow subject of putting value on life. If value is defined in our society, as it is, in dollars, why is that person worth more in the eyes of the law than another person? It's fairly pedestrian because all of this economic-loss modeling that you're so familiar with is the time-honored procedure for determining value. I'm not saying that's right or wrong. I'm just saying that's the American legal system; that's the western civilized legal system. In Africa you may value lives differently. You may say in some African tribal community, "That man is worth more than that man because he was 'good.'"

Wilkes: What do you think that says about America as compared to other societies, where perhaps the culture accepts that experiences like pain and suffering are simply part of life, and money is not the ultimate fixer?

Feinberg: I give two answers, which are totally unsatisfactory. One: that's the way it's always been. I mean, it's so ingrained in the fabric of our society that I'm not sure that criticism of that time-honored system would be anything other than theoretical. That's first.

Wilkes: Second?

Feinberg: Secondly, I would say to somebody who questions the merit of that approach, "You got a better idea?" I mean, one good thing about economic-loss modeling is it's objective.

David C. Wilkes (dwilkes@huffwilkes.com), a partner at Huff, Wilkes, Cavallaro & Loveless, LLP in Westchester, NY, is editor-in-chief of the *Journal*. He is Chairman of The Appraisal Foundation in Washington, DC, the congressionally authorized source of U.S. valuation standards. He earned his law degree from the Boston University School of Law and a Master's degree in Real Estate Valuation from New York University.

And I worry about an alternate system that would delegate to the fact finder or the decision maker so much subjectivity on a subject like intrinsic moral worth that the system would be governed by whim and by the arbitrariness of the decision maker. So, one reason that economic-loss modeling is so important is not only because it's always been that way – but what's the alternative? And you might get the Nobel Prize if you can come up with an objective alternative mechanism, but I haven't been able to think of what that would be. You could always have rabbis and priests value lives. Be careful, be careful what you wish for. I'm not sure that that would be credible and accepted as a fair and just alternative mechanism.

Wilkes: There was quite a lot of controversy and emotion attached to the 9/11 Fund for all the obvious reasons. Do you think that some of that could have been avoided if the issue had been framed less in terms of what a person was worth, in the broad sense, and more in terms of a computation of lost potential earnings?

Feinberg: No, that's exactly what I did. I told every 9/11 family, "Now listen, when we talk about the check you're going to receive I want to emphasize it's dollar and cents. We looked at your husband's tax returns. We looked at his earnings over the last three years. We put pencil to paper. I am not, Mrs. Jones, placing any value on the intrinsic moral integrity of your lost husband. I can't do that. Only the Lord above can do that." I can't do that. I think that went right over these people.

Wilkes: Estimating lost earnings is inherently highly speculative. Was your approach much different from the way that a jury might consider the lost profits from a business venture that was caused to fail in midstream?

Feinberg: Yes. I'm making a judgment call based on numbers. That business was going down the tubes. I'm not placing any moral, subjective judgment on that. Maybe the business would have turned around. But I was examining retrospective data: $4 million several years ago, and the last two years $2 million, then last year $1 million, and so far, at the time of death, $612,000. I ground my prospective decision on the same type of number crunching as personal income. There may be better ways to do it, but I haven't found a better way. I could say, no, I'm not even going to look at the numbers. I will take expert testimony from six different appraisers or experts on what they think the future of the business looked like. First of all, you'd get three experts saying that the future was rosy and the business would have turned around. You'd get three experts saying it was doomed. I can only ground my decision on what I have before me in the way of objective numbers.

Wilkes: Did you take expert testimony in administering the 9/11 Fund?

Feinberg: There was some. This person said, "I am an expert in the button manufacturing business. I'm going to tell you what I believe the claimant's husband would have been doing in the next three years with buttons in Queens based on the way that things worked for the start-up potential of a button manufacturer." I listened. At the end of the day I listened, and maybe I gave that some credence, but at the margin.

Wilkes: Did you go beyond strict number crunching when you made these decisions?

Feinberg: Sure, things like this: We will not pay taxpayer money to a felon – to somebody in jail. A political decision. I would run the numbers and determine that the brother of the dead woman would get from the Fund $1.1 million, but he's in jail for embezzlement. Disqualified. Political decision. Purely political. It's taxpayer money. There would be a riot if I gave $1.1 million to a guy in Sing Sing. There are always moral dimensions to this, political dimensions. The deceased left his estate to his brother and sister in Saudi Arabia. Under the law of Saudi Arabia, women cannot receive compensation in an estate. It has to go to the men. Ridiculous. I'm not going to honor that. The political consequences of selling out a woman with federal taxpayer money – I concluded politically that won't fly. Won't do it. Not a whimper; everybody agreed.

Wilkes: You must have come across some interesting bequests –

Feinberg: Of course. This guy died. In his will he leaves all his estate to the dog and cat museum. We're going to ignore the will and give the money to next of kin. Remember it's federal money – that's taxpayers' public dollars. I'm not going to give $1 million to the dog and cat museum. Those aren't moral questions. Those are practical policies.

Wilkes: You and I may be in agreement that the dog should not receive $1 million, but someone else may be an ardent dog lover and see things quite differently. Ken Feinberg's judgment overrode everyone else's.

Feinberg: That's a political judgment. What are the political consequences of the *New York Times* reporting that I was giving $1 million of taxpayer money to the dog when we have budget deficits? There would be a riot. They would send me to Pluto. No way I'm going to do that. That's a practical, Machiavellian decision.

Wilkes: As Fund administrator you were in the position of judge and jury. Do you think that is more responsibility than any one person should have?

Feinberg: Absolutely. Congress will never do it again. Not a good idea. The program worked very, very well. They'll never do it again, and next time everybody will get $250,000 whether they're a stockbroker or a busboy. Give everybody the same amount of money. That's all. You couldn't do that in the 9/11 Fund because you were trying to prevent people from suing voluntarily. I had to make it worth your while.

Wilkes: You drew a very clear distinction between the way that you handled compensation for economic loss and the way that you provided compensation for pain and suffering. You declined to measure degrees of pain and suffering, regardless of whether a lost loved one might have been a so-called hero and have been shown to have experienced extreme distress in their final hours, and instead everyone received essentially a flat $250,000 check.

Feinberg: That was a rabbinic decision. If you died, everybody suffers. I was not going to get into this argument, which was raised, "My wife lived eight minutes longer than someone else so she should get eight times more," like juries do.

Wilkes: Oklahoma's Governor Frank Keating said, "We in this state would not have contemplated distribution based upon income and lifetime earnings, because that would simply be un-American." You're very fond of defending the Americanism of the manner in which you administered compensation, and that it was no different than the way that juries handle the matter every day.

But juries award varying degrees of pain and suffering awards every day – admittedly valuing the most intangible thing of all, someone's feelings – but they do this all the time. And yet, on this issue, you decided to depart from that approach.

Feinberg: There are thousands, not hundreds, thousands of articles that have been written in the last 50 years on the vagaries of pain and suffering calculation – half of them critical of juries being asked to fine-tune pain and suffering and translate it into dollars. I said, in the 9/11 Fund I'm not going to do that. And I think that although it is very un-American in the legal system to give everybody the same pain and suffering, in a death case involving traumatic loss like 9/11 terrorism, I will treat my program more as an administrative mechanism than a legal judicial one. In administrative law, workers' comp and pension benefits, pain and suffering is not a factor. It's a flat amount. You don't get pain and suffering in a workers' comp claim. You get a no-fault flat amount, you know.

Wilkes: If not parsing amounts to the penny, what about at least considering some "classes" of pain and suffering, such as for a lost loved one who may have been a fireman who voluntarily went back into one of the buildings to save others?

Feinberg: I thought that that would be devastating to people whose husbands weren't firemen, and instead might have been a stockbroker and anecdotally he saved four women by letting them get on the elevator first and the elevator never came back. So, even though he wasn't a fireman and even though he was a greedy no-good he saved those four women. I'm not going to get into calibrations of pain and suffering. I thought that it would render the class of people I'm trying to help divisive, argumentative. They're already emotionally in grief, fragile. I can't do that, and I had the discretion to frankly do whatever I wanted. It was a lawless system in the sense that so much was delegated to me by law to use my judgment, and the trouble with delegating to me and using my judgment is my judgment was good *this* time. Tell me, one person, to exercise that judgment next time – bad idea, and it's a bad idea even if it's me again because I don't know if my judgment will be that fine-tuned and acceptable next time.

Wilkes: You've also laid out a record for whoever comes next to say to themselves, if I do what Ken Feinberg did in this situation then I may draw this or that type of controversy, so I'd better do things differently – even if what Ken Feinberg did was exactly the right thing to do.

Feinberg: That's right. Now, with physical injury, I did have a wide variation of pain and suffering. Physical injury – not death. But I had very objective tests.

Wilkes: There is a significant distinction between what you may be worth to others, such as your wife and your children, versus what you are worth to yourself when it comes to loss of the quality of your life and perhaps a shortened life expectancy.

Feinberg: How do you deal with this in an objective way, so that people will understand what you're doing other than saying, oh I think, subjectively, a paraplegic gets $10 million for pain and suffering while a broken finger gets $250,000 pain and suffering. That's not credible. That's a whim. That's subjective. I had to come up with a better way to objectively calculate the award to the guy who's the paraplegic who wishes he was dead because now he's going to live 10 more years as compared with the guy with the broken thumb. And what I basically did was use hospitalization as a surrogate for pain and suffering. The person, the paraplegic, is going to be in a hospital for four months. The broken thumb is an outpatient. Let's determine in a very objective way, every day of hospitalization as a surrogate for pain increases the calculus. So you come up with a rather interesting formula, which says I'm not God, I can't look inside a guy's mind in terms of pain and suffering, but somebody in the hospital for four months should get 30 days times 4, that is 120 days – 120 days worth of pain and suffering as opposed to the person who's an outpatient, who gets one day. And that's what I tried to do: structure it. In absolute terms it wasn't always very satisfying, because for the guy in the hospital for four months it might be appropriate in that case that you can look inside anecdotally to give him three times that. Or the person's in the hospital for two days and should have been in the hospital for a month, but is courageous and says "I hate it here. I'm leaving here and I'll work it out." Well he only had two days. Well, yes, but he left because he wanted to fight it. No, it all gets back to the same point. You can't rely on subjective determinations. But that's the problem with pain and suffering. That's what everybody criticizes about it – runaway juries. And so I've tried over the years to provide rough justice, rough justice. Hospitalization is a pretty good litmus test for pain. It's an objective framework.

It was a lawless system in the sense that so much was delegated to me by law to use my judgment. I don't know if my judgment will be that fine-tuned and acceptable next time.

Wilkes: A self-portrait of Van Gogh sells for over $70 million while someone's life is valued by a jury at $2 million. How do we reconcile that as a society? Is it because there's an established market for so-called commodities like art, but there's no market for human life?
Feinberg: Don't be too quick to say that there's no market for human life. As a result of the free market, in terms of economic loss, the stockbroker's life is worth $10 million. The busboy's life is worth $800,000. Why? Because, in the free market, that stockbroker's compensation as a surrogate for work is much greater than the busboy's. It's not that there's not a market. It's that the market drives the whole economic-loss calculation.

Wilkes: What about compensation for pain and suffering?
Feinberg: That's not a market.

Wilkes: Should we say that compensation should not be awarded for pain and suffering because there's no market for that and so it's impossible to determine an objective figure?
Feinberg: I'm dubious about free-standing discretionary pain and suffering. But that is so conventional a criticism that you can't read a law review without seeing an article about this. Giving juries free rein to act as a community barometer of pain and suffering is probably, I think, a bad idea because it becomes too discretionary and emotional. It's not grounded in the type of methodology that I've used in the 9/11 Fund, such as hospitalization as a surrogate for pain – that's objective. But if you took a poll, or a referendum, and asked if you could burn the Van Gogh, burn it into ashes in return for saving one life, wouldn't that be a fair trade? It's only paint and canvas. This is a human being. Why don't we burn that Van Gogh and save the life of a human being? You wouldn't get 5% of the people that wouldn't agree to burn the Van Gogh. What's a life? There's 250 million lives in America but there's only one Van Gogh. In the 9/11 Fund, Congress allowed me to give everybody $250,000 because they wanted to get people out of the legal system. So you got people out of the legal system by giving them their court award. Maybe the pain and suffering was more administrative, but we gave them a chunk of change that attracted them out of the legal system, and 97% of the people came into the Fund.

Wilkes: And Congress did not put a ceiling on how much you could award in total.
Feinberg: I had unlimited dollars. When you have unlimited dollars you can do a lot. You see, the problem with a fixed amount is not only do you not have enough to distribute, the bigger problem is if you have a fixed amount that inherently causes divisiveness among the claimants. Because one person says the reason you're only giving me that is to save money to pay her and there is an internal tension between claimants. If you don't have a limited fund, you can say to them, "That's not true – what I'm giving you is just for you and the other person's claim has no bearing on yours." It makes a big difference in terms of the consumer's willingness to accept the credibility of the process.

Wilkes: But it also places so much more on your shoulders. You can't blame an award on limited funds.
Feinberg: Right. But I'd rather have that any day of the week than saying I can only give you *this* because out of this pot I've got to pay *that*. The minute you get into that, that person starts counting other's people money. And that makes the job much more difficult.

Wilkes: Juries will sometimes seek to maintain a family that has lost a significant earner in the life to which they became accustomed – the Hamptons and limousines included. Is that reasonable? Would it have been fair in the 9/11 Fund?
Feinberg: I think that juries have the ability in individual anecdotal cases to say they have been convinced by a preponderance of the evidence that that lifestyle is important and they want to maintain it. But the Fund was taxpayer money. I cannot have 10% of the claimants get 90% of the taxpayers' money.

Wilkes: So there was a balancing of the public interest as well.
Feinberg: "Mr. Feinberg, I want $8 million because, otherwise, I'll have to sell the second home in the Hamptons, I'll have to get rid of the Mercedes and buy a Buick, the kids can't go to Andover or Exeter, they're going to have to go to the public schools."

"No, Mrs. Jones. I'm only going to give you $4 million."

"Now, why are you only giving me $4 million? Don't you dare say I don't need $8 million. Frankly, Mr. Feinberg, you're not qualified to tell me what I need or don't need."

And I think that's absolutely right. A woman could make an argument, the widow, "I need $8 million. That's the only place my kids can go for peace now that their father is gone, Andover and Exeter, because they're already emotionally traumatized. If they don't stay there with their friends they'll flunk out of public school. Don't tell me what I need. You've never even met my children."

My argument was, I'm not saying you don't need it. I'm saying you can't have it and the reason you can't have it is the same reason the woman in Saudi Arabia won't be mistreated and the prisoner in Sing Sing can't get that money. There is a political dynamic here. This is federal taxpayer public money. If I don't exercise my

judgment and reduce you to $4 million, the program will lack credibility to the public. I'll lack credibility, and I've made a discretionary judgment that $4 million is right. She took the $4 million, but I wouldn't say that she was happy about it.

Wilkes: Did your ideas about the value of your own life change in the course of administering the 9/11 Fund?
Feinberg: Yes, two thoughts. The system is a rather poor evaluator of value, of pain and suffering, emotional distress, economic loss. I learned that. But, you got a better way? I want to know when the critics come at you, nipping at my heels, "boy this system is about dollars and cents – it sucks. It doesn't really take into account anecdotal evidence of worth, moral value, goodness, integrity." You're right. It doesn't. How are you gonna do that? I mean it gets so philosophic and so impossible to translate into the rule of law. I disarm people with this argument: I agree with you. The system isn't a very good evaluator of value. I'm agreeing. Now, what do you want to tell me now? What's a better way? Not what's a better way in your individual case – what's a better way as a principle of law? I mean in some societies, I guess, they would say, "He died and he was deemed by the tribe to be a wonderful man so we will all give his widow barley in shares for a year to help her get over the hurdle. He was a wonderful man. We'll all give her a trinket of beads." And the more beads, the more honorable the man was. In an industrialized society, with 200 years of history, I'm trying to figure out what's a better way other than some philosophic conference, where, at the end of the day I step back and say, well this is all very interesting reading, but what does it mean in terms of sound public policy? That's what I have trouble with.

> I agree with you. The system isn't a very good evaluator of value.

Wilkes: You said that you learned two things –
Feinberg: What I also found out is, letting victims vent about life's unfairness has a tremendous ameliorative positive effect. "Mrs. Jones I'm going to give you only $1 million for your husband even though the broker's getting $8 million." That's the system. "Well, Mr. Feinberg, under oath, let me tell you about my husband and what a wonderful, moral, man of integrity he was." Under oath I'm taking it down. Tremendously beneficial.

Wilkes: It's as if that's a form of compensation.
Feinberg: Exactly. It's not about the money. It's about valuing the memory of a lost loved one. I grew in the course of 9/11 to so respect the notion of due process and a hearing – the right to be heard. In court you have that right, but it's not always exercised.

Wilkes: And one generally doesn't get to provide some of the personal, anecdotal details in a courtroom that are quite meaningful to the family and need to be said, to be recorded.
Feinberg: That's right. "Mr. Feinberg I now understand why I only got $1 million. I wanted you to know why he was such a wonderful man and could I please have a copy of the transcript?" Here, put it in your safe deposit box for your grandchildren.

Wilkes: Nowadays, when people discuss the preparation of a will they are also often looking for ways to convey their wishes to their loved ones – thoughts and feelings that often go beyond the contents of a will but are just as important.
Feinberg: That's absolutely right and that makes a big difference.

At the end of the interview we used the few remaining minutes to touch on Ken Feinberg's recent appointment as BP Fund Administrator.

Wilkes: Could you describe your role and mandate as the BP Fund administrator?
Feinberg: The mandate is to distribute money to eligible claimants who have been harmed as a result of the oil spill. Now there's going to be three obvious issues that come up and you know what they are. One, what constitutes an eligible claim?

Wilkes: What is the proximate cause to your damages?
Feinberg: That's right. It's one thing to say, "Mr. Feinberg, I own a house, it's on the beach, and there's oil all over the place." Pay him. "I own a motel, it's on the beach, there's no oil, but my clients aren't coming because they can't fish or go sightseeing." Diminution of natural resources. Pay him. "Mr. Feinberg, I own a golf club 50 miles from the beach. There's no oil here, nowhere near it, but everybody's read about the oil and now they're not coming to the golf course. Pay me." Wait a minute. Pay you? There's not enough money in the world to pay everybody. You mean just because – as a matter of public policy – just because in the newspapers they read about the BP oil spill, so no one's coming to your golf course, BP should pay for that? I mean, why not pay for the restaurant in Boston that can't get shrimp?

Wilkes: For an entire local economy that's suffering and it's attributable largely to one cause, how do you value that diminution in value?
Feinberg: "Mr. Feinberg, I own a condo on the beach. That condo was valued at $1 million before the spill. Now I can't get $500,000 for it. Pay me." Now that's an easy one because, well, did you sell it at a $500,000 loss? You can't just get it. Tell me when you sell and see me about your loss.

Wilkes: Eligibility is the first issue. What's next?
Feinberg: Then the second issue and the third issue are very, very mechanical, even if you're eligible. How do you calculate your loss? What's the methodology? Corroborate your loss. Then we can pay you for your loss.

Ken Feinberg was named head of the BP Fund in mid-June, just a brief time before our interview. I hope at some point in the future to sit down with him again and discuss his latest role and to share that discussion with Journal *readers as well.* ■

BY DAVID PAUL HOROWITZ

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

"Breaking Up Is [Easier] to Do"

Introduction

Mae West famously remarked, "Marriage is a great institution, but I'm not ready for an institution."[1] As you read this column, exiting this great institution just got easier, as New York sheds the distinction of being the last state in the United States lacking true "no-fault" divorce.[2]

The New Law

Effective with actions commenced on or after October 12, 2010,[3] Domestic Relations Law § 170(7) (DRL), a new subsection, permits divorce where:

> The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce.[4]

The enactment of "no-fault" divorce leaves intact all of the existing grounds for divorce.[5] Critically, a judgment of divorce will not be granted until the remaining issues outlined in the statute are either resolved by agreement between the parties or by judicial determination incorporated into the judgment.

Rationale

The bill was signed into law by Governor Paterson on August 13, 2010, as one of four bills dramatically impacting matrimonial practice, as explained in the Governor's signing memo:

> Governor Paterson also signed into law a package of four bills that would bring significant reform to New York's outdated divorce laws. In particular, the Governor signed into law A.9753A/S.3890, which would make New York the last State of the fifty to adopt no-fault divorce. The bill would end the requirement that a party seeking a divorce had to claim one of a limited set of reasons as the basis for doing so, a rule that forced parties to invent false justifications, and that prolonged and aggravated the painful divorce process.[6]

A sponsor's supporting memorandum offered the following history and guidance:

> PURPOSE OR GENERAL IDEA OF THE BILL: This bill would allow a judgment of divorce to be granted to either a husband or a wife without assigning fault to either of the parties. However, a divorce could only be granted after the major ancillary issues have been resolved.
>
> SUMMARY OF SPECIFIC PROVISIONS: Section 1. Section 170 of the Domestic Relations Law is amended by adding subdivision 7 allowing divorce when a marriage is irretrievably broken for a period of at least six months, provided that one party has so stated under oath. This judgment can only be granted after the following ancillary issues have been resolved: the equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and expert fees and expenses, and custody and visitation with the infant children of the marriage. A judgment of divorce under this subdivision could not be issued until all these issues are resolved. Section 2 establishes that this act shall take effect on the sixtieth day after it shall have become law.
>
> JUSTIFICATION: New York is the only state that does not have a no-fault divorce provision. Currently, a divorce can only be procured by alleging fault such as cruel and inhuman treatment, adultery, abandonment or confinement of the defendant in prison (in addition to the parties living apart pursuant to a separation agreement or judicial decree for more than one year). Yet many people divorce for valid reasons that do not fall under these classifications. They are forced to invent false justifications to legally dissolve their marriages. False accusations and the necessity to hold one partner at fault often result in conflict within the family. The conflict is harmful to the partners and destructive to the emotional well being of children. Prolonging the divorce process adds additional stress to an already difficult situation.

> A study cited at the 2007 Forum on the Need for No-Fault Divorce presented by the NYS Office of Court Administration's Office of Matrimonial and Family Law Study and Reform showed a large decline in domestic violence in states with no-fault divorce. The 37 states studied that have adopted no-fault divorce statutes have seen female suicide rates decline approximately 20% while reports of domestic violence committed by husbands against wives were reduced by more than one-third. This legislation enables parties to legally end a marriage which is, in reality, already over and cannot be salvaged. Its intent is to lessen the disputes that often arise between the parties and to mitigate the potential harm to them and their children caused by the current process. Because a resolution of all the major issues must be reached before a divorce judgment is granted, this legislation safeguards the parties' rights and economic interests.[7]

Accompanying Legislation

The enactment of DRL § 170(7) was just one part of a reform package of legislation affecting matrimonial actions.

As part of the "no-fault" divorce package of legislation enacted in 2010 and applicable to actions commenced on or after October 12, 2010,[8] amendments to DRL §§ 237(a), (b) and 238 contained identical provisions:

> Both parties to the action or proceeding and their respective attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses.[9]

A new, rebuttable presumption has been created regarding the award of legal fees:

> There shall be rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding.[10]

Both statutes also provide:

> Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and their respective attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses.[11]

Governor Paterson's signing memorandum explained:

> Another bill (A7569-A/S4532-A) would create a presumption that a less monied spouse in a divorce case is entitled to payment of attorneys' fees. Under current law, a party that cannot afford to secure representation in a divorce proceeding must make an application for fees at the end of the process, which can force a poor individual to proceed without a lawyer, or to surrender on important issues due to lack of means. These bills received strong support from women's groups, advocates for victims of domestic violence and legal aid organizations.[12]

The justification for this aspect of the new legislation was detailed in a sponsoring memorandum:

> This bill would amend sections 237 and 238 of the Domestic Relations Law to require the court in a matrimonial case, or a proceeding to enforce a judgment therein, involving parties with greatly unequal financial resources, to order the monied party to pay interim counsel fees for the non-monied party during the course of the case so as to enable her or him to carry on or defend it.
>
> Current law places an onus upon the party in a matrimonial action seeking counsel fees pendente lite, to show why the interests of justice require it. In addition, Judges appear reluctant to order pendente lite counsel fee awards in matrimonial actions under the current statute.
>
> A judicial order for pendente lite counsel fee awards in a matrimonial proceeding is a vital step in preventing an imbalance in the parties' resources from affecting the proceeding's outcome. Given the importance of pendente lite counsel fees, and the frequency of financial imbalance between parties to matrimonial proceedings, it is inappropriate to place the burden upon a non-monied spouse to justify it. Therefore, it is important for the Legislature to revise the statute, as proposed, to create a rebuttable presumption that such relief should be granted to the non-monied spouse. This measure requires that in a matrimonial action an order for pendente lite counsel fees and expenses should be granted at the outset of the case to ensure adequate representation of the less monied spouse from the commencement of the proceeding, and it is left to the affected parties to show why, in the interests of justice, the order should not be made. This will better address today's economic and social realities, and will help ensure that no party to a matrimonial case is strategically at a disadvantage for want of resources to pursue or defend the case.[13]

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Richard A. Matasar is President and Dean of New York Law School.

Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (or Anyone Else)?

By Richard A. Matasar

I was asked to write about the following question: "Does the current economic model of legal education work for law schools? Or law firms?" The better question is, however, "Does the current economic model of legal education work for law schools, law firms (or anyone else)?", which moves the discussion from what about *me* (lawyer, law professor, law student) to what about our clients and the public.

A couple of answers came to mind – the simple, "no;" the more complex, but equally useless, "no for some, but yes for others"; or, the ever popular and enigmatic: "it depends." But these answers seemed so inelegant and inadequate for a journal article. So I start by offering a broader range of partial answers and tentative conclusions:

- There is no single, current economic model for all students and law schools.
- Legal education is a vehicle for social mobility, status, and career satisfaction that extends beyond the practice of law.
- The value of a legal education varies widely given individual student goals and the alternative paths that a student might have followed in lieu of law school.
- Some schools will continue to prosper charging high tuition (at least for a while); others will not.
- Lower priced alternatives to the current model will certainly evolve; non-U.S. law schools will become viable competitors in training U.S. lawyers; some schools will fail; others will adjust.
- There is no unified organizational structure followed by all law firms.
- Law is practiced in many settings beyond private practice.

- The economics of legal education has little to do with whether students fulfill the needs of employers or clients.
- The focus on law firm profits per partner undermines lawyer training and client service.
- Legal employers will evolve to serve their varying constituents, and new models will certainly emerge for training young lawyers on the job.

In this article, I examine the legal education economic model, students' goals, and alternative funding models that may emerge. I discuss the impact the current model has on firms and other employers, the tenuous relationship between law school economics and law firm economics, and models for continued lawyer development that may emerge in the years ahead. The article concludes that change is inevitable for both schools and employers, that without change we surely will not optimally serve our clients and the public, and that it is the shared responsibility of law schools and the bar to improve our profession.

Law School Economics 101

Over the past decade, conventional wisdom has held that legal education is a bad economic investment. The argument emphasizes that educational costs have for most students been rising at a much faster rate than the salaries most law graduates will earn; very few students pay for their education without borrowing funds for tuition and living expenses; the debt service on their loans is so high in relation to the salaries they will earn that it will be difficult for most students to pay back their loans and manage all the other expenses they will face; and law graduates' debt will remain with them for decades, skewing their life and career choices.

This economic plight is exacerbated by several factors. First, students accumulate about the same amount of debt, regardless of their employment – a public interest lawyer, whose salary expectation is quite modest, generally borrows the same amount as the student headed for practice at a big law firm, whose salary will be significantly higher. Second, the only students who avoid accumulating large debt are those who either come from a family of means or who receive a "merit" scholarship – thereby creating the anomalous result that the students most likely to obtain the highest paying jobs (or be able to afford to take the lower paying jobs) are those most likely to have the lowest debt. Third, the number of jobs in big law firms – basically the only employment that allows students to comfortably manage their debt – is inadequate to employ most students, thereby ensuring that the (vast?) majority of law school graduates will face economic difficulties. Finally, initial salary differences generally widen over the course of a career.

In addition to this gloomy economic forecast, law school graduates face other financial problems. Tuition at state-supported law schools is rising at a faster pace than private school tuition rates; and states are contributing a decreasing share of the total cost of educating law students. Together, these state actions reduce the number of lower cost options for aspiring lawyers. Undergraduate debt has been rising rapidly as well and access to non-governmental undergraduate loans has been eroding, except for students who have co-signors with good credit, i.e., the well-to-do. At the same time, students have been taking on increasing amounts of consumer debt: credit cards, car loans, revolving credit, and the like. And, we are just emerging from the worst recession of our lives. In sum: law student educational costs are rising, student debt is rising, the job market is tanking, and there is no end in sight.

In the light of this disturbing picture, one might expect that law schools are facing an imminent market collapse – declining applications, few students willing to take on financial risk, the need for significant internal cost savings, price cutting, and other similar measures. Surprise, surprise, surprise! The demand for legal education has remained strong throughout the economic downturn. Applications at many schools are at record levels. Enrollment has been solid, with many schools recording historically high yields of new students.

What possibly could be going on? Are law school applicants ignorant of the new economy and job market? Do they ignore the cost of education? Are law schools deceiving students about their prospects for gainful employment? Is this just another game of chance in which students pray to hit the lotto?

Law students are not ignorant. Today they have access to more information than ever, information that is tested daily in the blogosphere for accuracy, which is producing even greater transparency about law schools and employment. Students do not ignore costs; they bargain for higher scholarships and induce schools into bidding wars for their admission or to prevent them from transferring. Law students are fully aware of the economic conditions that force many to work while in school, live at home or with roommates, borrow casebooks from the library rather than buying them, and network at every opportunity.

In spite of the many difficult economic issues law students confront, they still find legal education attractive. Many law schools, especially outside of New York, continue to have modest tuition. Other schools provide significant scholarship support to substantial numbers of students. Even at the most expensive schools, top applicants and highly ranked students receive large scholarship awards. Other students work full time, while attending law school part-time. Others have employers or parents who are paying for their education.

Even beyond the fortunate few, many students carrying more debt than they seemingly can afford are satis-

fied with their choice to attend law school. Some see no other rewarding career alternative. Law practitioners are licensed to engage in a business into which new competition is highly regulated. Lawyers have tremendous autonomy in their daily lives – especially in comparison with much more routinized or regimented employment.

Students who have no technical, mathematic, or scientific knowledge may have few career choices based solely upon their undergraduate degree. Thus, in comparison with other graduate disciplines, law may provide many more opportunities. Finally, over the long arc of a career, even those students who begin with high debt and a low salary can build successful and rewarding careers. The return on investment is not merely a short-term measure; it depends on lifelong earnings as against alternative paths, discounted by the opportunity costs of delaying entry to the workforce. It is simply not possible to know in advance whether the long-term financial return on a legal education will pay off until a number of years have passed. And, without more data, it is very difficult to assess whether today's investment is less wise than the similar investment made by previous generations of lawyers.

With these potential advantages to a legal career, maybe it is not such a bad investment after all. However, I have no doubt that the value of a legal education will continue to erode in the years ahead, especially if the price of that education continues to rise at a higher rate than the expected return on that investment. There certainly will come a day in which demand will decline. Therefore, if law schools wish to prosper (or perhaps even survive), price must go down or value must go up. Schools must change . . . but change will not come easily.

The Challenge

State Support

In face of the deep economic pressures facing state governments, they are unlikely to increase their subsidy to legal education. It is hard to argue that support for law students is more important than for K-12 education, benefits for the unemployed, investment in new or green technology, better management of prisons and hospitals, or scores of other public service needs.

Federal Support

The federal government has already made a huge commitment to legal education through its direct lending program, by which virtually any law student can borrow the full cost of his or her education – and living expenses – with no obligation to make a payment while still in law school. In addition, the federal government has embraced a loan forgiveness program for qualified public service and has set up income-based repayment programs for newly minted lawyers whose incomes are so low as to make paying their loans difficult. But, as with the states, the federal government has other priorities,

If law schools wish to prosper (or perhaps even survive), price must go down or value must go up.

like the economy, ending armed conflict, mending the environment, improving health care, and on and on. Law students are not going to rise to the top.

Regulatory System

The American Bar Association regulatory regime has been built over many decades and includes many requirements that increase educational cost, like requiring job security for faculty members, librarians, and deans; requiring a significant physical plant; requiring three years (give or take) of law school; requiring an undergraduate degree; or limiting the number of classes that can be taken online. Recent proposed changes that mandate law schools to announce, measure, and improve their outcomes and offer particular types of skills classes, while desirable, will not lower costs.

Self-Interest

Law schools will not voluntarily cut costs, as long as demand is sufficient to maintain their current operations. Few faculty members are retiring. Few employees are giving back their salaries. Most faculty members would like decreased teaching responsibilities and more time to write and research. Schools are not downsizing their facilities. And, all schools continue to seek an improved reputation, one that frequently comes with spending more and passing the costs directly on to the students.

Increased Leverage

Students continue to borrow, not just for their tuition, but also to support their lifestyle choices. Most prefer to live away from their parents' homes. Many own cars, buy new technology, go out for meals, and pay for entertainment expenses. Hence, even if tuition were to stabilize, many students would still choose to take on debt to support their lifestyles. As the saying goes: "Living like a lawyer while going to school is likely to mean living like a student after graduation."

Change Will Come

Despite the difficulty of change, it will come. The demand for legal education will decline at high-priced schools whose graduates are having difficulty repaying their loans. The federal government, the only remain-

ing lender, if at all rational, will respond: perhaps by restricting the amount of credit to students of such schools, requiring an equity contribution by those students, requiring co-signors, or increasing the interest rate for their loans. Alternatively, the Department of Education (aka the "Bank") as the regulator of higher education might respond by issuing regulations requiring schools to reduce their costs, justify their price increases, or otherwise alter their model. The government, as lender or regulator, is unlikely to prioritize subsidizing legal education over all other potential uses of federal funds.

Similarly, the ABA, as law school regulator, will have to deal with cost issues. As I write, the Standards Review Committee has propounded new accreditation standards that may eliminate job security as an accreditation requirement. They are considering lifting the ban preventing students from obtaining academic credit and salaries for the same work or working more than 20 hours a week while going to school full-time. And they are evaluating proposals to expand the number of courses that may be taken online. These measures could lower educational cost substantially. More important, such measures make it possible for new, lower cost competitors to begin to offer law degrees.

Like any other market, as economic barriers to entry are lowered, we should expect lower cost and more efficient providers to enter the legal education field. Already non-U.S. law schools are seeking approval by the ABA to offer American J.D. degrees. These schools underprice our market. Even without direct ABA approval, students may take their law studies at inexpensive non-U.S. schools, take a one-year LL.M. in the United States, and sit for the bar exam – all at a lower aggregate cost than those who attend three years at an ABA-approved law school. Domestic law schools are already offering two-year law degrees (for the price of three years). Eventually, some will lower their costs as well. Taking a page from other countries, there are proposals to eliminate the requirement of a college degree for entering law school. If such proposals are approved, the total cost of higher legal education in the United States will be reduced substantially, from seven years of tuition to perhaps as little as four years.

Law School Economics and Legal Employers

As with the conventional wisdom concerning law school economics, there is similar wisdom about the relationship of law schools and law firms.

- BigLaw jobs dictate the price of legal education (or reflect the price of legal education), a kind of chicken and egg, which came first relationship.
- Many law students falsely believe that "decent" performance in law school alone will make them attractive to big firms and that they will have a choice whether to accept a BigLaw job.
- Relying on this misapprehension or students' overestimation of their opportunities, schools will continue to raise their prices.
- Schools will mistakenly rely on the job market to continue to offer enough high-paying jobs that will allow most students to manage their debt.
- The federal government, as lender, will continue to fund students, regardless of default rates.
- Big firms will continue to absorb large numbers of new associates to replace the significant numbers of more senior lawyers lost through attrition.
- Clients will be willing to pay firms for the high-priced new talent they have hired.
- Through leveraging their many associates, firm partners will capture revenue sufficient to restock with new talent, pay firm overhead, and yield increasing profits.
- Finally, the tight relationship among clients willing to pay, big law firms willing to employ large numbers of graduates at high salaries, and law schools graduating attractive new employees will allow sufficient numbers of talented lawyers to trickle down to smaller firms, the government, and other employers.

Ummm, no. The past three years have exposed the conventional lack of wisdom in these many assumptions.

Most students do not go, have not gone, and have not wanted to go to work for BigLaw. If they go into private practice, most law graduates will work for smaller firms or end up in solo practice. Many will work for the government. And, an increasing number will find their way to permanent employment through temporary assignments or by working in a business setting. Many students will ultimately end up in non-law jobs. For some students, like those in part-time programs, this may have been the goal to begin with; they seek law degrees to enhance their roles with current employers. For others, it reflects disenchantment with a profession they may erroneously have chosen. And, for some, perhaps the largest group, it reflects their inability to find a job as a lawyer.

No more than 10% of the graduates of most law schools find work in BigLaw. As for the most elite schools, where many more students have such an opportunity, significant numbers of graduates avoid BigLaw firms or abandon such jobs once they pay down their debt. In short, the pervasive impact of BigLaw, even at its height four or five years ago, has likely been overstated. More disturbing, perhaps, is a widespread belief that students are intentionally misled into thinking that they all will receive whatever employment they seek; that they could have a BigLaw job if they want one. Given the pervasiveness of stories of law firm layoffs, popular law-debunking sites that catalogue the plight of law school graduates, the straightforward warnings that senior students give to applicants, and even honest communication from law schools to applicants, students today know, or should know, that banking on a BigLaw job is risky.

Whatever expectations law school graduates might once have had about BigLaw practice have been shattered in recent years. Summer programs have declined precipitously. Firms have laid off lawyers in record numbers, have deferred start dates of new lawyers, and have shuttered – all covered under the bright lights of the popular press. Moreover, the supposed BigLaw monolith long ago split, showing wide differences. Some firms offer lockstep compensation; others differentiate by practice setting, entry credentials, and even performance! Some firms want young lawyers to specialize; others demand rotation. Some firms have one class of partnership, others have tiers. Some firms do pro bono; others do not. Some have diversified practices; others (if they survived the downturn) do not. Apparently, even big firms differ from each other.

The downturn has further frayed the model. Clients are pushing back, hard, on law firm leverage. Some refuse to pay for the work of young associates. Others demand that firms justify their staffing choices. Some refuse to pay the billable hour, seek caps on fees, or unilaterally demand discounts to their bills. General counsel organize to compare notes and place greater demands on their lawyers. Client pressures have forced firms to evaluate their economic assumptions; it is clear that they cannot simply pass on new lawyer costs to clients (and make leveraging profits). Further, the downturn has also made clear that voluntary lawyer attrition cannot be assumed, that hard performance evaluations are necessary, and that hiring decisions made years in advance can lead to costly mistakes, rectifiable only by layoff, delay, or permanent down-sizing.

Most students do not go, have not gone, and have not wanted to go to work for BigLaw.

These economic forces have led firms to engage in serious soul-searching. Many question their hiring models. Should they abandon summer programs? Should they seek only laterals, already trained by others, who can produce more immediate returns? Should they continue to hire almost all graduates from a limited number of schools and be willing to hire even those with weak law school performance because their pedigree alone is sufficient? Should they expand their hiring to the top graduates of non-elite schools (and if so, how deeply into the class can they go)?

Some firms question the compensation offered to associates. Should they pay less? Should they pay less to some and more to others? Should they pay lower entry salaries, invest more deeply in in-house professional development, and only then offer young lawyers who have demonstrable skills an increased compensation?

Other firms have questioned their managerial competence. Can they, as lawyers, really manage well or should they engage professionals to help them? Can they evaluate talent or should they expand their HR departments and delegate to them? Should they abandon the billable hour, create alternative billing models, or engage in hand-to-hand combat over fees with their clients?

BigLaw faces competition from medium law. Medium law faces pressure from boutique law. All private lawyers face competition from non-lawyers who provide routine services no longer exclusive to lawyers. Lawyers may compete with new smart computerized systems that automate some practice problems. Non-U.S. legal service providers compete vigorously for U.S. clients and

may not have the same professional responsibility rules restricting how they practice, what non-legal services they offer, and even how they are financed. The government may eliminate some practice areas through regulation, restrict available fees for other areas, and authorize some non-lawyers to engage in client services.

That law practice is radically changing cannot be questioned. What remains is to look more carefully at the relationship between law school economics and law practice – a tenuous relationship at best.

Firms are not beholden to law schools or law students to pay associates high salaries. That wound is self-inflicted, reflecting law firm competitiveness to hire from a very limited pool of law school graduates whose worth to the firm is uncertain. Law firms expect high attrition, suggesting that there are many false positives in evaluating talent. They also hire laterals with demonstrable talents, many of whom they refused to hire in the entry market, suggesting that firms also produce false negatives in evaluating talent. Law school economics does not dictate this approach to evaluating talent; risk aversion does.

Law school economics is not the primary cause of deficiencies in new lawyers. Schools provide training that the market demands. To date, the market for new lawyers does not reward skills training in law schools; firms seek those with the highest grades from the highest ranked law schools, regardless of their law school curriculum. Law school economics did not create the billable hour, which is now under attack from clients. Law school economics did not create leverage, an unwillingness to train young lawyers, a bad balance between life and work, or hosts of other ills lumped into undifferentiated critiques of law practice, law schools, and lawyers.

But such critiques are increasingly loud and clear in identifying the problem: law schools do not graduate lawyers who are sufficiently ready to take on responsibility, the employers are not filling the void, and the clients and the public have suffered as a result.

Improving the Value of Legal Education and Employment

Whatever the relationship (or lack thereof) between law school economics and legal employment, two things are clear: (1) the price of a legal education is too high in relation to its perceived value, and (2) the legal employment market must shift from asking what is good for lawyers to asking what is good for clients and the public. These two imperatives are related. As legal employers more clearly define the competencies they expect from their employees and seek to improve client service and pricing, they will create pressure on law schools to produce graduates who better fulfill these needs. In turn, as law schools produce more effective graduates, those graduates will provide greater value, both to their employers and, more important, to those served by their employers. Legal education then more clearly resides on a continuum of lifelong service and learning on behalf of our clients and the public.

This continuum is not a mystery. It begins with the need to define the knowledge, skills, and values essential to serving clients and the public effectively. The general taxonomy of basic service skills has been discussed for many decades: knowledge of basic law; critical thinking skills; communication skills, both oral and written; research skills; listening skills; a commitment to justice; and so on. Less clearly understood but equally critical are a strong work ethic, the ability to work on deadline and on a budget, project management skills, and a host of other interpersonal skills that allow a lawyer to be a good team member or leader. More important than such lists, however, is that law schools and legal employers must commit to teaching what is needed, evaluating performance on those factors, and recognizing that lawyers will continue to develop throughout their careers and will need increasingly sophisticated training as they mature.

Conscious, professional development in law schools is underway. Under proposed new accreditation standards, every law school must define the learning outcomes it seeks to produce, design a curriculum that will produce those outcomes, measure whether they successfully produce the outcomes, and then improve in areas in which it is less than successful. Few schools will do so without regard to the needs of those who will employ their graduates, ensuring a role for the profession to influence the way lawyers are trained. Even if schools do not lower their prices, they can argue much more powerfully that they provide value when they seek to produce more attractive graduates.

Law firms too are becoming significantly more conscious of developing specific competencies in their lawyers. Whether they design year-by-year training programs, move CLE programs internally to their firms,

define clear competencies that each lawyer must achieve, or have sophisticated, layered, practice area training, firms are reinventing their associate training programs. These too have powerful benefits: they demonstrate to potential employees that the firm is making a long-term investment in them. They offer clients more skilled younger lawyers.

Professional development will be most successful if schools and firms work together.

Professional development will be most successful if schools and firms work together. Training is expensive. Schools will need to reallocate resources to improve their training of students. It is unlikely that they will do so unless they can improve their students' prospects for employment. Therefore, if firms speak about skills they are seeking, but act by continuing to hire only those from top-tier schools (regardless of grades), those with high grades from lower ranked schools, and do so without regard for the content of their training, schools are unlikely to make a serious effort at change. Schools and firms will change when doing so reinforces the sense that change has benefits.

The market may push greater cooperation between educators and employers. Employers and law schools may partner, with schools providing training and firms providing experts to teach. Firms may agree to hire from certain schools whose graduates demonstrate particular competencies or expertises prized at the firm. Even if schools and firms make a shallow commitment to engage in professional development, the market is likely to fill the void. Third-party training companies – legal publishers, bar reviews, for-profit post-graduate programs – may begin to offer specific courses to improve young lawyers' skills and knowledge. Other organizations – Boards of Law Examiners, courts, government agencies, *Consumer Reports* – may begin to "certify" that some graduates are better than others. Perhaps, like professional sports recruiting services, outside evaluators may hold "combines" at which they assess which potential new lawyers have appropriate skills that cannot be discerned by their transcripts. If all else fails, perhaps we will require lawyers to take mini bar exams to demonstrate that they have kept current or have developed the expertises that they claim.

Improving lawyer training cannot come without cost. In the law schools, it is likely that current faculty members will have to retool, to focus more clearly on lawyer training. If they are to maintain tenure, job security, relatively low teaching loads, sabbaticals, and the freedom to spend time writing scholarship, they will have to give up pet teaching areas and spend more time as mentors to their students. They will need to align their interests in legal research to the professional training needs of their students. In the long run, as tenured, higher-priced faculty retire, schools may refocus their own talent assessment, pay higher salaries to those who do training, give lower salaries to those seeking job security, create alliances with itinerant lecturers who peddle their wares at multiple schools, use more part-time faculty, create online learning tools that can be scaled to serve many students, or create asynchronous distance-learning programs that can make use of teaching and facilities on a 24/7/365 basis.

In firms, short-term profits may have to be sacrificed to find resources to develop new talent. Over the past two years, despite the significant economic downturn, many firms have reported flat or even greatly improved profits per partner. Easy math: throwing their associates and lower profit partners under the bus, requiring more of the remaining lawyers, equals continued wealth for the managers. But, how long can that model prosper? Clients are demanding faster, cheaper, and more effective results from their lawyers. They have a point. Profits per partner, defined by leverage and the billable hour, cannot continue to grow unabated. On its face, the billable hour creates a potential conflict. What is good for the lawyer – more time billed – is more expensive to the client. What is good for the client – a clear price – is bad for the firm, which cannot predict in advance how much time is needed to effectively complete the work. However this delicate pricing problem is resolved, it seems likely that clients are driving the bargain.

It also seems likely that initial salaries for new lawyers at big firms will decline. This will place pressure on law schools to reduce their price. Law schools will seek to avoid this by finding ways to retain their income, but reduce costs to students – creating new graduate degrees, selling education to non-lawyers, or accelerating the training time for new lawyers, either through two-year degree programs or by eliminating some years of undergraduate training. Firms paying lower salaries might become more attractive to new employees if they acquire the debt of those employees and then forgive increasing portions of that debt as retention bonuses for those employees who stay at the firm. Perhaps the cost of a legal education should receive more favorable tax treatment, as a capital expense, depreciable over some portion of a lawyer's professional career.

The years ahead suggest that law schools and firms must change or die. We are colleagues whose futures are inextricably tied to each other. Schools exist to train lawyers. Lawyers exist to serve clients and the public. Our economic success is bound to the fulfillment of those functions. ■

NEW YORK STATE BAR ASSOCIATION

My NYSBA membership enriches my personal and professional lives by presenting opportunities to make new friends and contacts, by exposing me to issues affecting our legal system generally, and to areas of the law in which I do not practice on a day-to-day basis. These opportunities serve as constant reminders that the law is indeed a noble and learned profession of which it is a privilege to belong, and that attorneys from all geographical areas and practice disciplines share common ideals and goals.

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Steven C. Bennett (scbennett@JonesDay.com) is a partner in the New York City offices of Jones Day and a member of the firm's training committee. The views expressed are solely those of the author, and should not be attributed to the author's firm, or its clients.

Constructing an In-House Training Program

By Steven C. Bennett

For many lawyers, the words "continuing legal education" conjure up one of two images, neither of which is particularly positive. One is of a boondoggle trip to some ski or surf venue, where a vacation may be justified as a business deduction. The other is of a generic hotel ballroom full of lawyers rustling newspapers, filling in crossword puzzles and surfing the web, while a speaker drones on. In either case, little learning occurs. The profession has not been not particularly well-served by its efforts to extend legal education over the course of lawyers' professional lives.

But are these the only real possibilities for a CLE program? Must CLE be a rip-off or irrelevant or boring? For many law firms, the answer is "no," and the solution to making CLE economical and effective is to bring large parts of CLE training in-house. This article outlines some of the essential advantages and the challenges involved in creating an effective in-house training program and includes some practical suggestions for how to construct an in-house training program. At best, this article is a starting point – the programs adopted at individual firms will, of course, need to be tailored to each firm's needs and circumstances.

In-house training may not work for all firms – it is one of those situations where size does matter. Solo practitioners and very small firms are inevitably better served by programs targeted to their needs that are produced by bar associations or commercial providers. At a certain point, however, the benefits of bringing CLE in-house begin to militate against purchasing programs produced outside the office, and the firm size at which this occurs may be less than what many lawyers think. Firms may be able to manage costs related to training and other educational activities more effectively than by leaving decisions to individual lawyers, and firm leadership may also be able to create a coherent curriculum instead of relying on a series of disconnected programs.

With the mandatory continuing legal education requirements in New York and most other states, it does not take many lawyers to cover the cost of an in-house

trainer. Specialty bar associations also serve the needs of practitioners in narrow substantive practice areas. Where the information is so technical that it benefits only a small percentage of the lawyers in a firm, an in-house program may not make sense. Larger firms, however, may be able to support programming for specific practice groups.

Advantages of In-House Training

Continuing legal education providers include bar associations, law schools, private education institutes, and other groups. The forms of programs, moreover, vary widely, from live lectures and demonstrations to video programs and (increasingly) to web-based individual programs that users can view on their individual computer screens. What is common about these programs, however, is that, like a movie or television program, the producers of the program determine the content. If participants need a particular kind of information or training, they must search for an appropriate program. If none exists or none is conveniently available, they must do without or accept a "best under the circumstances" program.

In-house training, by contrast, offers several advantages:

Training Can Be Tailored to Specific, Identified Needs

The training needs of lawyers in a law firm are often obvious to the managers and senior lawyers. Certain fundamental skills are required to succeed in the firm's practice areas, for example, as well as the need for understanding new developments in the law, law-related technology and client initiatives. Training can be tailored to these specific, identified needs.

Appropriate Training Resources Can Be Applied

The senior lawyers in a firm are ready sources of expertise and are best positioned to meet the training needs of lawyers in the firm. In essence, the lawyers who complain "our junior lawyers don't seem to know enough about X, Y or Z" are those who have the skills and experience to provide effective training in the required areas. Many less-senior (but still experienced and capable) lawyers may be eager to share their knowledge with the junior lawyers who make up the teams of subordinates that get the work done.

Adaptation to Feedback May Be Enhanced

In-house programs offer great flexibility. A need can be identified quickly and, often, a program can be organized in relatively short order. A program that, in practice, turns out to be of relatively limited value, or not well-received or well-attended, moreover, may be omitted or presented less frequently.

Challenges of In-House Training

In-house training does not just happen. It requires real dedication and hard work by those who plan and coordinate training programs. Developing and implementing such programs may present several challenges:

The Range of Education Needs in the Lawyer Population May Be Broad

Law firms (especially large law firms) often have a very wide range of lawyers (and paraprofessionals). Many junior lawyers, just starting in the profession, need training in the most practical fundamental aspects of lawyering, while mid-level and senior-level lawyers will get little value out of introductory courses that offer no more than what they already know. Some method of providing step-wise, graduated programs appropriate to different levels must be developed.

Attendance Patterns May Vary Greatly

Busy lawyers often find it difficult to spare significant amounts of time for training. Even the most well-meaning, with every intention of taking advantage of programs, can find themselves overwhelmed with the crush of work on a particular project. As a result, firms must make special efforts to support and encourage training programs by offering such programs at convenient times and stating clearly that lawyers should be freed, wherever possible, to attend such programs. No matter the amount of support, however, any successful training program must address the fact that attendance problems will occur for some people. Some solutions include offering a program on more than one occasion and repeating it periodically, such as year to year, or taping it for later viewing and/or broadcasting to various offices in the firm.

Bad Programs Are Inevitable

No matter the amount of preparation, some training programs will fail. They will not meet the real needs of lawyers in the firm; they will be targeted to the wrong audience; they will present some useful material, but in a boring or disorganized manner; or they will fail in some other way. Whatever the cause, the organizers of training programs must be prepared to identify, and to modify or eliminate, programs that do not work. Some system of meaningful feedback and assessment is key. An attitude of "we put this program on last year, so we must do it again this year" must not prevail.

Key Elements of an Effective Program

In looking at the opportunities and challenges of in-house training, certain key elements for success are readily apparent. This list is merely a starting point; it is necessarily incomplete and requires adaptation to the circumstances of the individual firm. And the presence of all these elements is no guarantee of success. In the end,

it is the dedication and the insight of those who plan and coordinate training that will determine the firm's success at training.

There is no one-size-fits-all training program for lawyers.

Someone Must Take Responsibility for Training

The first priority of most lawyers, in most law firms, is not training, it is client service and client development. Unless the firm assigns responsibility for training to one or more lawyers (and, in many firms, one or more full-time training administrators), attention to the issue may suffer. Often, the best tack is to form a training committee, but in smaller firms it might not be feasible. In that case the firm should designate someone as the training partner, who consults with the other partners in planning training programs, but is personally responsible for their execution. The members of the training committee will become familiar with the training needs and teaching capabilities of the firm's lawyers. The committee, moreover, will develop perspective on training issues, ensuring that training programs have long-term value and sustainability rather than serving the personal whims of some lawyers in the firm, or following some trendy, but ungrounded, training technique. The committee and its administrative staff will also take care of ensuring that CLE credit standards are achieved, and documented.

Mix of Programs Is Often Best

There is no one-size-fits-all training program for lawyers. Each lawyer represents a unique combination of skills and experience, practice focus, and training needs and interests. A training program cannot teach only to the most junior lawyers, or the litigators, or the lawyers with interest in high-technology issues. Trainers must offer a variety of programs, with the goal of maximizing the opportunity each lawyer has to find the right personal combination of program.

Fundamentals Are Forever

The population of most law firms is ever-changing. The rhythm of the recruiting season brings every fall a crop of new lawyers fresh out of law school. These new associates require training in the fundamentals of practice – basic skills of litigation or corporate practice, basic professional habits, and an introduction to the firm and its lawyers and clients. Many firms dedicate specific resources and time to this orientation process. It is a fundamental building block on which to base further training and development.

Do Not Try to Make What You Can Buy More Effectively

The idea of bringing all training in-house is probably wrong-headed in most cases. There are some really tremendous training resources available from outside sources. A firm's training coordinators may wish to survey these resources periodically, to develop new programs in under served areas and to supplement and extend existing programs. Many outside trainers, moreover, are willing to customize their programs to fit the needs of a particular firm. Outside trainers may also make use of in-house trainers, thus ensuring that training is appropriate to the specific audience and also helping to "train the trainers" within the firm.

Pay Attention to Local Needs

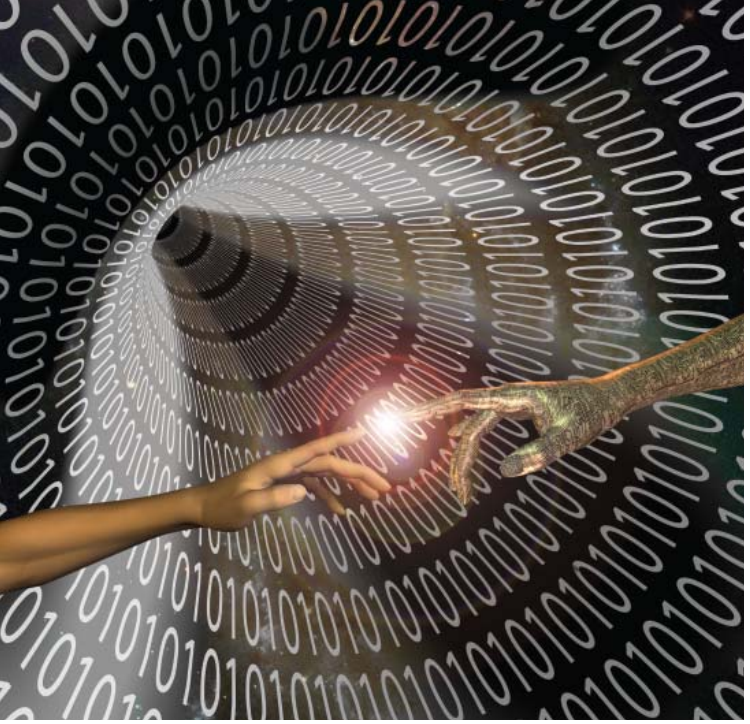
The idea of creating and implementing all training programs by dictate of some central committee is, in most instances, folly. In a firm with multiple offices, the training needs and teaching capabilities in various offices will necessarily differ. As a result, it is often necessary to have training coordinators in each office, who can take responsibility for implementing programs chosen by the firm-wide committee. These local coordinators should also take responsibility for developing local programs. Any programs developed at the local level that prove to be particularly effective, moreover, may be considered for implementation on a firm-wide basis.

Consider Training Retreats

Many firms offer their most important, most comprehensive, training programs by retreat to a location away from work. The training retreat is a serious commitment of time and effort. It is a symbolic statement by the firm that certain training is particularly important. Lawyers who attend a retreat set aside work to a large degree in order to focus on training. If the training programs offered at a retreat are appropriate and effective, the retreat method may be particularly successful. Holding a retreat may involve an added layer of planning to secure a venue, order food and beverages, arrange transportation, and sell the concept, but the results can be well worth the effort.

Final Thoughts

The benefits of in-house training include improved efficiency and better client service, but it can also produce intangible benefits. The message from firm management to the firm's lawyers, which can be quite powerful, is: "We value you. We want you to be well trained in order to succeed in the profession and at this firm in particular. We are willing to listen to you about your needs and interests." These affirmations are positive and inspiring, and can pay off in improved retention rates and greater cohesiveness. ■



Training Lawyers for the Real World

Part Two

By Rachel J. Littman

In the previous issue of the *Journal*, I surveyed the current issues of and market pressures on the traditional model of educating and training new attorneys. Part Two highlights several law schools that are on the cutting edge of legal education reform and a handful of the law firms that are changing the way they manage the practice of law, particularly in how they train and integrate new attorneys into their client-driven operations. The article will conclude with some industry-wide calls to action and specific suggestions for re-thinking the legal education and employer models.

New and Innovative Models

Many law schools and law firms around the country have embodied forward-thinking methods of teaching and training lawyers. Others are starting to experiment – with positive results.

Law Schools

Several law schools have adopted new and innovative courses or are changing entire years of their legal education curriculum, partly driven by the Carnegie and McCrate reports. The ABA is currently considering integrating competency-based learning outcomes into its accreditation standards that more closely align with the skills necessary to practice law.[1] In the meantime, a few law schools across the country are at the forefront of innovative legal education designed to better align legal education with practice.

The City University of New York School of Law and the Northeastern University School of Law have been for decades the academic leaders in their approaches to legal education. CUNY (www.law.cuny.edu) unapologetically touts itself as "the premier public interest law school" and does a very good job recruiting, training and outputting to that model. For the past 40 years Northeastern (www.northeastern.edu/law) has integrated a unique practical learning Cooperative Legal Education program into its curriculum.

Other, more traditional schools are starting to include more practical training. Washington and Lee University School of Law (http://www.law.wlu.edu/thirdyear) recently revamped its third-year curriculum to incorporate more "professional development through simulated and actual practice experiences." The focus is on practical lawyering experiences, intensive skills training in litigation and transactional work, and required live-client externships or simulation practicum courses, all intended to simulate actual lawyering within an educational setting. The program recently completed the first year of its three-year optional phase-in, with nearly two-thirds of the third-year class opting into the new curriculum. The most popular and effective of the new specialized practicum courses are those that are taught collaboratively between a permanent member of the faculty and a practicing attorney. The students have expressed uniform satisfaction and excitement about having the benefit of a current practitioner on hand with the stability, reliability and consistency that comes with the presence of a full-time faculty member. Only two admissions recruiting years into the new curriculum, Washington and Lee has already seen anecdotal evidence of the positive effect of the program; the number of applications have increased more than 30% in each of the past two years.

Northwestern University School of Law has for several years required that first-year and LLM students attend a unique and creative "Lawyer as Problem Solver" workshop program during the January inter-session.[2]

Rachel J. Littman (rlittman@law.pace.edu) is Assistant Dean for Career Development and External Relations, Pace Law School, White Plains, New York. She is a member of the NYSBA Law Practice Management Committee.

This inter-term course integrates hands-on learning experiences with group problem solving to develop the kinds of skills lawyers need to practice law in today's world. Being a high-ranked law school in the metropolitan legal market of Chicago, Northwestern has been able to partner with such legal powerhouses as Jenner & Block LLP and Mayer Brown LLP. The school also offers a two-year accelerated JD program comprising five semesters and one summer off to work. Northwestern touts its program as economical, efficient, and part of the law school's overall plan to maximize "the long-term career success of its graduates and prepar[e] them for multi-job careers."[3]

Harvard Law School started a collaborative teaching program this past winter to teach smaller sections of first-year law students how to think about and solve problems for clients. The new Problem Solving Workshop is now a mandatory two-credit course for 1Ls during their winter term; it is intended to "bridge[] the gap between academic study and practical lawyering."[4] Students work in groups and handle live client issues in a realistic time-pressured environment. Many of the instructors bring practicing attorneys into the classroom, exposing the students to highly accomplished, real-world problem solvers and lending a bit of gravitas to the academic forum. Like Northwestern, Harvard has positively leveraged its prestige and proximity to a major, urban legal market and collaborated with hiring partners at top law firms and general counsel of multinational corporations. The course has so far been mutually beneficial to students, the law school, visiting professors, adjuncts and practitioners.

Innovative teaching is also being encouraged at the individual professor level. Some law school professors come to the legal academy with a multi-disciplinary background, and they are often the first to look to other academic institutions – such as business schools – to integrate more practical aspects into their classrooms. For example, Prof. George J. Siedel of the Ross School of Business, University of Michigan, integrates business and law in the classroom using a method called the "Manager's Legal Plan," where he helps students learn and explain legal issues to clients in a way that makes sense to the client.[5] Prof. Siedel emphasizes that, ultimately, the role of the lawyer is to help clients make decisions or counsel them on how to avoid legal problems, which translate in ways to help the client save money or avoid having to spend money. Other academics have echoed this point, noting that "lawyers who cannot provide non-legal insights . . . are likely to find that their phone rings less often."[6]

Large Law Firms

Large law firms have historically enjoyed the luxury of recruiting from the top law schools, taking on as many summer and first-year associates as their workload requires and reducing their summer classes or downsizing staff when workflow decreases. While complaints have always been made about the lack of usefulness and efficiency of junior associates, there was never a real need to change the system. Now with the current deep recession, some large firms (though not AmLaw top-tier firms) have taken the initiative to bolster their recruiting and training programs, and are even looking more broadly at their promotion tracks and client billing systems.

Now with the current deep recession, some large firms have taken the initiative to bolster their recruiting and training programs, and are even looking at their promotion tracks and client billing systems.

Howrey LLP (www.howrey.com), a global law firm, approaches attorney training in an individualized fashion. Heather Bock, Howrey's Chief Professional Development Officer, noted at the recent FutureEd conference[7] that the firm was increasingly concerned about new lawyers who started practice with "an absence of soft skills" like team building and participation, management, and an understanding of how to influence others. The firm now focuses on hiring, training, promoting and compensating attorneys based on the same skills and core competencies they have identified as necessary to be successful at their firm to deliver the kinds of legal services their clients want. They use a variety of core competency training resources, like their unique online virtual "HowreyU" and individually created and monitored professional development plans. While the Howrey competencies and training methods work uniquely for their firm, they certainly represent one of the more dynamic methods of competency and skills focused approaches in the legal law firm world.

Orrick, Herrington & Sutcliffe LLP (www.orrick.com), a large, multi-national law firm, is one of the more progressively managed large firms in the industry, and one that effectively promotes and utilizes its attorney training system, particularly as they remain focused on client service. They were one of the first firms to officially embrace alternatives to the traditional partnership track, implementing what they call their "innovative talent model" to allow for merit-based promotion and customized professional development. The progression system is supported by the firm's specially developed training curriculum, one-on-one mentoring, and clear articulation of expectations and performance reviews. Orrick's commitment to individualized attorney training goes hand in hand with their push to innovate constantly with their clients. They, like many firms, are developing more cost-efficient ways

to serve the needs of their clients by unbundling some of the services that accompany complex commercial litigation and moving away from the hourly billing model. Orrick also recently announced they would no longer collect or report the profit per equity partner measurement used by law firm ranking surveys like The American Lawyer 100. It is Orrick's total commitment to innovative management and client service that makes their training and development programs so successful and integral to their mission and goals.

Last fall, Drinker Biddle & Reath LLP (www.drinkerbiddle.com), a national firm based in Philadelphia, implemented a new first-year associate, six-month training program, garnering much praise from the industry. Drinker Biddle acknowledged that it was responding to the Association of Corporate Counsel's Value Challenge (www.acc.com/valuechallenge) and direct client conversations about the need for Drinker Biddle attorneys to understand their clients' business and industry. The training program comprises three components: (1) a core curriculum course that all incoming associates must attend; (2) practice-specific, hands-on training with the groups the individual associates will be joining; and (3) what the firm deems the most important aspect, an "apprenticeship" in the practice group modeled on the way attorneys used to be trained (with an emphasis on observing and learning and asking questions). The first iteration of the program included 37 first-year associates spread among five of the firm's offices around the country. The firm is absorbing the costs of training the new associates while still paying them a respectable $105,000 salary during the training period.

The creator and manager of the program, partner Kate Levering, explained that Drinker Biddle did not create the training program as a way to fill in any gaps from law school. The program was a practical and tactical investment. The firm was clearly committed to working with its intended incoming first-year class of attorneys rather than deferring them or rescinding their offers and decided to work with the graduates with a consideration of what kind of lawyers the firm needed them to be. The firm thought about how to use what students learned in law school and then build on those strengths and education. Drinker Biddle integrated inter-disciplinary exercises to show the new attorneys how much cross-over there is among practice groups so they could get a better sense of the larger picture of legal practice. The philosophy the firm adopted for the training program is: "jump start the transition of bright, new law school graduates into the real world of practice." So far, the philosophy seems to be a success.

The feedback on the new Drinker Biddle program – from the participating new associates, partners and clients – has been very positive. The recent graduates were delighted to learn what law school did not teach them – how to practice in real life. Collateral positive consequences included the new associates feeling a real sense of place within the firm because it was willing to invest in them. Their confidence grew as did their class cohesion. The senior lawyers who helped teach and mentor tapped into their memories of what it was like to start their own legal careers under the guidance of senior lawyers. Those memories made the senior attorneys eager participants; they really wanted to invest back into the firm and help train the upcoming generation of attorneys. Many clients also participated in the program, seemingly grateful that

Law schools may wish to take a more proactive approach to mixing the theoretical with the practical.

their outside attorneys were responding to some of their needs and making an investment on their behalf.

Smaller Firms

The issue of new attorney training is relevant for all law firms, not just those with more than 500 attorneys. Many local firms have the advantage of hiring law students as law clerks throughout their law school tenure, which ensures a deeper and longer period of training at very little cost to the firm, as well as providing important help. The firms then use that pool of clerks as a feeder for their new associate ranks. Smaller firms are able to train junior associates rather efficiently by encouraging them to attend CLE classes with local bar associations (with whom the firms collaborate), requiring reading of specialized industry practice material, and otherwise spending a great deal of time individually editing and working on attorney written products.

Attorneys at smaller firms have more control over the kinds of attorneys they hire and train. More important, they can adjust their overall practice management strategies to keep in line with client needs. Keith M. Goldstein from Lavelle & Finn has tested a few ideas about how to ensure better and more efficient lawyers and legal services.

First: fixed fees. Mr. Goldstein and his partners have witnessed firsthand how a more efficient billing system forces attorneys, even junior associates, to price and work efficiently. Imposing a top-down overarching firm management principle causes inefficiencies in knowledge or skills to correct themselves. The system does require a great deal of oversight, but for the dedicated legal professional, it is enormously successful.

Second: change the culture of what and how students are taught in law school; teach them to understand business issues and business economics. In order to fix the lack of business readiness he had been witnessing in junior attorneys, Mr. Goldstein decided to collaborate with nearby Albany Law School and create a JD/MBA private equity course. He helps students analyze a business problem and teaches them to think like his clients. The course is quite technical and multi-disciplinary. He and his co-teacher bring real clients – business people from the industry – into the classroom. He works with students on a single case study – the leveraged buyout of a company. The students dissect the transaction from a financial viewpoint, learning all the business components to help deliver better legal advice. Mr. Goldstein has learned that when attorneys have a better understanding of the business deal and what really matters to the clients, there is less over-billing and over-analyzing, and more efficient, valuable legal services are delivered to the client. An added benefit of Mr. Goldstein's proactive approach and involvement in a law school classroom is that he and his firm have a new group of students each year from which they can pick new attorneys, knowing that they will come to the firm with precisely the kind of business experience their practice requires.

Solutions

Law Schools

Each law school in this country needs to think critically about the kind of students it draws, how it trains them to become practicing lawyers, and the kinds of outputs they are producing, including the types and location of employers that hire their graduates. Law schools could certainly do a better job of identifying (or at least re-thinking), from the beginning, the core and range of competencies that law students need to develop during their time in legal education to enable to them to enter the legal profession. In addition to the many suggestions and guidelines raised in the Carnegie and McCrate reports, law schools may wish to take a more proactive approach to mixing the theoretical with the practical.

- Require every student to engage in some kind of problem-solving course. Create more realistic issues and start to teach students to solve problems or produce deliverables within time and parameter limitations that more closely resemble real-world practice.
- Where possible, bring in outside practitioners or use more collaborative teaching and multi-disciplinary techniques. Incorporate better use of adjuncts. Engage alumni and retired attorneys who have a wealth of experience and knowledge and now have the patience and desire to help train the next generation of lawyers.
- If a school lacks the multi-disciplinary resources to supplement core legal education, consider developing, collaborating or outsourcing to executive education programs, much the same way business schools do. Law schools should try to partner with law firms or corporations who have the motivation and the resources to help train law students and new attorneys. Many of the skills taught in leadership management and other executive management courses really are considered core functions in the world in which many clients operate. If schools or law firms or corporate clients do not or cannot afford to create more practical training courses, the gaps can be filled by market innovators. For example, a recently formed company called LawyerSchool (www.thelawyerschool.com) offers specialized, short-term courses geared toward law students and recent grads to help them learn the practice skills they did not learn in law school.

- Re-think tenure requirements. It is no mystery that most academic scholarly output has little or no impact on actual legal practice or, for that matter, on the development of judicial common law. There is clear academic merit in shaping academic thinkers, but, like law schools themselves, not all academics should be teaching or writing or being judged on the same model. Institutionalize and memorialize and value the creative and innovative teaching methods that produce top-notch legal practitioners. Some members of law school faculties are better at teaching than others; some are better producers of scholarly works than others. Tenure and teaching systems should better recognize these different talents.
- Start putting pressure on the ABA and licensing authorities to allow accelerated legal studies (and I mean reduced credit requirements, not just the same number of credit hours jammed into two years), to begin during undergraduate education. New York Law School Dean Richard Matasar is one of the loudest proponents for these kinds of educational innovations. Many common law countries, like the United Kingdom, allow earlier, specialized legal studies mixed with on-the-job training (or "articling" as it is called) in an efficient and substantively sound process. Most law schools in this country are already affiliated with a university. Why not take more advantage of those resources and capitalize on their potential for legal studies?

Law Firms

Law firms are as unique as the attorneys who work there, yet there is a core range of practice management techniques that any law firm could implement to better train attorneys.

- Implement more training. For firms that are not large enough to have formal training and professional development programs, they can develop better localized training collaboration with local law schools or bar associations to develop a more comprehensive practice-based curriculum. Law schools are in a good position to train practitioners "how to teach" and to explore relationships where the practicing attorney teacher can take on at least one intern a year or summer. Another benefit to more localized training at smaller firms, starting during law school, is that small firms can integrate law clerks into their practice, introducing them to as many clients and supervising attorney work styles as possible. Smaller law firms benefit from smooth billing relationships with clients because the partners emphasize to junior associates efficiency in working and articulating the time they record with an eye toward what it would look like in a final client bill.
- Absorb costs of training. Costs of training new attorneys should never be passed along to clients. Firms need to evaluate how much new attorney time they are writing off and consider other efficient uses of their time or keep new attorneys out of the billing system until they are able to produce at a certain level of proficiency and value to the client.
- Pay lower starting salaries. There is no real reason to pay new attorneys $160,000 a year. For those firms that use summer programs, use them as a real competitive test and do not pay them the equivalent of a $160,000 starting salary.
- Students undoubtedly have large law school loans, but the College Cost Reduction and Access Act and more realistic expectations about initial starting sala-

ries will help incoming law students evaluate their financial needs and educational investment opportunities.

- Move to more of an apprenticeship training model. With Boomers retiring and the market still at a slow point, this is a perfect time to tap into institutional expertise to train incoming attorneys for the benefit of the employer and the clients.
- Take more clerks during the year. There is a great deal of untapped potential for term-time law clerks. Most law schools are eager to have students gain paying (or credit) experience, and many firms have found the year-round training and help to be low cost and efficient for them and their clients.
- Employers should utilize more comprehensive, core-competency-identifying and personality-based methods of interviewing to better highlight the kinds of skills and attributes they and their clients want in an attorney. That process should help winnow the pool of applicants down to attorneys who are starting with the basic competencies needed for that particular employer's practice and client base, thus decreasing some of the need for on-the-job training. Once employers start demanding certain competencies, law schools will be forced to teach them.

Clients

A quick note about in-house counsel (the corporate clients). There are many opportunities for in-house lawyers to participate in mentoring programs. In addition to individual mentoring, in-house legal departments can ask their outside counsel for a secondee or hire more law students during the summer or school year or collaborate with a local law school for an externship or guest lecture program. Large clients could also wield their influence and start to pressure the ABA to change the accreditation regulations to allow more flexibility in the law school model, like distance learning and greater use of non-tenured faculty. They could also help push for a national bar examination and faster, more streamlined admissions processes. Closer to their bottom line, they have a big incentive to pressure state authorities to let non-attorneys officially provide the kind of work they need and have needlessly and traditionally been overpaying licensed attorneys to do – like discovery, expert witness preparation, patent filing, and similar tasks.

Other Influential Organizations

The biggest outside influencers to the existing legal education model are the ABA and *U.S. News & World Report*. Running a close second are individual state bar examining and licensing authorities. The ABA is currently on the right path with the proposed changes to Standard 302, but that is only one step. If the ABA does not push in the direction of more experiential learning, law schools, employers and even students could pressure the ABA to allow law schools to move beyond the traditional core doctrinal courses. The ABA should also be thinking about greater flexibility in law school learning methodologies, including distance learning, the number of credits needed for residency requirements and ultimate graduation, and the number of practitioners and members of other disciplines allowed to teach in the classroom.

Large clients could also wield their influence and start to pressure the ABA to change the accreditation regulations to allow more flexibility in the law school model, like distance learning and greater use of non-tenured faculty.

There is certainly more room for state bar examining and licensing authorities and bar associations to be involved in how law students are trained. States could re-think the bar exam such that it tests more problem-solving skills and competencies. Before granting a license to practice law to a law school graduate, state licensing authorities should require some kind of apprenticeship or fellowship similar to what is done in the medical industry. Simple "bridge the gap" types of CLE courses are a bare minimum. Knowing that almost two-thirds of new lawyers in this country go to small firms that do not have the resources for formal training programs, local and state bar associations should have a more integrated approach to working with local employers to train new and experienced lawyers.

When adjustments are made to the top-tier firms' billing systems and salary structure, there will be less pressure on attorneys to spend all their time billing to clients. The average private practitioner, like any human in a capitalistic system, will naturally gravitate toward making the most return on his or her time investment. Remove or limit that incentive, the way some lockstep and fixed-fee-based firms have done, and there is more time and incentive to invest in human capital. Many of the UK firms

have been doing that. Orrick seems to have figured that out. While this does not put attorneys in the top revenue or profits categories, it is a trade-off that is essential to the future of the legal industry in this country.

The *U.S. News & World Report* ranking of law schools – and impending ranking of law firms – is the single most influential ranking system affecting the current state of the legal education market. The *American Lawyer* annual ranking of the top 200 law firms in the country is the most widely acknowledged indicator of law firm success. There are thousands of law firms in this country but only 200 law schools that are subject to the same ranking and influencing system. There are scores of articles criticizing and denouncing the *U.S. News* methodology.[8] The U.S. General Accounting Office has even scorned the effect the rankings have on the costs of education.[9] But they continue. Until all the law schools, or at least the top 25 to 50, refuse to submit their *U.S. News* questionnaire, the magazine has little incentive to cease its money-making annual venture, and every incentive for law schools to allocate resources in a manner that most benefits their ranking. If *U.S. News* refuses to abandon its annual survey, then it should at least take a more thoughtful approach to law school teaching competencies. *U.S. News*'s current focus and weighting on such components as academic reputation, student-faculty ratio, and placement by nine months following graduation, encourages all law schools to drive toward the same model where none but the top 25 or so really excel. That is a wasteful and misguided system that unfortunately has a huge sway over prospective students, potential employers, and faculty appointments and publications. It is time to move away from that destructive and misleading system.

Conclusion

All members of the legal profession have an obligation to ensure ethical, competent, and efficient delivery of legal services to clients. "The education of the next generation of lawyers is critical to the future of our system of justice."[10] That call to action includes attorneys in all ranks and levels of practice and in all areas of legal services delivery, from direct representation in public interest organizations, like Legal Aid, to the small, local, suburban firm that provides basic corporate, T&E and matrimonial services to the average person, to the lowest associate on a team of attorneys on the nation's largest trademark infringement litigation suit.

The consensus among practitioners and academics about the core competencies needed in future lawyers is this: The best lawyers and law students are and will be those who can master and explain to their clients the relevant substantive legal issues and rules, and who have an understanding of their clients' business. "Business" may be in the traditional sense of pharmaceuticals, airplane engines and securities, or the business of life and matters relating to buying a home or seeking an order of protection against an abusive spouse. Lawyers and law students must also learn to write clearly and concisely, on point, and in a time-restricted manner. They must be able to answer a given question or make a concrete recommendation that makes practical and realistic sense for the client. As one general counsel put it, most corporate clients "don't have legal problems, we have business problems that require the involvement of lawyers."[11] It is incumbent upon law professors and law school administrators to teach law students about the fields of practice and the skills and substantive legal knowledge necessary to provide related legal and other kinds of advice. Practitioners must also take it upon themselves to train new lawyers in whatever manner is best suited for the legal service provider and its clients, and in a way that does not increase costs to their clients. Even the clients who work as in-house attorneys in corporate legal departments and government agencies should be helping to devise solutions to ensure there are future generations of good lawyers around to help them and their issues. When everyone affiliated with the legal industry stops blaming everyone else, stops kowtowing to misguided external influences and commits to rethinking the current system of legal education and legal service, we will start to develop a better way to educate and train lawyers. ■

1. See Proposed Standard 302(b)(2)(iii), which would include a learning outcome competency standard of "a depth and breadth of other professional skills sufficient for effective, responsible and ethical participation in the legal profession." ABA Section of Legal Education & Admissions to the Bar, Student Learning Outcomes Committee, *available at* http://www.abanet.org/legaled.

2. *See* http://www.law.northwestern.edu/problemsolver.

3. *See* http://www.law.northwestern.edu/academics/ajd.

4. *See* http://www.law.harvard.edu/academics/registrar/winter-term/problem-solving-workshop.html.

5. *See* George J. Siedel, Using the Law for Competitive Advantage (Jossey Bass 2002) and George J. Siedel, *The Sixth Strategy: Integrating the Law School and Business School Case Methods*, The Law Teacher 15, Fall 2008.

6. Thomas D. Morgan, "The Future Training of Lawyers: The ABA and the Law Schools," March 1, 2010 version, p. 2 (prepared for the panel on Rethinking Legal Education and Training at the Conference on Law Firm Evolution: Brave New World or Business as Usual? Sponsored by the Georgetown Center for the Study of the Legal Profession) *available at* http://www.law.georgetwon.edu/LegalProfession/documents/Morgan.pdf.

7. The FutureEd Conference, jointly sponsored by Harvard Law School and New York Law School, was held in April at New York Law.

8. *See, e.g.*, Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. Rev. 493 (2007).

9. *See* United States Government Accountability Office Report to Congressional Committees, *Higher Education: Issues Related to Law School Cost and Access* (Oct. 2009), *available at* http://www.gao.gov/new.items/d1020.pdf.

10. Emily Spieler, Dean, Northeastern University School of Law, *Making Legal Education More Practical*, Nat'l L.J., Feb. 22, 2010.

11. *See* comments from Chester Paul Beach, Jr., General Counsel of United Technologies, at the FutureEd Conference *available at* http://www.nyls.edu/centers/harlan_scholar_centers/institute_for_information_law_and_policy/events/futureed/.

Update: Did the Appellate Odds Change in 2009?

Appellate Statistics in State and Federal Courts

By Bentley Kassal

Available official statistical data has been the hallmark for this and eight prior articles in place of guesswork, conjecture, and gut reaction. Attorneys and clients – prospective or current – are obviously very interested in the actual mathematical history of the civil and criminal courts generally utilized by New York litigators.[1] Of course, these are general figures based on civil, criminal, and administrative appeals and do not supply the answers for particular cases. The report presented is based on simple and accurate answers from official court sources, data readily available to the public.

The appellate data and comments are for the following appellate courts, which include civil and, in some instances, criminal data for the year 2009:

1. New York Court of Appeals.[2]
2. The four departments of the Appellate Division of the New York State Supreme Court.[3]
3. The Appellate Terms of the New York State Supreme Court for the First and Second Departments.
4. The U.S. Circuit Courts for the Second Circuit and the District of Columbia.
5. The New York Court of Claims.

Bentley Kassal (BKassal@Skadden.com) retired in 1993 as an Associate Justice of the Appellate Division, First Department; also served as a Judge in the Civil Court; a Justice of the Supreme Court, New York County; and an Associate Judge at the New York Court of Appeals in 1985. He was a New York Assemblyman for six years. He received his law degree from Harvard Law School in 1940 and has been counsel to the litigation department at Skadden, Arps, Slate, Meagher & Flom LLP since 1997. On June 6, 2009, in Normandy, Judge Kassal received the French Legion of Honor. This is his eighth consecutive article on the subject of appellate statistics.

Unless otherwise indicated, all the statistics are in percentages and presented in descending consecutive order, with the most recent year of 2009 on the left.

This is the fourth consecutive year I have intentionally omitted several appellate statistical dispositions that I have deemed irrelevant for purposes of this study, as well as distracting (since simplicity and accuracy are the objective). Among the dispositions excluded are those that are not dispositions on the merit, but are basically procedural and which are usually categorized by the reporting appellate courts as "other" or "dismissed" under "dispositions." As for criminal cases, those statistics included are only for New York state appellate courts, not federal.

New York Court of Appeals[4]

The percentages for appellate statistics for the five-year period ending in 2009, are:

Civil Cases					
	2009	2008	2007	2006	2005
Affirmed	48	(48)	(56)	(66)	(55)
Reversed	41	(43)	(27)	(25)	(35)
Modified	11	(9)	(17)	(9)	(10)

Criminal Cases					
	2009	2008	2007	2006	2005
Affirmed	71	(70)	(66)	(71)	(70)
Reversed	21	(7)	(30)	(17)	(25)
Modified	8	(23)	(4)	(12)	(5)

Comments

For civil cases, the 2009 affirmance rates were identical to 2008 but much lower than the previous three years.

With respect to the criminal cases, the 2009 affirmance figures generally paralleled those for the years 2008, 2006, and 2005. There was a 4% lower affirmance rate for 2007. Interestingly, the modification rate for 2009 is significantly less than that for 2008.

Avenues to the Court of Appeals – Jurisdictional Predicates

Civil Appeals for 2009 (2008, 2007, 2006, and 2005 in parentheses)	
Permission of Court of Appeals	44 (48) (48) (49) (57)
Permission of Appellate Division	25 (29) (26) (24) (22)
Dissents in Appellate Division	24 (18) (19) (17) (14)
Constitutional Question	7 (5) (7) (10) (7)

Criminal Appeals for 2009 (2008, 2007, 2006, and 2005 in parentheses)	
Permission of Court of Appeals Judges	70 (72) (78) (85) (87)
Permission of Appellate Division Justices	30 (28) (22) (15) (13)

Comments

The only significant change is the greater number of Appellate Division dissents in civil appeals. A question frequently posed to the author is whether the Court of Appeals more frequently grants leave when there is a basic difference or conflict between or among the several Appellate Division departments on a significant issue. The answer is an emphatic "yes."

Significant Other Statistics

1. The average time from argument or submission to disposition of an appeal in normal course was 36 days and for all appeals, 29 days.
2. The average time from filing a notice of appeal or an order granting leave to appeal to oral argument was about 7.5 months, a half month greater than in 2008.
3. The average time, from when all papers were served and filed to calendaring for oral argument was approximately three months, the same as 2008.
4. The total 2009 filings were 328, the same as 2008.
5. The total number of Appellate Division orders granting leave was 65 (44 civil and 21 criminal) with 54 in 2008 (36 civil and 18 criminal). Of these, the First Department issued 39 (28 civil and 11 criminal) with 34 for 2008 (24 civil and 10 criminal).
6. The total motions filed decreased slightly from 1,421 in 2008 to 1,397 in 2009, a 1.7% reduction.
7. Dispositions:
   (a) In 2009, 212 appeals (146 civil and 66 criminal) were decided, as contrasted with 225 (172 civil and 53 criminal) for 2008.
   (b) Of these 212 appeals, 161 were decided unanimously.
   (c) Motions: 1,370 were decided in 2009, which was 89 fewer than in 2008.
   (d) The average time from the return date of the motions to the disposition for all motions was 50 days, with 57 days for civil motions for leave to appeal.
   (e) Of the 1,070 motions decided for leave to appeal in civil cases, 7.2% were granted (6.8% in 2008).
8. Review of State Commission on Judicial Conduct determinations: Three were reviewed in 2009 with the Court accepting the recommended sanction of removal in one case, imposing the sanction of admonition in another after rejecting the recommendation of removal. In the third case, the Court remitted to the Commission for a further hearing. Two other judges were suspended, with pay, pursuant to Judiciary Law § 44(8) "pending a determination by the Commission for his removal or retirement."
9. Rule 500.27: This Rule grants discretionary jurisdiction to the Court of Appeals to review certified questions from certain federal courts and other state courts of last resort. At the end of 2008, seven cases certified by the U.S. Court of Appeals for the Second Circuit were pending, which were all answered in 2009. Also in 2009, the Court accepted four new cases from the same court with two decided in 2009 and two pending at the end of 2009.

The Four Departments of the Appellate Division of the Supreme Court of the State of New York[5]

Civil Statistics for 2009 (2008, 2007, 2006, and 2005 in parentheses)	First	Second	Third	Fourth
Affirmed	63 (64) (60) (64) (66)	60 (62) (60) (59) (61)	73 (78) (78) (80) (81)	62 (65) (68) (70) (70)
Reversed	21 (20) (26) (23) (21)	27 (27) (27) (29) (27)	16 (11) (10) (10) (10)	22 (19) (15) (14) (13)
Modified	16 (16) (14) (13) (13)	13 (11) (13) (12) (12)	11 (11) (12) (10) (9)	16 (16) (17) (16) (17)

Criminal Statistics for 2009 (2008, 2007, 2006, and 2005 in parentheses)	First	Second	Third	Fourth
Affirmed	91 (90) (88) (89) (88)	88 (89) (90) (88) (90)	80 (81) (84) (85) (87)	85 (84) (80) (80) (87)
Reversed	4 (5) (6) (3) (3)	7 (6) (4) (5) (5)	11 (10) (6) (6) (7)	6 (6) (9) (9) (5)
Modified	5 (5) (6) (8) (9)	5 (5) (6) (7) (5)	9 (9) (6) (9) (6)	9 (10) (11) (11) (8)

Comments

Affirmance Rates: For 2009, the civil affirmance rate for the First and Second Departments were about the same as previously. However, the Third and Fourth Departments' affirmance rates decreased from 5% and 3% respectively from 2008, with reversal rates similarly increasing.

Total Appellate Dispositions: The First Department had 2,816 (3,040 for 2008), the Second Department had 11,665 (17,403 for 2008), the Third Department had 1,828 (1,838 for 2008) and the Fourth Department had 1,554 (933 for 2008). The Second Department's 2009 total was more than four times that of the First Department.

Total Oral Arguments: There were 1,216 in the First Department, 2,321 in the Second Department, 715 in the Third Department, and 1,027 in the Fourth Department. It is noteworthy that, in contrast to the differential as to the above total disposition rates, with the First Department having 24% of the Second Department's total dispositions, the First Department had about 52% of the total oral arguments of the Second Department.

Average Time to Decide Appeals: The First Department's record for the year ending June 30, 2009, indicated that it recorded the shortest period of all departments for decisions. There was an average of 30 days after submission or oral argument for both 2007–2008 and 2008–2009. This occurred while its backlog was increasing. The Fourth Department in 2007–2008 also reported a 30-day average.

Total Motions Decided: There were 4,648 decided in the First Department, 10,321 in the Second Department, 6,195 in the Third Department, and 3,489 in the Fourth Department. Again, note the ratio of total motions decided between the First and Second Departments in relation to their respective total dispositions.

As noted previously, the Third Department's much greater affirmance rate for civil appeals is attributed to its greater number of Article 78 administrative appeals, which are reviewed on the lesser standard of "substantial evidence."

The Appellate Terms of the First and Second Departments

Civil Statistics for 2009 (2008, 2007, 2006, and 2005 in parentheses)		
	First Department	Second Department
Affirmed	64 (62) (61) (65) (62)	51 (52) (61) (61) (52)
Reversed	28 (31) (29) (23) (25)	38 (37) (28) (27) (35)
Modified	8 (7) (10) (12) (13)	11 (11) (11) (12) (13)

Criminal Statistics for 2009 (2008, 2007, 2006, and 2005 in parentheses)		
	First Department	Second Department
Affirmed	87 (79) (86) (69) (72)	57 (62) (38) (64) (70)
Reversed	13 (18) (14) (29) (23)	39 (30) (59) (32) (25)
Modified	(3) (0) (2) (5)	4 (8) (3) (4) (5)

Comments (Comparable figures from 2008 are in parentheses)

The Second Department had 1,528 (1,426) total civil dispositions in contrast to 452 (448) in the First Department. As to the total number of oral arguments, the Second Department heard 347 (334) oral arguments while the First Department heard only 263 (308).

The affirmance rate of criminal appeals again was much higher in the First Department, which had a rate of 87% (79%), while the Second Department had an affirmance rate of only 57% (62%).

As to the total motions decided, the First Department issued decisions on 1,568 (1,509) motions, while the Second Department issued decisions on 4,416 (3,432) motions.

The U.S. Circuit Courts of Appeal for the Second Circuit and the District of Columbia[6]

This year, for the fourth time, appellate statistics for civil cases are being presented as they are specifically defined in the official report, namely, as "Other U.S. Civil" (involving governmental entities) and "Other Private Civil" (involving private parties). Additionally, administrative appeals are included for these two circuits. The Court of Appeals for the Federal Circuit is not included because it has nationwide jurisdiction to hear appeals in specific cases, such as those involving international trade, government contracts, patents, trademarks, and veterans' benefits.

	Second Circuit		Administrative Appeals	
	Other U.S. Civil	Other Private Civil		
Affirmed	81 (65) (63) (67)	84 (64) (61) (71)	Affirmed	93 (18) (70) (80)
Reversed	16 (6) (10) (9)	12 (7) (12) (11)	Reversed	4 (8) (10) (17)
Dismissed	1 (21) (26) (24)	2 (21) (24) (18)	Dismissed	2 (11) (15) (13)
Remanded	2 (8) (1) (0)	2 (8) (3) (0)	Remanded	1 (3) (5) (0)

	Second Circuit		Administrative Appeals	
	Other U.S. Civil	Other Private Civil		
Affirmed	66 (77) (83) (67)	74 (79) (85) (71)	Affirmed	74 (65) (63) (70)
Reversed	12 (14) (12) (9)	6 (17) (9) (11)	Reversed	11 (19) (20) (17)
Dismissed	21 (4) (2) (24)	19 (1) (3) (18)	Dismissed	13 (13) (12) (13)
Remanded	1 (5) (3) (0)	1 (3) (3) (0)	Remanded	2 (8) (5) (10)

Comments

In comparing civil appeals, both circuit courts have greater affirmance rates than the New York Court of Appeals and all four Appellate Division Departments, with the District of Columbia Court being much higher. The U.S. Circuit Court for the Second Circuit's affirmance rate is also higher on the average than both the First and Second Departments of the New York Appellate Division.

New York Court of Claims

This is a trial, not appellate, court solely concerned with claims against the State of New York. As a unique tribunal, the 2009 statistics will have significance primarily for practitioners in this specialty.

1. A total of 1,506 claims were disposed of in 2009, an increase of 44 over 2008. There were 82 awards (5.4% of total claims) with 1,424 dismissals.
2. The 82 successful claims sought $391,188,926, but the total amount awarded was only $20,341,698, which is 5.19% of the amounts demanded. ■

1. For the New York state courts, the information may be obtained at the website http://www.nycourts.gov ("Courts," "Court Administration" and "reports"). For the United States Circuit Courts, contact the Administrative Office of the United States Courts, One Columbus Circle N.E., Washington, D.C. 20544 or search its website, http://www.ca2.uscourts.gov.

2. See the Annual Report of the Clerk of the Court of Appeals for 2009 *available at* http://www.nycourts,gov/ctapps/crtnews.htm.

3. See Reports of the New York State Office of Court Administration *available at* http://www.courts.state.ny.us/reports/annual/index.shtml.

4. See the Annual Report of the Clerk of the Court of Appeals for 2009 *available at* http://www.nycourts.gov/ctapps/crtnews.htm.

5. See Reports of the New York State Office of Court Administration *available at* http://www.courts.state.ny.us/reports/annual/index.shtml.

6. Applicable to the 12-month periods, ending September 30, 2009. This year, for the third time, includes "Remanded."

Bran Noonan (bnoonan@gordonrees.com) is an attorney in the Employment Law and Commercial Litigation Practice Groups in the New York office of Gordon & Rees and is an editor with the NYSBA *Journal* as well as an Adjunct Professor at New York Law School.

The Campaign Against Employee Misclassification

By Bran Noonan

Employee misclassification occurs when an employer improperly categorizes and treats a worker as an "independent contractor" rather than an "employee." Over the past few years, New York State and the federal government have increasingly extended their efforts to eliminate the misclassification of workers as independent contractors. They have expanded investigative and enforcement initiatives, infused agencies with additional funds, and explored various legislative measures in an effort to protect workers and shore up lost tax revenue. This article traces the recent campaigns against misclassification in both the New York State and federal systems and outlines the law of classification in both jurisdictions.

The Effects of Misclassification

Workers misclassified as independent contractors are denied a wide range of legal safeguards and benefits afforded to those classified as "employees," such as workers' compensation benefits, wage and hour protections, unemployment insurance, anti-discrimination protections, and family medical leave benefits. Misclassified workers are also typically locked out of various customary benefits of employment, including vacation, sick leave, retirement, and health care coverage – the latter two benefits being costs that are shifted onto the worker and, oftentimes, the taxpayer.

For the employer, however, the advantages of misclassifying workers are substantial, making it a dangerously tempting business decision. By categorizing a worker as an independent contractor, employers can avoid paying minimum wage and overtime in accordance with the federal Fair Labor Standards Act and New York State Labor Law, employment insurance taxes, workers' compensation premiums, and their share of Social Security, Medicare, and federal unemployment taxes, all of which take a significant financial toll not only on workers, but also on government treasuries. Employers are also relieved from liability under anti-discrimination statutes and from vicarious liability for the acts of independent contractors, both of which can add up to substantial financial savings. In addition, employers that misclassify workers can gain a competitive advantage over law-abiding employers, who spend substantial capital on employee expenses and, consequently, can be priced out of the marketplace.

Properly classifying workers, however, can be a rather complicated and involved process; responsible employers can mistakenly misclassify employees on a well-founded belief that the workers are indeed independent

contractors. A major reason for such errors, whether accidental or intentional, is that no uniform definition of "employee" exists among the various state and federal statutes, all of which contain rather broad and indeterminate definitions of the term. Resolving whether a worker is an employee ultimately requires employers to apply various, fact-intensive tests regulatory agencies and the judiciary have devised, depending on which law applies. For instance, the relevant tests differ if a worker is being classified for the purposes of the Fair Labor Standards Act versus the Internal Revenue Code.

Many employers, nevertheless, will not engage in the process of formally classifying a worker, unaware that various classification criteria exist and that the law is far less straightforward than they may have presumed. For example, employers who report wages on a 1099 form, refer to a worker as a consultant or freelancer, or label a worker as an "independent contractor" in a contract, will classify the worker as an independent contractor, even though none of those circumstances serve to automatically brand a worker as an independent contractor.

Regardless of whether misclassification is intentional or accidental, the financial penalties of misclassification can be burdensome. Specifically, employers may be liable for unpaid wages and benefits, back taxes, civil and criminal penalties, and other government penalties. With respect to tax penalties, not only will employers have to pay their share of unpaid taxes, such as Medicare and Social Security, but they might have to pay the employee's share of unpaid taxes. Moreover, recently there has been a legislative push in New York to create individual liability for officers and directors that commit classification violations.

Given the problems associated with misclassification, particularly the loss of tax revenue, governmental pressure and oversight is not expected to lessen anytime soon. In light of such escalated political pressure and the challenges of accurately classifying employees, employers should be wary of the consequences of misclassification and begin to reevaluate their classification policies and practices to ensure compliance.

The New York State Misclassification Landscape

Beginning in 2007, New York State began to pay greater attention to the problem of misclassification. In February of that year, the Cornell University School of Industrial and Labor Relations released a study titled "The Cost of Worker Misclassification in New York State," which exposed the scope of misclassification in the state and helped jumpstart government action.[1] According to the study, from 2002 through 2005, approximately 10.3% of private-sector workers were considered misclassified as independent contractors. About 14.8% of those misclassified workers were in the construction industry. The study estimated that out of 400,732 employers in audited industries statewide, an average of 39,587 of those employers misclassified workers during that time period. Along with the study, at the same time, several labor leaders complained that unionized companies were being outbid by competitors that misclassified workers.[2]

In response, several New York state agencies began to convene and explore how they could coordinate their efforts and resources to crack down on the problem.[3] Out of those discussions, on September 5, 2007, then-Governor Eliot Spitzer issued an executive order establishing the Joint Enforcement Task Force on Employee Misclassification (Task Force), assigning the Task Force with the responsibility of "coordinating efforts by appropriate state agencies to ensure that all employers comply with all the State's employment and tax laws."[4] The Task Force created an unprecedented partnership among the Department of Labor, the Department of Taxation and Finance, the Workers' Compensation Board, the Attorney General's Office and the New York City Comptroller's Office in an effort to combine agency resources to develop policy solutions, conduct statewide industry enforcement sweeps, and improve inter-agency data sharing. Inter-agency communication was in fact a significant development in enforcement and deterrence because, previously, agencies did not share information when one agency discovered a misclassification violation. Now, employers that fell under the radar of, say, the state labor department for wage and hour violations could (ideally) no longer rely on agency isolationism and continue misclassifying for tax purposes.

After four months in existence and in accordance with its mandate to report on its findings at the beginning of each year, the Task Force issued its first report in February 2008.[5] According to the report, from September 1, 2007, through December 31, 2007, the Task Force conducted enforcement sweeps of 117 businesses, primarily in the construction and food service industries, uncovering 2,078 misclassified employees and $19 million in unreported wages. Out of those employees misclassified, the Task Force determined that 646 of them were owed unpaid wages totaling approximately $3 million.

Exactly a year later, the Task Force issued a second, more comprehensive report.[6] This time, with over a year in operation, the Task Force was able to conduct extensive investigations statewide, identifying at least 12,300 cases of employee misclassification and $157 million in unreported wages, which included at least $12 million in unpaid wages.

The Task Force took a three-prong coordinated strategic approach to enforcement: (1) joint agency sweeps primarily of the construction industry; (2) "Main Street" sweeps where investigators went door-to-door to commercial and retail business in shopping districts; and (3) enforcement investigations based on complaints and information shared among the agencies. Each enforce-

ment tactic successfully uncovered instances of misclassification for the year 2008. The joint enforcement sweeps uncovered 7,789 misclassified employees out of the 291 business entities investigated. Under the "Main Street" sweeps, the Task Force visited 304 businesses, 67% of which had some violations. Complaints and tips led to 1,118 investigations that exposed 4,564 misclassified workers. In total, the Task Force investigated a wide array of industries, ranging from those where misclassification traditionally is pervasive, such as construction, food service, hospitality, and factories, to smaller retail businesses, such as bars, grocery stores, delis, bakeries, clothing and sneaker stores, travel agencies, nail salons, jewelry stores, hairdressers, mortgage service companies, and nightclubs. Where sweeps uncovered evidence of criminal fraud, the Task Force referred those cases to state prosecutors for criminal prosecution.

Along with enforcement initiatives, the Task Force has recommended legislative prescriptions, such as imposing individual liability for misclassification and adopting what is commonly referred to as the "ABC test" – used among several states – for all the major state laws defining "employee" to ensure a common, uniform approach to classifying workers. While the latter suggestion might help foster stability and predictability, the former could have a significant deterrence impact as it would financially expose officers and directors.

The state Legislature has also entered the fray and responded with proposed legislation. On March 12, 2009, a bill was introduced in the New York State Assembly to amend the state tax, workers' compensation, and labor laws to include an express definition of "employee," using the ABC test. According to the test, an employee shall not include a person who (1) is free from control and direction in connection with the performance of the service; (2) performs the service outside the usual course of business of an employer; and (3) is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.[7] Interestingly, the bill would also empower the New York State Department of Taxation and Finance, as opposed to the state labor department, to act as the sole administrative agency to promulgate rules and regulations defining and determining when a person is deemed an employee.

In June 2009, three months after the state Assembly bill was presented, a second bill, titled the New York State Construction Fair Play Act (Construction Act), was introduced in the New York State Senate to amend the state labor law to target misclassification in the construction industry, which studies had characterized as rampant.[8] For instance, one out of every four construction workers is reportedly either misclassified or paid off the books.[9] Accordingly, the proposed act would create a presumption of employment wherein any person performing services for a contractor would be classified as an employee unless the three requirements of the ABC test were satisfied. The bill would also provide workers with notice of their classification status, protect them from retaliation for reporting violations, and impose civil and criminal penalties against employers and individual corporate officers who knowingly allow violations to occur.

While neither of these bills has officially been enacted, both continue to move through required channels toward passage. The first bill was referred to the Labor Committee for review on January 6, 2010. The Construction Act is actually quite close to becoming law, having been approved by both legislative houses in June 2010 and subsequently being delivered to the governor on August 18, 2010, where it awaits executive action.

The Federal Misclassification Landscape

As with New York State, in the past few years, the problem of misclassification has attracted the attention of the federal government. Beginning in 2008, Congress has considered several legislative proposals aimed at combating misclassification. While the proposed bills have either stalled or remain under review, they provide a prelude of legislation that will very likely come to fruition at some point, particularly if the Obama administration remains in office.

In September 2007, several Democratic senators, including then-Senator Barack Obama, introduced a bill to amend the Revenue Act of 1978.[10] Titled the "Independent Contractor Proper Classification Act of 2007," the proposed amendment sought to (1) require employers to treat workers misclassified as independent contractors as employees for tax purposes upon a determination of the Department of Treasury; (2) repeal the safe harbor defense of "industry practice" as a justification for misclassifying workers; (3) require the Departments of Treasury and Labor to share information on misclassification cases; (4) prohibit retaliation against employees for filing complaints; (5) require employers to provide independent contractors notice of their tax obligations, employment protections unavailable to them, and right to seek a classification determination from the IRS; and (6) maintain a list of all independent contractors hired for a three-year period. The proposed legislation did not provide a definition of the term "employee." Yet eliminating the industry practice defense for misclassifications would help compel employers to adjust their policies to ensure proper classification. This bill ultimately stalled after being referred to committee.

In May of the next year, another bill was introduced in the U.S. House of Representatives. Known as the Employee Misclassification Prevention Act, this bill would amend the Fair Labor Standards Act with respect to misclassification issues.[11] Four months later, Senator Barack Obama and the late Senator Edward Kennedy co-

sponsored the same House bill in the Senate, along with other Democratic senators.[12] Specifically, the acts would require employers to keep records of non-employees' classification status, provide each worker employed with a written notice informing the worker of his or her classification and information as to his or her rights under the law, and provide a special penalty for employers who misclassify. While the acts did not provide an explicit classification test, the record keeping and notice requirements would induce employers to engage in a thorough review process of their workforce and ensure proper classification. While these bills eventually stalled after being referred to committees, in April 2010, they were reintroduced in both legislative houses and sent to committee for review.[13]

In 2009, Congress again attempted to enact misclassification legislation through the tax law. On July 20, 2009, a bill that was introduced the preceding year was again offered in the House. Six months later, on December 15, 2009, Senator John Kerry and other Democratic colleagues introduced the same bill in the Senate for consideration. Those bills, known as the Taxpayer Responsibility, Accountability, and Consistency Act of 2009, seek to amend the Internal Revenue Code of 1986 in connection with the rules relating to independent contractors.[14] Significantly, the bills would narrow the safe harbor protection to exclude the industry standard justification for improper classification and increase penalties for failure to file correct tax returns, similar to the failed Independent Contractor Proper Classification Act of 2007. The bills also would require employment status to be determined under "the usual common law rules," which is a reference to the current control test used to classify workers for federal income tax purposes. Both bills remain active, having advanced to legislative committees for deliberation and revision before potentially proceeding to a general debate.

Along with pursuing legislative renovations, the federal government has also sought to increase enforcement efforts. In an attempt to reenergize the U.S. Department of Labor, on February 2, 2010, the Obama administration requested an additional $25 million in its projected 2011 budget to go toward the creation of what it termed the Misclassification Initiative. The proposed initiative's sole mission would be to "target misclassification with 100 additional enforcement personnel and competitive grants to boost states' incentives and capacity to address th[e] problem."[15] While the initiative intends to spread across all industries, the Department of Labor has made it a point to target industries where misclassification pervades, such as construction, child care, home health care, grocery stores, landscaping, janitorial services, and business services.[16] While the initiative is a year away from starting, the federal government has clearly had the issue of misclassification in its sights for several years, continuing to make it a top priority, particularly given the urgent need to increase government revenue streams.

Employers must actively and preemptively classify a worker for federal tax and wage purposes, both of which fall under separate laws that have distinctive classification tests.

Classifying Workers Under Federal Law

Under federal law, employers must actively and preemptively classify a worker for federal tax and wage purposes, both of which fall under separate laws that have distinctive classification tests. While overlap exists in the application of both tests, an employee could technically be classified as an independent contractor under the tax law and an employee under the wage and hour law. What this means is that employers cannot simply rely on the advice of an accountant or a determination from the Internal Revenue Service (IRS) when classifying an employee under federal laws. Rather, they need to ensure that their policies and procedures incorporate all federal, and state, tests when making classification decisions.

Federal law requires an employer to withhold an "employee's" federal income tax and to pay its share of an employee's Social Security, Medicare, and federal unemployment taxes. To determine whether a worker is an employee for federal tax purposes, Congress adopted "the usual common law rules"[17] – that is, the rules of the conventional master-servant relationship under agency principles – to determine an individual's employment status. This focuses on whether the employer has the *right to control* the employee, not whether the employer actually controls the worker.

To help employers evaluate the existence of control, in 1987, the IRS promulgated a list of 20 factors grouped together from various court decisions.[18] But because the IRS did not advise what weight to give each factor, their application often led to inconsistent results. Eventually, in 1996, the IRS reorganized the list into three presumably more manageable categories: (1) behavioral control; (2) financial control; and (3) the relationship.[19] Under "behavioral control," the IRS looks at the means and details of the work, such as the degree of instruction, supervision, evaluation, and training. The next category focuses on "financial control," which examines whether the business has the right to control the economic aspects of the worker's activities. For instance, does the worker

pay for advertising and business expenses, make significant investments in the business, and share in the profits or losses? The third "relationship" category looks at how the parties perceive their relationship, including the existence of employee benefits and the permanency of the relationship. Notwithstanding the three categories, employers and the IRS continue to use the 20 factors as tools of reference when examining the categories.

The other key federal law that requires employers to prospectively classify their workforce is the Fair Labor Standards Act (FLSA), which provides "employees" with two major wages and hour protections: the right to (1) minimum wage and (2) overtime for hours worked in excess of 40 hours a week. The FLSA neither points to an area of law, such as the common law, to define "employee," as the Internal Revenue Code does, nor provides an operable definition of the term for classification purposes. Rather, the statute defines "employee" as "any individual employed by an employer," a fairly broad and circular definition.[20] Yet in developing a classification test, courts have been struck by the statutory definition of the term "employ," which means "to suffer or permit to work,"[21] viewing it as intending to "stretch[] the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law purposes"[22] because of the remedial purposes of the statute.[23]

The FLSA neither points to an area of law, such as the common law, to define "employee," as the Internal Revenue Code does, nor provides an operable definition of the term for classification purposes.

Accordingly, due to the societal goals of the FLSA and the restrictive scope of the common law agency test, the U.S. Supreme Court adopted the "economic reality" test in 1947 to determine the status of a worker, which remains the guiding approach today.[24] Under the test, courts will generally consider the following five factors that the Court set forth in *United States v. Silk*, a New Deal–era case: (1) the degree of control exercised; (2) the workers' opportunity for profit or loss and their investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the relationship; and (5) the extent to which the work is an integral part of the employer's business.[25] Courts do not focus on the factors in isolation or limit themselves to only those factors, but rather examine the totality of the circumstances.

In fact, the Second Circuit has devised two additional sets of factors, in addition to the *Silk* factors, that are typically used in cases involving joint employment issues. The FLSA recognizes that workers may be employees of two or more employers, entitling them to wage and hour protections from their joint employers. To determine the existence of a joint employment relationship, in *Carter v. Dutchess Community College*, the Second Circuit adopted four factors from a Ninth Circuit decision, which asks whether the employer (1) has the power to hire and fire the workers, (2) supervises and controls the workers' schedule or condition of employment, (3) determines the rate and method of payment, and (4) maintains employment records.[26] These factors are generally applied where the purported joint employer exercises formal control over the worker, which is not mandatory to establish an employment relationship for FLSA purposes. Due to the expansive nature of the economic reality test, in the absence of formal control, the Second Circuit devised a list of six factors in *Zheng v. Liberty Apparel Co.*[27] to establish what it termed "functional control" in joint employment relationships. Under the six factors, courts are instructed to look at whether a unit of subcontractors, for example, acted as an employee, such as whether the unit worked on the contractor's premises, was subject to supervision, worked exclusively for the contractor, and shifted as a unit from one contractor to another.

Regardless of the number of factors applied, courts have consistently stressed that "[t]he ultimate concern" under the economic reality test is the dependence of the employee on the employer – that is, "whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves."[28] Factors merely serve as "tools to be used to gauge the degree of dependence of the alleged employees on the business with which they are connected."[29]

Accordingly, in theory, the ultimate paradigm and objective of the control and economic reality tests differ considerably. One test looks for the existence of control, while the other test is interested in the existence of worker dependence. In fact, under the economic reality test, courts can devise sets of factors that allow for an expansive definition of "employee." Yet in application, the two tests can operate quite similarly and focus on the same facts. For instance, in an FLSA case, the Second Circuit focused on nurses' opportunity for profit and loss, their investment in the business, whether they were supervised, and the permanence of their relationship, all facts

from the *Silk* factors that the IRS would take into account. Part of this overlap is due to the fact that the concepts of control and dependence are not mutually exclusively and unrelated. Generally speaking, those who depend on another are often subject to some degree of control.

Classifying Workers Under New York State Law

The law of classification in New York State is relatively straightforward. Despite pending legislation that may institute the ABC test for classifying employees, New York state courts have generally adopted a single common law test for determining an employee's status in various actions, such as unemployment insurance violations, unpaid wages claims under Article 6 of the state Labor Law, state anti-discrimination violations, and vicarious liability claims, which presumably provides a uniform approach to classification.[30] Specifically, in applying the common law approach to determining if an employer-employee relationship exists, New York courts have focused on whether "the evidence demonstrates that the employer exercises control over the result produced *or* the means used to achieve the result."[31]

The New York Court of Appeals has indicated that "control over the means is the more important factor to be considered."[32] As a result, "[m]inimal or incidental control over one's work product with the employer's direct supervision or input over the means used to complete it is insufficient to establish a traditional employment relationship."[33] For instance, providing an employee instruction as to what to wear and what products to promote is not evidence of control significant enough to transform a worker into an employee.[34] In fact, courts have acknowledged that the "requirement that work be done properly is a condition just as readily required of any independent contractor"[35] and is viewed as "a necessarily wise business decision."[36] While state agencies, such as the state labor department, have issued guidelines for classifying workers, the guidance consists of a collection of relevant factors that extend from the case law.[37]

Indeed, in 2003, the New York Court of Appeals set forth the following list of factors in *Bynog v. Cipriani Group, Inc*. to help assess the degree of control under Article 6 of the Labor Law: (1) did the worker work at his or her own convenience; (2) was the worker free to engage in other employment; (3) did the worker receive fringe benefits; (4) was the worker on the employer's payroll; and (5) was the worker on a fixed schedule.[38] Despite the application of the factors to an Article 6 claim, the Court acknowledged that the factors are applicable to other claims with classification issues, such as vicarious liability actions.

For workers' compensation issues, New York state courts have taken a somewhat different approach, devising two separate tests to determine whether a worker is an employee: the common law "control" test, and the relative nature of work test.[39] Under the control test, courts evaluate four factors, which fall in line with conventional agency law principles: (1) right to control; (2) method of payment; (3) extent the entity furnishes equipment; and (4) the entity's right to discharge.[40] In contrast, the second test focuses on factors such as the character of the work, the difference in the work from the entity's work, permanence of the relationship, and the importance of the work in connection with the entity's overall business.[41] Despite the two tests, the trend over the past few decades has been to combine the factors of both tests.[42] In fact, the state Workers' Compensation Board advises parties in its agency publications to apply factors that actually are a combination of those from both tests.[43] Interestingly, the ABC test, which is pending before the state Legislature, actually functions somewhat as a combination of these two tests because it concentrates on control and the nature of the work performed.

Finally, unlike federal case law, there is a surprising dearth of cases addressing classification issues under the state overtime and minimum wage laws. The few cases that do tackle the issue of misclassification analyze the claims under Article 6 of the New York Labor Law, which is not necessarily the correct provision.[44] While Article 6 governs the payment of wages, such as improper wage deductions, and authorizes a claim for unpaid wages, Article 19 of the Labor Law and its accompanying regulation control the state minimum wage and overtime laws. Parties that commence claims for minimum wage and overtime violations will typically do so under Article 19 as opposed to Article 6.[45] Whether or not a misclassification issue arising in a minimum wage or overtime claim should technically be analyzed under Article 6 case law is likely immaterial since a state court would presumably apply the same control test it uses for Article 6 and other state employee classification claims to a wage and hour claim commenced under Article 19 and the state regulation.

Conclusion

The efforts of New York State and the federal governments over the past few years should make employers think more carefully before classifying an individual as an independent contractor. While the various classification tests all slightly differ and make classification a challenge, the common thread among them is control. Without some degree of control, it will be difficult to establish that a worker is an employee for any purpose. Nevertheless, employers that fail to properly classify employers, even if accidentally, can face stiff financial penalties. If the campaign against misclassification continues, and there is no reason to believe it will fade, the public will become more aware of the issue, emboldening workers to complain about and expose classification violations. Moreover, employers will progressively be

unable to rely on those industries with a penchant for misclassification to monopolize the resources of state and federal enforcement agencies. With this in mind, employers should carefully update their classification policies to ensure employees are properly classified. ■

1. Linda H. Donahue, James R. Lamare, Fred B. Kotler, J.D., The Cost of Worker Misclassification in New York State, Cornell University, ILR School, *at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1009&context=reports.

2. *See* Steven Greenhouse, *Dozens of Companies Underpay or Misreport Workers, State Says*, N.Y. Times (Feb. 12, 2008).

3. *See* Report of the Joint Enforcement Task Force on Employee Misclassification, February 1, 2008, at 9, at http://www.labor.state.ny.gov/pdf/Report%20of%20the%20Joint%20Enforcement%20Task%20Force%20on%20Employee%20Misclassification%20to%20Governor%20Spitzer.pdf.

4. N.Y. Exec. Order No. 17 (Sept. 5, 2007).

5. Report of the Joint Enforcement Task Force on Employee Misclassification, February 1, 2008 *at* http://www.labor.state.ny.gov/pdf/Report%20of%20the%20Joint%20Enforcement%20Task%20Force%20on%20Employee%20Misclassification%20to%20Governor%20Spitzer.pdf.

6. Annual Report of Joint Enforcement Task Force on Employee Misclassification, February 1, 2009, *at* http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification_TaskForce_AnnualRpt_2008.pdf.

7. N.Y.S. A.06793 (2009).

8. *See* N.Y. State Construction Fair Play Act, N.Y.S. S.5847 (2009). Another Construction Act was introduced in the State Senate under Bill number S.6194 on September 25, 2009, which appears to have been combined with Bill number S5847. The State Assembly also introduced the Construction Act under Bill number A.8237-A on May 11. 2009.

9. *See* N.Y. State Construction Fair Play Act, N.Y.S. S.5847 (2009).

10. *See* S.2044, 110th Cong. (2007).

11. *See* H.R. 6111, 110th Cong. (2008).

12. *See* S.3648, 110th Cong. (2008).

13. *See* H.R. 5107, 111th Cong. (2010) and S. 3254, 111th Cong. (2010).

14. *See* H.R. 3408, 111th Cong. (2009) and S. 2882, 111th Cong. (2009).

15. Press Release, U.S. Dep't of Labor, Secretary Hilda L. Solis Presents U.S. Department of Labor Budget Request for Fiscal Year 2011 (Feb. 1, 2010).

16. *Budget in Brief*, U.S. Dep't of Labor (Feb. 1, 2010).

17. 26 U.S.C. § 3121(d)(2).

18. *Independent Contractor or Employee? Training Manual*, U.S. Dep't of the Treasury, Oct. 30, 1996.

19. *Id.*

20. 29 U.S.C. § 203(e)(1).

21. 29 U.S.C. § 203(g).

22. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

23. *Brock v. Superior Care Inc.*, 840 F.2d 1054 (2d. Cir. 1988).

24. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *U.S. v. Silk*, 331 U.S. 704 (1947).

25. *See Superior Care*, 840 F.2d at 1058 (citing *Silk*, 331 U.S. at 1045).

26. 735 F.2d 8, 12 (2d Cir. 1984).

27. 355 F.3d 61 (2d Cir. 2003).

28. *Superior Care*, 840 F.2d at 1059.

29. *Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042, 1043 (5th Cir. 1987).

30. *In re Hertz Corp.*, 2 N.Y.3d. 733, 778 N.Y.S.2d 743 (2004) (unemployment insurance); *Scott v. Mass. Mutual Life Ins. Co.*, 86 N.Y.2d 429, 633 N.Y.S.2d 754 (1995) (N.Y. State Human Rights Law); *Koren v. Zazo*, 262 A.D.2d 287, 691 N.Y.S.2d 549 (2d Dep't 1999) (vicariously liability); *Bynog v. Cipriani Group, Inc.*, 1 N.Y.3d 193, 770 N.Y.S.2d 692 (2003) (unpaid wages under Article 6); *Pachter v. Berbard Hodes Group, Inc.*, 10 N.Y.3d 609, 861 N.Y.S.2d 246 (2008) (unpaid wage under Article 6).

31. *In re Ted Is Back Corp.*, 64 N.Y.2d 725, 485 N.Y.S.2d 742 (1984) (emphasis added).

32. *Id.*

33. *Scott*, 86 N.Y.2d 429 (1995).

34. *See, e.g., Hertz Corp.*, 2 N.Y.3d 733.

35. *Id.* (quoting *In re Werner*, 210 A.D.2d 526, 619 N.Y.S.2d 379 (3d Dep't 1994)).

36. *Ted Is Back Corp.*, 64 N.Y.2d 725.

37. *See Independent Contractors*, NYS Dep't of Labor, www.labor.state.ny.us/ui/dande/ic.shtm; N.Y. State Dep't of Taxation & Finance http://www.tax.state.ny.us/pdf/2006/wt/nys50_506.pdf.

38. 1 N.Y.3d 193.

39. *Commissioner of the State Ins. Fund v. Lindenhurst Green & White Corp.*, 101 A.D.2d 730, 475 N.Y.S.2d 42 (1st Dep't 1984).

40. *Id.*

41. *Id.*

42. *Lindenhurst Green & White Corp.*, 101 A.D.2d 730; *Brown v. City of Rome*, 66 A.D.3d 1092, 887 N.Y.S.2d 279 (3d Dep't 2009)

43. *See* N.Y. State Workers' Compensation Board, "Who Is an Employee Under the Workers' Compensation Law" *at* www.wcb.state.ny.us/content/main/Employers/Coverage_wc/emp_empDefinition.jsp.

44. *See Gagen v. Kipany Prods., Ltd.*, 27 A.D.3d 1042, 812 N.Y.S.2d 689 (3d Dep't 2006).

45. *See, e.g., Faculty Student Ass'n of State Univ. of Oneonta v. Ross*, 54 N.Y.2d 460, 446 N.Y.S.2d 205 (1981); *Garcia v. Heady*, 46 A.D.3d 1088, 847 N.Y.S.2d 303 (3d Dep't 2007); *Anderson v. Ikon Office Solutions, Inc.*, 38 A.D.3d 317, 833 N.Y.S.2d 1 (1st Dep't 2007); *Edwards v. Jet Blue Airways Corp.*, 21 Misc. 3d 1107(A), 2008 WL 4482409 (Sup. Ct., Kings Co. 2008).

BY RANDALL FARRAR

Metadata: The Hidden Disaster That's Right in Front of You

Randall Farrar (randall.farrar@esqinc.com) is the president of Esquire Innovations, Inc., a software company that develops Microsoft Office integrated applications for the legal market, located in Temecula, CA.

What Is Metadata?

Succinctly defined, metadata is "data about data." Metadata is embedded in all Microsoft Office documents

Microsoft Word, Excel and PowerPoint include automated features to aid in document production and collaboration. These features embed electronic information (metadata) in a file, which can reveal the identity of those who edited the document (revision authors); track the time, date, and frequency of edits (track changes and revisions); reveal inserted comments and the document template; and other data employed to control the document's text and format. Metadata is placed in a document by the operating system, the application, and by users utilizing the automated features of the application.

The metadata contained in a Word document doesn't necessarily create risk of adverse disclosure. In fact some document metadata is necessary for formatting or automation macros within a document. Some document metadata, such as tracked changes, may be used to collaborate with co-counsel, but one might not wish to share such information with one's adversary. The commonly held opinion is that information should be removed before a file is shared outside a firm's electronic walls to avoid violating attorney-client privilege, disclosing sensitive information to third parties and so on.

Before determining how your law office is going to manage metadata, it is important to understand the basic facts about document metadata.

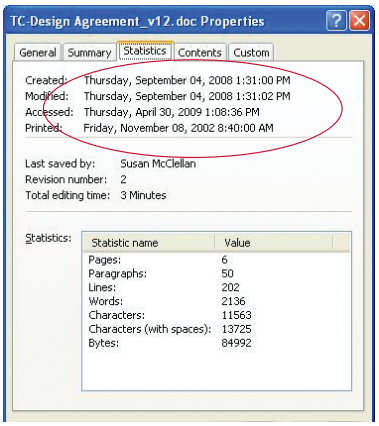
Fact 1: Metadata Exists in ALL Microsoft Office Documents

A rule of thumb when considering metadata is that every time a document is opened, edited and saved, metadata is added by the operating system, the application itself, and through the use of certain automation features.

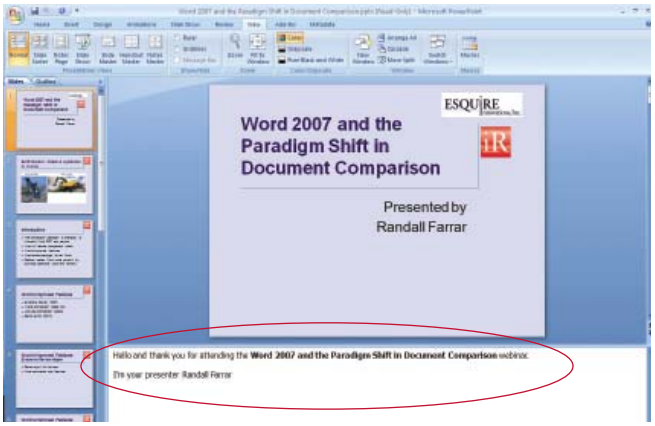
Some firms claim that they do not have a "metadata problem" when in fact ALL Microsoft Office documents contain some kind of metadata. The question is whether the metadata revealed is harmful or not. It is always better to err on the side of caution.

Fact 2: Metadata Can Be Useful

Microsoft Word metadata is often essential to the document production process to automate formatting and reduce editing and collaboration time. For example, the date fields (under document properties) are referenced when searching for documents created in a specified time frame, or to gain quick access to documents from "My Recent Documents."



Tracked changes can be useful when editing a document with multiple co-counsel or colleagues to identify which editors have made specific changes. In Excel, metadata can also be very useful and includes formulas in a spreadsheet, hidden columns, author names and creation dates of documents. In PowerPoint, metadata includes author information and presentation creation dates, as well as speaker notes and links to graphs or other statistics from outside documents.



Fact 3: Metadata Can Be Harmful

Metadata can be harmful when users unknowingly send documents that contain confidential or potentially embarrassing information. There have been many well-publicized cases in which tracked changes or hidden comments have been left in a document sent via email or shared on the Internet. Two examples of high profile metadata blunders are the SCO Group's lawsuit against DaimlerChrysler and a United Nations report.

A Microsoft Word document from SCO's suit against DaimlerChrysler originally identified Bank of America as the defendant instead of the automaker. Metadata revealed that SCO spent considerable time building a case against the bank before changing the name on the suit to

DaimlerChrysler. More information can be found at the following web link: http://news.cnet.com/2100-7344_3-5170073.html.

In a United Nations report, tracked changes were discovered in a document that supported the published conclusion that Syria was behind an assassination in Beirut. Confidential and sensitive information as well as evidence that the report may have been altered after it was submitted to the United Nations were disclosed. More information can be found at http://www.timesonline.co.uk/tol/news/world/middle_east/article581486.ece.

Law firms that deal with sensitive and confidential information on a daily basis must be diligent in managing their metadata or they too may find themselves the subject of media reports and embarrassment.

Fact 4: Tracked Changes Can Easily Be Left in a Document

Despite the far-reaching negative effects of metadata discovered in a document, something as simple as leaving tracked changes in a document can easily happen. Consider the following scenario.

An attorney switches on the "Track Changes" feature in Word to make edits to a document. After collaborating with his assistant and associates he is satisfied with the changes.

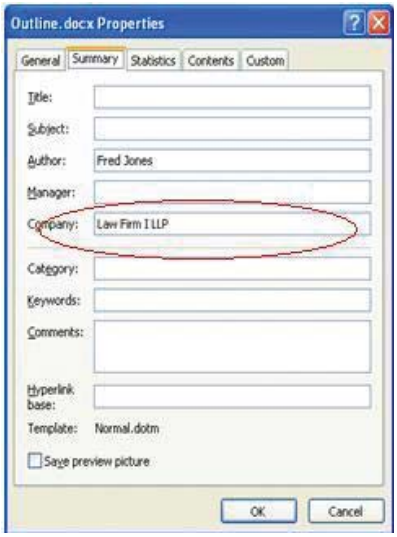
He decides to send it to the client for review and clicks on the "Review" ribbon in Word 2007 and changes the document to "Final" in the Tracking section.

The tracked changes disappear from the document. He assumes they are no longer there, clicks on send via e-mail and forwards the document to his client. The client opens the document to see all of the tracked changes displayed. This occurred because the attorney did not accept all of the changes in the document; he merely hid them from view. When the client opened the document the "Display for Review" settings were set by default to "Final Showing Markup," thus revealing all of the changes in the document.

To make sure that this scenario does not occur, and that there are no tracked changes left in a document, always accept all changes.

Fact 5: Metadata Can Be Found in the Document Author Information

Multiple author names can remain with a document as it is edited and revised. Microsoft Word automatically pulls the author name from the User Information for the "Last saved by" author (found by accessing the Office Button then Word Options | Popular), and will save the names if there have been multiple editors of a document.



When a document is created from an earlier document using Save As, the author name from the original document will stay with the document as will the company name. Often an attorney will create new documents from legacy documents that could have been produced when working for a previous firm. Unless the company information is manually updated by the user, or cleaned by a metadata software application, it will stay with the document.

If a law firm regularly uses the same document for multiple clients and/or uses documents created by lawyers when they were employed by previous firms, the client could see a different author, law firm and client listed in the properties. This information could lead to serious questions from a client as to a firm's billing practices. However, there are ways to control author information on documents. Microsoft Word has five areas that collect author information:

User Name
User Initials
Document Author
Manager
Last Author

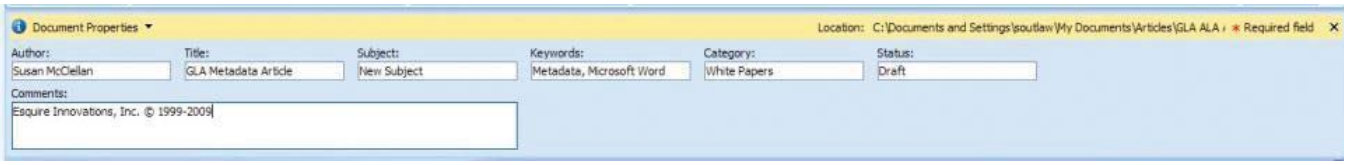
The User Name and User Initials control what appears in the author properties of a Microsoft Word document. User Name and User Initials are found in Word Option | Popular | Personalize, depending on your copy of Microsoft Office.

Microsoft Word documents also contain other properties that reveal the document author, which can be found in the built-in document properties of a document.

To view these properties click on the Office button select Prepare | Properties. A display bar will open at the top of the document.

The document author is pulled from the "Word Options" settings described above and inserted when the document is created. This stays with the document until it is changed or deleted.

The other fields displayed are user input properties. That means one has to manually place text here. Some



template and macro applications use this field for automation purposes and place information in these properties. Unless the firm is using an automated metadata software, be aware of these properties and that they will remain with the document until they are changed or deleted.

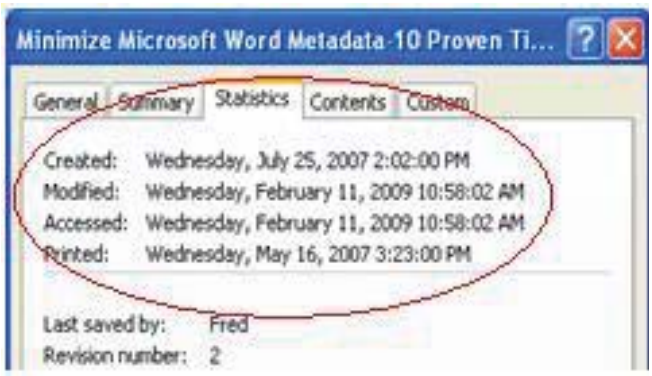
Fact 6: Metadata Is a Document's Dates and Times

In the Microsoft Word "Statistics" tab the Created, Modified, Accessed and Printed fields are displayed. This information can cause potential problems for a law firm.

For example, an attorney is creating a new contract for a client. The contract requires some standard language. The attorney has prepared similar contracts before, so she opens up a contract that she had created in Microsoft Word for another client when she worked at a different firm. The attorney makes edits as needed and e-mails the contract to her client. Upon receipt, the client opens the document and, since she has heard about metadata, opens "File Properties" to view any data. File properties can be accessed in Office 2007 by clicking on Office Button | Prepare | Document Properties | Advanced Properties. By viewing the Statistics tab the client sees a Created date of Wednesday, July 25, 2007, one year before she was a client and a Modified date of Wednesday, February 11, 2009, which is the current date.

Even more puzzling is the Printed date, which is several years earlier, indicating that the last time this document was printed was Wednesday, May 16, 2007. This date will remain unchanged until the document is printed again.

Word files can contain a history that reveals the true age of a document. That history will stay with the document until it is "cleaned" using a metadata management tool.



Metadata of this type can be useful when searching for documents created in a specified time frame, or to gain quick access to documents from, for example, My Recent Documents. But a firm may not wish to reveal this type of information to a client being billed an hourly rate for creating the document.

Fact 7: There Are More Than 200 Types of Document Metadata

There can be more than 200 types of metadata added to a document.

In addition to the examples cited above, less commonly known metadata include:

Field Codes – Naming conventions for custom field codes may disclose information about the drafting process not disclosed by the text.

Bookmarks – Naming conventions for bookmarks may disclose information about the drafting process.

Routing Slips – When the File | Send | Routing Recipient function is used, the recipients' email addresses are stored in Word's electronic file (not available in Office 2007).

Firm Styles – Custom style names can sometimes be firm specific and therefore considered metadata.

Prevent Metadata Issues – Establish a Metadata Policy

Law firms, more than most users of Microsoft products, can be embarrassed – or worse – if metadata is not properly managed. Each law firm should have a metadata policy that is utilized by all attorneys and staff who work on firm documents. Considerations to take into account when establishing a metadata policy include:

- Educate yourself and your users about metadata.
- Review the applicable New York opinions (and those of other states and entities, as needed) regarding metadata.
- Review firm documents (on internal networks and published on external networks). Is your firm inadvertently sharing confidential information?
- Involve attorneys and your IT department and establish a firm approach based on your findings.
- If necessary, bring in a consultant to advise your firm on a metadata policy.
- Periodically review the firm's policy to address any new rulings on metadata and/or changes to Microsoft.

Enforcing the Policy

All firms should consider purchasing metadata management software. The software should be flexible enough to execute firm policy, automated enough to enforce firm policy and easy enough for users to understand and utilize.

The latest Microsoft Office program includes a metadata tool called Document Inspector. Since Microsoft applications add metadata to files, it presents a somewhat contradictory position for Microsoft to provide a tool for removing that metadata. Firms who already practice a metadata policy have found that the main weakness with

Document Inspector is the lack of automation. The onus is on individual users to "inspect" documents and then decide which metadata to remove. This approach proves ineffective in enforcing a metadata policy throughout an organization. Metadata management software, on the other hand, removes metadata more thoroughly and is designed to help firms automate and therefore enforce metadata policies. The most popular products available for metadata management can be found by searching for "metadata management software" in Google.

The success of any policy hinges on the execution. A firm's metadata policy will be more successful if staff can grasp what metadata is, when it can be useful, when it can be harmful and how to manage the metadata in documents. Consider bringing in outside trainers to help educate your firm with hands-on training.

Metadata and New York Law Firms

Historically, opinions on whether there is a significant risk with metadata and if so what must be done to address that risk have varied among attorneys, IT departments, management, bar associations and other governing entities. In the past few years, a multitude of governing bodies have drafted and issued opinions regarding metadata. New York has opinions specifically addressing an attorney's ethical obligations regarding metadata in place. Law firms in New York should ensure they are in accordance.

Law associations throughout New York, including the New York State Bar Association, the New York City Bar Association and the New York County Lawyers' Association, have released formal opinions on attorneys' ethical responsibilities regarding metadata.

The New York State Bar Association's Committee on Professional Ethics Opinion 749 and Opinion 782 state that a lawyer's ethical obligations regarding metadata are summarized as follows:

> Lawyers may not ethically use available technology to surreptitiously examine and trace e-mail and other electronic documents.[1]
>
> and
>
> Lawyers must exercise reasonable care to prevent the disclosure of confidences and secrets contained in "metadata" in documents they transmit electronically to opposing counsel or other third parties.[2]

The New York State Bar Association has also developed a basic guide for attorneys regarding metadata, which outlines the legal and ethical issues for lawyers regarding metadata, how to preserve and produce metadata, and the ethical obligations specific to New York lawyers.[3]

The New York County Lawyers' Association's Professional Ethics Committee Opinion 738 states in part,

> [A]ttorneys are advised to take due care in sending correspondence, contracts, or other documents electronically to opposing counsel by scrubbing the documents to ensure that they are free of metadata, such as tracked changes and other document property information.[4]

As more states sound off on metadata and an attorney's responsibility, New York firms with practices in multiple states should also make sure that their policies are acceptable in every jurisdiction in which they practice. ■

1. New York State Bar Association, Committee on Professional Ethics: Opinion 749 (2001), *available at* http://ww.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6533.

2. New York State Bar Association, Committee on Professional Ethics: Opinion 782 (2001), *available at* http://www.nysba.org/AM/Template.cfm? Section=Ethics_Opinions&CONTENTID=6871&TEMPLATE=/CM/ContentDisplay.cfm.

3. "Metadata: Basic Guidance for New York Attorneys" was produced in April 2008 by the Committee on Electronic Discovery of the Commercial and Federal Litigation. The guide can be found at http://www.nysba.org/Content/NavigationMenu4/Committees/Metadata.pdf.

4. New York County Lawyers' Association, Committee on Professional Ethics: Opinion 738 (2008), *available at* http://www.nycla.org/siteFiles/Publications/Publication1154_0.pdf.

Finally, amendments to DRL § 236 were enacted, governing the provision of temporary maintenance in matrimonial actions.[14]

Conclusion

As actions are commenced after the effective date under DRL § 170(7), courts and counsel will, no doubt, disagree over the import and impact of provisions of the new subsection and accompanying statutes. For example, the kind and quantum of proof required to rebut the presumption that counsel fees be awarded to the less monied spouse will develop over time, and comparison to other presumptions will, no doubt, be instructive.

Practitioners in this field should be alert to motion and trial decisions in this area, so as to heed advice given by Mae West in another context which is excellent advice for lawyers (replace "dame" with "lawyer"): "A dame that knows the ropes isn't likely to get tied up."[15]

1. Brainy Quote, *Mae West Quotes*, www.brainyquote.com/quotes/authors/m/mae_west_3.html. Of course, she also said: "Opportunity knocks for every man, but you have to give a woman a ring." *Id.*

2. Last issue's column promised more on the subject of "loss of enjoyment of life," but the enactment of this legislation cried out for timely coverage.

3. The bill takes effect 60 days after its enactment into law, on October 12, 2010, and shall apply to matrimonial actions commenced on or after the effective date. Act of Aug. 13, 2010, 233 N.Y. Leg. 384 (2010).

4. DRL § 170(7).

5. DRL § 170(1)–(6).

6. Press Release, Governor David A. Paterson, Governor Paterson Acts on 137 Bills; Vetoes 34 Bills Worth More Than $22.9 Million in Additional Spending (Aug. 15, 2010) *available at* http://www.state.ny.us/governor/press/081510acts_vetos.html.

7. Sponsor Memo. (D. Hassell-Thompson) S.3890, 233d Leg. (NY 2010).

8. The bill originally provided that it would take effect 120 days after signing, subsequent corrective legislation changed the effective date to 60 days after signing. Act of Aug. 13, 2010, 233 N.Y. Leg. 384 (2010).

9. Act of Aug. 13, 2010, 233 N.Y. Leg. 329 (2010). DRL §§ 237(a), (b), 238.

10. Act of Aug. 13, 2010, 233 N.Y. Leg. 329 (2010). DRL §§ 237(a), (b), 238.

11. Act of Aug. 13, 2010, 233 N.Y. Leg. 329 (2010). DRL §§ 237(a), (b), 238.

12. Governor David A. Paterson, *supra* note 6.

13. Sponsor Memo. (D. Weinstein) A.7569A, 233d Leg. (NY 2010).

14. DRL § 236 (as amended effective Oct. 13, 2010).

15. Brainy Quote, *supra* note 1.

Determine whether you're entitled to a jury trial.

Consider where you may file the case.[15] Are you bringing the action in federal or state court? Do you have a basis to bring a case in a particular venue? Plaintiffs have the choice of available forums for litigating their claims.[16] The decision you make will depend on the costs involved, the convenience of witnesses, the availability of evidence, the substantive and procedural law in the forum, the judicial attitudes, and the jury verdicts.[17]

CPLR Article 5 addresses venue. A trial will take place in the county in which one of the parties resided when the lawsuit began. If none of the parties resided in the state, the plaintiff may designate the county. Some statutes require that the case be venued in a specific forum, such as cases against governmental entities and officials and actions disposing of real estate. Contracts between parties will specify the forum and venue selection. Look at the contract to see whether you've complied with the terms of that contract.

Ascertain whether you've exhausted all the administrative remedies before you start the litigation. Learn whether you're precluded from bringing the case because you could have brought the case in another court.

Verify whether your county has a Commercial Division before you sue in federal court.[18] Litigating commercial cases in a New York court's Commercial Division is advantageous. It has resources to devote to those cases, and it's familiar with the laws concerning commercial cases. In New York County, for example, the threshold to bring a commercial case is $150,000.[19]

Establish whether the statute of limitations has expired or will expire soon. The time you have left on the statute of limitations will affect how much time you'll have to draft a complaint.

Work backwards. Research your client's cause of action in the New York Pattern Jury Charges. Knowing what the jury, or a judge in a bench trial, must decide once all the evidence is in will help you know what you must plead. It'll also help you determine what you need to prove at trial and how you can do so.

Consult CPLR 3015 and 3016 to see whether your client's case is one in which particular allegations must be pleaded. In a libel or slander case, you must plead the particular words in the complaint. In cases involving fraud, mistake, misrepresentation, willful default, breach of trust, or undue influence, each substantive element must be alleged in detail. This applies to defenses as well as to causes of action. Personal-injury cases covering motor-vehicle accidents in New York must state that the no-fault law does not preclude the claim; you must plead either serious injury or economic loss greater than basic economic loss. You must also plead the law of a foreign country. Pleading federal law or the law of sibling states is unnecessary.

> The strength of your papers might be enough to secure a satisfactory settlement.

Some allegations must be pleaded with particularity. If a party is a corporation, you must plead that it's a corporation and state the type of corporation and the place of incorporation. You must plead prior judgments, decisions, and determinations. Signatures on negotiable instruments are admitted unless you specifically deny them in the pleadings. You must plead that a business possessed a license to do particular business. If you're suing New York City or other local governments and agencies, follow the applicable statutes.[20]

You no longer have to plead contractual conditions precedent.[21] As a responding party, you must deny the performance or occurrence. Otherwise, you've waived it. No requirement exists about pleading "the time an action accrued, satisfaction of the statute of limitations, satisfaction of the statute of frauds, performance of conditions precedent."[22] In New York, you no longer have to plead subject-matter or personal jurisdiction. A defendant may plead subject-matter or personal jurisdiction as an affirmative defense in the answer.

Combine Fact and Law

Once you have all the facts and relevant law, sort the facts to support each element of a claim. Go through your list of elements and find facts to support each element. Sorting facts allows you to confirm that your client has given you all the facts to sustain a claim.[23] If one or more elements are unsubstantiated with facts, you need to ask your client more questions. Although you might have few facts to establish an element, you must plead every element of your claim, or the court might dismiss the complaint.[24] The repercussions are severe: Pleading a claim or defense that has no reasonable basis in law or fact might result in sanctions against the attorney, the client, or both.

Certificate of Merit Under CPLR 3012-a

In medical-, dental-, and podiatric-malpractice actions, include with the complaint a certificate of merit declaring that you, as the attorney, reviewed the facts, consulted with a licensed medical practitioner, and concluded that a reasonable basis for the action exists.[25] If you don't have the time to include the certificate because the statute of limitations is expiring, you may file the certificate later. If you haven't been able to consult with a medical practitioner after making three attempts, state that information in the certificate. A certificate of merit isn't required when the plaintiff is pro se[26] or if you've included an expert report.[27] A certificate of merit isn't required when the action is based upon res ipsa loquitur.[28] As the attorney, you must provide a certificate indicating that you're relying solely on the doctrine of res

ipsa loquitur; attach the certificate to the complaint.

Theories and Remedies

When you have multiple theories of recovery for the same damages under the same set of facts, plead it as one cause of action. If the measure of damages differs, plead and number each cause of action even though the facts might be the same. Examples: employment discrimination cases under city and state law, personal injury, and property damage.

Sort the facts to support each element of a claim.

You may also plead inconsistent claims, even though all the damages sought may not be awarded in a judgment. A plaintiff may ask for recission of a contract and also seek specific performance, all in the same complaint.[29]

Alternative pleading is recognized under CPLR 3014.[30] An example is when a plaintiff doesn't know which defendant damaged the goods but states that at least one of the defendants must be responsible. Another example is when a pedestrian is injured when two cars collide. The plaintiff would then allege that both drivers in the cars are responsible even though the plaintiff doesn't know which car hit the plaintiff.

CPLR 3014 authorizes hypothetical pleading. In one of the examples above, a plaintiff may plead for specific performance of a contract, but may also plead that if the court refuses the relief of specific performance, the plaintiff seeks damages for breach of the contract.[31]

Splitting claims is forbidden: "A plaintiff cannot split a claim into successive lawsuits; full recovery for each claim must be obtained in a single lawsuit."[32] The purpose behind this rule is to prevent a defendant from being harassed by multiple lawsuits. An exception exists when "[t]he liabilities claimed in the prior and subsequent actions are from different sources, instruments, or agreements."[33] An exception also exists when "[t]he elements of proof required vary materially between the subsequent and prior actions." An exception to the splitting rule also arises when "[t]here are different parties in interest in the prior and subsequent actions. The court in the first action would not have had jurisdiction to entertain the omitted claim or, having jurisdiction, would clearly have declined to exercise it."[34] A defendant may waive the rule against splitting.

Ethics

Know your jurisdiction's ethical rules. You must be ethical with your client, your adversary, and the court.[35] Be honest, maintain confidentiality, and avoid conflicts of interest.[36] Conflicts of interest arise when you represent multiple parties in the same litigation. Sometimes your clients might start out having the same interests. But they can develop different interests later in the litigation.

Writing the Complaint: Organization, Content, Form

How you draft the complaint will frame facts and issues in a favorable light: "[T]he complaint is the basis of the court's first — and often lasting — impression of the case and plaintiff's counsel."[37] The statement of claim, often called the body of the complaint, and the demand for judgment and relief form the two fundamental elements of a complaint in civil actions — local rules dictate the substance and form of all other components — "regardless of jurisdiction, court, or cause of action."[38] The complaint is the plaintiff's opportunity to allege facts, evidence, and conclusions that form the basis of a legal claim for a remedy.[39]

The complaint contains six parts: (1) the caption; (2) the commencement, also known as the introductory statement; (3) the causes of action, also known as the body of the complaint; (4) the demand for relief; (5) the signature; and (6) the verification.[40]

1. The Caption.

The caption is the heading for all civil-litigation documents and contains essential information about the lawsuit: the jurisdiction; the court's name; the venue; the title of the case, including names of parties and their positions; the name of the litigation document; and the index or docket number.[41]

a. Name of the court and venue: If you're going to write well, start with the caption. At the top of the page of all court filings is the court's name. Start by eliminating verbiage. For instance, "Civil Court of the City of New York, County of Kings" can easily be shortened to "New York City Civil Court, Kings County." The information is the same, but the modified version uses three fewer prepositions and one less definitive article. Cutting fat in litigation documents is a good, easy way to improve them.

b. Name(s) of the parties: In a summons, complaint, or a judgment, all the parties to the lawsuit must be listed. In all other civil-litigation documents, the attorney need list only the first-named party on each side with an appropriate indication of any omissions: an "et al." at the end.[42] Some law firms routinely list all the parties in every filing out of a misguided view that it makes a filing seem more formal and professional. But in cases with numerous parties, the caption can take up the entire first page. Avoid waste.

c. Title: A proper title for each document is critical for court papers. As the case drags on, the number of documents filed can swell a court's or attorney's file unmanageably. Titling a document "Plaintiff's Memorandum of Law" is essentially meaningless in protracted litigation. Briefly title documents you'll unlikely repeat: "Complaint"; "Answer." If you amend these documents, they should be titled: "Amended Complaint"; "Amended Answer." For all other civil-litigation documents, be concise and specific. The title to your document, "Plaintiff's Summary-Judgment Motion," is adequate because you'll likely move for summary judgment once. For all other

documents, identify the document clearly.

As a courtesy to your adversary and the court, put the date on the first page of the document; anyone trying to assemble the papers in the correct order will find this helpful. Court clerks often stamp the filing date in odd locations; sometimes the dates are legible only after minutes of study. Courts rarely read each document as it is filed. Rather, when it's time to decide an issue, the court will stack the papers, usually in chronological order of submission, and then review them, often chronologically but from time to time in reverse chronological order. Make it easy for the court and its staff to put your papers in order.

Unless a court requests a courtesy copy, don't file one. Courtesy copies needlessly congest both the court file and chambers.

d. Index number: Include the index or docket number on all litigation documents. It's the number that identifies and separates your case from the millions of other cases filed. That's the easiest way for the document to make its way into the right place in the file. One small error in the index or docket number will wreak havoc later. The clerk or the judge might misfile or reject your papers.

2. The Commencement.

The commencement paragraph follows the caption and introduces the complaint; it's separate from the body of the complaint.[43] Write it as a complete sentence without legalese. Modern forms still have archaic language in the commencement paragraph.[44] Here's an example: "Comes now the plaintiff Mollie Anderson and for cause of action and complaint against the defendant herein alleges:"[45] The antiquated language has meaning no longer. Here's a modern approach: "Mollie Anderson, plaintiff, by her attorney Henry Frank, complains against John Hopkins, defendant, and asserts the following in support of her claim:"[46] The modern example is clear and less verbose. Simplify it even further: "The plaintiff, Mollie Anderson, by Henry Frank, her attorney, makes the following complaint:" You need not use the defendant's name; you've used it in the caption, and you'll introduce the defendant to the reader almost immediately — in the body of the complaint. Abandoning legalese removes the dust from the commencement sentence and allows the reader to understand what you're about to allege in the body of the complaint.

Cutting fat in litigation documents is one of the easiest ways to improve them.

3. The Body.

The complaint's body forms the bulk of the complaint. The body of the complaint identifies the parties and sets forth the substance of the complaint. Write plain and concise statements in a series of consecutively numbered paragraphs, each of which should contain a single allegation.[47] A properly drafted complaint must allege each element required to establish a cause of action. You needn't detail all the evidence you expect to prove at trial.[48]

In the next column, the Legal Writer will continue with writing the complaint. ■

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at St. John's University School of Law and Columbia Law School. For their research he thanks court attorney Alexandra Standish, University of Ottawa recent graduate Nicholas Malone, and New York Law School student Adam Seldon. Judge Lebovits's e-mail address is GLebovits@aol.com.

1. Margaret Z. Johns, Professional Writing for Lawyers 89 (1998).
2. *Id.*
3. Susan L. Brody, Jane Rutherford, Laurel A. Vietzen & John C. Dernbach, Legal Drafting 291 (1994).
4. *Id.* at 291–92.
5. *Id.* at 293.
6. Suzanne M. Lewis, *Litigation 101: Drafting a Complaint*, City Bar Ctr. for CLE 227, 227 (Dec. 8, 2008).
7. Elizabeth Fajans, Mary R. Falk & Helene S. Shapo, Writing for Law Practice 48 (2004).
8. N.Y. St. Bar Ass'n, Committee on Continuing Legal Education, *Practical Skills — How to Commence a Civil Lawsuit* 5 (Spring 2009).
9. Brody, *supra* note 3, at 293; 22 NYCRR Part 130.
10. Brody, *supra* note 3, at 293.
11. *Id.*
12. Mary Barnard Ray & Barbara J. Cox, Beyond the Basics: A Text for Advanced Legal Writing 250 (2d ed. 2003).
13. Lewis, *supra* note 6, at 227.
14. Brody, *supra* note 3, at 295.
15. *See* Fajans, *supra* note 7, at 51.
16. Michael P. Graff, *The Art of Pleading — New York State Courts*, City Bar Ctr. for CLE 1, 1 (Dec. 8, 2008).
17. *Id.*; *see generally* CPLR 325, 326.
18. Graff, *supra* note 16, at 3.
19. Rules of the Commercial Division of the Supreme Court § 202.70.
20. For example, General Municipal Law § 50-e applies to tort claims against local governments and public corporations.
21. CPLR 3015(a). When statute imposes a condition precedent, however, or when the claim isn't contractual, satisfaction of conditions precedent must be specifically pleaded.
22. Graff, *supra* note 16, at 13; David D. Siegel, New York Practice § 552, at 352–53 (4th ed. 2005).
23. Brody, *supra* note 3, at 298.
24. *Id.* at 300.
25. Graff, *supra* note 16, at 7; CPLR 3012-a.
26. CPLR 3012-a(f).
27. CPLR 3012-a(g).
28. CPLR 3012-a(c).
29. Siegel, *supra* note 22, at § 214, at 351.
30. *Id.*
31. *Id.*
32. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial §15:390, at 15-42 (2006; Dec. 2009 Supp.).
33. *Id.*
34. *Id.* at §15:391, at 15-42, 15-43 (citations omitted).
35. Brody, *supra* note 3, at 294.
36. *Id.*
37. Barr, *supra* note 32, at §15:191, at 15-29 (2006).
38. *See* Fajans, *supra* note 7, at 39.
39. *Id.* at 32.
40. Ray, *supra* note 12, at 257.
41. *Id.*
42. CPLR 2101(c).
43. Ray, *supra* note 12, at 258.
44. Fajans, *supra* note 7, at 39.
45. Ray, *supra* note 12, at 258.
46. *Id.*
47. CPLR 3014.
48. Ray, *supra* note 7, at 259.

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: I frequently see in newspapers and hear on television statements like, "He is a friend of John's." Why not, "He is a friend of John"?

Answer: The statement, "He is a friend of John's," contains two possessives, and there is no grammatical reason for the second apostrophe-s. To say that the second possessive is ungrammatical would be wrong, however, because it has become idiomatic and is so common that it is now acceptable. The English language contains many redundancies: for example, why start a sentence with both *but* and *yet* when either one alone would mean the same thing. Yet a PBS commentator did just that, and he has plenty of company for using both words.

Potpourri

In the November/December 2009 issue of the *Journal* I answered a reader's question about the meaning of *zeugma*, which his dictionary defined as: "A construction in which a word is used to modify or govern two words, often so that its use is grammatically or logically correct with only one." He wrote that he could not understand that definition.

Zeugma is a rhetorical device, usually employed humorously, in which a verb has two or more objects, but must change its meaning to modify each. Zeugma is not new; its classic illustration is in Alexander Pope's "Rape of the Lock," addressing the English queen, Anne:

> Here thou, great Anna, whom three realms obey
> Dost sometimes counsel take – and sometimes tea.

("Tea" was pronounced "tay" when Pope wrote.)

After reading that column, attorney Frank G. Helman wrote that he had been familiar with zeugma, but did not know its name until reading the column. He included in his email a delightful lyric titled "Have Some Madeira, M'Dear," by the British duo Flanders and Swann. When that column ran in the March/April 2010 *Journal*, the poem was edited for space, and unfortunately, a lot of the meaning was lost. Below is the entire piece. It contains excellent illustrations of zeugma (which I have italicized).

"Have Some Madeira, M'Dear"

She was young, she was pure, she was new, she was nice,
She was fair, she was sweet seventeen
He was old, he was vile, and no stranger to vice
He was base, he was bad, he was mean.
He had slyly inveigled her up to his flat
To view his collection of stamps
And he said as he hastened to put out the cat,
The wine, his cigar and the lamps:
"Have some Madeira, M'dear
You really have nothing to fear
I'm not trying to tempt you, that wouldn't be right
You shouldn't drink spirits at this time of night.
Have some Madeira, M'dear
It's very much nicer than beer.
I don't care for sherry, one cannot drink stout
And port is a wine I can well do without
It's simply a case of chacon à son gout.
Have some Madeira, M'dear!"

Unaware of the wiles of the snake in the grass
The fate of the maiden who topes
She lowered her standards by raising her glass,
Her courage, her eyes, and his hopes.
She sipped it, she drank it, she drained it, she did.
He quietly refilled it again
And he said, as he secretly carved one more notch
On the butt of his gold-handled cane:
"Have some Madeira, M'dear
I've got a small cask of it here
And once it's been opened, you know it won't keep
Do finish it off, it'll help you to sleep
Have some Madeira M'Dear!
It's really an excellent year.
Now if it were gin you'd be wrong to say yes
The evil gin does would be hard to assess
Besides, it's inclined to affect me prowess
Have some Madeira, M'dear!"

Then it flashed through her mind what her mother had said
With her antepenultimate breath
"Oh, My child, if you tope on the wine that is red
Then prepare for a fate worse than death!"
She let go the glass with a shrill little cry
Crash! Tinkle! It fell to the floor
When he asked "What in Heaven?" *she made no reply,*
up her mind, and a dash for the door.
"Have some Madeira, M'dear"
Rang out down the hall, loud and clear
A tremulous cry that was filled with despair
As she paused to take breath in the cool midnight air.
"Have some Madeira, M'dear!
The words seemed to ring in her ear.
Until the next morning she woke up in bed
With a smile on her lips and an ache in her head
And a beard in her earhole that tickled and said
"Have some Madeira, M'dear!"

Gertrude Block is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

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BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part II —The Complaint

The Legal Writer continues from the last *Journal* issue with techniques on writing a complaint. The complaint "introduces you and your client to the court."[1] The complaint tells the court and your adversary what you want and why. The complaint also shows how competent you are as an attorney, how prepared you are, and how serious you are about your client and your client's case.[2] Because the complaint is the first and sometimes the last impression you'll make, think before you write.

Before You Write, Consider Your Audience

When you draft litigation documents, your primary audience is the court. Your goal is to persuade the court to rule for your client. Also important is the impact a well-written document will have on your opposition. Clear, concise, and logical documents set the tone to interact with opposing counsel. The best attorneys always produce well-written papers, even when their case has weaknesses. When drafting your papers, frame the lawsuit in a way that causes your adversary to recognize the strength of the case even when the case isn't a slam dunk. The strength of your papers might be enough to secure a satisfactory settlement.

The court and your adversary aren't the only ones who'll read your papers. Others who might see them include your client, counsel for other plaintiffs or defendants, attorneys in your office, the press, and possibly jurors.[3] Non-attorneys like your client must understand your papers.[4] Clients who don't understand what you've written will skim over the material and miss errors. That can be embarrassing and, perhaps, deadly to your case. Write litigation documents, therefore, for all readers to understand.

Obtain the Facts

Gather all the facts.[5] Investigate. Find out what happened from your client and any available person familiar with the issue or incident.[6] Interviewing clients to get the necessary facts is a delicate and difficult task, especially when their injury or loss is traumatic. Many clients omit or forget helpful and even harmful information. Some clients omit information because they fear that you'll disapprove, that they'll disappoint you, that the truth will weaken their case, or that some information is irrelevant even though it is critical to the case.[7] The key to a good client interview is to listen. Be patient and empathetic while clients tell you their story. Without being judgmental, encourage clients to tell their story in detail. Ask the basic who, what, when, where, why, and how: "The more exhaustive you are at the interview and investigation stage, the easier it will be for you to determine (as you research and organize) if the case or the defense has merit."[8]

Always verify your client's facts independently. Failing to investigate your client's story might put you at risk of paying costs, sanctions, or both for commencing a frivolous action.[9] Interview witnesses and get relevant documents and statements from them. Get hospital and medical records,[10] for example.

In a complex case, consult an expert to understand what happened.[11] You might have to speak to a doctor or an engineer before filing a complaint.

If time constraints require you to draft a complaint without having all the facts or without having confidence in the facts your client has supplied, draft the complaint cautiously.

Timing is never on your side. But draft a complaint only after you thoroughly understand your client's situation.[12]

Research the Law

Study the law in your department. New York has four departments; sometimes the law differs from one department to the next. Determine the statutory basis on which your client will bring the action. You must answer a threshold question: Does your client have standing to sue?

Determine what claims are available to your set of facts and what affirmative defenses a defendant might raise. List the element or elements of each cause of action you're pursuing. Choose the theory or theories under which you're seeking recovery. As a tactical consideration, ask yourself whom you can sue. You might have to sue, among others, agents, principals, partners, joint venturers, and any "Jane Doe" or "John Doe."[13] Then ask yourself what claims you can assert.

Also think about what relief you can seek for each claim.[14] Are you entitled to attorney fees? What damages are you seeking? Are you entitled to equitable remedies like an injunction or specific performance? Who'll determine the damages: the court or a jury?

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